STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 27 and 71 of the New York State Environmental Conservation Law (ECL) and Part 370 et seq. of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

MORGAN MATERIALS INC. (previously known as Morgan Chemicals, Inc.),
MORGAN CHEMCIAL INC. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.),
MORGAN GLOBEX, INC.,
NORTH SEA MINING & MINERALS, LTD.,
ORCHARD MECHANICS, INC.,
DONALD SADKIN, AS CHIEF EXECUTIVE OFFICER OF MORGAN MATERIALS, INC., MORGAN CHEMCIALS, INC., MORGAN GLOBEX, INC. AND NORTH SEA MINING & MINERALS, LTD.,
DONALD SADKIN, INDIVIDUALLY
and
JONATHAN SADKIN, INDIVIDUALLY,

Respondents.

DECISION AND ORDER
DEC Case No.
R9-20170214-15

This administrative enforcement proceeding concerns respondents' ownership and/or operation of a facility located at 380, 400, 408 and 416 Vulcan Street, Tonawanda, Erie County, New York (Facility or Sadkin Facility) and allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondents violated articles 27 and 71 of the ECL, as well as regulations governing the generation, storage, handling and disposal of hazardous waste (see 6 NYCRR part 370 et seq.).

Department staff commenced this proceeding by serving respondents with a notice of hearing and complaint, dated December 29, 2017. Pursuant to a directive by Administrative Law Judge (ALJ) Lisa Wilkinson to "amend the Complaint to provide a more definite statement of the basis or bases on which staff seeks to hold respondents liable" (Ruling on Motions to Dismiss dated June 11, 2018, at 8), Department staff served a second amended complaint dated July 27, 2018 (Second Amended Complaint) which alleged twenty-one causes of action.[1]

[1] Although captioned "Second Amended Complaint," the pleading was, in fact, the first (and only) amended complaint served by Department staff.

The Second Amended Complaint identified respondents Morgan Materials Inc. (Morgan Materials), Morgan Chemcial, Inc. (Morgan Chemcial),[2] Morgan Globex, Inc. (Morgan Globex), Donald Sadkin, individually and as chief executive officer (CEO) of Morgan Materials, Morgan Chemcial, and Morgan Globex, and Jonathan Sadkin,[3] individually, as operators of the Facility (see Second Amended Complaint ¶ 10).[4]

Respondents Orchard Mechanics, Inc. (Orchard) and North Sea Mining & Minerals, Ltd (North Sea), along with Morgan Materials, are alleged to be liable for the charged violations as current or former owners of the real property where the Facility is located (see Second Amended Complaint ¶¶ 15-21).

Respondent Jonathan Sadkin filed an amended answer, dated August 20, 2018, raising forty-four affirmative defenses (Jonathan Sadkin Answer). The other respondents (Morgan Materials, Morgan Chemcial, Morgan Globex, Orchard, North Sea, and Donald Sadkin, individually and as CEO of Morgan Materials, Morgan Chemcial, Morgan Globex and North Sea), filed a separate answer, dated October 9, 2018, raising six affirmative defenses (Remaining Respondents' Answer).[5]

Department staff thereafter served a Motion for Order without Hearing, dated April 13, 2020 (Motion for Order without Hearing or Motion), upon respondents. Staff sought an order finding that respondents are liable for the violations set forth in the Second Amended Complaint and imposing a civil penalty and remedial relief. Respondents opposed the Motion for Order without Hearing.

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[2] "Chemcial" is the spelling used in the corporation's certificate of incorporation as reflected in the New York Department of State Division of Corporations database (see Ruling and Summary Report at 2, n 2; Department Staff Memorandum of Law in Support of Motion dated April 13, 2020 at 2, n 1).

[3] Jonathan Sadkin, also known as Guy, is Donald Sadkin's son (see Affidavit of Peter Reuben, sworn to March 27, 2020, ¶ 49).

[4] In paragraph 12 of the Second Amended Complaint, however, staff alleges that only respondents Morgan Materials, Morgan Chemcial, Morgan Globex, Donald Sadkin, individually and as CEO of Morgan Materials, and Jonathan Sadkin, individually, are liable for the charged violations as operators of the Facility, and does not allege that Donald Sadkin in his capacity as CEO of Morgan Chemcial and Morgan Globex, is liable as an operator (see Second Amended Complaint ¶ 12). Notwithstanding that omission in paragraph 12, it is clear from a review of the Second Amended Complaint as a whole, and in particular its discussion of the violations, that the "Operating Respondents" listed in paragraph ¶ 10 are the respondents alleged to be liable as operators, including Donald Sadkin in his capacity as CEO of Morgan Chemcial and Morgan Globex.

[5] Department staff, by notice of motion dated October 18, 2018, moved for clarification of the affirmative defenses raised in the Remaining Respondents' Answer. In a Ruling dated November 19, 2018, ALJ Wilkinson directed answering respondents to replead the First, Second, Fourth and Fifth affirmative defenses and determined that the Third and Sixth affirmative defenses were in the nature of a denial of the charges and not affirmative defenses (see ALJ Ruling on Motion for Clarification of Affirmative Defenses, at 4-7). Pursuant thereto, a Clarification was filed that withdrew the First and Second affirmative defenses and addressed the Fourth and Fifth affirmative defenses (see Affirmation of Jennifer Dougherty in Support of the Motion for Order without Hearing dated April 13, 2020 [Dougherty Affirmation], Exhibit I [Respondents' Clarification of Affirmative Defenses dated December 14, 2018]).

ALJ Maria E. Villa prepared the attached Ruling and Summary Report, dated January 23, 2021 (Ruling and Summary Report), in which she recommends that I: (a) grant the Motion for Order without Hearing; (b) find that respondents are liable for the violations set forth in the Second Amended Complaint; and (c) grant the relief that Department staff requested except inasmuch as it requested that Donald Sadkin be required to pay stipulated penalties (see Ruling and Summary Report at 3).[6]

ALJ Villa's Ruling and Summary Report is a comprehensive and thorough review that provides a clear and careful evaluation of the issues presented in this proceeding. I hereby adopt her Ruling and Summary Report as my decision in this matter subject to my comments and modifications below.

Based upon my review of the record, I adopt the ALJ's finding that Department staff met its burden on its Motion for Order without Hearing as to the liability of Morgan Materials, Morgan Chemcial, Orchard, North Sea and Donald Sadkin (individually and as CEO of Morgan Materials, Morgan Chemcial, and North Sea) and that those respondents failed to submit proof demonstrating that there are material issues of fact in dispute that require a hearing.[7] For the reasons set forth below, I decline to adopt the recommendation with respect to the liability of respondents Jonathan Sadkin, Morgan Globex and Donald Sadkin in his capacity as CEO of Morgan Globex and deny the Motion as to respondents Jonathan Sadkin, Morgan Globex and Donald Sadkin in his capacity as CEO of Morgan Globex.

As to a civil penalty for the violations, based on the record before me, I adopt the penalty amount sought by Department staff as to those parties where liability has been imposed pursuant to this Decision and Order and assess a total combined civil penalty of $2,500,000, payable as follows:

-- (1) by operating respondents Morgan Materials, Morgan Chemcial, and Donald Sadkin (individually and as CEO of Morgan Materials and Morgan Chemcial), jointly and severally in the amount of $1,500,000;
-- (2) by owner respondents North Sea, Orchard, and Morgan Materials, jointly and severally in the amount of $500,000; and
-- (3) by Morgan Materials and Donald Sadkin, individually and as CEO of Morgan Materials, in the amount of $500,000 in stipulated penalties for violations of a 2005 consent order (2005 Consent Order) and the Management System Plan prepared pursuant to the 2005 Consent Order.

I am also modifying the remedial relief sought by Department staff, as discussed herein.

[6] ALJ Wilkinson who was previously assigned to this matter left her position with the Office of Hearings and Mediation Services, and ALJ Maria Villa was subsequently assigned to this matter.

[7] Upon consideration of this matter, I find that it is unnecessary to address the issue of collateral estoppel and decline to adopt the findings in the Ruling and Summary Report as to that issue.

Factual Background

The Facility consists of several interconnected buildings located on four separate tax parcels - identified as 380 Vulcan Street, 400 Vulcan Street, 408 Vulcan Street and 416 Vulcan Street - and includes approximately 2.8 acres of warehousing and material processing space (see Second Amended Complaint ¶¶ 10, 45; Affidavit of Peter Reuben[8] sworn to March 27, 2020 [Reuben Affidavit] ¶¶ 5, 10). The Facility was historically used for, among other things, storing chemicals and raw materials that were purchased and intended for re-sale (see Reuben Affidavit ¶¶ 11-12; Matter of Morgan Materials Inc., Summary Abatement Proceeding, Order of the Commissioner, dated February 6, 2017 [February 2017 SAO], at 4-5).

In 2005, Morgan Materials entered into an order on consent (2005 Consent Order) to resolve allegations by Department staff that Morgan Materials had committed multiple violations of DEC regulations, including regulations relating to storage of hazardous waste. The 2005 Consent Order was signed by Donald Sadkin as president of Morgan Materials (see Reuben Affidavit, Exhibit [Exh] F), but only Morgan Materials was named as a respondent. The 2005 Consent Order required Morgan Materials to, among other things, develop a plan for establishing best management practices relative to storage, maintenance and disposal of materials at its facilities in New York State (see id. at 10 [Schedule A: Morgan Materials Schedule of Environmental Improvements, item #5]). The plan was required to include the implementation of a "material tracking and inventory system" to include "material description, quantities, location, and dates for material purchase, processing, transfer, sale, or disposal" (id.).

As required by the 2005 Consent Order, Morgan Materials provided a Management System Plan (MSP) for the Facility which was approved by the Department (see Reuben Affidavit ¶ 42, Exh H). In relevant part, the MSP provided that Morgan Materials "will not accept a new material for purchase . . . unless a known market exists as determined by" Donald Sadkin (id., Exh H at 2 [§ 2.2]). It also provided that Donald Sadkin "will perform an annual check of the purchase date of all material in the inventory" and, if he determines that the material is not likely to be sold within 12 months (for hazardous materials) or 18 months (for non-hazardous materials), he will notify the Department in writing (id.). The MSP also noted that "chain of command" for the implementation of the MSP would begin with Donald Sadkin (see id. at 1).

In November 2016, following inspections of the Facility by Department staff, I issued a summary abatement order (SAO) and notice of hearing to Morgan Materials, Morgan Chemcial, Morgan Globex, North Sea and Donald Sadkin, individually and as CEO of the named entities (collectively, the SAO respondents) (see Affirmation of Jennifer Dougherty in Support of the Motion for Order Without Hearing dated April 13, 2020 [Dougherty Affirmation], Exh C). The SAO stated, among other things, that the SAO respondents had accumulated and were storing substantial quantities of chemicals and waste, including hazardous waste, at the Facility and had failed to properly handle, manage or dispose of the waste, creating dangerous conditions at the

[8] Peter Reuben is an Environmental Chemist with the Department, and is responsible for inspecting facilities for compliance with the ECL pertaining to the Resource Conservation and Recovery Act, New York State's petroleum bulk storage and chemical bulk storage statutes and regulations, and the New York Navigation Law (see Reuben Affidavit ¶¶ 1, 4).

Facility (see id. ¶¶ 38, 41, 45-47). The SAO enumerated numerous regulatory violations committed by the SAO respondents (see id. ¶ 48).

The SAO respondents did not appear for the hearing, held on December 13, 2016 before ALJ Villa, but made a written submission in response to the proceeding which was considered by the ALJ (see Dougherty Affirmation ¶ 14, Exh E; see also February 2017 SAO, at 2). In the February 2017 SAO, I adopted the ALJ's findings of fact and conclusions of law and found that the SAO respondents had violated the ECL and its implementing regulations (see February 2017 SAO at 2-3). I determined that the Facility "presents an imminent danger to the health or welfare of the people of the State and is likely to result in irreversible or irreparable damage to the natural resources of the State" and continued the SAO (see id. at 8). Following the issuance of the February 2017 SAO, the United States Environmental Protection Agency (US EPA) took over control of the Facility and conducted an emergency removal action (see Reuben Affidavit ¶ 100).

Department staff alleges the following twenty-one causes of action in its Second Amended Complaint:[9]

(1) Morgan Materials and Donald Sadkin, individually and as CEO of Morgan Materials, violated the terms of the 2005 Consent Order by "purchasing material for which there is no known market, failing to annually inspect the . . . Facility and failing to report to the DEC that materials had been stored in excess of the 12-month or 18-month timeframe" in violation of the requirements of the 2005 Consent Order and ECL 71-2705 (Second Amended Complaint ¶ 140);[10]

(2) The Operating Respondents violated 6 NYCRR 372.2 (a)(2) by generating and storing wastes on-site without making any determination as to whether the wastes were hazardous wastes (see Second Amended Complaint ¶ 144);

(3) All respondents violated 6 NYCRR 373-3.3 (f) by failing to maintain adequate aisle space at the Facility (see Second Amended Complaint ¶ 152);

(4) All respondents violated 6 NYCRR 373-3.9 (g)(3) by storing incompatible wastes in close proximity to each other at the Facility (see Second Amended Complaint ¶ 159);

(5) All respondents violated 6 NYCRR 373-2.9 (f)(1)(i) by failing to employ secondary containment in compliance with 6 NYCRR Part 373-1.1 (d)(1)(iv)(*f*) (see Second Amended Complaint ¶ 166);

[9] The regulatory references cited are those that were applicable at the time of the violations.

[10] The terms alleged to have been violated are found in the MSP and not the 2005 Consent Order itself. As noted, the 2005 Consent Order required the preparation of the MSP (see Reuben Affidavit ¶¶ 41-42; Exh H).

(6) All respondents violated 6 NYCRR 373-3.2 (h)(1) by failing to take measures to prevent accidental ignition and failing to post "No Smoking" signs at the Facility (see Second Amended Complaint ¶ 176);

(7) All respondents violated 6 NYCRR 373-3.3 (c)(1) by failing to provide any method for internal communication or an alarm system within the Facility (see Second Amended Complaint ¶ 183);

(8) All respondents violated 6 NYCRR 373-3.3 (c)(2) by failing to provide any manner by which the personnel within the Facility could summon assistance in the event of an emergency (see Second Amended Complaint ¶ 190);

(9) All respondents violated 6 NYCRR 372.2 (a)(8)(ii) by storing waste items on site in excess of 90 days (see Second Amended Complaint ¶ 198);

(10) The Operating Respondents violated 6 NYCRR 372.2 (a)(8) (ii) and 6 NYCRR 373-1.1 (d)(1)(ii)(c)(2) by generating waste and failing to properly label the hazardous waste at the Facility with an accumulation date (see Second Amended Complaint ¶ 203);[11]

(11) All respondents violated 6 NYCRR 373-3.9 (b) by failing to transfer hazardous waste from leaking containers to containers that were in good condition (see Second Amended Complaint ¶¶ 207-210);

(12) All respondents violated 6 NYCRR 373-3.9 (d)(1) by failing to keep containers closed and in good condition (see Second Amended Complaint ¶ 218);

(13) All respondents violated 6 NYCRR 373-3.9 (d)(3) by failing to mark and properly label containers of hazardous waste (see Second Amended Complaint ¶ 225);

(14) All respondents violated 6 NYCRR 373-3.9 (e) by failing to inspect the areas where the containers were stored on a weekly basis (see Second Amended Complaint ¶ 235);

(15) All respondents violated 6 NYCRR 373-3.2 (g) by failing to provide any training to Facility personnel (see Second Amended Complaint ¶ 241);

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[11] One of the regulations cited in the Tenth Cause of Action is incorrect and should have been cited as 6 NYCRR 373-1.1(d)(1)(iii)(*c*)(*2*) rather than 6 NYCRR 373-1.1(d)(1)(ii)(*c*)(*2*) (see Second Amended Complaint ¶ 203; 6 NYCRR 373-1.1[d][1][iii][*c*][*2*]). This error is repeated in staff's motion papers (see Reuben Affidavit ¶ 174). The ALJ cited the correct regulation in the Ruling and Summary Report (see Ruling and Summary Report at 26). With respect to typographical errors in pleadings, a tribunal may "permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just" (CPLR 2001; see also Matter of Lucian Buchanan, Order of the Commissioner, June 17, 2021 at 2 n 1). Here, the Tenth Cause of Action contained the correct regulatory language and fully appraised the Operating Respondents that they were being charged with a violation of 6 NYCRR 373-1.1(d)(1)(iii)(*c*)(*2*). As such, I discern no prejudice to respondents and deem the Second Amended Complaint to be amended to charge the Operating Respondents in the Tenth Cause of Action with a violation of 6 NYCRR 373-1.1 (d)(1)(iii)(*c*)(*2*).

(16) All respondents violated 6 NYCRR 373-3.3 (b) by failing to take necessary measures to ensure that the Facility was maintained in a manner which would minimize the possibility of fire, explosion or non-sudden releases to air, soil or surface (see Second Amended Complaint ¶ 251);

(17) All respondents violated 6 NYCRR 373-3.4 by failing to have a contingency plan (see Second Amended Complaint ¶ 258);

(18) All respondents violated 6 NYCRR 373-3.4 (g) by failing to activate emergency procedures in an emergency (see Second Amended Complaint ¶ 263);

(19) The Operating Respondents violated 6 NYCRR 376.1 (g)(1)(viii) by failing to make and/or retain any Land Disposal Notices (see Second Amended Complaint ¶ 269);

(20) The Operating Respondents violated 6 NYCRR 374-3.2 (d)(1)(i) by, as generators of universal waste, failing to collect and store universal waste in a container (see Second Amended Complaint ¶ 274); and

(21) The Operating Respondents violated 6 NYCRR 374-3.2 (e)(1) by, as generators of universal waste, failing to label the container(s) of universal waste (see Second Amended Complaint ¶ 279).

Liability

Pursuant to 6 NYCRR (former) 622.12, "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence" (6 NYCRR [former] 622.12 [a]).[12] "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 [former] 622.12 [d]). In turn, a motion for order without hearing "must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of facts sufficient to require a hearing" (6 NYCRR [former] 622.12 [e]).

Summary judgment, pursuant to the CPLR, is "a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact . . . and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [Vega] [internal quotation marks omitted]; see CPLR 3212 [b]). On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party" (Vega, 18 NY3d at 503).

[12] This motion was served in April 2020. Effective September 16, 2020, 6 NYCRR part 622 was repealed and replaced. In this Decision and Order, I apply the former version of Part 622, as the version in effect when the motion was served.

Upon review, I concur with the ALJ's ruling granting the Motion as to:

-- the joint and several liability of Morgan Materials, Morgan Chemcial, Orchard, North Sea and Donald Sadkin (individually and as CEO of Morgan Materials, Morgan Chemcial, and North Sea) with respect to fifteen causes of action;

--the joint and several liability of Morgan Materials, Morgan Chemcial and Donald Sadkin (individually and as CEO of Morgan Materials and Morgan Chemcial) with respect to five causes of action; and

--the liability of Morgan Materials and Donald Sadkin with respect to one cause of action;

and adopt the ruling, subject to my comments and modifications herein. With respect to the liability of Jonathan Sadkin and Morgan Globex, however, I deny the motion as to those two respondents, and also as to the liability of Donald Sadkin in his capacity as CEO of Morgan Globex.

In support of its Motion, Department staff submitted the affidavit of Peter Reuben, who, as previously noted, is an Environmental Chemist with the Department who participated in on-site inspections of the Facility, along with supporting documents. The assertions in Mr. Reuben's affidavit are summarized as follows.

Mr. Reuben made numerous visits to the Facility in 2015 and 2016, the initial purpose of which was to evaluate operations at the Facility and Morgan Materials' compliance with the 2005 Consent Order, as well as to determine if the operations were subject to the federal Resource Conservation and Recovery Act (RCRA) (see Reuben Affidavit ¶¶ 32-33).

At his initial visit, on February 19, 2015, Mr. Reuben observed, in the exterior of the Facility: (1) chemicals that were stored outside and exposed, approximately 2,000 drums of which contained flammable chemicals; (2) many drums of chemicals in "very poor condition" which were unmarked and/or unlabeled; and (3) drums of chemicals that were "stored in an area which was not secured, without secondary containment, and lacked appropriate aisle space to allow for a complete visual inspection" (Reuben Affidavit ¶ 34). In the interior of the Facility, Mr. Reuben observed "thousands of drums of chemicals," most of which were unmarked and/or unlabeled and "significantly corroded," with some having corroded "completely through" (id.). These drums were also unsecured and not secondarily contained and there was a lack of appropriate aisle space in between the drums (see id.). Based on this site visit, discussions with Department staff and representatives of Morgan Materials, and a review of DEC's records, Mr. Reuben determined that Morgan Materials was in violation of the 2005 Consent Order and the MSP and had failed to properly maintain an inventory (id. ¶ 47).

