

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation
of Article 17 of the Environmental
Conservation Law (ECL) of the State of
New York and Parts 612 and 613 of Title
6 of the Official Compilation of Codes,
Rules and Regulations of the State of
New York (6 NYCRR),

ORDER

DEC Case No.
R6-20151116-67

- by -

CHARLESTOWN MALL OF UTICA, LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Charlestown Mall of Utica, LLC (respondent) violated (i) 6 NYCRR 612.2(b) for failing to register respondent's petroleum bulk storage (PBS) facility within thirty (30) days of transfer of the facility to respondent on October 19, 2007; and (ii) 6 NYCRR 613.9(b) for failing to properly close permanently out-of-service PBS tanks at respondent's PBS facility at 311 Turner Street, Utica, New York.¹ Located at the facility are five 550 gallon underground PBS tanks and one 30,000 gallon aboveground PBS tank.

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

As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear at a pre-hearing conference

¹ Part 612 was repealed, effective in 2015 subsequent to Department staff's inspection of respondent's facility, and replaced by a revised part 613. For the purposes of the violations alleged in this matter, the former parts 612 and 613 apply, and the caption has been so modified (see Hearing Exhibit 1, Department staff's Complaint [citing violations of former Part 612 and former Part 613]). For the purposes of the ordered corrective action, the current regulations apply.

scheduled for March 8, 2016 (see Hearing Report at 5 [Finding of Fact No. 17]), or at the hearing that was convened on March 8, 2016 before the ALJ (see Hearing Report at 3).

Because respondent failed to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 6-7 and 9). I agree that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report at 6-7). Accordingly, staff is entitled to a judgment based on record evidence.

ECL 71-1929, which applies to the violations at issue in this proceeding, provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff are seeking a civil penalty of thirty-five thousand dollars (\$35,000), with twenty thousand dollars (\$20,000) suspended conditioned on respondent's compliance with this order. Staff demonstrated that respondent failed to register the PBS facility within thirty (30) days of transfer of ownership to respondent and failed to properly close the permanently out-of-service PBS tanks.

Based on this record, the requested penalty of thirty-five thousand dollars (\$35,000) with twenty thousand dollars (\$20,000) suspended, conditioned on respondent's compliance with this order, is authorized and appropriate.

I also concur with the ALJ that respondent needs to register the facility pursuant to 6 NYCRR 613-1.9 and properly close the underground and aboveground PBS tanks pursuant to 6 NYCRR 613-2.6(b) through (e) and 613-4.5(b), respectively.

Staff requested that I order respondent to submit a \$1,000 registration fee covering initial registration in 2007 that should have been applied for upon the transfer of property and for renewal of the registration in 2012 (see Complaint at 4-5; Staff Proposed Order, § VI). This request is authorized and appropriate.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Charlestown Mall of Utica, LLC, waived its right to be heard at the hearing.
- II. Based upon record evidence, respondent Charlestown Mall of Utica, LLC, is adjudged to have violated:
 - A. 6 NYCRR 612.2(b), by failing to register its petroleum bulk storage facility located at 311 Turner Street, Utica, New York, within thirty (30) days of the transfer of ownership of the facility to it on October 19, 2007; and
 - B. 6 NYCRR 613.9(b), by failing to properly close five 550-gallon underground petroleum bulk storage tanks and one 30,000-gallon aboveground petroleum bulk storage tank that are permanently out-of-service located at 311 Turner Street, Utica, New York.
- III. Respondent Charlestown Mall of Utica, LLC, is assessed a civil penalty of thirty-five thousand dollars (\$35,000) for the violations set forth in paragraph "II" of this order, with payment of twenty thousand dollars (\$20,000) of the penalty suspended, conditioned upon respondent's compliance with the provisions of this order.
- IV. Within sixty (60) days of the service of this order upon respondent Charlestown Mall of Utica, LLC, respondent shall pay the non-suspended portion of the civil penalty referenced in paragraph "III" of this order (that is, fifteen thousand dollars [\$15,000]) by certified check, cashier's check or money order made payable to the "New York State Department of Environmental Conservation."
- V. The penalty payment shall be sent to the following address:

Office of General Counsel
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601
Attention: Nels G. Magnuson, Esq.

