STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violation of Article 17 of the Environmental Conservation Law and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

– by -

PETER J. SCHREIBER,

Respondent.

DEC Case No. R4-2003-0130-20

DECISION AND ORDER OF THE ACTING COMMISSIONER

July 12, 2005

DECISION AND ORDER OF THE ACTING COMMISSIONER

Pursuant to a notice of hearing and complaint dated March 28, 2003, staff of the New York State Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against Peter J. Schreiber ("respondent").

Department staff's complaint alleged that respondent violated 6 NYCRR 612.2 by failing to renew the registration for a petroleum bulk storage facility ("facility") that he owns and which is located at 286 East Main Street, Amsterdam, New York ("site"). In addition, the complaint alleged that, in violation of 6 NYCRR 613.5(a)(1) and 613.5(a)(4), respectively, respondent failed to timely test two underground storage tanks at the site and failed to submit the testing reports to the Department.

Following service of the notice of hearing and complaint upon respondent, respondent submitted an answer dated April 18, 2003. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois. Following motion practice and efforts between the parties to reach settlement, Department staff provided a statement of readiness on November 15, 2004, requesting that a hearing date be scheduled. The hearing took place on January 18, 2005 at the Department's Region 4 office in

Schenectady, New York. The hearing record closed on February 11, 2005, and the ALJ prepared the attached hearing report dated April 1, 2005 ("Hearing Report"). I adopt the ALJ's Hearing Report as my decision in this matter, subject to my comments herein.

The ALJ recommended that a civil penalty of fifteen thousand dollars ($15,000) be imposed for respondent's failure to test the two underground petroleum bulk storage tanks at the site, unless I concluded that a lower penalty is appropriate "in view of the penalties per tank in recent orders concerning failures to test" (Hearing Report, at 14). The ALJ concurred with Department staff's request that no penalty be imposed for the late renewal of the facility's petroleum bulk storage registration.

Section 71-1929 of the Environmental Conservation Law ("ECL") establishes the maximum civil penalty for the violation of 6 NYCRR 613.5, which sets forth the requirements for testing underground petroleum bulk storage tanks. On May 21, 2003, the Department issued an enforcement guidance entitled "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy" ("Policy"). The Policy, which identifies suggested penalty ranges to be imposed through orders on consent, proposes a penalty of $5,000

per tank for failure to comply with the tank testing requirements. In setting a penalty, a Department attorney has the discretion to increase, decrease or suspend a civil penalty assessed pursuant to the Policy, in accordance with the guidelines in the Department's Civil Penalty Policy.

However, the suggested penalty ranges in the Policy do not apply to the resolution of violations after a notice of hearing and complaint has been served. The Policy states that "[t]he penalty amounts calculated with the aid of this [Policy] in adjudicated cases must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents."

Whether the maximum statutory penalty,[1] or some lesser amount, is imposed in a Commissioner's order will reflect the particular circumstances of the matter. A number of factors, including but not limited to the extent of respondent's

[1] From July 29, 1988 to May 15, 2003, ECL 71-1929 provided for a civil penalty not to exceed $25,000 per day for each violation of titles 1 through 11 and title 19 of article 17, or the rules, regulations, orders or determinations of the Commissioner promulgated thereto. Effective May 15, 2003, the penalty was increased to $37,500 per day. Department staff indicated that it used the amount of $25,000 per day to calculate its requested penalty (Department Staff's Post-Hearing Brief [2-10-05], at 4).

cooperation with the Department, the duration of the violation, the number of tanks involved, the nature of the environmental harm and respondent's prior record of compliance, can affect the amount of the penalty that is imposed. Accordingly, the penalty assessed in another proceeding may have little if any relevance to a pending matter, and penalties from one proceeding to another will vary in light of applicable mitigating and aggravating factors.

The ALJ's Hearing Report addresses the arguments that Department staff and respondent raised with respect to the proposed penalty for respondent's failure to test the underground petroleum bulk storage tanks at the site (see Hearing Report, at 8-12) . Tightness testing of underground petroleum bulk storage tanks is a longstanding requirement of the State's petroleum bulk storage regulations. Such testing is critical to determining the existence of potential or actual environmental harm. Failure to comply with the tank testing schedule established by the Department's regulations poses a substantial risk to the environment.

Respondent purchased the site in 1997. He submitted a registration application to the Department for the two tanks at the site in May 1997 to reflect his acquisition of the site. The

Department issued a registration certificate to respondent which noted that the testing of the tanks was overdue (Hearing Exhibit 6). In addition to the registration certificate, Department staff sent a memorandum dated May 22, 1997 to respondent stating that he was to submit a copy of complete test reports and calculations for the two tanks within thirty days, and that the two tanks were required to be tested or permanently closed (id.).

