

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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.2-606358.4.2018

-by-

**318-20 CO. LLC,**

Respondent.

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This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent 318-20 CO. LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility at 320 East 59th Street, New York, New York (facility) on or before July 13, 2016, the date on which its prior registration expired. Located at the facility is an aboveground storage tank with a capacity of 2,000 gallons.

On July 16, 2018, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Caruso 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 March 9, 2018, and failed to appear for the adjudicatory hearing scheduled in the matter for April 10, 2018 and reconvened on July 16, 2018 (see Hearing Report at 4 [Finding of Fact No. 8]).

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 4-6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 16, 2018, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim and proved its case on the merits by a preponderance of the evidence (see id.). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent was required to renew the registration of its facility on or before July 13, 2016 (see ECL 17-1009[2]; Hearing Report at 4-5). Respondent's

failure to properly renew the registration of its facility violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of title 10 of article 17 and its implementing regulations.

At hearing, Department staff requested a civil penalty in the amount of seven thousand five hundred dollars (\$7,500). The ALJ has concluded that, in this matter, Department staff only proved that the violation continued as of July 12, 2018, which was still within a two year period and, accordingly, a civil penalty of five thousand dollars (\$5,000) was consistent with administrative precedent (see Hearing Report at 5; see also Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). The ALJ-recommended penalty of five thousand dollars (\$5,000) is authorized and appropriate. Respondent is to submit payment of the penalty to the Department within fifteen (15) days of service of this order upon it.

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 318-20 CO. LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 318-20 CO. LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 320 East 59th Street, New York, New York on or before July 13, 2016, the date the prior registration expired.
- III. Within fifteen (15) days of the service of this order upon respondent 318-20 CO. LLC, 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 318-20 CO. 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.

- 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, 14<sup>th</sup> 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 318-20 CO. 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: October 31, 2018  
Albany, New York

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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.  
PBS.2-606358.4.2018

-by-

**318-20 CO. LLC,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 318-20 CO. LLC (respondent) with a notice of hearing and complaint, dated February 1, 2018, alleging a violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) for failing to renew the registration of its petroleum bulk storage facility located at 320 East 59th Street, New York, New York on or before July 13, 2016, 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 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.

Because 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 serving the New York State Department of State on February 1, 2018 (see Staff Exhibit 3). Department staff provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about February 1, 2018 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for March 9, 2018, as directed in the notice of hearing and accompanying cover letter (see Staff Exhibit 2).

As stated in the notice of hearing, on April 10, 2018, an adjudicatory hearing was convened before the undersigned. Department staff was represented by Deborah Gorman, Esq., Senior Attorney, 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, and proffered a staff witness. Noting for the record that respondent had not answered the complaint, had not appeared 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. I reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b), and indicated that, upon staff's request, the hearing would be reconvened on a subsequent date and on notice to respondent.

On June 13, 2018, the Office of Hearings and Mediation Services served a Notice of Hearing on respondent by first class mail, advising respondent that the hearing would be reconvened on July 16, 2018. On July 16, 2018, the adjudicatory hearing was reconvened before me at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by law student intern Christopher Williams, under the supervision of the Office of General Counsel. No one appeared on behalf of respondent.

Department staff orally renewed its motion for a default judgment. 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, ten (10) exhibits were received in evidence.<sup>1</sup>

#### Applicable Regulatory Provision

##### 613-1.9 Registration

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“(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 preponderance of evidence presented at the hearing, see 6 NYCRR 622.11(c):

1. Respondent 318-20 CO. LLC (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 320 East 59th Street, New York, New York (facility). In particular, petroleum storage tank number 01 at the facility has a capacity of 2,000 gallons and is located aboveground. See Testimony of Benjamin

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<sup>1</sup> At hearing, Department staff moved to keep the record open to allow staff time to correct a date reference in the affidavit of service (Exhibit 3). I granted staff's motion, and staff submitted the corrected affidavit on July 19, 2018, which was received into evidence, and the record was closed.

Conlon (Conlon Testimony); Staff Exhibits 4, 6, 7, and 8.

2. Respondent is an active domestic limited liability company in the State of New York. See Conlon Testimony; Staff Exhibit 5.
3. Pursuant to a registration application received April 22, 2011, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-606358 to “318-20 CO. LLC” identified on the certificate as the owner of the facility, on April 26, 2011 with an expiration date of July 13, 2016. The PBS Application received by Department staff on April 22, 2011 identifies the owner as “318-20 CO. LLC”. See Conlon Testimony; Staff Exhibits 7 and 8.
4. On November 20, 1998, 318-20 CO., by deed, transferred all right, title and interest in the facility to respondent 318-20 CO. LLC, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, on Reel 2810, Page 1552. See Conlon Testimony; Staff Exhibit 4.<sup>2</sup>
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 613-1.9. See Conlon Testimony.
6. On July 12, 2018, 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 application filed by respondent for the facility. Mr. Conlon determined that respondent’s registration expired on July 13, 2016 and, as of July 12, 2018, had not been renewed. See Conlon Testimony; see also Staff Exhibits 8 and 9.
7. As shown by Receipt for Service No. 201802080133 issued by the New York State Department of State, respondent was served personally, on February 1, 2018, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated February 1, 2018 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 320 East 59th Street, New York, New York on or before July 13, 2016, the date 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 or about February 1, 2018. See Staff Exhibits 2 and 3; see also Hearing Record.

