

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

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In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL") and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

**ORDER**

DEC VISTA No.  
R6-20090827-49

- by -

**CROW PROPERTIES, L.L.C.,**

Respondent.

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Respondent Crow Properties, L.L.C., owns a petroleum bulk storage ("PBS") facility located at 7712 NYS Route 5, Town of Kirkland, Oneida County, New York. Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated February 2, 2010, alleging multiple violations of the Department's regulations governing PBS facilities.

In its complaint, staff alleged seven causes of action. The causes of action include the following:

(1) that respondent violated 6 NYCRR 612.2(b) by failing to re-register the PBS facility within 30 days after transfer of ownership to respondent;

(2) that respondent violated 6 NYCRR 612.2(e) by failing to display a current and valid PBS registration certificate at the facility;

(3) that respondent violated 6 NYCRR 613.9(b) by failing to properly close the facility consistent with regulatory requirements governing facilities that are permanently out of service;

(4) that respondent violated 6 NYCRR 613.3(d) by failing to maintain gauges and other spill prevention equipment for the underground storage tanks ("USTs") at the facility;

(5) that respondent violated 6 NYCRR 613.5(b)(3) by failing to monitor at least weekly for traces of petroleum from the USTs and associated piping at the facility;

(6) that respondent violated 6 NYCRR 613.4(a)(1) by failing to maintain daily inventory records for each UST at the facility; and

(7) that respondent violated 6 NYCRR 613.6(a) and (c) by failing to perform monthly inspections and maintain monthly inspection reports for a period of at least ten years for the aboveground PBS tanks at the facility.

In its complaint, Department staff seeks a total civil penalty of \$20,700, with no more than one half suspended to ensure compliance with any order that might be issued, and an order directing respondent to provide the Department with a report regarding the removal of the PBS tanks at the facility and the permanent closure of the facility.

In response, respondent filed an answer dated March 25, 2010. In a ruling dated December 20, 2010, Chief Administrative Law Judge ("Chief ALJ") James T. McClymonds, the assigned ALJ, granted respondent's cross motion to amend the answer and accepted respondent's proposed amended answer as filed (see Matter of Crow Properties, L.L.C., Ruling of the Chief ALJ on Motion and Cross Motion, Dec. 20, 2010). Chief ALJ McClymonds also denied in part and otherwise granted Department staff's motion to strike or clarify affirmative defenses.<sup>1</sup>

Department staff filed this motion for order without hearing dated May 14, 2010, seeking summary judgment on its first cause of action and an order assessing a civil penalty in the amount of \$5,000. Respondent opposed the motion in papers dated June 26, 2010.

Chief ALJ McClymonds prepared the attached summary report, which I adopt as my decision in this matter subject to the following comments.

I agree with Chief ALJ McClymonds that Department staff established its entitlement to summary judgment on the

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<sup>1</sup> The December 20, 2010, ruling of Chief ALJ McClymonds is not before me on this motion.

first cause of action, and that respondent failed to raise any substantive dispute of fact requiring a hearing. I also agree that the \$5,000 penalty is authorized and warranted on the record of this proceeding.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing on the first cause of action pleaded in the February 2, 2010, complaint is granted.

II. Respondent Crow Properties, L.L.C., is adjudged to have violated 6 NYCRR 612.2(b) by failing to re-register the PBS facility with the Department within 30 days after transfer of ownership to respondent.

III. Respondent Crow Properties, L.L.C., is assessed a civil penalty in the amount of five thousand dollars (\$5,000), which shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Nels G. Magnuson, Esq.  
Assistant Regional Attorney  
New York State Department  
of Environmental Conservation  
Office of General Counsel, Region 6  
Dulles State Office Building  
317 Washington Street  
Watertown, New York 13601-3787.

IV. All communications from respondent to the Department concerning this order shall be made to Nels G. Magnuson, Esq., Assistant Regional Attorney, at the address set forth in paragraph III of this order.

V. The provisions, terms, and conditions of this order shall bind respondent Crow Properties, L.L.C., and its agents, successors, and assigns, in any and all capacities.

VI. The matter is remanded to Chief ALJ McClymonds for further proceedings consistent with this order.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Peter M. Iwanowicz  
Acting Commissioner

Dated: December 27, 2010  
Albany, New York

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

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In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**SUMMARY REPORT OF THE  
CHIEF ADMINISTRATIVE  
LAW JUDGE**

DEC VISTA No.  
R6-20090827-49

- by -

December 20, 2010

**CROW PROPERTIES, L.L.C.,**

Respondent.

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Appearances of Counsel:

- Alison H. Crocker, Deputy Commissioner and General Counsel (Nels G. Magnuson of counsel), for staff of the Department of Environmental Conservation
- Norman P. Deep, for respondent Crow Properties, L.L.C.

