STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17, 19, 27, and 72 of the Environmental Conservation Law (ECL) of the State of New York, and Parts 201, 228, 364, 371, and 372 of Title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (6 NYCRR) [1] by

MAN PRODUCTS, INC. and MICHAEL MANCUSI,

Respondents.

ORDER

DEC CASE NO. R1-20130725-87

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondents Man Products, Inc. and Michael Mancusi violated Environmental Conservation Law (ECL) articles 17, 19, 27 and 72 and parts 201, 228, 364, 371, and 372 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) in connection with respondents' operation of a surface coating facility at 178 New Highway, Amityville, Suffolk County, New York (Facility). The Facility was vacated in late 2014 and the property was sold to the Town of Babylon on December 11, 2014 (*see* Ruling of Administrative Law Judge [ALJ] Lisa Wilkinson, February 20, 2018, at 4 [Finding of Fact No. 3] and 7 [Finding of Fact No. 21]).

Department staff served a notice of hearing and verified complaint dated September 14, 2016 (Complaint) on respondents, alleging nine causes of action, including:

--First cause of action: conducting a surface coating operation inside a paint spray booth at the Facility without Department authorization, in violation of 6 NYCRR 201-1;

--Second cause of action: using a coating at the Facility with a volatile organic compound content greater than 3.0 pounds per gallon, in violation of 6 NYCRR 228-1.3(a);

--Third cause of action: failing to demonstrate that the Facility's spray booth filter efficiency was at least 85%, in violation of 6 NYCRR 228-1.3(c);

--Fourth cause of action: failing to maintain required records for a period of five years, in violation of 6 NYCRR 228-1.5(a) and 228-1.5(k);

--Fifth cause of action: storing and disposing of spent filters and primer in an outdoor tub and dumpster, in violation of 6 NYCRR 228-1.10(a) and 228-1.10(e);

[1] The caption has been conformed to include article 72 of the ECL and 6 NYCRR part 372 (*see* Ruling of Administrative Law Judge Lisa Wilkinson, February 20, 2018, at 1, n 1).

--Sixth cause of action: failing to provide documentation indicating that the required hazardous waste determinations were made with respect to waste paint, waste filters from the spray booth, wastewater from the soaking of waste filters, waste rags from painting/cleaning operations, and waste fluorescent lamps at the Facility, in violation of 6 NYCRR 371.1(f)(7)(i) and 372.2(a)(2);

--Seventh cause of action: failing to use a 6 NYCRR part 364 permitted waste transporter to dispose of regulated waste "in that [respondents] failed to provide documentation regarding the disposal of regulated waste from the Site," in violation of 6 NYCRR 364.2(b) (Complaint ¶ 67);

--Eighth cause of action: unlawful discharge of industrial waste into the waters of the State by washing paint spray booth filters in outdoor tubs resulting in the unlawful discharge of industrial waste water into storm drains, in violation of ECL 17-0511; and

--Ninth cause of action: failing to have an air permit, registration or any Department authorization to conduct a surface coating operation in a spray booth at the Facility from 1999-2013 and failing to pay regulatory fees for this time period pursuant to ECL 72-0302.[2]

Department staff moved for a default judgment on December 22, 2016, after respondents failed to answer the complaint. The matter was assigned to ALJ Lisa Wilkinson of the Department's Office of Hearings and Mediation Services. In a ruling dated February 28, 2017, ALJ Wilkinson denied Department staff's motion for a default judgment, and granted respondents' motion for leave to answer the complaint. Respondents submitted an answer dated March 20, 2017.

By papers dated June 16, 2017, staff moved for an order without hearing (MOWH) requesting that I issue an order holding respondents liable for the violations alleged in the complaint and imposing a civil penalty in the amount of $176,000, and the payment of back regulatory fees of $2,240. Respondents cross-moved, by motion dated August 10, 2017, for an order dismissing all the causes of action in the complaint (Cross Motion).

On February 20, 2018, ALJ Wilkinson issued a ruling on the MOWH and Cross Motion (*see Matter of Man Products, Inc. and Michael Mancusi*, Ruling of the Administrative Law Judge, February 20, 2018 [February Ruling]), granting in part and denying in part staff's MOWH and respondents' Cross Motion. In the February Ruling, ALJ Wilkinson found respondents liable on the first, second, third, fourth, sixth, eighth, and ninth causes of action.

As to the allegations in the fifth cause of action, the ALJ held that Department staff's proof that respondents stored or disposed of cloth or other absorbent applicators having volatile organic compound (VOC) solvents was inconclusive and that an issue of fact existed whether any of the cloths were saturated with a regulated VOC solvent and therefore subject to the

[2] Various regulatory citations in the Complaint refer to earlier versions of these regulations (*see e.g.* Ruling of Administrative Law Judge Lisa Wilkinson, February 20, 2018, at 2, n 2).

storage requirements under 6 NYCRR 228-1.10(a) (*see* February Ruling, at 17-18). The ALJ concluded that neither party was entitled to judgment as a matter of law with respect to this portion of the alleged violation. The ALJ, however, concluded as to the remaining allegation that Department staff made a prima facie showing through affidavits and photographic evidence that respondents violated 6 NYCRR 228-1.10(e) which prohibits the owner or operator of a facility from using open containers to store or dispose of spent surface coatings (*see* February Ruling, at 19 [noting staff exhibits showing open containers of spent VOC-based paint stored in dumpsters and used rags with VOC-based paint stored in open containers]).[3]

The ALJ dismissed the seventh cause of action (failure to use a permitted waste transporter for regulated waste) and reserved on the issue of civil penalties (*see* February Ruling at 23-25, 28-29).

By email dated May 3, 2018, Department staff submitted a revised penalty calculation and advised the ALJ that it was withdrawing the seventh cause of action and that portion of the fifth cause of action on which ALJ Wilkinson declined to find liability. Department staff requested a civil penalty of $151,199 and, in addition, the payment by respondents of $2,240 in back regulatory fees.

ALJ Wilkinson has prepared the attached summary report (Summary Report). I affirm ALJ Wilkinson's February Ruling in part on liability and adopt the February Ruling and the Summary Report as my decision in this matter, subject to my comments below.

Liability

ALJ Wilkinson's conclusions on the issue of liability for the violations charged are set forth in the February Ruling. I concur with ALJ Wilkinson that Department staff established its entitlement to summary judgment on the issue of respondents Man Products, Inc.'s and Michael Mancusi's liability for the violations alleged in the first, second, fourth, sixth, eighth, and ninth causes of action and, in part, the fifth cause of action as set forth in the February Ruling.

For the reasons discussed below, I do not find respondents liable with respect to the third cause of action.

Air Pollution Violations – First, Second, Third, Fourth, Fifth and Ninth Causes of Action

During a May 2, 2013 inspection of the Facility, Department staff documented numerous violations of the air pollution regulations (*see e.g.* Affidavit of Tatiana Klappas in support of the MOWH, sworn to June 15, 2017 [Klappas Affidavit], ¶¶ 11, 15, 17, and 19; Affidavit of Jamie

[3] In the February Ruling, in the ruling section at the end of page 19, the regulatory citations are transposed. The Ruling should read that Department staff's MOWH and respondents' Cross Motion are denied with respect to 6 NYCRR 228-1.10(a), and Department staff's MOWH is granted on the issue of liability with respect to 6 NYCRR 228-1.10(e). The February Ruling is hereby corrected. Similarly, the citations to 6 NYCRR 228-1.10(a) that appear on pages 5, 13 and 16 of the Summary Report are also corrected to read 6 NYCRR 228-1.10(e) in place of 6 NYCRR 228-1.10(a).

