

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the
Environmental Conservation Law and Parts 612-614 of
Title 6 of the Codes, Rules and Regulations of the State
of New York,

-by-

R & L SMITH TRUCKING, INC.,

Respondent.

ORDER

DEC Case No.
R9-20150219-13

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent R & L Smith Trucking, Inc. (respondent) violated former parts 612, 613, and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) and current 6 NYCRR part 613,¹ at a petroleum bulk storage (PBS) facility (PBS # 9-385395) that respondent owns at 516 Pine Street, South Dayton, New York (facility). At the facility is one underground PBS tank (PBS tank no. 4), installed in 1987, that has a capacity of 10,000 gallons.

In accordance with 6 NYCRR 622.3(a)(3), Department staff commenced this proceeding by serving a notice of hearing and complaint dated July 6, 2016 on respondent by certified mail. The signed certified mail receipt reflects that the notice of hearing and complaint was received on July 21, 2016. Respondent failed to answer the complaint, and failed to appear at the pre-hearing conference on October 21, 2016.²

At the pre-hearing conference, staff made a motion for a default judgment based upon respondent's failure to answer the complaint and failure to appear at the pre-hearing conference, and also presented its case on the merits, proffering a staff witness and 11 exhibits, which were entered into evidence. Administrative Law Judge (ALJ) D. Scott Bassinson presided at the pre-hearing conference and the default hearing, and prepared the attached hearing report, which I adopt as my decision in this matter, subject to the following modifications and comments.

¹ In October 2015, 6 NYCRR parts 612, 613, and 614 were repealed and replaced with a new part 613.

² The notice of hearing advised respondent that a pre-hearing conference was scheduled for August 17, 2016, but the pre-hearing conference was adjourned and rescheduled for October 21, 2016 (see Hearing Exhibit 4; Hearing Report at 2).

Department Staff's Complaint

Department staff's complaint alleges that respondent committed the following PBS violations at this facility:

- First Cause of Action: 6 NYCRR 612.2(a)(2) (now 6 NYCRR 613-1.9[c]), by failing to renew the PBS facility registration for the facility;
- Second Cause of Action: 6 NYCRR 613.3(d) (now 6 NYCRR 613-2.2[a]³), by failing to keep the fill port catch basin clear for PBS tank no. 4;
- Third Cause of Action: 6 NYCRR 613.5(b)(2) (now 6 NYCRR 613-3.2[b]), by failing to monitor the cathodic protection system for PBS tank no. 4;
- Fourth Cause of Action: 6 NYCRR 613.5(b)(4) (now 6 NYCRR 613-2.3[b]), by failing to maintain monitoring records for leak detection for PBS tank no. 4;
- Fifth Cause of Action: 6 NYCRR 613.9(a) (now 6 NYCRR 613-2.6[a][2]), by failing to properly temporarily close PBS tank no. 4;⁴ and
- Sixth Cause of Action: 6 NYCRR 614.3(a) (now 6 NYCRR 613-2.2[a][3]), by failing to properly label PBS tank no. 4.

As set forth in the attached Hearing Report, respondent failed to file an answer to the complaint served by Department staff in this matter, and failed to appear at a pre-hearing conference scheduled for October 21, 2016 (see Hearing Report at 4 [Finding of Fact Nos. 9 and 10]).

Liability

The State's petroleum bulk storage regulations were revised effective October 11, 2015 establishing a new 6 NYCRR part 613, with six subparts, to replace the former parts 612, 613, and 614 of 6 NYCRR. General provisions applying to petroleum bulk storage facilities are set forth in new Subpart 613-1 (see 6 NYCRR 613-1.2 [Applicability]). The new Part 613 also establishes regulatory requirements governing three tank categories: (a) underground storage systems that are subject to both Subtitle I of the Resource Conservation and Recovery Act and title 10 of article 17 of the Environmental Conservation Law (ECL) (Subpart 613-2); (b) underground storage systems that are subject only to title 10 of article 17 of the ECL (Subpart 613-3); and (c) aboveground storage tank systems (Subpart 613-4). In addition, Part 613 contains: (a) subpart 613-5, which addresses prohibitions on delivery; and (b) Subpart 613-6, which addresses release response and corrective action.

