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 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by,

AVIS RENT A CAR SYSTEM, LLC,

Respondent.

ORDER

DEC File Nos. R2-20070103-2, R2-20070104-9, and R2-20080115-16

On April 21, 2008, pursuant to 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against Respondent Avis Rent A Car System, LLC ("Avis" or "Respondent"). The proceeding was commenced by service via certified mail of a notice of motion for order without hearing dated April 21, 2008 and supporting affidavits, affirmation of counsel and exhibits (the "Motion").

The Motion avers that Avis owns and operates eight petroleum bulk storage ("PBS") facilities, as defined in 6 NYCRR 612.1(c) in Manhattan, each with a combined storage capacity of over 1,100 gallons of petroleum. The Motion sets forth thirty-seven (37) causes of action based upon Avis's alleged failure to comply with various PBS regulations contained in 6 NYCRR Parts 612, 613 and 614.

The Motion was received by Avis on April 23, 2008, thereby completing service. Pursuant to the Department's regulations, Respondent's response to the Motion was due within twenty days of service, or by May 13, 2008. Avis failed to serve any response to the Motion until May 14, 2008, when it moved to quash Department staff's motion or, alternatively, for an additional twenty days from the ruling on its motion to serve an answer. Based on Respondent's failure to timely serve an answer Department staff, by motion dated May 15, 2008, moved for a default judgment and order and, in papers dated May 19, 2008, opposed Respondent's May 14, 2008 motion.

The assigned administrative law judge ("ALJ"), Helene G. Goldberger, issued a Ruling and Default Summary Report dated June 6, 2008 ("Default Report"), a copy of which is attached. The ALJ found that Avis had failed to timely submit an answer to the Motion as required by Part 622.12(c), and was therefore in default. Consequently, the ALJ found Avis liable for each of the violations of article 17 of the Environmental Conservation Law ("ECL") and provisions of 6 NYCRR parts 612, 613 and 614 alleged in the Motion. The ALJ also determined that a hearing was necessary on penalties so that Department staff could present evidence in support of its requested penalty amount and Avis could present mitigating evidence, if any.[1]

On August 5, 2008, an enforcement hearing was convened before the ALJ in the DEC Region 2 offices in Long Island City for the limited purpose of determining the appropriate penalty amount for each of the violations for which Avis had already been determined liable. Following the hearing, ALJ Goldberger prepared a Hearing Report, a copy of which is attached.

I adopt the ALJ's Default Report as my decision concerning Respondent's liability for the violations set forth in Department staff's Motion.

With respect to the penalty hearing, for the reasons set forth below I am reversing the ALJ's decision to accept Respondent's closing brief and am excluding it from the record of this proceeding due to Respondent's failure to submit it by the deadline established by the ALJ. Consequently, the legal arguments raised in Respondent's brief are excluded in their entirety as untimely.

In addition, as discussed below I am reversing those ALJ rulings which allowed Respondent to introduce evidence at the hearing concerning its purported lack of liability for certain violations. Having already determined in the Default Report that Respondent is liable for each violation alleged by Department staff, it was error for the ALJ to admit evidence at the penalty inquest purporting to show Respondent's lack of liability. Further, I do not adopt the ALJ's conclusion that Department staff failed to consider mitigating factors in its penalty calculations. As a result of these rulings, as well as other

[1] Department staff in its papers alleged only violations of the PBS regulations in 6 NYCCR Parts 612, 613 and 614, and, accordingly, this Order only addresses those regulatory violations.

considerations discussed below, I am imposing a civil penalty of $154,500 for Respondent's violations.

In all other respects, except where specifically stated otherwise, I adopt the ALJ's Hearing Report as my decision in this matter.

Exclusion of Respondent's Closing Brief

As set forth in both the Default Report and the Hearing Report, Respondent has consistently failed to comply with or meet deadlines imposed by the Department's regulations or by the ALJ. Respondent failed to appear at a compliance conference scheduled for January 15, 2008 as set forth in the notice of violation. Then, after failing to timely respond to Department staff's motion for order without hearing, Respondent submitted a purported "motion to quash" which failed to meet the minimum requirements for responsive pleadings set forth in the Department's regulations. Default Report, at 4. Subsequently, despite having requested and been granted two extensions of time in which to file its post-hearing brief, Respondent failed to submit its closing brief by the November 18, 2008 deadline established by ALJ Goldberger. Hearing Report, at 2-3. Respondent then filed its proposed errata sheet for the hearing transcript two months after the deadline set by the ALJ. Id. at 3.

A single late submission might, for good cause shown, be excused, and the Department's hearing regulations provide the ALJ with discretion to modify deadlines in appropriate circumstances. 6 NYCRR 622.6(f). However, the circumstances in this case do not merit such an outcome. Respondent is a sophisticated corporate entity represented by counsel. Not only has Respondent (and its counsel) consistently failed to meet deadlines, but it has also neglected to provide any justification – much less a showing of good cause – for its repeated tardiness. Respondent's pattern of untimely submissions evidences a disregard of the Department's hearing procedures and a surprisingly cavalier attitude toward this proceeding.[2] Consequently, I am excluding Respondent's late submitted post-hearing brief from the record of this proceeding,

[2] I note that Department staff, which if anything had a more onerous and complex burden in this proceeding, managed to comply with every submission deadline.

and the legal arguments raised therein are excluded in their entirety as untimely.[3]

Exclusion of Evidence Bearing on Liability

As noted above, Respondent defaulted and was consequently found liable for each of the violations set forth in the Department staff's Motion. See Default Report. Having already been found liable, Respondent was not entitled to introduce evidence of its purported lack of liability at the penalty inquest. See Wilson v. Galicia Contracting and Restoration Corp., 10 N.Y.3d 827 (2008) (once liability is established by default, inquest is restricted to proof of damages and evidence concerning liability is inadmissible).

Respondent's argument that evidence concerning liability is admissible because it is relevant to the issue of penalty mitigation is incorrect. Evidence concerning liability is relevant only to the issue of liability, and Respondent defaulted on its opportunity to present such evidence.

Moreover, the admission at the penalty hearing of evidence concerning Respondent's liability was prejudicial to Department staff. The Default Report stated that the purpose of the penalty hearing was for Department staff to submit proof that its recommended penalties were consistent with DEC's civil penalty policies and to allow Respondent to present evidence, if any, of mitigating factors. Default Report, at 5-6. In the Default Report the ALJ made an express finding that Respondent is liable for each violation alleged in the Motion and articulated the limited scope of the penalty hearing. Department staff was therefore justified in assuming that liability would not be at issue at the hearing and to prepare its witnesses accordingly. The admission at the hearing of evidence on liability constituted unfair surprise,[4] and counsel for Department staff properly and timely objected to the admission of such evidence.

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[3] Even if I were inclined to consider the legal arguments raised in Respondent's brief I would reject them for the reasons stated in the Hearing Report.

[4] This was acknowledged by the ALJ in her Hearing Report, which notes that "[w]hen presented at the hearing with documentation of Avis's response to a number of the violations, the staff maintained that for the most part this information had not been previously supplied." Hearing Report, at 4.

Respondent's argument on this point is, in essence, an attempt to introduce evidence on liability when it has already been adjudged liable by default, and such evidence should have been excluded. Consequently, I am reversing the ALJ's rulings insofar as they allowed Respondent to introduce evidence concerning its liability for the violations at issue.

Department Staff's Consideration of Mitigating Factors

The ALJ concluded that based on a portion of the Hearing Transcript, "it does not appear that staff applied the appropriate mitigating factors set forth in the [PBS Enforcement Policy] Penalty Schedule." Hearing Report, at 28. The Hearing Transcript excerpt referred to by the ALJ is a portion of the cross-examination by Respondent's counsel of Department witness Krimgold. Hearing Transcript, at 135-140. I find nothing in that record to support a conclusion that Department staff failed to apply appropriate mitigating factors in recommending penalties. To the contrary, Mr. Krimgold resisted the efforts by Respondent's counsel to imply that the mitigating factors were ignored,[5] and pointed out that aggravating factors also applied to the violations at issue. Hearing Transcript, at 139-140. It is also clear from both the direct examination of Mr. Krimgold and other portions of his cross-examination that mitigating factors, such as duration of the violation, were considered by staff in their penalty calculations.[6] Moreover, additional support for staff's penalty calculations is provided in Hearing Exhibit 1 (Department Staff's Penalty Calculation Chart). Accordingly, I do not adopt the ALJ's conclusion that Department

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[5] See, e.g., Hearing Transcript, at 136:

Q. Isn't it true that you simply disregarded the mitigating factors and used the suggested penalty in DEE-22?

A. I can't say so.

Q. Was there some other method?

A. No, there are no other methods. We use just this method.

[6] Respondent's counsel made much of the fact that in two instances Department staff recommended the same penalty for identical violations of substantially different durations. See Hearing Transcript, at 135-37. However, Respondent actually benefitted from those calculations because staff recommended that Respondent's longer duration violations (which could have been penalized at a higher amount) be assessed the same penalties as the shorter duration violations.

staff failed to consider mitigating factors in their penalty calculations.

Penalty Calculation

Based on the rulings above, the Hearing Report, and review of the record in this proceeding including the hearing transcript, I have concluded that the penalties set forth below by facility are supported by sufficient evidence and are in accordance with the Civil Penalty Policy and the PBS Inspection Enforcement Policy.

East 43rd Street: For the violations at this facility, I am adopting Department staff's recommended penalties of $300 for the fill port violation (613.3[b]) and $1,500 for the shear valve violation (613.3[c]). The ALJ recommended somewhat lower penalties for these violations ($200 for the fill port and $1,000 for the shear valve) based on what she characterized as Respondent's relatively prompt cure of these violations (within eleven days of receiving notice of the violation from the Department). In my view, Department staff's recommended penalties already reflect Respondent's relatively prompt cure of these violations because they are substantially less than the maximum penalty that could be imposed for a violation that continues for eleven days. I therefore find there is no justification for a further reduction of the penalty. Moreover, as noted in Department staff's Penalty Calculation Chart (Exhibit 1) the period of eleven days represents the minimum period that the violation existed because it is measured from the date that Department staff discovered the violation.

With respect to the failure to maintain as-built plans for underground tanks and piping (Part 614.7[d]), Respondent's evidence concerning liability was improperly admitted, including (i) the portion of the cross-examination of Department staff witness Krimgold concerning the penalty amount that would have been appropriate had Respondent presented the as-built plans during staff's inspection of the facility, and (ii) Respondent's claim that it maintained the plans at its New Jersey office. Accordingly, I adopt Department staff's recommended penalty of $3,000 for this violation.[7]

With respect to its failure to properly maintain inventory records (613.4), I adopt the ALJ's recommended penalty of $7,500.

[7] In fact, the DEC inspector was told by Respondent's employees that as-built plans did not exist for the facility. Hearing Transcript, at 139.

