STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 12 of the New York State Navigation Law, Article 17 of the New York State Environmental Conservation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

FORDHAM ROAD CONCRETE CORP. and ARTHUR GEORGE REIS,

Respondents.

RULING

DEC Case Number: R2-20130930-432

PROCEEDINGS

This ruling addresses a motion for order without hearing in lieu of complaint (motion for order) filed with the Office of Hearings and Mediation Services by staff of the New York State Department of Environmental Conservation (DEC or Department) on December 4, 2013. Pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), staff may serve a motion for order without hearing in lieu of or in addition to a complaint. By its motion, staff alleges that respondents violated certain provisions of article 12 of the Navigation Law and of titles 6 and 17 of NYCRR. The violations alleged by staff relate to the storage and discharge of petroleum products at a petroleum bulk storage (PBS) facility (facility) located at 47-17 27th Street, Long Island City, Queens, New York.

In support of its motion for order, Department staff filed a notice of motion, dated October 24, 2013; an affirmation (staff affirmation) of John K. Urda, Assistant Regional Attorney, DEC, Region 2, dated October 24, 2013; and an affidavit (Breen affidavit) of George Breen, Environmental Engineer 2, DEC, Region 2, sworn to on October 24, 2013. Both the affirmation and affidavit include numerous exhibits. Additionally, by notice of motion (motion to amend) dated January 15, 2014, staff moved to amend its motion for order by the filing of an affidavit (Falvey affidavit) of Brian K. Falvey, Environmental Engineer, DEC, Region 2, sworn to on January 13, 2014.

In opposition to the motion for order, respondents' counsel, Peter Sullivan, Esq., filed a memorandum of law (respondents MOL) dated November 25, 2013; an affidavit (Reis affidavit) of George Reis,[1] sworn to on November 25, 2013; and an affirmation (respondents first

[1] Department staff notes that respondent Arthur George Reis is also known as George Reis (staff affirmation ¶ 5; Breen affidavit ¶ 4) and this respondent is sometimes identified in the record as George Reis (see e.g. staff affirmation, exhibit B [PBS facility information report and PBS certificate]; Breen affidavit, exhibit C [notice of violation]).

affirmation) of Peter Sullivan, Esq. (undated). The opposition papers include numerous exhibits. Lastly, in opposition to Department staff's motion to amend, respondents filed an affirmation (respondents second affirmation) of Peter Sullivan, Esq., dated January 19, 2014.

Department Staff's Allegations

As enumerated below, Department staff alleges five causes of action, some with multiple counts, against respondents.

First cause of action: Respondents violated Navigation Law § 173 by the discharge of petroleum at the facility "as observed by Department staff on August 15, 2013" (staff affirmation ¶ 33).

Second cause of action: Respondents violated 6 NYCRR 613.8, Navigation Law § 175 and 17 NYCRR 32.3 by their failure to report the discharge of petroleum (staff affirmation ¶ 35).

Third cause of action: Respondents violated Navigation Law § 176 and 17 NYCRR 32.5 by their failure to contain, clean up or remove the discharge of petroleum (staff affirmation ¶ 37).

Fourth cause of action, first count: Respondents violated 6 NYCRR 612.2 by their failure to accurately register the facility (staff affirmation ¶ 40).

Fourth cause of action, second count: Respondents violated 6 NYCRR 612.2(a)(2) by their failure to renew the facility registration (staff affirmation ¶ 41).

Fourth cause of action, third count: Respondents violated 6 NYCRR 613.3(b)(1) by their failure to color-code five fill ports (staff affirmation ¶ 42).

Fourth cause of action, fourth count: Respondents violated 6 NYCRR 613.3(c)(3)(ii) by their failure to properly label aboveground tank number 5 (staff affirmation ¶ 43).

Fourth cause of action, fifth count: Respondents violated 6 NYCRR 613.3(d) by their failure to maintain spill prevention equipment "by allowing the accumulation of liquid and/or debris in two tank sumps (tanks 1 and 2)" (staff affirmation ¶ 44).

Fourth cause of action, sixth count: Respondents violated 6 NYCRR 613.3(d) by their failure to maintain spill prevention equipment "by allowing the overfill alarm for tanks 1 and 2 to be non-functional" (staff affirmation ¶ 45).

Fourth cause of action, seventh count: Respondents violated 6 NYCRR 613.4 by their failure to "keep and maintain properly reconciled inventory records of two underground storage tanks (diesel tanks 1 and 2) for the purpose of leak detection" (staff affirmation ¶ 46).

Fourth cause of action, eighth count: Respondents violated 6 NYCRR 613.4(a)(2) by their failure to "conduct leak detection on two unmetered underground storage tanks (fuel oil tanks 3 and 4)" (staff affirmation ¶ 47).

Fourth cause of action, ninth count: Respondents violated 6 NYCRR 613.5(a) by their failure to "test two tank systems (tanks 3 and 4) for tightness every five years" (staff affirmation ¶ 48).

Fourth cause of action, tenth count: Respondents violated 6 NYCRR 614.3(a)(2) by their failure to "attach permanent labels at two fill ports (tanks 1 and 2)" (staff affirmation ¶ 49).

Fourth cause of action, eleventh count: Respondents violated 6 NYCRR 614.7(d) by their failure to "maintain facility drawings or as-built plans for underground storage tank systems (tanks 1 and 2)" (staff affirmation ¶ 50).

Fifth cause of action, first count: Respondents violated Environmental Conservation Law (ECL) § 71-1929 by their failure to "provide evidence of corrective action under the 2008 Order [on consent]" (staff affirmation ¶ 51).

Fifth cause of action, second count: Respondents violated ECL 71-1929 by their failure to "provide evidence of corrective action under the 2011 Order [on consent]" (staff affirmation ¶ 52).

As for relief, Department staff requests that the Commissioner issue an order (i) holding respondents liable for the violations enumerated above; (ii) assessing a total penalty "in an amount no less than $113,500" against respondents; (iii) directing respondents to "comply with all [PBS laws and regulations] and correct all violations set forth above;" (iv) directing respondents to remediate the site pursuant to a Department-approved work plan; and (v) granting "such other and further relief as may be deemed just, proper and equitable under the circumstances" (staff affirmation at 12).

Respondents' Position

Respondents state that Department staff's motion for order "must be denied . . . as it is apparent on its face that [staff] has not met its burden" to prove that there are no material issues of fact in dispute (respondents MOL at 3-4). Respondents assert that the "[staff] **[a]ffirmation does not address the facts at all**" (id. at 4). Respondents further assert that this "fatal deficiency" is not remedied by the Breen affidavit (id.). In their filings in opposition to the motion for order, respondents also attempt to demonstrate the existence of material issues of fact in relation to most, but not all, of the violations alleged by staff (see respondents MOL and Reis affidavit).

