

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

ORDER
DEC File No.
R6-2008-0707-58

-by-

THOMAS E. BRUNET,

Respondent.

This administrative enforcement proceeding concerns the alleged failure of respondent Thomas E. Brunet to re-register a petroleum bulk storage (PBS) facility, to subsequently renew the facility's registration, and to properly close the facility.

Respondent Brunet owns property at 501 West Thomas Street in the City of Rome, New York (site). At the site are two underground petroleum bulk storage tanks, with a combined capacity of 6,000 gallons. The site was registered as a PBS facility by a previous owner (PBS #6-389277).

In accordance with 6 NYCRR 622.3(a)(3), Department staff commenced this proceeding against respondent by service of a notice of hearing and complaint, dated January 27, 2011, by certified mail. Respondent received the papers on February 2, 2011.

Department staff, in its complaint, set forth three causes of action, in which staff alleged that respondent:

-failed to re-register the facility's PBS registration within thirty days of respondent's acquisition of the facility (that is, by November 12, 2000), thereby violating 6 NYCRR 612.2(b);

-failed to renew the facility's PBS registration on November 12, 2005 and November 12, 2010, thereby violating 6 NYCRR 612.2(a)(2); and

-failed to properly close the facility, which was permanently out-of-service, thereby violating 6 NYCRR 613.9(b).

Respondent failed to file an answer. Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer has expired, and has not been extended by Department staff.

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

I concur with the ALJ's determination that Department staff is entitled to a finding of liability on each of the three causes of action in the complaint.

With respect to penalty, Department staff requested a civil penalty of thirteen thousand dollars (\$13,000). In support of the requested civil penalty, staff noted that the civil penalty amount is within the range authorized by section 71-1929 of the Environmental Conservation Law and consistent with DEC's Civil Penalty Policy (see DEE-1, dated June 20, 1990). In addition, the ALJ reviewed the Department's enforcement guidance memorandum entitled "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy," dated May 21, 2003 (PBS Enforcement Policy), and determined that the staff-requested penalty was consistent with the PBS Enforcement Policy.

DEC staff also cited several aggravating factors warranting the civil penalty. These factors included that respondent knew the site was a PBS facility when he purchased it, and that respondent ignored Department staff's requests that he comply with the applicable PBS regulations.

Staff stated, however, that an "appropriate portion" of the civil penalty could be suspended (see Complaint, at V). Staff indicated that any suspension should amount to no more than \$8,000, and be contingent upon respondent's compliance with the terms and conditions of the Commissioner's order, which includes specific remedial actions.

Based on this record, a civil penalty of \$13,000 is authorized and appropriate. The remedial actions that Department staff requested are also authorized and appropriate. I concur that a portion of the penalty should be suspended to

facilitate the necessary remedial activity. Accordingly, I have determined to suspend \$8,000 of the civil penalty, conditioned upon respondent:

- paying the non-suspended portion (\$5,000) of the penalty within sixty days of the service of this order upon him;

- submitting an application to re-register the facility to Department staff. In addition, respondent is to submit payment to the Department of five hundred dollars for each of three registration periods missed, or a total payment of fifteen hundred dollars (\$1,500) in registration fees. Respondent shall submit the application and pay the registration fees within thirty days of the service of this order upon him;¹

- permanently closing the facility in accordance with 6 NYCRR 613.9(b) within sixty days of the service of this order upon him. Respondent shall notify the Department within thirty days prior to permanent closure of the tanks (see 6 NYCRR 613.9[c]). Immediately following closure of the tanks, respondent shall submit a report to Department staff which documents the closure; and

- complying with the other terms and conditions of this order.

¹ For this facility, registration fees were due on November 12, 2000, November 12, 2005, and November 12, 2010, which respondent did not pay. The registration fee for an owner of a PBS facility that has a storage capacity of 6,000 gallons, as is the case here, is five hundred dollars (\$500) for each registration period (see section 17-1009 of the Environmental Conservation Law).

Although the registration fee prior to 2003 for facilities of this size was two hundred and fifty dollars (\$250), rather than five hundred dollars (\$500), the Department has determined that the higher fee applies to all registration applications including applications that were due prior to the effective date of the change in fees, with one exception that has not been shown to be applicable here (see Memorandum, "Change in Procedures for Implementation of Higher Fees for Petroleum Bulk Storage [PBS] Regulations," dated January 12, 2005, at 1-2).

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 against respondent Thomas E. Brunet is granted.
- II. Respondent Thomas E. Brunet is adjudged to be in default and to have waived the 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 Thomas E. Brunet is adjudged to have violated:
(1) 6 NYCRR 612.2(b), by failing to re-register the PBS facility within thirty days of his taking title to it on October 13, 2000 (that is, by November 12, 2000); (2) 6 NYCRR 612.2(a)(2), by failing to renew the PBS registration for the facility as required on November 12, 2005 and November 12, 2010; and (3) 6 NYCRR 613.9(b), by failing to properly close the facility, which was permanently out-of-service.
- IV. Respondent Thomas E. Brunet is assessed a civil penalty in the amount of thirteen thousand dollars (\$13,000), of which eight thousand dollars (\$8,000) is suspended on the condition that respondent complies with the conditions and terms of this order.

