

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

---

In the Matter of the Alleged Violations of Article 17 of  
the New York State Environmental Conservation Law (ECL)  
and 6 NYCRR 613-2.6(a)(3) of Title 6 of the Codes, Rules and  
Regulations of the State of New York (6 NYCRR),

**ORDER**

DEC Case No.  
R5-20180123-2277

-by-

**GREAT WHITE NORTH REALTY HOLDINGS, LLC.,**

Respondent.

---

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Great White North Realty Holdings, LLC (respondent), violated ECL article 17 and 6 NYCRR 613-2.6(a)(3) by failing to close two underground petroleum bulk storage (PBS) tanks at a facility owned by respondent and located at 231 Brand Road, Malone, Franklin County, New York (facility).

Chief Administrative Law Judge (ALJ) James T. McClymonds was initially assigned to this matter and presided at the December 19, 2018 hearing. The matter was subsequently reassigned to ALJ Michele M. Stefanucci, who prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for March 13, 2018, and failed to appear at the adjudicatory hearing on December 19, 2018 (*see* Hearing Report at 3 [Findings of Fact Nos. 12, 13]).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see* Hearing Report at 6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Respondent identified that two underground PBS tanks (001A and 001B) at its facility were taken out-of-service as of November 16, 2016. Department staff has provided sufficient evidence that respondent failed to close the two underground PBS tanks (001A and 001B) within one year from the date that the tanks were taken out-of-service and therefore, respondent is in violation of 6 NYCRR 613-2.6(a)(3).

In its complaint, Department staff requested a civil penalty of fifteen thousand dollars (\$15,000). Title 10 of ECL article 17 and the regulations promulgated thereto establish requirements governing PBS tanks, including their closure. Pursuant to ECL 71-1929(1), a

person who violates any of the provisions of, or who fails to perform any duty imposed by title 10 of article 17 or the rules and regulations promulgated thereto “shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation, and in addition thereto, such person may be enjoined from continuing such violation.”

In support of its penalty request staff cites the Department’s Civil Penalty Policy dated June 20, 1990 (DEE-1). According to DEE-1, the potential maximum potential civil penalty for all provable violations is the starting point of any civil penalty calculation (*see* DEE-1 § IV.B). An appropriate civil penalty is derived from a number of factors, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of a respondent's conduct (*see* Hearing Report at 4-5; DEE-1 § IV.C, D, and E).

Here, Department staff asserts that respondent benefited from avoiding the costs associated with closing the two tanks. Evidence in the hearing record indicates that respondent has been in violation of 6 NYCRR 613-2.6(a)(3) since November 30, 2017 (*see* Hearing Transcript at 193-194, 210). Department staff testified at hearing that the economic benefit derived from respondent's non-compliance was in the range of twelve thousand (12,000) to twenty thousand (20,000) dollars (*see* Hearing Transcript at 208-210).

Furthermore, Department staff notes that activities such as properly closing out-of-service tanks are critical in the effort to prevent petroleum spills and leakage. The record in this matter demonstrates that respondent failed to timely close the storage tanks after taking them out-of-service, thereby increasing the likelihood of potential environmental harm from failure to maintain and properly close the tanks (*see* Hearing Transcript at 214-216).

Finally, a respondent's level of cooperation or lack thereof, may be considered when determining the appropriate civil penalty (*see* DEE-1 § IV.E.2). Here evidence in the hearing record indicates that while respondent’s representative was initially cooperative, he eventually ceased all communication with the Department (*see* Hearing Transcript at 216-218; *see also* Hearing Exhibits 5, 6, 7, and 8).

Based on this record, I conclude that staff’s request for a civil penalty in the amount of fifteen thousand dollars (\$15,000) is authorized and appropriate. I hereby direct that respondent Great White North Realty Holdings, LLC, submit the civil penalty to the Department within thirty (30) days of the service of this order upon respondent. In addition, I direct that within thirty (30) days of the service of this order upon respondent Great White North Realty Holdings, LLC, respondent is to submit to the Department proof in a form and manner acceptable to Department staff that tanks 001A and 001B have been closed in accordance with 6 NYCRR 613-2.6(a)(3).

