

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17  
of the Environmental Conservation Law of the State of New  
York and Parts 612-614 of Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the State of New York,

**ORDER**

DEC Case No.  
R5-20100924-1018  
PBS No. 5-600043

**KENNETH J. PREVO and LINDA A. PREVO  
d/b/a K & L COUNTRY CONVENIENCE STORE,**

Respondents.

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This administrative enforcement proceeding concerns the failure of respondents Kenneth J. Prevo and Linda A. Prevo, d/b/a K&L Country Convenience Store, to comply with New York State's petroleum bulk storage regulations at a petroleum bulk storage facility (PBS #5-600043) that respondents own. At the facility, which is located at 5663 Route 11, Ellenburg Center, New York, are five petroleum bulk storage tanks, three of which are unregistered. Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") have denominated the tanks as Tank 001, Tank 002, Tank UNREG1, Tank UNREG2, and Tank UNREG3. The five tanks have a combined capacity of 16, 550 gallons and, accordingly, are subject to regulation by the Department.

Department staff commenced this administrative enforcement proceeding against respondents by serving by certified mail a notice of hearing and complaint dated December 14, 2010. Respondents received the papers on December 17, 2010. Accordingly, service of process was accomplished 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").

Department staff's complaint sets forth fifteen causes of action arising from violations of the applicable petroleum bulk storage regulations, including the following:

- failure to have a current and valid registration for the petroleum storage facility, in violation of 6 NYCRR 612.2(a);
- failure to maintain top sumps for Tank 001 and Tank 002, in violation of 6 NYCRR 613.3(d);
- failure to properly color code fill ports for Tank 001, Tank 002, Tank UNREG1, Tank UNREG2, and Tank UNREG3, in violation of 6 NYCRR 613.3(b);
- lack of surface coating for Tank 001, Tank 002, Tank UNREG1, Tank UNREG2 and Tank UNREG 3, in violation of 6 NYCRR 614.9(c);
- lack of cathodic protection for Tank UNREG1, in violation of 6 NYCRR 614.9(b);

- lack of impermeable barrier for Tank UNREG 1, in violation of 6 NYCRR 614.10;
- lack of monitoring system for Tank UNREG1, in violation of 6 NYCRR 614.11;
- failure to conduct monthly inspections for Tank 001, Tank 002, Tank UNREG1, Tank UNREG2, and Tank UNREG3, in violation of 6 NYCRR 613.6(a) and (c);
- failure to maintain secondary containment for Tank 001 and Tank 002, in violation of 6 NYCRR 613.3(d);
- lack of secondary containment for Tank UNREG1, Tank UNREG2, and Tank UNREG3, in violation of 6 NYCRR 613.3(c)(6)(i);
- failure to lock dike drain valve closed for Tank 001 and Tank 002, in violation of 6 NYCRR 613.3(c)(6)(iii);
- failure to maintain overfill prevention for Tank UNREG2, in violation of 6 NYCRR 613.3(d);
- lack of design/working capacity and identification numbers for Tank 001, Tank 002, Tank UNREG1, Tank UNREG2, and Tank UNREG3, in violation of 6 NYCRR 613.3(c)(3)(ii);
- failure to permanently close out-of-service Tank 002, in violation of 6 NYCRR 613.9(b) and (c); and
- failure to temporarily close out-of-service Tank 002, in violation of 6 NYCRR 613.9(a).

Respondents failed to answer the complaint. The matter was assigned to Administrative Law Judge (“ALJ”) Richard R. Wissler, who presided at a pre-hearing conference on February 16, 2011. No one appeared on behalf of respondents at the pre-hearing conference, and Department staff moved for a default judgment.

ALJ Wissler has prepared the attached hearing report in which he recommends that Department’s motion for default be granted, respondents be found in violation of the various sections of 6 NYCRR parts 612, 613 and 614 as enumerated in the complaint, and respondents be directed to undertake various corrective actions relating to the petroleum bulk storage tanks at the facility. In addition, the ALJ recommends imposing a civil penalty in the amount of twenty-five thousand dollars (\$25,000), of which (a) five thousand dollars (\$5,000) would be immediately payable and (b) twenty-thousand dollars (\$20,000) would be suspended contingent upon respondents’ completion of the prescribed corrective actions.

