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 Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER
DEC Case No.
R5-20170301-2241
PBS No. 5-462969

- by -

BELLMONT L.M. INC. and
ANDREW B. CHASE, Individually,
Respondent.

This administrative enforcement proceeding involves alleged violations of article 17 of the ECL and 6 NYCRR part 613 at a petroleum bulk storage (PBS) facility known as Mountain Marketplace (facility). The facility, which was owned by respondent Bellmont L.M. Inc. (Bellmont) at the time of the alleged violations, is located at 3851 Route 374, Lyon Mountain, Clinton County, New York. It has three underground petroleum bulk storage tanks (tanks 001, 006A and 006B) and one aboveground storage tank (tank 009).

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this proceeding by service of a notice of hearing and complaint on respondent Bellmont, dated May 15, 2017. Pursuant to a ruling dated October 6, 2017, Department staff served respondent Andrew B. Chase (Chase) by email and first-class mail on December 5, 2017. Department staff alleged that Chase, who was the Chief Executive Officer for Bellmont, was a responsible corporate officer and, in that capacity, liable for the alleged violations (see Hearing Exhibit 1 [Complaint ¶¶ 14-21] at 3-4).

In its complaint, Department staff set forth the following alleged violations at the facility:

1. failure to maintain an accurate registration in violation of 6 NYCRR 613-1.9(a);
2. failure to keep all gauges, valves and other equipment for spill prevention associated with tank 006B in good working order in violation 6 NYCRR 613-2.2(a)(6);
3. failure to properly color code the fill port for tank 001 in violation of 6 NYCRR 613-2.2(a)(4);
4. failure to maintain as-built records for tanks 001, 006A, and 006B in violation of 613-2.1(b)(4)(iii)(*a*);
5. failure to maintain records demonstrating compliance with all applicable leak detection requirements for tanks 001, 006A, and 006B in violation of 6 NYCRR 613-2.3(e);

6. failure to have or maintain adequate inventory monitoring equipment for tanks 001, 006A, and 006B in violation of 6 NYCRR 613-2.1(c)(1) and (2);
7. failure to investigate discrepancies in fuel inventory and report a spill to the department within 48 hours in violation of 6 NYCRR 613-2.4(a)(2);
8. failure to conduct annual tests of the operation of the leak detector for the pressurized piping associated with tanks 006A and 006B in violation of 6 NYCRR 613-2.3(d)(1);
9. failure to maintain records that demonstrated compliance with the requirement to accurately record the condition of tank 009 in violation of 6 NYCRR 613-4.3(e);
10. failure to keep spill prevention equipment on tank 009 in good working order in accordance with 6 NYCRR 613-4.2(a)(6); and
11. failure to mark tank 009 with the tank identification number, the tank design capacity and the tank working capacity in violation of 6 NYCRR 613-4.2(a)(3).

Based upon these alleged violations, Department staff seeks a Commissioner's Order finding that respondents Bellmont and Chase committed the violations alleged in the complaint and assessing a civil penalty against respondents, jointly and severally, in the amount of twenty thousand dollars ($20,000) (Exhibit 1 [Complaint par II] at 14). Department staff did not request any remedial relief in its complaint (id., see also Hearing Transcript [Tr] at 121).

Respondents contended in their answers that "Mountain Marketplace/[R]onald [H]emingway"[1] as the operator of the facility were in total control, and therefore responsible for maintaining the facility in compliance with the applicable regulatory requirements (see Hearing Exhibits 3 and 5). Furthermore, respondents stated that Mountain Marketplace had previously admitted liability for the violations (id.), and was assessed a civil penalty.[2]

A hearing was convened before Chief Administrative Judge James McClymonds of the Department's Office of Hearings and Mediation Services on December 19, 2018. At the hearing, respondents raised the defense of inability to pay a civil penalty (see Tr at 144-147). Upon the completion of testimony, the hearing was adjourned with the understanding that it could be reconvened on the issue of penalty (see Tr at 149, 151). Respondents later elected to pursue this defense on papers.

Subsequently, the matter was reassigned to Administrative Law Judge Michele M. Stefanucci who prepared the attached hearing report. In her report, ALJ Stefanucci sets forth findings of fact and conclusions of law, finding respondents liable for the eleven (11) causes of action alleged in the complaint and recommending a civil penalty in the amount of five thousand seven hundred and fifty dollars ($5,750). I hereby adopt the Hearing Report as my decision in this matter, subject to my comments below.

[1] Respondents reference is to the domestic limited liability company – Mountain Marketplace, LLC, of which Ronald J. Hemingway is the Chief Executive Officer, and which operated the facility at the time of the alleged violations. See Matter of Mountain Marketplace, LLC, DEC Consent Order effective January 23, 2017, Case No. R5-20160718-2210 (PBS No. 5-462969).
[2] Id.

