

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

In the Matter of the Alleged Violation
of Article 17 of the Environmental
Conservation Law of the State of New
York ("ECL") and Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR") Parts 612 and 613,

ORDER

DEC File No.
R620050303-07

- by -

DONALD W. GAY,

Respondent.

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"), staff of the New York State Department of
Environmental Conservation ("Department") commenced this
administrative enforcement proceeding against respondent Donald
W. Gay ("respondent"). The proceeding was commenced by service
via certified mail of a notice of hearing and complaint dated
April 11, 2005. The notice of hearing and complaint was received
by respondent on April 19, 2005, thereby completing service (see
6 NYCRR 622.3[a][3]).

The complaint alleged that respondent owns and operates
an existing petroleum bulk storage facility located at 21
Herkimer Street, Middleville, Herkimer County, New York with a
six-thousand gallon double walled underground gasoline storage
tank that was installed in April 1988. The complaint also
alleges that respondent initially registered the facility on July
15, 1999, but that the registration subsequently expired and has
not been renewed. The complaint alleged the following four
causes of action:

1. respondent violated 6 NYCRR 612.2(a)(2) by failing
to renew the registration or notify the Department of permanent
closure of the tank or transfer of ownership of the facility;

2. respondent violated 6 NYCRR 613.3(b) by failing to
color code the fill port of the tank from August 25, 2000 to the
present;

3. respondent violated 6 NYCRR 613.4 by failing to
keep inventory records for the tank from July 15, 1999 to the

present; and

4. respondent violated 6 NYCRR 614.5(b) by failing to monitor the interstitial space of the tank for leaks, from July 15, 1999 to the present.

Department staff also served with the notice of hearing and complaint a notice of motion and motion for order without hearing. Among the documents served with the motion was an affidavit supporting the motion. Through the motion, staff sought summary judgment on the first cause of action pleaded in the April 11, 2005 complaint. Attached as an exhibit to the affidavit supporting the motion was a copy of respondent's July 15, 1999 petroleum bulk storage registration certificate. That certificate showed an expiration date of July 15, 2004.

Respondent failed to answer or move with respect to the complaint, or respond to the motion for order without hearing. Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint or otherwise appear expired on May 9, 2005, and Department staff did not extend that deadline.

On June 20, 2005, Department staff filed a motion for a default judgment with the Department's Office of Hearings and Mediation Services. On the same day, Department staff served the notice of motion and motion for a default judgment upon respondent, by certified mail, return receipt requested. Although respondent subsequently contacted staff concerning a potential settlement, respondent did not execute a consent order. Respondent also failed to respond to the motion for default judgment.

The matter was assigned to Administrative Law Judge ("ALJ") Kevin J. Casutto, who prepared the attached default summary report. The ALJ's report is adopted as my decision in this matter, subject to the comments herein.

Effective May 15, 2003, ECL 71-1929 currently provides that any person who violates any provision or fails to perform any duty imposed by ECL article 17 or any rule, regulation or order issued thereunder, or commits any offense described in ECL article 17 shall be liable for a civil penalty not to exceed thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Prior to May 15, 2003, ECL 71-1929 provided for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) per day for each violation. Based upon the record, the penalty sought by Department staff is justified and warranted by the circumstances of this case.

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

I. Department staff's motion for a default judgment against respondent is granted.

II. Pursuant to 6 NYCRR 622.15, respondent is adjudged to be in default and to have waived its right to a hearing in this matter. Accordingly, respondent is deemed to have admitted the factual allegations in the complaint.

III. Respondent is determined to have violated 6 NYCRR 612.2(a)(2) by failing to timely renew its registration for its petroleum bulk storage facility.

IV. Respondent is determined to have violated 6 NYCRR 613.3(b) by failing to color code the fill port of the tank from August 25, 2000 to April 11, 2005.

V. Respondent is determined to have violated 6 NYCRR 613.4 by failing to keep inventory records for the tank from July 15, 1999 to April 11, 2005.

VI. Respondent is determined to have violated 6 NYCRR 614.5(b) by failing to monitor the interstitial space of the tank for leaks, from July 15, 1999 to April 11, 2005.

VII. Respondent is assessed a civil penalty in the amount of ten thousand five hundred dollars (\$10,500), which is due and payable no later than 30 days after service of this order upon respondent. Such payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the Department at the following address: 317 Washington Street, Watertown, New York, 13601, ATTN: Ronald J. Novak, Regional Enforcement Coordinator.

VIII. Respondent must immediately:

A. initiate daily inventory monitoring in compliance with 6 NYCRR 613.4;

B. implement a leak detection monitoring program in compliance with 6 NYCRR 614.5(b);

C. color code the fill port of the tank in compliance with 6 NYCRR 613.3(b)(2); or

D. arrange for permanent closure of the facility in accordance with 6 NYCRR 613.9(b), 6 NYCRR 613.9(c) and 6 NYCRR 612.2(d).

