

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

In the Matter of the Alleged Violations
of Article 17 of the Environmental
Conservation Law ("ECL") and Parts 612
through 614 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR"),

ORDER

DEC Case No.
R4-2006-00427-84

- by -

**JOSEPH CALABRO d/b/a JOE'S SERVICE
STATION AND MA'S SERVICE STATION,**

Respondent.

This matter arises from an administrative enforcement proceeding commenced by staff of the Department of Environmental Conservation ("Department") for alleged violations of the Environmental Conservation Law ("ECL") and related implementing regulations at two separate petroleum storage facilities located in Altamont (Albany County), New York.

Factual and Procedural Background

Respondent Joseph Calabro owns and operates Joe's Service Station at 2594 Western Avenue, Altamont ("Joe's Service Station"), and Ma's Service Station at Routes 158 and 20, RD 2, Altamont ("Ma's Service Station"). Following inspections of the two service stations, in a complaint dated August 15, 2006, Department staff alleged 17 causes of action against respondent stemming from violations of Environmental Conservation Law ("ECL") article 17 and its implementing regulations in parts 612, 613 and 614 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").¹

In particular, staff alleged that, as owner and operator of Joe's Service Station and Ma's Service Station, respondent:

¹ Fifteen of the causes of action related to violations at Joe's Service Station; the other two causes of action related to violations at Ma's Service Station (see Hearing Exhibit 2).

1. substantially modified Joe's Service Station on January 12, 2006 by adding 4 tanks at that facility without notifying the Department, in violation of 6 NYCRR 612.2(d);
2. failed to label the monitoring well at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 613.3(b)(4);
3. failed to notify the Department of a petroleum spill into the catch basin at Joe's Service Station on January 12, 2006 until January 19, 2006, in violation of 6 NYCRR 613.8;
4. failed to keep sumps and/or fill port catch basins associated with tanks 1 and 5 at Joe's Service Station in good working order on January 12, 2006, in violation of 6 NYCRR 613.3(d);
5. failed to mark the fill ports at Joe's Service Station as required on January 12, 2006, in violation of 6 NYCRR 613.3(b);
6. failed to label tank 5 and failed to place a label at the fill port showing the date of installation of tank 5 at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 614.3(a)(1) and 614.3(a)(2);
7. failed to maintain an accurate drawing or as-built plans for tank 5 at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 614.7(d);
8. failed to monitor for traces of petroleum at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 613.5(b)(3);
9. failed to monitor the interstitial space of tank 5 at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 614.5(b);
10. failed to maintain interstitial space monitoring records on the premises of Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 613.5(b)(4);
11. failed to maintain inventory records for the underground storage tanks at Joe's Service Station and Ma's Service Station on January 12, 2006 and January 13, 2006, respectively, in violation of 6 NYCRR

613.4(a)(1);

12. failed to reconcile inventory records for the underground storage tanks at Joe's Service Station and Ma's Service Station on January 12, 2006 and January 13, 2006, respectively, in violation of 6 NYCRR 613.4(a)(1);

13. failed to paint or otherwise protect aboveground storage tanks at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 614.9(c);

14. failed to conduct monthly inspections of aboveground storage tanks at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 613.6(a);

15. failed to keep records of aboveground storage tank inspections at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 613.6(c);

16. failed to install gauges or a high level warning system for the aboveground storage tanks at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 613.3(c); and

17. failed to mark the design capacity, working capacity and identification number on the tanks and at the gauges of the aboveground storage tanks at Joe's Service Station on January 12, 2006, in violation of 6 NYCRR 613.3(c)(3)(ii).

Respondent filed a verified answer sworn to October 10, 2006, in which he generally denied the majority of the allegations in the complaint (see Hearing Exhibit 4). Respondent admitted that he owned and operated both Joe's Service Station and Ma's Service Station, but did not raise any affirmative defenses in his verified answer (see id.). Thereafter, an adjudicatory hearing was held in this matter on February 27, 2007 at the Department's Region 4 office in Schenectady, New York, before Administrative Law Judge ("ALJ") Maria E. Villa.

After the hearing, ALJ Villa prepared the attached hearing report ("Hearing Report"). Upon reviewing the record, I concur with and hereby adopt ALJ Villa's report as my decision in this proceeding, subject to the following comments.

Discussion

Department staff bears the burden of proof on all charges and matters that it affirmatively asserts in the August 15, 2006 complaint (see 6 NYCRR 622.11[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 622.11[c]). In this proceeding, preponderance of the evidence is the proper standard.

In light of the documentary and testimonial evidence presented by Department staff at the hearing, which was not rebutted by respondent, the record clearly demonstrates that staff carried its burden of proof against respondent by a preponderance of the evidence. Accordingly, respondent is liable for 16 of the 17 violations alleged in staff's complaint as owner and operator of Joe's Service Station and Ma's Service Station.²

Proposed Penalty

In its complaint, Department staff sought a \$28,000 civil penalty in addition to an order directing respondent's compliance with certain enumerated regulatory requirements related to his two service stations (see Hearing Exhibit 2). As noted by ALJ Villa, staff did not seek a civil penalty for all of the causes of action alleged in the complaint (see Hearing Report, at 5).³ Further, as computed by ALJ Villa, Department staff's penalty calculation (see Hearing Exhibit 26) should be corrected to \$27,600 (see Hearing Report, at 11).

I agree with ALJ Villa that based on this record and respondent's efforts to correct the violations alleged in the complaint, suspension of a portion of the civil penalty is appropriate. Moreover, I agree with the ALJ that staff's request for the permanent closure of respondent's facilities is not warranted here.

