

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the
New York State Environmental Conservation Law and
Title 6, Parts 612-614, of the Official Compilation of Codes,
Rules and Regulations of the State of New York,

ORDER

- by -

NYSDEC File No
R2-20130513-183

FLORENCE EDELSTEIN,

Respondent.

This administrative enforcement proceeding concerns allegations that respondent Florence Edelstein (“respondent”) committed multiple violations of article 17 of the Environmental Conservation Law (“ECL”) and parts 612-614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) at Petroleum Bulk Storage (“PBS”) facilities located at 25 properties she owns in New York and Bronx Counties.

Staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) commenced this proceeding by serving on respondent, via certified mail return receipt requested, the following documents: (i) Notice of Motion for an Order Without Hearing, dated June 6, 2013; (ii) Affirmation of John K. Urda (“Urda Aff.”), dated June 6, 2013, attaching exhibits; and (iii) Staff Affidavit of George Breen, P.E., (“Breen Aff.”), dated June 6, 2013, attaching exhibits. Staff has submitted a copy of the signed certified mail receipt and a copy of the United States Postal Service web page reflecting that respondent received the motion papers on June 7, 2013, thereby completing service under the Department Uniform Enforcement Hearing Procedures regulations (see 6 NYCRR 622.3[a][3]).

Department staff asserted one cause of action for each of the 25 facilities, and each cause of action contains multiple counts, for a total of 95 alleged violations (see Urda Aff. at 5-17, ¶¶ 17-136). Staff requests that I: (i) hold that respondent violated 6 NYCRR parts 612-614 as set forth in detail in the motion papers; (ii) impose upon respondent, pursuant to ECL articles 17 and 71, a civil penalty in the amount of one hundred thirteen thousand five hundred dollars (\$113,500); and (iii) direct respondent to comply with all ECL provisions, rules and regulations governing PBS, and correct all violations identified in the motion papers (see Urda Aff. at 19, Wherefore clause ¶¶ 1-3).

Respondent failed to file or serve a response to staff's motion papers, and has not otherwise appeared in this proceeding. Accordingly, Department staff requested that the matter be decided as an unopposed motion for order without hearing (see 6 NYCRR 622.12).

The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, who prepared the attached summary hearing report. ALJ Goldberger concluded that respondent violated several PBS regulations, and recommends that I: (i) direct respondent to correct all violations and come into compliance with the PBS regulations within 30 days; and (ii) assess against respondent a civil penalty of \$113,500, the amount requested by staff, to be paid within 30 days of service of the order upon respondent. I adopt the ALJ's summary hearing report with respect to the amount of the civil penalty, and with respect to ordering respondent to correct all violations within thirty (30) days of service of the Order on respondent. I also adopt some, but not all, of the ALJ's findings of fact and the ALJ's recommendations with respect to liability, as discussed below.

DISCUSSION

I. Liability

A motion for order without hearing is governed by the same standards as are applicable to motions for summary judgment under the CPLR (see 6 NYCRR 622.12[d]). On an unopposed motion for order without hearing, the issue is whether Department staff established its entitlement to summary judgment on the violations charged in the motion (see Matter of Hunt, Decision and Order of the Commissioner, July 25, 2006, at 7 n2).

I agree with the ALJ that staff's motion papers establish many PBS violations at respondent's 25 buildings. I do not agree completely, however, with the ALJ's identification of the number or nature of the violations.

With respect to the number of violations, the ALJ states that Department staff has alleged ninety-three (93) violations (see e.g. Summary Hearing Report at 11, 12). Both the Breen affidavit and the Urda affirmation, however, allege ninety-five (95) violations (see Urda Aff. at 5-17, ¶¶17-136; see also id. ¶ 140 [penalty calculation based on ninety-five (95) counts]; see also Breen Aff. at 2-10, ¶¶ 5-29).

As discussed below, I also do not agree completely with the ALJ's methodology for identifying violations. Based upon my review of all of the papers submitted, I hold that respondent is liable for ninety (90) violations of the PBS regulations.

A. Claim Identified in NOV but Not Alleged in Motion Papers

The ALJ identified violations based in part upon her conclusion that, where there is a difference between violations identified in a notice of violation ("NOV") and violations identified in the pleadings, the NOV controls (see e.g. Summary Hearing Report, at 3 n1 [stating that "where there are discrepancies between the affidavit and the NOV, I am relying upon the

latter”]; see also id. at 11-12 [finding eleven additional counts which include violations cited in the NOV’s but not in Mr. Breen’s affidavit]). I disagree.

Service of a notice of violation does not commence a formal enforcement proceeding. NOV’s are considered informal enforcement tools, and precede the commencement of formal enforcement proceedings. Formal enforcement proceedings are commenced by service of: (i) a notice of hearing and complaint (see 6 NYCRR 622.3[a]); (ii) a motion for order without hearing (see id. 622.12[a]); or (iii) a summary abatement order or summary suspension order (see id. 622.14[a]), among other methods.