East 64th Street: With respect to the violations of 612.2 (failure to maintain a current and valid registration), 613.3(c)(3)(ii) (failure to properly mark a tank and gauge), 613.6(a) (failure to inspect), 613.6(c) (failure to maintain inspection records), and 613.9(a) (failure to cap, secure or plug), all of which relate to a 10,000 gallon aboveground tank that was not properly closed or maintained, I adopt Department staff's recommended total penalty for these violations of $8,550. The ALJ recommended a somewhat lower total penalty for these violations ($3,000) based on what she characterized as Respondent's relatively prompt cure of these violations. However, I do not find Respondent's actions to have been prompt. After being notified by Department staff of the violation on January 10, 2007, Respondent allowed nearly six weeks to elapse before hiring a contractor to cure the violation. Moreover, as the ALJ correctly notes, Respondent had a duty to adhere to the regulations regardless of an express notification by DEC staff. Finally, Department staff's recommended total penalty is already substantially less than the maximum penalty that could be imposed for these violations, and I find there is no justification for a further reduction of the penalty.

With respect to other violations at this facility, Department staff recommended penalties of $1,500 for the failure to install the shear valve (613.3[c]); $750 for the failure to maintain monitoring records for the cathodic protection system (613.5[b][4]); $300 for the failure to label an underground tank (614.3[a][2]); and $3,000 for failure to maintain site drawings or as-built plans (614.7[d]). I find sufficient evidence to adopt Department staff's recommended penalties for these violations. The ALJ recommended lower penalties for the site drawing ($2,000) and monitoring record ($300) violations based on evidence concerning Respondent's liability. This evidence was improperly admitted, and thus there is no basis for the recommended penalty reductions. The ALJ also recommended reduced penalties for the fill port ($200), shear valve ($1,000) and labeling ($200) violations, based on what she characterized as Respondent's relatively prompt curing of these violations. Again, Respondent had a duty to comply regardless of when it was notified of the violations. Department staff's recommended penalties reflect the relatively prompt curing of the violations because they are substantially less than the maximum penalties, and I find no justification for a further reduction of these penalties.

Department staff also recommended a penalty of $300 for the failure to mark the fill port (613.3[b]), a violation that continued for 518 days. While I question whether this penalty

amount adequately reflects the extended duration of this violation, I am adopting the recommended penalty for this fill port violation.

With respect to Respondent's failure to report a discharge (613.8), Department staff recommended a penalty of $22,500. The ALJ recommended that this be reduced to $2,500 based on evidence concerning liability that was improperly admitted. Because Department staff presented no evidence of contamination or other environmental harm resulting from the spill, I am imposing a penalty for this violation of $10,000.

West 76th Street: Violations at this facility included failure to properly register a tank (612.2), failure to maintain the spill prevention equipment (613.3[d]), and failure to properly maintain inventory records (613.4[a]). The ALJ recommended that no penalty be imposed for the registration violation based on evidence concerning liability that was improperly admitted. I therefore adopt Department staff's recommended penalty of $3,000 for this violation.

With respect to the spill prevention violation, the ALJ recommended that Department staff's recommended penalty of $7,500 be reduced to $3,500 based on testimony that Respondent cured this violation by January 10, 2007. I adopt the ALJ's recommended penalty of $3,500 for this violation for the reasons set forth in the Hearing Report.

I also adopt the ALJ's recommended penalty of $7,500 for the inventory record violations.

East 54th Street: Department staff recommended penalties of $6,000 for failure to properly register two tanks at this facility (612.2); $300 for failure to mark the fill port (613.3[b]); $7,500 for failure to reconcile inventory records (613.4); $30,000 for failure to perform tightness tests for two underground tanks (613.5[a]); and $1,500 for failure to maintain monitoring records (613.5[b][4]).

I adopt the ALJ's recommended penalties for the fill port ($300) and inventory record ($7,500) violations. The ALJ recommended that the penalty for failure to maintain monitoring records be reduced to $500 and that no penalty be assessed for the registration violations. These recommendations were based on liability evidence that was improperly admitted at the hearing. I am therefore adopting Department staff's recommended penalties for these violations.

With respect to the tightness test violations, the ALJ recommended that no penalty be assessed based on liability evidence that was improperly admitted. Accordingly, I adopt Department staff's recommended penalty of $30,000 for these violations.

West 43rd Street: For this facility, I adopt the ALJ's recommended penalties of $300 for failure to display facility registration (612.2[e]); $600 for failure to mark fill ports (613.3[b]); and $7,500 for failure to maintain properly reconciled inventory records (613.4).

With respect to the failure to maintain monitoring records (613.5[b][4]), Department staff recommended a penalty of $750. The ALJ recommended that no penalty be assessed based on liability evidence that was improperly admitted. Department staff reasonably relied on the facility report for this violation, particularly in light of Respondent's refusal to open the sump during the inspection. Hearing Report, at 24. I therefore adopt the Department staff's recommended penalty of $750 for this violation.

The ALJ recommended that no penalty be imposed for the failure to label the underground storage tank (614.3[a][2]) based on liability evidence that was improperly admitted. I therefore adopt Department staff's recommended penalty of $300 for this violation.

With respect to the violation of failing to report that the fill port contained a leak, spill or discharge, Department staff recommended a penalty of $22,500. The ALJ recommended that this be reduced to $2,500 because of the lack of proof of environmental harm resulting from the spill and actions taken by Respondent to remedy the spill. While I concur that the lack of proof of environmental harm and Respondent's remedial actions are mitigating factors, I find that the ALJ's recommended reduction based on these factors is excessive. Failure to report a spill is a very serious matter, particularly in an area as densely populated as Manhattan. I am therefore imposing a penalty of $15,000 for this violation.

West 54th Street: For this facility, I adopt the ALJ's recommended penalties of $3,000 for failure to maintain as-built plans (614.7[d]) and $7,500 for failure to maintain properly reconciled inventory records (613.4).

Department staff recommended penalties of $2,250 for failure to maintain monitoring records for three cathodic protection systems (613.5[b][4]). The ALJ recommends that the penalty for the monitoring records be reduced to $750 based on liability evidence that was improperly admitted. I therefore adopt the staff's recommended penalty of $2,250 for these violations, which I find is supported by sufficient evidence.

East 90th Street: For this facility, I adopt the ALJ's recommended penalty of $300 for failure to display a registration certificate (612.2[e]). With respect to the failure to properly maintain properly reconciled inventory records (613.4), the ALJ recommends reducing Department staff's proposed penalty of $7,500 to $5,000 based on Respondent's production at a compliance conference of records that it conceded were non-compliant. Hearing Report, at 26. I do not find this to be an appropriate mitigating factor and therefore adopt the staff's recommended penalty of $7,500 for this violation.

With respect to the failure to maintain as-built plans (614.7[d]), the ALJ recommends reducing Department staff's proposed penalty of $3,000 to $2,000 based on evidence concerning liability that was improperly admitted. Accordingly, I adopt staff's recommended penalty of $3,000 for this violation.

East 11th Street: For this facility, I adopt the ALJ's recommended penalty of $7,500 for failure to maintain properly reconciled inventory records (613.4). With respect to the failure to maintain as-built plans (614.7[d]), the ALJ recommended that no penalty be imposed based on evidence concerning liability that was improperly admitted. Accordingly, I adopt Department staff's recommended penalty of $3,000 for this violation.

Summary of Penalties Imposed

The table below summarizes the penalties imposed by facility:

FACILITY DESIGNATION	PENALTY	COMPONENTS OF PENALTY
East 43rd Street	$12,300	Violations of 6 NYCRR 613.3(b)($300); 613.3(c)($1,500); 613.4($7,500); 614.7(d)($3,000)
East 64th Street	$24,400	Violations of 6 NYCRR 613.3(b)($300); 613.3(c)($1,500); 613.5(b)(4)($750); 613.8($10,000); 614.3(a)(2)($300); 614.7(d)($3,000); and $8,550 total penalty for the following aboveground tank regulations – 6 NYCRR 612.2, 613.3(c)(3)(ii); 613.6(a); 613.6(c) and 613.9(a)
West 76th Street	$14,000	Violations of 6 NYCRR 612.2 ($3,000); 613.3(d)($3,500); 613.4(a)($7,500)
East 54th Street	$45,300	Violations of 6 NYCRR 612.2 ($6,000); 613.3(b)($300); 613.4($7,500); 613.5(a)($30,000); 613.5(b)(4)($1,500)
West 43rd Street	$24,450	Violations of 612.2(e)($300); 613.3(b)($600); 613.4($7,500); 613.5(b)(4)($750); 613.8($15,000); 614.3(a)(2)($300)
West 54th Street	$12,750	Violations of 613.4($7,500); 613.5(b)(4)($2,250); 614.7(d)($3,000)
East 90th Street	$10,800	Violations of 612.2(e)($300); 613.4($7,500); 614.7(d)($3,000)
East 11th Street	$10,500	Violations of 613.4($7,500); 614.7(d) ($3,000)
TOTAL	**$154,500**	

These penalties are substantial and warranted by the following factors:

1. The pervasiveness of Respondent’s non-compliance, evidenced by numerous violations at multiple facilities;

2. Respondent's status as the owner of multiple PBS facilities;

3. Respondent's status as a sophisticated, large corporation with sufficient resources to ensure compliance with Department regulations. As such, Respondent should be fully aware of and compliant with the Department's PBS regulations, and should not need to rely on Department inspections to identify compliance problems;[8]

4. Respondent's failure to cooperate with Department staff as evidenced, for example, by failing to produce required documentation during inspections, in one instance refusing to open a sump for inspection, and failing to expeditiously remedy violations;

5. Respondent's history of non-compliance. As noted by Department staff, Respondent has been the subject of previous enforcement actions by the Department in 2002 and 2006 for violations of the PBS regulations, including violations at one of the facilities at issue in this proceeding;[9]

6. The gravity of the violations. The Department's PBS regulations are designed to protect public health and the environment from the adverse impacts of both above-ground and underground releases of petroleum products. Such releases can and often do have serious consequences including contamination of surface and groundwater (including drinking water supplies) and adverse effects on fish and wildlife. Respondent's violations cover a wide range of regulatory requirements, including record keeping, facility maintenance, registration, monitoring, and spill reporting. The variety and number of violations would be a serious matter in any part of the State, but are

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[8] The Civil Penalty Policy states that "[p]arties undertaking activities regulated by DEC have a duty to familiarize themselves with applicable legal requirements. Ignorance of the law or rules is never a mitigating factor. Indeed, in many situations, ignorance of the law may amount to negligence." DEE-1: Civil Penalty Policy (6/20/90) § IV.I.1.

[9] I am taking official notice of these prior violations, which were the subject of Department administrative consent orders.

particularly egregious in an area as densely populated as Manhattan; and

7. The need to deter future violations by this Respondent. Given the financial resources of Respondent, a sizeable civil penalty is necessary to meet the Civil Penalty Policy's goal of deterring future violations. The need for a significant deterrent is deemed necessary based on the numerous, widespread and serious violations at Respondent's facilities.

