

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

In the Matter of the Alleged 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"),

ORDER

Index No. 08-69
R9-20080609-38

- by -

L-S AERO MARINE, INC. and DAVID LAWSON,

Respondents.

This proceeding addresses violations of New York State's petroleum bulk storage regulations at a petroleum bulk storage facility owned and operated by L-S Aero Marine, Inc. located at 73 Lakeside Drive, Bemus Point, New York ("facility"). David Lawson is the president of L-S Aero Marine, Inc.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent L-S Aero Marine, Inc. by service of a notice of hearing and complaint dated August 27, 2008, by certified mail. Respondent L-S Aero Marine, Inc. received the notice of hearing and complaint on September 9, 2008, but failed to file an answer.

By motion dated November 20, 2009, Department staff moved for leave to amend the complaint to add David Lawson, the president of L-S Aero Marine, Inc., as an additional respondent, and for permission to serve the amended complaint on Mr. Lawson. The motion was served upon Mr. Lawson in his individual capacity and as president of L-S Aero Marine, Inc. No response to Department staff's motion was filed by either L-S Aero Marine, Inc., the corporate respondent, or David Lawson, in his individual capacity. Chief Administrative Law Judge James T. McClymonds of the Office of Hearings and Mediation Services ("OHMS") granted the motion on December 17, 2009.

The amended complaint was served on David Lawson and L-S Aero Marine, Inc. on February 1, 2010. It was received by David Lawson, in his individual capacity and as president of L-S Aero Marine, Inc., on February 5, 2010.

The amended complaint alleged that respondents:

1. failed to renew the facility's registration, which expired on August 17, 2007, thereby violating 6 NYCRR 612.2(a);
2. failed to mark the fill ports for the tank identified as number 1, thereby violating 6 NYCRR 613.3(b). The tank identified as number 1 is a 3,000 gallon underground storage tank that holds gasoline (see Exhibit C to the Affirmation of Teresa J. Mucha, Esq., dated April 6, 2010 ["Mucha Affirmation"]);
3. failed to properly label the tank identified as number 1, thereby violating 6 NYCRR 614.3(a);
4. failed to properly monitor the tank identified as number 1, thereby violating 6 NYCRR 613.5(b)(3);
5. failed to maintain monitoring records for the tank identified as number 1, thereby violating 6 NYCRR 613.5(b)(4);
6. failed to perform the requisite monitoring of the cathodic protection system on the tank identified as number 1, thereby violating 6 NYCRR 613.5(b)(2);
7. failed to keep daily inventory records and failed to reconcile records, thereby violating 6 NYCRR 613.4(a);
8. failed to install the required cathodic protection on the metallic piping for the tank identified as number 1, thereby violating 6 NYCRR 614.14(b); and
9. failed to install overflow protection equipment on the tank identified as number 1, thereby violating 6 NYCRR 614.14(g).

Both respondents failed to file an answer to the amended complaint. Pursuant to 6 NYCRR 622.4(a), respondents' time to serve an answer to the amended complaint expired on February 25, 2010, and has not been extended by Department staff.

Department staff filed a motion for default judgment, dated April 6, 2010, with OHMS. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

Department staff has requested a civil penalty of \$16,660. Department attorney Teresa J. Mucha, in her affirmation, details the factors that support the requested civil penalty against respondents jointly and severally. These include the economic benefit that respondents realized from non-compliance, their lack of cooperation in addressing the violations, the long-term duration of the violations and the relative importance of the regulations that were violated to the regulatory scheme. See, e.g., Mucha Affirmation, ¶¶ 17, 24, 26-29, and 32.

Department staff's allegations concerning respondent Lawson's role with regard to the conduct of respondent L-S Aero Marine, Inc. were not contested by respondents, and are deemed admitted. Thus it can be concluded that he possessed the authority and responsibility to prevent the violations.

The civil penalty of \$16,660 that Department staff requested and the ALJ has recommended is authorized pursuant to ECL 71-1929, and is appropriate based on this record. Department staff also requested that respondents be directed to perform certain remedial actions to correct the violations or, alternatively, close the tank in accordance with 6 NYCRR 613.9(b). The remedial actions are authorized and appropriate. Respondents are jointly and severally liable for the penalty and remedial actions imposed by this order.

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

- I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.
- II. Respondents L-S Aero Marine, Inc. and David Lawson are adjudged to be in default and to have waived their rights to a hearing in this enforcement proceeding. Accordingly, the allegations against respondents, as set forth in Department staff's complaint and amended complaint, are deemed to have been admitted by respondents.

