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 Environmental Conservation Law (ECL), 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 -

Q.P. SERVICE STATION CORPORATION,
ANTICO REALTY CORPORATION,
GREGORY IOVINE, and
LUCOLO BUS CORPORATION,

Respondents.

DEC Case No. R2-20021001-319

DECISION AND ORDER
OF THE COMMISSIONER

October 20, 2004

DECISION AND ORDER OF THE COMMISSIONER

Staff of the Department of Environmental Conservation ("Department") move, pursuant to 6 NYCRR 622.12, for an order without hearing as against respondents Q.P. Service Station Corporation and Antico Realty Corporation ("respondents"). In a ruling dated July 8, 2003, Administrative Law Judge ("ALJ") Daniel P. O'Connell granted Department staff's motion in part on the issue of respondents' liability for two causes of action alleged in the complaint. The ALJ subsequently submitted a hearing report recommending the imposition of a penalty and certain remedial action. For the reasons that following, I affirm the ALJ's July 8, 2003 ruling, and grant Department staff's motion in part.

Proceedings and Findings of Fact

Department staff commenced this enforcement proceeding as against respondents Q.P. Service Station Corporation, Antico Realty Corporation, Gregory Iovine, and Lucolo Bus Corporation. Department staff's claims as against respondents Gregory Iovine and Lucolo Bus Corporation were subsequently withdrawn by staff, as noted in the ALJ's hearing report (see attached, at 1-2).

In the July 8, 2003 ruling, the ALJ determined that respondent Q.P. Service is the owner and operator of a petroleum bulk storage facility located at 1317 Castleton Avenue, Staten Island, which contained five 550-gallon underground storage

tanks. The ALJ also determined that respondent Antico Realty Corporation is an owner of the property located at 1317 Castleton Avenue. The ALJ found that, on March 7, 2002, underground petroleum storage tanks were removed on behalf of respondents Q.P Service and Antico, but that the Department was not notified until April 2, 2002 that the tanks were removed. Finally, the ALJ found that between March 7 and March 27, 2002, a petroleum spill occurred at the facility.

For the reasons stated in the July 8, 2002 ruling, I adopt the ALJ's findings of fact (see ALJ's Ruling, at 9). I also find, based upon the record, that five underground storage tanks were removed from the facility.

Liability and Number of Violations

The ALJ concluded that Department staff established respondents Q.P. Service and Antico's liability for the first and third causes of action alleged in the complaint -- (1) that respondents violated 6 NYCRR 612.2(d) by removing underground petroleum storage tanks from the facility without providing the Department with notice within 30 days prior to such removal; and (2) respondents violated 6 NYCRR 613.9(c) by permanently closing underground petroleum storage tanks at the facility without providing the Department with notice within 30 days prior to such closure. The ALJ held that issues of fact required hearing with respect to the second cause of action alleged in the complaint --

alleged violations of 6 NYCRR 613.8. Before hearing, however, Department staff withdrew the second cause of action.

For the reasons stated in the ALJ's July 8, 2002 ruling, I affirm the ALJ's conclusions of law that respondents Q.P. Service and Antico each technically violated both 6 NYCRR 612.2(d) and 613.9(c). I also affirm the ALJ's rejection of respondents' affirmative defenses to those violations.

In his hearing report, however, the ALJ questioned whether a separate civil penalty may be assessed for the violation of each subdivision, given the similarity of the notice requirements in the two regulatory provisions (see ALJ's Hearing Report, at 5). Under the circumstances of this case, I conclude that separate penalties should not be assessed.

The ALJ correctly notes that the provisions of 6 NYCRR part 613 ("Handling and Storage of Petroleum") are applicable to some facilities not subject to 6 NYCRR part 612 ("Registration of Petroleum Storage Facilities") (compare 6 NYCRR 612.1[b] with 6 NYCRR 613.1[b]). The facility at issue in this case, however, is regulated under both Part 612 and Part 613.

Part 612 requires that owners of regulated facilities notify the Department within 30 days prior to "substantially modifying" a facility (6 NYCRR 612.2[d]). The permanent closure of a tank constitutes a substantial modification of a facility under Part 612 (see 6 NYCRR 612.1[b][27]). Thus, Part 612

requires that owners of a regulated facility provide the Department with notice within 30 days prior to permanently closing a tank.