Among the proven violations were respondent's failure to perform inventory reconciliation and to maintain leak detection system monitoring records. These requirements are

² At the hearing, Department staff withdrew the second cause of action in the complaint against respondent -- labeling of a monitoring well at Joe's Service Station (see Hearing Transcript, at 13).

³ Staff did not seek a civil penalty for 6 of the 16 causes of action proven against respondent (see Hearing Report, at 12-13).

critical to the Department's regulatory scheme to protect against any release of petroleum product to the environment and, in the event that such a release occurs, that it is detected and addressed as early as possible. There is a significant potential for harm to the environment as a result of respondent's failure to comply with these inventory-related requirements. Furthermore, although the record reveals that respondent promptly rectified certain of the deficiencies identified by staff, other obligations, including the submission of proper records, have not been satisfied.

Accordingly, I conclude that the civil penalty to be assessed against respondent should be \$27,600. This penalty, although substantially below the statutory maximum, is significant. Based on the record of this proceeding, and taking into account ALJ Villa's recommendation, in light of respondent's correction of certain violations at one of the facilities, I have determined to suspend one quarter (that is, \$6,900) of the \$27,600 penalty, contingent upon respondent's prompt compliance with the remedial measures the ALJ has recommended (see Hearing Report, at 13-14). Based on my review of the recommended remedial measures, I conclude that they are authorized and warranted, and the recommended dates by which respondent Joseph Calabro is to implement these measures are reasonable.

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

I. Respondent Joseph Calabro is hereby adjudged to have violated:

A. 6 NYCRR 612.2(d) by substantially modifying Joe's Service Station on January 12, 2006 by adding 4 tanks at that facility without notifying the Department;

B. 6 NYCRR 613.8 by failing to notify the Department of a petroleum spill into the catch basin at Joe's Service Station on January 12, 2006 until January 19, 2006;

C. 6 NYCRR 613.3(d) by failing to keep sumps and/or fill port catch basins associated with tanks 1 and 5 at Joe's Service Station in good working order on January 12, 2006;

D. 6 NYCRR 613.3(b) by failing to mark the fill ports at Joe's Service Station as required on January 12, 2006;

E. 6 NYCRR 614.3(a)(1) and 614.3(a)(2) by failing to label tank 5 and failing to place a label at the fill port showing the date of installation of tank 5 at Joe's Service Station on January 12, 2006;

F. 6 NYCRR 614.7(d) by failing to maintain an accurate drawing or as-built plans for tank 5 at Joe's Service Station on January 12, 2006;

G. 6 NYCRR 613.5(b)(3) by failing to monitor for traces of petroleum at Joe's Service Station on January 12, 2006;

H. 6 NYCRR 614.5(b) by failing to monitor the interstitial space of tank 5 at Joe's Service Station on January 12, 2006;

I. 6 NYCRR 613.5(b)(4) by failing to maintain interstitial space monitoring records on the premises of Joe's Service Station on January 12, 2006;

J. 6 NYCRR 613.4(a)(1) by failing to maintain inventory records for the underground storage tanks at Joe's Service Station and Ma's Service Station on January 12, 2006 and January 13, 2006, respectively;

K. 6 NYCRR 613.4(a)(1) by failing to reconcile inventory records for the underground storage tanks at Joe's Service Station and Ma's Service Station on January 12, 2006 and January 13, 2006, respectively;

L. 6 NYCRR 614.9(c) by failing to paint or otherwise protect aboveground storage tanks at Joe's Service Station on January 12, 2006;

M. 6 NYCRR 613.6(a) by failing to conduct monthly inspections of aboveground storage tanks at Joe's Service Station on January 12, 2006;

N. 6 NYCRR 613.6(c) by failing to keep records of aboveground storage tank inspections at Joe's Service Station on January 12, 2006;

O. 6 NYCRR 613.3(c) by failing to install gauges or a high level warning system for the aboveground storage tanks at Joe's Service Station on January 12, 2006; and

P. 6 NYCRR 613.3(c)(3)(ii) by failing to mark the

design capacity, working capacity and identification number on the tanks and at the gauges of the aboveground storage tanks at Joe's Service Station on January 12, 2006.

II. Respondent Joseph Calabro is hereby assessed a civil penalty in the amount of twenty seven thousand six hundred dollars (\$27,600), of which six thousand nine hundred dollars (\$6,900) is suspended contingent upon respondent's compliance with the remedial measures set forth in paragraph III of this order. The non-suspended civil penalty portion of twenty thousand seven hundred dollars (\$20,700) 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 payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Ann Lapinski, Esq.
Assistant Regional Attorney
New York State Department of
Environmental Conservation
Region 4, Division of Legal Affairs
1130 North Westcott Road
Schenectady, New York 12306-2014

Should respondent Joseph Calabro fail to comply with the remedial measures set forth in paragraph III of this order, the suspended portion of the civil penalty shall become immediately due and payable and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

III. In addition to the payment of a penalty, respondent Joseph Calabro is hereby directed:

A. Within thirty (30) days after service of this order, to submit the four most recent weekly leak detection system monitoring records to the Department for the tanks at Joe's Service Station, and continue to maintain such proper records for at least one year from the date of this order;

B. Within thirty (30) days after service of this order, to submit the four most recent weekly interstitial space monitoring records to the Department for the double-walled tanks at Joe's Service Station, and continue to maintain such proper records;

C. Within thirty (30) days after service of this order, to submit proper inventory records to the Department utilizing a ten (10) day reconciliation period for the most recent thirty (30) day period for the underground storage tanks at both Joe's Service Station and Ma's Service Station, and continue to maintain such records until respondent has provided the Department with proper records to the Department for six consecutive months from the date of this order;

D. Within thirty (30) days after service of this order, to conduct monthly inspections of the aboveground storage tanks at Joe's Service Station, and submit a copy of the most recent monthly inspection report to the Department, and continue to provide such monthly inspection reports to the Department for six consecutive months from the date of this order; and

E. Within thirty (30) days after service of this order, to begin monitoring the leak detection system at Joe's Service Station at least weekly, and submit the four most recent weekly leak detection monitoring records to the Department.

