

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 613 and 614 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC Case No. R6-20100629-21
PBS No. 6-141186

-by-

BRUCE GALLOWAY and TAMARA GALLOWAY,

Respondents.

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (“Department” or “staff”) that respondents Bruce Galloway and Tamara Galloway (“respondents”) violated several petroleum bulk storage regulations with respect to three petroleum storage tanks, with a combined capacity of eleven thousand (11,000) gallons, located at respondents’ property at 64 South Main Street (NYS Route 37), Village of Hammond, Town of Hammond, St. Lawrence County, New York (“facility”). Two of the tanks are underground storage tanks (designated as Tank No. 1A and Tank No. 1B) that are used for the storage of gasoline, with capacities of 6,000 gallons and 4,000 gallons, respectively. The third tank (designated as Tank No. 2), an aboveground tank, is used for the storage of kerosene and has a capacity of 1,000 gallons.

Staff commenced this proceeding by serving on respondents, via certified mail, a notice of hearing and complaint dated February 8, 2011. Respondents received the notice of hearing and complaint on February 10, 2011. Service of process was accomplished in accordance with 6 NYCRR 622.3.

Staff’s complaint asserts seven causes of action alleging regulatory violations involving the three petroleum storage tanks (see Staff Exhibit [“Staff Ex.”] 1, Complaint at 2-7, ¶¶ 5-32). Specifically staff cited the following violations:

1. Failure to install a shutoff valve for the gravity-fed motor fuel dispenser on Tank No. 2, in violation of 6 NYCRR 613.3(c)(2);
2. Failure to clearly mark the design capacity, working capacity, and identification number of Tank No. 2, in violation of 6 NYCRR 613.3(c)(3)(ii);
3. Failure to lock the fill ports of Tank Nos. 1A, 1B, and 2 which have been temporarily out-of-service for more than thirty days, in violation of 6 NYCRR 613.9(a)(1)(ii);
4. Failure to provide alternative leak detection for unmetered Tank No. 1A and Tank No. 1B, in violation of 6 NYCRR 613.4(a)(2);
5. Failure to monitor at least annually the adequacy of the cathodic protection system of Tank No. 1A and Tank No. 1B, in violation of 6 NYCRR 613.5(b)(2);

6. Failure to monitor for tightness the interstitial spaces of Tank No. 1A and 1B, in violation of 6 NYCRR 614.5(b); and
7. Failure to perform monthly inspections of the aboveground petroleum storage at the facility (Tank No. 2), in violation of 6 NYCRR 613.6(a). See Staff Ex. 1, Complaint ¶¶ 5, 9, 13, 17, 21, 25 and 29).

Staff requests that I issue an order: finding that respondents committed the violations of the petroleum bulk storage regulations cited in the complaint. With respect to a civil penalty, staff requests that I assess a civil penalty totaling six thousand one hundred dollars (\$6,100) but suspend “an appropriate portion, but not more than half,” of the civil penalty to ensure compliance with any order that is issued (see Staff Ex. 1, Complaint at 8, ¶ IX). Department staff also request that I: direct that the civil penalty be paid by certified check and submitted to the Department within sixty (60) days of the issuance of the order; order respondents to permanently close the facility in accordance with 6 NYCRR 613.9(b) and 40 CFR 280.72, within 60 days of the issuance of the order;¹ direct respondents to provide to the Department with a report on the removal of the petroleum storage tanks from, and the permanent closure of, the facility; reserve all rights of the Department and the State regarding civil or criminal actions for matters not specifically alleged in staff’s motion; and order such other and further relief as may be just and appropriate under the circumstances (see Complaint at 7-9, ¶¶ I-XV).

Respondents failed to answer the complaint. A notice of hearing dated June 2, 2014, and received by respondents on June 3, 2014, stated that the matter would be called on July 10, 2014 before Administrative Law Judge (“ALJ”) Richard R. Wissler. The notice of the July 10, 2014 hearing stated that: (i) Department staff intended to move for a default judgment because respondents failed to answer the complaint; (ii) respondents could appear personally or by counsel to present argument in opposition to the motion; and (iii) respondents’ failure to appear would constitute a default and a waiver of their right to be heard, and could result in a Commissioner’s order being issued against them. The notice of hearing set forth the penalty amount requested in the complaint (see Staff Ex. 3).

