

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.2-611710.10.2016

-by-

RCASCO PROPERTIES INC.,

Respondent.

This administrative enforcement proceeding addresses allegations by the staff of the New York State Department of Environmental Conservation (Department) that respondent RCASCO Properties Inc. (respondent) violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility within 30 days after it became the owner of the facility. Respondent’s facility is located at 37-38 104th Street, Corona, Queens, New York and includes an underground storage tank with a capacity of 1,500 gallons.

Administrative Law Judge (ALJ) D. Scott Bassinson of the Department’s Office of Hearings and Mediation Services was assigned to the matter. ALJ Bassinson 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 September 27, 2016, and failed to appear for the adjudicatory hearing scheduled in the matter on October 27, 2016 (see Default Summary Report at 3 [Finding of Fact No. 6]).

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 4-5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Staff’s papers submitted in support of its motion for default judgment provide proof of facts sufficient to support staff’s claim that respondent failed to register its petroleum bulk storage facility within 30 days after it became the owner of the facility.

The record demonstrates that respondent was required to register the facility within 30 days after it became owner of the facility (see ECL 17-1009[2]; 6 NYCRR 613-1.9[d][1]; former 6 NYCRR 612.2[b]; Default Summary Report at 3 [Finding of Fact No. 4]). Although respondent was in violation of former 6 NYCRR 612.2(b) until that provision was replaced in

October 2015, Department staff did not reference the former regulation in its papers. Rather, staff's complaint alleges a violation of the current regulation, 6 NYCRR 613-1.9(d)(1), which became effective on October 11, 2015. In future matters, Department staff should cite violations of both regulatory sections where, as here, the violations commenced prior to and continued after October 11, 2015.

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff's complaint seeks a civil penalty of ten thousand dollars (\$10,000) (see Motion for Default Judgment, Exhibit A [Complaint, Wherefore Clause, at II]), but staff's motion papers and proposed order seek a lower penalty of seven thousand five hundred dollars (\$7,500).

Respondent failed to register the facility within 30 days after November 22, 2013, the date respondent became the owner of the facility (see Default Summary Report at 3 [Finding of Fact No. 4]). Where, as here, an owner has not registered the facility for more than two years but less than five years, a civil penalty of seven thousand five hundred dollars (\$7,500) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). I agree with the ALJ that the civil penalty of seven thousand five hundred dollars (\$7,500) sought by staff is authorized and appropriate (see Default Summary Report at 4-5).

I also direct that respondent submit to the Department a petroleum bulk storage application for the facility within fifteen (15) days of service of this order upon it, together with all applicable 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 RCASCO Properties Inc. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent RCASCO Properties Inc. violated (a) ECL 17-1009 and (b) since October 11, 2015, 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 37-38 104th Street, Corona, Queens, New York, within 30 days after becoming the owner of the facility.
- III. Within fifteen (15) days of the service of this order upon respondent RCASCO Properties Inc., respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent RCASCO Properties Inc., 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, 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: Yvonne M. Ward, Esq.

- VI. Any questions or other correspondence regarding this order shall also be addressed to Yvonne M. Ward, Esq. at the address referenced in paragraph V of this order.

- VII. The provisions, terms and conditions of this order shall bind respondent RCASCO Properties Inc., 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
November 28, 2016

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

DEC Case No.
PBS.2-611710.10.2016

-by-

RCASCO PROPERTIES INC.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent RCASCO Properties Inc. (“respondent”) with a notice of hearing and complaint, dated August 23, 2016, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 37-38 104th Street, Corona, New York within 30 days after respondent became the owner of the facility. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL § 17-1009 and 6 NYCRR § 613-1.9(d)(1); (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (3) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner’s order by remitting the applicable registration fee, including any past registration fees, along with a complete registration application; and (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Because respondent was an active domestic business corporation in the State of New York at the time of the service of the notice of hearing and complaint,¹ service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State on August 23, 2016. See Staff Exhibit (“Staff Ex.”) C. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on August 23, 2016. See id. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for September 27, 2016, as directed in the notice of hearing and accompanying cover letter. See Staff Ex. B, ¶¶ 4-5.

