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 Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

ORDER

DEC Case No.
R5-20060816-642
PBS No. 5-407321

-by-

THOMAS P. MAGGY and MR. MODULAR, INC.,

Respondents.

This administrative enforcement proceeding concerns the alleged failure of respondents Thomas P. Maggy and Mr. Modular, Inc., to comply with the requirements of the New York State petroleum bulk storage (PBS) regulations at a PBS facility located at 4732 Route 3, Saranac, New York (site). The facility had contained a twelve thousand gallon gasoline tank, which was removed on or about May 2007.[1]

This matter involved two enforcement actions. Staff of the New York State Department of Environmental Conservation (DEC or Department) first commenced an enforcement action against Mr. Modular, Inc., by notice of hearing and complaint dated July 8, 2010. By papers dated December 28, 2010, Department staff moved for a default judgment and order. Mr. Modular, Inc., filed a notice of cross-motion to vacate the default and opposition to the motion for default dated January 20, 2011. Staff subsequently withdrew its first action and commenced a second enforcement action against Thomas P. Maggy, John A. Smith,[2] and Mr. Modular, Inc., by service of a motion for order without hearing (in lieu of complaint) dated February 3, 2011. On February 4, 2011, the attorney for respondents Thomas P. Maggy and Mr. Modular, Inc., accepted service on their behalf. Accordingly, service was accomplished pursuant to sections 622.3(a)(3) and 622.12 of title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR).

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[1] Respondent Thomas P. Maggy maintains that the tank was an aboveground tank (see Affidavit of Tom Maggy dated January 20, 2011, ¶ 7, attached to the papers filed by the Cantwell Law Firm under cover of a letter dated January 21, 2011). However, the Department's PBS certificate (PBS # 5-407321) lists the tank as being underground (see also Affidavit of Benjamin Hankins, DEC Environmental Engineer 1, sworn to on February 3, 2011 [Hankins February Affidavit], ¶¶ 9, 13, and 39). Whether the the tank was an aboveground tank or an underground tank, either category of tank would have been subject to the registration and closure requirements that Department staff cited.

[2] Department staff subsequently moved to remove John A. Smith as a respondent in this proceeding (see Department staff motion for default judgment and order and permission to amend pleading, dated July 7, 2011, at 1; Affirmation of Scott Abrahamson, Esq., dated July 7, 2011, ¶ 15).

Thomas P. Maggy and Mr. Modular, Inc., are, respectively, the owner and the operator of the PBS facility. Department staff's motion for order without hearing alleges that respondents:

-- failed to have a current and valid registration for the petroleum storage facility, in violation of 6 NYCRR 612.2(a);

-- failed to temporarily close a PBS tank that was out-of-service, in violation of 6 NYCRR 613.9(a);

-- failed to properly and permanently close an out-of-service PBS tank, in violation of 6 NYCRR 613.9(b); and

-- failed to notify the Department before removing the PBS tank, in violation of 6 NYCRR 613.9(c).

In February 2011, Department staff agreed to indefinitely extend the deadline for respondents to file a response to staff's motion for order without hearing. The extension was to provide respondents with an opportunity to comply with staff's requests relative to the PBS facility. By letter dated May 3, 2011, Department staff served notice on respondents Thomas P. Maggy and Mr. Modular, Inc., that Department staff was amending the motion for order without hearing to increase the amount of the civil penalty requested to $25,000, and demanding that respondents file a response to staff's motion for order without hearing no later than May 31, 2011. Respondents failed to file a response by May 31, 2011. Under a cover letter dated July 13, 2011, Department staff served a notice of motion for default judgment on respondents' counsel.

This matter was assigned to Administrative Law Judge (ALJ) Nicholas P. Garlick, who prepared the attached summary report. I adopt the ALJ's summary report as my decision in this matter, subject to my comments below.

Liability

ALJ Garlick recommends that Department staff's motion for default be granted in part. He concludes that the record does not demonstrate that respondents were in violation of the facility registration requirement set forth in 6 NYCRR 612.2(a), and I agree (see ALJ Summary Report, at 6-7 [reviewing PBS registration documents for the facility]). With respect to the alleged closure requirement violations (6 NYCRR 613.9[a], [b], and [c]), the ALJ concludes that respondents Thomas P. Maggy and Mr. Modular, Inc., violated 6 NYCRR 613.9(a) by failing to temporarily close an out-of-service tank, and that respondent Thomas P. Maggy also violated 6 NYCRR 613.9(b) and 6 NYCRR 613.9(c), by failing to permanently close the out-of-service tank and failing to notify Department staff prior to removal of the tank in May 2007.

