

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

In the Matter of the Alleged Violations 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, by

ORDER

LALO’S AUTO SERVICE CENTER INC.,

DEC File No.
R2-20210309-23

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Lalo’s Auto Service Center Inc. (Lalo) violated Environmental Conservation Law (ECL) 17-1009 and section 613-1.9(c) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) in failing to renew the registration of its petroleum bulk storage (PBS) facility at 1496 Inwood Avenue, Bronx, New York for a period of approximately thirteen years. At the facility is a 275-gallon aboveground used oil tank.

Department staff filed a motion for order without hearing in lieu of complaint, dated September 30, 2021 (motion). In its motion, Department staff requested that a total civil penalty of twenty-five thousand dollars (\$25,000) be assessed upon respondent. Respondent Lalo failed to respond to the Department’s motion.

Administrative Law Judge (ALJ) Jennifer M. Ukeritis 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.

On January 17, 2001, respondent applied for a PBS facility registration. The location of the aboveground 275 gallon used oil tank is designated on the registration form as “Aboveground-contact w/soil” (*see* Exhibits A, B and C to Affirmation of DEC Region 2 Assistant Engineer Brian Falvey, sworn to on August 10, 2021 [Falvey Aff.]; *see also* Summary Report at 2 [Finding of Fact No. 1]). The Department issued a PBS certificate to respondent on January 26, 2001 which certificate expired on January 26, 2006 (*see id.* [Finding of Fact Nos. 2 and 3]). Respondent however did not file for a renewal of the PBS certificate until July 29, 2019, which renewal was issued two days later (*see id.* [Finding of Fact No. 4]; Falvey Aff. ¶¶ 5, 6). Department staff subsequently processed a further PBS registration renewal for the facility on March 19, 2021 (*see* Falvey Aff. at ¶ 12) which does not expire until January 26, 2026.

Accordingly, there was approximately a thirteen and a half year period between January 2006 and July 2019 during which the facility’s registration had lapsed. Department staff became

aware of this lapse through a search of the PBS registration database in early August 2019 (Falvey Aff., ¶¶ 8-10).

As a consequence of respondent's failure to respond, the ALJ recommends that Department staff's motion be granted in part (*see* Summary Report at 5).

Used oil tanks, regardless of their size were to be registered under the State's petroleum bulk storage regulations by July 14, 1995 (*see* former 6 NYCRR 374-2.3[c][2][ii][a])¹. This registration requirement is continuing (*see* current 6 NYCRR 374-2.3[c][2]; *see also* Memorandum of Law filed by DEC Attorney James L. Simpson dated September 30, 2021 [DEC Memorandum of Law], at 3).

Department staff alleges that respondent was in violation of 6 NYCRR 613-9(c) for the time period January 26, 2006 until July 31, 2019 but, as the ALJ explains, 6 NYCRR 613-9(c) has only been in effect since October 11, 2015 (*see* Summary Report at 4). Prior to that date, the applicable registration provision was contained in 6 NYCRR 612.2, which is not referenced in staff's papers. As Department papers only cite the regulation in effect for four years of the time period alleged, the ALJ has limited her penalty recommendation to those four years -- October 11, 2015 to July 31, 2019 (*see* Summary Report at 4).

Staff, however, also cites to ECL 17-1009 in its papers, which was in effect for the entire period of the alleged violation (*see* Motion at 2, ¶ III). ECL 17-1009(2) provides that registrations are to be renewed every five years or whenever ownership of a facility is transferred. Although it would have been helpful for the papers to have referenced subdivision (2) and not just ECL 17-1009, respondent was on sufficient notice of the violations at issue.²

Pursuant to ECL 17-1009, respondent Lalo was required to renew the PBS registration for its facility in 2006, and subsequent years, and failed to do so until 2019. I conclude that respondent Lalo violated (a) ECL 17-1009 from January 26, 2006 until July 31, 2019, and (b) since October 11, 2015 until July 31, 2019, 6 NYCRR 613-1.9(c), by failing to renew the registration of its facility.³ Accordingly, Lalo was in violation of the registration requirement for the entire period referenced by Department staff. Staff has made a prima facie showing that respondent violated ECL 17-1009 and 6 NYCRR 613-1.6(c).

¹ *See* <https://web.archive.org/web/20080515225100/http://www.dec.ny.gov/regs/4379.html>.

