

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

In the Matter of the Alleged Violations of Article 17 and 71 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

-by-

DEC Case No.
R2-20160408-141

JAMES BULLOCH,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent James Bulloch committed two violations. The first cause of action asserts respondent violated ECL 71-1929(1) by failing to comply with an Order on Consent File No. R2-20160408-141, which addressed various petroleum bulk storage (PBS) violations at respondent's facility at 441 Beach 129th Street, Belle Harbor, New York and which became effective on April 18, 2017 (2017 Consent Order). Specifically, Department staff alleged that respondent failed to pay the agreed to \$5,250 civil penalty under the 2017 Consent Order. The second cause of action alleges that respondent violated 6 NYCRR 613.1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility on or before August 28, 2017, the date on which its prior PBS registration expired.

Administrative Law Judge (ALJ) P. Nicholas Garlick of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's summary report, respondent failed to file an answer to the motion for order without hearing in lieu of complaint. As a consequence of respondent's failure to answer in this matter, and based on the evidence included with Department staff's motion, the ALJ recommends that Department staff's motion be granted (see Summary Report at 5). I concur. The pleadings and the papers submitted with and in support of the motion establish a prima facie case that respondent is liable for the two violations alleged.

Department staff seeks a total civil penalty in the amount of twenty thousand dollars (\$20,000) – ten thousand dollars (\$10,000) for the violation of the 2017 Consent Order and ten thousand dollars (\$10,000) for the failure to renew the PBS facility's registration. ECL 71-1929(1), which applies to the statutory and regulatory violations at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Staff's requested civil penalty is in accordance with the Department's Civil Penalty Policy (DEE-1), the Department's Order on Consent Enforcement Policy (DEE-2), and

administrative precedent relating to similar violations. Based on this record, the requested civil penalty of twenty thousand dollars (\$20,000) is authorized and appropriate.

I direct that respondent submit the civil penalty of twenty thousand dollars (\$20,000) imposed for these two violations within fifteen (15) days of the service of this order upon respondent. I also further direct that respondent submit the civil penalty of five thousand two hundred fifty dollars (\$5,250) that is due and owing under the 2017 Consent Order within fifteen (15) days of the service of this order upon respondent.

In addition to the payment of these civil penalties, respondent is directed to submit a petroleum bulk storage application for the facility, plus applicable registration fees, to the Department within fifteen (15) days of the service of this order upon respondent (see Summary Report at 1 n 1, 4-5).

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

- I. Department staff's motion for an order without hearing in lieu of complaint is granted. By failing to answer or appear in this proceeding, respondent James Bulloch waived his right to be heard.
- II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent James Bulloch is determined to have violated: (1) ECL 71-1929(1) by failing to comply with Order on Consent File No. R2-20160408-141, which became effective on April 18, 2017, by failing to pay the agreed to civil penalty of five thousand two hundred and fifty dollars (\$5,250); and (2) 6 NYCRR 613.1.9(c) by failing to renew the registration of his petroleum bulk storage (PBS) facility located at 441 Beach 129th Street, Belle Harbor, New York on or before August 28, 2017, the date on which the prior registration expired.
- III. Within fifteen (15) days of the service of this order upon respondent James Bulloch, respondent shall pay a civil penalty in the amount of twenty thousand dollars (\$20,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation" for the violations referenced in paragraph II of this order.
- IV. Within fifteen (15) days of the service of this order upon respondent James Bulloch, respondent shall pay the amount of the civil penalty agreed to in Order on Consent File No. R2-20160408-141 in the amount of five thousand two hundred and fifty dollars (\$5,250) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."
- V. Within fifteen (15) days of the service of this order upon respondent James Bulloch, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable current and past due registration fees.

- VI. The petroleum bulk storage application, applicable registration fees, the civil penalty payment, and the payment required under Order on Consent File No. R2-20160408-141 (which became effective on April 18, 2017), shall be sent to the following address:

NYS Department of Environmental Conservation
Office of General Counsel, Region 2
One Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101
Attn: James L. Simpson, Esq.

- VII. Any questions or other correspondence regarding this order shall also be addressed to James L. Simpson, Esq. at the address referenced in paragraph VI of this order.
- VIII. The provisions, terms, and conditions of this order shall bind James Bulloch and his agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
October 29, 2018

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Articles 17 and 71 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

SUMMARY REPORT

DEC Case No.
R2-20160408-141

-by-

JAMES BULLOCH,

Respondent.

This report recommends that the Commissioner grant a motion for order without hearing in lieu of complaint, dated January 30, 2018, brought by Staff of the New York State Department of Environmental Conservation (Department) against James Bulloch (respondent). The motion alleges two violations. The first cause of action asserts respondent violated ECL 71-1929(1) by failing to comply with an order on consent (file #R2-20160408-141), executed on April 18, 2017, by failing to pay the agreed to five thousand two hundred and fifty dollar (\$5,250) civil penalty. The second cause of action alleges respondent violated 6 NYCRR 613.1.9(c) by failing to renew the registration of petroleum bulk storage (PBS) facility #2-327530, located at 441 Beach 129th Street, Belle Harbor, New York (facility) on or before August 28, 2017, the date on which its prior registration expired.