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Great White North Realty Holdings, LLC, waived its right to be heard at the hearing.
- II. Based on the pleadings and evidence adduced at hearing, respondent Great White North Realty Holdings, LLC, is adjudged to have violated 6 NYCRR 613-2.6(a)(3), by failing to close two underground petroleum bulk storage tanks (001A and 001B) at its facility located at 231 Brand Road, Malone, Franklin County, New York, on or before November 30, 2017.
- III. Within thirty (30) days of the service of this order upon respondent Great White North Realty Holdings, LLC, respondent shall submit to the Department proof in a form and manner acceptable to Department staff that tanks 001A and 001B have been closed in accordance with 6 NYCRR 613-2.6(a)(3).
- IV. Within thirty (30) days of the service of this order upon respondent Great White North Realty Holdings, LLC, respondent shall pay a civil penalty in the amount of fifteen thousand dollars (\$15,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."
- V. The penalty payment shall be sent to the following address:

Office of General Counsel (Remediation Bureau)  
NYS Department of Environmental Conservation  
625 Broadway, 14th Floor  
Albany, New York 12233-1500  
Attn: Benjamin Conlon, Esq.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Benjamin Conlon, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms, and conditions of this order shall bind respondent Great White North Realty Holdings, LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: /s/  
Basil Seggos  
Commissioner

Dated: Albany, New York  
January 24, 2020

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

---

In the Matter of the Alleged Violations of Article 17 of  
the New York State Environmental Conservation Law (ECL)  
and 6 NYCRR 613-2.6(a)(3) of Title 6 of the  
Codes, Rules and Regulations of the State of New York,

**HEARING REPORT**

DEC Case No.  
R5-20180123-2277

-by-

**GREAT WHITE NORTH REALTY HOLDINGS LLC.,**

Respondent.

---

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Great White North Realty Holdings LLC (respondent) with a notice of hearing and complaint dated February 13, 2018, alleging a violation of 6 NYCRR 613-2.6(a)(3), for failing to close two underground petroleum bulk storage (PBS) tanks at a facility owned by respondent and located at 231 Brand Road, Malone, Franklin County, New York (facility). The complaint seeks an order of the Commissioner:

- finding respondent in violation of 6 NYCRR 613-2.6(a)(3);
- assessing a civil penalty in the amount of fifteen thousand dollars (\$15,000);
- directing respondent to submit proof of closure of the tanks in accordance with 6 NYCRR 613-2.6(b)-(e) within thirty (30) days of the service of the Commissioner's order; and,
- granting such other and further relief as the Commissioner shall deem just and appropriate.

Inasmuch as respondent is an active domestic limited liability company in the State of New York, service of the notice of hearing and complaint was made by personally serving the New York State Department of State on February 21, 2018 (*see* Hearing Exhibit 1). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on February 27, 2018 (*see* Hearing Exhibit 3). As noticed in the hearing and complaint, a prehearing conference was convened on March 13, 2018, in the Department's Region 5 Office in Ray Brook, New York. Department staff was represented by Scott Abrahamson, Assistant Regional Attorney. No one appeared on behalf of respondent.

By motion dated November 6, 2018, Department staff moved for a default judgment and a hearing on the merits was scheduled for December 19, 2018. In the motion for a default

judgment, staff alleged that respondent was personally served with a notice of hearing and complaint, failed to answer the complaint, and failed to appear at the prehearing conference. The notice of motion was served on respondent by first class mail on November 9, 2018.

A hearing on the merits was convened before Chief Administrative Law Judge James McClymonds on December 19, 2018. Department staff was represented by Scott Abrahamson, Assistant Regional Attorney. Respondent failed to appear. Department staff presented its case, calling one witness and offering thirteen (13) exhibits into evidence. The exhibits are listed in Appendix A and attached hereto. On July 12, 2019, this matter was reassigned to the undersigned.

### Findings of Fact

The following facts are found based upon a preponderance of the evidence:

1. Respondent Great White North Realty Holdings LLC is the owner of PBS facility Number 5-600341 having a capacity of over 1,100 gallons located at 231 Brand Road, Malone, Franklin County, New York (facility). In particular, PBS tank number 001A at the facility has a capacity of 12,000 gallons, PBS tank number 001B has a capacity of 3000 gallons and PBS tank number 002 has a capacity of 270 gallons. PBS tank numbers 001A and 001B are underground petroleum bulk storage tanks. (*See* Hearing Exhibit 4.)
2. Respondent is an active domestic limited liability company in the State of New York. (*See* Hearing Exhibit 1.)
3. On November 21, 2013, Gaetan A. Yelle transferred all right, title and interest in the facility and the real property it is located on, to Great White North Realty Holdings LLC, the facility's current owner. This deed was recorded on November 26, 2013, in the Office of the Franklin County Clerk as Instrument #2013-6817. (*See* Hearing Exhibit 12.)
4. On February 4, 2016, the Department received an information update from Bart Patterson for PBS Number 5-600341. In the update, respondent Great White North Realty Holdings LLC was identified as the facility owner and Shawn Patterson was identified as the owner or authorized representative and class A operator of the facility. (*See* Hearing Exhibit 4.)
5. Bart Patterson is the brother of Shawn Patterson and was communicating with Department staff on Shawn Patterson's behalf. (*See* Hearing Exhibit 5; Hearing transcript [tr] at 178, 180-181.)
6. By email dated June 11, 2017, Bart Patterson submitted an information update, on behalf of respondent, to the Department for PBS Number 5-600341. In the update, Tank 001A and Tank 001B were identified as out of service as of November 30, 2016. In addition, a receipt, dated April 4, 2017, was submitted as proof of the pump down of the two PBS tanks. (*See* Hearing Exhibit 5; tr at 194-196.)

