

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**ORDER**

-by-

DEC Case No.  
R6-20120104-01  
PBS No. 6-053511

**JAMES B. VOCK, INC., JAMES B. VOCK and  
MARLENE VOCK,**

Respondents.

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This administrative enforcement proceeding concerns the failure of respondents James B. Vock, Inc., James B. Vock, and Marlene Vock, to comply with New York State's petroleum bulk storage regulations at a petroleum bulk storage facility (PBS No. 6-053511) located at 27764 County Route 193, Town of Theresa, Jefferson County, New York 13691 ("facility"). The facility is owned by James B. Vock, Inc., and the property on which the facility is situated is owned by James B. Vock and Marlene Vock.

Eight (8) aboveground petroleum storage tanks are located at the facility. The tanks were used to store diesel fuel, gasoline, No. 2 fuel oil and kerosene. Seven (7) of the tanks are identified by numbers -- 196, 198, 200, 202, 204, 205, and 206. The eighth tank, having a capacity of 500 gallons for the storage of gasoline, is unnumbered and is not shown on the facility's last petroleum bulk storage registration application or its petroleum bulk storage certificate. The facility has a combined petroleum storage capacity of 106,500 gallons and, accordingly, the site is subject to the State's petroleum bulk storage regulations (see 6 NYCRR 612.1[b]).

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") commenced this administrative enforcement proceeding by serving a notice of hearing and complaint and a motion for order without hearing each dated May 3, 2012 upon respondents. The papers were served on each respondent by certified mail, which respondents received on May 5, 2012. Accordingly, service of process was accomplished pursuant to section 622.3 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

## BACKGROUND

The papers that have been submitted in this matter have varied somewhat with respect to the violations alleged and the penalties requested. A review of these papers follows.

### Department staff's complaint

Department staff's complaint ("complaint") alleges a series of violations of the applicable petroleum bulk storage regulations<sup>1</sup>:

- a. ECL 17-1009(2) and (4) and 6 NYCRR 612.2 – Failure of respondents James B. Vock and Marlene Vock to re-register the facility within one year of assuming ownership. According to Department staff, the Vocks became owners of the facility effective July 21, 2008 and were required to re-register the facility by July 21, 2009. In the alternative, Department staff alleges the failure of respondents James B. Vock and Marlene Vock, on or before December 2, 2011, to re-register the facility pursuant to ECL 17-1009(2) and 6 NYCRR 612.2(a);
- b. 6 NYCRR 613.9(a)(1)(ii) – Failure of respondents James B. Vock, Marlene Vock, and James B. Volk, Inc., to bolt or lock the openings of tanks that have been temporarily out-of-service for more than thirty (30) days;
- c. 6 NYCRR 613.8 – Failure of respondents James B. Vock, Inc. and James B. Vock to report petroleum spills within two hours of their discovery;
- d. 6 NYCRR 613.3(b)(1) – Failure of respondents James B. Vock, Marlene Vock, and James B. Volk, Inc., to color code the fill ports for tanks 196, 198, 200, 202, 204, 205, 206, as well as an unregistered tank at the site, to show the product stored in the tank served by the fill port;
- e. 6 NYCRR 613.6(d) – Failure of respondents James B. Vock, Marlene Vock, and James B. Volk, Inc., to maintain the paint on the tanks to prevent corrosion;
- f. 6 NYCRR 613.6(a) or (c) – Failure of respondents James B. Vock, Marlene Vock, and James B. Volk, Inc., either to make monthly inspections of the facility or to keep records of monthly inspections;
- g. 6 NYCRR 613.3(d) – Failure of respondents James B. Vock, Marlene Vock, and James B. Volk, Inc., to maintain the secondary containment areas for tanks 196, 198, 200, 202, 204, 205, and 206 at the facility in good working order;
- h. 6 NYCRR 613.3(c)(3)(i) and (iii) – Failure of respondents James B. Vock, Marlene Vock, and James B. Volk, Inc., to have a gauge or high level warning alarm, high level liquid pump cutoff controller or equivalent device on the unregistered tank at the facility; and
- i. 6 NYCRR 613.3(c)(3)(ii) – Failure of respondents James B. Vock, Marlene Vock, and James B. Volk, Inc., to label tanks at the facility with design capacity, working capacity and identification number.<sup>2</sup>

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<sup>1</sup> Although not all of the causes of action identified which respondents were allegedly liable, the identification of the respondents to each violation was clarified later in the complaint when staff listed the requested penalties (see Complaint, VIII-X).

<sup>2</sup> The caption of Department staff's complaint and motion for order without hearing references violations of 6

In its complaint, Department staff sought the assessment of civil penalties as follows:

- \$2,500 against Marlene Vock and James B. Vock, jointly and severally, for failure to register the facility;
- \$3,000 against James B. Vock and James B. Vock, Inc., jointly and severally for failure to report spills at the facility;
- \$17,800 against Marlene Vock, James B. Volk, and James B. Vock, Inc., jointly and severally, for violations relating to securing tank openings, color coding, corrosion, monthly inspections or reports, containment, gauges or alarms, and labeling; and
- an additional penalty of \$20,000 against respondents James B. Vock, Marlene Vock, and James B. Volk, Inc., jointly and severally, to be suspended conditioned on respondents' compliance with the provisions of any order that the Commissioner may issue.

See Complaint, VIII-XI. Respondents failed to answer the complaint and failed to appear for the prehearing conference scheduled in the notice of hearing served with the complaint.

#### Department staff's motion for order without hearing

Simultaneously with the service of the notice of hearing and complaint, respondents were served on May 5, 2012, with a motion for order without hearing. The motion included a revised penalty for the failure to register the facility, penalties for violation of 6 NYCRR 613.3, and an assessment of an additional penalty of ten thousand dollars (\$10,000) (see Exhibit 4 [motion for order without hearing], at 3). The notice of motion for order without hearing stated that a response to the motion was due within twenty (20) days of the service of the motion. Respondents failed to file a response to the motion.

