

In the Matter

of

Causing, Engaging In or Maintaining
a Condition or Activity which Presents
an Imminent Danger to the Health or Welfare
of the People of New York State
or which Is Likely To Result in Irreversible or Irreparable Damage
to Natural Resources of the State

-by-

**102 ELMONT REALTY CORP.,
ELMONT GASOLINE CO., INC., and
NEDJET YETIM,**

Respondents.

Case No. D1-1293-SAO

SUMMARY ABATEMENT PROCEEDING

ORDER OF THE COMMISSIONER

March 26, 2009

ORDER OF THE COMMISSIONER

Respondents 102 Elmont Realty Corp., Elmont Gasoline Co., Inc. and Nedjet Yetim own and/or operate a petroleum bulk storage (“PBS”) facility located at 653 Hempstead Turnpike, Elmont, Nassau County, New York (“facility”). Respondent Nedjet Yetim is the president of both corporate entities.

Pursuant to section 71-0301 of the Environmental Conservation Law (“ECL”), I issued a summary abatement order (“SAO”) and notice of hearing dated February 27, 2009, ordering respondents to undertake certain activities at the facility, including but not limited to pumping out the petroleum contained in tank no. 10665, closing and removing that tank, and submitting an acceptable plan to the New York State Department of Environmental Conservation (“Department”) for investigation and remediation of any petroleum contamination found at the facility. Pursuant to section 620.3 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, respondents were notified by the SAO that a hearing, as required, would be held on Friday, March 13, 2009, at the Department’s Region 1 office in Stony Brook, New York. The hearing was duly convened on that date, with Administrative Law Judge (“ALJ”) Maria E. Villa presiding. Respondents, however, failed to appear.

The ALJ prepared a hearing report, a copy of which is attached (“Hearing Report”). The ALJ recommends that the summary abatement order be continued. The ALJ concludes that respondents’ continued operation of tank no. 10665 at the facility poses an imminent danger to the health and welfare of the people of the State of New York, and is likely to result in irreversible and irreparable damage to the Long Island aquifer, a unique and invaluable natural resource of the State. Upon my consideration of the record, I concur with and adopt the ALJ’s findings of fact, conclusions of law, and recommendation as my own. Respondents did not appear at the hearing and have failed to contradict any of the assertions made by Department staff.

NOW, THEREFORE, having considered these matters and being duly advised, it is ORDERED that:

- I. The summary abatement order dated February 27, 2009 is continued.
- II. This matter is remanded to Department staff for further action in accordance with the ALJ’s Hearing Report and this order.
- III. All communications from respondents to the Department concerning this order shall be made to Scott W. Owens, Esq., Section Chief, Spill and Bulk Storage Section, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway, First Floor
Albany, New York 12233-1550

In the Matter

of

Causing, Engaging In or Maintaining
a Condition or Activity which Presents
an Imminent Danger to the Health or Welfare
of the People of New York State
or which Is Likely To Result in Irreversible or Irreparable Damage
to Natural Resources of the State

-by-

**102 ELMONT REALTY CORP.,
ELMONT GASOLINE CO., INC., and
NEDJET YETIM,**

Respondents.

Case No. D1-1293-SAO

**SUMMARY ABATEMENT PROCEEDING
HEARING REPORT**

/s/

Maria E. Villa
Administrative Law Judge

March 25, 2009

BACKGROUND

On February 27, 2009, the Commissioner of the New York State Department of Environmental Conservation (the “Department”) issued a summary abatement order (the “Order”) to respondents Nedjet Yetim, Elmont Gasoline Co., Inc., and 102 Elmont Realty Corp. (collectively, “Respondents”). The Order was issued pursuant to the Commissioner’s summary abatement powers, as set forth in Section 71-0301 of the Environmental Conservation Law (“ECL”) and Part 620 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”). The Order stated that the Commissioner had caused the investigation of conditions present at and near property located at 653 Hempstead Turnpike, Elmont, New York (the “Facility”), where Respondents own and operate a petroleum bulk storage (“PBS”) system, including one 6,000 gallon and two 8,000 gallon single walled fiberglass underground PBS tanks.

The Order alleged further that, on or about December 9, 2005, one of the 8,000 gallon single walled fiberglass underground PBS tanks (Tank No. 10665) failed a required tightness test. As a result, spill number 05-10613 was reported to the Department. Xerxes Corporation (“Xerxes”) inspected the tank on or about April 25, 2006. That inspection revealed an eight inch by five inch hole and two hairline fractures, both over three feet long, on either end of the tank. The Order alleged that the hole and the hairline fractures compromised the structural integrity of Tank No. 10665, and that Xerxes advised Respondents that if Tank No. 10665 were repaired and returned to service Xerxes could not “state that the damage will not happen again.” Exhibits 7, 18.

