

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

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

- by -

**BRADLEY K. GRANT and GRANT’S GAS  
AND GROCERY, LLC,**

Respondents.

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**RULING ON MOTION  
FOR ORDER WITHOUT  
HEARING IN LIEU OF  
COMPLAINT**

DEC Case No.  
R6-20150306-18

October 19, 2018

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Randall C. Young, Regional Attorney, Region 6, of counsel), for staff of the Department of Environmental Conservation.
- The Law Office of Douglas H. Zamelis (Douglas H. Zamelis of counsel), for respondents Bradley K. Grant and Grant’s Gas and Grocery, LLC.

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department or DEC) alleges that respondents Bradley K. Grant and Grant’s Gas and Grocery, LLC (respondents), violated the statutes and regulations governing petroleum bulk storage (PBS) facilities when they failed to re-register and permanently close an out-of-service gasoline station located in the Town of Potsdam, St. Lawrence County. Department staff moves for an order without hearing in lieu of complaint, and respondents oppose. For the reasons that follow, Department staff’s motion is granted in part and otherwise denied.

I. PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a March 26, 2018 notice of motion and motion for order without hearing in lieu of complaint (see 6 NYCRR 622.12[a]). The motion was personally served on respondents on June 28, 2018 (see Affidavit of Personal Service of Environmental Conservation Officer [ECO] Joel Schneller, dated June 29, 2018). Attached to the motion was a brief supporting motion for order without hearing, and the affidavits of Ronald Novak, Michael Cox, and Jessica Fauteux, each with exhibits attached.

In the motion, which serves as the complaint in this matter, staff charges that respondents violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration for the PBS facility located at 6759 US Route 11, Potsdam, New York 13617 when it expired on March 16, 2016. Staff also charges that respondents violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close six underground storage tanks at the facility that have been out of service for more than one year, and 6 NYCRR 613-4.5(a)(3) by failing to permanently close an aboveground storage tank at the facility that has also been out of service for more than one year. Staff seeks to hold respondent Grant's Gas and Grocery, LLC liable for the violations as the owner of the facility, and respondent Bradley K. Grant individually liable as the responsible corporate officer of the LLC. Staff seeks an order imposing a civil penalty jointly and severally on respondents in the amount of \$75,000, with \$15,000 immediately payable and \$60,000 suspended, provided that respondents comply with the terms of any Commissioner order issued in this matter. Staff also seeks an order requiring respondents to submit a complete and accurate PBS registration application together with regulatory fees to register the facility, and directing respondents to permanently close the facility pursuant to the requirements of 6 NYCRR part 613 (Part 613).

Department staff granted respondents two extensions of time to respond to the motion. Accordingly, on June 19, 2018, respondents served and filed papers in opposition to staff's motion. Respondents' papers consist of an affidavit of Bradley K. Grant, an affidavit of Anthony Inserra, Esq., with attachments, an affirmation of Douglas H. Zamelis, Esq., with exhibits attached, and a memorandum of law in opposition to motion for order without hearing. Respondents' response to the motion, which constitutes the answer in this proceeding, raises the defense of inability to pay the civil penalty or for the remediation sought in staff's motion.

After the filing of respondents' response with the Department's Office of Hearings and Mediation Services (OHMS), the matter was assigned to the undersigned Chief Administrative Law Judge (ALJ).

## II. FINDINGS OF FACT

The following facts are determinable as a matter of law on this motion for order without hearing, which is the administrative equivalent of a motion for summary judgment under CPLR 3212 (see 6 NYCRR 622.12[d]), and are deemed established for all purposes in this proceeding (see 6 NYCRR 622.12[e]).

1. Respondent Grant's Gas and Grocery, LLC (Grant's Gas), is a New York limited liability company that owns a petroleum bulk storage facility located at 6759 US Route 11, Potsdam, New York 13617 (the facility) (see Novak Aff ¶ 3; see also Deed, Fauteux Aff, Exh 14; Articles of Organization, id., Exh 16). Respondent Bradley K. Grant is a duly authorized member and sole owner of Grant's Gas and Grocery, LLC (see Grant Aff ¶¶ 11-12; see also Limited Liability Company Biennial Statements, Fauteux Aff, Exhs 17-19; Bankruptcy Schedule B, Inserra

Supplemental Aff, Attachment). Grant's Gas and Mr. Grant (respondents) formerly operated the facility as a retail gasoline station and convenience store (see Novak Aff ¶ 4).