IV. All communications from respondent Joseph Calabro to the Department concerning this order shall be made to: Ann M. Lapinski, Esq., New York State Department of Environmental Conservation, Region 4, 1130 North Westcott Road, Schenectady, New York 12306-2014.

V. The provisions, terms and conditions of this order shall bind respondent Joseph Calabro and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: September 21, 2007
Albany, New York

TO: Joseph Calabro (By certified mail)
Joe's Service Station
2594 Western Avenue
Altamont, New York 12009

Joseph Calabro (By certified mail)
Ma's Service Station
Routes 158 and 20
RD 2
Altamont, New York 12009

Joseph D. Gardner, Esq. (By certified mail)
1528 Union Street
Schenectady, New York 12309

Ann Lapinski, Esq. (By regular mail)
Assistant Regional Attorney
New York State Department of
Environmental Conservation
Region 4, Division of Legal Affairs
1130 North Westcott Road
Schenectady, New York 12306-2014

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway
Albany, New York 12233-1550

In the Matter of the Alleged Violations of Article 17
of the New York State Environmental Conservation Law
and Parts 612 through 614 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York,

-by-

JOSEPH CALABRO
d/b/a/ Joe's Service Station
Ma's Service Station,

Respondent.

DEC Case No. R4-2006-00427-84

HEARING REPORT

/s/

Maria E. Villa
Administrative Law Judge

September 14, 2007

PROCEEDINGS

On August 28, 2006, Staff of the New York State Department of Environmental Conservation ("Department Staff") commenced this action against respondent, Joseph Calabro d/b/a Joe's Service Station and Ma's Service Station ("Respondent"). On that date, Department Staff personally served Respondent with a Notice of Hearing and Complaint dated August 15, 2006, alleging that Respondent had violated Article 17 of the Environmental Conservation Law ("ECL") and the statute's implementing regulations at Parts 612, 613 and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Joe's Service Station is located at 2594 Western Avenue, Altamont, New York 12009. Ma's Service Station is located at Routes 158 and 20, RD 2, Altamont, New York 12009. Only two of the allegations in the Complaint refer to Ma's Service Station. The remainder of the violations alleged relate to Joe's Service Station. It is undisputed that Respondent owns and operates both stations, and that both stations are petroleum storage facilities as defined by 6 NYCRR Section 612.1(c)(10) and (21).

Respondent filed a Verified Answer sworn to October 10, 2006. On January 4, 2007, Department Staff filed a Statement of Readiness, pursuant to Section 622.9 of 6 NYCRR, stating that settlement efforts were unavailing and that the case was ready for adjudication. The matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa, and the hearing took place on February 27, 2007.

Department Staff was represented by Ann Lapinski, Esq., Assistant Regional Attorney, of the Department's Region 4 office in Schenectady. Department Staff called two witnesses: Thomas Koch and Richard Schowe, both Region 4 Environmental Program Specialists I. Respondent was represented by Joseph Gardner, Esq., of Schenectady. Respondent testified on his own behalf, and also called Mitchell Russell as a witness.

At the conclusion of the hearing, Department Staff requested leave to file a post-hearing brief. Over Respondent's objection, the ALJ granted the request. Upon receipt of the transcript, the ALJ set a briefing schedule. Initial briefs were to be served by June 15, 2007. Department Staff filed a brief, but Respondent did not. Reply briefs were due on July 20, 2007. By letter dated July 2, 2007, Department Staff advised the ALJ that because Respondent had not submitted a brief, Department Staff did not plan to file a reply brief. Respondent did not submit a reply brief.

FINDINGS OF FACT

1. Respondent is the owner of Ma's Service Station, a petroleum bulk storage ("PBS") facility with nine tanks, and a total capacity of 25,650 gallons. Ma's Service Station is located at Routes 158 and 20, RD 2, Altamont, New York 12009.
2. Respondent is the owner and operator of Joe's Service Station, a petroleum bulk storage facility with six tanks, and a total capacity of 28,825 gallons. Joe's Service Station is located at 2594 Western Avenue, Altamont, New York 12009.
3. On July 3, 2002, the Department issued a PBS registration certificate to Ma's Service Station. The certificate indicated that the facility consisted of three tanks, each with a capacity of 8,000 gallons. In fact, there are also six 275 gallon above ground storage tanks at the facility.
4. On June 28, 2002, the Department issued a PBS registration certificate to Joe's Service Station. The certificate indicated that the facility consisted of three tanks, two with a capacity of 8,000 gallons, and one with a capacity of 12,000 gallons. In fact, there are also three 275 gallon above ground storage tanks at the facility.¹
5. On February 14, 2005, Department Staff inspected Ma's Service Station. During the inspection, Department Staff noted the presence of four² above ground 275 gallon storage tanks that were not indicated on the facility's PBS registration certificate. A number of other violations were noted, and were detailed in a Notice of Violation dated February 18, 2005. The Notice stated that Respondent was subject to penalties as a result of the violations noted.

