



County, New York, because the defendant resides there.

Dated: New York, New York  
December 2, 2014

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Attorney for Plaintiffs

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

----- x  
JOSEPH MARTENS, Commissioner of the :  
New York State Department of Environmental :  
Conservation and the NEW YORK STATE :  
DEPARTMENT OF ENVIRONMENTAL :  
CONSERVATION, : Index No.  
: :  
Plaintiffs, : **VERIFIED COMPLAINT**  
: :  
-against- : :  
: :  
FLORENCE EDELSTEIN, : :  
: :  
Defendant. x  
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Plaintiffs New York State Department of Environmental Conservation (“DEC”) and Joseph Martens, DEC Commissioner (collectively “Plaintiffs”), by their attorney, Eric T. Schneiderman, the Attorney General of the State of New York, allege as follows against defendant Florence Edelstein (“Edelstein”):

**PRELIMINARY STATEMENT**

1. Petroleum spills have caused, and can cause, serious harm to human health and safety, and to New York’s water and other natural resources. To prevent such spills from petroleum bulk storage (“PBS”) tanks the New York legislature enacted Environmental Conservation Law (“ECL”) Article 17, Title 10, which directed DEC to promulgate the PBS regulations codified at 6 New York Codes, Rules and Regulations (“NYCRR”), Parts 612 - 614. The PBS regulations require proper registration, installation, operation, maintenance, inspection and, when applicable, closure of PBS systems to prevent leakage and more voluminous spills. Violations of the PBS laws and regulations are subject to civil penalties and injunctive relief.
2. This action arises out of 90 PBS violations that occurred at 25 separate

residential properties for which Edelstein had registered with DEC as the PBS facility owner (the “Edelstein Facilities”). Twenty-two of the Edelstein Facilities are in Manhattan, and three are in the Bronx.

3. After DEC investigators uncovered a pattern of PBS violations by Edelstein, and Edelstein rejected the agency’s offer to resolve the violations by settlement, DEC brought an administrative enforcement action. This culminated in a July 18, 2014 order by plaintiff DEC Commissioner (the “Commissioner’s Order;” Exhibit A hereto). The Commissioner’s Order found Edelstein liable for a total of 90 violations at the Edelstein Facilities, assessed a civil penalty against her of \$113,500, to be paid within 30 days of service, and ordered her to correct all 90 violations within 30 days.

4. Although duly served, Edelstein neither challenged the Commissioner’s Order in an Article 78 proceeding within the applicable statute of limitations, nor paid any of the penalty assessed in the Commissioner’s Order, or submitted documentation to DEC demonstrating correction of any of her PBS violations.

5. Plaintiffs therefore bring this action to obtain: (a) an injunction compelling Edelstein to correct all 90 PBS violations, as directed by the Commissioner; (b) a judgment for the \$113,500 penalty assessed by the Commissioner, plus applicable interest and other charges; and (c) a judgment for additional penalties for violations of the Commissioner’s Order, in an amount to be determined by the Court.

### **PARTIES**

6. Plaintiff DEC is an executive agency of the State of New York, and is authorized to administer and enforce the ECL and the Navigation Law.

7. Plaintiff Joseph Martens is the Commissioner of the DEC.

8. Defendant Florence Edelstein is an individual who resides in New York County, and has her principal place of business in Kings County. Edelstein is the registered PBS owner for each of the Edelstein Facilities with DEC.

**JURISDICTION AND VENUE**

9. This Court has jurisdiction over this case pursuant to ECL §§ 71-1929 and 71-1931.

10. Venue is proper in New York County pursuant to CPLR § 503(a) and (c) because Edelstein resides in New York County.

**STATUTORY AND REGULATORY FRAMEWORK**

11. Article 17 of the ECL contains various provisions aimed at preventing and addressing water pollution. ECL Article 17, Title 10, entitled “Control of the Bulk Storage of Petroleum,” was enacted to protect “the lands and waters of New York state” from “contaminat[ion] by spills and leaks of petroleum from active and abandoned petroleum bulk storage facilities.” ECL § 17-1001. Provisions of Article 17, Title 10, and regulations promulgated by DEC under that title govern PBS facilities. A PBS facility is defined as “a single property or contiguous or adjacent properties used for a common purpose which are owned or operated by the same person on or in which are located:

- a. one or more stationary tanks which are used singularly or in combination for the storage or containment of more than one thousand one hundred gallons of petroleum; or
- b. any tank whose capacity is greater than one hundred ten gallons that is used for the storage or containment of petroleum, the volume of which is ten percent or more beneath the surface of the ground.”