After operating his vehicle repair business at the site for about a year, respondent had a new building constructed at another location and moved his business there. Subsequently, the site was vacant for approximately one and a half to two years.

Not only did respondent not test the tanks, he did not remove them until the summer of 2003. It is clear that, in light of the delay in removing the tanks, respondent was obligated to test the tanks.

As one of the reasons for the delay in removing the tanks, respondent cites the financial difficulties that he experienced as a result of a catastrophic fire in 2001 at his new business location. The record also reflects that respondent previously assumed significant financial obligations in establishing his business and in the construction of the new

building to house it.

Because respondent has now removed the tanks and in light of the fact that some of the delay in removing the tanks was the result of his substantial financial difficulties resulting from the fire, I determine that a reduction in the civil penalty would be appropriate. Arguments in support of the reduction are limited by the fact that the financial difficulties arising from the fire do not explain respondent's delay in complying with the applicable legal requirements prior to the fire.

Based upon my review of the record in this proceeding, I determine that the civil penalty for the failure to conduct the required tank testing shall be reduced from $15,000 to $12,000. With respect to the penalty, I concur with the ALJ's recommendation that no penalty be imposed for the late renewal of the facility's petroleum bulk storage registration.

In consideration of respondent's financial situation as presented in the record, I am providing an extended schedule for the payment of the civil penalty.

When the two underground storage tanks were removed, a

spill was discovered and a substantial amount of petroleum-contaminated soil was detected (see Hearing Report, at 11; see also Hearing Transcript ("Tr.") ,at 171-74; Hearing Exhibit 19). The facility is one of four that the Department is investigating to determine the source of contamination that was found at a downgradient well (Tr., at 172). This matter before me, however, is limited to violations concerning registration and testing of the two underground petroleum bulk storage tanks at the site. Accordingly, the civil penalty provided for in this order does not impair, abridge or limit the right of the Department or the State of New York to recover from respondent or any other party the investigation or remediation costs that the Department or the State incurs with respect to the site or any release arising from the site.

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

I. Respondent Peter J. Schreiber is found to have violated 6 NYCRR 612.2 and 6 NYCRR 613.5.

II. Respondent is assessed a civil penalty pursuant to ECL 71-1929 in the amount of twelve thousand dollars ($12,000). Of this penalty, six thousand dollars ($6,000) shall be due and payable within one hundred twenty (120) days of the date of the service of this order upon respondent, and the remaining amount of six thousand dollars ($6,000) shall be due and payable within two hundred and forty (240) days of the date of the service of this order upon respondent. In the

event that respondent fails to pay the first installment of six thousand dollars ($6,000) within the referenced one hundred and twenty (120) day period, the entire civil penalty of twelve thousand dollars ($12,000) shall become immediately due and payable.

III. Payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the Department at the following address: New York State Department of Environmental Conservation, Division of Legal Affairs, Region 4, 1150 North Westcott Road, Schenectady, New York, 12306-2014, Attn: Ann Lapinski, Assistant Regional Attorney.

IV. All communications from respondent to the Department concerning this order shall be made to Ann Lapinski, Assistant Regional Attorney, New York State Department of Environmental Conservation, Division of Legal Affairs, Region 4, 1150 North Westcott Road, Schenectady, New York 12306-2014.

V. Nothing contained in this order shall be construed to impair, limit or otherwise affect the right of the Department or the State of New York to recover from respondent or any other party the investigation or remediation costs that the Department or the State of New York incurs with respect to the site or any release arising from the site.

VI. The provisions, terms and conditions of this decision and order shall bind respondent, his successors and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

_____/s/_____
By: Denise M. Sheehan
Acting Commissioner

Dated: July 12, 2005
Albany, New York

To: Peter J. Schreiber (By Certified Mail)
154 Reynolds Road
Fultonville, New York 12072

Robert J. Krzys, Esq. (By Certified Mail)
107 Division Street
Amsterdam, New York 12010

Ann Lapinski, Esq. (By Regular Mail)
Assistant Regional Attorney
New York State Department of
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Division of Legal Affairs, Region 4
1150 North Westcott Road
Schenectady, New York 12306-2014

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

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Alleged Violation of Environmental Conservation Law article 17 and parts 612 and 613 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

