STATE OF NEW YORK:
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
In the Matter of the Alleged Violation of
Article 17 of the Environmental Conservation
Law and 6 NYCRR Parts 612 and 613 by:

ORDER

File Number:
R6-20030418-18

WALTER UNDERWOOD
Rome (C)
Oneida (Co.)
Respondent.

Whereas:

1. On May 16, 2003, staff of the New York State Department of Environmental Conservation ("Department") served a notice of hearing and complaint on respondent, Walter Underwood, pursuant to part 622 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

2. The complaint alleged that respondent violated the provisions of 6 NYCRR 612.2 and 613 at an existing petroleum bulk storage facility located at 6113 Trenton Road, Marcy, Oneida County, New York.

3. The notice of hearing stated that a pre-hearing conference would take place at 10:00 a.m. on June 4, 2003 in the Department's offices at 207 Genesee Street, Utica, New York.

4. Respondent failed to appear for the pre-hearing conference, nor did he contact staff to arrange another date or time for the conference.

5. Pursuant to 6 NYCRR 622.15, Department staff served a motion for default judgment dated June 5, 2003 and filed a copy of the motion with the Department's Office of Hearings and Mediation Services. Administrative Law Judge ("ALJ") Daniel P. O'Connell was assigned to, and has prepared a report in, this matter.

6. As required by 6 NYCRR 622.15(b), staff's motion included:

a) proof of service of the notice of hearing and complaint commencing this action against respondent;

b) proof that respondent failed to serve an answer to the complaint in this matter; and

c) a proposed order.

7. Upon review of the record and the ALJ's report, I hereby adopt the report subject to my comments below. I agree with the ALJ that respondent's failure to appear at the pre-answer, pre-hearing conference is not grounds for a default judgment (see Matter of Singh, Decision and Order of the Commissioner, December 17, 2003, at 8). I also agree, however, that respondent's failure to file a timely answer to the complaint is grounds for a default judgment.

8. Department staff had proposed a penalty of $23,700, apportioning $13,700 to specific violations and requesting an additional penalty of $10,000 that was not expressly associated with any particular violation. I agree with the ALJ's apportioning the $10,000 penalty to respondent's violation of 6 NYCRR 613.5(a)(1), that is respondent's failure to tightness test four unprotected underground petroleum storage tanks at the facility. Tightness testing of tanks is a longstanding requirement of the State's petroleum bulk storage regulations, and it is critical to determining whether there may be potential or actual environmental harm arising from underground storage tanks.

9. With respect to the penalty, Department staff requested that $10,000 of the civil penalty of $23,700 be suspended, contingent upon respondent's compliance with this order. I hereby adopt that request.

10. Department staff did not propose that respondent be given the opportunity to conduct the required tank tightness testing and, if the tanks passed the test, that closure would not be required. Evidence is lacking in the record as to why this option was not considered and, absent such evidence, I am providing this option to respondent.

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

I. Pursuant to 6 NYCRR 622.15, respondent is found to be in default. Staff's motion for default judgment is hereby granted. The allegations in the complaint are deemed to have been admitted by respondent.

II. Respondent is adjudged to have violated the following provisions:

a) 6 NYCRR 612.2(a) by failing to register an existing petroleum bulk storage facility located at 6133 Trenton Road, Marcy, New York;

b) 6 NYCRR 613.5(a)(1) by failing to tightness test four unprotected underground petroleum storage tanks at the facility;

c) 6 NYCRR 613.3(b)(2) by failing to permanently mark the fill ports of the tanks at the facility to identify the products stored in them;

d) 6 NYCRR 613.4 by failing to keep inventory monitoring records as required; and

e) 6 NYCRR 613.9(a) by failing to properly secure tanks while they were temporarily out of service.

III. Within 30 days of service of a copy of this order on respondent, respondent shall register the facility in accordance with 6 NYCRR 612.2(a) and include payment of the requisite registration fee pursuant to 6 NYCRR 612.3.

IV. Within 30 days of service of this order on respondent, respondent shall either:

A. permanently close the four petroleum bulk storage tanks that are subject to tightness testing at the facility in accordance with 6 NYCRR 613.9(b). As required by 6 NYCRR 612.2(d), respondent shall notify the Region 6 Petroleum Bulk Storage Engineer within 30 days prior to closure of the tanks at the facility; or

B. provide evidence satisfactory to the Department that the four petroleum bulk storage tanks that are subject to tightness testing have been so tested and have passed the test, and that the facility is in compliance with all other applicable petroleum bulk storage regulations. In the event that any tank fails tightness testing, the tank must be closed immediately in accordance with 6 NYCRR 613.9(b).

