

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

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

ORDER

DEC File No.
R4-2012-1129-111

- by -

LANCE HILL,

Respondent.

This administrative enforcement proceeding addresses the alleged violations by respondent Lance Hill at a petroleum bulk storage (“PBS”) facility, known as Cobleskill Collision, Inc., that he owns and operates at 147 Barnerville Road, Cobleskill, New York (“facility”).

On February 12, 2013, staff of the New York State Department of Environmental Conservation (“Department”) sent to respondent, by certified mail, a notice of hearing and complaint of same date. Service was complete upon respondent’s receipt of the notice of hearing and complaint on February 21, 2013 (see 6 NYCRR 622.3[a][3]). Respondent failed to answer. By papers dated April 10, 2013, Department staff moved for a default judgment and order. This motion was received by respondent, and service completed, on April 12, 2013.

Department staff’s complaint alleges five causes of action related to respondent’s PBS facility, which has been designated as PBS #4-484253. Specifically, Department staff alleges that respondent:

- (1) failed to timely renew the PBS facility’s registration in violation of 6 NYCRR 612.2(a)(2);
- (2) failed to notify Department staff of a substantial modification to the PBS facility in violation of 6 NYCRR 612.2(d);
- (3) failed to properly permanently close three aboveground storage tanks in violation of 6 NYCRR 613.9(b);
- (4) failed to maintain monthly inspection reports for the facility’s tanks for a period of at least ten years in violation of 6 NYCRR 613.6(c); and
- (5) failed to install overfill prevention systems on four tanks in violation of 6 NYCRR 613.3(c)(3).

Department staff requests an order: finding respondent liable for the violations alleged in the complaint; ordering respondent to pay a civil penalty in the amount of \$10,750; and directing respondent to undertake certain corrective actions.

The matter was assigned to Administrative Law Judge (“ALJ”) P. Nicholas Garlick, who 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 ALJ’s report, respondent Lance Hill failed to answer the complaint in this matter, and the ALJ recommends that Department staff’s motion for a default judgment be granted. I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15. Review of the documents submitted established that all the requirements of 6 NYCRR 622.15 have been met. In addition, the proof submitted on Department staff’s motion, including the August 30, 2012 notice of violation, the May 23, 2007 PBS application, the expired PBS certificate, and the February 12, 2013 facility information report, together with the allegations of the complaint, is sufficient to establish the violations charged (see Matter of Queen City Recycling Center, Inc., Decision and Order of the Commissioner, Dec. 12, 2013, at 2-3; Matter of Farmer, Decision and Order of the Commissioner, Oct. 22, 2009, at 3).

Department staff’s civil penalty request of \$10,750 includes the following: (1) for the first cause of action, a total payable civil penalty of \$1,000; (2) for the second cause of action, a total payable civil penalty of \$1,000; (3) for the third cause of action, a total payable civil penalty of \$6,000 (\$2,000 per tank for each of three aboveground tanks referenced in this cause of action); (4) for the fourth cause of action, a total payable civil penalty of \$1,750 (\$250 per tank for each of seven tanks referenced in this cause of action); and (5) for the fifth cause of action, a total payable civil penalty of \$1,000 (\$250 per tank for each of four tanks referenced in this cause of action). In determining the appropriate requested penalty in this case, Department staff considered the applicable guidance documents and the following factors: the critical nature of the requirements violated by respondent to the Department’s petroleum bulk storage program; the potential threat to human health and the environment from petroleum contamination; and the pervasive nature of the violations and respondent’s indifference to compliance. Based on this record, the \$10,750 payable civil penalty for the violations alleged in the complaint is authorized and appropriate. Respondent shall pay this penalty within thirty (30) days of the service of this order upon him.

In addition, Department staff requests language in the order directing respondent to: (1) within ten (10) days of the effective date of this order, submit to Department staff an updated and accurate PBS application; (2) within thirty (30) days of the effective date of this order, submit a plan to Department staff indicating whether tanks #3, #4 and #6 will be properly permanently closed or brought into compliance, and a schedule for achieving such compliance; (3) submit monthly inspection reports for all remaining active tanks for three months from the effective date of this order (that is April, May and June 2015); and (4) within thirty (30) days of the effective date of this order, submit documentation showing that the required overfill prevention gauges or equivalent devices have been installed on all active tanks. Based on this record, these actions are warranted and appropriate.