PETER J. SCHREIBER
154 Reynolds Road
Fultonville, New York 12072

RESPONDENT

DEC Case No. R4-2003-0130-20

HEARING REPORT

by

_____/s/_____
Susan J. DuBois
Administrative Law Judge

April 1, 2005

PROCEEDINGS

Pursuant to part 622 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 622), an administrative enforcement hearing was held to consider allegations by the New York State Department of Environmental Conservation (Department or DEC) against Peter J. Schreiber, 154 Reynolds Road, Fultonville, New York 12072 (Respondent). DEC Staff alleged that Respondent violated 6 NYCRR parts 612 and 613 by failing to renew the registration of a petroleum bulk storage facility owned by the Respondent and by failing to conduct tightness testing of underground storage tanks at the facility in a timely manner. The site of the alleged violations is 286 East Main Street, Amsterdam, New York (Montgomery County).

The Respondent was served with a notice of hearing and complaint in April 2003. Counsel for the Respondent submitted an answer that DEC Staff received on April 21, 2003. DEC Staff was initially represented in this matter by Robert Leslie, Esq., Regional Attorney for DEC Region 4, and at the time of the hearing was represented by Ann Lapinski, Esq., Assistant Regional Attorney. The Respondent was represented by Robert J. Krzys, Esq., Amsterdam, New York. Administrative Law Judge (ALJ) Susan J. DuBois was assigned to conduct the hearing.

On April 23, 2003, DEC Staff moved for clarification or dismissal of affirmative defenses set forth in the answer. The letter transmitting the motion also noted that DEC Staff and the Respondent planned to meet on May 5, 2003 to discuss the terms of a possible settlement. The meeting occurred but did not result in a settlement. On July 5, 2003, Mr. Krzys submitted an affirmation in opposition to DEC Staff’s motion.

On July 29, 2003, I made a ruling that partially granted DEC Staff’s motion to dismiss or clarify affirmative defenses. The Respondent asserted as an affirmative defense that DEC lacks jurisdiction over the facility because the Respondent never operated it as a gasoline station. The ruling dismissed this affirmative defense. The ruling denied DEC Staff’s motion to dismiss the affirmative defense that the facility has been permanently closed and also denied DEC Staff’s motion for clarification of this affirmative defense. The ruling dismissed two other affirmative defenses because neither defense, even if true, would demonstrate that the Respondent was not liable for the alleged violations. The Respondent was allowed, however, to submit proof regarding the statements in the latter two affirmative defenses to the extent it was relevant to factors

that would be considered under the DEC Civil Penalty Policy (Commissioner Policy DEE-1 [June 20, 1990]).

DEC Staff provided a statement of readiness pursuant to 6 NYCRR 622.9 on November 15, 2004, requesting that a hearing date be scheduled. The hearing took place on January 18, 2005 at the DEC Region 4 Office in Schenectady, New York.

DEC Staff called as its witnesses three DEC employees who work in Region 4: Thomas Sperbeck, Environmental Engineering Technician 3; Richard Schowe, Environmental Program Specialist 1; and Edward L. Moore, Environmental Engineer 2. Peter Schreiber, the Respondent, testified on his own behalf. The parties submitted written closing statements. The hearing record closed on February 11, 2005.

Charges and Relief Sought

DEC Staff alleged that the Respondent owns and maintains a retail gasoline facility in Amsterdam, New York that is a petroleum bulk storage facility, with a petroleum storage capacity of 6,000 gallons. At the time of the complaint, the most recent registration certificate described the facility as having two 3,000 gallon tanks. DEC Staff alleged that the facility's registration expired on May 19, 2002 and was not renewed either by the June 20, 2002 date of an inspection by DEC or within 30 days of a June 27, 2002 notice of violation, in violation of 6 NYCRR 612.2. DEC Staff also alleged that tightness testing of the gasoline tanks was due in 1992 but that the Respondent, "as the new owner in 1997," failed to conduct tightness testing and to submit a test report, in violation of 6 NYCRR 613.5(a)(1) and (4).[1]

DEC Staff sought an order imposing a civil penalty of $15,000. This is based upon $7,500 for each tank DEC Staff alleged was not properly tested or closed; DEC Staff did not request a penalty for the late registration. In its complaint, DEC Staff also requested that the order direct the Respondent to submit a petroleum bulk storage substantial modification application form that would ensure that an underground used oil storage tank be added to the registration, and to permanently

[1] The captions of the notice of hearing and complaint refer to alleged violations of article 12 of the New York State Navigation Law, but the complaint does not identify any alleged violations of this law.

close all underground petroleum storage tanks at the facility in accordance with 6 NYCRR 613.9. In a letter dated January 14, 2005, shortly prior to the hearing, DEC Staff stated it was withdrawing its request for a schedule of compliance because the Respondent had removed the two 3,000 gallon tanks. The January 14, 2005 letter also noted that DEC Staff would address the matter of the used oil tank separately from this proceeding.