Staff commenced this formal enforcement proceeding after having served respondent with the NOV’s and attempting to negotiate a settlement (see Breen Aff. ¶ 30 [after completing each inspection, he sent respondent each NOV and a copy of the facility information report marked to indicate registration deficiencies]; Urda Aff. ¶¶ 145-146 [respondent rejected staff’s offer to settle, notwithstanding staff’s “clear statement that the result would be formal enforcement”]). This formal enforcement proceeding was commenced by service of the motion for order without hearing, with supporting affidavit and documents (see 6 NYCRR 622.12; 622.3[b][1]).

Although the NOV’s – as documents prepared by inspector Breen at or near the time of the inspections, reflecting his inspection findings – may be submitted as evidence to support causes of action asserted in the motion, they are not pleadings and do not assert causes of action. I therefore reject the ALJ’s conclusion that a violation alleged in a NOV but not in the motion papers nevertheless asserts a claim (see e.g. Summary Hearing Report, at 3 n1, 4 n3, 8 n10, 10 n14). The motion for order without hearing and its supporting materials – not the NOV’s – define the number and nature of claims. Pleadings supersede NOV’s and therefore, if a violation is cited in a NOV but not in the motion for order without hearing, such alleged violation is not part of this proceeding.¹

This case also presents two related but different circumstances: (i) a violation is alleged in the motion papers but not in the corresponding NOV; and (ii) the motion papers conflict with the NOV. Each circumstance is addressed below.

B. Claim Asserted in Motion Papers but not in NOV

Some of the claims asserted in the motion papers are not identified in the corresponding NOV (compare Urda Aff. at 5, ¶ 21; Breen Aff. at 2, ¶ 5[d] [asserting, with respect to an aboveground tank at the facility located at 133 West 71st Street, Manhattan, a failure to maintain spill prevention equipment in violation of 6 NYCRR 613.3(d) because of accumulated debris in the tank secondary containment area] with Breen Aff. Ex. A [NOV for that facility does not contain an allegation of failure to maintain spill prevention equipment]).² The ALJ did not

¹ For example, Department staff may exercise prosecutorial discretion and decide not to pursue in a formal enforcement proceeding one or more violations identified in a NOV.

² The NOV form document identifies 33 specific violation categories, including ten specific categories of “Facility and General Tank Violations,” fourteen specific categories of “Underground Tank Violations,” and four specific

include in her Summary Hearing Report an analysis of alleged violations asserted in the motion papers but not the NOVs (see e.g. Summary Hearing Report, at 3 n1; see also id. at 4 n2; id. at 5 n5; id. at 6 n6; id. at 7 n8).

As discussed above, because pleadings supersede NOVs, I look to the pleadings to identify claims. Thus, if the motion papers allege there has been a violation, such allegation is a part of this formal enforcement proceeding and must be analyzed. I therefore do not adopt the ALJ's determination to omit claims asserted in the motion for order without hearing but not identified in the NOVs.

Of course, the mere assertion of a claim in a motion for order without hearing is not sufficient to prevail on such claim, even where, as in this case, the respondent has failed to answer, appear, or otherwise controvert any of the allegations in the pleadings. Even where a respondent defaults, staff must still submit evidence sufficient to support the asserted claims (see Matter of Hunt). In the PBS context such as the present case, staff must at a minimum submit the following documents: (i) a copy of each facility's PBS registration; (ii) each facility's facility information report; and (iii) any NOV that is a basis for the allegations in the charging instrument (see Matter of Farmer, Order of the Commissioner, October 22, 2009, at 3). In this case, staff has submitted the required documents.

In addition to the documentary evidence, the inspector's sworn affidavit submitted in support of the motion for order without hearing is testimonial evidence offered to support the claim of violation. The fact that the NOV form document may be silent with respect to a particular violation alleged in the inspector's affidavit does not necessarily conflict with the inspector's testimony that such a violation existed at the time of his inspection. Therefore, I disagree with the ALJ on this issue (see Summary Hearing Report, at 11 [stating that judgment should not be granted with respect to counts in the motion papers but not in the NOV]). In this case, where the NOV form does not include a particular category of violation, but credible testimonial evidence supporting the claimed violation is proffered by staff, I will find a violation.³

categories of "Aboveground Tank Violations," and a box to check for each category (see Breen Aff. Ex. A). The NOV form does not identify every possible violation of the PBS regulations. For example, the Aboveground Tank Violations section of the form does not contain a category for failure to maintain spill prevention equipment, even though such maintenance is clearly required by the regulations (see 6 NYCRR 613.1[b] ["This Part applies to all aboveground and underground petroleum storage facilities with a combined storage capacity of over 1,100 gallons"]; see also 6 NYCRR 613.3[d] ["owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order"]).

³ Respondent could have submitted, but did not submit, papers in opposition to staff's motion for order without hearing, including submitting evidence challenging the assertions in the motion relating to claims not identified in the NOVs. Similarly, had this matter proceeded to an adjudicatory hearing, respondent could have cross-examined the inspector regarding the allegations he has made that are not contained in the NOVs. Because respondent has failed to appear or otherwise respond, however, respondent has waived her right to make such challenges (see 6 NYCRR 622.12[c], 622.15[a]).