- III. Respondents are adjudged to have violated 6 NYCRR 612.2(a), 613.3(b), 613.4(a), 613.5(b)(2), 613.5(b)(3), 613.5(b)(4), 614.3(a), 614.14(b), and 614.4(g).
- IV. Respondents L-S Aero Marine, Inc. and David Lawson are jointly and severally assessed a civil penalty in the amount of sixteen thousand six hundred and sixty dollars (\$16,660). The civil penalty is due and payable within thirty (30) days after service of this order upon respondents. Payment of the civil penalty shall be by cashier's check, certified check or money order drawn to the order of the New York State Department of Environmental Conservation and mailed or hand delivered to:

Teresa J. Mucha, Esq.
Assistant Regional Attorney
NYSDEC, Region 9
270 Michigan Avenue
Buffalo, New York 14203.

- V. Within thirty (30) days of service of this order upon respondents, respondents shall either:
- A. perform the following corrective actions and provide the information set forth below to Teresa J. Mucha, Esq. at the address referenced in paragraph IV of this order:
1. submit a completed petroleum bulk storage application, with a registration fee of \$300, to renew the petroleum bulk storage registration for respondents' petroleum bulk storage facility located at 73 Lakeside Drive, Bemus Point, New York 14712;
 2. paint the fill port for the tank identified as number 1 and provide a photograph confirming that the tank has been properly color coded;
 3. properly label the fill port for the tank identified as number 1 and provide a photograph confirming that labeling;

4. provide copies of the weekly leak detection monitoring records for the facility from September 2006 through the date of this order;
5. provide copies of cathodic protection monitoring results for the tank identified as number 1 that have been performed within the twelve months prior to the date of this order;
6. provide copies of the completed ten day inventory reconciliations for the tank identified as number 1 from September 2006 through the date of this order;
7. provide documentation that the underground portion of the piping associated with the tank identified as number 1 is corrosion resistant; and
8. provide documentation that overflow protection has been installed at the tank identified as number 1; or

B. permanently close the tank identified as number 1 in accordance with 6 NYCRR 613.9(b). As required by 6 NYCRR 612.2(d), respondents shall notify the Region 9 Petroleum Bulk Storage Engineer within 30 days prior to closure of the tank. Respondents shall also at the same time notify Teresa J. Mucha, Esq., in the event that respondents decide to permanently close the tank identified as number 1.

VI. All communications from respondents to the Department concerning this order, other than the notice referenced in paragraph V.B. of this order, shall be solely directed to:

Teresa J. Mucha, Esq.
Assistant Regional Attorney
NYSDEC, Region 9
270 Michigan Avenue
Buffalo, New York 14203.

VII. The provisions, terms and conditions of this order shall bind respondents L-S Aero Marine, Inc. and its agents, successors and assigns and David Lawson and his heirs, agents, successors and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: June 29, 2010
Albany, New York

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

DEFAULT SUMMARY
REPORT

DEC File No.
R9-20080609-38

L-S AERO MARINE, INC. and
DAVID LAWSON,

June 28, 2010

Respondents.

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement proceeding by serving a notice of hearing and complaint upon L-S Aero Marine, Inc., 73 Lakeside Drive, Bemus Point, New York 14712. The complaint alleged that L-S Aero Marine, Inc. violated Environmental Conservation Law ("ECL") article 17 and parts 612 through 614 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by failing to comply with numerous provisions applicable to L-S Aero Marine's petroleum bulk storage ("PBS") facility.

The notice of hearing and complaint were served upon L-S Aero Marine, Inc. by certified mail, return receipt requested, on September 9, 2008. L-S Aero Marine failed to file a timely answer, but some communications occurred between L-S Aero Marine, Inc. and DEC Staff during June, 2009. On November 20, 2009, DEC Staff moved to amend the complaint to add David Lawson, the president of L-S Aero Marine, Inc., as an additional respondent in this matter and for permission to serve the amended complaint upon Mr. Lawson. Neither L-S Aero Marine, Inc. nor David Lawson responded to the motion to amend the complaint. Chief Administrative Law Judge ("ALJ") James T. McClymonds granted the motion on December 17, 2009.

