

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 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

DEC Case No.
PBS.2-467189.7.2016

-by-

**125 SCHENECTADY AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,**

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Conservation (Department or DEC) that respondent 125 Schenectady Avenue Housing Development Fund Corporation (respondent) violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility on or before February 12, 2014, the date on which its prior registration expired. Respondent's facility is located at 125 Schenectady Avenue, Brooklyn, New York and includes an aboveground storage tank with a capacity of 3,000 gallons.

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

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for June 28, 2016, and failed to appear for the adjudicatory hearing scheduled in the matter on July 28, 2016 (see Default Summary Report at 3 [Finding of Fact No. 7]).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Default Summary Report at 4-5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Staff's papers, submitted in support of its motion for default judgment, provide proof of facts sufficient to support staff's claim that respondent failed to renew the registration of its petroleum bulk storage facility on or before February 12, 2014, the date on which its prior registration expired.

The record demonstrates that respondent was required to renew its registration on or before the date when the registration expired -- that is, on February 12, 2014 (see ECL 17-1009[2]; Default Summary Report, at 2 [Finding of Fact No. 3]). At that time and continuing until October 11, 2015, respondent was also in violation of the registration requirement at former 6 NYCRR 612.2(a), although Department staff did not reference that regulatory provision in its papers. Department staff did reference the applicable facility registration requirement at 6 NYCRR 613-1.9(c), which became effective on October 11, 2015 and which replaced the previous registration provision in 6 NYCRR part 612. In future matters, Department staff should cite violations of both regulatory sections where, as here, the violations commenced prior to and continued after October 11, 2015.

Department staff initially sought a civil penalty of ten thousand dollars (\$10,000) (see Staff Complaint, Wherefore Clause, at II). In its motion papers, however, staff seeks a civil penalty of five thousand dollars (\$5,000) (see Default Summary Report at 4). ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation.

As noted, respondent has failed to renew the registration for the facility since February 12, 2014 when the registration expired (see Default Summary Report at 2-3 [Finding of Fact Nos. 3, 5]). Where, as here, an owner has not registered the facility for more than two years but less than five years from the expiration date, and no other violations or mitigating or aggravating factors exist, a civil penalty of seven thousand five hundred dollars (\$7,500) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). I agree with the ALJ that the appropriate civil penalty on the facts established here is seven thousand five hundred dollars (\$7,500) (see Default Summary Report at 4-5). No mitigating factors appear on this record that would support further reducing this penalty.

I also direct that respondent submit to the Department a petroleum bulk storage application for the facility within fifteen (15) days of service of this order upon it, together with all applicable registration fees.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent 125 Schenectady Avenue Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 125 Schenectady Avenue Housing Development Fund Corporation violated (a) ECL 17-1009 and (b) since October 11, 2015, 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 125 Schenectady Avenue, Brooklyn, New York.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 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”),

DEFAULT SUMMARY REPORT

DEC Case No.
PBS.2-467189.7.2016

-by-

**125 SCHENECTADY AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent 125 Schenectady Avenue Housing Development Fund Corporation (“respondent”) with a notice of hearing and complaint, dated May 24, 2016, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 613-1.9(c) for failing to renew the registration of its petroleum bulk storage facility located at 125 Schenectady Avenue, Brooklyn, New York on or before February 12, 2014, the date on which its prior registration expired. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL § 17-1009 and 6 NYCRR § 613-1.9(c); (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (3) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner’s order by remitting the applicable registration fee along with a complete registration application; and (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Inasmuch as respondent is an active domestic business corporation in the State of New York, service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State on May 24, 2016. See Staff Exhibit (“Staff Ex.”) C. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on May 24, 2016. See id. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for June 28, 2016, as directed in the notice of hearing and accompanying cover letter. See Staff Ex. B, ¶¶ 4-5.

