

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17
of the Environmental Conservation Law ("ECL")
of the State of New York and Parts 612 and 613 of
Title 6 of the Official Compilation of Codes, Rules
and Regulations of the State of New York

ORDER

-by-

Case No. 7-433098

WILLIAM W. WAKEFIELD,

Respondent.

WHEREAS:

1. Respondent is the owner of a petroleum bulk storage facility located at 7525 Highbridge Road, De Ruyter, Madison County, New York.
2. Pursuant to section 622.15 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 on January 29, 2004 a notice of hearing and a complaint upon respondent, by certified mail, return receipt requested.
3. The complaint asserted the following causes of action:
 - (i) respondent failed to timely register its facility as required by 6 NYCRR 612.2. Department records reveal that the registration for respondent's facility expired on May 19, 1998; and
 - (ii) respondent has failed to conduct tightness testing and submit the results of that testing to the Department, as required by 6 NYCRR 613.5, for the underground tank and connecting piping system at the facility.
4. The notice of hearing and complaint stated that a pre-hearing conference was scheduled to take place on February 23, 2004 at 1:20 p.m. at the Department's Region 7 office, located at 615 Erie Boulevard West, Syracuse, New York. The notice of hearing included a statement that, pursuant to 6 NYCRR 622.15, a failure to timely answer or failure to attend a pre-hearing conference would result in a default under 6 NYCRR 622.15 and a waiver of respondent's right to a hearing.

5. The affidavit of Department employee Lisa Cerniglia, sworn to April 16, 2004, states that she served the respondent in this proceeding by certified mail, return receipt requested, by placing a true copy of the notice of hearing and the complaint in an envelope addressed to respondent and mailed the same to respondent by depositing said envelope in a United States Postal Box at 625 Broadway, Albany, New York on January 29, 2004. The associated return receipt indicates that the notice of hearing and complaint were received by respondent on February 2, 2004. Staff states, by affirmation of Scott A. Herron, Esq., that:

- (i) respondent failed to appear at the pre-hearing conference;
- (ii) respondent failed to serve on the Department an answer within 20 days of respondent's receipt of the notice of hearing and the complaint or otherwise in a timely manner; and
- (iii) the penalty proposed is appropriate based on the type and the duration of the violations.

6. Attached is a copy of the summary report of Administrative Law Judge Daniel P. O'Connell, which report I adopt.

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

I. Staff's motion for a default judgment is granted. Pursuant to 6 NYCRR 622.15, respondent is adjudged to be in default and to have waived its right to a hearing in this enforcement proceeding. Accordingly, the allegations in the complaint are deemed admitted. Respondent is found to have violated ECL 17-1009, 6 NYCRR 612.2(a) and 6 NYCRR 613.5(a).

II. Respondent is assessed a civil penalty of seventeen thousand five hundred (\$17,500) dollars which shall be paid within thirty (30) days of the date of service of this order upon respondent. Payment shall be made by cashier's check, certified check or money order drawn to the order of "NYSDEC" and delivered to the New York State Department of Environmental Conservation, Division of Environmental Enforcement, 625 Broadway, 14th Floor, Albany, New York 12233, Attn: Scott A. Herron, Esq., Senior Attorney.

III. Within thirty (30) days of the date of service of this order, respondent shall submit to the Department a completed application to register its petroleum bulk storage facility, as well as a certified check or money order in the amount of the registration fee(s) required under 6 NYCRR 612.3.

IV. Within thirty (30) days of the service of this order, respondent shall either: (1) conduct tightness testing on the underground tank and connecting piping system at the facility in accordance with 6 NYCRR 613.5; or (2) permanently close the tank and the connecting piping system at the facility in accordance with 613.9(b), (c), (d) and (e). In the event that respondent decides to conduct tightness testing of the underground tank and the connecting piping, respondent shall notify the Department not less than five (5) business days in advance of conducting the tank tightness test. A report containing the results of the test shall be submitted to the Department within fifteen (15) days of the completion of the test. In the event that the tightness test reveals that the tank is not tight, that portion of the facility which failed the test must be promptly repaired,

replaced or closed in accordance with 6 NYCRR 613.5(a)(5) and 613.9(b), (c), (d) and (e). Additionally, if such test reveals that either the tank or the piping is leaking, such leak must be reported to the Department, pursuant to 6 NYCRR 613.8, within two (2) hours of discovery by calling the Spills telephone hotline at (800) 457-7362 or, for out-of-state callers, (518) 457-7362.

