

**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.
2-602800NJB2

148-158 WEST 142 OWNERS LLC,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department) that respondent 148-158 West 142 Owners LLC violated ECL 17-1009 and 6 NYCRR 612.2(b)¹ by failing to reregister its petroleum bulk storage (PBS) facility at 148 West 142nd Street, New York, New York, within thirty (30) days of August 6, 2014, the date that respondent acquired the facility. Located at the facility is a 5,000-gallon aboveground petroleum bulk storage tank.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Caruso 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 July 7, 2015, and failed to appear for the adjudicatory hearing scheduled in the matter on August 6, 2015 (see Default Summary Report at 3 [Finding of Fact No. 8]). At the August 6, 2015 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ D. Scott Bassinson, presiding at the August 6 hearing, reserved on the motion, and Department staff later submitted a motion for default judgment with supporting papers. The matter was then assigned to ALJ Caruso.

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

¹ The PBS regulations were repealed and revised in 2015, after the commencement of this enforcement action. For the purpose of the violation of respondent's failure to reregister its facility, the former regulations apply (6 NYCRR 612.2). For the purposes of the ordered corrective action requiring respondent to reregister the facility, the current regulation applies (6 NYCRR 613-1.9).

NYCRR 622.15. Staff's papers submitted in support of its motion for default judgment provide proof of the facts sufficient to support staff's claim that respondent failed to reregister its petroleum bulk storage facility located at 148 West 142nd Street, New York, New York, within thirty days of the date that it acquired the facility, in violation of ECL 17-1009 and 6 NYCRR 612.2(b).

Department staff seeks a civil penalty in the amount of five thousand dollars (\$5,000) (see Motion for Default Judgment and Exhibit B, Affirmation of Deborah Gorman, Esq., [Gorman Aff] modifying and reducing the civil penalty requested from the ten thousand dollars (\$10,000) requested in the Complaint). ECL 71-1929, 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, and the requested penalty is substantially below this statutory amount.

Staff's requested civil penalty of five thousand dollars (\$5,000) is in accordance with general penalty guidelines for violations of less than two years as is the case here (see e.g., Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2). Respondent was required to reregister the facility no later than September 5, 2014, but has failed to do so (see Default Summary Report at 3 [Findings of Fact Nos. 4-6]). Based on this record, the requested penalty of five thousand dollars (\$5,000) is authorized and appropriate.

Department counsel correctly points out that the requirement to register PBS facilities is one of the cornerstones of the PBS regulatory scheme. (Gorman Aff, ¶ 14.) Proper registration assists in the more complete oversight of the remaining requirements for a PBS facility – e.g., leak detection, monitoring, and reporting – with the ultimate goal of protecting the environment and public health.

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.²

Staff's request that I order respondent to "permanently cease and desist from any and all future violations of the ECL and the Rules and Regulations promulgated pursuant thereto" is unnecessary (see Exhibit I [Staff Proposed Order], at § III; see also Motion for Default Judgment, at Wherefore Clause ¶ IV). Respondent is already required to comply with the ECL and the applicable regulations, and further language to that effect is not needed.

² Although Department staff, in its complaint, requested that the civil penalty, applicable registration fees and petroleum bulk storage application be submitted within fifteen (15) days of the service of the order upon respondent, Department staff's proposed order called for submission within thirty (30) days. The ALJ has recommended fifteen (15) days, which comports with the time period established in prior orders addressing these types of violations, and which I am directing 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 148-158 West 142 Owners LLC waived its right to be heard at the hearing.
- II. Respondent 148-158 West 142 Owners LLC is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum bulk storage facility located at 148 West 142nd Street, New York, New York.
- III. Within fifteen (15) days of the service of this order upon respondent 148-158 West 142 Owners 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 148-158 West 142 Owners 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.

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.
2-602800NJB2

148-158 WEST 142 OWNERS LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 148-158 West 142 Owners LLC (respondent) with a notice of hearing and complaint, dated June 9, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), for failing to reregister its petroleum bulk storage (PBS) facility located at 148 West 142nd Street, New York, New York (facility) within thirty (30) days of the date (August 6, 2014) that it acquired the facility. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2(b); (ii) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (iii) directing respondent to re-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 may deem just and appropriate.

Inasmuch as 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 personally serving the New York State Department of State on June 9, 2015 (see Motion for Default Judgment, Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on June 9, 2015 (see id.).¹ Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for July 7, 2015, as directed in the cover letter served with the notice of hearing and complaint (see Motion for Default Judgment, Exhibit A).

