

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of
Article 17 of the Environmental
Conservation Law and Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York,
Parts 612 through 614,

ORDER

- by -

DEC File No.
R7-20120517-42M
PBS 7-460214

GARY BILOW
DBA BILOW'S GARAGE and
NORTH BROAD STREET STATION,

Respondent.

Introduction and Procedural Background

This administrative enforcement proceeding concerns alleged violations of the petroleum bulk storage (PBS) provisions of the New York State Environmental Conservation Law (ECL) and accompanying regulations. The alleged violations are based on respondent's (a) failure to fulfill the terms of modification consent order (Case No. R7-20120517-42M/PBS No. 7-460214) effective March 4, 2013 (2013 modification consent order) and (b) failure to comply with other requirements of the ECL and the PBS regulations.

Department staff from the New York State Department of Environmental Conservation (Department or DEC) instituted this proceeding to enforce provisions of ECL article 17 and former parts 612 and 613 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) for alleged violations concerning underground storage tanks at a former gas station and current motor vehicle repair shop, which is a State-regulated PBS facility. This facility is owned by respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, and is located at 81 North Broad Street, Norwich, New York.

Department staff commenced this administrative proceeding by service of a notice of motion and motion for order without hearing in lieu of complaint (see 6 NYCRR 622.12).¹ In support of the motion, Department staff submitted affidavits from a Department engineer and Department counsel, with supporting exhibits. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, did not respond to the motion.

In its papers, Department staff alleges that the property contains five storage tanks: (1) two registered 10,000-gallon underground storage tanks containing gasoline (tanks 001 and 002); (2) one registered 4,000-gallon underground storage tank containing gasoline (tank 003); (3) one registered underground storage tank with a 550-gallon capacity containing used oil (tank 004); and (4) one unregistered underground storage tank with a 550-gallon capacity containing #2 fuel oil (tank 005). Department staff further alleges that respondent committed three violations of the 2013 modification consent order, by failing to:

- (1) update and renew the PBS facility registration and pay the required \$500 registration fee by February 28, 2013;²
- (2) permanently close the three gasoline underground storage tanks (tanks 001, 002, and 003) by June 30, 2013; and
- (3) submit a closure report/site assessment report, including the soil sample results, for the permanent closure of tanks 001, 002, and 003 by July 31, 2013.

¹Section 622.12(a) of 6 NYCRR provides, in relevant part, that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence."

² Even though this compliance date of February 28, 2013 predated the effective date of the 2013 modification consent order (effective upon the March 4, 2013 signing by the Department's Region 7 Director), respondent signed the 2013 modification consent order on February 13, 2013 and agreed to be bound by its terms. See Affidavit of Barbara A. McGinn, sworn to January 8, 2014 (McGinn Affidavit), Exhibit H, "Consent by Respondent." In any event, respondent has not complied with the 2013 modification consent order.

Department staff further alleges that respondent committed additional violations of the ECL and 6 NYCRR former parts 612 and 613³ by failing to:

- (1) properly color code the fill ports for tanks 004 and 005 pursuant to 6 NYCRR former 613.3(b);
- (2) conduct annual cathodic protection system monitoring tests for tank 004 pursuant to 6 NYCRR former 613.5(b)(2); and
- (3) conduct inventory monitoring for tanks 004 and 005 pursuant to 6 NYCRR former 613.4(a)(2).

Department staff's motion was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick of the Department's Office of Hearings and Mediation Services. ALJ Garlick prepared the attached summary report on motion for order without hearing. I adopt ALJ Garlick's report as my decision in this matter, subject to the following comments.

Standards for Motion for Order without Hearing

The provisions of 6 NYCRR 622.12 are governed by the same principles that govern summary judgment motions brought pursuant to the New York Civil Practice Law and Rules (see 6 NYCRR 622.12[d]; see also Matter of Locaparra, d/b/a L&L Scrap Metals, Commissioner's Final Decision and Order, June 16, 2003, at 3).

Department Staff's Proof of Liability

Department staff's case against respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, is based on: (1) a 2012 inspection resulting in a notice of violation dated May 16, 2012 (2012 NOV); (2) alleged violations of the 2013 modification consent order; and (3) a 2013 inspection (see Affidavit of Kevin C. Kemp, sworn to January 8, 2014 [Kemp Affidavit], ¶¶ 3-8).

Based on a review of his 2012 inspection report and 2012 NOV and the 2013 modification consent order, as well as his 2013 inspection, Mr. Kemp determined that the Department did not

³ Parts 612 and 613 were repealed and replaced by a revised part 613, effective on October 11, 2015. For the purposes of the violations alleged in this matter, former parts 612 and 613 apply. For the purposes of following the requirements going forward, the current regulations apply.

receive any of the submissions required by the 2013 modification consent order, and did not receive payment for the civil penalty now outstanding due to respondent's failure to comply with the 2013 modification consent order (see Kemp Affidavit, ¶¶ 5, 6, and 8).

In her affidavit, the Department's attorney, Barbara A. McGinn, Esq., stated that she searched the Department's files and also determined that the Department did not receive any of the submissions required by the 2013 modification consent order, or any other required documentation of compliance or payment of the civil penalty now due for respondent's failure to comply with the 2013 modification consent order (see McGinn Affidavit, ¶¶ 9, 11 and 13).

The ALJ addresses the violations that Department staff has alleged and my review of his analysis confirms that Department staff has met its burden of establishing a prima facie case (see Summary Report at 7-14). Accordingly, Department staff has established that respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, committed the violations alleged.

Civil Penalty

Department staff is seeking payment of the fifteen thousand dollar (\$15,000) civil penalty that was suspended conditioned upon respondent's compliance with the 2013 modification consent order. Respondent did not comply with the 2013 modification consent order, and that civil penalty is now due.

I further determine that the proposed civil penalties sought by Department staff in the amount of forty-two thousand two hundred dollars (\$42,200) to address the violations at the facility are authorized and appropriate. The civil penalties are as follows:

- Failure to update and renew the facility's registration:
\$10,000;
- Failure to permanently close tanks 001, 002, and 003:
\$30,000;
- Failure to properly color code fill ports on tanks 004 and 005: \$400;

- Failure to perform annual monitoring of cathodic protection systems on tank 004: \$600; and
- Failure to perform alternative leak detection for tanks 004 and 005: \$1,200.

The penalty, including the previously suspended amount under the 2013 modification consent order, totals fifty-seven thousand two hundred dollars (\$57,200).

Corrective Action

In addition to the payment of civil penalties, Department staff seeks an order requiring respondent to remedy the violations. This includes updating and renewing registrations, permanently closing tanks, sending reports to the Department, submitting photos that fill ports are properly color coded, and submitting test results to the Department. The ALJ concludes that this corrective action is reasonable and necessary to protect the environment (see Summary Report at 24-26). I concur that the corrective actions that Department staff requests are critical to the protection of the public health and environment.