§ 17-1003(1).

12. ECL § 17-1009 requires any owner of a PBS facility to register the facility with DEC. DEC's PBS registration application requires the applicant to identify the "Property/Facility owner" and the owner of the PBS tanks that are the subject of the application. The party submitting the application must certify under penalty of law that the information provided is accurate.

13. The PBS regulations issued by DEC are codified at 6 NYCRR Parts 612-14. The regulations require, among other things, that PBS owners: (a) provide accurate information when registering their facilities, 6 NYCRR 612.2; (b) properly color-code fill ports, to ensure that the tanks only receive the petroleum products that they are designed and intended to use, 6 NYCRR 613.3(b)(1); (c) label the tank and gauge with the unique tank identification number, and its design capacity and working capacity, to prevent overfills and improper deliveries, 6 NYCRR 613.3(c)(3)(ii); (d) keep all spill prevention equipment in good working order, 6 NYCRR 613.3(d); (e) maintain records of monthly inspections, to ensure that such required inspections are conducted in order to visually verify that the tank's integrity, leak detection, cathodic protection and other monitoring or warning systems (including overfill protection) are functioning and operating as designed, 6 NYCRR 613.6(c); and (f) equip aboveground PBS tanks with corrosion protection and leak detection, 6 NYCRR 614.8(a).

14. Each violation of those ECL provisions and regulations enacted thereunder is subject to a civil penalty of up to \$37,500 per day. ECL § 71-1929; 6 NYCRR § 612.1(f); 6 NYCRR § 613.1(f); 6 NYCRR § 614.1(g). DEC can pursue those civil penalties administratively or through judicial proceedings.

15. The ECL further provides that where (as here) the Commissioner conducts an administrative enforcement proceeding that results in an order, violations of the

Commissioner's Order are themselves subject to civil penalties of up to \$37,500 per day. ECL § 71-1929(1). The Attorney General, upon request of the DEC Commissioner, is empowered to recover penalties assessed by the Commissioner as well as seek an injunction compelling compliance with the corrective actions ordered by the Commissioner. *Id.* §§ 71-1929(3), 71-1931.

### **STATEMENT OF FACTS**

16. Edelstein is the registered owner of the Edelstein Facilities, each with petroleum storage capacity over 1,100 gallons, registered at the residential buildings in the City of New York indicated below, and identified in DEC records with the associated PBS numbers:

- (1) 133 West 71<sup>st</sup> Street, Manhattan, PBS #2-130001;
- (2) 145 West 71<sup>st</sup> Street, Manhattan, PBS #2-130036;
- (3) 10 Cooper Street, Manhattan, PBS #2-160989;
- (4) 701 West 176<sup>th</sup> Street, Manhattan, PBS #2-201162;
- (5) 60 Thayer Street, Manhattan, PBS #2-201995;
- (6) 10 Hillside Avenue, Manhattan, PBS #2-219398;
- (7) 1781 Riverside Drive, Manhattan, PBS #2-252425;
- (8) 621 West 172<sup>nd</sup> Street, Manhattan, PBS #2-252433;
- (9) 162 West 54<sup>th</sup> Street, Manhattan, PBS #2-259896;
- (10) 427 Fort Washington Avenue, Manhattan, PBS #2-267767;
- (11) 1675 Grand Concourse, Bronx, PBS #2-269859;
- (12) 708 West 192<sup>nd</sup> Street, Manhattan, PBS #2-270040;
- (13) 179 Bennett Avenue, Manhattan, PBS #2-271365;

- (14) 801 West 181<sup>st</sup> Street, Manhattan, PBS #2-277096;
- (15) 95 West 195<sup>th</sup> Street, Bronx, PBS #2-277118;
- (16) 1793 Riverside Drive, Manhattan, PBS #2-284661;
- (17) 815 West 181<sup>st</sup> Street, Manhattan, PBS #2-284718;
- (18) 209 Bennett Avenue, Manhattan, PBS #2-284831;
- (19) 610 West 173<sup>rd</sup> Street, Manhattan, PBS #2-288810;
- (20) 812 West 181<sup>st</sup> Street, Manhattan, PBS #2-314595;
- (21) 119 Audubon Avenue, Manhattan, PBS #2-400963;
- (22) 6555 Broadway, Bronx, PBS #2-600909;
- (23) 128 Fort Washington Avenue, Manhattan, PBS #2-606910;
- (24) 34 Bogardus Place, Manhattan, PBS #2-607419; and
- (25) 124 Fort George Avenue, Manhattan, PBS #2-199680.