Although the petroleum bulk storage regulations are, in many instances, specific as to whether an obligation is that of an owner or of an operator or of both, the closure requirements in 6 NYCRR 613.9 do not provide that specificity except for the notification requirement relating to the permanent closure of a tank. As stated in the regulations, notification is the obligation of the

owner of the facility (see 6 NYCRR 613.9[c]). Accordingly, Mr. Modular, Inc., as the facility's operator, cannot be held liable for violation of that regulatory section.

The ALJ concluded that both owners and operators of PBS facilities are subject to the temporary closure requirements. As part of temporary closure, the regulations require removal of tank product and appropriate locking or bolting and capping or plugging of tank equipment for storage tanks or facilities that are temporarily out of service for thirty (30) days or more (see 6 NYCRR 613.9[a]). In contrast to permanent closure activities, such temporary activities do not result in the loss or removal of an asset for future use. Particularly where only an operator is present onsite, it could be expected that the operator would undertake such temporary closure requirements as part of the facility's ongoing operation. DEC guidance further supports the application of these requirements to both owners and operators. For example, the Department's Petroleum Bulk Storage (PBS) Inspection Handbook, DEC Program Policy, DER-25, issued April 20, 2011 (Handbook), references temporary closure in terms of "owner/operator" (see Handbook, at 77 [owner/operator responsibility to temporarily close a tank where secondary containment is improperly designed]). Based on this record, liability for the violation of 6 NYCRR 613.9(a) may be imposed on both respondent Maggy and respondent Mr. Modular, Inc.

With respect to permanent closure, I conclude that those requirements should generally be seen as an owner's responsibility. Permanent closure involves the removal or permanent discontinuance of use of a property asset, and should be within the scope of the owner's responsibility. In addition, that an owner is responsible for notification of the permanent closure of a tank (see 6 NYCRR 613.9[c]) further supports the conclusion that it is the owner who is responsible for permanently closing a tank. Notwithstanding the foregoing, because it remains the responsibility of the tank system operator, as well as the owner, to ensure compliance with all applicable (local, State and federal) requirements (see Handbook, at vi, 1; see also ECL 17-1007[3]), unique circumstances may exist where the obligation for permanent tank closure would fall on an operator. However, that is not the case here, and I concur with the ALJ that the operator of this facility, Mr. Modular, Inc., should not be held liable for a violation of 6 NYCRR 613.9(b), but only the owner, respondent Thomas P. Maggy.

Penalty

The record is not clear as to the civil penalty that is being requested in this proceeding. Department staff in its motion for default judgment referenced two penalty amounts. It requested a payable penalty of $10,000, but in an earlier section of the motion, staff stated that it was entitled to a civil penalty in the amount of $15,000. The $15,000 figure appears to be in error. An accompanying affirmation references a total civil penalty of $25,000, with $10,000 payable and $15,000 suspended (see Affirmation of Attorney Scott Abrahamson dated July 7, 2011, ¶¶ 2, 7). However a staff affidavit, also submitted with the motion, sets forth the request as $10,000, with no sum of money suspended (see Affidavit of Benjamin Hankins, sworn to July 13, 2011 [Hankins July Affidavit], ¶ 5; see also draft order prepared by staff requesting a $10,000 penalty). In light of the ambiguity in the motion for default and the accompanying papers as to any suspended amount, I am considering the ten thousand dollar ($10,000) payable penalty as staff's total penalty request.

The ALJ recommends that no penalty be imposed on respondent Mr. Modular, Inc. As the ALJ notes, Department staff, in its penalty proposal, requested that no civil penalty be imposed for violation of the temporary closure requirement in 6 NYCRR 613.9(a), the only count on which Mr. Modular, Inc., is found liable. Because staff is not requesting any penalty for this violation, I concur with the ALJ that no civil penalty should be imposed on Mr. Modular, Inc.

ALJ Garlick recommends imposing a civil penalty in the amount of five thousand dollars ($5,000) on respondent Maggy, payable within thirty (30) days of service of the order upon him. The penalty would be for his failure to permanently close the tank at the site (see 6 NYCRR 613.9[b]). Staff did not request a penalty for violation of the notification requirement set forth in 6 NYCRR 613.9(c). In its penalty calculations, Department staff requested a ten thousand dollar ($10,000) penalty for the failure to properly permanently close the tank at the facility. The facility's tank was a two-compartment tank, with a different type of product in each compartment for retail gasoline sales (see Hankins February Affidavit, ¶ 10, and Exhibit 6 [petroleum bulk storage application date stamped October 19, 2006]). Staff determined that a two-compartment tank should be considered as two tanks for purposes of the closure requirements (and that a penalty of five thousand dollars [$5,000] should be imposed for each tank). The ALJ, however, concluded that the tank should not be treated as two tanks for purposes of closure, and I agree. In certain circumstances, such as inventory monitoring and recordkeeping, a compartmentalized tank should be considered as more than one tank, as such monitoring and recordkeeping would apply separately to each compartment. These circumstances do not apply to closure where, as here, only one tank was removed, no matter what the number of compartments.