I adopt the report as my decision in this matter, subject to the following comments.

Section 71-1929 of the New York Environmental Conservation Law (“ECL”) provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500.00) per day for each violation of titles 1 through 11 inclusive and title 19 of article 17, or the rules or regulations promulgated thereto by the Commissioner of the Department. Title 10 of article 17 addresses requirements governing bulk storage of petroleum systems, with applicable regulations at 6 NYCRR parts 612, 613, and 614. The civil penalty requested by Department staff and recommended by the ALJ is authorized and appropriate. However, with respect to the payable portion of the penalty (\$5,000), rather than making it immediately due upon respondents’ receipt of this order, I am providing that respondents will have thirty (30) days to submit payment. The suspended portion of the penalty shall be contingent upon respondents’ completion of the

corrective actions set forth in this order and compliance with all other terms and conditions of this order.

Department staff has submitted a “schedule of compliance,” a copy of which is attached to the ALJ’s hearing report. The “schedule of compliance” sets forth corrective actions for respondents to implement to address deficiencies in the facility’s petroleum bulk storage tanks. The proposed corrective actions are authorized and warranted. I am however changing various compliance timeframes to a period after the date of the service of this order upon respondents.

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

- I. Pursuant to 6 NYCRR 622.15, Department staff’s motion for a default judgment is granted.
- II. Respondents Kenneth J. Prevo and Linda A. Prevo, d/b/a K & L Country Convenience Store, are adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations in Department staff’s complaint against respondents are deemed to have been admitted by respondents.
- III. Respondents Kenneth J. Prevo and Linda A. Prevo, d/b/a K & L Country Convenience Store, are adjudged to have violated 6 NYCRR 612.2(a), 613.3(b), 613.3(c)(6)(i), (ii) and (iii), 613.3(d), 613.6(a) and (c), 613.9(a), 613.9(b) and (c), 614.9(b), 614.9(c), 614.10, and 614.11.
- IV. Respondents are hereby assessed, jointly and severally, a civil penalty in the amount of twenty-five thousand dollars (\$25,000). Of this penalty, twenty-thousand dollars (\$20,000) is suspended on the condition that respondents timely complete, to Department staff’s satisfaction, the corrective actions set forth in paragraph V of this order and comply with all other terms and conditions of this order.

The non-suspended portion of the civil penalty, five thousand dollars (\$5,000), is due and payable within thirty (30) days after service of this order upon respondents. Payment of the civil penalty shall be by cashier’s check, certified check or money order drawn to the order of the New York State Department of Environmental Conservation and mailed or hand-delivered to:

Scott Abrahamson, Esq.  
Office of the General Counsel  
Region 5, NYSDEC  
1115 NYS Route 86  
P.O. Box 296  
Ray Brook, New York 12977

Should respondents fail to timely complete the corrective actions to Department staff's satisfaction or comply with all other terms and conditions of this order, the suspended portion of the penalty shall become immediately due and payable and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

V. Respondents shall:

- A. Within thirty (30) days of the service of the order upon respondents, display a current and valid petroleum bulk storage certificate at the facility, and submit photo documentation of compliance to the Department.
- B. Within thirty (30) days of the service of the order upon respondents, submit an application to correct and update the information on the facility's petroleum bulk storage registration.
- C. Immediately upon the service of the order upon respondents, respondents shall empty Tank 002, and shall either: 1) submit a plan to permanently close Tank 002 at respondents' facility within thirty (30) days of the effective date of this order, in accordance with the requirements of 6 NYCRR 613.9(b) and (c); or 2) bring Tank 002 into compliance with all applicable laws and regulations within sixty (60) days of the service of this order upon respondents.

