

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

In the Matter of the Alleged Violations of Article 17 of the
Environmental Conservation Law (ECL) and 6 NYCRR Part 613,

ORDER

-by-

SHAWNA M. KAVANAUGH,

DEC Case No:
R6-20180214-07

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Shawna M. Kavanaugh violated petroleum bulk storage (PBS) laws and regulations at a PBS facility (facility) located at 38198 State Route 37, Town of Theresa, Jefferson County, New York. Specifically, the complaint alleges that respondent violated ECL 17-1009(2) and 6 NYCRR 613-1.9(c) by failing to renew the facility's PBS registration, and 6 NYCRR 613-4.5(a)(3) by failing to permanently close five aboveground PBS tanks at the facility that were out-of-service for more than one year.

Staff's complaint seeks an order of the Commissioner (1) directing respondent to submit a petroleum bulk storage registration application together with the required fees; (2) directing respondent to complete permanent closure of the tanks at the facility; (3) assessing a civil penalty in the amount of \$16,500 with \$12,500 suspended provided that respondent complies with the terms of the Commissioner's order and applicable regulations; and (4) imposing such other and further relief as may be just and appropriate under the circumstances.

Administrative Law Judge (ALJ) Richard Sherman of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision, subject to my comments below.

As set forth in the ALJ's default summary report, Department staff served a complaint dated May 24, 2018, and subsequently an amended complaint dated August 27, 2018 (amended complaint) upon respondent. Respondent failed to file an answer to the complaint or the amended complaint (*see* Default Summary Report at 2 [Finding of Fact No. 3] and 3 [Finding of Fact No. 6]), nor did respondent communicate with staff counsel in any way in relation to this matter (*id.*).

By motion dated September 13, 2021, Department staff moved for a default judgment against respondent. The ALJ determined that Department staff satisfied each of the requirements governing default procedures and that staff's motion for a default judgment should be granted (*see* Default Summary Report at 4-6, 8). I concur that staff is entitled to a judgment on default

pursuant to 6 NYCRR 622.15. The pleadings and papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent violated ECL 17-1009(2) and 6 NYCRR 613-1.9(c) by failing to renew the facility's PBS registration, and 6 NYCRR 613-4.5(a)(3) by failing to permanently close five aboveground PBS tanks at the facility that were out-of-service for more than one year.

Civil Penalty

ECL 71-1929(1), which applies to the statutory and regulatory violations at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In this proceeding, Department staff seeks a civil penalty in the amount of sixteen thousand five hundred dollars (\$16,500) against respondent.

As noted by the ALJ, Department staff argues that the requested civil penalty is fair, reasonable, and consistent with penalty ranges considered for these violations and applicable DEC penalty policies. Staff, in its calculations, referenced applicable Department guidance and policy (*see* Department Staff Brief dated September 13, 2021 [staff brief] at 11; Commissioner Policy DEE-1, Civil Penalty Policy, issued June 20, 1990; *see also* DEC Program Policy DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy, issued May 21, 2003). Staff also notes the consistency of this penalty request with other administrative decisions (staff brief at 11 [citing other enforcement matters that involved violations of PBS facility registration and tank closing requirements]). The penalty request is authorized and appropriate.

With respect to the civil penalty, staff requests that twelve thousand five hundred dollars (\$12,500) be suspended contingent upon “[r]espondent's timely compliance with the terms of any order the Commissioner may issue, the ECL, and its implementing regulations” (amended complaint at 5-6). Based on this record, this suspension request (which results in a payable penalty of four thousand dollars [\$4,000]) is reasonable and acceptable. However, if respondent fails to comply with any term or condition of this order, the suspended portion of the penalty (that is, \$12,500) shall become immediately due and payable.

Corrective Action

In the amended complaint, Department staff requests an order directing respondent to undertake certain corrective actions at the facility, including:

--submission of a petroleum bulk storage registration application, together with current and back registration fees in the amount of five hundred dollars (\$500) to re-register the facility;

--execution of a contract with a qualified tank contractor for permanent closure of the tanks at the facility and submission of a copy of the contract to the Department, together with notice of the date upon which closure of the tanks is scheduled to begin;

--completion of the permanent closure of all tanks at the facility in compliance with 6 NYCRR Part 613-4.5(b); and

--submission of a complete petroleum bulk storage application, photographs, and invoices or receipts showing the permanent closure of the tanks at the facility in compliance with 6 NYCRR Part 613-4.5(b).

