STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Articles 17 and 19 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules, and Regulations of the State of New York ,

DEFAULT SUMMARY REPORT

- by -

DEC Case No. R2-20090220-101

BEACH CHANNEL LLC and MANNY SHURKA, .

Respondents.

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Proceedings

On April 16, 2009, the Department staff commenced this enforcement proceeding by serving a notice of hearing and complaint upon the respondents Beach Channel LLC and Mr. Manny Shurka by certified mail. The respondents served their answer on June 24, 2009. The staff alleges that the respondents have violated the Environmental Conservation Law (ECL)[1], the Navigation Law (NL), and their implementing regulations contained in Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) by failing to address a 1991 petroleum spill at 38-01/38-15 Beach Channel Drive, Far Rockaway, New York (Queens County), the site of a gasoline station; by illegally discharging petroleum during a failed tightness test; by failing to submit results of tightness tests; by failing to properly register the facility with the Department; by failing to properly keep and maintain inventory records for the facility; by failing to mark three vapor recovery fill ports; by failing to properly maintain two tank top sumps and one fill port; and by failing to properly maintain components of a Stage II vapor recovery system. By notice of motion dated May 21, 2009, Department staff moved for a default judgment. By their attorney, on June 24, 2009, respondents served an affidavit in opposition. With the permission of the Chief Administrative Law Judge, Mr. Urda submitted a reply affirmation dated June 30, 2009 and received in the Office of Hearings and Mediation Services (OHMS) on July 6, 2009.

Department staff is represented by John K. Urda, Assistant Regional Attorney of the New York State Department of Environmental Conservation's (DEC or Department) Region 2 legal staff. The respondents are represented by Marshall G. Kaplan, Esq., Brooklyn, New York.

[1] There is no cause of action in the complaint citing a violation of the ECL. Rather, the staff cites to a number of regulations that implement Article 17 of the ECL.

In support of staff's motion, Assistant Regional Attorney Urda submitted:

1) Notice of motion for default judgment and order dated May 21, 2009
2) Motion for default judgment and order dated May 21, 2009
3) Affirmation of John K. Urda in support of motion for default judgment and order dated May 21, 2009 with the following attachments:
A) Notice of hearing and complaint dated April 16, 2009
B) Affidavit of service dated April 16, 2009; copies of certified mail receipts signed and dated April 17, 2009; copies of United States Postal Services Track & Confirm
C) Fax memo dated April 23, 2009 from Efe Shurka, SIG to Ryan M. Piper, DEC
Fax memo dated August 7, 2006 from Efe Shurka, SIG to Ryan M. Piper, DEC
Fax memo dated August 23, 2006 from Efe Shurka, SIG to Ryan M. Piper, DEC
Fax memo dated October 13, 2006 from Efe Shurka, SIG to Ryan M. Piper, DEC
Fax cover sheet dated June 13, 1991 from Ryan M. Piper to Efe Shurka re: spill # 9102914
Fax memo dated June 27, 2007 from Efe Shurka, SIG to Ryan M. Piper, DEC
Cover pages for Notice of Hearing and Complaint
D) Letter dated July 25, 2006 from Ryan M. Piper, Engineering Geologist I, Spill & Prevention & Response Programs, NYSDEC to Manny Shurka, Beach Channel LLC
Spill Report Form dated November 25, 2008
E) Spill Report Form dated November 13, 2006
F) NYSDEC Petroleum Bulk Storage Program Facility Information Report
Petroleum Bulk Storage Application, Section B - Tank Information
G) Spill Report Form dated April 23, 2008
H) Proposed Order.

4) Reply Affirmation dated June 30, 2009 with the following attachments:
A) E-mails between John Urda and Dan Yarom CDSP, Corp. dated May 6, 2009
B) E-mails between John Urda and Efraim Shurka dated May 27, 2009, and Dan Yarom and John Urda dated June 10 & 11, 2009.