De Coteau in support of the MOWH, sworn to June 16, 2017 [De Coteau Affidavit], ¶¶ 7, 17 and 19; *see also* February Ruling at 4-6, Findings of Fact Nos. 7, 8, 11, 15, and 19; Exhibit 5 to the MOWH [Department staff letter dated June 28, 2013 detailing violations at the Facility]). In addition, Department staff conducted a review of the Department's records and noted that the Facility failed to pay the required air program fees from 1999 to 2013 (*see* Klappas Affidavit ¶ 21; *see also* Summary Report at 7).[4]

The evidence submitted in support of Department staff's MOWH demonstrates that respondents:

> -- operated an air contamination source, namely a paint spray booth that utilized a surface coating containing volatile organic compounds, without authorization from the Department;
>
> -- the surface coating applied at the Facility contained volatile organic compounds in excess of the applicable regulatory limits;
>
> -- respondents failed to maintain records and required documentation and failed to provide such required records and documentation to Department staff (including failing to provide documentation to demonstrate that the Facility used a spray booth filter with an 85% efficiency to control VOCs);
>
> -- respondents failed to properly store and dispose of materials containing VOC-based surface coatings; and
>
> -- respondents failed to pay air program fees as required by law.

See February Ruling at 8-21.

Accordingly, I hold respondents liable on the first, second, fourth, and ninth causes of action, and the fifth cause of action, in part, with respect to 6 NYCRR 228-1.10(e) (prohibiting the use of open containers to store or dispose of spent surface coatings or spent VOC solvents).

I do not find respondents liable with respect to the third cause of action. The third cause of action notes that 6 NYCRR 228-1.3(c) provides that the overall removal efficiency of an air cleaning device used as a control strategy must be determined for every surface coating formulation on a solids as applied basis using the equation in 6 NYCRR 228-1.3(c) unless an 85 percent or greater overall removal efficiency is achieved by the air cleaning device (*see* Complaint at ¶ 47). According to Department staff, respondents failed to demonstrate that the spray booth filter efficiency was at least 85% at the Facility. On that basis, Department staff concluded that respondents were in violation of 6 NYCRR 228-1.3(c) (*see* Complaint ¶ 50).

[4] The ALJ states that, based on a re-inspection of the facility on October 16, 2013, no violations were recorded (*see* Summary Report at 6-7 [Finding of Fact No. 20]; MOWH Exhibit 13). The report for that inspection states that the Facility "no longer sprays their sheds" (*id.).*

However, 6 NYCRR 228-1.3(c) sets forth various equations for use by owners and operators of surface coating facilities for purposes of complying with 6 NYCRR 228-1.3(a), for which a violation has been established in this matter under the second cause of action. Furthermore, Department staff's allegation that respondents failed to provide documentation to demonstrate that the spray booth efficiency was at least 85% goes to a failure to comply with the reporting and recordkeeping provisions of 6 NYCRR 228-1.5 (*see* fourth cause of action), and not 6 NYCRR 228-1.3(c). Accordingly the third cause of action is dismissed.

Hazardous Waste Violations – Sixth Cause of Action

I concur with the ALJ's conclusion in the February Ruling and hold respondents liable on the sixth cause of action with respect to the hazardous waste violations (*see* February Ruling at 22-23). Any person who generates solid waste must determine whether the waste is hazardous (6 NYCRR 372.2[a][2]). A solid waste includes, in part, any discarded material which is abandoned, recycled, or is considered inherently waste-like (*see* 6 NYCRR 371.1[c][2]). Department staff established that respondents generated solid waste as a result of the Facility operations and failed to determine whether the waste so generated was hazardous, as they were required to do (*see* February Ruling at 22-23).[5]

Water Pollution Violations – Eighth Cause of Action

Department staff established that respondents discharged industrial waste consisting of red dust and/or red paint residue that washed into the storm drains, and that the discharge occurred from a storm drain at the Facility. The storm drain constitutes a point source under ECL 17-0105(16), and the waste so discharged entered the waters of the State in violation of ECL 17-0511 (*see* February Ruling at 25-27; *see also* Klappas Affidavit ¶ 19; Affidavit of Cathy A. Haas in support of the MOWH, sworn to June 16, 2017 [Haas Affidavit], ¶¶ 6-9).

Civil Penalty

ALJ Wilkinson offered the parties the opportunity to mediate this matter before proceeding to the penalty phase of the enforcement proceeding. The parties were unable to reach a settlement. On May 3, 2018, Department staff advised the ALJ that staff was withdrawing that portion of the fifth cause of action as to which the ALJ denied staff's motion, and withdrawing the seventh cause of action which the ALJ dismissed. Department staff also reduced its proposed civil penalty from $176,000 to $151,199. Respondents did not respond to Department staff's submission.

ALJ Wilkinson's recommendations with respect the civil penalty are set forth in the Summary Report and are reviewed below.

[5] A generator is also required to keep records of any test results, waste analyses or other determinations made in accordance with 6 NYCRR 372.2(a)(2) for at least three years from the date that the waste was last sent to onsite or off-site treatment, storage or disposal (*see* 6 NYCRR 372.2[c][1][iii]).

--Civil Penalty for Violation of Air Pollution Regulations

ECL 71-2103(1) provides that any person who violates article 19, or any regulation which implements the State's air pollution laws, shall be liable for a civil penalty in the case of a first violation of not less than $500 and not more than $18,000 and an additional penalty not to exceed $15,000 for each day during which the violation continues.

Department staff requested a civil penalty of $60,000 for the alleged violations of air pollution regulations with further upward adjustments of $40,000, for a total civil penalty of $100,000 for the violation of the air regulations.

With respect to the violations of air pollution regulations alleged in the first, second, fourth and fifth causes of action, the ALJ offers two civil penalty options for me to consider (*see* Summary Report, at 16 [attached *Recommended Civil Penalty*]).[6] The first option recommends that I impose a civil penalty in the amount of $55,000. Under the second option offered by the ALJ, the civil penalty would be $42,720. ALJ Wilkinson also recommends an upward adjustment for both civil penalty options in the amount of $5,000, due to respondents' lack of cooperation in resolving the violations and the duration of the violations, resulting in a $60,000 option and an alternative $47,720 option for the violation of the air regulations (*see* Summary Report, at 12-13).[7] It is unclear the extent to which either or both of these factors were taken into consideration in the penalty recommendations of $55,000 and $42,720 and I decline to make these further upward adjustments.

The ALJ acknowledges that Department staff has justified a significant penalty request (*see e.g.* Summary Report at 7, 14). Based upon my review of this record, including but not limited to the extent of respondents' violations, the duration of the violations, respondents' failure to observe best management practices, and the location of the Facility in an area of the State that does not meet national ambient air quality standards for ozone (*see* Summary Report at 4-7; *see also* Klappas and De Coteau Affidavits), a substantial civil penalty for the violation of the air regulations is warranted.

Department staff justifies its proposed upward adjustments based on respondents' repeat violations, their failure to apply for a registration application upon consolidating operations at two other locations to this new location, and their violation of a prior consent order (*see* Summary Report at 12). I decline to make an adjustment with respect to the consent order for reasons given in the Summary Report (*see* Summary Report at 12-13 [the consent order at issue pertained to a different facility, and the violations in that order were not charged against respondent Michael Mancusi]). In terms of the penalty calculation, I am treating, as did the ALJ,

[6] The ALJ did not recommend assessing a penalty for the third cause of action (*see* Summary Report at 7). Because I have dismissed that cause of action, no penalty would lie.