2. The facility was a registered petroleum bulk storage facility containing six 4,000-gallon underground tanks (USTs) (see Novak Aff ¶ 7; see also PBS Facility Information Report, Novak Aff, Exh 1 [Tanks 7, 8, 9, 10, 11, and 12]). Four of the USTs were registered for the storage of gasoline, one for the storage of kerosene, and one for diesel fuel (see id.). The facility also contains a 275-gallon stationary aboveground storage tank (AST) associated with the heating system for the building (see id. [Tank 13]).

3. On April 19, 2011, respondents renewed the facility's PBS registration by filing an application with the Department (see PBS Application, Novak Aff, Exh 2). On the application, Mr. Grant listed his own name in the boxes designated "Owner Name," "Name of Daily On-Site Operator," and "Emergency Contact Name" (see id.). In the box titled "Federal Tax ID Number," Mr. Grant listed the employer identification number for Grant's Gas and Grocery, LLC, rather than his personal social security number (see id.; Grant Aff ¶ 8). Mr. Grant also signed the check to pay the registration fee on behalf of Grant's Gas and Grocery, LLC (see Novak Aff, Exh 3).

4. On April 19, 2011, the Department issued PBS Registration Certificate No. 6-264075 to Grant's Gas and Grocery, LLC (see PBS Registration Certificate, Novak Aff, Exh 1). The registration's expiration date was March 16, 2016 (see id.).

5. On August 11, 2010, Department staff member Michael Cox, a sanitary construction inspector for the Department's Division of Environmental Remediation (DER) in the Region 6 Potsdam sub-office, inspected the facility (see Cox Aff ¶ 5). During the inspection, Mr. Grant was present and indicated to Mr. Cox that he was the facility owner (see id.). Mr. Grant acted as the facility representative during the inspection, accompanying Mr. Cox and providing access to the facility and its records (see id.). During his inspection, Mr. Cox identified several alleged violations of the PBS regulations (see PBS Inspection Form, Cox Aff, Exh 11).

6. On October 4, 2010, staff sent respondents a notice of violation advising respondents of several violations of the PBS regulations noted during the August 2010 inspection, including the failure to maintain certain monitoring records (see Cox Aff ¶ 6; see also Notice of Violation, Cox Aff, Exhibit 13). In response to the notice of violation, Mr. Grant provided staff with weekly monitoring records and monthly inspection reports, signed by him as inspector, covering the period beginning October 4, 2010 through October 31, 2010 (see Novak Aff ¶ 9; see also Inspection Reports, Novak Aff, Exh 5).

7. During the spring of 2013, a leak occurred in Tank 12, one of the 4,000-gallon USTs containing gasoline/ethanol. Staff assigned the incident spill number 1302797 and issued a spill report. (See Novak Aff ¶ 10; see also NYSDEC Spill Report Form, Novak Aff, Exh 6.) Mr. Novak spoke with Mr. Grant about the spill on more than one occasion, and Mr. Grant

eventually informed Mr. Novak that he had hired Bach Environmental Inc. to address the problem (see Novak Aff ¶ 10).

8. In response to the report of problems with Tank 12, staff received copies of the leak detection monitoring reports and inventory monitoring records, which Mr. Grant signed to indicate that he performed the inspections and reconciliations himself (see Novak Aff ¶¶ 11 and 12; see also Leak Detection Reports, Reconciliation Worksheets, Novak Aff, Exhs 7 and 8).

9. On June 14, 2013, staff observed employees of Bach Environmental Inc. working on Tank 12 (see Novak Aff ¶ 13). Specifically, staff observed the employees excavate soil from around the tank, cut and cap its connections to the other tanks, and transfer the product to a different tank (see id.). As a result, Tank 12 has not received or dispensed product since June 14, 2013 (see id.).

10. On June 27, 2014, respondents Mr. Grant and Grant's Gas separately filed for bankruptcy under chapter 7 of the United States Bankruptcy Code (see Novak Aff ¶ 17; id., Exh 10). Mr. Grant received a bankruptcy discharge on October 3, 2014 (see Inserra Supplemental Aff ¶ 3; Discharge of Debtor, Novak Aff, Exh 10). Although respondent Grant's Gas did not receive a discharge, after the case was administered by the bankruptcy trustee, the case was deemed closed on April 5, 2016 (see Inserra Supplemental Aff ¶ 4).

