

**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 (6 NYCRR), Part 613,

ORDER

by

DEC Case No.
R6-20140806-46

ILION PROPERTIES, INC.,

Respondent.

This administrative enforcement proceeding concerns allegations that respondent Ilion Properties, Inc. (respondent) violated ECL 17-1009(2) and 6 NYCRR 613.9(b)(1)¹ at respondent's petroleum bulk storage (PBS) facility at 7 Spruce Street, Ilion, Herkimer County, New York where a 30,000 gallon aboveground PBS tank is located. Specifically, Department staff alleges that respondent violated ECL 17-1009(2) by failing to renew the PBS registration for the facility, and 6 NYCRR 613.9(b)(1) by failing to permanently close the 30,000 gallon PBS tank.

Staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent by personally serving on the Secretary of State pursuant to Business Corporation Law § 306, the following documents:

¹Part 613 of 6 NYCRR was repealed and replaced by a new Part 613, effective on October 11, 2015, subsequent to the service of Department staff's motion for order without hearing. For the purposes of the violation alleged in this matter, the former regulation, 6 NYCRR 613.9(b)(1) applies. With respect to the ordered corrective action, the current regulation addressing this type of aboveground tank applies (see 6 NYCRR 613-4.5).

- (i) Notice of Motion, dated May 12, 2015;
- (ii) Motion for Order without Hearing in lieu of complaint, dated May 12, 2015;
- (iii) Affidavit of Ronald F. Novak, P.E. (Novak Affidavit), sworn to on May 12, 2015, attaching exhibits A-I; and
- (iv) Department staff's brief, dated May 12, 2015 (Staff's Brief).

By letter dated May 26, 2015, Assistant Regional Attorney Nels G. Magnuson emailed a copy of the papers to respondent's attorney, Charles S. Warren, Esq.

Based upon these alleged violations, Department staff requests that I issue an order:

- (i) holding respondent in violation of ECL 17-1009(2) and 6 NYCRR 613.9(b)(1);
- (ii) assessing a civil penalty of not less than sixty thousand dollars (\$60,000) but not more than the maximum amount allowed by law, and suspending payment of fifty thousand dollars (\$50,000), provided that respondent complies with the order;
- (iii) directing respondent to register the PBS facility with the Department and pay the registration fees due for two registration periods, totaling one thousand dollars (\$1,000), within thirty (30) days; and
- (iv) directing respondent to permanently close the PBS facility.²

²Department staff also requests that the order reserve all rights of the Department and the State regarding civil or criminal actions for matters not specifically alleged. This proceeding is limited to those matters specifically alleged in the pleadings and language to reserve the Department or the State's rights for matters that have not been alleged in this complaint is not necessary. To the extent that causes of action arise relating to matters not specifically alleged here, Department staff may pursue those as circumstances warrant (see e.g. Matter of Galloway, Order of the Commissioner, January 16, 2015, at 5).

Although the Office of Hearings and Mediation Services granted respondent's request for an extension until July 7, 2015 to respond to staff's motion for order without hearing, respondent did not file or serve a response to staff's motion papers. Accordingly, by letter dated August 20, 2015, Department staff requested that the matter be decided as an unopposed motion for order without hearing (see 6 NYCRR 622.12).

The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso, who prepared the attached summary report (Summary Report). ALJ Caruso requested additional information from the parties regarding ownership of the real property and status of the corporation. Department staff and respondent provided information confirming that respondent owns the real property located at 7 Spruce Street, Ilion, New York, and is an active domestic business corporation.

ALJ Caruso concluded that respondent violated ECL 17-1009(2) and 6 NYCRR 613.9(b)(1), and recommends that I issue an order that would, in part:

- (i) assess against respondent a civil penalty of sixty thousand dollars (\$60,000), with fifty thousand dollars (\$50,000) suspended provided that respondent complies with the order;
- (ii) direct respondent to submit the payable portion of the penalty in the amount of ten thousand dollars (\$10,000) within thirty (30) days of service of the order on respondent;
- (iii) direct respondent to register the PBS facility within thirty (30) days of service of the order on respondent, and pay applicable past due registration fees; and
- (iv) direct respondent to permanently close the 30,000 gallon tank within sixty (60) days of service of the order on respondent.