As stated in the notice of hearing, on July 28, 2016, an adjudicatory hearing was convened by teleconference before the undersigned Administrative Law Judge (“ALJ”), who was located in the Department’s central offices, 625 Broadway, Albany, New York. Staff, located in the Department’s Region 2 offices, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City,

New York, was represented by Deborah Gorman, Esq. of the Remediation Bureau in the Department's Office of General Counsel. No one appeared on behalf of respondent.

Noting for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference, and failed to appear for the adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR § 622.15, and stated that staff would be submitting motion papers in support of the motion for a default judgment. I reserved on the oral default motion pending service and filing of the motion papers and any response thereto.

Applicable Regulatory Provision

613-1.9 Registration.¹

* * *

“(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 documents submitted with and in support of staff's motion for a default judgment:

1. Respondent 125 Schenectady Avenue Housing Development Fund Corporation (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 125 Schenectady Avenue, Brooklyn, New York (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 3,000 gallons and is located aboveground. See Staff Exs. D, E, F, and G.
2. Respondent is an active domestic business corporation in the State of New York. See Staff Ex. H.
3. On January 21, 2009, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-467189 to respondent. This registration expired on February 12, 2014. See Staff Ex. F.

¹ Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, “(a) *Existing facilities*. . . (2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred.” ECL § 17-1009(2) requires facility registrations to be “renewed every five years or whenever ownership of a facility is transferred, whichever occurs first.”

4. On May 11, 1989, the City of New York, by deed, transferred all right, title and interest in the facility to respondent 125 Schenectady Avenue Housing Development Fund Corporation, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 2392, Page 2134. See Staff Ex. D.
5. Deborah Gorman is an attorney in the Department's Office of General Counsel, and is familiar with the Department's procedures regarding issuance of PBS facility registration certificates. Ms. Gorman reviewed the results of a May 20, 2016 search of the Department's PBS registration database, which revealed, among other things, that (i) the capacity of the tank at respondent's facility exceeded 1,100 gallons; and (ii) as of the date of the database search, the PBS registration for PBS facility No. 2-467189 had expired and had not been renewed. See Staff Ex. A, Affirmation of Deborah Gorman, Esq. (undated), at ¶¶ 9-12.
6. As shown by Receipt for Service No. 201605270179 issued by the New York State Department of State, respondent was served personally, on May 24, 2016, pursuant to section 306 of the Business Corporation Law with a notice of hearing and complaint dated May 24, 2016, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 613-1.9(c), together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its petroleum bulk storage facility located at 125 Schenectady Avenue, Brooklyn, New York on or before February 12, 2014, the date that the prior registration expired. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on May 24, 2016. See Staff Exs. A, B, and C.
7. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for June 28, 2016, as directed in the notice of hearing and accompanying cover letter, and failed to appear for the adjudicatory hearing scheduled in the matter on July 28, 2016, as directed in the notice of hearing. See Staff Ex. B, Affirmation of Deborah Gorman, Esq. in Support of Motion for Default Judgment, dated July 28, 2016 "Gorman Aff. II"), at ¶¶ 4-6.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint. See 6 NYCRR § 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." 6 NYCRR § 622.15(a). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing." 6 NYCRR § 622.8(c); see also 6 NYCRR § 622.15(a) ("A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing").

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment.

Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR § 622.15(b)(1)-(3).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim." Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

In this case, Department staff's motion papers demonstrate that respondent failed to renew the registration of its petroleum bulk storage facility located at 125 Schenectady Avenue, Brooklyn, New York on or before February 12, 2014, the date that the prior registration expired, in violation of ECL § 17-1009. Respondent has also been in violation of 6 NYCRR § 613-1.9(c) from the effective date of part 613, October 11, 2015.

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for June 28, 2016, as directed in the cover letter served with the notice of hearing and complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on July 28, 2016, as directed in the notice of hearing. Department staff has submitted a proposed order with its motion papers. See Staff Ex. I. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to 6 NYCRR § 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers. See July 28, 2016 letter from Deborah Gorman, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent by first class mail.

