STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC Case No. R2-20120526-301

-by-

S & M REALTY OF NEW YORK INC.,

Respondent.

This administrative enforcement proceeding concerns alleged violations of article 17 of the New York State Environmental Conservation Law (ECL) and parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) at a petroleum bulk storage (PBS) facility (number 2-606927) that respondent S & M Realty of New York Inc. (S & M Realty) owns at 2045 McDonald Avenue, Brooklyn, New York (site). At the site is a 4,000 gallon underground storage tank that was installed in or about 1950.

Staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding by service of a notice of motion for order without hearing, in lieu of complaint, dated June 11, 2012, which respondent received on June 13, 2012. In its papers, Department staff alleges that respondent S & M Realty:

(1) failed to properly register its PBS facility by including an incorrect installation date, incorrect tank external protection, incorrect product identification, incorrect piping leak detection, and incorrect piping secondary containment on its registration, thereby violating 6 NYCRR 612.2 and ECL 17-1009;
(2) failed to renew its facility registration, which expired on September 11, 2006, thereby violating 6 NYCRR 612.2(a)(2) and ECL 17-1009;
(3) failed to display the facility's PBS certificate, thereby violating 6 NYCRR 612.2(e);
(4) failed to properly mark the facility tank fill port, thereby violating 6 NYCRR 613.3(b)(1);
(5) failed to internally inspect the epoxy liner of the storage tank within ten (10) years of the liner's installation, thereby violating 6 NYCRR 613.3(d);
(6) failed to keep properly reconciled inventory records for the purpose of leak detection, thereby violating 6 NYCRR 613.4;
(7) failed to keep the in-tank leak monitoring system in working order, thereby violating 6 NYCRR 613.5(b)(3); and
(8) failed to remove all product from the tank and piping system and plug or cap the fill line when the respondent temporarily took the tank out of service, thereby violating 6 NYCRR 613.9(a).

Additionally, Department staff alleges that respondent, upon receiving a notice of violation dated April 25, 2012, failed to take corrective action with respect to the above-referenced violations except that respondent subsequently properly marked the fill port.

Respondent failed to respond to Department staff's motion. The matter was assigned to Administrative Law Judge (ALJ) Helene G. Goldberger, who prepared the attached summary hearing report. I adopt the ALJ's report as my decision in this matter, subject to my comments below.

I concur with the ALJ's determination that Department staff is entitled to a finding of liability with respect to the eight (8) violations described above.

With respect to penalty, Department staff requested that respondent pay a civil penalty of twenty-four thousand four hundred dollars ($24,400) and correct all violations within thirty (30) days of the date of this order. In support of the requested civil penalty, staff noted that the penalty requested is consistent with DEC's Civil Penalty Policy (see DEE-1, dated June 20, 1990) and the Department's enforcement guidance memorandum entitled "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy," dated May 21, 2003. Staff further details the serious nature of the violations, respondent's lack of cooperation, and the economic advantage respondent has obtained by not complying with the regulations.

Based on this record, a civil penalty in the amount of twenty-four thousand four hundred dollars ($24,400) is authorized and appropriate. In addition, the corrective action that staff has requested is authorized and warranted. With respect to the submission of properly reconciled inventory records, such records are to be provided to Department staff for the month of December 2012.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing in lieu of complaint is granted.

II. Respondent S & M Realty of New York Inc. is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2, 612.2(a)(2), 612.2(e), 613.3(b)(1), 613.3(d), 613.4, 613.5(b)(3), and 613.9(a).

III. Respondent S & M Realty of New York Inc. is hereby assessed a civil penalty in the amount of twenty-four thousand four hundred dollars ($24,400). The 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 made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC, Region 2
47-40 21st Street
Long Island City, New York 11101-5407

IV. Respondent S & M Realty of New York Inc. shall, within thirty (30) days of service of this order upon it:

A. file a corrected registration application with the Department, and submit the applicable filing fee, if it has not done so already;

B. display the PBS registration certificate on the premises of the facility at all times, and provide a photograph of the manner in which the certificate is displayed at the facility to Department staff;

C. inspect the tank's epoxy liner and provide information acceptable to Department staff relating to that inspection;

D. submit to Department staff accurate and complete copies of properly reconciled inventory records for the 4,000 gallon underground storage tank for the month of December 2012; and

E. provide information acceptable to Department staff that demonstrates that the in-tank leak monitoring system is in working order.

