

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Article 17 of the  
New York State Environmental Conservation Law,  
Article 12 of the New York State Navigation  
Law, Title 6 of the Official Compilation of  
Codes, Rules and Regulations of the State of  
New York parts 612 and 613, and Title 17 of  
the Official Compilation of Codes, Rules and  
Regulations of the State of New York part 32

- by -

**MOHAMMAD A. MALIK, and  
134 PLUS 37 MAPLE AVENUE REALTY INC.,**

Respondents.

DEC File No. R2-20040916-244

ORDER OF THE COMMISSIONER

May 9, 2007

ORDER OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this administrative enforcement proceeding against respondents 134 Plus 37 Maple Avenue Realty Inc. ("Maple Avenue Realty") and Mohammad A. Malik by service of a complaint and a notice of motion for order without hearing both dated July 22, 2005. In accordance with 6 NYCRR 622.3(a)(3), service was effected on respondent Malik by certified mail and by personal service on respondent Maple Avenue Realty. No response was received from either respondent.

Respondents own a residential apartment building located at 134-37 Maple Avenue, Flushing ("site") at which a 4,000 gallon underground petroleum bulk storage tank is located. The matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell. By ruling dated September 27, 2006, ALJ O'Connell denied the motion in its entirety with respect to respondent Malik in his individual capacity. ALJ O'Connell also denied the motion with regard to the second and third causes of action against respondent Maple Avenue Realty because unresolved issues of fact existed relating to the alleged violations.

Department staff subsequently withdrew its complaint as against respondent Malik and also withdrew the second and third causes of action as against respondent Maple Avenue Realty.

This order addresses matters pertaining to the allegations in the complaint against respondent Maple Avenue Realty that have not been withdrawn by staff. Specifically, these are:

(i) the first cause of action, alleging failure to register an underground petroleum bulk storage tank at the site in violation of Environmental Conservation Law ("ECL") 17-1009 and 6 NYCRR 612.2;

(ii) the fourth cause of action, alleging the unauthorized discharge of petroleum in violation of Navigation Law § 173;

(iii) the fifth cause of action, alleging failure to notify the Department of a petroleum discharge in violation of ECL 17-1743, 6 NYCRR 613.8 and 17 NYCRR 32.3; and

(iv) the sixth cause of action, alleging failure to contain an unauthorized discharge of petroleum in violation of Navigation Law § 176 and 17 NYCRR 32.5.

Upon review of the record and the attached summary

report prepared by ALJ O'Connell, I hereby adopt the ALJ's findings of fact and conclusions subject to my comments below.

### Liability

Department staff has established, as a matter of law, that respondent Maple Avenue Realty is liable for the first, fourth, fifth and sixth causes of action as set forth in the complaint. Accordingly, I adopt the ALJ's conclusions with regard to liability of Maple Avenue Realty (see Summary Report at 9-10).

However, I note that the record before me is silent with regard to when the underground petroleum bulk storage tank at the site was installed. While it is likely the tank was in place at the time Maple Avenue Realty acquired the property in December 1996, this is not established in the record. Therefore, I hereby modify the ALJ's conclusion with regard to the first cause of action and hold Maple Avenue Realty liable for failure to register the underground petroleum bulk storage tank on or before January 5, 2004, the date of the first report to the Department of a petroleum discharge at the site.

### Penalty

By its motion and complaint, Department staff requested a total penalty of \$212,500. On review of the record, ALJ O'Connell concluded staff's requested penalty was justified and recommended a \$212,500 penalty be assessed against respondent Maple Avenue Realty. I concur.

ECL 71-1929 provides that any person who violates any provision of titles 1 through 11 and 19 of ECL article 17 or any rule, regulation or order issued thereunder shall be liable for a penalty not to exceed \$37,500 per day for each violation. Navigation Law § 192 provides that any person who violates any provision of article 12 of the Navigation Law, or any rule promulgated thereunder shall be liable for a penalty of not more than \$25,000 per violation, and that if the violation is of a continuing nature, each day during which the violation continues constitutes an additional, separate and distinct offense.

ALJ O'Connell considered staff's penalty request and the underlying rationale, and recommended that respondent Maple Avenue Realty be assessed a \$212,500 penalty. Although the recommended penalty is less than the statutory maximum, it is substantial. Given the continuing nature of the violations, Maple Avenue Realty's lack of cooperation and other aggravating

factors set forth in the record, I find the \$212,500 penalty to be justified and appropriate.

