

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

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

**RULING ON MOTION FOR  
ORDER WITHOUT  
HEARING**

DEC Case Nos.  
R2-20150202-52 and  
R2-20150409-231

- by -

**CAROLEI REALTY L.L.C.,**

Respondent.

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Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (John K. Urda, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- No appearance for respondent

**Proceedings**

By notice of motion for order without hearing in lieu of complaint dated October 30, 2015, staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent Carolei Realty L.L.C. (respondent) for alleged violations of ECL article 17, 6 NYCRR part 612, Navigation Law article 12 and 17 NYCRR part 32. On October 30, 2015, Department staff served its notice of motion, supporting statements and exhibits on the respondent by certified mail return receipt requested.

Respondent received the certified mail on November 2, 2015. The notice of motion instructed respondent that a written

response must be served within twenty days of respondent's receipt of the motion. Respondent has not responded to the motion.

By letter dated December 9, 2015, Chief Administrative Law Judge James T. McClymonds advised Department staff and respondent that the matter had been assigned to me.

Staff's Papers

Department staff's motion for order without hearing in lieu of complaint consists of the notice of motion; affirmation of John K. Urda (Urda Affirmation), dated October 30, 2015; the affidavit of Andre Obligado (Obligado Affidavit), sworn to October 30, 2015, the affidavit of Brian Falvey (Falvey Affidavit), sworn to October 30, 2015, and an affirmation of service dated November 30, 2015. The Urda Affirmation sets forth six causes of action and has the following exhibits attached:

Exhibit A - NYS Department of State, Division of Corporations, Entity Information Sheet for Carolei Realty L.L.C., current through October 28, 2015.

Exhibit B - Deed conveying 2561-2585 Boston Road (also known as 800-816 Allerton Avenue), Bronx, New York (site) to Carolei Realty Corp, dated January 23, 1970;  
- Deed conveying the site to Carolei Realty Partnership, dated April 17, 1979; and  
- Deed conveying the site to Carolei Realty L.L.C., dated November 1, 2013.<sup>1</sup>

Exhibit C - Petroleum Bulk Storage (PBS) Program Facility Information Report for the facility located at 2561-2571 Boston Road, Bronx, New York, printed October 29, 2015 (PBS #2-604170 for five 550-gallon underground PBS tanks;  
- PBS Certificate issued to Carolei Realty Partnership on July 21, 1999 with an expiration date of July 21, 2004 (PBS #2-604170 for five 550-gallon underground PBS tanks); and  
- PBS Program Facility Information Report for facility located at 800 Allerton Avenue, Bronx,

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<sup>1</sup> Each deed also identifies the site by Bronx County Tax Block 4440 Lot

New York, printed October 29, 2015 (PBS #2-605939 for one 550-gallon underground PBS tank).

- Exhibit D - Email dated February 23, 2015 from Ariel Czemerinski, PE to Michael DiGiulio, DEC Fellow Attorney;
- email dated February 23, 2015 from Michael DiGiulio to Ariel Czemerinski;
  - email dated March 2, 2015 from Michael DiGiulio to Chris Carpentieri; and
  - email dated March 11, 2015 from Michael DiGiulio to Chris Carpentieri.
- Exhibit E - Letter from John K. Urda to Carolei Realty LLC dated June 30, 2015 (with USPS tracking and signed return receipt attached).
- Exhibit F - Order on Consent, Carolei Realty Partnership, respondent, signed and dated May 2, 2008.

The Obligado Affidavit has the following exhibits attached:

- Exhibit A - NYSDEC Spill Report, Spill No. 9902856, printed October 29, 2015 (four pages with staff notes from July 9, 1999 to January 5, 2015).
- Exhibit B - Correspondence from Harbor Environmental to Carolei Realty, dated July 1, 1999 re: spill remediation and tank removal with fourteen photos, waste manifest and PBS Application (dated June 7, 1999) attached.
- Exhibit C - Correspondence from Steven Sangesland, DEC Environmental Engineer-1, to Harbor Environmental, dated July 9, 1999 re: spill #9902856 closure.
- Exhibit D - Remedial Investigation Report, "Oseda", 824 Allerton Avenue, Bronx, New York, NYSDEC Spill #02-30029, dated November 2011, prepared for Gasetaria Oil Corp by J.C. Broderick & Associates, Inc.
- Exhibit E - NYSDEC Spill Report, Spill No. 1110342, printed September 17, 2015 (two pages with staff notes from November 21 and 23, 2011; December 1 and 29, 2011; and January 30, 2012).