I adopt the ALJ's Summary Report, subject to my comments below.

DISCUSSION

I. Liability

A motion for order without hearing in lieu of complaint is governed by the same standards as are applicable to motions for summary judgment under the CPLR (see 6 NYCRR 622.12[d]). When a motion for order without hearing is uncontested, as here, staff's motion may be granted and respondent's liability determined as a matter of law when staff supports each element of the claims alleged in the motion with evidence in admissible form. (Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2.)

In this proceeding, respondent did not address the violations alleged by staff, except to state that respondent would not be able to comply with a Commissioner's order related to the PBS tank due to respondent's financial situation. Respondent did provide a financial statement demonstrating that the real property was valued at \$610,000 in 2004 (see Summary Report at 5 [Finding of Fact 4]).

Based upon my review of the record, I concur with the ALJ that staff's motion papers establish that respondent (a) failed to register and (b) failed to properly close its PBS facility located at 7 Spruce Street, Ilion, New York and, accordingly, is in violation of ECL 17-1009(2) and 6 NYCRR 613.9(b)(1).

II. Civil Penalty

ECL 71-1929 provides for the imposition of a civil penalty of up to thirty-seven thousand five hundred (\$37,500) per day for each violation of titles 1 through 11 inclusive and title 19 of article 17, or the rules or regulations, orders or determinations promulgated pursuant thereto. Because I have held that staff has proven the two violations, the maximum civil penalty for a single day of these two violations would be seventy-five thousand dollars (\$75,000).

Staff also alleges in its motion papers that respondent has not taken steps to register the PBS facility or to permanently close the aboveground tank (see Novak Affidavit ¶ 11; see also id. ¶ 8 [Department staff inspection on June 17, 2014]).

In calculating the maximum penalty, using the date of Department staff's notice of violation (July 8, 2014) as the "starting point" and using the date of staff's service of papers

upon respondent (May 18, 2015) as the ending date, the maximum civil penalty would exceed twenty-three million dollars.

Staff's papers discuss the issues to be considered in setting a civil penalty, including (i) application of the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22) and Civil Penalty Policy (DEE-1); and (ii) staff's attempts to resolve the matter with respondent. Staff seeks a civil penalty of not less than sixty thousand dollars (\$60,000), with fifty thousand dollars (\$50,000) suspended, provided that respondent complies with this order.

The statutory penalty in ECL 71-1929 that applies to the regulatory provisions that respondent violated and the multi-year time period involved fully support a civil penalty of sixty thousand dollars (\$60,000). The ALJ's recommended penalty of sixty thousand dollars (\$60,000), with fifty thousand dollars (\$50,000) suspended, provided that respondent complies with this order, is authorized on the record of this proceeding. Suspending a substantial portion of the penalty to provide respondent an incentive for complying with this order in a timely manner is appropriate.³

III. Remedial Relief

Staff has requested that I order respondent to register the PBS facility within thirty (30) days and permanently close the tank within sixty (60) days. Both of these requests are reasonable and appropriate. The tank has been out of service and unregistered for a number of years. Furthermore, the tank contains approximately ten thousand (10,000) gallons of fuel oil, which should be removed and handled properly as expeditiously as possible. Respondent shall provide Department staff with proof of the permanent closure of the tank and the proper handling of the fuel oil that the tank currently contains.

