

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

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

ORDER

DEC Case No.
3-466026

- by -

CHARLES JOHNSON,

Respondent.

Pursuant to a notice of hearing and complaint dated October 16, 2001, staff of the New York State Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against respondent Charles Johnson.

The complaint asserted that respondent owns a petroleum bulk storage facility along Route 209 in Accord, New York (the "facility"). The complaint alleges that respondent violated provisions of ECL article 17, and its implementing regulations at 6 NYCRR parts 612 and 613, when respondent failed to: (1) register the eleven petroleum bulk storage tanks at his facility; (2) test the five underground tanks for tightness; (3) maintain inventory records on the underground tanks; (4) maintain cathodic protection for the underground tanks; (5) mark fill ports to identify the product stored in the tanks; (6) conduct monthly inspections of the aboveground tanks; (7) provide secondary containment for the aboveground tanks; (8) equip all aboveground tanks with gauges to indicate the level of product in the tank; and (9) mark the design capacity, work capacity and an identification number on each aboveground tank.

A hearing convened on November 16, 2004 before Administrative Law Judge ("ALJ") Daniel P. O'Connell at the Department's Region 3 office in New Paltz, New York. Department staff appeared by Scott A. Herron, Esq., Senior Attorney. Respondent appeared pro se.

Upon review of the hearing record and attached hearing report, I adopt ALJ O'Connell's findings of fact, conclusions and

recommendations as my decision in this matter, subject to my comments herein.

At the hearing, Department staff moved to amend the October 16, 2001 complaint to change the address of the facility from Route 52, White Sulphur Spring, New York to Route 209, Accord, New York. ALJ O'Connell granted Department staff's motion over respondent's objection. I concur with the ALJ's conclusion that Department's motion did not limit respondent's ability to respond and that respondent was not prejudiced by the amendment of the complaint, and I affirm the ALJ's ruling (see 6 NYCRR 622.5[b]).

Department staff, in its opening statement, indicated that one of the allegations in its complaint, although it referenced a state regulation, related to a federal violation. On that basis, Department staff withdrew the allegation. No further explanation was provided. As no testimony was presented with respect to the allegation, the ALJ did not make any findings of fact or conclusions about whether respondent violated the state regulation that was referenced in the allegation. Because \$5,000 of the proposed civil penalty of \$40,000 was attributable to the allegation being withdrawn, Department staff proposed that the civil penalty be reduced to \$35,000. The ALJ has recommended this reduced civil penalty amount, which recommendation I adopt.

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

I. A preponderance of the record evidence establishes the following:

1. respondent owns a petroleum bulk storage facility on Route 209 in Accord, New York. The facility when initially registered consisted of eleven petroleum bulk storage tanks: five underground tanks with a combined storage capacity of 14,000 gallons, and six aboveground tanks with a combined storage capacity of 70,000 gallons;

2. the registration for the facility expired in 1994. Respondent purchased the facility from the Van DeMark Oil Company, Inc., in March 2000. To date, respondent has failed to demonstrate that any of the eleven petroleum bulk storage tanks at the facility have been permanently closed in a manner consistent with the requirements outlined in 6 NYCRR 613.9(b);

3. respondent failed to register the facility in violation of 6 NYCRR 612.2;

4. respondent violated 6 NYCRR 613.5 by failing to

test the tightness of the underground tanks at the facility and failing to submit the appropriate reports to the Department;

5. respondent violated 6 NYCRR 613.4 by failing to take inventory and failing to maintain records of the products stored in the underground tanks;

6. respondent violated 6 NYCRR 613.3 by not permanently marking all the fill ports to identify the products stored in the tanks;

7. respondent violated 6 NYCRR 613.6(a) by failing to conduct monthly inspections of the aboveground tanks, and failing to maintain inspection records;

8. respondent violated 6 NYCRR 613.3(c)(6) by failing to install secondary containment systems around the aboveground tanks;

9. respondent violated 6 NYCRR 613.3(c)(3)(i) by failing to equip each aboveground tank with a gauge that accurately shows the level of product in each tank;

10. respondent violated 6 NYCRR 613.3(c)(3)(ii) by failing to mark each aboveground tank with the design capacity, work capacity and an identification number; and

11. the foregoing violations have been of a continuing nature. Pursuant to 6 NYCRR 613.9(b)(2), respondent's obligation to comply with these requirements continues until respondent demonstrates that the tanks at the facility have been permanently closed in a manner consistent with the requirements set forth in 6 NYCRR 613.9(b)(1).