² The Department's enforcement hearing procedures establish that a complaint is to contain a reference to the particular sections, subsections, paragraphs and subparagraphs of the statutes, rules and regulations alleged to have been violated (*see* 6 NYCRR 622.3[a][1][iii]). Although the regulations currently do not establish the same specificity for a motion for order without hearing, it is recommended that staff should follow the same requirements as those imposed on a complaint in 6 NYCRR 622.3(a)(1)(iii).

³ For matters involving PBS registration violations that apply ECL 17-1009, together with the current part 613 regulations, *see 125 Schenectady Avenue Housing Development Fund Corporation*, Order of the Commissioner, August 25, 2016; *see also 2206 Cornaga, LLC*, Order of the Commissioner, August 26, 2019.

As noted, Department staff is requesting a civil penalty of twenty-five thousand dollars (\$25,000) for this violation. ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of title 10 of article 17 and its implementing regulations. Staff references various factors set forth in the DEC's Civil Penalty Policy, DEE-1 (June 20, 1990) and Bulk Storage and Spill Response Enforcement Policy (DEE-4 (March 15, 1991) with respect to the penalty (*see* DEC Memorandum of Law, at 5-7) but does not detail the manner by which this specific figure was calculated.

The ALJ questions the amount of the requested penalty of twenty-five thousand dollars (\$25,000) for respondent's failure to renew and maintain its PBS registration (*see* Summary Report at 5). The ALJ notes that respondent self-corrected the violation in 2019, voluntarily bringing the facility into compliance, which is a key mitigating factor here. Furthermore, as the ALJ references, the record does not indicate the existence of any environmental harm at the facility arising from the use of the tank. Taking these factors into account, the ALJ recommends a penalty of one thousand dollars (\$1,000) per year for the four years that the ALJ finds respondent liable for failing to register its tank (*see* Summary Report at 5).

The Department, in considering late registration penalties, may provide for a penalty reduction where a respondent self-corrects a violation at a time when it is not involved in formal enforcement proceedings. In addition to self-correcting the violation, respondent Lalo has subsequently kept its registration up-to-date. I also take into consideration that, in this matter, no fees are required for registering this tank, as a result of its limited gallonage.⁴ On this record, I would, absent any aggravating factors, consider a civil penalty in the range of four thousand dollars to be appropriate.⁵

However, I cannot ignore the fact that respondent failed to meaningfully engage in any effort to settle this enforcement matter or formally respond to this administrative proceeding. Department staff sets forth in detail the efforts it undertook with respondent (*see* Affirmation of DEC Attorney James L. Simpson dated September 30, 2021 at 2-3, ¶¶ 5-14 and accompanying Exhibits B-H). Respondent's failure to interact meaningfully with Department staff or formally respond to this administrative proceeding is an aggravating factor that clearly warrants an increase in the civil penalty. Based on my review of the record in light of this aggravating factor, I am increasing the civil penalty to be assessed here to seven thousand dollars (\$7,000). This penalty is authorized and appropriate.

I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of the order upon respondent.

⁴ I also note that, in appropriate circumstances, the use or non-use of a tank in a retail setting may be an additional consideration in calculating the civil penalty.

⁵ With respect to heating oil tanks in New York City apartment buildings, as a comparison, where registrations are more than five years overdue, Department staff has generally requested a penalty of ten thousand dollars (\$10,000). However, that relates to matters where a respondent has not self-corrected the violations prior to the commencement of an adjudicatory proceeding and has not complied with the regulatory fee requirements.

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

- I. Department staff's motion for order without hearing in lieu of complaint is granted. By failing to respond to the motion, respondent Lalo's Auto Service Center Inc. waived its right to be heard at a hearing.
- II. Based upon the papers submitted with and in support of Department staff's motion, respondent Lalo's Auto Service Center Inc. is adjudged to have violated (a) ECL 17-1009, from January 26, 2006 until July 31, 2019; and (b) 6 NYCRR 613-1.9(c), from October 11, 2015 until July 31, 2019, by failing to register its petroleum bulk storage facility at 1496 Inwood Avenue, Bronx, New York.
- III. Respondent Lalo's Auto Service Center Inc. is hereby assessed a civil penalty in the amount of seven thousand dollars (\$7,000), to be paid within thirty (30) days of the service of this order upon respondent. Payment is to be by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation at the address noted in paragraph IV of this order.
- IV. The civil penalty payment shall be sent to the following address:

James L. Simpson, Esq.
Assistant Counsel
DEC Region 2 Office of General Counsel
47-40 21st Street
Long Island City, NY 11101-5407
- V. Any questions or other correspondence regarding this order shall also be addressed to James L. Simpson, Esq., at the address referenced in paragraph IV of this order.
- VI. The provisions, terms and conditions of this order shall bind respondent Lalo's Auto Service Center Inc. and respondent's agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____ /S/
Louis Alexander
Deputy Commissioner for Hearings and Mediation Services

Dated: October 3, 2022
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations 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, by

SUMMARY REPORT

DEC File No.
R2-20210309-23

LALO'S AUTO SERVICE CENTER INC.,

Respondent.

Appearance of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (James L. Simpson, Assistant Counsel, of counsel) for staff of the Department of Environmental Conservation

- No appearance for respondent

PROCEEDINGS

By notice of motion for order without hearing in lieu of a complaint dated September 30, 2021 (motion), staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent, Lalo's Auto Service Center, Inc. (respondent), for alleged violations of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 613 at respondent's petroleum bulk storage (PBS) facility located at 1496 Inwood Avenue, Bronx, New York.

Respondent is an active domestic business corporation in the State of New York. Department staff served the motion and supporting papers on respondent by certified mail to the address listed for service of process with the Department of State's Division of Corporations (*see* affirmation of service of James L. Simpson, dated October 15, 2021). The notice of motion instructed the respondent that a written response must be filed within twenty days of the receipt of the motion. Respondent failed to file a response to the motion by October 25, 2021, the date the response was due (*see* 6 NYCRR 622.12[c]). By letter dated November 2, 2021, this matter was assigned to the undersigned.

Department staff's motion papers do not state or number alleged causes of action. The Commissioner previously directed Department staff to specifically number staff's causes of action in all matters (*see Matter of RGLL, Inc.*, Decision and Order of the Commissioner, Dec. 29, 2009, at 5 n4). In addition, 6 NYCRR 622.3(a)(1)(iii) requires each cause of action to be separately stated and numbered. As this motion stands as the complaint, staff should have

separately stated and numbered each cause of action. While this motion contains only one cause of action, it is not specifically stated which regulation was violated, except in the prayer for relief.

Department staff's papers consist of the following: notice of motion dated September 30, 2021; motion for order without hearing dated September 30, 2021; affidavit of Brian Falvey sworn to on August 10, 2021 (Falvey Aff.) attaching three exhibits; affirmation of James L. Simpson dated September 30, 2021 (Simpson Affirmation), attaching eight exhibits. (*See* Appendix A, attached hereto.)

Staff requests that the commissioner issue an order:

- I. "Finding that no hearing is required because no material issue of fact exists;
- II. Finding that Staff is entitled to judgment as a matter of law and to the relief requested herein;
- III. Finding that Respondent violated ECL § 17-1009 and 6 NYCRR 613-1.9 (c)¹ because the Facility's PBS tank registration had been expired for thirteen years prior to renewal;
- IV. Assessing a total civil penalty of twenty-five thousand dollars (\$25,000) against Respondent for violating [Environmental Conservation Law (ECL)] Article 17 and 6 NYCRR Part 613;
- V. Reserving the Department's right to take additional action for violations not specifically alleged herein; and
- VI. Ordering such other and further relief as may be just and appropriate under the circumstances." (*See* Motion at 2.)

FINDINGS OF FACT

1. Respondent is the owner and operator of a petroleum bulk storage (PBS) facility at 1496 Inwood Avenue, Bronx, New York with a single 275 gallon above ground storage tank (AST) with its location classified as in contact with the soil. (*See* Falvey Aff. Exhibit A, Exhibit B, and Exhibit C.)
2. Respondent applied for a PBS certificate on January 17, 2001, which was issued on January 26, 2001. (*See* Falvey Aff. Exhibit C.)
3. Respondent's PBS certification expired on January 26, 2006. (*See* Falvey Aff. Exhibit C.)
4. On July 29, 2019, Respondent then filed for a renewal of the certificate. A new certificate was issued on July 31, 2019, with an expiration date of January 26, 2021. (*See* Falvey Exhibit A and Exhibit B.)

