

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

-by-

DEC Case No.
R6-20110112-03
PBS No. 6-135933

YVONNE M. COLBY and RONALD C. GREEN, JR.,

Respondents.

This administrative enforcement proceeding concerns the failure of respondents Yvonne M. Colby and Ronald C. Green, Jr., to comply with New York State's petroleum bulk storage regulations at a petroleum bulk storage facility (PBS No. 6-135933) that respondents own in the hamlet of Edwardsville at 3287 County Road 6 (NYS Route 58 and Black Lake Road), Town of Morristown, St. Lawrence County, New York ("site").

Located at the facility, known as Edwardsville Grocery, Inc., are four petroleum bulk storage tanks: two underground tanks, numbered 01A and 01B, which have been used to store gasoline; and two aboveground tanks, numbered 006 and 007, which have been used to store kerosene. Tank 01A has a capacity of 5,000 gallons, tank 01B has a capacity of 3,000 gallons, tank 006 has a capacity of 275 gallons, and tank 007 has a capacity of 500 gallons. The four tanks have a combined capacity of 8,775 gallons and, accordingly, the site is subject to the State's petroleum bulk storage regulations (see 6 NYCRR 612.1[b]) (applicability to all aboveground and underground petroleum storage facilities with a combined storage capacity over 1,100 gallons).

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 dated August 11, 2011 upon respondents. The papers were personally served on each respondent on August 12, 2011. 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").

Department staff's complaint ("complaint") sets forth fifteen causes of action arising from violations of the applicable petroleum bulk storage regulations:

- a. 6 NYCRR 612.2(b) – Failure to reregister the PBS facility within 30 days of its acquisition by respondents;
- b. 6 NYCRR 612.2(e) – Failure to display a valid PBS registration certificate at the facility;

- c. 6 NYCRR 613.3(b) – Failure to properly color-code the fill port for tank 006;
- d. 6 NYCRR 613.3(c)(1) – Failure to install shear valves in the supply lines at the inlet of the dispensers for tanks 007, 01A, and 01B;
- e. 6 NYCRR 613.3(c)(2) – Failure to install a shutoff valve for the gravity-fed motor fuel dispenser on tank 007;
- f. 6 NYCRR 613.3(c)(6)(i)(a) – Failure to install secondary containment around tanks 006 and 007 which are within close proximity to Black Lake and could reasonably be expected to discharge petroleum to the waters of the state;
- g. 6 NYCRR 613.3(c)(3)(ii) – Failure to clearly mark the design capacity, working capacity, and identification number of tank 006 on the tank and at the gauge;
- h. 6 NYCRR 613.3(d) – Failure to maintain in good working order the gauges and other spill prevention equipment for tank 01A;
- i. 6 NYCRR 613.4(a)(1) – Failure to maintain daily inventory records for the purpose of detecting leaks from tanks 01A and 01B;
- j. 6 NYCRR 613.5(b)(2) – Failure to monitor at least annually the adequacy of the cathodic protection system of tanks 01A and 01B;
- k. 6 NYCRR 613.5(b)(3) – Failure to monitor at least weekly for traces of petroleum in tanks 01A and 01B and associated piping;
- l. 6 NYCRR 613.6(a) – Failure to perform monthly inspections of tanks 006 and 007;
- m. 6 NYCRR 613.9(b) – Failure to properly close the facility which was permanently out-of-service;
- n. 6 NYCRR 614.9(c) – Failure to protect the exteriors of tanks 006 and 007 with adequate surface coating; and
- o. 6 NYCRR 614.7(d) – Failure to maintain accurate drawings or as-built plans showing the size and location of tanks 01A and 01B.

Department staff sought the assessment of a civil penalty in the amount of forty-three thousand dollars (\$43,000) for these violations, allowing for the suspension of up to half of the penalty contingent upon respondents' compliance with any order issued with respect to the facility (see Compliant, ¶¶ XVI and XVII).

Respondents failed to answer the complaint and failed to appear for the prehearing conference scheduled in the notice of hearing served with the complaint.

