

**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, 613, and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

ABLE ENERGY NEW YORK, INC.,

Respondent.

ORDER

DEC Case Nos.
R5-20140313-2108
and
LER5-13-000495B

PBS No. 5-600665

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) charged that respondent Able Energy New York, Inc. (respondent) committed multiple violations of the Environmental Conservation Law (ECL) and the regulations governing petroleum bulk storage (PBS) facilities at a facility located at 10 Industrial Road, Town of Warrensburg, Warren County, New York. The PBS facility consists of eight aboveground PBS storage tanks with a total storage capacity of 103,000 gallons. Staff also alleges that respondent violated ECL 37-0107 when on January 11, 2013, respondent's employee caused heating oil to be discharged onto the ground and snow at a private residence located in Lake George, New York.

Chief Administrative Law Judge (Chief ALJ) James T. McClymonds of the Department's Office of Hearings and Mediation Services was assigned to this matter. Chief ALJ McClymonds prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the Chief ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear at a pre-hearing conference scheduled for May 12, 2015 (see Hearing Report at 6 [Finding of Fact No. 15]). At the May 12, 2015 pre-hearing conference, Department staff made an oral motion for a default judgment. The Chief ALJ reserved on the motion, an adjudicatory hearing was convened, and Department staff proceeded to present its case on the merits with witness testimony and documentary evidence.

As discussed in the hearing report, the Chief ALJ granted the motion of Department staff's counsel to conform the pleadings to the proof and, consistent with the governing statutes, regulations and Department policy, the Chief ALJ corrected staff's papers to plead a violation of section 173 of the Navigation Law (which prohibits the discharge of petroleum) in lieu of ECL 37-0107 (see Hearing Report at 9-10). In addition, as a basis for the penalty for that violation, the Chief ALJ appropriately relied on section 192 of the Navigation Law rather than ECL 71-3703 (see id.).

As a consequence of respondent's failure to answer or appear in this matter, the Chief ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 10). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The testimonial and documentary evidence staff presented at the May 12, 2015 hearing, together with the factual allegations of the complaint, provides proof of the facts sufficient to establish the violations alleged in the complaint.

Department staff seeks a civil penalty in the amount of seventy-nine thousand five hundred dollars (\$79,500) (see Complaint, NYSDEC OHMS Exhibit [Exh] A, Wherefore Clause, at II). ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of ECL article 17 and its implementing regulations. For violations of Navigation Law § 173, Navigation Law § 192 provides for a penalty of up to twenty-five thousand dollars per offense (\$25,000). Section 192 also provides that if the violation is of a continuing nature, each day during which the violation continues constitutes an additional, separate and distinct offense. Staff's requested penalty is substantially below these statutory amounts and is justified under the Department's Civil Penalty Policy (DEE-1), the Petroleum Bulk Storage Inspection Enforcement Policy - Penalty Schedule (DEE-22), and Matter of 12 Martense Associates, LLC (Order of the Commissioner, December 19, 2011, at 2).

I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of this order upon respondent. In addition, I direct respondent to complete the PBS remedial actions sought in the complaint no later than thirty (30) days of the service of this order upon respondent.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Able Energy New York, Inc. waived its right to be heard at the hearing.
- II. Moreover, based upon proof of the facts presented at the May 12, 2015 hearing and the factual allegations of the complaint, respondent Able Energy New York, Inc. is adjudged to have committed the following violations:
 - a. Respondent violated 6 NYCRR 612.2(e) by failing to display a PBS registration certificate that was current and valid;
 - b. Respondent violated ECL 17-1009(2) and 6 NYCRR 612.2(a)(2) by failing to renew the facility's PBS registration after it expired on May 18, 2014;