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

- I. Department staff's unopposed motion for order without hearing in lieu of complaint pursuant to 6 NYCRR 622.12 is granted. By failing to respond to the motion or otherwise appear in this proceeding, respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, waived his right to be heard at a hearing.
- II. Based upon record evidence, respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, is adjudged to have violated the 2013 modification consent order at its PBS facility located at 81 North Broad Street, Norwich, New York, as follows:
 - A. Failing to update and renew the PBS facility registration and pay the required \$500 registration fee by February 28, 2013, as well as the \$500 registration fee for the current five-year registration period;

- B. Failing to permanently close the three gasoline underground storage tanks (tanks 001, 002, and 003) by June 30, 2013; and
 - C. Failing to submit a closure report/site assessment report, including the soil sample results, for the permanent closure of tanks 001, 002, and 003 by July 31, 2013.
- III. Based upon record evidence, respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, is adjudged to have violated the ECL and 6 NYCRR former Parts 612 and 613, as follows:
- A. Failing to properly color code the fill ports for tanks 004 and 005, in violation of 6 NYCRR former 613.3(b);
 - B. Failing to conduct annual cathodic protection system monitoring tests for tank 004 and the associated piping, in violation of 6 NYCRR former 613.5(b)(2); and
 - C. Failing to conduct tightness testing for tanks 004 and 005 and submit the results of this testing to Department staff to demonstrate compliance with the alternate leak detection requirement, in violation of 6 NYCRR former 613.4(a)(2).
- IV. Within sixty (60) days of service of this order upon respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, respondent is directed to pay fifty-seven thousand two hundred dollars (\$57,200) to the Department, consisting of:
- A. The fifteen thousand dollars (\$15,000) that had been suspended by a modification consent order (Case No. R7-20120517-42M/PBS No. 7-460214), effective March 4, 2013 (2013 modification consent order), contingent upon respondent's compliance with the 2013 modification consent order, which respondent failed to do; and
 - B. A civil penalty in the amount of forty-two thousand two hundred dollars (\$42,200) that is hereby assessed for the violations set forth in paragraphs II and III of this order.

Respondent shall pay fifty-seven thousand two hundred dollars (\$57,200) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation." The civil penalty payment shall be sent to the following address:

Office of General Counsel
NYSDEC Region 7
615 Erie Boulevard West
Syracuse, New York 13204-2400
Attention: Barbara A. McGinn, Esq.

- V. In addition to the payment of civil penalties, respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, is ordered to perform the following corrective action:
- A. No later than sixty (60) days after service of this order upon respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, respondent is required to:
- update and renew the PBS facility registration and paying the required \$1,000 registration fee for two consecutive five year periods: October 14, 2008-October 13, 2013 and October 14, 2013-October 13, 2018;
 - permanently close the three gasoline underground storage tanks (tanks 001, 002, and 003); and
 - submit a closure report/site assessment report, including the soil sample results, for the permanent closure of tanks 001, 002, and 003.
- B. No later than thirty (30) days after service of this order upon respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, respondent is required to bring tanks 004 and 005 into compliance by:
- properly color coding the fill ports for tanks 004 and 005 pursuant to current 6 NYCRR 613-2.2(a)(4), and submitting photographs to Department staff demonstrating compliance with this requirement;

- conducting annual cathodic protection system monitoring tests for tanks 004 and 005 and the associated piping pursuant to current 6 NYCRR 613-2.2(b) and submitting the results of these monitoring tests to Department staff; and
- conducting tightness testing for tanks 004 and 005 pursuant to current 6 NYCRR 613-2.3(a)(3), and submitting the results of this testing to Department staff to demonstrate compliance.

C. If respondent does not bring tanks 004 and 005 into compliance as set forth in Paragraph V.B. of this order, respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, must permanently close tanks 004 and 005, in accordance with current 6 NYCRR 613-2.6(b), and submit a closure/site assessment report to Department staff after the tanks are removed no later than sixty (60) days after service of this order upon him.

D. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, is required to provide at least 30 days' notice to Department staff, pursuant to current 6 NYCRR 613-2.6(b)(1), that any tanks at the facility will be permanently closed.

VI. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station shall submit all documentation and other evidence required in this order to the Department at the following address:

Mr. Kevin C. Kemp, P.E.
NYSDEC Region 7
615 Erie Boulevard West
Syracuse, New York 13204-2400.

VII. The provisions, terms, and conditions of this order shall bind respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, and his 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
January 2, 2018

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

In the Matter of Alleged Violations of
Article 17 of the Environmental
Conservation Law and Title 6 of the
Official Compilation of Codes,
Rules and Regulations of the State of
New York, Parts 612 through 614,

Summary Report

DEC File No.
R7-20120517-42M
PBS 7-460214

-by-

**GARY BILOW
DBA BILOW'S GARAGE and
NORTH BROAD STREET STATION,**

Respondent.

SUMMARY

This summary report recommends the Commissioner grant an unopposed motion for order without hearing in lieu of complaint served by staff of the Department of Environmental Conservation (Department staff) on respondent Gary Bilow (respondent) on January 13, 2014. The respondent has not answered or otherwise appeared. In its motion papers, Department staff alleges the respondent committed three violations of modification consent order R7-20120517-42M and three violations of Department regulations involving a Petroleum Bulk Storage (PBS) facility that the respondent owns and operates at 81 North Broad Street, Norwich, Chenango County, New York (PBS facility #7-460214). The evidence included with Department staff's motion, establishes a prima facie case that the violations occurred and no material questions of fact exist. For this reason, the Commissioner should find the respondent liable for the six alleged violations. The Commissioner's order should also direct the respondent to pay: (1) a suspended penalty of fifteen thousand dollars (\$15,000) authorized by paragraph I. B. of modification consent order R7-20120517-42M; and (2) an additional civil penalty of forty-two thousand two hundred dollars (\$42,200) for the six violations proven in this

proceeding. In addition, the respondent should be directed to undertake corrective actions to address the violations.

PROCEEDINGS

On January 13, 2014, Department staff served a motion for order without hearing in lieu of complaint and supporting papers on respondent by certified mail. Department staff's papers consisted of: (1) a cover letter dated January 10, 2014; (2) a notice of motion dated January 9, 2014; (3) a motion for order without hearing dated January 9, 2014; (4) an attorney brief signed by Department staff counsel Barbara A. McGinn, Esq., dated January 9, 2014; (5) the affidavit of Department staff counsel Barbara A. McGinn, Esq., dated January 8, 2014; (6) the affidavit of Department staff engineer Kevin C. Kemp, P.E., dated January 8, 2014; and (7) twelve exhibits (described in the attached exhibit chart).

By letter dated January 15, 2014, Department staff counsel provided a copy of the notice of motion for order without hearing, the motion for order without hearing, and supporting papers to the Department's Chief Administrative Law Judge (CALJ). She also provided a copy of the proof of service. The affidavit of service submitted with Department Staff's papers indicated service on the CALJ while the accompanying mailing receipts show delivery to the respondent.

No response has been received from respondent at the Department's Office of Hearings and Mediation Services (OHMS) though it was due on or before February 3, 2014. By email dated February 7, 2014, Department staff counsel McGinn informed the CALJ that no response had been received from the respondent.

On February 7, 2014, this matter was assigned to me.

By letter dated July 9, 2015, I wrote to Department counsel inquiring whether service had been made on the respondent.

By email dated July 13, 2015, Department staff counsel responded and provided a corrected affidavit of service showing that the respondent was served on January 13, 2014. She also provided a corrected affidavit and mailing receipts with a cover letter dated July 22, 2015.

