

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

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

**ORDER**

DEC Case No.  
R2-20150518-318

- by -

**S & M REALTY OF NEW YORK INC.,**

Respondent.

This administrative enforcement proceeding concerns alleged violations of ECL article 17 and 6 NYCRR parts 612 and 613 at a petroleum bulk storage (PBS) facility (# 2-606927) (facility) that respondent S & M Realty of New York Inc. owns at 2045 McDonald Avenue, Brooklyn, New York. A 4,000-gallon underground PBS tank, a 550-gallon underground PBS tank and two 200-gallon underground PBS tanks are located at the facility.

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this proceeding by service of a notice of motion for order without hearing, in lieu of complaint, dated August 21, 2015, which respondent received on August 25, 2015. In its papers, Department staff alleges that respondent:

1. failed to maintain a current and valid registration of a closed-in-place 4,000-gallon underground PBS tank, in violation of 6 NYCRR 612.2;
2. failed to maintain a current and valid registration for three tanks: a 550-gallon underground waste oil tank, one underground 200-gallon motor oil tank, and one 200-gallon underground transmission fluid tank, in violation of 6 NYCRR 612.2;

3. failed to notify the Department at least thirty days before the permanent closure of the 4,000-gallon underground PBS tank, in violation of 6 NYCRR 612.2(d);
4. failed to display the facility's PBS certificate, in violation of 6 NYCRR 612.2(e);
5. failed to properly mark the fill ports for the 550-gallon underground waste oil tank and the two 200-gallon underground tanks, in violation of 6 NYCRR 613.3(b)(1); and
6. failed to perform leak detection on the 550-gallon underground waste oil tank and the two 200-gallon underground tanks, in violation of 6 NYCRR 613.4(a)(2).

These violations were identified during a site visit by DEC Environmental Engineer Moses Ajoku on April 16, 2015 (see Affidavit of Moses Ajoku, sworn to August 20, 2015 [Ajoku Aff], ¶ 7; see also Exhibit C to the Ajoku Aff). Department staff also alleges that respondent, upon receiving a notice of violation dated April 16, 2015, failed to take corrective action with respect to these violations (see Affirmation of John K. Urda, Esq., dated August 21, 2015 [Urda Aff], ¶ 38; Ajoku Aff ¶ 10).

Respondent submitted an affidavit in opposition to staff's motion (see Affidavit of Scott Sanders, sworn to September 16, 2015 [Sanders Aff]). The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso, who prepared the attached summary hearing report. I adopt the ALJ's report as my decision in this matter, subject to my comments below.

### Liability

I concur with the ALJ's determination that Department staff is entitled to a finding of liability with respect to the referenced violations. Although respondent opposed staff's motion, respondent failed to raise a triable issue of fact requiring a hearing.

Respondent, in part, contended that the violations alleged in this proceeding were addressed in a prior DEC proceeding that resulted in a Commissioner's order (Matter of S&M Realty of New York Inc., Order of the Commissioner dated December 19, 2012 [2012 Order]). The 2012 Order has been the subject of a pending

judicial proceeding (see e.g. Sanders Aff, ¶¶ 2A, 3B, 5-7; see also Urda Aff ¶¶ 7-8).

The violations at issue in this administrative proceeding, however, are separate from, and independent of, the violations that were the subject of the prior proceeding and which resulted in the 2012 Order. The 2012 Order did not address the violations associated with the 550-gallon and the two 200-gallon underground tanks at the facility. In fact, these three tanks were unknown to the Department until Mr. Ajoku's inspection on April 16, 2015 (see Urda Aff, ¶ 9). Moreover, the failure of respondent to comply with the notification and registration requirements governing closure of the 4,000-gallon underground PBS tank did not arise until the time that tank was closed in 2014 (see Ajoku Aff, ¶ 7iii, and Exhibit F).

As for the remaining allegation, the 2012 Order did impose liability with respect to the facility's failure to display its registration certificate properly. However, I read staff's papers in this proceeding as alleging violations of this requirement subsequent to the date of the 2012 Order, as reflected by the findings of the Department inspector in the April 16, 2015 site visit (see Ajoku Aff, ¶ 7iv).