V. If evidence of any spill, leak or discharge of petroleum is found during the closure of any tank at the facility, the Department must be notified immediately in accordance with 6 NYCRR 613.8 and the Navigation Law of New York State.

VI. Respondent is hereby assessed a civil penalty in the amount of $23,700 allocated as follows:

-- for violation of 6 NYCRR 612.2(a): $ 1,000;
-- for violation of 6 NYCRR 613.5(a)(1): $ 15,000;
-- for violation of 6 NYCRR 613.3(b)(2): $ 700; and
-- for violation of 6 NYCRR 613.9(a): $ 7,000.

Of the total penalty, $10,000 is suspended, conditioned upon respondent's compliance with the terms of this order. In the event that respondent fails to comply with the terms of this order, the $10,000 suspended portion of the penalty shall immediately become due and payable, and shall be in the form and delivered to the address as set forth in Paragraph VII.

VII. The unsuspended portion of the penalty ($13,700) is due and payable within 30 days of the effective date of this order. Payment of the penalty to the Department shall be in the form of a cashier's check, certified check or money order made payable to "NYSDEC" and delivered to the Regional Director, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601-3738.

VIII. All communications from respondent to the Department in this matter, other than the payment of penalties, shall be made to the Regional Petroleum Bulk Storage Engineer, NYSDEC Region 6, 207 Genesee Street, Utica, New York 13501.

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

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

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

Dated: Albany New York
January 27, 2004

To: By Certified Mail:
Mr. Walter Underwood
103 3rd Street #2
Rome, NY 13440-6036

By Regular Mail:
Randall C. Young, Esq.
Assistant Regional Attorney
NYSDEC Region 6
317 Washington Street
Watertown, NY 13601-3738

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of an Alleged Violation 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) by:

Summary Report

WALTER UNDERWOOD
115 West Fox Street
Rome, New York 13440

Case No.: R6-20030418-18

RESPONDENT

Proceedings

With a cover letter dated May 16, 2003, the Region 6 Staff of the Department of Environmental Conservation (Department Staff or Staff) commenced this enforcement action by duly serving a notice of hearing and complaint, also dated May 16, 2003, upon Walter Underwood by certified mail, return receipt requested. The notice of hearing stated that Respondent would be in default and would waive his right to a hearing if Respondent did not answer the complaint within 21 days of receiving it, or attend the pre-hearing conference scheduled for June 4, 2003 at the Department's Region 6 Suboffice in Utica.

The May 16, 2003 complaint alleged that Respondent owns a petroleum bulk storage facility at 6133 Trenton Road in Marcy, New York (the Facility). In a letter dated January 8, 2004, Staff clarified that Respondent's Facility consists of seven underground petroleum storage tanks with a combined storage capacity of at least 14,500 gallons. According to Staff, all seven tanks must be registered, and four of the seven tanks must comply with requirements related to tightness testing. With respect to the tanks that must comply with the tightness testing requirements, the complaint asserts that the capacity of the first and third tanks is 4,000 gallons each. The capacity of the second tank is 6,000 gallons. The capacity of the fourth tank is 500 gallons. Prior to the time Respondent owned the Facility, Staff inspected it on June 15, 2000. At the time of Staff's June 2000 inspection, tanks one through three contained gasoline, and tank four contained fuel oil.

The complaint alleged five causes of action. Respondent allegedly violated:

1. 6 NYCRR 612.2(a) by failing to register his Facility with the Department;
2. 6 NYCRR 613.5(a) by failing to test the tightness of the tanks;
3. 6 NYCRR 613.3(b)(2) by failing to color code the fill ports of the tanks;
4. 6 NYCRR 613.4(a) by failing to keep inventory records of the petroleum products at the Facility; and
5. 6 NYCRR 613.9 by failing to close the tanks properly.

With a cover letter dated June 5, 2003, Staff filed a notice of motion; motion for order without hearing [sic]; an affidavit by Ardis Seifried with attached Exhibit A; an affidavit by Randall C. Young, Esq., Assistant Regional Attorney, with attached Exhibits B and C; and a

proposed order. All of Staff's papers are dated June 5, 2003. Although Staff's motion is entitled, "motion for order without hearing," Staff actually requested a default judgment, pursuant to 6 NYCRR 622.15. According to Mr. Young's affidavit, Respondent neither answered the May 16, 2003 complaint, nor appeared at the pre-hearing conference scheduled for June 4, 2003.

Subsequently, in a letter dated September 3, 2003, Staff outlined its justification for the requested relief. Enclosed with Staff's September 3, 2003 cover letter was an affidavit also dated September 3, 2003 by Gary McCullouch to support the requested civil penalty. Staff's request for relief is discussed further below.