16. Upon information and belief, Edelstein is Chief Executive Officer and an owner of Edel Family Management Corporation, which owns and manages each of the 25 residential buildings in which the Edelstein Facilities are located.

17. Between April 2 and May 7, 2013, DEC inspected each of the Edelstein Facilities, and found violations of the PBS regulations at and/or concerning each. After completing his inspections the DEC inspector sent a notice of violation for each facility to Edelstein, as well as copies of each Facility Information Report – a DEC form reflecting a facility’s registration information – indicating registration deficiencies, and an application for each facility to correct the registration.

18. After Edelstein rejected DEC’s offer to resolve her liability through an administrative consent order, DEC commenced an administrative enforcement proceeding. This

resulted in issuance of the Commissioner's Order on July 18, 2014.

19. The Commissioner's Order found Edelstein liable for the following 90 violations:

1. 133 West 71<sup>st</sup> Street, PBS #2-130001

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);

(d) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and

(e) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

2. 145 West 71<sup>st</sup> Street, PBS #2-130036

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and

(d) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

3. 10 Cooper Street, PBS #2-160989

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and

(d) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

4. 701 West 176<sup>th</sup> Street, PBS #2-201162

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);

(d) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and

(e) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

5. 60 Thayer Street, PBS #2-201995

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

6. 10 Hillside Avenue, PBS #2-219398

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

7. 1781 Riverside Drive, PBS #2-252425

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);

(d) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and

(e) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

8. 621 West 172<sup>nd</sup> Street, PBS #2-252433

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);

(d) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and

(e) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

9. 162 West 54<sup>th</sup> Street, PBS #2-259896

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);

(d) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and

(e) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

10. 427 Fort Washington Avenue, PBS #2-267767

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

11. 1675 Grand Concourse, PBS #2-269859

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

12. 708 West 192<sup>nd</sup> Street, PBS #2-270040

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c); and

(d) failure to properly install aboveground tank with corrosion protection and leak detection, in violation of 6 NYCRR 614.8(a).

13. 179 Bennett Avenue, PBS #2-271365

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and

(d) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

14. 801 West 181<sup>st</sup> Street, PBS #2-277096

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d).

15. 95 West 195<sup>th</sup> Street, PBS #2-277118

(a) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(b) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

16. 1793 Riverside Drive PBS #2-284661

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d).

17. 815 West 181<sup>st</sup> Street, PBS #2-284718

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2; and

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1).

18. 209 Bennett Avenue, PBS #2-284831

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

19. 610 West 173<sup>rd</sup> Street, PBS #2-288810

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

20. 812 West 181<sup>st</sup> Street, PBS #2-314595

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2; and

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1).

21. 119 Audubon Avenue, PBS #2-400963

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

22. 6555 Broadway, PBS #2-600909

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c); and

(d) failure to properly install aboveground tank with corrosion protection and leak detection, in violation of 6 NYCRR 614.8(a).

23. 128 Fort Washington Avenue, PBS #2-606910

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the tank and gauge, in violation of 6 NYCRR

613.3(c)(3)(ii);

(d) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and

(e) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

24. 34 Bogardus Place, PBS #2-607419

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and

(c) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

25. 124 Fort George Avenue, PBS #2-199680

(a) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

(b) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);

(c) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and

(d) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

20. The Commissioner's Order assessed a civil penalty against Edelstein of \$113,500, to be paid within 30 days of service of that order.

21. The Commissioner's Order directed Edelstein to correct all 90 violations within 30 days of service of that order.

22. DEC duly served the Commissioner's Order on Edelstein on July 24, 2014. The first business day 30 days after service was August 25, 2014.

23. Edelstein has to date failed to pay DEC any of the penalty assessed in the

Commissioner's Order.

24. Edelstein has to date failed to submit documentation demonstrating that she has corrected any of the violations assessed in the Commissioner's Order.

25. Edelstein has not challenged the Commissioner's Order in an Article 78 proceeding, and the statute of limitations under CPLR § 217 and ECL § 17-0909 to file such a challenge has expired.

### **FIRST CAUSE OF ACTION**

#### **Violation of the Commissioner's Order by Failing to Pay Penalties**

26. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 25.

27. Edelstein violated the Commissioner's Order by failing to pay the \$113,500 penalty by August 25, 2014.

28. Edelstein's failure to pay the assessed penalty has continued to the present.

29. Pursuant to ECL §§ 71-1927, 71-1929(1), and 71-1931, Plaintiffs are entitled to a judgment against Edelstein for \$113,500, the amount of the total civil penalty set forth in the Commissioner's Order, plus interest and other charges due under applicable law.

