

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

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

- by -

**BROTHER'S GAS STOP, INC.,
GUS ROTZIOKIOUS, and
BROADWAY AUTO SERVICE, INC.,**

Respondents.

DEC No. D1-1130-11-04

DECISION AND ORDER OF THE
ASSISTANT COMMISSIONER

April 6, 2007

DECISION AND ORDER OF THE
ASSISTANT COMMISSIONER¹

This matter arises from an administrative enforcement proceeding commenced by staff of the Department of Environmental Conservation ("Department") for alleged violations of the Environmental Conservation Law ("ECL") and related implementing regulations at a petroleum bulk storage facility located at 582 Broadway, Massapequa, New York.

Factual and Procedural Background

The property at 582 Broadway contains two separate businesses: (1) a convenience store and gasoline pumping station (with underground storage tanks) named Brother's Gas Stop, Inc. operated by Kisim Yilmaz; and (2) an automobile repair shop with service bays named Broadway Auto Service, Inc. operated by Gus Rotziokious. Both of these businesses lease their respective holdings from a corporation named 582 Broadway Corp.

In an initial complaint dated December 29, 2004, Department staff alleged that, as revealed by an inspection of the retail gasoline business by staff on November 9, 2004, respondents Brother's Gas Stop, Inc. and Gus Rotziokious violated

¹By memorandum dated March 14, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

a number of applicable provisions of law. Department staff's complaint alleged that respondent Brother's Gas Stop, Inc. operated the facility and respondent Gus Rotziokious owned the facility. Staff further alleged that, as operator and owner, respondents:

1. failed to properly reconcile the inventory records for the facility's underground storage tanks in violation of the ECL and section 613.4(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR");
2. failed to properly secure the shear valves at the facility in violation of 6 NYCRR 613.3(d);
3. failed to check monitoring wells at the facility in violation of 6 NYCRR 613.5(b)(3);
4. failed to keep all gauges, valves and other equipment for spill prevention in good working order in violation of 6 NYCRR 613.3(d);
5. failed to remediate or call in a spill report for petroleum contamination in the spill buckets within two hours, in violation of both 6 NYCRR 613.8 and Navigation Law § 175;
6. failed to maintain leak monitoring records at respondents' facility for a period of at least one year in violation of 6 NYCRR 613.5(b)(4); and
7. failed to properly color code the fill ports at the facility in violation of 6 NYCRR 613.3(b).

Following service of the complaint, both respondents appeared in the action by the timely service of a joint answer. By that answer, respondents denied virtually all of the allegations set forth in the complaint, and denied that respondent Gus Rotziokious was the owner of the petroleum bulk

storage facility in question. Thereafter, an adjudicatory hearing was held in this matter on August 17, 2005 at DEC's Region 1 office in Stony Brook, New York, before Administrative Law Judge ("ALJ") Kevin J. Casutto.

At the commencement of the hearing, counsel for Department staff proposed to make a number of oral amendments to the original complaint. Most of these amendments consisted of minor language changes with the notable exceptions being the deletion of the alleged Navigation Law violation from the original complaint and the addition of a new allegation that respondents had failed to properly maintain stage I vapor recovery in accordance with 6 NYCRR 230.2(f)(3).

At the close of the adjudicatory hearing, counsel for Department staff sought leave to file and serve an amended complaint to conform to the oral amendments proposed at the beginning of the hearing and, most notably, to add a third named respondent that the evidence at hearing had disclosed was also a likely operator or owner of the petroleum bulk storage facility in question. The name of this third respondent was determined to be "582 Broadway Corp." which is the corporate owner of record of the property and facilities located at 582 Broadway, Massapequa.

In a post-hearing ruling dated September 7, 2005, ALJ Casutto authorized Department staff to serve an amended complaint specifically naming 582 Broadway Corp. as a third respondent in this proceeding. Department staff then filed an amended complaint dated September 8, 2005, which named a third respondent, Broadway Auto Service, Inc., but did not name 582 Broadway Corp.

The amended complaint, as did the initial complaint, maintained that respondent Brother's Gas Stop, Inc. was an "operator" of the facility in question. The amended complaint also alleged that respondent Gus Rotziokious was now the "owner and/or operator" of the facility, and that newly-added respondent Broadway Auto Service, Inc. was the "owner" of the facility. The amended complaint, however, did not incorporate the minor language changes to the original complaint that Department staff had proposed orally at the commencement of the adjudicatory hearing. In addition, the amended complaint re-alleged a violation of the Navigation Law that Department staff had previously withdrawn at the hearing, and failed to include the new (eighth) allegation related to stage I vapor recovery that Department staff proposed to add at the hearing.

The three named respondents, by their attorney, again

jointly served an answer to the amended complaint with affirmative defenses and again denied the causes of action in the amended complaint.² Further, respondents' answer to the amended complaint denied that Gus Rotziokious was the owner or operator of the facility and denied that newly-added respondent Broadway Auto Service, Inc. was the owner of the facility.

Following the submission of the amended pleadings and closing briefs by the parties, ALJ Casutto, assisted by ALJ P. Nicholas Garlick, prepared the attached hearing report. The hearing report includes a ruling by the ALJs that the violations alleged by Department staff in its final written amended complaint, dated September 8, 2005 (other than the Navigation Law claim that Department staff had withdrawn at hearing but which was contained in the amended complaint) were the only ones that should be considered by me in assessing this matter. I concur with their ruling and adopt the ALJs' report as my decision in this matter, subject to the following comments.

² Respondents' fifth affirmative defense maintained that the amended complaint should be dismissed because it improperly named Broadway Auto Service, Inc. and Gus Rotziokious as parties to the proceeding.