Although I disagree with staff's determination to treat this two-compartment tank as two tanks for purposes of closure, a ten thousand dollar ($10,000) penalty is substantially lower than what could be assessed for the failure to properly permanently close one tank (see ECL 71-1929 [civil penalty of up to $37,500 per day for each violation]). Furthermore, although the Department's enforcement guidance memorandum, "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy," dated May 21, 2003 (PBS Enforcement Policy, at 1), in its penalty schedule references a penalty range of $500 to $5,000 for failure to permanently close a tank, the PBS Enforcement Policy states that penalty amounts in adjudicated cases are to be "significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents."

The proximity of the tank to the Saranac River (approximately 320 feet [see Hankins February Affidavit, ¶ 32(6) and Exhibit 14]), and the failure to permanently close the tank (see, e.g., Notice of Violation dated July 26, 2006, attached as Exhibit 11 to the Hankins February Affidavit [citing facility for failure to permanently close the tank], and Hankins February Affidavit, ¶¶ 27 and 29 [noting that tank was not removed until nearly nine months after the notice of violation was issued]) warrant a substantial penalty. Accordingly, I conclude that imposing a ten thousand dollar ($10,000) penalty on respondent Thomas P. Maggy for failing to properly permanently close the out-of-service tank is authorized and appropriate.

Remedial Relief

Department staff did not include remediation as part of the relief that it is demanding, because staff will be investigating the facility and will remediate any contamination pursuant to the Department's authority under article 12 of the Navigation Law (see Notice of Motion for Default Judgment and Order and Permission to Amend Pleading, at 1-2). Nothing in this order, however, precludes the Department or the State from pursuing reimbursement from respondents for the costs of investigation or remediation (see, e.g., e-mail dated August 2, 2011 from respondents' attorney to ALJ Garlick regarding entitlement of the Department to compensation), or any applicable penalties with respect to the failure to report any release of petroleum at or from the site.

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 default judgment is granted in part and denied in part.

II. Respondents Thomas P. Maggy and Mr. Modular, Inc., are adjudged to be in default and to have waived the right to be heard in this enforcement proceeding. With respect to the four alleged violations set forth by Department staff in its motion for order without hearing, no violation is found with respect to 6 NYCRR 612.2(a) (tank registration). The second, third and fourth violations (6 NYCRR 613.9[a], 6 NYCRR 613.9[b], and 6 NYCRR 613.9[c]) (relating to the temporary and permanent closure of an out-of-service tank) are deemed to have been admitted by respondent Maggy, and the second violation (6 NYCRR 613.9[a]) (relating to the closure of a tank temporarily out-of-service) is deemed to have been admitted by respondent Mr. Modular, Inc.

III. Respondent Thomas P. Maggy is adjudged to have violated 6 NYCRR 613.9(a), 6 NYCRR 613.9(b), and 6 NYCRR 613.9(c); and respondent Mr. Modular, Inc., is adjudged to have violated 6 NYCRR 613.9(a).

IV. Respondent Thomas P. Maggy is hereby assessed a civil penalty in the amount of ten thousand dollars ($10,000), which shall be due and payable within thirty (30) days after service of this order upon him. Payment shall be made in the form of a cashier's check, certified check or money order made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:

Scott Abrahamson, Esq.
Assistant Regional Attorney
NYS DEC Region 5
1115 NYS Route 86, P.O. Box 296
Ray Brook, New York 12977.[3]

[3] Former regional attorney Christopher A. Lacombe, Esq., originally represented Department staff. Following his departure, Scott Abrahamson, Esq., assumed responsibility for this matter.

V. Department staff's request to amend its February 3, 2011 motion for order without hearing to remove John A. Smith as respondent in this matter is granted.

VI. The imposition of a civil penalty provided for by this order shall not impair, limit or abridge the right of the New York State Department of Environmental Conservation or the State of New York to recover from respondents or any of their principals the costs of any investigation or remediation at the site or any applicable penalties with respect to the failure to report any release of petroleum at or from the site.

VII. All communications from respondents to Department staff concerning this order shall be directed to Scott Abrahamson, Esq., at the address set forth in paragraph IV of this order.

VIII. The provisions, terms and conditions of this order shall bind respondents Thomas P. Maggy and Mr. Modular, Inc. and their agents, successors, and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

By: _____/S_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
September 9, 2011

To: Mr. Modular, Inc. (Via Certified Mail)
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Saranac, New York 12981

Thomas P. Maggy (Via Certified Mail)
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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 and 614 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York

SUMMARY REPORT

DEC File No.
R5-20060816-642
PBS R5-407321

-by-

THOMAS P. MAGGY and
MR. MODULAR, INC.,

Respondents.