- Exhibit F - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty L.L.C. and Carolei Realty Partnership, dated November 23, 2011 re: Spill No. 1110342.
- Exhibit G - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty L.L.C., dated January 31, 2012 re: reopening Spill No. 9902856 and required site investigation.
- Exhibit H - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty L.L.C., dated April 6, 2012 re: Spill No. 9902856 and requesting signed Stipulation.
- Exhibit I - Stipulation for Spill No. 9902856, Carolei Realty L.L.C., respondent, signed August 14, 2012, with corrective action plan attached.
- Exhibit J - Correspondence from AMC Engineering to Andre Obligado, dated November 26, 2012 with Subsurface Investigation Report attached re: Spill No. 99-02856.
- Exhibit K - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty Partnership, dated January 4, 2012 re: Subsurface Investigation Report and requesting investigation work plan.
- Exhibit L - Correspondence from AMC Engineering to Andre Obligado, dated August 19, 2013 with Supplemental Subsurface Investigation Report attached.
- Exhibit M - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty Partnership, dated October 3, 2012<sup>2</sup> re: August 19, 2013 Supplemental Subsurface Investigation Report and requesting remedial action work plan.
- Exhibit N - Correspondence from Chris Carpentieri & Associates LLC to Andre Obligado, dated March

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<sup>2</sup> The letter was mistakenly dated October 3, 2012 rather than October 3, 2013 (see Obligado Affidavit at ¶ 24).

19, 2014 re: response to staff's October 3, 2012 correspondence.

Exhibit O - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty Partnership, dated April 10, 2014 re: Spill No. 9902856, violation of Stipulation and need for remedial action work plan.

Exhibit P - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty Partnership, dated July 9, 2014 re: Spill No. 9902856 and continuing need for remedial action work plan.

Exhibit Q - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty Partnership, dated September 30, 2014 re: Spill No. 9902856 and continuing need for remedial action work plan.

Exhibit R - Correspondence from Andre Obligado, DEC Engineering Geologist 1, to Carolei Realty LLC and Carolei Realty Partnership, dated December 14, 2014 re: Spill No. 9902856 and continuing need for remedial action work plan.

The Falvey Affidavit has the following exhibits attached:

Exhibit A - Notice of Violation from Brian Falvey, DEC Region 2, to Carolei Realty LLC, dated November 10, 2014.

Exhibit B - NYSDEC Pre-Work Notification for Bulk Storage (PBS or CBS) Tank Installation, Closing, Repair or Reconditioning, dated March 5, 2015 submitted by AMC Engineering, PLLC and Carolei Realty.

Exhibit C - Correspondence from AMC Engineering, PLLC to Brian Falvey, PE, dated May 6, 2015 re: Tank Closure and attached Closure Report for PBS No. 2-605939.

Exhibit D - PBS Application submitted by Carolei Realty dated May 11, 2015.

Attached as Exhibit A to the November 30, 2015 affirmation of service is a copy of the signed USPS return receipt and a copy of the USPS Tracking information confirming the date respondent received Department staff's motion papers.

### Staff's Charges

Department staff alleges that respondent violated the following:

1. Navigation Law § 173 for discharging petroleum at the site (first cause of action);
2. Navigation Law § 176 and 17 NYCRR 32.5 for failing to immediately clean up the spill at the site (second cause of action);
3. Stipulation, R2-20120809-488, dated August 14, 2012 for failing to submit a remedial action work plan (third cause of action);
4. ECL 17-1009(2) and 6 NYCRR 612.2(a)(1) for failing to register the installation date, tank spill prevention, pipe secondary containment and pipe leak detection for the waste oil tank (fourth cause of action);
5. ECL 17-1009(2) and 6 NYCRR 612.2(a)(2) for failing to renew the registration of the waste oil tank (fifth cause of action); and
6. Order on Consent, PBS No.: 2-605939SWO, dated May 2, 2008 for failing to renew the facility registration (sixth cause of action).