30. Pursuant to ECL § 71-1929(1), Plaintiffs are also entitled to additional civil penalties against Edelstein of up to \$37,500 per day for each day on which she has failed to pay the penalty assessed in the Commissioner's Order since August 25, 2014.

### **SECOND CAUSE OF ACTION**

#### **Violation of the Commissioner's Order by Failing to Correct The Violations as Directed**

31. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 30.

32. Edelstein violated the Commissioner's Order by failing to correct the 90

violations for which she was found liable by August 25, 2014.

33. Edelstein's failure to correct the 90 violations has continued to the present.

34. Pursuant to ECL §§ 71-1927, 71-1929(1), and 71-1931, Plaintiffs are entitled to an injunction ordering Edelstein to correct the 90 violations for which she was found liable within 30 days.

35. Pursuant to ECL § 71-1929(1), Plaintiffs are also entitled to additional civil penalties against Edelstein of up to \$37,500 per day for each day on which she has failed to correct all 90 violations since August 25, 2014.

**WHEREFORE**, Plaintiffs respectfully request that the Court enter judgment:

**A. On the First Cause of Action:** (1) finding Edelman in violation of the Commissioner's Order and directing that judgment be entered against her in favor of Plaintiffs in the amount of \$113,500, plus interest and other charges due under applicable law, for penalties assessed in the Commissioner's Order; and (2) finding Edelstein in violation of the Commissioner's Order from August 25, 2014, and assessing additional penalties in an amount up to \$37,500 per day, from August 25, 2014 through the present.

**B. On the Second Cause of Action:** (1) finding Edelstein in violation of the Commissioner's Order, and ordering her to correct all outstanding PBS violations as directed in the Commissioner's Order, and to submit to DEC documentation of such corrections; and (2) assessing penalties additional to those assessed in the Commissioner's Order, in an amount of up to \$37,500 per day, for each day on which she has failed to correct all 90 violations since August 25, 2014.

C. Awarding such additional relief as may be just and proper.

Dated: New York, New York  
December 2, 2014

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Plaintiffs

By: Andrew J. Gershon  
Andrew Gershon  
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**VERIFICATION**

John K. Urda, an employee of plaintiff New York Department of Environmental Conservation (“DEC”), affirms under penalty of perjury as follows:

I am an Assistant Regional Attorney for DEC Region 2, which covers New York City. I have been assigned to the matter addressed in the foregoing verified complaint (the “Verified Complaint”) since on or about May 13, 2013. I have read the Verified Complaint and assert, based upon personal knowledge and information and belief, that the contents thereof are true. The sources of my personal knowledge, information and belief are my handling of this matter for DEC administratively, discussions with and information provided by DEC staff who inspected the Edelstein Facilities, and my review of DEC files concerning the allegations contained in this Verified Complaint.

Dated: Long Island City, New York  
December 2, 2014



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John K. Urda, Esq.

# **EXHIBIT A**

**COMMISSIONER'S ORDER DATED JULY 18, 2014**

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of the  
New York State Environmental Conservation Law and  
Title 6, Parts 612-614, of the Official Compilation of Codes,  
Rules and Regulations of the State of New York,

**ORDER**

- by -

NYSDEC File No  
R2-20130513-183

**FLORENCE EDELSTEIN,**

Respondent.

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This administrative enforcement proceeding concerns allegations that respondent Florence Edelstein (“respondent”) committed multiple violations of article 17 of the Environmental Conservation Law (“ECL”) and parts 612-614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) at Petroleum Bulk Storage (“PBS”) facilities located at 25 properties she owns in New York and Bronx Counties.

Staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) commenced this proceeding by serving on respondent, via certified mail return receipt requested, the following documents: (i) Notice of Motion for an Order Without Hearing, dated June 6, 2013; (ii) Affirmation of John K. Urda (“Urda Aff.”), dated June 6, 2013, attaching exhibits; and (iii) Staff Affidavit of George Breen, P.E., (“Breen Aff.”), dated June 6, 2013, attaching exhibits. Staff has submitted a copy of the signed certified mail receipt and a copy of the United States Postal Service web page reflecting that respondent received the motion papers on June 7, 2013, thereby completing service under the Department Uniform Enforcement Hearing Procedures regulations (see 6 NYCRR 622.3[a][3]).

Department staff asserted one cause of action for each of the 25 facilities, and each cause of action contains multiple counts, for a total of 95 alleged violations (see Urda Aff. at 5-17, ¶¶ 17-136). Staff requests that I: (i) hold that respondent violated 6 NYCRR parts 612-614 as set forth in detail in the motion papers; (ii) impose upon respondent, pursuant to ECL articles 17 and 71, a civil penalty in the amount of one hundred thirteen thousand five hundred dollars (\$113,500); and (iii) direct respondent to comply with all ECL provisions, rules and regulations governing PBS, and correct all violations identified in the motion papers (see Urda Aff. at 19, Wherefore clause ¶¶ 1-3).