Department staff states that proper registration of PBS facilities assists the Department in the oversight of these facilities and, therefore, "aids in the protection of public health and the environment" (staff brief at 10). Staff further states that the proper closure of out-of-service above ground storage tanks "is critical in the effort to prevent and limit environmental contamination due to leaks from PBS tanks" (*id.*). Based upon my review, these corrective actions are necessary and appropriate to address the registration and closure violations that are the subject of this proceeding. I am however making some modification to the timeframes requested by staff to provide some additional time for respondent to satisfy the directed actions and in consideration of the ALJ's review of regulatory timeframes (*see* Default Summary Report at 7).

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.
- II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Shawna M. Kavanaugh is determined to have violated ECL 17-1009(2) and 6 NYCRR 613-1.9(c) by failing to renew the PBS registration, and 6 NYCRR 613-4.5(a)(3) by failing to permanently close five aboveground PBS tanks that were out-of-service for more than one year at the petroleum bulk storage facility located at 38198 State Route 37, Town of Theresa, Jefferson County, New York.
- III. Respondent Shawna M. Kavanaugh is hereby assessed a civil penalty in the amount of sixteen thousand five hundred dollars (\$16,500). Of this amount, twelve thousand five hundred dollars (\$12,500) shall be suspended contingent upon respondent's compliance with the terms and conditions of this order.

In the event that respondent fails to comply with any of the terms and conditions of this order, the suspended portion of the penalty (that is twelve thousand five hundred dollars [\$12,500]) shall become immediately due and payable to the Department.

- IV. Within thirty (30) days of the service of this order upon respondent, respondent shall pay the payable portion of the civil penalty (that is, four thousand dollars [\$4,000]) by certified check, cashier's check, or money order made payable to the

“New York State Department of Environmental Conservation.” The penalty payment shall be sent to the following address:

Shannon C. McGlew, Esq.
New York State Department of Environmental
Conservation
Region 6
317 Washington Street
Watertown, New York 13601

If respondent fails to comply with any of the terms and conditions of this order, the suspended portion of the penalty (that is, twelve thousand five dollars [\$12,500]) shall become immediately due and payable and shall be submitted to the Department in the same manner and to the same address as the payable portion of the penalty.

- V. Respondent Shawna M. Kavanaugh is hereby directed to:
- A. Within thirty (30) days of service of the Commissioner's order, submit a petroleum bulk storage registration application to Department staff, together with current and back registration fees in the amount of \$500 to re-register the facility;
 - B. Within forty-five (45) days of service of the Commissioner's order, execute a contract with a qualified tank contractor for permanent closure of the tanks at the facility and submit a copy to the Department, together with notice of the date upon which closure of the tanks is scheduled to begin;
 - C. Within ninety (90) days of service of the Commissioner's order, complete permanent closure of all tanks at the facility in compliance with 6 NYCRR Part 613-4.5(b); and
 - D. Following the permanent closure of all the tanks at the facility as referenced in Paragraph V.C. of this order, submit a complete petroleum bulk storage application, photographs, and invoices or receipts showing the permanent closure of the tanks in compliance with 6 NYCRR Part 613-4.5(b). Respondent shall submit this information to the Department no later than thirty (30) days after the date of the completion of the permanent closure.
- VI. Any questions or other correspondence regarding this order shall be addressed to Shannon C. McGlew, Esq., at the address referenced in Paragraph IV of this order.

VII. The provisions, terms, and conditions of this order shall bind respondent Shawna M. Kavanaugh, and her agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: Albany, New York
March 2, 2022

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

In the Matter of the Alleged Violations of Article 17 of the
Environmental Conservation Law (ECL) and 6 NYCRR Part 613,

-by-

SHAWNA M. KAVANAUGH,

Respondent.