In addition, as to respondent Arthur George Reis (respondent Reis), respondents argue that he "was added as a respondent improperly" (respondents MOL at 26). Respondents state that respondent Reis was not named as an individual respondent in the two prior enforcement actions against the facility. Further, respondent Reis was not named in either the notice of violation (NOV) or the draft order on consent that staff generated in relation to the current enforcement action. Respondents argue that there is no basis for individual liability on the part

of respondent Reis and that the motion papers fail to raise "a single allegation . . . of Mr. Reis undertaking any act that is the subject of the Motion [for order]." (Id.)

FINDINGS OF FACT

Based upon the papers filed by Department staff and respondents, I make the following findings of fact (see 6 NYCRR 622.12[e]):

1. Respondent Fordham Road Concrete Corp. (respondent Fordham) is a domestic business corporation (staff affirmation ¶ 3, exhibit A) and the owner of a petroleum bulk storage facility (PBS facility number 2-610744) located at 47-17 27th Street, Long Island City, New York (staff affirmation ¶ 4, exhibit B [PBS certificate]; Breen affidavit ¶¶ 3-4, exhibit B [PBS applications]).

2. Respondent Reis is the chief executive officer and president of respondent Fordham (staff affirmation ¶ 5, exhibits A, D [2008 and 2011 orders on consent signed by respondent Reis as president of respondent Fordham]; Breen affidavit ¶ 4, exhibit B [two 2013 PBS applications signed by respondent Reis, as president of respondent Fordham]).

3. Respondent Reis is the on-site operator of the facility (staff affirmation ¶ 5, exhibit B [PBS facility information report identifying respondent Reis as the "Class B (On-Site) Operator" and PBS certificate identifying respondent Reis as the "Class B (Daily On-Site) Operator"]; Breen affidavit ¶ 4, exhibit B [two 2013 PBS applications signed by respondent Reis designating him as the "Class B (Daily On-Site) Operator"]).

4. As a result of alleged violations observed by Department staff during an inspection of the facility on August 15, 2013, staff issued a notice of violation, dated August 16, 2013, addressed to respondent Reis at the facility (Breen affidavit ¶¶ 4-7, exhibit C).

5. Respondent Fordham has been the subject of prior enforcement actions by the Department relating to PBS operations at the facility and respondent Fordham entered into orders on consent with the Department in 2008 and 2011 (2008 order on consent and 2011 order on consent, respectively) (staff affirmation ¶ 11, exhibit D).

DISCUSSION

Summary Judgment Standard

Pursuant to 6 NYCRR 622.12(d), "[a] contested motion for 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."

New York courts have long held that summary judgment is a drastic remedy, to be granted only where it is clear that there are no material issues of fact to be adjudicated (see e.g.

Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [holding that "[s]ummary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact"] [internal quotation marks and citations omitted]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957] [holding that "[t]his drastic remedy should not be granted where there is any doubt as to the existence" of material issues of fact]). As the Court noted in Sillman, when determining a motion for summary judgment, "'issue-finding, rather than issue-determination, is the key to the procedure'" (id. at 404 [quoting Esteve v Abad, 271 AD 725, 727 (1st Dept 1947)]). Additionally, this office "should draw all reasonable inferences in favor of the nonmoving party" (Tadmor v New York Jiu Jitsu Inc., 109 AD3d 440, 443 [1st Dept 2013]).

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. In 2003, the Commissioner elaborated on the standard for determining a motion for order without hearing:

> "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. The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. [A supporting] 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."

(Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [internal quotation marks and citations omitted]). Where a moving party establishes a prima facie case in its favor, the burden shifts to the responding party to proffer competent evidence in rebuttal (see Ramos v Howard Indus., Inc., 10 NY3d 218, 224 [2008] [stating that once the movant has "met its initial burden, in order to defeat summary judgment, [the non-moving party] must raise a triable question of fact by offering competent evidence which, if credited by the jury, is sufficient to rebut [the movant's] evidence"] [internal quotation marks and citations omitted]).

Lastly, where a party has moved for an order without hearing, this office may search the record and grant summary judgment in favor of either party on any charge that is the subject of the motion (see Dunham v Hilco Constr. Co., 89 NY2d 425, 429-430 [1996] [noting that "the Appellate Divisions have uniformly held that a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court"]; see also CPLR 3212[b] [stating that a summary judgment motion is to be determined "upon all the papers and proofs submitted" and that the court may grant summary judgment to a non-moving party "without the necessity of a cross-

motion"]; 6 NYCRR 622.12[d] [stating that this office may grant a contested motion for order without hearing "in favor of any party"]).

As discussed below, applying the summary judgment standard to Department staff's motion for order without hearing, I conclude that staff's motion must, in large part, be denied. However, I also conclude that staff and respondent Reis are entitled to summary judgment in relation to certain charges.

Staff Motion to Amend Its Motion for Order Without Hearing

By notice of motion dated January 15, 2014, Department staff filed a motion to amend the motion for order without hearing. Staff states that the motion to amend is filed pursuant to 6 NYCRR 622.5(b) and CPLR 3025(b) and argues that the motion should be granted because it is limited in scope, will expedite this proceeding, and will cause no prejudice to respondents (see affirmation of John K. Urda, Esq., Jan. 15, 2014, ¶ 2). The "amendment" sought by staff is the addition of the Falvey affidavit to the record. The Falvey affidavit relates only to the two counts of the fifth cause of action: the alleged failure of respondents to provide evidence of corrective action, as required under the 2008 order on consent and the 2011order on consent.

Respondents oppose staff's motion to amend and argue that 6 NYCRR 622.12 makes no provision for amending a motion for order without hearing (respondents second affirmation ¶¶ 2-3). Respondents further argue "it is intuitively clear that motions brought pursuant to 6 NYCRR §622.12 should not be permitted to be amended" and that to allow such amendments would open the door for staff to "continually 'amend' its motion until it gets it right[]" (id. ¶ 7). With regard to staff's reliance upon 6 NYCRR 622.5 as authority for the amendment, respondents assert that section 622.5 applies only to pleadings and that a motion for order without hearing is not a pleading (id. ¶¶ 4-6).

I find no merit in respondents' argument that a motion for order without hearing is not a pleading. Regardless of its denomination as a "motion," in the context of this proceeding the motion for order performs the function of a pleading. That is, it sets forth the Department's allegations and charges against the respondents (see Black's Law Dictionary 1191 [8th ed 2004] [defining a pleading as "[a] formal document in which a party to a legal proceeding . . . sets forth or responds to allegations, claims, denials, or defenses"]). Further, I note that Department regulations expressly provide that a motion for order without hearing may be served in lieu of a complaint (6 NYCRR 622.12[a]) and, in the event the motion is denied, the motion and supporting papers are "deemed the complaint" (6 NYCRR 622.12[e]). Accordingly, this office will consider motions to amend a motion for order without hearing (see e.g. Matter of Maggy, Order of the Commissioner, Sept. 9, 2011, at 6, Summary Report at 5; Matter of Scrima, Order and Judgment of the Commissioner, Nov. 21, 2003, at 2; Matter of Beach, Ruling, May 3, 2013, at 9-10).

