STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 71 of the New York Environmental Conservation Law, Article 12 of the New York Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

DEC File No.
R2-20071210-426

- by -

MUSTANG BULK CARRIERS, INC.,

Respondent.

Respondent Mustang Bulk Carriers, Inc., is a domestic corporation whose business includes the transportation and delivery of bulk petroleum product. In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation ("Department") is seeking an order requiring respondent to (1) pay a civil penalty for alleged environmental violations arising from the discharge of petroleum at a service station located at 2151 Forest Avenue, Staten Island, New York on December 4, 2007, and (2) investigate and remediate the spill in accordance with an approved plan.

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint upon respondent by certified mail, return receipt requested, on May 28, 2008. Department staff set forth four causes of action alleging that respondent illegally discharged petroleum at the service station, failed to contain the spill, failed to notify the Department of the spill, and failed to properly transfer petroleum at the service station, thereby violating various provisions of the Environmental Conservation Law ("ECL") and Navigation Law, and titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR").

Respondent interposed an answer dated June 20, 2008. Department staff filed a motion dated June 30, 2008, seeking an order striking, or directing clarification of, the affirmative defenses that respondent raised in its answer. Respondent filed no response to Department staff's motion to strike or clarify affirmative defenses. Department staff subsequently filed a motion dated November 25, 2008, for an order without hearing. In the motion for

order without hearing, Department staff seeks summary judgment on the issues of liability and penalties, and requests an order directing respondent to investigate and remediate the spill in accordance with a Department-approved work plan. Respondent filed an affirmation dated December 19, 2008, in opposition to the motion for order without hearing, requesting denial of the motion and seeking a hearing on the charges.

The matter was assigned to Chief Administrative Law Judge ("Chief ALJ") James T. McClymonds, who prepared the attached ruling and summary report ("summary report"). I adopt the Chief ALJ's summary report as my decision in this matter, subject to the following comments.

The Chief ALJ recommended that summary judgment be granted with the exception of a portion of the first cause of action that alleged a violation of ECL 17-0501. To establish a violation of ECL 17-0501, Department staff must identify the classification of the receiving water and the specific water quality standard promulgated at 6 NYCRR part 703 that was violated. This was not done here and, accordingly, summary judgment on that portion of the first cause of action is denied. I agree with the Chief ALJ that Department staff otherwise established its entitlement to summary judgment on the remaining claims in the complaint, and the civil penalty and remedial relief that staff seeks.

As also set forth by the Chief ALJ, respondent's conclusory statements or denials are insufficient to overcome a motion for order without hearing (see Summary Report, at 6-7). In this matter, the assertion of respondent's principal that discrepancies between "site receipt" and the delivery manifest were not uncommon and "could" be the result of human error, weather conditions or mechanical failures is speculative and unsubstantiated by other evidence. Furthermore, the statement of respondent's principal that he had spoken with the driver of the truck delivering petroleum to the service station and that he stated that no spill occurred on the date and time alleged is a conclusory denial by an interested witness that is insufficient to counter the facts established by the Department's inspector and the documentary evidence (see id., at 8).

The civil penalty of sixty thousand dollars ($60,000) requested by Department staff is authorized for the violations established and is justified by the circumstances of this case. The remedial relief requested, to investigate and remediate the spill in accordance with a Department-approved work plan, is also authorized and warranted. I direct that, within thirty (30) days of the service of the order upon it, respondent shall submit an approvable work plan to investigate and remediate the spill to Department staff. I encourage respondent Mustang Bulk Carriers, Inc., to discuss the

scope and content of the plan with Department staff prior to submitting the plan to the Department.

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

I. Department staff's motion to strike or clarify affirmative defenses is denied.

II. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted with respect to the second, third, and fourth causes of action and, in part, with respect to the first cause of action.

III. Respondent Mustang Bulk Carriers, Inc., is adjudged to have violated:

A. Navigation Law § 173, by illegally discharging approximately fifty gallons of petroleum on December 4, 2007, at 2151 Forest Avenue, Staten Island;

B. Navigation Law § 176 and 17 NYCRR 32.5, by failing to contain the spill;

C. Navigation Law § 175, 6 NYCRR 613.8, and 17 NYCRR 32.3, by failing to notify the Department of the petroleum spill; and

D. 6 NYCRR 613.3(a), by failing to employ practices to prevent discharges and to take immediate action to halt the flow of petroleum.

