

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**ORDER**

DEC Case No.  
R2-20150901-477

-by-

**VILLAGE KF 2 ASSOCIATES LLC,**

Respondent.

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This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Village KF 2 Associates LLC (respondent) violated section 17-1009(2) of the New York Environmental Conservation Law (ECL), and former and current regulations relating to respondent's 4,000-gallon petroleum bulk storage (PBS) facility No. 2-607183, located at 170 East 2nd Street, New York, New York (facility).

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

As set forth in the summary report, staff served respondent by certified mail on June 30, 2016, with a notice of motion for order without hearing, along with a supporting affirmation of counsel for staff, attaching exhibits, and an affidavit of a staff environmental engineer, attaching exhibits. Staff submitted proof that respondent received the papers. Respondent has not responded to staff's motion papers.

**Liability**

I concur with the ALJ's conclusion that Department staff has submitted evidence sufficient to establish its entitlement to summary judgment on the violations alleged in the motion. Department staff's motion for order without hearing in lieu of complaint establishes as a matter of law that respondent violated:

- (i) ECL 17-1009(2), section 612.2(b) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) and 6 NYCRR 613-1.9(d)(1), by failing to register a PBS facility within 30 days of becoming owner of the facility on December 16, 2013;

- (ii) 6 NYCRR 612.2(d), by failing to notify the Department thirty days prior to the closure and removal of a storage tank at respondent's PBS facility in 2014;<sup>1</sup> and
- (iii) 6 NYCRR 612.3(a) (eff. 1985, repealed 2015) and 6 NYCRR 613-1.9(d)(5) (eff. 2015), by failing to pay the required PBS facility registration fee.

### Civil Penalty

Department staff seeks a civil penalty of thirty thousand dollars (\$30,000).<sup>2</sup> The ALJ recommends, based on administrative precedent, that staff's requested civil penalty be reduced to seventeen thousand five hundred dollars (\$17,500).

I agree with the ALJ that staff's requested penalty should be reduced in consideration of the penalties assessed in prior orders involving New York City petroleum bulk storage facilities where a respondent has failed to re-register upon transfer of facility ownership and has failed to pay applicable registration fees (see e.g. Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

I note however that aggravating factors exist that support increasing the penalty above what has been customarily assessed. Staff's papers demonstrate that staff contacted respondent on multiple occasions and respondent was given opportunities to correct or otherwise address its violations and omissions (see e.g. Affirmation of John K. Urda, Esq., June 30, 2016, ¶¶ 10-18 [referencing letters that Department staff sent respondent on March 13, 2015, May 20, 2015, July 1, 2015, and October 7, 2015 regarding the outstanding fees that were due and to which no response was received, and a proposed order on consent to which no response was received], ¶¶ 19-20 [noting respondent's failure to appear at the scheduled calendar call], ¶ 44 [listing various of the aggravating factors]; see also Affidavit of Leszek T. Zielinski, June 30, 2016, ¶¶ 8-15).

Accordingly, based on this record, I am increasing the civil penalty that the ALJ recommends by five thousand dollars (\$5,000). I hereby assess a civil penalty in the amount of twenty-two thousand five hundred dollars (\$22,500). I am directing respondent to pay the penalty within thirty (30) days of the service of this order upon it. In addition, respondent is also directed to submit a complete and accurate petroleum bulk storage application for the facility, together with the outstanding PBS application fee of three hundred dollars (\$300), within fifteen (15) days of the service of the order upon it.

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<sup>1</sup> Respondent submitted an affidavit of removal from Michael D. Savino dated October 15, 2014, stating that the 4,000-gallon tank was removed from the facility "in accordance with regulations of the NYC Fire Department" (see Affidavit of Leszek T. Zielinski, June 30, 2016, Exhibit E [FDNY Affidavit of Removal]). Compliance with regulations promulgated by New York City, however, does not negate respondent's responsibility to comply with applicable DEC regulatory requirements.

