STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), and Article 12 of the Navigation Law of the State of New York,

- by -

HUNTINGTON AND KILDARE, INC. and METZ FAMILY ENTERPRISES, LLC,

Respondents.

ORDER

DEC Case No. R4-2001-0418-49

This administrative enforcement proceeding concerns the alleged discharge of gasoline from underground storage tanks (USTs) and the failure to properly close those tanks at a retail gas station in Columbia County.

Respondent Metz Family Enterprises, LLC (MFE) is the current owner of property located on Route 9G in the Town of Germantown, Columbia County. MFE purchased the property in 2004 from prior owner respondent Huntington and Kildare, Inc. (H&K), which in turn purchased the property in 1988. The site is presently being operated as a retail gasoline facility.

Staff of the New York State Department of Environmental Conservation commenced this administrative enforcement proceeding against respondents by service of a notice of hearing and complaint dated November 1, 2005. Respondents filed an answer dated May 1, 2006.

Department staff’s complaint charges four causes of action:

(1) respondents violated Navigation Law § 173 by discharging petroleum at the facility;

(2) respondents violated Navigation Law § 176 by failing to immediately contain a discharge of petroleum at the facility;

(3) respondents violated ECL 17-0501 by discharging petroleum into the waters of the State in contravention of water quality standards established at 6 NYCRR 703.5; and

(4) respondents violated 6 NYCRR 613.9(b) by failing to properly permanently close three 4,000 gallon steel USTs after being notified that the tanks had not been properly closed, and by failing to comply with regulatory testing, inspection, registration, and reporting requirements until the tanks were properly closed.

Department staff alleges that respondent H&K committed the first three causes of action since August 4, 1998, the date the Department informed H&K of a petroleum discharge at the property, and the fourth cause of action since April 30, 2001, thirty days after it notified H&K that the tanks were not properly closed. Staff alleges that MFE committed the first three causes of action since February 27, 2004, the date MFE purchased the property, and the fourth cause of action since March 27, 2004, thirty days after MFE purchased the property.

Staff seeks a $15,000 penalty against each respondent, and various items of remedial relief, including the proper registration of the three 4,000 gallon steel USTs, the proper closing of the USTs, and the investigation and remediation of the petroleum discharge at the property.

The matter was referred to the Department's Office of Hearings and Mediation Services, and assigned to Chief Administrative Law Judge (ALJ) James T. McClymonds. After conducting an adjudicatory hearing on January 28 and 29, 2008, Chief ALJ McClymonds prepared the attached hearing report. I adopt the Chief ALJ's hearing report as my decision in this matter, subject to the following comments.

Based upon the record, I conclude that Department staff proved the violations charged by a preponderance of the evidence. I also conclude that the proposed civil penalty is well within the amounts authorized by statute and guidance and is justified under the circumstances. I further conclude that the tank closure and remediation recommended to address the violations are appropriate.

The Department has adopted a Civil Penalty Policy (issued June 20, 1990) for assessing civil penalties. One of the steps set forth in the Policy involves a calculation of the economic benefit that accrues to a respondent because of its noncompliance. The intent is to recover at least the economic

benefit of noncompliance unless staff determines that it (1) provides de minimis benefits, (2) goes against a compelling public interest, or (3) was not requested based on an exercise of prosecutorial discretion. In essence, the default is to recover the economic benefit. This means that the reasons for not seeking the economic benefit are intentionally compelling and should be documented and explained.

Here, staff prepared a careful and detailed calculation of the economic benefit of noncompliance that accrued to the respondents. Exh 19. The penalty requested by staff was less than the economic benefit, but staff did not explain the deviation. Accordingly, while I agree with the Chief ALJ that the requested penalty is warranted by this record, for all future matters, I direct staff to explain any deviations from the Civil Penalty Policy.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Respondents Huntington and Kildare (H&K) and Metz Family Enterprises, LLC (MFE) are adjudged to have committed the following violations:

A. Since August 4, 1998, respondent H&K violated Navigation Law § 173 by discharging petroleum at the facility.

B. Since August 4, 1998, respondent H&K violated Navigation Law § 176 by failing to immediately contain a discharge of petroleum at the facility.

C. Since August 4, 1998, respondent H&K violated ECL 17-0501 by discharging petroleum into the waters of the State in contravention of water quality standards established at 6 NYCRR 703.5.

D. Since April 30, 2001, respondent H&K violated 6 NYCRR 613.9(b) by failing to properly permanently close three 4,000 gallon steel USTs after being notified that the tanks had not been properly closed, and failing to comply with regulatory testing, inspection, registration, and reporting requirements until the tanks were properly closed.

E. Since February 27, 2004, respondent MFE violated Navigation Law § 173 by discharging petroleum at the facility.

F. Since February 27, 2004, respondent MFE violated Navigation Law § 176 by failing to immediately contain a discharge of petroleum at the facility.

G. Since February 27, 2004, respondent MFE violated ECL 17-0501 by discharging petroleum into the waters of the State in contravention of water quality standards established at 6 NYCRR 703.5.

H. Since March 27, 2004, respondent MFE violated 6 NYCRR 613.9(b) by failing to properly permanently close three 4,000 gallon steel USTs within 30 days after purchasing the property, and failing to comply with regulatory testing, inspection, registration, and reporting requirements until the tanks were properly closed.

II. H&K is assessed a civil penalty in the amount of fifteen thousand dollars ($15,000). The civil penalty shall be paid within thirty (30) days after service of this order upon respondents.

III. MFE is assessed a civil penalty in the amount of fifteen thousand dollars ($15,000). The civil penalty shall be paid within thirty (30) days after service of this order upon respondents.

IV. Payment of the civil penalties assessed to H&K and MFE in paragraphs II and III above shall be made in the form of a cashier's check, certified check, or money order payable to "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Ann Lapinski, Esq.
Senior Attorney
New York State Department of Environmental Conservation
Office of the General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500.