SUMMARY

Staff of the Department of Environmental Conservation (DEC Staff) brought this administrative enforcement action against Thomas P. Maggy and Mr. Modular, Inc. (respondents) for actions involving a petroleum underground storage tank (UST) located at the site of a former convenience store in Saranac, New York. DEC Staff alleges four causes of action against both respondents and seeks a $10,000 payable civil penalty. DEC Staff and contractors are presently on the site investigating any possible contamination. Respondents did not respond to DEC Staff's allegations (although the parties have been in regular communication) and DEC Staff moved for a default judgment and order. This report recommends that the Commissioner issue an order finding the respondent Thomas P. Maggy liable for three violations and imposing a civil penalty of $5,000. Mr. Modular, Inc. should be held liable for a single violation, but no civil penalty should be imposed. DEC Staff does not request language be included in the order regarding remediation because the investigation is currently ongoing.

BACKGROUND

Prior to January 2004, the site of the alleged violations, 4732 Route 3, Saranac, New York, was owned by Dorothy Strong and known as the Clayburg Grocery, a convenience store and gas station. The site contained a 12,000 gallon petroleum UST and was registered as a petroleum bulk storage (PBS) facility with DEC Staff (#5-407321). The tank had two compartments which were used to store and dispense two different types of petroleum products. The tank was installed directly on the ground and portion of the bottom of the tank was covered

by sand and soil (since more than 10% of the tank was below ground, it is considered an underground storage tank, see 40 CFR 280.12). On September 6, 2001, Ms. Strong filed an application to renew the PBS certificate for the facility. The application was processed by DEC Staff on September 13, 2001. DEC Staff does not state in its papers that a renewal was issued and no PBS certificate resulting from this application is attached to its papers. However, the respondents have provided a copy of this PBS certificate.

In January 2004, the site was purchased by Thomas P. Maggy and John A. Smith. According to the New York State Department of State's website, the site is listed as the address for the service of process for Mr. Modular, Inc. Mr. Modular, Inc. operates a business which sells and constructs modular homes at the site. According to DEC Staff, the UST was not used for storage or sale of petroleum products after the purchase.

On July 26, 2006, DEC Staff member Benjamin Hankins and Environmental Conservation Officer (ECO) Lester Taylor conducted an inspection of the facility. Mr. Hankins completed an inspection report and ECO Taylor issued a notice of violation (NOV) which listed twelve separate violations at the PBS facility.

On August 30, 2006, Thomas P. Maggy sent a PBS application to DEC Staff requesting a certificate with a change of ownership. The application was returned to him by DEC Staff with a cover letter dated September 11, 2006 because it lacked certain information and attached the wrong fee amount. Mr. Maggy returned the completed application on October 17, 2006. On November 8, 2006, DEC Staff issued a PBS storage certificate for the facility. This certificate listed Thomas P. Maggy and John A. Smith as the owners of the facility and Mr. Modular, Inc. as the operator.

A settlement conference regarding the July 26, 2006 NOV was scheduled for October 4, 2006.

In May 2007, Mr. Maggy arranged for Church Oil Co., Inc., to remove the tank and related pumps and lines at the site. A receipt for this work is included in the record.

In August 2007, representatives of DEC Staff and the respondents negotiated a consent order that was never executed. This consent order was sent to the respondents by DEC Staff on October 3, 2007 and again on December 11, 2007.

DEC STAFF'S FIRST ENFORCEMENT ACTION

On July 9, 2010, DEC Staff served Mr. Modular, Inc. with a notice of hearing and complaint by certified mail. This complaint alleged four causes of action.

By papers dated December 28, 2010, DEC Staff moved for a default judgment and order. DEC Staff's papers included: (1) a cover letter; (2) a notice of motion; (3) the motion; (4) an affirmation of DEC Staff counsel Christopher A. Lacombe, Esq.; (5) an affidavit of service of the notice of hearing and complaint by DEC Staff member Betty E. Vann; (6) a United States Postal

Service certified mail receipt; (7) a copy of information from NYS DOS's website regarding Mr. Modular, Inc.; (8) a copy of the notice of hearing and complaint dated July 8, 2010; (9) an affidavit by DEC Staff member Benjamin Hankins; (10) a copy of a New York State Petroleum Bulk Storage Regulations Inspection Report for the facility dated July 26, 2006; (11) a copy of a Notice of Violation dated July 26, 2006; (12) a copy of a Notice of Settlement Conference and proposed consent order dated September 25, 2006; (13) a copy of an invoice from Church Oil Co., Inc. dated May 1, 2007; (14) a copy of a cover letter from DEC Staff to the respondent dated December 11, 2007 and proposed consent order; and (15) a proposed order finding the respondent in default.

On December 31, 2010, this matter was assigned to me.

By letter dated January 7, 2011, I wrote to DEC Staff counsel seeking proof of service of the default motion and inquiring as to whether Mr. Modular, Inc. was the correct respondent in this case.