DISCUSSION

Liability

I concur with ALJ Stefanucci's determination that Department staff has proved by a preponderance of the evidence that respondent Bellmont, as the owner of the facility as well as the owner of the tank system, is liable for the eleven causes of action alleged in the complaint (see Hearing Report at 6-7). I also agree that, based on this record, respondent Chase, as the responsible corporate office of respondent Bellmont, is personally liable for the violations of the corporate respondent (see id. at 5; see also Exhibit 1 [Complaint ¶ 63] at 14).

Penalty

In its complaint and at the hearing, Department staff requested a civil penalty in the amount of twenty thousand dollars ($20,000). Department staff did not request any remedial relief (see Tr at 121).

The calculation of any civil penalty begins with the maximum statutory penalty. Pursuant to ECL 71-1929, the Commissioner may impose a maximum daily penalty of thirty-seven thousand five hundred dollars ($37,500) per day on any person who violates any of the provisions of, or who fails to perform any duty imposed by title 10 (Control of the Bulk Storage of Petroleum) of ECL article 17 or the regulations promulgated pursuant thereto. In applying DEE-22, the Petroleum Bulk Storage Inspection Enforcement Policy dated May 21, 2003 (DEE-22), Department staff calculated a base penalty of five thousand seven hundred and fifty dollars ($5,750) for the eleven (11) causes of action as follows:

First Cause of Action	$1000
Second Cause of Action	$600
Third Cause of Action	$100
Fourth Cause of Action	$1000
Fifth Cause of Action	$250
Sixth Cause of Action	$200
Seventh Cause of Action	$1000
Eight Cause of Action	$1000
Ninth Cause of Action	$250
Tenth Cause of Action	$250
Eleventh Cause of Action	$100
Subtotal	**$5750**

(see Exhibit 1 [Complaint ¶ 61] at 12-13).

Utilizing DEE-1, the Department's Civil Penalty Policy dated June 20, 1990, staff determined that an upward adjustment to the base penalty was warranted due to three aggravating factors (Exhibit 1 [Complaint ¶ 61] at 13). The three aggravating factors included: a prior (2009) violation by Chase Services, Inc. for petroleum bulk storage violations at this

facility; respondents' lack of cooperation in addressing the violations; and a need for a "substantial increase" because penalty amounts in adjudicated cases are to be higher than those in matters resolved through an order on consent (see DEE–22, at 2). Based on these aggravating factors, Department staff applied a multiplier of approximately 3.5 to the base penalty of $5,750, for a total penalty of $20,000 (see Exhibit 1 [Complaint ¶ 61] at 13).[3]

During the proceeding, respondent Chase alleged that he was unable to pay a civil penalty, that he had filed for bankruptcy and that he was facing foreclosure on his primary residence (see e.g. Tr at 142-147).

Based on the record before me, I concur with the ALJ's determinations that the alleged aggravating circumstances do not warrant an upward adjustment of the civil penalty (see Hearing Report at 7-8 [whereby ALJ addressed each of the aggravating factors referenced by Department staff]). In addition, I note that the facility's violations have been addressed -- many if not most by respondent Chase (see Tr at 75-93). I also have reviewed the information in the record regarding Chase's contentions as to his financial circumstances and inability to pay. Taking these various matters into consideration, I conclude that the ALJ's downward adjustment from twenty thousand dollars ($20,000) to five thousand seven hundred fifty dollars ($5,750) is appropriate.

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

I. Respondents Bellmont L.M., Inc. and Andrew B. Chase, jointly and severally, are adjudged to be liable for the following violations at the petroleum bulk storage facility located at 3851 Route 374, Lyon Mountain, Clinton County, New York:

- failure to maintain an accurate registration in violation of 6 NYCRR 613-1.9(a);
- failure to keep all gauges, valves and other equipment for spill prevention associated with tank 006B in good working order in violation 6 NYCRR 613-2.2(a)(6);
- failure to properly color code the fill port for tank 001 in violation of 6 NYCRR 613-2.2(a)(4);
- failure to maintain as-built records for tanks 001, 006A, and 006B in violation of 613-2.1(b)(4)(iii)(*a*);
- failure to maintain records demonstrating compliance with all applicable leak detection requirements for tanks 001, 006A and 006B in violation of 6 NYCRR 613-2.3(e);
- failure to have or maintain adequate inventory monitoring equipment for tanks 001, 006A, and 006B in violation of 6 NYCRR 613-2.1(c)(1) and (2);
- failure to investigate discrepancies in fuel inventory and report a spill to the department within 48 hours in violation of 6 NYCRR 613-2.4(a)(2);

[3] The record did show that respondent Chase was involved with a number of PBS facilities over time and, accordingly, should have been familiar with the applicable legal requirements (see Tr at 151-158).