**DEFAULT
SUMMARY REPORT**

DEC Case No:
R6-20180214-07

PROCEDURAL HISTORY

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this matter by personal service of a notice of hearing and complaint, dated May 24, 2018, on respondent Shawna M. Kavanaugh (respondent). By ruling (ruling) dated August 21, 2018, the Chief Administrative Law Judge granted staff's motion to serve an amended complaint and directed that staff serve the amended complaint pursuant to 6 NYCRR 622.3(a)(3). In accordance with the ruling, staff served a notice of hearing and amended complaint (amended complaint), dated August 27, 2018, on respondent by personal service on October 29, 2020.

The amended complaint alleges that respondent violated provisions of the petroleum bulk storage (PBS) laws and regulations at a PBS facility (facility) located at 38198 State Route 37, Town of Theresa, Jefferson County. Specifically, the complaint alleges that respondent violated ECL 17-1009(2) and 6 NYCRR 613-1.9(c) by failing to renew the facility's PBS registration, and 6 NYCRR 613-4.5(a)(3) by failing to permanently close PBS tanks at the facility that were out-of-service for more than one year.

The complaint seeks an order of the Commissioner (1) directing respondent to submit a petroleum bulk storage registration application together with the required fees; (2) directing respondent to complete permanent closure of all tanks at the facility in compliance with the regulations; (3) assessing a civil penalty in the amount of \$16,500 with \$12,500 suspended provided that respondent complies with the terms of the Commissioner's order and applicable regulations; and (4) imposing such other and further relief as may be just and appropriate under the circumstances.

By motion (motion) dated September 13, 2021, Department staff moves for a default judgment against respondent. Shannon McGlew, Esq. (staff counsel), Assistant Regional Attorney, DEC Region 6, filed a brief (staff brief), dated September 13, 2021, in support of the motion. Attached to the staff brief are supporting documents, designated as exhibits 1 through

10, including the affidavit of Gary McCullouch (McCullouch affidavit¹), Regional Engineer, DEC Region 6, sworn September 10, 2021 (*see* exhibit list appended hereto).

DEFAULT PROCEDURE

Pursuant to 6 NYCRR 622.15(a), a respondent's failure to file a timely answer constitutes a default and a waiver of respondent's right to a hearing. In accordance with 6 NYCRR 622.15(b), where Department staff moves for a default judgment, the motion must contain:

- "(1) proof of service upon respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- "(2) proof of respondent's failure to appear or failure to file a timely answer;
- "(3) consistent with CPLR 3215(f), proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim;
- "(4) a concise statement of the relief requested;
- "(5) a statement of authority and support for any penalty or relief requested; and
- "(6) proof of mailing the notice required by subdivision (d) of this section, where applicable."

In accordance with 6 NYCRR 622.15(c), where the ALJ finds that the requirements of 6 NYCRR 622.15(b) have been adequately met, the ALJ will submit a summary report, which will address the circumstances of the default as well as the matters set forth in subdivision (b) of this section, and provide recommendations to the Commissioner.

For the reasons set forth below, I conclude that the requirements of 6 NYCRR 622.15(b) have been adequately met and I recommend that Department staff's motion for default judgment be granted.

FINDINGS OF FACT

1. Department staff commenced this matter by personal service of a notice of hearing (original notice of hearing) and complaint (complaint) upon respondent on May 30, 2018 (staff brief at 2; exhibit 1).
2. The original notice of hearing advised respondent that, pursuant to 6 NYCRR 622.4(a), the failure to serve an answer to the complaint would constitute a default and a waiver of respondent's right to a hearing (staff brief at 3; exhibit 3 at 1-2).
3. Respondent failed to file an answer to the complaint (staff brief at 3; exhibit 4, ¶ 11).

¹ The McCullouch affidavit is attached to the staff brief as exhibit 9 and includes 10 exhibits, designated as exhibits A through J. For ease of reference and clarity, the affidavit will be cited herein as the "McCullouch affidavit" rather than by its exhibit number.

