

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

In the Matter of Alleged Violations
of Article 17 of the Environmental
Conservation Law, Article 12 of the
New York State Navigation Law and
Titles 6 and 17 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("NYCRR"),

ORDER

DEC File No.
R2-20091218-727

- by -

TY46, LLC,

Respondent.

This proceeding addresses alleged violations at a petroleum bulk storage facility ("facility") that respondent TY46, LLC, owns at 5-48 46th Road, Long Island City, NY ("site").

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent TY46, LLC, by service of a notice of hearing and complaint dated April 15, 2010, by certified mail. Respondent received the notice of hearing and complaint on April 16, 2010.

The complaint alleged six causes of action. Specifically, it was alleged that respondent:

1. illegally discharged petroleum at and from the site in violation of Navigation Law ("NL") § 173;
2. failed to immediately undertake containment of the petroleum discharge at the site in violation of NL § 176 and 17 NYCRR 32.5;
3. failed to re-register the facility as a petroleum bulk storage facility in violation of 6 NYCRR 612.2(b);

4. failed to perform leak detection on an unmetered underground storage tank at the facility in violation of 6 NYCRR 613.4(a)(2);
5. failed to test a tank and piping system at the facility for tightness every five years in violation of 6 NYCRR 613.5(a)(1); and
6. failed to submit a tank tightness test report in violation of 6 NYCRR 613.5(a)(4).¹

Respondent failed to file an answer to the complaint. Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on May 6, 2010, and has not been extended by Department staff.

Department staff filed a motion for default judgment, dated May 24, 2010, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

Department staff has requested a civil penalty of "no less than" ninety-six thousand dollars (\$96,000) in its motion for default judgment. Department attorney John K. Urda details the factors in support of the requested civil penalty against respondent, including the economic benefit that respondent realized from non-compliance, its lack of cooperation in addressing the violations, the long-term duration of the violations and the relative importance of the regulations that were violated to the State's regulatory scheme (see Urda Affirmation, at 6).

I concur with the ALJ's determination that Department staff is entitled to a default judgment on the first, second, third and fifth causes of action. Because the papers did not allege that respondent TY46, LLC, was the operator of the facility, I agree with the ALJ that Department staff is not entitled to a default judgment on the fourth cause of action.

I also concur with the recommendation of the ALJ for a civil penalty of \$95,000. The civil penalty is authorized and appropriate based on this record. Department staff also

¹ This sixth cause of action was subsequently withdrawn by Department Staff (see Affirmation of John K. Urda, Esq., in Support of Motion for Default Judgment and Order, May 24, 2010 ["Urda Affirmation"], at 4).

requested in its papers that respondent be directed to investigate and remediate the petroleum spill pursuant to a Department-approved work plan, and to correct various violations of the petroleum bulk storage regulations at the facility. These remedial actions requested by Department staff are authorized and appropriate.

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 with respect to the first, second, third and fifth causes of action, and is denied with respect to the fourth cause of action.
- II. Respondent TY46, LLC is adjudged to be in default and to have waived its rights to a hearing in this proceeding. Accordingly, the allegations against respondent, as set forth in Department staff's complaint, are deemed to have been admitted by respondent.
- III. Respondent is adjudged to have violated Navigation Law § 173, Navigation Law § 176, 17 NYCRR 32.5, 6 NYCRR 612.2(b), and 6 NYCRR 613.5(a)(1).
- IV. Respondent TY46, LLC, is assessed a civil penalty in the amount of ninety-five thousand dollars (\$95,000). The civil penalty is due and payable within thirty (30) days after service of this order upon respondent. 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:

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC, Region 2
47-40 21st Street
Long Island City, NY 11101.

