

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law and Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by

**RULING ON MOTION
FOR ORDER WITHOUT
HEARING IN LIEU OF A
COMPLAINT**

310 LEXINGTON OWNERS CORP.,

DEC File Nos.
R2-2020513-145
R2-20170113-24

Respondent.

Appearance of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Meredith S. Kaufer, Assistant Regional Counsel, 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 a complaint dated August 25, 2021 (motion), staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent, 310 Lexington Owners Corp. (respondent), for alleged violations of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 613 at respondent's petroleum bulk storage (PBS) facility located at 310 Lexington Avenue, New York, New York.

Respondent is an active domestic business corporation in the State of New York. Department staff served the motion and supporting papers on respondent by certified mail to the address listed for service of process with the Department of State's Division of Corporations (*see* affirmation of service of Meredith S. Kaufer, dated August 31, 2021 [Kaufer Affirmation of Service]). The notice of motion instructed respondent that a written response must be filed within twenty days of the receipt of the motion. Respondent failed to file a response to the motion, as directed in the notice of motion, although a response was due by September 20, 2021 (*see* 6 NYCRR 622.12(c)). By letter dated November 8, 2021, this matter was assigned to me.

Department staff's motion papers do not state or number alleged causes of action. The Commissioner previously directed Department staff to specifically number staff's causes of action in all matters (*see Matter of RGLL, Inc.*, Decision and Order of the Commissioner, Dec. 29, 2009, at 5 n4). In addition, 6 NYCRR 622.3(a)(1) requires each cause of action to be separately stated and numbered. As this motion stands as the complaint, staff should have

separately stated and numbered each cause of action. For the purpose of the ruling, I am identifying the causes of action as expressed below.

Department staff's motion for order without hearing in lieu of a complaint alleges that respondent:

1. Failed to maintain an accurate PBS registration for the facility (First Cause of Action);
2. Failed to accurately color code the tank's fill port (Second Cause of Action);
3. Failed to test the tank for tightness at least annually (Third Cause of Action); and
4. Failed to perform weekly leak detection tests (Fourth Cause of Action).

Department staff's papers consist of a notice of motion dated August 25, 2021; motion for order without hearing dated August 25, 2021; affidavit of Moses Ajoku sworn to on August 5, 2021 (Ajoku Affidavit), attaching three exhibits¹; affirmation of Meredith S. Kaufer dated August 25, 2021 (Kaufer Affirmation), attaching 12 exhibits. (*See Appendix A attached hereto*)

Staff requests that the commissioner issue an order:

1. "Finding that no hearing is required because no material issue of fact exists;
2. "Finding that Department staff are entitled to judgment as a matter of law and to the relief requested herein;
3. "Finding that Respondent violated 6 NYCRR 613-1.9(a) by failing to maintain an accurate facility registration with the Department [First Cause of Action];
4. "Ordering Respondent to correct and submit to the Department an updated copy of the facility registration with accurate information within fifteen (15) days of the service of the Commissioner's Order;
5. "Finding that Respondent violated 6 NYCRR 613-3.2(a)(4) for incorrectly color coding the Tank's fill port [Second Cause of Action];
6. "Ordering Respondent to properly color code the Tank's fill port within fifteen (15) days of the service of the Commissioner's order and submit evidence of such to the Department;
7. "Finding that Respondent failed to test for tightness at least annually [Third Cause of Action];
8. "Ordering Respondent to annually test Tank for tightness and submit evidence of the tightness test to the Department within fifteen (15) days of the service of the Commissioner's order;
9. "Respondent violated 6 NYCRR 613-3.3(b) by failing to perform weekly leak detection tests [Fourth Cause of Action];
10. "Ordering Respondent to begin conducting the required weekly leak detection tests of the Tank and submit evidence of these leak detection inspections to the Department within fifteen (15) days of the service of the Commissioner's Order, as well as keep these leak detection records on file for three (3) years;

¹ None of the exhibits have page numbers and multiple documents are included in Ajoku Affidavit Exhibit A: the two-page 2020 Notice of Violation (NOV) which is dated May 11, 2020, and two copies of the two-page 2017 NOV dated January 5, 2017.