As stated in the notice of hearing, on October 27, 2016, an adjudicatory hearing was convened before the undersigned Administrative Law Judge (“ALJ”) at the Department’s Region 2 offices, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York. Department

¹ According to the NYS Department of State Entity Information Sheet submitted by staff with its motion, respondent was dissolved by proclamation, and its authority annulled, on October 26, 2016. See Staff Ex. H.

staff was represented by Yvonne M. Ward, Esq. of the Remediation Bureau in the Department's Office of General Counsel. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a staff witness. Noting 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, and stated that staff would be submitting motion papers in support of the motion for a default judgment. I reserved on the oral default motion pending service and filing of the motion papers and any response thereto.

Staff has submitted a Notice of Motion for Default Judgment, a Motion for Default Judgment, both dated November 16, 2016, and nine exhibits.² Respondent has failed to file any response to staff's motion for default judgment.

Applicable Regulatory Provision

613-1.9 Registration.³

* * *

“(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 the transfer.”

Findings of Fact

The following facts are found based upon the documents submitted with and in support of staff's motion for a default judgment:

1. Respondent RCASCO Properties Inc. (“respondent”) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 37-38 104th Street, Corona, New York (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 1,500 gallons and is located underground. See Staff Exs. D, E, F, and G.
2. At the time this proceeding was commenced, respondent was an active domestic business corporation in the State of New York. On October 26, 2016, respondent was dissolved

² A list of the exhibits submitted by staff in support of its motion for default judgment is attached hereto as Appendix A.

³ Effective October 11, 2015, 6 NYCRR § 613-1.9(d)(1) replaced 6 NYCRR § 612.2(b), which stated: “(b) *Transfer of Ownership.* If 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.”

by proclamation and its authority annulled. See Staff Ex. H.

3. On November 16, 2011, the Department issued to Prista Properties, LLC Petroleum Bulk Storage (“PBS”) Registration Certificate No. 2-611710 for the facility. This registration contains an expiration date of July 24, 2014. See Staff Exs. F, G.
4. On November 22, 2013, Prista Properties, LLC, by deed, transferred all right, title and interest in the facility to respondent RCASCO Properties Inc., the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, City Register File No. 2013000508596. See Staff Ex. D.
5. As shown by Receipt for Service No. 201608230450 issued by the New York State Department of State, respondent was served personally on August 23, 2016, pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated August 23, 2016, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 613-1.9(d)(1), together with an order on consent, statement of readiness and an affidavit, for failure to register its petroleum bulk storage facility located at 37-38 104th Street, Corona, New York within 30 days after respondent became the owner of 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 August 23, 2016. See Staff Ex. B, Affirmation of Yvonne M. Ward, Esq. in Support of Motion for Default Judgment, dated November 16, 2016 (“Ward Aff.”), ¶¶ 2-3; see also Staff Ex. C, Affidavit of Service of Dale L. Thiel, sworn to November 16, 2016.
6. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for September 27, 2016, as directed in the notice of hearing and accompanying cover letter, and failed to appear for the adjudicatory hearing scheduled in the matter on October 27, 2016, as directed in the notice of hearing. See Staff Ex. B, Ward Aff., at ¶¶ 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 a 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 "also submit some proof of the facts sufficient to support the claims charged in the complaint." Matter of Greene Technologies Incorporated, Ruling of the Commissioner, November 10, 2016, at 3; Matter of American Auto Body & Recovery Inc., Ruling of the Commissioner, July 2, 2015, at 3; Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

In this case, Department staff's motion papers demonstrate that respondent failed to register its petroleum bulk storage facility located at 37-38 104th Street, Corona, New York within 30 days after respondent became the owner of the facility, in violation of ECL § 17-1009. Respondent has also been in violation of 6 NYCRR § 613-1.9(d)(1) from the effective date of Part 613, October 11, 2015.⁴

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 September 27, 2016, as directed in the cover letter served with the notice of hearing and complaint, and in the notice of hearing; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on October 27, 2016, as directed in both the cover letter and the notice of hearing. Department staff has submitted a proposed order with its motion papers. See Staff Ex. I. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to 6 NYCRR § 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers. See November 16, 2016 letter from Yvonne M. Ward, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent.