DEC Staff served the amended complaint upon David Lawson and L-S Aero Marine, Inc. ("Respondents") on February 5, 2010 by certified mail, return receipt requested. The Respondents failed to answer the complaint. By papers dated April 6, 2010, DEC Staff moved for a default judgment and order against the Respondents pursuant to 6 NYCRR 622.15. DEC Staff mailed a copy of the default motion and supporting papers to the Respondents. As of the date of this default summary report, the DEC Office of

Hearings and Mediation Services has not received any response from or on behalf of the Respondents.

DEC Staff is represented in this matter by Teresa J. Mucha, Esq., Assistant Regional Attorney, DEC Region 9, Buffalo, New York. Ms. Mucha's April 6, 2010 letter that transmitted the default motion papers, and was copied to the Respondents, stated that the Respondents had not retained counsel.

On April 20, 2010, I wrote to Ms. Mucha, with a copy to Mr. Lawson and L-S Aero Marine, Inc., noting that the New York State Department of State's web site lists L-S Aero Marine, Inc. as an inactive corporation and states that it was dissolved "by proclamation/annulment of authority" on March 24, 1993. I asked DEC Staff to provide a response concerning what impact, if any, the dissolution of the corporation has on the liability and relief being sought in this matter. Ms. Mucha responded by letter dated May 26, 2010, which was copied to Mr. Lawson and L-S Aero Marine, Inc., stating that L-S Aero Marine, Inc. is a valid party to the present action and that its inactive status has no bearing on whether it may be found liable for the violations alleged in the amended complaint. Ms. Mucha's letter cited two prior orders of the Commissioner and three sections of the Business Corporation Law in support of the response. As of the date of this report, the Respondents have not replied to the May 26, 2010 letter, nor have they sought an opportunity to reply.

Subdivision 622.15(a) of 6 NYCRR (Default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]."

DEC Staff's default motion papers consist of the following documents:

Notice of motion for default judgment and order, dated April 6, 2010;

Motion for default judgment and order, dated April 6, 2010;
and

Affirmation of Teresa J. Mucha, Esq., dated April 6, 2010 with twelve attached exhibits:

Exhibit A, the August 27, 2008 notice of hearing and complaint that named only L-S Aero Marine, Inc. as the Respondent;

Exhibit B, a September 29, 2006 notice of violation addressed to David Lawson and L-S Aero Marine, Inc.;

Exhibit C, a December 16, 2002 petroleum bulk storage application for the L-S Aero Marine, Inc. facility at 73 Lakeside Drive, Bemus Point, New York 14712 and an April 6, 2010 printout of the PBS Program facility information report for this facility;

Exhibit D, the signed postal return receipt for mailing of the August, 2008 notice of hearing and complaint;

Exhibit E, a letter of June 18, 2009 from Ms. Mucha to Mr. Lawson;

Exhibit F, the December 17, 2009 ruling on DEC Staff's motion to amend the complaint;

Exhibit G, a December 22, 2009 transmittal letter from Ms. Mucha to Mr. Lawson, transmitting the amended complaint;

Exhibit H, a February 1, 2010 transmittal letter from Ms. Mucha to Mr. Lawson, re-sending the amended complaint;

Exhibit I, the signed postal return receipt for the February 1, 2010 mailing of the amended complaint;

Exhibit J, the DEC Policy DEE-1 (Civil Penalty Policy), dated June 20, 1990;

Exhibit K, the PBS penalty schedule from DEC Policy DEE-22 (Petroleum Bulk Storage Inspection Enforcement Policy); and

Exhibit L, a proposed order in this matter.

FINDINGS OF FACT

1. L-S Aero Marine, Inc. owns and operates a PBS facility located at 73 Lakeside Drive, Bemus Point, New York 14712 (the "facility"). L-S Aero Marine, Inc. submitted a PBS application on December 16, 2002 that identified L-S Aero Marine, Inc. as both the owner and the operator of the facility (Ex. C). This PBS application was signed by David S. Lawson, Jr., as president of L-S Aero Marine, Inc., on December 16, 2002. The PBS application states that the facility has one 3,000-gallon underground storage tank that was installed on May 1, 1991 and that stores unleaded gasoline. This is the only tank that the facility information report lists as being present but not closed at the facility. The PBS registration number of the facility is 9-224324.
2. David Lawson¹ is president of L-S Aero Marine, Inc. and is the sole officer and shareholder of that corporation. In his corporate capacity, Mr. Lawson is actively and directly involved in the corporation's conduct and has the authority and responsibility to prevent L-S Aero Marine, Inc. from engaging in actions that violate applicable environmental laws.