C. Motion Papers Conflict with NOV

This case also presents the circumstance in which the motion papers conflict with the NOV. For example, staff alleges in the motion papers that respondent violated 6 NYCRR 613.3(c)(3)(ii) by failing to properly label the tank and gauge at the aboveground tank at the facility located at 145 West 71st Street, Manhattan (see Urda Aff. at 5-6, ¶ 26; Breen Aff. at 2, ¶ 6[c]). The NOV form contains this violation category (see Breen Aff., Ex. A, NOV, Box 25 [“Tank and/or Gauge Not Properly Labeled [613(c)(3)(ii)”]). On the NOV that inspector Breen prepared with respect to the April 30, 2013 inspection of this facility, however, the words “Tank and/or” are crossed out. Therefore, Breen’s affidavit and the NOV that he prepared are in conflict with respect to whether a violation based upon improper labeling of the tank occurred.

In such circumstance, the conflicting testimonial and documentary evidence in effect cancel each other out, and it is not appropriate to hold respondent liable for failure to properly label the tank. I have applied that principle to all such circumstances presented in this case.

Similarly, where the motion papers allege a violation and the NOV form contains a category for such violation but the box associated with that violation category is not checked, I have not held respondent liable for such alleged violation on this unopposed motion, as discussed below (see e.g. footnotes 4, 5, 6, 7, 8 below).

D. Number and Nature of Violations for Each Facility

Given the foregoing discussion, and based upon the evidence submitted, I hold that staff has satisfied its burden of establishing its entitlement to summary judgment for ninety (90) violations at the 25 facilities, as discussed below:

1. 133 West 71st Street, PBS #2-130001

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

2. 145 West 71st Street, PBS #2-130036

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and
- (iv) failure to maintain records of monthly inspections, in violation of 6 NYCRR

613.6(c).

3. 10 Cooper Street, PBS #2-160989

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and
- (iv) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

4. 701 West 176th Street, PBS #2-201162

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

5. 60 Thayer Street, PBS #2-201995

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

6. 10 Hillside Avenue, PBS #2-219398

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

7. 1781 Riverside Drive, PBS #2-252425

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);

- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

8. 621 West 172nd Street, PBS #2-252433

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

9. 162 West 54th Street, PBS #2-259896

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

10. 427 Fort Washington Avenue, PBS #2-267767

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

11. 1675 Grand Concourse, PBS #2-269859

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).⁴

⁴ Both the Urda Aff. and the Breen Aff. allege that the tank and gauge were not properly labeled, but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence therefore conflict, and the inspector offers no

12. 708 West 192nd Street, PBS #2-270040

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c); and
- (iv) failure to properly install aboveground tank with corrosion protection and leak detection, in violation of 6 NYCRR 614.8(a).

13. 179 Bennett Avenue, PBS #2-271365

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and
- (iv) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

14. 801 West 181st Street, PBS #2-277096

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d).

15. 95 West 195th Street, PBS #2-277118

- (i) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (ii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).⁵

16. 1793 Riverside Drive PBS #2-284661

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

⁵ Both the Urda Aff. and the Breen Aff. allege that the facility was not accurately registered, but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence therefore conflict, and the inspector offers no additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d).⁶

17. 815 West 181st Street, PBS #2-284718

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2; and
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1).

18. 209 Bennett Avenue, PBS #2-284831

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).⁷

19. 610 West 173rd Street, PBS #2-288810

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

20. 812 West 181st Street, PBS #2-314595

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2; and
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1).⁸

⁶ Both the Urda Aff. and the Breen Aff. allege that respondent failed to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c), but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence therefore conflict, and the inspector offers no additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

⁷ Both the Urda Aff. and the Breen Aff. allege that the tank and gauge for this aboveground tank were not properly labeled, but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence therefore conflict, and the inspector offers no additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

⁸ Both the Urda Aff. and the Breen Aff. allege that respondent failed to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c), but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence

21. 119 Audubon Avenue, PBS #2-400963

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

22. 6555 Broadway, PBS #2-600909

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c); and
- (iv) failure to properly install aboveground tank with corrosion protection and leak detection, in violation of 6 NYCRR 614.8(a).

23. 128 Fort Washington Avenue, PBS #2-606910

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

24. 34 Bogardus Place, PBS #2-607419

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

25. 124 Fort George Avenue, PBS #2-199680

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR

therefore conflict, and the inspector offers no additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

- 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and
- (iv) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

II. Remedial Relief

Staff has requested that I order respondent “to comply with all ECL provisions, rules and regulations governing petroleum bulk storage, and correct all violations set forth” in the motion for order without hearing (Urda Aff. at 19, Wherefore Clause ¶3). Because respondent is already required to comply with the ECL and its rules and regulations, an order on that issue is unnecessary (see e.g. Matter of West 63 Empire Associates LLC, Order of the Commissioner, August 9, 2012, at 2 [respondent has continuing duty to comply with consent order, so order to comply is not necessary]). I do, however, grant staff’s request that I order respondent to correct, within thirty (30) days of service of this order upon respondent, all of the violations for which respondent is held liable in this order.

