

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

In the Matter of the Alleged Violations of Article 17 of
the New York State Environmental Conservation Law
(ECL) and Part 613 of Title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of
New York (6 NYCRR),

ORDER

DEC File No. 12-33
R9-20120524-53A

-by-

A & P MART and ARUNDEEP VIJ,

Respondents.

This administrative enforcement proceeding concerns the alleged failure of respondents A & P Mart and Arundeeep Vij (respondents) to comply with Consent Order No. R9-20120524-53, effective October 15, 2012 (2012 consent order) (Exhibit [Ex.] 8) and the revised compliance schedule to the 2012 consent order, effective on February 25, 2013 (Ex. 9). Respondent Arundeeep Vij owns respondent A & P Mart, a business that includes a Petroleum Bulk Storage Facility (PBS #9-060747), which is located at 4641 Maple Road, Amherst, NY 14226 (see Exs. 3, 4).

The complaint alleges a single cause of action related to respondents' failure to comply with the 2012 consent order and its revised compliance schedule. Specifically, staff of the New York State Department of Environmental Conservation (Department) alleges that respondents: (1) failed to submit copies of the leak detection monitoring records for the tanks identified as numbers 4A and 4B for the weeks of February 22, 2013 and March 15, 2013; and (2) submitted a check for three consent order installment payments totaling fifteen hundred dollars (\$1,500), and that check was returned by the bank for insufficient funds (see Ex. 2, Complaint ¶¶ 18-22).

On March 28, 2013, Department staff served respondents with the notice of hearing and complaint dated March 20, 2013 (see Exs. 1A, 1B). The cover letter accompanying the notice of hearing and complaint also informed respondents that: (i) the matter was scheduled for a calendar call in the Region 9 offices on April 26, 2013; (ii) respondents were required to appear at the calendar call; and (iii) should respondents fail to appear at the calendar call, the Department may move for a default judgment against respondents (see Ex. 2).

Administrative Law Judge (ALJ) Richard R. Wissler presided at the April 26, 2013 calendar call. Respondents did not appear at the calendar call, and counsel for the Department stated that no answer to the complaint had been received from respondents.

Staff made an oral motion for default judgment in this matter and offered documents in support of the motion which were received into the record.

On May 3, 2013, the matter was assigned to ALJ P. Nicholas Garlick, who prepared the attached default summary report (Default Summary Report). I adopt the Default Summary Report as my decision in this matter, subject to the following comments.

As set forth in the ALJ's Default Summary Report, the ALJ recommends that I: (i) grant Department staff's motion for a default judgment; (ii) hold that respondents violated the terms of the 2012 consent order and its revised compliance schedule; (iii) direct respondents to submit payment of seven thousand dollars (\$7,000); and (iv) direct respondents to submit copies of the leak detection monitoring records for the period of February 22, 2013 through May 17, 2013 (Default Summary Report at 5).

I concur with the ALJ that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15. I also concur that respondents should submit payment of seven thousand dollars (\$7,000), based on the following:

- (a) One thousand five hundred dollars (\$1,500), representing the outstanding unpaid amount of the non-suspended civil penalty under the 2012 consent order and the revised compliance schedule;
- (b) One thousand five hundred dollars (\$1,500), representing the suspended portion of the civil penalty under the 2012 consent order that is due and owing because of respondents' violations of the consent order;
- (c) A civil penalty of four thousand dollars (\$4,000) for respondents' violations of the 2012 consent order and revised compliance schedule. This penalty amount of four thousand dollars (\$4,000) is significantly below the maximum possible civil penalty that could be imposed in this circumstance (see ECL 71-1929; Default Summary Report at 4)¹ and, based on the record, is authorized and appropriate.

Respondents are directed to submit to the Department the payment of seven thousand dollars (\$7,000) within thirty (30) days of the service of this order upon them.

I am also directing that, within thirty (30) days of service of this order upon respondents, respondents shall submit to Department staff copies of the leak detection monitoring records for the period of February 22, 2013 through May 17, 2013, as required in the 2012 consent order and the revised compliance schedule.

¹ The 2012 consent order cited ECL 71-4003 for calculation of a penalty (see Ex. 8 ¶ 15). The proper provision to calculate that civil penalty, however, is ECL 71-1929. The complaint in this proceeding properly cites ECL 71-1929 with respect to calculating the penalty for violating the 2012 consent order (see Ex. 2, Complaint ¶ 8).

