

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

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

ORDER

DEC Case No.
R9-20210331-10

-by-

3287 SOUTHPARK LLC,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department or DEC) alleges that respondent 3287 SouthPark LLC violated multiple provisions of ECL article 17 and 6 NYCRR part 613 at its petroleum bulk storage (PBS) facility located at 3287 South Park Avenue, Lackawanna, New York (facility). The facility, which is registered in the DEC's PBS database as PBS #9-383384, has three 10,000 gallon underground storage tanks that are numbered 55, 56 and 57. Respondent purchased the facility property in March 2018.

Efforts to settle the matter in the spring of 2021 proved unsuccessful. Department staff then mailed a notice of hearing and complaint upon respondent by certified mail on August 17, 2021, which was served on August 19, 2021 (*see* Motion for Default Judgment, Exhibit G [Affidavit of Service and Certified Mail documentation]). Staff, in its complaint, set forth the following twelve causes of action alleging that respondent:

1. Failed to file a PBS registration application to transfer ownership of the facility to it, in violation of 6 NYCRR 613-1.9(d);
2. Failed to provide a copy of the as-built plan for the facility, in violation of 6 NYCRR 613-2.1(b)(4)(iii)(a);
3. Failed to have properly installed shear valves at dispensers 1/2 and 3/4, in violation of 6 NYCRR 613-2.1(c)(5)(i);
4. Failed to provide a copy of the internal liner inspection report for tanks 55, 56, and 57, in violation of 6 NYCRR 613-2.1(c)(2)(i);
5. Failed to provide the results of the site assessment for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(c)(6)(vii);
6. Failed to perform and have records of the reconciled inventory monitoring for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(b)(1)(i);
7. Failed to have the annual line tightness tests performed and records available on the pressurized piping for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(b)(2)(i)(a)(2);

8. Failed to have tests of line leak detectors for tanks 55 and 56 performed on an annual basis, in violation of 6 NYCRR 613-2.3(d)(1);
9. Failed to maintain leak detection monitoring records for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(e);
10. Failed to maintain records of the training of class A/B and C operators, in violation of 6 NYCRR 613-2.5(f)(2);
11. Failed to maintain spill prevention equipment in proper working order since liquid and debris were observed in the spill bucket for tank 55, in violation of 6 NYCRR 613-2.2(a)(6); and
12. Failed to permanently close tank 57 which has been out of service for more than 12 months, in violation of 6 NYCRR 613-2.6(a)(3).

Administrative Law Judge (ALJ) Jennifer M. Ukeritis of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter (*see* Default Summary Report at 6 [Finding of Fact No. 21]). Department staff filed a motion for default judgment, dated October 5, 2021 (Motion), together with extensive supporting documentation.

As a consequence of respondent's failure to answer, the ALJ recommends that Department staff's motion for a default judgment be granted in part (*see* Default Summary Report at 10). I concur with the ALJ that Department staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15 for eleven of the twelve causes of action enumerated in the complaint. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that Department staff has made viable claims on the first cause of action and the third through twelfth causes of action. With respect to the second cause of action regarding as-built plans, the record does not provide documentation that any of the tanks are category 2 tanks or category 3 tanks that are subject to the as-built survey requirement cited in the papers (*see* Default Summary Report at 6-7).

Department staff correctly points out that the Department's PBS laws and regulation are designed to protect the public health and environment from adverse impacts from releases of petroleum products. The requirement that PBS facility owners provide accurate information to the Department on the facility (including the names of the owners and operators), that tanks not in use for a year are to be closed, and that all systems are to be tested and operating correctly are among the ways the Department ensures compliance with the regulatory scheme. This compliance is essential for environmental protection and ensures avoidance of contamination that might otherwise arise from PBS tanks (*see* Motion, Exhibit A [Affidavit of Patrick Diez sworn to October 5, 2021 (Diez Aff.) ¶¶ 59-61]), Exhibit L [Affirmation of Teresa J. Mucha, Esq., dated October 5, 2021 (Mucha Aff.), ¶¶ 18-20]).

With respect to this facility, Department staff conducted two inspections that identified a multitude of PBS violations and resulted in the issuance of two notices of violations (*see* Diez Aff. ¶¶ 9-12). In addition, the facility's PBS registration indicates that the tanks at the facility

are of a significant age, being installed nearly fifty years ago which further underscores the need for protective compliance (*see* Exhibit 2 to Diez Aff. [date of tank installations listed as “12/01/1970”]).

ECL 71-1929(1) provides that any person who violates any of the provisions of, or who fails to perform any of the duties imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, order or determinations promulgated thereto (which regulations are applicable here) shall be liable for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation.

Department staff, in its papers, seeks a penalty of thirty-four thousand nine hundred eighty dollars (\$34,980) (*see* Diez Aff ¶ 57 [setting forth the penalty calculation]). The ALJ recommends that the staff-requested penalty be reduced by five hundred dollars in light of the recommended dismissal of the second cause of action (*see* Default Summary Report at 7-8, 10). Accordingly, the ALJ recommends that respondent 3287 SouthPark LLC be directed to pay \$34,380.