A notice of hearing dated January 3, 2012 was received by respondents on January 4, 2012, stating that, on February 9, 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 and failed to appear for the prehearing conference. Respondents were advised that they could appear personally or by counsel on February 9, 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 matter was assigned to ALJ Richard R. Wissler, who presided at the calendar call on February 9, 2012. Respondents did not appear at the February 9, 2012, calendar call or

otherwise respond to the notice. Accordingly, Department staff moved for a default judgment at the calendar call.

ALJ Wissler has prepared the attached default summary report in which he recommends that the Department's motion for default judgment be granted, respondents be found in violation of the various sections of 6 NYCRR parts 612, 613 and 614 enumerated in the complaint, and respondents be directed to undertake various remedial activities relating to the petroleum bulk storage tanks at the facility. In addition, the ALJ recommends that the civil penalty of forty-three thousand dollars (\$43,000) that Department staff requests be imposed. Of this amount, he also concurs that twenty-one thousand five-hundred dollars (\$21,500) of the penalty should be immediately payable, and twenty-one thousand five-hundred dollars (\$21,500) should be suspended contingent upon respondents' completion of the prescribed remedial activity.

I adopt the default summary report as my decision in this matter, subject to the following comments.

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, 613, and 614. The civil penalty that Department staff has requested and the ALJ recommends is authorized and appropriate.

Department staff has also included in its proposed order certain remedial actions for respondents to undertake with respect to the site, including registration of the facility, payment of registration fees, permanent closure of the facility, and preparation of a report on the removal of the tanks and on the closure of the facility. The proposed remedial activities are authorized and warranted.

However, in light of the cost of the remedial activities required pursuant to this order, I am reducing the payable amount of the penalty from twenty-one thousand five hundred dollars (\$21,500) to ten thousand dollars (\$10,000). The overall civil penalty of forty-three thousand dollars (\$43,000) remains the same, but the suspended portion of the penalty is increased to thirty-three thousand dollars (\$33,000). This will allow respondents to devote more of their financial resources to the immediate and proper removal of the tanks from the site.¹ In the event that respondents fail to comply with the terms and conditions of this order, including but not limited to the satisfactory completion of the remedial activities and the timely submission of the payable portion of the penalty, the suspended portion of the penalty shall immediately become due and payable.

¹ Department staff conducted an inspection of the facility on August 27, 2010 (see complaint, ¶ 5). Department staff indicates that the facility is not in operation and that, on information and belief, the facility discontinued operation in July 2010 and an auction was held in August 2010 to sell grocery store equipment from the facility (see id.). Based on the record before me, Department staff did not issue a notice of violation to respondents prior to the service of the notice of hearing and complaint.

This order establishes the date by which payment of the non-suspended portion of the penalty (that is, ten thousand dollars [\$10,000]) is due and payable and the dates by which the remedial activities are to be completed. I encourage respondents to contact Department staff to discuss the closure requirements for the facility to ensure that the appropriate requirements are satisfied.

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

- I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.
- II. Respondents Yvonne M. Colby and Ronald C. Green, Jr., 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 against respondents are deemed to have been admitted by respondents.
- III. Respondents Yvonne M. Colby and Ronald C. Green, Jr., are adjudged to have violated 6 NYCRR 612.2(b), 612.2(e), 613.3(b), 613.3(c)(1), 613.3(c)(2), 613.3(c)(6)(i)(a), 613.3(c)(3)(ii), 613.3(d), 613.4(a)(1), 613.5(b)(2) and (3), 613.6(a), 613.9(b), 614.7(d), and 614.9(c).
- IV. Respondents are hereby assessed, jointly and severally, a civil penalty in the amount of forty-three thousand dollars (\$43,000). Of this penalty, thirty-three thousand dollars (\$33,000) is suspended on the condition that respondents complete, to Department staff's satisfaction, the remedial activities set forth in paragraph V of this order and comply with all other terms and conditions of this order.

The non-suspended portion of the civil penalty, that is, ten thousand dollars (\$10,000), is due and payable within thirty (30) days after service of this order upon respondents. 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:

Nels G. Magnuson, Esq.
Office of the General Counsel
Region 6, NYSDEC
317 Washington Street
Watertown, New York 13601

Should respondents fail to complete the remedial activities set forth in paragraph V of this order to Department staff's satisfaction or otherwise comply with all other terms and conditions of this order, 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.