Based upon these alleged violations, Department staff seeks an order: finding respondent in violation of the ECL, Navigation Law and NYCRR titles 6 and 17; assessing a penalty of \$117,500; and directing respondent to clean up and remove the subject contamination from the spill under a Department approved work plan and such other and further relief as may be deemed just, proper and equitable under the circumstances.

To date, the Office of Hearings and Mediation Services has not received a reply from respondent regarding Department staff's motion. Accordingly, staff's motion is unopposed.

## FINDINGS OF FACT

1. This matter concerns property located at 2561-2585 Boston Road, Bronx, New York, also known as 800-815 Allerton Avenue, Bronx, New York and Bronx County Tax Block 4440, Lot 71 (site). (Urda Affirmation at ¶ 4, Exhibit B.)
2. Respondent Carolei Realty L.L.C. is an active domestic limited liability company in the State of New York. The company was formed December 26, 2000. (Urda Affirmation at ¶ 3, Exhibit A.)
3. On January 23, 1970, Edward G. Galian, Referee, by deed, transferred all right, title and interest in the site to Carolei Realty Corp. The deed is recorded in the Office of the Registrar of the City of New York at Reel 125 Page 770. (Urda Affirmation at ¶ 4, Exhibit B.)
4. On April 17, 1979, Carolei Realty Corp., by deed transferred all right, title and interest in the site to Luigi Ciardullo, John Ciardullo, Joseph Ciardullo, Franco Ciardullo, Frank Falsetta, Louis Falsetta and John Petrozza, doing business as a partnership under the trade name Carolei Realty Partnership. The deed is recorded in the Office of the Registrar of the City of New York at Reel 338 Page 1557. (Urda Affirmation at ¶ 4, Exhibit B.)
5. On November 1, 2013, John Ciardullo, Joseph Ciardullo, Franco Ciardullo, John Petrozza, Frank Falsetta, Louis Falsetta, and Rosanna Ciardullo, Alfonso Ciardullo and Daniela Ciardullo as surviving heirs of law of Luigi Ciardullo, doing business as a partnership under the trade name Carolei Realty Partnership, transferred all right, title and interest in the site to Carolei Realty L.L.C., the facility's current owner. The deed is recorded in the Office of the Registrar of the City of New York at City Register File No. 2013000468180; Document ID: 2013111300191001. (Urda Affirmation at ¶ 4, Exhibit B.)
6. Mr. John Ciardullo was the managing member of respondent when the site was conveyed to respondent. (Urda Affirmation, Exhibit B - RP5217NYC at 3.)
7. The site contained five unregistered 550-gallon underground PBS tanks used for the storage of gasoline. Harbor Environmental, Inc. (Harbor Environmental), a contractor for Carolei Realty Partnership, removed the

tanks from the site in June 1999. During the tank removal, Harbor Environmental noted a spill and reported it to the Department. The Department opened spill number 9902856.<sup>3</sup> (Urda Affirmation at ¶ 6; Obligado Affidavit at ¶¶ 5 and 6, Exhibit A.)

8. The installation date of the five unregistered PBS tanks is unknown, but underground storage tanks have been located at the site since 1929. (Obligado Affidavit, Exhibit J at 7.)
9. The site has an area of 13,057 square feet. The site is improved by a one-story building with an area of 12,310 square feet. The building is occupied by multiple commercial tenants including a garage and auto shop, a car wash, an auto sound and design retailer, a dry cleaner, liquor store, barbershop, chiropractic office and real estate office. (Obligado Affidavit, Exhibit J at 6.)
10. Spill number 9902856 was remediated and Department staff issued a spill closure letter to Harbor Environmental on July 9, 1999. Department staff expressly stated that the closure letter "does not, in any way, exempt the spiller from unforeseen, or future, environmental problems at this site; either directly related or unrelated to the contamination source which initiated this remediation." (Urda Affirmation at ¶ 7; Obligado Affidavit at ¶¶ 7 and 8, Exhibits A, B and C.)
11. Harbor Environmental registered the five 550-gallon PBS tanks as closed and removed, on behalf of Carolei Realty Partnership, the owner of the site in 1999. (Obligado Affidavit, Exhibit B.)
12. The sixth and seventh pages of photographs of the tank removal operations from the Harbor Environmental report show two fill ports remaining in the sidewalk at the site. (Obligado Affidavit, Exhibit B.)
13. An off-site spill investigation conducted in 2011 revealed the presence of a spill at the site. A copy of the remedial investigation report entitled "Oseda", 824 Allerton Avenue, Bronx, New York (Oseda Report) was provided to the Department. (Urda Affirmation at ¶ 8; Obligado Affidavit at ¶¶ 9-11, Exhibits A and D.)