Part 613 establishes requirements not otherwise provided for in Part 612 for the permanent closure of a tank in a facility registered pursuant to Part 612 (see 6 NYCRR 613.9[b]). The reporting requirement under 6 NYCRR 613.9(c), however, adds nothing to the obligations imposed upon the owner of a facility already subject to the requirements of Part 612. The requirement under section 613.9(c) that the owner of a regulated tank must provide the Department with notice within 30 days prior to permanent closure of that tank is, in this circumstance, a reiteration of the obligation already imposed upon the tank owner by section 612.2(d). In other words, where a facility is regulated pursuant to Part 612, all violations of section 613.9(c) would constitute a violation of section 612.2(d). In this context, nothing in the plain language, structure, or purpose of the respective Parts justifies treating the violation of section 613.9(c) as a distinct violation, subject to a separate penalty, from a violation of section 612.2(d) (compare Matter of Steck, Commissioner's Order, March 29, 1993, at 5; Matter of Wilton, Order of the Commissioner, Feb. 1, 1991, at 1). Thus, I conclude that respondents' technical violations of

section 613.9(c) do not warrant a penalty separate from that imposed for respondents' violations of section 612.2(d).

Duration of Violations

As noted by the ALJ in his hearing report, Department staff contends that respondents' violations of sections 612.2(d) and 613.9(c) continued from March 7, 2002 until the date of staff's motion for an order without hearing, a period of 400 days. The ALJ agreed that the violations were of a continuing nature. However, the ALJ concluded that the violations ended when respondents provided the Department with an application for a substantial modification of its facility on April 2, 2002, a period of 26 days.

I adopt the ALJ's rationale and conclusions, both with respect to the continuing nature of the violations established, and the duration of such violations. Although the "within 30 days prior" notice requirement is significant to the Department's ability to effectively administer Parts 612 and 613, it is the notice itself that a substantial modification will occur or has occurred that is the essence of the requirement. The purpose of Parts 612 and 613 are to protect the public health, welfare, and the lands and the waters of the State from releases of petroleum into the environment. In order to accomplish this purpose, the Department must receive notice when a regulated facility is planning to modify or close tanks so that the Department may

observe and supervise the operation or, if the operations are concluded, to determine whether they complied with regulatory requirements. Each day the Department is deprived of such notice, its ability to accomplish the purposes of Parts 612 and 613 is compromised. Thus, I agree with the ALJ that the failure to provide notice pursuant to sections 612.2(d) and 613.9(c) continues each day respondents fail to provide such notice. I also agree that the violations ended when respondents provided the Department with the application for a substantial modification and, thus, provided the notice required by section 612.2(d).

Civil Penalty Calculation

I adopt the ALJ's recommendation that $2,000 be assessed for the initial violation of sections 612.2(d) and 613.9(c), and that an additional $200 per day be assessed for the 26 days that the violation continued. Accordingly, the total civil penalty assessed should be $7,200.

Remediation

I also adopt the ALJ's recommendation granting Department staff's request that respondents be ordered to investigate whether a petroleum leak or spill occurred when respondents removed the underground storage tanks and, if necessary, to remediate the site. In addition to the reasons stated by the ALJ, and adopted here, such remedial measures are

justified by the factual determination that a petroleum spill occurred at the facility.

THEREFORE, having considered this matter, it is ORDERED that:

I. Department staff's motion for an order without hearing pursuant to 6 NYCRR 622.12 is granted in part.

II. Respondents Q.P. Service Station Corporation and Antico Realty Corporation are adjudged to have violated 6 NYCRR 612.2(d) and 613.9(c) by permanently closing underground petroleum storage tanks at the facility on or before March 7, 2002 without providing the Department with notice within 30 days prior to such closure and allowing such violation to continue for 26 days.

