

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

In the Matter of the Alleged Violation  
of Article 17 of the Environmental  
Conservation Law (ECL) of the State of  
New York and former Parts 612 and 613  
and current Part 613 of Title 6 of the  
Official Compilation of Codes, Rules  
and Regulations of the State of New  
York (6 NYCRR),<sup>1</sup>

**ORDER**

DEC Case No.  
R6-20150428-29

- by -

**WATERBURY SQUARE, INC.,**

Respondent.

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This administrative enforcement proceeding concerns alleged violations of ECL article 17 and 6 NYCRR parts 612 and 613 at a petroleum bulk storage (PBS) facility (No. 6-260754) (facility) that respondent Waterbury Square, Inc. owns at 107 River Street, Oriskany, New York. A 12,000-gallon underground PBS tank and a 2,000-gallon aboveground PBS tank, both of which contained fuel oil for onsite consumption, are located at the facility. Both tanks have been out-of-service since at least 2014.

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this proceeding by service of a notice of hearing and complaint, dated January 27, 2016. In its complaint, Department staff alleges that respondent: (1) failed to re-register the facility within thirty (30) days of the transfer of ownership to respondent; and (2) failed to permanently close the out-of-service PBS underground tank and aboveground tank.

The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso.

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<sup>1</sup> Parts 612 and 613, together with Part 614, of 6 NYCRR were repealed and replaced by a new part 613, effective October 11, 2015. The violations alleged by staff of the New York State Department of Environmental Conservation occurred before and continued after the effective date of the current 6 NYCRR part 613.

Although respondent was served at the corporation's address for service of process, respondent objected to the service as it was addressed to James Kernan, PE, Esq., President, Waterbury Square, Inc. At a pre-hearing conference, respondent accepted the previous service, and was granted an extension of time to answer the complaint or settle the matter (see Matter of Waterbury Square, Inc., Ruling of the ALJ, May 10, 2016, at 3). The parties did not settle the matter, and respondent failed to answer the complaint. The matter was then scheduled for a default hearing on May 5, 2016. Following the hearing at which respondent was represented by counsel, ALJ Caruso ordered respondent to answer the complaint and remove the petroleum product from the underground and the aboveground PBS tanks (see id. at 5-6).

Respondent pumped the petroleum product from the two PBS tanks on May 23, 2016. At that time, it was discovered that the underground PBS tank had been taking on water. In addition, respondent filed and served on Department staff an answer verified June 6, 2016.

By notice of motion dated September 14, 2016, Department staff moved for an order without hearing seeking summary judgment against respondent on the alleged violations of the following:

- current 6 NYCRR 613-1.9(d)(1) and former 6 NYCRR 612.2(b) for respondent's failure to register the PBS facility within thirty (30) days of transfer of ownership of the facility to respondent; and
- current 6 NYCRR 613-3.5 and 613-4.5 and former 6 NYCRR 613.9(b) for respondent's failure to permanently close the out-of-service underground and aboveground storage tank systems at the facility.

These violations were identified during site visits by DEC Environmental Engineer Ronald F. Novak on March 10 and August 19, 2015, and May 23, 2016 (see Affidavit of Ronald F. Novak, sworn to September 14, 2016 [Novak Aff], ¶¶ 7-9, which accompanied staff's motion for an order without hearing).

Respondent submitted a verified response in opposition to staff's motion (see Response, verified by Frederick K. Davis, President of Waterbury Square, Inc. on October 7, 2016). ALJ Caruso prepared the attached summary report which I adopt as my decision in this matter, subject to my comments below.

## Liability

I concur with the ALJ's determination that Department staff is entitled to a finding of liability with respect to the referenced violations. Although respondent opposed staff's motion, respondent failed to raise a triable issue of fact requiring a hearing.

## Penalty

With respect to penalty, Department staff requested that respondent pay a civil penalty of fifteen thousand dollars (\$15,000) with up to five thousand dollars (\$5,000) suspended provided respondent complies with this order. In support of the requested civil penalty, staff noted that the penalty requested is consistent with ECL 71-1929(1) and the Department's enforcement guidance memorandum entitled "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy," dated May 21, 2003 (see Department Staff's Brief, September 14, 2016, at 6-7). Staff further details the serious nature of the violations and the fact that the underground PBS tank was taking on water (see id. at 7; see also Summary Report at 16). Based on this record, a civil penalty in the amount of fifteen thousand dollars (\$15,000) with five thousand dollars (\$5,000) suspended provided respondent complies with this order, is authorized and appropriate.

## Corrective Action

Staff has also requested that respondent be directed to permanently close the underground storage tank system at the facility in accordance with 6 NYCRR 613-3.5(b) and permanently close the aboveground storage tank system at the facility in accordance with 6 NYCRR 613-4.5(b) within sixty (60) days of service of the Commissioner's order on respondent.

The corrective action that staff requests is authorized and warranted, and the compliance time period requested - sixty (60) days - is appropriate. Within thirty (30) days after permanent closure, respondent is to submit records to the Department that "are capable of demonstrating compliance with [the applicable] closure requirements" (6 NYCRR 613-3.5[c] and 613-4.5[c]).