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<sup>3</sup> Carolei Realty Partnership owned the site at this time. Carolei Realty LLC did not exist until December 26, 2000.

14. The Oseda Report established the following:
  - a. The presence of free phase and dissolved phase gasoline in groundwater in two monitoring well borings in the sidewalk at the site;
  - b. Two abandoned underground storage tank (UST) fill ports in the sidewalk at the site; and
  - c. The UST fill ports were sealed and rusted, indicating two USTs were still in place. (Urda Affirmation at ¶ 8; Obligado Affidavit at ¶¶ 9-11, Exhibits A and D.)
15. The two fill ports are the same fill ports photographed in the 1999 Harbor Environmental report referenced in Finding of Fact No. 10. (Compare Obligado Affidavit, Exhibit B photographs with Exhibit C photographs 11 and 12.)
16. Based on the information obtained from the Oseda Report, Department staff opened spill number 1110342 for the site. (Urda Affirmation at ¶ 9; Obligado Affidavit at ¶ 12, Exhibit E.)
17. By letter dated November 23, 2011, Department staff notified the owner, Carolei Realty Partnership, and respondent that contamination had been discovered at the site and directed respondent to perform a subsurface investigation to fully delineate the extent of the contamination. (Urda Affirmation at ¶ 10; Obligado Affidavit at ¶ 13, Exhibit F.)
18. Department staff closed spill number 1110342 and reopened spill number 9902856 on January 30, 2012, and by letter dated January 31, 2012, repeated staff's directive to respondent to perform the required investigation. (Urda Affirmation at ¶ 11; Obligado Affidavit at ¶ 15, Exhibit G.)
19. Respondent failed to comply with Department staff's directive. (Urda Affirmation at ¶ 12; Obligado Affidavit at ¶ 16, Exhibit A.)
20. By letter dated April 6, 2012, Department staff sent a stipulation and corrective action plan to respondent and directed respondent to sign and return the stipulation to the Department by April 30, 2012. (Urda Affirmation at ¶ 13; Obligado Affidavit at ¶ 17, Exhibit H.)

21. Department staff extended respondent's deadline to sign the stipulation until May 31, 2012, but respondent failed to sign the stipulation. (Obligado Affidavit at ¶ 18, Exhibit A at 2.)
22. Department staff visited the site on July 26, 2012 and observed the two abandoned UST fill ports in the sidewalk at the site (see Findings of Fact Nos. 10 and 13). Staff advised respondent that the Department would perform the spill investigation and remediation if respondent did not sign and return the stipulation to the Department. (Urda Affirmation at ¶ 14; Obligado Affidavit at ¶ 19, Exhibit A at 2.)
23. On July 30, 2012, Mr. John Ciardulo, member of respondent, executed the stipulation (Stipulation) on behalf of Carolei Realty L.L.C. The Department executed the Stipulation on August 14, 2012. (Urda Affirmation at ¶ 14; Obligado Affidavit at ¶ 19, Exhibit I.)
24. On behalf of respondent, AMC Engineering performed a subsurface investigation at the site and submitted a subsurface investigation report (SSIR) to the Department dated November 26, 2012 that established the following:
  - a. Petroleum contamination in the soils at the site above the unrestricted use soil cleanup objectives and the restricted residential soil cleanup objectives;
  - b. Groundwater contamination in the vicinity of the two sidewalk fill ports at the site; and
  - c. Free petroleum product was found in monitoring well #3 located across Boston Road and downgradient from the site. (Urda Affirmation at ¶ 16; Obligado Affidavit at ¶¶ 20-22, Exhibit J at 12-14.)
25. Respondent's SSIR recommended that the property be re-excavated to remove impacted materials and rule out the presence of any additional environmental conditions such as abandoned tanks. The report also recommended further investigation to determine the source of the off-site contamination, and if the site is determined to be the source, the report proposes a course of action to mitigate the plume of contamination. (Urda Affirmation at ¶ 16; Obligado Affidavit at ¶ 21, Exhibit J at 14.)
26. Based on staff's review of the SSIR, Department staff