II. Respondent is assessed a civil penalty in the amount of thirty-five thousand dollars (\$35,000), which is due and payable within thirty (30) days of service of this order upon respondent. Payment shall be in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation," and shall be submitted by certified mail, overnight delivery or hand delivery to the following address: Scott A. Herron, Esq., Senior Attorney, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

III. Within thirty days of the date of this order, respondent shall submit to the Department a completed application to register his petroleum bulk storage facility, as well as a certified check or money order in the amount of the registration fee required pursuant to 6 NYCRR 612.3.

IV. Within thirty days of the date of this order, respondent shall:

1. conduct tightness testing on the underground tanks and connecting piping systems at the facility in accordance with 6 NYCRR 613.5. The results of the tests shall be reported to the Department within fifteen days of their completion. For any tank that fails the tightness test, respondent must promptly repair, replace or close the tank in accordance with the requirements set forth in 6 NYCRR 613.5(a)(5). Additionally, if the tests show that the tanks are leaking, respondent must notify the Department within two hours of discovery by calling the spills telephone hotline at (800) 457-7362, or 518-457-7362;

2. inventory and maintain records of the product stored in the underground tanks in a manner consistent with 6 NYCRR 613.4;

3. permanently mark all the fill ports to identify the products stored in the tanks in accordance with 6 NYCRR 613.3;

4. conduct monthly inspections of the aboveground tanks, and maintain inspection records as required by 6 NYCRR 613.6(a);

5. install secondary containment systems around the aboveground tanks as required by 6 NYCRR 613.3(c)(6);

6. equip each aboveground tank with a gauge that accurately shows the level of product in each tank in accordance with 6 NYCRR 613.3(c)(3)(i); and

7. mark each aboveground tank with the design capacity, work capacity and an identification number in accordance with 6 NYCRR 613.3(c)(3)(ii).

V. Respondent shall not be required to perform the tasks set forth in Paragraph IV with respect to any tank where respondent submits documentation, in a manner and form satisfactory to the Department, that the tank has been permanently closed consistent with the requirements set forth in 6 NYCRR 613.9(b). Such documentation must be provided to the Department within twenty days of the date of this order.

VI. All communications with the Department concerning this order shall be made to: Scott A. Herron, Esq., Senior Attorney, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

VII. The provisions, terms and conditions of this order shall bind respondent and his heirs and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: Denise M. Sheehan, Acting
Commissioner

Dated: Albany, New York
March 10, 2005

To: Charles Johnson (VIA CERTIFIED MAIL)
CJ's Auto Body
5185 Route 409
Accord, New York 12404

Charles Johnson (VIA CERTIFIED MAIL)
159 Mettakahonts Road
Accord, New York 12404

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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

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

- by -

CHARLES JOHNSON,
Respondent.

DEC Case No.: 3-466026

Hearing Report

-by-

/s/

Daniel P. O'Connell
Administrative Law Judge

December 7, 2004

Proceedings

Staff of the New York State Department of Environmental Conservation (Department staff) initiated this enforcement action by duly serving a notice of hearing and complaint both dated October 16, 2001 upon Charles Johnson (respondent). According to the amended complaint, respondent owns a petroleum bulk storage (PBS) facility along Route 209 in Accord, New York (the Facility). Respondent allegedly violated provisions of Environmental Conservation Law (ECL) article 17, and implementing regulations at Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR) parts 612 and 613, when respondent did not: (1) register the PBS tanks at his Facility; (2) test the underground tanks for tightness; (3) maintain inventory records for the underground tanks; (4) maintain cathodic protection for the underground tanks; (5) mark fill ports to identify the product stored in the tanks; (6) conduct monthly inspections of the aboveground tanks; (7) provide secondary containment for the aboveground tanks; (8) equip all aboveground tanks with gauges; and (9) mark each aboveground tank with the design capacity, work capacity and an identification number.

The October 16, 2001 notice of hearing advised respondent that he had to file an answer within 20 days after receiving the notice of hearing and complaint. The notice also scheduled a pre-hearing conference for November 14, 2001 at the Department's Region 3 offices in New Paltz, New York. The notice further advised respondent that if he did not file an answer, or appear at the pre-hearing conference, he would waive his right to a hearing and could be found in default. Respondent appeared at the scheduled pre-hearing conference, but never filed an answer.