### Penalty

With respect to penalty, Department staff requested that respondent pay a civil penalty of thirty-four thousand seven hundred dollars (\$34,700). In support of the requested civil penalty, staff noted that the penalty requested is consistent with the Department's enforcement guidance memorandum entitled "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy," dated May 21, 2003 (see Urda Aff, ¶¶ 47-48, 51). Staff further details the serious nature of the violations, respondent's history of non-compliance, respondent's lack of cooperation, and the economic advantage respondent has obtained by failing to comply with the applicable regulations (see id. ¶ 49). Based on this record, a civil penalty in the amount of thirty-four thousand seven hundred dollars (\$34,700) is authorized and appropriate.

### Corrective Action

Staff has also requested that respondent correct the violations at the facility within fifteen (15) days of the date of this order. Considering the violations cited and the ALJ's

recommendations, this corrective action would require respondent to:

- submit a corrected and complete PBS registration application to the Department for the PBS facility at 2045 McDonald Avenue, Brooklyn, New York;
- display the PBS registration certificate on the premises of the facility at all times;
- color code the fill ports for the three recently identified underground tanks; and
- submit to the Department an inventory of leak protection monitoring performed on the 550-gallon and two 200-gallon underground tanks.

The corrective action that staff requests is authorized and warranted, and the compliance time period requested - fifteen (15) days - is appropriate. I am further directing that, in addition to submitting an updated PBS registration form to Department staff, respondent submit documentation confirming that it has corrected these violations. As noted by the ALJ, in performing these corrective actions, respondent must comply with new PBS regulations, set forth in the revised 6 NYCRR part 613 that became effective in October 2015.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing in lieu of complaint is granted.
- II. Respondent S & M Realty of New York Inc. is adjudged to have violated the following regulations at its facility located at 2045 McDonald Avenue, Brooklyn, New York:
  - A. 6 NYCRR 612.2 for failing to maintain a current and valid registration of a closed in place 4,000-gallon underground PBS tank;
  - B. 6 NYCRR 612.2 for failing to maintain a current and valid registration of the 550-gallon waste oil tank and the two 200-gallon underground tanks;

- C. 6 NYCRR 612.2(d) for failing to notify the Department at least thirty (30) days before the permanent closure of the 4,000-gallon underground PBS tank;
- D. 6 NYCRR 612.2(e) for failing to display the facility's PBS certificate on the facility premises;
- E. 6 NYCRR 613.3(b) (1) for failing to properly mark the 550-gallon underground waste oil tank and two 200-gallon underground tanks; and
- F. 6 NYCRR 613.4(a) (2) for failing to perform leak detection on the 550-gallon underground waste oil tank and two 200-gallon underground tanks at the facility.

III. Respondent S & M Realty of New York Inc. is hereby assessed a civil penalty in the amount of thirty-four thousand seven hundred dollars (\$34,700). The penalty shall be due and payable within thirty (30) days after service of this order upon respondent.

Payment shall be made in the form of a cashier's check, certified check or money order made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:

John K. Urda, Esq.  
Assistant Regional Attorney  
NYSDEC, Region 2  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101-5407

IV. Respondent S & M Realty of New York Inc. shall, within fifteen (15) days of service of this order upon it:

- A. file a corrected complete PBS registration application with the Department together with any applicable registration fees;
- B. display the PBS registration certificate on the premises of the facility at all times, and provide a photograph of the manner in which the certificate is displayed at the facility to Department staff;

C. color code the fill ports for the 550-gallon and two 200-gallon underground PBS tanks and provide photographs of the color coded fill ports to Department staff; and

D. submit to Department staff an inventory of leak protection monitoring performed by respondent on the 550-gallon and two 200-gallon underground tanks.

V. All communications from respondent S & M Realty of New York Inc. to Department staff concerning this order shall be directed to John K. Urda, Esq., at the address set forth in paragraph III of this order.

