

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC Case No.
R2-20140224-154

- by -

HILLARY FARMER, JR. and
THROOP AND GATES INC.,

Respondents.

Background

This administrative enforcement proceeding concerns alleged violations of ECL article 17, former 6 NYCRR parts 612, 613, and 614 and current 6 NYCRR part 613 at a petroleum bulk storage (PBS) facility that respondent Throop and Gates Inc. owns and respondent Hillary Farmer, Jr. (Farmer) operates at 482 Throop Avenue, also known as 584 Gates Avenue, Brooklyn, New York (site). At the facility are four underground PBS tanks, each with a capacity of 4,000 gallons (tanks 004, 005, 006 and 007), and two underground PBS tanks, each with a capacity of 550 gallons (tanks 008 and 009). The DEC has designated the facility, an automobile service station engaged in retail gasoline sales, as PBS No. 2-600011.

Staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding by service of a notice of motion for order without hearing against respondent Farmer dated June 21, 2016. Staff received an answer in opposition to staff's motion dated June 24, 2016. Subsequently, Administrative Law Judge (ALJ) Michael S. Caruso was assigned to this matter.

ALJ Caruso directed staff to provide a copy of the current deed to the premises known as 584 Gates Avenue, Brooklyn, New York. Department staff provided a copy of the requested deed and moved for leave to amend staff's pleadings to add the owner of the facility, Throop and Gates Inc., as a respondent. Respondent Farmer opposed staff's motion. The ALJ granted staff's motion by ruling dated October 12, 2016, and directed staff to serve the amended papers on respondent Farmer and respondent Throop and Gates Inc. (collectively, respondents). Department staff thereafter personally served respondents with a notice of amended motion for order without hearing dated October 20, 2016, and supporting statements and documents.

In response to staff's amended motion, respondents submitted:

- a document entitled "Notice of Compliance," signed by respondent Farmer, bearing the caption City of New York Commissioner of the Department of Environmental Protection v. Throop & Gates Inc., Cease and Desist No. 20160028, Comm. Order dated 11/28/2012; and
- a document entitled "Defendant's Answer," signed by respondent Farmer on behalf of respondent Throop and Gates Inc., from an action in New York State Supreme Court, Kings County, captioned Joseph Martens as Commissioner NYSDEC Department of Environmental Conservation v. Throop and Gates Inc., Hillary Farmer, et al., Index No. 9210/2012.

As discussed below, I adopt the findings of fact, and in part the legal conclusions, contained in ALJ Caruso's Summary Report, which is attached to this order.

Liability

Department staff has asserted five causes of action, alleging that respondents violated:

- ECL 17-1009, former 6 NYCRR 612.2(a) and current 6 NYCRR 613-1.9(a), for failing to maintain a current and valid registration (first cause of action). This cause of action is asserted against "respondents;"
- ECL 17-1007, former 6 NYCRR 613.4(a)(1) and current 6 NYCRR 613-2.3(c)(1), for failing to keep current reconciliation of daily inventory records for PBS tanks 004, 005, 006 and

007 (second cause of action - four counts). This cause of action is asserted against respondent Farmer;

- former 6 NYCRR 613.4(a)(2) and current 6 NYCRR 613-2.3(b)(1), for failing to perform leak detection on PBS tanks 008 and 009 (third cause of action - two counts). This cause of action is asserted against respondent Farmer;
- former 6 NYCRR 614.7(d) and current 6 NYCRR 613-2.1(b)(4)(iii), for failing to maintain as-built drawings for PBS tanks 004, 005, 006 and 007 including a statement by the installer that the UST system was installed in compliance with DEC regulations (fourth cause of action). This cause of action is asserted against "the owner;" and
- current 6 NYCRR 613-1.9(c) because the PBS facility registration expired on March 13, 2016 and has not been renewed (fifth cause of action). This cause of action does not specify the respondent(s) against whom it is asserted.

Based upon the record evidence, I hold that Department staff has met its burden of establishing the alleged violations with respect to the first four causes of actions, and respondents have failed to raise any triable issue of fact with respect to them.

The ALJ recommends that I dismiss staff's fifth cause of action, which alleges that the facility's PBS registration expired on March 13, 2016 and has not been renewed, in violation of 6 NYCRR 613-1.9(c) (see Affirmation of John K. Urda in Support of Amended Motion for an Order Without Hearing dated October 20, 2016 [Urda Affirmation] at 8, ¶¶ 46-48). The ALJ recommends that this cause of action be dismissed because neither respondent can be directed at this time to "renew" the registration of this facility (see Summary Report at 13).

I am dismissing the fifth cause of action, but for a reason that differs from the ALJ's rationale. In this matter, staff's papers fail to identify which respondent staff is seeking to hold liable for failing to renew the PBS facility registration. In enforcement proceedings with more than one respondent, staff should identify the respondent or respondents against whom the cause of action is being asserted.¹

¹ The ALJ's discussion with respect to the fifth cause of action underscores the need for staff to clearly identify the proper respondent in light of the new regulatory language in 6 NYCRR part 613 which, among other things,

Civil Penalty

Department staff requests that I impose a total civil penalty of twenty-four thousand dollars (\$24,000). Staff has listed a specific amount for each cause of action, and has applied a multiplier based upon several aggravating factors (see Urda Affirmation at 8-12, ¶¶ 49-67).

The dismissal of the fifth cause of action reduces the requested penalty from twenty-four thousand dollars (\$24,000) to twenty thousand dollars (\$20,000).