In support of the respondents' opposition, Marshall G. Kaplan, Esq. submitted:

1) Undated answer with affidavit of service indicating service upon Department on June 24, 2009
2) Affidavit of Efraim Shurka in opposition dated June 21, 2009 with the following attachments:
A) Notice of Hearing dated April 16, 2009
B) E-mails between John Urda and Dan Yarom of May 6 & 19, 2009
C) Memos dated June 27, 2007 and April 24, 2009 from Efe Shurka to Ryan M. Piper, e-mail from Efe Shurka to Ryan Piper dated April 29, 2009, letter dated May 18, 2009 from Dan Yarom to Ryan M. Piper, e-mail dated May 19, 1009 between Ryan Piper

and Dan Yarom, e-mail dated May 26, 2009 between Dan Yarom and Ryan Piper and John Urda ccing Efraim Shurka and Dan Yarom

D)Facsimile cover sheet dated November 13, 2006 from Ryan Piper to Efe Shurka

E)Cover sheets for Phase I and Phase II environmental site assessment reports prepared for Beach Channel, LLC - 38-01 Beach Channel Drive, Far Rockaway, NY 11691-1403 dated January 15, 2007 and March 20, 2007

F)Fax memo dated June 27, 2007 from Efe Shurka to Ryan M. Piper.

Staff's Position

Staff alleges that on August 6, 1998, respondent Beach Channel LLC purchased the subject property upon which an active gas station operates. Staff maintains that Beach Channel LLC is a subsidiary of Signature Investment Group (SIG) which owns 40 gasoline stations in New York City. The registration for this facility supplied by staff indicates that Manny Shurka is the operator of the facility as well as the president and authorized representative of Beach Channel LLC. According to staff, Mr. Manny Shurka is also president of SIG.

Staff explains in its complaint that on June 13, 1991, a contractor working on the site notified the DEC spills hotline that there were 5 inches of free petroleum product in two monitoring wells at the site resulting in the assignment of DEC spill number 9102914. According to DEC staff, there has been little cooperation from the respondents to remediate this spill. In addition, based upon inspections in 2006, the staff reports that it discovered a failure to maintain inventory monitoring records for the three underground storage tanks (USTs) at the facility, an inoperable leak detection system, and free product contamination in site monitoring wells. Staff provides that in an inspection in 2008, staff discovered free product contamination in the monitoring wells while the 1991 spill remained unremediated. Later in 2008, staff was notified of an underground storage tank product leak that was discovered in the course of tightness tests on two of the facility's three USTs. The Department staff assigned spill number 0800957 for this discharge. According to the complaint, in 2009, DEC inspections revealed that the respondents failed to properly register the facility by failing to provide installation dates of the facility tanks; failed to report recent tightness tests; incorrectly identified tank and piping information; failed to maintain spill prevention equipment; maintained a fill port containing petroleum product; maintained two tank top sumps containing water and debris; failed to properly color-code three Stage I vapor recovery fill ports; and failed to maintain a Stage II vapor recovery component. Staff provides that on or about March 5, 2009, the respondents corrected the alleged violations with the spill prevention equipment, fill port color-coding, and Stage II vapor recovery equipment. However, staff says respondents presented incomplete inventory records and maintains that all the other violations remain uncorrected.

With respect to the question of the default, the staff argues that the respondents' service of their answer on June 24, 2009 was well beyond the twenty day period set forth in 6 NYCRR § 622.4 for service. Mr. Urda answers the respondents' claims concerning confusion about an adjournment by stating that staff at no time consented to an adjournment of the deadline for an answer. He further explains that all the agreed upon extensions related to the time to respond to the motion for default. Staff maintains that there is no good cause for the default and that there is no meritorious

defense for the eight causes of action set forth in the complaint. Mr. Urda stresses that the 1991 spill was posted on the Department's spills database and therefore was of public knowledge and that in any case, lack of knowledge is not a meritorious defense to Navigation Law claims. Mr. Urda argues that the Department staff has had communications with the respondents since 2006 directing that an investigation and remediation be started and claims the respondents were not responsive. He also states that the long sought after investigation has only just recently commenced since this proceeding was begun. As for the other allegations, Mr. Urda points to the lack of any defense set forth in the answer or Efraim Shurka affidavit.

For relief, staff requests that a civil penalty of no less than $100,000 be assessed (the complaint asked for no more than $379,760) and that the respondents be ordered to perform remediation of the site pursuant to a Department-approved work plan.

Respondents' Position

The respondents emphasize that they purchased the property in 1998 and contend that they did not have knowledge of the 1991 spill. They maintain that they have attempted to work with Department staff to "rectify the situation" but have been hamstrung by the inaccessibility of staff. They maintain that they have done Phase I and Phase II investigations and submitted the results of those studies to the Department in 2007. In his affidavit, Mr. Efraim Shurka states that Manny Shurka was not at the site when the Department staff performed their inspections and therefore does not have knowledge regarding the allegations with respect to other violations.

