

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

RULING MOTION FOR ORDER  
WITHOUT HEARING

DEC # R4-0602-54

By

February 7, 2006

DICOCCO ENTERPRISES, INC.

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**SUMMARY**

By motion for order without hearing, Staff of the Department of Environmental Conservation (DEC Staff) alleges that DiCocco Enterprises, Inc. (Respondent) violated several regulations related to the operation of a service station located at 1307 Altamont Avenue, Rotterdam, New York. Based on the record, DEC Staff has not shown that the Respondent was properly served with the motion. If the Respondent has been served, DEC Staff has shown that Respondent operated an unregistered petroleum bulk storage (PBS) facility and that this violation began on February 21, 2005. However, a question remains regarding when this violation ended. DEC Staff has failed to prove by a preponderance of the evidence that Respondent: (1) failed to monitor for traces of petroleum on a weekly basis; (2) failed to maintain monitoring records; and, (3) failed to maintain inventory records. Accordingly, substantive disputes of fact exist sufficient to require a hearing, pursuant to §622.12(e) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). The parties will be contacted to schedule a hearing in this matter.

**JURISDICTION AND PROCEDURAL HISTORY**

By papers dated November 4, 2005, DEC Staff filed a Motion for Order Without Hearing, an Affirmation in Support by DEC Staff attorney Ann Lapinski and two supporting Affidavits by members of DEC Staff, Edward Moore and Thomas Sperbeck. Attached to these papers were 9 exhibits. Apparently, these papers were not served on Respondent but an incomplete copy was delivered to Respondent's attorney.

By papers dated November 29, 2005, Respondent filed two

Answering Affidavits, one from Anthony DiCocco, President of the Respondent, and a second from his attorney, responding to the allegations. In his Answering Affidavit, the Respondent's counsel argues that DEC Staff failed to properly serve the Respondent as required by 6 NYCRR 622.3. Mr. DiCocco states in his affidavit that he never was served and only learned of the matter after his attorney received an incomplete set of motion papers from DEC Staff.

Apparently in response to the Respondent's claim of insufficient service, DEC Staff counsel wrote a letter to Mr. DiCocco dated December 4, 2005. This letter indicates that attached to the letter is a "revised Motion for Order without Hearing". It is unclear if this revised Motion is simply the original Motion with a complete set of attachments or whether the "revised Motion" is another document, not in the record of the proceeding. Adding to the confusion, this letter also includes in its subject line the phrase "Notice of Hearing and Complaint". It is unclear whether this is a typographical error or whether a Notice of Hearing and Complaint exist in this action (if so this document is not in the record either). Further compounding the confusion, there is an Affidavit of Personal Service in the file indicating that ECO Brian Canzeri served a Notice of Hearing and Complaint on Mr. DiCocco on December 10, 2005. Again, it is not clear whether the ECO merely copied the typographical error from the letter onto his affidavit.

On December 16, 2005, Administrative Law Judge (ALJ) P. Nicholas Garlick was assigned this matter. On December 22, 2005 a conference call was held in this matter to discuss additional submissions. By letter dated December 27, 2005, DEC Staff submitted an additional affidavit by Mr. Moore. By letter dated January 10, 2005, the Respondent submitted an additional affidavit from its attorney. Neither of these submissions provide any other information regarding service of the papers on Mr. DiCocco.

Consequently, it is not clear that DEC Staff ever served the Motion for Order Without Hearing on Respondent. However, assuming that there is only one version of the Motion, that the ECO's affidavit was based on the subject line of DEC counsel's cover letter, and that Respondent was in fact served, this ruling proceeds. However, at the hearing, DEC Staff will have to establish that service did occur.

## FINDINGS OF FACT

Pursuant to 6 NYCRR 622.12(e), the following facts are deemed established for the purposes of the hearing.

