

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC Case No. R5-20140225-2100
PBS No. 5-514063

-by-

WENDY DABY,

Respondent.

This administrative enforcement proceeding concerns the failure of respondent Wendy Daby to comply with New York State’s petroleum bulk storage regulations at a petroleum bulk storage facility (PBS No. 5-514063) she owns located at 8179 State Route 3, hamlet of Vermontville, Town of Franklin, Franklin County, New York (“facility”). The facility, which is known as the Birch Bark Deli, was a convenience store that at one time engaged in the retail sale of gasoline and diesel fuel.

At the facility are four aboveground petroleum storage tanks with a combined capacity of 14,550 gallons and which are designated Tank Nos. 001, 002, 004 and 005, respectively. Tank No. 001 has a capacity of 8,000 gallons and is intended for the storage of gasoline and ethanol. Tank No. 002 has a capacity of 6,000 gallons and is intended for the storage of diesel fuel. Tank Nos. 004 and 005 each have a capacity of 275 gallons and are intended for the storage of No. 2 fuel oil for onsite consumption. The facility is subject to the State’s petroleum bulk storage regulations (see 6 NYCRR 612.1[b]).

Staff of the New York State Department of Environmental Conservation (“DEC” or “Department”) commenced this administrative enforcement proceeding by serving a notice of hearing and complaint dated July 7, 2014 upon respondent. The papers were personally served on respondent on July 13, 2014. Accordingly, service of process was accomplished pursuant to 6 NYCRR 622.3. Respondent failed to answer the complaint.

Staff’s complaint alleges that, based upon records that the Department maintains and upon an inspection of the facility by Department staff on May 24, 2013, six regulatory violations were observed or documented:

- a. 6 NYCRR 612.2(a)(2) -- failure to renew the PBS registration for the facility which expired on July 1, 2014;
- b. 6 NYCRR 612.2(e) -- failure to display at the facility a registration certificate that was current and valid;

- c. 6 NYCRR 613.3(b) -- failure to permanently mark all fill ports to identify the product inside Tank Nos. 004 and 005;
- d. 6 NYCRR 613.3(c)(6)(i) -- failure to install secondary containment for Tank Nos. 004 and 005;
- e. 6 NYCRR 613.9(a) -- failure to temporarily close Tank Nos. 001 and 002; and
- f. 6 NYCRR 613.9(b) -- failure to permanently close Tank Nos. 001, 002 and 005.

Staff, in its complaint, sought an order directing respondent to undertake various remedial measures at the facility and to pay a civil penalty in the amount of eleven thousand three hundred dollars (\$11,300).

Department staff personally served a “Notice of Hearing-Default” dated September 30, 2014 (“Notice”) on respondent on October 6, 2014. The Notice stated that, on December 2, 2014 the matter would be called before an administrative law judge (“ALJ”). It further stated, in part, that respondent’s failure to appear would constitute a default and a waiver of her right to be heard, and could result in a Commissioner’s order being issued against her (see Hearing Exhibit [“Exh”] 13, at page 2).

Attached to the Notice that was served on respondent was a proposed Commissioner’s order that Department staff drafted (see Exh 2 attached to Exh 13). The Staff-drafted order modified both the civil penalty and the remedial measures that were set forth in the complaint. As noted, in the complaint, staff requested assessment of a payable civil penalty of eleven thousand three hundred dollars (\$11,300) (see Exh 12, Complaint [Section II, at page 8 (Wherefore Clause)]). Although retaining an overall penalty request of eleven thousand three hundred dollars (\$11,300), Department staff in the Notice is seeking a payable penalty of only three thousand dollars (\$3,000) with the remaining portion (that is, eight thousand three hundred dollars [\$8,300]) suspended, contingent upon respondent implementing specified remedial measures at the facility (see Exh 2 to Exh 13, Proposed Commissioner’s Order, Section V). As to the remedial measures, Department staff is no longer requesting submission of a registration renewal application and is providing sixty (60) days for the submission of documentation relative to the installation of secondary containment (compare Exh 12, Complaint [Section III, at pages 8-10] with Exh 2 to Exh 13, Proposed Commissioner’s Order [Section VI]). Furthermore, in contrast to the complaint, staff, in the Notice, no longer requests that respondent be held liable for a violation of 6 NYCRR 612.2(a)(2).