V. Within thirty (30) days after service of this order upon respondent MFE, MFE shall submit a Petroleum Bulk Storage (PBS) application and registration fee transferring ownership of the three 4,000 gallon steel USTs at the property to itself.

VI. Within thirty (30) days after service of this order upon respondents MFE and H&K, MFE and H&K shall submit a work plan to the Department describing the method and procedure to

properly close the three 4,000 gallon steel USTs located on the property according to the requirements of 6 NYCRR 613.9 and a Department guidance document called “Spill Prevention Operations Technology Series [SPOTS] #14.” The Department shall either approve or disapprove of the plan, in writing. If the submittal is disapproved, the Department shall specify any deficiencies and required modifications. Within 20 days of the receipt of the Department’s disapproval notice, respondents shall submit a revised work plan that addresses the Department’s comments, correcting all deficiencies identified in the disapproval notice.

VII. Within fifteen (15) days of receipt of the Department’s notice of approval of the work plan, submitted pursuant to paragraph VI above, respondents MFE and H&K shall begin to implement the approved work plan.

VIII. Within sixty (60) days of the closure of the tanks noted in paragraph VI above, respondent MFE and H&K shall submit a tank closure report that includes a description of the work performed, any applicable disposal receipts, and the results of the environmental assessment required by SPOTS #14.

IX. If the results of the environmental assessment necessitate an additional subsurface investigation, the Department will notify respondents in writing. Within thirty (30) days of receipt of the Department’s notice of the requirement for additional subsurface investigation, respondents MFE and H&K shall submit a subsurface investigation work plan, detailing the work proposed to delineate and characterize the identified petroleum contamination originating from the property. The Department shall either approve or disapprove of the plan, in writing. If the submittal is disapproved, the Department shall specify any deficiencies and required modifications. Within twenty (20) days of the receipt of the Department’s disapproval notice, respondents shall submit a revised work plan that addresses the Department’s comments, correcting all deficiencies identified in the disapproval notice.

X. Within fifteen (15) days of receipt of the Department’s notice of approval of the subsurface investigation work plan, submitted pursuant to paragraph IX above, respondents MFE and H&K shall begin to implement the approved plan.

XI. Upon the date of service of this order upon respondents, respondents MFE and H&K shall begin quarterly sampling of all on-site monitoring wells and continue that sampling up to at least one year after demonstrating that the groundwater at this site meets State groundwater standards

contained in 6 NYCRR 703.5 or an acceptable alternative as determined by the Department.

XII. All communications from respondent to the Department concerning this order shall be made to Ann Lapinski, Esq., at the address listed in paragraph IV above.

XIII. The provisions, terms, and conditions of this order shall bind respondents MFE and H&K, and their agents, successors, and assigns, in all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Alexander B. Grannis
Commissioner

Dated: December 22, 2009
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL") of the State of New York and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and Article 12 of the Navigation Law of the State of New York,

- by -

HUNTINGTON AND KILDARE, INC. and METZ FAMILY ENTERPRISES, LLC,

Respondents.

HEARING REPORT

DEC Case No. R4-2001-0418-49

Appearances:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Ann Lapinski of counsel), for the Department of Environmental Conservation

-- Sgambettera & Associates, P.C. (Matthew J. Sgambettera of counsel), for respondent Metz Family Enterprises, LLC

-- James Metz, Jr., for respondent Huntington and Kildare, Inc.

HEARING REPORT

Proceedings

This administrative enforcement proceeding concerns the alleged discharge of gasoline and the failure to properly close petroleum bulk storage tanks at a retail gasoline station located in Germantown, Columbia County. Staff of the Department of Environmental Conservation ("Department") commenced this proceeding by service of a notice of hearing and complaint dated November 1, 2005, against respondents Huntington and Kildare, Inc. and Metz Family Enterprises, LLC (collectively "respondents"). Respondents filed an answer dated May 1, 2006, in which they deny the allegations of liability asserted in the complaint, and raise four defenses.

The underlying factual allegations alleged in the complaint and admitted in the answer are as follows. Respondent Metz Family Enterprises, LLC ("MFE") is the current owner of the property located on Route 9G in the Town of Germantown, Columbia County. MFE purchased the property on February 27, 2004, from Huntington and Kildare, Inc. ("H&K"). H&K is the former owner of the property, who purchased the site in 1988 from the now defunct Peterson Petroleum Inc. The site is presently being operated as a retail gasoline station ("facility") by non-party RGLL, Inc., who owns the facility and its new petroleum storage tanks.

Department staff's complaint charges four causes of action:

(1) respondents violated Navigation Law § 173 by discharging petroleum at the facility;[1]

(2) respondents violated Navigation Law § 176 by failing to immediately contain a discharge of petroleum at the facility;

(3) respondents violated ECL 17-0501 by discharging petroleum into the waters of the State in contravention of water quality standards established at 6 NYCRR 703.5; and

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[1] In its complaint, Department staff cites Navigation Law § 173 as the basis of its first cause of action, but quotes and applies the language of Navigation Law § 176. Similarly, in its second cause of action, staff cites section 176, but quotes and applies the language of section 173. Because respondents were fully aware of the nature of the two charges and had a full opportunity to litigate their liability under the correct theories and, thus, have suffered no prejudice, I am amending the pleadings concerning the first and second causes of action to conform to the proof (see Matter of Wilder, ALJ Hearing Report, Aug. 17, 2005, at 3-4, adopted by Supplemental Order of the Acting Commissioner, Sept. 27, 2005 [2005 WL 2407517]).