<sup>2</sup> ECL 71-1929 authorizes the imposition of a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation (see Summary Report, at 4).

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

- I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 is granted.
- II. Respondent Village KF 2 Associates LLC is adjudged to have violated:
  - A. ECL 17-1009(2), by failing to register its PBS facility within 30 days of becoming owner of the facility;
  - B. 6 NYCRR 612.2(d), by failing to notify the Department thirty days prior to the closure and removal of a storage tank at respondent's PBS facility; and
  - C. 6 NYCRR 612.3(a) (eff. 1985, repealed 2015) and 6 NYCRR 613-1.9(d)(5) (eff. 2015), by failing to pay the required PBS facility registration fee.
- III. Respondent Village KF 2 Associates LLC is assessed a civil penalty in the amount of twenty-two thousand five hundred dollars (\$22,500), which is due and payable within thirty (30) days of service of a copy of this order on respondent. Payment shall be made in the form of a certified check, cashier's check, or money order payable to the "New York State Department of Environmental Conservation."
- IV. Within fifteen (15) days of the service of this order upon respondent Village KF 2 Associates LLC, respondent shall submit to the Department a complete and accurate petroleum bulk storage registration application for the facility, plus the applicable registration fee of three hundred dollars (\$300).
- V. The facility petroleum bulk storage registration application, the registration fee and the civil penalty shall be mailed or otherwise delivered to the following address:

John K. Urda, Esq.  
Assistant Regional Attorney  
NYS Department of Environmental Conservation, Region 2  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101-5401
- VI. All questions and correspondence regarding this order shall be addressed to John K. Urda, Esq., at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this order shall bind respondent Village KF 2 Associates LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: September 13, 2016  
Albany, New York

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**SUMMARY REPORT**

DEC Case No.  
R2-20150901-477

-by-

**VILLAGE KF 2 ASSOCIATES LLC,**

Respondent.

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I. Background

By notice of motion for order without hearing dated June 30, 2016, staff of the New York State Department of Environmental Conservation (“Department”) commenced this enforcement proceeding against respondent Village KF 2 Associates LLC (“respondent”) alleging that respondent violated: (i) section 17-1009(2) of the New York Environmental Conservation Law (“ECL”), section 612.2(b) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) and 6 NYCRR § 613-1.9(d)(1), by failing to register a petroleum bulk storage (“PBS”) facility within 30 days of becoming owner of the facility; (ii) 6 NYCRR § 612.2(d), by failing to notify the Department thirty days prior to the closure and removal of a storage tank at respondent’s PBS facility; and (iii) 6 NYCRR § 612.3(a) and 6 NYCRR § 613-1.9(d)(5), by failing to pay the required PBS facility registration fee.

Staff’s papers consist of a notice of motion for order without hearing dated June 30, 2016, the Affirmation of John K. Urda, Esq. dated June 30, 2016 (“Urda Affirm.”), attaching four exhibits, and the Affidavit of Leszek T. Zielinski, P.E. sworn to June 30, 2016 (“Zielinski Aff.”), attaching eight exhibits. See Appendix A attached hereto. The PBS facility is located at 170 East 2<sup>nd</sup> Street, New York, New York.

Staff served the notice of motion for order without hearing with supporting papers on respondent by certified mail on June 30, 2016, and has submitted copies of the return receipts reflecting that respondent received and signed for the papers. Respondent has not responded to staff’s motion papers, although a response was due within 20 days of service of the motion. See 6 NYCRR § 622.12(c).

Staff requests that the Commissioner issue an order: (i) finding that respondent committed the violations alleged; (ii) imposing on respondent a civil penalty in the amount of \$30,000; (iii) noting respondent’s continuing obligation to pay the outstanding registration fee of \$300; and (iv) granting such other and further relief as may be deemed just, proper and equitable under the circumstances. See Urda Affirm. at 8-9, Wherefore Clause.