The Order went on to state that Respondents 102 Elmont Realty Corp. and Nedjet Yetim entered into a consent order (the “Consent Order”) which became effective on June 6, 2006.¹ Respondent Yetim signed the Consent Order as president on behalf of Elmont Realty Corp. The Consent Order (No. D1-1293-06) required these respondents to pay an \$87,000 penalty, audit six PBS facilities, and bring those facilities into compliance with applicable local, State, and federal law. The Facility is one of the PBS sites subject to the Consent Order.

Four affidavits were attached to the Order (Exhibits 1A, 1B, 1C, and 1D). Hugh Cirrito, an Environmental Engineer II in the Department’s Region 1 office, submitted an affidavit sworn to on February 24, 2009 (the “Cirrito Affidavit,” Exhibit 1A). In his Affidavit, Mr. Cirrito stated that on February 9, 2009, he inspected the Facility, and at that time, the Facility’s three PBS tanks were in operation. Cirrito Affidavit, at Paragraphs 4-5. According to the Cirrito Affidavit, the inspection on February 9, 2009 revealed that the Facility had no leak detection system, either electronic or manual. *Id.* at ¶ 6.

¹ On March 4, 2009, Department Staff filed a motion for order without hearing, alleging violations of the Consent Order. That motion, dated February 27, 2009, will be the subject of a separate ruling.

Mr. Cirrito stated that there was only one monitoring well, located upgradient of the tanks. Id. Mr. Cirrito went on to note that monitoring wells may only be used for leak detection if they are installed within the tank bed backfill material, and located on the down gradient side of the tanks. Id. Moreover, monitoring wells can only be used at locations where groundwater is less than 20 feet below grade.² Id.

According to the Cirrito Affidavit, other violations were noted during the inspection. Specifically:

1. Daily inventory records were not reconciled on a ten-day basis, as required by the State's PBS regulations. All inventory records reviewed recorded positive daily variances, which indicated that the tanks would fill eventually even if no product were delivered. Id. at ¶ 7.
2. Fill port color coding on all three tanks was incorrect and severely worn, in violation of Section 613.3(b) of 6 NYCRR. Id. at ¶ 8.
3. Petroleum was present in the super gasoline fill port spill bucket, in violation of Section 613.8 of 6 NYCRR, and the New York State Navigation Law. Id. at ¶ 9.
4. Fill caps for both regular gasoline tanks were not sealing, in violation of Section 230.2 of 6 NYCRR. Id. at ¶ 10.
5. Petroleum discharges were present in dispenser No. 5. One discharge was at a shear valve, and one discharge was at a gasket. Id. at ¶ 11.
6. Metal components at all three pumps were not cathodically protected, even though those components were buried in soil. This lack of cathodic protection is a violation of federal law. Id. at ¶ 12.

Mr. Cirrito stated that a PBS facility such as Respondents' without leak detection or accurate and properly maintained reconciled inventory records has no means of detecting a discharge of petroleum. Id. at ¶ 13.

Mr. Cirrito went on to state that at the inspection on February 9, 2009, he found that Tank No. 10665 was still in service, and that the tank may have leaked in 2005 from the eight by five inch hole and two hairline fractures. Id. at ¶ 14. According to Mr. Cirrito, the hole and hairline fractures "compromised the structural integrity of the tank beyond repair," and noted that Xerxes had advised Respondents that if the tank were repaired Xerxes could not "state that damage will not happen again." Id.; Exhibits 7 and 18.

² Mr. Cirrito testified at the hearing on March 13, 2009 that groundwater at the Facility is approximately 35 feet below grade, and the monitoring well is installed upgradient of the tanks. Transcript at 31.

In the Cirrito Affidavit, Mr. Cirrito indicated that he received and reviewed a Field Inspection Report from Xerxes dated April 25, 2006, as well as a project Change Order Estimate dated April 26, 2006, detailing these findings.³ *Id.* at ¶ 15. On October 24, 2007, Mr. Cirrito sent Respondent Yetim a letter, directing him to close the tank and, within ten days, conduct a soil and groundwater investigation to determine if any product were released from the tank. Exhibit 3.

Mr. Cirrito stated that in his professional opinion, “the tank should not be in operation, and should not store any petroleum product. The tank threatens to leak and/or fail catastrophically because the interior inspection of the tank performed in 2006 revealed the tank was damaged beyond repair.” *Id.* at ¶ 16. Mr. Cirrito went on to offer his professional opinion that the tank “must be emptied immediately and the tank must be closed and removed in accordance with 6 NYCRR 613.9 because this eight thousand (8,000) gallon tank may leak and could suffer a catastrophic failure.” *Id.* at ¶ 17.

