STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Articles 17 and 19 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

- by -

PARMAR BROTHERS INC.,

Case No. R2-20060307-102

Respondent.

Respondent Parmar Brothers Inc. is the owner and operator of a petroleum bulk storage facility ("facility") that is located at 60-90 Eliot Avenue, Maspeth, New York. This administrative enforcement proceeding addresses violations of New York State's regulations governing petroleum bulk storage tanks and vapor recovery equipment.

On May 26, 2009, staff of the New York State Department of Environmental Conservation ("Department") mailed a notice of hearing and complaint dated May 26, 2009 to respondent, which respondent received on May 27, 2009. The notice of hearing advised respondent that a pre-hearing conference to address matters relating to the complaint was scheduled for June 25, 2009.

Based on inspections that Department staff conducted on March 1, 2006 and February 5, 2008, the complaint set forth eleven causes of action relating to violations of various sections of 6 NYCRR part 230 (Gasoline Dispensing Sites and Transport Vehicles), part 613 (Handling and Storage of Petroleum) and part 614 (Standards for New and Substantially Modified Petroleum Storage Facilities).

The notice of hearing stated that an answer was due within twenty (20) days following receipt of the complaint and that failure to answer or attend the pre-hearing conference would result in a default and a waiver of respondent's right to a hearing. Respondent Parmar Brothers Inc. failed to file an answer to the complaint and failed to attend the pre-hearing

conference. On December 10, 2009 Department staff served a motion for default judgment on respondent and its attorney.

The matter was referred to the Office of Hearings and Mediation Services, and was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois. ALJ DuBois prepared the attached default summary report, which I adopt as my decision in this matter subject to my comments below.

With respect to Department staff's complaint, I concur that it states claims upon which relief may be granted except for the alleged violation of 6 NYCRR 230.2(h) that Department staff cites, in addition to 6 NYCRR 230.2(f) and (g), in the fourth cause of action. Section 230.2(h) prohibits the modification, removal, replacement or addition of any element which would render the stage II vapor collection system inoperative or impair its integrity and efficiency. The factual allegations in the complaint, however, do not support the claim that 6 NYCRR 230.2(h) was violated. I note also that the notices of violation appended to Department staff's papers do not refer to a violation of that provision. I concur with the ALJ that, with respect to the other two regulatory sections cited in the fourth cause of action, the complaint states claims upon which relief may be granted.

Department staff requested and the ALJ recommends that a civil penalty of $75,000 be assessed. The proposed penalty is authorized pursuant to sections 71-1929 and 71-2103 of the Environmental Conservation Law. Based on a review of the papers, respondent's violations are longstanding, and constitute a potential substantial adverse threat to the environment. To the extent that respondent has made any effort to address the violations, those efforts have been limited and unsatisfactory. Accordingly, the civil penalty of $75,000 is fully warranted. The information respondent has provided to Department staff regarding corrective measures at the facility indicates that respondent has corrected only the violations concerning the maintenance of the facility's Stage II vapor recovery system.

Department staff also requested that respondent be ordered to correct all violations immediately. The ALJ recommends that the order should authorize Department staff to require respondent to undertake any testing and inspections that may be necessary as a result of the violations. I concur. Respondent also needs to provide complete information on any corrective

measures already taken. Accordingly, within thirty (30) days of the service of this order upon respondent, respondent is directed to submit to Department staff a letter report that:

(a) describes the corrective measures that respondent has undertaken since March 1, 2006 to address the violations set forth in Department staff's notices of violations and in this order;

(b) lists the dates of all corrective measures since March 1, 2006;

(c) proposes a compliance schedule, that is acceptable to Department staff, for any unaddressed violations, which schedule shall be completed within sixty (60) days of the service of this order upon respondent, provided that respondent shall immediately commence any tank testing and tank inspection obligations upon service of this order; and

(d) provides, as an attachment to the letter report, copies of documents (invoices, test reports and data, inspection reports, etc.) relating to the corrective measures.

Nothing in this order precludes Department staff from conducting inspections or tests for tightness or structural soundness at the facility in accordance with its authority pursuant to 6 NYCRR part 613.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondent Parmar Brothers Inc. is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as set forth in Department staff's complaint dated May 26, 2009, are deemed to have been admitted by respondent.