With respect to the default, Mr. Shurka asserts, as a principal of the corporate respondent, that upon receipt of the notice of hearing he contacted his contractor to communicate with the Department staff attorney. He points to a series of e-mails between Mr. Urda and Mr. Yarom to establish that the pre-trial conference was adjourned from May 15, 2009 until June 12, 2009 and that he understood that similarly, the time to file an answer would also be extended. He was not represented by counsel at that time.

Discussion

According to the Department's regulations, a respondent's failure to file a timely answer to a complaint constitutes a default and waiver of the respondent's right to a hearing. 6 NYCRR §§ 622.12(b), 622.15(a). In these circumstances, Department staff may move for a default judgment, such motion to contain:

(1) proof of service of the notice of hearing and complaint or motion for order without hearing;
(2) proof of the respondent's failure to file a timely answer; and
(3) a proposed order. 6 NYCRR § 622.15(b).

Attached to the affirmation of John K. Urda, Assistant Regional Attorney, are Louise Munster's affidavit of service of the notice of hearing and complaint dated April 16, 2009 as well

as copies of the certified mail receipts and United States Postal Service "track & confirm" indicating that the respondents received the pleadings on April 17, 2009. *See*, Exhibit B. The respondents do not contest that the answer was not served within the twenty days required by the regulations. They served their answer on June 24, 2009. Mr. Urda has also submitted a proposed order that is annexed as Exhibit H to his affirmation.

Section 622.15(d) of 6 NYCRR does allow a respondent to move to reopen a default "upon a showing that a meritorious defense is likely to exist and that good cause for the default exists." The respondents' papers submitted in opposition to the default are essentially a motion to reopen the default although the default had not yet been granted.

The respondents contend that they have good cause for the default because Efraim Shurka, who identifies himself as a principal of the corporate respondent, "contacted [his] contractor prior to the date of the hearing and asked him to get in touch with counsel for the petitioner . . ." *See*, Affidavit in Opposition. Mr. Shurka points to a series of e-mails between the contractor, Mr. Yarom, and Mr. Urda to support the contention that he was under the impression that staff had granted an extension to answer. *See*, Exhibit B to Shurka affidavit. However, all these e-mails address is Mr. Yarom's May 6, 2009 request that the proceeding be separated into two matters and a reference to a date and time presumably for a meeting. Mr. Urda emphasizes that at no time did he consent to a postponement of the deadline for the answer and the e-mail of May 27, 2009 bears out that he represented that only the time to respond to staff's motion for default judgment was extended. *See*, Exhibit B to Urda Reply Affirmation. Moreover, Mr. Urda stresses that in conversations with both Mr. Shurka and Mr. Yarom he said that the respondents' failure to answer the complaint constituted a default. Urda Reply Affirmation, ¶¶ 7, 11. Neither party has submitted any documentation to support a finding that staff agreed to an extension to serve the answer. Instead, the respondents did not contact staff until May 6, 2009, the last day to respond to the complaint. *See*, Exhibit A to Urda Reply Affirmation; Exhibit B to Shurka Affidavit in Opposition.

With respect to whether a meritorious defense exists, the respondents have presented a number of pieces of correspondence indicating that over a period of years efforts were made to contact Mr. Piper, the engineering geologist at DEC regarding the investigation of a spill at this facility. *See*, Exhibits C and F to Shurka Affidavit. However, Mr. Urda notes that the spill that this correspondence refers to is not the subject of this proceeding. Urda Affirmation, ¶¶ 11(ii), (iii).

As to the respondents' argument that they were not aware of the contamination at the purchase of the property and did not cause it, as Mr. Urda notes in his papers, the Navigation Law is quite strict in its presumption of liability of the owner and operator of a site. Mr. Urda's assessment of the law is correct - the standard is not based on whether the individual or company caused the spill but rather whether it was situated to prevent the spill or further contamination. *State of New York v. Speonk Fuel, Inc.* 3 NY3d 720 (2004); *Matter of Linden Latimer Holdings, LCC*, DEC Case No. R2-20070419-180 (Summary Hearing Report, October 18, 2007, pp. 11-12). The respondents present evidence of having submitted the Phase I and Phase II reports to the Department. *See*, Exhibit E to Shurka Affidavit. Mr. Urda states that staff did not receive these site assessments until April 2009 and that they are unsatisfactory. Urda Aff., ¶ 11(v). Moreover, other

than to state that Manny Shurka was not on the premises of the facility during the inspections that gave rise to staff's other allegations, the respondents do not present a defense to the other alleged violations. *See*, Shurka Affidavit. Based upon the above discussion, I have determined that staff has met the requirements for a default judgment and the respondents have failed to present good cause for the default or a meritorious defense that would warrant denying or reopening the default.