- VI. Within ten (10) days of service of this order on respondent Charlestown Mall of Utica, LLC, respondent shall submit an approvable petroleum bulk storage registration application to the Department for the above facility together with one thousand dollar (\$1,000) in registration fees.
- VII. Within one hundred fifty (150) days of service of this order on respondent Charlestown Mall of Utica, LLC, respondent shall permanently close the underground petroleum bulk storage tank systems in accordance with 6 NYCRR 613-2.6(b) through (e).
- VIII. Within sixty (60) days of service of this order on respondent Charlestown Mall of Utica, LLC, respondent shall permanently close the aboveground petroleum bulk storage tank system in accordance with 6 NYCRR 613-4.5(b).
- IX. Should respondent fail to pay the non-suspended portion of the civil penalty, to submit the registration application and applicable fees, or complete the corrective action set forth in paragraphs "VII" and "VIII" of this order to Department staff's satisfaction, or otherwise fails to comply with the terms and conditions of this order, the suspended portion of the civil penalty (that is, twenty thousand dollars [\$20,000]) shall become immediately due and payable upon Department staff's demand, and shall be submitted in the same form and to the same address as the non-suspended portion of the penalty.
- X. Respondent Charlestown Mall of Utica, LLC, shall permit any duly designated officer, employee or agent of the Department entry to respondent's PBS facility, or areas (i) in the vicinity of respondent's facility that are under the control of respondent, or (ii) as to which respondent has authority to provide access to others, for the following purposes:
- (A) inspection;
 - (B) sampling and testing that the Department deems necessary;
 - (C) ascertaining respondent's compliance with the Environmental Conservation Law and the Navigation Law, and the regulations promulgated thereto, and the provisions of this order;

(D) completing permanent closure of the facility as ordered; and

(E) investigating and remediating any petroleum contamination found at the facility.

XI. Except for the penalty payment, respondent shall send all submissions to the Department to the following:

Mr. Ronald F. Novak, P.E.
Regional PBS Supervisor
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601.

XII. The provisions, terms and conditions of this order shall bind respondent Charlestown Mall of Utica, LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Acting Commissioner

Dated: Albany, New York
June 14, 2016

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

HEARING REPORT

DEC Case No.
R6-20151116-67

- by -

CHARLESTOWN MALL OF UTICA, LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Charlestown Mall of Utica, LLC (respondent) with a notice of hearing and complaint, dated January 27, 2016, alleging a violation of 6 NYCRR 612.2(b), for failing to register respondent's petroleum bulk storage (PBS) facility within thirty days of transfer of ownership to respondent; and a violation of 6 NYCRR 613.9(b), for failure to properly close PBS tanks permanently out of service at respondent's PBS facility located at 311 Turner Street, Utica, New York.¹

The complaint sought an order of the Commissioner:

(1) finding the facility is a PBS facility and respondent in violation of 6 NYCRR 612.2(b) by failing to register the PBS facility by November 18, 2007;

(2) finding respondent in violation of 6 NYCRR 613.9(b) by failing to permanently close the out-of-service underground storage tank (UST) systems and aboveground storage tank (AST) system at the facility;

(3) assessing a civil penalty of at least thirty-five thousand dollars (\$35,000);

¹ Part 612 was repealed, effective subsequent to the staff's inspection of respondent's facility, and replaced by a revised part 613. For the purposes of the violations alleged in this matter, the prior part 612 applies.