The civil penalty that Department staff is requesting is consistent with ECL 71-1929(1), the Department’s Civil Penalty Policy (DEE-1), dated June 20, 1990, the Department’s Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22) and administrative precedent concerning similar violations (*see* Diez Aff. ¶¶ 49-58; *see also* Mucha Aff. ¶¶ 9-15, 17, 24-26). Based on the record before me, the staff-requested penalty, as modified by the ALJ’s recommendation, is authorized and appropriate. I direct that respondent submit the civil penalty of thirty-four thousand three hundred eighty dollars (\$34,380) to the Department within thirty (30) days of the service of this order upon respondent.

Department staff also requests that a number of corrective actions set forth in its complaint be imposed to address and correct the multitude of PBS violations at the facility and to prevent environmental harm that may arise from the facility’s non-compliance with the PBS requirements. These corrective actions include:

- Submission of a PBS registration application to reflect the transfer of ownership of the facility, the fact that tank 57 is out-of-service, the identification of any Class A or Class B Operator information, and other corrected information that may be necessary;
- Submission of a work plan, for Department review and approval, for the permanent closure of tank number 57 in accordance with 6 NYCRR 613-2.6(b) through (e). The closure of tank number 57 is to occur within sixty (60) days of Department approval of the work plan. The facility’s PBS registration is to be updated to reflect the closure status of the tank upon completion of the closure;
- Installation of shear valves at dispensers 1/2 and 3/4 and submission of color photographs showing the completion of the work;

--Retention of a qualified company to perform an inspection of the internal liners for tanks 55, 56 and 57 and submission of a report of the results within fifteen (15) days of receipt of the report;

--Submission of copies of properly reconciled inventory records for tanks 55 and 56 from March 2018 through March 2021;

--Retention of a qualified company to perform an annual line test on the piping associated with tanks 55 and 56 and submission of a copy of the results within fifteen (15) days of receipt of the report;

--Retention of a qualified company to perform site assessments within and immediately below the excavation zone for tanks 55 and 56 to demonstrate that use of the existing groundwater monitoring is an appropriate leak detection method for the tanks or documentation that another appropriate leak detection method has been implemented at tanks 55 and 56;

--Retention of a qualified company to perform line leak detector tests for tanks 55 and 56 and submission of a copy of the results within fifteen (15) days of receipt of the report;

--Submission of copies of the leak detection monitoring records for tanks 55 and 56 for the period of March 2018 through March 2021; and

--Submission of copies of the current operator testing and training records for the facility which shall include the information outlined in 6 NYCRR 613-2.5(f).

Based on the record before me, the corrective actions are also authorized and appropriate. Unless another timeframe is noted, respondent is to perform the above-listed corrective actions within thirty (30) days of the service of this order upon respondent. Respondent, on good cause shown, may submit a request to Department staff to extend the timeframes for one or more of the above-listed corrective actions. Any such request by respondent must be in writing and the decision whether or not to grant the extension shall be solely within the discretion of Department staff.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted on the first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action in its complaint. By failing to answer in this proceeding, respondent 3287 SouthPark LLC waived its right to be heard at the hearing.
- II. Department staff's second cause of action in its complaint is dismissed.

- III. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent 3287 SouthPark LLC is determined to have:
- A. Failed to file a PBS registration application to transfer ownership of the facility, in violation of 6 NYCRR 613-1.9(d);
 - B. Failed to have properly installed shear valves at dispensers 1/2 and 3/4, in violation of 6 NYCRR 613-2.1(c)(5)(i);
 - C. Failed to provide a copy of the internal liner inspection report for tanks 55, 56, and 57, in violation of 6 NYCRR 613-2.1(c)(2)(i);
 - D. Failed to provide the results of the site assessment for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(c)(6)(vii);
 - E. Failed to perform and have records of the reconciled inventory monitoring for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(b)(1)(i);
 - F. Failed to have the annual line tightness tests performed and records available on the pressurized piping for tanks 55 and 56. in violation of 6 NYCRR 613-2.3(b)(2)(i)(a)(2);
 - G. Failed to have tests of line leak detectors for tanks 55 and 56 performed on an annual basis, in violation of 6 NYCRR 613-2.3(d)(1);
 - H. Failed to maintain leak detection monitoring records for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(e);
 - I. Failed to maintain records of the training of class A/B and C operators, in violation of 6 NYCRR 613-2.5(f)(2);
 - J. Failed to maintain spill prevention equipment in proper working order for tank 55, in violation of 6 NYCRR 613-2.2(a)(6); and
 - K. Failed to permanently close tank 57 as it has been out of service for more than 12 months, in violation of 6 NYCRR 613-2.6(a)(3).
- IV. Respondent 3287 SouthPark LLC is hereby directed to perform the following corrective actions to address the violations, within thirty (30) days of the service of this order upon respondent unless another timeframe is noted:
- A. Submit a PBS registration application to reflect the transfer of ownership of the Facility, the fact that tank 57 is out-of-service, the identification of any Class A of Class B Operator information, and other corrected information that may be necessary;