FINDINGS OF FACT

1. Respondent Gary Bilow owns property located at 81 North Broad Street, Norwich, New York (Exh. D), which has been assigned Tax Map Parcel Number 136.48-3-4 (Exh. C) (site). The respondent purchased the property on December 14, 1983 (Exh. D). The property is the site of a motor vehicle repair and service station operated by the respondent (Kemp affid. ¶ 9; Exh. C).
2. The PBS program Facility Information Report (Exh. A) and the PBS program information sheet (Exh. B) together show that the respondent Gary Bilow owns and operates PBS facility #7-460214 which is located at the site. Both documents show the site contains four in-service active petroleum tanks: (1) Tank 001 is an underground storage tank (UST) with a 10,000 gallon capacity used for gasoline storage; (2) Tank 002 is a 10,000 gallon UST used for gasoline storage; (3) Tank 003 is a 4,000 gallon UST used for gasoline storage; and (4) Tank 004 is a 550 gallon UST used for storage of used oil. Both documents also show that these tanks are constructed from steel/carbon steel/iron and were installed between 1969 and 1971. The PBS program Information sheet (Exh. B) shows that the PBS registration for the facility expired on October 14, 2008.
3. During an inspection of the facility on March 3, 2006, Department staff engineer Kemp noted that the facility was no longer selling gasoline products and Tank 001, Tank 002 and Tank 003 were out of service, but not properly permanently closed in accordance with 6 NYCRR 613.9(b). During this and other conversations Mr. Kemp has had with the respondent, Mr. Kemp was told that gasoline has not been sold from the facility since approximately 2004 and that Tank 001, Tank 002 and Tank 003 have been out of service since that time (Kemp affid. ¶ 9).
4. During an inspection of the facility on May 11, 2012,¹ Department staff engineer observed unregistered UST, (unregistered Tank 005), which has an approximate design capacity of 550 gallons used for storing #2 fuel oil (Kemp affid. ¶ 4).

¹ Both the original consent order (R7 20120517-42) and the modification consent order (R7-20120517-42M) cite an inspection that occurred on March 11, 2012. No other reference to this inspection is in the record.

5. During his conversations with the respondent over the years, Mr. Kemp was informed by the respondent that unregistered Tank 005 was at the facility when the respondent purchased the facility in 1983 and was installed in 1969. Mr. Kemp was also told by the respondent that he uses Tank 004 and unregistered Tank 005 in his business as a motor vehicle repair and service station (Kemp affid. ¶ 9).

6. During his May 11, 2012 inspection of the facility, Department staff engineer Kemp prepared a PBS inspection report (Exh. E, at 8 - 11), which identifies the violations he observed during his inspection (Kemp affid. ¶ 3). On May 16, 2012, Mr. Kemp mailed or caused to be mailed a notice of violation (NOV) (Exh. E, at 1 - 4) detailing all of the violations of the PBS statutes and regulations discovered during the inspection (Kemp affid. ¶ 3). Among the violations noted in the NOV are respondent's failure to: (1) properly color code the fill ports for Tank 004 and unregistered Tank 005 in violation of 6 NYCRR 613.3(b); (2) annually monitor the cathodic protection on Tank 004 and associated piping in violation of 6 NYCRR 613.5(b); and (3) detect inventory leakage for Tank 004 and unregistered Tank 005 using an alternative leak detection method in violation of 6 NYCRR 613.4(a)(2). The NOV required the respondent to, within 30 days: (1) submit to the Department a photograph showing that the fill ports had been properly color coded, labeled or marked; (2) submit to the Department the most recent annual monitoring report; and (3) tightness test Tank 004 and unregistered Tank 005 and submit the results to the Department (Exh. E at 2).

7. On October 16, 2012, the respondent met with Department staff counsel McGinn and engineer Kemp for a settlement conference (McGinn affid. ¶ 6). At the end of the conference, the respondent was given a proposed consent order to resolve the violations documented in the NOV. The respondent signed the consent order on October 23, 2012 and paid the five hundred dollar (\$500) payable civil penalty. The Department's Region 7 director signed the consent order²

² The consent order has a variation in the name of the respondent from the instant action. The consent order names Gary Bilow dba Bilow's Garage, while Department staff's motion papers name the respondent as Gary Bilow dba Bilow's Garage and North Broad Street Station.

(R7-20120517-42) on October 26, 2012 and it became effective that date (Exh. F). The respondent was served with the executed consent order and receipt of payment, and Department staff received confirmation of this on November 9, 2012 (Exh. G).

8. At the request of the respondent, the consent order was modified to allow the respondent additional time to perform the required compliance items (McGinn affid, ¶ 8). This document, entitled "modification consent order (R7-20120517-42M)"³ became effective on March 4, 2013 (Exh. H). Respondent was served with the executed modification consent order and Department staff received confirmation of this on March 6, 2013 (Exh. I). The compliance items section of this document stated:

- A. By no later than February 28, 2013, Respondent shall update the registration of the Facility with the Department. Respondent shall send the Department a check for Five Hundred Dollars (\$500.00) along with the Renewal Application Form. This check must be separate from the check for the Payable Civil Penalty.

- B. By no later than June 30, 2013, Respondent shall close and remove Tank 001, Tank 002 and Tank 003 at the Facility. By no later than July 31, 2013, Respondent shall send to the Department the closure report for the removal of the tanks which must include soil sample results.

9. On July 11, 2013, the respondent spoke via telephone with Department staff counsel McGinn regarding his request for additional time to meet the requirements of the modification consent order. Department staff did not agree to another modification (McGinn affid. ¶ 10).

³ The modification consent order also contains the variation in the name of the respondent. The consent order names Gary Bilow dba Bilow's Garage, while Department staff's motion papers name the respondent as Gary Bilow dba Bilow's Garage and North Broad Street Station.

10. In a letter to the respondent dated July 15, 2013, Department staff counsel McGinn again apprised the respondent of the requirements for closure of USTs and attached a listing of possible contractors to perform some of the closure work (Exh. J). This letter was sent by certified mail and was received by the respondent on July 16, 2013 (Exh. K).
11. On December 5, 2013, Department staff engineer Kemp inspected the respondent's facility and he observed that Tank 001, Tank 002 and Tank 003 remain in place and do not appear to be permanently closed (Kemp affid. ¶ 9). Mr. Kemp emailed photographs taken during this inspection to Department staff counsel McGinn (Exh. L).
12. As of January 8, 2014, the respondent had not complied with the requirements of the modification consent order (Kemp affid. ¶ 8). Specifically, the respondent has not: (1) updated his PBS registration and paid the five hundred dollar (\$500) registration fee; (2) filed a closure report indicating that Tank 001, Tank 002, and Tank 003 were closed by June 30, 2013; and (3) filed a closure report with soil sample results from the closure of Tank 001, Tank 002, and Tank 003 (McGinn affid. ¶ 11, Kemp affid. ¶ 5).
13. As of January 8, 2014, the Department staff had not received the fifteen thousand dollar (\$15,000) suspended penalty for failure to comply with the requirements of the modification consent order (McGinn affid. ¶ 12, Kemp affid. ¶ 6).
14. As of January 8, 2014, the Department staff had not received any of the compliance documentation respondent was required to submit to demonstrate that Tank 004 and unregistered Tank 005 had been brought into compliance with 6 NYCRR 613.3(b), 613.5(b)(2), and 613.4(a)(2). The Department does not have in its files: (1) photographs of the properly color coded fill ports for Tank 004 and unregistered Tank 005; (2) the results of the annual cathodic protection system monitoring tests for Tank 004 and associated piping; and (3) the tightness testing results for Tank 004 and unregistered Tank 005 as requested by the Department to demonstrate compliance with the alternative leak detection requirement (McGinn affid. ¶ 13, Kemp affid. ¶ 8).

DISCUSSION

In its unopposed motion for order without hearing in lieu of complaint, Department staff requests the Commissioner issue an order that: (1) finds the respondent liable for the six violations alleged; (2) requires the respondent to pay a total payable civil penalty of fifty-seven thousand two hundred dollars (\$57,200); and (3) directs the respondent to undertake certain actions to remedy the violations. Each of these requests is discussed below.

As a preliminary matter, there is discrepancy between the captions used in the instant action and both the consent order, R7-20120517-42 (Exh. F), and the modification consent order R7-20120517-42M (Exh. H). Both consent orders name **Gary Bilow dba Bilow's Garage** as the respondent, while Department staff's motion papers in this case identify the respondent as **Gary Bilow dba Bilow's Garage and North Broad Street Station**. Both the PBS program Facility Information Report (Exh. A) and the PBS program information sheet (Exh. B) identify the site name as North Broad Street Station, as does the NOV (Exh. E). Department staff counsel's letter dated July 15, 2013 also uses North Broad Street Station (Exh. J). In any event, the respondent here is Gary Bilow as the legal entity responsible for the subject facility.