Should respondents elect to permanently close Tank 002, respondents shall, within thirty (30) days of the service of this order upon them, temporarily close Tank 002, in accordance with the requirements of 6 NYCRR 613.9(a). Should respondents elect to continue using Tank 002, respondents shall comply with the following requirements:

1. Within thirty (30) days of the service of this order upon respondent, maintain spill prevention equipment in good working order by emptying and cleaning the top sump for Tank 002 and submit photo documentation of compliance to the Department.
2. Within thirty (30) days of the service of this order upon respondent, permanently mark all fill ports for Tank 002 to identify the product inside the tank in accordance with the color and symbol code of the American Petroleum Institute and submit photo documentation of compliance to the Department.
3. Within thirty (30) days of the service of this order upon respondents, either: (a) protect the exterior surfaces of Tank 002 with a primer coat, a bond coat and two or more final coats of paint or an equivalent surface coating system and submit documentation of compliance to the

Department; or (b) remove the tank from service in accordance with 6 NYCRR 613.9(a) and submit for Department approval a proposal to protect the exterior surfaces of the tank with a primer coat, a bond coat and two or more final coats of paint or an equivalent surface coating system.

4. Upon service of this order upon respondents, respondents shall immediately begin conducting monthly inspections of Tank 002. Within thirty (30) days of the service of this order upon respondents, respondents shall submit a copy of the most recent monthly inspection report to the Department.
  5. Within thirty (30) days of the service of this order upon respondents, respondents shall maintain spill prevention equipment in good working order by repairing or replacing the secondary containment system for Tank 002 and submit documentation that the secondary containment has been repaired or replaced to the Department.
  6. Upon service of this order upon respondents, respondents shall immediately maintain the dike valve for the facility's gravity drain pipe for Tank 002 in a locked and closed position and shall submit photo documentation of compliance within thirty (30) days to the Department.
  7. Within thirty (30) days of the service of this order upon respondents, respondents shall clearly mark the design capacity, working capacity and identification number of Tank 002 on the tank and at the gauge and submit photo documentation of compliance to the Department.
- D. Within thirty (30) days of the service of this order upon respondents, respondents shall conduct a test of the cathodic protection for Tank UNREG1 and the connecting piping systems, and submit the results to the Department. Respondents shall thereafter monitor the cathodic protection at least annually.
- E. Within thirty (30) days of the service of this order upon respondents, respondents shall submit a plan to the Department for the installation of a double bottom for Tank UNREG1 or underlay Tank UNREG1 with an impermeable barrier. Respondents shall submit documentation to the Department of the completion of the installation within one hundred-eighty (180) days of the service of this order upon them.
- F. Within thirty (30) days of the service of this order upon respondents, respondents shall provide a method for monitoring between the tank bottom and impermeable barrier of Tank UNREG1 and submit photo documentation of compliance to the Department.
- G. Upon service of this order upon respondents, respondents shall immediately

begin conducting monthly inspections of Tank 001, Tank UNREG1, Tank UNREG2 and Tank UNREG3. Within thirty (30) days thereafter, respondents shall submit a copy of the most recent monthly inspection report to the Department.

- H. Within thirty (30) days of the service of this order upon respondents, respondents shall maintain spill prevention equipment in good working order by repairing or replacing the secondary containment system for Tank 001 and submit documentation that the secondary containment has been repaired or replaced to the Department.
  - I. Within thirty (30) days of the service of this order upon respondents, respondents shall submit a plan to install secondary containment or the equipment that meets Department guidance document SPOTS #17 for Tank UNREG1, Tank UNREG2 and Tank UNREG3. Respondents shall submit documentation to the Department that the required secondary containment system has been installed within ninety (90) days of the service of this order upon them.
  - J. Upon service of this order upon respondents, respondents shall immediately maintain the dike valve for the facility's gravity drain pipe for Tank 001 in a locked and closed position and shall submit photo documentation of compliance within thirty (30) days to the Department.
  - K. Within thirty (30) days of the service of this order upon respondents, respondents shall maintain spill prevention equipment in good working order by repairing or replacing the gauges or equivalent devices that provide overflow and spill prevention for Tank UNREG2 and submit documentation to the Department that the gauges have been repaired or replaced.
  - L. Within thirty (30) days of the service of this order upon respondents, respondents shall clearly mark the design capacity, working capacity and identification number of Tank 001, Tank UNREG1, Tank UNREG2 and Tank UNREG3 on the tanks and at the gauges and submit photo documentation of compliance to the Department.
- VI. All communications from respondent to the Department concerning this order shall be directed to Scott Abrahamson, Esq., at the address referenced in paragraph IV of this order, except that questions regarding the corrective actions and all proof of compliance with those actions shall be directed to Benjamin Hankins at the following address: NYS DEC Region 5, Division of Environmental Remediation, 1115 NYS Route 86, P.O. Box 296, Ray Brook, New York 12977.

