STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 19 of the Environmental Conservation Law, and Parts 201, 613, and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

DEC Case No. R2-20080623-319

- by -

Benhim Enterprises, Inc.,

Respondent.

This matter involves the administrative enforcement of alleged violations of New York's petroleum bulk storage (PBS) and air quality regulations at a PBS facility (#2-347272) located at 75-09 Northern Boulevard, Queens, New York (facility) and owned by respondent Benhim Enterprises, Inc.

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding against respondent by service of a notice of motion for order without hearing in lieu of complaint, dated July 15, 2010. The motion for order without hearing set forth twelve (12) causes of action which alleged twenty-nine (29) separate violations of the Department's PBS and air regulations arising from respondent's ownership and operation of the PBS tanks at the facility.

Respondent filed (a) an affidavit in opposition to the motion for order without hearing signed by Aftab Hussain, the tenant at the facility, and (b) a response signed by respondent's counsel, Ki Young P. Choe, Esq.

The matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached summary report on motion for order without hearing. I adopt ALJ Garlick's report as my decision in this matter, subject to the following comments.

The record establishes that respondent Benhim Enterprises, Inc., owns a PBS facility at 75-09 Northern Boulevard, Queens, New

York, and has committed twenty-six (26) violations of the Department's PBS and air regulations at the facility. Each of those violations involves obligations of an owner of a PBS facility.

The three remaining violations (which are set forth in staff's seventh cause of action) involve the failure to properly reconcile inventory monitoring records for the underground storage tanks at the facility. As set forth in 6 NYCRR 613.4, it is the operator of a facility who is responsible for complying with this reconciliation requirement. Based on this record, it cannot be determined whether respondent was the operator of the facility at the time that the three violations were allegedly committed and, accordingly, the liability of Benhim Enterprises, Inc., for the three remaining violations cannot be determined on this motion. The ALJ is directed to schedule a hearing regarding the alleged violations in staff's seventh cause of action, assuming that Department staff wishes to pursue that remaining cause of action.

The ALJ determined that it was reasonable to conclude that respondent had corrected the violations cited in the second, third, fourth, fifth, sixth, eighth, tenth, and twelfth causes of action. The ALJ, however, is recommending that respondent provide additional photographic or other evidence to the Department with respect to those violations. Based upon my review of the record, including the invoices and receipts that have been provided by respondent's attorney, I conclude that the information that respondent has produced is sufficient to make a prima facie showing that the corrections were made (see Matter of Tractor Supply, Decision and Order of the Commissioner, August 8, 2008, at 2-3), and no further documentation is required at this time. Staff's assertions to the contrary do not raise a triable issue of fact.

The ALJ concluded that the violations cited in the first, ninth and eleventh causes of action had not been corrected by respondent, and I concur. Accordingly, I am directing that respondent provide proof to the Department that these violations have been corrected within thirty (30) days of the service of this order upon respondent.

Department staff requested a civil penalty in the amount of $164,400. The ALJ recalculated the civil penalty and is recommending a penalty of seventy three thousand seven hundred dollars ($73,700).

Pursuant to the Environmental Conservation Law (ECL), each violation of the PBS regulations is subject to a civil penalty of up to thirty-seven thousand five hundred dollars ($37,500) per day (see ECL 71-1929[1]). With respect to the violations of the air

regulations, a first violation is subject to a penalty of not less than three hundred seventy-five dollars ($375) nor more than fifteen thousand dollars ($15,000), and, for each day the violation continues, an additional penalty of not to exceed fifteen thousand dollars may be assessed (see ECL 71-2103[1]).

The record demonstrates that, in light of the number, duration, and seriousness of the violations of the State's PBS and air regulations, a substantial civil penalty is warranted and one higher than the penalty recommended in the summary report. I conclude that the civil penalty recommended in the ALJ's summary report should be increased by $15,000, that is, from $73,700 to $88,700. This increased amount is well within the penalties authorized by the ECL.

I am, however, suspending the additional $15,000 in penalty, contingent upon respondent's compliance with the remedial measures set forth in this order and timely payment of the unsuspended portion of the civil penalty ($73,700). These remedial measures include (1) submitting to Department staff a corrected petroleum bulk storage application, and (2) submitting proof, in a form acceptable to Department staff, that (a) monthly inspections of the aboveground tank are being performed and (b) site drawings or as-built plans showing the size and location of new underground storage tanks and piping systems are being maintained. These remedial measures are authorized and warranted.

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

I. Department staff's motion for order without hearing is granted in part.

II. Respondent Benhim Enterprises, Inc., is adjudged to have

A. failed to register the 275-gallon aboveground storage tank and failed to properly register the 10,000-gallon underground diesel fuel tank at the facility, in violation of 6 NYCRR 612.2;

B. failed to properly mark the fill port for the 10,000-gallon underground diesel fuel tank at the facility, in violation of 6 NYCRR 613.3(b)(1);

C. failed to properly equip each of the three pressurized motor fuel dispensers at the facility with shear valves in the supply lines, in violation of 6 NYCRR 613.3(c)(1);

D. failed to properly install a gauge at the facility to accurately show the level of product in the aboveground storage tank, in violation of 6 NYCRR 613.3(c)(3)(i);

E. failed to mark the design capacity, working capacity, and identification number on the aboveground storage tank at the facility and at its tank gauge, in violation of 6 NYCCR 613.3(c)(3)(ii);

F. failed to properly maintain spill prevention equipment, including three tank sumps which contained water, three dispenser sumps which contained water, and one dispenser sump which contained a discharge of petroleum, in violation of 6 NYCRR 613.3(d);

G. failed to properly position liquid sensors in the sumps of the three underground storage tanks at the facility, in violation of 6 NYCRR 613.5(b)(3);

H. failed to perform monthly inspections of the aboveground storage tank at the facility, in violation of 6 NYCRR 613.6(a);

I. failed to affix labels with required information to the three underground storage tank fill ports at the facility, in violation of 6 NYCRR 614.3(a)(2);

J. failed to maintain site drawings or as-built plans showing the size and location of new underground storage tanks and piping systems, in violation of 6 NYCRR 614.7(d); and

K. failed to seal two vapor fill port caps and one dispenser hose face plate at the facility, in violation of 6 NYCRR 230.2(f).