Additionally, I note that Department staff's motion to amend is not, as it is characterized by staff, a motion to amend its pleading. Rather, staff seeks to submit a supplemental affidavit in relation to the facts underlying the fifth cause of action as set forth in staff's original motion for order. Staff has proposed no amendment to its motion for order.

As to the merits of allowing staff to file the supplemental affidavit, I am cognizant of the concerns raised by respondents. Department staff should endeavor to set forth complete and comprehensive papers on its initial filing of a motion for order without hearing and the serial supplementation of the record should be discouraged. There is, however, little danger of prejudice to respondents under the circumstances presented here and significant efficiency to be gained in allowing Department staff's submittal (see 6 NYCRR 622.10[b][1][x][authorizing the ALJ to "do all acts and take all measures necessary for the . . . efficient conduct of the hearing"]). Staff seeks only to supplement the record on a rather narrow issue: whether respondents fulfilled their obligations to submit documentation of corrective measures as required under the 2008 and 2011 orders on consent. The Falvey affidavit is directly on point relative to the fifth cause of action and respondents have already addressed the underlying facts of this cause of action in an affidavit in opposition to the motion for order (see Reis affidavit ¶ 26 [attesting that respondents "have made submittals to [the Department] that include much of the information that it claims was not submitted"]).

There would be little purpose served by requiring staff to testify at hearing to facts so easily established by affidavit on a question of such limited complexity. In light of the foregoing discussion, I grant staff's motion to supplement the record with the Falvey affidavit.[2]

Individual Liability of Respondent Reis

Department staff names respondent Reis as an individual respondent. Respondents argue that "[r]espondent Reis was added as a respondent improperly" (respondents MOL at 26). Respondents note that respondent Reis was not a named respondent in either the 2008 order on consent or the 2011 order on consent with the Department. Further, respondents argue that he should not be a respondent because "there is not a single allegation in the Motion [i.e., the motion for order] of Mr. Reis undertaking any act that is the subject of the Motion." (Id.)

Respondents are correct that respondent Reis is not a named respondent on either of the two orders on consent that form the bases of the allegations in the fifth cause of action (see staff affirmation, exhibit D). Although the orders on consent were signed by respondent Reis, he did so in his capacity as the president of respondent Fordham, and not as an individual (id. [2008 order on consent at 5; 2011 order on consent at 5]). Accordingly, respondent Fordham is "bound by the terms, conditions and provisions" of the orders and may be held liable upon a showing that it failed to abide by the terms of the orders. However, staff does not advance a basis for holding respondent Reis liable for "failing to provide evidence of corrective action under the [terms of the 2008 and 2011 orders on consent]" (staff affirmation ¶¶ 51-52).

[2] I note that the CPLR contains a provision that is similar to the part 622 provision for a motion for order without hearing (see CPLR 3213 [motion for summary judgment in lieu of complaint]). As the First Department recently held in context of a 3213 motion, "[m]ere omissions from the affidavits that can be rectified by filing and serving additional affidavits should be cured by a continuance or adjournment in order for the additional affidavits to be served and filed" (Sea Trade Mar. Corp. v Coutsodontis, 111 AD3d 483, 486 [2013] [internal quotation marks and citations omitted]).

With regard to the violations of PBS regulations alleged by Department staff, several of these concern obligations that are imposed on the owner, and not on the operator, of a PBS facility (see e.g. staff affirmation ¶¶ 40-41[citing 6 NYCRR 612.2(a)], 43 [citing 6 NYCRR 613.3(c)(3)(ii)], 48 [citing 6 NYCRR 613.5(a)], 50 [citing 6 NYCRR 614.7(d)]). Staff does not allege, however, that respondent Reis is the owner of the facility at issue here. Moreover, I find no basis in the record to hold that respondent Reis "has legal or equitable title to a facility" (see 6 NYCRR 612.1[c][18] [defining "owner"]). Accordingly, where ownership is a necessary element of a charge, respondent Reis may not be held liable.

Department Staff's Charges

Below, Department staff's charges are discussed seriatim. A summary of the charges and their respective dispositions may be found at the end of this section (see Table: Summary of Rulings, *infra* at 19).

Alleged Violations of the Navigation Law and Regulations

The first three causes of action all relate to Department staff's allegation that respondents unlawfully discharged petroleum at the facility.

By its first cause of action, Department staff alleges that respondents violated Navigation Law § 173 by discharging petroleum at the facility "as observed by Department staff on August 15, 2013" (staff affirmation ¶ 33). For this alleged violation, staff seeks a $12,500 penalty (id. ¶ 34).[3]

By its second cause of action, staff alleges that respondents violated 6 NYCRR 613.8, Navigation Law § 175 and 17 NYCRR 32.3 by their failure to report the discharge (staff affirmation ¶ 35). For this alleged violation, staff seeks a $12,500 penalty (id. ¶ 36).

By its third cause of action, staff alleges that respondents violated Navigation Law § 176 and 17 NYCRR 32.5 by their failure to contain, clean up or remove the discharge (staff affirmation ¶ 37). For this alleged violation, staff seeks a $12,500 penalty (id. ¶ 38).

As is plain on the face of these three causes of action, the existence of a "discharge" is a material element of each charge. Accordingly, to prevail in this summary proceeding, staff must prove the existence of a discharge as a matter of law. Here, the parties do not dispute that there was a release of petroleum onto the ground at the facility (although, according to respondents, the release was de minimis [see Reis affidavit ¶ 3(second[4])]). The parties do dispute, however, whether the release constitutes a "discharge" of petroleum under the Navigation Law.

Navigation Law § 173(1), states that "[t]he discharge of petroleum is prohibited." For the purposes of Navigation Law, a "discharge" is defined as "any intentional or unintentional action

[3] Department staff also seeks remediation of the discharge (see staff affirmation at 12 [staff request for relief ¶ 4]).

[4] There are two paragraphs numbered "3" in the Reis affidavit. To avoid confusion, the paragraphs will be cited as "¶ 3(first)" and "¶ 3(second)," respectively.

or omission resulting in the releasing . . . of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters" (Navigation Law § 172[8]; see also 6 NYCRR 612.1[c][8] [defining a "discharge" under the PBS regulations to "mean[] any intentional or unintentional action or omission resulting in the releasing . . . of petroleum into the waters of the State or onto lands from which it might flow or drain into said waters"]).

Department staff's motion papers establish that there was a release (release) of petroleum, in the form of diesel fuel, onto the ground at the facility that was observed by staff on August 15, 2013 (see Breen affidavit ¶ 5.ii, exhibit A) and respondents do not dispute that there was diesel on the ground (see Reis affidavit ¶ 3[second]). Respondents argue, however, that the release does not constitute a discharge under the Navigation Law. Respondents assert that there is no possible path for the diesel to reach the waters of the State from the location where the release was observed (Reis affidavit ¶¶ 3[first]-7). Specifically, respondent Reis asserts that there is a "double concrete containment system that makes it impossible for any liquid . . . to reach the waters of the state" (id. ¶ 4).

