

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC Case No.
R6-20131231-48

- by -

EMPIRE CONSTRUCTION AND REAL ESTATE LLC
AND CHARLES CELI,

Respondents.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department) that respondents Empire Construction and Real Estate LLC (respondent Empire) and Charles Celi (respondent Celi) (collectively respondents) violated 6 NYCRR 613.9(b) by failing to properly close petroleum bulk storage (PBS) tanks that were permanently out of service and located at respondents' PBS facility at 217 Washington Street North, Herkimer, New York. At the facility are two 9,000 gallon underground PBS tanks that, combined, currently contain several thousand gallons of fuel oil (see Hearing Report at 6 [Finding of Fact 8]; Department staff Exhibit 16).

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

As set forth in the ALJ's hearing report, respondents failed to file an answer to the July 13, 2015 complaint served by Department staff in this matter (see Hearing Report at 7 [Finding of Fact No. 16]). Department staff, in the notice of hearing accompanying the complaint, advised respondents that

(1) a pre-hearing conference was scheduled for September 16, 2015 before ALJ Caruso,

(2) failure to appear at the pre-hearing conference would result in a default and a waiver of respondents' right to a subsequent adjudicatory hearing, and

(3) if they failed to appear, staff would move for default at the pre-hearing conference.

The pre-hearing conference was convened on September 16, 2015, as noticed, and respondents failed to appear. Staff moved for a default judgment and also presented evidence in support of a judgment on the merits (see Hearing Report at 4).

As a consequence of respondents' failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 9). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report at 7-9). Accordingly, staff is entitled to a judgment on the merits based on record evidence.

Based on the record, respondent Celi had direct responsibility for the operations of the real property and PBS tanks that respondent Empire owned, and represented to Department staff that he owned the facility (see Finding of Fact 10). In this matter, both respondents were in a position to properly close the underground tanks, and failed to do so (see Findings of Fact 10 and 11). Imposing joint and several liability on each respondent for the ongoing violation to comply with the closure requirements is fully consistent with the broad remedial purposes of the regulations and the underlying statute, and administrative precedent (see e.g. Matter of QP Service Station Corp., Decision and Order of the Commissioner, Oct. 20, 2004; Matter of Morgan Oil Terminals Corp., Order of the Commissioner, Oct, 17, 1994).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for a violation of 6 NYCRR 613.9(b). Department staff, in its papers, sought a civil penalty of thirty thousand dollars (\$30,000), with twenty thousand dollars (\$20,000) suspended, conditioned on respondents' compliance with this order.

The fact that these tanks continue to contain several thousand gallons of fuel oil is a factor to be considered in determining an appropriate penalty. The potential of a release of petroleum or other failure of these tanks, which have not been tested since 1987 (see Department staff Exhibits 13 and 14), is of significant concern. Based on this record, the requested penalty of thirty thousand dollars (\$30,000), with twenty thousand dollars (\$20,000) suspended conditioned on respondents' compliance with this order, is authorized and appropriate.

I also concur with the ALJ that the PBS tanks should be removed and the facility permanently closed.¹

Department staff also requests that the order reserve all rights of the Department and the State regarding civil or criminal actions for matters not specifically alleged in the complaint. Such requests by staff have been made, and rejected, in prior orders (see e.g. Matter of Galloway, Order of the Commissioner, January 16, 2015, at 5). This proceeding is limited to those matters specifically alleged in the pleading, and language to reserve the Department or the State's rights for matters that have not been alleged in this complaint is not necessary. To the extent that causes of action arise relating to matters not specifically alleged here, Department staff may pursue those as circumstances warrant and as the law allows.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondents Empire Construction and Real Estate LLC and Charles Celi waived their right to be heard at the hearing.

¹ Parts 612 and 613 were repealed, effective subsequent to the ALJ's Hearing Report, and replaced by a revised part 613. With respect to the violation alleged in this matter, the former part 613 applies. For the purposes of the closure of the tanks, the current closure regulations in the revised part 613 apply.