Respondents did not appear at the July 10, 2014 hearing. Department staff moved for a default judgment on the complaint. Department staff submitted a proposed order as well as twelve (12) exhibits in support of its motion.

ALJ Wissler has prepared the attached default summary report, which I adopt in part, subject to my comments below.

Incarceration of Respondent Bruce Galloway

A review of the record in this proceeding reveals that on August 24, 2010, soon after staff’s May 18, 2010 inspection of the facility that gave rise to the allegations in the complaint, respondent Bruce Galloway was incarcerated for crimes unrelated to the operation of the facility

¹ As part of permanent closure, Department staff requests that respondents file a facility registration form with the Department. I am ordering that respondents file this form within fifteen (15) days of the service of the order upon them.

(see Staff Ex. 11), and has remained incarcerated since August 2010. The earliest date on which he could be released from prison is May 6, 2017 (see id.).

Mr. Galloway's incarceration does not absolve him of his obligation to respond to the complaint in this matter. Nor does his incarceration absolve respondent Tamara Galloway – co-owner of the property at issue here (see Staff Ex. 5 [deed]) – of her independent obligation to answer or appear in this proceeding. The record clearly establishes that both respondents were served with the pleadings and the notice of hearing, and that both respondents failed to respond or appear. Staff is therefore entitled to a default judgment.

Temporary Closure Status Recommendation

As noted, Department staff seeks: (i) permanent closure of the facility; (ii) a report that addresses the closure including the removal of the tanks; and (iii) a partially suspended civil penalty. The ALJ recommends, however, that respondents be provided with the option of allowing the tanks to remain in temporary closure status provided respondents satisfy the ongoing monitoring and testing requirements of 6 NYCRR 613.9(a) (Default Summary Report at 7, 8 [Recommendation 3(b)]).

As support for this alternative recommendation, the ALJ cites two relevant factors: (i) Bruce Galloway's incarceration "and the impediment this status may present to the implementation of any order of the Commissioner until his release" (Default Summary Report at 7); and (ii) the fact that respondents filed a PBS application on the same day as the May 2010 inspection that gave rise to the allegations in the complaint, which the ALJ interprets as evidence that respondents intended to maintain the tanks at the facility in a temporary closure status (see id.; see also id. at 6, Finding of Fact No. 10).

The record does not support granting the ALJ's alternative recommendation. Respondents have had the option for several years to correct the violations at the facility, but have failed to do so.² Nor does respondents' failure to answer or appear entitle them to an inference that respondent Tamara Galloway is unable, without the assistance of respondent Bruce Galloway, to correct the remaining violations or close the facility. By failing to answer or appear, respondents have not only waived their right to be heard, but have failed to avail themselves of an opportunity to identify any potential mitigating circumstances relating to the claims against them. Therefore, I do not adopt the ALJ's recommendation that respondents be given the option to keep the tanks in "temporary closure status." Respondents are hereby directed to permanently close the facility in accordance with the requirements set forth at 6 NYCRR 613.9 and 40 CFR 280.72.

² See Default Summary Report at 5 (Finding of Fact 3). The record does reflect that one of the seven categories of violations had been corrected as of the July 8, 2014 inspection of the facility (see Default Summary Report at 6 [Finding of Fact No. 9]). The record does not, however, reflect the date when that correction was made.

Facility Closure

Staff requests that respondents be ordered to close the facility, provide the closure report, and pay the civil penalty, all within sixty (60) days of service of the order on the respondents. The ALJ has recommended that the order set forth a period of ninety (90) days within which to comply. I adopt the ALJ's recommendation, and will allow respondents in this matter ninety (90) days to complete the permanent closure of the facility, submit the required closure report, and pay the civil penalty discussed below. With respect to the permanent closure of the facility and the submission of the closure report, in light of the circumstances of this matter where one of the respondents is incarcerated, I hereby grant Department staff, at its discretion, to extend the time period for permanent closure and submission of the closure report on good cause shown by one or both respondents.

Civil Penalty

The ALJ has recommended that I grant staff's request for a civil penalty of six thousand one hundred dollars (\$6,100), and that I suspend three thousand one hundred dollars (\$3,100) of that amount contingent upon respondents' compliance with the provisions of this order. Although the requested penalty amounts are authorized under ECL 71-1929, the Department's Civil Penalty Policy (DEE-1, dated June 20, 1990) and the Petroleum Bulk Storage Inspection Enforcement Policy – Penalty Schedule (DEE-22, dated May 21, 2003), a reduction in the total civil penalty is appropriate in this case.