With a cover letter dated September 16, 2004, Department staff filed a statement of readiness pursuant to 6 NYCRR 622.9. By letter dated October 14, 2004, Administrative Law Judge (ALJ) Daniel P. O'Connell from the Department's Office of Hearings and Mediation Services informed the parties that he was assigned to the case, and scheduled the hearing for November 16, 2004 at 10:00 a.m. at the Department's Region 3 Offices.

The hearing convened as scheduled. At the hearing, Department staff appeared by Scott A. Herron, Esq., Senior Attorney. R. Daniel Bendell, Supervisor of the Region 3 Petroleum Bulk Storage Unit testified on behalf of the Department. Mr. Johnson appeared *pro se*, and testified on his behalf. The Office of Hearings and Mediation Services received

the stenographic transcript of the hearing on November 24, 2004, whereupon the record of the hearing closed.

Motion to Amend the Complaint

At the November 16, 2004 hearing, Department staff moved to amend paragraph 1 of the October 16, 2001 complaint. According to Mr. Herron, the correct location of the Facility is Route 209, Accord, New York, rather than Route 52, White Sulphur Spring, New York. Mr. Herron characterized the error as typographical (Tr. 15-16, 22).

Mr. Johnson objected to Department staff's motion to amend the complaint. He stated that the complaint identified a PBS facility in White Sulphur Spring, and that the violations alleged therein relate to that facility. Mr. Johnson stated that he does not own property in White Sulphur Spring (Tr. 74).

By permission of the ALJ, a party may amend its pleading prior to the final decision of the Commissioner absent prejudice to the ability of any other party to respond (see 6 NYCRR 622.5[b]). Respondent stated that he owns a PBS facility on Route 209 in Accord, New York (Tr. 23). During his testimony, respondent said that he came to the pre-hearing conference at the Region 3 office in November 2001, and further acknowledged that the purpose of the pre-hearing conference was to discuss the Facility located on Route 209 in Accord, New York (Tr. 76). In addition, Mr. Johnson admitted that prior to the hearing date, he was represented by counsel,¹ that his counsel attended settlement conferences, and that his counsel had not objected to the address of the Facility in the complaint (Tr. 77).

Department staff's motion to amend the complaint at the hearing did not limit respondent's ability to respond. Based on respondent's statements and testimony, he understood that the violations alleged in the October 16, 2001 complaint related to the petroleum bulk storage facility located in Accord, New York. Therefore, there is no prejudice. At the hearing, I granted the motion.

Department Staff's Position

The October 16, 2001 complaint alleged nine violations, as described above. For these alleged violations, Department staff

¹ It is not known when respondent's counsel withdrew or why.

requested an order from the Commissioner that would assess a total civil penalty of \$40,000 dollars, and direct respondent to: (1) register the PBS tanks at the Facility; (2) test the tightness of the underground tanks, and depending on the results, take the appropriate action; (3) maintain inventory records for the underground tanks; (4) monitor the cathodic protection for the Facility's underground tanks; (5) permanently mark all fill ports; (6) conduct monthly inspections of the aboveground tanks; (7) mark the aboveground tanks with the design capacity, working capacity and an identification number; (8) install secondary containment for the aboveground tanks; and (9) equip the aboveground tanks with gauges. During the hearing, Department staff requested, in the alternative, that the Commissioner direct respondent to permanently close all tanks that are out of service in a manner consistent with the requirements outlined in 6 NYCRR 613.9(b) (Tr. 6).

At the hearing, Department staff reduced the total requested civil penalty to \$35,000 (Tr. 6, 7, 81, 82). Department staff withdrew the allegation that respondent failed to maintain cathodic protection for Facility's underground tanks because that allegation relates to a federal requirement (Tr. 7).

Respondent's Position

Although Mr. Johnson appeared at the November 14, 2001 pre-hearing conference, respondent did not answer the complaint (Tr. 25). Throughout the proceeding, respondent objected to all the documentary evidence offered by Department staff because it related to the Facility located on Route 209 in Accord, New York, rather than a facility located in White Sulfur Spring, as initially stated in the complaint. Respondent stated, however, that he owns the PBS Facility on Route 209 in Accord, New York (Tr. 23).

