

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.
2-469041DG

-by-

**1113-17 GRANT AVENUE HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

On August 4, 2015, an adjudicatory hearing was convened before D. Scott Bassinson, Administrative Law Judge (“ALJ”) of the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation (“Department”). The hearing addressed Department staff’s allegations that 1113-17 Grant Avenue Housing Development Fund Corporation (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2 by failing to renew the registration of its petroleum bulk storage facility located at 1113-1117 Grant Ave., Bronx, New York (“facility”). Located at the facility is an aboveground storage tank with a capacity of 5,000 gallons.

ALJ Bassinson 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 April 21, 2015, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on May 19, 2015, as directed in the notice of hearing (see Hearing Report at 4 [Finding of Fact No. 9]).

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 August 4, 2015, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report at 4-5). Accordingly, staff is entitled to a judgment based on record evidence.¹

¹ At the hearing, staff submitted an affirmation detailing its efforts to obtain telephone or other contact information for the facility (see Staff Exhibit 9). The affirmation was signed, but was undated. I hereby direct that any such staff affirmations in the future be dated as well as signed.

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, in its papers, sought a civil penalty 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.

Respondent has failed to renew the registration for the facility for almost one and a half years (see Hearing Report at 3 [Finding of Fact No. 7]). Where, as here, a facility has not renewed its registration within the past 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 registration 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 1113-17 Grant Avenue Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 1113-17 Grant Avenue Housing Development Fund Corporation is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2 for failing to renew the registration of its petroleum storage facility located at 1113-1117 Grant Avenue, Bronx, New York.
- III. Within fifteen (15) days of the service of this order upon respondent 1113-17 Grant Avenue Housing Development Fund Corporation, respondent shall submit to the Department a complete petroleum bulk storage registration application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent 1113-17 Grant Avenue Housing Development Fund Corporation 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.

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.
2-469041DG

-by-

**1113-17 GRANT AVENUE HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent 1113-17 Grant Avenue Housing Development Fund Corporation (“respondent”) with a notice of hearing and complaint, dated March 20, 2015, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 612.2, for failing to renew the registration of its petroleum bulk storage facility located at 1113-1117 Grant Avenue, Bronx, New York on or before March 9, 2014, the date on which its prior registration expired. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL § 17-1009 and 6 NYCRR § 612.2; (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 and remit the applicable registration fee; and (4) granting such other and further relief as the Commissioner may deem just and appropriate.

Inasmuch as respondent is an active domestic business corporation 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 March 20, 2015 (see Staff Exhibit 3). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by regular mail on March 20, 2015. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 21, 2015, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on May 19, 2015, an adjudicatory hearing was convened before ALJ Michael S. Caruso at the Department’s Region 2 offices, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407. 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 12233-1500. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a program staff witness. Noting for the record that respondent had failed to answer the complaint, failed to appear for the prehearing conference and failed to appear for the adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR § 622.15. Judge Caruso reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR § 622.15(b). Moreover, Judge Caruso noted Department staff's readiness for hearing and noted the failure of respondent to appear. Judge Caruso advised that the hearing, in the absence of respondent, would be convened on a subsequent date.

At approximately 10:30 a.m. on August 4, 2015, the adjudicatory hearing was convened before the undersigned ALJ at the Department's Central Office at 625 Broadway, Albany, New York 12233. Department staff was represented by law student intern Victoria Claire Hall-Swartz under the supervision of Benjamin Conlon, Esq., Associate Attorney, Remediation Bureau, Office of General Counsel. Department staff renewed orally its motion for a default judgment, and also sought judgment on the merits.

Department staff called one witness, Cynthia Freedman, an Environmental Program Specialist 2 in the Registration and Permit Section of the Department's Division of Environmental Remediation. In all, eight (8) exhibits were received in evidence.

Applicable Regulatory Provision

Section 612.2. Registration of Facilities.

“(a) *Existing facilities.*

“(1) Within one year of the effective date of these regulations, the owner of any petroleum storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.

“(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.”

Findings of Fact

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

1. Respondent 1113-17 Grant Avenue Housing Development Fund Corporation is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at

1113-1117 Grant Avenue, Bronx, NY (“facility”). In particular, petroleum storage tank number 1 at the facility has a capacity of 5,000 gallons and is located above ground. See Testimony of Cynthia Freedman; Staff Exhibits 5, 7 and 8.