(4) suspending an appropriate portion, but not more than twenty thousand dollars (\$20,000), of the total penalty to ensure compliance with the Commissioner's order;

(5) directing respondent to pay the penalty within sixty (60) days;

(6) directing respondent to submit an approvable PBS registration application for initial registration and permanent closure of the PBS tanks together with the \$1,000 registration fee covering the initial registration fee due in 2007 and the renewal registration fee due in 2012 within 10 days;

(7) directing respondent to permanently close the UST systems in accordance with 6 NYCRR 613-2.6(b) through (e) within one hundred fifty (150) days, and permanently close the AST system in accordance with 6 NYCRR 613-4.5(b) within sixty (60) days;

(8) directing respondent to provide any duly designated officer, employee or agent of the Department entry to respondent's PBS facility or areas in the vicinity of Respondent's facility which may be under the control of Respondent, and as to which Respondent has authority to provide access to others and any areas under Respondent's control necessary to gain access thereto, for the purposes of inspection; sampling and testing that the Department deems necessary; ascertaining Respondent's compliance with the ECL, the Navigation Law, the regulations promulgated thereto, and provisions of the order; completing permanent closure of the facility as ordered; and investigating and remediating any petroleum contamination found at the site.

(9) reserving all rights of the Department and the state regarding civil or criminal actions for matters not specifically alleged in this proceeding;² and

(10) granting such other and further relief as the Commissioner may deem just and appropriate under the circumstances.³

² Such requests by staff to reserve all rights have been made, and rejected, in prior orders (see e.g. Matter of Galloway, Order of the Commissioner, January 16, 2015, at 5). Language reserving the Department or the State's rights for matters that have not been alleged in this complaint is unnecessary.

³ Department staff also requests that the following be ordered: (i) The penalty assessed in the Order constitutes a debt owed to the state of New York; (ii) Failure to pay the assessed penalty, or any part thereof, in accordance with the schedule contained in the Order, may result in referral to the New York State Attorney General for collection of the entire amount owed (including the assessment of interest, and a charge to cover the cost of collecting the debt), or referral to the New York State Department of Taxation and Finance, which may offset any tax refund or other monies that may be owed to Respondent by the state of New York by the penalty amount; and (iii) Any suspended and/or stipulated penalty provided for in this order will constitute a debt owed to the state of New York when and if such penalty becomes due.

However, based on administrative practice, this information is more appropriately

Department staff served the notice of hearing and complaint on respondent Charlestown Mall of Utica, LLC by certified mail on January 27, 2016. The certified mail was received on or before January 29, 2016. The notice of hearing advised respondent that respondent was required to serve a written answer to the complaint within 20 days after receipt, that failure to serve an answer would constitute a default and waiver of respondent's right to be heard, and that staff may thereafter move for a default judgment against respondent at any time. Respondent failed to file an answer to the complaint.

As stated in the notice of hearing, on March 8, 2016, a pre-hearing conference was convened before me at the Department's Region 6 sub-offices in Utica, New York. The notice of hearing advised respondent that the pre-hearing conference was scheduled for 10:00 a.m. and attendance at the pre-hearing conference was mandatory. The notice also advised respondent that should respondent fail to appear, a hearing record would be opened and staff would move for a default judgment imposing the penalty and relief requested in staff's complaint. The pre-hearing conference commenced at 10:40 a.m. Department staff was represented by Nels G. Magnuson, Esq., Assistant Regional Attorney, Region 6. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a program staff witness. Noting for the record that respondent had failed to answer the complaint and failed to appear for the pre-hearing conference, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15 and offered the documentation required by 6 NYCRR 622.15(b). Department staff also sought judgment on the merits.

Department staff called one witness, Ronald F. Novak, PE, an engineer in the Department's Division of Environmental Remediation, Region 6. In all, nine (9) exhibits were received in evidence.

Findings of Fact

The following findings of fact are found based upon the preponderance of record evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent Charlestown Mall of Utica, LLC is the owner of a

addressed in the body of the transmittal letter serving a Commissioner's order on respondent.

PBS facility having a capacity of over 32,000 gallons located at 311 Turner Street, Utica, New York (facility). In particular, five PBS tanks at the facility each have a capacity of 550 gallons and are located underground. An aboveground PBS tank at the facility has a capacity of 30,000 gallons. (Testimony of Ronald F. Novak; Staff Exhibit 1.)

