

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

In the Matter of Alleged Violations of
Article 17 of the Environmental
Conservation Law of the State of New York,
and Parts 612, 613 and 614 of Title 6 of
the Official Compilation of Codes, Rules
and Regulations of the State of New York,

ORDER

-by-

HILLARY FARMER, JR.,
Respondent.

DEC File Nos.:
R2-20080115-14
R2-20090309-141

Respondent Hillary Farmer, Jr., owns and operates a petroleum bulk storage facility at 482 Throop Avenue, Brooklyn, New York (the "Facility"). Located at the Facility are six underground storage tanks, four of which contain gasoline product, one of which contains waste oil, and one of which contains #2 fuel oil.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent by service of a notice of hearing and complaint both dated June 11, 2009. In accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR"), the complaint, together with a notice of hearing, were served upon respondent by certified mail, return receipt requested, which respondent received on June 12, 2009.

Based upon inspections of the Facility that Department staff conducted on November 30, 2007 and February 18, 2009, Department staff alleged in its complaint that respondent:

- violated 6 NYCRR 612.2(e), by failing to display a current and valid registration certificate on the premises of the Facility;

- violated 6 NYCRR 614.3(a)(2), by failing to properly label the fill ports for three of the four underground storage tanks containing gasoline at the Facility;

- violated 6 NYCRR 612.2, by failing to display a current and valid registration certificate that included the two 550-gallon underground storage tanks;

- violated 6 NYCRR 613.3(c)(1), by failing to properly equip a fuel dispenser with a shear valve;

- violated 6 NYCRR 613.4(a)(1), by not properly maintaining daily inventory records for purposes of leak detection; and

- violated 6 NYCRR 613.5(b)(3), by failing to monitor leaks at the Facility at least once a week.

Respondent failed to file an answer to the complaint. Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on or about July 3, 2009, and was not extended by Department staff. In addition, Respondent failed to appear at a pre-hearing conference that Department staff had scheduled for July 25, 2009 at the Department's Region 2 Office in Long Island City.

On September 15, 2009, Department staff filed a motion for default judgment, dated August 3, 2009, with the Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

For purposes of my review in this matter, I advised the parties, by letter dated September 30, 2009, that I intended to take official notice of the following documents which staff did not initially include with its papers:

- the petroleum bulk storage certificate that the Department had issued to the Facility on March 13, 2006;

- the petroleum bulk storage application that Hillary Farmer, Jr., submitted to the Department in March 2009; and

- the Department inspection reports dated November 30, 2007, and February 18, 2009, which were referenced in Department staff's complaint, and any resulting letters of violation that were sent to respondent and that referenced the alleged violation of 6 NYCRR 613.5(b)(3).

I directed Department staff to provide a copy of the documents to respondent, and allowed Department staff and respondent the opportunity to submit comments by October 20, 2009, if they wished to dispute the facts contained in the documents or their materiality (see 6 NYCRR 622.11[a][5]). Department staff circulated the documents under cover of a letter dated October 1, 2009, and provided their comments in that letter. Respondent failed to submit any comments on the documents.

I am hereby taking official notice of the above-referenced documents, and they shall be included as part of the record in this proceeding. Based on my review, the inspection reports and notices of violation that Department staff circulated under cover of its October 1, 2009 letter further support the allegations that Department staff raised.

In enforcement proceedings before the Office of Hearings and Mediation Services alleging violations of the petroleum bulk storage ("PBS") regulations (see 6 NYCRR parts 612, 613 and 614), it is useful for the record to include the facility's PBS registration, the PBS facility information report, if any, and any notices of violation that are a basis for Department staff's allegations. Accordingly, for all such Department enforcement proceedings that involve alleged violations of the PBS regulations, I am directing Department staff to include, with staff's complaint or motion for order without hearing (in lieu of complaint), at a minimum the following documents:

- a copy of the facility's PBS registration (if one has been issued);
- the PBS facility information report, if any; and
- any notice of violation that is a basis for Department staff's allegations in the charging instrument.

This direction shall apply to Department PBS enforcement proceedings commenced on or after January 4, 2010.

