

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

**ORDER**

Case No. 02-38  
R9-20020819-42

**ROGER DULSKI,**

Respondent.

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WHEREAS:

1. Pursuant to a notice of hearing and complaint dated November 22, 2002, staff of the New York State Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against respondent Roger Dulski for failure to timely tightness test two underground petroleum bulk storage tanks at his petroleum bulk storage facility located at 1985 Genesee Street, Buffalo, New York ("facility") and for failure to timely register the tanks at the facility.

2. Department staff served respondent Roger Dulski with the notice of hearing and complaint on November 25, 2002, which service was accomplished by certified mail in accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

3. The complaint alleged that respondent had violated section 17-1005 of the Environmental Conservation Law ("ECL") and 6 NYCRR 612.2(b) and 613.5.

4. Although respondent received the notice of hearing and complaint on November 26, 2002, he failed to serve an answer to the complaint, and the time period for such service expired on December 17, 2002.

5. By motion dated April 30, 2004, Department staff moved for a default judgment. Respondent was duly served with a copy of Department staff's motion for default on May 18, 2004. Respondent failed to respond to or oppose Department staff's motion.

6. The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, and the ALJ's default summary

report dated August 11, 2004 is attached to this order. I adopt the ALJ's default summary report subject to the comments in this order.

7. Pursuant to ECL 71-1929, a person who violates any provision of, or who fails to perform any duty imposed by, titles 1 through 11 and title 19 of article 17 of the ECL or the rules, regulations, orders or determinations of the commissioner promulgated thereto was, at the time that this proceeding commenced, liable for a penalty of not to exceed twenty-five thousand dollars per day for each violation. Effective May 15, 2003, the penalty was increased to thirty-seven thousand five hundred dollars per day for each violation. Based on the record of this proceeding, the ALJ has recommended that a civil penalty of \$10,000 should be assessed, and I adopt that recommendation.

8. The ALJ, in the default summary report, recommends that I direct staff to investigate the status of the tanks at the facility and take whatever remedial measures are necessary to ensure that there are no discharges of petroleum to the environment. In this order, however, I am directing that respondent either repair, replace or remove the tank (and connecting piping system) that failed the tightness test and to undertake whatever remediation is necessary. Accordingly, I leave it to the discretion of Department staff to determine what activities, as authorized pursuant to the ECL and the Navigation Law, Department staff should undertake at the facility.

NOW THEREFORE, having considered this matter and being duly advised, it is ORDERED that:

I. Department staff's motion for default judgment is granted. Respondent is hereby found to be in default for having failed to answer the complaint and has waived its right to a hearing in this proceeding. Department staff's allegations in its complaint against respondent are deemed to have been admitted by respondent.

II. Respondent is found to have violated ECL 17-1005 and 6 NYCRR 612.2(b) and 613.5 by failing to timely register his petroleum bulk storage facility and by failing to timely tightness test the two underground petroleum bulk storage tanks at the facility.

III. Respondent is assessed a civil penalty in the amount of ten thousand dollars (\$10,000), which is due and payable within 30 days after service of this order on respondent. Payment of this penalty shall be made by cashier's check, certified check or money order drawn to the order of the "New York State Department of Environmental Conservation" and delivered to: Joseph J.

Hausbeck, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 9, 270 Michigan Avenue, Buffalo, New York 14203-2999.

IV. Within 30 days of the date of service of this order, respondent shall either (1) replace or repair, in accordance with 6 NYCRR part 614, the underground storage tank and connecting piping system that failed tank tightness testing; or (2) permanently remove that tank and piping system from service in accordance with 6 NYCRR 613.9(b), (c), (d) and (e). Respondent shall remediate any contamination that is found.

V. All communications from respondent to the Department concerning this order shall be made to: Joseph J. Hausbeck, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 9, 270 Michigan Avenue, Buffalo, New York 14203-2999.