advised Carolei Realty Partnership<sup>4</sup> by letter dated January 4, 2012,<sup>5</sup> that the soil and groundwater contamination found on the site came from an on-site source. Staff also determined that further investigation was needed to determine whether an on-site source was causing the off-site impacts. The Department advised respondent that a remedial action work plan (RAWP) would be required upon completion of the additional investigation. (Obligado Affidavit at ¶ 22, Exhibit K.)

27. AMC Engineering performed a supplemental investigation for respondent and in its supplemental SSIR (SSSIR) concluded that respondent's site was not the source of off-site contamination. (Obligado Affidavit at ¶ 23, Exhibit L.)
28. By letter dated October 3, 2012,<sup>6</sup> staff disagreed with the conclusion reached by respondent's SSSIR as being unsupported by the evidence. Based on the Oseda Report, the SSIR and SSSIR, the lack of compliance with PBS regulations at the site (e.g. no leak detection of tanks, etc.), and comparison of the spill information from the site to information from the Oseda spill, Department staff concluded that respondent's site is the most probable source of the off-site impacts. (Obligado Affidavit at ¶¶ 24-33, Exhibit M.)
29. Department staff determined that the investigation was complete and directed Carolei Realty Partnership<sup>7</sup> to submit, as required by the Stipulation, a RAWP for the on-site and off-site contamination. (Obligado Affidavit at ¶ 33, Exhibit M.)
30. In response to staff's October 3, 2013 letter, Chris Carpentieri argued that the site was not the source of off-site or on-site contamination. Mr. Carpentieri did not identify himself professionally. (Obligado Affidavit

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<sup>4</sup> The letter was addressed to Carolei Realty Partnership, c/o John Ciardullo, 804-806 Allerton Avenue, Bronx, New York 10467 rather than to respondent, Carolei Realty LLC, c/o John Ciardullo, 156 Valentine Street, Yonkers, New York 10704.

<sup>5</sup> The letter was mistakenly dated January 4, 2012 rather than January 4, 2013 (see Obligado Affidavit at ¶ 22).

<sup>6</sup> The letter was mistakenly dated October 3, 2012 rather than October 3, 2013 (see Obligado Affidavit at ¶ 24).

<sup>7</sup> The letter was addressed to Carolei Realty Partnership, c/o John Ciardullo, 804-806 Allerton Avenue, Bronx, New York 10467 rather than to respondent, Carolei Realty LLC, c/o John Ciardullo, 156 Valentine Street, Yonkers, New York 10704.

at ¶ 35, Exhibit N.)

31. Department staff addressed Mr. Carpentieri's assertions in a letter to Carolei Realty Partnership<sup>8</sup> dated April 10, 2014, repeated staff's position and demand for a RAWP within thirty days of receipt of the correspondence. (Obligado Affidavit at ¶ 36, Exhibit O.)
32. By letters dated July 9, 2014 and September 30, 2014 to Carolei Realty Partnership,<sup>9</sup> staff repeated staff's demand for a RAWP to be submitted and extended the deadline. (Obligado Affidavit at ¶¶ 37 and 38, Exhibits P and Q.)
33. On December 14, 2014, Department staff sent its final demand letter to Carolei Realty Partnership and respondent,<sup>10</sup> demanding that the RAWP be submitted to the Department by December 31, 2014. (Obligado Affidavit at ¶ 39, Exhibit R.)
34. To date, respondent has not submitted the RAWP to the Department. (Urda Affirmation at ¶¶ 20-22; Obligado Affidavit at ¶¶ 34-39, Exhibits N-R.)
35. PBS tanks 1, 2, 3, 4, and 5 were removed from the site in 1999. (Urda Affirmation at ¶ 6; Obligado Affidavit at ¶¶ 5 and 6, Exhibits A and B.)
36. PBS tank 001, a 550-gallon underground PBS tank, was used to store waste oil (waste oil tank) at the site. (Urda Affirmation, Exhibit C; Falvey Affidavit at ¶ 5.)
37. The Department issued PBS Certificate Number 2-605939 for the waste oil tank to "Carolei Realty" on June 4, 2001. The certificate expired June 4, 2006. (Urda Affirmation, Exhibit C.)
38. The PBS Facility Information Report for the waste oil tank lists Carolei Realty as the owner. At the time the certificate was issued, Carolei Realty Partnership was the owner of the facility. (Urda Affirmation, Exhibits B and C.)