2. Respondent Charlestown Mall of Utica, LLC is a domestic limited liability company registered in the State of New York. (Testimony of Ronald F. Novak; Staff Exhibit 5.)
3. Michael J. Cancilla, Esq. is the managing member of respondent. (Testimony of Ronald F. Novak; Staff Exhibits 7 and 9.)
4. On October 19, 2007, Capital Prime Properties Two, Inc., by deed, transferred all right, title and interest in the facility to respondent Charlestown Mall of Utica, LLC, the facility's current owner. This deed is recorded in the Oneida County Clerk's Office, as Instrument Number 2008-003066. Respondent remains the owner of the facility. (Testimony of Ronald F. Novak; Hearing Record; Staff Exhibits 3 and 4.)
5. The facility is located in part in Utica, Oneida County and in part in Frankfurt, Herkimer County. The PBS tanks are located in the Oneida County portion of the premises. (Testimony of Ronald F. Novak; Hearing Record; Staff Exhibit 3.)
6. The facility has never been registered as a PBS facility with the Department. (Testimony of Ronald F. Novak; Hearing Record.)
7. The facility was the subject of an U.S. Environmental Protection Agency (EPA) removal action to abate asbestos. (Testimony of Ronald F. Novak; Hearing Record; Staff Exhibit 6.)
8. On December 6, 2011, the EPA's contractor discovered the five underground PBS tanks when the excavator unintentionally broke and removed the pipes connected to the tops of the tanks. (Testimony of Ronald F. Novak; Hearing Record; Staff Exhibit 6 at 2.2.2.)
9. On June 23, 2015, Michael J. Cancilla, managing member of respondent signed a letter granting staff access to

respondent's facility. (Testimony of Ronald F. Novak; Hearing Record; Staff Exhibit 7.)

10. On June 29, 2015, Department staff inspected the PBS facility and discovered that the six PBS tanks were no longer in service and had not been in service since at least 2011, but were not registered or permanently closed. (Testimony of Ronald F. Novak; Staff Exhibit 6 at 2.2.2.)
11. Staff determined that the 30,000 gallon aboveground PBS tank contains approximately 4,000 gallons of waste oil. The secondary containment is in a state of disrepair, collapsed in places, and would not contain a spill if the aboveground PBS tank failed or leaked. (Testimony of Ronald F. Novak; Hearing Record; Staff Exhibit 7.)
12. Staff found that of the five underground PBS tanks, two were severely compromised and had holes in the tops. All of the underground PBS tanks contained some petroleum product. One of the compromised PBS tanks was nearly full of water and waste oil. (Testimony of Ronald F. Novak.)
13. Mr. Novak searched the Department's paper records and unified information system (UIS) database, and determined that the facility had never been registered. (Testimony of Ronald F. Novak.)
14. Department staff attempted to settle the matter, but respondent indicated that it did not have the funds to settle the matter. (Hearing Record; Staff Exhibits 8 and 9.)
15. Ronald F. Novak is an environmental engineer employed in the Department's Division of Environmental Remediation as the Regional Bulk Storage Supervisor in DEC Region 6. (Testimony of Ronald F. Novak.)
16. As shown by the signed certified mail receipt, respondent Charlestown Mall of Utica, LLC was served January 29, 2016 with the notice of hearing and complaint dated January 27, 2016. Service was made on the managing member of the LLC pursuant to CPLR 311-a. (Hearing Record; Staff Exhibit 2.)
17. Respondent failed to file an answer to the complaint and failed to appear at the pre-hearing conference scheduled for March 8, 2016, as directed in the notice of hearing. (Hearing Record.)

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 (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (see 6 NYCRR 622.15[b][1]-[3]).

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" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

Department staff's proof presents a prima facie case demonstrating that the PBS tanks located at 311 Turner Street, Utica, New York were never registered with the Department and not registered by the respondent within thirty days of transfer of the facility to respondent in violation of 6 NYCRR 612.2(b). Staff's proof also demonstrated that the PBS tanks have been permanently out of service since at least 2011. Staff's proof also demonstrates that respondent failed to properly close the PBS tanks in violation of 6 NYCRR 613.9(b).