4. Department staff served a second notice of hearing (notice of hearing) and amended complaint (amended complaint) upon respondent by personal service on October 29, 2020 (staff brief at 3; exhibit 2).
5. The second notice of hearing advised respondent that, pursuant to 6 NYCRR 622.4(a), the failure to serve an answer to the amended complaint would constitute a default and a waiver of respondent's right to a hearing (staff brief at 3; exhibit 5 at 1-2).
6. Respondent failed to file an answer to the amended complaint and "has not communicated in any way" with staff counsel regarding this matter (staff brief, exhibit 6, ¶ 4).
7. Respondent acquired property (site) located at 38198 State Route 37, Town of Theresa, Jefferson County on June 3, 2003 (McCullough affidavit ¶ 8; staff brief, exhibits 7, 8).
8. A PBS facility (facility) consisting of five stationary aboveground storage tanks (ASTs) with a total capacity of 19,500 gallons is located at the site (McCullough affidavit ¶ 9; exhibits A, B).
9. Respondent last registered the facility with the Department on July 25, 2011 (McCullough affidavit ¶ 11; exhibit A [stating "Cert Issued: 07/25/2011"]).
10. The PBS registration expired on October 16, 2016 (McCullough affidavit ¶ 15; exhibit A [stating "Reg Expires: 10/16/2016"]).
11. Department staff sent respondent a letter, dated November 21, 2016, stating that the PBS facility registration expired on October 16, 2016 and that the failure to register the facility is a violation of 6 NYCRR 612.2² (McCullough affidavit ¶ 15; exhibit F).
12. Department staff reviewed the Department's PBS records and confirmed that there is no record that respondent renewed the facility's last valid registration or that the facility had been transferred or permanently closed (McCullough affidavit ¶ 18).
13. Respondent filed a Petroleum Bulk Storage Application, dated October 5, 2015, with the Department wherein respondent indicated that the status of each of the five ASTs at the facility should be changed from "in-service" to "out-of-service" (McCullough affidavit ¶ 12; exhibit C at 2, column 4; *see also* exhibit A at 2 [PBS application code keys]).
14. Department staff inspected the facility on October 7, 2015, and identified multiple PBS violations, including that the five ASTs were out-of-service but had not been properly temporarily closed (McCullough affidavit ¶ 13; exhibit D).

² Former 6 NYCRR part 612 was repealed effective October 11, 2015. The alleged violation commenced on October 16, 2016 and, therefore, the registration requirements under 6 NYCRR 612.2 were no longer in effect. Rather, as set forth in the amended complaint, the registration requirements for PBS facilities are now set forth under 6 NYCRR 613-1.9 (amended complaint ¶¶ 7, 9).

15. Department staff sent a notice of violation, dated October 16, 2015, to respondent notifying respondent that, because the five ASTs at the site were not in service, the ASTs must be closed in accordance with 6 NYCRR 613.9(a)³ (McCullough affidavit ¶ 14; exhibit E).
16. Department staff inspected the facility on November 30, 2017, and again observed that the ASTs were out-of-service but were not permanently closed (McCullough affidavit ¶ 16; exhibit G).
17. Department staff sent a second notice of violation, dated December 7, 2017, to respondent noting that "the facility has been closed for more than one year" and that several PBS violations were observed at the facility (McCullough affidavit, exhibit H). The violations cited by staff included failure to keep the facility registration current and accurate (because it had expired on October 16, 2016) in violation of 6 NYCRR 613-1.9(a), and failure to permanently close the five ASTs at the facility in violation of 6 NYCRR 613-4.5(a)(3) (McCullough affidavit ¶ 17; exhibit H).
18. Department staff reviewed the Department's PBS records and confirmed that there is no record that respondent submitted documentation that the facility has been permanently closed (McCullough affidavit ¶ 18).
19. Department staff served the motion, together with supporting papers, on respondent by first class mail on September 13, 2021 (staff brief, exhibit 10).

DISCUSSION

Department staff moves for a default judgment against respondent. For the reasons set forth below, I conclude that staff's motion should be granted.

Department staff served the notice of hearing and amended complaint upon respondent by personal service on October 29, 2020 (findings of fact ¶ 4). This method of service of process is authorized under 6 NYCRR 622.3(a)(3) and is in accordance with the ruling authorizing staff to serve the amended complaint. The notice of hearing advised respondent that, pursuant to 6 NYCRR 622.4(a), the failure to serve an answer to the amended complaint would constitute a default and a waiver of respondent's right to a hearing (findings of fact ¶ 5).

