**STATE OF NEW YORK**
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

**ORDER**
DEC Case No.
R2-20101208-459

-by-

**ZAHAV ENTERPRISES LLC,**

Respondent.

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This administrative enforcement proceeding concerns alleged violations of the New York Environmental Conservation Law (ECL) and Navigation Law committed by respondent Zahav Enterprises LLC (Zahav) at property it owns at 1124 East New York Avenue, Brooklyn, New York (site).

Staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding by service of a notice of motion for order without hearing, in lieu of complaint, dated March 30, 2011, which respondent received on April 1, 2011. Department staff alleges that Zahav:

1) discharged petroleum into the waters of the State, causing or contributing to a condition in contravention of New York State water quality standards, in violation of ECL 17-0501 and 17-0807, and Navigation Law § 173;

2) failed to immediately undertake to contain the prohibited discharge, in violation of Navigation Law § 176 and 17 NYCRR 32.5; and

3) failed to submit a required remedial investigation report (RIR), in violation of an executed stipulation of settlement effective January 27, 2010, ECL 71-1929 and Navigation Law §§ 176 and 192.[1]

In addition to requesting a civil penalty of $112,500, Department staff requested that the Commissioner direct Zahav "to properly investigate, clean up and remove the subject contamination from the [s]pill under a Department-approved work plan" (see Affirmation of John K. Urda, Esq., in support of motion for order without hearing, dated March 30, 2011 [Urda Affirmation] , at ¶¶ 28-35).

[1] Navigation Law § 192 provides authorization for penalties and would not be a basis for a violation of the stipulation of settlement.

Zahav served a notice of cross-motion for order without hearing dated June 6, 2011, in which it sought dismissal of all of the Department staff's causes of action. On July 1, 2011, Department staff served its opposition to Zahav's motion.

The matter was assigned to Administrative Law Judge Helene G. Goldberger, who prepared the attached report. I adopt the ALJ's summary hearing report as my decision in this matter, subject to my comments below.

Zahav Enterprises, Inc., purchased the site on March 7, 1985. On December 20, 1999, it transferred the site to an entity named Zahav Enterprises LLC (Zahav), the respondent in this matter. During the time that Zahav and its predecessor company owned the site, the site was leased as a gasoline station. Three 4,000-gallon underground petroleum bulk storage tanks containing gasoline were registered at the site. See, e.g., Affidavit of Efraim Shurka (Shurka Affidavit), sworn to on June 1, 2011, ¶¶ 6-8.

On November 13, 2007, Zahav sold the site to West 16 East New York, LLC. According to Zahav, West 16 East New York, LLC is a corporation created by Unicorp National Development (Unicorp) for the purpose of taking title to the site (Shurka Affidavit, ¶ 15) on which Unicorp plans to construct a drugstore. It is not clear on this record whether West 16 East New York, LLC has transferred ownership of the site to Unicorp.

During the course of a subsurface investigation undertaken by an environmental consultant for Unicorp and prior to the sale of the site, soil contamination near the three active gasoline tanks was detected (see, e.g., Hearing Report, at 7 [Finding of Fact 6]; Exhibit C to the Affidavit of Jonathan Kolleeny, sworn to on March 8, 2011 [Kolleeny March Affidavit]) . It is not clear on this record when Zahav was notified of this finding, but it occurred prior to the November 13, 2007 sale of the property (see Shurka Affidavit, ¶ 13).[2]

At the time of the tank removal in June 2008, gasoline was found to be leaking from one of the tanks. This discharge was reported to the Department on June 5, 2008 (see Exhibit A [NYSDEC Spill Report Form: Spill No. 0802550] to the Kolleeny March Affidavit). In addition to the three known 4,000-gallon underground storage tanks, two sets of 550-gallon underground storage tanks (20 and 10 tanks, respectively) were found at the site (id., ¶¶ 19-21), and removed.

Department staff interacted with Zahav, Unicorp and their consultants to address the contamination at the site. Several submissions relating to the investigation and cleanup were not satisfactory to Department staff, and were not approved (see, e.g.,

[2] Zahav states that, at the time that Unicorp advised Zahav of the contamination, Unicorp also advised that it had reported the test results to the Department (Shurka Affidavit, ¶ 13). The records provided by Department staff indicate that the Department was not notified of any contamination until June 5, 2008. As the ALJ correctly notes, Zahav, which still owned the site at the time that it received the test results, had the responsibility for notifying the Department, and should not have relied upon Unicorp's representation without confirmation (see Hearing Report, at 11).

Hearing Report at 7 [Finding of Fact 10], 8 [Findings of Fact 12 and 15], 9 [Findings of Fact 16 and18]. By letter dated January 21, 2011, Department staff approved the revised remedial action plan for the site (see Exhibit 30 to the Shurka Affidavit).

The record indicates that Zahav and Unicorp have, among other things, disagreed over the appropriate remediation activity relative to the site (see, e.g., Hearing Report, at 10 [Findings of Fact 23 and 24]; and Shurka Affidavit, ¶ 23 and Exhibits 5, 6, and 16 to the Shurka Affidavit). Zahav contends that Unicorp has deprived Zahav of access to the site.[3]

Liability

-First Count

Department staff, in its first count, alleges that Zahav, by discharging petroleum into the waters of the State, caused or contributed to a condition in contravention of State water quality standards, and thereby violated ECL 17-0501 and 17-0807, and Navigation Law § 173. Section 173(1) of the Navigation Law prohibits the discharge of petroleum. With respect to the ECL provisions, ECL 17-0501 provides that "[i]t shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301" (ECL 17-0501[1]). The water quality standards adopted by the Department pursuant to ECL 17-0301 are found at 6 NYCRR 703.5. ECL 17-0807 prohibits any discharge into the waters of the State not permitted by the provisions of ECL article 17, the rules and regulations adopted thereunder, the Federal Water Pollution Control Act, or provisions of a permit issued pursuant to ECL article 17.

Section 703.5 of 6 NYCRR establishes water quality standards for various petroleum constituents. Analytical results for groundwater samples revealed exceedances of multiple gasoline constituents (see Kolleeny March Affidavit, ¶ 10 and Exhibit A to Kolleeny March Affidavit [page 3, providing groundwater sampling data]); see also Urda Affirmation, ¶ 10; Matter of Huntington and Kildare, Inc., Order of the Commissioner, Dec. 22, 2009 [imposing strict liability under the ECL 17-0501]). I concur with the ALJ that Zahav violated ECL 17-0501.

Zahav maintains that it is not responsible for the site contamination because it did not operate the gasoline station at the site and because the contamination appears to be largely in the area of tanks that were discovered upon the environmental investigations that were conducted on behalf of Unicorp. The ALJ concludes that Zahav owned the

[3] Based on the record, remedial work at the site has not progressed. By letter dated July 28, 2011 to the parties, ALJ Goldberger inquired about the current status of the remediation. Department staff, in its response, advised that the site is vacant and that "the current site owner intends to implement the approved Revised Remedial Action Plan" (Supplemental Affidavit of Jonathan Kolleeny, sworn to on August 11, 2011, ¶ 4; see also Hearing Report, at 5).

tanks and is responsible for any contamination that occurred during or prior to its ownership of the site, regardless of whether it had any direct knowledge of the release or whether it contributed to it (see Hearing Report, at 11-12 [citing relevant precedent, including State of New York v C.J. Burth Services, Inc., 79 AD3d 1298, 1300-1301 (3d Dept 2010)(system owners strictly liable under the Navigation Law for the cost of remediation even in the absence of any evidence that the owner caused or contributed to the discharge and even where the discharge occurred before their ownership began)]). The ALJ also rejects Zahav's argument that its lessee assumed all responsibility with respect to environmental concerns, including liability for the petroleum contamination. The ALJ held that Zahav is liable for the discharge of petroleum at the site under Navigation Law § 173, and I agree.

