

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.2-604932.2.2018

-by-

RH 250 SHERMAN AVE LLC,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent RH 250 Sherman Ave LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility at 250-252 Sherman Avenue, New York, New York (facility) within 30 days of the transfer of ownership of the facility to it on August 23, 2016. Located at the facility is an aboveground storage tank with a capacity of 2,500 gallons.

On May 10, 2018, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Caruso prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ's hearing 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 January 8, 2018, and failed to appear for the adjudicatory hearing scheduled in the matter for February 7, 2018 and reconvened on May 10, 2018 (see Hearing Report at 4 [Finding of Fact No. 8]).

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 Hearing Report at 4-5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on May 10, 2018, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim, and proved its case on the merits by a preponderance of the evidence (see id.). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent was required to register the facility following the transfer of ownership of the facility to it on August 23, 2016 (see ECL 17-1009[2]; Hearing Report at 4-5). Respondent's failure to properly register the facility violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of title 10 of article 17 and its implementing regulations. Department staff, in its papers, sought a civil penalty in the amount of ten thousand dollars (\$10,000). At the hearing, Department staff moved to amend its pleadings to reduce the civil penalty to five thousand dollars (\$5,000), and the ALJ granted staff's motion. Where, as here, an owner has not registered the facility for up to two years, and no other violations or mitigating or aggravating factors exist, a civil penalty of five thousand dollars (\$5,000) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). The requested penalty of five thousand dollars (\$5,000) is authorized and appropriate.

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 RH 250 Sherman Ave LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent RH 250 Sherman Ave LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 250-252 Sherman Avenue, New York, New York within 30 days of the transfer of ownership of the facility to it.
- III. Within fifteen (15) days of the service of this order upon respondent RH 250 Sherman Ave LLC, 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 RH 250 Sherman Ave LLC, respondent shall pay a civil penalty in the amount of five thousand dollars (\$5,000) 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 RH 250 Sherman Ave LLC, 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: July 26, 2018
Albany, New York

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),

HEARING REPORT

DEC Case No.
PBS.2-604932.2.2018

-by-

RH 250 SHERMAN AVE LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent RH 250 Sherman Ave LLC (respondent) with a notice of hearing and complaint, dated December 11, 2017, alleging a violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) for failing to register its petroleum bulk storage facility located at 250-252 Sherman Avenue, New York, New York within 30 days of the transfer of ownership of the facility to it. 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 service of the Commissioner's order by remitting the applicable registration fee along with a complete registration application; and (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Because 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 serving the New York State Department of State on December 11, 2017 (see Staff Exhibit 3). Department staff provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about December 11, 2017 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for January 8, 2018, as directed in the notice of hearing and accompanying cover letter (see Staff Exhibit 1).

As stated in the notice of hearing, on February 7, 2018, an adjudicatory hearing was convened before the undersigned. Department staff was represented by Deborah Gorman, Esq., Senior Attorney, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent. Department staff, however, stated there was a pending settlement with respondent. Accordingly, the matter was adjourned in contemplation of settlement. On March 30, 2018, Department staff advised the Office of Hearings and Mediation Services (OHMS) that the matter did not settle and

requested that the hearing be reconvened. On April 5, 2018, OHMS served a Notice of Hearing on respondent by first class mail, advising respondent that the hearing would be reconvened on May 10, 2018 (see Staff Exhibit 2). On May 10, 2018, the adjudicatory hearing was reconvened before me at the Department’s Region 2 offices. Department staff was represented by Ms. Gorman. 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 reconvened adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15 and also sought judgment on the merits.

Department staff called one witness, Benjamin Conlon, Associate Attorney with the Department’s Office of General Counsel, and Section Chief in the Bureau of Remediation. In all, eight (8) exhibits were received in evidence.

Applicable Regulatory Provision

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 the transfer.

Findings of Fact

The following facts are found based upon the preponderance of evidence presented at the hearing, see 6 NYCRR 622.11(c):

1. Respondent RH 250 Sherman Ave LLC (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 250-252 Sherman Avenue, New York, New York (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 2,500 gallons and is located aboveground. See Testimony of Benjamin Conlon (Conlon Testimony); Staff Exhibits 6, 7 and 8.

2. Respondent is an active domestic limited liability company in the State of New York.

¹ ECL 17-1009(2) requires facility registrations to be “renewed every five years or whenever ownership of a facility is transferred, whichever occurs first.”

