STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

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

- by -

SUPREME ENERGY CORPORATION,
SUPREME ENERGY, LLC, and
FREDERICK KARAM,

Respondents.

DEC Case No. 7-1780

DECISION AND ORDER OF THE COMMISSIONER

April 11, 2014

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding addresses the alleged violations of various provisions of the New York Navigation Law and Environmental Conservation Law (ECL), and their implementing regulations, at an onshore major oil storage facility (MOSF) in Baldwinsville, Onondaga County, New York.

I. PROCEDURAL BACKROUND

The facility that is the subject of this enforcement proceeding is located at 7437 Hillside Road, Baldwinsville, New York. Staff of the Department of Environmental Conservation (Department or NYSDEC) commenced this proceeding against respondents Supreme Energy Corporation, Supreme Energy, LLC, and Frederick Karam, by service of a Notice of Hearing and Complaint dated June 27, 2007. The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick. Department staff later served an amended complaint dated March 24, 2008. The adjudicatory hearing began on July 10, 2008 and continued on various dates until its conclusion on June 26, 2009.[1]

The hearing was suspended from September 15, 2008 until April 30, 2009 because of a protracted discovery dispute. Briefly, respondents requested documents from the Department's consultant. Department staff claimed ownership of the documents and that many of them were privileged. The ALJ ruled on April

[1] Two Supreme Court actions relate to this facility. The first action is State of New York v Stratus Petroleum Corp. (Supreme Court, Albany County, Teresi, J., Index No. L000134-01), in which the State sought to recover costs from a number of defendants (including respondents) for the discharge of petroleum on property that included the Supreme facility that is the subject of this proceeding. Respondents here and other defendants settled with the State. Pursuant to a settlement agreement dated April 9, 2009, respondents paid $50,000 in the settlement.

The second action is Supreme Energy, LLC v Aztech Technologies, Inc. (Supreme Court, Oneida County, Index No. CA2008-1856), in which plaintiffs (respondents here) sought damages from defendant Aztech Technologies, Inc. for Aztech's drilling of holes in the secondary containment liner at the facility. Aztech was the contractor engaged by the Department for the purposes of investigating and remediating the above referenced petroleum discharge. On December 30, 2009, Oneida County Supreme Court granted Aztech's motion for summary judgment on the grounds that (1) Aztech was entitled to responder immunity under Navigation Law § 178(a), and (2) plaintiffs failed to demonstrate that Aztech engaged in gross negligence or intentional misconduct (Order, Sup Ct, Oneida County, Dec. 30, 2009, Siegel, J., Index No. CA2008-1856). Plaintiffs filed a notice of appeal, but did not perfect the appeal.

30, 2009, that this claim of privilege was unfounded as to many of the documents. Department staff has appealed from the ALJ's ruling.

The amended complaint alleged that respondents committed four violations with regard to their operation of the facility:

- operation of a MOSF without a license;

- failure to submit licensing fees and licensing fee reports;

- failure to maintain adequate secondary containment; and

- failure to comply with a September 29, 2004 order on consent.

In the attached hearing report, the ALJ recommends that I determine that Department staff established that the respondents violated the Navigation Law for the first three charged violations. The ALJ further recommends that I determine that Department staff did not establish that respondents violated the September 29, 2004 order on consent.

As discussed more fully below, I modify and otherwise adopt ALJ Garlick's findings of fact, and adopt some, but not all, of his recommendations in this matter.

II. OVERVIEW OF THE REGULATION OF MOSFs

A MOSF is defined as a facility that has a combined total storage capacity of 400,000 gallons or more of petroleum (Navigation Law § 172[11]). To operate a MOSF, an operator must have a license and pay the appropriate license fees and surcharges (Navigation Law § 174[1]). The Department is responsible for licensing MOSFs and collecting the license fees and surcharges (Navigation Law §§ 174[1]), 172[6]). The Department deposits the license fees and surcharges into the New York Environmental Protection and Spill Compensation Fund (the Fund) (Navigation Law § 172[9]), which is administered by the Department of Audit and Control, also referred to as the Office of the State Comptroller. The Fund provides the Department with resources to quickly respond to petroleum spills and, when necessary, to effectuate prompt cleanup and removal of those spills (see Navigation Law § 171).

To obtain a license to operate a MOSF, the applicant must demonstrate that the facility has adequate secondary containment[2] to guard against spills, as well as meet other technical requirements (Navigation Law §§ 174[3], 174[9][c], 174[9][d]; 17 NYCRR 30.4[c], 30.5). A license issued to an operator is not transferable to a subsequent operator; a new license must be obtained by the subsequent operator (see, e.g., Exhibit [Exh] 44 [letter notification to respondents that MOSF license to prior operator is not transferable to a new operator]). Licenses are generally issued for five-year periods and may include conditions (Navigation Law § 174[2]).

These requirements are to ensure the proper operation of MOSFs, to prevent petroleum spills, to provide a fund for quick response and to effectuate cleanup and removal of spills, and to further protect the environment (Navigation Law § 171). Failure to follow these requirements can result in enforcement and payment of substantial penalties (see Navigation Law §§ 174[6], 174[7], 192).[3]

The delivery of petroleum product to a facility, which the statute refers to as the "transfer" of petroleum product, is also subject to license fees.[4] License fees are charged at different rates, depending on the balance in the Fund (Navigation Law § 174[4][a]).[5] When the license fees are imposed, they apply only upon the point of "first transfer" (id.). For example, if petroleum is delivered to a MOSF from another facility in New York State, that delivery is not subject to license fees. If, however, the delivery to the MOSF comes from another state, that delivery is subject to the license fee.

Surcharges on the license fees are also assessed against

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[2] If a discharge from a tank did occur, it would need to be contained within the secondary containment, rather than be released into the environment.

[3] For the reasons stated by the Commissioner in Matter of Gasco-Merrick Road Gas Corp. (Decision and Order of the Commissioner, June 2, 2008, at 4-11), the Department has jurisdiction to impose penalties under Navigation Law § 192 through administrative adjudicatory proceedings.

[4] "Transfer" is defined as "onloading or offloading between major facilities and vessels or vessels and major facilities, and from vessel to vessel or major facility to major facility" (Navigation Law § 172[16]).

[5] The license fees range from no license fee to eight cents per barrel transferred (see Navigation Law § 174[4][a]). When claims exceed the balance in the Fund, the license fee is eight cents per barrel transferred (id.). License fees are not payable if the balance in the Fund reaches a certain amount (id.).

MOSFs (Navigation Law § 174[4][b]). The surcharge has been assessed at 4.25 cents for each barrel transferred, except that the surcharge is 1.5 cents for each barrel transferred to the MOSF but then exported outside the State (see Navigation Law § 174[4][d]). Surcharges are assessed and payable even if license fees are not payable (Navigation Law § 174[4][c]).

By the 20th day of each month, MOSF licensees must submit monthly certifications of the number of barrels of petroleum product transferred the prior month (Navigation Law §§ 172[10], 174[5]). Along with each monthly certification, the licensee must also submit full payment of the license fees and surcharges due, provided that the amount payable is more than one hundred dollars ($100) (id.). License fees and surcharges that are less than $100 will carry over to the next reporting and payment period (id.). If no license fees or surcharges are payable, licensees must certify annually (no later than April 20th) to the Department that the barrels of petroleum transferred were not subject to the license fees and surcharges (id.). Late payment of the license fees and surcharges are assessed an additional fee of one percent of the amount due per month (17 NYCRR 30.9[e]).

The licensee's failure to file a monthly certification, failure to pay the owed license fees and surcharges, or falsification of a monthly certification can result in a fine that is twice the amount of the license fees and surcharges owed (Navigation Law § 174[7]). Moreover, an additional penalty of $25,000 can be assessed for each violation of article 12 of the Navigation Law (which includes sections 170-197) or any rule promulgated thereunder (Navigation Law § 192). For each day that the violation continues, an additional $25,000 penalty may be assessed (id.).

III. PRELIMINARY MATTERS

1. Respondents

Department staff named three parties as respondents: (1) Supreme Energy Corporation; (2) Supreme Energy, LLC; and (3) Frederick Karam. Respondent Karam claims that Supreme Energy Corporation is not a legal entity and was not appropriately named as a respondent. Staff disagrees. The ALJ agreed with respondent Karam and determined that Supreme Energy Corporation does not exist, but was a name repeated incorrectly on various documents by both respondent Karam and Department staff.

I agree with the ALJ's determination. The appropriate respondents are Supreme Energy, LLC, which is a registered limited liability company (LLC) in New York State, and Frederick Karam, the sole member of the LLC. The ALJ also recommended that I determine that Mr. Karam is liable for various violations under two theories of law: (1) that he was the member of the LLC who had the responsibility and authority to prevent the violations; and (2) that it is appropriate to pierce the corporate veil in the circumstances here. For the reasons that I set forth in Section VI below, I concur with the ALJ's assessment that respondent Frederick Karam is personally liable for the violations established on this record under both the responsible corporate officer doctrine and the doctrine of piercing the corporate veil.

2. Appeal from April 15, 2009 Ruling on Request for Inspection of Documents Claimed as Privileged

As mentioned above, this matter included a protracted discovery dispute. In the midst of the adjudicatory hearing in this matter, respondents served a subpoena, dated August 29, 2008, on Aztech Technologies, Inc. (Aztech) (the contractor the Department engaged to investigate and remediate an unrelated petroleum discharge on the site [see footnote 1, above]), in which respondents requested the following documents:

> "Any written communications, including letters, e-mails, telefaxes, etc. between New York State Department of Environmental Conservation and Aztech regarding Supreme Energy LLC premises at 7433 and 7437 Hillside Road, Baldwinsville, New York."

DEC staff counsel moved to quash the subpoena. To support its standing to file the motion to quash, staff argued that it had a proprietary interest in the documents sought. On the merits, staff claimed that the documents were privileged because Aztech's status as a contractor to the Department was in essence akin to being staff of the Department.

The ALJ denied the motion to quash (Ruling on Motion to Quash, Nov. 3, 2008). The ALJ determined that Department staff failed to prove its claim of ownership of the documents. Staff based its ownership claim on its 2003 contract with Aztech for standby investigation and remediation services (see Ruling on Motion to Quash, at 4-5; see also 2003 Agreement Standby Investigation & Remediation, Exh 104). The ALJ determined, however, that the contract offered by staff applied to services provided to NYSDEC Regions 3, 4, and 5, while the NYSDEC Region

in which the Supreme facility is located is Region 7 (Ruling on Motion to Quash, at 5). The ALJ noted that the subpoena in this matter was issued to "Aztech, Inc.," at an address that was different than the Aztech Technologies address listed in the contract proffered by staff (id.). If staff was aware of these inconsistencies, the ALJ stated that it did not explain them (id.).[6] The ALJ opined that, although the failure to demonstrate ownership also called into question the standing of Department staff to pursue the motion to quash, the ALJ agreed with respondents that it was better to decide the motion on the merits because Aztech could easily renew the motion (id. at 6-7). On the merits, the ALJ rejected a categorical or blanket claim of privilege between the Department and its contractor, and determined that privilege logs should be compiled so that any assertion of privilege could be fully evaluated (see id. at 12).

Aztech produced a log of 36 privileged documents; Department counsel produced a log of 362 privileged documents. The privileges asserted were varied: attorney-client, attorney work product, and trial preparation materials (see Ruling on Request for Inspection of Documents Claimed as Privileged, April 15, 2009 [April 15, 2009 ruling], at 1). Respondents questioned the accuracy of the privilege logs and whether the asserted privileges were proper (id. at 2).

In the April 15, 2009 ruling, the ALJ determined that many documents were improperly withheld and ordered the release of those documents (id. at 1). As to staff's asserted attorney-client privilege, the ALJ determined that staff counsel's client is Department staff, not Aztech, which is a private contractor represented by its own private counsel (id. at 4). Moreover, the ALJ held that neither Department counsel nor Aztech established any other theory of agency that might qualify for the attorney-client privilege. The ALJ ruled that neither Department counsel nor Aztech established that Aztech was hired to assist Department counsel in rendering legal advice or to interpret technical documents for Department counsel (id. at 8). Therefore, in the ALJ's view, no documents could be withheld based on this asserted privilege. In sum, the ALJ ruled that the attorney-client privilege does not apply to the situation presented here, that is, a contractor is neither a client nor an agent of Department counsel when it is performing remediation

[6] Any perceived discrepancies concerning the identity of Aztech and its corporate address were resolved in subsequent submissions of Department staff and Aztech (see, e.g., Department Staff's Reply Affirmation/Memorandum in Support of Staff's Claim of Privilege [Jan. 2, 2009], at 4 n 2).

services pursuant to a contract with the Department (id. at 4, 9).

As to the asserted privilege based on attorney work product, the ALJ reviewed the documents in camera and determined that nearly all of them should be released in whole or in part (id. at 13-15). Most of the documents were "email strings." The ALJ ruled that portions of email strings that were not prepared by an attorney should be released (id.). The ALJ further ruled that other documents that were not prepared by an attorney should be released.

As to the asserted privilege based on trial preparation materials, the ALJ reviewed the documents in camera and determined that they were properly withheld as trial preparation materials (id. at 15-16).[7]

As authorized by the Department's regulations, Department staff appeals from the ALJ's April 15, 2009, ruling as part of its post-hearing closing brief. In its appeal, Department staff challenges the ALJ's ruling on staff's claim of attorney-client privilege (see 6 NYCRR 622.10[d][1]).[8] Staff notes that it released the documents as directed by the ALJ notwithstanding its claim that those documents were privileged attorney-client communications. Staff also asserts that the release of those documents "neither undermines Staff's case, nor adds any weight to Respondents' claim of bias on the part of Staff" (Department Staff's Appeal of ALJ Ruling [Sept. 3, 2009], at 1). Staff indicates, however, that it "nevertheless feels obliged to appeal the ALJ's ruling, which Staff respectfully asserts is mistaken, because to fail to do so could result in unfortunate and possibly damaging precedent for future cases" (id.). Respondents do not respond to staff's appeal in their closing brief.

a. Discussion -- Attorney-Client Privilege

Department staff argues that the ALJ erred in concluding both that Aztech was not the Department's agent in this matter,

[7] The litigation for which they were prepared was not this administrative proceeding, but New York Supreme Court litigation between respondents, the Department, and Aztech.

[8] On its appeal, Department staff asserts no other privilege beyond the attorney-client privilege. Accordingly, I have not considered whether any other privilege may apply to the materials sought to be withheld (see, e.g., Matter of World Trade Ctr. Bombing Litig., 93 NY2d 1 [1999] [public interest privilege]).

and that the sharing of communications with Aztech waived any attorney-client privilege. Department staff recognizes that the attorney-client privilege has been applied to communications with a client's agents that provide legal advice or interpreter services. However, staff asserts that the privilege is broader than that, and would extend to agents such as Aztech that undertake remedial activities for the Department and provide technical support to the Department's attorneys. Based on my review of the record, I conclude that the ALJ erred in his consideration of the applicable legal principles in the context of the facts of this case.

As an initial matter, although the objected-to documents were released to respondents prior to this appeal, the controversy remains ripe. At the hearing, several of the documents released as result of the ALJ's ruling were admitted into evidence, as Exhibit 105, over Department staff's objection (see Hearing Transcript [Tr] at 1580-1582). Included as Exhibit 105 were DEC 5 (pages 3 and 4), DEC 6 (page 1), and DEC 12 (pages 1 and 2). The ALJ relied on these documents in his hearing report (see Hearing Report, at 33-34). Thus, the appeal has not been rendered academic by the release of the documents.

In administrative enforcement proceedings, the Department is required to give effect to the rules of privilege recognized by New York State law (see 6 NYCRR 622.11[a][3]), including the attorney-client privilege (see CPLR 4503[a][1]). Generally, communications between a client and counsel in the known presence of a third party are not privileged (see People v Osorio, 75 NY2d 80, 84 [1989]; Matter of Morgan v New York State Dept. of Envtl. Conservation, 9 AD3d 586, 587-588 [3d Dept 2004]). An exception exists, however, for third parties that are serving as either an agent of the attorney or the client (see Osorio, 75 NY2d at 84). A third-party's agency alone is not sufficient to fall within the exception; the agent's role must, at least in part, be to facilitate communications between the client and the attorney for purposes of obtaining legal advice (see id.; see also Sevenson Envtl. Servs., Inc. v Sirius America Ins. Co., 64 AD3d 1234, 1236 [4th Dept 2009], lv dismissed 13 NY3d 893 [2009] [communications with insurance company's third-party claims administrator within privilege]; United States v Kovel, 296 F2d 918, 921-922 [2d Cir 1961] [accountant]). Moreover, the communication must have been made under circumstances demonstrating that the client intended to make the communication in confidence and had a reasonable expectation of confidentiality (see Osorio, at 84).

Here, the record supports the conclusion that Aztech's role, at least in part, was to facilitate communications between Department staff and its attorneys -- both in the Department's Office of General Counsel, and the Office of the New York State Attorney General (see Morgan, 9 AD3d at 587) -- for purposes of obtaining legal advice concerning remedial activities at the facility. Although the ALJ cited the relevant portions of Aztech's contract with the Department that support this conclusion, he failed to apprehend their import. First, I disagree with the ALJ's holding that the 2003 contract did not apply to the documents (see Ruling on Motion to Quash, at 5). The ALJ correctly noted that the cover of the 2003 contract indicated that it applied to Department Regions 3, 4 and 5 (see Exh 104). However, the contract also included an express provision authorizing the Department to call out Aztech to investigate and remediate contaminated sites in other regions of the State, which would include Region 7 (see id. at 2). Thus, the contract applied to the services rendered by Aztech with respect to the facility at issue here.

Second, although a primary purpose of the contract was for the provision of investigatory and remedial services, the contract also obligated Aztech to provide litigation support to the Department. The contract was executed pursuant to the Department's authority under ECL 3-0309 and Navigation Law § 176 to contract for the clean up of sites contaminated with petroleum, hazardous wastes, and other hazardous substances subject to the Department's direction. Under the contract, Aztech was responsible for all investigation and remediation activities at the site, and the provision of all necessary personnel, equipment, materials, and utilities to undertake those activities. Aztech was specifically obligated to provide the Department with expert advice and testimony regarding all tests performed or services provided under the contract in preparation for and during administrative or other litigation concerning the facility (see id., Schedule 2, Art 1[e], at 14), and to provide confidential reports, analyses, data, and other written and oral materials to the Department's attorneys (see id., Art 14, at 4). Thus, in addition to its role as the Department's agent for investigation and remediation activities at the site, Aztech was also obligated to facilitate communication between staff and the Department's legal representatives concerning those activities.

Third, communications among the Department's legal representatives and Aztech were undertaken under circumstances demonstrating that the Department intended to make the communications in confidence and had a reasonable expectation of

confidentiality. The contract expressly provided that all data, analyses, materials, reports, or other information, oral or written, prepared by Aztech under the contract were the property of the Department, would be treated as confidential, and would not be released by Aztech other than to provide consultation or other services to the Department and the Office of the Attorney General (see id., Article 14, at 4; id., Schedule 2, Art 6, at 17).

Finally, in order for the attorney-client privilege to attach to a communication, the communication must be made for the purpose of obtaining or rendering legal advice or services, (see Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 377-378 [1991]). Whether a particular document is protected is necessarily a fact-specific determination often requiring in camera review (see id.).

Here, review of the documents whose production was objected to by Department staff reveals that the communications contained within them were made for the purposes of facilitating staff's communications with its attorneys for the provision of legal advice to staff concerning legal issues arising in the course of the investigation and remediation of the facility, and staff's oversight of Aztech's activities. In addition, although the prospect of litigation is not critical to the availability of the privilege (see Spectrum, 78 NY2d at 380), review of the documents reveals that the communications were made in anticipation of potential litigation concerning the facility. Thus, the communications among Department staff, staff's attorneys in the Department's Office of General Counsel, attorneys in the Department of Law, and Aztech that were not voluntarily produced by Department staff were subject to the attorney-client privilege.

Respondents also argued, and the ALJ agreed, that the privilege was waived when the Department placed the condition of the facility's secondary containment system at issue (see Ruling on Request for Inspection of Documents, at 10-12). Respondents asserted that the Department is seeking to hold them liable for holes in the secondary containment system's liner that were created and not repaired by Aztech pursuant to allegedly improper instructions from Department's counsel. Thus, respondents claimed that by commencing this enforcement proceeding and placing respondents' liability for the holes at issue, staff has waived the attorney-client privilege for communications concerning the holes. I disagree.

A waiver of the attorney-client privilege may be found

where the client places the subject matter of the privileged communication in issue or where the invasion of the privilege is required to determine the validity of the client's claim and application of the privilege would deprive the adversary of vital information (see Hurrell-Harring v State of New York, 75 AD3d 667, 668 [3d Dept 2010]). That a privileged communication contains information relevant to issues the parties are litigating, however, does not, without more, place the contents of the privileged communication itself "at issue" in the case (Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust, 43 AD3d 56, 64 [1st Dept 2007]). Rather, "at issue" waiver occurs when the party asserting the privilege intends to prove its claim by use of the privileged material (id.).

In this case, Department staff did not seek to prove its claims concerning respondents' responsibility for holes in the liner through use of the privileged communications. To the contrary, at the time of the ALJ's ruling, independent evidence had already been adduced concerning the condition of the liner, the holes created by Aztech for purposes of drilling test wells, and Department staff's role in and reasons for directing that those holes not be repaired (see April 15, 2009 Ruling, at 10). Department staff did not object to that evidence on the ground that it revealed confidential information. Thus, Department staff did not place the subject of the communications at issue in this matter and, therefore, did not waive the attorney-client privilege for those communications.

b. Conclusion and Ruling

The ALJ's determination in the April 15, 2009 ruling that Department staff had not met its burden of showing that the attorney-client privilege was applicable to documents involving certain communications with Aztech is rejected, and those communications should not have been released in their entirety.

At this juncture, I shall address the portions of three of the documents at issue that were entered into evidence in this proceeding as Exhibit 105.[9] A review of Exhibit 105 demonstrates that these documents contained communications subject to the attorney-client privilege. Department staff's request to

[9] I am not identifying the privileged portions of the other documents that the ALJ incorrectly ordered to be produced. Those documents were not entered into evidence and are not part of this record. However, the legal analysis that I have set forth and applied in this decision and order is to be followed in future proceedings where such claims of privilege are raised.

withhold those communications should have been granted, and the exhibit should not have been admitted into evidence with the privileged portions unredacted. Accordingly, Exhibit 105 is excluded in part from evidence, and the privileged communications will not be considered in making this decision.[10]

IV. THE CHARGED VIOLATIONS

As stated above, Department staff charged respondents with four violations of the New York Navigation Law and applicable regulations. These charged violations are addressed below.

The Commissioner conducts a de novo review of an ALJ's hearing report prepared after an evidentiary hearing and applies the preponderance of evidence standard for resolving fact issues (see Matter of Universal Waste, Inc., Decision of the Commissioner, Oct. 15, 2011, at 16; Matter of Karta Corp., Decision of Executive Deputy Commissioner, April 20, 2006, at 6; Matter of Athens Generating Co., LP, Interim Decision of the Commissioner, June 2, 2000, at 12; see also Matter of Sil-Tone Collision, Inc., 63 NY2d 406, 411 [1984]; Matter of Simpson v Wolansky, 38 NY2d 391, 394 [1975]).

1. Respondents' failure to obtain a license for the facility

I agree with the ALJ that respondents failed to obtain a license for the facility, as they were required to do under the Navigation Law and applicable regulations. Pursuant to Navigation Law §§ 174(1)(a) and 174(9), a person who operates a

[10] This decision and order excludes as privileged the following portions of Exhibit 105:

(1) all of the subject lines and all the message text on pages 3 and 4 of DEC 5;

(2) all of the subject lines and all the message text on page 1 of DEC 6;

(3) all of the subject lines and all the message text on page 1 of DEC 12; and

(4) all of the subject lines and all the message text on page 2 of DEC 12 except between the line beginning ">>> 'Fil Fina, III'" and the line "-----Original Message-----."

However, the names contained in the "From, "To," and "Cc" lines, the dates that the communications were sent, and the boilerplate notice statement (which begins – "Notice: This communication and any attachments") which appear on these pages, are not excluded.

major facility must obtain a license from the Commissioner. Licenses are issued for no more than five year terms (Navigation Law § 174[2] and [9]). Failure to pay a license fee can result in a fine not to exceed two times the annual license fee (Navigation Law § 174[7]). The record demonstrates that respondents did not obtain a license for the facility. Respondents violated these provisions of the Navigation Law.

In his analysis, the ALJ stated that the violation commenced on May 2, 2007, which was the receipt date of a letter that Department staff sent to respondents in which staff directed closure of the facility for failure, among other things, to obtain a license (see Hearing Report, at 16-17). I agree with the ALJ's selection of May 2, 2007 as the date that the violation began.

As a general rule, the violation for failing to obtain a license for a facility runs from the time that a person operates the facility without a license. Navigation Law § 172(13) defines an operator as "any person owning [a major oil storage] facility, or operating it by lease, contract or other form of agreement."

Here, Supreme Energy, LLC, operated the facility pursuant to a "land contract" (see Exh 33) that it entered into with the prior facility operator, Alaskan Oil, Inc. (Alaskan). Title to the property was to be transferred to Supreme Energy, LLC, upon the final payment to Alaskan, anticipated to occur on or around September 2008. Respondents did not make any payments to Alaskan for the facility. Because the site needed substantial upgrades, the parties modified their agreement to dispense with payments. Respondents paid only one dollar ($1.00) for the facility (Tr at 526, 1086, 1473-1474). Although respondents assumed various obligations concerning the facility in 2003 (for example, respondents paid employee salaries on September 24, 2003, and property taxes in October 2003 [see Exh 33]), the most certain date established in this record of when respondents began to operate the facility was August 1, 2004, the first month that respondents submitted a monthly license fee report (see Exh 25, at 10). The Department has never issued a license to either respondent to operate the facility.

Department staff informed respondents on August 16, 2004, of the requirement to obtain a license, and specifically pointed out that the license issued to Alaskan "is not transferable to a

new operator" (Exh 44).[11] Department staff directed respondents to submit an application by August 27, 2004 (id.). The Department received an application for a license on August 23, 2004 (Exh 6) (the application was dated August 17, 2004). The application indicated that a change of ownership of the facility had occurred; that the facility was in the name of Supreme Energy Cold Springs Terminal; that the owner was Alaskan Oil Company "(land contract with Supreme Energy)"; and that the legal agent was Supreme Energy Corporation (id.).[12] Respondent Frederick Karam signed the application (id.).

Department staff issued a notice of violation (NOV) on September 7, 2004 (Exh 115), listing numerous violations, including the failure to obtain a license (id.). This NOV was addressed when the parties entered into an order on consent dated September 29, 2004 (Exh 7). The order on consent stated that the August 17, 2004, application was not complete because it did not include a number of items: (1) a spill prevention, control, and countermeasure (SPCC) plan; (2) a facility response plan; (3) an environmental compliance report; and (4) a five-year in-depth integrity inspection of the secondary containment system (see id. at 2-3).

Staff correctly states that the September 29, 2004 order on consent was "a bridge to compliance" – that is, it authorized the operation of the facility for some period of time. Staff asserts, however, that the authorization expired on December 31, 2004.

Although the bridge to compliance was not without end, I agree with the ALJ that the order on consent did not expire on December 31, 2004. The plain wording of the order on consent required respondents to submit, "to the Department for its approval," a corrective action plan and a schedule for the secondary containment system for tank No. 8 by September 30, 2004 (Exh 7, at 4). The plan was to contain "a critical path schedule" to complete, by December 31, 2004, all construction activities related to secondary containment for tank No. 8 (id, at 4-5). Respondents were also required to submit a SPCC plan,

[11] The record shows that the most recent license for the facility was issued to Alaskan Oil, Inc., on March 30, 2001; it expired on March 31, 2002 (Exh 5).

[12] As noted above, Supreme Energy Corporation is not a legal entity. The correct entity is Supreme Energy, LLC. This application (Exh 6) is one example of the typographical errors concerning Supreme Energy's name. Respondents were the source of this incorrect information.

a facility response plan, and an environmental compliance report within 30 days of the date of the order on consent, which was October 29, 2004 (id.). Finally, respondents were required to cure other technical deficiencies by October 29, 2004, including submission of ten-year inspection reports, color-coding of fill ports for specified tanks, installation of level gauges or equivalent devices on specified tanks, and permanent closure of the hazardous substance bulk storage tanks at the facility (id. at 4).

Respondents submitted (1) a SPCC plan dated November 17, 2004 (received by the Department on November 17, 2004) (Exh 10); (2) a facility response plan dated November 2004 (received by the Department on November 17, 2004) (Exh 9); and (3) an environmental compliance report dated November 5, 2004 (Exh 8).[13] These documents were submitted beyond the thirty-day period (which ended on October 29, 2004) specified in the order on consent. However, the order on consent did not provide a timeline or deadline for staff review and approval of these documents. Instead, the December 31, 2004, performance date in the order on consent presumed that Department staff would have reviewed and approved respondents' submissions by then.

While the record demonstrates that respondents submitted the various plans (although they were not submitted on time), Department staff never informed respondents that it had reviewed and approved the plans. Without Department staff approval of the submissions, respondents could not have undertaken or completed construction activities by December 31, 2004.

When the Department issues an order on consent, a respondent's authority to operate under the consent order takes effect when the order is signed by the Commissioner of Environmental Conservation, or his designee, and expires in accordance with the terms of the order. An authorization to operate pursuant to an order on consent can also expire based on noncompliance with the terms of the order on consent.

Here, the ALJ determined that the authorization to operate pursuant to the order on consent expired when Department staff directed respondents to close the facility. In a NOV dated April 27, 2007 (Exh 16), Department staff directed respondents

[13] Exhibits 9 and 10 were prepared by Lu Engineers for "Supreme Energy Corporation." Exhibit 8 was signed by respondent Frederick Karam with the facility name as "Supreme Energy Corporation – Cold Springs MOSF."

to close the facility[14] and thereby gave notice of staff's determination that respondents were not in compliance with the consent order. The ALJ determined that on the record, the best date for when respondents actually received this NOV was May 2, 2007, five days after it was mailed (see Hearing Report, at 16-17).

I agree that, on this record, the bridge to compliance – the authorization to operate the facility pursuant to the order on consent – did not expire on December 31, 2004. Based on this record, I also agree with the ALJ's choice of the expiration date, which is also the beginning date of the violations. In the circumstances here, I determine that May 2, 2007 was the date that the bridge to compliance ended. On the record, staff asserted that the April 2007 NOV was both hand-delivered and sent by certified mail to respondents (Tr at 35-36). Whether the NOV was hand-delivered is not corroborated on this record. However, respondents' counsel stated at the hearing that he did not object that this NOV "was sent and we received it" (Tr at 36). Thus, it is fair to conclude that the NOV was received in the mail on May 2, 2007. Therefore, respondents were operating an onshore MOSF without a license from May 2, 2007, at least until June 22, 2009, which is the date of staff's last inspection of the facility (see Hearing Report, at 16-17; Finding of Fact No. 20, at 8).[15]

I also reject respondents' theory that they were operating pursuant to the license issued to Alaskan. Neither the law nor the record supports respondents' theory. The last license issued to Alaskan expired on March 31, 2002 (Exh 5), eighteen months before respondents entered into the land contract with Alaskan (Exh 33). Even so, as the ALJ noted, the last license issued to Alaskan included the following statement in bold capital letters: "**THIS LICENSE IS NON-TRANSFERABLE**" (Exh 5, third to last unnumbered page of the exhibit) (emphasis in original). Additionally, Department staff informed respondents that a prior-issued license was not transferable to a new operator (Exh 44).

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[14] The NOV stated, in pertinent part, that the Navigation Law prohibits operation of a MOSF without a current and valid license. It further stated that "[a]ll tanks at this facility must be emptied immediately and until such time that a license is issued" (Exh 16, at 1).

[15] Accordingly, the last sentence of Finding of Fact No. 19 (Hearing Report, at 8) is modified to provide: "The first date in the record that DEC staff informed the respondents to cease operations at the facility due to the failure to comply with the consent order was in a letter dated April 27, 2007, received no later than May 2, 2007."

I also do not agree with respondents' theory that Department staff improperly withheld approval of respondents' license application. Again, neither the law nor the record support respondents' position. The inadequacy of secondary containment has been an issue throughout respondents' operation of the facility, as discussed below. Respondents' failure to provide satisfactory evidence that the secondary containment met State and federal requirements was a proper basis for denying respondents' license application (see Navigation Law § 174[3]).

2. Respondents' failure to submit license fees, license fee reports, and surcharges

I agree with the ALJ that staff demonstrated that respondents failed to submit license fees and timely license fee reports. As stated above, the Navigation Law requires licensees to submit license fees and surcharges for the product transferred to the facility (Navigation Law § 174[1]). By the 20th day of each month, licensees are required to submit to Department staff a certification of the number of barrels transferred during the license fee period (the prior calendar month), along with payment of the license fees and surcharges (Navigation Law § 174[5]). If the license fees are late, an additional fee of 1% of the license fees is assessed for every month that the license fees are late (17 NYCRR 30.9[e]). This 1% additional fee is assessed against all amounts due, including any unpaid license fees and surcharges (id.).[16]

Here, the record establishes that respondents began to operate this facility on August 1, 2004 (see Exh 25, at 10 [the first monthly license fee report for this facility submitted by respondents]). While the Department received monthly license fee reports for every month between August 1, 2004, and July 10, 2008 (the date that the adjudicatory hearing began) (Exh 25, at 10-56), not all of these reports were submitted timely and a majority did not include the requisite license fees. Indeed, respondents admit that they did not pay all license fees (see Respondents' Answer to the Amended Complaint [March 28, 2008], ¶¶ 4, 5; Tr at 551-552, 590-591, 1000).