## II. Findings of Fact

1. Respondent Village KF 2 Associates LLC is an active domestic limited liability company. See Urda Affirm. ¶ 3; see also id. Exhibit (“Ex.”) A (Entity Information Sheet, New York State Department of State, current through June 29, 2016).<sup>1</sup>
2. Respondent Village KF 2 Associates LLC became owner of the property located at 170 East 2nd Street, New York, New York, on December 16, 2013. See Urda Affirm. Ex. B (deed).
3. Respondent Village KF 2 Associates LLC submitted to the Department a PBS application form dated March 2, 2015 for the facility with PBS No. 2-607183, and the form was received by the Department on March 12, 2015. See Zielinski Aff. Ex. B.
4. The March 2, 2015 PBS application form reflects a change of facility ownership and that a 4,000 gallon aboveground fuel oil storage tank at the facility was removed on October 15, 2014. See Zielinski Aff. Ex. B (PBS application). The “Transaction” column on the left side of the first page of the PBS application form contains the following entry: “Type 3/2.” See id. In that column, #2 refers to change of ownership, and #3 refers to tank installation, closing, repair or reconditioning. See id. The PBS application form identifies the facility owner as Village KF 2 Associates LLC. See id.
5. The “Action” column on the second page of the March 2, 2015 PBS application form contains the number “3.” See id. This signifies closure and removal of a tank. See id.; see also id. Ex. A (PBS application code keys, reflecting that “Action” #3 means “Close/Remove Tank”).
6. On March 13, 2015, Department staff returned respondent’s PBS application because it did not include the required registration fee. See Zielinski Aff. ¶ 8; see also id. Ex. C. The letter included the following handwritten notation: “Ownership changed before tank was removed.” Id. Although the letter directed respondent to provide the requested information within 10 days, Department staff did not receive a response from respondent. See Zielinski Aff. ¶ 9.
7. On May 20, 2015, Department staff resent the letter returning respondent’s March 2015 PBS application because it did not include the required registration fee. See Zielinski Aff. ¶ 10; see also id. Ex. D. The letter contained the following handwritten notation: “5/20/15 SECOND & FINAL NOTICE.” Zielinski Aff. Ex. D.

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<sup>1</sup> Although the affirmation asserts that respondent is “an active domestic business corporation,” see Urda Affirm. ¶ 3, the caption of staff’s motion, and the supporting documentation, including application forms prepared and submitted by respondent, reflect that respondent is an “LLC,” or limited liability company. See e.g. Urda Affirm. Ex. A (Department of State Entity Information Sheet reflecting that the entity is a domestic limited liability company); id. Ex. B (deed reflecting that owner of site is an “LLC”); Zielinski Aff. Ex. B (PBS application form identifying owner as “Village KF 2 Associates LLC”).

8. On June 26, 2015, respondent submitted a PBS application form, now dated June 22, 2015, but did not include the required registration fee. See Zielinski Aff. ¶ 11; see also id. Ex. E. Included with the application form was an October 15, 2014 letter-affidavit of M. Savino on letterhead of “Statewide Oil & Heating Co., Inc., stating that a 4,000 gallon aboveground fuel oil storage tank had been removed from the site “in accordance with regulations of the NYC Fire Department.” Id.
9. On July 1, 2015, staff sent respondent another letter rejecting respondent’s application for failure to provide the \$300 registration fee, and requesting a copy of the deed to show the date that ownership of the facility was transferred to respondent. See Zielinski Aff. ¶ 12; see also id. Ex. F. In addition to stating that the requested information was due within ten days, the letter contained the following handwritten notation: “If the ownership transfer date was after 10/15/2014 there is no fee. Facility information report is enclosed.” Id.
10. On October 5, 2015, staff received a PBS application form from respondent, dated October 1, 2015. The application included a copy of the tank removal affidavit and the December 16, 2013 deed, but did not include the required registration fee. See Zielinski Aff. ¶ 13; see also id. Ex. G.
11. By letter dated October 7, 2015, staff returned respondent’s application because it did not include the required registration fee. The letter included the following handwritten notation: “Ownership changed before tank was removed.” Zielinski Aff. Ex. H. Respondent failed to respond to staff’s October 7, 2015 letter. Id. ¶ 15.