Penalty

In his affirmation, Mr. Urda requests a penalty of no less than $100,000 in satisfaction of the 14 counts of violations of the ECL and NL in addition to an order directing the respondents to immediately investigate and remediate the site. Staff calculated the statutory maximum for each violation and arrived at a total of $379,760,000. However, staff fails to present its analysis of how it came to a request for "no less than $100,000" from the statutory maximum.

ECL § 71-1929 provides for a penalty of up to $37,500 per day for each violation of Titles 1 through 11 inclusive and Title 19 of Article 17 or the rules and regulations implementing these laws. ECL § 71-2103 provides for penalties of up to $15,000 per day for a respondent's first violation of Article 19, or the rules or regulations promulgated thereto by the Commissioner of the Department. In addition, NL § 192 provides that any person who violates any provision of Article 12 of the Navigation Law is liable for penalties of up to $25,000 per day for each violation. Staff's request for a penalty of $100,000 is significantly less than the maximum calculated penalty under these laws. The 1990 Civil Penalty Policy requires that the gravity of the violations and the economic benefits of the non-compliance be assessed. The factors to consider with respect to gravity are (1) potential harm and actual damage caused by the violations and (2) relative importance of the type of violations in the context of the Department's overall regulatory scheme.

The violations established by staff are serious. In addition to two oils spills that have contaminated the environment, the respondents have failed to comply with a number of critical regulations that are important to preventing future spills such as failure to maintain spill prevention equipment, failure to report tightness tests, failure to correctly identify tank and piping information, and failure to maintain complete inventory records. In addition, the failure to maintain the Stage II equipment may contribute to air pollution.

Staff has not provided any information with respect to the amount of funds the respondents have saved by not complying with these regulations and by delaying the cleanup of the oil spills but clearly a facility that adheres to the environmental rules is spending considerable sums on compliance that the respondents have saved.

The Civil Penalty Policy also provides additional factors to adjust the gravity component. These are (a) culpability; (b) violator cooperation; (c) history of non-compliance; (d) ability to pay; and (e) unique factors. The staff reports a lengthy history of non-compliance and delay by these respondents while the respondents counter that there have been difficulties in communication with Department staff and they have submitted the Phase I and Phase II assessments. From the papers before me, it is not readily apparent whether or not the respondents' statements should be considered

to mitigate the penalty request. While the Department staff may have been diligent in responding to the respondents, I have no information that answers the respondents' claims. The staff maintains that it did not receive the Phase I and Phase II assessments until recently, while the respondents claim that they were sent in 2007.

In addition, the Department's Division of Environmental Enforcement maintains an Inspection Enforcement Policy that contains a PBS Penalty Schedule entitled "DEE-22/Petroleum Bulk Storage." This document sets forth ranges of suggested penalties for violations of parts 612, 613, and 614. In its papers, the Department staff has failed to address these ranges and in light of this policy how it chose to increase the penalties over the suggested ranges. *See, Matter of 2526 Valentine LLC,* DEC Case No. R2-20070604-242 (ALJ Ruling, January 6, 2009). To ensure that the penalty that is assessed is not arbitrary, I have determined that a hearing is necessary to establish a record that addresses the parties' contrasting statements of fact.

Recommendation and Conclusion

Staff's motion for a default judgment meets the requirements of 6 NYCRR § 622.15(b). However, due to the issues of fact regarding the respondents' level of cooperation and compliance, I have determined that an adjudicatory hearing on the issue of the penalty and whether there is a basis for mitigation of the penalty requested by staff is necessary.

I will convene a hearing to hear the parties' evidence with respect to staff's request for a minimum penalty of $100,000. This office will contact the parties to set up a conference call during the week of July 27, 2009 to discuss scheduling.

I recommend that the parties consider the option of engaging in a mediation process to resolve this issue. The OHMS is available to facilitate such an endeavor and if the parties are interested, I ask that they so advise me.

Dated: July 16, 2009
Albany, New York

_____/s/_____
Helene G. Goldberger
Administrative Law Judge