Discussion

The Amended Complaint

Despite evidence at the hearing as to the actual ownership of the facility and ALJ Casutto's subsequent ruling allowing an amended complaint specifically naming 582 Broadway Corp., the amended complaint failed to name 582 Broadway Corp. as a respondent.³ In its closing brief, Department staff acknowledged that it did not file an action against 582 Broadway Corp. and claimed to preserve its rights to commence an action against this entity later, without prejudice, if deemed appropriate. Since Department staff did not name 582 Broadway Corp. as a respondent in its amended complaint, 582 Broadway Corp. is not a party to this proceeding.

The amended complaint, instead, named a different party, Broadway Auto Service, Inc., as the new third respondent. In its closing brief, Department staff acknowledged that naming Broadway Auto Service, Inc. as a respondent in the amended complaint was an error and, as such, Broadway Auto Service, Inc. should not be a party to this action. Therefore, the ALJs correctly determined that all allegations against Broadway Auto

³ The evidence consisted of the testimony of Gus Rotziokious, statements made by respondents' attorney on the record at the hearing, and records from the Office of the Nassau County Fire Marshall that confirmed 582 Broadway Corp.'s ownership of the property and facilities in question.

Service, Inc. were deemed withdrawn. Such entity is hereby dismissed from, and not a party to, this proceeding.

The ALJs correctly ruled that the post-hearing amended complaint of September 8, 2005 (with the exclusion of the Navigation Law claim) serves as the relevant statement of the alleged violations against respondents. Because the amended complaint failed to allege a violation relating to the facility's stage I vapor collection or control system, which was raised orally at the hearing, that allegation is properly excluded from consideration. Even though the amended complaint continued to allege a violation of the Navigation Law, Department staff previously withdrew that claim at the hearing. As such, I concur with the ALJs' conclusion that the alleged Navigation Law violation was withdrawn and, therefore, dismissed from this proceeding.

Applicable Standard

Department staff bears the burden of proof on all charges and matters which they affirmatively assert in the September 8, 2005 complaint as modified above (see 6 NYCRR 622.11[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by

statute or regulation (see 6 NYCRR 622.11[c]). In this proceeding, preponderance of the evidence is the appropriate standard.

The Respondents

Gus Rotziokious

Gus Rotziokious is the sole shareholder of 582 Broadway Corp. The ALJs determined based on the record of the hearing that respondent Gus Rotziokious was neither an "operator" nor an "owner" of the facility as alleged in the amended complaint as those terms are found in 6 NYCRR part 612.⁴ Here, it is undisputed that 582 Broadway Corp. is the record owner of the property containing both the retail gas facility (Brother's Gas Stop, Inc.) and the auto repair business (Broadway Auto Service, Inc.).

I have reviewed the hearing testimony of Gus Rotziokious which indicates the limited nature of his involvement

⁴ Section 612.1(c)(16) of 6 NYCRR defines an "operator" as any person who leases, operates, controls or supervises a facility. Section 612.1(c)(10) defines a "facility" or "storage facility" as one or more stationary tanks, including any associated intra-facility pipelines, fixtures or other equipment, which have a combined storage capacity of over 1,100 gallons of petroleum at the same site. A facility may include aboveground tanks, underground tanks or a combination of both. Section 612.1(c)(18) of 6 NYCRR defines an "owner" as any person who has legal or equitable title to a facility.

with the gasoline pumping station. He notes that he had, at times, checked the monitoring wells at the facility, received monthly inventory reports from tenant Brother's Gas Stop, Inc. (which are forwarded to an accountant for review), and arranged for testing of the storage tanks on one occasion. However, the record demonstrates that Mr. Rotziokious' responsibilities generally relate to the auto repair business (and not the gasoline business). On the weight of the record evidence, I cannot conclude that his acts constitute, in this specific case, activities of an "operator" of a petroleum bulk storage facility.

Accordingly, the ALJs correctly concluded that Department staff did not prove by a preponderance of evidence that respondent Gus Rotziokious was an "operator" of the facility under 6 NYCRR 612.1(c)(16). Further, since the evidence showed that 582 Broadway Corp., and not Gus Rotziokious individually, was the actual owner of the property and lessor of the facility at issue, the ALJs were also correct in holding that Department staff had failed to prove that Gus Rotziokious was responsible as an "owner" under 6 NYCRR 612.1(c)(18).

Brother's Gas Stop, Inc.

As the record demonstrates, respondent Brother's Gas Stop, Inc. is an "operator" of the petroleum bulk storage

facility at 582 Broadway, Massapequa as that term is defined by 6 NYCRR 612.1(c)(16)("[o]perator means any person who leases, operates, controls or supervises a facility"). The uncontroverted testimony revealed that, at the time of the violations alleged in the amended complaint, respondent Brother's Gas Stop, Inc. leased the gasoline pumping facilities (including two underground storage tanks -- one 4,000 gallon tank and one 5,000 gallon tank), and a convenience store with an office, from 582 Broadway Corp.

In light of the evidence presented by Department staff at the hearing, and the findings made by the ALJs, the only respondent that is liable for violations alleged in the amended complaint is Brother's Gas Stop, Inc. as "operator" of the petroleum bulk storage facility in question.

The ALJs concluded that respondent Brother's Gas Stop, Inc. is liable for six of the seven violations alleged in the amended complaint dated September 8, 2005. I concur with the ALJ's conclusions except with respect to the alleged violation of 6 NYCRR 613.8. That regulatory section provides that any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two hours of discovery. With respect to Brother's Gas Stop, Inc.'s knowledge

of the spill and the duration of the petroleum product in the spill bucket, the record lacks evidence of sufficient weight to establish a violation of 6 NYCRR 613.8 by a preponderance of the evidence.

Proposed Penalty

In its amended complaint, Department staff sought a \$60,000 civil penalty from respondent Brother's Gas Stop, Inc.

I agree with the ALJs that based on this record a reduction in the civil penalty is appropriate. However, in light of the nature and number of the violations at the site, I decline to reduce the penalty to \$35,000 as recommended by the ALJs.

