

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

ORDER

- by -

Case No. R6-19991228-109

DOUGLAS MURRAY,

Respondent.

WHEREAS :

1. Pursuant to part 622 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") duly served a notice of motion and a motion for order without hearing upon respondent Douglas Murray on May 24, 2004. The motion was supported by an affidavit dated May 19, 2004 by Donald I. Johnson, Department Environmental Engineer I.

2. Respondent was served by certified mail, return receipt requested. While the date of delivery was not indicated on the return receipt, the return receipt had been signed and was received by Department staff on June 3, 2004.

3. In the motion for order without hearing, DEC staff alleged that respondent failed to renew the registration for his petroleum bulk storage facility ("facility") and thereby violated 6 NYCRR 612.2(a)(2). The facility registration had expired on January 4, 1996.

4. Department staff, as part of the relief requested, seeks an order that directs respondent to re-register its facility and to pay a civil penalty.

5. Respondent failed to serve an answer on Department staff within 20 days of respondent's receipt of the motion for order without hearing.

6. A copy of the motion for order without hearing, the notice and supporting papers were filed with the Office of Hearings and Mediation Services and the matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick.

7. A copy of the ALJ's Ruling on Motion for Order without Hearing ("Ruling") is attached. Upon review of the record, I adopt the Ruling as my decision in this matter, subject to the comments in this order.

8. No hearing is required because no material issue of fact exists.

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

- I. Department staff's motion for an order without hearing is granted.
- II. Respondent is found to have violated 6 NYCRR 612.2(a)(2) for failing to timely re-register his petroleum bulk storage facility.
- III. For the violation set forth in Paragraph II of this order, respondent is assessed a civil penalty of twenty-five hundred dollars (\$2,500), and shall pay the penalty within thirty (30) days of the service of this order. Five hundred dollars (\$500) of the penalty shall be suspended if respondent submits an application to the Department to re-register his facility within ten (10) days of the service of this order. Payment of the penalty shall be by cashier's check, certified check or money order drawn to the order of "New York State Department of Environmental Conservation" and delivered to: Randall C. Young, Esq., NYSDEC, Region 6, 317 Washington Street, Watertown, NY 13601-3787.
- IV. Respondent shall, within ten (10) days of the service of this order, submit an application to the Department to re-register his facility as required by 6 NYCRR part 612.
- V. All communications from respondent to the Department concerning this order shall be made to Randall C. Young, Esq., NYSDEC, Region 6, 317 Washington Street, Watertown, NY 13601-3787.

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

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Erin M. Crotty, Commissioner

Dated: Albany, New York
September 3, 2004

To: Randall C. Young, Esq.
New York State Department of Environmental Conservation
Region 6 Office
317 Washington Street
Watertown, New York 13601-3787

Mr. Douglas Murray
1183 Main Street
Chippewa Bay, New York 13623

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged
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Environmental Conservation Law
of the State of New York and
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612 by:

RULING ON MOTION FOR ORDER
WITHOUT HEARING

Case No.R6-19991228-109

DOUGLAS MURRAY,

August 27, 2004

Respondent.

Summary

In this case, Staff of the Department of Environmental Conservation ("DEC Staff") moved for an Order Without Hearing. The respondent, Douglas Murray, has not responded to the motion. The Administrative Law Judge ("ALJ") recommends that the Commissioner issue an Order which finds that DEC Staff has borne its burden of proof and shown that the respondent has failed to re-register his petroleum bulk storage facility ("facility"). DEC Staff also moves for an Order requiring the respondent to pay a \$2,500 civil penalty, \$500 of which should be suspended if the respondent re-registers his facility within ten days of the Commissioner's Order.

Proceedings

By notice of motion dated May 13, 2003, DEC Staff sought, pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR") section 622.15, a default judgment against respondent Douglas Murray for alleged violations of article 17 of the Environmental Conservation Law ("ECL") and its implementing regulations.

On May 5, 2004, Chief ALJ James T. McClymonds issued a ruling which denied the motion because DEC Staff failed to include proof of service of the Notice of Hearing and Complaint upon the respondent.

In papers dated May 24, 2004, DEC Staff moved for an Order Without Hearing. In her affidavit supporting the motion, Ardis

Seifried of DEC Staff states that she mailed the motion and supporting papers to the respondent on or about May 24, 2004 via certified mail, return receipt requested. Accompanying the motion when it was submitted to the Office of Hearings and Mediation Services was a U.S. Postal Service Receipt indicating that the motion was received at the respondent's address and signed for by Christine Murray (USPS Article Number 7003 1680 0002 6204 6863). While the date of delivery is not indicated on the receipt, the receipt was returned to DEC Staff on June 3, 2004.