### Injunctive Relief

Staff, by its complaint, requested an order directing Maple Avenue Realty to "remediate the Site consistent with a DEC-approved work plan." I conclude that such relief is warranted and appropriate.

The Department has broad authority to prevent and provide for the abatement of pollution (see, e.g., ECL 3-0301[1][i]). Furthermore, pursuant to Navigation Law § 176(2)(a), upon the occurrence of a discharge of petroleum, the Department may "direct the discharger to promptly cleanup and remove the discharge" and such remediation "shall be conducted in accordance with . . . procedures established by the department." Given the liability of Maple Avenue Realty and the foregoing provisions of law, an order directing respondent to cleanup the site is appropriate.

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

I. Department staff's motion for order without hearing against respondent Malik is denied in its entirety.

II. Department staff's motion for order without hearing against respondent 134 Plus 37 Maple Avenue Realty Inc. is granted in part and otherwise denied.

III. Department staff has established that respondent 134 Plus 37 Maple Avenue Realty Inc.:

- a. violated ECL 17-1009 and 6 NYCRR 612.2 by failing to register the 4,000 gallon underground petroleum bulk storage tank located at 134-37 Maple Avenue, Flushing, New York, on or before January 5, 2004;
- b. violated Navigation Law § 173 by the unauthorized discharge of petroleum at 134-37 Maple Avenue, Flushing, New York, on or about January 5, 2004;
- c. violated ECL 17-1743, 6 NYCRR 613.8 and 17 NYCRR 32.3 by failing to report the unauthorized petroleum discharge that occurred at 134-37 Maple Avenue, Flushing, New York, on or about January 5, 2004; and

- d. violated Navigation Law § 176 and 17 NYCRR 32.5 by failing to immediately contain and cleanup the illegal discharge that occurred at 134-37 Maple Avenue, Flushing, New York.

IV. Respondent 134 Plus 37 Maple Avenue Realty Inc. is assessed a civil penalty in the amount of two hundred twelve thousand, five hundred dollars (\$212,500). Payment of the penalty is due and payable within thirty (30) days of service of this order upon respondent. Payment shall be in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation," and shall be mailed or delivered to the following address: John K. Urda, Esq., Assistant Regional Attorney, Region 2, New York State Department of Environmental Conservation, 47-40 21<sup>st</sup> Street, Long Island City, New York 11101-5407.

V. Within 15 days of the service of this order, respondent 134 Plus 37 Maple Avenue Realty Inc. shall register the site as a petroleum bulk storage facility in accordance with 6 NYCRR 612.2(a) and pay the required registration fee.

VI. Within 30 days of the service of this order, respondent 134 Plus 37 Maple Avenue Realty Inc. shall provide Department staff with an approvable remediation plan to ensure no further discharge occurs and to cleanup any residual petroleum from the unauthorized discharge at 134-37 Maple Avenue, Flushing, New York. Upon approval by Department staff, the plan shall provide for the immediate commencement of remedial activities. Within five (5) days of the completion of the remedial activities, respondent shall furnish Department staff with written documentation that these activities have been completed.

VII. All communications with Department staff concerning this order shall be made to John K. Urda, Esq., Assistant Regional Attorney, Region 2, New York State Department of Environmental Conservation, 47-40 21<sup>st</sup> Street, Long Island City, New York 11101-5407.

VIII. The provisions, terms and conditions of this order shall bind respondent 134 Plus 37 Maple Avenue Realty Inc. and its agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

/s/

By: \_\_\_\_\_  
Alexander B. Grannis  
Commissioner

Dated: May 9, 2007  
Albany, New York

TO: (via Certified Mail)  
Mohammad A. Malik  
PO Box 770538  
Woodside, New York 11377

(via Certified Mail)  
134 Plus 37 Maple Avenue Realty Inc.  
47-11 Elmhurst Avenue  
Queens, New York 11373

(via Certified Mail)  
Otis Allen, Esq.  
Cohen & Hochman  
130 William Street  
New York, New York 10038

(via Regular Mail)  
John K. Urda, Esq.  
Assistant Regional Attorney  
Region 2, New York State  
Department of Environmental Conservation  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101-5407

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Compilation of Codes, Rules and Regulations  
of the State of New York (6 NYCRR) parts 612  
and 613, and 17 NYCRR part 32

