STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York and Part 612 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

-by-

TERRY MOORE D/B/A MOORE'S COUNTRY STORE,

Respondent.

ORDER

VISTA Number:
R6-20090428-22

This administrative enforcement proceeding concerns violations of the petroleum bulk storage ("PBS") regulations at a facility that respondent Terry Moore d/b/a/ Moore's Country Store owns and operates at 20693 County Route 93, Town of Lorraine, Jefferson County, New York (the "facility").

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent by serving, by certified mail, a notice of motion and a motion for order without hearing in lieu of complaint, together with accompanying papers, all dated November 3, 2009. Respondent received the papers on November 13, 2009. Accordingly, service of process was accomplished in accordance with 6 NYCRR 622.3.

Department staff's motion alleges that respondent violated 6 NYCRR 612.2(a)(2), by failing to renew the facility's PBS registration after it had expired, and violated 6 NYCRR 612.2(d), by failing to notify the Department within thirty (30) days prior to substantially modifying the facility.

Pursuant to 6 NYCRR 622.12(c), respondent's time for serving a response to the motion for order without hearing in lieu of complaint expired on December 3, 2009. Respondent failed to respond to the motion. Department staff filed a motion for default judgment dated January 19, 2010. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter. The proposed civil penalty, as set forth in the papers, is authorized and warranted.

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

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

II. Respondent Terry Moore d/b/a Moore's Country Store is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the motion, are deemed to have been admitted by respondent.

III. Respondent Terry Moore d/b/a Moore's Country Store is adjudged to have violated 6 NYCRR 612.2(a)(2), by failing to renew the registration after it expired for the facility at 20693 County Route 93, Town of Lorraine, Jefferson County, New York, and 6 NYCRR 612.2(d) by failing to notify the Department thirty (30) days prior to substantially modifying the facility.

IV. Respondent Terry Moore d/b/a Moore's Country Store is hereby assessed a civil penalty in the amount of four thousand dollars ($4,000). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the Department at the following address:

New York State Department of Environmental Conservation
Region 6 Office
317 Washington Street
Watertown, New York 13601
Attn: Regional Attorney.

V. All communications from respondent to Department staff concerning this order shall be made to:

Nels G. Magnuson, Esq,
Assistant Regional Attorney
New York State Department of Environmental Conservation
Region 6 Office
317 Washington Street
Watertown, New York 13601.

VI. The provisions, terms, and conditions of this order shall bind respondent Terry Moore d/b/a Moore's Country Store and respondent's agents, successors, and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONVERSATION

/s/

By: ______________________________
Alexander B. Grannis
Commissioner

Dated: February 23, 2010
Albany, New York

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of article 17 of the Environmental Conservation Law and part 612 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by TERRY MOORE d/b/a MOORE'S COUNTRY STORE, Respondent.	DEFAULT SUMMARY REPORT DEC File No. R6-20090428-22 February 22, 2010

On November 13, 2009, Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement proceeding by serving a motion for order without hearing upon Terry Moore doing business as Moore's Country Store, P.O. Box 81, Lacona, New York 13083 (the "Respondent"). The motion for order without hearing alleged that the Respondent violated part 612 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR part 612") by failing to renew the registration for his petroleum bulk storage ("PBS") facility (6 NYCRR 612.2[a][2]) and by failing to notify the Department of Environmental Conservation ("DEC" or "Department") 30 days prior to substantially modifying the facility (6 NYCRR 612.2[d]). The facility is located at 20693 County Route 93 (Egg and Main Streets), in the Town of Lorraine, Jefferson County, New York.

The Respondent failed to file a response to the motion for order without hearing within the 20 day time period for such response. On January 19, 2010, DEC Staff moved for a default judgment and order pursuant to 6 NYCRR 622.15.

DEC Staff is represented in this matter by Nels G. Magnuson, Esq., Assistant Regional Attorney, DEC Region 6, Watertown, New York. As of the date of this summary report, the DEC Office of Hearings and Mediation Services ("OHMS") has not received any correspondence or other communications about this case from or on behalf of the Respondent. The motion for default judgment and its supporting papers were served upon the Respondent by first class mail on January 19, 2010.

DEC Staff's default motion papers consist of the following documents:

Notice of motion for default judgment and order, dated January 19, 2010;

Motion for default judgment and order, dated January 19, 2010;

Affirmation of Nels G. Magnuson, Esq., to which are attached: affidavit of service of April L. Sears, sworn to on January 13, 2010, concerning service of the motion for order without hearing, plus a copy of the postal return receipt for this service (Exhibit I), a copy of the motion papers for the November 2009 motion for order without hearing (Exhibit II), and a proposed order (Exhibit III); and

Affidavit of April L. Sears, sworn to on January 19, 2010 concerning service of the default motion.

In its default motion, DEC Staff is seeking a civil penalty of $4,000 ($3,000 for failure to renew the registration plus $1,000 for failure to notify the Department about a substantial modification of the facility) and such other relief as may be just, proper and appropriate.