- c. Respondent violated 6 NYCRR 613.9(a) by failing to close tanks 3, 5A, 5B, and 6 in accordance with section 613.9(a);
 - d. Respondent violated 6 NYCRR 613.3(b) by failing to mark the fill ports for tank 3;
 - e. Respondent violated 6 NYCRR 614.9(c) by failing to protect the surface of tanks 3, 4, 5A, 5B, and 6 from corrosion and deterioration;
 - f. Respondent violated 6 NYCRR 613.6(a) by failing to inspect tanks 1A, 1B, 2, 3, 4, 5A, 5B, and 6 at least monthly;
 - g. Respondent violated 6 NYCRR 613.3(c)(3)(ii) by failing to clearly mark tanks 4, 5A, 5B, and 6 as required by that section;
 - h. Respondent violated 6 NYCRR 613.3(c)(3)(i) by failing to equip tank 3 with a gauge or equivalent device that accurately shows the level of product in the tank; and
 - i. Respondent violated Navigation Law § 173 when on January 11, 2013, respondent's employee Paul J. Breault caused heating oil to be discharged onto the ground and snow at a private residence located at 13 Pine Grove Avenue, Lake George, New York 12845.
- III. Within thirty (30) days of the service of this order upon respondent Able Energy New York, Inc., respondent shall pay a civil penalty in the amount of seventy-nine thousand five hundred dollars (\$79,500) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- IV. Within thirty (30) days of the service of this order upon respondent Able Energy New York, Inc., respondent shall complete the following remedial actions:
- a. submit to the Department a complete petroleum bulk storage application to renew the facility's registration, along with applicable registration fees;
 - b. either close tanks 3, 5A, 5B, and 6 in accordance with 6 NYCRR 613.9(a) and submit photographic evidence of compliance, or ensure the tanks otherwise comply with the PBS laws and regulations;
 - c. permanently mark the fill ports of tank 3 in accordance with 6 NYCRR 613.3(b) and submit photographic evidence of compliance;

- d. protect the surface of tanks 3, 4, 5A, 5B, and 6 in accordance with 6 NYCRR 614.9(c) and submit photographic evidence of compliance;
 - e. inspect the facility in accordance with 6 NYCRR 613.6(a) and submit a complete and accurate copy of the inspection report to the Department;
 - f. clearly mark tanks 4, 5A, 5B, and 6 with the design capacity, working capacity, and identification number on the tank and at the gauge in accordance with 6 NYCRR 613.3(c)(3)(ii) and submit photographic evidence of compliance; and
 - g. install a gauge or equivalent device on tank 3 in accordance with 6 NYCRR 613.3(c)(3)(i), and submit photographic evidence of compliance.
- V. The petroleum bulk storage application, applicable registration fees, the penalty payment, and any photographic evidence of compliance shall be sent to the following address:
- Scott Abrahamson, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Office of General Counsel - DEC Region 5
1115 NYS Route 86, P.O. Box 296
Ray Brook, New York 12977.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Scott Abrahamson, Esq., at the address referenced in paragraph V of this order.

**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, 613, and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

ABLE ENERGY NEW YORK, INC.,

Respondent.

**HEARING
REPORT**

DEC Case Nos.
R5-20140313-2108
and
LER5-13-000495B

PBS No. 5-600665

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Scott Abrahamson, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- No appearance for respondent Able Energy New York, Inc.

I. PROCEDURAL BACKGROUND

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated April 15, 2015, upon respondent Able Energy New York, Inc. Respondent Able Energy New York, Inc., is a domestic business corporation that owns and operates a petroleum bulk storage (PBS) facility located at 10 Industrial Park Road, Town of Warrensburg, Warren County, New York. Service of the notice of hearing and complaint was made by personally serving the Secretary of State pursuant to Business Corporation Law § 306(b) on April 21, 2015.

In its complaint (see NYSDEC OHMS Exhibit [Exh] A), Department staff alleged the following causes of action:¹

- (1) Respondent violated 6 NYCRR 612.2(e) by failing to display a PBS registration certificate that was current and valid;
- (2) Respondent violated ECL 17-1009(2) and 6 NYCRR 612.2(a)(2) by failing to renew the facility's PBS registration after it expired on May 18, 2014;

¹ Department staff did not number the causes of action in its complaint (cf. Matter of RGLL, Inc., Decision and Order of the Commissioner, Dec. 29, 2009, at 5 n 4). I do so here for ease of reference.

- (3) Respondent violated 6 NYCRR 613.9(a) by failing to close tanks 3, 5A, 5B, and 6 in accordance with section 613.9(a);
- (4) Respondent violated 6 NYCRR 613.3(b) by failing to mark the fill ports for tank 3;
- (5) Respondent violated 6 NYCRR 614.9(c) by failing to protect the surface of tanks 3, 4, 5A, 5B, and 6 from corrosion and deterioration;
- (6) Respondent violated 6 NYCRR 613.6(a) by failing to inspect tanks 1A, 1B, 2, 3, 4, 5A, 5B, and 6 at least monthly;
- (7) Respondent violated 6 NYCRR 613.3(c)(3)(ii) by failing to clearly mark tanks 4, 5A, 5B, and 6 with design capacity, working capacity, and identification number on the tank and at the gauge;
- (8) Respondent violated 6 NYCRR 613.3(c)(3)(i) by failing to equip tank 3 with a gauge that accurately shows the level of product in the tank; and
- (9) Respondent violated ECL 37-0107 when on January 11, 2013, respondent's employee Paul J. Breault caused heating oil to be discharged onto the ground and snow at a private residence located at 13 Pine Grove Avenue, Lake George, New York 12845.