Each monthly report is required to be signed and dated by the person submitting the report. For the 47 monthly reports that were submitted on behalf of respondents, all but two (August 2004 and October 2007) were dated by respondents within the 20th day of the month following the month for which the

[16] The ALJ refers to the 1% late fee authorized by 17 NYCRR 30.9(e) as "interest" (see Hearing Report, at 24).

report was due (Exh 25, at 10, 48). Respondents rely on the date of the reports and, thus, under their theory, only two reports were submitted late.

Department staff, however, claims that of the 47 reports submitted by respondents for the reporting period of August 2004 through June 2008, 36 were submitted late (Exh 24; Department Staff's Closing Brief [Sept. 3, 2009], at 11). Department witness Diane Palmer testified that the Department date-stamps the reports when they are received (Tr at 490, 491). The ALJ, however, did not give any credit to the date stamps because some reports had more than one stamp (see, e.g., Exh 25, at 46), and some had scribbled obliterations (see, e.g., Exh 25, at 39, 43).

While I agree with the ALJ's determination regarding the date stamps, I determine that the law and the record present another way of determining which submissions were late. Apart from the Department's date-stamps and respondents' handwritten dates on the monthly reports, the monthly submissions are not timely if they are not accompanied by the required license fees and surcharges (see 17 NYCRR 30.9[b] ["(t)he fee for each month shall be submitted to the commissioner, shall accompany the monthly report and shall be received by the commissioner no later than the 20th day of the month immediately following" (emphasis added)]; see also 17 NYCRR 30.9[e] ["An additional fee shall be due for the late payment of the monthly license fee. The additional fee shall be assessed at a rate of one percent of the amount due per month."]).

Here, Department staff demonstrated that respondents failed to submit license fees for 31 months (see Exh 24). Department witness Diane Palmer created a spreadsheet setting forth each monthly submission and whether the submission was accompanied by a check for the license fees and surcharges (Exh 24). Although respondents claimed that they submitted checks that were not included in the Department's calculations (see, e.g., Tr at 470-71), respondents did not produce the cancelled checks to substantiate their claim. The record presents no reason to doubt the Department's recordkeeping of checks received (Tr at 472-473, 476).

Based on this analysis, I find that respondents failed to submit license fees and surcharges, and were thus subject to the additional 1% fee for late payment (here, nonpayment) of the amounts due. Appendix A to the hearing report indicates the months that the license fees and surcharges were not paid, as

well as the applicable additional 1% fee for lateness.[17]

3. Respondents' failure to maintain adequate secondary containment

The ALJ examined the record on the condition of the liner and the secondary containment system, breaking down his analysis into different time periods. He concluded that Department staff demonstrated by a preponderance of the evidence that respondents failed to maintain adequate secondary containment at the facility from September 2006 through June 22, 2009. I agree that Department staff met its burden on this alleged violation, but for a longer period than that determined by the ALJ.

The operator of a MOSF is required by statute to implement State and federal plans and regulations for the control of discharges of petroleum, and the containment and removal thereof in the event a discharge occurs (see Navigation Law § 174[3]). In addition, the operator is required to provide evidence, satisfactory to the Department, that the regulations for controlling, containing, and removing petroleum discharges have been implemented (see id.). Pursuant to Departmental guidance, an operator's compliance is generally demonstrated through an engineering report prepared by a qualified engineer (see Spill Prevention Operations Technology Series [SPOTS] Memo #10, Secondary Containment Systems for Aboveground Storage Tanks, Sept. 28, 1994 [SPOTS 10]).

The State requirements for secondary containment for MOSFs are provided, in part, at 6 NYCRR part 613 (see 6 NYCRR 613.1[b][applicability]). Under 6 NYCRR 613.3(c)(6)(i), a secondary containment system must be installed around any aboveground petroleum storage tank which, as here, could reasonably be expected to discharge petroleum to the waters of the State, or has a capacity of 10,000 gallons or more. The secondary containment system

> "must be constructed so that spills of petroleum and chemical components of petroleum will not permeate, drain, infiltrate or otherwise escape to the groundwaters or surface waters before cleanup occurs. The secondary containment system may consist of a combination of dikes, liners, pads, ponds, impoundments, curbs, ditches, sumps, receiving tanks or other equipment capable of containing

[17] To conform the ALJ's findings of fact to the terminology used in this decision, Finding of Fact No. 24 (Hearing Report, at 8) is modified to read "Late fees due on the amounts owed by Supreme Energy, LLC total $39,941.41."

> the product stored. Construction of diking and the storage capacity of the diked area must be in accordance with NFPA No. 30, section 2-2.3.3 (see section 613.1[g] of this Part)"

(6 NYCRR 613.3[c][6][i]).[18]

Under NFPA No. 30, walls of diked areas must be made of earth, steel, concrete, or solid masonry designed to be liquid tight and to withstand a full hydrostatic head (see NFPA No. 30, § 2-2.3.3[d], at 30-14). The volumetric capacity of the diked area shall not be less than the greatest amount of liquid that can be released from the largest tank within the diked area, assuming a full tank (see id., § 2-2.3.3[b], at 30-14). In its guidance document on secondary containment, Department staff has recommended that an additional 10 percent be added to the 100 percent volume of the largest tank, to provide for freeboard and stormwater that may accumulate behind the dike (see SPOTS 10, Sec. A.1 [Dike Construction and Storage Capacity]).[19]

As of September 2004, the facility's secondary containment system consisted of an existing reinforced concrete masonry unit and cast-in-place reinforced concrete retention walls that surround the facility's 15 aboveground storage tanks (see SPCC Plan [Nov. 2004], Exh 10, at 11). The interior sides of the walls and floor areas are lined with a urethane liner system (see id.; see also Hearing Report, at 26; id., Finding of Fact No. 11, at 6). In late 2004, in an attempt to increase the capacity of the diked area, the height of the retaining wall was raised through the installation of cinder blocks along the perimeter of the wall (see Hearing Report, at 46-47). However, the urethane liner was not extended the full height of the cinder blocks (see id.).

Upon my examination of the record, staff demonstrated by a preponderance of the evidence that respondents failed to maintain adequate secondary containment from August 2004 through June 22, 2009, the date of staff's last inspection. First, the record demonstrates that respondents failed to maintain the integrity of the urethane liner for the secondary containment system in such as manner as would prevent the release of

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[18] NFPA No. 30 means the National Fire Protection Association, Flammable and Combustible Liquids Code, No. 30 (July 5, 1984), which is incorporated by reference into Part 613 (see 6 NYCRR 613.1[g][1]).

[19] Federal requirements are similar, requiring containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation (see 40 CFR 112.8[c][2]).

petroleum in the event of a discharge from the facility's storage tanks. As early as September 2004, respondents' own engineer reported rips, tears, and other perforations in the liner system that required repair (see Elliott Letter [9-30-04], attachment to Exh 13). In addition, inspections by Department staff revealed that rips and tears in the liner system persisted from August 2004 through June 2009, well after the commencement of hearings in this matter (see, e.g., Exh 20).[20] In addition, the record reveals that the liner was not extended to the top of the walls of the secondary containment system (see, e.g., id.). Other record evidence revealed multiple, persistent problems with the liner system, including the infiltration of water under the liner.

Respondents claimed that rips in the liner system were repaired as needed, and provided some evidence of those patches. However, the record contains no evidence corroborating respondents' assertion that they completed all necessary repairs. Moreover, Department staff proved by a preponderance of evidence that respondents never satisfied their statutory obligation to provide proof that the liner system met regulatory standards. At best, respondents provided a certification in November 2008 certifying that repairs to the liner undertaken in August and September 2008 (after hearings commenced in this case) were performed "in accordance with good engineering practice" (Exh 109). However, that certification did not indicate that the entire liner met regulatory standards. Moreover, a subsequent inspection by Department staff revealed persistent problems with the liner (see Hearing Report, at 40). Thus, the preponderance of credible record evidence supports the conclusion that the liner system never met regulatory standards.

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[20] The ALJ recommends that I give little or no weight to staff's and Aztech's testimony concerning the condition of the liner from August 2004 through September 2006, when Aztech began installation of the monitoring wells (see Hearing Report, at 31). I decline to discount the testimony, and do not accept the ALJ's recommendation. Staff's and Aztech's testimony is consistent and corroborative. Moreover, the testimony is corroborated by contemporaneous documentation, including documents prepared by respondents' engineers. Thus, I conclude that Department staff established the poor condition of the liner prior to September 2006, and that staff's evidence more than outweighs respondents' evidence to the contrary. Accordingly, Finding of Fact No. 26 (Hearing Report, at 8-9) is revised to read as follows:

> "Evidence in the record shows that from the time Supreme Energy, LLC began operations at the facility (August 1, 2004) until the last day of testimony (June 22, 2009), the liner did not meet applicable standards."

Respondents alleged as a defense and asserted throughout this proceeding that Department staff illegally, willfully, and maliciously directed Aztech not to repair the liner after installing the monitoring wells, and yet is seeking to hold respondents liable for those repairs. The ALJ recommends that I reject this and other claims of staff misconduct and, for the reasons stated by the ALJ and based on this record, I agree. I have considered that Department staff counsel directed Aztech to not repair the holes in the liner. However, the record contains sufficient evidence of the liner's poor condition that is independent of and unrelated to the holes created by Aztech. Accordingly, respondents' liability for failure to maintain the liner systems is based solely on the disrepair of the liner that is unrelated to the installation of the monitoring wells.

Second, an additional basis for holding that respondents failed to maintain secondary containment is respondents' failure to meet regulatory requirements for the capacity of the system. The record demonstrates that the largest tank within the diked area, Tank No. 8, has a capacity of 1 million gallons. However, the diked area, without the cinder block wall extensions, only had a capacity of approximately 933,000 gallons (see, e.g., Elliott Letter [9-30-04], attachment to Exh 13). Thus, the containment area without the wall extensions did not meet the capacity requirements of 6 NYCRR 613.3(c)(6)(i) and NFPA No. 30, section 2-2.3.3(b).

Moreover, the weight of record evidence supports the conclusion that respondents failed to satisfy the capacity requirement through the installation of the cinder block wall extensions. The record contains evidence that the cinder block wall extensions were not structurally sound (see, e.g., Tr at 1233-1234, 1251) and were not lined with the urethane liner. Although respondents provided certification that the capacity requirements were met with the addition of the cinder blocks (see Crandell Letter [12-5-04], Exh 51), neither that certification nor any other certification establishes that the wall extensions are liquid tight and able to withstand a full hydrostatic head. Thus, the requirements of section 613.3(c)(6)(i) and NFPA No. 30, section 2-2.3.3(d) have not been met.[21]

[21] Accordingly, I make the additional Finding of Fact No. 30:

> "Record evidence shows that respondents failed to establish that the facility's secondary containment system meets the capacity and design requirements of 6 NYCRR 613.3(c)(6)(i) and NFPA No. 30, § 2-2.3.3 (see, e.g., Exh 13, and Hearing Report, at 44-47)."

The ALJ recommends that respondents' failure to satisfy regulatory capacity requirements not be used as a basis for liability on the ground that respondents lacked notice of this theory (see Hearing Report, at 47-48). I disagree. Respondents were well aware of the need to increase the capacity of the facility's secondary containment system, and of Department staff's claims in this regard (see, e.g., SPCC Plan, Exh 10, at 11; Consent Order, ¶ 17, Exh 7; Notice of Violation [9-7-04], Exh 115, at 2-3). Moreover, respondents addressed the merits of the claim without raising any claim of surprise or prejudice (see, e.g., Supreme Post-Hearing Memorandum, at 11-12). Accordingly, respondents had notice of this theory of liability.

With respect to staff's remaining theories of liability for the failure to maintain secondary containment, I agree with the ALJ's conclusions (see Hearing Report, at 41-44, 48-49). With respect to the lack of a five-year in-depth integrity inspection, the five-year inspection requirement is generally imposed through an MOSF license Special Condition (see Hearing Report, at 48; Exh 5 [Special Condition 3j]). Because an MOSF license was not issued to respondents, such special condition is not enforceable and does not provide a separate basis for liability in addition to the applicable Navigation Law § 174 requirement that a MOSF operator maintain and provide satisfactory evidence of adequate petroleum discharge containment.

4. Respondents' alleged violation of the September 29, 2004, Order on Consent

I agree with the ALJ that Department staff did not prove its allegations regarding respondents' violation of the September 29, 2004 consent order (see Hearing Report, at 49-61). In its amended complaint, staff alleged that respondents violated the consent order by (1) failing to submit ten-year inspection reports, and (2) failing to construct and maintain valid secondary containment for Tank No. 8 (see Amended Complaint [3-24-08], ¶ 15). In its closing brief, apparently for the first time, staff argued that respondents also violated the order by failing to conduct a five-year in-depth integrity inspection of the secondary containment by December 31, 2004.

The ALJ states that Department staff made no mention of ten-year inspection reports in its closing brief (see Hearing Report, at 50). Based on this record, and for the reasons stated by the ALJ, I conclude that staff did not meet its burden with respect to the alleged violation concerning submission of the ten-year inspection reports (see id. at 56-60).

With respect to the alleged failure to construct and maintain valid secondary containment, the consent order notes the Department's allegations with respect to secondary containment (see Consent Order, ¶¶ 17-18, Exh 7). The consent order required respondents to submit to the Department for approval a corrective action plan and a schedule to ensure that the secondary containment system complies with 6 NYCRR 613.3(c)(6) (see id., ¶ I.B). Respondents submitted the corrective action plan for approval (see SPCC Plan, Exh 10; Elliot Letters, attachments to Exh 13).[22] The ALJ noted that nothing exists in the record that indicates whether Department staff approved the plan (see Hearing Report, at 15). I concur with the ALJ that, based on the record in this proceeding, staff failed to meet its burden showing a violation of the consent order in this regard (see, e.g., Hearing Report, at 54-55).

With respect to the five-year in-depth integrity inspection, the consent order's ordering clauses do not clearly impose a requirement that the inspection be conducted by December 31, 2004. Based on the record, staff has not met its burden in this regard.

V. RESPONDENTS' DEFENSES

In their answer and throughout this enforcement proceeding, respondents raised various defenses related to Department staff's decision not to repair the facility's secondary containment system liner after Aztech installed the monitoring wells during the site remediation project in 2006. The ALJ recommends that I reject the defenses and, for the reasons stated by the ALJ, I agree (see Hearing Report, at 62-68). In addition, as noted above, by holding respondents liable only for rips, tears, and other defects in the liner system that are unrelated to the monitoring wells (see above at Section IV[3]), respondents are not being held responsible for any defects in the liner that resulted from staff's decision.

Moreover, to the extent respondents claim the Department caused them to incur unnecessary costs in repairing the holes left by Aztech, as the owner and operator of a MOSF at which a petroleum discharge has occurred, respondents are liable for all investigation, clean up, and removal costs associated with remediating the discharge (see Navigation Law § 181). Thus, respondents would have been liable for the repair of the holes whether staff directed Aztech to repair them or not. In any

[22] The ALJ noted that DEC staff did not make an issue of any late filings under the consent order (see Hearing Report, at 51 n 38 and 52 n 39).

event, the cost recovery action concerning the oil spill remediation would have been the proper forum to raise respondents' claims concerning the cost of remediating the petroleum spill, not this enforcement proceeding (see footnote 1, above).

VI. PERSONAL LIABILITY OF RESPONDENT FREDERICK KARAM

The ALJ recommended that I hold respondent Frederick Karam personally liable in this matter because (1) he was the member of the LLC with the responsibility and authority to prevent violations (applicable only to the violations of failure to license the facility and failure to maintain adequate secondary containment), and (2) the record in this matter warrants piercing the corporate veil of the LLC (applicable only to the charge of nonpayment of license fees and surcharges, and failure to submit monthly certifications).[23] The ALJ also recommended that I not hold Mr. Karam personally liable for the failure to pay license fees and surcharges pursuant to the responsible corporate officer doctrine.

For the reasons that follow, I accept the ALJ's recommendations in part. I determine that Mr. Karam is personally liable for all of the violations established on this record: failure to license the facility; failure to pay license fees and surcharges, and to submit monthly reports; and failure to maintain adequate secondary containment. The basis for this personal liability stems from application of both the responsible corporate officer doctrine, and the doctrine of piercing the corporate veil.

1. Responsible Corporate Officer

A corporate officer can be held personally liable for violations of the corporate entity that threaten the public health, safety, or welfare (Matter of Galfunt, Order of the Commissioner, May 5, 1993, at 2 [citing United States v Park, 421 US 658 (1975); United States v Dotterweich, 320 US 277 (1943); and United States v Hodges X-Ray, Inc., 759 F2d 557 (6th Cir 1985)]). A corporate officer need only have responsibility over the activities of the business that caused the violations (see id.). Galfunt established that it was unnecessary to

[23] The ALJ recommended that Mr. Karam not be held personally liable as an owner or operator of the facility. The ALJ noted that Department staff did not pursue this theory in its closing or reply briefs. I accept the ALJ's recommendation.

determine if the corporate officer made any specific decisions concerning the conduct alleged in the violations, only that the officer had direct responsibility for operations and was in a position to prevent the violations (see id.). The responsible corporate officer doctrine has also been applied to limited liability companies and their members (see Matter of 125 Broadway, LLC, Decision and Order of the Commissioner, Dec. 15, 2006, at 5, and Default Summary Report, at 7-11).

Here, Mr. Karam is the sole member of respondent Supreme Energy, LLC. He alone made the decisions that are the subject of the violations in this matter. He failed to obtain a license for the facility. He collected license fees from his vendors and instead of remitting those fees to the State for them to be placed in the New York Environmental Protection and Spill Compensation Fund, he redirected those funds to himself and to upgrade another facility that he operated (see, e.g., Tr at 533, 541-542). He also made all the decisions regarding the secondary containment. He had the authority and responsibility within the LLC for complying with the law. For all of these reasons, Frederick Karam is personally liable under the responsible corporate officer doctrine (see also Matter of Oil Co., Inc., Order of the Commissioner, July 9, 1998 [holding President and CEO of corporation and Secretary of corporation individually and jointly and severally liable under the Navigation Law for failure to obtain a license to operate a MOSF, among other violations]).

The ALJ recommended that I apply the responsible corporate officer doctrine only to the violations of failure to license the facility and failure to maintain adequate secondary containment. He recommended that I not apply the doctrine to the failure to pay license fees and surcharges because the ALJ reasoned that nonpayment of those fees was not a threat to public health, safety or welfare. I do not accept the ALJ's recommendation. The license fees and surcharges that MOSF operators are required to pay are deposited into the New York Environmental Protection and Spill Compensation Fund. The purpose of the Fund is to provide money for the Department to respond quickly to petroleum discharges and effect prompt clean up and removal of those discharge prior to seeking recovery of response costs from responsible parties (see, e.g., Navigation Law §§ 171, 179[1]). Without adequate funds, the Department's ability to quickly and effectively respond to petroleum spills is compromised, and the public health, safety and welfare are thereby threatened.

Thus, I am applying the responsible corporate officer doctrine to Frederick Karam as the sole member of Supreme Energy, LLC with respect to all violations established – including the failure to pay license fees and surcharges.

2. Piercing the Corporate Veil

Another doctrine that holds corporate officers liable for violations is piercing the corporate veil. Under this doctrine, corporate officers will be held personally liable when (1) the officer exercised complete domination over the corporation concerning the transaction at issue, and (2) that domination was used to commit a fraud or wrong against the plaintiff (Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141 [1993]). As the ALJ noted, the courts have applied the doctrine of piercing the corporate veil to limited liability companies and their members (see, e.g., Williams Oil Co., Inc. v Randy Luce E-Z Mart One, LLC, 302 AD2d 736 [3d Dept 2003]; Retropolis, Inc. v 14th St. Dev. LLC, 17 AD3d 209 [1st Dept 2005]).

The ALJ recommended that this doctrine be applied to hold Mr. Karam personally liable for the nonpayment of license fees and surcharges. The ALJ reasoned that Mr. Karam's conduct for the nonpayment of license fees and surcharges was akin to a fraud. The ALJ declined to reach the fraud issues with respect to the failure to obtain a license or to maintain secondary containment on the ground that such a ruling was unnecessary.

I agree with the ALJ's recommendation and determine that staff proved by clear and convincing evidence that Mr. Karam is personally liable under the doctrine of piercing the corporate veil for the LLC's failure to pay license fees and surcharges.[24] The evidence revealed: (1) Mr. Karam's complete domination over the operations of the LLC; (2) the failure to observe corporate formalities with respect to the handling of funds; (3) the commingling of the LLC's assets with Mr. Karam's personal assets; (4) an overlap in ownership of Supreme Energy, LLC with another LLC, Cold Springs Terminal, LLC; (5) the commingling of the assets of Supreme Energy, LLC and Cold Springs; (6) the failure to remit to the State license fees and surcharges

[24] I note that the ALJ made one separate finding of fact supporting respondent Karam's individual liability under the doctrine of piercing the corporate veil (see Finding of Fact No. 29, Hearing Report, at 9). Additional factual findings supporting application of the doctrine are recited on pages 68 to 72 of the ALJ's hearing report.

collected by Supreme Energy; and (7) the transfer of Supreme Energy, LLC's assets to Cold Springs and to Karam personally without fair consideration, thereby rendering Supreme Energy, LLC insufficiently solvent to meet its obligations. This evidence establishes respondent Karam's abuse of the limited liability company form to wrongfully deprive the State of the license fees and surcharges due to the State (see Matter of EAC of New York, Inc. v Capri 400, Inc., 49 AD3d 1006, 1007 [3d Dept 2008]; Rebh v Rotterdam Ventures, Inc., 252 AD2d 609, 610-611 [3d Dept 1998]; Anderson St. Realty Corp. v RHMB New Rochelle Leasing Corp., 243 AD2d 595, 596 [2d Dept 1997]).

In addition, I see no reason not to hold respondent Karam personally liable for the remaining violations committed by the LLC as well. Misuse of the LLC form to avoid the LLC's other legal obligations, including obtaining a license and maintaining the facility's secondary containment system, is as much of a wrong against the State as is the failure to pay license fees. In any event, once it is concluded the corporate veil should be pierced, the owners of the corporate entity lose their limited liability shield and are held personally responsible for the underlying corporate obligations (see, e.g., Matter of Morris, 82 NY2d at 140-141). Thus, the circumstances of this case warrant piercing Supreme's LLC form and holding respondent Karam, the sole member of the LLC, personally liable for all of the LLC's violations established on this record.

VII. CIVIL PENALTIES FOR THE VIOLATIONS

1. Respondents' failure to obtain a license

The failure to obtain a license for a MOSF is subject to a civil penalty of twenty-five thousand dollars ($25,000) (Navigation Law § 192). Each day that the violation continues is a separate violation.

Respondents have never obtained a license for the facility. However, shortly after they began to operate the facility, they entered into an order on consent which addressed the failure to obtain a license. As I determined above, the order on consent, which was a bridge to compliance, expired on May 2, 2007. Thus, the period of violation is calculated from that date until the date of the last inspection by Department staff, which was June 22, 2009.[25] The number of days between May 2, 2007, and June 22,

[25] Department counsel argues for the penalty calculation to run from January 1, 2005, until the date of the filing of the brief and beyond (see, e.g., Department Staff's Closing Brief, at 17-19). As discussed above, I determine

2009, is 783. Seven hundred eighty-three days multiplied by $25,000 for each day equals $19,575,000 – the maximum penalty that could be assessed against respondents for this violation.

For this violation, Department counsel has requested a minimum penalty of $500,000 up until the filing of its brief on September 2, 2009, plus $500 for each day thereafter. The ALJ determined that the penalty should be $235,000. He determined that the number of days of violation was 783 days, and he multiplied that figure by $300 per day, staff's penalty request prorated (see Hearing Report, at 87 n 59). I agree with the ALJ that the $300 per day penalty amount is reasonable on this record. Multiplying 783 days by $300 per day, and without any rounding up, the amount of civil penalty is $234,900. This $234,900 civil penalty amount is supported by the record, is less than the maximum penalty allowed by law, and is reasonable. I also agree that respondents should be held jointly and severally liable for this penalty.

2. Respondents' failure to pay license fees and surcharges, and to submit monthly certifications

The failure to pay license fees or surcharges is subject to a civil fine of two times the annual license fee or surcharge (Navigation Law § 174[7]). The failure to submit monthly certifications of the number of barrels of petroleum product transferred is also subject to a civil fine of two times the annual license fee and surcharge (Navigation Law § 174[7]).

Here, Department staff requests that respondents be required to pay the following fees and penalties: (1) license fees of $243,484.87 (plus an additional 1% fee per month for late payment of license fees); (2) a fine equal to two times the license fees as authorized by Navigation Law § 174(7); and (3) an additional penalty of $250,000 as authorized by Navigation Law § 192. Staff has not calculated the total penalty it requests.

The ALJ determined that Department staff did not calculate the license fees and surcharges fees correctly. The ALJ calculated the license fees owed as $97,387.86; the surcharges

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that the date of the violation began on May 2, 2007, and runs to the date of staff's last inspection of the facility, June 22, 2009. I agree with the ALJ that the June 2009 inspection is the last evidence in the record demonstrating respondents' operation of the facility without a license (see Hearing Report, at 87-88; Finding of Fact No. 20, id. at 8).

owed as $51,737.35;[26] and an additional late fee of 1% per month owed as $39,941.41, for a total of $189,066.62 (see Hearing Report, at 24, 89, and Appendix A).

The ALJ therefore recommends that I hold respondents jointly and severally liable for the following fees and penalties: (1) license fees, surcharges, and interest owed of $189,066.62; (2) a fine equal to two times the license fee of $97,387.86, which amounts to $194,775.72, as authorized by Navigation Law § 174(7);[27] and (3) an additional penalty of $5,000 as authorized by Navigation Law § 192. These fees and penalties total $388,842.34.

The ALJ determined that respondents began operations at the facility on August 1, 2004, and hence were then responsible for license fees, surcharges, and monthly reports. The ALJ further determined that staff demonstrated that respondents filed their monthly license reports late on only two occasions (August 2004 and October 2007). The ALJ further determined that staff's calculations of license fees and surcharges owed were incorrect because staff included fees for a number of months before respondents began operation of the facility on August 1, 2004, and acknowledged, upon cross-examination, several mathematical errors. Therefore, the ALJ recalculated the amounts owed in light of the evidence.

The ALJ also correctly noted that staff counsel provided minimal justification for the request of an additional penalty of $250,000. Staff counsel argued that respondents committed "almost 100 separate" knowing and intentional violations of the Navigation Law for filing late and not paying the fees (Staff's Closing Brief, at 13). Counsel, however, provided no citations to the record to support this statement. Nonetheless, the ALJ divided staff's requested $250,000 added penalty by the claimed 100 violations, for a total of $2,500 per violation. This per-violation amount is well within the $25,000 per violation maximum penalty authorized in Navigation Law § 192. Because the ALJ determined that Department staff proved respondents submitted only two of the monthly certifications late, he calculated the total added penalty to be $5,000 (2 x $2,500).

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[26] The ALJ also noted that, while the amended complaint requests the payment of surcharges, Staff counsel's closing and reply briefs did not specifically request the payment of surcharges. The briefs only referred to license fees (see Staff's Closing Brief at 13, 22; Staff's Reply Brief at 20, 21).

[27] The fine portion of the penalty is conservative because it only doubled the license fees owed. As discussed further below, pursuant to Navigation Law § 174(7), surcharges can also be doubled.

I do not agree with the ALJ's calculations. While the ALJ focused on the late submission of the reports and found that reports for only two months were late, I have determined that the focus is more appropriately placed on the nonpayment of license fees and surcharges. Respondents were required to remit payment for license fees and surcharges for the 47 months between August 2004 and July 10, 2008 (the first day of the adjudicatory hearing). Of those 47 months, respondents failed to submit payments for 31 months. On the record in this matter, my analysis is based on the lateness of payments (more precisely nonpayments), not on the lateness of the reports. Thus, for the 31 months of nonpayment of license fees and surcharges, I have determined that respondents owe $97,387.86 in license fees, $51,737.35 in surcharges, and $39,941.41 in the additional 1% fee for late payments of license fees and surcharges, for a grand total of $189,066.62 of missed payments.

I have also determined that an additional fine equal to two times the license fees and surcharges is appropriate. I recognize that the ALJ only doubled the license fee,[28] but a doubling of both the license fees and surcharges is authorized by statute as a fine (see Navigation Law § 174[7]), and is appropriate here. As stated above, missed payments of license fees and surcharges amount to $149,125.21. A doubling of that figure is $298,250.42.

As the ALJ noted, Navigation Law § 192 authorizes a maximum penalty of $25,000 for each violation of the Navigation Law, Article 12. Nonpayment of license fees and surcharges is a violation of the Navigation Law (see Navigation Law 174[4]). The ALJ determined that a $2,500 penalty for each violation was appropriate. I agree with this determination, though I disagree that only two months are subject to this penalty. As stated above, I have determined that the violations occurred over 31 months. Thirty-one months of nonpayment of license fees and surcharges at $2,500 per violation equals $77,500. This amount is less than the maximum penalty of $775,000, is based on the

[28] The ALJ based this upon his conclusion that the regulation at 17 NYCRR 30.10(a) somehow limited the amount of the fine to two times the license fee only (see Hearing Report, at 89-90). Review of the relevant statutory and regulatory history reveals that this conclusion is in error. Section 30.10(a) was added in 1978 and has not been amended since. In 1985, shortly after the Legislature transferred jurisdiction over Navigation Law article 12 to the Department (see L 1985, ch 35), the Legislature added the surcharge to article 12, including in the fine provision at Navigation Law § 174(7) (see L 1985, ch 38, § 14). Based on this history, no basis exists for concluding that the prior promulgated regulation limits the subsequently enacted statutory authorization.

record, and is reasonable.

In conclusion, respondents are jointly and severally liable for the following fees and penalties:

(1) license fees, surcharges, and late fees owed of $189,066.62;

(2) a fine equal to two times the license fee and surcharges of $149,125.21, which amounts to $298,250.42, as authorized by Navigation Law § 174(7); and

(3) an additional penalty of $77,500 as authorized by Navigation Law § 192.

These fees and penalties total $564,817 (rounded down). This amount is reasonable and is within the statutory maximum.

3. Respondents' failure to maintain secondary containment

The failure to maintain secondary containment and provide satisfactory evidence of its compliance with regulatory standards is a violation of the Navigation Law (see Navigation Law § 174[3]) and, thus, is subject to a civil penalty of twenty-five thousand dollars ($25,000) per day for each day the violation continues (see Navigation Law § 192). Using the consent order as a bridge to compliance (see Section IV[1], above), Department staff seeks a civil penalty of $645,000, which amounts to $250 per day for 1,800 days (from January 1, 2005 to the date of staff's closing brief) plus an estimated cost to repair the liner of $195,000 (see Hearing Report, at 91-92).

The ALJ recommends imposing $250 per day for this violation, calculated from July 1, 2007, through the date of staff's last inspection of the facility on June 22, 2009 (see Hearing Report, at 92-93).

I accept the ALJ's recommendation to disregard staff's repair estimate. I conclude, however, that the record warrants a penalty greater than $250 per day for each day the violation continued. As reflected in the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEC Program Policy DEE-22, May 21, 2003), the Department considers the failure to properly maintain secondary containment to be generally more significant a violation than the failure to license a facility, warranting a penalty of up to five times greater than the

average penalty imposed for failure to obtain a license (compare id., PBS Penalty Schedule, items 35 and 37 to item 1). Given the significant potential environmental harm that could have been caused in the event of a major release from this facility, including a potential release to the Seneca River (see Hearing Report, at 92-93), the record supports the imposition of a penalty equal to $600 per day for each day the violation continued.

With respect to the duration of the violation, because I am imposing liability for rips, tears, and other problems with the secondary containment liner, and the system's lack of capacity, all of which are independent of the holes produced by Aztech, I do not use the ALJ's July 2007 start date for the violation. Instead, using the consent order as a bridge to compliance, respondents' failure to maintain the secondary containment system and provide satisfactory evidence concerning the repair of the liner and the capacity of the system began on May 2, 2007, and continued through June 22, 2009, a period of 783 days. Accordingly, for this violation, respondents are jointly and severally liable for a penalty of $469,800.

VIII. REMEDIAL RELIEF

The ALJ recommends that I direct respondents to immediately cease operations at this unlicensed facility (see Hearing Report, at 95). Furthermore, the ALJ recommends that I direct respondents to properly close the facility, and immediately empty and close all of the tanks storing petroleum at the site in accordance with 6 NYCRR 613.9 (see id. at 94-95; see also Staff's Amended Complaint [March 24, 2008] [requesting, in part, that operations at the facility immediately cease and all of the tanks storing petroleum at the facility be immediately emptied]).

As the ALJ noted, the tanks, which are located alongside the Seneca River, pose a risk of significant environmental damage to the river (see Hearing Report, at 93 [ALJ noting the potential devastating result of a spill, considering that the facility sits on the bank of the Seneca River]; see also Tr at 110, 143, 176). Protecting the Seneca River and water resources of the State requires proper closure of the tanks and the facility.

Section 613.9 of 6 NYCRR establishes closure requirements for tanks. In this circumstance, where the facility is unlicensed and unauthorized to operate, and operations are to cease, each tank shall be closed in accordance with the

permanent closure requirements in 6 NYCRR 613.9(b)(1), including the following:

"(i) Liquid and sludge must be removed from the tank and connecting lines. Any waste products removed must be disposed of in accordance with all applicable State and Federal requirements.

"(ii) The tank must be rendered free of petroleum vapors. Provisions must be made for natural breathing of the [tanks] to ensure that the tank remains vapor-free.

"(iii) All connecting lines must be disconnected and removed or securely capped or plugged. Manways must be securely fastened in place.

"(iv) Aboveground tanks must be stenciled with the date of permanent closure.

"(v) Underground tanks must either be filled to capacity with a solid inert material (such as sand or concrete slurry) or removed. If an inert material is used, all voids within the tank must be filled.

"(vi) Aboveground tanks must be protected from floatation in accordance with good engineering practice"

(6 NYCRR 613.9[b][1][i]-[vi]).

