

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

**NYSDEC File No.
R2-20080129-50**

- by -

VIGOR REALTY, LLC,

Respondent.

Respondent Vigor Realty, LLC purchased a property interest in 537 West 158th Street, New York, New York (the "site") on or about August 29, 2000. The site contains a 3,000-gallon aboveground storage tank that stores #2 fuel oil (the "tank") and which constitutes a "facility" under the State's law governing petroleum bulk storage (see ECL 17-1003[1]).

Staff of the New York State Department of Environmental Conservation (the "Department") commenced this administrative enforcement proceeding against respondent by service of a notice of hearing and complaint dated December 29, 2008 (the "notice of hearing and complaint"), for failure to comply with State registration, fee and color-coding requirements that apply to petroleum bulk storage facilities. Respondent received service of the notice of hearing and complaint by certified mail on December 30, 2008. Service of process was accomplished in accordance with 6 NYCRR 622.3.

Department staff, in its complaint, alleged that respondent:

-- failed to register the tank at the time of its purchase of the property, and failed to renew the tank's registration five years thereafter, in violation of ECL 17-1009 and 6 NYCRR 612.2(a);

-- failed to pay applicable registration and renewal fees, in violation of ECL 17-1009 and 6 NYCRR 612.3(a); and

-- failed to mark the fill port on the tank, in violation of 6 NYCRR 613.3(b)(1).

Pursuant to 6 NYCRR 622.4(a), a respondent is required to file a response to a complaint within twenty days after service. Respondent Vigor Realty, LLC failed to answer the complaint, and failed to attend the pre-hearing conference scheduled in the notice of hearing for February 2, 2009.

Department staff moved for a default judgment and order by motion dated June 18, 2009. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

Based on the record, I conclude that the proposed civil penalty is authorized and appropriate.

The record is unclear whether any registration or renewal fees for the facility remain outstanding. Department staff shall advise respondent by letter within two weeks of the issuance of this order whether any fees are owed. Respondent is to pay any outstanding fees immediately upon receipt of Department's letter.

Pursuant to 6 NYCRR 622.11(a)(5), I hereby take official notice of a petroleum bulk storage application dated September 24, 2009 that was submitted to the Department and is maintained as part of the Department's records on petroleum bulk storage facilities. That application states that the ownership of the facility has changed. Accordingly, Department staff is directed to contact the new owner of the facility to determine whether respondent or the new owner has properly color-coded the fill port for the tank in accordance with 6 NYCRR 613.3(b).

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 Vigor 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 Vigor Realty, LLC is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(a), 612.3(a), and 613.3(b)(1).

IV. Respondent Vigor Realty, LLC is assessed a civil penalty in the amount of seventeen thousand five hundred dollars (\$17,500), which is due and payable no later than thirty (30) days after the service of this order upon respondent. Payment shall be made in the form of a cashier's, certified or bank check payable to the order of the "Environmental Protection and Spill Compensation Fund" and mailed or hand-delivered to the Department at the following address: 47-40 21st Street, Long Island City, New York, 11101, Attention: John K. Urda, Assistant Regional Attorney.

V. Department staff shall advise respondent by letter within two weeks of the issuance of this order whether respondent owes any petroleum bulk storage facility registration and renewal fees, and where any payment for those fees is to be submitted. Respondent is to submit payment for any outstanding fees immediately upon receipt of Department's letter.

VI. All communications from respondent to Department staff concerning this order shall be made to John K. Urda, Assistant Regional Attorney, NYSDEC Region 2, 47-40 21st Street, Long Island City, New York, 11101.

VII. The provisions, terms and conditions of this order shall bind respondent Vigor Realty, LLC and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis, Commissioner

Dated: Albany, New York
December 7, 2009

In the Matter of Alleged Violations
of article 17 of the Environmental
Conservation Law and parts 612 and 613
of title 6 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York, by

DEFAULT
SUMMARY
REPORT

VIGOR REALTY, LLC,

DEC File No.
R2-20080129-50

Respondent.

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement proceeding by serving a notice of hearing and complaint upon Vigor Realty, LLC, 939 Eighth Avenue #301, New York, New York 10019 ("Respondent") on December 29, 2008. The complaint alleges that the Respondent violated Environmental Conservation Law ("ECL") article 17 and parts 612 and 613 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by failing to register a petroleum bulk storage facility owned by the Respondent, failing to pay registration fees and failing to permanently mark a fill port on the facility's tank.

On June 18, 2009, DEC Staff moved for a default judgment against the Respondent on the basis that the Respondent had failed to file an answer or otherwise respond to DEC Staff's complaint, and had failed to attend the pre-hearing conference scheduled in the notice of hearing. The notice of motion is dated June 18, 2009 and was apparently mailed to the Respondent on that date. The motion was also transmitted to the Respondent on July 7, 2009 by delivery to the New York State Department of State. The notice of motion, the motion and supporting papers were transmitted by DEC Staff to the DEC Office of Hearings and Mediation Services on September 15, 2009.

