STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Articles 17 and 27 of the Environmental Conservation Law of the State of New York ("ECL") and Parts 360 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.
R6-20150312-19

-by-

JAMES A. DALTON d/b/a DALTON'S DELI,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondent James A. Dalton ("respondent") violated several legal requirements relating to his petroleum bulk storage ("PBS") facility located at 82 Main Street, Richville, St. Lawrence County, New York ("facility"). The facility contains three aboveground storage tanks, whose combined capacity is 4,500 gallons.

Administrative Law Judge ("ALJ") D. Scott Bassinson of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Bassinson prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the default summary report, staff served respondent with a notice of hearing and complaint. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for January 15, 2016, as directed in the notice of hearing (see Default Summary Report at 2). As a consequence of respondent's failure to answer or appear in this matter, staff served and filed a motion for a default judgment, and the ALJ recommends that Department staff's motion be granted with respect to the five causes of action alleged in the complaint (see Default Summary Report at 5-7, 8-9).

Staff's papers submitted in support of its motion for default judgment also "provide proof of the facts sufficient to support [staff's] claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3). Staff's papers establish that respondent violated:

(i) ECL 17-1009(2), by failing to renew the PBS registration for the facility;

(ii) 6 NYCRR 613.9(b) (eff. 1985, repealed 2015) and 6 NYCRR 613-4.5 (eff. 2015), by taking three PBS tanks permanently out of service at the facility without permanently closing them in compliance with the regulations;

(iii) 6 NYCRR 613.6(a) or (c) (eff. 1985, repealed 2015) and 6 NYCRR 613-4.3(a)(1)(i) (eff. 2015), by failing to conduct monthly inspections of the facility or keep records of such inspections;

(iv) 6 NYCRR 360-1.7(a), by storing petroleum contaminated soil at the facility for more than 60 days; and

(v) 6 NYCRR 360-1.5(a), by disposing of contaminated soil at the facility.

Based on the record before me, I concur that staff is entitled to a judgment on default with respect to the five causes of action alleged in the complaint.

Civil Penalty

Department staff seeks a total civil penalty of twenty-eight thousand five hundred dollars ($28,500), of which eleven thousand dollars ($11,000) is payable and seventeen thousand five hundred dollars ($17,500) is suspended contingent upon respondent's compliance with terms of this order. Staff has provided a per-claim allocation of the payable and suspended civil penalties (see Default Summary Report at 8). The ALJ recommends that I grant staff's requested payable and suspended civil penalties.

I find that the recommended payable and suspended penalties are authorized and appropriate on this record. The requested payable penalty is far below the possible penalty, given that the relevant statutes authorize an additional penalty for each day a violation continues, and the violations in this case have been continuing for several years (see e.g. Default Summary Report at 3-4 [Findings of Fact Nos. 5, 7, 8, 9, 13-15] [respondent stopped operating the facility in 2010; PBS tanks had not been closed, and contaminated soil remained at the facility, as of the December 10, 2015 date of the notice of hearing and complaint]; see also ECL 71-1929[1] [authorizing $37,500 penalty per day for each PBS violation] and ECL 71-2703[1] [authorizing $7,500 penalty for each solid waste violation, and $1,500 per day penalty for each day violation continues]).

Remedial Relief

As the ALJ states, the relief requested in the proposed order differs from, but subsumes, the relief requested in the complaint (see Default Summary Report at 7-8). The remedial relief requested is intended to address the violations that are set forth in Department staff's papers, and is authorized and appropriate on this record.

Accordingly, I hereby direct that respondent:

(i) within fifteen (15) days of service of this order on him, submit to the Department a complete petroleum bulk storage registration application plus applicable registration fees;

(ii) within thirty (30) days of service of this order on him, remove the stockpiles of contaminated soil from respondent's facility to a solid waste management facility authorized to accept such waste, and submit to the Department receipts demonstrating proper disposal, as well as photographs of respondent's PBS facility demonstrating that respondent has removed the soil; and

(iii) within ninety (90) days of service of this order on him, permanently close all PBS tanks at the facility in accordance with the requirements of 6 NYCRR 613-4.5(b).