**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 is granted.
- II. Respondent Waterbury Square, Inc. is adjudged to have violated the following regulations at its facility located at 107 River Street, Oriskany, New York:
  - A. former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1)(since October 11, 2015) for failing to register the facility within thirty (30) days of transfer of ownership to respondent;
  - B. former 6 NYCRR 613.9(b) and current 6 NYCRR 613-3.5, for failing to permanently close the out-of-service underground storage tank system; and
  - C. former 6 NYCRR 613.9(b) and current 6 NYCRR 613-4.5, for failing to permanently close the out-of-service aboveground storage tank system.
- III. Respondent Waterbury Square, Inc. is hereby assessed a civil penalty in the amount of fifteen thousand dollars (\$15,000) for the above referenced violations, with payment of five thousand dollars (\$5,000) of the penalty suspended, conditioned upon respondent's compliance with the provisions of this order.
- IV. Within thirty (30) days of the service of this order upon respondent, respondent Waterbury Square, Inc. shall pay the payable portion of the civil penalty referenced in paragraph III (that is, ten thousand dollars [\$10,000]) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

The payment shall be sent to the following address:

Office of General Counsel  
NYSDEC Region 6  
317 Washington Street  
Watertown, New York 13601  
Attention: Nels G. Magnuson, Esq.

Should respondent fail to satisfy the terms and conditions of this order, the suspended portion of the penalty (that is, five thousand dollars [\$5,000]) shall become immediately due and payable. The five thousand dollars (\$5,000) shall be submitted in the same form and to the same address as the ten thousand dollar (\$10,000) payable penalty payment referenced in this paragraph.

V. Within sixty (60) days, of service of this order on respondent Waterbury Square, Inc., respondent shall permanently close:

- (A) the underground storage tank system in accordance with 6 NYCRR 613-3.5(b); and
- (B) the aboveground storage tank system in accordance with 6 NYCRR 613-4.5(b).

VI. Within thirty (30) days of permanent closure, respondent Waterbury Square, Inc. shall furnish records that demonstrate compliance with the applicable closure requirements for the underground and aboveground storage tank systems to the following:

Mr. Ronald F. Novak, P.E.  
Regional PBS Supervisor  
NYSDEC Region 6  
317 Washington Street  
Watertown, New York 13601.

VII. Respondent Waterbury Square, Inc. shall provide to any duly designated officer, employee or agent of the Department entry to respondent's PBS facility or areas in the vicinity of respondent's facility that are under the control of respondent, or as to which respondent has authority to provide access to others and any areas under respondent's control necessary to gain access thereto, for the purposes of:

- (A) inspection;
- (B) sampling and testing that the Department deems necessary;
- (C) ascertaining respondent's compliance with the ECL, the Navigation Law, the regulations promulgated pursuant to the ECL and the Navigation Law, and the provisions of this order;

- (D) completing permanent closure of the facility as ordered; and
- (E) investigating and remediating any petroleum contamination found at the facility.

VIII. The provisions, terms and conditions of this order shall bind respondent Waterbury Square, Inc., 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: April 4, 2017  
Albany, New York

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

In the Matter of the Alleged Violation of  
Article 17 of the Environmental Conservation  
Law (ECL) of the State of New York and Part  
613 of Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the State  
of New York (6 NYCRR),

**SUMMARY REPORT**

DEC Case No.  
R6-20150428-29

- by -

**WATERBURY SQUARE, INC.,**

Respondent.

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Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General  
Counsel (Nels G. Magnuson, Assistant Regional Attorney, of  
counsel), for staff of the Department of Environmental  
Conservation

-- Kernan Professional Group, LLP (James M. Kernan of  
counsel) for respondent Waterbury Square, Inc.

Procedural History

Staff of the New York State Department of Environmental  
Conservation (Department) served respondent Waterbury Square,  
Inc. (respondent) with a notice of hearing and complaint, dated  
January 27, 2016, alleging respondent violated 6 NYCRR 612.2(b),  
for failing to reregister respondent's petroleum bulk storage  
(PBS) facility located at 107 River Street, Oriskany, New York  
within thirty (30) days of the date (September 12, 2014) that  
respondent acquired the facility; and 6 NYCRR 613.9(b), for  
failing to properly close tanks permanently out of service at  
respondent's PBS facility.<sup>1</sup>

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<sup>1</sup> Parts 612, 613 and 614 were repealed and replaced by a new part 613,  
effective October 11, 2015. The violations alleged by staff occurred before

The complaint sought an order of the Commissioner: (1) finding respondent in violation of 6 NYCRR 612.2(b) and 613.9(b); (2) assessing a civil penalty of at least fifteen thousand dollars (\$15,000) with an appropriate portion of the penalty, but not more than seven thousand five hundred dollars (\$7,500) suspended to ensure compliance with the order and directing payment of the civil penalty within 60 days of the Commissioner's order; (3) directing respondent to submit an approvable PBS registration application together with applicable fees in accordance with 6 NYCRR 613-1.9 within 10 days of the Commissioner's order; and (4) directing respondent to permanently close the underground storage tank system in accordance with 6 NYCRR 613-3.5(b) and permanently close the aboveground storage tank system in accordance with 6 NYCRR 613-4.5(b) within 60 days of the Commissioner's order.