Based on this record, the proposed remedial relief that Department staff has requested and the ALJ has recommended is appropriate and authorized. Accordingly, upon service of this decision and order upon respondents, respondents shall immediately cease operations at the MOSF. Within thirty (30) days of the service of this decision and order upon respondents, respondents shall submit a closure plan that complies with the above-referenced requirements of 6 NYCRR 613.9(b), in a form that is approvable by Department staff. The closure plan must also include a timetable that provides for the completion of closure activities within sixty (60) days of the service of this decision and order upon respondents. The time for the completion of the closure plan may be extended by Department staff upon good cause shown.

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

I. Department staff established that respondents, Supreme Energy, LLC, and Frederick Karam, individually, failed to obtain a license for the facility, in violation of Navigation Law § 174(1)(a).

II. Department staff established that respondents, Supreme Energy, LLC, and Frederick Karam, individually, failed to maintain adequate secondary containment at the facility, in violation of Navigation Law § 174(3).

III. Department staff established that respondents, Supreme Energy, LLC, and Frederick Karam, individually, failed to pay license fees and surcharges on barrels of petroleum product transferred to the facility, in violation of Navigation Law § 174.

IV. Department staff failed to establish that respondents Supreme Energy, LLC, and Frederick Karam, individually, violated the Order on Consent (Case No. 7-20040909-3) dated September 29, 2004.

V. Respondents Supreme Energy, LLC, and Frederick Karam, individually, being jointly and severally liable for the violation of failure to obtain a license to operate the facility in violation of Navigation Law §§ 174(1)(a) shall pay a civil penalty in the amount of two hundred thirty-four thousand nine hundred dollars ($234,900).

VI. Respondents Supreme Energy, LLC, and Frederick Karam, individually, being jointly and severally liable for the violation of failure to maintain adequate secondary containment at the facility in violation of Navigation Law § 174(3) shall pay a civil penalty in the amount of four hundred sixty-nine thousand eight hundred dollars ($469,800).

VII. Respondents Supreme Energy, LLC, and Frederick Karam, individually, being jointly and severally liable for the violations of failure to pay license fees and surcharges, in violation of Navigation Law § 174, shall pay license fees, surcharges, an additional 1% fee on nonpayment of monthly license fees and surcharges, a fine, and a civil penalty to the Department pursuant to Navigation Law §§ 174(7) and 192, in the amount of five hundred sixty-four thousand, eight hundred seventeen dollars ($564,817).

VIII. The entire amount of license fees, surcharges, additional 1% fee on nonpayment of monthly license fees and surcharges, fines, and civil penalties set forth in paragraphs V, VI, and VII, which amount to one million two hundred sixty-nine thousand five hundred seventeen dollars ($1,269,517), shall be paid within ninety (90) days of service of this decision and order upon respondents.

IX. The license fees, surcharges, additional 1% fee on nonpayment of monthly license fees and surcharges, the fines, and civil penalties set forth in paragraphs V, VI, and VII (and added together in paragraph VIII) shall be paid 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 shall be mailed or delivered to

Benjamin A. Conlon, Esq.
Associate Attorney
New York State Department
of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-5500

X. Upon service of this decision and order upon respondents Supreme Energy, LLC, and Frederick Karam, respondents shall immediately cease operations at the facility. Within thirty (30) days of the service of this decision and order, respondents Supreme Energy, LLC, and Frederick Karam shall submit a closure plan for the facility, in a form approvable by Department staff, which complies with the requirements of 6 NYCRR 613.9(b). The closure plan must also include a timetable for the completion of closure activities within sixty (60) days of the service of this decision and order upon respondents, provided, however, that the time for completion of the closure plan may be extended by Department staff upon good cause shown.

XI. All communications with Department staff concerning this decision and order shall be made to Benjamin A. Conlon, Esq., at the address set forth in paragraph IX.

XII. The provisions, terms, and conditions of this decision and order shall bind respondent Supreme Energy, LLC, and the members, agents, employees, successors, and assigns of Supreme Energy LLC, in all capacities, and respondent Frederick Karam, individually, and Frederick Karam’s agents, successors and assigns in all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
April 11, 2014

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

by

Supreme Energy Corporation,
Supreme Energy, LLC, and
Frederick Karam,

Respondents.

DEC #7-1780

Hearing Report

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Contents

SUMMARY

This hearing report recommends the Commissioner issue an order holding respondent Supreme Energy, LLC, liable for three of the four causes of action alleged in an amended complaint filed by the Staff of the Department of Environmental Conservation (DEC Staff). These violations occurred at a major onshore storage facility (MOSF) located at 7437 Hillside Drive, Baldwinsville, NY (the facility). This report further recommends respondent Frederick Karam should be held jointly and severally liable with Supreme Energy, LLC for the violations. Respondent Supreme Energy Corp. (or Supreme Energy Corporation) should not be held liable for any of the violations because it does not exist as a duly formed corporation (rather, it appears on several documents as an apparent typographical error).

The evidence in the record demonstrates respondent Supreme Energy, LLC, as operator and then owner of the facility, committed the following violations: (1) operated the facility without a license in violation of Navigation Law ("NL") §174 from May 2, 2007 until June 22, 2009; (2) failed to remit to the State license fees and surcharges collected from its customers in the amount of $149,125.21 in violation of NL §174(4) and title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (17 NYCRR) 30.9; and, (3) failed to maintain the secondary containment system at the facility in violation of 6 NYCRR 613.3(d) from September 2006 until June 22, 2009. DEC Staff failed to meet its burden of proof that Supreme Energy, LLC violated the terms of Order on Consent #7-20040909-3.

The record also demonstrates Frederick Karam is the sole member of Supreme Energy, LLC and responsible for its actions that resulted in the violations. Accordingly, this report recommends Mr. Karam be held jointly and severally liable for Supreme Energy, LLC's operation of the facility without a license and failure to maintain its secondary containment system. In addition, under the theory of piercing the veil of the LLC, Mr. Karam should also be held liable for the failure to remit the license fees and surcharges collected.

In their answer, respondents raise a single affirmative defense and claim the violations at the facility were the result

of DEC Staff's improper actions. This report recommends the Commissioner reject this affirmative defense.

For the violations proven, the Commissioner should impose a total payable civil penalty of $803,842.34 in his order. For the operation of the facility without a license, a civil penalty of $235,000 should be imposed. For failing to remit license fees and surcharges collected, the Commissioner should order the following: (1) the payment of the amount owed, plus a one percent per month additional fee (as authorized by 17 NYCRR 30.9(e)), for a total of $189,066.62; and (2) a civil penalty equal to two times the license fees owed ($97,387.86) which would total $194,775.72. An additional civil penalty of $5,000 should be imposed for the late filing of two license fee reports. Finally, for failing to maintain the secondary containment system at the facility the Commissioner should impose a civil penalty of $180,000.

In addition to finding liability, the imposition of the civil penalty, and the payment of license fees, surcharges and interest due, this report also recommends the Commissioner order the closure of the facility. The Commissioner should reject DEC Staff's request that Mr. Karam be forever banned from operating a DEC licensed facility in the future because no authority for this request is cited or exists.

PROCEEDINGS

On May 16, 2008, DEC Staff filed a Statement of Readiness, pursuant to 6 NYCRR 622.9, with DEC's Office of Hearings and Mediation Services (OHMS). Attached to this statement were: (1) a copy of the original notice of hearing and complaint dated June 27, 2007; (2) a copy of the first amended notice of hearing and complaint dated March 24, 2008; and (3) a copy of respondents' answer to the amended complaint dated March 27, 2008.

By letter dated May 19, 2008, the parties were informed that I was assigned to this matter. After several preliminary conference calls, a notice of hearing was issued on June 30, 2008. By papers dated July 1, 2008, DEC Staff filed a motion to amend its complaint for a second time. The adjudicatory hearing commenced on July 10, 2008 and continued on July 11, 2008, July 24, 2008, July 25, 2008, August 18, 2008, September 11, 2008,

and September 15, 2008. The hearing was held in abeyance pending a protracted discovery dispute.

By subpoena dated August 29, 2008, respondents' counsel sought the production of certain documents in the possession of DEC Staff's independent contractor, Aztech Technologies, Inc. (Aztech). A series of emails, a conference call, and face-to-face discussions were held in an attempt to get the parties to agree on the appropriate scope of discovery. These attempts were unsuccessful. DEC Staff then filed a motion to quash on September 17, 2008. The motion was opposed and respondents' final submission regarding this motion was received on September 29, 2008. By ruling dated November 3, 2008, I denied DEC Staff's motion and directed Aztech and DEC Staff to comply with respondents' subpoena within 30 days or produce a privilege log for documents withheld.

By documents dated December 2, 2008, Aztech produced a log of 36 privileged documents and the following day DEC Staff provided a privilege log listing 362 privileged documents. Almost immediately, respondents questioned whether the privileges claimed were proper. After a series of emails and conference calls, the dispute was not resolved. A schedule was established for respondents to make a motion for *in camera* review and for DEC Staff and Aztech to respond. A complete set of the withheld documents was received on March 10, 2009. By ruling dated April 15, 2009, I determined that most of the documents listed in the logs were improperly withheld and directed their disclosure no later than April 30, 2009.

DEC Staff did not appeal the April 15, 2009 ruling at that time. Rather, it provided all the documents to respondents' counsel and then appealed the ruling to the Commissioner as part of its closing arguments in this case. The hearing concluded on June 26, 2009. The record includes the transcript and 115 exhibits[1] which are listed in Appendix B. Closing briefs were

[1] At the hearing, 113 exhibits were offered. In respondents' closing brief, a motion was made to include an August 30, 2004 inspection report in the record as Exhibit 114. DEC Staff did not object and noted in its reply brief that this document is an attachment to Exhibit 56 that was placed in the record at the hearing. Since there is no dispute regarding this document, Exhibit 114 is included in the record. Exhibit 115 was also included in the record and is a copy of the same August 30, 2004 inspection report as provided by DEC Staff.

received on September 3, 2009 and reply briefs on September 18, 2009. The record closed on September 18, 2009.

APPEARANCES

DEC Staff appeared through Benjamin Conlon, Esq., and called the following four DEC Staff members as witnesses: Kevin Kemp, Richard Brazell, Diane Palmer, and Edward Moore.

The respondents appeared through Daniel Cohen, Esq. of the law firm Cohen & Cohen, LLP, 258 Genesee Street, Utica, NY 13502. The respondents called the following nine witnesses: Steven Terpening, Jonathan Dreimiller, Peter Paragon, Fil Fina, Eric Murdock, Patrick Leone, Robert Ward, Richard Neugebauer and Robert Blanchard.

Both respondents and DEC Staff called as a witness respondent Frederick Karam and he testified at length at the hearing.

In addition, Mr. Fina had his attorney present during his second day of testimony, June 22, 2009. He was represented by Marc Gerstman, Esq., 313 Hamilton Street, Albany, NY 12210.

FINDINGS OF FACT

1. Supreme Energy, LLC owns an oil storage facility located at 7437 Hillside Drive, Baldwinsville, NY. The facility has a storage capacity for petroleum in excess of 400,000 gallons. Due to its size, the facility is subject to the requirements of Navigation Law §174 and meets the definition of a Major Onshore Storage Facility (see e.g. Exh. 6).

2. The license issued for the facility to Alaskan Oil, Inc., with an expiration date of March 31, 2002, indicates that at the time the facility consisted of 15 aboveground tanks numbered 1 through 15. The largest tank at the facility is Tank 8 with a storage capacity of approximately one million gallons (Exh. 5).

3. On July 24, 2008, respondent Karam testified only tanks 6, 7, and 8 were being used (t.607). Tank 1 was not in use, but had not been cleaned with a small amount of product at the bottom of the tank (t. 631). Tank 2 was empty, cleaned

and open (t. 631). Tank 3 had been removed. Tanks 4 and 5 were not in use, but had not been cleaned (t. 632). Tanks 9 and 10 were empty, clean and open (t. 632). Tank 11 was an above ground, 1,000 gallon tank that was going to be emptied (t. 633).

4. The facility can receive petroleum product from a pipeline which is located on an adjacent parcel. The adjacent parcel is owned by Cold Springs Terminal, LLC (t. 137).

5. Supreme Energy Corporation (or Supreme Energy Corp.) does not exist, nor is there evidence that it ever existed. Rather, it is apparently a typographical error that was reproduced on many official records (t. 65).

6. Supreme Energy, LLC is a duly formed limited liability company and is listed on the New York State Department of State's website (t. 65).

7. Frederick Karam is a natural person who is the sole member of Supreme Energy, LLC. Mr. Karam also has interests in Cold Springs Terminal, LLC (t. 531), Buckskin Pipeline Construction, Ltd. (t. 788), and a farm (t. 1096).

8. The facility was apparently constructed in the mid-1930s and Tanks 1, 2, 3, 4, 5, 6, 7, and 8 were installed in December 1935. Tank 9 was installed in August 1990. Tanks 10-13 were installed in September 1993. Tank 14 was installed in November 1997. Tank 15 was installed in March 1999 (Exh. 5).

9. The first information in the record regarding ownership of the facility indicates that in approximately 1984 Alaskan Oil, Inc. purchased the facility from Corning Glassworks (t. 676).

10. In 1989, an oil spill was reported that affected the facility and two neighboring oil terminals. These terminals are known as Cold Springs Terminal, which is immediately adjacent to the facility, and Buckeye, which is located up the hill from the facility and has since been dismantled. The plume from this spill extends beneath the facility, and some monitoring wells record up to nine feet of petroleum on top of the water table. There is an ongoing cost recovery action in New York State Supreme Court (State of New York v. Stratus Petroleum Corp., et

al., Supreme Court, Albany County, J. Teresi, index #L000134-01).

11. In the winter of 1990-91, a secondary containment system was installed at the facility (t. 1429). The liner was composed of a material known as Geothane 5020 and was manufactured by a company called Futura (t. 1622). This is the liner that remains at the site today. Before this system was installed, no liner existed at the site (t. 1432).

12. In addition to the 1989 oil spill, several other spills have been reported at or around the facility, including: (1) a spill that occurred in 1993 (DEC spill #9311059);[2] (2) a spill reported in 2004 (DEC spill #7-0401142);[3] and (3) a spill reported in June 2008 (DEC spill #0890541).[4]

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[2] Spill #9311059 occurred on December 9, 1993 at the facility while it was owned by Alaskan Oil, Inc. It happened when a tank overflowed while receiving a shipment of jet fuel from the pipeline (t. 1282). This resulted in a spill of approximately 4,300 gallons (t. 693), which was entirely contained in the secondary containment liner. The spill was reported to DEC (Exh. 90) by Mr. Leone (t. 1301) on December 13, 1993. The spill report indicates DEC Staff member Tom Gragg visited the site on December 12, 1993, and the spill was closed on December 17, 1993.

[3] The record contains a Spill Record for a spill that was reported on May 3, 2004 (spill #7-0401142) (Exh. 6, p. 6). Reference to this spill is also found in the Facility Response Plan (Exh. 9, p. 46) where it is explained that the spill report listed the Oswego River as the site of the spill, in error. It should have reported the Seneca River. The Plan also stated that it "is understood that this spill is considered to be related to the documented long-term presence of free-phase gasoline in the subsurface beneath the Supreme and adjacent Stratus MOSFs." See also the Spill Prevention Control and Countermeasure Plan (Exh. 10, p. 2).

[4] DEC Staff member Kemp testified that during an inspection he noticed the holes in the bottom of Tank #3 and a rainbow sheen on some water in close proximity to the tank (t. 216). He did not take a sample of the substance or take steps to clean it up (t. 255). When he returned to his office, Mr. Kemp entered a spill report (#0890541) into the Department's database (Exh. 15)

13. Supreme Energy, LLC entered into a land contract to purchase the facility from Alaskan Oil, Inc. on September 24, 2003 (Exh. 33). The contract called for Supreme Energy, LLC to take responsibility for paying employees of the facility and its utilities. The land contract also provided that property taxes would become the responsibility of Supreme Energy, LLC on October 1, 2003 (Exh. 33). At the time of the land contract in September 2003, the secondary containment liner was in reasonably good condition and regularly maintained (t. 1430).

14. The record indicates that Supreme Energy, LLC began operations at the facility on August 1, 2004. (see discussion beginning on p. 18 of this document).

15. The terms of the land contract were modified to the effect of lowering the purchase price to $1 (t. 525, 1086), due to unforeseen environmental and compliance costs (t. 1473).

16. The deed for the site was transferred in December 2006 (t. 516, 1476).[5]

17. By letter dated April 22, 2009, the respondents informed Chevron that the facility would no longer accept deliveries via pipeline. The letter also stated that sixty days from the date of the letter, operations at the facility would cease (Exh. 113).

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although he did not actually see a spill or a release of petroleum (t. 131). He entered the quantity of the spill as zero (which he testified meant the quantity was unknown) (t. 132). Mr. Kemp testified that the basis for this report was the odor of petroleum in a monitoring well and a rainbow sheen he observed inside the secondary containment area which he concluded was petroleum (t. 133). Mr. Kemp later apparently contradicted himself when he stated that the existence of the sheen was not part of the reason for filing the spill report (t. 288). Mr. Terpening, an employee of Supreme Energy, LLC, testified the rainbow sheen observed by DEC Staff was caused by a two part polymer that was used to patch holes in the liner he applied in the days before DEC Staff inspected (t. 714-8).

[5] The deed for the facility is not in the record. Respondent Karam testified that he took title to the property (t. 516), but he meant Supreme Energy, LLC (t. 524).

18. No license to operate the facility was ever issued to Supreme Energy, LLC or Frederick Karam.

19. Consent Order #7-1780 (Exh. 7) was executed on September 29, 2004 and authorized operation of the facility, provided certain conditions were met. One of the conditions required the submission of a Corrective Action Plan, which was timely submitted. The consent order required DEC Staff to approve this plan before it was implemented. The first date in the record that DEC Staff informed the respondents to cease operations at the facility due to respondents' failure to comply with the consent order is was in a letter dated April 27, 2007 (see discussion p. 16 of this document).

20. The last evidence in the record that the facility was operating without a license is June 22, 2009 (Exh. 113).

21. Supreme Energy, LLC failed to timely file required monthly license fee reports for August 2004 and October 2007 (see discussion p. 22 of this document).

22. During the period beginning in August 2004 and ending in June 2008, Supreme Energy, LLC failed to pay license fees totaling $97,387.86 (see Appendix A of this document).

23. From August 2004 through June 2008, Supreme Energy, LLC failed to pay surcharges totaling $51,737.35 (see Appendix A of this document).

24. The interest accrued on the amounts owed by Supreme Energy, LLC totals $39,941.41 (see Appendix A of this document).

25. The total due to the State from Supreme Energy, LLC is $189,066.62 (see Appendix A of this document).

26. From the time Supreme Energy, LLC began operations at the facility (August 1, 2004) until the time Aztech Technologies, Inc. (Aztech), a DEC contractor, punctured the liner to place wells (September 2006), evidence in the record does not show that the respondents failed to maintain valid secondary containment for the tanks at the facility. From the time Aztech punctured the liner until the last day of testimony (June 22, 2009) evidence in the record does show that the respondents failed to maintain valid secondary containment for the tanks at the facility

(see, discussion beginning on p. 32 of this document).

27. Evidence in the record does not show that Supreme Energy, LLC failed to comply with the consent order. (see discussion beginning on p. 49 of this document).

28. Frederick Karam is the sole member of Supreme Energy, LLC and possessed the authority and responsibility to prevent the violations. (see discussion beginning on p.72 of this document).

29. Frederick Karam exercised his control of Supreme Energy, LLC to withhold the payment of license fees and surcharges collected from the customers of Supreme Energy, LLC which should have been remitted to the State on a monthly basis (see discussion beginning on p. 72 of this document).

DISCUSSION

This discussion addresses the following: (1) prehearing motions in this matter; (2) DEC Staff's appeal of the April 15, 2009 discovery ruling; (3) the identity of the respondents; (4) the liability of Supreme Energy, LLC; (5) the respondents' affirmative defense; (6) civil penalty and other relief; and (7) the personal liability of respondent Karam.

Prehearing motions

At the opening of the adjudicatory hearing on July 10, 2008, three preliminary motions were addressed. First, by petition dated July 1, 2008, DEC Staff sought to amend its amended complaint (dated March 24, 2008) to add a fifth cause of action. The second amendment was sought as a result of DEC Staff's June 27, 2008 inspection of the facility, at which time DEC Staff noted additional alleged violations relating to holes observed at the bottom of the recently removed tank 3 and an alleged oil spill. DEC Staff's motion to amend its amended complaint was the first item discussed when the hearing convened (t. 3). Respondents' counsel objected to the late amendment and requested additional hearing dates be scheduled to allow discovery and preparation to defend against the new allegation. DEC Staff rejected a proposed compromise which would have allowed three weeks for respondents to address the new allegation. I denied DEC Staff's petition to amend its amended

complaint (t. 13). The hearing proceeded based on the four unnumbered causes of action contained in the March 24, 2008 amended complaint.

DEC Staff made a second motion to amend its March 24, 2008 amended complaint. Specifically, DEC Staff moved to strike the phrase "since December of 2006" from paragraph 10 so that it reads: "Based on the Department's records, the Respondents have failed to submit monthly licensing fee reports, with payment of licensing fees, to the Department" (t. 47). Respondents' counsel did not object to this amendment, but stated that a factual question existed as to when Supreme Energy, LLC began operating the facility, and, thus, when the fees and reports first became due. Since there was no dispute regarding this DEC Staff amendment, I granted DEC Staff's motion (t. 49).

Also at the opening of the hearing, respondents' counsel made a motion to recuse DEC Staff counsel Conlon, because of Mr. Conlon's actions in directing that the holes cut in the secondary containment liner by Aztech (a DEC contractor) at the facility remain unrepaired. Respondents' counsel argued that Mr. Conlon could potentially be a witness in the matter and had a conflict of interest in representing DEC Staff (t. 50). Mr. Conlon contested respondents' motion. After conferring with the Chief ALJ by telephone, I denied the respondents' counsel's motion, but allowed the motion to be made again, later in the hearing after the record was developed (t. 55). Respondents' counsel did not renew this motion, nor was Mr. Conlon called as a witness.

DEC Staff's Appeal of Discovery Ruling

In its closing brief, DEC Staff includes an appeal from the April 15, 2009 ruling (pursuant to 6 NYCRR 622.10(d)(1)) that required DEC Staff to release certain documents pursuant to the respondents' discovery demand. Respondents do not address this appeal in their papers. This appeal is noted, but since it is addressed to the Commissioner and will be dealt with in his final decision in this matter, it is not addressed here.

Respondents

DEC Staff names three respondents in the caption of its amended complaint. They are Supreme Energy Corporation, Supreme

Energy, LLC, and Frederick Karam, individually. The parties agree that Supreme Energy Corporation does not exist and it is not listed on the New York State Department of State's (NYSDOS) website (t. 65). Respondents' counsel argues references to it are the result of a typographical error that occurs throughout the record and these references to it are a mutual mistake. In its closing brief DEC Staff argues: (1) Supreme Energy Corporation is an a/k/a that respondent Karam regularly used for the facility, including on the license application (p. 1); and (2) the use of the name Supreme Energy Corporation was a mutual mistake (p. 7). It is not clear if DEC Staff is seeking the inclusion of Supreme Energy Corporation as a respondent in the Commissioner's order and if so, on what grounds.[6] Based on the evidence in the record, the Commissioner should not find Supreme Energy Corporation liable for any of the violations alleged. Supreme Energy, LLC does exist and is listed on the NYSDOS website (t. 65). Supreme Energy, LLC operated the facility beginning on August 1, 2004 and took title to it in December 2006. Frederick Karam is a natural person and the sole member of Supreme Energy, LLC. He also has interests in a number of other companies including Buckskin Pipeline Construction, Ltd. and Cold Springs Terminal, LLC.

LIABILITY

In its amended complaint DEC Staff alleges four unnumbered causes of action. Specifically, DEC Staff alleges respondents: (1) operated an MOSF since at least August 2004 without a license in violation of Navigation Law (NL) §174; (2) failed to submit monthly licensing fee reports or pay any licensing fees in violation of NL §174 and §192; (3) failed to maintain valid secondary containment for the tanks at the facility in violation of the Navigation Law; and (4) failed to comply with a number of terms and conditions of an Order on Consent (DEC #7-20040909-3). Each is discussed below.

[6] DEC Staff has not withdrawn its allegations against Supreme Energy Corporation. In its closing brief, DEC Staff seems to be requesting an order finding all three respondents liable, but in its reply brief only asks for an order finding Supreme Energy, LLC and Frederick Karam liable.

First Cause of Action – operation of a facility without a license

The first unnumbered cause of action in DEC Staff's March 24, 2008 amended complaint reads:

> "7. According to the Department's records and inspections of the facility, Respondents have operated the Facility since at least August 2004, without a license issued pursuant to the NL by the Commissioner.
>
> 8. Respondents [sic] operation of the facility without a license is in violation of NL §174."

Navigation Law §174(1) reads in relevant part "[n]o person shall operate or cause to be operated a major facility as defined in this article without (a) a license issued by the Commissioner." The record indicates that the last license issued for the facility was issued to Alaskan Oil, Inc. on March 30, 2001 and expired on March 31, 2002 (Exh. 5). This license includes in bolded capital letters "**THIS LICENSE IS NON-TRANSFERABLE.**" There is no question of fact that no license to operate the facility was ever issued to Supreme Energy, LLC, or the other respondents.

In their answer, respondents deny the allegations in this cause of action (paragraphs 6 & 7). Respondents answer that operation of the facility was known by DEC Staff and operations were pursuant to the license issued to Alaskan Oil, Inc. while Supreme Energy, LLC's license application was pending. With respect to Frederick Karam, respondents answer that he is neither the owner nor operator of the facility.

A brief history of the application process in this case is helpful. Supreme Energy, LLC entered into a land contract with Alaskan Oil, Inc. on September 24, 2003 which provided for the future sale of the facility, all equipment and permits and licenses that may be transferable (Exh. 33). Alaskan Oil, Inc. had operated the facility since about 1984 (t. 1533), when it purchased the facility from Corning Glassworks (t. 675). The land contract also provided for Supreme Energy, LLC to assume responsibility for employee salaries and utilities on September 24, 2003 and property taxes on October 1, 2003. Despite this language, Alaskan Oil, Inc. continued to operate the facility for several more months and on August 1, 2004, Supreme Energy,

LLC began operating the facility.

DEC Staff member Brazell sent a letter dated August 16, 2004 to respondent Supreme Energy Corp. which stated the facility's license issued to Alaskan Oil, Inc. was not transferable and set a deadline of August 27, 2004 for the submission of a completed application or the emptying of the tanks and closure of the facility (Exh. 44).

On August 23, 2004, DEC Staff received an application for the facility. The application listed the facility owner as Alaskan Oil, Inc. (land contract with Supreme Energy) and Supreme Energy Corporation as the legal agent. Frederick Karam was listed as the contact for mailing correspondence (Exh. 6). This application was referred to DEC Staff member Brazell who did not review it, but forwarded it from DEC's Syracuse office to DEC's Albany office (t. 364).

On August 30, 2004, DEC Staff members Victor and Moore inspected the facility and completed a Major Oil Storage Facility Site Inspection report (Exh. 114). They also hand delivered a letter dated August 30, 2004, that DEC Staff member Brazell wrote to Mr. Karam stating the secondary containment at the facility was insufficient to contain a spill from Tank 8, which has a shell capacity of approximately one million gallons (Exh. 55). In his letter, Mr. Brazell stated that Tank 8 should not be used until it was reduced in size, or the capacity of the secondary containment was increased, or a consent order was executed with DEC Staff.

By Notice of Violation (NOV) dated September 7, 2004, DEC Staff member Victor identified ten violations: (1) the facility failed to have a current Spill Prevention, Control, and Countermeasures (SPCC) plan; (2) the facility failed to have a Facility Response Plan (FRP); (3) the Environmental Compliance Report (ECR) submitted with the license application was incomplete; (4) the five year in-depth secondary containment integrity inspection was overdue; (5) the ten-year inspection reports for the tanks at the site were overdue; (6) the secondary containment system contained a number of rips and tears around the base of the tanks; (7) the secondary containment system was too small; (8) the fill ports at the facility were not properly color coded; (9) four tanks did not have appropriate overfill protection systems; and (10) small tanks that had contained de-icing fluid had not been properly closed. The NOV stated that the most significant problems were

the need to repair, expand and certify the secondary containment area at the facility (Exh. 56). Attached to this NOV was a copy of the site inspection report (Exh. 114).

On September 29, 2004, an order on consent was executed (Exh. 7) to resolve the violations listed above. This order on consent listed the respondent as Supreme Energy Corporation; however, Mr. Karam signed the document as a member of an LLC. It seems that the caption of this document was a typographical error. This is supported by the fact that the October 4, 2004 cover letter enclosing the consent order from DEC Staff lists Supreme Energy, LLC as the addressee. The terms of the order on consent are discussed in greater detail in the discussion of the fourth cause of action, which alleges the respondents' failure to comply with this consent order.

DEC Staff concedes that the order on consent (while not explicitly stating the fact) authorized operation of the facility for a period of time, but argues the authorization to operate expired on December 31, 2004. DEC Staff argues the respondents failed to comply with paragraph I(B) of the consent order, which states:

> "B. Not later than September 30, 2004, Respondent shall submit to the Department for its approval a corrective action plan and schedule (the Plan) to ensure that the secondary containment system for Tank #8 complies with 6 NYCRR 613.3(c)(6). The plan shall include an engineered solution to provide Tank #8 with an adequate secondary containment volume (either dismantle the tank or expand the containment), to test the existing synthetic liner for strength and capability (in-depth integrity inspection), and a critical path schedule to complete all construction activities by December 31, 2004."

DEC Staff argues the consent order provided a bridge to compliance and when Supreme Energy, LLC failed to complete the tasks called for in the above-quoted paragraph by the December 31, 2004 deadline, the authorization to operate expired. DEC Staff argues in its briefs that this paragraph required all work to be done by December 31, 2004, but a reading shows the corrective action plan had to include a schedule for completing the work by that date and the plan needed to be approved by DEC Staff. As discussed in greater detail, below, relating to the fourth cause of action, Mr. Karam testified the corrective action plan and schedule were included in two letters from Lu

Engineers, dated November 15 and September 30, 2004 (t. 875, Exh. 13). DEC Staff does not contest the fact that these letters were the plan. There is nothing in the record that indicates DEC Staff ever responded to, approved or disapproved the plan in these letters. Because DEC Staff failed to respond to the plan, as required by the consent order, DEC Staff's argument that respondents' authority to operate expired on December 31, 2004 must fail.

Respondents' counsel argues alternatively that: (1) Supreme Energy, LLC was operating pursuant to Alaskan Oil, Inc.'s expired license; or (2) DEC Staff improperly withheld a license; or (3) Supreme Energy, LLC was operating pursuant to the consent order (Exh. 7).

Respondents' counsel's first claim that Supreme Energy, LLC was legally operating under the expired license issued to Alaskan Oil, Inc. is without merit. Respondents' counsel does not cite any legal authority for this claim, nor is there any. The license itself clearly states the license is not transferable (Exh. 5) and respondents were notified as early as August 16, 2004 that the license was not transferable (Exh. 44). They were also notified by NOV dated April 27, 2007 (Exh. 16). Mr. Karam testified he believed the license had been transferred because each month DEC Staff sent him a license fee report to complete with Alaskan Oil, Inc.'s license number on it and Supreme Energy LLC's name on it (t. 771). These license fee reports (Exh. 2B) were prepared by DEC Staff, beginning in May 2005, in the name of "Supreme Energy," but are not proof that a license was transferred.

Respondents' counsel's second claim that Supreme Energy, LLC was entitled to a license but DEC Staff improperly denied issuance is also without merit. In his closing brief, respondents' counsel argues an inspection report, dated August 30, 2004 (Exh. 114), recommends the issuance of a license provided the secondary containment was repaired within sixty days. This is a misreading of the inspection report which noted numerous other violations at the facility which were listed in the September 7, 2004 NOV (Exh. 56) and again in the consent order (Exh. 7). Had respondents brought the facility into compliance with applicable standards, a license may have been issued. However, DEC Staff's failure to prove a violation of the consent order on this record and respondents' counsel proving that the facility met the requirements for the issuance of a MOSF license are two different matters. As discussed in

detail below, Supreme Energy, LLC never submitted a five-year in-depth integrity inspection report for the secondary containment liner at the facility. This inspection report is necessary before a license could be issued. Accordingly, Supreme Energy, LLC was never entitled to a license and DEC Staff did not improperly deny it a license.

Respondents' third claim to be legally operating under the consent order (Exh. 7) has some merit. In his closing brief, respondents' counsel argues that Supreme Energy, LLC complied with the consent order. DEC Staff admits operation of the facility was authorized by the consent order, but the date at which time this authorization expired is in question. DEC Staff's claim Supreme Energy, LLC should have completed the construction identified in the corrective action plan by December 31, 2004 cannot be accepted. DEC Staff seems to be arguing that Supreme Energy, LLC should have undertaken construction activities in the absence of DEC Staff's approval as required by the consent order.

DEC Staff has met its burden of proof in demonstrating that Supreme Energy, LLC operated the facility without a license after its authorization to operate under the consent order expired. However, it is difficult to determine the exact date when this authorization expired because the record is silent as to whether DEC Staff ever responded to or approved the corrective action plan submitted, as required by the consent order. DEC Staff has known the facility has been operating and regularly visited to the facility. During his February 22, 2005 inspection of the facility, Mr. Kemp did not direct the facility to cease operations (t. 1719). There were many contacts between DEC Staff and the respondents over the years and the record does not contain a complete account of all of these contacts. The best date available in the record is date respondents received an April 27, 2007 letter (Exh. 16) which notified them that the facility was operating without a current and valid license.

DEC Staff has met its burden of showing Supreme Energy, LLC operated the facility without a license in violation of NL §174. However, for the reasons discussed above, I recommend the Commissioner find that the facility was operated pursuant to the consent order until DEC Staff notified the respondents such authority expired. The best date contained in the record is the date of receipt of a DEC Staff letter dated April 27, 2007. Assuming the letter was received five days after it was mailed, it is reasonable to assume the respondents received the letter

on May 2, 2007. The last date in the record that this violation continued is June 22, 2009. On this date DEC Staff member Kemp inspected the facility and he later testified he was told by the facilities manager that the facility still had product in the tanks. Therefore, on this record, it is reasonable to conclude this violation ended on June 22, 2009.