III. Respondent Benhim Enterprises, Inc., is hereby assessed a civil penalty in the amount of eighty-eight thousand seven hundred dollars ($88,700), of which fifteen thousand dollars ($15,000) is suspended on condition that respondent

A. pays the unsuspended portion of the civil penalty (seventy-three thousand seven hundred dollars [$73,700]) within thirty (30) days after service of this order upon respondent; and

B. complies with the remedial measures set forth in paragraph IV of this order.

Payment of the unsuspended portion of the penalty ($73,700 dollars) shall be made in the form of a cashier's check, certified check, or money order made payable to the order of the "New York State Department of Environmental Conservation" and shall be delivered by certified mail, overnight delivery, or hand delivery to the Department of Environmental Conservation at the following address:

New York State Department of Environmental Conservation
Division of Legal Affairs, Region 2 Office
47-40 21st Street
Long Island City, New York 11101-5407
ATTN: John K Urda, Esq.
Re: File No. R2-20080623-319

If respondent fails to timely pay the unsuspended portion of the civil penalty or fails to comply with the remedial measures set forth in paragraph IV of this order, the suspended portion of the penalty shall also become immediately due and payable, and is to be submitted in the same form and to the same address as the unsuspended portion of the penalty.

IV. Within thirty (30) days of the service of this order upon respondent, respondent shall

A. submit to Department staff a corrected petroleum bulk storage application that lists all tanks located at the facility, correctly identifies the product stored in each tank, and correctly indicates the name of the operator of the facility; and

B. submit proof, in a form acceptable to Department staff,

1. that monthly inspections of the aboveground storage tank are being performed; and

2. that site drawings or as-built plans showing the size and location of new underground storage tanks and piping systems are being maintained.

V. The matter is remanded to Administrative Law Judge P. Nicholas Garlick for further proceedings consistent with this order.

VI. The provisions, terms, and conditions of this order shall bind respondent Benhim Enterprises, Inc., and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Louis A. Alexander
Assistant Commissioner[1]

Dated: December 31, 2010
Albany, New York

[1] By memorandum dated December 30, 2010, Acting Commissioner Peter M. Iwanowicz delegated decision making authority in this matter to Louis Alexander, Assistant Commissioner for Hearings and Mediation Services. A copy of that memorandum is being sent together with this order.

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

In the Matter

-of-

the Alleged Violations of Articles 17 and 19 of the Environmental Conservation Law and Title 6, Parts 201, 613, and 614 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

-by-

BENHIM ENTERPRISES, INC.,

Respondent.

DEC No. R2-20080623-319

SUMMARY REPORT ON MOTION FOR ORDER WITHOUT HEARING

/s/

_____

P. Nicholas Garlick
Administrative Law Judge

December 31, 2010

SUMMARY

This report addresses a motion for order without hearing bought by the Staff of the New York State Department of Environmental Conservation ("DEC Staff"), which is the administrative equivalent of a motion for summary judgment. In its motion, DEC Staff alleges twelve causes of action and twenty-nine individual violations involving the ownership and operation of a gas station located at 75-09 Northern Boulevard, Queens, New York (the "facility"). DEC Staff's motion was opposed by Benhim Enterprises, Inc. ("respondent"). Based on the papers in the record, DEC Staff has met its burden of proof and demonstrated that the respondent is liable for eleven of the twelve causes of action alleged and for 26 of the 29 individual violations. This report recommends the Commissioner issue an order finding liability, imposing a payable civil penalty of $73,700, and directing the respondent to provide proof that the violations are cured within 30 days of service of the order. The Commissioner should also remand the remaining cause of action for a hearing to determine if the respondent, in addition to being the owner, is the operator of the facility.

PROCEEDINGS

By motion for order without hearing in lieu of complaint dated July 15, 2010, DEC Staff commenced this administrative enforcement action pursuant to 6 NYCRR 622.14. DEC Staff's papers included: (1) a notice of motion; (2) the affirmation of DEC Staff attorney John K. Urda, Esq.; and (3) the affidavit of DEC Staff engineer Moses Ajoku. Attached to Mr. Urda's affirmation were: (1) the facility's Petroleum Bulk Storage Program Facility Information Report (PBS facility number 2-347272); (2) an Order on Consent (case #2-347272) executed on December 1, 2006 between DEC Staff and the respondent for earlier violations at the facility; (3) an Order of the Commissioner dated January 25, 2008 (case # R2-20050107-17) involving a second facility, located at 175-14 Horace Harding Expressway, Queens, New York, which named the President of Benhim Enterprises, Inc., Mr. Raphy Benaim, as a respondent; (4) a Stipulation, executed on May 26, 2009, involving an oil spill at the second facility (spill # 01-09599, case #R2-20090330-185); and (5) an invoice from Island Pump & Tank dated June 24, 2008 purporting to show repairs to the facility. Attached to Mr. Ajoku's affidavit was a copy of a June 4, 2008 Notice of Violation ("NOV") involving the alleged violations at the facility which are at issue in this case.

After requesting and receiving additional time to respond, Benhim Enterprises, Inc. submitted its response. The response included: (1) an affidavit of Aftab Hussain, the tenant at the facility; and (2) the response authored by the respondent's attorney, Ki Young P. Choe, Esq. Attached to the response were: (1) a copy of the facility's registration as a gasoline dispensing site with the New York City Department of Environmental Protection ("NYCDEP"); (2) three invoices from Island Pump & Tank dated June 24, 2008, June 26, 2008, and June 27, 2008; (3) an invoice from Feliks & Son Storage Tank Co. dated February 23, 2009; (4) inventory reconciliation records for tanks at the facility for the months of June, July, and August 2008; (5) an invoice dated July 21, 2010 from Alvin Petroleum Systems, Inc.; and (6) a copy of a proposal dated August 26, 2010 from Walter T. Gorman, P.E., P.C.