The Order included the Affidavit of Russ Brauksieck, Section Chief of the Spill Prevention and Bulk Storage Section of the Department’s Central Office, sworn to on February 25, 2009 (the “Brauksieck Affidavit,” Exhibit 1B). In his Affidavit, Mr. Brauksieck stated that he had spoken with Hugh Cirrito, and reviewed the Department’s file. Mr. Brauksieck went on to state his professional opinion that

the damage to the tank revealed by the 2006 internal inspection revealed the tank’s structural integrity has been compromised, and now that the tank is back in service, it may leak and/or fail catastrophically, releasing up to 8,000 gallons of petroleum into the environment. A leak from this tank would not currently be detected because the tank has no leak detection and the tank’s daily inventory records have not been reconciled on a ten-day basis as required by statute.

Brauksieck Affidavit, at ¶¶ 6-7. According to Mr. Brauksieck, “[i]n my professional opinion, the tank should not be in operation and should not store any petroleum product. This eight thousand (8,000) gallon tank must be emptied immediately and the tank must be closed and removed in accordance with 6 NYCRR 613.9 because this tank may suffer a catastrophic failure, and as such poses an imminent danger.” *Id.* at ¶ 8.

Also attached to the Order was the affidavit of Maria Mastroianni, sworn to February 25, 2009 (the “Mastroianni Affidavit,” Exhibit 1C). In her Affidavit, Ms. Mastroianni indicated that she processed the Consent Order, and that three checks signed by Respondent Yetim drawn on an account for Gizem Realty Corp. were returned for insufficient funds when the Department attempted to cash the checks. Mastroianni Affidavit, at ¶¶ 3-6. According to Ms. Mastroianni, no further payments were received, and pursuant to the terms of the Consent Order, \$87,000 remains outstanding. *Id.* at ¶¶ 7-8. Ms. Mastroianni stated

³ In his testimony at the hearing, Mr. Cirrito stated that he received those documents on October 23, 2007. Transcript at 28.

further that the Department had not received any documentation of compliance with the Consent Order. Id. at ¶ 9.

The fourth supporting affidavit was submitted by Kristy Salafrio, and was sworn to on February 24, 2009 (the “Salafrio Affidavit,” Exhibit 1D). Ms. Salafrio is an Engineering Geologist II in the Department’s Region 1 Office, and in her Affidavit, she stated that four active public drinking water supply wells for the Water Authority of Western Nassau are located approximately 1,000 feet north of the Facility. Salafrio Affidavit, at ¶ 5. According to Ms. Salafrio, these public water supply wells draw their water from groundwater that is part of Long Island’s sole source aquifer, which constitutes a natural resource. Id. The Salafrio Affidavit went on to say that this sole source aquifer is highly vulnerable to groundwater contamination.

Ms. Salafrio stated that two of the four active supply wells are very shallow Glacial aquifer wells (well No. N5155 at 90 feet below grade, and well N6744 at 94 feet below grade), while the other two wells (N5156 and N6745) are deeper wells located in the Magothy aquifer. Id. at ¶ 6. The two shallow Glacial aquifer wells supplied approximately 298,000,000 gallons of potable water in 2008, and the Water Authority of Western Nassau pumped approximately 832,680,000 gallons of potable water from the two Magothy wells during that year. Id. at ¶¶ 7-8.

The Salafrio Affidavit included the Source Water Area Protection Zone (“SWAP”) map for the public drinking water wells in the vicinity of spill 05-10613. Exhibit 1E. The Salafrio Affidavit stated that SWAP map depicts the modeled areas from which the supply wells draw their water over a certain time period, and concluded that over a period of twenty-five years, public drinking water supply well N6745 draws its water (amounting to 89,283,000 gallons in 2008) from an area encompassing the Facility. Salafrio Affidavit, at ¶ 9. Ms. Salafrio stated that in her professional opinion,

a petroleum discharge from this Facility that impacts/contaminates groundwater could pose an imminent threat to the four active supply wells that draw their water from the area encompassing the Facility (specifically N6745). This would endanger the health and welfare of the people of the State of New York, who drink the water from the Water Authority of Western Nassau.

Id. at ¶ 10. The Salafrio Affidavit went on to state that although Mr. Cirrito’s October 24, 2007 letter directed Respondent Yetim to contact Ms. Salafrio with regard to conducting a soil and groundwater investigation, Respondent Yetim had failed to do so as of the date of the Salafrio Affidavit. Id. at ¶ 11.