VI. The provisions, terms and conditions of this order shall bind respondent S & M Realty of New York Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

/s/

By:

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Basil Seggos  
Commissioner

Dated: July 29, 2016  
Albany, New York

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

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

**SUMMARY REPORT ON  
MOTION FOR ORDER  
WITHOUT HEARING**

DEC Case No.  
R2-20150518-318

- by -

**S & M REALTY OF NEW YORK INC.,**

Respondent.

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Appearances of Counsel:

-- Thomas S. Berkman, Acting Deputy Commissioner and  
General Counsel (John K. Urda, Assistant Regional Attorney,  
of counsel), for staff of the Department of Environmental  
Conservation

-- Scott Sanders, (Officer of S & M Realty of New York,  
Inc.), for respondent S & M Realty of New York Inc.

Proceedings

By notice of motion for order without hearing dated August 21, 2015, staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent S & M Realty of New York Inc. (respondent) for alleged violations of ECL article 17 and 6 NYCRR parts 612 and 613.<sup>1</sup> On August 25, 2015, Department staff served its notice of motion and supporting statements and exhibits on the respondent.

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<sup>1</sup> Parts 612 and 613 were repealed, effective subsequent to the commencement of this proceeding, and replaced by a revised part 613. For the purposes of the violations alleged in this matter, the prior parts 612 and 613 apply.

Respondent submitted an affidavit in opposition to staff's motion sworn to September 16, 2015. By letter dated September 30, 2015, Chief Administrative Law Judge James McClymonds advised the parties that the matter had been assigned to me.

By letter dated October 7, 2015, I requested proof of service of the motion papers on respondent from Department staff. Department staff provided the affirmation of service of John K. Urda dated October 7, 2015.

#### Staff's Charges

Department staff's motion for order without hearing consists of the notice of motion; affirmation of John K. Urda (Urda Affirmation), dated August 25, 2015; and the affidavit of Moses Ajoku (Ajoku Affidavit), sworn to August 20, 2015. The Urda Affirmation sets forth five causes of action and has the following exhibits attached:

- Exhibit A - Deed conveying 2045 McDonald Avenue, Brooklyn, New York to S & M Realty of New York Inc. dated September 16, 1988;
- Exhibit B - NYS Department of State Entity Information Sheet for S & M Realty of New York Inc.;
- Exhibit C - PBS Program Facility Information Report for facility located at 2045 McDonald Avenue, Brooklyn, New York, generated August 20, 2015; and PBS Certificate issued to S & M Realty of New York Inc. on September 20, 2012 with an expiration date of September 11, 2016;
- Exhibit D - Matter of S & M Realty of New York Inc., Order of the Commissioner, December 19, 2012 with Summary Report attached;
- Exhibit E - Email from John K. Urda to Lawrence Culley dated July 7, 2015; and
- Exhibit F - Press Release from United States Department of Justice, The United States Attorney's Office, Southern District of New York, dated February 14, 2014.

The Ajoku Affidavit has the following exhibits attached:

- Exhibit A - A photograph of respondent's facility located at 2045 McDonald Avenue, Brooklyn, New York;



- Exhibit B - PBS Program Facility Information Report for respondent's facility printed April 8, 2015, with Mr. Ajoku's handwritten notes;
- Exhibit C - Notice of Violation dated April 16, 2015;
- Exhibit D - Three photographs of three fill ports for a 550 gallon underground waste oil tank, 200 gallon underground motor oil tank and 200 gallon underground transmission fluid tank;
- Exhibit E - Photograph of closed fill port for 4,000 gallon underground PBS tank; and
- Exhibit F - Tank Seal Affidavit from Energy Fueling Systems, Corp. dated March 14, 2014.