The matter was heard by ALJ Richard R. Wissler on December 2, 2014. Respondent did not appear. Accordingly, Department staff moved for a default judgment on the complaint and submitted exhibits in support of its motion. ALJ Wissler has prepared the attached default summary report which I adopt as my decision in this matter, subject to the following comments.

For purposes of this proceeding, I am considering only the findings, civil penalty and remedial measures that staff set forth in its proposed Commissioner’s order and attached to the Notice (see Exh 2 to Exh 13), and I am treating the staff-drafted order as an amendment to the findings, penalty and remedial measures in staff’s complaint.

These modifications to the findings, penalty and remedial measures were in the last set of papers that respondent received and these modifications impose lesser charges and obligations on respondent than those set forth in the complaint. As noted, the revised penalty request includes a suspended portion (whereas staff's original request in the complaint did not suspend any portion of the penalty), and the modified remedial measures eliminate one obligation and provide an extended timeframe for another. In addition, one of the alleged violations (failure to register the facility – 6 NYCRR 612.2[a][2]) was dropped. Imposing lesser charges and obligations do not raise due process concerns or otherwise prejudice respondent in this default proceeding (see, e.g., Matter of EV 1st Ave. Prop. Owner, L.P., ALJ Hearing Report, June 5, 2014, at 2, adopted in relevant part by Order of the Commissioner, Sept. 29, 2014, at 1-2). I note, however, that no explanation for these changes were provided. In future proceedings, staff should provide an explanation for any changes that it may propose to the original complaint or other charging instrument. Such explanation may be by written submission or orally on the record.

With respect to the penalty, ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of titles 1 through 11 inclusive and title 19 of ECL article 17, or the rules or regulations promulgated thereto. Title 10 of ECL article 17 establishes the requirements governing petroleum bulk storage, with applicable regulations at 6 NYCRR parts 612, 613 and 614. In consideration of DEE-1 (Civil Penalty Policy) dated June 20, 1990, DEE-22 (Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule) dated May 21, 2003, and ECL 71-1929, and based upon my review of the record, I am adopting the ALJ's recommendation to assess a civil penalty against respondent of eleven thousand three hundred dollars (\$11,300), of which three thousand dollars (\$3,000) will be payable within thirty (30) days of the service of this order upon respondent. The remaining amount of eight thousand three hundred dollars (\$8,300) will be suspended contingent upon respondent's compliance with the terms of this order. This penalty, which is significantly below the statutory maximum, is authorized and warranted.

I have also reviewed the requested remedial measures that Department staff included in the Notice, and these measures are authorized and appropriate.

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 on the complaint, as the complaint's findings, civil penalty and remedial measures were amended by staff's proposed Commissioner's order that was attached to the Notice of Hearing-Default, is granted.
- II. Respondent Wendy Daby is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations in Department staff's complaint against respondent are deemed to have been admitted by her.

- III. Moreover, based on record evidence, respondent Wendy Daby, with respect to a petroleum storage facility she owns and which is located at 8179 State Route 3, hamlet of Vermontville, Town of Franklin, Franklin County, New York, is adjudged to have violated:
- A. 6 NYCRR 612.2(e), for failing to display at the facility a registration certificate that was current and valid;
 - B. 6 NYCRR 613.3(b), for failing to permanently mark all fill ports to identify the product inside Tank Nos. 004 and 005;
 - C. 6 NYCRR 613.3(c)(6)(i), for failing to install secondary containment for Tank Nos. 004 and 005;
 - D. 6 NYCRR 613.9(a), for failing to temporarily close Tank Nos. 001 and 002; and
 - E. 6 NYCRR 613.9(b), for failing to permanently close Tank Nos. 001, 002 and 005.
- IV. Respondent Wendy Daby is hereby assessed a civil penalty in the amount of eleven thousand three hundred dollars (\$11,300). Respondent shall pay the sum of three thousand dollars (\$3,000) within thirty (30) days after service of this order upon her. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the Department at the following address: Betty Douglas, New York State Department of Environmental Conservation, Office of General Counsel – Region 5, P.O. Box 296, Ray Brook, New York 12977.
- The balance of the civil penalty, eight thousand three hundred dollars (\$8,300), shall be suspended on the condition that respondent complies with the terms of this order. In the event Department staff determines that respondent has failed to comply with this order, the suspended sum of eight thousand three hundred dollars (\$8,300) shall be due within thirty (30) days of service on respondent of written notice by Department staff. Department staff's determination of noncompliance shall be final and binding on respondent.
- V. Respondent Wendy Daby is ordered to complete the following remedial actions:
- A. Within ten (10) days after service of this order upon respondent Wendy Daby, respondent shall notify Department staff of her choice to permanently or temporarily close Tank No. 001 and Tank No. 002.
 - B. If respondent elects to permanently close Tank No. 001 and Tank No. 002, she shall perform the following actions with respect to Tank No. 001 and Tank No. 002 within thirty (30) days after service of this order upon respondent:

1. All liquid in the tanks and lines shall be removed and disposed of in accordance with applicable State and federal requirements;
2. The manholes at the top of the tanks shall be removed, the insides of the tanks shall be cleaned, and respondent shall dispose of the liquid and sludge properly and in accordance with applicable State and federal requirements. Where required, respondent shall retain a qualified contractor to enter the confined space;
3. Respondent shall disconnect the lines and securely cap or lock the fill ports and other lines to prevent unauthorized use;
4. Respondent shall stencil the date of permanent closure on the tanks;
5. Respondent shall protect the tanks from floatation in accordance with good engineering practices, and shall notify Department staff in writing of the method that will be used to so protect the tanks. Department staff retains the discretion to approve or reject the method chosen; and
6. Within ten (10) days of completing the work required in this paragraph B (subparagraphs 1-5), respondent shall accurately complete, sign and mail a PBS application to Department staff, permanently closing Tank No. 001 and Tank No. 002.

C. If respondent Wendy Daby chooses not to permanently close Tank No. 001 and Tank No. 002 at the facility, respondent shall perform the following actions:

1. Within thirty (30) days after service of this order upon her, properly and temporarily close Tank No. 001 and Tank No. 002 in accordance with the requirements of 6 NYCRR 613.9(a). Respondent shall submit to Department staff photographs showing that Tank No. 001 and Tank No. 002 have been so temporarily closed;
2. Within thirty (30) days after service of this order upon her, permanently mark all fill ports for Tank No. 004 and Tank No. 005 to identify the product inside the tank in accordance with the color and symbol code of the American Petroleum Institute. Respondent shall submit to Department staff photo documentation of the color coding's compliance with the requirements of 6 NYCRR 613.3(b);
3. Within thirty (30) days after service of this order upon her, submit to Department staff a plan to install secondary containment or the

equipment that meets the Department's Inspection Handbook DER-25 requirements for Tank No. 004 and Tank No. 005, which could be reasonably expected to discharge petroleum to the waters of the State, in accordance with the requirements of 6 NYCRR 613.3(c)(6); and

4. Within sixty (60) days after service of this order upon her, submit documentation that the required secondary containment system set forth in paragraph V.C.3 of this order has been so installed.

- VI. Except as set forth in Section IV, all communications from respondent Wendy Daby to Department staff concerning this order shall be made to:

Scott Abrahamson, Esq.
Assistant Regional Attorney
New York State Department of Environmental Conservation
Region 5
P.O. Box 296, 1115 NYS Route 86
Ray Brook, New York 12977
(518) 897-1214

- VII. The provisions, terms and conditions of this order shall bind respondent Wendy Daby and respondent's agents, successors, and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: June 16, 2015
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

DEFAULT SUMMARY REPORT

DEC Case No. R5-20140225-2100
PBS No. 5-514063

-by-

WENDY DABY,

Respondent.

Procedural History

On July 13, 2014, staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) personally served respondent Wendy Daby with a notice of hearing and complaint dated July 7, 2014, containing one cause of action alleging six violations of ECL article 17 title 10 and 6 NYCRR parts 612 and 613 at a petroleum storage facility owned by her located at 8179 State Route 3, Hamlet of Vermontville, Town of Franklin, Franklin County, New York 12989 (“facility”). The facility is known as the Birch Bark Deli. The facility was a convenience store which at one time engaged in the retail sale of gasoline and diesel fuel. There are four petroleum storage tanks at the facility with a combined capacity of 14,550 gallons. All of the tanks are aboveground storage tanks (“ASTs”). The ASTs are designated Tank Nos. 001, 002, 004 and 005. Tank No. 001 has a capacity of 8,000 gallons and is intended for the storage of gasoline and ethanol. Tank No. 002 has a capacity of 6,000 gallons and is intended for the storage of diesel fuel. Tank Nos. 004 and 005 each have a capacity of 275 gallons and are intended for the storage of No. 2 fuel oil for onsite consumption.