By letter dated October 4, 2010, DEC Staff requested an opportunity to submit an additional filing pursuant to 6 NYCRR 622.6(c)(3). This request was granted by letter dated October 14, 2010. DEC Staff's filing was received on November 1, 2010 and consisted of a reply affirmation by Mr. Urda and three attachments: (1) another copy of DEC's Facility Information Report; (2) a copy of the Petroleum Bulk Storage Application for the facility dated October 6, 2008; and (3) a copy of a United States Postal Service Track and Confirm receipt showing the delivery of an item (which Mr. Urda identifies as a cover letter and a proposed Order on Consent) on May 8, 2010 and a printout from the New York State Department of State's ("NYSDOS") website showing the respondent to be a duly registered corporation with an address for service of process at 75-15 Northern Boulevard, Jackson Heights, NY 11372.

DISCUSSION

DEC Staff alleges twenty-nine separate violations in twelve causes of action in its motion for order without hearing. All these alleged violations were discovered during an inspection of the facility conducted by DEC Staff member Ajoku on June 4, 2008.

In its papers, respondent Benhim Enterprises, Inc. does not dispute the fact that the violations occurred. Rather, the respondent claims that the violations were corrected or are in the process of being corrected and requests that this proceeding be dismissed, or alternatively requests that minimal penalties

be imposed by reason of the *de minimis* nature of the violations. The respondent does take issue with several statements made in DEC Staff's papers and these are addressed in this report where appropriate.

There is no dispute that the respondent owns the facility. However, a material question of fact exists regarding whether Benhim Enterprises, Inc. is the "operator" of the facility, as that term is defined in 6 NYCRR 612.1(c)(16). DEC Staff includes with its papers copies of the respondent's Petroleum Bulk Storage Application (dated October 6, 2008) and the PBS Program Facility Information Sheet which indicate that the respondent is the operator of the facility. However, the respondent produces the affidavit of Aftab Hussain who claims to be the tenant of the facility and a copy of an application for registration of a gasoline dispensing site submitted to the New York City Department of Environmental Protection which indicates that the operator of the site is Abid Zulfiqar. Based on these documents, it is impossible at this time to determine whether or not the respondent is the operator of the facility.

Liability

The Commissioner set forth the standards to be used in evaluating a motion for order without hearing in Matter of Loccaparra (Decision and Order, June 16, 2003).

> Staff brings this motion for an order without hearing pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party.
>
> The moving party on a summary judgment motion has the burden of establishing "his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b])."[1] The moving party carries this burden by

[1] Friends of Animals v Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979).

> submitting evidence sufficient to demonstrate the absence of any material issues of fact.[2] The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof.[3] The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.[4]

(id. At 3-4).

In its motion for order without hearing, DEC Staff alleges twelve causes of action involving twenty-nine separate violations. All these violation were noted on a June 4, 2008 inspection of the facility. In its response, the respondent does not deny that any of the alleged violations occurred. Each cause of action is discussed below.

First Cause of Action. In its first cause of action, DEC Staff alleges two violations of 6 NYCRR 612.2 at the facility. Specifically, DEC Staff alleges that the respondent failed to register a 275 gallon aboveground storage tank (AST) located at the site and had incorrectly registered a 10,000 gallon underground storage tank (UST) by registering it as containing "gasoline/ethanol" when, in fact, the tank contained diesel fuel.

In its response, respondent's counsel does not address the alleged violation involving the failure to register the 275 gallon AST. With respect to the alleged violation involving the mis-registration of the contents of one of the 10,000 gallon USTs, the respondent claims this to be an inadvertent clerical error.

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[2] See Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986).

[3] See Hanson v Ontario Milk Producers Coop., Inc., 58 Misc 2d 138, 141-142 (Sup Ct, Oswego County 1968).

[4] See Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 (1975).

Owners of petroleum storage facilities with a capacity over 1,100 gallons must register the facility with the department (612.2(a)). Obviously, the information included on a registration must be accurate.

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed the 275 gallon aboveground storage tank, which was being used for the storage of waste oil. This tank is not included on the facility's PBS registration. Since the respondent does not address this alleged violation, DEC Staff has proven a violation of 612.2. With respect to the second violation, the respondent acknowledges that one tank is used to store diesel fuel and that the facility's registration does not accurately reflect this fact. The respondent argues that this was an inadvertent clerical error. Based on this, DEC Staff has proven a second violation of 612.2. Respondent includes with its papers a copy of the facility's registration with NYC DEP, which correctly reports the tank as containing diesel.

Second Cause of Action. In its second cause of action, DEC Staff alleges one violation of 6 NYCRR 613.3(b)(1). Specifically, DEC Staff alleges that the respondent failed to properly mark the fill port of one of the 10,000 gallon USTs at the facility.

In its response, respondent's counsel does not dispute that this violation occurred. Counsel asserts that this violation was addressed by the tenant at the facility and has been corrected.

The owner or operator of a facility must permanently mark all fill ports to identify the product inside the tank (613.3(b)(1)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that the fill port for the diesel tank was not properly color coded. Based on this evidence, DEC Staff has proven a violation of 613.3(b)(1).

Third Cause of Action. In its third cause of action, DEC Staff alleges three violations of 6 NYCRR 613.3(c)(1). Specifically, DEC Staff alleges that the respondent failed to equip each of

three pressurized motor fuel dispensers with shear valves in the supply lines.

In its response, respondent's counsel does not dispute that this violation occurred. Counsel asserts that this violation was addressed by the tenant at the facility and has been corrected.

The owner must install on all dispensers of motor fuel under pressure from a remote pumping system, a shear valve which is located in the supply line at the inlet of the dispenser (613.3(c)(1)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that shear valves were not installed on three motor fuel dispensers. Based on this evidence, DEC Staff has proven three violations of 613.3(c)(1).

Fourth Cause of Action. In its fourth cause of action, DEC Staff alleges one violation of 6 NYCRR 613.3(c)(3)(i). Specifically, DEC Staff alleges that the respondent failed to properly install a gauge to accurately show the level of product in the AST.

In its response, respondent's counsel does not dispute that this violation occurred. Counsel asserts that this violation was addressed by the tenant at the facility and has been corrected.

The owner of a facility must install on all petroleum tanks a gauge which accurately shows the level of product in the tank (613.3(c)(3)(i)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that there was no gauge installed on the above ground tank at the facility. Based on this evidence, DEC Staff has proven a violation of 613.3(c)(3)(i).