³ In reviewing staff's brief, I concur with the ALJ that, although the amount requested is authorized, the methodology that staff used to calculate that amount needs to be revised. As the ALJ discusses, staff should have first established the total amount of the civil penalty, and then determined what portion of that total amount, if any, should be suspended (see Summary Report at 9). I also reject staff's use of the "not less than" phrasing in its civil penalty request. Staff's papers do not provide any analysis to assist me in deciding whether to increase the assessed civil penalty above \$60,000, or to determine what an appropriate increase would be. Merely using the phrase "not less than \$60,000" is insufficient to guide me in assessing a specific civil penalty appropriate to the facts of this case, particularly where, as here, the motion for order without hearing is unopposed.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted.
- II. Respondent Ilion Properties, Inc. is adjudged to have violated ECL 17-1009(2) by failing to renew the registration of its petroleum bulk storage facility located at 7 Spruce Street, Ilion, New York on or before July 21, 2009.
- III. Respondent Ilion Properties, Inc. is adjudged to have violated 6 NYCRR (former) 613.9(b)(1) by failing to permanently close the 30,000 gallon aboveground tank that is out of service.
- IV. Respondent Ilion Properties, Inc. is assessed a civil penalty of sixty thousand dollars (\$60,000) for the violations set forth in paragraphs "II" and "III" of this Order, with payment of fifty thousand dollars (\$50,000) of the penalty suspended, conditioned upon respondent's compliance with the provisions of this Order. Within thirty (30) days of service of this Order upon respondent Ilion Properties, Inc., respondent shall pay the non-suspended portion of the civil penalty (that is, ten thousand dollars [\$10,000]) by certified check, cashier's check or money order made payable to the "New York State Department of Environmental Conservation."
- V. The penalty payment shall be sent to the following address:

Office of General Counsel
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601
Attention: Nels G. Magnuson, Esq.

- VI. Within thirty (30) days of service of this Order upon respondent Ilion Properties, Inc., respondent shall submit a complete petroleum bulk storage registration application for the facility, together with the applicable registration fees of one thousand dollars (\$1,000) for two registration periods (these registration fees are in addition to the civil penalties set forth in

paragraph "IV" and of this Order, and must be submitted by separate check, also made payable to the "New York State Department of Environmental Conservation").

VII. Within sixty (60) days of service of this Order upon respondent Ilion Properties, Inc., respondent shall permanently close the 30,000 gallon aboveground petroleum bulk storage tank at its facility in accordance with 6 NYCRR 613-4.5 and submit proof to the Department of permanent closure of the tank and the appropriate handling of the fuel that the tank currently contains.

VIII. The facility petroleum bulk storage registration application, applicable registration fees, and proof of permanent closure shall be sent to the following address:

Mr. Ronald F. Novak, P.E.
Regional PBS Supervisor
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601.

IX. Should respondent fail to pay the non-suspended portion of the civil penalty, fail to submit the registration application and the applicable fees, or fail to complete the corrective action set forth in paragraphs "VI" and "VII" of this Order to Department staff's satisfaction, or otherwise fails to comply with any other term or condition of this Order, the suspended portion of the penalty (that is, fifty thousand dollars [\$50,000] shall become immediately due and payable upon Department staff's demand, and shall be submitted in the same form and to the same address as the non-suspended portion of the penalty.

X. All communications from respondent to Department staff concerning this Order shall be directed to Ronald F. Novak, P.E., at the address set forth in paragraph "VIII" of this Order.

XI. The provisions, terms, and conditions of this Order shall bind respondent Ilion Properties, Inc. and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Basil Seggos
Commissioner

Dated: Albany, New York
June 27, 2016

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
(6 NYCRR), Part 613,

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

DEC Case No.
R6-20140806-46

by

ILION PROPERTIES, INC.,

Respondent.

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General
Counsel (Nels G. Magnuson, Assistant Regional Attorney, of
counsel), for staff of the Department of Environmental
Conservation

-- Kramer Levin Naftalis & Frankel LLP, (Charles S.
Warren, of counsel), for respondent Ilion Properties, Inc.

Proceedings

By notice of motion for order without hearing in lieu of
complaint dated May 12, 2015, staff of the New York State
Department of Environmental Conservation (DEC or Department)
commenced this enforcement proceeding against respondent Ilion
Properties, Inc. (respondent) for alleged violations of ECL
article 17 and 6 NYCRR part 613. On May 18, 2015, Department
staff served its notice of motion and supporting statements and
exhibits on the respondent by personally serving the Secretary
of State pursuant to Business Corporation Law § 306. By letter
dated May 26, 2015, Assistant Regional Attorney Nels G. Magnuson
emailed a copy of the papers to respondent's attorney, Charles
S. Warren, Esq.

By letter dated May 27, 2015 to attorney Magnuson and Chief Administrative Law Judge (CALJ) James McClymonds, respondent's attorney requested that the deadline for respondent to file a response to staff's motion be extended to July 7, 2015. Department staff advised CALJ McClymonds that staff had no objection to the request. Upon the consent of the parties, the CALJ granted the extension on May 28, 2015.