- B. Submit a work plan, for Department review and approval, for the permanent closure of tank number 57 in accordance with 6 NYCRR 613-2.6(b) through (e), permanently close tank number 57 within sixty (60) days of Department approval of the work plan, and update the PBS registration to reflect the closure status of the tank upon completion of the closure;
- C. Install shear valves at dispensers 1/2 and 3/4 and submit color photographs showing the completion of the work;
- D. Retain a qualified company to perform an inspection of the internal liners for tanks 55, 56 and 57 and submit a report of the results within fifteen (15) days of receipt of the report;
- E. Submit copies of properly reconciled inventory records for tanks 55 and 56 from March 2018 through March 2021;
- F. Retain a qualified company to perform an annual line test on the piping associated with tanks 55 and 56 and submit a copy of the results within fifteen (15) days of receipt of the report;
- G. Retain a qualified company to perform site assessments within and immediately below the excavation zone for tanks 55 and 56 to demonstrate that use of the existing groundwater monitoring is an appropriate leak detection method for the tanks or document that another appropriate leak detection method has been implemented at tanks 55 and 56;
- H. Retain a qualified company to perform line leak detector tests for tanks 55 and 56 and submit a copy of the results within fifteen (15) days of receipt of the report;
- I. Submit copies of the leak detection monitoring records for tanks 55 and 56 for the period of March 2018 through March 2021; and
- J. Submit copies of the current operator testing and training records for the facility which shall include the information outlined in 6 NYCRR 613-2.5(f).

On good cause shown, respondent may request an extension of the timeframes for one or more of the above-listed corrective actions. Any request by respondent must be in writing and the decision whether or not to grant the extension shall be solely within the discretion of Department staff.

- V. Respondent 3287 SouthPark LLC is hereby assessed a civil penalty in the amount of thirty-four thousand three hundred eighty dollars (\$34,380), to be paid within thirty (30) days of the service of this order upon respondent. Payment is to be by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation at the address noted in paragraph VI of this order.

VI. The reports and civil penalty payment shall be sent to the following address:

Teresa J. Mucha, Esq.
Office of General Counsel, Region 9
New York State Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203-2915

VII. Any questions or other correspondence regarding this order shall also be addressed to Teresa J. Mucha, Esq. at the address referenced in paragraph VI of this order.

VIII. The provisions, terms and conditions of this order shall bind respondent 3287 SouthPark LLC and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: */s/*
Basil Seggos
Commissioner

Dated: July 14, 2022
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law of the State of New York and Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

-by-

**Default Summary Report
Case No. R9-20210331-10**

3287 SOUTHPARK LLC,

Respondent.

Appearance of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Teresa J. Mucha, Assistant Regional Counsel, of counsel) for staff of the Department of Environmental Conservation
- No appearance for the Respondent

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 3287 SouthPark LLC (respondent) with a notice of hearing and complaint dated August 16, 2021 (complaint), alleging twelve violations of Environmental Conservation Law (ECL) article 17 and part 613 of title 6 of the New York Code of Rules and Regulations (6 NYCRR). The complaint seeks an order of the Commissioner:

- “Finding Respondent in violation of the cited regulations;
- Directing Respondent to pay a civil penalty in the amount of \$34,980;
- Directing Respondent to perform the corrective actions outline[d] on the attached [in the Complaint’s] Appendix A; and
- For such other and further relief as may be just, proper, and appropriate.” (Motion for Default Judgment dated October 5, 2021 [Motion], Exhibit F).

Respondent is an active domestic limited liability company, according to the New York State Department of State (NYSDOS) (*see* Motion, Exhibit B). Department staff served the complaint by certified mail on the address listed with the NYSDOS Division of Corporations for service of process on August 19, 2020 (*see* Motion, Exhibit G Affidavit by Pamela Frasier sworn

to September 28, 2021). Respondent failed to file an answer to the complaint, as directed in the cover letter and complaint (*see* Motion, Exhibit F dated August 17, 2021).¹

By papers dated October 5, 2021, Department staff moved for a default judgement based upon respondent's failure to answer the complaint.

Applicable Regulatory Provisions

6 NYCRR 613-1.9(d)(1) states that “[i]f ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the Department within 30 days after the transfer.”

6 NYCRR 613-2.1(b)(4)(iii)(a) requires the facility to maintain for the life of every Category 2 or 3 underground storage tank (UST) as-built information records and diagrams, including the locations of each UST and its piping, fill ports, dispensing equipment, check valves, and other equipment.

6 NYCRR 613-2.1(c)(5)(i) states that “[e]very dispenser of motor fuel under pressure from a remote pumping system must be equipped with a shear valve (impact valve) that is located in the supply line at the inlet of the dispenser.”

6 NYCRR 613-2.1(c)(2)(i) requires that a steel UST with internal lining must have the lining internally inspected 10 years after installed and every 5 years thereafter. The inspection must show that the lining is still structurally sound and performing in accordance with original design specifications, and the report of the inspections must be maintained for 5 years.