In September 2015, upon Mr. Reuben's request following another site visit, Morgan Materials' representatives provided DEC with a partial inventory report, later updated in November 2015, which revealed that Donald Sadkin and Morgan Materials had failed to provide to DEC any of the notices required by the MSP with respect to materials that were not sold

within the 12-month and 18-month time frames and, in addition, had accumulated substantial quantities of chemicals at the Facility for which markets had not been identified and which were waste (Reuben Affidavit ¶¶ 50-53, 55-56). Mr. Reuben directed that Morgan Materials commence the submission of monthly reports (id. ¶ 58). The reports documented that the Facility "had enormous quantities of unsaleable chemicals in storage that were not being managed as waste or disposed of in accordance with regulatory requirements, the 2005 Consent Order, or [the] MSP" (id. ¶ 62). The reports "documented that wastes were not leaving the Site and month by month wastes were remaining on-Site far beyond time limits allowed in the 2005 Consent Order [and] 2005 MSP" or the applicable 6 NYCRR part 372 storage limits (Reuben Affidavit ¶ 64).

During a December 3, 2015 visit to the Facility, Mr. Reuben raised concerns about the November 2015 monthly report and requested that he be shown the inventory of items identified in the report as waste (see Reuben Affidavit ¶ 66). After over an hour of searching the Facility, "no one was able to locate 64 of the 67-line items in the November 30, 2015 Monthly Report, or roughly 5-million pounds of waste" (id. ¶ 66). During that site visit, Mr. Reuben also noted that some of the drums had been moved inside (see id. ¶ 69). These drums, which included flammable chemicals, had "corroded substantially" and were not within secondary containment (id.). Mr. Reuben advised Facility representatives that the area lacked appropriate fire controls (id.). Mr. Reuben received what was described as a "complete inventory" from Jonathan Sadkin on July 15, 2016 (id. ¶ 79). This inventory revealed that "there was an estimated total of 18 million pounds of chemicals, materials, hazardous and non-hazardous waste, some of which [r]espondents reported had been stored at the Facility for more than 20 years" (id.). This inventory prompted a "multi-agency and multi-programmatic inspection" (id. ¶ 80), which would lead to the issuance of the SAOs.

Respondent Jonathan Sadkin

I turn now to the issue of the individual liability of Jonathan Sadkin. The Second Amended Complaint alleged that Jonathan Sadkin, upon information and belief, "is or was a manager at the Sadkin Facility, receiving a salary commensurate with a high level of responsibility and authority in Respondent's [sic] operations, with authorization to make business decisions" (Second Amended Complaint ¶ 11). The Second Amended Complaint further alleged that Jonathan Sadkin "had an individual responsibility to report the inventory to the DEC, to properly make waste determination[s] for the waste generated, and to properly store and dispose of the waste in accordance with the ECL and 6 NYCRR Parts 370-374" and "had responsibility and authority over the activities of the business that caused the violations and [was] in a position to prevent the violations" (Second Amended Complaint ¶¶ 85-86).

Department staff argues in its motion that Jonathan Sadkin is personally liable for the alleged violations under the responsible corporate officer doctrine (see Department Staff's Memorandum of Law in Support of Motion dated April 13, 2020 [Department Staff Memorandum of Law], at 37-40). "A corporate officer can be held personally liable for violations of the corporate entity that threaten the public health, safety, or welfare" (Matter of Supreme Energy Corp., Decision and Order of the Commissioner, April 11, 2014, at 25). To establish the liability of an individual under this doctrine, it must be shown that "the officer had

direct responsibility for operations and was in a position to prevent the violations" (id. at 26; see State of New York v C & J Enters., LLC, 179 AD3d 1200, at 1202-1203 [3d Dept 2020]). "A corporate officer need only have responsibility over the activities of the business that caused the violations to be held individually liable" (Matter of the Call-a-Head Portable Toilets, Inc., Decision and Order of the Commissioner, March 4, 2019, at 5).

In support of its position that Jonathan Sadkin is a responsible corporate officer, Department staff relies on the following: (1) the fact that the MSP designated Jonathan Sadkin as the second-in-command decision-maker and provided that the MSP would be reviewed and updated by Donald Sadkin or Jonathan Sadkin; (2) a statement in an affidavit of Donald Sadkin, sworn to December 12, 2016, that he (Donald Sadkin) did not make all purchasing decisions at Morgan Materials; (3) Department staff's assertion that Jonathan Sadkin attended all of the on-site meetings with the Department and was the only Facility representative who attended all of the meetings;[13] and (4) correspondence from Jonathan Sadkin to the Department which, Department staff asserted, demonstrated that he held himself out as a representative of Morgan Materials and reflected his "involvement in upper level management issues" (Department Staff Memorandum of Law at 39; see Reuben Affidavit, Exh H [§ 1.0]). The correspondence submitted by Department staff included Jonathan Sadkin's submissions to DEC of Morgan Materials' "monthly schedule of outdated materials" and included Jonathan Sadkin's representations as to efforts made by Morgan Materials to inventory its stock of materials and dispose of hazardous materials (see Reuben Affidavit, Exhs P, Q, R, S).

In opposition to the Motion, Jonathan Sadkin disputed the claim of Department staff that he is a responsible corporate officer and submitted his affidavit stating, among other things, that he worked for Morgan Materials between 1994 and 2016 and his job responsibilities were "primarily back office administration, including payroll, billing, shipping/logistics, general office management and human resources work" (Jonathan Sadkin Affidavit in Opposition to the Motion for Order Without Hearing dated July 17, 2020 [Jonathan Sadkin Affidavit] ¶ 1). Jonathan Sadkin stated that he stopped working at Morgan Materials in 2016 (see id. ¶ 2). He asserted that he "never had any operating authority or control over the purchase, storage, and processing of materials" (id. ¶ 5), and maintained that he was not responsible for regulatory compliance as part of his job duties and had no authority to prevent the alleged violations from occurring (see id. ¶¶ 10-12). He further stated that, although the MSP stated that he was second in the chain of command, the "truth of the matter" is that Donald Sadkin, not Jonathan Sadkin, was personally responsible for controlling the actions of the corporate respondents and that Donald Sadkin and warehouse manager Tracy McLaverty were solely responsible for warehouse operations and the purchase, storage and processing of materials (id. ¶¶ 8, 15).[14] Jonathan Sadkin also stated that any information regarding inventories that he provided to DEC was provided to him by Donald Sadkin or Tracy McLaverty (see id. ¶ 9), and that he "did not inventory chemicals, direct the inventory of chemicals, or classify any materials" (id. ¶ 10). He further stated that, although he was among the Morgan Materials representatives who met with

[13] I do not see that the record supports this assertion as several on-site meetings were referenced where Jonathan Sadkin's presence was not indicated.

[14] Tracy McLaverty was the Facility manager and represented Morgan Materials at a number of meetings with DEC (see Reuben Affidavit ¶¶ 15, 33).

DEC, he "did not have any authority or power to comply with DEC directives or other regulations" (id. ¶ 11).

Donald Sadkin also submitted an affidavit in opposition to Department staff's Motion in which he stated that Jonathan Sadkin was the Office Manager of Morgan Materials and his duties included distributing payroll, managing the office employees, handling banking issues, occasionally calling customers, processing samples and ordering office supplies (see Donald Sadkin Affidavit in Opposition to Motion for Order Without Hearing dated July 17, 2020 [Donald Sadkin Affidavit] ¶ 21). Donald Sadkin averred that Jonathan Sadkin "never made any buying decisions of materials or equipment" (id. ¶ 22) and, at no time, had the authority to purchase or sell materials, to direct any employee at the warehouse or to determine any warehouse policies (see id. ¶ 24). Donald Sadkin asserted that all decisions having to do with the purchase, sale, storage or processing of materials or with compliance with any regulations or the 2005 Consent Order were made by him, Donald Sadkin, alone (see id. ¶ 25).

Upon my review of the papers submitted, I conclude that the affidavits of Jonathan Sadkin and Donald Sadkin submitted in opposition to the Motion demonstrated the existence of an issue of fact as to whether Jonathan Sadkin may be held liable as a responsible corporate officer, such that a hearing on the issue is required. Specifically, the two affidavits directly countered Department staff's assertion that Jonathan Sadkin had sufficient control over the operations of Morgan Materials that led to the violations and was in a position to address and remedy them. Although the ALJ concluded that the record evidence submitted by Department staff provided support that Jonathan Sadkin played an active role in operations at the Facility and "outweighed" the assertions made in the affidavits in opposition (Ruling and Summary Report at 16), I note that "[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (Vega, 18 NY3d, at 505). As such, I decline to adopt the conclusions in the Ruling and Summary Report in this regard.

Accordingly, Department staff's Motion for Order without Hearing is denied inasmuch as it sought a finding that Jonathan Sadkin is individually liable for the charged violations. I direct Department staff, if it chooses to pursue the causes of action alleged as against Jonathan Sadkin, to file a statement of readiness with the Chief Administrative Law Judge when it is ready to proceed to hearing.

Respondent Morgan Globex

The Second Amended Complaint alleged that Morgan Globex was "engaged in the business and/or commercial operations [consisting] of the purchasing, processing, sale and/or resale of chemical substances and chemical materials" (Second Amended Complaint ¶ 5), and "operated and stored solid and hazardous waste, chemicals and materials" at the Facility (id. ¶ 10). Respondents, in their Answer, denied that Morgan Globex "actively engaged in the business indicated" (Remaining Respondents' Answer ¶ 7). Although admitting that Morgan Globex "engaged in activities at the addresses indicated," respondents denied that Morgan Globex stored solid and hazardous waste (id. ¶ 8). In opposition to Department staff's motion, respondents argued that there were insufficient facts alleged or established to support a finding of

liability as against Morgan Globex as an operator of the Facility (see Memorandum of Law in Opposition to the Motion for Order without Hearing dated July 17, 2020, at 5-6). Upon review, I agree with respondents.

Under the hazardous waste regulations in effect at the time of the alleged violations, an "operator" was defined as "the person responsible for the overall operation of a facility" (6 NYCRR [former] 370.2 [b] [136]).[15] Here, Department staff did not offer any specific evidence supporting a finding that Morgan Globex had any responsibility for the overall operation of the Facility. In his affidavit in opposition, Donald Sadkin stated that Morgan Globex "was formed for the sole purpose of being an entity for purposes of exporting materials internationally" (Donald Sadkin Affidavit ¶ 30) and, although it "filed independent tax returns concerning these exports, [it] did not engage in any operations at the site, and did not own any of the Vulcan Street property, and was not engaged in making any purchase or sales decision concerning the materials at the site" (Donald Sadkin Affidavit ¶ 32). I find that, at the very least, respondents demonstrated the existence of an issue of fact as to whether Morgan Globex may be held liable as an operator of the Facility, such that a hearing on the issue is required. Accordingly, Department staff's Motion for Order without Hearing is denied inasmuch as it sought a finding as to the liability of Morgan Globex and the liability of Donald Sadkin as CEO of Morgan Globex.

I direct Department staff, if it chooses to pursue the causes of action alleged as against Morgan Globex and/or Donald Sadkin as CEO of Morgan Globex, to file a statement of readiness with the Chief Administrative Law Judge when it is ready to proceed to hearing.

Remaining Respondents Morgan Materials, Morgan Chemcial, Orchard, North Sea, and Donald Sadkin (individually and as CEO of Morgan Materials, Morgan Chemcial, and North Sea)

As to the remaining respondents, I agree with the ALJ's ruling granting the Motion as to the liability of Morgan Materials, Morgan Chemcial, Orchard, North Sea and Donald Sadkin (individually and as CEO of Morgan Materials, Morgan Chemcial, and North Sea).

Initially, I find that Donald Sadkin may be held liable as a responsible corporate officer. He did not specifically dispute his individual liability for the charged violations, and his status as a responsible corporate officer was soundly established by the record. As the ALJ noted, Donald Sadkin admitted that he is the CEO and sole shareholder of Morgan Materials, Morgan Chemcial and North Sea and that he is a responsible corporate officer and controlled the corporate actions of those entities (see Second Amended Complaint ¶¶ 7, 9, 77; Remaining Respondents' Answer ¶¶ 1, 24; Ruling and Summary Report at 13). These admissions, along with the statements in his affidavit in opposition, demonstrated that he "had direct responsibility for operations and was in a position to prevent the violations" and, accordingly, may be held individually liable for the violations alleged (Matter of Supreme Energy Corp., Decision and Order of the Commissioner, April 11, 2014, at 26). Furthermore, with respect to the First Cause of Action, I note that the MSP that was developed pursuant to the 2005 Consent Order imposed various obligations on Mr. Sadkin with which he failed to comply.

[15] The identical definition of "operator" appears in the current regulations at 6 NYCRR 370.2 (b) (133).

Turning to the alleged violations, as set forth in the Second Amended Complaint, I conclude that Department staff made a prima facie showing of its entitlement to summary judgment with respect to these respondents. Department witness Reuben, in his affidavit, provided a detailed factual basis for each of the twenty-one causes of action alleged in the Second Amended Complaint and supported his statements with citations to documents and photographs (see Reuben Affidavit ¶¶ 108-229). I find that this evidence was sufficient to satisfy Department staff's burden on its motion and shifted the burden to respondents to demonstrate the existence of material issues of fact requiring a hearing.

Based on the record before me, respondents Morgan Materials, Morgan Chemcial, Orchard, North Sea and Donald Sadkin failed to submit proof demonstrating that there are material issues of fact in dispute (see Ruling and Summary Report at 12).[16] Respondents did not submit any evidence which specifically addressed or refuted Department staff's evidence as to any of the twenty-one causes of action.

Inasmuch as respondents made broad assertions that the hazardous waste regulations were not violated because the materials located at the Facility were neither hazardous waste nor solid waste (see Memorandum of Law in Opposition to Motion dated July 17, 2020, at 2), the statements in Donald Sadkin's affidavit as to this point are conclusory and insufficient to demonstrate that an issue of fact exists for hearing. In his affidavit, Donald Sadkin stated that his business "consisted of purchasing mainly off spec materials for resale, either as-is or mostly after processing those materials so that they would be resalable" (Donald Sadkin Affidavit ¶ 4). He stated that there was a market for all of the materials at the time of their purchase (see id. ¶ 5). He stated that only "one-half of one percent of material on-site has been on-site for a lengthy number of years" and that, even as to that material, there was a market for the material and it was "waiting to have an identified customer" (id. ¶ 15). He asserted that, therefore, the material stored at the Facility was not solid waste because it "was not discarded material" and was not hazardous waste within the meaning of 6 NYCRR part 371 because "the material on site was never intended to be disposed on land, water or through burning" (id. ¶ 14). Without more, these general assertions do not demonstrate that issues of fact exist as to whether the hazardous waste regulations apply to the Facility. The photographs of the Facility submitted by Department staff including, for example, a drum labeled "condemn[n]ed" and "no good" and numerous other photographs of degraded, leaking and water-damaged drums (see e.g. Reuben Affidavit, Exhibit G at 4, 5, 8, 10, 11, 15, 16, 18, 19 and 20), clearly contradict bare assertions that a market existed for all of the material at the Facility and that the material was not waste.

Respondents also argued that insufficient facts were alleged or established to support a finding of liability as against Orchard as a former owner of property (Memorandum of Law in Opposition to Motion dated July 17, 2020 at 5-6). I disagree and adopt the ALJ's recommendation on this point (see Ruling and Summary Report at 17-18). As to this respondent, Department staff alleged that Orchard was "engaged in the business and/or commercial operations consisting of buying and selling real estate" (Second Amended Complaint ¶ 19) and owned 400 Vulcan Street from 2014 to 2015 (see id. ¶ 13). Department staff also alleged that,

[16] This determination renders it unnecessary to address the collateral estoppel issue raised by Department staff (see Department Staff Memorandum of Law at 10-20; Ruling and Summary Report at 10-12).

during the time periods that Orchard owned the parcel within the Facility, "the violations set forth within this complaint occurred and continued" (id. ¶ 21).

With respect to the hazardous waste regulations that are relevant to this proceeding, an "owner" is defined as "the person who owns a facility or part of a facility" (6 NYCRR [former] 370.2 [b][137]).[17] In turn, a "facility" is defined as "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste" (6 NYCRR [former] 370.2 [b][70][i]).[18] Here, it is undisputed that Orchard owned one of the parcels that comprised the Facility from 2014 to 2015 (see Second Amended Complaint ¶ 19; Remaining Respondents' Answer ¶ 12; Donald Sadkin Affidavit ¶ 36). Department staff's evidence demonstrated that numerous regulatory violations were discovered by Mr. Reuben during a site visit that occurred in February 2015 and that the regulatory violations continued into 2016 (see Reuben Affidavit ¶¶ 32-34, 64, 66-67, 69, 79).

In opposition, respondents did not raise an issue of fact requiring a hearing as to Orchard's liability. Respondents have not offered any evidence rebutting Department staff's evidence that the charged regulatory violations occurred during the time period that Orchard owned a part of the Facility. Neither the fact that Orchard owned the property for a short period of time – approximately ten months according to Donald Sadkin – nor Donald Sadkin's bare assertion that no activities concerning the purchasing, sale, processing or storage of materials occurred on the land owned by Orchard raise an issue of fact as to Orchard's liability as a former owner of part of the Facility (see Donald Sadkin Affidavit ¶¶ 36, 38).

I agree with the ALJ that Department staff's evidence was sufficient to demonstrate Orchard's liability as a former owner (see Ruling and Summary Report at 18).

Affirmative Defenses

In the Ruling and Summary Report, the ALJ found that the Fourth affirmative defense raised by respondents (other than Jonathan Sadkin) in their answer should be dismissed because it related to the penalty amount to be assessed and not to respondents' liability (Ruling and Summary Report at 33). The ALJ also found that the Fifth affirmative defense was without merit and should be dismissed (id. at 33-34). Upon review, I concur with the ALJ's determinations.

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Based upon the foregoing, I grant Department staff's Motion for Order without Hearing as to the liability of Morgan Materials, Morgan Chemcial, Orchard, North Sea and Donald Sadkin (individually and as CEO of Morgan Materials, Morgan Chemcial, and North Sea) and deny the request of these respondents for a hearing. As discussed above, I deny Department staff's motion as to the liability of Jonathan Sadkin, Morgan Globex, and Donald Sadkin in his

[17] The identical definition of "owner" appears in the current regulations at 6 NYCRR 370.2 (b) (134).

[18] The identical definition of "facility" appears in the current regulations at 6 NYCRR 370.2 (b) (73).

capacity as CEO of Morgan Globex and find that a hearing is required to determine the liability, if any, of those respondents.

Civil Penalty

ECL 71-2705(1) provides that "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by titles 9, 11 and 13 of article 27 or any rule or regulation promulgated pursuant thereto, . . . or any final determination or order of the commissioner made pursuant to this title shall be liable in the case of a first violation, for a civil penalty not to exceed thirty-seven thousand five hundred dollars and an additional penalty of not more than thirty-seven thousand five hundred dollars for each day during which such violation continues." In addition, ECL 71-2705(1) authorizes the imposition of injunctive relief.

Here, Department staff, in the Second Amended Complaint and in its motion papers, requested the imposition of a combined penalty of $2,500,000, consisting of: (1) a penalty of $1,500,000, payable jointly and severally, by Morgan Materials, Morgan Chemcial, Morgan Globex, and Donald Sadkin, individually and as CEO of Morgan Materials, Morgan Chemcial and Morgan Globex, and Jonathan Sadkin, individually, (2) a penalty of $500,000, payable jointly and severally, by Orchard, North Sea, and Morgan Materials; and (3) a stipulated penalty of $500,000 pursuant to the 2005 Consent Order, payable jointly and severally by Morgan Materials and Donald Sadkin (individually and as CEO of Morgan Materials) (see Second Amended Complaint, Wherefore Clause; Motion for Order without Hearing, ¶¶ XIX-XXI).

ALJ Villa recommended that the full amount of the requested penalty be assessed, except that Donald Sadkin be ordered to pay statutory penalties, rather than stipulated penalties, for his violation of the 2005 Consent Order (see Ruling and Summary Report at 19-20).

Upon review of the record before me, I determine that the penalty of $1,500,000 that staff proposes to be assessed, jointly and severally, upon Morgan Materials, Morgan Chemcial, and Donald Sadkin, individually and as CEO of Morgan Materials and Morgan Chemcial, based upon their operation of the Facility, to be authorized and appropriate. As discussed above, issues of fact exist as to the liability of Jonathan Sadkin, Morgan Globex, and Donald Sadkin as CEO of Morgan Globex, and therefore no penalty is assessed as against them at this time.

I also find that, based upon this record, a joint and several penalty of $500,000 to be imposed on North Sea, Orchard and Morgan Materials based on their ownership of the Facility is appropriate and authorized and I adopt it.

Finally, I adopt staff's requested penalty of $500,000, as a stipulated penalty payable jointly and severally by Morgan Materials and Donald Sadkin individually and as CEO of Morgan Materials for violations of the 2005 Consent Order (First Cause of Action in the Second Amended Complaint). As determined above, the record reflects that Donald Sadkin was a responsible corporate officer of Morgan Materials and therefore should be held personally liable for violations of the 2005 Consent Order and assessed the stipulated penalty jointly and severally

with Morgan Materials (see State of New York v C & J Enters., LLC, 179 AD3d at 1202-1204 [3d Dept 2020]).[19]

In making these determinations, I have considered DEE-1: Civil Penalty Policy (June 20, 1990) (DEE-1) and the RCRA Civil Penalty Policy, the potential for harm and the extent of deviation from the regulatory requirements, the period of time of the violations, the economic benefit of noncompliance and various adjustment factors, including the Facility's history of non-compliance.

