

**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

DEC Case No.
PBS.2-293083.8.2019

-by-

EAST 89TH ASSOCIATES, LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent East 89th Associates, LLC 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 July 14, 2017, the date on which its prior registration expired. Respondent's facility is located at 242 East 89th Street, New York, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 2,000 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. 9]). 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 renew the registration of its PBS facility on or before July 14, 2017, 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 May 27, 2020, ¶ 17). 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). 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 (*see Matter of 12 Martense Associates, LLC*, Order of the Commissioner, December 19, 2011, at 2). Respondent was required to renew the registration of its PBS facility by July 14, 2017 but failed to do so (*see* Default Summary Report at 2-3 [Findings of Fact Nos. 5, 6, and 7]). In cases, such as here, in which one of the penalty date “thresholds” under *12 Martense Associates* and its progeny is passed during the period between service of the notice of hearing and complaint and the date of the adjudicatory hearing, the penalty amount based on the longer period of time is appropriate (*see Matter of Promesa Ct Residences L. P.*, Order of the Commissioner, September 11, 2017, at 3). Here, the two-year threshold for applying a civil penalty of seven thousand five hundred dollars (\$7,500) was reached on July 14, 2019, after service of the notice of hearing and complaint but before the hearing and staff’s motion for default judgment. Staff’s papers demonstrate the violation continued as of May 27, 2020 (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated May 27, 2020, ¶¶ 8-9).

In its motion for default judgment however, Department staff maintained that a higher penalty of ten thousand dollars (\$10,000) was warranted (*see* Default Summary Report at 5; Exhibit B, Affirmation of Deborah Gorman, Esq., dated May 27, 2020, ¶ 14; Exhibit I). Department staff cited respondent's past history of noncompliance with the PBS program, exemplified by a 2013 consent order, as an aggravating factor (*see id.*).

I concur with Department staff that the penalty staff has requested, ten thousand dollars (\$10,000), is authorized and appropriate under the circumstances here (*see Matter of JG 542 Assoc. LLC*, Order of the Commissioner, June 12, 2017, at 2 [higher penalty ranges for PBS registration violations are appropriate where the respondent has a history of noncompliance]). 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 East 89th Associates, 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 East 89th Associates, LLC is determined to have

violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the registration of its PBS facility located at 242 East 89th Street, New York, New York, on or before July 14, 2017, the date on which its prior registration expired.

- III. Within fifteen (15) days of the service of this order upon respondent East 89th Associates, 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 East 89th Associates, LLC, respondent shall pay a civil penalty in the amount of ten thousand dollars (\$10,00) 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 East 89th Associates, 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. Alexander
Deputy Commissioner^[1]

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.2-293083.8.2019

EAST 89TH ASSOCIATES, LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent East 89th Associates, LLC (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(c), for failing to renew the registration of its petroleum bulk storage (PBS) facility located at 242 East 89th Street, New York, 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 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 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 or about 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). By cover letter dated 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 or about May 27, 2020 (*see* corrected Affirmation of Service of Deborah Gorman, dated June 23, 2020).

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 East 89th Associates, LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 242 East 89th Street, New York, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 2,000 gallons and is located aboveground. (*See* 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* Motion for Default Judgment, Exhibit H.)
3. On December 31, 1997, East 89th Associates transferred all right, title and interest in the facility to East 89th Associates, LLC, the facility’s current owner. This deed, as corrected, is recorded in the Office of the City Register of the City of New York in City Register File No. 2006000547762. (*See* Motion for Default Judgment, Exhibit D.)
4. On May 31, 2013, the Department entered into an order on consent with “East 89th St. Associates, LLC” for failing to register its PBS facility located at 242 East 89th Street, New York, New York. (*See* Motion for Default Judgment, Exhibit I.)
5. Pursuant to a registration application received August 22, 2011, the Department issued PBS Certificate Number 2-293083 to East 89th Associates, LLC on August 23, 2011 with

an expiration date of July 14, 2017. (*See* Motion for Default Judgment, Exhibits E, F, and G.)

