

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

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law (ECL) and Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

DEC File No. 20-17
R9-20200601-34

-by-

CARDINAL POINTS DEVELOPMENT INC.,

Respondent.

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (Department) that Cardinal Points Development Inc. (respondent) violated 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage (PBS) facility within thirty (30) days of the date it acquired the property (December 5, 2018), and 6 NYCRR 613-2.6(a)(3), by failing to permanently close the underground storage tanks at the facility, which have been out-of-service for more than 12 months. Respondent's facility is located at 5565 Millersport Highway, Amherst, New York (facility) and includes two underground storage tanks with a total capacity of 18,000 gallons.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter (*see* Default Summary Report at 5 [Finding of Fact No. 17]). After withdrawing a default hearing request due to increased COVID-19 cases in Erie County, Department staff submitted a motion for default judgment (*see* Default Summary Report at 2).

As a consequence of respondent's failure to answer in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see* Default Summary Report at 6, 8). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to register its PBS

facility within thirty (30) days of the date it acquired the facility and failed to permanently close the underground storage tanks at the facility, which have been out-of-service for more than 12 months. Accordingly, respondent is in violation of 6 NYCRR 613-1.9(d)(1) and 6 NYCRR 613-2.6(a)(3).

Department staff correctly points out that the requirement to register PBS facilities is one of the “cornerstones” of the PBS regulatory scheme (Motion for Default Judgment, Exhibit C, Affidavit of Patrick Diez, ¶ 40). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health (*see id.*). The requirement to close out-of-service PBS tanks is also critical to the PBS regulatory scheme, the prevention of petroleum discharges, and the goal of protecting the environment and public health (*see id.* ¶ 41).

Respondent did submit a letter dated January 22, 2021 in which it alleged that the presence of the PBS tanks was not its fault, and that removal of the tanks was the responsibility of a prior owner. Respondent claimed that the property is vacant, with no income coming in, and that it cannot afford to pay a penalty or remove the tanks (*see* Default Summary Report at 2). Respondent however provided no documentation as to its financial circumstances. The ALJ addressed respondent’s contentions and, based on a review of the law and precedent, correctly concluded that respondent is the owner of the facility including all of the tanks, and is required to register and permanently close the tanks located at the facility (*see id.* at 6-7).

Department staff seeks a penalty in the amount of five thousand, four hundred dollars (\$5,400). ECL 71-1929, which applies to the regulatory violations at issue in this proceeding, provides for a penalty of up to thirty-seven thousand, five hundred dollars (\$37,500) per day for each violation. In support of its penalty request, Department staff considered various applicable Department enforcement and penalty policies, respondent’s failure to cooperate and respondent’s economic benefit of noncompliance (*see* Motion for Default Judgment, Exhibit C, Diez Affidavit, ¶¶ 28-38). The civil penalty in the amount of five thousand, four hundred dollars (\$5,400) as requested by Department staff, is authorized and appropriate for the violations established on this motion.

With regard to corrective measures, Department staff seeks an order of the Commissioner directing respondents to permanently close the underground storage tanks at the facility in accordance with the provisions of 6 NYCRR 613-2.6(b)-(e). The proper closure of the underground storage tanks is required under part 613 and Department staff’s request is consistent with the regulatory requirements. Accordingly, I hereby direct respondent to submit a work plan to the Department within thirty (30) days of the service of this order upon respondent, for Department review and approval, for permanent closure of the underground storage tanks at the facility. Within sixty (60) days of Department approval of the work plan, respondent Cardinal Points Development Inc. shall permanently close the underground storage tanks at the facility in accordance with 6 NYCRR 613-2.6(b)-(e).

In addition, I direct that respondent submit a complete petroleum bulk storage application for the facility, plus applicable and past due registration fees to the Department within thirty (30) days of the service of this order upon respondent.