On August 20, 2015, Department staff advised the CALJ that staff had not received a response to its motion and requested that the motion be granted. Respondent's attorney was copied on the letter. By letter dated August 26, 2015, CALJ McClymonds advised the parties that the matter had been assigned to me.

By letter dated September 17, 2015, I requested further information from the parties regarding respondent's ownership of the site and corporate status. Under cover letter and affidavit dated September 21, 2015, Department staff, responded to my request. By letter dated October 1, 2015, Charles S. Warren, Esq. (Warren Letter), attorney for respondent, responded to my request. Respondent Ilion Properties, Inc. has not otherwise responded to the staff's motion or addressed the violations alleged, and the time to do so has passed.

The record closed on October 5, 2015.

Staff's Charges

Department staff's motion for order without hearing consists of the notice of motion; motion for order without hearing; affidavit of Ronald F. Novak, P.E., DEC Environmental Engineer 2 (Novak Affidavit); and Department staff's brief, all dated May 12, 2015. The Novak Affidavit has the following exhibits attached:

- Exhibit A - Deed conveying 7 Spruce Street, Ilion, New York to Ilion Properties, Inc., dated July 31, 1986;
- Exhibit B - Petroleum Bulk Storage (PBS) Application from Duofold, Inc. for the facility located at 7 Spruce Street, Ilion, New York, dated December 31, 1986;
- Exhibit C - PBS Registration Certificate issued to Duofold, Inc. for 30,000 gallon tank located at 7 Spruce Street, Ilion, New York, issued June 5, 1987, with expiration date of June 5, 1992;

- Exhibit D - PBS Application from J.E. Morgan Knitting Mills, Inc. for the facility located at 7 Spruce Street, Ilion, New York, dated June 16, 1997;
- Exhibit E - PBS Registration Certificate issued to J.E. Morgan Knitting Mills, Inc. for 30,000 gallon tank located at 7 Spruce Street, Ilion, New York, issued July 18, 1997, with expiration date of June 5, 2002;
- Exhibit F - PBS Program Facility Information Report for facility located at 7 Spruce Street, Ilion, New York, generated April 29, 2015;
- Exhibit G - Notice of Violation dated July 8, 2014, with Inspection Form, dated June 17, 2014 attached;
- Exhibit H - Response to Notice of Violation from Respondent's attorney, Charles S. Warren, dated August 5, 2014; and
- Exhibit I - Correspondence from respondent's consultant, Barton & Loguidice, D.P.C., dated September 5, 2014, with three estimates to close the 30,000 gallon aboveground PBS tank.

In response to my request for additional information, Department staff filed and served the affidavit of Nels G. Magnuson (Magnuson Affidavit), sworn to September 21, 2015, with the following exhibits attached:

- Exhibit J - Herkimer County Property Description Report For: 7 Spruce St, Municipality of Village of Ilion, German Flatts, dated September 21, 2015.
- Exhibit K - NYS Department of State Entity Information, dated September 21, 2015.

Department staff also filed an affidavit of service on the Secretary of State, sworn to on May 18, 2015.

Department staff alleges that respondent violated ECL 17-1009(2) by failing to renew the PBS registration for the facility and 6 NYCRR 613.9(b)(1)¹ by failing to permanently close the 30,000 gallon aboveground PBS tank. Based upon these alleged violations, Department staff seeks an order:

- (1) finding respondent in violation of ECL 17-1009(2) and 6 NYCRR 613.9(b)(1);

¹ Effective October 11, 2015, 6 NYCRR parts 612, 613 and 614 were repealed and replaced by new part 613. Section 613-4.5 now covers out-of-service aboveground PBS tanks and closure. The violation of 6 NYCRR 613.9(b)(1) would now be a violation of 6 NYCRR 613-4.5(a)(3) and (b).

- (2) assessing a penalty of not less than \$60,000 and suspending payment of \$50,000, provided respondent complies with the order;
- (3) ordering respondent to register the PBS facility and pay the registration fees due from 2008 to date; and
- (4) ordering respondent to permanently close the 30,000 gallon aboveground PBS tank.

