

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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),

- by -

2363 SOUTHERN BLVD., LLC,

Respondent.

ORDER
DEC Case No.
R2-20161205-429

This administrative enforcement proceeding concerns alleged violations of ECL article 17, former 6 NYCRR part 612 and current 6 NYCRR part 613 at a petroleum bulk storage (PBS) facility owned by respondent 2363 Southern Blvd., LLC and located at 2363 Southern Boulevard, Bronx, New York. At the facility is one aboveground PBS tank with a capacity of 10,000 gallons that contains #2 fuel oil. The facility, which is designated as PBS #2-600160, is an apartment building known as Parkview Apartments.

Staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding by service of a notice of motion for order without hearing, in lieu of complaint, dated January 30, 2017, which respondent received on February 6, 2017. In its papers, Department staff sets forth the following nine causes of action, alleging that respondent 2363 Southern Blvd., LLC:

1. Failed to accurately register the PBS facility in violation of current 6 NYCRR 613-1.9(a), ECL 17-1009(2) and former 6 NYCRR 612.2(a)(1);
2. Failed to renew the PBS facility registration in violation of current 6 NYCRR 613-1.9(c), ECL 17-1009(2) and former 6 NYCRR 612.2(a)(2);
3. Failed to register the facility within thirty (30) days of transfer of ownership to respondent in violation of current 6 NYCRR 613-1.9(d)(1) and former 6 NYCRR 612.2(b);
4. Failed to display a PBS certificate at the facility in violation of current 6 NYCRR 613-1.9(g);
5. Failed to equip the 10,000 gallon aboveground PBS tank with secondary containment that is able to contain petroleum leaked from any portion of the tank system until it is detected and removed, and to prevent the release of petroleum in violation of current 6 NYCRR 613-4.1(c)(1)(i);
6. Failed to properly mark the aboveground PBS tank with the tank registration identification number, as well as the tank design and working capacities, in violation of current 6 NYCRR 613-4.2(a)(3);
7. Failed to color code the fill port in violation of current 6 NYCRR 613-4.2(a)(4);

8. Failed to maintain the tank vault by allowing the accumulation of water and debris in violation of current 6 NYCRR 613-4.2(a)(6); and
9. Failed to conduct monthly inspections and maintain records of monthly inspections in violation of current 6 NYCRR 613-4.3(a)(1)(i) and 613-4.3(e), respectively.

Based upon these alleged violations, Department staff requests that I: (a) hold respondent in violation of the ECL, current 6 NYCRR part 613 and former 6 NYCRR part 612 as set forth in the nine causes of action; (b) assess a civil penalty in the amount of thirty-seven thousand dollars (\$37,000); and (c) direct respondent to complete corrective action within thirty (30) days.

Respondent did not file or serve a response to staff's motion papers. Accordingly, Department staff's motion is an unopposed motion for order without hearing (see 6 NYCRR 622.12). The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso, who prepared the attached summary report. I adopt the ALJ's summary report as my decision in this matter, subject to my comments below.

Liability

Department staff's first three causes of action allege violations relating to the registration of the PBS facility. On December 21, 2006, respondent acquired ownership of the facility. Pursuant to the applicable regulations, respondent was to register the facility within thirty (30) days of the transfer of ownership. Respondent failed to do so. Accordingly, Department staff is entitled to a finding of liability with respect to staff's third cause of action.

As the ALJ discusses, staff's first cause of action (failure to accurately register the facility) is multiplicative of the third cause of action for which liability is found (see Summary Report at 5) and should be dismissed. As to staff's second cause of action (failure to renew a PBS facility registration), the ALJ points out that there was no valid registration to renew and that cause of action should also be dismissed (see id.). I concur with the ALJ's determination to dismiss staff's first and second causes of action.

Regarding staff's remaining causes of action -- fourth (failure to display the PBS certificate at the facility), fifth (failure to equip the PBS tank with secondary containment in accordance with regulatory requirements), sixth (failure to properly mark the PBS tank), seventh (failure to color code the fill port), eighth (failure to maintain the tank vault) and ninth (failure to conduct monthly inspections and maintain records of monthly inspections) -- I concur with the ALJ's determination that Department staff is entitled to a finding of liability on each of them.