1. DiCocco Enterprises, Inc. operates a Petroleum Bulk Storage (PBS) facility located at 1309 Altamont Avenue, Schenectady, New York. The facility consists of seven new storage tanks with a total underground storage capacity of 60,000 gallons.
2. Anthony DiCocco is the President of DiCocco Enterprises, Inc. (DiCocco Affidavit, 1).
3. At some point during 1999, Mr. DiCocco met with Thomas Sperbeck of DEC Staff and they discussed the need for PBS facilities to be registered with DEC (Sperbeck Affidavit, paragraph 4).
4. During the period from 1999-2003, Mr. DiCocco was involved in the cleanup of the site and removal of tanks in place at the site.
5. In approximately March 2004, Mr. DiCocco began construction of a new facility at the site. The tanks, pumps, lines, etc. were installed by R. M. Dalrymple.
6. On February 21, 2005, the facility received a delivery of petroleum of over 9,000 gallons.
7. On March 29, 2005, the facility received a delivery of petroleum of 23,000 gallons.
8. On March 31, 2005, the facility received a delivery of petroleum of 8,400 gallons.
9. On March 31, 2005, DEC Staff member Edward Moore observed a delivery of petroleum at the facility.
10. On or about March 30, 2005, the facility opened for business. The site had in the past operated as a gas station but had been closed for over six years.
11. On April 1, 2005, DEC Staff member Officer Kathleen Jacoby served a Notice of Violation on Anthony DiCocco.
12. On April 4, 2005, Mr. DiCocco completed an application form to register the facility at DEC's Region 4 headquarters in Schenectady. Mr. DiCocco paid the \$500 registration fee by

check. The PBS application form was processed and a PBS certificate was issued that day.

13. On April 5, 2005, DEC Staff member Moore inspected the facility.
14. On or about April 21, 2005, DEC Staff was notified that the check used by Mr. DiCocco was returned for insufficient funds. This notification came to the attention of DEC Staff member Moore on April 27, 2005.
15. On April 27, 2005 DEC Staff member Moore issued a second Notice of Violation to Respondent for operating a facility with an invalid certificate. This Notice of Violation was served on Mr. DiCocco on April 29, 2005 by DEC Officer Antone Paluch at 10:10 a.m.
16. On April 29, 2005, the registration fee and bank fee for the returned check were paid to DEC Staff by two money orders purchased 12:29 p.m. on that day.

## **DISCUSSION**

In its Motion for Order Without Hearing, DEC Staff alleges that Respondent has not complied with a large number of the requirements for PBS facilities and asserted that no material issues of fact exist. In her Affirmation, DEC Staff counsel sets forth four alleged specific violations.

In his Answering Affidavit, Respondent's counsel argues that DEC Staff's motion and supporting papers are not sufficient to make out any cause of action and do not afford Respondent adequate notice nor the ability to prepare a proper defense, thus violating minimum standards of due process. Counsel continues that despite these problems, the Respondent has made a good faith effort to respond.

The quality of the Respondent's Answering Affidavits demonstrates that DEC Staff's alleged violations or causes of action are specifically detailed enough to provide both adequate notice and allow for preparation of a proper defense. As stated above, DEC Staff alleges that the Respondent violated four specific regulations relating to PBS facilities, and sets forth the duration of these alleged violations, and the penalty sought for each. Each violation is discussed below.

*Alleged Violation of 612.2(c)*

Section 612.2(c) requires owners of new facilities with a combined storage capacity of over 1,100 gallons to be registered with the Department before the facility is placed in service. In this case there is no dispute that the Respondent is the owner of the facility or that it has a capacity of 60,000 gallons. However, several disputes remain.

First, DEC Staff asserts that the facility was placed in service on February 21, 2005 when the first delivery of petroleum was received for the purposes of testing and calibrating the system. DEC Staff produces a receipt for this delivery as proof. This is the date DEC Staff uses in calculating the length of the violation. Respondent argues that it did not have control of the facility when the first two deliveries were made and that these deliveries were made at the request of the contractor working at the site. Respondent believed that the contractor had received all the necessary approvals. Respondent argues that the facility was placed in service when it opened for business and began to sell petroleum on or about March 30, 2005. With this argument, Respondent admits violating this section, however, the length of time of the violation is for only a few days, from when retail sales began until April 4, 2005 when a registration was issued by DEC Staff.