The documentation that respondent is directed to provide must be in a manner and form that is acceptable to Department staff.

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.

II. Respondent James A. Dalton is adjudged to have violated:

A. ECL 17-1009(2), by failing to renew the PBS registration for the facility;

B. 6 NYCRR 613.9(b) (eff. 1985, repealed 2015) and 6 NYCRR 613-4.5 (eff. 2015), by taking three PBS tanks permanently out of service at the facility without permanently closing them in compliance with the regulations;

C. 6 NYCRR 613.6(a) and (c) (eff. 1985, repealed 2015) and 6 NYCRR 613-4.3(a)(1)(i) (eff. 2015), by failing to conduct monthly inspections of the facility or keep records of such inspections;

D. 6 NYCRR 360-1.7(a), by storing petroleum contaminated soil at the facility for more than 60 days; and

E. 6 NYCRR 360-1.5(a), by disposing of contaminated soil at the facility.

III. Respondent James A. Dalton is assessed a civil penalty in the amount of twenty-eight thousand five hundred dollars ($28,500), of which seventeen thousand five hundred dollars ($17,500) is suspended contingent upon respondent's compliance with the terms and conditions of this order. The non-suspended portion of the

penalty (eleven thousand dollars [$11,000]) is due and payable within thirty (30) days of service of a copy of this order on respondent. Payment shall be made in the form of a certified check, cashier's check or money order made payable to the "New York State Department of Environmental Conservation," and should be mailed to the following address:

Randall C. Young, Esq.
Regional Attorney
NYS Department of Environmental Conservation
Region 6
317 Washington Street
Watertown, New York 13601

Should respondent fail to comply with the terms and conditions of this order, including but not limited to paying the non-suspended portion of the penalty, the suspended portion of the penalty (that is, seventeen thousand five hundred dollars [$17,500]) shall become immediately due and payable and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

IV. Respondent James A. Dalton is directed to undertake the following remedial relief at the facility:

A. Within fifteen (15) days of the service of this order upon respondent, respondent shall submit to the Department a complete petroleum bulk storage registration application for the facility, plus applicable registration fees;

B. Within thirty (30) days of the service of this order upon respondent, respondent shall remove the stockpiles of contaminated soil from its facility to a solid waste management facility authorized to accept such waste, and submit to the Department (1) receipts demonstrating proper disposal, and (2) photographs of respondent's facility demonstrating that respondent has removed the contaminated soil; and

C. Within ninety (90) days of the service of this order upon respondent, respondent shall permanently close all petroleum bulk storage tanks at the facility in accordance with the applicable requirements in 6 NYCRR 613-4.5(b).

V. Respondent shall send the facility petroleum bulk storage registration application, applicable registration fees, and the penalty payment to the following address:

Paula Jacobs
Regional Enforcement Coordinator
NYS Department of Environmental Conservation, Region 6
317 Washington Street
Watertown, New York 13601-3787

VI. Any questions or other correspondence regarding this order shall also be addressed to Paula Jacobs at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this order shall bind respondent James A. Dalton, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Basil Seggos
Commissioner

Dated: Albany, New York
August 15, 2016

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Articles 17 and 27 of the Environmental Conservation Law of the State of New York ("ECL") and Parts 360 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

-by-

JAMES A. DALTON d/b/a DALTON'S DELI,

Respondent.