The complaint alleges that, based upon records maintained by the Department as well as during an inspection of the facility on May 24, 2013, the following regulatory violations were observed or documented:

- a. 6 NYCRR 612.2(a)(2) by failing to renew the PBS registration for the facility which expired on July 1, 2014;
 - b. 6 NYCRR 612.2(e) by failing to display at the facility a registration certificate that was current and valid;
 - c. 6 NYCRR 613.3(b) by failing to permanently mark all fill ports to identify the product inside Tank Nos. 004 and 005;
 - d. 6 NYCRR 613.3(c)(6)(i) by failing to install secondary containment for Tank Nos. 004 and 005;
 - e. 6 NYCRR 613.9(a) by failing to temporarily close Tank Nos. 001 and 002;
- and

- f. 6 NYCRR 613.9(b) by failing to permanently close Tank Nos. 001, 002 and 005.

The complaint seeks an order of the Commissioner providing the following relief:

I. That the Commissioner issue an Order finding that Respondent Wendy Daby violated 6 NYCRR 612.2(a)(2), 6 NYCRR 612.2(e), 6 NYCRR 613.3(b), 6 NYCRR 613.3(c)(6)(i), 6 NYCRR 613.9(a), and 6 NYCRR 613.9(b);

II. That the Commissioner issue an Order assessing a civil penalty against Respondent in the amount of \$11,300, which amount shall be payable to the Department no later than thirty (30) days from the date of service of the Commissioner's Order on Respondent;

III. That the Commissioner issue an Order directing Respondent to perform remedial actions as follows:

1. Within ten (10) days from the date of service of the Commissioner's Order on Respondent, Respondent shall submit a complete application to renew the registration for the facility in accordance with 6 NYCRR 612.2(a)(2) and remit to the Department the appropriate fee for renewal.

2. Within ten (10) days from the date of service of the Commissioner's Order on Respondent, Respondent shall notify Department staff of her choice to either (1) permanently close **tanks 001 and 002**; or (2) temporarily close **tanks 001 and 002**.

3. If Respondent elects to permanently close **tanks 001 and 002**, she shall perform the following actions within thirty (30) days from the date of service of the Commissioner's Order on Respondent:

- a. All liquid in the tanks and lines shall be removed and disposed of in accordance with applicable State and Federal requirements.

- b. The manholes at the top of the tanks shall be removed, the insides of the tanks shall be cleaned, and Respondent shall dispose of the liquid and sludge properly and in accordance with applicable State and Federal requirements.

NOTE: A qualified contractor may be needed to enter the confined space.

- c. Respondent shall disconnect the lines and securely cap or lock the fill ports and other lines to prevent unauthorized use.

- d. Respondent shall stencil the date of permanent closure on the tanks.

- e. Respondent shall protect the tanks from floatation in accordance with good engineering practices; Respondent shall notify Department staff in writing of the method that will be used to protect the tanks from floating and Department staff retains the discretion to approve or reject the method chosen.

- f. Within ten (10) days of completing the permanent closure of **tanks 001 and 002**, Respondent shall accurately complete, sign and mail to the Department a Petroleum Bulk Storage Application that accurately reflects the permanent closure of **tanks 001 and 002**.

NOTE: In the event Respondent permanently closes tanks 001 and 002 in accordance with the Commissioner's Order and applicable regulatory requirements, the facility's PBS operations will no longer be subject to Department regulation and Respondent need not complete any further remedial actions at the facility otherwise required by the Commissioner's Order.

4. In the event Respondent chooses not to permanently close **tanks 001 and 002** at the facility, within thirty (30) days from the date of service of the Commissioner's Order on Respondent, Respondent shall properly and temporarily close **tanks 001 and 002** in accordance with the requirements of 6 NYCRR 613.9(a) and Respondent shall submit photographs to the Department showing that the tanks have been closed.

NOTE: In the event Respondent elects to not permanently close tanks 001 and 002 in accordance with the Commissioner's Order, Respondent must also comply with items 5 through 7, below.