[7] It is my preference for hearing reports to recommend a specific penalty amount rather than offer options, and to justify the penalty recommendation. Where an ALJ concludes that more than one penalty recommendation is appropriate for consideration, a detailed discussion in support of each recommendation and accompanying calculation should be provided.

the violations of 6 NYCRR 201-1 and 228-1.3 as a "first violation" under ECL 71-2103 and not a "second violation" (*see* Summary Report at 5-6).

Respondents' failure to obtain a registration application for the Facility is a significant omission. Compliance with permitting and registration requirements is critical for the Department to ensure that environmental standards are met. Otherwise, the Department's monitoring activities are impaired (*see* Summary Report at 6). The Facility was in operation for fourteen years prior to its closure and sale of the property in 2014 (*see* February Ruling at 7 [Finding of Fact No. 21]). The duration of these violations, as well as respondents' failure to maintain the required records with respect to its operation, are important considerations. Accordingly, I am imposing a civil penalty of $55,000 for the violations set forth in the first, second, fourth, and sixth causes of action and, with respect to the fifth cause of action, for the violation of 6 NYCRR 228-1.10(e). I am not imposing any penalty with respect to the third cause of action, and I decline to impose the additional upward adjustments. The $55,000 civil penalty is authorized and appropriate for the violations of the air pollution regulations.

--Civil Penalty for Violation of the Hazardous Waste Regulations

Department staff has requested a penalty of $25,000 for respondents' violation of 6 NYCRR 371.1(f)(7) and 372.2(a)(2). Pursuant to ECL 71-2705(1), any person who violates these regulations "shall be liable in the case of a first violation, for a civil penalty not to exceed thirty-seven thousand five hundred dollars and an additional penalty of not more than thirty-seven thousand five hundred dollars for each day during which such violation continues." Respondents' failure to properly characterize the waste generated at the Facility and retain records frustrates the Department's implementation of the State's hazardous waste program and merits the penalty staff is seeking. The requested penalty is authorized and appropriate pursuant to the ECL. [8]

Although Department staff has requested further upward adjustments to the civil penalty for these violations, I decline to make those adjustments based on the Summary Report (*see* Summary Report at 13).

--Civil Penalty for Violation of Water Regulations

Finally, respondents' unauthorized discharge of industrial waste into the waters of the State violated ECL 17-0511 (*see e.g.* February Ruling at 25-27; Haas Affidavit, ¶¶ 6-9). Department staff's requested penalty of $5,000 is authorized and appropriate (*see* ECL 71-1929[1]).

[8] The ALJ reviewed the federal Resource Recovery and Conservation Act Civil Penalty Policy, in addition to the ECL, and concluded that Department staff's proposed penalty "is reasonable and consistent with the statutory scheme and applicable penalty policies" (*see* Summary Report at 12). However, I am not relying on the ALJ's analysis of that policy as the statute (ECL 71-2705[1]) provides sufficient support for the penalty in the circumstances here.

Summary

This matter involved violations in several environmental program areas (air resources, water resources and solid and hazardous waste). Based on the administrative record, I hereby assess a civil penalty in the amount of $85,000 for the violations alleged in the first, second, fourth, fifth (as modified), sixth, eighth, and ninth causes of action in the complaint. Respondents Man Products, Inc. and Michael Mancusi, who are being held jointly and severally liable, are to pay this penalty within ninety (90) days of the service of this order upon them.

Regulatory Fees

I also direct that respondents pay $2,240 for fourteen years of annual air program fees that respondents were obligated to pay pursuant to ECL 72-0302(1)(e) for their operation of the Facility, which constituted an air contamination source within the meaning of ECL 72-0301(3) (*see* Summary Report at 7; February Ruling at 20-21). These fees are to be paid within ninety (90) days of the service of this order upon respondents and are to be submitted by check or money order that is separate from the check or money order for the civil penalty.

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

I. The Ruling dated February 20, 2018 granting Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 on the first, second, fourth, sixth, eighth and ninth causes of action in their entirety, and on the fifth cause of action with respect to the violation of 6 NYCRR 228-1.10(e), is affirmed.

II. The third cause of action is dismissed.

III. Based on the evidence, respondents Man Products, Inc. and Michael Mancusi, jointly and severally, violated:

A. 6 NYCRR 201-1, for failing to have an air facility permit, registration or other Department authorization to operate a surface coating operation inside a paint spray booth at respondents' facility at 178 New Highway, Amityville, Suffolk County, New York (Facility);

B. former 6 NYCRR 228-1.3(a), for using a surface coating that had a volatile organic compound content in excess of the regulatory limit;

C. former 6 NYCRR 228-1.5(a) and 228-1.5(k), for failing to comply with recordkeeping requirements, failing to provide Department staff with records concerning the coatings used, and failing to demonstrate that spray booth filter efficiency was at least 85% at the Facility;

D. former 6 NYCRR 228-1.10(e), for improperly storing and disposing of materials;

E. 6 NYCRR 371.1(f)(7) and 372.2(a)(2), for failing to make a hazardous waste determination with respect to the solid waste generated at the Facility;

F. ECL 17-0511, for unlawfully discharging industrial waste into the waters of the State without a State Pollutant Discharge Elimination System permit; and

G. ECL 72-0302(1), for failing to pay air program regulatory fees for the years from 1999 to 2013.

IV. A civil penalty in the amount of eighty-five thousand dollars ($85,000) is hereby assessed, jointly and severally, upon respondents Man Products, Inc. and Michael Mancusi. Within ninety (90) days of service of this order upon respondents Man Products, Inc. and Michael Mancusi shall pay the civil penalty by check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

V. In addition, within ninety (90) days of service of this order, respondents Man Products, Inc. and Michael Mancusi shall pay annual air program fees in the amount of two thousand two hundred and forty dollars ($2,240), by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

VI. The payment of the civil penalty and the payment of the air program fees are to be submitted by separate check or money order.

The payment of the air program fees and the payment of the civil penalty shall be sent or hand-delivered to the following address:

Office of General Counsel, Region 1
NYS Department of Environmental Conservation
SUNY at Stony Brook
50 Circle Road
Stony Brook, New York 11790-3409
Attn: Susan Schindler, Esq.

VII. The provisions, terms and conditions of this order shall bind respondents Man Products, Inc. and Michael Mancusi, jointly and severally, and their agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: October 16, 2019
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17, 19, and 27 of the Environmental Conservation Law (ECL) of the State of New York, and Parts 201, 228, 364, and 371 of Title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (6 NYCRR) by:

SUMMARY REPORT

MAN PRODUCTS, INC. and MICHAEL MANCUSI,

DEC CASE NO. R1-20130725-87

Respondents.

Appearances of Counsel:

- Thomas S. Berkman, General Counsel (Susan Schindler, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Michael Mancusi, respondent *pro se* and for respondent Man Products, Inc.