As noted by the ALJ, the proposed civil penalties are well below the statutory maximum (see Ruling and Summary Report at 39). They are still a substantial sum, however. As documented in Department staff's motion papers (including the photographs), the gravity and extent of the regulatory violations present at the Facility was significant and, in fact, led to my issuance of the February 2017 SAO upon a finding that the Facility "presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources" (ECL 71-0301; see February 2017 SAO at 8). Indeed, the conditions at the Facility, including the presence of many drums and other containers containing hazardous waste were of such concern that the US EPA conducted a removal action to address conditions at the Facility. Department staff characterized most of the regulatory violations here as having a "major" potential for harm and the extent of most of the violations to be "major" (see Department Staff Memorandum of Law at 50-51), and this assessment is not disputed. The regulatory violations were ongoing for years and continued despite DEC's identification of the violations in 2005 and Morgan Materials' agreement to the 2005 Consent Order. Moreover, as Department staff asserts, respondents economically benefitted from their noncompliance inasmuch as they avoided disposal costs and other costs associated with compliance (see Department Staff Memorandum of Law at 53-54).

Remedial Relief

Department staff also requested a wide range of remedial measures, including an order enjoining respondents from conducting any further business or activities of any kind in the State of New York pertaining to the handling, processing and storage of any chemicals or waste (except for activities related to my order) (see Second Amended Complaint, Wherefore Clause ¶¶ IV-XXI; Motion for Order without Hearing ¶¶ VI-XVIII). With respect to remedial relief, Department staff requested in the Second Amended Complaint and in the motion papers an order:

(1) Directing all respondents to fully cooperate with DEC, US EPA and any other agencies and contractors for the DEC and US EPA including providing all records of receipts, inventory and documentation of sales, and disposal of any material or waste from the Facility, financial records for respondents, documentation of any insurance naming any of the respondents as the insured, any and all corporate records and records of ownership of respondents' properties;

[19] Inasmuch as the Ruling and Summary Report found that statutory penalties, rather than stipulated penalties, should be assessed against Donald Sadkin for his violation of the 2005 Consent Order, that recommendation is not being accepted.

(2) Enjoining respondents who operated the Facility from conducting any further business or activities of any kind within the State of New York pertaining to the handling, processing, and storage of any chemicals or waste, except for activities related to this Order;

(3) Directing all respondents to submit a written work plan to propose hazardous and solid waste storage areas, including construction requirements for any containment, and plans for all requirements to meet large quantity generator standards and directing respondents to comply with the requirements of (2) above until the DEC's approval of such plans;

(4) Directing all respondents to come into compliance and construct storage areas and implement the requirements for a large quantity generator;

(5) Directing respondents Morgan Materials and Donald Sadkin, as CEO and Donald Sadkin individually, to complete and submit an updated MSP for review and approval for any future operations;

(6) Directing all respondents to comply with (2) above until the approval of an updated MSP;

(7) Directing all respondents to comply with (2) above until an accurate and up-to-date inventory has been reviewed and approved by DEC in writing;

(8) Directing all respondents to document and certify compliance with all storage requirements, including compatibility requirements under the ECL and related regulations, if applicable;

(9) Directing all respondents to install fire suppression and other appropriate safety related measures;

(10) Directing all respondents to create appropriate pathways within the storage areas and secure containers, if any, that are likely to create a hazard within the Facility;

(11) Directing Donald Sadkin to provide a complete list of companies in which he is an owner, partner, member, operator, CEO or manager, including companies operating in unrelated industries;

(12) Directing all respondents to comply with the Summary Abatement Order, the 2005 Consent Order and any other order of the DEC Commissioner; and

(13) Directing Morgan Materials and Donald Sadkin, as CEO, and Donald Sadkin individually to comply with the 2005 Consent Order, this order and any approved plan pursuant to those orders.

(See Motion for Order without Hearing ¶¶ IV-XVIII; Second Amended Complaint, Wherefore Clause ¶¶ IV-XVI).

The ALJ recommended granting the relief requested (see Ruling and Summary Report at 3, 40). Except as stated below, I concur with the ALJ's determination with respect to those parties where liability has been imposed pursuant to this Decision and Order. With respect to the Summary Abatement Order referenced in item (12) and the 2005 Consent Order referenced in items (12) and (13), the obligations of the parties subject to those prior orders continue and need not be reiterated in this Decision and Order as a remedial measure. In addition, the provisions, terms and conditions of this Decision and Order, by its terms (see paragraph X on page 23 of this Decision and Order) bind respondents Morgan Materials, Morgan Chemcial, Orchard, North Sea, and Donald Sadkin (individually and as CEO of Morgan Materials, Morgan Chemcial and North Sea), and their agents, successors and assigns, in any and all capacities. As such, it is unnecessary for me to also direct compliance with this order as a remedial measure. Finally, I decline to issue a blanket direction that all respondents comply with any other order issued by me.

As documented in a letter dated March 8, 2023 from the US EPA to the DEC's Director of DEC's Division of Environmental Remediation (March 2023 Letter), the DEC in November 2016 requested that US EPA implement removal actions at the Facility under section 104(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980. According to the March 2023 Letter, the US EPA removal action was completed on May 16, 2018 and "[t]he immediate threats to health and welfare to the local community. . . have been addressed" (see March 2023 Letter at 2). Accompanying the March 2023 Letter was a May 2021 "Final Removal Action Report" which documented the removal activities at the Facility.[20] Other documents in the record indicate that the Facility has been sold (see e.g. Dougherty Affirmation ¶ 57, Exh M [sale of 380 Vulcan Street to Devin Development I LLC]; Donald Sadkin Affidavit ¶ 47).

In light of the US EPA's removal action and the sale of Facility property, various of the remedial measures ordered herein may no longer be necessary or may otherwise be moot. To the extent that respondents take that position, it is respondents' obligation to submit any information in that regard, together with any proposed modifications to the directed remedial measures, to Department staff within sixty (60) days of service upon respondents of this Decision and Order. It will be in the sole discretion of Department staff to consider and evaluate any such modifications and whether respondents shall be relieved of undertaking various of the remedial measures. It shall also be in the sole discretion of Department staff to set deadlines for respondents' implementation and completion of any of the various obligations set forth herein.

[20] Pursuant to 6 NYCRR 622.11 (a)(5), I hereby take official notice of the March 8, 2023 letter from US EPA to the Director of the DEC's Division of Environmental Remediation and the report "Final Removal Action Report – Morgan Materials Site" dated May 2021 that described the removal actions undertaken at the Facility.

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

I. Department staff's Motion for Order without Hearing is granted as to the liability of respondents Morgan Materials Inc., Morgan Chemcial Inc., Orchard Mechanics, Inc., North Sea Mining & Minerals, Ltd., and Donald Sadkin, individually and as CEO of Morgan Materials Inc., Morgan Chemcial Inc., and North Sea Mining & Minerals, Ltd., as set forth below:

A. Respondent Morgan Materials Inc. and Donald Sadkin, individually and as CEO of Morgan Materials Inc., are adjudged to have violated the 2005 Consent Order and ECL 71-2705 by purchasing material for which there is no known market, failing to annually inspect the Facility and failing to report to the DEC that materials had been stored in excess of the 12-month or 18-month timeframe (First Cause of Action in the Second Amended Complaint).

B. Respondents Morgan Materials Inc., Morgan Chemcial Inc., Orchard Mechanics Inc., North Sea Mining & Minerals, Ltd. and Donald Sadkin, individually and as CEO of Morgan Materials Inc., Morgan Chemcial Inc., and North Sea Mining & Minerals, Ltd., are adjudged, jointly and severally, to have violated:

1. 6 NYCRR 373-3.3 (f) by failing to maintain adequate aisle space at the Facility (Third Cause of Action);

2. 6 NYCRR 373-3.9 (g)(3) by storing incompatible wastes in close proximity to each other at the Facility (Fourth Cause of Action);

3. 6 NYCRR 373-2.9 (f)(1)(i) by failing to employ secondary containment in compliance with 6 NYCRR Part 373-1.1 (d)(1)(iv)(*f*) (Fifth Cause of Action);

4. 6 NYCRR 373-3.2 (h)(1) by failing to take measures to prevent accidental ignition and failing to post "No Smoking" signs at the Facility (Sixth Cause of Action);

5. 6 NYCRR 373-3.3 (c)(1) by failing to provide any method for internal communication or an alarm system within the Facility (Seventh Cause of Action);

6. 6 NYCRR 373-3.3 (c)(2) by failing to provide any manner by which the personnel within the Facility could summon assistance in the event of an emergency (Eighth Cause of Action);

7. 6 NYCRR 372.2 (a)(8)(ii) by storing waste items on site in excess of 90 days (Ninth Cause of Action);

8. 6 NYCRR 373-3.9 (b) by failing to transfer hazardous waste from leaking containers to containers that were in good condition (Eleventh Cause of Action);

9. 6 NYCRR 373-3.9 (d)(1) by failing to keep containers closed and in good condition (Twelfth Cause of Action);

10. 6 NYCRR 373-3.9 (d)(3) by failing to mark and properly label containers of hazardous waste (Thirteenth Cause of Action);
11. 6 NYCRR 373-3.9 (e) by failing to inspect the areas where the containers were stored on a weekly basis (Fourteenth Cause of Action);

12. 6 NYCRR 373-3.2 (g) by failing to provide any training to Facility personnel (Fifteenth Cause of Action);

13. 6 NYCRR 373-3.3 (b) by failing to take necessary measures to ensure that the Facility was maintained in a manner which would minimize the possibility of fire, explosion or non-sudden releases to air, soil or surface (Sixteenth Cause of Action);

14. 6 NYCRR 373-3.4 by failing to have a contingency plan (Seventeenth Cause of Action); and

15. 6 NYCRR 373-3.4 (g) by failing to activate emergency procedures in an emergency (Eighteenth Cause of Action).

C. Respondents Morgan Materials Inc., Morgan Chemcial Inc., and Donald Sadkin, individually and as CEO of Morgan Materials Inc., and Morgan Chemcial Inc., are adjudged, jointly and severally, to have violated:

1. 6 NYCRR 372.2 (a)(2) by generating and storing wastes on-site without making any determination as to whether the wastes were hazardous wastes (Second Cause of Action);

2. 6 NYCRR 372.2 (a)(8) (ii) and 6 NYCRR 373-1.1 (d)(1)(iii)(*c*)(*2*) by generating waste and failing to properly label the hazardous waste at the Facility with an accumulation date (Tenth Cause of Action);

3. 6 NYCRR 376.1 (g)(1)(viii) by failing to make and/or retain any Land Disposal Notices (Nineteenth Cause of Action);

4. 6 NYCRR 374-3.2 (d)(1)(i) by, as generators of universal waste, failing to collect and store universal waste in a container (Twentieth Cause of Action); and

5. 6 NYCRR 374-3.2 (e)(1) by, as generators of universal waste, by failing to label the container(s) of universal waste (Twenty-First Cause of Action).

II. Department staff's Motion for Order Without Hearing is denied, as to the liability of respondents Morgan Globex, Inc., Jonathan Sadkin, individually, and Donald Sadkin as CEO of Morgan Globex, Inc.

III. I hereby assess a total combined civil penalty of $2,500,000, payable as follows: (i) Operating respondents Morgan Materials Inc., Morgan Chemcial Inc., and Donald Sadkin (individually and as CEO of Morgan Materials Inc. and Morgan Chemcial Inc.), jointly and severally, in the amount of $1,500,000; (ii) Owner respondents North Sea Mining & Minerals, Ltd., Orchard Mechanics Inc. and Morgan Materials Inc., jointly and severally, in the amount of $500,000; and (iii) Morgan Materials Inc. and Donald Sadkin (individually and as CEO of Morgan Materials Inc.), jointly and severally, in the amount of $500,000 for violations of the 2005 Consent Order and ECL 71-2705.

Such penalty shall be paid within ninety (90) days of the service of this Decision and Order upon respondents by certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation and submitted to:

Jennifer Dougherty, Esq.
Regional Attorney
NYS Department of Environmental Conservation
Office of General Counsel, Region 6
317 Washington Street
Watertown, New York 13601

IV. Respondents Morgan Materials Inc., Morgan Chemcial Inc. and Donald Sadkin, individually and as CEO of Morgan Materials Inc. and Morgan Chemcial Inc., are enjoined from conducting any further business or activities of any kind within the State of New York pertaining to the handling, processing, and storage of any chemicals or waste, except for activities related to this Decision and Order.

V. Respondents Morgan Materials Inc., Morgan Chemcial Inc., North Sea Mining & Materials, Ltd., Orchard Mechanics Inc., and Donald Sadkin, individually and as CEO of Morgan Materials Inc., Morgan Chemcial Inc., and North Sea Mining & Materials, Ltd., are:

A Directed to fully cooperate with DEC, US EPA and any other agencies and contractors for the DEC and US EPA including providing all records of receipts, inventory and documentation of sales, and disposal of any material or waste from the Facility, financial records for respondents, documentation of any insurance naming any of the respondents as the insured, any and all corporate records and records of ownership of respondents' properties;

B. Directed to submit (1) a written work plan to propose hazardous and sold waste storage areas, including construction requirements for any containment, and (2) plans for all requirements to meet Large Quantity Generator standards and directing respondents to comply with the requirements set forth in Paragraph IV of this Decision and Order until the DEC's approval of such plans;

C. Directed to come into compliance and construct storage areas and implement the required requirements for a Large Quantity Generator;

D. Directed to comply with Paragraph IV above until the approval of an updated MSP;

E. Directed to comply with Paragraph IV above until an accurate and up-to-date inventory has been reviewed and approved by DEC in writing;

F. Directed to document and certify compliance with all storage requirements, including compatibility requirements under the New York State Environmental Conservation Law and related regulations, if applicable;

G. Directed to install fire suppression and other appropriate safety related measures; and

H. Directed to create appropriate pathways within the storage areas and secure containers, if any, that are likely to create a hazard within the Sadkin Facility.

VI. Morgan Materials Inc. and Donald Sadkin, individually and as CEO of Morgan Materials Inc., are directed to:

A. Comply with any approved plan pursuant to this Decision and Order; and

B. Complete and submit for approval an updated Management System Plan for review and approval for all future operations.

VII. Donald Sadkin is directed to provide a complete list of companies in which he is an owner, partner, member, operator, CEO or manager, including companies operating in unrelated industries.

VIII. To the extent that respondents Morgan Materials Inc., Morgan Chemcial Inc., Orchard Mechanics, Inc., North Sea Mining & Minerals, Ltd., and Donald Sadkin take the position that certain remedial measures ordered herein may no longer be necessary, it is respondents' obligation to submit any information in that regard to Department staff within sixty (60) days of service upon respondents of this Decision and Order, together with any proposed modifications to the directed remedial measures. It will be in the sole discretion of Department staff to consider and evaluate any such modifications and determine whether respondents shall be relieved of undertaking various of the listed remedial measures. It shall also be in the discretion of Department staff to set deadlines for respondents' implementation and completion of any of the various remedial measures set forth herein.

IX. Any questions or other correspondence regarding this Decision and Order, including but not limited to the submission of information pursuant to Paragraph VIII of this Decision

and Order, shall be addressed to Jennifer Dougherty, Esq., at the address referenced in Paragraph III herein.

X. The provisions, terms and conditions of this Decision and Order shall bind respondents Morgan Materials Inc., Morgan Chemcial Inc., Orchard Mechanics, Inc., North Sea Mining & Materials, Ltd., and Donald Sadkin (individually and as CEO of Morgan Materials Inc., Morgan Chemcial Inc. and North Sea Mining & Materials, Ltd.), and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /S/
Basil Seggos
Commissioner

Dated: July 24, 2023
Albany, New York

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 27 and 71 of the New York State Environmental Conservation Law and Parts 370 *et seq.* of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

RULING AND SUMMARY REPORT

- by -

NYSDEC File No. 17-11
R9-20170214-15

MORGAN MATERIALS INC. (previously known as Morgan Chemicals, Inc.), MORGAN CHEMCIAL, INC. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), MORGAN GLOBEX, INC., NORTH SEA MINING AND MINERALS, LTD., ORCHARD MECHANICS, INC., DONALD SADKIN, as Chief Executive Officer of MORGAN MATERIALS, INC., MORGAN CHEMICALS, INC., MORGAN GLOBEX, INC. AND NORTH SEA MINING & MINERALS, LTD., DONALD SADKIN, Individually and JONATHAN SADKIN, Individually,

Respondents.

PROCEEDINGS

This ruling and summary report addresses an April 13, 2020 contested motion for order without hearing (the "Motion"), filed with the Office of Hearings and Mediation Services by staff of the New York State Department of Environmental Conservation ("DEC" or "Department"). Pursuant to Section 622.12(a) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), Department Staff may serve a motion for order without hearing in lieu of or in addition to a notice of hearing and complaint. Here, Department Staff served the Motion on respondents subsequent to the filing of a second amended complaint dated July 27, 2018 (the "Complaint"). The Complaint alleged twenty-one causes of action arising out of respondents' ownership and operation of a facility where solid and hazardous wastes were located.

In its Motion, Department Staff seeks summary judgment as to numerous alleged violations of Article 27 of the New York State Environmental Conservation Law ("ECL"), as well as the applicable regulations governing the storage and handling of hazardous wastes, at a site with a street address of 380 Vulcan Street, Tonawanda, New York. This street address consists of various buildings located on four separate tax parcels, including 380 Vulcan, 400 Vulcan, 408 Vulcan, and 416 Vulcan Street (the "Facility"). In addition, Department Staff alleged that respondents Morgan Materials Inc. and Donald Sadkin violated the terms of a January 31, 2005 order on consent (the "2005 Order"). Complaint, ¶ 140.

The current or former owners of the real property, including the land contiguous to the interconnected buildings that comprise the facility where the alleged violations occurred, are referred to in the Complaint and the Motion as the "Respondent Owners." Specifically, North Sea Mining and Minerals, Ltd., Orchard Mechanics, Inc. and Morgan Materials Inc.[1] are denominated "Respondent Owners." Department Staff referred to the remaining respondents as the "Operating Respondents," and alleged that these parties (Morgan Materials Inc., Morgan Chemcial,[2] Inc., Morgan Globex, Inc., Donald Sadkin as the chief executive officer, and Donald Sadkin and Jonathan Sadkin, individually), were liable due to their involvement in the operations at the Facility.

In support of its Motion, Department Staff filed the April 13, 2020 affirmation of Jennifer Dougherty, Esq. (the "Dougherty Aff."), with attached exhibits, and the affidavit of Peter A. Reuben, sworn to March 27, 2020 (the "Reuben Aff."), with attached exhibits. A list of exhibits is attached to this ruling. Department Staff also filed an April 13, 2020 memorandum of law in support of the Motion.

The Respondent Owners, and the Operating Respondents (except Jonathan Sadkin) were represented by Richard J. Lippes, Esq., of the law firm of Lippes & Lippes, Buffalo, New York. Counsel submitted the affidavit of Donald Sadkin (the "Sadkin Aff."), sworn to July 17, 2020, as well as a memorandum of law in opposition of that same date. Exhibits attached to the Sadkin Affidavit are listed in the attached exhibit chart. Respondent Jonathan Sadkin was represented by Mark C. Davis, Esq. of Lippes Mathias Wexler Friedman, Buffalo, New York, and submitted the affidavit of Jonathan Sadkin, sworn to July 17, 2020 (the "J. Sadkin Aff.").

The Facility was the subject of a summary abatement order (the "SAO") issued on November 17, 2016 pursuant to Section 622.14 of 6 NYCRR. Following a hearing on December 13, 2016 and the submission of a hearing report dated January 4, 2017 (the "Hearing Report"), the Commissioner issued an order continuing the SAO. *Matter of Morgan Materials Inc.,* Order of the Commissioner (February 6, 2017) (the "2017 Order").

Department Staff served a complaint dated December 29, 2017, which was the subject of a January 15, 2018 motion to dismiss by respondent Orchard Mechanics, Inc., as well as a February 20, 2018 motion to dismiss by respondents North Sea Mining & Minerals, Ltd., both of which Department Staff alleged owned property where the violations occurred. The February 20, 2018 motion also moved to dismiss the proceeding against Morgan Globex, Inc., which was alleged by Department Staff to be an operator of the Facility. Department Staff opposed both motions.

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[1] Respondent Morgan Materials Inc. is sometimes referred to as "Morgan Materials, Inc." in the parties' submissions. The correct corporate name, as found in the corporation's registration in the New York State Division of Corporations database, is "Morgan Materials Inc."

[2] "Chemcial" is the spelling found in the corporation's registration in the New York State Department of State's Division of Corporations database.

In a June 11, 2018 ruling, administrative law judge ("ALJ") Lisa Wilkinson[3] denied the motion to dismiss and directed Department Staff to amend its complaint. Department Staff then served the July 27, 2018 second amended Complaint. Jonathan Sadkin filed his amended answer on August 20, 2018 (the "JS Answer"), and the remaining respondents filed their answer on October 9, 2018 (the "Answer").