According to Mr. Young's June 5, 2003 cover letter, Staff served Respondent with a copy of the motion for default judgment by certified mail. Staff also provided Respondent with copies of its September 3, 2003 letter and Mr. McCullouch's affidavit, as well as the January 8, 2004 letter. The Office of Hearings and Mediation Services did not receive any reply from Respondent.

Findings of Fact

1. Since February 2002, Respondent has owned a petroleum bulk storage facility at 6133 Trenton Road, Marcy, New York (the Facility). The Facility consists of seven unregistered tanks with a combined storage capacity of at least 14,500 gallons.

2. Four of the seven tanks at the Facility are unprotected, underground storage tanks of unknown age. Of these four, the capacity of the first and third tanks is 4,000 gallons each. The capacity of the second tank is 6,000 gallons. The capacity of the fourth tank is 500 gallons.

3. On May 16, 2003, Ardis Seifried served the notice of hearing and complaint in this matter upon Walter Underwood by certified mail, return receipt requested. Staff sent the notice of hearing and complaint to Mr. Underwood at 115 W. Fox Street, Rome, New York.[1] Respondent received the May 16, 2003 notice of hearing and complaint on May 17, 2003.

4. The time for Respondent to serve an answer to the May 16, 2003 complaint expired on June 6, 2003. Respondent did not file an answer.

5. The notice of hearing scheduled a pre-hearing conference for June 4, 2003, which was two days before Respondent's answer was due on June 6, 2003. Respondent did not

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[1] As of January 7, 2004, Mr. Underwood's mailing address is 103 Third Street, Rome, New York 13440-6036.

appear at the June 4, 2003 pre-hearing conference at the Department's Region 6 Suboffice in Utica.

6. It costs at least $500 to test the tightness of one underground storage tank.

7. It costs about $2,500 to close one underground storage tank permanently. This cost estimate will vary depending on the amount of waste product and sludge in the tank at the time of closure.

Discussion

Motion for Default Judgment

According to the Department's enforcement hearing regulations, a Respondent's failure to file a timely answer, or even if a timely answer has been filed, a Respondent's failure to appear at the pre-hearing conference, constitutes a default and a waiver of Respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under these circumstances, DEC Staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), Staff's motion must contain:

1. Proof of service upon Respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
2. Proof of Respondent's failure to appear at a pre-hearing conference, or to file a timely answer; and
3. A proposed order.

Ms. Seifried's affidavit, sworn on June 5, 2003, demonstrates that service of the May 16, 2003 notice of hearing and complaint upon Respondent was in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3). Furthermore, the domestic return receipt attached to Ms. Seifried's affidavit shows that Respondent received the May 16, 2003 notice of hearing and complaint on May 17, 2003. Therefore, Respondent's answer was due twenty days hence, which was June 6, 2003 (see 6 NYCRR 622.4[a]).

According to the June 5, 2003 affidavit of Randall C. Young, Esq., Assistant Regional Attorney, Respondent neither answered the complaint nor appeared at the scheduled pre-hearing conference. However, Staff scheduled the pre-hearing conference on June 4, 2003, which was two days before Respondent's answer was due on June 6, 2003. In addition, Staff's default motion is dated June 5, 2003, which was the day before Respondent's answer was due.

The Commissioner should not rely on Respondent's failure to appear at the June 4, 2003 pre-hearing conference as a basis for the default because the pre-hearing conference took place before the due date for Respondent's answer. On the date of the pre-hearing conference, Respondent had two more days to file a timely answer pursuant to 6 NYCRR 622.4(a).

Although Staff's motion is one day premature, the Commissioner may conclude that Respondent has defaulted and waived his right to a hearing pursuant to 6 NYCRR 622.15(a). Though not required, Staff served Respondent with a copy of the notice of the default motion by certified mail. Service of the default motion provided Respondent with a subsequent opportunity to demonstrate whether he had filed a timely answer by June 6, 2003. As stated above, however, the Office of Hearings and Mediation Services did not receive any answer or other reply from Respondent concerning Staff's May 16, 2003 complaint, or Staff's June 5, 2003 motion for default judgment. Since Respondent did not answer the complaint as required by 6 NYCRR 622.4(a), the Commissioner may conclude that Respondent is in default, and therefore grant Staff's motion pursuant to 6 NYCRR 622.15.

Relief

The relief requested by Staff in the May 16, 2003 complaint is similar to what is outlined in the proposed order. The proposed order would direct Respondent to register all tanks at the Facility and pay the requisite fee within 30 days of service of the order upon Respondent, and permanently close "the petroleum bulk storage tanks" 15 days later.

