

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Title 10 of
Article 17 of the Environmental Conservation Law and
Part 613 of Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of
New York (6 NYCRR)

ORDER

DEC Case No.
R6-20170804-39

PBS No. 6-600225

- by -

NICKI L. KOGUT,
JOANNA E. MINICHELLO,
and
ARTEMIS ENTERPRISES PLUS, LLC,

Respondents.

This administrative enforcement proceeding addresses allegations by the staff of the Department of Environmental Conservation (Department or DEC) that respondents Nicki L. Kogut (respondent Kogut), Joanna E. Minichello (respondent Minichello) and Artemis Enterprises Plus, LLC (respondent LLC) (collectively, respondents) violated title 10 of article 17 of the Environmental Conservation Law (ECL) and 6 NYCRR part 613 at a petroleum bulk storage (PBS) facility (facility or PBS facility) located at the intersection of NYS Routes 180 and 12E in the Town of Brownville, Jefferson County, New York (site).

Department staff served a motion for order without hearing, with supporting papers, seeking summary judgment on a previously served notice of hearing and complaint, in which staff alleged that respondents violated:

- (i) ECL 17-1009 and 6 NYCRR 613-1.9(d), by failing to renew the registration of a PBS facility located at the site within thirty (30) days of the transfer of ownership of the facility (first cause of action); and
- (ii) 6 NYCRR 613-2.6(a)(3), by failing to permanently close PBS tanks at the facility that had been out-of-service for more than twelve (12) months (second cause of action).¹

In response to the motion, respondents filed an affidavit of David P. Antonucci, Esq. (Antonucci affidavit), counsel for respondents, dated May 20, 2019; and an affidavit of respondent Nicki L. Kogut (Kogut affidavit), sworn to May 20, 2019, with attached exhibits. Under cover letter dated May 30, 2019, respondents filed a supplement to exhibit A of the Kogut affidavit.

¹ See Motion for Order Without Hearing dated April 17, 2019 at 2, 4; Complaint dated June 4, 2018 at 2, 5.

Administrative Law Judge (ALJ) Richard A. Sherman of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached summary report which I adopt as my decision in this matter, subject to my comments below.

First Cause of Action

As to the first cause of action, the ALJ notes that respondents do not dispute that the site is a PBS facility (*see* Summary Report at 5). The PBS facility includes two underground PBS tanks – one with a 10,000 gallon capacity and one with a 4,000 gallon capacity (*see* Summary Report at 3 [Finding of Fact No. 7]).

Pursuant to ECL 17-1009(2), the owner of a PBS facility "shall register the facility with the department" and the "[r]egistration shall be renewed every five years or whenever ownership of a facility is transferred, whichever occurs first." This ECL provision relating to transfer is implemented through 6 NYCRR 613-1.9(d). The record indicates that respondents Kogut and Minichello acquired title to the site on October 19, 2016, and failed to register the facility within thirty (30) days as required by 6 NYCRR 613-1.9(d) (*see* Summary Report at 6). Respondents did not file a PBS registration application with the Department until March 28, 2018, which submittal was untimely by nearly 500 days (*see id.*).

Similarly, respondent LLC failed to timely submit a PBS facility registration application to the Department within thirty (30) days following the time that it acquired title to the site on March 19, 2017 (*see* Summary Report at 6). Respondent LLC did not file a PBS registration application with the Department until July 11, 2017 (*see id.* at 4 [Finding of Fact No. 13]). This submittal was untimely by 84 days. Moreover, this application submitted by respondent LLC was deficient (*see id.* [Finding of Fact No. 15]). Respondent LLC submitted a complete application on or about October 18, 2017.

I concur with the ALJ that, on this record, Department staff has established as a matter of law that each respondent violated ECL 17-1009(2) and 6 NYCRR 613-1.9(d) by failing to renew the registration of the facility within thirty (30) days of transfer of ownership to each of them, respectively, as alleged in the first cause of action.

Second Cause of Action

The provisions of 6 NYCRR 613-2.6(a)(3) governing out-of-service tank closure apply to underground storage tank (UST) systems (Motion for Order Without Hearing at 4).

Respondents do not dispute that the tank system located at the site constitutes a UST system (*see* Summary Report at 6-7). The site includes two underground petroleum storage tanks that are subject to 6 NYCRR 613-2.6(a)(3). Pursuant to 6 NYCRR 613-2.6(a)(3), "[w]hen a UST system is out-of-service for more than 12 months, the facility must permanently close the UST system in accordance with subdivisions (b) through (e) of this section." Furthermore, 6 NYCRR 613-1.2(d) provides that "[a]ny provision of [part 613] that imposes a requirement on a facility imposes that requirement on every operator and every tank system owner at the facility, unless expressly stated otherwise."

Based on his review of the record, the ALJ has determined that the requirements established under 6 NYCRR 613-2.6(a)(3) apply to this PBS facility and provide no exception for the tank system owners. Accordingly, he concludes that because each respondent owns, or formerly owned, the PBS facility, each respondent in this proceeding is liable for violations of 6 NYCRR 613-2.6(a)(3) (*see* Summary Report at 7).

I concur with the ALJ's determination that on this motion, Department staff has established as a matter of law that each respondent violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close the UST system at the PBS facility that had been out-of-service for more than 12 months.

Respondents' Defenses

Respondents in this matter assert a number of defenses, including: (a) Department staff failed to join a necessary party (in this case, Jefferson County); (b) the terms of a release executed by the New York Environmental Protection and Spill Compensation Fund relieves respondents from the regulatory obligations at issue here; (c) estoppel and settlement arising from prior negotiations and interactions with the Department apply here; and (d) issues of fact exist that require adjudication.

The ALJ in the summary report has carefully and thoroughly evaluated each of the defenses raised (*see* Summary Report at 8-12) and I concur with his rejection of these defenses.

Furthermore, the record fully supports Department staff's position that respondents Kogut and Minichello were responsible for the activities of respondent LLC and, accordingly, are jointly and severally liable for respondent LLC's failure to timely register the PBS facility and its failure to permanently close its UST system.