### III. Discussion

#### A. Liability – Conclusions of Law

A motion for order without hearing is governed by the same standards as are applicable to motions for summary judgment under the CPLR. See 6 NYCRR § 622.12(d). On an unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the violations alleged in the motion. See Matter of Edelstein, Order of the Commissioner, July 18, 2014, at 2; see also Matter of Hunt, Decision and Order of the Commissioner, July 25, 2006, at 7 n2.

Department staff has asserted three causes of action relating to: (i) respondent’s alleged failure to register the PBS facility after becoming its owner; (ii) failure to notify the Department in advance regarding closure and removal of a tank at the facility; and (iii) failure to pay the required facility registration fee. Department staff’s submissions establish entitlement to judgment on all three causes of action.<sup>2</sup> Staff has submitted an affirmation of counsel for staff, an affidavit of the Chief of the Bulk Storage Unit of the Department’s Bureau of Spill Prevention

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<sup>2</sup> Staff’s second cause of action asserts a claim for failure to provide 30 days’ advance notice of the closure and removal of the tank at the facility on October 15, 2014. See Urda Affirm. ¶¶ 30-33. The violation occurred in 2014, prior to the repeal of Part 612.

and Response, and several documents, reflecting staff's repeated efforts to procure respondent's compliance. In addition, respondent has failed to respond to staff's motion or otherwise appear in this proceeding, even though served properly with the motion for order without hearing.

I conclude that Department staff has established that respondent committed the violations alleged. I therefore recommend that the Commissioner grant staff's unopposed motion for order without hearing, and hold respondent liable on all three causes of action.

## B. Civil Penalty

Pursuant to ECL § 71-1929(1), the Commissioner may impose a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day on any 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, or the rules, regulations, orders or determinations of the commissioner promulgated thereto." In its motion for order without hearing, Department staff calculated a combined total maximum statutory penalty for the alleged violations as \$68,475,000. See Urda Affirm. at 7, ¶ 38.

Department staff requests that the Commissioner impose a civil penalty in the amount of \$30,000, comprised of \$10,000 for each of the three causes of action. See id. ¶ 39. To support the requested penalty, staff discusses several factors consistent with the Department's Civil Penalty Policy (DEE-1) and cites several aggravating factors, including that the facility is located in a heavily-populated residential and commercial area of Manhattan, respondent's failure to attend a calendar call, and respondent's failure to respond to staff's repeated efforts to obtain respondent's compliance. See id. ¶¶ 39-44.

Several Commissioner orders have addressed circumstances such as those alleged in the first and third causes of action in this proceeding, to wit: where a respondent has failed to register a PBS facility within 30 days of becoming owner of the facility, and has failed to pay the required registration fee. See e.g. Matter of 148-158 West 142 Owners LLC, Order of the Commissioner, June 2, 2016; Matter of 962-68 Anderson Avenue Housing Development Fund Corporation, Order of the Commissioner, March 31, 2016; Matter of RH 1218 Corp., Order of the Commissioner, January 28, 2016. In such cases, the Commissioner has held that, absent mitigating or aggravating circumstances, a proper civil penalty is \$5,000 for violations less than two years' duration, \$7,500 for violations between two and five years' duration, and \$10,000 for violations exceeding five years' duration. See Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2.

The record reflects that respondent's failure to register the facility for more than two years but less than five years prior to the commencement of this proceeding. See Finding of Fact No. 2, above. Although Department staff seeks a penalty of \$20,000 for respondent's failure to register and failure to pay the registration fee, I find that, under 12 Martense and its progeny, an appropriate penalty for respondent's violations alleged here would be \$7,500.