The ALJ set forth a recommended penalty allocation upon his analysis that the second and third causes of action are asserted only against respondent Farmer, and the first and fourth causes of action are applicable only to the owner, that is, respondent Throop and Gates Inc.

Based on the ALJ's analysis for the first four causes of action, with which I concur, the civil penalty would be allocated between respondent Hillary Farmer, Jr., and respondent Throop and Gates Inc. as follows:

--six thousand dollars (\$6,000) assessed against respondent Throop and Gates Inc.; and

--fourteen thousand dollars (\$14,000) assessed against respondent Hillary Farmer, Jr. (see ALJ Summary Report at 13-16).

Based on the record before me, the civil penalty and its allocation are supported and appropriate.²

imposes requirements on distinct entities or individuals -- facility owner, tank system owner, and operator (see 6 NYCRR 613-1.3 ["Definitions"]).

² I note, in particular, that respondent Farmer has failed to comply with an October 22, 2009 order of the Commissioner with respect to PBS violations at this same facility, and both respondents have failed to comply with an order and judgment of the New York State Supreme Court, Kings County, regarding prior PBS violations (see Urda Affirmation Exhibit E).

Corrective Action

Department staff has requested that respondents undertake corrective action. I direct that, within thirty (30) days of the service of this order on respondents, respondent Throop and Gates Inc. shall submit to Department staff:

- a corrected complete registration application, including the change of ownership for the above facility, together with the applicable registration fees; and
- copies of as-built drawings for PBS tanks 004, 005, 006 and 007 that satisfy regulatory requirements.

I also direct that, within thirty (30) days of the service of this order on respondents, respondent Hillary Farmer, Jr. shall submit:

- copies of the completed ten day inventory reconciliations for PBS tanks 004, 005, 006 and 007 from February 12, 2014 to the date of this order; and
- an inventory of leak protection monitoring on PBS tanks 008 and 009 from February 12, 2014 to the date of this order.³

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

- I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 is granted with respect to the first, second, third and fourth causes of action. Department staff's motion with respect to the fifth cause of action is denied, and that cause of action is dismissed.

³ DEC previously directed respondent Farmer, among other things, to keep daily inventory records for the purpose of detecting leaks and to ensure that inventory records are reconciled (see Notice of Violation letter dated February 12, 2014 attached as Exhibit B to the Affidavit of Jeffrey Rakowski dated June 21, 2016).

- II. Based on record evidence, respondent Throop and Gates Inc. is adjudged to have violated:
- A. ECL 17-1009, former 6 NYCRR 612.2(a) and current 6 NYCRR 613-1.9(a), by failing to maintain a current and valid registration (first cause of action); and
 - B. former 6 NYCRR 614.7(d), by failing to maintain as-built drawings for PBS tanks 004, 005, 006 and 007 including a statement by the installer that the UST system was installed in compliance with DEC regulations (fourth cause of action).
- III. Based on record evidence, respondent Hillary Farmer, Jr. is adjudged to have violated:
- A. ECL 17-1007, former 6 NYCRR 613.4(a)(1) and current 6 NYCRR 613-2.3(c)(1), by failing to keep current reconciliation of daily inventory records for PBS tanks 004, 005, 006 and 007 (second cause of action - four counts); and
 - B. former 6 NYCRR 613.4(a)(2) and current 6 NYCRR 613-2.3(b), by failing to perform leak detection on PBS tanks 008 and 009 (third cause of action - two counts).
- IV. With respect to a civil penalty:
- A. respondent Throop and Gates Inc. is assessed a civil penalty of six thousand dollars (\$6,000) for the violations referenced in paragraph "II" of this order. Within thirty (30) days of service of this order on respondent Throop and Gates Inc., respondent Throop and Gates Inc. shall pay a civil penalty of six thousand dollars (\$6,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."
 - B. respondent Hillary Farmer, Jr. is assessed a civil penalty of fourteen thousand dollars (\$14,000) for the violations referenced in paragraph "III" of this order. Within thirty (30) days of service of this order on respondent Hillary Farmer, Jr., respondent Hillary Farmer, Jr. shall pay a civil penalty of fourteen thousand dollars (\$14,000) by certified

check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

V. Within thirty (30) days of service of this order on respondents Throop and Gates Inc. and Hillary Farmer, Jr.:

A. respondent Throop and Gates Inc. shall submit to Department staff:

1. a corrected complete registration application, including reflecting the facility's change of ownership, together with the applicable registration fees; and
2. copies of as-built drawings for PBS tanks 004, 005, 006 and 007 that satisfy regulatory requirements.

B. respondent Hillary Farmer, Jr. shall submit to Department staff:

1. copies of the completed ten day inventory reconciliations for PBS tanks 004, 005, 006 and 007 from February 12, 2014 to the date of this order; and
2. an inventory of leak detection monitoring on PBS tanks 008 and 009 from February 12, 2014 to the date of this order.

VI. The civil penalty payments referenced in paragraph "IV" of this order, and the documents referenced in paragraph "V" of this order, shall be submitted to the following address:

New York State Department of Environmental
Conservation
Region 2
One Hunters Point Plaza
47-40 21st Street
Long Island City, NY 11101
Attention: John K. Urda, Esq.

VII. The provisions, terms, and conditions of this order shall bind respondents Throop and Gates Inc. and Hillary Farmer, Jr., and their agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: July 10, 2017
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**SUMMARY REPORT ON
AMENDED MOTION FOR
ORDER WITHOUT
HEARING**

- by -

DEC Case No.
R2-20140224-154

**HILLARY FARMER, JR. and
THROOP AND GATES INC.,**

Respondents.