11. On February 16, 2015, Department staff member Ronald Novak, an environmental engineer and the regional bulk storage supervisor for DEC Region 6, inspected the facility and observed that the store was closed and vacant, and the facility appeared to be out of business (see Novak Aff ¶ 16).

12. On February 18, 2015, staff sent respondents a second notice of violation advising respondents of several more violations of the PBS regulations, including the failure to properly and permanently close out of service USTs numbers 7, 8, 9, 10, 11, and 12 (see id.; see also 2015 Notice of Violation, Novak Aff, Exh 9). In response to staff's February 16, 2015 notice of violation, staff received a facsimile from respondents' bankruptcy attorney, Anthony Inserra, notifying staff that respondents had filed for Chapter 7 bankruptcy (see id. ¶ 17; id., Exh 10).

13. On March 16, 2016, the facility's PBS registration certificate expired (see PBS Registration Certificate, Novak Aff, Exh 1). The Department did not receive a re-registration application from respondent to renew the facility's registration on or before March 16, 2016 (see Novak Aff ¶ 5).

14. As of March 2018, the facility has been out of business for more than two years (see Cox Aff ¶ 8). No petroleum has been delivered to or dispensed from the tanks at the facility in more than 12 months, but the tanks at the facility have not been permanently closed (see id. ¶¶ 7-9; Novak Aff ¶¶ 15-16).

15. On March 26, 2018, staff served a notice of motion for order without hearing in lieu of a complaint on respondents seeking an order holding them in violation of ECL 17-1009(2), 6 NYCRR 613-1.9(c), 6 NYCRR 613-2.6(a)(3), and 6 NYCRR 613-4.5(a)(3), and imposing a civil penalty jointly and severally in the amount of seventy-five thousand dollars (\$75,000), with fifteen thousand dollars of that amount payable and the remaining sixty thousand dollars (\$60,000) suspended (see id. at 6-7). Staff also seeks an order requiring respondents to take certain remedial action to permanently close all the PBS tanks at the facility (see id.).

16. On May 11, 2018, attorney Douglas H. Zamelis wrote to staff confirming that the Department granted respondents an extension to June 21, 2018 to respond to the motion (see Letter from Douglas H. Zamelis, Esq., to Randall C. Young, Esq., Regional Attorney, Region 6, dated May 11, 2018).

17. On June 19, 2018, respondents served their response to the motion for order without hearing upon staff (see Affirmation of Service, Respondent's Opposition to Motion for Order Without Hearing, Attachment 5).

### III. DISCUSSION

#### A. Standards of Review

A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the causes of action or defenses are established sufficiently to warrant granting summary judgment under the CPLR in favor of any party (see 6 NYCRR 622.12[d]). The motion will be denied with respect to particular causes of action if any party shows the existence of substantive disputes of fact sufficient to require a hearing (see 6 NYCRR 622.12[e]).

If a motion for order without hearing is denied, the ALJ may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel, or directing a conference (see 6 NYCRR 622.12[e]). The ALJ will issue a ruling denying the motion and specifying what facts, if any, will be deemed established for all purposes in the hearing (see id.). Upon the issuance of such a ruling, the moving and responding papers will be deemed the complaint and answer, respectively, and the hearing will proceed (see id.).

The existence of a triable issue of fact regarding the amount of civil penalties that should be imposed will not bar the granting of a motion for an order without hearing (see 6 NYCRR 622.12[f]). If the civil penalty to be imposed is the only triable issue of fact presented, the ALJ must convene a hearing to assess the amount of penalties to be recommended to the Commissioner (see id.).

On a motion for summary judgment pursuant to the CPLR, the movant must establish its cause of action or defense sufficiently to warrant directing judgment in its favor as a matter of law. The party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to meet the parties' burdens. (See Matter of Wilder, Ruling/Hearing Report on Motion for Order Without Hearing at 10, adopted by Order of the Commissioner, Nov. 4, 2004 [citing Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 (1988), and quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980)].)

Thus, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (see id. [citing Cheeseman v Inserra Supermarkets, Inc., 174 AD2d 956, 957-958 [3d Dept 1991]). To carry its burden of making a prima facie showing of its entitlement to summary judgment, Department staff must proffer "sufficient" evidence to support the factual assertions in its complaint (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 3 [and cases cited therein]). "Sufficient" evidence is such relevant proof as a reasonable person may accept as adequate to support a conclusion or ultimate fact (see id.). Once Department staff has made a prima facie showing, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (Cheeseman, 174 AD2d at 957-958). The failure of the opposing party to deny a fact alleged in the moving papers constitutes an admission of the fact (see Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 4).