IV. Respondent Mustang Bulk Carriers, Inc., is assessed a civil penalty in the amount of sixty thousand dollars ($60,000), which shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

John Urda, Esq.
Assistant Regional Attorney
New York State Department of
Environmental Conservation, Region 2
47-40 21st Street
Long Island City, New York 11101-5407

V. Within thirty (30) days of the service of this order upon respondent, respondent shall submit to Department staff an approvable plan for the investigation and remediation of the spill. Respondent

shall immediately implement the plan following notification that Department staff has approved the plan.

VI. All communications from respondent to the Department concerning this order shall be made to John Urda, Esq., Assistant Regional Attorney, at the address set forth in paragraph IV of this order.

VII. The provisions, terms, and conditions of this order shall bind respondent Mustang Bulk Carriers, Inc., and its agents, successors, and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

/s/

By: _____
Peter M. Iwanowicz
Acting Commissioner

Dated: November 10, 2010
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 and 71 of the New York State Environmental Conservation Law (ECL), Article 12 of the New York State Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules, and Regulations of the State of New York,	**RULING AND SUMMARY REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE** DEC File No. R2-20071210-426

- by -

MUSTANG BULK CARRIERS, INC.,

Respondent.

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (John K. Urda of counsel), for staff of the Department of Environmental Conservation

-- Miller Law Offices, PLLC (Jeffrey H. Miller of counsel), for respondent Mustang Bulk Carriers, Inc.

RULING AND SUMMARY REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR ORDER WITHOUT HEARING AND MOTION TO STRIKE OR CLARIFY AFFIRMATIVE DEFENSES

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation filed two motions: (1) a motion to strike or clarify affirmative defenses pleaded in the answer of respondent Mustang Bulk Carriers, Inc., and (2) a motion for order without hearing. For the reasons that follow, the motion to strike or clarify affirmative defenses is denied. Department staff's motion for order without hearing, however, should be granted in part.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated May 28, 2008. In the complaint, staff alleged that respondent Mustang Bulk Carriers, Inc., is a domestic business corporation whose business includes the transportation and delivery of bulk petroleum products. Staff further alleged that on December 4, 2007, at approximately 12:36 AM, respondent delivered approximately 1,999 gallons of petroleum product to a service station located at 2151 Forest Avenue, Staten Island, New York. Staff further alleged that during that delivery, respondent spilled approximately 50 gallons of petroleum into the soil around the fill port, onto the surrounding pavement, into a sewer drain and, thereby, into the waters of the State of New York. Staff asserted that respondent failed to immediately contain or report the spill.

As a result of the alleged spill, Department staff charged respondent with four causes of action:

(1) Respondent allegedly violated ECL 17-0501 and Navigation Law § 173 by illegally discharging approximately 50 gallons of petroleum on December 4, 2007;

(2) Respondent allegedly violated Navigation Law § 176 and 17 NYCRR 32.5 by failing to immediately undertake containment of the petroleum discharge;

(3) Respondent allegedly violated Navigation Law § 175, 17 NYCRR 32.3, and 6 NYCRR 613.8 by failing to notify the Department of the petroleum discharge; and

(4) Respondent allegedly violated 6 NYCRR 613.3(a) by failing to employ practices for preventing spills and accidental discharges, and by failing to take immediate action to stop the flow of petroleum when the working capacity of the tank had been reached.

For the violations alleged, Department staff seeks a total civil penalty of $60,000.

Respondent interposed an answer dated June 20, 2008, in which respondent asserts three affirmative defenses.[1]

Department staff filed a motion dated June 30, 2008, seeking an order striking, or directing clarification of, the affirmative defenses raised in the answer. Respondent filed no response to staff's motion to strike or clarify affirmative defenses.

Department staff subsequently filed a motion dated November 25, 2008, for an order without hearing. In the motion for order without hearing, Department staff seeks summary judgment on the issues of liability and penalties, and requests an order directing respondent to investigate and remediate the spill in accordance with a Department-approved work plan. Respondent filed an affirmation dated December 19, 2008, in opposition to the motion for order without hearing, requesting denial of the motion and seeking a hearing on the charges.