The proven violations include respondent's failure to perform inventory reconciliation and to maintain leak detection system monitoring records. These requirements are critical to the regulatory scheme to protect against any release of petroleum product to the environment and, in the event that such a release occurs, that it is detected and addressed as early as possible. The failure to comply with these inventory-related requirements constitutes a significant potential of harm to the environment. Furthermore, although Department staff noted that certain of the deficiencies identified were rectified quickly, other

obligations, including the submission of records, have not been forthcoming.

Accordingly, I conclude that the civil penalty should be reduced but only to \$50,000. This penalty, although substantially below the statutory maximum, is significant. Based on the record of this proceeding, and taking into account the cooperation provided in relation to Department staff's inspection and the prompt correction of several noted deficiencies, I have determined to suspend \$15,000 of the \$50,000 penalty contingent upon respondent's prompt compliance with the remedial measures that the ALJs have recommended. Based on my review of the recommended remedial measures, I conclude that they are authorized and warranted, and the recommended dates by which respondent Brother's Gas Stop, Inc. is to implement these measures are reasonable.

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

I. Respondent Brother's Gas Stop, Inc. is adjudged to have violated the provisions of 6 NYCRR 613.4(a) by failing to properly reconcile the inventory records for the underground petroleum bulk storage tanks located at 582 Broadway, Massapequa, New York.

II. Respondent Brother's Gas Stop, Inc. is adjudged to have violated the provisions of 6 NYCRR 613.3(d) by failing to properly secure shear valves at the petroleum bulk storage facility located at 582 Broadway, Massapequa, New York.

III. Respondent Brother's Gas Stop, Inc. is adjudged to have violated the provisions of 6 NYCRR 613.3(d) by failing to properly maintain the spill buckets at the petroleum bulk storage facility located at 582 Broadway, Massapequa, New York.

IV. Respondent Brother's Gas Stop, Inc. is adjudged to have violated the provisions of 6 NYCRR 613.5(b)(4) by failing to maintain leak detection system monitoring records on the premises of the petroleum bulk storage facility located at 582 Broadway, Massapequa, New York.

V. Respondent Brother's Gas Stop, Inc. is adjudged to have violated the provisions of 6 NYCRR 613.3(b) by failing to color code fill ports of the tanks at the petroleum bulk storage facility located at 582 Broadway, Massapequa, New York.

VI. Respondent Brother's Gas Stop, Inc. is hereby assessed a civil penalty in the amount of fifty thousand dollars (\$50,000), of which fifteen thousand dollars (\$15,000) is suspended contingent on respondent's compliance with the remedial measures set forth in paragraph VII of this decision and order. The non-suspended portion civil penalty of thirty-five thousand dollars (\$35,000) shall be due and payable within thirty (30) days after respondent's receipt of this decision and order. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Benjamin A. Conlon, Esq.
New York State Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500

Should respondent Brother's Gas Stop, Inc. fail to comply with the remedial measures set forth in paragraph VII of this decision and order, the suspended portion of the civil penalty shall become immediately due and payable and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

VII. In addition to the payment of a penalty, respondent Brother's Gas Stop, Inc. is hereby directed:

A. Within thirty (30) days after receipt of this decision and order, to submit proper inventory records to the Department utilizing a ten (10) day

reconciliation period for the most recent thirty (30) day period for the underground storage tanks located at 582 Broadway, Massapequa, New York;

- B. Within ten (10) days after receipt of this decision and order, to maintain spill prevention equipment in good working order by emptying and cleaning the top sumps and fill port catch basins for the underground storage tanks located at 582 Broadway, Massapequa, New York, and to submit photographic documentation of compliance to the Department; and
- C. Within thirty (30) days after receipt of this decision and order, to submit the four most recent weekly leak detection system monitoring records to the Department for the underground storage tanks located at 582 Broadway, Massapequa, New York.

VIII. All communication from respondent Brother's Gas Stop, Inc. to the Department concerning this decision and order shall be made to: Benjamin A. Conlon, Esq., New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

IX. The provisions, terms and conditions of this decision and order shall bind respondent Brother's Gas Stop, 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

Dated: April 6, 2007
Albany, New York

TO: Brother's Gas Stop, Inc. (By certified mail)
582 Broadway
Massapequa, New York 11758

Thomas J. Lavallee, Esq. (By certified mail)
Attorney for Respondent
490 Wheeler Road, Suite 165K
Hauppauge, New York 11788

Gus Rotziokious (By certified mail)
582 Broadway
Massapequa, New York 11758

Broadway Auto Service, Inc. (By certified mail)
582 Broadway
Massapequa, New York 11758

Benjamin A. Conlon, Esq. (By regular mail)
New York State Department of
Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500

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

In the Matter

- of -

the alleged violations of Article 17 of the Environmental Conservation Law and Part 613
of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of
New York by:

Brother's Gas Stop, Inc.
Gus Rotziokious
Broadway Auto Service, Inc.

Respondents.

NYSDEC NO. D1-1130-11-04

HEARING REPORT

- by -

/s/

Kevin J. Casutto
Administrative Law Judge

/s/

P. Nicholas Garlick
Administrative Law Judge

April 4, 2007

SUMMARY

In this administrative enforcement case, Staff of the Department of Environmental Conservation ("DEC Staff") has shown that one of the respondents, Brother's Gas Stop, Inc. ("Brother's") is liable for six of the eight violations alleged. The Administrative Law Judges ("ALJs") recommend that a civil penalty of \$35,000 be imposed by the Commissioner and other filing requirements be placed on Brother's to ensure compliance with applicable regulations.

PROCEEDINGS

By Notice of Hearing and Complaint dated December 29, 2004, DEC Staff initiated this enforcement proceeding against two respondents, Brother's Gas Stop, Inc. and Gus Rotziokious. By papers dated January 18, 2005, the respondents answered, denying all allegations.