6 NYCRR 613-2.3(c)(6)(vii) requires that ground water monitoring meets the following requirements “[w]ithin and immediately below the UST system excavation zone, the site is assessed to ensure compliance with the requirements in subparagraphs (i) through (v) of this paragraph and to establish the number and positioning of monitoring wells or devices that will detect leaks from any portion of the UST that routinely contains petroleum.”

6 NYCRR 613-2.3(b)(1)(i) requires a facility to monitor USTs for leaks so that “[e]very tank that is part of a category 1 UST system must be monitored for leaks at weekly intervals using one of the methods listed in paragraphs (c)(2) and (4) through (9) of this section. Continuous electronic monitoring satisfies the weekly monitoring requirement. Additionally, any UST system which stores any amount of motor fuel or kerosene that will be sold as part of a

¹ On June 4, 2021, John Kolaga, Esq. of Rupp Baase Pfalzgraf and Cunningham, LLC, contacted Department staff and indicated that he would be representing respondent. (*See* Motion Exhibit E.) Department staff provided respondent with an extension of time, until August 2, 2021, to respond to the proposed settlement offer. (*See* Motion Exhibit E.) Respondent failed to respond by that date and Department staff served a Notice of Hearing and Complaint by certified mail on August 17, 2021. (*See* Motion Exhibit F.) On August 18, 2021, Ms. Mucha received an email from Mr. Kolaga stating he had mailed a counter settlement offer the previous day and that he had received the complaint. (*See* Motion Exhibit I [email] and K [counteroffer letter].) Ms. Mucha responded via email on August 19, 2021, indicating that the counteroffer was rejected and that the Department was proceeding with the enforcement action. (*See* Motion Exhibit J.)

commercial transaction must meet the 10-day inventory monitoring requirements in paragraph (c)(1) of this section.”

6 NYCRR 613-2.3(b)(2)(i)(a)(2) requires that any category tank with pressurized piping routinely containing petroleum installed on or before October 11, 2015 “have an annual line tightness test conducted in accordance with paragraph (d)(2) of this section or have monitoring conducted at weekly intervals in accordance with paragraph (d)(3) of this section. Continuous electronic monitoring satisfies the weekly monitoring requirement.”

6 NYCRR 613-2.3(d)(1) states that “[a]utomatic line leak detectors. Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of petroleum through piping or triggering an audible or visual alarm may be used only if they detect leaks of 3 gallons per hour at 10 pounds per square inch line pressure within one hour. The facility must conduct a test of the operation of the leak detector at yearly intervals.”

6 NYCRR 613-2.3(e) states that with regard to [l]eak detection record keeping, “All facilities must maintain records demonstrating compliance with all applicable requirements of this section. These records must meet the following requirements: (1) the results or records of any sampling, testing, or monitoring must be maintained for at least three years; (2) the results of tank and line tightness testing must be retained until the next test is conducted; (3) a copy of the results of tank and line tightness testing must be submitted to the Department within 30 days after performance of the test(s); and (4) written documentation of all calibration, maintenance, and repair of leak detection equipment permanently located on-site must be maintained for at least three years after the servicing work is completed. Any schedules of required calibration and maintenance provided by the leak detection equipment manufacturer must be retained for three years from the date of installation.”

6 NYCRR 613-2.5(f)(2) requires that the facility must maintain a list of designated Class A/B/C operators and maintain records verifying their required training and testing has been completed.

6 NYCRR 613-2.2(a)(6) states “[t]he facility must keep all gauges, valves, and other equipment for spill prevention in good working order.”

6 NYCRR 613-2.6(a)(3) states “[w]hen a UST system is out-of-service for more than 12 months, the facility must permanently close the UST system in accordance with subdivisions (b) through (e) of this section.”

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff’s motion for default judgment

1. Respondent 3287 SouthPark LLC is the deed owner of a petroleum bulk storage facility located at 3287 South Park Avenue, Lackawanna, New York (facility). (*See* Motion for

Default Judgment [Motion] ¶ 10, Affidavit of Patrick Diez sworn October 5, 2021 [Diez Aff.] ¶ 13, Exhibit 7.)