**SUMMARY REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE**

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges multiple violations of the regulations governing petroleum bulk storage (PBS) facilities at facility owned by respondent Crow Properties, L.L.C., located in the Town of Kirkland, Oneida County. Department staff moves for an order without hearing on the first cause of action pleaded in the complaint. For the reasons, that follow, I recommend that the Commissioner issue an order granting Department staff's motion and imposing a civil penalty in the amount of \$5,000.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of notice of hearing and complaint dated February 2, 2010. In the complaint, staff alleges that on August 11, 2005, respondent Crow Properties,

L.L.C., purchased a PBS facility, formerly known as Tom's Small Engine & Gas, located at 7712 NYS Route 5, Town of Kirkland, Oneida County, New York. The facility allegedly consisted of three underground PBS tanks (USTs) (tank nos. 1, 2, and 3), and two aboveground PBS tanks (tank nos. 4 and 5), with a combined capacity of 10,550 gallons. Staff further alleges that on October 28, 2009, respondent removed all petroleum storage tanks from the facility.

In the complaint, Department staff charged seven causes of action:

(1) that respondent violated 6 NYCRR 612.2(b) by failing to re-register the PBS facility within 30 days after transfer of ownership to respondent;

(2) that respondent violated 6 NYCRR 612.2(e) by failing to display a current and valid PBS registration certificate at the facility;

(3) that respondent violated 6 NYCRR 613.9(b) by failing to properly close the facility consistent with regulatory requirements governing facilities that are permanently out of service;

(4) that respondent violated 6 NYCRR 613.3(d) by failing to maintain gauges and other spill prevention equipment for the USTs at the facility;

(5) that respondent violated 6 NYCRR 613.5(b)(3) by failing to monitor at least weekly for traces of petroleum from the USTs and associated piping at the facility;

(6) that respondent violated 6 NYCRR 613.4(a)(1) by failing to maintain daily inventory records for each UST at the facility; and

(7) that respondent violated 6 NYCRR 613.6(a) and (c) by failing to perform monthly inspections and maintain monthly inspection reports for a period of at least ten years for the aboveground PBS tanks at the facility.

As a consequence of the violations alleged, the complaint seeks a total civil penalty of \$20,700, with no more than one half suspended to ensure compliance with any order that

might be issued. The complaint also seeks an order directing respondent to provide the Department with a report regarding the removal of the PBS tanks at the facility and the permanent closure of the facility.

In response, respondent filed an answer dated March 25, 2010. In the answer, respondent denied the allegations of the complaint, and asserted unnumbered affirmative defenses and two counterclaims.

After settlement negotiations mediated by Administrative Law Judge (ALJ) Molly T. McBride failed to produce an agreement, Department staff filed a motion dated April 30, 2010, to strike or clarify affirmative defenses. In papers dated May 19, 2010, respondent opposed the motion and cross-moved for permission to amend its answer. Department staff opposed the cross motion in papers dated May 21, 2010.

Meanwhile, Department staff filed a motion for order without hearing dated May 14, 2010. On the motion, staff seeks summary judgment on its first cause of action pleaded in the February 2, 2010, complaint and an order assessing a civil penalty in the amount of \$5,000. Respondent opposed the motion in papers dated June 26, 2010. The matter was thereafter assigned to the undersigned as presiding ALJ.

Department staff's motion to strike or clarify affirmative defense and respondent's cross motion to amend its answer was addressed in a separate ruling (see Ruling of the Chief ALJ on Motion and Cross Motion, Dec. 20, 2010). This summary report addresses Department staff's motion for order without hearing on its first cause of action.

DISCUSSION

Department staff moves for an order without hearing pursuant to 6 NYCRR 622.12, seeking summary judgment on the first cause of action alleged in the complaint and a civil penalty in the amount of \$5,000. In support of its motion, staff submits the affidavit of Ronald F. Novak, who has been an environmental engineer with the Department since 1994. The affidavit documents the transfer of ownership of the facility to respondent on August 11, 2005. The affidavit further documents respondent's failure to submit an application for change of ownership to the Department prior to September 25, 2009.

In opposition to the motion, respondent submits the affidavit of Norman P. Deep, who is respondent's attorney and listed as the on-site operator and contact on the facility's PBS certificate (see PBS Certificate No. 6-451894, Novak Affidavit, Exh E). Mr. Deep asserts that in late 2009, he was contacted by the Department's attorney and advised "for the first time" that the Department considered the facility to be a PBS facility. Mr. Deep states that he promptly completed and filed an application with the Department and has since fully cooperated with the Department. He also asserts that he spent approximate \$20,000 to investigate and remove all tanks at the facility.

A motion for order without hearing pursuant to 6 NYCRR 622.12 is the Departmental equivalent of a CPLR 3212 motion for summary judgment (see 6 NYCRR 622.12[d]; Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 3-4). On the motion, Department staff carries the burden of establishing its entitlement to judgment as a matter of law on the claims asserted and any penalty and remedial relief sought (see Locaparra, at 4). Staff must support its motion with evidence in admissible form establishing the material facts supporting its claims (see id.).

Once Department staff makes a prima facie showing of its entitlement to summary judgment, the burden shifts to respondent to raise substantive disputes of fact requiring a hearing (see 6 NYCRR 622.12[e]; Locaparra, at 4). To carry its burden, a respondent must lay bare its proof (see id.). Conclusory assertions and unsupported allegations are insufficient to avoid summary judgment (see id.; see also Matter of Mustang Bulk Carriers, Inc., Chief ALJ Ruling and Summary

Report, at 6-7 [feigned issues of fact will not defeat summary judgment], adopted by Order of the Acting Commissioner, Nov. 10, 2010).

