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 Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC Case No. 04-20
R9-20040412-12

- by -

CHARLES E. AUSTIN,

Respondents.

Pursuant to a notice of hearing and complaint dated July 12, 2004, staff of the Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against respondent Charles E. Austin.

In accordance with 6 NYCRR 622.3(a)(3), respondent was personally served with a copy of the notice of hearing and complaint on October 25, 2004, at 10 Jamestown Street, Sinclairville, New York, where respondent owns and operates a petroleum bulk storage facility.

The July 12, 2004 complaint alleged that respondent:

1. violated 6 NYCRR 613.5(a)(1) by failing to timely conduct a tightness test on one of respondent's two underground petroleum bulk storage tanks; and

2. violated 6 NYCRR 613.9(a)(1) by failing to properly close a tank that was temporarily out of service for more than 30 days.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint has expired, and has not been extended by Department Staff.

Department Staff filed a motion for default judgment, dated January 25, 2005, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster, who prepared the attached summary report. I adopt the ALJ's report as my decision in this matter, subject to my comments herein.

Based upon the record, I conclude that the proposed civil penalty and the measures recommended to address the violations are 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.

II. Respondent Charles E. Austin is adjudged to be in default and to have waived his right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have:

A. violated 6 NYCRR 613.5(a)(1) by failing to conduct tightness testing on an underground storage tank at his petroleum bulk storage facility at 10 Jamestown Road, Sinclairville, New York, on or before October 1, 2000, the date the tank was due for retesting; and

B. violated 6 NYCRR 613.9(a)(1) by temporarily removing the same tank from service for more than 30 days without properly closing the tank in accordance with the requirements of 6 NYCRR 613.9(a)(1).

IV. Respondent, having violated the sections of 6 NYCRR part 613 listed in Paragraph III of this order, is hereby assessed a civil penalty in the amount of six thousand dollars ($6,000). The civil penalty shall be due and payable within thirty (30) days after service of this order. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: Joseph J. Hausbeck, Esq., Assistant Regional Attorney, Region 9, NYSDEC, 270 Michigan Avenue, Buffalo, New York 14203-2999.

V. Within thirty (30) days after service of this order, respondent shall either: (1) conduct tightness testing on the tank in question and its connecting piping systems, in accordance with 6 NYCRR 613.5; or (2) permanently close the tank and its connecting piping systems, in accordance with 6 NYCRR 613.9(b), (c), (d), and (e).

VI. If respondent does not elect to permanently close the tank, respondent shall, within thirty (30) days after service of this order, conduct tightness testing on the tank and its connecting piping systems and close the tank in accordance with the requirements for closure of temporarily out-of-service tanks set forth in 6 NYCRR 613.9(a).

VII. Respondent shall notify the Department five (5) days in advance of conducting all tightness tests and shall, within fifteen (15) days of completion of such tests, submit to the Department a report containing the results of such tests.

VIII. In the event a tightness test reveals that the tank is not tight, respondent shall, in accordance with 6 NYCRR 613.5(a)(5), promptly repair, replace or close that portion of the facility that failed the test.

IX. In the event that a tightness test reveals that the tank or its connecting piping systems are leaking, respondent shall report the leak to the Department, in accordance with 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.

X. All communications from respondent to the Department concerning this order shall be made to Joseph J. Hausbeck, Esq., Assistant Regional Attorney, NYSDEC, 270 Michigan Avenue, Buffalo, New York 14203-2999.

XI. The provisions, terms and conditions of this order shall bind respondent Charles E. Austin, and his successors and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

/s/

By: _____

Denise M. Sheehan
Acting Commissioner

Dated: Albany, New York
April 15, 2005

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

CHARLES E. AUSTIN,
Respondent.

DEFAULT SUMMARY REPORT

Case No. 04-20
R9-20040412-12

Proceedings

On October 25, 2004, Staff of the Department of Environmental Conservation served a notice of hearing and complaint upon Charles E. Austin. The notice announced that, pursuant to 6 NYCRR 622.4, Mr. Austin was required to serve an answer within 20 days of receiving the notice and complaint. The notice also indicated that failure to make timely service of an answer would result in a default and waiver of Mr. Austin's right to a hearing.

By written motion dated January 25, 2005, Department Staff counsel Joseph J. Hausbeck moved for a default judgment against Mr. Austin. The motion was based on Mr. Austin's failure to timely file an answer to the complaint. Staff's motion papers included a copy of the notice of hearing and complaint, an affidavit of personal service by Department Environmental Conservation Officer (ECO) Robert E. O'Connor, Mr. Hausbeck's affirmation in support of the motion for default judgment, Mr. Hausbeck's affidavit in respect to the components of Staff's requested civil penalty, and a proposed order for the Commissioner's signature.

The motion papers were sent to James T. McClymonds, the Department's Chief Administrative Law Judge, who then assigned the matter to me.

Findings of Fact

1. At 5:23 p.m. on October 25, 2004, a copy of the notice of hearing and complaint in this matter was personally delivered to the Respondent, Charles E. Austin, by Department ECO Robert E. O'Connor. Delivery occurred at 10 Jamestown Street, Sinclairville, New York, where Mr. Austin owns and operates a petroleum bulk storage facility.