11. “Assessing a total civil penalty of thirty-thousand dollars (\$30,000) against Respondent for violating ECL Article 17 and 6 NYCRR Part 613;
12. “Reserving the Department's right to take additional action for violations not specifically alleged herein; and
13. “Ordering such other and further relief as may be just and appropriate under the circumstances.” (See Motion at 2-3.)

FINDINGS OF FACT

1. Respondent is the owner and operator of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 310 Lexington Avenue, New York, New York, since at least October 2018. (See Ajoku Affidavit Exhibit B and Kaufer Affirmation Exhibits B and D)²
2. The facility has one tank (Tank 001) that is located in the basement, encased in concrete (see Ajoku Affidavit ¶ 8), and holds 6000 gallons which is used to store #2 Fuel oil to be used on site. (See Ajoku Affidavit ¶¶ 5-6, Exhibit B; Kaufer Affirmation ¶ 17 Exhibit D)
3. The PBS registration certificate codes Tank 001 as “aboveground in subterranean vault with access for inspection”. (See Ajoku Affidavit Exhibit B)
4. The PBS registration certificate demonstrates that Tank 001 was installed on August 29, 1979. (See Ajoku Affidavit Exhibit B and Kaufer Affirmation Exhibit D)
5. Moses Ajoku is an engineer in the Department’s Region 2 PBS unit. (See Ajoku Affidavit ¶¶ 1 and 3)
6. As part of his duties, Mr. Ajoku inspects PBS facilities in Region 2 for compliance with New York State laws including article 17 of the Environmental Conservation Law (ECL) and 6 NYCRR part 613. (See Ajoku Affidavit ¶ 3)
7. Mr. Ajoku conducted inspections of respondent’s facility on December 16, 2016 (2016 Inspection), and January 30, 2020 (2020 Inspection). (See Ajoku Affidavit ¶ 4, Exhibit C)
8. Mr. Ajoku then prepared notices of violation dated January 5, 2017 (2017 NOV) which was mailed certified mail, and May 11, 2020 (2020 NOV) which was mailed regular mail. (See Ajoku Affidavit ¶¶ 4 and 16, Exhibit A)
9. During both the 2016 and 2020 inspections, Mr. Ajoku observed and documented four violations:
 - a. Respondent’s registration was inaccurate as it listed the tank as above ground (see Ajoku Affidavit ¶¶ 7 and 8, Exhibits A, B, and C),

² Ajoku Affidavit Exhibit B contains a copy of the PBS Registration Certificate and a Facility Information Report dated May 13, 2020. Kaufer Affirmation Exhibit D is a Facility Information Report dated May 13, 2020.

- b. Respondent failed to color code Tank 001's fill port (*see* Ajoku Affidavit ¶ 10, Exhibits A and C),
 - c. Respondent failed to perform a tank tightness test at least annually (*see* Ajoku Affidavit ¶ 12, Exhibits A and C), and
 - d. Respondent failed to do weekly leak detection tests for piping and weep hole monitoring. (*See* Ajoku Affidavit ¶ 14, Exhibits A and C)
10. Respondent was directed in both the 2017 NOV and 2020 NOV to correct the violations and submit evidence of the corrective actions by the deadlines listed in each NOV. (*See* Ajoku Affidavit Exhibit A)
11. As of August 5, 2021, respondent has not provided the Department any documentation regarding the corrective actions required by the 2017 or 2020 NOVs. (*See* Ajoku Affidavit ¶ 18)
12. As shown by the affirmation of service of Meredith S. Kaufer, respondent was served by certified mail the motion for order without hearing on August 25, 2021. (*See* Kaufer Affirmation of Service)
13. As per the USPS tracking information, respondent received the motion papers on August 30, 2021. (*See* Affirmation of Service Exhibit A [USPS Tracking Form for Tracking No. 70181830000064141501]). Respondent failed to respond to the 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 (*see Matter of Locaparra*, Commissioner's Decision and Order, June 16, 2003).

Respondent has not submitted any response to 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 n2).

