

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**ORDER**  
DEC Case No.  
3-601306-1

- by -

**CHARLES BUDD, JR.,**

Respondent.

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Pursuant to a notice of hearing and complaint dated April 15, 2005, staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced an administrative enforcement proceeding against respondent Charles Budd, Jr. Respondent owns a petroleum bulk storage facility which is located at 1912 Salt Point Turnpike, Salt Point, New York ("facility") and which includes both aboveground and underground petroleum bulk storage ("PBS") tanks.

The complaint alleged that respondent violated article 17 of the Environmental Conservation Law ("ECL") and the implementing regulations at parts 612, 613 and 614 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by:

- failing to timely renew the facility's registration with the Department;
- failing to conduct tightness tests and submit to the Department the testing results on four of the facility's underground PBS tanks (nos. 8, 9, 10 and 11);
- failing to monitor the interstitial space of the facility's double-walled PBS tanks for tightness;
- failing to conduct monthly inspections of the facility's aboveground PBS tanks;
- failing to mark design capacity, working capacity and identification numbers on the facility's aboveground PBS tanks and their gauges;
- failing to maintain drawings or as-built plans that show the size and location of the PBS tanks and associated piping at the facility; and

- failing to permanently mark fill ports of the facility's PBS tanks to identify the product contained therein.

Respondent was served with the notice of hearing and complaint in accordance with 6 NYCRR 622.3(a)(3). 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 notice of motion and motion for default judgment, dated July 25, 2005, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, who prepared the attached default summary report. I adopt the ALJ's default summary report as my decision in this matter, subject to the comments in this order. Among the papers submitted by Department staff was an inspection report dated January 5, 2005 which identified, by PBS tank number, the violations at the facility.

With respect to the penalty, whether the maximum statutory penalty or some lesser amount is imposed in a Commissioner's order reflects the particular circumstances of the matter (see Matter of Peter J. Schreiber, Decision and Order of the Acting Commissioner, July 12, 2005, at 3-4). In this matter, Department staff proposed a civil penalty of \$35,000. However, the ALJ determined that the penalty, based upon the amounts set forth in the complaint, was miscalculated and the correct amount is \$28,500.

If only a civil penalty were at issue, the penalty that I would impose would be higher than either the originally proposed or the corrected amount due to the numerous PBS violations at the facility and their duration. However, because this order requires respondent to correct the violations at the facility which may include removal of one or more tanks, I accept the recalculated civil penalty amount of \$28,500 as recommended by the ALJ.

I fully concur with the ALJ that the compliance activity requested by Department staff is rationally supported by the record. However, in reviewing the compliance schedule, I have determined that the timeframes for respondent's correction of the violations shall be tied to the service of the order. In addition, I have revised certain of the Department staff-recommended timeframes for the completion of the compliance activities to ensure that these activities are promptly performed.

**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 Budd, Jr., is adjudged to be in default and to have waived his right to a hearing in this 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 612.2(a) by failing to timely renew the facility's registration from February 4, 2004, the date the registration expired, until February 2, 2005;

B. violated 6 NYCRR 613.5 by failing to tightness test PBS tanks nos. 8, 9, 10 and 11 from December 1, 1987, the date such testing was first required, to the present;

C. violated 6 NYCRR 614.5(b) by failing to monitor the interstitial space of the facility's double-walled PBS tanks for tightness;

D. violated 6 NYCRR 613.6(a) by failing to conduct monthly inspections of the facility's aboveground PBS tanks;

E. violated 6 NYCRR 613.3(c)(3)(ii) by failing to label design capacity, working capacity and identification number on the facility's aboveground PBS tanks and at their gauges;

F. violated 6 NYCRR 614.7(d) by failing to maintain drawings or as-built plans that show the size and location of the new underground PBS tanks and associated piping at the facility; and

G. violated 6 NYCRR 613.3(b)(1) by failing to permanently mark fill ports of the PBS tanks to identify the product contained therein.