V. All communications from respondent regarding this order shall be directed to: New York State Department of Environmental Conservation, Division of Environmental Enforcement, 625 Broadway, 14th Floor, Albany, New York 12233, Attn: Scott A. Herron, Esq., Senior Attorney.

VI. This order shall bind respondent, his heirs and assigns in any and all capacities.

New York State Department
of Environmental Conservation

/s/

By: Erin M. Crotty, Commissioner

Dated: July 7, 2004
Albany, New York

To: William W. Wakefield
7525 Highbridge Road
De Ruyter, New York 13052

Scott A. Herron, Esq.
Senior Attorney
NYSDEC, Division of Environmental Enforcement, 14th Floor
625 Broadway
Albany, New York 12233-1550

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Environmental
Conservation Law (ECL) article 17 and Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State
of New York (6 NYCRR) parts 612 and 613 by:

Summary Report

WILLIAM W. WAKEFIELD
7525 Highbridge Road
De Ruyter, New York 13052
RESPONDENT.

Case No.: 7-433098

Proceedings

Staff of the Department of Environmental Conservation (Department Staff) commenced this enforcement action by duly serving a notice of hearing and complaint, dated January 29, 2004, upon William W. Wakefield (Respondent) 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 20 days of receiving it, or attend the pre-hearing conference scheduled for February 23, 2004 at the Department's Region 7 office in Syracuse.

The January 29, 2004 complaint alleges that Respondent owns a petroleum bulk storage facility at 7525 Highbridge Road, De Ruyter (Madison County), New York (the Facility). According to the complaint, the Facility consists of one 2,000 gallon underground petroleum storage tank and associated piping. The complaint alleges that Respondent violated: (1) ECL 17-1009 and 6 NYCRR 612.2(a) by failing to register his Facility with the Department,¹ and (2) ECL 17-1005 and 6 NYCRR 613.5(a) by failing to test the tightness of the tank.²

With a cover letter dated April 23, 2004, Department Staff filed a notice of motion, and a motion for default judgment with Exhibits A through F. Exhibit A is a copy of the January 29, 2004 notice of hearing and complaint. Exhibit B is an affirmation in support of the motion for default judgment by Scott A. Herron, Esq., Senior Attorney. Mr. Herron's affirmation is dated April 16, 2004. Exhibit C is an affidavit of service of the notice of hearing and complaint by Lisa M. Cerniglia, sworn to April 16, 2004. Exhibit D is a copy of the domestic return receipt signed by Respondent and dated February 2, 2004. Exhibit E is an affidavit in support of the motion for

¹ ECL 17-1009(2) requires owners to register their facilities and renew the registration every five years. The regulatory requirement at 6 NYCRR 612.2(a) mirrors the statutory requirement at ECL 17-1009(2).

² ECL 17-1005 directs the Department to promulgate rules concerning the early detection of leaks. The Department fulfilled that statutory obligation by promulgating 6 NYCRR part 613. Section 613.5(a) requires periodic tightness testing of underground petroleum storage tanks.

default judgment by Richard Coriale, Regional Enforcement Coordinator in Region 7, sworn to April 12, 2004. Exhibit F is a proposed order for the Commissioner's consideration.

Department Staff provided Respondent with a copy of the motion papers. As of the date of this Summary Report, the Office of Hearings and Mediation Services has not received any reply from Respondent.

Findings of Fact

1. At least since May 1998, Respondent has owned a petroleum bulk storage facility at 7525 Highbridge Road, De Ruyter, New York (the Facility). The Facility consists of one 2,000 gallon underground storage tank of unknown age.
2. On January 29, 2004, Lisa M. Cerniglia served the notice of hearing and complaint in this matter upon William W. Wakefield by certified mail, return receipt requested. Subsequently, Respondent received the January 29, 2004 notice of hearing and complaint on February 2, 2004.
3. The time for Respondent to serve an answer to the January 29, 2004 complaint expired on February 23, 2004. Respondent did not file an answer.
4. The notice of hearing scheduled a pre-hearing conference for February 23, 2004 at the Department's Region 7 office in Syracuse. Respondent did not appear at the pre-hearing conference.
5. The registration for the Facility expired on May 19, 1998. To date, Respondent has not renewed the registration.
6. Respondent has not provided the Department with the results from any tightness tests.