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<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> The letter was addressed to respondent, Carolei Realty LLC, c/o John Ciardullo, 156 Valentine Street, Bronx, New York 10704. The zip code is correct, but the correct city is Yonkers not the borough of the Bronx.

39. Information relating to the installation date, tank spill prevention, pipe secondary containment and pipe leak detection for the waste oil tank is missing from the PBS Facility Information Report. (Urda Affirmation, Exhibit C.)
40. Carolei Realty Partnership entered into an Order on Consent with the Department, effective May 2, 2008 to address the Partnership's failure to renew the registration for PBS Certificate #2-605939 (the waste oil tank). John Ciardullo, as President of the Carolei Realty Partnership, signed the Order on Consent. (Urda Affirmation, Exhibit F.)
41. Respondent became the owner of the facility on November 1, 2013. (Urda Affirmation, Exhibit B; Finding of Fact No. 5.)
42. On November 10, 2014, Department staff sent a notice of violation to respondent advising respondent that the PBS registration for the waste oil tank was not current or valid and that the registration had expired in 2006. Staff also advised respondent that the tank and connecting piping must be tightness tested within thirty days of the date of the notice of violation. (Falvey Affidavit, Exhibit A.)
43. By pre-work notification dated March 5, 2015, AMC Engineering notified the Department that the waste oil tank would be closed and removed. (Falvey Affidavit, Exhibit B.)
44. AMC Engineering submitted a closure report to the Department dated May 6, 2015 indicating that the waste oil tank had been closed in place due the tank's location under the building and close proximity to the foundation. (Falvey Affidavit, Exhibit C.)
45. Respondent submitted an application, dated May 11, 2015, to register the waste oil tank as closed along with a tank closure affidavit. (Falvey Affidavit, Exhibit C.)
46. Respondent has not responded to Department staff's motion.

## DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when 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. "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." (Matter of Frank Perotta, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report.)

CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. (Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003.) Respondent has not submitted any response to the Department staff's motion and therefore has failed to provide any material fact that would require a hearing.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affidavit from an engineering geologist that describes the violations of the Navigation Law and petroleum spill regulations, 17 NYCRR part 32, and an affidavit of an environmental engineer that describes the violations of ECL 17-1009 and 6 NYCRR part 612.

Based on review of the affidavits and the exhibits attached thereto, I conclude that Department staff's proof presents a prima facie showing, in part, as discussed below.

### Liability

A discussion of respondent's liability for the acts or omissions of the previous owners of the site is warranted before discussing staff's proof related to each cause of action. Department staff claims that respondent Carolei Realty L.L.C. is responsible for the acts or omissions of Carolei Realty Partnership. Department staff bases this in part on the history of the ownership of the site by Carolei Realty Corp., Carolei Realty Partnership and Carolei Realty L.L.C. (see Findings of Fact Nos. 3, 4 and 5). Staff claims the corporation and partnership were predecessors of respondent. Staff's proof

demonstrates the corporation and partnership were previous owners of the site (id). Staff, however, has not provided any proof, and has not made a prima facie showing, that respondent also assumed the liabilities of the corporation or the partnership.