Department staff alleges that the respondent violated the following:

1. 6 NYCRR 612.2 for failing to maintain a current and valid registration of a closed in place 4,000 gallon underground PBS tank (First cause of action);
2. 6 NYCRR 612.2 for failing to maintain a current and valid registration of three underground PBS tanks (First cause of action);
3. 6 NYCRR 612.2(d) for failing to notify the Department at least thirty days before the permanent closure of the 4,000 gallon underground PBS tank (Second cause of action);
4. 6 NYCRR 612.2(e) for failing to display the facility PBS certificate (Third cause of action);
5. 6 NYCRR 613.3(b) (1) for failing to properly mark three unregistered PBS tank fill ports (Fourth cause of action); and
6. 6 NYCRR 613.4(a) (2) for failing to perform leak detection on three unmetered underground PBS tanks (Fifth cause of action).

Based upon these alleged violations, Department staff seeks an order: finding the respondent in violation of the ECL and 6 NYCRR parts 612 and 613; assessing a penalty of \$34,700; and directing respondent to complete corrective action within 15 days.

#### Respondent's Position

In opposition to Department staff's motion, respondent submitted the affidavit of Scott Sanders (Sanders affidavit), an officer of respondent, sworn to September 16, 2015. Respondent

argues that staff's motion should be denied for the following reasons:

1. The proceeding is duplicative of pending charges and the relief should be an amendment to the existing proceedings in Supreme Court;
2. Granting the relief requested by staff without a hearing in which respondent can confront and cross-examine witnesses violates respondent's fundamental constitutional rights and right to due process; and
3. Staff's motion is jurisdictionally and procedurally defective because the supporting affirmation contains staff's allegations rather than being asserted in a separate charging or similar document.

Respondent also argues that each of the first, third, fourth and fifth causes of action alleged by Department staff are the exact allegations currently pending in Supreme Court, Kings County and should not be litigated here. As to the second cause of action, respondent alleges that respondent hired a contractor to legally close the tanks, and the contractor complied with all applicable laws. Respondent also argues that the action pending in Supreme Court deals with the registration of the 4,000 gallon PBS tank, and in response to a previous Commissioner's order, respondent sought to close the tank by retaining experienced contractors to legally close the tank.

Respondent did not otherwise address staff's motion or the violations alleged by Department staff.

#### **FINDINGS OF FACT**

1. Respondent S & M Realty of New York Inc. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 2045 McDonald Avenue, Brooklyn, New York (facility). In particular, PBS tank number 1 at the facility has a capacity of 4,000 gallons and is located underground. (Urda Affirmation at ¶¶ 3, 5 and 6, Exhibit C; Ajoku Affidavit at ¶¶ 5 and 6, Exhibit B.)
2. Respondent is an active domestic business corporation in the State of New York. (Urda Affirmation at ¶ 5, Exhibit B.)
3. On September 16, 1988, 2045 LLC, by deed, transferred all right, title and interest in the facility to respondent S

& M Realty of New York Inc., the facility's current owner. This deed is recorded in the Office of the Registrar of the City of New York at Reel 4379 Page 0489. (Urda Affirmation at ¶ 3, Exhibit A.)

4. In a previous enforcement proceeding against respondent involving the 4,000 gallon underground PBS tank only, the Commissioner found respondent liable for failing to:
  - properly register the facility,
  - renew its facility registration,
  - display the facility's PBS certificate,
  - mark the fill port on the 4,000 gallon underground PBS tank,
  - internally inspect the tank's epoxy liner,
  - keep reconciled inventory records for purpose of leak detection,
  - keep in-tank leak monitoring system in working order, and
  - remove all product from the tank and piping system and plug or cap the fill line when the tank was temporarily out of service. (See Matter of S & M Realty of New York, Inc., Order of the Commissioner, December 19, 2012 at 1-2.)
5. On September 20, 2012, the Department issued PBS Registration Certificate No. 2-606927 to S & M Realty of New York Inc. for the active 4,000 gallon underground PBS tank. The registration expires on September 11, 2016. (Urda Affirmation at ¶ 6, Exhibit C.)
6. The Department has not received an application to modify the PBS registration for respondent's facility. (Urda Affirmation at ¶ 14, Exhibit C; Ajoku Affidavit at ¶¶ 6 and 7 [ii], Exhibit B.)
7. Moses Ajoku is an environmental engineer employed in the Bulk Storage Section of the Bureau of Spill Prevention and Response in the Department's Division of Environmental Remediation in DEC Region 2. (Ajoku Affidavit at ¶ 1.)
8. As of September 20, 2012 and the date of Mr. Ajoku's inspection, April 16, 2015, the Department believed the facility consisted of one underground 4,000 gallon PBS tank. (Urda Affirmation at ¶ 6, Exhibit C; Ajoku Affidavit at ¶ 6, Exhibit B.)