Penalty

Department staff has requested a civil penalty in the amount of thirty-seven thousand dollars (\$37,000). Pursuant to ECL 71-1929(1), a civil penalty of thirty-seven thousand five hundred dollars (\$37,500) per day may be imposed for each of the violations found here. Considering the dismissal of the first and second causes of action relating to registration, the ALJ concluded that a total penalty of twenty-six thousand five hundred dollars (\$26,500) would be supported and appropriate (see Summary Report at 6-7).

I have given consideration, however, to the number of violations and their duration and severity, respondent's lack of cooperation in addressing Department staff's efforts to secure compliance or resolve the violations, and the proximity of the facility to sensitive receptors (see Affirmation of John K. Urda, Esq. dated January 30, 2017 [Urda Aff], ¶¶ 72-75). Based on the record before me, I conclude that the third through the ninth causes of action for which liability is found are sufficient to support staff's requested civil penalty of thirty-seven thousand dollars (\$37,000). I hereby impose a civil penalty in the amount that staff has requested and direct that respondent submit payment of that amount to the Department within thirty (30) days of the service of this order upon it.¹

Corrective Action

Department staff has requested that respondent undertake corrective action and that such corrective action be completed within thirty (30) days of the order (see Urda Aff at 12 [Wherefore Clause number 3]). Staff cites various deficiencies that were identified in an October 2016 inspection of the facility (see e.g. Affidavit of M. Shahin Ali, P.E., dated January 30, 2017, ¶ 13 [i-vii]), and which deficiencies are the basis for staff's various causes of action. The ALJ recommends that the deficiencies be corrected within thirty (30) days of service of my order upon respondent, and I concur with that recommendation. These corrective actions include:

- displaying the PBS certificate at the facility;
- equipping the 10,000 gallon aboveground PBS tank with secondary containment that is able to contain petroleum leaked from any portion of the tank system until it is detected and removed;
- marking the 10,000 gallon PBS tank with the tank registration identification number, and the tank design and working capacities;
- color coding the PBS tank at or near the fill port;
- maintaining the tank vault in good working order; and
- conducting monthly inspections and maintaining records of the monthly inspections of the PBS tank.

(see Summary Report at 8-9). Respondent shall, within thirty (30) days of service of this order on respondent, submit proof, including photographs, in a form and manner acceptable to Department staff, that documents the completion of each corrective action. I encourage respondent to contact Department staff to discuss the applicable regulatory requirements to ensure that any corrective actions that respondent undertakes comply with those requirements.

¹ As the ALJ states, because respondent's facility is an apartment building in New York City, the Department's administrative precedent supports a civil penalty of ten thousand dollars (\$10,000) on the third cause of action alone (see Summary Report at 7 n2).

I also direct that, within thirty (30) days of service of this order, respondent 2363 Southern Blvd., LLC submit a complete and correct registration application for the facility together with the applicable registration fees.

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

- I. Department staff's motion for order without hearing, on staff's third, fourth, fifth, sixth, seventh, eighth and ninth causes of action, pursuant to 6 NYCRR 622.12, is granted.
- II. Department staff's first and second causes of action are dismissed.
- III. Based on record evidence, respondent 2363 Southern Blvd., LLC. is adjudged to have violated the following:
 - A. Current 6 NYCRR 613-1.9(d)(1) and former 6 NYCRR 612.2(b) for failing to register the facility within thirty (30) days of transfer of ownership to it (third cause of action);
 - B. Current 6 NYCRR 613-1.9(g) for failing to display a PBS certificate at the facility (fourth cause of action);
 - C. Current 6 NYCRR 613-4.1(c)(1)(i) for failing to equip the 10,000 gallon aboveground PBS tank with secondary containment that is able to contain petroleum leaked from any portion of the tank system until it is detected and removed (fifth cause of action);
 - D. Current 6 NYCRR 613-4.2(a)(3) for failing to properly mark the aboveground PBS tank with the tank registration identification number and the tank design and working capacities (sixth cause of action);
 - E. Current 6 NYCRR 613-4.2(a)(4) for failing to color code a fill port (seventh cause of action);
 - F. Current 6 NYCRR 613-4.2(a)(6) for failing to maintain the tank vault by allowing the accumulation of water and debris (eighth cause of action); and
 - G. Current 6 NYCRR 613-4.3(a)(1)(i) and 613-4.3(e) for failing to conduct monthly inspections and for failing to maintain records of the monthly inspections (ninth cause of action).
- IV. Respondent 2363 Southern Blvd., LLC is assessed a civil penalty of thirty-seven thousand dollars (\$37,000) for the violations referenced in paragraph III of this order.