In that liability for the first count has been established by Zahav's violation of Navigation Law § 173 and ECL 17-0501, I do not have to reach whether Zahav has also violated ECL 17-0807 under this first count.

-Second Count

With respect to Department staff's second count (that is, Zahav's failure to immediately contain a discharge of petroleum), the record is clear that Zahav failed to contain the petroleum discharge at the site, and thereby violated NL § 176 and 17 NYCRR 32.5. Although the record presents conflicting information as to when Zahav became aware of the onsite petroleum contamination in 2007, no dispute exists that Zahav had knowledge of the contamination prior to its sale of the site. The period that Zahav failed to address the discharge extends from the date it had knowledge of the contamination in 2007.[4]

Although the tanks were removed in June 2008, it is not clear that this tank removal alone contained the discharge. The site contains contaminated soil and, depending upon the extent and amount of contamination, that soil may potentially be a continuing source of a discharge. Absent the progress of remedial activities at the site, and the failure to delineate the extent of any contamination, Zahav's failure to contain the discharge of petroleum may have continued for a period beyond the June 2008 tank removal date, even up to the date of staff's motion. Staff, however, is requesting a combined penalty of only $75,000 for (a) the discharge of petroleum and (b) the failure to contain the discharge. This amount is substantially below the statutory maximum penalty, and if equally apportioned between the two violations, would only represent a penalty for one day of violation (see ECL 71-1929[1][penalty of up to $37,500 per day for each violation]). Accordingly, in this instance, a change to the duration of the violation would not affect the penalty requested.

[4] I agree with the ALJ that the May 11, 2010 date that staff identified as the first day of the violation for failing to contain the discharge is not appropriate.

-Third Count

The stipulation that Zahav signed with the Department, effective January 25, 2010, required Zahav to investigate and cleanup the discharge of petroleum at the site. Attached to the stipulation was a corrective action plan that Zahav agreed to implement (see Exhibit G to the Urda Affirmation). Pursuant to paragraphs 2 and 3 of the corrective action plan, Zahav was required to submit an approvable remedial investigation report to Department staff, which it failed to do. As the ALJ correctly notes, consent orders and stipulations between the Department and a respondent are equivalent to contracts (see Hearing Report, at 13; see also McCoy v Feinman, 99 NY2d 295, 302-03 [2002]; ECL 71-1929[1]). Zahav is obligated to comply with the terms of the stipulation, and is liable for its noncompliance.

Penalty

Department-staff requested a civil penalty of $112,500. ECL 71-1929(1) provides that a person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 and title 19 of article 17, or the rules, regulations, orders or determinations of the Commissioner promulgated thereto shall be subject to a penalty of up to $37,500 per day for each violation. Navigation Law § 192 establishes a penalty of $25,000 for each offense under article 12 of the Navigation Law.

The ALJ recommended that the civil penalty be lowered to $60,000. The ALJ based this reduction on several factors including, but not limited to, the range of civil penalties assessed in prior orders, and the remedial efforts that Zahav has undertaken (including, for example, the installation of monitoring wells, performance of sampling, and submission of reports to and communications with Department staff on the remedial activities). The record also demonstrates that Zahav has spent over $400,000 on the site investigation and cleanup (see, e.g., Affirmation of Frederick Eisenbud, dated June 6, 2011, ¶ 24; and Exhibit 31 to Shurka Affidavit).

I have considered the ALJ's penalty recommendation of $60,000. Based on this record, the recommended civil penalty of $60,000 is authorized and appropriate, and I hereby adopt it.

Site Remediation

Zahav is responsible for the investigation and cleanup of the site. Records on file with the Department list W[est] 16 East New York, LLC as the site owner.[5] However, as set forth in this proceeding, Unicorp has recently assumed responsibility for the remediation of the site (see, e.g., Affidavit of James M. DeMartinis, sworn to on May 31, 2011, ¶¶ 76 and 78).

[5] The petroleum bulk storage application that was filed for the site in 2008 (subsequent to the sale) listed W 16 East New York, LLC as the owner of the site (see Exhibit 5 to the Shurka Affidavit).

The ALJ recommends that I direct staff to order Unicorp to implement the revised remedial plan that Department staff approved on January 21, 2011 (see Hearing Report, at 15). Although I recognize the need to ensure prompt remediation of the site, I decline to direct staff to so order Unicorp on this record. Unicorp was not listed as a respondent in this enforcement action, has not had an opportunity to be heard, and its status as owner or operator of the site is unclear. In fact, subsequent to Zahav's sale of the property, the Department entered into a consent order dated October 28, 2008 with West 16 East New York, LLC, as the owner of the petroleum bulk storage facility at the site. I am taking official notice of this consent order pursuant to 6 NYCRR 622.11(a)(5). Nothing in this record indicates that Unicorp subsequently has acquired title to the site.

However, as noted, the record indicates that Unicorp has assumed responsibility for site remediation. Accordingly, I am directing staff to schedule a meeting with representatives of Unicorp and Zahav, together with representatives of West 16 East New York, LLC, to address site access and remediation issues in an effort to achieve a mutually agreeable accommodation. At any such meeting, staff should review with Unicorp the extent to which Unicorp seeks to undertake remedial activities at the site (in whole or in part), and the extent to which Unicorp and West 16 East New York, LLC, are willing to provide access to Zahav to undertake any remediation activity.

Whether or not Unicorp undertakes the remediation of the site, Zahav remains legally responsible for site investigation and cleanup. If Department staff determines that Unicorp or West 16 East New York, LLC, is improperly preventing Zahav from meeting its cleanup obligations on the site, staff should use its best efforts to secure such access for Zahav, including consideration of appropriate enforcement action. Alternatively, if Unicorp intends to investigate and conduct the cleanup of the site (in whole or in part), Department staff should enter into a stipulation with Unicorp to ensure that the remediation is performed in compliance with Department requirements and that the remedial activity meet appropriate timeframes.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted in part on the issue of liability, granted in part on the issue of penalty, and granted as to remedial relief.

II. Respondent Zahav Enterprises LLC's cross-motion for motion for order without hearing is denied in its entirety.

III. Respondent Zahav Enterprises LLC is adjudged to have violated Environmental Conservation Law 17-0501 and 17-1929, Navigation Law §§ 173 and 176, and 17 NYCRR 32.5.

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

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC, Region 2
47-40 21st Street
Long Island City, New York 11101-5407

V. Respondent Zahav Enterprises LLC shall investigate and remediate the site in accordance with the terms and conditions of the January 27, 2010, stipulation that it entered into with the Department, subject to any modifications agreed to by Department staff, and in accordance with a Department-approved work plan.

VI. All communications from respondent to Department staff concerning this order shall be directed to John K. Urda, Esq., at the address set forth in paragraph IV of this order.

VII. The provisions, terms and conditions of this order shall bind respondent Zahav Enterprises LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: October 24 , 2011
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway, 1st Floor
Albany, New York 12233-1550

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

- by –

**ZAHAV ENTERPRISES LLC,**

Respondent.

R2-20101208-459

# SUMMARY HEARING REPORT

- by –

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Helene G. Goldberger
Administrative Law Judge

Proceedings

Department staff is represented by John K. Urda, Assistant Regional Attorney of the Department's Region 2 legal staff. The respondent is represented by Frederick Eisenbud, Esq. of Commack, New York.