Discussion

I. 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, Department 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. Cerniglia's affidavit, sworn to April 16, 2004 (*see* Exhibit C), demonstrates that Department Staff served the January 29, 2004 notice of hearing and complaint upon Respondent by certified mail, return receipt requested. This method of service is consistent with the requirements outlined in 6 NYCRR 622.3(a)(3).

Furthermore, the domestic return receipt (*see* Exhibit D) shows that Respondent received the January 29, 2004 notice of hearing and complaint on February 2, 2004. As a result, Respondent's answer was due twenty days hence, which was February 23, 2004 (*see* 6 NYCRR 622.4[a]). According to the April 16, 2004 affirmation of Scott A. Herron, Esq., Senior Attorney (*see* Exhibit B), Respondent neither answered the complaint nor appeared at the pre-hearing conference. Therefore, Respondent has defaulted and waived his right to a hearing. Pursuant to 6 NYCRR 622.15, Department Staff has established a prima facie entitlement to a default judgment.

II. Relief

In the complaint and motion for default judgment, Department Staff seeks a total civil penalty of \$17,500, as well as an order that would require Respondent to comply with the applicable regulations.

A. Civil Penalty

Pursuant to ECL 71-1929, the Commissioner may assess civil penalties for violations of ECL article 17, titles 1-11 and 19, and implementing regulations. The maximum civil penalty is \$37,500 per day for each violation (*see* ECL 71-1929, amended 2003, effective May 15, 2003). Based on the following discussion, the Commissioner should assess the full amount of the civil penalty requested by Department Staff.

To calculate the requested civil penalty, Department Staff considered the guidance outlined in the Department's Civil Penalty Policy. Department Staff contends that Respondent realized an economic benefit by avoiding compliance costs. These costs include periodic registration fees, and fees related to testing the tank for tightness. Respondent has an obligation to register the Facility, and to renew the registration every five years (*see* 6 NYCRR 612.2[a]). Respondent's initial registration expired on May 19, 1998 (*see* Exhibit E), and he was obliged to renew it. This violation continues to date. Subsequently, Respondent failed to renew the registration in 2003, and that violation, which is distinct from Respondent's failure to renew his registration in 1998, continues to the present.

A similar pattern of non-compliance is associated with Respondent's failure to test the tank for tightness periodically. Initially, the tightness of the tank should have been tested in December 1987 (*see* 6 NYCRR 613.5[a][1][i]). It is not known, however, whether Respondent has owned the Facility since 1987. Because Respondent's registration expired on May 19, 1998, it can be reasonably inferred that Respondent owned the tank at least five years before May 1998 (*see* 6 NYCRR 612.2[a]). At a minimum, therefore, Respondent should have tested the tightness of the tanks three times (1993, 1998 and 2003). Each time Respondent failed to test the tightness of the tank is a separate violation, and each violation has continued to date. This pattern of non-compliance is an aggravating factor that justifies the civil penalty requested by Department Staff.

In addition, Department Staff reasonably argues that the potential environmental harm associated with storing petroleum products in an unprotected, underground tank that has not been tested for tightness is significant. According to Department Staff, the failure to test for tightness may lead to prolonged, substantial spills of petroleum into the environment.

B. Regulatory Compliance and Remediation

In addition to a civil penalty, Department Staff seeks an order from the Commissioner that directs Respondent to bring his facility into compliance. Department Staff requests that the Commissioner order Respondent to register the tank at his Facility. Also, Department Staff recommends that Respondent be given the option of either testing the tightness of the tank or permanently closing it.

If Respondent chooses to test the tightness of the tank, then Department Staff requests that the Commissioner direct Respondent to provide Department Staff with five days advance notice. If the results of the tightness show that the tank is sound, then Respondent may continue to operate the Facility, provided he continues to comply with the applicable regulations.

The results of the tightness test, however, may show that the tank is not sound. Under such circumstances, Department Staff has requested that the Commissioner direct Respondent to report the leak to the Department within two hours of its discovery (*see* 6 NYCRR 613.8), and close the tank permanently consistent with the requirements outlined in 6 NYCRR 613.9(b).

Conclusions

Respondent has defaulted on his obligation to file an answer to the January 29, 2004 complaint. As a result, William W. Wakefield has waived his right to a hearing. Department Staff has established *prima facie* entitlement to default judgment.

Recommendations

The Commissioner should grant Department Staff's motion for default judgment. The Commissioner should assess a total civil penalty of \$17,500 and direct Respondent to register his facility, and either test the tank for tightness or permanently close the tank.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
April 30, 2004