Respondent's argument that the violation commenced when the facility began selling petroleum must fail. The regulations are unambiguous and state that an owner must register a facility before it is placed in service. While the term "placed in service" is not defined in the regulations, DEC Staff's interpretation that since this regulation deals with the storage of petroleum, "placed in service" means when petroleum is first stored at a facility. Respondent's proposed definition, namely the time of first retail sale ignores the fact that many facilities (such as tanks for apartment buildings, etc.) do not engage in retail sales and consequently, this proposed definition does not make sense in this regulatory setting. Accordingly, DEC Staff have established a violation of this regulation beginning on February 21, 2005 and continuing until at least April 4, 2005.

The second dispute involves when this violation ended. DEC Staff asserts that because the check which paid the registration fee on April 4, 2005 was returned for insufficient funds, the registration issued that day was invalid and the violation continued until April 29, 2005 when payment was finally received. Respondent argues that DEC Staff cites no authority for the proposition that an otherwise valid registration automatically

becomes void when a check is returned for insufficient funds. Respondent notes that on the same day it was notified by DEC Staff that the check had bounced, Respondent submitted a money order. Accordingly, a question remains as to when this violation ended. A legal question remains to be briefed regarding what authority exists for finding an otherwise valid registration is void because a check was returned for insufficient funds. Depending upon the outcome of this legal question, factual questions regarding when the Respondent learned of the return of the check may become relevant.

DEC Staff has shown that Respondent violated 612.2(c), however, the length of the violation is not established. Accordingly, DEC Staff's motion for order without hearing on this alleged violation is denied and a hearing will be convened to allow testimony and briefs on this issue.

*Alleged Violation of 613.5(b)(3)*

Section 613.5(b)(3) requires owners of facilities to monitor for traces of petroleum at least once a week. In her Affirmation, DEC Staff counsel alleges that Respondent failed to comply with this provision. DEC Staff does not specifically address this allegation in its papers, but it seems that since DEC Staff member Edward Moore alleges that there were no leak detection records available on his April 5, 2005 inspection, that no monitoring was being done at the facility.

In his Answering Affidavit, Mr. DiCocco denies this allegation and states that since the facility was opened that it has been properly monitored for traces of petroleum at least once a week and he can produce these records at hearing (paragraph 22).

DEC Staff's motion for order without hearing on this alleged violation must be denied. The only evidence offered to prove this violation is a statement by Mr. Moore that leak detection records were not available on his April 5, 2005 inspection. Mr. DiCocco categorically denies this and states that he has the records to show that leak detection monitoring was done. It is unclear whether these are the inventory records submitted with the Answering Affidavits or whether other records exist. It is also unclear whether DEC Staff claims that the records cited by the Respondent are recreations that did not exist at the time of the April inspection. With conflicting, sworn statements in the record, cross-examination and other evidence are necessary to resolve this seeming contradiction.

Consequently, material issues of fact exist regarding this alleged violation that should be resolved at a hearing.

*Alleged Violation of 613.5(b)(4)*

Section 613.5(b)(4) requires owners of facilities to maintain monitoring records for cathodic protection and leak detection systems for one year on the premises. In her Affirmation, DEC Staff counsel alleges that Respondent failed to comply with this provision. In his affidavit, DEC Staff member Moore states that on his April 5, 2005 inspection of the facility that there were no leak detection records available for his review (paragraph 19).

In his Answering Affidavit, Mr. DiCocca denies this allegation and states that he can produce leak detection records at the hearing (paragraph 21). It is unclear whether these are the inventory records submitted with the Answering Affidavits or whether other records exist. It is also unclear whether DEC Staff claims that the records cited by the Respondent are recreations that did not exist at the time of the April inspection. Again, cross examination of the two witnesses who have made conflicting statements is necessary.

