

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

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

- by -

RULING
DEC Case No.
R2-20180914-340

1084 NY AVE LLC,

Respondent.

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Aldie K. Levine, 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 May 12, 2020, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent 1084 NY Ave LLC (respondent) for alleged violations of ECL article 17 and 6 NYCRR part 613 at respondent's petroleum bulk storage (PBS) facility located at 1084 New York Avenue, Brooklyn, New York (facility). Staff served the notice of motion with supporting papers on respondent by certified mail on May 26, 2020. Respondent received the motion papers on or about May 28, 2020.

Department staff alleges respondent violated the following:

1. 6 NYCRR 613-1.9(a) for failing to maintain an accurate PBS facility registration;
2. 6 NYCRR 613-3.2(a)(4) for failing to properly color code the PBS tank's fill port;
and
3. 6 NYCRR 613-3.3(e) for failing to maintain weekly leak detection records.

Staff's papers consist of a notice of motion for order without hearing and motion dated May 12, 2020, the affirmation of Aldie K. Levine, Esq. (Levine Aff.), dated May 12, 2020, and the affidavit of Leszek T. Zielinski, P.E. (Zielinski Aff.), sworn to March 12, 2020, and attached exhibits A-V (*see* Appendix A attached hereto).

Respondent has not responded to staff's motion papers, although a response was due by June 17, 2020 (*see* 6 NYCRR 622.12[c]).

Staff requests that the Commissioner issue an order: (i) finding that respondent violated the law and regulations as set forth above; (ii) imposing a civil penalty of \$20,000 on respondent; (iii) directing respondent to correct and submit an updated facility registration application to the Department within fifteen (15) days of the service of the Commissioner's order on respondent; (iv) directing respondent to properly color code the tank's fill port within fifteen (15) days of the service of the Commissioner's order on respondent; (v) directing respondent to conduct and maintain the required weekly leak detection monitoring of its PBS tank and submit evidence of the leak detection inspections to the Department within fifteen (15) days of the service of the Commissioner's order on respondent and to keep the weekly leak detection monitoring records on file for three years; (vi) reserving the Department's right to take additional action for violations not specifically alleged in the current proceeding; and (vii) granting such other and further relief as may be just and appropriate under the circumstances (*see* Motion for Order Without Hearing at 2-3).

FINDINGS OF FACT

1. Respondent 1084 NY Ave LLC (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 1084 New York Avenue, Brooklyn, New York (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 5,000 gallons and is located underground. (*See* Levine Aff. ¶¶ 3, 6-7; Zielinski Aff. ¶¶ 9-10; Exhibits A, B, G and I.)
2. Respondent 1084 NY Ave LLC is an active domestic limited liability company. (*See* Levine Aff. ¶ 4; Exhibit H.)
3. On January 23, 2018, CRP New York Avenue LLC and CRP New York Avenue Annex LLC, by deed, transferred all right, title and interest in the facility to respondent 1084 NY Ave LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2018000037989. (*See* Levine Aff. ¶ 6, Exhibit I.)
4. Leszek T. Zielinski is an environmental engineer employed as the supervisor of the Bulk Storage Unit in the Department's Division of Environmental Remediation in DEC Region 2. (*See* Zielinski Aff. ¶ 1.)
5. As part of his duties, Mr. Zielinski supervises, and is responsible for, the Region's petroleum bulk storage (PBS), chemical bulk storage (CBS) and major oil storage facility

(MOSF) programs, and inspects PBS facilities for compliance with ECL article 17 and the PBS regulations. (See Zielinski Aff. ¶¶ 2, 5 and 8.)