In its fourth cause of action, Department staff cites the permanent tank closure requirements at 6 NYCRR 613.9(b) as the basis of its charge, but quotes the language from the temporary tank closure requirements at 6 NYCRR 613.9(a). At the hearing, Department staff clearly sought permanent closure of the tanks, and respondents had the full and fair opportunity to oppose under the correct theory of liability. Accordingly, I am also amending the pleadings concerning the fourth cause of action to conform to the proof (see id.).

(4) respondents violated 6 NYCRR 613.9(b) by failing to properly permanently close three 4,000 gallon steel underground storage tanks ("USTs") after being notified that the tanks had not been properly closed, and failing to comply with regulatory testing, inspection, registration, and reporting requirements until the tanks were properly closed.

Department staff alleges that H&K committed the first three causes of action since August 4, 1998, the date it informed H&K of the petroleum discharge, and the fourth cause of action since April 30, 2001, thirty days after it notified H&K that the tanks were not properly closed. Staff alleges that MFE committed the first three causes of action since February 27, 2004, the date MFE purchased the property, and the fourth cause of action since March 27, 2004, thirty days after MFE purchased the property. Consequently, staff seeks a $15,000 penalty against each respondent, and various items of remedial relief, including the proper registration of the three 4,000 gallon steel USTs, the proper closure of the USTs, and the investigation and remediation of the petroleum discharge at the facility.

Respondents answered and asserted four defenses. Respondents simultaneously moved for leave to file a third-party complaint against Stewart's Ice Cream Company, Inc. ("Stewarts"), a former lessee of the facility, to join Stewarts as a necessary party and to implead Stewarts for contribution or indemnification. The undersigned presiding Chief Administrative Law Judge ("ALJ") denied respondents' motion in a ruling dated November 15, 2006 (see Matter of Huntington and Kildare, Inc., Ruling on Motion to Allow Third-Party Claim, Nov. 15, 2006 [2006 WL 3380420]).

The adjudicatory hearing was conducted in the Department's Central Office in Albany, New York, on January 28 and 29, 2008. After the hearing, the parties submitted the following briefs: Department staff filed a closing brief on March 31, 2008; respondents filed a brief in response on May 27, 2008; and Department staff filed a reply brief on June 9, 2008. With the filing of staff's reply brief, the record closed.

FINDINGS OF FACT

The following facts were established by a preponderance of the credible evidence:

1. This matter concerns a property located on the west side of Route 9G in the Town of Germantown, Columbia County (Tax I.D. No. 158.4-1-36 [the "site"]). The site is immediately north

of a property known as the Boice property, which in turn, is located on the northwest corner of Route 9G and Main Street in Germantown.

2. The site has been used for the sale of gasoline since the early 1930s. In 1973, the now defunct Peterson Petroleum, Inc. ("Peterson"), purchased the site.

3. From 1977 to February 1988, Stewart's Ice Cream Company, Inc., leased from Peterson a convenience store located on the site, together with its gasoline pumps and three 4,000 gallon steel underground storage tanks ("USTs") used for the storage of gasoline.

4. The installation date of the three 4,000 gallon steel USTs at the site is unknown. However, during Stewarts' leasehold, Peterson was the owner of the petroleum storage facility,[2] including the three steel tanks (see, e.g., Exh D).

5. In 1986, after the Department's regulations for PBS facilities became effective, Stewarts filed the petroleum bulk storage application for the initial registration of the three steel tanks (see Exh B). Stewarts indicated on the application that it was the owner and operator of the facility. Stewarts also indicated that the tanks had an unknown installation date. This information was recorded in the Department's records, and on the PBS registration certificate issued for the facility (see Exh C).

6. Because Stewarts was not the owner of the facility, the application was filed in error. However, the Department never received an application and fee to change the registration and, therefore, the Department's records were never corrected to show that Peterson was the owner of the facility and of the three steel tanks (see Exh 20).

7. In 1986, two days after Stewarts filed the PBS application, James Metz and his wife purchased the stock of Peterson. Shortly thereafter, James Metz was informed by Peterson staff that the steel tanks at the facility needed to be replaced because Stewarts thought they might be leaking.

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[2] A "petroleum storage facility" is one or more stationary petroleum storage tanks, including any associated intra-facility pipelines, fixtures, or other equipment, which have a combined storage capacity of over 1,100 gallons of petroleum at the same site (see 6 NYCRR 612.1[c][10]).

8. In June 1987, R.M. Dalrymple Co., Inc., attempted to test the steel tanks. The tank containing unleaded gasoline passed inspection, but the two tanks containing leaded gasoline did not (see Exh D). Because the two leaded gasoline tanks were manifolded together and located under a building on site, Dalrymple was unable to determine which of the two tanks failed. A gasoline spill reported in connection with the tank test was closed by the Department (see Exh F).

9. In December 1987, Stewarts continued to report inventory loss from the steel tanks. A gasoline spill associated with the inventory loss was reported to the Department by James Calvin, who identified himself as an employee of an entity known as Cobble Pond Farm, and who identified Cobble Pond Farm as owner of the tanks (see Exh E, G, H). After a Department employee, Joe McDonald, inspected a monitoring well at the site and found no problems, the spill was closed (see id.).

10. Because of the inventory losses, Peterson replaced the steel tanks with new tanks. In February 1988, Peterson hired a company identified as Anderson to install three 6,000 gallon fiberglass reinforced USTs in the southern portion of the site. James Calvin, who was also an employee of Peterson, oversaw the installation, and forwarded his notes to James Metz (see Exh M). After installation, James Calvin filed the PBS registration for the fiberglass USTs and indicated that Peterson was the owner of the facility (see Exh 21). The registration also showed that Stewarts was the operator of the facility.

11. Peterson also hired Anderson to close the three steel tanks. On February 18, 1988, with the Department's Joe McDonald on hand to witness the event, Anderson began to dig up the one steel tank not entirely under a building on site. Once the tank was exposed, it became evident that removing the tank would be difficult. Joe McDonald instructed James Calvin to dig down beside the outer side of the tank and, if no contamination was found, to slurry all three tanks in place (see Exh M). After digging down 11 to 12 feet and finding no evidence of contamination, Joe McDonald approved filling the tank in place (see id.).