Department staff does not controvert respondents' assertions with regard to the facility's on-site containment system. Nor did staff proffer evidence demonstrating that the petroleum release did, or could, reach the waters of the state from the point of the release.

I conclude that an issue of fact has been raised. Specifically, the issue of whether the diesel release at the facility, observed by Department on August 15, 2013, constitutes a discharge under either the Navigation Law or 6 NYCRR part 613 cannot be resolved on this record.[5] Accordingly, staff's motion for order must be denied as to the first three causes of action.

Alleged Violations of PBS Regulations

- - Fourth cause of action, first count

Under the fourth cause of action, first count, Department staff alleges that respondents violated 6 NYCRR 612.2 by their failure to "accurately register the Facility" (staff affirmation ¶ 40). For this count, staff seeks a $1,000 penalty (id.).

Department staff does not allege that respondents failed to register the facility. Rather, staff alleges that respondents failed to "accurately" register the facility (staff affirmation ¶ 40; Breen affidavit ¶ 5.i). Indeed, staff includes the facility's last PBS certificate (issued February 11, 2008) in its motion papers, thereby demonstrating that the facility was registered with the

[5] The identification of a specific triable issue of fact here is not intended to, nor does it, preclude other elements of a cause of action or charge from being adjudicated. For example, as to the second cause of action, if staff successfully demonstrates at hearing that the release at issue constitutes a discharge under the Navigation Law, staff would still need to prove respondents failed to notify the Department of the spill. In that regard, I note that respondent Reis attests that he believed his discussions concerning the release with the DEC inspector satisfied the notice requirement (see Reis affidavit ¶ 9; see also 17 NYCRR 32.3 [stating that further notice to the Department is not necessary where an "owner, operator . . . has adequate assurance that such notification has already been given"]; but see 6 NYCRR 613.8 [stating that "[n]otification must be made by calling the [DEC] telephone hotline"]).

Department (see staff affirmation, exhibit B). Staff attests, however, that "14 incorrect items" were identified on the facility's registration during the Department's August 2013 inspection of the facility (Breen affidavit ¶ 5.i). Staff further attests that, after the August 2013 inspection, the Department "sent [respondent Fordham] a copy of the Facility Information Report, marked to indicate registration deficiencies" (id. ¶ 7 [a copy of the marked facility information report was not included in staff's filings on the instant motion for order]).

Respondent Reis attests that "Respondent Fordham has always filed, to its knowledge, accurate registration statements" (Reis affidavit ¶ 13). He further attests that the inaccurate tank installation dates noted on the facility's registration relate to tanks that "had been installed prior to occupancy [of the facility] by Respondent Fordham" and he notes that, "in the many prior inspections of the tanks," staff had not discovered that the installation dates were in error (id. ¶ 14). Respondent Reis also attests that "Respondent Fordham submitted a 'registration correction application' as soon as the [erroneous] information was discovered" (id.). Lastly, respondent Reis asserts that it should not be "a violation of law to correct an honestly filed registration" (id. ¶ 15).

It is clear that the facility has been registered with the Department for some time (see staff affirmation, exhibit B [PBS certificate]). It is also clear that respondents do not dispute that some of the data on the facility's registration was in error. Respondents' efforts to correct the errors and the assertion that the errors were inadvertent or difficult to identify are factors to consider in assessing a penalty, but these issues do not alter the fact that the facility's registration contained errors. Accordingly, staff has established as a matter of law that the registration included inaccurate information and, therefore, staff is entitled to summary judgment on this count (see Matter of Benhim Enterprises, Inc., Order of the Assistant Commissioner, Dec. 31, 2010, at 3 [holding that, because the contents of a storage tank were not correctly identified on a facility's PBS registration, the facility owner "failed to properly register the 10,000-gallon underground diesel fuel tank at the facility, in violation of 6 NYCRR 612.2"]).

As to respondent Fordham, Department staff has established as a matter of law that respondent violated 6 NYCRR 612.2 by failing to accurately register the facility. Accordingly, staff's motion for order is granted with respect to respondent Fordham on the first count of the fourth cause of action. Because the obligations relating to the registration of a facility are imposed upon a facility "owner" and not the operator (see 6 NYCRR 612.2[a]), this count is dismissed as to respondent Reis (see Liability of Respondent Reis, *supra* at 7-8).

- - Fourth cause of action, second count

Under the fourth cause of action, second count, staff alleges that respondents violated 6 NYCRR 612.2(a)(2) by their failure to renew the facility's registration (staff affirmation ¶ 41). For this count, staff seeks a $2,000 penalty (id.).

Department staff's motion papers include two registration application forms that were submitted by the facility: the first is denominated as a "renewal" and was signed by respondent Reis on January 21, 2013 (January renewal application), the second is denominated as an

"information correction"[6] and was signed by respondent Reis on August 27, 2013 (August correction application) (see Breen affidavit, exhibit B). Respondents' August correction application appears to address errors that staff had previously identified on the facility's registration (see e.g. id. [January renewal application, page 2, column 5 (showing the installation dates for tanks 3 and 4 to be 1998) and August correction application, page 2, column 5 (showing the installation dates for tanks 3 and 4 to be 1985)]). Notwithstanding these submittals by respondents, staff attests that the facility's registration "has not been renewed to date [i.e., October 24, 2013, the date of the Breen affidavit]" (id. ¶ 6).

The information contained in the August correction application (see Breen affidavit, exhibit B) is largely consistent with what is shown on the PBS facility information report (printed October 24, 2013) that was submitted by staff in support of the instant motion for order (see staff affirmation, exhibit B). I also note that the form letter from the Department advising respondents of deficiencies in the August correction application does not indicate that the application contains errors. Rather, the letter indicates only that tightness testing for tanks 3 and 4 is overdue and directs the "Tank Owner" to "[p]rovide [a] copy of passing tank tightness test reports (tanks 003 & 004) with your application and renewal fee" (Breen affidavit, exhibit B [letter dated September 17, 2013]).

Pursuant to Department policy, the failure to demonstrate that a storage tank has undergone a required tightness test is cause for the Department to return a facility's registration application (see DEC Application Review Policy for PBS and CBS Registration Applications [DER-12] § V [PBS Procedure]). I note, however, that the PBS regulations do not state that the failure to include information regarding tightness testing will result in the application being deemed incomplete.