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

- I. Department staff's motion for default judgement pursuant to 6 NYCRR 622.15 is granted. By failing to answer the complaint, respondent Cardinal Points Development Inc. waived its right to be heard at hearing.
- II. Based on the pleadings and papers submitted with and support of Department staff's motion, respondent Cardinal Points Development Inc. is adjudged to have violated:
 - A. 6 NYCRR 613-1.9(d) by failing to register its PBS facility within 30 days of acquiring the facility; and
 - B. 6 NYCRR 613-2.6(a)(3) by failing to permanently close the underground storage tanks at the facility that have been out-of-service for more than 12 months.
- III. Within thirty (30) days of service of this order upon respondent Cardinal Points Development Inc., respondent shall submit to the Department a complete registration application for the facility, with applicable registration fees.
- IV. Within thirty (30) days of service of this order upon respondent Cardinal Points Development Inc., respondent shall pay a civil penalty in the amount of five thousand, four hundred dollars (\$5,400) by certified check, cashier's check or money order made payable to the "New York State Department of Environmental Conservation."
- V. Within thirty (30) days of service of this order upon respondent Cardinal Points Development Inc., respondent shall submit a work plan to the Department, for Department review and approval, for permanent closure of the underground storage tanks at the facility in accordance with 6 NYCRR 613-2.6(b)-(e). The work plan shall include a schedule and timetable for implementation of the plan and completion of the remedial activities.
- VI. Within sixty (60) days of Department approval of the work plan, respondent Cardinal Points Development Inc. shall permanently close the underground storage tanks at the facility.
- VII. Respondent Cardinal Points Development Inc. shall submit the penalty payment and all other submissions to the following:

Teresa J. Mucha, Esq.
Associate Attorney
NYSDEC Region 9
270 Michigan Avenue
Buffalo, New York 14203-2915

- VIII. Any questions or other correspondence regarding this order shall also be addressed to Teresa J. Mucha, Esq. at the address referenced in paragraph VII of this order.
- IX. The provisions, terms and conditions of this order shall bind respondent Cardinal Points Development Inc. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: March 22, 2021
Albany, New York

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

In the Matter of the Alleged Violation of Article 17 of the New York State Environmental Conservation Law (ECL) and Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

**DEFAULT SUMMARY
REPORT**

- by -

DEC File No. 20-17
R9-20200601-34

CARDINAL POINTS DEVELOPMENT INC.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Cardinal Points Development Inc. (respondent) with a notice of hearing and complaint, dated August 11, 2020, alleging violations of 6 NYCRR 613-1.9(d), for failing to register its petroleum bulk storage (PBS) facility located at 5565 Millersport Highway, Amherst, New York (facility) within thirty (30) days of the date (December 5, 2018)¹ it acquired the property and 6 NYCRR 613-2.6(a)(3), for failing to permanently close the underground storage tanks (USTs) at the facility. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of 6 NYCRR 613-1.9(d) and 613-2.6(a)(3); (ii) assessing a civil penalty in the amount of five thousand four hundred dollars (\$5,400); (iii) directing respondent to register its petroleum bulk storage facility, remit the applicable registration fee, and submit a complete registration application; (iv) directing respondent to submit a work plan for the permanent closure of the USTs, for Department review and approval, in accordance with 6 NYCRR 613-2.6(b)-(e); (v) directing respondent to permanently close the USTs within sixty (60) days of Department approval of the work plan, and (vi) granting such other and further relief as may be just, proper and appropriate.

Department staff served the notice of hearing and complaint on respondent by certified mail on August 12, 2020, which was received by respondent on August 17, 2020 (*see* Motion for

¹ Department staff's papers reference December 18, 2018 as the date respondent purchased the facility (*see* Motion for Default Judgment Exhibit C, affidavit of Patrick Diez, sworn to January 11, 2021, ¶ 10; and Exhibit D, complaint, ¶ 9). The deed to respondent is dated December 5, 2018, and that date will be referenced herein (*see* Motion for Default Judgment, Exhibit B).

Default Judgment, Exhibits E and F; *see* former 6 NYCRR 622.3[a][3]).² Respondent failed to file an answer to the complaint, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit D). In addition, respondent failed to appear at a pre-hearing conference scheduled for October 27, 2020. The pre-hearing conference, however, was scheduled as a meeting and did not provide notice to respondent that failure to appear at the pre-hearing conference constituted a default and judgment could be entered against respondent (*see* Motion for Default Judgment, Exhibit G).

On October 27, 2020, the matter was assigned to me. At staff's request a default hearing was scheduled for November 19, 2020 via video conference. The Office of Hearings and Mediation Services served a notice of hearing on the parties on October 28, 2020 by first class mail. On November 17, 2020, Department staff withdrew its request for a default hearing due to the increase in COVID-19 infection rates in Erie County and indicated that staff would submit its motion for default on the papers.