Fifth Cause of Action. In its fifth cause of action, DEC Staff alleges one violation of 6 NYCRR 613.3(c)(3)(ii). Specifically, DEC Staff alleges that the respondent failed to mark the AST design capacity, working capacity and identification number both on the tank and at the tank gauge.

In its response, respondent's counsel does not dispute that this violation occurred. Counsel asserts that this violation was addressed by the tenant at the facility and has been corrected.

The owner of a facility must clearly mark on the tank and at the gauge the design capacity, working capacity and identification number of the tank (613.3(c)(3)(ii)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that the AST was not properly labeled. Based on this evidence, DEC Staff has proven a violation of 613.3(c)(3)(ii).

Sixth Cause of Action. In its sixth cause of action, DEC Staff alleges seven violations of 6 NYCRR 613.3(d). Specifically, DEC Staff alleges that the respondent failed to properly maintain three tank sumps and three dispenser sumps, all of which contained water at the time of the inspection. The seventh violation involves the failure to maintain one of the dispenser sumps which contained a discharge of petroleum, when inspected.

In its response, respondent's counsel does not dispute that these violation occurred. Counsel asserts that these violations were addressed by the tenant at the facility and have been corrected.

The owner or operator of a facility must keep all gauges, valves and other equipment for spill prevention in good working order (613.3(d)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that the facility had failed to maintain three underground tank sumps and three dispenser sumps by allowing water to accumulate in the sumps. He also observed a failure to maintain one sump by allowing petroleum to accumulate. Based on this evidence, DEC Staff has proven seven violations of 613.3(d).

Seventh Cause of Action. In its seventh cause of action, DEC Staff alleges three violations of 6 NYCRR 613.4. Specifically, DEC Staff alleges that the respondent failed to properly reconcile inventory monitoring records for the three registered 10,000 gallon USTs at the facility.

In its response, respondent's counsel does not dispute that the inventory records could not be located at the facility during the inspection, but he does attach them to his response.

Operators of facilities must keep daily inventory records for the purpose of detecting leaks and reconciliation of records must be kept current (613.4(a)). These records must be maintained and made available for department inspection for a period of not less than five years (613.4(c)(1)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that the facility had failed to properly keep inventory records for the purpose of leak detection.

As discussed above, DEC Staff has not proven that the respondent is the operator of the facility. It is true that in the consent order dated December 1, 2006, the respondent admitted to this same violation, indicating it was the operator. It is also true that in its application for a PBS license dated October 6, 2008, the respondent admitted it was the operator. However, on the application for a NYCDEP registration as a gasoline dispensing site that was approved on September 9, 2008, a different operator is identified, Abid Zulfiqar. In addition, the respondent's papers include an affidavit of Aftab Hussain, who swears he is the tenant at the facility. Thus, it is impossible to conclude, without further inquiry, whether the respondent remains the operator of the facility. Accordingly, a question of fact remains as to the allegations in the seventh cause of action and this cause of action should be remanded for a hearing to develop evidence on this matter.

Eighth Cause of Action. In its eighth cause of action, DEC Staff alleges three violations of 6 NYCRR 613.5(b)(3). Specifically, DEC Staff alleges that the respondent failed to properly position the liquid sensors in the sumps of each of the three USTs, rendering each sensor incapable of detecting a leak in the sump.

In its response, respondent's counsel does not dispute that this violation occurred. Counsel asserts that this violation was addressed by the tenant at the facility and has been corrected.

The owner or operator must monitor for traces of petroleum at least once per week. All monitoring systems must be inspected monthly. Monitoring systems must be kept in proper working order (613.5(b)(3)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that the leak monitoring systems for the three 10,000 gallon USTs were not in proper working order. Specifically, he noted that the liquid detection sensors in each of the three tank sumps were improperly placed and thereby rendered non-functional. Based on this evidence, DEC Staff has proven three violations of 613.5(b)(3).

Ninth Cause of Action. In its ninth cause of action, DEC Staff alleges one violation of 6 NYCRR 613.6(a). Specifically, DEC Staff alleges that the respondent failed to perform monthly inspections of the AST.

In its response, respondent's counsel concedes liability and states that the respondent will promptly take the steps necessary to correct the violation.

The owner or operator of a facility must inspect above ground storage facilities (613.6(a)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that the AST had not been inspected on a monthly basis and recorded this information on the Notice of Violation. Based on this evidence and the respondent's admission, DEC Staff has proven a violation of 613.6(a).

Tenth Cause of Action. In its tenth cause of action, DEC Staff alleges three violations of 6 NYCRR 614.3(a)(2). Specifically, DEC Staff alleges that the respondent failed to affix to the three UST fill ports at the facility, labels containing required information.

In its response, respondent's counsel does not dispute that this violation occurred. Counsel asserts that this violation was addressed by the tenant at the facility and has been corrected.

All new USTs used in New York State must bear a permanent stencil, label or plate which contains certain required information, including the date of installation (614.3(a)(2)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he observed that the USTs were not properly labeled. Based on this evidence, DEC Staff has proven three violations of 613.2(a)(2).

Eleventh Cause of Action. In its eleventh cause of action, DEC Staff alleges one violation of 6 NYCRR 614.7(d). Specifically, DEC Staff alleges that the respondent failed to maintain site drawings or as-built plans showing the size and location of the USTs and piping systems at the facility.

In its response, respondent's counsel does not dispute that this violation occurred. Counsel asserts that this violation is being addressed and that the respondent is in the process of securing the necessary plans.

The owner of a facility must maintain an accurate drawing or as-built plans which show the size and location of any new UST and piping system (614.7(d)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he noted that the facility failed to maintain as-built drawings of the three USTs and piping system, which, according to Department records, were installed on November 1, 1998. Based on this evidence, DEC Staff has proven a violation of 614.7(d).

Twelfth Cause of Action. In its twelfth cause of action, DEC Staff alleges three violations of 6 NYCRR 230.2(f). Specifically, DEC Staff alleges that the respondent failed to seal two vapor fill port caps and one dispenser hose face plate at the facility.

In its response, respondent's counsel does not dispute that this violation occurred. Counsel asserts that this violation was addressed by the tenant at the facility.

Owners and/or operators of gasoline storage tanks must install and maintain necessary Stage I and Stage II vapor recovery systems (230.2(f)).