DEFAULT PROVISIONS

Pursuant to 6 NYCRR 622.12(b), a motion for order without hearing "shall include a statement that a response must be filed with the Chief ALJ [Administrative Law Judge] within 20 days after the receipt of the motion and that the failure to answer constitutes a default."

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."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]."

FINDINGS OF FACT

1. Terry Moore doing business as Moore's Country Store ("Respondent") was, at the time of the alleged violations, an owner and the operator of a petroleum bulk storage ("PBS") facility located at 20693 County Route 93 in the Town of Lorraine, Jefferson County, New York. The PBS registration certificate for the facility, issued on June 14, 1999, identifies the owners as Terry and Sherry Moore, and lists the facility's PBS identification number as 6-451010.

2. The facility had two tanks: a 1,000-gallon above-ground tank storing unleaded gasoline and a 175-gallon above-ground tank storing kerosene. The Respondent's June 11, 1999 PBS application lists both tanks as "Aboveground on saddles, legs, stilts, rack or cradle."

3. On November 13, 2009, DEC Staff served upon the Respondent a motion for order without hearing, with supporting papers including an affidavit of Ronald F. Novak, P.E., the Regional Bulk Storage Supervisor for DEC Region 6. DEC Staff mailed the motion for order without hearing, and its supporting papers, to the Respondent at Post Office Box 81, Lacona, New York 13083 by certified mail, return receipt requested, on November 3, 2009. On November 16, 2009, DEC Staff received the return receipt for this mailing, signed by Kristin A. Moore and showing November 13, 2009 as the date of delivery.

4. The notice of motion for order without hearing notified the Respondent that he must file a response to the motion, with the Chief ALJ at the OHMS address in Albany, within 20 days after receipt of the motion, and serve a copy of the response on DEC Staff. The notice of motion also notified the Respondent that failure to respond to the motion for order without hearing constitutes a default and a waiver of the Respondent's rights to be heard in this matter, and that an order may be issued against the Respondent pursuant to 6 NYCRR 622.15 granting the relief requested in the motion for order without hearing. The motion for order without hearing requested the same penalty amount that

DEC Staff subsequently identified in its default motion.

5. The 20-day time period for answering expired on December 3, 2009. The Respondent failed to timely serve a response to the motion or to have any other contact with DEC Staff regarding the motion.

6. On June 11, 1999, the Respondent submitted a change of ownership application to register the facility with DEC. In response to that application, DEC issued a PBS registration certificate for the facility on June 14, 1999 with an expiration date of June 14, 2004.

7. The Respondent allowed the registration to expire in 2004. On November 3, 2004, Donald I. Johnson, of the DEC Region 6 office in Utica, wrote to the Respondent and notified him that the facility's PBS registration had expired. Mr. Johnson's letter transmitted a PBS application form and directions for completing it, and notified the Respondent that failure to renew the registration or to notify the Department prior to modification is a violation of 6 NYCRR 612.2. The letter set November 15, 2004 as the deadline for returning the completed application and the $100 registration fee. Mr. Johnson's letter stated, "If tanks from the facility have been permanently closed or new ones added, please indicate the modification on the enclosed application." The Respondent did not send any written reply to DEC Region 6 in response to this letter.

8. On February 4, 2008, Ronald J. Novak, the Regional Enforcement Coordinator for the Region 6 Office,[1] sent to the Respondent a letter similar to the one sent by Mr. Johnson but setting a deadline of February 25, 2008 for returning the completed application and the registration fee. The Respondent did not send any written reply to DEC Region 6 in response to Mr. Novak's February 4, 2008 letter.

9. In April of 2009, Ronald F. Novak went to the facility. He observed the 1,000-gallon tank that was listed on the change of ownership application and on the 1999 registration certificate, but did not observe the 175-gallon tank that was listed on those documents. He also observed that the facility did not appear to be in operation.

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[1] Two employees named Ronald Novak work for DEC in Region 6.

10. The Department's PBS files do not contain correspondence from the Respondent notifying the Department of transfer of ownership of the facility or substantial modification of the facility.

11. The Respondent did not submit an application for renewal of the facility's PBS registration until June 5, 2009, when he attended a meeting with DEC Staff at the DEC Region 6 Office in Watertown.[2]

DISCUSSION

The motion for order without hearing was served upon the Respondent, by certified mail return receipt requested, but the Respondent did not submit a timely answer. Thus, the Respondent is in default and is deemed to have admitted the factual allegations of the motion for order without hearing and all reasonable inferences that flow from them. The Respondent, by failing to respond to the motion for order without hearing, also failed to show the existence of any substantive disputes of facts sufficient to require a hearing.

Recently, the Commissioner directed that DEC attorneys moving for default judgments are to serve the motions for default judgments upon respondents and their representatives (if known), even where such service is not required under Civil Practice Law and Rules 3215(g)(1) (Matter of Derrick Dudley, et al., Decision and Order of the Commissioner, July 24, 2009, at 2). DEC Staff accomplished this service by mailing the default motion to the Respondent by first class mail on January 19, 2010.