III. Civil Penalty

ECL 71-1929 provides for the imposition of a civil penalty of up to thirty-seven thousand five hundred (\$37,500) per day for each violation of titles 1 through 11 inclusive and title 19 of article 17, or the rules or regulations, orders or determinations promulgated thereto. Staff asserts that the 95 counts alleged in its motion papers would result in a maximum civil penalty of \$3,562,500 for a single day of the violations (see Urda Aff. at 17, ¶ 140). Because I have held that staff has proven 90 violations, the maximum civil penalty for a single day of violation would be \$3,375,000.

Staff also alleges in its motion papers that none of the violations has been corrected, and each is continuing daily (see id., ¶141). Inspector Breen inspected these facilities during the period from April 2, 2013, to May 7, 2013. The most conservative estimate of the number of days that the violations continued would be the period between the last inspection and the day staff served its motion papers; that is, assuming all the inspections occurred on the final day of inspections, May 7, 2013, all of the violations continued for at least 30 days until June 6, 2013, when staff served its motion papers. The maximum civil penalty for 90 violations that have continued for 30 days is \$101,250,000.

Staff has provided a thorough discussion of the issues to be considered in setting a civil penalty, including: (i) that respondent’s facilities are located in residential buildings in heavily-populated areas of New York City; and (ii) that staff attempted to negotiate an order on consent with respondent, including a settlement figure based upon the ranges set forth in the Department’s Petroleum Bulk Storage Inspection Enforcement Policy, DEE-22, but that respondent “rejected the Department’s attempt to resolve this matter by order on consent without any attempt to negotiate” (id. at 18, ¶146). Staff seeks a civil penalty of one hundred thirteen thousand five hundred dollars (\$113,500).

Given the number of violations, the number and location of residential facilities at issue, and the length of time during which the violations have been occurring as set forth in staff's motion papers, I hold that staff's requested penalty of one hundred thirteen thousand five hundred dollars (\$113,500) is authorized and appropriate on the record of this proceeding.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted in part and otherwise denied. Respondent Florence Edelstein is adjudged to have committed ninety (90) violations of the petroleum bulk storage regulations. As specifically set forth in this Order, respondent violated 6 NYCRR 612.2, 613.3(b)(1), 613.3(c)(3)(ii), 613.3(d), 613.6(c), and 614.8(a) .
- II. Within thirty (30) days of service of this Order upon respondent Florence Edelstein, respondent shall correct all ninety (90) violations for which respondent has been held liable in this Order.
- III. Respondent Florence Edelstein is assessed a civil penalty in the amount of one hundred thirteen thousand five hundred dollars (\$113,500), which is due and payable within thirty (30) days of service of a copy of this Order upon respondent. Payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation," and shall be delivered by certified mail, overnight delivery, or by hand delivery to the Department at the following address:

John K. Urda, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation, Region 2
47-40 21st Street
Long Island City, New York 11101-5407
- IV. All communications from respondent to Department staff concerning this Order shall be directed to John K. Urda, Esq., at the address set forth in paragraph III of this Order.

- V. The provisions, terms and conditions of this Order shall bind respondent Florence Edelstein, and her agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: July 18, 2014
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

Summary Hearing Report
NYSDEC File No
R2-20130513-183

- by -

FLORENCE EDELSTEIN,

Respondent.

Proceedings

By notice of motion for order without hearing dated June 6, 2013, the staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent Florence Edelstein for alleged violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 612-614 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). On June 6, 2013, by certified mail return receipt requested, the Department staff served its notice of motion and supporting statements and exhibits on the respondent. The United States Post Office delivered the staff's motion papers to the respondent on June 7, 2013.

As of this date, Ms. Edelstein has not responded to the staff's motion and the time to do so (by June 27, 2013) has passed. By letter dated July 22, 2013, the Department staff sent copies of its motion papers to the Department's Office of Hearings and Mediation Services for consideration. On July 29, 2013, Chief Administrative Law Judge James T. McClymonds assigned the matter to me.

Staff's Charges

Department staff's motion for order without hearing consists of the notice of motion dated June 6, 2013; Assistant Regional Attorney John K. Urda's affirmation dated June 6, 2013; Exhibit (Ex.) A - the Facility Information Reports for the 25 facilities addressed in the staff's motion papers; Ex. B - a letter dated May 16, 2013 from John K. Urda to Ms. Edelstein regarding an offer of settlement via a consent order; Affidavit of George Breen, P.E., DEC Environmental Engineer 2 dated June 6, 2013; Ex. A - Notices of Violation (NOV) for the 25 facilities addressed in staff's notice of motion; and Mr. Urda's cover letter dated July 22, 2013 along with copies of the signed certified mail domestic return receipt, front and back, and the United States

Postal Service (USPS) Track and Confirm web page indicating delivery to Ms. Edelstein on June 7, 2013.

The staff has alleged that the respondent has violated Parts 612-614 of 6 NYCRR by failing to meet the requirements at her 25 petroleum bulk storage (PBS) facilities located in residential buildings in New York and Bronx counties. Based upon these alleged violations, the Department staff seeks an order: finding the respondent in violation of 6 NYCRR Parts 612-614; requiring the payment of a penalty of \$113,500; and requiring the correction of all the violations.