5. Within thirty (30) days from the date of service of the Commissioner's Order on Respondent, Respondent shall permanently close **tank 005**.

6. Within thirty (30) days from the date of service of the Commissioner's Order on Respondent, Respondent shall permanently mark all fill ports for **tanks 004 and 005** to identify the product inside the tank in accordance with the color and symbol code of the American Petroleum Institute and submit photo documentation of compliance to the Department.

7. Within thirty (30) days from the date of service of the Commissioner's Order on Respondent, Respondent shall submit documentation that establishes to the Department's satisfaction that secondary containment or equipment has been installed for **tanks 004 and 005** that meets Department's Inspection Handbook DER-25 requirements.

IV. Ordering that all correspondence to the Department required pursuant to the terms of the Commissioner's Order shall be provided to the following:

Scott Abrahamson, Esq.
New York State Department of Environmental Conservation
Office of General Counsel - DEC Region 5
1115 NYS Route 86, P.O. Box 296
Ray Brook, NY 12977

and

Benjamin Hankins, P.E.
New York State Department of Environmental Conservation
DEC Region 5
1115 NYS Route 86, P.O. Box 296
Ray Brook, NY 12977.

V. Provide such other and further relief as the Commissioner may deem appropriate.

The notice of hearing annexed to and served with the complaint on July 13, 2014, indicated that an answer to the complaint was due within twenty days of service of the complaint. Respondent failed to answer the complaint. Moreover, the notice of hearing annexed to and served with the complaint on July 13, 2014, indicated that a conference was scheduled in the matter for August 11, 2014, at 2:00 p.m. at the Department's Region 5 office in Ray Brook, New York. Respondent did appear for the scheduled conference.

On October 6, 2014, respondent was personally served with a notice of default hearing dated September 30, 2014, stating that on December 2, 2014, at 10:00 a.m., at the Department's Region 5 sub-office in Warrensburg, New York, the matter would be called before the undersigned Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services ("OHMS"). This notice stated that, at that time, the Department intended to move for a default judgment against respondent due to her failure to answer the complaint served upon her on July 13, 2014.

Respondent was advised that she could appear personally or by counsel on December 2, 2014, to present argument in opposition to the motion for default judgment. Respondent was further advised that her failure to appear would constitute a default and a waiver of her right to be heard, and could result in a Commissioner's order being issued against her. The notice further stated that upon making the motion for default judgment, Department staff would be seeking an order of the Commissioner imposing a civil penalty of \$11,300 for the violations alleged in the complaint. Respondent did not file a response to the notice.

On December 2, 2014, and pursuant to the notice dated September 30, 2014, a calendar call was convened before the undersigned ALJ at the Department's Region 5 sub-office, 232 Golf Club Road, Warrensburg, New York 12885. At that time, respondent's matter was called. Department staff was represented by Scott Abrahamson, Esq., Assistant Regional Attorney for Region 5. No one appeared on behalf of respondent.

Pursuant to 6 NYCRR 622.15, Mr. Abrahamson, on behalf of Department staff, orally moved for a default judgment against respondent based upon her failure to answer the complaint dated July 7, 2014. In support of its motion for default, Department staff submitted thirteen (13) exhibits, all of which were admitted into the record. A summary of the exhibits is attached hereto. To introduce the foregoing exhibits and provide further support for its motion for default, Department staff also called two staff witnesses: Russell B. Mulvey, P.E., Environmental Engineer 2, Division of Environmental Remediation, Region 5; and Benjamin X. Hankins, Environmental Engineer 1, Region 5.

Default Provisions

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the action. A failure to timely respond to the motion constitutes a default. As applicable herein, the Department's default procedures in an enforcement action, found at 6 NYCRR 622.15, provide:

“(a) A respondent’s failure to file a timely answer ... constitutes a default and a waiver of respondent’s right to a hearing. If [this] occurs the department staff may make a motion to the ALJ for a default judgment.

“(b) The motion for a default judgment may be made orally on the record ... and must contain:

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

As the Commissioner stated in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 4), “[t]he consequences of a default is that the respondent waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint or other accusatory instrument on the issue of liability for the violations charged.” Moreover, the Commissioner has stated, “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them.” (id. at 6.) Accordingly, the following findings of fact are based upon the exhibits submitted into the record, as identified above.