In conclusion, I recommend the Commissioner find the respondent Supreme Energy, LLC liable for the operation of the facility without a license from May 2, 2007 through June 22, 2009; for a total of 783 days.

Second Cause of Action – failure to pay license fees

The second unnumbered cause of action in DEC Staff's March 24, 2008 amended complaint reads:

> "9. According to the Department's records, Respondents have not submitted and/or paid any licensing fees[7] due pursuant to NL §174, since the Respondents began operations at the facility.
>
> 10. Based on the Department's records, the Respondents have failed to submit monthly licensing fee reports, with payment of licensing fees, to the Department [since December of 2006[8]]."

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[7] NL §174(4)(a) imposes a license fee of eight cents per barrel on petroleum products when delivered in State. NL §174(4)(b) imposes a four and one quarter cent surcharge per barrel. In Exhibit 24, DEC Staff's calculation of the amount due, the amount of license fees and surcharges due are separately calculated. However, in the amended complaint, DEC Staff's closing brief and reply brief, no mention is made of nor is a demand made for surcharges owed. Respondents' counsel does not raise this issue. For the purposes of this report, DEC Staff's demand for license fees includes the amount of the surcharges owed; however, technically, DEC Staff never requested the payment of the surcharges. However, to the extent necessary, I am conforming the pleadings to the proof in this instance.

[8] As discussed above, DEC Staff moved to delete the bracketed language at the opening of the hearing and this motion

In their answer, respondents admit Supreme Energy, LLC has not fully paid all licensing fees (paragraph 3) and deny it failed to submit the required monthly licensing fee reports (paragraph 5).

As discussed below, DEC Staff has demonstrated the respondents have only made partial payment to the State of the amount due. However, DEC Staff's calculation of the amount owed is not correct. In addition, DEC Staff has failed to show by a preponderance of the evidence that respondents failed to timely submit the required license fee reports in all but two instances. Before the discussion of these matters can proceed, a question of fact must be resolved concerning when Supreme Energy, LLC took control of the site and began to operate the facility.

Supreme Energy, LLC's operations at the site

Determining the date that Supreme Energy, LLC began operations is necessary to establish when it became responsible for the submission of monthly reports and liable for the payment of license fees and surcharges. Respondents' counsel asserts Supreme Energy, LLC began operations on September 1, 2004 (t. 445).[9] DEC Staff argues Supreme Energy, LLC began operations on two different dates, December 1, 2003 and July 1, 2004. The evidence in the record supports the conclusion that the correct date Supreme Energy, LLC began operations at the site is August 1, 2004.

DEC Staff cites the following evidence to support its claim that operations began on December 1, 2003. By letter dated February 13, 2006, Supreme Energy, LLC's office manager wrote to DEC Staff regarding unpaid license fees (Exh. 1). This letter asserts Supreme Energy, LLC began to lease the facility from Alaskan Oil, Inc. in December 2003. Exhibit 1 attaches copies of License Fee Reports for November 2003 (for Alaskan Oil, Inc.) and December 2003 (for Supreme Energy). Based on this information, DEC Staff member Diane Palmer testified she created a spread sheet (Exh. 24) showing Supreme Energy, LLC to be

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was granted.

[9] Respondent Karam testified Supreme Energy, LLC began operating the facility in August or September 2004 (t. 518).

liable for license fee reports and license fees and surcharges as of December 1, 2003. However, the License Fee Reports for November and December 2003 attached to Exhibit 1 are not the same as the official license fee reports in the custody of DEC Staff (Exhs. 2B pgs 4 & 5 and Exh. 25 pgs 1 & 2). Those attached to Exhibit 1 were signed by Robert Blake while those attached to Exhibit 25 were signed by Donald Neugebauer for Alaskan Oil, Inc. This discrepancy suggests that the copies of the license fee reports submitted with Exhibit 1 are incorrect, perhaps drafts, and should not be relied on. For this reason, the official copies of the license fee reports found in Exhibits 2 and 25 should be relied on. DEC Staff has not offered sufficient proof to conclude that Supreme Energy, LLC began operations at the site on December 1, 2003.

In its closing brief (p. 11), DEC Staff argues Supreme Energy, LLC began operations at the site on July 1, 2004. To support this claim, DEC Staff points to a July 22, 2004 letter from Alaskan Oil, Inc. (Exh. 32) which DEC Staff claims demonstrates that respondents are liable for license fees from July 2004 forward. The letter, however, does not state what DEC Staff asserts, rather it merely remits payments through June 2004 from Alaskan Oil, Inc. There is a notation on the June 2004 license fee report filed by Alaskan Oil, Inc. stating that as of July 1, 2004, Supreme will be responsible for paying the license fee; however, Alaskan Oil, Inc. apparently paid the license fees and surcharges through July 31, 2004 (Exh. 24).

The License Fee Reports produced by DEC Staff at the hearing (Exh. 25 & Exh. 2B) show these reports were submitted in the name of Alaskan Oil, Inc. through July 2004. The report for August 2004 has the name “Supreme” handwritten on it, but is unsigned (t. 486). The reports from September 2004 forward are all signed and in the name of Supreme Energy, LLC. In addition, the table prepared by DEC Staff member Palmer records the first payment by someone other than Alaskan Oil, Inc. in August 2004, the reference in the table is to “Supreme” (Exh. 24, p. 2, column J).

Based on the above, I recommend the Commissioner conclude that the December 1, 2003 date is incorrect as is the July 1, 2004 date. Because the August 2004 report has “Supreme” handwritten above a crossed out “Alaskan” and Supreme Energy, LLC paid this month’s license fees, it is logical to conclude that Supreme Energy, LLC began operations at the facility on August 1, 2004. Support for respondents’ counsel’s contention

that Supreme Energy, LLC began operations at the facility on September 1, 2004 is limited to the respondent Karam's equivocal statements and not supported by any documentary evidence.

Failure to submit monthly licensing fee reports

Every licensee is required to submit a monthly license fee report to DEC Staff no later than the 20th day of the next month (17 NYCRR 30.8).[10] DEC Staff asserts that Supreme Energy, LLC has repeatedly failed to timely file the required monthly licensing fee reports. Between August 2004 and June 2008, DEC Staff asserts Supreme Energy, LLC failed to timely file a total of 35 times: (1) September 2004; (2) October 2004; (3) November 2004; (4) January 2005; (5) March 2005; (6) April 2005; (7) May 2005; (8) June 2005; (9) July 2005; (10) September 2005; (11) October 2005; (12) November 2005; (13) January 2006; (14) February 2006; (15) March 2006; (16) April 2006; (17) May 2006; (18) June 2006; (19) July 2006; (20) August 2006; (21) September 2006; (22) October 2006; (23) November 2006; (24) December 2006; (25) January 2007; (26) February 2007; (27) March 2007; (28) April 2007; (29) May 2007; (30) September 2007; (31) October 2007; (32) November 2007; (33) January 2008; (34) March 2008; and (35) April 2008.

The evidence offered by DEC Staff at hearing of these alleged violations included the testimony of DEC Staff member Palmer, photocopies of the monthly license fee reports in DEC's possession (Exhs. 2B & 25) and a summary table prepared by Ms. Palmer (Exh. 24). In addition, DEC Staff submitted hundreds of unsigned form letters from DEC Staff member Swank to Supreme Energy, LLC (Exh. 4).[11]

[10] There is no question that none of the respondents ever received a license to operate the facility, and using a narrow definition of that term, could not technically be licensees. However, for the purposes of this discussion, a broader definition of licensee (to include persons with a license, persons operating pursuant to a consent order, and persons who should have had a license) is used.

[11] These form letters were sent at monthly intervals to Supreme Energy, LLC and document the alleged failure to file license fee reports. While I have not reviewed all of these letters in detail (DEC Staff entered a stack of these form letters nearly 5 inches tall into the record) a cursory review

Exhibit 25 contains photocopies of the License Fee Reports submitted by the operators of the facility from November 2003 through June 2008. The first nine pages are reports submitted by Alaskan Oil, Inc. (11/03 - 7/04) and not relevant to this proceeding. The report for August 2004 is unsigned, but lists "Supreme" as the name of the company submitting the report. The remainder of the reports (9/04 - 6/08) are all signed and dated in the name of "Supreme Energy" or "Supreme Energy LLC". The signatures at the bottom of the reports certify that the information in the reports is true, correct and complete. Each of the reports signed in the name of Supreme Energy, LLC is dated by the signatory and only two of these reports are dated more than twenty days after the close of the previous month (8/04 & 10/07).

Most of the licensing fee reports filed by the respondent Supreme Energy, LLC from August 2004 through June 2008 are date stamped; some have multiple date stamps with different dates (e.g., 8/07). Some have other dates indicating faxing or email dates (e.g., 1/07). Some reports also appear to have handwritten notes on them regarding check numbers and some have "duplicate" written on them. Some of the reports also appear to have obliterations on them and in some cases the photocopies show only parts of information contained at the edge of the pages. Some of these reports also include a note between lines 16 and 17 indicating that certain previous reports have not been filed.[12]

At the hearing, Ms. Palmer testified that the date stamps on the reports indicate the date each report was received (t.

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shows that at least some of these letters are demands for reports that were already submitted by the respondents. For example, the license fee report for September 2004 in the record (Exh. 25, p. 11) indicates a signing date of October 20, 2004 and date stamp of October 29, 2004. This information is also reflected in DEC Staff's summary chart (Exh. 25). However, DEC Staff sent over thirty different letters to Supreme Energy, LLC claiming the report had not been filed. These letters begin in December 2004 and were sent regularly through May 2008. For this reason, I conclude these letters should not be relied upon.

[12] These notes do not appear to be correct. For example, on the June 2008 report, a total of 30 reports are listed as not being submitted for the facility. This is contradicted by the information on the reports in Exhibit 25.

490). Using these date stamps, she determined if the license fee report was timely submitted or not and entered this information in Exhibit 24 (columns N & O). This is the basis for DEC Staff's assertion that Supreme Energy, LLC failed to timely submit license fee reports thirty-five times.

On cross examination Ms. Palmer testified that she may have received some reports by e-mail from Mr. Karam and if she had, she would not have date stamped them (t. 502-3). No further explanation was provided of this statement or where these emailed documents might be. In addition, Ms. Palmer could not explain notations on certain license fee reports (e.g. January 2007) indicating they had been emailed in a timely manner, nor could she explain obliterations, likely made by DEC Staff (t. 495). Ms. Palmer also testified that she did not know if any of these documents had ever had a different date stamp on them which had been obliterated (t. 497). Based on these statements and the poor quality of the photocopies in Exhibit 25, I conclude that the date stamps on the reports should not be relied upon as proof the reports were not timely filed. In addition, it is not explained in the record why ten of the eleven license fee reports submitted between August 2004 and June 2008 that DEC Staff asserts were timely, have date stamps later than 20 days past the end of the prior month.

Because the date stamps on the license fee reports are unreliable, the only other basis to determine if these reports were late filed is the dates of the signatures on the reports. These signature dates are all within the twenty day window allowed by law except in two instances. Accordingly, I find that DEC Staff has met its burden of proof respondent Supreme Energy, LLC failed to timely submit a license fee report for August 2004 and October 2007.

Failure to pay licensing fees

The operator of a facility collects a license fee based on throughput. The license fee is the total of the $0.08 fee per barrel of throughput and the $0.0425 surcharge per barrel (NL §174(4)(a) & (b)). This amount is collected by the facility operator and should be transmitted to the State. In this case, DEC Staff alleges Supreme Energy, LLC failed to remit most of the license fees and surcharges it collected.

Section 174 of the Navigation Law states "[n]o person shall

operate or cause to be operated a major facility as defined in this article without ... (b) without paying a license fee if such fee is required by the administrator pursuant to the provisions of paragraph (a) of subdivision four of this section". Section 174(5) of the Navigation Law requires these fees to be paid in full on or before the twentieth day of the following month.

Respondent Karam testified that Supreme Energy, LLC charged its customers, Shell (Exh. 34) and Chevron, a fee for storing petroleum products at the facility and included in this fee was the license fee and surcharge (t. 537). Mr. Karam admitted Supreme Energy, LLC had not paid the entire amount of license fees and surcharges it collected to the State of New York (t. 538). Mr. Karam explained some of the license fees and surcharges that were collected were spent on the following unexpected environmental costs at the facility including: (1) approximately $40,000 on repairing the dike at the facility (t. 540); and (2) over $6,000 for testing petroleum in the plume beneath the facility (t. 541). This is part of respondents' affirmative defense and is discussed later in this report.

In its closing brief, DEC Staff alleges respondents owe a total of $191,772.28 in license fees, surcharges, and interest as of July 23, 2008. Respondents' counsel does not dispute that a portion of the license fees collected were not remitted to the State, but did not provide any calculation at the hearing.[13]

[13] On September 1, 2009, after the hearing concluded and before closing briefs were due, I requested the parties to provide the total amount of license fees each party believed was due. The intent was for: (1) DEC Staff to correct its calculations to show that Supreme Energy, LLC did not begin operations at the site on December 1, 2003 and correct other mathematical errors in Exhibit 24; and (2) respondents' counsel to offer his own calculation. In response, DEC Staff did not correct Exhibit 24; rather, it updated its calculations as an attachment to its brief and included monies due from July 2008 through May 2009 for a total of $243,484.87 (there are several additional errors in the undated chart, including inconsistencies in the calculation of interest, column G). Since there is no evidence in the record for these months other than the conclusory statements in the attachment to DEC Staff's brief, this additional amount is rejected. Respondents' counsel did not provide a calculation of the amount owed in his briefs.

As evidence of the amount of license fees and surcharges due, DEC Staff offered the testimony of DEC Staff member Palmer and Exhibits 24 and 25. Ms. Palmer testified that using the information on the license fee reports (Exh. 25) supplied by the operator of the facility, she prepared a spreadsheet which calculated the amount of license fees, surcharges and interest owed (Exh. 24, column M). Ms. Palmer also testified that as of the date of her testimony, July 23, 2008, the total due from the facility was $191,772.28. However, Ms. Palmer's calculations are not correct for the following two reasons: (1) she included license fees owned for the period between December 1, 2003 and July 31, 2004 when the facility was operated by Alaskan Oil, Inc.; and (2) there are several errors in Exhibit 24, some of which she acknowledged during her testimony and others which become apparent on further analysis (for example, interest is improperly charged for several months, including 9/07, 10/07 and 11/07).

Appendix A, attached to this report, recalculates the amount of license fees, surcharges and interest owed by respondent Supreme Energy, LLC for the period of August 1, 2004 through June 31, 2008. The information in Appendix A is derived from the amount reported by Supreme Energy, LLC in its monthly reports. These amounts are not challenged by DEC Staff. The interest rate is calculated at one percent per month, as authorized by 17 NYCRR 30.9(e) using July 2008 as the date for calculating when the interest accrued (this is the last date of testimony regarding the late payment of license fees and surcharges). This information is summarized below.

License Fees Owed	$97,387.86
Surcharges Owed	$51,737.35
Interest Owed	$39,941.41
Total Owed	$189,066.62

Based on the information contained in Appendix A, the Commissioner should conclude that the total amount of license fees and surcharges owed is $149,125.21; when interest is included the total becomes $189,066.62.

Third Cause of Action – failure to maintain secondary containment

The third unnumbered cause of action in DEC Staff's March 24, 2008 amended complaint alleges:

> "12. Based on the Department's inspections and records, Respondents have failed to maintain valid secondary containment for the tanks at the facility.
>
> 13. Respondents' failure to maintain secondary containment is a violation of the MOSF requirements of a facility operating in NYS and is in violation of the Navigation Law."

In the paragraphs above, DEC Staff does not specify exactly which MOSF requirements or sections of the Navigation Law or its implementing regulations respondents are alleged to have violated. No reference to the sections of law alleged to have been violated are found in DEC Staff's closing brief, or reply brief, either. Presumably, DEC Staff is referencing Article 12 of the Navigation Law and regulations promulgated pursuant thereto relating to the maintenance of secondary containment systems, 6 NYCRR 613.3(d). This section requires the owner or operator of a facility to keep the secondary containment system in good working order.

It is not clear exactly what DEC Staff's theory of liability is regarding this cause of action. During the hearing, DEC Staff introduced evidence regarding three possible theories. In its closing brief, DEC Staff argues that the secondary containment system at the facility was not properly maintained during the entire time Supreme Energy, LLC was operating the facility. This is not proven on this record. There are two other possible violations that DEC Staff may be asserting in this cause of action: (1) that the respondents failed to construct a large enough capacity for the secondary containment at the facility; or (2) that the respondents did not conduct an in-depth five-year inspection of the liner. Each of these is discussed below.

Condition of the secondary containment system

A large portion of the hearing record is devoted to

evidence detailing the condition of the secondary containment system at the facility. The secondary containment system consists of several components. The area between the tanks and the sides of the facility is covered in a liner which serves as part of the secondary containment system. Because many of the tanks are older, the tanks sit directly on the ground and the tank bottoms serve part of the secondary containment system. DEC Staff alleges that the secondary containment system at the facility was not properly maintained. Three specific problems are mentioned in the record: (1) the condition of the liner; (2) holes in the base of tank 3; and (3) the location of a stormwater pipe. This information is summarized below.

History of the liner prior to August 1, 2004. There is only a little information in the record regarding the history of the facility. The oldest and largest tanks at the facility were installed in December 1935 (tanks 1 - 8) (Exh. 5). In 1984 or 1985, Alaskan Oil, Inc. purchased the facility from Corning Glassworks (t. 676) and operated the facility until August 1, 2004. Alaskan Oil, Inc. installed a secondary containment liner at the facility in the area around the tanks in 1990 or 1991 (t. 1429, 1622). The liner is a fast-set urethane, called Geothane 5020, which was manufactured by a company called Futura Coatings (t. 1621-2). When the liner was installed it was expected to have a minimum ten year life span (t. 1647). Maintaining this type of liner can be difficult because liner cracks and holes occur frequently (t. 1735) and patching the liner is part of normal maintenance (t. 1629). Ice falling from the tops of tanks can pierce the liner (t. 905) and minor repairs are needed after every winter (t. 656). Repairs to the liner can only be done when the ambient temperature is above 60°F (Exh. 89) and it is not raining (t. 1447), unless a tent and heater are used (t. 763).

Richard Neugebauer, President of Alaskan Oil, Inc., testified that from the time of installation until 1997, the liner was properly maintained, regularly inspected and holes were diligently repaired (t. 1323). In fall 1997, Land Tech, Inc., at the direction of DEC Staff, punctured the liner at the facility for the purpose of installing monitoring wells (t. 1624-5). The holes in the liner were promptly repaired, in the next day or two (t. 1296, 1453) by a second DEC contractor at no cost to the facility. Apparently, the liner at this facility is the only one that has been intentionally pierced for remediation purposes (t. 1630). Mr. Neugebauer testified that from the time the liner was installed until the land contract (Exh. 33) with

Supreme Energy, LLC was executed on September 24, 2003 the liner was in reasonably good repair (t. 1430) and he could not recall any violations at the facility (t. 1431).

DEC Staff member Brazell, DEC's Region 7 Regional Spill Engineer since 1992, had a different recollection of the condition of the liner while the facility was operated by Alaskan Oil, Inc. Mr. Brazell testified that he had been at the facility 35 or 40 times (t. 327), and 10 of these visits occurred after Alaskan Oil Inc. ceased operations at the site (t. 357). Mr. Brazell testified he identified defects relating to rips and tears in the liner on visits to the facility while it was operated by Alaskan Oil, Inc. (t. 329) but he never took photographs of the holes (t. 385). He testified he may have taken notes (t. 385) but after a search, DEC Staff counsel reported none were to be found (t. 412). Mr. Brazell testified the license for Alaskan Oil, Inc. should not have been renewed if tears existed in the liner unless there was a special permit condition requiring repairs (t. 390). Mr. Brazell acknowledges signing Alaskan Oil, Inc.'s last license renewal on March 30. 2001, and no special condition exists in this license regarding repairs to the secondary containment liner (Exh. 5). Mr. Brazell stated in some cases, after a license was reviewed by DEC Staff in Albany, he would sign the license without reviewing it (t. 395).

Condition of the liner from August 1, 2004 through September 2006. The relevance of this time period is that on August 1, 2004 Supreme Energy, LLC began operations at the facility and in September 2006, Aztech (DEC Staff's contractor) cut holes in the secondary containment liner at DEC Staff's direction.

On August 30, 2004, DEC Staff members Moore and Victor inspected the facility and prepared a "Major Oil Storage Facility - Site Inspection Report" which noted rips and tears discovered in the secondary containment area around some tanks (Exh. 114). As a result of this inspection, on September 7, 2004, DEC Staff member Victor issued a Notice of Violation (NOV) for the facility which stated that the secondary containment system contained a number of rips and tears and a portion of the liner had pulled away from the concrete wall (Exh. 56 & 115). These violations were noted in the Consent Order (Exh. 7, paragraph 18). The Consent Order also required: (1) the filing of a Corrective Action Plan and a schedule to correct problems with the secondary containment system; and (2) performance of an

in-depth integrity inspection (Exh. 7, paragraph I(B)). Compliance with the consent order is addressed below, in the discussion of the fourth cause of action.

Six witnesses testified at the hearing about the condition of the liner during this period. Only one document was introduced, field notes of a DEC inspection (Exh. 60), into the record regarding the condition of the liner at this time. No photographs of the liner during this time are in the record.

After the Consent Order was executed in September 2004, Mr. Neugebauer (President of Alaskan Oil, Inc. which owned the facility at this time) testified that he helped Mr. Karam apply several patches to the liner to demonstrate how to repair the liner and left Mr. Karam to finish the other patches (t. 1476). Mr. Neugebauer also testified he sold a machine to Mr. Karam for repairing holes in the liner (t. 1431). Mr. Karam testified he repaired every tear and rip in the liner at that time (t. 896). Mr. Karam testified the photographs taken in July 2008 show some of the repairs that were made in 2004 (Exh. 20, photo 19; Exh. 61). He further testified that DEC Staff never informed him that these repairs were not satisfactory (t. 903).

DEC Staff member Kemp testified on the first, second and final day of the hearing and his testimony is confusing and perhaps contradictory, as discussed below. By email dated December 29, 2004, Mr. Kemp was requested to visit the facility by DEC Staff member Coriale to check compliance with the consent order (Exh. 83).[14] On February 22, 2005, Mr. Kemp inspected the facility[15] and took field notes which did not indicate any problems with the condition of the liner (Exh. 60) or that the consent order had not been complied with (t. 1701). Mr. Kemp stated he did not believe Exhibit 60 had been shared with Mr.

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[14] Mr. Kemp testified that he recalled this request to have occurred in mid-2005 (t. 156).

[15] This is apparently Mr. Kemp's first inspection of the facility (t. 157). Mr. Kemp testified that he had inspected the facility on more than one occasion (t. 119), but could not remember the dates of the other inspections (t. 120, 303). Apparently, all his testimony about the condition of the liner in 2005 is based on this February 22, 2005 inspection, because no reference to any other inspection in 2005 or 2006 is in the record.

Karam at that time (t. 1708). Mr. Kemp testified after this inspection, he recalled the following: (1) issuing either a formal notice of violation (t. 1697) or some informal notification that the consent order had not been complied with (t. 1698),[16] or (2) that he just had exchanged emails between himself and his boss (t. 159). Mr. Kemp testified he was accompanied on the 2005 inspection by Mr. Brazell (t. 160). Mr. Kemp provided two accounts of the condition of the liner in 2005. On his second day of testimony Mr. Kemp testified he observed the liner was in extremely poor condition, including holes and tears scattered throughout the facility, especially at the bases of certain tanks (t. 236) and that he had never been to the facility and not identified rips and tears in the liner (t. 281). On the last day of the hearing, during his rebuttal testimony, he stated during this 2005 inspection he could not recall seeing any rips, tears, or penetrations in the liner. There may have been snow and ice on the ground and he would have noted any tears, rips or penetrations in the liner, if he had observed them (t. 1707), but none were recorded on his field notes (Exh. 60). There may be an explanation for these two accounts, Mr. Kemp may have conducted a second inspection of the facility in 2005, but there is nothing in the record that helps reconcile these two seemingly contradictory statements. Because of this, I recommend the Commissioner give no weight to Mr. Kemp's testimony regarding the condition of the liner during this time.

The second DEC Staff member, Mr. Brazell, testified that he had been to the facility perhaps ten times since Supreme Energy, LLC began operations at the site (t. 357) and on two occasions conducted inspections, one on February 22, 2005 and one on June 27, 2008 (t. 160, 359). His testimony regarding the condition of the liner during his visits to the site is not entirely clear. He testified that he had identified defects in relation to rips or tears or other issues relating to the liner while Alaskan Oil, Inc. was operating the facility (before August 1, 2004)(t. 329). He then testified that subsequent to the transfer in ownership of the facility (December 2006), he noticed rips or tears or other issues in relation to the liner (t. 330). This is not surprising since Aztech began cutting holes in the liner in September 2006. He continued that on visits after December 2006, he noted the same problems he had observed on previous visits (t. 332) and that these problems

[16] There is nothing in the record to confirm Mr. Kemp's recollection.

continued until June 27, 2008 (t. 333). This is the extent of Mr. Brazell's testimony regarding the condition of the liner during this time and it does not specifically address the condition of the liner for the period between the time the consent order was executed and the time Aztech cut holes in the liner.[17]

DEC Staff member Moore testified that he inspected the facility in summer 2006 (t. 1734). DEC Staff counsel suggested August 2006 (t. 1738). In his testimony, Mr. Moore described the secondary containment liner as "one of the worst maintained secondary containment systems" he had ever seen (t. 1734). There are several problems with Mr. Moore's testimony in the record. First, Mr. Moore testified that this inspection was his one and only site visit (t. 1745); however, the record indicates Mr. Moore inspected the site on August 30, 2004 (Exh. 114) and, perhaps, April 25, 2007 (Exh. 12)[18]. More importantly, Mr. Moore testified that while on his inspection in August 2006, he spoke to Mr. Karam about repairing the holes cut in the liner by Aztech (t. 1741).[19] However, Aztech did not begin its work at the site until September 2006 and finished in February 2007. Given these inconsistencies with Mr. Moore's recollection as to the date of his inspection(s), I recommend the Commissioner give no weight to Mr. Moore's testimony.

The last witness to testify about the condition of the liner at this time is F. L. Fina, a principal with Aztech, who

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[17] There is some hearsay evidence in the record regarding Mr. Brazell's statements about the condition of the liner. Specifically, Mr. Kemp testified that on the February 22, 2005 inspection of the facility, Mr. Brazell had identified defects in the liner that were there on his previous visits (t. 87). Respondents' counsel objected to this hearsay, and I sustained the objection. Mr. Brazell was not asked about these statements during his subsequent testimony.

[18] Exhibit 12 is a site inspection report. The space for the date of the inspection is blank. Mr. Kemp testified that this report was prepared on April 25, 2007 (t. 119-120). Mr. Kemp later testified that he filled the form out about August 7, 2006 (t. 207).

[19] Mr. Karam also recalled this conversation and testified that it occurred in 2006 (t. 1777) and 2007 (t. 946).

first visited the facility at some point in 2006; his recollection of the date is not clear[20] (t. 1166). Aztech is a standby contractor for DEC Staff pursuant to contract #D400302 (Exh. 104) and the purpose of Mr. Fina's visit was to become familiar with the site in anticipation of remediating the petroleum spill beneath and around the site. During this visit, Mr. Fina observed the liner was in poor condition (t. 1571) and noted problems with the secondary containment, specifically the concrete block retaining wall and the condition of the liner (t. 1232). He stated when he walked on the liner, it would cause water beneath the liner to spray up on the sides of the tank (t. 1191) because the liner was not sealed to some tanks (t. 1232). Mr. Fina's testimony only addresses the condition of the liner on a single, unidentified day. It should also be noted, that information in the record indicates the respondents Supreme Energy, LLC and Mr. Karam are suing Aztech for $16 million in damages related to Aztech's damage to the liner and the rest of the facility. Because of Mr. Fina's sketchy recollections and obvious self-interest in establishing problems with the liner before his company began cutting holes in the liner, I recommend the Commissioner give Mr. Fina's testimony little or no weight.

Mr. Karam also testified that before Aztech drilled its holes in September 2006, he was not aware of any tears or holes in the liner (t. 937). He also stated that after Mr. Kemp's February 2005 inspection and before Aztech began work at the site several cracks or holes developed, but were repaired when the weather permitted (t. 940).

Based on the above, DEC Staff has not met its burden of proving by a preponderance of the evidence that there were holes, rips, tears or other defects in the liner from the time the consent order was executed until Aztech began cutting holes in the liner. The testimony of DEC Staff member Kemp appears contradictory; the testimony of Mr. Brazell is unclear; and the testimony of Mr. Moore is not consistent with other evidence in the record. The only other evidence is the testimony of Mr. Fina, which is not sufficient to prove DEC Staff's case on this point. Accordingly, I recommend the Commissioner not find that the respondents failed to maintain the secondary containment liner prior to September 2006.

[20] Mr. Fina's recollections are sketchy and he could not recall answers to a number of questions, either during his testimony on September 11, 2008 or June 26, 2009 (e.g. t. 1176, 1179, 1186, 1205, 1234, 1567, 1573, 1584, 1585, 1588, etc.)

Condition of the liner from September 2006 through February 2007. This is the time during which Aztech was installing the soil vapor recovery system (SVRS) inside the secondary containment area at the facility. This installation required the cutting of holes in the secondary containment liner. There is no question of fact that the secondary containment liner was not maintained during this time frame. The record contains the following information.

After discussions with DEC Staff and receiving the written permission of Mr. Karam (t. 916),[21] Aztech placed 14 monitoring wells inside the secondary containment area at the facility beginning in September 2006 (t. 347). To install the wells, Aztech cut a square of material from the liner (t. 1182) and then lowered a small track drill rig onto the liner (which weighed approximately 7,000 lbs) via crane (t. 1215). Blocking and cribbing was used in an effort to protect the liner and Aztech's employees were instructed to do as little damage as possible to the liner (t. 1215). Mr. Fina testified that all soils were treated as contaminated and drummed and removed from the site (t. 1233) via crane (Exh. 22). Mr. Karam disputes this and stated debris was left on the liner by Aztech.[22]

Mr. Karam testified (t. 927) that in addition to the holes intentionally cut in the liner, Aztech caused other damage to the liner including: using sharp edged six-inch by six-inch pieces of wood as blocking (Exh. 59, photo 8); placing the rig directly on the liner (Exh. 59, photos 5, 7); placing augers on the liner (Exh. 59, photos 5, 9); dropping barrels on the liner; and placing pipes on the liner (Exh. 59, photo 6). The close proximity of the drill rig to the tanks also caused the liner to be pulled away from the edge of the tanks (t. 930). Aztech

[21] This written authorization was not introduced into the record of the hearing.

[22] Mr. Karam made this statement during the site visit, before he testified, and his statements were not made under oath. The statements were made within the hearing of DEC Staff and following the site visit, Mr. Brazell requested photos from Aztech of the work (Exh. 22) and made reference to Mr. Karam's statement during the site visit (t. 348). Mr. Terpening, an employee of Supreme Energy, LLC, also testified that Aztech left dirt on the liner (t. 761).

finished its construction of the SVRS in late January or early February 2007 (t. 404). Aztech did not repair the damage to the liner and left the areas around the well casings unsealed.[23] There is nothing in the record indicating that discussions occurred before Aztech cut the holes in the liner regarding the repair of these holes.

Based on the above discussion, DEC Staff has met its burden of proving by a preponderance of the evidence that the secondary containment liner was not properly maintained while Aztech was installing the SVRS at the facility.

Condition of the liner from February 2007 through June 2007. This is the time after Aztech had installed the SVRS until DEC Staff directed Aztech not to repair the liner. After Aztech cut the holes in the liner and installed the wells (Exh. 23), Mr. Fina discussed with DEC Staff whether or not to repair the liner (t. 1188). The record contains several internal DEC emails, which are not complete (Exh. 105). In a May 4, 2007 email, Mr. Fina stated he was getting quotes for the repair of the liner and that he would get it repaired "ASAP" (Exh. 105, p.2). Another email sent on May 18, 2007 by Mr. Fina to DEC Staff member Brazell asked what to do about the liner (Exh. 105, p. 6). Mr. Fina testified that DEC Staff member Brazell was of the opinion that the liner should not be repaired because he felt that it was not adequate, due to other damage in the liner (t. 1188). Mr. Fina's recollection seems to be contradicted by Mr. Brazell's email of May 18, 2007, which suggested repairing the liner (Exh. 105, p. 5). Mr. Fina testified that repairing the holes Aztech created would not have stopped a release from the facility (t. 1188). According to Mr. Fina, the problems with the liner at this time included that the liner was not sealed to a number of tanks, there was a considerable amount of water beneath the liner in areas, and there was a considerable amount of organic debris on the liner (t. 1190).

Mr. Fina obtained quotes to repair the holes created by Aztech at the facility in mid May 2007. One company refused to

[23] It is not clear in the record why the "Guidelines on Installation of Monitoring Wells" found in DEC guidance document DER-11 (Procedures for Licensing Onshore Major Oil Storage Facilities) were not followed (see Appendix, B, Attachment 3(e), p. 26). The respondents' counsel also inquired as to why a concrete pad was not installed around the well casing (see Appendix B, attachment 3(e)).

quote a price, the other two came in at $9,860 and $18,975 (Exh. 85). Mr. Fina stated that one of the bidders would only certify his patches due to concerns about the condition of the liner (t. 1237) and the contractor who refused to offer a price quote did so because of the disrepair of the liner (t. 1238). After internal discussions regarding whether to authorize Aztech to repair the liner at the facility (Exh. 105), by email dated May 23, 2007, DEC Staff directed Mr. Fina and Aztech not to repair the liner (Exh. 84). The decision not to repair the liner seems to have been made by DEC Staff in late May 2007 and seems to have been made by DEC Staff counsel Conlon, who, at that time, had not been to the facility (t. 73).[24]

Several reasons for the decision not to repair the liner were mentioned in the record, including the following: (1) based on discussions regarding the 1997 penetrations,[25] DEC Staff

[24] Respondents' counsel points out that the contract between Aztech and DEC states "The Contractor [Aztech] will be responsible for correcting damage caused by the Contractor during investigation and/or remediation operations, and such responsibility is not limited by the types or amounts of insurance provided hereunder" (Exh. 104, p. 14, schedule 2, article 1, paragraph d).