- failure to conduct annual tests of the operation of the leak detector for the pressurized piping associated with tanks 006A and 006B in violation of 6 NYCRR 613-2.3(d)(1);
- failure to maintain records that demonstrated compliance with the requirement to accurately record the condition of Tank 009 in violation of 6 NYCRR 613-4.3(e);
- failure to keep spill prevention equipment on tank 009 in good working order in accordance with 6 NYCRR 613-4.2(a)(6); and
- failure to mark tank 009 with the tank identification number, the tank design capacity and the tank working capacity in violation of 6 NYCRR 613-4.2(a)(3).

II. Respondents Bellmont L.M., Inc. and Andrew B. Chase, jointly and severally, are assessed a civil penalty in the amount of five thousand seven hundred fifty dollars ($5,750) for the violations referenced in paragraph I of this Order.

III. Within sixty (60) days of service of the Commissioner's order on respondents Bellmont L.M., Inc. and Andrew B. Chase, respondents shall pay the civil penalty referenced in paragraph II by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The civil penalty shall be submitted to:

Deborah Gorman, Esq.
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, NY 12233-1550

IV. The provisions, terms and conditions of this Order shall bind respondents Bellmont L.M. Inc. and Andrew B. Chase, 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: Albany, New York
December 16, 2020

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 Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by –

BELLMONT L.M. INC. AND ANDREW B. CHASE, Individually,

Respondents.

HEARING REPORT
DEC Case No.
R5-20170301-2241
PBS No. 5-462969

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Scott Abrahamson, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Andrew B. Chase, respondent pro se

The New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint on respondent Bellmont L.M. Inc. (respondent Bellmont), dated May 15, 2017, for alleged violations at a petroleum bulk storage (PBS) facility know as Mountain Marketplace, which was owned by respondent Bellmont and operated by Ronald Hemingway. The facility, located at 3851 Route 374, Lyon Mountain, Clinton County, New York, has 3 underground petroleum bulk storage tanks (tanks 001, 006A and 006B) and one above-ground storage tank (009).

In its complaint, Department staff alleged that the facility was in violation of ECL article 17 and 6 NYCRR part 613 for:

1. failure to maintain an accurate registration in violation of 6 NYCRR 613-1.9(a);
2. failure to keep all gauges, valves and other equipment for spill prevention associated with tank 006B in good working order in violation 6 NYCRR 613-2.2(a)(6);
3. failure to properly color code the fill port for tank 001 in violation of 6 NYCRR 613-2.2(a)(4);

4. failure to maintain as-built records for tanks 001, 006A, and 006B in violation of 613-2.1(b)(4)(iii)(*a*);
5. failure to maintain records demonstrating compliance with all applicable leak detection requirements for tanks 001, 006A, and 006B in violation of 6 NYCRR 613-2.3(e);
6. failure to have or maintain adequate inventory monitoring equipment for tanks 001, 006A, and 006B in violation of 6 NYCRR 613-2.1(c)(1) and (2);
7. failure to investigate discrepancies in fuel inventory and report a spill to the department within 48 hours in violation of 6 NYCRR 613-2.4(a)(2);
8. failure to conduct annual tests of the operation of the leak detector for the pressurized piping associated with tanks 006A and 006B in violation of 6 NYCRR 613-2.3(d)(1);
9. failure to maintain records that demonstrated compliance with the requirement to accurately record the condition of Tank 009 in violation of 6 NYCRR 613-4.3(e);
10. failure to keep spill prevention equipment on tank 009 in good working order in accordance with 6 NYCRR 613-4.2(a)(6); and
11. failure to mark tank 009 with the tank identification number, the tank design capacity and the tank working capacity in violation of 6 NYCRR 613-4.2(a)(3).

The complaint seeks an order of the Commissioner finding that: respondent Bellmont committed the violations alleged in the complaint, assessing a civil penalty against respondents, jointly and severally, in the amount of twenty thousand dollars ($20,000), and ordering such other and further relief as the Commissioner may deem appropriate (*see* Complaint at 14). Department staff does not request any remedial relief (*id.*).

In an email answer dated July 23, 2017, respondent Bellmont generally denied the allegations in the complaint and alleged that at all times relevant to the violations at issue, the operator Ronald Hemingway was "in control of the total facility and have admitted to the violations and responsibility thereof" (Exhibit 3).