IX. Within 10 days after service of this order upon respondent, respondent must submit to the Department a completed petroleum bulk storage application to register the facility. The registration must be accompanied by the application fee required by ECL 17-1009(2).

X. Within 45 days after service of this order upon respondent, respondent must submit 30 days of inventory monitoring records as required by 6 NYCRR 613.4 and tank monitoring records pursuant to 6 NYCRR 614.5(b); or submit proof that the facility was permanently closed in accordance with 6 NYCRR 613.9(b).

XI. All communications from respondent to Department staff concerning this order shall be made to Randall C. Young, Esq., 317 Washington Street, Watertown, New York 13601 (except as provided in Paragraph VII, hereinabove).

XII. The provisions, terms and conditions of this order shall bind respondent and his successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: Denise M. Sheehan
Commissioner

Dated: December 19, 2005
Albany, New York

To: Donald W. Gay (via certified mail)
Gay's Garage
P.O. Box 35
Middleville, New York 13406

Randall C. Young, Esq. (via regular mail)
Assistant Regional Attorney
NYSDEC Region 6 Headquarters
317 Washington Street
Watertown, New York 13601-3787

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**DEFAULT
SUMMARY
REPORT**

DEC File No.
R620050303-07

Donald W. Gay,

Respondent.

X-----X

Proceedings

By notice of motion dated June 20, 2005, staff of the Department of Environmental Conservation ("DEC" or "Department") sought a judgment by default against respondent concerning alleged violations of article 17 of the Environmental Conservation Law ("ECL"). It is alleged by DEC that respondent violated article 17 of the ECL by failing to maintain daily inventory monitoring, failing to implement a leak detection monitoring program, failing to color code the fill port of the tank, or close the tank, and failing to re-register its petroleum bulk storage facility at 21 Herkimer Street, Middleville, Herkimer County, New York. In support of its motion, DEC submitted an affidavit of Assistant Regional Attorney Randall C. Young (dated June 20, 2005), a proposed order and proof of service of the notice of hearing, complaint, notice of motion and motion for order without hearing, on the respondent, by certified mail, return receipt requested on April 11, 2005. A copy of the return receipt was attached to the affidavit of service, revealing that respondent received the notice of hearing, complaint and related papers on April 19, 2005.

As of the date of the motion, respondent has failed to appear and serve an answer or otherwise move, although the time to do so expired on May 9, 2005. Further, DEC Staff submitted proof that said respondent contacted attorney Young prior to April 21, 2005 and indicated he intended to execute a proposed consent order. Consequently, no pre-hearing conference was held

in this matter. Since that time, respondent has failed to return an executed consent order to DEC Staff, has failed to file an answer and has failed to respond to a written inquiry from attorney Young.

DEFAULT PROCEDURES

Section 622.15 of 6 NYCRR, "Default Procedures" provides, in pertinent part: "(b) The motion for a 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."

The following findings are based upon the papers submitted, as identified above.

FINDINGS

1. On April 11, 2005 Staff mailed, by certified mail, a notice of hearing and complaint and related papers to respondent Donald W. Gay. Service was completed on April 19, 2005, when respondent received the notice of hearing and complaint (see 6 NYCRR 622.3[a][3]). The time to answer or otherwise move expired on May 9, 2005. The respondent has served no answer or response to the motion for order without hearing.
2. Respondent owns and operates an existing petroleum bulk storage facility located at 21 Herkimer Street, Middleville, Herkimer County, New York with a six-thousand gallon double walled underground gasoline storage tank that was installed in April 1988.
3. Respondent initially registered the facility on July 15, 1999. The registration for the facility expired on July 15, 2004. The tank remains unregistered since that date.
4. Department Staff notified respondent of the requirement to renew the registration on June 3, 2004 and on November 3, 2004.
5. Respondent failed to renew the registration or notify the Department of permanent closure of the tank or transfer of the tank. See 6 NYCRR 612.2(a)(2).

6. Respondent did not color code the fill port of the tank from August 25, 2000 to the present. See 6 NYCRR 613.3(b)(1).
7. Respondent did not keep inventory records for the tank from July 15, 1999 to the present. See 6 NYCRR 613.4(a)(1).
8. Respondent did not monitor the interstitial space of the tank for leaks, from July 15, 1999 to the present. See 6 NYCRR 614.5(b).
9. The requirements for a default judgment have been adequately met as prescribed by 6 NYCRR 622.15(b).

CONCLUSION

The motion for default judgment should be granted.

DATED: Sept. 1, 2005
Albany, New York

/s/

Kevin J. Casutto
Administrative Law Judge

To: Randall C. Young, Esq.
Assistant Regional Attorney
NYSDEC Region 6 Headquarters
317 Washington Street
Watertown, New York 13601-3787

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