2. The facility has three 10,000-gallon underground storage tanks (USTs). (*See* Diez Aff. ¶¶ 6-8.)
3. Tanks 55, 56, and 57 were installed on December 1, 1970, making each tank a Category 1 tank. (*See* Diez Aff. Exhibit 2.)
4. Respondent is an active domestic limited liability company authorized under the laws of the state of New York. (*See* Motion Exhibit B.)
5. Pursuant to a registration application received April 25, 2014, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 9-383384 to Mohamed Ahmed, identified as the owner of the facility, on April 30, 2014, with an expiration date of April 30, 2019. (*See* Diez Aff. Exhibits 1 and 2.)
6. On March 22, 2018, Mohsin A. Ahmen aka Moshin A. Ahmed, by deed, transferred all right, title, and interest in the facility to the respondent 3287 SouthPark LLC, the facility's current owner. This deed is recorded in the Erie County Clerk's Office in Book 11327, Page 2002. (*See* Motion ¶ 11, Diez Aff. ¶ 13, Exhibit 7.)
7. Respondent is the facility owner and tank system owner. (*See* Diez Aff. ¶¶ 17-18.)
8. Respondent is also the facility and tank system operator. (*See* Diez Aff. ¶ 17.)
9. Patrick Diez is an Environmental Program Specialist in the Department's Division of Environmental Remediation, PBS Unit in the Region 9 office. (*See* Diez Aff. ¶ 2.)
10. As part of his duties, Mr. Diez inspects PBS facilities, assists the regulated community with PBS compliance, and assists with enforcement of violations of PBS laws and regulations, including developing civil penalties for PBS violations, and is familiar with article 17 and part 613 which regulate PBS tanks. (*See* Diez Aff. ¶¶ 3-4.)
11. Mr. Diez conducted inspections of the respondent's facility on October 9, 2018, and June 17, 2021. (*See* Diez Aff. ¶ 9, Exhibit 3.)
12. Mr. Diez mailed a Notice of Violation (NOV) dated October 15, 2018, to Mohamed Ahmed detailing the violations at the facility. According to the NOV, a response was required by November 16, 2018.² (*See* Diez Aff. ¶ 10, Exhibit 4.)
13. During the October 9, 2018, inspection, Mr. Diez observed and documented the following fifteen violations at the facility:
 - Registration is not current in violation of 6 NYCRR 613-1.9(e);

² There is no NOV for the June 17, 2021, inspection.

- As-built plans are not maintained in violation of 6 NYCRR 613-2.1(b)(4)(iii)(a);
- Improperly installed shear valve in violation of 6 NYCRR 613-2.1(c)(5)(i);
- No internal lining inspection in violation of 6 NYCRR 613-2.1(c)(2)(i);
- Improper color coding of fill ports in violation of 6 NYCRR 613-2.3(a)(4);
- Inventory monitoring not performed in violation of 6 NYCRR 613-2.3(b)(1)(i);
- No leak monitoring performed in violation of 6 NYCRR 613-2.3(b)(1)(i);
- No automatic line leak detector installed in violation of 6 NYCRR 613-2.3(b)(2)(i)(a)(1);
- No annual line test in violation of 6 NYCRR 613-2.3(b)(2)(i)(a)(2);
- No site assessment for ground water monitoring wells in violation of 6 NYCRR 613-2.3(6)(vii);
- No annual test of line leak detector in violation of 6 NYCRR 613-2.3(d)(1);
- Leak detection records not maintained in violation of 6 NYCRR 613-2.3(e)(1) and (2);
- List of Designated Operators not maintained in violation of 6 NYCRR 613-2.5(f)(1);
- Records of Operator training not maintained in violation of 6 NYCRR 613-2.5(f)(2); and
- Failure to maintain spill prevention equipment in violation of 6 NYCRR 613-2.2(a)(6).

14. On August 13, 2019, a NOV was mailed to Mohamed Ahmed for failure to renew the facility's PBS registration that had expired on April 30, 2019. (*See* Diez Aff. ¶ 12, Exhibit 5.)

15. Since Department staff did not receive a response to either NOV, they conducted a search of the Erie County property records in March 2020. During that search, Department staff discovered that the facility was sold on March 22, 2018. (*See* Diez Aff. ¶13.)

16. In June 2021, Department staff was contacted by an attorney who was retained by respondent. (*See* Motion ¶ 20, Exhibit E.)

17. Department staff did not receive a response to Department's proposed settlement offer by the August 2, 2021 deadline and moved forward with enforcement, serving a Notice of Hearing and Complaint by certified mail on August 17, 2021. (*See* Motion ¶¶ 21-24, Exhibits F – H.) The Notice of Hearing and complaint listed twelve violations:

1. Failure to file a PBS registration application to transfer ownership of the facility in violation of 6 NYCRR 613-1.9(d);
2. Failure to provide a copy of the as-built plan for the facility in violation of 6 NYCRR 613-2.1(b)(4)(iii)(a);
3. Failure to have properly installed shear valves at dispensers 1/2 and 3/4 in violation of 6 NYCRR 613-2.1(c)(5)(i);
4. Failure to provide a copy of the internal liner inspection report for tanks 55, 56, and 57 in violation of 6 NYCRR 613-2.1(c)(2)(i);
5. Failure to provide the results of the site assessment for tanks 55 and 56 in violation of 6 NYCRR 613-2.3(c)(6)(vii);