#### Notice of Hearing

A notice of hearing for default judgment dated May 31, 2012 was received by respondents on June 1, 2012, stating that, on June 28, 2012, the matter would be called before an administrative law judge ("ALJ"). This notice stated that Department staff intended to move for a default judgment in the matter because respondents failed to answer the complaint, failed to appear for the prehearing conference and failed to respond to the motion for order without hearing. Respondents were advised that they could appear personally or by counsel on June 28, 2012, to present argument in opposition to the motion. Respondents were further advised that their failure to appear would constitute a default and a waiver of their right to be heard, and could result in a Commissioner's order being issued against them. The notice of hearing set forth the overall penalty amounts requested in the complaint. See Exhibit 11 (notice of hearing for default judgment), at 1.

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NYCRR part 614, in addition to violations of parts 612 and 613 of 6 NYCRR. As no violations of 6 NYCRR part 614 are set forth in the causes of action, the caption of this proceeding has been amended to delete the reference to 6 NYCRR part 614.

The matter was assigned to ALJ Richard R. Wissler, who presided at the calendar call on June 28, 2012. Respondents did not appear at the June 28, 2012 calendar call or otherwise respond to the notice. Accordingly, Department staff moved for a default judgment on the complaint and on the motion for order without hearing at the calendar call. Department staff submitted a proposed Commissioner order that requested somewhat different penalties from the complaint.

## DISCUSSION

ALJ Wissler has prepared the attached default summary report which I adopt as my decision in this matter, subject to the following comments.

With respect to liability, Department staff offers two theories regarding its allegation that Marlene Vock and James B. Vock failed to register the petroleum bulk storage facility. Department staff notes that, because of a statutory amendment to the definition of “facility” at section 17-1003(1) of the Environmental Conservation Law (“ECL”) that became effective on July 21, 2008, the owner of the property on which a petroleum bulk storage facility is located is required to register the facility, even though the petroleum bulk storage facility may be owned by a different individual or entity (see ECL 17-1009[2]).

The facility had been registered by James B. Vock, Inc., which owned the petroleum bulk storage facility, prior to the date of the statutory amendment. Staff contends that Marlene and James B. Vock, who are owners of the property upon which the facility is located, became subject to the registration requirements on July 21, 2008 and were required to submit a re-registration of the facility by July 21, 2009, which they failed to do. Alternatively, Department staff argues that because the facility registration obtained by James B. Vock, Inc., expired on December 2, 2011, Marlene and James B. Vock, as the owners of the property on which the facility is located, should have re-registered the facility at that time.

It is clear, on this record, that the facility is not registered and because of the change of law, it should have been registered by the owners of the property on which the facility is situated at least at the time that the registration expired on December 2, 2011 if not earlier. Accordingly, Marlene Vock and James B. Vock are liable for a failure to register the facility pursuant to ECL 17-1009(2).

Department staff stated in its motion for order without hearing that respondent Marlene Vock should not be considered liable other than for her failure to register the facility (see Exhibit 4 [motion for order without hearing], at 3). Based on Department staff’s statement, staff’s allegations against Marlene Vock on the remaining violations of the petroleum bulk storage regulations are deemed withdrawn.

The ALJ found that James B. Vock and James B. Vock, Inc., were in violation of 6 NYCRR 613.9(a)(1)(ii) (failure to bolt or lock the opening of tanks that have been temporarily out-of-service for more than thirty [30] days); 6 NYCRR 613.8 (failure to report petroleum spills within two hours of their discovery); 6 NYCRR 613.3(b)(1) (failure to color code the fill ports

for tanks 196, 198, 200, 202, 204, 205, 206, as well as an unregistered tank at the site, to show the product stored in the tank served by the fill port); 6 NYCRR 613.6(d) (failure to maintain the paint on the tanks to prevent corrosion; 6 NYCRR 613.6(a) or (c) (failure either to make monthly inspections of the facility or to keep records of monthly inspections); 6 NYCRR 613.3(d) (failure to maintain the secondary containment areas for tanks 196, 198, 200, 202, 204, and 206 at the facility in good working order); 6 NYCRR 613.3(c)(3)(i) and (iii) (failure to have a gauge or high level warning alarm, high level liquid pump cutoff controller or equivalent device on the unregistered tank at the facility); and 6 NYCRR 613.3(c)(3)(ii) (failure to label tanks at the facility with design capacity, working capacity and identification number. I concur with the ALJ, except as follows. It is unclear, from the papers presented, whether respondents are in violation of 6 NYCRR 613.6(a), 6 NYCRR 613.6(c) or both. Accordingly, I decline to find liability with respect to either of those two provisions. In addition, with respect to the cause of action relating to the failure to maintain secondary containment areas, my reading of the cause of action is that it includes tank 205, in addition to tanks 196, 198, 200, 202, 204 and 206.

Section 71-1929 of the New York Environmental Conservation Law (“ECL”) provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of titles 1 through 11 inclusive and title 19 of article 17, or the rules or regulations promulgated thereto. Title 10 of article 17 establishes the requirements governing petroleum bulk storage, with applicable regulations at 6 NYCRR parts 612 and 613. Although the penalties that Department staff requested are substantially below the statutory maximum and thereby authorized, the penalties requested varied in the papers. For purposes of the penalties assessed by this order, I am relying on the penalties that staff requested in the complaint and its May 31, 2012 notice of hearing for default judgment (see Exhibit 11), which penalties were identical. I am not considering the penalties requested in the motion for order without hearing or presented in the proposed order submitted by Department staff.

Based upon my review of the record, and in consideration of DEE-1 (Civil Penalty Policy) dated June 20, 1990, DEE-22 (Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule) dated May 21, 2003, and ECL 71-1929, I am assessing civil penalties as follows:

- a civil penalty in the amount of \$2,500, jointly and severally, against Marlene Vock and James B. Vock for failure to register the facility. The civil penalty of \$2,500 for failing to register the facility will be suspended in its entirety, contingent upon respondents Marlene Vock and James B. Vock registering the facility and paying all applicable fees within thirty (30) days of this order being served upon them;
- a civil penalty in the amount of \$20,800, jointly and severally, against James B. Vock and James B. Vock, Inc. for the remaining violations found at the facility.