³ The specific cite would be 6 NYCRR 613-2.2(a)(6).

⁴ New 6 NYCRR 613-2.6(a)(3) establishes requirements for underground storage tank systems that are out of service for a period of three (3) to twelve (12) months.

Department staff's complaint references violations under both the old and new regulatory provisions. As ALJ Bassinson noted in his hearing report, respondent corrected four of the violations prior to the October 11, 2015 effective date of the new regulations. Specifically, respondent at a meeting with Department staff in June 2015 demonstrated correction of the violations relating to temporary closure (fifth cause of action), labeling (sixth cause of action), fill port maintenance (second cause of action), and leak detection records (fourth cause of action) (see Hearing Report at 4 [Finding of Fact 7]). Therefore, only former parts 612, 613, and 614 apply to those four violations (see Hearing Report at 1 n1). The other two violations (see first and third causes of action) span a period before and after October 11, 2015, and so both the former and current regulations apply to those violations.

With respect to the corrective actions directed by this order, the current regulations (new Part 613) apply.

In reviewing the causes of action, certain of the regulatory citations need further comment. With respect to the new Part 613, the tank at issue here (PBS tank no. 4) is subject, in addition to applicable general provisions in new subpart 613-1, to the requirements of new subpart 613-2 of 6 NYCRR. Department staff, however, in the third cause of action (respondent's failure to monitor the cathodic protection system for petroleum bulk storage tank no. 4) alleges a violation of new Subpart 613-3 – specifically, 613-3.2(b). Regulatory requirements contained in Subpart 613-3 (such as section 613.3.2[b]), are not applicable to PBS tank no. 4. Upon review of the record, I determine that the reference to 6 NYCRR 613-3.2(b) in the complaint should be seen as a typographical error, and the appropriate reference should read 6 NYCRR 613-2.2(b)⁵, which addresses monitoring requirements. I hereby make that correction. This correction poses no prejudice to respondent as respondent was on notice of its failure to comply with the monitoring requirement.

With respect to the fourth cause of action, staff alleges that respondent failed to maintain monitoring records for leak detection. For this tank, creation and maintenance of records of inspection of cathodic protection are governed by Subpart 613-2.⁶ In addition to citing a regulatory provision under former 6 NYCRR 613.5(b)(4), Department staff references a violation of new 6 NYCRR 613-2.3(b) that addresses leak detection procedures. As to new 6 NYCRR 613-2.3(b), it is unclear why this provision is referenced rather than the recordkeeping requirements in new 6 NYCRR 613-2.3(e). The Hearing Report indicates that Department staff's citation is apparently a typographical error. Based upon my review of the record, the regulatory citation is unclear and, absent further clarification, may not serve as a basis for liability here. The issue of what is the appropriate provision under the new regulations, however, is moot -- the violation was corrected prior to October 11, 2015 and, accordingly, respondent was only in violation of the recordkeeping requirement during a time when former regulation 6 NYCRR 613.5(b)(4), which was cited correctly in staff's complaint, was in effect.

⁵ New 6 NYCRR 613-2.2(b)(2) reads "All UST systems equipped with cathodic protection systems must be inspected for proper operation by a qualified cathodic protection tester." The frequency and inspection criteria are set forth in 6 NYCRR 613-2.2(b)(2)(i) and (ii).

⁶ Cathodic protection requirements for tanks subject to Subpart 613-3 appear in that subpart.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report at 5). Accordingly, staff is entitled to a judgment based on record evidence. As noted above, because the record established that respondent corrected four of the violations prior to the effective date of the new part 613 (second, fourth, fifth and sixth causes of action), only the prior regulations apply to those four violations, whereas the former and current regulations apply to the violations that remained uncorrected as of the date of the complaint (first and third causes of action).

Civil Penalty

Department staff requested, and the ALJ has recommended that I impose, a civil penalty in the amount of six thousand nine hundred dollars (\$6,900) (see Hearing Exhibit 11 [Department staff penalty analysis]; Hearing Report at 5-6). The recommended penalty is authorized and warranted on this record.⁷ I hereby impose a civil penalty in the amount of six thousand nine hundred dollars (\$6,900), to be submitted within thirty (30) days of the service of this order on respondent.