Respondent contended further that he attempted to register the PBS Facility in Accord, New York on at least two occasions. He argued that the Commissioner should consider these attempts to be a mitigating factor that should reduce the total civil penalty.

Findings of Fact

1. Prior to March 24, 2000, the petroleum bulk storage facility located on Route 209 in Accord, New York (the PBS Facility) was owned and operated by the Van DeMark Oil Company, Inc.

When the Facility was initially registered, it consisted of a total of 11 petroleum bulk storage tanks. There were five underground tanks with a combined storage capacity of 14,000 gallons. Also, there were six aboveground tanks with a combined storage capacity of 70,000 gallons. (Exhibit 2.)

2. The registration for the PBS Facility expired in 1994 (Tr. 69). It has not been renewed since (see Tr. 42-43).
3. Subsequently, respondent purchased the PBS Facility from the Van DeMark Oil Company, Inc. around March 24, 2000 (Exhibit 3).
4. On March 24, 2000, respondent filed a PBS application to register the Facility with the Department. On the application, respondent noted the change of ownership. Of the original 11 tanks at the Facility, Respondent identified only three aboveground tanks, each with a capacity of 10,000 gallons. (Exhibit 4.)
5. In a notice dated May 7, 2000, the Department rejected respondent's March 24, 2000 PBS registration application because he did not include the appropriate fee with the application, which is \$250 (Exhibit 5, Tr. 57). Subsequently, the Department sent respondent a notice of violation dated July 1, 2000, which referenced the May 7, 2000 notice concerning the registration fee. The July 1, 2000 notice of violation asserted that respondent had failed to transfer the ownership of the Facility properly in violation of 6 NYCRR 612.2(b). The July 1, 2000 notice of violation directed respondent to correct the alleged violation in 14 days. (Exhibit 6.)
6. In response to the May 7 and July 1, 2000 notices, respondent filed a second PBS registration application for the Facility dated August 14, 2001. On this application, respondent identified only two aboveground tanks, each with a capacity of 10,000 gallons (Exhibit 7).
7. In response to the August 14, 2001 PBS application, the Department sent respondent a notice of violation dated September 19, 2001. The September 19, 2001 notice stated that respondent did not include the proper fee with the August 14, 2001 application. The notice asserted that respondent violated 6 NYCRR 612.2(b) by failing to transfer the ownership of the Facility properly. The September 19,

2001 notice of violation directed respondent to correct the alleged violation in 14 days. (Exhibit 8.)

8. Despite respondent's two attempts, the Facility is not registered (Tr. 40, 42-43).
9. Department staff inspected the Facility on May 15, 2001. During the inspection, staff could not determine the status of the five underground storage tanks mentioned in Finding of Fact No. 1 (Exhibit 11). The Department has no reliable information that any of the five underground tanks have been taken out of service and closed consistent with the requirements outlined in 6 NYCRR 613.9(b) (Tr. 44-45).
10. As noted above, the Facility initially had six aboveground tanks. During the May 15, 2001 inspection, staff observed that some of the aboveground tanks at the Facility remained in service, and noted that others had been removed (Exhibits 11).
11. Neither the previous owner nor respondent has filed any documentation with the Department to show that any of the five underground tanks at the Facility were tightness tested as required by 6 NYCRR 613.5 (Tr. 46). Since 2000, respondent should have tested the tightness of the five underground tanks at least once. The cost for testing one tank is about \$800. Therefore, the total cost for testing five tanks would be \$4,000. (Tr. 58.)
12. During the May 15, 2001 inspection, respondent did not produce any records related to the inventory (see 6 NYCRR 613.4). Respondent has not produced any inventory records since the May 2001 inspection. (Tr. 46-47.)
13. To prevent accidental delivery of petroleum products to a particular tank, 6 NYCRR 613.3(b) requires all fill ports to be color coded. At the time of the May 15, 2001 inspection, the fill ports on the tanks at the facility were not color coded in a manner consistent with 6 NYCRR 613.3(b). (Tr. 47-48.)
14. Pursuant to 6 NYCRR 613.6, owners or operators are required to inspect aboveground PBS tanks on a monthly basis and to maintain inspection records. During the May 15, 2001 inspection, respondent did not produce any inspection records, and respondent has not produced any monitoring records since the May 2001 inspection. (Tr. 48.)