Respondent's Position

According to staff, on May 22, 2013, Florence Edelstein called Mr. Urda to reject the Department staff's offer of settlement dated May 16, 2013 and since that time there has been no further communication. Urda Affirmation (Aff.), ¶ 7. The respondent has failed to submit a response to staff's motion and therefore, there is no record of her position.

FINDINGS OF FACT

Because the respondent has not responded to staff's motion, the only facts before me are those presented by Department staff.

1. The respondent, Florence Edelstein, is the registered owner of the following 25 New York State-regulated PBS facilities, each with petroleum storage capacity over 1,100 gallons, registered at the residential buildings which addresses are indicated below and identified with in DEC records with the associated PBS numbers:

- 1) 133 West 71st Street, PBS #2-130001;
- 2) 145 West 71st Street, PBS #2-130036;
- 3) 10 Cooper Street, PBS #2-160989;
- 4) 701 West 176th Street, PBS #2-201162;
- 5) 60 Thayer Street, PBS #2-201995;
- 6) 10 Hillside Avenue, PBS #2-219398;
- 7) 1781 Riverside Drive, PBS #2-252425;
- 8) 621 West 172nd Street, PBS #2-252433;
- 9) 162 West 54th Street, PBS #2-259896;
- 10) 427 Fort Washington Avenue, PBS #2-267767;
- 11) 1675 Grand Concourse, PBS #2-269859;
- 12) 708 West 192nd Street, PBS #2-270040;
- 13) 179 Bennett Avenue, PBS #2-271365;
- 14) 801 West 181st Street, PBS #2-277096;
- 15) 95 West 195th Street, PBS #2-277118;
- 16) 1793 Riverside Drive PBS #2-284661;
- 17) 815 West 181st Street, PBS #2-284718;
- 18) 209 Bennett Avenue, PBS #2-284831;
- 19) 610 West 173rd Street, PBS #2-288810;
- 20) 812 West 181st Street, PBS #2-314595;

- 21) 119 Audubon Avenue, PBS #2-400963;
- 22) 6555 Broadway, PBS #2-600909;
- 23) 128 Fort Washington Avenue, PBS #2-606910;
- 24) 34 Bogardus Place, PBS #2-607419; and
- 25) 124 Fort George Avenue, PBS #2-199680.

Urda Aff., ¶ 3; Ex. A.

2. Between April 2 and May 7, 2013, DEC Environmental Engineer 2 George Breen, P.E. inspected the above referenced facilities and found violations of the PBS regulations at each facility. Breen Aff., ¶¶ 4-29. When he completed his inspections, Mr. Breen sent a NOV for each facility to Ms. Edelstein as well as copies of each Facility Information Report indicating registration deficiencies and an Information Correction application for each facility. Ex. A to Breen Aff. *See also*, chart annexed to this hearing report.

3. On April 30, 2013, Mr. Breen inspected PBS facility number 2-130001 at 133 West 71st Street, Manhattan and found the following violations:

- a) The facility was not accurately registered: incorrect information (on-site operator, tank location, tank secondary containment, tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) The tank and gauge were not properly labeled;
- d) Records of monthly inspections were not maintained.¹

4. On April 30, 2013, Mr. Breen inspected PBS facility number 2-130036 at 145 West 71st Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (on-site operator, tank location, tank secondary containment, tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) The tank and gauge were not properly labeled;

¹ Mr. Breen states in his affidavit that spill prevention equipment was not adequately maintained as there was accumulated debris in the tank secondary containment area. Breen Aff., ¶ 8. However, the NOV reflecting the inspection results for this facility does not indicate this violation. Ex. A to Breen Aff. Because the NOV was sent to the respondent upon completion of the inspections, where there are discrepancies between the affidavit and the NOV, I am relying upon the latter. Breen Aff., ¶ 30.

- d) Records of monthly inspections were not maintained.

5. On April 16, 2013, Mr. Breen inspected PBS facility number 2-160989 at 10 Cooper Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank location, tank install date, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) The tank and gauge were not properly labeled;
- d) Records of monthly inspections were not maintained.

6. On April 23, 2013, Mr. Breen inspected PBS facility number 2-201162 at 701 West 176th Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank location, tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Spill prevention equipment was not adequately maintained as there was accumulated debris in the tank secondary containment area;
- d) Records of monthly inspections were not maintained.²

7. On April 16, 2013, Mr. Breen inspected PBS facility number 2-201995 at 60 Thayer Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained;
- d) The tank and gauge were not properly labeled.³

² In Mr. Breen's affidavit, he indicated that the respondent also failed to properly label the tank and/or gauge in violation of 6 NYCRR§ 613.3(c)(3)(ii). Breen Aff., ¶ 8. However, the NOV reflecting the inspection results for this facility does not indicate this violation. Ex. A to Breen Aff.

³ Mr. Breen does not indicate this violation in his affidavit; however, it is noted on the NOV for this facility. Breen Aff., ¶ 9; Ex. A. As Ms. Edelstein had notice of this violation and its addition does not alter the recommended

8. On April 2, 2013, Mr. Breen inspected PBS facility number 2-219398 at 10 Hillside Avenue, Manhattan, and found the following violations:

- a) The facility was not accurately registered; incorrect information (tank location, product identification, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained.

