

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

- by -

KG ISLAND REALTY CORP.,

DEC File No.
R2-20120720-458

Respondent.

Introduction and Procedural Background

This matter involves the administrative enforcement of alleged violations of the petroleum bulk storage (PBS) requirements of the New York Environmental Conservation Law (ECL) and accompanying regulations. The alleged violations concern underground and aboveground storage tanks at a PBS facility that respondent KG Island Realty Corp. owns at 571 Coney Island Avenue, Brooklyn, New York.

Staff from the New York State Department of Environmental Conservation (DEC or Department) commenced this administrative proceeding by service of a notice of motion and motion for order without hearing in lieu of complaint (see 6 NYCRR 622.12).¹ In support of the motion, staff submitted an affidavit from a Department engineer and an affirmation from staff counsel, with supporting exhibits. Respondent KG Island Realty Corp. did not respond to the motion or otherwise appear in this proceeding.

In its motion, staff alleges that respondent acquired the property at 571 Coney Island Avenue on February 20, 2002, and, at that location, owns a PBS facility containing five petroleum storage tanks: (1) three 4,000-gallon underground motor fuel storage tanks (tanks 001, 002 and 003); (2) one 500-gallon underground waste/used oil storage tank (tank 004); and (3) one

¹Section 622.12(a) of 6 NYCRR provides, in relevant part, that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence."

275-gallon aboveground waste/used oil storage tank (tank 005). Staff further alleges in eight causes of action that respondent committed sixteen (16) violations of the ECL, an order on consent that respondent signed in 2008 (identified under DEC File Nos. R2-20070329-154 and R2-20070329-155) (2008 Order on Consent) and 6 NYCRR Parts 612 and 613² by

- (1) Failing to register, to properly label, and to inspect monthly the aboveground tank (tank 005) and maintain inspection records, in violation of the 2008 Order on Consent and ECL 71-1929 (3 violations);
- (2) Failing to timely renew the PBS facility registration which expired on February 20, 2012, in violation of 6 NYCRR 612.2(a);
- (3) Failing to register the aboveground tank at the PBS facility (tank 005), in violation of 6 NYCRR 612.2(a);
- (4) Failing to properly label the aboveground tank (tank 005), in violation of 6 NYCRR 613.3(c)(3)(ii);
- (5) Failing to inspect monthly the aboveground tank (tank 005) and maintain inspection records, in violation of 6 NYCRR 613.6;
- (6) Failing to maintain adequate spill prevention equipment for the underground motor fuel tanks 001 and 002, in violation of 6 NYCRR 613.3(d);
- (7) Failing to perform leak detection monitoring on three underground tank and piping systems, in violation of 6 NYCRR 613.5(b)(3) (3 violations); and
- (8) Failing to test the underground tank and piping systems for tightness, in violation of 6 NYCRR 613.5(a) (3 violations).

Staff's uncontested motion was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick of the Department's Office of Hearings and Mediation Services. ALJ Garlick prepared the attached Summary Report (ALJ Summary Report) which I adopt as my decision in this matter, subject to the following comments.

² The PBS regulations were repealed and revised in 2015, after the commencement of this enforcement action. For the purpose of the violations alleged in this matter, the former regulations at 6 NYCRR parts 612 and 613 apply. For the purposes of the ordered corrective action and the requirements going forward, the current regulations in revised 6 NYCRR part 613 apply.

Standards for Motion for Order without Hearing

The provisions of 6 NYCRR 622.12 are governed by the same principles that govern summary judgment motions brought pursuant to CPLR 3212 (see 6 NYCRR 622.12[d]; see also Matter of Locaparra, d/b/a L&L Scrap Metals, Commissioner's Final Decision and Order, June 16, 2003, at 3).

Liability

Staff's case against respondent KG Island Realty Corp. is based on alleged violations of the 2008 Order on Consent, a June 5, 2012 inspection resulting in a notice of violation (2012 NOV) and an August 2, 2013 inspection resulting in a notice of violation (2013 NOV). Along with its motion for order without hearing, staff submitted, among other evidence, the 2008 Order on Consent, the 2012 and 2013 NOVs, an affidavit from a Department engineer, and an affirmation from staff counsel.

In the affirmation, staff counsel John K. Urda stated that, as of the 2012 inspection, respondent KG Island Realty Corp. had violated the 2008 Order on Consent by failing to register, appropriately label, and conduct monthly inspections and maintain inspection records of the aboveground tank (tank 005) (3 violations) (see Affirmation of John K. Urda, Esq., in Support of Motion for an Order Without a Hearing, dated May 27, 2014 [Urda Affirmation], at 6 [First Cause of Action]).

Staff also submitted the affidavit of Leszek Zielinski, P.E. sworn to on May 27, 2014 (Zielinski Affidavit). During his then 14-year tenure with the Department, Mr. Zielinski had conducted approximately 100 inspections of PBS facilities (id., ¶ 4). Based on his review of the 2012 inspection report conducted by a contracted Department inspector as well as the 2013 inspection that Mr. Zielinski conducted, he determined that respondent failed to:

- (1) timely renew the facility registration;
- (2) register the aboveground tank;
- (3) properly label the aboveground tank;
- (4) inspect monthly the aboveground tank and maintain inspection records;
- (5) maintain spill prevention equipment on three underground tanks (3 violations);
- (6) perform leak monitoring on three underground tank and piping systems (3 violations); and

- (7) test the underground tank and piping systems for tightness (3 violations).

See id., ¶¶ 8, 13.

Based upon the record and as further analyzed by ALJ Garlick, I conclude that Department staff established sixteen (16) violations against respondent KG Island Realty Corp.