Subdivision 612.2(a) of 6 NYCRR requires, for existing PBS facilities, "(1) Within one year of the effective date of these regulations [December 27, 1985], the owner of any petroleum storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed. (2) Registration must be renewed every five years from the date of the last valid registration until the department

[2] The application submitted by the Respondent on or about June 5, 2009 is not in the record concerning the motion for order without hearing or the default motion. The record does not indicate whether DEC Staff issued a new PBS registration to the facility in response to the June 2009 application.

receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred."

Subdivision 612.2(d) of 6 NYCRR requires, "Within 30 days prior to substantially modifying a facility, the owner must notify the department of such modification on forms supplied by the department." "Substantially modified facility" is defined for purposes of part 612 as including an existing facility at which an existing stationary tank has been replaced, reconditioned or permanently closed, or at which a leaking storage tank has been replaced, repaired or permanently closed (6 NYCRR 612.1[c][27]).

"Permanently closed" is defined in 6 NYCRR 612.1(c)(19) as meaning "an out-of-service storage tank or facility which has been closed in a manner prescribed by section 613.9(b) of this Title [i.e., of 6 NYCRR]." Subdivision 613.9(b) identifies requirements concerning how a permanently out-of-service tank is to be closed, among which are removing liquid, sludge and vapors from the tank, removing or capping or plugging the connecting lines, and stenciling aboveground tanks with the date of permanent closure.

Neither the motion for order without hearing nor the default motion discuss whether the 175 gallon kerosene tank was removed in a manner prescribed by 6 NYCRR 613.9(b) or was removed in a manner that failed to comply with those requirements. The absence of this information, however, does not affect the outcome of the motion. The Decision and Order of the Commissioner in Matter of Q.P. Service Station Corporation, et al. (October 20, 2004) found that two respondents in that case violated 6 NYCRR 612.2(d) by removing underground petroleum storage tanks from a facility without providing the Department with notice within 30 days prior to such removal (Q.P. Service Station Corporation, Decision and Order, at 2-3). That order, and the earlier rulings in the Q.P. Service Station Corporation matter, do not specify whether the tanks were removed in a manner prescribed by section 613.9(b) or in violation of section 613.9(b).

An interpretation of subdivision 612.2(d) that would find a violation if tanks were removed without the required notice and in compliance with subdivision 613.9(b), but not find a violation if tanks were removed without the required notice and in violation of subdivision 613.9(b), would not be a reasonable interpretation of the notice requirement. As stated in the hearing report of ALJ Daniel P. O'Connell attached with the

Decision and Order in Q.P. Service Station Corporation, the intent of the notice requirement in 6 NYCRR 612.2(d) "is to give Department Staff the opportunity to visit facilities in order to provide direction about how tanks should be modified or closed, to observe and supervise the modification or closure of tanks, to verify whether tanks were properly modified or closed, or any combination thereof" (Hearing Report, at 9).

Environmental Conservation Law ("ECL") 71-1929(1) provides that a person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17 of the ECL, or the regulations promulgated pursuant thereto, shall be liable for a civil penalty not to exceed $37,500 per day for each violation. The violations of part 612 of 6 NYCRR are violations of regulations promulgated pursuant to ECL article 17, title 10, and the penalty provision in ECL 71-1929 applies.

DEC Staff is seeking a civil penalty of $4,000 ($3,000 for failure to renew the registration plus $1,000 for failure to notify the Department about a substantial modification of the facility). The Respondent was aware of the requirements to renew the registration and to provide notice of substantial modifications; DEC Staff sent him two letters that reminded him of these requirements and transmitted to him the PBS application form. The Respondent failed to comply with the requirements after receiving the letters and also failed to respond to the motion for order without hearing. The proposed penalty is supported by the record of this case and is consistent with the Department's penalty policies relevant to facilities of this kind.

The default motion also requested that the Commissioner's order include such other relief as may be just, proper and appropriate. The proposed order attached with the default motion did not include other relief beyond a civil penalty. Although DEC Staff's brief and Mr. Novak's affidavit state that the Respondent submitted an application in June, 2009 for renewal of the facility's PBS registration, the record does not indicate whether a new PBS registration was issued by the Department. There is also no indication whether any remedial actions associated with the removed kerosene tank or the gasoline tank are necessary. Thus, this report does not recommend relief other than the requested penalty.

CONCLUSIONS

1. The Respondent was served with the motion for order without hearing in this matter. By failing to file a timely answer, the Respondent defaulted.

2. The Respondent violated 6 NYCRR 612.2(a)(2) by failing to renew the registration for his petroleum bulk storage facility.

3. The Respondent violated 6 NYCRR 612.2(d) by failing to notify the Department within 30 days prior to substantially modifying his facility.

4. The civil penalty provision of ECL 71-1929 applies to the Respondent's violations of 6 NYCRR 612.

RECOMMENDATION

I recommend that the Commissioner find the Respondent to be in default, and that the Commissioner impose the civil penalty requested by DEC Staff in its motion for a default judgment and order.

/s/
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Susan J. DuBois
Administrative Law Judge

Albany, New York
February 22, 2010