III. Respondent Parmar Brothers Inc. is adjudged to have violated 6 NYCRR 230.2(f), (g), and (k), 230.5(d), 613.3(d),

613.4(a), (c) and (d), 613.5(b)(2) and (3), 614.3(a)(2), and 614.7(d). The complaint fails to state a claim for violations of 6 NYCRR 230.2(h).

IV. Respondent Parmar Brothers Inc. is hereby assessed a civil penalty in the amount of seventy-five thousand dollars ($75,000). The civil penalty is due and payable within thirty (30) days after service of this order upon respondent. Payment of the civil penalty shall be by cashier's check, certified check, or money order drawn to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to:

John K. Urda, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 2
47-40 21st Street
Long Island City
New York 11101-5401.

V. Respondent shall, within thirty (30) days of the service of this order upon it, submit a letter report to Department staff that:

(a) describes the corrective measures that respondent has undertaken since March 1, 2006 to address the violations set forth in Department staff's notices of violations and in this order;

(b) lists the dates of all corrective measures undertaken since March 1, 2006;

(c) proposes a compliance schedule, that is acceptable to Department staff, for any unaddressed violations, which schedule shall be completed within sixty (60) days of the service of this order upon respondent, provided that respondent shall immediately commence any tank testing and tank inspection obligations upon service of this order; and

(d) provides, as an attachment to the letter report, copies of documents (invoices, test reports and data, inspection reports, etc.) relating to the corrective measures.

VI. All communications from respondent Parmar Brothers Inc. to the Department concerning this order shall be directed to:

John K. Urda, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 2
47-40 21st Street
Long Island City, New York 11101-5401.

VII. The provisions, terms, and conditions of this order shall bind respondent Parmar Brothers Inc. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: Albany, New York
February 12, 2010

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of articles 17 and 19 of the Environmental Conservation Law and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

PARMAR BROTHERS INC.

Respondent.

DEFAULT SUMMARY REPORT

DEC File No. R2-20060307-102

February 10, 2010

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement proceeding by serving a notice of hearing and complaint upon Parmar Brothers Inc., 60-90 Eliot Avenue, Maspeth, New York 11378 ("Respondent") on May 27, 2009. The complaint alleges that the Respondent violated Environmental Conservation Law ("ECL") articles 17 and 19 and parts 230, 613 and 614 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by failing to maintain and to test Stage I and Stage II vapor recovery equipment, and failing to comply with numerous requirements applicable to the petroleum bulk storage facility owned and operated by the Respondent. The motion proposes that a penalty of no less than $75,000 be imposed upon the Respondent.

The site of the alleged violations is 60-90 Eliot Avenue, Maspeth, New York (Queens County), at which the Respondent was in the business of retail gasoline sales and automobile repair.

The notice of hearing and complaint were served upon the Respondent by certified mail, return receipt requested, on May 27, 2009. The Respondent failed to answer the complaint and failed to appear at a scheduled pre-hearing conference.

On December 10, 2009, DEC Staff moved for a default judgment and order against the Respondent on the basis that the Respondent had failed to file an answer to the complaint and had failed to appear at the prehearing conference scheduled for June 25, 2009. DEC Staff made the motion pursuant to 6 NYCRR 622.4 and 622.15, provisions pertaining to defaults in DEC administrative enforcement hearings.

On December 10, 2009, DEC Staff served the notice of motion and supporting papers upon Bradley Green, Esq., of Cohen, Hochman & Allen, an attorney who had contacted DEC Staff regarding this matter for the first time on July 2, 2009, after the Respondent was in default. On December 10, 2009, DEC Staff also attempted to serve the motion and supporting papers upon the Respondent corporation at its 60-90 Eliot Avenue, Maspeth, New York address. The copy addressed to the Respondent was returned to DEC Staff by the United States Postal Service because the Respondent had moved and left no address.

On December 14, 2009, DEC Staff consented to Mr. Green's request for time to respond to the motion for a default judgment, setting a deadline of December 21, 2009 for such response. On December 21, 2009, Mr. Green notified DEC Staff that the consultant who had retained his firm in this matter was no longer working with Parmar Brothers and that Cohen, Hochman & Allen no longer had authorization to resolve the matter. On January 4, 2010, DEC Staff transmitted the motion and supporting papers to the DEC Office of Hearings and Mediation Services ("OHMS"). On January 8, 2010, the case was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois, who prepared this report.