DEFAULT SUMMARY REPORT

DEC CASE NO.
R6-20150312-19

I. Background

Staff of the New York State Department of Environmental Conservation ("Department") served respondent James A. Dalton d/b/a Dalton's Deli ("respondent") with a notice of hearing and complaint dated December 10, 2015, alleging that respondent violated: (i) ECL § 17-1009(2) by failing to renew the registration of its petroleum bulk storage ("PBS") facility located at 82 Main Street, Richville, St. Lawrence County, New York ("facility" or "site"); (ii) 6 NYCRR § 613.9(b) (eff. 1985, repealed 2015) and 6 NYCRR § 613-4.5 (eff. 2015) by taking three PBS tanks permanently out of service at the facility without permanently closing them in compliance with the regulations; (iii) 6 NYCRR § 613.6(a) or (c) (eff. 1985, repealed 2015) and 6 NYCRR § 613-4.3(a)(1)(i) (eff. 2015) by failing to conduct monthly inspections of the facility or keep records of such inspections; (iv) 6 NYCRR § 360-1.7(a) by storing contaminated soil at the facility for more than 60 days; and (v) 6 NYCRR § 360-1.5(a) by disposing of contaminated soil at the facility.

The complaint seeks an order of the Commissioner: (1) finding that respondent committed the alleged violations; (2) directing respondent to register its petroleum bulk storage facility and remit the applicable registration fee within ten (10) days; (3) directing respondent to remove any liquid and sludge from the tanks and connecting lines at the facility, and dispose of any waste products in accordance with all applicable state and federal requirements, within thirty (30) days; (4) directing respondent to permanently close the tank systems at the facility in accordance with 6 NYCRR § 613-4.5(b), within sixty (60) days; (5) directing respondent to cause the removal of the pile of petroleum contaminated soil from the site by a permitted waste hauler to a facility permitted to accept such waste, and submit receipts demonstrating proper transportation and disposal within sixty (60) days; (6) imposing a payable civil penalty of eleven thousand dollars ($11,000), and a suspended penalty of seventeen thousand five hundred dollars ($17,500) contingent upon respondent's strict compliance with the Commissioner's order; and (7) ordering such other and further relief as may be justified under the circumstances.

On December 10, 2015, staff served respondent by certified mail with a notice of hearing and complaint. See Affidavit of Service of April L. Sears, sworn to January 5, 2016 (attached as Exhibit 2 to the Affidavit of Randall Young, sworn to March 28, 2016 ("Young Aff.")), at ¶ B. On December 18, 2015, staff received a signed return receipt reflecting respondent's receipt of the notice of hearing and complaint on December 14, 2015. See id. ¶ C and copy of return receipt attached to the Sears Affidavit. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for January 15, 2016, as directed in the notice of hearing. See Young Aff. Exhibit ("Ex.") 1.

Department staff now moves for a default judgment. Staff's motion consists of the following submissions: (i) Notice of motion for default judgment dated March 29, 2016; (ii) Motion for default judgment; (iii) Young Aff., attaching four exhibits; (iv) Affidavit of Michael Cox, sworn to March 1, 2016 ("Cox Aff."), attaching 20 exhibits; (v) Affidavit of Jeremy Rogers ("Rogers Aff."), sworn to February 23, 2016, attaching 11 exhibits; (vi) Affidavit of Ronald F. Novak ("Novak Aff."), sworn to March 22, 2016, attaching one exhibit; and (vii) Affidavit of Lawrence Ambeau, sworn to January 13, 2016 ("Ambeau Aff."). See Appendix A attached hereto. Staff served its motion for default judgment and supporting papers on respondent by first class mail. See Affidavit of Mailing by April L. Sears, sworn to March 29, 2016. On April 13, 2016, Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services also mailed to respondent a notice of assignment of the matter to the undersigned.[1] Respondent has not responded.

II. Findings of Fact

1. On March 5, 2010, the Department issued to Nena Beane a PBS certificate, PBS No. 6-494917, with respect to a facility located at 82 Main Street, Richville, New York, known as "The Richville Store" and "Dalton's Deli." See Young Aff. Ex. 1 (Complaint), at ¶ 4, and Complaint Exs. 2, 3, 4. According to the PBS certificate, the site contains three aboveground storage tanks, whose combined capacity is 4,500 gallons. See id.; see also Cox Aff. ¶ 3.