- V. Within thirty (30) days of service of this order on respondent 2363 Southern Blvd., LLC, respondent shall pay the civil penalty referenced in paragraph IV in the amount of thirty-seven thousand dollars (\$37,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- VI. Within thirty (30) days of service of this order on respondent 2363 Southern Blvd., LLC, respondent shall submit to Department staff a complete registration application together with the applicable registration fees.
- VII. Within thirty (30) days of service of this order on respondent 2363 Southern Blvd., LLC, respondent shall:
- A. display the PBS certificate at the facility;
 - B. equip the 10,000 gallon PBS tank with secondary containment that is able to contain petroleum leaked from any portion of the tank until it is detected and removed, and able to prevent the release of petroleum;
 - C. mark the 10,000 gallon PBS tank with the tank registration identification number, and the tank design and working capacities;
 - D. color code the tank at or near the fill port;
 - E. maintain the tank vault in good working order;
 - F. conduct monthly inspections and maintain records of inspections; and
 - G. submit proof in a form and manner acceptable to Department staff that documents that the corrective measures referenced in subparagraphs A – F of this paragraph have been completed.
- VIII. Respondent 2363 Southern Blvd., LLC shall submit the penalty payment and all other submissions to:

Karen Mintzer, Esq.²
Regional Attorney
NYSDEC Region 2
1 Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101-5407

² Staff attorney John Urda, Esq. who represented Department staff in this proceeding is now with the Department's Region 3 office. Accordingly, submissions pursuant to this order, including the penalty payment, are to be sent to Region 2 Regional Attorney Karen Mintzer.

- IX. The provisions, terms and conditions of this Order shall bind respondent 2363 Southern Blvd., 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: Albany, New York
September 11, 2017

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

DEC Case No.
R2-20161205-429

- by -

2363 SOUTHERN BLVD., LLC,

Respondent.

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (John K. Urda, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- No appearance for respondent

Proceedings

By notice of motion for order without hearing in lieu of complaint dated January 30, 2017, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent 2363 Southern Blvd., LLC (respondent) for alleged violations of ECL article 17, former 6 NYCRR part 612 and current 6 NYCRR part 613 at respondent's petroleum bulk storage (PBS) facility located at 2363 Southern Boulevard, Bronx, New York (facility).¹ Staff served the notice of motion with supporting papers on respondent by certified mail on January 30, 2017. Respondent received the motion papers on February 6, 2017.

Department staff alleges respondent violated the following:

1. Current 6 NYCRR 613-1.9(a), ECL 17-1009(2) and former 6 NYCRR 612.2(a)(1) for failing to accurately register a PBS facility;

¹ As staff correctly demonstrates, the facility address is 2363 Southern Boulevard, Bronx, New York not 2364 Southern Boulevard as it was registered by the previous owner.

2. Current 6 NYCRR 613-1.9(c), ECL 17-1009(2) and former 6 NYCRR 612.2(a)(2) for failing to renew a PBS facility registration;
3. Current 6 NYCRR 613-1.9(d)(1) and former 6 NYCRR 612.2(b) for failing to register the facility within thirty (30) days of transfer of ownership to respondent;
4. Current 6 NYCRR 613-1.9(g) for failing to display a PBS certificate at the facility;
5. Current 6 NYCRR 613-4.1(c)(1)(i) for failing to equip a 10,000 gallon Category 1 aboveground PBS tank with secondary containment;
6. Current 6 NYCRR 613-4.2(a)(3) for failing to properly mark an aboveground PBS tank;
7. Current 6 NYCRR 613-4.2(a)(4) for failing to color code a fill port;
8. Current 6 NYCRR 613-4.2(a)(6) for failing to maintain spill prevention equipment; and
9. Current 6 NYCRR 613-4.3(a)(1)(i) and 613-4.3(e) for failing to conduct monthly inspections and maintain records of monthly inspections (two counts).

Staff's papers consist of a notice of motion dated January 30, 2017, the Affirmation of John K. Urda, Esq. dated January 30, 2017 (Urda Affirmation), attaching three exhibits and the Affidavit of M. Shahin Ali, P.E. sworn to January 30, 2017 (Ali Affidavit), attaching seven exhibits. See Appendix A attached hereto.

