

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of Alleged Violations
of Article 17 of the Environmental
Conservation Law of the State of New York
and Parts 612, 613 and 614 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York

Ruling on Default
Motion

DEC File No.
R4-2010-0120-2

-by-

WILLIAMS TIRE & AUTO, INC.,¹

Respondent.

SUMMARY

This ruling grants in part a motion for a default judgment brought by Staff of the Department of Environmental Conservation ("DEC Staff") against Williams Tire & Auto, Inc. ("respondent"). Specifically, DEC Staff has established that the respondent is liable for the fifteen causes of action alleged, however, factual questions exist regarding the respondent's actions to cure the violations which may impact the appropriate amount of civil penalty to be imposed in this case.

PROCEEDINGS

DEC Staff commenced this administrative enforcement proceeding by serving a notice of hearing and complaint upon the respondent at 711 State Highway 80, New Berlin, New York. The complaint alleged the respondent is responsible for fifteen violations involving three petroleum bulk storage (PBS)

¹ In its papers, DEC Staff refers to the respondent as "Williams Tire and Auto, Inc." However, according to the New York State Department of State's Division of Corporations, the correct name is "Williams Tire & Auto, Inc.", which is the name used in this report.

facilities used for the storage of used oil² it owns and/or operates.

Three causes of action alleged in the complaint involve violations at 711 State Highway 80, New Berlin, New York (PBS facility 4-135496) (facility 1) that were discovered during an inspection on May 6, 2011. At this facility, it is alleged that the respondent failed to: (1) properly color code the fill port for a 275 gallon aboveground storage tank used for heating oil (identified as AST #RED) in violation of 6 NYCRR 613.3(b); (2) properly label this tank with the design capacity, working capacity and identification number in violation of 6 NYCRR 613.3(c)(3)(ii); and (3) inspect this tank on a monthly basis in violation of 6 NYCRR 613.6(a).

Seven causes of action alleged in the complaint involve violations at 19 East Street, Edmeston, New York (PBS facility 4-601376) (facility 2) that were discovered during an inspection on May 6, 2011. At this facility, it is alleged that the respondent failed to: (1) register the facility in violation of 6 NYCRR 612.2(c); (2) properly permanently close a 275 gallon aboveground storage tank (identified as AST Tank #2) that had been used for the storage of waste/used oil in violation of 6 NYCRR 613.9(b); (3) properly label two tanks (identified as AST Tanks #1 & 2) at the facility with the design capacity, working capacity and identification number in violation of 6 NYCRR 613.3(c)(3)(ii); (4) properly color code the fill ports for these two tanks at the facility in violation of 6 NYCRR 613.3(b); (5) install overfill prevention systems for these two tanks in violation of 6 NYCRR 613.3(c)(3)(i) and 6 NYCRR 612.3(c)(3)(iii); and (6) inspect these two tanks on a monthly basis in violation of 6 NYCRR 613.6(a). DEC Staff also alleged a seventh violation, namely that one of the tanks (AST Tank #2) operated by the respondent at the facility did not meet required aboveground tank design and manufacturing standards in violation of 6 NYCRR 614.9(a).

² Pursuant to 6 NYCRR 374-2.3(c)(2), tanks used for the storage of used oil, regardless of tank size, must comply with various sections (6 NYCRR 612.2 through 6 NYCRR 612.4, 6 NYCRR 613.2 through 6 NYCRR 613.9, 6 NYCRR 614.6 and 6 NYCRR 614.12) of the petroleum bulk storage regulations. New aboveground and new underground used oil tank systems must be installed in accordance with 6 NYCRR 613.2, 613.3(c)(3) through (6), and 614.2 through 614.14 (see 6 NYCRR 374-2.3[c][2][ii]).

Five causes of action alleged in the complaint involve violations at 1134 State Highway 80, Edmeston, New York (PBS facility 4-601318) (facility 3) that were discovered during an inspection on May 6, 2011. At this facility, it is alleged that the respondent failed to: (1) display its PBS facility registration certificate in violation of 6 NYCRR 612.2(e); (2) properly color code the fill port for a 220 gallon aboveground storage tank (identified as AST #1) in violation of 6 NYCRR 613.3(b); (3) install overfill prevention systems for this tank at the facility in violation of 6 NYCRR 613.3(c)(3)(i) and 6 NYCRR 612.3(c)(3)(iii); (4) inspect this tank on a monthly basis in violation of 6 NYCRR 613.6(a); and (5) properly label this tank with the design capacity, working capacity, and identification number in violation of 6 NYCRR 613.3(c)(3)(ii).

Following the May 6, 2011 inspections, DEC Staff mailed a Notice of Violation (NOV) dated May 9, 2011 to the respondent. The NOV stated that the respondent had seven days to register facility 2; sixty days to properly close AST Tank #2 at facility 2; and thirty days to cure the other violations.

