

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of the Environmental Conservation Law of the State of New York (ECL) Article 17 and Title 6 of the Official Compilation of Codes Rules and Regulations of the State of New York (6 NYCRR) Parts 612 and 613 by

Ruling on Department staff's Amended Motion for Order without Hearing

Maspeth Concrete Loading Corp.,
Respondent.

DEC Case No.
R2-20090123-27

July 23, 2012

Proceedings

With a cover letter dated February 9, 2012, Staff from the Department's Region 2 Office, Long Island City, New York (Department staff) provided the Office of Hearings and Mediation Services (OHMS) with a copy of an amended motion for order without hearing dated January 12, 2012 with supporting papers (see Title 6 of the Official Compilation of Codes Rules and Regulations of the State of New York [6 NYCRR] § 622.12). In this matter, Department staff is represented by John K. Urda, Esq., Assistant Regional Attorney. A list of the papers filed by Department staff is provided in Appendix A to this ruling.

According to the January 12, 2012 motion, Maspeth Concrete Loading Corp. (Maspeth Concrete) is a foreign business corporation of Delaware, registered with the New York State Department of State. Department staff asserted further that Maspeth Concrete owns and operates two petroleum bulk storage (PBS) facilities. One is located at 46-73 Metropolitan Avenue in Ridgewood (Queens County), New York, and the second is located at 33-05 Laurel Hill Boulevard in Maspeth (Queens County), New York. The Ridgewood facility is identified by PBS facility number 2-016160. Department staff refers to the facility in Maspeth as the Newtown Creek facility, and its PBS facility number is 2-206334.

Based on observations made during an inspection of the Ridgewood facility on December 29, 2008, Department staff alleges various violations related to the requirements outlined

in 6 NYCRR Parts 612 and 613. These alleged violations are outlined in the January 12, 2012 motion as the first through sixth causes of action.

Based on observations made during an inspection of the Newtown Creek facility on December 31, 2008, Department staff alleges various violations related to the requirements outlined in 6 NYCRR Parts 612 and 613. These alleged violations are outlined in the January 12, 2012 motion as the seventh through tenth causes of action.

For these alleged violations, Department staff has asked the Commissioner for an order that would assess a total civil penalty of \$77,900, and direct Maspeth Concrete to correct the alleged violations at the Ridgewood and Newtown Creek PBS facilities within 30 days.

Maspeth Concrete responded to Department staff's January 12, 2012 motion with a letter dated February 7, 2012. In that letter, Maspeth Concrete stated that "... we object to all items relating to the above referenced matter and request a hearing by due process to address all allegations." Maspeth Concrete did not file any other documents or information with the February 7, 2012 letter.

In a letter dated February 15, 2012, Chief Administrative Law Judge (ALJ) James T. McClymonds advised the parties that the captioned matter was assigned to ALJ Daniel P. O'Connell.

Findings of Fact

The following findings of fact are established, as a matter of law, for the purposes of this proceeding.

1. The Maspeth Concrete Loading Corp. (Maspeth Concrete) is registered with the New York State Department of State as a foreign business corporation of Delaware. The chair or chief executive officer of Maspeth Concrete is John Quadrozzi, Jr. Maspeth Concrete has principal executive offices at 73-02 Amstel Boulevard, Arverne, New York 11692-0179. (¶ 3 Urda Affirmation and Exhibit E.)
2. The Quadrozzi Realty Corporation is a domestic business corporation registered with the New York State Department of State. The chair or chief executive officer of the Quadrozzi Realty Corporation is John Quadrozzi, Jr. The

Quadrozzi Realty Corporation has principal executive offices at 73-02 Amstel Boulevard, Arverne, New York 11692-0179. (¶ 9 Urda Affirmation and Exhibit E.)

I. The Ridgewood PBS Facility

3. The Ridgewood petroleum bulk storage (PBS) facility is located at 46-73 Metropolitan Avenue in Ridgewood (Queens County), New York. This facility is identified by PBS facility number 2-016160. (Exhibits A and D Urda Affirmation.) The Department issued the current PBS certificate to C. Quadrozzi for the Ridgewood facility on January 11, 2010, with an expiration date of January 11, 2015. Seven aboveground tanks are located at the Ridgewood PBS facility. Based on the January 11, 2010 PBS certificate, the total capacity of the facility is 5,455 gallons. (Urda Affirmation Exhibit A.)
4. Moses Ajoku is an Environmental Engineer from the Petroleum Bulk Storage Section of the Bureau of Spill Prevention and Response, Division of Environmental Remediation, in the Department's Region 2 office (¶ 1 Ajoku Affidavit).
5. On December 29, 2008, Mr. Ajoku inspected the Ridgewood PBS facility (¶ 5 Ajoku Affidavit). At the conclusion of the inspection, Mr. Ajoku prepared a notice of violation, and left it with personnel at the Ridgewood facility (¶ 6 Ajoku Affidavit and Exhibit A).