By cover letter dated January 12, 2021, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on January 12, 2021 (*see* Motion for Default Judgment, Exhibit H).

Respondent, by letter dated January 22, 2021, alleges that the presence of the tanks is not respondent's fault, and that the Department failed to have the original owner remove the tanks. Respondent claims that the Department wants to hold an innocent company responsible because the previous owner and DEC failed to address the problem. Respondent also claims the property is vacant, with no income and that COVID-19 has devastated the company to the verge of bankruptcy. As result, respondent claims it cannot afford to pay a fine or "remove someone else's mistake."

Applicable Regulatory Provision

Section 613-1.9. Registration.

* * *

“(d) Application procedure for initial registration or transfer of ownership.

“(1) If ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the department within 30 days after transfer.”

² 6 NYCRR part 622, Uniform Enforcement Hearing Procedures, was repealed and replaced effective September 16, 2020. Department staff commenced this proceeding before the effective date of the current part 622 regulations. Accordingly, jurisdictional service is reviewed and considered pursuant to former part 622. Staff's default motion papers were submitted after the effective date of the current part 622 and will be reviewed and considered pursuant to the current part 622 regulations.

Section 613-2.6

“(a) Out-of-service UST systems.

* * *

“(3) When a UST system is out-of-service for more than 12 months, the facility must permanently close the UST system in accordance with subdivisions (b) through (e) of this section.”

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff’s motion for a default judgment:

1. Respondent Cardinal Points Development Inc. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 5565 Millersport Highway, Amherst, New York (facility). In particular, PBS tank numbers 1 and 2 at the facility have a capacity of 10,000 and 8,000 gallons, respectively and are located underground. The USTs were used to store gasoline. (*See* Motion for Default Judgment, Exhibit B – referee’s deed, and Exhibit C – affidavit of Patrick Diez, sworn to January 11, 2021 [Diez Aff.], ¶¶ 6, 8, and 10, Diez Exhibits *A, B* and *C*.)
2. Respondent is an active domestic business corporation in the State of New York. (*See* Motion for Default Judgment, Exhibit A.)
3. On December 5, 2018, the County of Erie transferred all right, title and interest in the facility to Cardinal Points Development Inc., the facility’s current owner by referee’s deed. This deed is recorded in the Erie County Clerk’s Office in Book 11338 of Deeds Page 9964. (*See* Motion for Default Judgment, Exhibit B.)
4. Pursuant to a registration application received by the Department, the Department issued PBS Certificate Number 9-221856 to Qual-Econ Leasing Co. Inc., the previous owner of the facility, on October 1, 2007 with an expiration date of August 17, 2012. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶ 9, Diez Exhibit *A*.)
5. Patrick Diez is employed as an Environmental Program Specialist T2 in the Department’s Division of Environmental Remediation, Petroleum Bulk Storage unit, in the Department’s Region 9 office located in Buffalo, New York. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶ 2.)
6. As part of his duties, Mr. Diez is familiar with and administers provisions of ECL article 17 title 10 and 6 NYCRR part 613 pertaining to the regulation of PBS tanks, and assists the regulated community with PBS compliance, conducts inspections of PBS facilities and assists in enforcing violations of the PBS laws and regulations including

development of civil penalties. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶¶ 3-4.)

7. On October 1, 2019, Mr. Diez inspected the facility and observed several PBS violations. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶¶ 11-12, Diez Exhibits *B* and *C*.)
8. As part of his inspection, Mr. Diez reviewed the Department’s PBS file for the facility and discovered that respondent failed to timely register the facility as required by 6 NYCRR 613-1.9(d)(1) and that there was no documentation regarding the closure of the tanks. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶ 13.)
9. The PBS tanks were out-of-service for more than twelve months. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., Diez Exhibit *B*, Item 9 and page 7.)
10. On October 21, 2019, Mr. Diez mailed a notice of violation (NOV) to respondent identifying the violations he observed during his inspection. The NOV advised respondent that a new registration application with corrected information and a schedule for the permanent closure of the PBS tanks must be submitted to the Department by November 21, 2019. Respondent did not respond to the NOV. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶¶ 14-16, Diez Exhibit *D*.)
11. On January 27, 2020, Mr. Diez mailed a second NOV to respondent advising respondent to submit the registration and closure schedule by February 27, 2020. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶ 17, Diez Exhibit *E*.)
12. By letter dated February 7, 2020, respondent advised Mr. Diez that respondent had purchased the property at an Erie County foreclosure sale and denied any ownership or responsibility for the PBS tanks. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶ 18, Diez Exhibit *F*.)
13. On March 16, 2020, Mr. Diez sent respondent a letter explaining respondent’s legal responsibility for performing corrective actions and bringing the facility into compliance. Mr. Diez provided respondent a deadline of March 30, 2020 for respondent to submit the registration and closure schedule. Mr. Diez did not receive any further communication from respondent. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶ 19, Diez Exhibit *G*.)
14. To date, respondent has not registered the facility or permanently closed the two out-of-service PBS tanks. (*See* Motion for Default Judgment, Exhibit C – Diez Aff., ¶ 27.)
15. To date, respondent continues to claim it has no responsibility for the PBS tanks located at the facility. (*See* correspondence from Cardinal Points Development, dated January 22, 2021.)