III. Respondents Q.P. Service Station Corporation and Antico Realty Corporation are jointly and severally assessed a total civil penalty of SEVEN THOUSAND TWO HUNDRED ($7,200) DOLLARS for the violation adjudged in paragraph II above. One half of the total civil penalty ($3,600) shall be due and payable within 30 days of service of this order on respondents. Payment of this penalty shall be by cashiers check, certified

check or money order drawn to the order of "NYSDEC" and mailed (by certified mail, return receipt requested or by overnight delivery) or hand-delivered to: Regional Director, New York State Department of Environmental Conservation, Region 2, One Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407. The remaining balance of the total civil penalty ($3,600) shall be suspended provided respondents comply with paragraphs IV and V of this order.

IV. Within thirty (30) days of the service of this order upon respondents, respondents shall provide Department staff with approvable plans for the investigation and remediation of the facility. Respondents shall implement the investigation and remediation plans immediately upon notice by the Department that the plans are approved.

V. Department staff shall be authorized to enter and inspect respondents' facility for the purposes of ascertaining compliance with the Environmental Conservation Law, the regulations promulgated thereunder, and the terms and conditions of this order

including, but not limited to, the implementation of the investigation and remediation plans.

VI. All communications between respondents and Department staff concerning this order shall be made to the Regional Director, NYS Department of Environmental Conservation, Region 2, 47-40 21st Street, Long Island City, New York 11101-5407.

VII. The provisions, terms, and conditions of this order shall bind respondents, their successors and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

/s/

by: _____
Erin M. Crotty, Commissioner

Albany, New York
Dated: October 20, 2004

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway, 1st Floor
Albany, New York 12233-1550

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York (ECL), 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:

QP SERVICE STATION CORPORATION, and
ANTICO REALTY CORPORATION

Respondents

DEC Case No. R2-20021001-319

Hearing Report

-by-

/s/

_____
Daniel P. O'Connell
Administrative Law Judge

PROCEEDINGS

After duly serving a notice of hearing and complaint dated October 23, 2002 upon Respondents, the QP Service Station Corporation (QP Service), the Antico Realty Corporation (Antico), the Lucolo Bus Corporation (Lucolo), and Gregory Iovine, Staff from the New York State Department of Environmental Conservation (Department Staff) filed a notice of motion for order without hearing dated April 11, 2003. In a notice of motion dated May 19, 2003, Respondents moved to dismiss the charges alleged in the complaint against Lucolo, among other things. Department Staff did not oppose this portion of Respondents' motion, and withdrew the complaint against Lucolo. Subsequently, Respondents' reply to Department Staff's motion for order without hearing was received on June 9, 2003.

On July 8, 2003, I ruled on Department Staff's motion for order without hearing. The ruling is summarized below. A copy of it is attached to this Hearing Report as Appendix A. Among other things, the ruling found that QP Service and Antico own and operated a petroleum bulk storage facility at 1317 Castleton Avenue, Staten Island (Richmond County), New York (the Facility). Based on the Facility's registration application (*see* Exhibit F), the Facility consisted of 5 underground petroleum storage tanks, each with a capacity of 550 gallons.

With respect to the first cause of action alleged in the October 23, 2002 complaint, I granted Department Staff's motion for the reasons explained in the July 8, 2003 ruling, and found that QP Service and Antico violated 6 NYCRR 612.2(d) by removing underground petroleum storage tanks from the Facility around March 7, 2002 without providing the Department with 30 days advanced notice. With respect to the third cause of action, I granted Department Staff's motion for the reasons explained in the July 8, 2003 ruling, and found that QP Service and Antico violated 6 NYCRR 613.9(c) by permanently closing underground petroleum storage tanks at the Facility around March 7, 2002 without providing the Department with 30 days advanced notice. With respect to Gregory Iovine, I denied Department Staff's motion concerning the first and third causes of action because there is a material issue of fact about whether Mr. Iovine owns the Facility.

In the July 8, 2003 ruling, I further denied Department Staff's motion with respect to the second cause of action concerning an alleged violation of 6 NYCRR 613.8 for failing to report a petroleum discharge to the Department within two hours of its discovery. I concluded there are material issues of fact

about whether QP Service, Antico and Gregory Iovine knew, or should have known, about the petroleum spill at the Facility.