Pursuant to 6 NYCRR 622.12(a), Department staff has supported its motion for an order without hearing with the affidavit of Moses Ajoku, an engineer in DEC Region 2 PBS unit. Mr. Ajoku conducted the PBS inspections and has reviewed the records maintained by the Department.

As a preliminary matter, a description of the liability requirements of the part 613 subparts will assist in the discussion below. Subpart 613-1 of 6 NYCRR imposes registration requirements on the owner of the facility. Pursuant to 6 NYCRR subparts 613-2 and 613-3, the tank and operating requirements of the subparts are imposed on the facility. Whenever the 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” (*see* 6 NYCRR 613-1.2[d]). I also note that Tank 001 was installed on August 29, 1979, and therefore the tank is part of a category 1 tank system (*see* 6 NYCRR 613-1.3[e]).³

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

First Cause of Action

Department staff alleges that respondent has failed to maintain an accurate registration, because the tank is encased in concrete and, therefore, considered an underground tank, regardless of the tank’s above ground location (*see* Ajoku Affidavit ¶ 8). The PBS registration filed in 2018 codes the tank as above ground (*see* Finding of Fact No. 3).

Pursuant to 6 NYCRR 613-1.9(a), the facility owner must ensure that the registration information, including the tank system information, is accurate. Department staff has made a *prima facie* showing that respondent is the facility owner and the PBS Registration Certificate issued on October 9, 2018, and expiring on July 7, 2022, contains inaccurate information in violation of 6 NYCRR 613-1.9(a).

Accordingly, Department staff’s motion for order without hearing on the first cause of action is granted.

Second Cause of Action

Department staff alleges that the fill port on Tank 001 is not color coded correctly. Department staff offers photos from the 2016 inspection as proof of this violation (*see* Ajoku Affidavit Exhibit C). Pursuant to 6 NYCRR 613-3.2(a)(4), the facility must color code the fill port. As discussed above, the requirement of the facility is imposed on the operator and tank owner.

Department staff does not offer the 2020 Inspection report as evidence but does document the violation in the 2020 NOV (*see* Ajoku Affidavit ¶ 10 and Exhibit A). Department

³ Category 1 tanks are those tanks installed before December 27, 1986; Category 2 installed between December 27, 1986, and October 11, 2015; and Category 3 tanks were installed after October 11, 2015. (*See* 6 NYCRR 613-1.3[e][f] and [g]).

staff noted that respondent failed to provide any information to show respondent has corrected this violation as of August 5, 2021. I conclude that Department staff has made a *prima facie* showing that respondent is the facility operator, and the fill port was not properly color coded in violation of 6 NYCRR 613-3.2(a)(4).

Accordingly, Department staff's motion for order without hearing on the second cause of action is granted.

Third Cause of Action

Department staff alleges that respondent has not conducted the annual tank tightness testing. Department staff offers the 2016 Inspection, 2017 NOV, and 2020 NOV for its proof (*see* Ajoku Affidavit ¶ 12 and Exhibit A). Pursuant to 6 NYCRR 613-3.3(b)(1)(i), the facility is required to conduct annual tightness testing.

I conclude that Department staff has made a *prima facie* showing that respondent, as the facility operator, failed to conduct annual tank tightness testing on a tank that is part of a category 1 tank system and, accordingly, respondent violated 6 NYCRR 613-3.3(b)(1)(i).

Accordingly, Department staff's motion for order without hearing on the third cause of action is granted.

Fourth Cause of Action

6 NYCRR 622.3(a)(1)(ii) states that the complaint must reference "the particular sections, subsections, paragraphs and subparagraphs of the statutes, rules and regulations alleged to have been violated." Department staff has simply plead "respondent violated 6 NYCRR 613-3.3(b) by failing to perform weekly leak detection tests" (*see* Motion p 3 ¶ IX). This subsection is voluminous, dealing with tanks, piping, installation, and other factors related to an underground storage system. While the 2017 NOV states 6 NYCRR 613-3.3(a)(1) and 3.3(b)(2) were violated as leak detection related to piping was not done (*see* Ajoku Affidavit Exhibit A 2017 NOV) and the 2020 NOV states that 6 NYCRR 613-3.3(b)(1)(i)(c) was violated as weep hole monitoring was not performed (*see* Ajoku Affidavit Exhibit A 2017 NOV), neither of these were appropriately pleaded in the motion. As such, this pleading does not meet the level of specificity required under the regulations.