DISCUSSION

I. Motion To Strike or Clarify Affirmative Defenses

Department staff moves to strike or clarify the three defenses pleaded in respondent's answer. The three defenses are:

> (1) "[t]he complaint fails to state a cause of action upon which relief can be granted,"
>
> (2) "[p]laintiff's alleged damages as specified in the complaint are not supported by the documentary evidence," and
>
> (3) "[t]o the extent any allegations set forth in the complaint have not been admitted or denied, Defendant denies said allegations"[2]

(Verified Answer, unnumbered page).

[1] Although the answer is denominated a "verified answer," it does not contain a verification.

[2] The third defense pleaded in the answer is incorrectly denominated "a fourth affirmative defense" (Verified Answer). The answer only contains three defenses, however.

In a recent ruling, the standards applicable to motions to strike or clarify affirmative defenses are discussed in detail (see Matter of Truisi, Ruling of the Chief ALJ on Motion To Strike or Clarify Affirmative Defenses, April 1, 2010). In sum, motions to clarify affirmative defenses under 6 NYCRR 622.4(f) are addressed to the sufficiency of the notice provided by the pleading (see id. at 4, 6-7). They are not an opportunity for staff to obtain, in effect, a bill of particulars, which are prohibited by Part 622 (see id. at 7 n 2; 6 NYCRR 622.7[b][3]).

Motions to strike, on the other hand, are governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see Matter of Truisi, at 10-11). Motions to dismiss may either challenge the pleading facially -- i.e., on the ground that it fails to state a claim or defense -- or may seek to establish, with supporting evidentiary material, that a claim or defense lacks merit as a matter of law (see id. at 10).

The threshold inquiry on a motion to clarify or strike affirmative defenses is whether the defense pleaded is, in fact, a true affirmative defense (see id. at 4-5). Where the defense is actually a denial pleaded as a defense, a motion to clarify or strike affirmative defenses does not lie (see id. at 5, 11).

In this case, the first defense pleaded is that the complaint fails to state a claim. The failure to state a claim, however, is not properly pleaded as an affirmative defense (see id. at 7; Matter of Gramercy Wrecking and Envtl. Constrs., Inc., ALJ Ruling, Jan. 14, 2008, at 3-4). Instead, it is more properly a ground for a motion to dismiss the complaint (see id. [citing Riland v Frederick S. Todman & Co., 56 AD2d 350, 352 (1st Dept 1977)]). Department staff may safely ignore the defense unless and until respondent moves to dismiss the complaint on this basis (see Matter of Truisi, at 12). Accordingly, the motion, insofar as it seeks to clarify or strike the first defense, should be denied (see id.).

The second defense pleaded is also not an affirmative defense. Assuming that by "damages," respondent refers to the civil penalty and remedial relief sought by Department staff, staff bears the burden of supporting the penalty and remedial relief it seeks by a preponderance of the evidence (see 6 NYCRR 622.11[b][1], [c]; see also Matter of Truisi, at 5).

Respondent's defense, in essence, is a denial that staff can carry its burden of proof on penalty and remediation. To the extent the defense is read as asserting that any penalty and remedial relief is against the documentary evidence, documentary evidence is a way of raising or proving a defense, and is more properly a basis for a motion to dismiss the complaint (see Sotomayor v Princeton Ski Outlet Corp., 119 AD2d 197, 197 [1st Dept 1993]; CPLR 3211[a][1]). Documentary evidence is not by itself an affirmative defense (see id.; cf. CPLR 3018[b]). Thus, the second defense is not subject to clarification or dismissal.

The third defense pleaded is, on its face, a denial of allegations not otherwise admitted or denied and, as such, is not a defense subject to clarification or dismissal. Accordingly, the motion to strike or clarify should be denied in its entirety.