Respondent failed to file or serve a response to staff's motion papers, and has not otherwise appeared in this proceeding. Accordingly, Department staff requested that the matter be decided as an unopposed motion for order without hearing (see 6 NYCRR 622.12).

The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, who prepared the attached summary hearing report. ALJ Goldberger concluded that respondent violated several PBS regulations, and recommends that I: (i) direct respondent to correct all violations and come into compliance with the PBS regulations within 30 days; and (ii) assess against respondent a civil penalty of \$113,500, the amount requested by staff, to be paid within 30 days of service of the order upon respondent. I adopt the ALJ's summary hearing report with respect to the amount of the civil penalty, and with respect to ordering respondent to correct all violations within thirty (30) days of service of the Order on respondent. I also adopt some, but not all, of the ALJ's findings of fact and the ALJ's recommendations with respect to liability, as discussed below.

## DISCUSSION

### I. Liability

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 established its entitlement to summary judgment on the violations charged in the motion (see Matter of Hunt, Decision and Order of the Commissioner, July 25, 2006, at 7 n2).

I agree with the ALJ that staff's motion papers establish many PBS violations at respondent's 25 buildings. I do not agree completely, however, with the ALJ's identification of the number or nature of the violations.

With respect to the number of violations, the ALJ states that Department staff has alleged ninety-three (93) violations (see e.g. Summary Hearing Report at 11, 12). Both the Breen affidavit and the Urda affirmation, however, allege ninety-five (95) violations (see Urda Aff. at 5-17, ¶¶ 17-136; see also id. ¶ 140 [penalty calculation based on ninety-five (95) counts]; see also Breen Aff. at 2-10, ¶¶ 5-29).

As discussed below, I also do not agree completely with the ALJ's methodology for identifying violations. Based upon my review of all of the papers submitted, I hold that respondent is liable for ninety (90) violations of the PBS regulations.

#### A. Claim Identified in NOV but Not Alleged in Motion Papers

The ALJ identified violations based in part upon her conclusion that, where there is a difference between violations identified in a notice of violation ("NOV") and violations identified in the pleadings, the NOV controls (see e.g. Summary Hearing Report, at 3 n1 [stating that "where there are discrepancies between the affidavit and the NOV, I am relying upon the

latter”]; see also id. at 11-12 [finding eleven additional counts which include violations cited in the NOVs but not in Mr. Breen’s affidavit]). I disagree.

Service of a notice of violation does not commence a formal enforcement proceeding. NOVs are considered informal enforcement tools, and precede the commencement of formal enforcement proceedings. Formal enforcement proceedings are commenced by service of: (i) a notice of hearing and complaint (see 6 NYCRR 622.3[a]); (ii) a motion for order without hearing (see id. 622.12[a]); or (iii) a summary abatement order or summary suspension order (see id. 622.14[a]), among other methods.

Staff commenced this formal enforcement proceeding after having served respondent with the NOVs and attempting to negotiate a settlement (see Breen Aff. ¶ 30 [after completing each inspection, he sent respondent each NOV and a copy of the facility information report marked to indicate registration deficiencies]; Urda Aff. ¶¶ 145-146 [respondent rejected staff’s offer to settle, notwithstanding staff’s “clear statement that the result would be formal enforcement”]). This formal enforcement proceeding was commenced by service of the motion for order without hearing, with supporting affidavit and documents (see 6 NYCRR 622.12; 622.3[b][1]).

Although the NOVs – as documents prepared by inspector Breen at or near the time of the inspections, reflecting his inspection findings – may be submitted as evidence to support causes of action asserted in the motion, they are not pleadings and do not assert causes of action. I therefore reject the ALJ’s conclusion that a violation alleged in a NOV but not in the motion papers nevertheless asserts a claim (see e.g. Summary Hearing Report, at 3 n1, 4 n3, 8 n10, 10 n14). The motion for order without hearing and its supporting materials – not the NOVs – define the number and nature of claims. Pleadings supersede NOVs and therefore, if a violation is cited in a NOV but not in the motion for order without hearing, such alleged violation is not part of this proceeding.<sup>1</sup>

This case also presents two related but different circumstances: (i) a violation is alleged in the motion papers but not in the corresponding NOV; and (ii) the motion papers conflict with the NOV. Each circumstance is addressed below.