A pre-hearing conference was held before the undersigned Administrative Law Judge (ALJ) on March 8, 2016 at the Department's Region 6 sub-offices, 14th Floor, 207 Genesee Street, Utica, New York. Department staff was represented by Nels G. Magnuson, Esq., Assistant Regional Attorney with Ronald F. Novak, PE, an engineer in the Department's Division of Environmental Remediation, Region 6 also in attendance. Respondent was represented by Kernan Professional Group, LLP (David Bagley, Esq., of counsel) with Frederick Davis, president of respondent in attendance.

At the pre-hearing conference, respondent noted an objection to the service of the notice of hearing and complaint, but stated respondent would accept the previous service if staff acknowledged that Mr. Davis is the president of respondent. Staff acknowledged that fact, and respondent requested more time to file a response to the complaint. The parties agreed, on the record, that respondent would either sign and return Department staff's order on consent or serve Department staff with an answer to the complaint by March 18, 2016.

Respondent returned a signed order on consent to Department staff by cover letter dated March 18, 2016. Respondent made substantive changes to the order on consent that were not

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and continue after the effective date of the current 6 NYCRR part 613. The registration requirements applicable for facilities transferred to new owners are now found at 6 NYCRR 613-1.9(d). The requirements for the closure of underground storage tanks and aboveground storage tanks are now found at 6 NYCRR 613-3.5 and 613-4.5, respectively.



acceptable to the Department. As revised, the order on consent was rejected by staff. After failing to resolve the matter, Department staff served a notice of hearing dated April 11, 2016 advising respondent that a hearing would be held on May 5, 2016 and staff would move for a default judgment at that time.

On May 4, 2016, respondent served Department staff and the undersigned ALJ with an unsigned order to show cause and petition in a New York State Supreme Court proceeding commenced against the Commissioner seeking to prevent the entry of a default judgment against respondent in this matter. The hearing was held on May 5, 2016 at the Department's Region 6 Utica sub-offices. Appearing before me were Mr. Magnuson and Mr. Novak, for Department staff, and James M. Kernan, PE, Esq. and Mr. Davis, for respondent. Respondent continued to argue that the Department had not obtained jurisdiction even though respondent had now appeared before me twice, previously accepted service and moved for extra time to respond to the complaint. Mr. Kernan acknowledged that respondent received the notice of hearing and complaint. Respondent also moved to adjourn this proceeding pending the outcome of the Supreme Court matter.

By ruling dated May 10, 2016, I denied respondent's motion to adjourn the proceeding and directed respondent to serve an answer to the complaint within twenty (20) days. In addition, respondent was directed to remove any liquid and sludge from the underground and aboveground storage tank systems at the facility within thirty (30) days (see Matter of Waterbury Square, Inc., Ruling of ALJ, May 10, 2016, at 5-6).

On May 23, 2016, respondent's contractor pumped the petroleum product from the aboveground and underground storage tanks. Respondent served and filed an answer verified June 6, 2016.

Department staff served a notice of motion for order without hearing dated September 14, 2016 and supporting papers, seeking summary judgment against respondent Waterbury Square, Inc. for alleged violations of ECL article 17, former 6 NYCRR parts 612, 613 and 614 and current 6 NYCRR part 613. On September 16, 2016, Department staff served its notice of motion and supporting statements and exhibits on the respondent by serving the Secretary of State pursuant to Business Corporation Law § 306. Staff also served the notice of motion and supporting statements and exhibits on respondent's attorney by first-class mail on September 21, 2016.

Respondent served and filed an October 7, 2016 verified response in opposition to staff's motion along with exhibits in support of respondent's position.

Staff's Charges

Department staff's motion for order without hearing consists of the notice of motion; motion for order without hearing; affidavit of Ronald F. Novak (Novak Affidavit), sworn to September 14, 2016; affidavit of Nels G. Magnuson (Magnuson Affidavit), sworn to September 14, 2016; and staff's brief dated September 14, 2016. Staff also submitted the affidavit of service of Drew Wellette, sworn to September 16, 2016. The motion sets forth two causes of action. The Novak Affidavit has the following exhibits attached:

- Exhibit A - Deed from the Board of County Legislators of the County of Oneida to 107 River St., Inc., dated September 12, 2014, conveying premises known as tax map parcel 276.018-2-30.
- Exhibit B - Petroleum Bulk Storage Application from Waterbury Felt Company, Inc. dated February 29, 2012.
- Exhibit C - Petroleum Bulk Storage Certificate No. 6-260754 issued to Waterbury Felt Co., Inc. on March 3, 2012 with an expiration date of March 3, 2017.
- Exhibit D - Petroleum Bulk Storage Transaction Log dated March 24, 2016; Petroleum Bulk Storage Application from Waterbury Square, Inc. dated March 9, 2016; copy of deed referenced in Exhibit A; NYS Department of State, Division of Corporations Entity Information sheet for Waterbury Square, Inc. generated March 2, 2016; and a copy of the registration fee check.
- Exhibit E - Petroleum Bulk Storage Certificate No. 6-260754 issued to Waterbury Square, Inc. on April 1, 2016 with an expiration date of September 12, 2019.
- Exhibit F - Notice of Violation addressed to Waterbury Square, Inc. dated April 8, 2015.
- Exhibit G - Petroleum Bulk Storage Program Facility Information Report for respondent's facility located at 107 River Street, Oriskany, New York, generated September 7, 2016.