On March 30, 2011, by notice of motion for order without hearing in lieu of complaint, the New York State Department of Environmental Conservation (DEC or Department) staff commenced this proceeding by serving the respondent Zahav Enterprises LLC (Zahav) by certified mail. On June 6, 2011, the respondent served its notice of cross motion for motion without hearing and opposition to the staff's motion.[1] On July 1, 2011, the Department staff served its opposition to respondent's motion by electronic mail with hard copies following. On July 6, 2011, CALJ McClymonds assigned the matter to me. The staff alleges that the respondent has violated the Environmental Conservation Law (ECL) and the Navigation Law (NL) in relation to property it owned at 1124 East New York Avenue, Brooklyn, New York[2], by 1) discharging petroleum into the waters of the State, causing or contributing to a condition in contravention of New York State water quality standards, in violation of ECL §§ 17-0501 and 17-0807 and NL § 173; 2) failing to immediately undertake measures to contain the prohibited discharge, in violation of NL § 176 and 17 NYCRR § 32.5; and 3) failing to submit a required remedial investigation report (RIR), in violation of an executed stipulation of settlement dated January 27, 2010 and NL §§ 176 and 192.[3]

I have before me two motions regarding this proceeding – staff's motion for order without hearing dated March 30, 2011 and the respondent's cross-motion for order without hearing and to dismiss and in opposition to the staff's motion dated June 6, 2011.

In support of staff's motion, Assistant Regional Attorney Urda submitted:

1) notice of motion for an order without hearing dated March 30, 2011
2) affirmation of John K. Urda in support of motion for an order without hearing dated March 30, 2011 with:
3) Exhibit A – NYS Department of State Division of Corporations' Entity Information for Zahav Enterprises LLC
4) Exhibit B – deed dated March 7, 1985 between Robert Kirsch and Zahav Enterprises regarding 1124 East New York Avenue, Brooklyn, New York
5) Exhibit C – deed dated December 20, 1999 between Zahav Enterprises Inc. and Zahav Enterprises LLC regarding 1124-1134 East New York Avenue, Brooklyn, New York
6) Exhibit D - recording and endorsement cover page with correction deed dated November 13, 2007 between Zahav Enterprises Inc and Zahav Enterprises LLC

[1] Prior to the assignment of this matter, Chief Administrative Law Judge (CALJ) James T. McClymonds granted the respondent's counsel's two requests for extensions of time to serve his papers.

[2] In John Urda's affirmation in support of staff's motion, he references the address as being in Flushing, New York. Urda Aff. I, ¶ 4. This appears in error as all the documentation indicates that the property is in Brooklyn not Queens. Urda Aff, Exs. B, C, D.

[3] Staff also alleges in this third cause of action that the respondent violated ECL § 71-1929. However, Article 71 provides penalties for violations of other chapters of the ECL – its provisions do not constitute requirements in and of themselves.

7) Exhibit E – recording and endorsement cover page with correction deed dated November 13, 2007 between Zahav Enterprises LLC and W 16 East New York LLC
8) Exhibit F – letter dated January 13, 2010 from John K. Urda, Assistant Regional Attorney to Efraim Shurka re: Zahav Enterprises – 1124-1134 East New York Avenue, Brooklyn, New York – cover letter for proposed stipulation to address petroleum spill, and
9) Exhibit G - executed stipulation dated January 27, 2010 re: Spill No. 0802550 at 1124-1134 East New York Avenue, Brooklyn, New York dated January 27, 2010 with corrective action plan
10) Affidavit of Jonathan Kolleeny, Engineering Geologist 2 dated March 28, 2011 with:
11) Exhibit A – NYSDEC spill report form
12) Exhibit B – petroleum bulk storage application dated July 14, 1999 – 5 Gas Inc.
13) Exhibit C – limited subsurface investigation dated September 14, 2007 by Bureau Veritas North America, Inc. noting that a reportable release is suggested by investigation
14) Exhibit D – site map noting location of underground storage tanks
15) Exhibit E – groundwater results map – 1124 East New York Avenue
16) Exhibit F – letter dated December 21, 2009 from Veronica Zhune, Environmental Engineer to Signature Investment Group and Unicorp National Development regarding the investigation summary report dated October 2009 submitted by Reliant Consulting Services, Inc. for 1124-34 East New York Avenue, disapproving conclusions of report and asking for delineation of soil and groundwater via installation of monitoring wells; installation of 15 mil vapor barrier and installation of a passive sub-slab depressurization system; submission of a surrounding area map; and submission of a petroleum bulk storage application
17) Exhibit G – letter dated April 29, 2010 from Veronica Zhune to Zahav Enterprises, LLC regarding 1124-35 East New York Avenue and disapproving remedial investigation report and requiring down-gradient delineation of groundwater contamination via installation of monitoring wells
18) Exhibit H – letter dated June 8, 2010 from Joseph Maisonave, Environmental Engineer 1 to Zahav Enterprises, LLC regarding 1124-1134 East New York Avenue and disapproving remedial action plan for inadequate measures to address soil and groundwater contamination citing vacuum enhanced fluid recovery (VEFR) as an interim remedial measure and asking for installation of two down-gradient monitoring wells
19) Exhibit I – letter dated November 5, 2010 from Jonathan Kolleeny to Zahav Enterprises, LLC noting the ineffectiveness of VEFR and requiring a proposal for a comprehensive remedial strategy that will address both soil and groundwater contamination by November 24, 2010
20) Exhibit J – letter dated December 6, 2010 from James M. DeMartinis, Senior Hydrogeologist, J.R. Hozmacher P.E., LLC to Brian Holder, Unicorp National Development regarding proposal to develop remedial action plan for 1124-1134 East New York Avenue spill.

In support of the respondent's cross-motion and opposition to staff's motion, Mr. Eisenbud submitted:

1) Notice of cross-motion for an order without a hearing dated June 6, 2011
2) Affirmation of Frederick Eisenbud dated June 6, 2011

3) Affidavit of James M. DeMartinis, senior hydrogeologist at J.R. Holzmacher P.E., LLC dated May 31, 2011 with c.v. attached
4) Affidavit of Efraim Shurka dated June 1, 2011
5) Exhibit 1 - lease agreement dated August 11, 2004 between Zahav Enterprises LLC and Muli Inc. re: gasoline station located at 1124 E. New York Avenue, Brooklyn, NY 11213
6) Exhibit 2 – petroleum bulk storage certificate issued to Muli Inc. for three underground petroleum storage tanks located at 1124 East New York Avenue dated October 5, 2004
7) Exhibit 3 - proposal from Energy Tank & Environmental Services, Inc. dated November 12, 2007 submitted to Zahav LLC
8) Exhibit 4 - letter dated September 16, 2008 from Samuel Racer, Esq. to Jay Lang, Esq. re: Zahav Enterprises, LLC alleging delays by Unicorp National Developments, Inc. (Unicorp) (purchaser of property) in demolition and removal responsibilities at 1124 East New York Avenue
9) Exhibit 5 – petroleum bulk storage application for 1124 East New York Avenue dated April 2, 2008 by W 16 East New York LLC
10) Exhibit 6 – letter dated April 4, 2008 from Reid Turoff, president, Energy Tank & Environmental Services, Inc. – complaints about alleged contract breaches by Unicorp from contractor
11) Exhibit 7 – letter dated March 25, 2009 from Christopher P. Tomasello, IH, Project Manager and Reed [sic] Turoff, Energy Tank & Environmental Services, Inc. on behalf of ASR Advanced Site Restoration to Veronica Zhune, DEC regarding work plan and site summary for 1134 East New York Avenue with attachments
12) Exhibit 8 - investigation summary report dated October 2009 by Energy Tank & Environmental Services, Inc. and Reliance Consulting Services re: 1124 East New York Avenue – Spill Number 08-02550
13) Exhibit 9 - letter dated April 21, 2009 from Veronica Zhune to John Genovese, Unicorp disapproving work plan dated March 25, 2009 based upon need for additional borings/monitoring wells, submission of site map, installation of vapor barrier and updating of petroleum bulk storage application
14) Exhibit 10 - e-mail dated January 11, 2010 from Reid Turoff to Chuck Whitall advising that he is withdrawing from project due to problems with payment and compliance problems
15) Exhibit 11 – e-mails dated January 11 and 12, 2010 between John Urda and Zahav regarding remediation, stipulation, and issues related to redevelopment of site (appears to be missing at least one page)
16) Exhibit 12 - same as Exhibit 11
17) Exhibit 13 – letter dated January 12, 2010 from Dan Yarom, CDSP, Corp. to John Urda regarding remediation
18) Exhibit 14 – letter dated January 25, 2010 from Frederick Eisenbud to John Urda regarding stipulation, attached e-mail dated January 25, 2010 from Jim DeMartinis to Dan Yarom regarding vacuuming of three wells and the stipulation with Zahav Enterprises' manager's signature dated January 25, 2010

