

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.
2-605524VS

-by-

**1870 MORRIS AVENUE HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

On December 8, 2015, an adjudicatory hearing was convened before D. Scott Bassinson, Administrative Law Judge (“ALJ”) of the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation (“Department”). The hearing addressed Department staff’s allegations that 1870 Morris Avenue Housing Development Fund Corporation (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2 by failing to renew the registration of its petroleum bulk storage facility located at 1870 Morris Avenue, Bronx, New York (“facility”). Located at the facility is an aboveground storage tank with a capacity of 2,500 gallons.

ALJ Bassinson prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ’s hearing 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 November 4, 2015, and failed to appear for the adjudicatory hearing scheduled in the matter on December 8, 2015 (see Hearing Report at 3-4 [Finding of Fact No. 9]).

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 Hearing Report at 4-5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. At the hearing on December 8, 2015, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report at 4-5). Accordingly, staff is entitled to a judgment based on record evidence.

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff, in its papers, sought a civil penalty of ten thousand dollars (\$10,000). At the hearing, Department staff moved to amend its pleadings to reduce the civil penalty to seven thousand five hundred dollars (\$7,500), and the ALJ granted staff’s motion.

Respondent has failed to renew the registration for the facility since the registration expired on March 29, 2011 (see Hearing Report at 3 [Finding of Fact No. 7]). Where, as here, a facility has not renewed its registration for more than two years but less than five years, 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). The requested penalty of seven thousand five hundred dollars (\$7,500) is authorized and appropriate.

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 1870 Morris Avenue Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 1870 Morris Avenue Housing Development Fund Corporation is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2 for failing to renew its registration of its petroleum storage facility located at 1870 Morris Avenue, Bronx, New York.
- III. Within fifteen (15) days of the service of this order upon respondent 1870 Morris Avenue Housing Development Fund Corporation, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent 1870 Morris Avenue Housing Development Fund Corporation, respondent shall pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The petroleum bulk storage application, applicable registration fees, and 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.

- VI. Any questions or other correspondence regarding this order shall also be addressed to Deborah Gorman, Esq. at the address referenced in paragraph V of this order.
- VII. The provisions, terms and conditions of this order shall bind respondent 1870 Morris Avenue Housing Development Fund Corporation, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Acting Commissioner

Dated: Albany, New York
February 11, 2016

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”),

HEARING REPORT

DEC Case No.
2-605524VS

-by-

**1870 MORRIS AVENUE HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent 1870 Morris Avenue Housing Development Fund Corporation (“respondent”) with a notice of hearing and complaint, dated September 28, 2015, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 612.2,¹ for failing to renew the registration of its petroleum bulk storage facility located at 1870 Morris Avenue, Bronx, New York on or before March 29, 2011, 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 § 612.2; (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 and remit the applicable registration fee; and (4) granting such other and further relief as the Commissioner may 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 September 28, 2015 (see Staff Exhibit 2). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on September 28, 2015 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for November 4, 2015, as directed in the cover letter served with the notice of hearing and complaint (see Staff Exhibit 1).

¹ Part 612 was repealed, effective subsequent to the commencement of this proceeding, and replaced by a revised Part 613. The registration requirements applicable to renewal of registration are now found at 6 NYCRR 613-1.9(c). For purposes of the violations alleged in this matter, the prior Part 612 applies.

As stated in the notice of hearing, an adjudicatory hearing was convened on December 8, 2015 before the undersigned, at the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a staff witness. 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 proceeded to put on its case seeking judgment on the merits. The hearing commenced on December 8, 2015 at 1:36 p.m.

Department staff called one witness, Benjamin Conlon, Associate Attorney with the Department's Office of General Counsel, and Section Chief in the Bureau of Remediation. In all, eight (8) exhibits were received in evidence.

Applicable Regulatory Provision

Section 612.2. Registration of Facilities.

“(a) *Existing facilities.*

“(1) Within one year of the effective date of these regulations, the owner of any petroleum storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.

“(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.”

Findings of Fact

The following facts are found based upon the preponderance of evidence presented at the hearing, see 6 NYCRR § 622.11(c):

1. Respondent 1870 Morris 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 1870 Morris Avenue, Bronx, NY (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 2,500 gallons and is located above ground. See Testimony of Benjamin Conlon; Staff Exhibits 5, 6, and 7.
2. Respondent is an active domestic business corporation in the State of New York. See Testimony of Benjamin Conlon; see also Staff Exhibit 3.

