

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

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

ORDER

DEC Case No.
R2-20100428-132

- by -

CREEKHILL REALTY, LLC,

Respondent.

Respondent Creekhill Realty LLC is the owner of a residential apartment building located at 1070 St. Nicholas Avenue, New York, New York (site). At the site, which respondent purchased in 2006, is a 5,000-gallon petroleum bulk storage (PBS) tank. The site was registered as a PBS facility (PBS # 2-306487) by a prior owner. This administrative enforcement proceeding addresses allegations that respondent Creekhill Realty LLC has failed to comply with various PBS regulations that apply to the facility.

Staff of the New York State Department of Environmental Conservation ("Department") initially commenced an administrative enforcement proceeding against respondent Creekhill Realty, Inc., by service of a notice of hearing and complaint dated September 27, 2010. Respondent failed to file an answer to the complaint, and Department staff filed a motion for default judgment dated February 24, 2011.

The matter was assigned to Administrative Law Judge (ALJ) Helene G. Goldberger. The ALJ denied Department staff's motion for default judgment without prejudice (see Matter of Creekhill Realty, LLC, ALJ's Ruling on Motion for Default Judgment, April 6, 2011). Respondent received service of an amended notice of hearing and the original complaint by certified mail on April 9, 2011.

The complaint sets forth five causes of action, alleging that respondent:

1) failed to renew the facility's registration on February 18, 2009 when the registration filed by the prior owner of the site expired, in violation of ECL 17-1009 and 6 NYCRR 612.2(a);

2) failed to re-register the facility as the new owner when it acquired the site in September 2006, in violation of 6 NYCRR 612.2(b);

3) failed to display the facility's PBS registration certificate on the premises, in violation of 6 NYCRR 612.2(e);

4) failed to perform leak detection on the 5,000-gallon tank at the site, in violation of 6 NYCRR 613.4(a)(2); and

5) failed to tightness test the tank and piping system, in violation of 6 NYCRR 613.5(a).

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on April 29, 2011, and has not been extended by Department Staff.

The ALJ prepared a default summary report, a copy of which is attached. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

Based upon the record, I conclude that the civil penalty of \$73,706.25 that Department staff requested, and which the ALJ recommended, is appropriate and authorized.

In addition, the ALJ recommends that I direct Department staff to follow up on an unclosed oil spill report relating to the tank at the site "so that in the event that the discharge is ongoing, the State can take appropriate action" (see Hearing Report, at 3). I have reviewed NYSDEC Spill Report No. 0312046 for the facility (see Exhibit A to Department staff's complaint) (spill report). The spill report was generated because the 5,000-gallon tank failed a tightness test. No spill of product, however, was recorded. As the spill report documents, Department staff has been undertaking efforts to address PBS compliance at this facility, and no further direction is required at this time.

The ALJ also recommended that, with respect to remedial relief, the order contain a schedule of compliance to address the specific violations set forth in the complaint. I concur with that recommendation. By this order, I am directing respondent to correct the cited violations within thirty (30)

days of service of this order upon it. I note that the requirement that respondent re-register the facility will address the first and second causes of action in Department staff's complaint. From the record, some apparent discrepancies exist in the PBS registration that was filed by the prior owner of the site regarding the type of fuel in the tank, the tank's gallonage, and the tank's location (whether it is aboveground or underground). Respondent, on filing its PBS registration, is to provide all necessary corrected and updated information.

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 is granted.

II. Respondent Creekhill Realty, LLC, 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 is adjudged to have violated:

- A. ECL 17-1009 and 6 NYCRR 612.2(a), for its failure to renew the facility's PBS registration when that registration expired in 2009;
- B. 6 NYCRR 612.2(b), for its failure to re-register the facility when it acquired the facility in 2006;
- C. 6 NYCRR 612.2(e), for its failure to display the facility's PBS registration certificate on the facility premises;
- D. 6 NYCRR 613.4(a)(2), for its failure to perform leak detection on the 5,000-gallon tank at the facility; and
- E. 6 NYCRR 613.5(a), for its failure to test the facility tank and piping system for tightness.

IV. Respondent Creekhill Realty, LLC, is hereby assessed a civil penalty in the amount of seventy-three thousand, seven hundred six and 25/100 dollars (\$73,706.25). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent.

Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

John K. Urda, Esq.
Assistant Regional Attorney
New York State Department of
Environmental Conservation,
Region 2
47-40 21st Street
Long Island City, New York 11101

V. Within thirty (30) days after service of this order upon respondent, respondent shall:

- 1) submit a PBS registration form to Department staff to renew the facility's registration. In that registration renewal, respondent is to provide any and all corrected and updated tank information;
- 2) display the facility's PBS registration certificate on the facility premises;
- 3) perform leak detection on the tank at the facility, and submit written documentation to Department staff on the leak detection procedures that respondent implemented and a report on the results of the leak detection that respondent conducted; and
- 4) tightness test the 5,000-gallon tank and the piping system at the facility, and submit the resultant test report to Department staff.

VI. All communications from respondent to the Department concerning this order shall be made to John Urda, Esq., at the address set forth in paragraph IV of this order.

VII. The provisions, terms and conditions of this order shall bind respondent Creekhill Realty, LLC, and its 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: June 12, 2011
Albany, New York

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

DEFAULT
SUMMARY REPORT

DEC Case No.
R2-20100428-132

- by -

CREEKHILL REALTY, LLC,

Respondent.