19) Exhibit 15 – e-mail from John Urda to Frederick Eisenbud dated January 25, 2010 and response regarding changes made to stipulation and respondent's agreement to sign as originally proposed
20) Exhibit 16 – e-mail dated January 26, 2010 from Fred Eisenbud to John Urda regarding stipulation and delays related to remediation at site
21) Exhibit 17 – letter dated June 8, 2010 from Joseph Maisonave, DEC Environmental Engineer I to Mr. Shurka and Dr. Zernitsky disapproving remedial action plan – states that VEFR is interim remedial measure and not an appropriate remedy to address contamination; additional down-gradient monitoring wells required
22) Exhibit 18 – e-mail from Joseph Maisonave to Chuck at Unicorp noting that deadline for submission of proposed remedial strategy moved to October 22, 2010; also noting that groundwater sampling was inadequate
23) Exhibit 19 - revised remedial action plan dated October 22, 2010 from James DeMartinis to Joseph Maisonave
24) Exhibit 20 – DEC's response dated November 5, 2010 to revised remedial action plan from Jonathan Kolleeny to Mr. Shurka and Dr. Zernitsy disapproving revised plan and requiring submission of a proposal for "a comprehensive remedial strategy" by no later than November 24, 2010
25) Exhibit 21 – e-mails dated November 21, 2010 among Unicorp and CDSP, Inc. representatives and Jim DeMartinis transmitting proposal dated November 20, 2010 to address remediation of deeper soils with soil vapor extraction (SVE)
26) Exhibit 22 – letter dated November 30, 2010 from Dan Yarom, CDSP, Corp. to Brian Holder, Unicorp, e-mail dated November 30, 2010 from Brian Holder to Dan Yarom dated November 30, 2010 regarding proposal
27) Exhibit 23 – e-mail from Jim DeMartinis to Veronica Zhune dated February 17, 2010 regarding additional monitoring wells and location
28) Exhibit 24 – e-mails from Jim DeMartinis to Veronica Zhune dated February 23, 2010 and March 3, 2010, regarding site data and appropriate siting of monitoring wells and letter dated February 24, 2010 from Veronica Zhune to Mr. Shurka and Dr. Zernitsky regarding submission of remedial investigation work plan (RIWP) and the provision for installation of six additional groundwater monitoring wells
29) Exhibit 25 – RIWP dated March 5, 2010 from Jim DeMartinis to Ms. Zhune and letter dated March 11, 2010 from Ms. Zhune to Mr. Shurka and Dr. Zernitsky approving scope of work including installation of down-gradient monitoring wells but rejecting request to start construction prior to remediation and requiring report to be submitted by April 19, 2010
30) Exhibit 26 – e-mail dated April 19, 2010 from Jim DeMartinis to Veronica Zhune transmitting RI report
31) Exhibit 27 – remedial action plan dated May 11, 2010 from Jim DeMartinis to Joseph Maisonave
32) Exhibit 28 – e-mails between Dan Yarom and Joseph Maisonave dated July 26-27, 2010 regarding well locations and requiring presentation of remedial strategies by October 22, 2010
33) Exhibit 29 – record regarding drilling dated September 3, 2010
34) Exhibit 30 – letter dated January 21, 2011 from Jonathan Kolleeny to Mr. Shurka and Dr. Zernitsky approving revised remedial action plan and revised remedial action plan

dated January 13, 2011 from Jim DeMartinis to Mr. Kolleeny on behalf of Unicorp and

35) Exhibit 31 – list of payments for "Zahav Cleaning."

Staff submitted the following in opposition to cross-motion:

1) Affirmation of John Urda dated July 1, 2011 with:
2) Exhibit A – certificate of occupancy dated November 17, 1933 regarding 1134/44 East New York Avenue; certificate of occupancy dated December 16, 1958; amendment dated July 25, 1956 regarding tank installation on property; Division of Fire Prevention and Combustion form dated August 19, 1958 regarding gasoline service station at 1120-114 East New York Avenue; floor and plot plan indicating gasoline station; certificate of occupancy dated February 6, 1973; Division of Fire Prevention and Combustion form dated May 29, 1978 regarding gasoline tank installation at 1120-44 East New York Avenue; plot plan indicating gasoline station and
3) Exhibit B – aerial view of neighborhood indicating site location
4) Affidavit of Jonathan Kolleeny dated July 1, 2011 with:
5) Exhibit A – excerpts of scope of work to evaluate the recognized environmental conditions by Bureau Veritas North America, Inc. and report of limited subsurface investigation and
6) Exhibit B – chart of groundwater sampling events.

By letter dated July 28, 2011, I asked the staff to submit information in an affidavit by a knowledgeable individual that addresses the current status of the property. I also provided that the respondent was free to also provide such information. In response, staff submitted an affidavit by Mr. Kolleeny dated August 11, 2011 with two photographs of the site. The respondent submitted a letter from its counsel. In addition, the attorneys sent me follow-up e-mails on August 12, 2011.

Staff's Position

Staff alleges that the respondent is responsible for the discharge of petroleum on the property because it was the owner of the property "on which a discharge occurred . . .", citing a long line of Court of Appeals and Appellate Division cases in support. In addition, staff maintains that the respondent Zahav failed to immediately report the spill upon discovery and failed to take "immediate, substantive action to address the Spill despite having the capability to do so." Staff provides that the respondent's efforts were insufficient and also were contrary to the stipulation that it entered into with the Department. The staff finds that the respondent has not been cooperative in addressing the contamination and that its failure to act quickly and fully has contributed to a potentially unsafe condition particularly in light of some of the sensitive receptors in the area such as a school. Thus, staff has asked for a penalty of $75,000 for the discharge and failure to remediate in addition to a penalty of $37,500 for Zahav's failure to comply with the stipulation's terms. In staff's motion for order without hearing, it sets forth the start of the violation of the illegal discharge as August 17, 2007 (the date of the analytical results contained in the September 14, 2007 subsurface investigation) and continuing to the date of the

motion (1,322 days). Staff puts forward the date of May 11, 2010 as the start of the violation of failure to contain the discharge to the date of staff's motion based on the respondent's non-compliance with the stipulation – 324 days. And staff maintains that the respondent's failure to submit a required remedial investigation report runs daily from May 11, 2010 to the date of staff's motion – 324 days.