2. On or about June 1, 2010, Jeremy Rogers, an Environmental Program Specialist for the Division of Environmental Remediation, inspected the facility. See Rogers Aff. ¶¶ 1-4. At that time, the business had not commenced operation, and the three PBS tanks were not yet in service. See id. ¶ 4. The tanks were not labeled with design capacity, working capacity or tank identification number. Id.; see also id. Exs. 1, 2 (photographs of tanks taken on June 1, 2010).

[1] As noted above, respondent signed the certified mail receipt for the notice of hearing and complaint sent to him at a Cottageville, South Carolina address. Chief Judge McClymonds sent the ALJ assignment letter to respondent at three different addresses. Two of the letters were returned marked "Refused, Unable to Forward." The third letter was sent to the same Cottageville, South Carolina address at which respondent signed the certified mail receipt reflecting receipt of the notice of hearing and complaint, and has not been returned. Similarly, staff's motion for default judgment and supporting papers were sent to the Cottageville, South Carolina address, and there is no evidence in the record that the papers were returned. It is therefore reasonable to assume that respondent has received the assignment letter and the motion papers.

3. On or about August 30, 2010, Mr. Rogers traveled to the site to observe the removal of the dispenser for one of the tanks (Tank 104), and the underground pipe connecting the tank to the dispenser. In addition, Mr. Rogers observed a trench that was excavated to expose the underground fuel supply pipe connecting the dispenser to the tank. See Rogers Aff. ¶¶ 7-9; see also id. Exs. 3, 4, 5 (photographs).

4. The soils excavated from the trench relating to the underground fuel supply pipe were contaminated with petroleum, and the excavated contaminated soils were stockpiled at the site. See id. ¶¶ 10-12; see also id. Ex. 6 (Soil Laboratory Analysis Report)

5. By deed dated September 7, 2010, Nena Beane conveyed to Nena Beane and James Dalton, as joint tenants with right of survivorship, real property located at 82 Main Street, Richville, New York. See Complaint (attached to Young Aff. as Ex. 1), at ¶¶ 4-5 and Ex. 1 (deed).

6. Respondent stopped operating the business at the facility on or about August 19, 2010. See Complaint ¶ 18; see also Cox Aff. ¶ 3 (business closed "since late 2010 or early 2011"); see also Rogers Aff. ¶ 13 (at the time of a site visit in August 2012, the business was not operating and appeared to be permanently shut down).

7. Photographs of the aboveground tanks taken in August 2012 reflect that tanks 103 and 104 were marked temporarily out of service as of August 19, 2010, that piping was disconnected from tank 103, and that the tanks were not being maintained. See Rogers Aff. ¶¶ 14, 17-19; see also id. Exs. 7, 8, 9 and 11. The photographs also reflect that tank 104 had not been reconnected to a dispenser after August 30, 2010. See id. ¶ 15. The tanks have not been emptied, cleaned, or removed from the property. See Complaint ¶¶ 19-23; Cox Aff. Ex. 15 (photograph of tanks taken in August 2013). Department staff has not been provided with notice of permanent closure of the tanks at the facility. See Complaint ¶ 22.

8. The PBS certificate for the facility expired on February 10, 2015. See Young Aff. Ex. 1 (Complaint), at Complaint Exs. 2, 3; see also Novak Aff. ¶ 6 and Ex. 1. Staff searched the Department's statewide database of PBS facilities, but failed to find any record of the Department having received a PBS application for the facility after the registration expired on February 10, 2015. See Novak Aff. ¶¶ 4, 6.

9. The Department's Division of Environmental Permits ("DER") maintains a searchable electronic database known as "DART," to track the status of permit applications. See Ambeau Aff. ¶ 3. DER's standard practice is to enter all applications into DART. See id. ¶ 4. On January 13, 2016, Region 6 Regional Permit Administrator Lawrence Ambeau searched the DART database and found no record of a permit issued by the Department for operation of a solid waste management facility at 82 Main Street, Richville, New York. See id. ¶ 5.

10. On or about August 2012, Michael Cox, a Sanitary Construction Inspector for the Department's Division of Environmental Remediation, was assigned the

responsibility of overseeing the remediation of petroleum contamination at the facility. See Cox Aff. ¶¶ 1, 4.