DEC Staff is represented in this matter by John K. Urda, Esq., Assistant Regional Attorney, DEC Region 2, Long Island City, New York. As of the date of this summary report, OHMS has not received any correspondence or other communications about this case from the Respondent or any person identifying himself or herself as an officer of the Respondent, nor from any attorney other than Mr. Green.

Subdivision 622.15(a) of 6 NYCRR (Default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and

all reasonable inferences that flow from them [citations omitted]."

DEC Staff's motion papers consist of the following documents:

Notice of motion for default judgment and order, dated December 10, 2009;

Motion for default judgment and order, dated December 10, 2009; and

Affirmation of John K. Urda, Esq., dated December 10, 2009, with six attached exhibits:

Exhibit A, a copy of the notice of hearing and complaint in this matter, both dated May 26, 2009

Exhibit B, an affidavit of service of Louise Munster, sworn to on May 26, 2009, concerning service of the notice of hearing and complaint, plus a copy of the signed return receipt for the mailing and a copy of a tracking confirmation from the United States Postal Service ("USPS") for the mailing

Exhibit C, a printout of information from the website of the New York State Department of State, Division of Corporations, concerning entity status information for the Respondent

Exhibit D, the Respondent's March 21, 2006 Petroleum Bulk Storage Certificate and a facility information report, printed 12/8/2009, for the Respondent's facility

Exhibit E, notices of violation dated 3/1/06 and 2/5/08

Exhibit F, a proposed order.

With the motion papers, DEC Staff also transmitted to OHMS a December 10, 2009 affidavit of service for service of the motion papers upon the Respondent and upon Bradley Green, Esq., of Cohen, Hochman & Allen; the USPS tracking confirmation for delivery of these documents to Mr. Green; the USPS tracking confirmation stating that the Respondent had moved and left no

address; and two e-mails, dated December 14 and December 21, 2009, between Mr. Urda and Mr. Green.

FINDINGS OF FACT

1. At the time of the alleged violations, Parmar Brothers Inc., 60-90 Eliot Avenue, Maspeth, New York 11378 ("Respondent") was an active domestic business corporation engaged in the business of retail gasoline sales and automobile repair, with its business and principal office at 60-90 Eliot Avenue, Maspeth, New York (the "Site").

2. At the time of the alleged violations, the Respondent owned and operated a petroleum bulk storage ("PBS") facility at that location, consisting of five 4,000-gallon underground storage tanks storing gasoline and one 550-gallon underground storage tank storing waste oil. All of these tanks were installed on or about August 1, 1990, and are registered with the DEC as PBS facility number 2-337447 (the "Facility"). The PBS certificate for the Facility describes the five 4,000-gallon tanks as fiberglass coated steel tanks, and the waste oil tank as a steel/carbon steel/iron tank (Default motion, Exhibit D).

3. According to records of the New York State Department of State, Division of Corporations, the Respondent became inactive by dissolution on August 7, 2009. Despite its corporate dissolution, the Respondent remains the registered owner and operator of the PBS facility at the Site.

Default

4. On May 26, 2009, DEC Staff mailed the notice of hearing and complaint in this matter to the Respondent at 60-90 Eliot Avenue, Maspeth, New York 11378, by certified mail, return receipt requested. The signed mail receipt was returned to DEC Staff. The United States Postal Service's on-line tracking states that this mailing was delivered on May 27, 2009.

5. The twenty-day time period within which the Respondent was required to serve an answer to the complaint expired on June 16, 2009. The Respondent neither served an answer nor requested an extension of time to do so.

6. The notice of hearing scheduled a pre-hearing conference for June 25, 2009. The Respondent failed to appear at the pre-

hearing conference.

7. The notice of hearing stated that failure to timely answer or failure to attend the pre-hearing conference will result in a default and a waiver of the Respondent's right to a hearing.

8. On July 2, 2009, Bradley Green, Esq., of the law firm Cohen, Hochman & Allen, contacted DEC Staff on behalf of the Respondent for the first time concerning this matter. Mr. Green offered to send documentation of any corrective actions related to the allegations. On October 22, 2009, DEC Staff received certain documents from the Respondent. With the exception of part of the fourth cause of action, the documents did not demonstrate that the Respondent had corrected the alleged violations. The documents did not call DEC Staff's allegations into question.

Violations

9. DEC Staff inspected the Facility on March 1, 2006 and on February 5, 2008. For both of these inspections, DEC Staff issued notices of violation to the Respondent.