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer the complaint in this matter, respondents A & P Mart and Arundeeep Vij waived their right to be heard at the hearing. Accordingly, the allegations of the complaint are deemed to have been admitted by respondents.
- II. Based upon the allegations of the complaint, and the documents submitted in support of the motion, respondents A & P Mart and Arundeeep Vij have failed to comply with the terms and conditions of consent order R9-20120524-53, (effective October 15, 2012) and the revised compliance schedule (effective February 25, 2013). Specifically, respondents: (1) failed to submit copies of weekly leak detection monitoring records for the tanks identified as numbers 4A and 4B; and (2) failed to pay the civil penalty required by the 2012 consent order and paragraph I.1 of the revised compliance schedule.
- III. Within thirty (30) days of the service of this order on respondents, respondents shall submit payment of seven thousand dollars (\$7,000), comprised of:
 - A. One thousand five hundred dollars (\$1,500), representing the outstanding unpaid amount of the non-suspended civil penalty under the 2012 consent order and the revised compliance schedule;
 - B. One thousand five hundred dollars (\$1,500), representing the suspended portion of the civil penalty under the 2012 consent order that is due and owing because of respondents' violations of the consent order; and
 - C. A civil penalty of four thousand dollars (\$4,000) for respondents' violations of the 2012 consent order and the revised compliance schedule.

Payment of the seven thousand dollars (\$7,000) shall be made in the form of a cashier's check, certified check, or money order made payable to the order of the New York State Department of Environmental Conservation.
- IV. Within thirty (30) days of the service of this order upon respondents, A & P Mart and Arundeeep Vij shall submit to Department staff copies of the leak detection monitoring records for the period of February 22, 2013 through May 17, 2013.
- V. The monetary payment and the leak detection monitoring records, as referenced in paragraphs III and IV, respectively, of this order, shall be mailed or hand-delivered to:

New York State Department of Environmental Conservation
Region 9 Office

270 Michigan Avenue
Buffalo, New York 14203-2999
Attention: Teresa J. Mucha, Assistant Regional Attorney

- VI. Any questions or other correspondence regarding this order shall also be addressed to the attention of Teresa J. Mucha, Esq. at the address referenced in paragraph V of this order.
- VII. The provisions, terms and conditions of this order shall bind respondents A & P Mart and Arundee Vj, their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
December 17, 2013

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of
the New York State Environmental Conservation Law
("ECL") and Part 613 of Title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of
New York ("6 NYCRR"),

DEFAULT SUMMARY
REPORT
CASE NO. 12-33
R9-20120524-53A

-by-

A & P MART and ARUNDEEP VIJ,

Respondents.

This default summary report addresses an oral motion for default pursuant to 6 NYCRR 622.15, made by staff of the New York State Department of Environmental Conservation ("Department Staff") at the Region 9 calendar call on April 26, 2013 before Administrative Law Judge ("ALJ") Richard R Wissler. On March 28, 2013, Department Staff served a notice of hearing and complaint on respondents A & P Mart and Arundeeep Vij ("respondents") (see Exhibits ["Exhs."] 1A & 1B [affidavits of service]; see also Exh. 2 [notice of hearing and complaint]). Pursuant to 6 NYCRR 622.4(a), an answer was due to be filed within twenty days of receipt of the notice of hearing and the complaint. The time for respondents to reply expired on or about April 17, 2013. At the April 26, 2013 calendar call, counsel for Department Staff stated that no answer had been received. Respondents did not appear at the calendar call. The matter was assigned to the undersigned ALJ to prepare this default summary report.

Respondent Arundeeep Vij owns respondent A & P Mart, a business that includes a Petroleum Bulk Storage ("PBS") Facility (PBS #9-060747, Exhs. 3, 4 & 10). On November 15, 2010, Department Staff performed an inspection of the facility and detected several violations (Exh. 5). Department Staff notified the respondents of these violations by letter dated December 10, 2010 (Exh. 6). These violations were settled through the execution of consent order LER9-10-021208, effective April 4, 2011 ("2011 consent order", Exh. 7). Respondents failed to perform the corrective actions required by the compliance schedule in the 2011 consent order, and executed consent order R9-20120524-53, effective October 15, 2012 ("2012 consent order", Exh. 8) to resolve these violations. The respondents then failed to comply with the 2012 consent order, and failed to submit the entire civil penalty. In settlement of the breach of the 2012 consent order, respondents executed a revised compliance schedule, which became effective on February 25, 2013 (Exh. 9), and wrote a check for a civil penalty of \$1,500 (Exh. 11, Affidavit of Andrea E. Skalski, dated April 30, 2013 ["Skalski Aff."], at Exh. B).