11. A contractor hired by respondent to excavate and dispose of contaminated soils at the site excavated approximately 200-250 tons of contaminated soils at the facility, stockpiled the contaminated soils on plastic sheeting at the site, and covered the piles of contaminated soil with plastic sheeting. See Cox Aff. ¶¶ 6-7. Petroleum contamination of the excavated soils was confirmed by use of photo ionization detectors, direct observation of the soils and the smell of petroleum odors. Id. ¶ 6.

12. Mr. Cox estimates that an additional 400 to 500 cubic yards of contaminated soils remained *in situ* when excavation work at the site stopped. See id. ¶ 9.

13. On or about June 26, 2013, Mr. Cox traveled to the site and observed that the stockpiles of contaminated soils had not been removed from the site, and the plastic sheeting covering the contaminated soils had begun to disintegrate. See Cox Aff. ¶ 10; see also id. Exs. 1-7 (photographs).

14. On or about August 29, 2013, Mr. Cox traveled to the site and observed that the plastic sheeting covering the soils had disintegrated or torn away from large areas of the soil piles, and vegetation had started to grow in the exposed stockpile of contaminated soils. See Cox Aff. ¶ 11; see also id. Exs. 8-15 (photographs).

15. On or about November 25, 2015, Mr. Cox traveled to the site and observed that the stockpiles of contaminated soils remained on the site, and that the plastic sheets covering the stockpiles had completely disintegrated, leaving only a few small remnants. The site appeared to be completely abandoned. See Cox Aff. ¶ 12; see also id. Exs. 16-20.

III. Discussion

A. Liability – Conclusions of Law

A respondent served with a notice of hearing and complaint must serve an answer within 20 days of receiving the notice of hearing and complaint. See 6 NYCRR § 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." 6 NYCRR § 622.15(a). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing." 6 NYCRR § 622.8(c); see also 6 NYCRR § 622.15(a) ("A respondent's … failure to appear at the hearing or the pre-hearing conference … constitutes a default and waiver of respondent's right to a hearing").

Upon a respondent's failure to answer a complaint or attend a pre-hearing conference, Department staff may make a motion to an administrative law judge ("ALJ") for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of

hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR § 622.15(b)(1)-(3).

The record in this matter establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for January 15, 2016, as set forth in the notice of hearing; and (iii) staff has submitted a proposed order. See Young Aff. ¶¶ 4-10; see also id. Exs. 2 and 4. Staff also served respondent with copies of the motion for default judgment and supporting papers. See Affidavit of Mailing by April L. Sears, sworn to March 29, 2016.

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim." Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

As discussed below, Department staff's submissions in support of the motion for a default judgment in this matter provide proof of the facts sufficient to support a finding of liability with respect to all five causes of action asserted in the complaint.

First Cause of Action

The first cause of action in the complaint asserts that respondent violated ECL § 17-1009(2) by failing to renew the PBS registration for the facility before the prior registration expired on February 10, 2015. See Complaint ¶¶ 9-14.[2] The evidence submitted establishes that Nena Beane was the sole owner of the property when the Department issued the PBS certificate for the facility on March 5, 2010. See Complaint Ex. 2 (PBS certificate no. 6-494917 identifying Nena Beane as owner); see also Novak Aff. Ex. 1 (facility information report identifying Nena Beane as site owner).

On September 7, 2010, Ms. Beane transferred ownership to respondent James Dalton and Nena Beane as joint tenants with right of survivorship. See Complaint Ex. 1. This transfer of ownership triggered the obligation of Mr. Dalton and Ms. Beane to renew the registration of the facility. See ECL § 17-1009(2) ("*Registration shall be renewed* every five years or *whenever ownership of a facility is transferred*, whichever occurs first") (italics added). Thus, the record here establishes that respondent's obligation to renew the registration for the facility accrued when he became an owner with Ms. Beane in 2010. Respondent also thereafter failed to renew the existing registration prior to its expiration in 2015, as alleged in the complaint.