PROCEDURAL BACKGROUND

This summary report and ruling addresses a contested motion for order without hearing dated June 16, 2017 (Motion) brought by staff of the New York State Department of Environmental Conservation (Department) following service of a notice of hearing and complaint dated September 24, 2016 (Complaint). The Complaint alleges that respondents violated Environmental Conservation Law (ECL) articles 17, 19, 27 and 72 and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) parts 201, 228[1], 364[2], 371, and 372 in connection with respondents' operation of a surface coating facility at 178 New Highway, Amityville, New York, Suffolk County (Facility). The Motion requested a Commissioner's order holding respondents liable for the violations alleged in the Complaint and imposing a civil penalty in the amount of $176,000. By cross motion dated

[1] Surface coating processes and commercial and industrial adhesives, sealants and primers were formerly regulated pursuant to 6 NYCRR part 228 in effect on August 31, 2010 through May 2, 2013, however, some of the provisions at issue in this proceeding were promulgated before 2010. Section 228-1.1 of 6 NYCRR was in effect on March 31, 1993; 6 NYCRR 228-1.3 was in effect on February 28, 1994; and 6 NYCRR 228-1.5 was in effect on March 31, 1993. References to 6 NYCRR part 228 in this report refer to 6 NYCRR part 228 filed on August 31, 2010 and in effect on May 2, 2013 or earlier as noted above. The 2010 version of part 228 was repealed. On May 6, 2013, a new Part 228, including subpart 228-1 Surface Coating Processes (§§ 228-1.1 through 228-1.16), was adopted and filed with the Secretary of State, effective 30 days after filing (*see* 6 NYCRR part 228, Surface Coating Processes, Commercial and Industrial Adhesives, Sealants and Primers, Historical Notes).

[2] Section 364.2 of 6 NYCRR refers to the regulation in effect on May 2, 2013. Part 364 was repealed and replaced effective November 2017.

August 10, 2017, respondents opposed the Motion and cross moved for an order without hearing dismissing all the causes of action in the complaint (Cross Motion).

On February 20, 2018, I issued a Ruling on the Motion and Cross Motion (*see Matter of Man Products and Michael Mancusi*, Ruling of the Administrative Law Judge, February 20, 2018 [Ruling]). I granted staff's Motion with respect to the first, second, third, fourth, sixth, eighth, and ninth causes of action and denied respondents' Cross Motion on those causes of action. On the fifth cause of action, I partially granted and partially denied staff's Motion, and denied respondents' Cross Motion. I dismissed the seventh cause of action, granting respondents' Cross Motion and denying staff's Motion with respect to that cause of action. I reserved on the issue of the civil penalty. (*See* Ruling at 29.)

Following the Ruling, and several attempts by the Office of Hearings and Mediation Services to contact respondents to schedule a conference call with the parties to discuss further proceedings, I advised the parties by email on March 5, 2018 that they could settle this matter through mediation and explained the mediation process. I also advised that if both parties did not agree to mediation, or the matter did not settle, the enforcement proceeding would continue. Both parties initially agreed to mediation and one mediation call was held with Administrative Law Judge (ALJ) Michael Caruso. On April 13, 2018, James D'Angelo, Esq. (Central Islip, New York), on behalf of respondents, asked ALJ Caruso to adjourn the enforcement proceedings indefinitely, claiming that Mr. Mancusi was experiencing health issues. ALJ Caruso referred Mr. D'Angelo's request to me.

I advised the parties by letter dated April 16, 2018, that I would not adjourn the matter indefinitely, stating the enforcement case had been pending for five years and needed to be resolved. I directed Department staff to advise me by May 8, 2018, how staff intended to proceed in this matter in light of the Ruling, and gave respondents until May 29, 2018 to submit a response to staff's submission. By email dated May 3, 2018, Ms. Schindler advised me that Department staff decided not to pursue the seventh cause of action and that part of the fifth cause of action with respect to 6 NYCRR 228-10(a) on which I denied staff's Motion. Staff revised its proposed civil penalty to $151,199 from $176,000 to reflect the withdrawal of the causes of action. Respondents did not respond to Department staff's submission. The only issue that remains in this proceeding is the amount of the civil penalty for the causes of action where I found respondents liable.

The procedural history of this proceeding, the findings of fact I made as a matter of law on the Motion and Cross Motion, and the papers I considered are set forth in the Ruling. The only additional submission I considered for this summary report is Department staff's May 3, 2018 submission, consisting of an email from Susan Schindler with an attached penalty calculation. That submission is included in the revised exhibit list that is attached to this report.

DISCUSSION

At the outset, I grant Department staff's request to withdraw a portion of the fifth cause of action and the seventh cause of action, and reduce the proposed civil penalty. Respondents will suffer no prejudice from the withdrawal of the claims, nor are they prejudiced by Department staff's request to reduce the proposed civil penalty. Respondents had an opportunity to be heard on the Complaint, including Department staff's initial proposed civil penalty of $176,000, notwithstanding their initial failure to answer, as well as staff's Motion. Respondents submitted an answer to the Complaint and papers in opposition to the Motion (*see* attached revised Exhibit List). Respondents also had the opportunity to respond to Department staff's May 8, 2018 submission, although they did not submit a response. Therefore, I will turn to the merits of the remaining issue in this matter, the civil penalty.

Civil Penalty Policy Overview

My review of Department staff's proposed civil penalty is guided by *DEE-1: Civil Penalty Policy* (June 20, 1990) (Civil Penalty Policy). The Civil Penalty Policy provides the framework for Department staff to assess civil penalties for violations of environmental laws and regulations. The objective of the Civil Penalty Policy is to encourage the public to comply with environmental laws and protect the State's natural resources and environment by using enforcement action and civil penalties to deter non-compliance. "If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have voluntarily complied in a timely fashion" (Civil Penalty Policy III Objectives in Assessing Penalties).

A civil penalty calculation includes an analysis of the statutory maximum penalty, a review of the Civil Penalty Policy and consideration of program specific guidance documents, penalties assessed in similar cases, and any mitigating circumstances. Under the Civil Penalty Policy, the economic benefit of delayed compliance, including the value of avoided capital and operating costs, such as the costs to install and properly operate and maintain equipment and train staff, is taken into account. The civil penalty must also reflect the seriousness of the violation - the gravity component. (Civil Penalty Policy IV Penalty Calculations.)

The gravity component assesses two factors: (1) the potential harm and actual harm caused by the violation, and (2) the relative importance of the violation in the regulatory scheme (Civil Penalty Policy IV D). Potential harm and actual damage focus on whether, and to what extent, the violation resulted in, or could potentially result in, harm to the environment or human health. As a general rule, the longer a violation continues unabated, the greater the risk of harm to, and the loss of benefit from, the natural resource will be, and the gravity component is, therefore, greater. Another factor in assessing the gravity of a violation is the importance of the violated requirement to statutory objectives and the Department's ability to exercise its

regulatory oversight function. The Civil Penalty Policy states, for example, that "[r]egistration, filing or reporting requirements are critical to the Department's understanding of the universe of regulated entities," and that "[u]ndertaking any action which requires a DEC permit, without first obtaining the permit, is always a serious matter, not a mere 'technical' or 'paper work' violation, even if the activity is otherwise in compliance." (Civil Penalty Policy IV D 2.)

The Civil Penalty Policy allows for adjustments. A violator's culpability – how much control the violator had over the events constituting the violation and the foreseeability of the events constituting the violation – may increase the penalty. A violator's cooperation may justify a decreased penalty, while a lack of cooperation may increase it. A violator's history of non-compliance could also increase the penalty depending on how recent the violation was and the number of previous violations. (*See* Civil Penalty Policy E. Penalty Adjustments.) Department staff's requested civil penalty is addressed below in light of these considerations.