A Statement of Readiness dated June 2, 2005, was filed with DEC's Office of Hearings and Mediation Services and ALJ Kevin J. Casutto was assigned. The adjudicatory hearing in this matter occurred on August 17, 2005 in DEC's Region 1 headquarters, SUNY Building 40, Stony Brook, New York, ALJ Casutto presiding.

Department Staff appeared by Benjamin Conlon, Esq., Associate Attorney, New York State Department of Environmental Conservation, Albany, New York. DEC Staff presented two witnesses: Hugh Cirrito, P.E., N.Y.S.D.E.C., Division of Environmental Remediation; and Gary McPherson, P.E., N.Y.S.D.E.C., Division of Air Resources.

The respondents were represented by Thomas J. LaVallee, Esq., Hauppauge, New York. The respondents presented one witness, the respondent Gus Rotziokious.

At the commencement of the adjudicatory hearing, DEC Staff made a number of oral amendments to its complaint on the record. At the conclusion of the hearing, both DEC Staff and the respondents made separate motions. DEC Staff sought to amend its complaint to include a third respondent. Confusion over the name of this corporate respondent existed regarding whether it was Broadway Auto Repair, Inc. or 582 Broadway Corp. The respondents moved to include a copy of Brother's 2004 tax return in order to reduce any civil penalty based on respondents' ability to pay.

DEC Staff counsel objected to the reliability of this exhibit and opposed its receipt into evidence, stating that the proper way to demonstrate the financial position of a respondent was to complete and submit DEC's financial disclosure form. The ALJ reserved judgment on the motions, pending a submission by DEC Staff regarding the proper name of the third respondent and a blank financial disclosure form.

By letter dated August 25, 2005, DEC Staff provided Nassau County Fire Marshall's records that identified 582 Broadway Corp. as the owner of the site. DEC Staff also provided a blank financial disclosure form.

By letter ruling dated September 7, 2005, ALJ Casutto ruled that: (1) DEC Staff was authorized to serve an amended complaint naming 582 Broadway Corp. as the third respondent; and (2) that respondents were permitted to file financial disclosure forms as a means of mitigating any civil penalty which might be imposed. ALJ Casutto further ruled that the submission of tax returns alone would be insufficient. Respondents never submitted completed financial disclosure forms.

Under a cover letter dated September 8, 2005, DEC Staff filed an amended complaint. This document named the two original respondents and a third, Broadway Auto Service, Inc. This document also included the language of the original complaint and did not include any of the amendments made orally on the record at the opening of the adjudicatory hearing.

By letter dated October 19, 2005, respondents' counsel accepted service of the amended complaint.

During an October 25, 2005 telephone conference call with the parties and ALJ Casutto, a deadline for service of an amended answer was set and a second hearing date was scheduled for November 18, 2005 for the respondents to present additional evidence, but was cancelled because the respondents chose not to present any additional evidence.

By papers dated November 3, 2005, respondents provided an amended answer denying all the causes of action and setting forth five affirmative defenses.

Closing briefs were received on December 9, 2005.

Due to administrative demands within the Office of Hearings and Mediation Services, ALJ P. Nicholas Garlick assisted ALJ Casutto in the preparation of this report.

FINDINGS OF FACT

1. The petroleum bulk storage facility located at 582 Broadway, Massapequa, New York is owned by 582 Broadway Corp. Respondent Gus Rotziokious is the owner of 582 Broadway Corp.
2. 582 Broadway Corp. leases a portion of the property, including two underground gasoline storage tanks, pumps and a convenience store to Brother's Gas Stop, Inc. which operates the facility. Brother's is owned by Kasim "Jimmy" Yilmaz. (Mr. Yilmaz was present during the August 17, 2005 hearing).
3. 582 Broadway Corp. leases the remainder of the site, including car service bays, to Broadway Auto Service, Inc. which is also owned by respondent Gus Rotziokious. Broadway Auto Service, Inc. is in the business of repairing automobiles.
4. On November 9, 2004, DEC Staff members, including Hugh Cirrito, Gary McPherson and an Environmental Conservation Officer, conducted a surprise inspection of the retail gasoline station facility. Mr. Yilmaz was out of the country and not present. Mr. Yilmaz's cousin was operating the facility and the Respondent, Gus Rotziokious, was on the premises.
5. During the November 9, 2004 inspection, DEC Staff observed a number of violations of applicable regulations, including: (1) failing to perform inventory reconciliations in violation of the Official Compilation of Codes, Rules and Regulations of the State of New York, Title 6 ("6 NYCRR") 613.4(a); (2) failing to properly secure shear valves in violation of 6 NYCRR 613.3(d); (3) failing to properly maintain fill port catch basins and failing to remediate a spill therein in violation of 6 NYCRR 613.3(d) and 613.8, respectively; (4) failing to maintain leak monitoring records in violation of 6 NYCRR 613.5(b)(4); and (5) failing to color code fill ports in violation of 6 NYCRR 613.3(b).
6. On November 10 and 11, 2004, Brother's arranged for repairs at the facility totaling \$494.15.
7. On December 15, 2004, a tank tightness test was conducted for the tanks at the facility and all tanks passed.

DISCUSSION

The first question is: which form of the complaint is the appropriate accusatory instrument for this proceeding? As stated above, DEC Staff served the original complaint upon respondents Brother's Gas Stop, Inc. and Gus Rotziokious.

At the opening of the adjudicatory hearing, DEC Staff counsel moved orally on the record to: (1) withdraw an allegation that the respondents had committed a violation of the Navigation Law (t. 7); (2) amend the allegation that the respondents had failed to reconcile or keep proper inventory records (t. 8); (3) include an allegation that respondents had failed to properly maintain their stage I vapor recovery system (t. 9); and (4) amend the allegation that the respondents failed to maintain shear valves (t. 11). ALJ Casutto overruled an objection from respondents' counsel and allowed the complaint to be amended, but ruled the record would be held open should the respondents wish to submit additional information after the hearing (t. 10).