7. On December 1, 2017, Department staff contacted Bart Patterson by email requesting an update on removal of the underground storage tanks at the facility. (*See* Hearing Exhibit 5.)
8. Department staff issued a Notice of Violation to respondent, c/o Shawn Patterson, dated December 6, 2017, for failure to close the two underground petroleum bulk storage tanks at the facility that have been out of service for over a year. (*See* Hearing Exhibit 6; tr at 198.)
9. Department staff contacted respondent, c/o Shawn Patterson, regarding tank closure by letter dated January 23, 2018, with an attached Order on Consent. (*See* Hearing Exhibit 8.)
10. Russell B. Mulvey is an environmental engineer employed in the Department's Division of Environmental Remediation, NYSDEC Region 5. (*See* tr at 173-176.)
11. Pursuant to section 303 of the New York Limited Liability Company Law, respondent was served personally, on February 21, 2018, with a notice of hearing and complaint dated February 13, 2018. The complaint alleged a violation of ECL article 17 and 6 NYCRR 613-2.6(a)(3), for failure to close two underground PBS tanks at a facility owned by respondent and located at 231 Brand Road, Malone, Franklin County, New York. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about February 27, 2018. (*See* Hearing Exhibit 1 and 2.)
12. Respondent failed to file an answer to the complaint and failed to appear at the pre-hearing conference scheduled for March 13, 2018, as directed in the notice of hearing served with the complaint. (*See* Hearing Exhibit 1.)
13. By motion dated November 6, 2018, Department staff moved for a default judgment and a hearing on the merits was scheduled for December 19, 2018, at the Department's Region 5 Office in Ray Brook, New York. The Notice of Motion was served on respondent by first class mail on November 9, 2018. Respondent failed to appear at the hearing. (*See* Hearing Exhibit 3.)

### Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a 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 failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an 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]).

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[s]" alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Staff is required to support its motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018 [*Samber*], at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* CPLR 3215[f]).

The record 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 the pre-hearing conference scheduled for March 13, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Hearing Exhibit 10). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing conducted in respondent's absence demonstrates by a preponderance of the evidence that respondent failed to permanently close two underground petroleum bulk storage tanks at its facility located at 321 Brand Road, Malone, Franklin County, New York, in violation of 6 NYCRR 613-2.6(a)(3). Pursuant to 6 NYCRR 613-2.6(a)(3), when an Underground Storage System (UST) is out-of-service for more than 12 months, the facility must permanently close the UST system. Here, evidence in the hearing record indicates that respondent removed tanks 001A and 001B from service on November 30, 2016 (*see* Hearing Exhibit 5). Tanks 001A and 001B should have been closed no later than November 30, 2017 and accordingly, they have been out of compliance with the regulatory provisions since that time.

In the complaint, Department staff requested a civil penalty in the amount of fifteen thousand dollars (\$15,000). At hearing, Department staff testified that the maximum statutory penalty per day for a violation of ECL article 17 is \$37,500. In calculating the penalty here, staff utilized the Department's Civil Penalty Policy dated June 20, 1990, DEE-1.<sup>1</sup> According to the

---

<sup>1</sup> I note that while there is a penalty matrix (DEE-22) that addresses violations of the petroleum bulk storage regulations, Department staff testified at hearing that this guidance document has not been updated to reflect penalty amounts for the regulatory amendments which became effective in 2015. Accordingly, the penalty matrix contained



Civil Penalty Policy, determining the maximum potential civil penalty for all provable violations is the starting point of any civil penalty calculation (*see* DEE-1 § IV.B). The maximum potential civil penalty sets the ceiling for any amount that is ultimately assessed. Department staff correctly notes that the appropriate civil penalty is derived from a number of factors, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of respondent's conduct (*see* DEE-1 § IV.C, D, E).