Liability

In its motion, Department staff alleges that the respondent committed six violations. Specifically, staff alleges that respondent: (1) violated the modification consent order R7-20120517-42M by failing to update and renew the expired PBS registration and pay the PBS registration fee of five hundred dollars (\$500) by February 28, 2013; (2) violated the modification consent order R7-20120517-42M by failing to permanently close Tank 001, Tank 002 and Tank 003 by June 30, 2013; (3) violated the modification consent order R7-20120517-42M by failing to send Department staff the closure report/site assessment report including soil sample results from the permanent closure of Tank 001, Tank 002 and Tank 003 by July 31, 2013; (4) violated 6 NYCRR 613.3(b) pertaining to Tank 004 and unregistered Tank 005; (5) violated 6 NYCRR 613.5(b)(2) pertaining to Tank 004; and (6) violated 6 NYCRR 613.4(a)(2) pertaining to for Tank 004 and unregistered Tank 005.

The Commissioner set forth the standards to be used in evaluating a motion for order without hearing in Matter of

Locaparra (Decision and Order of the Commissioner, June 16, 2003).

Staff brings this motion for an order without hearing pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will 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 moving party on a summary judgment motion has the burden of establishing `his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor (CPLR 3212, subd [b]).' The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof. The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact"

(id. at 3-4 [internal citations omitted]); see also Matter of Alvin Hunt dba Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2 ["where a respondent fails to answer a motion for an order without hearing and Department staff ... seeks ... a determination on the merits of its motion for order without hearing, summary judgment principles are applied in analyzing the motion"]).

First alleged violation. Paragraph III. A. of modification consent order R7-20120517-42M (Exh. H) states:

"By no later than February 28, 2013, Respondent shall update the registration of the Facility with the Department. Respondent shall send the Department a check for Five Hundred Dollars (\$500.00) along with the Renewal Application form. This check must be separate from the check for the Payable Civil Penalty."

In its motion, Department staff alleges that the respondent violated this provision by failing to update and renew the expired registration and pay the registration fee of five hundred dollars (\$500) by February 28, 2013.

As proof that this violation occurred, Department staff offers two affidavits. Department staff counsel McGinn states that as of January 8, 2014, the respondent had not complied with this provision. She states that a diligent search of the Department's Region 7 Office of General Counsel files for consent orders R7-20120517-42 and R7-20120517-42M and failed to find an updated PBS registration and the registration fee (McGinn affid. ¶ 11). Department staff engineer Kemp states that, as of January 8, 2014, the Department had not received the required items. He further states that he diligently searched the Department's Region 7 PBS program files for PBS facility #7-460214 and failed to find an updated PBS registration and renewal application, and the registration fee (Kemp affid. ¶ 5). Based on this evidence, it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a prima facie case and that the respondent violated Paragraph III. A. of modification consent order R7-20120517-42M by failing to update and renew the expired registration and pay the registration fee of five hundred dollars (\$500) by February 28, 2013.

Second alleged violation. Paragraph III. B. of modification consent order R7-20120517-42M (Exh. H) states in relevant part:

"By no later than June 30, 2013, Respondent shall close and remove Tank 001, Tank 002, and Tank 003 at the Facility."

In its motion, Department staff alleges that the respondent violated this provision by failing to permanently close Tank

001, Tank 002, and Tank 003 by June 30, 2013. As proof that this violation occurred, Department staff offers the affidavit of Department staff engineer Kemp who states that during his December 5, 2013 inspection of the facility, he observed that Tank 001, Tank 002, and Tank 003 remained in place and did not appear to be permanently closed (Kemp affid. ¶ 7). He also took two photographs of the site on this inspection (Exh. L). Based on this evidence, it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a prima facie case that the respondent violated Paragraph III. B. of modification consent order R7-20120517-42M by failing to permanently close Tank 001, 002, and 003 by June 30, 2013.

Third alleged violation. Paragraph III. B. of modification consent order R7-20120517-42M (Exh. H) states in relevant part:

“By no later than July 31, 2013, Respondent shall send the Department the closure report for the removal of the tanks which must include soil sample results.”

In its motion, Department staff alleges that the respondent violated this provision by failing to send to the Department the closure report/site assessment report including the soil sample results from the permanent closure of Tank 001, Tank 002, and Tank 003 by July 31, 2013. As proof that this violation occurred, Department staff offers two affidavits. Department staff counsel McGinn states that, as of January 8, 2014, a diligent search of the Department's Region 7 Office of General Counsel files for consent orders R7-20120517-42 and R7-20120517-42M failed to reveal a closure report indicating that Tank 001, Tank 002, and Tank 003 were closed by June 30, 2013. She also states that a diligent search of the Department's Region 7 Office of General Counsel files for consent orders R7-20120517-42 and R7-20120517-42M failed to reveal a closure report with the soil sample results from the closure of Tank 001, Tank 002, and Tank 003 (McGinn affid. ¶ 11). Department staff engineer Kemp states that, as of January 8, 2014, he diligently searched the Department's Region 7 PBS program files for PBS facility #7-460214 and failed to find the closure report/site assessment report indicating that Tank 001, Tank 002, and Tank 003 were permanently closed by June 30, 2013. He also states that he diligently searched the Department's Region 7 PBS program files for PBS facility #7-460214 and failed to find the closure report/site assessment report with the soil sample results from the permanent closure of Tank 001, Tank 002, and Tank 003 (Kemp

affid. ¶ 5). Based on this evidence, it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a prima facie case that the respondent violated Paragraph III. B. of modification consent order R7-20120517-42M by failing to send to the Department the closure report/site assessment report including the soil sample results from the permanent closure of Tank 001, Tank 002, and Tank 003 by July 31, 2013.

Fourth alleged violation. Section 613.3(b) of 6 NYCRR requires the owner or operator of a PBS facility to mark all fill ports to identify the product inside the tank. In its motion, Department staff alleges that the respondent violated this provision as it pertains to Tank 004 and unregistered Tank 005.

On May 11, 2012, Department staff engineer Kemp inspected the respondent's facility and noted in his subsequent May 16, 2012 Notice of Violation (NOV) that the fill ports for Tank 004 and unregistered Tank 005 were not properly color coded at the time of the inspection (Kemp affid. ¶ 3, Exh. E). This NOV directed the respondent to, within 30 calendar days from the date of the NOV to submit a photograph showing that the fill ports had been properly color coded, labeled or marked (Exh. E at 2). This photograph was due on June 15, 2012.

As proof that this violation occurred, Department staff offers two affidavits. Department staff counsel McGinn states that, as of January 8, 2014, a diligent search of the Department's Region 7 Office of General Counsel files for consent orders R7-20120517-42 and R7-20120517-42M failed to reveal photographs of the properly color coded fill ports for Tank 004 and unregistered Tank 005 (McGinn affid. ¶ 13). Department staff engineer Kemp states that, as of January 8, 2014, he diligently searched the Department's Region 7 PBS program files for PBS facility #7-460214 and failed to find photographs of the properly color coded fill ports for Tank 004 and unregistered Tank 005 (Kemp affid. ¶ 8).

Based on this evidence, it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a prima facie case that the respondent violated 6 NYCRR 613.3(b) as it pertains to Tank 004 and unregistered Tank 005.