[2] Although the initial paragraph of the first cause of action alleges a violation of "ECL §71-1009(2)," see Complaint ¶ 9, it is clear that this is a typographical error. Paragraphs 10 and 14 of the complaint, as well as paragraph I.a. of the request for relief in the complaint, cite ECL § 17-1009(2), which is the proper provision.

I therefore recommend that the Commissioner grant the motion for default judgment on the first cause of action in the complaint.

Second Cause of Action

The second cause of action alleges that respondent took three PBS tanks permanently out of service without permanently closing them, in violation of 6 NYCRR § 613.9(b) (eff. 1985, repealed 2015) and 6 NYCRR § 613-4.5 (eff. 2015). The evidence submitted clearly establishes that the three aboveground tanks at the facility have been out of service for several years but have not been permanently closed in compliance with the applicable regulations. See Complaint ¶¶ 15-24 (2nd Cause of Action); see also Findings of Fact Nos. 3, 6, 7. I therefore recommend that the Commissioner grant staff's motion for default judgment on the second cause of action in the complaint.

Third Cause of Action

The third cause of action in the complaint alleges that respondent has failed to conduct monthly inspections of the facility or keep records of such inspections. See generally Complaint ¶¶ 25-38. The complaint states that staff's February 2015 notice of violation ("NOV") cited respondent's alleged failure to conduct monthly inspections, and requested that respondent inspect the facility and provide to the Department a copy of the inspection report within 30 days. See Complaint ¶¶ 30-31. The complaint alleges further that respondent failed to submit any monthly inspection reports in response to the NOV. Id. ¶ 32.

Although none of the affidavits submitted in support of staff's motion for default judgment discusses inspection reports, respondent "is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" because of his default. Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6. The evidence submitted reflects that the site operated for a very brief period of time and then was abandoned. See Findings of Fact Nos. 2, 6, 13-15. The complaint alleges that staff's NOV cited the failure to conduct inspections, and requested that respondent inspect the facility and provide inspection reports, but that respondent failed to do so. See Complaint ¶¶ 30-32. The allegations and evidence submitted in support of staff's motion, and reasonable inferences to be drawn therefrom, are sufficient to warrant granting staff's motion for a default judgment. I therefore recommend that the Commissioner grant staff's motion for default judgment on the third cause of action in the complaint.

Fourth Cause of Action

The fourth cause of action in the complaint alleges that respondent has stored contaminated soil on site for more than 60 days, in violation of NYCRR § 360-1.7(a). See generally Complaint ¶¶ 39-47. Section 360-1.7(a) prohibits the operation of a solid waste management facility, or any phase of it, without a permit, except as provided in, among others, 6 NYCRR § 360-1.7(b). Section 360-1.7(b)(4(iii) states, in relevant part, that, "[f]or petroleum contaminated soils, on-site storage is limited to 60 days unless otherwise approved by the department."

The complaint and the evidence submitted are sufficient to establish that petroleum contaminated soil has been stored at the site without departmental approval for more than 60 days. See Complaint ¶¶ 44-46; see also Findings of Fact Nos. 11-15. I therefore recommend that the Commissioner grant staff's motion for default judgment on the fourth cause of action in the complaint.

Fifth Cause of Action

The fifth cause of action in the complaint alleges that respondent has disposed of contaminated soil at the facility, in violation of 6 NYCRR § 360-1.5(a). See generally Complaint ¶¶ 48-57. Section 360-1.5(a) generally prohibits the disposal of solid waste except at a disposal facility authorized to accept such waste. The allegations in the complaint and the evidence submitted are sufficient to establish that respondent has (i) disposed of solid waste at the facility, see 6 NYCRR § 360-1.2(a)(3) ("A material is disposed of if it is … deposited … dumped … or placed into or on any land … so that such material or any constituent thereof may enter the environment …."); and (ii) the facility has not been authorized to accept such waste. See Complaint ¶¶ 52-56; see also Finding of Fact No. 9. I therefore recommend that the Commissioner grant staff's motion for default judgment on the fifth cause of action in the complaint.