6. On May 1, 2019, a search of the Department’s PBS registration database revealed that the registration for the facility expired on July 14, 2017 and, as of May 1, 2019, had not been renewed. (*See* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated May 3, 2019, ¶¶ 9-12.)
7. 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, ¶ 9; *see also* Exhibit G.)
8. As shown by Receipt for Service No. 201905090251 issued by the New York State Department of State, respondent was served personally, on May 3, 2019 pursuant to section 303 of the Limited Liability Company Law, 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(c), together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its PBS facility located at 242 East 89th Street, New York, 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 May 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 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., dated May 27, 2020, ¶¶ 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 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 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* corrected Affirmation of Service of Deborah Gorman, dated June 23, 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 renew the registration of its petroleum bulk storage facility located at 242 East 89th Street, New York, 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). 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 May 27, 2020, ¶¶ 14-21).

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).

In this matter, the two-year threshold for applying a civil penalty of seven thousand five hundred dollars (\$7,500) was reached on July 14, 2019, after service of the notice of hearing and complaint but before the hearing and staff's motion for default judgment. Staff's papers demonstrate the violation continued as of May 27, 2020. "In cases, such as here, in which one of the penalty 'thresholds' under *12 Martense Assoc.* and its progeny is passed during the period between service of the notice of hearing and complaint and the date of the adjudicatory hearing or submission of default motion papers, it is appropriate to seek the penalty amount related to the longer period" (*see Matter of Promesa Ct Residences L.P.*, Order of the Commissioner, September 11, 2017, at 3; *see also Matter of 1160 President St. Hous. Dev. Fund Corp.*, Order of the Commissioner, October 3, 2017, at 2). Typically, Department staff seeks a civil penalty of seven thousand five hundred dollars (\$7,500) for violations with a duration that extend between two and five 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 resolving respondent's failure to timely register the facility. Accordingly, staff's motion for a civil penalty of ten thousand dollars (\$10,000), as discussed above, should be granted.

I conclude 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. 12 Martense Assoc.*, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 242 East 89th Street, New York, New York on or before July 14, 2017, 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 East 89th Associates, LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent East 89th Associates, LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 242 East 89th Street, New York, New York on or before July 14, 2017, the date the prior registration expired;
3. Directing respondent East 89th Associates, 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 East 89th Associates, LLC 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 East 89th Associates, LLC
DEC File No. PBS.2-93083.8.2019
Motion for Default Judgment

1. Cover letter, dated May 27, 2020, addressed to Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers.
2. Notice of Motion for Default Judgment, dated May 27, 2020.
3. Motion for Default Judgment, dated May 27, 2020, attaching Exhibits A and B;
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., dated May 3, 2019;
 - B. Affirmation of Deborah Gorman, Esq., dated May 27, 2020, attaching Exhibits C, D, E, F, G, H, I and J;
 - C. Affidavit of Service of Dale Thiel, sworn to May 21, 2020, attaching Department of State Receipt for Service, dated May 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 March 16, 2020, attaching deed dated December 31, 1997;
 - E. Petroleum Bulk Storage (PBS) Application from "East 89th Associates, LLC," PBS No. 2-293083, received August 22, 2011;
 - F. PBS Certificate, PBS No. 2-293083 issued to "East 89th Associates, LLC" on August 23, 2011, with an expiration date of July 14, 2017;
 - G. Facility Information Report, PBS No. 2-293083, printed May 27, 2020;
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding East 89th Associates, LLC, reflecting information through March 13, 2020;
 - I. Matter of East 89th Associates, LLC, Order on Consent, May 31, 2013; and
 - J. Draft Order.
4. Affirmation of Service of Deborah Gorman, Esq., dated May 27, 2020.
5. Corrected Affirmation of Service of Deborah Gorman, Esq., dated June 23, 2020.