2. The notice of hearing advised Mr. Austin that, pursuant to 6 NYCRR 622.4, he must, within 20 days of receiving the notice and complaint, serve upon Department Staff an answer, signed by him, his attorney or other authorized representative.

3. The notice of hearing further advised Mr. Austin that failure to make timely service of an answer would result in a default and waiver of his right to a hearing.

4. Mr. Austin has failed to serve an answer to the complaint, and the deadline for service has not been extended.

Discussion

The following discussion addresses the basis for a default judgment and Department Staff's penalty considerations.

- - Basis for Default

According to the Department's hearing regulations, a respondent's failure to file a timely answer constitutes a default and a waiver of his right to a hearing. [See 6 NYCRR 622.15(a).] In such an event, Department Staff may move for a default judgment, such motion to contain:

(1) proof of service of the notice of hearing and complaint;
(2) proof of the respondent's failure to file a timely answer; and
(3) a proposed order. [See 6 NYCRR 622.15(b).]

Department Staff's motion papers include an affidavit of Department ECO Robert E. O'Connor, which adequately demonstrates service of the notice and complaint. Mr. O'Connor writes that on October 25, 2004, he personally delivered a copy of these papers to Mr. Austin at 10 Jamestown Street, Sinclairville. An affirmation of Mr. Hausbeck states that this is the address of a petroleum bulk storage facility owned and operated by Mr. Austin as established by an application Mr. Austin filed with the Department on January 15, 2002.

Mr. Hausbeck's affirmation also states that Mr. Austin has failed to file an answer to the complaint and has had no other contact with the Department. According to the affirmation, the time for Mr. Austin to answer the complaint expired on November 15, 2004, and the time for service of an answer has not been extended by consent of Department Staff. Because Mr. Austin has

never answered the complaint, Staff is entitled to a default judgment.

- - Penalty Considerations

As confirmed by its proposed order, Department Staff is seeking a Six Thousand Dollar ($6,000) civil penalty for violation of its regulations governing control of the bulk storage of petroleum. The complaint contains two particular allegations: failure to timely conduct tightness testing on one of Mr. Austin's two underground storage tanks, in violation of 6 NYCRR 613.5(a)(1), and failure to properly close the tank, though it has been temporarily out of service for 30 or more days, in violation of 6 NYCRR 613.9(a). According to the complaint, the violations occurred at Mr. Austin's petroleum bulk storage facility known as Charlie's Welding and Repair, located at 10 Jamestown Street, Sinclairville, New York.

Mr. Hausbeck has submitted an affidavit in respect to the components of the civil penalty sought by Department Staff. According to that affidavit, Mr. Austin had two underground storage tanks that were due for re-testing on October 1, 2000, five years after their previous test. A notice of violation was issued to Mr. Austin on January 16, 2001, and the Department received a tightness test report for one of the tanks on February 28, 2001. No report was received for the other tank; as a result, a second notice of violation was issued on June 11, 2001.

On July 18, 2001, the Department received a copy of a letter from M&M Maintenance to Mr. Austin regarding plans to replace the untested tank. However, the Department heard nothing further, so on April 11, 2002, it conducted a facility inspection. It was noted during this inspection that the tank was still overdue for tightness testing, and had been temporarily taken out of service for more than 30 days without having been properly closed. A notice of violation was sent to Mr. Austin on April 17, 2002. On June 12, 2002, the Department received a letter from M&M Maintenance indicating that the tank would be closed in place. It was not, and the Department heard nothing more about it.

According to Mr. Hausbeck, on March 30, 2004, this matter was referred to the Department's Division of Legal Affairs for enforcement. On April 14, 2004, an order on consent was sent to Mr. Austin because of his failure to comply with tightness test requirements. The order was sent by certified mail and delivered to Mr. Austin on April 19, 2004, but he did not reply. On June 17, 2004, the Division of Legal Affairs sent a follow-up letter

to Mr. Austin by regular mail, requesting that he contact the Department immediately to avoid the issuance of a notice of hearing and complaint. The correspondence was not returned, and Mr. Austin again did not reply.

Mr. Hausbeck writes that on July 12, 2004, a notice of hearing and complaint were sent to Mr. Austin by certified mail. The papers were delivered on July 17, 2004, and signed for by Valerie F. Mohr. No reply was received from Mr. Austin. On August 27, 2004, a follow-up letter was sent to Mr. Austin by certified mail. It was returned to the Department as "unclaimed."

According to Mr. Hausbeck, Department Staff personally served the notice and complaint on Mr. Austin on October 25, 2004, to assure that he actually received these documents.

The Commissioner's civil penalty policy provides that the starting point for any penalty calculation should be a computation of the statutory maximum for all provable violations. ECL Section 71-1929 provides for a penalty not to exceed $37,500 per day for each violation of Article 17, Title 10, or the regulations promulgated thereto concerning the bulk storage of petroleum. Prior to May 15, 2003, the maximum penalty was $25,000 per day.