According to the complaint, almost half of the requested civil penalty, that is, three thousand dollars (\$3,000), relates to respondents' failure to lock the fill ports at all three tanks at the facility (see Complaint at 8, ¶ VIII; see also id. at 3, ¶¶ 13-16 [Third Cause of Action]). The record reflects that the violation was corrected at some date prior to staff's July 2014 inspection (see Default Summary Report at 6 [Finding of Fact No. 9]). Subsequent correction of prior violations does not, of course, free respondents from liability for the violations, but I have considered respondents' correction of the violation in determining an appropriate penalty amount to be imposed. Accordingly, I am reducing the total civil penalty by five hundred dollars (\$500) to five thousand six hundred dollars (\$5,600).

Department staff requests that an appropriate portion of the penalty, "but not more than half," be suspended to ensure compliance with any order, and the ALJ has recommended a reduction of just over half. In light of staff's request and the ALJ's recommendation, and taking into account the reduction in the civil penalty that I am making, I hereby suspend two thousand eight hundred dollars (\$2,800) of the penalty, on the condition that respondents comply with the provisions of this order. In the event that respondents fail to comply with the provisions of the order, the suspended amount shall immediately become due and payable.³

³ Department staff specified that the penalty be paid by certified check. However, as orders of the Commissioner generally allow for payment by certified check, cashier's check, or money order, these alternative payment methods are being authorized here.

Reservation of Rights

Department staff also requests that the order reserve all rights of the Department and the State regarding civil or criminal actions for matters not specifically alleged in the complaint. This proceeding is limited to those matters specifically alleged in the pleading and language to reserve the Department or the State's rights for matters that have not been alleged in this complaint is not necessary. To the extent that causes of action arise relating to matters not specifically alleged here, Department staff may pursue those as circumstances warrant.

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, and failing to appear at the hearing pursuant to the notice of hearing duly served upon them, respondents Bruce Galloway and Tamara Galloway have waived their right to be heard at the hearing. Accordingly, the allegations in the complaint are deemed to have been admitted by respondents.

- II. Respondents Bruce Galloway and Tamara Galloway are adjudged to have violated the following regulations with respect to a petroleum storage facility they own at 64 South Main Street (NYS Route 37), Village of Hammond, Town of Hammond, St. Lawrence County, New York:
 - 6 NYCRR 613.3(c)(2), for the failure to install a shutoff valve for the gravity-fed motor fuel dispenser on Tank No. 2;
 - 6 NYCRR 613.3(c)(3)(ii), for the failure to clearly mark the design capacity, working capacity, and the identification number of Tank No. 2;
 - 6 NYCRR 613.9(a)(1)(ii), for the failure to lock the fill ports of Tank Nos. 1A, 1B and 2, which have been temporarily out-of-service for more than thirty days;
 - 6 NYCRR 613.4(a)(2), for the failure to provide alternative leak detection for unmetered Tank No. 1A and Tank No. 1B;
 - 6 NYCRR 613.5(b)(2), for the failure to monitor at least annually the adequacy of the cathodic protection system of Tank No. 1A and Tank No. 1B;
 - 6 NYCRR 614.5(b), for the failure to monitor for tightness the interstitial spaces of Tank No. 1A and Tank No. 1B; and
 - 6 NYCRR 613.6(a), for the failure to perform monthly inspections of Tank No. 2.

- III. Within ninety (90) days of the service of this order upon respondents Bruce Galloway and Tamara Galloway, respondents shall: (a) permanently close the facility in accordance with 6 NYCRR 613.9 and 40 CFR 280.72; and (b) provide the Department with a report regarding the removal of the petroleum storage tanks at the facility and permanent closure of the facility. Department staff, at its discretion, may extend this ninety (90) day period upon good cause shown by one or both respondents.
- IV. Within fifteen (15) days of the service of this order upon them, respondents Bruce Galloway and Tamara Galloway shall submit to the Department a petroleum bulk storage registration application for the facility.
- V. Respondents Bruce Galloway and Tamara Galloway are hereby assessed, jointly and severally, a civil penalty in the amount of five thousand six hundred dollars (\$5,600). Of this penalty, one-half (that is, two thousand eight hundred dollars [\$2,800]) is suspended on the condition that respondents comply with the provisions of this order.