It should be noted that although substantial, the penalties assessed in this Order are still far less than the statutory maximum penalties that could be imposed, which total over $500,000,000.

Injunctive Relief

Based on the record and the Hearing Report, the injunctive relief requested by Department staff and recommended by the ALJ is authorized and appropriate.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for default judgment is granted. Respondent Avis Rent A Car System, LLC is adjudged to be in default and to have waived its right to a hearing on the issue of liability in this matter. Accordingly, respondent is deemed to have admitted the allegations in the motion for order without hearing and is adjudged liable for each violation alleged in the motion for order without hearing.

II. Respondent Avis Rent A Car System, LLC is adjudged to have violated the following regulations:

A. Respondent, with respect to its East 43rd Street facility, failed: to properly color code a fill port; to properly secure a shear valve for spill prevention; to properly maintain inventory records, and to properly maintain as-built plans in violation of 6 NYCRR 613.3(b), 613.3(c), 613.4 and 614.7(d);

B. Respondent, with respect to its East 64th Street facility, failed: to properly maintain a current and valid registration for an aboveground storage tank; to properly color code a fill port; to properly install a shear valve; to properly mark an aboveground tank and gauge; to maintain monitoring

records for a cathodic protection system; to perform monthly inspections on a 10,000 gallon aboveground tank; to maintain inspection records; to report a discharge of petroleum; to cap, secure or plug the fill line of a temporarily out of service aboveground tank; to label a new underground storage tank fill port; and to maintain site drawings or as-built plans, in violation of 6 NYCRR 612.2, 613.3(b), 613.3(c), 613.3(c)(3)(ii), 613.5(b)(4), 613.6(a), 613.6(c), 613.8, 613.9(a), 614.3(a)(2) and 614.7(d);

C. Respondent, with respect to its West 76th Street facility, failed: to properly maintain a current and valid registration for a storage tank; to properly maintain spill prevention equipment; and to maintain inventory records, in violation of 6 NYCRR 612.2, 613.3(d) and 613.4(a);

D. Respondent, with respect to its East 54th Street facility, failed: to properly maintain a current and valid registrations for two storage tanks; to properly color code a fill port; to reconcile inventory records; to test two underground tanks for tightness; and to maintain monitoring records for cathodic protection systems, in violation of 6 NYCRR 612.2, 613.3(b), 613.4, 613.5(a) and 613.5(b)(4);

E. Respondent, with respect to its West 43rd Street facility, failed: to display the facility registration certificate; to properly mark two fill ports; to keep properly reconciled inventory records; to maintain monitoring records for cathodic protection system; to report a spill in the fill port, and to properly label an underground tank, in violation of 6 NYCRR 612.2(e), 613.3(b), 613.4, 613.5(b)(4), 613.8 and 614.3(a)(2);

F. Respondent, with respect to its West 54th Street facility, failed: to keep properly reconciled inventory records; to maintain annual monitoring records for cathodic protection systems on the premises; and to maintain as-built plans, in violation of 6 NYCRR 613.4, 613.5(b)(4), and 614.7(d);

G. Respondent, with respect to its East 90th Street facility, failed: to display the facility registration certificate on the premises; to keep properly reconciled inventory records; and to maintain as-built plans, in violation of 6 NYCRR 612.2(e), 613.4, and 614.7(d); and

H. Respondent, with respect to its East 11th Street facility, failed: to keep properly reconciled inventory records; and to maintain as-built plans showing the size and location of the underground tank and piping system, in violation of 6 NYCRR 613.4 and 614.7(d).

III. Respondent is assessed a civil penalty in the amount of one hundred fifty four thousand five hundred dollars ($154,500.00), which is due and payable no later than 30 days after service of this Order upon respondent. Such payment shall be made in the form of a certified check, cashier's check or money order payable to the order of "New York State Department of Environmental Conservation" and delivered to the Department at the following address: New York State Department of Environmental Conservation, Region 2, 47-40 21st Street, Long Island City, NY 11101, ATTN: John K. Urda, Esq., Assistant Regional Attorney.

IV. Upon service of this Order on Respondent, Respondent must:

A. immediately initiate daily inventory monitoring in compliance with 6 NYCRR 613.4, and within thirty days of service of this Order upon Respondent, submit to the Department reconciled inventory records for the facilities located at East 11th Street, East 43rd Street, West 43rd Street, East 54th Street, West 54th Street, West 76th Street, and East 90th Street;

B. within thirty days of service of this Order upon Respondent, submit to the Department site drawings/ as-built plans in accordance with 6 NYCRR 614.7(d) for the facilities located at East 64th Street, West 54th Street, and East 90th Street; and

C. within thirty days of service of this Order upon Respondent, submit to the Department a current and correct PBS registration for the West 76th Street facility and consult with Department staff regarding any necessary revisions to the PBS registration for the East 54th Street facility to reflect the upgrading of the tank cathodic protection.

V. All communications from respondent to Department staff concerning this Order shall be made to John K. Urda, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 2, 47-40 21st Street, Long Island City, NY 11101.

VI. The provisions, terms and conditions of this Order shall bind respondent and its successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Christopher Amato
Assistant Commissioner[10]

Dated: March 24, 2009
Albany, New York

[10] By memorandum dated July 15, 2008, Commissioner Alexander B. Grannis delegated decision making authority in this proceeding to Assistant Commissioner Christopher Amato. A copy of the memorandum was previously provided to the parties in this proceeding under cover of a letter dated July 16, 2008 from Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

Alleged violations of Article 17 of the New York State Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by,

AVIS RENT A CAR SYSTEM, LLC,

Respondent.

DEC File Nos. R2-20070103-2, R2-20070104-9, and **R2-20080115-16**

HEARING REPORT

- by -

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

Proceedings

For a detailed procedural history of this petroleum bulk storage (PBS) enforcement matter, I refer readers to my ruling and default summary report dated June 6, 2008 in which I granted staff's motion for a default judgment. This matter relates to PBS violations at eight of the respondent's facilities located in Manhattan.

In my June 6th ruling, I found that the respondent Avis Rent a Car System, LLC (Avis) had failed to answer the staff's motion for order without hearing and was liable for violations of Environmental Conservation Law (ECL) §§ 17-0303(3) and 17-1001, *et seq*. and § 612.2(a) of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) (failure to register or to maintain accurate registration); § 612.2(e) (failure to display facility registration certificate on premises); § 613.3(b)(1) (failure to mark fill port); § 613.3(c) (failure to properly install a shear valve for spill prevention); § 613.3(c)(3)(ii) (failure to mark design capacity, working capacity and identification of above ground tank and tank gauge); § 613.3(d) (failure to properly install or maintain spill prevention equipment); § 613.4(a) (failure to reconcile inventory records); § 613.5(a) (failure to perform tightness tests); § 613.5(b)(4) (failure to maintain annual monitoring records for cathodic protection system on premises); § 613.6(a) (failure to perform monthly inspections of above ground storage facility); § 613.6(c) (failure to maintain and make available to Department staff monthly inspection reports for a period of ten years); § 613.8 (failure to report leak, spill or discharge); § 613.9(a) (failure to secure, cap, or plug the fill line of a temporarily out of service above ground storage tank); § 614.3(a)(2) (failure to label); and § 614.7(d) (failure to maintain site drawings).

The respondent committed all or some of these violations at each of their facilities located at: 217-223 East 43rd Street; 304-310 East 64th Street; 216 West 76th Street; 240 East 54th Street; 515 West 43rd Street; 153-155 West 54th Street; 424 East 90th Street; and 68-70 East 11th Street in Manhattan.

In its moving papers, staff requested a penalty of $178,500 in addition to injunctive relief requiring that the respondent take corrective action to comply with applicable regulations. Because I determined that more information was needed to assess the appropriate monetary penalty, I convened an inquest on that issue on August 5, 2008 at 10:00 a.m. in the New York State Department of Environmental Conservation's (DEC or Department) Region 2 office in Long Island City pursuant to ECL § 71-1929.

Department staff was represented by John Urda, Assistant Regional Attorney and the respondent Avis was represented by Phillips Nizer LLP, Jon Schuyler Brooks, Esq., of counsel.

The Department staff's witness was:

Jacob Krimgold, P.E., DEC's Office of Spill Prevention

The respondent's witnesses were:

Veronica Zhune, DEC Environmental Engineer
Brian Falvey, DEC Environmental Engineer I
Philip W. Engle, Jr., Engineer, Environmental Affairs, Avis

Attached to this report is the exhibit list that identifies the 40 documents that I accepted into evidence. In addition to these exhibits, the Department staff asked me to take official notice of *DEE-1: Civil Penalty Policy* (6/20/90); *DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy - Penalty Schedule*; *DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy* (5/21/03); and Matter of HCIR Service and Richard Finklestein, Commissioner's Decision and Order (10/23/06) and I have done so.

In the respondent's closing brief (p. 1), Mr. Brooks has requested that ". . .the Tribunal take official notice [of the fact that] Avis is a Delaware limited liability company, with its principal place of business in Parsippany, New Jersey, authorized to do business in New York." The respondent has annexed to the brief a copy of the Department of State (DOS) information from the DOS website confirming these facts. I can take official notice of these facts. However, as discussed below, I do not find that they have a bearing on the matters before me at this time.

The hearing was completed in one day and at the conclusion of the hearing the parties requested an opportunity to file closing briefs. We agreed to one round of simultaneous briefs that would be submitted to the OHMS by no later than November 3, 2008. The respondent requested two extensions of time to submit its closing brief - first until November 17, 2008 and then until November 18, 2008. Although staff's closing brief was submitted to this office by e-mail on November 14, 2008 and in hard copy on November 18, 2008, the respondent's brief was not submitted until November 19, 2008 by e-mail. The hard copy was received by the OHMS on November 20, 2008. Although the respondent did not meet the deadline, in the interests of ensuring that the Assistant

Commissioner has an opportunity to review all the arguments of the parties in this matter, I will accept its late submission.

The transcript of the hearing was received in the OHMS on August 29, 2008 and I sent the parties an *errata* sheet on September 3, 2008. Despite the deadline I imposed of September 19, 2008 to submit additional corrections to the transcript, Mr. Brooks submitted an *errata* sheet on November 14, 2008, followed by additional corrections on November 17, 2008. Mr. Urda opposed these corrections due to their late submission. However, I have determined to incorporate the changes in order to ensure the accuracy of the transcript. The receipt of the respondent's brief closes the record in this matter.

Positions of the Parties

DEC Staff

The Department staff has requested the penalty of $178,500 based upon a tripling of the recommended settlement penalty for each specific violation pursuant to *DEE-22*. Its calculation of each of the 37 penalties is set forth in a "Penalty Calculation Chart" that staff presented as its first exhibit at the hearing. Hearing Exhibit (Hrg. Ex.) 1 [also annexed as Attachment A to staff's closing brief]. Included in this chart is the staff's calculation of the minimum number of days that the respondent failed to comply with the cited regulation. Staff also includes in the chart the statutory maximum penalty based upon ECL § 71-1929 ($500,542,500.00)and the percentage of that sum reflected in the proposed penalty.

