

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

VISTA Index No.
R620050513-17

- by -

GRANT L. MOORE, d/b/a
MOORE'S MARKETS, INC.

Respondent.

Pursuant to section 622.3 of title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of New
York ("NYCRR"), staff of the New York State Department of
Environmental Conservation ("Department") commenced this
administrative proceeding against respondent Grant L. Moore. The
proceeding was commenced on June 15, 2005 by personal service of
a notice of hearing dated June 13, 2005 and complaint dated June
14, 2005.

The complaint alleged that Moore's Markets, Inc., was
incorporated on March 10, 1986, and that the corporation owned
and operated stores in various locations in New York State,
including a retail store on Route 29A, Salisbury Center, Herkimer
County, New York ("facility"). The complaint further alleged
that stationary petroleum bulk storage ("PBS") tanks with a
combined capacity exceeding 1,100 gallons are located at the
facility. According to the complaint, Moore's Markets, Inc., was
dissolved by proclamation of the Secretary of State on June 24,
1998. Although the corporation has been dissolved, the complaint
asserts that Mr. Moore continues to own and operate the PBS
facility at the Salisbury Center.

According to the complaint, an inspection of the facility on
February 9, 2005 identified a number of violations, including but
not limited to the addition of an unregistered PBS tank for the
storage of #2 fuel oil, equipment deficiencies, lack of color
coding, and failure to produce any reports indicating that
monthly inspections of the PBS tanks had been performed at the
facility.

The complaint alleged nine causes of action:

1. Respondent violated 6 NYCRR 612.2(a)(2) since March 24, 2002 because he failed to renew the registration for three PBS tanks (designated tank numbers 1, 2 and 3) at the facility;
2. Respondent violated 6 NYCRR 612.2(d) when he installed a fourth PBS tank at the facility without notifying the Department;
3. Respondent violated 6 NYCRR 613.3(b) because the fill ports on tank number 2, tank number 3, and the unregistered fourth tank were not color coded to identify what kind of petroleum product was stored in them;
4. Respondent violated 6 NYCRR 614.9(a)(1) because neither tank number 1 nor tank number 2 are equipped with an emergency vent, and tank number 2 is not equipped with a normal vent;
5. Respondent violated the requirement at 6 NYCRR 614.9(c) concerning the painting of exterior tank surfaces with respect to tank number 1 and tank number 2;
6. Respondent violated either 6 NYCRR 613.6(a) by failing to conduct monthly inspections of the tanks at the facility, or 6 NYCRR 613.6(c) by failing to maintain monthly inspection reports;
7. Respondent violated 6 NYCRR 613.3(c)(6)(i) and (iii) due to structural defects associated with the secondary containment system for tank number 2;
8. Respondent violated 6 NYCRR 613.3(c)(3)(ii) because none of the tanks and gauges were labeled with the design capacity, working capacity or tank number; and
9. Respondent violated 6 NYCRR 613.3(c)(2) because tank number 1 and tank number 2 are not equipped with solenoid valves, or equivalent devices, so that liquid cannot flow by gravity from the storage tanks.

Respondent failed to answer or move with respect to the complaint. Pursuant to 6 NYCRR 622.4(a), Respondent's time to serve an answer to the complaint or otherwise appear expired on July 5, 2005, and Department staff did not extend that deadline.

On July 11, 2006, Department staff filed a motion for a default judgment with the Department's Office of Hearings and Mediation Services. On the same day, Department staff provided Respondent with a copy of the motion by certified mail. Respondent also failed to respond to the motion for default judgment.

The matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell, who prepared the attached default summary report. ALJ O'Connell's report is adopted as my decision in the matter subject to the following comments.

Effective May 15, 2003, ECL 71-1929 currently provides that any person who violates any provision or fails to perform any duty imposed by titles 1 through 11 and title 19 of article 17 of the Environmental Conservation Law or any rule, regulation, order or determination promulgated thereunder, shall be liable for a civil penalty not to exceed thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In addition, such person may be enjoined from continuing such violation. Based upon my review of the penalty and remedial measures sought by Department staff, the proposed penalty is justified by the circumstances of this case and is consistent with penalties awarded in comparable cases. I also conclude that the remedial measures are authorized and warranted, and the recommended dates by which the facility is to achieve compliance with applicable regulatory standards are reasonable.

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

- I. Department staff's motion for a default judgment against respondent Grant L. Moore is granted.
- II. Pursuant to 6 NYCRR 622.15, respondent is adjudged to be in default and to have waived his right to a hearing in this matter. Accordingly, respondent is deemed to have admitted the factual allegations in the complaint.
- III. Respondent is determined to have violated 6 NYCRR 612.2(a)(2) since March 24, 2002 by failing to renew the registration for three PBS tanks at the facility.
- IV. Respondent is determined to have violated 6 NYCRR 612.2(d) by installing a fourth PBS tank at the facility without notifying the Department.