Civil Penalty

I further conclude that the proposed civil penalty in the amount of sixty-eight thousand dollars (\$68,000) sought by Department staff to address the violations is authorized and appropriate. ECL 71-1929, which is applicable here, provides, in part, that “[a] person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto . . . shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation” (ECL 71-1929[1]). The maximum penalty for the violations in this proceeding, in light of their number and their duration, would total in the millions of dollars.

Staff counsel in his affirmation laid out a proposed penalty for each violation based on: the duration of the violation; the usual penalty upon settlement, according to Department guidance; and that an increased penalty for each violation is appropriate here because of the necessity to commence this enforcement proceeding. Based on this record, Department counsel’s request for a civil penalty in the amount of sixty-eight thousand dollars (\$68,000) is authorized and appropriate.³

³Department staff, in its allegations of violations relating to the 2008 Order on Consent, identifies respondent’s failure to register, failure to properly label and failure to inspect (together with a failure to maintain inspection records) the facility’s aboveground tank (tank 005) (see Urda Affirmation, at 6 [First Cause of Action]). In addition, Department staff references the failure to register, failure to label, and failure to inspect and maintain inspection records, with respect to the aboveground tank, in separate causes of action (see Urda Affirmation, at 7 [Third Cause of Action], 7-8 [Fourth Cause of Action] and 8 [Fifth Cause of Action]). However, even assuming without deciding that any portion of the causes of action relating to the facility’s aboveground tank is multiplicative, the civil penalty that Department staff is requesting is fully supported by the number and duration of independent and separate violations relating to the facility’s aboveground and underground tanks and the violations of the 2008 Order on Consent.

Corrective Action

For corrective action, Department staff are seeking an order requiring respondent to "comply with all applicable PBS regulations immediately." I agree with the ALJ that respondent is already required to comply with the ECL and the regulations.

The ALJ has recommended that I direct a series of corrective actions for this facility to address compliance issues raised in this proceeding (see ALJ Summary Report at 14-15). Upon review of the ALJ's recommendations and the record before me, I am directing that respondent undertake corrective action and submit written or photographic documentation to Department staff demonstrating that respondent has completed the corrective action.⁴ Respondent shall:

- provide photographic documentation to Department staff that the aboveground tank (which is now registered as tank 005) is appropriately labeled and provide documentation that monthly inspections of the tank are being conducted and records of those inspections are being maintained;
- provide photographic documentation to Department staff that the aboveground tank (which is now registered as tank 005) is clearly marked with its design capacity, working capacity, and identification number;
- provide documentation to Department staff that the facility's spill prevention equipment is being kept in good working order, and, in addition, provide photographs of the sumps at the facility;
- provide documentation to Department staff that all monitoring activities for underground and aboveground petroleum bulk storage tanks at the facility are being conducted in accordance with the requirements set forth in the revised 6 NYCRR part 613 that became effective in October 2015; and

⁴The ALJ notes that respondent has corrected the violations relating to registration of the PBS facility and registration of the aboveground storage tank (tank 005). Accordingly, respondent is not being directed to perform any further corrective action with respect to those aforementioned registration violations.

- provide written documentation to Department staff that underground tanks 001, 002 and 003 and their piping systems have been tested for tightness.

All such documentation supplied must be complete and satisfactory for Department staff review.

The corrective actions directed by this order are appropriate and authorized. With respect to timing, respondent shall have fifteen (15) days after service of this order upon it to complete the corrective action, except for the tightness testing. To ensure sufficient time for respondent to schedule tightness testing, respondent shall have thirty (30) days after service of this order upon it to complete that task.

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

- I. Department staff's motion for an order without hearing in lieu of complaint pursuant to 6 NYCRR 622.12 is granted. By failing to respond to the motion or otherwise appear in this proceeding, respondent KG Island Realty Corp. has waived its right to be heard at a hearing.
- II. Based upon the evidence submitted on staff's motion, respondent KG Island Realty Corp. is adjudged to have violated the ECL, the 2008 Order on Consent (identified under DEC File Nos. R2-20070329-154 and R2-20070329-155) and 6 NYCRR former parts 612 and 613 at its PBS facility located at 571 Coney Island Avenue, Brooklyn, New York, as follows:
 - A. Respondent KG Island Realty Corp. violated the 2008 Order on Consent and ECL 71-1929 by failing to register the aboveground tank at the facility by September 25, 2008, failing to appropriately label the aboveground tank by September 25, 2008, and failing to conduct monthly inspections and maintain inspection records for that tank;
 - B. Respondent KG Island Realty Corp. violated 6 NYCRR 612.2(a) by failing to timely renew the PBS facility's registration;

- C. Respondent KG Island Realty Corp. violated 6 NYCRR 612.2(a) by failing to register the one aboveground tank at the facility;
- D. Respondent KG Island Realty Corp. violated 6 NYCRR 613.3(c)(3)(ii) by failing to properly label the aboveground tank at the facility;
- E. Respondent KG Island Realty Corp. violated 6 NYCRR 613.6 by failing to inspect the aboveground tank at the facility on a monthly basis and maintain inspection records;
- F. Respondent KG Island Realty Corp. violated 6 NYCRR 613.3(d) by allowing liquid to accumulate in the tank sump of tank 001, by allowing liquid to accumulate in the tank sump of tank 002, and allowing debris to accumulate in the tank fill port catch basin of tank 001;
- G. Respondent KG Island Realty Corp. violated 6 NYCRR 613.5(b)(3) by failing to perform weekly leak monitoring on three underground tanks and piping systems; and
- H. Respondent KG Island Realty Corp. violated 6 NYCRR 613.5(a) by failing to test underground tanks and piping systems (tanks 001, 002 and 003) for tightness.