In his affidavit, DEC Staff engineer Ajoku states that during his June 4, 2008 inspection of the facility, he noted that the Stage I and Stage II vapor recovery systems were not properly maintained. Specifically, the vapor-tight seals on two fill port caps and one dispenser hose face plate were cracked. Based on this evidence, DEC Staff has proven three violations of 230.2(f).

Civil Penalty

In its motion, DEC Staff requests the Commissioner issue an order which includes a total payable civil penalty of $164,400 and directs that certain corrective action be undertaken immediately. The respondent requests a minimal penalty or no penalty due to the *de minimis* nature of the violations. Respondent also claims that all the violations have been or are in the process of being cured.

DEC Staff's requested penalty is arrived at through the following computation:

Cause of Action	Number of Violations	Amount requested per violation	Total Requested
1	2	$6,000	$12,000
2	1	$600	$600
3	3	$3,000	$9,000
4	1	$1,500	$1,500
5	1	$1,500	$1,500
6	7	$3,000	$21,000
7	3	$15,000	$45,000
8	3	$15,000	$45,000
9	1	$3,000	$3,000
10	3	$600	$1,800
11	1	$6,000	$6,000
12	3	$6,000	$18,000
	29		$164,400

In his affirmation, DEC Staff counsel Urda states the amount requested is consistent with the Department's Civil Penalty Policy (DEE 1, issued June 20, 1990), the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEE 22, issued May 21, 2003), and the Department's Air Violation Penalty Policy for Short-Form Orders on Consent (DEE 23, issued on March 14, 2005). Mr. Urda states that these policies are aimed at

protecting the public health, welfare, and the lands and waters of the State of New York against discharges of petroleum.

DEC Staff asserts that the respondent was notified of the alleged violations immediately following the completion of DEC Staff member Ajoku's inspection on June 4, 2008. Mr. Urda claims that a notice of violation (NOV) was given to a representative at the site who signed it (a copy of this NOV is attached as an exhibit to Mr. Ajoku's affidavit). The respondent disputes that its representative received or signed the NOV and implies that it was a representative of the tenant who received the NOV. The signature on the NOV is illegible, so it is unclear if the respondent received a copy of the NOV from Mr. Ajoku. This is a minor point and does not preclude the Commissioner from issuing an Order and imposing a civil penalty.

There is no dispute that a compliance conference regarding the alleged violations occurred on June 25, 2008. At the conference, the respondent produced a copy of an invoice from Island Pump & Tank Corp dated June 24, 2008 indicating that some repairs had been undertaken at the facility (DEC Staff Exh. E). In its papers, DEC Staff states that it informed respondent's representative at the conference that this invoice was not acceptable as evidence of corrective action, and instructed respondent to submit proper evidence in the form of photographs or invoices indicating completion of the required work and proof of payment for work done. DEC Staff states that such evidence was not offered. DEC Staff states it is particularly concerned about the respondent's failure to show properly reconciled inventory records for the facility, because of the potential for leaks from the three 10,000 USTs at the facility.

Also in its papers, DEC Staff states that it attempted to resolve this matter by sending the respondent a letter and a proposed consent order in May 2010. According to DEC Staff, these materials were received by the respondent on May 8, 2010. In the consent order, which is not in the record of this proceeding, DEC Staff states a civil penalty was proposed by DEC Staff within the range set forth in the applicable guidance documents (DEE #22 and DEE #23). Those documents would recommend a civil penalty of $20,100. In its reply, the respondent's attorney disputes that any letter and consent order were received by the respondent. DEC Staff states in its final submission that these documents were sent to the respondent at the address on file with the New York State Department of State's Division of Corporations. Attached to DEC Staff's reply affirmation is copy of a United States Postal Service Track and

Control Form showing delivery of the materials to the respondent on May 8, 2010. The signature on the receipt is illegible.

DEC Staff explains in its papers that it determined its requested civil penalty in the following manner. As a starting point, DEC Staff used the suggested amounts in the relevant penalty guidance documents. DEC Staff notes that DEC's Civil Penalty Policy requires that penalty amounts requested in adjudicated cases must, on average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders, which are entered into voluntarily by respondents. The amounts suggested in DEC policy guidance penalty schedules are set forth below:

Cause of Action	Suggested Civil Penalty Amount per violation	DEC Policy Reference
1	$1,000	DEE-22, line 1
2	$100	DEE-22, line 10
3	$500	DEE-22, line 11
4	$250	DEE-22, line 39, 40
5	$250	DEE-22, line 41
6	$500	DEE-22, line 38
7	$2,500	DEE-22, line 24.c
8	$2,500	DEE-22, line 15
9	$500	DEE-22, line 30
10	$100	DEE-22, line 13h
11	$1,000	DEE-22, line 13i
12	$1,000	DEE-23, App.1, line 8

In order to reach the total requested civil penalty amount of $164,400, DEC Staff multiplied the suggested penalty amount found in the guidance by the number of alleged violations and multiplied the subtotal by six. DEC Staff's rationale for this is that there are five aggravating factors in this case.

According to DEC Staff, the five aggravating factors in this case are: (1) the respondent's history of non-compliance; (2) the fact that several of the violations were initially discovered in 2006 and remained uncorrected when observed during the 2008 inspection; (3) the violations remain uncorrected; (4) the respondent's manager, Mr. Benaim, is an experienced, multiple facility manager well aware of NYS's PBS regulations; and (5) the respondent was given an opportunity to correct the

violations and resolve this matter by Consent Order, but failed to do so.

Respondent's history of non-compliance. As proof of the respondent's history of non-compliance, DEC Staff attach to the motion a copy of an Order of Consent executed in 2006 by the respondent for violations at this facility (DEC #2-347272). In this consent order, the respondent acknowledged three violations and agreed to pay a civil penalty totaling $2,250. The respondent also agreed to document to DEC Staff that all the violations were cured within 30 days. The three violations were: (1) failing to maintain overfill protection in violation of 6 NYCRR 613; (2) failing to properly maintain inventory records in violation of 6 NYCRR 613.4; and (3) failing to properly placard a post-1986 installed UST in violation of 6 NYCRR 614.3. This document demonstrates that the respondent has acknowledged responsibility for past violations at the site, as DEC Staff asserts. DEC Staff does not include any information in its papers as to whether or not the respondent submitted the documentation that the violations were cured within 30 days of the execution of the 2006 consent order, as required.