As a result of the alleged violations, Department staff seeks a total civil penalty of \$79,500. Staff also seeks various remedial relief, including an order directing respondent to:

- (1) submit to the Department a complete application to renew the facility's registration;
- (2) either close tanks 3, 5A, 5B, and 6 in accordance with 6 NYCRR 613.9(a) and submit photographic evidence of compliance, or ensure the tanks comply with the PBS laws and regulations;
- (3) permanently mark the fill ports of tank 3 in accordance with 6 NYCRR 613.3(b) and submit photographic evidence of compliance;
- (4) protect the surface of tanks 3, 4, 5A, 5B, and 6 in accordance with 6 NYCRR 614.9(c) and submit photographic evidence of compliance;
- (5) inspect the facility in accordance with 6 NYCRR 613.6(a) and submit a complete and accurate copy of the inspection report to the Department;²

² The copy of the complaint Department staff submitted for the record (Exh A) did not contain page 12 of 20. That page set forth a portion of the relief sought in paragraph III.5 and paragraphs III.6, III.7, IV, and V of the wherefore clause of the complaint. Upon my inquiry, Department staff submitted a copy of page 12 of 20 and an attorney's affirmation affirming that the page was served on respondent (see Exh H). I accepted the page 12 as submitted and appended it to Exh A.

- (6) clearly mark tanks 4, 5A, 5B, and 6 with the design capacity, working capacity, and identification number on the tank and at the gauge in accordance with 6 NYCRR 613.3(c)(3)(ii) and submit photographic evidence of compliance; and
- (7) install a gauge on tank 3 in accordance with 6 NYCRR 613.3(c)(3)(i), and submit photographic evidence of compliance.

The notice of hearing gave respondent twenty days from receipt of the complaint to serve an answer, and provided notice that the failure to timely answer would result in a default and a waiver of respondent's right to a hearing. The notice also directed that a pre-hearing conference before an Administrative Law Judge (ALJ) was scheduled to take place on May 12, 2015, at 10:00 AM at the Department's offices located at 232 Golf Course Road, Warrensburg, New York. The notice stated that the failure to be present for the pre-hearing conference constituted a default, and that Department staff would move at the conference for a default judgment and Commissioner's order.

The pre-hearing conference was convened as noticed, and I served as the presiding ALJ for the matter. Respondent failed to file an answer and failed to appear at the May 12, 2015 pre-hearing conference.

At the pre-hearing conference, Department staff made an oral motion for a default judgment pursuant to 6 NYCRR 622.15 based upon respondent's failure to answer the complaint and failure to appear for the pre-hearing conference. An adjudicatory hearing was then convened and Department staff proceeded to present its case on the merits. In support of its case, staff called five witnesses: Calvin and Bonnie Varnum, who testified concerning the discharge of heating oil at the private residence located at 13 Pine Grove Avenue, Lake George, New York; retired Environmental Conservation Officer (ECO) Steven DelaRosa; Lt. John Ellithorpe; Andrew Frank, Environmental Engineer, Division of Environmental Remediation; and Steve Paszko, PBS Inspector, Division of Environmental Remediation. The testimony was digitally recorded (see Edirof File No. 031005145451). A total of 17 exhibits were offered at the hearing, including a proposed Commissioner order, all of which were received into evidence. An additional exhibit and supplementation of one hearing exhibit were filed by staff after the hearing, and received into evidence (see Exhibit Chart attached).

Upon review of the hearing file, I concluded that staff had not established that notice pursuant to CPLR 3215(g)(4) had been sent to respondent's last known address, namely, an address in New York City that appears on respondent's letterhead, and to which mail had previously been successfully sent. Accordingly, in a letter dated June 19, 2015, I reopened the record and directed Department staff to send to respondent at the New York City address, by first class mail, a copy of the April 17, 2015 notice of hearing and complaint together with notice that the corporation was served the notice of hearing and complaint by service upon the Secretary of State pursuant to Business Corporation Law § 306(b). I also directed staff to serve my June 19,

2015 letter upon respondent, which directed respondent to contact my office within twenty days of service if it wished to address its default in this matter.