The record demonstrates that respondent did not file an answer to the amended complaint nor did respondent communicate with staff counsel in any way in relation to this matter (findings of fact ¶ 6).

³ Former 6 NYCRR 613.9(a) was repealed effective October 11, 2015. As set forth in the amended complaint, the closure requirements for ASTs are now set forth under 6 NYCRR 613-4.5(a) and (b) (amended complaint ¶¶ 12, 13).

Department staff served the motion, together with supporting papers, on respondent by first class mail on September 13, 2021 (findings of fact ¶ 19). This method of service satisfies the requirements of 6 NYCRR 622.6(a)(1) and (c)(1). Pursuant to these provisions, CPLR 2103 governs service of papers, and the method of service employed by Department staff here is consistent with CPLR 2103(c). Additionally, in accordance with 6 NYCRR 622.15(b)(6), staff filed proof of mailing with this office (*see* exhibit 10).

Proof of Facts

As previously noted, Department staff must proffer "proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim" (6 NYCRR 622.15[b][3]). Staff's proffer is considered below.

-- First Cause of Action

The amended complaint alleges that respondent violated ECL 17-1009(2) and 6 NYCRR 613-1.9(c) by failing to renew the facility's PBS registration (amended complaint ¶ 7). As relevant to the allegations set forth in the amended complaint, ECL 17-1009(2) provides that "[a]ll owners shall register the facility with the department [and the] [r]egistration shall be renewed every five years." Further, pursuant to 6 NYCRR 613-1.9(c), unless the Department has received written notice and documentation from the facility owner that a facility has been permanently closed or that ownership of the facility has been transferred, a PBS facility's "[r]egistration must be renewed every five years from the date of the last valid registration certificate."

As relevant here, a "facility" is a single property on which are located one or more tank systems having a combined storage capacity of more than 1,100 gallons (6 NYCRR 613-1.3[v]). A "tank system" is a stationary device designed to store petroleum (6 NYCRR 613-1.3[bk]). Additionally, a "facility owner" is any person who has legal or equitable title to the real property of a facility (6 NYCRR 613-1.3[w]). Here, the record reflects that respondent owns a property on which five ASTs with a total capacity of 19,500 gallons are located (findings of fact ¶¶ 7, 8). Accordingly, respondent is a facility owner.

Respondent last registered the facility on July 25, 2011, and that registration expired on October 16, 2016 (findings of fact ¶¶ 9, 10). Department staff sent respondent a letter on November 21, 2016, and a notice of violation (NOV) on December 7, 2017, both noting that the facility's registration was expired and must be renewed (findings of fact ¶¶ 11, 17). Staff's review of the Department's PBS records confirmed that respondent failed to timely submit a renewal registration and did not provide documentation that the facility has been permanently closed or that it has been transferred to another owner (findings of fact ¶ 12).

In accordance with 6 NYCRR 622.15(b)(3), I conclude that Department staff has provided sufficient proof of the facts to support the violation of ECL 17-1009(2) and 6 NYCRR 613-1.9(c) as alleged and to establish that staff has a viable claim.

-- Second Cause of Action

The amended complaint alleges that respondent "violated 6 NYCRR 61[3]-4.5(a)(3) by leaving tanks 1 through 5 at the facility out-of-service for more than one year without permanently closing them" (amended complaint ¶ 12). Pursuant to 6 NYCRR 613-4.5(a)(3), "[w]hen an AST system is out-of-service for more than 12 months, the facility⁴ must permanently close the AST system in accordance with [the regulations], unless the AST system is located at a facility where one or more other tank systems are not out-of-service."

On October 5, 2015, respondent submitted a PBS application to the Department to change the status of each of the facility's five PBS tanks from "in-service" to "out-of-service" (findings of fact ¶ 13). Department staff inspected the facility on October 7, 2015 and observed the out-of-service ASTs had not been permanently closed (findings of fact ¶ 14). Staff sent an NOV, dated October 16, 2015, to respondent that noted the violation and stated that the ASTs must be closed in accordance with the regulations (findings of fact ¶ 15).