- VII. The provisions, terms and conditions of this order shall bind respondents Kenneth J. Prevo and Linda A. Prevo, d/b/a K & L Country Convenience Store, and their agents, successors and assigns, in any and all capacities.

New York State Department of  
Environmental Conservation

/s/

By: \_\_\_\_\_

Joseph J. Martens

Commissioner

DATED: Albany, New York  
May 4, 2011

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of  
the Environmental Conservation Law of the State of New York  
("ECL") and Parts 612-614 of Title 6 of the Official  
Compilation of Codes, Rules and Regulations of the State of  
New York ("6 NYCRR"),

HEARING REPORT

DEC Case No.  
R5-20100924-1018

-by-

PBS No. 5-600043

KENNETH J. PREVO AND LINDA A. PREVO  
d/b/a K & L COUNTRY CONVENIENCE STORE,

Respondents.

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Procedural History

Staff of the New York State Department of Environmental Conservation ("Department") individually served respondents Kenneth J. Prevo and Linda A. Prevo, doing business as K & L Country Convenience Store, with a notice of hearing and complaint, dated December 14, 2010, alleging violations of various sections of the implementing regulations of ECL article 17 found at 6 NYCRR parts 612 through 614. Respondents' convenience store is a petroleum bulk storage ("PBS") facility subject to the Department's regulations and is located at 5663 Route 11, Ellenburg Center, New York 12934 ("facility"). The complaint alleges that during an inspection of the facility on July 12, 2010, the following violations were observed or documented:

- a. 6 NYCRR 612.2(a) – PBS facility registration not current and valid.
- b. 6 NYCRR 613.3(d) - Failure to maintain top sumps for tanks 001 and 002.
- c. 6 NYCRR 613.3(b) - Fill port not color coded properly for tanks 001, 002, UNREG1, UNREG2 and UNREG3.
- d. 6 NYCRR 614.9(c) - No surface coating for tanks 001, 002, UNREG1, UNREG2 and UNREG3.
- e. 6 NYCRR 614.9(b) - Tank UNREG1 resting on soil, not cathodically protected.
- f. 6 NYCRR 614.10 - No impermeable barrier under tank UNREG1.
- g. 6 NYCRR 614.11 - No leak monitoring between tank bottom and impermeable barrier for tank UNREG1.
- h. 6 NYCRR 613.6(a) and (c) - No monthly inspections for tanks 001, 002, UNREG1, UNREG2 and UNREG3.
- i. 6 NYCRR 613.3(d) - Failure to maintain secondary containment for tanks 001 and 002.
- j. 6 NYCRR 613.3(c)(6)(i) - No secondary containment for tanks UNREG1, UNREG2 and UNREG3.



- k. 6 NYCRR 613.3(c)(6)(iii) - Dike drain valve not locked closed for tanks 001 and 002.
- l. 6 NYCRR 613.3(d) - Failure to maintain overflow prevention (gauge) for tank UNREG2.
- m. 6 NYCRR 613.3(c)(3)(ii) - No design/working capacity and id number for tanks 001, 002, UNREG1, UNREG2 and UNREG3.
- n. 6 NYCRR 613.9(b)(1) & (c) - Failure to permanently close tank 002 properly.
- o. 6 NYCRR 613.9(a)(1) - Failure to temporarily close tank 002 properly.

The complaint seeks an order of the Commissioner (1) finding respondents in violation of the above enumerated sections of 6 NYCRR parts 612 through 614; (2) assessing a civil penalty; (3) directing respondents, within 30 days of the effective date of the order, to take certain corrective actions necessary to remedy the enumerated regulatory violations; and (4) granting such other and further relief as the Commissioner may deem just and proper.