2. Respondent is an active domestic business corporation in the State of New York. See Testimony of Cynthia Freedman; see also Staff Exhibit 4.
3. On August 1, 2011, the Department issued Petroleum Bulk Storage (“PBS”) Registration Certificate No. 2-469041 to the respondent. This registration expired on March 9, 2014. See Testimony of Cynthia Freedman; see also Staff Exhibit 7.
4. On June 26, 1998, the City of New York, through its Department of Housing Preservation and Development, conveyed all right, title and interest in the facility to respondent 1113-17 Grant Avenue Housing Development Fund Corporation. See Testimony of Cynthia Freedman; see also Staff Exhibit 6.
5. Cynthia Freedman is an Environmental Program Specialist 2 in the Registration and Permit Section of the Department’s Division of Environmental Remediation. Ms. Freedman has been employed in that position for twelve and a half years and 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 § 612.2. See Testimony of Cynthia Freedman.
6. On August 3, 2015, Cynthia Freedman searched the petroleum bulk storage facility records contained in the Department’s UIS and DecDOCS databases for any petroleum bulk storage facility registration or renewal registration filed by respondent for the facility. See Testimony of Cynthia Freedman.
7. As a result of her search, Cynthia Freedman confirmed that respondent had not renewed the registration the facility since the prior registration expired on March 9, 2014. See Testimony of Cynthia Freedman; see also Staff Exhibit 7.
8. As shown by Receipt for Service No. 201503300523 issued by the New York State Department of State, respondent was served personally, on March 20, 2015, pursuant to section 306 of the Business Corporation Law with a notice of hearing and complaint dated March 20, 2015, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 612.2, together with a cover letter, statement of readiness and supporting affidavit, for failure to renew the registration for its petroleum bulk storage facility located at 1113-1117 Grant Avenue, Bronx, New York on or before March 9, 2014, the date that the prior registration expired. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by regular mail on March 20, 2015. See Staff Exhibit 3.

9. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for April 21, 2015, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on May 19, 2015, as directed in the notice of hearing. See Hearing Record.

Discussion and Conclusions of Law

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." Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

In this case, Department staff's proof presents a prima facie case demonstrating that respondent failed to renew the registration of its petroleum bulk storage facility located at 1113-1117 Grant Avenue, Bronx, New York, on or before March 9, 2014, the date that the prior registration expired, in violation of ECL § 17-1009 and 6 NYCRR § 612.2.

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 21, 2015, as directed in the cover letter served with the notice of hearing and complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on May 19, 2015, as directed in the notice of hearing. Department staff provided its proposed order at the August 4, 2015 hearing. 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 renew the registration

of its petroleum storage facility on or before March 9, 2014, the date on which the prior registration expired, in violation of ECL § 17-1009 and 6 NYCRR § 612.2(b). The Department is entitled to judgment upon the facts proven. At the August 4, 2015 hearing, Department staff moved orally to amend the pleadings to reduce the civil penalty requested to five thousand dollars (\$5,000). Pursuant to 6 NYCRR § 622.10(b)(1)(i), I granted Department staff's motion to amend the pleadings, as there is no prejudice to respondent in reducing the penalty requested.

Department staff's proposed order and the five thousand dollar (\$5,000) civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent. See e.g. Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2.

Recommendations

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

1. Granting Department staff's motion for default, holding respondent 1113-17 Grant Avenue Housing Development Fund Corporation in default pursuant to the provisions of 6 NYCRR § 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent 1113-17 Grant Avenue Housing Development Fund Corporation violated ECL § 17-1009 and 6 NYCRR § 612.2 by failing to renew the registration of its petroleum bulk storage facility located at 1113-1117 Grant Avenue, Bronx, New York on or before March 9, 2014, the date on which the prior registration expired;
3. Directing respondent 1113-17 Grant Avenue Housing Development Fund Corporation 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 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/_____
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
September 3, 2015

EXHIBIT CHART – PBS EXPEDITED PROCEEDING

Matter of 1113-17 Grant Avenue Housing Development Fund Corporation

August 4, 2015 – Central Office, 625 Broadway, Albany, NY

DEC Case No. 2-469041DG - Edrol File No. 060903100225

Exhibit No.	Description	ID'd	Rec'd Into Evid.	Offered By	Notes
1	June 2, 2015 Order of the Appellate Division, Third Department authorizing Victoria Claire Hall-Swartz to act as law intern in the office of the NYS Department of Environmental Conservation.	✓	✓	Department Staff	
2	Cover Letter from Deborah Gorman, Esq., to respondent, dated March 20, 2015. Notice of Hearing and Complaint, dated March 20, 2015. Statement of Readiness, dated March 20, 2015. Affidavit of Brooke Turallo, sworn to March 19, 2015.	✓	✓	Department Staff	
3	Affidavit of Service of Brooke Turallo, sworn to, July 17, 2015, attaching NYS Department of State (“DOS”) Receipt for Service, dated March 20, 2015.	✓	✓	Department Staff	
4	NYS DOS Corporate Entity Information, dated July 31, 2015.	✓	✓	Department Staff	
5	PBS Application form filed for PBS No. 2-469041, received July 25, 2011.	✓	✓	Department Staff	
6	New York City Department of Finance ACRIS Title Search, dated August 3, 2015. Deed to respondent, dated June 26, 1998.	✓	✓	Department Staff	
7	PBS Certificate No. 2-469041 issued August 1, 2011, expiration date March 9, 2014.	✓	✓	Department Staff	
8	Facility Information Report, PBS No. 2-469041, printed July 24, 2015	✓	✓	Department Staff	
9	Affirmation of Deborah Gorman, Esq. (undated)	✓	NO	Department Staff	
10	Proposed Order	✓	NO	Department Staff	