Default

3. On August 27, 2008, DEC Staff mailed a notice of hearing and complaint in this matter to L-S Aero Marine, Inc., 73 Lakeside Drive, Bemus Point, New York 14712, by certified mail, return receipt requested. The mailing was sent to

¹ The amended complaint states the additional Respondent's name as "David Lawson" and identifies him as the president of L-S Aero Marine, Inc., while the PBS application identifies the president of L-S Aero Marine Inc. as "David S. Lawson, Jr." Neither Respondent has asserted that these are two different individuals and there is nothing in the record that provides a reason to believe that the two names are not the same individual.

the attention of David Lawson, at the address of L-S Aero Marine, Inc. The signed mail receipt was returned to DEC Staff showing the signature of Mr. Lawson as the person who received the mailing and September 9, 2008 as the date of delivery.

4. The notice of hearing stated that an answer must be served upon DEC Staff within twenty days of receipt of the complaint. The notice of hearing also stated that failure to timely file an answer will result in a default and a waiver of the Respondent's right to a hearing. The twenty-day time period expired on September 29, 2008.² L-S Aero Marine, Inc. failed to serve an answer within the 20-day period.
5. On November 20, 2009, DEC Staff moved to amend the complaint to add David Lawson, the president of L-S Aero Marine, Inc., as an additional Respondent and to serve the amended complaint upon Mr. Lawson. Chief ALJ James T. McClymonds granted the motion on December 17, 2009.
6. DEC Staff attempted service of the amended complaint by letter dated December 22, 2009. Due to an error in the December 22 mailing, DEC Staff again mailed the amended complaint to Mr. Lawson by certified mail, return receipt requested, on February 1, 2010. The transmittal letter for the February 1, 2010 letter stated that an answer was due within twenty days of receipt and that "[i]f you fail to return the document by that date, you will be deemed in default."
7. The amended complaint was served upon Mr. Lawson on February 5, 2010, as demonstrated by a postal return receipt bearing Mr. Lawson's signature and February 5, 2010 as the date of delivery. The Respondents failed to serve an answer within 20 days of their receipt of the amended complaint.
8. On April 6, 2010, DEC Staff moved for a default judgment and order. The motion included a proposed order.

² Ms. Mucha's affirmation in support of the motion states that the deadline was October 4, 2008, not September 29, 2008. Despite this discrepancy in dates, if L-S Aero Marine, Inc. failed to file an answer by October 4, 2008 it had also failed to file an answer by September 29, 2008.

Violations

9. The facility's PBS registration expired on August 17, 2007. The Respondents have not renewed the PBS registration. Subdivision 612.2(a) of 6 NYCRR requires that the owner of any petroleum storage facility having a capacity over 1,100 gallons must register the facility with the department, and that the registration must be renewed every five years until the facility is permanently closed or ownership of the facility has been transferred.
10. DEC Staff inspected the facility on September 19, 2006 and on July 24, 2008.
11. The Respondents failed to mark the fill port for the 3,000-gallon tank by means of color coding. Subdivision 613.3(b) of 6 NYCRR requires color coding of fill ports and specifies the colors used to identify particular petroleum products contained in tanks.
12. The 3,000 gallon gasoline tank, designated as tank #1 in the complaint and in the Respondents' PBS application, is not properly labeled with the descriptive information required by 6 NYCRR 614.3(a).
13. Paragraph 613.5(b)(3) of 6 NYCRR requires, for corrosion-resistant underground tanks that are exempt from tightness testing, that the owner or operator must monitor for traces of petroleum at least once per week, and that all monitoring systems must be inspected monthly and must be kept in proper working order. The Respondents failed to properly monitor tank #1.
14. The Respondents failed to maintain monitoring records for tank #1, which records are required by 6 NYCRR 613.5(b)(4) to be retained on the premises for at least one year.
15. The Respondents failed to perform the monitoring of the cathodic protection system on tank #1. Owners or operators of corrosion-resistant underground tanks that are exempt from tightness testing are required by 6 NYCRR 613.5(b)(2) to monitor the adequacy of their cathodic protection systems at least annually.

16. The Respondents failed to keep daily inventory records and failed to reconcile records. Subdivision 613.4(a) of 6 NYCRR requires that an operator of an underground storage tank must keep daily inventory records for the purpose of detecting leaks, and that reconciliation of records must be kept current and must account for all variables which could affect an apparent loss or gain of petroleum.
17. Tank #1 has metallic piping that does not have the cathodic protection required by 6 NYCRR 614.14(b).
18. Tank #1 does not have the overfill protection equipment required by 614.14(g).