In a motion dated October 18, 2018, Department Staff moved for clarification of the six affirmative defenses interposed by the respondents other than Jonathan Sadkin, and ALJ Wilkinson ruled on the motion on November 19, 2018. The ALJ granted Department Staff's motion as to the first and second affirmative defenses, and directed respondents to re-plead those defenses. The ruling denied Department Staff's motion as to the third and sixth affirmative defenses, stating that those defenses amounted to a denial of liability, rather than an affirmative defense. Department Staff's motion for clarification was granted as to the fourth and fifth affirmative defenses. On December 14, 2018, respondents withdrew the first and second affirmative defenses, and provided clarification as to the fourth and fifth affirmative defenses. The forty-four affirmative defenses raised by respondent Jonathan Sadkin are discussed further below.

As detailed below, Department Staff met its burden and established as a matter of law that Respondent Owners and the Operating Respondents are liable for the violations set forth in the Motion. There are no factual disputes that require adjudication, and this ruling and summary report[4] recommends that the Commissioner grant the relief Department Staff requests, with the exception of requiring Donald Sadkin to pay stipulated penalties for violations of the 2005 Order, and Morgan Materials Inc. to pay statutory penalties for those violations.

Positions of the Parties

The Complaint alleged that respondents violated numerous provisions of Articles 27 and 71 of the ECL and Parts 370 *et seq.* of 6 NYCRR, and that respondents Morgan Materials Inc. and Donald Sadkin (both individually and as CEO of Morgan Materials Inc.) violated the terms of the 2005 Order. In its Motion, Department Staff took the position that there were no undisputed facts, and that respondents were collaterally estopped from relitigating the matters already decided in the 2017 Order. According to Department Staff, respondents (other than Jonathan Sadkin) had admitted in their Answer to many of the violations charged in the Complaint.

With respect to the first cause of action that alleged violations of the 2005 Order, Department Staff requested that the Commissioner impose a $500,000 penalty on respondents Morgan Materials Inc., and Donald Sadkin, individually and as the CEO of Morgan Materials Inc., as stipulated penalties for those violations. In addition, with respect to the first cause of action, as well as each of the remaining twenty causes of action, Department Staff noted in its

[3] ALJ Wilkinson subsequently took another position within the Department.

[4] Pursuant to Section 622.12(d), "[u]pon determining that the motion [for order without hearing] should be granted, in whole or in part, the ALJ will prepare a report and submit it to the commissioner pursuant to Section 622.18 of this Part."

Complaint that pursuant to Section 71-2705 of the ECL, the Department was entitled to a penalty not to exceed $37,500, and an additional penalty not to exceed $37,500, for each day the violation continued, along with injunctive relief. Complaint, ¶¶ 141, 145, 153, 160, 167, 177, 184, 191, 199, 204, 211, 219, 226, 236, 242, 252, 259, 264, 270, 275 and 280. Department Staff did not seek the maximum statutory penalty, but requested that the Commissioner impose a $1,500,000 penalty on the Operating Respondents, and a $500,000 penalty on the Respondent Owners.

In their answer to the Complaint, and in their opposition to the Motion, respondents asserted that the material at the Facility was not hazardous waste. Furthermore, respondents took the position that Department Staff had known about the conditions at the facility for many years, but failed to take action concerning those conditions until the Commissioner's Order was issued in February of 2017. Respondents maintained that "[i]n fairness, to the extent that the Staff believed that the Consent Order was being violated, or that law or regulations were being violated, they should have worked with Morgan Materials to bring them into compliance during the 11 years that these conditions presumably existed." Respondents' Memorandum of Law, at 3. This statement fails to take into account the record evidence showing that Department Staff made numerous visits to the Facility, and made many attempts to address the situation with respondents in an effort to bring the Facility into compliance.

According to respondents, Department Staff's collateral estoppel claims were unfounded, because the nature of the proceedings, the parties, and the relief requested were not the same as between the SAO proceeding and the Complaint. Respondents also asserted that in any event, the issues were not fully litigated in the December 2016 hearing on the summary abatement order, because respondents only submitted an affidavit of Donald Sadkin, and no discovery had taken place in connection with that proceeding.

In his affidavit, Donald Sadkin requested that the Motion be denied, "[d]ue to the complexities of my various businesses, which could only be fully explained at a hearing where I will be allowed to testify. My testimony will answer significant questions and will refute many of the claims made by the Staff in support of this Motion." Sadkin Aff., ¶ 2. This statement overlooks the fact that it is respondents' obligation in response to a motion for order without hearing to produce evidence sufficient to establish an issue of fact. As discussed below, respondents have failed to do so, and this ruling and summary report recommends that Department Staff's Motion be granted, except with respect to the allocation of the penalty for the first cause of action.

FINDINGS OF FACT

The following findings of fact are established for purposes of this proceeding. Respondents did not seek judicial review of the 2017 Order. Accordingly, the findings of fact in that Order are incorporated and are established for purposes of this proceeding:

1. Respondents Morgan Materials Inc., Morgan Chemcial, Inc. and Morgan Globex, Inc. are New York State domestic business corporations, engaged in the business or commercial operation consisting of purchasing, processing, selling or re-selling

chemical substances and chemical materials. Answer, ¶ 1; SAO, ¶ 8; Hearing Report, Finding of Fact No. 2.

2. Respondent Donald Sadkin is the chief executive officer ("CEO") and sole shareholder of Morgan Materials Inc., Morgan Chemcial, Inc, Morgan Globex, Inc., as well as respondent North Sea Mining and Minerals Ltd., which is a New York State domestic business corporation engaged in the business of buying and selling real estate. Answer, ¶¶ 1 and 14.

3. Respondent Jonathan Sadkin is Donald Sadkin's son, and was employed at the Facility during the relevant period. He was present at all meetings with Department Staff, and submitted inventory reports to the Department. Reuben Aff., ¶¶ 49, 50, 65, 79, 81, 82, 90, 97, 102, 104, 106; Exhs. P, Q, R, S and V.

4. The Facility consists of an 8-acre parcel covered by a complex of buildings that includes approximately 2.8 acres of warehousing and material processing space. Reuben Aff., ¶ 10. The Facility is located on four separate tax parcels, specifically 380 Vulcan Street, 400 Vulcan Street, 408 Vulcan Street, and 416 Vulcan Street, Tonawanda, New York. Reuben Aff., ¶ 5.

5. Respondent North Sea Mining & Minerals, Ltd. is the current owner of 380 Vulcan Street, 416 Vulcan Street, and 400 and 408 Vulcan Street. Answer, ¶ 1. Respondent Morgan Materials Inc. is the former owner of 408 Vulcan Street, which it owned from 2003 to 2015. Answer, ¶ 1.

6. Respondent Orchard Mechanics, Inc. purchased 400 Vulcan Street for North Sea Mining & Minerals, Ltd., and owned 400 Vulcan Street from 2014 to 2015. Answer, ¶ 12.

7. Historically, respondents purchased off-specification chemicals and raw materials for resale. Reuben Aff., ¶ 11. Respondents failed to sell or re-sell much of the material that they purchased over the years. Id., ¶ 12. Department Staff's inspections of the Facility revealed waste and chemicals that had been stored at the Facility for over twenty years. Id., ¶ 12.

8. Another location owned by respondents at 373 Hertel Avenue in Buffalo was the subject of an emergency removal action by the United States Environmental Protection Agency ("USEPA"). Reuben Aff., ¶ 37; Dougherty Aff., Exh. A.

9. Respondent Morgan Materials Inc. entered into an order on consent with the Department (No. R9-20010306-21) (the "2005 Order"). Reuben Aff., Exh. F. The effective date of the 2005 Order was January 31, 2005. Id. The 2005 Order was signed by Donald Sadkin as president of Morgan Materials Inc. Id.

10. Pursuant to the 2005 Order, Morgan Materials Inc. provided a management system plan (the "2005 MSP"). Reuben Aff., Exhs. F and H. The 2005 MSP required

Donald Sadkin or Jonathan Sadkin to review and update the 2005 MSP every two years. 2005 MSP (Reuben Aff., Exh. H), at 1.0. The 2005 MSP provided that Morgan Materials would not accept a new material for purchase unless a known market existed, as determined by Donald Sadkin. 2005 MSP, at 2.2. Donald Sadkin was to perform an annual check of the purchase date of all material in the inventory, and if he determined that the materials would not be sold within the 12-month timeframe for hazardous materials, or the 18-month timeframe for non-hazardous materials, he was to notify the Department in writing. 2005 MSP, at 2.2.

11. Department Staff has not received any of the notices required by the 2005 MSP. Reuben Aff., ¶ 113.

12. The 2005 Order provided for stipulated penalties for failure to meet compliance dates of $50 per day for the first thirty days of violation, $75 per day for days 31 through 40, $100 per day for days 41 through 50, and $250 for each day thereafter. Reuben Aff., Exh. F, at 7, ¶ XVIII.

13. Department Staff visited the Facility on February 19, 2015 and observed a number of violations. Reuben Aff., ¶ 34. Mr. Reuben visited the Facility on July 16, 2015, September 17, 2015, December 3, 2015, April 8, 2016, April 15, 2016, and July 25-26, 2016. Reuben Aff., ¶¶ 48-50, 65, 74-77, and 81-82.

14. Respondents reported to the Department that the Facility was subject to an ongoing Occupational Safety and Health Administration ("OSHA") enforcement action. Reuben Aff., ¶ 14. During an on-site visit on or about February 22, 2016, Tracy McLaverty, a Facility representative, told Department Staff that it would cost respondents almost $400,000 to bring the Facility's processing equipment into compliance with OSHA. Reuben Aff., ¶ 15. Processing operations ceased at some point in 2015, and respondents' lack of funds and staff limited their ability to sell certain chemicals stored at the Facility. Id., ¶ 16.

15. On November 17, 2016, the Department issued a summary abatement order (the "SAO") pursuant to Section 71-0301 of the ECL and Part 620 of 6 NYCRR. Dougherty Aff., ¶ 12; Exh. C. The named respondents to the SAO were Morgan Materials Inc. (f/k/a Morgan Chemicals, Inc., Morgan Chemcial, Inc. (a/k/a Morgan Chemcial, Inc. and Morgan Chemicals, Inc.)), Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., Donald Sadkin, as Chief Executive Officer of Morgan Materials Inc., Morgan Chemcial, Inc. Morgan Globex, Inc., and North Sea Mining and Minerals, Ltd., and Donald Sadkin, individually. Id.

16. Pursuant to Section 622.14 of 6 NYCRR, a hearing was scheduled for December 13, 2016. Dougherty Aff., ¶ 13. Although Respondents indicated that they planned to attend the hearing (Dougherty Aff., Exh. D), late in the day on December 12, 2016 respondents' counsel submitted a letter stating that the respondents had insufficient resources to defend the SAO, and that "[a]s a result, the respondents hereby waive the SAO hearing under ECL § 71-0301 and, instead, submit the Affidavit of Donald

Sadkin in opposition to and as respondents[sic] request to vacate the SAO." Dougherty Aff., Exh. E.

17. The hearing took place as scheduled. On the morning of the hearing, the ALJ spoke with respondents' counsel by telephone. Counsel reiterated that his clients would not appear at the hearing. Dougherty Aff., Exh. F, Hearing Report, at 3-4.

18. The summary abatement order was continued by the 2017 Order. Dougherty Aff., Exh. F. The 2017 Order found that the Facility presented an imminent danger to the health or welfare of the people of the State and was likely to result in irreversible or irreparable damage to the State's natural resources. Dougherty Aff., Exh. F, at 8.

19. Furthermore, the 2017 Order found that respondents failed to notify the Department of chemicals that would not likely be sold within 12 months (for hazardous materials) or within 18 months (for non-hazardous materials); failed to prepare an accurate inventory of chemicals and materials at the Facility; stored chemicals outside the Facility, unsecured, with no secondary containment; and were storing thousands of drums inside the Facility which were unmarked, corroded and/or rusted through, with some drums stacked four to six drums high. Dougherty Aff., Exh. F, at 5.

20. The 2017 Order also found that respondents were storing containers of hazardous waste intermixed with solid waste, and that most of the containers were not properly managed or labeled, making it impossible to identify the contents without sampling and testing. Dougherty Aff., Exh. F, at 5.

21. In addition, the 2017 Order found that respondents were in violation of several provisions of the fire code; that respondents were storing abrasive materials that may not be approved for disposal as non-hazardous waste; and were storing more than 2,000 drums and intermediate bulk containers, or "totes" of flammable materials, both inside and outside the Facility. Dougherty Aff., Exh. F, at 5 and 7. According to the 2017 Order, there was an extremely high risk of release or explosion at the Facility. Id., at 7.

22. After the SAO was issued, the Department requested that the USEPA's Office of Emergency Response ("OER") assist in securing the Site. Reuben Aff., ¶ 18. The OER undertook an Emergency Removal Action, and began the response on November 17, 2016, making an inventory and assessing the waste at the Facility. Id., ¶ 20. During October and November of 2016, and after USEPA assumed control of the Facility, Mr. Reuben continued to visit the site on a regular basis. Reuben Aff., ¶ 99.

23. USEPA and the Department used the labeling and shipping information on the waste at the Facility to identify the original manufacturers, and those manufacturers were provided with an opportunity to remove any waste. Reuben Aff., ¶¶ 24-25. USEPA's March 9, 2018 progress report stated that between November 17, 2016 and March 9, 2018, an estimated 9,042,502 pounds of waste and materials were removed

from the Facility. Reuben Aff., ¶ 26; Exh. E. USEPA concluded its removal action on or about March 9, 2018. Reuben Aff., ¶ 30.

24. USEPA has not compiled the waste totals for the site, but Mr. Reuben reviewed the annual hazardous waste generation reports for 2016-2018 and confirmed that in addition to the 9 million pounds that was voluntarily removed, USEPA disposed of approximately three million pounds of waste. Reuben Aff., ¶ 29; Exh. E. Mr. Reuben calculated that approximately 1,108,366 pounds of that waste was hazardous waste. Id.

25. The Department is currently completing a site characterization pursuant to the State Superfund program to determine if the activities at the Site resulted in contamination to the surrounding environment. Reuben Aff., ¶ 31.

26. During his visits to the Facility, Mr. Reuben found many containers, including flammables and other waste, as to which the Operating Respondents had failed to make a waste determination. Reuben Aff., ¶ 115; Exh. G.

27. During inspections, Department Staff found areas of the Facility where aisles were not created, or where previously created aisles or walkways had been filled in with pallets, containers, and waste, thus blocking or eliminating those aisles or walkways. Reuben Aff., ¶ 129; Exh. G, pp. 8, 9, 12, 17, 18, 21 and 23.

28. During his site visit on February 19, 2015, and thereafter, Mr. Reuben observed numerous containers of incompatible waste stored in close proximity to one another throughout the Facility. Reuben Aff., ¶ 137; Exh. G, p. 8. Since at least February 19, 2015, Department Staff observed drums of a resin solution containing xylene, which is flammable, stored near a curing agent containing ethylenediamine, a corrosive. Id., ¶ 138. This close proximity created conditions for a dangerous chemical reaction to occur. Id.

29. Mr. Reuben observed that liquid volumes in excess of 185 gallons were stored at the Facility outside on a flat, cracked, concrete floor. Reuben Aff., ¶¶ 145-146; Exh. G, pp. 13 and 17.

30. Since at least February 19, 2015, Mr. Reuben observed leaning, crushed, bulging, corroded, dusty and unclosed drums and bulk containers throughout the Facility. Reuben Aff., ¶ 150. He also saw unlabeled drums and containers, and numerous containers of incompatible waste stored in close proximity to one another. Reuben Aff., ¶¶ 150-152.

31. Mr. Reuben never saw any "No Smoking" signs during his visits to the Facility. Reuben Aff., ¶ 154.

32. During his inspections, Mr. Reuben never saw any internal communication or alarm systems capable of providing immediate emergency instruction, either by voice or

signal, to Facility personnel, or a device that could summon emergency assistance. Reuben Aff., ¶¶ 158 and 163.

33. Respondents Donald Sadkin and Jonathan Sadkin told Mr. Reuben that some of the material at the Facility had been stored there in excess of twenty years. Reuben Aff., ¶ 166. This was confirmed by an inventory provided by respondents on July 15, 2016. Reuben Aff., ¶ 167; Exh. V.

34. Since at least February 19, 2015, Mr. Reuben observed numerous containers containing waste at the Facility that were not marked with an accumulation date. Reuben Aff., ¶¶ 171-173; Exh. G, pp. 4, 5, 10, 17, 18, 19, and 20.

35. In his inspections since at least February 19, 2015, Mr. Reuben saw waste spilled from drums onto other drums or the floor in various locations throughout the Facility. Reuben Aff., ¶ 176; Exh. G, pp. 4, 5, 10, 17, 18 and 19.

36. Mr. Reuben saw unsealed drums and containers that were not kept closed or were in poor condition at the Facility during his inspections. Reuben Aff., ¶ 182; Exh. G, p. 15. He also observed waste from drums spilled onto the floor, or onto other drums at various locations throughout the Facility. Reuben Aff., ¶ 183; Exh. G, pp. 18 and 20.

37. Mr. Reuben saw containers in the Facility that were left in the elements, stacked without regard to keeping the containers intact, or stacked in a way that would not keep the contents protected from spillage, or damage, or the elements. Reuben Aff., ¶ 188. The containers were not marked with an accumulation date, nor were they labeled as hazardous waste. Reuben Aff., ¶¶ 189 and 192.

38. Mr. Reuben found drums and containers at the Facility in which the contents appeared to have deteriorated from their original condition, drums and containers in poor condition, and areas in the Facility where drums and containers were so tightly stacked that it would be impossible to enter the area and complete a visual inspection. Reuben Aff., ¶¶ 195-198; Exh. G, pp. 4, 5, 6, 9, 10, 12, 15, 17, 18, 19, 20 and 23.

39. Since at least December 3, 2015, respondents failed to provide a personnel training program or document their compliance with the requirements for a personnel training program. Reuben Aff., ¶ 203.

40. Respondents never provided Mr. Reuben with a copy of a contingency plan, and he never saw such a plan during any of his visits to the Facility. Reuben Aff., ¶ 213.

41. Since at least February 19, 2015, Mr. Reuben saw numerous releases and spills, as well as containers that should have been addressed as emergencies under emergency procedures pursuant to Section 373-3.4(g) of 6 NYCRR. Reuben Aff., ¶ 217.

42. Mr. Reuben searched the Department's files and did not find any land disposal notices for the Facility. Reuben Aff., ¶ 222.

43. During all of his site visits since at least February 19, 2015, Mr. Reuben saw universal waste batteries abandoned in locations throughout the Facility. Reuben Aff., ¶ 225. He did not observe waste batteries collected and labeled. Reuben Aff., ¶ 229.

DISCUSSION

Summary Judgment Standard

Pursuant to Section 622.12(a) of 6 NYCRR, Department Staff may serve a motion for order without hearing lieu of, or in addition to, a complaint. Section 622.12(d) provides that a 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 New York Civil Practice Law and Rules ("CPLR") in favor of any party.

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. Summary judgment is to be granted only where it is clear that there are no material issues of fact to be adjudicated (*see Vega v Restani Constr. Corp*., 18 N.Y.3rd 499, 503 (2012) (holding that summary judgment is "to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact" (internal quotation marks and citations omitted))).

It is the moving party's initial burden to make a *prima facie* showing of entitlement to summary judgment for each element of the violations alleged, or any defenses raised. Once the moving party has put forward a *prima facie* case, the burden shifts to the non-moving party to produce evidence sufficient to establish a triable issue (*see Matter of Locaparra*, Commissioner's Decision and Order, at 4 (June 16, 2003)).

As discussed below, applying the summary judgment standard to Department staff's motion, this ruling and summary report recommends that Department Staff's motion for order without hearing be granted.

Collateral Estoppel

Department Staff maintained that the doctrine of collateral estoppel barred some of the respondents[5] from re-litigating those matters that were decided in the 2017 Order. Department Staff took the position that the Motion "is the enforcement action for the exigent situation that gave rise to DEC staff's request for the SAO." Department Staff's Memorandum of Law, at 10. According to Department Staff, the respondents in the SAO matter were afforded the opportunity for a full and fair hearing, and chose not to appear.

[5] Department Staff acknowledged that a claim of collateral estoppel could not be asserted as to respondents Jonathan Sadkin and Orchard Mechanics, Inc., because neither party was a named respondent in the summary abatement proceeding.

Department Staff asserted that the facts underlying the findings in the 2017 Order were the same facts upon which the Motion was based. Respondents did not challenge the 2017 Order. As a result, Department Staff concluded that "[u]nder the doctrine of collateral estoppel, the Respondents are estopped from relitigating a fact that has already been determined." Id., at 15.

Respondents argued that the parties to both proceedings were not identical, and that the relief requested was different, because "[t]he first proceeding was to determine whether or not a Summary Abatement Order should issue, and the instant proceeding is an enforcement action for a fine or penalty." Respondents' Memorandum of Law in Opposition, at 5. According to respondents, the issues in the SAO were not fully litigated, "and since no discovery was allowed in the previous proceeding, the administrative conclusion should not result in the application of collateral estoppel." Id.

Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500 (1984) (citations omitted). The doctrine of collateral estoppel is applied to give conclusive effect to the quasi-judicial determinations of administrative agencies "when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law." 62 N.Y.2d at 499 (citations omitted). "What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding." 62 N.Y.2d at 500 (citations omitted).

None of the cases cited by Department Staff in support of their collateral estoppel argument are analogous to the procedural posture of this proceeding, where an enforcement action followed a summary abatement proceeding. Nevertheless, findings of fact may be established on a motion for order without hearing by applying the principle of collateral estoppel, or issue preclusion, "to those factual matters necessarily raised and decided" in a prior administrative enforcement action. *Matter of Pasquale Izzo, et al.*, Ruling on Motion for Order Without Hearing, at 10 (December 1, 2005). "Of course, the issue must have been material to the first action or proceeding and essential to the decision rendered therein . . . and it must be the point actually to be determined in the second action or proceeding such that 'a different judgment in the second would destroy or impair rights or interests established by the first.'" *Ryan*, *supra*, at 500-501 (citations omitted). In this proceeding, the facts that Department Staff seeks to establish are the same as those addressed in the SAO hearing.

A determination whether the first action or proceeding genuinely provided a full and fair opportunity to be heard must take into account the realities of the prior litigation, "including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination." *Ryan*, *supra*, at 501 (citations omitted). Respondents' claims that they were not afforded a full and fair opportunity to litigate Department Staff's claims in the SAO proceeding were not borne out by the record, nor were those claims accompanied by any specific facts or proof that respondents were discouraged or deterred from appearing at the SAO hearing.

It was respondents' election to waive the summary abatement hearing and to decline to appear, and instead to offer only an affidavit. Respondents were on notice of the hearing, and over Department Staff's objections, the affidavit was received into the record for the Commissioner's consideration. Respondents have not pointed to any circumstances demonstrating that their non-attendance at that hearing was the result of anything but their decision not to appear, nor have they shown that the lack of discovery in that proceeding affected their interests. Moreover, respondents did not seek judicial review of the Commissioner's 2017 Order, pursuant to Article 78 of the CPLR.

In *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147 (1988), the Court of Appeals observed that collateral estoppel is a flexible doctrine, and stated that

> [i]n the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interest in consistent and accurate results.

72 N.Y.2d at 153. Applying this reasoning, collateral estoppel should be invoked as to those factual matters already determined in the summary abatement proceeding. In particular, the finding that respondents were storing millions of pounds of hazardous waste, some of which had been at the Facility for more than 20 years, is dispositive of respondents' argument that the material at the Facility is not hazardous waste. In their opposition to the Motion, respondents did not offer any evidence to support their position, such as chemical analyses or an accurate inventory, to show that the material at the Facility was not waste, or was not hazardous.

The Commissioner's 2017 Order determined that the conditions at the Facility presented an imminent danger to the health or welfare of the people of the State, and was likely to result in irreversible or irreparable damage to the State's natural resources. Consequently, there is a strong policy consideration in the context of this enforcement proceeding in favor of leaving the facts determined in the SAO undisturbed, especially where, as here, those facts were substantiated by the testimony of several witnesses, as well as documentary support. Given the evidence in that proceeding, as well as the proof offered on the Motion, relitigation in this particular case would serve no purpose, and instead would result in a waste of the State's resources.

In any event, even if the Commissioner declines to apply the principle of collateral estoppel in this enforcement action, Department Staff's Motion provides ample support for the allegations in the Complaint. The Reuben Affidavit sets forth the factual basis for those allegations, with documentary evidence provided to support the affiant's sworn statements. Respondents have failed to come forward with any proof that would put the material facts in this proceeding in dispute.

Liability of the Individual Respondents

In its Motion, Department Staff sought to impose liability for the violations at the Facility on both Donald Sadkin and Jonathan Sadkin individually, because of their respective roles as responsible corporate officers. A corporate officer may be held personally liable for a corporate entity's violations under the "responsible corporate officer" doctrine, particularly when a corporate entity's violations threaten public health, safety or welfare. *Matter of Supreme Entergy Corp., et al.*, Decision and Order of the Commissioner, at 25-26 (April 11, 2014), *citing Matter of Galfunt*, Order of the Commissioner, at 2 (May 5, 1993). A corporate officer need only have responsibility over the activities of the business that caused the violations; it is unnecessary to determine if the corporate officer made any specific decisions concerning the conduct alleged in the violations. *Matter of Galfunt*, at 7. Applying this standard, both Donald and Jonathan Sadkin should be held personally liable for the violations that are established by record evidence.

In his answer, Donald Sadkin admitted that he was "a responsible corporate office[r] and controlled the corporate actions of Morgan Materials Inc., Morgan Chemicals Inc. Morgan Globex, Inc., and North Sea Mining & Minerals Ltd." but went on to state that whether any violations alleged in the Complaint were actually violations was a question of fact, "and if such violations occurred it is also a question of fact as to whether or not Respondent Donald Sadkin could have prevented them." Answer, ¶ 24. As discussed below, Department Staff has established Donald Sadkin's liability for the violations charged in the Complaint, except for the payment of stipulated penalties under the 2005 Order. In light of Donald Sadkin's admission, as well as the evidence that establishes his central role in the respondent corporations, he should be held personally liable for those violations.

In its Complaint, Department Staff alleged that respondent Jonathan Sadkin "is or was a manager at the Sadkin Facility, receiving a salary commensurate with a high level of responsibility and authority in Respondent's operations, with authorization to make business decisions." Complaint, ¶ 11. The Complaint stated further that Jonathan Sadkin "had responsibility and authority over activities of the business that caused the violations and [was] in a position to prevent the violations." Complaint, ¶¶ 86, 119. According to Department Staff, Jonathan Sadkin "had an individual responsibility to report the inventory to the DEC, to properly make waste determination [sic] for the waste generated, and to properly store and dispose of the waste in accordance with the ECL and 6 NYCRR Parts 370-374." Complaint, ¶ 85.

Department Staff alleged that Jonathan Sadkin "individually submitted either false or inaccurate documents to the Department for the purposes of attempting to prove compliance with the ECL and the 2005 Consent Order." Complaint, ¶ 84. In addition, Department Staff alleged that Jonathan Sadkin had an individual responsibility to report the spills at the Facility, and to implement appropriate emergency procedures. Complaint, ¶¶ 117-118.

In its Motion, Department Staff asserted that Jonathan Sadkin "has been second in charge of the company since at least 2005." Department Staff's Memorandum of Law in Support, at 38. Department Staff noted that the 2005 MSP states that "[o]n all decisions the chain of command will be Donald Sadkin, President, or in his absence, Jonathan Sadkin, Operations Manager," and

that the 2005 MSP would be reviewed and updated, if necessary, every two years by the President or the Operations Manager. Reuben Aff., Exh. H, at § 1.0. The 2005 MSP also states that only the President or the Operations Manager (Guy Sadkin[6]) are permitted to sign hazardous waste manifests. Id., § 3.2.4.

Department Staff pointed out that Jonathan Sadkin attended all of the on-site meetings with representatives of the Department. Reuben Aff., ¶¶ 49, 50, 65, 82, and 90. In addition, Mr. Reuben referred to meetings that took place in August and October of 2016 at the Department's Region 9 offices, where Jonathan Sadkin, Donald Sadkin, and their respective counsel were advised regarding the measures that would be necessary to come into compliance. Reuben Aff., ¶ 87. As a result, according to Department Staff, Jonathan Sadkin was aware of the violations, and "had sufficient control of the company that he could have addressed the violations or ordered employees to take steps to address the violations." Department Staff's Memorandum of Law in Support, at 39.

Department Staff also supplied documentary evidence to demonstrate Jonathan Sadkin's role in the business. Mr. Reuben stated that on July 15, 2016, Jonathan Sadkin e-mailed him an electronic copy of what Jonathan Sadkin described as a complete inventory by date and warehouse. Reuben Aff., ¶ 79; Exh. V. In submissions to the Department, Jonathan Sadkin discussed his management of the inventory, cash flows and layoffs, and requests to outside companies to reclaim their materials. Reuben Aff., Exhs. P, Q, R, S, and V.

In his affidavit in opposition to the Motion, Jonathan Sadkin stated that he began working at Morgan Materials in 1994, and that his responsibilities were primarily "back office administration, including payroll, billing, shipping/logistics, general office management and human resources work." J. Sadkin Aff., ¶ 1. He maintained that he "never had any operating authority or control over the purchase, storage, and processing of materials," and that he did not "draft the MSP, update the document, or contribute to its content." Id., ¶¶ 5 and 7. According to Jonathan Sadkin, although the 2005 MSP states that he was second in the chain of command, "the truth of the matter is that Donald Sadkin, not me, was personally responsible for controlling the corporate actions of Morgan and other Respondents." Id., ¶ 8.

Jonathan Sadkin stated further that any information regarding inventories that he forwarded to the Department were provided to him by Donald Sadkin and Tracy McLaverty, and that he "did not inventory chemicals, direct the inventory of chemicals, or classify any materials." J. Sadkin Aff., ¶ 10. Nevertheless, one of the exhibits to the Reuben Affidavit is a January 15, 2076 [sic; probably 2016] monthly report signed by Tracy McLaverty, General Manager, which includes "a self-explanatory report by the VP, Guy Sadkin." Reuben Aff., Exh. M. In that report, Jonathan Sadkin discusses the efforts undertaken to inventory material and target overseas markets for sales of that material.

Jonathan Sadkin acknowledged that he met with the Department's representatives on multiple occasions, but asserted that he "did not have any authority or power to comply with

[6] From time to time, as reflected in the exhibits, Jonathan Sadkin is referred to as, and signed documents using his nickname, "Guy."

DEC directives or other regulations." Id., ¶ 11. He contended that he was not responsible for regulatory compliance, and that he "did not have the power or authority to prevent the alleged violations from occurring. Nor did I have the authority or responsibility to order other Morgan employees to take steps to address the violations." J. Sadkin Aff., ¶ 12. He stated that he did not play any role in his father's decisions to purchase or store chemicals, never personally purchased or stored chemicals, and that "[w]arehouse operations and the purchase, storage and processing or materials was the sole responsibility of Donald Sadkin and warehouse manager Tracy McLaverty." Id., ¶¶ 13-15.

According to Jonathan Sadkin, he "did not manage, direct the workings, or conduct the affairs of the facility where the violations allegedly occurred," and did not own or have any control over the real property at the Facility. J. Sadkin Aff., ¶ 18. He concluded that he never had any ownership interest in any of the corporate respondents. Id., ¶ 21.

In his answer, Jonathan Sadkin asserted forty-four affirmative defenses. The first affirmative defense alleged that the proceeding was not commenced within the statute of limitations. JS Answer, ¶ 1, p. 32. This defense was identical to the other respondents' first affirmative defense, which was the subject of Department Staff's motion for clarification. The ALJ ruled that the defense, as pleaded, did not provide adequate notice of the facts and legal theory upon which respondents intended to rely, granted Department Staff's motion, and directed respondents to replead. *Matter of Morgan Materials*, Ruling on Motion to Clarify Affirmative Defenses, at 5 (Nov. 19, 2018). Respondents ultimately withdrew this defense. Because Jonathan Sadkin's opposition to the Motion does not provide any further clarification as to the first defense, it should be dismissed.

The same is true of Jonathan Sadkin's fourth affirmative defense, which is identical to the remaining respondents' second affirmative defense, which stated that "[t]he issue of who is an Owner or Operator of the Sadkin Facility is barred by the doctrine of collateral estoppel." Answer, ¶ 2, p. 9. In the ruling on the motion to clarify, the ALJ found this defense insufficient to provide Department Staff with notice of the facts and legal theory underlying the defense, and directed respondents to replead. Respondents withdrew the defense, and Jonathan Sadkin's opposition to the Motion does not address it. The Commissioner should dismiss the fourth affirmative defense.

The second affirmative defense in Jonathan Sadkin's answer states that the Complaint fails to state a cause of action. This is not properly pleaded as an affirmative defense. *See Matter of Truisi,* Ruling of the Chief ALJ, at 12 (Apr.1, 2010). The second affirmative defense should be dismissed.

The remaining affirmative defenses in Jonathan Sadkin's answer are similar to many of the statements in his affidavit, and amount to denials (*see* JS Answer, ¶¶ 8-44, pp. 33-36). The fifth through seventh affirmative defenses allege that the Complaint is improperly pled and violates the 14th Amendment of the United States Constitution, because the allegations are overbroad and "include compound assertions of fact and conclusions of law that cannot be answered in the format specified in the Notice of Hearing." JS Answer, ¶¶ 5-7, at p. 32. These affirmative defenses were not discussed in Jonathan Sadkin's affidavit submitted in response to

the Motion, nor was that affidavit accompanied by a memorandum of law explaining the basis for these defenses. This is also the case with respect to the third affirmative defense, which alleged that the Complaint failed to join a necessary party. JS Answer, ¶ 2, p. 32. In light of the lack of any proof or citation to any authority, these affirmative defenses should be dismissed.

Donald Sadkin stated in his affidavit that his son was the office manager of Morgan Materials Inc., and that his duties were to distribute the payroll, manage the office employees, and deal with the banking. Sadkin Aff., ¶ 21. According to Donald Sadkin, Jonathan Sadkin never made any buying decisions regarding materials or equipment, "which were only authorized by myself." Id., ¶ 22. Donald Sadkin went on to state that Jonathan Sadkin "sat in on meetings with DEC and Municipal employees, but did this only for purposes of my training him when at some point I expected to leave the business to him when I retired." Id., ¶ 23.

Donald Sadkin stated further that Jonathan Sadkin did not have the authority to purchase or sell materials on-site, or to direct warehouse policies, noting that the warehouse had its own manager. He concluded that "anything having to do with the purchase or sale of materials, the storage or processing of materials, or compliance with any regulation or the 2005 Consent Order, was by me alone, and Jonathan Sadkin did not have any authority concerning any of those decisions or procedures." Sadkin Aff., ¶ 25.

These assertions are contradicted, and outweighed, by the proof Department Staff offered in its Motion. Record evidence supports Department Staff's allegations regarding Jonathan Sadkin's significant role in the operations of the Facility, and Department Staff's position that Jonathan Sadkin should be subject to liability for the violations at the Facility under the responsible corporate officer doctrine.

As discussed above, after the moving party, in this case Department Staff, has met its burden to show that it is entitled to summary judgment, the burden shifts to Jonathan Sadkin as the opposing party to put forth proof of a material factual dispute. Respondent Jonathan Sadkin has failed to do so. The assertions in the respective affidavits of Donald and Jonathan Sadkin are insufficient to rebut Department Staff's Motion, which provides ample support for the conclusion that both Donald Sadkin and Jonathan Sadkin played an active role in operations at the Facility, and therefore should be held personally liable for the violations at the site.

Liability of Morgan Globex, Inc. and Orchard Mechanics, Inc.

In their response to the Motion, respondents contended that the Motion did not allege any facts concerning the activities of Orchard Mechanics, Inc. and Morgan Globex, Inc., arguing that "[t]hose two entities are simply lumped with North Sea Mining & Minerals, Ltd. as the owner of the site, or with Morgan Materials as an operator."[7] Respondents' Memorandum of Law, at 5. According to respondents, because Department Staff did not show that Morgan Globex engaged in any activity in violation of the statute or regulations, or that this respondent owned any Vulcan Street property, Department Staff did not meet its burden to show that Morgan Globex should be held liable for the violations. Respondents went on to maintain that the same was true of

[7] Section 370.2(b)(137) defines an owner as "the person who owns a facility or part of a facility." An "operator" is defined as "the person responsible for the overall operation of a facility." Section 370.2(b)(136).

Orchard Mechanics, asserting that "[t]here is no attempt to show that . . . any law or regulation [was] violated on any land owned by Orchard Mechanics." Id., at 6.

In his affidavit, Donald Sadkin stated that Morgan Globex "was formed for the sole purpose of being an entity for purposes of exporting materials internationally." Sadkin Aff., ¶ 31. According to Donald Sadkin, the company filed independent tax returns with respect to these exports, "but did not engage in any operations at the site, and did not own any of the Vulcan Street property, and was not engaged in making any purchase or sales decision[s] concerning the materials at the site." Id., ¶ 32. He concluded that since the shutdown of Morgan Materials, Morgan Globex "no longer has any business purpose, is a shell corporation, and has no assets." Id., ¶ 33.

Morgan Globex was a named respondent in the summary abatement proceeding. In the 2017 Order, the Commissioner determined that the respondents in that proceeding, including Morgan Globex, violated the ECL and its implementing regulations. 2017 Order, at 3. Respondents waived the hearing on the SAO, and did not challenge the 2017 Order. Other than the unsupported assertions in the Sadkin Affidavit, respondents have not provided any additional facts or information to substantiate their position as to Morgan Globex. Consequently, they cannot now be heard to object to the imposition of liability on Morgan Globex as an Operating Respondent, and this ruling and summary report recommends that the Commissioner impose such liability for the violations alleged.

In the Complaint, Department Staff alleged that Orchard Mechanics was the former owner of 400 Vulcan Street, "which it owned from 2014 to 2015." Complaint, ¶ 19. With respect to Orchard Mechanics, Inc., Donald Sadkin's affidavit states that Orchard Mechanics was formed for the sole purpose of purchasing a vacant strip of land to supply water to his business. Sadkin Aff., ¶¶ 34 and 36. In their Answer, Respondents admitted that North Sea Mining & Minerals is the current owner of the property, but denied that Orchard Mechanics owned any land or property when violations occurred. Answer, ¶ 11. Respondents also admitted that Orchard Mechanics purchased 400 Vulcan Street, but "only owned it until the property could be transferred." Answer, ¶ 12.

Section 370.2(b)(70) of 6 NYCRR defines a "facility" as "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing or disposing of hazardous waste. A facility may consist of several treatment, storage or disposal operational units." A "treatment, storage or disposal facility" means "all contiguous land and structures, other appurtenances and improvements on the land, used for treating, storing or disposing of hazardous waste." Section 370.2(b)(199) of 6 NYCRR. In the June 11, 2018 ruling on respondents' motion to dismiss, the ALJ found that Department Staff's allegations regarding Orchard Mechanics' ownership of 400 Vulcan Street were sufficient to state a cognizable claim, and denied respondents' motion. Ruling on Motion to Dismiss, at 7. The ruling recognized that the pleadings must be liberally construed, that the facts alleged in the complaint must be accepted as true, and that the non-moving party must be given the benefit of every possible favorable inference. Id. (citations omitted). This differs from Department Staff's burden on a motion for order without hearing, where Department Staff has the burden to come forward with proof sufficient to establish liability.

Nevertheless, the 2017 Order adopted the findings of fact in the 2017 Hearing Report, which stated that 400 Vulcan Street was one of the properties that comprised the Facility. Respondents admitted that they were the current or former owners of the tax parcels, including 400 Vulcan Street. Answer, ¶ 48. Although respondents stated that 400 Vulcan Street is vacant land, the regulatory definition of "facility" is broad, and includes "all contiguous land."

Although respondents stated that Orchard Mechanics owned 400 Vulcan Street only from 2014 to 2015, the first site visit by Mr. Reuben took place on February 19, 2015, and at that time he found that respondents failed to comply with the requirements of the 2005 MSP. Reuben Aff., ¶ 47. He also observed a number of other violations at the Facility that Department Staff attributed to all respondents, including the Respondent Owners. Reuben Aff., ¶¶ 135, 141, 148, 159, 163, 180, 186, 200, 211 and 219. During his inspections of the Facility, Mr. Reuben found evidence of waste and chemicals that had been improperly stored at the Facility for over twenty years. Reuben Aff., ¶¶ 12. 166-169. On this record, this ruling and summary report recommends that the Commissioner find Orchard Mechanics, Inc. liable as a Respondent Owner for the violations alleged.

First Cause of Action (Morgan Materials Inc. and Donald Sadkin, Individually and as CEO)

The first cause of action in the Complaint alleges that respondents Morgan Materials Inc. and Donald Sadkin, both as an individual and as CEO of Morgan Materials Inc., violated the terms of the 2005 Order. Complaint, ¶¶ 134-140. The 2005 Order required respondent Morgan Materials Inc. to institute best management practices and create and comply with the 2005 MSP. Reuben Aff., ¶¶ 41-56; Exh. F, p. 10, Schedule A, ¶¶ 4 and 5.

Pursuant to the 2005 MSP, Donald Sadkin, as the president of Morgan Materials Inc., was to notify the Department in writing regarding hazardous materials that were not likely to be sold within 12 months, or non-hazardous materials that were not likely to be sold within 18 months. Reuben Aff., Exh. H, § 2.2, at 2-3. Morgan Materials was not to accept new material for purchase unless a known market existed, as determined by Donald Sadkin. Id., § 2.2, at 2. The 2005 Order set an 18-month limit for storage of materials on-site. Reuben Aff., Exh. F, at 4, p. 10. Mr. Reuben stated that he had searched all the relevant files for the notices required by the 2005 MSP and determined that respondent failed to file the applicable notices. Reuben Aff., ¶ 113.