- V. Within thirty (30) days of service of this order upon respondent, respondent shall:
 - A. submit to Department staff for its approval a work plan that will provide for the delineation of the extent of spill no. 0902534, both on and off the site, and for its remediation. Pursuant to the work plan, respondent shall

be required to provide the Department with monthly status reports relating to its spill investigation and remediation. Respondent shall, within thirty (30) days of Department staff's approval of the work plan, implement the approved work plan to investigate and remediate the spill;

B. register the facility with the Department as a petroleum bulk storage facility and pay the required registration fees; and

C. submit documentation in a form and manner satisfactory to Department staff demonstrating that respondent has tested the tank and piping system at the facility in accordance with the requirements of the State's petroleum bulk storage regulations.

VI. All communications from respondent to the Department concerning this order shall be directed to:

John K. Urda, Esq.
Assistant Regional Attorney
NYSDEC, Region 2
47-40 21st Street
Long Island City, NY 11101.

VII. The provisions, terms and conditions of this order shall bind respondent TY46, LLC, and its agents, successors and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: September 9, 2010
Albany, New York

In the Matter of Alleged Violations
of Article 17 of the Environmental
Conservation Law, Article 12 of the
New York State Navigation Law and
Titles 6 and 17 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York by

DEFAULT SUMMARY
REPORT

DEC File No.
R2-20091218-727

TY46, LLC,

Respondent.

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement proceeding by serving a notice of hearing and complaint upon TY46, LLC ("respondent"), 5-48 46th Road, Long Island City, NY 11101. The complaint alleged that TY46, LLC violated Environmental Conservation Law ("ECL") article 17, New York State Navigation Law ("NL") Article 12 and titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") regarding a petroleum bulk storage facility (PBS #2-110035) located at 5-48 46th Road, Long Island City, NY 11101 (Queens County block 28, lot 40) owned by respondent (the "site").

The notice of hearing and complaint were served upon respondent TY46, LLC by certified mail, return receipt requested, on April 16, 2010. Respondent failed to file a timely answer the complaint. By papers dated May 24, 2010, DEC Staff moved for a default judgment and order against respondent pursuant to 6 NYCRR 622.15. DEC Staff mailed a copy of the default motion and supporting papers to respondent. As of the date of this default summary report, the DEC Office of Hearings and Mediation Services has not received any response from or on behalf of respondent.

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 (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]."

DEC Staff's default motion papers consist of the following documents:

Notice of motion for default judgment and order, dated May 24, 2010;

Motion for default judgment and order, dated May 24, 2010; and

Affirmation of John K. Urda, Esq., dated May 24, 2010 with six attached exhibits:

Exhibit A, the April 15, 2010 notice of hearing and complaint that named TY46, LLC as respondent (attached to the complaint are: (1) a copy of a petroleum bulk storage certificate for the site; and (2) a copy of the PBS program facility information report);

Exhibit B, (1) an April 15, 2010 Affidavit of Service, (2) a signed postal return receipt for mailing of the notice of hearing and complaint dated April 16, 2010, and (3) a United States Postal Service Track & Confirm report indicating that the notice of hearing and complaint were delivered at 2:00 p.m. on April 16, 2010;

Exhibit C, a copy of the deed for 5-48 46th Road, Long Island City;

Exhibit D, (1) a copy of a April 9, 1992 Petroleum Bulk Storage Application for the facility by a prior owner, and (2) a copy of the Petroleum Bulk Storage Registration Certificate issued to the prior owner on April 14, 1992;

Exhibit E, a copy of a NYSDEC Spill Report Form (spill #0902534) regarding a spill at the site reported on June 2, 2009; and

Exhibit F, a proposed order in this matter.

FINDINGS OF FACT

1. Respondent TY46, LLC owns a PBS facility located at 5-48 46th Road, Long Island City, NY 11101 (the "facility"). The facility consists of a 5,000 gallon underground storage tank and piping system storing number two fuel oil that was installed in 1973 and registered with the Department as PBS facility number 2-110035. The facility is registered under the owner name "5-48 Corp." No such entity is registered with the New York State Department of State, Division of Corporations.
2. On August 28, 2009, the facility was due for tightness testing and as of the date of the complaint, April 15, 2010, DEC Staff had not received a tightness test report for the facility.