It is clear that respondents attempted to timely renew the facility's registration and that they later sought to correct errors that staff identified in the registration. These efforts, however, do not alter the fact that the facility's registration was not successfully renewed before it expired. As noted on its face, the facility's registration certificate expired on February 1, 2013 (see staff affidavit, exhibit B [PBS certificate]). Respondents' January 2013 renewal application, although timely, contained numerous errors, was incomplete, and was rejected by the Department (see Breen affidavit ¶ 5.i, exhibit B [DEC form letter, dated January 25, 2013, to the "Tank Owner" stating that the owner must "complete property owner info[rmation]" and resubmit the application; January renewal application, page 2, column 5 (showing, inter alia, incorrect installation dates for tanks 3 and 4)]).

Staff gave respondents 10 days to correct the deficiencies identified in the January renewal application (see staff affirmation, exhibit B [DEC form letter, dated January 25, 2013]). Respondents, however, failed to submit a corrected application until August 2013, approximately seven months after the initial renewal application was rejected and long after the facility's PBS certificate had expired. The August correction application was also rejected (see id. [DEC form letter, dated September 17, 2013]).

[6] This denomination is crossed out on the application that is included with Department staff's motion papers, but the record does not indicate when it was crossed out or by whom.

As to respondent Fordham, Department staff has established as a matter of law that respondent violated 6 NYCRR 612.2(a)(2) by failing to timely renew the facility's PBS registration. Accordingly, staff's motion for order is granted with respect to respondent Fordham on the second count of the fourth cause of action. Because the obligations relating to the registration of a facility are imposed upon the facility "owner" (see 6 NYCRR 612.2[a]), this count is dismissed as to respondent Reis (see Liability of Respondent Reis, *supra* at 7-8).

- - Fourth cause of action, third count

Department staff alleges that respondents violated 6 NYCRR 613.3(b)(1) by their failure to color-code five fill ports (id. ¶ 42). For this alleged violation, staff seeks a $2,500 penalty ($500 per fill port) (id.). Staff attests that respondents failed to "color-code all five Facility tank fill ports" (Breen affidavit ¶ 5.iii). The notice of violation sent to respondents indicates the fill ports for all five tanks at the facility were not labeled (see Breen affidavit, exhibit C).

Respondent Reis attests that all the fill ports were color-coded at the time of Department staff's August 2013 inspection, but that the markings had become faded and staff requested that they be repainted (Reis affidavit ¶ 18). Respondent Reis further attests that "all five fill ports were re-color coded" after the inspection and that he forwarded a "sample" photograph of one repainted fill port to demonstrate compliance to staff (id. ¶ 19).

Department staff has not established this violation as a matter of law. Accordingly, staff's motion for order is denied with respect to the third count of the fourth cause of action.

- - Fourth cause of action, fourth count

Department staff alleges that respondents violated 6 NYCRR 613.3(c)(3)(ii) by their failure to properly label aboveground tank number 5 (id. ¶ 43). For this alleged violation, staff seeks a $500 penalty (id.).

Respondents do not assert facts in dispute of this allegation (see Reis affidavit ¶¶ 18-20 [addressing Department staff's charges seriatim, without addressing the fourth count]). Respondents do argue, however, that staff's supporting affidavit is "conclusory" and the single sentence relating to this violation "is not even a declarative sentence" (respondents MOL at 6).

Respondents' arguments are without merit. Department staff has charged respondents with "failing to properly label an aboveground tank with design capacity, working capacity and identification number" in violation of 6 NYCRR 613.3(c)(3)(ii) (staff affirmation ¶ 43). Subparagraph 613.3(c)(3)(ii) expressly requires this information to be "clearly marked on the tank and at the gauge" and the staff affidavit in support of the motion for order states that respondents failed to "label the Facility's aboveground tank (tank 5)" (Breen affidavit ¶ 5.iv). This alleged violation is also set forth in the notice of violation sent to respondents (id., exhibit C).

Staff has made a prima facie showing that respondent Fordham violated 6 NYCRR 613.3(c)(3)(ii) and respondents have not proffered evidence in rebuttal. Accordingly, staff's

motion for order is granted against respondent Fordham on the fourth count of the fourth cause of action. Because the obligations imposed under 6 NYCRR 613.3(c) are imposed on the "owner" of a facility and not the operator, this count is dismissed as to respondent Reis (see Liability of Respondent Reis, *supra* at 7-8).

- - Fourth cause of action, fifth count

Department staff alleges that respondents violated 6 NYCRR 613.3(d) by their failure to maintain spill prevention equipment "by allowing the accumulation of liquid and/or debris in two tank sumps (tanks 1 and 2)" (staff affirmation ¶ 44). Staff attests that, during the August 15, 2013 facility inspection, there was "accumulated liquid in the tank sumps for tanks 1 and 2" (Breen affidavit ¶ 5.v). For this alleged violation, staff seeks a $1,000 penalty (staff affirmation ¶ 44).

Respondent Reis attests that "[t]he sumps were working perfectly before, during and after the [Department's August 15, 2013] inspection" and that "[t]here is often liquid in a sump that is well maintained and working well" (Reis affidavit ¶ 20).

The violation cited by staff requires proof that the owner or operator has not "ke[pt] all gauges, valves and other equipment for spill prevention in good working order" (6 NYCRR 613.3[d]). While properly functioning sumps are certainly part of a facility's spill prevention equipment, staff's allegation of "accumulated liquid" does not, standing alone, equate to a failure to maintain the equipment in good working order. Further, respondents directly controvert the allegation that the sumps were not in good working order.

Department staff has not established this violation as a matter of law. Accordingly, staff's motion for order is denied with respect to the fifth count of the fourth cause of action.

- - Fourth cause of action, sixth count

Department staff alleges that respondents violated 6 NYCRR 613.3(d) by their failure to maintain spill prevention equipment "by allowing the overfill alarm for tanks 1 and 2 to be non-functional" (staff affirmation ¶ 45). The staff affidavit in support of the motion for order states that "the overfill alarm light for tanks 1 and 2 was not functioning" (Breen affidavit at ¶ 5.vi). For this alleged violation, staff seeks a $1,000 penalty (staff affirmation ¶ 45).

Respondent Reis attests that he "was standing next to [the DEC inspector]" when the overfill alarm was tested and that he "personally witnessed the alarm working" (Reis affidavit ¶ 21). He further states that he "do[es] not know the basis for the confusion" over whether the alarm was working at the time of the inspection (id.)

Plainly, there is a material issue of fact in dispute and Department staff has not established this violation as a matter of law. Accordingly, staff's motion for order is denied with respect to the sixth count of the fourth cause of action.

- - Fourth cause of action, seventh count

Department staff alleges that respondents violated 6 NYCRR 613.4 by their failure to "keep and maintain properly reconciled inventory records of two underground storage tanks (diesel tanks 1 and 2) for the purpose of leak detection" (staff affirmation ¶ 46). Staff attests that Department forms completed by respondents "confirm that inventory records were not being kept as required for the purpose of leak detection" (Breen affidavit ¶ 10). For this alleged violation, staff seeks a $10,000 penalty (staff affirmation ¶ 46).