With respect to penalty, the affirmation of John K. Urda, Esq., Assistant Regional Attorney, dated August 3, 2009, details factors that support the requested civil penalty of ten thousand dollars (\$10,000), including the economic benefit respondent realized from non-compliance and respondent's lack of cooperation.

In March 2009, respondent submitted a PBS application form to the Department to correct the omission of two 550-gallon tanks from its registration. However, the PBS violations at respondent's Facility have been numerous and longstanding and, notwithstanding Department staff's efforts to obtain full compliance, respondent has failed to do so. Accordingly, respondent's recent filing of the PBS application form to correct certain registration deficiencies does not warrant any reduction in the requested penalty. Respondent's failure to respond to Department staff's complaint or the motion for default judgment further underscores respondent's lack of cooperation.

The proposed penalty of \$10,000 requested by Department staff is fully supported by ECL 71-1929 (establishing a civil penalty of up to \$37,500 per day for each violation), and this record. I direct that respondent remit payment of the civil penalty to the Department within thirty (30) days of service of this order upon him.

Department staff also requested that respondent be directed to correct the violations that were identified during the onsite inspections. Department's request for such relief is also appropriate. I am hereby directing that respondent correct the violations, and submit documentation to Department staff that demonstrates compliance, within thirty days of service of this order.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondent Hillary Farmer, Jr., is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the June 11, 2009 complaint, are deemed to have been admitted by respondent.

III. Respondent Hillary Farmer, Jr., is adjudged to have violated 6 NYCRR 612.2, 612.2(e), 613.3(c)(1), 613.4(a)(1), 613.5(b)(3) and 614.3(a)(2) at his petroleum bulk storage facility at 482 Throop Avenue, Brooklyn, New York ("Facility").

IV. Respondent Hillary Farmer, Jr., is hereby assessed a civil penalty in the amount of ten thousand dollars (\$10,000). The

civil penalty is due and payable within thirty (30) days after service of this order upon respondent. Payment of the penalty shall be by cashier's check, certified check, or money order drawn to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to John K. Urda, Esq., Assistant Regional Attorney, NYSDEC - Region 2, 47-40 21st Street, Long Island City, New York 11101-5407.

V. Within thirty (30) days of the service of this order upon respondent, respondent Hillary Farmer, Jr., shall:

A. Display a current and valid registration certificate on the premises of the Facility that lists all the PBS-regulated tanks at the Facility;

B. Properly label the fill ports of all four of the underground storage tanks that contain gasoline product at the Facility;

C. Properly equip the fuel dispenser referenced in Department staff's February 18, 2009 inspection with a shear valve; and

D. Maintain inventory records for the purposes of leak detection.

VI. Respondent Hillary Farmer, Jr., shall submit to Department staff, within thirty (30) days of the service of this order upon respondent:

A. Photographs that document the labeling of the fill ports of all four underground storage tanks at the Facility that contain gasoline product;

B. A written statement that documents that the fuel dispenser has been properly equipped with a shear valve; and

C. Copies of Facility inventory records relating to leak detection that respondent has compiled since the date of this order.

VII. All communications from respondent to the Department concerning this order shall be directed to John K. Urda, Esq., Assistant Regional Attorney, NYSDEC, Region 2, 47-40 21st Street, Long Island City, New York 11101-5407.

VIII. The provisions, terms, and conditions of this order shall bind respondent Hillary Farmer, Jr., and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: October 22, 2009
Albany, New York

TO: Hillary Farmer, Jr. (Via Certified Mail)
482 Throop Avenue
Brooklyn, NY 11221

John K. Urda, Esq. (Via Intra-Agency Mail)
Assistant Regional Attorney
NYSDEC - Region 2
47-40 21st Street
Long Island City, New York 11101-5407

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of
Environmental Conservation Law of the
State of New York (ECL) Article 17, and
Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State
of New York (6 NYCRR) Parts 612, 613, 614
by

Default
Summary Report

DEC File Nos.:
R2-20080115-14
R2-20090309-141

Hillary Farmer, Jr.
Respondent.