Consequently, material issues of fact exist regarding this alleged violation that can only be resolved at a hearing.

*Alleged Violation of 613.4*

Section 613.4 requires owners of facilities to maintain daily inventory records that account for gains and losses in petroleum. In her Affirmation, DEC Staff counsel alleges that Respondent failed to comply with this provision. In his affidavit, DEC Staff member Moore states that on his April 5, 2005 inspection of the facility that there were no daily inventory records available for his review (paragraph 19). On a subsequent inspection conducted on October 6, 2005, Mr. Moore alleges he discovered an error in the inventory records, specifically that Respondent was failing to review and reconcile its records every ten days. According to Mr. Moore, this review and reconciliation failure continued from February 21, 2005 through at least October 6, 2005.

In his Answering Affidavit, Mr. DiCocco denies this allegation and states that he can produce complete inventory records at the hearing (paragraph 24). Included with his

affidavit was a set of what he claims are the relevant records, which include ten day reconciliations. Mr. DiCocco asserts that Mr. Moore did not correctly read the inventory records that he reviewed during his April 2005 inspection (paragraph 31). Mr. DiCocco also asserts that during the October 2005 inspection that Mr. Moore did not understand the records generated by the computer program used by Respondent and that the ten day reconciliations were properly done and included in the records (paragraph 32).

In his December 27, 2005 reply affidavit, Mr. Moore alleges that the currently available inventory records were not in existence at on April 5, 2005 and that records were created later for the earlier periods. In support of his statement, Mr. Moore attaches a December 2005 letter to him from a local fuel supplier which states in its entirety: "As we discussed Neal had gone to DiCocco's a couple of days in April of 2005 and explained the ten-day reconciliation report as it pertained to the leak check methods (attached). He also reviewed the procedure on obtaining the information for calculating the different leak check methods with a lady who worked at the location." This letter is not sworn, is addressed to DEC Staff after the date of the original motion, and involves the actions by a person named "Neal" as reported by another third party.

DEC Staff has failed to show it is entitled to an Order without hearing on this cause of action because material fact questions exist, specifically, whether the inventory records submitted were created contemporaneously or whether they are recreations. It is impossible to determine this on the record as it exists now and this issue must be addressed at a hearing.

#### **PENALTY**

The amount of penalty, if any, associated with these alleged violations will also be the subject of a hearing. DEC Staff has established that the Respondent operated an unregistered facility beginning on February 21, 2005. However, the date the violation ended has not been determined, and therefore, no penalty recommendation can be arrived at. DEC Staff has also not proven the other three alleged violations. Information regarding any proposed penalty, including aggravating and mitigating factors, can be entered into the record at the hearing.

**OTHER ISSUES**

In his Answering Affidavit, Respondent's counsel expresses concern about the fairness of DEC administrative enforcement proceedings and states that the "whole concept of these proceedings now brought against the Respondent appears to violate both procedural and substantive due process standards under any reasonable interpretation of the 14<sup>th</sup> Amendment to the United States Constitution." His concern relates to the perceived exercise of powers reserved to the judiciary being exercised by the executive.

DEC has been conducting enforcement hearings for more than twenty years and the current hearing regulations, 6 NYCRR 622, were last revised in 1994. The Office of Hearing operates under the presumption that these regulations are valid and this issue will not be reviewed in a hearing before the agency.

February 7, 2006  
Albany, New York

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P. Nicholas Garlick  
Administrative Law Judge

Ann Lapinski, Esq.  
Assistant Regional Attorney  
NYSDEC Region 4  
1150 North Westcott Road  
Schenectady, NY 12306-2014

Wayne P. Smith, Esq.  
Attorney and Counselor at Law  
157 Barrett Street  
Schenectady, NY 12305

Mr. Anthony DiCocco  
DiCocco Enterprises, Inc.  
1307 Altamont Avenue  
Schenectady, NY 12305