V. All communications from respondent to Department staff concerning this order shall be directed to John K. Urda, Esq., at the address set forth in paragraph III of this order.

VI. The provisions, terms and conditions of this order shall bind respondent S & M Realty of New York Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: December 19, 2012
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Summary Hearing Report

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

NYSDEC File No. R2-20120526-301

- By -

S & M REALTY OF NEW YORK INC.,

Respondent.

Proceedings

By notice of motion for order without hearing dated June 11, 2012, the staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent S & M Realty of New York Inc. (SMR) for alleged violations of Article 17 of the Environmental Conservation Law (ECL) and various sections of Parts 612 and 613 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) with respect to an underground petroleum storage tank located at 2045 McDonald Avenue, Brooklyn, New York. On June 13, 2012, by certified mail return receipt requested, the Department staff served its notice of motion and supporting statements and exhibits on the respondent. The United States Post Office delivered the staff's motion papers to the respondent on June 13, 2012.

The Department staff extended the respondent's time to oppose the motion on several occasions and the final date of August 17, 2012 went by without any submission in opposition to the motion or other communication. On September 18, 2012, Chief Administrative Law Judge James T. McClymonds assigned the matter to me. On September 27, 2012, I e-mailed and called Thomas Sullivan, Esq., who represented the respondent in settlement discussions, to determine whether he was still retained by the respondent with respect to this matter. On September 28, 2012, Mr. Sullivan called me to advise that he no longer represented the respondent but would check with SMR to determine whether the company wished his representation with respect to staff's motion. I explained to Mr. Sullivan that the date the response was due had passed but that I was certainly willing to review any submission that was submitted on behalf of the respondent. As of the date of this report, neither the respondent nor Mr. Sullivan has submitted anything related to this motion.

Staff's Charges

Assistant Regional Attorney John K. Urda submitted to the Office of Hearings and Mediation Services (OHMS) Department staff's motion for order without hearing consisting of the notice of motion dated June 11, 2012; Mr. Urda's affirmation dated June 11, 2012; the deed dated September 16, 1998 that transferred the property to the respondent (Exhibit A [Ex.]); the New York State Department of State Division of Corporations Entity Information re: S & M Realty of New York, Inc. (active) and Always Available Private Car Service, Inc. (inactive as of June 23, 1993) (Ex. B); the NYSDEC Petroleum Bulk Storage (PBS) Program Facility Information Report and PBS certificate (Ex. C); the PBS application (Ex. D); letter dated May 10, 2012 from Energy Fueling Systems Corp. to NYSDEC re: Always Available Car Service (Ex. E); affidavit of Peter Lawler, consulting geologist to DEC to which were attached four photographs (Ex. A); and facsimile dated April 27, 2012 with notice of violation dated April 25, 2012 (Ex. B).

The staff has alleged that the respondent has a 4,000 gallon underground petroleum storage tank and piping system made of single-walled steel (facility number 2-606927). The tank, installed in or about 1950, has been used most recently to store diesel fuel. Based upon an April 25, 2012 inspection, the staff alleges: 1) that the respondent failed to properly register its PBS facility by including an incorrect installation date, incorrect tank external protection, incorrect product identification, incorrect piping leak detection and incorrect piping secondary containment in violation of 6 NYCRR § 612.2 and ECL § 17-1009; 2) failed to renew facility registration which expired on September 11, 2006 in violation of 6 NYCRR § 612.2(a)(2) and ECL § 17-1009; 3) failed to display the facility's PBS certificate in violation of 6 NYCRR § 612.2(e); 4) failed to properly mark the facility tank fill port in violation of 6 NYCRR § 613.3(b)(1); 5) failed to internally inspect the epoxy liner of the storage tank within ten years of the liner's installation in violation of 6 NYCRR § 613.3(d); 6) failed to keep properly reconciled inventory records for the purpose of leak detection in violation of 6 NYCRR § 613.4; 7) failed to keep the in-tank leak monitoring system in working order in violation of 6 NYCRR § 613.5(b)(3); and 8) failed to remove all product from the tank and piping system and plug or cap the fill line when the respondent took the tank out of service temporarily in violation of 6 NYCRR § 613.9(a). Staff alleges that the respondent failed to take corrective action with respect to all of these violations except the correct marking of the fill port.