Department staff has also requested that respondents James B. Volk and James B. Volk, Inc., be directed to undertake remedial actions with respect to the facility, including: color coding of the tanks; bolting or locking manways, fill ports, loading rack connections and other tank openings; labeling of the tanks; emptying the tanks; removing drums and containers of waste oil from the site; submitting monthly inspection reports; and submitting a site assessment plan and implementing a site investigation plan. In addition, Department staff also request that

respondents be directed to provide photographs confirming that the remedial work was completed. The proposed remedial activities are authorized and warranted. In undertaking remedial activities at the facility, I encourage respondents to contact Department staff to discuss these activities to ensure that the appropriate requirements are satisfied.

In light of the cost of the remedial activities required pursuant to this order, I am suspending half (ten thousand four hundred dollars [\$10,400]) of the penalty of twenty thousand eight hundred dollars (\$20,800) that is being imposed upon James B. Volk and James B. Volk, Inc., contingent upon their satisfactory completion of the remedial activities requested by staff. The payable portion of the penalty (ten thousand four hundred dollars [\$10,400]) is due and payable within thirty (30) days of the service of this order upon respondents James B. Volk and James B. Volk, Inc. This will allow respondents to devote more of their financial resources to the remedial activities at the facility. In the event that respondents fail to complete the remedial activities to the satisfaction of Department staff, the suspended portion of the penalty shall immediately become due and payable. Under the circumstances of this case, I decline to impose any further payable or suspended penalties as staff requested in its complaint.

**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 on the complaint and on the motion for order without hearing is granted in part and denied in part, as to respondents James B. Vock, Inc., Marlene Vock, and James B. Vock. With respect to respondent Marlene Vock, Department's allegations in the complaint and motion for order without hearing are deemed withdrawn, except for the allegations relative to her failure to register the petroleum bulk storage facility located at 27764 County Route 193, Town of Theresa, Jefferson County, New York.
- II. Respondents James B. Vock, Inc., James B. Vock and Marlene Vock are adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations in Department staff's complaint and in its motion for order without hearing against James B. Vock, Inc., and James B. Vock are deemed to have been admitted by them. With respect to Marlene Vock, only the allegations in the complaint and the motion for order without hearing against her for failure to register the petroleum bulk storage facility are deemed to have been admitted by her.
- III. Respondents Marlene Vock and James B. Vock are adjudged to have violated ECL 17-1009(2).
- IV. Respondents James B. Vock and James B. Vock, Inc. are adjudged to have violated 6 NYCRR 613.3(b)(1), 613.3(c)(3)(i), 613.3(c)(3)(ii), 613.3(c)(3)(iii), 613.3(d), 613.6(d), 613.8, and 613.9(a)(1)(ii).

- V. Respondents James B. Vock and Marlene Vock are hereby assessed, jointly and severally, a civil penalty in the amount of two thousand five hundred dollars (\$2,500) which shall be suspended in its entirety if respondents register the facility with the New York State Department of Environmental Conservation within thirty (30) days of service of this order upon them and pay all applicable registration fees.

Should respondents James B. Vock and Marlene Volk fail to register the facility and pay all applicable registration fees, the suspended portion of the penalty (two thousand five hundred dollars [\$2,500]) shall become immediately due and payable. Payment shall be by cashier's check, certified check, or money order drawn to the order of the New York State Department of Environmental Conservation and mailed or hand-delivered to:

New York State Department of Environmental  
Conservation  
Office of the General Counsel  
317 Washington Street  
Watertown, New York 13601  
Attn: Ronald J. Novak, P.E.

- VI. Respondents James B. Vock and James B. Vock, Inc. are hereby assessed, jointly and severally, a civil penalty in the amount of twenty thousand eight hundred dollars (\$20,800). Of this penalty, ten thousand four hundred dollars (\$10,400) is suspended on the condition that respondents James B. Vock and James B. Vock, Inc., complete, to Department staff's satisfaction, the remedial activities set forth in paragraph VII of this order.

The non-suspended portion of the civil penalty, that is, ten thousand four hundred dollars (\$10,400), is due and payable within thirty (30) days after service of this order upon respondents James B. Vock and James B. Vock, Inc. Payment of the civil penalty shall be by cashier's check, certified check, or money order drawn to the order of the New York State Department of Environmental Conservation and mailed or hand-delivered to:

New York State Department of Environmental  
Conservation  
Office of the General Counsel  
317 Washington Street  
Watertown, New York 13601  
Attn: Ronald J. Novak, P.E.

Should respondents James B. Vock and James B. Vock, Inc., fail to complete the remedial activities set forth in paragraph VII of this order to Department staff's satisfaction, the suspended portion of the penalty shall become immediately due and payable and shall be submitted in the same form and to the same address as the

non-suspended portion of the penalty.

VII. Respondents James B. Vock and James B. Vock, Inc., shall:

A. color code the fill ports for all the tanks at the facility with the appropriate symbol for the product stored in the tank within ten (10) days of the service of this order upon them;

B. bolt or lock all manways, fill ports, loading rack connections, and other tank openings within ten (10) days of service of this order upon them;

C. label all tanks at the facility with design capacity, working capacity, and identification number within ten (10) days of service of this order upon them;

D. within thirty (30) days of completing the actions required pursuant subparagraphs A, B, and C of this paragraph VII, mail photographs showing the completion of all work to the Regional Petroleum Bulk Storage Engineer and Regional Enforcement Coordinator. Alternatively, respondents James B. Vock and James B. Vock, Inc., may e-mail these photographs to the Regional Petroleum Bulk Storage Engineer and the Regional Enforcement Coordinator in a format acceptable to Department staff;

E. completely empty (vacuum) the tanks at the facility, submit receipts showing completion of the work, and submit receipts showing proper disposition of the material removed from the tanks within thirty (30) days of service of this order upon them;