On July 28, 2015, Department staff filed a cover letter, a copy of my June 19, 2015 letter, a July 2, 2015 affidavit of mailing by Kathy R. Scriver with attachments (marked as Exhibit I), seeking to establish compliance with the directives in my June 19, 2015 letter. Staff also filed a July 8, 2015 affidavit of mailing by Betty Douglas with attachments (marked as Exhibit J) seeking to establish that it had previously complied with the CPLR 3215(g)(4) notice requirements with an April 21, 2015 mailing to respondent at its New York City address. Staff also renewed its motion for a default judgment. Upon receipt of the Department's July 28, 2015 submissions, the record in this matter reclosed.

II. FINDINGS OF FACT

The following findings of fact are based upon the allegations of the complaint and the preponderance of record evidence presented at the hearing and in supplemental filings by Department staff (see 6 NYCRR 622.11[c]; see also Matter of Hunt, Decision and Order of the Commissioner, July 25, 2006, at 3-4; Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, Dec. 12, 2013, at 3).

1. Respondent Able Energy New York, Inc., is an active domestic business corporation (see Exh G).
2. Respondent owns business property located at 10 Industrial Park Road, Warrensburg, New York, 12885 (see Exh 1). Respondent took title to the property in 2004 (see id.).
3. Respondent is also the owner and operator of a PBS facility located at the 10 Industrial Park Road address (see Exh 4). The PBS facility consists of eight aboveground PBS storage tanks numbered 1A, 1B, 2, 3, 4, 5A, 5B, and 6, respectively (see Exhs 4, 5, 6). The tanks have the capacity to hold between 500 and 30,000 gallons of product (see id.). The total storage capacity of the facility is 103,000 gallons (see id.). The facility is considered a large PBS facility (see Paszko testimony).
4. On January 11, 2013, at approximately 2:30 PM, respondent, through its employee, Paul J. Breault, delivered heating oil to a private residence located at 13 Pine Grove Avenue, Lake George, New York, 12845. The private residence was owned by Charles Straight. During the delivery, Mr. Breault overfilled the fuel oil storage tank, which caused heating oil to spill from the overfill vent on the tank, and flow onto the side of the residence, onto a new wheel chair ramp, and eventually onto the ground and snow in an area around the residence. A minimum of five gallons of heating oil were released (see Exhs 2, 3; Bonnie Varnum testimony; Calvin Varnum testimony; Frank testimony).
5. Mr. Breault attempted to clean up the spill by shoveling the contaminated snow and dumping it in the back yard of the residence. Mr. Breault gave the home owner a delivery ticket

for the delivery and left without any further clean up and without reporting the spill. After the homeowner's daughter, Bonnie Varnum called respondent to complain about the spill, Mr. Breault returned to the residence, placed some of the oil-contaminated snow in his truck, and attempted to dispose of some of the rest of the contaminated snow by throwing it over a fence onto adjacent land owned by the State. Mr. Breault then left the residence and disposed of the contaminated snow in his truck at an undisclosed location (Bonnie Varnum testimony; Calvin Varnum testimony; DelaRosa testimony; Ellithorpe testimony; Frank testimony).

6. At approximately 6:25 PM on January 11, 2013, the homeowner's son-in-law, Calvin Varnum, reported the spill to the Department (see Exh 2). The following day, Department employee Andrew Frank and ECO DelaRosa inspected the residence. They confirmed the presence of spilled oil on the ramp, snow, and soils around the residence, in the back yard, and across the fence line on the neighboring property. They also observed odor masking material on the impacted wood of the ramp. Mr. Frank arranged for a contractor to finish the clean up of the spill (see Exh 2; DelaRosa testimony; Frank testimony).

7. Lt. Ellithorpe subsequently interviewed Mr. Breault, who acknowledged the spill and his attempts to clean it up (see Ellithorpe testimony). During a subsequent meeting between Department representatives and representatives of respondent, respondent did not deny the spill and indicated that it did not believe it had to report the spill given the quantity of oil discharged (see Ellithorpe testimony; Frank testimony).

8. On September 12, 2013, Department inspector Steve Paszko inspected respondent's PBS facility at 10 Industrial Park Road. The inspection revealed that: (1) respondent lacked a current and valid PBS registration certificate; (2) tanks 3, 5A, 5B, and 6 were out of service and had not been closed in compliance with the requirements of 6 NYCRR 613.9(a); (3) the fill port for tank 3 was not properly color coded; (4) tanks 3, 4, 5A, 5B, and 6 did not have surface coating present to protect them from corrosion; (5) tanks 1A, 1B, 2, 3, 4, 5A, 5B, and 6 had not been inspected at least monthly; (6) tanks 4, 5A, 5B, and 6 were not properly labeled in compliance with the requirements of 6 NYCRR 613.3(c)(3)(ii); and (7) tank 3 was not properly equipped with a gauge or equivalent device that accurately showed the level of product in the tank (see Exh 7). Mr. Paszko issued a notice of violation (NOV) dated September 23, 2013, documenting the violations observed and giving directions regarding corrective actions (see id.).