The non-suspended portion of the civil penalty, that is, two thousand eight hundred dollars (\$2,800), is due and payable within ninety (90) 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:

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

Should respondents fail to comply with the provisions 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.

- VI. All communications from respondents to the Department concerning this order shall be directed to Ronald J. Novak, P.E., at the address referenced in paragraph V of this order.

- VII. The provisions, terms and conditions of this order shall bind respondents Bruce Galloway and Tamara Galloway, and their agents, successors and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

By: _____ /s/
Joseph J. Martens
Commissioner

Dated: January 16, 2015
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 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. R6-20100629-21
PBS No. 6-141186

-by-

BRUCE GALLOWAY and TAMARA GALLOWAY,

Respondents.

Procedural History

On February 10, 2011 staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) served respondents Bruce Galloway and Tamara Galloway with a notice of hearing and complaint dated February 8, 2011 containing seven causes of action alleging various violations of ECL article 17 title 10 and 6 NYCRR parts 613 and 614 at a petroleum storage facility owned by them located at 64 South Main Street (NYS Route 37), Village of Hammond, Town of Hammond, St. Lawrence County, New York 13646 (“facility”). The facility is known as the Hammond Service Center. While designed to engage in the retail sale of gasoline and kerosene, the facility is not currently operating. There are three petroleum storage tanks at the facility with a combined capacity of 11,000 gallons. Two of the tanks are underground storage tanks (“UST”s) and the third is an aboveground storage tank (“AST”). The USTs are designated Tank No. 1A and Tank No. 1B, and have capacities of 6,000 gallons and 4,000 gallons, respectively. They are intended for the storage of gasoline. The AST is designated Tank No. 2 and has a capacity of 1,000 gallons. It is intended for the storage of kerosene.

The complaint alleges that, based upon records maintained by the Department as well as during an inspection of the facility on May 18, 2010, the following regulatory violations were observed or documented:

- a. 6 NYCRR 613.3(c)(2) by failing to install a shutoff valve for the gravity-fed motor fuel dispenser on Tank No. 2 at the facility;
- b. 6 NYCRR 613.3(c)(3)(ii) by failing to clearly mark the design capacity, working capacity, and identification number of Tank No. 2 on the tank and at the gauge at the facility;
- c. 6 NYCRR 613.9(a)(1)(ii) by failing to lock the fill ports of Tank Nos. 1A, 1B, and 2 at the facility, which have been temporarily out-of-service for more than thirty (30) days;

- d. 6 NYCRR 613.4(a)(2) by failing to provide alternative leak detection for unmetered Tank Nos. 1A and 1B at the facility;
- e. 6 NYCRR 613.5(b)(2) by failing to monitor at least annually the adequacy of the cathodic protection system of Tank Nos. 1A and 1B at the facility;
- f. 6 NYCRR 614.5(b) by failing to monitor for tightness the interstitial spaces of Tank Nos. 1A and 1B at the facility once per week; and,
- g. 6 NYCRR 613.6(a) by failing to perform monthly inspections of the aboveground petroleum storage tank, Tank No. 2, at the facility.

The complaint seeks an order of the Commissioner:

- (1) Finding that Respondents violated the provisions of 6 NYCRR 613.3(c)(2) by failing to install a shutoff valve for the gravity-fed motor fuel dispenser on Tank No. 2 at the facility, as stated in the first cause of action;
- (2) Finding that the Respondents violated the provisions of 6 NYCRR 613.3(c)(3)(ii) by failing to clearly mark the design capacity, working capacity, and identification number of Tank No. 2 on the tank and at the gauge at the facility, as stated in the second cause of action;
- (3) Finding that the Respondents violated the provisions of 6 NYCRR 613.9(a)(1)(ii) by failing to lock the fill ports of Tank Nos. 1A, 1B, and 2 at the facility, which have been temporarily out-of-service for more than thirty (30) days, as stated in the third cause of action;
- (4) Finding that Respondents violated the provisions of 6 NYCRR 613.4(a)(2) by failing to provide alternative leak detection for unmetered Tank Nos. 1A and 1B at the facility, as stated in the fourth cause of action;
- (5) Finding that Respondents violated the provisions of 6 NYCRR 613.5(b)(2) by failing to monitor at least annually the adequacy of the cathodic protection system of Tank Nos. 1A and 1B at the facility, as stated in the fifth cause of action;
- (6) Finding that Respondents violated the provisions of 6 NYCRR 614.5(b) by failing to monitor for tightness the interstitial spaces of Tank Nos. 1A and 1B at the facility once per week, as stated in the sixth cause of action;
- (7) Finding that Respondents violated the provisions of 6 NYCRR 613.6(a) by failing to perform monthly inspections of the aboveground petroleum storage tank, Tank No. 2, at the facility, as stated in the seventh cause of action;
- (8) Assessing a civil penalty of at least the following amounts for each of the violations:

6 NYCRR 613.3(c)(2)	-	Failure to install shutoff valve	-	\$ 500
6 NYCRR 613.3(c)(3)(ii)	-	Failure to clearly mark tank	-	\$ 100
6 NYCRR 613.9(a)(1)(ii)	-	Failure to lock fill ports	-	\$ 3,000

6 NYCRR 613.4(a)(2)	- Failure to provide leak detection	-	\$ 1,000
6 NYCRR 613.5(b)(2)	- Monitoring cathodic protection	-	\$ 500
6 NYCRR 614.5(b)	- Monitoring interstitial spaces	-	\$ 500
6 NYCRR 613.6(a)	- Monthly inspections	-	<u>\$ 500</u>
Total			\$ 6,100

- (9) Suspending an appropriate portion, but not more than half, of the total penalty to ensure compliance with any order that may be issued pursuant hereto;
- (10) Directing that payment of the penalty be made by certified check payable to NYSDEC and submitted to the Office of General Counsel, NYSDEC Region 6, 317 Washington Street, Watertown, New York 13601, within 60 days;
- (11) Ordering Respondents to permanently close the petroleum bulk storage facility in accordance with 6 NYCRR 613.9(b) and 40 CFR 280.72, within 60 days;
- (12) Directing that Respondents provide the Department with a report regarding the removal of the petroleum storage tanks at the facility and permanent closure of the facility;
- (13) “Reserving all rights of the Department and the state regarding civil or criminal actions for matters not specifically alleged in this motion, including, but not limited to, other violations of the PBS regulations and violations of Navigation Law, natural resources damages, and/or actions for civil recoveries;” and
- (14) Ordering such other and further relief as may be just and appropriate under the circumstances.

The notice of hearing annexed to and served with the complaint on February 10, 2011 indicated that an answer to the complaint was due within twenty days of service of the complaint. Respondents failed to answer the complaint.

On June 3, 2014 respondents were served with a notice of hearing dated June 2, 2014 stating that on July 10, 2014, at 11:00 AM, at the Department’s Region 6 office in Lowville, New York, the matter would be called before the undersigned Administrative Law Judge (“ALJ”) of the Department’s Office of Hearings and Mediation Services (“OHMS”). This notice stated that, at that time, the Department intended to move for a default judgment against respondents due to their failure to answer the complaint served upon them on February 10, 2011.

Respondents were advised that they could appear personally or by counsel on July 10, 2014 to present argument in opposition to the motion for default judgment. Respondents were further advised that their failure to appear would constitute a default and a waiver of their right to be heard, and could result in a Commissioner’s order being issued against them. Moreover, respondents were advised that the default hearing could proceed in their absence. The notice further stated that upon making the motion for default judgment, Department staff would be

seeking an order of the Commissioner imposing a civil penalty of \$6,100 for the violations alleged in the complaint. Respondents did not file a response to the notice.

On July 10, 2014 and pursuant to the notice of June 2, 2014, a calendar call was convened before the undersigned ALJ at the Department's Region 6 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 for Region 6. 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 against respondents based upon their failure to answer the complaint dated February 8, 2011. In support of its motion for default, Department staff submitted twelve (12) exhibits, all of which were admitted into the record. A summary of the exhibits is attached hereto.

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. A failure to timely respond to the motion constitutes a default. As applicable herein, the Department's default procedures in an enforcement action, found at 6 NYCRR 622.15, provide:

“(a) A respondent's failure to file a timely answer ... constitutes a default and a waiver of respondent's right to a hearing. If [this] occurs the department staff may make a motion to the ALJ for a default judgment.

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

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

As the Commissioner stated in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 4), “[t]he consequences of a default is that the respondent waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint or other accusatory instrument on the issue of liability for the violations charged.” Moreover, the Commissioner has stated, “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them.” (id. at 6.) Accordingly, the following findings of fact are based upon the exhibits submitted into the record, as identified above.