Since there are some outstanding factual issues concerning the Respondents' liability, I concluded in the July 8, 2003 ruling that a hearing would be necessary. In addition, I reserved making any recommendation about the relief requested by Department Staff until after the parties had an opportunity to develop a complete factual record at the hearing.

By notice of motion dated July 16, 2003, Respondents moved to reargue Department Staff's April 11, 2003 motion for order without hearing. Department Staff opposed Respondents' motion to reargue, and filed an affirmation dated July 31, 2003. In a ruling dated August 8, 2003, I denied Respondents' July 16, 2003 motion.

Subsequently, in a letter dated September 8, 2003, Department Staff withdrew all the charges alleged in the complaint against Mr. Iovine. In addition, Department Staff withdrew the second cause of action concerning the alleged violation of 6 NYCRR 613.8. Department Staff requested that I close the hearing record and prepare a report for the Commissioner's consideration. Department Staff sent a copy of the September 8, 2003 letter to Respondents' attorney. Respondents did not reply to Department Staff's September 8, 2003 letter. By letter dated October 10, 2003, I informed the parties that the record of this matter was closed and that I would prepare a hearing report.

DISCUSSION

Motion to Amend

Department Staff's September 8, 2003 letter, in part, is a motion to amend its pleadings to conform with the Findings of Fact and Conclusions outlined in the July 8, 2003 ruling. Pursuant to 6 NYCRR 622.5(b), a party may amend its pleadings prior to the Commissioner's final determination by permission of the ALJ and absent prejudice to the other party.

Respondents do not oppose Department Staff's motion to amend the October 23, 2002 complaint. Therefore, I grant it. Accordingly, the remaining Respondents to this administrative enforcement action are the QP Service Station Corporation and the Antico Realty Corporation. The remaining causes of action from the October 23, 2002 complaint are the first and the third

concerning alleged violations of 6 NYCRR 612.2(d) and 613.9(c), respectively. Based on the July 8, 2003 ruling, there are no factual issues about the liability of QP Service and Antico with respect to the first and third causes of action.

Relief

As part of its April 11, 2003 motion, Department Staff requested an Order from the Commissioner that would: (1) assess a total civil penalty of $240,000 for the three violations initially asserted in the complaint, and (2) direct Respondents to develop a remediation plan for the site that Department Staff would approve before implementation. With the motion for order without hearing, Department Staff provided a civil penalty calculation in Mr. Rubinton's April 11, 2003 affirmation. Respondents' June 9, 2003 reply is silent about Department Staff's demand for relief.

I. Civil Penalty

Citing ECL 71-1929, Department Staff contended that the maximum civil penalty for a violation of either ECL article 17, titles 1-11 and 19, or its implementing regulations, including 6 NYCRR parts 612 and 613, is $25,000 per day for each violation.[1] According to Mr. Rubinton's affirmation, the violations began on March 7, 2002, which is the day on which Department Staff became aware of them, and continued for about 400 days, which corresponds to the date of Department Staff's April 11, 2003 motion. Using this formula, Department Staff calculated the maximum civil penalty for each violation to be $10,000,000 (10 million dollars). Since three separate violations were initially alleged in the complaint, the total maximum civil penalty would have been $30,000,000 (30 million dollars). Based on Department Staff's September 8, 2003 letter, Department Staff withdrew one of the violations alleged in the complaint. Therefore, the revised total maximum civil penalty would be $20 million, based on the rationale used by Department Staff to calculate the requested civil penalty.

In Mr. Rubinton's affirmation, Department Staff characterized Respondents' failure to file a timely application to modify the Facility, and their failure to provide 30 days

[1]Effective May 15, 2003, the civil penalty authorized by ECL 71-1929 was increased to $37,500 per day for each violation. Department Staff's April 11, 2003 motion for order without hearing predates the effective date of the amendment.

notice prior to permanently closing the tanks at the Facility as aggravating factors that justify a substantial civil penalty. Department Staff acknowledged, however, that Respondents eventually filed an application to modify the Facility, but noted that it was untimely.