Default

3. On April 15, 2010, DEC Staff mailed a notice of hearing and complaint in this matter to TY46, LLC, 5-48 46th Road, Long Island City, NY 11101, by certified mail, return receipt requested. The signed mail receipt was returned to DEC Staff showing the receipt of the mailing as April 16, 2010.
4. The notice of hearing stated that an answer must be served upon DEC Staff within twenty days of receipt of the complaint. The notice of hearing also stated that failure to timely file an answer will result in a default and a waiver of the respondent's right to a hearing. The twenty-day time period expired on May 6, 2010. TY46, LLC failed to serve an answer within the 20-day period.
5. On May 24, 2010, DEC Staff moved for a default judgment and order. The motion included a proposed order.

Violations

6. On June 2, 2009, a consultant conducting a subsurface investigation on an adjacent parcel to the facility reported groundwater contaminated with number two fuel oil

coming from the facility. DEC Staff opened DEC spill number 0902534.

7. On June 10, 2009, DEC Staff met with Mr. Tony Yang, managing member of TY46, LLC, informed him of the discharge, and directed the respondent TY46, LLC to investigate and remediate the discharge.
8. On October 31, 2009, respondent received a stipulation agreement from DEC Staff providing for investigation and remediation of the discharge. Respondent ignored the stipulation.
9. Section 173(1) of the Navigation Law prohibits the discharge of petroleum. Respondent illegally discharged petroleum, as reported to DEC Staff on June 2, 2009. The duration of this violation is 310 days, from June 10, 2009 (the date Mr. Yang was notified of the spill) through the date of the complaint (April 15, 2010).
10. Section 176 of the Navigation Law and 17 NYCRR 32.5 requires persons responsible for discharges to immediately act to contain any discharges. Respondent has failed to take actions to contain the discharge. The duration of this violation is 310 days, from June 10, 2009 (the date Mr. Yang was notified of the spill) through the date of the complaint (April 15, 2010).
11. Section 612.2(b) of 6 NYCRR requires the new owner of the facility to reregister the facility with the Department within 30 days of ownership transfer. Respondent TY46, LLC acquired the facility September 14, 2005 and was required to reregister the facility by October 14, 2005, which it has not done. The duration of this violation is 1,646 days, October 14, 2005 through the date of the complaint (April 15, 2010).
12. Section 613.4(a)(2) of 6 NYCRR requires facility operators to perform leak detection on unmetered underground storage tanks. DEC Staff has not alleged nor offered any proof in its papers that respondent is an operator as that term is defined in 6 NYCRR 612.1(c)(16). Therefore, DEC Staff has failed to state a claim for this violation.
13. Section 613.5(a)(1) of 6 NYCRR requires the owner of a facility to test tanks and piping systems for tightness every five years. The date that tightness testing was due

for the facility was August 29, 2009. Respondent failed to test the tank and piping at the site. The duration of this violation is 228 days, from August 29, 2009 through the date of the complaint (April 15, 2010).²

14. Respondent's actions have resulted in a discharge at the site that is now impacting other properties. Until respondent investigates and delineates the contamination, the full impact of the spill will not be known. Had respondent complied with existing law, the spill may not have occurred or been detected earlier. Respondent avoided the expense of compliance.

DISCUSSION

The notice of hearing and complaint were served upon respondent on April 16, 2010. Respondent failed to serve an answer within the time period specified in 6 NYCRR 622.4(a) and respondent defaulted in this matter.

Respondent did not contest any of the allegations of the complaint nor any of DEC Staff's assertions or arguments about the proposed penalty and remedial actions.

With respect to the fourth cause of action, the alleged failure to perform leak detection on an unmetered underground storage tank pursuant to 6 NYCRR 613.4(a)(2), DEC Staff has failed to allege that respondent TY46, LLC was the operator of the facility. DEC Staff only alleges that the respondent is the owner. Since this duty falls only on operators, DEC Staff is not entitled to a default judgment on this cause of action.