The 2005 Order contains a provision stating that the execution of the 2005 Order did not constitute an admission by respondent of any factual allegation or legal conclusion in that document, but went on to state that "[n]otwithstanding the foregoing, Respondent will not, in any action or proceeding brought by the Department to enforce this Order, contest any factual allegation or legal conclusion set forth therein." Reuben Aff., Exh. F, at ¶ 12, p. 2.

For the violations alleged in the first cause of action, Department Staff requested that the Commissioner find respondents Morgan Materials Inc. and Donald Sadkin, both individually and as CEO of Morgan Materials Inc., liable for stipulated penalties of $500,000, as provided for in

the 2005 Order. Complaint, ¶ XIX, p. 30. Department Staff also sought penalties pursuant to ECL Section 71-2705.

In their answer, Morgan Materials Inc. and Donald Sadkin admitted that the 2005 MSP required Donald Sadkin to notify the Department of materials on-site beyond the specified timeframes, and also admitted that there were materials on-site for over 20 years. Answer, ¶¶ 1 and 23. In addition, the two respondents also admitted the allegations in Paragraph 139 of the Complaint, which stated that the Department had not received any of the notices required by the 2005 MSP. Answer, ¶¶ 1 and 41. Nevertheless, in their response to the Motion, respondent Donald Sadkin argued that he could not be held liable for violations of the 2005 Order, because he was not named as a respondent in that document.

Ruling: With respect to the violations alleged in the first cause of action, Department Staff's motion is granted as to respondent Morgan Materials Inc., the signatory to the 2005 Order. Respondents admitted the allegations in Paragraph 139 of the Complaint, which stated that the Department had not received any of the notices required pursuant to the 2005 Order. In addition, as Department Staff pointed out, the 2017 Order found that respondents "failed to notify the Department regarding chemicals that would not likely be sold within 12 months (for hazardous materials) or 18 months (for non-hazardous materials)," in violation of the 2005 Order. Dougherty Aff., Exh. F, at 5. There are no material disputed factual issues that require adjudication.

In addition to stipulated penalties of $500,000 for the violation of the 2005 Order, Department Staff requested that the Commissioner impose a penalty pursuant to ECL Section 71-2705. Section 71-2705 provides that any person who violates any of the provisions of, or fails to perform any duty imposed by, an order of the Commissioner, will be liable for a maximum penalty of $37,500 per violation, with an additional $37,500 for each day of continuing violation.

Because respondent Morgan Materials Inc. is liable for stipulated penalties for violations of the 2005 Order, a separate penalty for a statutory violation based upon the same facts is not authorized. *Matter of Wilder*, Hearing Report on Motion for Order Without Hearing, at 17 (Aug. 17, 2005), *adopted by* Supplemental Order of the Acting Commissioner, at 2 (Sept. 25, 2005); *see also Matter of Hua Li Fish House Inc.*, Summary Report, at 5 (Dec. 9, 2019) (concluding that the portion of Department Staff's complaint that alleged a violation of an order on consent did not provide a separate and independent basis for the award of a separate penalty under the statute and regulations), *adopted by* Commissioner's Order, at 1-2 (Dec. 13, 2019).

With respect to Donald Sadkin, liability for the violations alleged rests upon different grounds. Donald Sadkin signed the 2005 Order in his capacity as president of Morgan Materials Inc., and it is undisputed that he controlled the corporation's actions. The 2005 Order imposed various obligations upon Donald Sadkin, including the requirement to notify the Department of materials remaining at the Facility beyond the time periods specified in the 2005 MSP. Reuben Aff., Exh. H, at 2-3. Nevertheless, Donald Sadkin is not named as a respondent in the 2005 Order, and signed that document only in his capacity as president of Morgan Materials Inc., not as an individual respondent. Reuben Aff., Exh. H.

In its Motion, Department Staff did not cite any authority that would support imposing liability for the payment of stipulated penalties upon an individual that was not a named respondent to an order, and who did not sign that order in his or her individual capacity. Under the circumstances, this report recommends that the Commissioner decline to hold Donald Sadkin liable for the stipulated penalties provided for in the 2005 Order. Donald Sadkin should, however, be held liable for the statutory penalties Department Staff seeks pursuant to ECL Section 71-2705. The 2005 Order was binding upon Morgan Materials Inc., as well as its agents and employees. Reuben Aff., Exh. F, at 8, ¶ XXIII. As such, Donald Sadkin was obligated to comply with the provisions of the 2005 Order, and failed to do so. As discussed above in the discussion of the liability of the individual respondents, Donald Sadkin may be held liable as a responsible corporate officer, and as such, liability may be imposed upon him for statutory penalties.

Second Cause of Action (Operating Respondents)

Section 372.2(a)(2) of 6 NYCRR requires any person who generates solid waste to make a determination as to whether the waste is hazardous. A solid waste is defined as any discarded material that is not subject to an exclusion, and "discarded material" is any material that is abandoned or considered inherently waste like. Section 371.1(c)(1) and (2)(i) and (iii) of 6 NYCRR. Pursuant to Section 371.1(c)(3)(i)-(iii) of 6 NYCRR, materials are solid waste if they are abandoned by being disposed of, burned or incinerated, or accumulated, stored or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated.

In the second cause of action, Department Staff alleged that Operating Respondents generated and stored wastes on-site without making any determination as to whether the wastes were hazardous. Complaint, ¶ 144. According to the Reuben Affidavit, Department Staff found many containers of waste, including flammable waste, at the Facility as to which Operating Respondents had failed to make a waste determination. Reuben Aff., ¶ 115. Department Staff noted that there are exemptions from the rule requiring a waste determination, but asserted that respondents did not qualify for any such exemption. Pursuant to Section 371.1(c)(7) of 6 NYCRR, a party claiming an exemption must notify the Department in writing before utilizing any exemption or exception from the requirement, including a claim that certain material is not solid or hazardous waste, "or is exempt or conditionally exempt, based on the intent to reclaim, recycle, or reuse." Department Staff pointed out that it had not received any notification or written documentation from respondents requesting an exception or exemption "for any of the 13 million pounds of waste to be recycled and/or exempted from either the hazardous or non-hazardous waste regulations." Department Staff's Memorandum of Law, at 23; Reuben Aff., ¶ 126.

As an example, Mr. Reuben referred to a February 19, 2015 site visit, during which he observed a number of drums of Beckosol 102 Blend, a flammable material which was improperly stored and had been on-site for at least three to five years. Reuben Aff., ¶¶ 116-124; Exhs. G and V. Mr. Reuben concluded that the actions of respondents "indicate that they were storing the Beckosol 102 Blend in lieu of making a proper hazardous waste determination and/or paying for a proper disposal." Reuben Aff., ¶ 125.

In the November 15, 2015 inventory that respondents provided to Department Staff, there were materials labeled as "dump," "no good" or "hard." Reuben Aff., Exh. G, p. 10; Exh. I. Mr. Reuben concluded that these materials were being stored to avoid the costs of disposal. Reuben Aff., ¶ 66. Moreover, in the SAO proceeding, Finding of Fact No. 21 in the January 4, 2017 Hearing Report stated that respondents failed to make the required hazardous waste determinations, in violation of Section 372.2(a)(2). Hearing Report, at 28, ¶ 21.

Operating Respondents, other than Jonathan Sadkin, denied the allegations in the second cause of action. Answer, ¶ 2. Jonathan Sadkin denied having knowledge or information as to the allegations, or denied the allegations. JS Answer, ¶¶ 144-146. In their submissions on the Motion, Operating Respondents did not specifically address this cause of action, but argued that the materials on-site were purchased for resale, and therefore were not waste. Sadkin Aff., ¶ 43. Operating Respondents did not cite any persuasive authority, or point to any credible facts in support of this proposition.

Ruling: Department Staff's Motion is granted as to the second cause of action. Operating Respondents failed to establish that there are material issues of fact to be adjudicated. The Reuben Affidavit and the findings from the SAO proceeding, which respondents in that proceeding did not challenge, support Department Staff's allegations. As discussed above, respondents' collateral estoppel arguments, and their assertions that the materials at the Facility were not hazardous waste, are unavailing.

Third Cause of Action (All Respondents)

Department Staff's third cause of action alleged that respondents violated Section 373-3.3(f) of 6 NYCRR, which requires an owner or operator of a hazardous waste facility to maintain sufficient aisle space. Complaint, ¶¶ 148-152. A facility must have sufficient aisle space to allow unobstructed movement of personnel, as well as movement of fire protection, spill control, and decontamination equipment to any area of the facility's operations.

During site visits on July 16, 2015 and April 8, 2016, Mr. Reuben observed areas where aisles were not created, or where previously created aisles or walkways had been filled in with pallets, containers, and waste, thereby blocking or eliminating the aisles and walkways. Reuben Aff., ¶¶ 129 and 130; Exh. G, pp. 8, 9, 12, 14, 18, 21, and 23. As shown in the photographs in Exhibit G to the Reuben Affidavit, many of the pallets were in poor condition, which resulted in leaning towers of waste. Reuben Aff., ¶ 131; Exh. G, p. 21. There were multiple locations where drums were stacked several rows deep. Reuben Aff., ¶ 133; Exh. G, pp. 8-9.

In his answer, respondent Jonathan Sadkin denied the allegations. JS Answer, ¶ 151-152. The remaining respondents admitted the allegations in Paragraph 148 of the Complaint in Paragraph 1 of their answer, but then denied those allegations in Paragraph 2 of their answer. Paragraph 148 of the Complaint stated that "DEC Staff have found storage areas at the Sadkin Facility with insufficient aisle space or no aisles." These respondents admitted the allegations in Paragraph 151 of the Complaint, which stated that "Operating Respondents failed to operate the Sadkin Facility in a way that ensured there was sufficient aisle space as described under the

regulations." Answer, ¶ 1. In addition, the respondents other than Jonathan Sadkin admitted that Department Staff "found an area where drums and containers were stacked so tightly it would be impossible to enter the areas and complete a visual inspection, but aver that those conditions existed in only one area of the facility." Answer, ¶ 32.

Ruling: Department Staff's Motion is granted as to all respondents with respect to the third cause of action. The Reuben Affidavit describes Mr. Reuben's observation of chemicals stored at the Facility without aisles or with insufficient space between the stored materials, and is accompanied by photographs documenting his observations. In addition, Operating Respondents (other than Jonathan Sadkin) admitted that the Facility was not operated in a manner that ensured there was sufficient aisle space. As discussed above, because Jonathan Sadkin was properly named as an Operating Respondent, he is also liable for this violation. There are no material factual issues to be adjudicated.

Fourth Cause of Action (All Respondents)

The fourth case of action alleged that respondents failed to properly separate and store containers of incompatible wastes. Complaint, ¶¶ 155-159. Section 373-3.9(g)(3) of 6 NYCRR requires an owner or operator to ensure that storage containers holding hazardous waste incompatible with any waste or other material stored nearby in other containers, dikes, open tanks or surface impoundments are separated from that waste or other materials by means of a dike, berm, wall or other device. As set forth in the Reuben Affidavit, Department Staff documented numerous containers of incompatible waste stored in close proximity to one another throughout the Facility. Reuben Aff., ¶¶ 137-140.

In the 2017 Order, the Commissioner found that respondents were storing thousands of drums inside the Facility. The drums were unmarked, corroded and/or rusted through and some were stacked four to six drums high. Dougherty Aff., Exh. F (2017 Order), at 5. The Commissioner found further that respondents were storing containers of hazardous waste intermixed with solid waste, that most of the containers were not properly managed or labeled, and that as a result it was impossible to identify the contents without sampling and testing. Id.

Jonathan Sadkin denied the allegations in his answer, as did the remaining respondents. JS Answer, ¶¶ 158-159; Answer, ¶ 2. In their response to the Motion, the remaining respondents did not address this cause of action independently, but rather relied upon their arguments that the material at the Facility was not hazardous waste, that the doctrine of collateral estoppel did not apply, and that, even if it were applicable, the issues were not fully litigated in the SAO proceeding.

Ruling: Department Staff's Motion with respect to the fourth cause of action is granted. The Reuben Affidavit documents Mr. Reuben's observations during the February 19, 2015 site visit, when he saw numerous containers of incompatible waste stored in close proximity to one another. Mr. Reuben stated that since at least that date, Department Staff observed drums of a resin solution containing xylene, which is flammable, stored near a curing agent containing ethylenediamine, a corrosive substance. Reuben Aff., ¶ 138. Mr. Reuben stated further that this close proximity "creates conditions for a dangerous chemical reaction to occur." Id.

Respondents have not offered any specific evidence to refute this proof, and instead rely upon the arguments which have already been considered and rejected, as discussed above. There are no factual issues to be adjudicated.

Fifth Cause of Action (All Respondents)

Section 373-1.1(d)(1)(iv)(f)(*1)* of 6 NYCRR sets forth the requirements for secondary containment whenever the total quantity of liquid hazardous waste stored onsite in containers exceeds 185 gallons. That provision provides that the containment system must be designed and operated in accordance with Section 373-2.9(f)(1)(i) of 6 NYCRR, which states that container storage areas must have a base underlying the containers "which is free of cracks or gaps and is sufficiently impervious to contain leaks, spills and accumulated precipitation until the collected material is detected and removed."

In the fifth cause of action, Department Staff alleged that all respondents failed to provide secondary containment. Specifically, Paragraph 163 of the Complaint alleged that during inspections of the Facility, Department Staff found that material that was required to be stored in secondary containment had not been stored in that manner. Mr. Reuben stated that during an inspection on April 15, 2016, he saw liquid volumes in excess of 185 gallons, stored outside on a flat, cracked concrete floor, in violation of the regulatory requirements. Reuben Aff., ¶¶ 145-146, Exh. G, p. 13. The photographs attached to the Reuben Affidavit show an additional stockpile of totes commingled with drums of liquid stored outside the Facility, directly exposed to the elements. Reuben Aff., Exh. G, pp. 1-4, 12. In addition, in the 2017 Order, the Commissioner found that respondents were storing chemicals outside the Facility, unsecured with no secondary containment. Dougherty Aff., Exh. F, at 5. Department Staff maintained that the doctrine of collateral estoppel barred respondents from re-litigating this cause of action.

Jonathan Sadkin denied the allegations in the fifth cause of action, but did not specifically refute Department Staff's allegations regarding the lack of secondary containment at the Facility. JS Answer, ¶¶ 163-166. Operating respondents admitted the allegations in Paragraph 165 of the Complaint, which stated that "Operating Respondents failed to provide secondary containment at the Sadkin Facility." Answer, ¶ 1. The respondents other than Jonathan Sadkin also admitted the allegations in Paragraph 163 of the Complaint, stating that during inspections, Department Staff found that material required by the statute and regulations to be stored in secondary containment was not stored in that manner. Answer, ¶ 1.

Ruling: Department Staff's Motion as to the fifth cause of action is granted. Respondents, including respondent Jonathan Sadkin, have failed to provide evidence sufficient to rebut the testimony of Department Staff's witness, and the documentary evidence offered as part of the Motion. Moreover, Operating Respondents, other than Jonathan Sadkin, admitted their failure to provide secondary containment, and all respondents admitted that material was not properly stored in secondary containment, in violation of the statute and regulations. Under the circumstances, there are no factual issues in dispute.

Sixth Cause of Action (All Respondents)

The sixth cause of action alleged that all respondents failed to take measures to prevent accidental ignition. Complaint, ¶¶ 174-176. Section 373-3.2(h)(1) of 6 NYCRR requires owners or operators to take precautions to prevent accidental ignition, as well as the reaction of ignitable or reactive waste, and to place "No Smoking" signs conspicuously wherever there is a hazard from ignitable or reactive waste. According to the Reuben Affidavit, Department Staff observed leaking, crushed, bulging, corroded, dusty and unclosed drums and bulk containers throughout the Facility. Reuben Aff., ¶ 150-156. Mr. Reuben noted that spilled waste and waste that was not properly contained created an opportunity for accidental ignition of materials spilled on the floor or open to the atmosphere. Id.

In addition, Department Staff saw incompatible wastes, such as flammables and corrosive materials, stored together. Reuben Aff., ¶¶ 152-153; Exh. G. Mr. Reuben stated that he did not see any "No Smoking" signs during the inspections. Reuben Aff., ¶ 154. According to Mr. Reuben, these violations were observed during the July 26, 2016 inspection. Reuben Aff., ¶¶ 155-156. The 2017 Order in the SAO proceeding found that there was an extremely high risk of release or explosion at the Facility. Dougherty Aff., Exh. F, at 7.

Jonathan Sadkin denied the allegations. JS Answer, ¶¶ 175-177. Respondents admitted the allegations in Paragraph 175 of the Complaint, which stated that "Operating Respondents failed to take adequate precautions to prevent accidental ignition at the Sadkin Facility and failed to place 'No Smoking' signs in areas where required under 6 NYCRR 373-3.2(h)(1)." Answer, ¶ 1.

Ruling: Department Staff's motion is granted as to the sixth cause of action. Respondents did not offer any evidence or argument sufficient to rebut Department Staff's proof, or to raise an adjudicable issue. Moreover, in their answer, Operating Respondents (other than Jonathan Sadkin) admitted that they failed to take precautions to prevent accidental ignition, and did not display the required "No Smoking" signs in the Facility.

Seventh Cause of Action (All Respondents)

The seventh cause of action alleged that all respondents failed to provide an internal communication device for emergency notifications, in violation of Section 373-3.3(c)(1) of 6 NYCRR. Complaint, ¶¶ 181-183. The Reuben Affidavit stated that inspections of the Sadkin Facility did not reveal internal communication or alarm systems capable of providing immediate emergency instruction, either by voice or signal, to facility personnel. Reuben Aff., ¶¶ 158-160. Respondents denied the allegations. Answer, ¶ 2; JS Answer, ¶¶ 182-184.

Ruling: Department Staff's Motion is granted with respect to the seventh cause of action. Respondents did not offer any detailed argument or evidence in response to the proof in the Reuben Affidavit, and therefore failed to raise a material issue of fact.

Eighth Cause of Action (All Respondents)

In the eighth cause of action, Department Staff alleged that respondents failed to provide a device that could summon emergency assistance, as required by Section 373-3.3(c)(2) of 6 NYCRR. Complaint, ¶¶ 186-190. In his affidavit, Mr. Reuben stated that during inspections of the Facility, Department Staff noted that neither the owners nor the operators had installed devices or systems within the Facility that could be used to call emergency services. Reuben Aff., ¶¶ 162-164; 158-160. Respondents denied the allegations. Answer, ¶ 2; JS Answer, ¶¶ 189-191.

Ruling: As to the eighth cause of action, Department Staff's motion is granted. Respondents did not offer any specific rebuttal to the proof in the Motion, and therefore failed to raise a material issue of fact.

Ninth Cause of Action (All Respondents)

Department Staff's ninth cause of action alleged that respondents accumulated hazardous waste on-site in excess of ninety days, in violation of Section 372.2(a)(8)(ii) of 6 NYCRR. Complaint, ¶¶ 193-198. The regulation requires a generator of hazardous waste to either obtain a permit pursuant to Part 373 of 6 NYCRR, or ship the waste off-site within ninety days. It is undisputed that respondents did not have a Part 373 permit. Department Staff asserted that respondents designated wastes as hazardous, spilled materials that were discharged into the environment, and stored material in lieu of disposing of the waste, all in violation of Part 360.

Section 360.2(b)(85) of 6 NCYRR defines "disposal facility" as "a facility where waste is intentionally placed and where the waste is intended to remain."[8] Section 360.2(b)(262) defines "storage" to mean "the temporary holding or containment of waste in a manner which does not constitute disposal. However, any waste retained on-site for a period in excess of 12 months constitutes disposal, unless otherwise specified in this Part or Parts 361 through 365 of this Title."

As noted above, the November 15, 2015 inventory report included handwritten notations designating line items as "scrap," "toss," and "dump." Reuben Aff., ¶ 66; Exh. I. Department Staff took the position that this indicated that Operating Respondents "had declared numerous items to be waste, but failed to either obtain a permit from DEC to store the waste or to ship the materials off-site." Department Staff's Memorandum of Law, at 28.

In his affidavit, Mr. Reuben stated that Donald Sadkin and Jonathan Sadkin admitted that some of the chemicals and hazardous waste at the Facility had been stored there for more than 20 years. Reuben Aff., ¶ 166. On July 15, 2016, respondent Jonathan Sadkin e-mailed Mr. Reuben an electronic copy of what he described as a complete inventory by date and warehouse (the "July 15, 2016 Inventory Report"). Reuben Aff., ¶ 167; Exh. V. Mr. Reuben stated that the July 15, 2016 Inventory Report revealed that "there was a total of approximately 18 million pounds of chemicals, materials, hazardous and non-hazardous waste, some of which had been stored at the Facility for more than 20 years." Reuben Aff., ¶ 167.

[8] The pertinent regulations in effect in 2016 were Sections 360-1.2(b)(85) and (164) of 6 NYCRR.