V. Respondents shall:

- A. register the petroleum bulk storage facility with the Department pursuant to 6 NYCRR 612.2(b) and pay \$500 in registration fees for one 5-year registration period as required by section 17-1009 of the Environmental Conservation Law within thirty (30) days after service of this order upon respondents;
- B. permanently close the petroleum bulk storage facility, in accordance with the regulatory requirements in 6 NYCRR 613.9(b), within sixty (60) days after service of this order upon respondents. As part of the closure, respondents shall, among other things:
 - notify Department staff within thirty (30) days prior to permanent closure of the facility;
 - remove liquid and sludge from the tanks and connecting lines. Any waste products removed must be disposed of in accordance with applicable legal requirements;
 - render the tanks free of any petroleum vapors; and
 - remove the four petroleum bulk storage tanks and associated piping at the facility; and
- C. submit a report, in a form, manner and content satisfactory to Department staff, that describes the removal of the petroleum storage tanks and the closure of the facility. The report must include, among other things, a description of the removal and closure activities, all sampling data taken in conjunction with the facility closure, and the locations where any wastes arising from the removal of the tanks and closure of the facility were disposed. The report shall be submitted to Department staff within ninety (90) days after service of this order upon respondents.

VI. All communications from respondent to the Department concerning this order shall be directed to Nels G. Magnuson, Esq., at the address referenced in paragraph IV of this order, except that questions regarding the remedial activities and all proof of compliance with those activities shall be directed to Ronald J. Novak, P.E. at the following address:

Mr. Ronald J. Novak, P.E.
Regional Enforcement Coordinator
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601

VII. The provisions, terms and conditions of this order shall bind respondents Yvonne M. Colby and Ronald C. Green, Jr., and their agents, heirs, successors, and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

/s/

By: _____

Joseph J. Martens

Commissioner

Dated: June 21, 2012
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) and 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”),

DEFAULT SUMMARY REPORT

DEC Case No.
R6-20110112-03

PBS No. 6-135933

-by-

YVONNE M. COLBY and RONALD C. GREEN, JR.,

Respondents.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”), on August 12, 2011, individually and personally served respondents Yvonne M. Colby and Ronald C. Green, Jr., doing business as Edwardsville Grocery, Inc., with a notice of hearing and complaint, dated August 11, 2011, alleging violations of various sections of the implementing regulations of ECL article 17 found at 6 NYCRR parts 612 through 614. Respondents’ convenience store is a petroleum bulk storage (“PBS”) facility subject to the Department’s regulations and is located at 3287 County Road 6 (NYS Route 58 and Black Lake Road), Town of Morristown, St. Lawrence County, New York 13646 (“facility”). The complaint alleges that during an inspection of the facility on August 27, 2010, the following violations were observed or documented:

- a. 6 NYCRR 612.2(b) – Failure to reregister the PBS facility within 30 days of its acquisition by respondents.
- b. 6 NYCRR 612.2(e) – Failure to display a valid PBS registration certificate at the facility.
- c. 6 NYCRR 613.3(b) - Fill port not color coded properly for tank 006.
- d. 6 NYCRR 613.3(c)(1) – Failure to install shear valves in the supply lines at the inlet of the dispensers for tanks 007, 01A and 01B.
- e. 6 NYCRR 613.3(c)(2) – Failure to install a shutoff valve for the gravity-fed motor fuel dispenser on tank 007.
- f. 6 NYCRR 613.3(c)(6)(i)(a) – Failure to install secondary containment around aboveground petroleum storage tanks 006 and 007 which could reasonably be expected to discharge petroleum to the waters of the state.
- g. 6 NYCRR 613.3(c)(3)(ii) – Failure to clearly mark the design capacity, working capacity, and identification number of tank 006 on the tank and at the gauge.
- h. 6 NYCRR 613.3(d) – Failure to maintain the gauges and/or other spill prevention equipment for underground tank 01A in good working order.
- i. 6 NYCRR 613.4(a)(1) – Failure to maintain daily inventory records for the purpose of detecting leaks from underground storage tanks 01A and 01B.