Department staff has also requested that I direct respondent to undertake specified corrective actions at the facility, as follows:

- A. submit to the Department a completed petroleum bulk storage registration application for the above facility, together with the applicable registration fee; and
- B. perform a cathodic protection test on PBS tank no. 4 at the facility and submit the results to the Department.

These corrective actions are authorized and warranted. Department staff has requested that these corrective actions be completed within thirty (30) days of the "effective date of the order." I agree with the ALJ's recommendation that respondent submit the completed petroleum bulk storage registration application within thirty (30) days of the service of this order on respondent. As for the performance of a cathodic protection test, I direct that respondent contact Department staff within fifteen (15) days of the service of the order upon it for the scheduling of the test taking into consideration winter and other weather conditions. If a date for the testing cannot be mutually agreed to, Department staff is hereby authorized to set the date when respondent is to undertake the testing.

⁷ ECL 71-1929(1) provides that any 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, shall be liable to a penalty up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation.

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 or appear at the October 21, 2016 pre-hearing conference in this proceeding, respondent R & L Smith Trucking, Inc. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent R & L Smith Trucking, Inc. violated the following regulations at its petroleum bulk storage facility located at 516 Pine Street, South Dayton, New York:
 - A. former 6 NYCRR 612.2(a)(2), and current 6 NYCRR 613-1.9(c), by failing to renew its PBS registration, which expired on July 20, 2012;
 - B. former 6 NYCRR 613.3(d), by failing to keep the fill port catch basin clear for PBS tank no. 4 at the facility;
 - C. former 6 NYCRR 613.5(b)(2), and current 6 NYCRR 613-2.2(b), by failing to monitor the cathodic protection system for PBS tank no. 4 at the facility;
 - D. former 6 NYCRR 613.5(b)(4), by failing to maintain monitoring records for leak detection for PBS tank no. 4 at the facility;
 - E. former 6 NYCRR 613.9(a), by failing to properly temporarily close PBS tank no. 4 at the facility; and
 - F. former 6 NYCRR 614.3(a), by failing to properly label PBS tank no. 4 at the facility.
- III. Within thirty (30) days of the service of this order upon respondent R & L Smith Trucking, Inc., respondent shall:
 - A. submit to the Department a completed petroleum bulk storage registration application for the above facility, together with the applicable registration fee;
 - B. pay a civil penalty in the amount of six thousand nine hundred dollars (\$6,900) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- IV. Within fifteen (15) days of the service of this order upon respondent R&L Smith Trucking, Inc., respondent shall contact Department staff for the scheduling of the cathodic protection test on PBS tank no. 4, taking into consideration winter and other weather conditions. If a date for the testing cannot be mutually agreed to, Department staff is hereby authorized to set the date when respondent is to undertake the testing.

V. The petroleum bulk storage application, applicable registration fee, cathodic protection test once performed, and the penalty payment shall be sent to the following address:

Office of General Counsel
NYS Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203
Attn: Teresa J. Mucha, Esq.

VI. Any questions or other correspondence regarding this order shall also be addressed to Teresa J. Mucha, Esq. at the address referenced in paragraph IV of this order.

VII. The provisions, terms and conditions of this order shall bind respondent R & L Smith Trucking, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: December 14, 2016
Albany, New York

To:

R & L Smith Trucking, Inc.
c/o Steve Smith
947 Route 83
Cherry Creek, New York 14723

(Via certified mail)

R & L Smith Trucking, Inc.
516 Pine Street
South Dayton, New York 14138

(Via certified mail)

Teresa J. Mucha, Esq.
Associate Attorney
NYS Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203

(Via intra-agency mail)

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the
Environmental Conservation Law and Parts 612-614 of
Title 6 of the New York Codes, Rules and Regulations

HEARING REPORT

DEC Case No.
R9-20150219-13

-by-

R & L SMITH TRUCKING, INC.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent R & L Smith Trucking, Inc. (“respondent”) with a notice of hearing and complaint dated July 6, 2016, alleging six violations of the petroleum bulk storage (“PBS”) regulations found in title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”), relating to a 10,000 gallon underground storage tank (“PBS tank no. 4”) located at respondent’s facility at 516 Pine Street, South Dayton, New York (“facility”).