Respondent has not responded to staff's motion papers, although a response was due by February 27, 2017. See 6 NYCRR 622.12(c).

Staff requests that the Commissioner issue an order: (i) finding that respondent violated the law and regulations as set forth above; (ii) imposing a civil penalty of \$37,000 on respondent; (iii) directing respondent to complete corrective action within thirty (30) days; and (iv) granting such other and further relief as may be deemed just, proper and equitable under the circumstances. See Urda Affirmation at 12, Wherefore Clause.

FINDINGS OF FACT

1. Respondent 2363 Southern Blvd., LLC (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 2363 Southern Boulevard, Bronx, New York (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 10,000 gallons and is located aboveground. See Urda Affirmation ¶¶ 3-5, Exhibit A, Deed and Exhibit B; Ali Affidavit ¶¶ 8 and 10.
2. Respondent 2363 Southern Blvd., LLC is an active domestic limited liability company. See Urda Affirmation ¶ 3, Exhibit A, NYS Department of State Entity Information.
3. On December 21, 2006, Parkview Associates Limited Partnership, by deed, transferred all right, title and interest in the facility to respondent 2363 Southern Blvd., LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 200700015521. See Urda Affirmation ¶ 3, Exhibit A, Deed.

4. M. Shahin Ali is an environmental engineer employed in the Department's Division of Environmental Remediation in DEC Region 2. See Ali Affidavit ¶ 1.
5. As part of his duties, Mr. Ali inspects PBS facilities for compliance with ECL article 17 and the PBS regulations. See Ali Affidavit ¶ 3.
6. Mr. Ali searched the petroleum bulk storage facility records maintained by the Department and discovered that respondent had not registered the PBS facility since respondent took ownership of the facility on December 21, 2006. See Ali Affidavit ¶¶ 6, 7 and 11; Urda Affirmation, Exhibit B.
7. On October 18, 2016, Mr. Ali inspected the PBS facility located at 2363 Southern Boulevard, Bronx, New York and observed that the 10,000 gallon aboveground tank stored heating oil and was located in a vault with access for inspection. See Ali Affidavit ¶ 10, Exhibits A & B.
8. Mr. Ali found that the facility registration contained incorrect information regarding the facility address, site owner, operator and emergency contact. See Ali Affidavit ¶ 11.
9. During his inspection, Mr. Ali also found other tank information to be incorrect. See Ali Affidavit ¶ 12.
10. As a result of his inspection, Mr. Ali found:
 - A. There was no PBS registration posted at the facility. See Ali Affidavit ¶ 13(i).
 - B. The PBS tank did not have "functional, water-tight secondary containment." See Ali Affidavit ¶ 13(ii), Exhibit B.
 - C. The PBS tank was not marked with the tank registration identification number as well as tank design and working capacities. See Ali Affidavit ¶ 13(iii), Exhibit C.
 - D. The fill port for the PBS tank was not color coded to identify the petroleum in use at the facility. See Ali Affidavit ¶ 13(iv), Exhibit D.
 - E. Water and debris were allowed to collect inside the tank vault. See Ali Affidavit ¶ 13(v), Exhibit E.
 - F. The facility had not been inspected monthly and the facility did not keep monthly inspection reports. See Ali Affidavit ¶ 13(vi).
 - G. The facility had not undergone a ten-year inspection, including tightness testing, nor had records of ten-year inspections been kept. See Ali Affidavit ¶ 13(vii).
11. Mr. Ali also observed an April 9, 2014 Fire Safety Plan posted at the facility, which identified the building owner/representative's address and telephone number. The 280 E. 161 Street, Bronx, New York 10451 address matched the address used for mailing correspondence contained in Department records for the former owner's expired registration of the facility. See Ali Affidavit ¶ 14, Exhibit F; Urda Affirmation, Exhibit B.

12. Mr. Ali sent a notice of violation to NHP Property Mgmt, 280 E. 161st Street, Bronx, New York 10451. See Ali Affidavit ¶ 15, Exhibit G.
13. The notice of violation advised NHP Property Mgmt of violations noted at respondent's facility and advised NHP Property Mgmt that a settlement conference was scheduled for December 8, 2016 at the Department's Region 2 office. See Ali Affidavit ¶ 15, Exhibit G.
14. No one appeared at the December 8, 2016 settlement conference on behalf of respondent. See Urda Affirmation ¶ 10; Ali Affidavit ¶ 16.