Fifth alleged violation. Section 613.5(b)(2) of 6 NYCRR requires the owner or operator of any PBS facility to monitor the adequacy of a cathodic protection system at least annually. In its motion, Department staff alleges the respondent violated this provision as it pertains to Tank 004. In her attorney brief, Department staff counsel McGinn states that the respondent committed this violation by failing to perform annual monitoring of the cathodic protection systems on Tank 004 and the associated piping (McGinn brief at 10). She notes that the May 16, 2012 NOV stated:

"The cathodic protection on these tanks⁴ and associated piping system has not been monitored annually to ensure that the tank is protected from corrosion as required by 613.5(b)(2). Submit the most recent annual monitoring report within 30 calendar days from the date of this letter" (Exh. E at 2).

On May 11, 2012, Department staff engineer Kemp inspected the respondent's facility and noted this violation in his May 16, 2012 NOV, as quoted above. The NOV required the respondent to submit the most recent annual monitoring report within 30 calendar days, or by June 15, 2012.

As proof that this violation occurred, Department staff offers two affidavits. Department staff counsel McGinn states that, as of January 8, 2014, a diligent search of the Department's Region 7 Office of General Counsel files for consent orders R7-20120517-42 and R7-20120517-42M and failed to find the results of the annual cathodic protection system monitoring tests for Tank 004 and the associated piping (McGinn affid. ¶ 13). Department staff engineer Kemp states that, as of January 8, 2014, he diligently searched the Department's Region 7 PBS program files for PBS facility #7-460214 and failed to find the results of the annual cathodic protection system monitoring tests for Tank 004 and the associated piping (Kemp affid. ¶ 8).

Based on this evidence, it is reasonable for the Commissioner to conclude that Department staff has met its

⁴ The NOV lists all the tanks at the facility were in violation of 6 NYCRR 613.5(b)(2) (Exh. E at 2). This language is repeated in the modification consent order (Exh H at 2). Department staff does not explain why in the motion, only a violation pertaining to Tank 004 is being requested.

burden of establishing a prima facie case and that the respondent violated 6 NYCRR 613.5(b)(2) as it pertains to Tank 004.

Sixth alleged violation. Section 613.4(a)(2) of 6 NYCRR requires the owner or operator of any underground tank to keep daily inventory records for the purpose of detecting leaks to test for possible inventory leakage. In its motion, Department staff alleges the respondent violated this provision as it pertains to Tank 004 and unregistered Tank 005. In her attorney brief, Department staff counsel McGinn states that the respondent committed this violation by failing to perform alternative leak detection on unmetered Tank 004 and unregistered Tank 005. She continues that because these tanks are unmetered, inventory leakage must be performed by an alternative method (McGinn brief at 11). She notes that the May 16, 2012 NOV stated:

"No alternative leak detection has been provided for these tanks. Since these tanks are un-metered or contains [sic] petroleum for consumptive use on the premises, the operator must detect inventory leakage in an alternative method. The alternative method may include an annual standpipe analysis, annual tightness test, monitoring of inventory losses in the off-season or other method acceptable to the Department. Within 30 calendar days from the date of this letter this tank must be tested for tightness and the results submitted" (Exh. E at 2).

On May 11, 2012, Department staff engineer Kemp inspected the respondent's facility and noted in his PBS Inspection Form that Tank 004 and unregistered Tank 005 were unmetered tanks (Exh. E at 9). Mr. Kemp also noted this violation in his subsequent May 16, 2012 NOV. As quoted above, the NOV stated that within 30 calendar days from the date of the NOV, the tank tightness results must be submitted to Department staff. Such results were due by June 15, 2012.

As proof that this violation occurred, Department staff offers two affidavits. Department staff counsel McGinn states that, as of January 8, 2014, a diligent search of the Department's Region 7 Office of General Counsel files for consent orders R7-20120517-42 and R7-20120517-42M failed to

reveal the tightness testing results for Tank 004 and unregistered Tank 005 to demonstrate compliance with the alternative leak detection requirement (McGinn affid. ¶ 13). Department staff engineer Kemp states that, as of January 8, 2014, he diligently searched the Department's Region 7 PBS program files for PBS facility #7-460214 and failed to find the tightness testing results for Tank 004 and unregistered Tank 005 to demonstrate compliance with the alternative leak detection requirement (Kemp affid. ¶ 8).

Based on this evidence, it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a prima facie case that the respondent is liable for violating 6 NYCRR 613.4(a)(2) as it pertains to Tank 004 and unregistered Tank 005.

Civil Penalty

In its motion, Department staff requests the Commissioner impose in his order a total payable civil penalty of fifty-seven thousand two hundred dollars (\$57,200). The components of this requested penalty are summarized in the table below.

Description	Requested Penalty
Suspended Penalty	\$15,000
First Violation	\$10,000
Second Violation	\$30,000
Fourth Violation	\$400
Fifth Violation	\$600
Sixth Violation	\$1,200
TOTAL	\$57,200

Suspended civil penalty

Paragraph I. A. of modification consent order R7-20120517-42M (Exh. H) imposed a five hundred dollar (\$500) payable civil penalty, which was paid (Exh. G at 4). Paragraph I. B. of this document states:

"Respondent is also hereby assessed a Suspended Civil Penalty in the amount of Fifteen Thousand Dollars (\$15,000) for the violations stated herein as a penalty to guaranty compliance with this Consent Order. This Suspended Civil Penalty, or any portion

thereof, shall become payable in the event the Department determines that the Respondent has failed to comply with the Compliance Items. The penalty to guaranty compliance under this paragraph shall become due and payable within fifteen (15) calendar days after Respondent receives written notice from the Department that Respondent was or is in violation of this Order."

In its motion, Department staff requests the Commissioner issue an order directing the respondent to pay the Department the fifteen thousand dollar (\$15,000) suspended penalty, within sixty (60) days of the Commissioner's order, for failing to comply with modification consent order R7-20120517-42M. As stated above, the respondent agreed to the suspended penalty when he signed the modification consent order and agreed that it would become payable if he failed to comply with the compliance items, set forth in the document. As discussed in detail above, Department staff has shown that the respondent has failed to comply with the compliance items. Department staff's motion papers put the respondent on written notice that he was or is in violation of the order.

Because the respondent has not complied with compliance items in modification consent order R7-20120517-42M, it is appropriate for the Commissioner to determine that the fifteen thousand dollar (\$15,000) suspended penalty is payable. Therefore, the Commissioner should include in his order language requiring the respondent to pay the suspended civil penalty.

Additional Civil Penalties

In addition to directing the respondent to pay the suspended civil penalty, Department staff also seeks the Commissioner to direct the respondent to pay additional civil penalties for the violations alleged in its motion. In her attorney brief, Department staff counsel McGinn notes that modification consent order R7-20120517-42M informed the respondent that further penalties, pursuant to Environmental Conservation Law (ECL) § 71-1929(1) could be imposed for failing to fully comply with the requirements of the order (Exh. H at 1. C.).

ECL 71-1929(1) provides, in relevant part:

"A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of [ECL] article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation."

Department staff McGinn also references two relevant DEC guidance documents regarding the appropriate civil penalty amount in this case: (1) the Department's Civil Penalty Policy (DEE 1, issued June 20, 1990); and (2) the Department's Petroleum Bulk Storage Inspection Enforcement Policy and its associated Penalty Schedule (DEE 22, issued May 21, 2003). However, the penalty amounts calculated with the aid of DEE-22 in adjudicated cases (such as this one) must, on average and consistent with consideration of fairness, be significantly higher than the penalty amounts which the Department accepts in consent orders which are entered into voluntarily by respondents (DEE-22 ¶ 4). This document also states that the suggested penalty ranges included in the policy shall not apply to the resolution of violations after a Notice of Hearing and Complaint has been served (DEE-22 at 3).⁵

Respondent's economic benefit. In her attorney brief, Department staff counsel McGinn states that the respondent's total economic benefit by failing to comply with the PBS regulations is sixty-three thousand seven hundred dollars (\$63,700), based on the subtotals, below:

⁵ No notice of hearing and complaint has been served on the respondent in this case because this matter was initiated with a motion for order without hearing in lieu of complaint pursuant to 6 NYCRR 622.12. However, the civil penalties in this case should be significantly higher than those set forth in DEE-22 because these violations were not resolved through consent order.