12. Later that day, James Calvin learned that the two steel tanks under the building had remote fill ports and, therefore, Anderson would not be able to get much slurry into them. Joe McDonald indicated that they should leave the tanks empty and write a letter to the Department indicating they had done so. Also, James Calvin and Anderson agreed that product left in the unleaded steel tank would be transferred to the new tanks the

next day.

13. At some point prior to 1990, the Department was informed that the three steel tanks had been closed, and the Department changed its records accordingly (see Exh A). Who provided this information to the Department and exactly when is unknown, however.

14. After its lease with Peterson expired in February 1988, Stewarts moved across the street to a new convenience store facility located on the northeast corner of the intersection of Route 9G and Main Street, where it currently operates a gasoline station.

15. On August 31, 1988, respondent Huntington & Kildare, Inc. ("H&K"), purchased the site from Peterson (see Exh 4). James Metz was employed as a consultant to H&K.

16. In 1997, the Department began an investigation into the potential source of petroleum contamination in a water supply well located on the adjacent Boice property. During that investigation, in May 1998, the Department, through its contractor Maxim Technologies, Inc., installed five monitoring wells on H&K's property (see Site Plan [Drawing No. 2], Exh 8, Appdx A). Samples taken on June 1, 1998, from monitoring well no. 101, which was located adjacent to the location of the three steel USTs, showed petroleum contamination in excess of water quality standards established at 6 NYCRR 703.5 (see Exh 8, at 12-15; see also Exh 18 [summarizing samples taken from well no. 101 and comparing to 6 NYCRR 703.5 water quality standards]). The profile of the contamination was consistent with a gasoline discharge.

17. As a result of the investigation, the Department concluded that the primary source of the petroleum contamination in the Boice water supply well originated from a site known as the Extra-Mart site, which is immediately south of and across Main Street from the Boice property. The Department also concluded, however, that a separate petroleum plume was located on and originated from the H&K property, in the vicinity of well no. 101.

18. On April 4, 1998, the Department gave H&K notice of the petroleum plume originating on its property, described further steps the Department intended to take to investigate the plume, and offered H&K the opportunity to take over portions of the Department's anticipated future work (see Exh 9). The Department also gave notice that if H&K declined to conduct the work, the

Department would proceed, and refer the matter to the New York Attorney General for the collection of all project costs and an assessment of penalties.

19. In July 2000, the Department further detailed the investigative work that needed to be performed on the H&K site, including quarterly sampling of the monitoring wells (see Exh 10). At that time, the Department believed that the likely source of the plume was the steel USTs abandoned in place underneath the on-site building (see id.). The Department again indicated that if H&K did not conduct the work, the Department would proceed and refer the matter to the Attorney General for reimbursement of costs and the assessment of penalties.

20. In August 2000, H&K submitted to the Department a report from H&K's consultant, Alpha Geoscience, which H&K had hired to reactivate the fiberglass tanks on site. The report included results from ground water samples taken from the monitoring wells on June 28, 2000 (see Exh 11). The sample taken from well no. 101 continued to show petroleum contamination in excess of water quality standards (see id.; see also Exh 18). Again, the contamination profile was consistent with a gasoline discharge.

21. Also, in August 2000, Alpha Geoscience confirmed that the three steel USTs, which some thought had previously been removed, were still on the site. At some prior time, James Metz had hired a backhoe and dug around the fill pipe of the one steel tank not located under the building. Although contamination was found near the fill pipe, it could not be determined whether the soil under the tank was contaminated. Department staff and Alpha Geoscience agreed to meet at the site at a later date to further investigate the tanks.

22. On November 2, 2000, with the Department's Keith Goertz on hand to observe, the two ends of the steel tank not under the building were uncovered. After the fill pipe was knocked off, Keith Goertz detected gasoline odor. Inside the tank, a cone of sand emanating from the fill pipe was observed. Mr. Goertz also observed unfilled spaces in the tank, fifteen inches of water with a gasoline odor in the tank, and a manifold pipe attaching the tank to another UST. The presence of gasoline vapor in the tank also indicates the presence of gasoline.

23. On that same day, one end of a second steel tank, located under a wood shed addition to the building, was uncovered but could not be further accessed. The third tank, which was presumed to be under the main building, also could not be

accessed.

24. Although the soil excavated from the ends of the two tanks did not exhibit contamination, large volumes of soil under and around the USTs could not be observed. Therefore, Department staff could not confirm whether or not the three steel USTs were the source of the petroleum plume.

25. After the field investigation by Keith Goertz and H&K revealed that the three steel USTs had not been properly closed, Edward Moore of Department staff changed the records to indicate that the tanks were temporarily out of service (see Exh 20). Mr. Moore did not change the ownership of the status of the tanks from Stewarts, however, because the current owner of the tanks had not applied for a transfer of ownership and paid the registration fee.

26. In February 2001, James Metz filed a PBS application indicating that non-party RGLL, Inc., was now the owner of the retail gasoline sales facility on the site (see Exh J). The Department's records indicate that RGLL is the owner of the fiberglass tanks (see Exh I). James Metz remains a consultant to RGLL.

27. On March 13, 2001, Department staff notified H&K that because the three steel USTs had not been rendered vapor free and were not filled to capacity with an inert material, the tanks were not properly closed in place (see Exh 14). The Department directed H&K to either remove the tanks, or properly abandon them in place. Staff notified H&K that proper in-place abandonment would require exposing the tank tops, cutting them open, cleaning the tank interiors, including removing all solids, liquids and vapors from the tanks, punching through the bottoms and collecting soil samples, and filling them to capacity with inert material. An additional monitoring well would also have to be installed. The Department also directed H&K to conduct quarterly sampling of all on-site monitoring wells. The Department again notified H&K that if H&K did not conduct the work, the Department would proceed and refer the matter to the Attorney General for reimbursement of costs.