III. Respondent KG Island Realty Corp. is assessed a civil penalty in the amount of sixty-eight thousand dollars (\$68,000) for the above referenced violations. Within sixty (60) days of service of this order upon respondent KG Island Realty Corp., respondent shall pay the civil penalty of sixty-eight thousand dollars (\$68,000) by certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation. The penalty payment shall be sent to the following address:

NYS Department of Environmental Conservation
Region 2, Office of General Counsel
47-40 21st Street
Long Island City, New York 11101-5407
Attention: John K. Urda, Esq.

- IV. In addition to the payment of the civil penalty, respondent KG Island Realty Corp. is ordered to perform the following corrective action:
- A. No later than fifteen (15) days after service of this order upon respondent KG Island Realty Corp., provide photographic documentation to Department staff that the aboveground tank (which is now registered as tank 005) is appropriately labeled and provide documentation that monthly inspections of the tank are being conducted and records of those inspections are being maintained;
 - B. No later than fifteen (15) days after service of this order upon respondent KG Island Realty Corp., provide photographic documentation to Department staff that the aboveground tank (which is now registered as tank 005) is clearly marked with its design capacity, working capacity, and identification number;
 - C. No later than fifteen (15) days after service of this order upon respondent KG Island Realty Corp., provide photographic documentation to Department staff that the facility's spill prevention equipment is being kept in good working order, and, in addition, provide photographs of the sumps at the facility;
 - D. No later than fifteen (15) days after service of this order upon respondent KG Island Realty Corp., provide documentation to Department staff that all monitoring activities for underground and aboveground petroleum bulk storage tanks at the facility are being conducted in accordance with the requirements set forth in the revised 6 NYCRR part 613 that became effective in October 2015; and
 - E. No later than thirty (30) days after service of this order upon respondent KG Island Realty Corp., provide documentation to Department staff that underground tanks 001, 002 and 003 and their piping systems have been tested for tightness.
- V. Respondent KG Island Realty Corp. shall submit all documentation and other information required in

paragraph IV of this order to the Department at the following address:

Mr. Leszek Zielinski, P.E.
Regional PBS Supervisor
NYSDEC Region 2
47-40 21st Street
Long Island City, New York 11101-5407

- VI. Any questions or other correspondence regarding this order shall be addressed to John K. Urda, Esq. at the address referenced in paragraph III of this order.
- VII. The provisions, terms, and conditions of this order shall bind respondent KG Island Realty Corp. 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
July 29, 2016

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

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

Summary Report

DEC File No.
R2-20120720-458

-by-

KG ISLAND REALTY CORP.,

Respondent.

SUMMARY

This summary report recommends that the Commissioner grant an unopposed motion for order without hearing in lieu of complaint served by Staff of the Department of Environmental Conservation (Department staff) on the respondent, KG Island Realty Corp. (respondent), on May 28, 2014 by certified mail. Respondent has not answered or otherwise appeared. In its motion papers, Department staff alleges eight causes of action and sixteen violations that occurred at a gasoline station (facility) respondent owns located at 571 Coney Island Avenue, Brooklyn, New York. The facility contains five petroleum tanks and is a New York State regulated petroleum bulk storage (PBS) facility (PBS #2-146153). The evidence included with Department staff's motion establishes a prima facie case that the violations occurred and no material questions of fact exist. For this reason the Commissioner should find respondent liable for the sixteen alleged violations, direct respondent to pay a civil penalty of \$68,000, and order corrective actions be undertaken to address the violations.

PROCEEDINGS

On May 28, 2014, Department staff served a motion for order without hearing in lieu of complaint and supporting papers on respondent by certified mail. Department staff's papers consisted of: (1) a cover letter; (2) a notice of motion; (3) the affirmation of Department staff attorney John K. Urda, with

three exhibits attached; and (4) the affidavit of Department staff engineer Leszek Zielinski, with six exhibits attached.

A response was due on or before June 17, 2014. No response has been received. On June 25, 2014, this matter was assigned to me.

FINDINGS OF FACT

1. Respondent KG Island Realty Corp. owns property located at 571 Coney Island Avenue, Brooklyn, New York (the site) (see Zielinski affidavit dated May 27, 2014, Exh. F at 1). Respondent purchased the property in 2002 (see Urda Affirmation dated May 27, 2014, ¶ 3).
2. Respondent is also the owner of PBS facility #2-146153, which is located at the site. This facility includes five petroleum tanks. The PBS program facility information report states that: (1) tank 001 is an underground storage tank (UST) with a 4,000 gallon capacity containing gasoline; (2) tank 002 is a 4,000 gallon UST containing gasoline; (3) tank 003 is a 4,000 gallon UST containing diesel; (4) tank 004 is 500 gallon UST containing waste/used oil; and (5) tank 005 is a 275 gallon aboveground storage tank (the AST) containing waste/used oil (see Zielinski affidavit dated May 27, 2014, Exh. F at 1).
3. In a consent order (DEC File Nos. R2-20070329-154 and R2-20070329-155) that became effective on September 10, 2008 (2008 consent order), respondent admitted to several violations and agreed to cure all violations within 15 days, or by September 25, 2008 (see Urda Affirmation dated May 27, 2014, Exh. B).
4. On June 5, 2012, Department staff inspector Peter Lawler inspected the respondent's facility.¹ Following the

¹ There is no affidavit in the record from Mr. Lawler, who is no longer affiliated with the Department (see Zielinski affidavit dated May 27, 2014, ¶ 6). The record does contain an affidavit from the supervisor of the PBS program in NYDEC's Region 2, Department Staff Engineer Leszek Zielinski (see Zielinski affidavit dated May 27, 2014, ¶ 1). In his affidavit, Mr. Zielinski states that Mr. Lawler took photographs of certain violations during his inspection and that the annotations on the photographs indicating they were taken on June 6, 2012 are

inspection, Mr. Lawler prepared a notice of violation that identified numerous violations, including: (1) failure to renew the facility's registration; (2) failure to register, label and perform monthly inspections of the AST (tank 005); (3) failure to maintain the functionality of the facility's leak detection system; (4) failure to maintain two underground tank sumps; and (5) failure to maintain one fill port catch basin (see Zielinski affidavit dated May 27, 2014, ¶ 6, Exh. B).

5. On July 2, 2012, Mr. Lawler prepared and hand delivered a notice of violation (2012 NOV) listing the violations noted during the June 5, 2012 inspection to Mr. Slavik Gofman, respondent's principal (see Zielinski affidavit dated May 27, 2014, ¶ 7, Exh. B).
6. The 2012 NOV directed respondent to correct each violation and submit evidence of the corrective action within thirty calendar days (see Zielinski affidavit dated May 27, 2014, ¶ 14, Exh. B).
7. Respondent did not respond to the 2012 NOV (see Zielinski affidavit dated May 27, 2014, ¶ 15).
8. On July 10, 2012, Department staff received a PBS application from the facility renewing the facility's registration, but not registering the AST (tank 005) (see Zielinski affidavit dated May 27, 2014, ¶ 10, Exh. C).
9. On July 20, 2012, Department staff attorney Urda sent respondent a cover letter and proposed consent order and received no response (see Urda Affirmation dated May 27, 2014, ¶ 16, Exh. C).
10. On August 2, 2013, Department staff engineer Leszek Zielinski inspected respondent's facility and noted the following violations: (1) failure to register, label and inspect monthly the AST (tank 005); (2) failure to perform leak detection on underground tanks and piping; and (3) failure to test underground tank systems for tightness which according to NYSDEC records was due to be done by June 29, 2013 (see Zielinski affidavit dated May 27, 2014, ¶¶ 11 & 13, Exhs. D & E).

incorrect and that they were in fact taken on June 5, 2012 (see Zielinski affidavit dated May 27, 2014, ¶ 6).

11. On August 9, 2013, Department staff served a second notice of violation (2013 NOV) on respondent by certified mail (see Zielinski affidavit dated May 27, 2014, ¶ 12, Exh. E).
12. The 2013 NOV directed respondent to correct each violation and submit evidence of the corrective action (see Zielinski affidavit dated May 27, 2014, ¶ 14, Exh. E).
13. Respondent did not respond to the 2013 NOV (see Zielinski affidavit dated May 27, 2014, ¶ 15).
14. On March 27, 2014, Department staff received a PBS application for the facility that corrected information regarding the underground tanks and registered the AST (tank 005) (see Zielinski affidavit dated May 27, 2014, ¶ 16, Exh. F).

DISCUSSION

In its unopposed motion for order without hearing in lieu of complaint, Department staff requests the Commissioner issue an order that: (1) finds respondent liable for the sixteen violations alleged; (2) requires respondent to pay a total payable civil penalty of \$68,000; and (3) directs respondent to undertake certain actions to remedy the violations. Each of these requests is discussed below.

The Commissioner set forth the standards to be used in evaluating a motion for order without hearing in Matter of Locaparra (Decision and Order, June 16, 2003).

Staff brings this motion for an order without hearing pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party.

The moving party on a summary judgment motion has the burden of establishing "his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd

[b])." The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof. The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.

(id. at 3-4 [internal citations omitted]); see also Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2 ("[w]here a respondent fails to answer a motion for an order without hearing, and Department staff ... seeks ... a determination on the merits of its motion for order without hearing, summary judgment principles are applied in analyzing the motion").

Liability

In his affirmation, Department staff counsel alleges sixteen violations in eight causes of action, specifically, that respondent: (1) violated the 2008 consent order and ECL 71-1929 by failing to register one aboveground tank at the facility by September 25, 2008, failing to appropriately label this tank by September 25, 2008, and failing to conduct monthly inspections and maintain inspection records for this tank; (2) violated 6 NYCRR 612.2(a) by failing to timely renew the facility's registration; (3) violated 6 NYCRR 612.2(a) by failing to register one aboveground tank at the facility; (4) violated 6 NYCRR 613.3(c)(3)(ii)² by failing to properly label an aboveground tank at the facility; (5) violated 6 NYCRR 613.6 by failing to inspect an aboveground tank monthly and maintain inspection records; (6) violated 6 NYCRR 613.3(d) by allowing liquid to accumulate in the tank sump of tank 001, by allowing liquid to accumulate in the tank sump of tank 002, and allowing debris to accumulate in the tank fill port catch basin of tank 001; (7) violated 6 NYCRR 613.5(b)(3) by failing to perform leak monitoring weekly on three underground tank and piping systems;

² In paragraphs 43 and 45 of his affirmation, Department staff counsel cites to 6 NYCRR 613.3(c)(ii), which appears to be a typographical error, because in paragraph 25, he refers to 613.3(c)(3)(ii), which is the correct citation.

and (8) violated 6 NYCRR 613.5(a) by failing to test underground tank and piping systems (tanks 001, 002 and 003) for tightness.

First cause of action. Paragraph I of the 2008 consent order (DEC File Nos. R2-20070329-154 and R2-20070329-155) required respondent to cure the violations listed in the consent order within 15 days of the effective date of the order, September 10, 2008 (see Urda Affirmation dated May 27, 2014, Exh. B ¶ 5). In its papers, Department staff alleges three violations, specifically, that the respondent failed to meet this deadline: (1) to register the AST (tank 005) at the facility; (2) to appropriately label this tank (tank 005); and (3) to conduct monthly inspections and maintain inspection records for this tank (tank 005). The AST (tank 005) at the facility was installed on February 1, 1973 and not included on a registration application until April 9, 2014 (see Zielinski affidavit dated May 27, 2014, Exh. F). In the 2012 NOV, Mr. Lawler records that the unregistered AST (tank 005) was not appropriately labeled and that it had not been inspected at least monthly (see Zielinski affidavit dated May 27, 2014, Exh. B at 2). In his affidavit, Department staff engineer Zielinski states that when he inspected the facility on August 2, 2013, these violations were again observed (see Zielinski affidavit dated May 27, 2014, ¶¶ 11 - 13, Exh. E). Based on this evidence it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a *prima facie* case and that respondent is liable for three violations of the 2008 consent order.

Second cause of action. Section 612.2(a) of 6 NYCRR requires the owner of a PBS facility to register the facility with the Department, and section 612.2(a)(2) requires the owner to renew this registration every five years. Department staff alleges that respondent violated 6 NYCRR 612.2(a)(2) by failing to timely renew the facility's registration when it expired on February 20, 2012. As proof that this violation occurred, Department staff offers the facility information report showing the date of expiration of the registration (February 20, 2012) and applicant's renewal application received on July 10, 2012 (see Zielinski affidavit dated May 27, 2014, Exhs. A & C). Based on this evidence it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a *prima facie* case and that the respondent is liable for a single violation of 6 NYCRR 612.2(a).

Third cause of action. Section 612.2(a) requires the owner of any facility to register such facility with the Department.

In its papers, Department staff alleges that respondent violated this provision by failing to register the AST (tank 005). The AST (tank 005) was observed by Mr. Lawler during his June 5, 2012 inspection (see Zielinski affidavit dated May 27, 2014, Exh. B) and photographed (see Zielinski affidavit dated May 27, 2014, Exh. A at 3). The AST (tank 005) was observed again on Mr. Zielinski's August 2, 2013 inspection (see Zielinski affidavit dated May 27, 2014, ¶ 13, Exh. E) and again photographed (see Zielinski affidavit dated May 27, 2014, Exh. D). This tank was not included on a registration application until April 9, 2014 (see Zielinski affidavit dated May 27, 2014, Exh. F). Based on this evidence it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a *prima facie* case and that the respondent is liable for a single violation of 6 NYCRR 612.2(a).

Fourth cause of action. Section 613.3(c)(3)(ii) of 6 NYCRR requires the owner to clearly mark on aboveground storage tanks the design capacity, working capacity, and identification number. In its papers, Department staff alleges that the respondent violated this requirement by failing to label the AST (tank 005) at the facility. This violation was observed by Mr. Lawler during his June 5, 2012 inspection and noted in the 2012 NOV (see Zielinski affidavit dated May 27, 2014, Exh. B). The violation was again observed on Mr. Zielinski's August 2, 2013 inspection and noted in the 2013 NOV (see Zielinski affidavit dated May 27, 2014, ¶ 13, Exhs. D & E). Based on this evidence it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a *prima facie* case and that the respondent is liable for a single violation of 6 NYCRR 612.3(c)(3)(ii).

Fifth cause of action. Section 613.6(a) of 6 NYCRR requires the owner or operator of an aboveground storage facility to inspect the facility at least monthly, and 6 NYCRR 613.6(c) requires maintaining inspection reports. In its papers, Department staff alleges that respondent committed a single violation when it violated 6 NYCRR 613.6 by failing to inspect the AST (tank 005) monthly and maintain inspection records at the facility.³ This violation was observed by Mr. Lawler during his June 5, 2012 inspection and noted in the 2012

³ In this cause of action Department staff alleges two separate violations but treats them as a single violation. Department staff alleges both: a violation of 6 NYCRR 613.6(a) for failing to inspect; and a violation of 6 NYCRR 613.6(c) for failing to maintain inspection records.

NOV (see Zielinski affidavit dated May 27, 2014, Exh. B) and again on Mr. Zielinski's August 2, 2013 inspection and noted in the 2013 NOV (see Zielinski affidavit dated May 27, 2014, ¶ 13, Exh. E). Based on this evidence it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a *prima facie* case and that the respondent is liable for a single violation of 6 NYCRR 612.6.

Sixth cause of action. Section 613.3(d) of 6 NYCRR requires the owner or operator of a PBS facility to keep all gauges, valves and other equipment for spill prevention in good working order. In its papers Department staff alleges that respondent violated this requirement in three instances by: (1) allowing liquid to accumulate in the tank sump of tank 001; allowing liquid to accumulate in the tank sump of tank 002; and (3) allowing debris to accumulate in the tank fill port catch basin of tank 001. Each of these violations was observed by Mr. Lawler during his June 5, 2012 inspection of the respondent's facility (see Zielinski affidavit dated May 27, 2014, Exh. B) and photos were taken to document the violations (see Zielinski affidavit dated May 27, 2014, Exh. A at 5 - 7). Based on this evidence it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a *prima facie* case and that the respondent is liable for three violations of 6 NYCRR 613.3(d).

Seventh cause of action. Section 613.5(b)(3) of 6 NYCRR requires the owner or operator of a PBS facility to monitor for traces of petroleum at least once per week and inspect all monitoring systems at least monthly. In its papers, Department staff alleges that respondent failed to perform leak monitoring weekly on three underground tanks and piping systems. These violations were first observed during Mr. Lawler's June 5, 2002 inspection of respondent's facility (see Zielinski affidavit dated May 27, 2014, Exh. B). They were again observed on Mr. Zielinski's August 2, 2013 inspection (see Zielinski affidavit dated May 27, 2014, ¶ 13, Exh. E). Based on this evidence it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a *prima facie* case and that the respondent is liable for three violations of 613.5(b)(3).

Eighth cause of action. Section 613.5(a) of 6 NYCRR requires owners of PBS facilities to test underground tanks and connecting piping systems every five years for tightness. In its papers, Department staff alleges that respondent has failed to timely tightness test three underground tanks (tank 001, tank

002, and tank 003) and piping systems at the facility for tightness. Respondent's facility information report indicates that the last date tank 001, tank 002 and tank 003 were tested was June 29, 2008 (see Urda Affirmation dated May 27, 2014, Exh. A). During his August 2, 2013 inspection, Department staff engineer Zielinski noted that respondent had failed to conduct tightness testing on the three underground tanks and piping systems (see Zielinski affidavit dated May 27, 2014, ¶ 13, Exh. E). Based on this evidence it is reasonable for the Commissioner to conclude that Department staff has met its burden of establishing a *prima facie* case and that the respondent is liable for three violations of 613.5(a).

Civil Penalty

In its papers, Department staff requests that the Commissioner impose in his order a total payable civil penalty of sixty eight thousand dollars (\$68,000). The components of this requested penalty are summarized in the table below.

Description	Number of Violations	Requested Penalty
First cause of action	3	\$15,000
Second cause of action	1	\$2,000
Third cause of action	1	\$2,000
Fourth cause of action	1	\$1,000
Fifth cause of action	1	\$1,500
Sixth cause of action	3	\$1,500
Seventh cause of action	3	\$15,000
Eighth cause of action	3	\$30,000
TOTAL	16	\$68,000

Environmental Conservation Law § 71-1929(1) provides, in relevant part, as follows:

A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation.

Staff cites three DEC guidance documents with respect to its discussion of the appropriate civil penalty amount in this case:

(1) the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990); (2) the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22, issued May 21, 2003); and (3) the Department's Order on Consent Enforcement Policy (DEE-2, rev. August 28, 1990) (see Urda affirm. ¶ 61).

First cause of action. In its papers Department staff requests a total payable civil penalty of fifteen thousand dollars (\$15,000) for the first cause of action, which alleges three violations of the 2008 consent order and ECL 71-1929 (see Urda Affirmation dated May 27, 2014, ¶ 36 [five thousand dollars (\$5,000) for each of the three violations alleged]). As set forth above, ECL 71-1929 applies to violations of orders of the Commissioner, including consent orders, and provides for a civil penalty of up to \$37,500 per day for each violation. In its papers, Department staff states that each of these three violations of the 2008 consent order began on September 25, 2008 and continued for over 2,000 days (see Urda Affirmation dated May 27, 2014, ¶¶ 31 [2,010 days], 33 [2,065 days], and 35 [2,070 days]).⁴

Based upon information in the record, including the importance of ensuring respondents comply with consent orders, respondent's culpability, lack of cooperation with Department staff and history of non-compliance, I recommend that the Commissioner grant Department staff's request and include in his order a requirement for respondent to pay a civil penalty of \$15,000 for these three violations.

Second cause of action. In its papers Department staff requests a payable civil penalty of two thousand dollars (\$2,000) for the second cause of action, which alleges a violation of 6 NYCRR 612.2(a) (see Urda Affirmation dated May 27, 2014, ¶¶ 37-39). With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to \$37,500 per day. In its papers, Department staff states that it typically resolves violations of 6 NYCRR 612.2(a) in consent orders for \$1,000 (see Urda Affirmation dated May 27, 2014, ¶ 39) (see DEE-22, Penalty Schedule ¶ 3).

⁴ Department staff explains that the first violation began on September 25, 2008 and continued until the PBS application was received on March 27, 2014. The second and third violations also began on September 25, 2008 and continued through the date of Department staff's papers. No explanation is provided as to why Department staff calculated the length of time for the second violation at 2,065 days and the third at 2,070 days.

Based upon information in the record, including the importance of timely renewing PBS registrations, the respondent's culpability, lack of cooperation with Department staff and history of non-compliance, I recommend that the Commissioner grant Department staff's request and include in his order a requirement for respondent to pay a civil penalty of \$2,000 for this violation.

Third cause of action. In its papers Department staff requests a payable civil penalty of two thousand dollars (\$2,000) for the third cause of action, which alleges a violation of 6 NYCRR 612.2(a) (see Urda Affirmation dated May 27, 2014, ¶¶ 40-42). With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to \$37,500 per day. Department staff calculates that this violation continued for 9,953 days, starting on February 1, 1973 when the respondent indicated the AST (tank 005) was installed until March 27, 2014 when it was registered (see Urda Affirmation dated May 27, 2014, ¶ 41). Department staff states that it typically resolves violations of 6 NYCRR 612.2(a) in consent orders for \$1,000 per violation (see Urda Affirmation dated May 27, 2014, ¶ 42) (see DEE-22, Penalty Schedule ¶ 1).

Based upon information in the record, including the importance of registering all tanks at a PBS facility, respondent's culpability, lack of cooperation with Department staff and history of non-compliance, I recommend that the Commissioner grant Department staff's request and include in his order a requirement for respondent to pay a civil penalty of \$2,000 for this violation.

Fourth cause of action. In its papers Department staff requests a payable civil penalty of one thousand dollars (\$1,000) for the fourth cause of action, which alleges a violation of 6 NYCRR 613.3(c)(3)(iii) (see Urda Affirmation dated May 27, 2014, ¶¶ 43-45). With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to \$37,500 per day. Department staff calculates that this violation began on June 5, 2012 and continued to the date of the motion, May 27, 2014, for a total of 721 days. Department staff states that it typically resolves violations of 6 NYCRR

613.3(c)(3)(ii) in consent orders for \$250 per violation (see Urda Affirmation dated May 27, 2014, ¶ 45).⁵

Based upon information in the record, including the importance of properly labelling tanks at a PBS facility, respondent's culpability, lack of cooperation with Department staff and history of non-compliance, I recommend that the Commissioner grant Department staff's request and include in his order a requirement for respondent to pay a civil penalty of \$1,000 for this violation.

Fifth cause of action. In its papers Department staff requests a payable civil penalty of one thousand five hundred dollars (\$1,500) for the fifth cause of action, which alleges a violation of 6 NYCRR 613.6 (see Urda Affirmation dated May 27, 2014, ¶¶ 46-48). With respect to this violation, ECL 71-1929 authorizes the imposition of a civil penalty of up to \$37,500 per day. Department staff calculates that this violation began on June 5, 2012 and continued to the date of the motion, May 27, 2014, for a total of 721 days. Department staff states that it typically resolves violations of 6 NYCRR 613.6 in consent orders for \$500 per violation (see Urda Affirmation dated May 27, 2014, ¶ 48) (see DEE-22, Penalty Schedule ¶¶ 30, 31).⁶

Based upon information in the record, including the importance of regularly inspecting tanks, respondent's culpability, lack of cooperation with Department staff and history of non-compliance, I recommend that the Commissioner grant Department staff's request and include in his order a requirement for respondent to pay a civil penalty of \$1,500 for this violation.

Sixth cause of action. In its papers Department staff requests a payable civil penalty of one thousand five hundred dollars (\$1,500) for the sixth cause of action, which alleges three violations of 6 NYCRR 613.3(d) (see Urda Affirmation dated May 27, 2014, ¶¶ 49-51). With respect to such violations, ECL

⁵ This amount is higher than the average \$100 per tank penalty in DEE-22, ¶ 41, but Department staff provides no explanation for this differential.

⁶ Department staff counsel appears to be referencing paragraph 30 of the Penalty Schedule in DEE-22 which states that the average penalty for a violation of 6 NYCRR 613.6(a) should be \$500 per tank. Paragraph 31 of the Penalty Schedule in DEE-22 is also relevant because it suggests an average penalty of \$250 per tank for violations of 6 NYCRR 613.6(c).

71-1929 authorizes the imposition of a civil penalty of up to \$37,500 per day for each violation. Department staff states that it typically resolves violations of 6 NYCRR 613.3(d) in consent orders for \$250 per violation (see Urda Affirmation dated May 27, 2014, ¶ 53) (see DEE-22, Penalty Schedule ¶ 9)⁷.

Based upon information in the record, including the importance of maintaining spill prevention equipment, respondent's culpability, lack of cooperation with Department staff and history of non-compliance, I recommend that the Commissioner grant Department staff's request and include in his order a requirement for respondent to pay a civil penalty of \$1,500 for these three violations.

Seventh cause of action. In its papers Department staff requests a payable civil penalty of fifteen thousand dollars (\$15,000) for the seventh cause of action, which alleges three violations of 6 NYCRR 613.5(b)(3). With respect to such violations, ECL 71-1929 authorizes the imposition of a civil penalty of up to \$37,500 per day for each violation. Department staff calculates that these violations began on June 5, 2012 and continued through the date of the motion, May 27, 2014, a period of 721 days. In its papers, Department staff states that it typically resolves violations of 6 NYCRR 613.5(b)(3) in consent orders for \$2,500 per tank system (see Urda Affirmation dated May 27, 2014, ¶ 56). Department guidance suggests an average penalty of \$2,500 per facility (see DEE-22, Penalty Schedule ¶ 14). Department staff does not explain its request for a higher amount.

However, in this case a higher penalty is warranted due to the importance of performing leak detection monitoring to protect the environment, respondent's culpability, lack of cooperation with Department staff and history of non-compliance. Based on the record, the Commissioner should grant Department staff's request and include in his order a requirement for respondent to pay civil penalty of \$15,000 for these three violations.

Eighth cause of action. In its papers Department staff requests a payable civil penalty of thirty thousand dollars (\$30,000) for the eighth cause of action, which alleges three violations of 6 NYCRR 613.5(a) (see Urda Affirmation dated May

⁷ Paragraph 9 of the Penalty Schedule in DEE-22 states the average penalty for a violation of 6 NYCRR 613.3(d) is \$200 per tank with a penalty range of \$100-\$250 per tank.

27, 2014, ¶¶ 57-60). With respect to such violations, ECL 71-1929 authorizes the imposition of a civil penalty of up to \$37,500 per day for each violation. Department staff calculates that these violations began on June 29, 2013 and continued through the date of the motion, May 27, 2014, a period of 333 days. In its papers, Department staff states that it typically resolves violations of 6 NYCRR 613.5(a) in consent orders for \$5,000 per tank system (see Urda Affirmation dated May 27, 2014, ¶ 59) (see DEE-22, Penalty Schedule ¶¶ 26, 27 & 28)⁸.

Based upon information in the record, including the importance of tightness testing to protect the environment from leaking tanks, respondent's culpability, lack of cooperation with Department staff and history of non-compliance, I recommend that the Commissioner grant Department staff's request and include in his order a requirement for respondent to pay a civil penalty of \$30,000 for these violations.