The Order required Respondents to pump out the product from PBS Tank No. 10665 within twenty-four hours of service of the Order, and to close and remove the tank within seven days of such service. Order, at Paragraph IV. Within eight days from service of the Order, Respondents were directed to submit an acceptable plan to the Department, consistent with Department policies and procedures for petroleum spill and investigation, for

investigation and remediation of any petroleum contamination at the Facility. Id. In order to ensure compliance with the Order and to monitor the activities at the Facility, Respondents were required to immediately, and at all times, grant full access to the Facility to Department Staff or Department Staff's designees, agents, or contractors. Id.

APPEARANCES

Section 620.3(a) of 6 NYCRR provides that upon issuance of a summary abatement order, the Department must schedule a hearing within fifteen days. Notice of the hearing must be provided with the written summary abatement order. Id. The Order notified Respondents that a hearing would be held at 11:30 a.m. on Friday, March 13, 2009, at the Department's Region 1 offices in Stony Brook, New York. According to the Affidavit of Lieutenant Frank Lapinski, sworn to March 6, 2009, the Order was personally served on Respondent Yetim on March 4, 2009 (Exhibit 15). The corporate respondents were served via hand delivery at the Secretary of State on March 5, 2009. Exhibits 13A and 14.

The hearing proceeded as noticed at 11:30 a.m. on Friday, March 13, 2009, at the Department's Region 1 offices in Stony Brook. At the hearing, Department Staff was represented by Scott W. Owens, Esq., Chief of the Department's Spill and Bulk Storage Section, and Benjamin Conlon, Esq., Bureau Chief of the Bureau of Remediation and Revitalization, both from the Department's General Counsel's office at 625 Broadway in Albany, New York. Department Staff called two witnesses: Hugh Cirrito and Kristy Salafrio, both of the Region 1 office. Nick Acampora, Environmental Program Specialist and Response Section Supervisor in the Division of Environmental Remediation at the Region 1 office, also attended the hearing.

At 11:02 a.m. on the morning of the hearing, Respondent Yetim left a message on Mr. Cirrito's answering machine. (Transcript (hereinafter "Tr.") at 12). That message was subsequently transcribed verbatim, on the record. Id. In the message, Respondent Yetim stated that he would not attend the hearing, because he was unable to arrange for his attorney to be present. Id. He requested that Mr. Cirrito return his call. Id.

Ms. Salafrio also received a call at approximately 11:05 a.m. from Respondent Yetim on the morning of the hearing. Tr. at 65-66; Exhibit 20. Ms. Salafrio testified that Respondent Yetim told her that his attorney was unable to appear, and that he would not be present. Tr. at 66. Ms. Salafrio stated that Respondent Yetim advised her that he was obtaining estimates to have the tank pumped and removed from service, but had not pumped the tank because it was linked to another tank and he would be unable to sell gas if that tank were emptied. Id. The witness testified that Respondent Yetim asked Ms. Salafrio to call him back and asked Department Staff what steps he should take because he was unable to appear at the hearing. Id.

After opening the record at 11:30 a.m., the administrative law judge ("ALJ") attempted to reach Respondent Yetim at 11:45 a.m. at the telephone number he provided in the message left for Mr. Cirrito. Tr. at 9-10. There was no answer, and the ALJ then

telephoned Respondent at two telephone numbers that appeared on the Facility's Registration Application for Storage of Flammable/Combustible Liquids, submitted to the County of Nassau (Exhibit 11B). Tr. at 11. There was no answer at either number, and the ALJ left a message directing Respondent to call the telephone extension of the hearing room. Tr. at 10.

The testimony of Department Staff's witnesses proceeded, and during a recess in the proceedings, the ALJ requested that Mr. Cirrito and Ms. Salafrio retrieve any new answering machine messages in the event Respondent Yetim had attempted to contact either of them. Ms. Salafrio received a message from Respondent Yetim, and the ALJ was able to reach Respondent Yetim on the telephone in the hearing room. Tr. at 50-54. Respondent Yetim was advised that the hearing was proceeding in his absence, and he stated that he could not attend because his attorney was unable to appear. *Id.* The ALJ requested the attorney's name and telephone number. Tr. at 51-52. Respondent Yetim stated that he would call his lawyer, and then call the number of the hearing room. Tr. at 52. Mr. Conlon then attempted to reach the attorney at the number provided, and the attorney's office stated that the attorney was not in the office. Tr. at 53.

