

**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.2-604603.5.2018

ZB PROSPECT REALTY LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent ZB Prospect Realty LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d) (1) by failing to register its petroleum bulk storage (PBS) facility within thirty days of the transfer of the facility to respondent, on July 8, 2011. Respondent's facility is located at 846-848 Prospect Place, Brooklyn, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 3,000 gallons.

Administrative Law Judge (ALJ) Maria E. Villa 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 April 10, 2018, and failed to appear for the adjudicatory hearing on May 10, 2018 (see Default Summary Report at 3 [Finding of Fact No. 9]). At the May 10, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment before ALJ Michael Caruso. ALJ Caruso reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers.

Because respondent failed to answer or appear in this matter, ALJ Villa recommends that Department staff's motion for a default judgment be granted (see Default Summary Report at 6). 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 staff's motion provide enough facts to enable me to determine that staff has a viable claim that respondent failed to register its PBS

facility within thirty days of the transfer of the facility to respondent, on July 8, 2011, in violation of ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(d)(1).¹

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 August 20, 2018, ¶ 14). 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.

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. Department staff is seeking a civil penalty in the amount of seven thousand five hundred dollars (\$7,500). Staff’s penalty request is less than the amount typically imposed for this type of violation by similar New York City facilities (see Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2). Nevertheless, based on the circumstances noted in the default summary report (see Default Summary Report at 5) and considering staff’s explanation, the requested penalty of seven thousand five hundred dollars (\$7,500) is authorized and appropriate in this case.

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, plus applicable registration fees, 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 ZB Prospect Realty 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 ZB Prospect Realty LLC is determined to have violated ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the facility to respondent on July 8, 2011.
- III. Within fifteen (15) days of the service of this order upon respondent ZB Prospect Realty 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 ZB Prospect Realty LLC, respondent shall pay a civil penalty in the amount of seven thousand

¹ 6 NYCRR 613-1.9 replaced former 6 NYCRR 612.2 which similarly included requirements governing transfer of ownership.

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 ZB Prospect Realty 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
December 3, 2018

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.2-604603.5.2018

ZB PROSPECT REALTY LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent ZB Prospect Realty LLC (respondent) with a notice of hearing and complaint, dated March 5, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), for failing to register its petroleum bulk storage (PBS) facility located at 846-848 Prospect Place, Brooklyn, New York (facility) within thirty days of the transfer of the facility to respondent on July 8, 2011. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1); (ii) assessing a civil penalty in the amount of ten thousand dollars (\$10,000)¹; (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.

Respondent is an active limited liability company in the State of New York. Service of the notice of hearing and complaint upon respondent was made by personally serving the New York State Department of State on March 5, 2018 (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 March 5, 2018. *Id.* Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint (Exhibit A).

As stated in the notice of hearing, on May 10, 2018, an adjudicatory hearing was convened before administrative law judge ("ALJ") Michael S. Caruso. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New

¹ As discussed below, in its motion for default judgment, Department staff reduced the penalty amount requested to seven thousand five hundred dollars (\$7,500).

York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

ALJ Caruso 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. ALJ Caruso 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). On August 20, 2018, staff submitted a written motion for a default judgment with supporting papers. Department staff served the motion and supporting papers on respondent by first class mail on August 20, 2018 (Affirmation of Service of Deborah Gorman, dated August 20, 2018).

As discussed below, Department staff identified only one violation (failure to register the facility upon transfer of ownership) in the complaint and the subsequent motion for default judgment. In fact, the documents submitted indicate that there were a series of violations related to respondent's PBS tank at the facility. Nevertheless, in the complaint and in Department staff's motion, respondent only received notice of a single violation, and Department staff is entitled to relief only with respect to that violation.

Applicable Regulatory Provisions

Section 613-1.9. Registration.² (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.

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

1. Respondent ZB Prospect Realty LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 846-848 Prospect Place, Brooklyn, New York (facility). PBS tank number 001 at the facility has a capacity of 3,000 gallons and is located

² Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, "(a) *Existing facilities*. . . (2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred." ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

aboveground. Exhibits E, F, and H.

2. Respondent is an active limited liability company in the State of New York. Exhibit I.
3. On July 15, 2003, 848 Prospect Place, the prior owner, conveyed the facility to ZB Prospect Realty LLC. Exhibit D.
4. Pursuant to a registration application dated May 5, 2008, the Department issued PBS Certificate Number 2-604603 to ZB Prospect Realty LLC, the owner of the facility, on May 14, 2008, with an expiration date of July 15, 2013. The application and certificate identify the owner as “ZB Prospect Realty LLC.” Exhibits E and F.
5. On December 17, 2009, ZB Prospect Realty LLC conveyed the facility to Zalmen Biederman. Exhibit D.
6. On July 8, 2011, Zalmen Biederman conveyed the facility to ZB Prospect Realty LLC, the facility’s current owner. Exhibit D.
7. As of August 20, 2018, respondent had not registered the facility. Exhibit B, Affirmation of Deborah Gorman, Esq., dated August 20, 2018, ¶¶ 9-10; Exhibit H.
8. Respondent was served personally, on March 5, 2018, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated March 5, 2018, 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 PBS facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the property to respondent on July 8, 2011. 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 March 5, 2018. Exhibit C.
9. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for April 10, 2018, 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 May 10, 2018, as directed in the notices of hearing. Exhibit B, Affirmation of Deborah Gorman, Esq., dated August 20, 2018, ¶¶ 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 (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); 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 (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 N.Y.2nd 62, 70-71 (2003)