Department staff's submissions in support of the motion for a default judgment provide proof of the facts sufficient to support staff's claim that respondent failed to register its petroleum bulk storage facility located at 37-38 104th Street, Corona, New York within 30 days after respondent became the owner of the facility, in violation of ECL § 17-1009 and, from its October 11, 2015 effective date, 6 NYCRR § 613-1.9(d)(1).

In its complaint, Department staff seeks a civil penalty of ten thousand dollars (\$10,000). In its motion for a default judgment, however, Department staff seeks to modify the civil penalty requested, and now requests a civil penalty in the amount of seven thousand five hundred dollars

⁴ Staff has not alleged that, for the period from December 22, 2013 (30 days after respondent became the owner of the facility) to October 10, 2015, respondent was in violation of former section 612.2(b) of the regulations. Staff has alleged, however, that respondent was in violation of the governing statute, ECL § 17-1009. See e.g. Complaint ¶¶ 22-24.

(\$7,500). See Motion for Default Judgment at 1, ¶ 2, and Wherefore Clause ¶ II; compare Complaint, Wherefore Clause ¶ II.

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 Associates LLC, Order of the Commissioner, December 19, 2011 (“12 Martense Associates”), 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 Associates at 2.

The record in this matter reflects that, as of the date of the service and filing of the notice of hearing and complaint in this matter, respondent’s failure to register its facility exceeded two years but was less than five years. I agree with staff that a reduction from the ten thousand dollars (\$10,000) sought in the complaint is appropriate on the facts present here. I therefore recommend that the Commissioner impose a civil penalty of seven thousand five hundred dollars (\$7,500) because respondent’s failure to renew its registration, in violation of ECL § 17-1009, has continued for more than two but less than five years. There is no prejudice to respondent in reducing the penalty requested in the complaint.

Recommendations

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

1. Granting Department staff’s motion for default, holding respondent RCASCO Properties Inc. in default pursuant to the provisions of 6 NYCRR § 622.15;
2. Holding that respondent RCASCO Properties Inc. violated ECL § 17-1009 and, from October 11, 2015 forward, 6 NYCRR § 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 37-38 104th Street, Corona, New York within 30 days after it became the owner of the facility;
3. Directing respondent RCASCO Properties Inc. 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 applicable registration fees;

4. Directing respondent RCASCO Properties Inc. 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/_____
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
November 28, 2016

APPENDIX A

Matter of RCASCO Properties Inc.

DEC Case No. PBS.2-611710.10.2016

Exhibits to Staff Motion for Default Judgment dated November 16, 2016

Exhibit	Description
A	Cover letter, Notice of Hearing, Complaint, Statement of Readiness, all dated August 23, 2016
B	Affirmation of Yvonne M. Ward, Esq., dated November 16, 2016
C	Affidavit of Service of Dale L. Thiel, sworn to November 16, 2016, attaching NYS Department of State Receipt for Service No. 201608230450
D	New York City Department of Finance ACRIS Title Search, dated November 16, 2016. Deed to respondent dated November 22, 2013
E	PBS Application form filed for PBS No. 2-611710, dated October 12, 2011
F	PBS Certificate, PBS No. 2-611710, issued November 16, 2011
G	Facility Information Report, PBS No. 2-611710, printed November 16, 2016
H	NYS DOS Corporate Entity Information, dated November 16, 2016
I	Proposed Order