At the conclusion of the testimony, the telephone rang in the hearing room. Tr. at 67. Respondent Yetim was calling. The ALJ returned the phone call so that the speaker phone could be used. Respondent Yetim stated that he was unable to reach his attorney. Tr. at 67-68. The ALJ advised Respondent Yetim that the testimony of Department Staff's witnesses had been completed, and Respondent Yetim reiterated that he was not able to attend without his attorney. Tr. at 68. The ALJ then told Respondent Yetim to contact Mr. Owens if he wished to discuss the matter further, and Mr. Owens provided his telephone number. Tr. at 68-69. Finally, the ALJ told Respondent Yetim to have his attorney call her as soon as Respondent Yetim was able to speak with him. Tr. at 69.

No telephone calls were received during the hearing from the attorney that Respondent Yetim said that he had retained. Counsel for Department Staff advised that they had spoken several times with the individual Respondent Yetim identified as his attorney, and that individual did not state that he represented Respondents. Tr. at 72-74. Counsel stated further that every e-mail sent to the attorney included as an attachment the summary abatement order with the date of the hearing. Tr. at 73. According to counsel, Department Staff was never contacted with any request for an adjournment. *Id.* At the conclusion of the hearing, the ALJ and counsel for Department Staff checked their voicemailboxes to see if any message had been left by the attorney Respondent Yetim identified, and there were no such messages. Tr. at 74-75. As of the date of this hearing report, the attorney has not contacted the ALJ. In response to an inquiry by the ALJ on March 18, 2009, counsel for Department Staff advised that they had not been contacted by the attorney.

Respondents were duly notified of the hearing, and failed to appear. No appearance has been entered by any attorney on behalf of Respondents. Accordingly, Respondents have waived their right to a hearing in this matter. The remainder of this hearing report provides further detail as to the testimony and evidence offered at the hearing, and concludes that the Commissioner's summary abatement order should be continued.

RELEVANT FACTS AND ARGUMENTS PRESENTED

Part 620 of 6 NYCRR governs summary abatement proceedings. Section 620.2 (“General procedure”) provides, in pertinent part, that

(a) [w]henever the commissioner finds, after an investigation, that any person is causing, engaging in or maintaining a condition or activity which, in the judgment of the commissioner:

(1) presents an imminent danger to the health of [sic] welfare of the people of the State, or results in or is likely to result in irreversible or irreparable damage to natural resources; and

(2) relates to the prevention and abatement powers of the commissioner in that the condition of [sic] activity pertains to or affects any of the objectives or goals of the Environmental Conservation Law, or relates to any of the permit, licensing, or regulatory programs of the Department; so that it appears to be prejudicial to the interest of the people of the State to delay action until an opportunity for hearing can be provided, the commissioner may, without prior hearing or notice, order such person to discontinue, abate or alleviate such condition or activity.

(b) Such order may be oral, telephonic, in writing, or in such other form as will, in the commissioner’s judgment give reasonable notice to the person. . . . A written summary abatement order shall state the grounds on which the order is based.

(c) Upon receipt of the commissioner’s summary abatement order, it shall thereafter be the duty of the respondent to immediately discontinue, abate or alleviate such condition or activity pursuant to the terms of said order. Failure to do so shall constitute a violation of the order and of these regulations.

At the hearing, Department Staff offered additional testimony by Mr. Cirrito and Ms. Salafrio, who confirmed the content of the affidavits they provided in support of the Order, described above. Mr. Cirrito testified that the Facility registration indicated that the tank owner was 102 Elmont Realty Corp., and that the facility operator was identified as Elmont Gasoline Inc. Tr. at 21-22; Exhibit 11B. The witness testified that Nedjet Yetim signed the registration as president of these corporate entities. Tr. at 22; Exhibit 11B. The tank registration certificate was issued to Elmont Realty Corp., for two 8,000 gallon tanks, and one 6,000 gallon tank. Tr. at 22; Exhibit 11A. Respondent Yetim also signed the Consent Order for each of the corporate respondents. Tr. at 23-24; Exhibit 2. As of the date of the hearing, Respondents had not submitted any documentation of compliance with the Consent Order. Tr. at 24.

Mr. Cirrito stated that spill No. 05-10613 was reported on December 9, 2005, when one of the 8,000 gallon tanks (Tank No. 10665) failed a tightness test. Tr. at 24; Exhibit 9. The witness testified that he received a field inspection report from Xerxes. Tr. at 25-26; Exhibit 6. The inspection revealed an eight inch by five inch hole, and hairline fractures at the tank's end caps. Tr. at 26; Exhibit 6. Mr. Cirrito stated that end caps typically fracture because of improper backfilling when the tanks are installed, which leads to a condition called "squatting," or deflection. Tr. at 26. The witness testified that when this occurs, there is stress on the tank at the end caps, and the tank pulls away from the end caps and cracks. Id. Mr. Cirrito testified that in his professional opinion, the tank at the Facility at 653 Hempstead Turnpike is deflected. Tr. at 27-28.

Department Staff offered a project change order, prepared by Xerxes Corporation, the manufacturer of the tank. Tr. at 28; Exhibit 7. In that document, Xerxes stated that it could not state that the damage observed would not occur again if repairs were made to the tank. Id. Department Staff also offered a subsequent letter from Xerxes, reiterating the earlier observation, and stating that if the tank were repaired, Xerxes would not provide a warranty on that repair. Tr. at 28; Exhibit 18.

Mr. Cirrito did not receive Xerxes' field inspection report or the project change order until October 23, 2007. Tr. at 28. On October 24, 2007, Mr. Cirrito sent a letter to Respondent Yetim. Tr. at 28-29; Exhibit 3. That letter stated that the Department would not permit the tank to remain in service, and directed closure of the tank immediately in accordance with Section 613.9(b) of 6 NYCRR. Tr. at 29; Exhibit 3. The letter went on to direct that a soil and groundwater investigation be conducted to determine if any product had been released as a result of the damage to the tank. Exhibit 3.

Mr. Cirrito stated that in early to mid-2008, a Region 1 employee visited the Facility while obtaining coordinates to map the gasoline stations on Long Island, and observed that the Facility was closed. Tr. at 30-31. On February 9, 2009, Mr. Cirrito inspected the Facility, and discovered that the tank was still in service, and no investigation had been conducted. Exhibit 4.

During that inspection, Mr. Cirrito observed a number of violations. There was a lack of leak detection at the Facility, and the monitoring well was upgradient of the tanks in an area where groundwater is approximately 35 feet below grade. Tr. at 31-32; Exhibit 4. According to Mr. Cirrito, monitoring wells must be located downgradient, and can only be used in locations where groundwater is less than 20 feet below grade. Tr. at 31; Exhibit 4. Moreover, the monitoring well was not secured, the cap was cracked, and there was no documentation on-site indicating that the well had been checked at any time since September of 2008. Tr. at 32-33; Exhibits 4, 5P, 5Y.

The witness observed that inventory reconciliation was not properly performed, and the compliance checklist was incomplete. Tr. at 34-35, 37-40; Exhibits 5D-5O. Mr. Cirrito noted that there was gasoline in the super unleaded fill port spill bucket, in violation of Section 613.8 of 6 NYCRR, and that the tank fill caps for both of the regular gasoline tanks

were not sealing, in violation of Section 230.2(f) and (g). Tr. at 35-36; Exhibits 4, 5V, 5W, 5 X. In addition, product was leaking at one of the dispensers, in a shear valve and a gasket, in violation of Section 613.8. Tr. at 36-37; Exhibits 4, 5CC, 5DD, 5EE. The color coding on the fill ports for all three tanks was severely worn, in violation of Section 613.3(b). Exhibit 4.

Mr. Cirrito pointed out that the 8,000 gallon tank is manifolded to a “slave” tank, which does not have a separate dispenser. Tr. at 39. Instead, the second tank is connected by pipes to the first tank, so that the contents of the second tank can be pumped into cars through the first tank’s dispenser. Id. As a result, the combined capacity at the Facility for Tank No. 10665 is actually 16,000 gallons. Id.

The witness testified that there was no cathodic protection for metal components of the tank system, nor were those components isolated from the soil, and thus were subject to rusting. Tr. at 41; Exhibits 5AA, 5BB. According to Mr. Cirrito, the tanks may be leaking, and in fact the damage to the tanks and the fact that the tank failed a leak detection test indicated that the tank is leaking. Tr. at 41-42. Mr. Cirrito went on to testify that the best way to remediate any contaminated soil at the facility would be to excavate any accessible contaminated soil, and then employ a treatment system to treat the inaccessible soil beneath the tank. Tr. at 42.

Mr. Cirrito testified that he conducted another inspection at the Facility on Wednesday, March 11, 2009, two days before the hearing, and at that time, Tank No. 10665 was still in service. Tr. at 43-44. The witness said that he saw that cars were still being filled with gas, and that the tanks contained product. Tr. at 44. According to the witness, he saw Respondent Yetim at the Facility on that day, and that Respondent Yetim indicated that he planned to attend the hearing and had retained an attorney. Id. Mr. Cirrito testified that Respondent Yetim stated that he wanted to correct the problems at the Facility, and that he would like to abandon the tank. Id. Mr. Cirrito advised Respondent Yetim that the tank could not be abandoned. Id. The witness testified further that, to his knowledge, Respondent Yetim owns several other gas stations. Tr. at 45.

Mr. Cirrito reiterated that he observed significant violations at the Facility during his inspection on February 9, 2009. Tr. at 54-55. Specifically, there was no leak detection for the tanks, and no inventory reconciliation was being performed. Tr. at 55. According to Mr. Cirrito, even if those violations were cured, there would still be substantial violations. Tr. at 55. The witness testified that the main problem with the tank was that it is siphoned to another tank, with a combined capacity of 16,000 gallons, and had leaked. Id. Mr. Cirrito stated that the tank had been repaired, against the advice of the manufacturer. Id. The witness testified further that no investigation or remediation was performed with respect to the spill, as directed in his letter of October 24, 2007. Tr. at 55-56; Exhibit 3.

Mr. Cirrito stated that Willie Gabin, an Environmental Engineering Technician II in the Region 1 office, inspected the Facility on March 10, 2009, and observed that the Facility was still pumping gas, and that the tanks contained product. Tr. at 45-46. Mr. Cirrito noted

that Mr. Gabin recorded the levels of product in the tanks in pencil on a sketch, and that during his inspection on March 11, Mr. Cirrito recorded the levels in pen on that same document. Tr. at 46-47; Exhibit 19B. According to Mr. Cirrito, the levels he marked during his inspection on March 11 were lower than the levels observed by Mr. Gabin on March 10. Tr. at 48. Mr. Gabin also took photographs, depicting improper color coding of the fill ports at the Facility. Tr. at 47; Exhibit 19A.

Mr. Cirrito stated that Respondent Yetim understood the Order, and that Respondent Yetim planned to attend the hearing. Tr. at 48. According to the witness, Respondent Yetim told him that he had spoken with contractors to remove the tank. Tr. at 48-49. Department Staff introduced letters from two contracting firms, The Tyree Organization and C₂G Environmental Consultants, LLC, stating that the work required pursuant to the Order could be performed in the timeframes set forth. Tr. at 49; Exhibits 16 and 17.

Department staff also offered the testimony of Kristy Salafrio at the hearing. Ms. Salafrio testified that the Long Island aquifer is a natural resource, and is the sole source, principal aquifer for Nassau and Suffolk counties. Tr. at 58. The witness testified that she prepared the SWAP Zone map, depicting public water supply wells (N006744, N006745, and N005156) approximately 1,000 feet north of the Facility. Tr. at 58-59; Exhibit 1E. According to the witness, the Facility is within the area of contribution for those public water supply wells, and consequently, if there were a release of petroleum from the Facility, those wells would potentially be affected by contamination. Tr. at 59.

Ms. Salafrio testified that the upper Glacial aquifer is the most shallow aquifer on Long Island. Tr. at 60. The Magothy aquifer lies beneath the Glacial aquifer, and is the primary public drinking water source on Long Island. *Id.* A leaking tank at the Facility would lead to a plume of contamination dissolved in groundwater, which would eventually migrate off-site. *Id.* Ms. Salafrio testified this had happened at another gas station owned by Respondent Yetim at 1278 Hempstead Turnpike. Tr. at 60-61. There, Department Staff found floating petroleum product in two of the tank bed monitoring wells during an inspection, and noted that there had been a substantial release that impacted soil and groundwater on the property. Tr. at 61.

The witness stated that a plume of contaminated groundwater had migrated off that property, approximately 1,000 feet from the source. Tr. at 61. The plume also contained methyl tertiary butyl ether ("MTBE"). *Id.* Department Staff has cleaned up contaminated soil and groundwater, and is installing a pump and treatment system to address the contamination, at the State's expense through the New York State spill fund. Tr. at 61-62. Ms. Salafrio testified that Respondent Yetim has not performed any of the required investigation and cleanup at that site, which at this point has resulted in an expenditure of approximately \$800,000 from the fund, with total expenses in excess of one million dollars anticipated. Tr. at 62.

According to Ms. Salafrio, there would be a similar impact to the natural resources of the State, and there is a threat to public health if the groundwater becomes contaminated as a

result of a release at the Facility. Tr. at 62-63. She testified that the risks are even greater at the Facility than at the property which has been the subject of the ongoing cleanup. Tr. at 63. There is still an open spill number at the Facility, and no action has been taken, despite notification to Respondent Yetim. Tr. at 63-64. Ms. Salafrio opined that the tank may have cracked again, and a slow leak over time, such as might be anticipated at the Facility, poses a greater threat than a catastrophic failure, because the former may go undetected for some time. Tr. at 64. Ms. Salafrio stated that she was concerned that this may have happened at the Facility. Tr. at 64-65.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent 102 Elmont Realty Corp. is an inactive domestic corporation incorporated under the laws of the State of New York, and is registered with the Nassau County Fire Marshal as the owner of the Facility at 653 Hempstead Turnpike, Elmont, New York. The Facility includes a 6,000 gallon and two 8,000 gallon single walled fiberglass underground storage tanks.

