

**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 Part 612 of Title
6 of the Official Compilation of Codes,
Rules and Regulations of the State of
New York,

ORDER
VISTA No.
R6-20081208-108

-by-

MARIA BAGAN,

Respondent.

This administrative enforcement proceeding concerns the alleged failure of respondent Maria Bagan to re-register a petroleum bulk storage ("PBS") facility at 2160 Broad Street, Utica, New York ("site") at the time that she took title to the site.

Three underground petroleum bulk storage tanks are at the site, with a combined capacity of 3,500 gallons. The site had been registered as a PBS facility by a previous owner. Staff of the New York State Department of Environmental Conservation ("Department") commenced this proceeding by serving a motion for order without hearing in lieu of complaint on respondent's counsel. Respondent's counsel filed an affidavit in opposition to the motion.¹

Department staff, in its motion, sets forth a single cause of action. Staff alleges that respondent failed to re-register the PBS facility within thirty days of her acquisition of the site on January 30, 1999, thereby violating 6 NYCRR 612.2(b).

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

¹ It is unclear on this record whether the motion was served on respondent, but no defense was raised as to the lack of personal jurisdiction.

I concur with the ALJ's determination that Department staff is entitled to a finding of liability on the cause of action in the motion. The staff-requested civil penalty of five thousand dollars (\$5,000) is authorized and appropriate.

In addition to the civil penalty, Department staff requests that respondent be directed to re-register her PBS facility and pay the registration fees due and owing for the period of her ownership of the site. The registration fee for an owner of a PBS facility that has a storage capacity of more than 2,000 gallons but less than 5,000 gallons, as is the case here, is three hundred dollars (\$300) for each registration period (see ECL 17-1009). Department staff calculated that the registration fees due and owing amounted to nine hundred dollars (\$900) (see Memorandum, "Change in Procedures for Implementation of Higher Fees for Petroleum Bulk Storage [PBS] Regulations," dated January 12, 2005, at 1-2). Department staff's request that respondent be directed to pay past and current registration fees and register her facility is authorized and appropriate.

Department staff also requests that the order include language directing the permanent closure of the facility in accordance with 6 NYCRR 613.9(b) and section 280.72 of title 40 of the Code of Federal Regulations ("CFR")² within 60 days of service of the Commissioner's order. Respondent, however, submitted the affidavit of Vladimir A. Suprunchik, sworn to on June 6, 2011 (Suprunchik Affidavit). Mr. Suprunchik states that he operates a "licensed automobile retail dealer[ship]" at 2160 Broad Street, Utica, with respondent Bagan (Suprunchik Affidavit, ¶ 1), that respondent is willing to register the tanks, and that the tanks are not out of service (see id., ¶¶ 3 and 4).

If respondent is interested in registering the tanks and not closing them, respondent must so advise Department staff in writing within thirty (30) days of the service of this order upon her. In addition, respondent must provide at that time appropriate documentation, acceptable to Department staff, demonstrating that any tank not to be closed is in full compliance with the applicable laws and regulations. Otherwise, respondent must permanently close the facility in accordance with 6 NYCRR 613.9(b) and 40 CFR 280.72 within 60 days of service of the Commissioner's order upon her.

² Section 280.72 of 40 CFR establishes requirements for assessing a site at closure.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for an order without hearing against respondent Maria Bagan is granted.
- II. Respondent Maria Bagan is adjudged to have violated 6 NYCRR 612.2(b), by failing to re-register the petroleum bulk storage facility at 2160 Broad Street, Utica, New York, within thirty days of her taking title to the site on January 30, 1999.
- III. Respondent Maria Bagan is assessed a civil penalty in the amount of five thousand dollars (\$5,000) which is due and payable within thirty (30) 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

- IV. Within thirty (30) days of service of this order upon respondent, respondent shall register her petroleum bulk storage facility with the Department pursuant to 6 NYCRR 612.2(b), and submit a total payment of nine hundred dollars (\$900) for past and current registration fees.
- V. Respondent shall, either:
 - A. within sixty (60) days of service of this order upon her, permanently close the petroleum bulk storage tanks at the site in accordance with 6 NYCRR 613.9(b) and 40 CFR 280.72. Respondent shall notify the Department staff within thirty (30) days prior to permanent closure of the tanks (see 6 NYCRR 613.9[c]). Immediately following closure of the tanks, respondent shall submit a written report to Department staff which documents the closure activities that were undertaken; or

B. within thirty (30) days of service of this order upon her, advise Department staff in writing of any tank or tanks that she does not wish to close. At the same time, respondent must provide documentation, to the satisfaction of Department staff, demonstrating that any tank or tanks not to be closed fully comply with applicable petroleum bulk storage law and regulations. Respondent must permanently close all tanks that do not fully comply with the applicable petroleum bulk storage law and regulations.

VI. 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 III of this order.

VII. The provisions, terms, and conditions of this order shall bind respondent Maria Bagan, and her 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: August 24, 2011
Albany, New York

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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 Part 612 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York,

Summary Report

-by-

VISTA No.
R6-20081208-108

MARIA BAGAN,

Respondent.

Staff of the Department of Environmental Conservation ("DEC Staff") filed a motion for order without hearing in lieu of complaint against Maria Bagan ("respondent") dated January 4, 2011. DEC Staff's motion alleges the respondent is responsible for a single violation involving a petroleum bulk storage (PBS) facility she owns located at 2160 Broad Street, in the City of Utica, New York ("site"). The motion alleges that when the respondent took title to the site on January 30, 1999, it contained a PBS facility (#6-600083) consisting of three underground petroleum storage tanks with a combined capacity of 3,500 gallons. According to the motion, this facility is not in use and the tanks have not been removed. DEC Staff alleges the respondent failed to re-register the PBS facility within thirty days of taking title to it on January 30, 1999, in violation of 6 NYCRR 612.2(b).