#### B. Claim Asserted in Motion Papers but not in NOV

Some of the claims asserted in the motion papers are not identified in the corresponding NOV (compare Urda Aff. at 5, ¶ 21; Breen Aff. at 2, ¶ 5[d] [asserting, with respect to an aboveground tank at the facility located at 133 West 71<sup>st</sup> Street, Manhattan, a failure to maintain spill prevention equipment in violation of 6 NYCRR 613.3(d) because of accumulated debris in the tank secondary containment area] with Breen Aff. Ex. A [NOV for that facility does not contain an allegation of failure to maintain spill prevention equipment]).<sup>2</sup> The ALJ did not

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<sup>1</sup> For example, Department staff may exercise prosecutorial discretion and decide not to pursue in a formal enforcement proceeding one or more violations identified in a NOV.

<sup>2</sup> The NOV form document identifies 33 specific violation categories, including ten specific categories of “Facility and General Tank Violations,” fourteen specific categories of “Underground Tank Violations,” and four specific

include in her Summary Hearing Report an analysis of alleged violations asserted in the motion papers but not the NOVs (see e.g. Summary Hearing Report, at 3 n1; see also id. at 4 n2; id. at 5 n5; id. at 6 n6; id. at 7 n8).

As discussed above, because pleadings supersede NOVs, I look to the pleadings to identify claims. Thus, if the motion papers allege there has been a violation, such allegation is a part of this formal enforcement proceeding and must be analyzed. I therefore do not adopt the ALJ's determination to omit claims asserted in the motion for order without hearing but not identified in the NOVs.

Of course, the mere assertion of a claim in a motion for order without hearing is not sufficient to prevail on such claim, even where, as in this case, the respondent has failed to answer, appear, or otherwise controvert any of the allegations in the pleadings. Even where a respondent defaults, staff must still submit evidence sufficient to support the asserted claims (see Matter of Hunt). In the PBS context such as the present case, staff must at a minimum submit the following documents: (i) a copy of each facility's PBS registration; (ii) each facility's facility information report; and (iii) any NOV that is a basis for the allegations in the charging instrument (see Matter of Farmer, Order of the Commissioner, October 22, 2009, at 3). In this case, staff has submitted the required documents.

In addition to the documentary evidence, the inspector's sworn affidavit submitted in support of the motion for order without hearing is testimonial evidence offered to support the claim of violation. The fact that the NOV form document may be silent with respect to a particular violation alleged in the inspector's affidavit does not necessarily conflict with the inspector's testimony that such a violation existed at the time of his inspection. Therefore, I disagree with the ALJ on this issue (see Summary Hearing Report, at 11 [stating that judgment should not be granted with respect to counts in the motion papers but not in the NOV]). In this case, where the NOV form does not include a particular category of violation, but credible testimonial evidence supporting the claimed violation is proffered by staff, I will find a violation.<sup>3</sup>

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categories of "Aboveground Tank Violations," and a box to check for each category (see Breen Aff. Ex. A). The NOV form does not identify every possible violation of the PBS regulations. For example, the Aboveground Tank Violations section of the form does not contain a category for failure to maintain spill prevention equipment, even though such maintenance is clearly required by the regulations (see 6 NYCRR 613.1[b] ["This Part applies to all aboveground and underground petroleum storage facilities with a combined storage capacity of over 1,100 gallons"]; see also 6 NYCRR 613.3[d] ["owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order"]).

<sup>3</sup> Respondent could have submitted, but did not submit, papers in opposition to staff's motion for order without hearing, including submitting evidence challenging the assertions in the motion relating to claims not identified in the NOVs. Similarly, had this matter proceeded to an adjudicatory hearing, respondent could have cross-examined the inspector regarding the allegations he has made that are not contained in the NOVs. Because respondent has failed to appear or otherwise respond, however, respondent has waived her right to make such challenges (see 6 NYCRR 622.12[c], 622.15[a]).

### C. Motion Papers Conflict with NOV

This case also presents the circumstance in which the motion papers conflict with the NOV. For example, staff alleges in the motion papers that respondent violated 6 NYCRR 613.3(c)(3)(ii) by failing to properly label the tank and gauge at the aboveground tank at the facility located at 145 West 71<sup>st</sup> Street, Manhattan (see Urda Aff. at 5-6, ¶ 26; Breen Aff. at 2, ¶ 6[c]). The NOV form contains this violation category (see Breen Aff., Ex. A, NOV, Box 25 [“Tank and/or Gauge Not Properly Labeled [613(c)(3)(ii)]”). On the NOV that inspector Breen prepared with respect to the April 30, 2013 inspection of this facility, however, the words “Tank and/or” are crossed out. Therefore, Breen’s affidavit and the NOV that he prepared are in conflict with respect to whether a violation based upon improper labeling of the tank occurred.