In the April 11, 2003 motion, Department Staff recommended a civil penalty of $200.00 per day for each violation. For two violations that continued for 400 days, the total civil penalty would be $160,000.00. Department Staff recommended further that the Commissioner require Respondents to pay half, or $80,000.00, with the balance suspended, provided Respondents properly remediate the Facility.

In their reply to Department Staff's April 11, 2003 motion, Respondents did not object to the method that Department Staff used to calculate the civil penalty. Therefore, given the absence of any objections or material issues of fact, the Commissioner may assess civil penalties now.

However, Department Staff's civil penalty calculation does not appear to be consistent with ECL 71-1929 and relevant civil penalty guidance. Therefore, the Commissioner should consider the following alternative methods for calculating the civil penalty.

There are two Enforcement Guidance Memoranda (EGM) that specifically apply to petroleum bulk storage facilities. Both memoranda are posted on the Department's web site (*see* htpp://www.dec.state.ny.us/website/ogc/egm/index.htm). EGM DEE-20 dated December 12, 1997 addresses violations related to tank registration and tightness testing. In the October 22, 2002 complaint, Department Staff did not allege that Respondents failed to comply with these requirements. Therefore, DEE-20 does not apply here.

The second EGM is DEE-22, dated May 21, 2003 entitled, *Petroleum Bulk Storage Inspection Enforcement Policy*. A civil penalty schedule is attached to this EGM. The penalty schedule identifies provisions of 6 NYCRR parts 612, 613 and 614; lists potential violations associated with these regulatory provisions; and recommends a penalty range associated with each potential violation.

Depending on the type of violation, the guidance recommends assessing civil penalties either on a per tank basis or for the entire facility. Although none of the potential violations of 6 NYCRR parts 612 and 613 listed in the guidance

are identified as "continuous," the duration of a violation and its continuous nature may be considered aggravating factors in calculating the appropriate civil penalty. With respect to violations of 6 NYCRR 612.2(d) and 613.9(c), the EGM is silent. For similar violations (*see e.g.* 6 NYCRR 613.9[b] - tanks not permanently closed), however, the PBS Penalty Schedule attached to DEE-22 recommends a civil penalty ranging from $500 to $5,000 per tank, with an average civil penalty of $2,000 per tank.

In *Matter of Edson J. Martin* (Order of the Commissioner, August 17, 1992), the Commissioner considered violations of 6 NYCRR 612.2(d) and 613.9(c) and other provisions of 6 NYCRR parts 612 and 613. The Commissioner accepted the ALJ's determination that separate violations of the two notification requirements at 6 NYCRR 612.2(d) and 613.9(c) resulted from a single act. For these and other violations, the Commissioner assessed a total civil penalty of $10,000. Neither the Hearing Report nor the Order apportioned the civil penalty among the various violations. Therefore, it cannot be determined from *Martin* whether the Commissioner assessed separate civil penalties for the violations of 6 NYCRR 612.2(d) and 613.9(c). The discussion that follows outlines various options that the Commissioner may consider in determining the appropriate civil penalty in this case.

A. Number of Violations

Facility owners must notify the Department 30 days prior to substantially modifying a facility (*see* 6 NYCRR 612.2[d]), or permanently closing a tank or facility (*see* 6 NYCRR 613.9[c]). In addition, the notice requirement in 6 NYCRR 613.9(c) expressly refers to the requirements in 6 NYCRR 612.2(d), which relates to substantial modifications. 6 NYCRR 612.2(d) states that, "[w]ithin thirty (30) days prior to substantially modifying a facility, the owner must notify the department of such modification on forms supplied by the department." The term, "substantially modified facility," is defined at 6 NYCRR 612.1(c)(27) and includes the permanent closure of a stationary tank or a leaking storage tank. Therefore, by operation of regulation, tank closures are substantial modifications. Although Department Staff made a *prima facie* showing that Respondents did not comply with both 6 NYCRR 612.2(d) and 613.9(c), there is a question whether the Commissioner may assess separate civil penalties given the similarity of the notice requirements in the two regulatory provisions.