By letters dated January 18, 2011, DEC Staff provided proof of service of the default motion and stated that DEC Staff was confident that Mr. Modular, Inc. was both the owner and the operator of the facility, but did not state the basis of this belief or provide any proof.

With a cover letter dated January 21, 2011, Richard E. Cantwell, Esq., counsel for Mr. Modular, Inc., filed a notice of cross-motion to vacate default and opposition to DEC motion for default. Attached to the cross-motion were: (1) respondent's counsel's affirmation; (2) the affidavit of Thomas Maggy; (3) a copy of the PBS registration certificate issued to Dorothy Strong on September 18, 2001; and (4) a copy of the PBS Registration Certificate issued to Thomas Maggy and John Smith on November 8, 2006.

With a cover letter dated February 3, 2011, DEC Staff withdrew its July 2010 notice of hearing and complaint which listed Mr. Modular, Inc. as the sole respondent. This letter terminated the first enforcement action and rendered respondent's cross-motion moot.

DEC STAFF'S SECOND ENFORCEMENT ACTION

Accompanying DEC Staff's February 3, 2011 letter withdrawing the first enforcement action, DEC Staff enclosed papers commencing a second enforcement action (these papers are also dated February 3, 2011). These papers included a motion for order without hearing in lieu of complaint and other papers naming three respondents: Thomas P. Maggy, John A. Smith, and Mr. Modular, Inc. Staff's motion papers included: (1) a notice of motion for order without hearing; (2) proof of service of the papers on the Cantwell Law firm on February 4, 2011 (this firm represents Mr. Maggy and Mr. Modular, Inc.); (3) the affirmation of DEC Staff Attorney Scott Abrahamson, Esq., with attachments; and (4) the affidavit of DEC Staff member Benjamin Hankins, with attachments. These papers were forwarded to me with a cover letter dated February 10, 2011.

DEC Staff granted respondents an extension of time of undefined length for the respondents to answer in order to allow settlement discussions to commence.

By letter dated March 9, 2011, DEC Staff requested a status update from respondents' counsel and offered additional time to respond to the motion. Respondents' counsel replied by email on March 14, 2011.

By letter dated April 6, 2011, DEC Staff again requested a status update from the respondents' counsel and requested the return of a signed consent order by April 11, 2011.

With a cover letter dated May 3, 2011, DEC Staff mailed a document entitled '(1) notice to demand an answer and (2) notice to amend motion for order without a hearing' as well as DEC Staff counsel's affirmation with four exhibits. The notice sought to compel an answer by May 31, 2011 and increase the total civil penalty to $25,000 and the payable civil penalty to $10,000.

By letter dated May 26, 2011, DEC Staff again requested an update on the status of the matter from the respondents' counsel and informed him that DEC Staff would file a default motion if no answer to the motion for order without hearing was received by May 31, 2011.

By letter dated July 12, 2011, respondents' counsel wrote to DEC Staff stating that he represented Mr. Maggy and his interest in Mr. Modular, Inc. and that he did not represent Mr. Smith. The letter also authorized DEC Staff and contractors to enter the site to investigate and remedy any petroleum contamination.

With a cover letter dated July 13, 2011, DEC Staff served a motion for default judgment on respondents' counsel. In this letter DEC Staff counsel states that he now seeks a civil penalty of $15,000[1] and to strike John A. Smith as a respondent. In addition, DEC Staff withdrew its request that the respondents be directed to investigate and remediate the site. Finally, this letter acknowledged that the respondents have granted permission for DEC Staff and contractors to enter the property to investigate and remediate potential petroleum contamination at the site.

With a cover letter dated July 19, 2011, DEC Staff sent the default motion and accompanying papers to DEC's Office of Hearings and Mediation Services. These papers included copies of: (1) the notice of motion; (2) an affidavit of service of the motion for order without hearing; (3) an affidavit of service for the default motion; (4) a copy of respondents' counsel's July 12, 2011 letter; (5) an affidavit of DEC Staff counsel Scott Abrahamson, Esq.; (6) the affidavit of DEC Staff member Hankins, with three exhibits; and (7) the affirmation of DEC Staff counsel, with ten exhibits, including a proposed order.

On August 2, 2011, I sent an email to the parties inquiring if the matter had settled and if the respondents had replied to DEC Staff's default motion. Respondents' counsel promptly replied on the same date and stated that DEC Staff had been granted access to the site. He did

[1] This amount appears to be a typographical error and is not referenced in any of the other DEC Staff papers.

not address the question of whether or not he had replied to the pending motion. DEC Staff confirmed by an email, also dated August, 2, 2011, that its contractors were on the site and that no response had been filed.