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**MOHAMMAD A. MALIK, and  
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DEC File No. R2-20040916-244

SUMMARY REPORT

- by -

/s/

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Daniel P. O'Connell  
Administrative Law Judge

## Proceedings

On January 5, 2004, a resident from the apartment building located at 134-37 Maple Avenue, Flushing, New York 11377 reported a petroleum oil spill at that location to the New York State Department of Environmental Conservation. Subsequently, Staff of the Department of Environmental Conservation (Department staff) commenced this enforcement action by duly serving a motion for order without hearing and a complaint, both dated July 22, 2005, upon Mohammad A. Malik, and 134 Plus 37 Maple Avenue Realty Inc. (Respondents).

According to the July 22, 2005 motion and the complaint, Respondents own the residential apartment building located at 134-37 Maple Avenue, Flushing (Borough: Queens, Block: 05121, Lot: 0050), New York 11377 (the site). Department staff contended there is a 4,000 gallon underground petroleum storage tank at the site. In six causes of action, the July 22, 2005 complaint alleged that Respondents violated various provisions of ECL article 17, its implementing regulations at 6 NYCRR parts 612 and 613, as well as Navigation Law article 12 and its implementing regulations at 17 NYCRR part 32. The violations alleged in the complaint relate to the underground petroleum storage tank at the site. For these alleged violations, Department staff has requested a total civil penalty of \$212,500. In addition, Department staff has requested an order from the Commissioner that would direct Respondents to comply with all applicable regulatory requirements, and to remediate the alleged oil spill.

Although advised by the July 22, 2005 notice of motion for order without hearing that Respondents were required to file an answer pursuant to 6 NYCRR 622.12(b), the Office of Hearings and Mediation Services did not receive any answer. Upon review of Staff's motion papers, I subsequently issued a ruling dated September 27, 2006.

The September 27, 2006 ruling granted in part, and denied in part Staff's motion for order without hearing. The ruling granted Staff's motion with respect to the charges alleged in the first, fourth, fifth and sixth causes of action against the corporate Respondent, 134 Plus 37 Maple Avenue Realty Inc.<sup>1</sup> As

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<sup>1</sup> The sixth cause of action is discussed on page 12 of the September 27, 2006 ruling. Based on that discussion, I concluded that 134 Plus 37 Maple Avenue Realty Inc. violated Navigation Law § 176 and 17 NYCRR 32.5 when it failed to

provided by 6 NYCRR 622.12(e), the ruling identified the incontrovertible facts established as a matter of law concerning the demonstrated violations.

The ruling denied Department staff's motion with respect to the individual respondent, Mohammad A. Malik. The ruling stated that Staff would have the opportunity at hearing to make a *prima facie* showing that Mr. Malik, as a corporate officer of 134 Plus 37 Maple Avenue Realty Inc., should be held individually liable for the violations alleged in the July 22, 2005 complaint, as amended.

The ruling further denied Staff's motion with respect to the second and third causes of action against both Respondents. I determined that a hearing would be necessary to determine the nature and type of petroleum product stored in the underground tank at the site. I noted that if the petroleum product is No. 6 fuel oil is as stated in Exhibit B to Ms. Tipples' July 22, 2005 affidavit, then 134 Plus 37 Maple Avenue Realty Inc. would be exempt from the requirements outlined in 6 NYCRR 613.4 and 613.5. Given the outstanding factual issues, the ruling further reserved on making a recommendation to the Commissioner about the appropriate civil penalty and the need to remediate the site until after a complete record had been developed at hearing.

The September 27, 2006 ruling advised the parties that a hearing would be scheduled. By letter dated October 4, 2006, Department staff requested leave to amend the July 22, 2005 complaint to withdraw Mohammad A. Malik as a Respondent, and to withdraw the charges alleged in the second and third causes of action, without prejudice. In lieu of a hearing, Staff asked me to prepare this Summary Report that provides a recommendation for the Commissioner's consideration with respect to the relief requested by Department staff.

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contain and clean up the illegal petroleum discharge that occurred on the site in January 2004. The section entitled, "Ruling," on page 18 of the September 27, 2006 ruling, however, does not expressly state that I granted Staff's motion with respect to the sixth cause of action. This omission was inadvertent. The discussion on page 12 of the September 27, 2006 ruling provides my rationale for granting Staff's motion with respect to the sixth cause of action against 134 Plus 37 Maple Avenue Realty Inc.

