

**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.2-608825.7.2019

3906 ARM REALTY LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 3906 ARM Realty LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage (PBS) facility within thirty (30) days of the date (March 25, 2015) it acquired the property. Respondent's facility is located at 3906 Avenue K, Brooklyn, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 2,500 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 7, 2019, and failed to appear for the adjudicatory hearing scheduled for July 9, 2019 (*see* Default Summary Report at 3 [Finding of Fact No. 8]). At the July 9, 2019 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Caruso 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).

Department counsel correctly points out that the requirement to register PBS facilities is one of the "cornerstones" of the PBS regulatory scheme (*see* Amended Motion for Default

Judgment, Exhibit B, Affirmation of Justin Stenerson, Esq., dated March 3, 2020, ¶ 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, in its complaint, sought a penalty of ten thousand dollars (\$10,000). In its amended default papers and proposed order, Department staff seeks to reduce the civil penalty to seven thousand five hundred dollars (\$7,500). 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 registration violations that extend from two to five years, Department staff has, absent other violations, generally requested a penalty of seven thousand five hundred dollars (\$7,500) (*see Matter of 12 Martense Assoc., LLC*, Order of the Commissioner, December 19, 2011, at 2). Respondent was required to register its facility within thirty (30) days of the date (March 25, 2015) 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 seven thousand five hundred dollars (\$7,500) is authorized and appropriate. (*see Matter of 12 Martense Assoc., LLC*, Order of the Commissioner, December 19, 2011, at 2).

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent. In addition, I direct that respondent submit a petroleum bulk storage application for the facility 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 3906 ARM Realty 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 3906 ARM Realty 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 3906 Avenue K, Brooklyn, New York within thirty (30) days of the date (March 25, 2015) that it acquired the facility.
- III. Within fifteen (15) days of the service of this order upon respondent 3906 ARM Realty LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent 3906 ARM Realty LLC, 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: Justin Stenerson, Esq.

- VI. Any questions or other correspondence regarding this order shall also be addressed to Justin Stenerson, Esq. at the address referenced in paragraph V of this order.
- VII. The provisions, terms, and conditions of this order shall bind respondent 3906 ARM Realty LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Louis A. Alexander¹
Deputy Commissioner

Dated: Albany, New York
April 13, 2020

¹ By memorandum dated April 8, 2020, Commissioner Basil Seggos delegated the decision-making authority in this matter to the Deputy Commissioner for Hearings and Mediation Services. A copy of the delegation memorandum is on file in the Office of Hearings and Mediation Services.

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.2-608825.7.2019

3906 ARM REALTY LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 3906 ARM Realty LLC (respondent) with a notice of hearing and complaint, dated April 3, 2019, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), for failing to register its petroleum bulk storage (PBS) facility located at 3906 Avenue K, Brooklyn, New York (facility) within thirty (30) days of the date (March 25, 2015) 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(d)(1); (ii) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (iii) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application; and (iv) granting such other and further relief as the Commissioner shall deem just and appropriate.

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 April 3, 2019 (*see* Amended 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 April 3, 2019 (*see id.*). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for June 7, 2019, as directed in the cover letter and notice of hearing served with the complaint (*see* Amended Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on July 9, 2019, an adjudicatory hearing was convened before me. 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.

I 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. I 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 March 3, 2020, staff submitted a written amended motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on amended motion]).¹ Department staff served the amended motion and supporting papers on respondent by first class mail on March 3, 2020 (*see* Affirmation of Service of Justin Stenerson, dated March 3, 2020).

Applicable Regulatory Provision

Section 613-1.9. Registration.²

* * *

“(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 3906 ARM Realty LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 3906 Avenue K, Brooklyn, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 2,500 gallons and is located aboveground. (*See* Amended 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* Amended Motion for Default Judgment, Exhibit H.)
3. On March 25, 2015, 3906 Ave. K Realty, LLC transferred all right, title and interest in the facility to 3906 ARM Realty LLC, the facility’s current owner. This deed is recorded

¹ Department staff served a notice of motion for default judgment dated February 14, 2020. After discovering a discrepancy in its paper, Department staff was granted permission to file and serve the amended motion papers.