- j. 6 NYCRR 613.5(b)(2) – Failure to monitor at least annually the adequacy of the cathodic protection system of tanks 01A and 01B.
- k. 6 NYCRR 613.5(b)(3) – Failure to monitor at least weekly for traces of petroleum in underground storage tanks 01A and 01B and associated piping.
- l. 6 NYCRR 613.6(a) – Failure to perform monthly inspections of aboveground tanks 006 and 007.
- m. 6 NYCRR 613.9(b) – Failure to properly close the facility which was permanently out-of-service.
- n. 6 NYCRR 614.9(c) – Failure to protect the exteriors of tanks 006 and 007.
- o. 6 NYCRR 614.7(d) – Failure to maintain accurate drawings or as-built plans showing the size and location of tanks 01A and 01B.

The complaint seeks an order of the Commissioner (1) finding respondents in violation of the above enumerated sections of 6 NYCRR parts 612 through 614; (2) directing respondents to permanently close the facility in accordance with 6 NYCRR part 613 within 60 days of the service of the Commissioner’s order; (3) directing respondents to provide the Department with a report regarding the removal of the petroleum storage tanks at the facility and permanent closure of the facility; (4) assessing a total civil penalty of \$43,000.00, but suspending up to half of this amount upon compliance with the aforementioned conditions; and (5) 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 August 12, 2011, 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 September 21, 2011, at 10:00 AM. Respondents failed to answer the complaint and failed to appear for the scheduled prehearing conference.

On January 4, 2012, respondents were served with a notice of hearing dated January 3, 2012, stating that on February 9, 2012, the matter would be called before an Administrative Law Judge (“ALJ”) of the Department’s Office of Hearings and Mediation Services (“OHMS”). This second notice stated that the Department intended to move for a default judgment in the matter inasmuch as respondents had failed to answer the complaint dated August 11, 2011, and had failed to appear for the prehearing conference scheduled in the notice of hearing served with that complaint. Respondents were advised that they could appear personally or by counsel on February 9, 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 further stated that Department staff would be seeking a civil penalty in the amount of \$43,000.00 for the violations alleged in the complaint. Respondents did not file a response to the notice and did not appear at the February 9, 2012, calendar call.

On February 9, 2012, the calendar call was convened before the undersigned ALJ at the Department’s Region 6 sub-office, 7327 NYS Route 812, Lowville, New York 13367. At that time, respondents’ matter was called. Department staff was represented by Nels G. Magnuson,

Esq., Assistant Regional Attorney, Region 6 Headquarters, New York State Department of Environmental Conservation, 317 Washington Street, Watertown, New York 13601. No one appeared on behalf of respondents.

Pursuant to 6 NYCRR 622.15, Mr. Magnuson, on behalf of Department staff, orally moved for a default judgment based upon respondents' failure to answer the complaint dated August 11, 2011, and failure to appear for the prehearing conference scheduled in the notice of hearing served with that complaint. As part of its motion, Department staff submitted the following documents for the record:

1. Two affidavits of personal service, each sworn to by New York State Environmental Conservation Office Joel T. Schneller on August 12, 2011. The first affidavit states that on August 12, 2011, ECO Schneller personally served respondent Ronald C. Green, Jr., with the notice of hearing and complaint. The second affidavit states that on August 12, 2011, ECO Schneller personally served respondent Yvonne M. Colby with the notice of hearing and complaint.
2. The notice of hearing and complaint dated August 11, 2011.
3. Two affidavits of service by certified mail, return receipt requested, each sworn to by April L. Sears on January 5, 2012. The first affidavit states that on January 3, 2012, Ms. Sears sent respondent Ronald C. Green, Jr., a copy of the notice of default hearing scheduled for February 9, 2012, the notice being dated January 3, 2012. As stated in the affidavit, the certified mailing to respondent Ronald C. Green, Jr., bore United States Postal Service ("USPS") domestic return receipt article number 7007 2680 0000 4936 1748. Attached to this affidavit is a copy of the USPS domestic return receipt received back by the Departments, signed as received on January 4, 2012. The second affidavit states that on January 3, 2012, Ms. Sears sent respondent Yvonne M. Colby a copy of the notice of default hearing scheduled for February 9, 2012, the notice being dated January 3, 2012. As stated in the affidavit, the certified mailing to respondent Yvonne M. Colby bore United States Postal Service ("USPS") domestic return receipt article number 7007 2680 0000 4936 1731. Attached to this affidavit is a copy of the USPS domestic return receipt received back by the Departments, signed as received on January 4, 2012.
4. A copy of the notice of default hearing of February 9, 2012, dated January 3, 2012, with a cover letter also dated January 3, 2012.
5. A proposed Commissioner's order.