DISCUSSION

Before addressing DEC Staff's July 7, 2011 motion for default judgment and order against Thomas P. Maggy and Mr. Modular, Inc., there are two preliminary matters: (1) DEC Staff's May 3, 2011 amendment of its motion for order without hearing to increase the amount of civil penalty; and (2) DEC Staff's July 7, 2011 motion to amend its motion for order without hearing to remove John A. Smith as a respondent. Each is dealt with below.

DEC Staff's Notice to Increase the Penalty Amount

In its February 3, 2011 motion for order without hearing, DEC Staff requested a total penalty of $11,000 of which $5,000 would be payable (the remainder [$6,000] would be suspended upon the respondents completing remedial actions, which as discussed elsewhere in the report are no longer relevant). In its May 3, 2011 notice, DEC Staff amended its motion to increase its civil penalty demand to a total of $25,000 of which $10,000 would be payable. This notice was served on respondents' counsel and mp response has been received.

"A party may amend its pleading once without permission at any time before the period for responding expires or, if no responsive pleading is required, at least 20 days prior to commencement of the hearing" (6 NYCRR 622.5(a)). In this case, the time for responding was extended by DEC Staff until May 31, 2011 and, therefore, it was not improper for DEC Staff to amend its pleading to increase its penalty demand.

DEC Staff's Motion to Remove Respondent John A. Smith

In its July 7, 2011 motion papers, DEC Staff seeks to remove John A. Smith as a respondent in this matter. In his affirmation, DEC Staff counsel states that after a diligent search of public records and other efforts, service of the motion on John A. Smith was not possible. Since enforcement of the violations was possible through the other respondents, DEC Staff decided Mr. Smith was not a necessary party to this proceeding (Abrahamson affidavit, dated July 7, 2011, paragraph 15(G)). Respondents' counsel has not addressed DEC Staff's request. Accordingly, DEC Staff's request to remove John A. Smith as a respondent in this matter should be granted.

DEC Staff's Motion for Default Judgment and Order

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."

Regulatory Requirements. DEC Staff has provided an affidavit of service, dated February 9, 2011, of the motion for order without hearing, which commenced this proceeding, on respondents' attorney on February 4, 2011. While no formal response to this motion has been filed, correspondence in the file indicates that counsel accepted such service, represents the respondents in this action, indicated he would continue to accept service for his clients, and has been actively involved in negotiations with DEC Staff in an attempt to resolve this matter. While attorneys are not automatically considered the agents of their clients for the purposes of service of process, it is not uncommon for them to accept such service. In this case, the evidence in the record as well as the fact that the respondents have not objected to the method of service, allow the Commissioner to conclude that service on the respondents was effected. DEC Staff counsel Abrahamson states in his July 13, 2011 affidavit, that he has not received an answer in this matter and respondents' counsel, in his reply to my August 2, 2011 email, did not dispute this. DEC Staff has also provided a proposed order (Exh. 7 to the default motion). Accordingly the requirements of 6 NYCRR 622.15(a) have been met.

Liability. 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 its February 3, 2011 motion for order without hearing, DEC Staff alleges four causes of action, specifically, that the respondents: (1) failed to register the facility in violation of 6 NYCRR 612.2(a); (2) failed to properly temporarily close out of service tanks in violation of 6 NYCRR 613.9(a); (3) failed to properly permanently close out of service tanks in violation of 6 NYCRR 613.9(b); and (4) failed to notify DEC Staff before removing the underground storage tank at the site in violation of 6 NYCRR 613.9(c). Each is discussed in turn, below.

In the first cause of action, DEC Staff alleges that respondents Thomas P. Maggy and Mr. Modular, Inc. failed to register the facility in violation of 6 NYCRR 612.2(a). This regulation requires the owner of a PBS facility to register with the department. The deed for the site and the PBS registration certificate list the owners as Thomas P. Maggy and John A. Smith. Nowhere in the record is Mr. Modular, Inc. listed as an owner. With respect to the first cause of action, DEC Staff's motion for order without hearing does not set forth a cause of action for which relief can be granted against Mr. Modular, Inc.

Thomas P. Maggy, as an owner of the site, could be liable for the first cause of action if the facility were not registered; however, information in the record indicates that it was, in fact, registered. In its papers, DEC Staff includes a copy of the PBS certificate for the site that was issued to the prior owner and expired on 11/01/01 (Hankins affidavit dated February 4, 2011,

Exh. 3). DEC Staff also includes the renewal application from the prior owner which was received by DEC Staff on 9/13/01 (Hankins affidavit dated February 4, 2011, Exh. 3). DEC Staff's papers are silent as to whether a certificate was issued, however, attached to respondents' papers (in the first enforcement action) dated January 21, 2011, is a copy of the registration. This certificate expired on 11/01/06.

