

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

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In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law ("ECL"), Article 12 of the New York State Navigation Law, Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and Part 32 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("17 NYCRR"),

**ORDER**

DEC Case No.  
R2-20040722-186

- by -

**LONGWOOD ASSOCIATES, LLC,**

Respondent.

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Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Longwood Associates, LLC, also known as Longwood Associates and Longwood Holdings, LLC (collectively, "respondent") by service of a motion for order without hearing and a complaint dated July 6, 2005.

In accordance with 6 NYCRR 622.3(a)(3), CPLR 311-a, and Limited Liability Company Law § 303, respondent was served with a copy of the complaint by personal service upon the New York State Secretary of State on August 9, 2005.

The complaint alleges that respondent, a domestic limited liability company, has principal offices located at 3696 Hempstead Turnpike, Levittown, New York, 11756. The complaint further alleges that respondent is the owner of a residential apartment building located at 871 Longwood Avenue, Bronx, New York (the "site"), at which is located a 2,000-gallon petroleum bulk storage ("PBS") tank, and, accordingly, is the owner of a PBS facility. The complaint alleges that an inspection on January 13, 2004 by Department staff revealed an ongoing petroleum spill at the site.

The complaint further alleges the following causes of action:

1. Respondent violated ECL 17-1009 and 6 NYCRR 612.2(a) and (b) by failing to register the PBS facility at the site;
2. Respondent failed to notify the Department of either transfer of ownership of the facility to respondent upon acquisition of the site, as required by 6 NYCRR 612.2(b) or, in the alternative, if the facility was not in place at the time of acquisition, the installation of the PBS tank at the facility, as required by ECL 17-1009(3) and 6 NYCRR 612.2(d)<sup>1</sup>;
3. Respondent violated 6 NYCRR 613.5(a) by failing to conduct tightness testing on the 2,000-gallon PBS tank at the site, and send test reports to the Department;
4. Respondent violated 6 NYCRR 613.4 by failing to comply with inventory monitoring procedures;
5. Respondent violated ECL 17-0501 by illegally discharging petroleum;
6. Respondent violated ECL 17-1743, 6 NYCRR 613.8 and 17 NYCRR 32.3 by failing to notify the Department not more than two hours after the discharge; and
7. Respondent violated Navigation Law § 176 and 17 NYCRR 32.5 by failing to immediately undertake containment of the illegal discharge.

Respondent's time to serve an answer to the complaint has expired, and has not been extended by Department staff.<sup>2</sup>

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<sup>1</sup> In the second cause of action, Department staff also alleged that 6 NYCRR 613.9(c) was violated. Section 613.9(c), which imposes reporting obligations for the permanent closure of a tank or facility, does not apply to the facts as alleged in that cause of action. Thus, a claim for a violation of section 613.9(c) is not stated.

<sup>2</sup> In the attached ruling, Administrative Law Judge Molly T. McBride applied the 30-day period answer period provided by CPLR 320 for service of process upon an official of the State authorized to receive service on respondent's behalf, rather than

Accordingly, Department staff's motion for an order without hearing is unopposed. Although respondent is in default, Department staff does not seek a default judgment. Instead, staff seeks a determination on the merits of its motion for an order without hearing.

Department staff filed its motion for an order without hearing with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Molly T. McBride, who prepared the attached ruling. I adopt the ALJ's ruling as my decision in this matter, subject to the following comments.

In circumstances where Department staff's motion for an order without hearing is unopposed by a respondent, staff's motion may be granted and respondent's liability determined as a matter of law when staff supports each element of the claims alleged in the complaint with evidence in admissible form (see Matter of Hornburg, Commissioner's Order, Aug. 26, 2004, adopting ALJ Ruling/Hearing Report, at 10). I conclude that the affidavit of Michelle Tipple, an Engineering Geologist for the Department, and other documentary evidence supporting staff's motion establishes respondent's liability for the claims asserted in the first, fifth, sixth and seventh causes of action as alleged in the complaint, and the second cause of action as modified (see footnote 1 of this order).

However, the PBS regulations for which violations are alleged in the third and fourth causes of action in the complaint apply to underground storage tanks. Department staff's affidavit establishes that the subject tank is an aboveground tank as defined in the regulations (see 6 NYCRR 612.1[c][1]). Thus, respondent's liability for the claims in the third and fourth causes of action has not been established.

The record sets forth respondent's failure to comply with applicable PBS statutory and regulatory requirements, the extensive contamination in the basement of the apartment building, the existence of an ongoing spill and petroleum leakage from the PBS tank, and respondent's lack of cooperation that has impeded remediation efforts. Although two of the causes of action were not established, based upon my review of the record and the Department's Civil Penalty Policy, I conclude that the

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the 20-day answer period provided for in 6 NYCRR 622.4(a). I conclude that which answer period applies need not be decided in this matter because respondent failed to meet either deadline.

proposed civil penalty of two hundred and fifty thousand dollars (\$250,000) is entirely supported by those causes of action that were established on this motion. The measures to address the violations including (a) requiring either the registration of the facility or the permanent closure of the PBS tank, and (b) requiring site remediation in accordance with a work plan approved by the Department are also appropriate.

**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 an order without hearing is granted in part and otherwise denied.

II. Respondent Longwood Associates, LLC, is adjudged to have committed the violations alleged in the first, fifth, sixth and seventh causes of action as alleged in the complaint, and the second cause of action as modified by this order.