The motion was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois (the undersigned), as stated in the letter that Chief ALJ James T. McClymonds sent on September 18, 2009 to DEC Staff and to the Respondent.

DEC Staff is represented in this matter by John K. Urda, Esq., Assistant Regional Attorney, DEC Region 2, Long Island

City, New York. As of the date of this summary report, the DEC Office of Hearings and Mediation Services has not received any correspondence or contacts 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 (Decision and Order dated 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 motion papers consist of the following documents:

Notice of motion for default judgment and order, dated June 18, 2009;

Motion for default judgment and order, dated June 18, 2009;

Affirmation of John Urda, Esq., dated June 18, 2009, with three attached exhibits:

Exhibit A, a copy of the notice of hearing and complaint in this matter, both dated December 29, 2008

Exhibit B, an affidavit of service of Louise Munster, sworn to on December 29, 2008, concerning service of the notice of hearing and complaint. Attached to the affidavit are a copy of the signed return receipt for the mailing and a copy of a tracking confirmation from the United States Postal Service for the mailing.

Exhibit C, a proposed order;

- Affidavit of service of Louise Munster, sworn to on June 30, 2009, for the June 30, 2009 mailing of an additional copy of the notice of hearing and complaint to the Respondent; and
- Affidavit of service of Brooke Turallo, sworn to on August 10, 2009, concerning service of the motion for default judgment and order upon the Respondent by hand delivery on July 7, 2009 to the New York State Department of State.

FINDINGS OF FACT

1. Vigor Realty, LLC (the "Respondent") is a domestic limited liability company authorized to do business in the State of New York. The Respondent owns property at 537 West 158th Street, New York, New York (the "Site"), which is also identified as New York County Block 2117, Lot 57.
2. The Respondent owns a petroleum bulk storage ("PBS") facility located at the Site, that consists of a 3,000-gallon aboveground storage tank installed in September 1970 and storing #2 fuel oil. The PBS facility is identified in DEC records as PBS facility number 2-610366.

Default

3. On December 29, 2008, DEC Staff mailed the notice of hearing and complaint in this matter to the Respondent at 939 Eighth Avenue, #301, New York, New York 10019,¹ by certified mail, return receipt requested. The mail receipt, signed by Sonia Gutierrez, was returned to DEC Staff. The United States Postal Service's on-line tracking states that this mailing was delivered on December 30, 2008.
4. The twenty-day time period within which the Respondent was required to serve an answer to the complaint expired on January 20, 2009, and the Respondent failed to serve an answer within that time. The Respondent did not request an extension of time for service of an answer.

¹ This address is the address listed for Vigor Realty, LLC by the New York State Department of State, Division of Corporations on its corporations and business entity database, as viewed on November 20, 2009.

5. The notice of hearing stated that a pre-hearing conference was scheduled for February 2, 2009. The Respondent failed to attend the conference.

Violations

6. The Respondent purchased the Site, and became the owner of PBS facility number 2-610366, on or about August 29, 2000. The Respondent failed to register the facility upon purchasing the Site. The Respondent submitted to the DEC a registration application marked "Initial/New Facility" on October 10, 2006.
7. With its October 10, 2006 registration application, the Respondent submitted a check in the amount of \$300 for the registration fee. This check was dated October 4, 2006 and bore a check number of 1048.
8. By letter dated October 23, 2006, DEC Staff informed the Respondent that a total of \$600 in current and unpaid back fees were due, based upon the Respondent's failure to register the facility when it acquired the Site in August 2000. This letter directed the Respondent to submit another check for the full \$600 and a renewal application to cover the second five-year period of the Respondent's ownership of the facility.
9. On November 14, 2006, check number 1048 was returned to the DEC marked "Insufficient Funds."
10. By letter dated November 15, 2006, DEC Staff directed the Respondent to submit a valid check plus an additional \$20 dishonored check fee within ten days.
11. On November 21, 2006, the Respondent submitted a renewal application dated November 16, 2006, plus a second check in the amount of \$300. This check was dated November 16, 2006 and bore check number 1035.
12. DEC Staff processed the renewal application, and renewed the facility's registration, on November 21, 2006.
13. On December 11, 2006, check number 1035 was returned to the DEC marked "Insufficient Funds, Do Not Redeposit." By letter dated January 8, 2007, DEC Staff returned check number 1035 to the Respondent and informed the Respondent of its outstanding obligation. DEC Staff made several

attempts to gain the Respondent's cooperation, but as of the date of the complaint (December 29, 2008) the Respondent had failed to submit the registration fee.

14. On January 4, 2008, DEC Staff inspected the facility and observed that the Respondent had failed to color code the fill port on the facility tank.
15. On September 3, 2008, DEC Staff attempted to resolve the matter by serving an order on consent on the Respondent, but the Respondent ignored the order on consent.

DISCUSSION

The notice of hearing and complaint were served upon the Respondent, by certified mail return receipt requested, but the Respondent did not submit a timely answer and failed to appear at the pre-hearing conference. Thus, the Respondent is in default and is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them.