Other information in the record shows that on August 30, 2006, Thomas P. Maggy sent a PBS application to DEC Staff requesting a certificate with a change of ownership. The application was returned to him by DEC Staff with a cover letter dated September 11, 2006 because it lacked certain information and attached the wrong fee amount. Mr. Maggy returned the completed application on October 17, 2006. On November 8, 2006, DEC Staff issued a PBS storage certificate for the facility. This certificate listed Thomas P. Maggy and John A. Smith as the owners of the facility and Mr. Modular, Inc. as the operator. Based on this information, the facility was technically unregistered from November 2, 2006 until November 8, 2006, but since DEC Staff was processing the completed application at this time, Mr. Maggy should not be held liable for this violation.

DEC Staff may have meant to allege a violation of 612.2(b), failing to register the facility within 30 days of taking ownership of the site, but this is not alleged in DEC Staff's papers. With respect to the first cause of action, DEC Staff's papers fail to set forth a cause of action for which relief may be granted against Thomas P. Maggy.

In the second cause of action, DEC Staff alleges that respondent Thomas P. Maggy and Mr. Modular, Inc. failed to temporarily close the out of service tank in violation of 6 NYCRR 613.9(a). This section of the regulations requires both owners and operators of a facility undertake certain actions for tanks that are out of service for more than thirty days.[2] DEC Staff's papers set forth a cause of action for which relief may be granted and both Thomas P. Maggy and Mr. Modular, Inc. should be held liable for the second cause of action.

In the third cause of action, DEC Staff alleges that respondent Thomas P. Maggy and Mr. Modular, Inc. failed to properly permanently close the out of service tank in violation of 6 NYCRR 613.9(b). This section of the regulation requires that certain actions be taken for tanks which are taken permanently out of service. The section does not explicitly state whether the requirements are on the owners or operators of a PBS facility. I can find no cases where the Commissioner has imposed liability for a violation of this section on an operator who was not also the owner of a facility. Because the duty to report the permanent closure of out of service tanks (6 NYCRR 613.9(c)) falls on only the owner of a PBS facility, as discussed below, I believe it is reasonable to require only the owner to comply with the requirement related to the permanent closure of out of service tanks. Therefore, I recommend that the Commissioner not hold Mr. Modular, Inc. liable, but hold Thomas P. Maggy liable for the third cause of action.

In the fourth cause of action, DEC Staff alleges that respondent Thomas P. Maggy and Mr. Modular, Inc. failed to notify DEC Staff before removing the underground storage tank at

[2] This section does not explicitly refer to "owners and operators" but the nature of these requirements and department policy has applied these requirements to both.

the site in violation of 6 NYCRR 613.9(c). This regulation requires the owner of a PBS facility to notify DEC Staff within 30 days prior to permanent closure of a tank or facility. As noted above, the deed for the site as well as the PBS registration certificate list the owners of the facility as Thomas P. Maggy and John A. Smith. Nowhere in the record is Mr. Modular, Inc. listed as an owner. Accordingly, DEC Staff's motion for order does not set forth a cause of action for which relief can be granted against Mr. Modular, Inc. The Commissioner should hold Thomas P. Maggy liable for failing to notify DEC staff 30 days prior to permanent closure of a tank.

Civil Penalty. In its February 3, 2011 motion for order without hearing, DEC Staff seeks a total civil penalty of $11,000 of which $6,000 would be suspended upon the respondents investigating and remediating any petroleum spill at the site. The remaining $5,000 penalty would be payable. DEC Staff's justification for this penalty amount is found in Mr. Hankins affidavit dated February 3, 2011, paragraphs 44-54. This justification suggests no penalty be imposed for the second and fourth causes of action. DEC Staff recommends a $1,000 penalty for the first cause of action and a $10,000 penalty for the third cause of action for a total of $11,000.

In its May 3, 2011 notice to amend motion for order without hearing, DEC Staff increased its recommended civil penalty amount to a total of $25,000 with $10,000 payable. In his affirmation attached to the notice, DEC Staff counsel cites as justification for the increased penalty the respondents' refusal to cooperate with DEC Staff to settle this matter (paragraph 15).

In its default motion, DEC Staff seeks a payable civil penalty of $10,000 (Hankins affidavit dated July 13, 2011, paragraph 5). The justification provided for this is that the respondents have refused to cooperate in the investigation of the site. However, no further justification of the higher recommended penalty is provided.

In support of DEC Staff's recommended penalty amount for the first cause of action, Mr. Hankins states that the recommended penalty of $1,000 for failing to register the PBS facility in violation of 6 NYCRR 612.2(a) is the same amount indicated as the "average penalty" in the Department's enforcement guidance memorandum entitled "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy," dated May 21, 2003 (PBS Enforcement Policy). However, as discussed above, DEC Staff has not shown that it is entitled to a default on this cause of action so no civil penalty should be imposed.