The Magnuson Affidavit has the following exhibits attached:

Exhibit A - NYS Department of State, Division of Corporations Entity Information sheet for Waterbury Square, Inc. generated September 6, 2016.

Exhibit B - Cover letter to Waterbury Square, Inc. dated January 27, 2016 with signed certified mail receipt, notice of hearing and complaint attached. The complaint has the following exhibits attached:

Exhibit A - NYS Department of State, Division of Corporations Entity Information sheet for Waterbury Square, Inc. generated January 21, 2016.

Exhibit B - Deed from the Board of County Legislators of the County of Oneida to 107 River St., Inc., dated September 12, 2014, conveying premises known as tax map parcel 276.018-2-30.

Exhibit C - Petroleum Bulk Storage Certificate No. 6-260754 issued to Waterbury Felt Co., Inc. on March 3, 2012 with an expiration date of March 3, 2017.

Exhibit D - Notice of Violation addressed to Waterbury Square, Inc. dated April 8, 2015.

Exhibit E - Petroleum Bulk Storage Application from Waterbury Felt Co., Inc. dated February 29, 2012.

Exhibit F - Petroleum Bulk Storage Program Facility Information Report for facility located at 107 River Street, Oriskany, New York, generated January 22, 2016.

Exhibit C - Affidavit of service of April L. Sears, sworn to February 2, 2016 with copy of USPS certified mail receipt attached.

Exhibit D - Cover letter from Kernan Professional Group, LLP dated June 6, 2016 with respondent's June 6, 2016 verified answer attached.

Department staff alleged the following:

1. Respondent violated current 6 NYCRR 613-1.9(d)(1) and former 6 NYCRR 612.2(b) for failing to register the PBS facility within thirty (30) days of transfer of ownership of the facility to respondent; and

2. Respondent violated current 6 NYCRR 613-3.5 and 613-4.5 and former 6 NYCRR 613.9(b) for failure to permanently close the out of service PBS tanks at the facility.

Based on these allegations, Department staff seeks an order:

1. finding respondent in violation of current 6 NYCRR 613-1.9(d)(1) and former 6 NYCRR 612.2(b), and current 6 NYCRR 613-3.5 and 613-4.5 and former 6 NYCRR 613.9(b);
2. assessing a civil penalty in the amount of fifteen thousand dollars (\$15,000) with up to five thousand dollars (\$5,000) suspended provided respondent complies with the Commissioner's order;
3. directing respondent to permanently close the underground storage tank (UST) system in accordance with 6 NYCRR 613-3.5(b) and permanently close the aboveground storage tank (AST) system at the facility in accordance with 6 NYCRR 613-4.5(b) within sixty (60) days of the Commissioner's order;
4. directing respondent to provide any duly designated officer, employee or agent of the Department entry to respondent's PBS facility or areas in the vicinity of Respondent's facility which may be under the control of Respondent, and as to which Respondent has authority to provide access to others and any areas under Respondent's control necessary to gain access thereto, for the purposes of inspection, sampling and testing that the Department deems necessary, ascertaining Respondent's compliance with the ECL, the Navigation Law, the regulations promulgated thereto, and provisions of the order, completing permanent closure of the facility as ordered, and investigating and remediating any petroleum contamination found at the site;
5. directing that all submissions to the Department be sent to Ronald F. Novak, P.E.; and
6. granting such other and further relief as the Commissioner may deem just and appropriate under the circumstances.<sup>2</sup>

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<sup>2</sup> Department staff also requests that the following be ordered: (i) the penalty assessed in the order constitutes a debt owed to the State of New York; (ii) failure to pay the assessed penalty, or any part thereof, in accordance with the schedule contained in the order, may result in referral to the New York State Attorney General for collection of the entire amount owed (including the assessment of interest, and a charge to cover the cost of collecting the debt), or referral to the New York State Department of Taxation and Finance, which may offset any tax refund or other monies that may be owed to respondent by the State of New York by the penalty amount; and (iii) any suspended or stipulated penalty provided for in this order will constitute a debt owed to the State of New York when and if such penalty becomes due. This information is more appropriately addressed in the body of the

## Respondent's Position

In opposition to Department staff's motion, respondent Waterbury Square, Inc. submitted a verified response dated October 7, 2016 (Response) with the following exhibits attached:

- Exhibit 1 - Correspondence from Kernan Professional Group, LLP to Nels G. Magnuson, dated February 10, 2016.
- Exhibit 2 - Waterbury Square, Inc. v Seggos, Order to Show Cause signed by Hon. Patrick F. MacRae (Supreme Court, Oneida County) on May 5, 2016.
- Exhibit 3 - Waterbury Square, Inc. v Seggos, Order to Show Cause signed by Hon. Patrick F. MacRae (Supreme Court, Oneida County) on May 5, 2016 with petition dated May 4, 2016 attached. The petition has the following attached:
  - EP1 - Waterbury Felt Company, Inc. v 107 River Street, Inc., Order to Show Cause signed by Hon. Patrick F. MacRae (Supreme Court, Oneida County) on September 12, 2014 with the affidavit of Peter C. Earle sworn to September 12, 2014 attached.
  - EP2 - The cover letter, complaint, and attachments referenced in Exhibit B to the Magnuson Affidavit.
  - EP3 - Notice of hearing from Department staff dated January 27, 2016.
  - EP4 - Correspondence from Kernan Professional Group, LLP to Nels G. Magnuson, dated February 10, 2016.
  - EP5 - Correspondence from Kernan Professional Group, LLP to Nels G. Magnuson, dated March 18, 2016 with the executed consent order and check attached.
  - EP6 - Cover letter from Nels G. Magnuson to Kernan Professional Group, LLP and notice of hearing dated April 11, 2016.
  - EP7 - Correspondence from the State Education Department to Glenn B. Block dated September 14, 2015.
  - EP8 - Waterbury Felt Company, Inc. v 107 River Street, Inc., correspondence from Hon. Patrick

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transmittal letter serving the order on respondent, not in a Commissioner's order.

F. MacRae with order on settlement and transcript attached.

- Exhibit 4 - Waterbury Felt Company, Inc. v 107 River Street, Inc., Order to Show Cause signed by Hon. Patrick F. MacRae (Supreme Court, Oneida County) on September 12, 2014.
- Exhibit 5 - Correspondence from Kernan Professional Group, LLP to Nels G. Magnuson, dated March 18, 2016 with the executed consent order and check attached.
- Exhibit 6 - Affidavit of James Perone, sworn to July 6, 2016.

Respondent denies the allegations set forth in Department staff's motion, and argues respondent answered and placed at issue the allegations of staff's complaint. Respondent states this proceeding cannot go forward because of an action commenced in New York State Supreme Court, Oneida County, against the Commissioner seeking declaratory judgment and a writ of prohibition to prohibit the Commissioner from entering a default judgment against respondent. Respondent also incorporates by reference the allegations against the Department contained in respondent's petition in support of an order to show cause. Respondent also avers that respondent was delayed in responding to the Department's demands due to other litigation in New York State Supreme Court, Oneida County, with the former owner of the facility.

Respondent points out that respondent undertook and completed the requirements ordered by the May 10, 2016 ruling. Respondent also argues that the intended use of the property should mitigate any fines and penalties. Lastly, respondent argues that this proceeding may be barred in whole or part by estoppel. Respondent requests that staff's motion be denied on the grounds of other actions pending and prohibiting the entering of a judgment.

#### **FINDINGS OF FACT**

1. Respondent Waterbury Square, Inc. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 107 River Street, Oriskany, New York (facility). In particular, PBS tank number 1 has a capacity of 12,000 gallons is located underground and contains No. 6 fuel oil; PBS tank number 2 has a capacity of 2,000 gallons is

located aboveground and contains No. 2 fuel oil. (Novak Affidavit at ¶¶ 4, 5, 6, and 7, Exhibits A, B, C, D and E.)

2. Respondent Waterbury Square, Inc. is listed as an active domestic business corporation in the State of New York and was formerly known as 107 River St., Inc. (Magnuson Affidavit at ¶ 3, Exhibit A.)
3. The Department received a PBS application dated February 29, 2012 from the previous owner of the facility, Waterbury Felt Co., Inc. (Novak Affidavit at ¶ 6, Exhibit B.)
4. The Department issued PBS Certificate No. 6-260754 to Waterbury Felt Co., Inc. on March 12, 2012 with an expiration date of March 3, 2017. (Novak Affidavit at ¶ 6, Exhibit C.)
5. On September 12, 2014, the County of Oneida, by deed, transferred all right, title and interest in the facility to 107 River St., Inc., now known as respondent Waterbury Square, Inc., the facility's current owner. This deed was recorded in the Oneida County Clerk's Office on September 12, 2014 as Instrument No. 2014-012831. (Novak Affidavit at ¶ 5, Exhibit A; Magnusson Affidavit at ¶ 3, Exhibit A.)
6. The Department attempted to inspect respondent's facility on March 10, 2015 but it was closed. Novak Affidavit at ¶ 8, Exhibit F.)
7. Department staff sent a notice of violation to respondent dated April 8, 2015, notifying respondent that respondent was required to comply with the PBS regulations and advising respondent to submit a PBS application and close respondent's PBS tanks. (Novak Affidavit at ¶ 8, Exhibit F.)
8. On August 19, 2015, Department staff inspected the PBS facility and determined that the two PBS tanks were no longer in service and had not been in service since at least 2014, but were not permanently closed. (Novak Affidavit at ¶ 8.)
9. On March 16, 2016, Department staff received a PBS application from respondent Waterbury Square, Inc. identifying respondent as the facility owner, tank owner and operator of the facility. (Novak Affidavit at ¶ 7,

Exhibit D.)