Continuing Nature of the Violations. To support its claim of the continuing nature of the violations at the site, DEC Staff claims that two of the violations addressed in the 2006 consent order were again observed during the 2008 inspection. These two violations are set forth in the seventh and tenth causes of action. With respect to the seventh cause of action, failure to maintain inventory records in violation of 6 NYCRR 613.4, it is true that in the 2006 consent order the respondent admitted to this violation, but as explained above, DEC Staff has not proven that the respondent is still the operator of the facility and, therefore, even if the violation continues, it may be the responsibility of the tenant of the facility who may operate the facility. With respect to the tenth cause of action, failure to properly label the USTs at the fill ports in violation of 6 NYCRR 614.3(a)(2), DEC Staff has demonstrated that this violation continued from 2006 until the 2008 inspection.

DEC Staff's Claim that the Violations Remain Uncorrected. The respondent asserts in its papers that the violations have been or are in the process of being cured. DEC Staff contests this claim. The respondent includes several invoices with its papers which it contends supports its claim that the repairs have been completed or are in the process thereof. The contents of these invoices are summarized below.

The first document is an invoice from Island Pump & Tank dated June 24, 2008. This invoice was given to DEC Staff by the respondent at the pre-hearing conference which occurred on June 25, 2008. The 6/24/08 invoice states:

> "Arrived at site to make DEC violation repairs. I painted fills, labeled the waste oil tank, tightened impact valve bolts, replaced evertite caps for [unreadable word] tank. I need to return to finish repairs, need v/r caps (2), nuts and washers for impact valve brackets, lable (sic) motor tank, replace diesel hatch style cover, a level gauge for the waste oil tank. I informed dealer on where to get tank tags for the fill ports and he understood other violations about records he needed to have."

The second document is an invoice from Island Pump & Tank dated June 26, 2008 which states:

> "Secured impact valve brackets in dispensers as needed (replaced missing nuts). Installed decals for the motor oil tank. Checked tanks that were reading water, no water in tanks, adjusted tank probes. Veederroot is now showing 'no' water. Needed to replace diesel EBW hatch cover that was broken. Still need to return to install the waste oil gauge when in stock. Need to install drop tubes in all 3 tanks (straight 4") + silicone base of dispensers to keep water out of dispenser pans."

The third document is also an invoice from Island Pump & Tank dated 6/27/08 which states:

> "Final trip – installed drop tubes in all tanks as needed + installed a level gauge in the waste oil tank."

The fourth document is an invoice from Feliks & Son Storage Tank Co. dated February 23, 2009. This invoice details repairs at the facility between December 24, 2008 and January 27, 2009.

The fifth document is an invoice from Alvin Petroleum Systems, Inc. dated July 21, 2010, which states:

> "Installed 3 tank identification tags as per request: 1 premium, 1 regular, 1 diesel."

The sixth document is a Proposal from Walter T. Gorman, P.E. P.C. dated August 26, 2010 and a copy of a check from the respondent on which is written "gas tank drawing."

In his response, the respondent's counsel explains how each of the violations has been or will be remedied. For the first cause of action, respondent's counsel states that the respondent will expeditiously and correctly re-register the tanks. This statement was made in papers received on October 1, 2010. In its reply DEC Staff reports that as of October 21, 2010 that no corrected application had been received. Accordingly, the respondent has not demonstrated that the first cause of action has been remedied. In his Order, the Commissioner should direct the respondent to submit a corrected PBS application within thirty days of the issuance.

For the second cause of action, respondent's counsel states that the June 24, 2008 receipt, which includes language "I painted fills" demonstrates this violation has been remedied. DEC Staff argues that this is insufficient and that photos or other evidence should be provided. There is nothing in the record to indicate that DEC Staff has inspected the facility since the June 4, 2008 inspection. At this time, based on the evidence in the record, it is reasonable to conclude that these violations were corrected on June 24, 2008. However, the respondent should confirm this with photographs or other evidence acceptable to DEC Staff of the remedy within thirty days of the issuance of the Commissioner's Order.

For the third cause of action, respondent's counsel states that the June 24, 2008 receipt, which includes language "tightened impact valve bolts, replaced evertite caps for the RVh tank" demonstrates this violation has been remedied. DEC Staff argues that this is insufficient and that photos or other evidence should be provided. There is nothing in the record to indicate that DEC Staff has inspected the facility since the June 4, 2008 inspection. At this time, based on the evidence in the record, it is reasonable to conclude that this violation was corrected on June 24, 2008. However, the respondent should confirm this with photographs or other evidence acceptable to DEC Staff of the remedy within thirty days of the issuance of the Commissioner's Order.

For the fourth cause of action, respondent's counsel states that the June 27, 2008 receipt, which includes language "installed drop tubes in all tanks as needed & installed a level

gauge in the waste oil tank" demonstrates this violation has been remedied. DEC Staff argues that this is insufficient and that photos or other evidence should be provided. There is nothing in the record to indicate that DEC Staff has inspected the facility since the June 4, 2008 inspection. At this time, based on the evidence in the record, it is reasonable to conclude that this violation was corrected on June 27, 2008. However, the respondent should confirm this with photographs or other evidence acceptable to DEC Staff of the remedy within thirty days of the issuance of the Commissioner's Order.

For the fifth cause of action, respondent's counsel states that the June 24, 2008 receipt, which includes language "labeled the waste oil tank" and the June 26, 2008 receipt which states "installed decals for the motor oil tank" demonstrate this violation has been remedied. DEC Staff argues that this is insufficient and that photos or other evidence should be provided. There is nothing in the record to indicate that DEC Staff has inspected the facility since the June 4, 2008 inspection. At this time, based on the evidence in the record, it is reasonable to conclude that this violation was corrected on June 24, 2008. However, the respondent should confirm this with photographs or other evidence acceptable to DEC Staff of the remedy within thirty days of the issuance of the Commissioner's Order.