[25] In the late 1990s, when Alaskan Oil, Inc. operated the facility, DEC Staff used a company called Land Tech, Inc. to drill monitoring wells through the secondary containment liner at the facility as part of the ongoing investigation into contamination at the site. Drilling these wells required putting holes in the liner. By site access agreement dated February 22, 1996, Land Tech, Inc. agreed to repair any damage caused to the facility in the course of the investigation (Exh. 97). In November 1996, DEC Staff requested information on repairing the liner after penetrations were made (Exh. 87). In December 1996, it was recommended that any penetrations be postponed until the ambient temperature was above 60°F (Exh. 89). In the fall 1997 (t. 1290), the liner was penetrated by Land Tech, Inc. (t. 1452) for the purposes of installing monitoring wells at the facility (t. 1624-5). The holes in the liner were then repaired the next day (t. 1296, 1623) or two (t. 1453) at no cost to the facility. Mr. Leone, Alaskan Oil, Inc.'s consultant, testified that when the penetrations were made in 1997, the liner was properly maintained, regularly inspected and holes in the liner were diligently repaired (t. 1323).

understood that repairs to the liner could only be undertaken by the manufacturer or an authorized representative (t. 323, 369); (2) the liner was in such poor condition generally, that repairing the holes would be a waste of money; and (3) since Supreme Energy, LLC, the operator of the facility, was a responsible party and potentially liable for the costs of remediating the site, it would be improper to spend State resources to repair the liner (t. 1249). DEC Staff member Brazell testified he told Mr. Karam that he could file a claim with the State for the cost of repairs after they were done (t. 375). Mr. Karam disputes Mr. Brazell's statement (t. 947).

Mr. Karam testified that he did not take steps to repair the holes created by Aztech because he thought Aztech was going to repair the holes (t. 921). Mr. Karam testified that he made repeated inquiries with Aztech staff and DEC staff about repairs. In 2007, Mr. Karam contacted Mr. Fina by telephone regarding the holes in the liner and was told Aztech would not repair the holes at the direction of DEC Staff counsel Conlon (t. 924). Mr. Karam testified he then called Mr. Brazell who advised Mr. Karam that if he had a complaint he could take it up legally and abruptly hung up the phone (t. 944). Mr. Karam then called DEC Staff member Magee who said he would talk to Aztech about it (t. 944). Mr. Karam also attempted to talk to the Aztech foreman at the facility several times and was told to talk to Aztech's headquarters (t. 945). Mr. Karam also had a conversation with DEC Staff member Moore (t. 946).

Mr. Karam testified that he was told that if he did the repairs, he was told Supreme Energy, LLC could not be reimbursed by the State's spill fund for the cost of repairs (t. 947, 1079). This is contradicted by Mr. Brazell who testified he never told Mr. Karam that the State would not reimburse Supreme Energy, LLC for the cost of repairs to the liner (t. 325). Mr. Karam testified that in 2008 another meeting at the facility occurred where he raised the issue of repairing the holes in the liner (t. 964). He was again told that DEC Staff counsel Conlon had directed the holes not be repaired (t. 965).

Based on the above discussion, DEC Staff has met its burden of proving by a preponderance of the evidence that the secondary containment liner was not properly maintained during this period.

Condition of the liner from June 2007 through June 2008. There is nothing in the record that indicates that repairs were

undertaken between June 2007 and at least June 27, 2008. Robert Ward, General Manager of Hydro Labs Corporation, testified that he was contacted by Mr. Karam in January 2008 and subsequently met him at the facility (t. 1344). On a second visit in March 2008, Mr. Ward inspected the secondary containment liner in preparation of remediating and repairing the liner (t. 1346). Mr. Ward noted the holes cut in the liner by Aztech as well as cuts and other faults in the liner. He estimated that there were approximately 40 or 50 problems areas (t. 1347); the remainder of the liner was in fair condition (t. 1407). He also observed areas of the liner that lifted up off the ground and fluttered in the wind, a condition he had not seen before. He stated that the damage was caused by a number of factors including ultraviolet degradation from sunlight, wind, weathering, scouring and mechanical action. The most pronounced tears were likely caused by frost heaving and wind (t. 1390). He noted that the damage was associated very closely to the cut penetrations in the liner where the PVC piping for the wells was placed (t. 1392). Mr. Ward took a sample of the liner back to his laboratory for testing. These tests demonstrated that the liner could be revitalized (t. 1350). Mr. Ward returned to the facility in June 2008 and showed the sample to Mr. Karam (t. 1351).[26]

On June 27, 2008, DEC Staff members Kemp and Brazell conducted an inspection in preparation of this administrative hearing. Also in attendance was DEC Staff counsel Conlon (t. 73). During this inspection, DEC Staff member Kemp took a number of photographs and then that evening added written notes on each photo (Exh. 20). A number of the photographs taken by Mr. Kemp during the June 27, 2008 inspection show holes, tears and other defects in the liner (Exh. 20, photos 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23). Mr. Kemp testified that some of these holes were created by Aztech and other holes were not (t. 86). Mr. Kemp testified these holes should have been noted on the reports of the facility's monthly inspections (t. 101).[27] There is no question

[26] Mr. Karam lost this sample (t. 1362). Mr. Ward did offer a second piece of liner, not from the facility (Exh. 92) which he stated was very similar to the material on the walls of the dike at the facility (t. 1366).

[27] Mr. Kemp also testified as part of the monthly inspection routine, the monitoring wells at the facility should be checked and if petroleum is discovered in the wells, an oil spill should

of fact that these photos accurately depict the condition of the liner at the facility at this time or that the liner was not maintained. Mr. Karam testified that a majority of the problems with the liner at this time were the result of Aztech's actions (t. 656).

On July 10, 2008, Mr. Karam, his attorney, DEC Staff counsel, members of DEC Staff and I conducted a site visit of the facility. After the site visit, DEC Staff member Brazell testified that during the two weeks between his June 27, 2008 inspection and the site visit, some patches had been applied (t. 333) and the liner looked materially better, but that additional work was needed (t. 341).

Steven Terpening testified that repairs began on the liner in mid July 2008. Both the holes caused by Aztech and other holes were patched and photos were taken (Exh. 48). He testified that the work to repair at least 50 holes in the liner (t. 758) took about three weeks, involved up to three employees, and cost perhaps $2,000 in materials (t. 757). Prior to the patching, debris was removed (including piles of dirt left by Aztech and sand that had leached through the open holes) and the liner was cleaned (t. 761). As of July 25, 2008, all the holes in the secondary containment liner had been repaired (t. 729). However, no testing of the liner or the patches was done (t. 759).

In late July 2008, Mr. Ward testified that his company began to work on the liner. At this time, Mr. Ward noted that the holes created by Aztech and the other holes were repaired (t. 1356). The work began with multiple cleanings of the liner by exposing the membrane completely, brushing and shoveling the dirt, using pressure washers and compressed air (t. 1355). Following the cleaning, in August 2008, Mr. Ward sprayed the liner and walls of the facility with a material to rejuvenate the liner (t. 1362). Photographs of this work were entered into

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be reported to DEC (t. 103). Mr. Kemp testified that no spills had been reported by the facility (t. 103), although monitoring reports for the wells (Exh. 11A & 11B) indicate free product in five wells and contamination in another two (t. 105). However, since this apparent violation is not alleged in the complaint or referred to in DEC Staff's papers, I recommend the Commissioner not find a violation. It should also be noted that Aztech has discovered petroleum in the monitoring wells at the site and has not reported any spill (t. 253).

the record (Exh. 94). Mr. Ward did not test the liner after his work, but testified, based on his experience, that he thought the liner would meet DEC standards (t. 1368).

By letter dated September 12, 2008, William G. Fisher, P.E. wrote to Mr. Karam certifying that the facility meets the requirements for the five year integrity certification (Exh. 107). On September 14, 2008, Mr. Ward inspected his work at the facility and discovered small cracks on the upper row of blocks in the secondary containment area (t. 1371). Mr. Ward testified the following day and stated that this would be repaired and re-inspected (t. 1421). By memo dated September 29, 2008, Mr. Ward certified that repairs to the liner were complete and performed in accordance with the manufacturer's instructions, application rates and procedures. He further stated that the liner meets the New York State Department of Environmental Conservation's standards and requirements for certification (Exh. 107, 111). This memo was also stamped by Mr. Fisher.

On October 20, 2008, Mr. Karam submitted Mr. Fisher's September 12, 2008 letter and Mr. Ward's September 29, 2008 memo to DEC Staff member Kemp. Mr. Kemp responded by letter dated October 29, 2008 that the submission was incomplete without the procedures and processes used to determine the adequacy of the secondary containment (Exh. 107).

On November 4, 2008, DEC Staff member Kemp visited the facility to inspect the repairs to the secondary containment (t. 1614). Mr. Kemp testified that following his inspection he had three concerns: (1) the condition of the liner was still poor; (2) the certification was for chemical bulk storage standards, which is inapplicable to the facility; and (3) the letter incorporated a second letter which was written three weeks later (t. 1610). Mr. Kemp testified that at the date of the Mr. Fisher's September 12, 2008 letter, the work on the liner at the facility had not yet been completed (t. 1370, 1611).

Mr. Kemp took photographs during this inspection and on November 6, 2008 sent an email to DEC Staff counsel noting his concerns (Exh. 108). Mr. Kemp testified that during this inspection he noted several areas where repairs did not adhere (t. 1614, Exh. 108 photos 30, 31, 36, 40 and 41). In addition, Mr. Kemp identified the following problems: piping penetrations

through the secondary containment liner;[28] areas where water was beneath the liner and flowed through a hole when stepped on; areas in need of repair; cracked mortar in the cinder block wall; and inadequate reinforcement of this wall (t. 1615). Mr. Kemp concluded that the secondary containment liner could not be certified in accordance with DEC's requirement (t. 1616). Following this inspection, on November 6, 2008, Mr. Kemp forwarded his preliminary inspection report, photos and other information (Exh. 110) to respondent Karam and his counsel (t. 1667). No final inspection report was prepared after this inspection (t. 1668).

By letter dated November 8, 2008, William G. Fisher, P.E. wrote to Supreme Energy, LLC explaining his earlier (September 12, 2008) letter stating that the liner at the facility met the requirements for the five year integrity certification was sent in error (Exh. 111). Mr. Fisher explained in this letter that he had intended to only certify the repairs were guaranteed for five years and his September 12, 2008 letter was sent in error and that a certification for a five year integrity inspection would include a more thorough and comprehensive inspection. By letter dated November 13, 2008, Mr. Fisher wrote to DEC Staff informing them of this mistake (Exh. 111). By letter dated November 20, 2008, Mr. Fisher wrote to Mr. Karam certifying that based in his judgment, the repairs to the facility were performed in accordance with good engineering practice (Exh. 109).[29]

In December 2008 or January 2009, Mr. Karam contacted Mr. Blanchard, who in 1990 worked as an independent company representative for Futura Coatings, the manufacturer of the secondary containment liner at the facility. Mr. Blanchard had been involved in the original installation in 1991 and the patching of the liner in 1997, after Land Tech had cut holes in the liner to install monitoring wells at the facility (t. 1623).

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[28] This is the first time DEC Staff mentions piping penetrations as a violation and it is not clear if these are new penetrations or conditions that have existed at the facility during prior inspections.

[29] Apparently, DEC law enforcement personnel contacted Mr. Fisher at some point in time and advised him that he was part of a criminal investigation. Respondents' counsel argued that this was done to intimidate him (t. 1724).

Mr. Blanchard met Mr. Karam at the facility and visually inspected the liner. He noted areas where the liner had been repaired and other areas where repairs were needed (t. 1641). He concluded that in his opinion if the repairs were adequate, the liner could be used for its intended use (t. 1654).

Mr. Kemp again inspected the facility on June 22, 2009 (t. 1675). He completed a Site Inspection Report and took photographs at the site.[30] Mr. Kemp testified that as of the date of this inspection, the secondary containment remained uncertified (t. 1690) and the facility remained unlicensed (t. 1691). Subsequent to this visit, he issued an NOV (Exh. 112 not admitted into evidence). During this inspection Mr. Kemp testified that problems he had observed the previous year remained unrepaired (t. 1691). Mr. Kemp also testified that a DEC investigator had provided him with a copy of a letter from Supreme Energy, LLC indicating the facility was ceasing operations (Exh. 113) (t. 1695). He also testified that Mr. Fisher's final letter (Exh. 109) only certified the liner and repairs, and did not address the structural integrity of the walls (t. 1674).

Mr. Karam testified after Mr. Kemp and stated that in response to DEC Staff's concerns about piping penetrations through the liner, some of the pipes through the liner were plugged (t. 1758) and corrective actions to address the other problems were done shortly after the photos were received (t. 1760-77). Mr. Karam stated the piping through the liner is a condition that had existed since 1983 and the facility had been inspected at least five times and the first mention of problems with them was made during this inspection (t. 1790).

Condition of the secondary containment liner – conclusion. Based on the above, I recommend the Commissioner conclude DEC

[30] Mr. Kemp also completed a Notice of Violation dated June 25, 2009 which he sent to Mr. Karam with the results of his inspection. This NOV includes 16 violations (Exh. 112). Respondents' counsel objected to the introduction of Exhibit 112 on the last day of the hearing as part of DEC Staff's rebuttal testimony and argued that if the Exhibit was to be put into evidence that he would need time to analyze it and additional days of hearing to respond to the new allegations. I ruled if DEC Staff wanted to enter this exhibit into evidence, that additional hearing time would be necessary. DEC Staff did not offer this exhibit into evidence (t. 1687).

Staff has shown that the secondary containment liner at the facility was not maintained from September 2006, when Aztech began puncturing the liner, through June 22, 2009, Mr. Kemp's final inspection. Accordingly, the Commissioner should conclude Supreme Energy, LLC is liable for violating 6 NYCRR 613.3(d) for this time period.

Holes in the Bottom of Tank 3. During DEC Staff's June 27, 2008 inspection, DEC Staff member Kemp photographed the base of tank 3 and recorded holes in it (Exh. 20, photos 40, 41, 42, 43, 45, & 46, t. 80). There is no question that these photos accurately depict the condition of the base of tank 3 on this date. How these holes occurred is discussed below.

Supreme Energy, LLC had external inspections of the tanks at the facility done which were completed in January 2007 (Exh. 36). At the time, tanks 2 and 3 were being used to store kerosene and fuel oil for a company called Apex (t. 625). Mr. Karam testified that after receipt of the inspection reports, Apex became worried about liability issues and used a series of tractor trailers to remove its product from the facility and empty the tanks. Apex sent a letter to Mr. Karam in March 2007 stating it would no longer continue to store product at the facility (t. 625). Steven Terpening, who has worked at the facility on and off for more than twenty years under various owners, testified that at some point in late 2007 he noticed tank 2 was leaning quite precariously (t. 705). Mr. Karam testified that because both tanks 2 and 3 were leaning, he considered the tanks unsafe and decided to have them removed. He had them cleaned and notified DEC Staff of his intention to remove the tanks (t. 613).

Peter Paragon, President of Paragon Environmental Construction, Inc., testified that his company had worked at the site both as a subcontractor for Aztech and directly for Mr. Karam. In February 2008, employees of his company cleaned tanks 2 and 3 at the request of Mr. Karam (t. 1137). According to Mr. Paragon, his employees reported that the tank bottoms were in great shape and there was no evidence of any leaking (t. 1141). Mr. Terpening also inspected the interior of tank 2 and reported it to be in very good shape (t. 706). Mr. Terpening also inspected the bottom of Tank 3 after it was cleaned and noted no holes (t. 710).

Mr. Murdock, an engineer who had previous experience with the facility and was considering working for Mr. Karam,

testified he attended a meeting at the site in spring 2008 with Mr. Karam, DEC Staff member Magee and Mr. Fina regarding a proposed pilot study to be undertaken at the site involving a technique called total fluid extraction. At the meeting, Mr. Karam discussed the leaning tanks and asked Mr. Fina if he thought the remediation had caused this condition. According to Mr. Murdock, Mr. Fina denied that it had and stated that the remediation techniques used at the facility had been used at hundreds of sites around the country. Mr. Murdock testified that Mr. Fina stated at the meeting the best way to remediate the site would be to dig out the soil after the tanks come down (t. 1269).[31] Mr. Karam told Mr. Fina that he believed the remediation had caused the damage to the facility and he would sue and offered Mr. Fina an opportunity to take photos or measurements before removing the tanks. Mr. Fina declined. Mr. Karam testified that he had sent letters to Aztech about the leaning tanks because he felt the tanks started to tilt after Aztech installed its wells and began operation of the vapor extraction system. Mr. Karam felt that Aztech's activities had caused the foundation beneath the tanks to become unstable (t. 631).

Jonathan Dreimiller testified that he was employed by Mr. Karam to dismantle tank 3 and remove the pieces in late June 2008 (t. 1122). The witness explained that he and another person cut the tank sections, starting with the roof, and dropped these sections on the floor of the tank. While lying on the floor of the tank, these sections were then cut into smaller pieces and removed from the site. The work was done at night, due to the summer heat, and Mr. Dreimiller did not notice that the torches had cut holes in the floor of the tank until he was notified by Mr. Karam the following day (t. 1128). Mr. Dreimiller offered to come to the facility immediately to fix the holes, but Mr. Karam declined because of a pending DEC Staff inspection. Mr. Dreimiller was not paid for this work, but rather received the cut steel as payment (t. 1132).

Mr. Karam testified that after tank 3 had been taken down, he noticed holes at the bottom of the tank on the morning of June 26, 2008 (t. 993). Mr. Karam testified that he did not immediately repair the holes (before DEC Staff inspected the site the next day) because he was afraid he would be accused of hiding something (t. 993).

[31] Mr. Fina did not remember making this statement, but testified he might have, since it made sense (t. 1585).

Mr. Paragon testified that on July 1, 2008, after DEC Staff's site visit, he received a telephone call from DEC Staff counsel Conlon. During this call, Mr. Paragon was informed that DEC Staff had observed multiple holes in the base of Tank 3 and faxed photos of the holes to Mr. Paragon. Mr. Paragon then testified that he immediately went to the facility and determined the holes were torch holes (t. 1140). Mr. Paragon then hired an engineering firm to confirm his judgment that the holes were caused by the torches (Exh. 80). Mr. Paragon testified that he faxed a second document from the engineering firm to DEC Staff member Kemp which summarized the firm's opinion (Exh. 81) (t. 1011, 1098).

Following the DEC Staff inspection, a welder came to the facility and patched the holes in the bottom of Tank 3 (t. 716). These repairs were completed on July 9, 2008 (t. 808). Photos of these repairs were entered into the record (Exhs. 47 & 48). The respondents' counsel entered three "coupons" or rectangles of steel cut from the bottom of Tank 3 containing the holes made by Mr. Dreimiller (Exh. 46). No sampling was done of the ground beneath the tank at the time of the repairs (t. 752).

The above indicates that bottom of Tank 3, which is part of the secondary containment equipment at the facility, was punctured in late June 2008 and repaired on July 9, 2008.

However, since the liner contained many holes, rips and tears, as demonstrated by the photos in Exhibit 20, no separate violation for the holes at the bottom of Tank 3 should be found by the Commissioner.

Location of the stormwater pipe. DEC Staff member Kemp testified that during DEC Staff's June 27, 2008 inspection he identified an additional problem with the facility's secondary containment, specifically a stormwater pipe that drained into the secondary containment area should have a valve on it (t. 78) (Exh. 20, photos 26, 33). Mr. Kemp testified that if a tank failed and petroleum filled the secondary containment area, it would flow back through this pipe out of the secondary containment area (t. 72, 168). Mr. Kemp continued that the area on the other side of the pipe could not be considered a remote impounding area and would not contain any potential spill (t. 175). Mr. Kemp did not know when the drainpipe was installed and could not recall anything about the pipe from his 2005 inspection (t. 185). Mr. Karam testified that during the

February 2005 inspection, DEC Staff had not advised him a valve was necessary (t. 994).

Mr. Kemp testified the first time he mentioned the problem to Mr. Karam was during the June 27, 2008 inspection (t. 186) and when he returned to the facility two weeks later, for the July 10, 2008 site visit by the parties, he noted that a valve had been installed (t. 183) and Mr. Brazell concurred (t. 333).

Mr. Neugebauer, President of Alaskan Oil, Inc., testified that the drainpipe was installed in approximately 1993 (t. 1457) and there was never a valve placed on the drainpipe while Alaskan Oil, Inc. operated the facility (t. 1458).

During DEC Staff's August 30, 2004 inspection of the facility, prior to the execution of the consent order and Mr. Kemp's employment as a member of DEC Staff, the pipe in question was observed. The inspection report of this visit includes the following statement: "Storm water discharged into secondary containment via pipe located toward top of containment; not an issue as long as ponded water is properly discharged from containment" (emphasis in original, Exh. 115, p. 7). No mention of the pipe is made in either the September 7, 2004 NOV or the consent order.

Based on the above, the Commissioner should conclude that the pipe in question had existed at the facility for more than a decade before the June 27, 2008 inspection and it had been noted in at least one previous DEC Staff inspection and determined not to be a violation. Moreover, Mr. Karam promptly installed a valve when told of the need for it by Mr. Kemp. Accordingly, no violation should be found with regard to the drain pipe.

The capacity of the secondary containment

As discussed above, the amended complaint alleges a "failure to maintain valid secondary containment for the tanks at the facility" and does not provide any specific cites to any law or regulation that is alleged to have been violated other than a general statement that this is a violation of MOSF requirements and the Navigation Law. As a consequence, it is difficult to understand exactly what DEC Staff is alleging. It may be that DEC Staff is alleging the secondary containment area at the facility is too small and this condition could be a

violation of 6 NYCRR 613.6(c)(3) which requires the construction of a secondary containment systems.

Some background is helpful to understanding this issue. The shell capacity of Tank 8, which was erected at the site in the mid 1930's, is approximately one million gallons. DEC staff member Kemp testified that federal regulations (40 CPR part 112) require that the capacity of a secondary containment be 110% of the capacity of the largest tank, or 1.1 million gallons in this case (t. 218).[32] Mr. Kemp testified that this requirement has not changed since 1986 (t. 93, 408).

At some point in the past, DEC Staff inserted a special condition in the license issued to Alaskan Oil, Inc. that administratively adjusted the capacity of Tank 8 to 755,000 gallons (Exh. 55), provided the tank was not filled beyond this level (t. 1458) (Exh. 5). This special condition existed in the licenses of Alaskan Oil, Inc. (however, all past licenses are not in the record). Mr. Neugebauer testified that he could not remember when the condition was first put in the license, maybe 1994 (t. 1460) or 1998 (t. 1472) and it existed in subsequent licenses through the expiration of the last license issued to Alaskan Oil, Inc. on March 31, 2002 (Exh. 5). DEC Staff member Brazell signed this license on March 30, 2001, and he testified that he signed the license at the direction of DEC Staff in Albany (t. 395). He also stated that during the 1990s, DEC Staff wrote special conditions like this, but since this policy contradicted existing regulations it was quickly changed (t. 391). There is no explanation in the record as to why the special condition was allowed to continue in Alaskan Oil, Inc.'s license until 2002.

Shortly after Supreme Energy, LLC began operations at the site on August 1, 2004, it entered into a consent order with DEC Staff. The consent order required submission of a corrective

[32] Respondents' counsel questioned Mr. Kemp about DEC guidance document SPOTS #10 which reads in relevant part "While NFPA 30 section 2-2.3.3 requires the impoundment capacity to be a minimum of one hundred percent of the volume of the largest tank, the division [of water] recommends an additional ten percent be added to provide for free board to contain storm water that may accumulate behind the dike." (t. 222). DEC Staff member Kemp then stated that it was common practice to require 110% within the industry professional standards.

action plan and schedule which included an engineered solution to provide Tank 8 with an adequate secondary containment volume (either partially dismantle the tank or expand the containment area). There was no change in the capacity of the secondary containment area between the time Alaskan Oil, Inc. operated the facility and when Supreme Energy, LLC began operations (t. 987). Mr. Karam testified that the first time he learned DEC Staff was going to require the capacity of the secondary containment to be increased to 1.1 million gallons was in his consultant's submissions to DEC Staff (t. 909).[33]

Following the execution of the consent order, in late 2004, some work was done on the secondary containment wall. A portion of the secondary containment wall at the facility consists of cinder blocks.[34] The work included constructing a footing beneath a portion of the cinderblock wall surrounding the tanks and placing three extra courses of blocks around the top of the wall. The respondents' engineer had provided calculations that increasing the wall by 1.41 feet would give the facility adequate secondary containment capacity (Exh. 13, p. 9 & 10). The respondents claim that they completed the required work and submitted a December 5, 2004 letter from consulting engineer Edward K. Crandall (Exh. 51) and its SPCC (Exh. 10, p. 18). Mr. Crandall's letter states that with additional blocks added to the entire perimeter wall, the volume of the secondary containment area had been expanded to 1,199,865 gallons, in excess of the 1.1 million gallon capacity required. Respondents' counsel argues that the secondary containment capacity was expanded in late 2004, as called for in the SPCC plan (Exh. 10), and points to the Crandall letter (Exh. 51) as proof (t. 798). Mr. Kemp did not know if Exhibit 51 had been

[33] As discussed later in connection with the respondents' affirmative defense, respondents argue that the condition in Alaskan Oil, Inc.'s license administratively reducing the capacity of Tank #8 should be continued (Exh. 76, 100, 102) and that DEC Staff improperly required expensive alterations to the facility. In its closing brief DEC Staff argues that by signing the consent order respondents waived any rights to challenge the conditions with respect to Tank #8.

[34] DEC Staff member Moore testified that he could not recall other facilities that had cinder block secondary containment walls higher than two courses (t. 1748) because above that height it is not structurally sound (t. 1738).

submitted to DEC Staff and could not remember ever seeing it (t. 1712).

DEC Staff member Kemp testified that during his February 2005 inspection of the site he observed two problems with the newly constructed sections of wall. The first problem was that the construction was not complete and some blocks had been added to the secondary containment wall and other blocks were stacked on pallets next to the wall and a complete course of blocks had not been installed around the entire facility (t. 164). Mr. Karam testified that the wall was made higher than required with an extra course of blocks (three courses of 8" cinder blocks, instead of just two), and the required height was constructed when Mr. Kemp made his inspection (t. 665). The second problem was that the liner had not been extended up to the top of the new construction (t. 71) and he had observed this continuing condition during his June 27, 2008 inspection of the facility (t. 79, Exh. 20 photo 33).

Other information about the capacity of the secondary containment area is found in a May 4, 2007 letter from respondents' counsel (Exh. 50). This letter states that the walls at the facility have been increased in height to increase the capacity of the area to 110% and then says additional height is needed. This apparent contradiction was addressed by Mr. Karam in his testimony when he stated that the 110% had been achieved and indications in the letter to the contrary were wrong (t. 795).

It may be possible to conclude that the evidence shows the facility's secondary containment was never properly constructed, but I recommend the Commissioner not do so. This violation is a violation of 6 NYCRR 613.3(c)(6)), which requires the installation of secondary containment systems for aboveground tanks which have a capacity greater than ten thousand gallons so that spills will not permeate, drain, infiltrate or otherwise escape to the groundwaters or surface waters before cleanup occurs. This alleged failure to properly construct secondary containment is not clearly alleged in the amended complaint or specifically addressed in DEC Staff's papers[35] and it is not

[35] In its closing brief, DEC Staff states "the requirement for 110% secondary containment capacity is a requirement not only required by the State, but a Federal requirement." (p. 10). But this passing reference is not explained, nor is there a reference to any specific state law or regulation.

clear the respondents knew that this interpretation of this cause of action was being alleged.

Lack of a five-year in-depth integrity inspection

Another possible theory for liability under this cause of action of failing to maintain valid secondary containment at the facility could be the respondent Supreme Energy, LLC's failure to conduct a five-year in-depth secondary containment integrity inspection. However, it is not clear from DEC Staff's papers that this is a violation being alleged or that the respondents were on notice that this was DEC Staff's theory of liability regarding this cause of action.

DEC Staff can require the owner or operator of a facility to test tanks or equipment for structural soundness (6 NYCRR 613.7). Apparently, DEC Staff routinely requires this for MOSF operators through the imposition of a special condition in licenses.[36] The last license for the facility (issued to Alaskan Oil, Inc.) did contain such a provision (Exh. 5, special license condition #3j). DEC Staff member Kemp testified that the performance of this inspection is a licensing requirement for MOSF facilities (t. 94).

The last time the secondary containment liner underwent a five-year in-depth integrity inspection was in 1997,[37] when Alaskan Oil, Inc. operated the facility. Mr. Karam testified that after he signed the consent order, he repaired the liner but did not have any testing done (t. 660). He continued that after Aztech cut holes in the liner in 2006, it would be pointless to have the testing done until repairs were complete (t. 662).

The consent order required that the corrective action plan include a provision to test the liner for strength and capability (in-depth integrity inspection) (Exh. 7, paragraph

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[36] See DEC's DER-11/Procedures for Licensing Onshore Major Oil Storage Facilities, Appendix B, Attachment 3(c).

[37] Mr. Kemp's Site Inspection Report dated February 22, 2005 states that the last date for an in-depth inspection was 9/30/04. Mr. Kemp testified at the hearing that this information was incorrect (t. 1702).

IB). This inspection would have addressed issues such as water under the liner, the integrity of the land upon which the facility sits, and the strength of the walls to contain any potential spill. However, as discussed above, there is nothing in the record to show DEC Staff ever approved the corrective action plan.

I recommend the Commissioner not find liability based on the failure to perform a five-year in-depth integrity inspection because it is not clear that DEC Staff is alleging this as a violation, it is not clear that the respondents were on notice that this was what DEC Staff was alleging, and because the completion of this inspection is apparently required by special license conditions, none of which are binding on the respondents.

Fourth Cause of Action – failure to comply with the consent order

The fourth unnumbered cause of action in DEC Staff's March 24, 2008 amended complaint reads as follows:

> "14. On or about September 29th, 2004, Respondents entered into an Order on Consent with the Department (Case #7-20040909-3) to remedy various violations at the Facility.
>
> 15. Respondents failed to comply with the terms and conditions of the Order on Consent. These violations included, failing to submit ten year inspection reports and failing to construct and maintain valid secondary containment for Tank #8."

The consent order (Exh. 7) named Supreme Energy Corporation as the respondent in the caption. As discussed above, the parties agree that this corporation does not exist and is the result of a series of typographical errors. The correct name for this respondent is Supreme Energy, LLC. Mr. Karam signed the consent order as a member of the LLC and the cover letter from DEC Staff also is addressed to Supreme Energy, LLC. The consent order requires the payment of a civil penalty and contains six items of compliance that Supreme Energy, LLC was required to perform. Mr. Karam signed the consent order on

September 16, 2004, and it became effective the date that DEC's Region 7 Director signed it on September 29, 2004.

A copy of the consent order was introduced at the hearing (Exh. 7); however, this copy is incomplete. Specifically, paragraph III entitled Standard Conditions reads "Respondents shall further comply with the standard provisions which are attached, and which constitute material and integral terms of this Order and are hereby incorporated into this document." However, no standard conditions are attached to Exhibit 7.

In its closing brief, DEC Staff only argues that the respondents violated the consent order with respect to secondary containment and makes no mention of ten-year inspection reports or any other alleged violation of the consent order. In a recent administrative decision, the Commissioner stated in future cases, where staff counsel chooses not to brief an alleged violation, that the alleged violation should be withdrawn (Matter of RGLL, Inc. and GRJH, Inc., Decision and Order of the Commissioner, December 29, 2009, footnote 11). However, since this decision was issued after DEC Staff's brief was received, DEC Staff counsel was not aware of this direction.

Respondents deny that they failed to comply with the consent order in their answer. In his closing brief, respondents' counsel argues that Supreme Energy, LLC complied with all requirements of the consent order. Respondents' counsel further argues the respondents were not given notice of the fact that DEC Staff considered them to be in violation of the requirements of the consent order until 2007 (t. 892).

The only witness called by DEC Staff to testify about this alleged violation was DEC Staff member Kemp, who began employment with the Department in October 2004, after the consent order was executed (t. 57). Mr. Kemp spent the first several months involved in training across the State (t. 58). He began his MOSF licensing duties in early or mid 2005 and at this time learned of the consent order (t. 61, 156). Mr. Kemp's testimony about compliance with the consent order is not entirely clear. He testified that the only item not complied with in the consent order related to the corrective action plan (t. 1704) and at other points in his testimony, discussed below, seems to have testified otherwise.

Because it is not clear from DEC Staff's papers which aspects of the consent order are alleged to have been violated,

each of the seven requirements of the consent order are discussed below. Based on the discussion below, the Commissioner should conclude that DEC Staff has failed to prove any violation of the consent order occurred.

Payment of the civil penalty

Paragraph II of the consent order required the payment of a $7,500 civil penalty. The copy of the consent order in the record (Exh. 7) includes a photocopy of a check signed by Mr. Karam from Buckskin Pipeline Construction, Ltd. for $7,500 and a DEC receipt showing the check was received by DEC Staff on October 4, 2004. Nowhere in the record does DEC Staff allege that the respondents violated this requirement of the consent order or failed to pay the civil penalty. Based on this evidence, the Commissioner should conclude that the respondents paid the civil penalty and find no violation.