¹ The prayer for relief cites 6 NYCRR 613-1.9(c), the current regulatory language that became effective October 11, 2015. Prior to October 11, 2015, 6 NYCRR 612.2(a)(2) applied.

5. Mr. Brian Falvey is an Assistant Engineer in the Department's Region 2 office who is tasked with inspecting regulated PBS facilities for compliance with NYS ECL article 17 and 6 NYCRR Part 613 related to PBS. (See Falvey Aff. ¶¶ 1, 3, and 4.)
6. Mr. Falvey reviewed the Department's PBS files for the respondent's facility in August of 2019. (See Falvey Aff. ¶ 8.)
7. Mr. Falvey found that the respondent had failed to renew their PBS registration from January 26, 2006, until respondent filed for a renewal on July 29, 2019. (See Falvey Aff. ¶¶ 9 - 11.)
8. Mr. Falvey also found the Department processed the newest renewal application for respondent in March 2021. (See Falvey Aff. ¶ 12.)
9. On April 16, 2021, in an attempt to settle the matter, Department representative, James L. Simpson Esq., emailed a proposed order on consent to respondent at the email address listed on respondent's PBS application. (See Simpson Affirmation ¶ 5.)
10. On May 13, 2021, Mr. Simpson resent the email to the same address on file after not receiving a response. (See Simpson Affirmation ¶ 5.)
11. On May 21, 2021, Mr. Simpson received an email from a Ms. Tania Pena of Tirado & Associates, Inc., stating the firm was respondent's accountants. Ms. Pena requested the paperwork be sent to her. (See Simpson Affirmation ¶ 7.)
12. On May 24, 2021, Mr. Simpson sent the proposed order on consent from his April 16, 2021 email to Ms. Pena. (See Simpson Affirmation ¶ 8.)
13. On June 23, 2021, Mr. Simpson sent a Notice of Calendar Call for July 9, 2021, to both respondent and Ms. Pena via email. (See Simpson Affirmation ¶ 11.)
14. Respondent did not appear at the July 9, 2021 Calendar Call. (See Simpson Affirmation ¶ 13.)
15. As of the date of Department's papers, Mr. Simpson has not heard from Ms. Pena nor the Respondent. (See Simpson Affirmation ¶ 14.)
16. No response has been filed in response to the motion papers filed by Department staff.

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the

movant is entitled to judgment as a matter of law” (*Matter of Frank Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, *adopting* ALJ Summary Report.)

CPLR 3212(b) provides that a motion for summary judgment shall be granted, “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Once the moving party has put forward a *prima facie* case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (*see Matter of Locaparra*, Commissioner’s Decision and Order, June 16, 2003).

Respondent has not submitted any response to Department staff’s motion and therefore has not raised any material fact that would require a hearing. On an unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the violations alleged in the motion (*see Matter of Edelstein*, Order of the Commissioner, July 18, 2014, at 2; *see also Matter of Hunt*, Decision and Order of the Commissioner, July 25, 2006, at 7 n2).

Pursuant to 6 NYCRR 622.12(a), Department staff supported its motion for an order without hearing in lieu of complaint with the affidavit of Brian Falvey, an assistant engineer in the DEC Region 2 PBS unit. Mr. Falvey reviewed files maintained by the Department

Based upon my review of the affirmation, affidavit, and exhibits attached thereto, I conclude that the Department staff have made a *prima facie* showing that the respondent is the facility owner and did not have a valid PBS registration from October 11, 2015, through July 31, 2019.

Pursuant to 6 NYCRR 613-1.9(c), a facility must renew its registration “every five years from the date of the last valid registration certificate until the Department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section.”

Department staff’s papers allege a single count of failing to maintain a PBS registration from January 26, 2006, until July 31, 2019.² In its prayer for relief, Department staff alleges that respondent was in violation of 6 NYCRR 613-1.9(c) for that time period. (*See* Motion p. 2.) However, the effective date of 6 NYCRR 613-1.9(c) is October 11, 2015. Consequently, respondent was allegedly in violation of 6 NYCRR 613-1.9(c) from October 11, 2015, until July 31, 2019.

Accordingly, Department staff’s motion for order without hearing in lieu of a complaint is granted for the revised time period the cited regulations were in effect: October 11, 2015, through July 31, 2019.

² Department staff has not visited the site, according to its papers, and solely finds this in a review of its files after the respondent has renewed its registration. (*See* Findings of Fact Nos. 3, 4, and 6.)