9. On April 18, 2013, Mr. Breen inspected PBS facility number 2-252425 at 1781 Riverside Drive, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank install date, tank leak detection, pipe location);
- b) The tank fill port was not color-coded;
- c) The tank and gauge were not properly labeled;
- d) Failure to report a spill;
- e) Records of monthly inspections were not maintained.⁴

10. On April 8, 2013, Mr. Breen inspected PBS facility number 2-252433 at 621 West 172nd Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank internal protection, pipe location, pipe type);
- b) The tank fill port was not color-coded;
- c) The tank and gauge were not properly labeled;
- d) Records of monthly inspections were not maintained.⁵

11. On April 30, 2013, Mr. Breen inspected PBS facility number 2-259896 at 162 West 54th Street, Manhattan, and found the following violations:

relief, I see no prejudice to the respondent in adding it and others that were not included in the Breen affidavit but were in the NOVs.

⁴ In Mr. Breen's affidavit, he indicates that spill prevention equipment was not adequately maintained as there was accumulated debris in the tank secondary containment area. Breen Aff., ¶ 11. However, this is not noted on the NOV. Breen Aff., Ex. A. Rather, the NOV states that the respondent failed to report a spill. *Id.*

⁵ In Mr. Breen's affidavit, he states that the spill prevention equipment was not maintained properly because there was spilled petroleum under the tank gauge, but this information does not appear on the NOV. Breen Aff., ¶ 12; Breen Aff., Ex. A.

- a) The facility was not accurately registered: incorrect information (on-site operator, tank location, product identification, tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) The tank and gauge were not properly labeled;
- d) Spill prevention equipment was not adequately maintained as there was a broken vent pipe cap;
- e) Records of monthly inspections were not maintained.

12. On April 17, 2013, Mr. Breen inspected PBS facility number 2-267767 at 427 Fort Washington Avenue, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained.

13. On May 7, 2013, Mr. Breen inspected PBS facility number 2-269859 at 1675 Grand Concourse, Bronx, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank location, tank secondary containment, tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Failure to report spill;
- d) Records of monthly inspections were not maintained.⁶

14. On April 4, 2013, Mr. Breen inspected PBS facility number 2-270040 at 708 West 192nd Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank location, tank leak detection, tank spill prevention, pipe location, pipe secondary containment);

⁶ In Mr. Breen's affidavit, he states that the facility's tank and gauge were not properly labeled. Breen Aff., ¶ 15. The NOV does not note this violation but does cite "failure to report a spill." Breen Aff., Ex. A.

- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained;
- d) The aboveground tank was not properly installed with secondary containment.

15. On April 23, 2013, Mr. Breen inspected PBS facility number 2-271365 at 179 Bennett Avenue, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) The tank and gauge were not properly labeled;
- d) Records of monthly inspections were not maintained.

16. On April 17, 2013, Mr. Breen inspected PBS facility number 2-277096 at 801 West 181st Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (product identification, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Failure to report spill;
- d) Failure to monitor unmetered tank for leaks⁷;

17. On May 7, 2013, Mr. Breen inspected PBS facility number 2-277118 at 95 West 195th Street, Bronx, and found the following violations:

- a) The tank fill port was not color-coded;
- b) Failure to report spill;
- c) Records of monthly inspections were not maintained.⁸

⁷ Mr. Breen's affidavit did not include the violations of "failure to report a spill" or "failure to monitor unmetered tank for leaks" which are indicated on the NOV. Breen Aff., ¶ 18; Breen Aff., Ex. A. The affidavit does include the allegation that the spill prevention equipment was not adequately maintained as there was petroleum discharged on and around the vent pipe. *Id.* However this was not indicated on the NOV. Breen Aff., Ex. A.

18. On April 16, 2013, Mr. Breen inspected PBS facility number 2-284661 at 1793 Riverside Drive, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank leak detection, pipe location);
- b) The tank fill port was not color-coded;
- c) Failure to report a spill⁹.

19. On April 4, 2013, Mr. Breen inspected PBS facility number 2-284718 at 815 West 181st Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank leak detection, tank overfill prevention, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Failure to monitor unmeted tank for leaks.¹⁰

20. On April 2, 2013, Mr. Breen inspected PBS facility 2-284831 at 209 Bennett Avenue, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained.¹¹

21. On April 23, 2013, Mr. Breen inspected PBS facility number 2-288810 at 610 West 173rd Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank spill prevention, pipe location, pipe secondary containment);

⁸ Mr. Breen's affidavit states that the respondent's registration was not accurately registered; however, there is no indication of this on the NOV. Breen Aff., ¶ 19; Breen Aff., Ex. A. The NOV does note a "failure to report a spill" that is not in Mr. Breen's affidavit. *Id.*

⁹ In Mr. Breen's affidavit, he states that records of monthly inspections were not maintained. Breen Aff., ¶ 20. However, the NOV does not indicate this violation. Breen Aff., Ex. A. The NOV does include the violation of "failure to report a spill" which is not included in the affidavit. *Id.* But the NOV does not indicate anything regarding the spill prevention equipment. *Id.*

¹⁰ Mr. Breen does not include "failure to monitor unmeted tank for leaks" in his affidavit but it is included in the NOV. Breen Aff., ¶ 21; Breen Aff., Ex. A.