Zahav's Position

The respondent maintains that it is not a discharger because the spill contamination was found in an area of the property that revealed tanks unknown to Zahav while it was the owner. Zahav states that it had leased the gasoline station to a tenant and had nothing to do with the operation and moreover there was no history of a spill during Zahav's ownership. Zahav also argues that Unicorp, the purchaser of the property from the respondent, caused the delays in the initial cleanup of soils and dismantling and removal of tanks.[4] Zahav states that these actions caused the delays in the respondent's tasks of remediation. Zahav provides details on the actions and resources it applied to the site towards remediation and compliance and argues that, while it may have disagreed with certain engineering decisions made by DEC staff, it never failed to address the contamination in good faith. Zahav maintains that DEC counsel harbored prejudices against the company stemming from another case and this animus has caused an unfair approach to the remediation. Zahav states that the purchaser of the property decided to take over the remediation using the same environmental consulting firm retained by Zahav and did not permit Zahav to continue its work on the site. Zahav provides that ultimately no work continued on the site due to these actions.

## FINDINGS OF FACT

1. Zahav Enterprises, Inc. purchased the property located at 1124 East New York Avenue, Brooklyn, New York on March 7, 1985, and on December 20, 1999, the property was transferred to an entity entitled Zahav Enterprises LLC, the respondent in this matter. Exhibits (Exs.) B and C annexed to affirmation of John Urda in support of motion for order without hearing (Urda Aff. I).

2. Since at least 1958 and possibly as early as the 1920s, the property has been used as a gasoline station. Ex. A to Urda affirmation in opposition to cross-motion (Urda Aff. II) and Ex. 7 to Shurka Aff.

3. In August 2004, Zahav leased the property to Muli, Inc. to be used as a gasoline station and repair shop. Ex. 1 annexed to Shurka Affidavit in support of cross-motion. The Department issued Muli Inc. a petroleum bulk storage certificate for three 4,000 gallon underground storage tanks on October 5, 2004. Shurka Aff., Ex. 2.

[4] The deed annexed to Mr. Urda's affidavit dated March 30, 2011 indicates that W 16 East New York LLC is the current owner of the property (Ex. E, Urda I Aff.). Mr. Shurka states in his affidavit that he "believes that West 16 East New York LLC is a corporation created by Unicorp for the purpose of taking title to the property." Shurka Aff., ¶¶ 11, 15. In this report, I refer to Unicorp because that is the entity that is named in much of the relevant correspondence and other documentation.

4. On November 13, 2007, W 16 East New York LLC purchased the property from Zahav. Exhibit E, Urda Aff. I. The goal of the purchase was to redevelop the property for the construction of a Walgreen's drug store. Ex. 8, Shurka Aff.

5. In the area surrounding the site, there are several schools. Ex. B, Urda Aff. II.

6. On September 14, 2007, Bureau Veritas North America, Inc. (Veritas) completed a limited subsurface investigation report of the property based upon a Phase I environmental site assessment also performed by Veritas. Ex. C, Kolleeny Aff. I. The subsurface investigation report revealed soil contamination near the active tanks, concluded that the existing active tanks should be removed and closed in accordance with applicable regulations, and indicated that further investigation might be required. *Id.* The report also indicated that there might be additional tanks that required removal and closure. *Id.* Veritas recommended that DEC be informed to discuss sampling results and appropriate steps forward. *Id.*

7. As part of the purchase agreement for this property, Unicorp was responsible for demolishing existing structures, including the underground storage tanks, and it retained Energy Tank Environmental Services (Energy Tank) to perform these services. DeMartinis Aff., ¶ 4; Ex. A, Kolleeny Aff. I. On November 12, 2007, Energy Tank submitted a proposal for removal, sampling and closure activities. Ex. 3, Shurka Aff. On June 5, 2008, during the tank removal, gasoline was found leaking from a tank and this incident was reported to DEC by Mark Turoff of Energy Tank. Ex. A, Kolleeny Aff. I. In addition to the three known USTs, Energy Tank discovered thirty 550-gallon USTs on the property (20 550-gallon tanks were found in one location and 10 additional ones in another). Ex. E, Kolleeny Aff. I. These 30 tanks were found in groups of ten and twenty, north and west of the 4,000 gallon tanks, respectively. Shurka Aff., ¶ 19. A spill number was assigned to this property – 08-02550. Ex. A, Kolleeny Aff. I.

8. Due to the purchaser's delays in payment and response to regulatory issues, Energy Tank stopped work on the site twice and finally abandoned the project in January 2010. Exs. 6, 10, Shurka Aff. All the tanks were removed, dismantled and disposed of. Ex. 7, Shurka Aff. And, soil was sampled, excavated, stockpiled and removed. *Id.*

9. Advanced Site Restoration, LLC working with Energy Tank submitted a work plan and site summary dated March 25, 2009 to Veronica Zhune at DEC. Ex. 7, Shurka Aff. The work plan proposed soil borings to determine contamination of the groundwater and to screen and test the excavated soils. *Id.* The analytical soil results indicated volatile organic compounds (VOCs) exceeding the allowable standards in three samples – S2, S11 and S14. *Id.* The report states that "clean end point samples were obtained from most of the site" and the two areas of concern were in the area of where the twenty 550-gallon tanks were found and adjacent to E. 98$^{th}$ Street near the New York City Transit Authority elevated railway. *Id.*, p. 6.

10. By letter dated April 21, 2009, Veronica Zhune wrote to John Genovese of Unicorp, the current site owner, to inform him that the work plan was not approved. Ex. 9, Shurka Aff. Ms. Zhune emphasized in this letter that the development of the site could not proceed prior to the Department's approval of a remedial action plan because the site might prove a health risk to future residents. Ms. Zhune required additional soil sampling, the installation of three

monitoring wells, the submission of a map with the location of all USTs, and potential receptors. Ms. Zhune also required the installation of a vapor barrier and passive sub-slab depressurization system. The letter also mandates the registration of the newly found USTs.

11. Energy Tank and Reliant Consulting Services submitted an investigation summary report dated October 2009 to DEC. Ex. 8, Shurka Aff. This report indicates that at some point a work plan was approved by DEC (p. 4) and Energy Tank began removing contaminated soils. *Id.* In August 2009, Energy Tank removed 2337.60 tons of contaminated soils and disposed of them in Jackson, New Jersey. *Id.* Six groundwater observation wells were installed on the site to characterize the subsurface potential for contamination. *Id.* Three groundwater monitoring wells were installed in June and August 2009 and once the groundwater flow was determined, three additional wells were installed in September 2009. *Id.* The results of the soil samples revealed exceedances of soil cleanup objective standards in two locations (MW-5 and MW-6). *Id.* at 13. Of the five groundwater wells sampled, three wells showed contamination in excess of TOGS 1.1.1 guidance values (MW-1, MW-2, MW-5 and MW-6). *Id.* The report concluded that contamination was centered around the northeastern portion of the site and recommended further investigation work to identify the northeastern boundaries of the plume; engineering controls; and a monitoring and bailing program to address the contamination. *Id.* at 14.

12. By letter dated December 21, 2009, Ms. Zhune wrote to Signature Investment Group and Unicorp stating that the Department did not approve the conclusions and recommendations of the investigation report. Ex. F, Kolleeny Aff. I. Essentially, this letter repeated the remarks contained in Ms. Zhune's April 21, 2009 letter (see ¶ 9 above).

13. On January 5, 2010, Department staff met with Mr. Shurka, managing member of Zahav Enterprises, and informed Zahav that additional spill investigation was required including the addition of six monitoring wells for groundwater delineation purposes and this must be done pursuant to a stipulation. Kolleeny Aff. I, ¶ 12; Shurka Aff., ¶ 1. The parties entered into a stipulation dated January 27, 2010. Ex. G, Urda Aff. In this stipulation, the respondent agreed to clean up and remove the petroleum discharge but did not admit any liability for the discharge. *Id.*, ¶¶ 2, 4. In paragraph 6 of the corrective action plan annexed to the stipulation, it states that "[i]f a submittal is disapproved, the Department shall specify any deficiencies and required modifications in writing. . . . the Respondent shall submit a revised submittal which addresses the Department's comments, correcting all deficiencies identified in the disapproval notice."

