

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC Case No. R6-20030324-14

**PHIL HATHWAY d/b/a Phil's Over-the-Hill,**  
Respondent

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WHEREAS:

1. Staff of the Region 6 Office of the New York State Department of Environmental Conservation ("Staff," "Department") duly served a notice of motion for order without hearing and complaint on Phil Hathway, d/b/a/ Phil's Over-the- Hill ("respondent"), on or about May 9, 2003. Respondent has not opposed the motion nor sought leave to extend the time to respond to the motion, and the time to respond has expired.

2. By ruling dated December 22, 2003, Administrative Law Judge ("ALJ") Molly T. McBride found that respondent violated section 612.2(a)(2) of title 6 of the Official Compilation of Codes, Rules and Regulations ("NYCRR") by failing to renew the registration of his petroleum bulk storage facility after expiration of a five-year period from the date of the last valid registration, and 6 NYCRR 612.3 by failing to submit a fee with the registration renewal.

3. The regulation of petroleum bulk storage under article 17 of the Environmental Conservation Law ("ECL") is important to the public health and welfare and the actions of the respondent in this matter were in direct violation of the applicable statutes.

4. The allegations in Staff's motion were uncontroverted and justify the imposition of a penalty.

NOW, THEREFORE, having considered this matter, it is ORDERED, that:

I. Respondent violated 6 NYCRR 612.2(a) and 612.3 as more fully stated in the hearing report, which I adopt as my decision in this case.

II. Respondent is assessed a civil penalty of Four Thousand Dollars (\$4,000) with Two Thousand Dollars (\$2,000) thereof suspended on the condition that respondent submit to the Department a fully completed renewal application and appropriate registration fee within 30 days of the effective date of this order.

III. All communications between respondent and Department Staff concerning this order, including the payment of penalties, shall be made to the Department's Region 6 Director, Dulles State Office Building, 317 Washington Street, Watertown, New York 13601-3787.

IV. The provisions, terms and conditions of this order shall bind respondent, his agents, servants and employees, successors and assigns and all persons, firms and corporations acting for or on behalf of respondent.

For the New York State Department  
of Environmental Conservation

/s/

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By: Erin M. Crotty, Commissioner

January 6, 2004  
Albany, New York

To: Phil Hathway  
RD #1, Box 81  
Harrisville, NY 13648

James T. King, Esq.  
Regional Attorney  
NYSDEC - Region 6  
Dulles State Office Building  
317 Washington Street  
Watertown, NY 13601-3787

In the Matter of the Alleged  
Violation of Article 17  
of the Environmental Conservation  
Law and Part 612 of  
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DEC Case No. R6-20030324-14

HEARING REPORT

-by-

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Molly T. McBride  
Administrative Law Judge

December 22, 2003

## **Procedural Background**

The New York State Department of Environmental Conservation (DEC Staff, Department) commenced this action pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) section 622.12 by service of a notice of motion for order without hearing and a complaint on or about May 9, 2003 on Phil Hathway, (Respondent). DEC Staff submitted the following in support of the motion: affirmation of assistant regional attorney Randall C. Young, Esq, the affidavit of Donald I. Johnson, Department Staff, and a memorandum in support. Respondent has not opposed the motion nor sought leave to extend the time to respond to the motion and the time to respond has expired.

Staff's motion was served on the Office of Hearings and Mediation Services and was assigned to Administrative Law Judge (ALJ) Molly T. McBride.

A contested motion for order without hearing shall be granted, if upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant granting summary judgment under the Civil Practice Law and Rules of New York (CPLR) in favor of any party. 6 NYCRR 622.12(d). CPLR 3212 allows for the granting of summary judgment when no issue of fact remains.

## **Background**

Respondent owns a facility located at NYS Route 3, Diana, Lewis County, New York (facility). The facility has 2 underground petroleum bulk storage tanks (tanks). DEC Staff alleges that Respondent violated the Environmental Conservation Law (ECL) Article 17 and 6 NYCRR Part 612 in that he failed to comply with the registration requirements pertaining to petroleum bulk storage facilities. Petroleum bulk storage tanks must be registered with the Department. The affidavit of Donald Johnson indicates that this facility did not have a current registration.

