

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

DEC File No.
R6-20110324-09
PBS No. 6-600856

-by-

HOLT BROS., INC.,

Respondent.

This administrative enforcement proceeding concerns the alleged failure of respondent Holt Bros., Inc., to comply with the requirements of the New York State petroleum bulk storage (PBS) regulations at its PBS facility (PBS no. 6-600856) located at 94 West Main Street, Mohawk, New York. The PBS facility consists of five stationary petroleum storage tanks with a total storage capacity of two thousand gallons.

In accordance with 6 NYCRR 622.3(a)(3), staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding against respondent by service of a notice of hearing and complaint by certified mail, return receipt requested. Respondent received Department staff's papers on July 1, 2011. Department staff in its complaint alleged that respondent failed to re-register the facility's PBS registration in violation of 6 NYCRR 612.2(a)(2).

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. Respondent also failed to attend a pre-hearing conference scheduled for September 7, 2011.

By papers dated September 12, 2011, Department staff moved for a default judgment and order. A copy of staff's motion papers were mailed to respondent.

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 with respect to the charge that respondent failed to renew the PBS registration for its facility.

With respect to penalty, Department staff requested a civil penalty of two thousand five hundred dollars (\$2,500), two thousand dollars (\$2,000) of which would be payable. Five hundred dollars (\$500) of the civil penalty would be suspended upon the condition that respondent submit a renewal application for the facility and pay the applicable registration fee. 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 is consistent with DEC's Civil Penalty Policy (see DEE-1, dated June 20, 1990) and the Department's enforcement guidance entitled "DEE-22, Petroleum Bulk Storage Inspection Enforcement Policy," dated May 21, 2003. Department staff cites, as justification for the penalty, respondent's failure to re-register the facility despite being advised of the requirement by Department staff.

Based on this record, a civil penalty of \$2,500 is authorized and appropriate. The remedial action that Department staff requested, that is, for respondent to submit an approvable PBS registration renewal application for the facility and to submit the filing fee for that application, is also authorized and appropriate. I concur with the ALJ's recommendation to suspend \$500 of the civil penalty, conditioned upon respondent:

- paying the non-suspended portion (\$2,000) of the penalty within twenty (20) days of the service of this order upon it;

- submitting to Department staff an approvable application to renew the registration of the PBS facility within twenty (20) days of the service of this order upon it;

- submitting the applicable PBS facility registration fee, together with the registration renewal application; and

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

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 default judgment is granted.
- II. Respondent Holt Bros., Inc. is adjudged to be in default and to have waived the right to a hearing in this proceeding. Accordingly, the alleged registration violation, as set forth in Department staff's complaint dated June 30, 2011, is deemed to have been admitted by respondent.
- III. Respondent Holt Bros., Inc. is adjudged to have violated 6 NYCRR 612.2(a)(2), by failing to renew the registration for its PBS facility (PBS no. 6-600856).
- IV. Respondent Holt Bros., Inc. is hereby assessed a civil penalty in the amount of two thousand five hundred dollars (\$2,500), of which five hundred dollars (\$500) is suspended on the condition that respondent complies with the conditions and terms of this order.
- V. The non-suspended portion of the penalty (that is, two thousand dollars [\$2,000]) is due and payable within twenty (20) 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 made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:

Ronald J. Novak, P.E.
Regional Enforcement Coordinator
NYSDEC Region 6
317 Washington Street
Watertown, New York 13601.

If respondent fails to comply with any of the terms and conditions of this order, including but not limited to the timely payment of the non-suspended portion of the civil penalty, the submission of an approvable PBS registration renewal application, or the submission of the registration filing fee, the suspended portion of the penalty (that is, five hundred dollars [\$500]) 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.

- VI. Within twenty (20) days of service of this order upon respondent, respondent shall submit: (a) an approvable PBS registration renewal application for its PBS facility to Department staff; and (b) a one hundred dollar (\$100) registration fee.
- VII. All communications from respondent to Department staff concerning this order shall be directed to Ronald J. Novak, P.E., at the address set forth in paragraph V of this order.
- VIII. The provisions, terms and conditions of this order shall bind respondent Holt Bros., Inc., its agents, successors, and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: Albany, New York
October 13, 2011

**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,

SUMMARY REPORT

DEC File No.
R6-20110324-09
PBS No. 6-600856

-by-

HOLT BROS., INC.,

Respondent.