Department Staff's complaint (Exh. 2) alleges a single cause of action related to the respondents' failure to comply with the 2012 consent order (Exh. 8) and its revised compliance schedule (Exh. 9). Specifically, Department Staff allege that the respondents: (1) failed to submit copies of the leak detection monitoring records for the tanks identified as numbers 4A and 4B for the weeks of February 22, 2013 and March 15, 2013; and (2) failed to pay the civil penalty required by the 2012 consent order and paragraph I.1 of the revised compliance schedule when the respondents' check was returned by the bank for insufficient funds (see Exh. 2, ¶¶18-22).

The complaint seeks an order of the Commissioner (1) finding respondents in violation of the 2012 consent order and its revised schedule of compliance; (2) ordering respondents to pay a civil penalty in the amount of \$7,000; (3) directing respondents to submit copies of the leak detection monitoring records for the period of February 22, 2013 through May 17, 2013; and (4) granting such other and further relief as the Commissioner may deem just and proper (*id.* at Wherefore Clause).

Default Provisions

Section 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Section 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

In Matter of Alvin Hunt d/b/a Our Cleaners (Decision and Order of the Commissioner, July 25, 2006) ("Hunt"), the Commissioner set forth the process to be followed by an ALJ in reviewing a default motion. First, an examination of the proof of service of notice of hearing and complaint is required as well as the proof of the respondent's failure to appear or file a timely answer. Then an ALJ must consider whether the complaint states a claim upon which relief may be granted and, if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported.

In this case, Department Staff has met the requirements of 6 NYCRR 622.15, and the complaint sets forth a single cause of action for which relief can be granted. The complaint alleges that the respondents agreed to the revised compliance schedule to the 2012 consent order, which required them to submit copies of the leak detection monitoring records for the tanks identified as numbers 4A and 4B for the weeks of February 22, 2013 and March 15, 2013, and to pay the civil penalty of \$1,500. Department Staff allege that the monitoring reports have not been submitted, and provided a copy of the returned check for \$1,500 from the respondents. At the April 26, 2013 calendar call, Teresa J. Mucha, Esq., counsel for Department Staff, stated that no answer has been received, though due no later than April 17, 2013. Based on this information, Department Staff is entitled to a judgment of default in this matter.

As the Commissioner stated in Hunt, “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]” (Hunt, at 6). Accordingly, the findings of fact set forth below are based upon the documents submitted into the record, as identified in the attached exhibit list.

Applicable Regulatory Provisions

Regulations dealing with the handling and storage of petroleum applicable to the PBS facility at the A & P Mart are found at 6 NYCRR Part 613. Section 613.5(b) of 6 NYCRR requires the monitoring of all leak detection systems, and 6 NYCRR 613.5(b)(4) requires that monitoring records for leak detection systems must be maintained on the premises for a period of at least one year.

The 2012 consent order and revised compliance schedule were executed pursuant to the Department’s authority under titles 3 and 10 of article 17 of the ECL to regulate the storage and handling of petroleum. ECL 71-1929 provides that any person who violates any provision of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable for a penalty not to exceed thirty-seven thousand five hundred dollars (\$37,500) per day.

Findings of Fact

1. Respondent Arundeeep Vij owns respondent A & P Mart, a business that includes a Petroleum Bulk Storage Facility (PBS #9-060747, Exhs. 3, 4 & 10). A & P Mart is located at 4641 Maple Road, Amherst, NY 14226.
2. On November 15, 2010, Department Staff performed an inspection of the facility and detected several violations (Exh. 5). Department Staff notified the respondents of these violations by letter dated December 10, 2010 (Exh. 6). These violations were settled through the execution of Consent Order No. LER9-10-021208, effective April 4, 2011 (“2011 consent order”, Exh. 7). Respondents failed to perform the corrective actions required by the compliance schedule in the 2011 consent order, and executed Consent Order No. R9-20120524-53, effective October 15, 2012 (Exh. 8) to resolve these violations. The respondents failed to comply with the 2012 consent order and failed to submit the entire civil penalty. In settlement of the breach of the 2012 consent order, respondents executed a revised compliance schedule, which became effective on February 25, 2013 (Exh. 9) and wrote a check for a civil penalty of \$1,500. This check was returned for insufficient funds (see Skalski Aff., at ¶ 16; see also id. Exh. B).
3. Respondents have failed to comply with the 2012 consent order (Exh. 8) and its revised compliance schedule (Exh. 9). Specifically, respondents: (1) failed to

submit copies of the leak detection monitoring records for the tanks identified as numbers 4A and 4B for the weeks of February 22, 2013 and March 15, 2013; and (2) failed to pay the civil penalty required by the 2012 consent order and paragraph I.1 of the revised compliance schedule when the respondents' \$1,500 check was returned by the bank for insufficient funds.