For relief, Department staff seeks a civil penalty in the amount of twenty-five thousand dollars (\$25,000). (*See* Motion p. 2.) Neither staff's affidavit nor the attorney affirmation cite any regulatory authority for penalties related to violations of Part 613 or ECL article 17. Nor does staff cite any penalty policy guidance issued by the Department.

Twenty-five thousand dollars (\$25,000) for a violation the Department did not find until after the respondent corrected it on its own accord, without any indication of environmental harm, is a significant penalty, more so without any explanation of how the amount was determined. Even if this ruling had found a violation of regulations for the full period alleged, January 26, 2006, until July 31, 2019, I would still have trouble accepting the penalty asked for. The Department has given no indication the facility has been inspected in all those years and there is no indication that there has been any environmental harm. Respondent self-corrected its long oversight in registration renewals. That said, the respondent also failed to respond to the Department. Respondent's ignoring Department staff's attempts to settle the matter is troubling, given the importance of these regulations and the environmental damage that could result.

Department has issued penalty guidance on PBS violations that provides a range of penalty amounts when settling the violations in an order on consent. (*See* DEE-22 Petroleum Bulk Storage Inspection Enforcement Policy - Penalty Schedule (issued May 21, 2003).³ Failure to register a facility has a penalty range of \$500-\$5,000, with an average penalty of \$1,000. Registration not current and valid has a penalty range of \$100-\$1000, with an average penalty of \$1,000. While this matter has moved beyond settlement with an order on consent, the guidance is still instructive. Respondent corrected the violation prior to Department staff finding it, which is a mitigating factor. Respondent has failed to respond to the Department, which is an aggravating factor. Balancing the factors, I find a penalty of one thousand dollars (\$1,000) per year the facility did not have a current registration is suitable. Given that respondent has been in violation of the cited regulation for four years, I find that a penalty of four thousand dollars (\$4,000) is authorized and appropriate.

RECOMMENDATIONS

Based upon the foregoing,

1. I recommend that Department staff's motion for order without hearing in lieu of a complaint dated September 30, 2021, is granted on the sole issue of liability against respondent Lalo's Auto Service Center, Inc., from October 11, 2015, until July 31, 2019, for failing to renew and maintain a current PBS regulation under the cited 6 NYCRR 613-1.9(c).
2. I recommend the Commissioner issue an order directing respondent to pay a civil penalty in the amount of \$4,000.

³ DEE-22 has yet to be updated to the new regulations effective October 11, 2015.

Appendix A

Matter of Lalo 's Auto Service Center Inc.
DEC File No. R2-20210309-23
Motion for Order Without Hearing in Lieu of Complaint

- 1) Notice of Motion for Order without Hearing, dated September 30, 2021
- 2) Motion for Order without Hearing, dated September 30, 2021
- 3) Affidavit of Brian Falvey in Support of Motion for Order without Hearing, sworn to August 10, 2021, attaching the following exhibits:
 - A. Petroleum Bulk Storage Application received on July 29, 2019
 - B. Petroleum Bulk Storage Certificate printed August 1, 2019
 - C. Petroleum Bulk Storage Application received on January 17, 2001
- 4) Affirmation of James L. Simpson in Support of Motion for Order without Hearing, dated September 30, 2021, attaching the following exhibits:
 - A. DOS Division of Corporations Entity Information for Lalo's Auto Service Center Inc.
 - B. Email with proposed Order on Consent from James Simpson to respondent dated April 16, 2021
 - C. Email from James Simpson to respondent regarding no response to proposed order on consent dated May 13, 2021
 - D. Email from Tania Pena to James Simpson requesting copy of proposed order as accountants of respondent dated May 21, 2021
 - E. Email from James Simpson to Tania Pena, forwarding proposed settlement, dated May 24, 2021
 - F. Email from James Simpson to Tania Pena regarding no response to proposed order on consent dated June 7, 2021
 - G. Email dated June 23, 2021 from James Simpson to Tania Pena and respondent attaching Notice of Calendar Call for July 9, 2021
 - H. Email from James Simpson to Tania Pena and respondent regarding no response to calendar call dated July 6, 2021
- 5) Memorandum of Law in Support of Motion for Order without Hearing, dated September 30, 2021
- 6) Affirmation of Service of James L. Simpson, dated October 15, 2021