In a letter dated October 11, 2006, I stated that Department staff, as the prosecutor, has the discretion to commence and withdraw any enforcement action. With respect to this matter, I acknowledged that Staff chose to exercise this discretion by withdrawing all the charges alleged in the July 22, 2005 complaint against Mr. Malik, as well as the second and third causes of action in the complaint alleged against both Respondents.

### **Discussion**

#### Liability

Issues related to liability associated with the charges alleged in the first, fourth, fifth, and sixth causes of action were resolved in the September 27, 2006 ruling concerning Department staff's July 22, 2005 motion for order without hearing. Although the ruling determined that a hearing was necessary to resolve issues related to Mr. Malik's individual liability, as well as fact issues concerning the violations alleged in second and third causes of action, Department staff's decision to withdraw all the charges alleged against Mr. Malik, and to withdraw the charges alleged in the second and third causes of action against 134 Plus 37 Maple Avenue Realty Inc. obviates the need for an adjudicatory hearing.

The September 27, 2006 ruling found that 134 Plus 37 Maple Avenue Realty Inc. owns and operates a petroleum bulk storage (PBS) facility, which consists of a 4,000 gallon underground storage tank, at 134-37 Maple Avenue in Flushing, New York. The ruling concluded, with respect to the first cause of action, that 134 Plus 37 Maple Avenue Realty Inc. has not registered its facility with the Department as required by 6 NYCRR 612.2.

Furthermore, as alleged in the fourth cause of action, Department staff demonstrated that 134 Plus 37 Maple Avenue Realty Inc. violated Navigation Law § 173, which prohibits petroleum discharges without a permit. As alleged in the fifth cause of action, Department staff proved that 134 Plus 37 Maple Avenue Realty Inc. failed to report the unauthorized petroleum spill as required by ECL 17-1743; 6 NYCRR 613.8 and 17 NYCRR 32.3. As alleged in the sixth cause of action, Department staff showed that 134 Plus 37 Maple Avenue Realty Inc. violated Navigation Law § 176 and 17 NYCRR 32.5 by failing to contain the unauthorized petroleum spill that occurred at the site on or about January 5, 2004.

## Relief

In the July 22, 2005 motion papers, Department staff initially sought a total civil penalty of \$212,500, and provided a reasoned explanation about how the requested civil penalty was calculated. The Department staff also requested an order from the Commissioner directing 134 Plus 37 Maple Avenue Realty Inc. to remediate the site consistent with a work plan approved by the Department staff.

### 1. Civil Penalty

Effective May 15, 2003, ECL 71-1929 authorizes a civil penalty of \$37,500 per day for each violation of the requirements outlined in 6 NYCRR parts 612 and 613. Navigation Law § 192 authorizes a civil penalty of \$25,000 per violation, and states further that if the violation is of a continuous nature, each day during which the violation continues constitutes an additional, separate and distinct offense.

In the July 22, 2005 motion for order without hearing, Department staff calculated the potential maximum civil penalty for each alleged violation. In a letter dated March 2, 2006, however, Department staff requested that these calculations be disregarded. For each of the violations alleged in the first through fifth causes of action of the July 22, 2005 complaint, Department staff initially requested a civil penalty of \$37,500. For the alleged violation of Navigation Law § 176 and its implementing regulation in the sixth cause of action, Department staff initially requested a civil penalty of \$25,000.

To calculate the initial civil penalty request, Department staff relied on the guidance outlined in the Department's Civil Penalty Policy, dated June 20, 1990. Staff explained that the violations occurred over a long period of time. With respect to 134 Plus 37 Maple Avenue Realty Inc.'s failure to register the PBS facility at the site as initially alleged in the first cause of action, Department staff argued that the violation commenced on December 27, 1986.<sup>2</sup> With respect to this violation, Staff

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<sup>2</sup> Staff initially alleged in the July 22, 2005 complaint (Paragraph No. 6) that 134 Plus 37 Maple Avenue Realty Inc. acquired the apartment building at 134-37 Maple Avenue in Flushing, New York on January 26, 1983. To calculate the potential maximum civil penalty, Staff asserted in the July 22, 2005 complaint that the alleged violations commenced on

observed that 134 Plus 37 Maple Avenue Realty Inc. avoided the expenses associated with registering the PBS facility. Staff contended that by ignoring this regulatory responsibility, 134 Plus 37 Maple Avenue Realty Inc. reduced its operating costs, but increased the probability that a petroleum spill would occur at 134-37 Maple Avenue.