- V. Respondent is determined to have violated 6 NYCRR 613.3(b) by failing to color code the fill ports on tank number 2, tank number 3, and the unregistered fourth tank.
- VI. Respondent is determined to have violated 6 NYCRR 614.9(a)(1) by failing to equip tank number 1 and tank number 2 with an emergency vent, and tank number 2 with a normal vent.
- VII. Respondent is determined to have violated the requirement at 6 NYCRR 614.9(c) concerning the painting of exterior tank surfaces with respect to tank number 1 and tank number 2.
- VIII. Respondent is determined to have violated either 6 NYCRR 613.6(a) by failing to conduct monthly inspections of the tanks at the facility, or 6 NYCRR 613.6(c) by failing to maintain monthly inspection reports.
- IX. Respondent is determined to have violated 6 NYCRR 613.3(c)(6)(i) and (iii) by failing to construct and maintain the secondary containment system for tank number 2.
- X. Respondent is determined to have violated 6 NYCRR 613.3(c)(3)(ii) by failing to label the tanks and gauges with their design capacity, working capacity or tank number.
- XI. Respondent is determined to have violated 6 NYCRR 613.3(c)(2) by failing to equip tank number 1 and tank number 2 with solenoid valves, or equivalent devices, so that liquid cannot flow by gravity from these storage tanks.
- XII. Respondent Grant L. Moore is hereby assessed a civil penalty in the amount of fourteen thousand six hundred dollars (\$14,600), which is due and payable no later than 30 days after service of this order upon respondent. Such payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation," and delivered to the Department at the following address: New York State Department of Environmental Conservation, Region 6, Dulles State Office Building, 317 Washington Street, Watertown, New York 13601, ATTN: Ronald J. Novak, P.E., Regional Enforcement Coordinator.
- XIII. Respondent is hereby directed:

- A. Within ten (10) days after service of this order, to submit a completed petroleum bulk storage application identifying all tanks at the facility along with payment of the registration fee in the amount of three hundred dollars (\$300) pursuant to ECL 17-1009(2);
 - B. Within ten (10) days after service of this order, to color code the fill ports of tank number 2, tank number 3, and the presently unregistered tank at the facility in accordance with 6 NYCRR 613.3(b);
 - C. Within thirty (30) days after service of this order, to install emergency vents in tank number 1 and tank number 2 in accordance with 6 NYCRR 614.9(a);
 - D. Within thirty (30) days after service of this order, to install a normal vent in tank number 2 in accordance with 6 NYCRR 614.9(a);
 - E. Within thirty (30) days after service of this order, to repaint tank number 1 in accordance with 6 NYCRR 614.9(c);
 - F. Immediately, and on an on-going basis thereafter, to commence monthly inspections of the facility in compliance with 6 NYCRR 613.6(a) and maintain records in compliance with 6 NYCRR 613.6(c);
 - G. Immediately to install a plug in the dike for tank number 2 in compliance with 6 NYCRR 613.3(c);
 - H. Within forty-five (45) days after service of this order, to label all tanks at the facility with design capacity, working capacity and tank number in compliance with 6 NYCRR 613.3(c)(3)(ii); and
 - I. Within thirty (30) days after service of this order, to install solenoid valves, or equivalent devices, on tank number 1 and tank number 2 at the facility.
- XIV. All communications from respondent to Department staff concerning this order, other than the payment of penalty (see paragraph XII), shall be made to Randall C. Young, Esq., New York State Department of Environmental Conservation, Region 6, Division of Legal Affairs, Dulles State Office Building, 317 Washington Street, Watertown, New York 13601.

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

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Denise M. Sheehan
Commissioner

Date: Albany, New York
December 12, 2006

To: Grant L. Moore (By certified mail)
Moore's Markets
1607 Snells Bush Road
Little Falls, New York 13365

Randall C. Young, Esq. (By regular mail)
Assistant Regional Attorney
NYS DEC Region 6
Dulles State Office Building
317 Washington Street
Watertown, New York 13601-3787

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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(6 NYCRR) by:

Default
Summary Report

VISTA Index No.:
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Grant L. Moore, d/b/a
Moore's Markets, Inc.
Town of Salisbury
Herkimer County

RESPONDENT.

Proceedings

On June 15, 2005, the Region 6 Staff of the Department of Environmental Conservation (the Department Staff or Staff) duly served a notice of hearing and complaint upon Grant L. Moore by personal service. The notice of hearing is dated June 13, 2005, and the complaint is dated June 14, 2005. According to the complaint, Moore's Markets, Inc., was incorporated on March 10, 1986, and owned and operated stores in various locations in New York State, including a retail store on Route 29A, Salisbury Center, Herkimer, New York. The complaint asserts that stationary petroleum bulk storage (PBS) tanks with a combined storage capacity exceeding 1,100 gallons are located at the retail store on Route 29A at the Salisbury Center in Herkimer. The complaint asserts further that Moore's Markets, Inc., was dissolved by proclamation of the Secretary of State on June 24, 1998. Although the corporation has been dissolved, Mr. Moore continues to own and operate the PBS facility at the Salisbury Center, according to the complaint.

The June 13, 2005 notice of hearing stated that, pursuant to 6 NYCRR 622.4, Mr. Moore must serve an answer upon Department Staff within twenty days of receiving the notice of hearing and complaint. As provided for by 6 NYCRR 622.8, the notice also scheduled a prehearing conference for June 30, 2005 at 11:00 a.m. at the Department's Region 6 Suboffice in Utica. The notice stated that if Mr. Moore failed either to file an answer or to attend the prehearing conference, he would be in default and would waive his right to a hearing.