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (John K. Urda, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Hillary Farmer, Jr., pro se, for respondents

Proceedings

By notice of motion for order without hearing dated June 21, 2016, staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent Hillary Farmer, Jr. (Farmer) for alleged violations of ECL article 17, former 6 NYCRR parts 612, 613 and 614 and current 6 NYCRR part 613. On June 21, 2016, Department staff served its notice of motion and supporting statements and exhibits on respondent by certified mail. Respondent received the motion papers on June 23, 2016.

Respondent submitted an answer in opposition to staff's motion dated June 24, 2016. By letter dated August 12, 2016,

Chief Administrative Law Judge James T. McClymonds advised the parties that the matter had been assigned to me.

By letter dated September 15, 2016, I directed staff to provide a copy of the current deed to the premises known as 584 Gates Avenue, Brooklyn, New York and to provide respondent a copy of staff's response. Department staff's September 16, 2016 response provided a copy of the current deed. In addition, Department staff moved for leave to amend staff's pleadings to add the owner of the facility, Throop and Gates Inc. as a respondent. Respondent Farmer was copied on staff's response and motion. Respondent Farmer opposed staff's motion by submitting a document entitled "notice of compliance in lieu of appearance" in a matter captioned "The City of New York Commissioner of the Department of Environmental Protection, Petitioner, against Throop & Gates Inc., Respondent." In that document, respondent Throop & Gates Inc. objected to "petitioner's" application to amend and stated the application should be denied in all respects.

By ruling dated October 12, 2016, I granted staff's motion to amend and directed staff to serve the amended papers on respondent Farmer and respondent Throop and Gates Inc. (collectively respondents). On October 26, 2016, Department staff personally served respondents with a notice of amended motion for order without hearing dated October 20, 2016, and supporting statements and documents. In Department staff's cover letter, staff moved to conform the caption of this proceeding to reflect the added respondent, which is granted as reflected by the caption above.

In response to staff's amended motion, respondent Farmer submitted a "notice of compliance" bearing the same incorrect caption as its earlier submission, and submitted a document entitled "Defendant's Answer," from Martens v. Throop and Gates Inc., Index No. 9210/2012, an action in New York Supreme Court, Kings County.

Staff's Charges

Department staff's amended motion for order without hearing consists of the notice of amended motion; affirmation of John K. Urda (Urda Affirmation) dated October 20, 2016 with seven exhibits attached; and the affidavit of Jeffery Rakowski (Rakowski Affidavit), sworn to June 21, 2016 with two exhibits attached. Staff also submitted the affidavit of service of Environmental Conservation Officer Brian Gustitus, sworn to

October 28, 2016. See Appendix A attached hereto. The Urda Affirmation sets forth five causes of action.

Department staff alleges the following:

1. Respondents violated ECL 17-1009, former 6 NYCRR 612.2(a) and current 6 NYCRR 613-1.9(a)(since October 11, 2015), by failing to properly register the facility, including failing to include the correct product code for tanks 005, 006 and 007 and the correct pipe leak detection code for tanks 004, 005, 006 and 007 and other correct information for tank 004 (First cause of action);
2. Respondent Farmer violated ECL 17-1007, former 6 NYCRR 613.4(a)(1) and current 6 NYCRR 613-2.3(c)(1)(since October 11, 2015) by failing to keep current reconciliation of daily inventory records for tanks 004, 005, 006, and 007 (Second cause of action; four counts);
3. Respondent Farmer violated former 6 NYCRR 613.4(a)(2) and current 6 NYCRR 613-2.3(b)(1) (since October 11, 2015) by failing to perform leak detection on two unmetered underground PBS tanks (tanks 008 and 009) (Third cause of action; two counts);
4. The owner violated former 6 NYCRR 614.7(d) and current 6 NYCRR 613-2.1(b)(4)(iii)(since October 11, 2015) by failing to maintain as-built plans for tanks 004, 005, 006 and 007 including a statement by the installer that the UST system was installed in compliance with 6 NYCRR part 614 (Fourth cause of action); and
5. The PBS facility registration expired on March 13, 2016 and has not been renewed in violation of current 6 NYCRR 613-1.9(c) (Fifth cause of action).

Based upon these alleged violations, Department staff seeks an order: finding respondents in violation of the ECL and former 6 NYCRR parts 612, 613 and 614 and current 6 NYCRR part 613; assessing a penalty of \$24,000; and directing respondents to complete corrective action within thirty days of service of the Commissioner's order.

Respondents' Position

In opposition to Department staff's amended motion for order without hearing, respondent Hillary Farmer, Jr. submitted:

- a notice of compliance in a matter entitled "The City of New York Commissioner of The Department of Environmental Protection, Petitioner, against Throop &

Gates Inc., Respondent" relating to "Cease and Desist No. 20160028" and "Comm. Order Dated 11/28/2012" (notice of compliance); and

- an answer dated March 25, 2013 in a matter captioned for the Supreme Court of the State of New York, County of Kings entitled "Joseph Martens as Commissioner of NYSDEC Department of Enviornmental [sic] Conservation, et. al., Plaintiff, against Throop and Gates Inc., Hillary Farmer, et. al., Defendants." Index No. 9210/2012 (answer). See Appendix A attached hereto.

The "notice of compliance" does not address staff's motion except to state respondent Throop and Gates Inc.'s overall objection, demand for a hearing and statement that "Respondent contends that tr4iable [sic] issues of fact exist."

