

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of Title 10 of Article 17 of the Environmental Conservation Law (ECL) of the State of New York, as implemented pursuant to Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

DEC Case No.
PBS.OP.4-106186.5.2017

-by-

YOGIJI REAL ESTATE LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Yogiji Real Estate LLC violated 6 NYCRR 613-1.9(a) by failing to ensure that the registration information, including the identity of any authorized class A or authorized class B operator, remained current and accurate for its petroleum bulk storage (PBS) facility.

Respondent's facility is located at 176 Erie Blvd., Canajoharie, New York, and includes the following petroleum bulk storage tanks: No. 11, an underground tank with a capacity of 10,000 gallons, containing gasoline; No. 12, an underground tank with a capacity of 6,000 gallons, containing gasoline; No. 13, an underground tank with a capacity of 6,000 gallons, containing diesel fuel; No. 14, an underground tank with a capacity of 4,000 gallons, containing gasoline; and No. 15, an aboveground tank with a capacity of 2,000 gallons, containing kerosene.

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 and failed to appear for the adjudicatory hearing scheduled for July 24, 2018 (see Default Summary Report at 3 [Finding of Fact No. 5]). At the July 24, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Caruso reserved on the motion, and Department staff 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 enough facts to enable me to determine that staff has a viable claim that respondent failed to ensure that the registration information for its petroleum bulk storage facility located at 176 Erie Blvd., Canajoharie, New York, remained current and accurate, in violation of 6 NYCRR 613-1.9(a). In particular, respondent failed to designate an authorized class A operator or authorized class B operator for each tank system on the registration by October 11, 2016, as required by 6 NYCRR 613-2.5(a).

Department counsel correctly points out that the requirement to register PBS facilities and maintain current and accurate information on the registration is one of the “cornerstones” of the PBS regulatory scheme (see Motion for Default Judgment, Exhibit B, Affirmation of Stephen Repsher, Esq., dated July 24, 2018 [Repsher Affirmation], ¶ 12). 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.

Respondent was required to designate an authorized class A operator and an authorized class B operator on the registration for its facility no later than October 11, 2016 but failed to do so (see Default Summary Report at 3 [Finding of Fact No. 3]). Accordingly, respondent has been in violation of 6 NYCRR 613-1.9(a) from October 11, 2016.

ECL 71-1929(1), which applies to the 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. For this violation, Department staff seeks a civil penalty in the amount of five thousand dollars (\$5,000) and addresses the penalty in the context of ECL 71-1929(1) and the Department’s Civil Penalty Policy (DEE-1) dated June 20, 1990 (Civil Penalty Policy)(see Repsher Affirmation ¶¶ 12-14, 16). In this matter the civil penalty of five thousand dollars (\$5,000) that staff requests is supported by the record and is in accordance with ECL 71-1929(1) and the Civil Penalty Policy.¹

I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of this order upon respondent. In addition, I direct that respondent submit to the Department a complete petroleum bulk storage registration application for the facility, including the information identifying the authorized class A operator and authorized class B operator for all relevant tank systems, within thirty (30) days of the service of this order upon respondent.

¹ In its evaluation of the civil penalty, staff also cites to the Commissioner’s order dated December 19, 2011 in Matter of 12 Martense Associates LLC (12 Martense Associates)(see Repsher Affirmation ¶ 15). The Commissioner in 12 Martense Associates established a penalty structure that applies to violations of PBS registration requirements for heating oil tanks in New York City (see 12 Martense Associate, at 2), specifically PBS registration renewals and PBS re-registrations when the ownership of a PBS facility is transferred. It would not be applicable to violations involving the failure to identify an authorized Class A or Class B operator as is the case here.

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 Yogiji Real Estate 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 Yogiji Real Estate LLC is determined to have violated 6 NYCRR 613-1.9(a) by failing to maintain an accurate and current registration for its PBS facility located 176 Erie Blvd., Canajoharie, New York.
- III. Within thirty (30) days of the service of this order upon respondent Yogiji Real Estate LLC, respondent shall submit to the Department a complete petroleum bulk storage registration application for the facility, including the information identifying the authorized class A operator and authorized class B operator for all relevant tank systems.
- IV. Within thirty (30) days of the service of this order upon respondent Yogiji Real Estate 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 and the penalty payment shall be sent to the following address:

Office of General Counsel
NYS Department of Environmental Conservation
1130 North Westcott Road
Rotterdam, New York 12306
Attn: Stephen Repsher, Esq.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Stephen Repsher, Esq. at the address referenced in paragraph V of this order.