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. "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, June 16, 2003.)

Respondent has not submitted any response to the Department staff's motion and therefore has failed to provide any material fact that would require a hearing. On an unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the violations alleged in the motion. (See Matter of Edelstein, Order of the Commissioner, July 18, 2014, at 2; see also Matter of Hunt, Decision and Order of the Commissioner, July 25, 2006, at 7 n2.)

Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with the affidavit of an environmental engineer who inspected respondent's facility, reviewed the PBS facility records maintained by the Department and described the violations of the PBS regulations.

Based on review of the affirmation, affidavit and the exhibits attached thereto, I conclude that Department staff's proof presents a prima facie showing, in part, as discussed below.

First, Second and Third Causes of Action

Staff alleges that respondent failed to keep the PBS registration information for the facility updated and current (first cause of action), failed to renew the registration (second cause of action), and failed to register the facility within thirty days of transfer of ownership to respondent (third cause of action). Department staff has made a prima facie showing, on staff's third cause of action, that respondent failed to register the facility within thirty days of transfer of ownership to respondent in violation of former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1) (from October 11, 2015). Respondent was required to register the facility by January 20, 2007, but to date has not registered the facility.

Because respondent was required to register the facility in the first instance and did not, I conclude that staff's first cause of action for failing to keep the registration updated and current is multiplicative of the third cause of action. Accordingly, staff's first cause of action should be dismissed.

Staff also claims that respondent failed to renew the facility's PBS registration. Pursuant to former 6 NYCRR 612.2(a)(2) and current 6 NYCRR 613-1.9(c), a PBS registration "must be renewed every five years from the date of the last valid registration." Respondent never registered the facility and never had a "last valid registration" to renew. Respondent was not the owner of the facility when the last valid registration expired on June 6, 1996 and is not responsible for renewing the expired registration. Consequently, the Commissioner cannot order respondent to renew the registration. Accordingly, staff's second cause of action should be dismissed.

I conclude that respondent's violation of the registration provisions of the former and current regulations is limited to the third cause of action. The relief provided will include the registration fees that accrued every five years from December 21, 2006. In summary, staff's first and second causes of action are dismissed and staff's motion for order without hearing on the third cause of action is granted.

Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Causes of Action

As a result of the October 18, 2016 inspection, Department staff has made a prima facie showing that respondent, as the facility owner, failed to display a PBS certificate at the facility in violation of 6 NYCRR 613-1.9(g) (fourth cause of action). Also as a result of the inspection, staff alleges respondent failed to equip the PBS tank with secondary containment that is able to contain petroleum leaked from any portion of the aboveground storage tank (AST) until it is detected and removed, and able to prevent the release of petroleum in violation of 6 NYCRR 613-4.1(c)(1)(i)(a) and (b) (fifth cause of action); failed to mark the AST with the tank registration identification number, tank design and working capacities in violation of 6 NYCRR 613-4.2(a)(3) (sixth cause of action); failed to color code the AST system at or near the fill port in violation of 6 NYCRR 613-4.2(a)(4) (seventh cause of action); failed to maintain the tank vault in good working order in violation of 6 NYCRR 613-4.2(a)(6) (eighth cause of action); and

failed to conduct monthly inspections and maintain records of inspections in violation of 6 NYCRR 613-4.3(a)(1)(i) and 613-4.3(e) (ninth cause of action), respectively.

Pursuant to 6 NYCRR subpart 613-4 the tank and operating requirements of the subpart are imposed on the facility. Whenever the current regulations impose a requirement on a facility that requirement is imposed “on every operator and every tank system owner at the facility, unless expressly stated otherwise.” (6 NYCRR 613-1.2[d].) Staff, however, has not pleaded or demonstrated the identity of the operator or tank system owner in support of staff’s fifth through ninth causes of action alleging violations of subpart 613-4. Where respondent has failed to register the facility and identify the operator and tank system owner, staff cannot determine whether there are other responsible parties besides the facility owner.

