

**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

-by-

DEC Case No.
PBS.2-346071.7.2018

1534 SELWYN LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 1534 Selwyn LLC violated ECL 17-1009 and 6 NYCRR 613-1.9 by failing to register its petroleum bulk storage (PBS) facility within thirty (30) days of the date (April 18, 2016) it acquired the property. Respondent's facility is located at 1534 Selwyn Avenue, Bronx, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 5,000 gallons.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter and 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 11, 2018, and failed to appear for the adjudicatory hearing scheduled for July 11, 2018 (*see* Default Summary Report at 3 [Finding of Fact No. 7]). At the July 11, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment. Chief ALJ James T. McClymonds reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers.

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 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to register its PBS facility within thirty (30) days of the date it acquired the facility and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).¹

¹ Although staff's papers provide a basis to find liability under 6 NYCRR 613-1.9(d)(1), staff cited the general provision 6 NYCRR 613-1.9. Where a section is comprised of a number of subsections, paragraphs, or

Department counsel correctly points out that the requirement to register PBS facilities is one of the “cornerstones” of the PBS regulatory scheme (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated September 27, 2018, ¶ 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Department staff seeks a civil penalty in the amount of five thousand dollars (\$5,000). ECL 71-1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In proceedings similar to this one, Department staff has requested penalties that take into account the duration of the violation. For those facilities that have violated the registration requirement within the past two years, Department staff has, absent other violations, generally requested a penalty of five thousand dollars (\$5,000) (*see Matter of 12 Martense Associates, LLC*, Order of the Commissioner [*12 Martense*], December 19, 2011, at 2). In this matter, respondent was required to register its facility on or before May 18, 2016. Respondent, however, did not submit an application to register the facility until October 25, 2017.

Department staff, in its papers, sought a penalty of five thousand dollars (\$5,000). Staff's requested civil penalty of five thousand dollars (\$5,000) is in accordance with general penalty guidelines for violations of PBS registration requirements for certain facilities in New York City where a violation is less than two years, as is the case here (*see 12 Martense* at 2). Respondent was required to register its facility within thirty (30) days of the date (April 18, 2016) that it acquired the facility, but failed to do so (*see* Default Summary Report at 2-3 [Findings of Fact Nos. 3, 4 and 5]). Based on this record, the requested penalty of five thousand dollars (\$5,000) is authorized and appropriate.

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent.

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 1534 Selwyn LLC waived its right to be heard at the hearing.
- II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent 1534 Selwyn LLC is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to register its PBS facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days of the date (April 18, 2016) that it acquired the facility.

subparagraphs, staff should designate the particular subsection(s), paragraph(s) and subparagraph(s) at issue (*see Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 2 n 6).

- III. Within fifteen (15) days of the service of this order upon respondent 1534 Selwyn LLC, respondent shall pay a civil penalty in the amount of five thousand dollars (\$5,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."
- IV. The penalty payment shall be sent to the following address:
- Office of General Counsel (Remediation Bureau)
NYS Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Deborah Gorman, Esq.
- V. Any questions or other correspondence regarding this order shall also be addressed to Deborah Gorman, Esq. at the address referenced in paragraph IV of this order.
- VI. The provisions, terms, and conditions of this order shall bind respondent 1534 Selwyn LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
November 15, 2018

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**

-by-

DEC Case No.
PBS.2-346071.7.2018

1534 SELWYN LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 1534 Selwyn LLC (respondent) with a notice of hearing and complaint, dated May 7, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9, for failing to register its petroleum bulk storage (PBS) facility located at 1534 Selwyn Avenue, Bronx, New York (facility) within thirty (30) days of the date (April 18, 2016) it acquired the property. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9; (ii) assessing a civil penalty in the amount of five thousand dollars (\$5,000); and (iii) granting such other and further relief as the Commissioner shall deem just and appropriate.¹

Inasmuch as respondent is an active domestic limited liability company in the State of New York, service of the notice of hearing and complaint on respondent was made by personally serving the New York State Department of State on May 7, 2018 (*see* Motion for Default Judgment, Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on May 7, 2018 (*see id.*). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for June 11, 2018, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on July 11, 2018, an adjudicatory hearing was convened before Chief Administrative Law Judge (Chief ALJ) James T. McClymonds. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of

¹ Specifically, 6 NYCRR 613-1.9(d)(1) requires a new owner to register the facility within thirty days after transfer of ownership.

General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

Chief ALJ McClymonds noted 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. The Chief ALJ reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On September 27, 2018, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on September 27, 2018 (*see* Affirmation of Service of Deborah Gorman, dated September 27, 2018). Thereafter, the motion was assigned to the undersigned ALJ.