Specifically, Department staff alleges that respondent:

1. failed to renew its PBS registration, which expired on July 20, 2012, in violation of 6 NYCRR § 612.2(a)(2) (now 6 NYCRR § 613-1.9(c));¹
2. failed to keep the fill port catch basin clear for PBS tank no. 4, in violation of 6 NYCRR § 613.3(d) (now 6 NYCRR § 613-2.2(a));
3. failed to monitor the cathodic protection system for PBS tank no. 4, in violation of 6 NYCRR § 613.5(b)(2) (now 6 NYCRR § 613-3.2(b));²

¹ Parts 612, 613 and 614 of 6 NYCRR were repealed and replaced by a revised part 613, effective in October 2015, subsequent to Department staff’s November 2013 inspection of respondent’s facility. The causes of action in the complaint refer to both the former and current regulatory provisions. According to the hearing record, however, respondent corrected four of the violations by June 5, 2015, a date preceding the effective date of new Part 613. See Testimony of Andrea Skalski, Hearing Record. With respect to those four violations, see Second, Fourth, Fifth and Sixth Causes of Action, the former regulatory provisions apply. With respect to the remaining two violations, which are continuing, see First Cause of Action (failure to renew facility registration) and Third Cause of Action (failure to monitor the cathodic protection system for PBS tank no. 4), both the former and the current regulatory provisions apply. Moreover, the current regulatory provisions apply to the corrective actions recommended herein.

² Staff’s citation to current section 613-3.2(b) is apparently a typographical error. Inspection and monitoring of cathodic protection is governed in the new regulations by section 613-2.2(b) rather than section 613-3.2(b) as cited by staff.

4. failed to maintain monitoring records for leak detection for PBS tank no. 4, in violation of 6 NYCRR § 613.5(b)(4) (now 6 NYCRR § 613-2.3(b));³
5. failed to properly temporarily close PBS tank no. 4, which had been out of service for thirty days or more, in violation of 6 NYCRR § 613.9(a) (now 6 NYCRR § 613-2.6(a)(2)); and
6. failed to properly label PBS tank no. 4, in violation of 6 NYCRR § 614.3(a) (now 6 NYCRR § 613-2.2(a)(3)).

See Complaint, Staff Exhibit 1, at ¶¶ 16-27.

The complaint seeks an order of the Commissioner:

1. Finding respondent in violation of the cited regulations;
2. Directing respondent to pay a civil penalty in the amount of \$6,900;
3. Directing respondent to perform the following corrective actions within thirty days of the effective date of the order of the Commissioner:
 - a. Submit a complete PBS application that updates the contact information and changes the status of PBS tank no. 4, together with the appropriate registration fee; and
 - b. Perform a cathodic protection test on PBS tank no. 4 and submit the results to the Department; and
4. Granting such other and further relief as may be just, proper and appropriate.

See id., Wherefore Clause, ¶¶ I-IV.

Department staff served the notice of hearing and complaint on respondent by certified mail, which was received on July 21, 2016. The notice of hearing advised respondent that respondent was required to serve a written answer to the complaint within 20 days after receipt, that failure to serve an answer would constitute a default and waiver of respondent's right to a hearing, and that an order may be issued against respondent granting the relief requested in the complaint. See Staff Exhibit 1, Notice of Hearing. The notice of hearing also advised respondent that a pre-hearing conference was scheduled for August 17, 2016 at 11:00 a.m. at the Department's Region 9 office in Buffalo, New York, that attendance at the pre-hearing conference was mandatory, and that failure to attend constitutes a default and waiver of the opportunity for a hearing. See id. The pre-hearing conference was adjourned by agreement of the parties pending settlement discussions. See Hearing Record.

Respondent failed to file an answer to the complaint. By letter dated October 3, 2016, Department staff advised respondent that the pre-hearing conference was re-scheduled for October 21, 2016 at 11:00 a.m. at the Department's Region 9 office, that attendance was

³ Staff's citation to current section 613-2.3(b) is apparently a typographical error. The prior regulation, section 613.5(b)(4), governed records of both cathodic protection and leak detection. Under the new regulations, creation and maintenance of records of inspection of cathodic protection are governed by section 613-2.2(b), and leak detection recordkeeping generally is governed by section 613-2.3(e). In this matter, staff's typographical error regarding the current recordkeeping regulations has no substantive impact here, because the records-related violation was corrected prior to the effective date of the new regulations, and respondent did not violate the recordkeeping requirements of the new regulations.

mandatory and that, if respondent failed to appear at the pre-hearing conference, Department staff would move for a default judgment. See Staff Exhibit 4.