To determine whether it is appropriate to access separate civil penalties, the Commissioner has considered the similarity of the elements of proof for each violation. In *Matter of Richard K. Steck* (Order of the Commissioner, March 29, 1993), the Commissioner considered two separate circumstances. First, the Commissioner considered whether it was appropriate to assess separate civil penalties for violating a statute and a regulation where the regulation reiterates a statutory prohibition. Under such circumstances, the Commissioner concluded that it would be inappropriate to assess separate civil penalties because such an assessment would undermine the intent of the Legislature to establish the level of maximum civil penalties for a particular violation. The Commissioner applied this principle in determining the appropriated civil penalty in the *Matter of Frank Coppola, Sr.* (Order of the Commissioner, November 12, 2003). This circumstance does not exist here.

The second circumstance considered in *Steck* was whether it was appropriate to assess separate civil penalties for violating two similarly worded regulatory provisions. The Commissioner concluded in *Steck* that separate civil penalties could be assessed if the elements of proof for each violation were different. The applicability of this principle to the captioned matter will be discussed further below.

Finally, in the *Matter of Linda Wilton and Costello Marine, Inc.* (Order of the Commissioner, February 1, 1991), the Commissioner determined that a single act that would require a permit under three independent bases constituted three distinct violations. The principle in *Wilton* does not apply to the civil penalty calculation here.

An argument can be made that the notice requirement, and therefore, the elements of proof with respect to violations of 6 NYCRR 612.2(d) and 6 NYCRR 613.9(c) are the same. Both 6 NYCRR 612.2(d) and 613.9(c) require 30 days advanced notice prior to the substantial modification of a tank, or the permanent closure of a tank or facility, respectively. 6 NYCRR 613.9(c) expressly refers to 6 NYCRR 612.2(d). By definition, the permanent closure of a tank is a substantial modification (*see* 6 NYCRR 612.1[c][27]). Because the elements of proof are the same here, the Commissioner should not assess separate civil penalties based on the previous determination in *Steck*.

However, the two notice requirements are in separate, duly promulgated regulations. On the one hand, 6 NYCRR part 612 is entitled, *Registration of Petroleum Storage Facilities*. The purpose of this part is to regulate petroleum storage facilities

in order to protect public health, welfare, as well as the land and waters of the state (*see* 6 NYCRR 612.1[a]). It applies to all above ground and underground petroleum storage facilities with a combined storage capacity over 1,100 gallons except oil production facilities, facilities licensed pursuant to Navigation Law article 12, and facilities regulated by the federal Natural Gas Act (*see* 6 NYCRR 612.1[b]).

On the other hand, 6 NYCRR part 613 is entitled, *Handling and Storage of Petroleum*. Although similar to the purpose of 6 NYCRR part 612, the purpose of 6 NYCRR part 613 is to regulate how petroleum is handled and stored so as to protect public health, welfare, and the land and waters of the state (*see* 6 NYCRR 613.1[a]). Part 613 applies to all above ground and underground petroleum storage facilities with a combined storage capacity over 1,100 gallons including all facilities registered pursuant to 6 NYCRR part 612, as well as facilities licensed pursuant to Navigation Law article 12 (*see* 6 NYCRR 613.1[b]). Part 613 does not apply to either oil production facilities or those facilities regulated by the federal Natural Gas Act (*see* 6 NYCRR 613.1[b]).

Parts 612 and 613 have similar, but not identical, purposes. Based on the applicability of these two sets of regulations, some facilities may need to comply with the requirements outlined in both 6 NYCRR parts 612 and 613. Even though the elements of proof associated with violations of 6 NYCRR 612.2(d) and 613.9(c) are the same, however, parts 612 and 613 are two separate, duly promulgated regulations. This circumstance, arguably, distinguishes this case from the above identified administrative decisions. The alleged violations considered in *Steck* were from the same subpart of 6 NYCRR part 360. Here, the violations are found in separate, though related, parts. If the Commissioner concurs that the circumstances of this case are distinct from the circumstances considered in *Steck* because the violations arise from separate parts, then separate civil penalties may be assessed for violations of 6 NYCRR 612.2(d) and 613.9(c).