¹ A fourth tank that was observed during Department Staff's inspection of the facility and referenced in an inspection report and Notice of Violation was subsequently removed.

² Although all six of the above ground storage tanks were not listed on the facility's PBS registration certificate, the Notice of Violation and Department Staff's complaint state that only four were unregistered. Department Staff did not seek a penalty for this violation.

6. On or about April 6, 2005, Albany Tank Services, Inc., a firm hired by Respondent, submitted a compliance report to the Department with respect to Ma's Service Station. The report summarized the action taken to address the deficiencies observed during the inspection and set forth in the February 18, 2005 Notice of Violation.
7. On April 29, 2005, Department Staff inspected Ma's Service Station. The inspection report noted that Department Staff provided the operator with the corrected version of the PBS registration certificate. The inspection report stated that there had been notable improvement at the facility. Certain violations were noted, which were set forth in a Notice of Violation dated May 2, 2005. The Notice stated that Respondent was subject to penalties as a result of the violations noted.
8. On January 13, 2006, Department Staff inspected Ma's Service Station. The inspection report noted, among other things, that Respondent did not have inventory records for the underground storage tanks at the facility, and that inventory records were not reconciled every ten days. A January 20, 2006 Notice of Violation advised Respondent that proper inventory records were not being maintained or reconciled as required.
9. On January 12, 2006, Department Staff inspected Joe's Service Station. A number of violations were noted, including the presence of four³ unregistered above ground storage tanks with a capacity of 275 gallons each; failure to permanently mark and label monitoring wells; failure to report a spill of diesel fuel in a catch basin; and failure to maintain gauges, valves and other spill prevention equipment in good working order.
10. Other violations noted at the inspection of Joe's Service Station on January 12, 2006 included water in two of the three dispenser sumps; failure to mark fill ports to identify product; failure to properly label tanks, and to maintain accurate drawings or as-built plans for one of the tanks; failure to monitor for traces of petroleum at least once per week; failure to

³ One of the tanks was subsequently removed.

maintain leak monitoring records for at least one year; and failure to monitor the interstitial space of double-walled tanks for tightness using pressure monitoring, vacuum monitoring, electronic monitoring or manual sampling at least once per week.

11. In addition, the following violations at Joe's Service Station were noted during the January 12, 2006 inspection: failure to maintain inventory records and properly maintain those records; failure to protect the exterior surfaces of the facility's above ground storage tanks with a primer coat, a bond coat and two or more final coats of paint or an equivalent surface coating system; failure to conduct monthly inspections of the above ground storage tanks and to maintain records of those inspections; failure to properly equip all above ground storage tanks with a gauge which accurately shows the level of product in the tank or install a high level warning system, a high level liquid pump cutoff controller, or equivalent device; and failure to clearly mark the above ground storage tanks with the tanks' design capacity, working capacity, and identification number.
12. These violations were set forth in a Notice of Violation dated January 18, 2006. Albany Tank Services, Inc. submitted a compliance report for Joe's Service Station, dated February 2006. Department Staff undertook a subsequent inspection on March 14, 2006, and certain violations were noted and set forth in a Notice of Violation, dated that same day.

DISCUSSION

A petroleum bulk storage facility is defined as

"one or more stationary tanks, including any associated intra-facility pipelines, fixtures or other equipment, which have a combined storage capacity of over 1,100 gallons of petroleum at the same site. A facility may include aboveground tanks, underground tanks or a combination of both."

Section 612.1(c)(10). Joe's Service Station has a combined storage capacity of 28,825 gallons.⁴ Ma's Service Station has a total capacity of 25,650 gallons. Accordingly, the facilities are subject to the Department's petroleum bulk storage regulations.

An "owner" is defined as "any person who has legal or equitable title to a facility." Section 612.2(c)(18). An "operator" means "any person who leases, operates, controls or supervises a facility." Section 612.1(c)(16). In the answer, Respondent admitted that Joseph Calabro is the owner and operator of Joe's Service Station and Ma's Service Station, and that both are registered petroleum bulk storage facilities. Exhibit 4, ¶ 3.

Department Staff's Complaint alleged 17 causes of action. See Exhibit 2. At the hearing, Department Staff withdrew the second cause of action. Tr. at 13. In addition, as discussed more fully below, Department Staff did not seek a civil penalty for certain of the remaining causes of action. The attached chart lists the causes of action and proposed civil penalties for each.

Department Staff provided a penalty calculation at the hearing. Exhibit 26. The penalty calculation indicates the individual amounts for each violation alleged, and combines those amounts to arrive at a subtotal of \$14,500.⁵ Id. At the hearing, Department Staff's witness testified that the \$28,000 figure in the prayer for relief in the Complaint was derived by roughly doubling the \$14,500 amount. Tr. at 160. This is consistent with the Department's Petroleum Bulk Storage Inspection Enforcement Policy Penalty Schedule (DEE-22) (the "Penalty Schedule"), which states that

"[t]he penalty amounts calculated with the aid of this document in adjudicated cases must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC

⁴ Although Department Staff's Complaint stated that Joe's Service Station has a total capacity of 28,835 gallons, the facility consists of one 12,000 gallon underground storage tank, two 8,000 gallon underground storage tanks, and three 275 gallon aboveground storage tanks, for a total capacity of 28,825.

⁵ In fact, the total of all the itemized penalty amounts on Exhibit 26 is \$14,450.

accepts in consent orders which are entered into voluntarily by respondents."

Penalty Schedule, at ¶ 4.