Department staff also claims that respondent is liable for the acts or omissions of the partnership based on the successors and assigns language contained in the order on consent that Carolei Realty Partnership entered into with the Department. The consent order obligated Carolei Realty Partnership to renew the PBS registration of the facility by June 1, 2008. As stated above, Department staff has not provided any proof that the LLC assumed the liabilities of the partnership. Staff has not provided any legal analysis regarding successors and assigns or demonstrated that an order on consent runs with the land and affects all future owners. I conclude that staff has not made a prima facie showing that respondent is liable for Carolei Realty Partnership's violation of the order on consent.

#### A. Petroleum discharge

When the partnership conveyed the real property to respondent, respondent became subject to the strict liability provisions of the Navigation Law. Respondent, as a subsequent owner, is liable for the petroleum discharge at the site (see Matter of White v Regan, 171 AD2d 197, 200 [3d Dept 1991], lv denied 79 NY2d 754 [1992][holding that liability applies even in the absence of evidence that the owner caused or contributed to the discharge]). A subsequent purchaser with constructive knowledge, if not actual knowledge, of the site's previous use as a gas station and petroleum spill history is liable as a discharger (see Matter of Huntington and Kildare, Inc., Order of Commissioner, December 22, 2009, adopting Hearing Report of the Chief Administrative Law Judge at 10-11).

In this case, Mr. John Ciardullo previously owned the site as a partner in the Carolei Realty Partnership, which cleaned up the site from the 1999 petroleum spill (see Findings of Fact Nos. 4, 7, and 10). Mr. Ciardullo is also a member of the current owner, Carolei Realty L.L.C. (see Findings of Fact Nos. 6 and 23). Mr. Ciardullo signed the consent order on behalf of the partnership (see Finding of Fact No. 39) and signed the Stipulation on behalf of respondent (see Finding of Fact No. 23). I conclude that respondent, through its member, had actual knowledge of the previous use of the site as a gas station and

the 1999 petroleum discharge associated with the five removed PBS tanks.

Although respondent did not own the site at the time the spill was reported in 2011, respondent signed the Stipulation to investigate and remediate the spill in July 2012. When the site was conveyed to respondent in November 2013, respondent was fully aware that Department staff determined that the site was the most probable source of on-site and off-site petroleum contamination.

I conclude that Department staff's proof presents a prima facie case demonstrating that respondent discharged petroleum at the site in violation of Navigation Law § 173 (first cause of action).

#### B. Failure to clean up the spill

Spill number 9902856 was reopened on January 30, 2012 and despite staff's repeated requests and directives, respondent has not remediated the spill (see Findings of Fact Nos. 18-34). I conclude that Department staff presents a prima facie case showing respondent has failed to clean up the spill in violation of Navigation Law § 176 and 17 NYCRR 32.5 (second cause of action).

#### C. Failure to comply with Stipulation

The Stipulation signed by respondent requires respondent to submit a remedial action work plan within sixty days of receiving the Department's approval of the remedial investigation report. Department staff received the SSIR from respondent and advised respondent that a supplemental investigation was required and upon completion, a RAWP would be required (see Finding of Fact No. 26). Staff received the SSSIR from respondent and although staff disagreed with the conclusion reached in the SSSIR regarding the source of off-site contamination, Department staff determined the investigation was complete and directed respondent to submit a RAWP within sixty days of staff's October 3, 2013 correspondence (see Finding of Fact No. 29).

Despite repeated requests, respondent has not submitted the RAWP (see Findings of Fact Nos. 32 and 33).<sup>11</sup> I conclude that

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<sup>11</sup> Although several staff letters were addressed to Carolei Realty Partnership rather than Carolei Realty L.L.C., all were sent c/o John Ciardullo (see Findings of Fact Nos. 26, 29, 31 and 32, footnotes 3, 6, 7 and

Department staff has made a prima facie showing that respondent has failed to submit a RAWP in violation of the Stipulation executed by respondent and the Department (third cause of action).

D. Failure to properly register a PBS facility

Staff's fourth cause of action alleges that respondent failed to register the installation date, tank spill prevention, pipe secondary containment and pipe leak detection related to the Waste Oil Tank, in violation of ECL 17-1009(2) and 6 NYCRR 612.2(a)(1). Staff's proof consists of the PBS Facility Information Report for PBS facility #2-605939 that demonstrates the information is lacking on Department records (see Finding of Fact No. 39). Staff did not provide the PBS application for the original registration of the facility.