In addition, the notice of hearing advised respondents that any answer to the complaint must be filed within twenty days of their receipt of the complaint. Moreover, the notice of hearing stated that a pre-hearing conference in this matter would be held before an Administrative Law Judge of the Department on February 16, 2011, at 10:00 a.m., at the Department's Region 5 offices in Ray Brook, New York. The notice of hearing further stated that failure to timely answer the complaint or failure to appear at the pre-hearing conference would constitute a default in the proceeding and a waiver of their right to a hearing. As shown by United States Postal Service records, respondents received the notice of hearing and complaint on December 17, 2010. Respondents failed to file an answer to the complaint and failed to appear for the pre-hearing conference scheduled for February 16, 2011, as directed in the notice of hearing.

On February 16, 2011, the scheduled pre-hearing conference was convened before the undersigned Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services ("OHMS") at the Department's Region 5 offices, 1115 NYS Route 86, Ray Brook, New York 12977. Department staff was represented by Scott Abrahamson, Esq., Acting Regional Attorney, Region 5, New York State Department of Environmental Conservation, 1115 NYS Route 86, Ray Brook, New York 12977. No one appeared on behalf of respondents.

Pursuant to 6 NYCRR 622.15, Department staff orally moved for a default judgment based upon respondents' failure to answer the complaint. As part of its motion, Department staff submitted the following documents for the record:

1. The notice of hearing and complaint dated December 14, 2010, with attachments and cover letters to each respondent dated December 15, 2010.
2. An affidavit of service by certified mail sworn to by Betty E. Vann on February 16, 2011, stating that on December 15, 2010, she sent the respondents, each under separate cover, a copy of the notice of hearing and complaint, with attachments and cover letter, as indicated above. As stated in the affidavit, the certified mailing to respondent Linda A. Prevo bore United States Postal Service ("USPS") domestic return receipt article number

7008 1830 0002 5679 5751 and the certified mailing to respondent Kenneth J. Prevo bore USPS domestic return receipt article number 7008 1830 0002 5679 5690. Attached to the affidavit are true copies of the USPS domestic return receipts for each article thus sent, each signed for by Linda Prevo on December 17, 2010.

3. A photocopy of notes of a telephone conversation between Scott Abrahamson, Esq., and Linda Prevo on February 9, 2011.
4. A proposed Commissioner's order.
5. A calculation of the penalty amount sought in the complaint.

#### Default Provisions

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the action. As applicable herein, the Department's default procedures in an enforcement action, found at 6 NYCRR 622.15, provide:

“(a) A respondent's failure to file a timely answer ... constitutes a default and a waiver of respondent's right to a hearing. If [this] occurs the department may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record ... and must contain:

- (1) proof of service upon the respondent of the notice of hearing and complaint ... ;
- (2) proof of the respondent's failure ... to file a timely answer; and
- (3) a proposed order.”

As the Commissioner stated in the decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted].” Accordingly, the following findings of fact are based upon the documents submitted into the record, as identified above.

#### Findings of Fact

1. Kenneth J. Prevo and Linda A. Prevo (“respondents”), are individuals doing business as K & L Country Convenience Store.
2. K & L Country Convenience Store is located at 5663 Route 11, Ellenburg Center, New York 12934 (the “facility”).

3. Respondents possess fee title in the real property where the facility is located by virtue of a warranty deed recorded in the Clinton County Clerk's Office on August 30, 1991 at Liber of Deeds 832, Page 240.

4. There are five (5) petroleum storage tanks located at the facility having a combined capacity of more than 1,100 gallons, to wit, 16,550 gallons. Two of the tanks have been previously registered with the Department and are designated tanks 001 and 002, herein. Three of the tanks have not been registered with the Department and are designated UNREG 1, UNREG 2 and UNREG 3, herein. Because its capacity exceeds 1,100 gallons, the facility is thus a petroleum storage facility subject to regulation by the Department pursuant to 6 NYCRR parts 612-614.

5. On July 12, 2010, Department staff conducted an inspection of the facility (the "inspection"). During this inspection, Department staff observed sixteen (16) separate violations of the Department's petroleum storage facility regulations which were recorded on a petroleum bulk storage inspection form utilized by the Department.