According to Department staff, the violations alleged in the fourth, fifth and sixth causes of action commenced on January 5, 2004, when the petroleum spill at 134-37 Maple Avenue was reported to the Department. Staff asserted that these violations continued until the date of July 22, 2005 motion for order without hearing and the complaint. Staff contended that 134 Plus 37 Maple Avenue Realty Inc. exacerbated the conditions at the site and has made a full cleanup more costly and difficult because 134 Plus 37 Maple Avenue Realty Inc. has yet to acknowledge and otherwise address the petroleum spill discovered on January 5, 2004.

Department staff argued that each of the violations prevented Staff from performing duties mandated by the Environmental Conservation Law, the Navigation Law and their respective implementing regulations, which include expeditiously responding to, containing, and effectuating the cleanup of the petroleum spill. Staff noted that the continued contamination of the apartment building presents a health and safety hazard to the residents.

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December 27, 1986, which was the effective date of 6 NYCRR 612, according to Staff (see e.g. Paragraph No. 27).

In a letter dated March 2, 2006, however, Department staff moved to amend Paragraph No. 6 of the July 22, 2005 complaint. The proposed amendment was: "The Respondent 134 Plus 37 Maple Avenue Realty Inc. acquired the Site on December 23, 1996" [emphasis added]. To support its motion, Staff submitted a copy of a deed with the March 2, 2006 letter, to show that 134 Plus 37 Maple Avenue Realty Inc. purchased the site on the date proposed in the March 2, 2006 letter. In the September 27, 2006 ruling (at 5), I granted Staff's motion, and Paragraph No. 6 of the July 22, 2005 complaint was amended accordingly. Therefore, for purposes of the captioned enforcement action, 134 Plus 37 Maple Avenue Realty Inc. has owned the apartment building located at 134-37 Maple Avenue in Flushing, New York since December 23, 1996 (see Finding No. 2 below).

Department staff has correctly noted that 134 Plus 37 Maple Avenue Realty Inc. has gained a substantial economic benefit by avoiding the costs related to registering the PBS facility, and that this violation has continued since about December 1996.<sup>3</sup> In addition to reregistering the facility at 134-37 Maple Avenue when it purchased the site in December 1996, 134 Plus 37 Maple Avenue Realty Inc. was required to renew the tank registration at least once since then (see 6 NYCRR 612.2[a][2]) and, to date, has not. Therefore, 134 Plus 37 Maple Avenue Realty Inc. has gained an additional economic benefit by further avoiding the costs related to renewing the registration. I find that 134 Plus 37 Maple Avenue Realty Inc.'s continued failure to comply with the requirements concerning registration and renewal to be significant aggravating factors that justify the civil penalty sought by Department staff.

I note further that 134 Plus 37 Maple Avenue Realty Inc. did not respond to Staff's two inquiries (*i.e.*, Ms. Tipple's letters dated January 8, 2004 and April 15, 2004) about the nature and status of the petroleum spill at 134-37 Maple Avenue. In addition, 134 Plus 37 Maple Avenue Realty Inc. did not respond to the July 22, 2005 motion for order without hearing or answer the complaint. I conclude that the lack of any response to Staff's inquiries as well as to the motion shows a blatant disregard for the Department's mission and a lack of cooperation. Finally, the violations are continuous in nature. Based on Department staff's proof and the arguments presented in the motion papers, and the additional, aggravating circumstances discussed above, the Commissioner should assess a substantial civil penalty.

Although, Staff has withdrawn the second and third causes of action alleged in the July 22, 2005 complaint, the Commissioner may assess the total civil penalty initially requested by Department staff (*i.e.*, \$212,500). Given the continuous nature of the four demonstrated violations, the total civil penalty initially requested by Staff is substantially less than the potential maximum civil penalty authorized by statute for the demonstrated violations. In addition, the reapportioned amounts would not exceed the civil penalties recommended in the guidance that Staff relied upon to calculate its initial request. Based on the foregoing discussion, the Commissioner, therefore, should

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<sup>3</sup> Pursuant to 6 NYCRR 612.2(b), if ownership of a facility changes, the new owner must reregister the facility with the Department within 30 days of ownership transfer.

assess a total civil penalty of \$212,500 against 134 Plus 37 Maple Avenue Realty Inc.