With respect to the second cause of action, relating to respondent's failure to notify the Department thirty days prior to the closure and removal of the tank at the facility, I find that



Department staff's recommended penalty of \$10,000 is authorized and appropriate. Thus, I recommend that the Commissioner assess a total civil penalty in the amount of seventeen thousand five hundred dollars (\$17,500) for respondent's violations.

IV. Recommendations

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

A. Holding that respondent Village KF 2 Associates LLC violated:

- i. ECL § 17-1009(2), 6 NYCRR § 612.2(b) (prior to October 11, 2015) and 6 NYCRR § 613.9(d)(1) (from October 11, 2015 forward) by failing to register the PBS facility within thirty days of becoming owner of the facility;
- ii. 6 NYCRR § 612.2(d) by failing to notify the Department thirty days prior to the closure and removal of the tank at the facility on October 15, 2014; and
- iii. 6 NYCRR § 612.3(a) (prior to October 11, 2015) and 6 NYCRR § 613-1.9(d)(5) (from October 11, 2015 forward) by failing to pay the required PBS facility registration fee;

B. Directing respondent Village KF 2 Associates LLC to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, together with the applicable registration fees; and

C. Directing respondent Village KF 2 Associates LLC to pay a civil penalty in the amount of seventeen thousand five hundred dollars (\$17,500) within thirty (30) days of service of the Commissioner's order.

\_\_\_\_\_/s/\_\_\_\_\_  
D. Scott Bassinson  
Administrative Law Judge

Dated: August 17, 2016  
Albany, New York

## APPENDIX A

*Matter of Village KF 2 Associates LLC*  
DEC File No. R2-20150901-477  
Motion for Order Without Hearing

1. Notice of Motion for an Order Without a Hearing, dated June 30, 2016
2. Affirmation of John K. Urda in Support of Motion for an Order Without a Hearing, dated June 30, 2016, attaching the following exhibits:
  - A. NYS Department of State Entity Information Sheet regarding Village KF 2 Associates LLC, reflecting information through June 29, 2016
  - B. Recording and Endorsement Cover Page of the Office of the City Register of the City of New York, attaching deed dated December 16, 2013
  - C. Email from John K. Urda, Esq. dated September 1, 2015
  - D. Letter from John K. Urda, Esq. to Village KF 2 Associates LLC dated December 2, 2015
3. Affidavit of Leszek T. Zielinski, P.E. in Support Motion for an Order Without a Hearing, sworn to June 30, 2016, attaching the following exhibits:
  - A. Facility Information Report for PBS facility No. 2-607183, printed on June 30, 2016; and PBS Certificate for PBS facility No. 2-607183, printed on August 17, 2011
  - B. PBS Application Form for PBS facility No. 2-607183, dated March 2, 2015, stamped received by Department on March 12, 2015; deed dated December 16, 2013; and Authorization to Submit Facility Registration Information dated March 6, 2015
  - C. Cover Letter dated March 13, 2015 from N. Lombardo regarding return of PBS application form
  - D. Cover Letter dated March 13, 2015 from N. Lombardo regarding return of PBS application form, with handwritten note stating “5/20/2015 Second and Final Notice”
  - E. PBS Application Form for PBS facility No. 2-607183, dated June 22, 2015; and October 15, 2014 letter from M. Savino with title “FDNY Affidavit of Removal”

- F. Cover Letter dated July 1, 2015 from N. Lombardo regarding return of PBS application form
- G. PBS Application Form for PBS facility No. 2-607183, dated October 1, 2015; October 15, 2014 letter from M. Savino with title “FDNY Affidavit of Removal;” and deed dated December 16, 2013
- H. Cover Letter dated October 7, 2015 from N. Lombardo regarding return of PBS application form