10. The notice of violation from the March 1, 2006 inspection instructed the Respondent to appear at the DEC Region 2 Office on March 15, 2006 for an administrative settlement conference. The Respondent failed to attend the conference. Repeated efforts by DEC Staff to contact the Respondent were unsuccessful.

11. The notice of violation from the February 5, 2008 inspection also instructed the Respondent to appear at the DEC Region 2 Office for an administrative settlement conference, to take place on February 27, 2008. The Respondent did attend this conference, but repeated efforts by DEC Staff to settle the violations with the Respondent were unsuccessful.

12. The Respondent failed to maintain daily records of inventory for the purpose of detecting leaks for the five 4,000-gallon tanks (1st cause of action; 6 NYCRR 613.4[a]). During the March 1, 2006 inspection, DEC Staff discovered that the Respondent did not have inventory reconciliation records. As of the date of the default motion, the Respondent had failed to produce any inventory records for the time period immediately prior to March 1, 2006.

13. The Respondent failed to properly affix permanent labels at the fill ports of the five 4,000-gallon tanks (2nd cause of action; 6 NYCRR 614.3[a][2]). DEC Staff observed this omission during both the March 1, 2006 and February 5, 2008 inspections. On October 22, 2009, the Respondent submitted an undated and unsigned document on the letterhead of Energy Tank & Environmental Services, Inc. stating, "Supply and install 5 tank identification tags. 5 tags @ $100.00 per tag." It is unclear whether this document was a work order, an invoice for work performed, or an estimate.

14. The Respondent failed to monitor the cathodic protection systems for the piping of the five 4,000-gallon tanks. DEC Staff observed this condition during the March 1, 2006 inspection (3d cause of action; 6 NYCRR 613.5[b][2]). As of the date of the complaint, the Respondent had not submitted cathodic protection records. On October 22, 2009, the Respondent submitted a February 2008 cathodic protection test for the five 4,000-gallon tanks, indicating that a test was done in June 2006, but did not provide the test report.[1] The Respondent has not submitted any record of testing done prior to 2006, or in 2007.

15. During the March 1, 2006 inspection, DEC Staff observed that the Respondent had failed to maintain one component of a Stage I vapor recovery system and had failed to maintain two components of a Stage II vapor recovery system.[2] During the

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[1] Paragraph 21 of Mr. Urda's affirmation states, "On October 22, 2009, the respondent submitted a February 2008 cathodic protection test for the five 4,000-gallon [underground storage tanks], indicating that a test was done in June of 2006, but not including the test report." The quoted sentence suggests that the Respondent submitted a report concerning a test done in February 2008 and that this report mentioned that an earlier test had been done in June 2006. The quoted sentence further suggests that the Respondent did not submit a report concerning the results of any cathodic protection test done in June 2006. In any event, the first inspection that is the subject of the complaint occurred in March 2006, and the required annual test had not been done at that time nor in the year preceding that date.

[2] These systems recover gasoline vapors at gasoline dispensing sites. A Stage I system recovers vapors displaced when gasoline is loaded from a tanker truck into a bulk storage tank. A Stage

February 5, 2008 inspection, DEC Staff observed that the Respondent had failed to maintain three components of a State II vapor recovery system (4th cause of action; 6 NYCRR 230.2[f],[g] and [h]). As of the date of the complaint (May 26, 2009), the Respondent had failed to submit evidence of corrective action. On October 22, 2009, the Respondent submitted a February 14, 2008 invoice from Techserv Petroleum that DEC Staff regards as acceptable evidence of belated corrective action regarding the Stage II vapor recovery violations found during the two inspections. The Stage I vapor recovery system violation remained uncorrected as of the date of the default motion (December 10, 2009).

16. During the March 1, 2006 inspection, DEC Staff observed that the Stage II vapor recovery test was not performed (5th cause of action; 6 NYCRR 230.2[k] and 230.5[d]). The Respondent had not submitted evidence of corrective action as of the date of the complaint. The Respondent had not produced a Stage II vapor recovery system test as of the date of the default motion.

17. On February 5, 2008 DEC Staff observed that the Respondent had failed to maintain a tank top sump (6th cause of action; 6 NYCRR 613.3[d]). As of the date of the default motion, the Respondent had not produced evidence of corrective action.

