

**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 Parts 612
and 613 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York ("6
NYCRR"),

ORDER

DEC File No.
R619991228-98

- by -

HELEN MONTGOMERY,

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Helen Montgomery by service of a motion for order without hearing in lieu of complaint. Respondent owns a petroleum bulk storage facility at 20 Lake Street, Ogdensburg, New York ("facility") where four underground petroleum bulk storage tanks are located.

In accordance with 6 NYCRR 622.3(a)(3), the motion for order without hearing was served upon respondent by certified mail, return receipt requested. The motion was received by respondent before January 19, 2006 (see Affidavit of Service dated January 19, 2006), thereby completing service (see 6 NYCRR 622.3[a][3]).

The motion for order without hearing, which serves as the complaint in this matter, alleged that respondent: (1) failed to renew the registration of the petroleum bulk storage facility in violation of 6 NYCRR 612.2(a)(2); (2) failed to tightness test two unprotected underground gasoline storage tanks (tanks #1 and #3) at the facility in violation of 6 NYCRR 613.5(a); (3) failed to remove tank #2 from service after it failed a tightness test in violation of 6 NYCRR 613.5(a)(5); and (4) failed to properly permanently close tanks #1 and #3 at the facility after failing to tightness test these tanks in violation of 6 NYCRR 613.5(a)(1)(v) and 6 NYCRR 613.9(b).

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the motion has expired, and has not been extended by Department staff. Accordingly, staff's motion for an

order without hearing is unopposed. Although respondent is technically in default, Department staff does not seek a default judgment. Instead, staff seeks a determination on the merits of its motion for an order without hearing.

Department staff filed its motion for an order without hearing with the Department's Office of Hearings and Mediation Services ("OHMS"). The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick, who prepared the attached report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

In circumstances where Department staff's motion for an order without hearing is unopposed by a respondent, staff's motion may be granted and respondent's liability determined as a matter of law when staff supports each element of the claims alleged in the motion with evidence in admissible form (see, e.g., Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 fn 2). I conclude that in this matter, the affidavits of Department staff's witnesses and other documentary evidence supporting staff's motion establishes respondent's liability for the claims asserted.

In this matter, respondent's son, apparently on behalf of respondent, sent a letter dated January 23, 2006 stating that his mother lacked the financial resources to address the tanks at the facility and was living solely on social security. Although the Department previously requested specific information on respondent's financial status for consideration in this proceeding, no information was provided.

Based on a review of the record, then Commissioner Denise M. Sheehan subsequently directed that the record be reopened pursuant to 6 NYCRR 622.18(d) to provide respondent a further opportunity to provide such information. Under cover of a letter dated October 13, 2006, a financial information disclosure form was mailed to respondent.

On November 17, 2006 a partially completed financial information disclosure form was received from respondent. Respondent's disclosure form indicated that she has minimal financial assets, and also that respondent had filed for bankruptcy. Department staff then obtained a copy of records relating to the bankruptcy filing which indicated that the bankruptcy case had been filed under Chapter 7 of the United States Bankruptcy Code on July 13, 2004. The records noted that the estate had been fully administered and by decree dated

January 19, 2006 the case was closed. OHMS contacted the bankruptcy trustee who advised that, because of environmental conditions at the facility, including the need to remove the underground petroleum bulk storage tanks, the trustee declined to acquire the facility as part of the bankruptcy estate.

The violations of the petroleum bulk storage regulations at this facility support the assessment of a substantial civil penalty as proposed by Department staff. However, in this matter, the record indicates the limited financial resources of respondent. Based on the equities in this matter and in the interests of justice, I am exercising my discretion and will not impose on respondent Helen Montgomery either the civil penalty requested by Department staff or that proposed by the ALJ. No civil penalty is being imposed by this order.

Respondent, however, remains subject to the petroleum bulk storage requirements applicable to the facility. Respondent is directed to permanently close the three 2,000 gallon underground storage tanks at the facility within sixty days of receipt of this order and comply with any and all other applicable requirements.

Respondent shall also provide Department staff full access to the facility to determine the extent of her compliance with the petroleum bulk storage regulations. In the event that respondent fails to close the tanks, respondent shall provide Department staff with access and with whatever further assistance is necessary for the closure of the tanks and for Department staff to undertake any other appropriate action.

The terms and conditions of this order shall not impair, limit or abridge the right of the Department or the State of New York in any way to recover from respondent the cost of any remediation of petroleum or other contamination at respondent's facility.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for an order without hearing is granted.