The staff maintains that the respondent who owns another petroleum bulk storage facility should be experienced in compliance with the applicable laws. Staff also emphasizes that the tank is old and inadequately protected and is located in a densely populated community thus potentially subjecting those individuals to a health risk. Staff also provides that by not complying with the applicable laws, the respondent has avoided expenses of testing, registration, leak detection and recordkeeping. And, staff notes that the respondent has not cooperated with the Department in either addressing the violations after receiving the notice of violation or settling the matter. Staff calculated the penalty by starting with the application of DEE-22 and adding to those numbers based upon the aggravating factors described. Based upon these alleged violations, the Department staff seeks an order finding the respondent in violation of the Environmental Conservation Law and Parts 612 and 613 of 6 NYCRR; requiring the payment of a penalty of $24,400; and the correction of the these violations within thirty days of the order.

Respondent's Position

S & M Realty of New York Inc. has failed to submit a response to staff's motion and therefore, there is no record of its position.

FINDINGS OF FACT

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

1. The respondent is a New York State active corporation that operates an active automotive refueling and maintenance shop at 2045 McDonald Avenue, Brooklyn, New York under the entity name Always Available Private Car Service, Inc.[1] The shop contains one 4,000 gallon underground petroleum storage tank and the PBS facility number is 2-606927. Urda Affirmation (Aff.), ¶¶ 3, 4 and annexed Exhibits (Ex.) A, B and C.

2. The 4,000 gallon underground storage tank which is made of single-walled steel was installed in or around 1950 and has been used to store diesel fuel. Urda Aff. ¶ 5, Ex. C; Lawler Aff. (affidavit), ¶¶ 3, 4.

3. On April 25, 2012, Peter Lawler, a geologist employed by YEC, Inc., an environmental and consulting firm under contract to DEC to perform inspections of New York State –regulated PBS facilities, performed an inspection of the SMR facility located at 2045 McDonald Avenue in Brooklyn, New York. He found numerous violations of Parts 612 and 613 of 6 NYCRR including the failure of the facility to display its registration certificate; the fill port was not color-coded; there were no inventory records available; the automatic tank gauge system was not functioning; and the tank's internal epoxy liner had not been inspected. Lawler Aff., ¶ 6.

4. On the April 2012 site visit, Mr. Lawler was advised by the facility operator that the tank had not been used in the four years he had worked there. Lawler Aff., ¶ 7. Mr. Lawler noted that the regulations require that a tank that is out of service for more than thirty days must be emptied and the fill port secured against tampering. *Id.* Mr. Lawler observed that the Veeder Root monitoring system for this tank indicated that there was 1,156 gallons of product in the tank and the fill port was not secured. *Id.*

5. On April 27, 2012, Mr. Lawler faxed a notice of violation to SMR. Lawler Aff., ¶ 8; Exhibit B to Lawler Aff. The notice advised SMR that it was required to correct the violations within thirty days and was subject to penalties pursuant to ECL § 71-1929.

6. Mr. Lawler noted that the respondent failed to correct the violations other than the fill port color-coding violation. Lawler Aff., ¶ 10. Citing 40 CFR 280.21(b)(1)(ii), Mr. Lawler emphasized that the epoxy liners are subject to degradation and therefore internal inspections were important to assess soundness within ten years of installation. Lawler Aff., ¶ 11. Mr. Lawler explained that the records produced by the respondent at the compliance conference were

[1] Always Available Private Car Service, Inc. is listed as inactive, dissolved by proclamation/annulment of authority on June 23, 1993. Urda Affirmation, ¶ 4; Ex. B to Urda Affirmation.

suspect due to their uncharacteristic uniformity. Lawler Aff., ¶ 12. Moreover, the respondent's records were not in compliance with the regulatory requirements and therefore, their ability to assist in leak detection was inadequate. *Id.*

CONCLUSIONS OF LAW

1. By failing to properly register its PBS facility, SMR is in violation of 6 NYCRR § 612.2 and ECL § 17-1009.

2. By failing to renew the registration for its PBS facility, SMR is in violation of 6 NYCRR § 612.2(a)(2) and ECL § 17-1009.

3. By failing to display the facility certificate at its PBS facility, SMR is in violation of 6 NYCRR § 612.2(e).

4. By failing to properly mark the facility tank fill port at the time of the April 25, 2012 inspection, SMR is in violation of 6 NYCRR § 613.3(b)(1).