6. On July 28, 2010, Department staff sent a notice of violation to respondents identifying these violations which included a copy of the above inspection form.

7. On September 24, 2010, Department staff sent a proposed Order on Consent to respondents. Department staff requested that respondents appear for a settlement conference for October 14, 2010. Respondents failed to appear for this settlement conference.

8. During its inspection of respondents' facility on July 12, 2010, Department staff observed:

- a. That respondents did not have a current and valid registration for the facility, a violation of 6 NYCRR 612.2(a).
- b. An accumulation of water and/or debris in the top sumps for tanks 001 and 002, a violation of 6 NYCRR 613.3(d) which states: "The owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order."
- c. That the fill ports for tanks 001, 002, UNREG 1, UNREG 2 and UNREG 3, which were gasoline, kerosene and #2 heating fuel tanks, were not properly color coded, a violation of 6 NYCRR 613.3(b) which states: "(1) Beginning five (5) years from the effective date of these regulations, the owner or operator must permanently mark all fill ports to identify the product inside the tank. These markings must be consistent with the color and symbol code of the American Petroleum Institute ...."
- d. That the exteriors of tanks 001, 002, UNREG 1, UNREG 2 and UNREG 3 did not have adequate surface coating, a violation of 6 NYCRR 614.9(c) which states: "The exterior surfaces of all new aboveground storage tanks must be protected by a primer coat, a bond coat and two or more final coats of paint, or have an equivalent surface coating system designed to prevent corrosion and deterioration."

- e. That the tank bottom of tank UNREG 1, a 1,000 gallon kerosene tank, was resting on the ground and did not possess cathodic protection, a violation of 6 NYCRR 614.9(b) which states: "(1) Bottoms of new tanks which rest on or in the ground must be cathodically protected with sacrificial anodes or an impressed current system which is designed, fabricated and installed in accordance with recognized engineering practices."
- f. That the tank bottom of tank UNREG 1, a 1,000 gallon kerosene tank, lacked an impermeable barrier, a violation of 6 NYCRR 614.10 which states: "Any new stationary tank which is designed to rest on the ground must be constructed with a double bottom or underlain by an impervious barrier such as a concrete pad or a cut-off barrier. If a barrier is used, it must have a permeability rate to water equal or less than  $1 \times 10^{-6}$  cm/sec and must not deteriorate in an underground environment or in the presence of petroleum."
- g. That tank UNREG 1 lacked a monitoring system, a violation of 6 NYCRR 614.11 which states: "All new aboveground tanks must have equipment for monitoring between the tank bottom and the impermeable barrier required in section 614.10 of this Part. This includes, but is not limited to, perforated gravity collection pipes or channels in a concrete foundation pad which may be monitored for the presence of petroleum visually, electronically or by other satisfactory methods. Observation wells or other systems which monitor the soil or groundwater beneath the impermeable barrier do not satisfy the leak detection requirements of this section."
- h. That respondents had not conducted monthly inspections for tanks 001, 002, UNREG 1, UNREG 2 and UNREG 3, violations of 6 NYCRR 613.6(a) and (c) which state, respectively: "The owner or operator of an aboveground storage facility must inspect the facility at least monthly...." and "Reports for each monthly inspection and 10-year inspection must be maintained and made available to the department upon request for a period of at least ten (10) years."
- i. That respondents had not properly maintained or repaired the secondary containment system for tanks 001 and 002, a violation of 6 NYCRR 613.3(d) which states: "The owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order."
- j. That respondents had no secondary containment system for tanks UNREG 1, UNREG 2 and UNREG 3, violations of 6 NYCRR 613.3(c)(6)(i) which states: "A secondary containment system must be installed around any above ground petroleum storage tank which:
  - (a) could reasonably be expected to discharge petroleum to the waters of the State; or
  - (b) which has a capacity of 10,000 gallons or more."
- k. That respondents had not locked closed the dike drain valve for tanks 001 and 002, violations of 6 NYCRR 613.3(c)(6)(iii) which states: "Stormwater which collects within the secondary containment system must be controlled by a manually operated pump or siphon, or a gravity drain pipe which has a two manually controlled dike valves, one on

each side of the dike. All pumps, siphons and valves must be properly maintained and kept in good condition. If gravity drain pipes are used, all dike valves must be locked in a closed position except when the operator is in the process of draining clean water from the diked area."