Respondents' "answer" "[d]enies each and every allegation contained in each and every paragraph of the complaint." In addition, respondents set forth sixteen paragraphs under the heading "affirmative defenses". Respondents did not otherwise address staff's amended motion or the violations alleged by Department staff.

FINDINGS OF FACT

1. Respondent Throop and Gates Inc. is the owner of a PBS facility having a capacity of over 1,100 gallons located at the Hillary Farmer Service Station, 584 Gates Avenue (also known as 482 Throop Avenue, Brooklyn, New York [designated as Block 1815 Lot 40 in the Borough of Brooklyn]) (facility). In particular, PBS tank number 004 has a capacity of 4,000 gallons, is located underground and contains diesel; PBS tanks 005, 006 and 007 each have a capacity of 4,000 gallons, are located underground and contain gasoline; PBS tank 008 has a capacity of 550 gallons, is located underground and contains waste oil; and PBS tank 009 has a capacity of 550 gallons, is located underground and contains fuel oil. (Urda Affirmation at ¶¶ 4, 8, and 10, Exhibits A and B.)
2. Respondent Throop and Gates Inc. is listed as an inactive domestic business corporation in the State of New York due to its dissolution by proclamation/annulment of authority on June 29, 2016. (Urda Affirmation at ¶ 6, Exhibit C.)

3. On October 6, 2009, respondent Farmer, by deed, transferred all right, title and interest in the facility to respondent Throop and Gates Inc., the facility's current owner. This deed is recorded in the Office of the Register of the City of New York under City Register File No. 2009000337977. (Urda Affirmation at ¶ 4, Exhibit B.)¹
4. Respondent Farmer is the president of respondent Throop and Gates Inc. (Urda Affirmation at ¶ 5, Exhibit B at sixth and eighth unnumbered pages.)
5. Subsequent to transferring ownership of the facility to respondent Throop and Gates Inc., respondent Farmer submitted a Petroleum Bulk Storage Application dated January 19, 2011 to correct information on the facility's registration regarding the contents of PBS tank 004. (Urda Affirmation, Exhibit A.)
6. Respondent Farmer holds himself out as Hillary Farmer, Jr. and Hillary Farmer as evidenced by the signatures on Exhibits A and B to the Urda Affirmation and respondents' answer and notice of compliance.
7. The PBS Application identifies Hillary Farmer as the owner of the facility, but respondent Farmer checked the box indicating the type of owner as a corporate/commercial owner. The application also provides respondent Farmer's personal email address.² (Urda Affirmation at ¶ 8, Exhibit A.)
8. The PBS Application identifies Hillary Farmer as the operator of the facility. (Urda Affirmation, Exhibit A.)
9. On March 4, 2011, the Department issued PBS Registration Certificate No. 2-600011 to respondent Farmer, as owner of the facility, for the six active underground PBS tanks. The registration expired on March 13, 2016. (Urda Affirmation at ¶ 21, Exhibit A; see also Rakowski Affidavit at ¶ 11.)

¹ According to records maintained by the Office of the Register of the City of New York, of which I take official notice, Block 1815 Lot 40 in the Borough of Brooklyn includes 582-586 Gates Avenue also known as 482-490 Throop Avenue.

² Mr. Farmer communicated with Mr. Urda and the undersigned administrative law judge via email using the email address noted in the PBS application.

10. The Department has not received an application to correct, modify or renew the PBS registration for the facility. (Urda Affirmation at ¶ 22, Exhibit A.)
11. The Department has not received an application from respondent Throop and Gates Inc. to register the facility in respondent's name as the owner. (Urda Affirmation, Exhibit A.)
12. Jeffrey Rakowski is employed by CDM Smith, a consulting firm, under contract with the Department to perform inspections of PBS facilities. (Rakowski Affidavit at ¶ 1.)
13. On February 12, 2014, Mr. Rakowski inspected the facility in the presence of respondent Farmer. (Rakowski Affidavit at ¶ 5.)
14. As a result of the inspection, Mr. Rakowski observed that the facility registration contained several errors including incorrect product code for PBS tanks 005, 006 and 007; incorrect pipe leak detection codes for PBS tanks 004, 005, 006 and 007; and other incorrect information for PBS tank 004 such as the tank being identified as a double-wall tank when it is a single-wall tank, incorrect tank leak detection code or incorrect tank installation date. (Rakowski Affidavit at ¶ 5[i], Exhibit B, Inspection Report [tanks 004-008] at #2 and page 6; and Notice of Violation.)
15. Mr. Rakowski also discovered during his February 12, 2014 inspection of the facility that the inventory records for PBS tanks 004, 005, 006 and 007 were not reconciled every ten days; leak detection had not been conducted on two unmetered PBS tanks 008 and 009; and the facility did not have certified as-built plans for tanks 004, 005, 006 and 007. (Rakowski Affidavit at ¶ 5[ii-iv], Exhibit B, Inspection Report [tanks 004-008] at ## 12, 15 and page 6; and Notice of Violation.)
16. As a result of the inspection, Mr. Rakowski issued a notice of violation to respondent Farmer dated February 12, 2014. The notice advised respondent Farmer that the PBS facility was in violation of several sections of the PBS regulations, including the failure to maintain an accurate drawing or as-built plans including a statement from the installer that the tank and piping system has

been installed in compliance with the PBS regulations; failure to keep proper inventory records; and failure to reconcile inventory records for each tank every ten days. (Rakowski Affidavit at ¶ 6, Exhibit B, Notice of Violation.)