16. As shown by affidavits of Pamela Frasier and Susan L. Reynolds, respondent was served by certified mail on August 12, 2020, which was received by respondent on August 17, 2020, with a notice of hearing and complaint dated August 11, 2020, alleging violations of 6 NYCRR 613-1.9(d) and 613-2.6(a)(3), together with a cover letter, for failure to register its PBS facility and for failure to permanently close the USTs at the facility located at 5565 Millersport Highway, Amherst, New York. (See Motion for Default Judgment, Exhibits E and F.)
17. Respondent failed to file an answer to the complaint, as directed in the notice of hearing. (See Affirmation of Teresa J. Mucha, Esq., dated January 12, 2021, ¶ 2.)

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain:

- "(1) Proof of service upon respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- "(2) Proof of respondent's failure to appear or failure to file a timely answer;
- "(3) Consistent with CPLR 3215(f), proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim;
- "(4) A concise statement of the relief requested;
- "(5) A statement of authority and support for any penalty or relief requested; and
- "(6) Proof of mailing the notice required by 6 NYCRR 622.15(d), where applicable." (*see* 6 NYCRR 622.15[b][1] - [6] [effective September 16, 2020]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Staff is required to support its motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018 [*Samber*], at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint, as directed in the cover letter and notice of hearing served with the complaint; (iii) Department staff's motion includes a concise statement of the relief requested; (iv) staff's motion includes a statement of authority and support for the penalty and relief requested; and (v) Department staff provided proof of service of the motion papers on respondent (*see* affidavit of service of Pamela Frasier, sworn to January 12, 2021). Respondent filed a letter responding to staff's motion. Respondent's letter, however, does not address, or show good cause for, respondent's failure to answer the complaint or state a meritorious defense to the violations alleged by Department staff. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to register its petroleum bulk storage facility located at 5565 Millersport Highway, Amherst, New York, within thirty (30) days after it acquired the facility, in violation of 6 NYCRR 613-1.9(d), and failed to permanently close the out-of-service USTs located at the facility, in violation of 6 NYCRR 613-2.6(a)(3) (*see Samber* at 1).

I do, however, feel compelled to address respondent's position even though Department staff is entitled to default judgment on both causes of action. Respondent's correspondence with the Department before the commencement of this proceeding, and that dated January 22, 2021, demonstrate respondent's continued argument that others are to blame and respondent's denial of any responsibility for the PBS tanks. The law, however, is clear. ECL 17-1009 and 6 NYCRR 613-1.9(d) impose the PBS registration requirement on all facility owners. A facility "means a single property, or contiguous or adjacent properties used for a common purpose which are owned or operated by the same person or persons, on or in which are located: (1) one or more tank systems having a combined storage capacity of more than 1,100 gallons; or (2) an underground tank system having a storage capacity that is greater than 110 gallons," and a facility owner "means any person who has legal or equitable title to the real property of a facility" (*see* 6 NYCRR 613-1.3[v] and [w]). Department staff's proof demonstrates that the real property in question is a facility and that it is owned by respondent. Accordingly, respondent, as the new facility owner, was required to register the facility within thirty days of acquiring the facility pursuant to 6 NYCRR 613-1.9(d).