5. By failing to internally inspect the epoxy liner of the facility's underground storage tank within ten years of its installation, SMR is in violation of 6 NYCRR § 613.3(d).

6. By failing to produce inventory records for the underground storage tank at the time of the April 25, 2012 inspection and by failing to produce properly reconciled inventory records at the May 30, 2012 compliance conference, SMR is in violation of 6 NYCRR § 613.4.

7. By failing to keep the in-tank leak monitoring system for the facility's underground storage tank in working order, SMR is in violation of 6 NYCRR § 613.5(b)(3).

8. By failing to remove all the product from the tank and the piping system to the lowest draw-off point and failing to plug or cap the fill line, SMR is in violation of 6 NYCRR 613.9(a).

DISCUSSION

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

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affirmation from the Assistant Regional Attorney that describes the respondent's business and legal status, refers to Mr. Lawler's affidavit for the description of the respondent's underground storage tank, and provides information about the May 30, 2012 compliance conference that the respondent's representative attended. Urda Aff., ¶¶3-17. In addition, the Department staff has submitted the affidavit of Peter Lawler, a geologist employed by YEC, Inc. which is under contract with DEC to perform inspections of New York State–regulated petroleum bulk storage facilities. In his affidavit, Mr. Lawler details his April 25, 2012 inspection of the SMR facility and the numerous violations that he discovered. Lawler Aff., ¶¶ 3-13.

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

The staff has met its burden to show that the respondent has violated the cited sections of Parts 612 and 613 of NYCRR. *Edgar v. Jorling*, 225 AD2d 770, 771 (2d Dep't 1996), *lv to appeal den.*, 89 NY2d 801 (1996); 6 NYCRR § 622.12(c).

Accordingly, I find the respondent liable for violating 6 NYCRR §§ 612.2, 612.2(a)(2), 612.2(e), 613.3(b)(1), 613.3(d), 613.4, 613.5(b)(3), and 613.9(a) and ECL § 17-1009.

Penalties

In its notice of motion, Department staff requests that the respondent be ordered to pay a civil penalty of $24,400. Urda Aff., ¶ 67. Mr. Urda provides a detailed rationale for this penalty citing to both the Department's Civil Penalty Policy and DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy. Mr. Urda notes that DEE-22 sets forth guidelines for penalties to be used in cases of settlement. Because this matter was not resolved without further litigation, Mr. Urda seeks a significantly higher penalty (twice the penalties for each cause of action). Specifically, Mr. Urda has requested a penalty of: $1,000 for the failure to submit accurate information for its registration; $6,000 for the failure to renew the registration; $200 for the failure to display the facility certificate; $200 for the fill port violation; $5,000 for the failure to inspect the tank's liner; $5,000 for the failure to keep inventory records; $5,000 for failure to maintain spill prevention equipment; and $2,000 for failure to properly close the out-of-service tank.

He further supports the requested penalty amount by detailing, consistent with the Civil Penalty Policy, the serious nature of the violations by underscoring the fact that the tank is unprotected and in a densely populated residential area. Urda Aff., ¶ 64. He also notes the lack of cooperation by the respondent – its failure to comply with the notice of violation or to come into compliance either before or after the compliance conference except for the relabeling of the tank port. *Id.* And, finally Mr. Urda underscores the economic advantage the respondent has obtained by failing to register, inspect or maintain the tank, keep inventory records, and take the tank out of service properly. *Id.* The Department staff has not provided any mitigating factors

that would call for a reduction of the requested penalty and the respondent has not provided any such information.

Pursuant to ECL § 71-1929 provides for a penalty of up to $37,500 per day for each violation of Titles 1 through 11 inclusive of ECL Article 17 or the rules or regulations promulgated thereto by the Commissioner of the Department. I find that the Department staff's penalty request is appropriate given the respondent's numerous and uncorrected violations of the petroleum bulk storage law and regulations and its failure to cooperate with Department staff to address these violations is serious.

RECOMMENDATIONS

1. The respondent, S & M Realty of New York Inc., should be assessed a penalty of $24,400. All penalties should be paid within 30 days of service of the Commissioner's order; and

2. The respondent should be ordered to correct all the violations within thirty days of the Commissioner's order.

Albany, New York
October 1, 2012

/s/
_____
Helene G. Goldberger
Administrative Law Judge

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