Findings of Fact and Conclusions of Law

1. Respondent Wendy Daby possesses fee title to a certain piece of real property located at 8179 State Route 3, Hamlet of Vermontville, Town of Franklin, Franklin County, New York 12989 by virtue of a deed transferring ownership to her on May 7, 2009, recorded in the office of the Franklin County in Book 999 of Deeds at page 223. (Department Staff Exhibit 12, Complaint, Paragraph 4 and Exhibit 1, annexed to the Complaint; Department Staff Exhibit 9.)

2. The site is known as the Birch Bark Deli (“facility”) and was a convenience store which at one time engaged in the retail sale of gasoline and diesel fuel. (Department Staff Exhibit 12, Complaint, Paragraph 3; Department Staff Exhibit 6A; Hearing Record, Testimony of Russell B. Mulvey, P.E., Environmental Engineer 2, Division of Environmental Remediation, Region 5; and Benjamin X. Hankins, Environmental Engineer 1, Region 5.)

3. There are four petroleum storage tanks at the facility with a combined capacity of 14,550 gallons. All of the tanks are aboveground storage tanks (“ASTs”). The ASTs are designated Tank Nos. 001, 002, 004 and 005. Tank No. 001 has a capacity of 8,000 gallons and is intended for the storage of gasoline and ethanol. Tank No. 002 has a capacity of 6,000 gallons and is intended for the storage of diesel fuel. Tank Nos. 004 and 005 each have a capacity of 275 gallons and are intended for the storage of No. 2 fuel oil for onsite consumption. (Department Staff Exhibit 12, Complaint, Paragraphs 7 and 8, and Exhibit 2, annexed to the Complaint; Department Staff Exhibit 3 and 6B; Hearing Record, Testimony of Russell B. Mulvey, P.E., Environmental Engineer 2, Division of Environmental Remediation, Region 5; and Benjamin X. Hankins, Environmental Engineer 1, Region 5.)

4. The facility has been registered with the Department and has been issued Petroleum Bulk Storage (“PBS”) Certificate No. 5-514063. This PBS Certificate was issued to the owner of the facility, respondent Wendy Daby, on July 1, 2009. The certificate expired on July 1, 2014, prior to the initiation of the instant enforcement action. (Department Staff Exhibit 12, Complaint, Paragraph 7, and Exhibit 2, annexed to the Complaint; Department Staff Exhibit 3; Hearing Record, Testimony of Russell B. Mulvey, P.E., Environmental Engineer 2, Division of Environmental Remediation, Region 5; and Benjamin X. Hankins, Environmental Engineer 1, Region 5.)

5. On May 24, 2013, Department staff inspected the facility and observed the following conditions, each a violation of the cited applicable regulatory provision:

- a. Failure to display at the facility a registration certificate that was current and valid, a violation of 6 NYCRR 612.2(e);
- b. Failure to permanently mark all fill ports to identify the product inside Tank Nos. 004 and 005, a violation of 6 NYCRR 613.3(b);
- c. Failure to install secondary containment for Tank Nos. 004 and 005, a violation of 6 NYCRR 613.3(c)(6)(i);
- d. Failure to temporarily close Tank Nos. 001 and 002, a violation of 6 NYCRR 613.9(a);
- e. 6 NYCRR 613.9(b) by Failure to permanently close Tank Nos. 001, 002 and 005, a violation of 6 NYCRR 613.9(b).

(Department Staff Exhibit 12, Complaint, Paragraphs 39 through 43; Department Staff Exhibits 1, 2, 4B and 6.)

6. The violation alleged in Finding of Fact 5(a) above consisted of respondent’s failure display a PBS registration certificate that had been signed by her and that contained current information as to the status of the tanks located at the facility. These items were corrected onsite at the time of the facility inspection on May 24, 2013. (Department Staff Exhibits 2 and 4B.)

7. A subsequent review of Department records after July 1, 2014, and before filing the complaint in this matter, dated July 7, 2014, indicated that the facility’s PBS registration had not been renewed and had expired as of July 1, 2014, a violation of 6 NYCRR 612.2(a)(2). (Department Staff Exhibit 12, Complaint, Paragraph 38; Department Staff Exhibit 3; Hearing Record, Testimony of Russell B. Mulvey, P.E., Environmental Engineer 2, Division of Environmental Remediation, Region 5; and Benjamin X. Hankins, Environmental Engineer 1, Region 5.)