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 the complaint in this matter, respondent Lance Hill waived his right to be heard at the hearing. Accordingly, the allegations of the complaint are deemed to have been admitted by respondent.
- II. Based upon the allegations of the complaint and the documents submitted in support of the motion, respondent Lance Hill, at a PBS facility he owns and operates and which is located at 147 Barnerville Road, Cobleskill, New York, has violated:
 - 6 NYCRR 612.2(a)(2), by failing to timely renew the PBS facility's registration, which expired on May 25, 2012;
 - 6 NYCRR 612.2(d), by failing to notify Department staff of a substantial modification to the PBS facility, specifically the removal of aboveground storage tanks #5 and #7 from the facility;
 - 6 NYCRR 613.9(b), by failing to properly permanently close three aboveground storage tanks, specifically tanks #3, #4, and #6;
 - 6 NYCRR 613.6(c), by failing to maintain monthly inspection reports for the facility's aboveground storage tanks for a period of at least ten years; and
 - 6 NYCRR 613.3(c)(3), by failing to install overfill prevention systems on four aboveground storage tanks, specifically tanks #2, #3, #4, and #6.
- III. Within thirty (30) days of the service of this order upon respondent Lance Hill, respondent shall pay a civil penalty in the amount of ten thousand seven hundred and fifty dollars (\$10,750). Payment shall be made in the form of a certified check, cashier's check, or money order payable to the New York State Department of Environmental Conservation. The penalty payment shall be mailed or otherwise delivered to the following address:

New York State Department of Environmental Conservation
Region 4 Office
1130 North Westcott Road
Schenectady, New York 12306
Attention: Richard Ostrov, Esq., Regional Attorney.¹
- IV. Respondent Lance Hill shall, within ten (10) days of the service of this order upon respondent, submit to Department staff an updated and accurate PBS application for PBS facility #4-484253.

¹ Jill Phillips, Esq., the assistant regional attorney in DEC Region 4 who handled this matter, is now with another State agency. Accordingly, communications are hereby being directed to the Regional Attorney for DEC Region 4.

- V. Respondent Lance Hill shall, within thirty (30) days of the service of this order upon him, submit a plan to Department staff indicating whether aboveground storage tanks #3, #4 and #6 will be properly permanently closed or brought into compliance, and provide a schedule for achieving such compliance.
- VI. Respondent Lance Hill shall submit monthly inspection reports for all remaining active tanks at the facility to the Department for the months of April, May and June 2015.
- VII. Respondent Lance Hill shall, within thirty (30) days of the service of this order upon him, submit documentation showing that the required overfill prevention gauges or equivalent devices have been installed on all active tanks at the facility or provide documentation that such tanks have been properly permanently closed.
- VIII. Any questions or other correspondence regarding this order shall also be directed to Richard Ostrov, Esq., at the address referenced in paragraph III of this order.
- IX. The provisions, terms and conditions of this order shall bind respondent Lance Hill, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

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

Dated: March 10, 2015
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of
the New York State Environmental Conservation Law 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 File #
R4-2012-1129-111

-by-

LANCE HILL,

Respondent.

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This summary report addresses a motion for default judgment, pursuant to 6 NYCRR 622.15, by staff of the New York State Department of Environmental Conservation ("Department Staff") against Lance Hill ("respondent"). Mr. Hill owns and operates a petroleum bulk storage ("PBS") facility (PBS #4-484253), known as Cobleskill Collision, Inc., located at 147 Barnerville Road, Cobleskill, New York (Schoharie County).

Department staff served a notice of hearing and complaint upon respondent by certified mail on February 21, 2013. The respondent failed to answer, though such answer was due on or before March 13, 2013. By papers dated April 10, 2013, Department Staff moved for a default judgment and order. This motion was served on respondent on April 12, 2013. Department staff's motion papers included: (1) a cover letter; (2) the notice of motion for default and judgment; (3) the motion for default judgment and order; (4) the affirmation of Department staff counsel Jill Phillips; and (5) an affidavit of service for the default motion. Attached to Ms. Phillips' affirmations are: (1) an affidavit of service of the notice of hearing and complaint and postal receipts; (2) a copy of the complaint and cover letter; (3) cover letters dated December 3, 2012 and January 4, 2013 regarding settlement of this matter; (4) a copy of an August 30, 2012 notice of violation; (5) copies of the respondent's PBS application (dated May 25, 2007), his PBS Certificate (which expired on May 25, 2012), and his PBS facility information report; and (6) a proposed order.

Department staff's complaint alleged five causes of action related to an inspection of the respondent's PBS facility on August 29, 2012. Specifically, Department staff alleges that the respondent: (1) failed to timely renew the PBS facility's registration in violation of 6 NYCRR 612.2(a)(2); (2) failed to notify Department Staff of a substantial modification to the PBS facility in violation of 6 NYCRR 612.2(d); (3) failed to properly permanently close three aboveground storage tanks ("ASTs") in violation of 6 NYCRR 613.9(b); (4) failed to maintain monthly inspection reports for the facility's tanks for a

period of at least ten years in violation of 6 NYCRR 613.6(c); and (5) failed to install overfill prevention systems on four tanks in violation of 6 NYCRR 613.3(c)(3).