II. Newtown Creek PBS Facility

6. The Newtown Creek PBS facility is located at 33-05 Laurel Hill Boulevard in Maspeth (Queens County), New York. Its PBS facility number is 2-206334. (Exhibits A and D Urda Affirmation.) The Department issued the current PBS certificate for the Newtown Creek facility on September 30, 2008, which expired on June 30, 2012. There are eleven tanks at the Newtown Creek PBS facility. Six are aboveground in contact with the soil; five are underground. Based on the September 30, 2008 certificate, the total capacity of the facility is 12,025 gallons. (Urda Affirmation Exhibit A.)

7. Mr. Ajoku inspected the Newtown Creek PBS facility on December 31, 2008, and observed that the facility was inactive (¶ 8 Ajoku Affidavit). Mr. Ajoku subsequently prepared a notice of violation, dated January 14, 2009, and sent it, by certified mail, return receipt requested, to Maspeth Concrete at its corporate address (¶ 9 Ajoku Affidavit and Exhibit B).
8. As noted above, the Department issued a PBS certificate to Maspeth Concrete for the Newtown Creek facility on September 30, 2008 (Urda Affirmation Exhibit A). However, when Mr. Ajoku inspected the Newtown Creek facility on December 31, 2008, he did not observe the registration certificate (¶ 10 Ajoku Affidavit and Exhibit B).
9. On December 31, 2008, the Newtown Creek facility was inactive; however, the eleven storage tanks on the site were registered as being in service (¶¶ 8 and 10 Ajoku Affidavit and Exhibit B).

Discussion

I. Commencement of Proceedings

With service of an amended notice of motion for order without hearing in lieu of a complaint and supporting papers dated January 12, 2012 upon Maspeth Concrete, Department staff duly commenced the captioned administrative enforcement proceeding. On January 13, 2012, Department staff sent, by certified mail, return receipt requested, a copy of the January 12, 2012 motion and supporting papers to Maspeth Concrete at 73-02 Amstel Boulevard, Arverne, New York 11692.¹ According to the domestic return receipt from the US Postal Service, Maspeth Concrete received Department staff's January 12, 2012 motion on January 20, 2012. As previously noted, Maspeth Concrete responded to the motion with a letter dated February 7, 2012, and requested a hearing.

¹ Department staff also sent a copy of the January 12, 2012 motion and supporting papers, by certified mail, return receipt requested, to Joseph N. Paykin, Esq., 185 Madison, Avenue, 7th Floor, New York, New York 10016. It is not clear from Department staff's papers whether Mr. Paykin represents either or both Respondents. According to the domestic return receipt from the US Postal Service, Mr. Paykin received a copy of the motion on January 17, 2012.

In lieu of a notice of hearing and complaint, Department staff may serve a motion for order without hearing. With service of the motion upon a respondent, Department staff must also send a copy of the motion papers to the Chief ALJ with proof of service of the motion upon respondent. (See 6 NYCRR 622.3[b][1] and 622.12[a].)

A motion for order without hearing must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. (See 6 NYCRR 622.12[d]; Civil Practice Law and Rules [CPLR] § 3212[b].)

An attorney's affirmation "has no probative force" unless the attorney has first-hand knowledge of the facts at issue (Siegel, *NY Prac* § 281, at 442 [3d ed] [citation omitted]). The Commissioner elaborated on the standard for granting a motion for order without hearing, which is equivalent to the standard applied for summary judgment:

The moving party on a summary judgment motion has the burden of establishing his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor. The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. [A supporting] affidavit may not consist of mere conclusory statements but must include specific evidence establishing a *prima facie* case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof. The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.

(*Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [internal quotation marks and citations omitted].)

Additionally, the weight of the evidence is not considered on a motion for order without hearing.

Rather, the issue is whether the moving party has offered sufficient evidence to support a *prima facie*

case for summary judgment. The test for sufficiency of evidence in the administrative context is the substantial evidence test -- whether the factual finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

(*Matter of Tractor Supply Co.*, Decision and Order of the Commissioner, August 8, 2008, at 3 [internal quotation marks and citations omitted].)

Based on the following discussion, I deny, in part, and grant, in part, Department staff's January 12, 2012 motion. A hearing will be scheduled to provide the parties the opportunity to develop a record about the factual issues identified below.

II. Facility Ownership

Department staff asserted that Maspeth Concrete owns and operates the Ridgewood facility and the Newtown Creek facility. To support this assertion, Department staff provided, among other things, Exhibit A, which consists of copies of the facility information reports printed on October 19, 2011 for the two PBS facilities, as well as copies of the PBS certificates for each facility. (¶ 4 Urda Affirmation.) A necessary element of the causes of action is who owns the two PBS facilities that are the subject of this proceeding because the facility owner is responsible for complying with some of the regulatory requirements allegedly violated.

A. Ridgewood Facility

The report for the Ridgewood facility (PBS No. 2-016160), states that the owner is C. Quadrozzi, 46-732 Metropolitan Avenue, Ridgewood, New York 11385. Mike Bartlett is identified as the on-site operator. According to the report, mail should be directed to Maspeth Concrete at 7302 Amstel Boulevard, Far Rockaway, New York 11692. The certificate was issued on January 11, 2010 and is effective until January 11, 2015. On the certificate, the owner is identified as C. Quadrozzi. (Exhibit A Urda Affirmation.)