28. In May 2001, Alpha Geoscience submitted to the Department a report of ground water samples taken on April 30, 2001 (see Exh 15). The sample taken from monitoring well no. 101 continued to show gasoline contamination in excess of water quality standards (see id.; see also Exh 18).

29. On February 27, 2004, respondent Metz Family

Enterprises, LLC ("MFE") purchased the property from H&K (see Exh 5). Prior to purchase, a member of MFE reviewed Alpha Geoscience's notes and file for the property, among other records (see Tr at 274). In addition, James Metz is employed as a consultant to MFE.

30. In January 2008, Alpha Geoscience submitted to the Department a report of a ground water sample taken from monitoring well no. 101 on December 18, 2007 (see Exh 17). The sample taken from monitoring well no. 101 continued to show gasoline contamination in excess of water quality standards (see id.; see also Exh 18).

31. A comparison of the ground water samples taken from monitoring well no. 101 reveals a persistent, on-going and continuing petroleum discharge from a source located somewhere in the vicinity of the well.

32. Although the exact source of the petroleum discharge cannot be determined without further investigation, a suspected source of the discharge is one or more of the three improperly-closed 4,000 gallon steel USTs located in the vicinity of well no. 101.

DISCUSSION

In this administrative enforcement proceeding conducted pursuant to 6 NYCRR part 622, Department staff carries the burden of proof on all charges and matters affirmatively asserted in the November 2005 complaint (see 6 NYCRR 622.11[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).

On the record developed at the hearing, Department staff has carried its burden of proving respondents' liability for the violations charged in the complaint.

Navigation Law Violations

In its first and second causes of action, Department staff alleges that respondents violated Navigation Law §§ 173 and 176. Department staff alleges that respondent H&K is responsible for the petroleum contamination at the site since August 4, 1998, when the Department notified H&K of the petroleum in monitoring well no. 101, and H&K failed to immediately contain the discharge. Department staff alleges respondent MFE became responsible for the petroleum contamination on February 27, 2004,

the date it purchased the property, and also failed to immediately contain the discharge.

Navigation Law § 173 provides that "[t]he discharge of petroleum is prohibited" (Navigation Law § 173[1]). Navigation Law § 176 further provides that "[a]ny person discharging petroleum in the manner prohibited by section [173] of this article shall immediately undertake to contain such discharge" (Navigation Law § 176[1]). "Discharge" means "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state" (Navigation Law § 172[8]). "Waters" of the State include groundwater (see Navigation Law § 172[18]). "Petroleum" includes gasoline (see Navigation Law § 172[15]).

Article 12 of the Navigation Law is a strict liability statute which holds owners of property contaminated with petroleum strictly liable for all investigation and clean up costs associated with the remediation of the contamination (see State v Green, 96 NY2d 403, 406-408 [2001]). Even faultless landowners are liable provided the landowner has control over activities occurring on its property and reason to believe that petroleum products are being used there (see id. at 407). A landowner's failure, whether unintentional or otherwise, to take action in controlling events that lead to a discharge or to effect an immediate cleanup renders it liable as a discharger (see id.). Moreover, a subsequent purchaser of contaminated property is liable as a discharger if it has knowledge of the contamination and the need for cleanup, but fails to take action (see State v Speonk Fuel, Inc., 3 NY3d 720, 724 [2004]). By imposing strict liability on landowners, Navigation Law article 12 ensures that responsible parties are readily available to undertake remediation activities or to reimburse the State for its cleanup costs in the event the State conducts the remediation (see Green, 96 NY2d at 407).

In this case, the record establishes that an on-going and continuous discharge of petroleum to groundwater has been occurring on the site in the vicinity of monitoring well no. 101, in violation of section 173 (see, e.g., State v LVF Realty Co., Inc., 59 AD3d 519, 522-523 [2d Dept], lv denied 12 NY3d 871 [2009] [holding former and present owners of site liable for petroleum contamination in soil in the area of PBS tanks]; Merrill Transp. Co. v State, 94 AD2d 39, 42-43 [3d Dept], lv denied 60 NY2d 555 [1983] [finding a discharge to groundwater under the Navigation law, taking judicial notice that petroleum can seep through the ground into groundwater]).

As a former landowner of the site with control over activities on the property and the ability to cleanup the petroleum contamination during the period of its ownership, respondent H&K is liable as a discharger, at least since April 4, 1998, when the Department informed it of the discharge.

MFE is also liable for the on-going discharge as a subsequent purchaser of the property. When MFE purchased the property, the site had a history of use as a gasoline station, and had an active PBS facility on site. Thus, MFE had reason to believe that gasoline was and had been stored on site. Moreover, from its review of Alpha Geoscience's notes and file, and its relationship with James Metz as a consultant, MFE had at least constructive knowledge, if not actual knowledge, of the petroleum discharge in the vicinity of well no. 101. MFE also admitted that by late 2005, early 2006 at the latest, it knew about the contamination near well no. 101 (see Tr at 280). Thus, as a subsequent purchaser of the property with knowledge of the discharge and need for cleanup, MFE is liable as a discharger since February 27, 2004, when it purchased the property with a known petroleum discharge on-going (see Spoenk Fuel, 3 NY3d at 724; LVF Realty Co., 59 AD3d at 523).

Moreover, although both respondents have conducted some groundwater sampling from well no. 101, neither respondent has conducted sampling on a quarterly basis, nor engaged in any of the other investigative or remedial work directed by the Department to contain the discharge. Thus, respondents have failed to immediately contain the discharge in violation of section 176 -- H&K from the time the Department notified it of the existence of the discharge, and MFE from the time it purchased the property with a known petroleum discharge on-going.