Department staff asserts that respondent benefited from avoiding the costs associated with closing the two tanks (*see* tr at 208). Evidence in the hearing record indicates that the respondent has been in violation of 6 NYCRR 613-2.6(a)(3) since November 30, 2017 (*see* tr at 193-194, 210). Department staff testified at hearing that the economic benefit derived from respondent's non-compliance was in the range of twelve thousand (\$12,000) to twenty thousand (\$20,000) dollars (*see* tr at 208-210).

With respect to the gravity component, Department staff notes that activities such as properly closing out of service tanks are critical in the effort to prevent and limit environmental contamination due to spillage (*see* tr at 208, 215). The record in this matter demonstrates that respondent failed to timely close the storage tanks after taking them out of service, thereby increasing the likelihood of potential environmental harm from failure to maintain and properly close the tanks (*see* tr 214-216).

Finally, a respondent's level of cooperation or lack thereof, may be considered when determining the appropriate civil penalty (*see* DEE-1 § IV.E.2). Here, evidence in the hearing record indicates that respondent did not communicate with the Department or respond to the Department's telephone calls and letters (*see* tr at 216-218; *see also* Hearing Exhibits 5, 6, 7, 8).

Accordingly, I conclude that staff's request for a civil penalty in the amount of fifteen thousand dollars (\$15,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

#### Conclusion of Law

By failing to permanently close two out of service underground PBS tanks at a facility owned by respondent and located at 231 Brand Road, Malone, Franklin County, New York, respondent violated 6 NYCRR 613-2.6(a)(3).

#### Recommendation

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

---

in DEE-22 does not provide a penalty range for violation of 6 NYCRR 613-2.6(a)(3), which now, unlike the previous provision which addressed tank closure (6 NYCRR 613.9[b]), requires an environmental site assessment (*see* tr at 205-207).

1. Granting Department staff's motion for default judgment, holding respondent Great White North Realty Holdings LLC. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Great White North Realty Holdings LLC violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close two underground PBS tanks (Tank 001A and Tank 001B) at its facility located at 231 Brand Road, Malone, Franklin County, New York, on or before November 30, 2017;
3. Directing respondent to pay a civil penalty in the amount of fifteen thousand dollars (\$15,000) within thirty (30) days of service of the Commissioner's order;
4. Directing respondent to submit proof to Department staff within thirty (30) days of service of the Commissioner's order that tanks 001A and 001B have been closed in accordance with 6 NYCRR 613-2.6(b)-(e); and
5. Directing such other and further relief as the Commissioner may deem just and appropriate.

/s/  
Michele M. Stefanucci  
Administrative Law Judge

Dated: Albany, New York  
October 22, 2019

## APPENDIX A

*Matter of Great White North Realty Holdings LLC.*  
DEC File No. R5-20180123-2277  
December 19, 2018, Ray Brook, New York

Exhibit	Description	Offered	Admitted
1	Affidavit of Service of Notice of Hearing and Complaint on NYS Department of State on February 21, 2018, with accompanying exhibits.	✓	✓
2	Affidavit of Mailing of Notice of Hearing and Complaint to Respondent on February 27, 2018, pursuant to CPLR §3215(g)(4), with accompanying exhibits.	✓	✓
3	Affidavit of Service of Notice of Motion for Default Judgment and Default hearing on November 9, 2018, with accompanying exhibits.	✓	✓
4	Petroleum Bulk Storage Application dated January 28, 2016.	✓	✓
5	Copies of email correspondence between Russell Mulvey, P.E., and Bart Patterson (June 11, 2017-December 1, 2017).	✓	✓
6	Notice of Violation (NOV) dated December 6, 2017.	✓	✓
7	Copies of email correspondence between staff-person Russell Mulvey and Bart Patterson (December 6, 2017 – December 29, 2017).	✓	✓
8	Letter dated January 23, 2018 from Assistant Regional Attorney Scott Abrahamson to Respondent, with proposed Order on Consent (with redactions).	✓	✓
9	Affirmation of Assistant Regional Attorney Scott Abrahamson dated November 6, 2018.	✓	✓
10	Proposed Commissioner's Order.	✓	✓

11	New York State Department of State Entity Information printout for Great White North Realty Holdings LLC.	✓	✓
12	Certified Deed into Great White North Realty Holdings LLC; Franklin County Property Description; copy of page 597 from the 2018 Tentative Assessment Roll.	✓	✓
13	Phone log of Russel Mulvey, P.E., December 29, 2017 to January 5, 2018.	✓	✓