Respondent Reis attests that "Respondents maintain completely reconciled inventory records of the two underground storage tanks (diesel tanks 1 and 2) for the purpose of leak detection" (Reis affidavit ¶ 22). Respondents assert that they "maintain a state of the art computer leak detection system" that is "utilized by gas stations throughout the country." The alleged inaccuracy of the inventory records is, according to respondents, the result of attempting to comply with staff's request that respondents transfer "the data from our records and enter it into form documents that [staff] preferred." Respondents asserts that the Department "forms are ineffective and confusing." (Id.)

As respondents note, 6 NYCRR 613.4 does not require an operator to use a particular form for inventory reconciliation (see respondents MOL at 20). Rather, 6 NYCRR 613.4(a)(1) expressly states that the reconciliation of inventory records "must be kept current . . . and must be in accordance with generally accepted practices."

Respondents have raised a material issue of fact with regard to whether its automated computer leak detection system satisfies the requirement to "keep and maintain properly reconciled inventory records . . . for the purpose of leak detection" (staff affirmation ¶ 46). Accordingly, staff's motion for order is denied with respect to the seventh count of the fourth cause of action.

- - Fourth cause of action, eighth count

Department staff alleges that respondents violated 6 NYCRR 613.4(a)(2) by their failure to "conduct leak detection on two unmetered underground storage tanks (fuel oil tanks 3 and 4)" (staff affirmation ¶ 47; see also Breen affidavit ¶ 5.viii). For this alleged violation, staff seeks a $10,000 penalty (id.).

Respondent Reis attests that tanks 3 and 4 "have been empty, without inventory, and sealed for 14 years" and that "[a]ll fill ports to the tanks have been welded closed" during that time (Reis affidavit ¶ 24). Respondent Reis also asserts that respondents "stand ready to generate the necessary inventory records in the unlikely event that inventory would ever be put in these tanks" (id.). Respondents argue that "it is actually physically, not just 'technically impossible to perform inventory monitoring' if there is no such [] inventory" (respondents MOL at 24 [quoting the reporting exemption under 6 NYCRR 613.4[b][2]).[7]

[7] Respondents also argue that "empty and sealed" tanks are no longer being operated and that "without an operating tank there can be no violation of 613.4" (respondents MOL at 23). To be considered out of operation, however, a tank must be closed pursuant to 6 NYCRR 613.9(b)(1) and, until that time, the tank

While I disagree with respondents' assertion that the content of an empty tank cannot be inventoried – the inventory is simply zero – the assertion that the tanks are welded shut raises the issue of whether it is "technically impossible" for respondents to perform inventory monitoring. Accordingly, an issue of fact is presented as to whether the respondents should be able to avail themselves to the exemption under 6 NYCRR 613.4(b)(2).

Department staff's motion for order is denied with respect to the eighth count of the fourth cause of action.

- - Fourth cause of action, ninth count

Department staff alleges that respondents violated 6 NYCRR 613.5(a) by their failure to "test two tank systems (tanks 3 and 4) for tightness every five years" (staff affirmation ¶ 48). Staff attests that "tanks 3 and 4 were due for [tightness] testing in 1995, 2000, 2005 and 2010" and respondents had failed have the tests performed (Breen affidavit ¶ 5.ix). For this alleged violation, staff seeks a $20,000 penalty (staff affirmation ¶ 48).

Respondents do not assert facts in opposition to this count (see Reis affidavit ¶¶ 24-25 [addressing Department staff's charges seriatim, without addressing the ninth count]). Respondents do raise a general objection to the lack of sufficient factual allegations by the Department and argue that staff's supporting affidavit is "conclusory" (respondents MOL at 6).

Respondents' arguments are without merit. Department staff has charged respondents with failure to "test two tank systems (tanks 3 and 4) for tightness every five years" in violation of 6 NYCRR 613.5(a) (staff affirmation ¶ 48). The staff affidavit in support of the motion for order states that the tightness tests for these "two non-corrosive resistant underground tank systems" were required beginning in 1995 and every five years thereafter and that, despite repeated requests, respondents have failed to provide proof of the tests being conducted (Breen affidavit ¶ 5.ix).

Department staff has established its right to summary judgment on this charge as to respondent Fordham and, as to that respondent, staff's motion for order is granted. Because the obligations under 6 NYCRR 613.5(a) are imposed on the "owner" and not the operator, this count is dismissed as to respondent Reis (see Liability of Respondent Reis, *supra* at 7-8).

- - Fourth cause of action, tenth count

Department staff alleges that respondents violated 6 NYCRR 614.3(a)(2) by their failure to "attach permanent labels at two fill ports (tanks 1 and 2)" (staff affirmation ¶ 49; see also Breen affidavit ¶ 5.x [attesting to the failure of respondents to place permanent labels at the fill ports of underground tanks 1 and 2]). For this alleged violation, staff seeks a $1,000 penalty (staff affirmation ¶ 49).

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or facility is "subject to all requirements of [parts 612 and 613], including . . . reporting requirements" (6 NYCRR 613.9[b][2]). Here, there is no evidence that the regulatory closure requirements have been met and, therefore, tanks 3 and 4 remain subject to regulation.

Respondents do not assert facts in opposition to this count (see Reis affidavit ¶¶ 24-25 [addressing Department staff's charges seriatim, without addressing the tenth count]). As with the ninth count, respondents raise a general objection to the lack of sufficient factual allegations by the Department and argue that staff's supporting affidavit is "conclusory" (respondents MOL at 6).

Here again, respondents arguments are without merit. Pursuant to 6 NYCRR 614.3(a)(2), underground storage tanks installed after December 27, 1985 must have the specified label "conspicuously displayed and permanently affixed to the fill port." The staff affidavit in support of the motion for order states that underground storage tanks 1 and 2, which were installed in 1998 (see Breen affidavit, exhibit B [January renewal application, section B, column 5, and August correction application, section B, column 5]; staff affirmation, exhibit B [facility PBS certificate, column 3]) do not have "permanent labels at the fill ports" (Breen affidavit ¶ 5.x).

I note that 6 NYCRR 614.3(a)(2) does not state whether the owner, operator, or both are obligated to comply with its provisions. Nevertheless, unless otherwise specified, it is clear that the duties and obligations imposed under part 614 fall upon both the owner and operator of a facility (see e.g. 6 NYCRR 614.1[f] [stating under the "[g]eneral" provisions of part 614 that Department staff may "enter and inspect a facility for compliance with this Part, provided that [staff] is accompanied by the owner, operator or their designee" and that "the owner or operator must allow [staff] at all reasonable times to review and to copy any books, papers, documents and records relating to recordkeeping requirements and compliance with this Part"]; see also Matter of Benhim Enterprises, Inc., Order of the Assistant Commissioner, Dec. 31, 2010, at 1-2, 4 [holding a facility owner liable for violation of 6 NYCRR 614.3(a)(2)]; Matter of Gasco-Merrick Road Gas Corp., Decision and Order of the Commissioner, June 2, 2008, at 13-14 [holding facility operators liable for violation of 6 NYCRR 614.3(a)(2)]).