II. Respondent Helen Montgomery is determined to have committed the following violations:

1. Respondent failed to renew her registration of the petroleum bulk storage facility in violation of 6 NYCRR 612.2(a)(2);
2. Respondent failed to tightness test tanks #1 and #3 in violation of 6 NYCRR 613.5(a);
3. Respondent failed to remove tank #2 from service after it failed a tightness test and therefore violated 6 NYCRR 613.5(a)(5); and
4. Respondent failed to permanently close tanks #1 and #3 after failing to tightness test them in violation of 6 NYCRR 613.5(a)(1)(v) and 613.9(b).

III. Within thirty (30) days after service of this order upon respondent, respondent shall register the facility with the Department pursuant to 6 NYCRR 612.2(a).

IV. Within sixty (60) days after service of this order upon respondent, respondent shall permanently close the three 2,000 gallon underground storage tanks at the site pursuant to 6 NYCRR 613.5(a)(1)(v) and 613.9(b). Respondent shall provide the required advanced notice of closure specified in 6 NYCRR 612.2(d) and 613.9(c).

V. Respondent shall grant access to the facility to Department staff to determine respondent's compliance with this order, to conduct any investigations and to undertake any closure or other appropriate action.

VI. The terms and conditions of this order do not impair, limit or abridge the right of the Department or the State of New York to recover from respondent all costs allowable under the law for any pollution remediation activities incurred with respect to respondent's facility.

VII. All communications from respondent to the Department concerning this order shall be made to Randall C. Young, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 6, 317 Washington Avenue, Watertown, New York, 13601.

VIII. The provisions, terms and conditions of this order shall bind respondent Helen Montgomery and her agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Louis A. Alexander
Assistant Commissioner¹

Dated: March 20, 2007
Albany, New York

To: Ms. Helen Montgomery (VIA CERTIFIED MAIL)
20 Lake Street
Ogdensburg, New York 13669

Ms. Helen Montgomery (VIA CERTIFIED MAIL)
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Las Vegas, Nevada 89135-7807

Mr. Joseph Montgomery (VIA CERTIFIED MAIL)
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Ogdensburg, New York 13669

Randall C. Young, Esq. (VIA REGULAR MAIL)
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New York State Department of
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Region 6
317 Washington Avenue
Watertown, New York, 13601

¹ By memorandum dated March 16, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

SUMMARY

Staff of the Department of Environmental Conservation (DEC Staff) initiated this enforcement proceeding against Helen Montgomery, the respondent, by Motion for Order without Hearing. The motion was unopposed. Based on the evidence submitted with the motion papers, DEC Staff has proven by a preponderance of the evidence that the respondent is liable for all four causes of action alleged. Specifically, the respondent: (1) failed to renew the registration of her petroleum bulk storage facility in violation of 6 NYCRR 612.2(a)(2); (2) failed to tightness test two unprotected underground gasoline storage tanks (tanks #1 and #3) in violation of 6 NYCRR 613.5(a); (3) failed to remove tank #2 from service after it failed a tightness test in violation of 6 NYCRR 613.5(a)(5); and (4) failed to properly permanently close tanks #1 and #3 at the site after failing to tightness test these tanks in violation of 6 NYCRR 613.5(a)(1)(v) and 6 NYCRR 613.9(b). DEC Staff has also shown that its proposed civil penalty of \$27,000 is justified under the circumstances and that the respondent should be ordered to implement other remedial actions at the site.

PROCEEDINGS

By papers dated January 12, 2006, DEC Staff filed a Notice of Motion, Motion for Order Without Hearing, an Affidavit of Donald I. Johnson, an Affidavit of Randall C. Young, Esq. and a brief alleging four violations against Helen Montgomery, the respondent. These papers were sent to the respondent by certified mail and received before January 19, 2006.

A letter dated January 23, 2006 from the respondent's son, apparently acting for his mother, was mailed to DEC's Chief Administrative Law Judge (ALJ). This letter stated that the respondent "has no money to have these tanks removed and lives solely on social security. There is a very small resale value of the building. Could you please let us know what we should do next?"

This letter was forwarded by the Chief ALJ to DEC Staff by letter dated January 26, 2006.

No answer has been received although the time to do so

expired before February 9, 2006.

This matter was assigned to ALJ P. Nicholas Garlick on February 10, 2006.