Department Staff views the failure to timely retest an underground petroleum bulk storage tank as a continuing violation, but concludes that a penalty assessed at a rate of $25,000 per day from October 2000 to May 2003, and at a rate of $37,500 per day for the period since, would be clearly excessive. Staff also views the failure to close the tank, though it was temporarily out of service for more than 30 days, as a continuing violation, one that was first noted during the inspection of April 11, 2002, and apparently is still uncorrected. Likewise, Staff considers the maximum penalty for that violation - - $25,000 per day until May 2003, and $37,500 per day for the period since - - to be excessive.

To calculate an appropriate civil penalty, Department Staff initially turned to its Petroleum Bulk Storage (PBS) Inspection Enforcement Policy. That policy functions as a guide in setting penalty amounts, though it allows Department attorneys discretion to increase, decrease or suspend penalties in accordance with the Commissioner's Civil Penalty Policy, and its suggested penalty ranges do not apply to the resolution of violations after a notice of hearing and complaint has been served.

The enforcement policy's penalty schedule recommends an average penalty of $5,000 per tank for the 6 NYCRR 613.5 violation of failure to tightness test, and a penalty range of from $250 to $1,000 per tank for the 6 NYCRR 613.9(a) violation of failure to properly close a temporarily out-of-service tank. According to Department Staff, Mr. Austin's facility is comprised of two 3,000-gallon underground storage tanks, one of which was successfully tested in 2001 and is not due for retesting until February 15, 2006.

According to Mr. Hausbeck, Staff's proposed order on consent, which was sent to Mr. Austin on April 14, 2004, assessed a $5,000 civil penalty, $4,000 of which would be suspended if there was timely compliance with the order's requirements. Mr. Hausbeck says that the assessed penalty was set in recognition of the fact that tank testing and proper closure were substantially overdue. He adds that the payable amount - - $1,000 in the event of timely compliance - - was set as an incentive for Mr. Austin to correct the violations.

Because Mr. Austin did not sign and return the consent order, and the matter remained unresolved, Department Staff issued a notice of hearing and complaint. As part of the requested relief, a total payable penalty of $6,000 was sought. According to Staff, this penalty is consistent with the concept that fairness requires significantly higher penalty amounts in adjudicated cases than in voluntary consent orders.

The $6,000 penalty includes both a benefit and a gravity component, as anticipated by the Commissioner's penalty policy. Staff argues that because the tank in question has been out of service since at least April 2002, Mr. Austin does not directly benefit from sales associated with the tank, but benefits instead from the savings realized by not having retested or properly closed the tank. According to Mr. Hausbeck's affidavit, these savings are about $2,000, which represents the benefit component of the civil penalty.

As noted in the Commissioner's civil penalty policy, removing the benefit of non-compliance only places the violator in the position it would be in had compliance been achieved in a timely manner. Accordingly, the policy is that a penalty also include, as a deterrent, a gravity component involving consideration of both (1) the potential harm or actual damage of non-compliance, and (2) the importance of compliance to the regulatory scheme.

According to Department Staff, the violations alleged in the complaint have not yet caused actual damage, though the potential exists for harm to human health and the environment. ECL 17-1001 points out that the lands and waters of the state may be contaminated by spills and leaks of petroleum from active and abandoned petroleum bulk storage facilities, and that, once contaminated, these resources cannot be completely restored to their original quality. It also states that contamination of these resources must be prevented through improved safeguards in storage and handling.

The Department's civil penalty policy stresses that the longer a violation continues uncorrected, the greater the risk of harm to the natural resource, and therefore, the greater the gravity of the violation. Because Mr. Austin has a tank whose testing is more than four years overdue, Staff has apportioned $2,000 for the potential harm of non-compliance.

Staff has apportioned another $2,000 for the importance of compliance to the regulatory scheme, arguing that failure to assess a significant penalty would be unfair to those who voluntarily comply with the law. According to Staff, the requirements for periodic tightness testing of underground storage tanks and proper closure of temporarily out-of-service tanks are critical to the petroleum bulk storage program's goal of preventing spills and leaks of petroleum from active and abandoned facilities.

Conclusions

Charles E. Austin failed to answer the complaint in this matter, and is therefore in default.

The total penalty sought by Department Staff for the violations alleged in the complaint is $6,000. This penalty was calculated by adding a $2,000 benefit component and a $4,000 gravity component, with the gravity component accounting for both the potential harm of the violations (for which $2,000 is apportioned) and the importance of the violated requirements to the regulatory scheme (for which another $2,000 is apportioned). The requested civil penalty - - which has not been divided between the two alleged violations, but accounts for them together - - is rationally supported by the facts and arguments in Mr. Hausbeck's affidavit.

Recommendation

The Commissioner should sign the attached order confirming the default and providing the relief requested by Department Staff. The order is consistent with the one Staff provided with its default motion.

/s/

DATED: February 10, 2005
Albany, New York

Edward Buhrmaster
Administrative Law Judge