F. remove all drums and containers of waste oil from the site to a permitted disposal facility and submit receipts showing proper disposition to the Department within thirty (30) days of service of this order upon them;

G. submit an approvable site assessment plan for determining the nature and extent of petroleum contamination related to the unreported spills at the site within sixty (60) days of service of this order upon them;

H. implement the site investigation plan and submit the results of the site investigation to the Department staff within sixty (60) days of staff's approval of the site investigation plan;

I. within one (1) year of the service of this order upon respondents, either:

1. permanently close the facility in accordance with 6 NYCRR Part 613.9(b) and (c); or
2. (a) repair or replace the secondary containment system for tanks 196, 198, 200, 202, 204, 205 and 206, and submit as-built designs and a



certification by a licensed professional engineer that the containment system comports with 6 NYCRR Part 613.3(c)(6) and NFPA No. 30 section 2-3.3.3;

(b) sandblast or grind all tanks to bare metal and apply a primer, bond coat, and two surface coats of paint; and

(c) install a gauge to show the level of the product stored in the unregistered 500 gallon aboveground tank at the site; and

J. submit copies of the monthly inspection reports of the facility to the Department by the 15<sup>th</sup> day of each calendar month starting on December 15, 2012, and continue to submit these reports for a total of 12 months (until December 15, 2013) or until the facility is permanently closed, whichever occurs sooner. If the facility is not permanently closed by December 15, 2013, Department staff may continue, at its discretion, to require respondents to submit copies of the required monthly inspections of the facility to Department staff.

VIII. All communications from respondents James B. Vock, Inc., James B. Vock, and Marlene Vock to the Department concerning this order shall be directed to Ronald J. Novak, P.E., at the address referenced in paragraph VI of this order.

IX. The provisions, terms and conditions of this order shall bind respondents James B. Vock, Inc., James B. Vock, and Marlene Vock, 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: October 25, 2012  
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 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  
AND RULING ON MOTION  
FOR ORDER WITHOUT  
HEARING

-by-

DEC Case No. R6-20120104-01  
PBS No. 6-053511

**JAMES B. VOCK, INC., JAMES B. VOCK and  
MARLENE VOCK,**

Respondents.

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Procedural History

Staff of the New York State Department of Environmental Conservation (“Department” or “DEC”), on May 4, 2012, individually served respondents James B. Vock, Inc., James B. Vock and Marlene Vock with a notice of hearing and complaint dated May 3, 2012, containing ten causes of action alleging various violations of ECL article 17 title 10 and 6 NYCRR parts 612 and 613 at a petroleum storage facility owned by them located at 27764 County Road 193, Town of Theresa, Jefferson County, New York 13691 (“facility”). The facility was designed for the storage and commercial sale of various petroleum products including heating oil, diesel fuel, gasoline and kerosene. There are eight aboveground storage tanks at the facility having an aggregate petroleum storage capacity of 106,000 gallons. The complaint alleges that based upon records maintained by the Department as well as during an inspection of the facility on February 7, 2012, the following violations were observed or documented:

- a. ECL 17-1009(2) and (4) and 6 NYCRR 612.2 – Failure of respondents James B. Vock and Marlene Vock to reregister the facility within one year of assuming ownership thereof.
- b. ECL 17-1009(2) and 6 NYCRR 612.2(a) – Failure of respondents James B. Vock and Marlene Vock to register the facility.
- c. 6 NYCRR 613.9(a)(1)(ii) – Failure of respondents to bolt or lock the openings of tanks that have been temporarily out-of-service for more than thirty days.
- d. 6 NYCRR 613.8 – Failure of respondents James B. Vock, Inc. and James B. Vock to report petroleum spills within two hours of their discovery.
- e. 6 NYCRR 613.3(b)(1) – Failure of respondents to color code the fill ports for tanks 196, 198, 200, 202, 204, 205, 206, as well as an unregistered tank at the site, to show the product stored in the tank served by the fill port.
- f. 6 NYCRR 613.6(d) – Failure of respondents to maintain the paint on all of the tanks at the facility to prevent corrosion.

- g. 6 NYCRR 613.6(a) or (c) – Failure of respondents to make monthly inspections of the facility or failing to keep records of monthly inspections.
- h. 6 NYCRR 613.3(d) – Failure of respondents to maintain the secondary containment areas for tanks 196, 198, 200, 202, 204, and 206 at the facility in good working order.
- i. 6 NYCRR 613.3(c)(3)(i) – Failure of respondents to have a gauge or high level warning alarm, high level liquid pump cutoff controller or equivalent device on the unregistered tank at the facility.
- j. 6 NYCRR 613.3(c)(3)(ii) – Failure of respondents to label tanks at the facility with design capacity, working capacity and identification number.

The complaint seeks an order of the Commissioner:

(1) Finding respondents, individually and/or severally liable as indicated in the complaint, in violation of the above enumerated sections of ECL 17-1009 and 6 NYCRR parts 612 and 613;

(2) Directing respondents James B. Vock and Marlene Vock to register the facility and pay the required registration fee;

(3) Directing respondents to take certain corrective actions to bring the facility into compliance with the Department's regulations;

(4) Directing respondents to prepare and submit, and then implement, an approvable site investigation plan to ascertain the nature and extent of petroleum contamination related to unreported spills at the site, submitting the results thereof within sixty days of approval of the plan;

(5) Directing respondents within one year to either permanently close the facility in accordance with 6 NYCRR part 613 or make such repairs as are required to allow the facility to meet regulatory requirements for continued operation, including repairs to the secondary containment system, deteriorated tank surfaces, and installation of a product-level gauge on the unregistered tank;

(6) Directing respondents to perform monthly inspections at the facility and file the reports thereof with the Department for a period of one year, unless the facility is permanently closed by an earlier date;

(7) Assessing a payable civil penalty of \$2,500.00 jointly and severally against James B. Vock and Marlene Vock for failure to register the facility in violation of ECL 17-1009(2);

(8) Assessing a payable civil penalty of \$3,000.00 jointly and severally against James B. Vock, Inc. and James B. Vock for failure to report petroleum spills in violation of 6 NYCRR 613.8;