I conclude that when respondent failed to register the facility after transfer of ownership to it that a presumption arises that respondent facility owner is also the operator and tank system owner. It is, however, a rebuttable presumption. Moreover, respondent, as a facility owner, is in a position to correct the violations in this matter. Respondent has failed to appear in this proceeding and has failed to rebut the presumption. Accordingly, I conclude that Department staff has made a prima facie showing on staff’s fifth through ninth causes of action.

Staff’s motion for order without hearing on staff’s fourth, fifth, sixth, seventh, eighth and ninth causes of action is granted.

Penalty

Department staff requests that respondent be assessed a civil penalty of thirty-seven thousand dollars (\$37,000). Pursuant to ECL 71-1929(1), the Commissioner may impose a maximum daily penalty of thirty-seven thousand five hundred dollars (\$37,500) per day on any person who violates any of the provisions of, or who fails to perform any duty imposed by ECL article 17 title 10 or the regulations promulgated pursuant thereto.

In support of the requested penalty, staff discussed several factors consistent with the Department’s Civil Penalty Policy (DEE-1), including the importance of registering PBS facilities to the overall statutory scheme and the Department’s ability to monitor PBS facilities for compliance. Staff also took into consideration respondent’s lack of cooperation in addressing the violations. Staff based respondent’s lack of cooperation, in part, on the notice of violation, including a notice of a settlement conference, that staff mailed to NHP Property Mgmt (NHP) (see Ali Affidavit, Exhibit G). NHP, however, is not the owner of the facility. Such notice is not notice to respondent herein. Staff, however, did attempt to settle the matter through an order on consent mailed to respondent (see Urda Affirmation, Exhibit C).

In addition, staff notes that the facility is located near sensitive receptors including a large public elementary school adjacent to the facility and the Bronx Zoo across the street from the facility. Staff also cites the Bulk Storage and Spill Response Enforcement Policy (DEE-4) and Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22) in determining the appropriate

penalty for each violation, but does not explain how those policies were applied to the penalty calculation.

The penalties requested are a fraction of the maximum statutory penalty that could be assessed against 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 PBS tank further supports the penalty requested.² I reduce staff's requested penalty by ten thousand five hundred dollars (\$10,500), the amount staff assigned to staff's first and second causes of action combined, and conclude that a total penalty of twenty-six thousand five hundred dollars (\$26,500) is supported and appropriate.

Corrective Action

Department staff requests as part of the relief in this matter that respondent be directed "to complete corrective action within thirty days." Staff, however, has not stated what corrective action is being requested or whether staff wants records maintained or submitted or both. Nonetheless, the Commissioner can direct respondent to correct the violations and submit documentation to Department staff demonstrating compliance. The corrective actions recommended herein must be performed in compliance with the current PBS regulations, 6 NYCRR part 613, that became effective October 11, 2015.

CONCLUSIONS OF LAW

1. By failing to register the facility within thirty (30) days of transfer of ownership to respondent, respondent violated current 6 NYCRR 613-1.9(d)(1) and former 6 NYCRR 612.2(b).
2. By failing to display a PBS certificate at the facility, respondent violated current 6 NYCRR 613-1.9(g).
3. By failing to equip a 10,000 gallon Category 1 aboveground PBS tank with secondary containment, respondent violated current 6 NYCRR 613-4.1(c)(1)(i).
4. By failing to properly mark an aboveground PBS tank, respondent violated current 6 NYCRR 613-4.2(a)(3).
5. By failing to color code the fill port, respondent violated current 6 NYCRR 613-4.2(a)(4).
6. By failing to maintain spill prevention equipment, respondent violated current 6 NYCRR 613-4.2(a)(6).
7. By failing to conduct monthly inspections and maintain records of monthly inspections, respondent violated current 6 NYCRR 613-4.3(a)(1)(i) and 613-4.3(e).

² Because respondent's facility is an apartment building in New York City, Department precedent supports a penalty of ten thousand dollars on the third cause of action alone (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