II. Motion for Order Without Hearing

Department staff moves for an order without hearing pursuant 6 NYCRR 622.12 on the charges alleged in the complaint, and seeks a civil penalty and remedial relief. Staff supports its motion with the affidavit of Ryan Piper, an Engineering Geologist 1 in the Department's Division of Spill Prevention and Response, who inspected the spill on the day after the spill allegedly occurred. Staff also supports its motion with other documentary evidence, including the NYSDEC Spill Report for spill number 0709528; the bill of lading for a delivery at the site at 11:45 PM on December 3, 2007; respondent's delivery manifest for the December 3, 2007, delivery; and a print out from the facility's electronic tank inventory monitoring system showing a delivery beginning at 12:36 AM on December 4, 2007. The evidence shows an approximately 50 gallon discrepancy between the amount of petroleum product delivered to the facility, and the amount of petroleum that was received by the tank.

In response, respondent opposes the motion arguing that material issues of fact exist that preclude the grant of summary judgment, and that the motion is based upon "double hearsay" (Opposition to Motion, ¶ 3). In support, respondent submits an affidavit by David Rishty, a principal of respondent, in which he states that "[i]n my experience, it is not uncommon

for discrepancies to occur between the site receipt and the manifest. These discrepancies could be the result of human error, weather conditions, or mechanical failures" (Rishty Affid [12-19-08]). He also states that "I have spoken with the driver and he has stated no spill occurred on the date and time alleged" (id.).

Motions for order without hearing pursuant to 6 NYCRR 622.12 are the Department's equivalent to summary judgment, and are governed by the standards and principles applicable to CPLR 3212 motions (see 6 NYCRR 622.12[d]). A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action is established sufficiently to warrant granting summary judgment under the CPLR (see id.). Where several causes of action are pleaded, the motion may be granted in part if it is found that some but not all such causes of action are sufficiently established (see id.). The motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of facts sufficient to require a hearing (see 6 NYCRR 622.12[e]).

On the motion, Department staff bears the initial burden of establishing its entitlement to judgment as a matter of law on the violations charged (see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [and cases cited therein]). Department staff carries its burden by producing evidence sufficient to demonstrate the absence of any material issue of fact with respect to each element of the causes of action that are the subject of the motion (see id.). Because hearsay is admissible in administrative hearings, staff may support its motion with hearsay evidence, provided that the evidence is sufficiently relevant, reliable, and probative (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 2-3).

Once Department staff has carried its initial burden of establishing a prima facie case justifying summary judgment, the burden shifts to respondent to produce evidence sufficient to raise a triable issue of fact warranting a hearing (see Matter of Locaparra, at 4). As with the proponent of summary judgment, a party opposing summary judgment may not merely rely on conclusory statements or denials, but must lay bear its proof (see id. [and cases cited therein]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (see Zuckerman v New York City Tr. Auth., 49

NY2d 557, 562-563 [1980]; Drug Guild Distribs. v 3-9 Drugs, Inc., 277 AD2d 197, 198 [2d Dept 2000], lv denied 96 NY2d 710 [2001] [conclusory denial of transactions by company president insufficient to counter facts established by plaintiff's documentary evidence]). Although the credibility of affiants is not weighed on summary judgment, feigned issues of fact will not defeat summary judgment (see Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; Benedikt v Certified Lumber Corp., 60 AD3d 798, 798 [2d Dept 2009]).

In this case, Department staff carried its initial burden of establishing a prima facie case on each cause of action pleaded in the complaint, except for a portion of the first cause of action (see Conclusion of Law ¶ 2, below). Although the Department's motion is supported, in part, by hearsay evidence -- the statement of an New York City Department of Environmental Protection inspector who originally reported the spill, and the statement of the gasoline station attendant who indicated that the most recent delivery of petroleum occurred just before midnight on December 3, 2007 (see Piper Affid, at ¶¶ 5, 11) -- the evidence is admissible in this administrative proceeding, and is sufficiently relevant, reliable and probative.

Moreover, the hearsay evidence is corroborated by the non-hearsay evidence of the Department inspector, who reported that on December 4, 2007, he observed a large, fresh petroleum stain, about 12 feet by 15 feet in area, around the gasoline fill ports at the site and leading into a sewer manhole cover (see id. ¶¶ 7-9). The Department inspector further indicated that based upon the size of the stain around the fill port area, he estimated no less than 40 gallons of petroleum was spilled, although an additional quantity could have drained into the sewer (see id. ¶ 9). The inspector also observed grossly contaminated soil around the fill ports (see id. ¶ 10).