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 April 10, 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 May 10, 2018, as directed in the notices of hearing. Department staff has submitted a proposed order. 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 (Affirmation of Service of Deborah Gorman, dated August 20, 2018, ¶ 2).

Department staff's complaint, and the motion, only address respondent's failure to register the facility within thirty days of the transfer of ownership on July 8, 2011. Nevertheless, based upon the submissions on the motion, Department staff could have charged another violation. Specifically, it appears from the documents that Zalmen Bierderman, who acquired the facility when the property was transferred on December 17, 2009, did not register the facility at that time. Exhibit D. The facility registration remained in the name of ZB Prospect Realty, LLC.

By letter dated October 26, 2018, the ALJ requested clarification with respect to the potential violation. Department staff responded in a letter dated November 20, 2018, acknowledging the additional potential violation, but concluding that due to the need to prioritize the matters sent to hearing in expedited petroleum bulk storage cases, "generally we serve the current owner only based on their current duration of legal or equitable ownership." November 20, 2018 letter, at 1.

The potential violation was not part of the pleadings or the submissions on the motion, and therefore cannot be considered here. Consequently, Department staff's submissions in support of the motion for a default judgment only provide proof of facts sufficient to determine that staff has a viable claim that respondent failed to register its petroleum bulk storage facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the property to respondent on July 8, 2011, in violation of ECL 17-1009 (see Matter of Samber Holding Corp., Order of the Commissioner at 1). Respondent was in violation of 6 NYCRR 613-1.9(d)(1) from the effective date of the current part 613, October 11, 2015.

In the March 5, 2018 complaint, Department staff requested that the Commissioner impose a \$10,000 civil penalty. Exhibit A, Wherefore Clause, ¶ II. Department staff requested a reduced civil penalty in the amount of seven thousand five hundred dollars (\$7,500) in its motion for default judgment. Department 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 (Exhibit A, Complaint, at Wherefore Clause ¶ II; Exhibit B, August 20, 2018 Gorman Affirmation, ¶¶ 14-19).

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. 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.

In this case, the violation charged occurred in 2011, when respondent failed to register the tank upon transfer of the facility to ZB Prospect Realty LLC. Department staff's motion for default judgment was filed in August of 2018, more than seven years from the time the tank should have been registered to respondent. Although ordinarily this amount of time would warrant the imposition of a \$10,000 penalty, Department staff stated in its affirmation in support that Department staff previously served this matter in 2016, and at that time respondent and Department staff were attempting to settle the matter. Exhibit B, at ¶ 12. Due to continued non-compliance, the matter was re-served. Given the circumstances of this default, staff's request to reduce the penalty to seven thousand five hundred dollars (\$7,500) should be granted.

Conclusion of Law

By failing to register its PBS facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the facility to respondent, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent ZB Prospect Realty LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent ZB Prospect Realty LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its PBS facility located at 846-848 Prospect Place, Brooklyn, New York within thirty days of the transfer of the facility to respondent on July 8, 2011;
3. Directing respondent ZB Prospect Realty 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 ZB Prospect Realty LLC 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/_____
Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
November 29, 2018

APPENDIX A

Matter of ZB Prospect Realty LLC
DEC File No. PBS.2-604603.5.2018
Motion for Default Judgment

1. Cover letter, dated August 20, 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 August 20, 2018
3. Motion for Default Judgment, dated August 20, 2018, attaching Exhibits A and B:
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated March 5, 2018
 - B. August 20, 2018 Affirmation of Deborah Gorman, Esq., attaching Exhibits C – J:
 - C. Affidavit of Service of Dale Thiel, sworn to August 20, 2018, attaching March 5, 2018 Department of State Receipt for Service, 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 July 5, 2018, attaching deed dated July 8, 2011
 - E. Petroleum Bulk Storage (PBS) Application from "ZB Prospect Realty LLC," PBS No. 2-604603, dated May 5, 2008
 - F. PBS Certificate No. 2-604603 issued to "ZB Prospect Realty" on May 14, 2008, expired July 15, 2013
 - G. [No Exhibit G]
 - H. Facility Information Report, PBS No. 2-604603, printed July 5, 2018
 - I. NYS Department of State, Division of Corporations, Entity Information Sheet regarding ZB Prospect Realty LLC, reflecting information through July 5, 2018
 - J. Draft Order
4. August 20, 2018 Affirmation of Service of Deborah Gorman