In such circumstance, the conflicting testimonial and documentary evidence in effect cancel each other out, and it is not appropriate to hold respondent liable for failure to properly label the tank. I have applied that principle to all such circumstances presented in this case.

Similarly, where the motion papers allege a violation and the NOV form contains a category for such violation but the box associated with that violation category is not checked, I have not held respondent liable for such alleged violation on this unopposed motion, as discussed below (see e.g. footnotes 4, 5, 6, 7, 8 below).

### D. Number and Nature of Violations for Each Facility

Given the foregoing discussion, and based upon the evidence submitted, I hold that staff has satisfied its burden of establishing its entitlement to summary judgment for ninety (90) violations at the 25 facilities, as discussed below:

#### 1. 133 West 71<sup>st</sup> Street, PBS #2-130001

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

#### 2. 145 West 71<sup>st</sup> Street, PBS #2-130036

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and
- (iv) failure to maintain records of monthly inspections, in violation of 6 NYCRR

613.6(c).

3. 10 Cooper Street, PBS #2-160989

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and
- (iv) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

4. 701 West 176<sup>th</sup> Street, PBS #2-201162

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

5. 60 Thayer Street, PBS #2-201995

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

6. 10 Hillside Avenue, PBS #2-219398

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

7. 1781 Riverside Drive, PBS #2-252425

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);

- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

8. 621 West 172<sup>nd</sup> Street, PBS #2-252433

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

9. 162 West 54<sup>th</sup> Street, PBS #2-259896

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

10. 427 Fort Washington Avenue, PBS #2-267767

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

11. 1675 Grand Concourse, PBS #2-269859

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).<sup>4</sup>

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<sup>4</sup> Both the Urda Aff. and the Breen Aff. allege that the tank and gauge were not properly labeled, but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence therefore conflict, and the inspector offers no

12. 708 West 192<sup>nd</sup> Street, PBS #2-270040

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c); and
- (iv) failure to properly install aboveground tank with corrosion protection and leak detection, in violation of 6 NYCRR 614.8(a).

13. 179 Bennett Avenue, PBS #2-271365

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and
- (iv) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

14. 801 West 181<sup>st</sup> Street, PBS #2-277096

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d).

15. 95 West 195<sup>th</sup> Street, PBS #2-277118

- (i) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (ii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).<sup>5</sup>

16. 1793 Riverside Drive PBS #2-284661

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;

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additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

<sup>5</sup> Both the Urda Aff. and the Breen Aff. allege that the facility was not accurately registered, but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence therefore conflict, and the inspector offers no additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d).<sup>6</sup>

17. 815 West 181<sup>st</sup> Street, PBS #2-284718

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2; and
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1).

18. 209 Bennett Avenue, PBS #2-284831

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).<sup>7</sup>

19. 610 West 173<sup>rd</sup> Street, PBS #2-288810

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

20. 812 West 181<sup>st</sup> Street, PBS #2-314595

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2; and
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1).<sup>8</sup>

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<sup>6</sup> Both the Urda Aff. and the Breen Aff. allege that respondent failed to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c), but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence therefore conflict, and the inspector offers no additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

<sup>7</sup> Both the Urda Aff. and the Breen Aff. allege that the tank and gauge for this aboveground tank were not properly labeled, but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence therefore conflict, and the inspector offers no additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

<sup>8</sup> Both the Urda Aff. and the Breen Aff. allege that respondent failed to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c), but the NOV – which contains a specific category for this violation – does not reflect that Mr. Breen found that violation during his inspection. Because the documentary and testimonial evidence

21. 119 Audubon Avenue, PBS #2-400963

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

22. 6555 Broadway, PBS #2-600909

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c); and
- (iv) failure to properly install aboveground tank with corrosion protection and leak detection, in violation of 6 NYCRR 614.8(a).

23. 128 Fort Washington Avenue, PBS #2-606910

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii);
- (iv) failure to maintain spill prevention equipment, in violation of 6 NYCRR 613.3(d); and
- (v) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

24. 34 Bogardus Place, PBS #2-607419

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR 613.3(b)(1); and
- (iii) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

25. 124 Fort George Avenue, PBS #2-199680

- (i) failure to accurately register the facility, in violation of 6 NYCRR 612.2;
- (ii) failure to properly color-code the tank fill port, in violation of 6 NYCRR

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therefore conflict, and the inspector offers no additional evidence to support the allegation in his affidavit, I will not find respondent liable for this violation at this particular facility.

