

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

In the Matter of the Alleged Violations of Articles 17 and 71 of the Environmental Conservation Law of the State of New York (“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

Case No.
R2-20121025-653

-by-

HEZEKIAH VARCIANNA,

Respondent.

This administrative enforcement proceeding concerns the alleged failure of respondent Hezekiah Varciana to comply with Articles 17 and 71 of the New York State 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”). Respondent is the owner and operator of a petroleum bulk storage facility located at 4801 Kings Highway, Brooklyn, New York 11234 (the “facility”), which is designated as PBS number 2-600436. In connection with his ownership and operation of the facility, respondent entered into an order on consent, No. R2-20081014-484, that became effective on December 3, 2008 (the “consent order”).

On November 8, 2012, staff of the New York State Department of Environmental Conservation (the “Department”) served respondent with a notice of hearing and a complaint by first class mail, return receipt requested. The complaint alleged three causes of action, including failure to comply with the terms of the consent order, a violation of 6 NYCRR 613.4 by failing to reconcile inventory records for two underground storage tanks at the facility, and a violation of 6 NYCRR 612.2 by failing to renew the facility’s petroleum bulk storage registration.

The return receipt was signed and date-stamped, and returned to the Department. Respondent failed to answer the complaint. The notice of hearing stated that at 3:00 p.m. on November 27, 2012, a pre-hearing conference would be held at the Department’s Region 2 office, at 47-40 21st Street, Long Island City, New York. Respondent did not appear at the pre-hearing conference. On December 17, 2012, Administrative Law Judge (“ALJ”) Richard R. Wissler presided at a calendar call in the Region 2 office. At that calendar call, Department staff made an oral motion for default judgment, and offered documents in support of the motion, which were received into the record.

The matter was reassigned to ALJ Maria E. Villa, who prepared the attached default summary report, which I adopt as my decision in this matter. As a consequence

of respondent's failure to answer or appear in this matter, the ALJ recommended that Department staff's motion for a default judgment be granted. I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Pursuant to ECL 71-1929, the maximum penalty for each day of violation of an order on consent is \$37,500. In addition, ECL 71-1929 provides that any person who violates 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 rules, regulations, orders or determinations promulgated thereunder, shall be liable for a civil penalty of up to \$37,500 per day for each day of violation. Department staff requested an order directing respondent to comply immediately with the consent order by paying the outstanding penalty balance of \$3,000 (three thousand dollars), as well as a penalty of no less than \$3,750 (three thousand seven hundred fifty dollars) for respondent's violation of the consent order.

Additionally, Department staff requested that respondent be assessed a penalty of no less than \$5,000 (five thousand dollars) for respondent's failure to reconcile inventory storage records for two underground storage tanks. Department staff also requested a penalty of no less than \$1,000 (one thousand dollars) for respondent's failure to renew its petroleum bulk storage registration. Respondent's violations fall within the scope of ECL 71-1929. The penalties requested are below the statutory maximum.

Based on this record, the \$3,000 outstanding penalty balance under the consent order is due and owing, and an additional penalty of \$9,750 (nine thousand seven hundred and fifty dollars) for the three violations alleged in the complaint is authorized 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 or appear at the pre-hearing conference in this matter, respondent Hezekiah Varciana waived the 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 Hezekiah Varciana is adjudged to have violated ECL 71-1929, and 6 NYCRR 612.2 and 613.4.
- III. Within 30 (thirty) days of the service of this order upon respondent, respondent shall comply with the December 3, 2008 consent order by paying the outstanding penalty balance of \$3,000 (three thousand dollars).