Proceedings

On April 8, 2011, the Region 2 staff of the New York State Department of Environmental Conservation (DEC or Department) served a second notice of hearing and complaint upon the respondent Creekhill Realty, LLC (Creekhill) by certified mail return receipt requested.¹ *See*, Affirmation (Aff.) of John K. Urda, Assistant Regional Attorney, ¶ 7 and Exhibit (Ex.) C(2) in support of staff's motion for default judgment and order.² The notice of hearing is dated April 8, 2011 and the complaint is dated September 27, 2010. Mr. Urda states that Creekhill failed to appear at the pre-hearing conference scheduled for May 2, 2011 and the time to answer the complaint expired on April 29, 2011, without any pleading from the respondent. *See*, Urda Aff., ¶ 9.

According to the complaint (annexed as Ex. B to Urda's affirmation), the respondent has been owner of a residential building and petroleum bulk storage (PBS) facility located at 1070 St. Nicholas Avenue, New York, New York since 2006. Ex. B to Urda Aff., Complaint, ¶¶ 3-4. The PBS storage facility is identified in Department records as PBS number 2-306487 and consists of a 5,000 gallon storage tank installed in 1950. Exs. A (2), B(2), and C to Complaint. The complaint sets forth five causes of action: 1) respondent failed to renew facility registration in violation of ECL § 17-1009 and § 612.2(a) of Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR); 2) respondent failed to transfer ownership of the facility registration in violation of 6 NYCRR § 612.2(b); 3) respondent failed to display the facility's PBS registration certificate on the premises in violation of 6 NYCRR § 612.2(e); 4) respondent failed to perform leak detection in violation of 6 NYCRR § 613.4(a)(2); and 5) respondent failed to test the facility tank and piping system for tightness in violation of 6 NYCRR § 613.5(a). The staff is seeking a penalty of \$73,706.25, which it has calculated is .0005% of the statutory maximum penalty allowed by law. Urda Aff., ¶ 15.

¹ The staff had served a notice of hearing and complaint upon the respondent on September 27, 2010 and no answer was filed by the respondent. However, I denied staff's motion for a default judgment without prejudice based upon certain errors in the notice of hearing. *See*, ruling on motion for default judgment dated April 6, 2011.

² The staff's papers have attached to them multiple exhibits with the same exhibit letter. Where cited herein, I have identified the second exhibit letter with the number 2 in parentheses.

In paragraph 5 of the complaint, the staff explains that on January 27, 2004, a petroleum storage tank tester called the Department's spill hotline to report a tightness test failure at the site and the Department opened NYSDEC spill number 0312046 for that site. Ex. A(2). According to staff's complaint, the spill remains open and unaddressed. Ex. B, Complaint, ¶ 5. Despite this claim, the staff does not address the spill in any of its causes of action and does not request any injunctive relief in its pleadings related to the spill.

On May 23, 2011, Chief Administrative Law Judge James T. McClymonds provided the staff's May 9th motion papers to me. As of the date of this ruling, the Office of Hearings and Mediation Services (OHMS) has not received any response to staff's motion.

DISCUSSION

According to the Department's enforcement regulations, a respondent's failure either to file a timely answer or to appear at a prehearing conference constitutes a default and a waiver of the respondent's right to a hearing. 6 NYCRR § 622.15(a). Under these circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR § 622.15(b), staff's motion must contain:

1. proof of service upon the respondent of the notice of hearing and complaint or other document which commenced the proceedings;
2. proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and
3. a proposed order.

The staff has provided the affidavit of service signed by Sun Chih-Yao in which Ms. Chih-Yao avers that she mailed the notice of hearing and complaint to Creekhill on April 8, 2011 by certified mail. Ex. C (2), annexed to Urda Aff. In addition, staff includes the confirmation from the U.S. Postal Service which indicates that the papers were delivered to the respondent on April 9, 2011 and a copy of the certified mail return receipt that further confirms delivery to the respondent. *Id.*

Mr. Urda affirms that the respondent has failed to file an answer or to appear at the scheduled pre-hearing conference. Urda Aff., ¶ 9. And, the staff has included a proposed order with its motion papers. Ex. D. The proposed order would assess a total civil penalty of \$73,706.25 and would require the respondent to comply with "all applicable regulations."

When a respondent defaults, he or she waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, however, still has the obligation to prove damages. *See, Matter of Alvin Hunt d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, pp. 3-4. Any person who violates any provision or fails to perform any duty imposed by Titles 1-11 and Title 19 of Article 17 of the ECL or any rule, regulation, order or determination promulgated

thereunder, shall be liable for a civil penalty not to exceed thirty-seven thousand five hundred dollars (\$37,500) per day for each violation, and in addition, such person may be enjoined from continuing such violation. ECL § 71-1929(1). Department staff has proposed a total civil penalty that is substantially less than the potential maximum. Particularly given the environmental harm that may result from the violations (*e.g.*, failure to tightness test) and may have already resulted, a significant penalty is warranted. Moreover, the respondent's repeated failures to respond to the Department staff's efforts to get compliance, its failure to respond to the April 2010 notice of violation, its failure to respond to the proposed July 2010 consent order, its failure to attend several scheduled conferences, and its failure to answer the complaint, warrant a substantial penalty as requested by staff.

I recommend, however, that the Commissioner direct the staff to follow up with respect to the unclosed oil spill report of January 2004 so that in the event that the discharge is ongoing, the State can take appropriate action to prevent further environmental damage even without the respondent's cooperation. *See*, Ex. A (2). In addition, the Commissioner's Order should contain a detailed schedule of compliance that addresses the specific violations addressed in the complaint and in Paragraph III of staff's proposed order.

CONCLUSION

1. Creekhill has defaulted, and therefore, has waived its right to a hearing with respect to its liability for the violations alleged in the complaint.
2. Department staff has provided a justification for the requested penalty and other relief.

RECOMMENDATION

The proposed order, submitted by staff, should be modified as proposed above, signed by the Commissioner and served on the respondent.

/s/

May 24, 2011
Albany, New York

Helene G. Goldberger
Administrative Law Judge