Near the end of the adjudicatory hearing, DEC Staff counsel again moved to amend the complaint, this time to include a new respondent. Some confusion existed regarding whether this additional respondent was named Broadway Auto Repair, Inc. (t. 147) or 582 Broadway Corp. Respondents' counsel objected (t. 148) and ALJ Casutto reserved his ruling (t. 149) due to confusion over the legal name of the corporation which DEC Staff sought to add as a respondent.

The ALJ subsequently ruled that DEC Staff could amend its complaint to include 582 Broadway Corp., but DEC Staff instead named Broadway Auto Service, Inc. in its amended complaint. In its closing brief, DEC Staff acknowledged its error and stated that Broadway Auto Service, Inc. should not have been named a party and that DEC Staff reserved the right to later file a complaint against 582 Broadway Corp.

In its amended complaint, DEC Staff also used the language of the original complaint, which did not reflect the oral amendments made on the record during the hearing. As a result, the amended complaint alleges a violation of the Navigation Law; two amendments are not included (that respondents failed to keep proper inventory records and maintain shear valves). Also omitted is the new allegation (that respondents failed to maintain their stage I vapor recovery system). In its closing brief, DEC Staff attempts to address the alleged violations as

amended orally at the hearing, and to disregard their subsequent written amendment in the amended complaint.

While not raised by the respondents in their closing brief, a basic issue of fairness arises when alleged violations are raised, withdrawn orally during the hearing, and then revived in closing briefs. While the prejudice to the respondents is minimal because they knew at the hearing of all the allegations and were provided additional opportunities, including additional days of hearing (which were subsequently cancelled due to respondents' failure to identify additional evidence or witnesses), the last written statement of the alleged violations is narrower than those alleged at the hearing. Consequently, respondents may have not had an opportunity to respond, since closing briefs were the last submission in this case.

Ruling: In the interest of fairness, only those violations alleged in the amended complaint (dated September 8, 2005) and not withdrawn at the hearing should be considered by the Commissioner and addressed in the order. However, if the Commissioner decides that violations alleged at the hearing but not included in the amended complaint should be considered, this report provides a discussion of those alleged violations.

The Respondents

In its original complaint, DEC Staff named two respondents: Brother's and Gus Rotziokious. As discussed above, DEC Staff moved to include a third corporation as respondent. However, during the hearing there was some confusion whether the name of the respondent was Broadway Auto Repair, Inc., or 582 Broadway Corp. ALJ Casutto deferred ruling on DEC Staff's motion at the hearing, but later allowed DEC Staff to provide an amended complaint. DEC Staff provided the amended complaint under cover letter dated September 8, 2005 which named as a third respondent Broadway Auto Service, Inc. DEC Staff has subsequently acknowledged in its closing brief this was an error. Accordingly, all allegations against Broadway Auto Service, Inc. are deemed withdrawn.

DEC Staff alleges that Gus Rotziokious is the owner and/or operator of the facility. DEC Staff argues that Mr. Rotziokious is liable both as the owner and as an operator of the facility. It is undisputed that Mr. Rotziokious is the sole shareholder of 582 Broadway Corp. which owns the facility. The facility consists of a gas station with two service bays, two offices, a

convenience store, two gas pumps and two underground tanks. Mr. Rotziokious is also the sole shareholder of Broadway Auto Repair, Inc., a car repair business that occupies the services bays and one office. While it may be possible for the Commissioner to find Mr. Rotziokious personally liable in a future proceeding in which 582 Broadway Corp. is named as a respondent, the failure by DEC Staff to do so in this case makes it impossible to find Mr. Rotziokious liable as owner. DEC Staff also argues that Mr. Rotziokious is liable as an operator of the facility and point to testimony that he would check the monitoring wells once a week, receive monthly inventory reports from his tenant as well as arrange for the tanks to be tested every five years. However, these facts are not sufficient to prove Mr. Rotziokious is an operator of this facility.

There is no dispute that Brother's is an operator of the facility as that term is used in the DEC regulations. It leases one office, the convenience store, as well as the gas pumping facilities for \$2,000.00 a month.

Thus, in this case, the only respondent that is liable is Brother's Gas Stop, Inc. Allegations regarding the Respondents Gus Rotziokious and Broadway Auto Service, Inc., must be dismissed.

The Violations

In its amended complaint, DEC Staff alleged seven violations at a petroleum bulk storage facility located at 582 Broadway, Massapequa, New York. An eighth violation was alleged at the hearing but not included the amended complaint. Each is discussed below.

First Alleged Violation

In its amended complaint, DEC Staff alleges that respondents failed to properly reconcile the inventory records for the facility's underground storage tanks in violation of ECL 17-1007 and 6 NYCRR 613.4(a).¹ Section 613.4(a) requires operators to keep daily inventory records for the purposes of detecting leaks and requires that reconciliation of these records be kept current.

¹At the adjudicatory hearing, DEC Staff moved to include in this alleged violation an allegation that the respondents had failed to keep proper inventory records, but this language was not included in the amended complaint.

DEC Staff presented 10 day reconciliation forms from the facility as well as the testimony of DEC Staff member Hugh Cirrito. Mr. Cirrito testified that his review of inventory reconciliation forms led him to conclude that the records were unreliable (t. 73). Specifically, these records did not show the same amount of petroleum in the tanks as the tank test run on December 15, 2004 (t. 61); all the reconciliations showed overages (no shortages were recorded, as would be expected)(t. 67); all tank measurements were done by placing a stick in the tank and the same level of product in the tank was represented by different quantities of petroleum on the forms (t. 69); as well as other problems. These factors, combined with respondents' failure to produce delivery records, led Mr. Cirrito to conclude that these records were inaccurate. DEC Staff goes further in its closing brief to assert these inventory records were falsified.