VI. The provisions, terms and conditions of this order shall bind respondent and his heirs and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Erin M. Crotty, Commissioner

Albany, New York  
September 22, 2004

TO: Roger Dulski  
2015 Genesee Street  
Buffalo, New York 14211

Joseph J. Hausbeck, Esq.  
Assistant Regional Attorney  
New York State Department of  
Environmental Conservation  
Region 9  
270 Michigan Avenue  
Buffalo, New York 14203-2999

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

**DEFAULT SUMMARY REPORT**

Case No. 02-38 R9-  
20020819-42

**ROGER DULSKI,**

Respondent.

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Proceedings

On November 25, 2002, staff of the New York State Department of Environmental Conservation (DEC or Department) served a notice of hearing and complaint upon Roger Dulski, the owner of a petroleum bulk storage facility located at 1985 Genesee Street, Buffalo, New York. The notice announced that pursuant to § 622.4 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), the respondent must, within 20 days of receiving the notice of hearing and complaint serve DEC with his answer or be in default.

By written motion dated April 30, 2004, DEC Assistant Regional Attorney Joseph J. Hausbeck requested that a default judgment be issued against the respondent and an order be issued finding the respondent in violation of Environmental Conservation Law (ECL) § 17-1005 and 6 NYCRR §§ 612.2(b) and 613.5 and requiring him to pay a civil penalty of \$10,000. The motion is based on the respondent's failure to submit an answer within 20 days of service of the complaint's service.

On January 14, 2003, Mr. Hausbeck sent a letter by certified mail to the respondent in which he advised him that the failure to serve an answer is considered a default and a waiver of the respondent's right to a hearing.

To date, the respondent has not submitted an answer or a reply to the staff's motion for default.

Findings of Fact

1. On November 25, 2002, staff served the respondent, Roger Dulski with a notice of hearing and complaint by certified mail. Exhibit A to staff's affirmation in support of motion for default judgment.

2. The notice of hearing advised the respondent that pursuant to 6 NYCRR § 622.4, he was obliged to serve an answer upon the DEC staff within 20 days of receipt of the notice of hearing and complaint and the failure to make timely service of an answer would result in a default and waiver of the respondent's right to a hearing. Exhibit B to staff's affirmation in support of motion for default judgment.

3. The respondent's time for serving an answer expired on December 17, 2002. As of April 30, 2004 when the default motion was made, the respondent had not filed a timely answer. Hausbeck Affirmation, ¶ 9.

### Discussion

According to DEC's hearing regulations, a respondent's failure to file a timely answer constitutes a default and waiver of the respondent's right to a hearing. 6 NYCRR § 622.15(a). In such an event, DEC staff may move for a default judgment, such motions to contain:

(1) proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;

(2) proof of the respondent's failure to file a timely answer, and

(3) a proposed order. 6 NYCRR § 622.15(b).

Assistant Regional Attorney Hausbeck submitted his affirmation in support of this motion in which he describes that on November 25, 2002, he served a notice of hearing and complaint on the respondent, Roger Dulski, by United States Postal Service certified mail #7002 0510 0002 6910 2742, return receipt requested. Included with the staff's motion papers is Exhibit A - a copy of the certified mail receipt indicating that Mr. Dulski signed the return receipt on November 26, 2002.

Staff's motion papers adequately demonstrate that the respondents failed to file a timely answer and therefore defaulted in this matter. In accordance with the DEC regulations, DEC staff has included a proposed order with its motion papers.

### Penalty Considerations

Department staff request that the respondent pay a total civil penalty of \$10,000 in this matter. The penalty is based upon: 1) the respondent's failure to perform timely tightness

testing of its two underground petroleum bulk storage tanks in violation of ECL § 17-1005 and 6 NYCRR § 613.5 and 2) the respondent's failure to timely register his facility in violation of ECL § 17-1009 and 6 NYCRR § 612.2(b).