(9) Assessing a payable civil penalty of \$17,800.00 jointly and severally against all respondents apportioned as follows: (a) \$3,000.00 for violation of 6 NYCRR 613.9(a)(ii) [failure

to secure tank openings]; (b) \$1,600.00 for violation of 6 NYCRR 613.3(b) [no color coding]; (c) \$4,000.00 for violation of 6 NYCRR 613.6(d) [rusting tanks]; (d) \$4,000.00 for violation of 6 NYCRR 613.6(a) and (c) [monthly inspections/reports]; (e) \$3,000.00 for violation of 6 NYCRR 613.6(d) [maintaining containment]; (f) \$1,000.00 for violation of 6 NYCRR 613.3(c)(3) [no gauge/alarm]; (g) \$1,200.00 for violation of 6 NYCRR 613.9(c)(3)(ii) [no tank labels];

(10) Imposing an additional penalty of \$20,000.00 jointly and severally against all respondents which will be suspended in its entirety if the foregoing corrective actions are implemented; and

(11) Granting such other and further relief as the Commissioner may deem just and proper.

The notice of hearing annexed to and served with the complaint on May 4, 2012, indicated that an answer to the complaint was due within twenty days of service of the complaint. In addition, the notice of hearing stated that a pre-hearing conference would be held at the Department's offices in Watertown, New York, on May 30, 2012, at 11:00 AM. Respondents failed to answer the complaint and failed to appear for the scheduled prehearing conference.

Simultaneously with the service of the notice of hearing and complaint, respondents were also served on May 4, 2012, with a motion for order without hearing. The motion asserts that the incontrovertible facts demonstrate that respondents James B. Vock and Marlene Vock violated ECL 17-1009(2) by failing to register the facility. In addition, the motion asserts that the incontrovertible facts demonstrate that James B. Vock violated 6 NYCRR 613.3(c)(3)(i),(ii) and (iii) by failing to install a gauge on an unregistered 500 gallon tank at the site to indicate the petroleum product level in the tank, and by failing to label the tanks at the facility with their respective design capacity, working capacity, and tank number.

The motion seeks an order of the Commissioner:

(1) Finding no material issue of fact exists regarding the violations alleged in the motion;

(2) Finding respondents James B. Vock and Marlene Vock in violation of those regulatory provisions enumerated in the motion alleged as to each of them;

(3) Directing respondents James B. Vock and Marlene Vock to register the facility;

(4) Directing respondent James B. Vock to either install the gauge on the unregistered tank or vacuum any product from it, and supplying the Department with documentation of the option chosen and completed;

(5) Assessing a payable penalty of \$2,500.00 jointly and severally against James B. Vock and Marlene Vock for violation of ECL 17-1009(2);

(6) Assessing a payable penalty against James B. Vock of (a) \$1,000.00 for violation of 6 NYCRR 613.3(c)(3) [no gauge/alarm] and (b) \$1,200.00 for violation of 6 NYCRR 613.3(c)(3)(ii) [no tank labels];

(7) Assessing an additional penalty of \$5,000.00 against James B. Vock and Marlene Vock, payment of which would be suspended if the facility were registered within the timeframe ordered by the Commissioner;

(8) Assessing an additional penalty of \$10,000.00 against James B. Vock, payment of which would be suspended upon compliance with the direction of prayer for relief item 4, above; and

(9) Granting such other and further relief as the Commissioner may deem just and proper.

The notice of motion for order without hearing stated that a response to the motion was due within twenty days of the service of the motion. Respondents failed to file a response to the motion.

On May 31, 2012, respondents were served with a notice of hearing dated May 31, 2012, stating that on June 28, 2012, at 9:00 AM, at the Department's Region 6 office in Watertown, the matter would be called before an Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services ("OHMS"). This notice stated that, at that time, the Department intended to move for a default judgment against respondents due to their failure to answer the complaint served upon them or to appear for the pre-hearing conference on May 30, 2012, as directed in the notice of hearing served with the complaint. In addition, this notice stated that at that time the Department also intended to move for a default judgment against respondents due to their failure to file a response to the motion for order without hearing.

Respondents were advised that they could appear personally or by counsel on June 28, 2012, to present argument in opposition to the motions for default judgment. Respondents were further advised that their failure to appear would constitute a default and a waiver of their right to be heard, and could result in a Commissioner's order being issued against them. Moreover, respondents were advised that the default hearing could proceed in their absence. The notice further stated that upon making the motion for default judgment, Department staff would be seeking an order of the Commissioner:

(1) Assessing a payable civil penalty of \$2,500.00, jointly and severally, against James B. Vock and Marlene Vock;

(2) Assessing a payable civil penalty of \$3,000.00, jointly and severally, against James B. Vock, Inc. and James B. Vock;

(3) Assessing a payable civil penalty of \$17,800.00, jointly and severally, against James B. Vock, Inc., James B. Vock and Marlene Vock; and

(4) Imposing an additional penalty of \$20,000.00, payment of which should be suspended conditioned upon compliance.

Respondents did not file a response to the notice.

On June 28, 2012, and pursuant to the notice of May 31, 2012, the calendar call was convened before the undersigned ALJ at the Department's Region 6 office, Room 504 of the Dulles State Office Building, 317 Washington Street, Watertown, New York 13601. At that time, respondents' matter was called. Department staff was represented by Randall C. Young, Esq., Regional Attorney for Region 6. No one appeared on behalf of respondents.