Air Pollution Violations

Department staff requests a civil penalty for violations of air pollution regulations as follows: $20,000 for the violation of the requirement to obtain an air registration (6 NYCRR 201-1), $20,000 for the violation of emission control requirements (6 NYCRR 228-1.3[a]), $5,000 for the violation of pollution control equipment requirements (6 NYCRR 228-1.3[e]), $10,000 for the violation of recordkeeping and reporting requirements (6 NYCRR 228-1.5[a] and 228-1.5[k]), and $5,000 for the violation of storage and disposal requirements related to paints and volatile organic compound (VOC) material (6 NYCRR 228-1.10[e]). Staff also seeks back payment of regulatory fees (ECL 72-0302). (*See* Penalty Calculation, causes of action 1-5, 9, and Adjustments for air.)

The State's policy is that air quality should be protective of the public health and welfare (ECL 19-0103). The purpose of ECL article 19 is to control and prevent air pollution (ECL 19-0105), and, to achieve this objective, the Legislature has authorized the Department to adopt regulations specifying the extent to which air contamination sources may emit air pollutants (ECL 19-0301[1]). ECL 71-2103 provides that any person who violates article 19 or any regulation which implements the State's air pollution laws, shall be liable for a civil penalty in the case of a first violation of not less than $500 and not more than $18,000 and an additional penalty not to exceed $15,000 for each day the penalty continues.

Suffolk County, where respondents operated the Facility, is located in the New York City metropolitan area for air quality planning purposes (6 NYCRR 200.1[au]). In 2012, the U.S. Environmental Protection Agency (EPA) designated the New York-Northern New Jersey-Long Island metropolitan area as a nonattainment area for the 2008 8-hour ozone national ambient air quality standards, meaning that air quality in that region does not meet the standard necessary to protect the public health or the standard necessary to protect the public welfare (77 Fed Reg

30137 [May 21, 2012]; 42 USC § 7409).[3] Before this designation, EPA designated the New York City metropolitan area as non-attainment for the 1997 8-hour ozone national ambient air quality standard (NAAQS) (*see* http://www.dec.ny.gov/chemical/37012.html). Volatile organic compounds, such as are found in surface coatings, contribute to ozone formation and are the target of State and federal regulations limiting emissions to achieve the 8-hour ozone NAAQS. The Department promulgated Part 228 to control the emissions of volatile organic compounds from facilities that apply surface coatings, and included specific requirements for facilities located in the New York City metropolitan area (*see e.g.* 6 NYCRR 228-1.1[b][1]).

Respondents operated the Facility in Suffolk County from 1999 to 2013 without applying for, or receiving, an air facility registration (registration) from the Department in violation of 6 NYCRR 201-1 and 6 NYCRR 228-1.1[a][1]) (*see* Ruling, Findings of Fact Nos. 3 and 8). Staff alerted respondents in 2010 that they needed a registration for the Facility, but respondents failed to submit an application or obtain a registration (*see* Ruling, Finding of Fact No. 19). Respondents also utilized a surface coating with a VOC content that exceeded the regulatory limit in violation of 6 NYCRR 228-1.3(a) (*see* Ruling at 11-14). How long respondents utilized the non-compliant coating, or whether they utilized other coatings with excess VOCs, cannot be determined because respondents failed to keep the purchase and use records that they were required to keep under 6 NYCRR 228-1.5 (*see* Ruling at 15-16). Respondents also failed to provide these records to Department staff upon request or maintain the records for five years, as they were required to do under 6 NYCRR 228-1.5 (*see id.*). In addition, respondents disposed and stored materials and supplies containing VOCs in open containers and on the floor of the Facility, contrary to the storage and disposal requirements set forth in 6 NYCRR 228-1.10(a) (*see* Ruling at 18-19).

Due to respondents' use of a non-compliant surface coating and improper storage of paint and waste material at the Facility, the Facility did not adequately control VOC emissions from KEM-FLASH® 500 Primer, Red Oxide, the surface coating it used, and emitted more VOCs in an area of the State that does not meet the 8-hour ozone national ambient air quality standards. Respondents' long-standing violations of 6 NYCRR part 201 and NYCRR part 228 are serious infractions given the air quality concerns in the New York City metropolitan area.

Department staff requests a penalty of $20,000 for respondents' violation of 6 NYCRR 201-1 based on a percentage of the maximum statutory penalty for a second violation. Staff's Motion papers included a 1985 consent order executed by Attilio Mancusi on behalf of Man Products, Inc. for unspecified violations of 6 NYCRR part 228 at a facility located in Glen Cove, New York, and a 1987 consent order executed by Attilio Mancusi, individually, and on behalf of Man Products, Inc., at the same location, for the unpermitted disposal of industrial commercial waste and the discharge of industrial waste from a point source without a permit. Man Products was a party to the consent orders, but Michael Mancusi was not a respondent in either

[3] *See* http://www.dec.ny.gov/docs/air_pdf/sip2008o3nymafinal.pdf (executive summary and Section 1: Background and Overview of Federal Requirements).

proceeding. The consent orders did not involve the Facility in Amityville, New York nor did they explicitly address a part 201 violation. Under the circumstances, I do not consider respondents' violation of 6 NYCRR 201-1 to be a second violation.

Research reveals four administrative decisions involving violations of 6 NYCRR part 228, not including the rulings in this matter, two of which also involved part 201 violations. In a 1992 case, the Commissioner imposed a civil penalty of $100,000 on a respondent who operated a surface coating facility in Nassau County that had violated a 1985 consent order and operated the facility without a part 201 permit. The penalty included $30,000 for violating the consent order, $20,000 for continuing to operate the facility without a permit in violation of then 6 NYCRR 201.2(b), $10,000 for using a non-compliant surface coating under a former version of part 228, $10,000 for using a non-compliant surface coating after September 15, 1988, and $30,000 for respondents' continuing violation of part 228 (*Matter of Korfund Dynamics Corp*., Order of the Commissioner, January 6, 1992). In 2004, the Commissioner assessed a civil penalty of $5,000 against an auto body shop located in Babylon, New York for operating a paint spray booth without a permit or registration in violation of 6 NYCRR 201-1.1 and nonpayment of three years of State air quality control fees (ECL 72-0302[1]) (*Matter of Montalto and Montalto United Auto Body, Inc*., Order of the Commissioner, July 6, 2004). It is not clear how long the *Montalto* respondents had operated in non-compliance with part 228, but staff only sought three years of back regulatory fees.

The fact that respondents operated the Facility without a part 201 air facility registration or permit from 1999 to 2013, and did not correct the problem after the Department issued a notice of violation to the Facility in 2010 (*see* Motion, Exhibit 5), hindered the Department's ability to monitor the operations of an air contamination source and warrants a substantial civil penalty. Department staff's requested penalty of $20,000 is less than the daily maximum for one day and supported under the circumstances. I recommend that the Commissioner impose a civil penalty for a first violation in the amount of $13,860, which is proportionate to the penalty that Department staff is seeking for a second violation, for respondents' violation of 6 NYCRR 201-1.

The civil penalty for respondents' violation of 6 NYCRR 228-1.3(a) should also be based on the maximum statutory penalty for a first violation for the reasons discussed above, and also because the previous consent orders do not indicate that Man Products was using a non-compliant coating. Three reported administrative decisions involved the use of a non-compliant surface coating. In a 1993 case, the Commissioner assessed a penalty of $3,500 against respondents for using a surface coating with an excessive VOC content in violation of then 6 NYCRR 228.3(a) at a facility located in Long Island City, New York (*see Matter of Galfunt and Hudson Chromium Company, Inc*., Commissioner's Order, May 5, 1993). In a 1985 case, the Commissioner imposed a civil penalty of $25,000, with $23,000 suspended, on the operator of a surface coating facility in Bayport, New York that used paint which contained VOCs in excess of the limits in part 228 (*see Matter of E.B. Stimpson Co., Inc*, Order of the Commissioner, May 28,

1985). These cases are not recent, and did not involve facilities with multiple violations of part 228 or violations of other regulatory program requirements, as is the case here. In *Matter of Korfund Dynamics Corp*., (Order of the Commissioner, January 6, 1992), the Commissioner assessed a total of $20,000 in civil penalties for the respondents' continued use of a non-compliant surface coating.