Findings of Fact and Conclusions of Law

1. Respondents Bruce Galloway and Tamara Galloway possess fee title in a certain piece of real property located at 64 South Main Street (NYS Route 37), Village of Hammond, Town of Hammond, St. Lawrence County, New York 13646 by virtue of a deed transferring ownership to them on June 2, 1998 recorded in the office of the St. Lawrence County Clerk, Instrument Identification Number 1998-00006578. (Department Staff Exhibit 1, Complaint, Paragraph 3 and Exhibits A and B, annexed to the Complaint; Department Staff Exhibits 5, 6, 7, 8 and 9.)

2. The site is known as the Hammond Service Center (“facility”). Until its dissolution on June 4, 2009, Hammond Service Center, Inc. was a domestic business corporation in the State of New York. Its chairman or chief executive officer was respondent Bruce Galloway. (Department Staff Exhibits 6, 7, 8 and 9.)

3. While designed to engage in the retail sale of gasoline and kerosene, the facility is not currently operating and was not operating at the time of an inspection of the facility on May 18, 2010. (Department Staff Exhibit 1, Complaint, Paragraph 4; Department Staff Exhibit 10 and Hearing Record, Testimony of Ronald F. Novak, PBS Supervisor, Region 6.)

4. Respondent Bruce Galloway is an inmate under the supervision of the New York State Department of Corrections and Community Supervision (“DOCCS”) and is currently incarcerated at the Marcy Correctional Facility. His DOCCS Department Identification Number (“DIN”) is 10A4152. Pending approval after a parole hearing, his earliest release date is May 6, 2017. (Department Staff Exhibit 11.)

5. Respondent Tamara Galloway resides at the site of the facility, 64 South Main Street, Hammond, New York 13646. (Department Staff Exhibits 2, 3 and 4.)

6. There are three petroleum storage tanks at the facility with a combined capacity of 11,000 gallons. Two of the tanks are underground storage tanks (“UST”s) and the third is an aboveground storage tank (“AST”). The USTs are designated Tank No. 1A and Tank No. 1B, and have capacities of 6,000 gallons and 4,000 gallons, respectively. They are intended for the storage of gasoline. The AST is designated Tank No. 2 and has a capacity of 1,000 gallons. It is intended for the storage of kerosene. (Department Staff Exhibit 1, Complaint, Paragraph 3; Department Staff Exhibits 6, 8, 9 and 10.)

7. The facility has been registered with the Department and has been issued Petroleum Bulk Storage (“PBS”) Certificate No. 6-141186. This PBS Certificate was issued to the owners of the facility, respondents Bruce and Tamara Galloway, on December 19, 2008. The certificate expired on May 19, 2013, subsequent to the initiation of the instant enforcement action. (Department Staff Exhibits 8 and 9.)

8. On May 18, 2010 Department staff inspected the facility and observed the following conditions, each a violation of the cited applicable regulatory provision:

- a. Tank No. 2 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);
- b. Tank No. 2 was not marked with the design capacity, working capacity, and tank number on the tank and at the gauge, a violation of 6 NYCRR 613.3(c)(3)(ii);
- c. The fill ports on Tank Nos. 1A, 1B, and 2, which tanks had been out-of-service for more than thirty (30) days, were not locked, a violation of 6 NYCRR 613.9(a)(1)(ii);
- d. Tank Nos. 1A and 1B, which are unmetred, did not have a method of alternative leak detection, a violation of 6 NYCRR 613.4(a)(2);
- e. The adequacy of the cathodic protection system of Tank Nos. 1A and 1B had not been monitored at least annually, a violation of 6 NYCRR 613.5(b)(2);
- f. The interstitial spaces of Tank Nos. 1A and 1B had not been monitored for tightness on a weekly basis, a violation of 6 NYCRR 614.5(b); and
- g. Monthly inspections of Tank No. 2 had not been performed, a violation of 6 NYCRR 613.6(a).

(Department Staff Exhibit 1, Complaint, Paragraphs 5 through 32; Department Staff Exhibit 10.)

9. A further inspection of the facility on July 8, 2014, by Ronald F. Novak, PBS Supervisor, Region 6, confirmed that all of the conditions observed on May 18, 2010 still existed, except that the fill ports on Tanks Nos. 1A, 1B and 2 had been locked, correcting the conditions observed in Finding of Fact 8(c), above. This inspection indicated that the facility's tanks are temporarily closed. (Hearing Record, Testimony of Ronald F. Novak, PBS Supervisor, Region 6.)