In general, staff concluded that the respondent's repeated failure to comply with the PBS regulations (37 causes of action - 43 counts at eight facilities), its size, its failure to timely respond to notices of violations and to appear at one compliance conference, and the importance of the regulatory scheme that had been ignored, called for a large penalty. Staff placed emphasis on the lengthy time (approximately 11 months) Avis was given by staff to come into compliance and the discovery by staff that despite meetings with the respondent, violations continued. Hearing Transcript (TR) 43-44. Staff pointed out that the PBS regulatory scheme is geared towards spill prevention and that the failure to comply with the requirements is a threat to the environment and public health particularly in a region where there is such a dense population.

In the staff's brief, Mr. Urda reiterates these arguments and in addition, notes the respondent's default in responding to

staff's motion for order without hearing as another example of Avis's failure to cooperate. Staff Br., p. 6. Moreover, Mr. Urda notes that Avis has a prior history of non-compliance. Staff Br., pp. 7-8. Staff points out that in 2002, the E. 54th Street facility and JFK facility were found to be in violation of PBS regulations - these were settled in separate consent orders. In 2004 and 2005, Department staff found air violations at the Avis facility at the Westchester County Airport and the East Elmhurst facility. In 2006, staff found PBS violations at the Avis facility at the Syracuse Airport facility. See, Exhibit C annexed to staff's brief.

When presented at the hearing with documentation of Avis's response to a number of the violations, the staff maintained that for the most part this information had not been previously supplied. However, Mr. Krimgold acknowledged with respect to some of the respondent's proof that had he been presented with it at one of the prehearing conferences, staff would have been amenable to foregoing a penalty or settling for a lower one.

Staff noted the aggravating factors that are set forth in *DEE-22: PBS Inspection Enforcement Policy - Penalty Schedule*. There are nine such factors listed in that policy: 1) duration of violation - long term; 2) multiple facility owner; 3) continuing violation; 4) intentional violation; 5) failure to correct violation(s) actually known to the owner/operator; 6) number of tanks - many; 7) facility capacity - large; 8) non-compliance with notice of violation (NOV); and 9) actual environmental or human health harm resulted from the violation(s). In his testimony, Mr. Krimgold pointed to the failure to correct, continuing nature of the violations, and non-compliance with notices of violation (NOVs) as well as Avis's multiple facilities to support staff's recommendation. TR 32-49.

On the staff's Penalty Calculation Chart, the staff has proposed the same penalty for a violation that occurred at several facilities regardless of the number of days over which it continued. Hrg. Ex. 1. For example, the penalty amount staff requested is $300 for the respondent's failure to properly mark a fill port at one facility for at least 11 days and its failure to so mark its fill port at another facility for at least 518 days. Id. Mr. Krimgold did not present a reason for this outcome. See, *e.g.*, TR 137. He acknowledged on cross-examination that if the same penalty is exacted for violations that are quickly corrected and those that are not, there may not be an incentive for respondents to address violations promptly. TR 169.

Respondent's Position

On behalf of Avis, Mr. Brooks made an opening statement at the hearing in which he claimed that my June 6, 2008 ruling had not found the respondent in violation of the regulations. TR 9-10. While not typical of the ALJ to interrupt or respond to an opening statement, due to the inaccuracy of Mr. Brooks's statement, I let it be known that indeed, my ruling granted staff a default judgment on all the allegations. TR 14-15. I emphasized that the present hearing would address the issue of penalties, not liability. Id. It became clear early on in the proceeding that much of respondent's proof, that it may have presented in its defense on liability had it not defaulted, could equally be relevant on the issue of mitigation and therefore, was admissible. TR 77.

The respondent, through its environmental affairs engineer Philip W. Engle, Jr., provided testimony and documentary evidence in support of its position that in many cases, the company was not in violation of the regulation at issue or had remedied the violation soon after the violation was brought to Avis's attention. TR 218-332. Based upon these representations, the respondent argued that it had worked cooperatively towards compliance. At the conclusion of the hearing, Mr. Brooks moved for setting aside the default judgment and to strike any violations that were not contained in the various NOVs. TR 356-357. I denied both these motions. Id.

In its closing brief, the respondent has presented two arguments for the first time. The first argument is that the default should be opened or set aside because the respondent had good cause for the default and meritorious defenses. 6 NYCRR § 622.15(d). The good cause is based upon a theory that staff did not achieve personal jurisdiction over the respondent because it did not meet the requirements for service on a limited liability corporation pursuant to CPLR § 311. Respondent's Br., p. 2. Avis maintains that because staff addressed and delivered the motion for order without hearing to Avis itself without specifying a manager or one designated to accept service, the service was defective and DEC never acquired personal jurisdiction over the respondent and the matter "must be dismissed." Respondent's Br., p. 3.

The second new argument is respondent's claim that ECL § 17-1005(1)(b) and 6 NYCRR § 613.4(a)(2) do not require Avis to maintain daily inventory logs because it does not sell gasoline to the general public. Respondent's Br., p. 13.

Stipulations

With respect to causes of action 1, 2, 4, 20, 25 and 28, the parties agreed that the end date that is listed on the staff's Penalty Calculation Chart (Hrg. Ex. 1), is the date of cure. TR 234. In addition, as to causes of action 5, 8, 10, 11, and 13, the parties agreed that these were cured no later than February 22, 2007. TR 251.

FINDINGS OF FACT

1. Avis Rent a Car System, LLC is a Delaware-based car rental company with its headquarters located in Parsippany, New York that has at least 24 PBS facilities in New York State including the eight in Manhattan that were the subject of this hearing:

- 217-223 East 43rd Street - PBS #2-364509
- 304-310 East 64th Street - PBS #2-364495
- 216 West 76th Street - PBS #2 -364428
- 240 East 54th Street - PBS #2-364436
- 515 West 43rd Street - PBS #2-609926
- 153-155 West 54th Street - PBS #2-511781
- 424 East 90th Street - PBS #2-480886
- 68-70 East 11th Street - PBS #2-601834

At the time that the DEC staff found the violations at issue, each of these facilities had a combined storage capacity of over 1,100 gallons of petroleum.

East 43rd Street Facility

2. On November 21, 2006, DEC Environmental Engineer Veronica Zhune performed an inspection at respondent's 217-223 East 43rd Street facility. She observed that the respondent failed to mark a fill port on an underground storage facility; a shear valve in the supply line at the inlet of a pressurized motor fuel dispenser for spill prevention was not secured rending it inoperable; inventory monitoring records were not properly reconciled every 10 days; and accurate site drawings or as-built plans showing the size and location of the underground tank and piping system were not available. Hrg. Ex. 7; Zhune Affidavit in Support of Motion for Order without Hearing (Zhune aff.), ¶¶ 4-5.

3. On or about December 1, 2006, Alvin Petroleum Systems, Inc. (Alvin) color-coded the fill box and examined the shear valve to ensure it was in working order. Hrg. Exs. 14, 15, 16.

4. The respondent maintained copies of the as-built plans at its central office in Parsippany, New Jersey. Hrg. Ex. 17.

5. In February 2007, the respondent embarked upon an environmental training exercise to teach company employees the measures required to comply with environmental regulations pertaining to petroleum underground storage tanks including inventory reconciliation at all its Manhattan facilities. Hrg. Ex. 36; TR 306-312. In addition, Avis retained JD2 Environmental to perform an environmental audit of its facilities that had been cited by DEC and to prepare a "punch list" of any compliance issues. Avis then retained Alvin to address any of the problems found by JD2 Environmental in the audit. TR 305-306.

East 64th Street Facility

6. On November 21, 2006, Ms. Zhune observed at the E. 64th Street location, a 10,000 gallon above ground storage tank (Tank 004) that had been installed in 1958 according to the facility's Department registration had been taken out of service while its registration with DEC indicated it was in service. This tank was not marked to reflect its design capacity, working capacity and identification number nor were monthly inspections performed of this tank nor records of such inspections maintained for a period of ten years. Although this tank had been out of service for more than 30 days, the respondent had not secured, capped, or plugged the fill line to prevent unauthorized use or tampering. Zhune Aff., ¶ 6.

7. In addition, during this same inspection, the inspector noted that the fill port for the underground storage tank (Tank 005) was not properly marked or labeled; the shear valve in the supply line at the inlet of a pressurized motor fuel dispenser was not secured; and the respondent did not maintain on the premises annual monitoring records for a cathodic protection system. Id.; Hrg. Ex. 8.

8. At this location, staff was not provided with accurate site drawings or as-built plans showing the size and location of the underground tank and piping system. Hrg. Ex. 8.

9. During this same visit, staff observed a discharge of petroleum product that had not been reported to the Department. Id. This spill was never assigned a spill number and there are no records of an investigation nor any evidence of impact to soils or waters of the State. On or about November 21, 2006, DEC staff served the respondent with an NOV. Prior to

January 10, 2007, Avis completed a cleanup of the spill bucket. TR 264-266.

10. On or about January 12, 2007, Alvin personnel performed work at this facility including the installation of a new impact valve. Hrg. Exs. 22, 23.

11. Avis maintained storage tank plans of this facility at its Parsippany, New Jersey offices; however these did not contain the required notation regarding Part 614 compliance. Hrg. Ex. 18.

12. The respondent marked the fill covers on or about January 10, 2007 and placed a tank tag on the fill port. Hrg. Exs. 21, 31; TR 287-289.

13. On or about June 26, 2006, RAM Services LLC (RAM) personnel conducted a corrosion control/cathodic protection inspection and survey at the 310 E. 64th Street premises for Cendant Car Rental Group (the predecessor company of Avis) with respect to the 4,000 gallon underground storage tank. The results of this inspection reveal that the system was in satisfactory operating order and in compliance with Part 614 of 6 NYCRR. Hrg. Ex. 24; TR 260-264. This information had been kept on-site although not presented at the time of the DEC inspection. TR 263.

14. Prior to February 22, 2007, Avis engaged a contractor to remove the above ground storage tank that was not in use and submitted the PBS application to DEC for removal. TR 252.

West 76th Street Facility

15. On December 5, 2006, Department Environmental Engineer Brian Falvey inspected this facility located at 216 West 76th Street. Falvey Affidavit in Support of Motion for Order without Hearing (Falvey Aff.), ¶¶ 4-6; Hrg. Ex. 10. Based upon this visit and a review of DEC records, staff concluded that Avis had improperly registered the facility by failing to properly identify tank internal protection for Tank 002. Falvey Aff., ¶ 5. Prior to the spring of 2008, Avis had not been made aware of this allegation by staff.

16. During this same inspection, Mr. Falvey observed that the spill prevention equipment was not properly maintained because the double-walled piping test boot would not permit the flow of product into the tank, thereby rendering the spill prevention equipment inoperable. Falvey Aff., ¶ 4; Hrg. Ex. 10.