In its brief, Department Staff took the position that the fine requested was well below the statutory maximum. Department Staff noted that ECL Section 71-1929 allows the imposition of penalties of up to \$37,500 per day. Based upon the statute, Department Staff argued that the penalty for the sixteen causes of action addressed at the hearing would be \$600,000. In addition, Department Staff stated that because five of the violations are continuing violations, an additional penalty of \$68,537,500 could be imposed for a violation that continued for one year.⁶ Department Staff arrived at this figure by multiplying \$37,500 times 5 violations for 365 days.

Department Staff also offered argument addressing the gravity component factors articulated in the Department's Civil Penalty Policy. Civil Penalty Policy, DEE-1 (June 20, 1990)(the "Policy"). The Policy establishes guidance for developing penalties for violations, and states that "to be a deterrent, a penalty must include a gravity component, which reflects the seriousness of the violation." Policy, at ¶ D(1). Specifically, Department Staff addressed the potential harm and actual damage caused by the violations, and the importance of the type of violations in the regulatory scheme, as indicated by the Policy.

The Policy states that the "potential harm and actual damage" factor "focuses on whether and to what extent the respondent's violation resulted in or could potentially result in loss or harm to the environment or human health." Policy, at ¶ D(2)(b). In that regard, Department Staff's witness testified that PBS facilities are heavily regulated because of the potential for tanks to leak over time. Tr. at 148. The witness stated that there are two 23 year old tanks at Joe's Service Station, and Respondent's failure to perform leak detection and

⁶ The five violations relate to maintenance of leak detection records at Joe's Service Station (Section 613.5(b)(4)); monitoring interstitial spaces in double-walled tanks for tightness at Joe's Service Station (Section 614.5(b)); maintenance of inventory records for both service stations, including ten day inventory and reconciliation records (Section 613.4(a)); conducting monthly inspections of the aboveground storage tanks at Joe's Service Station (Section 613.6(a)); monitoring the leak detection system at Joe's Service Station at least weekly (Section 613.5(b)(3)).

inspect these tanks and the above ground tanks posed a serious risk to the environment. Tr. at 161-62.

Department Staff's witness went on to state that monitoring the tanks with leak detection and maintaining inventory records is a high priority, and therefore of considerable importance in the context of the Department's regulatory scheme. Tr. at 161. The Policy indicates that this factor "focuses on the importance of the violated requirement in achieving the goal of the underlying statute." Policy, at ¶ D(2)(b). According to Department Staff, because Respondent was not performing monthly inspections or a daily inventory and reconciling those records, the facility was at risk for a petroleum spill. Tr. at 162.

Citing to the testimony of its witness, Mr. Koch, Department Staff contended that Respondent

"was reminded of the PBS program requirements based on an inspection and Notice of Violation related to the Ma's facility in early 2005 yet engaged in many of the same violations at his other facility in Guilderland. He hired Albany tank services [sic] to correct the violations at Ma's and could have done the same at Joe's at the same time. The PBS program is designed to be preventive, not reactive but Mr. Calabro did not meet his obligation to operate in compliance before an inspection is done."

Department Staff's Brief, at 4. According to Department Staff, this was evidence of Respondent's knowledge of the regulatory requirements.

As discussed more fully below, most of the allegations in the Complaint relate only to Joe's Service Station. Only causes of action 11 and 12 deal with both facilities. Those allegations are discussed in the paragraphs immediately following.

Causes of Action 11 and 12 (Ma's and Joe's Service Stations)

Part 613 of 6 NYCRR sets forth the regulatory provisions governing the handling and storage of petroleum. Section 613.4(a)(1) requires the operator of an underground storage tank to keep daily inventory records for the purpose of detecting leaks. With respect to Ma's Service Station, Department Staff alleged that an inspection on January 13, 2006 revealed that Respondent did not have inventory records for the underground

storage tanks at the facility. Exhibit 2, ¶¶ 50-53. In addition, Department Staff asserted that Respondent did not have records to document reconciling the inventory records, as required by Section 613.4(a)(1). Exhibit 2, ¶¶ 54-57.

At the hearing, Department Staff's witness, Thomas M. Koch, testified that he inspected the facility on January 13, 2006, and no ten-day inventory reconciliation records were provided. Tr. at 72-73; Exhibit 21. This testimony was un rebutted. During Respondent's direct case, Respondent offered the testimony of Mitchell Russell, who stated that he had worked for Mr. Calabro for twenty years before opening his own service station in East Greenbush. Tr. at 187. Mr. Russell testified that the reconciliation of the records every ten days has been performed for both Joe's and Ma's Service Stations since approximately January 2006, when the witness began assisting Respondent in preparing those records. Tr. at 189-191.

The Penalty Schedule lists a \$2,500 penalty per facility for failure to properly reconcile inventory records, as required by Section 613.4(a)(1). Penalty Schedule, at 24.c. Although the Complaint charges Respondent with this violation at both facilities in the twelfth cause of action, the penalty calculation provided at the hearing references only paragraph 53 of the Complaint (cause of action 11) with respect to this violation at Ma's Service Station. Exhibit 26; Exhibit 2, at ¶¶ 50-57.

Cause of action 11 charges Respondent with failing to maintain inventory records at both facilities, in violation of 6 NYCRR Section 613.4. Exhibit 2, at ¶¶ 50-53. Nevertheless, Department Staff's penalty calculation refers only to Joe's Service Station with respect to this violation, with a penalty of \$2,500.