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. 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 the decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted].” Accordingly, the following findings of fact are based upon the documents submitted into the record, as identified above.

Findings of Fact

1. Yvonne M. Colby and Ronald C. Green, Jr. (“respondents”) are the owners of Edwardsville Grocery, Inc., located in the hamlet of Edwardsville at 3287 County Road 6 (NYS Route 58 and Black Lake Road), Town of Morristown, St. Lawrence County, New York 13646 (the “facility”). (Department Staff Exhibit 2, Complaint, Paragraphs 3 and 4.)

2. Respondents possess fee title in the real property where the facility is located by virtue of a warranty deed executed on March 4, 2010, by the former owners James H. Snyder, Jr. and Cheryl F. Snyder and recorded in the St. Lawrence County Clerk's Office as Instrument No. R-2010-00002915, on March 4, 2010. (Department Staff Exhibit 2, Complaint, Exhibit A, annexed thereto.)

3. There are four (4) petroleum storage tanks located at the facility. Two of the tanks, tank numbers 01A and 01B, are located underground, while the remaining two tanks, tank numbers 006 and 007, are located aboveground. Tank 01A with a capacity of 5,000 gallons and Tank 01B with a capacity of 3,000 gallons are utilized for gasoline. Tank 006 with a capacity of 275 gallons and Tank 007 with a capacity of 500 gallons are utilized for kerosene. The facility has a combined capacity of 8,775 gallons. (Department Staff Exhibit 2, Complaint, Paragraph 4, Exhibits B and C, annexed thereto.)

4. The facility was last registered with the Department on June 24, 2005, upon the issuance of Petroleum Bulk Storage (“PBS”) Certificate No. 6-135933 to the former owners, James H. Snyder, Jr. and Cheryl F. Snyder. This registration expired on June 24, 2010. (Department Staff Exhibit 2, Complaint, Exhibits B and C, annexed thereto.)

5. On August 27, 2010, Department staff inspected the facility and determined that it was not in operation. As noted in the complaint, on information and belief, the facility discontinued operation in July 2010 and an auction was held in August 2010 to sell the grocery store equipment. (Department Staff Exhibit 2, Complaint, Paragraph 5.)