Respondent's Position

In response to my request for additional information, respondent's attorney confirmed that respondent owns the real property located at 7 Spruce Street, Ilion, New York, and is still an active domestic business corporation. Mr. Warren also stated that due to respondent's "precarious financial position, the company is not in a position to comply with the Department's order relating to the aboveground storage tank." (Warren Letter at 2.)

Mr. Warren also stated that the real property is the sole asset of the company. The following were attached to the Warren Letter:

- Result of deed search for the real property located at 7 Spruce Street, Ilion, New York.
- Financial Statement/Corporation of Ilion Properties, Inc. dated October 13, 2014.
- Respondent's tax returns for 2011, 2012, and 2013 comprised of IRS Forms 1120, 4626 and 8916-A for each tax year.

Respondent did not otherwise address staff's motion or the violations alleged by Department staff.

FINDINGS OF FACT

1. Respondent Ilion Properties, Inc. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 7 Spruce Street, Ilion, New York 13357 (facility). In particular, PBS tank number 1 at the facility has a capacity of 30,000 gallons and is located aboveground. (Novak Affidavit at ¶¶ 4, 5 and 8, Exhibits A and B; Magnuson Affidavit ¶¶ 5 and 6, Exhibit J; Warren Letter, Result of deed search.)
2. Respondent is an active domestic business corporation in

the State of New York. (Magnuson Affidavit at ¶ 7, Exhibit K; Warren Letter.)

3. On July 31, 1986, Duofold, Inc., by deed, transferred all right, title and interest in the facility to respondent Ilion Properties, Inc., the facility's current owner. This deed is recorded in the Office of the Herkimer County Clerk at Book 712 Page 293. (Novak Affidavit at ¶ 5, Exhibit A; Magnuson Affidavit at ¶ 6, Exhibit J; Warren Letter, Result of deed search.)
4. In 2004, the real property was valued at \$610,000. (Warren Letter, Financial Statement/Corporation at 8 [¶ 22].)
5. On January 5, 1987, the Department received an application from Duofold, Inc., the facility operator, to register the facility. (Novak Affidavit at ¶ 6, Exhibit B.)
6. On June 5, 1987, the Department issued PBS Registration Certificate No. 300357 to Duofold, Inc. the operator of the facility at that time. This registration expired on June 5, 1992. (Novak Affidavit at ¶ 6, Exhibit C.)
7. On July 10, 1997, the Department received a renewal application from J.E. Morgan Knitting Mills Inc., the facility owner, to register the facility.² (Novak Affidavit at ¶ 7, Exhibit D.)
8. On July 18, 1997, the Department issued PBS Registration Certificate No. 6-300357 to J.E. Morgan Knitting Mills Inc. This registration expired on June 5, 2002. (Novak Affidavit at ¶ 7, Exhibit E.)
9. The Department has not received an application for renewal of the PBS registration since the July 10, 1997 application for the renewal registration that expired on June 5, 2002. (Novak Affidavit at ¶ 7, Exhibits D, E and F.)
10. Ronald F. Novak is an environmental engineer employed in the Department's Division of Environmental Remediation as

² Prior to July 21, 2008, the owner of real property on which a PBS facility was located was not required to register the facility. The owner of the facility or business, such as J.E. Morgan Knitting Mills Inc., registered the facility. (See Matter of James B. Vock, Inc., Order of the Commissioner, October 25, 2012 at 4.)

the Regional Bulk Storage Supervisor in DEC Region 6.
(Novak Affidavit at ¶ 2.)