B. Remedial Relief

Staff requests in the complaint that the Commissioner direct respondent to (a) submit a PBS registration application and registration fee, within 10 days; (b) remove any liquid and sludge from the storage tanks and connecting lines at the site, and properly dispose of any waste products, within 30 days; (c) permanently close the tanks, remove the petroleum contaminated soil from the site, and submit to the Department receipts demonstrating the proper transportation and disposal of the soil, within 60 days. See Complaint at 11, ¶¶ II(a)-(c).

The relief set forth in the proposed order differs from that requested in the complaint. The proposed order requires respondent: (i) to submit to the Department, within 15 days of service on respondent of the Commissioner's order, the PBS registration application and applicable registration fee; (ii) within 30 days of service on respondent of the Commissioner's order, to remove the stockpiles of contaminated soil from the site to a solid waste management facility authorized to accept such waste, and submit to the Department receipts demonstrating proper disposal, and photographs of the site demonstrating removal of the soil; and (iii) within 90 days of service on respondent of the Commissioner's order, to permanently close all of the PBS tanks at the facility in accordance with 6 NYCRR § 613-4.5(b). See Young Aff. Ex. 4, at 2-3, ¶¶ VII-IX.

The requested relief in the proposed order[3] is authorized and appropriate, and I recommend that the Commissioner issue an order directing the remedial relief as it is set forth in the proposed order.

[3] The request in the complaint for an order requiring respondent to remove liquid and sludge from the storage tanks and connecting lines is subsumed within the provision in the proposed order requiring proper permanent closure of

C. Civil Penalty

Staff seeks a total payable civil penalty of $11,000, based upon the following per-violation schedule of penalties:

1. $1,000 for failure to renew the facility's registration (first cause of action);
2. $6,000 for failure to permanently close the out-of-service tanks at the facility (second cause of action);
3. $1,500 failure to inspect the facility monthly or keep records of such inspections (third cause of action); and
4. $2,500 for failure to properly dispose of petroleum contaminated soil (fourth and fifth causes of action).

See Complaint at 12, ¶¶ III(a)-(d); see also Young Aff. Ex. 4 (proposed order) at 3, ¶ X(a)-(d). Staff seeks an additional suspended penalty $17,500, of which (i) $10,000 relates to the failure to conduct monthly inspections and to permanently close the out-of-service tanks at the facility; and (ii) $7,500 relates to the failure to properly dispose of the contaminated soils. See Complaint at 12-13, ¶ IV(a)-(b).[4]

The requested payable and suspended penalties are authorized and appropriate on this record. With respect to the violations alleged in the first, second and third causes of action, respondent is subject to a penalty of up to $37,500 per day for each violation. See ECL § 71-1929(1). Given that the violations have continued for several years, the statutory maximum penalty for these causes of action far exceeds the $8,500 sought by staff ($1,000 for failure to renew the facility registration, $6,000 for failure to properly close the tanks, and $1,500 for failing to conduct inspections and prepare inspection reports). With respect to the fourth and fifth causes of action, respondent is subject to a civil penalty of up to $7,500 for the violation and up to $1,500 for each day during which the violation continues. See ECL § 71-2703.[5] Given that the violations relating to the petroleum contaminated soil have continued for several years, the requested penalty of $2,500 for these violations is reasonable.

IV. Recommendations

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

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the tanks. See 6 NYCRR § 613-4.5(b)(2) (to permanently close "AST system" "the facility must empty and clean it by removing all liquids, vapors and accumulated sludge"); 6 NYCRR § 613-1.3(a) (defining "AST system" as "any tank system that is not an underground storage tank system"); 6 NYCRR § 613-1.3(bk) (definition of "tank system" "includes all associated piping and ancillary equipment").

[4] Staff's proposed order seeks a suspended penalty in the amount of $17,500, but does not tie a specific portion thereof to particular violations. See Young Aff. Ex. 4, at 3, ¶ XI.