The non-suspended portion of the penalty (five thousand dollars [\$5,000]) is due and payable within sixty (60) days of service of this order upon respondent. Payment of the civil penalty shall be by cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation," and delivered to the Department at the following address:

Ronald J. Novak, P.E.
Regional Enforcement Coordinator
New York State Department of Environmental
Conservation, Region 6
317 Washington Street
Watertown, NY 13601

If respondent fails to comply with any of the terms and conditions of this order, including but not limited to the payment of the non-suspended portion of the civil penalty,

the submission of a registration application for the facility, or the permanent closure of the facility, the suspended portion of the civil penalty (\$8,000) shall immediately become due and payable and shall be submitted to Department staff in the same form and to the same address as the non-suspended portion of the penalty.

- V. Within thirty (30) days of service of this order upon respondent, respondent shall register the petroleum bulk storage facility with the Department pursuant to 6 NYCRR 612.2(b), and submit a total payment of fifteen hundred dollars (\$1,500) for past and current registration fees.
- VI. With respect to the closure of the petroleum bulk storage facility, respondent shall:
 - A. within sixty (60) days of service of this order upon respondent, permanently close the petroleum bulk storage facility in accordance with 6 NYCRR 613.9(b);
 - B. notify the Department within thirty (30) days prior to permanent closure of the tanks (see 6 NYCRR 613.9[c]); and
 - C. immediately following closure of the tanks, submit a report to Department staff which documents the closure activities that were undertaken.
- VII. All communications from respondent to the Department concerning this order shall be directed to Ronald J. Novak, P.E., at the address set forth in paragraph IV of this order.

VIII. The provisions, terms, and conditions of this order shall bind respondent Thomas E. Brunet, and his agents, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Joseph J. Martens
Commissioner

Dated: May 17, 2011
Albany, New York

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

Default Summary
Report

DEC File No.
R6-2008-0707-58

-by-

THOMAS E. BRUNET,

Respondent.

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement proceeding by serving a notice of hearing and complaint upon Thomas E. Brunet ("respondent") at 8833 Soule Road, Holland Point, New York. The complaint alleged the respondent is responsible for three violations involving a petroleum bulk storage (PBS) facility he owns which is located at 501 West Thomas Street, in the City of Rome, New York ("site"). The complaint alleges that when the respondent took title to the site on October 13, 2000, it contained a PBS facility (#6-389277) consisting of two underground petroleum storage tanks with a combined capacity of 6,000 gallons. According to the complaint, these tanks have not been used for many years and have not been removed. DEC Staff alleges three causes of action in its complaint. Specifically, that the respondent: (1) failed to re-register the PBS facility within thirty days of taking title to it, November 12, 2000, in violation of 6 NYCRR 612.2(b); (2) failed to renew the facility's PBS registration on November 12, 2005 and November 12, 2010, in violation of 6 NYCRR 612.2(a)(2); and (3) failed to properly close the facility, which is permanently out-of-service, in violation of 6 NYCRR 613.9(b).

The notice of hearing and complaint were served upon the respondent by certified mail, return receipt requested, on

February 2, 2011. The respondent failed to file an answer to the complaint. By papers dated March 29, 2011, DEC Staff moved for a default judgment and order against the respondent pursuant to 6 NYCRR 622.15. DEC Staff mailed a copy of the default motion and supporting papers to the respondent. As of the date of this default summary report, the DEC Office of Hearings and Mediation Services has not received any response from or on behalf of the respondent.

Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Commissioner Decision and Order, July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]."

DEC Staff's default motion papers consist of the following documents: (1) a notice of motion; (2) a motion for default judgment and order; (3) the affirmation of DEC Staff counsel Nels G. Magnuson; and (4) a cover letter. Attached to Mr. Magnuson's affirmation are: (1) an affidavit of service of the notice of hearing and complaint; (2) a United States Postal Service's delivery receipt; (3) a copy of the notice of hearing and complaint; (4) a copy of the deed for 501 West Thomas Street, Rome, New York; (5) a copy of the petroleum bulk storage registration certificate issued to the prior owner for the facility that expired on June 30, 1992; and (6) a proposed order in this matter. DEC Staff's affidavit of service of the default motion shows mailing on March 29, 2011.

FINDINGS OF FACT

1. Thomas E. Brunet owns a petroleum bulk storage facility (#6-389277) located at 501 West Thomas Street, Rome, New York.