Respondent's liability for both causes of action was established at the hearing by a preponderance of the evidence. Department Staff's witness testified that inventory records were not maintained, nor were those records reconciled every ten days. Tr. at 53-54, 67, 72-73; Exhibits 15, 16, 21 and 22. The penalty sought by Department Staff (\$2,500 per violation per facility) is consistent with the Penalty Schedule. Accordingly, this hearing report recommends that a penalty of \$2,500 be imposed for the violation at Ma's Service Station, and a penalty of \$2,500 for the violation at Joe's Service Station.

Joe's Service Station

The remaining causes of action relate only to Joe's Service Station. The first cause of action alleges a substantial modification of the facility without prior notification to the Department, in violation of Section 612.2(d) of 6 NYCRR. Exhibit 2, at ¶¶ 8-13. Section 612.2(d) provides that "[w]ithin 30 days prior to substantially modifying a facility, the owner must notify the department of such modification on forms supplied by the department."

Specifically, Department Staff alleged that Respondent added four⁷ 275 gallon aboveground storage tanks to the facility and failed to notify the Department. Exhibit 2, ¶ 12. Department Staff offered documentation and testimony with respect to this violation, which was observed during an inspection on January 12, 2006. Tr. at 50; Exhibits 9, 15 and 16. Department Staff's evidence was unrebutted, and Respondent's liability for this violation is established by a preponderance of the evidence.

Department Staff sought a \$1,000 penalty for this violation, which is the amount set forth in paragraph 3 of the Penalty Schedule. Exhibit 26. This penalty should be imposed.

As noted above, the second cause of action was withdrawn at the hearing. The third cause of action alleges that Respondent failed to notify the Department of a petroleum spill at Joe's Service Station within two hours of the spill being discovered, in violation of Section 613.8. Exhibit 2, at ¶¶ 18-21. At the hearing, Department Staff's witness testified that he observed diesel fuel in a fill port catch basin during the January 12, 2006 inspection. Tr. at 50-51; Exhibits 15 and 16. Respondent did not offer any evidence in rebuttal, and this violation is established by a preponderance of the evidence. The Penalty Schedule provides for an average penalty of \$5,000 for failure to report, and this amount should be imposed as part of the penalty in this matter. Penalty Schedule at ¶ 8.

⁷

A February 2006 compliance report prepared by Albany Tank Services, Inc. indicates that a 275 gallon fuel oil storage tank was disposed of on February 9, 2006. Exhibit 17. That compliance report includes an above ground tank monthly inspection report checklist which lists three tanks. Id. Department Staff's Complaint indicates that Joe's Service Station has a total of six tanks. Exhibit 2, ¶ 7. The current PBS certificate lists six tanks: two underground tanks, each with a capacity of 8,000 gallons, one 12,000 gallon underground storage tank, and three 275 gallon above ground storage tanks. Exhibit 24.

The fourth cause of action alleges that Respondent failed to maintain spill prevention equipment in good working order at Joe's Service Station. Exhibit 2, at ¶¶ 22-25. According to Department Staff, because Respondent had not maintained the top sump or fill port catch basin associated with tanks 1 and 5, liquid accumulated in those areas, in violation of Section 613.3(d). At the hearing, Department Staff offered evidence to substantiate this allegation, which was not rebutted. Tr. at 52; Exhibits 15 and 16. Accordingly, Respondent is liable for this violation, which was established by a preponderance of the evidence. The \$400 penalty (\$200 per underground storage tank) conforms to paragraph 9 of the Penalty Schedule, and should be imposed.

In the fifth cause of action, Department Staff alleged that during the inspection on January 12, 2006, the fill ports at Joe's Service Station were not color coded as required by Section 613.3(b)(1) of 6 NYCRR. Exhibit 2, at ¶¶ 26-29. This allegation was proved by a preponderance of the evidence at the hearing by unrefuted documentation and testimony. Tr. at 51-52; Exhibits 15 and 16. Respondent is liable for this violation, and the penalty sought (\$100 per above ground storage tank, for a total of \$400) should be imposed. Penalty Schedule, ¶ 41.

The sixth cause of action alleged that Respondent failed to label underground storage tank No. 5 at Joe's Service Station. Exhibit 2, at ¶¶ 30-33. Section 614.3(a)(1) provides that

"[a]ll new underground tanks used in New York State must bear a permanent stencil, label or plate which contains the following information:

- (i) manufacturer's statement that, "This tank conforms with 6 NYCRR Part 614";
- (ii) the standard of design by which the tank was manufactured;
- (iii) the petroleum products and percentages of volume of petroleum additives which may be stored permanently and compatibly within the tank or reference to a list available from the manufacturer which identifies products compatible with all tank materials;
- (iv) the year in which the tank was manufactured;
- (v) a unique identification number;
- (vii) the dimensions, design and working capacity and model number of tank; and
- (viii) the name of manufacturer."

Section 614.3(a)(2) provides that

"[a] second label which shows all of the information required above and which also shows the date of installation must be conspicuously displayed and permanently affixed to the fill port. It must be readily visible to the carrier and may be imbedded in concrete, welded to the fill port, or otherwise permanently affixed."

Department Staff maintained that Respondent violated this regulatory provision by not labeling tank No. 5 with the information required pursuant to Section 614.3(a)(1), and by not labeling tank No. 5's fill port, showing the date of installation, as required pursuant to Section 614.3(a)(2). Respondent did not dispute the allegations, which were established by the preponderance of the evidence offered at the hearing. Tr. at 52-53; Exhibits 15 and 16.