Staff has made a prima facie showing that respondents violated 6 NYCRR 614.3(a)(2) and respondents have not proffered evidence in rebuttal. Accordingly, staff's motion for order is granted with respect to the tenth count of the fourth cause of action.

- - Fourth cause of action, eleventh count

Department staff alleges that respondents violated 6 NYCRR 614.7(d) by their failure to "maintain facility drawings or as-built plans for underground storage tank systems (tanks 1 and 2)" (staff affirmation ¶ 50). The staff affidavit in support of the motion for order attests to respondents' "[f]ailure to keep and maintain as-built drawings" for the tank systems (Breen affidavit ¶ 5.xi). For this alleged violation, staff seeks a $2,000 penalty (staff affirmation ¶ 50).

Respondent Reis attests that respondents were not "provided with 'as-built' drawings . . . when the site was acquired" and that they "cannot prepare drawings because that would require interrupting the business operation . . . [and] would destroy, or at least materially jeopardize, the seal of [the] concrete bowl in which the site sits" (Reis affidavit ¶ 25). Respondents also argue that this obligation is imposed on the "installing owner" and that, because the facility was

acquired by respondents after the tanks were installed, respondents are not in violation of 6 NYCRR 614.7(d) (respondents MOL at 25).

Under 6 NYCRR 614.7(d), a facility "owner must maintain an accurate drawing or as-built plans which show the size and location of any new underground tank and piping system." Respondents admit that they do not have such plans and their arguments in opposition to the motion for order relative to this charge are without merit. The fact that respondent Fordham acquired the facility after the tanks were installed does not relieve it of compliance with subdivision 614.7(d). To hold otherwise would, over time, result in a large number of facilities having no obligation to maintain this basic information. As to respondents' argument that generating such plans is cost prohibitive, I note that the requirements of subdivision 614.7(d) do not require "as-built plans." Rather, an owner may satisfy the requirements of subdivision 614.7(d) by "maintain[ing] an accurate drawing" of the tank system. In any event, there is nothing in subdivision 614.7(d) that would relieve respondents of their obligation to have the requisite site plans because of the difficulty in generating same (cf. 6 NYCRR 613.4[b][2] [providing a compliance exemption where it is "technically impossible" to meet certain regulatory requirements]).

Department staff has established its right to summary judgment on this charge as to respondent Fordham and, as to that respondent, staff's motion for order is granted. Because the obligations under 6 NYCRR 614.7(d) are imposed on the "owner" and not the operator, this count is dismissed as to respondent Reis (see Liability of Respondent Reis, *supra* at 7-8).

Alleged Violations of Prior Orders on Consent

- - Fifth cause of action, first count

Department staff alleges that "respondents violated ECL § 71-1929" by their failure to "provide evidence of corrective action under the 2008 Order [on consent]" (staff affirmation ¶ 51).[8] For this alleged violation, staff seeks a $12,500 penalty (id.).

Respondents argue that the allegation of non-compliance with the 2008 order on consent is "improper" because the subsequent order, the 2011 order on consent, was issued "after a comprehensive review of the facility and [DEC] was fully informed of the state of compliance of the facility" (respondents MOL at 26). Respondent Reis asserts that the Department "negotiated the consent order of 2011 to include all prior liabilities arising from the [2008] consent order" (Reis affidavit ¶ 26).

The record is not clear with regard whether the 2011 order on consent superseded the 2008 order on consent. The 2011 order addresses many of the same deficiencies cited in the

[8] Note that ECL 71-1929 provides for sanctions where a party is found to have violated an order on consent issued pursuant to certain provisions of ECL article 17 or associated regulations. Accordingly, this allegation should be read as an alleged violation of an order on consent, not as an alleged violation of the penalty provisions of ECL 71-1929 (see e.g. Matter of Kligof Holding Corp., Order of the Commissioner, Sept. 15, 2009, at 3, Hearing Report at 6-7 [holding respondent liable for the violation of an order on consent and imposing a penalty under ECL 71-1929]).

2008 order, tending to support respondents' contention that the 2008 order was superseded. An issue of fact has been raised. Staff's motion for order is denied.

As noted above (see Liability of Respondent Reis, *supra* at 7-8), Department staff has not advanced an argument in support of holding respondent Reis liable for violations of the 2008 order on consent. Accordingly, this charge is dismissed as to respondent Reis.

- - Fifth cause of action, second count

Department staff alleges that respondents violated ECL 71-1929 by "failing to provide evidence of corrective action under the 2011 Order [on consent]" (staff affirmation ¶ 52). Brian Falvey was the staff member identified under the 2011 order on consent as the individual to whom respondents were to submit the required evidence of corrective action (see staff affirmation, exhibit D [2011 order on consent at 3]). Mr. Falvey attests that he "received none of the documentation of corrective action required" (Falvey affidavit ¶¶ 11-12). For this alleged violation, staff seeks a $12,500 penalty (staff affirmation ¶ 52).

As to this count, respondents argue that the motion for order must be denied because the Falvey affidavit should not be considered[9] and, absent that affidavit, Department staff has failed to "provide any reference, allegation, assertion, or evidence concerning the matter" (respondents MOL at 26). Respondent Reis attests that he has "made submittals to [the Department] that include much of the information" required under the 2011 order on consent (Reis affidavit ¶ 26).

Department staff is entitled to summary judgment against respondent Fordham on this count. The 2011 order on consent expressly provides that respondent Fordham must submit "full and acceptable evidence of completed corrective action" to the Department within 30 days of the effective date of the order (staff affirmation, exhibit D [2011 order on consent at 3, section II][emphasis supplied]). The statement by respondent Reis that "much of the information" required under the 2011 order on consent has been submitted, is an admission that respondents have failed to fulfill their obligation to submit all (i.e., "full and acceptable") evidence, as required under the order.

As with the first count of the fifth cause of action, Department staff has not advanced an argument in support of holding respondent Reis liable for violations of the 2011 order on consent (see Liability of Respondent Reis, *supra* at 7-8). Accordingly, staff's motion for order on this charge is granted against respondent Fordham and dismissed as against respondent Reis.

[9] As previously discussed, I have rejected this argument (see *supra* at 6-7).