10. On May 18, 2010, respondent Bruce Galloway filed a PBS Application with the Department correcting certain facility information. In particular, the application indicates that as to "Status" [Column 4 of Section B of the application], all three tanks at the facility are temporarily out-of-service, and that as to Tank Leak Detection [Column 12 of Section B of the application] all three tanks are subject to interstitial manual monitoring. (Department Staff Exhibit 6; See generally, "Code Keys" on reverse side of Department Staff Exhibit 9.)

11. The notice of hearing in this matter and the complaint alleging the various regulatory violations enumerated in Finding of Fact 8, above, were served by certified mail, return receipt requested, upon respondents on February 8, 2011. United States Postal Service ("USPS") return receipts indicate that the respondents received these documents on February 10, 2011. (Department Staff Exhibits 1 and 2.)

12. The notice of hearing served on February 8, 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 respondents and that failure to file an answer to the complaint would constitute a default in the matter. Respondents failed to file an answer to the complaint. (Department Staff Exhibit 1 and Hearing Record.)

13. The notice of hearing in this matter, dated June 2, 2014, was served upon the respondents by certified mail, return receipt requested, on June 2, 2014. USPS return receipts indicate that the respondents received the notice on June 3, 2014. (Department Staff Exhibits 3 and 4.)

14. The notice of hearing stated that the default hearing would be held on July 10, 2014, at 11:00 AM, before the undersigned ALJ, at the Department's offices located at 7327 NYS Route 812, Lowville, New York 13367. Respondents failed to appear for the default hearing. (Department Staff Exhibit 3 and Hearing Record.)

Discussion

The record shows that respondents were duly served with the notice of hearing and complaint on February 10, 2011. The record further shows that respondents failed to file an answer to the complaint. Moreover, the record shows that respondents were duly served with the notice of hearing in this matter on June 3, 2014, and that they failed to appear for the default hearing scheduled for July 10, 2014. The Department is entitled to a default judgment in this matter on the complaint pursuant to the provisions of 6 NYCRR 622.15.

Department staff's proposed order and the \$6,100 civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71. However, while the Department seeks the permanent closure of the petroleum storage tanks at the site, it is my recommendation that the Commissioner give respondents the option allowing the tanks to remain in temporary closure status provided they satisfy the ongoing monitoring and testing requirements of 6 NYCRR 613.9(a)(1) and (a)(2). I make this recommendation based upon two circumstances unique to this matter. The first such circumstance is the current incarceration of respondent Bruce Galloway and the impediment this status may present to the implementation of any order of the Commissioner until his release. The second is the proof adduced by Finding of Fact 10, above. The PBS application referred to in Finding of Fact 10, was filed on May 18, 2010, the day of Department staff's inspection [Finding of Fact 8] and evinces an intent by respondents to maintain the tanks at the facility in a temporary closure status. Finally, I recommend that the Commissioner direct respondents to renew the PBS registration for the facility which expired on May 19, 2013, subsequent to the commencement of the instant enforcement action.

Recommendation

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

1. Granting Department staff's motion for default on the complaint as to both respondents pursuant to the provisions of 6 NYCRR 622.15;
2. Finding respondents in violation of the various sections of 6 NYCRR parts 613 and 614 alleged against them as enumerated in the complaint and in Finding of Fact 8, above, for and at a petroleum storage facility they own located at 64 South Main Street (NYS Route 37), Village of Hammond, Town of Hammond, St. Lawrence County, New York 13646;
3. Directing respondents, within 90 days of the service of this order upon them, to either:
 - (a) Provide the Department with an approvable plan to permanently close the facility within one year in accordance with 6 NYCRR 613.9(b); or
 - (b) Correct the regulatory violations alleged in the complaint and to immediately comply with the testing, reporting, monitoring and other provisions of 6 NYCRR 613.9(a) applicable to temporarily closed facilities;
4. Directing respondents, within 90 days of the service of this order upon them, to renew the PBS registration for the facility;
5. Directing respondents, within 90 days of the service of this order upon them, to pay a civil penalty in the amount of six thousand one hundred dollars (\$6,100) of which three thousand dollars (\$3,000) is payable upon receipt of the Commissioner's order and three thousand one hundred dollars (\$3,100) is suspended contingent upon compliance with the provisions of Recommendations 3 and 4, above; and
6. Directing such other and further relief as he may deem just and proper.

