

**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.2-608482.7.2019

6 BROTHERS REALTY CORPORATION,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 6 Brothers Realty Corporation violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility on or before March 4, 2018, the date on which its prior registration expired. Respondent's facility is located at 210 Dahill Road, Brooklyn, 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 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. 9]). 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 renew the registration of its PBS facility on or before March 4, 2018, the date on which its prior registration expired and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c).

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 October 10, 2019, ¶ 16). 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 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 those facilities that have violated the registration requirement for less than two years, Department staff has, absent other violations, generally requested a penalty of five thousand dollars (\$5,000) (see Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2).

Here, the duration of the violation is less than two years, but staff demonstrated that respondent has a history of noncompliance with the PBS registration requirements. Staff's requested civil penalty of seven thousand five hundred dollars (\$7,500) is in accordance with general penalty guidelines for violations of PBS registration requirements for certain facilities in New York City where a violation is less than two years but aggravating factors are considered in support of a higher penalty, as is the case here (see e.g. Matter of 12 Martense Associates, LLC, at 2). Respondent previously entered into an order on consent for failing to register, which resulted in the registration that expired on March 4, 2018 (see Default Summary Report at 3 [Finding of Fact No. 5] and 4; Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated October 10, 2019, first ¶ 19 and Exhibit I). Respondent was required to renew the registration of its facility no later than March 4, 2018 but failed to do so (see Default Summary Report at 3 [Findings of Fact Nos. 5-7]). Based on this record, the requested penalty of seven thousand five hundred dollars (\$7,500) is authorized and appropriate.

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.¹

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 6 Brothers Realty Corporation 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 6 Brothers Realty Corporation is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the

¹ Respondent is directed to include the correct corporate name in its application.

registration of its PBS facility located at 210 Dahill Road, Brooklyn, New York, on or before March 4, 2018, the date on which its prior registration expired.

- III. Within fifteen (15) days of the service of this order upon respondent 6 Brothers Realty Corporation, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, including correction of the facility owner's name, plus applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent 6 Brothers Realty 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 6 Brothers Realty 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
Commissioner

Dated: Albany, New York
December 13, 2019

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.2-608482.7.2019

6 BROTHERS REALTY CORPORATION,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 6 Brothers Realty Corporation (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(c), for failing to renew the registration of its petroleum bulk storage (PBS) facility located at 210 Dahill Road, Brooklyn, New York (facility). The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c); (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 business corporation 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* 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 or about 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* 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). By cover letter dated October 10, 2019, 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 or about October 11, 2019 (*see* Affirmation of Service of Deborah Gorman, dated October 11, 2019).

Applicable Regulatory Provision

Section 613-1.9. Registration.

* * *

“(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 pleadings and papers submitted with and in support of staff’s motion for a default judgment:

1. Respondent 6 Brothers Realty Corporation is the owner of a PBS facility having a capacity of over 1,100 gallons located at 210 Dahill Road, Brooklyn, New York (facility). In particular, PBS tank number 001 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 business corporation in the State of New York. (*See* Motion for Default Judgment, Exhibit H.)
3. On February 4, 1975, the surviving heirs of Sarah Silverman and Martha Krassner transferred all right, title and interest in the facility to 6 Brothers Realty Corporation, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 762 Page 1308 and as corrected by the City Register in City Register File No. 2005000617025. (*See* Motion for Default Judgment, Exhibit D.)
4. On June 24, 2014, the Department entered into an order on consent with 6 Brothers Realty Corporation for failing to register its PBS facility located at 210 Dahill Road, Brooklyn, New York. The order on consent required respondent to submit an application within thirty (30) days of the order. The order was signed by respondent on June 3, 2014. (*See* Motion for Default Judgment, Exhibit I.)