Department Staff's penalty calculation is inaccurate with respect to this violation. The penalty calculation lists a \$400 penalty, with the notation "Failure to label *aboveground* tanks (\$100 per AST)." (emphasis added). As noted above, the Complaint seeks a penalty only for the failure to label tank No. 5, a 12,000 gallon underground storage tank at Joe's Service Station. Exhibit 2, at ¶ 32; Exhibit 24.

Department Staff's calculation for a violation of Sections 614.3(a)(1) and (2) incorrectly relies on paragraph 41 of the Penalty Schedule. Paragraph 41 is based upon a different section of the regulations (Section 613.3(c)(3)(ii)). The correct Penalty Schedule paragraph for the violation alleged in the Complaint is paragraph 13.h, which provides for a \$100 penalty for a violation of Section 614.3(a)(1), and a \$100 penalty for Section 614.3(a)(2). Therefore, the appropriate penalty for the violation alleged in the sixth cause of action is \$200.

Moreover, the Complaint alleges a violation with respect to only one tank, not four. Accordingly, the penalty subtotal should be adjusted downward by \$200, and the total penalty, which Department Staff indicated was derived by roughly doubling the subtotal, should be reduced by \$400.

The seventh cause of action alleged that Respondent failed to maintain an accurate drawing or as-built plan for tank No. 5, in violation of Section 614.7(d). Exhibit 2, at ¶¶ 34-37. This violation was proven at the hearing, when Department Staff

offered uncontested proof that no drawing or plans were provided at the inspection of Joe's Service Station on January 12, 2006. Tr. at 52-53; Exhibits 15 and 16. Paragraph 13.I of the Penalty Schedule provides for a penalty of \$1,000 for this violation, which is the amount set forth in Department Staff's penalty calculation. The \$1,000 penalty is supported by the evidence, and should be imposed.

Department Staff's Complaint alleged that Respondent failed to monitor for traces of petroleum at least once per week, in violation of Section 613.5(b)(3). Exhibit 2, at ¶¶ 38-41 (eighth cause of action). According to Department Staff, Respondent did not perform this monitoring, and the violation was noted during the January 12, 2006 inspection. Tr. at 53; Exhibits 15 and 16. Respondent did not offer any evidence to the contrary, and as a result, Respondent's liability for this violation has been demonstrated by a preponderance of the evidence.

Department Staff sought a penalty of \$1,000 for this eighth cause of action, but incorrectly cited to paragraph 16 of the Penalty Schedule. Exhibit 26. Paragraph 16 does not refer to Section 613.5(b)(3). Rather, Section 613.5(b)(3) is referenced in paragraph 14 of the Penalty Schedule, and the average penalty is listed as \$2,500. Although Department Staff's penalty calculation is inaccurate, the \$1,000 penalty sought is less than the \$2,500 average. Accordingly, a \$1,000 penalty may be imposed, and this report recommends that the Commissioner do so.

Department Staff did not seek a penalty for the violation alleged in the ninth cause of action (failure to monitor the interstitial space of tank No. 5), although evidence was offered at the hearing as to this allegation. Tr. at 53; Exhibits 15 and 16. With respect to the tenth cause of action, Department Staff contended that Respondent violated Section 613.5(b)(4) by not maintaining records of interstitial space monitoring, or leak detection records, on the premises for a period of at least one year. Exhibit 2, at ¶¶ 46-49. This cause of action was proved at the hearing by a preponderance of the evidence. Tr. at 53-54; Exhibits 15 and 16.

Department Staff's calculation listed the penalty for this violation as \$250, citing to paragraph 17 of the Penalty Schedule. Exhibit 46. This citation is incorrect. Paragraph 17 does not refer to Section 613.5(b)(4), which is in fact referenced in paragraph 16, with an average penalty of \$1,000 per facility. Despite this error, the \$250 penalty is significantly less than the \$1,000 amount that could be imposed, and this

hearing report recommends that Respondent be assessed a \$250 penalty for this violation, as requested by Department Staff.

The eleventh and twelfth causes of action were discussed above. Department Staff did not seek a penalty for the following causes of action:

- thirteenth (failure to paint aboveground storage tanks, in violation of Section 614.9(c));
- fourteenth (failure to conduct monthly inspections, in violation of Section 613.6(a));
- fifteenth (failure to keep records of aboveground storage tank inspections, in violation of Section 613.6(c));
- sixteenth (failure to install gauges or high level alarms, in violation of Section 613.3(c)); and
- seventeenth (failure to label aboveground storage tanks and gauges, in violation of Section 613.3(c)(3)(ii)).

These allegations were the subject of documentary evidence submitted and testimony offered at the hearing, and Respondent did not rebut that evidence. Tr. at 55; Exhibits 15-16. Respondent's liability for those violations is therefore established, but no penalty is recommended because Department Staff did not assign a penalty amount to these causes of action. Tr. at 167-68.

RELIEF REQUESTED

In its complaint, Department Staff requested that the Commissioner impose a \$28,000 penalty. In addition, Department Staff requested an order directing the Respondent to surrender the facilities' petroleum bulk storage registrations, and permanently close the tanks. As an alternative to permanent closure, Department Staff requested that the Commissioner order Respondent:

(1) to begin maintaining leak detection records at Joe's Service Station, and maintain those records for at least one year. Within thirty days of the effective date of the Commissioner's order, Respondent would be required to submit the four most recent sets of weekly leak detection monitoring records;

(2) to begin monitoring the interstitial space of Respondent's double-walled underground storage tanks at Joe's Service Station for tightness, and to submit the four most recent

sets of weekly monitoring records within thirty days of the Commissioner's order;

(3) to properly maintain inventory records for the underground storage tanks at both facilities. Within thirty days of the Commissioner's order, Respondent would be required to submit proper inventory records, using a ten-day reconciliation period for the most recent thirty day period, and would submit ten-day inventory and reconciliation records for the previous month by the fifth of each month. These submissions would be required until Respondent provided six months of proper records to the Department;

(4) to begin conducting monthly inspections of the above ground storage tanks at Joe's Service Station, and submit a copy of the most recent inspection report within thirty days of the Commissioner's order. In addition, Respondent would be required to provide monthly inspection records for six consecutive months after the order's effective date; and

(5) to begin monitoring the leak detection system at Joe's Service Station at least weekly, and submit the four most recent sets of weekly leak detection monitoring records within thirty days of the Commissioner's order.