17. Respondents have not provided any tightness test reports or other leak detection records for PBS tanks 008 and 009. (Rakowski Affidavit at ¶ 7.)
18. Respondents have not corrected the violations witnessed by Mr. Rakowski. (Urda Affirmation at ¶ 22; Rakowski Affidavit at ¶ 10.)
19. Respondent Farmer failed to comply with a previous Commissioner's order (see Matter of Hillary Farmer, Jr., Order of the Commissioner, October 22, 2009). (Urda Affirmation at ¶¶ 11-12.)
20. The Department referred the violation of the previous Commissioner's order to the New York State Attorney General for enforcement. (Urda Affirmation at ¶ 12.)
21. The Attorney General obtained an order and judgment against respondents Throop and Gates Inc. and Farmer in New York State Supreme Court, Kings County. (Urda Affirmation at ¶ 13, Exhibit E.)
22. Respondents have failed to comply with the order and judgment of the New York State Supreme Court, Kings County. (Urda Affirmation at ¶ 13.)

DISCUSSION

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR (see 6 NYCRR 622.12[d]). "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law" (Matter of Frank Perotta, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report). CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court

as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (see Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003 at 4).

In this instance, Department staff must establish its causes of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by tendering evidentiary proof in admissible form. It is Department staff's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged by staff. I conclude staff has made, in part, a prima facie showing of the violations alleged subject to my comments below.

Staff's papers demonstrate that respondent Throop and Gates Inc. has owned the property located at 584 Gates Avenue, Brooklyn, New York since October 6, 2009. Department staff's papers also demonstrate that respondent Farmer is the operator of the facility.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affidavit from a Department consultant that describes the violations of the PBS regulations and an affirmation of counsel providing documentary evidence in support of the noted violations.

First Cause of Action

Department staff alleges that respondents failed to properly register the facility in violation of ECL 17-1009, former 6 NYCRR 612.2(a) and current 6 NYCRR 613-1.9(a). Each of those provisions requires the facility owner to comply with the registration requirements. In this matter, the facility owner is respondent Throop and Gates Inc., which has owned the facility since October 6, 2009. Staff notes that the facility registration identifies respondent Farmer as the site owner. The deed to the premises, however, is dispositive and respondent Farmer cannot be held liable for these violations based on the PBS application, facility information report or certificate.³

³ Respondent Farmer is the president of respondent Throop and Gates Inc., but without pleading and providing evidence to support a responsible corporate officer theory of liability, respondent Farmer cannot be held liable for the corporation's violations. See Matter of Turtle Oil Co., Inc., Order of the Commissioner, February 13, 2017, at 2.

Department staff has made a prima facie showing that respondent Throop and Gates Inc. has not maintained a current and valid registration (Findings of Fact Nos. 10, 11, 14 and 18). In addition, respondent Throop and Gates Inc. has not registered the facility in respondent's name as the facility owner as required by the ECL and regulations (Findings of Fact Nos. 1 and 3).

Staff's proof also reveals that respondent Throop and Gates Inc. was dissolved by proclamation on June 29, 2016. It is well settled that a corporation that has been dissolved by proclamation due to the corporation's failure to file biennial statements or franchise tax returns continues its corporate existence for the purpose of winding up its corporate affairs, including paying liabilities or obligations, for being sued and participating in administrative proceedings in its corporate name, even if the activities giving rise to liability occurred after corporate dissolution (see Matter of AMI Auto Sales Corp., Manuel R. Inoa, and Ramon B. Reyes, Decision and Order of the Commissioner, February 16, 2012 at 5). In this matter, the violations giving rise to liability occurred before and continue after dissolution.

Moreover, a corporation may be held liable for violations that occur or accrue after its dissolution if the corporation continued its operations, operated its premises and held itself out as a de facto corporation, notwithstanding its being dissolved by proclamation (see Bruce Supply Corp. v New Wave Mechanical, Inc., 4 AD3d 444 [2d Dept 2004]; see also D & W Central Station Alarm Co., Inc. v Copymasters, Inc., 122 Misc2d 453 [Civ Ct, Queens County 1983].) In addition, respondent's ownership of real property, after its dissolution, is indicia of the corporation continuing to conduct business in New York (see Laurendi v Cascade Dev. Co. Inc., 5 Misc2d 688, 689 [Niagara County Ct 1957]). I conclude respondent Throop and Gates Inc. continues to conduct business in New York and is liable for the violations alleged against it.

Inasmuch as Department staff has made a prima facie showing that respondent Throop and Gates Inc. failed to properly register the facility up to the date of the staff's amended motion, the burden shifts to respondent to raise triable issues of fact. A respondent opposing staff's motion for an order without hearing must also lay bare its proof. The New York State Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material

questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). General denials are insufficient to raise an issue of fact on a summary judgment motion (see Gruen v Deyo, 218 AD2d 865, 866 [3d Dept 1995]; Bronowski v Magnus Enterprises, Inc., 61 AD2d 879 [4th Dept 1978]).

Respondent's general denials and affirmative defenses without evidentiary proof in support of respondent's position are not sufficient to raise an issue of fact.⁴ Respondents have the burden of raising a triable issue of fact. I conclude that respondents have failed to do so.

Accordingly, Department staff has met its burden in showing that respondent Throop and Gates Inc. failed to maintain a current and valid registration for the facility, including the correct product code for PBS tanks 005, 006 and 007; and the correct pipe leak detection code for PBS tanks 004, 005, 006 and 007, in violation of ECL 17-1009, former 6 NYCRR 612.2(a) and current 6 NYCRR 613-1.9(a). Staff has also demonstrated that respondent Throop and Gates Inc. failed to correct information for PBS tank 004 relating to tank secondary containment, tank leak detection and pipe leak detection.