Respondents did not present any evidence to counter DEC Staff's assertion that these records were not properly compiled or that respondents failed to properly reconcile the inventory records for the facility's underground storage tanks in violation of 6 NYCRR 613.4(a). Accordingly, this violation has been proven against Brother's as the operator of the facility.

Second Alleged Violation

In its amended complaint, DEC Staff alleges that respondents failed to properly secure the shear valves at the facility in violation of 6 NYCRR 613.3(d). This regulation requires the owner or operator to keep all gauges, valves and other equipment for spill prevention in good working order.

At the hearing, DEC Staff presented photographs of the shear valves and the testimony of Mr. Cirrito. Exhibit 1E shows one of the shear valves held open by a wooden stick and Exhibits 1F and 1G show the other shear valve held open with wire. Mr. Cirrito testified about seeing these valves on his inspection.

Respondents did not dispute DEC Staff's evidence on this point, and produced photos showing that these violations had been corrected within two days of the inspection (Exh. 3E & F).

Accordingly, DEC Staff has shown that respondent Brother's failed to properly secure the shear valves at the facility in violation of 6 NYCRR 613.3(d).

Third Alleged Violation

In its amended complaint, DEC Staff alleges that respondents failed to check monitoring wells at the facility in violation of 6 NYCRR 613.5(b)(3). This regulation requires the owner or operator to monitor for traces of petroleum at least once a week and that all monitoring systems must be inspected monthly.

DEC Staff presented the testimony of Mr. Cirrito who testified that he had to use a pry bar to open the monitoring wells because the caps on them were "real difficult to take off" (t. 37). From this, Mr. Cirrito inferred that the wells were not being checked regularly. Mr. Cirrito also testified that he asked someone at the facility (it is not clear who he asked) what device was used to check the monitoring wells and was shown what he described as "a two-inch ball that is cut in half with a little wire attached to it to hold it and a short string attached to that" (t. 39) and went on to say that the string was "[a] couple feet. Five feet" (t. 39) in length. He further testified that he thought groundwater at the facility was "somewhere around eight feet" (t. 39). Therefore, the device could not have been used to check groundwater for petroleum contamination.

Respondent Rotziokious also testified regarding the monitoring wells. He testified that every Friday he would check the monitoring wells by using a big crowbar to open the caps, which he acknowledged are difficult to open (t. 143-4). He stated he never found any contamination at any of the wells. On cross-examination he stated that he had been shown how to check the monitoring wells by the local fire marshal (t. 158) and that the ground water level was between five and six feet. He stated he bought a new device for checking the wells every year, that his son buys it for him off the computer and it costs about \$35 (t. 159). He testified that his memory of the inspection was not clear because his mother had recently passed away, but stated both that he did and did not show his device for checking the monitoring well to DEC Staff during the inspection.

In DEC administrative enforcement hearings, DEC Staff bears the burden of proving the alleged violation by a preponderance of the evidence. DEC Staff has not met this burden with respect to this alleged violation. DEC Staff's case rests on the undisputed fact that the caps to the monitoring wells are difficult to remove and the assertion that the monitoring device shown to staff was not long enough to reach groundwater (no photograph of this device was entered into the record). DEC Staff member Cirrito testified that it was his belief that groundwater at the site was around eight feet, however, the basis of his belief is

not in the record and seems to be contradicted by Mr. Rotziokious' statement that groundwater was five or six feet below the surface, based on his personal knowledge. If groundwater is higher than Mr. Cirrito believes it to be, the device shown to DEC Staff would be capable of checking the monitoring well. On the basis of this record, DEC Staff has not proven this alleged violation by a preponderance of the evidence.

Fourth and Fifth Alleged Violations

In its amended complaint, DEC Staff alleges that respondents failed to keep all gauges, valves and other equipment for spill prevention in good working order in violation of 6 NYCRR 613.3(d) and 613.8.² Specifically, DEC Staff alleged that respondents failed to properly maintain the top sump(s) and/or fill port catch basin(s) associated with tank(s) at the facility, resulting in debris and petroleum accumulation in the facility's spill buckets. The failure to remediate or call in a spill report for petroleum contamination in the spill buckets within two hours is a violation of 6 NYCRR 613.8.

These alleged violations involve conditions found in the spill buckets at the facility on the day of the inspection. Specifically, Mr. Cirrito testified that he found about 4-5 inches of petroleum product in the spill bucket for regular gasoline. He estimated the quantity at between 1-1.5 gallons (t. 92). The facility had received a delivery of petroleum earlier in the morning and the product was still in the bucket that afternoon. Mr. Cirrito also testified that he found debris in the spill bucket for super gasoline. Respondents do not challenge this evidence.

Accordingly, DEC Staff has shown that Brother's is liable for violations of 6 NYCRR 613.3(d) for failing to keep the super spill bucket clean and 6 NYCRR 613.8 for failing to promptly address the petroleum contamination in the regular spill bucket.

² In the original complaint DEC Staff alleged that a failure to remediate or call in a spill report for petroleum contamination in the spill buckets within two hours is a violation of 6 NYCRR 613.8 and Navigation Law 175. At the adjudicatory hearing, DEC Staff moved to strike the alleged violation of the Navigation Law from the complaint, however, this alleged violation was revived in the amended complaint. DEC Staff does not address the alleged violation of Navigation Law in its closing brief. Therefore, this alleged violation is deemed withdrawn.

Sixth Alleged Violation

In its amended complaint, DEC Staff alleges that respondents failed to maintain leak monitoring records at the facility for at least one year in violation of 6 NYCRR 613.5(b)(4). This regulation requires monitoring records for cathodic protection and leak detection systems to be maintained on the facility's premises for at least one year.