6. Tony Ye was formerly employed as an engineer by the Department and inspected respondent's facility located at 1084 New York Avenue, Brooklyn, New York on March 1, 2018. (See Levine Aff. ¶ 8; Zielinski Aff. ¶ 8.)
7. The facility is registered as PBS No. 2-605502 and contains a 5,000 gallon underground PBS tank containing #2 fuel oil. (See Zielinski Aff. ¶¶ 9-10; Exhibits B, G, and T.)¹
8. As a result of his inspection, Mr. Ye found:
 - A. The facility registration was inaccurate because:
 - (i) The registration incorrectly identified the former owner of the facility rather than the current owner 1084 NY Ave LLC;
 - (ii) the tank location is listed as aboveground rather than underground;
 - (iii) the leak detection method is listed as none rather than weepholes;
 - (iv) the secondary containment is listed as none rather than vaulted without access;
 - (v) the tank pumping/dispensing method is listed as suction dispenser rather than on-site heating return system;
 - (vi) the piping location is listed as an aboveground/underground combination rather than aboveground; and
 - (vii) the piping leak detection is listed as exempt rather than other (visual leak detection). (See Zielinski Aff. ¶ 12(i)-(vii); Exhibits A, B, D and I.)
 - B. The fill port for the PBS tank was not properly color coded to identify the petroleum in use at the facility. (See Zielinski Aff. ¶ 15; Exhibits A, C, D and E.)
 - C. Weekly leak detection records were not maintained for at least three years. (See Zielinski Aff. ¶ 17; Exhibits A and C.)
9. Mr. Ye sent a notice of violation to 1084 NY Ave LLC, dated March 2, 2018. (See Zielinski Aff. ¶ 19; Exhibit A.)
10. The notice of violation advised 1084 NY Ave LLC of the violations noted at respondent's facility and directed 1084 NY Ave LLC to submit the following by April 2, 2018: the enclosed registration application and registration fee with the inaccurate information corrected; a photograph showing the fill port had been properly color coded; and a completed weep hole monitoring form for at least one week. (See Zielinski Aff. ¶¶ 19-20; Exhibit A.)
11. On August 9, 2018, Mr. Ye sent a second notice of violation to 1084 NY Ave LLC again directing the facility owner to submit the corrected registration application and proof that the other violations had been corrected to the Department by September 20, 2018. The notice of violation also advised respondent that a settlement conference was scheduled

¹ The Zielinski Aff. states the incorrect PBS facility number (2-328960), but staff's proof demonstrates the correct PBS number is 2-604502. (Compare Zielinski Aff. ¶ 9 and Exhibits B, G and T.)

for September 20, 2018 at 3:00 p.m. at the Region 2 office. (See Zielinski Aff. ¶ 22; Exhibit F.)

12. Respondent did not appear at the September 20, 2018 settlement conference. (See Levine Aff. ¶ 13; Exhibit K.)
13. On September 21, 2018, Department staff sent a cover letter and draft order on consent to respondent to resolve the violations, which were received by respondent on or about September 25, 2018. (See Levine Aff. ¶¶ 14-16; Exhibits K-M.)
14. Respondent did not respond to staff's settlement offer. (See Levine Aff. ¶ 17.)
15. In April 2019, the Department's Office of General Counsel located in the Central Office in Albany, New York, commenced an enforcement proceeding against respondent for respondent's failure to register the facility within thirty days of taking ownership of the facility. That matter was settled by order on consent dated April 23, 2019. (See Levine Aff. ¶¶ 23-24; Exhibits S-T.)
16. Respondent submitted a PBS application, received by Department staff on April 16, 2019, along with the signed order on consent, but did not correct the other inaccurate items on the registration that are the subject of the present proceeding. (See Levine Aff. ¶ 25; Exhibit T.)
17. On May 22, 2019, Region 2 Department staff sent a draft order on consent to respondent with a cover letter advising respondent that respondent must appear for a June 11, 2019 calendar call scheduled in the Region 2 offices for 10:30 a.m. (See Levine Aff. ¶ 18; Exhibits O-P.)
18. Respondent received the calendar call notice on or about May 24, 2019 but did not appear for the June 11, 2019 calendar call. (See Levine Aff. ¶¶ 20-21; Exhibits Q-R.)
19. As of March 12, 2020, respondent has failed to fully correct the PBS facility registration, and the facility has failed to properly color code the tank's fill port and maintain proper leak detection records. (See Zielinski Aff. ¶ 22.)
20. As of May 12, 2020, respondent has not responded to Department staff's May 22, 2019 calendar call notice. (See Levine Aff. ¶ 22.)

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. On an unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the violations alleged in the motion. (*See Matter of Edelstein*, Order of the Commissioner, July 18, 2014, at 2; *see also Matter of Hunt*, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2.)

Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with the affidavit of an environmental engineer who reviewed the PBS facility records including the notices of violations, inspection report and photographs, maintained by the Department and described the violations of the PBS regulations.

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

First Cause of Action

Staff alleges that respondent failed to keep the PBS registration information for the facility updated and current (first cause of action). Department staff has made a prima facie showing, that respondent is the owner of the facility and failed to correct the tank, piping and leak detection information on the facility’s registration. In particular, respondent’s April 10, 2019, PBS application provided information for change of ownership but failed to correct the deficiencies noted in detail by Department staff’s inspection report and notices of violation (*see Findings of Fact Nos. 8(A)(ii)-(vii), 16 and 19; compare Exhibits B and T [section B]*).