14. On March 5, 2010, J.R. Holzmacher P.E., LLC (JRH) through James DeMartinis, senior hydrogeologist on behalf of Zahav, submitted a revised RIWP. Ex. 25, Shurka Aff. Mr. DeMartinis references discussions with staff regarding new information on groundwater flow and the respondent's agreement to site three additional monitoring wells. *Id.* The report addresses Zahav's use of VEFR to remove contaminated groundwater from the three affected wells as well as the option to employ other procedures. *Id.*

15. By letter dated March 11, 2010, Ms. Zhune wrote to Mr. Shurka and Dr. Zernitsky approving the scope of work in the March 5th submission by JRH "including the installation of three down-gradient monitoring wells." Ex. 25, Shurka Aff. Ms. Zhune, however, noted that the

Department did not approve the request to commence construction at the site. *Id.* She directed that the RIR be submitted by April 19, 2010. *Id.*

16. On April 19, 2010, JRH submitted a RIR which reported elevated levels of soil and groundwater contamination. The RIR recommended the continuation of VEFR, monitoring, and additional groundwater sampling. The report noted that VEFR could be used to remove the heaviest contamination and other remedies used later, if necessary. Kolleeny Aff. I, ¶ 14; Ex. 26, Shurka Aff. The Department staff disapproved this RIR by letter dated April 29, 2010. Ex. G, Kolleeny Aff. I. Specifically, Ms. Zhune reiterated that the stipulation required complete off-site delineation of groundwater contamination including the installation of off-site down-gradient monitoring wells with continuous soil sampling as wells are installed. Ex. G, Kolleeny Aff. I.

17. Through its environmental consultant, JRH, Zahav submitted a remedial action plan (RAP) dated May 11, 2010. Ex. 27, Shurka Aff. In the RAP, it is noted that three additional monitoring wells were installed downgradient of the groundwater flow. *Id.*, p.2. Based upon sampling results, the report recommends the installation of two additional monitoring wells. *Id.*, p.3. Because both of these wells would be sited off the respondent's property, the RAP notes that permission to install them would have to be obtained. *Id.* JRH proposed to continue and increase the frequency of VEFR and to utilize other methods if VEFR was not successful in remediating the groundwater. *Id.*, p. 4, 5.

18. By letter dated June 8, 2010, Joseph Maisonave, DEC Environmental Engineer 1, disapproved the RAP because he found that it did not adequately address soil and groundwater contamination. Ex. H, Kolleeny Aff. I. Mr. Maisonave notes that VEFR is not considered an appropriate remedy to address the contamination at this site given the concentrations of BTEX (benzene, toluene, ethylbenzene and xylene). *Id.* In addition, he called upon Zahav to install the (off-site) additional wells so that the "feasibility of various remedial strategies to address soil and groundwater contamination [can] be evaluated." *Id.*

19. Due to the proposed location for the additional monitoring wells – beneath an elevated track of the Metropolitan Transit Authority (MTA) - the respondent encountered difficulty in getting permission to install the wells. The proposed locations had to be moved and on July 27, 2010, Mr. Maisonave advised the respondent's environmental consultants that the well locations were approved and gave direction regarding soil screening and sampling as the wells were installed. DeMartinis Aff. ¶ 31; Ex. 28, Shurka Aff. Based upon the logistical issues with these wells, Mr. Maisonave extended the time for the respondent to submit a revised RAP to October 22, 2010. Ex. 28, Shurka Aff.

20. The two off-site wells were installed on September 3, 2010 and all the wells were sampled on September 8, 2010. DeMartinis Aff., ¶ 32; Exs. 19, p. 4 and 29, Shurka Aff. The revised RAP was submitted on or about October 22, 2010. Ex. 19. JRH found that as a result of the increased use of VEFR, the contamination levels had substantially decreased in several of the wells and recommended that this procedure be continued with the use of chemical injections to follow along with continued sampling. *Id.* JRH found that the site did not warrant the expense of an SVE system based upon the success of the VEFR. DeMartinis Aff., ¶¶ 34-40.

21. Mr. Kolleeny rejected this submission by letter dated November 5, 2010 stating that the use of VEFR would not address the "residual petroleum-contaminated soil which was identified in the tank removal end-point soil samples and in soil screened during installation of the monitoring wells." Mr. Kolleeny disagrees with JRH's conclusions that the presence of pavement would "prevent infiltration of precipitation that could leach contaminants." Mr. Kolleeny remarks that in the Department's experience it was more likely that water will get to the subsurface and interact with the soil contamination thus providing for a source of continuing groundwater contamination. Mr. Kolleeny directs the respondent to submit a proposal that contains a comprehensive remedial strategy by November 24, 2010. Ex. I, Kolleeny Aff. I.

22. VEFR did achieve substantial reductions in groundwater contaminant levels between April 2010 and August 3, 2010; however, further sampling in September and October of 2010 demonstrated that the system had reached its limits in terms of reducing contamination. Kolleeny Aff. II, ¶¶ 20-21; Ex. B, Kolleeny Aff. II.

23. At the time of the Department staff's letter to the respondent rejecting the revised RAP, the property owner's representative, Brian Holder of Unicorp, advised Mr. DeMartinis that Unicorp wanted JRH "to do whatever DEC asked for regardless of cost" in order to start construction. DeMartinis Aff., ¶ 45. Accordingly, on November 20, 2010, JRH submitted a proposal to Unicorp to install a SVE system to address the deep soil contamination of concern to Department staff. DeMartinis Aff., ¶ 49; Ex. 21, DeMartinis Aff. Unicorp approved the proposal on December 9, 2010, Kolleeny Aff. I, Ex. J. Mr. DeMartinis prepared a revised RAP that included the use of SVE and the discontinuance of VEFR. DeMartinis Aff., ¶ 60. Mr. Kolleeny approved the revised RAP on January 21, 2011. DeMartinis Aff., Ex. 30.

24. Unicorp rejected Zahav's offer to continue the use of VEFR at the site and to monitor the groundwater and instead advised JRH that it would use its own contractors to install the SVE. Mr. DeMartinis states that he saw no evidence, however, that the system was installed although construction had begun on the redevelopment project. DeMartinis Aff., ¶ 63. Mr. Kolleeny confirmed that the remediation has not progressed and that Unicorp intends to implement the RAP. Kolleeny Aff. III, ¶ 4.

## DISCUSSION

Standards for Order Without Hearing

The staff has moved for an order without hearing and the respondent has counter-moved for the same relief. This relief is governed by 6 NYCRR § 622.12. The regulations provide that "[a] contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party." 6 NYCRR § 622.12(d). "The motion must be denied . . . if any party shows the existence of substantive disputes of facts sufficient to require a hearing." 6 NYCRR § 622.12(e). Summary judgment, under the CPLR, is appropriate when no genuine, triable issues of material fact exist between the parties and the movant is entitled to judgment as a matter of law. CPLR § 3212(b); Friends of Animals v. Association of Fur Mfgrs., 46 NY2d 1067 (1979).