Another inventory report from May of 2016 showed 67 unsaleable line items, of which 38 had been on-site for nine or more years, two had been on-site for at least eight years, and eighteen had been on-site for at least seven years. Reuben Aff., Exh. Q. In addition, during his inspections of the Facility, Mr. Reuben documented numerous instances where waste had been discharged and was left in place, escaping into the air and the environment. Reuben Aff., Exh. G, pp. 4, 5, 15, 17, 18, and 19. Moreover, the 2017 Order concluded that respondents were storing millions of pounds of hazardous waste at the Facility, some of which had been there for more than 20 years. 2017 Order, at 5-6.

Ruling: Department Staff's motion is granted as to the ninth cause of action. As discussed above, respondents' argument that the material at the Facility is not hazardous waste is not credible, and respondents have not offered any evidence sufficient to rebut the proof Department Staff offered.

Tenth Cause of Action (Operating Respondents)

The tenth cause of action alleged that Operating Respondents did not label containers with an accumulation date. Complaint, ¶¶ 201-203. Pursuant to Section 372.2(a)(8)(i) of 6 NYCRR, a generator of hazardous waste must either obtain a permit pursuant to Part 373, or ship the waste off-site within ninety days. Containers must be marked with the accumulation date, as required by Section 373-1.1(d)(1)(iii)(c)(2) of 6 NYCRR.

Containers at the Facility were marked with a red dot, and Department Staff were told that this meant the containers were to be disposed of. Reuben Aff., ¶ 191; Exh. G, pp. 4, 10 and 11. None of the drums marked with a red dot had an accumulation date, and in fact, Department Staff observed many containers at the Facility that were not labeled with an accumulation date. Reuben Aff., ¶ 173. The 2017 Order found that respondents were storing thousands of drums at the Facility that were unmarked. Dougherty Aff., Exh. F, at 5.

Respondents denied the allegations. Answer, ¶ 2; JS Answer, ¶ 204. Nevertheless, respondents did not offer any specific facts or evidence to rebut the allegations in the tenth cause of action.

Ruling: As to the tenth cause of action, Department Staff's motion is granted. Respondents failed to show that there are any material facts in dispute, and did not offer anything to rebut the proof provided by Department Staff in the affidavit of Mr. Reuben.

Eleventh Cause of Action (All Respondents)

Department Staff's eleventh cause of action alleged that respondents failed to ensure that the containers at the Facility were kept in good condition, in violation of Section 373-3.9(b) of 6 NYCRR. Complaint, ¶¶ 206-210. That provision mandates that if a container holding hazardous waste is not in good condition, or if the container begins to leak, the owner or operator of the facility must transfer the hazardous waste from that container to a container that is in good

condition, or manage the waste in some other manner that complies with the requirements of Subpart 373-3 of 6 NYCRR.

The Reuben Affidavit states that since at least from February 19, 2015, Mr. Reuben observed waste spilled from drums onto other drums or onto the floor at various locations throughout the Facility. Reuben Aff., ¶¶ 176-180; Exh. G, pp. 4, 5, 10, 17, 18, 19 and 20. According to Department Staff, respondents "had an established pattern of failing to address these spills and failed to ensure that if containers were failing that the contents were placed into a container in good condition." Department Staff's Memorandum of Law, at 31. Respondents denied the allegations. Answer, ¶ 2; JS Answer, ¶¶ 209-211.

Ruling: Department Staff's motion is granted as to the eleventh cause of action. Respondents offered nothing other than general denials in response to the allegations in the Complaint. Such denials are insufficient to raise an issue of fact where, as here, Department Staff offered proof on the Motion that supports those allegations.

Twelfth Cause of Action (All Respondents)

In the twelfth cause of action, Department Staff alleged that respondents failed to ensure that containers at the Facility were kept closed and in good condition, in violation of Section 373-3.9(d)(1) of 6 NYCRR. Complaint, ¶¶ 213-218. The regulation requires owners and operators to ensure that a container holding hazardous waste is always closed during storage except when it is necessary to add or remove waste.

According to the Reuben Affidavit, Department Staff documented numerous containers in the Facility that were either damaged, unable to be closed, or were left open. Reuben Aff., ¶¶ 182-185; Exh. E, pp. 15, 18-20. In addition, Department Staff documented several locations at the Facility where waste spilled from drums onto other drums or the floor, which showed that the drums had not been kept closed. Reuben Aff., ¶¶ 183-185; Exh. G, pp. 18 and 20.

Respondents other than Jonathan Sadkin denied the allegations in Paragraphs 213-218 of the Complaint, but admitted in Paragraph 25 of their answer that "there were some containers that were either damaged, unable to be closed, or were left open, but den[ied] that there were numerous containers in this condition." Jonathan Sadkin denied the allegations in the twelfth cause of action in his answer, but did not offer any specific facts to rebut Department Staff's allegations. JS Answer, ¶ 217-219.

Ruling: Department Staff's Motion with respect to the twelfth cause of action is granted. There are no material facts in dispute, particularly in light of the admission (by respondents other than Jonathan Sadkin), and the proof Department Staff put forth in the affidavit of Mr. Reuben.

Thirteenth Cause of Action (All Respondents)

The thirteenth cause of action alleged that all respondents failed to label the hazardous waste at the Facility, in violation of Section 373-3.9(d)(3) of 6 NYCRR. Complaint, ¶¶ 221-225.

That provision requires owners or operators to mark containers holding hazardous waste with the words "Hazardous Waste."

Mr. Reuben stated that Department Staff found numerous containers at the Facility that were unmarked or unlabeled, and also were not marked with the accumulation date. Reuben Aff., ¶ 34(a), 188-192; Exh. G, pp. 4, 10, and 11. The 2017 Order found that most of the containers at the Facility were not properly managed or labeled, making it impossible to identify the contents without sampling and testing. Dougherty Aff., Exh. F, at 5. In their answers, respondents denied the allegations, but did not offer any specific proof beyond the general denials. Answer, ¶ 2; JS Answer, ¶¶ 224-226.

Ruling: Department Staff's Motion as to the thirteenth cause of action is granted. Respondents did not offer evidence sufficient to rebut the statements of Department Staff's witness and the documentary evidence. Respondents' argument that the material in question was not hazardous waste is rejected, as discussed above.

Fourteenth Cause of Action (All Respondents)

In the fourteenth cause of action, Department Staff alleged that respondents failed to inspect the hazardous waste storage area. Complaint, ¶¶ 228-235. Section 373-3.9(e) of 6 NYCRR requires the owners or operators of hazardous waste facilities, at least weekly, to inspect the areas where containers are stored, to look for leaking containers, or for the deterioration of containers or the containment system that may be caused by corrosion or other factors.

According to Mr. Reuben, Department Staff documented leaking, crushed, bulging, corroded, dusty and unclosed drums and bulk containers throughout the Facility. Reuben Aff., ¶¶ 195-196. In addition, Department Staff documented dusty, ripped, damaged and leaking containers, such as super sacks and fiberboard containers, throughout the Facility. Id., ¶¶ 197-199. There were some areas of the Facility where drums and containers were stacked so tightly that it would be impossible to enter the areas and complete a visual inspection. Reuben Aff., ¶ 199; Exh. G, pp. 9, 12, and 23. The Hearing Report in the SAO proceeding noted that respondents did not inspect the hazardous waste storage area weekly. Dougherty Aff., Exh. F, Hearing Report at 28 (Finding of Fact No. 21).

Respondents denied the allegations but did not assert any specific facts in support of that denial. Answer, ¶ 2; JS Answer, ¶¶ 234-236. As noted above, respondents other than Jonathan Sadkin admitted that Department Staff found an area where drums and containers were stacked so tightly that it would be impossible to enter the areas and complete a visual inspection, but asserted that those conditions existed in only one area of the Facility. Answer, ¶ 32.

Ruling: Department Staff's Motion is granted as to the fourteenth cause of action. The evidence offered by Department Staff was uncontroverted, and respondents' denials were insufficient to raise a factual issue.

Fifteenth Cause of Action (All Respondents)

The fifteenth cause of action alleged that the respondents failed to have a personnel training program, as required by Section 373-3.2(g) of 6 NYCRR. Complaint, ¶¶ 238-241. The regulation states that hazardous waste facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches facility personnel to perform their duties in a way that ensures the facility's compliance with the requirements of Subpart 373-3. The owner or operator must ensure that the program meets all of the elements set forth in Section 373-3.2(g)(4)(iii) of 6 NYCRR, and must keep records that document that the training took place.

The Reuben Affidavit states that during an on-site meeting on December 3, 2015, Department Staff requested that respondents provide records demonstrating that the employees at the Facility had completed the required personnel training. Reuben Aff., ¶ 202. According to Mr. Reuben, respondents failed to provide the training program, and thus were unable to furnish the records demonstrating compliance. Reuben Aff., ¶ 203. Respondents denied the allegations, but did not offer any evidence beyond those denials in response to the fifteenth cause of action. Answer, ¶ 2; JS Answer, ¶¶ 240-242.

Ruling: Department Staff's motion is granted as to the fifteenth cause of action. Respondents failed to rebut the proof offered by Department Staff in the Motion, and therefore have not established that there are factual issues in dispute.

Sixteenth Cause of Action (All Respondents)

In the sixteenth cause of action, Department Staff alleged that respondents failed to maintain and operate the facility to minimize the possibility of fire and explosion. Complaint, ¶¶ 244-251. Pursuant to Section 373-3.3(b) of 6 NYCRR, owners or operators must ensure that facilities are maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water, which could threaten human health or the environment.

In his affidavit, Mr. Reuben stated that since at least February 19, 2015, he observed leaking, crushed, bulging, corroded, dusty and unclosed drums and bulk containers throughout the Facility. Reuben Aff., ¶ 206. Drums and bulk containers were found in exterior, unsecured areas of the Facility, and those drums and containers were exposed to the elements and precipitation. Reuben Aff., ¶ 209; Exh, E, pp. 1-3, 12-13, 17 and 21. Moreover, throughout the Facility, there were dusty, ripped, damaged and leaking containers, such as super sacks and fiberboard containers, as well as numerous containers that were either damaged and unable to be closed, or left open. Reuben Aff. ¶¶ 207-208; Exh. E, pp. 4, 5, 15, and 19-20; Exh. G, pp. 4, 5, 10 and 17-20.

In their respective answers, respondents denied the allegations. Answer, ¶ 2; JS Answer, ¶¶ 250-251. In their submissions in opposition to the Motion, respondents did not address these allegations specifically.

Ruling: As to the sixteenth cause of action, Department Staff's motion is granted. Apart from the denials in their answers, and general assertion that the material at the Facility was not hazardous waste, respondents did not raise a factual issue that would require adjudication, sufficient to warrant denial of the Motion in light of the proof offered by Department Staff.

Seventeenth Cause of Action (All Respondents)

In the seventeenth cause of action, Department Staff alleged that all respondents failed to have a contingency plan. Complaint, ¶¶ 254-258. Section 373-3.4 of 6 NYCRR requires owners and operators of all hazardous waste facilities to have a contingency plan. According to Department Staff, no contingency plan was provided to Department Staff during any of the inspections, nor was any such plan identified. Complaint, ¶ 255; Reuben Aff., ¶¶ 213-214. Mr. Reuben stated that respondents failed to have a contingency plan since at least December 3, 2015. Reuben Aff., ¶ 215.

Respondents denied the allegations in their respective answers (Answer, ¶ 2; JS Answer, ¶¶ 256-259), but did not allege that such a plan existed, or that one had been provided to Department Staff. Rather, respondent Jonathan Sadkin stated that he had no authority over the operations at the Facility, and the remaining respondents relied upon the arguments already discussed and rejected above, primarily that the materials on-site were not solid or hazardous waste.

Ruling: Department Staff's Motion with respect to the seventeenth cause of action is granted. Department Staff has shown that respondents did not have a contingency plan required pursuant to Section 373-3.4 of 6 NYCRR.

Eighteenth Cause of Action (All Respondents)

In the eighteenth cause of action, Department Staff alleged that all respondents failed to activate emergency procedures. Complaint, ¶¶ 261-263. Section 373-3.4(g) of 6 NCYRR requires that owners and operators ensure that whenever there is an emergency, the emergency coordinator immediately activates emergency procedures. According to Mr. Reuben, at least since February 19, 2015, he observed numerous releases, spills, and containers that should have been addressed as emergencies under the emergency procedures. Reuben Aff., ¶ 217. Mr. Reuben stated that if respondents had activated the emergency procedures, the spills would have been addressed, through removal and/or cleanup. Reuben Aff., ¶ 218; Exh. G, pp. 5, 17, and 18.

Respondents denied the allegations in their answers. Answer, ¶ 2; JS Answer, ¶ 263. Other than these denials, respondents did not offer any evidence to rebut Mr. Reuben's statements.

Ruling: Department Staff's Motion as to the eighteenth cause of action is granted. Department Staff met its burden to show that respondents failed to activate emergency procedures. Respondents did not come forward with evidence to support their claim that there are material facts in dispute that would require a hearing.

Nineteenth Cause of Action (Operating Respondents)

In the nineteenth cause of action, Department Staff alleged that the Operating Respondents failed to file land disposal notices. Complaint, ¶¶ 267-268. Pursuant to Section 376.1(g)(1)(viii) of 6 NYCRR, a generator must determine if waste must be treated before land disposal.[9] In his affidavit, Mr. Reuben stated that he searched the Department's records, and did not find any land disposal notices filed by Operating Respondents. Reuben Aff., ¶ 222. Moreover, Mr. Reuben stated that Operating Respondents did not make any waste determinations on any of the waste, or provide waste determinations of land disposal notices to Department Staff. Reuben Aff., ¶¶ 221-224. As a result, according to Mr. Reuben, Operating Respondents had not made any waste determinations, or provided the Department with land disposal notices since at least February 19, 2015. Reuben Aff., ¶ 221 and 223.

In their respective Answers, Operating Respondents denied the allegations, but did not provide any details or response to the specific allegations in the Complaint. Answer, ¶ 2; JS Answer, ¶¶ 268-270.

Ruling: Department Staff's Motion is granted as to the nineteenth cause of action. Operating Respondents have not provided evidence sufficient to rebut the proof Department Staff offered, and therefore have not established that there are material facts in dispute.

Twentieth Cause of Action (Operating Respondents)

In the twentieth cause of action, Department Staff alleged that Operating Respondents failed to store universal waste batteries in a container, as required by Section 374-3.2(d)(1)(i) of 6 NYCRR. Complaint, ¶¶ 272-274. Pursuant to the regulation, small quantity generators of universal waste must manage universal waste batteries in a manner that prevents the release of any universal waste or component of a universal waste to the environment. In the Reuben Affidavit, Mr. Reuben stated that Department Staff observed universal waste at the Facility, including batteries improperly stored and without appropriate labels. Reuben Aff., ¶¶ 225-229.

Operating Respondents denied the allegations, but did not provide any specific facts in response to Department Staff's Motion to rebut the statements in the Reuben Affidavit. Answer, ¶ 2; JS Answer, ¶ 275.

Ruling: Department Staff's Motion is granted as to the twentieth cause of action. Operating Respondents' denials were not discussed further in their responses to the Motion, and did not rebut the statements in the Reuben Affidavit. There are no material facts in dispute that require adjudication.

[9] "Land disposal" is defined at Section 376.1(b)(1)(iii) as "placement in or on the land, except in a corrective action management unit or staging piles, and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, land treatment facility, salt dome formation, salt bed formation, underground mine or cave, injection well, or placement in a concrete vault or bunker intended for disposal purposes."

Twenty-First Cause of Action (Operating Respondents)

The twenty-first cause of action alleged that the Operating Respondents failed to label universal waste batteries. Complaint, ¶¶ 277-279. Section 374-3.2(e)(1) of 6 NYCRR requires a generator of hazardous waste to label batteries as "Universal Waste Batteries" or "Used Batteries." Mr. Reuben stated that Department Staff observed used and waste batteries in various locations throughout the Facility. Reuben Aff., ¶ 228. The used batteries were not collected or labeled as required by the regulation. Id., ¶¶ 227-229.

Jonathan Sadkin denied the allegations. JS Answer, ¶ 280. In their Answer, the other Operating Respondents did not reply to Paragraph 279 of the Complaint, which stated that "Operating Respondents, as the generator(s) of universal waste violated 6 NYCRR 374-3.2(e)(1) by failing to label the container(s) of universal waste." Nevertheless, the Answer contains a general denial at Paragraph 42, which states that "[a]s to any paragraphs not previously admitted, denied, or for which Respondents lack knowledge in order to answer, respondent deny such paragraphs." None of the respondents offered any specific facts to rebut the evidence offered by Department Staff.

Ruling: Department Staff's Motion is granted with respect to the twenty-first cause of action. Department Staff offered proof sufficient to establish the violation, and that proof was not rebutted by respondents. There are no issues of material fact to be adjudicated.

Affirmative Defenses

As discussed above, respondents (other than respondent Jonathan Sadkin) raised six affirmative defenses in their answer. Following Department Staff's motion for clarification of those defenses and a ruling by the ALJ, respondents withdrew their first and second affirmative defenses in respondents' December 14, 2018 clarification (the "Clarification"). The Clarification did not address the third and sixth affirmative defenses, which the ALJ had ruled amounted to a denial of liability and were not therefore properly pleaded as affirmative defenses. Accordingly, this ruling and summary report addresses only the fourth and fifth affirmative defenses.

The fourth affirmative defense alleged that "[t]he activities of the Respondents positively impacted the environment, since otherwise such materials may not have been resold and may have had to have been sent to a disposal facility." Respondents' Answer, ¶ 4, p. 9. In their Clarification, respondents contended that "this affirmative defense is asserted in the nature of a legal argument why Respondents should be granted leniency in terms of the relief sought by Department Staff." Clarification, ¶ 3.

In his affidavit, Donald Sadkin asserted that "[t]he service I provided was good for the economy, and good for the environment, and the materials that I purchased, literally millions of pounds, did not have to be disposed of in a landfill or by some other method." Sadkin Aff., ¶ 10. Donald Sadkin went on to argue that his business allowed small businesses to purchase raw materials needed for their end products less expensively than if the materials were purchased directly from the initial manufacturer. According to Donald Sadkin, this allowed these businesses "to continue operations at a profitable level, and also allowed[ed] a large

manufacturer of the material to receive cash flow of that material instead of it being a significant cost to the company if it had to be disposed of." Id.

In response, Department Staff contended that it was still unclear whether respondents intended to argue that being a recycler was an affirmative defense, or rather a factor to be considered in assessing the appropriate penalty. Department Staff asserted that respondents' claim was false, because the regulations state that a recyclable "means solid waste that exhibits the potential to be used repeatedly."[10] Department Staff pointed out that the affidavit of Donald Sadkin that was offered in the SAO proceeding expressly stated that none of the materials at the Facility were waste, and therefore those materials do not fall within the regulatory definition.

Department Staff went on to note that respondents never registered as a recycler, or notified the Department that they were claiming an exemption from the hazardous waste regulations pursuant to Section 371.1(c)(7). Department Staff also maintained that respondents' recycling argument was precluded because it was not raised in the SAO proceeding.

The fourth affirmative defense, as clarified by respondents, is not directed towards respondents' liability, but rather towards the penalty amount to be assessed. As discussed below, given the significant number of violations that have been established at the Facility, and the fact that Department Staff has not sought the maximum civil penalty, this summary report and order recommends that the Commissioner impose the $2,500,000 penalty that Department Staff has requested. The fourth affirmative defense should be dismissed.

The fifth affirmative defense stated that Department Staff

> improperly directed that all of the materials at the facility be either reacquired by the entities that the materials were purchased from or otherwise dispose[d] of in landfills. Since the materials on site were salable materials, it was improper for the DEC to require that such materials could not be sold by Respondent Sadkin or Morgan, and in fact put him out of business, and made him destitute, by such requirement, which was unnecessary and punitive.

Respondents' Answer, ¶ 5, p. 9. In their Clarification, respondents contended that the fifth affirmative defense "relates to any request for costs recovery [by the Department] as well as any fine or penalty that would be requested. . . . The value of the property that Respondents were not able to sell should be considered a set off against any fine, penalty, or costs recovery action." Clarification, ¶ 4. Respondents did not cite any authority in support of this argument.

Department Staff responded that this was not an affirmative defense, but a denial of liability, and that the argument that the chemicals and materials at the Facility were not waste, but saleable material, was precluded by the doctrine of collateral estoppel. According to Department Staff, respondents' claim that the Department required respondents to dispose of the

[10] Department Staff cited to the definition at Section 360.2 of 6 NCYRR under the solid waste regulations that were in effect prior to 2017. The current definition states that "recyclable" means "a component of waste which exhibits the potential to be recycled." Section 260.2(b)(220).

materials on-site, or allow that material to be re-acquired by the original manufacturer, was "patently false." Department Staff's Memorandum of Law, at 46. Department Staff pointed out that if the respondents could have emptied the Facility by selling off the contents prior to the issuance of the SAO, "Department Staff would have permitted that." Id., at 47. Department Staff went on to observe that "[r]espondents failed to sell the material before the SAO, which necessitated the SAO." Id. Noting that the Department and USEPA worked with numerous companies to encourage them to reclaim their materials to avoid disposal costs, the Department "did not issue any orders or directives relative to these companies and these companies acted voluntarily." Id.; Reuben Aff., ¶ 25.