B. Duration of the Violations

According to Department Staff, the violations continued from when they were reported to the Department on March 7, 2002 until the date of Department Staff's motion for order without hearing, which is April 11, 2003. Department Staff asserted in the motion that ECL 71-1929 authorizes additional civil penalties related to the continuous nature of the violations. The Commissioner has determined that other violations of 6 NYCRR

parts 612 and 613 can be continuous in nature, and has assessed additional civil penalties accordingly (*see e.g. Matter of Arthur K. Costie d/b/a Costie's Body Shop*, Order of the Commissioner, December 16, 2003; *Matter of Morgan Oil Terminals Corp. et al.*, Order of the Commissioner, October 17, 1994; and *Matter of Edson J. Martin*, Order of the Commissioner, August 17, 1992).

New York courts have considered the civil penalties assessed pursuant to the authority provided by ECL 71-1929 (*see e.g. Michael D. Vito, Sr., v. Thomas C. Jorling*, 197 AD2d 822 [3rd Dept. 1993]; *Deutsch Relay, Inc. v. New York State Depart. of Envtl. Conservation*, 179 AD2d 756 [2nd Dept. 1992]; *State of New York v. Town of Wallkill*, 170 AD2d 8 [3rd Dept. 1991]; and *DVC Industries, Inc. v. Robert F. Flacke*, 86 AD2d 892 [2nd Dept. 1982]).

In *Vito*, (197 AD2d at 824), the court reviewed an administrative decision concerning violations related to the periodic testing of underground petroleum storage tanks for tightness (*see* 6 NYCRR 613.5). The court determined that the civil penalty assessed by the Commissioner was excessive because the economic benefit component of the civil penalty calculation was incomplete, and the assessed civil penalty was 1,200 times greater than that proposed during settlement discussions. The other decisions identified above do not review civil penalties assessed pursuant to ECL 71-1929 for of violations of 6 NYCRR parts 612 and 613.

In *US v. Trident Seafoods Corp.* (60 F3d 556 [9th Cir. 1995], *appeal after remand* 92 F3d 855 [1996], *cert. denied* 519 US 1109 [1997]), a federal court considered a notice requirement in the federal Clean Air Act. Pursuant to 42 USC § 7412, the US Environmental Protection Agency (EPA) is authorized to identify hazardous pollutants and to develop National Emission Standards for Hazardous Air Pollutants (NESHAP). The NESHAP for asbestos is found at 40 CFR part 61, subpart M. The regulation requires contractors to provide written notification to EPA prior to renovating a structure containing asbestos (*see* 40 CFR 61.146[b][4]). Violations of NESHAP requirements are violations of the federal Clean Air Act (*see* 42 USC § 7412[c] and [e]), and are punishable by penalties of "not more that $25,000 per day of violation" (42 USC § 7413[b]). The court's majority held "there are no specific time periods defined by the statute or regulation" (*Trident*, 60 F3d at 558). As a result, the court limited the civil penalty to a single violation of the federal Clean Air Act when the Trident Seafood Corporation failed to notify the state of Washington and EPA that it intended to remove asbestos.

In the dissent, Circuit Judge Ferguson reasoned otherwise, however. The dissenting judge characterized Trident's failure to provide notice as an act of omission that continues until there is compliance. Because the purpose of the notice requirement is to allow for the supervision of the renovation process by the responsible regulatory agency, the dissenting judge reasoned that each day that Trident failed to provide notice of its renovation resulted in a "separate harm" from the dangers of exposure to asbestos. As a result, the violation continued until the responsible regulatory agency received notice of the renovation (*see Trident*, 60 F3d at 561-562).

The notice requirements at 6 NYCRR 612.2(d) and 613.9(c) are important to the Department's regulatory obligation to protect public health and welfare, as well as the land and waters of the state. The intent of the notice requirement in each regulation is to give Department Staff the opportunity to visit facilities in order to provide direction about how tanks should be modified or closed, to observe and supervise the modification or closure of tanks, to verify whether tanks were properly modified or closed, or any combination thereof.

Even if an owner fails to give prior notice, that owner's obligation to notify the Department, pursuant to 6 NYCRR 612.2(d) and 613.9(c), continues. To fulfill the purpose of 6 NYCRR parts 612 and 613, Department Staff must have an opportunity, at the very least, to determine whether the owner properly modified or closed the tanks.