Department staff inspected the facility again on November 30, 2017 and observed that ASTs had still not been permanently closed (findings of fact ¶ 16). Staff sent another NOV, dated December 7, 2017, stating that the facility had been closed for more than one year and again advising respondent that the ASTs must be permanently closed in accordance with the regulations (findings of fact ¶ 17). Staff's review of the Department's PBS records confirmed that respondent did not provide documentation that the facility has been permanently closed (findings of fact ¶ 18).

In accordance with 6 NYCRR 622.15(b)(3), I conclude that Department staff has provided sufficient proof of the facts to support the violation of 6 NYCRR 613-4.5(a)(3) as alleged and to establish that staff has a viable claim.

Relief

By its amended complaint, Department staff requests an order of the Commissioner directing that:

- "Within 10 days of the effective date of this order, Respondent must submit a petroleum bulk storage registration application, together with current and back registration fees in the amount of five hundred dollars (\$500) to re-register the facility.
- "Within 30 days of the effective date of this order, Respondent must execute a contract with a qualified tank contractor for permanent closure of the tanks at the facility and submit a copy to the Department, together

⁴ In accordance with 6 NYCRR 613-1.2(d), any requirement that is imposed on a facility is also imposed on the facility's owner.

with notice of the date upon which closure of the tanks is scheduled to begin.

- "Within 90 days of the effective date of this order, Respondent must complete permanent closure of all tanks at the facility in compliance with 6 NYCRR Part 613-4.5(b).
- "Within 120 days of the effective date of this order, Respondent must submit a complete petroleum bulk storage application, photographs, and invoices or receipts showing the permanent closure of the tanks at the facility in compliance with 6 NYCRR Part 613-4.5(b)" (amended complaint at 5).

The foregoing measures are necessary and appropriate to correct the violations alleged in the amended complaint. Moreover, the timeframes requested by staff provide respondent with sufficient time to implement each of the corrective measures. I recommend, however, that the last corrective measure, the filing of a post-closure PBS application, be modified to be consistent with 6 NYCRR Part 613-4.5(b)(1). That is, the corrective measure should require that respondent submit the post-closure PBS application within 30 days after the date of permanent closure. As modified, I recommend that the Commissioner direct respondent to implement the corrective measures as requested by staff.

Additionally, Department staff requests that the Commissioner assess a penalty of \$16,500 against respondent, with \$12,500 of that amount suspended, apportioned as follows:

- "One Thousand Five Hundred Dollars (\$1,500) for failure to renew the registration of the facility, with Five Hundred Dollars (\$500) of that amount suspended conditioned upon Respondent's timely compliance with the terms of any order the Commissioner may issue, the ECL, and its implementing regulations; and
- "Fifteen Thousand Dollars (\$15,000) [for failure to permanently close tanks at the facility,] with Twelve Thousand Dollars (\$12,000) of that amount suspended conditioned upon Respondent's timely compliance with the terms of any order the Commissioner may issue, the ECL, and its implementing regulations" (amended complaint at 5-6).

Department staff argues that "[t]he civil penalty sought in this matter is fair, reasonable, [and] consistent with penalty ranges considered for similar or [the] same violations and applicable DEC penalty policies" and that it "is within the statutory maximum authorized by law" (staff brief at 11; *see also* Commissioner Policy DEE-1, Civil Penalty Policy, issued June 20, 1990 [DEE-1], § IV.B [stating that "[t]he starting point of any penalty calculation should be a computation of the potential statutory maximum for all provable violations"]).

Pursuant to ECL 71-1929(1), the statutory maximum penalty authorized for violations of title 10 of ECL article 17, and its implementing regulations, is \$37,500 per day for each

violation. Because the alleged violations in this matter continued for several years, the maximum penalty would be in the millions of dollars. Department staff states that a penalty in the range of the statutory maximum "would be excessive" (staff brief at 9).

Department staff states that the penalties that it seeks to impose here are within the penalty ranges that are recommended under the program specific penalty policy, DEC Program Policy DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy, issued May 21, 2003 (DEE-22).⁵ Staff also states that the penalty sought is "consistent with other administrative decisions" (staff brief at 11 [citing other enforcement matters that involved violations of PBS facility registration and tank closing requirements]).