For the sixth cause of action, respondent's counsel states that the February 23, 2009 receipt, demonstrates this violation has been remedied. DEC Staff argues that this is insufficient and that photos or other evidence should be provided. There is nothing in the record to indicate that DEC Staff has inspected the facility since the June 4, 2008 inspection. At this time, based on the evidence in the record, it is reasonable to conclude that these violations were corrected on June 23, 2009. However, the respondent should confirm this with photographs or other evidence acceptable to DEC Staff of the remedy within thirty days of the issuance of the Commissioner's Order.

For the seventh cause of action, respondent's counsel includes copies of inventory records. However, since DEC Staff has not proven the respondent liable for this alleged violation, and a hearing will be needed to determine if the respondent is the operator of the facility, it is not necessary to address DEC Staff's claims that these records are deficient.

For the eighth cause of action, respondent's counsel states that the February 23, 2009 receipt demonstrates this violation

has been remedied. DEC Staff argues that this is insufficient and that photos or other evidence should be provided. There is nothing in the record to indicate that DEC Staff has inspected the facility since the June 4, 2008 inspection. At this time, based on the evidence in the record, it is reasonable to conclude that these violations were corrected on February 23, 2009. However, the respondent should confirm this with photographs or other evidence acceptable to DEC Staff of the remedy within thirty days of the issuance of the Commissioner's Order.

For the ninth cause of action, respondent's counsel states that the respondent will promptly take the necessary steps to correct the violation. DEC Staff states that as of October 21, 2010, no evidence of corrective action has been submitted. In his Order, the Commissioner should direct the respondent to take the necessary steps to correct this violation within thirty days of issuance.

For the tenth cause of action, respondent's counsel states that the July 21, 2010 receipt demonstrates this violation has been remedied. DEC Staff argues that this is insufficient and that photos or other evidence should be provided. There is nothing in the record to indicate that DEC Staff has inspected the facility since the June 4, 2008 inspection. At this time, based on the evidence in the record, it is reasonable to conclude that these violations were corrected on July 21, 2010. However, the respondent should confirm this with photographs or other evidence acceptable to DEC Staff of the remedy within thirty days of the issuance of the Commissioner's Order.

For the eleventh cause of action, respondent's counsel states that the September 23, 2010 receipt demonstrates this violation is in the process of being remedied and that the necessary drawings will be provided. DEC Staff argues that this is insufficient and at this time, based on the evidence in the record, respondent has failed to demonstrate that corrective action has been completed. In his Order, the Commissioner should direct the respondent to produce the required drawings within thirty days of the issuance.

For the twelfth cause of action, respondent's counsel states that the June 26, 2008 receipt demonstrates this violation has been remedied. DEC Staff argues that this is insufficient and that photos or other evidence should be provided. There is nothing in the record to indicate that DEC Staff has inspected the facility since the June 4, 2008

inspection. At this time, based on the evidence in the record, it is reasonable to conclude that these violations were corrected on June 26, 2008. However, the respondent should confirm this with photographs or other evidence acceptable to DEC Staff of the remedy within thirty days of the issuance of the Commissioner's Order.

Based on this evidence, it is reasonable to conclude that the first, ninth and eleventh causes of action remain uncorrected. In addition, the tenth cause of action continued from its discovery in 2006 until July 2010, when it was finally addressed. The sixth and eighth causes of action were only addressed in February 2009. The others, the second, third, fourth, fifth and twelfth were all addressed within a month of the Notice of Violation.

Mr. Benaim's Past Violations. DEC Staff alleges that Raphy Benaim is the president of the respondent Benhim Enterprises, Inc. The respondent's counsel does not challenge this assertion. DEC Staff asserts that Mr. Benaim has owned or operated multiple gasoline stations and development properties in and around New York City. DEC Staff argues that Mr. Benaim's history of environmental violations should serve as an aggravating factor in this case. As proof of Mr. Benaim's past environmental violations DEC Staff includes with its papers two documents which involve a second facility located at 175-14 Horace Harding Expressway, Queens, NY. The first is an order of the Commissioner dated January 25, 2008 in which Mr. Benaim and another respondent were found liable for several violations and assessed a civil penalty of $60,000. The second document is a stipulation involving a discharge of petroleum which occurred on January 3, 2002. DEC Staff claims Mr. Benaim is in violation of this stipulation, but provides no proof. The respondent's counsel disputes DEC Staff's claims regarding the stipulation. Based on these documents, it is reasonable to conclude that Mr. Benaim has a history of past violations.

Respondent's Failure to Resolve this matter by Consent Order. The fifth aggravating factor identified by DEC Staff is that the respondent was given the opportunity to resolve this matter by consent order and failed to do so. As discussed above, DEC Staff claims to have sent a cover letter and draft consent order to the respondent at its registered address on by certified mail on May 8, 2010 and provides a copy of a USPS Track and Confirm receipt. The respondent claims to have never received the documents. DEC Staff has shown that the documents were delivered to the address on file with the NYS Department of

State for service of process, so the respondent's failure to receive the documents is its own responsibility.

Civil Penalty – Conclusion. As discussed above, DEC Staff has shown that five aggravating factors of varying degree exist in this case. However, DEC Staff's requested method of calculating the payable civil penalty, multiplying the civil penalty suggested by the guidance by the number of aggravating factors, is not supported by either applicable guidance or past administrative precedents and should be rejected by the Commissioner. The violations demonstrated by DEC Staff in this matter are serious and that seriousness is amplified by presence of the aggravating factors.

The evidence in the record supports the conclusion that five of the causes of action (the second, third, fourth, fifth and twelfth) were corrected within a month of the inspection and several continue through the date of the last submission. For those violations corrected within a month of the NOV, I recommend that the Commissioner impose a civil penalty equal to twice the amount recommended in the applicable guidance documents. By the respondent's own admission two causes of action (the sixth and the eighth) continued until February 2009 and for these I recommend that the Commissioner impose a civil penalty equal to four times the amount recommended in the applicable guidance documents. There is no proof that three others were ever corrected (the first, ninth and eleventh) and for these I recommend that the Commissioner impose a civil penalty equal to five times the amount recommended in the applicable guidance documents. For the last cause of action (the tenth), the evidence in the record indicates that this violation continued from at least 2006 until July 2010 and for these violations I recommend that the Commissioner impose a civil penalty equal to five times the amount recommended in the applicable guidance documents as well as an additional $500 penalty. These recommendations are summarized below.