No written response was received from the respondent although the time to answer expired on or about June 23, 2004. DEC Staff attorney Randall C. Young reports in a June 28, 2004 letter to the Chief ALJ that the respondent telephoned him on or about June 2, 2004 and asked several questions about the motion.

Findings of Fact

1. On November 14, 1990, the respondent signed a petroleum bulk storage application seeking to register two 2,000 gallon steel tanks located at a facility he owns located at 1183 Main Street, Chippewa Bay, New York, 13623.
2. On January 4, 1991, DEC Staff issued the respondent a petroleum bulk storage registration certificate for the facility. This registration expired on January 4, 1996.
3. By letter dated October 4, 1996, DEC Staff informed the respondent that the registration had expired. Enclosed with the letter was a new registration application.
4. To date, the respondent has not filed a new registration application and the facility is currently unregistered.
5. On or about May 24, 2004, DEC Staff mailed a motion for order without hearing and supporting papers to the respondent on via certified mail, return receipt requested. A U.S. Postal Service Receipt indicates that the motion was received at the respondent's address and signed for by Christine Murray (USPS Article Number 7003 1680 0002 6204 6863). While the date of delivery is not indicated on the receipt, the receipt was returned to DEC Staff on June 3, 2004.

6. Respondent has not filed an answer, responded to the motion for order without hearing, or otherwise appeared in this matter.

Discussion

Section 622.12(a) of 6NYCRR states that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence." In this case, the respondent was properly served with a motion for order without hearing at some time between May 24, 2004 and June 3, 2004. Respondent has not filed an answer although the time to do so expired on June 23, 2004 at the latest.

DEC Staff allege that the respondent violated 6 NYCRR 612.2(a)(2) which requires owners of petroleum storage facilities to renew registration for facilities every five years from the date of the last valid registration until DEC Staff receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred. In this case, DEC Staff has shown that the respondent had previously registered his facility and that this registration expired on January 4, 1996. According to the affidavit of Donald I. Johnson, a member of DEC Staff, a diligent search of the Department's Region 6 petroleum bulk storage files failed to show any record of the facility being transferred or permanently closed. The respondent has not responded or contested any of these facts. Accordingly, DEC Staff has borne its burden of proof and shown by a preponderance of the evidence that the respondent has violated 6 NYCRR 622.2(a)(2) and the Commissioner should find the same.

In its motion, DEC Staff seek a civil penalty in an amount not to exceed the maximum amount authorized by law. In a June 8, 2004 letter to the ALJ previously assigned to this matter, DEC Staff state that it seeks a monetary penalty of \$2,500. This letter was also sent to the respondent. DEC Staff states in its letter that DEC's "Petroleum Bulk Storage Inspection Enforcement Policy", Enforcement Guidance Memorandum DEE-22 specifies a penalty range of \$500 - \$5000, with an average penalty of \$1000. DEC Staff states that a penalty of \$2500 is reasonable in this case because of the duration of the violation and the respondent's continuing failure to register his facility. DEC Staff recommends suspending \$500 of the penalty if the respondent timely complies with the Commissioner's Order and registers his

facility. The respondent has not responded nor contested the suggested civil penalty amount. In this case, a penalty greater than the average penalty is justified given the duration of the violation and the unwillingness of the respondent to come into compliance. The Commissioner should impose a civil penalty of \$2,500 in this case and suspend \$500 of the penalty if the respondent comes into compliance within 10 days of the date of the Order.

In addition to the civil penalty, DEC Staff also seeks the Commissioner to Order the respondent to register his facility within ten days. Again, the respondent has not responded to this request. In this case, it is reasonable for the Commissioner to require the respondent to register his facility and come into compliance with the law within ten days of the Order.

Conclusions of Law and Ruling

No material issue of fact exists regarding the violation alleged by DEC Staff. The respondent has failed to re-register his facility, as required by 6 NYCRR 612.2(a)(2). DEC Staff have shown that the penalty sought is reasonable. Accordingly, the Commissioner should issue an order finding the respondent liable for the violation alleged, imposing a civil penalty of \$2,500 and ordering the respondent to register his facility within ten days. If the respondent timely complies, \$500 of the penalty should be suspended.

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
August 27, 2004

To: Randall C. Young, Esq.
NYS Department of Environmental Conservation
Region 6 Office
317 Washington Street
Watertown, New York 13601-3787

Mr. Douglas Murray
1183 Main Street
Chippewa Bay, New York 13623