9. On October 23, 2013, respondent submitted a PBS application (see Exh 4). The Department issued respondent a PBS certificate with an expiration date of May 18, 2014 (see Exh 5). Respondent failed to renew its PBS certificate after it expired (see Complaint, Exh A ¶ 10). In addition, respondent failed to provide the Department with any proof that the remaining violations identified in the September 23, 2013 NOV were corrected (see Paszko testimony).

10. On April 17, 2015, Department staff served an April 15, 2015 notice of hearing and complaint by sending it by certified mail, return receipt requested, to an address in New York City respondent used in its letterhead (see Exh C). A signed but undated and unpostmarked certified mail receipt (green card) was received by the Department on May 4, 2015 (see id.).

11. Department staff also served the April 15, 2015 notice of hearing and complaint by personally serving the New York State Secretary of State on April 20, 2015 pursuant to Business Corporation Law § 306(b)(1) (see Exh B).

12. In an attempt to provide the additional notice of hearing and complaint required by CPLR 3215(g)(4)(ii), Department staff sent the notice of hearing and complaint to respondent by first class mail on April 21, 2015 to respondent's Warrensburg address; on May 1, 2015 to respondent's post office box in Warrensburg; and on May 5, 2015 to a Rockaway, New Jersey address that respondent gave during the September 12, 2013 inspection and used on its website (see Exhs D, E, and F). All three first class mailings were returned (see id.).

13. On April 21, 2015, Department staff also sent the notice of hearing and complaint to respondent by first class mail, together with a cover letter providing notice that the notice of hearing and complaint had been served on the Secretary of State,³ to respondent at the New York City address used in its letterhead (see Exh J). The first class mailing to the New York City address was not returned to the Department (see id. at 2-3).

14. Pursuant to my June 19, 2015 letter, on July 2, 2015, Department staff again sent the notice of hearing and complaint to respondent by first class mail, together with a cover letter providing notice that the notice of hearing and complaint had been served on the Secretary of State,⁴ to respondent at the New York City address used in its letterhead (see Exh I). The July 2, 2015 mailing also contained my June 2015 letter, staff's proposed Commissioner order (see Exh 10), and a notice that respondent should immediately contact the undersigned Judge if it wished to address its default (see Exh I).

15. Respondent has failed to serve an answer, and failed to appear at the pre-hearing conference scheduled before me on May 12, 2015.

III. DISCUSSION

Within 20 days of receiving a notice of hearing and complaint, respondent must serve an answer on Department staff (see 6 NYCRR 622.4[a]). The failure to timely serve an answer constitutes a default and a waiver of respondent's right to a hearing (see id.; 6 NYCRR 622.15[a]). The failure to attend a pre-hearing conference scheduled in the notice of hearing is also a default and a waiver of respondent's right to a hearing, provided the pre-hearing conference is scheduled beyond the twenty day period for answering the complaint (see 6

³ The cover letter indicated that the notice of hearing and complaint was served on the Secretary of State on April 21, 2015. The April 21 dated must be a typographical error. The affidavit of service on the Secretary of State establishes April 20, 2015 as the service date.

⁴ Again, the cover letter indicated that the notice of hearing and complaint was served on the Secretary of State on April 21, 2015. As noted above, the April 21 date must be a typographical error.

NYCRR 622.3[a][2]; 6 NYCRR 622.15[a]; Matter of Kuldeep Singh, Decision and Order of the Commissioner, Dec. 17, 2003, at 8).

When a respondent fails to answer a complaint or fails to appear for a pre-hearing conference scheduled in the notice of hearing, Department staff may make a motion to an ALJ for a default judgment (see 6 NYCRR 622.15[a]). The motion may be made orally on the record or in writing, and must contain:

- (1) proof of service of the notice of hearing and complaint on respondent;
- (2) proof of respondent's failure to appear or failure to file a timely answer; and
- (3) a proposed order

(see 6 NYCRR 622.15[b]).