IV. Respondent is hereby assessed a civil penalty in the amount of \$28,500. The civil penalty shall be due and payable within 30 days after service of this order upon respondent. 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: Benjamin A. Conlon, Esq.,

New York State Department of Environmental Conservation, Division of Environmental Enforcement, 625 Broadway, Albany, New York 12233-5500.

V. A. Within thirty (30) days of the service of this Order upon respondent, respondent shall either: (1) conduct tightness testing on tank nos. 8, 9, 10 and 11 and their connecting piping systems at the facility in accordance with 6 NYCRR § 613.5(a); or (2) permanently close these four tanks and their connecting piping systems in accordance with 6 NYCRR 613.9(b), (c), (d), and (e).

In the event that respondent conducts tightness testing, he shall notify the Department five business days in advance of that testing. Respondent shall submit a report containing the results of the tightness tests to the Department within fifteen (15) days of the completion of the tests.

In the event that a tightness test reveals that a tank is not tight, respondent shall promptly repair, replace or close the tank that failed the test in accordance with 6 NYCRR 613.5(a)(5). Additionally, if a tightness test reveals that a tank is leaking, such leak must be reported to the Department, within two (2) hours of discovery by calling the Spills Hotline at (800) 457-7362 or for out-of-state callers: (518) 457-7362;

B. Within fifteen (15) days of the service of this order upon respondent, respondent shall commence weekly monitoring the interstitial space of the facility's double-walled tanks for tightness, in accordance with 6 NYCRR 614.5(b), and shall submit the first four weeks of monitoring results to the Department no later than forty-five (45) days of the service of this order;

C. Within thirty (30) days of the service of this order upon respondent, respondent shall submit to the Department as-built plans that show the size and location of the facility's new underground storage tanks and piping systems, in accordance with the requirements set forth in 6 NYCRR 614.7(d);

D. Within fifteen (15) days of the service of this order upon respondent, respondent shall permanently mark all fill ports to identify the product inside the tank in accordance with 6 NYCRR 613.3(b)(1) and shall submit photo documentation of compliance to the Department;

E. Within fifteen (15) days of the service of this order upon respondent, respondent shall begin conducting monthly inspections of the facility's aboveground PBS tanks in accordance



TO: Charles Budd, Jr. (Via Certified Mail)  
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I-108  
Naples, FL 34104

Benjamin A. Conlon, Esq. (Via Regular Mail)  
Associate Attorney  
Division of Environmental Enforcement  
New York State Department of  
Environmental Conservation  
625 Broadway  
Albany, NY 12233-5500

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

**DEFAULT SUMMARY  
REPORT**

Case No. 3-601306-1

**CHARLES BUDD, Jr.,**

Respondent.

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Proceedings

On April 15, 2005, New York State Department of Environmental Conservation (DEC or Department) staff served a notice of hearing and complaint upon the respondent Charles Budd, Jr. The notice provided that the respondent had 20 days from receipt of the complaint to serve an answer or be in default. This notice also informed the respondent that failure to serve an answer timely would result in a default and waiver of the respondent's right to a hearing. The respondent has failed to answer.

By notice of motion dated July 25, 2005, Department staff moved for default judgment by filing its motion with the Department's Office of Hearings and Mediation Services (OHMS) and mailing a copy to Mr. Budd. The motion is based upon the respondent's failure to file a timely answer to the complaint. To date, the OHMS has not received a response to this motion.

Staff's motion papers included a copy of the April 2005 notice of hearing and complaint (Exhibit A), an affidavit of service of the notice of hearing and complaint (Exhibit C), a copy of the certified mail receipt for service of the 2005 complaint with an acknowledgment of receipt by Hilda Budd (Exhibit D), affirmations in support of the default motion by DEC Division of Environmental Enforcement Senior Attorney Scott A. Herron (Exhibit B) and DEC Region 3 Environmental Engineer R. Daniel Bendell (Exhibit E) dated July 25 and July 5, 2005, respectively, an inspection report by DEC staff person Wayne Wadsworth dated January 5, 2005 (Exhibit F) and a proposed order for the Acting Commissioner's signature (Exhibit G).