Spill Prevention, Control and Countermeasure Plan, a Facility Response Plan and an Environmental Compliance Report

Paragraph I(A) of the consent order reads:

> "A. Respondent shall submit a Spill Prevention, Control and Countermeasure Plan, a Facility Response Plan, and an Environmental Compliance Report to the Department within 30 days of the effective date of this Order on Consent."

DEC Staff counsel acknowledged the complaint did not allege that these plans were not submitted pursuant to the consent order (t. 211). But Mr. Kemp testified at length about the deficiencies in these plans, as discussed below.

Spill Prevention, Control and Countermeasure Plan (SPCC). An SPCC plan is defined in New York State law (17 NYCRR 30.2(f)) and is required for the issuance of a license (17 NYCRR 30.5). DEC Staff did not allege any specific violation related to the SPCC in the complaint nor did it mention such violation in its closing briefs.

There is no question of fact that Mr. Karam submitted an SPCC dated November 2004 to DEC Staff, and the copy in the record is date-stamped November 17, 2004 (Exh. 10).[38] At the

[38] There is no mention in the record of the fact that the

hearing, DEC Staff member Kemp testified that the SPCC was deficient because of information regarding the facility's secondary containment area (t. 67). Specifically, the SPCC reported that the capacity was undersized, only 933,000 gallons and not the 1.1 million gallons, as required (Exh. 10, p. 11). Mr. Kemp noted the SPCC included information that an expansion of the secondary containment area was planned to be completed by December 31, 2004 (t. 69).

Mr. Karam testified that he complied with the requirement of the consent order when he submitted this document to DEC Staff. Mr. Karam testified he did not receive any communication from DEC Staff that the plan was deficient (t. 873).

It is not clear that DEC Staff is alleging Supreme Energy, LLC violated the consent order by submitting a deficient SPCC. However, at the time of its submission, the SPCC was accurate and, therefore, DEC Staff has failed to demonstrate a violation of the consent order with respect to the submission of the SPCC. I recommend the Commissioner find no violation with respect to the SPCC.

Facility Response Plan. There is no question of fact that Supreme Energy, LLC submitted a Facility Response Plan dated November 2004 which was date-stamped received by DEC Staff on November 17, 2004 (Exh. 9).[39]

DEC Staff member Kemp testified that the Facility Response Plan submitted by respondent Supreme Energy, LLC was not acceptable because the secondary containment referenced in the

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SPCC was filed several days late. The consent order became effective on September 29, 2004 and the SPCC was due thirty days later, on October 29, 2004. If the date stamp is correct, then the SPCC was filed late; however, since DEC Staff did not make an issue of this, nor did it offer any evidence that the date stamp was accurate, I recommend that the Commissioner not find a violation based on the apparent late filing of the SPCC.

[39] As is the case with the SPCC, discussed in the footnote above, it appears that the Facility Response Plan was filed late, however, DEC Staff did not make an issue of this, nor did it offer any evidence that the date-stamp was accurate. I recommend that the Commissioner not find a violation based on the apparent late filing of the Facility Response Plan.

plan was insufficient and had other defects (Exh. 9, p. 56, t. 90). However, Mr. Kemp did not identify in his testimony what the other defects were, nor could he locate the alleged deficiencies in the Plan.

Mr. Karam testified that he complied with this requirement of the consent order when he submitted Exhibit 9. Mr. Karam testified after submission of this document, DEC Staff did not notify him that any of these submissions were deficient (t. 873).

It is not clear that DEC Staff is alleging Supreme Energy LLC violated the consent order by submitting a deficient facility response plan. However, at the time of its submission, the plan was accurate with respect to the secondary containment and Mr. Kemp did not identify other alleged deficiencies in the plan. Therefore, DEC Staff has failed to allege a violation of the consent order with respect to the submission of the facility response plan.

Environmental Compliance Report. An environmental compliance report (ECR) is required to be submitted to DEC Staff every year (t. 286). There is no question of fact that Supreme Energy, LLC submitted an Environmental Compliance Report dated November 5, 2004 to DEC Staff (Exh. 8).[40]

DEC Staff member Kemp testified that he reviewed DEC Staff's files for the facility and located environmental compliance reports dating back to the 1980s which had been filed by previous license owners of the facility, but found none subsequent to Exhibit 8 for the facility (t. 91).[41]

With respect to Exhibit 8, DEC Staff member Kemp testified that the Environmental Compliance Report submitted by Supreme Energy, LLC was not acceptable. The problems with the ECR included the following: (1) the report listed the operator as Supreme Energy Corporation, not Supreme Energy, LLC (t. 238);

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[40] There is no date-stamp on this document.

[41] This testimony suggests that the respondent has failed to file environmental compliance reports for the years following the submission of Exhibit 8. However, since DEC Staff has not alleged this as a violation in the complaint or argued it in its papers, I recommend the Commissioner not find the respondent in violation of this requirement.

(2) it failed to define which major changes are currently in progress at the facility; (3) it incorrectly stated underground piping at the facility was protected from corrosion by cathodic protection, when in fact it was not (t. 240, 269); (4) it stated the monitoring wells were secure when some of them were not (t. 270); (5) it incorrectly indicated that secondary containment was in compliance when in fact it did not comply with regulations (t. 91, 241, 265); (6) it failed to evaluate groundwater risks (t. 242); and (7) it incorrectly stated that monthly fee reports were submitted and license fees paid (t. 243, 277). Mr. Kemp also testified that he never notified any of the respondents of these deficiencies because he assumed responsibility for the MOSF program with DEC after the report was submitted (t. 244).

Mr. Karam testified that he complied with this requirement of the consent order when he submitted Exhibit 8. Mr. Karam testified after submission of these documents, DEC Staff did not notify him that this submission was deficient or that he was in violation of the terms of the consent order (t. 874).

The Commissioner should not find a violation the consent order with respect to the Environmental Compliance Report in the record (Exh. 8). While some or all of Mr. Kemp's alleged deficiencies in the report may be correct, these violations were not alleged in DEC Staff's amended complaint or addressed in its closing brief.

Corrective Action Plan

Paragraph I(B) of the consent order stated:

> "B. Not later than September 30, 2004, Respondent shall submit to the Department for its approval a corrective action plan and schedule (the Plan) to ensure that the secondary containment system for Tank #8 complies with 6 NYCRR 613.3(c)(6). The plan shall include an engineered solution to provide Tank #8 with an adequate secondary containment volume (either dismantle the tank or expand the containment), to test the existing synthetic liner for strength and capability (in-depth integrity inspection), and a critical path schedule to complete all construction activities by December 31, 2004."

There is no document in the record entitled Corrective

Action Plan, nor do the respondents claim that such a document was ever prepared or submitted to DEC Staff. Mr. Karam testified the corrective action plan and schedule were included in two letters from Lu Engineers, dated November 15 and September 30, 2004 (t. 875, Exh. 13), that were sent to DEC Staff. Relevant information is also found on page 18 of the SPCC deals with recommendations made by the engineering firm who prepared the SPCC and includes the following two recommendations relevant to this discussion: (1) complete planned upgrade to secondary containment structure and (2) make necessary repairs to liner system. Mr. Karam stated DEC Staff did not notify him that these submissions were deficient (t. 876).

DEC Staff does not argue that a corrective action plan was not submitted or Exhibit 13 is not the plan. Rather DEC Staff argues that the secondary containment area was not upgraded by December 31, 2004, and therefore, Supreme Energy, LLC did not comply with the consent order (t. 71 and 1705). However, DEC Staff is misreading the language of the consent order. The consent order only required the upgrades to be completed by December 31, 2004, after DEC Staff had approved the Corrective Action Plan. DEC Staff has not established in this record that such approval was ever given for the corrective action plan.[42]

DEC Staff argues extensively that the respondent Supreme Energy, LLC violated the consent order by failing to undertake the work required in the corrective action plan by December 31, 2004. However, a reading of language of the consent order clearly requires DEC Staff to approve the plan before it is implemented. DEC Staff has not shown that such approval was ever granted. Accordingly, DEC Staff has not met its burden of showing a violation of the consent order with respect to the corrective action plan.

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[42] Mr. Kemp testified about a meeting he had at the facility with Mr. Karam regarding compliance with the consent order in 2005 at which time he asked Mr. Karam if he had an updated schedule (t. 162). It may be possible to infer from this comment that this implied DEC Staff’s approval of the corrective action plan. However, if this statement did grant DEC Staff’s approval, DEC Staff would still have had to approve the revised schedule. In any event, there is no evidence that a revised schedule was ever submitted nor, more importantly, there is not any evidence of DEC Staff’s approval of the corrective action plan.

Ten Year Tank Inspections

Paragraph I(C) of the consent order reads:

> "C. Within 30 days of the effective date of this Order on Consent, Respondent shall submit ten-year inspection reports for Tanks 1,2,3,4,5,6,7, and 8, as required by 6 NYCRR 613.6(c)(1)."

Section 613.6(c)(1) reads:

> "(1) Reports for each monthly inspection and ten-year inspection must be maintained and made available to the Department upon request for a period of at least ten (10) years."

Another regulation (6 NYCRR 613.6(b)) requires inspections of aboveground tanks with a capacity of more than 10,000 gallons every ten years and sets forth the requirements for these inspections. In addition, 6 NYCRR 613.6(c)(2) sets forth the information required to be included in the inspection reports. Every ten years, the above-ground tanks at the facility are required to be tested using the American Petroleum Industry's (API) 653 inspection requirements for out-of-service tanks (t. 117). These inspections require the tank to be emptied and cleaned so that both an internal and external inspection of the tank may be performed. In addition, DEC Staff must be notified about the inspections (t. 595).

These inspections are critical to determining the integrity of the Supreme Energy, LLC facility. This is because: (1) there is no secondary containment beneath the tanks, because of their age; and, (2) the petroleum plume in the ground beneath and around the facility renders the monitoring wells of little value in detecting a discharge (t. 188). Information in the record indicates that levels of petroleum in the monitoring wells is varying, which means either the plume is moving or additional discharges are occurring (Exh. 23, t. 350).

DEC Staff called one witness who testified about this alleged violation. DEC Staff member Kemp's testimony is confusing and contradictory. First, Mr. Kemp testified that he had reviewed the file for this facility and the required inspection reports were not present (t. 115). As discussed above, Mr. Kemp assumed his responsibilities for the MOSF program after these reports were due, so these reports would not

have been received by him. He further testified he had not been provided with the inspection reports at any time for these tanks to show that they were in compliance with this provision of the consent order (t. 113). Mr. Kemp also stated that there is not one integrated file for this facility and parts of it were in DEC's Region 7 (Syracuse), DEC's Central Office (Albany) and the Attorney General's Office (t. 158). It is not clear from Mr. Kemp's testimony if he reviewed all the parts of the file for this facility (t. 304), and consequently, his testimony does not prove the inspection reports were never submitted.

Mr. Kemp also testified that in his review of the consent order with DEC Staff member Brazell and Mr. Karam in 2005, all items in the consent order had been complied with, except those relating to secondary containment (t. 162). This would seem to indicate that this item of the consent order relating to ten-year tank inspections was complied with.

Mr. Kemp also testified that, based on his review of the Facility Inspection Report (Exh. 18, column 21), tanks 6, 9, 10, and 11 were overdue for inspection (t. 116). Mr. Kemp testified that the information in Exhibit 18 (a "NYSDEC Major Oil Storage Facility Program Facility Information Report" which was printed on July 8, 2008) contains information from records seen by DEC Staff and is reliable (t. 117). The information in Exhibit 18 shows that DEC Staff was aware of inspection reports for this time for tanks 1, 2, 3, 4, 5, 7 and 8 and entered the dates of these inspections into DEC Staff's database. The record also contains the August 30, 2004 Site Inspection Report completed by DEC Staff members Moore and Victor (Exh. 115). This document states "10-yr inspection reports only available for tanks: 1 (7/99), 3 (4/99), 6 (9/03), 8 (9/01)" (p. 6). It also states tanks "10, 11 not used; 9 serves as temporary storage for BP Air" (p. 7).

Confusing the issue further is information found in the SPCC (Exh. 10). On page 10, the following chart is found.

“8.5 Ten Year Internal Inspections (Aboveground)

Tank No.	Last Inspected*	Next Due	Test Method
1	June 1999	June 2009	API650/NYCRR613
2	April 1999	April 2009	API650/NYCRR613
3	May 1999	May 2009	API650/NYCRR613
4	July 1999	July 2009	API650/NYCRR613
5	April 2000	April 2010	API650/NYCRR613
6	June 2003	June 2013	API650/NYCRR613
7	April 2001	April 2011	API650/NYCRR613
8	October 2001	October 2011	API650/NYCRR613
9	August 1992	Not required	
10	September 1993	Not required	
11	September 1993	Not required	
12	September 1993	Not required	
13	September 1993	Not required	
14	September 1993	Not required	
15	September 1993	Not required	

*As reported by Facility Management
Not required = Not required as per 6NYCRR 613.6(b)(2)(1)”

This chart generally agrees with the information found in Exhibit 18 (the month of the various inspections differ for some tanks).[43] The only major difference is that this chart shows Tank 6 was tested in June 2003, which is not reflected in Exhibit 18. It should be noted that this information is self-reported by facility management so it has not been verified by DEC Staff. It should also be noted all of these inspections were done before Supreme Energy, LLC entered into the land

[43] This information is identical to that found in the Environmental Compliance Report (Exh. 8, p. 37 - 38). See also Exh. 9, p. 43.

contract in September 2003 and before it began operations at the facility in August 2004.

The record also contains a series of in-service, external inspection reports for tanks at the facility (Exhs. 36 & 40) that were provided by HMT Inspection and completed in January 2007. These reports were paid for by North Albany Terminal Co. LLC, who at the time of their completion was considering purchasing the facility (t. 598). DEC Staff received these reports in July 2008, during the hearing (t. 592). These reports are not relevant to this alleged violation.[44] Mr. Karam testified that these reports did not meet the requirements of 6 NYCRR 613.6. The inspections did not inspect the tanks internally because the tanks were not out-of-service (t. 594).[45]

At the hearing, Mr. Karam was asked several questions about the API 653 out-of-service inspections. On July 24, 2008, he testified that the tanks had not been inspected pursuant to API 653 standards for out-of-service inspections (t. 591). While it is not clear what the time frame is for this answer, it seems that he is referring to the period of time during which Supreme Energy, LLC was operating the facility. Then Mr. Karam testified that an out-of-service API 653 testing was done on Tank 8 and provided to DEC Staff, then in the next answer he seems to contradict himself (t. 614). Mr. Karam also testified that he provided the ten-year inspections to DEC Staff counsel

[44] DEC Staff also stressed information in these reports indicating that the foundations of the tanks were not level (t. 609, 628). However, the reports also state that the measurements done for these reports may not be accurate (see sections 2.0 of each report in Exh. 36, entitled foundation). In addition, a March 27, 2007 letter regarding proposed repairs to the facility indicates that only one tank (tank #3) showed differential settlement that exceeded the API recommendations (Exh. 38).

[45] Also in the record are: (1) a price quote from HMT for various repairs (Exhs. 37 & 38); and (2) Stress Test Analyses for some of the tanks prepared by Meley Engineering Corporation in February 27, 2007 (Exh. 39). However, these documents refer to the Cold Springs Terminal, adjacent to the Supreme Energy, LLC facility (t. 599, 606).

on Monday, July 21, 2008 (t. 634)[46] and these reports were done before Supreme Energy, LLC began operations at the site.

The following day, Mr. Karam also answered a series of questions about these inspection reports. He testified that he submitted ten year inspection reports to comply with the consent order (t. 877). He testified that Exhibit 58 included copies of these reports (t. 878). However, a review of Exhibit 58 shows it to be a series of 9 manila files labeled Tank 1, 2, 3, 4, 5, 6, 7, 8, and 9-10-11, which contain invoices and other information. He stated he was never notified that the reports were not sufficient (t. 882). These reports were prepared while Alaskan Oil, Inc. was operating the facility (t. 882).

As discussed above, while DEC Staff alleges that this provision of the consent order was violated in its amended complaint, DEC Staff makes no mention of this allegation in either its closing or reply brief. Thus, it is not clear if DEC Staff has withdrawn this claim or not. Weighing the evidence in the record (reviewed above), the Commissioner should conclude that DEC Staff has failed to demonstrate a violation of the consent order with respect to the submission of tank inspection records. While the information in the record is confusing, Mr. Kemp's statement that all items in the consent order had been complied with except modifications to the secondary containment (t. 162) is the strongest evidence that no violation relating to the ten year tank inspections occurred.

Color code fill ports

Paragraph I(D) of the consent order reads:

> "D. Within 30 days of the effective date of this Order on Consent, Respondent shall to (sic) properly color code the fill ports for Tank #s 12, 13, 14, and 15, as required by 6 NYCRR 613.3(b)."

DEC Staff did not offer any evidence that this provision of the consent order had been violated. Mr. Karam testified that these fill ports were properly color coded (t. 883) and produced

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[46] DEC Staff counsel immediately denied receiving the reports; however, since he was not under oath and his statement was not subject to cross examination, these statements cannot be considered evidence.

photographs (Exh. 59). Mr. Karam stated that this was done within a week or ten days after he signed the consent order (t. 889). Mr. Karam testified DEC Staff never notified him of failure to comply with this requirement (t. 891). Accordingly, the Commissioner should conclude that DEC Staff has not shown any violation of this requirement of the consent order.

Level Gauges

Paragraph I(E) of the consent order reads:

> "E. Within 30 days of the effective date of this Order on Consent, Respondent shall install level gauges or an equivalent device on Tank #s 12, 13, 14, 15, as required by 6 NYCRR 612.3(c)(3)."

DEC Staff did not offer any evidence that this provision of the consent order had been violated. Mr. Karam testified that this work was done about a week or ten days after the consent order was signed (t. 890). Mr. Karam testified DEC Staff never notified him of failure to comply with this requirement (t. 891). Accordingly, the Commissioner should conclude that DEC Staff has not shown any violation of this requirement of the consent order.

Tank Closure

Paragraph I(F) of the consent order reads as follows:

> "F. Within 30 days of the effective date of this Order on Consent, Respondent shall permanently close its hazardous substance bulk storage tanks, in accordance with 6 NYCRR 598.10(c)."

DEC Staff did not offer any evidence that this section of the consent order was violated. Mr. Karam testified that the tank was permanently closed and removed immediately after the consent order was signed (t. 890). Mr. Karam testified DEC Staff never notified him of the failure to comply with this requirement (t. 891). Accordingly, the Commissioner should conclude that DEC Staff has not shown any violation of this requirement of the consent order.

Respondents' Affirmative Defense and other arguments

In their answer, respondents raise a single affirmative defense (paragraphs 9-15). Specifically, that in 2006 DEC Staff acted unlawfully, willfully and maliciously in refusing to repair holes in the secondary containment liner that its contractor Aztech caused. These actions of DEC Staff resulted in damages to the facility and respondents in excess of unpaid license fees. Due to this, Supreme Energy, LLC is not liable for the amount in arrears and DEC Staff and Aztech are liable for damages. Respondents' counsel expanded on this defense in his closing brief by pointing to a series of claimed improper actions by DEC Staff.

Throughout the hearing respondents made almost constant reference to alleged misdeeds of DEC Staff and its alleged mistreatment of Mr. Karam. Respondents' counsel argues that DEC Staff had treated Supreme Energy, LLC and Mr. Karam differently than the previous owner/operator of the facility, Alaskan Oil, Inc. These claims are treated as part of the respondents' affirmative defense. Simply put, respondents claim DEC Staff's incompetence and vindictiveness (t. 689) created a series of conditions that were designed to injure respondents and force the closure of the facility.

As discussed above, the facility is located on land above a plume of petroleum that was first reported as a spill in 1989 and is the subject of ongoing litigation.[47] Mr. Karam testified that when he first became involved at the facility in about 2003, he reviewed all the documents in the possession of Alaskan Oil, Inc. relating to the 1989 spill and came to the conclusion that DEC Staff had not done anything to remediate the site in the previous fifteen years (t. 976).

In July 2004, after a petroleum sheen was noticed along the shoreline of the Seneca River adjacent to the facility,[48] Mr.

[47] The facility is one of three facilities in the immediate area, none of which are apparently operating at the time of this writing. Litigation involving current and past owners and operators of these facilities (including Supreme Energy, LLC and Mr. Karam) is ongoing (State of New York v Stratus Petroleum Corp., Supreme Court, Albany County, J. Teresi, Index No. L000134-01).

[48] The record contains a Spill Record for a spill that was

Leone (respondents' consultant) requested a meeting with DEC Staff to discuss remediation plans for the site (Exh. 54 & 74). The meeting occurred at DEC's region 7 office during the week of July 26, 2004. Attending the meeting were Mr. Karam, Mr. Neugebauer (President of Alaskan Oil, Inc.), Mr. Leone, DEC Staff member Brazell and NYS Assistant Attorney General Jeremy Feedori (t. 842). Mr. Brazell asserted that the facility, while owned by Alaskan Oil, Inc., had stored gasoline and contributed to the plume beneath the facility. Apparently, both Mr. Neugebauer and Mr. Leone disputed this claim (t. 979, 1304) and stated Alaskan Oil, Inc. had only stored aviation gasoline and it was not responsible for the plume (t. 844). Mr. Karam testified that Mr. Leone spoke at the meeting regarding the failure of DEC Staff to remediate the site. [49]

On August 1, 2004, Supreme Energy LLC began operations at the site without either applying for or obtaining a license. DEC Staff then wrote demanding the submission of a license application and the signing of a consent order to correct problems at the facility (Exh. 44). The application was timely submitted (Exh. 6), DEC Staff conducted an inspection during which a number of violations were noted (Exh. 114) and the consent order executed (Exh. 7).

Respondents' counsel argues DEC Staff acted improperly and in a retaliatory manner by including in the consent order a requirement that Tank 8 either be reduced in size or that the secondary containment area expanded. This item in the consent order required expensive alterations at the facility and justified the withholding of license fees collected by Supreme Energy, LLC. Respondents' counsel argues that DEC Staff's decision was irrational and in retaliation for Mr. Karam's

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reported on May 3, 2004 (spill #7-0401142) (Exh. 6, p. 6). Apparently, this is the spill referred to in the testimony.

[49] After the meeting, Mr. Karam had three samples taken from the plume tested and sent the results to Mr. Brazell (t. 851). Mr. Karam then called Mr. Brazell regarding the results of the testing, which Mr. Karam testified were 75-80% gasoline and the remainder diesel (t. 853). According to Mr. Karam, Mr. Brazell did not believe him, so he had a subsequent test showing the plume did not contain aviation gasoline. Mr. Karam continued that Mr. Brazell still refused to believe it and repeated his claim in another conversation in April 2005 (t. 855).

criticism of DEC Staff's perceived inaction in remediating the spill at the site. Mr. Karam testified that complying with the requirement involving Tank 8 would require the expenditure of funds to increase capacity (t. 866). DEC Staff argues it was acting properly and that Supreme Energy, LLC, by signing the consent order, waived its right to challenge this condition. Respondents' counsel claims that DEC Staff has continued its abusive behavior toward the respondents, or as Mr. Karam stated, he has been "getting his chops handed to him" since he began operations at the facility (t. 1080).

Following respondents' submission of various documents in response to the requirements of the consent order, DEC Staff did not issue a license to Supreme Energy, LLC or notify respondents that the submissions were deficient. DEC visited the site a number of times and knew the facility was operating. Supreme Energy, LLC collected license fees during this time, but only remitted a portion to the State.

Friction again arose regarding the proposed remediation at the site. Mr. Karam testified that he was shocked to find out DEC Staff planned to spend $1.2 million to begin remediation at the site using Aztech. Mr. Karam, who had experience remediating sites, developed and submitted an alternative plan to DEC Staff which involved directional drilling and treating the free flowing product beneath the site (t. 912). This proposal would have been less expensive and would not require putting holes in the secondary containment liner. Mr. Karam testified that during 2005, he had conversations with DEC Staff member Brazell about this proposal (t. 911) and Mr. Brazell rejected this idea (t. 913). DEC Staff decided to go forward using Aztech. Aztech is a standby contractor for DEC Staff pursuant to contract #D400302 (Exh. 104).

As discussed above, in September 2006, Aztech began installing a soil vapor recovery system within the secondary containment area at the facility and cut a series of 14 holes in the secondary containment liner (t. 347, 1182). Respondents allege that DEC Staff acted improperly by preventing Aztech from repairing the liner. As discussed above, after the holes were cut in the liner, Aztech discussed repairs to the liner with DEC Staff and obtained estimates for the repair of the holes Aztech made in the liner (t. 1205). After Aztech shared the estimates with DEC Staff, Aztech was directed not to repair the liner (Exh. 84, t. 324, t. 1247). Respondents argue that DEC Staff intentionally damaged the facility and did not repair it, as

part of its continuing effort to force closure of the facility and drive respondents out of business. Respondents point out that DEC staff's actions with respect to the holes cut in the liner by Aztech are at variance with earlier holes DEC staff caused in the liner in 1997.

There is nothing in the record to indicate that there were any discussions or agreements before the work was done at the facility between Supreme Energy, LLC and Aztech regarding who would repair the holes in the liner or who would pay for such repairs. Because Aztech refused to repair the damage it caused at the facility, Mr. Karam and Supreme Energy, LLC initiated litigation against Aztech.[50] Respondents claim that the holes created by Aztech and left open allowed water to get beneath the liner, which froze and caused tanks 2 and 3 to lean dangerously, requiring the removal of Tank 3. Mr. Karam claims that these tanks were undermined either by the operation of the soil vapor recovery system[51] beneath them or frost-heave caused by water entering through the unrepaired holes[52] cut by Aztech.

According to the respondents, the litigation against Aztech further irritated DEC Staff and led to DEC Staff to improperly pursue enforcement actions against the facility in order to harass Mr. Karam and force the facility to close. They also allege that these improper enforcement activities include this administrative hearing.

Respondents claim that DEC Staff's improper actions extend beyond the facility at issue in this case. Mr. Karam has an

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[50] The respondents have sued Aztech seeking $16 million in damages (Supreme Energy LLC, and Fred Karam Individually v. Aztech Technologies, Inc., Supreme Court, Oneida County, Index #CA2008-001856)

[51] While the soil vapor extraction system has been in operation at the site since January or February 2007 (t. 303), Mr. Fina testified that it had only been used with the wells within the secondary containment area at the site for only one hour as a pilot test (t. 1210) and the wells are now only used to monitor the plume (t. 1213).

[52] Mr. Ward testified that he concluded that the reason the tank #3 had tilted was frost heave and noted that approximately four feet from the base of this tank that a hole approximately two feet by two feet had been cut in the membrane (t. 1392-4).

ownership interest in a second major oil storage facility which is located on an adjacent parcel (7429 and 7431 Hillside Avenue (t. 676). The second facility is owned by Cold Springs Terminal, LLC and Mr. Karam is a member of this LLC (t. 531). Respondents' counsel claims that DEC Staff prevented this facility from operating as part of its ongoing campaign against the respondents in this case.

Mr. Karam testified that he was contacted by a representative of a company called U.S. Oil regarding the storage of denatured alcohol (ethanol) (t. 995). Mr. Karam stated he called an unidentified DEC Staff member in Albany and asked if he could store this product in the Cold Springs Terminal and was told ethanol was unregulated (t. 996). Mr. Karam continued that the representative of U.S. Oil also called DEC Staff and got the same answer (t. 996). Based on this information, product was transferred to this facility and stored. Cold Springs Terminal, LLC operated for a three month period in February, March and April 2008 (t. 532). During this time, it stored denatured alcohol (ethanol) (t. 1057) but has since ceased (t. 650). After storage had begun, DEC Staff informed Mr. Karam that ethanol was regulated. An application dated February 28, 2008 was filed with DEC Staff for a license to operate the Cold Springs Terminal (t. 636). This application was to store jet fuel and number 2 heating oil (t. 996). By letter dated March 14, 2008, DEC Staff notified the applicant that the application was incomplete (Exh. 41) and a notice of incomplete application (Exh. 42). Mr. Karam responded by letter dated March 31, 2008 (Exh. 43).

DEC Staff then initiated an enforcement action for operation of the Cold Springs Terminal without a license which stopped the processing of the license application. Mr. Karam testified it was his belief that the product stored (ethanol) was not a petroleum product (t. 998). On May 22, 2008, a consent order was executed between DEC Staff and respondent Karam and Cold Springs Terminal, LLC (Exh. 17). This consent order addressed issues related to operating this facility without a license and inadequate secondary containment. Mr. Karam stated that he felt DEC Staff was blackmailing him (t. 999).

During his testimony on July 24, 2008, Mr. Karam testified that work was underway at the Cold Springs Terminal. This work included the following: repairing tanks, and repairing the secondary containment system with bentonite and clay (the Cold

Springs Terminal facility has a different secondary containment system than that at the facility at issue in this case) (t. 619). These repairs were done with the intention of getting a license to operate the facility. The funding for the repairs at the Cold Springs Terminal came in part from a loan from Supreme Energy, LLC and in part from seed money supplied by US Oil (t. 621).

Mr. Karam testified that petroleum storage facilities are valuable in the Syracuse area because only two terminals exist there (t. 641). Mr. Karam also testified that in an effort to compromise the ongoing compliance issues and other problems with DEC Staff regarding the facility, his attorney sent a letter offering to shut down the Supreme Energy, LLC facility upon the granting of a license for the Cold Springs Terminal, LLC facility (Exh. 44)(t. 648). At various points, Mr. Karam testified that it was his intention to close the Supreme Facility (t. 620), partially close the facility (t. 649) and not to close it (t. 648).

In his closing brief, respondents' counsel argues another part of DEC Staff's misconduct in this case is that it improperly withheld documents. This is a reference to the dispute that arose relating to respondents' counsel's subpoena which was addressed in my November 3, 2008 ruling, which is currently under appeal and discussed above.

Respondents' counsel argues DEC Staff's actions resulted in additional expenditures. Mr. Karam testified that he had spent $40,000 to expand the capacity of the secondary containment area (t. 1001), $10,000 to test the plume (t. 1001, 1004), $8,800 for Lu Engineers to prepare alternative remediation plan (t. 1005), between $6,000 and $8,000 for CES consulting services (t. 1008), $4,500 for tank cleaning (t. 1009), $12,000 for tank removal (t. 1009, 1056), and an estimated $65,000 to repair the secondary containment liner (t. 1009).

The essence of the respondents' affirmative defense is that the improper actions of DEC Staff caused respondents monetary damages and respondents then had a right to withhold payment of its license fees. Respondents cite no legal authority for this claim nor does one exist. Accordingly, respondents' affirmative defense should be rejected by the Commissioner.

Respondents' other arguments. Respondents also argue DEC Staff failed to notify respondents that the application was

incomplete as required by 17 NYCRR 30.4. DEC Staff responds that the consent order (Exh. 7) states the application is incomplete and lists the deficiencies (paragraph 14).

> "14. On August 23, 2004, Respondent submitted an application to the Department to obtain a license to operate the Facility. The Department's preliminary review indicates that the application is incomplete, as it lacks a current Spill Prevention, Control, and Countermeasure Plan, a Facility Response Plan, and an Environmental Compliance Report. Additionally, the Facility is overdue for a five-year in-depth integrity inspection of its secondary containment system. Until such time as the foregoing deficiencies are cured, the Department cannot complete its review of said application."

The paragraph from the consent order fully disclosed to respondents the information necessary to have its application considered complete so as to allow DEC Staff to consider issuing a license. DEC Staff member Kemp testified that until the missing information was provided, DEC Staff could not complete its review of the application (t. 64). Since some of this information was not and has not been provided (e.g., the five-year in-depth integrity inspection), respondents are not entitled to a license and have been put on notice as to what information is missing. This argument is without merit.

Personal Liability of Respondent Karam

There is no question of fact that Supreme Energy, LLC has been the owner of the site since December 2006, or that it operated the facility from August 1, 2004. Accordingly, Supreme Energy, LLC is an owner or operator as that term is defined in NL §172(13). DEC Staff argues that Mr. Karam should be found personally liable for the alleged violations on a number of grounds: (1) he was also an owner and/or operator of the facility; (2) he was the sole member of Supreme Energy, LLC and the facility was under his exclusive control; (3) the veil of Supreme Energy, LLC should be pierced due to Mr. Karam's actions; and (4) Mr. Karam admitted to personal liability in another similar but separate matter. Before discussing each of these theories of liability, a summary of the information in the record regarding Mr. Karam's various businesses and his relationship with Supreme Energy, LLC is helpful.

Mr. Karam and His Various Businesses

Mr. Karam testified at length at the hearing (approximately 550 pages of the transcript), and the information regarding his businesses is summarized below. Mr. Karam stated that he began working in the oil business after college in 1975 (t. 515). After working for Northland Petroleum, in the early 1980s he formed his own company, Karam Petroleum, and operated an oil terminal in Rochester, NY (t. 828). He sold this business and began working in construction, installing gas service for Niagara Mohawk, using directional drilling technology, which he also used to remediate oil spills (t. 515-6).

It is not clear from the record when Supreme Energy, LLC was formed, but it was in existence in 2003 when it purchased an oil terminal from Alaskan Oil, Inc. that was located on Lyle Avenue in Rochester, NY (t. 516). This terminal was then resold in approximately 2005 to a company called Apex or North Atlantic (t. 830, 1027) which generated revenue for Supreme Energy, LLC. At this time, other revenue was generated by construction activities undertaken by Supreme Energy, LLC (t. 558).

As discussed in detail above, Supreme Energy, LLC entered into a land contract (Exh. 33) to purchase the facility at issue here on September 24, 2003, began operations at the site on August 1, 2004, and recorded the deed for the facility in December of 2006 (t. 516). The land contract called for payments totaling $98,000, but due to the environmental conditions at the site the deed was transferred for one dollar (t. 526).

It is also not in the record when a second limited liability company was formed called Cold Springs Terminal, LLC. Mr. Karam testified that he owned this LLC (t. 531), but it is not clear if he is the sole member. In 2008, Cold Springs Terminal, LLC operated a second MOSF, located immediately adjacent to the Supreme Energy LLC site, for three months, February, March and April 2008. These operations were the subject of a separate enforcement action and consent order (DEC #7-1560, executed May 2008 in the record as Exhibit 17). Ethanol was stored at the Cold Springs Terminal LLC for a company called US Oil (t. 578).