- II. Based upon record evidence, respondent Empire Construction and Real Estate LLC and respondent Charles Celi are adjudged to have jointly and severally violated 6 NYCRR 613.9(b) by failing to properly close the two 9,000 gallon underground petroleum bulk storage tanks that are permanently out of service and located at respondents' facility at 217 Washington Street North, Herkimer, New York.
- III. Respondent Empire Construction and Real Estate LLC and respondent Charles Celi are jointly and severally assessed a civil penalty in the amount of thirty thousand dollars (\$30,000) for the above-referenced violations, with payment of twenty thousand dollars (\$20,000) of the penalty suspended, conditioned upon respondents' compliance with the provisions of this order. If the respondents do not comply with the provisions of this order, the suspended portion of the civil penalty (that is, twenty thousand dollars [\$20,000]) will be immediately due upon written demand by Department staff.
- IV. Within sixty (60) days of the service of this order upon respondent Empire Construction and Real Estate LLC and respondent Charles Celi, respondents shall pay the unsuspended portion of the civil penalty referenced in paragraph III (that is, ten thousand dollars [\$10,000]) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The penalty payment shall be sent to the following address:
- Office of General Counsel
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601
Attention: Nels G. Magnuson, Esq.
- VI. Within sixty (60) days of service of this order upon respondent Empire Construction and Real Estate LLC and respondent Charles Celi, respondents shall remove the two 9,000 gallon underground petroleum bulk storage tanks at the facility and permanently close the facility in accordance with 6 NYCRR 613-3.5.

VII. Within ninety (90) days of service of this order on respondent Empire Construction and Real Estate LLC and respondent Charles Celi, respondents shall submit a report and proof of the removal of the petroleum bulk storage tanks at the facility and their contents and permanent closure of the facility to the Department at the following address:

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

VIII. Respondent Empire Construction and Real Estate LLC and respondent Charles Celi shall provide any duly designated officer, employee, or agent of the Department entry to respondents' petroleum bulk storage facility or areas in the vicinity of respondents' facility that are under control of respondents or as to which respondents have the authority to provide access to others, for the following purposes:

- A. inspection;
- B. sampling and testing that Department staff deems necessary;
- C. ascertaining respondents' compliance with the ECL, the Navigation Law, the applicable regulations, and the provisions of this order, as well as completing the closure of the facility; and
- D. investigating and remediating any petroleum contamination found at the site.

IX. The provisions, terms and conditions of this order shall bind respondent Empire Construction and Real Estate LLC and respondent Charles Celi, and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Acting Commissioner

Dated: Albany, New York
June 2, 2016

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

HEARING REPORT

DEC Case No.
R6-20131231-48

- by -

EMPIRE CONSTRUCTION AND REAL ESTATE LLC
AND CHARLES CELI,

Respondents.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondents Empire Construction and Real Estate LLC (respondent Empire) and Charles Celi (respondent Celi) (collectively respondents) with a notice of hearing and complaint, dated November 25, 2014, alleging a violation of 6 NYCRR 613.9(b), for failure to properly close petroleum bulk storage (PBS) tanks permanently out of service located at respondents' PBS facility located at 217 Washington Street North, Herkimer, NY 13350.

The complaint sought an order of the Commissioner: (1) finding respondents in violation of 6 NYCRR 613.9(b); (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (3) suspending an appropriate portion, but not more than half, of the penalty to ensure compliance with the Commissioner's order; (4) directing respondents to pay the penalty within sixty (60) days of the service of the Commissioner's order on respondents; (5) directing respondents to permanently close the PBS facility in accordance with 6 NYCRR 613.9(b) within sixty (60) days of the service of the Commissioner's order on respondents; (6) directing respondents to provide the Department with a report regarding the removal of the PBS tanks at the facility and permanent closure of the facility; (7) reserving all rights of the Department and the state regarding civil or criminal actions for matters not specifically alleged in this proceeding; and (8) granting such

other and further relief as the Commissioner may deem just and appropriate under the circumstances.

Pursuant to a notice of default hearing, an adjudicatory hearing was convened before the undersigned Administrative Law Judge (ALJ) of the Department's Office of Hearings and Mediation Services on May 13, 2015 at the Department's Region 6 sub-offices, 14th Floor, 207 Genesee Street, Utica, New York. No one appeared on behalf of respondents. Department staff was represented by Nels G. Magnuson, Assistant Regional Attorney, Region 6.