Mr. Cirrito testified that no leak monitoring records were provided during the inspection of the facility and no information was submitted prior to the hearing (t. 4). In its closing brief, DEC Staff states no documentation had been submitted following the hearing. The respondents do not assert otherwise.

DEC Staff has proven that Brother's Gas Stop, Inc. is liable for this violation.

Seventh Alleged Violation

In its amended complaint, DEC Staff alleges that respondents failed to properly color code the fill ports at the facility in violation of 6 NYCRR 613.3(b). This was discovered by DEC Staff during its November 9, 2005 inspection. Respondents admitted this violation at hearing and, consequently, it is deemed proved.

Eighth Alleged Violation

In addition to the seven violations included in the amended complaint, DEC Staff alleged an eighth violation in oral amendments to the original complaint at the adjudicatory hearing which was then omitted from DEC Staff's final amended complaint. Specifically, DEC Staff alleged that the respondents failed to properly maintain Stage I vapor recovery in accordance with 6 NYCRR 230.2(f)(3). In its closing brief, DEC Staff attempts to revive this alleged violation. As discussed above, we have ruled that the amended complaint is the final statement of the violations alleged in this case; however, if the Commissioner determines that our ruling is in error and that this alleged violation was properly brought by DEC Staff, we provide the following analysis of the evidence.

The evidence in the record does show a violation of 6 NYCRR 230.3(f)(3) which requires owners and operators of gasoline storage tanks to properly maintain the vapor-tight integrity and efficiency of stage I vapor collection and control systems. DEC Staff presented the testimony of DEC Staff member Gary McPherson

regarding the failure to maintain the vapor controls. DEC Staff also provided a photograph of a failed seal (Exh. 5c). Based on this information and Respondents' failure to challenge this evidence of the alleged violation, DEC Staff has proven the violation. Nevertheless, because this cause of action was not pleaded in the amended complaint, the respondent is not liable for this violation.

Respondents' Affirmative Defenses

In its amended answer, Respondents raise five affirmative defenses. First, respondents claim that the amended complaint fails to state a cause of action. DEC Staff argues that the amended complaint does, in fact, state a cause of action. The amended complaint identifies the respondents, the sections of law that are alleged to have been violated, the date of the alleged violations and other information necessary to state a cause of action. The first affirmative defense is without merit.

Respondents' second affirmative defense asserts that the respondents are unable to pay the civil penalty sought in this case. Since this goes to the civil penalty calculation, the discussion of this point is addressed below.

Respondents' third affirmative defense asserts that all issues were immediately remedied. To support this claim, respondents' provided receipts dated November 10 and 11, 2004 totaling \$494.15 for repairs at the facility as well as photos showing the repairs. DEC Staff is correct when it argues that even if this was true, it would not limit DEC Staff's authority to seek civil penalties for the alleged violations. The remedying of the violations is an appropriate factor to consider in the civil penalty calculation, and is discussed below as to penalty, but not as to whether the respondent is liable for the violations alleged.

Respondents' fourth affirmative defense asserts that DEC Staff failed to provide respondents with reasonable notice of the inspection and failed to have the owner or operator accompany them during the inspection as required by ECL 17-1011(2) and 6 NYCRR 613.1, and therefore, the complaint should be dismissed. DEC Staff responds that when DEC Staff announced its inspection to respondent Rotziokious, he responded by saying "go ahead" (t. 105) and thereby gave DEC Staff permission to conduct the inspection. DEC Staff maintains that the fact that Mr. Rotziokious did not accompany DEC Staff on the inspection was his choice. There may be a case where a respondent may be able to show that adequate notice was not provided prior to an

inspection, but this is not such an instance. In this case, DEC Staff arrived during normal business hours and announced its intention to begin an inspection. The owner of Brother's Gas Stop, Inc., Kasim "Jimmy" Yilmaz, was out of the country and had left his cousin in charge. Mr. Rotziokious was also present and told of the inspection. Given the time of day (during normal hours of operation) and the fact that representatives of both the operator and owner were present, adequate notice of the inspection was given in this case.

Respondents' fifth affirmative defense states that Broadway Auto Service, Inc. and Gus Rotziokious are improper parties to this action. DEC Staff responds that it has dropped its claim against Broadway Auto Service, Inc. and that Mr. Rotziokious is a proper party to this complaint. As discussed above, we have ruled that Mr. Rotziokious is not liable for the violations alleged in this case.

The Civil Penalty

In its complaint, DEC Staff sought a sixty thousand dollar (\$60,000.00) civil penalty from respondent Brother's Gas Stop, Inc. and a twenty-five thousand dollar (\$25,000.00) penalty from respondent Gus Rotziokious. In its amended complaint, DEC Staff also sought a twenty-five thousand dollar (\$25,000.00) penalty from Broadway Auto Service, Inc. Environmental Conservation Law section 71-1929 provides for a civil penalty of up to \$37,500.00 per day for these alleged violations. Therefore, the maximum possible penalty for these violation would be in the millions of dollars. Because only Brother's has been found liable, the civil penalty is discussed only with respect to this respondent.

As discussed above, DEC Staff has shown Brother's is liable for six violations (and has not proven two alleged violations). In its closing brief, DEC Staff does not assign individual penalties to the various alleged violations, and since two of the alleged violations upon which DEC Staff's suggested penalty are based have not been proved, it is difficult to adjust DEC Staff's suggested penalty. Thus, the maximum penalty in this case should be less than the \$60,000.00 amount suggested by DEC Staff.

The chart below summarizes the violations as well as the suggested penalty from DEC's Petroleum Bulk Storage Inspection Enforcement Policy DEE-22, which pertains to guidance for penalties in the context of settlement, not after adjudication.