Attached to Department Staff's motion as Exhibit F is a copy of Respondents' application for a substantial modification. Exhibit F demonstrates that Department Staff received Respondents' application on April 2, 2002, some 26 days after the violations were reported to the Department on March 7, 2002. Although Respondents did not provide timely advanced notice as required by 6 NYCRR 612.2(d) and 613.9(c), Respondents eventually complied with the notice requirement. According to Department Staff, Respondents' eventual compliance should be considered a mitigating factor. I conclude, however, that the Department's receipt of Respondent's application for a substantial modification (*see* Exhibit F) on April 2, 2002, ended the violation. Therefore, the violations of 6 NYCRR 612.2(d) and 613.9(c) occurred for the first time on March 7, 2002, and continued for an additional 26 days until the Department received Respondents' application for a substantial modification on April 2, 2002, rather than the 400 days contended in Department Staff's motion.

C. Civil Penalty Calculation

Based on the foregoing discussion, the following alternative civil penalty calculations are offered for the Commissioner's consideration. If the Commissioner concludes that separate civil penalties may not be assessed for violations of 6 NYCRR 612.2(d) and 613.9(c) because the elements of proof are identical, and that the violations occurred on one day, based on Trident (60 F3d at 558), then a total civil penalty of $2,000 would be consistent with the civil penalty schedule attached to DEE-22.

Alternatively, if the Commissioner concludes that separate civil penalties may be assessed for violations of 6 NYCRR 612.2(d) and 613.9(c) because the requirements are outlined in two, separate duly promulgated regulations, and that each of these separate violations continued for 26 days, consistent with the discussion in the *Trident* dissent (60 F3d at 561-562), then a total civil penalty of $14,400 would be consistent with the rationale offered in Department Staff's May 19, 2003 motion and the civil penalty schedule attached to DEE-22. This total civil penalty could be apportioned as follows:

$2,000 for violating 6 NYCRR 612.2(d);
$5,200 for the continuous nature of the violation ($200 per day for 26 days);
$2,000 for violating 6 NYCRR 613.9(c); and
$5,200 for the continuous nature of the violation ($200 per day for 26 days).

II. Remediation

Department Staff also requested an Order from the Commissioner that would direct Respondents to develop a plan to investigate the need to remediate the site. As noted above, the tanks have been removed from the Facility. Department Staff would approve the plan before Respondents initiate the investigation. If the results of the investigation show that remediation is necessary, Department Staff requested that the Commissioner order Respondents to undertake any necessary remediation.

The purposes of ECL article 17 (Water Pollution Control) are to abate existing water pollution and to prevent any new pollution (*see* ECL 17-0103). To accomplish these purposes, the Department is required to classify the state's water bodies, and to adopt water quality standards that maintain the

classification of the state's waters (*see* ECL 17-0301). ECL 17-0303(2) authorizes the Department to abate and prevent water pollution in accordance with the classification of waters. In addition, ECL 17-0303(4)(g) provides the Commissioner with the authority to conduct investigations in order to carry out the purposes of ECL article 17. ECL 17-1001 authorizes the Department to establish a state petroleum bulk storage code for new and substantially modified facilities. This code is outlined in 6 NYCRR parts 612, 613 and 614.

Based on the various provisions of ECL article 17 identified above, the Commissioner has the authority to direct Respondents to develop a plan to investigate whether a petroleum leak or spill occurred when Respondents removed the underground storage tanks from the Facility. Depending on the results of that investigation, it may be necessary for Respondents to remediate the site.

RECOMMENDATIONS

The Commissioner should affirm the July 8, 2003 ruling, and should grant Department Staff's motion for order without hearing, in part, as discussed in detail in the July 8, 2003 ruling. Based on the discussion provided above, the Commissioner may assess a joint and several civil penalty that ranges from $2,000 to $14,400. In addition, the Commissioner should direct QP Service and Antico to develop a plan to investigate the need to remediate the Facility.

Appendix A: Ruling on Department Staff's Motion for Order without Hearing, July 8, 2003.