Pursuant to 6 NYCRR 622.15, Mr. Young, on behalf of Department staff, orally moved for a default judgment against respondents based upon their failure to answer the complaint dated May 3, 2012, their failure to appear for the prehearing conference scheduled in the notice of hearing served with that complaint, and their failure to file a response to the motion for order without hearing dated May 3, 2012. As part of its motion, Department staff submitted the following documents for the record:

1. The notice of adjudicatory hearing dated May 3, 2012.
2. The complaint dated May 3, 2012.
3. The notice of motion for order without hearing dated May 3, 2012.
4. The motion for order without hearing dated May 3, 2012.
5. An affidavit of Ronald F. Novak, P.E., DEC Region 6 Regional Petroleum Bulk Storage Supervisor sworn to on May 3, 2012.
6. An affidavit of Ronald J. Novak, P.E., DEC Region 6 Regional Enforcement Coordinator sworn to on April 27, 2012.
7. A brief in support of the motion for order without hearing submitted by Randall C. Young, Esq., Regional Attorney, DEC Region 6 dated May 5, 2012.
8. Three cover letters, one addressed to each respondent and dated May 4, 2012, served with the notice of adjudicatory hearing and complaint and the motion for order without hearing served on each respondent.
9. Three affidavits of service by certified mail, each sworn to by April L. Sears on May 7, 2012. The first affidavit states that on May 4, 2012, she served respondent James B. Vock, Inc. with the notice of hearing and complaint and the motion for order without

hearing and its supporting documents by certified mail, return receipt requested, and on May 7, 2012, received the return receipt indicating that this respondent had received the aforementioned papers on May 5, 2012. The second affidavit states that on May 4, 2012, she served respondent James B. Vock with the notice of hearing and complaint and the motion for order without hearing and its supporting documents by certified mail, return receipt requested, and on May 7, 2012, received the return receipt indicating that this respondent had received the aforementioned papers on May 5, 2012. The third affidavit states that on May 4, 2012, she served respondent Marlene Vock with the notice of hearing and complaint and the motion for order without hearing and its supporting documents by certified mail, return receipt requested, and on May 7, 2012, received the return receipt indicating that this respondent had received the aforementioned papers on May 5, 2012.

10. Three affidavits of service by certified mail, each sworn to by April L. Sears on June 11, 2012. The first affidavit states that on May 31, 2012, she served respondent James B. Vock, Inc. with the notice of hearing for default judgment by certified mail, return receipt requested, and on June 4, 2012, received the return receipt indicating that this respondent had received the aforementioned notice on June 1, 2012. The second affidavit states that on May 31, 2012, she served respondent James B. Vock with notice of hearing for default judgment by certified mail, return receipt requested, and on June 4, 2012, received the return receipt indicating that this respondent had received the aforementioned notice on June 1, 2012. The third affidavit states that on May 31, 2012, she served respondent Marlene Vock with notice of hearing for default judgment by certified mail, return receipt requested, and on June 4, 2012, received the return receipt indicating that this respondent had received the aforementioned notice on June 1, 2012.
11. A copy of the notice of hearing for default judgment dated May 31, 2012, and three cover letters, one addressed to each of the respondents, each dated May 31, 2012.
12. Three copies of a letter dated June 12, 2012, one addressed to each respondent, clarifying the cover letter of May 31, 2012, by specifying that the notice of hearing for default judgment would be returnable and heard at 9:00 AM on June 28, 2012.
13. Three affidavits of service by certified mail, each sworn to by April L. Sears on June 28, 2012. The first affidavit states that on June 12, 2012, she served respondent James B. Vock, Inc. with the clarification letter dated June 12, 2012 [Department Staff Exhibit 12, above], by certified mail, return receipt requested, and on June 14, 2012, received the return receipt indicating that this respondent had received the aforementioned notice on June 13, 2012. The second affidavit states that on June 12, 2012, she served respondent James B. Vock with the clarification letter dated June 12, 2012 [Department Staff Exhibit 12, above], by certified mail, return receipt requested, and on June 14, 2012, received the return receipt indicating that this respondent had received the aforementioned notice on June 13, 2012. The third affidavit states that on June 12, 2012, she served respondent Marlene Vock with the clarification letter dated June 12, 2012 [Department Staff Exhibit 12, above], by certified mail, return receipt requested, and on June 14, 2012, received the

return receipt indicating that this respondent had received the aforementioned notice on June 13, 2012.

14. A proposed Commissioner's order.
15. A letter to the Department from Colleen A. Fulton, dated May 7, 2012.
16. Department form response to owner of PBS facility number 6-053511, dated May 15, 2012.

#### 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 action. Moreover, pursuant to 6 NYCRR 622.12(b), a respondent upon whom a motion for order without hearing has been served must file a response to the motion within twenty days of the date of such service. A failure to timely respond to the motion constitutes a default. As applicable herein, the Department's default procedures in an enforcement action, found at 6 NYCRR 622.15, provide:

“(a) A respondent's failure to file a timely answer ... constitutes a default and a waiver of respondent's right to a hearing. If [this] 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 Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 4), “The consequences of a default is that the respondent waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint or other accusatory instrument on the issue of liability for the violations charged.” Moreover, the Commissioner has stated, “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted].” (*id.* at 6.) Accordingly, the following findings of fact are based upon the documents submitted into the record, as identified above.

#### Findings of Fact

1. Respondents James B. Vock and Marlene Vock possess fee title in a certain piece of real property located at 27764 County Route 193, Town of Theresa, Jefferson County, New York 13691 by virtue of a deed transferring ownership to them on February 28, 1985, recorded in the



office of the Jefferson County Clerk, Document Identification Number 001229310003. The property is designated on the tax map of Jefferson County as Parcel Number 22.00-2-21.1. (Department Staff Exhibit 2, Complaint, Paragraph 4 and Exhibits A and B, annexed to the Complaint; see also, Department Staff Exhibit 4, Motion for Order Without Hearing [“MOWH”] at 1; Department Staff Exhibit 5, Affidavit of Ronald F. Novak, P.E. [“RFN Affidavit”], Paragraphs 13, 14 and 15 and attached Exhibits 9 and 10; and Department Staff Exhibit 6, Affidavit of Ronald J. Novak, P.E. [“RJN Affidavit”], Paragraph 9 and attached Exhibit 17.)