In support of DEC Staff's $10,000 recommended penalty amount for the third cause of action, Mr. Hankins states that because the 12,000 gallon UST at issue here had two compartments, it should be treated as two tanks. While DEC's PBS Enforcement Policy states the average penalty for this violation is $2,000 per tank, Mr. Hankins states that a penalty of $5,000 per tank should be assessed. Nowhere in DEC Staff's papers is any authority cited for the proposition that this tank with two compartments should be treated as two tanks for purposes of closure. In fact, DEC Staff's papers often refer to it as a single tank. In addition, the PBS applications and certificates in the record all refer to it as a single tank. Based on this, I recommend the Commissioner assess a civil penalty based on a single tank.

Mr. Hankins' justification for the recommended civil penalty (in his February 3, 2011 affidavit, paragraphs 31-35 and 51-53) includes aggravating factors including the fact that the tank had been partially buried in permeable sandy soil in close proximity to the Saranac River (approximately 320 feet away). In addition, he states he is very concerned about the removal of the tank in the absence of DEC Staff because no observation of the bottom of the tank was possible and his belief that a leak from the tank was probable. He bases his belief on his observations at the site, including: (1) the fact that the steel tank had been installed directly on the ground, which could lead to rusting and the leaking of petroleum to the ground; (2) the fact that the owners had failed to perform testing to determine the integrity of the tank; (3) the failure to use cathodic protection to protect the tank; (4) the failure to maintain inventory records; (5) the permeable nature of the soils in the area; and (6) his conclusion that the tank was in poor condition.

Because DEC Staff requests no civil penalty be imposed for the second and fourth causes of action, none should be imposed. DEC Staff has justified a payable civil penalty of $5,000 per tank is warranted for the third cause of action. However, since there is only one tank, I recommend the Commissioner impose a total civil penalty of $5,000 on Thomas P. Maggy.

Remediation. In its February 3, 2011 motion for order without hearing, DEC Staff requested that the Commissioner include language in his order directing the respondents to take steps to investigate and remediate possible petroleum contamination at the site. This request was withdrawn in its default motion because DEC Staff will investigate and take any needed remedial actions at the site pursuant to its authority under Article 12. Respondents' counsel has granted DEC Staff authority to undertake these actions in his July 12, 2011 letter and in an August 2, 2011 email indicates that DEC Staff may be entitled to subsequent compensation for such activities. Based on this, the Commissioner need not include any language in his order addressing remediation at the site.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. By deed recorded January 7, 2004, respondent Thomas P. Maggy and John A. Smith took title to real property located at 4732 Route 3, Saranac, New York (Clinton County Tax Map # Section 262, Block 1, Lot 12.1). At the time of the purchase the property contained a 12,000 underground storage tank. The former owner operated a convenience store and gas station at the site and had registered it as a PBS facility with DEC Staff (#5-407321). This registration expired on November 1, 2006.

2. On July 26, 2006, DEC Staff inspected the facility and issued a Notice of Violation.

3. An application to register this facility was received by DEC Staff on August 30, 2006. This application listed Thomas P. Maggy and John A. Smith as the owners and Mr. Modular, Inc. as the operator. Due to the incompleteness of the application and the submission of an incorrect fee payment, the application was resubmitted on October 2006 and a PBS Certificate was not issued until November 8, 2006.

4. On or about May 1, 2007, the tank at the facility was permanently closed and removed.

5. DEC Staff served a motion for order without hearing on respondents' counsel on February 4, 2011. DEC Staff provided an indefinite extension of the time to answer to allow for settlement discussions. When these discussions were not successful, DEC Staff mailed a demand for an answer by May 31, 2011 on respondents' counsel. No answer or response to DEC Staff's motion for order without hearing has been filed on behalf of the respondents. Respondents Thomas P. Maggy and Mr. Modular, Inc. are in default.

6. Respondent Thomas P. Maggy and Respondent Mr. Modular, Inc. violated 6 NYCRR 613.9(a) by failing to properly temporarily close the out of service tank at the site.

7. Respondent Thomas P. Maggy violated 6 NYCRR 613.9(b) by failing to properly permanently close the out of service tank at the site.

8. Respondent Thomas P. Maggy violated 6 NYCRR 613.9(c) by failing to notify DEC Staff before removing the underground storage tank at the site.

9. Environmental Conservation Law 71-1929 provides that a person who violates any of the provisions of Article 17, or who fails to perform any duty imposed by thereunder, shall be liable for a civil penalty of up to $37,500 for each violation.

RECOMMENDATION

The Commissioner should issue an order finding the respondent Thomas P. Maggy liable for three violations and imposing a civil penalty of $5,000. Mr. Modular, Inc. should be held liable for a single violation, but no civil penalty should be imposed. DEC Staff does not request language be included in the order regarding remediation because the investigation is currently ongoing.

/s/

_____

P. Nicholas Garlick
Administrative Law Judge

August 31, 2011
Albany, NY