Exhibit E to Mr. Urda's Affirmation is a copy of the registration information from the NYS Department of State, Division of Corporations. Maspeth Concrete is registered with

the New York State Department of State as a foreign business corporation of Delaware. The chair or chief executive officer of Maspeth Concrete is John Quadrozzi, Jr. Maspeth Concrete has principal executive offices at 73-02 Amstel Boulevard, Arverne, New York 11692-0179. (¶ 3 Urda Affirmation and Exhibit E.)

In addition to Exhibit A, Department staff proffered Exhibit B, which is a copy of a registration application, dated March 18, 2002, for the Ridgewood facility. According to Department staff, the March 18, 2002 registration application is the earliest one filed by Maspeth Concrete for the Ridgewood facility. (¶ 5 Urda Affirmation.) On the March 18, 2002 registration application, Maspeth Concrete is identified as the facility owner, and Constantine Quadrozzi is identified as the operator. Consistent with the information on file with the New York State Department of State, Division of Corporations (Exhibit E Urda Affirmation), John Quadrozzi signed the application as President of Maspeth Concrete. (Exhibit B Urda Affirmation.)

Exhibit C consists of a set of three PBS registration applications for the Ridgewood facility filed after the March 18, 2002 registration application (see Exhibit B Urda Affirmation). These applications are dated December 21, 2004, March 30, 2009, and January 4, 2010. Each application identifies C. Quadrozzi, not Maspeth Concrete, as the facility owner. Constantine Quadrozzi signed the December 21, 2004 application, and Catherine Quadrozzi signed the March 30, 2009 and January 4, 2012 applications. (Exhibit C Urda Affirmation.) With respect to Exhibit C, Department staff argued that, "each application misidentifies the facility owner, which is Maspeth Concrete" (¶ 6 Urda Affirmation). Mr. Urda, however, does not state, in his affirmation, that he has first-hand knowledge that the PBS applications filed subsequent to March 18, 2002 misidentify the owner of the Ridgewood PBS facility as C. Quadrozzi rather than Maspeth Concrete.

Department staff argued further that "[w]hether the identification of C. Quadrozzi as owner was a typographical error or a mis-registration, Maspeth Concrete continues to own and operate the [Ridgewood] facility at all relevant times for purposes of New York State's regulation of PBS facilities" (¶ 7 Urda Affirmation). To support this argument, Department staff referred to the definitions of the terms "operator" and "owner" outlined at 6 NYCRR 612.1(c). An operator is any person who leases, operates, controls, or supervises a facility (see 6

NYCRR 612.1[c][16]). An owner is any person who has legal or equitable title to a facility (see 6 NYCRR 612.1[c][18]).

To establish who has legal or equitable title to the Ridgewood PBS facility, Department staff offered a copy of the deed for the real property located along Metropolitan Avenue in Queens, at the site of the Ridgewood facility (¶ 8 Urda Affirmation and Exhibit D). According to the deed, Quadrozzi Realty Corp. (73-02 Amstel Boulevard, Arverne, New York), purchased the site of the Ridgewood PBS facility on December 29, 1998 (Exhibit D Urda Affirmation). It cannot be reasonably inferred, however, that the owner of the real property also owns the PBS facility on it.

According to Exhibit E (Urda Affirmation), the Quadrozzi Realty Corporation is a domestic business corporation registered with the New York State Department of State. The chair or chief executive officer of the Quadrozzi Realty Corporation is John Quadrozzi, Jr., who is also the chair or chief executive officer of Maspeth Concrete. The Quadrozzi Realty Corporation has principal executive offices at 73-02 Amstel Boulevard, Arverne, New York 11692-0179, which is the same location as the principal executive offices for Maspeth Concrete. (¶ 9 Urda Affirmation and Exhibit E.)

Department staff observed that the Quadrozzi Realty Corporation shares corporate ownership, a chief executive officer, and a principal executive office with Maspeth Concrete. Department staff observed further that Maspeth Concrete, rather than the Quadrozzi Realty Corporation, responded to the notices of violation (see Exhibits A and B Ajoku Affidavit) that Department staff issued after inspecting the Ridgewood facility on December 29, 2008 and the Newtown Creek facility on December 31, 2008, and assumed responsibility (see Exhibit C Ajoku Affidavit) for the violations alleged in Department staff's January 12, 2012 motion. (¶ 9 Urda Affirmation.) Department staff's observations and Exhibit E (Urda Affirmation) suggest, but do not prove, that the Quadrozzi Realty Corporation and Maspeth Concrete are related. Department staff, however, offered no proof about the nature of any relationship between Maspeth Concrete and the Quadrozzi Realty Corporation, if one exists.

The evidence proffered with Department staff's January 12, 2012 motion does not support a *prima facie* case for summary judgment. Rather, the evidence is conflicting and, thereby, highlights a fact issue about who owns the Ridgewood PBS

facility. Based on the March 18, 2002 PBS application (Exhibit B Urda Affirmation), Maspeth Concrete owns the Ridgewood facility. However, subsequent PBS applications (*i.e.*, December 21, 2004, March 9, 2009, and January 4, 2012 [see Exhibit C Urda Affirmation]) identify C. Quadrozzi as the owner, rather than Maspeth Concrete. Although Department staff asserted a typographical error on the later applications, the information on the PBS applications filed after March 18, 2002 reasonably suggests that the owner of the Ridgewood facility changed from Maspeth Concrete to C. Quadrozzi.

Moreover, the deed for the Metropolitan Avenue property (Exhibit D Urda Affirmation) demonstrates that the Quadrozzi Realty Corporation, and not Maspeth Concrete, owns the real property on which the Ridgewood facility is located. Absent evidence to demonstrate some sort of relationship between Maspeth Concrete and the Quadrozzi Realty Corporation, the deed contradicts Department staff's argument that Maspeth Concrete owns the Ridgewood facility.

Finally, additional information is needed about the corporate structures of Maspeth Concrete and the Quadrozzi Realty Corporation, and any relationship that may exist between them. It is probably not a coincidence that the corporations share a chief executive officer and the location of their principal executive offices, but these common features do not mean the corporations are identical or interchangeable for the purpose of this administrative enforcement action. Despite these common features, Department staff did not identify the Quadrozzi Realty Corporation or any of its corporate officers, or any of the corporate officers of Maspeth Concrete, as respondents in this proceeding. Rather, Department staff identified Maspeth Concrete as the only respondent in this matter.

Based on the foregoing discussion, a fact issue exists about who owns the Ridgewood PBS facility.

B. Newtown Creek Facility

The report for the Newtown Creek facility (PBS No. 2-206334), states that the owner is Maspeth Concrete Loading Corp., PO Box 960493, Inwood, New York 11096. In addition, Maspeth Concrete is identified as the on-site operator. According to the report, mail should be directed to Maspeth Concrete at PO Box 920158, Arverne, New York 11692. The

certificate was issued on September 30, 2008 and was effective until June 30, 2012. On the certificate, the owner is identified as Maspeth Concrete. (Exhibit A Urda Affirmation.)

With respect to the Newtown Creek PBS facility, the only other evidence that Department staff provided to address the question of ownership was a copy of the deed for the Laurel Hill Boulevard property, dated March 30, 1990, on which the Newtown Creek facility is located (Exhibit D Urda Affirmation). According to the deed, Maspeth Concrete owns the real property. As previously noted, the owner of the real property on which is located a PBS facility may not be the owner of that PBS facility.

Based on Exhibit A (Urda Affirmation), I find that Maspeth Concrete owns the Newtown Creek PBS facility.

III. Department Staff's Motion for Order without Hearing

The causes of action alleged in the January 12, 2012 motion for order without hearing are addressed below.

A. Ridgewood PBS Facility (First through Sixth Causes of Action)

The violations alleged in the first through sixth causes of action are based on an inspection of the Ridgewood PBS facility by Moses Ajoku. Mr. Ajoku is an Environmental Engineer from the Petroleum Bulk Storage Section of the Bureau of Spill Prevention and Response, Division of Environmental Remediation, in the Department's Region 2 office (¶ 1 Ajoku Affidavit). Mr. Ajoku inspected the Ridgewood facility on December 29, 2008 (¶ 5 Ajoku Affidavit). At the conclusion of his inspection, Mr. Ajoku prepared a notice of violation, and handed it to a person present at the facility who identified himself as the plant operator (¶ 6 Ajoku Affidavit and Exhibit A). Department staff did not identify the name of this person.

1. Owner and Operator

The first through sixth causes of action in Department staff's January 12, 2012 motion for order without hearing concern alleged violations of the requirements outlined in 6 NYCRR Part 612 (Registration of Petroleum Storage Facilities)

and Part 613 (Handling and Storage of Petroleum) at the Ridgewood facility. Compliance with the requirements outlined in 6 NYCRR Part 612 and Part 613 is the responsibility of either the PBS facility owner (see e.g. 6 NYCRR 612.2[a], and 613.3[c]²), or the PBS facility owner or operator (see e.g. 6 NYCRR 613.9, 613.3[b], 613.6[a]).

As discussed above, Department staff has not made a *prima facie* showing of who owns the Ridgewood PBS facility. Department staff alleges further that Maspeth Concrete operates the Ridgewood facility (¶ 4 Urda Affirmation). Based on Exhibits A, B, and C (Urda Affirmation), however, the on-site operator is Mike Bartlett, and the operator is either Constantine Quadrozzi, or C. Quadrozzi. This evidence does not demonstrate that Maspeth Concrete operates the Ridgewood facility. Moreover, Department staff did not identify Mike Bratlett, Constantine Quadrozzi or C. Quadrozzi as respondents in this matter. Given the factual issues concerning who owns and operates the Ridgewood facility, I reserve ruling on the first through sixth causes of action.

2. Tank Identification

The Department issued the current petroleum bulk storage certificate for the Ridgewood facility on January 11, 2010, which will expire on January 11, 2015. Based on the current certificate, the facility consists of seven aboveground tanks, in contact with an impervious barrier, identified as R1 through R7. The individual capacities are as follows: Tank R1 is 3,000 gallons, Tank R2 is 1,080 gallons, Tank R3 is 275 gallons, Tank R4 is 275 gallons, Tank R5 is 275 gallons, Tank R6 is 275 gallons, and Tank R7 is 275 gallons. The total storage capacity of the facility is 5,455 gallons. On the PBS Facility Information Report, printed on October 19, 2011, an eighth tank is listed, which was an underground tank with a capacity of 200,000 gallons. The eighth tank is identified as Tank 015, and was closed on September 1, 1995. (Exhibit A Urda Affirmation.)

The allegations in the first and second causes of action relate to Tank R2. Based on the evidence provided by Department staff, clarification about Tank R2 is needed.

² The fourth cause of action is an alleged violation of 6 NYCRR 613.3(c)(3)(ii), and the fifth cause of action is an alleged violation of 6 NYCRR 613.3(c)(3).

The March 18, 2002 PBS application for the Ridgewood facility identifies two tanks at the facility. Tank R1 has a capacity of 3,000 gallons, and Tank R2 has a capacity of 2,000 gallons. (Exhibit B Urda Affirmation.)

As noted above, Exhibit C (Urda Affirmation) consists of three PBS applications for the Ridgewood facility dated December 21, 2004, March 30, 2009 and January 4, 2004. The express purpose of the December 21, 2004 PBS application was to correct information about the tanks, including information about modifications. Seven tanks, identified as R1 through R7, are reported in the December 21, 2004 PBS application. (Exhibit C Urda Affirmation.)

According to the December 21, 2004 application, Tank R2 is an aboveground tank with a capacity of 2,000 gallons. The action reported in column 1 for Tank R2 is to close/remove the tank at the facility, and to correct information about the tank. In column 4, Tank R2 is reported as in service. The action (see column 1) for Tanks R3 through R7 is to add them to the facility. The reported capacity of Tank R3 is 10,800 gallons. Moreover, unlike the January 11, 2010 PBS certificate (Exhibit A Urda Affirmation), which lists five tanks (Tanks R3 through R7) each having a capacity of 275 gallons, the December 21, 2004 PBS application lists four tanks (Tank R4 through Tank R7) each having a capacity of 275 gallons. (Exhibit C Urda Affirmation.)

The information presented in the December 21, 2004 PBS application (Exhibit C Urda Affirmation) about Tank R2 is consistent with what was initially reported in the March 18, 2002 PBS application (Exhibit B Urda Affirmation). A discrepancy exists among the PBS applications, however, with respect to the number of tanks at the Ridgewood facility having a capacity of 275 gallons.

Subsequently, the Department received a PBS application for the Ridgewood facility dated March 30, 2009 (Exhibit C Urda Affirmation), that was received on April 27, 2009, which is about four months after Mr. Ajoku's December 29, 2008 inspection. The stated purpose of the March 30, 2009 PBS application was to correct information about the tanks (see column 1).

In the March 30, 2009 PBS application, six tanks (R1 through R6), rather than seven (*cf* December 21, 2004 PBS application [Exhibit C Urda Affirmation]), are identified at the Ridgewood facility. The status of Tank R2 (column 4) in the

March 30, 2009 PBS application is left blank, however. In the March 30, 2009 application, the capacity of Tank R2 has changed from 2,000 gallons, as reported in the December 21, 2004 PBS application, to 1,080 gallons. Unlike the December 21, 2004 PBS application, no tank on the March 30, 2009 PBS application has a capacity of 10,800 gallons. The individual capacity of Tanks R3 through R6 is 275 gallons each. (Exhibit C Urda Affirmation.) No explanation was offered for the change in capacity of Tank R2 from 2,000 gallons to either 10,080 gallons or 1,080 gallons. No explanation about the status of Tank R7, as identified in the December 21, 2004 application, was offered.

The third application is dated January 4, 2010 (Exhibit C Urda Affirmation). Its purpose was to renew the registration of the Ridgewood facility. As in the March 30, 2009 PBS application, six tanks (R1 through R6) are identified at the Ridgewood facility. In column 4, Tank R2 is reported to be in service. Like the March 30, 2009 PBS application, the capacity of Tank R2 in the January 4, 2010 PBS application is 1,080 gallons. Tank R7 with a capacity of 275 gallons is reported on the January 4, 2010 PBS application.

It appears that what was initially identified as Tank R2 in the March 18, 2002 and December 21, 2004 PBS applications for the Ridgewood facility may have been reported to be out of service before the March 30, 2009 PBS application was filed. Also, it appears that the remaining tanks were renumbered. Consequently, what was identified in the December 12, 2004 PBS application as Tank R3 with a capacity of 10,800 gallons, was renumbered in the March 30, 2009 PBS application, and subsequent applications, as Tank R2. Also, the capacity reported in the December 21, 2004 PBS application for this tank (presently Tank R2, but initially Tank R3) should have been reported as 1,080 gallons rather than 10,800 gallons. Any evidence to confirm this sequence of events would inform the record of this matter.

Also, it is not clear when the tanks were renumbered in relationship to Mr. Ajoku's December 29, 2008 inspection of the Ridgewood facility. The first and second causes of action refer to an inactive 2,000 gallon tank (¶¶ 29 and 31 Urda Affirmation), and Mr. Ajoku states that Tank R2 was inactive although registered as in service, and that Tank R2 (2,000 gallons) was not properly closed (¶ 7 Ajoku Affidavit). As a result, Department staff's references to Tank R2 in the first and second causes of action, and Mr. Ajoku's references to Tank R2 in his January 12, 2012 affidavit need to be clarified.

B. Newtown Creek PBS Facility (Seventh through Tenth Causes of Action)

The Department issued the current petroleum bulk storage certificate for the Newtown Creek facility to Maspeth Concrete on September 30, 2008, and it expired on June 30, 2012. The Newtown Creek PBS facility has eleven tanks. Six are aboveground in contact with the soil, and five are underground. (Urda Affirmation Exhibit A.) In addition to owning the Newtown Creek PBS facility, Maspeth Concrete owns the real property on which the Newtown Creek facility is located (¶ 8 Urda Affirmation and Exhibit D).

On December 31, 2008, Mr. Ajoku inspected the Newtown Creek facility, which he described as "inactive" (¶ 8 Ajoku Affidavit). During his December 31, 2008 inspection of the Newtown Creek PBS facility, Mr. Ajoku observed numerous violations of 6 NYCRR Parts 612 (Registration of Petroleum Storage Facilities) and 613 (Handling and Storage of Petroleum) (¶ 10 Ajoku Affidavit). Mr. Ajoku subsequently prepared a notice of violation, dated January 14, 2009, and sent it, by certified mail, return receipt requested, to Maspeth Concrete at its corporate address (¶ 9 Ajoku Affidavit and Exhibit B).

1. Seventh Cause of Action

In the seventh cause of action, Department staff alleged that Maspeth Concrete did not post the registration certificate for the Newtown Creek facility in violation of 6 NYCRR 612.2(e) (¶ 41 Urda Affirmation). After submitting a complete PBS application and applicable fee, the Department will issue a registration certificate. When the Department issues a registration certificate, 6 NYCRR 612.2(e) requires the operator to display the certificate at the PBS facility at all times.

On September 30, 2009, the Department issued a PBS certificate to Maspeth Concrete for the Newtown Creek facility. On the September 30, 2008 PBS certificate for the Newtown Creek facility, Maspeth Concrete is identified as the facility operator (Exhibit A Urda Affirmation). To demonstrate the violation alleged in the seventh cause of action, Mr. Ajoku states, in his January 12, 2012 affidavit (¶ 10), that he did not observe the registration certificate when he inspected the Newtown Creek facility on December 31, 2008. Consequently, Mr. Ajoku noted this deficiency in the January 14, 2009 notice of violation (Exhibit B Ajoku Affidavit).

Maspeth Concrete offered nothing to contradict Mr. Ajoku's affidavit and the information presented in Exhibit B to Mr. Ajoku's affidavit. Therefore, I conclude that Maspeth Concrete, as the facility operator, failed to post the PBS registration certificate at the Newtown Creek facility in violation of 6 NYCRR 612.2(e). I conclude further that this violation has continued since Department staff's December 31, 2008 inspection.

2. Eighth Cause of Action

As the eighth cause of action, Department staff alleged that Maspeth Concrete failed to properly register the Newtown Creek facility in violation of 6 NYCRR 612.2(a) by having eleven inactive storage tanks registered as in service (¶ 43 Urda Affirmation). Section 612.2(a)(1) requires an owner of an existing PBS facility to register the facility with the Department including any out of service facility that has not been permanently closed. Pursuant to 6 NYCRR 612.2(a)(2), the registration must be renewed every five years until the Department receives notice that the facility has been permanently closed.

To demonstrate the violation alleged in the eighth cause of action, Mr. Ajoku states in his January 12, 2012 affidavit (¶ 10) that Maspeth Concrete did not "properly register the facility with the Department (eleven inactive storage tanks were registered as being in service)." In addition, a facility information report for the Newtown Creek facility, printed on October 19, 2011, lists eleven tanks. According to the report, every tank is in service. (Exhibit A Urda Affirmation.) When Mr. Ajoku inspected the Newtown Creek facility on December 31, 2008, however, he observed that the facility was inactive (¶ 8 Ajoku Affidavit). In the January 14, 2009 notice of violation, Mr. Ajoku noted that the registration information for the tanks was not current and valid (Exhibit B Ajoku Affidavit).

Maspeth Concrete offered nothing to contradict Mr. Ajoku's affidavit, and the supporting documentary evidence offered with Department staff's motion. Therefore, I conclude that Maspeth Concrete failed to properly register the Newtown Creek facility in violation of 6 NYCRR 612.2(a) because Maspeth Concrete continues to report that the tanks are in service when Mr. Ajoku determined, during his December 31, 2008 inspection, that they were not in service and not permanently closed. I conclude

further that this violation has continued since the December 31, 2008 inspection.

3. Ninth and Tenth Causes of Action

Exhibit A to Mr. Urda's Affirmation includes a facility information report for the Newtown Creek facility, printed on October 19, 2011. According to the report, the Newtown Creek PBS facility has a total of eleven tanks; six are aboveground, and five are underground. Although all tanks are reported to be in service, Mr. Ajoku observed, during his December 31, 2008 inspection, that all eleven PBS tanks at the Newtown Creek facility were not in service and that that facility was inactive (¶ 8 and ¶ 10 Ajoku Affidavit). It is not known how long the tanks were out of service prior to Mr. Ajoku's December 31, 2008 inspection. However, the tanks at the Newtown Creek facility were not permanently closed based on Mr. Ajoku's December 31, 2008 observations (¶ 10 Ajoku Affidavit). In addition, Maspeth Concrete's consultant, in a letter dated March 20, 2009 (Exhibit C Ajoku Affidavit), stated that it was in the process of removing the aboveground tanks, and testing the underground tanks to develop a closure plan.

In the ninth cause of action, Department staff alleged that Maspeth Concrete failed to properly close the underground tanks (five) at the Newtown Creek facility in violation of 6 NYCRR 613.9(a) (¶ 45 Urda Affirmation). As the tenth cause of action, Department staff alleged that Maspeth Concrete failed to properly close the aboveground tanks (six) at the Newtown Creek facility in violation of 6 NYCRR 613.9(b) (¶ 47 Urda Affirmation). According to Mr. Urda, these violations have continued since Department staff's December 31, 2008 inspection (¶¶ 44 and 46 Urda Affirmation).

Section 613.9 outlines the requirements for closing out of service PBS tanks. When tanks have been temporarily out of service for 30 days or more, all product must be removed, and the openings and pipes must be capped or plugged, among other things (see 6 NYCRR 613.9[a][1]). Pursuant to 6 NYCRR 613.9(a)(2), storage tanks that are temporarily out of service are subject to all applicable requirements outlined in Parts 612 and 613, such as, periodic tightness testing and registration.

The requirements for permanently closing out of service tanks are outlined at 6 NYCRR 613.9(b). All petroleum product and sludge must be removed from the tanks (see 6 NYCRR

613.9[b][1][i]). All lines and openings must be capped or plugged (see 6 NYCRR 613.9[b][1][iii]). For aboveground tanks, the date of permanent closure must be stenciled on the tank, and the tanks must be protected from floatation (see 6 NYCRR 613.9[b][1][iv and vi]). For underground tanks, they must be filled with a solid inert material or removed (see 6 NYCRR 613.9[b][1][v]). As with the temporary closure of a tank (see 6 NYCRR 613.9[a][2]), any out of service tank remains subject to all applicable requirements outlined in Parts 612 and 613, such as, periodic tightness testing and registration until it is permanently closed (see 6 NYCRR 613.9[b][2]).

It is not clear why Department staff is attempting to differentiate violations concerning the temporary closure of underground tanks at the Newtown Creek facility (see 6 NYCRR 613.9[a] [ninth cause of action]) from violations concerning the permanent closure of aboveground tanks (see 6 NYCRR 613.9[b] [tenth cause of action]). The requirements for the temporary or permanent closure of tanks apply to any tank and make no distinction between aboveground tanks and underground tanks.

Based on the March 20, 2009 letter from its consultant (Exhibit C Ajoku Affidavit), Maspeth Concrete is in the process of permanently closing the Newtown Creek facility, but had not temporarily closed the inactive PBS facility given Mr. Ajoku's observations on December 31, 2008 (¶ 10 Ajoku Affidavit). Until the Newtown Creek facility is permanently closed, 6 NYCRR 613.9(a)(1) requires Maspeth Concrete to temporarily close it because the Newtown Creek facility has been out of service for 30 days or more.

Department staff should clarify the charges alleged in the ninth and tenth causes of action. Department staff may either present a legal theory that explains the distinction between the temporary closure of underground tanks at the Newtown Creek facility (see 6 NYCRR 613.9[a] [ninth cause of action]) and the permanent closure of aboveground tanks (see 6 NYCRR 613.9[b] [tenth cause of action]), or amend the pleadings. Accordingly, I reserve ruling on the ninth and tenth causes of action.

IV. Civil Penalty

In the January 12, 2012 motion for order without hearing, Department staff requested an order from the Commissioner that would assess a total civil penalty of \$77,900, and direct Maspeth Concrete to correct the outstanding violations,

particularly those that occurred at the Newtown Creek PBS facility. To support the requested civil penalty, Department staff cited ECL 71-1929(1), which authorizes a civil penalty of \$37,500 per day for each violation of Title 1 through 11 inclusive and Title 19 of ECL Article 17, or the rules and regulations promulgated thereto. Department staff based its request on the guidance outlined in the Commissioner's Civil Penalty Policy (DEE-1) dated June 20, 1990, the Bulk Storage and Spill Response Enforcement Policy (DEE-4) dated March 15, 1991, and the Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22) dated May 21, 2003 (¶ 49 Urda Affirmation).

I reserve making any recommendations about the appropriate civil penalty that the Commissioner should assess until the factual issues are resolved, and the requested clarification is provided.

Conclusions

I. Motion for Order without Hearing

1. With service of an amended notice of motion for order without hearing dated January 12, 2012, and supporting papers upon Maspeth Concrete, by certified mail, return receipt requested, Department staff duly commenced the captioned administrative enforcement proceeding in a manner consistent with the requirements outlined at 6 NYCRR 622.3(a)(3) and 622.12.
2. With respect to the Ridgewood facility, Department staff has not met the requirements for a motion for order without hearing as outlined at 6 NYCRR 622.12(a). Therefore, Department staff's motion is denied. A hearing is needed to develop a record about factual issues. Also, as outlined above, clarification of certain circumstances is needed. As appropriate, any evidence to support the requested clarification should be provided.
3. Concerning the Newtown Creek facility, Department staff has met the requirements for a motion for order without hearing as outlined at 6 NYCRR 622.12(a) with respect to the seventh and eighth causes of action, but not with respect to the ninth and tenth causes of action. Therefore, Department staff's motion is granted with respect to the

seventh and eighth causes of action, but denied with respect to the ninth and tenth causes of action.

II. Newtown Creek PBS Facility

4. Maspeth Concrete failed to post the registration certificate at the Newtown Creek PBS facility in violation of 6 NYCRR 612.2(e). This violation has continued since Department staff's December 31, 2008 inspection.
5. Maspeth Concrete failed to properly register eleven tanks at the Newtown Creek PBS facility in violation of 6 NYCRR 612.2(a). The violation has continued since Mr. Ajoku's December 31, 2008 inspection.

Further Proceedings

An adjudicatory hearing will be scheduled to develop a record about the factual issues identified above.

I would like to schedule a telephone conference call with the parties to select a date for the hearing. For the telephone conference call, I am available during the weeks of August 13 and 27, 2012. Please advise about your availability for the telephone conference call by August 2, 2012.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
July 23, 2012

To: Attached Service List dated July 19, 2012

Appendix A

**Motion for Order without Hearing
Maspeth Concrete Loading Corporation
DEC Case No. R2-20090123-27**

1. Cover letter dated February 9, 2012 by Assistant Regional Attorney John K. Urda with enclosures:
 - a. US Postal Service - Track and Confirm Receipt for Maspeth Concrete Loading Corporation;
 - b. US Postal Service - Track and Confirm Receipt for Joseph Paykin, Esq.;
 - c. Letter dated February 7, 2012 by Maspeth Concrete Loading Corp. to Mr. Urda; and
 - d. Letter dated February 9, 2012 by Mr. Urda to Maspeth Concrete Loading Corp.

2. Amended Notice of Motion for Order without Hearing dated January 12, 2012.

3. Amended Affirmation of Assistant Regional Attorney John K. Urda, dated January 12, 2012, in support of the Motion for Order without Hearing with Exhibits A through F.
 - a. **Exhibit A:**
 - i. Ridgewood Facility (PBS Facility No. 2-016160)
 1. PBS Facility Information Report; and
 2. Petroleum Bulk Storage Certificate; and

 - ii. Newton Creek Facility (PBS Facility No. 2-206334)
 1. PBS Facility Information Report; and
 2. Petroleum Bulk Storage Certificate.

 - b. **Exhibit B:** Ridgewood Facility - Petroleum Bulk Storage Application dated March 18, 2002.

 - c. **Exhibit C:**
 - i. Ridgewood Facility - Petroleum Bulk Storage Application dated December 21, 2004;
 - ii. Ridgewood Facility - Petroleum Bulk Storage Application dated March 30, 2009; and
 - iii. Ridgewood Facility - Petroleum Bulk Storage Application dated January 4, 2010.

d. **Exhibit D:**

- i. Deed for property located at 46-73 Metropolitan Avenue, Ridgewood, Queens County (Ridgewood Facility); and
- ii. Deed for property located at 33-05 Laurel Hill Boulevard, Maspeth, Queens County (Newton Creek Facility).

e. **Exhibit E:**

- i. New York State Department of State, Division of Corporations - Maspeth Concrete Loading Corp.; and
- ii. New York State Department of State, Division of Corporations - Quadrozzi Realty Corporation.

f. **Exhibit F:**

- i. Email from John Urda to Joseph Paykin dated December 1, 2011 regarding Maspeth Concrete Loading Corp.; and
- ii. Email from John Urda to Joseph Paykin dated December 19, 2011 regarding Maspeth Concrete Loading Corp.

4. Amended Affidavit by Moses Ajoku sworn to January 12, 2012 with Exhibits A through C.

- a. **Exhibit A:** Notice of Violation dated December 29, 2008 for the Ridgewood Facility (PBS Facility No. 2-016160).
- b. **Exhibit B:** Notice of Violation dated January 14, 2009 for the Newton Creek Facility (PBS Facility No. 2-206334).
- c. **Exhibit C:** Letter dated March 20, 2009 by Nicholas Mann, Principal, Quay Consulting to Mr. Ajoku regarding the Ridgewood Facility (PBS Facility No. 2-016160), and the Newton Creek Facility (PBS Facility No. 2-206334) with attached correspondence dated March 3, 2009 concerning Tank R2 at the Ridgewood Facility (PBS Facility No. 2-016160).