Department staff states that proper registration of PBS facilities assist the Department in the oversight of these facilities and, therefore, "aids in the protection of public health and the environment" (staff brief at 10). Additionally, the proper closure of out-of-service ASTs "is critical in the effort to prevent and limit environmental contamination due to leaks from PBS tanks" (*id.*; *see also* DEE-1, § IV.D.2 [identifying the potential harm caused by a violation and the importance of the type of violation in the regulatory scheme as "gravity component factors"]).

Lastly, I note that Department staff estimates that, on the basis of the information currently before staff, the proper permanent closing of the tank system at this facility will "likely cost around \$20,000" (McCullough affidavit ¶ 28). Given this, staff's request to suspend the majority of the penalty pending respondent's timely compliance with the Commissioner's order and the ECL is reasonable.

I conclude that the penalty requested by Department staff is authorized and appropriate for the violations alleged in the amended complaint. I also conclude that the apportionment of the penalty proposed by staff is appropriate under the circumstances of this matter.

CONCLUSIONS AND RECOMMENDATIONS

As detailed above, Department staff has satisfied each of the requirements governing default procedures set forth at 6 NYCRR 622.15(b). Accordingly, I conclude that staff's motion for a default judgment against respondent should be granted.

I recommend that the Commissioner issue an order holding respondent Shawna M. Kavanaugh liable for violating ECL 17-1009(2) and 6 NYCRR 613-1.9(c) by failing to renew the facility's PBS registration, and for violating 6 NYCRR 613-4.5(a)(3) by failing to permanently close the AST system at the facility after it had been out-of-service for more than one year.

⁵ Department staff notes that DEE-22 was issued prior to the effective date of the 2015 revisions to the PBS regulations and, therefore, includes outdated citations. Nevertheless, the penalty schedule issued under DEE-22 includes penalty ranges for "Failure to register" and for "Tanks not permanently closed" that are comparable to the violations alleged here (staff brief at 8; McCullough affidavit ¶ 24, exhibit J [DEE-22 - Penalty Schedule]).

I further recommend that the Commissioner direct respondent to undertake the following corrective measures:

- Within 10 days of service of the Commissioner's order, respondent must submit a petroleum bulk storage registration application, together with current and back registration fees in the amount of \$500 to re-register the facility;
- Within 30 days of service of the Commissioner's order, respondent must execute a contract with a qualified tank contractor for permanent closure of the tanks at the facility and submit a copy to the Department, together with notice of the date upon which closure of the tanks is scheduled to begin;
- Within 90 days of service of the Commissioner's order, respondent must complete permanent closure of all tanks at the facility in compliance with 6 NYCRR Part 613-4.5(b); and
- Within 30 days of the permanent closure of all the tanks at the facility, respondent must submit a complete petroleum bulk storage application, photographs, and invoices or receipts showing the permanent closure of the tanks in compliance with 6 NYCRR Part 613-4.5(b).

I further recommend that the Commissioner assess a penalty, payable within 15 days of service of the Commissioner's order, against respondent Shawna M. Kavanaugh in the amount of \$16,500, with \$12,500 of that amount suspended, apportioned as follows:

- \$1,500 for failure to renew the registration of the facility, with \$500 of that amount suspended conditioned upon respondent's timely compliance with the terms of the Commissioner's order, the ECL, and its implementing regulations; and
- \$15,000 for failure to permanently close the tanks at the facility, with \$12,000 of that amount suspended conditioned upon respondent's timely compliance with the terms of the Commissioner's order, the ECL, and its implementing regulations.

/s/
Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
February 17, 2022

Matter of Kavanaugh
DEC Case No: R6-20180214-07

Exhibit List

Exhibit	Description
1	Affidavit of Service, sworn July 13, 2018
2	Affidavit of Service, sworn November 18, 2020
3	Notice of Hearing, dated May 24, 2018
4	Affirmation of Randall C. Young, Esq., dated September 9, 2021
5	Notice of Hearing, dated August 27, 2018
6	Affirmation of Shannon C. McGlew, Esq., dated September 13, 2021
7	Jefferson County Recording Coversheet and Deed
8	Jefferson County Property Description Report
9	Affidavit of Gary McCullouch, sworn September 10, 2021, with attached exhibits
10	Affidavit of Service, sworn September 13, 2021