

**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.2-115797.8.2019

407 BEACH 20 ASSOCIATES L.P.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 407 Beach 20 Associates L.P. 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 7, 2014) that it acquired the property. Respondent's facility is located at 407 Beach 20th Street, Far Rockaway, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 3,000 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 July 9, 2019, and failed to appear for the adjudicatory hearing scheduled for August 8, 2019 (*see* Default Summary Report at 3 [Finding of Fact No. 8]). At the August 8, 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* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated May 27, 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 seeks a civil penalty in the amount of ten thousand dollars (\$10,000). 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 registration violations that exceed five years, Department staff has, absent other violations, generally requested a penalty of ten thousand dollars (\$10,000) (*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 7, 2014) that it acquired the facility, but failed to do so (*see* Default Summary Report at 2-3 [Findings of Fact Nos. 3, 5 and 6]). The five-year threshold for applying a civil penalty of ten thousand dollars (\$10,000) was reached on April 6, 2019. Based on this record, the requested penalty of ten thousand dollars (\$10,000) is authorized and appropriate. (*see Matter of 12 Martense Assoc.*, 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 am directing respondent, also within fifteen (15) days of the service of this order, to submit to the Department a complete petroleum bulk storage application for the facility, plus applicable and past due 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 407 Beach 20 Associates L.P. 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 407 Beach 20 Associates L.P. 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 407 Beach 20th Street, Far Rockaway, New York, New York within thirty (30) days of the date (March 7, 2014) that it acquired the facility.
- III. Within fifteen (15) days of the service of this order upon respondent 407 Beach 20 Associates L.P., 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 407 Beach 20 Associates L.P., respondent shall pay a civil penalty in the amount of ten thousand dollars (\$10,000) 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, 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 407 Beach 20 Associates L.P., and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Louis A. Alexander
Deputy Commissioner¹

Dated: Albany, New York
July 14, 2020

¹ By memorandum dated June 12, 2020, Commissioner Basil Seggos delegated the decision-making authority in Region 2 PBS registration matters 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.2-115797.8.2019

407 BEACH 20 ASSOCIATES L.P.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 407 Beach 20 Associates L.P. (respondent) with a notice of hearing and complaint, dated May 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 407 Beach 20th Street, Far Rockaway, New York (facility) within thirty (30) days of the date (March 7, 2014) 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 limited partnership 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 3, 2019 (*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 3, 2019 (*see id.*). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for July 9, 2019, 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 August 8, 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 May 27, 2020, 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 May 27, 2020 (*see* Affirmation of Service of Deborah Gorman, dated May 27, 2020). Department staff served a corrected Exhibit A on respondent by first class mail on June 18, 2020.

Applicable Regulatory Provision

Section 613-1.9. Registration.¹

* * *

“(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 407 Beach 20 Associates L.P. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 407 Beach 20th Street, Far Rockaway, New York (facility). In particular, PBS tank number 002 at the facility has a capacity of 3,000 gallons and is located aboveground. (*See* Motion for Default Judgment, Exhibits D, E, F, and G.)
2. Respondent is an active domestic limited partnership in the State of New York. *See* Motion for Default Judgment, Exhibit H.
3. On March 7, 2014, Kings and Queens Holdings, LLC transferred all right, title and interest in the facility to 407 Beach 20 Associates L.P., the facility’s current owner. This

¹ 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.”

deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2014000098798. (*See* Motion for Default Judgment, Exhibit D.)

4. Pursuant to a registration application received August 20, 2012, the Department issued PBS Certificate Number 2-115797 to Kings and Queens Holdings, LLC on October 3, 2012 with an expiration date of August 8, 2017. (*See* Motion for Default Judgment, Exhibits E, F and G.)
5. On May 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* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated May 3, 2019, ¶¶ 9-12.)
6. As of May 27, 2020, respondent had not registered the facility. (*See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated May 27, 2020, ¶ 8-9; Exhibit G.)
7. As shown by Receipt for Service No. 201905090272 issued by the New York State Department of State, respondent was served personally, on May 3, 2019 pursuant to section 121-109 of the Revised Limited Partnership Act, with a notice of hearing and complaint dated May 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 407 Beach 20th Street, Far Rockaway, 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 3, 2019. (*See* 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 July 9, 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 August 8, 2019, 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 July 9, 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 August 8, 2019, 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 May 27, 2020, ¶ 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 407 Beach 20th Street, Far Rockaway, 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). 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 May 27, 2020, ¶¶ 13-18).

ECL 71-1929 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 Assoc. LLC*, Order of the Commissioner, December 19, 2011 [*12 Martense Assoc.*], 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 Assoc.* at 2).

In this matter, the five-year threshold for applying a civil penalty of ten thousand dollars (\$10,000) was reached on April 6, 2019. Accordingly, I find that staff's request for a civil penalty in the amount of ten thousand dollars (\$10,000) 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 Assoc.* at 2).

Conclusion of Law

By failing to register its PBS facility located at 407 Beach 20th Street, Far Rockaway, New York, New York within thirty (30) days of the date (March 7, 2014) 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 407 Beach 20 Associates L.P. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 407 Beach 20 Associates L.P. violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its PBS facility located at 407 Beach 20th Street, Far Rockaway, New York, New York within thirty (30) days of the date (March 7, 2014) that it acquired the facility;
3. Directing respondent 407 Beach 20 Associates L.P. 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 407 Beach 20 Associates L.P. to pay a civil penalty in the amount of ten thousand dollars (\$10,000) 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: Albany, New York
June 30, 2020

APPENDIX A

Matter of 407 Beach 20 Associates L.P.
DEC File No. PBS.2-115797.8.2019
Motion for Default Judgment

1. Cover letter, dated May 27, 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. Cover letter to Administrative Law Judge Michael Caruso, dated June 18, 2020, explaining Exhibit A was inadvertently missing pages and submitting Exhibit A-1 to accurately reflect what was served on respondent on May 3, 2019
3. Notice of Motion for Default Judgment dated May 27, 2020
4. Motion for Default Judgment, dated May 27, 2020, attaching Exhibits A and B:
 - A. Corrected as A-1. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated May 3, 2019
 - B. Affirmation of Deborah Gorman, Esq., dated May 27, 2020, attaching Exhibits C – I
 - C. Affidavit of Service of Dale Thiel, sworn to May 21, 2020, attaching a Department of State Receipt for Service, dated May 3, 2019, reflecting service upon respondent pursuant to section 121-109 of the Revised Limited Partnership Act
 - D. Printout of search on Automated City Register Information System (ACRIS), dated May 16, 2020, attaching deed dated March 7, 2014
 - E. Petroleum Bulk Storage (PBS) Application from Kings and Queens Holdings, LLC PBS No. 2-115797, received August 20, 2012
 - F. PBS Certificate, PBS No. 2-115797 issued to Kings and Queens Holdings, LLC on October 3, 2012, with an expiration date of August 8, 2017
 - G. Facility Information Report, PBS No. 2-115797, printed May 27, 2020
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 407 Beach 20 Associates L.P., reflecting information through March 13, 2020
 - I. Draft Order
5. Affirmation of Service of Deborah Gorman, dated May 27, 2020