The motion seeks an order of the Commissioner: (i) finding respondent liable for the violations alleged; (ii) assessing a total civil penalty in the amount of twenty thousand dollars (\$20,000), ten thousand (\$10,000) dollars for each violation; (iii) requiring respondent to pay the civil penalty assessed in the consent order, five thousand two hundred and fifty dollars (\$5,250); and (iv) granting such other and further relief as the Commissioner shall deem just and appropriate.¹

Service of the motion for order without hearing was made on respondent by personal service, pursuant to CPLR 308(2) (*see* affidavit of Moses Ajoku dated August 21, 2018, ¶¶6-7)). The notice of motion for an order without a hearing stated that respondent must serve a response within twenty days of receipt and that such response must be directed to the Chief Administrative Law Judge in the Department's Office of Hearings and Mediation Services. As

¹ Department staff does not request specific language in the order directing respondent to renew the registration for its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, to remit the applicable registration fee, and to submit a complete registration application. However, in the circumstances of this case, I am recommending the Commissioner order such just and appropriate relief.

of the date of this report, no such response has been received. In his letter dated January 30, 2018, Department staff counsel requested a ruling on the merits of the motion.

Procedural History

Department staff's motion papers, dated January 30, 2018, include: a cover letter; a notice of motion for an order without hearing; the affirmation of James L. Simpson, Esq., with four exhibits (listed in the attached exhibit chart); an affirmation of service by certified mail (without proof of receipt); and the affidavit of Regina Seetahal.

With a cover letter dated May 8, 2018, Department staff provided a second affirmation of service by certified mail, again without proof of receipt, as well as an affidavit from Moses Ajoku purporting to have personally served respondent James Bulloch.

On May 16, 2018, I was assigned to this matter.

By letter dated August 10, 2018, I contacted Department staff counsel regarding deficiencies in Department staff's papers. In response, with a cover letter dated August 22, 2018, Department staff filed a revised affirmation of James L. Simpson, Esq. (with four exhibits), and the revised affidavit of Moses Ajoku.

Applicable Regulatory Provisions

ECL 71-1929(1) reads in relevant part:

A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation, and, in addition thereto, such person may be enjoined from continuing such violation as hereinafter provided.

6 NYCRR 613-1.9, entitled "Registration", reads, in relevant part:

(c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section.

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of Department staff's motion:

1. Respondent James Bulloch. is the owner of PBS facility #2-327530 having a capacity of over 1,100 gallons located at 441 Beach 129Th Street, Belle Harbor, New York (facility). The facility contains five tanks: tank number 004 has a capacity of 550 gallons; tank number 100 has a capacity of 4,000 gallons; tank number 200 has a capacity of 4,000 gallons; and tank number 300 has a capacity of 4,000 gallons. All tanks are located underground. *See* Exh. A.
2. The petroleum bulk storage certificate for PBS facility #2-327530 expired on August 8, 2017 (*see* Exh. A). As of late August 2018, Department staff had not: received a registration renewal; received notice that the facility had been permanently closed; or that the facility had been transferred to another owner (*see* affirmation of James L. Simpson, Esq. dated August 21, 2018, ¶¶11-12, and affidavit of Moses Ajoku dated August 21, 2018, ¶8)
3. Order on consent #R2-20160408-141, effective April 18, 2017, required, among other things, that respondent James Bulloch pay a civil penalty to resolve certain violations discovered at the facility during an inspection on March 2, 2016. The total civil penalty agreed to was five thousand two hundred and fifty dollars (\$5,250) which was to be paid in ten monthly installments of five hundred and twenty-five dollars (\$525) commencing on April 15, 2017 and ending on January 15, 2018 (*see* Exh. B). Department staff has not received any payments from respondent James Bulloch as required by the consent order (*see* affidavit of Regina Seetahal, ¶¶4-5).

Discussion

Department staff has requested an order on the merits, and based upon review of the evidence attached to the motion, I recommend the Commissioner conclude that Department staff has established a prima facie case that respondent James Bulloch is liable for the violations alleged in the two causes of action. The respondent was personally served with Department staff's motion papers on April 20, 2018 (Affidavit of Moses Ajoku, dated August 21, 2018, ¶6).

The first cause of action alleges that respondent violated ECL 71-1929(1) by failing to comply with an order on consent (file #R2-20160408-141), executed on April 18, 2017, by failing to pay the required five thousand two hundred and fifty dollars \$5,250 civil penalty. Included with the motion is a copy of the consent order in which respondent agreed to pay a total civil penalty of five thousand two hundred and fifty dollars (\$5,250) which was to be paid in ten monthly installments of five hundred and twenty-five dollars (\$525) commencing on April 15, 2017 and ending on January 15, 2018 (*see* Exh. B). Department staff has provided proof that no payments were received from respondent James Bulloch (Affidavit of Regina Seetahal, ¶¶4-5). Based on the above, the Commissioner should hold the respondent liable for the first cause of action.