In its first cause of action, Department staff alleges that respondent violated 6 NYCRR 612.2(b) by failing to re-register the facility's PBS registration within 30 days of ownership transfer.<sup>2</sup> Department staff's proof establishes that ownership of the PBS facility located at 7712 NYS Route 5, Town of Kirkland, Oneida County, New York, was transferred to respondent on August 11, 2005. Staff's proof further establishes that at the time of the transfer, the facility consisted of three underground PBS tanks and two aboveground PBS tanks, with a combined capacity of 10,550 gallons. Staff's proof also establishes that respondent did not file an application to re-register the facility until September 25, 2009, well more than 30 days after ownership of the facility was transferred.

In support of the penalty sought, Department staff notes that pursuant to the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEC Program Policy DEE-22, May 21, 2003), a penalty in the range of \$500 to \$5,000 is accepted by the Department in settlement of violations of section 612.2. Although a greater penalty would ordinarily be imposed after the commencement of administrative enforcement proceedings (see DEE-22, ¶ V; see, e.g., Matter of Fairfax Owners Corp., Order of the Acting Commissioner, Dec. 6, 2010 [imposing \$10,000 penalty for failure to renew PBS registration]), staff asserts that the penalty sought is appropriate under the circumstances.

In response, respondent fails to raise any substantive dispute of fact requiring a hearing. Respondent admits that it purchased the property on August 11, 2005, and does not dispute that it did not re-register the facility until September 25, 2009. Respondent's conclusory and unsupported assertion that it was not aware that it was purchasing a regulated PBS facility when it bought the property is insufficient to overcome Department staff's showing that at the time of the property transfer, the facility known as "Tom's Small Engine & Gas"

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<sup>2</sup> Section 612.2(b) provides the following:

"(b) Transfer of ownership. If ownership of the facility changes, the new owner must reregister the facility with the department within 30 days of ownership transfer."

(emphasis added) consisted of both aboveground and underground PBS tanks. Even accepting as true respondent's assertion that it did not know the facility was a PBS facility, 6 NYCRR part 612 imposes requirements for registration and proper closure of out-of-service petroleum storage facilities upon current owners (see Matter of White v Regan, 171 AD2d 197, 200 [3d Dept 1991], lv denied 79 NY2d 754 [1992]). Those requirements apply even if the current owner unwittingly takes title to undisclosed PBS storage tanks (see id.).

Moreover, as noted in the ruling on Department staff's motion to strike or clarify affirmative defenses, respondent's assertion that it was not on notice of the regulatory requirements applicable to PBS facilities is not a defense to liability under part 612 (see Matter of Crow Properties, L.L.C., Ruling of the Chief ALJ on Motion and Cross Motion, Dec. 20, 2010, at 7 [and cases cited therein]). Finally, given the length of time respondent was out of compliance, and considering the penalty amounts imposed in similar cases, the penalty sought in this case is authorized and supported by the record.

Where, as here, an order without hearing may be granted in whole or in part, the ALJ is to prepare a report and submit it to the Commissioner for an order (see 6 NYCRR 622.12[d]). Accordingly, I am hereby submitting this summary report to the Commissioner with the recommendation that the Commissioner issue an order granting Department staff's motion for order without hearing on its first cause of action and imposing a penalty in the amount of \$5,000.

#### FINDINGS OF FACT

Findings of fact determinable on this motion for order without hearing are as follows:

1. On August 11, 2005, respondent Crow Properties, L.L.C., purchased a property formerly known as Tom's Small Engine & Gas, located at 7712 NYS Route 5, Town of Kirkland, Oneida County, New York. The property contained a PBS facility consisting of three underground PBS tanks and two aboveground PBS tanks, with a combined capacity of 10,550 gallons.

2. The property was previously owned by Gerard N. and Lisa M. Bartholomeo, who sold the property to respondent. At the time of the sale, Gerard N. Bartolomeo possessed a PBS registration for the facility valid from August 6, 2003, through July 28, 2008.

3. Respondent Crow Properties, L.L.C., did not re-register the facility until September 25, 2009.

CONCLUSIONS OF LAW

1. Respondent Crow Properties, L.L.C., violated 6 NYCRR 612.2(b) by failing to re-register the PBS facility located at 7712 NYS Route 5, Town of Kirkland, Oneida County, New York, within 30 days of ownership transfer. This violation continued from September 10, 2005, through September 24, 2009.

2. A civil penalty in the amount of \$5,000 is authorized and warranted in the circumstances of this case for respondent's violation of 6 NYCRR 612.2(b).

RECOMMENDATION

I recommend that the Commissioner issue an order granting Department staff's motion for order without hearing on its first cause of action, holding respondent liable for violating 6 NYCRR 612.2(b), and imposing a penalty in the amount of \$5,000.

\_\_\_\_\_/s/\_\_\_\_\_  
James T. McClymonds  
Chief Administrative Law Judge

Dated: December 20, 2010  
Albany, New York