Before the thirty days set forth in the NOV had transpired, DEC Staff served a notice of hearing and complaint upon the respondent by certified mail, return receipt requested, on May 27, 2011. The respondent failed to file an answer to the complaint. By papers dated June 22, 2011, DEC Staff moved for a default judgment and order against the respondent pursuant to 6 NYCRR 622.15. DEC Staff's default motion papers consist of the following documents: (1) a notice of motion; (2) a motion for default judgment and order; (3) the affirmation of DEC Staff counsel Jill Phillips, Esq.; and (4) a cover letter. Attached to Ms. Phillips' affirmation are: (1) an affidavit of service of the notice of hearing and complaint; (2) a United States Postal Service's delivery receipt; (3) a copy of the notice of hearing and complaint; (4) copies of the PBS certificates for two of the facilities and copies of facility information reports for all three facilities at issue; (5) a copy of a Notice of Violation issued to the respondent on May 9, 2011; and (6) a proposed order in this matter.

DEC Staff mailed a copy of the default motion and supporting papers to the respondent that were received on June 25, 2011. As of the date of this default summary report, the DEC Office of Hearings and Mediation Services has not received any written response from or on behalf of the respondent.

Mr. Jeff Williams, President of Williams Tire & Auto, Inc. did call the Office of Hearings and Mediation Services on July 6, 2011 and I returned his call the following morning. Mr. Williams opened the conversation by stating that he didn't want to pay the civil penalty that DEC Staff sought and that he had corrected all the violations. I explained to Mr. Williams the procedural posture of the case and that I could not discuss the merits of the matter with him without a representative of DEC Staff involved. I suggested either making a written submission or attempting to contact DEC Staff counsel Jill Phillips to attempt to resolve the matter.

Ms. Phillips sent me an email on July 11, 2011 informing me that Mr. Williams had called her that morning and that it was DEC Staff's position that it was moving forward with its motion. No further communication has been received from the parties.

DISCUSSION

Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Commissioner Decision and Order, 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]." However, this only establishes liability and a defaulting respondent is entitled to be heard on penalty and proposed remediation, provided a timely request is made.

As stated above, the notice of hearing and complaint were served upon the respondent on May 27, 2011. Respondent failed to serve an answer within the time period specified in 6 NYCRR 622.4(a) and respondent defaulted in this matter.

DEC Staff has provided proof of service upon the respondent of the notice of hearing and complaint, proof that the respondent failed to appear or file a timely answer, and

provided a proposed order. Accordingly, DEC Staff has met the requirements of 6 NYCRR 622.15(a). In addition, DEC Staff has provided proof of mailing of the default motion to the respondent. DEC Staff's complaint contains sufficient allegations for the Commissioner to conclude that relief may be granted for the causes of action alleged.

Ms. Phillips' affirmation states that the requested civil penalty of \$8,650 is within the range authorized by ECL 71-1929, which authorizes a penalty of up to \$37,500 for any violation of any provision of ECL article 17, or any rule or regulation promulgated thereunder. Ms. Phillips also states that the requested civil penalty amount is consistent with the Department's Civil Penalty Policy (see DEE-1, dated June 20, 1990). She cites as aggravating factors: (1) the critical nature of the Department's petroleum bulk storage program to preventing the discharge of petroleum; (2) the threat that petroleum discharges presents to public health and the environment; and (3) the pervasive nature of the violations in this case. Staff's papers do not indicate whether any efforts were made to settle this matter prior to commencement of this proceeding.

In addition to the requested civil penalty, DEC Staff seeks the inclusion of language in the Commissioner's order which would require the respondent to submit photos and documentation to DEC Staff to certify that: (1) the fill ports at all three facilities have been properly color coded (specifically AST #RED at facility 1, AST tanks #1 & #2 at facility 2, and AST tank #1 at facility 3); (2) each of these tanks has a level gauge; and (3) each tank is properly labeled with its design, working capacity and identification number. DEC Staff also requests the respondent be directed to: (1) submit the inventory and leak detection records for the three facilities for the three months following the effective date of the Commissioner's order; (2) submit proof to DEC Staff within 30 days of service of the Commissioner's order that an environmental consultant has been hired to permanently close the tank which did not meet required aboveground tank design and manufacturing standards (AST Tank #2) at 19 East Street, Edmeston, New York (PBS facility 4-601376); and (3) submit a closure plan for this tank to DEC Staff for review and approval within sixty (60) days of service of the order upon the respondent.