- l. That respondents failed to properly maintain the overflow prevention gauge for tank UNREG 2, a violation of 6 NYCRR 613.3 (d) which states: "The owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order."
- m. That respondents failed to label the design capacity, working capacity and identification number for tanks 001, 002, UNREG 1, UNREG 2 and UNREG 3, violations of 6 NYCRR 613.3(c)(3)(ii) which states: "The design capacity, working capacity and identification number of the tank must be clearly marked on the tank and at the gauge."
- n. That respondents failed to permanently close tank 002, an out-of-service 5,000 gallon aboveground gasoline storage tank, a violation of 6 NYCRR 613.9(b)(1) and 613.9(c) which state, respectively, "Any tank or facility which is permanently out of service must comply with [Department requirements for permanent closure]" and "The owner of a tank or facility which is to be permanently closed must notify the department within thirty (30) days prior to permanent closure of the tank or facility pursuant to the requirements of subdivision 612.2(d) of this Title."
- o. That respondents failed to temporarily close tank 002, an out-of-service 5,000 gallon aboveground gasoline storage tank, a violation of 6 NYCRR 613.9(a)(1) which states: "(1) Storage tanks or facilities which are temporarily out-of-service for thirty (30) or more days must be closed [in accordance with the Department requirements for temporary closure]"

9. The notice of hearing in this matter, as well as the complaint alleging the various regulatory violations enumerated in Finding of Fact 8, above, were served upon the respondents by certified mail on December 15, 2010. As shown by United States Postal Service records, respondents received the notice of hearing and complaint on December 17, 2010.

10. The notice of hearing stated that an answer to the complaint had to be filed within twenty days of the receipt of the complaint by the respondents and that failure to file an answer to the complaint would constitute a default in the matter. Respondents failed to file an answer to the complaint.

#### Discussion

The record shows that respondents were duly served with the notice of hearing and complaint on December 17, 2010, and that they failed to file an answer to the complaint. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Department staff's proposed order and the \$25,000 civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default, finding respondents in default pursuant to the provisions of 6 NYCRR 622.15;
2. Finding respondents in violation of the various sections of 6 NYCRR parts 612, 613 and 614 enumerated in the complaint and in the findings of fact, above, for and at a petroleum storage facility it owns located at 5663 Route 11, Ellenburg Center, New York 12934, and known as K & L Country Convenience Store (the "facility");
3. Directing respondents to effect such corrective actions at and on behalf of the facility as are indicated in the schedule of compliance included in Department staff's proposed order, annexed thereto;
4. Directing respondents to pay a civil penalty in the amount of twenty-five thousand dollars (\$25,000.00), of which five thousand dollars (\$5,000.00) is payable upon receipt of the Commissioner's order and twenty thousand (\$20,000) is suspended if the corrective actions indicated in the schedule of compliance are fulfilled; and
5. Directing such other and further relief as he may deem just and proper.

/s/

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Richard R. Wissler  
Administrative Law Judge

Dated: Albany, New York  
April 28, 2011

Index of Attached Exhibits Received

- Exhibit 1: Notice of Hearing and Complaint, dated December 14, 2010, served individually upon respondents Kenneth J. Prevo and Linda A. Prevo, with copies of cover letter to each respondent, each dated December 15, 2010.
- Exhibit 2: Affidavit of Betty E. Vann attesting to service by U.S. Postal Service (USPS) Certified Mail of the Notice of Hearing and Complaint upon respondents on December 15, 2010, with attached copies of USPS Domestic Return Receipts signed for by Linda Prevo, on behalf of both respondents, on December 17, 2010.
- Exhibit 3: Photocopy of notes taken by Scott Abrahamson, Esq., of telephone conversation between himself and respondent Linda Prevo on February 9, 2011.
- Exhibit 4: Proposed Commissioner's Order prepared by Department staff.
- Exhibit 5: Penalty calculation prepared by Department staff.