Additional matters

19. Brian Graber, Environmental Engineer I, DEC Region 9, sent a notice of violation to the Respondents on September 29, 2006 concerning DEC Staff's September 19, 2006 inspection. The notice of violation listed six of the violations alleged in the amended complaint and required the Respondents to transmit to DEC, by October 31, 2006, specific photographs and documents to show that the violations were corrected. The Respondents failed to meet the October 31, 2006 deadline.
20. DEC Staff wrote to the Respondents on December 5, 2006, transmitting another copy of the notice of violation and stating that the matter would be referred to the DEC Division of Legal Affairs if the remedial work was not completed by January 15, 2007. The Respondents again failed to perform the corrective actions.
21. On June 9, 2008, Ms. Mucha provided the Respondents an additional opportunity to demonstrate that the facility had been brought into compliance, but the Respondents failed to provide the requested documentation by the June 30, 2008 deadline set by Ms. Mucha. DEC Staff inspected the facility on July 24, 2008 and found that none of the corrective actions had been completed.
22. DEC Staff then served the original notice of hearing and complaint upon L-S Aero Marine, Inc. on September 9, 2008, but L-S Aero Marine Inc. failed to submit an answer. On June 18, 2009, Ms. Mucha telephoned Mr. Lawson, stated that the corporation was in default and

reminded him of the need to perform the corrective actions outlined in the complaint. Mr. Lawson asked whether he could, instead, close the tank if that option was not too costly. He requested a few weeks to contact contractors for estimates. Ms. Mucha sent a letter, dated June 18, 2009, to Mr. Lawson, documenting the phone conversation and agreeing to wait 30 days before filing a motion for default judgment. The letter stated that if Mr. Lawson did not contact Ms. Mucha by July 30, 2009 with his decision regarding closure of the tank, a motion for default judgment would be filed. Mr. Lawson did not contact DEC Staff by that deadline.

23. As noted above, DEC Staff moved to amend the complaint to add Mr. Lawson as a Respondent and to serve the amended complaint. This motion was granted on December 17, 2009.
24. By failing to comply with the cited provisions of 6 NYCRR parts 612 through 614, the Respondents avoided substantial costs, giving them an economic advantage over those who comply with these requirements. DEC Staff estimated these avoided costs as including \$400 for leak detection monitoring, \$100 for cathodic protection monitoring on the tank, \$50 for labeling and color-coding, \$500 for overflow protection and \$100 for the verification of the cathodic protection on the tank and piping system. According to DEC Staff, these figures would vary depending on the contractor retained and other factors, and the cost could increase if piping needs to be excavated. The registration fee of \$300 is an additional avoided cost.³ DEC Staff estimated that these avoided costs total approximately \$1,450.
25. DEC Staff is not aware of any actual harm caused by a discharge from the Respondents' tank. The regulations that the Respondents violated, however, are directed at preventing spills and contamination and the Respondents' failure to comply increased the likelihood of environmental harm.

³ The registration fee for a PBS facility storing greater than 2,000 gallons to less than 5,000 gallons is listed in 6 NYCRR 612.3(a) as being \$150, but the fee is now actually \$300 (ECL 17-1009[2]).

DISCUSSION

The amended notice of hearing and complaint were served upon the Respondents on February 5, 2010. Both Respondents failed to serve an answer within the time period specified in 6 NYCRR 622.4(a) and both Respondents defaulted in this matter.

The Respondents did not contest any of the allegations of either the complaint or the amended complaint, nor any of DEC Staff's assertions or arguments about the proposed penalty and remedial actions.

DEC Staff's uncontested allegations concerning Mr. Lawson's role in L-S Aero Marine, Inc., and concerning his relation to the violations, support finding both the corporation and Mr. Lawson liable for the violations (see, Matter of Wayne Jahada and Watertown Tire and Metal, Inc., Order of the Commissioner, November 21, 2006).

The corporation and business entity database on the web site of the New York State Department of State lists L-S Aero Marine, Inc. as inactive, with a note stating "Dissolution by Proclamation/Annulment of Authority (Mar 24, 1993)" (http://www.dos.state.ny.us/corps/bus_entity_search.html, last reviewed on June 1, 2010).