Based on the above, DEC Staff is entitled to a default judgment and order regarding the respondent's liability for the fifteen causes of action alleged. However, two facts in this

case require that a hearing be convened on civil penalty amount and the proposed remedy for the violations. These two facts are: (1) Mr. Williams did call me and spoke briefly about the penalty amount and his remedial efforts; and (2) DEC Staff served the notice of hearing and complaint on the respondent before the time set forth in the NOV for most of the violations to be corrected had passed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Williams Tire & Auto, Inc. was served with the notice of hearing and complaint on May 27, 2011. The respondent failed to file a timely answer and has failed to file any answer as of the date of this report. The respondent has defaulted in this matter with respect to liability, but has appeared with respect to civil penalty amount and remediation.
2. At the facility located at 711 State Highway 80, New Berlin, New York (PBS facility 4-135496), Williams Tire & Auto, Inc. failed to properly color code the fill port for a 275 gallon aboveground storage tank (AST #RED) used for heating oil in violation of 6 NYCRR 613.3(b).
3. At the facility located at 711 State Highway 80, New Berlin, New York (PBS facility 4-135496), Williams Tire & Auto, Inc. failed to properly label a 275 gallon aboveground storage tank (AST #RED) with the design capacity, working capacity and identification number in violation of 6 NYCRR 613.3(c)(3)(ii).
4. At the facility located at 711 State Highway 80, New Berlin, New York (PBS facility 4-135496), Williams Tire & Auto, Inc. failed to inspect a 275 gallon aboveground storage tank (AST #RED) on a monthly basis in violation of 6 NYCRR 613.6(a).
5. At the facility located at 19 East Street, Edmeston, New York (PBS facility 4-601376), Williams Tire & Auto, Inc. failed to register this facility in violation of 6 NYCRR 612.2(c).
6. At the facility located at 19 East Street, Edmeston, New York (PBS facility 4-601376), Williams Tire & Auto, Inc. failed to properly permanently close a 275 gallon aboveground storage tank (AST #2) that is no longer being

7. At the facility located at 19 East Street, Edmeston, New York (PBS facility 4-601376), Williams Tire & Auto, Inc. failed to properly label two tanks (AST Tank #1 & #2) at the facility with the design capacity, working capacity and identification number in violation of 6 NYCRR 613.3(c)(3)(ii).
8. At the facility located at 19 East Street, Edmeston, New York (PBS facility 4-601376), Williams Tire & Auto, Inc. failed to properly color code the fill ports for two tanks (AST Tank #1 & #2) at the facility in violation of 6 NYCRR 613.3(b).
9. At the facility located at 19 East Street, Edmeston, New York (PBS facility 4-601376), Williams Tire & Auto, Inc. failed to install overflow prevention systems for two tanks (AST Tank #1 & #2) in violation of 6 NYCRR 613.3(c)(3)(i) and 6 NYCRR 612.3(c)(3)(iii).
10. At the facility located at 19 East Street, Edmeston, New York (PBS facility 4-601376), Williams Tire & Auto, Inc. failed to inspect two tanks (AST Tank #1 & #2) on a monthly basis in violation of 6 NYCRR 613.6(a).
11. At the facility located at 19 East Street, Edmeston, New York (PBS facility 4-601376), Williams Tire & Auto, Inc. operated one of the tanks (AST Tank #2) at the facility which did not meet required aboveground tank design and manufacturing standards in violation of 6 NYCRR 614.9(a).
12. At the facility located at 1134 State Highway 80, Edmeston, New York (PBS facility 4-601318), Williams Tire & Auto, Inc. failed to display its PBS facility registration certificate in violation of 6 NYCRR 612.2(e).
13. At the facility located at 1134 State Highway 80, Edmeston, New York (PBS facility 4-601318), Williams Tire & Auto, Inc. failed to properly color code the fill port for a 220 gallon aboveground storage tank (AST Tank #1) in violation of 6 NYCRR 613.3(b).
14. At the facility located at 1134 State Highway 80, Edmeston, New York (PBS facility 4-601318), Williams Tire & Auto, Inc. failed to install overflow prevention systems for a

tank (AST Tank #1)at the facility in violation of 6 NYCRR 613.3(c)(3)(i) and 6 NYCRR 612.3(c)(3)(iii).

15. At the facility located at 1134 State Highway 80, Edmeston, New York (PBS facility 4-601318), Williams Tire & Auto, Inc. failed to inspect a tank (AST Tank #1)on a monthly basis in violation of 6 NYCRR 613.6(a).
16. At the facility located at 1134 State Highway 80, Edmeston, New York (PBS facility 4-601318), Williams Tire & Auto, Inc. failed to properly label a tank (AST Tank #1) with the design capacity, working capacity and identification number in violation of 6 NYCRR 613.3(c)(3)(ii).
17. Environmental Conservation Law 71-1929 provides that a person who violates any of the provisions of Article 17, or who fails to perform any duty imposed by thereunder, shall be liable for a civil penalty of up to \$37,500 for a first offense.

CONCLUSION

The respondent Williams Tire & Auto, Inc. is liable for the fifteen violations alleged in the complaint. A hearing will be convened shortly regarding the status of respondent's efforts to remedy the violations and the appropriate amount of civil penalty.

Albany, New York
August 4, 2011

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