6. During its inspection of respondents' facility on August 27, 2010, Department staff observed that:

- a. Respondents did not have a current and valid registration for the facility, having failed to reregister the facility on or before April 3, 2010, said date being 30 days after they acquired ownership of the facility, a violation of 6 NYCRR 612.2(b). (Department Staff Exhibit 2, Complaint, Paragraphs 6-9, and Exhibits A, B and C, annexed thereto.)
- b. No current and valid PBS certificate was posted at the facility, a violation of 6 NYCRR 612.2(e). (Department Staff Exhibit 2, Complaint, Paragraphs 10-13.)
- c. Tank 006 was not properly color coded, a violation of 6 NYCRR 613.3(b) which states: "(1) Beginning five years from the effective date of these regulations, the owner or operator must permanently mark all fill ports to identify the product inside the tank. These markings must be consistent with the color and symbol code of the American Petroleum Institute" (Department Staff Exhibit 2, Complaint, Paragraphs 14-17.)
- d. Tank 007, Tank 01A and Tank 01B did not have shear valves in the supply lines at the inlet of the dispensers for the tanks, a violation of 6 NYCRR 613.3(c)(2) which states: "(c) Requirements for valves, gauges and secondary containment systems. Within five (5) years of the effective date of these regulations, the owner must install ... (2) Shut-off valves for gravity fed motor fuel dispensers. All tanks which cause a gravity head on a dispenser of motor fuels must be equipped with a device such as a solenoid valve which is positioned adjacent to and downstream from the operating valve required in paragraph [613.3(c)(5)] of this subdivision. The valve must be installed and adjusted so that liquid cannot flow by gravity from the tank in case of piping or dispenser hose failure. A valve meeting the standards set forth in NFPA 30A, section 2-1.7 (see section 613.1(g) of this Part) meets the requirements of this subdivision." (Department Staff Exhibit 2, Complaint, Paragraphs 18-21.)
- e. Tank 007 did not have a shutoff valve for the gravity-fed motor fuel dispenser on the tank, a violation of 6 NYCRR 613.3(c)(2) as set forth in Finding of Fact 6(d), above. (Department Staff Exhibit 2, Complaint, Paragraphs 22-25.)
- f. There was no secondary containment around Tank 006 and Tank 007 at the facility, these tanks being in close proximity to Black Lake and, therefore, if compromised, could reasonably be expected to discharge petroleum into waters of New York State, a violation of 6 NYCRR 613.3(c)(6)(i)(a) which states: (c) Requirements for valves, gauges and secondary containment systems. Within five years of the effective date of these regulations, the owner must install ... (6) Secondary containment system for aboveground tanks. (i) A secondary containment system must be installed around any

aboveground petroleum storage tank which: (a) could reasonably be expected to discharge petroleum to the waters of the State” (Department Staff Exhibit 2, Complaint, Paragraphs 26-29.)

- g. Tank 006 was not marked with its design capacity, working capacity, and tank number on the tank or at the gauge, a violation of 6 NYCRR 613.3(c)(3)(ii) which states: “(c) Requirements for valves, gauges and secondary containment systems. Within five years of the effective date of these regulations, the owner must install ... (3) Gauges for aboveground storage tanks ... (ii) The design capacity, working capacity and identification number of the tank must be clearly marked on the tank and at the gauge.” (Department Staff Exhibit 2, Complaint, Paragraphs 30-33.)
- h. Spill prevention equipment was not properly maintained, as specifically evidenced by the observed accumulation of liquids in the fill port catch basin of Tank 01A, a violation of 6 NYCRR 613.3(d) which states: “(d) Maintenance of spill prevention equipment. The owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order.” (Department Staff Exhibit 2, Complaint, Paragraphs 34-37.)
- i. Daily inventory records for the purpose of detecting leaks from underground storage Tanks 01A and 01B were not maintained, a violation of 6 NYCRR 613.4(a)(1) which states: “§ 613.4 Inventory monitoring for underground storage facilities. (a) Inventory tank records. (1) The operator of an underground storage tank must keep daily inventory records for the purpose of detecting leaks. Records must be kept for each tank (or battery of tanks if they are interconnected) and shall include measurements of bottom water levels, sales, use, deliveries, inventory on hand and losses or gains. Reconciliation of records must be kept current, must account for all variables which could affect an apparent loss or gain and must be in accordance with generally accepted practices.” (Department Staff Exhibit 2, Complaint, Paragraphs 38-41.)
- j. The adequacy of the cathodic protection system of Tank 01A and Tank 01B had not been monitored at least annually, a violation of 6 NYCRR 613.5(b)(2) which states: “§613.5 Underground storage facilities - testing and monitoring. (b) Monitoring of corrosion-resistant tanks and pipes ... (2) The adequacy of a cathodic protection system must be monitored at least annually. If at any time the system fails to provide the necessary electrical current to prevent corrosion, the cathodic protection system must be restored within 30 days. Any tank or pipe with a nonworking cathodic protection system will be considered unprotected and must be tested for tightness within one year and retested every five years thereafter until the tank is permanently closed.” (Department Staff Exhibit 2, Complaint, Paragraphs 42-45.)
- k. Underground petroleum storage Tanks 01A and 01B had not been monitored for traces of petroleum at least weekly, a violation of 6 NYCRR 613.5(b)(3) which states: “§613.5 Underground storage facilities - testing and monitoring ... (b) Monitoring of corrosion-resistant tanks and pipes ... (3) The owner or operator must monitor for traces of petroleum at least once per week.” (Department Staff Exhibit 2, Complaint, Paragraphs 46-49.)