Pursuant to 6 NYCRR subpart 613-2, the tank closure requirements are imposed on the facility. Whenever the current regulations impose a requirement on a facility that requirement is imposed "on every operator and every tank system owner at the facility, unless expressly stated otherwise" (*see* 6 NYCRR 613-1.2[d]). In this matter, staff has not pleaded or affirmatively demonstrated the identity of the operator or tank system owner in support of staff's second cause of action alleging violation of 6 NYCRR 613-2.(a)(3). In a previous matter, I concluded "that when respondent failed to register the facility after transfer of ownership to it that a presumption arises that respondent facility owner is also the operator and tank system owner. It is, however, a rebuttable presumption" (*Matter of 2363 Southern Boulevard, LLC*, Summary Report at 6, *adopted by* Order of the Commissioner, September 11, 2017). I also noted in that matter that

respondent, as a facility owner, is in a position to correct the violations, and respondent failed to appear and failed to rebut the presumption.

In this matter, I conclude that when respondent failed to register the facility, a presumption arises that the respondent facility owner is also the tank system owner. Respondent failed to answer the complaint and, except for bald assertions, failed to rebut the presumption in its correspondence. Respondent claims that a former tenant of the property installed and owned the tanks before abandoning the facility (*see* correspondence from Cardinal Points Development, dated January 22, 2021). Even assuming that the prior tenant owned the tanks, it has previously been held that PBS tanks (trade fixtures) not removed by the tenant prior to giving up possession at the termination of its leasehold are presumed to be abandoned by the tenant, and title to the abandoned property passes to the landlord (*see Modica v Capece*, 189 AD2d 860, 861 [2d Dept 1993]; *Gristede Bros., Inc. v State*, 11 AD2d 580, 580 [3d Dept 1960]; *Lewis v Ocean Nav. & Pier Co.*, 125 NY 341, 350 [1891]), and when the property is sold, title to the abandoned tanks passed to the new owner (*see Matter of Huntington and Kildare, Inc.*, Order of the Commissioner, December 22, 2009, at 2, *adopting* the hearing report of the Chief Administrative Law Judge [*see* hearing report at 15-16]). In this matter, the referee's deed to respondent grants and conveys to respondent all of the right, title and interest "which the said County of Erie and all other persons" had in the premises sold to respondent. Accordingly, I conclude that respondent is the owner of the facility including all tanks situated therein, and respondent is required to register and permanently close the tanks located at the facility. Respondent's denials are without merit.

Staff's complaint requested a civil penalty in the amount of five thousand four hundred dollars (\$5,400). Staff's submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department's Civil Penalty Policy (DEE-1, June 20, 1990) and DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy-Penalty Schedule (*see* Motion for Default Judgment, Exhibit C, Diez Aff., ¶¶ 28-41).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. The statutory maximum penalty for the two violations, as computed by staff, exceeds forty million dollars. Department staff discusses the costs avoided by respondent's noncompliance and the average costs to close PBS tanks. Staff assigned a \$900 penalty for failure to submit the registration, a penalty of \$3,600 for failing to close two USTs and a 20% (of \$4,500) or \$900 upward adjustment due to respondent's failure to cooperate, the importance of the violations to the regulatory scheme and due to the inability to accurately determine the economic benefit received by respondent's noncompliance.

I conclude that staff's request for a civil penalty in the amount of five thousand four hundred dollars (\$5,400) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Department staff also requests the following corrective action within thirty (30) days of the effective date of the Commissioner's order. First, staff requests that respondent be directed to register the facility by submitting a completed PBS registration application together with the applicable fees. Second, staff requests that respondent be directed to submit a work plan, for Department review and approval, for the permanent closure of the USTs at the facility in

accordance with 6 NYCRR 613-2.6(b)-(e). Lastly, staff requests that respondent be directed to close the USTs at the facility within sixty (60) of Department approval of the work plan.

Department staff states that the corrective actions are necessary to address the PBS violations and to prevent the continuing and potential additional environmental harm from respondent's noncompliance with applicable PBS law and regulations. I conclude that Department staff's request for corrective action is supported by the record and appropriate under the circumstances.

Lastly, respondent claims, in its January 22, 2021 correspondence, that respondent is financially unable to bring the facility into compliance. Respondent produced no evidence in support of that claim. The record in this matter demonstrates that respondent paid \$52,000 for an abandoned gas station, and respondent was required to comply with the ECL and PBS regulations since taking ownership of the facility on December 5, 2018. Respondent, however, has expressly refused to do so and failed to answer the complaint in this matter. Therefore, I conclude that Department staff is entitled to a default judgment on both causes of action and the relief requested by staff.