A defaulting respondent is deemed to have admitted the factual allegations of the complaint (see Matter of Hunt, at 3-4). In addition, in support of its motion, Department staff must provide some proof of facts sufficient to support the causes of action pleaded in the complaint (see Matter of Queen City Recycle Center, at 3). Where personal jurisdiction over a corporation was obtained by personally serving the notice of hearing and complaint on the Secretary of State pursuant to Business Corporation Law § 306(b), Department staff must also provide proof of additional service consistent with CPLR 3215(g)(4) (see Matter of Milu, Inc., Order of the Commissioner, May 25, 2007, at 1; Matter of Polanaya Corp., Order of the Commissioner, April 12, 2005, at 1). The additional service consists of service by first class mail of the notice of hearing and complaint, together with notice to respondent that service upon the corporation is being or was made pursuant to Business Corporation Law § 306(b) (see CPLR 3215[g][4][i], [ii]). The additional service must be made at least twenty days before the entry of a judgment against respondent (see CPLR 3215[g][4][i]).

A. Proof of Service of Notice of Hearing and Complaint

Department staff has established that the April 15, 2015 notice of hearing and complaint was served upon respondent, an active domestic business corporation, by personal service on the Secretary of State pursuant to Business Corporation Law § 306(b) on April 20, 2015 (see Exh B). Thus, Department staff has demonstrated that it obtained personal jurisdiction over respondent.

I note that an alternative basis exists for personal jurisdiction over respondent. Pursuant to 6 NYCRR 622.3(a)(3), staff may serve a notice of hearing and complaint by certified mail, with service being completed upon respondent's receipt of the papers. Here, Department staff sent the April 15, 2015 notice of hearing and complaint to respondent by certified mail on April 17, 2015, and a return receipt was returned to the Department evidencing that respondent received the mailing. However, because the return receipt was undated and unpostmarked, no

evidence exists that the certified mailing was received more than 20 days prior to the default hearing in this matter. Thus, the April 17, 2015 mailing may not be used as a basis for the default motion in this matter (see Matter of Kuldeep Singh, at 8), and staff does not rely on the April 17, 2015 mailing for purposes of the default judgment motion. The return receipt from the April 17, 2015 mailing, however, does provide some evidence that the New York City address is a valid last known address for respondent.

B. Additional Service Under CPLR 3215(g)(4)

When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation over which Department staff obtained jurisdiction by serving the Secretary of State pursuant to Business Corporation Law § 306, consistent with CPLR 3215(g)(4), staff must provide (1) additional service of the notice of hearing and complaint by first class mail to the corporate respondent's last known address at least twenty days before the entry of judgment, and (2) notice to the corporate respondent that service is being made or has been made pursuant to Business Corporation Law § 306 (see e.g. Matter of Milu, at 1).

In this matter, the July 8, 2015 affidavit of mailing by Betty Douglas establishes that respondent was provided with the additional notice required by CPLR 3215(g)(4) on April 21, 2015 (see Exh J). On April 21, 2015, which was one day after Department staff personally served the April 15, 2015 notice of hearing and complaint on the Secretary of State pursuant to Business Corporation Law § 306, staff sent the notice of hearing and complaint, together with a cover letter providing notice that the complaint was being served pursuant to section 306, by first class mail to respondent at its New York City address (see id.). Ms. Douglas avers that the April 21, 2015 mailing was not returned to the Department and, as noted above, the record contains evidence that respondent's New York City address is the last known address at which respondent has received mail. Accordingly, Department staff has demonstrated compliance with CPLR 3215(g)(4).

I also note that Department staff made several other attempts to provide CPLR 3215(g)(4) notice by sending the notice by first class mail to addresses in Warrensburg, New York, and Rockaway, New Jersey (see Exhs D-F). Each of those mailings was returned by the United States Postal Service as undeliverable and thereby raised questions about whether those addresses were good addresses for respondent (see id.). While a corporate respondent's failure to receive a CPLR 3215(g)(4) notice does not preclude entry of a default judgment against the corporation (see CPLR 3215[g][4][ii]), the successful delivery of the CPLR 3215(g)(4) notice to respondent's New York City address renders the issue academic.

C. Other Default Judgment Requirements

With respect to the remaining requirements for a default judgment, Department staff established that respondent failed to answer the complaint, and failed to appear at the pre-hearing conference as noticed (see 6 NYCRR 622.15[b][2]). Department staff also provided a proposed Commissioner's order for the record (see Exh 10; see 6 NYCRR 622.15[b][3]).