- l. Monthly inspections of aboveground petroleum storage Tanks 006 and 007 had not been performed, a violation of 6 NYCRR 613.6(a) which states: “§613.6 Aboveground storage facilities – inspections. (a) Monthly inspections. The owner or operator of an aboveground storage facility must inspect the facility at least monthly. This must include: (1) inspecting exterior surfaces of tanks, pipes, valves and other equipment for leaks and maintenance deficiencies; (2) identifying cracks, areas of wear, corrosion and thinning, poor maintenance and operating practices, excessive settlement of structures, separation or swelling of tank insulation, malfunctioning equipment and structural and foundation weaknesses; and (3) inspecting and monitoring all leak detection systems, cathodic protection monitoring equipment, or other monitoring or warning systems which may be in place at the facility.” (Department Staff Exhibit 2, Complaint, Paragraphs 50-53.)
- m. The facility, which was permanently out-of-service, had not been properly closed in accordance with Department regulations, a violation of 6 NYCRR 613.9(b) which states: “§ 613.9 Closure of out-of-service tanks ... (b) Closure of tanks permanently out-of-service. (1) Any tank or facility which is permanently out of service must comply with the following: (i) Liquid and sludge must be removed from the tank and connecting lines. Any waste products removed must be disposed of in accordance with all applicable State and Federal requirements. (ii) The tank must be rendered free of petroleum vapors. Provisions must be made for natural breathing of the tank to ensure that the tank remains vapor-free. (iii) All connecting lines must be disconnected and removed or securely capped or plugged. Manways must be securely fastened in place. (iv) Aboveground tanks must be stenciled with the date of permanent closure. (v) Underground tanks must either be filled to capacity with a solid inert material (such as sand or concrete slurry) or removed. If an inert material is used, all voids within the tank must be filled. (vi) Aboveground tanks must be protected from floatation in accordance with good engineering practice. (2) Storage tanks or facilities which have not been closed pursuant to paragraph [613.9(b)(1)] above, are subject to all requirements of this Part and Part 612 of this Title including but not limited to periodic tightness testing, inspection, registration and reporting requirements.” (Department Staff Exhibit 2, Complaint, Paragraphs 54-57.)
- n. The exterior of Tanks 006 and 007 had not been protected with adequate surface coating (paint), a violation of 6 NYCRR 614.9(c) which states: “§ 614.9 New aboveground tanks ... (c) Painting of exterior tank surfaces. The exterior surfaces of all new aboveground storage tanks must be protected by a primer coat, a bond coat and two or more final coats of paint, or have an equivalent surface coating system designed to prevent corrosion and deterioration.” (Department Staff Exhibit 2, Complaint, Paragraphs 58-61.)
- o. Accurate drawings or as-built plans showing the size and location of Tanks 01A and 01B at the facility were not maintained, a violation of 6 NYCRR 614.7(d) which states: “§ 614.7 Installation of underground facilities ... (d) Installation plans. The owner must maintain an accurate drawing or as-built plans which show the size and location of any new underground tank and piping system. These plans must include a statement by the installer that the system has been installed in compliance with the New York State

Standards for New and Substantially Modified Petroleum Storage Facilities, 6 NYCRR Part 614.” (Department Staff Exhibit 2, Complaint, Paragraphs 62-65.)

7. The notice of hearing in this matter, as well as the complaint alleging the various regulatory violations enumerated in Finding of Fact 6, above, were individually and personally served upon respondents by New York State Department of Environmental Conservation Officer Joel T. Schneller on August 12, 2011. (Department Staff Exhibit 1, Affidavits of Personal Service.)
8. The notice of hearing served on August 12, 2011, with the complaint stated that an answer to the complaint had to be filed within twenty days of the receipt of the complaint by the 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.
9. The notice of hearing served on August 12, 2011, with the complaint stated that a prehearing conference would be held in the matter at 10:00 a.m., September 21, 2011, at the Department’s office located at 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 prehearing conference.
10. The notice of default hearing in this matter, dated January 3, 2012, was served upon the respondents by certified mail on January 3, 2012. As shown by United States Postal Service records, respondents received the notice of hearing and complaint on January 4, 2012.
11. The notice of default hearing stated that the default hearing would be held on February 9, 2012, at 1:00 PM, at the Department’s offices located at 7327 NYS Route 812, Lowville, New York 13367. Respondents failed to appear for the default hearing.