- IV. Within 30 (thirty) days of the service of this order upon respondent, respondent shall pay a total civil penalty in the amount of \$9,750 (nine thousand seven hundred fifty dollars), for the following violations:
- a. For violation of the December 3, 2008 consent order, as set forth in the first cause of action: \$3,750 (three thousand seven hundred fifty dollars);
 - b. For violation of 6 NYCRR 613.4, as set forth in the second cause of action: \$5,000 (five thousand dollars); and
 - c. For violation of 6 NYCRR 612.2, as set forth in the third cause of action: \$1,000 (one thousand dollars).
- V. Payment of the amounts due under paragraphs III and IV of this order, which total \$12,750 (twelve thousand seven hundred fifty dollars), shall be made by certified check, cashier's check or money order made payable to the order of the "Environmental Protection and Spill Compensation Fund." Payment shall be mailed or otherwise delivered to the following address:
- New York State Department of Environmental Conservation
Region 2
47-40 21st Street
Long Island City, New York 11101
Attention: John K. Urda, Assistant Regional Attorney
- VI. Any questions or other correspondence regarding this order shall also be addressed to John Urda, Esq. at the address referenced in paragraph V of this order.
- VII. The provisions, terms and conditions of this order shall bind respondent Hezekiah Varciana, 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: Albany, New York
January 13, 2013

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Articles 17 and 71 of
the Environmental Conservation Law of the State of New York
("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"),

DEFAULT SUMMARY
REPORT

CASE NO.
R2-20121025-653

-by-

HEZIKIAH VARCIANNA,
Respondent.

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Proceedings

Respondent Hezekiah Varciana¹ ("respondent"), was served by staff of the New York State Department of Environmental Conservation ("Department Staff") with a notice of hearing, and a complaint, all dated November 8, 2012. Department Staff's complaint alleged three causes of action, including violations of Environmental Conservation Law ("ECL") Article 71 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"), as follows:

First Cause of Action: violation of ECL 71-1929(1) by failing to pay the penalty required by a December 3, 2008² Order on Consent (the "Order"), in connection with his ownership and operation of a petroleum bulk storage facility located at 4801 Kings Highway, Brooklyn, New York, PBS Facility 2-600436 (the "Facility").

Second Cause of Action: violation of 6 NYCRR 613.4 by failing to keep daily inventory records at the Facility.

Third Cause of Action: violation of 6 NYCRR 612.2 by failing to renew the registration for the Facility.

The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL Article 71 and 6 NYCRR Parts 612 and 613; (2) ordering respondent to pay the outstanding \$3,000 penalty required under the terms of the Order; (3) assessing a

¹ The caption on Department staff's complaint indicates that respondent's name is "Varciana," which is consistent with respondent's signature on the December 3, 2008 Order on Consent. Nevertheless, in various other documents in the record, respondent's name is spelled "Varciana." This default summary report will use the spelling "Varciana."

² As discussed in greater detail below, the Order on Consent was subsequently modified by letter dated January 8, 2009, and again by letter dated June 10, 2010.

total civil penalty in the amount of \$9,750 (nine thousand seven hundred fifty dollars); and (4) granting such other and further relief as the Commissioner may deem just and proper.

Respondent was served with the notice of hearing and complaint by certified mail, return receipt requested, on November 8, 2012. Pursuant to 6 NYCRR 622.4(a), an answer was due to be filed within twenty days of receipt of the notice of hearing and complaint. Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for November 27, 2012, as directed in the notice of hearing.

A calendar call was held in Region 2 on December 17, 2012. During the calendar call, Department Staff made an oral motion for a judgment of default for failure to answer the complaint or appear at the pre-hearing conference. The motion was made pursuant to 6 NYCRR 622.15, and Department Staff proffered documents in support of its motion. In particular, Department Staff submitted the following documents for the record:

1. Pleadings, including: notice of hearing, and complaint, all dated November 8, 2012, with attached exhibits:
 - a. Facility Information Report, PBS No. 2-600436, and PBS Certificate.
 - b. December 3, 2008 Order on Consent.
 - c. January 8, 2009 letter from John K. Urda, Esq. to Hezekiah Varcianna, regarding modification of Order on Consent to provide a payment schedule.
 - d. June 10, 2010 letter from Michele C. Perino, Esq. to Hezekiah Varcianna, regarding a new payment schedule.
 - e. April 29, 2011 Notice of Violation.
2. Affidavit of service of Edward Kang, sworn to November 8, 2012, with attached signed and date-stamped receipt for certified mail.
3. Proposed order.
4. December 17, 2012 Affirmation of John K. Urda, Esq. in Support of Penalty Request (the “Urda Affirmation”), with attached Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule (DEE-22).