D. Violations and Penalty

At the adjudicatory hearing held on May 12, 2015, Department staff provided sufficient testimonial and documentary evidence to establish the PBS violations charged in paragraphs 19 through 22 of the complaint in this matter (see Complaint, Exh A, at 3-4 [referenced above as causes of action 1 through 8]), and the appropriateness of the penalty being sought for those violations (see Matter of Queen City Recycle Center, at 3; see also Exh 9 [Department staff's penalty calculations]; Paszko testimony). Accordingly, Department staff is entitled to a default judgment for the PBS violation charged in this matter.

With respect to the cause of action charging the release of a hazardous substance (see Complaint, Exh A, at 4-5, ¶¶ 23-32, 45-48, 58-59 [referenced above as cause of action 9]), the Department does not regulate petroleum products, such as heating oil, as hazardous substances under ECL article 37. ECL 37-0107 prohibits the release to the environment substances hazardous to the public health, safety, or the environment in contravention of the rules and regulations promulgated by the Department pursuant to article 37. Although petroleum is defined as a hazardous substance under the Department's regulations implementing article 37 in effect at the time of the incident (see 6 NYCRR former 597.1[a][3][ix], [7]), petroleum is exempt from the regulations governing the release of hazardous substances (see 5 NYCRR former 595.1[b]).⁵ Because the release of petroleum is not governed by the regulations implementing article 37, the prohibition under ECL 37-0107 does not apply in this matter.⁶

Instead, the storage and release of petroleum products are regulated under ECL article 17 (see ECL 17-1001 *et seq.*), Navigation Law article 12 (see Navigation Law § 170 *et seq.*), and their respective implementing regulations (see 6 NYCRR part 613; 17 NYCRR parts 30-33). Specifically, Navigation Law § 173 prohibits the discharge of petroleum. In addition, Navigation Law § 192 authorizes a penalty of up to \$25,000 per day for any such discharge. Accordingly, consistent with the governing statutes, regulations, and Department policy, the correct statutory basis for Department staff's ninth cause of action is Navigation Law §§ 173 and 192, not ECL 37-0107 and 71-3703.

At the close of Department staff's case, counsel moved to conform the pleadings to the proof. A motion to conform the pleadings to the proof may be used to correct the legal basis for a particular charge, provided the respondent will not be prejudiced (see Matter of Wilder, Hearing Report at 3-4, adopted by Supplemental Order of the Acting Commissioner, Sept. 27, 2005; see also CPLR 3025[c]; Dauernheim v Landlease Cars, Inc., 238 AD2d 462, 463 [2d Dept 1997]; Matter of Cerio v New York City Tr. Auth., 228 AD2d 676 [2d Dept 1996]). In

⁵ Effective October 11, 2015, the regulations governing hazardous substances were substantially modified. Under the current regulations, petroleum and petroleum products are expressly excluded from the definition of hazardous substances, except where petroleum is part of certain blends of hazardous substances (see 6 NYCRR 597.1[a][7][ii], [12], [13]).

⁶ Petroleum is also statutorily exempt from coverage under the Hazardous Substances Bulk Storage Act (see ECL 40-0105[4]).

this case, the complaint provided respondent with adequate notice of the factual basis and the actual nature of the charge. Moreover, respondent had ample notice of the hearing and staff's intent to proceed in the event of respondent's default. Finally, Department staff is only seeking a \$2,500 penalty for the petroleum discharge, even though the Navigation Law authorizes a substantially higher amount (see Navigation Law § 192; ECL 71-3703). Thus, respondent will not be prejudiced if staff's motion to conform the pleadings to the proof is granted.

Accordingly, Department staff's motion to conform the pleadings to the proof is granted, and paragraphs 45 through 48 and 58 through 59 are corrected to plead a violation of Navigation Law § 173 and its implementing regulations. Department staff provided sufficient proof at the hearing to establish a violation of section 173, and staff has provided sufficient justification for imposing a \$2,500 penalty for that violation.

IV. RECOMMENDATIONS

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

1. Granting Department staff's motion for a default judgment, holding respondent Able Energy New York, Inc. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Able Energy New York, Inc., committed the ECL, Navigation Law, and regulatory violations charged in the April 15, 2015 complaint, as amended by this hearing report;
3. Directing respondent Able Energy New York, Inc., to pay a civil penalty in the amount of seventy-nine thousand five hundred dollars (\$79,500) within thirty (30) days of service of the Commissioner's order;
4. Directing respondent Able Energy New York, Inc., to complete the corrective actions sought in the complaint at the facility within thirty (30) days of service of the Commissioner's order; and
5. Directing such other and further relief as the Commissioner may deem just and appropriate.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: February 8, 2016
Albany, New York

EXHIBIT CHART

Matter of Able Energy New York, Inc.