6. Failure to perform and have records of the reconciled inventory monitoring for tanks 55 and 56 in violation of 6 NYCRR 613-2.3(b)(1)(i);
 7. Failure to have the annual line tightness tests performed and records available on the pressurized piping for tanks 55 and 56 in violation of 6 NYCRR 613-2.3(b)(2)(i)(a)(2);
 8. Failure to have tests of line leak detectors for tanks 55 and 56 performed on an annual basis in violation of 6 NYCRR 613-2.3(d)(1);
 9. Failure to maintain leak detection monitoring records for tanks 55 and 56 in violation of 6 NYCRR 613-2.3(e);
 10. Failure to maintain records of the training of class A/B and C operators in violation of 6 NYCRR 613-2.5(f)(2);
 11. Failure to maintain spill prevention equipment in proper working order for tank 55 in violation of 6 NYCRR 613-2.2(a)(6); and
 12. Failure to permanently close tank 57 as it has been out of service for more than 12 months in violation of 6 NYCRR 613-2.6(a)(3).
18. On August 17, 2021, Department staff received a counter settlement offer from respondent's attorney via email. (*See* Motion ¶¶ 26 and 43, Exhibit K.)
19. On August 18, 2021, Department staff received an email from respondent's attorney acknowledging receipt of the Notice of Hearing and Complaint emailed to him. (*See* Motion ¶ 25, Exhibit I.)
20. On August 19, 2021, Department staff acknowledged the counter settlement offer, addressed some of the provided information, and rejected it in an email to the respondent's attorney. (*See* Motion ¶¶ 26, Exhibit J.)
21. As per the USPS tracking information, respondent received the motion papers on August 19, 2021. (*See* Motion ¶¶ 22-24, Exhibits G and H). Respondent did not answer the complaint. (*See* Motion ¶ 28.)

DISCUSSION

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, and failure to attend constitutes a default and a waiver of the opportunity for a hearing (*see* 6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain:

- “(1) proof of service upon respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- “(2) proof of respondent's failure to appear or failure to file a timely answer;
- “(3) consistent with CPLR 3215(f), proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim;
- “(4) a concise statement of the relief requested;
- “(5) a statement of authority and support for any penalty or relief requested; and
- “(6) proof of mailing the notice required by [6 NYCRR 622.15(d)], where applicable.” (see 6 NYCRR 622.15[b][1] - [6]).

As the Commissioner has held, “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them” (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, Department staff must “provide proof of the facts sufficient to support the claim[s]” alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Department staff is required to support its motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that Department staff has a viable claim (see *Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; see also 6 NYCRR 622.15[b][3], CPLR 3215[f]).

The record establishes that (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint, as directed in the cover letter and notice of hearing served with the complaint; (iii) Staff’s papers provide proof of the facts sufficient to support the violations alleged and enable me to determine that staff has a viable claim, to the extent detailed below; (iv) Staff’s papers include a concise statement of relief requested; (v) Staff’s motion includes a statement of authority and support for the penalty and relief requested; and (vi) Staff provided proof of service of the motion papers on respondent. Respondent did not file or serve a response to staff’s motion. Based upon the foregoing, the Department is entitled to a default judgement on eleven of its twelve violations in this matter pursuant to the provisions of 6 NYCRR 622.15.

First Cause of Action

Department staff’s submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to timely file a PBS registration application to transfer ownership of the facility, in violation of 6 NYCRR 613-1.9(d). (See Diez Aff. ¶¶ 8, 13, 15; Findings of Fact ## 1, 5, 6, 15).

Second Cause of Action

Department staff’s submissions in support of the motion for a default judgment do not provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to provide a copy of the as-built plan for the facility, in violation of 6 NYCRR 613-2.1(b)(4)(iii)(a).

Department staff has not provided documentation that any tanks are category 2 or 3. Moreover, the facility information report lists all tanks as being installed in 1970 and therefore classified as Category 1. (See Diez Aff. Exhibit 2 and Findings of Fact ## 2 and 3.) Pursuant to 6 NYCRR 613-2.1(b)(4)(iii)(a), an as-built survey is required for category 2 or 3 tanks installed after December 26, 1986.

Third Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to have properly installed shear valves at dispensers 1/2 and 3/4, in violation of 6 NYCRR 613-2.1(c)(5)(i). (See Diez Aff. ¶ 24, Exhibits 2-4; Findings of Fact # 13).

Fourth Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to provide a copy of the internal liner inspection report for tanks 55, 56, and 57, in violation of 6 NYCRR 613-2.1(c)(2)(i). (See Diez Aff. ¶ 26; Exhibits 2-4.)

Fifth Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to provide the results of the site assessment for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(c)(6)(vii). (See Diez Aff. ¶ 28; Exhibits 2-4.)

Sixth Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to perform and have records of the reconciled inventory monitoring for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(b)(1)(i). (See Diez Aff. ¶ 30; Exhibits 2-4.)

Seventh Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to have the annual line tightness tests performed and records available on the pressurized piping for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(b)(2)(i)(a)(2). (See Diez Aff. ¶ 32; Exhibits 2-4.)

Eighth Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to have tests of line leak detectors for tanks 55 and 56 performed on an annual basis, in violation of 6 NYCRR 613-2.3(d)(1). (See Diez Aff. ¶ 34; Exhibits 2-4.)