The proof demonstrates that these violations are attributable to the previous owner of the facility, Carolei Realty Partnership. PBS registrations are non-transferable as stated on each registration certificate. When ownership of a PBS facility is conveyed, the new owner must comply with the registration provisions of ECL 17-1009(2) and the PBS regulations. The new owner, however, does not assume liability for a previous owner's failure to properly register or renew a registration of a PBS facility. The new owner is required to register the facility (see ECL 17-1009[2]) within thirty of transfer of the property to the new owner (see 6 NYCRR 612.2[b]).

When respondent became the owner of the facility on November 1, 2013, respondent was obligated to re-register the facility pursuant to 6 NYCRR 612.2(b) within thirty days of transfer of ownership to respondent. Respondent's obligation to submit a registration application that provides the details required by staff in this instance arises because of the requirements of ECL 17-1009(2) and 6 NYCRR 612.2(b). Although staff did not plead a violation of 6 NYCRR 612.2(b), staff's proof presents a prima facie showing that respondent failed to register the facility in violation of ECL 17-1009(2) (fourth cause of action).

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8). Mr. Ciardullo, a member of respondent, had knowledge of staff's letter requests as some of staff's letters were answered by respondent's consultants (see Findings of Fact Nos. 27 and 30. Staff's final request for the RAWP was sent to respondent (see Finding of Fact No. 33).

Staff maintains that the violation runs from June 4, 2001. I disagree. Although respondent was formed in 2000, staff presented no proof that demonstrates respondent was the owner or operator of the facility prior to November 1, 2013. On this record, the earliest respondent was required to re-register the facility was December 1, 2013. I conclude that by failing to register the facility, respondent's violation of ECL 17-1009(2) runs from December 1, 2013.

E. Failure to renew a PBS facility registration

Department staff alleges that respondent violated 6 NYCRR 612.2(a)(2) and ECL 17-1009(2) by failing to renew the PBS registration for the waste oil tank, which expired June 4, 2006. As discussed above, respondent had no obligation to register the facility until the site was conveyed to respondent on November 1, 2013. Department staff has not made a prima facie showing that respondent was required to renew the PBS registration. Department staff's motion for order without hearing is denied on staff's fifth cause of action.

F. Failure to comply with an order on consent

Department staff also alleges that respondent violated the order on consent by failing to renew the PBS registration for the waste oil tank. As discussed above, staff has not made a prima facie showing that respondent is liable for the partnership's violation of the order on consent. Carolei Realty Partnership failed to renew the registration by June 1, 2008 and was in violation of the order on consent for more than five years before the property was conveyed to respondent on November 1, 2013. Department staff's motion for order without hearing is denied on staff's sixth cause of action.

**RULING**

Based upon the foregoing, my ruling on Department staff's motion is as follows.

1. Department staff's motion for order without hearing dated October 30, 2015 is granted on the issue of liability against Carolei Realty L.L.C. on the following violations:
  - a. Navigation Law § 173 for discharging petroleum at the site (first cause of action);

- b. Navigation Law § 176 and 17 NYCRR 32.5 for failing to clean up the petroleum spill (second cause of action);
  - c. The Stipulation for failing to submit a remedial action work plan to the Department (third cause of action); and
  - d. ECL 17-1009(2) for failing to re-register the facility within thirty days of the transfer of ownership of the facility to respondent (fourth cause of action).
- 2. Department staff's motion for order without hearing on Department staff's fifth and sixth causes of action is denied.
  - 3. I reserve on ruling on the civil penalty and relief requested in Department staff's motion for order without hearing until a hearing is held on the remaining issues.

Accordingly, Department staff's motion for order without hearing is granted in part, as detailed herein. A conference call will be scheduled after the parties have been served with this ruling to schedule the hearing on the remaining causes of action and the requested penalty and relief. In the event Department staff elects not to pursue the remaining causes of action, a summary report will be issued with respect to the requested penalties and relief.

/s/

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Michael S. Caruso  
Administrative Law Judge

Dated: May 20, 2016  
Albany, New York