In addition to the two limited liability companies discussed above, Mr. Karam has an interest in at least one other

business, Buckskin Pipeline Construction, Ltd., which according to Mr. Karam is not currently active (t. 788).

In the days before the hearing commenced, DEC Staff served a subpoena upon Mr. Karam and Supreme Energy, LLC (see my November 3, 2008 ruling in this matter). Several of the documents disclosed to DEC Staff as a result of the subpoena were introduced in the record, including the following: (1) a "Profit & Loss Detail, Supreme Energy, LLC., January through December 2007" (Exh. 28); (2) a "Profit & Loss Detail, Cold Springs Terminal, January through June 17, 2008" (Exh. 29); (3) Mr. Karam's 2007 Federal Income Tax Return (including two schedule C forms, one for Supreme Energy, LLC and one for Cold Springs Terminal, LLC) (Exh. 30); (4) copies of schedule C forms for Supreme Energy, LLC for 2007, 2004 and 2005 (Exh. 31); and (5) information about a checking account from July 1, 2007 through July 24, 2008 (Exh. 35).

Mr. Karam was examined at length regarding the finances of the two LLCs and his personal finances. A number of discrepancies were revealed and not explained. For example, Mr. Karam testified that Cold Springs Terminal, LLC did not have any business in 2007 (t. 533) but reported $74,594 in revenues for that year, $49,864 in expenses (Exh. 30, p. 5) and took $22,363 as business income (t. 544). Mr. Karam's explanation was that Cold Springs Terminal, LLC had borrowed the money from Supreme Energy LLC to pay for improvements (t. 533) and that no document memorializing this transaction existed (t. 535). In addition, Mr. Karam testified that he used a cash basis for accounting (t. 534, 570); however, his tax return stated that he used the accrual method (Exh. 30, p. 5, line F).

With respect to Supreme Energy, LLC, all revenues were derived from storing petroleum products at the facility for two customers, Shell Oil and Chevron. Supreme Energy, LLC billed its customers for the cost of storage as well as the license fees and surcharges. These bills were paid in a timely manner; however, as discussed elsewhere in this report, the license fees and surcharges were not remitted to the state in full, as required. Mr. Karam admitted that if he paid license fees and surcharges owed to the state, there would be nothing for him to take as wages (t. 552). Shell Oil paid its bill by check (t. 567) while Chevron utilized wire transfers (t. 580). At the hearing, Mr. Karam was not able to show that certain checks received from Shell were properly accounted for or recorded in the bank statements (Exh. 28) (t. 571). Mr. Karam stated that

he would sometimes sign over checks directly to creditors to cover expenses (t. 573). In addition, the bank account was used for money from Mr. Karam's other business, Buckskin Pipeline Construction, Ltd. (t. 582).

The finances of Supreme Energy, LLC, Cold Springs Terminal, LLC and Mr. Karam are closely linked. Mr. Karam testified that there was only one checkbook for both Supreme Energy, LLC and Cold Springs Terminal, LLC (t. 575) and the finances were combined to save time. He explained that at the end of the year the businesses activities were separated for the filing of tax returns (t. 583). Since both businesses are reported on his tax returns by use of a Schedule C, this practice did not impact his income taxes (t. 556, 1095).

Mr. Karam testified that he would draw money from the LLC's account for his personal use throughout the year (t. 552, 574) for expenses such as his home payment (588, 1024) and gasoline for him to travel to and from work (t. 1025). Mr. Karam stated that he put other monies into the businesses account, including child support payments he received (t. 553, 588). In addition, he would place money he received from the sale of property he owned personally into the business account to meet payroll and other business expenses (t. 1096, 1101). He also put money he received as salary from other jobs into the business (t. 1108). Monies generated from Supreme Energy, LLC were also used to pay expenses incurred by Cold Springs Terminal, LLC (t. 556).

With respect to employees, Mr. Karam testified that because Cold Springs Terminal, LLC and Supreme Energy, LLC had one or one and a half people working for them, it was easier to use a single bank account. It is also easier for payroll taxes and unemployment taxes (t. 1094). Although Mr. Terpening was employed by Supreme Energy, LLC in October 2007, there is no record of his salary being paid by Supreme Energy, LLC. Mr. Karam explained that this was because he was being paid by Cold Springs, LLC for ease of administration (t. 1018).

Complicating the understanding of the finances of Mr. Karam, Supreme Energy, LLC, Cold Springs Terminal, LLC and Buckskin Pipeline Construction, Ltd. is the ongoing litigation involving the historical petroleum contamination at the site. According to Mr. Karam, his records (some eight filing cabinets) have been provided to the parties of this litigation as part of the ongoing discovery in that case (t. 587).

The evidence in the record supports the conclusion that Mr. Karam is the sole member of Supreme Energy, LLC (Exh. 50) and has control over Cold Springs Terminal, LLC (he may also be the sole member of this LLC, however, this is not proven in this record). Mr. Karam controls both entities and directs the actions of both. While many aspects of the finances of Mr. Karam, the two LLC's and Buckskin Pipeline Construction, Ltd. are unexplained in the record, it is clear that all are closely linked.

Mr. Karam as Owner or Operator

In its amended complaint, DEC Staff alleges that Mr. Karam is an owner and/or operator of the facility. In their answer, the respondents deny this claim and assert Mr. Karam is neither the owner nor operator of the facility. The term "owner" or "operator," in this case, is defined as any person owning a facility or operating it by lease, contract or other form of agreement (Navigation Law §172(13)).

There is nothing in the record to indicate that Mr. Karam either owned or operated the facility. Most, if not all, of the documentation shows Supreme Energy, LLC (or a variation of its name, e.g. Supreme Energy and Supreme Energy Corp.) operated and then owned the facility. While most correspondence to Supreme Energy, LLC is to the attention of Mr. Karam, there is nothing to indicate that Mr. Karam was either the owner or operator in his own right. DEC Staff seems to have abandoned this theory of liability and makes no reference to it in its closing or reply briefs. Based on the above, I recommend the Commissioner conclude that the record does not support a finding of liability for Mr. Karam, individually, based on the theory that he was either the owner or operator of the facility.

Mr. Karam as the responsible member of Supreme Energy, LLC

DEC Staff argues that Mr. Karam, as the exclusive representative and sole member of Supreme Energy, LLC, was the decision maker with respect to compliance issues. As such, Mr. Karam should be held liable for the violations of Supreme Energy, LLC because he was the responsible member of the LLC. As noted above, all correspondence with Supreme Energy, LLC was directed to Mr. Karam and the record shows no other decision maker at Supreme Energy, LLC.

DEC Staff argues that Mr. Karam was the decision-maker in relation to what Supreme Energy, LLC would and would not do for compliance purposes. DEC Staff continues that Mr. Karam transferred funds between Supreme Energy, LLC and Cold Springs Terminal, LLC for the purpose of renovating the neighboring facility while not allocating funds to bring the Supreme Energy, LLC facility into compliance.

DEC Staff cite to several long-standing DEC administrative precedents. In the Matter of Sheldon Galfunt and Hudson Chromium Company, Inc., Order of the Commissioner, May 5, 1993, the Commissioner held that Mr. Galfunt, the secretary and treasurer of Hudson Chromium Company, Inc., managed the day-to-day affairs of the company and was directly in charge of the quality control. In holding Mr. Galfunt jointly and severally liable for the violations committed by the corporation the Commissioner wrote as follows:

> "It is well established that a corporate officer may be held criminally liable for violations of statutes enacted to protect the public health, safety and welfare, where that officer had the authority and responsibility to prevent the violation (United States v. Park, 95 S.Ct. 1903 (1975); United States v. Dotterweich 64 S.Ct. 134 (1943)). The rationale for holding corporate officers criminally responsible is even more persuasive where only civil liability is involved (United States v. Hodges X-Ray, Inc., 759 F.2d 557 (CA 6th Cir, 1985))." (Galfunt, p. 2).

The Commissioner continued "[i]n cases where the statutory violation does not require any showing of wrongdoing, liability attaches to managerial officers of a corporation where it is shown that, by virtue of the relationship the officer bore to the corporation, he or she had the power to prevent the violation (United States v. Park, *supra*)." The Commissioner concluded that "it is not necessary to determine whether Respondent Galfunt facilitated the violations or whether he acted reasonably in exercising his supervisory authority. The fact that he was directly responsible for operations and had managerial authority to prevent the violation is sufficient to establish his liability. Whether and to what extent he acted negligently or consciously wrongfully need not be proven to establish his liability but would be considered as one factor in determining an appropriate civil penalty." (Galfunt, p. 2).

In the Matter of 125 Broadway, LLC, (Decision and Order of the Commissioner, December 15, 2006), the Commissioner extended this reasoning to limited liability companies. "The legal theories in New York Law that authorize imposition of individual liability for environmental violations upon corporate officers arising from their individual acts or omissions are equally applicable to a member or officer of a limited liability company" (Matter of 125 Broadway, p. 5).

In this case, Mr. Karam has been shown to have the authority and responsibility to prevent the violations proven against Supreme Energy, LLC, as discussed in detail above. He was directly, actively and knowingly involved in the actions of Supreme Energy, LLC that resulted in the violations proven. Respondents' counsel does not contest the fact that Mr. Karam controlled Supreme Energy, LLC. Respondents' counsel does, however, argue that these precedents are not applicable, at least in part. As discussed above, respondents' counsel contests liability for all the causes of action, except with respect to the failure to pay license fees in full. In his reply brief, he argues that the non-payment of license fees is not a threat to public health, safety or welfare (Respondents' post hearing rebuttal memorandum, p. 18). Accordingly, he argues, Mr. Karam should not be held liable for the license fees owed by Supreme Energy, LLC.

In the past, the Commissioner has issued orders finding corporate officers or directors liable using the theory of responsible corporate officers or managers in a number of program areas including the following: pesticides [article 33 of the ECL] in Matter of Mudd's Vineyard, Ltd., Commissioner's Decision and Order, August 8, 1994; air pollution control [article 19 of the ECL] in Matter of Sheldon Galfunt; and solid waste [article 27 of the ECL] in Matter of Ronald Edgar, Productive Recycling, Inc., and Productive Recycling Corporation, Commissioner's Order, June 18, 1993. More relevant to this case is Matter of Oil Co., Inc., Order of the Commissioner, July 9, 1998, in which the Commissioner found corporate officers liable for violations of the Navigation Law involving the failure to register an MOSF and failing to maintain secondary containment around above ground tanks. In at least two other case, the Commissioner has found corporate officers liable for violating consent orders they signed in their corporate capacities (Matter of 125 Broadway and Michael O'Brien and Matter of Wayne Jahada, individually, and Watertown

Iron and Metal, Inc., Order of the Commissioner, November 21, 2006).

Based on these precedents, the Commissioner should also find Frederick Karam jointly and severally liable for operating the facility without a license and failing to maintain the secondary containment liner at the facility because Mr. Karam was the sole member of Supreme Energy, LLC and responsible for environmental compliance as the sole member of the LLC.

With respect to the non-payment of license fees and surcharges, the Commissioner has not found corporate officers liable for the payment of fees owed by a corporation in any administrative case. In addition, DEC Staff does not cite any authority for their request for Mr. Karam's personal liability for license fees and surcharges collected by Supreme Energy, LLC from its clients, but not remitted to the state. Consequently, the Commissioner should adopt Respondents' counsel's argument that the non-payment of license fees is not a threat to public health, safety or welfare.

If the Commissioner rejects the recommendation that Mr. Karam not be held personally liable for failure to remit fees he collected, a possible theory of liability does exist. Unlike most taxes which are deposited in the State's general fund and do not specifically protect the public health, safety and welfare, in this case the license fees and surcharges owed by Supreme Energy, LLC are dedicated to environmental protection. Specifically, the license fees and surcharges are authorized pursuant to NL §174(4)(a) & (b) and the fine of two times the amount owed is authorized by NL §174(7). These monies are to be deposited in the New York Environmental Protection and Spill Compensation Fund pursuant to NL §179(1)(a) and NL §187(3). The money from this fund is disbursed for the environmental purposes set forth in NL §186. Based on this analysis, the Commissioner could reasonably conclude these sections of the Navigation Law were established to protect the public health, safety or welfare and that Mr. Karam should be held liable for the payment of license fees and surcharges owed by Supreme Energy LLC as well as the civil penalty imposed for this cause of action. However, because this reasoning has not been used by the Commissioner in the past, the connection between fee collection and a threat to public safety is tenuous.

In conclusion, the record supports the Commissioner finding Mr. Karam personally liable for operating the facility without a

license and failing to maintain the secondary containment system. Both of these violations are of laws designed to protect the public health, safety and welfare. With respect to the non-payment of license fees and surcharges, because there is no precedent for finding Mr. Karam personally liable and because the argument that the failure to pay a fee is a violation of a law designed to protect the public health, safety and welfare is tenuous, the Commissioner should not hold Mr. Karam personally liable under this theory of liability.

Piercing the Veil of the LLC

In addition to arguing for the personal liability of Mr. Karam based on his control over Supreme Energy, LLC, DEC Staff argues that Mr. Karam's actions warrant the Commissioner to find personal liability based on the piercing of the veil of the LLC. In its brief, DEC Staff argues that Supreme Energy, LLC is a corporation; however, it is in fact a limited liability company. The arguments for piercing an LLC are similar to those for corporations and in several recent decisions, courts have held that the doctrine of piercing the corporate veil applies to limited liability companies (see Williams Oil Company, Inc. v Randy Luce E-Z Mart One, LLC, 302 AD2d 736, 757 NYS2d 341 [3d Dept 2003]; Retropolis, Inc. v 14th Street Development LLC, 17 AD3d 209, 797 NYS2d 1 [1st Dept 2005]).

DEC Staff argues that Mr. Karam has dominion over Supreme Energy, LLC and used this authority to direct the violations. According to DEC Staff, Mr. Karam used his control over Supreme Energy, LLC to commit a wrong by failing to comply with the consent order and remit license fees and surcharges. DEC Staff alleges that Supreme Energy, LLC is not operated as a separate company; rather it is an alter ego of Mr. Karam and argues its funds are commingled with those of Cold Springs Terminal, LLC and Mr. Karam's personal funds with no clear delineation among them. DEC Staff cites as support for this argument the fact that no records are kept of loans between the entities or other transactions and Mr. Karam routinely withdrew money from this account to pay his personal bills.

In its brief, DEC Staff cites Matter of Joseph Morris, 82 N.Y.2d 135, 141 (1993). In this case, the Court of Appeals stated "[g]enerally, however, piercing the corporate veil requires a showing of the following: (1) the owners exercised complete domination of the corporation in respect to the

transaction attacked; and (2) such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." The court also noted that the decision on whether to pierce the corporate veil will depend on the facts and equities of a given case.

Respondents' counsel agrees DEC Staff has correctly cited Morris and concedes that Mr. Karam controls Supreme Energy, LLC; however, he asserts DEC Staff has not met its burden of establishing that a fraud or similar type of wrongful conduct was committed by Mr. Karam. It should be noted again, that respondents' counsel only addresses this issue with respect to repayment of owed license fees and surcharges; he does not address the other causes of action.

DEC Staff makes no specific argument nor does it cite any cases in an attempt to prove a fraud or similar type of wrongful conduct with respect to the first cause of action (operation without a license), the third cause of action (operating with inadequate secondary containment) or the fourth cause of action (failing to comply with consent order). Nor is it necessary to address this claim, since Mr. Karam's personal liability for these causes of actions is established, above, based on his control of Supreme Energy, LLC and his actions as its responsible member. Consequently, only the question of piercing the veil of the LLC with respect to the second cause of action (failure to pay license fees and surcharges) is discussed below.

DEC Staff argues that the corporate veil of Supreme Energy, LLC should be pierced and Mr. Karam be held personally liable based on the facts of this case. There is no factual dispute that Supreme Energy, LLC billed its customers for and received license fees and surcharges during its operation of the facility, beginning on August 1, 2004. There is also no dispute that only some of this money was remitted to the State, though it was required to be paid on a monthly basis. Appendix A summarizes and totals the amount due. Mr. Karam testified that as the sole member of Supreme Energy, LLC, he directed this money be used for other purposes, including loaning to other companies under his control, paying expenses incurred by Supreme Energy, LLC and withdrawing funds for his personal use. Mr. Karam testified that he personally did not have the funds to pay the State nor did Supreme Energy, LLC. DEC Staff argues that the facts of this case demonstrate Mr. Karam, by collecting money owed the State and then spending it for his own use, committed a fraud upon DEC and the oil companies. DEC Staff

cites Matter of EAC, 49 AD3d 1006, 853 N.Y.S.2d 419 (2d Dept 2008), a case in which the owner of a corporation transferred corporate assets to himself, personally, and rendered the corporation insolvent. The court held this was a fraud and allowed creditors to pierce the corporate veil.

Respondents' counsel argues DEC Staff has failed to demonstrate a fraud, rather the facts of this case show that Supreme Energy, LLC was undercapitalized and Mr. Karam had failed to anticipate the compliance costs involved in operation of the facility. Respondents' counsel identifies the following four factors in his reply brief to demonstrate the lack of fraud: (1) the fact that Mr. Karam filed all license fee reports and accurately set forth the amount owed; (2) the fact that partial payments were made until compliance costs prevented further payments; (3) the lack of evidence that Mr. Karam was lining his pockets with the funds and points to Mr. Karam's 2006 federal tax return which showed Mr. Karam had an income of less than $40,000; and (4) the end of year accounting that separated the monies in the bank account in which the funds were commingled. Respondents' counsel concludes that Mr. Karam greatly underestimated the costs of compliance, but naiveté, stupidity, lack of good business acumen or the like does not constitute fraud or other similar wrongful conduct necessary to pierce the corporate veil.

Respondents' counsel's arguments are unpersuasive. The record clearly demonstrates that Mr. Karam used his position as sole member of the LLC to redirect monies collected for the State to other purposes, which directly benefitted him. The facts of this case support a finding that Mr. Karam did commit a fraud or wrong by diverting these monies. In conclusion, the record supports a finding by the Commissioner that the veil of Supreme Energy, LLC should be pierced and Mr. Karam held personally liable for the violations alleged in the second cause of action.

Admission of Personal Liability in Second Matter

Finally, DEC Staff argues that because Mr. Karam admitted personal liability when he executed the consent order for the neighboring facility (Exh. 17) he should be found personally liable in this case. DEC Staff argues that Mr. Karam's relationship with the adjacent facility, owned and operated by Cold Springs Terminal, LLC, is no different than at Supreme

Energy, LLC's terminal and the business structure is the same. Respondents do not address this argument in their reply brief.

Exhibit 17 is an order on consent executed on May 22, 2008 that named both Mr. Karam and Cold Springs Terminal, LLC as respondents. This case dealt with violations at the MOSF facility adjacent to the Supreme Energy, LLC facility (7431 Hillside Road, Baldwinsville, NY). In this order, the respondents admitted to the following: (1) operating the facility without a license from at least February 2008 in violation of Navigation Law §174; (2) failing to file correct licensing reports in violation of Navigation Law §174(7); and (3) failing to maintain valid secondary containment for the tanks at the facility in violation of the Navigation Law. The order required the respondents to do the following: (1) pay a $25,000 civil penalty; (2) submit corrected license fee reports within 15 days of the execution of the order and pay the license fees; and (3) properly clean and close the two tanks at the facility that had stored ethanol.

DEC Staff's argument that Exhibit 17 provides a basis for finding Mr. Karam personally liable in this case is without merit. The cases are different enforcement actions. However, this exhibit can be considered in calculating the appropriate civil penalty because it shows past violations admitted to by Mr. Karam.

CIVIL PENALTY AND OTHER RELIEF REQUESTED

As discussed above, evidence in the record supports the conclusion that DEC Staff has met its burden of proving by a preponderance of the evidence that the following violations occurred: (1). operating the facility without a license in violation of Navigation Law §174 from November 7, 2007 through June 22, 2009; (2) failing to remit a portion of the license fees and surcharges to the State collected from customers from August 1, 2004 through June 30, 2008 in violation of Navigation Law §174; and, (3) failing to maintain the secondary containment liner at the facility as required by 6 NYCRR 613.3(d) from September 2006 through June 22, 2009. This section addresses the parties' arguments regarding the appropriate amount of civil penalty, closure of the facility, and barring Mr. Karam from being issued any future DEC permits.

Positions of the Parties

DEC Staff has increased its civil penalty demand through the hearing process.[53] In its closing brief, DEC Staff requests that the Commissioner impose a civil penalty of $1,395,000 for the violations up to the filing of its brief (September 3, 2009) and a penalty of $1,000 per day for any continuing operation of this facility subsequent to the filing of the brief. DEC Staff also requests the immediate payment of license fees owed and an additional penalty of two times this amount (p. 22).

DEC Staff provides the following analysis for the total civil penalty in its closing brief. For the first cause of action, DEC Staff requests a civil penalty of $500,000 to the date of filing of the brief plus $500 per day until the Commissioner's order is issued (p. 19). For the second cause of action, DEC Staff seeks a civil penalty of $250,000 (p. 13). For the third cause of action, DEC Staff seeks a civil penalty of $645,000 and $500 per day from the time its closing brief was filed to the date of the Commissioner's order (p. 17). DEC Staff, in its closing brief, combines the fourth cause of action with the third (violation of the consent order and failure to construct/maintain adequate secondary containment) and does not request a separate civil penalty for the fourth cause of action, which as discussed above, was not proven at the hearing. In addition to the civil penalty, DEC Staff also requests the Commissioner include language in his order that: (1) requires immediate payment of license fees owed; (2) requires an

[53] The original complaint (dated June 27, 2007) requested a civil penalty of $750,000 and all license fees due "which total over $191,400"; no mention of surcharges is made. In its amended complaint (dated March 24, 2008), DEC Staff increased this amount and requested the Commissioner to impose a civil penalty of one million dollars ($1,000,000) and the payment of all licensing fees due (no estimate of these fees was provided in the complaint); again no mention of the surcharges is made. The amended complaint does not provide a breakdown of DEC Staff's request by cause of action. During the hearing, DEC Staff announced its intention to again increase its demand for civil penalties. DEC Staff argues that respondents have been on notice of DEC Staff's intention to seek additional penalties based on the continued operation of the facility and non-compliance during the hearing process and claims that the delays in the hearing process were the result of the respondents' deliberate actions.

additional penalty of two times the amount of license fees owed; (3) directs the closure of the facility; and (4) bans respondent Karam from ever operating a Department regulated facility again.

In its closing brief, respondents acknowledge that they have not fully paid the license fees due and argue they are not liable for civil penalties because DEC Staff has not proven any of the other violations alleged.

Applicable Law and DEC Guidance Documents

The first and second causes of action which were proven at the hearing are violations of Article 12 of the Navigation Law and its implementing regulations. Navigation Law §192 is the applicable civil penalty provision and states:

> "A person who...violates any of the provisions of this article or any rule or regulation promulgated thereunder or who fails to comply with any duty created by this article shall be liable for a penalty of not more than twenty-five thousand dollars for each offense in a court of competent jurisdiction. If the violation is of a continuing nature, each day during which it continues shall constitute an additional, separate and distinct offense."

In the past, the Commissioner has imposed civil penalties pursuant to this section using an administrative forum. "[T]he Department is expressly authorized to institute administrative proceedings to enforce Navigation Law article 12 and assess penalties" (Matter of Gasco-Merrick Road Gas Corp., Decision and Order of the Commissioner, June 2, 2008, p. 11).

The third cause of action which was also proven at the hearing is a violation of 6 NYCRR 613.3(d). ECL §71-1929(a) is the applicable civil penalty provision and authorizes a civil penalty not to exceed thirty-seven thousand five hundred dollars per day for each violation.

DEC's Civil Penalty Policy (DEE-1, dated June 20, 1990) "establishes the Department's policy and guidance for developing penalties for violations of the Environmental Conservation Law (ECL) and the Department's regulations" (p. 2). While DEE-1 does not explicitly refer to violations of the Navigation Law, it does require ALJs to "consider this guidance in recommending

penalty terms for all orders executed by or for the Commissioner of Environmental Conservation" (p. 2).

DEE-1 states that "the starting point of any penalty calculation should be a computation of the potential statutory maximum for all provable violations" (p.5). In its closing brief DEC Staff calculates that the maximum civil penalty to be in excess of $85 million dollars and estimates that the maximum penalty for the first cause of action to be in excess of $40 million, based on the $25,000 per day maximum penalty multiplied by the number of days between January 1, 2005 and the date of its brief (September 3, 2009). DEC Staff does not provide a maximum penalty calculation for the second cause of action, but a similar calculation to that for the first cause of action can be used. DEC Staff calculates the maximum penalty for the third cause of action to be approximately $45 million.[54] Totaling these DEC Staff calculations, the maximum penalty is in excess of $100 million dollars.

The civil penalty policy next requires an examination of the benefit component, or the economic benefit of delayed compliance including the present value of avoided capital and operating costs and permanently avoided costs which would have been expended if compliance had occurred when required (p. 6). With respect to the first cause of action, DEC Staff argues that the penalty should include the cost to obtain a license and maintain it.[55] DEC Staff also argues the civil penalty should equal all revenue that respondents were paid for storing product.[56] DEC Staff does not make an argument with respect to

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[54] DEC Staff uses in its calculation a penalty of $25,000 per day, when the ECL authorizes a maximum penalty of $37,500. If the higher amount is used the maximum penalty for this violation is in excess of $67 million.

[55] DEC Staff makes this narrative statement in its brief but offers no calculation and makes no effort to convert this statement into a monetary amount in its brief.

[56] DEC Staff does not attempt to quantify the amount of revenue that was generated by the storage of product at the facility, nor does it explain why the amount of revenue should be used rather than the profit (revenue less expenses) earned from the storage of product. The record contains some information about the revenue and profit earned by Supreme Energy, LLC during its operation of the facility. The Profit

the benefit component relative to the second cause of action. For the third cause of action, DEC Staff identifies a benefit component of $195,000 for the avoided cost of repairing the secondary containment liner. The basis for this claim is an email dated August 31, 2007 (Exh. 14). In its closing brief, DEC Staff claims this email was sent by a representative of the manufacturer of the secondary containment liner at the facility to Mr. Karam, and then forwarded to DEC Staff member Kemp. According to DEC Staff, this email provides an estimate of $195,000 to fix the liner at the facility and provides a basis for calculating the benefit component enjoyed by respondents by not maintaining the secondary containment liner. Respondents do not address this issue in their briefs.

There are several problems with Exhibit 14. First the estimate concludes "[t]otal cost $195,000?" which seems to indicate that it is not a true estimate, but rather an educated guess. More importantly, however, Exhibit 14 refers to two areas of work. The first area of work is called the front containment area and may refer to the facility. The email goes on to state that the second area needs a total system and it is not clear this is part of the facility at issue here, or the neighboring Cold Springs Terminal (which is also controlled by Mr. Karam and which he was also trying to get licensed at about this time). Because of this ambiguity in the record, I recommend the Commissioner not rely on Exhibit 14 as the basis for calculating the benefit component. It is certain that a monetary benefit accrued to respondents as a result of not complying with the requirements of providing adequate secondary containment; however, for the reasons stated above, DEC Staff has not quantified it adequately.

The civil penalty policy then requires an analysis of the gravity component which involves the following two factors: (1) the potential harm and actual damage caused by the violations; and, (2) the relative importance of the type of violation to the

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and Loss Detail for Supreme Energy LLC for 2007 (Exh. 28) indicates total sales of $175,397.88 and a net income of $8,233.43, which is different than the $1,896 amount reported to the Internal Revenue Service in 2007 (Exh 31). The amount of net loss reported by Supreme Energy, LLC to the IRS in 2004 was $209,305; in 2005 a loss of $154,847 was reported (Exh. 30); and in 2006 a profit of $43,177 was reported (Exh. 31). These figures, if accurate, indicate that the respondents did not enjoy an economic benefit from the operation of the facility.

regulatory scheme (p. 8). The first factor focuses on whether and to what extent the violations resulted in or could potentially result in loss or harm to the environment. In this case, there is nothing in the record to indicate any actual environmental damage or release of pollutants to the environment. DEC Staff does not seek any remediation, only proper closure of the facility. DEC Staff argues that the potential harm to the facility could have been great, had a spill occurred and not been contained at the facility and that respondents' actions created an ongoing endangerment to human health and the environment, including endangering the Seneca River, which is a National Heritage waterway. However, DEC Staff's actions in directing holes be cut in the secondary containment liner and then directing the holes not be repaired did not lessen this potential. It is clear that the failure to maintain the secondary containment liner at the facility had the potential to cause great environmental harm.

The second factor focuses on the importance of the violated requirements in achieving the goals of the underlying statutes. DEE #1 explicitly states that failure to obtain a license before undertaking a regulated action is always a serious matter (p. 10). As discussed above, while DEC Staff alleged the facility began operating without a license on January 1, 2005, it has only proven that this violation began on November 7, 2007. However, this violation continued until June 22, 2009 and should be considered a serious violation and important to the regulatory scheme. In addition, the failure to remit license fees and surcharges collected is also important to the regulatory scheme as is the duty to maintain adequate secondary containment at the facility.

Finally, the civil penalty policy identifies the following five penalty adjustments which should be applied if applicable: (1) culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) unique factors (p. 10). Each is discussed below.

DEC Staff argues that respondents committed the violations knowingly and intentionally, and, therefore, are culpable for the violations. Respondents argue that DEC Staff's actions are, at least in part, the reason the violations occurred and persisted. The record demonstrates that Mr. Karam, as the sole member of Supreme Energy, LLC, was an experienced businessman who had been involved in the storage and distribution of petroleum products for many years. The record also indicates

that Mr. Karam made managerial decisions for Supreme Energy, LLC that resulted in the continued operation of the facility without a license and without adequately maintained secondary containment. Further, the decision to collect the license fees and surcharges and not remit them to the State was made solely by Mr. Karam. These facts indicate that Supreme Energy, LLC and Mr. Karam, individually, are both fully culpable for the violations.

The record shows that there has been little violator cooperation in this case. As set forth in detail in the discussion of the respondents' affirmative defense, the parties have had very poor relations since the first meeting regarding this facility in July 2004. The record does not support reducing the penalty due to the cooperation of respondents.

DEC Staff argues respondents have a history of non-compliance that warrants a higher civil penalty amount. DEC Staff argues that respondents will never comply with the law based on their past violations. DEC Staff cites the 2003 consent order for this facility (Exh. 7) and the consent order executed by Mr. Karam and Cold Springs Terminal, LLC (Exh. 17) as evidence of past non-compliance with State law. In addition, DEC Staff points to a September 29, 2006 consent order between the United States Environmental Protection Agency (Region 2) and Supreme Energy (Exh. 79) as evidence of violation of federal laws at the facility by respondents.[57]

Additional information relevant to this point is found in the record, but not referenced in any of the parties' briefs. Beginning in the 1980s, Mr. Karam has owned and operated other oil terminals. In approximately 2002 or 2003, Mr. Karam testified that he bought a terminal in Rochester from Alaskan Oil, Inc (t. 830). Following this purchase, Supreme Energy, LLC filed an application for an MOSF license for the Rochester

[57] In November 2004, inspectors from the United States Environmental Protection Agency (EPA) examined both the Supreme Energy, LLC site and the neighboring terminal, which later became owned by the Cold Springs Terminal, LLC (t. 1041). A series of violations were noted, which Mr. Karam testified were promptly corrected (t. 1041) and a consent order was entered into (Exh. 79). Supreme Energy, LLC never paid the $10,000 fine, despite being obligated to pay it, because Mr. Karam felt that the violations were the result of actions taken by his contractors (t. 1044-5).

facility (t. 1029, Exh. 77). This license was apparently granted (MOSF #8-1560), but is not in the record. Mr. Karam testified that he never had any violations at this facility (t. 831). However, this testimony is contradicted by a July 1, 2004 Inspection Report (Exh. 78) produced by DEC Staff at the hearing. There is nothing in the record to indicate any enforcement action based on the violations noted in the inspection report. Mr. Karam testified that he later sold the facility (t. 1027) but could not remember the exact date.

In his closing brief, respondents' counsel argues that the actions of DEC Staff, as set forth above in the discussion of respondents' affirmative defense, were the cause of his clients' inability to pay the license fees and surcharges owed. DEC Staff argues that there is nothing in the record to demonstrate respondents lack the ability to pay any civil penalty imposed. The record does contain some financial data regarding Supreme Energy, LLC and Frederick Karam which presents a partial and incomplete picture of the financial resources of respondents. Supreme Energy, LLC's Profit and Loss Detail for 2007 shows a net income of $8,233.43 (Exh. 28).[58] Tax documents show a net loss reported by Supreme Energy, LLC to the IRS in 2004 of $209,305, in 2005 a loss of $154,847 (Exh. 30), and in 2006 a profit of $43,177 (Exh. 31). Mr. Karam's 2007 Federal Tax Return shows an adjusted gross income of $38,598 (Exh. 30). However, apart from the documents referenced above, no other financial information exists in the record regarding either Supreme Energy, LLC or Mr. Karam. Accordingly, there is insufficient information to warrant a penalty adjustment based on respondents' ability to pay. As discussed above, respondents' affirmative defense should be rejected, and the claim that DEC Staff's actions caused the failure to timely pay the license fees should also be rejected.

Neither DEC Staff nor respondents present any arguments that could be considered unique factors in their closing and reply briefs nor do they make any arguments not otherwise addressed in this report.

[58] This net income amount differs from the amount of net profit reported on Mr. Karam's Schedule C for 2007, which reported a net income of $1,896 (Exh. 31).

First Cause of Action – operation of a facility without a license

As discussed above, in its closing brief DEC Staff requests a civil penalty of $500,000 plus $500 per day from the date of filing of DEC Staff's brief (September 3, 2009) until the Commissioner's order is issued for the operation of the facility without a license issued pursuant to NL §174. Respondents deny liability for the violation and do not address DEC Staff's penalty request in its papers.