2. Respondent James B. Vock, Inc. is a domestic business corporation that engaged in the distribution of petroleum fuels from a petroleum storage facility it maintained at 27764 County Route 193, Town of Theresa, Jefferson County, New York 13691 (“facility”). Respondent James B. Vock has been president of James B. Vock, Inc. since its organization on December 10, 1985, and personally operated and controlled the activities of the facility on behalf of the respondent corporation. Respondent James B. Vock, Inc. was dissolved by proclamation on January 25, 2012. (Department Staff Exhibit 2, Complaint, Paragraphs 10, 11, 12, 13 and 14 and Exhibit E, annexed to the Complaint; see also, Department Staff Exhibit 5, RFN Affidavit, Paragraph 16; and Department Staff Exhibit 6, RJN Affidavit, Paragraph 10 and attached Exhibit 18.)

3. Some time prior to its dissolution, respondent James B. Vock, Inc. sold its customer list to MX Petroleum Corporation, doing business as MX Fuels, who subsequently provided service to the former Vock customers. Following an inspection of the facility by Department staff on February 7, 2012, respondent James B. Vock contacted Department staff by telephone on April 5, 2012, and stated that the facility had not been in operation for about two years. (Department Staff Exhibit 2, Complaint, Paragraphs 41, 42, and 43; see also, Department Staff Exhibit 5, RFN Affidavit, Paragraphs 22 and 23; and Department Staff Exhibit 6, RJN Affidavit, Paragraphs 7 and 8.)

4. There are eight (8) petroleum storage tanks located at the facility, all located aboveground. The tanks were used to store diesel fuel, gasoline, No. 2 fuel oil and kerosene. Seven of the tanks are identified by numbers, being 196, 198, 200, 202, 204, 205, and 206. The eighth tank, having a capacity of 500 gallons and utilized for the storage of gasoline, is unnumbered and is not shown on the facility’s last registration application or petroleum bulk storage certificate. Tank 196 has a capacity of 6,000 gallons and was utilized for the storage of diesel fuel. Tanks 198 and 200 each have a capacity of 20,000 gallons and were utilized for the storage of No. 2 fuel oil. Tank 202 has a capacity of 20,000 gallons and was utilized for the storage of kerosene. Tanks 204 and 205 each have a capacity 10,000 gallons and were utilized for the storage of gasoline. Tank 206 has a capacity of 20,000 gallons and was utilized for the storage of gasoline. The facility has a combined petroleum storage capacity of 106,500 gallons. (Department Staff Exhibit 2, Complaint, Paragraphs 5, 6, 7, 8 and 9 and Exhibits C and D, annexed to the Complaint; see also, Department Staff Exhibit 5, RFN Affidavit, Paragraphs 7 and 8 and attached Exhibits 6, 7 and 8.)

5. The facility has been registered with the Department and has been issued Petroleum Bulk Storage (“PBS”) Certificate No. 6-053511. Pursuant to a renewal application dated October 16, 2006, signed and filed by James B. Vock, as president, on behalf of James B. Vock, Inc., the

facility registration was renewed by the Department on October 24, 2006. The registration expired on December 2, 2011. The owner of the facility named in the renewal application and on the PBS certificate is James B. Vock, Inc. The contact person and authorized representative named in the renewal application and on the PBS certificate is the individual, respondent James B. Vock. (Department Staff Exhibit 2, Complaint, Paragraphs 19 and 30 and Exhibits C and D, annexed to the Complaint; see also, Department Staff Exhibit 5, RFN Affidavit, Paragraphs 4, 5 and 6 and attached Exhibits 1 through 8.)

6. The land upon which the facility owned by respondent James B. Vock, Inc. is located is owned by James B. Vock and Marlene Vock. (Department Staff Exhibit 2, Complaint, Paragraphs 4 and 24 and Exhibits A and B, annexed to the Complaint; see also, Department Staff Exhibit 4, Motion for Order Without Hearing [“MOWH”] at 1; Department Staff Exhibit 5, RFN Affidavit, Paragraphs 13, 14 and 15 and attached Exhibits 9 and 10; and Department Staff Exhibit 6, RJN Affidavit, Paragraph 9 and attached Exhibit 17.)

7. The facility has not been reregistered, transferred or permanently closed nor has a renewal application been filed since the last registration in the name of James B. Vock, Inc., as owner, expired on December 2, 2011. (Department Staff Exhibit 2, Complaint, Paragraphs 19, 20, 30 and 31 and Exhibits C and D, annexed to the Complaint; see also, Department Staff Exhibit 5, RFN Affidavit, Paragraphs 4, 5 and 6 and attached Exhibits 1 through 8.)

8. At no time have respondents James B. Vock and Marlene Vock applied to the Department to have the registration of the facility transferred to them as owners of the facility. (Department Staff Exhibit 2, Complaint, Paragraphs 27 and 28; see also, Department Staff Exhibit 5, RFN Affidavit, Paragraph 6.)

9. On February 7, 2012, Department staff inspected the facility. During this inspection Department staff observed that:

- a. Respondents did not have a current and valid registration for the facility, a violation of 6 NYCRR 612.2. (Department Staff Exhibit 2, Complaint, Paragraphs 15 through 33 and Exhibits C and D, annexed to the Complaint; see also, Department Staff Exhibit 5, RFN Affidavit, Paragraphs 4, 5 and 6 and attached Exhibits 1 through 8.)
- b. None of the fill ports, gauge openings or loading rack pipes on or associated with any of the tanks at the facility were locked or bolted closed, a violation of 6 NYCRR 613.9(a). (Department Staff Exhibit 2, Complaint, Paragraphs 34 through 46; see also, Department Staff Exhibit 5, RFN Affidavit, Paragraphs 17 and 18.)
- c. The ground at two loading racks at the facility was stained with petroleum and drums of waste oil at the facility were leaking oil onto the ground and subsequent inquiry by Department staff revealed that none of these spills had ever been reported to the Department, a violation of 6 NYCRR 613.8, as to respondents James B. Vock and James B. Vock, Inc. (Department Staff Exhibit 2, Complaint, Paragraphs 47 through 58.)