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

Department staff called one witness, Ronald Novak, PE, an engineer in the Department's Division of Environmental Remediation, Region 6. In all, sixteen (16) exhibits were received in evidence. By ruling dated May 27, 2015, I denied staff's motion for default judgment and judgment on the merits without prejudice.

Department staff commenced this instant proceeding by serving respondents a notice of hearing and complaint dated July 13, 2015 alleging a violation of 6 NYCRR 613.9(b), for failure to properly close PBS tanks permanently out of service located at respondents' petroleum bulk storage facility located at 217 Washington Street North, Herkimer, NY 13350.

The complaint seeks an order of the Commissioner: (1) finding respondents in violation of 6 NYCRR 613.9(b); (2) assessing a civil penalty in the amount of thirty thousand dollars (\$30,000) with payment of twenty thousand dollars (\$20,000) suspended, conditioned upon respondents' compliance with the provisions of the Commissioner's order; (3) directing respondents to permanently close the petroleum bulk storage facility within sixty (60) days of the service of the Commissioner's order; (4) directing respondents to provide the Department with a report regarding the removal of the petroleum bulk storage tanks at the facility and permanent closure of the facility within ninety (90) days; (5) directing respondents to provide any duly designated officer, employee, or agent of the Department entry to respondents' PBS facility for the purposes

of inspection, sampling and testing, determining compliance with the ECL, the Navigation Law, the regulations, and the Commissioner's order, as well as completing the closure of the facility, and investigating and remediating any petroleum contamination found at the site; (6) reserving all rights of the Department and the state regarding civil or criminal actions for matters not specifically alleged in this proceeding; and (7) granting such other and further relief as the Commissioner may deem just and appropriate under the circumstances.

Department staff served the notice of hearing and complaint on respondent Celi by certified mail on July 13, 2015. The certified mail was received on or before July 23, 2015.¹ Department staff served the notice of hearing and complaint on respondent Empire by serving the Secretary of State pursuant to Limited Liability Company Law (LLCL) § 303 on July 15, 2015.² The notice of hearing advised respondents that respondents were required to serve a written answer to the complaint within 20 days after receipt, that failure to serve an answer would constitute a default and waiver of respondents' right to be heard, and that staff may thereafter move for a default judgment against respondents at any time. Respondents failed to file an answer to the complaint.

Department staff also sent the notice of hearing and complaint with a cover letter by first class mail addressed to respondent Empire's last two known addresses on August 13, 2015. The cover letter notified respondent Empire that respondent had been served on July 15, 2015 by service on the Secretary of State pursuant to LLCL § 303. By doing so, staff satisfied the requirements of CLPR 3215(g)(4).

As stated in the notice of hearing, on September 16, 2015, a pre-hearing conference was convened before me at the Department's Region 6 sub-offices in Utica, New York. The notice of hearing advised respondents that the pre-hearing conference was scheduled for 10:00 a.m. and attendance at the pre-hearing conference was mandatory. The notice also advised respondents that should respondents fail to appear, a hearing record would be opened and staff would move for a default judgment imposing the penalty and relief requested in staff's complaint. The pre-hearing conference commenced at 10:30 a.m. Department staff was represented by Nels G. Magnuson, Esq.,

¹ The certified mail receipt was signed by respondent Celi but not dated. The certified mail receipt was received by Department staff on July 23, 2015. I use that date for the purpose of determining that an answer was due from respondent Celi on or before August 12, 2015.

² An answer was due from respondent Empire on or before August 4, 2015.

Assistant Regional Attorney, Region 6. No one appeared on behalf of respondents.

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

Department staff moved to have the record (testimony and sixteen [16] exhibits) from the May 13, 2015 hearing received into evidence. I orally granted staff's motion. Department staff called one witness, Ronald Novak, PE, an engineer in the Department's Division of Environmental Remediation, Region 6. Staff introduced an additional seven (7) exhibits into evidence. In all, twenty-three (23) exhibits were received in evidence.