Answer

The Respondent denied most of the allegations in the complaint and asserted that he had permanently closed the facility. He argued that even if a violation is found, no penalty should be imposed. In his closing statement, the Respondent argued that the DEC had not demanded that tank testing be done by any of the three entities that owned the facility during 1992 to 1997 and he suggested that the present enforcement action against him is selective prosecution. The Respondent stated that the facility consists of a rental facility for a trucking company, for which no petroleum products have been purchased, stored, sold, distributed or used. The Respondent stated that he had "experienced a severe hazard loss in the recent past, and although requested, time abatement has been rejected." As further discussed in his response to Staff's motion to dismiss affirmative defenses, this loss consisted of a fire. Under the July 29, 2003 ruling, the effects of this event are not an affirmative defense but may be considered in the context of the Department's Civil Penalty Policy.

OFFICIAL NOTICE

Official notice is taken that August 20 is 24 calendar days after July 27. These dates relate to the renewal of the petroleum bulk storage registration for the facility (Transcript, at 65 (Tr. 65)).

FINDINGS OF FACT

1. Peter Schreiber, 154 Reynolds Road, Fultonville, New York (Respondent) owns land and a building at 286 East Main Street, Amsterdam, New York, at which at least two petroleum bulk storage tanks were located (the facility). He owns and operates a vehicle repair business, repairing school buses and smaller vehicles, that formerly was located at this facility.

2. The Respondent bought the facility from the City of Amsterdam in the spring of 1997. He operated his vehicle repair business at the facility until the spring of 1998. Because the business had outgrown the Amsterdam location, he had a new building constructed at 2980 State Highway 38 in the Town of Glen and moved his business to that location. After the Respondent moved his business to Glen, the facility remained vacant for approximately one and a half to two years. It was then used by James Sweet Trucking as a truck repair facility (Tr. 196-204).

3. The first petroleum bulk storage registration certificate for the facility that is in the record of the present hearing is a registration issued on October 14, 1988, with an expiration date of August 17, 1992. As of 1988, the facility was registered as Natale's Service Station and was owned by Lawrence Natale, of Amsterdam. According to the 1988 registration, there were two tanks on the site, both of which were 3,000 gallon bare steel tanks that were installed on unknown dates. The registration certificate stated that the tanks had last been tested for tightness on October 14, 1987 and were due for testing in October 1992 (Ex. 4).

4. Subsequently, the facility ceased being used as Natale's Service Station and became a Tire Warehouse owned or operated by John McCall. It then was taken over by the City of Amsterdam for non-payment of taxes. The facility was not registered between August 17, 1992 and the spring of 1997. The Department did not bring any enforcement action regarding the expired registration between 1992 and 1997, and a Region 4 Staff member who worked in the bulk storage program during that time did not think there had been any inspections of the facility by DEC between 1992 and 1997 (Tr. 37-47, 179-180). The City of Amsterdam submitted a petroleum bulk storage application for the facility on April 10, 1997, shortly before the Respondent purchased the facility. In addition to the two 3,000 gallon tanks, this application lists a 5,000 gallon tank that is noted as "closed" and that had been used for storing unleaded gasoline (Ex. 9). This third tank does not appear on subsequent registration certificates for the facility, is listed as "closed" on a DEC facility information report, and is not at issue in this hearing.

5. The Respondent submitted a registration application on May 9, 1997, to reflect the change in ownership from the City of Amsterdam to the Respondent. The Department issued to the Respondent a registration certificate dated May 19, 1997, with an expiration date of May 19, 2002, that described the facility as having two 3,000 gallon steel/carbon steel tanks. This registration certificate stated that the tanks were last tested

in October 1987 and that testing was due in October 1992 (Ex. 5 and 6).

6. In addition to the testing due date identified on the 1997 registration certificate, Thomas Sperbeck, of DEC Region 4, sent a memorandum to the Respondent on May 22, 1997 asking the Respondent to submit a copy of complete tank test reports and calculations for his tanks within 30 days. The memo stated that the tanks were required to be tested or permanently closed (Ex. 6).

7. Prior to buying the facility, the Respondent contacted the DEC Region 4 Office and spoke with Mr. Sperbeck about the tanks. Mr. Sperbeck mailed to the Respondent and to the City of Amsterdam a report for the facility, a petroleum bulk storage application and a copy of regulations related to this program. Mr. Sperbeck and the Respondent also discussed the possibility of contamination at the site and procedures for removing tanks (Tr. 15-18, 204-205).

8. The Respondent telephoned Mr. Sperbeck on June 2, 1997 about his plans to install new tanks at the facility. At that time, the Respondent planned to have two jacketed double-wall steel tanks installed within the next three months (Tr. 33-35; Ex. 7). Mr. Sperbeck and the Respondent spoke on additional occasions about the Respondent’s intentions to remove the tanks that were at the facility when he purchased it, but the tank removal did not occur until after DEC Staff initiated the present enforcement action (Tr. 48-49, 159).

9. A fire occurred at the Respondent’s new repair garage in the Town of Glen in October 2001, destroying approximately 80 percent of the building including the Respondent’s office. The Respondent lost business and his repair business was operating at about ten percent of its pre-fire capacity. The Respondent was working in an unburned portion of his repair garage and at a facility owned by one of his employees. The Respondent did not receive the proceeds of his business interruption insurance until the spring of 2003. He borrowed money to keep his business going (Tr. 207-210).

10. Although the tanks were due for testing in October 1992, DEC Staff did not inspect the facility or take action to bring it into compliance with the testing requirement until June 2002. On June 20, 2002, Richard Schowe, of the DEC Region 4 petroleum bulk storage unit, and Environmental Conservation Officer (ECO) Martin Skotarczak went to the facility to inspect it because the registration was overdue for renewal and the tanks were also

overdue for tightness testing (Tr. 74-76, 118-119). Edward L. Moore, the supervisor of the Region 4 petroleum bulk storage program, had received a printout of overdue registrations that included the facility. This was part of an ongoing effort by DEC Staff to reduce a backlog of overdue registrations and tank tests that had accumulated while the Department was pursuing a policy of voluntary compliance (Tr. 150-151).

11. On June 20, 2002, Mr. Schowe noted that there were two tanks at the site but no dispensers associated with the tanks. On the same day, Mr. Schowe and ECO Skotarczak also visited the Respondent at his bus repair garage in the Town of Glen and spoke with him about the Amsterdam facility. He told them that he was having financial problems and would try to bring the facility into compliance in the fall of 2002. Construction was taking place at the Glen site at that time, to rebuild the bus repair facility (Tr. 121-126, 216-219).

12. Mr. Schowe sent the Respondent a notice of violation based upon the June 20, 2002 inspection. He initially sent this to the Respondent at the Amsterdam address on the bulk storage registration, but this copy was not deliverable. On July 9, 2002, he sent a second copy to the Respondent's Fultonville address. This copy of the notice of violation was received at that address on July 12, 2002, although someone other than the Respondent signed the mail receipt. The notice of violation gave the Respondent the options of registering the facility and bringing the tanks into compliance (including tightness testing), or permanently closing the tanks pursuant to 6 NYCRR 613.9(b). It also notified him that he was subject to penalties and that delays in correcting the violations would affect the amount of penalties (Ex. 11; Tr. 79-94).

13. On July 26, 2002, the Respondent spoke with Mr. Moore about the Respondent's plans to renew the registration and to close the tanks in September or October, 2002, and the status of his insurance claim (Ex. 17; Tr. 152-154). On August 13, 2002, the Respondent notified DEC Region 4 that the work described in the proposal Valley Equipment Company had given him, for removal of the tanks, would be started by October 15, presumably of 2002 (Ex. 12; Tr. 94-98).

14. The Respondent submitted a registration application and the required fee on or about August 13, 2002. On August 20, 2002, DEC issued a new registration, with an expiration date of May 19, 2007. This registration was for two 3,000 gallon steel/carbon steel tanks. It stated that the tanks were last tested for

tightness on October 1, 1987 and that testing was due to be done on October 1, 1992 (Ex. 8 and 15).

15. On October 22, 2002 the Respondent sent to Mr. Schowe copies of the proposal by Valley Equipment for tank removal and of his check to that company. The Respondent, however, did not send the check to Valley Equipment because he found out that there was going to be a delay in the payment of his insurance claim. The Respondent did not notify DEC Staff that he had decided not to send the check. Mr. Schowe found out that the check had not been sent and the work had not been done when he telephoned the Respondent in December 2002 (Ex. 14; Tr. 101-103, 126-128, 137-139, 219-224). DEC Staff sent a notice of hearing and complaint in this matter to the Respondent on March 28, 2003.

16. The Respondent received his insurance payment in the spring of 2003 (Tr. 208). The tanks were removed by Valley Equipment in early June 2003. During the removal, Valley Equipment observed a spill and reported it to DEC. One of the tanks had approximately 8 holes, ranging in size from a pinhole to about half an inch in diameter. The date on which the spill occurred is unknown, and it could have occurred before the Respondent bought the facility. The spill contaminated soil, which needed to be removed. The Respondent, with assistance from DEC Staff, investigated the possibility of decontaminating the soil through use of a "biopile" at his residence in the Town of Glen but the Town did not approve this. The contaminated soil was disposed of at a landfill. The cost paid by the Respondent for cleanup of the facility was approximately $28,000 (Ex. 16 and 19; Tr. 133-137, 159-161, 183-184, 226-230).

17. The average cost of testing petroleum bulk storage tanks for tightness is $500 per tank. The Respondent avoided $1,000 in costs by not having the two tanks tested. The Respondent also saved money as a result of his delay in removing the tanks. As stated in Finding 18, the Respondent was required to remove or to upgrade the tanks by the end of 1998. He did not do so until the summer of 2003, four and a half years later. DEC Staff presented a calculation that assumed that removing the tanks would have cost $20,000 in 1998, that there would be a cost savings of 4 percent per year of delay in removing the tanks, and that the delay was five years in duration. This calculation found an economic benefit of $4,000 due to the delay in tank closure. The total economic benefit to the Respondent of failing to test the tanks and to close them is approximately $5,000 (Ex. 20; Tr. 168-169). The cost for removing tanks would be less if there was no contamination than if contamination was found, but one cannot tell from the hearing record, and it may be impossible to know in

this case, whether the spill occurred before or after the Respondent bought the site and had the opportunity to remove the tanks (Tr. 129-132, 183-184).

18. The tanks at the site were bare steel tanks. The United States Environmental Protection Agency required that tanks of this kind be upgraded or permanently closed by December 1998. This is federal requirement, over which DEC does not have enforcement authority (Tr. 156-157, 238-239; 40 Code of Federal Regulations 280.21).

DISCUSSION

This report concludes that the Respondent failed to renew his facility's registration in a timely manner and failed to conduct tightness testing of the tanks in a timely manner. The following discussion analyzes the parties' positions with regard to a penalty amount in the context of the hearing record, the penalty authorized by the Environmental Conservation Law (ECL), DEC enforcement guidance memoranda, and recent orders issued by the Commissioner.

ECL section 71-1929, as it existed prior to May 15, 2003, authorized a maximum civil penalty of $25,000 per day for violations of ECL article 17, title 10 (Control of the bulk storage of petroleum) and the regulations implementing this statute. Effective May 15, 2003, ECL 71-1929 was amended to authorize a penalty of $37,500 for each such violation.

DEC Staff requested a penalty of $7,500 for failure to test each of two tanks, for a total penalty of $15,000. DEC Staff stated it was not requesting any penalty for the delay in re-registering the tanks in 2002, based on the length of time the tanks remained unregistered. The Respondent argued that no penalties should be imposed, even if violations are found to have occurred.

The Department's most recent enforcement guidance memorandum on petroleum bulk storage is DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy, issued on May 21, 2003. This policy includes suggested penalty ranges for violations of specific petroleum bulk storage requirements, but also states that the suggested penalty ranges are for use in preparing orders on consent and shall not apply to the resolution of violations after notices of hearing and complaints have been served. For orders on consent, the average penalty suggested for failure to tightness test a tank is $5,000 per tank. The policy does not

identify suggested penalty ranges to be imposed following service of a notice of hearing and complaint, nor following a hearing. It does state, however, that, "The penalty amounts calculated with the aid of this document in adjudicated cases must, on the average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents."

In addition to the program-specific enforcement guidance memos, the Department's Civil Penalty Policy (Commissioner Policy DEE-1, issued June 20, 1990), applies to penalties for violations of the ECL and the Department's regulations generally. This policy describes factors affecting penalties, including the economic benefit a violator gained by failing to comply with a legal requirement, the potential environmental harm and actual damage caused by the violation, the importance of the violated requirement to the regulatory scheme, cooperation by the violator in remedying the violation, and a respondent's ability to pay a penalty.

In the present case, both the Respondent and DEC Staff allowed years to pass after the date on which re-testing of the tanks was due to be performed. The petroleum bulk storage registration certificates state that the tanks were last tested in 1987 and were due for testing in 1992. The Respondent was aware of the requirement to test the tanks, based upon his conversation with Mr. Sperbeck, before he bought the facility. In addition, Mr. Sperbeck notified him in writing about this requirement on May 22, 1997. Although the Respondent cited the fire at his bus garage as a reason why he did not comply with this requirement, the fire did not occur until October 2001, over four years after he bought the facility.

The other reason cited by the Respondent for his failure to test or remove the tanks is his assertion that he decided to remove the tanks rather than test them and sent a form to DEC's Central Office in late 1997 requesting an extension of the time within which to remove the tanks. He further asserted that he received no response from DEC and that, based on the lack of a response, he assumed the extension had been granted. These assertions are not credible. No process existed for requesting an extension of this kind and DEC had no form for making such a request. DEC does not have authority to grant an extension for tightness testing, nor an extension for closing certain kinds of tanks by the 1998 deadline established by EPA. The Respondent's testimony that he assumed the request was granted (apparently indefinitely) because he received no response is not consistent

with his other interactions with DEC Staff about the facility, in which there were phone calls back and forth between him and various Region 4 staff members. The Respondent stated that he kept a copy of his request but lost it in the fire at his bus repair facility, and that he believed DEC's Albany office would have evidence of the request. Although the Respondent's office was destroyed in the fire, there is no indication that this document exists in DEC's central office or that the Respondent even attempted to obtain a copy in preparation for the hearing. Mr. Moore had not seen any such request in the files related to this proceeding (Tr. 230-236, 238-247).

At the same time, the registration certificates issued by DEC indicated the tanks were out of compliance with the testing requirement from October 1992 onward, but DEC Staff did not pursue enforcement action against the prior owners of the site while they owned it or against the Respondent until 2002. DEC Staff began trying to bring the tanks into compliance in mid-2002. Based upon the testimony of Mr. Moore, who has supervised the petroleum bulk storage unit in Region 4 for almost ten years, the Department's regulation of petroleum bulk storage used to rely on voluntary compliance. Due to workload and to not prioritizing enforcement, a large backlog of facilities with overdue registrations and tank testing had accumulated by 1998 (Tr. 148-151, 179). This backlog is also noted in DEC Enforcement Guidance Memorandum DEE-20 (Petroleum Bulk Storage Enforcement Guidance Memorandum, issued December 12, 1997), which sought to expedite the Department's review of approximately 2,800 such facilities that might not be registered at that time and approximately 8,000 tanks which were overdue for tightness testing. Although this memorandum was issued in late 1997, the initial action taken by DEC Region 4 Staff to inspect this facility did not occur until mid-2002 (Tr. 74, 150). The timing of DEC Staff's actions with regard to this facility appear to reflect the development of the petroleum bulk storage program rather than any intention by DEC Staff to single out the Respondent and to prosecute him while he was at a disadvantage.

The Respondent argued that he undertook the activity that DEC Staff directed as soon as he was financially able to do so, and that this was a reason why no penalty should be imposed. Although the Respondent was in a very difficult financial situation as of the summer of 2002, this argument does not take into account the fact that he failed to test or remove the tanks between the time he bought the facility in 1997 and the summer of 2002. In addition, the Respondent sent to DEC Staff the proposal from Valley Equipment and a copy of his check to that company, leading DEC Staff to believe that the tanks were about to be

removed, but then did not inform DEC Staff when he decided not to send the check to Valley Equipment.

The Respondent's written closing statement claims that, "As of 2002, NY DEC representatives never mentioned anything about a fine or civil penalties," but this is contradicted by the notice of violation that DEC Staff sent to the Respondent in July 2002 (Ex. 11, page 3).

When the tanks were eventually removed, a spill was discovered. The date or time period during which the spill occurred is not known, and the record does not contain information that would allow one to determine whether it occurred before or during the Respondent's ownership of the facility. The record also does not contain information regarding the extent to which contamination might have spread to a larger area between when the tank started leaking and when the Respondent could have tested the tanks to discover whether they were leaking. Although the DEC Staff cited the spill as being relevant to potential or actual environmental damage, a factor the Department takes into account under the Civil Penalty Policy, the record does not provide a basis to determine whether environmental damage could have been prevented if the Respondent had tested or removed the tanks in 1997. Had the tanks been tested in 1997, one would have known whether they were leaking or not (Tr. 170-175).

The Respondent's failure to test the tanks at least created the potential for environmental harm, because the tank with holes may have leaked during the time the Respondent owned the site. The facility is one of four that DEC Staff is investigating to determine if they are the source of contamination at an impacted well downgradient, although the results of this investigation are not in the record of this hearing (Tr. 172). Tightness testing is important to the Department's regulation of petroleum bulk storage, in order to determine whether tanks are leaking (Tr. 174-175). The importance of this requirement was noted by the Commissioner in two recent orders involving petroleum bulk storage facilities (Matter of Walter Underwood, Order of the Commissioner, January 27, 2004; Matter of Donald Zimmerman, Order of the Commissioner, March 19, 2004).

In the present case, DEC Staff proved that the Respondent benefitted economically by avoiding for years the cost of testing and removing the tanks. With regard to the Respondent's ability to pay the proposed penalty, he demonstrated that he had serious financial difficulties from the time of the fire until when he received his insurance payment, but did not demonstrate that he currently is unable to pay the proposed penalty. Although he has

a significant mortgage on the new bus garage, he also has a business that is operating again and is doing repair work for some number of school districts' buses.

The requested penalty in the present matter is higher than the average penalty recommended for orders on consent resolving violations of the tightness testing requirement, which is consistent with enforcement guidance memo DEE-22, but the requested penalty is not extremely higher. The total penalty requested by DEC is not disproportionate to those assessed in other recent decisions of the Commissioner concerning failure to tightness test petroleum bulk storage tanks (Underwood and Zimmerman, supra; Matter of Mohamed Fawaz, Order of the Commissioner, March 16, 2004; Matter of William W. Wakefield, Order of the Commissioner, July 7, 2004; Matter of Roger Dulski, Order of the Commissioner, September 22, 2004; Matter of Charles Johnson, Order of the Commissioner, March 10, 2005). Considering the numbers of tanks in those cases, however, the proposed penalty would be a higher penalty per tank than was imposed in most of those cases. It would be lower than the penalty per tank in the Wakefield order (1 tank, $17,500 penalty for both failure to test and failure to register).[2] The Commissioner may wish to take this into account in evaluating the penalty in this matter.

CONCLUSIONS

1. ECL article 17, title 10 governs bulk storage of petroleum. Among other things, this statute authorizes DEC to promulgate regulations to provide for the early detection of leaks and requires owners of petroleum bulk storage facilities to register them with the DEC.

2. From July 29, 1988 to May 15, 2003, ECL 71-1929 provided for a civil penalty not to exceed $25,000 per day for each violation of ECL article 17, title 10 or of the Department's regulations promulgated pursuant to this statute. ECL 71-1929 was amended, effective May 15, 2003, to increase this penalty to $37,500 (L

[2] DEC Staff's written closing statement cited a case as "Roger D Wakefield (2004 WL 2203383)" but there is no Roger D. Wakefield order in the Office of Hearings and Mediation Services' records of Commissioner's orders. The Westlaw citation corresponds to the Dulski order. The Dulski case involved failure to test two tanks, not one tank as suggested in the closing statement.

2003, ch 62, pt C, § 37). This amendment became effective after the date of the complaint in this matter and shortly before the tanks were removed.

3. Sections 612.2(a)(1) and (2) of 6 NYCRR provide that, "Within one year of the effective date of these regulations [December 27, 1985], the owner of any petroleum bulk storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed .... Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred."

4. Section 613.5(a)(1) of 6 NYCRR requires periodic testing of underground petroleum storage tanks of over 1,100 gallons capacity, with unprotected tanks (such as those at the Respondent's facility) to be retested every five years after the initial test, until permanently closed. Section 613.5(a)(4) requires that test reports must be sent by the owner or the test technician to the Department no later than 30 days after performance of the test, except that tests which show leaks must be reported within two hours of the discovery of the leak.

5. The Respondent violated 6 NYCRR 612.2(a) by failing to renew the registration of the facility that expired on May 19, 2002. He submitted an application for the renewal on August 13, 2002.

6. The Respondent violated 6 NYCRR 613.5(a) by failing to test the two 3,000 gallon underground petroleum bulk storage tanks at his facility at 286 East Main Street, Amsterdam, New York after purchasing the facility in 1997. The most recent tightness test of the tanks had occurred in October 1987, and the next test was already overdue at the time the Respondent purchased the facility. The tanks remained in the ground, untested, until the Respondent had them removed in June 2003. The Respondent did not submit a tightness testing report, and could not have done so because no tightness test was conducted.

RECOMMENDATION

I recommend that the Commissioner find that the Respondent violated 6 NYCRR 612.2(a) by failing to renew his petroleum bulk storage facility registration in a timely manner, and violated 6 NYCRR 613.5(a) by failing to tightness test the tanks in a timely manner. I further recommend that the Commissioner impose the

civil penalty requested by DEC Staff, consisting of no penalty for the late renewal of the registration and a $15,000 civil penalty for the testing violation, unless the Commissioner concludes that a lower penalty for the testing violation is appropriate in view of the penalties per tank in recent orders concerning failures to test.