In an affidavit submitted by Assistant Regional Attorney Joseph J. Hausbeck regarding the penalties sought by staff, he explains that Department staff determined that the respondent saved approximately \$3000 by delaying tightness testing and registration.<sup>1</sup> Hausbeck Aff., ¶ 10. In this document, Mr. Hausbeck explains that no environmental harm has been discovered by staff. However, the respondent did tightness test his tank (albeit 28 months late) and it was determined that out of the two tanks, one failed. Hausbeck Aff., ¶ 4. This tank has not been retested as required over the past 18 months thus the risk of harm exists and continues to increase. Hausbeck Aff., ¶ 10. Based upon the tightness testing violation, staff has calculated a penalty of \$3000. Id. Stressing the importance of tank registration to the Department based upon its value as a means to identify facilities and their owners, staff attributed a penalty of \$4,000 for the respondent's late registration of his tanks. Hausbeck Aff., ¶¶ 5, 10.

Staff issued a notice of violation for failing to tightness test his tank in October 2000 as his tanks were due for testing the prior June. Hausbeck Aff., ¶ 4. Staff sent a second notice of violation in June 2001, when the respondent had still not complied. Id. In September 2002, the staff issued an order on consent for tank testing and failure to register. Id. On October 2, 2002, the respondent had his tanks tested with one tank failing out of the two. Id. On October 11, 2002, respondent advised Mr. Hausbeck that he would not sign the consent order. Id. On October 15, 2002, staff informed the respondent that he must test the second tank but Mr. Dulski failed to comply. Id. On March 7, 2003, the respondent filed a registration for his facility that was 40 months overdue. Id.

Staff notes in its motion papers that DEE -22, the Petroleum Bulk Storage Inspection Enforcement Policy suggests a penalty range of \$500 to \$5000 for both failure to tightness tank and to register. Hausbeck Aff., ¶ 6. ECL § 71-1929 provides for a penalty of up to \$25,000 per day for each violation of Titles 1 through 11 and Title 19 of Article 17 or the rules and

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<sup>1</sup> In support of staff's motion for default, Mr. Hausbeck submitted an affirmation and an "affidavit." However, the latter document was not signed by a witness. Because Mr. Hausbeck is an attorney and signed the two documents, I will consider the "affidavit" to be an affirmation.

regulations promulgated thereto by the Commissioner. The maximum penalties pursuant to statute are much greater than what is recommended by staff. However, based upon the aforementioned penalty analysis, the PBS policy, and because the respondent's facility is closed and staff believes that Mr. Dulski has an inability to pay, staff has recommended the \$10,000 amount.

### Conclusions

By failing to answer the complaint in a timely manner, the respondent has defaulted and waived his right to a hearing in this matter.

Department staff's proposed penalty of \$10,000 is rational and supported by the record. The penalty is justified based upon respondent's significant delays in testing and registering his tanks. Based upon the failure of one tank during the belated testing, there is a potential harm to the environment. ECL § 71-1929 provides for maximum penalties that greatly exceed staff's request, I find staff's request well within rationality.

Given the closure of this facility and the failure of one of the tanks to pass the tightness test, I agree with staff's proposed order requiring the respondent to either: (1) empty, replace or repair, in accordance with 6 NYCRR Part 614, the underground storage tank and connecting pipe system that failed tank tightness testing; or (2) permanently take the tank and piping system out of service in accordance with 6 NYCRR §§ 613.9(b), (c), (d) and (e).

However, based upon staff's description of the respondent's facility as not in operation and possibly abandoned, I recommend that the Commissioner direct staff to fully investigate the status of these tanks and if necessary, take steps for their removal and/or closure pursuant to Parts 613 and 614 of 6 NYCRR and ECL §§ 17-1005, 17-1007, 17-1011.

Recommendation

The Commissioner should sign the attached order confirming default, assessing a civil penalty of \$10,000 and requiring the respondent to close and/or remove the failed tank within 30 days of the service of the order pursuant to 6 NYCRR § 613.9. In addition, I recommend that the Commissioner direct staff to fully investigate the status of these tanks and take whatever remedial measures are necessary to ensure that petroleum products are not entering the environment.

Albany, New York  
August 11, 2004

\_\_\_\_\_/s/\_\_\_\_\_  
Helene G. Goldberger  
Administrative Law Judge