Conclusions of Law

By failing to register its PBS facility located at 5565 Millersport Highway, Amherst, New York, within thirty (30) days of the date (December 5, 2018) that it acquired the facility, respondent violated 6 NYCRR 613-1.9(d)(1). By failing to permanently close the out-of-service USTs at the facility, respondent violated 6 NYCRR 613-2.6(a)(3).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Cardinal Points Development Inc. in default pursuant to the provisions of 6 NYCRR 622.15.
2. Holding that respondent Cardinal Points Development Inc. violated 6 NYCRR 613-1.9(d) by failing to register its PBS facility located at 5565 Millersport Highway, Amherst, New York within thirty (30) days of the date (December 5, 2018) that it acquired the facility.
3. Holding that respondent Cardinal Points Development Inc. violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close the USTs at the facility that have been out-of-service more than 12 months.
4. Directing respondent Cardinal Points Development Inc. to submit to the Department, within thirty (30) days of service of the Commissioner's order, a complete registration application for the facility, together with the applicable registration fees.

5. Directing respondent Cardinal Points Development Inc. to pay a civil penalty in the amount of five thousand four hundred dollars (\$5,400) within thirty (30) days of service of the Commissioner's order.
6. Directing respondent Cardinal Points Development Inc. to submit a work plan, for Department review and approval, for the permanent closure of the USTs at the facility in accordance with 6 NYCRR 613-2.6(b)-(e) within thirty (30) days of service of the Commissioner's order.
7. Directing respondent Cardinal Points Development Inc. to permanently close the USTs at the facility within sixty (60) days of Department approval of the work plan.
8. Directing such other and further relief as may be just, proper and appropriate.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
February 17, 2021

APPENDIX A

Matter of Cardinal Points Development Inc.

DEC File No. 20-17

R9-20200601-34

Motion for Default Judgment

1. Cover letter, dated January 12, 2021, attaching staff's motion papers.
2. Cover letter to Ms. Noelle Alessandra, Cardinal Points Development Inc., dated January 12, 2021, enclosing staff's motion papers.
3. Notice of Motion for Default Judgment, dated January 12, 2021.
4. Motion for Default Judgment, dated January 12, 2021, attaching Exhibits A-H and the affirmation of Teresa J. Mucha;
 - A. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Cardinal Points Development Inc., reflecting information through November 2, 2020
 - B. Copy of Referee's Deed, dated December 5, 2018 with Erie County Clerk's Recording Page, dated December 21, 2018
 - C. Affidavit of Patrick Diez, sworn to January 11, 2021, attaching the following exhibits:
 - A. Facility Information Report, PBS#: 9-221856, printed August 11, 2020
 - B. PBS Inspection Form, dated October 1, 2019
 - C. Photograph of tank location, dated October 1, 2019
 - D. Notice of Violation addressed to Cardinal Points Development, dated October 21, 2019
 - E. Second Notice of Violation addressed to Cardinal Points Development, dated January 27, 2020
 - F. Correspondence from Cardinal Points Development to Patrick Diez, dated February 7, 2020
 - G. Correspondence from Patrick Diez to Cardinal Points Development, dated March 16, 2020
 - D. Cover to Ms. Noelle Alessandra, Cardinal Points Development Inc., attaching staff's notice of hearing and complaint, all dated August 11, 2020
 - E. Affidavit of Service of Pamela Frasier, sworn to November 3, 2020 attaching the following exhibits:
 - A. USPS Tracking delivery confirmation
 - B. Copy of executed USPS return receipt
 - F. Affidavit of Susan L. Reynolds, sworn to November 3, 2020

- G. Copy of Webex meeting email invitation to Department staff and respondent from ALJ Molly McBride
 - H. Affidavit of Service of Pamela Frasier, sworn to January 11, 2021, serving Department staff's cover, notice of motion, motion for default judgment and supporting documents on respondent
5. Affirmation of Teresa J. Mucha, Esq, dated January 12, 2020
 6. Cover letter, dated February 5, 2021, from Teresa J. Mucha, Esq. attaching Affirmation of Teresa J. Mucha, dated February 5, 2021
 7. Correspondence from Cardinal Points Development, dated January 22, 2021