While the parties have different interpretations of the facts in this matter, they do not have materially different presentations of the key facts. Thus, I do not find that a hearing is necessary to adjudicate this proceeding. I do find that the staff has established that the respondent is liable for violations of ECL §§ 17-0501 and 17-0807, and NL § 173 for the discharge of petroleum (1st cause of action) and for failure to comply with the stipulation (3rd cause of action). With respect to the second cause of action, the staff has demonstrated that the respondent did not take steps to immediately contain the discharge of petroleum, in violation of NL § 176 and 16 NYCRR § 32.5. However, as discussed below, because the respondent did take significant measures to address the contamination, I find the staff's recommended penalty to be higher than appropriate.

Liability for Discharge of Petroleum

The respondent maintains that because Zahav did not run the gasoline station and because the contamination appears to be largely in the area of tanks that were only discovered upon the investigations conducted by the purchaser, it is not responsible for the contamination.[5] However, as staff notes in its opposition to the cross-motion, the law of this State is very broad with respect to defining responsibility for petroleum discharges. The Third Department held in Veltri v. New York State Office of the State Comptroller, 81 AD3d 1050 (2011) that NL § 181 did not predicate liability on landowner status but rather as the owner of the system at the time of discovery regardless of fault or knowledge. There is no dispute regarding Zahav's use of the tanks or even with regard to the possibility that the discharge predated the respondent's ownership. However, the tanks, as fixtures, are part of the property Zahav owned and therefore, the respondent is responsible for any contamination that occurred regardless of whether or not it had any direct knowledge of the spill or whether it contributed to its causation. Matter of White v. Regan, 171 AD2d 197, 198-199 (3d Dep't 1991), lv denied, 79 NY2d 754 (1992). The purpose of Article 12 of the Navigation Law, the Oil Spill Law, is to ensure that a discharge is addressed expeditiously and that cleanup is not delayed because the State must attempt to track down an owner who may have long left the scene. State of New York v. Green, 96 NY2d 403 (2001).

In September 2007, while Zahav still owned the property, environmental studies of the property by the interested purchaser revealed that there was contamination on the site. Kolleeny Aff. I, Ex. C. Despite this revelation, Zahav did not contact the Department and failed to take any steps to address the contamination until after Unicorp had purchased the property and work had begun to remove the petroleum storage tanks in June 2008. Ex. A, Kolleeny Aff. I. Mr. Shurka states that he had been advised that Unicorp notified DEC of the contamination. Shurka Aff.,¶ 13. However, as the property owner, it was Zahav who had responsibility at that point and the respondent should not have relied upon this representation without confirmation.

Zahav also points to the lease it had with Muli which provides that the lessee would have all responsibility with respect to environmental concerns. Ex. 1, Shurka Aff. Regardless of this agreement, Zahav retained ownership of any petroleum tanks on the property and responsibility

[5] The initial environmental report submitted by Bureau Veritas North America, Inc. in September 2007 found contamination around the three 4,000 gallon tanks. Ex. C, Kolleeny I.

for any discharge. State of New York v. C.J. Burth Servs., 79 AD3d 1298 (2010) (property owner held responsible even though it did not have ownership when the discharge occurred).[6]

In addition, the respondent is also liable under ECL §§ 17-0501 and 17-0807. ECL § 17-0501 prohibits the discharge into waters of the state any substance that causes a contravention of water quality standards. The evidence presented by both parties confirmed violations of water quality standards resulting from the discharge of petroleum. Kolleeny Aff., ¶ 20. ECL § 17-0807(4) prohibits any discharge not permitted under Article 17, the rules and regulations promulgated pursuant to the statute, the Federal Water Pollution Control Act, 33 USCA §1251 *et seq.*, or any provisions of a permit issued thereunder. As the discharges described in staff's complaint and other supporting documents were not permitted by any authority, staff has also shown Zahav in violation of this law.

Therefore, I find the respondent liable for the discharge of petroleum.

Failure to Contain a Discharge of Petroleum

NL § 176(1) requires that a person responsible for discharging petroleum pursuant to NL § 173 must immediately contain the discharge. As noted above, although Zahav was aware of the contamination beginning in September 2007, it did not assist with the control and remediation of the site until after the property was sold. Thus, Zahav violated this provision of law. Staff identifies May 11, 2010, a date when Zahav submitted the remedial action plan that staff found deficient, to be the date when the respondent violated the stipulation and failed to contain the discharge. However, as noted below, while at certain points the respondent did not adhere to the stipulation's requirements to amend rejected submissions as required by staff, the evidence submitted by both parties demonstrates that Zahav did undertake steps to address the contamination, albeit insufficiently. Therefore, while I agree with staff that Zahav failed to comply with the all the terms of the stipulation, after the property was sold, the company did take steps to address the oil spill. Thus, I find that the period that Zahav failed to address the discharge is measured from September 14, 2007 (date of report by Bureau Veritas North America, Inc. for Unicorp) until June 5, 2008, when Energy Tank called DEC regarding the spill.[7]

Non-compliance with Stipulation

The respondent entered into a stipulation dated on January 25, 2010 that required Zahav to clean up and remove the discharge of petroleum at 1124-1134 East New York Avenue by complying with the measures set forth in the attached corrective action plan. Ex. G, Urda Aff. I. In paragraph 6 of the stipulation, it is stated that "[i]f a submittal is disapproved, the Department shall specify any deficiencies and required modifications in writing. Within 15 days of receipt of the Department's disapproval notice, the Respondent shall submit a revised submittal which

[6] The law acknowledges that there can be more than one responsible party to an oil spill. Veltri, *supra*, fn 2. Certainly, the respondent may seek contribution from Muli in a civil proceeding.

[7] Staff refers to August 17, 2007 as the date of laboratory results from the subsurface investigation in 2007. Kolleeny Aff. I, ¶ 7. However, I could find no reference to this date in the report annexed as Ex. C to Mr. Kolleeny's affidavit dated March 28, 2011.

addresses the Department's comments, correcting all deficiencies in the disapproval notice." The respondent failed to comply with this term, as staff repeatedly advised Zahav that its use of VEFR was not appropriate as more than an interim, remedial measure. Exs. H, I, Kolleeny Aff. I.

The courts have determined that consent orders and stipulations are tantamount to contracts and therefore, bind the parties who have executed them. *See*, *e.g.*, State v. Walkill, 170 AD2d 8, 10 (3d Dep't 1991); Matter of Howard (ALJ Report, May 17, 2000); Singh v. North Shore University Hospital, 76 AD3d 1004 (2d Dep't 2010). Neither party raises any issue with respect to interpretation of the January 2010 stipulation and its terms are clear. While the representatives of the respondent may have in good faith believed that Unicorp was proceeding appropriately to address the contamination (and apparently there were problems with the purchaser Unicorp moving forward on its obligations), Zahav failed to adhere to the precise requirements of the stipulation in a timely manner. As early as June 2010, DEC staff informed the respondent that its use of VEFR was not adequate, but still Zahav continued to use it and to propose it. Exs. H, I, Kolleeny Aff. I. Accordingly, I find that the respondent is liable for failing to comply with the stipulation.

Penalty

The staff has requested a penalty of $112,500 and an order directing Zahav to complete the full investigation and remediation of the spill under a Department-approved work plan. Addressing the second aspect of this request first, the staff failed to provide any information to contradict the evidence of the respondent that the current owner, Unicorp, has taken over the remediation of the site and has started to develop the site.[8] In fact, the August 11, 2011 affidavit of Jonathan Kolleeny supports this contention. Accordingly, I accept the evidence provided by Zahav with respect to these issues and I fail to see how it would be appropriate for the Department to require Zahav to continue the work under these circumstances. I am troubled by the lack of information with respect to Unicorp's progress in these matters. Clearly, Unicorp took title to the property with the understanding that it was contaminated and ultimately, approved a proposal put forward to it by JRH to remediate the spill which was approved by Department staff. Ex. 30, DeMartinis Aff. In addition, in the course of DEC staff's oversight of this remediation, it specifically addressed Unicorp's responsibility in at least two communications. Ex. 9, Shurka Aff.; Kolleeny Aff. I, Ex. F. Staff should have no difficulty in overseeing the completion of this task by Unicorp, another responsible party.