Rather than direct permanent closure of the facilities, this hearing report recommends that the terms requested by Department Staff in the Complaint be incorporated into the Commissioner's order. As discussed above, Department Staff's penalty calculation should be adjusted from \$28,000 TO \$27,600. This report recommends further that the Commissioner consider suspending a portion of the \$27,600 penalty, in recognition of Respondent's efforts to correct the violations at the facilities, and to ensure Respondent's continued compliance. At the hearing, evidence was offered to show that Respondent made efforts to comply with regulatory requirements, by hiring Albany Tank Services, and seeking the assistance of Mr. Russell in an effort to perform the required record keeping. Tr. at 42; 187-191. Under the circumstances, the Commissioner in his discretion may wish to suspend some portion of the penalty to encourage Respondent's efforts in this regard.

CONCLUSION

Respondent violated Article 17 of the ECL and Parts 612, 613, and 614 of 6 NYCRR. The specific regulatory provisions appear on the attached chart.

RECOMMENDATIONS

The Commissioner should find Respondent liable for the violations alleged in the Complaint, and should impose a penalty of \$27,600. In addition, the terms of the Commissioner's order should include the provisions set forth in paragraph 3 of the prayer for relief in Department Staff's Complaint. Finally, the Commissioner may wish to consider suspension of a portion of the penalty, to ensure future compliance and in recognition of Respondent's efforts to address the violations noted during the facilities' inspections.

TO: (VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED)

Joseph D. Gardner, Esq.
1528 Union Street
Schenectady, New York 12309

Joseph Calabro
Joe's Service Station
2594 Western Avenue
Altamont, New York 12009

Joseph Calabro
Ma's Service Station
Routes 158 and 20, RD #2
Altamont, New York 12009

(VIA REGULAR MAIL)

Ann Lapinski, Esq.
Assistant Regional Attorney
New York State Department of Environmental Conservation
Division of Legal Affairs, Region 4
1130 North Westcott Road
Schenectady, New York 12306-2014

Joseph Calabro
d/b/a/ Joe's Service Station/Ma's Service Station

PENALTY CALCULATION

Cause of Action	Facility	Allegation	6 NYCRR Provision	Penalty Sought	DEE-22 Section	Notes
1 (¶¶ 8-13)	Joe's	Failure to register above ground storage tanks (substantial modification without notification)	612.2(d)	\$1,000	3	
2 (¶¶ 14-17)	Joe's	Failure to label monitoring well	613.3(b)(4)	None	N/A	Cause of Action Withdrawn
3 (¶¶ 18-21)	Joe's	Failure to report spill of diesel in catch basin	613.8	\$5,000	8	
4 (¶¶ 22-25)	Joe's	Failure to maintain sumps and catch basins	613.3(d)	\$400	9	\$200 per UST
5 (¶¶ 26-29)	Joe's	Failure to color code AST fill ports	613.3(b)	\$400	10	\$100 per AST
6 (¶¶ 30-33)	Joe's	Failure to label Tank No. 5	614.3(a)(1) and (2)	\$200	13.h	\$100 for violation of 614.3(a)(1); \$100 for violation of 614.3(a)(2)
7 (¶¶ 34-37)	Joe's	Failure to maintain drawing for 1992 UST	614.7(d)	\$1,000	13.i	
8 (¶¶ 38-41)	Joe's	Failure to monitor for traces of petroleum	613.5(b)(3)	\$1,000	14	Penalty Schedule provides for an average penalty of \$2,500 per facility
9 (¶¶ 42-45)	Joe's	Failure to monitor double walled tank	614.5(b)	None	N/A	
10 (¶¶ 46-49)	Joe's	Failure to maintain monitoring records	613.5(b)(4)	\$250	16	Penalty Schedule provides for an average penalty of \$1,000 per facility
11 (¶¶ 50-53)	Joe's and Ma's	Failure to maintain inventory records	613.4(a)(1)	\$2,500	24(c)	Exhibit 26 lists penalty only for Ma's
12 (¶¶ 54-57)	Joe's and Ma's	Failure to reconcile inventory records	613.4(a)(1)	\$2,500	24(c)	Exhibit 26 lists penalty only for Joe's
13 (¶¶ 58-61)	Joe's	Failure to paint ASTs	614.9(c)	None	N/A	
14 (¶¶ 62-65)	Joe's	Failure to conduct monthly inspections	613.6(a)	None	N/A	
15 (¶¶ 66-69)	Joe's	Failure to keep records of AST inspections	613.6(c)	None	N/A	
16 (¶¶ 70-73)	Joe's	Failure to install gauges or high level alarm	613.3(c)	None	N/A	
17 (¶¶ 74-77)	Joe's	Failure to label AST tanks and gauges	613.3(c)(3)(ii)	None	N/A	

TOTAL PENALTY: \$27,600