B. Respondent Grant's Gas and Grocery, LLC's Liability

In its motion papers, which serves at the complaint in this matter, Department staff charges that respondent Grant's Gas, as owner of the subject PBS facility, violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of the facility when it expired on March 16, 2016. ECL 17-1009 provides that:

"All owners shall register the facility with the department. . . . Registration shall be renewed every five years or whenever ownership of a facility is transferred, whichever occurs first"

(ECL 17-1009[2]). ECL 17-1003(1) defines facility as "a single property or adjacent properties used for a common purpose which are owned or operated by the same person on or in which are located . . . one or more stationary tanks which are used singularly or in combination for the storage or containment of more than one thousand one hundred gallons of petroleum." ECL 17-1003(4) defines owner as "any person who has legal or equitable title to a facility."

Similarly, 6 NYCRR 613-1.9(c) states:

“(c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of the Part, or that ownership of the facility had been transferred in accordance with subdivision (d) of this section.”

Here, Department staff has made a prima facie showing, and respondents do not dispute, that respondent Grant’s Gas is the owner of a PBS facility, as defined by the statute, that as of the date of staff’s motion, Grant’s Gas has not renewed the registration for the facility when it expired on March 16, 2016, and that Grant’s Gas has not permanently closed the tanks at the facility. Accordingly, staff has established its entitlement to summary judgment on the issue of respondent Grant’s Gas’s liability for the violation of ECL 17-1009 and 6 NYCRR 613-1.9(c), and respondents fail to raise a triable issue of fact requiring hearing.

Department staff further charges respondent Grant’s Gas with violating 6 NYCRR 613-2.6(a)(3) by failing to permanently close the underground storage tank (UST) system at the facility that have been out-of-service for more than one year. Section 613-2.6(a)(3) provides: “[w]hen a UST system is out-of-service for more than 12 months, the facility must permanently close the UST system in accordance with subdivision (b) through (e) of this section.” Section 613-1.3(ap) provides that: “[o]ut-of-service with respect to a tank system means no longer receiving or dispensing petroleum.”

Here, Department staff has made a prima facie showing that for over a year, respondent Grant’s Gas is no longer receiving or dispensing petroleum from the six USTs at the facility, and that the UST system has not been permanently closed consistent with regulatory requirements. Respondents do not raise any triable issues of fact in opposition. Accordingly, Department staff has established its entitlement to summary judgment of the issue of respondent Grant’s Gas’s liability for the violation of 6 NYCRR 613-2.6(a)(3).

Finally, Department staff charges respondent Grant’s Gas with violating 6 NYCRR 613-4.5(a)(3) by failing to close the aboveground petroleum storage tank (AST) at the facility that has been out-of-service for more than one year. Section 613-4.5(a)(3) provides: “[w]hen an AST system is out-of-service for more than 12 months, the facility must permanently close the AST system in accordance with subdivision (b) of this section, unless that AST system is located at a facility where one or more other tank systems are not out-of-service.”

Here, Department staff has made a prima facie showing that the AST at the facility has not received petroleum for more than one year, that no other tanks at the facility are in-service, and that the AST has not been permanently closed consistent with regulatory requirements. Respondents do not raise any triable issues of fact in opposition. Accordingly, staff is entitled to summary judgment on the issue of respondent Grant’s Gas’s liability for violating section 613-4.5(a)(3).

C. Respondent Bradley K. Grant's Liability

In its papers, Department staff charges that respondent Bradley Grant is individually liable for all violations alleged as a corporate officer directly and actively involved in the activities of the facility with the authority to make all business and operating decisions related to the facility. Accordingly, staff seeks to hold respondent Mr. Grant, as the responsible corporate officer, individually liability for the violations at the facility.

In opposition, respondents argue that respondent Bradley Grant, while the owner of the LLC, is not the owner of the facility. Moreover, respondents contend that no basis exists for piercing the corporate form to hold Mr. Grant individually liable for the LLC's violations. Respondents' arguments are not persuasive.