Cause of Action	Number of Violations	Guidance Penalty Amount	Date of Repair per respondent	ALJ's Suggested Penalty
1	2	$1,000	None	$10,000
2	1	$100	6/24/08	$200
3	3	$500	6/26/08	$3,000
4	1	$250	6/27/08	$500
5	1	$250	6/26/08	$500
6	7	$500	2/09	$14,000
7	0	n/a	n/a	0
8	3	$2,500	2/09	$30,000
9	1	$500	None	$2,500
10	3	$100	7/22/10	$2,000
11	1	$1,000	None	$5,000
12	3	$1,000	6/26/08	$6,000
				$73,700

In addition the respondent's history of non-compliance and Mr. Benhim's history of violations all combine to make this a very serious matter and warrant the imposition of a substantial payable civil penalty. In this case, based on the above, I recommend the Commissioner impose a payable civil penalty of $73,700.

Corrective Action

In its motion, DEC Staff requests that the Commissioner direct the respondent to perform all outstanding corrective action within thirty (30) days. DEC Staff does not provide any greater detail regarding the corrective actions sought. In its papers, the respondent claims that all violations have been corrected, or are in the process of being corrected, however, the proof submitted does not conclusively prove this to be the case for all the violations. Accordingly, I recommend that the Commissioner include in his order language that directs the following corrective actions be undertaken by the respondent.

Within thirty (30) days of the service of the Commissioner's order upon respondent, respondent shall:

1. Submit to DEC Staff a corrected Petroleum Bulk Storage Application, which includes all tanks located at the facility, correctly indicates the product stored in each tank, and correctly indicates the operator of the facility.

2. Submit, in a form acceptable to DEC Staff, photographs or other proof that confirms that the fill port for the 10,000 gallon underground diesel storage tank has been permanently marked.

3. Submit, in a form acceptable to DEC Staff, photographs or other proof that confirms that each of the three pressurized motor fuel dispensers have been properly equipped with shear valves in the supply lines.

4. Submit, in a form acceptable to DEC Staff, photographs or other proof that confirms that a gauge to accurately show the level of product in the aboveground storage tank has been properly installed.

5. Submit, in a form acceptable to DEC Staff, photographs or other proof that confirms that the aboveground storage tank and its tank gauge have been marked with its design capacity, working capacity and identification number.

6. Submit, in a form acceptable to DEC Staff, photographs or other proof that confirms that the dispenser sumps are properly maintained and do not contain any discharges of petroleum.

7. Submit, in a form acceptable to DEC Staff, photographs or other proof that confirms that liquid sensors in the sumps of each of the three underground storage tanks are properly positioned to detect a leak in the sump.

8. Submit, in a form acceptable to DEC Staff, proof that monthly inspections of the aboveground storage tank are being performed.

9. Submit, in a form acceptable to DEC Staff, photographs or other proof that confirms that labels containing the information set forth in 6 NYCRR 614.3(a) are affixed to the three underground storage tank fill ports.

10. Submit, in a form acceptable to DEC Staff, proof that site drawings or as-built plans showing the size and location of the underground storage tanks and piping systems are maintained.

11. Submit, in a form acceptable to DEC Staff, photographs or other proof that confirms that the vapor fill port caps and the dispenser hose face plates are properly sealed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Benhim Enterprises, Inc. is an active domestic business corporation and is registered with the New York State Department of State, Divisions of Corporations. Benhim Enterprises, Inc. owns a regulated PBS facility (DEC #2-347272) at an active gasoline service station located at 75-09[5] Northern Boulevard, Queens, New York.

2. On June 4, 2008, DEC Staff member Moses Ajoku inspected the facility at 75-09 Northern Boulevard and issued a notice of violation. A prehearing conference occurred on June 25, 2008 which involved members of DEC Staff and a representative of the respondent.

3. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to register the 275 gallon aboveground storage tank and failed to properly register the 10,000 gallon underground diesel fuel tank at the facility in violation of 6 NYCRR 612.2.

4. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to properly mark the fill port for the 10,000 gallon underground diesel fuel tank at the facility in violation of 6 NYCRR 613.3(b)(1).

5. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to properly equip each of the three pressurized motor fuel dispensers with sheer valves in the supply lines in violation of 6 NYCRR 613.3(c)(1).

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[5] The address of the facility is identified as both 75-09 and 75-15 Northern Boulevard on various documents in the record. DEC's PBS Facility Information Report uses 75-09, while NYC DEP's Gasoline Dispensing Site Registration and the NYS Department of State's website lists the address as 75-15.

6. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to properly install a gauge to accurately show the level of product in the aboveground storage tank in violation of 6 NYCRR 613.3(c)(3)(i).

7. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to mark the design capacity, working capacity and identification number on the aboveground storage tank and on its gauge in violation of 6 NYCCR 613.3(c)(3)(ii).

8. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to properly maintain spill prevention equipment, including three tank sumps which contained water, three dispenser sumps which contained water, and one dispense sump which contained discharged petroleum in violation of 6 NYCRR 613.3(d).

9. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to properly position liquid sensors in the sumps of the three underground storage tanks in violation of 6 NYCRR 613.5(b)(3).

10. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to perform monthly inspections of the aboveground storage tank in violation of 6 NYCRR 613.6(a).

11. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to affix labels with required information to the three underground storage tank fill ports in violation of 6 NYCRR 614.3(a)(2).

12. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to maintain site drawings or as-built plans showing the size and location of the underground storage tanks and piping systems in violation of 6 NYCRR 614.7(d).

13. The record of this matter supports the conclusion that Respondent Benhim Enterprises, Inc. failed to seal two vapor fill port caps and one dispenser hose face plate in violation of 6 NYCRR 230.2(f).

RECOMMENDATION

I recommend that the Commissioner issue an Order in this matter that finds the respondent, Benhim Enterprises, Inc., liable for the eleven of the twelve causes of action alleged and for 26 of the 29 violations alleged, as detailed above. I further recommend that the Commissioner impose a payable civil penalty of $73,700 and direct that respondent provide proof that the violations are cured within 30 days of service of the order. Finally, the Commissioner should remand the remaining cause of action #7 for a hearing on whether the respondent is the operator of the site.