/s/

Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
September 30, 2014

DEC v. Bruce Galloway and Tamara Galloway

Index of Attached Exhibits Received

Edirol 050809105110
NYSDEC Region 6, Lowville
July 10, 2014

- Exhibit 1. Notice of Hearing, dated February 8, 2011; Complaint, dated February 8, 2011, with attachments consisting of a copy of PBS certificate number 6-141186 for the facility, and a copy of the PBS Application for the facility, dated May 18, 2010; Cover Letter, dated February 8, 2011; and copies of two United States Postal Service (“USPS”) Domestic Return Receipts (“return receipt(s)”), one indicating service of the aforementioned documents on respondent Bruce Galloway on February 10, 2011 and the other indicating service of the aforementioned documents on respondent Tamara Galloway on February 10, 2011.
- Exhibit 2. Two affidavits of service by certified mail, each sworn to by April L. Sears on February 14, 2011. The first affidavit states that on February 8, 2011 she served respondent Bruce Galloway with the notice of hearing and complaint by certified mail, return receipt requested at the following address: Cossackie Correctional Facility, DIN 10A4152 [the inmate identification number assigned by the NYS Department of Corrections and Community Supervision], P.O. Box 999, Cossackie, New York 12051-0999, and on February 11, 2011 received the USPS return receipt indicating that the Cossackie Correctional Facility had received the aforementioned papers on behalf of this respondent on February 10, 2011. The second affidavit states that on February 8, 2011 she served respondent Tamara Galloway with the notice of hearing and complaint by certified mail, return receipt requested at the following address: 64 South Main Street, P.O. Box 203, Hammond, New York 13646, and on February 11, 2011 received the USPS return receipt indicating that this respondent had received the aforementioned papers on February 10, 2011. A copy of the respective aforementioned USPS return receipt is attached to each affidavit.
- Exhibit 3. Notice of Hearing, dated June 2, 2014; Cover Letter, dated June 2, 2014; and copies of two USPS return receipts, one indicating service of the aforementioned documents on respondent Bruce Galloway on June 3, 2014 and the other indicating service of the aforementioned documents on respondent Tamara Galloway on June 3, 2014.
- Exhibit 4. Two affidavits of service by certified mail, each sworn to by April L. Sears on June 10, 2014. The first affidavit states that on June 2, 2014 she served respondent Bruce Galloway with the notice of hearing by certified mail return receipt requested at the following address: Marcy Correctional Facility, DIN

10A4152, P.O. Box 3600, Marcy, New York 13403, and on June 4, 2014 received the USPS return receipt indicating that the Marcy Correctional Facility had received the aforementioned notice on behalf of this respondent on June 3, 2014. The second affidavit states that on June 2, 2014 she served respondent Tamara Galloway with the notice of hearing by certified mail return receipt requested at the following address: 64 South Main Street, P.O. Box 203, Hammond, New York 13646, and on June 4, 2014 received the USPS return receipt indicating that this respondent had received the aforementioned notice on June 3, 2014. A copy of the respective aforementioned USPS return receipt is attached to each affidavit.

- Exhibit 5. Deed from Louise Decondo to Bruce Galloway and Tamara Galloway executed June 2, 1998 and recorded in the Clerk's Office of St. Lawrence County, New York, Instrument ID: 1998-00006578.
- Exhibit 6. PBS Application, signed by Bruce Galloway and dated May 18, 2010.
- Exhibit 7. NYS Department of State, Division of Corporations, Entity Information webpage for Hammond Service Center Inc., dated January 28, 2011.
- Exhibit 8. PBS Certificate Number 6-141186.
- Exhibit 9. PBS Program Facility Information Report, printed July 1, 2014.
- Exhibit 10. Notice of Violation Letter to Bruce Galloway from Jeremy Rogers of NYSDEC Region 6, dated May 24, 2010, with attachments consisting of 5-page NYSDEC PBS Inspection Form, dated May 18, 2010, and PBS Program Facility Information Report, printed March 16, 2010.
- Exhibit 11. NYS Department of Corrections and Community Supervision Inmate Information webpage for Bruce M. Galloway, DIN 10A4152, dated May 28, 2014.
- Exhibit 12. Proposed Commissioner's Order prepared by Department staff.