The second cause of action alleges respondent violated 6 NYCRR 613.1.9(c) by failing to renew the registration of its petroleum bulk storage facility (PBS #2-32-7530) located at 441

Beach 129th Street, Belle Harbor, New York on or before August 28, 2017, the date on which its prior registration expired. Department staff has provided the facility's PBS bulk storage certificate which has an expiration date of August 28, 2017 (*see* Exh. A). Department staff has also provided proof that: (1) no PBS registration renewal application has been received; (2) no registration fee for the facility has been received; (3) there has been no notification that the facility has been permanently closed pursuant to applicable regulations; and (4) there has been no notification that the facility has been transferred to another owner pursuant to applicable regulations (*see*, affirmation of James L. Simpson dated August 21, 2018, ¶¶11-12; and affidavit of Moses Ajoku dated August 21, 2018, ¶8). Based on the above, the Commissioner should hold the respondent liable for the second cause of action.

In addition to a finding of liability, Department staff seeks a total civil penalty in the amount of twenty thousand dollars (\$20,000) and requiring respondent to pay the agreed to civil penalty amount owed under the consent order (five thousand two hundred and fifty dollars (\$5,250)). For the first cause of action, failing to comply with consent order, Department staff seeks a civil penalty of ten thousand dollars (\$10,000). As justification for this penalty amount, Department staff cites the Department's Civil Penalty Policy (DEE-1), the Department's Order on Consent Enforcement Policy (DEE-2), and administrative precedent relating to similar violations. Specifically, Department staff cites the respondent's failure to comply with the consent order as subverting a vital enforcement tool that deters PBS violations in order to protect the public health, welfare, and the lands and waters of the State. *See* affirmation of James L. Simpson dated August 21, 2018, ¶¶21-26). Based on the above, the Commissioner should determine a civil penalty of ten thousand dollars (\$10,000) for the first cause of action is appropriate. In addition, Department staff has shown that the agreed to penalty imposed by the consent order has not been paid and the Commissioner should require respondent to pay this amount, five thousand two hundred and fifty dollars (\$5,250). For the second cause of action, failing to reregister his PBS facility, Department staff seeks a civil penalty of ten thousand dollars (\$10,000). As justification for this penalty amount, Department staff cites the respondent's repeated violation of PBS regulations. (*see* affirmation of James L. Simpson dated August 21, 2018, ¶¶27-29). Based on the above, the Commissioner should determine a civil penalty of ten thousand dollars (\$10,000) for the second cause of action is appropriate

Department staff does not request specific language in the order directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application. However, in the circumstances of this case, I am recommending that the Commissioner order such just and appropriate relief.

In conclusion, I find that staff's request for a civil penalty in the amount of ten thousand dollars (\$10,000) for each cause of action and requiring respondent to pay the amount owed under the consent order, five thousand two hundred and fifty dollars (\$5,250), is consistent with the Department's penalty policies and relevant administrative precedents, as well as applicable provisions of ECL article 71. In addition, the order should direct respondent to register the petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application.

Conclusions of Law

1. By failing to comply with order on consent #R2-20160408-141, effective April 18, 2017, respondent James Bulloch violated ECL 71-1929(1).

2. By failing to renew the registration of his PBS facility located at 441 Beach 129th Street, Belle Harbor, New York on or before August 28, 2017, the date the prior registration expired, respondent James Bulloch violated 6 NYCRR 613-1.9(c).

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Holding that respondent James Bulloch violated ECL 71-1929(1) by failing to comply with an order on consent (file #R2-20160408-141), executed on April 18, 2017, by failing to pay the required five thousand two hundred and fifty dollar (\$5,250) civil penalty;
2. Holding that respondent James Bulloch violated 6 NYCRR 613.1.9(c) by failing to renew the registration of his petroleum bulk storage (PBS) facility located at 441 Beach 129th Street, Belle Harbor, New York (facility) on or before August 28, 2017, the date on which its prior registration expired;
3. Directing respondent James Bulloch to pay a total civil penalty in the amount of twenty thousand dollars (\$20,000) within fifteen (15) days of service of the Commissioner's order;
4. Directing respondent James Bulloch to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility together with the applicable registration fees;
5. Directing respondent James Bulloch to submit to the Department, within fifteen (15) days of service of the Commissioner's order, the civil penalty of five thousand two hundred and fifty dollars (\$5,250) due under order on consent file #R2-20160408-141, executed on April 18, 2017; and
6. Directing such other and further relief as he may deem just and appropriate.

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
October 25, 2018

APPENDIX A

Matter of James Bulloch
DEC File No. PBS R2-20160408-141

Attached to the affirmation of James L. Simpson, dated January 30, 2018 and revised affirmation dated August 21, 2018.

Exh.	Description
A	PBS facility information report for respondent's facility and respondent's PBS certificate
B	Order on consent file number R2-20160408-141 executed on April 18, 2017
C	Emails between Department staff members and respondent
D	Follow up email from Department staff counsel