9. Mr. Ajoku inspected the PBS facility located at 2045 McDonald Avenue, Brooklyn, New York on April 16, 2015 and observed that the 4,000 gallon underground PBS tank had been closed in place. (Ajoku Affidavit at ¶ 7 [ii], Exhibits C, E and F; Sanders Affidavit at ¶¶ 4 and 5.)
10. Respondent did not notify the Department within 30 days prior to closing the 4,000 gallon underground PBS tank. (Ajoku Affidavit at ¶ 7 [iii].)
11. Respondent did not modify its registration to reflect the 4,000 gallon underground PBS tank was closed in place and no longer an active tank. (Ajoku Affidavit ¶ 7 [ii], Exhibit B.)
12. Mr. Ajoku also observed that there were three other underground PBS tanks at the facility not registered with the Department. In particular, Mr. Ajoku observed one 550 gallon underground PBS tank used to store waste oil, one 200 gallon underground PBS tanks used to store motor oil, and one 200 gallon underground PBS tank used to store transmission fluid. (Ajoku Affidavit at ¶ 7 [i], Exhibits C & D.)
13. The three unregistered PBS tanks did not have color coding on their respective fill ports. (Ajoku Affidavit ¶ 7 [v], Exhibits C and D.)
14. Leak detection monitoring has not been performed on the three unregistered underground PBS tanks. (Ajoku Affidavit ¶ 7 [vi], Exhibit C.)
15. The facility PBS Registration Certificate was not displayed at the facility. (Ajoku Affidavit ¶ 7 [iv].)
16. As a result of the inspection, Mr. Ajoku issued a notice of violation to respondent dated April 16, 2015. The notice advised respondent that the PBS facility was in violation of several sections of the PBS regulations, including the failure to register three underground PBS tanks; failure to notify the Department within 30 days prior to a substantial modification of the 4,000 gallon PBS tank; failure to color-code the fill ports for each of the three unregistered tanks; and failure to perform leak detection on the three unregistered tanks. (Ajoku Affidavit at ¶ 7, Exhibit C.)

17. To date, neither respondent nor its representatives have taken steps to correct the violations. (Urda Affirmation at ¶ 38; Ajoku Affidavit at ¶ 10.)
18. To date, the respondent has not produced any evidence of corrective action with respect to these violations of the PBS regulations.
19. Respondent's affidavit in opposition to Department staff's motion does not deny any of the violations alleged by staff.

### **DISCUSSION**

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR. (See 6 NYCRR 622.12[d].) "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." (Matter of Frank Perotta, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report.) CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. (Matter of Locaparra, Commissioner's Decision and Order, 2003 WL 21633072, \*2 [June 16, 2003].)

In this instance, Department staff must establish its causes of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by tendering evidentiary proof in admissible form. It is Department staff's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged by staff. I conclude that in this proceeding staff has met its initial burden.

Staff's papers demonstrate that respondent S & M Realty of New York Inc. owns the property located at 2045 McDonald Avenue, Brooklyn, New York. As the owner, respondent is responsible for

complying with the statutory and regulatory requirements for PBS facilities.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affidavit from an environmental engineer that describes the violations of the PBS regulations. Department staff's proof presents a prima facie case demonstrating that respondent's PBS Certificate No. 2-606927 issued on September 20, 2012 with an expiration date of September 11, 2016 is for an active 4,000 gallon underground PBS tank. Staff's proof also demonstrates that the 4,000 gallon PBS tank was closed and that respondent failed to notify Department staff of its intent to close the tank and failed to provide proof of the tanks proper closure to bring the registration current.