Default Provisions

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the

proceeding. As applicable herein, the Department's default procedures in an enforcement proceeding, found at 6 NYCRR 622.15, provide:

(a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent's right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record ... and must contain:

- (1) proof of service upon the respondent of the notice of hearing and complaint...;
- (2) proof of the respondent's failure to appear or failure to file a timely answer; and
- (3) a proposed order.

As the Commissioner stated in the 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]." Accordingly, the findings of fact set forth below are based upon the documents submitted into the record, as identified above.

Applicable Statutory and Regulatory Provisions

ECL 71-1929(1) states, in pertinent part, 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, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation.

Section 612.2(2) of 6 NYCRR requires renewal of petroleum bulk storage facility registrations every five years (see also ECL 17-1009(2)). Section 613.4(a)(1) of 6 NYCRR provides that the operator of an underground storage tank must keep daily inventory records. Section 613.4(c) requires that inventory monitoring records be maintained and made available for Department inspection for a period of not less than five years.

Findings of Fact

1. The respondent is the registered owner and operator of a petroleum bulk storage (“PBS”) facility at 4801 Kings Highway, Brooklyn, New York, 11234, identified in Department records as PBS Facility 2-600436 (the “Facility”). Exhibits 1A and 1B.
2. On December 3, 2008, the parties entered into an Order on Consent, NYSDEC File No. R2-20081014-484, wherein the respondent admitted to violating the state’s regulations governing petroleum bulk storage facilities. Exhibit 1B.
3. Pursuant to the 2008 Order, the respondent agreed to pay a penalty of \$5,800. The respondent failed to submit the penalty. Exhibit 1B.
4. On January 8, 2009, Department Staff agreed to modify the 2008 Order and provided the respondent with a payment schedule. According to the schedule, the respondent was required to make six monthly installment payments starting on February 1, 2009. Exhibit 1C.
5. Department Staff received the first penalty installment, due February 1, 2009, on February 24, 2009. The respondent failed to make the subsequent payments. Exhibit 1, ¶5; Exhibit 1D.
6. On June 10, 2010, Department Staff agreed to further modify the 2008 Order, requiring the respondent to pay the remaining penalty of \$5,000 in ten monthly installments beginning on August 1, 2010. Exhibit 1D.
7. Department Staff received the first payment, due August 1, 2010 under the modified schedule, on August 12, 2010. Exhibit 1, ¶ 7.
8. Department Staff received the second payment, due September 1, 2010 under the modified schedule, on September 22, 2010. Exhibit 1, ¶ 8.
9. Department Staff received the third payment, due October 1, 2010, and the fourth payment, due November 1, 2010 under the modified schedule, together on November 17, 2010. Exhibit 1, ¶ 9.
10. The respondent failed to submit any subsequent installment. To date, the respondent has paid a total of \$2,800 of the penalty agreed to in the 2008 Order, leaving \$3,000 unpaid. Exhibit 1, ¶ 10.
11. On April 29, 2011, Department Staff inspected the Facility and found that the respondent had failed to reconcile inventory records for the two underground storage tanks at the Facility, in violation of 6 NYCRR 613.4. A Notice of Violation (the “NOV”) was hand delivered to the respondent on April 29, 2011. Exhibit 1E.

12. The respondent failed to renew the Facility registration, which expired on November 14, 2011, in violation of 6 NYCRR 612.2. Exhibits 1A and 1, ¶ 13.
13. On November 8, 2012, Department Staff served the respondent with the notice of hearing, and the complaint, by certified mail, return receipt requested. The return receipt was signed and date-stamped, and returned to the Department. Exhibit 2.
14. The respondent failed to appear at the duly scheduled prehearing conference.
15. The respondent failed to answer the complaint.