10. The Department issued PBS Registration Certificate No. 6-260754 to respondent Waterbury Square, Inc. on April 1, 2016. (Novak Affidavit at ¶ 7, Exhibit E.)
11. On May 23, 2016, Department staff met with respondent's representative at the facility and witnessed respondent's contractor removing the liquids from PBS tanks number 1 and 2. (Novak Affidavit at ¶ 9.)
12. Department staff determined that PBS tank number 1, the 12,000 gallon UST, had taken on water since staff's previous visit to the facility in August 2015. (Novak Affidavit at ¶ 9.)
13. Respondent has not permanently closed the out of service PBS tanks. (Novak Affidavit at ¶ 10.)

#### **DISCUSSION**

Department staff's motion for order without hearing raises a procedural issue that must be discussed in advance of the merits. Staff's complaint recognized that the provisions of current 6 NYCRR part 613 replaced former parts 612 and 613, but staff only alleged violations of the former regulations. Staff's motion amends the causes of action of the complaint by including the violation of the current regulations (after October 11, 2015) in addition to the former regulations. The underlying factual allegations have not changed. The motion relates to the complaint's facts and charges and does not include any additional causes of action. In effect, staff's motion conforms the pleadings to the staff's proof.

In addition, the motion decreases the maximum amount of suspended penalty requested by staff from up to seven thousand five hundred dollars (\$7,500) to up to five thousand dollars (\$5,000). The total penalty of fifteen thousand dollars (\$15,000) remains unchanged. If any portion of the penalty is suspended, it is at the discretion of the Commissioner.

Staff's motion for order without hearing does not include a motion to amend the pleadings or a motion to conform the pleadings to the proof, which at this point in the proceedings would require leave of the ALJ. Staff's motion, however, does not expand the violations alleged in the complaint or increase



respondent's total liability. Moreover, the pleadings of the complaint are sufficiently particular to give the court and parties notice of the facts intended to be proved and the material elements of each cause of action. Those material elements are identical under the former and current regulations. Respondent was provided notice and an opportunity to respond to staff's motion for order without hearing and did so.

As a result, I conclude that respondent will not be prejudiced if the violation of the current regulations are considered in addition to the former regulations.

### Liability

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR (see 6 NYCRR 622.12[d]). "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, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report). CPLR 3212(b) 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 a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (see Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003 at 4).

In this instance, Department staff must establish its causes of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by tendering evidentiary proof in admissible form. It is Department staff's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged by staff. I conclude staff has made a prima facie showing of the violations alleged.

### First Cause of Action

Pursuant to ECL 17-1003(1)(a), a facility is defined as "a single property or contiguous or adjacent properties used for a common purpose which are owned by the same person on or in which

are located" one or more stationary tanks with a capacity greater than one thousand one hundred gallons. The owner of the facility is "any person who has legal or equitable title to a facility" (see ECL 17-1003[4]), in other words, the owner of the real property on or in which the PBS tanks are located.

Staff's papers demonstrate that respondent Waterbury Square, Inc. has owned the facility since September 12, 2014, when respondent took title to the real property. Department staff's papers also demonstrate that respondent did not submit an application to register the facility until March 16, 2016. Former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1) require respondent as owner of the real property on which the facility is located to submit an application to register the facility with the Department within thirty (30) days of transfer of ownership to respondent (see also ECL 17-1009). Respondent failed to do so.

Department staff has made a prima facie showing that respondent Waterbury Square, Inc. failed to register the facility within thirty (30) days of transfer of ownership to respondent in violation of former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1).

### Second Cause of Action

PBS facilities that are permanently out of service must be closed pursuant to former 6 NYCRR 613.9(b) and current 6 NYCRR 613-3.5 and 613-4.5. Former 6 NYCRR 613.9(b) required the owner of the facility to close permanently out of service tanks (see Matter of Magy, Order of the Commissioner, September 9, 2011, at 2-3.) Current 6 NYCRR 613-3.5 and 613-4.5, on the other hand, place the responsibility of closure on the facility (see 6 NYCRR 613-3.5[a][3], [b]; 613-4.5[a][3], [b]).

The current regulations provide that "any provision of this Part that imposes a requirement on a facility imposes that requirement on every operator and every tank system owner at the facility, unless expressly stated otherwise." (6 NYCRR 613-1.2[d].) Department staff's proof demonstrates that respondent has been the owner of the facility since September 12, 2014. In addition, respondent's PBS application identifies respondent as the tank owner and operator of the facility (see Finding of Fact No. 9).

Department staff has made a prima facie showing that the PBS tanks at respondent's facility are out of service and respondent Waterbury Square, Inc. failed to close the UST and AST systems in violation of former 6 NYCRR 613.9(b) and current 6 NYCRR 613-3.5 and 613-4.5.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affidavit from a Department engineer.