By letter dated August 17, 2017, Department staff filed an ex-parte motion with Chief Administrative Law Judge (Chief ALJ) James T. McClymonds seeking permission to use an alternative method to serve the notice of hearing and complaint on respondent Andrew B. Chase (respondent Chase) in his individual capacity. In a Ruling dated October 6, 2017 (October 2017 Ruling), the Chief ALJ determined that Department staff demonstrated that service upon respondent Chase by certified mail was impracticable and service by email was reasonably calculated to apprise respondent Chase of the proceeding (October 2017 Ruling at 5). In addition, the October 2017 Ruling authorized service on respondent Chase by first class mail (*id.*).

On December 5, 2017, Department staff served a duplicate notice of hearing and complaint by email and first-class mail on respondent Chase (Exhibit 4). In an email answer dated January 17, 2018, respondent Chase generally denied the allegations in the complaint and alleged that at all times relevant to the violations at issue, "mountain marketplace/ronald hemingway had total control over the site and had the power and authority to keep in compliance with 6-nycrr part 613 and title 10 of article 17 of the ECL. Ronald Hemingway/mountain

marketplace were in control of the total facility and have admitted to the violations and responsibility thereof" (Exhibit 5).

On December 19, 2018, an adjudicatory hearing was convened before the Chief ALJ.[1] Department staff presented one witness and introduced 23 exhibits into the record. Respondents appeared pro se. At the conclusion of the proceeding, respondent Chase raised the defense of inability to pay a civil penalty (*see* Hearing Transcript [tr] at 145-147).

At the conclusion of testimony, the Chief ALJ adjourned the proceeding to provide respondents with an opportunity to submit documentation to Department staff in support of the inability to pay defense, with the understanding that the hearing could be reconvened to further develop the record with regard to the penalty phase of the proceeding (tr at 149).

By email dated August 6, 2019, Department staff notified the Chief ALJ that the financial information submitted by respondents in support of their defense had been reviewed and that Department staff was ready to reconvene the proceeding (*see* email dated August 6, 2019, from Benjamin Conlon to Chief ALJ).

On August 17, 2019, the matter was reassigned to the undersigned. After conferring with the parties, it was agreed that respondents would proceed with the ability to pay defense by paper submission. In support of the defense, respondent Chase submitted an email, dated October 22, 2019, describing his current financial situation, with two attachments: the payoff figures for his primary residence located at 14 Klein Strasse, Lyon Mountain, New York, and a Claims Register for the Chapter 13 bankruptcy proceeding in the Northern District of New York.

In response, Department staff submitted a copy of respondent Chase's petition for Chapter 13 Bankruptcy, a sales listing for respondent Chase's primary residence and a Clinton County Property report for respondent Chase's primary residence. It is Department staff's position that respondent Chase has failed to sustain his burden of proving an inability to pay a civil penalty. The record was closed on November 14, 2019.

Findings of Fact

1. Respondent Bellmont was the owner of the facility (Mountain Marketplace Service Station PBS 5-462969), located at 3851 Route 374, Lyon Mountain, Clinton County, New York, at the time of the alleged violations (Exhibit 6 [deed dated April 27, 1993, conveying all right, title and interest in the land and premises located at 3851 Route 374, Lyon Mountain, New York, from Andrew B. Chase to Bellmont L.M. Inc.]).

2. Respondent Andrew B. Chase is the sole officer and shareholder of respondent Bellmont (Exhibit 26; tr at 160, 162).

[1] Prior to the adjudicatory hearing, Department staff served a notice of motion and motion to compel disclosure dated June 11, 2018. In a ruling dated August 22, 2018 (August 2018 Ruling), the Chief ALJ granted staff's motion as to respondent Chase, individually, and denied without prejudice, for failure to demonstrate proper service, as to respondent Bellmont.

3. Mountain Marketplace has 3 underground petroleum bulk storage tanks. Tank 001 has a capacity of 3,000 gallons, is located underground and contains diesel. Tank 006A has a capacity of 11,000 gallons, is located underground and contains gasoline. Tank 006B has a capacity of 4,000 gallons, is located underground and contains gasoline. Tank 009 has a capacity of 500 gallons, is located above-ground and contains kerosene (Exhibit 9).

4. Ronald Hemingway is the Class A and B operator of Mountain Marketplace (Exhibit 9).

5. On April 1, 2016, Benjamin Hankins, an Environmental Engineer in the Region 5 office of the Department of Environmental Conservation, inspected the Mountain Marketplace facility to determine compliance with New York State's PBS regulations. At that time, Mr. Hankins observed several violations (Exhibit 8; tr at 24).

6. During the inspection, Mr. Hankins observed that the PBS registration certificate needed to be updated. Mr. Hemingway updated the PBS registration during the April 1, 2016 site visit (Exhibits 8 and 9).