Description	Department staff's estimated economic benefit
Suspended Penalty	
First Violation	\$1,000
Second Violation	\$30,000
Fourth Violation	\$200
Fifth Violation	\$4,500
Sixth Violation	\$28,000
TOTAL	\$63,700

Department staff bases its estimate for the first violation on the fact that the respondent should have spent one thousand dollars (\$1,000) total to renew the registration for each five-year period, from October 14, 2008 to October 13, 2013, and from October 14, 2013 to October 13, 2018. Each period required a five hundred dollars (\$500) registration fee pursuant to ECL 17-1009(2) (attorney brief at 31).

Department staff bases its estimate for the second violation on information in the affidavit of Department staff engineer Kemp, who estimates the cost of permanent closure of a UST at ten thousand dollars (\$10,000) per tank (Kemp affid. ¶ 10). Because respondent was required to close three tanks, Tank 001, Tank 002, and Tank 003, the total estimate is thirty thousand dollars (\$30,000).

Department staff bases its estimate for the fourth violation on information in the affidavit of Department staff engineer Kemp, who estimates the cost of color coding a fill port at one hundred dollars (\$100) per tank (Kemp affid. ¶ 10). Because respondent was required to color code two fill ports, the total estimate is two hundred dollars (\$200).

Department staff bases its estimate for the fifth violation on information in the affidavit of Department staff engineer Kemp who estimates the cost of a cathodic protection test is approximately five hundred dollars (\$500) (Kemp affid. ¶ 10). Department staff counsel states that this requirement came into effect in 1999 and, therefore, the respondent has avoided this cost for 15 years (attorney brief at 32). This leads to a total economic benefit of seven thousand five hundred (\$7,500)⁶.

⁶ Counsel states the cost of a cathodic protection test is three hundred dollars (\$300) (attorney brief at 32), while Mr. Kemp states it is five hundred dollars (\$500) (Kemp affid. ¶ 10).

Department staff bases its estimate for the sixth violation on information in the affidavit of Department staff engineer Kemp who estimates the average cost of a tightness test is approximately five hundred dollars (\$500) (Kemp affid. ¶ 10). Department staff counsel states that this requirement came into effect in 1986, and for the past 28 years, the respondent enjoyed an economic benefit of one thousand dollars (\$1,000) per year (for Tank 004 and unregistered Tank 005), for a total economic benefit of twenty-eight thousand dollars (\$28,000) (attorney brief at 33).

Department staff counsel notes that the total amount of estimated economic benefit is higher than the total civil penalty sought. She acknowledges that a higher penalty could be requested, but states that the amount sought is reasonable and sufficient. However, Department staff's estimate of the economic benefit enjoyed by the respondent is not correct. The estimates for the first, second, and fourth violations are all costs that the respondent will incur, if the Commissioner orders the relief Department staff requests. The respondent did enjoy the value of having these costs deferred. Department staff's estimates for the fifth and sixth violations are costs that the respondent avoided and properly considered as an economic benefit. Therefore, it is reasonable to conclude that the respondent enjoyed an economic benefit from failing to comply with Department regulations and the modification consent order of an amount greater than thirty-five thousand five hundred dollars (\$35,500). This amount is less than the civil penalty requested by Department staff and consistent with the Department's Civil Penalty policy which states that every effort should be made to calculate and recover the economic benefit of non-compliance (DEE-22 at IV.C.1).

First violation. In its motion, Department staff requests the Commissioner direct the respondent to, with sixty (60) days of his order, pay civil penalty of ten thousand dollars (\$10,000) for failing to update and renew the registration in violation of 6 NYCRR 612.2(a)(2) for a period exceeding five (5) years.

As discussed above, Department staff has shown that the respondent failed to renew the PBS registration for the facility, which expired on October 14, 2008, and failed to send a five hundred dollar (\$500) check and renewal application form by February 28, 2013 in violation of Paragraph III. B. of modification consent order R7-20120517-42M. The facility's PBS program information sheet shows that the PBS registration for

the facility expired on October 14, 2008 (Exh. B), more than five years before Department staff initiated this enforcement action.

With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day. A penalty range of one hundred dollars (\$100) to one thousand dollars (\$1,000) is recommended by the penalty schedule of DEE-22 (¶ 3) for failing to keep a PBS registration valid in violation of 6 NYCRR 612.2. As discussed above, the suggested penalty ranges in DEE-22 are not to be used in adjudicated cases.

In her brief, Department staff counsel McGinn cites three Departmental administrative precedents involving a respondent's failure to renew its PBS registration: (1) Matter of 2112 Honeywell Avenue, LLC, Order of the Commissioner, March 6, 2013; (2) Matter of Spring Street Assets, Inc., Order of the Commissioner, August 30, 2012; and (3) Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011. The most recent of these cases, notes that in these cases, absent other violations, Department staff has generally requested a penalty of five thousand dollars (\$5,000) for facilities that have violated the registration requirement within the past two years. For registration violations that extend from two to five years, Department staff has generally requested a penalty of seven thousand five hundred dollars (\$7,500). For those facilities where registrations are more than five years overdue, Department staff has generally requested a penalty of ten thousand dollars (\$10,000) (Matter of 2112 Honeywell Avenue, LLC, at 2). However, to the extent that mitigating or aggravating factors exist, such factors are considered for purposes of the penalty request (see 12 Martense Associates LLC, at 2). In these cases, Department staff's requested penalties have been imposed by the Commissioner in his orders. However, in this case, because other violations have been proven, these administrative precedents support a minimum base penalty.

Department staff argues in its papers that the requested penalty of ten thousand dollars (\$10,000) is justified in this case and consistent with past Commissioner's orders. In her brief, Department staff counsel McGinn notes that the requested amount is far less than the maximum permitted by ECL 71-1929(1), which authorizes a penalty of thirty-seven thousand five hundred dollars (\$37,500) per day for the duration of the violation (attorney brief at 21). In addition, Department staff states

that the registration requirement is of great importance to the regulatory scheme and allows for an accurate database of PBS facilities to be maintained (attorney brief at 33). Department staff contends that by not complying with this requirement, the respondent enjoyed an economic benefit of one thousand dollars (\$1,000), the five hundred dollar (\$500) registration fee multiplied by the two registration periods (attorney brief at 31).

In this case, Department staff's request for a \$10,000 civil penalty for this violation is justified, based on the length of the violation, the importance of the registration requirement to the regulatory scheme, and the economic benefit enjoyed by the respondent. Based on the record, the Commissioner should grant Department staff's request and include a requirement for the respondent to pay a civil penalty of ten thousand dollars (\$10,000) within sixty (60) days of the service of the order on the respondent, for this violation of Paragraph III. B. of modification consent order R7-20120517-42M.

Second violation. In its motion, Department staff requests the Commissioner direct the respondent to, with sixty (60) days of his order, pay a civil penalty of thirty thousand dollars (\$30,000) for failure to properly permanently close Tank 001, Tank 002, and Tank 003 under 6 NYCRR 613.9(b) in violation of Paragraph III. B. of modification consent order R7-20120517-42M. In her brief, Department staff counsel McGinn explains that this amount is comprised of a requested penalty of ten thousand dollars (\$10,000) each for tank (attorney brief at 22).