In its closing brief, DEC Staff concedes that the consent order (Exh. 7) authorized operation of the facility without a license (p. 18). DEC Staff asserts that this authority expired on December 31, 2004. DEC Staff requests a civil penalty of $500,000 for the period beginning on January 1, 2005 and ending September 3, 2009, the date of its closing brief.[59] In addition, DEC Staff seeks $500 per day in additional penalties until the date of the Commissioner's order.

However, as discussed above, DEC Staff's calculation of the length of time of the violation is not correct. Because the DEC Staff has not shown that it ever approved the corrective action plan that was required by the consent order, Supreme Energy, LLC's authorization to operate under the consent order continued past December 31, 2004. DEC Staff made numerous visits to the facility over the years and knew that it was operating. The first evidence in this record indicates that DEC Staff considered the facility to be operating without authorization is the April 27, 2007 letter (Exh. 16).

In addition, DEC Staff's request for penalties up to the date of its closing brief and beyond is problematic, because this time period extends past when evidence in the record indicates the violation occurred. There are several dates that could be used for the last date of the violation based on this record including the date of the amended complaint (March 24, 2008), the date that DEC Staff rested its direct case (August 18, 2008, t. 1113), or the date the facility ceased operating. Determining the date the facility ceased operations is difficult and the only evidence in the record regarding this date is found

[59] The civil penalty requested is $500,000 and the period of the violation, as calculated by DEC Staff, is 1,676 days for a daily penalty request of approximately $300 per day.

in an April 22, 2009 letter to Chevron Products Co. from Mr. Karam informing Chevron that the facility would cease operations 60 days from the date of the letter (Exh. 113). In order to clarify the meaning of Exhibit 113, by email dated September 1, 2009, I asked respondents' counsel if the facility was operating or not. By email dated September 9, 2009, counsel forwarded an email from Mr. Karam stating the facility was not operating. There is nothing else in the record indicating the facility ceased operations at that date or that any steps were taken to properly close the facility.

Mr. Kemp testified that during his June 22, 2009 visit to the facility, it remained unlicensed (t. 1691). During a discussion at the facility with the operator of the facility, he learned the facility was still storing approximately 100,000 gallons of product (t. 1691). This is the last evidence in the record indicating that the facility was still storing product or operating without a license.

Based on this record, it is reasonable to conclude that this violation continued from May 2, 2007 through June 22, 2009, or 783 days. Using DEC Staff's prorated proposed penalty of approximately $300 per day, I recommend the Commissioner impose a civil penalty of $235,000 for this violation on Supreme Energy, LLC. As discussed above, the record supports the conclusion that Mr. Karam was the responsible member of Supreme Energy, LLC and it was his direct action that caused the facility to operate without the required license. Therefore the Commissioner should find Mr. Karam jointly and severally liable for the civil penalty of $235,000.

Second Cause of Action – failure to pay license fees

In its closing brief, DEC Staff requests the Commissioner include in his order a requirement that Supreme Energy, LLC be directed to do the following: (1) immediately pay all license fees (as required by 17 NYCRR 30.9(a) & (e)); (2) pay a penalty of two times the license fees due pursuant to Navigation Law §174(7); and (3) pay an additional civil penalty of $250,000 pursuant to Navigation Law §192 (p. 13).[60] DEC Staff argues that

[60] It is not clear from DEC Staff's papers, the exact rationale for this requested civil penalty. In its closing brief, DEC Staff states the penalty is "for the almost 100 separate knowingly and intentionally violations of the

the respondents knowingly and intentionally failed to pay the license fees and instead used the money for their own purposes. DEC Staff continues that failure to significantly penalize respondents will send a clear message to the industry that nonpayment of these fees is not treated seriously.

As discussed in detail above, DEC Staff has shown that Supreme Energy, LLC has not fully paid all the license fees and surcharges it has collected. However, DEC Staff did not accurately calculate the amount due. The correct amount, including interest, is $189,066.62 (see Appendix A of this report). Respondents' counsel does not dispute that some amount is due but provides no calculation or estimate of the amount owed. Respondents' counsel requests that a timetable be established for Supreme Energy, LLC to pay the outstanding amount, after taking into account all the costs which were needlessly incurred because of DEC Staff's "willful and malicious actions" (respondents' post hearing memorandum, p. 21). As discussed above, I recommend the Commissioner find that respondents' affirmative defense be rejected and conclude the respondents' arguments are unpersuasive. Accordingly, I recommend the Commissioner include in his final order DEC Staff's request for immediate payment of the $189,066.62 owed.

In addition to the immediate repayment of license fees, surcharges and fines owed (discussed above) and the civil penalty requested (discussed below), DEC Staff seeks an additional penalty equivalent to two times the licensure fees owed to the department.[61] DEC Staff cites NL §174(7) as authority for this request.

"Any licensee failing to file a certificate, failing

Navigation Law for filing late and not paying the fees." DEC Staff does not specify the 100 separate violations it references. DEC Staff claims that the license fee reports were filed late 36 times (which as discussed above is not supported by evidence in the record, which shows only two late filed reports) and that license fees were not paid 31 times. DEC Staff does not explain how it arrived at the "almost 100" number.

[61] This demand is not present in DEC Staff's complaint or amended complaint, but is made in its closing brief (p. 22). DEC Staff argues that the respondents have been on notice of DEC Staff's intention of requesting additional penalties.

> to pay a license fee or surcharge, or filing or causing to be filed, a certificate which is willfully false, or failing to keep any records required by this article or rules and regulations adopted hereunder, shall, in addition to any other penalties herein or otherwise provided, be subject to a fine not to exceed two times the annual license fee or surcharge, as determined by the commissioner."

This is also authorized in the implementing regulations at 17 NYCRR 30.10(a), which reads as follows:

> "Any licensee which willfully refuses to file a monthly report, or to pay a licensee fee and/or additional fee after a determination by the commissioner, or files a monthly report which is willfully false or willfully fails to keep the records required by this Part, may be subject to a fine, not to exceed two times the annual license fee, as determined by the commissioner."

The regulations limit the amount of the fine to two times the license fees owed. As determined above, respondents owe a total of $189,066.62 in license fees, surcharges and interest. DEC Staff has requested an additional penalty of two times the license fee, which in this case is $97,387.86. Therefore, doubling that amount makes DEC Staff's request $194,775.72.

It should be noted that none of respondents were ever issued a license to operate the facility (see discussion of the first cause of action, above). Therefore, logically, none of the respondents could be technically a "licensee." A narrow reading of NL §174(7) would lead to the conclusion that this provision is not applicable in this case. However, a broader definition of the term "licensee," to include persons to whom a license is granted, persons operating under a consent order, and persons who should have obtained a license, is appropriate in this case to fulfill the purposes of this section of law. Based on this, I conclude that NL §174(7) is applicable in this case. Respondents' counsel does not address DEC Staff's request for this additional penalty in its papers. Based on the above and the circumstances of this case, I recommend the Commissioner include in his order a requirement that Supreme Energy, LLC pay a penalty equal to two times the license fees owed, or $194,775.72.

In addition to the payment of amounts owed with interest and a penalty of two times the amount of license fees, discussed above, DEC Staff also seeks an additional civil penalty of $250,000, pursuant to NL §192. DEC Staff states that this penalty is for almost 100 separate violations, which are not clearly identified. Apparently, DEC Staff is arguing each violation should be subject to a fine of $2,500. As discussed above, the record supports the conclusion that Supreme Energy, LLC failed to timely file its license fee reports on two occasions. Using DEC Staff's proposed penalty of $2,500 per violation,[62] this would total a penalty of $5,000 for these two violations. While it is not clear from DEC Staff's papers whether any portion of this proposed penalty is intended to be for failing to pay license fees and surcharges collected, in this case, the fine of two times the amount owed is appropriate and no additional penalty should be imposed.

In conclusion, the Commissioner should order the following: (1) the immediate payment of all license fees, surcharges and fines owed ($189,066.62); (2) the immediate payment of a penalty equal to two times the license fees owed ($194,775.72); and (3) the immediate payment of a penalty of $5,000 for the late filing of two license fee reports. As discussed above, the record supports the conclusion that the veil of Supreme Energy, LLC should be pierced. Therefore, the Commissioner should find Mr. Karam jointly and severally liable for these amounts.

Third Cause of Action – failure to maintain secondary containment

As discussed above, DEC Staff requests a civil penalty of $645,000 for failing to maintain adequate secondary containment at the facility. DEC Staff also requests an additional civil penalty of $500 per day for the time between the date of DEC Staff's brief until the issuance of the Commissioner's order.

The basis for DEC Staff's request of $645,000 is a suggested penalty of $250 per day for the approximately 1,800 days between the beginning of the violation (January 1, 2005)

[62] DEC Staff does not point to any guidance document or otherwise provide any rationale for this proposed penalty. Nor does DEC Staff mention 17 NYCRR 30.10(a) which addresses civil penalties for failure to file monthly reports and payment of license fees.

and the date of DEC Staff's brief (September 3, 2008) for a total of $450,000.[63] DEC Staff adds to this amount what it claims is the estimated cost to repair the liner of $195,000. The cost to repair the liner was a cost that respondents avoided by failing to comply. As discussed above, the $195,000 figure comes from an August 31, 2007 email (Exh. 14, p. 2).

There are several problems with DEC Staff's calculation. First, DEC Staff did not meet its burden of proving that the secondary containment liner was not maintained before September 2006 when Aztech, at the direction of DEC Staff, began cutting holes in it. Second, it is not clear that the $195,000 figure is an estimate to repair the Supreme Energy, LLC facility alone or if it includes an estimate to install a new liner at the Cold Springs Terminal, LLC facility as well. Finally, there is no evidence in the record supporting the imposition of a continuing penalty after DEC Staff's submission of its brief.

Using DEC Staff's proposed penalty of $250 per day, the Commissioner should impose a civil penalty of $180,000 for this violation. The basis for this recommendation is the following. This record shows that the violation began in September 2006, however, it does not seem reasonable to have required the respondents to begin repairs while Aztech was working on the site (until January or February 2007) or while Aztech and DEC Staff were discussing whether or not to repair the liner. The

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[63] As discussed above, DEC Staff does not identify which section of statute or regulation was violated by Supreme Energy, LLC with respect to the secondary containment in the complaint or DEC Staff's briefs. Presumably, DEC Staff is alleging a violation of 6 NYCRR 613.3(d) which requires maintenance of secondary containment systems. In its briefs, DEC Staff does not address the "Petroleum Bulk Storage Inspection Enforcement Policy" (DEE–22). DEE–22 sets forth the average penalty in cases where no Notice of Hearing and Complaint have been served. The average penalty in DEE-22 for facilities that have: (1) no secondary containment is $10,000 per tank (row 34); (2) no appropriate secondary containment is $1,000 per tank (row 37); (3) failing to properly maintain secondary containment is $5,000 per tank (row 35); and (4) failing to maintain secondary containment equipment is $500 per tank (row 38). It is not clear how or why DEC Staff determined that $250 per day was an appropriate penalty for this violation.

record indicates that the decision not to repair the liner was made in late May 2007. Allowing until the end of June 2007 as a grace period for the respondents to arrange for repairs, the date to begin calculating the penalty should be on or about July 1, 2007.[64] The last date that the record shows this violation continuing was Mr. Kemp's June 22, 2009 inspection, at which time he observed holes in the liner and cracking to the recent repairs (t. 1690-1). Based on this, the record supports the conclusion that the violation lasted approximately 720 days. At $250 per day, the total civil penalty for this cause of action would be $180,000.

It should be noted that the gravity of this offense is great. Had a spill occurred at the facility, the result could have been devastating, considering the facility sits on the bank of the Seneca River. This would have been the case if the spill had occurred while Aztech was working in the secondary containment area, or while DEC Staff and Aztech were discussing possible repair of the liner, or afterwards. It should also be noted that the reasons DEC Staff provided for not repairing the liner are problematic. First, the claim that the liner was in such poor condition that repairs were not worth it has not been proven on this record. The other two reasons, that the liner was proprietary and that the respondents were responsible parties under the contribution lawsuit, were also the case when the 1997 penetrations were made and the liner was promptly repaired at no cost by the operator of the facility. Considering these, and the other relevant factors, the Commissioner should conclude $180,000 is an appropriate penalty for this cause of action. As discussed above, the record supports the conclusion that Mr. Karam was the responsible member of Supreme Energy, LLC and it was his direct action that caused this violation. Therefore, the Commissioner should find Mr. Karam jointly and severally liable for the civil penalty of $180,000.

Closure of the Facility

In addition to the civil penalty and payment of owed license fees and surcharges, DEC Staff requests the Commissioner order that the facility be emptied of its contents and closed in

[64] This date after the respondents received DEC Staff's April 27, 2007 letter which notified respondents that the authority to operate the facility pursuant to the consent order had expired.

accordance with 6 NYCRR 613.9. As discussed above, by letter dated April 22, 2009, Mr. Karam informed Chevron Products Co. that the terminal would cease operations sixty days from the date of the letter (Exh. 113). In his email dated September 9, 2009, respondents' counsel forwarded an email from Mr. Karam stating the facility was not operating. In its reply brief, DEC Staff argues that the facility must be properly closed. DEC Staff notes that hundreds of petroleum facilities across the State have been left unattended and tanks at these facilities have leaked product into the environment. DEC Staff concludes that proper closure of the tanks at the facility is necessary to prevent any future leaks. Respondents do not address this request in their papers but argue that a license for the facility should be issued. The record supports DEC Staff's request and the Commissioner should include language in his order requiring the proper closure of the facility.

Precluding Mr. Karam from Future Activities

DEC Staff also includes in its closing brief the statement "Department Staff believes that Mr. Karam should be precluded from ever operating an MOSF in New York State or any other NYSDEC regulated facility again." DEC Staff does not cite any authority for this request. Respondents do not address this request in their papers. The Commissioner should not grant DEC Staff's request to include this prohibition in his order. However, should Mr. Karam or any of his various companies ever apply for a license or permit from DEC Staff, past compliance with the law is an appropriate part of the review of the application and a valid consideration in determining whether or not to issue a permit or license. Each application should be evaluated on a case-by-case basis, consistent with the Department's Record of Compliance Policy (DEE-16).

CONCLUSIONS & RECOMMENDATIONS

The Commissioner should issue an Order which finds respondent Supreme Energy Corporation does not exist and is not liable for any of the violations alleged. The Order should find respondent Supreme Energy, LLC liable for the following violations: (1) operating a major onshore storage facility without a license in violation of Navigation Law §174 from May 2, 2007 until June 22, 2009; (2) failing to pay license fees and surcharges as required by Navigation Law §174(4) and 17 NYCRR

30.9 from August 1, 2004 until June 30, 2008 in the amount of $149.125.21; and, (3) failing to maintain the secondary containment liner at the facility in violation of 6 NYCRR 613.3(d) from September 2006 until June 22, 2009. The Order should also find that respondent Supreme Energy, LLC did not violate the terms and conditions of Consent Order 7-20040909-3.

The Commissioner should impose a total payable civil penalty of $803,842.34 on Supreme Energy, LLC. The components of the civil penalty should be as follows: (1) for the operation of the facility without a license, a civil penalty of $235,000; (2) for failing to remit license fees and surcharges collected, requiring payment of the amount owed $149,125.21, plus a one percent per month additional fee (as authorized by 17 NYCRR 30.9(e)), for a total of $189,066.62 and impose a civil penalty equal to two times the license fees owed ($97,387.86), as authorized by NL §174(7) which for a total of $194,775.72; (3) for filing license fee reports late on two occasions, a civil penalty of $5,000; and (4) for failing to maintain the secondary containment liner at the facility, a civil penalty of $180,000.

The Commissioner should also find Frederick Karam jointly and severally liable for operating the facility without a license and failing to maintain the secondary containment liner at the facility because Mr. Karam was the sole member of Supreme Energy, LLC and responsible for environmental compliance as the sole member of the LLC. The Commissioner should also find that Frederick Karam committed a fraud by collecting license fees and surcharges from his customers and not remitting these sums to the State as required by law. Based on this fraud and Mr. Karam’s exclusive control of Supreme Energy, LLC, Mr. Karam should be held jointly and severally liable, under the theory of piercing the veil of the LLC. Because of the above, the Commissioner should conclude that Mr. Karam is liable for all license fees, surcharges, fines and civil penalties owed by Supreme Energy, LLC.

Finally, the Commissioner should direct that the facility immediately cease operations and immediately empty and close all of the tanks storing petroleum at the site in accordance with 6 NYCRR 613.9.

APPENDIX A

Appendix A calculates the total amount of license fees, surcharges and interest due. The column labeled "Month" indicates the period for which the license fees and surcharges were collected and due. The column labeled "License Fee Due & Surcharge Due" is the amount collected and due as reported on the monthly reports (Exh. 2B, 2C and 25, line 13) and summarized in the table created by DEC Staff member Palmer (Exh. 25, column E). The column labeled "Payments" is taken from column H of Exh. 25 (copies of the checks are not included in the record). The column labeled "Months Late" indicates the length of time that the payment is overdue and is taken from the Exh. 24 which was prepared on July 23, 2008, the day before DEC Staff member Palmer testified. The column labeled "Total Due" indicates the amount owed for a particular month, less payments and includes a calculation of a 1% per month late fee (Exh. 26, paragraph B, t. 465). The columns are totaled at the bottom.

Month	License Fees Due	License Fee & Surcharge Due	Payments[1]	Months Late	Total Due
8/04	0	$3,668.26	$3,668.26	47	0
9/04	2,758.64	$4,224.17		46	$6,167.29
10/04	2,394.80	$3,667.04		45	$5,317.21
11/04	2,538.32	$3,886.80		44	$5,596.99
12/04	0	$4,113.06	$4,113.06	43	0
1/05	3,904.80	$5,979.23		42	$8,490.51
2/05	0	$3,973.17	$3,973.17	41	0
3/05	0	$4,212.29	$4,212.29	40	0
4/05	2,722.48	$4,168.80		39	$5,794.63
5/05	4,124.98	$6,316.35		38	$8,716.56

[1] Some payments were made by check from Supreme Energy, LLC and others were made by check from Cold Springs Terminal, LLC.

6/05	4,395.84	$6,731.13		37	$9,221.65
7/05	4,460.08	$6,829.50		36	$9,288.12
8/05	0	$11,037.50	$11,037.50	35	0
9/05	4,768.48	$7,301.74		34	$9,784.33
10/05	4,578.00	$7,010.07[2]		33	$9,323.39
11/05	4,853.60	$7,432.08		32	$9,810.35
12/05	0	$5,859.18	$5,859.18	31	0
1/06	3,877.76	$5,937.82		30	$7,719.17
2/06	3,483.12	$5,333.53		29	$6,880.25
3/06	0	$4,208.00	$4,208.00	28	0
4/06	4,219.04	$6,460.41		27	$8,204.72
5/06	4,750.16	$7,273.68		26	$9,164.84
6/06	4,725.68	$7,236.20		25	$9,045.25
7/06	1,880.96	$2,880.22		24	$3,571.47
8/06	1,768.64	$2,708.23		23	$3,331.12
9/06	3,381.92	$5,178.57		22	$6,317.86
10/06	3,087.92	$4,728.38		21	$5,721.34
11/06	1,273.84	$1,950.57		20	$2,340.68
12/06	1,623.68	$2.486.26		19	$2,958.65
1/07[3]	1,907.68	$2,921.14		18	$3,446.95
2/07	2,941.76	$4.504.57		17	$5,270.35

[2] There is an insignificant one cent difference between Exh. 24 and 25.

[3] The profit and loss statement for Supreme Energy, LLC for 2007 (Exh. 28) shows three checks (#1561, #1583 and #1596) were submitted to DEC Staff for payment of the license fee for the first three months of 2007. DEC Staff checked its system for these checks and found no record of them (t. 473).

3/07	2,151.04	$3,293.78		16	$3,820.78
4/07	1,939.04	$2,969.16		15	$3,414.53
5/07	752.24	$1,151.87		14	$1,313.13
6/07	0	$4,136.58	$4,136.58	13	0
7/07	0	$4,825.89	$4,825.89	12	0
8/07	0	$4,841.08	$4,841.08	11	0
9/07	0	$4,261.53	$4,261.53	10	0[4]
10/07	0	$5,442.68	$5,442.68	9	0[5]
11/07	0	$4,844.51	$4,844.51	8	0[6]
12/07	0	$2,761.52	$2,761.52	7	0
1/08	0	$4,210.70[7]	$4,210.70	6	0[8]
2/08	0	$5,977.39	$5,997.39	5	0
3/08	3,068.64	$4,698.86		4	$4,886.81
4/08	3,537.20	$5,416.34		3	$5,578.83
5/08	2,328.48	$3,565.49		2	$3,636.80
6/08	3,189.04	$4,883.22		1	$4,932.05
TOTAL	97,387.86	$227,498.55	$78,373.34		$189,066.62

Total Amount of License Fees Due $97,387.86

License Fees, Surcharges and Interest Due $189,066.62

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[4] Exh. 24 erroneously reports $426.15 due for this month.

[5] Exh. 24 erroneously reports $469.84 due for this month.

[6] Exh. 24 erroneously reports $387.56 due for this month.

[7] There is an insignificant one cent difference between Exhs. 24 and 25.

[8] Exh. 24 erroneously reports $252.63 due for this month.

APPENDIX B

EXHIBIT CHART

Exh. #	Description	Id	Evid
1	2/13/06 2 page letter to R. Schwank (DEC) from Wyman (Supreme) attachments: 1) 2 page 11/03 fee report; 2) 2 page 12/03 fee report; 3) 4 letters from R. Schwank dated 1/27/06 seeking fee reports for 7/03, 8/03, 9/03 & 10/03; 4) proof of mailing; 5) 2 letters from Gingold to Schwank dated 10/24/05 & 1/12/06 regarding fee reports.	yes	yes
2A	6 page spread sheet dated 6/27/08 and 1 page undated, blank fee report	yes	yes
2B	31 pages, including: 1) fee reports from 4/03, 5/03, 6/03, 11/03, 12/03, 2/04. 1/04, 2/04 (2d version), 3/04, 4/04, 5/04, 6/04, 7/ 04, 8/04, 12/04, 2/05, 3/05, 8/05, 12/05, 3/06, 6/07, 7/07, 8/07, 9/07, 10/07, 11/07, 12/07, 1/08, 2/08; and 2) 7/22/04 letter from Neugebauer to Dianne ?? (DEC) and proof and mailing.	yes	yes
2C	30 pages, including: fee reports from 9/04, 10/04, 11/04, 1/05, 4/05, 5/05, 6/05, 7/05, 9/05, 10/05, 11/05, 1/06, 2/06, 4/06, 5/06, 6/06, 7/06, 8/06, 9/06, 10/06, 11/06, 12/06, 1/07, 2/07, 3/07, 4/07, 5/07, 3/08, 4/08, 5/08	yes	yes
3	30 pages, all letters dated 5/29/08 to Supreme from Schwank noting failure to pay fees.	yes	yes

4	Sets of letters regarding unpaid license fees dated:11/29/04, 12/24/04, 2/28/05, 3/29/05, 4/29/05, 5/27/05, 6/28/05, 7/28/05, 8/26/05, 9/28/05, 10/28/05, 11/29/05, 12/30/05, 1/27/06, 3/28/06, 5/30/06,7/26/06, 8/26/06, 9/29/06, 10/27/06, 11/29/06, 1/2/07, 1/30/07, 3/1/07, 3/26/07, 4/27/07, 6/1/07, 6/27/07, 7/30/07, 8/31/07, 9/28/07, 12/31/07, 11/30/07 , 1/4/08, 1/30/08, 2/29/08, 3/28/08, 55/08, 5/6/08, and 5/29/08.	yes	yes
5	22 pages, 3/30/01 license for Alaskan Oil, Inc	yes	yes
6	14 pages, 8/17/04 License Application	yes	yes
7	8 pages, 10/4/04 cover letter, copy of check and 9/29/04 consent order	yes	yes
8	18 pages, 11/5/04 Environmental Compliance Report prepared by Karam	yes	yes
9	11/04 Facility Response Plan, prepared by Lu Engineers	yes	yes
10	11/04 Spill Prevention Control and Countermeasure Plan, prepared by Lu Engineers	yes	yes
11A	5/4/05 letter to Blake (Supreme) from Shannon (Paradigm), 8 pages	yes	yes
11B	4/26/07, Paradigm test results, 8 pages	yes	yes
12	Undated Facility Inspection Report (7 pages)	yes	yes
13	11/2/07, 2 page letter to Karam from Conlon w/ attachments: 1) certified mail receipt; 2) 11/9/07 one page letter from Cohen to Grannis; 3) 11/15/04 2 page letter from Elliot to Brazell; 4) 9/30/04 letter from Elliot to Brazell; 5) 2 pages of worksheet of Lu Engineering; 6) 8/16/04 one page letter from Brazell to Karam; and 8/30/04 one page letter from Brazell to Karam.	yes	yes
14	2 emails dated 8/31/07 and specification guideline from Futura (total of 9 pages)	yes	yes
15	DEC Spill Report for 6/27/08 (1 page)	yes	yes

16	4/27/07 NOV (3 pages)	yes	yes
17	5/22/08 Consent Order for Cold Springs with copy of check (4 pages)	yes	yes
18	MOSF Information Report, 7/8/08, (1 page)	yes	yes
19	Sampling Notes, 7/9/08 (2 pages) and facility diagrams 12/15/06 (5 pages)	yes	yes
20	Color photographs (26 pages dbl sided)	yes	yes
21	“Other criteria for secondary containment systems (1 page)	yes	no
22	Color photographs (3 pages, dbl sided)	yes	yes
23	Remediation wells map 6/4/07 (4 pages)	yes	yes
24	Spreadsheet of monies due 7/23/08 (6 pages)	yes	yes
25	License Fee Reports from 11/03 – 6/08	yes	yes
26	Instructions for MOSF License Fee Reports (2 pages)	yes	yes
27	MOSF Fee Secondary Transfer Certificate (1 page with carbons)	yes	yes
28	Supreme Energy, LLC Profit and Loss Detail 1-12/07 (12 pages)	yes	yes
29	Cold Springs Profit and Loss Detail 1-12/08 (9 pages)	yes	yes
30	Form 1040 for Karam 2007 (20 pages)	yes	yes
31	Schedule C for Karam 2007 (6 pages)	yes	yes
32	7/22/04 letter from Neugebauer to Dianne (DEC) (1 page)	yes	yes
33	Land Contract, October 1, 2003 (1 page)	yes	yes
34	17 pages: including: 1) 9 invoices; and 2) 8 pages (odd pages only) of Terminalling Agreement.	yes	yes
35	27 pages of checking account information	yes	yes

36	12 documents: API 653 in-service inspection reports for tanks: 1,2,4,5,6,7,8,9,10,11,12 and 13.	yes	yes
37	3/27/07 letter from HMT, Inc. to Burst (5 pages without prices)	yes	yes
38	3/27/07 letter from HMT, Inc. to Burst (5 pages with prices)	yes	yes
39	2/27/07 reports on Tank 6, 4, & 8 by Meley	yes	yes
40	API 653 for tank 3 by HMT	yes	yes
41	3/14/08 letter from Kemp to Karam, Notice of Incomplete Application (2 pages)	yes	yes
42	5/30/08 letter from Kemp to Kemp, Notice of Incomplete Application (5 pages)	yes	yes
43	3/31/08 “Response to Incomplete Application” (27 pages)	yes	yes
44	8/16/04 letter from Brazell to Karam (1 page)	yes	yes
45	10/18/07 letter from Cohen to Conlon (1 page)	yes	yes
46	3 bits of metal (coupons)	yes	yes
47	3 color photos	yes	yes
48	6 color photos	yes	yes
49	13 color photos	yes	yes
50	5/4/07 letter from Cohen to Kemp (2 pages)	yes	yes
51	12/5/04 letter to Karam from Crandall (1 page)	yes	yes
52	6/30/08 letter (NOV) to Karam from Kemp (3 pages)	yes	yes
53	11/8/07 email from Conlon and 11/7/07 letter from Karam to Fina (2 pages)	yes	yes
54	7/23/04 letter from Leone to Brazell (2 pages) (same as 74)	yes	yes
55	8/30/04 letter from Brazell to Karam (2 pages)	yes	yes

56	9/7/04 NOV letter to Karam from Victor (2 pages)	yes	yes
57	withdrawn	no	no
58	A series of 9 manilla files labeled Tank 1, 2, 3, 4, 5, 6, 7, 8, and 9-10-11	yes	yes
59	10 color photos	yes	yes
60	4 page inspection report by Kemp for inspection on 2/22/05	yes	yes
61	3 black and white photos	yes	yes
62	11/12/96 memo from O'Toole to Palm (1 page)	yes	yes
63	11/21/96 letter from Brazell to Leone (1 page)	yes	yes
64	12/5 fax from Leone to Brazell attaching copies of Exh 88 & 89 (3 pages)	yes	yes
65	undated draft letter from Brazell to Alaskan (1 page)	yes	yes
66	12/12/96 draft DEC memo from DP to TQ (2 pages)	yes	yes
67	10/13/97 draft letter from Brazell to Neugebauer (3 pages)	yes	yes
68	9/18/97 letter from Copozza to Lynch (3 pages)	yes	yes
69	12/5/96 letter from Brazell to Neugebauer (2 pages)	yes	yes
70	10/1/97 letter from Brazell to Neugebauer (2 pages)	yes	yes
71	10/1/97 letter from Foster to Brazell (4 pages)	yes	yes
72	10/3/97 letter from Capozza to Lynch (2 pages)	yes	yes
73	10/3/97 letter from Brazell to Capozza (2 pages, incl fax page)	yes	yes

74	7/23/04 letter from Leone to Brazell (2 pages) (same as 54)	yes	yes
75	8/30/04 letter from Brazell to Karam (1 page)	yes	yes
76	MOSF facility information report Alaskan (1 page)	yes	yes
77	Application for MOSF license, Supreme Energy, 4/21/03 (3 pages)	yes	yes
78	7/1/04 letter from Zamiarski to Karam re: 12/9/03 inspection (7 pages)	yes	yes
79	EPA consent order with Supreme Energy (8 pages), 10/6/6 cover letter and 8/15/08 fax cover page	yes	yes
80	7/11/08 letter from Sachs to Paragon (2 pages)	yes	yes
81	7/11/08 fax cover page, email from Paragon to Kemp (2 pages)	yes	yes
82	8/30/04 letter from Brazell to Karam (1 page)	yes	yes
83	12/29/04 email from Coriale to Kemp (1 page)	yes	yes
84	5/23/07 email from Magee to Fina (1 page)	yes	yes
85	contractor quotes	yes	yes
86	7/8/07 email from Archibal to Fritz (11 pages)	yes	yes
87	11/21/96 letter from Brazell to Leone (1 page)	yes	yes
88	12/2/96 letter from Marsden to Leone (1 page)	yes	yes
89	12/5/96 letter from Blanchard to Neugebauer (1 page)	yes	yes
90	NYSDEC Spill report form #9311059, 1993 spill of jet fuel (1 page) (same as Exh 5)	yes	yes
91	“typical monitoring well construction” (1 page)	yes	no
92	sample of liner	yes	yes

93	technical data on geothane 520 (2 pages)	yes	yes
94	3 photos of spraying liner	yes	yes
95	draft letter from Brazell to Neugebauer (3 pages)	yes	yes
96	draft of Exh 103	no	no
97	2/22/96 site access agreement (1 page)	yes	yes
98	9/18/97 letter from Capozza to Lynch (3 pages) (same as Exh. 63)	yes	yes
99	WITHDRAWN	no	no
100	Application for MOSF license by Neugebauer 12/26/00 (5 pages)	yes	yes
101	Application for MOSF license by Neugebauer 12/31/92 (4 pages)	yes	yes
102	Application for MOSF license by Neugebauer 12/20/01 (5 pages) License, unsigned and undated (2 pages)	yes	yes
103	4/2/97 letter from Brazell to Neugebauer, 3 pages requesting access to Alaskan property. (replaces 99)	yes	yes
104	“2003 Agreement Standby Investigation & Remediation” Contract #D400302	yes	yes
105	Portions of DEC #5, #6 & #12 (3 pages)	yes	yes
106	3/27/09 Affidavit of C. Magee	yes	no
107	10/20/08 email from Supreme to Kemp attaching: (1) 9/12/08 letter from Fisher to Supreme (2) 9/29/08 memo from Hydro-labs, Inc. to Supreme (3) 10/29/08 letter from Kemp to Karam	yes	yes
108	Color photos	yes	yes

109	11/20/08 letter from Fisher to Supreme and 9/29/08 memo from Hydro-labs, Inc. to Supreme	yes	yes
110	emails from Conlon to Mastroianni	yes	yes
111	11/18/08 email from Kemp to Conlon attaching: (1) 11/13/08 letter from Fisher to DEC (2) 11/8/08 letter from Fisher to Supreme (3) 9/12/08 letter from Fisher to Supreme (4) 9/29/08 memo from Hydro-labs, Inc. to Supreme (5) email string	yes	yes
112	6/25/09 NOV	yes	no
113	4/22/09 letter from Karam to Chevron (1 page)	yes	yes
114	8/30/04 inspection report (respondents' version)	yes	yes
115	9/7/04 NOV and 8/30/04 inspection report (DEC Staff version)	yes	yes

APPENDIX C

CIVIL PENALTY SUMMARY

Cause of Action	Civil Penalty Requested By DEC Staff	ALJ's Recommended Civil Penalty
1. Operation without a license	Civil penalty 500,000	$235,000.00
2. Failure to pay license fees	Amount Owed $243,484.87 2x penalty $486,969.74 Civil penalty $250,000	$189,066.62 $194,775.72 $5,000.00
3. Operating with inadequate secondary containment	Civil penalty $450,000 Avoided costs $195,000	$180,000.00
4. Violating Consent Order	combined w/ 3rd cause of action	Not proved.
TOTAL	$2,125,454.61	$803,842.34

In addition, DEC Staff requests a civil penalty of $1,000 per day from the date it filed its closing brief, September 3, 2009 until the date of the Commissioner's Order. For the reasons set forth in the test of this report, the Commissioner should reject this request.