In part, subdivision 613-1.9(a) of 6 NYCRR provides that the facility owner must ensure that the registration information identified in subdivision 613-1.9(e) remains current and accurate. Subdivision 613-1.9(e) requires the facility owner to submit information corrections for registered facilities using forms or electronic means as provided by the Department. The forms are available online and at all Department offices. The subdivision identifies the following as information corrections, which require no registration fee: (i) contact information; (ii) class A or class B operator; (iii) tank system status; (iv) tank system equipment; or (v) type of petroleum stored. In this matter, respondent failed to ensure that the PBS registration information remained current and accurate in violation of 6 NYCRR 613-1.9(a). Accordingly, staff’s motion for order without hearing on the first cause of action is granted.

Second Cause of Action

As a result of the March 1, 2018 inspection, Department staff alleges that respondent failed to color code the tank’s fill port in violation of 6 NYCRR 613-3.2(a)(4). Paragraph 613-3.2(a)(4) provides:

(a) Spill and overflow prevention.

* * *

(4) Every UST system fill port must be color coded in accordance with API RP 1637. If a UST system contains petroleum that does not have a corresponding API color code, the facility must otherwise mark the fill port (for example, with stenciled letters) to identify the petroleum currently in the UST system. For any fill port connected to multiple UST systems storing different types of petroleum, the facility may place the marking near the fill port (for example, with a label or placard) to identify the types of petroleum in the UST systems.

Department staff has made a prima facie showing that the fill port at the facility was not properly color coded. That fact, however, raises two issues that must be discussed. First, this facility involves an underground PBS tank (in a vault without access for inspection) and Department staff correctly pleaded violation of subpart 613-3, which applies to underground storage tank systems (*see* Levine Aff. ¶¶ 32 and 43). Staff’s proof, however, cites violation of 613-4.2(a)(4), which applies to aboveground tank systems (*see* Exhibits A and F). The Zielinski Affidavit corrects Mr. Ye’s reference to paragraph 613-4.2(a)(4) without explanation (*see* Zielinski Aff. ¶ 15). Both paragraphs 613-3.2(a)(4) and 613-4.2(a)(4) require fill ports to be color coded. The paragraphs contain some differences in detail that are not relevant to this discussion. Given the similarity in fill port requirements, and pursuant to CPLR 2001, I disregard the inspector’s reference to the incorrect regulatory provision because it does not prejudice a substantial right of respondent.

The second issue involves who is liable for violations of 6 NYCRR subpart 613-3. The tank and operating requirements of 6 NYCRR subparts 613-3 and 613-4 are imposed on the facility, not the facility owner. Paragraph 613-3.2(a)(4) expressly places the obligation of proper color coding on the facility. Whenever the current regulations impose a requirement on a facility, that requirement is imposed “on every operator and every tank system owner at the facility, unless expressly stated otherwise” (6 NYCRR 613-1.2[d]). Respondent’s PBS application identifies a Class A operator (*see* Exhibit T [Section A]). Department staff, however, did not commence this proceeding against the operator. The affirmation and affidavit submitted in support of the motion do not identify a tank owner. Department staff did not submit Section C of respondent’s PBS application, which may have identified the tank owner for the record. Staff did not explain the absence of Section C. Department staff did not provide a copy of the current PBS Certificate, which also may have provided information regarding the tank owner. The Facility Information Report, printed December 2, 2019, contains a column to identify the tank owner, which does not contain any information. In short, Department staff has not pleaded or proven that respondent is an operator or tank owner.

Accordingly, I conclude that Department staff has failed to make a prima facie showing on staff's second cause of action. Staff's motion for order without hearing on staff's second cause of action is denied.

Third Cause of Action

Department staff alleges that respondent violated 6 NYCRR 613-3.3(e) for failing to maintain weekly leak detection records at the facility. Department staff has made a prima facie showing that the weekly leak detection records were not maintained. Paragraph 613-3.3(e) provides:

(e) Leak detection recordkeeping.

Every facility must maintain records demonstrating compliance with all applicable requirements of this section. These records must meet the following requirements:

- (1) the results or records of any sampling, testing, or monitoring must be maintained for at least three years;
- (2) the results of tank and line tightness testing must be retained until the next test is conducted;
- (3) a copy of the results of tank and line tightness testing must be submitted to the department within 30 days after performance of the test(s); and
- (4) written documentation of all calibration, maintenance, and repair of leak detection equipment permanently located on-site must be maintained for at least three years after the servicing work is completed. Any schedules of required calibration and maintenance provided by the leak detection equipment manufacturer must be retained for three years from the date of installation.