As discussed above, Department staff has shown that the respondent has failed to permanently close Tank 001, Tank 002, and Tank 003 by June 30, 2013 as required by Paragraph III. B. of modification consent order R7-20120517-42M. With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day. A penalty range of five hundred dollars (\$500) to five thousand dollars (\$5,000) is recommended by the penalty schedule of DEE-22 (¶ 5) for tanks not permanently closed in violation of 6 NYCRR 613.9(b). As discussed above, the suggested penalty ranges in DEE-22 should be increased in adjudicated cases.

Department staff argues in its papers that its requested penalty of thirty thousand dollars (\$30,000) is justified in this case and consistent with past Commissioner's orders. In her brief, Department staff counsel McGinn notes that the

requested amount is far less than the maximum permitted by ECL 71-1929(1) which would authorize a penalty of thirty-seven thousand five hundred dollars (\$37,500) per day for the duration of the violation (attorney brief at 26).

Department staff cites several aggravating factors that warrant this penalty, including the respondent's knowledge of these violations and failure to comply, even when given additional time to do so through a consent order modification. In addition, Department staff argue that the fact these tanks were last in service over ten years ago (Kemp affid. ¶ 9) is an additional aggravating factor. Department staff argues that the respondent's actions are egregious and show the respondent's blatant disregard for the Department's PBS program (attorney brief at 26). Department staff states that the permanent closure requirement is important to the Department's regulatory scheme, which ensures that tanks that are not monitored and tested are closed so no spill occurs (attorney brief at 33).

In this case, Department staff's request for a thirty thousand dollar (\$30,000) civil penalty for this violation is justified, based on the length of the violation, the respondent's failure to comply even when given additional time by Department staff, and the economic benefit enjoyed by the respondent. Based on the record, the Commissioner should grant Department staff's request and include a requirement for the respondent to pay a civil penalty of thirty thousand dollars (\$30,000) within sixty (60) days of the service of the order on the respondent, for failing to properly permanently close Tank 001, Tank 002, and Tank 003 under 6 NYCRR 613.9(b) in violation of Paragraph III. B. of modification consent order R7-20120517-42M.

Third violation. In its motion, Department staff does not request a separate payable civil penalty for the respondent's failure to send to the Department the closure report/site assessment report including the soil sample results from the permanent closure of Tank 001, Tank 002 and Tank 003 by July 31, 2013 as required by Paragraph III. B. of modification consent order R7-20120517-42M (Exh. H).

Fourth violation. In its motion, Department staff requests the Commissioner direct the respondent to, with sixty (60) days of his order, pay civil penalty of four hundred dollars (\$400) for the violations of 6 NYCRR 613.3(b). In her attorney brief, explains that this amount is comprised of a requested penalty of

two hundred dollars (\$200) each for Tank 004 and unregistered Tank 005 (attorney brief at 27).

As discussed above, Department staff has shown that the respondent failed to properly color code the fill ports for Tank 004 and unregistered Tank 005 in violation of 6 NYCRR 613.3(b). With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day. An average penalty of one hundred (\$100) is recommended by the penalty schedule of DEE-22 (¶ 10) for fill port not properly color coded in violation of 6 NYCRR 613.3(b). As discussed above, the suggested penalty ranges in DEE-22 should be increased in adjudicated cases.

Department staff cites respondent's knowledge of this violation and failure to comply as an aggravating factor that justifies the two hundred dollar (\$200) per tank penalty and the total four hundred dollar (\$400) penalty.

In this case, Department staff's request for a four hundred dollar (\$400) civil penalty for this violation is justified, based on the respondent's failure to comply with past directions to correct this violation. Based on the record, the Commissioner should grant Department staff's request and include a requirement for the respondent to pay a civil penalty of four hundred dollars (\$400) within sixty (60) days of the service of the order on the respondent, for failing to properly color code the fill ports for Tank 004 and unregistered Tank 005 in violation of 6 NYCRR 613.3(b).

Fifth violation. In its motion, Department staff requests the Commissioner direct the respondent to, with sixty (60) days of his order, pay civil penalty of six hundred dollars (\$600) for the violation of 6 NYCRR 613.5(b)(2).

As discussed above, Department staff has shown that the respondent failed to perform annual monitoring of the cathodic protection systems on Tank 004 in violation of 6 NYCRR 613.5(b)(2). With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day. An average penalty of five hundred dollars (\$500) is recommended by the penalty schedule of DEE-22 (¶ 18) for failure to monitor cathodic protection of tanks and piping in violation of 6 NYCRR 613.5(b). As discussed above, the suggested penalty ranges in DEE-22 should be increased in adjudicated cases.

Department staff cites respondent's knowledge of this violation and failure to comply as an aggravating factor that justifies the six hundred dollar (\$600) penalty (attorney brief at 29)

In this case, Department staff's request for a six hundred dollar (\$600) civil penalty for this violation is justified, based on the respondent's failure to comply with past directions to correct this violation and the economic benefit enjoyed by the respondent. Based on the record, the Commissioner should grant Department staff's request and include a requirement for the respondent to pay a civil penalty of six hundred dollars (\$600) within sixty (60) days of the service of the order on the respondent, for failing to perform annual monitoring of the cathodic protection systems on Tank 004 in violation of 6 NYCRR 613.5(b)(2).

Sixth violation. In its motion, Department staff requests the Commissioner direct the respondent to, with sixty (60) days of his order, pay civil penalty of one thousand two hundred dollars (\$1,200) for the violations of 6 NYCRR 613.4(a)(2). In her brief, Department staff counsel McGinn explains that this amount is comprised of a requested penalty of six hundred dollars (\$600) each for Tank 004 and unregistered Tank 005 (attorney brief at 30).

As discussed above, Department staff has shown that the respondent has failed to perform alternative leak detection for Tank 004 and unregistered Tank 005 in violation of 6 NYCRR 613.4(a)(2). With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day. An average penalty of five hundred dollars (\$500) is recommended by the penalty schedule of DEE-22 (¶ 25) for an unmetered tank without alternative leak detection in violation of 6 NYCRR 613.4(a)(2). As discussed above, the suggested penalty ranges in DEE-22 should be increased in adjudicated cases.

Department staff cites respondent's knowledge of this violation and failure to comply as aggravating factors that justifies the one thousand two hundred dollar (\$1,200) penalty (attorney brief at 30). In addition, Department staff correctly contends that by failing to perform an alternative leak detection test on Tank 004 and unregistered Tank 005, the respondent enjoyed an economic benefit of twenty-eight thousand dollars (\$28,000), or an estimated cost of five hundred dollars

(\$500) per tank per year to perform alternative leak detection tests for fourteen years (Kemp affid. ¶ 10).

In this case, Department staff's request for a one thousand two hundred dollars (\$1,200) civil penalty for this violation is justified, based on the respondent's failure to comply with past directions to correct this violation and the economic benefit enjoyed by the respondent. Based on the record, the Commissioner should grant Department staff's request and include a requirement for the respondent to pay a civil penalty of one thousand two hundred dollars (\$1,200) within sixty (60) days of the service of the order on the respondent, for failing to perform alternative leak detection for Tank 004 and unregistered Tank 005 in violation of 6 NYCRR 613.4(a)(2).

Corrective Action

In addition to requesting the Commissioner find the respondent liable for the six violations alleged and impose a total payable civil penalty of fifty-seven thousand two hundred dollars (\$57,200), Department staff requests in its motion that the Commissioner include in his order language requiring the respondent to correct the violations.