Ninth Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to maintain leak detection monitoring records for tanks 55 and 56, in violation of 6 NYCRR 613-2.3(e). (*See* Diez Aff. ¶ 36; Exhibits 2-4.)

Tenth Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to maintain records of the training of class A/B and C operators, in violation of 6 NYCRR 613-2.5(f)(2). (*See* Diez Aff. ¶ 40; Exhibits 2-4.)

Eleventh Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to maintain spill prevention equipment in proper working order for tank 55, in violation of 6 NYCRR 613-2.2(a)(6). (*See* Diez Aff. ¶ 42; Exhibits 2-4.)

Twelfth Cause of Action

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that Department staff has a viable claim that respondent failed to permanently close tank 57 as it has been out of service for more than 12 months, in violation of 6 NYCRR 613-2.6(a)(3). (*See* Diez Aff. ¶ 44; Exhibit 3.)

Penalty

Department staff's complaint requested a total civil penalty of thirty-four thousand nine hundred eighty dollars (\$34,980). ECL 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff's submissions on the motion for a default judgment elaborate on the requested civil penalty, discussing the Department's Civil Penalty Policy (DEE-1), the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22)³ and administrative precedent concerning similar violations. (*See* Motion ¶ 44; Diez Aff. ¶¶ 49-61.) In his affidavit, Mr. Diez provides a breakdown of the requested civil penalty for each violation. (*See* Diez Aff. ¶ 57.) Department staff also details the rationale for the upward adjustment of the penalty sought, given the importance of prompt remediation of violations and flagrant disregard by the respondent of the regulations. (*See* Diez Aff. ¶ 58 - 59.)

Department staff calculated the statutory maximum penalty for the twelve violations at \$474,825,000. (*See* Diez Aff. ¶ 52.) Department Staff notes that applying the daily maximum penalty of \$37,500 per day to a single violation continuing from the October 9, 2018 inspection date, until the date of the service of the complaint, August 16, 2021 (1041 days) would result in a maximum penalty of \$39,037,500 per violation. (*See* Diez Aff. ¶ 52.)

³ As Staff notes, this guidance has not yet been updated for the regulatory amendments that became effective in 2015 and is considered for calculating a civil penalty under an Order on Consent. (*See* Diez Aff. ¶ 50.)

The requested penalty, a total of \$34,380, for the above eleven violations that Department staff provided proof of facts sufficient to show a viable claim for is supported by, consistent with, and authorized by the Department's penalty policies, applicable provisions of the ECL, and administrative precedent. The Department is not entitled to the \$600 (\$500 penalty plus 20% upward adjustment) attributed to the failure to provide as-built plans, for the reason stated above.

RECOMMENDATIONS

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

1. Granting Department Staff's motion for default on causes of action 1, 3-12.
2. Holding that, based upon the proof provided in Department staff's papers, respondent 3287 SouthPark LLC:
 - a. Failed to file a PBS registration application to transfer ownership of the facility in violation of 6 NYCRR 613-1.9(d);
 - b. Failed to have properly installed shear valves at dispensers 1/2 and 3/4 in violation of 6 NYCRR 613-2.1(c)(5)(i);
 - c. Failed to provide a copy of the internal liner inspection report for tanks 55, 56, and 57 in violation of 6 NYCRR 613-2.1(c)(2)(i);
 - d. Failed to provide the results of the site assessment for tanks 55 and 56 in violation of 6 NYCRR 613-2.3(c)(6)(vii);
 - e. Failed to perform and have records of the reconciled inventory monitoring for tanks 55 and 56 in violation of 6 NYCRR 613-2.3(b)(1)(i);
 - f. Failed to have the annual line tightness tests performed and records available on the pressurized piping for tanks 55 and 56 in violation of 6 NYCRR 613-2.3(b)(2)(i)(a)(2);
 - g. Failed to have tests of line leak detectors for tanks 55 and 56 performed on an annual basis in violation of 6 NYCRR 613-2.3(d)(1);
 - h. Failed to maintain leak detection monitoring records for tanks 55 and 56 in violation of 6 NYCRR 613-2.3(e);
 - i. Failed to maintain records of the training of class A/B and C operators in violation of 6 NYCRR 613-2.5(f)(2);
 - j. Failed maintain spill prevention equipment in proper working order for tank 55 in violation of 6 NYCRR 613-2.2(a)(6); and
 - k. Failed to permanently close tank 57 as it has been out of service for more than 12 months in violation of 6 NYCRR 613-2.6(a)(3).
3. Directing the respondent pay a civil penalty of \$34,380.
4. Directing that Respondent perform the following corrective actions to address the violations within 30 days of the date of a Commissioner's Order:
 - a. Submit a PBS registration application to reflect the transfer of ownership of the Facility, that tank 57 is out-of-service, the identification of any Class A of Class B Operator information, and other corrected information that is necessary.