- d. None of the fill ports for any of the tanks at the facility were color coded, a violation of 6 NYCRR 613.3(b)(1). (Department Staff Exhibit 2, Complaint, Paragraphs 59 through 62.)
  - e. All the tanks at the facility were corroding and rust had eaten through significant areas of the paint on the surface of the tanks indicating that respondents had failed to maintain the paint on the tanks to prevent corrosion, a violation of 6 NYCRR 613.6(d). (Department Staff Exhibit 2, Complaint, Paragraphs 63 through 68.)
  - f. There were no records at the facility of any monthly inspections made during the two years preceding the Department's inspection of the facility, a violation of 6 NYCRR 613.6(c). (Department Staff Exhibit 2, Complaint, Paragraphs 69 through 74.)
  - g. Dormant or winter-killed vegetation was observed within the secondary containment areas for tanks 198, 200, 202, 204, 205 and 206, designed as being soil lined with crushed stone, indicating respondents' failure to maintain the secondary containment with respect to these tanks in good working order, a violation of 6 NYCRR 613.3(d). (Department Staff Exhibit 2, Complaint, Paragraphs 75 through 86.)
  - h. The unregistered 500 gallon gasoline storage tank did not have a gauge or high level warning alarm, high level liquid pump cutoff controller or equivalent device, a violation of 6 NYCRR 613.3(c)(3)(i). (Department Staff Exhibit 2, Complaint, Paragraphs 87 through 92.)
  - i. None of the tanks at the facility were labeled with their respective design capacity, working capacity or identification number, a violation of 6 NYCRR 613.3(c)(3)(ii). (Department Staff Exhibit 2, Complaint, Paragraphs 93 through 96.)
10. The notice of hearing in this matter and the complaint alleging the various regulatory violations enumerated in Finding of Fact 9, above, as well as the motion for order without hearing were individually served by certified mail, return receipt requested, upon respondents on May 4, 2012. United States Postal Service ("USPS") return receipts indicate that the respondents received these documents on May 5, 2012. (Department Staff Exhibit 9, Affidavits of Service of the Notice of Hearing and Complaint and Motion For Order Without Hearing.)
11. The notice of hearing served on May 4, 2012, with the complaint stated that an answer to the complaint had to be filed within twenty days of the receipt of the complaint by respondents and that failure to file an answer to the complaint would constitute a default in the matter. Respondents failed to file an answer to the complaint. (Department Staff Exhibit 1 and Hearing Record.)
12. The notice of hearing served on May 4, 2012, with the complaint stated that a prehearing conference would be held on May 30, 2012, at 11:00 AM, at the Department's offices, 317 Washington Street, Watertown, New York 13601 and that failure to appear at the prehearing conference would constitute a default in the matter. Respondents failed to

appear for the scheduled prehearing conference. (Department Staff Exhibit 1 and Hearing Record.)

13. The notice of motion for order without hearing served on May 4, 2012, stated that a response to the motion had to be filed within twenty days of the receipt of the motion by respondents and that failure to file a response to the motion would constitute a default in the matter. Respondents failed to file a response to the motion. (Department Staff Exhibit 3 and Hearing Record.)
14. The notice of hearing for default judgment in this matter, dated May 31, 2012, was served upon the respondents by certified mail, return receipt requested, on May 31, 2012. USPS return receipts indicate that the respondents received the notice on June 1, 2012. (Department Staff Exhibit 10, Affidavits of Service of the Notice of Hearing for Default Judgment.)
15. The notice of hearing for default judgment stated that the default hearing would be held on June 28, 2012, at 9:00 AM, in Room 504 of the Department's offices located in the Dulles State Office Building, 317 Washington Street, Watertown, New York 13601. Respondents failed to appear for the default hearing. (Department Staff Exhibit 11 and Hearing Record.)

#### Discussion

The record shows that respondents were duly served with the notice of hearing and complaint and the motion for order without hearing on May 5, 2012. The record further shows that respondents failed to file an answer to the complaint, failed to appear for the scheduled prehearing conference on May 30, 2012, and failed to respond to the motion for order without hearing. Moreover, the record shows that respondents were duly served with the notice of default hearing in this matter on June 1, 2012, and that they failed to appear for the default hearing scheduled for June 28, 2012. The Department is entitled to a default judgment in this matter on the complaint and motion for order without hearing pursuant to the provisions of 6 NYCRR 622.15.

Department staff's proposed order and the \$45,800.00 civil penalty it seeks, as apportioned among respondents, are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

#### Recommendation

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

1. Granting Department staff's motion for default on both the complaint and the motion for order without hearing as to all respondents pursuant to the provisions of 6 NYCRR 622.15;

2. Finding each respondent in violation of the various sections of the ECL and 6 NYCRR parts 612 and 613 alleged against them, either jointly or individually, as enumerated in the complaint and motion for order without hearing in the findings of fact, above, for and at a petroleum storage facility they own and/or operate located at 27764 County Route 193, Town of Theresa, Jefferson County, New York 13691;
3. Directing respondents James B. Vock, Inc. and James B. Vock to take such steps and to effect such corrective actions at and on behalf of the facility as are indicated in paragraphs XVI through XX of Department staff's proposed order, annexed hereto (Department Staff Exhibit 14 at 7-9);
4. Directing respondents James B. Vock and Marlene Vock to pay a civil penalty in the amount of five thousand dollars (\$5,000.00) of which twenty-five hundred dollars (\$2,500.00) is payable upon receipt of the Commissioner's order and twenty-five hundred dollars (\$2,500.00) is suspended contingent upon registration of the facility;
5. Directing respondents James B. Vock, Inc. and James B. Vock to pay a civil penalty in the amount of forty thousand eight hundred dollars (\$40,800.00), of which twenty thousand dollars (\$20,000.00) is payable upon receipt of the Commissioner's order and twenty thousand eight hundred dollars (\$20,800.00) is suspended if the corrective actions indicated in Recommendation 3, above, are fulfilled; and
6. Directing such other and further relief as he may deem just and proper.

\_\_\_\_\_/s/\_\_\_\_\_  
Richard R. Wissler  
Administrative Law Judge

Dated: Albany, New York  
October 4, 2012

Index of Attached Exhibits Received

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