Mr. Urda's affirmation included a list of the regulatory sections violated by the respondent and the average penalties for each violation as recommended in the PBS penalty schedule in DEC Policy DEE-22. Mr. Urda's affirmation noted that, while this policy states the penalty ranges are not to apply after

² In its complaint, DEC Staff also alleged a violation of 6 NYCRR 613.5(a)(4) which requires the owner of a facility to send the results of tightness testing to DEC Staff no later than 30 days after performance of the test. However, in his affirmation in support, Mr. Urda withdrew this cause of action (paragraph 24).

service of a notice of hearing and complaint, the figures provide a starting point for calculating penalties.

Mr. Urda requests a civil penalty of no less than \$75,000 for the first two causes of action relating to the illegal discharge of petroleum and the failure to contain the discharge immediately. For the third cause of action, failure to register the facility, Mr. Urda seeks a civil penalty of no less than \$10,000. For the fourth cause of action, failure to perform leak detection, Mr. Urda seeks a penalty of no less than \$1,000. Mr. Urda also seeks a civil penalty of no less than \$10,000 for the fifth cause of action involving the failure to tightness test the facility.

Mr. Urda's affirmation also outlined the aggravating factors that support DEC Staff's request of a penalty of no less than \$96,000, including the respondent's lack of cooperation in remediating the site. The proposed penalty is far less than the maximum penalty authorized by ECL 71-1929 and NL § 192.

However, because DEC Staff has failed to show it is entitled to a default judgment on the fourth cause of action, it is also not entitled to the \$1,000 minimum penalty it seeks. Accordingly, I recommend that the Commissioner reduce the amount of civil penalty to \$95,000. This suggested penalty is supported by the record and is consistent with the Department's penalty policies relevant to facilities of this kind.

The complaint did not request that the Commissioner order respondent to undertake corrective actions or bring the facility into compliance. The complaint did ask for other and further relief as may be deemed just, proper and equitable under the circumstances. The motion for a default judgment requested that respondent be ordered to investigate and remediate the petroleum discharge pursuant to a Department-approved work plan. No elaboration of this request is found in Mr. Urda's affirmation. However, language included in DEC Staff's proposed order would require respondent to fully investigate and remediate the spill pursuant to a DEC approved work plan. Specifically, the draft order would require respondent, within 30 days of service of the order, to submit for DEC Staff approval an Investigation Work Plan to fully delineate the spill both on and off site. The draft order would also require respondent to bring the site into full compliance with all applicable PBS regulations within 30 days of service of the order.

CONCLUSIONS OF LAW

7. Respondent TY46, LLC was served with the notice of hearing and complaint on April 16, 2010. Respondent failed to file a timely answer and has failed to file any answer as of the date of this report. Respondent has defaulted in this matter.
8. Respondent discharged petroleum from the site in violation of Navigation Law § 173.
9. Respondent failed to immediately undertake containment of the discharge in violation of NL § 176 and 17 NYCRR 32.5.
10. Respondent failed to register the Petroleum Bulk Storage facility in violation of 6 NYCRR 612.2(b).
11. Respondent failed to test a tank and piping system for tightness every five years in violation of 6 NYCRR 613.5(a)(1).
12. Navigation Law § 192 provides that a person who violates Article 12 or a duty created thereunder shall be liable for a penalty of not more than \$25,000 for each offence and that each day such violation occurs shall be considered a separate violation.
13. Environmental Conservation Law § 71-1929(1) provides that a person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17 of the ECL, or the regulations promulgated pursuant thereto, shall be liable for a civil penalty not to exceed \$37,500 per day for each violation. The violations of parts 612 and 613 of 6 NYCRR are violations of regulations promulgated pursuant to ECL article 17, title 10, and the penalty provision in ECL 71-1929 applies.

RECOMMENDATION

I recommend that the Commissioner issue an order holding respondent TY46, LLC liable for the first, second, third, and

fifth causes of action alleged in the complaint and imposing a civil penalty of \$95,000. I also recommend that language be included in the order to require respondent to bring the facility into compliance with New York State's Petroleum Bulk Storage Regulations and to prepare an Investigation Work Plan to fully delineate the spill both on and off site.

Albany, New York

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