Respondents argue that Department staff failed to carry its "burden" of establishing that Extra Mart was not also responsible for the contamination of well no. 101, or that Extra Mart was ordered to but failed to conduct sampling of the well, among other things. As noted above, however, respondents' liability is premised upon their ownership and control of the property and their ability to control cleanup activities. Respondents' liability is independent of any other potentially responsible party, and Department staff is under no burden to exclude other such parties' liability to establish respondents' liability (see State v Robin Operating Corp., 3 AD3d 767, 769 [3d Dept 2004] [landowner's strict liability cannot be avoided simply by demonstrating that another party actually and culpably caused a discharge]).

In any event, the weight of the evidence indicates that Extra Mart is not responsible for the petroleum discharge in the vicinity of well no. 101 (see, e.g., Exh 8, Drawing No. 8). The Phase II Study conducted by Maxim Technology, Inc., revealed two independent petroleum plumes on the site, one to the south emanating from Extra Mart's property, and a separate and distinct plume in the northern portion of the site in the vicinity of well no. 101. Given the separation between the two plumes, it is not fairly inferrable that Extra Mart shares any responsibility for the northern plume.

ECL 17-0501 Violation

In its third cause of action, Department staff alleges that respondents violated ECL 17-0501 by discharging petroleum into groundwater in contravention of water quality standards established at 6 NYCRR 703.5. Department staff alleges that respondents are responsible for the petroleum discharge during the same time periods as for the first and second causes of action.

ECL 17-0501 provides that "[i]t shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301" (ECL 17-0501[1]). ECL 17-0301 authorizes the Department to classify the waters of the State, including groundwater (see ECL 17-0105[2]), and establish water quality standards to protect those waters.

The water quality standards adopted by the Department pursuant to ECL 17-0301 that respondents are charged with violating are found at 6 NYCRR 703.5. Section 703.5 contains groundwater quality standards for various petroleum constituents, including 1,2,4-Trimethylbenzene, 1,3,5-Trimethylbenzene, Benzene, Ethylbenzene, Isopropylbenzene, n-Butylbenzene, Naphthalene, Toluene, and Xylenes.

The groundwater sampling from well no. 101 conducted in 1998, 2000, 2001, and 2007 revealed exceedances of the water quality standards for each of above listed compounds. Notably, the sampling showed Benzene levels from 750 micrograms per liter ("ug/L") to as high as 3,900 ug/L. The water quality standard for Benzene in groundwater is 1 ug/L. Moreover, the persistence of various petroleum constituents in the groundwater samples reveals that the discharge of petroleum is continuous and ongoing (see Matter of Howard v Cahill, 290 AD2d 712, 716 [3d Dept 2002]

[confirming the ALJ's finding of a discharge under ECL 17-0501 based upon sampling results showing continuing exceedances of groundwater standards]; see also Matter of Robert Howard, ALJ Ruling, May 17, 2000, at 6 [2000 WL 33341458, *6, *9], adopted by Order of the Commissioner, May 30, 2000; cf. State v Schenectady Chemicals, Inc., 103 AD2d 33, 35-36 [3d Dept 1984] [in contrast to this case, which involves a continuous and on-going petroleum discharge, the mere seepage of pollutants over time from an inactive site has been held not to be a discharge under ECL 17-0501]). Thus, a continuous discharge of petroleum to groundwater in contravention of the standards established by the Department pursuant to ECL 17-0301 occurred during respondents' respective periods of ownership.

Improper Tank Closure

In its fourth cause of action, Department staff alleges that respondents failed to comply with the regulatory requirements for the permanent closure of PBS tanks established at 6 NYCRR 613.9(b). Department staff alleges that as a prior owner of the steel tanks, respondent H&K was required to properly close the tanks no later than April 30, 2001, 30 days after being notified by the Department that the tanks had not been properly closed, and to comply with all requirements for periodic tightness testing, inspection, registration, and reporting until the tanks were properly closed. Department staff also alleges that as the current owner of the steel tanks, respondent MFE was required to permanently close the tanks no later than March 27, 2004, 30 days after it acquired title to the tanks, and to comply with all testing, inspection, registration, and reporting requirements until the tanks are properly closed.

Section 613.9(b) establishes the closure requirements for PBS tanks permanently out of service. The closure requirements for USTs include the removal of all liquids and sludge from the tank and connecting lines; the removal of all petroleum vapors; the removal or secure capping of all connecting lines; and the securing of all manways (see 6 NYCRR 613.9[b][1]). USTs must then be filled to capacity with an inert material such as sand or concrete slurry, so that no voids remain within the tank (see 6 NYCRR 613.9[b][1][v]). In the alternative, USTs may be removed (see id.). USTs that have not met these closure requirements remain subject to all requirements under Parts 612 and 613, including periodic tightness testing, inspection, registration, and reporting requirements (see 6 NYCRR 613.9[b][2]).

The Department's regulatory UST closure requirements

were adopted pursuant to the 1983 Control of the Bulk Storage of Petroleum Act (ECL 17-1001 et seq.; see ECL 17-1005[2][b]). The 1983 Act was adopted with legislative goals almost identical to those underlying Navigation Law article 12 and expanded the Department's authority to regulate major petroleum storage facilities to include non-major facilities as well (see Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation, 71 NY2d 186, 193-196 [1988]).