#### Respondent's Burden

Inasmuch as Department staff has made a prima facie showing against respondent Waterbury Square, Inc. for failing to register the facility within thirty (30) days of transfer of ownership to respondent and for failing to permanently close the out of service UST and AST systems, the burden shifts to respondent to raise triable issues of fact. A respondent opposing staff's motion for an order without hearing must also lay bare its proof. The New York State Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). General denials are insufficient to raise an issue of fact on a summary judgment motion (see Gruen v Deyo, 218 AD2d 865, 866 [3d Dept 1995]; Bronowski v Magnus Enterprises, Inc., 61 AD2d 879 [4th Dept 1978]).

Respondent's general denials and affirmative defenses without evidentiary proof in support of respondent's position are not sufficient to raise an issue of fact. Other than general denials, respondent does not dispute that respondent failed to register the facility within thirty (30) days of transfer of ownership of the facility to respondent or that the UST and AST systems are out of service and have not been permanently closed.

Respondent continued to argue that service of the notice of hearing and complaint was not proper even after respondent accepted service on the record and personal jurisdiction was obtained over respondent. (compare Matter of Waterbury Square, Inc., Ruling of the ALJ, May 10, 2016 at 3 with respondent's

June 6, 2016 answer at ¶ 17). Accordingly, I conclude respondent's service argument is without merit.

Respondent's opposition to staff's motion includes several legal arguments regarding the Supreme Court action against the Commissioner and the Commissioner's authority to issue a final order. The order to show cause signed by Supreme Court Justice MacRae, however, was not served in a timely fashion. According to the New York State Unified Court System "eCourts" website, respondent Waterbury Square, Inc.'s motion was withdrawn on July 6, 2016.<sup>3</sup> Respondent admits the Supreme Court matter must be re-noticed (see Response at ¶ 6).

Absent a writ of prohibition or a stay from a State Supreme Court, a pending action in State court does not act as an automatic stay prohibiting the Commissioner from ruling on Department staff's motion (see CPLR 7805). A writ of prohibition "may be obtained only when a clear legal right of a petitioner is threatened by a body or officer acting in a judicial or quasi-judicial capacity without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction" (Matter of Morgenthau v Erlbaum, 59 NY2d 143, 147 [1983]). The term jurisdiction refers to subject matter jurisdiction (see Herskowitz v Tompkins, 184 AD2d 402, 403 [1st Dept 1992]). Furthermore, "a writ of prohibition is not a proper remedy where, as here, any order or decision of the Commissioner that may be made in the matter is reviewable in a certiorari proceeding" (Village of Camillus v Diamond, 76 Misc2d 319 [Sup Ct, Onondaga County 1973]).

The Commissioner and the Department's Office of Hearings and Mediation Services have subject matter jurisdiction over this administrative proceeding (see ECL 17-1005, 17-1009, 71-1709, and 71-1721), as well as the authority to determine whether the Department has obtained personal jurisdiction over a respondent (see State Administrative Procedure Act [SAPA] § 301 and 6 NYCRR 622.3[a][3]). Respondent's arguments to the contrary are without merit.

Respondent also states that this proceeding is or may be barred by the doctrine of estoppel, but respondent does not provide any facts in support of that argument. It is generally held that estoppel may not be used against a governmental entity when it is discharging its statutory duties (see Matter of

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<sup>3</sup> <https://iapps.courts.state.ny.us/webcivil/FCASSearch?param=P>

Wedinger v Goldberger, 71 NY2d 428, 440-441 [1988]; Waste Recovery Enterprise LLC v Town of Unadilla, 294 AD2d 766, 768 [3d Dept 2002]). Equitable estoppel is not available against the Department unless it is determined that the Department was guilty of improper conduct upon which the opposing party justifiably relied (see Matter of Forest Creek Equity Corp. v Department of Env'tl. Conservation, 168 Misc2d 567, 571 [Sup Ct, Monroe County 1996]). Further, estoppel may not be used when the party invoking the doctrine should have been aware of statutory requirements through diligent research (see Waste Recovery Enterprise LLC, 294 AD2d at 769).

Respondent has not alleged any affirmative misconduct of the Department that respondent relied upon in support of this defense. Absent that, the defense cannot stand. I conclude respondent's estoppel defense is unsupported and without merit.

Turning back to Department staff's prima facie showing, despite general denials or defenses to the contrary, respondent has not submitted any evidentiary proof in admissible form or demonstrated an acceptable excuse for its failure to do so. I conclude respondent has failed to raise a triable issue of fact on staff's causes of action.

Accordingly, Department staff has met its burden of showing that respondent Waterbury Square, Inc. failed to register the facility within thirty (30) days of transfer of ownership of the facility to respondent, in violation of former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1); and failed to close the permanently out of service UST and AST systems in violation of former 6 NYCRR 613.9(b) and current 6 NYCRR 613-3.5 and 613-4.5.

### Penalties

Department staff requests that respondent be assessed a civil penalty of \$15,000 with up to \$5,000 suspended provided respondent complies with the Commissioner's order. Staff cites the provisions of ECL 71-1929(1) that set forth a maximum daily civil penalty of \$37,500 for violations of ECL article 17, title 10, or the regulations promulgated pursuant thereto.

Staff also references the penalty ranges for each violation set forth in DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy - Penalty Schedule (May 21, 2003) and applies the settlement penalty amount of \$5,000 to each violation (\$5,000 for failing to register and \$5,000 for each tank that was not permanently closed). Staff requests that up to \$5,000

of the civil penalty be suspended as incentive for respondent to close the permanently out of service UST and AST systems.