III. Respondent Longwood Associates, LLC, is hereby assessed a civil penalty in the amount of two hundred and fifty thousand dollars (\$250,000). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: John K. Urda, Esq., Assistant Regional Attorney, Department of Environmental Conservation, Division of Legal Affairs, Region 2, One Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407.

IV. Within thirty (30) days after service of this order upon respondent, respondent shall submit an approvable work plan to the Department to address the petroleum contamination at the site. Respondent shall undertake the remediation of the site pursuant to the work plan as approved by the Department.

V. Within thirty (30) days after service of this order upon respondent, respondent shall either register the facility with the Department pursuant to ECL 17-1009 and 6 NYCRR 612.2(a) and pay the required facility registration fee, or permanently close the PBS tank at the site in accordance with 6 NYCRR 613.9(b),(c),(d), and (e).

VI. All communications from respondent to the Department concerning this order shall be made to John K. Urda, Esq.,

Assistant Regional Attorney, Department of Environmental Conservation, Division of Legal Affairs, Region 2, One Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407.

VII. The provisions, terms and conditions of this order shall bind respondent Longwood Associates, LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_ /s/  
Denise M. Sheehan  
Commissioner

Dated: Albany, New York  
June 29, 2006

TO: Longwood Associates, LLC (via Certified Mail)  
3696 Hempstead Turnpike  
Levittown, New York 11756

John K. Urda, Esq. (via Regular Mail)  
Assistant Regional Attorney  
Department of Environmental Conservation  
Division of Legal Affairs, Region 2  
One Hunter's Point Plaza  
47-40 21st Street  
Long Island City, New York 11101-5407

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

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In the Matter of the Alleged Violations  
of Article 17 of the Environmental  
Conservation Law of the State of New York,  
Article 12 of the New York State Navigation Law  
and Titles 6 and 17 of the Official Compilation of  
Codes, Rules and Regulations of the State  
of New York (NYCRR), by:

Ruling

DEC Case No.  
R2-20040722-186

LONGWOOD ASSOCIATES, LLC

Respondent.

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Proceedings

By service of a motion for order without hearing and complaint, pursuant to 6 NYCRR 622, the New York State Department of Environmental Conservation (DEC or Department) commenced an administrative enforcement proceeding against Longwood Associates, LLC (respondent). Respondent failed to answer or move with respect to the complaint or otherwise appear in this proceeding and, pursuant to 6 NYCRR 622.4(a), respondent's time for serving an answer to the complaint expired on September 12, 2005 and such time has not been extended. It is alleged by DEC that respondent violated Article 17 of the Environmental Conservation Law of New York State (ECL) and Article 12 of the Navigation Law of the New York State (NL) with regards to its petroleum bulk storage facility at 871 Longwood Avenue, Bronx, NY.

In support of its motion, DEC submitted the complaint dated July 6, 2005, an affirmation of Assistant Regional Attorney John K. Urda, and affidavit of Michelle Tipple, Engineering Geologist for the Department as well as proof of service of the motion for order without hearing and complaint on the respondent, by service on the New York Secretary of State on August 9, 2005.

As of the date of the motion, respondent has failed to appear and serve an answer or otherwise move, although the time to do so expired on or about September 12, 2005.

### Applicable Regulation

Section 622.12 of 6 NYCRR provides for the Department to move for an order without hearing. Pursuant to 6 NYCRR 622.12(d) "[a] contested motion for order without hearing will be granted if, 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". The motion must be denied if any party shows the existence of substantive disputes of facts sufficient to require a hearing. (See 6 NYCRR 622.12(e)).

The following Findings are based upon the papers submitted, as identified above.

### Findings

1. On August 9, 2005 DEC Staff served a notice of motion for order without hearing and complaint on respondent by serving the Secretary of State. No answer has been served to date.
2. Respondent has failed to comply with the requirements set forth in ECL 17-1009, 17-0501, 17-1743; 6 NYCRR 612.2(a), (b) & (d) and, section 613.8; NL sections 175 & 176; and 17 NYCRR 32.3 & 32.5 for its petroleum bulk storage facility located at 871 Longwood Avenue, Bronx, NY.
3. Department Staff has not met its burden with regards to the alleged violations of 6 NYCRR sections 613.4 and 613.5. Those provisions relate to underground storage tanks and the tank at issue is located above ground.
4. The requirements for an order without hearing have been adequately met as prescribed by 6 NYCRR Part 622.12(d) with regards to the violations detailed in paragraph number "2" above.
5. The penalties requested by Department Staff are reasonable. Staff has adequately addressed the Civil Penalty Policy and Enforcement Guidance Memorandum in the moving papers in support of the penalty request.

### Ruling

The motion is granted in part, as detailed above, with respect to the alleged violations.

Recommendation

I recommend that the Commissioner grant the Department's request for penalties in the amount of \$250,000.00. Although Department Staff has not met its burden of proof with respect to all allegations alleged, the penalty requested, \$250,000, is significantly lower than the maximum allowable under the applicable statutes and I would recommend that the requested penalty amount be granted.

DATED: June 8, 2006  
Albany, New York

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Molly T. McBride  
Administrative Law Judge

To: John K. Urda, Esq.  
NYS Department of Environmental Conservation, Region 2  
One Hunter's Point Plaza, 47-40 21<sup>st</sup> Street  
Long Island City, NY 11101-5407

(Via certified mail)  
Longwood Associates, LLC  
3696 Hempstead Turnpike  
Levittown, NY 11756