DEC Staff cited Business Corporation Law sections 1005(a)(2), 1006(a) and 1009 as providing that a dissolved corporation continues its corporate existence for purposes of paying liabilities or obligations, for being sued, and to participate in administrative proceedings in its corporate name. DEC Staff also cited the Commissioner's orders in Matter of Salvatore Viti and A-1 Auto Parts, Inc. (March 7, 2008, at footnote 1) and Matter of Martin H. Doran and Almag Construction, Inc. (September 12, 2002) as prior cases in which the Commissioner had issued orders against corporations that had been dissolved by proclamation. DEC Staff noted that, after L-S Aero Marine, Inc. was dissolved in 1993, the corporation continued to hold itself out as a valid corporation in communications with the Department. The 2002 PBS application, a copy of which was included in Exhibit C of the default motion, listed L-S Aero Marine, Inc. as the owner and operator of the PBS facility. The PBS application was signed by Mr. Lawson with the title of "president."

Ms. Mucha's affirmation included a list of the regulatory sections violated by the Respondents and the average penalties

for each violation as recommended in the PBS penalty schedule in DEC Policy DEE-22. Ms. Mucha's affirmation noted that, while this policy states the penalty ranges are not to apply after service of a notice of hearing and complaint, the figures provide a starting point for calculating penalties. Ms. Mucha's affirmation outlined the aggravating factors that support DEC Staff's request of an upward adjustment of the penalty, from the total (\$10,450) of the average penalties for each violation to the requested penalty of \$16,660. The proposed penalty is far less than the maximum penalty authorized by ECL 71-1929.

The proposed penalty is supported by the record of this case and is consistent with the Department's penalty policies relevant to facilities of this kind.

The amended complaint also requested that the Commissioner order the Respondents to undertake corrective actions including registering the facility, and such other and further relief as may be just, proper and appropriate. The corrective actions identified in the amended complaint are ones that would be necessary if the Respondents intend to continue to use the tank rather than to close it. The motion for a default judgment requested the same corrective actions but added, as an alternative, that the Respondents may permanently close the tank in accordance with 6 NYCRR 613.9(b). The alternative of closing the tank was actually something Mr. Lawson wished to consider as of his June 18, 2009 discussion with Ms. Mucha. This alternative should be included in the order, with a slight modification to make it clear that the Respondents must choose between the carrying out all of the corrective actions in paragraphs V.1 through V.8 of the proposed order and the alternative of closing the tank in accordance with 6 NYCRR 613.9(b), and that one of these forms of compliance must be completed within 30 days of the service of the order upon the Respondents.

CONCLUSIONS

1. Respondent L-S Aero Marine, Inc. was served with the notice of hearing and complaint on September 9, 2008, with Respondent David Lawson signing for receipt of these documents. Both Respondents were served with the amended complaint on February 5, 2010. The Respondents failed to file a timely answer and have failed to file any answer as of the date of this report. The Respondents have defaulted in this matter.

2. The Respondents violated 6 NYCRR 612.2(a) by failing to renew the facility's PBS registration after it expired on August 17, 2007.
3. The Respondents violated 6 NYCRR 613.3(b) by failing to mark the fill port of the facility's tank #1 with the required color coding.
4. The Respondents violated 6 NYCRR 614.3(a) by failing to properly label tank #1 with the descriptive information required by that subdivision.
5. The Respondents violated 6 NYCRR 613.5(b)(3) by failing to properly carry out the required weekly and monthly monitoring of tank #1.
6. The Respondents violated 6 NYCRR 613.5(b)(4) by failing to maintain the monitoring records required by that paragraph.
7. The Respondents violated 6 NYCRR 613.5(b)(2) by failing to perform annual monitoring of the cathodic protection system on tank #1.
8. The Respondents violated 6 NYCRR 613.4(a) by failing to keep daily inventory records and by failing to reconcile such records.
9. The Respondents violated 6 NYCRR 614.14(b) because tank #1 has metallic piping that does not have the cathodic protection required by that subdivision.
10. The Respondents violated 6 NYCRR 614.14(g) because tank #1 does not have overfill protection equipment.
11. ECL 71-1929(1) provides that a person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17 of the ECL, or the regulations promulgated pursuant thereto, shall be liable for a civil penalty not to exceed \$37,500 per day for each violation. The violations of parts 612 through 614 of 6 NYCRR are violations of regulations promulgated pursuant to ECL article 17, title 10, and the penalty provision in ECL 71-1929 applies.

RECOMMENDATION

I recommend that the Commissioner issue an order granting the relief sought by DEC Staff, with paragraph V of the proposed order modified as described in the Discussion section above.

/s/

Albany, New York
June 28, 2010

Susan J. DuBois
Administrative Law Judge