The regulation expressly states that the leak detection record keeping requirements are the responsibility of the facility, which as discussed above is imposed on every operator and tank owner.

For the reasons stated above, I conclude that Department staff has failed to make a prima facie showing on staff's third cause of action. Staff's motion for order without hearing on staff's third cause of action is denied.

RULING

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

1. Department staff's motion for order without hearing in lieu of complaint dated May 12, 2020, is granted on the issue of liability against respondent 1084 NY Ave LLC on Department staff's first cause of action for violation of 6 NYCRR 613-1.9(a) for failing to maintain a current and accurate PBS registration.

2. Department staff's motion for order without hearing in lieu of complaint on Department staff's second and third 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 in lieu of complaint until a hearing is held on the remaining causes of action.

Accordingly, Department staff's motion for order without hearing in lieu of complaint is granted in part and denied in part, as detailed herein. I will schedule a hearing on the second and third causes of action and the requested civil penalties and relief.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: September 2, 2020
Albany, New York

APPENDIX A

Matter of 1084 NY Ave LLC
DEC File No. R2-20180914-340
Motion for Order Without Hearing

1. Notice of Motion for an Order Without Hearing, dated May 12, 2020
2. Motion of Order Without Hearing, dated May 12, 2020
3. Affirmation of Aldie K. Levine, Esq. in Support of Motion for Order Without a Hearing, dated May 12, 2020, attaching exhibits A, C-U
4. Affidavit of Leszek T. Zielinski, P.E. in Support of Motion for Order Without a Hearing, sworn to March 12, 2020, attaching exhibits A-F, I
5. Affirmation of Service of Aldie K. Levine, dated May 28, 2020, attaching Exhibit V
6. Exhibits
 - A. Correspondence from Tony Ye to 1084 NY Ave LLC, dated March 2, 2018, re: Notice of Violation
 - B. PBS Facility Information Report, PBS #2-604502, printed January 25, 2017 with hand written notes and corrections
 - C. PBS Inspection Form, dated March 1, 2018, pages 1 and 6 of 8
 - D. Photograph record of PBS Facility located at 1084 New York Avenue, Brooklyn, New York, dated March 1, 2018, containing eight unnumbered photographs
 - E. API Recommended Practice 1637 - Equipment Marking Color-Symbol System
 - F. Correspondence from Tony Ye to 1084 NY Ave LLC, dated August 9, 2018, re: Notice of Violation and administrative settlement conference
 - G. PBS Facility Information Report, PBS #2-604502, printed December 2, 2019
 - H. NYS Department of State Entity Information regarding 1084 NY Ave LLC, reflecting information through February 28, 2020
 - I. Deed from CRP New York Avenue LLC and CRP New York Avenue Annex LLC to 1084 NY Ave LLC, dated January 23, 2018
 - J. Meeting Roster for September 20, 2018, PBS Conference
 - K. Correspondence from Aldie K. Levine to 1084 NY Ave LLC, dated September 20, 2018

- L. Order on Consent (proposed), mailed with Exhibit K
- M. USPS Certified Mail receipt signed by Marc Blumenfrucht for 1084 NY Ave LLC (for Exhibits K and L)
- N. USPS Tracking demonstrating delivery of Exhibits K and L on September 25, 2018
- O. Correspondence from Aldie K. Levine to 1084 NY Ave LLC, dated May 22, 201[9], re: Notice of Calendar Call (for June 11, 2019 mediation)
- P. USPS Certified Mail receipt signed by Marc Blumenfrucht for 1084 NY Ave LLC (for Exhibit O)
- Q. USPS Tracking demonstrating delivery of Exhibit O on May 24, 2019
- R. Meeting Roster for June 11, 2019, Calendar Call re: 1084 NY Ave LLC
- S. *Matter of 1084 NY AVE LLC*, Order on Consent, dated April 23, 2019 (signed by Marc Blumenfrucht, owner of 1084 NY Ave LLC)
- T. PBS Application (Sections A and B) from 1084 NY Ave LLC, PBS No. 2-604502, received April 16, 2019, with check attached
- U. Affidavit of Leszek Zielinski, P.E., in Support of Motion for Order Without a Hearing, sworn to March 12, 2020 (same as Item 4 above)
- V. USPS Certified Mail receipt signed by Marc Blumenfrucht for 1084 NY Ave LLC and USPS Tracking demonstrating delivery on May 28, 2020 (Notice of Motion for Order Without Hearing and supporting papers)