15. The regulations at 6 NYCRR 613.3(c)(6) require owners to install secondary containment systems around aboveground PBS tanks. During the May 15, 2001 inspection, Department staff observed that no secondary containment systems were installed around the aboveground PBS tanks. Furthermore, respondent has not installed any secondary containment systems since the May 2001 inspection. (Tr. 49, Exhibit 13.) It would cost about \$20,000 to install a secondary containment system around the remaining aboveground tanks at the Facility (Tr. 59).
16. Pursuant to 6 NYCRR 613.3(c)(3)(i), aboveground PBS tanks require gauges to show the level of product in each tank. During the May 15, 2001 inspection, Department staff observed there were no gauges on the aboveground PBS tanks, and respondent has not installed any gauges since the May 2001 inspection. (Tr. 49-50, Exhibit 13.) The approximate cost of a gauge for a tank is \$150 (Tr. 59).
17. Pursuant to 6 NYCRR 613.3(c)(3)(ii), each aboveground PBS tank must be marked with the design capacity, working capacity and an identification number. During the May 15, 2001 inspection, Department staff observed that the aboveground PBS tanks at the Facility were not marked with the design capacity, working capacity and an identification number (Tr. 50-51).
18. Department staff returned to the Facility on January 10, 2003, and observed that three aboveground PBS tanks remain at the Facility. The status of the underground tanks could not be determined. The conditions of the tanks at the Facility had not changed since the initial inspection on May 15, 2001. (Tr. 51-55; Exhibits 13 and 14.)
19. No reliable information about the status of the underground tanks at the Facility was presented at hearing. Given the lack of information about the tightness of any remaining underground tanks and the absence of any inventory information, the potential for environmental harm is great. With respect to the aboveground tanks, the potential for environmental harm is great given the lack of monthly inspection records, as well as the absence of any secondary containment system and gauges on the aboveground tanks. (Tr. 59-64.)

Discussion

I. Liability

Parts 612 and 613 of 6 NYCRR apply to aboveground and underground petroleum bulk storage facilities with a combined storage capacity over 1,100 gallons. The purpose of 6 NYCRR parts 612 and 613 is to regulate how petroleum products are handled and stored so as to protect public health, as well as the land and waters of the state.

Respondent relied on Exhibits 3 and 9 to demonstrate that the underground tanks at the Facility were removed. Exhibit 3 is a letter dated March 24, 2000 written by respondent, which states that he purchased the Facility and that the Facility consists of three aboveground tanks. The letter states further that the previous owner removed the other eight tanks. Exhibit 9 is an invoice from Ronnie Barringer, Trucking and Excavating. Exhibit 9 is dated "8/29;" no year is provided. I find that the information provided in Exhibits 3 and 9 is not sufficiently reliable to prove that either respondent, or the previous owner, complied with the requirements outlined in 6 NYCRR 613.9(b) concerning the permanent closure of any of the underground PBS tanks at the Facility. Accordingly, the Facility remains subject to all the requirements of 6 NYCRR parts 612 and 613 (see 6 NYCRR 613.9[b][2]).

Respondent offered nothing to refute Mr. Bendell's testimony or the documentary evidence offered by Department staff. Therefore, I find that respondent owns the Facility. I conclude that respondent violated 6 NYCRR 612.2 by failing to register his Facility because he did not include the appropriate fee. With respect to the underground tanks, respondent violated 6 NYCRR 613.5 by failing to submit the proper tightness reports. Respondent violated 6 NYCRR 613.4 by failing to keep and maintain inventory records. Respondent violated 6 NYCRR 613.3 by not permanently marking all the fill ports to identify the products stored in the underground tanks. These violations have continued since Department staff's May 2001 inspection. Respondent must comply with these requirements until he can demonstrate that the underground tanks have been permanently closed consistent with the requirements outlined in 6 NYCRR 613.6(b).

With respect to the aboveground tanks, I conclude further that respondent violated 6 NYCRR 613.6(a) by failing to conduct monthly inspections and to maintain inspection records.