Under the circumstances, Department staff has justified its requested penalty of $20,000, but the Commissioner could also impose a civil penalty in the amount of $13,860, which is proportionate to the civil penalty Department staff proposed for a second violation and not unreasonable considering the civil penalties assessed in other cases. How long respondents utilized a non-compliant surface coating cannot be determined because respondents did not keep records. This violation is serious because it occurred in an area of the State with persistent air quality concerns and meant that the Facility emitted more VOCs into the atmosphere than part 228 allowed. Moreover, respondents committed other violations of air pollution regulations, as well as water pollution and hazardous waste regulations. I do not concur with staff's recommendation that a separate penalty be assessed pursuant to section 228-1.3(c) for respondents' failure to use an air cleaning device. Section 228-1.3 imposes VOC emission control requirements and provides options for meeting these requirements. Respondents' use of a non-compliant surface coating without an air cleaning device demonstrates that they did not meet emission control requirements and constitutes a violation of section 228-1.3. Respondents did not violate section 228-1.3 a second time, however, by failing to use an air cleaning device.

I recommended a civil penalty in the amount of $10,000, as staff requested, for respondents' violation of 6 NYCRR 228-1.5 and $5,000 for respondents' violation of 6 NYCRR 228-1.10(e). These penalty amounts are modest. Respondents' neglect of recordkeeping and reporting requirements for five years interfered with the Department's ability to monitor air emission sources in the New York City metropolitan area and oversee the Facility's compliance with air regulations. The Civil Penalty Policy does not treat so-called "paperwork" violations as minor (Civil Penalty Policy IV D 2.b). Moreover, respondents' failure to observe best management practices designed to minimize air emissions is a serious infraction, especially when it occurs in a non-attainment area of the State.

I also recommend that respondents be required to pay $2,240 for fourteen years of annual air program fees that they were required to pay pursuant to ECL 72-0302(1)(e) for operation of the Facility which qualifies as an air contamination source pursuant to ECL 72-0301(3).

RCRA Violations

Department staff requests a civil penalty in the amount of $25,000 for respondents' violation of 6 NYCRR 371.1(f)(7) and 372.2(a)(2). In the Ruling, I held respondents liable for violating 6 NYCRR 372.2(a)(2) (*see* Ruling at 22-23). Section 372.2 implements Environmental Conservation Law article 27, title 9, the statutory provisions which regulate the management of hazardous waste "in a manner consistent with" the federal Resource Conservation and Recovery

Act (RCRA), 42 USC §§ 6901, *et seq*. (ECL 27-0090; 6 NYCRR part 372 [statutory authority]). RCRA was enacted to reduce or eliminate the generation of hazardous waste as expeditiously as possible and to treat, store and dispose of hazardous waste "so as to minimize the present and future threat to human health and the environment" (42 USC 6902[b]). States retain the authority under RCRA to regulate hazardous waste so long as the state's statutory authority and regulatory scheme is at least as stringent as the federal program, and the state's program is authorized by the EPA. New York's program to regulate the management of hazardous waste is set forth in article 27 of the ECL (ECL 27-0900) and New York is an "authorized" state with respect to RCRA requirements (https://www.dec.ny.gov/chemical/60828.html). The civil penalties for violating any rule or regulation imposed by title 9 of ECL article 27 are set forth in ECL 71-2705. In the case of a first violation, the civil penalty is not to exceed thirty-seven thousand five hundred dollars; an additional penalty of not more than thirty-seven thousand five hundred dollars may be assessed for each day during which the violation continues (*see* ECL 71-2705). Department staff provided the following rationale for its penalty calculation:

> Staff determined that the potential for harm resulting from this violation was determined to be major as Respondents failed to make [sic] hazardous waste determination on waste paint, waste filters from the spray booth, waste water, waste rags, and waste fluorescent lamps, and improperly disposed of wastes posing a substantial risk of exposure to humans and the environment.
>
> Staff determined that this violation was considered major because there is significant deviation from the regulations, and the facility has been violating these requirements for at least ten (10) years

(Penalty Calculation, cause of action 6). Department staff did not reference the Civil Penalty Policy or any other penalty policy in support of its penalty calculation.

In a recent Region 9 enforcement proceeding involving a facility that violated 6 NYCRR 372-2(a)(2), Department staff utilized EPA's 1990 RCRA Civil Penalty Policy to calculate the civil penalty (*see Matter of Hydramec, Inc*., Order of the Commissioner, November 13, 2017, *adopting* Hearing Report of the Administrative Law Judge, July 19, 2017). EPA updated the RCRA Civil Penalty Policy in 2003 (USEPA RCRA Civil Penalty Policy, revised June 23, 2003 [RCRA Penalty Policy or Policy]). The RCRA Civil Penalty Policy sets forth a methodology for calculating penalties based on section 3008 of RCRA, 42 USC § 6928, which requires that regulators consider the seriousness of the violation and any good faith efforts to comply with applicable requirements (42 USC 6928[a][3]). The RCRA Penalty Policy provides a useful framework to consider Department staff's proposed penalty because its overall approach is similar to DEE-1, and the policy uses the terms "major", "moderate", and "minor" to characterize and describe violations of RCRA requirements.[4] I take official notice of the policy

[4] The RCRA Civil Penalty Policy is available on EPA's website at: https://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf.

and will address Department staff's requested civil penalty in light of the revised RCRA Penalty Policy because respondents' violation of section 372.2(a)(2) occurred after 2003.

The RCRA Penalty Policy provides a penalty calculation methodology consisting of four elements: (1) determination of a gravity-based penalty from a penalty assessment matrix; (2) addition of a "multi-day" component to account for a violation's duration; (3) adjustment of the penalty amount up or down based on case-specific circumstances; and (4) addition of the economic benefit gained through non-compliance. DEE-1 follows a similar approach to penalty calculation. Under both policies, the gravity component, which is the starting point of the calculation, considers (1) the potential for harm and (2) the extent of deviation from the statutory requirement. Potential for harm is based on the risk of human or environmental exposure to hazardous waste or hazardous waste constituents and the adverse effect noncompliance may have on the regulatory program. (*See* RCRA Penalty Policy at 12; Civil Penalty Policy IV.D.)

The RCRA Penalty Policy instructs that "all regulatory requirements are fundamental to the continued integrity of the RCRA program," and although some requirements "may not appear to give rise as directly or indirectly to a significant risk of contamination as other requirements," "noncompliance with these requirements directly increases the threat of harm to human health and the environment" (RCRA Penalty Policy at 14). A violation is considered "major" for potential for harm under the RCRA Penalty Policy if it poses or may pose a substantial risk of exposure of humans or other environmental receptors to hazardous waste or constituents, or the actions have had or may have a substantial adverse effect on statutory or regulatory purposes or procedures implementing RCRA (RCRA Penalty Policy at 15). A violation is "moderate" for potential for harm if "(1) the violation poses or may pose a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or (2) the actions have or may have a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program" (*id.*).