It is unclear whether the motion was ever served on the respondent, but it was sent to her attorney, David G. Goldbas, Esq., with a cover letter dated May 13, 2011. DEC Staff's motion papers consist of the following documents: (1) a notice of motion; (2) a motion for order without hearing; (3) a brief authored by DEC Staff counsel Nels G. Magnuson, Esq.; and (4) an affidavit of DEC Staff member Ronald F. Novak. Attached to Mr. Novak's affidavit are: (1) a copy of the deed for the site; (2) a copy of a PBS application by the previous owner of the site

dated October 3, 1991; and (3) a copy of the PBS registration certificate issued to the prior owner of the facility.

The respondent's attorney opposed DEC Staff's motion with papers dated June 8, 2011. These papers consisted of: (1) a cover letter; (2) the affidavit of Vladimir A. Suprunchik; and (3) an affidavit of service.

This matter was assigned to me on June 8, 2011.

By email dated June 16, 2011, DEC Staff counsel Magnuson requested the matter be held in abeyance, pending settlement discussions. By email dated August 8, 2011, DEC Staff counsel Magnuson informed me that he had not heard back from respondent's counsel regarding settlement and requested a decision in this matter. Respondent's attorney does not raise any issues regarding the service of the motion on the respondent or personal jurisdiction in the matter.

FINDINGS OF FACT

1. Maria Bagan owns a petroleum bulk storage facility (#6-00083) located at 2160 Broad Street, Utica, New York.
2. Maria Bagan 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 on or about March 1, 1999.

DISCUSSION

DEC Staff's motion for order without hearing, which is the administrative equivalent of a motion for summary judgment, alleges that Maria Bagan took title to 2160 Broad Street, Utica, NY on January 30, 1999. At the time of the purchase the site contained three underground petroleum storage tanks with a combined storage capacity of 3,500 gallons. The facility had previously been registered by the prior owner as PBS facility #6-600083. That registration expired on November 5, 1996. DEC Staff alleges that respondent failed to re-register the facility within 30 days of taking title to the site, in violation of 6 NYCRR 612.2(b). To prove the alleged violation, DEC Staff includes with its papers the affidavit of DEC Staff member Ronald F. Novak. Mr. Novak attaches to his affidavit a copy of the deed for the site, proving respondent's ownership thereof. He also includes the PBS registration application from the site's previous owner as well as the registration certificate

issued to him. Mr. Novak states that on December 6, 2010 he visited the site and observed vent pipes for three underground storage tanks at the site and noted that the PBS facility was not in use. He concluded his affidavit by stating that he reviewed DEC's PBS files and did not find an application seeking to re-register the facility submitted by respondent or by anyone else on her behalf. Based on this evidence, DEC Staff has made a prima facie case establishing respondent's liability for the alleged violation.

Respondent's attorney submits the affidavit of Vladimir A. Suprunchik in opposition to DEC Staff's motion. Mr. Suprunchik states that he and respondent operate a business called "Upstate Auto" at the site and have done so continuously from 2001 through the present. He states that respondent is willing to register any tanks at the site. He argues that there is no proof that the tanks are out-of-service, but does not state that they are in-service. He concludes that no finding of liability is warranted because there is no significant threat to the environment attributable to conditions at the site. Mr. Suprunchik does not raise any material issue of fact in his affidavit that warrants denial of DEC Staff's motion. He does not deny that: (1) respondent owns the site; (2) the tanks exist on the site; or (3) respondent failed to timely register the facility at the site. Based on the above, I recommend that the Commissioner issue an order finding respondent liable for the violation alleged.

With respect to civil penalty, Mr. Magnuson's brief states that the requested total civil penalty of \$5,000 is within the range authorized by ECL 71-1929, which authorizes a penalty of up to \$37,500 per day 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 DEC's Civil Penalty Policy (see DEE-1, dated June 20, 1990) and the Department's enforcement guidance memorandum entitled "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy," dated May 21, 2003 (PBS Enforcement Policy). He cites as justification for the penalty respondent's failure to register the facility and the need to deter future violations by this respondent and others. The requested penalty amount is not addressed in respondent's papers other than to argue that no significant threat is posed by the unregistered facility. Based on this, it is reasonable for the Commissioner to conclude that DEC Staff's requested payable penalty of \$5,000 is justified in this case.

In addition to the requested civil penalty, DEC Staff seeks the inclusion of language in the Commissioner's order that would require respondent to: (1) register the PBS facility and pay registration fees for the past three 5-year registration periods¹ 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. Respondent's papers include a statement that the respondent is willing to register the facility and that there are no grounds to require closure of the facility, however, no proof is provided that the tanks are in service. Based on the papers in the record, it is reasonable for the Commissioner to include DEC Staff's requests in his order.

CONCLUSIONS

1. Respondent Maria Bagan violated 6 NYCRR 612.2(b) by failing to re-register PBS facility (#6-600083) by March 1, 2000.
2. Environmental Conservation Law section 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 per day.

¹ For this facility, registration fees were due on March 1, 1999, March 1, 2004, and March 1, 2009, which respondent did not pay. The registration fee for an owner of a PBS facility that has a storage capacity of more than 2,000 gallons and less than 5,000 gallons, as is the case here, is three hundred dollars (\$300) 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 one hundred and fifty dollars (\$150), rather than three hundred dollars (\$300), 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).

RECOMMENDATION

I recommend that the Commissioner issue an order holding respondent Maria Bagan liable for the violation alleged in the motion and imposing a civil penalty of \$5,000 upon the respondent. 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
August 16, 2011

P. Nicholas Garlick
Administrative Law Judge