Civil Penalty

Department staff requests in its motion for order without hearing that I issue an order assessing a penalty against respondents in the amount of \$37,000, with the penalty apportioned among the respondents as follows:

- \$1,500 assessed against respondents Kogut and Minichello, jointly and severally, "for violation of 6 NYCRR [] 613-1.9(d) – failure to register the facility in their names in a timely manner;"
- \$1,500 assessed against all respondents, jointly and severally, "for violation of ECL § 71-1009(2) and 6 NYCRR [] 613-1.9(d), for failure to register the facility in the name of Artemis Enterprises Plus, LLC in a timely manner;"
- \$8,000 assessed against respondents Kogut and Minichello, jointly and severally, "for violation of 6 NYCRR [] 613-2.6(a)(3), failure to permanently close out-of-service tanks;"

- \$8,000 assessed against all respondents, jointly and severally, "for violation of 6 NYCRR [] 613-2.6(a)(3);" and
- \$18,000 "assessed against all Respondents, jointly and severally, payment of which should be suspended, conditioned upon Respondents['] compliance with the terms of any order the Commissioner may issue"

(Motion for Order Without Hearing at 8).

Pursuant to ECL 71-1929(1):

"[a] person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 . . . of article 17, or the rules [or] regulations . . . promulgated thereto . . . shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation."

Department staff has proven each of the violations alleged in the complaint. Furthermore, each of these violations continued over some time and, pursuant to ECL 71-1929(1), respondents are liable to a penalty up to \$37,500 per day for each violation. As the ALJ notes, the maximum authorized statutory penalty for each of the proven violations is in the millions of dollars. The total penalty (both payable and suspended) sought by Department staff is \$37,000. Department staff notes that the payable penalties it seeks to impose are within the penalty ranges recommended under DEC Program Policy DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy, issued May 21, 2003 (DEE-22).

Proper registration of PBS facilities is important to the PBS regulatory scheme because it ensures that the Department has current information for all PBS facilities. Proper closure of out-of-service UST systems is necessary to ensure that petroleum products are not left in abandoned tanks that may someday leak and release petroleum into the environment.

The civil penalty requested by Department staff is authorized and appropriate for the violations established on this motion. I also conclude that the apportionment of the penalty proposed by staff is similarly authorized and appropriate.

Corrective Measures

With regard to corrective measures, Department staff seeks an order of the Commissioner directing respondents to permanently close the UST system at the facility in accordance with the provisions of 6 NYCRR 613-2.6(b), (c), (e) and 613-1.9(f). The proper closure of the UST system is required under part 613 and staff's request is consistent with the regulatory requirements. Accordingly, I hereby direct respondents to, within 120 days of service of the Commissioner's order on them, permanently close the UST system at the facility in accordance with all applicable legal requirements including 6 NYCRR 613-2.6(b), (c), and (e).²

² The ALJ notes that compliance with 6 NYCRR 613-1.9(f) is required by 6 NYCRR 613-2.6(b)(1) and, accordingly, citing it as a separate requirement is not necessary (*see* Summary Report at 15 n7).

All required notices and submittals to the Department are to be sent to the attention of Ronald F. Novak, P.E., 317 Washington Street, Watertown, NY 13601.

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

- I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 is granted.
- II. Based on record evidence, respondents are adjudged to be liable as follows:
 - A. Respondents Nicki L. Kogut and Joanna E. Minichello are jointly and severally liable for violating ECL 17-1009(2) and 6 NYCRR 613-1.9(d), by failing to renew the PBS registration of the petroleum bulk storage facility at the site within 30 days of the transfer of ownership of the facility to them;
 - B. Respondents Nicki L. Kogut and Joanna E. Minichello are jointly and severally liable for violating 6 NYCRR 613-2.6(a)(3), by failing to permanently close the underground storage tank system at the petroleum bulk storage facility during the time that they owned the facility;
 - C. Respondents Nicki L. Kogut, Joanna E. Minichello, and Artemis Enterprises Plus, LLC are jointly and severally liable for violating ECL 17-1009(2) and 6 NYCRR 613-1.9(d), by failing to renew the registration of the petroleum bulk storage facility within 30 days of the transfer of ownership of the petroleum bulk storage facility to respondent Artemis Enterprises Plus, LLC; and
 - D. Respondents Nicki L. Kogut, Joanna E. Minichello, and Artemis Enterprises Plus, LLC, are jointly and severally liable for violating 6 NYCRR 613-2.6(a)(3), by failing to permanently close the underground petroleum bulk storage system at the facility during the time that respondent LLC owned the facility.
- III. I hereby assess civil penalties as follows:
 - A. A payable penalty in the amount of nine thousand five hundred dollars (\$9,500) jointly and severally upon respondents Nicki L. Kogut and Joanne E. Minichello for the violations set forth in paragraph II.A and II.B;
 - B. A payable penalty of nine thousand five hundred dollars (\$9,500) jointly and severally upon respondents Nicki L. Kogut, Joanna E. Minichello, and Artemis Enterprises Plus, LLC for the violations set forth in paragraph II.C. and II.D; and

- C. Assessing a further penalty of eighteen thousand dollars (\$18,000) jointly and severally upon respondents Nicki L. Kogut, Joanna E. Minichello, and Artemis Enterprises Plus, LLC, which amount shall be suspended provided that respondents comply with all terms and conditions of this order
- IV. Within sixty (60) days of the service of this order upon respondents Nicki L. Kogut and Joanna E. Minichello, the civil penalties that are assessed in paragraph III.A. shall be paid by certified check, cashier's check or money order made payable to the order of the New York State Department of Environmental Conservation. Similarly, within sixty (60) days of the service of this order upon respondents Nicki L. Kogut, Joanna E. Minichello, and Artemis Enterprises Plus, LLC, the civil penalties that are assessed in paragraph III.B. shall be paid by certified check, cashier's check or money order made payable to the order of the New York State Department of Environmental Conservation. All payments shall be submitted to:

Ronald F. Novak, P.E.
New York State Department
of Environmental Conservation
Region 6
317 Washington Street
Watertown, NY 13601

In the event that respondents fail to comply with any term or condition of this order, the suspended portion of the penalty (that is, eighteen thousand dollars [\$18,000]) set forth in paragraph III.C., shall immediately become due and payable and shall be submitted in the same manner and to the same address as the non-suspended penalties.

- V. I hereby direct respondents Nicki L. Kogut, Joanna E. Minichello, and Artemis Enterprises Plus, LLC to, within one hundred days (120) days of service of this order upon them, permanently close the underground system at the facility in accordance all applicable legal requirements including 6 NYCRR 613-2.6(b), (c), and (e).
- VI. Any notices, submittals, or questions regarding this order shall be addressed to Ronald F. Novak, P.E. at the address set forth in paragraph IV of this order.

VII. The provisions, terms and conditions of this order shall bind respondents Nicki L. Kogut, Joanna E. Minichello, and Artemis Enterprises Plus, LLC, and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: January 14, 2021
Albany, New York

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Title 10 of
Article 17 of the Environmental Conservation Law and
6 NYCRR Part 613

SUMMARY REPORT

- by -

DEC Case No.
R6-20170804-39

**NICKI L. KOGUT,
JOANNA E. MINICHELLO,
and
ARTEMIS ENTERPRISES PLUS, LLC,**

PBS No. 6-600225

Respondents.