7. On April 21, 2016, Mr. Hankins sent a notice of violation (NOV) to respondents and Ronald Hemingway alleging that the facility:

    - failed to keep all gauges, valves and other equipment for spill prevention associated with tank 006B in good working order;
    - failed to properly color code the fill port for tank 001;
    - failed to maintain as-built records for tanks 001, 006A, and 006B;
    - failed to maintain records demonstrating compliance with all applicable leak detection requirements for tanks 001, 006A and 006B;
    - failed to have or maintain adequate inventory monitoring equipment for tanks 001, 006A, and 006B; failure to investigate discrepancies in fuel inventory and report a spill to the department within 48 hours;
    - failed to conduct annual tests of the operation of the leak detector for the pressurized piping associated with tanks 006A and 006B;
    - failed to maintain records that demonstrated compliance with the requirement to accurately record the condition of Tank 009;
    - failed to keep spill prevention equipment on tank 009 in good working order;
    - failed to mark tank 009 with the tank identification number, the tank design capacity and the tank working capacity (Exhibit 8).

8. The April 21, 2016 NOV required respondents and Mr. Hemingway to begin corrective actions to address the violations within 30 days (Exhibit 8).

9. By emails with attached photos dated July 5, 7, 8 10, 11 and 28, 2016, respondents sent Mr. Haskins documentation and photos depicting actions taken to correct the aforesaid PBS violations (Exhibits 10 – 18).

10. By letter dated July 22, 2016, department staff sent respondents and Ronald Hemingway an order on consent to resolve the violations at Mountain Marketplace (Exhibit 19).

11. Mr. Hemingway settled his liability for the PBS violations with an order on consent (Exhibit 20).

12. By deed dated July 8, 2016, respondent Bellmont transferred all right, title and interest in the land and premises known as Mountain Marketplace to KORO enterprises, LLC. This deed is recorded in the Office of the Clinton County Clerk, File Number: 2016-00280680 (Exhibit 7).

Discussion

At the hearing, Department staff offered documentary evidence and provided testimony to establish each of the 11 (eleven) violations of ECL article 17 and 6 NYCRR Part 613 by a preponderance of the evidence (*see* Hearing Record).

Liability of Bellmont L.M. Inc.

In its complaint, Department staff alleged that at all relevant times, respondent Bellmont L.M. was the owner of the facility (property) as well as the owner of the PBS tanks located at the facility (Exhibit 1). As such, respondent Bellmont L.M. is responsible for the aforementioned violations.

Respondent Bellmont indicated that it is no longer a corporation in the State of New York and that "Mountain Marketplace was the purchaser and seller of all motor fuel and was also the sole corporation responsible for maintaining and keeping in regulation with all NYS laws rules and regulations regarding the operation of the business and or maintenance and sale of the product." (Exhibit 3)[2] Respondent further alleges that it is the operator of the facility, Ronald Hemingway, who must maintain the facility in compliance with all NYS rules and regulations (*id.*)

Pursuant to ECL 17-1003(4) and 6 NYCRR 613-1.3(w), a facility owner is defined as the person who has legal or equitable title to the facility. A facility is defined as one or more stationary tanks for the storage or containment of more than one thousand one hundred gallons of petroleum at the same time (ECL 17-1003(1); 6 NYCRR 613-1.3[v]). Pursuant to 6 NYCRR 613-1.2(d), any provision of part 613 that imposes a requirement on a facility, imposes that requirement on every operator and every tank system owner at the facility, unless expressly stated otherwise. Mountain Marketplace is a PBS facility as that term is defined in ECL 17-1003(1) and 6 NYCRR 613-1.3(w) (*see* Finding of Fact 3).

[2]A search of the New York State Department of State Entity Corporations Database reveals that respondent Bellmont L.M. Inc. continues to be an active corporation.

At the hearing, Department staff established that respondent Bellmont is the owner of the facility, as well as the owner of the petroleum bulk storage tanks at the facility (*see* Findings of Fact 1, 2). Accordingly, as the owner of the facility and the tank system, respondent Bellmont is liable for the violations at issue in the proceeding.[3]

Liability of Andrew B. Chase

By its 2017 complaint, Department staff alleged that respondent Chase had direct responsibility for the operations of respondent Bellmont, exercised total control over the site, and "[a]t all times relevant to this Complaint, Andrew B. Chase was in all regards the responsible corporate officer for Bellmont L.M., Inc." (Exhibit 1 at ¶¶ 14-21). In his answer, respondent Chase denies the foregoing and alleges that "mountain marketplace/Ronald hemingway had total control over the site and had the power and authority to keep in compliance with 6-nycrr part 613 and title 10 of article 17 of the ECL" (Exhibit 5 at ¶¶ 14-21).

The Department has long held that liability may attach to a corporate officer who has the "authority and responsibility to prevent the violation" (*Matter of Galfunt*, Order of the Commissioner, May 5, 1993, at 2). Moreover, a "corporate officer can be held personally liable for violations of the corporate entity that threaten the public health, safety, or welfare [and] need only have responsibility over the activities of the business that caused the violations" (*Matter of Supreme Energy Corp.*, Order and Decision of the Commissioner, April 11, 2014, at 25).

Here, respondent Chase testified at the hearing that he is the only shareholder of respondent Bellmont and that he had the sole legal authority to make decisions on behalf of the respondent corporation (tr at 161-165). Based on the foregoing, I find that respondent Chase is a corporate officer of respondent Bellmont, and as such, had the authority and responsibility to prevent each of the violations at issue in this proceeding.

Civil Penalty

Environmental Conservation Law § 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars ($37,500) per day for each violation of title 19 of article 17. In calculating the civil penalty in this matter, Department staff relied on DEE-1, the Civil Penalty Policy, as well as DEE-22, the Petroleum Bulk Storage Penalty Policy (Exhibit 21).

At hearing, Department staff testified that the penalty matrix contained in DEE-22 provides penalty amounts for violations of the PBS regulations that were in effect prior to October 15, 2015 (tr at 105). Department staff acknowledged that the inspection in this case occurred in April 2016, after the new PBS regulations became effective. Department staff

[3] In respondent Bellmont's answer, as well as at hearing, respondent argues that the requirements that are the subject of this enforcement proceeding were the result of new legal requirements and that previously, the law did not make a "lessor responsible for the lessee's negligence in keeping compliance with state law". (*see* Answer; tr at 13-15). In 2008, title 10 of Article 17 of the ECL was amended to make the owner of the property where the PBS tanks are located, the owner of the facility. While the owner of the facility can delegate responsibility to another individual to act on his behalf, the owner of the facility has always been ultimately responsible for violations.

testified that the penalty matrix in DEE-22 was not updated to account for the regulatory changes and there is not a "one to one correspondence between the old and new regulations" (*id.*) Accordingly, Department staff exercised discretion in assigning penalty amounts to the violations alleged in the complaint (*id.* at 106).

With the aid of DEE-22, Department staff assigned the following penalties to each cause of action:

Description	**Requested Penalty**
First Cause of Action	$1,000
Second Cause of Action	$600
Third Cause of Action	$100
Fourth Cause of Action	$1,000
Fifth Cause of Action	$250
Sixth Cause of Action	$200
Seventh Cause of Action	$1,000
Eight Cause of Action	$1,000
Ninth Cause of Action	$250
Tenth Cause of Action	$250
Eleventh Cause of Action	$100
Subtotal	$5,750

(*see* Exhibit 1 at 12-13).

Department staff identified three aggravating factors that warrant an upward adjustment to the subtotal referenced above: a prior (2009) violation by respondents at this facility; respondents' lack of cooperation in addressing the violations; and, a "substantial increase" because penalty amounts in adjudicated cases must be higher than those in matters resolved through an order on consent. According to Department staff, these three aggravating factors equate to a multiplier of 3.5. (Exhibit 1 at 13; tr at 120). To arrive at a civil penalty in the amount of twenty thousand ($20,000) dollars, staff multiplied the base penalty of five thousand seven hundred fifty ($5750) dollars by 3.5 and rounded up (Exhibit 1 at 13; tr at 121). Department staff does not seek any remedial relief (Exhibit 1 at 14; tr at 121).

Based on this record, I find staff's assignment of penalty amounts with the aid of DEE-22 to be authorized and appropriate, however, I do not find that an upward adjustment of the penalty based on aggravating factors is warranted.[4]

In order to provide flexibility and equity in the Department's penalty system, DEE-1 provides that an adjustment to a civil penalty can be made based upon several factors including a violator's culpability, cooperation, history of non-compliance, ability to pay, and any other unique factors (*see* DEE-1, ¶IV[E]).

[4] Department staff cites 3 aggravating factors, yet applies a multiplier of 3.5.

With regard to violator cooperation, the relevant inquiry is whether respondents were cooperative in addressing the violations (*see* DEE-1, ¶IV[E][2]. The record indicates that while respondents did not address the violations within the 30-day timeframe set forth in the April 2016 NOV, respondents were responsive to Department staff's request and by July 28, 2016, the violations were resolved such that Department staff is not now seeking any remedial relief (*see* Exhibits 10-18; tr at 115-118). In light of this, I do not find support for an upward adjustment to the penalty based on a failure to cooperate.