The record shows that: Department staff duly served the notice of hearing and complaint upon respondent; respondent failed to file an answer to the complaint; and respondent failed to appear at the pre-hearing conference scheduled for March 8, 2016, as directed in the notice of hearing. The notice of

hearing advised respondent that attendance at the pre-hearing conference was mandatory, and if respondent failed to appear, the record would be opened and staff would move for a default judgment for the relief requested in the complaint. Department staff submitted a proposed order and proof of service at the time of the hearing. Department staff is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to register the facility within thirty days of transfer of the facility to respondent in violation of 6 NYCRR 612.2(b) and respondent failed to properly close the PBS tanks in violation of 6 NYCRR 613.9(b).

Department staff seeks a penalty of thirty-five thousand dollar (\$35,000) with twenty thousand dollars (\$20,000) suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order. Staff requests five thousand dollars (\$5,000) for the violation of 6 NYCRR 612.2(b) and thirty thousand dollars (\$30,000) (\$5,000 per tank) for violation of 6 NYCRR 613.9(b). Staff's penalty request is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71. Staff cites the provisions of ECL § 71-1929 that set forth a maximum daily civil penalty of \$37,500 for violations of Article 17 or the regulations promulgated thereto.

Respondent failed to register the facility for more than eight years. Staff requested a penalty of five thousand dollars (\$5,000) for violation of 6 NYCRR 612.2(b). Each tank constitutes a violation of 6 NYCRR 613.9(b) resulting in a maximum daily penalty of \$225,000 for the six violations. Staff also references the penalty range of \$500 to \$5,000 set forth in DEE-22 for settlement of violations of 6 NYCRR 613.9(b)(1) for failure to permanently close an out of service tank. Because an administrative proceeding was commenced to address the violations and compromised tanks and secondary containment are involved, staff states that a payable penalty of \$5,000 should be assessed for each tank in violation (Hearing Record).

I note that the penalties requested are a fraction of the maximum statutory penalty that could be assessed against the respondent. I also find that staff's penalty request is appropriate based on respondent's continued violations of the petroleum bulk storage law and regulations, and respondent's failure to cooperate with Department staff to address the

violations. The potential harm from a spill or other failure resulting from lack of appropriate maintenance and closure in this matter is exacerbated by the fact that approximately 4,000 gallons of waste oil remain in the aboveground PBS tank having a compromised secondary containment system. Moreover, the five 550 gallon underground tanks each contain petroleum product with two of those tanks compromised with holes in the tops of the tanks and one nearly full of water and oil. I conclude that a total payable penalty of \$15,000 is supported and appropriate.

Staff's requested suspended penalty of \$20,000 is based on staff's hope that the suspended portion will ensure compliance with the Commissioner's order. Given respondent's statements regarding its finances and respondent's potential liability for the cost of the EPA removal action, it is unlikely that a suspended penalty will provide an incentive to respondent. Nonetheless, I understand staff's concern that the amount of the suspended penalty would be better spent registering and properly closing the facility.⁴

Accordingly, I find that a civil penalty of \$35,000, with \$20,000 suspended provided respondent complies with the Commissioner's order, is appropriate.

Department staff requests that respondent be directed to close the PBS facility in accordance with the new PBS regulations (effective October 11, 2015) found at 6 NYCRR 613-2.6(b) through (e) and 613-4.5(b). I agree. While the violations alleged and proven were those regulations in effect at the time of staff's inspection of the premises, the current regulations must be followed to register and permanently close the facility.

Conclusions of Law

By failing to register its petroleum bulk storage facility located at 311 Turner Street, Utica, NY within 30 days of transfer of ownership of the facility to it, the respondent violated 6 NYCRR 612.2(b). By failing to properly close the six permanently out of service PBS tanks, respondent violated 6 NYCRR 613.9(b).

⁴ The registration requirements are now provided in 6 NYCRR 613-1.9.