- VII. The provisions, terms, and conditions of this order shall bind respondent Yogiji Real Estate 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: Albany, New York
September 17, 2018

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of Title 10 of Article 17 of the Environmental Conservation Law (ECL) of the State of New York, as implemented pursuant to Part 613 of 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.OP.4-106186.5.2017

-by-

YOGIJI REAL ESTATE LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Yogiji Real Estate LLC (respondent) with a notice of hearing and complaint, dated May 24, 2018, alleging a violation of 6 NYCRR 613-1.9(a), for failing to ensure that the registration information, including the identity of any authorized class A or class B operator, remained current and accurate for its petroleum bulk storage (PBS) facility located at 176 Erie Blvd., Canajoharie, New York (facility). The complaint seeks an order of the Commissioner: (i) finding respondent in violation of 6 NYCRR 613-1.9(a); (ii) assessing a civil penalty in the amount of five thousand dollars (\$5,000); (iii) directing respondent to submit a completed PBS registration application form to the Department including information identifying the authorized class A operator and authorized class B operator for the relevant tank systems within 30 days after the date the order is signed by the Commissioner; and (iv) imposing such other and further relief as the Commissioner may deem just and appropriate.

Department staff served the notice of hearing and complaint on respondent by certified mail return receipt requested (*see* Motion for Default Judgment, Exhibit C) on May 24, 2018. Respondent received the certified mail on May 29, 2018 (*id.*). Respondent failed to file an answer to the complaint, and failed to appear at the adjudicatory hearing scheduled for July 24, 2018, 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, an adjudicatory hearing was convened on July 24, 2018 before the undersigned Administrative Law Judge (ALJ) at the Department's Region 4 offices, located at 1130 North Westcott Road, Rotterdam, New York. Department staff was represented by Stephen Repsher, Esq., Assistant Regional Attorney, Office of General Counsel, New York

State Department of Environmental Conservation, 1130 North Westcott Road, Rotterdam, New York. No one appeared on behalf of respondent.

I noted for the record that respondent had failed to answer the complaint 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). At the July 24, 2018 hearing, 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 July 24, 2018 (*see* Motion for Default Judgment, Exhibit F).

By letter dated August 10, 2018, I requested additional documents from Department staff. On August 13, 2018, Department staff provided the additional documents and served them on respondent (*see* Affidavit of Service of Jill Viscusi, sworn to August 13, 2018).

Applicable Regulatory Provision

Section 613-1.9. Registration.

* * *

“(a) General. The facility owner must obtain an initial or revised registration certificate from the department prior to the first receipt of petroleum into a new or replaced tank system. The facility owner must ensure that the registration information identified in subdivision (e) of this section remains current and accurate. In addition, every temporary tank system that is not removed within 180 days after installation must either be included on a new facility registration or be added to an existing facility's registration. The facility owner may rely on an authorized representative to satisfy any obligation imposed on the owner by the provisions of this section. (emphasis added)

* * *

“(e) Application procedure for information corrections.

(1) The facility owner must submit information corrections for registered facilities using forms or electronic means as provided by the department. Forms are available online at www.dec.ny.gov and at all department offices.

(2) The registration application must be signed by the facility owner.

(3) Changes in the following registration items are considered information corrections:

- (i) contact information;
- (ii) class A or class B Operator;
- (iii) tank system status;
- (iv) tank system equipment; or
- (v) type of petroleum stored.

(4) No registration fee is required for submitting information corrections.”

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 Yogiji Real Estate LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 176 Erie Blvd., Canajoharie, New York (facility). In particular, PBS tank number 11 at the facility has a capacity of 10,000 gallons, contains gasoline and is located underground; tank number 12 has a capacity of 6,000 gallons, contains gasoline and is located underground; tank number 13 has a capacity of 6,000 gallons, contains diesel fuel and is located underground; tank number 14 has a capacity of 4,000 gallons, contains gasoline and is located underground; and tank number 15 has a capacity of 2,000 gallons, contains kerosene and is located aboveground. *See* Motion for Default Judgment, Exhibit D.
2. The Department issued PBS Certificate Number 4-106186 to Yogiji Real Estate LLC, the owner of the facility, on August 25, 2014 with an expiration date of August 25, 2019. *See* Motion for Default Judgment, Exhibit D (Addendum).
3. On March 19, 2018, a search of the Department's PBS registration database revealed that respondent's facility contains a tank system or systems that is or are subject to the requirements of 6 NYCRR 613-2 and that respondent had not designated an authorized class A operator or class B operator for each tank system on the registration. *See* Motion for Default Judgment, Exhibit E, Affidavit of Amiel Lagatic, sworn to May 23, 2018, ¶¶ 16 (a) and (b); *see also* Exhibit D.¹
4. As shown by the Affidavit of Service of Jill Viscusi, sworn to July 23, 2018, Department staff served a notice of hearing and complaint on respondent by certified mail return receipt requested, on May 24, 2018, which were received by respondent on May 29, 2018, alleging a violation of 6 NYCRR 613-1.9(a), together with a cover letter, order on consent, statement of readiness and affidavit of Amiel Lagatic, for failure to maintain a current and accurate registration of its PBS facility located at 176 Erie Blvd., Canajoharie, New York. *See* Motion for Default Judgment, Exhibit C.
5. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on July 24, 2018, as directed in the notice of hearing. *See* Motion for Default Judgment, Exhibit B, Affirmation of Stephen Repsher, Esq., dated July 24, 2018, ¶¶ 4-5; Hearing Record.
6. As shown by the Affidavit of Service of Jill Viscusi, sworn to July 24, 2018, Department staff served the Notice of Motion and Motion for Default Judgment, with a cover letter and exhibits, on respondent by first class mail. *See* Motion for Default Judgment, Exhibit F.