Discussion

The record of this proceeding demonstrates that respondent violated ECL Article 71 by failing to comply with the terms of the December 3, 2008 Order on Consent. Moreover, respondent violated 6 NYCRR 613.4 by failing to reconcile inventory records for two petroleum bulk storage tanks at the Facility, and violated 6 NYCRR 612.2 by failing to renew the Facility's petroleum bulk storage registration.

The record shows that respondent did not answer the complaint and did not appear at a pre-hearing conference scheduled for November 27, 2012, as directed in the notice of hearing and complaint. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

According to the Urda Affirmation, the requested penalty amount is reasonable and appropriate. Exhibit 4. Department Staff requested an order directing the respondent to comply immediately with the Order by paying the outstanding penalty balance of \$3,000 (three thousand dollars), as well as a penalty of \$3,750 (three thousand seven hundred fifty dollars) for respondent's violation of the Order. As noted above, the maximum penalty for each day of violation of an order on consent is \$37,500, pursuant to ECL 71-1929. As detailed in the complaint, respondent has failed to pay the penalty imposed in the Order, despite numerous attempts by Department Staff to facilitate compliance.

Department Staff requested that respondent be assessed a penalty of \$5,000 (five thousand dollars) for the violation alleged in the second cause of action (failure to reconcile inventory storage records for two underground storage tanks). This penalty amount is below the statutory maximum. The Department's Civil Penalty Policy (DEE-1) (June 20, 1990) states that penalties sought in adjudicated cases are typically significantly higher than the penalty amount requested in a case where the Department accepts a consent order. Department Staff has requested a penalty of \$5,000 for this violation, which is appropriate based upon this record.

For the third cause of action alleged (failure to renew a petroleum bulk storage facility registration), Department Staff requested a penalty of \$1,000 (one thousand

dollars). This amount is below the statutory maximum, and Department Staff has requested the suggested average settlement penalty (see Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule (DEE-22), line 3).

Based on this record, the \$3,000 outstanding penalty balance under the Order is due and owing, and the requested total penalty of \$9,750 (nine thousand seven hundred and fifty dollars) for the three violations alleged in the complaint is authorized and appropriate. Moreover, the amount requested is within the range authorized by the Department’s Civil Penalty Policy (DEE-1, June 20, 1990), and is consistent with the Department’s Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule (DEE -22)).

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;
2. Finding respondent in violation of ECL Article 71, and Parts 612 and 613 of 6 NYCRR, as alleged in the complaint;
3. Directing respondent to pay the outstanding penalty balance of \$3,000 (three thousand dollars) imposed under the December 3, 2008 Order on Consent;
4. Directing respondent to pay a total civil penalty in the amount of \$9,750 (nine thousand seven hundred fifty dollars); and
5. Directing such other and further relief as he may deem just and proper.

_____/s/_____
Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
December 21, 2012

EXHIBIT CHART*Matter of Hezekiah Varciana – Region 2**Calendar Call: December 17, 2012*Edirol File No. 040117103630

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Pleadings, including: notice of hearing and pre-hearing conference, and complaint, all dated November 8, 2012	✓	✓	Department Staff	
1A	Facility Information Report and PBS Certificate	✓	✓	Department Staff	
1B	December 3, 2008 Order on Consent	✓	✓	Department Staff	
1C	January 8, 2009 letter from John K. Urda, Esq. to Hezekiah Varciana, regarding modification of Order on Consent to provide a payment schedule	✓	✓	Department Staff	
1D	June 10, 2010 letter from Michele C. Perino, Esq. to Hezekiah Varciana, regarding a new payment schedule	✓	✓	Department Staff	
1E	April 29, 2011 Notice of Violation	✓	✓	Department Staff	
2	Affidavit of Service by Edward Kang, sworn to November 8, 2012, with attached signed and date-stamped return receipt for certified mail and USPS Track and Confirm	✓	✓	Department Staff	
3	Proposed Order	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
4	December 17, 2012 Affirmation of John K. Urda, Esq. in Support of Penalty Request, with attached Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule (DEE -22)	✓	✓	Department Staff	