5. Pursuant to the June 24, 2014 order on consent and a corrected registration application received August 19, 2014, the Department issued PBS Certificate Number 2-608482 to “Six Brothers Realty” on August 19, 2014 with an expiration date of March 4, 2018. (See Motion for Default Judgment, Exhibits E, F and G.)
6. On April 1, 2019, a search of the Department’s PBS registration database revealed that the registration for the facility expired on March 4, 2018 and, as of April 1, 2019, had not been renewed. (See Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated April 3, 2019, ¶¶ 9-12.)
7. As of October 10, 2019, respondent had not registered the facility. (See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated October 10, 2019, ¶ 9; see also Exhibit G.)
8. As shown by Receipt for Service No. 201904110857 issued by the New York State Department of State, respondent was served personally, on April 3, 2019 pursuant to section 306 of the Business Corporation 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(c), together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its PBS facility located at 210 Dahill Road, Brooklyn, New York. 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 Motion for Default Judgment, Exhibit C.)
9. 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 Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated October 10, 2019, ¶¶ 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 its 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* Motion for Default Judgment, Exhibit J). 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 October 11, 2019, ¶ 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 renew the registration of its petroleum bulk storage facility located at 210 Dahill Road, Brooklyn, New York, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) (*see Samber* at 1).

Staff's complaint requested a civil penalty in the amount of ten thousand dollars (\$10,000). In its motion for default judgment and proposed order, Department staff seeks to reduce the civil penalty to seven thousand five thousand 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* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause ¶ II; *see also* Exhibit B, Affirmation of Deborah Gorman, dated October 10, 2019, ¶¶ 15-19 [second]). Typically, Department staff seeks to reduce the penalty to five thousand dollars (\$5,000) for violations with a duration less than two years, as is the case here. Staff, however, applied an aggravating factor to staff's penalty calculation due to respondent's history of noncompliance and the need for a previous order on consent requiring respondent to register the facility. Accordingly, staff's motion to reduce the civil penalty to seven thousand five thousand dollars

(\$7,500), as discussed above, should be granted because respondent is not prejudiced by reducing the penalty requested.

I conclude 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 Associates LLC*, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 210 Dahill Road, Brooklyn, New York on or before March 4, 2018, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent 6 Brothers Realty Corporation in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 6 Brothers Realty Corporation violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 210 Dahill Road, Brooklyn, New York on or before March 4, 2018, the date the prior registration expired;
3. Directing respondent 6 Brothers Realty Corporation to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, including correction of the facility owner's name, together with the applicable registration fees;
4. Directing respondent 6 Brothers Realty Corporation 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
November 5, 2019

APPENDIX A

Matter of 6 Brothers Realty Corporation
DEC File No. PBS.2-608482.7.2019
Motion for Default Judgment

1. Cover letter, dated October 10, 2019, addressed to Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers.¹
2. Notice of Motion for Default Judgment, dated October 10, 2019.
3. Motion for Default Judgment, dated October 10, 2019, attaching Exhibits A and B;
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., dated April 3, 2019;
 - B. Affirmation of Deborah Gorman, Esq., dated October 10, 2019, attaching Exhibits C, D, E, F, G, H, I and J;
 - C. Affidavit of Service of Dale Thiel, sworn to October 11, 2019, attaching Department of State Receipt for Service, dated April 3, 2019, reflecting service upon respondent pursuant to section 306 of the Business Corporation Law;
 - D. Printout of search on Automated City Register Information System (ACRIS), dated October 10, 2019, attaching deed dated February 4, 1975;
 - E. Petroleum Bulk Storage (PBS) Application from "Six Brothers Realty Corp," PBS No. 2-608482, received August 19, 2014;
 - F. PBS Certificate, PBS No. 2-608482 issued to "Six Brothers Realty" on August 19, 2014, with an expiration date of March 4, 2018;
 - G. Facility Information Report, PBS No. 2-608482, printed October 10, 2019;
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 6 Brothers Realty Corporation, reflecting information through October 9, 2019;
 - I. Matter of 6 Brothers Realty Corporation, Order on Consent, June 24, 2014; and
 - J. Draft Order.
4. Affirmation of Service of Deborah Gorman, Esq., dated October 11, 2019.

¹ By letter dated October 29, 2019, Department staff advised the Office of Hearings and Mediation Services and respondent that items 1, 2, 3 and 3B dated October 10, 2019 were executed and served on October 11, 2019.