RECOMMENDATIONS

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

1. granting Department staff's motion for order without hearing, on staff's third, fourth, fifth, sixth, seventh, eighth and ninth causes of action, pursuant to 6 NYCRR 622.12;
2. dismissing Department staff's first and second causes of action;
3. holding that respondent 2363 Southern Blvd., LLC violated the following:
 - a. Current 6 NYCRR 613-1.9(d)(1) and former 6 NYCRR 612.2(b) for failing to register the facility within thirty (30) days of transfer of ownership to respondent (third cause of action);
 - b. Current 6 NYCRR 613-1.9(g) for failing to display a PBS certificate at the facility (fourth cause of action);
 - c. Current 6 NYCRR 613-4.1(c)(1)(i) for failing to equip a 10,000 gallon Category 1 aboveground PBS tank with secondary containment (fifth cause of action);
 - d. Current 6 NYCRR 613-4.2(a)(3) for failing to properly mark an aboveground PBS tank (sixth cause of action);
 - e. Current 6 NYCRR 613-4.2(a)(4) for failing to color code a fill port (seventh cause of action);
 - f. Current 6 NYCRR 613-4.2(a)(6) for failing to maintain spill prevention equipment (eighth cause of action); and
 - g. Current 6 NYCRR 613-4.3(a)(1)(i) and 613-4.3(e) for failing to conduct monthly inspections and maintain records of monthly inspections (two counts) (ninth cause of action).
4. directing respondent 2363 Southern Blvd., LLC to pay a civil penalty of twenty-six thousand five hundred dollars (\$26,500) within fifteen (15) days of service of the Commissioner's order on respondent;
5. directing respondent 2363 Southern Blvd., LLC to submit a corrected complete registration application together with the applicable registration fees within thirty (30) days of service of the Commissioner's order on respondent;
6. directing respondent 2363 Southern Blvd., LLC to perform the following within thirty (30) days of service of the Commissioner's order on respondent:
 - a. display the PBS certificate at the facility;
 - b. equip the 10,000 gallon PBS tank with secondary containment that is able to contain petroleum leaked from any portion of the AST until it is detected and removed, and able to prevent the release of petroleum;
 - c. mark the 10,000 gallon PBS tank with the tank registration identification number, tank design and working capacities;
 - d. color code the AST system at or near the fill port;

- e. maintain the tank vault in good working order; and
 - f. conduct monthly inspections and maintain records of inspections.
7. directing respondent 2363 Southern Blvd., LLC to submit photographs, documentation or reports, acceptable to the Department, demonstrating that the corrective actions have been completed within thirty (30) days of service of the Commissioner's order on respondent;
8. directing respondent 2363 Southern Blvd., LLC to submit the penalty payment, registration and fees and all other submissions to the following:

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC Region 2
47-40 21st 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/
Michael S. Caruso
Administrative Law Judge

Dated: May 9, 2017
Albany, New York

APPENDIX A

Matter of 2363 Southern Blvd., LLC
DEC File No. R2-20161205-429
Motion for Order Without Hearing

1. Notice of Motion for an Order Without a Hearing, dated January 30, 2017
2. Affirmation of John K. Urda in Support of Motion for Order Without a Hearing, dated January 30, 2017, attaching the following exhibits:
 - A. NYS Department of State Entity Information Sheets regarding 2363 Southern Blvd., LLC, reflecting information through January 25, 2017 and deed from Parkview Associates Limited Partnership to 2363 Southern Blvd., LLC, dated December 21, 2006
 - B. PBS Facility Information Report, PBS #2-600160, printed January 30, 2017 and PBS Registration Certificate issued to NHP Property Mgmt, Inc on June 7, 1991, expired June 6, 1996
 - C. Correspondence from John K. Urda, Esq. to 2363 Southern Blvd., LLC, dated December 14, 2016
3. Affidavit of M. Shahin Ali, P.E. in Support of Motion for Order Without a Hearing, sworn to January 30, 2017, attaching the following exhibits:
 - A. Photograph of entrance to Parkview Apartments, 2363 Southern Boulevard, Bronx, New York
 - B. Photograph of PBS tank and secondary containment area located at 2363 Southern Boulevard, Bronx, New York
 - C. Photograph of unmarked PBS tank located at 2363 Southern Boulevard, Bronx, New York
 - D. Photograph of fill port for the PBS tank located at 2363 Southern Boulevard, Bronx, New York
 - E. Photograph of water and debris in secondary containment area of PBS tank located at 2363 Southern Boulevard, Bronx, New York
 - F. Photograph of fire safety plan for Parkview Apartments, 2363 Southern Boulevard, Bronx, New York
 - G. Correspondence from MD S Ali, dated October 20, 2016 to NHP Property Mgmt, re: Notice of Violation
4. Affirmation of Service of John K. Urda, dated to March 8, 2017