3. On January 25, 2006, the Department issued Petroleum Bulk Storage (“PBS”) Registration Certificate No. 2-605524 to respondent. This registration expired on March 29, 2011. See Testimony of Benjamin Conlon; see also Staff Exhibit 6.
4. On June 28, 1988, Ristanliro Realty Corp. conveyed all right, title and interest in the facility to respondent 1870 Morris Avenue Housing Development Fund Corporation. See Testimony of Benjamin Conlon; see also Staff Exhibit 4.
5. Benjamin Conlon is an Associate Attorney in the Department’s Office of General Counsel, serving as a Section Chief in the Bureau of Remediation, whose responsibilities include enforcement of the Petroleum Bulk Storage, Chemical Bulk Storage, and Major Oil Storage Facilities laws and regulations. Mr. Conlon is authorized to access and inspect the Department’s unified information system (“UIS”) and the electronic repository for scanned documents known as DecDOCS. The UIS and DecDOCS are databases maintained by the Department and contain petroleum bulk storage facility records filed with the Department, which records include petroleum bulk storage facility registrations filed pursuant to 6 NYCRR § 612.2. See Testimony of Benjamin Conlon.
6. On December 8, 2015, Benjamin Conlon searched the petroleum bulk storage facility records contained in the Department’s UIS and DecDOCS databases for any petroleum bulk storage facility registration or renewal registration filed by respondent for the facility. See Testimony of Benjamin Conlon.
7. As a result of his search, Benjamin Conlon confirmed that respondent had not renewed the registration the facility since the prior registration expired on March 29, 2011. See Testimony of Benjamin Conlon; see also Staff Exhibit 6 (includes handwritten initials of witness reflecting that he checked database on December 8, 2015).
8. As shown by Receipt for Service No. 201510060178 issued by the New York State Department of State, respondent was served personally, on September 28, 2015, pursuant to section 306 of the Business Corporation Law with a notice of hearing and complaint dated September 28, 2015, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 612.2, together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration its petroleum bulk storage facility located at 1870 Morris Avenue, Bronx, New York on or before March 29, 2011, 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 September 28, 2015. The address for first class mailing was determined by searching the public New York City Housing Preservation & Development website. See Staff Exhibit 2; see also Hearing Record; <http://www1.nyc.gov/site/hpd/index.page> (search HPDonline).
9. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for November 4, 2015, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing

scheduled in the matter on December 8, 2015, as directed in the notice of hearing. See Hearing Record.

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 proof presents a prima facie case demonstrating that respondent failed to renew the registration of its petroleum bulk storage facility located at 1870 Morris Avenue, Bronx, New York, on or before March 29, 2011, the date that the prior registration expired, in violation of ECL § 17-1009 and 6 NYCRR § 612.2.

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 November 4, 2015, 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 December 8, 2015, as directed in the notice of hearing. Department staff provided its proposed order at the December 8, 2015 hearing. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR § 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to renew the registration of its petroleum storage facility on or before March 29, 2011, the date on which the prior registration expired, in violation of ECL § 17-1009 and 6 NYCRR § 612.2. The Department is entitled to judgment upon the facts proven. At the December 8, 2015 hearing, Department staff

moved orally to amend the complaint to reduce the civil penalty requested from ten thousand dollars (\$10,000) to seven thousand five hundred dollars (\$7,500). Pursuant to 6 NYCRR § 622.10(b)(1)(i), I granted Department staff's motion to amend the pleadings, as there is no prejudice to respondent in reducing the penalty requested.

Department staff's proposed order and the seven thousand five hundred dollars (\$7,500) civil penalty it seeks are 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.

Recommendation

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

1. Granting Department staff's motion for default, holding respondent 1870 Morris Avenue Housing Development Fund Corporation in default pursuant to the provisions of 6 NYCRR § 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent 1870 Morris Avenue Housing Development Fund Corporation violated ECL § 17-1009 and 6 NYCRR § 612.2 by failing to renew the registration of its petroleum bulk storage facility located at 1870 Morris Avenue, Bronx, New York on or before March 29, 2011, the date on which the prior registration expired;
3. Directing respondent 1870 Morris 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 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
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
December 11, 2015

EXHIBIT CHART – PBS EXPEDITED PROCEEDING

Matter of 1870 Morris Avenue Housing Development Fund Corporation

December 8, 2015 –Region 2, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York

DEC Case No. 2-605524VS - Ediol File No. 020517114313

Exhibit No.	Description	ID’d	Rec’d Into Evid.	Offered By	Notes
1	Cover Letter from Deborah Gorman, Esq., to respondent, dated September 28, 2015. Notice of Hearing and Complaint, dated September 28, 2015. Statement of Readiness, dated September 28, 2015. Affirmation of Deborah Gorman.	✓	✓	Department Staff	
2	Affidavit of Service of Lisa Kranick, sworn to December 3, 2015, attaching NYS Department of State (“DOS”) Receipt for Service, dated September 28, 2015.	✓	✓	Department Staff	
3	NYS DOS Corporate Entity Information, dated December 4, 2015.	✓	✓	Department Staff	
4	New York City Department of Finance ACRIS Title Search, dated December 4, 2015. Deed to respondent, dated June 29, 1988.	✓	✓	Department Staff	
5	PBS Application form filed for PBS No. 2-605524, received January 23, 2006.	✓	✓	Department Staff	
6	PBS Certificate No. 2-605524 issued January 5, 2006, expiration date March 29, 2011.	✓	✓	Department Staff	
7	Facility Information Report, PBS No. 2-605524, printed November 23, 2015	✓	✓	Department Staff	
8	Affirmation of Deborah Gorman, Esq. dated December 3, 2015	✓	✓	Department Staff	
9	Proposed Order	✓	NO	Department Staff	