The extent of deviation from the regulatory requirement relates to the degree to which the violation undermines the requirement violated (RCRA Penalty Policy at 16). This factor is also included in DEE-1 which considers the importance of the violated requirement to achieving statutory goals (DEE-1 IV D). Under the RCRA Penalty Policy, the deviation from requirement factor is major if the violator deviates from the requirement to such an extent that most important aspects of the requirements are not met resulting in substantial noncompliance (RCRA Penalty Policy at 17). The deviation is moderate if "the violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended" (*id.*).

The RCRA Penalty Policy includes a penalty assessment matrix that shows the potential harm along one axis and the extent of deviation along the other, with three categories of classification for each factor. The matrix has nine cells, each containing a penalty range based on which category – major, moderate, or minor -- is applied to the potential for harm factor and

which category – major, moderate, or minor - is appropriate for the extent of deviation factor. (*See* 2003 RCRA Penalty Policy at 18.) According to the penalty matrix, the gravity component for a violation with a major-major gravity designation would be between $22,000 to $27,500. The gravity component for a violation with a moderate-moderate designation would range from $5,500 to $8,799. Department staff's proposed penalty is in the mid-range of a major-major violation.

The RCRA Penalty Policy and the ECL authorize the Department to consider the duration of a violation in determining the appropriate penalty amount if the violation persists for more than one day, and to assess a multi-day penalty if appropriate (*see* ECL 71-2705; RCRA Penalty Policy at 2, 23). Multi-day penalties are considered mandatory for days 2 to 180 of violations with a gravity designation of major-major or major-moderate, and presumed appropriate where the gravity designation is major-minor, moderate-major or moderate-moderate (*id*. at 25-26). For gravity designations of minor-major, moderate-minor or minor-minor, multi-day penalties are discretionary. The multi-day penalty matrix is the same format as the penalty matrix, but presents the minimum daily penalties for days 2 to 180 of violations (RCRA Penalty Policy at 25). For example, the penalty for days 2 to 180 of a major-major violation ranges from $1,100 to $5,500 per day, multiplied by the number of days of non-compliance; the penalty for days 2 to 180 for a moderate to moderate violation is $825 to $4,400 multiplied by the number of days of non-compliance (*id*.).

Under the Department's RCRA regulations, any person who generates waste must keep records of any test results, waste analyses or other determinations, consistent with the protocols in section 373-2(a)(2), for at least three years from the date the waste was last sent to onsite or off-site treatment, storage or disposal (6 NYCRR 372.2[c][iii]). The purpose of this requirement is to ensure that waste is properly characterized and disposed according to regulation if it is hazardous waste. Respondents included one hazardous waste manifest with their opposition papers, indicating that hazardous waste was generated at the Facility, but did not submit corresponding records of a hazardous waste determination for that waste, or demonstrate that they had appropriately characterized commercial waste at their Facility for the three year reporting period 2010-2013, particularly for waste associated with respondents' use of KEM-FLASH® 500 Primer, Red Oxide (*see* Ruling at 22-23). A reasonable inference can be made in this case that respondents' violation of section 372.2 continued for the duration of the three-year retention period due to their lack of recordkeeping.

Department staff is correct that respondents' failure to test for hazardous waste could pose a significant risk of exposure to the environment and public health if respondents improperly disposed of the waste at a facility that could not handle the waste stream. Due to respondents' failure to characterize waste and maintain the required records, Department staff could not determine whether respondents' waste disposal practices were lawful or ensure that they were complying with State regulations implementing RCRA. Respondents' disregard of

section 372.2 is a serious infraction given the potential risks associated with the improper disposal of hazardous waste and the need for regulatory oversight of this activity.

In *Matter of Hydramec, Inc*., the Commissioner imposed a penalty of $44,500 on a respondent for its failure to properly characterize waste pursuant to 6 NYCRR part 372 for 20 years, and shipping hazardous waste as nonhazardous waste on at least 20 occasions to a facility not permitted to accept hazardous waste, in violation of 6 NYCRR 371.1(f)(6)(iii)(a) (*Matter of Hydramec, Inc.*, Order of the Commissioner, November 13, 2017, at 7-8; *see also* Hearing Report of the Administrative Law Judge, July 19, 2017 [Hearing Report], at 17-18). Staff applied EPA's 1990 RCRA Penalty Policy to calculate the civil penalty and collapsed the two alleged violations – failure to properly characterize waste and improper shipment of hazardous waste – into one violation. Pursuant to the RCRA Penalty Policy, staff determined that both elements of the gravity component were moderate. Respondent conceded liability, but contested the penalty calculation. The ALJ concluded, and the Commissioner concurred, that Department staff's characterization of the violation as moderate-moderate was reasonable given that the violation involved the actual management of waste, and that respondent had actually disposed of hazardous waste at a facility that was not permitted to accept hazardous waste based on the incorrect determination that the waste was non-hazardous. The ALJ noted that actual harm is not required under the RCRA Penalty Policy for a determination that the "potential for harm" element is moderate and that even though respondent had sent the waste out for testing, respondent was ultimately responsible for its proper disposal. (*See Matter of Hydramec, Inc.* Hearing Report at 11-12.)

Although this case does not involve direct evidence of improper waste disposal as in *Matter of Hydramec*, respondents' failure to properly characterize the waste generated at the Facility and retain appropriate records makes it impossible to determine whether waste was disposed of properly, frustrating the Department's implementation of the State's RCRA regulations. The fact that respondents had no records over a three-year period increases the potential for harm as well as the extent of the deviation from the regulatory requirement. (*See* Ruling at 22-23.) Staff's general characterization of the violation as "major" due to its alleged 10-year duration does not address all the steps set forth in the RCRA Penalty Policy, which expressly considers two gravity elements – potential for harm and extent of deviation of the regulatory requirement – to arrive at a penalty amount. Staff also overlooks the fact that the recordkeeping requirement under part 372 is three years, not ten years, so respondents' failure to have records dating back 10 years is not necessarily actionable unless staff raised the issue during the record retention period in which respondents would have been obligated to maintain records. Staff did not do so in this case. Nonetheless, on the record before me, a reasonable inference can be made that the violation continued for the duration of the three-year record retention period above and a major-major designation could be supported. A moderate designation for potential for harm and moderate characterization for deviation from the regulatory requirement are also supported in the record for the reasons discussed above.

Department staff's proposed penalty of $25,000 is approximately two-thirds of the maximum daily penalty under ECL 71-2705. Applying the RCRA Penalty Policy, staff's proposed penalty is at the mid-point of the penalty range for a single violation with a major-major gravity designation under the RCRA Penalty Policy, but high for a single penalty with a moderate-moderate designation, which has a civil penalty range of $5,500 to $8,799 (*see* RCRA Penalty Policy, at 18). If a multi-day penalty is assessed, Department staff's proposed penalty is supported. The proposed penalty is nearly equivalent to the civil penalty for a multi-day violation with a moderate-moderate gravity designation that continued for thirty days based on the lowest multi-day daily penalty in the moderate-moderate range - $825 per day. Based on my review of the RCRA Civil Penalty and the administrative record, I believe staff's proposed civil penalty is reasonable and consistent with the statutory scheme and applicable penalty policies whether the violation is characterized as major-major or moderate-moderate for gravity.