17. On or about April 10, 2002, Michael Feeley, of the respondent's Properties Department, submitted to DEC an amended PBS application for the West 76th Street facility. Hrg. Ex. 32. In the cover letter accompanying this application, Mr. Feeley notes that the headquarters of the facility had recently moved to Parsippany, New Jersey from Garden City, New York. Id. Contained in Section B of this application, Tank 002 is identified as having a fiberglass liner FRP. Id.; TR 290-292.

18. Avis retained Alvin to address the leak detection system and this deficiency was corrected prior to January 10, 2007. TR 294.

19. This tank was removed in 2008 by the respondent due to lease termination. TR 291-292.

East 54th Street

20. On January 5, 2007, Mr. Falvey inspected respondent's facility located at 240 East 54th Street. Mr. Falvey had alerted the company's personnel in advance of his inspection; however, despite this notification, facility operation personnel were not available. Falvey Aff., ¶ 8.

21. At this inspection, Mr. Falvey observed a failure to color-code a fill port; failure to reconcile inventory records; failure to tightness test two underground tank and piping systems; and failure to maintain records of annual cathodic protection testing for the two underground tank and piping systems. Id., ¶ 9.

22. He reviewed the Department's records regarding this facility and he determined that Avis failed to properly identify the tank type, tank external protection, tank secondary containment and piping for both tank systems in its registration. Id., ¶ 10.

23. On January 9, 2007, Ms. Zhune inspected this facility. When inspection assignments were made by DEC staff, it had not come to the attention of the staff person responsible for inspection assignments that this facility had already been recently inspected. Ms. Zhune also found a failure to properly reconcile records and to test the two underground storage tanks for tightness. Zhune Aff., ¶¶ 7-8.

24. Subsequent to the inspection by Mr. Falvey, Avis submitted a PBS application that supplied some of the missing or correct information and identified the tank and pipe

external protection as "original impressed current." Avis installed these tanks with sacrificial magnesium anodes on the piping system in 1985 making them Category C tanks pursuant to the PBS regulations. TR 317, 319-3321; Hrg. Ex. 37; 6 NYCRR § 613.5(a)(1)(i) & Table 1.

25. In 1997, Avis employed an engineering consultant to upgrade the two 4,000 gallon tanks to install an impressed current cathodic protection system. TR 322-324; Hrg. Ex. 38. Avis upgraded the cathodic protection in 1997 to comply with 40 Code of Federal Regulations (CFR) § 280.21. TR 322 - 328; Respondent's Br., p. 12. On the completion of this upgrade, Avis retained RAM to test the impressed current cathodic protection system. TR 327; Hrg. Ex. 39. As a result of this testing, RAM determined that the equipment was operating correctly pursuant to Part 614. Hrg. Ex. 39, Gimelfarb affidavit.

26. On or about June 26, 2006, RAM conducted the 2006 Corrosion Control/Cathodic Protection inspection and survey at this location. Hrg. Ex. 33. Richard Mazur, of RAM Services LLC, found the system working and in conformance with Part 614 of 6 NYCRR. Id.; TR 295-298.

27. As of the date of the staff's motion for order without hearing, Avis still had not submitted to DEC properly reconciled inventory records.

West 43rd Street Facility

28. On January 9, 2007, DEC Environmental Engineer Zhune inspected Avis's facility located at 515 West 43rd Street. During this visit, Ms. Zhune observed a failure to display the facility registration on the premises; failure to properly mark and color-code two fill ports; failure to properly reconcile inventory records for a 4,000 gallon underground storage tank; failure to maintain records of annual cathodic protection testing; failure to report a spill leak or discharge of petroleum product at or around a fill port; and failure to properly label an underground storage tank fill port. Zhune Aff., ¶ 10. On or about November 21, 2006, DEC staff served an NOV on the respondent. Hrg. Ex. 9. As of the date of the staff's motion for order without hearing, the respondent had not provided DEC staff with properly reconciled inventory records despite being directed to do so. Zhune Aff., ¶ 11.

29. On or about March 13, 2007, Michael Feeley of the Avis Budget Group, sent an amended PBS application for this facility to the Department. Hrg. Ex. 29. This application was to correct

a registration error that had the tank listed as a steel tank - the tank is fiberglass reinforced plastic. Id.; TR 280-283

30. On or about January 15, 2007, Alvin went to this facility to paint the fill ports. Hrg. Exs. 25, 26. In addition, Alvin staff cleared water and vapor out of the fill buckets that was caused by the nearby taxicab company washing down its vehicles. TR 268-26-271; Ex. 25. Due to this ongoing problem with the car washing, Avis installed a new fill bucket with a sealable lid to prevent water from infiltrating the bucket. TR 268-272; Hrg. Ex. 26.

31. On or about January 9, 2007, Avis staff posted the PBS certificate at the West 43rd Street facility. Hrg. Ex. 27; TR 275-278.

32. Avis maintained a tank tag on the fill port at this facility within the fill bucket requiring one to lift up the lid of the bucket to view it. TR 283-285. Due to the weight of the lid, the Avis employee that accompanied Ms. Zhune during this inspection, would not lift it and Ms. Zhune was not able to. Hrg. Ex. 30; TR 206, 284-285.

West 54th Street

33. On January 9, 2007, Ms. Zhune inspected the respondent's facility located at 153-155 West 54th Street. Zhune Aff., ¶ 12. During this visit, Ms. Zhune found that Avis had failed to properly reconcile inventory records for three 4,000 gallon underground storage tanks; failed to maintain monitoring records on the premises for cathodic protection systems for these tanks; and failed to properly maintain accurate site drawings or as-built plans. Id. Up until at least the filing of staff's motion for order without hearing, the respondent had not provided reconciled inventory records to DEC staff. Id., ¶ 13.

34. On June 26, 2006, RAM personnel conducted the year 2006 Corrosion Control/Cathodic Protection inspection and survey at the W. 54th Street location. Hrg. Ex. 34; TR 298-301. At the time of this inspection, the cathodic protection systems for the three underground storage tanks were found to be in satisfactory operating condition. Hrg. Ex. 34.

East 90th Street

35. On December 4, 2007, Ms. Zhune inspected the PBS facility at 424 East 90th Street. Zhune Aff., ¶ 14. During this inspection, Ms. Zhune found: failure to display the facility

registration certificate on the premises; failure to reconcile inventory records; and failure to properly maintain accurate site drawings or as-built plans showing the size and location of the underground tank and piping system. Id.

36. The respondent failed to appear at a compliance conference scheduled for January 15, 2008 that was set forth in the notice of violation. At a compliance conference on February 11, 2008, staff and Avis representatives met to discuss the notice of violation issued as a result of the December 4 inspection. Avis presented reconciliation records that were incomplete or incorrectly compiled. Id., ¶ 15; Hrg. Ex. 40. In addition, these records showed unexplained overages or losses dating back to November 2007, the earliest records presented. To the date of staff's motion for order without hearing, Avis failed to present reconciled records or explanations of the excesses and deficits in the produced records, despite DEC staff's directives to do so. Id.

37. Avis maintained plans at its headquarters in Parsippany, New Jersey but these did not contain required language with respect to Part 614 compliance. Hrg. Ex. 19.

38. Prior to January 29, 2008, Avis posted the certificate of registration at this location. TR 302-303; Hrg. Ex. 35.

East 11th Street

39. On January 4, 2008, Ms. Zhune inspected the PBS facility belonging to the respondent located at 68-70 East 11th Street. Zhune Aff., ¶ 16. In this inspection, Ms. Zhune observed that there was a failure to properly reconcile inventory records and failure to properly maintain accurate site drawings or as-built plans. Id.

40. At the February 11, 2008 compliance conference between Department staff and the respondent's representatives, Avis presented incomplete or incorrect reconciliation records that showed inaccuracies dating back to March 1, 2007. Id., ¶ 17. As of the date of the staff's motion for summary order, the respondent had not supplied DEC staff with properly reconciled records although staff had directed the respondent to do so. Id.

41. Avis maintained the as-built plans at its headquarters in Parsippany, New Jersey. Hrg. Ex. 20; TR 245-248.

DISCUSSION

As stated above, my June 6, 2008 ruling found the respondent in default; thereby concluding that it was liable on all of the DEC staff's causes of action. While much of the evidence produced by the respondent established that Avis was not liable for some of the violations alleged by staff, because that information was not presented in a timely fashion it could not be considered with respect to liability. However, I ruled at the hearing that this evidence could be considered with respect to mitigation of penalties and I have done so in this report as follows.[11]

Personal Jurisdiction

Prior to the discussion of penalties, I will address the respondent's argument, raised for the first time in its closing brief, that the Department failed to obtain personal jurisdiction over Avis because the staff failed to identify a manager or individual responsible for accepting service of legal process when it served the motion for order without hearing on Avis. It is not in contest that the Department staff served the respondent by certified mail with the notice of motion for order without hearing on April 21, 2008. Staff submitted a copy of the affidavit of service indicating that staff mailed the respondent and Mr. Brooks the notice of motion for order without hearing and supporting papers by certified mail on April 21, 2008. See, Exhibit B to Urda affirmation in support of motion for default judgment and order. By notice of motion dated May 14, 2008, counsel for Avis responded by seeking an order to quash the staff's motion for order without hearing or to extend the time to respond to the motion. See, ALJ ruling and default summary report dated June 6, 2008. These papers did not raise any claims

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[11] In Wilson v. Galicia Contracting & Restoration Corp., 10 NY3d 827 (2008), the Court of Appeals decided in a personal injury case where the lower court struck the answer of a defendant based upon its failure to comply with a discovery order that this defendant was not entitled to rely on exculpatory evidence revealed later in the case. The court found that once liability is established - here based upon the defendant's disclosure default - the inquest is restricted to proof of damages and evidence with respect to liability is inadmissible. That is the basis of my rulings early in this proceeding. However, because some of the evidence that would go to defend against liability was also relevant to mitigation of penalties, I allowed it in.

with respect to lack of personal jurisdiction. By affirmation dated May 19, 2008, the staff opposed this motion and by motion dated May 15, 2008, staff moved for a default judgment and order based upon the respondent's failure to serve a timely response to the motion for order without hearing. Id. Avis did not submit any response to staff's motion for a default judgment. Id.

First, there is no question that a member of Avis's staff, in what it has identified as its world headquarters in Parsippany, New Jersey, accepted service of the motion for order without hearing by signing the "green card" acknowledging receipt of the papers by certified mail. See, Exhibit B annexed to staff's motion for default judgment and order and Exhibit A to respondent's closing brief. Respondent has not produced any evidence that this individual was not an agent authorized to accept certified mail on behalf of this limited liability corporation.