Applicable Regulatory Provision

Section 613.9 Closure of out-of-service tanks

"(b) *Closure of tanks permanently out of service.*

"(1) Any tank or facility which is permanently out of service must comply with the following:

- (i) Liquid and sludge must be removed from the tank and connecting lines. Any waste products removed must be disposed of in accordance with all applicable State and Federal requirements.
- (ii) The tank must be rendered free of petroleum vapors. Provisions must be made for natural breathing of the tank to ensure the tank remains vapor-free.
- (iii) All connecting lines must be disconnected and removed or securely capped or plugged. Manways must be securely fastened in place.
- (iv) Aboveground tanks must be stenciled with the date of permanent closure.
- (v) Underground tanks must either be filled to capacity with a solid inert material (such as sand or concreted slurry) or removed. If an inert material is used, all voids within the tank must be filled.

(vi) Aboveground tanks must be protected from floatation in accordance with good engineering practice.

"(2) Storage tanks or facilities which have not been closed pursuant to paragraph (1) of this subdivision are subject to all requirements of this Part and Part 612 of this Title, including but not limited to periodic tightness testing, inspection, registration and reporting requirements."

Findings of Fact

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

1. Respondent Empire Construction and Real Estate LLC is the owner of a petroleum bulk storage facility having a capacity of over 18,000 gallons located at 217 Washington Street North, Herkimer, New York 13350 (facility). In particular, petroleum bulk storage tanks numbered 3 and 4 at the facility each have a capacity of 9,000 gallons and are located underground. (Testimony of Ronald Novak; Staff Exhibits 12, 13, 14, 15, and 16.)
2. Respondent Empire is a domestic limited liability company registered in the State of New York. (Testimony of Ronald Novak; Staff Exhibits 11 and 22.)
3. On June 28, 2011, the County Treasurer for the County of Herkimer, by tax sale deed, transferred all right, title and interest in the facility to respondent Empire, the facility's current owner. This deed is recorded in the Herkimer County Clerk's Office, as Document Number 2011-00165653. Respondent Empire remains the owner of the facility. (Testimony of Ronald Novak and Nels G. Magnuson; Staff Exhibits 10 and 23.)
4. On or about August 26, 2011, respondent Empire submitted a Petroleum Bulk Storage Application to the Department for two 9,000 gallon petroleum bulk storage tanks located underground at the L.W. Bills School, 217 North Washington Street, Herkimer, New York 13350.³ (Testimony of Ronald Novak; Staff Exhibit 12.)

³ The application lists "Empire Const." as the primary operator of the facility and the owner name is listed as "Gary Cioch", but the type of owner is identified as "Corporate/Commercial".

5. On November 28, 2011, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 6-431605 to "Gary Cioch/Empire Construction and". (Testimony of Ronald Novak; Staff Exhibits 13 and 14.)
6. On October 1, 2013, Department staff inspected the PBS facility and discovered that the two 9,000 gallon underground tanks were no longer in service but were not permanently closed. (Testimony of Ronald Novak; Staff Exhibits 14 and 15.)
7. The two PBS tanks are single-wall tanks. (Testimony of Ronald Novak.)
8. Each of the PBS tanks contains approximately 3,250 gallons of fuel oil. (Testimony of Ronald Novak; see also Staff Exhibit 16.)
9. The estimated cost to permanently close and remove the tanks is \$18,506. (Testimony of Ronald Novak; Staff Exhibit 16.)
10. Respondent Celi represented to staff that he owned and was in control of the PBS facility and that he was the owner of respondent Empire. (Testimony of Ronald Novak; see also Staff Exhibit 16.)
11. Respondent Celi is the operator of the PBS facility. (Hearing Record; see also Staff Exhibit 16.)
12. Ronald Novak is an environmental engineer employed in the Department's Division of Environmental Remediation as the Regional Bulk Storage Supervisor in DEC Region 6. (Testimony of Ronald Novak.)
13. As shown by the signed certified mail receipt, respondent Celi was served, on or about July 23, 2015 with a notice of hearing and complaint dated July 13, 2015. As shown by the affidavit of service sworn to July 15, 2015, respondent Empire was served the notice of hearing and complaint on July 15, 2015 pursuant to LLCL § 303. (Staff Exhibits 17, 18 and 19.)
14. The complaint alleged a violation of 6 NYCRR 613.9(b), for failure to properly close PBS tanks permanently out of service located at respondents' petroleum bulk storage

facility at 217 Washington Street North, Herkimer, NY 13350. (Hearing Record; Staff Exhibit 17.)