Violation	Penalty suggested by DEE-22	Total
Failure to perform inventory reconciliation 6 NYCRR 613.4(a)	\$2,500 per facility	\$2,500
Failure to properly secure shear valves 6 NYCRR 613.3(d)	\$500 per tank	\$1,000
Failure to properly maintain fill port catch basins 6 NYCRR 613.3(d)	\$200 per tank	\$400
Failure to report a spill 6 NYCRR 613.8	\$500	\$500
Failure to maintain leak monitoring records 6 NYCRR 613.5(b)(4)	\$1,000 per facility	\$1,000
Failure to color code fill ports 6 NYCRR 613.3(b)	\$100 per port	\$200
TOTAL		\$5,600

It should be noted that the penalties found in DEE-22 are not applicable in cases such as this, where a Notice of Hearing and Complaint have been served. Further, DEC's Civil Penalty Policy states that "penalty amounts calculated with the aid of this document 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" (p. 1). Thus, the range of civil penalty in this case is something less than \$60,000.00 and significantly higher than \$5,600.00.

DEC's Civil Penalty Policy sets forth the process by which the amount of civil penalty is assessed. DEC Staff addresses this policy in its closing brief. DEC Staff argues that the maximum penalty allowed under law for these violation would be in the millions of dollars (ECL section 71-1929 allows a civil penalty of up to \$37,500.00 per day). DEC Staff argues further that Brother's enjoyed an economic benefit because the gas station should have ceased operations after the inspection because it did not have two operating leak detection systems and the tanks should have been emptied and tightness tested before being put into service again. Regarding the gravity component of the violations, DEC Staff argues that the Commissioner should

consider this very high in this case for two reasons; first, because of the importance of the regulatory scheme, and second, because the respondent submitted inventory records which DEC Staff characterizes as false and/or misleading. DEC Staff also argues that the respondent is culpable for the violation but note that there is no history of non-compliance at the facility.

Regarding cooperation from the respondents, DEC Staff states that the non-compliant conditions at the site were remedied very quickly, within two days of the inspection, however, DEC Staff points out that this cooperation ended with the submission of the suspect inventory records and that no additional documentation has been received from the respondents.

Respondent argues that its ability to pay should be considered in lowering the amount of civil penalty. DEC Staff responds that the respondent has failed to provide any documentary evidence to support this claim. Since no information regarding the financial position of Brother's is in the record, no adjustment to the amount of civil penalty in this case is warranted.

Respondent also argues that the amount of civil penalty should be lowered because the violations at the site were cured within two days of the inspection. DEC Staff points out that the repairs do not relieve respondent of its liability for the violations. In addition, DEC Staff states that no recent inventory records or delivery records have been submitted, although both have been requested.

Accordingly, based upon a full review of the record, the parties' arguments and DEC guidance documents, we believe the Commissioner should impose upon corporate respondent Brother's Gas Stop, Inc., a civil penalty of \$35,000.00.

Other Relief

In addition to the imposition of a civil penalty, DEC Staff seeks an order from the Commissioner requiring the respondent to undertake other actions. Several of these proposed actions are mandated by law, such as maintaining proper inventory records, properly monitoring the facility for leaks, properly maintaining its Stage I vapor recovery system and promptly reporting any new spills. Since these are merely restatements of existing regulatory requirements, their inclusion in the Commissioner's order is unnecessary.

DEC Staff also seeks language in the Commissioner's order which would require the respondent to submit within 30 days of the effective date of the order, proper inventory records utilizing a ten day reconciliation period for the most recent 30 days of operation. Given the failure of the respondent to properly use this form in the past, it is reasonable to include DEC Staff's proposed language to assure that the facility is complying with the law.

DEC Staff also seeks language requiring the respondent to conduct a tank tightness test within thirty days of the order or close the facility. This is based on DEC Staff's assertion that leak monitoring has not been ongoing at the facility. However, DEC Staff has not proven that the respondents have not been checking the monitoring wells, as alleged. In addition, the tanks were tested after the inspection, on December 15, 2004 and found to be not leaking. Based on this, we recommend that the Commissioner not order another tightness test.

DEC Staff also seeks language in the Commissioner's order requiring the respondents to clean the top sumps and/or fill port catch basins and submit photo documentation of compliance within ten days of the effective date of the order. This is reasonable given the past violations in this regard.

DEC Staff also seeks language in the Commissioner's order requiring that within thirty days of the effective date of the order, the respondent submit the four most recent weekly leak detection monitoring records. Given the past violation of this requirement, the inclusion of this language in the order is reasonable.

CONCLUSION

DEC Staff has shown that Respondent Brother's Gas Stop, Inc. is liable for six violations; (1) failing to perform inventory reconciliations in violation of 6 NYCRR 613.4(a); (2) failing to properly secure shear valves in violation of 6 NYCRR 613.3(d); (3 & 4) failing to properly maintain fill port catch basins and failing to remediate a spill therein in violation of 6 NYCRR 613.3(d) and 613.8, respectively; (5) failing to maintain leak monitoring records in violation of 6 NYCRR 613.5(b)(4); and (6) failing to color code fill ports in violation of 6 NYCRR 613.3(b).

RECOMMENDATION

We recommend that the Commissioner issue an order that:

1. Directs respondent Brother's Gas Stop, Inc., to pay a civil penalty of \$35,000.
2. Requires respondent Brother's Gas Stop, Inc., within 30 days of the effective date of the order, to submit proper inventory records utilizing a ten-day reconciliation period for the most recent thirty day period for the facility's underground storage tanks, in accordance with 6 NYCRR 613.4(a).
3. Requires respondent Brother's Gas Stop, Inc., within 10 days of the effective date of the order, to maintain spill prevention equipment in good working order by emptying and cleaning the top sumps and/or fill port catch basins for the facility's underground storage tanks and to submit photo-documentation of compliance, in accordance with 6 NYCRR 613.3(d).
4. Requires respondent Brother's Gas Stop, Inc., within 30 days of the effective date of the order, to submit the most recent four weekly leak detection monitoring records.