With a cover letter dated July 11, 2006, Randall C. Young, Esq., Assistant Regional Attorney, Region 6, filed a notice of motion and a motion, both dated July 11, 2006, with supporting

papers for a default judgment against Mr. Moore. The supporting papers consisted of an affidavit by Mr. Young dated July 6, 2006 with attached Exhibits A, B and C. Exhibit A is an affidavit of personal service sworn to July 6, 2006 by Environmental Conservation Officer Luke Billotto. Exhibit B is a copy of the June 13, 2005 notice of hearing. Exhibit C is a copy of the June 14, 2005 complaint. Department staff provided a copy of a proposed order.

The bases for Staff's motion for default judgment are Mr. Moore's failure to file a timely answer to the June 14, 2005 complaint, and to appear at the June 30, 2005 prehearing conference. Mr. Young also mailed copies of the default motion and supporting papers to Mr. Moore.

Findings of Fact

1. On June 15, 2005, Environmental Conservation Officer Luke Billotto personally served a copy of the notice of hearing dated June 13, 2005, and a copy of the complaint dated June 14, 2005 upon Grant L. Moore.
2. The June 13, 2005 notice of hearing stated that, pursuant to 6 NYCRR 622.4, Mr. Moore must serve an answer upon DEC Staff within twenty days of receiving the notice of hearing and complaint. As provided for by 6 NYCRR 622.8, the notice also scheduled a prehearing conference for June 30, 2005 at 11:00 a.m. at the Department's Region 6 Suboffice in Utica. The notice stated that if Mr. Moore failed either to file an answer or to attend the prehearing conference, he would be in default and would waive his right to a hearing.
3. With respect to the June 13, 2005 complaint, the time for Mr. Moore to serve an answer expired on July 5, 2005. As of the date of Department staff's default motion, Mr. Moore had not filed an answer.

Discussion

According to the Department's hearing regulations, a respondent's failure either to file a timely answer or to appear at a prehearing conference constitutes a default and a waiver of the 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:

- a. Proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
- b. Proof of the respondent's failure to file a timely answer or to appear at a prehearing conference; and
- c. A proposed order.

Environmental Conservation Officer Billotto's July 6, 2006 affidavit of personal service demonstrates service of the June 13, 2005 notice of hearing and June 14, 2005 complaint upon Mr. Moore in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3). In addition, Mr. Young's July 6, 2006 affidavit demonstrates that Mr. Moore did not timely file any answer to the complaint. Based on these circumstances, Mr. Moore has defaulted and waived his right to a hearing, and Department staff is entitled to a default judgment pursuant to 6 NYCRR 622.15(a).

Staff, however, may not rely on Mr. Moore's failure to appear at the June 30, 2005 prehearing conference as an additional basis for the default judgment. The June 30, 2005 prehearing conference was scheduled within the twenty day period provided for filing the answer. The Commissioner has previously determined that a respondent must be afforded the full regulatory period in which to answer. As a result, the Commissioner has held that a respondent's failure to appear at a "pre-answer, pre-hearing conference" cannot be relied upon as a basis for a default judgment. (*See Matter of Kuldeep Singh*, Commissioner's Decision and Order, December 17, 2003.) As noted above, the only basis, therefore, for a default judgment that may be relied upon here is Mr. Moore's failure to file any answer.

The Department Staff has provided a proposed order with its motion papers. The proposed order would assess a total civil penalty of \$14,600, and would require Mr. Moore to comply with the applicable requirements outlined in 6 NYCRR parts 612, 613 and 614.

When a respondent defaults, he waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, however, still has the obligation to prove damages. (*See Matter of Alvin Hunt d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 3-4.)

Any person who violates any provision or fails to perform any duty imposed by titles 1 through 11 and title 19 of article 17 of the Environmental Conservation Law or any rule, regulation, order or determination promulgated thereunder, shall be liable for a civil penalty not to exceed thirty-seven thousand five hundred dollars (\$37,500) per day for each violation, and in addition, such person may be enjoined from continuing such violation (see ECL 71-1929[1], effective May 15, 2003). Here, Department staff has proposed a total civil penalty that is substantially less than the potential maximum, particularly given the potential environmental harm that may result from these violations, as well as the continuous nature of them. In addition, the requested civil penalty is consistent with civil penalties assessed in similar cases (see *e.g. Matter of Harry R. Wright*, Commissioner's Order, April 4, 2006).

Finally, Staff's proposed order includes a schedule to bring Mr. Moore's PBS facility into compliance with the applicable regulations. I find that the dates in the compliance schedule outlined in the proposed order are reasonable.

Conclusion

1. Mr. Moore has defaulted and, therefore, has waived his right to a hearing with respect to his liability for the violations alleged in the complaint.
2. Department staff has provided a justification for the requested civil penalty and remediation.

Recommendation

The proposed order, submitted by Department Staff, should be signed and served on Mr. Moore.

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