Staff's proof further demonstrates that three other underground PBS tanks located at respondent's facility were not registered, the fill ports were not color coded and no leak detection was performed on the three unmetered tanks. Even if the 4,000 gallon tank is removed from respondent's registration due to its permanent closure, respondent must continue the registration of the three other underground tanks.

ECL 17-1003(1) defines a facility as "a single property or contiguous or adjacent properties used for a common purpose which are owned or operated by the same person on or which are located:

"a. one or more stationary tanks which are used singularly or in combination for the storage or containment of more than one thousand one hundred gallons of petroleum; or

"b. any tank whose capacity is greater than one hundred ten gallons that is used for the storage or containment of petroleum, the volume of which is ten percent or more beneath the surface of the ground."

Here, each of respondent's underground tanks has a capacity exceeding one hundred ten gallons and must be registered with the Department pursuant to ECL 17-1009(2).<sup>2</sup>

Lastly, staff's proof demonstrates that respondent did not display the facility's PBS registration certificate.

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<sup>2</sup> See also 6 NYCRR 613-1.2(a) and 613-1.3(v) effective October 11, 2015.

Inasmuch as Department staff has made a prima facie showing on the PBS violations noted above, the burden shifts to respondent to raise triable issues of fact. A respondent opposing staff's motion for an order without hearing must also lay bare its proof. The New York State Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) General denials are insufficient to raise an issue of fact on a summary judgment motion. (See Gruen v Deyo, 218 AD2d 865, 866 [3rd Dept 1995]; Bronowski v Magnus Enterprises, Inc., 61 AD2d 879 [4th Dept 1978].)

As noted above, respondent does not deny Department staff's allegations, otherwise refute the violations, or demonstrate that the violations have been corrected. Respondent's arguments that these violations are the same as those found in a previous Commissioner's order, which is now being enforced in State Supreme Court, are incorrect and without merit. The violations proven by staff in this proceeding are new and distinct violations not previously litigated.

Respondent's argument that it hired a company to properly close the 4,000 gallon PBS tank has no bearing on respondent's obligation to comply with the regulations. Notably, it is the owner who must notify the Department of substantial modifications of a facility and the owner who must keep a PBS registration current. See 6 NYCRR 612.2 (a)(1) and (d).<sup>3</sup>

Respondent's argument that denying respondent the right to a hearing where respondent can confront and cross examine witnesses violates respondent's constitutional rights and right to due process is also unavailing. Respondent had the burden of raising a triable issue of fact. I conclude that respondent failed to do so. Moreover, respondent did not deny any facts alleged by Department staff. "The failure of a responding party to deny a fact alleged in the moving papers constitutes an admission of fact." (Matter of Locaparra, Commissioner's Decision and Order, 2003 WL 21633072, \*2 [June 16, 2003]; see Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539, 544 [1975]. Because respondent did not deny any of the facts constituting the

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<sup>3</sup> See also 6 NYCRR 613-1.9(a), (b), (e) and (f) effective October 11, 2015.

violations alleged by staff, those facts are deemed admitted. Respondent's remaining arguments are without merit.

Accordingly, I conclude that Department staff has met its burden in showing that: (1) the respondent has not maintained a current and valid registration of the 4,000 gallon PBS tank; (2) has not maintained a current and valid registration of the three unregistered underground PBS tanks; (3) did not notify the Department at least 30 days before substantially modifying the 4,000 gallon PBS tank by closing it in place; (4) did not display the facility's PBS registration certificate; (5) did not properly mark the fill ports of the three unregistered underground PBS tanks; and (6) did not perform leak detection of the three unmetered unregistered underground PBS tanks.

I conclude that respondent is liable for violating 6 NYCRR 612.2 (four counts), 612.2(d), 612.2(e), 613.3(b)(1) (three counts) and 613.4(a)(2) (three counts).

#### Penalties

Department staff requests that the respondent be assessed a civil penalty of \$34,700. Staff cites the provisions of ECL 71-1929 that set forth a maximum daily civil penalty of \$37,500 for violations of article 17 title 10 or the regulations promulgated pursuant thereto.