On October 21, 2016, a pre-hearing conference was convened before the undersigned at the Department's Region 9 office in Buffalo, New York. Department staff was represented by Teresa J. Mucha, Esq., Associate Attorney, Region 9. No one appeared on behalf of respondent.

Noting for the record that respondent failed to answer the complaint and failed to appear for the pre-hearing conference, Department staff moved orally for a default judgment pursuant to 6 NYCRR § 622.15, and offered the documentation required by 6 NYCRR § 622.15(b). Department staff also indicated that it was prepared to proceed with a hearing on the default, seeking judgment on the merits, and proffered a program staff witness.

Department staff called one witness, Andrea Skalski, an engineer in the Department's Division of Environmental Remediation, Region 9, whose current title is PBS program manager. In all, eleven (11) exhibits were received in evidence.

Findings of Fact

The following findings of fact are found based upon the preponderance of record evidence presented at the hearing. See 6 NYCRR § 622.11(c):

1. Respondent R & L Smith Trucking, Inc. ("respondent") is the owner of a PBS facility comprised of one underground storage tank having a capacity of 10,000 gallons ("PBS tank no. 4"), located at 516 Pine Street, South Dayton, New York ("facility"). See Testimony of Andrea Skalski, Hearing Record; see also Staff Exhibits 5-7.
2. Respondent R & L Smith Trucking, Inc. is an active domestic business corporation. See Staff Exhibit 3.
3. Andrea Skalski is the Petroleum Bulk Storage ("PBS") Manager for the Department's Region 9. She has been employed in the Department's Division of Environmental Remediation, Petroleum Bulk Storage unit, for 18 years. Ms. Skalski's duties include directing staff, reviewing inspection reports, decision-making regarding enforcement, and calculating civil penalties. She has conducted approximately 4,000 inspections during her career. See Testimony of Andrea Skalski, Hearing Record.
4. On July 3, 2007, the Department issued PBS Registration Certificate No. 9-385395 to respondent. This registration expired on July 20, 2012. See Staff Exhibits 5-7.
5. On November 21, 2013, Peter Reuben, Engineering Technician I, inspected respondent's facility and prepared an inspection report reflecting several alleged violations of PBS regulations, including: (a) facility registration was not current or valid; (b) improper temporary closure of PBS tank no. 4; (c) fill port basin not properly maintained; (d) no label on fill port; (e) no leak detection records for PBS tank no. 4; and (f) no cathodic protection monitoring or records. See Staff Exhibit 8; see also

Testimony of Andrea Skalski, Hearing Record.

6. Department staff sent a notice of violation to respondent dated November 26, 2013, identifying the violations and describing corrective actions. See Staff Exhibit 10.
7. On June 5, 2015, respondent met with Andrea Skalski and staff counsel Teresa Mucha, Esq. regarding the violations. At that meeting, respondent demonstrated correction of four of the violations – temporary closure, fill port labeling and maintenance, and leak detection records. Respondent did not correct the registration and cathodic protection violations. See Testimony of Andrea Skalski, Hearing Record.
8. As shown by the signed certified mail receipt, respondent was served on July 21, 2016 with a cover letter, notice of hearing and complaint, all dated July 6, 2016. See Staff Exhibits 1 and 2; see also Hearing Record.
9. Respondent failed to file an answer to the complaint. See Hearing Record. Although the cover letter and notice of hearing informed respondent that a pre-hearing conference was scheduled for August 17, 2016, staff and respondent agreed to reschedule the pre-hearing conference pending settlement discussions. By letter dated October 3, 2016, Department staff advised respondent that the pre-hearing conference was re-scheduled for October 21, 2016. See Staff Exhibits 1, 2 and 4; see also Hearing Record.
10. Respondent failed to appear at the pre-hearing conference on October 21, 2016. See Hearing Record.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint. See 6 NYCRR § 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." 6 NYCRR § 622.15(a). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing." 6 NYCRR § 622.8(c); see also 6 NYCRR § 622.15(a) ("A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing").