ECL 17-1009 requires owners to register the PBS facility with the Department whenever ownership of the facility is transferred (see ECL 17-1009[2]). The record demonstrates that respondent Throop and Gates Inc. should have registered the facility as the new owner, but failed to do so. As this is a violation of ECL 17-1009, respondent Throop and Gates must submit a complete and accurate registration application to the Department with the applicable fees.

Second Cause of Action

Department staff alleges that respondent Farmer failed to keep current reconciliation of daily inventory records for PBS tanks 004, 005, 006 and 007 in violation of ECL 17-1007, former 6 NYCRR 613.4(a)(1) and current 6 NYCRR 613-2.3(c)(1). ECL 17-

⁴ Respondents' purported March 25, 2013 answer and 2012 notice of compliance are in response to unrelated proceedings. Although there is no indication from respondents that the denials and defenses contained therein are being restated in defense of this 2016 proceeding, I treat them as being restated.

1007 and former 6 NYCRR 613.4(a)(1) require the operator to keep daily inventory records for each tank and to keep current reconciliation of those records. Current 6 NYCRR 613-2.3(c)(1) requires the facility to perform the various methods of leak monitoring, including inventory monitoring. The current regulations provide that "[a]ny provision of this Part that imposes a requirement on a facility imposes that requirement on every operator and every tank system owner at the facility, unless expressly stated otherwise." (6 NYCRR 613-1.2[d].) Department staff has made a prima facie showing that respondent Farmer is the operator of the facility and that he has failed to keep current reconciliation of daily inventory records for PBS tanks 004, 005, 006 and 007 (Findings of Fact Nos. 8, 15, 16 and 18).

Although respondents state that they "present a proffer of proof that would show a daily inventory for all underground tanks," (see answer at ¶ 15) respondents have not done so by submitting evidentiary proof in admissible form sufficient to require a trial. I conclude respondents have failed to raise a triable issue of fact.

Department staff has met its burden in showing that respondent Farmer, as operator of the facility, failed to keep current reconciliation of daily inventory records for PBS tanks 004, 005, 006 and 007 in violation of ECL 17-1007, former 6 NYCRR 613.4(a)(1) and current 6 NYCRR 613-2.3(c)(1).

Third Cause of Action

Department staff alleges respondent Farmer failed to perform leak detection on PBS tanks 008 and 009 (unmetered underground storage tanks) in violation of former 6 NYCRR 613.4(a)(2) and current 6 NYCRR 613-2.3(b)(1). The former regulation requires the operator to perform leak detection and the current regulation requires the facility to do so. As noted above, the current requirement for the facility is also imposed on the operator (see 6 NYCRR 613-1.2[d]).

Department staff has made a prima facie showing that respondent Farmer is the operator of the facility and that he has failed to perform leak detection on PBS tanks 008 and 009. (See Findings of Fact Nos. 8, 15 and 17.) Again, respondents' answer states that they "present a proffer of proof that would show monitoring of the two unmetered tanks annually" (see answer at ¶ 16). However, as noted above, respondents have not submitted evidentiary proof in admissible form or demonstrated

an acceptable excuse for their failure to do so. I conclude respondents have failed to raise a triable issue of fact.

Department staff has met its burden in showing that respondent Farmer, as operator of the facility, failed to perform leak detection on PBS tanks 008 and 009, in violation of former 6 NYCRR 613.4(a)(2) and current 6 NYCRR 613-2.3(b)(1).

Fourth Cause of Action

Department staff alleges the owner failed to maintain as-built drawings for PBS tanks 004, 005, 006 and 007 including a statement by the installer that the UST system was installed in compliance with DEC regulations in violation of former 6 NYCRR 614.7(d) and current 6 NYCRR 613-2.1(b)(4)(iii). Former paragraph 614.7(d) requires the facility owner to maintain accurate as-built drawings, whereas the current regulation requires the facility to maintain the as-built drawings. As discussed above, the facility requirement is imposed on every operator and every tank system owner at the facility (see 6 NYCRR 613-1.2[d]).

Although respondent Farmer as the operator is responsible for complying with the current 6 NYCRR 613-2.1(b)(4)(iii), staff's allegations are against the owner. Department staff has not identified the tank system owner.

Respondent Throop and Gates Inc., as owner of the facility at the time of the February 12, 2014 inspection, was required by former 6 NYCRR 614.7(d) to maintain as-built drawings but failed to do so. When this regulation was amended, effective October 11, 2015, the responsibility for maintaining as-built drawings shifted from the facility owner to the operator and tank owner.

Staff has made a prima facie showing that respondent Throop and Gates Inc. has failed to maintain accurate as-built drawings that have been certified by the installer to comply with the regulations, in violation of former 6 NYCRR 614.7(d) from February 12, 2014 to October 11, 2015. (Findings of Fact Nos. 1, 3, 15, 16 and 18).

Despite general denials or defenses to the contrary, respondents have not submitted any evidentiary proof in admissible form or demonstrated an acceptable excuse for their failure to do so. I conclude respondents have failed to raise a triable issue of fact on staff's fourth cause of action.

Department staff has met its burden in showing that respondent Throop and Gates Inc., as the facility owner, failed to maintain accurate as-built drawings that have been certified by the installer to comply with the regulations, in violation of former 6 NYCRR 614.7(d).

Fifth Cause of Action

Department staff alleges that the PBS facility registration expired on March 13, 2016 and has not been renewed, in violation of current 6 NYCRR 613-1.9(c). Department staff does not allege which respondent is responsible for renewing the registration. Section 613-1.9 requires the facility owner to apply for initial, revised, corrected or renewed registrations. Respondent Throop and Gates Inc. should have filed an application to register the facility by November 5, 2009; that is within thirty days of the October 6, 2009 transfer of ownership of the facility to Throop and Gates Inc. (see former 6 NYCRR 612.2[b] and current 6 NYCRR 613-1.9[d]). Staff, however, did not plead a violation of those provisions.

Respondent Throop and Gates Inc. is not responsible for renewing a registration that was issued to respondent Farmer. Respondent Farmer has not been the owner of the facility since October 6, 2009 and is not responsible for renewing the expired registration. Consequently, the Commissioner cannot order either respondent to renew the registration.

For the reasons set forth above, staff's fifth cause of action should be dismissed.

I have considered respondents' remaining arguments and determine them to be without merit.

Penalties

Department staff requests that respondents be assessed a total civil penalty of \$24,000. Staff cites the provisions of ECL 71-1929 that set forth a maximum daily civil penalty of \$37,500 for violations of ECL article 17 title 10 or the regulations promulgated pursuant thereto.

Staff also references the penalty ranges for each violation set forth in DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy - Penalty Schedule (May 21, 2003) and applies the settlement penalty amount to each count adjusted upward by eight aggravating factors. Staff then requests the adjusted

settlement amount reached for each cause of action be quadrupled. Applying these factors, staff assigned penalties as follows: first cause of action - \$2,000; second cause of action (four counts) - \$10,000; third cause of action (two counts) - \$4,000; fourth cause of action - \$4,000; and fifth cause of action - \$4,000.

Respondents' history of non-compliance justifies the penalty requested by staff. Respondent Farmer failed to comply with a previous Commissioner's order and as a result, an action was commenced in New York State Supreme Court, Kings County against respondents.⁵ Respondents have not complied with the resulting court order and judgment (see Findings of Fact Nos. 19-22).

The penalties requested are a fraction of the maximum statutory penalty that could be assessed against respondents. I also conclude that staff's penalty request is appropriate based on respondents' continued violations of the petroleum bulk storage statutes and regulations, and respondents' failure to cooperate with Department staff to address the violations. The potential harm from a spill or other failure resulting from lack of appropriate maintenance of respondents' underground PBS tanks further supports the penalty requested.

Even though staff only proved a violation of former 6 NYCRR 614.7(d) on staff's fourth cause of action, I find the penalty requested on that cause of action is supported and appropriate.

I reduce staff's requested penalty by four thousand dollars (\$4,000), the amount staff assigned to staff's fifth cause of action, and conclude that a total penalty of twenty thousand dollars (\$20,000) is supported and appropriate.

Department staff requests that the total penalty be assessed against respondents, presumably jointly and severally. Staff, however, provides no grounds for doing so. Staff's first cause of action is pleaded against both respondents, but only respondent Throop and Gates Inc. as facility owner is liable for those violations. The second and third causes of action are only pleaded against respondent Farmer, and the fourth cause of action is pleaded only against the owner, which is respondent Throop and Gates Inc.

⁵ In the Matter of Hillary Farmer, Jr., Order of the Commissioner, October 22, 2009, respondent Farmer was ordered to pay a \$10,000 civil penalty, perform corrective measures and submit records to Department staff (id. at 4-5), but failed to comply with the order (see Urda Affirmation at ¶¶ 11-12).

Based on the penalties requested by staff with respect to each cause of action, I conclude that respondent Throop and Gates Inc. should be assessed a civil penalty in the amount of six thousand dollars (\$6,000) and respondent Hillary Farmer, Jr. should be assessed a civil penalty in the amount of fourteen thousand dollars (\$14,000).

Corrective Action

Department staff requests as part of the relief in this matter that respondents be directed to complete corrective action within thirty days of service of an Order of the Commissioner. Staff, however, has not stated what corrective action is being requested or whether staff wants records maintained or submitted or both. Nonetheless, the Commissioner can direct respondents to correct the violations and submit documentation to Department staff demonstrating compliance. The corrective actions recommended herein must be performed in compliance with the current PBS regulations, 6 NYCRR part 613, that became effective October 11, 2015.

CONCLUSIONS OF LAW

1. By failing to register the facility and maintain a current and valid registration, respondent Throop and Gates Inc. violated ECL 17-1009, former 6 NYCRR 612.2(a) and current 6 NYCRR 613-1.9(a)(since October 11, 2015).
2. By failing to keep current reconciliation of daily inventory records for PBS tanks 004, 005, 006 and 007, respondent Farmer violated ECL 17-1007, former 6 NYCRR 613.4(a)(1) and current 6 NYCRR 613-2.3(c)(1) (since October 11, 2015).
3. By failing to perform leak detection on PBS tanks 008 and 009, respondent Farmer violated former 6 NYCRR 613.4(a)(2) and current 6 NYCRR 613-2.3(b) (since October 11, 2015).
4. By failing to maintain as-built drawings for PBS tanks 004, 005, 006 and 007 including a statement by the installer that the UST system was installed in compliance with DEC regulations, respondent Throop and Gates Inc. violated former 6 NYCRR 614.7(d).

RECOMMENDATIONS

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

1. granting Department staff's motion for order without hearing, on staff's first, second, third and fourth causes of action, pursuant to 6 NYCRR 622.12;
2. dismissing Department staff's fifth cause of action;
3. holding that respondent Throop and Gates Inc. violated the following:
 - a. ECL 17-1009, former 6 NYCRR 612.2(a) and current 6 NYCRR 613-1.9(a) by failing to register the facility and failing to maintain a current and valid registration (First cause of action); and
 - b. former 6 NYCRR 614.7(d) by failing to maintain as-built drawings for PBS tanks 004, 005, 006 and 007 including a statement by the installer that the UST system was installed in compliance with DEC regulations (Fourth cause of action);
4. holding that respondent Hillary Farmer, Jr. violated the following:
 - a. ECL 17-1007, former 6 NYCRR 613.4(a)(1) and current 6 NYCRR 613-2.3(c)(1) by failing to keep current reconciliation of daily inventory records for PBS tanks 004, 005, 006 and 007 (Second cause of action - four counts); and
 - b. former 6 NYCRR 613.4(a)(2) and current 6 NYCRR 613-2.3(b) by failing to perform leak detection on PBS tanks 008 and 009 (Third cause of action - two counts);
5. assessing a civil penalty of six thousand dollars (\$6,000) against respondent Throop and Gates Inc. for the above referenced violations and directing respondent Throop and Gates Inc. to pay the assessed penalty within fifteen (15) days of service of the Commissioner's order on respondent;
6. assessing a civil penalty of fourteen thousand dollars (\$14,000) against respondent Hillary Farmer, Jr. for the

above referenced violations and directing respondent Hillary Farmer, Jr. to pay the assessed penalty within fifteen (15) days of service of the Commissioner's order on respondent;

7. directing respondent Throop and Gates Inc. to submit the following within thirty (30) days of service of the Commissioner's order on respondent:
 - a. a corrected complete registration application, including the change of ownership, together with the applicable registration fees; and
 - b. copies of as-built drawings for PBS tanks 004, 005, 006 and 007 that satisfy regulatory requirements;
8. directing respondent Hillary Farmer, Jr. to submit the following within thirty (30) days of service of the Commissioner's order on respondent:
 - a. copies of completed ten day inventory reconciliations for PBS tanks 004, 005, 006 and 007 from February 12, 2014 to the date of the Commissioner's order; and
 - b. an inventory of leak detection monitoring performed by respondent on PBS tanks 008 and 009 from February 12, 2014 to the date of the Commissioner's order.
9. directing respondents to submit the penalty payments and all other submissions to the following:

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC Region 2
One Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101-5407; and
10. directing such other and further relief as may be deemed just, proper and equitable under the circumstances.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: December 1, 2016
Albany, New York

APPENDIX A

Matter of Hillary Farmer, Jr. and Throop and Gates Inc.,
DEC File No. R-20140224-154
Motion for Order Without Hearing

Department Staff's papers

1. Notice of Amended Motion for an Order Without Hearing, dated October 20, 2016
2. Affirmation of John K. Urda, dated October 20, 2016, attaching the following exhibits:
 - A. Petroleum Bulk Storage (PBS) Program Facility Information Report for facility located at 482 Throop Avenue AKA 584 Gates Avenue, Brooklyn, New York, printed October 20, 2016; PBS Certificate (PBS Number 2-600011) issued to Hillary Farmer on March 4, 2011 with an expiration date of March 13, 2016; and Petroleum Bulk Storage Application, dated January 19, 2011.
 - B. Deed from Hillary Farmer, Jr. to Throop and Gates Inc., dated October 6, 2009, conveying premises known as 582 Gates Avenue, Brooklyn, New York with Real Property Transfer Report (RP-5217NYC) and Customer Registration Form for Water and Sewer Billing attached.
 - C. New York State Department of State Entity Information sheet, current through October 12, 2016.
 - D. New York State Department of State, State Tax Warrant Notice System, listing for Throop and Gates Inc.
 - E. Order and Judgment from Martens v Hillary Farmer Jr. and Throop and Gates Inc., Sup Ct, Kings County, January 24, 2013, Sweeney, J., index No. 9210-2012.
 - F. Notice of Settlement Conference dated February 19, 2014 from Regional Attorney Louis P. Oliva to Hillary Farmer Service Station Inc.
 - G. Notice of Calendar Call dated February 25, 2015 from John K. Urda to Hillary Farmer, Jr.

3. Affidavit of Jeffery Rakowski, sworn to June 21, 2016, attaching the following exhibits:
 - A. Email dated February 6, 2014 from Jeffery Rakowski to respondent Farmer's email address (typhoon695@aol.com) with Letter of Introduction for NYSDEC Contracted Inspector attached.
 - B. Email dated February 12, 2014 from Jeffery Rakowski to respondent Farmer's email address (typhoon695@aol.com) with New York State DEC Petroleum Bulk Storage (PBS) Inspection Report dated February 12, 2014 and Notice of Violation dated February 12, 2014 from Jeffrey Rakowski to Hillary Farmer attached.
4. Affidavit of service of Environmental Conservation Officer Brian Gustitus, sworn to October 28, 2016.

Respondents' Papers

1. Notice of Compliance in a matter captioned "The City of New York Commissioner of The Department of Environmental Protection, Petitioner, against Throop & Gates Inc., Respondent" relating to "Cease and Desist No. 20160028" and "Comm. Order Dated 11/28/2012."
2. Answer dated March 25, 2013 in a matter captioned for the Supreme Court of the State of New York, County of Kings entitled "Joseph Martens as Commissioner of NYSDEC Department of Environmental [sic] Conservation, et. al., Plaintiff, against Throop and Gates Inc., Hillary Farmer, et. al., Defendants." Index No. 9210/2012.