It is not necessary to apply "the piercing of the corporate veil" doctrine to hold a responsible corporate officer individually liable for the environmental violations of an LLC. Rather, a corporate officer may be held liable for the environmental violations of an LLC under the separate and distinct "responsible corporate officer" doctrine (see Matter of Supreme Energy Corp., Decision and Order of the Commissioner, April 11, 2014, at 25-27, confirmed on other grounds sub nom Matter of Supreme Energy, LLC v Martens, 145 AD3d 1147 [3d Dept 2016]). A corporate officer can be held personally liable for violations of the corporate entity that threaten the public health, safety, or welfare (see id. at 25-26 [citing Matter of Galfunt, Order of the Commissioner, May 5, 1993, at 2; United States v Park, 421 US 658 (1975); United States v Dotterweich, 320 US 277 (1943); United States v Hodges X-Ray, Inc., 759 F2d 557 (6th Cir 1985)]). A corporate officer need only have responsibility over the activities of the business that caused the violations (see id.). It is not necessary to determine if the corporate officer made any specific decisions concerning the conduct alleged in the violations, only that the officer had direct responsibility for operations and was in a position to prevent the violations (see id.). The responsible corporate officer doctrine has also been applied to limited liability companies and their members (see Matter of 125 Broadway, LLC, Decision and Order of the Commissioner, Dec. 15, 2006, at 5, and Default Summary Report at 7-11).

Here, Department staff established that respondent Bradley Grant is a member and sole owner of respondent Grant's Gas and Grocery, LLC. Staff also established that Mr. Grant submitted the last PBS facility registration renewal for the facility, and signed the application as the on-site operator, emergency contact, and "owner." Mr. Grant also signed the check to pay the registration fee on behalf of respondent Grant's Gas. He also accompanied staff on inspections, and filled out monthly inspection reports and leak detection monitoring reports required for the facility. Further, Mr. Grant was responsible for hiring an environmental services company to address a petroleum release at the facility. Thus, although respondent Bradley Grant is not the owner of the subject facility, Department staff made a prima facie showing that Mr. Grant is the member and sole owner of the LLC, which does own the facility, that had direct responsibility for facility operations and was in a position to prevent the violations. Respondents failed to raise any triable issues of fact in response. Accordingly, Department staff is entitled to summary judgment on the issue of respondent Bradley K. Grant's individual liability as a

responsible corporate officer for the violations of the environmental laws of the State of New York by respondent Grant's Gas and Grocery, LLC.

D. Penalty and Remedial Relief

In its motion, Department staff seeks an order imposing a civil penalty jointly and severally on respondents in the amount of \$75,000, with \$15,000 of that amount payable within 20 days of service of the order, and the remaining \$60,000 suspended, conditioned upon respondents' compliance with the terms of any order the Commissioner may issue. In addition, staff seeks an order requiring respondents to submit a complete and accurate petroleum bulk storage facility registration application to register the facility with payment of the regulatory fee of \$500 within 10 days of the service of any order, and to take certain steps to permanently close the storage tanks at the facility in compliance with the requirements of Part 613.

In response, respondents allege that they lack the ability to pay any penalty or for the remedial relief sought by Department staff. In support of their allegations, respondent Bradley Grant notes his discharge in bankruptcy, and attests to the financial and medical difficulties he and his family have faced since the bankruptcy (see Grant Aff ¶¶ 16-18, 22-29). Respondents' also submit documents from the Chapter 7 bankruptcy proceeding.

On this motion, Department staff does not offer any justification or support for the civil penalty or remedial relief sought. Moreover, although respondents do not proffer sufficient proof to warrant granting summary judgment to respondents on their ability to pay defense, they nevertheless raise triable issues of fact that are relevant to the amount of civil penalty and remedial obligations to be assessed (see Civil Penalty Policy, Commissioner's Policy DEE-1, ¶ IV.E.4 [1990]). Accordingly, Department staff's motion for order without hearing is denied on the issue of civil penalty and remedial relief.

IV. CONCLUSIONS AND RULING

Department staff's motion for order without hearing is granted in part on the issue of the joint and several liability of respondent Bradley K. Grant, individually, and respondent Grant's Gas and Grocery, LLC for the following violations:

1. Respondents violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of the facility when it expired on March 16, 2016;
2. Respondents violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close the underground storage tank (UST) system at the facility that have been out-of-service for more than one year; and

3. Respondents violated 6 NYCRR 613-4.5(a)(3) by failing to close the aboveground petroleum storage tank (AST) at the facility that has been out-of-service for more than one year.

The motion for order without hearing is denied on the issues of penalty and remedial relief.

The matter will be set down for a hearing on the issues of penalty and remedial relief to be recommended to the Commissioner for imposition in this case. In the meantime, Department staff is requested to forward to respondents the forms used by the Department to evaluate inability to pay claims.

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

Dated: Albany, New York  
October 19, 2018