FINDINGS OF FACT

1. Helen A. Montgomery is the owner of a petroleum bulk storage facility located at 20 Lake Street, Ogdensburg, New York.
2. The facility includes four underground petroleum storage tanks. Tank #1 has an estimated capacity of 2000 gallons, Tank #2 has an estimated capacity of 2000 gallons, Tank #3 has an estimated capacity of 2000 gallons, and Tank #4 has an estimated capacity of 1000 gallons. The site was formerly used as a gas station and tanks #1, #2, and #3 stored unleaded gasoline. Tank #4 stored another unspecified product.
3. The facility's petroleum bulk storage registration certificate was issued on October 16, 1996 and expired on October 16, 2001 and has not been renewed. The facility has not been transferred or permanently closed.
4. The facility's tanks #1, #2, and #3 were due to be tested by December 1987. Tank #2 was tightness tested on March 21, 2000 and failed the test. DEC Staff has no record of tanks #1 or #3 ever being tested. DEC Staff has no record of any of the tanks being permanently closed.

DISCUSSION

LIABILITY

DEC Staff alleged four causes of action against the respondent related to a petroleum bulk storage facility located at 20 Lake Street in the City of Ogdensburg.

First Cause of Action

DEC Staff alleges that respondent failed to renew the registration of her petroleum bulk storage facility in violation of section 612.2(a)(2). This section states that:

"(2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility

has been permanently closed or that ownership of the facility has been transferred."

DEC Staff provided a copy of the deed of the site demonstrating her ownership. DEC Staff provided a copy of the facility's petroleum bulk storage registration facility certificate which expired on October 16, 2001. DEC Staff member Donald I. Johnson states in his affidavit that the respondent failed to renew the registration and that he conducted a diligent search of DEC's region 6 petroleum bulk storage files and failed to find any record of the facility being transferred or permanently closed.

Accordingly, DEC Staff has proven the first cause of action.

Second Cause of Action

DEC Staff alleges that the respondent failed to tightness test two unprotected underground gasoline storage tanks (tanks #1 and #3) in violation of section 613.5(a). This section requires the owner of any underground petroleum storage tank to have the tanks periodically tested for tightness.

DEC Staff provided a copy of a December 31, 1997 letter to the respondent informing her that tanks #1, #2 and #3 were due to be tested by December 1987. DEC Staff member Donald I. Johnson states in his affidavit that he thoroughly examined the files of DEC's petroleum bulk storage program and has found no record indicating that tanks #1 or #3 were ever tightness tested or permanently closed.

Accordingly, DEC Staff has proven the second cause of action.

Third Cause of Action

DEC Staff alleges that the respondent failed to remove tank #2 from service after it failed a tightness test in violation of section 613.5(a)(5). This section states:

"(5) Repair, replacement and closure of leaking systems. Any part of the storage facility which is not tight must be promptly emptied, replaced or repaired in accordance with Part 614 of this Title or taken out-of-service in accordance with section 613.9 of this Part."

DEC Staff has provided a copy of the results of a tank tightness test for tank #2 at the facility, conducted on March 21, 2000. These results concluded a gross failure had occurred. DEC Staff has proven that tank #2 is not tight.

DEC Staff has demonstrated that tank #2 was not replaced because in order to replace the tank, it must be taken out of service and DEC Staff notified pursuant to section 613.9(c). DEC Staff member Donald I. Johnson states in his affidavit that he thoroughly examined the files of DEC's petroleum bulk storage program and found no record indicating that this tank was ever permanently closed.

DEC Staff has also demonstrated that tank #2 was not repaired because following repair, the tank must be retested for tightness and a report sent to DEC Staff pursuant to section 614.6(i). DEC Staff member Donald I. Johnson states in his affidavit that he thoroughly examined the files of DEC's petroleum bulk storage program and found no tightness test result other than the March 21, 2000 test result indicating that tank #2 was not tight.

DEC Staff has also proven that tank #2 was not taken out of service in accordance with section 613.9. DEC Staff member Donald I. Johnson states in his affidavit that he thoroughly examined the files of DEC's petroleum bulk storage program and found no record indicating that this tank was ever permanently closed.

Accordingly, DEC Staff has proven the third cause of action.

Fourth Cause of Action

DEC Staff alleges that the respondent failed to properly permanently close tanks #1 and #3 at the site after failing to tightness test these tanks in violation of sections 613.5(a)(1)(v) and 613.9(b).

DEC Staff provided a copy of a December 31, 1997 letter to the respondent informing her that tanks #1, #2 and #3 were due to be tested by December 1987. DEC Staff member Donald I. Johnson states in his affidavit that he thoroughly examined the files of DEC's petroleum bulk storage program and found no record indicating that these tanks were ever tightness tested or permanently closed. Accordingly, DEC Staff has proven the fourth cause of action.

PENALTY

DEC Staff seeks a total penalty of \$27,000: for the first cause of action, \$2,000; for the second, \$10,000; for the third, \$10,000 and for the fourth, \$5,000. In this case several aggravating factors identified in DEC's Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22) are present. The violation is continuing, of long duration and intentional. The letter from respondent's son claiming a lack of ability to pay must be weighed against the fact that DEC Staff mailed Financial Disclosure forms to the respondent on January 20, 2000 and those forms were not returned. Accordingly, there is no proof in the record of the respondent's financial situation other than the unsworn letter from her son dated January 23, 2006. This, despite being given an opportunity to provide such information.

First Cause of Action

DEC Staff seeks a civil penalty of \$2,000 from the respondent for failing to register her facility. Respondent's registration expired on October 16, 2001 and has not been renewed. In its brief, DEC Staff references DEE-22 which establishes a penalty range for this violation of between \$500 and \$5,000. The policy also sets forth an average penalty of \$1,000, if a respondent enters into a consent order. DEE-22 also states that "penalty amounts calculated with the aid of this document in adjudicated cases must, on average and consistent with considerations of fairness, be significantly higher than the penalty amount which DEC accepts in consent orders which are entered into voluntarily by respondents." In this case, considering the aggravating factors and DEE-22, DEC Staff's proposed penalty is appropriate.

Second Cause of Action

DEC Staff seeks a civil penalty of \$10,000 from the respondent for failing to tightness test tanks #1 and #3. DEE-22 suggests an average penalty of \$5,000 per tank should be imposed in a consent order. DEC Staff's suggested penalty is consistent with DEE-22 and justified in this case.

Third Cause of Action

DEC Staff seeks a civil penalty of \$10,000 from the respondent for failing to permanently remove tank 2 from

service after it failed a tightness test. DEE-22 suggests an average penalty of \$2,000 for failing to permanently close tanks with a penalty range of \$500-\$5,000. DEC Staff argues that a higher penalty should be imposed in this case because the respondent caused actual harm to the environment by leaving the failed tank in the ground. DEC Staff's proposed penalty is justified because of the environmental harm caused by this violation and the respondent's knowledge of the violation and failure to act.

Fourth Cause of Action

DEC Staff seeks a civil penalty of \$5,000 from the respondent for failing to permanently close tanks #1 and #3. DEE-22 suggests an average penalty of \$2,000, with a penalty range of \$500-\$5,000, for failing to permanently close tanks. DEC Staff's suggested penalty is consistent with DEE-22 and justified in this case.

SUSPENDED PENALTY

In addition to the \$27,000 civil penalty to be imposed, DEC Staff also seeks a suspended penalty of \$15,000 to ensure the respondent's strict compliance with the Commissioner's Order. DEC Staff offers no justification for this suspended penalty, nor does it indicate which cause of action it applies to. Accordingly, the suspended penalty should not be included in the Commissioner's Order.

REMEDIAL ACTIONS

In addition to the \$27,000 civil penalty and the \$15,000 suspended penalty, DEC Staff seeks a series of remedial actions to be included in the Commissioner's Order. First, DEC Staff seeks the Commissioner to order the respondent to register the facility and pay the \$500 registration fee within ten days of the service of the order on the respondent.

Second, DEC Staff seeks the Commissioner to order the respondent to permanently close the three 2,000 gallon underground tanks at the site pursuant to 6 NYCRR 613.5(a)(1)(v) and 613.9(b) within sixty days of service of the order on the respondent. The respondent shall provide the required advance notice of closure specified in Part 612.2(d) and 613.9(c).

These remedial actions are justified on this record and are necessary to address contamination at the site and prevent further threats to the State's natural resources. Accordingly, these remedial measures should be included in the Commissioner's Order.

CONCLUSIONS OF LAW

The respondent has committed the following violations:

1. Respondent failed to renew the registration of her petroleum bulk storage facility in violation of 6 NYCRR 612.2(a)(2);
2. Respondent failed to tightness test tanks #1 and #3 in violation of 6 NYCRR 613.5(a);
3. Respondent failed to remove tank #2 from service after it failed a tightness test in violation of 6 NYCRR 613.5(a)(5); and
4. Respondent failed to permanently close tanks #1 and #3 after failing to tightness test them in violation of 6 NYCRR 613.5(a)(1)(v) and 613.9(b).

RECOMMENDATIONS

The Commissioner should issue an Order in this matter with the following contents:

1. Find the respondent liable for the four causes of action described above.
2. Impose a civil penalty of \$27,000.
3. Order the respondent to register the facility and pay the \$500 registration fee within ten days of the service of the order on the respondent.
4. Order the respondent to permanently close the three 2,000 gallon underground tanks at the site pursuant to 6 NYCRR 613.5(a)(1)(v) and 613.9(b) within sixty days of service of the order on the respondent. In addition, order the respondent to provide the required advance notice of closure specified in Part 612.2(d) and 613.9(c)).