DEC Staff served the motion for default judgment upon the Respondent by delivering it to the New York State Department of State. This service was not necessary in the present case, for reasons similar to those discussed in the ALJ's default summary report in Matter of U.S.A. Env'tl. Servs. Corp. (Order of the Commissioner, November 16, 2009, adopting Default Summary Report, at 4-5). Service of the motion did, however, provide an additional opportunity for the Respondent to attempt to resolve the matter or to contest DEC Staff's assertion that the notice of hearing and complaint were served, but the Respondent did not make use of this opportunity.

ECL 71-1929(1) provides that 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 of the ECL, or the regulations promulgated pursuant thereto, shall be liable for a civil penalty not to exceed \$37,500 per day for each violation. The violations in this matter are violations of ECL article 17, title 10 and regulations promulgated pursuant to that statute, and the penalty provision in ECL 71-1929 applies.

ECL 17-1009 and 6 NYCRR 612.2(a) require that owners of PBS facilities register the facilities with the DEC. The Respondent's tank, a 3,000-gallon aboveground storage tank

storing #2 fuel oil, is a "facility" pursuant to the definition in ECL 17-1003(1).

The Respondent failed to comply with the registration requirement from August 29, 2000 until October 10, 2006. ECL 17-1009(2) and 6 NYCRR 612.2 require that PBS registrations be renewed every five years or whenever title to a facility is transferred, whichever occurs first. The Respondent's facility was unregistered for a long enough time that the Respondent also failed to renew the registration five years after becoming the owner of the facility.

For the first cause of action, DEC Staff is seeking a civil penalty of \$10,000. This penalty is within the amount authorized by ECL 71-1929.

ECL 17-1009 and 6 NYCRR 612.3(a) require that a registration fee be submitted with each application for registration or renewal of a registration. The Respondent provided two checks to DEC with its registration and renewal applications, but each check was returned by the bank for insufficient funds. The Respondent violated the requirement for registration fees.

The complaint treats the two checks as two violations, one associated with the registration application that the Respondent submitted on October 10, 2006 and the other associated with the registration renewal application that the Respondent submitted on November 21, 2006. DEC Staff is seeking imposition of a total penalty of \$6,000 for the Respondent's failure to pay registration fees. Because this penalty is substantially below the maximum penalty authorized for one violation lasting one day, it is not necessary to determine whether to treat this as one or two violations.

Section 613.3(b)(1) of 6 NYCRR requires that PBS facility owners or operators must permanently mark all fill ports to identify the product inside the tank, using a color and symbol code as listed in section 613.3(b)(2). The Respondent failed to comply with this requirement. For this violation, DEC Staff proposes a civil penalty of \$1,500.

Mr. Urda's affirmation makes reference to the Department's Civil Penalty Policy (Commissioner Policy DEE-1), Bulk Storage and Spill Response Enforcement Policy (Commissioner Policy DEE-4) and PBS Inspection Enforcement Policy (DEC Program Policy DEE-22) in justifying the proposed penalty. It is undisputed

that the violations occurred over a long period of time, during which the Respondent avoided the expense of complying with the registration fee requirement. It is also undisputed that the Respondent demonstrated a continued lack of cooperation with the Department's requirements and ignored DEC Staff's efforts to bring the facility into compliance. Registration of PBS facilities is part of the regulatory framework designed to protect the public health, welfare and the lands and waters of the State from spills and leaks of petroleum.

The total penalty proposed by DEC Staff is \$17,500. This penalty is within the maximum penalty authorized by law, is consistent with the Civil Penalty Policy and enforcement policies related to petroleum bulk storage, is warranted by the circumstances of the case, and is in the general range of penalties imposed in other petroleum bulk storage cases.

The record in this matter suggests that the registration fees for the facility have not yet been paid and that the fill port has not yet been marked as required. In addition to imposing the penalties proposed by DEC Staff, I recommend that the Commissioner's order direct the Respondent to pay any outstanding PBS registration fees for this facility on or before a specified date and to mark the fill port on or before a specified date.

CONCLUSIONS OF LAW

1. By failing to file a timely answer, and failing to appear at the scheduled pre-hearing conference, the Respondent defaulted in this matter.
2. The Respondent violated ECL 17-1009 and 6 NYCRR 612.2(a) by failing to register its PBS facility with the DEC from August 29, 2000 to October 10, 2006.
3. The Respondent violated ECL 17-1009 and 6 NYCRR 612.3(a) by failing to pay registration fees in connection with its registration application and registration renewal application.
4. The Respondent violated 6 NYCRR 613.3(b)(1) by failing to permanently mark the fill port on its facility to identify the product inside the tank.

5. For violations of these provisions, ECL 71-1929(1) authorizes a civil penalty not to exceed \$37,500 per day for each violation.

Albany, New York
December 2, 2009

_____/s/_____
Susan J. DuBois
Administrative Law Judge