- 613.3(b)(1);
- (iii) failure to properly label the tank and gauge, in violation of 6 NYCRR 613.3(c)(3)(ii); and
- (iv) failure to maintain records of monthly inspections, in violation of 6 NYCRR 613.6(c).

## II. Remedial Relief

Staff has requested that I order respondent “to comply with all ECL provisions, rules and regulations governing petroleum bulk storage, and correct all violations set forth” in the motion for order without hearing (Urda Aff. at 19, Wherefore Clause ¶3). Because respondent is already required to comply with the ECL and its rules and regulations, an order on that issue is unnecessary (see e.g. Matter of West 63 Empire Associates LLC, Order of the Commissioner, August 9, 2012, at 2 [respondent has continuing duty to comply with consent order, so order to comply is not necessary]). I do, however, grant staff’s request that I order respondent to correct, within thirty (30) days of service of this order upon respondent, all of the violations for which respondent is held liable in this order.

## III. Civil Penalty

ECL 71-1929 provides for the imposition of a civil penalty of up to thirty-seven thousand five hundred (\$37,500) per day for each violation of titles 1 through 11 inclusive and title 19 of article 17, or the rules or regulations, orders or determinations promulgated thereto. Staff asserts that the 95 counts alleged in its motion papers would result in a maximum civil penalty of \$3,562,500 for a single day of the violations (see Urda Aff. at 17, ¶ 140). Because I have held that staff has proven 90 violations, the maximum civil penalty for a single day of violation would be \$3,375,000.

Staff also alleges in its motion papers that none of the violations has been corrected, and each is continuing daily (see id., ¶141). Inspector Breen inspected these facilities during the period from April 2, 2013, to May 7, 2013. The most conservative estimate of the number of days that the violations continued would be the period between the last inspection and the day staff served its motion papers; that is, assuming all the inspections occurred on the final day of inspections, May 7, 2013, all of the violations continued for at least 30 days until June 6, 2013, when staff served its motion papers. The maximum civil penalty for 90 violations that have continued for 30 days is \$101,250,000.

Staff has provided a thorough discussion of the issues to be considered in setting a civil penalty, including: (i) that respondent’s facilities are located in residential buildings in heavily-populated areas of New York City; and (ii) that staff attempted to negotiate an order on consent with respondent, including a settlement figure based upon the ranges set forth in the Department’s Petroleum Bulk Storage Inspection Enforcement Policy, DEE-22, but that respondent “rejected the Department’s attempt to resolve this matter by order on consent without any attempt to negotiate” (id. at 18, ¶146). Staff seeks a civil penalty of one hundred thirteen thousand five hundred dollars (\$113,500).

Given the number of violations, the number and location of residential facilities at issue, and the length of time during which the violations have been occurring as set forth in staff's motion papers, I hold that staff's requested penalty of one hundred thirteen thousand five hundred dollars (\$113,500) is authorized and appropriate on the record of this proceeding.

**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 in part and otherwise denied. Respondent Florence Edelstein is adjudged to have committed ninety (90) violations of the petroleum bulk storage regulations. As specifically set forth in this Order, respondent violated 6 NYCRR 612.2, 613.3(b)(1), 613.3(c)(3)(ii), 613.3(d), 613.6(c), and 614.8(a) .
- II. Within thirty (30) days of service of this Order upon respondent Florence Edelstein, respondent shall correct all ninety (90) violations for which respondent has been held liable in this Order.
- III. Respondent Florence Edelstein is assessed a civil penalty in the amount of one hundred thirteen thousand five hundred dollars (\$113,500), which is due and payable within thirty (30) days of service of a copy of this Order upon respondent. 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 shall be delivered by certified mail, overnight delivery; or by hand delivery to the Department at 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 11101-5407
- IV. All communications from respondent to Department staff concerning this Order shall be directed to John K. Urda, Esq., at the address set forth in paragraph III of this Order.

- V. The provisions, terms and conditions of this Order shall bind respondent Florence Edelstein, and her agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By:

  
Joseph J. Martens  
Commissioner

Dated: 7/18/2014, 2014  
Albany, New York

To:

Florence Edelstein  
2207 Coney Island Avenue  
Brooklyn, NY 11223

(Via Certified Mail)

John K. Urda, Esq.  
Assistant Regional Attorney  
NYSDEC – Region 2  
47-40 21<sup>st</sup> Street  
Long Island City, NY 11101

(Via Intra-Agency Mail)