² Effective October 11, 2015 6 NYCRR 613-6.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, “(b) *Transfer of ownership.* If the ownership of the facility changes, the new owner must reregister the facility with the department within 30 days of ownership transfer.” ECL 17-1009(2) requires facility registrations to be “renewed every five years or whenever ownership of a facility is transferred, whichever occurs first.”

in the Office of the City Register of the City of New York, as City Register File No. 2015000124883. (*See* Amended Motion for Default Judgment, Exhibit D.)

4. Pursuant to a registration application received March 25, 2013, the Department issued PBS Certificate Number 2-608825 to 3906 Ave K Realty, LLC on April 1, 2013 with an expiration date of April 11, 2018. (*See* Amended Motion for Default Judgment, Exhibits E, F and G.)
5. On April 1, 2019, a search of the Department’s PBS registration database revealed that respondent failed to timely re-register the facility as required by 6 NYCRR 613-1.9(d)(1). (*See* Amended Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated April 3, 2019, ¶¶ 9-12.)
6. As of March 3, 2020, respondent had not registered the facility. (*See* Amended Motion for Default Judgment, Exhibit B, Affirmation of Justin Stenerson, Esq. [Stenerson Affirmation], dated March 3, 2020, ¶ 10-12; Exhibit G.)
7. As shown by Receipt for Service No. 201904120672 issued by the New York State Department of State, respondent was served personally, on April 3, 2019 pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated April 3, 2019, 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 3906 Avenue K, Brooklyn, 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 April 3, 2019. (*See* Amended Motion for Default Judgment, Exhibit C.)
8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for June 7, 2019, 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 9, 2019, as directed in the notice of hearing. (*See* Amended Motion for Default Judgment, Exhibit B, Stenerson Affirmation, ¶¶ 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 7, 2019, 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 9, 2019, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Amended 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 Justin Stenerson, dated March 3, 2020, ¶ 3).

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 3906 Avenue K, Brooklyn, 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 ten thousand dollars (\$10,000). In its amended motion for default judgment and proposed order, Department staff seeks to reduce the civil penalty to seven thousand five hundred dollars (\$7,500). 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* Amended Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause ¶ II; *see also* Exhibit B, Stenerson Affirmation, ¶¶ 13-18). Typically, Department staff seeks to reduce the penalty to seven thousand five hundred dollars (\$7,500) for violations with a duration more than two years but less than five years, as is the case here. Accordingly, staff's motion to reduce the civil penalty to seven thousand five hundred dollars (\$7,500) should be granted because respondent is not prejudiced by reducing the penalty requested.

Accordingly, I find that staff's request for a civil penalty in the amount of seven thousand five hundred dollars (\$7,500) 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 Assoc. LLC*, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to register its PBS facility located at 3906 Avenue K, Brooklyn, New York within thirty (30) days of the date (March 25, 2015) 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 3906 ARM Realty LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 3906 ARM Realty LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its PBS facility located at 3906 Avenue K, Brooklyn, New York within thirty (30) days of the date (March 25, 2015) that it acquired the facility;
3. Directing respondent 3906 ARM Realty LLC 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 3906 ARM Realty LLC 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/
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
March 30, 2020

APPENDIX A

Matter of 3906 ARM Realty LLC
DEC File No. PBS.2-608825.7.2019
Motion for Default Judgment

1. Cover letter, dated March 3, 2020, 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 Amended Motion for Default Judgment dated March 3, 2020
3. Amended Motion for Default Judgment, dated March 3, 2020, attaching Exhibits A and B:
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated April 3, 2019
 - B. Affirmation of Justin Stenerson, Esq., dated March 3, 2020, attaching Exhibits C – I:
 - C. Affidavit of Service of Dale Thiel, sworn to March 2, 2020, attaching Department of State Receipt for Service, dated April 3, 2019, 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 February 12, 2020, attaching deed dated March 25, 2015
 - E. Petroleum Bulk Storage (PBS) Application from 3906 Avenue K Realty LLC, PBS No. 2-608825, received March 25, 2013
 - F. PBS Certificate, PBS No. 2-608825 issued to 3906 Ave K Realty, LLC on April 1, 2013, with an expiration date of April 11, 2018
 - G. Facility Information Report, PBS No. 2-608825, printed February 12, 2020
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 3906 ARM Realty LLC, reflecting information through February 11, 2020
 - I. Draft Order
4. Affirmation of Service of Justin Stenerson, dated March 3, 2020