15. Department staff provided additional service on respondent Empire by sending the notice of hearing and complaint, together with a cover letter by first class mail on August 13, 2015 to respondent Empire's last known two addresses. The cover letter notified respondent Empire that service on the company was made on the Secretary of State pursuant to LLCL § 303. (Staff Exhibits 20 and 21.)
16. Respondents failed to file an answer to the complaint and failed to appear at the pre-hearing conference scheduled for September 16, 2015, as directed in the notice of hearing. (Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that the PBS tanks located at 217 Washington Street North, Herkimer, New York were permanently out of service since at least October 1, 2013. Staff's proof also demonstrates that respondents failed to properly close the PBS tanks in violation of 6 NYCRR 613.9(b).

The record shows that Department staff duly served the notice of hearing and complaint upon respondents; respondents failed to file an answer to the complaint; and respondents failed to appear at the pre-hearing conference scheduled for September 16, 2015, as directed in the notice of hearing. The notice of hearing advised respondents that attendance at the pre-hearing conference was mandatory, and if respondents failed to appear, the record would be opened and staff would move for a default judgment for the relief requested in the complaint. Department staff submitted a proposed order and proof of service at the time of the hearing. Department staff is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondents' absence, demonstrates by a preponderance of the evidence that respondents failed to properly close the PBS tanks in violation of 6 NYCRR 613.9(b). Department staff alleges that respondent Celi is the sole member and principal of respondent Empire. In addition, staff alleges that respondent Celi is the operator of the facility as that term is defined in 6 NYCRR

612.1(c)(16) ("Operator means any person who leases, operates, controls or supervises a facility").

Staff demonstrated that respondent Celi had direct responsibility for the operations of the real property and PBS tanks owned by the limited liability company and was in a position to prevent the violations (see Matter of Supreme Energy Corporation, Supreme Energy, LLC and Frederick Karam, Decision and Order of the Commissioner, April 11, 2014 at 25-26). I conclude that respondent Celi is personally liable for violations of respondent Empire in this case. Respondents should be held jointly and severally liable for the violation of 6 NYCRR 613.9(b) as requested by staff at hearing and in staff's proposed order.

Department staff seeks a penalty of thirty thousand dollars (\$30,000) with twenty thousand dollars (\$20,000) suspended, conditioned upon respondents' compliance with the provisions of the Commissioner's order. Staff's penalty request is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71. Staff cites the provisions of ECL § 71-1929 that set forth a maximum daily civil penalty of \$37,500 for violations of Article 17 or the regulations promulgated thereto.

Here each tank constitutes a violation of 6 NYCRR 613.9(b) resulting in a maximum daily penalty of \$75,000 for the two violations. Staff also references the penalty range of \$500 to \$5,000 set forth in DEE-22 for settlement of violations of 6 NYCRR 613.9(b)(1) for failure to permanently close an out of service tank. Because an administrative proceeding was commenced to address the violations and underground tanks are involved, staff states that a payable penalty of \$5,000 should be assessed for each tank in violation (Hearing Record).

I note that the penalties requested are a fraction of the maximum statutory penalty that could be assessed against the respondents. I also find that staff's penalty request is appropriate based on respondents' continued violations of the petroleum bulk storage law and regulations, and respondents' failure to cooperate with Department staff to address the violations. The potential harm from a spill or other failure resulting from lack of appropriate maintenance and closure in this matter is exacerbated by the fact that approximately 3,250 gallons of fuel oil remain in each of respondents' 9,000 gallon underground tanks. I conclude that a total payable penalty of \$10,000 is supported and appropriate.

Staff's requested suspended penalty of \$20,000 is based on staff's reliance on the estimate received by staff from respondents' consultant for permanent tank closure (see Hearing Record; Staff Exhibit 16). At hearing staff referenced DEE-1: Civil Penalty Policy in support of staff's suspended penalty request. DEE-1 states that "the suspended component of the penalty should generally be somewhat greater than the estimated cost of complying with the order." Here, Department staff requests a suspended penalty of \$20,000 based on the estimated cost to permanently close and remove the tanks of \$18,506.