2. Thomas E. Brunet failed to re-register the petroleum bulk storage facility within 30 days of assuming ownership, in violation of 6 NYCRR 612.2(b). Such re-registration was due by November 12, 2000.
3. Thomas E. Brunet failed to renew the PBS registration as required by November 12, 2005 and November 12, 2010, in violation of 6 NYCRR 612.2(a)(2).
4. Thomas E. Brunet failed to properly close the PBS facility which was permanently out-of-service, in violation of 6 NYCRR 613.9(b).
5. On February 2, 2011, a notice of hearing and complaint in this matter were served on Thomas E. Brunet, at 8833 Soule Road, Holland Point, NY, by certified mail, return receipt requested. The receipt was returned showing delivery of the mailing.
6. The notice of hearing stated that an answer must be served upon DEC Staff within twenty days of receipt of the complaint. The notice of hearing also stated that failure to timely file an answer will result in a default and a waiver of the respondent's right to a hearing. The twenty-day time period expired on February 22, 2011. Thomas E. Brunet failed to serve an answer within the 20-day period.
7. On March 29, 2011, DEC Staff moved for a default judgment and order. The motion was mailed to the respondent on that date. DEC Staff's motion papers included a proposed order.

DISCUSSION

The notice of hearing and complaint were served upon the respondent on February 2, 2011. Respondent failed to serve an answer within the time period specified in 6 NYCRR 622.4(a) and respondent defaulted in this matter.

DEC Staff has provided proof of service upon the respondent of the notice of hearing and complaint, proof that the respondent failed to appear or file a timely answer, and provided a proposed order. Accordingly, DEC Staff has met the requirements of 6 NYCRR 622.15(a). In addition, DEC Staff has provided proof of mailing of the default motion to the respondent. DEC Staff's complaint contains sufficient

allegations for the Commissioner to conclude that relief may be granted for the cause of action alleged. Therefore, DEC Staff is entitled to a default judgment and order in this matter.

Mr. Magnuson's affirmation states that the requested total civil penalty of \$13,000 (comprised of a \$5,000 payable portion and \$8,000 suspended upon the respondent's compliance with the terms and conditions of the Commissioner's order) is within the range authorized by ECL 71-1929, which authorizes a penalty of up to \$37,500 for any violation of any provision of ECL article 17, or any rule or regulation promulgated thereunder. Mr. Magnuson also states that the requested civil penalty amount is consistent with the Department's Civil Penalty Policy. He cites the respondent's failure to register the facility and his failure to respond to DEC Staff's requests that he comply with applicable PBS regulations as aggravating factors. Based on this, and that the requested civil penalty amount is consistent with the Department's Petroleum Bulk Storage Inspection Enforcement Policy, it is reasonable for the Commissioner to conclude that DEC Staff's requested payable penalty of \$5,000 and suspended penalty of \$8,000 is justified in this case.

In addition to the requested civil penalty, DEC Staff seeks the inclusion of language in the Commissioner's order which would require the respondent to: (1) register the PBS facility and pay registration fees for the past three 5-year registration periods within 30 days of the service of the Commissioner's order; and (2) permanently close the facility in accordance with 6 NYCRR 613.9(b) within 60 days of service of the Commissioner's order. Based on the papers in the record, it is reasonable for the Commissioner to include this language in his order.

CONCLUSIONS

1. Respondent Thomas E. Brunet was served with the notice of hearing and complaint on February 2, 2011. The respondent failed to file a timely answer and has failed to file any answer as of the date of this report. The respondent has defaulted in this matter.
2. Respondent Thomas E. Brunet violated 6 NYCRR 612.2(b) by failing to re-register PBS facility (#6-389277) by November 12, 2000.

3. Respondent violated 6 NYCRR 612.2(a)(2) by failing to renew the registration for PBS facility (#6-389277) by November 12, 2005 and November 12, 2010.
4. Respondent Thomas E. Brunet violated 6 NYCRR 612.2(b) by failing to re-register PBS facility (#6-389277) by November 12, 2000.
5. Respondent Thomas E. Brunet violated 6 NYCRR 613.9(b) by failing to properly close the facility which was out of service.
6. Environmental Conservation Law 71-1929 provides that a person who violates any of the provisions of Article 17, or who fails to perform any duty imposed by thereunder, shall be liable for a civil penalty of up to \$37,500 for a first offense.

RECOMMENDATION

I recommend that the Commissioner issue an order holding the respondent Thomas E. Brunet liable for the violations alleged in the complaint and imposing a civil penalty of \$13,000 (comprised of a \$5,000 payable portion and \$8,000 suspended upon the respondent's compliance with the terms and conditions of the Commissioner's order). In addition, the Commissioner should direct the respondent to: (1) register the PBS facility and pay registration fees for the past three 5-year registration periods within 30 days of the service of the Commissioner's order; and (2) permanently close the facility in accordance with 6 NYCRR 613.9(b) within 60 days of service of the Commissioner's order.

/s/

Albany, New York
May 9, 2011

P. Nicholas Garlick
Administrative Law Judge