Proceedings

Staff from the Region 2 Office of the Department of Environmental Conservation (Department staff) commenced this administrative enforcement proceeding by serving a notice of hearing and complaint, both dated June 11, 2009, by certified mail, return receipt requested, upon Hillary Farmer, Jr. (Respondent).

The June 11, 2009 complaint asserts that Respondent operates a petroleum bulk storage (PBS) facility at 482 Throop Avenue, Brooklyn, New York. The PBS facility (Facility ID No.: 2-600011) is associated with an automobile service station. Respondent's facility consists of four 4,000-gallon underground storage tanks for gasoline storage, and two 550-gallon tanks. One 550-gallon tank is used to store waste oil, and the other is for #2 fuel oil.

In six causes of action, the June 11, 2009 complaint alleges that Respondent violated various provisions of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 612 (Registration of Petroleum Storage Facilities), Part 613 (Handling and Storage of Petroleum), and Part 614 (Standards for New and Substantially Modified Petroleum Storage Facilities).

For these alleged violations, Department staff requests a total civil penalty of not less than \$10,000 and an Order from the Commissioner directing Respondent to comply with the applicable requirements in 6 NYCRR Parts 612, 613, and 614.

Motion for Default Judgment

With a cover letter dated September 15, 2009, Department staff provided the Office of Hearings and Mediation Services with a motion for default judgment. This matter was assigned to me on September 18, 2009. Staff's motion papers consist of the following documents:

1. Notice of Motion for Default Judgment and Order, dated August 3, 2009;
2. Motion for Default Judgment and Order, dated August 3, 2009;
3. An Affirmation of John K. Urda in Support of the Motion for Default Judgment and Order, dated August 3, 2009, with three attached exhibits;
 - a. Exhibit A is a copy of the notice of hearing and complaint, both dated June 11, 2009;
 - b. Exhibit B is an Affidavit of Service by Brandon Harrell sworn to on June 11, 2009 with a copy of the signed domestic return receipt, and tracking confirmation from the US Postal Service;
 - c. Exhibit C is a draft Order; and
4. An Affidavit of Service by Sheila Warner sworn to August 3, 2009 with a copy of the signed domestic return receipt, and tracking confirmation from the US Postal Service.

Pursuant to 6 NYCRR 622.15(a), a respondent's failure either to file a timely answer to a complaint, or to appear at a scheduled pre-hearing conference constitutes a default and waiver of a respondent's right to a hearing. Under these circumstances, Department staff may move for a default judgment. Staff's motion must include: (1) proof of service of the notice of hearing and complaint or motion for order without hearing; (2) proof of the respondent's failure to file a timely answer or to appear; and (3) a proposed order (see 6 NYCRR 622.15[b]).

For the following reasons, Staff has met the requirements for a default judgment as provided for by 6 NYCRR 622.15(c).

First, Brandon Harrell's Affidavit of Service sworn to on June 11, 2009 with a copy of the signed domestic return receipt, and tracking confirmation from the US Postal Service (Exhibit B) demonstrate that Department staff duly served Respondent with a copy of the June 11, 2009 notice of hearing and complaint in a manner consistent with the regulations (see 6 NYCRR 622.3[a][3]). Respondent received the June 11, 2009 notice of hearing and complaint on June 12, 2009 (Exhibit B).

Second, the June 11, 2009 notice of hearing (Exhibit A) advised Respondent to file an answer within 20 days of the receipt of the complaint, and further advised that Staff had scheduled a pre-hearing conference at 10:00 a.m. on July 25, 2009 at the Department's Region 2 Office in Long Island City, New York. Mr. Urda's August 3, 2009 affirmation demonstrates that Respondent neither filed any answer, nor appeared at the July 25, 2009 pre-hearing conference.

Third, Staff submitted, as required by 6 NYCRR 622.15(b), a proposed order (Exhibit C). Finally, consistent with the Commissioner's directive in *Matter of Derrick Dudley*, Decision and Order, dated July 24, 2009 (at 2), Ms. Warner's August 3, 2009 Affidavit of Service with a copy of the signed domestic return receipt, and tracking confirmation from the US Postal Service demonstrate that Department staff served Respondent with a copy of the motion for default judgment by certified mail, return receipt requested. Respondent received Staff's motion papers on August 6, 2009. To date, the Office of Hearings and Mediation Services has not received any reply from Respondent concerning Staff's motion. Staff's motion for default judgment is, therefore, unopposed.