Water Pollution Violations

Department staff seeks a penalty of $5,000 for the violation of ECL 17-0511. As Department staff notes, this penalty is consistent with applicable Division of Water policy guidelines, which provide for a penalty of $5,000 per day for a discharge at an unpermitted facility (*see* Division of Water Technical and Operational Guidance Series, June 24, 2000, 1.4.2. Violation of Effluent Requirements, Unpermitted Discharges and Water Quality Standards, at 37). The penalty is also substantially less than the maximum statutory penalty of $37,500 under ECL 71-1929. Accordingly, I recommend that respondents be assessed a civil penalty of $5,000 for their violation of ECL 17-0511.

Proposed Adjustments

Air Pollution Violations

Department staff seeks two adjustments to the air pollution penalty in the amount of $20,000 each as follows:

(1) 20% addition to base Air penalty of $100,000. Respondents consolidated operations from two locations to [sic] and failed to submit a Registration application for the new location. Respondents are repeat violations [sic].
(2) 20% addition to base Air penalty of $100,000. Respondents contested the billing of the two facilities closed in 2000 when they moved to Amityville yet never submitted a registration application for their new location. Respondents also violated its [sic] previous consent order for the same violation.

(Penalty Calculation, adjustments [air]).

Staff asserts similar bases for these adjustments and is not entitled to both of them. The violations at issue in the 1985 consent order pertain to a different Facility, were not charged against Michael Mancusi, and occurred more than 30 years ago. Consequently, the 1985 consent

order does not justify increasing the civil penalty with respect to the present violations. Respondents' noncompliance with environmental laws and regulations in multiple program area and their lack of cooperation with Department staff in resolving the violations, however, provides a basis to adjust the civil penalty. Respondents and staff were unable to settle this matter. I recommend increasing the civil penalty for respondents' violations of air pollution regulations by $5,000 due to their lack of cooperation.

RCRA Violations

Department staff seeks an adjustment to the hazardous waste penalty in the amount of $7,500 (30% of $25,000 base penalty) for respondents' willful negligence and for the substantial harm to the environment that can occur from improper waste; $5,000 (20% of the base penalty) for respondents' protracted history of non-compliance and the substantial adverse impact to the RCRA program caused by the violation; and $8,699 for the economic benefit of noncompliance. I decline to adjust the proposed civil penalty for respondents' violation of 6 NYCRR 372.2(a)(2). Based on my analysis of the RCRA Penalty Policy, Department staff's proposed penalty already takes into account respondents' disregard of RCRA regulations and the potential harm to the environment from the improper disposal of waste. As with the air regulations, Department staff has not established respondents' history of noncompliance with RCRA regulations, nor has staff substantiated its proffered economic benefit with evidence of avoided waste disposal costs. Accordingly, I decline to adjust the civil penalty upward for respondents' violation of 6 NYCRR 372.2(a)(2).

CONCLUSION

The following summarizes my assessment of Department staff's proposed civil penalty. In the Ruling, I granted Department staff's Motion and found respondents liable on the first, second, third, fourth, sixth, eighth and ninth causes of action and a portion of the fifth cause of action (Ruling at 29). Staff seeks a civil penalty in the amount of $151,199 for these violations (Penalty Calculation). I recommend a civil penalty in the amount of $77,720, or in the alternative $90,000.

With respect to the air pollution violations, I concur that respondents should be assessed a civil penalty for their violation of 6 NYCRR 201-1 and 228-1.3(a), but present the Commissioner with two options to consider: (1) $20,000 per violation as requested by Department staff, or (2) $13,860 per violation based on a pro-rata adjustment to the civil penalty to reflect a first violation rather than a second violation. As requested by Department staff, I recommend that the Commissioner assess a civil penalty in the amount of $10,000 for respondents' violation of 6 NYCRR 228-1.5 and $5,000 for respondents' violation of 6 NYCRR 228-1.10(a). Thus, the total civil penalty, before adjustments, for respondents' violations of air pollution regulations would be $55,000 or $42,720. I also recommend that the Commissioner increase the penalty for the air pollution violations by $5,000 due to respondents' lack of cooperation with Department staff and the duration of the violations. For respondents' violation of 6 NYCRR 372.2(a)(2), I

recommend that the Commissioner assess a civil penalty in the amount of $25,000, but decline to adjust this penalty amount as requested by Department staff. Finally, I recommend that respondents be assessed a civil penalty in the amount of $5,000 for their violation of ECL-17-0511.

To summarize, I recommend that the Commissioner assess a civil penalty against respondents in the amount of $77,720. The recommended civil penalty is well below the statutory maximum penalty that could be assessed, consistent with the Civil Penalty Policy and EPA RCRA Policy, and appropriate on this administrative record. As discussed, the Commissioner could impose a higher civil penalty in the amount of $90,000, reflecting higher penalty assessments for respondents' violation of air pollution regulations. In any event, a significant penalty is warranted in this proceeding given that the violations involved multiple environmental program areas, including air resources, water resources, and solid and hazardous waste disposal. (*See* attached Recommended Civil Penalty Table.)

RECOMMENDATION

Based my Ruling granting Department staff's motion for order without hearing on the issue of liability, and in consideration of Department staff's revised penalty calculation and withdrawal of a portion of the fifth cause of action and the seventh cause of action, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for order without hearing on the first, second, third, fourth, sixth, eighth and ninth causes of action in their entirety and on the fifth cause of action with respect to the violation of 6 NYCRR 228-1.10(e), as recommended in my Ruling;
2. Holding that respondents Man Products, Inc. and Michael Mancusi, individually, violated (a) 6 NYCRR 201-1 by failing to obtain an air facility registration to operate its facility; (b) 6 NYCRR 228-1.3(a) by utilizing a surface coating for a coating line for miscellaneous metal products that had a VOC content in excess of the regulatory limit in NYCRR 228-1.7 table 1; (c) 6 NYCRR 228-1.5(a) and (k) by failing to comply with recordkeeping requirements; (d) 6 NYCRR 228-1.10(e) by improperly storing materials; (e) 6 NYCRR 372.2(a)(2) by failing to make a hazardous waste determination with respect to the solid waste generated at the Facility; and (f) ECL 17-0511 for unlawfully discharging industrial waste into the waters of the State without a State Pollutant Discharge Elimination System permit.
3. Directing respondents Man Products, Inc. and Michael Mancusi to pay a civil penalty in the amount of $77,720 within thirty (30) days of service of the Commissioner's order; and
4. Directing respondents Man Products, Inc. and Michael Mancusi to pay $2,240 for fourteen years of annual air program fees within thirty (30) days of service of the Commissioner's order; and

5. Directing such other and further relief as he may deem just and appropriate.

/s/
Lisa A. Wilkinson
Administrative Law Judge

MATTER OF MAN PRODUCTS, INC. and MICHAEL MANCUSI
DEC Case No. R1-20130725-87

RECOMMENDED CIVIL PENALTY

Cause(s) of Action	Regulation	Civil Penalty Option 1	Civil Penalty Option 2	Penalty Adjustments
1	6 NYCRR 201-1	$20,000	$13,860	
2	6 NYCRR 228-1.3(a)	$20,000	$13,860	
3	6 NYCRR 228-1.3(c)	$0	$0	
4	6 NYCRR 228-1.5	$10,000	$10,000	
5	5 NYCRR 228-1.10(a)	$5,000	$5,000	
Air Penalty Adjustment				$5,000
6	6 NYCRR 372.2(a)(2)	$25,000	$25,000	
Hazardous Waste Penalty Adjustment				$0
8	ECL 17-0511	$5,000	$5,000	
9	ECL 72-0302(1)(e)			
TOTAL		$85,000	$72,720	$5,000