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR § 622.15(b)(1)-(3).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted). In addition, in support of a motion for a default judgment, staff must

“provide proof of the facts sufficient to support the claim.” Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

Department staff’s proof presents a prima facie case demonstrating that respondent committed the violations alleged in the complaint. The record shows that Department staff served the notice of hearing and complaint upon respondent, and that respondent failed to file an answer to the complaint and failed to appear at the pre-hearing conference on October 21, 2016. The notice of hearing advised respondent that failure to answer and failure to attend the pre-hearing conference was mandatory, and if respondent failed to appear, the record would be opened and staff would move for a default judgment for the relief requested in the complaint. Department staff submitted a proposed order and proof of service at the time of the hearing. Department staff is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR § 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent’s absence, demonstrates by a preponderance of the evidence that respondent:

1. failed to renew the facility’s PBS registration in violation of former 6 NYCRR § 612.2(a)(2) and, because the violation has continued after the effective date of new part 613, in violation of current 6 NYCRR § 613-1.9(c);
2. failed to keep the fill port catch basin clear for PBS tank no. 4 at the facility, in violation of former 6 NYCRR § 613.3(d);
3. failed to monitor the cathodic protection system for PBS tank no. 4 at the facility, in violation of former 6 NYCRR § 613.5(b)(2) and, because the violation has continued after the effective date of new part 613, in violation of current 6 NYCRR § 613-2.2(b);
4. failed to maintain monitoring records for leak detection for PBS tank no. 4 at the facility, in violation of former 6 NYCRR § 613.5(b)(4);
5. failed to properly temporarily close PBS tank no. 4 at the facility, in violation of former 6 NYCRR § 613.9(a); and
6. failed to properly label PBS tank no. 4 at the facility, in violation of former 6 NYCRR § 614.3(a).

I recommend that the Commissioner hold that respondent committed the violations alleged and proven.

Department staff seeks a total civil penalty in the amount of six thousand nine hundred dollars (\$6,900). In determining an appropriate civil penalty, staff calculated a maximum statutory penalty of \$208,575,000 for the violations, based upon Environmental Conservation Law (“ECL”) § 71-1929(1), which provides for a civil penalty of up to \$37,500 per day per violation. See Staff Exhibit 11; see also Testimony of Andrea Skalski, Hearing Record.⁴ Staff

⁴ The maximum penalty calculated by staff includes an assumption that all six of the violations were continuing from the date of the inspection to the date of the notice of hearing and complaint. See Staff Exhibit 11 (calculating each violation as \$37,500 x 927 days (11/21/13-07/06/16)). As the testimony revealed, however, respondent demonstrated correction of four of the violations by the June 5, 2015 meeting between the parties. Thus, for each of those four violations, the maximum statutory penalty should have been calculated as \$37,500 times 560 days

also reviewed and applied the Department's Civil Penalty Policy, DEE-1, and the Department's Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule, DEE-22. Staff determined that an appropriate base penalty for the violations alleged is \$5,550, and made an upward adjustment of \$1,350 based upon the importance of compliance to the regulatory scheme, respondent's lack of cooperation and history of non-compliance, and the potential harm that the violations pose to the environment. See Staff Exhibit 11; see also Testimony of Andrea Skalski, Hearing Record.

Staff's requested penalty, which is a fraction of the maximum statutory penalty possible in this matter, is consistent with the applicable provisions of the ECL and the Department's penalty policies. I recommend that the Commissioner impose a civil penalty in the amount that staff has requested, six thousand nine hundred dollars (\$6,900).

Department staff requests that respondent be directed to perform the following corrective actions within thirty (30) days of the effective date of the Commissioner's order: (1) submit a completed PBS application form with the appropriate registration fee; and (2) perform a cathodic protection test on PBS tank no. 4 at the facility and submit the results to the Department. See Staff Exhibit 1, Complaint, at Wherefore Clause ¶ III; see also Hearing Record. Although I find that the relief requested is appropriate, and recommend that the Commissioner grant the requested relief, I recommend that the time frame by which respondent is required to act be measured from service of the Commissioner's order on respondent rather than from the "effective date" of such order. Therefore, I recommend that the Commissioner require respondent to submit a completed PBS application form with the appropriate registration fee, and that respondent perform the cathodic protection test and submit the results to the Department, within thirty (30) days of service of the Commissioner's order on respondent.