May 12, 2015 -- Region 5, Warrensburg Sub-office

DEC Case No. R5-20140313-2108

Edirol File No. 031005145451

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
A	Notice of Hearing and Complaint, dated April 15, 2015	✓	✓	Department staff	Page 12 of 20 provided by DEC staff on June 8, 2015.
B	Affidavit of Service by Drew Wellette, DEC Paralegal 2, dated April 20, 2015	✓	✓	Department staff	
C	Affidavit of Service (Cert. Mail) by Betty Douglas, DEC Secretary 1, dated May 15, 2015; with cover letter of Assistant Regional Attorney Scott Abrahamson dated April 17, 2015; a copy of October 23, 2013 letter from Respondent; signed certified mail receipt; and a copy of Attorney Affirmation by Scott Abrahamson, Esq., dated May 13, 2015, with attachment	✓	✓	Department staff	Copy of Douglas Affidavit of Service and copy of Abrahamson Attorney Affirmation provided by email dated May 15, 2015. Remainder of exhibit proffered at hearing.
D	Affidavit of CPLR § 3215 (g) (4) (ii) Notice and Mailing of Betty Douglas, DEC Secretary 1, dated April 28, 2015; with copies of notices dated April 21, 2015, attached; and mailing envelope returned to DEC April 30, 2015 marked "MOVED LEFT NO ADDRESS, UNABLE TO FORWARD, RETURN TO SENDER."	✓	✓	Department staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
E	Affidavit of CPLR § 3215 (g) (4) (ii) Notice and Mailing of Betty Douglas, Secretary 1, dated May 1, 2015; with copies of notices dated May 1, 2015, attached; copy of business card and web pages showing P.O. Box 217 address; and mailing envelope returned to DEC marked "Not Deliverable as Addressed, Unable to Forward, Returned to Sender."	✓	✓	Department staff	
F	Affidavit of CPLR § 3215 (g) (4) (ii) Notice and Mailing of Linda Branch, Secretary 2, dated May 5, 2015; with copies of notices dated May 5, 2015, attached; copies of web pages and DEC PBS Inspection Form showing Rockaway, NJ address; and mailing envelope returned to DEC marked "ATTEMPTED NOT KNOWN, RETURN TO SENDER."	✓	✓	Department staff	
G	NYS Department of State Division of Corporations Entity Information, printed 3/14/14	✓	✓	Department staff	
H	Attorney Affirmation of Assistant Regional Attorney Scott Abrahamson dated June 8, 2015, affirming that page 12 of 20 of the complaint was served on respondent; with copy of page 12 attached	✓	✓	Department staff	Received by email dated June 8, 2015.
I	Affidavit of CPLR § 3215(g)(4)(ii) Notice and Mailing of Kathy R. Scriver, Administrative Assistant, dated July 2, 2015, with attachments	✓	✓	Department staff	
J	Affidavit of CPLR § 3215(g)(4)(ii) Notice and Mailing of Betty Douglas, Secretary 1, dated July 8, 2015, with attachments	✓	✓	Department staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
1	Certification of Assistant Regional Attorney Scott Abrahamson dated May 5, 2015 with copy of Deed into Respondent dated November 25, 2003; Correction Warranty Deed dated May 6, 2004; Warren County Real Property Tax Services data; and copy of 2014 Assessment Roll	✓	✓	Department staff	
2	NYSDEC Spill Report Form, dated January 11, 2013	✓	✓	Department staff	
3	Complaint Form, ECO Stephen delaRosa with narrative	✓	✓	Department staff	
4	Cover letter of Able Energy dated Oct. 23, 2013, with respondent's 2013 Petroleum Bulk Storage Application, processed by DEC on December 11, 2013; expiration date of May 18, 2014	✓	✓	Department staff	
5	Petroleum Bulk Storage Certificate, PBS No. 5-600665, printed December 11, 2013	✓	✓	Department staff	
6	Facility Information Report, PBS No. 5-600665, printed December 11, 2013	✓	✓	Department staff	
7	DEC staff's Notice of Violation ("NOV") dated September 23, 2013, from inspection of respondent's facility on September 12, 2013, and copy of staff's Petroleum Bulk Storage Inspection Form	✓	✓	Department staff	
8	DEC staff's Notice of Violation ("NOV") dated March 6, 2009	✓	✓	Department staff	
9	Penalty Calculations, from staff's April 15, 2015 complaint	✓	✓	Department staff	
10	Proposed Commissioner's Order	✓	✓	Department staff	