Second and most important, pursuant to 6 NYCRR § 622.4(c), the respondent must set forth all affirmative defenses in its answer. Section 622.4(d) of 6 NYCRR provides that "[affirmative defenses not pled in the answer may not be raised in the hearing unless allowed by the ALJ." Pursuant to CPLR 3211(a)(8), a defendant may move to dismiss a proceeding for lack of personal jurisdiction. This motion must be made within the time allowed for an answer. Failure to either raise this defense in an answer or a timely motion results in a waiver of the claim. CPLR 3211(e). In this proceeding, respondent defaulted by failing to answer staff's motion. Respondent submitted a motion to quash, participated in a day-long hearing to address the penalties recommended by staff in its motion for order without hearing, and moved to set aside the default at the conclusion of the hearing. However, Avis did not raise the jurisdictional claim in its motions or at the hearing.

I do not find this claim to meet the "good cause" requirement for re-opening a default as the respondent had several opportunities to raise this claim prior to this time. Moreover, there can be no question that Avis has had full notice of these proceedings and legal representation throughout. Therefore, to the extent that there is any merit to this defense, Avis has not been prejudiced by any technical errors in service having had full notice of these proceedings and representation in them.[12] It is far too late to raise this claim at this juncture

[12] In contrast to this proceeding, in two of the matters cited by the respondent in support of this claim, the respondents

and respondent's motions to dismiss and/or to re-open the default are denied.

Assessment of Appropriate Penalty

The Department's 1990 *Civil Penalty Policy* provides that several factors be considered in establishing a penalty. Among these are the gravity of the violation and the economic benefits of non-compliance. These factors are intended to effectuate a policy of punishment and deterrence. With respect to gravity, the criteria to consider are: a) potential harm and actual damage caused by the violations; and b) relative importance of the type of violations in the context of the Department's overall regulatory scheme.

The Department's *DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy* also provides guidance to DEC staff with respect to suggested penalty ranges for each PBS violation. However, as noted in the policy, these ranges apply only to the resolution of violations prior to the service of a notice of hearing and complaint. Still, these suggested penalties provide a starting point for calculating penalties after an enforcement proceeding.

I have found that the size and resources of this company, the number of its facilities, its failure to achieve compliance with the PBS regulations in an expeditious fashion, and the location of these facilities in a very densely populated city warrant a sizeable penalty. While staff has not demonstrated any environmental harm resulting immediately from the violations, all of the regulations at issue are directed at preventing spills and

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had made no appearance. See, In re Zip Zip Mini Mart, Inc., 1990 WL 263936 (NYSDEC Nov. 19, 1990) and In re Sam Batsiyan and S.L.D. Corporation, 1988 WL 158322 (NYSDEC June 23, 1988). With respect to the other cases cited by the respondent on page 4 of its brief, the facts of these cases are inopposite. In re Garcia Beck Street Corp., 2004 WL 2132949, the respondent did not oppose the default judgment and the recipient's name on the certified mail receipt was not decipherable (in the case here the name is clear: L. [Louis] Rossetti). In re Christopher Persheff and Light Street, LLC, 2004 WL 1748959 and In re R.S.T.Z. Associates, R. Chmarzewski, 2004 WL 1748960, the respondents did not oppose the motions and there was not proof of service. In re David Parent, 2003 WL 22380023, the attorney for the respondent was served with the notice of hearing and complaint instead of the respondent.

contamination. Without compliance, there is a much greater probability that environmental harm will ensue.

However, there are also a number of violations that proved not to be substantiated and while the company was found liable based upon a default, I do not find that a penalty in such instances is warranted.

In calculating my recommended penalties, I considered the penalty policies noted above in addition to the calculation chart provided by staff in which staff tripled the amount from the *DEE-22* suggested penalty (Hrg. Ex. 1), the chart presented by the respondent (Hrg. Ex. 13), as well as the testimony and exhibits introduced at the hearing. In order to provide a clear understanding of my monetary penalty calculations, I have provided below a description of my findings with respect to each facility.

East 43rd Street

Avis corrected the failure to color code the fill port and the inoperable shear valve in eleven days. The *DEE-22* penalty schedule provides for an average penalty of $100 per fill port and $500 per tank for the shear valve. Staff recommends a penalty of $300 and $1500, respectively, in its Penalty Calculation Chart (Hrg. Ex. 1) and notes that these sums are a small fraction of the potential maximum of $412,500.00 for each violation. As noted above, at the hearing, counsel for staff and Avis stipulated that the end dates listed on staff's Penalty Calculation Chart for the fill port, shear valve and as-built plan violations indicate that these violations were all resolved by December 1, 2006. TR 234. I find that due to the relatively short time in which Avis responded to these violations, a penalty of $200 for the fill port violation and $1000 for the shear valve violation is appropriate.

At the hearing, Avis produced documents that it represented as the as-built plans noting that they were retained in the main office of the company. TR 236; Hrg Ex. 17. Staff conceded at the hearing that 6 NYCRR § 614.7(d) does not require these plans to be maintained at the facility location and in addition, Mr. Krumgold testified that he directs his staff not to review these documents at the site. In addition, the as-built plans for this facility do contain the statement that the equipment was installed in accordance with Part 614 in compliance with 6 NYCRR § 614.7(d). Since Mr. Krimgold testified that if the company had

and presented the plans there should be no penalty, I can find no rationale to penalize Avis on this contention.[13] TR 181.

The respondent's failure to keep accurately reconciled records at seven of the eight facilities that are the subject of this proceeding is a serious matter. These records should be the wake-up call to a facility operator/owner when discrepancies appear that its PBS equipment may have an integrity issue. It is necessary to immediately respond to these noted overages and losses in order to prevent a possible spill. Avis continued to have problems with accurate recordkeeping even after DEC staff noted the violations. Avis's decision to retain a consultant to perform an audit of its facility and to hold a training session in February 2007 and to continue these on an annual basis for its staff on this issue is a good one. TR 305-310; Hrg. Ex. 36. However, it does not absolve the company from these serious and repeated violations. Staff has recommended a penalty of $7500 for this violation and I conclude that this is appropriate based upon the above described factors.

In the closing brief, Avis raised a new argument with respect to the recordkeeping violations (6 NYCRR § 613.4). Avis argues that because it does not sell petroleum products to the public out of these facilities, it is not required to keep daily inventory records. Respondent's Br., p. 13. Avis points to ECL § 17-1005(1)(b) and 6 NYCRR § 613.4(a)(2) claiming that this law and regulation exempt its facilities from the inventory keeping requirements. A review of these provisions shows otherwise.

ECL § 17-1005(1)(b) provides that the "department <u>may</u> exempt facilities which are not engaged in the resale of petroleum from the requirements of this paragraph." Section 613.4(a)(2) of 6 NYCRR provides: "[i]f the tank is unmetered or if the tank contains petroleum for consumptive use on the premises where stored, the operator may detect inventory leakage in an

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[13] In the staff's closing brief, counsel adds an additional argument against finding that the as-built plans provided by Avis at the hearing meet the regulatory requirements. Staff Br., p. 14. Staff states that the plans submitted do not show that the structures indicated have all been installed and therefore, are not as-built plans. I reject this argument as staff failed to provide clear testimony at the hearing as to why the plans do not meet the regulatory requirements. This cannot be a shifting target and to the extent that the plans presented by Avis meet the requirements set forth in the staff's pleadings, I find them to be in compliance.

alternative method to paragraph (1) of this subdivision. This may include an annual standpipe analysis or other method acceptable to the department." [emphasis added.] There has been no evidence produced that this facility was exempted from the daily inventory requirements. To the contrary, the staff has repeatedly found violations of these requirements at the Avis facilities. Moreover, Avis itself embarked on a training effort, in part, to ensure that its employees perform the inventory properly. Hrg. Ex. 36. Avis points to this effort as an example of its cooperative behavior. TR 307.

The respondent has not presented any evidence to suggest that the tanks at these various facilities are unmetered. And, presumably the tanks supplied fuel for the rental cars. Thus, the petroleum stored was not used for "consumptive use on the premises where stored" but rather was used by those who rented the Avis cars. Finally, at no time during these proceedings did Avis offer any evidence of another method of recordkeeping that had been adopted by DEC. Accordingly, I reject this argument and I find that the respondent is liable for penalties associated with its violations of 6 NYCRR § 613.4.

East 64th Street

At this facility, the respondent maintained a 10,000 gallon above ground tank (004) that was not in use but was not properly closed or maintained resulting in multiple violations: failure to maintain a current and valid registration (612.2); failure to properly mark (613.3[c][3][ii]); failure to inspect (613.6[a]); failure to maintain inspection records (613.6[c]); failure to cap, secure or plug (613.9[a]).

The staff's penalty recommendations for each of these violations relating to the out-of-use above ground tank total $8550. The respondent hired a contractor to remove this tank on or about February 21, 2007 and submitted a removal application to DEC. TR 252-253. Staff did not submit evidence related to environmental harm or any economic benefit derived from the failure to remove this tank sooner. As the stipulation between the parties indicates, Avis became aware of these violations at a January 10, 2007 settlement conference with the Department. TR 250-251. While the company had a duty to adhere to the regulations regardless of an express notification by DEC staff, the prompt response of the company must be considered as mitigation of the penalty. Accordingly, I find that a penalty of $3000 for failure to properly close and to maintain this tank in accordance with the other cited regulations is appropriate.

With respect to the underground storage tank (005), the respondent has been found liable for failure to properly mark the fill port (613.3[b]); failure to properly install shear valve (613.3[c]); failure to maintain monitoring records for cathodic protection system (613.5[b][4]); failure to report a discharge (613.8); failure to label underground storage tank (614.3[a][2]); and failure to maintain site drawings (614.7[d]).

Staff has asked for a penalty of $300 for failure to mark the fill port; a penalty of $1,500 for failure to install the shear valve; a penalty of $750 for failure to maintain the monitoring records for the cathodic protection system; a penalty of $22,500 for failure to report the discharge; a penalty of $300 for failure to label an underground tank; and a penalty of $3,000 regarding the site drawings. Hrg. Ex. 1.

As noted above with respect to the site drawings, these are maintained at the respondent's New Jersey office. Hrg. Ex. 18. However, it was pointed out by staff that the plans must contain a note that confirms that the system was installed pursuant to Part 614 of 6 NYCRR. TR 240; 6 NYCRR § 614.7(d). In footnote 6 of its closing brief (p. 7), respondent contends that in noting that the plans produced by Avis at the hearing were deficient, the staff was attempting to "change the substance of these causes of action from 'no as built plans' to 'inadequate as built plans.'" However, staff's motion for order without hearing clearly sets forth the requirement that the drawing or as-built plans, *inter alia*, include a statement that the system has been installed in compliance with Part 614. Urda Aff., ¶¶ 26, 59, 107, 113, 117. Accordingly, I find that a penalty of $2000 is appropriate.

Because the respondent showed proof of having performed the cathodic protection testing but these results were not presented at the time of the inspection, I find that a penalty of $300 should be assigned. Hrg. Ex. 24; TR 261-263.