4. On March 28, 2013, Department Staff personally served the respondents with the notice of hearing and the complaint (see Exhs. 1A and 1B).
5. The respondents failed to answer the complaint.

Discussion

The record of this proceeding demonstrates that respondents failed to comply with the terms of the 2012 consent order (Exh. 8) and its revised compliance schedule (Exh. 9). Specifically, respondents: (1) failed to submit copies of the leak detection monitoring records for the tanks identified as numbers 4A and 4B for the weeks of February 22, 2013 and March 15, 2013 as required by paragraphs I.3 and I.4 of the revised compliance schedule; and (2) failed to pay the civil penalty required by the 2012 consent order and paragraph I.1 of the revised compliance schedule.

The record shows that respondents did not answer the complaint. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

The affidavit of Department Staff engineer Andrea E. Skalski addresses respondents' failure to comply with the 2012 consent order and staff's demand for payments under the consent order and for a civil penalty. In her affidavit, Ms. Skalski states that consideration was given to the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990), and several factors thereunder, including economic benefit of noncompliance, gravity of violation, and consideration of aggravating and mitigating factors (see Skalski Aff. ¶¶ 8-18). The maximum penalty authorized under the statute for these violations is in excess of \$1.275 million (see id. ¶ 7). This amount is calculated by multiplying the maximum daily penalty of \$37,500 authorized by ECL 71-1929 by the number of days the violation occurred, a total of 34 days (from February 22, 2013 through March 28, 2013) (id.).

Department Staff is seeking from respondents a total payment of \$7,000, which is the sum of the following components: (1) the \$1,500 that was due, but not paid, under the 2012 consent order and revised compliance schedule; (2) the \$1,500 suspended penalty agreed to in the 2012 consent order that is now due because of the respondents' failure to comply; (3) the \$20 dishonored check fee charged to the Department as a result of the respondents insufficient funds; and (4) a \$3,980 civil penalty based on violations of the 2012 consent order.

Based on this record, the \$7,000 amount requested by Department staff is authorized and appropriate.

Department Staff also requests language in the Commissioner's order that directs respondents to submit copies of the leak detection monitoring records for the period of February 22, 2013 through May 17, 2013. Based on this record, this request is authorized and appropriate.

Recommendation

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

1. granting Department Staff's motion for default, finding respondents in default pursuant to the provisions of 6 NYCRR 622.15 for failing to answer the complaint;
2. finding respondents in violation of the terms of the 2012 consent order and its revised compliance schedule, as alleged in the complaint;
3. directing respondents to pay seven thousand dollars (\$7,000) to the Department;
4. directing respondents to submit copies of the leak detection monitoring records for the period of February 22, 2013 through May 17, 2013; and
5. directing such other and further relief as he may deem just and proper.

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
May 13, 2013

EXHIBIT CHART

Matter of A & P Mart and Arundeeep Vij – Region 9

Calendar Call: April 26, 2013

Edirol File No. 040526112359

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1A	Affidavit of personal service on Arundeeep Vij sworn to April 25, 2013	✓	✓	Department Staff	
1B	Affidavit of personal service on A & P Mart sworn to April 25, 2013	✓	✓	Department Staff	
2	Notice of Hearing and Complaint with cover letter dated March 20, 2013	✓	✓	Department Staff	
3	PBS Certificate 9-060747	✓	✓	Department Staff	
4	Facility information report	✓	✓	Department Staff	
5	Inspection report of Andrea Skalski dated November 15, 2010	✓	✓	Department Staff	
6	Notice of Violation dated December 10, 2010	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	Order on Consent Executed by Region 9 Regional Director on April 4, 2011	✓	✓	Department Staff	
8	Order on Consent Executed by Region 9 Regional Director on October 15, 2012	✓	✓	Department Staff	
9	Revised schedule of compliance Executed by Region 9 Regional Director on February 25, 2013	✓	✓	Department Staff	
10	PBS application Signed by Arundeeep Vij on February 28, 2012 Received by DEC Staff on March 5, 2012	✓	✓	Department Staff	
11	Affidavit of Andrea Skalski with attachments dated April 30, 2013	✓	✓	Department Staff	
12	DEC Staff's Proposed Order	✓	✓	Department Staff	