The complaint seeks an order of the Commissioner: (1) finding respondent liable for the violations alleged in the complaint; and (2) ordering respondent to pay a civil penalty in the amount of \$10,750. In addition, Department staff request that the Commissioner include language in his order directing respondent to: (1) within ten days of the effective date of the Order, submit to Department staff an updated and accurate PBS application; (2) within 30 days of the effective date of the order, submit a plan to Department staff indicating whether ASTs #3, #4 and #6 will be properly permanently closed or brought into compliance and a schedule for achieving such compliance; (3) submit monthly inspection reports for all remaining active tanks for three months from the effective date of the order; and (4) within 30 days of the effective date of the order to submit documentation showing that the required overfill prevention gauges or equivalent devices have been installed on all active tanks.

Default Provisions

Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order." Pursuant to prior Commissioner's decisions, Department staff is also expected to submit some proof of the violations alleged, including a copy of any PBS facility registration, PBS facility information report and notice of violation (see Matter of Farmer, Decision and Order of the Commissioner, Oct. 22, 2009).

In Matter of Alvin Hunt d/b/a Our Cleaners (Decision and Order of the Commissioner, July 25, 2006), the Commissioner set forth the process to be followed by an administrative law judge (ALJ) in reviewing a default motion. First, an examination of the proof of service of notice of hearing and complaint is required as well as the proof of the respondent's failure to appear or file a timely answer. Then, an ALJ must consider whether the complaint states a claim upon which relief may be granted and if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported.

In this case, Department Staff has met the requirements of 6 NYCRR 622.15 and the complaint sets forth five causes of action for which relief can be granted. The complaint alleges that the respondent (1) failed to timely renew the PBS facility's registration in violation of 6 NYCRR 612.2(a)(2); (2) failed to notify Department staff of a substantial modification to the PBS facility in violation of 6 NYCRR 612.2(d); (3) failed to properly permanently close three aboveground storage tanks in violation of 6

NYCRR 613.9(b); (4) failed to maintain monthly inspection reports for the facility's tanks for a period of at least ten years in violation of 6 NYCRR 613.6(c); and (5) failed to install overfill prevention systems on four tanks in violation of 6 NYCRR 613.3(c)(3). Based on the information included in Department Staff's papers, Department Staff is entitled to a default judgment in this matter.

As the Commissioner stated in Hunt, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]." Accordingly, the findings of fact set forth below are based upon the documents submitted into the record, as identified in the attached exhibit list.

Applicable Regulatory Provisions

Regulations dealing with the registration of petroleum storage facilities applicable to the respondent are found at 6 NYCRR part 612 and those applicable to the handling and storage of petroleum are found at 6 NYCRR part 613. Section 612.2(a)(2) of 6 NYCRR requires PBS facilities to renew their registrations every five years. Section 612.2(d) of 6 NYCRR requires owners of PBS facilities to notify Department Staff within thirty days prior to substantially modifying a facility. Section 613.9(b) of 6 NYCRR sets forth the requirements that must be met to permanently take a tank out-of-service. Section 613.6(c) of 6 NYCRR requires inspection reports for aboveground tanks be maintained for at least ten years.

Parts 612 and 613 were promulgated pursuant to the Department's authority to regulate the storage and handling of petroleum found in titles 3 and 10 of article 17 of the ECL. ECL 71-1929 provides that any person who violates any provision of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the Commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable for a penalty not to exceed thirty-seven thousand five hundred dollars per day.

Findings of Fact and Conclusions of Law

1. Respondent Lance Hill owns and operates a PBS facility ("PBS #4-484253") known as Cobleskill Collision, Inc. which is located at 147 Barnerville Road, Cobleskill, New York (Schoharie County).
2. On August 29, 2012, Department Staff performed an inspection of the facility and detected several violations which were communicated to the respondent in a notice of violation dated August 30, 2012.
3. Respondent failed to comply with: (1) 6 NYCRR 612.2(a)(2) by failing to timely renew the PBS facility's registration which expired on May 25, 2012; (2) 6 NYCRR 612.2(d) by failing to notify Department Staff of a substantial modification to the PBS facility, specifically the removal of ASTs #5 and #7 from

- the facility; (3) 6 NYCRR 613.9(b) by failing to properly permanently close three ASTs #3, #4, and #6; (4) 6 NYCRR 613.6(c) by failing to maintain monthly inspection reports for the facility's seven tanks for a period of at least ten years; and (5) 6 NYCRR 613.3(c)(3) by failing to install overfill prevention systems on four tanks, ASTs #2, #3, #4, and #6.
4. On February 21, 2013, Department Staff served the respondent with the notice of hearing and the complaint via certified mail. The respondent's time to answer expired on or before March 13, 2013. The respondent was also served with a copy of the motion for a default judgment and order on April 12, 2013.
 5. The respondent failed to answer the complaint.
 6. The \$10,750 penalty and remedial and corrective relief sought by Department staff are authorized and warranted on this record.