Thus, while I have found the respondent liable for the violations cited by staff, I find the penalty to be excessive in light of precedent and Zahav's actions. In State v. Green, 96 NY2d 403 (2001), the Court of Appeals makes clear that the Navigation Law targets the landowner because that individual or entity is in the best position to address prevention of spills and

[8] Mr. Urda states in his reply affirmation that "[a] large portion of the Cross-motion is devoted to *ad hominen* [sic] and speculative argument regarding Department technical and legal staff's motivations in bringing this case which, in addition to being untrue, is irrelevant and should be disregarded." Urda Aff. II, ¶ 76. While I do not find it necessary or appropriate to address respondent's claims with respect to staff's motivations, staff's failure to respond to respondent's factual claims regarding the purchaser's purge of Zahav from the remediation amounts to staff's admission of such claims. Kuehne & Nagel, Inc. v Barden, 36 NY2d 539 (1979)(failure to respond to a fact attested to in the moving [summary judgment] papers results in an admission).

response to them. In State of New York v. Speonk Fuel, Inc., 3 NY3d 720 (2004), the court discusses the application of this holding to the landowner's ability to work with other potentially responsible parties to address cleanup. As documented by Zahav, it did enter into an agreement with the purchaser of the property to perform remediation once Unicorp completed the tank removal. Zahav documented the delays in Unicorp's responsibilities which in turn caused delays in the remediation efforts. And, while Zahav can be faulted for not adhering to the instructions provided by staff with respect to the remedial measures that were used, the respondent did install monitoring wells, it did perform sampling, and it did submit several reports to the Department as well as communicate with staff about its progress.

These documented actions are a far cry from circumstances where the respondent failed to address contamination at all or performed in extremely half-hearted ways. For example in Matter of Howard, the respondent delayed for a year in putting in the required SVE system and then did not send any groundwater monitoring data or other information to DEC for several years. In the meantime, the contamination had migrated onto neighboring property. At the time of the staff's enforcement proceeding, sampling results indicated continued contamination, but no efforts to clean it up or contain it. Yet, in that matter, the staff requested a penalty of $75,000. Also, in Matter of Linden Latimer Holding, LLC (Summary Hearing Report, October 18, 2007), the respondent did virtually nothing to address the contamination on its property and staff requested $75,000 in penalties in that matter as well. In Matter of Gladiator Realty Corp. and Canal Management Corp. (Commissioner's Order , January 14, 2010), the respondent did not do anything towards a cleanup of a spill and defaulted in the proceeding. Staff sought a penalty of $82,500. Similarly, in Matter of 366 Avenue Y Development Corporation (Commissioner's Order, August 16, 2010), the respondent defaulted in the proceeding and failed to comply with a stipulation to clean up and remove a petroleum discharge yet was only penalized $37,500 for these violations (apparently, at the hearing staff asked for an increase of penalty to $75,000 but because the respondent was not on notice of this request, it was denied). And in two other cases, Matter of USA Environmental Services Corp., and True Blue Environmental Services, Corp. (Commissioner's Order, November 16, 2009) and Matter of TY46 , LLC (Commissioner's Order, September 9, 2010), where all the respondents defaulted in the proceeding and failed to address the petroleum discharges on their properties, they were subject to penalties of $118, 000 and $95,000, respectively.

The Department's 1990 Civil Penalty Policy requires that several factors be assessed in determining a penalty. Among these are the gravity of the violation and the economic benefits of non-compliance. These factors are intended to result in a penalty that will effectuate a policy of punishment and deterrence. To determine gravity, the policy sets forth the factors of: a) potential harm and actual damage caused by the violations; and b) relative importance of the type of violations in the context of the Department's overall regulatory scheme. It is not clear from the evidence presented in the opposing motions what if any additional environmental harm the respondent caused by failing to commence cleanup of the site as soon as it became aware of the contamination. However, the delays could potentially have resulted in creating a larger environmental problem. There is no question that the law places great importance on prompt and appropriate site cleanups and that failure of a responsible party to perform a cleanup can result in the State's takeover of a remediation. NL § 176.

With respect to economic benefit, the staff did not present details with respect to any sums that it contended the respondent saved by not carrying out the remediation in the manner staff sought. Mr. Urda states that "[d]uring the period of these ongoing violations, Zahav Enterprises avoided the expense of compliance." Urda I, ¶ 42. However, the respondent did present uncontested information on the amount it expended on the work it performed – over $400,000. Ex. 31, Shurka Aff. There is no indication that the respondent's actions resulted in a significant savings particularly if Zahav will have to reimburse Unicorp for remediation efforts it performs.

The Civil Penalty Policy also sets forth factors to be used to adjust the gravity component: a) culpability; b) violator cooperation; c) history of non-compliance; d) ability to pay; and e) unique factors. While the respondent is a legally responsible entity in this matter, there has been no proof that it caused the spill or was aware of it prior to Unicorp's environmental investigations or that it failed to take any actions with respect to remediation. However, it does appear from the information presented by both parties that Zahav was intent on adhering to its plans with respect to the remediation despite the criticisms of staff. I am not aware of a history of non-compliance by Zahav although Mr. Shurka notes that he was involved in a prior oil spill matter – Matter of Beach Channel and Manny Shurka. There was no evidence presented with respect to the respondent's ability to pay the penalty and thus, it is not a consideration here. The unique factor that I consider in this instance is the role of the current owner in the remediation efforts and the ability of Department staff to enlist that entity to assist in the cleanup.

The Civil Penalty Policy requires the Department staff to look at the potential statutory maximum which could be assessed. ECL § 71-1929 provides for a penalty of $37,500 per day for each violation of titles 1 through 11 and title 19 of Article 17. NL § 192 provides for a penalty of $25,000 per day for each violation of the Oil Spill Act. Clearly, if calculated based upon the total number of days for each violation, the sum of these penalties is much larger than the amount the staff has requested. But as I have indicated above, several factors support a lesser penalty. The respondent has spent a considerable sum on the investigation and remediation of this site. Ex. 31, DeMartinis Aff. Zahav, while not as compliant as staff would have liked, did work with the staff and provide information on the spill. And, as noted above, I do not find the staff's penalty request consistent with precedent.

Accordingly, I recommend a penalty of $60,000 based upon a calculation of $20,000 for each cause of action. Since it appears that the SVE system has not been installed by Unicorp and no remediation is ongoing, I recommend that the Commissioner direct staff to order Unicorp to implement the January 13, 2011 revised remedial action plan that was submitted to Department staff by JRH and approved by Mr. Kolleeny on January 21, 2011.

## Conclusion

The respondent has failed to put forward any material issue of fact to defeat staff's motion and I find no basis to grant respondent's motion or to dismiss the proceeding. Zahav is responsible for the illegal discharge, for failing to immediately contain it upon discovery, and for failing to comply with the stipulation in violation of ECL §§ 17-0501, 17-0807, NL §§ 173 and

176. I have not found Zahav's opposition meritorious nor sufficient to warrant a hearing. However, based upon the facts presented, I find the staff's recommended relief to be excessive and, I find that $60,000 is an appropriate penalty. With respect to the injunctive relief sought by staff, as it has been confirmed that the current owner of the site has assumed responsibility for the remediation, staff should be directed to oversee that effort to its completion.

Dated: Albany, New York
August 18, 2011