Consistent with the 1983 Act's legislative policy in favor of the prevention and remediation of discharges of petroleum, the courts have held the current owners of improperly closed petroleum storage facilities strictly liable for the costs of proper closure of out of service tanks (see Matter of White v Regan, 171 AD2d 197, 200 [3d Dept 1991], lv denied 79 NY2d 754 [1992]). Although the courts have imposed strict liability upon a tank owner at the time a discharge from the storage facility was discovered (see id.), a discharge need not occur before strict liability may be imposed. The Department's authority to require corrective action extends to facilities "[w]here a leak or spill of petroleum is suspected or appears probable" (ECL 17-1007[2]). Given the legislative goal of the 1983 Act to prevent discharges of petroleum, a current tank owner is strictly liable not only for the proper closure of tanks known to be leaking but also, at the very least, for the investigation and closure of out of service tanks that are the suspected or probable source of petroleum contamination as well.

In this case, Department staff established that the steel tank that was opened for investigation in 2000 was not properly closed in 1988. Instead of being slurried in place as required by the regulations and the instruction of the Department's Joe McDonald, the tank was only partially filled with sand, leaving unfilled voids in the tank. In addition, the tank had not been rendered free of liquids and gasoline vapor.

As to the remaining two steel tanks, nothing in the record indicates whether they were emptied, as directed by Mr. McDonald, and no letter to the Department was produced indicating that they were. Thus, even assuming Mr. McDonald's instruction to simply empty the tanks and send a letter to the Department once that was done was sufficient to constitute proper closure at the time, the record does not support the conclusion that those instructions were followed. Finally, all three tanks are the suspected source of the petroleum contamination in the vicinity of monitoring well no. 101.

Respondents dispute the current ownership of the three

steel tanks. Respondents contend that the tanks are trade fixtures currently owned by former lessee Stewart's Ice Cream Co. The general rule governing the ownership of trade fixtures in New York, however, is that as between a landlord and tenant, machinery and equipment affixed to the leased premises by the tenant for the purpose of trade by the tenant remain the property of the tenant to the extent that the tenant retains the right to remove that machinery or equipment (see Chittenden Falls Realty Corp. v Cray Valley Prods. Inc., 208 AD2d 1114, 1115 [3d Dept 1994]; see generally Matter of City of New York [Kaiser Woodcraft Corp.], 11 NY3d 353, 359-360 [2008]). USTs have been held to be trade fixtures owned by the tenant when the tanks were installed by the tenant solely for the purpose of furthering the tenant's business, and the tenant retained its ownership interest in the lease agreement (see Drouin v Ridge Lumber, Inc., 209 AD2d 957, 957 [4th Dept 1994]; Shell Oil Co. v Capparelli, 648 F Supp 1052, 1055-1056 [SDNY 1986]; cf. State v Wisser Co., Inc., 170 AD2d 918, 919 [3d Dept 1991] [landlord held to be owner of USTs when landlord retained ownership of USTs in lease agreement, and no evidence was presented establishing that landlord sold USTs to tenant]).

In this case, the record contains no evidence that the three steel tanks were installed by Stewarts at Stewarts' expense. Moreover, the lease between Stewarts and Peterson was not offered into evidence and, accordingly, whether Stewarts retained any ownership interest through that lease cannot be determined on this record. The only evidence of Stewarts' ownership of the three tanks is the 1986 tank registration application, on which Stewarts mistakenly indicated that it was the owner of the tanks.

In contrast, the weight of the credible record evidence supports the conclusion that Peterson was the owner of the three steel tanks. When R.M. Dalrymple Co. attempted to test the tanks in June 1987, it noted on its test notice that Peterson was the owner of the tanks (see Exh D). Moreover, Peterson made the decision in late 1987 to replace the three steel tanks, hired the company that unsuccessfully closed the tanks in 1988, and made all decisions concerning the unsuccessful closure. Nothing in the documents contemporaneous with the unsuccessful tank closure in 1988 indicated any involvement by Stewarts. Thus, the reasonable inference is that Peterson, and not Stewarts, was the owner of the tanks.

In addition, a trade fixture not removed by the tenant prior to giving up possession at the termination of its leasehold is presumed to be abandoned by the tenant, and title to the

abandoned property passes to the landlord (see Modica v Capece, 189 AD2d 860, 861 [2d Dept 1993]; Gristede Bros., Inc. v State, 11 AD2d 580, 580 [3d Dept 1960]; Lewis v Ocean Nav. & Pier Co., 125 NY 341, 350 [1891]). Thus, even assuming that contrary to the weight of evidence, Stewarts was the owner of the three steel tanks, Stewarts abandoned the tanks when it left the premises without removing them and without exercising any further control over them. Accordingly, title to the tanks thereby passed to Peterson.

When Peterson sold the premises, title to the abandoned tanks passed first to respondent H&K and, ultimately, to respondent MFE. Nothing in the chain of title from Peterson to H&K to MFE excepts the abandoned steel tanks from the sale. Thus, as former and current owners of the improperly closed steel tanks, respondents H&K and MFE are strictly liable for the registration, investigation, and proper closure of the tanks during their respective periods of ownership. By failing to comply with the permanent closure requirements, and by failing to maintain the tanks' registration and testing until the tanks are properly closed, respondents violated 6 NYCRR 613.9(b).[3]

Penalty and Remedial Obligations

For the violations established, Department staff requests that a penalty of $15,000 be assessed against each respondent in this matter, for a total penalty of $30,000. In addition, staff seeks various items of remedial relief, including the proper closing of the steel tanks, quarterly sampling of all monitoring wells on site until ground water standards are achieved, and the investigation and potential remediation of the petroleum plume in the vicinity of monitoring well no. 101. Department staff also seeks an order requiring respondent MFE to submit a PBS transfer of ownership form and registration fee for

[3] Assuming for the sake of argument that Stewarts was a prior owner of the steel tanks, and assuming without deciding that Stewarts violated the ECL or Navigation Law during the period of that ownership, the circumstance that Stewarts abandoned the tanks would not relieve it of any liability for those violations (see, e.g., State v LVF Realty Co., Inc., 59 AD3d 519, 522-523 [2d Dept], lv denied 12 NY3d 871 [2009]). That Stewarts would additionally be liable to the State under this scenario would not relieve H&K or MFE of liability for their independent violations of the ECL or Navigation Law during the periods of their respective ownership of the same tanks (see, e.g., id. at 523; Matter of White v Regan, 171 AD2d at 200).

the three 4,000 gallon steel USTs.