The Department inspector's affidavit is corroborated by documentary evidence, including the bill of lading for the delivery, respondent's own delivery manifest, and the print out from the tank's inventory monitoring system (see Piper Affid, Exhs B-D). Those documents reveal that approximately 50 more gallons of petroleum product were delivered to the site on December 4, 2007, than were received by the tank.

Thus, Department staff has established its entitlement to summary judgment on the issue of respondent's liability for each of the causes of action alleged in the complaint, except a portion of the first cause of action. In addition, Department staff has established that the penalty and remedial relief it seeks are authorized and warranted.

In response, respondent has failed to tender evidence sufficient to raise a triable issue of fact warranting a hearing. The assertion of respondent's principal that discrepancies between the site receipt and delivery manifest are not uncommon and "could" be the result of human error, weather conditions, or mechanical failures is speculative and unsubstantiated by any other evidence. In addition, the driver's allegation that no spill occurred on the date and time alleged, is a conclusory denial by an interested witness that is insufficient to counter the facts established by the Department inspector and the documentary evidence (see Drug Guild Distribs., 277 AD2d at 198; JPMorgan Chase Bank v Gamut-Mitchell, Inc., 27 AD3d 622, 622-623 [2d Dept 2006]). The affidavit of respondent's principal merely raises feigned issues of fact that are insufficient to defeat the Department's motion for summary judgment (see Benedikt, 60 AD3d, at 798; Gomez v Rodriguez, 31 AD3d 497, 498 [2d Dept 2006]; Prunty v Keltie's Bum Steer, 163 AD2d 595, 596 [2d Dept 1990]). Accordingly, Department staff's motion for order without hearing should be granted in part.

FINDINGS OF FACT

Based upon the foregoing, the following findings of fact and conclusions of law are determinable on this motion for order without hearing:

1. Respondent Mustang Bulk Carriers, Inc., is a domestic corporation licensed to do business in the State of New York, whose business includes the transportation and delivery of bulk petroleum product. Respondent's offices are located at 1783 73rd Street, Brooklyn, New York.

2. On December 4, 2007, at approximately 12:36 AM, respondent delivered approximately 1,999 gallons of petroleum product to a Gulf service station located at 2151 Forest Avenue, Staten Island, New York. At the time of the delivery, the

service station was closed, and neither the owner of the property nor the service station operator was present.

3. During the delivery, approximately 50 gallons of petroleum were discharged into the soil around the fill port, onto the surrounding pavement, into a sewer drain and, thereby, into the waters of the State of New York.

4. Respondent failed to employ practices for preventing transfer spills and accidental discharges of petroleum during the delivery, and failed to take immediate action to stop the flow of petroleum once the discharge began.[3]

5. Respondent did not immediately contain the spill or report the spill to the Department.

6. On December 4, 2007, in response to complaints from local residents of petroleum vapors, the New York City Fire Department notified the New York City Department of Environmental Protection (DEP) about the spill. A DEP inspector inspected the site and subsequently notified the Department's petroleum spills hotline of the spill at approximately 10:42 AM. The spill was assigned NYSDEC Spill Number 0709528.

7. The Fire Department flushed the sewer at the site twice to abate the gasoline vapors entering the neighbors' residences.

8. A Department inspector inspected the site on December 4, 2007, and observed a large fresh petroleum stain, about 12 feet by 15 feet in area, around the gasoline fill ports at the site and leading to a sewer manhole cover. Based upon the size of the stain around the fill port area, the inspector estimated that at least 40 gallons of petroleum had been spilled, and that an additional amount could have drained into the sewer. The inspector also observed soils grossly contaminated with petroleum in the fill box.

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[3] Department staff did not establish the capacity of the receiving tank and, thus, did not establish that the discharge occurred when the working capacity of the tank had been reached. Nonetheless, it is evident from the quantity of petroleum discharged that respondent failed to employ practices for preventing transfer spills and to take immediate action to stop the flow of petroleum, whether the cause of the discharge was due to an overfilled tank, equipment failure, or some other cause.