- b. Submit a work plan, for Department review and approval, for the permanent closure of tank number 57 in accordance with 6 NYCRR 613-2.6(b) through (e). Permanently close tank number 57 within 60 days of Department approval of the work plan. The PBS registration must be updated to reflect the closure status of the tank upon completion of the closure.
- c. Install shear valves at dispensers 1/2 and 3/4 and submit color photographs showing the completion of the work.
- d. Retain a qualified company to perform an inspection of the internal liners for tanks 55, 56 and 57 and submit a report of the results within 15 days of receipt of the report.
- e. Submit copies of properly reconciled inventory records for tanks 55 and 56 from March 2018 through March 2021.
- f. Retain a qualified company to perform an annual line test on the piping associated with tanks 55 and 56 and submit a copy of the results within 15 days of receipt of the report.
- g. Retain a qualified company to perform site assessments within and immediately below the excavation zone for tanks 55 and 56 to demonstrate that use of the existing groundwater monitoring is an appropriate leak detection method for the tanks or documentation that another appropriate leak detection method has been implemented at tanks 55 and 56.
- h. Retain a qualified company to perform line leak detector tests for tanks 55 and 56 and submit a copy of the results within 15 days of receipt of the report.
- i. Submit copies of the leak detection monitoring records for tanks 55 and 56 for the period of March 2018 through March 2021.
- j. Submit copies of the current operator testing and training records for this Facility which shall include the information outlined in 6 NYCRR 613-2.5(f).

/s/

Jennifer M. Ukeritis
Administrative Law Judge

Dated: July 14, 2022
Albany, New York

Appendix A
Matter of 3287 SOUTHPARK LLC
Case No. R9-202110331-10
Motion for Default Judgement

1. Notice of Motion for Default dated October 5, 2021
2. Motion for Default Judgment dated October 5, 2021, attaching exhibits A through M (listed as 3 through 15 below)
3. Exhibit A – Affidavit of Patrick Diez sworn on October 5, 2021, attaching exhibits 1 through 9)
 - a. Exhibit 1 – PBS Registration Application for Facility 9-383384 dated April 18, 2014
 - b. Exhibit 2 – PBS Facility Information Report for Facility 9-383384 dated September 15, 2021
 - c. Exhibit 3 – PBS Inspection Report for October 9, 2018 including Google Map photo and PBS Inspection Report for June 17, 2021 including Google Map photo
 - d. Exhibit 4 – Notice of Violation issued by Department Staff Mr. Diez dated October 15, 2018
 - e. Exhibit 5 – Letter dated June 10, 2019, from Department staff Andrea E. Caprio stating registration expired on April 30, 2019
 - f. Exhibit 6 – Notice of Violation issued by Department Staff Ms. Caprio dated August 13, 2019
 - g. Exhibit 7 – Deed for the Facility location
 - h. Exhibit 8 – PBS Registration Application dated July 25, 2021
 - i. Exhibit 9 – Letter from Department Staff Veronica Kreutzer dated August 11, 2021 stating the PBS application is incomplete
4. Exhibit B – Department of State information for Respondent 3287 Southpark LLC dated September 27, 2021
5. Exhibit C – Articles of Organization for Respondent filed on March 20, 2018
6. Exhibit D – Letter dated April 15, 2021, from Department Staff Teresa J Mucha, Esq. enclosing settlement Order on Consent
7. Exhibit E – Emails between Ms. Mucha and John Kolaga, Esq. (respondent’s representative) regarding extensions of settlement offer
8. Exhibit F – Cover letter with Notice of Hearing, Complaint and Compliance Schedule, dated August 17, 2021, from Ms. Mucha
9. Exhibit G – Affidavit of Service of Pamela Frasier (Notice of Hearing and Complaint) sworn on September 28, 2021, attaching exhibits A and B, below
 - a. Exhibit A – USPS tracking printout

- b. Exhibit B – Signed USPS return receipt
10. Exhibit H – Affidavit of Susan Reynolds on USPS Covid Policy for return receipt signatures, sworn on September 28, 2021
 11. Exhibit I – Email from Mr. Kolaga acknowledging receipt of notice of hearing and complaint
 12. Exhibit J – Letter sent via email from Ms. Mucha to Mr. Kolaga dated August 19, 2021, rejecting settlement offer of August 17, 2021 and notifying that the Department is proceeding with notice of hearing and complaint
 13. Exhibit K – Letter from Mr. Kolaga to Ms. Mucha, dated August 17, 2021, outlining respondent’s settlement counteroffer, attaching exhibits A through F below
 - a. Exhibit A – PBS Registration Application dated July 25, 2021
 - b. Exhibit B – Photos of color coding on fill ports
 - c. Exhibit C – Photos of color coding on vapor recovery ports
 - d. Exhibit D – Inventory worksheets for metered USTs dated March 1 through July 26, 2021
 - e. Exhibit E – Leak Detection Systems Inc. reports of test results performed at facility
 - f. Exhibit F – Photos of spill buckets
 14. Exhibit L – Affirmation of Teresa J Mucha, Esq. in support of the motion for default dated October 5, 2021
 15. Exhibit M – Affidavit of Service of Pamela Frasier (motion for default) sworn on October 5, 2021