[5] Staff cites "ECL §71-7203" in the fourth and fifth causes of action. See Complaint ¶¶ 47, 57. This is clearly a typographical error, as there is no such section in the ECL, and section 71-2703 governs penalties relating to solid waste violations such as the violation alleged here.

A. Granting staff's motion for a default judgment with respect to the first, second, third, fourth and fifth causes of action alleged in the complaint.

B. Holding that respondent James A. Dalton violated:

1. ECL § 17-1009(2), as alleged in the first cause of action of the complaint;
2. 6 NYCRR § 613.9(b) (eff. 1985, repealed 2015) and 6 NYCRR § 613-4.5 (eff. 2015), as alleged in the second cause of action of the complaint;
3. 6 NYCRR § 613.6(a) (eff. 1985, repealed 2015), § 613.6(c) (eff. 1985, repealed 2015) and 6 NYCRR § 613-4.3(a)(1)(i) (eff. 2015), as alleged in the third cause of action of the complaint;
4. 6 NYCRR § 360-1.7(a), as alleged in the fourth cause of action of the complaint; and
5. 6 NYCRR § 360-1.5(a), as alleged in the fifth cause of action of the complaint.

C. Directing respondent:

1. To submit to the Department, within fifteen (15) days of service on respondent of the Commissioner's order, a complete petroleum bulk storage registration application for the facility, plus applicable registration fees;
2. Within thirty (30) days of service on respondent of the Commissioner's order, to remove the stockpiles of contaminated soil from the site to a solid waste management facility authorized to accept such waste, and submit to the Department receipts demonstrating proper disposal and photographs of the site demonstrating removal of the soil; and
3. To permanently close all petroleum bulk storage tanks at the facility in accordance with 6 NYCRR § 613-4.5(b), within ninety (90) days of service on respondent of the Commissioner's order.

D. Imposing on respondent a civil penalty in the amount of twenty-eight thousand five hundred dollars ($28,500), of which eleven thousand dollars ($11,000) is payable within thirty (30) days of service on respondent of the Commissioner's order, and of which the remaining seventeen thousand five hundred dollars ($17,500) is suspended contingent upon respondent's compliance with the terms and conditions of the Commissioner's order.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: May 16, 2016
Albany, New York

APPENDIX A

Matter of James A. Dalton d/b/a Dalton's Deli
DEC File No. R6-20150312-19
Motion for Default Judgment

A. Notice of Motion for Default Judgment, dated March 29, 2016

B. Motion for Default Judgment, dated March 29, 2016

C. Affidavit of Randall Young, sworn to March 28, 2016, attaching the following exhibits:

    1. Cover letter, notice of hearing, complaint (attaching four exhibits), dated December 10, 2015

    2. Affidavit of Service of April L. Sears, sworn to January 5, 2016, and signed return receipt

    3. St. Lawrence County Real Property Tax office webpage, printed January 12, 2015

    4. Proposed Order

D. Affidavit of Jeremy Rogers, sworn to February 23, 2016, attaching the following exhibits:

    Exhibits 1-2 – Photographs taken at facility on June 1, 2010

    Exhibits 3-5 – Photographs taken at facility on August 30, 2010

    Exhibit 6 – Laboratory analysis report of materials received on August 31, 2010

    Exhibits 7-10 – Photograph taken at facility on August 17, 2012

    Exhibit 11 – Photograph taken at facility on August 12, 2012

E. Affidavit of Michael Cox, sworn to March 1, 2016, attaching the following exhibits:

    Exhibits 1-7 – Photographs taken at facility on June 26, 2013

    Exhibits 8-15 – Photographs taken at facility on August 29, 2013

    Exhibits 16-20 – Photographs taken at facility on November 25, 2015

F. Affidavit of Ronald F. Novak, sworn to March 22, 2016, attaching the following exhibit:

    1. Facility Information Report, PBS No. 6-494917

G. Affidavit of Lawrence R. Ambeau, sworn to January 13, 2016

H. Affidavit of Mailing of April Sears, sworn to March 29, 2016