

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC CASE NO.
2-602087BT

-by-

3840 ORLOFF AVE. CORP.,

Respondent.

On August 1, 2014, 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 the allegations of Department staff that respondent 3840 Orloff Ave. Corp. (“respondent”) violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 3840 Orloff Avenue, Bronx, New York (“facility”), after its registration certificate expired on February 10, 2010.

ALJ Bassinson prepared the attached hearing report, which I adopt as my decision in this matter. 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 July 1, 2014, 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 July 29, 2014, as directed in the notice of hearing (see Hearing Report, at 4 [Finding of Fact No. 10]).

As a consequence of respondent’s failure to answer or appear in this matter, the ALJ recommended that Department staff’s motion for default be granted (see Hearing Report, at 5-6), and I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Furthermore, at the hearing conducted on August 1, 2014, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 5). Accordingly, staff is entitled to a judgment based on record evidence.

In its papers, Department staff sought a civil penalty of ten thousand dollars (\$10,000) (see Staff Ex. 2, Complaint, at Wherefore Clause ¶ II). At the August 1, 2014 hearing, the ALJ granted staff’s motion to reduce the requested civil penalty to seven thousand five hundred dollars (\$7,500) (see Hearing Report, at 2). Respondent has failed to reregister its facility since its registration certificate expired on February 10, 2010, and the civil penalty requested by staff is authorized and appropriate (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). Respondent is also directed to submit to the

Department a petroleum bulk storage registration application for the facility, plus applicable registration fees, within fifteen (15) days of the service of this order upon it.

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 3840 Orloff Ave. Corp. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 3840 Orloff Ave. Corp. is adjudged to have violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 3840 Orloff Avenue, Bronx, New York since its registration certificate expired on February 10, 2010.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent 3840 Orloff Ave. Corp. shall submit to the Department a petroleum bulk storage registration application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent 3840 Orloff Ave. Corp. 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 facility petroleum bulk storage registration application, applicable registration fees, and the penalty payment shall be sent to the following address:

Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Brooke Turallo.

- VI. Any questions or other correspondence regarding this order shall also be addressed to Brooke Turallo at the address referenced in paragraph V of this order.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) 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.
2-602087BT

-by-

3840 ORLOFF AVE. CORP.,

Respondent.

Procedural History

Respondent 3840 Orloff Ave. Corp. (“respondent”) was served with a notice of hearing and complaint, dated May 29, 2014, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum storage facility located at 3840 Orloff Avenue, Bronx, New York, after its registration certificate expired on February 10, 2010. 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 reregister its petroleum storage facility within fifteen (15) days of the service of the Commissioner’s order upon respondent, by remitting the registration fee set forth in ECL 17-1009(2) and a complete registration application in accordance with 6 NYCRR 612.2; and (4) granting such other and further relief as the Commissioner may deem just and proper.

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 30, 2014 (see Staff Exhibit [“Staff Ex.”] 3). Consistent with CPLR 3215(g)(4), respondent was also served with the notice of hearing and complaint by regular mail on May 30, 2014. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for July 1, 2014, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on July 29, 2014, an adjudicatory hearing was convened before Administrative Law Judge (“ALJ”) Richard R. Wissler of the Department of Environmental Conservation’s (“Department”) Office of Hearings and Mediation Services at the Department’s Region 2 offices, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407. Department staff was represented

by Benjamin Conlon, Esq., Chief, Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a program staff witness. Noting for the record that respondent had failed to answer the complaint, failed to appear for the prehearing conference and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. The ALJ 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). Moreover, the ALJ noted Department staff's readiness for hearing and noted the failure of the respondent to appear. The ALJ advised that the hearing, in the absence of respondent, would be convened on a subsequent date.

On August 1, 2014, the adjudicatory hearing was convened before the undersigned ALJ at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by Leonard Gryskewicz, a law intern authorized to represent Department staff pursuant to an order of the Appellate Division, Third Department, dated July 1, 2014 (see Staff Ex. 1). Department staff orally renewed its motion for a default judgment, and also sought judgment on the merits.

Staff also made a motion to amend the complaint to reduce the requested penalty from ten thousand dollars (\$10,000) to seven thousand five hundred dollars (\$7,500), in accordance with general penalty guidelines as set forth in Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2 (civil penalty of \$7,500 is appropriate for registration violations of between two and five years' duration). Reduction of the penalty requested in the complaint in this matter does not raise the same due process concerns as would a request to increase the penalty in a default situation (see Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 2-3; see also CPLR 3215[b] [default judgment "shall not exceed in amount ... that demanded in the complaint"]), and the requested reduction does not otherwise prejudice respondent. I therefore granted staff's motion to amend at the August 1, 2014 hearing (see 6 NYCRR 622.5[b] ["a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ ... and absent prejudice to the ability of any other party to respond"]).