See Conlon Testimony; Staff Exhibit 4.²

3. On October 25, 2005, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-604932 to “Catello Striano,” identified on the certificate as the owner of the facility at that time. In bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” See Conlon Testimony; Staff Exhibits 6, 7 and 8.
4. On August 23, 2016, Catello Striano and Grazia Striano, by deed, transferred all right, title and interest in the facility to respondent RH 250 Sherman Ave LLC, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2016000305767. See Conlon Testimony; Staff Exhibit 5.
5. Benjamin Conlon is an Associate Attorney in the Department’s Office of General Counsel, serving as a Section Chief in the Bureau of Remediation, whose responsibilities include enforcement of the Petroleum Bulk Storage, Chemical Bulk Storage, and Major Oil Storage Facilities laws and regulations. Mr. Conlon is authorized to access and inspect the Department’s unified information system (UIS) and the electronic repository for scanned documents known as DecDOCS. The UIS and DecDOCS are databases maintained by the Department and contain petroleum bulk storage facility records filed with the Department, which records include petroleum bulk storage facility registrations filed pursuant to 6 NYCRR 613-1.9. See Conlon Testimony.
6. On May 9, 2018, Benjamin Conlon searched the petroleum bulk storage facility records contained in the Department’s UIS and DecDOCS databases for any petroleum bulk storage facility registration application filed by respondent for the facility. Mr. Conlon determined that, as of May 9, 2018, respondent had failed to file a petroleum bulk storage facility registration application since respondent took ownership on August 23, 2016. See Conlon Testimony; see also Staff Exhibits 5 and 8.
7. As shown by Receipt for Service No. 201712290202 issued by the New York State Department of State, respondent was served personally, on December 11, 2017, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated December 11, 2017, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), together with a cover letter, statement of readiness and supporting affirmation, for failure to register its petroleum bulk storage facility located at 250-252 Sherman Avenue, New York, New York within 30 days of the transfer of ownership of the facility to it. 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 December 11, 2017. See Staff Exhibits 1 and 3; see also Hearing Record.

² According to the records of the Department of State (Staff Exhibit 4), the current entity name of respondent is BSF 250-252 Sherman Holding LLC. The real property, however, is titled in the name of RH 250 Sherman Ave LLC (see Staff Exhibit 5).

8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for January 8, 2018 as directed in the notice of hearing and the accompanying cover letter, and failed to appear for the adjudicatory hearing scheduled in the matter for February 7, 2018 and reconvened on May 10, 2018, as directed in the notices of hearing. See Hearing Record.

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 "provide proof of the facts sufficient to support the claim" (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, at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)]; see also State v Williams, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and 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 January 8, 2018, 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 February 7, 2018 and reconvened on May 10, 2018, as directed in the notices of hearing. Department staff has submitted a proposed order.

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 250-252 Sherman Avenue, New

York, New York within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) (see Matter of Samber Holding Corp., Order of the Commissioner at 1). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to register its petroleum bulk storage facility located at 250-252 Sherman Avenue, New York, New York within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1). The Department is entitled to judgment upon the facts proven.

In its complaint, Department staff seeks an order imposing a civil penalty of ten thousand dollars (\$10,000). ECL § 71-1929(1) 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.

At the May 10, 2018 hearing, Department staff moved orally to amend the complaint to reduce the civil penalty requested from ten thousand dollars (\$10,000) to five thousand dollars (\$5,000). Department staff's proposed order seeks a civil penalty of five thousand dollars (\$5,000). This requested civil penalty is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (see 12 Martense Associates, at 2). Accordingly, pursuant to 6 NYCRR 622.10(b)(1)(i), I grant Department staff's motion to amend the pleadings, as there is no prejudice to respondent in reducing the penalty requested.

Conclusion of Law

By failing to register its PBS facility located at 250-252 Sherman Avenue, New York, New York within 30 days of the transfer of ownership of the facility to it, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Recommendations

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

1. Granting Department staff's motion for default, holding RH 250 Sherman Ave LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent RH 250 Sherman Ave LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 250-252 Sherman

Avenue, New York, New York within 30 days of the transfer of ownership of the facility to it;

3. Directing respondent RH 250 Sherman Ave LLC to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete petroleum bulk storage registration application for the facility, together with applicable registration fees;
4. Directing respondent RH 250 Sherman Ave LLC to pay a civil penalty in the amount of five thousand dollars (\$5,000) 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: May 24, 2018
Albany, New York

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of RH 250 Sherman Ave LLC
 250-252 Sherman Avenue, New York, New York – DEC Case No. PBS.2-604932.2.2018
 May 10, 2018 – Region 2
 Edrol File No. 180510154653

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, and Affirmation of Deborah Gorman all dated December 11, 2017.	✓	✓	Department Staff	
2	Notice of Hearing (reconvened) dated April 5, 2018	✓	✓	Department Staff	
3	Affidavit of Service of Dale Thiel, sworn to May 9, 2018 with New York State Department of State Receipt for Service dated December 11, 2017.	✓	✓	Department Staff	
4	NYS Department of State Entity Information, current through May 2, 2018.	✓	✓	Department Staff	
5	Deed to respondent, dated August 23, 2016.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	PBS Application, dated September 23, 2005, from Catello Striano (prior owner), for 250-252 Sherman Avenue, New York, New York.	✓	✓	Department Staff	
7	PBS Registration Certificate issued October 25, 2005, expiration date December 26, 2010.	✓	✓	Department Staff	
8	PBS Program Facility Information Report, printed May 3, 2018.	✓	✓	Department Staff	