¹¹ Mr. Breen includes the violation of failure to label the tank and gauge properly in his affidavit but this omission is not included in the NOV for this facility. Breen Aff., ¶ 22; Breen Aff., Ex. A.

- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained.

22. On April 4, 2013, Mr. Breen inspected PBS facility number 2-314595 at 812 West 181st Street, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank install date, tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded.¹²

23. On April 15, 2013, Mr. Breen inspected PBS facility number 2-400963 at 119 Audubon Avenue, Manhattan, and found the following violations:

- a) The facility was not accurately registered; incorrect information (tank overflow prevention, tank dispenser, pipe type, pipe leak detection);
- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained.

24. On May 7, 2013, Mr. Breen inspected PBS facility number 2-600909 at 6555 Broadway, Bronx, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank leak detection, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained.¹³

25. On April 8, 2013, Mr. Breen inspected PBS facility number 2-606910 at 128 Fort Washington Avenue, Manhattan, and found the following violations:

- a) The facility's registration was not accurately registered; incorrect information (tank location, install date, tank spill prevention, pipe location, pipe type, pipe secondary containment, pipe leak detection);
- b) The tank fill port was not color-coded;

¹² Mr. Breen states in his affidavit that the respondents failed to maintain records of monthly inspections for this facility. Breen Aff., ¶ 24. However, the NOV does not indicate this violation. Breen Aff., Ex. A.

¹³ Mr. Breen notes in his affidavit that the aboveground tank was not properly installed with corrosion protection and leak detection; however this is not indicated in the NOV. Breen Aff., ¶ 26; Ex. A.

- c) The tank and gauge were not properly labeled;
- d) Failure to notify of petroleum discharge/report spill;
- e) No secondary containment;
- f) Failure to control petroleum transfer;
- g) Records of monthly inspections were not maintained.¹⁴

26. On April 2, 2013, Mr. Breen inspected PBS facility number 2-607419 at 34 Bogardus Place, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank overfill prevention, tank spill prevention, pipe location, pipe secondary containment, pipe leak detection);
- b) The tank fill port was not color-coded;
- c) Records of monthly inspections were not maintained.

27. On May 7, 2013, Mr. Breen inspected PBS facility number 2-199680 at 124 Fort George Avenue, Manhattan, and found the following violations:

- a) The facility was not accurately registered: incorrect information (tank location, tank spill prevention, pipe location, pipe secondary containment);
- b) The tank fill port was not color-coded;
- c) The tank and gauge were not properly labeled;
- d) Records of monthly inspections were not maintained.

28. To date, the respondent has not produced any evidence of corrective action with respect to these violations of the PBS regulations.

CONCLUSIONS OF LAW

By failing to accurately register her facilities; failing to maintain the tank fill ports so that they were color-coded; failing to properly label the tanks and gauges on aboveground tanks; failing to maintain the spill prevention equipment; failing to report spills; failing to control petroleum transfer; failing to maintain records of monthly inspections; failure to monitor

¹⁴ In his affidavit, Mr. Breen does not reflect the additional violations that are on the NOV for this facility: no secondary containment, failure to notify of petroleum discharge/report spill, and failure to control petroleum transfer. Breen Aff., ¶ 27; Ex. A. Mr. Breen states that the spill prevention equipment was not maintained properly; however there was no indication on the NOV. *Id.*

unmetered tanks for leaks; and failing to properly install the corrosion protection and leak detection equipment on the underground tanks and secondary containment in the aboveground tanks, the respondent is in violation of 6 NYCRR §§ 612.2, 613.3(b)(1), 613.3(c)(3)(ii), 613.3(d), 613.8, 613.3(a), 613.6(c), 613.4(a)(2), 613.5, and 613.3(c)(6)(i).

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. And, “summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law.” *Matter of Frank Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1. Section 3212(b) of the CPLR provides that a motion for summary judgment shall be granted, “. . . if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Once the moving party has put forward its case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. *Matter of Locaparra*, Commissioner’s Decision and Order, June 16, 2003.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affirmation from the Assistant Regional Attorney and an affidavit from an Environmental Engineer that describe the many violations (93) of the PBS regulations.

The respondent has not submitted any response to the Department staff’s motion and therefore has failed to provide any material fact that would require a hearing.

The staff has met its burden to show that the respondent has violated Parts 612-614 of 6 NYCRR. 6 NYCRR § 622.12(c). With respect to certain counts set forth in counsel’s affirmation and the engineer’s affidavit but which were not supported in the NOV’s, summary judgment should not be granted. Specifically, those counts were: failure to maintain spill prevention equipment at 133 W. 71st Street, 1781 Riverside Drive, 621 W. 172nd Street, 801 W. 181st Street, and 128 Fort Washington Avenue in violation of 6 NYCRR § 613.3(d); failure to label tanks and gauges at 701 W. 176th Street, 1675 Grand Concourse, and 209 Bennett in violation of 6 NYCRR § 613.3(c)(3)(ii); failure to accurately register facility at 95 W. 195th Street in violation of 6 NYCRR § 612.2; failure to maintain monthly inspection records at 1793 Riverside Drive and 812 W. 181st Street in violation of 6 NYCRR § 613.6(c); and failure to install corrosion protection and leak detection equipment at 6555 Broadway in violation of 6 NYCRR § 613.5.