Discussion

The record shows that respondents were duly served with the notice of hearing and complaint on August 12, 2011. The record further shows that respondents failed to file an answer to the complaint and failed to appear for the scheduled prehearing conference on September 21, 2011. Moreover, the record shows that respondents were duly served with the notice of default hearing in this matter on January 4, 2012, and that respondents failed to appear for the default hearing scheduled for February 9, 2012. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Department staff’s proposed order and the \$43,000.00 civil penalty it seeks 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, finding respondents in default pursuant to the provisions of 6 NYCRR 622.15;
2. Finding respondents in violation of the various sections of 6 NYCRR parts 612, 613 and 614 enumerated in the complaint and in the findings of fact, above, for and at a petroleum storage facility they own located at 3287 County Road 6 (NYS Route 58 and Black Lake Road), Town of Morristown, St. Lawrence County, New York 13646, and known as Edwardsville Grocery, Inc. (the "facility");
3. Directing respondents to take such steps and to effect such corrective actions at and on behalf of the facility as are indicated in paragraphs VI, VII, VIII and IX of Department staff's proposed order, annexed hereto (Department Staff Exhibit 5, pp. 4-5.);
4. Directing respondents to pay a civil penalty in the amount of forty-three thousand dollars (\$43,000.00), of which twenty one thousand five hundred dollars (\$21,500.00) is payable upon receipt of the Commissioner's order and twenty one thousand five hundred dollars (\$21,500.00) is suspended if the corrective actions indicated in the schedule of compliance are fulfilled; and
5. Directing such other and further relief as he may deem just and proper.

/s/

Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
June 12, 2012

Index of Attached Exhibits Received

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- Exhibit 1: Two affidavits of personal service, each sworn to by New York State Environmental Conservation Office Joel T. Schneller on August 12, 2011. The first affidavit states that on August 12, 2011, ECO Schneller personally served respondent Ronald C. Green, Jr., with the notice of hearing and complaint, dated August 11, 2011. The second affidavit states that on August 12, 2011, ECO Schneller personally served respondent Yvonne M. Colby with the notice of hearing and complaint, dated August 11, 2011.
- Exhibit 2: Notice of hearing and complaint dated August 11, 2011, with attachments and cover letter also dated August 11, 2011.
- Exhibit 3: Two affidavits of service by certified mail, return receipt requested, each sworn to by April L. Sears on January 5, 2012. The first affidavit states that on January 3, 2012, she sent respondent Ronald C. Green, Jr., a copy of the notice of default hearing scheduled for February 9, 2012, the notice being dated January 3, 2012. As stated in the affidavit, the certified mailing to respondent Ronald C. Green, Jr., bore United States Postal Service (“USPS”) domestic return receipt article number 7007 2680 0000 4936 1748. Attached to this affidavit is a copy of the USPS domestic return receipt received back by the Departments, signed as received on January 4, 2012. The second affidavit states that on January 3, 2012, she sent respondent Yvonne M. Colby a copy of the notice of default hearing scheduled for February 9, 2012, the notice being dated January 3, 2012. As stated in the affidavit, the certified mailing to respondent Yvonne M. Colby bore United States Postal Service (“USPS”) domestic return receipt article number 7007 2680 0000 4936 1731. Attached to this affidavit is a copy of the USPS domestic return receipt received back by the Departments, signed as received on January 4, 2012.
- Exhibit 4: A copy of the notice of default hearing of February 9, 2012, dated January 3, 2012, with a cover letter also dated January 3, 2012.
- Exhibit 5: Proposed Commissioner’s Order prepared by Department staff.