With respect to the violations concerning the shear valve, marking and labeling of fill port and underground tank respectively, Avis retained Alvin to address these deficiencies within a relatively short time of notification. Hrg. Exs. 21, 22, 23, 31; TR 254-259, 286-289. Therefore, I recommend that a penalty of $1400 be assessed for these violations based upon a $200 penalty for the failure to mark the fill port; a $1000 penalty for failure to install the shear valve; and a penalty of $200 for failure to label the underground storage tank.

With respect to the spill, Mr. Engle of Avis testified that "[f]rom what was witnessed, the spill was water only that it was cleaned up." TR 264. He represented that a photograph of the clean fill port was presented to DEC at the January 10, 2007 settlement conference. TR 265. However, his testimony is ambiguous as to whether he had personal knowledge of the nature of the spill. Ms. Zhune, who noted the spill during her visit, was unable to recall any details of the inspection at the hearing. TR 209-210. Presumably, as someone employed by the Department to conduct these inspections, she would be able to discern between petroleum and water. There was no evidence presented that a spill report was made regarding this discharge nor was there any evidence of any contamination or other environmental harm. Accordingly, I recommend a penalty of $2500 for failure to report this discharge.

West 76th Street

At this facility, staff determined based upon an inspection and review of Department records that the respondent had failed to properly identify the internal protection for Tank 002, failed to properly register Tank 2, and had not maintained a current and valid registration. Urda Aff. in support of motion for order without hearing, ¶¶ 60-62. In addition, staff found that the spill prevention equipment was improperly maintained and Avis had failed to reconcile inventory records. Id., ¶¶ 63-66. For these violations, staff is seeking $3000 for the failure to register the tank, $7,500 for failure to maintain the spill prevention equipment, and $7,500 for failure to properly maintain the inventory records.

At the June hearing, Mr. Engle produced the PBS registration that he testified was submitted to DEC on April 10, 2002. The forms specify that Tank 002 has a fiberglass liner (FRP) for internal protection. Hrg. Ex. 32; TR 290-292. In addition, Mr. Engle testified that until the proposed order on consent was received by the respondent, Avis was unaware that the Department had determined the registration was not in compliance with the regulations. TR 292-293. When this information was brought to the attention of Mr. Krimgold at the hearing, he speculated that "[i]t looks like an outdated form. Probably it was returned with a request to fill out the newer form." TR 342. Based upon Avis's production of the registration form and the staff's failure to confirm the violation, I do not recommend any penalty.

With respect to the spill prevention equipment, Avis did not contest that the test boot was not properly installed. TR 294-295. Mr. Engle testified that Avis employed Alvin to address

this violation and the test boot was fixed prior to January 10, 2007. TR 295. In its Penalty Calculation Chart (Hrg. Ex. 1), staff has this violation as not being cured (12/5/06 - 4/21/08 [the date of the motion for order without hearing]). Although staff did not acknowledge the remedy, I found Mr. Engle to be a credible witness and thus, I base my recommendation of a penalty of $3500 on his testimony regarding the repairs.

As for the inventory records, as noted above, this is a very serious violation that was persistent throughout the Avis facilities in question. Therefore, I endorse the staff's penalty of $7500.

East 54th Street

At this location, as a result of two visits a few days apart in January 2007, Department staff observed failure to color-code a fill port; failure to tightness test two underground tank and piping systems; failure to maintain records of annual cathodic protection testing for the two underground tank and piping systems; failure to properly describe tank and systems in its registration; and failure to reconcile inventory records. Falvey Aff., ¶¶ 8-10; Zhune Aff.,¶¶ 8-9. The staff is seeking penalties of $6000 for failure to properly register two tanks; $300 for failure to properly mark the fill port; $7500 for failure to maintain inventory records, $30,000 for failure to test two underground tank systems for tightness, and $1,500 for failure to maintain monitoring records for two cathodic protection systems. Hrg. Ex. 1, p. 2.

With respect to the failure to maintain monitoring records for the cathodic protection systems, through its witness Mr. Engle, Avis produced the annual compliance cathodic protection testing documentation from June 2006. TR 296-298; Hrg. Ex. 33. This documentation was on-site at the time of Department staff's visit according to Mr. Engle but was not produced to the staff at the time. TR 297. Accordingly, I recommend that a penalty of $500 be assessed.

As for the failure to maintain inventory records, I agree with staff's recommended penalty of $7500 based upon my conclusions with respect to the other similar violations discussed above.

Concerning the tightness testing and registration violations, at the hearing, Avis presented testimony and documentation to support its claim that the respondent was not required to tightness test because the two tanks were corrosion

resistant based upon their cathodic protection and leak detection. TR 315-330; Hrg. Exs. 4, 6, 37-39. According to Mr. Krimgold, the tanks were "unprotected" based upon 6 NYCRR § 612.1 because they were tanks which were retrofitted in 1997 with cathodic protection and therefore were required to be tested. TR 344-345. Mr. Krimgold admitted that the tanks in question had original impressed current, meaning that they had cathodic protection. TR 96. And, he also admitted that the staff was unclear what the leak detection system entailed. TR 100-101.

The respondent is of the opinion that since it has cathodic protection and in-tank leak detection, it is exempt from testing because the tanks qualify as Category C. TR 98, 327-331; Hrg. Exs. 4, 37-39; 6 NYCRR § 613.5(a)(1). It also appears that the tanks were originally installed with cathodic protection. Hrg. Ex. 37; TR 327-328.

At the hearing, through Avis's counsel, Mr. Engle explained that the RAM letter of August 11, 1997 (Hrg. Ex. 39) contained the testing results performed on the two underground steel storage tanks after they were upgraded to an impressed current cathodic protection system. TR 327-328. Mr. Engle testified that the DEC registration form did not provide an avenue for explaining the precise system that Avis had at this facility. TR 328-331.

In the respondent's closing brief, Avis contests the staff's testimony that the respondent's action to upgrade its tanks caused it to "lose" the Category C status. Respondent's Br., p. 12. Avis cites to the exemptions for tightness testing contained in 6 NYCRR §§ 613.5(a)(2)(iii)-(iv). As noted by the respondent, these regulations provide for exemptions for both those which are leak resistant and have a leak monitoring system and those that have systems installed in conformance with Part 614. I agree with the respondent that staff appears to be limiting the exemption to only those tanks that are installed with the anti-corrosive materials and leak monitoring system in contrast to the regulations. Respondent's Br., p. 12. In staff's closing brief, Mr. Urda points to the definition of unprotected tank in 6 NYCRR § 612.1(a)(30) that includes those that have been retrofitted with cathodic protection. Staff's Br., pp. 14-15. However, as proven by the respondent, the tanks in question were installed with cathodic protection and then upgraded rather than retrofitted.

The testimony of staff on these issues was quite confusing. Mr. Urda's statement "[t]his is precisely the type of information that Avis had an opportunity to present at the compliance

conferences * * *" (TR 103-104) leads me to believe that had this information been presented or heard earlier by the Department staff, it would have reconsidered these penalties. I understand the evidence presented by Avis to mean that these tanks were not presenting an environmental danger and that they were effectively maintained. Accordingly, I recommend that no penalty be assessed for these violations.

With respect to the fill port violation, the parties stipulated that the respondent cured this violation by no later than January 9, 2007. The penalty requested by staff is reasonable particularly in light of the fact that this violation occurred at a number of Avis's facilities. Therefore, I recommend that the respondent be ordered to pay a penalty of $300 for this violation.

West 43rd Street

Based upon the Department staff's findings of violations at this facility on January 9, 2007, the staff is seeking penalties of $300 for Respondent's failure to display its facility registration; $600 for the failure of Avis to mark two fill ports; $7500 for failure to maintain properly reconciled inventory records for its 4,000 gallon underground storage tank; $750 for failure to maintain annual monitoring records for the cathodic protection system on these premises; $22,500 for failure to report that the fill port contained a leak, spill or discharge; and $300 for failure to properly label the underground storage tank. Urda Aff.,¶¶ 24-29; Hrg. Ex. 1.

With the exception of the staff's request concerning the failure to report a discharge, failure to maintain monitoring records for cathodic protection system, and failure to label the underground storage tank, I recommend that the penalties be adopted by the Commissioner. The penalties are reasonable and appropriately reflect the magnitude of the violations and the respondent's response. As explained above, with respect to causes of action 25 (marking of fill ports) and 28 (discharge), the parties stipulated to the cure dates as noted on Hearing Exhibit 1.

With respect to the discharge violation, at the hearing, the respondent presented evidence that the cause of the discharge was the run-off from the nearby taxicab facility as a result of car washing. TR 267-269; Hrg. Ex. 25. To address this ongoing problem, Avis recently installed a new fill bucket with a sealable lid that would not permit water to enter it. TR 268-269, 270-271, 273-274; Hrg. Exs. 25, 26. Ms. Zhune's notice of

violation indicates a "spill in sump of fill port." See. Exhibit A annexed to Urda affirmation. As noted above, I must rely upon this PBS professional's ability to detect a petroleum spill and therefore, a penalty is appropriate. But because staff was not able to demonstrate any environmental harm resulting from this discharge and the respondent has taken appropriate steps to rectify the water inflow problem, I find that the staff's recommended penalty is too high. I recommend a penalty of $2500 for this violation.

During the hearing, Mr. Engle testified that the certificate of registration was in the West 43rd Street offices but had not been posted. TR 278. He stated that as soon as the notice of violation was brought to the respondent's attention, the certificate was posted. TR 278; Hrg. Ex. 27. The staff's requested penalty of $300 is reasonable.

At the hearing, Mr. Engle testified that the relevant piping at this location was fiberglass and the amended registration certificate reflected this status. TR 280-283; Hrg. Ex. 29. Department staff had relied solely on the facility information report to determine this violation because the respondent's staff would not open the sump. TR 205-206. Ms. Zhune answered in the negative to the respondent's counsel's question whether fiberglass piping requires a cathodic protection test. TR 207. As no tests were required because of the fiberglass and thus no environmental harm was associated with the violation, I do not find a penalty appropriate for this violation.

Similarly, Mr. Engle testified at the hearing that the tank tag for the underground storage tank was always under the lid of the tank. TR 284-285; 30. While Mr. Krimgold contradicted Mr. Engle's testimony that this information was provided by Avis at the compliance conference in February 2007, I don't find that sufficient grounds to undermine the evidence presented by Avis. Accordingly, I do not find a penalty appropriate for this violation.

West 54th Street

At this facility, based upon its observations on January 9, 2007, for the violations of failing to keep properly reconciled records, the staff is seeking a penalty of $7500; for failure to maintain monitoring records for three cathodic protection systems, staff is seeking a penalty of $2,250; and for failure to maintain as-built plans for underground tanks and piping, staff is seeking a penalty of $3,000.

With respect to the failure to keep reconciled records, as set forth above, I concur with the staff's request for a $7500 penalty.

At the hearing, Avis produced a letter dated June 28, 2006 from RAM that sets forth its results of the corrosion control/cathodic protection inspection and survey of the three underground steel storage tanks at this facility. TR 299-300; Hrg. Ex. 34. Mr. Engle testified that while the annual testing results were sent by Avis headquarters to the specific site, the Avis personnel did not produce them to the inspector. TR 300. Based upon this information, I find a penalty of $750 is appropriate.