Accordingly, I find that a civil penalty of \$30,000, with \$20,000 suspended provided respondents comply with the Commissioner's order, is appropriate.

Department staff requests that respondents be directed to close the PBS facility in accordance with 6 NYCRR 613.9(b). Staff also requests that respondents be directed to provide a report to Department staff "regarding the removal of the petroleum bulk storage tanks at the facility and permanent closure of the facility" (see Staff Exhibit 17). As noted above, the estimate that is the basis for the suspended penalty includes removal of the tanks. Moreover, staff testified that the tanks are single-wall tanks and the record indicates that the tanks have not been tested since 1987 (see Staff Exhibits 13 and 14). I conclude that the tanks should be removed as proposed in the closure estimate.

Recommendation

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

1. granting Department staff's motion for default, holding respondents in default pursuant to the provisions of 6 NYCRR 622.15;
2. holding that, based upon the proof adduced at the adjudicatory hearing, respondents violated 6 NYCRR 613.9(b) by failing to properly close two 9,000 gallon underground petroleum bulk storage tanks that are permanently out of service located at 217 Washington Street North, Herkimer, New York;
3. holding that respondents are jointly and severally liable for the violation of 6 NYCRR 613.9(b);

4. directing respondents to pay a civil penalty of thirty thousand dollars (\$30,000) for the above referenced violations, with payment of twenty thousand dollars (\$20,000) of the penalty suspended, conditioned upon respondents' compliance with the provisions of the Commissioner's order;
5. directing respondents to submit the payable portion of the civil penalty in the amount of ten thousand dollars (\$10,000) within sixty (60) days of service of the Commissioner's order on respondents to the following:

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

6. directing respondents to remove the two 9,000 gallon underground petroleum bulk storage tanks at the facility and permanently close the petroleum bulk storage facility in accordance with 6 NYCRR 613.9(b) within sixty (60) days of service of the Commissioner's order on respondents;
7. directing respondents to provide the Department with a report regarding the removal of the petroleum bulk storage tanks at the facility and permanent closure of the facility within ninety (90) days of service of the Commissioner's order on respondents;
8. directing respondents to provide any duly designated officer, employee, or agent of the Department entry to respondents' petroleum bulk storage facility or areas in the vicinity of respondents' facility which may be under control of respondents, and as to which respondents have the authority to provide access to others and any areas under respondents' control necessary to gain access thereto, for the purposes of inspection; sampling and testing that the Department deems necessary; ascertaining respondents' compliance with the ECL, the Navigation Law, the regulations, and the provisions of the Commissioner's order; as well as completing the closure of the facility; and investigating and remediating any petroleum contamination found at the site;

9. directing respondents to send all submissions to the Department to the following:

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

10. reserving all rights of the Department and the state regarding civil or criminal actions for matters not specifically alleged in this proceeding, including, but not limited to, other violations of the petroleum bulk storage regulations and violations of Navigation Law, natural resource damages, and/or civil recoveries.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
September 24, 2015

EXHIBIT CHART

Matter of Empire Construction and Real Estate LLC and Charles Celi, September 16, 2015 – Region 6 Sub-Office, Utica, NY