Department staff has not made a *prima facie* showing in regard to the fourth cause of action as staff has failed to clearly state the regulation alleged to have been violated.

Accordingly, the Department's motion for order without hearing on the fourth cause of action is denied.

PENALTY

Department staff includes the PBS penalty schedule (*see* Kaufer Affirmation Exhibit J) as an exhibit but provides no guidance as to how it was applied to calculate the penalty in this

matter. With no information as to how the \$30,000 requested penalty applies to the causes of action, I cannot rule on how much penalty to assess for each violation found. Additionally, as the PBS Registration Certificate became effective on October 9, 2018, Department staff has also not established that respondent was the facility owner or operator prior to October 2018, and therefore, I cannot determine the duration of each violation found.

Because of these deficiencies, a hearing must be held to determine the penalty in this matter.

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 a complaint dated August 25, 2021, is granted on the issue of liability against respondent 310 Lexington Owners Corp., on the following violations:
 - a. 6 NYCRR 613-1.9(a) for failing to maintain an accurate PBS registration;
 - b. 6 NYCRR 613-3.2(a)(4) for failing to properly color code the fill port; and
 - c. 6 NYCRR 613-3.3(b)(1) for failing to annually test tank tightness.
2. Department staff's motion for order without hearing in lieu of complaint on Department staff's fourth cause of action alleging respondent failed to perform weekly leak detection tests 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 a complaint until a hearing is held on the remaining cause of action and penalty.

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

/s/
Jennifer M. Ukeritis
Administrative Law Judge

Dated: March 31, 2022
Albany, New York

APPENDIX A

Matter of 310 LEXINGTON OWNERS CORP.
DEC File Nos. R2-2020513-145 and R2-20170113-24
Motion For Order Without Hearing

1. Notice of Motion for Order without Hearing, dated August 25, 2021
2. Motion for Order without Hearing, dated August 25, 2021
3. Affidavit of Moses Ajoku in Support of Motion for Order without Hearing, dated August 5, 2021, attaching the following exhibits:
 - A. May 11, 2020 Notice of Violation (NOV), January 5, 2017 NOV, a second copy of January 5, 2017 NOV
 - B. PBS Registration Certificate #2-091898 and Facility Information Report
 - C. PBS Inspection Report dated December 16, 2016
4. Affirmation of Meredith S. Kaufer in Support of Motion for Order without Hearing, dated August 25, 2021, attaching the following exhibits:
 - A. Email from Meredith S. Kaufer to Moses Ajoku asking for more case information dated May 13, 2020
 - B. 2018 Order on Consent PBS.2-091898.10.2018
 - C. May 11, 2020 NOV, January 5, 2017 NOV, a second copy of January 5, 2017 NOV
 - D. PBS Facility Information Report for PBS #2-091898
 - E. Email from Meredith S. Kaufer to Thomas DaSilva regarding settlement offer including cover letter, proposed Order on Consent, Electronic Notary, Invoice, dated August 25, 2020
 - F. Email from Meredith S. Kaufer to Thomas DaSilva regarding status of settlement offer dated October 30, 2020
 - G. Second email from Meredith S. Kaufer to Thomas DaSilva, regarding status of settlement offer dated November 18, 2020
 - H. Email from Meredith S. Kaufer to Thomas DaSilva regarding Notice of Calendar Call dated April 13, 2021
 - I. Email from Molly McBride to Thomas DaSilva with Meredith S. Kaufer cc'd regarding failure to appear at calendar call dated April 27, 2020
 - J. DEE-22 PBS Enforcement Policy Penalty Schedule
 - K. DEE-1 Civil Penalty Policy
 - L. DEE-4 Bulk Storage and Spill Response Enforcement Policy
5. Affirmation of Service by Meredith S. Kaufer, dated August 31, 2021