Department staff's submissions in support of the motion for a default judgment provide proof of the facts sufficient to support staff's claim that respondent failed to renew the registration of its petroleum bulk storage facility located at 125 Schenectady Avenue, Brooklyn, New York on or before February 12, 2014, the date that the prior registration expired, in violation of ECL § 17-1009 and, from its October 11, 2015 effective date, 6 NYCRR § 613-1.9(c).

Department staff seeks to modify the civil penalty requested, and now requests a civil penalty in the amount of five thousand dollars (\$5,000), rather than ten thousand dollars (\$10,000) as set forth in the complaint. See Gorman Aff. II at ¶¶13-18; see also Motion for Default Judgment, at 1 and Wherefore Clause ¶ II; compare Complaint, Wherefore Clause ¶ II.

In proceedings concerning violations of PBS registration requirements in the New York City area, calculation of an appropriate penalty turns in part on the duration of the violations. See e.g. Matter of 540 Jackson Realty Corp., Order of the Commissioner, May 18, 2016, at 2; see also Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011 ("12 Martense Associates"), at 2. Department staff has generally requested a penalty of five

thousand dollars (\$5,000) for violations extending up to two years, seven thousand five hundred dollars (\$7,500) for violations extending from two to five years, and ten thousand dollars (\$10,000) for violations exceeding five years in duration. See 12 Martense Associates at 2.

The record in this matter reflects that, as the date of the service and filing of the notice of hearing and complaint in this matter, respondent's failure to renew its registration exceeded two years but was less than five years.² I agree with staff that a reduction from the ten thousand dollars (\$10,000) sought in the complaint is appropriate on the facts present here. Based upon prior precedent, however, I recommend that the Commissioner impose a civil penalty of seven thousand five hundred dollars (\$7,500) because respondent's failure to renew its registration, in violation of ECL §17-1009, has continued for more than two but less than five years. There is no prejudice to respondent in reducing the penalty requested in the complaint.

Recommendation

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

1. Granting Department staff's motion for default, holding respondent 125 Schenectady Avenue Housing Development Fund Corporation in default pursuant to the provisions of 6 NYCRR § 622.15;
2. Holding that respondent 125 Schenectady Avenue Housing Development Fund Corporation violated ECL § 17-1009 and, from October 11, 2015 forward, 6 NYCRR § 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 125 Schenectady Avenue, Brooklyn, New York on or before February 12, 2014, the date that the prior registration expired;
3. Directing respondent 125 Schenectady Avenue Housing Development Fund Corporation 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;
4. Directing respondent 125 Schenectady Avenue Housing Development Fund Corporation to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500) within fifteen (15) days of service of the Commissioner's order; and

² Respondent's PBS registration expired on February 12, 2014. See Finding of Fact No. 3. This proceeding was commenced by service of a notice of hearing and complaint on May 24, 2016, more than two years after respondent first failed to renew its registration. See Finding of Fact No. 6.

5. Directing such other and further relief as he may deem just and appropriate.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
August 12, 2016

APPENDIX A

Matter of 125 Schenectady Avenue Housing Development Fund Corporation

DEC Case No. PBS.2-467189.7.2016

Exhibits Submitted with Motion for Default Judgment

- A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, all dated May 24, 2016, and undated Affirmation of Deborah Gorman, Esq.
- B. Affirmation of Deborah Gorman, Esq. in Support of Motion for Default Judgment, dated July 28, 2016
- C. Affidavit of Service of Dale Thiel, sworn to July 27, 2016, attaching New York State Department of State Receipt for Service # 201605270179, dated May 24, 2016
- D. New York City Department of Finance ACRIS Title Search, dated July 26, 2016. Deed to respondent dated May 11, 1989.
- E. PBS Application form filed for PBS No. 2-467189, received January 16, 2009
- F. PBS Certificate No. 2-467189 issued January 21, 2009, expiration date February 12, 2014
- G. Facility Information Report, PBS No. 2-467189, printed July 26, 2016
- H. NYS DOS Corporate Entity Information, dated July 29, 2016
- I. Proposed Order