11. Since at least December 31, 1986, the facility consisted of one aboveground 30,000 gallon PBS tank. (Novak Affidavit at ¶ 8.)
12. Mr. Novak inspected the PBS facility located at 7 Spruce Street, Ilion, New York on June 17, 2014 and observed the 30,000 gallon aboveground PBS tank. The tank was not in use. (Novak Affidavit at ¶ 8.)
13. As a result of the inspection, Mr. Novak issued a notice of violation to respondent dated July 8, 2014. The notice advised respondent that the PBS facility was in violation of several sections of the PBS regulations, including for purposes of staff's motion, the registration information is not current and valid; and the out of service PBS tank had not been properly and permanently closed. (Novak Affidavit at ¶ 8, Exhibit G.)
14. By letter dated August 5, 2014, respondent's attorney advised Mr. Novak "that the tank must be closed in accordance with the regulations. Ilion Properties Inc. is prepared to take the necessary steps to properly close the tank and make the necessary filings." (Novak Affidavit at ¶ 9, Exhibit H.)
15. By letter dated September 5, 2014, Barton & Loguidice, D.P.C. advised Mr. Novak that it had been retained to assist respondent in addressing the notice of violation and provided copies of three estimates from environmental remediation contractors to permanently close the tank. An estimated 10,000 gallons of No. 6 fuel oil remain in the tank. (Novak Affidavit at ¶ 10, Exhibit I.)
16. To date, neither respondent nor its representatives have taken steps to register the PBS facility or permanently close the tank. (Novak Affidavit at ¶ 11, Exhibit F.)
17. To date, the respondent has not produced any evidence of corrective action with respect to these violations of the PBS regulations.

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when 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. "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. (Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003.) In addition, where, as here, the motion for order without hearing is served in lieu of complaint, the motion constitutes the complaint in this matter.

Prior to July 21, 2008, the owner of real property on which a PBS facility was located was not required to register the facility. When the law was amended in 2008, the real property owner was required to register the facility within one year of becoming subject to the registration requirements (see ECL 17-1009[4]). Here, respondent owned the real property before the July 21, 2008 effective date of the amendment. At the time of the amendment, the facility was unregistered. Accordingly, respondent was required to register the facility no later than July 21, 2009.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affidavit from an environmental engineer that describes the violations of the PBS regulations. Department staff's proof presents a prima facie case demonstrating that respondent's PBS Certificate No. 6-300357 expired on June 5, 2002, and respondent failed to renew the registration of its petroleum bulk storage facility located at 7 Spruce Street, Ilion, New York, in violation of ECL 17-1009(2). Staff's proof also demonstrates that respondent has not properly closed the 30,000 gallon aboveground PBS tank located at the address.

Respondent has not submitted any response to the violations alleged by Department staff's motion except to confirm that respondent owns the real property and is an active corporation. Respondent states that due to its financial situation, it cannot comply with a Commissioner's order relating to the PBS tank. That statement, however, does not address the violations alleged by Department staff. Respondent has failed to produce sufficient evidence to establish a triable issue that would require a hearing.

Department staff has met its burden in showing that respondent has not registered the PBS facility or permanently closed the 30,000 gallon aboveground PBS tank. I conclude that respondent is liable for violating ECL 17-1009(2) and 6 NYCRR 613.9(b) (1).

Penalties

Department staff requests that respondent be assessed a minimum civil penalty of not less than \$60,000 with payment of \$50,000 suspended, provided respondent complies with the Commissioner's order. Staff cites the provisions of ECL 71-1929 that set forth a maximum daily civil penalty of \$37,500 for violations of article 17 or the regulations promulgated pursuant thereto.

Staff also references the penalty range of \$500 to \$5,000 set forth in the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22) - Penalty Schedule, for settlement of violations of 6 NYCRR 612.2(a) for failure to register a facility. In this proceeding, staff alleges a violation of ECL 17-1009(2) for failure to renew a registration and argues that because it is similar to the violation of 6 NYCRR 612.2(a), a comparable penalty should be applied.

I do not distinguish any difference between a failure to renew a registration under ECL 17-1009(2) and 6 NYCRR 612.2(a) (2). The wording varies slightly, but both require renewal every five years. I conclude that the penalty schedule in DEE-22 related to regulatory violations would also apply to the same statutory violation. Staff also references the penalty range of \$500 to \$5,000 set forth in DEE-22 for settlement of violations of 6 NYCRR 613.9(b) (1) for failure to permanently close an out of service tank.

Because an administrative proceeding was commenced to address the violations, staff requests that \$5,000 be assessed for each violation.