2. Regulatory Compliance and Remediation

Department staff requested an order from the Commissioner directing 134 Plus 37 Maple Avenue Realty Inc. to comply with applicable regulatory requirements, and to develop a remediation plan for Staff's approval to clean up the spilled petroleum at the apartment building located at 134-37 Maple Avenue. In addition, the order should direct 134 Plus 37 Maple Avenue Realty Inc. to register the PBS facility consisting of the 4,000 gallon underground petroleum storage tank at 134-37 Maple Avenue pursuant to 6 NYCRR 612.1(b), as well as direct compliance with other applicable requirements.

Based on Ms. Tipple's July 22, 2005 affidavit, the pipeline between the tank and the boiler in the apartment building located at 134-37 Maple Avenue is damaged. In addition, Ms. Tipple observed fuel oil on the ground in the vicinity of the underground tank. According to the spill report, a resident of the apartment build observed oil on the floor coming from under the boiler room door and moving across the floor to a drain. Accordingly, the Commissioner should direct 134 Plus 37 Maple Avenue Realty Inc. to repair the damaged pipeline, and clean up any residual oil outside the building and in the boiler room.

**Findings of Fact**

From pages 14 through 17 of the September 27, 2006 ruling, the following incontrovertible facts established as a matter of law for this case are presented here for convenience. The facts presented here are relevant to the charges alleged in the first, fourth, fifth, and sixth causes of action from the July 22, 2005 complaint.

1. On February 6, 2006, Environmental Conservation Officer (ECO) Jeffery R. Conway served the July 22, 2005 notice of motion for order without hearing and the complaint upon 134 Plus 37 Maple Avenue Realty Inc., by personally serving Virginia Turner. Ms. Turner is the office manager for 134 Plus 37 Maple Avenue Realty Inc. The location of the Respondent corporation's office is 47-11 Elmhurst Avenue, Queens, New York 11373.
2. 134 Plus 37 Maple Avenue Realty Inc. acquired the property located at 134-37 Maple Avenue, Flushing, New York 11377

(also known as Borough: Queens, Block: 05121, Lot: 0050) (the site) on December 23, 1996. Since December 1996, 134 Plus 37 Maple Avenue Realty Inc. has owned the property located at 134-37 Maple Avenue in Flushing, New York.

3. A 4,000 gallon underground petroleum storage tank is located at 134-37 Maple Avenue, Flushing, New York.
4. On January 5, 2004, a resident of the apartment building located at 134-37 Maple Avenue reported a petroleum spill to the Department via the telephone hotline. The petroleum release was not authorized by any State permit. Department staff completed a spill report form, which identifies the spill by No. 03-11275.
5. Michelle Tipple has a Bachelor of Arts degree in Geology from the State University of New York College at Potsdam. Since February 2000, Ms. Tipple has worked as an Engineering Geologist I in the Department's Region 2 Office, Division of Environmental Remediation, Bureau of Spills Prevention and Response. Prior to her position with the Department, Ms. Tipple worked at the New York State Department of Transportation. Since February 2000, Ms. Tipple has conducted hundreds of petroleum spill investigations.
6. On January 6 and 7, 2004, Ms. Tipple attempted to contact a building representative at 134-37 Maple Avenue via telephone, but was not successful. On January 8, 2004, Ms. Tipple sent a letter to the "Management Agent/Owner" at 134-37 Maple Avenue, which stated that a petroleum spill had occurred at the site on January 2, 2004. In the January 8, 2004 letter, Ms. Tipple requested documentation demonstrating that the spill had been properly cleaned up, and that any contaminated materials that could not be cleaned had been properly disposed. Department staff did not receive a response to the January 8, 2004 letter.
7. Ms. Tipple sent a second letter dated April 15, 2004 to the Management Agent/Owner by certified mail return receipt requested. In the April 15, 2004 letter, Ms. Tipple requested an investigation and assessment report detailing the extent of the petroleum spill at the site, as well as a remediation plan outlining the steps to clean up the spill and to dispose of any contaminated soil. Department staff did not receive a response to the April 15, 2004 letter.