Conclusions of Law

Based upon the record, I conclude that Department staff is entitled to a default judgment pursuant to 6 NYCRR § 622.15, and that staff has proved by a preponderance of the evidence at hearing that respondent committed the violations alleged in the complaint and discussed above.

Recommendations

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

1. granting Department staff's motion for default, holding respondent in default pursuant to the provisions of 6 NYCRR § 622.15;
2. holding that, based upon the preponderance of the evidence adduced at the hearing, respondent violated:

(11/21/13-06/05/2015), or \$21,000,000 per cause of action. The revised statutory maximum penalty for the six violations would therefore be as follows: (\$37,500 per day x 927 days x 2 causes of action) + (\$37,500 per day x 560 day x 4 causes of action), for a total of \$153,525,000. The requested penalty of \$6,900 is a fraction of even this revised and reduced statutory maximum penalty.

- a. former 6 NYCRR § 612.2(a)(2), and current 6 NYCRR § 613-1.9(c), by failing to renew its PBS registration, which expired on July 20, 2012;
 - b. former 6 NYCRR § 613.3(d), by failing to keep the fill port catch basin clear for PBS tank no. 4 at the facility;
 - c. former 6 NYCRR § 613.5(b)(2), and current 6 NYCRR § 613-2.2(b), by failing to monitor the cathodic protection system for PBS tank no. 4 at the facility;
 - d. former 6 NYCRR § 613.5(b)(4), by failing to maintain monitoring records for leak detection for PBS tank no. 4 at the facility;
 - e. former 6 NYCRR § 613.9(a), by failing to properly temporarily close PBS tank no. 4 at the facility; and
 - f. former 6 NYCRR § 614.3(a), by failing to properly label PBS tank no. 4 at the facility;
3. directing respondent to do the following within thirty (30) days of service of the Commissioner's order on respondent:
 - a. pay a civil penalty in the amount of six thousand nine hundred dollars (\$6,900);
 - b. submit a completed petroleum bulk storage registration application to the Department for the above facility, together with the applicable registration fee; and
 - c. perform a cathodic protection test on PBS tank no. 4 at the facility and submit the results to the Department; and
 4. directing such other and further relief as the Commissioner may deem just and appropriate.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
November 1, 2016

EXHIBIT CHART

Matter of R & L Smith Trucking, Inc.

October 21, 2016 –Region 9, 270 Michigan Ave., Buffalo, New York

DEC Case No. R9-20150219-13 - Edinol File No. 030331080038

Exhibit No.	Description	ID'd	Rec'd Into Evid.	Offered By	Notes
1	Cover Letter from Teresa J. Mucha, Esq. to respondent dated July 6, 2016. Notice of Hearing and Complaint, dated July 6, 2016.	✓	✓	Department Staff	
2	Certified Mail return receipt reflecting delivery on July 21, 2016.	✓	✓	Department Staff	
3	NYS DOS Corporate Entity Information, dated October 20, 2016.	✓	✓	Department Staff	
4	Cover Letter from Teresa J. Mucha, Esq. to respondent dated October 3, 2016.	✓	✓	Department Staff	
5	Facility Information Report, PBS No. 9-385395, printed October 13, 2016.	✓	✓	Department Staff	
6	PBS Application form filed for PBS No. 9-385395, received July 3, 2007.	✓	✓	Department Staff	
7	PBS Certificate No. 9-385395 issued July 3, 2007, expiration date July 20, 2012.	✓	✓	Department Staff	
8	NYS DEC PBS Regulations Inspection Report, dated November 21, 2013	✓	✓	Department Staff	
9	Photograph of fill port catch basin	✓	✓	Department Staff	
10	Notice of Violation dated November 26, 2013	✓	✓	Department Staff	
11	Penalty Calculation Sheet	✓	✓	Department Staff	