In the motion papers, Staff does not explain why Respondent should be directed first to register the Facility, and shortly thereafter permanently close it. Based on Staff's January 8, 2004 clarification, Staff seeks closure of the four unprotected, underground storage tanks. If the Commissioner decides to provide Respondent with alternative options of either registering the Facility, or permanently closing it, then the registration option should also direct Respondent to comply with all other applicable requirements outlined in 6 NYCRR parts 612 and 613 such as color coding the ports as required by 6 NYCRR 613.3(b)(2); keeping and maintaining inventory records as required by 6 NYCRR 613.4; and testing the tightness of the tanks as required by 6 NYCRR 613.5(a).

In the complaint, Staff requested, and the proposed order would also assess, a civil penalty of $13,700 plus an additional civil penalty of $10,000, which would be suspended provided Respondent complies with the terms of the proposed order. Therefore, the total requested civil penalty is $23,700.

Staff considered the guidance outlined in the Department's Civil Penalty Policy in calculating the requested civil penalty. According to Staff, the requested civil penalty includes a consideration of the economic benefits Respondent obtained from not complying with the regulations, as well as a gravity component.

By not complying with the regulations, Staff argued that Respondent obtained an economic benefit that ranges from $12,250 to $19,750. Staff calculated this benefit in the following manner. First, Respondent's Facility consists of seven unregistered tanks with a combined storage capacity of at least 14,500 gallons. Pursuant to 6 NYCRR 612.3(a), the registration fee for this size facility is $250. Second, four of the seven tanks are unprotected, underground storage tanks of unknown age. Based on Mr. McCullouch's September 3, 2003

affidavit, it costs about $500 to test the tightness of one tank. Therefore, the total economic benefit associated with failing to test the tightness of four tanks would be at least $2,000. Third, Mr. McCullouch states further in his affidavit that it costs about $2,500 to close each tank permanently. This cost estimate varies depending on the amount of waste product and sludge in the tank at the time of closure. The total estimated cost to close four tanks would be $10,000 and the total estimated cost to close all seven tanks at the Facility would be $17,500. Finally, the economic benefits associated with the other violations are negligible, according to Staff.

With respect to the gravity component, Staff reasonably argued that the potential environmental harm associated with storing petroleum products in unprotected, underground tanks that have not been tested for tightness is significant. Based on the gravity component, a substantial civil penalty is, therefore, warranted to deter future violations by this Respondent and other petroleum bulk storage facility owners.

Although Respondent owns the Facility, Staff stated that Respondent may have never operated it. As a result, Staff considered this circumstance to be a mitigating factor with respect to the proposed civil penalty calculation.

As noted above, the proposed civil penalty totals $23,700. In the May 16, 2003 complaint, Staff apportioned the civil penalty as follows:

1. $1,000 for failing to register the Facility;
2. $5,000 for failing to test the tightness of the tanks;
3. $700 for failing to color code the fill ports; and
4. $7,000 for failing to close the tanks properly.

Staff did not request a civil penalty for Respondent's alleged failure to keep inventory records. The $10,000 portion of the civil penalty that Staff recommends should be suspended is not expressly associated with any particular violation.

The authority to assess civil penalties, pursuant to ECL 71-1929, is linked to a particular violation of either ECL article 17, titles 1-11 and 19, or implementing regulations. In the complaint, Staff asserted that ECL 71-1929 provides for a maximum civil penalty of $25,000 per day for each violation. ECL 71-1929 was recently amended, however. Effective May 15, 2003, the civil penalty authorized by ECL 71-1929 was increased to $37,500 per day for each violation. Although Staff's May 16, 2003 notice of hearing and complaint postdates the effective date of the amendment, the complaint states that the maximum civil penalty is $25,000 per day for each violation.

Based on the forgoing discussion, the Commissioner should assess the full amount of the civil penalty requested by Staff. The proposed civil penalty ($23,700), however, should be reapportioned as follows:

1. $1,000 for failing to register the Facility;

2. $15,000 for failing to test the tightness of four tanks ($3,750 per tank);
3. $700 for failing to color code the fill ports; and
4. $7,000 for failing to close the tanks properly.

The recommended reapportioned civil penalty increases the amount associated with Respondent's failure to test the tightness of the tanks from $5,000 to $15,000. This increase is justified based on the gravity of this particular violation, as discussed above.

Conclusions

Respondent has defaulted on his obligation to file an answer to Staff's May 16, 2003 complaint. As a result, Walter Underwood has waived his right to a hearing. Staff has established prima facie entitlement to default judgment.

Recommendation

The Commissioner should grant Staff's motion for default judgment. The Commissioner should adopt the recommended reapportioned civil penalty. The Commissioner may suspend a portion of the civil penalty to encourage Respondent to comply with the terms of the order.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge