STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

RULING
DEC Case No.R2-20050107-17

RAPHY BENAIM, TOVIT BENAIM AND
R.B. 175 CORP.,

Respondents

Procedural Background

By motion dated April 15, 2005 NYS Department of Environmental Conservation (Department, DEC) moved for an order without hearing against RAPHY BENAIM, TOVIT BENAIM AND R.B. 175 CORP.,(respondents) pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 622. The Department alleges that respondents violated New York State's petroleum bulk storage regulations and seeks a determination of liability and an assessment of penalties.

The Department submitted the motion and complaint as well as the affirmation of John K. Urda, assistant regional attorney for the Department, dated April 4, 2005 and the affidavit of Wann-Joe Sun, environmental Engineer II sworn to on April 4, 2005 in support of the motion to the DEC Office of Hearings and Mediation Services and the matter was assigned to Administrative Law Judge (ALJ) Molly T. McBride. Respondents opposed the motion by affirmation of their counsel, Marvin E. Kramer, Esq., dated July 7, 2005. Respondents also served an answer to the complaint dated May 5, 2005. The Department submitted a reply affirmation of Mr. Urda dated July 18, 2005 and Mr. Kramer submitted a letter dated July 19, 2005 commenting on the Urda reply affirmation. Additionally, respondents submitted the transcript of the deposition of Mr. Sun taken July 18, 2005.

Respondents also requested that the ALJ execute subpoenas for records related to the site for the New York City Fire Department

and New York City Building Department. The subpoenas were executed and served by respondents in August, 2005. Various documents have been produced in response to the subpoenas, most recently on October 4, 2005.

Applicable Regulation

Section 622.12 of 6 NYCRR provides for the Department to move for an order without hearing. Pursuant to 6 NYCRR 622.12(d) "[a] contested motion for order without hearing shall be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. The motion must be denied if any party shows the existence of substantive disputes of facts sufficient to require a hearing. (See 6 NYCRR 622.12(e)).

Summary

The Department contends that respondents own property in Queens, New York that contained 2 sets of underground storage tanks (UST) for petroleum bulk storage (PBS). According to the Department, none of the tanks were registered with the Department nor tested and daily inventory logs were not maintained for the tanks. Further, a petroleum discharge occurred. Finally, the Department was not notified when either set of tanks was removed. Respondents claim that in 1989, to their knowledge, they had all tanks removed. This was one year after they purchased the property. They deny any knowledge of the second set of tanks that were located on the property until a tenant discovered them during site construction in 2002 and had them removed. The discharge was reported in January, 2002 by a contractor hired by respondents' tenant. The Sun affidavit contends that extensive gasoline contaminated soil and groundwater were discovered under the location of the second set of tanks.

Department Position

The Department's complaint has seven causes of action.

1) Failure to register a PBS facility - two counts: The Department alleges that respondents failed to register the PBS facility when they purchased it in 1988. There are two time frames involved. Since there are 2 sets of tanks, the first violation allegedly occurred from 1988 until the tanks removal in 1989 and the second violation occurred from 1988 until 2002 when the second set of tanks were removed. The Department cites Environmental Conservation Law (ECL) 17-1009 and 6 NYCRR 612.2

which require the owner of a PBS facility to register the facility with the Department. Section 612.2 specifically includes “any out of service facility which has not been permanently closed.” Section 612.2(b) requires a new owner of a facility to reregister the facility within 30 days of ownership transfer.

2) Failure to notify of substantial modifications to a PBS facility - four counts: The Department alleges that respondents violated ECL 17-1009(3) and section 612.2(d). ECL 17-1009(3) requires an owner to notify the Department 30 days prior to reconditioning or replacing tanks or installing new tanks. Reconditioning is not defined in the ECL but is defined in the regulations and removal of tanks does not fall within that definition. The tanks were not replaced, new tanks were not installed. However, section 612.2(d) requires an owner to notify the Department of substantial modification within 30 days of the modification. Substantial modification is defined in the regulations and the action that occurred here does meet that definition.

3) The Department alleges that respondents failed to test both sets of USTs in violation of section 613.5(a)(1)-(3) and send in reports to the Department pursuant to section 613.5(a)(4). There are exceptions to the testing requirements but they are not applicable here.

4) Section 613.4(a),(c) and (d) of 6 NYCRR set forth the inventory monitoring rules for PBS tanks. Daily inventory records are to be kept to monitor for leaks. Respondents did not maintain such records for either set of tanks.

5) Section 613.9(a)(1) and/or (b)(1) of 6 NYCRR dictate the rules for PBS tank closure. The requirements include removing all product, locking manways, filling lines, gauge openings or pump lines capped or plugged, tanks must be rendered free of petroleum vapors and tanks must be filled with inert material or removed. The Department alleges that this was not completed for the tanks at issue.

6) Respondents allegedly violated ECL 17-0501 by discharging petroleum.

7) Respondents allegedly violated ECL 17-1743 and 6 NYCRR 613.8 by not reporting the petroleum discharge.

The Department has identified the maximum penalty allowed for each violation and requested a penalty that is significantly

less than the maximum for each of the alleged violations. The total penalty requested is $622,925.00. The total allowable penalty would be over six million dollars ($6,000,000.00).

Respondents' Position

Respondents argument is centered on their contention that they had no knowledge of the second set of tanks and that they removed the first set within a year of acquiring the property. Also, they argue that they never stored petroleum on the property and never used the tanks during their ownership of the site. Respondents also argue that the State Administrative Procedure Act (SAPA) section 301(1) calls for a hearing within reasonable time and that these violations date back to their taking ownership in 1988 and so the hearing is not timely. They acknowledge that laches and statute of limitations cannot be raised as a defense. Respondents argue that they could not test and maintain records for tanks if they were not aware that the tanks were present. They were not involved in the closure of the second set of tanks, their tenant handled that. The first set of tanks were removed at their direction by a contractor who had the knowledge and experience to remove such tanks in the manner prescribed by the regulations. As to the discharge, respondents raise the point that the Department has not identified the source of contamination found on the property. The Department states that it came from the tanks on the property but no proof is submitted on that point to confirm the source of contamination or the timing of the discharge.

Respondents want the Department to recognize its lease agreement with its tenants which places responsibility for clean up and any penalties on that tenant.

Discussion and Findings

The Department's arguments are premised on the theory that an owner is liable if PBS tanks are present, whether known or unknown. Respondents primary defense is that they were unaware of the second set of tanks and the first set were removed within one year of acquiring the property, and during the one year that they remained on the property, they were never in use. The ECL and implementing regulations are silent as to whether an owner need be aware of the tanks to be liable. Also, except for the registration requirements, they are silent about whether the tanks need be in use for the requirements to be triggered.

I will briefly address respondents argument that the hearing is not timely and therefore, should be dismissed. The Department

acted on this matter as soon as the spill report was made and the Department became aware of the situation, in 2002. Had the Department learned of these tanks and problems in 1988 when respondents acquired the property and waited in excess of 12 years to act on the alleged violations, the respondents arguments would have merit. But, the facts are that the Department learned of the problems at th site in 2002 as a result of a phoned in spill report and they acted immediately. Respondents were contacted shortly thereafter and efforts were made to resolve this matter between the Department and respondents before the present proceedings were commenced. This argument of an untimely hearing is without merit based upon the facts of the case.

The first cause of action alleges two violations of the regulations related to registering a PBS facility. ECL 17-1009 and 6 NYCRR 612.2 require the owner of a PBS facility to register the facility with the Department. Section 612.2 specifically includes "any out of service facility which has not been permanently closed." Section 612.2(b) requires a new owner of a facility to reregister the facility within 30 days of ownership transfer. There is no dispute that respondents failed to register the facility when they purchased it in 1988. Since there are 2 sets of tanks, the first violation allegedly occurred from 1988 until the first set of tanks were removed in 1989 and the second violation occurred from 1988 until 2002 when the second set of tanks were removed. Respondents only defense is that the City of New York Fire Department had a record of the first set of tanks from the prior owner. That does not satisfy the requirement to register with the Department. The first violation, related to the first set of tanks, has been established by the Department and no question of fact remains.

The second set of tanks poses a different question. Respondents claim to have not known of the existence of the second set of tanks until a tenant discovered them in 2002. I have no records before me to show if the second set of tanks were ever registered with the Department nor any documentation that shows of the tanks in existence in 1988 when respondents purchased the property.

However, the ECL and its implementing regulations related to PBS tanks require an owner of a PBS facility to comply with certain regulations to ensure the safe storage of petroleum products. Tanks are required to be registered so that the Department can monitor the tanks in existence. An owner has to test those tanks to ensure that there are no leaks that could result in damage to the environment. Inventory in the tanks

needs to be monitored so that it can be checked for possible leaks. When a tank is closed, the Department has certain procedures to be followed so that risk of discharge is eliminated. When a discharge occurs, the Department must be notified so that it can oversee the clean up to further protect the environment. Respondents violated the regulations related to the ownership of a facility that has PBS tanks. To allege a lack of knowledge of the tanks does not release one from the responsibilities dictated by the ECL.