Navigation Law § 200 authorizes a penalty of $25,000 per day for any violation of the provisions of article 12 (see Matter of Gasco-Merrick Road Gas Corp., Commissioner's Decision and Order, June 2, 2008, at 3-11 [examining the Commissioner's authority to impose penalties under the Navigation Law]). ECL 71-1929 authorizes the imposition of a penalty for violations of ECL 17-0501 or the regulations adopted pursuant to ECL 17-1001 et seq. in the amount of $25,000 per day for violations occurring prior to March 16, 2003, and $37,500 per day for violations occurring after that date.

Several factors are considered to determine the appropriate penalty in any given case: (1) the maximum penalty authorized by statute; (2) the Department's Civil Penalty Policy (see Commissioner Policy DEE-1, June 20, 1990) and, in this case, the Department's Petroleum Bulk Storage Inspection Enforcement Policy (PBS Penalty Schedule, DEC Program Policy DEE-22, May, 21, 2003); (3) the circumstances of the case; and (4) the penalties imposed after hearing in factually similar cases (see Matter of Alvin Hunt, Commissioner's Decision and Order, July 25, 2006, at 8-9 [2006 WL 2105981]).

Department staff asserts that the penalty sought in this case is modest. I agree. The penalty sought is well below the maximum allowable under the law. For respondent H&K, Department staff calculated the maximum allowable for one ECL violation to be $107,825,000, and for respondent MFE $53,962,500 (see Exh 19). Moreover, the proposed penalty is well below the economic benefit each of the respondents enjoyed by delaying the proper closing of the tanks ($58,752.00 for H&K, $24,480 for MFE) (see Civil Penalty Policy DEE-1 ¶ C.1). The penalty is also below the average penalty imposed after a hearing under the PBS policy for the failure to permanently close tanks (see DEC Program Policy DEE-22 ¶ V, and PBS Penalty Schedule) and is similar to or below the penalty imposed in other cases (see, e.g., Matter of Peter Schreiber, Acting Commissioner Decision and Order, July 12, 2005 [2005 WL 1650796]; Matter of Donald Zimmerman, Commissioner Order, March 19, 2004 [2004 WL 598992]; Matter of Blank, Blank and Jacobi, Commissioner Order, Feb. 4, 2003 [2003 WL 879140]).

Notwithstanding the modesty of the penalty sought to be imposed by Department staff, respondents argue for a further reduction of the penalty based upon their allegation that Stewarts owned the tanks and that Extra-Mart was responsible for the Boice spill. Respondents also argue that the Department's

conduct in inspecting the tanks, approving their closure, and closing the matter in 1988 warrants elimination of any monetary penalty.

Respondents' arguments are not compelling. As determined above, the record does not support the finding of any liability on the part of Stewarts or Extra-Mart for the violations charged and established in this case. Moreover, neither respondent has been charged with the improper closure of the tanks in 1988. Thus, the Department's involvement in that closure is irrelevant. What is relevant is respondents' conduct after the petroleum discharge and improper tank closure were discovered. In this regard, the Department repeatedly informed respondents of their obligations under the ECL and Navigation Law, and advised respondents concerning the steps required to satisfy those obligations. Although respondents took some steps toward investigation, including occasional sampling of the monitoring wells, they failed to follow through with the remaining investigative and remedial steps the Department has repeatedly indicated are necessary to address the tanks and the petroleum contamination. Respondents' failure to follow the Department's instructions and fulfill their obligations under the law, and their attempt, instead, to blame the Department for their own inaction is not a defense in mitigation of penalty. Therefore, the $15,000 penalty for each respondent is amply supported by the record in the case.

Finally, the remedial obligations that Department staff seeks to have imposed are necessary and appropriate to address the improper closure of the tanks and the clean up of the petroleum discharge (see, e.g., Navigation Law § 176; ECL 17-1007).

CONCLUSIONS OF LAW

1. Since August 4, 1998, respondent H&K violated Navigation Law § 173 by discharging petroleum at the facility.

2. Since August 4, 1998, respondent H&K violated Navigation Law § 176 by failing to immediately contain a discharge of petroleum at the facility.

3. Since August 4, 1998, respondent H&K violated ECL 17-0501 by discharging petroleum into the waters of the State in contravention of water quality standards established at 6 NYCRR 703.5.

4. Since April 30, 2001, respondent H&K violated 6 NYCRR

613.9(b) by failing to properly permanently close three 4,000 gallon steel USTs after being notified that the tanks had not been properly closed, and failing to comply with regulatory testing, inspection, registration, and reporting requirements until the tanks were properly closed.

5. Since February 27, 2004, respondent MFE violated Navigation Law § 173 by discharging petroleum at the facility.

6. Since February 27, 2004, respondent MFE violated Navigation Law § 176 by failing to immediately contain a discharge of petroleum at the facility.

7. Since February 27, 2004, respondent MFE violated ECL 17-0501 by discharging petroleum into the waters of the State in contravention of water quality standards established at 6 NYCRR 703.5.

8. Since March 27, 2004, respondent MFE violated 6 NYCRR 613.9(b) by failing to properly permanently close three 4,000 gallon steel USTs within 30 days after purchasing the property, and failing to comply with regulatory testing, inspection, registration, and reporting requirements until the tanks were properly closed.

RECOMMENDATION

I recommend that the Commissioner hold respondents liable for the violations determined above, impose a monetary penalty of $15,000 against each respondent, and order the remedial relief sought by Department staff in the complaint.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: November 20, 2009
Albany, New York