2. Respondent Elmont Gasoline Co., Inc. is an active domestic corporation incorporated under the laws of the State of New York, and is registered with the Nassau County Fire Marshal as the operator of the Facility at 653 Hempstead Turnpike, Elmont, New York. Respondent Elmont Gasoline Co., Inc. is the owner of the real property located at 653 Hempstead Turnpike, Elmont, New York.

3. Respondent Nedjet Yetim is a natural person, with a primary residence at 2 Patricia Lane, Patchogue, New York 11772, and is the president of both of the corporate respondents.

4. Respondents Nedjet Yetim and 102 Elmont Realty Corp. entered into a consent order (No. D1-1293-06) with the Department (the "Consent Order"), which was effective June 6, 2006. The Consent Order required payment of a penalty of \$87,000 (eighty-seven thousand dollars). In addition, the Consent Order required Respondents Nedjet Yetim and 102 Elmont Realty Corp. to audit six PBS facilities, including the Facility which is the subject of the summary abatement order in this proceeding, and bring those facilities into compliance with applicable local, State, and federal laws.

5. The Department has not received any documentation of compliance with the Consent Order. The three checks, each in the amount of \$3,600 (three thousand six hundred dollars) that were submitted by Respondent Nedjet Yetim to pay a portion of the \$87,000 fine were returned for insufficient funds.

6. One of the 8,000 gallon single walled fiberglass underground PBS tanks at the Facility (Tank No. 10665) failed a required tightness test on or about December 9, 2005. As a result of that failed tightness test, a spill (number 05-10613) was reported to the Department.

7. On April 25, 2006, Xerxes Corporation inspected Tank No. 10665. The inspection revealed two hairline fractures, both over three feet long, on either end of the tank, and an 8 inch by 5 inch hole. The hole and hairline fractures compromised the structural integrity of Tank No. 10665. In a report dated April 26, 2006, Xerxes Corporation advised Respondent Yetim that it could not state “that damage will not happen again.”

8. By letter dated October 24, 2007, Department Staff advised Respondent Yetim that Tank No. 10665 could not be repaired and returned to service, because if an attempt were made to do so, Tank No. 10665 might leak or suffer catastrophic failure.

9. On February 9, 2009, Department Staff inspected the Facility, and discovered that Tank No. 10665 was still in service. As of March 11, 2009, Tank No. 10665 was still in service, in violation of the Order which is the subject of this summary abatement proceeding.

10. The February 9, 2009 inspection revealed a number of additional violations. Specifically, the Facility had no leak detection, and inventory records were not reconciled on a ten day basis. Consequently, the Facility has no means of detecting a petroleum discharge from Tank No. 10665.

11. The Facility is situated approximately 1,000 feet north of four active public water supply wells for the Water Authority of Western Nassau. The Source Water Area Protection Zone map for one of these four wells, well number N6745, indicates that well number N6745 draws its water from the area encompassing the Facility, and there is a possibility that the other three wells may draw their water from the same location.

12. Continued operation of Tank No. 10665 is likely to result in irreversible or irreparable damage to the Long Island aquifer, a unique and invaluable natural resource of the State, and irreversible and irreparable damage to at least one of the four active public water supply wells for the Water Authority of Western Nassau that are located within 1000 feet of the Facility.

13. Continued operation of Tank No. 10665 presents an imminent danger to the health or welfare of the people of the State of New York who use the water from the wells maintained by the Water Authority of Western Nassau.

14. Respondents are causing, engaging in or maintaining a condition or activity which presents an imminent danger to the health or welfare of the people of New York State, through the continued operation of Tank No. 10665.

RECOMMENDATION

The testimony and documentary evidence offered by Department Staff at the hearing establishes that Respondents are causing, engaging in or maintaining a condition or activity which presents an imminent danger to the health or welfare of the people of New York State, through the continued operation of Tank No. 10665. Moreover, the record demonstrates that

continued operation of Tank No. 10665 is likely to result in irreversible or irreparable damage to the Long Island aquifer, a unique and invaluable natural resource of the State, and irreversible and irreparable damage to at least one of the four active public water supply wells for the Water Authority of Western Nassau, that are located within 1000 feet of the Facility. As a result, continued operation of Tank No. 10665 presents an imminent danger to the health or welfare of the people of the State of New York who use the water from the wells maintained by the Water Authority of Western Nassau.

For the reasons set forth above, the summary abatement order should be continued.