Specifically, Department staff requests the respondent to be directed to comply with modification consent order R7-20120517-42M within sixty (60) days of the Commissioner's order as follows:

(1) update and renew the expired registration and pay the registration fee of five hundred dollars (\$500) for the registration period of October 14, 2008 to October 13, 2013;

(2) update and renew the expired registration and pay the registration fee of five hundred dollars (\$500) for the current registration period of October 14, 2013 to October 13, 2018;

(3) permanently close⁷ Tank 001, Tank 002, and Tank 003;⁸
and

(4) send Department staff the closure report/site assessment report including the soil sample results for the permanent closure of Tank 001, Tank 002, and Tank 003.

In addition, the motion requests the Commissioner include a requirement in his order requiring the respondent to, within thirty (30) days:

(1) bring Tank 004 and unregistered Tank 005 into compliance by sending Department staff photographs of the properly color coded fill ports;

(2) bring Tank 004 into compliance by sending the Department the results of the annual cathodic protection system monitoring test; and

(3) bring Tank 004 and unregistered Tank 005 into compliance by sending the Department the results of the tightness tests, or if the thirty (30) day deadline is not met, then permanently close Tank 004 and unregistered Tank 005 in accordance with 6 NYCRR 613.9(b) within sixty (60) days.

In her brief, Department Staff counsel states that the registration requirement is of great importance to the Department's regulatory scheme. An updated and current registration allows Department staff to maintain an accurate database of the tanks under its jurisdiction (attorney brief at 33).

She also states that the permanent closure requirement is of great importance and helps ensure that tanks that are no

⁷ The modification consent order states the respondent should "close and remove" these tanks. No explanation is offered in Department staff's papers for the apparent variation in the language.

⁸ In her attorney brief, Department staff counsel McGinn also requests that the Commissioner include a requirement in his order requiring the respondent to, at least thirty (30) days prior to closing the tanks, notify Department staff (see McGinn Attorney Brief at 34). This is one of the regulatory requirements set forth in 6 NYCRR 613(b) which governs the closure of tanks permanently out of service.

longer being monitored and tested are closed so that no spills occur (attorney brief at 33). She cites five Departmental administrative precedents involving cases where the Commissioner has required respondents to properly permanently close PBS tank(s): (1) Matter of Yvonne M. Colby and Ronald C. Green, Jr., Order of the Commissioner, June 21, 2012; (2) Matter of Thomas E. Brunet, Order of the Commissioner, May 17, 2011; (3) Matter of RGLL, Inc., and GRJH, Inc. (Old Millerton Sunoco), Decision and Order of the Commissioner, December 29, 2009; (4) Matter of Kuldeep Singh and Kuldip, Inc., Decision and Order of the Commissioner, December 17, 2003; and (5) Matter of Taicorp Inc. and Sampson Chan, Decision and Order of the Commissioner, August 8, 2002. These cases establish precedent for the Commissioner to order the removal of tanks that are not in use (attorney brief at 23-25). In this case, the record demonstrates that the removal of the tanks is warranted.

In addition, Department staff's request that the respondent provide proof that the other violations have been cured is warranted. Specifically the respondent, within thirty (30) days, of service of the order shall provide Department staff: (1) photographs of the properly color coded fill ports of Tank 004 and unregistered Tank 005 to show compliance with 6 NYCRR 613.3(b); (2) the results of the annual cathodic protection system monitoring test for Tank 004 to show compliance with 6 NYCRR 613.5(b)(2); and (3) the results of the tightness tests for Tank 004 and unregistered Tank 005 to show compliance with 6 NYCRR 613.4(a)(2), or if the thirty (30) day deadline is not met, then permanently close Tank 004 and unregistered Tank 005 in accordance with 6 NYCRR 613.9(b) within sixty (60) days and submit a closure report/site assessment to Department staff after the tanks are removed.

Department staff's requests are reasonable and necessary to protect the environment. Based on the evidence in the record, the Commissioner should include Department staff's requested corrective actions in his order.

CONCLUSIONS OF LAW

1. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, violated paragraph III. A. of modification consent order R7-20120517-42M at PBS facility #7-460214, located at 81 North Broad Street, Norwich, New York, by failing to update and renew the expired PBS registration for the PBS facility and pay the PBS registration fee of five hundred dollars (\$500) by February 28, 2013.

2. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, violated paragraph III. B. of modification consent order R7-20120517-42M at PBS facility #7-460214 by failing to permanently close Tank 001, Tank 002, and Tank 003 by June 30, 2013.
3. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, violated paragraph III. B. of modification consent order R7-20120517-42M at PBS facility #7-460214 by failing to send Department staff the closure report for the removal of the tanks/assessment report including soil sample results by July 31, 2013.
4. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, violated 6 NYCRR 613.3(b) at PBS facility #7-460214 by failing to submit a photograph by June 15, 2012 showing that the fill ports had been properly color coded, labeled or marked for Tank 004 and unregistered Tank 005.
5. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, violated 6 NYCRR 613.5(b)(2) at PBS facility #7-460214 by failing to submit by June 15, 2012 the most recent annual monitoring report for cathodic protection for Tank 004.
6. Respondent Gary Bilow, dba Bilow's Garage and North Broad Street Station, violated 6 NYCRR 613.4(a)(2) at PBS facility #7-460214 by failing to provide by June 15, 2012 proof of alternative leak detection for Tank 004 and unregistered Tank 005.

RECOMMENDATION

The Commissioner should conclude that Department staff has met its burden of demonstrating that no material issue of fact exists in this case, and should issue an order that finds the respondent liable for the six violations alleged in Department staff's motion. The Commissioner's order should also impose a total payable civil penalty of fifty-seven thousand two hundred dollars (\$57,200).

In addition, the Commissioner should direct the respondent in his order to, within sixty (60) days of service of the order: (1) update the PBS registration for the facility and pay

registration fees totaling one thousand dollars (\$1,000) for the two registration periods (October 14, 2008 through October 13, 2013 and October 14, 2013 through October 13, 2018); (2) permanently close Tank 001, Tank 002, and Tank 003 in accordance with applicable Department regulations; (3) send Department staff the closure report/site assessment report for Tank 001, Tank 002, and Tank 003, as required by the modification consent order.

In his order, the Commissioner should also direct the respondent to within thirty (30) days of service of the order: (1) bring Tank 004 and unregistered Tank 005 into compliance with 6 NYCRR 613.3(b) and send Department staff photographs of the properly color coded fill ports; (2) bring Tank 004 into compliance with 6 NYCRR 613.5(b)(2) and send Department staff the results of the annual cathodic protection system monitoring test; and (3) bring Tank 004 and unregistered Tank 005 into compliance with 6 NYCRR 613.4(a)(2) and send Department staff the results of the tightness tests, or if the thirty (30) day deadline is not met, then permanently close Tank 004 and unregistered Tank 005 in accordance with 6 NYCRR 613.9(b) within sixty (60) days and submit a closure report/site assessment to Department staff after the tanks are removed.

Albany, New York

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

EXHIBIT LIST

MATTER OF GARY BILOW DBA BILOW'S GARAGE
AND NORTH BROAD STREET STATION
DEC CASE # R7-20120517-42
PBS # 7-460214

Exh. #	Description
A	PBS Facility Information Report for PBS # 7-460214
B	PBS Facility Information sheet for PBS # 7-460214
C	2013 tax information about respondent's property
D	Deed showing respondent's ownership of the facility
E	Notice of violation dated 5/16/12
F	Consent order effective 10/26/12
G	Letter transmitting consent order to respondent dated 10/29/12, affidavit of service, and mailing receipts
H	Modification consent order effective 3/4/13
I	Letter transmitting modification consent order to respondent dated March 4, 2013, affidavit of service, and mailing receipts
J	Letter from Department staff counsel McGinn to respondent dated 7/15/13
K	Mailing receipts for 7/15/13 letter (Exh. J, above)
L	Email dated 12/5/13 from Department staff engineer Kemp to Department staff attorney McGinn with two photos of site attached