Civil Penalty

In the June 11, 2009 complaint, Department staff requested a total civil penalty of not less than \$10,000. Mr. Urda repeated this request in his August 3, 2009 affirmation, and provided the following justification.

The complaint alleges six causes of action, based upon Department staff's inspections of Respondent's facility on November 30, 2007 and February 18, 2009. First, Respondent violated 6 NYCRR 612.2(e) on November 30, 2007 by failing to display a current and valid registration certificate for the PBS facility. Second, Respondent violated 6 NYCRR 614.3(a)(2) on

November 30, 2007 by failing to properly label the fill ports for three of the six underground storage tanks at the facility. Third, Respondent violated 6 NYCRR 612.2 on February 18, 2009 by failing to display a current and valid registration certificate for the two 550-gallon underground storage tanks. Fourth, Respondent violated 6 NYCRR 613.3(c)(1) on February 18, 2009 by failing to equip a fuel dispenser with a shear valve. Fifth, Respondent violated 6 NYCRR 613.4(a)(1) on February 18, 2009 by not keeping the required inventory records for leak detection. Sixth, Respondent violated 6 NYCRR 613.5(b)(3) on February 18, 2009 by failing to monitor leaks at the facility at least once a week.

Pursuant to Environmental Conservation Law (ECL) § 71-1929, the maximum civil penalty for violations of Titles 1 through 11 and Title 19 of ECL Article 17 and the implementing regulations at 6 NYCRR Parts 612 - 614 is \$37,500 per day for each violation. DEC staff's request for a penalty of \$10,000 is significantly less than the potential maximum civil penalty that could be assessed pursuant to the statute.

In his August 3, 2009 affirmation, Mr. Urda referred to two guidance memoranda that are relevant to the civil penalty calculation in this case: (1) the 1990 Civil Penalty Policy (CPP), and (2) the Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22). Based on these guidance documents, Staff argued that the following aggravating factors justify the requested civil penalty.

First, Department staff noted the continuous nature of the violations. When Staff inspected the facility on November 30, 2007, Staff advised Respondent about the requirements to display a valid registration certificate, and to label the fill ports. When Staff inspected the facility again on February 18, 2009, Respondent had yet to comply with these regulatory requirements (see Exhibit A, ¶¶ 6 and 7 of the June 11, 2009 Complaint). Staff argued that Respondent avoided substantial business costs by ignoring the applicable regulatory requirements and, consequently, obtained a significant economic benefit. Staff's motion papers, however, did not include an estimate of the economic benefit that Respondent realized.

Second, Respondent has shown a lack of cooperation. In his August 3, 2009 affirmation, Mr. Urda stated that Department staff advised Respondent about the violations during the

November 30, 2007 site inspection, and that Respondent subsequently attended a compliance conference at the Department's Region 2 Office. Despite the information that Staff provided to Respondent about the applicable regulations and the need to comply with them, Respondent had not taken any corrective action at the facility when Staff returned to the site on February 18, 2009. In addition, I note that Respondent's failure to reply to this motion for default judgment underscores a lack of cooperation to resolve the violations alleged in the June 11, 2009 complaint, and to comply with the applicable regulations in the future.

Third, Respondent's failure to comply with the regulations has threatened the public health and welfare of State residents, as well as the natural resources of the State.

Finally, Staff contended that the requested civil penalty would deter Respondent and other similarly situated PBS facility owners and operators from future violations of the regulations governing PBS facilities.

Conclusions and Recommendation

Based on the foregoing discussion, I conclude that Staff's motion for a default judgment meets the requirements outlined at 6 NYCRR 622.15(b). In addition, I find that Department staff has provided a reasoned explanation for the requested civil penalty. Therefore, in accordance with 6 NYCRR 622.15(c), I have prepared this summary report and recommend that the Commissioner grant Department staff's motion for default judgment.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
September 28, 2009