Corrective Action

In addition to finding respondent liable for the sixteen alleged violations and imposing a payable civil penalty of \$68,000, Department staff also requests that the Commissioner's order direct respondent to comply with all applicable PBS regulations immediately. This request should be rejected by the Commissioner for two reasons. First, respondent is already required by law to comply and second, such language would not provide respondent time to remedy the violations before additional enforcement could be taken. For these reasons the Commissioner should include language in his order directing respondent to correct the violations at the facility promptly and provide proof of such corrections to Department staff.

First cause of action. Since the AST (tank 005) was registered by the respondent by an application received by Department staff on March 27, 2014, no corrective action is necessary for this violation. However, respondent should be directed to provide photographic evidence to Department staff within 15 days of the effective date of the Commissioner's order that the AST (tank 005) is appropriately labeled. In addition, respondent should be directed to demonstrate to Department staff

⁸ Department staff appears to be referencing paragraph 26 of the Penalty Schedule of DEE-22 which states the average penalty for a violation of 6 NYCRR 613.5 for failure to test a tank for tightness tested is \$5,000 per tank.

that respondent is conducting monthly inspections of this tank and maintaining records.

Second cause of action. Since respondent submitted a renewal application which was received by Department staff on July 10, 2012 and revised it with an application received by Department staff on March 27, 2014, no corrective action is necessary for this cause of action.

Third cause of action. Since the AST (tank 005) was registered by respondent by an application received by Department staff of March 27, 2014, no corrective action is necessary for this violation.

Fourth cause of action. Respondent should be directed to provide photographic evidence to Department staff within 15 days of the effective date of the Commissioner's order that the AST (tank 005) is clearly marked with its design capacity, working capacity and identification number.

Fifth cause of action. Respondent should be directed to demonstrate to Department staff that the respondent is conducting monthly inspections of the AST (tank 005) and maintaining records.

Sixth cause of action. Respondent should be directed to provide photographic evidence to Department staff within 15 days of the effective date of the Commissioner's order that respondent is keeping its spill prevention equipment in good working order, including photographs of the sumps at the facility.

Seventh cause of action. Respondent should be directed to provide evidence to Department staff within 15 days of the effective date of the Commissioner's order that respondent is monitoring for traces of petroleum once a week.

Eighth cause of action. Respondent should be directed to provide evidence to Department staff within 15 days of the effective date of the Commissioner's order that the three underground tanks at the facility have been tested for tightness.

These corrective actions are reasonable and necessary to protect the environment. Based on the evidence in the record, the Commissioner's order should require Respondent to complete these actions.

CONCLUSIONS OF LAW

1. Respondent KG Island Realty Corp. violated Paragraph I of the 2008 consent order (DEC File Nos. R2-20070329-154 and R2-20070329-155) and ECL 71-1929 by failing to: (1) register the 275 gallon AST (tank 005) at the facility; (2) appropriately label the AST (tank 005); and (3) conduct monthly inspections and maintain inspection records for the AST (tank 005). These tasks should have been completed by September 25, 2008.
2. Respondent KG Island Realty Corp. violated 6 NYCRR 612.2(a)(2) by failing to timely renew the facility's registration when it expired on February 20, 2012.
3. Respondent KG Island Realty Corp. violated 6 NYCRR 612.2(a) by failing to include the AST (tank 005) in its PBS registration.
4. Respondent KG Island Realty Corp. violated 6 NYCRR 613.3(c)(3)(ii) by failing to label the AST (tank 005) at the facility.
5. Respondent KG Island Realty Corp. violated 6 NYCRR 613.6(a) by failing to inspect the AST (tank 005) at the facility, and violated 6 NYCRR 613.6(c) by failing to maintain inspection records.
6. Respondent KG Island Realty Corp. violated 6 NYCRR 613.3(d) in three instances by: allowing liquid to accumulate in the tank sump of tank 001; allowing liquid to accumulate in the tank sump of tank 002; and allowing debris to accumulate in the tank fill port catch basin of tank 001.
7. Respondent KG Island Realty Corp. violated 6 NYCRR 613.5(b)(3) in three instances by failing to perform leak monitoring at least weekly on the three underground tank and piping systems at the facility.
8. Respondent KG Island Realty Corp. violated 6 NYCRR 613.5(a) in three instances by failing to test the underground tank and piping systems for tank 001, tank 002 and tank 003.

RECOMMENDATION

The Commissioner should conclude that Department staff has met its burden of demonstrating that no material issue of fact exists in this case. The Commissioner should issue an order that finds respondent liable for the sixteen violations alleged and imposes a total payable civil penalty of sixty eight thousand dollars (\$68,000). In addition, the Commissioner should direct respondent to undertake actions to correct the violations and provide proof to Department staff that such actions are complete.

/s/

Albany, New York

P. Nicholas Garlick
Administrative Law Judge

EXHIBIT LIST

MATTER OF KG ISLAND REALTY CORP.

DEC CASE # R2-20120720-458

Attached to the affirmation of John K. Urda, Esq:

- Exh. A. PBS certificate for facility #2-146153 issued August 16, 2012 and the respondent's PBS facility information report.
- Exh. B. Order on Consent (2008 consent order) (DEC File Nos. R2-20070329-154 and R2-20070329-155).
- Exh. C. Letter from Department staff attorney Urda to respondent dated July 20, 2012 and postal receipts.

Attached to the affidavit of Leszek Zielinski:

- Exh. A: Copy of PBS Facility Information Report for respondent's facility and six photos taken during an inspection on June 6, 2012.
- Exh. B: Notice of Violation dated July 2, 2012.
- Exh. C: Copy of respondent's PBS application dated June 25, 2012.
- Exh. D: Single photo of a tank at the facility.
- Exh. E: Notice of Violation dated August 8, 2013.
- Exh. F: Copy of respondent's PBS application dated March 14, 2014.