In assessing the violator's history of noncompliance, consideration should be given to how recent the previous violation was, as well as the number and type of violations and the violator's response (*see* DEE-1, ¶IV[E][3]). Here, Department staff introduced a prior consent order signed by respondent Chase for violations of the PBS regulations at a facility (Exhibit 22). I note that those violations occurred over eleven years ago. In addition, absent from the record is any evidence that respondents were either uncooperative with regard to the penalty payment or the remedial work. Accordingly, based on the record before me, I do not believe that an upward adjustment for prior non-compliance is warranted.

Finally, I note that DEE-1 provides that penalty amounts calculated in adjudicated cases must on average be significantly higher than those calculated in cases where respondents voluntarily settle (DEE-1, ¶II). However, the failure to resolve a matter by consent order is not a penalty adjustment factor in and of itself, but a consideration in the calculation of penalties. In sum, I do not find that this record supports an upward adjustment of the base penalty.

Pursuant to DEE-1, the ability of a respondent to pay a civil penalty is a factor that may result in a penalty reduction (DEE-1, ¶IV[E][4]). The burden to demonstrate an inability to pay rests with the respondent (*id.*) In support of his inability to pay claim, respondent Chase submitted an email detailing his current financial situation, a copy of the Northern District of New York Claims Register for his Chapter 13 Bankruptcy filing, and the payoff figures for his residence. Department staff notes inconsistencies with those filings and the claims made by respondent Chase.

I note that an adjustment to a civil penalty based upon a respondent's ability to pay requires submission of a significant amount of financial information specific to the violator (DEE-1, ¶IV[E][4]). While the documents submitted by respondent Chase illustrate that respondent is experiencing financial difficulties, they do not substantiate respondent's claim that he cannot pay any civil penalty.

Recommendations

Based on the foregoing, I recommend that the Commissioner issue an order:

1. Finding that respondents Bellmont L.M. Inc. and Andrew B. Chase violated the following:

    - failure to maintain an accurate registration in violation of 6 NYCRR 613-1.9(a);
    - failure to keep all gauges, valves and other equipment for spill prevention associated with tank 006B in good working order in violation 6 NYCRR 613-2.2(a)(6);

- failure to properly color code the fill port for tank 001 in violation of 6 NYCRR 613-2.2(a)(4);
- failure to maintain as-built records for tanks 001, 006A, and 006B in violation of 613-2.1(b)(4)(iii)(a);
- failure to maintain records demonstrating compliance with all applicable leak detection requirements for tanks 001, 006A and 006B in violation of 6 NYCRR 613-2.3(e);
- failure to have or maintain adequate inventory monitoring equipment for tanks 001, 006A, and 006B in violation of 6 NYCRR 613-2.1(c)(1) and (2);
- failure to investigate discrepancies in fuel inventory and report a spill to the department within 48 hours in violation of 6 NYCRR 613-2.4(a)(2);
- failure to conduct annual tests of the operation of the leak detector for the pressurized piping associated with tanks 006A and 006B in violation of 6 NYCRR 613-2.3(d)(1);
- failure to maintain records that demonstrated compliance with the requirement to accurately record the condition of Tank 009 in violation of 6 NYCRR 613-4.3(e);
- failure to keep spill prevention equipment on tank 009 in good working order in accordance with 6 NYCRR 613-4.2(a)(6); and
- failure to mark tank 009 with the tank identification number, the tank design capacity and the tank working capacity in violation of 6 NYCRR 613-4.2(a)(3).

2. Directing respondents to pay a civil penalty in the amount of five thousand seven hundred fifty dollars ($5,750) within sixty (60) days of service of the Commissioner's order on respondents.

/s/
Michele M. Stefanucci
Administrative Law Judge

Dated: February 4, 2020
Albany, New York

Exhibit Chart
Matter of Bellmont L.M. Inc. and Andrew B. Chase
DEC Case No: R5-20170301-2241