Department staff called one witness, Michael Koes, a law intern whose duties included working in the Department's Office of General Counsel's Petroleum Spill and Bulk Storage ("PBS") Section. 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

1. Respondent 3840 Orloff Ave. Corp. is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 3840 Orloff Avenue, Bronx, New York (“facility”). In particular, petroleum storage tank number 3 at the facility has a capacity of 5,000 gallons and is located aboveground (Staff Ex. 2, Complaint [“Compl.”] ¶ 14; see also Staff Exs. 4, 7, and 8).
2. Respondent is an active domestic business corporation in the State of New York (Staff Ex. 6).
3. On or about December 2, 1976, the Alderton Company, by deed, transferred all right, title and interest in the facility to respondent 3840 Orloff Ave. Corp. This deed is recorded in the Office of the City Register of the City of New York (Staff Ex. 5).
4. On February 23, 2006, the Department issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-602087, registering the PBS facility, to respondent (Staff Ex. 7). This registration certificate expired on February 10, 2010 (id.).
5. Michael Koes is a law intern in the PBS Section of the Department’s Office of General Counsel, and is authorized to access, search and inspect the Department’s unified information system (“UIS”). The UIS is a database maintained by the Department that contains petroleum storage facility records filed with the Department, which records include petroleum storage facility registrations filed pursuant to 6 NYCRR 612.2 (Testimony of Michael Koes).
6. On or about August 1, 2014, Michael Koes searched the petroleum storage facility records contained in the Department’s UIS database for any petroleum facility registration or renewal registration or any petroleum storage facility reregistration

filed by respondent for the facility (Testimony of Michael Koes).

7. As a result of his searches, Michael Koes determined that respondent had not reregistered the facility at any time after the February 10, 2010 expiration of the PBS certificate issued to respondent on February 23, 2006 (Testimony of Michael Koes).
8. On or about August 1, 2014, Michael Koes reviewed the New York City Department of Finance Automated City Register Information System (“ACRIS”), a publicly available website that allows searches of property records, and contains document images of deeds and related documents concerning real property located in the New York City area (Testimony of Michael Koes). Mr. Koes’s search of ACRIS revealed that, as of August 1, 2014, respondent remained the facility owner (id.; see also Staff Ex. 5).
9. As shown by Receipt for Service No. 201406090400 issued by the New York State Department of State, respondent was served on May 30, 2014, pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated May 29, 2014, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum storage facility located at 3840 Orloff Avenue, Bronx, New York. Consistent with CPLR 3215(g)(4), the notice of hearing and complaint was also served on respondent by regular mail on May 30, 2014 (Staff Ex. 3).
10. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for July 1, 2014, 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 July 29, 2014, as directed in the notice of hearing (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 reregister its petroleum storage facility located at 3840 Orloff Avenue, Bronx, New York after its certificate expired on February 10, 2010, in violation of 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; failed to appear at a pre-hearing conference scheduled for July 1, 2014, 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 29, 2014, as directed in the notice of 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 reregister its petroleum storage facility after its certificate expired on February 10, 2010, in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

Department staff's proposed order and the \$7,500 civil penalty it seeks are consistent with the Department's penalty policy, prior decisions of the Commissioner, and applicable provisions of ECL article 71.

Recommendation

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

1. Granting Department staff's motion for default, finding respondent 3840 Orloff Ave. Corp. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding, based upon the proof adduced at the adjudicatory hearing, that respondent 3840 Orloff Ave. Corp. violated 6 NYCRR 612.2 when it failed to reregister its petroleum storage facility located at 3840 Orloff Avenue, Bronx, New York upon the February 10, 2010 expiration of the prior certificate;

3. Directing respondent 3840 Orloff Ave. Corp. to submit to the Department, within fifteen (15) days of the service of the Commissioner's order upon respondent, a complete reregistration application for the facility, accompanied by past due and current registration fees;
4. Directing respondent 3840 Orloff Ave. Corp. to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500); and
5. Directing such other and further relief as he may deem just and proper.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
August 22, 2014

EXHIBIT CHART – PBS EXPEDITED PROCEEDING*Matter of 3840 Orloff Ave. Corp.*

August 1, 2014 – Central Office, 625 Broadway, Albany, NY

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Exhibit No.	Description	ID'd	Rec'd	Offered By	Notes
1	July 1, 2014 Order of the Appellate Division, Third Department, authorizing Leonard Gyskewicz to act as law intern, and August 1, 2014 consent of Ben Conlon, Esq. to appearance of Leonard Gyskewicz on behalf of staff.	✓	✓	Department Staff	
2	Cover Letter from Scott W. Caruso, Esq., to respondent, dated May 29, 2014. Notice of Hearing and Complaint, dated May 29, 2014. Statement of Readiness, dated May 29, 2014. Affidavit of Brooke Turallo, sworn to May 29, 2014.	✓	✓	Department Staff	
3	Affidavit of Service of Brooke Turallo, sworn to, July 15, 2014, attaching NYS Department of State (“DOS”) Receipt for Service, dated May 30, 2014.	✓	✓	Department Staff	
4	PBS Application/renewal form filed for PBS No. 2-602087, received February 10, 2006.	✓	✓	Department Staff	
5	New York City Department of Finance ACRIS Title Search, dated August 1, 2014. Deed to respondent, dated December 2, 1976.	✓	✓	Department Staff	
6	NYS DOS Corporate Entity Information, dated August 1, 2014.	✓	✓	Department Staff	
7	PBS Certificate No. 2-602087 issued February 23, 2006, expiration date February 10, 2010.	✓	✓	Department Staff	
8	PBS Program Facility Information Report, printed August 1, 2014.	✓	✓	Department Staff	
9	Affirmation of Michael Koes dated July 30, 2014.	✓	No	Department Staff	