Respondent violated 6 NYCRR 613.3(c)(6) by failing to install secondary containment systems around the aboveground tanks. Respondent violated 6 NYCRR 613.3(c)(3)(i) by failing to equip each aboveground tank with a gauge that accurately shows the level of product in each tank. Respondent violated 6 NYCRR 613.3(c)(3)(ii) by failing to mark each aboveground tank with the design capacity, work capacity and an identification number. These violations have continued since Department staff's May 2001 inspection. Furthermore, respondent must comply with these requirements until he can demonstrate that the underground tanks have been permanently closed consistent with the requirements outlined in 6 NYCRR 613.6(b).

In his opening statement, Mr. Herron explained that Department staff withdrew the allegation that respondent failed to maintain cathodic protection for underground tanks because that allegation relates not only to a state requirement, but also to a federal requirement (Tr. 7; compare 6 NYCRR 613.5[b] with 40 CFR 280.21 and 280.31). Department staff withdrew this allegation (see October 16, 2001 complaint, ¶ 15). Mr. Bendell offered no testimony about this allegation. Accordingly, no findings of fact or conclusions are made about whether respondent violated 6 NYCRR 613.5(b).

II. Relief

A. Civil Penalty

Prior to May 15, 2003, ECL 71-1929 authorized a maximum civil penalty of \$25,000 per day for violations of ECL article 17, title 10 and implementing regulations. Effective May 15, 2003, however, the civil penalty authorized by ECL 71-1929 increased to \$37,500 per day for each violation. During the hearing, Department staff outlined its civil penalty calculation and provided a justification.

In the October 16, 2001 complaint, Department staff requested a total civil penalty of \$40,000, but reduced the total to \$35,000 at hearing (Tr. 6, 7, 81, 82). To calculate the civil penalty, Department staff relied on the guidance outlined in the Department's Civil Penalty Policy. According to the Civil Penalty Policy, the civil penalty should be based on the sum of the benefit component, and the gravity component. The final amount of the civil penalty is then adjusted after considering any aggravating or mitigating factors.

The benefit component of the civil penalty is an estimate of the economic gain accrued to the violator by not complying with the applicable regulations. According to Mr. Bendell's uncontroverted testimony, respondent has avoided significant costs by not complying with the requirements outlined in 6 NYCRR parts 612 and 613. The applicable registration fee for a facility of this type is \$250. Since 2000, respondent should have tested the tightness of the five underground tanks at the Facility at least once. The cost for testing one tank is about \$800. Therefore, the total cost for testing five tanks would be \$4,000.

During the May 15, 2001 inspection, Department staff observed that no secondary containment systems were installed around the aboveground PBS tanks. Mr. Bendell estimated that it would cost about \$20,000 to install a secondary containment system around the three remaining aboveground tanks at the Facility. As previously noted, the aboveground tanks must be equipped with gauges to show the level of product in each tank (see 6 NYCRR 613.3[c][3][i]). The approximate cost of a gauge for a tank is \$150, and the total cost for the three aboveground tanks would be \$450. As a result, the total estimated economic benefit that respondent gained from not complying with applicable regulatory requirements is \$24,700.

The gravity component of the civil penalty reflects the seriousness of the violations. Factors that should be considered include the actual and potential environmental damage that has resulted, or may result, from the violations, as well as the significance of the violations, given the Department's regulatory mandates. Here, Mr. Bendell testified further that the potential for environmental harm is great for the following reasons. Department staff has no reliable information about the status of the underground tanks or their tightness. Therefore, registering every facility, and regularly testing tanks for tightness are important requirements. Moreover, if tanks are permanently closed, the procedures outlined in 6 NYCRR 613.9(b) must be followed to ensure there is documentation to show that underground tanks were removed properly. With respect to the aboveground tanks at the PBS Facility, the potential for environmental harm is great given the lack of monthly inspection records, as well as the absence of secondary containment systems and gauges on these tanks. The potential volume of product stored in the three aboveground tanks at the Facility is 30,000 gallons, which is substantial.