Staff of the Department of Environmental Conservation (DEC Staff) brought this administrative enforcement action against Holt Bros., Inc. (respondent) for failing to renew its registration for a Petroleum Bulk Storage (PBS) facility (#6-600856) it owns at 94 West Main Street, Mohawk, New York in violation of 6 NYCRR 612.2(a)(2). DEC Staff requests an order from the Commissioner finding the respondent liable for failing to reregister the facility, imposing a twenty-five hundred dollar (\$2,500) civil penalty, and requiring the respondent to reregister the facility.

A notice of hearing and complaint were served upon the respondent, by certified mail, return receipt requested, on July 1, 2011. The respondent failed to file an answer to the complaint or to attend a prehearing conference which was scheduled for September 7, 2011. By papers dated September 12, 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.

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 Randall C. Young, Esq.; and (4) a cover letter. Attached to Mr. Young's affirmation are: (1) an affidavit of service of the

notice of hearing and complaint; (2) a United States Postal Service's Track & Confirm receipt; (3) a copy of the notice of hearing and complaint; and (4) a proposed order in this matter.

DISCUSSION

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."

In Matter of Alvin Hunt d/b/a Our Cleaners, (Decision and Order of the Commissioner, July 25, 2006), the Commissioner set forth the process to be followed by an administrative law judge (ALJ) in reviewing a default motion. First, an examination of the proof of service of notice of hearing and complaint is required as well as the proof of the respondent's failure to appear or file a timely answer. Then an ALJ must consider whether the complaint states a claim upon which relief may be granted and if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported.

In this case, DEC Staff has met the requirements of 6 NYCRR 622.15 and the complaint sets forth a cause of action for which relief can be granted. Attached to the complaint is a copy of a PBS certificate for the facility which expired on June 22, 2010. The complaint alleges that no application to renew this registration has been submitted nor has DEC Staff received notice that the facility is permanently closed or transferred to another owner. In his affirmation, Mr. Young states that no answer has been received, though it was due no later than July 21, 2011, and that the respondent failed to attend a pre-hearing conference scheduled for September 7, 2011. Based on this information, DEC Staff is entitled to a default in this matter.

DEC Staff requests language in the Commissioner's order imposing a civil penalty of twenty-five hundred dollars (\$2,500) and requiring the respondent to submit an approvable PBS registration renewal application and appropriate fee. DEC Staff requests that, of the twenty-five hundred dollar (\$2,500) civil penalty amount, two thousand dollars (\$2,000) be made payable

and five hundred dollars (\$500) be suspended upon the condition that Holt Bros., Inc. submit a renewal application within twenty days and pay the \$100 fee. In support of DEC Staff's recommended penalty amount, Mr. Young states that the requested civil penalty 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. He 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 reregister the facility despite being advised of the requirement by DEC Staff. Based on this, it is reasonable for the Commissioner to conclude that DEC Staff's requested civil penalty 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 reregister the PBS facility and pay the registration fee of one hundred dollars (\$100). Based on the papers in the record, it is reasonable for the Commissioner to include DEC Staff's requests in his order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Holt Bros., Inc. is an active domestic corporation with a principal executive office at 94 West Main Street, Mohawk, New York. At this address, Holt Bros., Inc. operates a retail automobile dealership and owns a petroleum bulk storage facility (#6-600856) consisting of five stationary petroleum storage tanks with a total storage capacity of two thousand gallons.
2. Holt Bros., Inc. registered the PBS facility in 2005 and this registration expired on June 22, 2010. Holt Bros., Inc. has not submitted an application to renew its registration, nor has it submitted any notice that the facility has been permanently closed or that the ownership of the facility has been transferred. Holt Bros., Inc. violated 6 NYCRR 612.2(a)(2) by failing to reregister its PBS facility.

3. Holt Bros., Inc. was served with a copy of the notice of hearing and complaint on July 1, 2011 by certified mail. No answer was received, though it was due on or before July 21, 2011. The notice stated that a prehearing conference would occur at 11:00 a.m. on September 7, 2011. Holt Bros., Inc. did not attend this conference. Holt Bros., Inc. is in default and has waived its right to a hearing.
4. 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 each violation.

RECOMMENDATION

The Commissioner should issue an order finding the respondent Holt Bros., Inc. liable for violating 6 NYCRR 612.2(a)(2) and imposing a civil penalty of twenty-five hundred dollars (\$2,500), with two thousand dollars (\$2,000) payable and five hundred dollars (\$500) suspended upon the condition that Holt Bros., Inc., submit an approvable PBS registration renewal application and appropriate fee.

/s/

P. Nicholas Garlick
Administrative Law Judge

October 7, 2011
Albany, NY