Discussion

The record of this proceeding demonstrates that respondent failed to comply with: (1) 6 NYCRR 612.2(a)(2) by failing to timely renew the PBS facility's registration which expired on May 25, 2012; (2) 6 NYCRR 612.2(d) by failing to notify Department Staff of a substantial modification to the PBS facility, specifically the removal of ASTs #5 and #7 from the facility; (3) 6 NYCRR 613.9(b) by failing to properly permanently close three ASTs #3, #4, and #6; (4) 6 NYCRR 613.6(c) by failing to maintain monthly inspection reports for the facility's seven tanks for a period of at least ten years; and (5) 6 NYCRR 613.3(c)(3) by failing to install overfill prevention systems on four tanks, ASTs #2, #3, #4, and #6.

The record shows that respondent was served with the complaint on February 21, 2013 and did not answer the complaint. The respondent was also served with a copy of Department Staff's motion for a default judgment and order on April 12, 2013. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

According to the affirmation of Department staff counsel Jill Phillips, the requested penalty is reasonable and appropriate. Department staff is seeking a total payable civil penalty of \$10,750 which is the sum of the following components: (1) for the first cause of action a total payable civil penalty of \$1,000; (2) for the second cause of action a total payable civil penalty of \$1,000; (3) for the third cause of action a total payable civil penalty of \$6,000 (\$2,000 per tank for each of three tanks); (4) for the fourth cause of action a total payable civil penalty of \$1,750 (\$250 per tank for each of seven tanks); and (5) for the fifth cause of action a total payable civil penalty of \$1,000 (\$250 per tank for each of four tanks).

In her affirmation, Department staff counsel Phillips states that consideration was given to the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) and the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22, issued May 21, 2003). Ms. Phillips notes that the statutory maximum civil penalty for these violations is \$37,500 per day, as authorized by ECL 71-1929. In determining the appropriate requested penalty in this case, Department staff considered the following factors: (1) the critical nature of the requirements violated by the respondent to the Department's petroleum bulk storage program; (2) the potential threat to human health and the environment from petroleum contamination; and (3) the pervasive nature of the violations and the respondent's indifference to compliance. Based on this record, the \$10,750 payable civil penalty for the violations alleged in the complaint is authorized and appropriate.

Department staff also requests language in the Commissioner's order that directs respondent to: (1) within ten days of the effective date of the Order, submit to Department staff an updated and accurate PBS application; (2) within 30 days of the effective date of the order, submit a plan to Department staff indicating whether tanks AST #3, #4 and #6 will be properly permanently closed or brought into compliance and a schedule for achieving such compliance; (3) submit monthly inspection reports for all remaining active tanks for three months from the effective date of the order; and (4) within 30 days of the effective date of the order submit documentation showing that the required overfill prevention gauges or equivalent devices have been installed on all active tanks. Based on this record, this request is authorized and appropriate.

Recommendation

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

1. granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15 for failing to answer the complaint;
2. finding respondent in violation of: (1) 6 NYCRR 612.2(a)(2) by failing to timely renew the PBS facility's registration which expired on May 25, 2012; (2) 6 NYCRR 612.2(d) by failing to notify Department staff of a substantial modification to the PBS facility, specifically the removal of ASTs #5 and #7 from the facility; (3) 6 NYCRR 613.9(b) by failing to properly permanently close three ASTs #3, #4, and #6; (4) 6 NYCRR 613.6(c) by failing to maintain monthly inspection reports for the facility's seven tanks for a period of at least ten years in; and (5) 6 NYCRR 613.3(c)(3) by failing to install overfill prevention systems on four tanks, ASTs #2, #3, #4, and #6.
3. directing respondent to pay a total civil penalty in the amount of \$10,750 (ten thousand seven hundred and fifty dollars); and

4. directing respondent to: (1) within ten days of the effective date of the order, submit to Department staff an updated and accurate PBS application; (2) within 30 days of the effective date of the order, submit a plan to Department staff indicating whether ASTs #3, #4 and #6 will be properly permanently closed or brought into compliance and a schedule for achieving such compliance; (3) submit monthly inspection reports for all remaining active tanks for three months from the effective date of the order; and (4) within 30 days of the effective date of the order, submit documentation showing that the required overfill prevention gauges or equivalent devices have been installed on all active tanks.

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
May 13, 2013