## **Staff's Position**

Department Staff has asked for an order of the Commissioner which finds that the Respondents violated 612.2 and 612.3 of 6 NYCRR. It is alleged by Department Staff that the Respondent owns a facility that has 2 underground petroleum storage tanks with capacity in excess of 1,100 gallons that must be registered with the Department. The Respondent's registration for the tanks expired on November 14, 2002 and was not renewed. Pursuant to 6 NYCRR 612.2(a)(2) a facility owner must renew the registration of any petroleum bulk storage facility having a capacity of over 1,100 gallons every five years from the date of the last valid registration. DEC Staff submitted documentation establishing that the last valid registration for this facility was November, 1997. DEC Staff alleges that it never received the required renewal. Also, pursuant to §612.3, the owner must submit a fee with the registration renewal of \$250.00. No fee was paid.

By letter dated July 12, 2002 DEC Staff notified the Respondent that the registration for the two tanks would need to be renewed in November, 2002 and included the renewal package. No response was received. By letter dated December 2, 2002, the DEC Staff sent a renewal reminder and Respondent never replied. DEC Staff has asked for an Order of the Commissioner that the Respondent has committed the above referenced violations and also an order directing the Respondents to pay penalties for the violations.

### **Findings of Fact**

After a review of the pleadings and papers submitted herein by the parties, I find that the following facts are not in dispute:

1. Respondent owns the facility located at NYS Route 3, Diana, Lewis County, New York.
2. The facility has two underground petroleum bulk storage tanks.
3. The petroleum bulk storage tanks are regulated under 6 NYCRR parts 612 and 613.
4. The tanks were registered with the Department in 1997 and the registration expired in November, 2002.
5. Pursuant to 6 NYCRR 612.2(a)(2) the registration for the tanks was due for renewal in November, 2002 and it was not renewed. The registration fee for the renewal was not paid either.

### **Conclusions of Law**

1. The registration for the facility expired in November, 2002. The Respondent violated 6 NYCRR 612.2(a)(2) by failing to renew the registration every five years from the date of the last valid registration.
2. The Respondent violated 6 NYCRR 612.3 in that the renewal registration was to be filed with a \$250.00 renewal application fee and the fee was not paid.

### **Penalty**

Staff has requested a penalty of four thousand dollars with two thousand dollars suspended pending Respondent's compliance. Also, DEC Staff is requesting that the Respondent submit a completed renewal registration and pay the \$250.00 filing fee for the renewal.

The Department has a Civil Penalty Policy that serves as guidance in calculating a

penalty in an enforcement case. The policy states that “The penalty should equal the gravity component, plus the benefit component, plus or minus any adjustments.” The benefit component is defined as the economic benefit that results from a failure to comply with the law. The gravity component is to be reflective of the seriousness of the violation and is to ensure that the enforcement deters the Respondent as well as others from future violations of a similar nature. DEC staff has evaluated the penalty requested based upon the economic benefit to the Respondent of not complying and the gravity component. Staff notes that the only economic benefit to the Respondent is the \$250.00 fee for the renewal. As for the gravity component, Staff states that this Respondent was the subject of an earlier Order on Consent that resulted from two prior registration violations. In that Order, a penalty of \$1,000 was agreed upon with \$500.00 suspended pending submission of required documents and registration fees to the Department. Although this Respondent was made aware of the registration regulations as a result of the earlier enforcement matter that culminated in the Order on Consent, he engaged in the same behavior. These facts warrant a higher penalty for the violation.

As the Respondent has defaulted with respect to this motion, I do not find that a triable issue of fact remains with regards to the issue of penalties and therefore will not convene a hearing on this issue. Department Staff’s recommendation is reasonable, as detailed above and I join in the recommendation.

### **Ruling**

The motion for order without hearing is granted in its entirety. Pursuant to 6 NYCRR 622.12(d), this report is submitted to the Commissioner for a final decision.

### **Recommendation**

I recommend that a penalty be assessed against the Respondent as requested by DEC Staff, four thousand dollars with one half suspended pending Respondent’s submission of the acceptable renewal registration within 30 days of the effective date of this Order along with payment of the \$250.00 registration fee.