PROCEEDINGS

This summary report addresses a motion for order without hearing (motion for order) filed with the Office of Hearings and Mediation Services by staff of the New York State Department of Environmental Conservation (DEC or Department) under cover letter dated April 17, 2019. In accordance with my ruling dated May 28, 2019, Department staff submitted a reply (DEC reply) to respondents' filing in opposition to the motion for order. Although I authorized respondents to file a sur-reply, they failed to do so. Accordingly, by letter dated June 20, 2019, I advised the parties that the motion for order would be decided on the filings of the parties through and including the DEC reply.

Pursuant to section 622.12(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), staff may serve a motion for order without hearing in lieu of or in addition to a complaint. Here, staff served the motion for order on respondents in addition to a notice of hearing and complaint. As authorized by 6 NYCRR 622.3(a)(3) and 622.12(a), staff served the motion by certified mail.

By the motion for order, Department staff alleges that respondent Nicki L. Kogut (respondent Kogut), respondent Joanna E. Minichello (respondent Minichello), and respondent Artemis Enterprises Plus, LLC (respondent LLC) (collectively, respondents) violated provisions of article 17 of the Environmental Conservation Law (ECL) and 6 NYCRR part 613 at a site (site) located at the intersection of NYS Routes 180 and 12E, Town of Brownville, Jefferson County. Specifically, staff alleges that respondents violated (i) ECL 17-1009 and 6 NYCRR 613-1.9(d) by failing to renew the registration of a petroleum bulk storage (PBS) facility (facility) located at the site within 30 days of the transfer of ownership of the facility, and (ii) 6 NYCRR 613-2.6(a)(3) by failing to permanently close PBS tanks that had been out-of-service for more than 12 months at the facility.

In support of the motion for order, Department staff filed a supporting brief (staff supporting brief); an affidavit of Randall C. Young, Esq. (Young affidavit), Regional Attorney, DEC Region 6, sworn to April 17, 2019, with attached exhibits; an affidavit of Ronald F. Novak (Novak affidavit), Regional Bulk Storage Supervisor, DEC Region 6, sworn to April 10, 2019, with attached exhibits; and an affidavit of Jessica E. Fauteux (Fauteux affidavit), Legal Assistant, DEC Region 6, sworn to April 11, 2019, with attached exhibits.

In response to the motion for order, respondents filed an affidavit of David P. Antonucci, Esq. (Antonucci affidavit), counsel for respondents, dated May 20, 2019; and an affidavit of respondent Nicki L. Kogut (Kogut affidavit), dated May 20, 2019, with attached exhibits. In response to an inquiry from this office, under cover letter dated May 30, 2019, respondents filed a supplement (Kogut exhibit A supplement) to exhibit A of the Kogut affidavit.

As noted above, I authorized the parties to file further responsive pleadings in this matter. Only Department staff, however, filed a further response. The staff response consists of a reply brief (staff reply brief), and a signed but undated affirmation of Randall C. Young, Esq. (Young affirmation), with attached exhibits.

Department Staff's Allegations

By its motion for order, Department staff asserts two causes of action:

1. that respondents violated ECL 17-1009(2) and 6 NYCRR 613-1.9(d) "by failing to renew the registration of the facility within 30 days of transfer of ownership to them;" and
2. that respondents violated 6 NYCRR 613-2.6(a)(3) "by failing to permanently close petroleum bulk storage tanks at the facility that had been out-of-service for more than 12 months" (motion for order at 2, 4).

Department staff requests that the Commissioner issue an order (i) holding respondents liable for the violations as alleged above; (ii) directing respondents to "permanently close the tanks [at the facility] in compliance with 6 NYCRR [] 613-2.6(b), (c), and (e) and 6 NYCRR [] 613-1.9(f);" and (iii) assessing a civil penalty against respondents in the amount of \$37,000, of which \$18,000 is to be suspended provided that respondents comply with the terms of the Commissioner's order (motion for order at 6-8). Staff also specifies how the penalty is to be apportioned between the various respondents (*id.* at 8).

Respondents' Position

Respondents oppose the motion and assert that "[i]ssues of Fact and Law preclude granting the judgment at this time" (Antonucci affidavit ¶ 3). Respondents argue that the motion for order should be "dismissed for failure to join[] an essential party" (*id.* ¶ 9). Respondents also argue that documentary evidence "bar[s] this action" (*id.* ¶ 10) or, alternatively, that DEC should be estopped from pursuing the motion for order because DEC "repudiat[ed] its own agreement" regarding removal of PBS tanks from the facility (*id.* ¶ 19). Lastly, respondents assert that issues of fact exist that require adjudication (*id.* ¶¶ 14-16, 20-22).

FINDINGS OF FACT

Based upon the papers filed by Department staff and respondents, I make the following findings of fact:

1. The site is located at the corner of NYS Routes 180 and 12E, Town of Brownville, Jefferson County, and is identified by Jefferson County Tax Parcel Identification Number 72.07-1-46 (Fauteux affidavit ¶¶ 4, 6; Fauteux exhibits 2, 3¹; Novak affidavit ¶ 3).

2. Respondent LLC acquired the site from respondents Kogut and Minichello by warranty deed, dated March 19, 2017 (Fauteux affidavit ¶ 7; Fauteux exhibit 3).

3. Respondents Kogut and Minichello acquired the site from Jefferson County by indenture, dated October 19, 2016 (Fauteux affidavit ¶ 8; Fauteux exhibit 4).

4. Jefferson County acquired the site through a tax foreclosure proceeding (judgment dated September 26, 2016) by indenture, dated October 19, 2016 (Fauteux affidavit ¶ 9; Fauteux exhibit 5).

5. At the time of the 2016 tax foreclosure, the site was owned by Leo D. Wilson, Nancy E. Wilson, Yvonne E. Wilson, and Linda C. Finnerson, who had owned the site since January 28, 1983 (Fauteux affidavit ¶¶ 9, 10; Fauteux exhibits 5, 6).

6. Leo D. Wilson submitted the initial PBS application (1993 application) to the Department in March 1993 and the Department issued the initial PBS registration certificate (1993 registration certificate) for the facility on March 11, 1993 (Novak affidavit ¶¶ 5, 6; Novak exhibits 2, 3).

7. The 1993 application lists the type of petroleum facility as "Retail Gasoline Sales" and states that the facility includes two underground PBS tanks; one with a 10,000 gallon capacity, and one with a 4,000 gallon capacity (Novak exhibit 2; *see also* Novak exhibit 3 [1993 registration certificate, listing the two PBS tanks and their respective capacities]).

8. The 1993 certificate for the facility expired on March 11, 1998 and the record indicates that the facility has not operated since that time (Novak affidavit ¶¶ 6-8; Novak exhibit 3).

9. The New York State Environmental Protection and Spill Compensation Fund (Spill Compensation Fund) executed a release, dated December 21, 2015, whereby the Spill Compensation Fund released Jefferson County "from any and all liability to the State for all . . . costs expended, and to be expended in the future" by the Spill Compensation Fund, "and any

¹ Exhibits are attached to several affidavits. The exhibits are identified herein by reference to the name of the affiant and the exhibit number or letter as designated by the affiant. Note that Young exhibits 1-7 are attached to his April 17, 2019 affidavit and Young exhibits 8-16 are attached to the affirmation he submitted with the staff reply brief, dated Jun 5, 2019.

penalties pursuant to New York Navigation Law § 192, relating to the discharge of petroleum product at and in the vicinity of [the site], which discharge was initially reported to the State on or about July 18, 1986" (Kogut exhibit A supplement).

10. The installation date or dates of the facility's two PBS tanks is unknown (*see* Novak exhibit 2 at 2 [1993 application] [denoting the month and year that the tanks were installed as "00" and "00," respectively]; Novak exhibit 3 [1993 registration certificate] [also denoting the month and year that the tanks were installed as "00" and "00," respectively]; Novak exhibit 6 at 2 [respondent LLC's PBS application, dated June 20, 2017] [stating that the deed for the site contains "no information on original install date" of the tanks and that the "best information would [indicate that the tanks were installed] appr[oximately] 30 years ago" (capitalization omitted)]; Novak exhibit 14 [PBS certificate, issued April 3, 2018] [showing no date under the "DATE INSTALLED" column]).

11. On or about May 17, 2017, Department staff inspected the facility for compliance with the State's PBS regulations and determined that (i) the facility was not in operation, (ii) the building at the site was vacant and rundown, (iii) a PBS certificate was not on display, and (iv) the tanks were not permanently closed (Novak affidavit ¶ 8).

12. Department staff sent a Notice of Violation, dated May 17, 2017, to respondents Kogut and Minichello citing, among other things, respondents' failure to file a PBS application with the Department and their failure to properly permanently close the PBS tanks at the facility (Novak ¶ 9; Novak exhibit 4).

13. On July 11, 2017, respondent LLC submitted a PBS application, signed by respondent Kogut on June 20, 2017, as "CEO" of respondent LLC (Novak affidavit ¶ 11; Novak exhibit 6²).

14. On or about October 18, 2017, respondent LLC submitted a revised PBS application, signed by respondent Kogut on October 16, 2017, as President of respondent LLC (Novak affidavit ¶ 21; Novak exhibit 13).³

15. In response to the PBS applications submitted by respondent LLC, the Department issued deficiency notices on July 12, 2017 and on October 23, 2017 advising respondent LLC that its PBS applications were incomplete and, on or about October 2, 2017, staff met with respondent Kogut to discuss "actions necessary for Respondents to return to compliance" (Novak affidavit ¶¶ 13, 15, 17; Novak exhibits 8, 10).

² The PBS applications submitted by respondent LLC (Novak exhibits 6, 9) erroneously omit "Plus" from respondent LLC's name.

³ The Novak affidavit states the revised PBS application was received by the Department "on or about November 3, 2017" (Novak affidavit ¶ 21). The revised PBS application is date stamped as having been received by the Department on October 18, 2017.

16. On or after March 28, 2018, respondents Kogut and Minichello submitted a PBS application, signed by respondent Kogut on March 28, 2018, as the property owner (Novak affidavit ¶ 19; Novak exhibit 11).

17. The Department issued a PBS certificate to respondents Kogut and Minichello on April 3, 2018 (Novak affidavit ¶ 20; Novak exhibit 12).

18. The Department issued a PBS certificate to respondent LLC on April 3, 2018 (Novak affidavit ¶ 22; Novak exhibit 14).

DISCUSSION

First Cause of Action

Department staff alleges that respondents violated ECL 17-1009(2) and 6 NYCRR 613-1.9(d) "by failing to renew the registration of the facility within 30 days of transfer of ownership to them" (motion for order at 2).

Pursuant to ECL 17-1009(2), the owner of a PBS facility "shall register the facility with the department" and the "[r]egistration shall be renewed every five years or whenever ownership of a facility is transferred, whichever occurs first." This provision of the ECL is implemented through 6 NYCRR 613-1.9(d), which reads:

- "(1) If ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the department within 30 days after the transfer.
- (2) The facility owner must submit a registration application using forms or electronic means as provided by the department. Forms are available online at www.dec.ny.gov and at all department offices.
- (3) Each application for an initial registration or transfer of facility ownership must be accompanied by a copy of the current deed for the property at which the facility is located. If the facility is located on multiple properties, deeds for each property must be submitted with the application. If a deed does not exist for a particular property, the application must be accompanied by other evidence of ownership of the property.
- (4) The application must be signed by the facility owner.
- (5) Every registration application must be accompanied by payment of the applicable per-facility registration fee as shown in Table 1 of this section."

Respondents do not dispute that the site is a PBS facility (*see* Kogut affidavit; Antonucci affidavit). The site includes two underground petroleum storage tanks with a combined capacity of 14,000 gallons (findings of fact ¶ 7). As set forth under 6 NYCRR 613-1.3(v), a PBS facility is defined to include any property "on or in which are located: (1) one or more tank systems having a combined storage capacity of more than 1,100 gallons (including a major facility); or (2) an underground tank system having a storage capacity that is greater than 110 gallons."

Because the site is a PBS facility, it is subject to the registration requirements set forth under 6 NYCRR 613-1.9(d). Respondents Kogut and Minichello acquired title to the site on October 19, 2016 (findings of fact ¶ 3). Accordingly, to meet the 30-day registration requirement, respondents Kogut and Minichello were required to submit a PBS facility registration application to the Department on or before November 18, 2016.⁴ They failed to do so.

Respondents Kogut and Minichello did not file a PBS registration application with the Department until March 28, 2018 (findings of fact ¶ 16). This submittal was untimely by 495 days.

Similarly, respondent LLC failed to timely submit a PBS facility registration application to the Department. Respondent LLC acquired title to the site on March 19, 2017 (findings of fact ¶ 2). Accordingly, to meet the 30-day registration requirement, respondent LLC was required to submit a registration application on or before April 18, 2017. It failed to do so.

Respondent LLC did not file a PBS registration application with the Department until July 11, 2017 (findings of fact ¶ 13). This submittal was untimely by 84 days. Moreover, as the record reflects, the application submitted by respondent LLC was inaccurate and incomplete (findings of fact ¶ 15). Respondent LLC submitted a complete application on or about October 18, 2017. This submittal was untimely by 183 days. However, because respondents Kogut and Minichello had not completed the registration process as the prior owners of the facility, the Department did not issue a PBS certificate to respondent LLC until April 3, 2018.

On this record, Department staff has established as a matter of law that each respondent violated ECL 17-1009(2) and 6 NYCRR 613-1.9(d) by failing to renew the registration of the facility within 30 days of transfer of ownership to each of them, respectively, as alleged in the first cause of action.

Second Cause of Action

Department staff alleges that respondents violated 6 NYCRR 613-2.6(a)(3) "by failing to permanently close petroleum bulk storage tanks at the facility that had been out-of-service for more than 12 months" (motion for order at 4).

As stated in the motion for order, the provisions of 6 NYCRR 613-2.6(a)(3) apply to underground storage tank (UST) systems (motion for order at 4). Pursuant to 6 NYCRR 613-1.3(br), a UST system "means a tank system that has ten percent or more of its volume beneath the surface of the ground or is covered by materials."

Respondents do not dispute that the tank system located at the site constitutes a UST system (*see* Kogut affidavit; Antonucci affidavit). The record shows that the site includes two

⁴ Department staff sometimes erroneously alleges that the PBS registration application was due by November 18, 2015 (*see* motion for order at 4; staff supporting brief at 5).

underground petroleum storage tanks (findings of fact ¶ 7; *see also* Novak affidavit ¶¶ 3, 8, 24 [Novak testimony that he is familiar with the site and that he inspected same on or about May 17, 2017 and January 15, 2019]; Novak exhibit 1 [PBS Program Facility Information Report, printed on May 3, 2018, stating that the facility's tanks are located underground]; Novak exhibit 13 at 2 [PBS application, certified by respondent Kogut on October 16, 2017, stating that the facility's tanks are located underground]).

With certain exceptions that are not applicable here, the provisions of 6 NYCRR subpart 613-2 apply to every UST system that is part of a PBS facility (*see* 6 NYCRR 613-2.1 [stating that a UST system that is part of a facility is subject to the provisions of subpart 613-2, except if the UST system is subject to regulation under 6 NYCRR subpart 613-3]).⁵

Pursuant to 6 NYCRR 613-2.6(a)(3), "[w]hen a UST system is out-of-service for more than 12 months, the facility must permanently close the UST system in accordance with subdivisions (b) through (e) of this section." There is no dispute that the UST system at the site has been out-of-service for more than 12 months. Indeed, the record indicates that the former gas station at the site ceased operations in or before 1998 and there is nothing in the record that indicates the UST system has been in service since that time (Novak affidavit ¶ 7; *see also id.* ¶ 8 [Novak testimony that when he inspected the site on or about May 17, 2017 the facility was not operating and "[t]he building at the site was vacant and appeared rundown"]).

Pursuant to 6 NYCRR 613-1.2(d) "[a]ny provision of [part 613] that imposes a requirement on a facility imposes that requirement on every operator and every tank system owner at the facility, unless expressly stated otherwise." The requirements established under 6 NYCRR 613-2.6(a)(3) are imposed on the facility and provide no exception for the tank system owners. Accordingly, because each respondent owns, or formerly owned, the facility, each respondent is liable for any violation of 6 NYCRR 613-2.6(a)(3).

On this record, Department staff has established as a matter of law that each respondent violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close the UST system at the facility that had been out-of-service for more than 12 months.

Respondents' Defenses

Although respondents fail to proffer facts to controvert the factual elements that establish the violations alleged in the motion for order, respondents assert that "[i]ssues of Fact and Law preclude granting the judgment at this time" (Antonucci affidavit ¶ 3). I address the issues raised by respondents below, *seriatim*.

⁵ Respondents do not argue that the UST system at the facility is excepted from the provisions of 6 NYCRR subpart 613-2, nor do they proffer evidence to that effect. Nevertheless, I note that the record includes evidence demonstrating that the exceptions set forth under 6 NYCRR 613-3.1 do not apply to the facility at issue here (*see* findings of fact ¶ 7 [noting that the PBS tanks at the facility were used to store gasoline for retail sale]; Novak affidavit ¶ 28 [Novak testimony that the PBS tanks installed at the facility "are of both age and size as to not be field constructed"]).

-- Failure to Join a Necessary Party

Respondents argue that the motion for order "should be denied or, in the alternative, the matter dismissed for failure to joint (sic) an essential party" (Antonucci affidavit ¶ 9).

As has been noted in prior matters before this office, the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [part 622]) do not include provisions for joinder of a non-party (*see e.g. Matter of U.S. Energy Development Corp.*, Chief ALJ Ruling, Aug. 23, 2013, at 17 [stating that "whether the failure to join necessary parties is an available defense in a Part 622 proceeding is an open question"]; *Matter of Berger*, ALJ Ruling, May 28, 2010, at 6 [noting that part 622 does not provide for joinder of non-parties]; *Matter of Gaul*, ALJ Ruling, Jan. 12, 2009, at 11 [holding that "it is solely up to the discretion of staff as to whom it decides to prosecute"]).

Notably, in 1994, former provisions of part 622 that had provided for joinder of non-parties were struck from the regulations in their entirety (*see* former 6 NYCRR 622.12[c] [2]; *see also Matter of Berger* at 5-6 [discussing the 1994 revisions]). I note also that no party to these proceedings has cited, nor have I identified, a ruling under the current version of part 622 wherein an ALJ compelled Department staff to join a non-party. Nevertheless, assuming, without deciding, that the failure to join a necessary party is an available defense in DEC enforcement proceedings, I conclude that respondents have not established that Jefferson County is a necessary party.

Where, as here, the provisions of part 622 do not address an issue presented, the CPLR may be consulted for guidance (*Matter of Gramercy*, ALJ Ruling, Jan. 14, 2008, at 7-8). Under the CPLR, persons who ought to be parties and who are subject to the court's jurisdiction must be made parties (*see* CPLR 1001[b] [stating that "[w]hen a person who should be joined under [CPLR 1001(a)] has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned"]). CPLR 1001(a) provides that "[p]ersons [i] who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or [ii] who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

Respondents argue that Jefferson County should be joined because the county "clearly possessed/owned th[e] premises as it exists now" and, therefore, "every alleged statutory violation of the Respondents . . . would apply to the County" (Antonucci affidavit ¶ 4). This argument fails on its face.

With regard to the first cause of action (respondents' failure to register the facility), these violations do not "apply to the County." Pursuant to 6 NYCRR 613-1.9(d)(1), "[i]f ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the department within 30 days after the transfer." As discussed above, each of the respondents has been shown to have owned the facility and, therefore, each respondent falls within the reach of this provision. The regulation does not, however, impose liability on a prior owner for the failure of "the new facility owner" to

submit an application to the Department. Accordingly, Jefferson County is not liable for respondents' failure to register the facility.

As to the second cause of action, 6 NYCRR 613-2.6(a)(3) requires every operator and every owner of a UST system to permanently close the system if it has been out-of-service for more than 12 months (*see* 6 NYCRR 613-1.2[d] [stating that "every operator and every tank system owner at the facility" is subject to the requirements imposed on a facility under part 613]). Similar to the first cause of action, Jefferson County is not liable for respondents' failure to permanently close the UST system during the time that respondents owned the facility. Department staff has established that respondents violated 6 NYCRR 613-2.6(a)(3) during the time that respondents owned the facility. Whether Jefferson County may be liable under 6 NYCRR 613-2.6(a)(3) for failing to close the UST system during the brief time that it possessed the site is not before me.

Respondents next argue that Jefferson County "has an absolute liability for contribution and indemnity in this matter" and "[f]ull and fair relief cannot be afforded the Respondent (sic) unless that entity is included" (Antonucci affidavit ¶ 7). First, I note that Jefferson County acquired the site through a tax foreclosure proceeding and, as stated in the deed, sold the site to respondents Kogut and Minichello "subject to all terms, conditions, limitations, disclaimers and waivers contained in the Property Tax Enforcement Administrative Regulations of the Jefferson County Board of Legislators" (Fauteux exhibit 4 [deed into respondents Kogut and Minichello]; findings of fact ¶¶ 3, 4; *see also* Young exhibit 16 [contract of sale signed by respondents Kogut and Minichello, ¶ 10 (buyer's due diligence) and ¶ 12 (environmental disclosure)]). Given the forgoing, respondents' assertion that Jefferson County has "absolute liability for contribution and indemnity" may be misplaced.

More importantly in terms of this proceeding, it has long been held that claims for contribution or indemnification against another party may not be adjudicated in this forum (*see Matter of Broome County*, ALJ Ruling, July 23, 1986, at 10 [holding that it is "beyond the statutory authorization of this administrative tribunal to consider equitable claims for contribution and indemnity"]; *Matter of Huntington and Kildare, Inc.*, Chief ALJ Ruling, Nov. 15, 2006 [holding that DEC enforcement proceedings "are not a proper forum for the resolution of claims among respondent parties for contribution or indemnification"]). Because such claims may not be heard, the purported liability of a non-party for contribution and indemnification does not provide a basis for mandatory joinder.

As set forth in the motion for order, Department staff seeks an order from the Commissioner (i) assessing penalties against respondents for their respective violations of the ECL and part 613, and (ii) directing respondents to permanently close the UST system at the site. Staff has established respondents' liability for the violations alleged in the motion for order and, as discussed above, respondents have made no demonstration that Jefferson County must be joined to accord complete relief between the parties. Additionally, respondents have not sought to demonstrate that Jefferson County might be inequitably affected by a decision in this matter.

Under the provisions CPLR 1001(a), a person should be made a party to an action if (i) necessary to ensure complete relief is to be accorded between the persons who are parties to the

action, or (ii) the person might be inequitably affected by a judgment in the action. Here, respondents have failed to make the requisite showing to demonstrate that Jefferson County must be joined.

-- Documentary Evidence

Respondents argue that a release (release) executed by the New York Environmental Protection and Spill Compensation Fund (Spill Compensation Fund) on December 21, 2015 was intended "to create documentation that the premises could be purchased without fear of cost, statutory violation or penalty from the DEC" (Antonucci affidavit ¶ 12).

Contrary to respondents' assertions, the terms of the release have no bearing on the violations alleged by Department staff. The release states that the Spill Compensation Fund released Jefferson County from:

"any and all liability to the State for all . . . costs expended, and to be expended in the future, by the [Spill Compensation Fund,] and any penalties pursuant to New York Navigation Law § 192, relating to the discharge of petroleum product at and in the vicinity of [the site], which discharge was initially reported to the State on or about July 18, 1986"

(Kogut exhibit A supplement).

Neither the registration requirements under 6 NYCRR 613-1.9(d) nor the tank closure requirements under 6 NYCRR 613-2.6(a)(3) fall within the scope of the release. The release expressly states that it relates to potential liability for costs incurred by the Spill Compensation Fund and penalties under Navigation Law § 192. The requirement to register the facility is neither a cost incurred by the Spill Compensation Fund, nor a penalty imposed under the Navigation Law. Rather, pursuant to ECL 17-1009 and 6 NYCRR 613 1.9(d), the registration requirement is imposed on all facility owners. Nothing in the release relieves the facility owner from the obligation to register the facility.

Similarly, the UST system closure requirements imposed under 6 NYCRR 613-2.6(a)(3) fall outside the scope of the release. The existence or the absence of a petroleum spill at the site in July of 1986 has no bearing on whether the out-of-service UST system at the facility must be permanently closed in accordance with the regulations. The facility was first registered in 1993 and, provided that the UST system at the site remained in operation, the closure requirements of 6 NYCRR 613 2.6(a)(3) would not be implicated. Sometime in or before 1998, however, the facility ceased operations and the requirement to permanently close the UST system ensued.

There is nothing in the release that relieves the facility owner from the obligation to permanently close the out-of-service UST system at the site. Rather, pursuant to 6 NYCRR 613 2.6(a)(3), any UST system that has been out-of-service for more than 12 months must be permanently closed, regardless of the condition of the system.

-- Estoppel and Settlement

Respondents argue that: "an agreement was reached between the parties for removal of the tanks;" "the agreement was complete in all respects[,] except the DEC's former Counsel refused to complete same;" and "DEC should be bound by its agreement" (Antonucci affidavit ¶¶ 17-19).

First, it must be noted that estoppel generally "cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (*Matter of Schorr v New York City Dept. of Housing Preserv. and Dev.*, 10 NY3d 776, 779, [2008] [citations omitted]; *see also Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988] [holding that "estoppel is not available to preclude a municipality from enforcing [its] laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results"] [citations omitted]). Here, the Department is discharging its statutory duty to regulate PBS facilities, as set forth under the ECL, and estoppel is not available to respondents.

Moreover, respondents fail to establish that the elements of estoppel are present here. Respondents assert that "an agreement was reached between the parties for removal of the tanks" and that the "agreement was complete in all respects; except the DEC's former Counsel refused to complete the same" (Antonucci affidavit ¶¶ 17-18). By respondents' own assertion, DEC staff refused to complete the agreement. In the absence of a completed agreement, there can be no reasonable reliance.

Although respondents assert that a complete agreement to resolve the matter was reached between the parties, respondents produced no records that support that assertion. In contrast, Department staff proffered records of exchanges between the parties and draft settlement documents. As affirmed by staff counsel, and evinced by the proffered documents, the Department has no record that respondents executed a consent order to resolve this matter (Young affirmation ¶ 8; Young exhibit 10 [proposed consent order]). The record reflects only that there were ongoing settlement discussions between the parties (*see* Young affirmation ¶¶ 5-14; Young exhibit 4 [DEC letter to respondents, dated Oct. 11, 2017 (enclosing a proposed consent order and noting, among other things, respondents' obligation to permanently close the out-of-service UST system at the facility)]; Young exhibit 13 [Antonucci letter to DEC, dated Sept. 16, 2018 (stating the "general language" of the proposed consent order is acceptable, but also suggesting certain changes)]).

-- Issues of Fact Exist

Respondents argue that "[t]he recounting of the Respondent (sic) dramatically differs from the moving pleadings" and "the question of whether permits for the tanks [are] available as a remedy also remains [an] issue of fact" (Antonucci affidavit ¶¶ 20, 21). Although respondents do not elaborate, it appears the "recounting" that they refer to relates to settlement negotiations between the parties. That issue is discussed in the estoppel section above.

With regard to "whether permits for the tanks [are] available as a remedy," this is not a factual issue in dispute. To clarify, the facility now has a current registration certificate (*see* Novak exhibit 14), not a permit. The issuance of the PBS registration certificate for the facility does not, however, "remedy" the failure of the respondents to permanently close the UST system at the site in accordance with the regulations. Further, although the issuance of a registration certificate ends the period of noncompliance with the requirement to submit a PBS application, it does not alter the fact that the applications were untimely.

Accordingly, respondents have raised no issues of fact that require adjudication.

Responsible Corporate Officer

As the Commissioner recently stated "[i]t is well settled that a corporate officer can be held personally liable for violations by the corporate entity that threaten public health, safety, or welfare. A corporate officer need only have responsibility over the activities of the business that caused the violations to be held individually liable" (*Matter of Call-A-Head Portable Toilets, Inc.*, Decision and Order of the Commissioner, Mar. 4, 2019, at 5 [citation omitted]).

Here, Department staff alleges that respondents Kogut and Minichello are jointly and severally liable for the violations of respondent LLC (motion for order at 5). Staff argues that this liability attaches because respondents Kogut and Minichello are the sole members and sole managers of respondent LLC (*id.* at 6; *see also* staff supporting brief at 10-11). Staff states that respondents Kogut and Minichello "have not delegated management responsibility to any other individual or entity" and that they have "full authority to take actions on behalf of Artemis Enterprises Plus, LLC to prevent and correct the violations" (motion for order at 6). Lastly, staff states that respondents Kogut and Minichello were "made aware of the continuing requirement to permanently close the out-of-service petroleum tank[s] at the facility . . . and failed to cause Artemis Enterprises Plus, LLC to take any action" (*id.*; *see also* Novak exhibit 4 [Notice of Violation, dated May 17, 2017, addressed to respondents Kogut and Minichello]).

Among other things, Department staff cites to the written responses and documents that respondents produced during discovery (discovery responses) to establish that respondents Kogut and Minichello should be held liable as responsible corporate officers (*see* motion for order at 6; staff supporting brief at 10-11). In their discovery responses, respondents identify respondents Kogut and Minichello as the only current or former managers of respondent LLC, and also as the only members of respondent LLC (Young Exhibit 3 [staff discovery demand ¶¶ 4, 5]; Young Exhibit 4 [discovery responses ¶¶ 4, 5]). Additionally, staff states that, other than respondents' counsel, respondents Kogut and Minichello were the only individuals who attended meetings with staff concerning the violations alleged in the motion for order (motion for order at 6).

Respondents do not dispute any of the factual assertions made by Department staff in support of holding respondents Kogut and Minichello liable for the violations of respondent LLC, nor do respondents offer argument in opposition to such liability.

Notably, the record reflects that respondent LLC is a limited enterprise. Its address is the residence of respondents Kogut and Minichello (*see* Fauteux exhibit 3 [deed from respondents

Kogut and Minichello into respondent LLC, stating that all parties have the same address]; Fauteux exhibit 7 [NYS Department of State, Division of Corporations, printout stating that respondent LLC's address for DOS process is the home address of respondents Kogut and Minichello]; Novak exhibits 11, 13 [respondents' PBS applications identifying the same address for the facility owner before and after respondent LLC purchased the site]). Respondent LLC owns the site, but the record shows that the site has not been used for the sale of gasoline in decades and the building at the site has fallen into disrepair (findings of fact ¶¶ 7, 8, 11).

There is also no indication in the record that respondent LLC has employed staff other than respondents Kogut and Minichello. In response to discovery demands for "[a]ny employee handbooks, policies, guidance, and instructions for employees" of respondent LLC, respondents stated that there are "[n]one" (Young Exhibit 3 [staff discovery demand ¶ 20]; Young Exhibit 4 [discovery responses ¶ 20]). Similarly, in response to a demand for "[a]ll job descriptions of employees" of respondent LLC, respondents stated that there are "[n]one" (Young Exhibit 3 [staff discovery demand ¶ 21]; Young Exhibit 4 [discovery responses ¶ 21]).

I conclude that Department staff has established that respondents Kogut and Minichello have responsibility over the activities of respondent LLC that resulted in the violations alleged in the motion for order. Accordingly, respondents Kogut and Minichello are liable for respondent LLC's failure to timely register the PBS facility and its failure to permanently close the UST system at the site.