The civil penalty requested by Department staff is consistent with the amount authorized by ECL 71-1929, and with the guidance outlined in the Civil Penalty Policy. Therefore, the Commissioner should assess a total civil penalty of \$35,000. The Commissioner may apportion the civil penalty as follows:

1. \$1,000 for violating 6 NYCRR 612.2 by not renewing the registration of the PBS tanks at the Facility in a timely manner;
2. \$4,000 for violating 6 NYCRR 613.5 by not testing the tightness of the underground tanks at the Facility and for not submitting the appropriate reports;
3. \$5,000 for violating 6 NYCRR 613.4 by not keeping and maintaining inventory records for the underground tanks;
4. \$500 for violating 6 NYCRR 613.3 by not permanently marking all the fill ports to identify the products stored in the underground tanks;
5. \$3,000 for violating 6 NYCRR 613.6(a) by failing to conduct monthly inspections and to maintain inspection records of the aboveground tanks;
6. \$20,000 for violating 6 NYCRR 613.3(c)(6) by not installing secondary containment systems around the aboveground tanks;
7. \$1,000 for violating 6 NYCRR 613.3(c)(3)(i) by failing to equip each aboveground tank with a gauge that accurately shows the level of product in each tank; and
8. \$500 for violating 6 NYCRR 613.3(c)(3)(ii) by failing to mark each aboveground tank with the design capacity, work capacity and an identification number.

The foregoing civil penalty recommendation takes into account the continuous nature of each violation. At hearing, respondent provided no explanation about why he did not include the registration fee. Respondent did not offer any evidence to show that he could not pay the registration fee. Therefore, I am not persuaded by respondent's argument that the total civil penalty should be reduced because he attempted to register the Facility twice.

B. Remediation and Site Access

As noted above, the information provided in Exhibits 3 and 9 is not sufficient to demonstrate that either respondent, or the previous owner, complied with the requirements outlined in 6 NYCRR 613.9(b) concerning the permanent closure of any of the underground PBS tanks at the Facility. Therefore, to end respondent's continuing obligation to comply with all the requirements of 6 NYCRR parts 612 and 613 (see 6 NYCRR 613.9[b][2]), respondent must either demonstrate that all underground PBS tanks at the Facility have been properly closed, or close any remaining underground tanks permanently pursuant to the requirements outlined in 6 NYCRR 613.9(b).

Furthermore, with respect to the aboveground tanks, respondent must comply with the applicable requirements, which include, among other things, conducting monthly inspections and maintaining inspection records (see 6 NYCRR 613.6[a]); installing secondary containment systems (see 6 NYCRR 613.3[c][6]); equipping each aboveground tank with a gauge that accurately shows the level of product in each tank (see 6 NYCRR 613.3[c][3][i]); and marking each tank with the design capacity, work capacity and an identification number (see 6 NYCRR 613.3[c][3][ii]).

Conclusions

1. Respondent violated 6 NYCRR 612.2 by failing to register his Facility.
2. Respondent violated 6 NYCRR 613.5 by failing to test the tightness of the underground storage tanks at the Facility, and to submit the appropriate reports.
3. Respondent violated 6 NYCRR 613.4 by failing to take inventory and maintain records of the products stored in the underground tanks.
4. Respondent violated 6 NYCRR 613.3 by not permanently marking all the fill ports to identify the products stored in the tanks.
5. The foregoing violations have continued since March 2000. Furthermore, pursuant to 6 NYCRR 613.9(b)(2), respondent's obligation to comply with these requirements continues until respondent demonstrates that all underground tanks at the

Facility have been permanently closed in a manner consistent with the requirements outlined in 6 NYCRR 613.9(b)1).

6. Respondent violated 6 NYCRR 613.6(a) by failing to conduct monthly inspections of the aboveground tanks, and to maintain inspection records.
7. Respondent violated 6 NYCRR 613.3(c)(6) by failing to install secondary containment systems around the aboveground tanks.
8. Respondent violated 6 NYCRR 613.3(c)(3)(i) by failing to equip each aboveground tank with a gauge that accurately shows the level of product in each tank.
9. Respondent violated 6 NYCRR 613.3(c)(3)(ii) by failing to mark each aboveground tank with the design capacity, work capacity and an identification number.

Recommendations

For the established violations, the Commissioner should assess a total civil penalty of \$35,000 based on the calculation presented above.

In addition, the Commissioner should direct respondent either to register the PBS Facility, or to permanently close the PBS Facility in a manner consistent with the requirements outlined in 6 NYCRR 613.9(b).

In order to register the PBS Facility, the Commissioner should direct respondent to provide Department staff with documentation about what tanks remain at the Facility, and that respondent has complied with all applicable regulations for any tanks that have been permanently closed or removed from the Facility. If respondent elects to register the PBS Facility, the Commissioner should direct him to comply with all applicable operating requirements outlined in the regulations.