With respect to respondents' arguments regarding a penalty offset, Department Staff countered that this proceeding is not a cost recovery action. Department Staff pointed out that "[w]hile the EPA committed federal resources to complete the cleanup and the EPA may seek cost recovery, the pending DEC enforcement matter specifically addresses the penalties to be assessed by DEC for the outstanding violations of applicable State law and regulations." Department Staff's Memorandum of Law, at 48. Department Staff's arguments with respect to the fifth affirmative defense are persuasive, and this defense should be dismissed.

In his Answer, Jonathan Sadkin raised forty-four affirmative defenses, including a reiteration of the statements in his affidavit. Those defenses and statements were discussed above, and were unaccompanied by any supporting documentation. Consequently, the Commissioner should find that that Jonathan Sadkin failed to raise an issue of fact in those affirmative defenses that would warrant a denial of the Motion, and dismiss those affirmative defenses.

Relief

Department Staff requested that the Commissioner issue an order:

(1) finding that respondents Morgan Materials, Inc. and Donald Sadkin (individually and as CEO) violated the 2005 Order, as set forth in the first cause of action in the Complaint;

(2) finding the Operating Respondents liable for the violations set forth in the second, tenth, nineteenth, twentieth and twenty-first causes of action in the Complaint;

(3) finding all respondents liable for the violations set forth in the third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth causes of action in the Complaint;

(4) directing all respondents to fully cooperate with the Department, USEPA and any other agencies and contractors for the Department and USEPA, including providing all record of receipts, inventory and documentation of sales, and disposal of any material or wastes from the Facility, respondents' financial records, documentation of any insurance naming any of the respondents as insureds, any and all corporate records, and records regarding the ownership of respondents' properties;

(5) enjoining all respondents from conducting any further business or activities of any kind within the State of New York pertaining to the handling, processing and storage of any waste, except for activities related to the requirements of the Commissioner's Order;

(6) directing all respondents to submit a written work plan to propose hazardous and solid waste storage areas, including construction requirements for any containment, and plans to meet all Large Quantity Generator requirements; and directing all respondents to comply with the requirements of Section 5 until the Department approves such plans;

(7) directing all respondents to come into compliance and construct storage areas and implement the requirements for a Large Quantity Generator:

(8) directing respondents Morgan Materials Inc. and Donald Sadkin, as CEO and Donald Sadkin, individually, to complete and submit for approval an updated Management System Plan ("MSP") for review and approval of any future operations;

(9) directing all respondents to comply with Section 5 until the approval of an updated MSP;

(10) directing all respondents to comply with Section 5 until an accurate and up to date inventory has been reviewed and approved by the Department in writing;

(11) directing all respondents to document and certify compliance with all storage requirements, including compatibility requirements under the ECL and any applicable requirements;

(12) directing all respondents to install fire suppression and undertake other appropriate safety related measures;

(13) directing all respondents to create appropriate pathways within the storage areas and secure any containers that are likely to create a hazard within the Facility;

(14) directing respondent Donald Sadkin to provide a complete list of companies in which he is an owner, partner, member, operator, CEO or manager, including companies operating in unrelated industries;

(15) directing all respondents to comply with the SAO, the 2005 Order, and any other Order of the Commissioner;

(16) directing Morgan Materials Inc. and Donald Sadkin, individually and as CEO, to comply with the 2005 Order and the Commissioner's Order with respect to the Motion, as well as any approved plan pursuant to those Orders;

(17) finding Operating Respondents jointly and severally liable for the violations alleged, and imposing a civil penalty of one million, five hundred thousand dollars ($1,500,000) upon them;

(18) finding Respondent Owners jointly and severally liable for the violations alleged, and imposing a civil penalty of five hundred thousand dollars ($500,000) upon them; and

(19) finding respondent Morgan Materials Inc. and Donald Sadkin individually, jointly and severally liable to pay stipulated penalties in the amount of five hundred thousand dollars ($500,000) for violations of the 2005 Order.

Complaint, ¶¶ I-XIX. The Motion sought the same relief. Motion, ¶¶ I-XXI. As discussed above, this ruling and summary report recommends that the Commissioner decline to find Donald Sadkin liable for the violations of the 2005 Order, or to order him to pay stipulated penalties.

Department Staff's penalty calculation was based upon the Commissioner's Civil Penalty Policy, DEE-1 (June 20, 2990) (the "CPP"). Dougherty Exh. K. According to the CPP, the starting point for any penalty calculation is the computation of the potential statutory maximum for all provable violations. CPP, at IV(A). In its Complaint, Department Staff alleged twenty-one violations, with a maximum statutory penalty of $37,500 per day per violation, pursuant to Section 71-1929 of the ECL. Thus, the maximum penalty for the first day of violation, for twenty-one violations, would be $787,500.

To calculate a multi-day penalty, Department Staff relied upon the USEPA's RCRA[11] Civil Penalty Policy, issued June 2003 (the "RCRA Policy"). Dougherty Exh. J. The RCRA Policy uses a Multi-Day Matrix, which takes into account the potential for harm, as well as the extent of a violator's deviation from statutory and regulatory requirements. RCRA Policy, at 25-26. For example, a violation which has a major potential for harm, with a major deviation from a statute or regulation would call for a minimum daily penalty of $1,100 to $5,500. RCRA Policy, at 26. A violation with a major potential for harm, with only a moderate deviation, would warrant a minimum penalty of $825 to $4,400.

In its Motion, Department Staff took the position that all of the violations alleged in its Complaint had a major potential for harm. Department Staff's Memorandum of Law, at 50-51. With respect to the extent of deviation, Department Staff characterized most of the violations as "major," with the exception of the sixth (failure to prevent accidental ignition: Section 373-3.2(h)(1) of 6 NYCRR); tenth (failure to label containers with an accumulation date: Sections 372.2(a)(8)(ii) and 373-1.1(d)(1)(iii)(c)(2) of 6 NYCRR); nineteenth (failure to file land disposal notices: Section 376.1(g)(1)(viii) of 6 NYCRR); twentieth (failure to store universal waste batteries in a container: Section 374-3.2(d)(1)(i) of 6 NCYRR); and twenty-first (failure to label

[11] The federal Resource Conservation and Recovery Act ("RCRA") governs the generation, management, storage, treatment and disposal of hazardous waste (*see* ECL 27-0900). New York's program to enforce RCRA's requirements has been authorized by the USEPA (s*ee e.g.* http://www.dec.ny.gov/chemical/60828.html).

batteries: Section 374-3.2(e)(1) of 6 NYCRR) causes of action, which Department Staff characterized as "moderate" deviations from statutory and regulatory requirements. Id.

According to the RCRA Policy, "[m]ulti-day penalties are considered mandatory for day 2-180 of all violations with the following gravity based-designations: major-major, major-moderate." RCRA Policy, at 25. Using the 180-day multiplier, Department Staff calculated that the total potential penalty for the RCRA violations alleged in Department Staff's Complaint to be $787,500 ($37,500 per day for 21 violations) times 180 days, or $141,750,000. The total penalty that Department Staff seeks in its Motion is $2,500,000, less than two percent of the total potential maximum.

For "major-major" violations, Department Staff used a baseline penalty amount of $7,090, while for "major-moderate" violations, the baseline penalty was $5,670. Department Staff's Memorandum of Law, at 50-51. According to Department Staff, this resulted in a per day penalty of $141,790[12] for the twenty-one violations alleged in the Complaint. Multiplying the per day penalty by 180 days results in a total potential maximum penalty of $25,522,200. As Department Staff noted, the $2,500,000 penalty Department Staff requested in this matter is less than 10% of the potential maximum.

Referring to the CPP, Department Staff adjusted the penalty based upon respondents' compliance history. Dougherty Aff., Exh. K, CPP at IV(E)(3). As set forth in the Reuben Affidavit, various violations at the Facility resulted in the 2005 Order. Reuben Aff, Exhs. F and H. In addition, Donald Sadkin and Morgan Materials Inc. were involved in stockpiling materials at a site at 373 Hertel Avenue in Buffalo, which was the subject of a response by the USEPA's emergency response team. Dougherty Aff., Exh. A. Department Staff characterized respondents as "repeat offenders" who refused to take responsibility "for what is now over $10-million-dollars worth [sic] of publicly-funded emergency response efforts." Department Staff's Memorandum of Law, at 52. According to Department Staff, respondents' long history of non-compliance warranted the imposition of a significant fine.

With respect to the CPP's requirement (CPP IV(E)(2)) that Department Staff consider a violator's cooperation, Department Staff pointed out that some or all of the respondents not only failed to cooperate, "but actively worked against efforts to abate the dangers that they had created at the Facility." Id. In his affidavit, Mr. Reuben described a visit to the site where he discovered that materials that were to have been removed by Dow Chemical were being diverted to another nearby warehouse. Reuben Aff., ¶¶ 24, 94-98, Exh. X. Upon investigation, Department Staff learned that some or all of the respondents had taken waste that Dow had packaged and were shipping to another warehouse around the corner from the Facility. Reuben Aff., ¶¶ 94-98. Exh. Y. Department Staff asserted that "[r]espondents were not only uncooperative but were actively obstructing regulatory efforts to remedy the situation." Department Staff's Memorandum of Law, at 53.

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[12] The total amount indicated in Department Staff's chart on page 50-51 of the Memorandum of Law is $141,790. In the text explaining the calculations, Department Staff states that "the recommended daily penalty is $141,750," but goes on to multiply $141,790 by 180 days. Department Staff's Memorandum of Law, at 51. This discrepancy is not explained, and is likely a typographical error. In any event, it is of no consequence, because the penalty Department Staff seeks is well below the potential maximum.

Respondents' argument that Department Staff knew about the conditions at the Facility for many years, but took no further action, is unavailing. Pursuant to the terms of the 2005 Order, respondents were to address the conditions at the Facility. It was only after many attempts by Department Staff to bring the Facility into compliance that the SAO issued and was continued by the Commissioner's 2017 Order. Respondents' contention that they made "material changes" in their operation to comply with the 2005 Order, and that there were only "a limited amount of materials that may have been in violation" overlooks the fact that any such changes were insufficient to address the serious deficiencies documented by Department Staff, leading to a response action by USEPA.

The CPP also requires consideration of the economic benefit that a respondent may realize as a result of delayed compliance, and the enhanced value of a business or real property. CPP at IV(C)(1). Department Staff noted that waste was removed from respondents' property at a cost of over $3 million, and "while these are costs that EPA can recover, these costs also represent the disposal costs that Respondents avoided." Department Staff's Memorandum of Law, at 53. Additional costs were assumed by private entities who voluntarily removed approximately 9 million pounds of waste. Reuben Aff., ¶ 26, Exh. E.

Once the Facility was emptied, respondents sold the building in November of 2019 for approximately $675,000. Dougherty Aff., Exh. M; Sadkin Aff., ¶ 47. Respondents also avoided the costs of training personnel, maintaining records, and providing fire prevention and emergency equipment in the building. Reuben Aff., ¶ 203. Department Staff calculated that respondents' economic benefit "was well in excess of $10 million dollars." Department Staff's Memorandum of Law, at 54. Department Staff concluded that the penalty requested in the Complaint and on the Motion was merited because of respondents' long history of egregious non-compliance.

In his affidavit, Donald Sadkin stated that "[s]ince the Department closed down my business, and did not allow me to sell the materials on-site instead of asking the companies I purchased the materials from [to] retrieve those materials or the EPA [to] dispose of those materials that in fact were saleable, I have had no income from my business since the Summary Abatement Order." Sadkin Aff., ¶ 45. He stated that since that time, his only income is from Social Security payments, "and a small income from land that I own in Wheatfield, New York," which he stated was independent of the Morgan Materials business. Id., ¶ 46.

Attached to the Sadkin Affidavit is a July 16, 2020 letter from Gary Kriner, CPA, to Donald Sadkin's counsel. Sadkin Aff., Exh. B. That document states as of the date of the letter, Donald Sadkin's rental income for 2020 was $1,920, and that his most recent Social Security payment was $2,771. Id. His 2019 income (including one-time payments from a sale of property ($25,000) and rental income ($35,000) was $93,924.

Donald Sadkin acknowledged that during the last year, the Vulcan Street property was sold for approximately $675,000. Nevertheless, he stated that "[w]hile this is true, the Department failed to mention that $650,000 of the sale went to pay back taxes and utilities, and I personally received only $25,000." Sadkin Aff., ¶ 47. He stated further that his sole assets were

the warehouse that he rents out, and the land in Wheatfield, and that he does not own a home or a car. Sadkin Aff., ¶ 48.

In his Answer, Jonathan Sadkin included a number of statements captioned "Mitigating Circumstances." JS Answer, at 36. These statements were unsworn, and were not supported by any documentation. He stated that he was a married father of two, and is currently employed by his spouse, who is a licensed clinical social worker. JS Answer, p. 36, ¶¶ 1 and 2. He indicated that he manages the office for his wife's therapy business, that he is currently paid $400 per week, and that his wife's total gross income for the past five years was approximately $240,000. Id., ¶¶ 3-5.

According to Jonathan Sadkin, he does not own any interest in real property other than his residence, and he and his wife do not own any vehicles. Id., ¶¶ 6 and 7. He stated that his mortgage is presently $160,000, with a home equity line of credit with a balance of $65,000, but did not provide any documentation as to the total value of the house, his salary, or debts. Id., ¶¶ 9. His retirement assets are worth less than $200,000, and the family's savings are less than $13,000. Id., ¶ 10. They also have "a points-based time share program with a resale value of $15,000.00, which was purchased in 2006." Id., ¶ 8. He concluded that he is not wealthy and does not have the ability to pay a civil penalty. Id., ¶ 12.

In his affidavit, Donald Sadkin asserted that respondents North Sea Mining & Minerals, Morgan Globex, and Orchard Mechanics have no assets and as a result Department Staff cannot recover a penalty from those entities. Sadkin Aff., ¶¶ 28, 29, 33 and 38. These statements are not substantiated by any documentation or other proof.

The Department's Civil Penalty Policy provides that the burden to demonstrate inability to pay rests with the respondent, and goes on to state that "[i]f the violator fails to provide sufficient credible information, Department staff should disregard this factor. An unsupported or inadequately supported claim of inability to pay should not be accepted." CPP, at IV(E)(4). This ruling and summary report recommends that the full amount of the civil penalty requested by Department Staff be assessed. The penalty is well below the potential maximum, is supported by the evidence, and is authorized and appropriate considering the circumstances of this case. Respondents have not offered any detailed documentary evidence or persuasive argument beyond unsupported statements.

In his discretion, the Commissioner may wish to take into account the statements offered by the individual respondents in connection with their assertions as to inability to pay a penalty, although, as noted, those statements are not supported by any documentary evidence in the case of Jonathan Sadkin, and by minimal documentation in the case of Donald Sadkin.

CONCLUSION AND RECOMMENDATION

As discussed above, Department Staff's Motion is granted, except with respect to the imposition of liability for the violations alleged in the first cause of action. Nevertheless, the total penalty Department Staff seeks remains the same, and differs only in the allocation of the

penalty for the violations of the 2005 Order. Because there are no material issues of fact that require adjudication, the Commissioner should grant the relief requested by Department Staff.

/S/

Maria E. Villa
Administrative Law Judge

Dated: January 23, 2021
Albany, New York

Matter of Morgan Materials, Inc. et al.
EXHIBIT CHART

Exhibit No.	Description
Dougherty Affirmation, Exhibit A	March 18, 1997 letter from Michael J. O'Toole, NYSDEC, to Richard Caspe, USEPA, re: request for emergency removal, with attached March 10, 1997 memorandum from Peter Buechi, NYSDEC Region 9, to Dick Koelling, Bureau of Construction Services re: referral to USEPA
Dougherty Affirmation, Exhibit B	December 11, 1997 and February 26, 1999 USEPA press releases re: EPA Superfund removal of drum stockpile from Morgan Materials, Inc.
Dougherty Affirmation, Exhibit C	November 17, 2016 Summary Abatement Order and Hearing Notice
Dougherty Affirmation, Exhibit D	December 6, 2016 letter from Craig A. Slater, Esq. to ALJ Villa re: respondents will not offer any additional witnesses or submit any further exhibits at hearing other than those already offered and submitted by Department Staff
Dougherty Affirmation, Exhibit E	December 12, 2016 letter from Craig A. Slater, Esq. to ALJ Villa re: respondents' waiver of hearing; submission of December 12, 2016 Affidavit of Donald Sadkin (attached) in opposition and request to vacate the summary abatement order
Dougherty Affirmation, Exhibit F	February 6, 2017 Summary Abatement Proceeding Order of the Commissioner, with attached January 4, 2017 Hearing Report
Dougherty Affirmation, Exhibit G	June 11, 2018 Ruling on Motions to Dismiss
Dougherty Affirmation, Exhibit H	October 9, 2018 Answer (Respondents other than Jonathan Sadkin)
Dougherty Affirmation, Exhibit I	December 14, 2018 clarification of affirmative defenses
Dougherty Affirmation, Exhibit J	June 23, 2003 memorandum from John Peter Suarez, Assistant Administrator, USEPA, to Regional Counsel, Region Enforcement Division Directors, and waste Management Division Directors, re: revisions to the 1990 RCRA Civil Penalty Policy, with attached revised policy (June 2003)
Dougherty Affirmation, Exhibit K	DEE-1: *Civil Penalty Policy* (June 20, 1990)
Dougherty Affirmation, Exhibit L	May 14, 2013 memorandum from Betsy Devlin, Director, Materials Recovery and Waste Management Division, USEPA, to RCRA Division Directors, RCRA Enforcement Managers, and Association of States and Territorial Solid Waste Management Officials re: Checklist to Assist in Evaluating Whether Commercial Chemical Products Are Solid and Hazardous Waste under RCRA
Dougherty Affirmation, Exhibit M	December 29, 2019 article: "Erie County Real Estate Transactions" (*Buffalo News*)
Reuben Affidavit, Exhibit A	Resume: Peter Reuben

Exhibit No.	Description
Reuben Affidavit, Exhibit B	December 5, 2016 report from Gezahegne Bushra, On Scene Coordinator, to Judith Enck, Regional Administrator, et al., re: Morgan Materials response
Reuben Affidavit, Exhibit C	November 21, 2016 final disconnect notice from National Grid to Morgan Material Inc. [sic]
Reuben Affidavit, Exhibit D	November 30, 2016 letter from Gezahegne Bushra, OSC to National Grid re emergency removal action
Reuben Affidavit, Exhibit E	March 9, 2018 memorandum from Gezahegne Bushra OSC to federal and NYS State officials (Peter Lopez, USEPA Region 2 RA, et al.), re: progress (disposal/recycling) – Morgan Materials
Reuben Affidavit, Exhibit F	Order on Consent No. R9-20010306-21 (effective date January 31, 2005)
Reuben Affidavit, Exhibit G	Site visit photographs (2/2015, 4/2016, 7/2016, 10/2016)
Reuben Affidavit, Exhibit H	November 2005 Management System Plan ("MSP") for Morgan Materials Inc. Vulcan Street Facility
Reuben Affidavit, Exhibit I	November 15, 2015 monthly report with "over five years" list
Reuben Affidavit, Exhibit J	October 15, 2015 monthly report
Reuben Affidavit, Exhibit K	November 30, 2015 e-mail from Tracy McLaverty to Peter Reuben and Nelson Schnabel re: error in last return (corrected schedule attached)
Reuben Affidavit, Exhibit L	December 16, 2015 monthly report
Reuben Affidavit, Exhibit M	January 15, 2076 [sic, probably 2016] monthly report
Reuben Affidavit, Exhibit N	February 15, 2016 monthly report
Reuben Affidavit, Exhibit O	March 15, 2016 monthly report
Reuben Affidavit, Exhibit P	April 16, 2016 monthly report
Reuben Affidavit, Exhibit Q	May 16, 2016 monthly report
Reuben Affidavit, Exhibit R	June 15, 2016 monthly report
Reuben Affidavit, Exhibit S	July 21, 2016 monthly report
Reuben Affidavit, Exhibit T	October 2015 Management System Plan
Reuben Affidavit, Exhibit U	April 26, 2016 Violation Notice (Town of Tonawanda, Fire Safety)
Reuben Affidavit, Exhibit V	July 15, 2016 e-mail from Guy Sadkin to Peter Reuben, attaching inventory report
Reuben Affidavit, Exhibit W	August 9, 2016 letter from Mark Mallick, NYS Homeland Security and Emergency Services, to Peter Reuben, NYSDEC, re: listing of violations of the NYS Fire and Building Code
Reuben Affidavit, Exhibit X	October 6, 2016 letter from Timothy J. Greenan, Esq. to Jennifer Dougherty, Esq. re: failure to reach agreement with Morgan Materials
Reuben Affidavit, Exhibit Y	Photographs of Dow waste and bills of lading (October 10, 2016)
Sadkin Affidavit, Exhibit A	July 14, 2020 letter from Gary Kriner, CPA re: sales 2014-2016)
Sadkin Affidavit, Exhibit B	July 16, 2020 letter from Gary Kriner, CPA re: Donald Sadkin income