18. During the February 5, 2008 inspection, DEC Staff was shown inventory records that were improperly completed. The complaint, at paragraph 8(ii), states that the records showed failures to reconcile the data every ten days and failures to investigate apparent inventory losses or gains in excess of three-quarters of one percent of total tank volume (7th cause of action; 6 NYCRR 613.4[c] and [d]). On October 22, 2009, the Respondent submitted improperly-completed inventory records from January, February and March 2008, including the records shown to DEC Staff during the February 5, 2008 inspection.

19. The notice of violation for the February 5, 2008 inspection stated that the Respondent violated 6 NYCRR 613.4(a)(2) due to the lack of alternative leak detection on the unmetered tank holding used oil, which is the 500-gallon tank (8th cause of action). The Respondent has failed to produce evidence of leak detection ever having been performed on this tank.

II system captures vapors displaced or drawn from a vehicle fuel tank during refueling. See, 6 NYCRR 230.1(b)(8) and (9).

20. On February 5, 2008, DEC Staff observed that the Respondent had failed to keep a leak monitoring system in proper working order (9th cause of action; 6 NYCRR 613.5[b][3]). According to the complaint, at paragraph 8(v), the leak detection sensor in a tank sump had been improperly raised, rendering the sensor inoperable. The Respondent has failed to submit evidence of corrective action.

21. On February 5, 2008, DEC Staff observed that the Respondent had failed to do the annual monitoring of the cathodic protection system for the 550-gallon used oil tank (10^{th} cause of action; 6 NYCRR 613.5[b][2]). The Respondent had not submitted any cathodic protection test results as of the date of the default motion.

22. During the February 5, 2008 inspection, DEC Staff observed that the Respondent had failed to maintain drawings or as-built plans that show the size and location of the Facility's underground tanks and piping (11th cause of action; 6 NYCRR 614.7[d]). The Respondent had not provided such drawings or plans as of the date of the default motion.

DISCUSSION

The notice of hearing and complaint were served upon the Respondent, by certified mail return receipt requested, but the Respondent did not submit a timely answer and failed to appear at the pre-hearing conference. Thus, the Respondent is in default and is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them.

Recently, the Commissioner directed that DEC attorneys moving for default judgments are to serve the motions for default judgments upon respondents and their representatives (if known), even where such service is not required under Civil Practice Law and Rules 3215(g)(1) (Matter of Derrick Dudley, et al., Decision and Order of the Commissioner, July 24, 2009, at 2).

In the present case, the default motion was served upon Mr. Green, the attorney who first began representing the Respondent in this matter in July 2009 and who, following receipt of the default motion, requested that DEC Staff provide time for a response to the default motion. Mr. Green wrote to me on January 20, 2010, in response to the January 8, 2010 letter from

Chief ALJ James T. McClymonds that notified the parties I had been assigned to review the default motion. Although Mr. Green's December 21, 2009 e-mail to Mr. Urda referred to "the consultant who retained us to assist in this matter,"[3] and Mr. Green's January 20, 2010 letter to me stated that "we were initially contacted about this matter through a consultant," Mr. Green's January 20, 2010 letter also stated that "our office is no longer authorized to appear on this matter." The consultant, who is not identified in this correspondence, is not a respondent in this matter. Further, Mr. Green's January 20, 2010 letter to me stated that his firm had contacted DEC Staff about settling the case, and had made efforts to communicate settlement terms to the Respondent. Thus, it is reasonable to conclude that Mr. Green was representing the Respondent at the time the default motion was served but ceased representing the Respondent on or about December 21, 2009, the date on which he notified Mr. Urda that he had no authorization to resolve this matter.

DEC Staff also attempted to serve the default motion on the Respondent by certified mail, return receipt requested, but the motion was returned by the U.S. Postal Service on the basis that the Respondent moved and left no address. Mr. Urda's letter of January 4, 2010, transmitting the default motion to OHMS, stated that DEC Staff subsequently served the default motion on the Respondent by regular mail.[4] The record does not indicate that the copy served by regular mail was returned to DEC Staff. The copy of Chief ALJ McClymonds's January 8, 2010 letter that was sent to the Respondent at its 60-90 Eliot Avenue address was not returned to OHMS, suggesting that the Respondent is still receiving mail at that address.