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<sup>2</sup> The City of New York obtained a permanent easement for a water tunnel under respondent’s property, which does not affect respondent’s ownership of the facility. See Conlon Testimony; Staff Exhibit 9.

8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for March 9, 2018 as directed in the notice of hearing and the accompanying cover letter, and failed to appear for the adjudicatory hearing scheduled in the matter for April 10, 2018 and reconvened on July 16, 2018, as directed in the notices 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 a 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). 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, 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 March 9, 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 for April 10, 2018 and reconvened on July 16, 2018, as directed in the notices of hearing. Department staff has submitted a proposed order.

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 renew the registration of its petroleum bulk storage facility located at 320 East 59th

Street, New York, New York on or before July 13, 2016, the date on which its registration expired, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) (see Matter of Samber Holding Corp., Order of the Commissioner at 1). Based upon the foregoing, 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 bulk storage facility located at 320 East 59th Street, New York, New York, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c). The Department is entitled to judgment upon the facts proven.

In its complaint, Department staff seeks an order imposing a civil penalty of ten thousand dollars (\$10,000). ECL § 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. 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. At hearing in this matter staff requested a civil penalty of seven thousand five hundred dollars (\$7,500) because as of the date of the hearing respondent had not registered the facility for more than two years.

Staff asks that the Commissioner follow the precedent for determining the duration of the violation at the time of the hearing set in Matter of Promesa Court Residences Limited Partnership, Order of the Commissioner, September 11, 2017, at 3. I cannot recommend the Commissioner determine that the duration of the violation extends from July 13, 2016 to July 16, 2018 for the following reasons. As noted herein, respondent's certificate expired on July 13, 2016 and the hearing was held on July 16, 2018, more than two years after respondent was required to renew the registration. If staff had proven that as of the date of the hearing the registration had not been renewed, then the precedent set in the Matter of Promesa Court Residences Limited Partnership should be followed. In this matter, however, staff proved as of July 12, 2018 that respondent had not renewed its PBS registration, a duration of one year eleven months and 29 days. There is no proof on this record that staff reviewed the various databases and document repositories after July 12. Accordingly, the penalty for violations extending up to two years should be applied to this matter.

Contrary to Department staff's request and proposed order, which seeks a civil penalty of seven thousand five hundred dollars (\$7,500), a civil penalty 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 12 Martense Associates, at 2).



### Conclusion of Law

By failing to renew the registration of its PBS facility located at 320 East 59th Street, New York, New York on or before July 13, 2016, the date the prior registration expired, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

### Recommendations

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

1. Granting Department staff's motion for default, holding 318-20 CO. LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent 318-20 CO. LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility located at 320 East 59th Street, New York, New York on or before July 13, 2016, the date the prior registration expired;
3. Directing respondent 318-20 CO. LLC to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete petroleum bulk storage registration application for the facility, together with applicable registration fees;
4. Directing respondent 318-20 CO. 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
5. Directing such other and further relief as he may deem just and appropriate.

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: August 1, 2018  
Albany, New York

**EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS**

*Matter of 318-20 CO. LLC*  
 320 East 59th Street, New York, New York – DEC Case No. PBS.2-606358.4.2018  
 July 16, 2018 – Central Office  
 Edrol File No. 180716144338

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	May 29, 2018 Practice Order of the Appellate Division, Third Department (Garry, P.J.), authorizing Christopher Williams to act as a law intern in New York State Department of Environmental Conservation.	✓	✓	Department Staff	
2	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, and Affirmation of Deborah Gorman all dated February 1, 2018.	✓	✓	Department Staff	
3	Affidavit of Service of Dale Thiel, sworn to July 19, 2018 with New York State Department of State Receipt for Service dated February 1, 2018.	✓	✓	Department Staff	
4	New York City Department of Finance, ACRIS Title Search, dated June 12, 2018, and deed to respondent, dated November 20, 1998.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
5	NYS Department of State Entity Information, current through July 11, 2018.	✓	✓	Department Staff	
6	PBS Program Facility Information Report, printed July 12, 2018.	✓	✓	Department Staff	
7	PBS Application, received April 22, 2011 from 318-20 CO. LLC for 320 East 59th Street, New York, New York.	✓	✓	Department Staff	
8	PBS Registration Certificate issued April 26, 2011, expiration date July 13, 2016.	✓	✓	Department Staff	
9	Affirmation of attempted contact of Deborah Gorman, dated July 12, 2018.	✓	✓	Department Staff	
10	Proposed Order.	✓	✓	Department Staff	