Staff arrives at its penalty calculation in a manner that is the reverse of standard practice. First, the total penalty must be supported followed by a discussion of any penalty adjustments and suspended portions of the total penalty.³ Notwithstanding the manner of staff's penalty calculation, I find the record supports the requested total penalty of \$60,000. Respondent failed to register the facility since at least July 21, 2009. Applying the maximum penalty allowed by law, \$37,500 per day of violation, to the period between the July 8, 2014 notice of violation and the date of the service of staff's motion, May 18, 2015 or 314 days results in a maximum penalty of \$11,775,000. The same calculation would apply to respondent's failure to properly close the tank, for a total maximum penalty of \$23,550,000. Additionally, respondent's failure to address either of these violations is an aggravating factor as is the potential harm from a spill or other failure resulting from lack of appropriate maintenance and closure. These factors are further exacerbated by the fact that approximately 10,000 gallons of fuel oil remain in respondent's 30,000 gallon aboveground PBS tank. On this record, I find that a \$60,000 penalty is supported.

Staff's requested suspended penalty of \$50,000 is based on staff's reliance on the three budgetary estimates for permanent tank closure received from respondent's consultant (see Novak Affidavit at ¶ 10). Staff quotes those estimates as being between \$49,050 and \$82,435. Staff references an estimate from TREC Environmental Inc. that totals \$49,050, an estimate from Paragon Environmental Construction, Inc. that totals \$65,900, and an estimate from OP-TECH that staff reads as totaling \$82,435.⁴ Staff cites DEE-1: Civil Penalty Policy for direction that "the suspended component of the penalty should generally be

³ "The starting point of any penalty calculation should be a computation of the potential statutory maximum for all provable violations." (See DEE-1: Civil Penalty Policy [June 20, 1990].)

⁴ The OP-TECH estimate lists a unit cost for fluids removal at \$3.52 per gallon based on 10,000 gallons, which would total \$35,200. It also lists a lump sum estimate for heating the oil, product transfer, tank cleaning, product disposal, tank and building demo and backfilling at \$47,235. Staff added those two amounts for a sum of \$82,435, whereas the estimate could be read so that the \$47,235 includes the \$35,200.

somewhat greater than the estimated cost of complying with the order."

Department staff requests a suspended penalty that is barely more than the lowest estimate. This may not prove to be an incentive for respondent to perform the proper closure. Due to the potential harm associated with the continued unmanaged storage of 10,000 gallons of fuel oil and given the range of estimates for permanently closing the tank, I note that a higher penalty is supported, but I refrain from increasing the amount requested by staff.

Accordingly, I find that a civil penalty of \$60,000, with \$50,000 suspended provided respondent complies with the order, is appropriate.

CONCLUSIONS OF LAW

By failing to renew the registration of its PBS facility and failing to permanently close the 30,000 gallon aboveground PBS tank, respondent violated ECL 17-1009(2) and 6 NYCRR 613.9(b) (1).

RECOMMENDATIONS

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

1. granting Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12;
2. holding that respondent violated ECL 17-1009(2) by failing to renew the registration of its petroleum bulk storage facility located at 7 Spruce Street, Ilion, New York 13357 on or before July 21, 2009;
3. holding that respondent violated 6 NYCRR 613.9(b) (1) by failing to properly close a tank that is permanently out of service;
4. directing respondent to pay a civil penalty of sixty thousand dollars (\$60,000) for the above referenced violations, with payment of fifty thousand dollars (\$50,000) of the penalty suspended, conditioned upon

respondent's compliance with the provisions of the Commissioner's order;

5. directing respondent to submit the payable portion of the civil penalty in the amount of ten thousand dollars (\$10,000), within thirty (30) days of service of the Commissioner's order on respondent, to the following:

Office of General Counsel
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601
Attention: Nels G. Magnuson, Esq.

6. directing respondent to submit a complete registration application to the Department for the above facility within thirty (30) days of service of the Commissioner's order on respondent together with the applicable registration fees to the following:

Mr. Ronald F. Novak, P.E.
Regional PBS Supervisor
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601

7. directing respondent to permanently close the 30,000 gallon aboveground petroleum bulk storage tank in accordance with 6 NYCRR 613-4.5 within sixty (60) days of service of the Commissioner's order on respondent; and
8. directing such other and further relief as may deem just and appropriate under the circumstances.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: October 13, 2015
Albany, New York