I have found eleven additional counts as noted in the Statement of Facts which include violations that were cited in the NOV’s but not included in Mr. Breen’s affidavit. Specifically, these are: failure to label tanks and gauges at 70 Thayer Street in violation of 6 NYCRR § 613.3(c)(3)(ii); failure to report spills at 1781 Riverside Drive, 1675 Grand Concourse, 801 W. 181st Street, 95 W. 195th Street, 1793 Riverside Drive and 128 Fort Washington Avenue in violation of § 613.8; failure to monitor unmetered tanks for leaks at 801 W. 181st Street and 815 W. 181st Street in violation of 6 NYCRR § 613.4(a)(2); and failure to provide secondary

containment and to control petroleum transfer at 128 Fort Washington Avenue in violation of 6 NYCRR §§ 613.3(c)(6)(i) and 613.3(a). I recommend granting summary judgment on these additional counts as the respondent had notice of the violations and as noted there is no change to the penalty amount.

In conclusion, I find the respondent liable for violating 6 NYCRR §§ 612.2, 613.3(b)(1), 613.3(c)(3)(ii), 613.3(d), 613.8, 613.3(a), 613.6(c), 613.4(a)(2), 613.5, and 613.3(c)(6)(i) at the facilities noted above.

Penalties

In its notice of motion, Department staff requests that the respondent be ordered to pay a civil penalty of \$113,500. Urda Aff., ¶¶ 137-149. Mr. Urda cites to ECL § 71-1929 that sets forth a daily civil penalty of \$37,500 for violations of Article 17 or the regulations promulgated thereto. As noted by Mr. Urda, the amount staff has requested as a penalty is a fraction of the maximum statutory penalty that could be assessed against the respondent for even one day. In addition, the Assistant Regional Attorney provides a rationale for the penalty based upon the Civil Penalty Policy (DEE-1) and the Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22). I agree with the Department staff that the respondent's continued violations of the petroleum bulk storage law and regulations and her failure to cooperate with Department staff to address the violations are serious.

As noted by Mr. Urda, the respondent has a great many storage tanks housed in residential buildings; thus exacerbating the potential harm that could result from these violations due to a spill or other failure resulting from the lack of appropriate protective equipment, maintenance, and recordkeeping. And, because the respondent has so many facilities, she has an even greater responsibility to ensure their compliance and safety.

The staff has shown that the respondent has violated 93 counts of the PBS regulations which continue to the present. Ms. Edelstein has not agreed to cooperate with the Department staff and has benefitted economically from minimizing the costs of compliance. Using the Department's DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy Penalty Schedule, I have calculated an average penalty of \$41,000 for the 93 counts. However, both the Civil Penalty Policy and the PBS Inspection Enforcement Policy call for larger penalties when the matter is adjudicated rather than settled and where there are aggravating factors as noted here. Accordingly, the staff's recommendation of a penalty of \$113,500 is appropriate.

CONCLUSIONS

The respondent's failure to comply with the PBS regulations constitutes violations of 6 NYCRR §§ 612.2, 613.3(b)(1), 613.3(c)(3)(ii), 613.3(d), 613.8, 613.3(a), 613.6(c), 613.4(a)(2), 613.5, and 613.3(c)(6)(i).

RECOMMENDATIONS

The respondent, Florence Edelstein, should be assessed a penalty of \$113,500. The penalty should be paid within 30 days of service of the Commissioner's order. In addition, the respondent should be given 30 days to correct all the violations and come into compliance with the PBS regulations.

Albany, New York
August 12, 2013

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

	Registration	Fill Port	Tank & Gauge not Labeled	Spill Prevention Not Maintained	Records of I/M not Maintained	Above ground tank - no corrosion/leak detection
133 W. 71	X	X	X		X	
145 W. 71	X	X	X		X	
10 Copper	X	X	X		X	
701 W. 176	X	X			X	
60 Thayer	X	X	X		X	
10 Hillside		X			X	
1781 Riverside	X	X		failure to report a spill	X	
621 W. 172	X	X	X		X	
162 W. 54	X	X	X	X	X	
427 Fort Wash	X	X	X		X	
1675 Grand Con	X	X		failure to report a spill	X	
708 W. 192	X	X			X	X
179 Bennett	X	X	X		X	
801 W. 181	X	X		failure to report a spill failure to monitor unmetered tank		
95 W. 195		X		failure to report a spill	X	
1793 Riverside	X	X		failure to report a spill	X	
815 W. 181	X	X		failure to monitor unmetered tank		
209 Bennett	X	X			X	
610 W. 173	X	X			X	
812 W. 181	X	X				
119 Audubon	X	X			X	
6555 Bdwy	X	X			X	
128 Fort Wash	X	X	X	X failure to report a spill	X	X
34 Bogardus	X	X			X	
124 Ft. George	X	X	X		X	