8. By letter dated June 18, 2013, Department staff advised respondent of the various PBS regulatory violations that had been observed during the inspection on May 24, 2013. The letter further advised respondent that she had thirty days from the date of the letter to correct the

violations and to submit appropriate documentation in support thereof. Respondent did not respond to this letter. (Department Staff Exhibit 12, Complaint, Paragraphs 16 and 17; Department Staff Exhibits 2 and 4B; Hearing Record, Testimony of Russell B. Mulvey, P.E., Environmental Engineer 2, Division of Environmental Remediation, Region 5; and Benjamin X. Hankins, Environmental Engineer 1, Region 5.)

9. By letter dated January 22, 2014, Department staff advised respondent that they had not received information demonstrating compliance with the directive in their letter of June 18, 2013, that the PBS violations observed during the May 24, 2013, inspection be corrected within thirty days. The January 22, 2014, letter gave respondent until February 21, 2014, to submit the necessary documentation. Respondent did not respond to this letter. (Department Staff Exhibit 12, Complaint, Paragraphs 18 and 19, and Exhibit 4 thereto; Department Staff Exhibit 5; Hearing Record, Testimony of Russell B. Mulvey, P.E., Environmental Engineer 2, Division of Environmental Remediation, Region 5; and Benjamin X. Hankins, Environmental Engineer 1, Region 5.)

10. By letter dated March 6, 2014, Michelle Crew, Regional Attorney for Region 5, offered to resolve the violations observed during the inspection on May 24, 2013, through an order on consent, a copy of which Ms. Crew enclosed in her letter. Respondent was advised that she had until March 25, 2014, to execute the proposed order and that, if she failed to do so, the Department would proceed with a formal enforcement proceeding against her through service of a notice of hearing and complaint. Respondent did not respond to this letter. (Department Staff Exhibit 12, Complaint, Paragraphs 20 and 21; Department Staff Exhibit 8, Affirmation of Regional Attorney Michelle Crew with letter of March 6, 2014, attached.)

11. The notice of hearing in this matter and the complaint, dated July 7, 2014, alleging the various regulatory violations enumerated in Findings of Fact 5 and 7, above, was personally served upon respondent on July 13, 2014, by Environmental Conservation Officer (“ECO”) James Cranker. (Department Staff Exhibits 11 and 12.)

12. The notice of hearing served on July 13, 2014, with the complaint stated that an answer to the complaint had to be filed within twenty days of the receipt of the complaint by respondent and that failure to file an answer to the complaint would constitute a default in the matter. Respondent failed to file an answer to the complaint. (Department Staff Exhibit 12 and Hearing Record.)

13. The notice of default hearing in this matter, dated September 30, 2014, was personally served upon respondent on October 6, 2014, by ECO James Cranker. (Department Staff Exhibits 11 and 13.)

14. The notice of default hearing stated that the default hearing would be held on December 2, 2014, at 10:00 AM, before the undersigned ALJ, at the Department’s Region 5 sub-offices located at 232 Golf Course Road, Warrensburg, New York 12885. Respondent failed to appear for the default hearing. (Department Staff Exhibit 13 and Hearing Record.)

Discussion

The record shows that respondent was duly served with the notice of hearing and complaint on July 13, 2014. The record further shows that respondent failed to file an answer to the complaint. Moreover, the record shows that respondent was duly served with the notice of default hearing in this matter on October 6, 2014, and that she failed to appear for the default hearing scheduled for December 2, 2014. Staff has also submitted a proposed order in accordance with 6 NYCRR 622.15(b)(3). The Department is entitled to a default judgment in this matter on the complaint pursuant to the provisions of 6 NYCRR 622.15.

Department staff's proposed order and the \$11,300 civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71. As to the proposed penalty in this matter, Department staff is seeking a payable penalty of \$3,000 and a suspension of the remainder of the penalty in the amount of \$8,300 conditioned upon respondent implementing certain corrective measures. Moreover, it should be noted that Department staff undertook to complete a financial analysis in this matter to determine respondent's ability to pay any civil penalty. This analysis was not fully completed due to respondent's failure to provide Department staff with certain financial information. However, as evidenced, in particular, by respondent's purchase in 2014 of a motor vehicle for \$23,000, Department staff concluded that respondent had not demonstrated that she was incapable of paying a civil penalty in this matter. (Department Staff Exhibit 10, Affidavit of Sharon L. Brooks, Principal Economist, Region 5.)