Recommendation

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

1. granting Department staff's motion for default, holding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated:
 - a. 6 NYCRR 612.2(b) by failing to register its petroleum bulk storage facility located at 311 Turner Street, Utica, New York, within 30 days of the transfer of ownership of the facility to it; and
 - b. 6 NYCRR 613.9(b) by failing to properly close five 550 gallon underground petroleum bulk storage tanks and one 30,000 gallon aboveground petroleum bulk storage tank that are permanently out of service located at 311 Turner Street, Utica, New York;
3. directing respondent to pay a civil penalty of thirty-five thousand dollars (\$35,000) for the above referenced violations, with payment of twenty thousand dollars (\$20,000) of the penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order;
4. directing respondent to submit the payable portion of the civil penalty in the amount of fifteen thousand dollars (\$15,000) by certified check payable to NYSDEC within sixty (60) days of service of the Commissioner's order on respondent to the following:

Office of General Counsel
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601
Attention: Nels G. Magnuson, Esq.
5. directing respondent to submit an approvable petroleum bulk storage registration application to the Department for the above facility within ten (10) days of service of the Commissioner's order on respondent together with the \$1,000 registration fee;

6. directing respondent to permanently close the underground petroleum bulk storage tank systems in accordance with 6 NYCRR 613-2.6(b) through (e) within one hundred fifty (150) days, and permanently close the aboveground petroleum bulk storage tank system in accordance with 6 NYCRR 613-4.5(b) within sixty (60) days, of service of the Commissioner's order on respondent;
7. directing respondent to provide any duly designated officer, employee or agent of the Department entry to respondent's PBS facility or areas in the vicinity of Respondent's facility which may be under the control of Respondent, and as to which Respondent has authority to provide access to others and any areas under Respondent's control necessary to gain access thereto, for the purposes of inspection; sampling and testing that the Department deems necessary; ascertaining Respondent's compliance with the ECL, the Navigation Law, the regulations promulgated thereto, and provisions of the order; completing permanent closure of the facility as ordered; and investigating and remediating any petroleum contamination found at the site;
8. directing respondent to send all submissions to the Department to the following:

Mr. Ronald F. Novak, P.E.
Regional PBS Supervisor
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601; and
9. directing such other and further relief as may deem just and appropriate under the circumstances.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
March 22, 2016

EXHIBIT CHART

Matter of Charlestown Mall of Utica, LLC
 March 8, 2016 – Region 6 Sub-Office, Utica, NY

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Nels G. Magnuson, Esq. to Michael J. Cancilla, Esq., Managing Member of Charlestown Mall of Utica, LLC, with Notice of Hearing and Complaint, all dated January 27, 2016 with Exhibit A.	✓	✓	Department Staff	
2	Affidavit of Service of April L. Sears, sworn to February 2, 2016 with certified mail receipt of January 29, 2016 delivery.	✓	✓	Department Staff	
3	Copy of Deed dated October 19, 2007 to Charlestown Mall of Utica, LLC for property located at 311 Turner Street, Utica, New York.	✓	✓	Department Staff	
4	Copy of 2016 Tax Roll for Oneida County, City of Utica for Tax Map Parcel Number 319.20-1-11, 311 Turner Street, Utica, New York.	✓	✓	Department Staff	
5	NYS Department of State, Division of Corporations, Entity Information, dated March 1, 2016.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	U.S. Environmental Protection Agency Pollution/Situation Report – Charlestown Mall Site – Removal Polrep, Completion date:12/19/2011	✓	✓	Department Staff	
7	Correspondence from Nels G. Magnuson to Michael J. Cancilla, dated May 26, 2015 with signed consent to Department's access to the premises.	✓	✓	Department Staff	
8	Correspondence from Nels G. Magnuson to Michael J. Cancilla, dated December 1, 2015 transmitting proposed consent order.	✓	✓	Department Staff	
9	Email chain between Nels G. Magnuson and Michael J. Cancilla, dated from July 21, 2015 to December 17, 2015.	✓	✓	Department Staff	