As for the failure to maintain as-built plans, the respondent did not produce anything at the hearing to mitigate the violation.[14] Accordingly, I accept the staff's recommendation of $3000 for this violation.

In the decretal portion of Mr. Urda's affidavit in support of its motion for order without hearing, he requests that the respondent "complete closure activities for Spill 07066702 at the West 54th Street facility, or promptly notify Department staff of any additional delays." Urda Aff., p. 26. However, there are no causes of action in the body of the affidavit that describe any violations relating to a spill at this site. Nor is there a request by staff for any penalties associated with this spill. Accordingly, I cannot recommend any appropriate penalty or injunctive relief.

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[14] In footnote 5 of its brief (p.7), Avis states that due to the "confusion caused" by the Department's objection to admit the plans offered by the respondent during the hearing, the plans/drawings for West 54th Street were "inadvertently neither marked or admitted." The respondent provides that in Exhibit 13 (Avis's chart regarding the causes of action), the information regarding cause of action 32 indicates that the plans for this facility were offered at the March 5, 2007 settlement conference. The staff has not acknowledged the validity of any documents offered at these conferences and it is too late to "open the evidence" as Avis proposes as an alternative. The hearing was concluded on August 5, 2008 and shortly afterwards, I provided the parties with an exhibit list. The respondent has had months to take the appropriate steps to offer this additional record. I have no basis to ascertain whether these plans meet the requirements of Part 614 and decline to re-open the hearing at this late stage.

East 90th Street

The Department staff seeks $300 from the respondent for failure to display the facility registration certificate; $7500 for failure to properly maintain inventory records; and $3000 for failure to maintain as-built plans for underground tanks and piping.

At the hearing, Mr. Engle testified that Avis gave direction to post the certificate upon notification of the violation and that he personally visited the location and took a photograph of the certificate on January 29, 2008. TR 303; Hrg. Ex. 35. Staff's request for a penalty of $300 for this violation is appropriate.

Avis also produced the as-built plans for this facility at the hearing. Hrg. Ex. 19; TR 245. Mr. Engle testified as he did with respect to the other plans presented by Avis that these plans were maintained at the company's main office in New Jersey. The staff disputes that these plans are in compliance with the regulations and specifically noted that 6 NYCRR § 614.7(d) requires that the plans include "a statement by the installer that the system has been installed in compliance with the New York State Standards for New and Substantially Modified Petroleum Storage Facilities, 6 NYCRR Part 614." Accordingly, I find a penalty of $2000 appropriate for this violation.

With respect to the respondent's failure to maintain inventory records, based upon the stipulation the parties entered into at the hearing concerning the respondent's presentation of noncompliant inventory records at the February 2008 compliance conference, I recommend that staff's penalty request of $7500 be reduced to $5000. TR 334, Hrg. Ex. 40.

East 11th Street

Staff proposed penalties of $7500 for failure to maintain reconciled records and $3000 for failure to maintain as-built plans. Based upon my findings as noted above regarding the failure to properly reconcile records, I conclude that staff's request for a $7500 penalty for this violation is appropriate. With respect to the as-built plans, at the hearing, the respondent presented the as-built plans for this facility that contain the statement that Part 614 must be complied with. Hrg. Ex. 20, TR 248-249. Mr. Engle testified that these plans were maintained in Avis' headquarters in New Jersey. TR 248. Accordingly, I do not find a basis for a penalty with respect to this violation.

Injunctive Relief

In addition to the payable penalties noted above, it is essential that the respondent come into compliance with the applicable regulations to protect against the possibility of spills. Accordingly, I adopt the staff requests, as applicable:

- within 30 days of the service of the order in this matter the respondent shall submit 30 days of properly reconciled inventory records for the East 43rd Street facility; West 76th Street facility; East 54th Street facility; West 43rd Street facility; West 54th Street facility; East 11th Street facility; and East 90th Street facility;

- within 30 days of the service of the order in this matter, the respondent shall submit a current and correct PBS registration for the West 76th Street facility;

- within 30 days of the service of the order in this matter and with assistance of Department staff, the respondent shall submit a current and correct PBS registration for the East 54th Street facility.

- within 30 days of the service of the order in this matter, the respondent shall submit compliant as built plans for the East 64th Street, West 54th Street and East 90th Street facilities.

CONCLUSION

While I determined that the respondent was in default and thus liable for the violations, I also determined that the evidence that was produced at the hearing through testimony and documentary evidence to establish compliance was appropriate in some situations to mitigate or eliminate the penalties proposed by Department staff. At various points, the Departments staff's testimony in support of its penalty proposal was vague and contradictory. For example, I found it difficult to discern the distinctions between several of the aggravating factors in support of the penalties such as duration of violation and continuing violation and intentional violation, failure to correct violation known to owner/operator and non-compliance with NOV. See, *DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy - Penalty Schedule;* TR 57-62, 131-135, 191-193.

As noted by respondent's counsel during the hearing, the staff proposed the same penalties for the same violations that were cured within a short time and those that persisted for many days. For example, a failure to mark fill port for 11 days versus failure to mark fill port for 518 days garnered the same penalty of $300. Hrg. Ex. 1; TR 120-121, 128-129, 151, 168-169.

And, as noted on cross-examination of Mr. Krimgold, it does not appear that staff applied the appropriate mitigating factors set forth in the *Penalty Schedule.* TR 135-140.

I also had difficulty with the spill contentions as there was no specific Departmental testimony regarding the nature of these discharges while the respondent presented evidence of relatively benign conditions. See, *e.g.*, TR 161-170, 211, 264-267. While Mr. Krimgold testified that water in the PBS equipment did not constitute good management, that is not the contention that the violations set forth in staff's pleadings are based upon. TR 339-341. 345-346.

There was a discrepancy in the testimony of staff and Mr. Engle as to the presentation of various documents such as the as-built plans and other records purporting to demonstrate compliance by Avis at the compliance conferences. TR 225-226, 236, 244, 247-248, 294-295, 301, 303, 307-308, 336, 338-339, 341, 342-343. I have no definitive conclusions as to why this is the case. The witnesses all appeared credible. However, as noted by the DEC witnesses, the Department has thousands of these cases and without field notes or some contemporaneous memorialization of the specific facts, it would be difficult to confirm the specific facts related to the condition of a fill port, a spill, or all the documents presented at a particular meeting. I do not place any emphasis on whether or not the particular records were produced at the compliance conferences or not. The important issue for calculating penalties is to determine whether there is proof of compliance and how long it took for the respondent to take the appropriate action.

Mr. Brooks also stressed at the hearing and in the respondent's closing brief with respect to certain violations that the respondent had no prior notice - before service of the motion for order without hearing - of a particular violation. Some violations were not contained within an NOV, so respondent was advised of them for the first time at the compliance conference. TR 147, 149, 155-156, 185. With respect to a number of the violations, it is apparent that staff found these after inspections when it reviewed records back at DEC's offices. TR 65, 80-83, 146.

I agree with Mr. Urda's statement at the hearing that there is no requirement in law or regulation that DEC staff set forth every violation in an NOV. In its closing brief (p. 14), the respondent asserts that "*DEE-22* interprets the PBS regulations as **requiring** the issuance and service of an NOV." [emphasis included.] This is a misinterpretation of the policy. Staff are directed to serve an NOV upon observation of a violation. However, in the facts before me, after inspectors made their observations and served Avis personnel with NOVs reflecting violations observed, further research of Department records revealed more violations. See, Falvey Aff, ¶ 5, annexed as Ex. A to Urda Aff. The NOV itself notes that "the inspection may not have disclosed all violations that exist at your site. You are responsible for ensuring that the entire facility is in compliance with applicable requirements." See, NOV annexed to Falvey Aff., Ex. A to Urda Aff. Accordingly, it was appropriate for the Department staff to address these violations at compliance conferences and/or in their enforcement pleadings.

Notice of violation is required and was given to the respondent in the notice of motion for order without hearing. The parties were given ample opportunity to prepare for the hearing and the date of the hearing was chosen based upon the mutual availability of both Avis personnel and Department staff.

Mr. Brooks also raised concerns regarding the "bundling" of violations. He contended that the Department had a duty to administer the violations at each facility separately from the other facilities even though they are all owned by the same company. TR 141. This would be an inefficient manner of handling violations that are the responsibility of one respondent - multiple proceedings, meetings, complaints. Moreover, as noted by the Department's *PBS Penalty Schedule*, a multiple facility owner is an aggravating factor. This is appropriate because such owners have the potential to cause more harm through noncompliant facilities and also the potential to have more resources in terms of expertise and financial means.

Citing to Vito v. Jorling, 197 AD2d 822, 824 (3d Dep't 1993), the respondent also argues that my decision to sustain the Department staff's objection to respondent's admission of the draft consent order into the record undermines staff's obligation to "prove the reasonableness of the proposed penalty." Respondent Br., p. 18. In that matter, the Appellate Division set aside the penalty of almost $60,000 because of the lack of any information in the record with respect to the staff's penalty calculations and the huge variance between the $500 settlement offer and the Commissioner's penalty. The facts before me are at

variance with those in Vito. While the staff may not have always articulated well its reasoning for the penalty at the hearing, it did provide the framework in its motion papers and supporting documentation as well as in Hrg. Ex. 1.

I have carefully reviewed the entire record with consideration for the appropriate mitigation of the penalty based upon the respondent's evidence. I believe this report provides a clear rationale for the penalty and the introduction of the order on consent into this record is unnecessary and inappropriate. Because the respondent failed to accept the settlement terms of the staff within the timeframe that staff provided, the offer was withdrawn. A penalty that is assigned after a hearing should reflect the expenditure of State resources as a result of that adjudication. Otherwise, there would not be an impetus for respondents to settle.

I have also considered the other arguments made by counsel (*e.g.,* disagreements regarding number and size of tanks, the respondent's suggested penalties and request for attorney's fees, the so-called *de minimis* nature of various violations, and the poor quality of the respondent's documentation) and have found them to be unavailing.

I have concluded based upon these considerations, the Civil Penalty Policy as well as the *DEE-22 PBS Inspection Policy* and *Penalty Schedule,* and the specific violations and facts set forth above that a penalty of $74,150 is appropriate. In addition, within thirty days of the service of the Commissioner's order, the respondent should be required to submit properly reconciled inventory records for these facilities, correct PBS registration applications for the West 76th Street and the East 54th Street facilities, and compliant as-built plans for the East 64th Street, West 54th Street and East 90th Street facilities.

RECOMMENDATION

The Commissioner should issue an order requiring Avis to pay a penalty of $74,150, to submit reconciled inventory records for all the facilities at issue in this matter, to submit correct registration applications for the West 76th Street and East 54th Street facilities and to submit compliant as-built plans for the East 64th Street, West 54th Street, and East 90th Street facilities.

Albany, New York
December 23, 2008