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. On April 15, 2005, Department staff served a notice of hearing and complaint on the respondent by certified mail. DEC staff sent the pleadings to Charles Budd, Jr. at 6945 Dennis Circle, I-108, Naples, Florida 34104. The certified mail receipt was signed by a Hilda Budd on April 18, 2005.

2. The respondent is the owner of a petroleum storage facility located at 1912 Salt Point Turnpike, Salt Point, New York 12578.

3. The notice of hearing advised the respondent that, pursuant to § 622.4 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), he must, within 20 days of receiving the notice and complaint serve upon Department staff an answer, signed by him, his attorney(s) or other authorized representative.

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

5. The respondent failed to answer the complaint.

## Discussion

This discussion addresses the bases for a default judgment and the Department staff's penalty considerations.

### Bases for Default

According to the Department's hearing regulations, a respondent's failure to file a timely answer constitutes a default and waiver of respondent's right to a hearing. 6 NYCRR § 622.15(a). In such circumstances, 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. 6 NYCRR § 622.15(b).

Department staff's motion papers include an affirmation by Senior Attorney Scott A. Herron, an affidavit of service by DEC staff person Kathleen A. Danaher dated June 28, 2005, and a copy of the return receipt signed by Hilda Budd and dated April 18, 2005 which adequately demonstrate service of the notice and

complaint.

Mr. Herron's affirmation also states that the respondent failed to answer the complaint. The time to respond to the complaint has long since elapsed and staff has not extended the time to answer. Because the respondent has never responded to the complaint, staff is entitled to a default judgment.

#### Penalty Considerations

In its proposed order, the Department staff is seeking a civil penalty of \$35,000 for violations of its regulations governing control of the bulk storage of petroleum at the respondent's facility located at 1912 Salt Point Turnpike, Salt Point, New York. The complaint contains seven allegations: 1) the respondent failed to timely renew the registration of the petroleum bulk storage facility that expired on February 4, 2004 and was not renewed until February 2, 2005 in violation of Environmental Conservation Law (ECL) § 17-1009 and 6 NYCRR § 612.2; 2) the respondent failed to conduct tightness testing and submit the results of that testing to the Department for tank nos. 8, 9, 10, and 11 and their connecting piping systems in violation of 6 NYCRR § 613.5; 3) the respondent failed to monitor the interstitial space of double-walled tanks for tightness of tank nos. 1-5 in violation of 6 NYCRR § 614.5(b); 4) the respondent failed to conduct monthly inspections of aboveground tank nos. 6, 12-15 in violation of 6 NYCRR § 613.6(a); 5) the respondent failed to label design capacity, working capacity and identification number on aboveground petroleum tank nos. 6, 12-15 in violation of 6 NYCRR § 613.3(c)(3)(ii); 6) the respondent failed to maintain drawings or as-built plans that show the size and location of the underground tanks and piping at the facility in violation of 6 NYCRR § 614.7(d); and 7) the respondent failed to permanently mark all fill ports to identify the product inside the facility's petroleum bulk storage tank nos. 8, 9, 10, 11 in violation of 6 NYCRR § 613.3.

Mr. Herron has submitted an affirmation support of the components of the civil penalty sought by Department staff. According to ECL § 71-1929, such violations are subject to a penalty of up to \$37,500 per day for each violation.<sup>1</sup> According

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<sup>1</sup> ECL § 71-1929 formerly provided for a penalty not to exceed \$25,000 per day for each violation of Article 17, Title 10, or the regulations promulgated thereto concerning the bulk storage of petroleum. In this matter, if the staff was to calculate the maximum penalty allowed, the former penalty would

to the affirmation, the respondent waited almost one year to renew registration of his petroleum bulk storage tank which expired on February 4, 2004 and was not renewed until February 2, 2005. Staff cites to DEC 's Environmental Guidance Memorandum DEE-22 Petroleum Bulk Storage (PBS) Penalty Schedule that sets forth a penalty of between \$500 - \$5000 for failure to register violations, with an average penalty of \$1000.