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[3] Mr. Green's e-mail stated, in part, "After an exhaustive effort to resolve this issue the consultant who retained us to assist in this matter informed us late last week that he is no longer working with Parmar Brothers and has no authorization to resolve this matter. Thus, we have no authorization to resolve this matter either. Consequently, I cannot state that there is any consent to your proposed settlement."

[4] DEC Staff had already obtained jurisdiction over the Respondent upon the Respondent's receipt of the notice of hearing and complaint. Service of the subsequent default motion by regular mail was sufficient (see, Matter of Gladiator Realty Corp., et al., Order of the Commissioner, Jan. 14, 2010, at 2).

Thus, both the notice of hearing and complaint and the default motion were served upon the Respondent.

Exhibit C of the default motion, information from the New York State Department of State that was current as of December 8, 2009, stated that the current entity status of the Respondent corporation was "INACTIVE - Dissolution (Aug 07, 2009)." Dissolution of the Respondent took place after the date of the alleged violations, after the date on which the notice of hearing and complaint were served, and after the date by which the Respondent was in default in this matter.

Business Corporation Law 1006(b) provides that: "The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation)" (see also, Matter of Skyline Point Homeowners Association, Inc., et al., Ruling of the ALJ, June 15, 2009, at 11). The information printed from the Department of State's web site did not reveal the circumstances of the dissolution.

Mr. Urda's December 10, 2009 affirmation, at paragraph 10, stated, "Upon information and belief, Parmar Brothers, Inc. continues operations at the Site." The affirmation did not elaborate on the basis for this information, but the Respondent did not contest it. Whether or not the gasoline sales business is still operating, it is important that ongoing violations be corrected and that any necessary testing be done.

With the exception of a portion of the fourth cause of action (maintenance of the Stage II vapor recovery system), the violations remain uncorrected. Some of the violations, such as failing to maintain daily inventory records for a time period that is now in the past, could not be directly remedied but could result in an order by the DEC for testing and inspection of the tanks. In the case of failure to maintain and reconcile daily inventory records, 6 NYCRR 613.4(c)(2) provides that, "Failure to maintain and reconcile such [inventory monitoring] records constitutes cause for department-ordered tests and inspections of the facility at operator expense as set forth in section 613.7 of this Part." This provision applies to the first and seventh causes of action, which pertain to the five 4,000-gallon tanks.

On March 1, 2006 the facility did not have inventory reconciliation records. On February 5, 2008, the facility had inventory records but these records showed failures to reconcile the records every ten days. The records also showed failures to investigate apparent inventory losses or gains that exceeded a threshold for requiring investigation under 6 NYCRR 613.4(d). If the losses or gains had been investigated, and if the causes could not be explained within 48 hours, the Respondent would have been required to notify the DEC Region 2 Office and to take the tank out of service until inspections or tightness tests were performed and the cause of the discrepancy was determined and repaired (6 NYCRR 613.4[d]).

With respect to the unmetered 550-gallon waste oil tank, the Respondent failed to perform leak detection through an alternative method (8th cause of action). If the results of conducting the required alternative leak detection reveal inventory loss or other conditions specified in subdivision 613.4(d), the remedial actions described in that subdivision would be required.

Similarly, failure to monitor a cathodic protection system (3d cause of action) and failure to keep a leak monitoring system in proper working order (9th cause of action) result in requirements for tightness testing under 6 NYCRR 613.5(b)(2) and (3).

Other violations, including but not limited to failure to test Stage II vapor recovery, failure to repair a Stage I component, and failure to provide an accurate drawing or as-built plans for its tank and piping system, need to be remedied. The document submitted by the Respondent in October 2009 concerning labels for the fill ports does not call into question DEC Staff's allegation that the fill ports were not labeled at the time of either inspection, although it suggests that the Respondent may have been looking into getting the fill ports labeled. The record does not demonstrate that this violation has been corrected to date.

With regard to the third cause of action, 6 NYCRR 613.5(b)(2) requires that the adequacy of a cathodic protection system must be monitored at least annually. The March 1, 2006 notice of violation stated that this had not been done. Mr. Urda's affirmation stated that, on October 22, 2009, the Respondent "submitted a February 2008 cathodic protection test for the five 4,000-gallon USTs [underground storage tanks], indicating that a test was done in June of 2006, but not

including the test report. No record of testing prior to 2006, or in 2007, has been submitted; and no record of testing for the 550-gallon UST has even been submitted" (Affirmation, paragraph 21). This statement supports the allegation that the Respondent was in violation of this annual monitoring requirement on March 1, 2006 as alleged.