The second cause of action alleges violations of ECL 17-1009(3) and 6 NYCRR 612.2(d). ECL 17-1009(3) requires an owner to notify the Department 30 days prior to reconditioning or replacing tanks or installing new tanks. Reconditioning is defined in the regulations at section 612.1(22)and the facts, as alleged by the Department and the respondent, do not fall within that definition. The Department has not established that cause of action. The tanks were not replaced nor were new tanks installed. Section 612.2(d) requires an owner to notify the Department of substantial modification within 30 days of the modification. Substantial modification is defined in the regulations and the action that occurred here does meet that definition. Respondents have not challenged this except for the repeated argument that they did not know of the existence of the second set of tanks and had the first tanks removed approximately one year after purchasing the property. The Department has established the violation of section 612.2(d) and no question of fact remains. The Department has not met its burden with respect to the alleged violations of ECL 17-1009(3) as a question of fact remains.

The third cause of action involves testing of tanks and providing results to the Department. Respondents do not challenge the facts asserted by the Department and argue only that they are not in violation because they were not aware of the tanks. That is not a successful defense and no question of fact remains to be adjudicated.

The fourth cause of action involves monitoring inventory and respondents have again offered no argument on the facts presented by Staff. No question of fact remains with respect to this cause of action.

The fifth cause of action is related to closing tanks. The regulations detail several requirements that must be met to ensure proper tank closure. The Department alleges that the tanks were not properly closed without identifying any specific violations. Respondents defense is that they hired a contractor

to remove the first set of tanks and therefore the tanks were properly closed. However, respondents do not identify how all closure requirement were met. The reports from the contractor who removed the tanks is offered but it does not identify how all closure requirements were met. The Department does not identify how the closure requirements were not met when the tanks were removed and respondents do not identify how they were met, although they may have been when the tanks were removed. Due to the lack of specific information from the both parties, questions of fact remain with regards to this cause of action and therefore, it can not be resolved by this motion.

The sixth cause of action alleges that respondents discharged petroleum. The Department is relying on a spill report made from someone at the site and the report of the contractor who removed the second set of tanks, who reported contamination at the site. The Sun affidavit establishes that extensive contamination was found at the site by the company who removed the second set of tanks in 2002 and that "the extent of the contamination at the site, in consideration of subsurface characteristics and other factors, indicates that the subject petroleum spill began at the tank field area at least several years prior to the January 3, 2002 spill report." (Sun affidavit pp. 9) Respondents have offered no evidence to refute these assertions by the Department. They argue that no definitive proof is submitted of the source of the discharge or that the discharge actually occurred on the property. The report of the contractor relied on by the Department does refer to a gas station on the adjacent lot. The Department has not done its own investigation. Mr. Sun's conclusions were based on the reading of the report of the contractor who removed the second set of tanks. While it does seem logical that the contamination of the site resulted from the USTs on the site, questions of fact remain that could be should be resolved in a hearing. As to when any spill occurred, Staff's vague statement that it appears to have been present for years is not sufficient for this motion once respondents question the lack of identification of the specific source and time. It would be guessing on my part to determine when the spill occurred and what caused the spill. A question of fact remains on this issue.

The seventh cause of action alleges a violation for respondents failing to report the discharge. Until the discharge source is confirmed, this cause of action can not be decided.

Ruling

There is no question of fact remaining with respect to the

first, second, third and fourth causes of action. The motion is granted with respect to the first, third and fourth causes of action and, in part with respect to the second cause of action, as more fully addressed above. As noted, a question of fact remains with regards to the fifth, sixth and seventh causes of action. The Department and respondents should contact each other to discuss possible hearing dates and then contact this office to set a hearing schedule with regards to those remaining causes of action.

I will reserve decision on the issue of penalties until the hearing is held on the remaining issues. In the event that the Department elects not to pursue the remaining causes of action, a summary report will be issued with respect to penalties.

/s/

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Molly T. McBride
Administrative Law Judge

November 8, 2005

To: John K. Urda, Esq.
NYS DEC, Region 2
47-40 21st Street
Long Island City, New York 11101-5407

Marvin E. Kramer & Associates
Marvin E. Kramer, Esq.
400 Post Avenue, Suite 402
Westbury, New York 11590

RAPHY BENAIM, TOVIT BENAIM AND
R.B. 175 CORP.
112-02 Northern Boulevard
Corona, New York 11368