¹ Although the PBS Certificate issued on August 25, 2014 identifies a "Class B (Daily On-Site) Operator", staff's sworn affidavit demonstrates that as of March 19, 2018 respondent had not designated an authorized Class A or authorized Class B operator on the registration.

7. As shown by the Affidavit of Service of Jill Viscusi, sworn to August 13, 2018, Department staff served a copy of the May 24, 2018 cover letter from Stephen Repsher to respondent and the statement of readiness that were served with the complaint along with a copy of the PBS Certificate, dated August 25, 2014, on respondent by first class mail. See Affidavit of Service of Jill Viscusi, sworn to August 13, 2018.

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, 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 (iii) respondent failed to appear for the adjudicatory hearing scheduled on July 24, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit G). 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* Findings of Fact Nos. 6 and 7).

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 ensure that the registration information for its petroleum bulk storage facility located at 176 Erie Blvd., Canajoharie, New York, remained current and accurate, in violation of 6 NYCRR 613-1.9(a) (*see Matter of Samber Holding Corp.*, Order of the Commissioner at 1). In particular, respondent failed to designate an authorized class A operator or authorized class B operator for each tank system on the registration by October 11, 2016, as required by 6 NYCRR 613-2.5(a). Respondent was in violation of 6 NYCRR 613-1.9(a) from October 11, 2016.

Department staff seeks a civil penalty in the amount of five thousand dollars (\$5,000), and 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, Repsher Affirmation, ¶¶ 12-16*).

I find that staff's request for a civil penalty in the amount of five thousand dollars (\$5,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Department staff does not request payment of the civil penalty within any specified period of time, but staff's complaint requests that a registration application be submitted within thirty (30) days of the date of a Commissioner's order. Although Department staff's proposed order directs respondent to submit the PBS registration application form within fifteen (15) days of the order, I recommend the Commissioner direct submission of the PBS registration application and payment of the civil penalty within thirty (30) days of respondent's receipt of the order.

Conclusion of Law

By failing to maintain an accurate and current registration for its PBS facility located at 176 Erie Blvd., Canajoharie, New York, respondent violated 6 NYCRR 613-1.9(a).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Yogiji Real Estate LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Yogiji Real Estate LLC violated 6 NYCRR 613-1.9(a) by failing to maintain an accurate and current registration for its PBS facility located at 176 Erie Blvd., Canajoharie, New York;

3. Directing respondent Yogiji Real Estate LLC to submit to the Department, within thirty (30) days of service of the Commissioner's order, a complete registration application for the facility, including the information identifying the authorized class A operator and class B operator for all relevant tank systems;
4. Directing respondent Yogiji Real Estate LLC to pay a civil penalty in the amount of five thousand dollars (\$5,000) within thirty (30) 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
August 23, 2018

APPENDIX A

Matter of Yogiji Real Estate LLC
DEC File No. PBS.OP.4-106186.5.2017
Motion for Default Judgment

1. Cover letter, dated July 24, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers
2. Notice of Motion for Default Judgment dated July 24, 2018
3. Motion for Default Judgment, dated July 24, 2018, attaching Exhibits A and B:
 - A. Notice of Hearing and Complaint dated May 24, 2018
 - B. Affirmation of Stephen Repsher, Esq., dated July 24, 2018, attaching Exhibits C – G:
 - C. Affidavit of Service of Jill Viscusi, sworn to July 23, 2018, attaching USPS Return Receipt, dated May 29, 2018, reflecting service of cover letter, notice hearing, complaint, order on consent, statement of readiness and affidavit of Amiel Lagatic, upon respondent by certified mail
 - D. Undated and unsigned Petroleum Bulk Storage (PBS) Application from Yogiji Real Estate LLC, PBS No. 4-106186; PBS Facility Information Report, PBS No. 4-106186, printed July 10, 2018
 - E. Affidavit of Amiel Lagatic, sworn to May 23, 2018
 - F. Affidavit of Service of Jill Viscusi, sworn to July 24, 2018, reflecting service of cover letter, notice of motion and motion for default judgment, with exhibits, upon respondent by mail
 - G. Proposed Order
4. Cover letter, dated August 13, 2018, from Stephen Repsher, Esq., attaching the May 24, 2018 cover letter and statement of readiness (Addendum to Exhibit A) that were served with the notice of hearing and complaint, the PBS Certificate (Addendum to Exhibit C) issued to respondent on August 25, 2014, and the Affidavit of Service of Jill Viscusi, sworn to August 13, 2018