Recommendation

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

1. Granting Department staff's motion for default on the complaint pursuant to the provisions of 6 NYCRR 622.15;
2. Finding respondent in violation of the various sections of 6 NYCRR parts 612 and 613 alleged against her as enumerated in the complaint and in Findings of Fact 5 and 7, above, for and at a petroleum storage facility owned by her located at 8179 State Route 3, Hamlet of Vermontville, Town of Franklin, Franklin County, New York 12989, known as the Birch Bark Deli;
3. Ordering respondent to undertake such remedial and curative actions as are delineated in Recital III of the proposed Commissioner order;
4. Directing respondent, within 30 days of the service of this order upon her, to pay a civil penalty in the amount of eleven thousand three hundred dollars (\$11,300) of which three thousand dollars (\$3,000) is payable upon receipt of the Commissioner's order and eight thousand three hundred dollars (\$8,300) is suspended contingent upon compliance with the provisions of Recommendations 3, above; and

5. Directing such other and further relief as he may deem just and proper.

_____/s/_____
Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
May 1, 2015

DEC v. Wendy Daby

DEC Case Number: R5-20140225-2100

PBS Number: 5-514063

Index of Attached Department Exhibits Received

Edirol Numbers:

010511082652 and 010511103244 – General Hearing Record
010511085254 and 010511093218 – Testimony of Benjamin X. Hankins
010511091928 – Testimony of Russell Mulvey, P.E.

NYSDEC Region 5, Warrensburg

December 2, 2014

- Exhibit 1: Inspection Report dated May 24, 2013.
- Exhibit 2: Benjamin Hankins letter to respondent, dated June 18, 2013.
- Exhibit 3A: Petroleum Bulk Storage Certificate Number 5-514063, issued July 1, 2009, expiration date July 1, 2014.
- Exhibit 3B: Facility Information Report, printed June 13, 2013.
- Exhibit 3C: PBS Application, received May 26, 2009, and processed July 1, 2009.
- Exhibit 4A: Russell Mulvey phone log for October 7, 2013.
- Exhibit 4B: Russell Mulvey to respondent email, dated October 7, 2013, with attachments, namely, copies of documents indicated respectively as Exhibits 2, 1, 3A, 3B and a list of environmental cleanup/testing companies.
- Exhibit 5: Benjamin Hankins letter to respondent, dated January 22, 2014.
- Exhibit 6: PBS Inspection Violation Summary Report generated August 11, 2014, with attachments, namely, three digital images, each of a particular fill port at the facility.
- Exhibit 6A: Digital Image of the facility, the Birch Bark Deli, taken December 1, 2014.
- Exhibit 6B: Digital image of PBS tanks at the facility, taken December 1, 2014.
- Exhibit 7: Penalty Calculation.

- Exhibit 8: Affirmation of Regional Attorney Michelle Crew, Esq., dated November 18, 2014, with attachment, her letter to respondent, dated March 6, 2014.
- Exhibit 9: Certification by Assistant Regional Attorney Scott Abrahamson, dated November 18, 2014, with attachment, a Warranty Deed, Michael Manley and Laurie Manley to Wendy Daby, executed May 7, 2009.
- Exhibit 10: Affidavit of Department Principal Economist Sharon L. Brooks, sworn to November 25, 2014, with attachment, Resume of Sharon L. Brooks.
- Exhibit 11: Affirmation of Assistant Regional Attorney Scott Abrahamson, dated November 18, 2014, with attachments, namely, Affidavit of Personal Service, sworn to by ECO James Cranker on July 14, 2014; Affidavit of Service by Mail, sworn to by Betty Douglas on September 16, 2014; USPS Certified Mail Receipt, stamped September 16, 2014; Affidavit of Personal Service, sworn to by ECO James Cranker on October 14, 2014; and Property Description Report For: 8179 State Route 3, Municipality of Franklin.
- Exhibit 12: Notice of Hearing and Complaint, dated July 7, 2014.
- Exhibit 13: Notice of Default Hearing, dated September 30, 2014, with attachments, the Notice of Hearing and Complaint, dated July 7, 2014, and Proposed Commissioner's Order.