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|--|-------|------------|------------------|----------|
| 1 | Cover Letter from Nels G. Magnuson, Esq. to Cecelia Fagan-Polidori, Esq., with Notice of Hearing and Complaint, all dated November 25, 2014 with Exhibits A-D. | ✓ | ✓ | Department Staff | See FN 1 |
| 2 | Affidavit of Service of April L. Sears, dated January 26, 2015 with certified mail receipt of November 28, 2014 delivery. | ✓ | ✓ | Department Staff | See FN 1 |
| 3 | Statement of Service by Mail and Acknowledgment of Receipt by Mail of Notice of Hearing and Complaint, signed January 28, 2015. | ✓ | ✓ | Department Staff | See FN 1 |
| 4 | Notice of Hearing (Default) dated April 7, 2015. | ✓ | ✓ | Department Staff | See FN 1 |
| 5 | Correspondence from Nels G. Magnuson to Cecelia Fagan-Polidori, Esq., dated April 7, 2015 (Serving the Notice of Hearing [Default]). | ✓ | ✓ | Department Staff | See FN 1 |
| 6 | Correspondence from Cecelia Fagan Polidori, Esq. to Nels G. Magnuson, dated April 13, 2015. | ✓ | ✓ | Department Staff | See FN 1 |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|--|-------|---------|------------------|----------|
| 7 | Correspondence from Nels G. Magnuson to Charles Celi and Empire Construction and Real Estate LLC, dated April 16, 2015 (Serving the Notice of Hearing [Default]) with certified mail receipt of April 23, 2015 delivery. | ✓ | ✓ | Department Staff | See FN 1 |
| 8 | Affidavit of Service of April L. Sears, dated April 30, 2015 with certified mail receipt of April 23, 2015 delivery. | ✓ | ✓ | Department Staff | See FN 1 |
| 9 | Affidavit of Service of Drew Wellette, dated April 20, 2015 of service on the New York State Department of State. | ✓ | ✓ | Department Staff | See FN 1 |
| 10 | Copy of Deed dated June 28, 2011 to Empire Construction and Real Estate LLC for property located at 217 Washington Street North, Herkimer, New York. | ✓ | ✓ | Department Staff | See FN 1 |
| 11 | NYS Department of State Entity Information, dated April 20, 2015. | ✓ | ✓ | Department Staff | See FN 1 |
| 12 | PBS Application, dated August 26, 2011. | ✓ | ✓ | Department Staff | See FN 1 |
| 13 | PBS Registration Certificate, issued November 28, 2011, expiration date June 16, 2016. | ✓ | ✓ | Department Staff | See FN 1 |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|---|-------|---------|------------------|--|
| 14 | PBS Program Facility Information Report, printed December 18, 2013. | ✓ | ✓ | Department Staff | See FN 1 |
| 15 | Notice of Violation dated October 2, 2013. | ✓ | ✓ | Department Staff | See FN 1 |
| 16 | Proposals to clean and close PBS tanks from Eggan Excavating & Equipment Co., Inc. to Charles Celi, dated October 28, 2014. | ✓ | ✓ | Department Staff | See FN 1 |
| 17 | Correspondence from Nels G. Magnuson to Charles Celi and Empire Construction and Real Estate LLC, dated July 13, 2015 Serving the Notice of Hearing and Complaint dated July 13, 2015 with certified mail receipt of July 2015 delivery. | ✓ | ✓ | Department Staff | Received at September 16, 2015 Hearing |
| 18 | Affidavit of Service of April L. Sears, dated August 18, 2015 with certified mail receipt of July 2015 delivery. | ✓ | ✓ | Department Staff | Received at September 16, 2015 Hearing |
| 19 | Affidavit of Service of Drew Wellette, dated July 15, 2015 of service on the New York State Department of State. | ✓ | ✓ | Department Staff | Received at September 16, 2015 Hearing |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|---|-------|---------|------------------|--|
| 20 | Correspondence from Nels G. Magnuson to Empire Construction and Real Estate LLC, dated August 13, 2015 Serving the Notice of Hearing and Complaint dated July 13, 2015 with notice of service on the Department of State pursuant to Limited Liability Company Law § 303 by first class mail with Affidavit of Service of April L. Sears, sworn to August 18, 2015. | ✓ | ✓ | Department Staff | Received at September 16, 2015 Hearing |
| 21 | Correspondence from Nels G. Magnuson to Empire Construction and Real Estate LLC, dated August 13, 2015 Serving the Notice of Hearing and Complaint dated July 13, 2015 with notice of service on the Department of State pursuant to Limited Liability Company Law § 303 by first class mail with Affidavit of Service of April L. Sears, sworn to August 18, 2015. | ✓ | ✓ | Department Staff | Received at September 16, 2015 Hearing |
| 22 | NYS Department of State Entity Information, dated September 15, 2015. | ✓ | ✓ | Department Staff | Received at September 16, 2015 Hearing |
| 23 | Herkimer County Property Description Report For: 217 Washington St N, Municipality of Village of Herkimer, dated September 16, 2015. | ✓ | ✓ | Department Staff | Received at September 16, 2015 Hearing |

FN 1 – Originally received into evidence at May 13, 2015 hearing and accepted into evidence with hearing record of that date on motion of Department staff at September 16, 2015 hearing.