8. On September 14, 2004, Ms. Tipple visited the apartment building at 134-37 Maple Avenue to investigate the petroleum spill. During the inspection, Ms. Tipple observed petroleum on the ground outside the building. Upon further investigation, Ms. Tipple determined that the spill was the result of a breach in the fuel line between the 4,000 gallon underground petroleum storage tank and the building. Ms. Tipple attempted to gain access to the boiler room of the apartment building, but no one at the site had a key to unlock the door to the boiler room.
9. Since the September 14, 2004 site visit, Ms. Tipple reviewed the Department's files and did not find any records related to the registration concerning the 4,000 gallon underground petroleum storage tank at 134-37 Maple Avenue, Flushing, New York.
10. Since December 1996, 134 Plus 37 Maple Avenue Realty Inc. has neither registered the PBS facility, which consists of a 4,000 gallon underground petroleum storage tank, at 134-37 Maple Avenue in Flushing, New York pursuant to 6 NYCRR 612.2, nor renewed the required registration.
12. As of July 22, 2005, 134 Plus 37 Maple Avenue Realty Inc. had not notified the Department about the petroleum spill at 134-37 Maple Avenue, which was reported to the Department on January 5, 2005 by a resident of the building.
13. As of July 22, 2005, 134 Plus 37 Maple Avenue Realty Inc. has neither contained, nor cleaned up the petroleum discharge that occurred at 134-37 Maple Avenue on or about January 5, 2004.

### **Conclusions**

From pages 17 through 18 of the September 27, 2006 ruling, the following conclusions are presented here for convenience. These conclusions relate to the first, fourth, fifth and sixth causes of action alleged in the July 22, 2005 complaint.

1. Department staff establishes as a matter of law that service of the July 22, 2005 notice of motion for order without hearing and the complaint upon 134 Plus 37 Maple Avenue Realty Inc. was in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3).

2. Because 134 Plus 37 Maple Avenue Realty Inc. owns the apartment building and 4,000 gallon underground petroleum storage tank at 134-37 Maple Avenue in Flushing, New York, it is obliged, pursuant to ECL 17-1009 and 6 NYCRR 612.2, to register the petroleum bulk storage facility with the Department.
3. With respect to the first cause of action alleged in the July 22, 2005 motion for order without hearing and complaint, Department staff established as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. has violated the registration requirements at 6 NYCRR 612.2 by not registering the PBS facility, which consists of a 4,000 gallon underground petroleum storage tank, since December 1996.
4. Department staff established as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. violated § 173 of the Navigation Law when an unauthorized petroleum spill occurred at 134-37 Maple Avenue in Flushing, New York on or about January 5, 2004.
5. Department staff established as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. did not report the unauthorized petroleum spill that occurred at 134-37 Maple Avenue on or about January 5, 2004, in violation of the reporting requirement outlined in ECL 17-1743, 6 NYCRR 613.8 and 17 NYCRR 32.3.
6. Department staff established as a matter of law that 134 Plus 37 Maple Avenue Realty Inc. violated section 176 of the Navigation Law and 17 NYCRR 32.5 when it failed to contain and clean up the illegal discharge that occurred on the site on or about January 5, 2004.

#### **Recommendations**

1. The Commissioner should conclude that 134 Plus 37 Maple Avenue Realty Inc. owns the apartment building and a PBS facility, which consists of a 4,000 gallon underground storage tank, located at 134-37 Maple Avenue in Flushing, New York.
2. With respect to the violations alleged in the first, fourth, fifth and sixth causes of action of Department staff's July 22, 2005 complaint and motion for order without hearing, the Commissioner should conclude there are no material issues of

law or fact related to 134 Plus 37 Maple Avenue Realty Inc.'s liability, and grant the motion with respect to the corporate Respondent.

3. The Commissioner should assess a total civil penalty of \$212,500 based on the penalty calculation discussed above.
4. The Commissioner should issue an order directing 134 Plus 37 Maple Avenue Realty Inc. to register the PBS facility consisting of a 4,000 gallon underground petroleum storage tank at 134-37 Maple Avenue as required by 6 NYCRR 612.2, and to comply with all other applicable requirements outlined in 6 NYCRR parts 612 and 613.
5. The order should also direct 134 Plus 37 Maple Avenue Realty Inc. to develop a plan to remediate the petroleum spilled at 134-37 Maple Avenue on January 5, 2004, and to submit the remediation plan to Department staff for review and approval.