Staff also references the penalty ranges for each violation set forth in DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy - Penalty Schedule and applies the settlement penalty amount to each count adjusted upward by seven aggravating factors. Staff then requests the adjusted settlement amount reached for each cause of action be doubled.

Because an administrative proceeding was commenced to address the violations, the doubling of staff's adjusted settlement penalty is supported and appropriate. Moreover, respondent's history of non-compliance justifies the penalty requested by staff. The penalties requested are a fraction of the maximum statutory penalty that could be assessed against the respondent. I also conclude that staff's penalty request is appropriate based on respondent's continued violations of the petroleum bulk storage law and regulations, and respondent's failure to cooperate with Department staff to address the violations. The potential harm from a spill or other failure resulting from lack of appropriate maintenance of respondent's underground PBS tanks further supports the penalty requested.



I conclude that a total penalty of \$34,700 is supported and appropriate. I also conclude that the corrective actions recommended herein must be performed in compliance with the new PBS regulations, 6 NYCRR part 613, that became effective October 11, 2015.

#### **CONCLUSIONS OF LAW**

1. By failing to maintain a current and valid registration of a closed in place 4,000 gallon underground PBS tank, respondent violated 6 NYCRR 612.2.
2. By failing to maintain a current and valid registration of three underground PBS tanks, respondent violated 6 NYCRR 612.2.
3. By failing to notify the Department at least thirty days before the permanent closure of the 4,000 gallon PBS tank, respondent violated 6 NYCRR 612.2(d).
4. By failing to display the facility PBS certificate, respondent violated 6 NYCRR 612.2(e).
5. By failing to properly mark three unregistered PBS tank fill ports, respondent violated 6 NYCRR 613.3(b)(1).
6. By failing to perform leak detection on three unmetered underground PBS tanks, respondent violated 6 NYCRR 613.4(a)(2).

#### **RECOMMENDATIONS**

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. granting Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12;
2. holding that respondent violated the following:
  - a. 6 NYCRR 612.2 for failing to maintain a current and valid registration of a closed in place 4,000 gallon underground PBS tank (First cause of action);
  - b. 6 NYCRR 612.2 for failing to maintain a current and valid registration of three underground PBS tanks (First cause of action - three counts);
  - c. 6 NYCRR 612.2(d) for failing to notify the Department at least thirty days before the permanent closure of the 4,000 gallon PBS tank (Second cause of action);

- d. 6 NYCRR 612.2(e) for failing to display the facility PBS certificate (Third cause of action);
  - e. 6 NYCRR 613.3(b) (1) for failing to properly mark three unregistered PBS tank fill ports (Fourth cause of action - three counts); and
  - f. 6 NYCRR 613.4(a) (2) for failing to perform leak detection on three unmetered underground PBS tanks (Fifth cause of action - three counts).
3. directing respondent to pay a civil penalty of thirty-four thousand seven hundred dollars (\$34,700) for the above referenced violations within thirty (30) days of service of the Commissioner's order on respondent;
  4. directing respondent to submit a corrected complete registration application to the Department for the above facility within fifteen (15) days of service of the Commissioner's order on respondent together with the applicable registration fees;
  5. directing respondent to display the PBS registration certificate on the premises of the facility at all times within fifteen (15) days of service of the Commissioner's order on respondent;
  6. directing respondent to color code the fill ports for the three underground PBS tanks within fifteen (15) days of service of the Commissioner's order on respondent;
  7. directing respondent to submit to Department staff an inventory of leak protection monitoring performed by respondent on the three unmetered underground tanks within fifteen (15) days of service of the Commissioner's order on respondent;
  8. directing respondent to submit the penalty payment and all other submissions to the following:

John K. Urda, Esq.  
Assistant Regional Attorney  
NYSDEC Region 2  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101-5407; and

9. directing such other and further relief as may be deemed just, proper and equitable under the circumstances.

/s/

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Michael S. Caruso  
Administrative Law Judge

Dated: October 23, 2015  
Albany, New York