Exhibit Number	Description	Offered	Received
1	Affidavit of Service of Notice of Hearing and Complaint on Bellmont L.M. Inc., sworn to May 17, 2017, with attached exhibits.	√	√
2	Affidavit of mailing of Notice of Hearing and Complaint on Bellmont L.M. Inc., sworn to May 18, 2017, with attached exhibits.	√	√
3	Answer by Bellmont L.M. Inc. dated July 23, 2017.	√	√
4	Affidavit of Service of Notice of Hearing and Complaint, on Andrew B. Chase, sworn to December 5, 2107, with attached exhibits.	√	√
5	Answer by Andrew B. Chase, dated January 28, 2018.	√	√
6	Certified Deed, Andrew Chase to Bellmont L.M. Inc, dated April 27, 1993.	√	√
7	Certified Deed from Bellmont L.M. Inc. to Koro Enterprises LLC dated July 8, 2016.	√	√
8	Notice of Violation, dated April 21, 2016.	√	√
9	Petroleum Bulk Storage Application, signed on April 1, 2016.	√	√
10	Email from Andrew B. Chase to Benjamin Hankins, dated July 5, 2016, 3:41 p.m..	√	√
11	Email from Andrew B. Chase to Benjamin Hankins, dated July 7, 2016, 12:35 p.m., and response from Benjamin Hankins to Andrew Chase dated July 7, 2016, 1:02 p.m.	√	√
12	Email from Andrew B. Chase to Benjamin Hankins dated July 7, 2016, 8:23 p.m.	√	√
13	Email from Benjamin Hankins to Andrew B. Chase dated July 8, 2016, 8:29 p.m.	√	√
14	Email from Andrew B. Chase to Benjamin Hankins, dated July 8, 2016, 8:44 p.m.	√	√

15	Email from Benjamin Hankins to Andrew B. Chase, dated July 8, 2016, 1:37 p.m.	√	√
16	Email from Andrew B. Chase to Benjamin Hankins, dated July 10, 2016, 5:41 p.m.	√	√
17	Email from Andrew B. Chase to Benjamin Hankins, dated July 10, 2016, 5:55 p.m.	√	√
18	Email from Andrew B. Chase to Benjamin Hankins, dated July 28, 2016, 8:46 a.m.	√	√
19	Letter from Scott Abrahamson to Andrew B. Chase and Ronald Hemingway, dated July 22, 2016.	√	√
20	Letter from Scott Abrahamson to Andrew B. Chase.	√	√
21	DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule.	√	√
22	Letter from Christopher Lacombe to Andrew B. Chase, dated November 4, 2009 and attached Order on Consent.	√	√
26	Copy of email exchange between Scott Abrahamson and Andrew B. Chase dated October 2 and 3, 2018.	√	√

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 Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by –

BELLMONT L.M. INC. AND ANDREW B. CHASE, Individually,

Respondents.

Ruling of the Administrative Law Judge Correcting the Transcript
DEC Case No. R5-20170301-2241
PBS No. 5-462969

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Scott Abrahamson, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Andrew B. Chase, respondent pro se

Based upon the errata submitted by Department staff, it is ORDERED that the transcript of the adjudicatory hearing conducted on December 19, 2018, in the above-referenced matter be corrected as follows:

1. On page 8, line 16, change “commence” to “commenced”.

2. On page 9, line 3, change “of PBS” to “(or PBS)”.

3. On page 9, line 9, change “admits” to “admit”.

4. On page 9, line 16, change “resinous” to “readiness for”.

5. On page 9, line 21, change “hearing procedures” to “Hearing Procedures”.

6. On page 9, line 24, change “waiver respondent’s” to “waiver of respondents’ right”.

7. On page 11, line 8, change “asking its’” to “asking its”.

8. On page 17, line 22, change “subject facility and Bellmont L.M. Inc.” to “subject facility by Bellmont L.M., Inc.”.

9. On page 31, line 12, change “composition on the tanks” to “composition of the tanks”.

10. On page 31, line 19, change “what is page” to “what does page”.

11. On page 36, line 16, change “water of those three items” to “water in those three items”.

12. On page 38, line 3, change “and they piping” to “and the piping”.

13. On page 38, line 21, change “tanks, which is” to “tanks, which are”.

14. On page 41, line 20, change “fuel on the tank: to “fuel in the tank”.

15. On page 42, line 1, change “do they use at number four?” to “do they use that number for?”.

16. On page 46, line 14, change “temperature and flu” to “temperature and fluctuation”.

17. On page 72, line 8, change “strike-outs in handwritten” to “strike-outs and handwritten”.

18. On page 88, line 12, change “Brian Hike” to “Brian Huyck”.

19. On page 90, line 4, change “interspace” to “interstitial space”.

20. On page 96, line 4, change “Brian Hike” to “Brian Huyck”.

21. On page 101, line 14, change “Order on Consents” to “Order on Consent”.

22. On page 102, line 17, change “that Mr. Chase not” to “that Mr. Chase and I”.

23. On page 105, line 10, change “order” to “Order”.

24. On page 137, line 11, change “You’re not” to “You are”.

25. On page 159, line 9, change “when I copies” to “when I make copies”.

26. On page 161, line 15, change “the Line Mountain facility” to “the Lyon Mountain Facility”.

27. On page 163, line 4, change “recall Bellmont” to “recall if Bellmont entered”.

/s/
Michele M. Stefanucci
Administrative Law Judge

Dated: February 4, 2020
Albany, New York