Relief

Department staff requests that the Commissioner issue an order (i) holding respondents liable for the violations alleged in the motion for order, (ii) directing respondents to permanently close the UST system at the facility in compliance with 6 NYCRR 613-2.6(b), (c), and (e), and 6 NYCRR 613-1.9(f); (iii) assessing a penalty against respondents in the amount of \$37,000, with the penalty apportioned among the respondents as follows:

- \$1,500 assessed against respondents Kogut and Minichello, jointly and severally, "for violation of 6 NYCRR [] 613-1.9(d) – failure to register the facility in their names in a timely manner;"
- \$1,500 assessed against all respondents, jointly and severally, "for violation of ECL § 71-1009(2) and 6 NYCRR [] 613-1.9(d), for failure to register the facility in the name of Artemis Enterprises Plus, LLC in a timely manner;"
- \$8,000 assessed against respondents Kogut and Minichello, jointly and severally, "for violation of 6 NYCRR [] 613-2.6(a)(3), failure to permanently close out-of-service tanks;"
- \$8,000 assessed against all respondents, jointly and severally, "for violation of 6 NYCRR [] 613-2.6(a)(3);" and
- \$18,000 "assessed against all Respondents, jointly and severally, payment of which should be suspended, conditioned upon Respondents['] compliance with the terms of any order the Commissioner may issue."

(motion for order at 7-8).

Department staff cites ECL 71-1929(1) in support of its penalty request (staff supporting brief at 5, 9). Pursuant to ECL 71-1929(1),

"[a] person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 . . . of article 17, or the rules [or] regulations . . . promulgated thereto . . . shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation."

As discussed herein, Department staff has proven each of the violations alleged in the motion for order. Moreover, each of the proven violations continued over many days and, pursuant to ECL 71-1929(1), respondents are liable to a penalty up to \$37,500 per day for each violation. Therefore, the maximum authorized statutory penalty for each of the proven violations is in the millions of dollars (*see* Commissioner Policy DEE-1, Civil Penalty Policy, issued June 20, 1990 [DEE-1], § IV.B [stating that "[t]he starting point of any penalty calculation should be a computation of the potential statutory maximum for all provable violations"]). For example, the failure of respondents Kogut and Minichello to permanently close the UST system at the site continued over the 152 days that they owned the site (from October 19, 2016 through March 19, 2017), thereby exposing them to a maximum penalty of \$5,700,000.

Department staff notes that the payable penalties it seeks to impose are within the penalty ranges recommended under DEC Program Policy DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy, issued May 21, 2003 (DEE-22).⁶ DEE-22 expressly states that "penalty amounts calculated with the aid of this document in adjudicated cases must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents" (DEE-22 at 1).

The total penalty (both payable and suspended) sought by Department staff is \$37,000, which is just below the maximum statutory penalty for a single violation of the PBS regulations lasting a single day (i.e., \$37,500). Here, staff has proven four violations, each of which continued for many months. Proper registration of PBS facilities is important to the PBS regulatory scheme because it ensures that the Department has current information for all PBS facilities. Proper closure of out-of-service UST systems is necessary to ensure that petroleum products are not left in abandoned tanks that may someday leak and release petroleum into the environment (*see* DEE-1, § IV.D [identifying the potential harm caused by a violation and the importance of the type of violation in the regulatory scheme as "gravity component factors"]).

I conclude that the penalty requested by Department staff is authorized and appropriate for the violations established on this record. I also conclude that the apportionment of the penalty proposed by staff is appropriate under the circumstances of this matter.

⁶ Department staff notes that DEE-22 was issued prior to the effective date of revisions to the PBS regulations in 2015 and, therefore, includes outdated citations. Nevertheless, the penalty schedule issued under DEE-22 includes penalty ranges for "Failure to register" and for "Tanks not permanently closed" that are comparable to the violations at issue here (staff supporting brief at 9; Young exhibit 5 [DEE-22 – Penalty Schedule]).

With regard to corrective measures, Department staff seeks an order of the Commissioner directing respondents to permanently close the UST system at the facility in accordance with the provisions of 6 NYCRR 613-2.6(b), (c), (e) and 613-1.9(f). The proper closure of the UST system is required under part 613 and staff's request is consistent with the regulatory requirements. Accordingly, I recommend that the Commissioner direct respondents to, within 120 days of service of the Commissioner's order on them, permanently close the UST system at the facility in accordance with 6 NYCRR 613-2.6(b), (c), and (e),⁷ and to send all required notices and submittals to the Department to the attention of Ronald F. Novak, PE, 317 Washington Street, Watertown, NY 13601.

CONCLUSIONS OF LAW

I conclude that Department staff's motion for order should be granted in its entirety against each respondent. Specifically, I conclude that respondents violated ECL 17-1009 and 6 NYCRR 613-1.9(d) by failing to register the facility within 30 days of acquiring ownership of the facility, and that respondents violated 6 NYCRR 613-2.6 by failing to permanently close the UST system at the facility that had been out-of-service for more than 12 months.

RECOMMENDATION

I recommend that the Commissioner issue an order:

1. Holding respondents Kogut and Minichello jointly and severally liable for violating ECL 17-1009(2) and 6 NYCRR 613-1.9(d) by failing to renew the PBS registration of the facility within 30 days of the transfer of ownership of the facility to them.
2. Holding respondents Kogut and Minichello jointly and severally liable for violating 6 NYCRR 613-2.6(a)(3) by failing to permanently close the UST system at the facility during the time that they owned the facility.
3. Holding all respondents jointly and severally liable for violating ECL 17-1009(2) and 6 NYCRR 613-1.9(d) by failing to renew the registration of the facility within 30 days of the transfer of ownership of the facility to respondent LLC.
4. Holding all respondents jointly and severally liable for violating 6 NYCRR 613-2.6(a)(3) by failing to permanently close the UST system at the facility during the time that respondent LLC owned the facility.
5. Assessing a payable penalty of \$9,500 jointly and severally upon respondents Kogut and Minichello for the violations set forth in paragraphs 1 and 2 above.

⁷ Note that compliance with 6 NYCRR 613-1.9(f) is required by 6 NYCRR 613-2.6(b)(1) and, therefore, citing it as a separate requirement is unnecessary.

6. Assessing a payable penalty of \$9,500 jointly and severally upon all respondents for the violations set forth in paragraphs 3 and 4 above.

7. Assessing a penalty of \$18,000 jointly and severally upon all respondents, the entirety of which shall be suspended provided that respondents comply with the terms and conditions of the Commissioner's order.

8. Directing respondents to, within 120 days of service of the order upon them, permanently close the UST system at the facility in accordance with 6 NYCRR 613-2.6(b), (c), and (e), and further directing respondents to send all notices and submittals required under the foregoing provisions to the Department to the attention of Ronald F. Novak, PE, 317 Washington Street, Watertown, NY 13601.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: April 28, 2020
Albany, New York