ECL 71-1929(1) provides that a person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17 of the ECL, or the regulations promulgated pursuant thereto, shall be liable for a civil penalty not to exceed $37,500 per day for each violation. The violations of parts 613 and 614 of 6 NYCRR are violations of regulations promulgated pursuant to ECL article 17, title 10, and the penalty provision in ECL 71-1929 applies.

ECL 71-2103(1) provides that a person who violates any provision of ECL article 19 (other than a provision not relevant here) or any regulation promulgated pursuant thereto shall be liable, in the case of a first violation, for a penalty not less than $375 nor more than $15,000 for said violation and an additional penalty not to exceed $15,000 for each day during which such violation continues. For a second or further violation, the penalty shall not exceed $22,500 for this second or further violation and for each day during which such violation continues. Part 230 of 6 NYCRR was promulgated pursuant to ECL article 19.

The Respondent is liable for at least ten violations of 6 NYCRR parts 613 or 614, plus at least four violations of 6 NYCRR part 230, even if individual tanks or individual vapor recovery system components are not counted as separate violations. If the violations were counted based upon each non-compliant tank or component being an individual violation, the number of violations would be substantially higher. The maximum penalty pursuant to ECL article 71, even based upon ten PBS violations and four vapor recovery violations, would be much higher than the penalty of $75,000 requested by DEC Staff.

The Respondent's violations allowed emission of gasoline vapor to the air due to the failure to maintain Stage I and II components. The Respondent neglected measures that are intended to detect and prevent leaks from petroleum tanks and pipes, as well as to detect operational problems with the vapor recovery systems. The great majority of the violations were not corrected after the Respondent was notified about them, and the

Respondent has been uncooperative with DEC Staff's efforts to bring the facility into compliance. The proposed penalty is supported by the record of this case and is consistent with the Department's penalty policies relevant to facilities of this kind.

CONCLUSIONS

1. The Respondent was served with the notice of hearing and complaint. By failing to file a timely answer, and failing to appear at the scheduled pre-hearing conference, the Respondent defaulted in this matter.

2. The Respondent was in violation of the following provisions of the Environmental Conservation regulations at the time of the March 1, 2006 inspection: 6 NYCRR 613.4(a)[first cause of action]; 614.3(a)(2)[second cause of action]; 613.5(b)(2)[third cause of action]; 230.2(f),(g) and (h)[fourth cause of action]; and 230.2(k) and 230.5(d)[fifth cause of action]. The violations that are the third and fifth causes of action remain uncorrected, and the violation that is the second cause of action (failure to label fill ports) probably remains uncorrected. A portion of the fourth cause of action (failure to maintain a Stage I vapor recovery component) remains uncorrected.

3. The Respondent was in violation of the following provisions of the Environmental Conservation regulations at the time of the February 5, 2008 inspection: 6 NYCRR 614.3(a)(2)[second cause of action]; 230.2(f),(g) and (h)[fourth cause of action]; 613.3(d)[sixth cause of action]; 613.4(c) and (d)[seventh cause of action]; 613.4(a)(2)[eighth cause of action]; 613.5(b)(3)[ninth cause of action]; 613.5(b)(2)[tenth cause of action]; and 614.7(d)[eleventh cause of action]. In addition to the continuing violations that were initially observed on March 1, 2006, the violations that are the sixth through eleventh causes of action remain uncorrected.

4. The Department of Environmental Conservation has authority, pursuant to 6 NYCRR 613.4(c)(2), 613.4(d), 613.7, and 613.5(b)(2), to require tightness testing and other appropriate inspection and testing of the facility, and to require tanks with unexplained inventory losses or gains to be taken out of service until tests and any necessary repairs have been completed.

RECOMMENDATION

I recommend that the Commissioner find that the Respondent defaulted and waived its right to a hearing in this matter, and that the Respondent violated 6 NYCRR parts 613, 614 and 230 as alleged in the complaint. I also recommend that the Commissioner issue the order proposed by DEC Staff, imposing a penalty of $75,000 upon the Respondent, and that the order also direct the Respondent to correct all outstanding violations. The order should authorize DEC Staff to require the Respondent to undertake any testing and inspection that may be necessary as a result of the violations.

/s/

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Albany, New York
February 10, 2010

Susan J. DuBois
Administrative Law Judge