Table: Summary of Rulings[10]

No.	Cause of Action	Respondent Fordham	Respondent Reis
1	Violation of NL § 173: prohibited discharge of petroleum	Motion denied. Material issue of fact: Was release a discharge?	Motion denied. Material issue of fact: Was release a discharge?
2	Violation of 6 NYCRR 613.8, NL § 175 and 17 NYCRR 32.3: failure to report discharge	Motion denied. Material issue of fact: Was release a discharge?	Motion denied. Material issue of fact: Was release a discharge?
3	Violation of NL § 176 and 17 NYCRR 32.5: failure to contain/remediate discharge	Motion denied. Material issue of fact: Was release a discharge?	Motion denied. Material issue of fact: Was release a discharge?
4.1	Violation of 6 NYCRR 612.2: failure of owner to register facility	Motion granted.	Motion denied, count dismissed. Respondent is not an owner nor does staff advance alternative basis for liability.
4.2	6 NYCRR 612.2(a)(2): failure of owner to renew the facility registration	Motion granted.	Motion denied, count dismissed. Respondent is not an owner nor does staff advance alternative basis for liability.
4.3	6 NYCRR 613.3(b)(i): failure of owner or operator to color-code five fill ports	Motion denied. Material issue of fact: Were ports color-coded?	Motion denied. Material issue of fact: Were ports color-coded?
4.4	6 NYCRR 613.3(c)(3)(ii): failure of owner to properly label an aboveground tank (tank 5)	Motion granted.	Motion denied, count dismissed. Respondent is not an owner nor does staff advance alternative basis for liability.
4.5	6 NYCRR 613.3(d): failure of owner or operator to maintain spill prevention equipment – accumulation of liquid in sumps (tanks 1&2)	Motion denied. Material issue of fact: Were sumps in good working order?	Motion denied. Material issue of fact: Were sumps in good working order?

[10] The numbers in the first column correspond to the numbers assigned to each cause of action and count by Department staff in its motion for order without hearing. For example, number 4.1 equates to the fourth cause of action, first count.

No.	Cause of Action	Respondent Fordham	Respondent Reis
4.6	6 NYCRR 613.3(d): failure of owner or operator to maintain spill prevention equipment – non-functional overfill alarm (tanks 1&2)	Motion denied. Material issue of fact: Was alarm in working order?	Motion denied. Material issue of fact: Was alarm in working order?
4.7	6 NYCRR 613.4: failure of operator to keep reconciled inventory records for underground storage tanks (tanks 1&2)	Motion denied. Material issue of fact: Do respondents' computerized inventory records satisfy this requirement?	Motion denied. Material issue of fact: Do respondents' computerized inventory records satisfy this requirement?
4.8	6 NYCRR 613.4(a)(2): failure of operator to conduct leak detection on underground storage tanks (tanks 3&4)	Motion denied. Material issue of fact: Are respondents required to monitor inventory of sealed tanks?	Motion denied. Material issue of fact: Are respondents required to monitor inventory of sealed tanks?
4.9	6 NYCRR 613.5(a): failure of owner to tightness test (tanks 3&4)	Motion granted.	Motion denied, count dismissed. Respondent is not an owner nor does staff advance alternative basis for liability.
4.10	6 NYCRR 614.3(a)(2): failure to attach permanent labels on fill ports (tanks 1&2)	Motion granted.	Motion granted.
4.11	6 NYCRR 614.7(d): failure of owner to maintain an accurate drawing or as-built plans for underground tank system (tanks 1&2)	Motion granted.	Motion denied, count dismissed. Respondent is not an owner nor does staff advance alternative basis for liability.
5.1	2008 order on consent: failure to provide proof of corrective action under 2008 CO	Motion denied. Material issue of fact: Did 2011 CO supersede the 2008 CO?	Motion denied, count dismissed. Respondent did not sign 2008 CO in his individual capacity and was not personally obligated to provide proof of corrective action.
5.2	2011 order on consent: failure to provide proof of corrective action under 2011 CO	Motion granted.	Motion denied, count dismissed. Respondent did not sign 2011 CO in his individual capacity and was not personally obligated to provide proof of corrective action.

CONCLUSION

Department staff has met its burden to prove, as a matter of law, that respondent Fordham is liable for the following causes of action and counts:

1. Fourth cause of action, first count (violation of 6 NYCRR 612.2, failure to accurately register the facility);

2. Fourth cause of action, second count (violation of 6 NYCRR 612.2[a][2], failure to renew the facility registration);

3. Fourth cause of action, fourth count (violation of 6 NYCRR 613.3[c][3][ii], failure to properly label aboveground tank 5);

4. Fourth cause of action, ninth count (violation of 6 NYCRR 613.5[a], failure to conduct tightness tests for tanks 3 and 4);

5. Fourth cause of action, tenth count (violation of 6 NYCRR 614.3[a][2], failure to attach permanent labels on fill ports for tanks 1 and 2);

6. Fourth cause of action, eleventh count (violation of 6 NYCRR 614.7[d], failure to maintain an accurate drawing or as-built plans for underground tank system for tanks 1 and 2); and

7. Fifth cause of action, second count (violation of the 2011 order on consent, failure to provide proof of corrective action required under the order).

Department staff's motion for order is granted with regard to the forgoing charges against respondent Fordham. The motion is denied with regard to all other causes of action and counts against this respondent.

Department staff has met its burden to prove, as a matter of law, that respondent Reis is liable for the following count: fourth cause of action, tenth count (violation of 6 NYCRR 614.3(a)(2), failure to attach permanent labels on fill ports for tanks 1 and 2). Accordingly, staff's motion for order is granted with regard to the fourth cause of action, tenth count against respondent Reis. For the reasons noted in the discussion (see Liability of Respondent Reis, *supra* at 7-8), the following counts against respondent Reis are dismissed:

1. Fourth cause of action, first count (alleged violation of 6 NYCRR 612.2);

2. Fourth cause of action, second count (alleged violation of 6 NYCRR 612.2[a][2]);

3. Fourth cause of action, fourth count (alleged violation of 6 NYCRR 613.3[c][3][ii]);

4. Fourth cause of action, ninth count (alleged violation of 6 NYCRR 613.5[a]);

5. Fourth cause of action, eleventh count (alleged violation of 6 NYCRR 614.7[d]);

6. Fifth cause of action, first count (alleged violation of the 2008 order on consent requirement for proof of corrective action); and

7. Fifth cause of action, second count (alleged violation of the 2011 order on consent requirement for proof of corrective action).

The motion for order is denied with regard to all other causes of action and counts against respondent Reis.

Given the number charges that remain to be adjudicated, I will incorporate the report provided for under 6 NYCRR 622.12(d) into the hearing report to be issued after adjudication. Pursuant to 6 NYCRR 622.12(e), staff's motion papers and respondents' responsive papers are deemed to be the complaint and answer, respectively, for the purposes of this proceeding.

I will contact the parties shortly after they have been served with this ruling to schedule the hearing on this matter. Note that, pursuant to 6 NYCRR 622.18(c), the parties remain free to resolve this matter by stipulation at any time prior to my submission of the hearing report to the Commissioner. I encourage the parties to seek a mutually acceptable resolution to this matter and, to that end, I note that mediation services are available through this office.

/s/

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Richard A. Sherman
Administrative Law Judge

Dated: March 4, 2014
Albany, New York