9. A comparison of respondent's delivery manifest for the December 4, 2007, delivery and the facility's delivery receipt reveals that approximately 50 more gallons of petroleum were delivered to the site than were received by the tank.

CONCLUSIONS OF LAW

1. In its first cause of action, Department staff alleges that respondent violated Navigation Law § 173. Navigation Law § 173 prohibits the illegal discharge of petroleum (see Navigation Law § 173[1]). By discharging approximately 50 gallons of petroleum onto the ground and into the sewer on December 4, 2007, respondent violated Navigation Law § 173.

2. In its first cause of action, Department staff also alleges that respondent violated ECL 17-0501. ECL 17-0501 prohibits the discharge of organic or inorganic matter in contravention of a water quality standard adopted by the Department pursuant to ECL 17-0301. To establish a violation of ECL 17-0501, Department staff must identify the classification of the receiving water and the specific water quality standards promulgated at 6 NYCRR part 703 that were violated by the discharge (see Matter of Gladiator Realty Corp., Order of the Commissioner, Jan. 14, 2010, at 3; Matter of Amabile, Order of the Commissioner, July 12, 2006, at 3). Here, Department staff has failed to establish the classification of the receiving water and the specific water quality standards violated by the discharge. Accordingly, summary judgment on that portion of the first cause of action as alleged a violation of ECL 17-0501 should be denied.

3. In its second cause of action, Department staff alleges that respondent violated Navigation Law § 176 and 17 NYCRR 32.5. Navigation Law § 176 and 17 NYCRR 32.5 both provide that any person discharging petroleum in violation of Navigation Law § 173 shall immediately undertake to contain the discharge (see Navigation Law § 176[1]; 17 NYCRR 32.5[1]). Respondent violated Navigation Law § 176 and 17 NYCRR 32.5 by failing to contain the petroleum discharged at the site. This violation continued from December 4, 2007, through May 28, 2008, the date of the complaint.

4. In its third cause of action, Department staff alleges that respondent violated Navigation Law § 175, 17 NYCRR 32.3, and 6 NYCRR 613.8. Navigation Law § 175 and 17 NYCRR 32.3

provide that any person responsible for causing a petroleum discharge shall notify the Department within two hours of the discharge. Section 613.8 of 6 NYCRR similarly requires that any person with knowledge of a petroleum spill must report the incident to the Department within two hours of discovery. By failing to notify the Department of the petroleum spill, respondent violated Navigation Law § 175, 17 NYCRR 32.3, and 6 NYCRR 613.8.

5. In its fourth cause of action, Department staff alleges that respondent violated 6 NYCRR 613.3. Section 613.3 provides that when a facility operator is not on the premises or in control of the petroleum transfer, the carrier (the person who transports and transfers petroleum from one pipe or tank to another) is responsible for all transfer activities (see 6 NYCRR 613.3[a]; 612.1[c][2] [definition of carrier]). Section 613.3 further provides that a carrier responsible for transfer activities must employ practices for preventing transfer spills and accidental discharges, determine that the receiving tank has available capacity to receive the volume of petroleum to be transferred, and monitor every aspect of the delivery and take immediate action to stop the flow of petroleum when the working capacity of the tank has been reached or when an equipment failure or emergency occurs (see 6 NYCRR 613.3[a]). By failing to employ practices to prevent the discharge to occur during the transfer of petroleum from the delivery tank to the receiving tank, and by failing to take immediate action to stop the flow of petroleum once the discharge began, respondent violated 6 NYCRR 613.3(a).

6. The $60,000 civil penalty sought by Department staff for the violations established falls within the statutory maximum authorized for the violations established and is justified by the circumstances of this case (see Navigation Law § 192; ECL 71-1929[1]). The remedial relief sought by staff is also authorized and warranted (see Navigation Law § 176; ECL 71-1929[1]).

RULING AND RECOMMENDATION

Department staff's motion to strike or clarify affirmative defenses should be denied.

Department staff's motion for order without hearing should be granted in part.

I recommend that the Commissioner find the violations established above, and impose the civil penalty and remedial relief sought by Department staff in an order of the Commissioner.

/s/

James T. McClymonds
Chief Administrative Law Judge