Applicable Regulatory Provision

Section 613-1.9. Registration.

* * *

“(d) *Application procedure for initial registration or transfer of ownership.*

“(1) If ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the department within 30 days after transfer.”

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff’s motion for a default judgment:

1. Respondent 1534 Selwyn LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 1534 Selwyn Avenue, Bronx, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 5,000 gallons and is located aboveground. *See* Motion for Default Judgment, Exhibits D, E, F, and G.
2. Respondent is an active domestic limited liability company in the State of New York. *See* Motion for Default Judgment, Exhibit H.
3. On April 18, 2016, 1534 Selwyn Ave. Co. LLC transferred all right, title and interest in the facility to 1534 Selwyn LLC, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2016000174902. *See* Motion for Default Judgment, Exhibit D.

4. Pursuant to a registration application dated October 25, 2017, the Department issued PBS Certificate Number 2-346071 to respondent 1534 Selwyn LLC on November 10, 2017 with an expiration date of November 10, 2022. *See* Motion for Default Judgment, Exhibits E, F and G.
5. On May 2, 2018, a search of the Department’s PBS registration database revealed that respondent registered the facility eighteen months later than required by 6 NYCRR 613-1.9(d)(1). *See* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated May 7, 2018, ¶¶ 11-13; *see also* Exhibit B, Affirmation of Deborah Gorman, Esq., dated September 27, 2018, ¶ 8; Exhibit G.
6. As shown by Receipt for Service No. 201805140254 issued by the New York State Department of State, respondent was served personally, on May 7, 2018 pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated May 7, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9, together with a cover letter, statement of readiness and supporting affirmation, for failure to register its PBS facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days of the date it acquired the facility. 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 or about May 7, 2018. *See* Motion for Default Judgment, Exhibit C.
7. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for June 11, 2018, as directed in the cover letter and notice of hearing served with the complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on July 11, 2018, as directed in the notice of hearing. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., ¶¶ 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[s]” alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018 [*Samber*], at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* CPLR 3215[f]).

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 11, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on July 11, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit I). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (*see* Affirmation of Service of Deborah Gorman, dated September 27, 2018, ¶ 2).

Department staff’s submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to register its petroleum bulk storage facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days after it acquired the facility, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) (*see Samber* at 1).

Staff’s complaint requested a civil penalty in the amount of five thousand dollars (\$5,000). Staff’s submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department’s Civil Penalty Policy, DEE-1, and administrative precedent relating to similar violations (*see* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause ¶ II; *see also* Exhibit B, Gorman Affirmation, dated September 27, 2018, ¶¶ 13-18).

I find that staff’s request for a civil penalty in the amount of five thousand dollars (\$5,000) is consistent with the Department’s penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see e.g. Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to register its PBS facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days of the date (April 18, 2016) that it acquired the facility, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent 1534 Selwyn LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 1534 Selwyn LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its PBS facility located at 1534 Selwyn Avenue, Bronx, New York within thirty (30) days of the date (April 18, 2016) that it acquired the facility;
3. Directing respondent 1534 Selwyn LLC to pay a civil penalty in the amount of five thousand dollars (\$5,000) within fifteen (15) days of service of the Commissioner's order; and
4. Directing such other and further relief as he may deem just and appropriate.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
October 26, 2018

APPENDIX A

Matter of 1534 Selwyn LLC
DEC File No. PBS.2-346071.7.2018
Motion for Default Judgment

1. Cover letter, dated September 27, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers
2. Notice of Motion for Default Judgment dated September 27, 2018
3. Motion for Default Judgment, dated September 27, 2018, attaching Exhibits A and B:
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated May 7, 2018
 - B. Affirmation of Deborah Gorman, Esq., dated September 27, 2018, attaching Exhibits C – I:
 - C. Affidavit of Service of Dale Thiel, sworn to September 27, 2018, attaching Department of State Receipt for Service, dated May 7, 2018, reflecting service upon respondent pursuant to section 303 of the Limited Liability Company Law
 - D. Printout of search on Automated City Register Information System (ACRIS), dated September 27, 2018, attaching deed dated April 18, 2016
 - E. Petroleum Bulk Storage (PBS) Application from 1534 Selwyn LLC, PBS No. 2-346071, dated October 25, 2017
 - F. PBS Certificate, PBS No. 2-346071 issued to 1534 Selwyn LLC on November 10, 2017, with an expiration date of November 10, 2022
 - G. Facility Information Report, PBS No. 2-346071, printed September 27, 2018
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 1534 Selwyn LLC, reflecting information through September 26, 2018
 - I. Draft Order
4. Affirmation of Service of Deborah Gorman, dated September 27, 2018