With respect to the failure to tightness test, the staff explains that the respondent avoided compliance costs by failing to conduct tightness testing for the facility's four 2,000 gallon tanks in 1987 and every five years thereafter. The PBS Penalty Schedule recommends a penalty of \$5000 per tank.

As for the leak monitoring requirements, staff notes that the PBS Penalty Schedule calls for a civil penalty of \$2,500.

The PBS Penalty Schedule suggests a penalty of \$500 per tank for failure to perform monthly inspections of aboveground storage tanks. In this matter, that amount would be \$3000 based upon the six tanks.

The failure to maintain as-built plans results in a penalty of \$1,000 according to the PBS Penalty Schedule. Labeling failures for aboveground storage tanks means a penalty of \$100 per tank - resulting in a \$600 penalty for respondent's six tanks. The PBS Penalty Schedule provides for a penalty of \$100 for each of a facility's unmarked fill ports; resulting in a penalty of \$400 in this case based on respondent's four unmarked fill ports.

In his affirmation, Mr. Herron explains that the penalty is based on respondent's avoidance of costs to comply with tightness testing as well as the potential for environmental harm due to the failure to test and monitor the tanks.

The Commissioner's civil penalty policy provides that the starting point for a penalty calculation should be computation of the statutory maximum for all provable violations. In this case, this sum would amount to several million dollars.

The Commissioner's Civil Penalty policy directs that staff

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apply for any violations occurring prior to May 15, 2003. Because the staff is recommending penalties that are considerably less than calculations based on either statutory provision, the difference in amounts is not relevant.

consider gravity and economic benefit in addition to culpability, violator cooperation, history of non-compliance, ability to pay and unique factors in fashioning an appropriate penalty. Staff has established the gravity of these violations based on their duration and their interference with the State's program to monitor these facilities to protect the public health. The failure to test and monitor these tanks jeopardized public health and safety as there was no means to determine whether or not the tanks were leaking petroleum product. By failing to maintain as-built plans, respondent undermined the ability of this Department or any other entity performing inspections or other activities at the facility to identify the location of the tanks and piping. The failure to label tanks with the design capacity and other required information and to permanently mark fill ports undermined public safety because this information is meant to ensure that tanks will not be overfilled or filled with inappropriate product.

The respondent also derived an economic benefit of unknown amount by delaying registration and avoiding tightness testing and monitoring requirements. Because this is a default, the staff has established culpability. As the respondent has failed to answer the pleadings or this motion, there is no basis to determine financial capabilities.

Staff's papers do not establish whether or not the violations alleged actually caused environmental harm. However, respondent's inaction could have resulted in contamination because of the lack of safeguards against spills and leaks. Only when respondent complies with the testing and monitoring requirements that staff has requested in a schedule of compliance will it be known whether or not there have been leaks or spills.

Given the jeopardy the respondent's omissions has placed the environment and the many years of his inaction, the penalty requested by staff is reasonable. However, staff has miscalculated the correct sum based upon the amounts set forth above for each violation. The correct total is \$28,500.

Staff has also requested that the Commissioner order the respondent to perform corrective actions. Staff has requested that the Commissioner order the respondent to perform tank testing, to commence interstitial monitoring, to submit as-built plans, to mark all fill ports, to begin monthly inspections of the aboveground tanks, and to mark the design capacity, working capacity and identification number of the facility's aboveground

tanks on the tanks and gauges. These measures are all appropriate as they directly correspond to the respondent's violations.

Conclusion

The respondent, Charles Budd, Jr., did not submit an answer to the complaint and therefore, he is in default.

A penalty of \$28,500 as well as the compliance schedule requested by staff are rationally supported by the facts and arguments in the affirmation of Mr. Herron and the affidavit of Mr. Bendell.

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 except for the modified penalty amount.

Dated: July 27, 2005  
Albany, New York

/s/  
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Helene G. Goldberger  
Administrative Law Judge