The penalties requested are a fraction of the maximum statutory penalty that could be assessed against respondent. The potential harm from a spill or other failure resulting from lack of appropriate closure of respondent's PBS tanks further supports the penalty requested, as exemplified by the fact that respondent's UST was taking on water.

Respondent argues that the intended use of the facility for educational purposes, and the costs associated with that purpose, should mitigate against imposing a penalty on respondent (see Response at ¶¶ 15-18.). Respondent complains that the penalties sought by staff will make respondent's project economically unattractive. Respondent has offered no proof regarding respondent's inability to pay a civil penalty.

Respondent also argues that the litigation between respondent and Waterbury Felt Company, Inc. involving control over the facility prevented respondent from cooperating with the Department until that litigation was resolved in January 2016. The Commissioner may consider that as a mitigating factor in arriving at the appropriate penalty. The facility owner of record since September 12, 2014, however, was respondent, and as the owner, respondent was required to comply with the PBS law and regulations.

Respondent submitted an application to register the PBS facility to the Department on March 16, 2016, 521 days late. Respondent pumped both PBS tanks on May 23, 2016 to remove the petroleum product as directed in the May 10, 2016 ruling. The PBS tanks, however, have not been permanently closed and the UST was taking on water. Based on the discussion above, I conclude that the penalty requested by Department staff is authorized and appropriate.

#### Corrective Action

Department staff requests as part of the relief in this matter that respondent be directed to permanently close the UST system at the facility in accordance with 6 NYCRR 613-3.5(b) and permanently close the AST system at the facility in accordance with 6 NYCRR 613-4.5(b) within sixty (60) days of service of the Commissioner's order on respondent. As noted above, the UST was taking on water. To prevent contamination of groundwater and soils surrounding the tank, the tank should be permanently

closed as soon as possible. I conclude staff's request is reasonable and authorized.

#### **CONCLUSIONS OF LAW**

1. By failing to register the facility within thirty (30) days of transfer of ownership to respondent, respondent Waterbury Square, Inc. violated former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1)(since October 11, 2015).
2. By failing to permanently close the out of service underground storage tank system, respondent Waterbury Square, Inc. violated former 6 NYCRR 613.9(b) and current 6 NYCRR 613-3.5.
3. By failing to permanently close the out of service aboveground storage tank system, respondent Waterbury Square, Inc. violated former 6 NYCRR 613.9(b) and current 6 NYCRR 613-4.5.

#### **RECOMMENDATIONS**

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

1. granting Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12;
2. holding that respondent Waterbury Square, Inc. violated former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 107 River Street, Oriskany, New York within thirty (30) days of transfer of ownership to respondent;
3. holding that respondent Waterbury Square, Inc. violated former 6 NYCRR 613.9(b) and current 6 NYCRR 613-3.5 by failing to permanently close the underground storage tank system that is permanently out of service;
4. holding that respondent Waterbury Square, Inc. violated former 6 NYCRR 613.9(b) and current 6 NYCRR 613-4.5 by failing to permanently close the aboveground storage tank system that is permanently out of service;

5. directing respondent Waterbury Square, Inc. to pay a civil penalty of fifteen thousand dollars (\$15,000) for the above referenced violations, with payment of five thousand dollars (\$5,000) of the penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order;
6. directing respondent Waterbury Square, Inc. to submit the payable portion of the civil penalty in the amount of ten thousand dollars (\$10,000), within thirty (30) days of service of the Commissioner's order on respondent, to the following:

Office of General Counsel  
NYSDEC Region 6  
317 Washington Street  
Watertown, New York 13601  
Attention: Nels G. Magnuson, Esq.

7. directing respondent Waterbury Square, Inc. to permanently close the 12,000 gallon underground storage tank system in accordance with 6 NYCRR 613-3.5(b) within sixty (60) days of service of the Commissioner's order on respondent;
8. directing respondent Waterbury Square, Inc. to permanently close the 2,000 gallon aboveground storage tank system in accordance with 6 NYCRR 613-4.5(b) within sixty (60) days of service of the Commissioner's order on respondent;
9. directing respondent Waterbury Square, Inc. to send all submissions to the following:

Mr. Ronald F. Novak, P.E.  
Regional PBS Supervisor  
NYSDEC Region 6  
317 Washington Street  
Watertown, New York 13601

10. directing respondent Waterbury Square, Inc. to provide any duly designated officer, employee or agent of the Department entry to respondent's PBS facility or areas in the vicinity of respondent's facility which may be under the control of respondent, and as to which respondent has authority to provide access to others and any areas



under respondent's control necessary to gain access thereto, for the purposes of inspection; sampling and testing that the Department deems necessary; ascertaining respondent's compliance with the ECL, the Navigation Law, the regulations promulgated thereto, and provisions of the order; completing permanent closure of the facility as ordered; and investigating and remediating any petroleum contamination found at the site; and

11. directing such other and further relief as the Commissioner may deem justified under the circumstances.

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: Albany, New York  
January 5, 2017