¹ Exhibit C, Affidavit of Service, states that the first class mail was sent to 1465-A Flatbush Avenue, Brooklyn, New York 11207. The Department of State receipt attached to the affidavit demonstrates that the Department of State mailed the cover letter and pleadings to 1465-A Flatbush Avenue, Brooklyn, New York 11210. The cover letter (Exhibit A) also demonstrates that the mailing went to 1465-A Flatbush Avenue, Brooklyn, New York 11210.

As stated in the notice of hearing, an adjudicatory hearing was convened on August 6, 2015 before Administrative Law Judge (ALJ) D. Scott Bassinson at the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York. 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. No one appeared on behalf of respondent.

ALJ Bassinson 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 Bassinson reserved on the oral motion and held the record open. Staff submitted a written motion for a default judgment with supporting papers (see Appendix A, attached hereto [listing documents submitted on motion]). The matter was assigned to the undersigned ALJ.

Applicable Regulatory Provision

Section 612.2. Registration of Facilities.²

"(a) *Existing facilities.*

"(1) Within one year of the effective date of these regulations, the owner of any petroleum bulk 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.

"(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."

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 148-158 West 142 Owners LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 148 West 142nd Street, New York, New York (facility). In particular, PBS tank number 1 at the facility has a capacity of 5,000 gallons and is located above ground. (See Motion for Default Judgment, Exhibits D, F, and G.)

² Part 612 was repealed, effective subsequent to the commencement of this proceeding, and replaced by a revised part 613. The registration requirements applicable for facilities transferred to new owners are now found at 6 NYCRR 613-1.9(d). For the purposes of the violations alleged in this matter, the prior part 612 applies.

2. Respondent is an active domestic limited liability company in the State of New York. (See Motion for Default Judgment, Exhibit H.)
3. The Department issued PBS Certificate Number 2-602800 to 148 West 142nd Realty Associates, a previous owner of the facility, on July 13, 2001. That registration expired on October 24, 2006. (See Motion for Default Judgment, Exhibits F and G.)
4. On August 6, 2014, 148 West 142 Street Corp., by deed, transferred all right, title and interest in the facility to respondent 148-158 West 142 Owners 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 Registry File No. 2014000278270. (See Motion for Default Judgment, Exhibit D.)
5. Yvonne M. Ward is an attorney in the Department's Office of General Counsel, and is familiar with the Department's procedures regarding issuance of PBS facility registration certificates. On May 29, 2015, Ms. Ward performed a search of the Department's PBS registration database, which revealed, among other things, that (i) the capacity of the tank at respondent's facility exceeded 1,100 gallons; and (ii) as of the date of the database search, the PBS registration for PBS facility No. 2-602800 did not reflect the current owner. (See Motion for Default Judgment, Exhibit A, Affirmation of Yvonne M. Ward, Esq. at ¶¶ 9-12; see also Exhibit F.)
6. As of February 17, 2016, respondent had not reregistered the facility. (See Motion for Default Judgment, Exhibits F and G.)
7. As shown by Receipt for Service No. 201506230069 issued by the New York State Department of State, on June 9, 2015, pursuant to section 303 of the Limited Liability Company Law, Department staff served respondent with a notice of hearing and complaint dated June 9, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), together with a cover letter, statement of readiness and supporting affirmation, for failing to reregister its petroleum bulk storage (PBS) facility located at 148 West 142nd Street, New York, New York within thirty (30) days of the date that it acquired 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 June 9, 2015. (See Motion for Default Judgment, Exhibit C.)
8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for July 7, 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 August 6, 2015, as directed in the notice of hearing. (See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq. [Gorman Affirmation] dated February 26, 2016, 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 unless extended by staff or ruling of the ALJ (see 6 NYCRR 622.4[a]).³ 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]).

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 July 7, 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 on August 6, 2015, as directed in the notice of hearing. In addition, Department staff has submitted a proposed order (see Motion for Default Judgment, Exhibit E). 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 February 26, 2016 letter from Deborah Gorman, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent).

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 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 reregister its PBS facility located at 148 West 142nd Street, New York, New York within thirty days of the date ownership was transferred to respondent, in violation of ECL 17-1009 and 6 NYCRR 612.2(b).

³ In this proceeding, staff's notice of hearing advises respondent that an answer must be served within 20 days of respondent's receipt of the notice of hearing and complaint. Staff's cover letter, however, advises respondent "the enclosed notice of hearing and complaint requires you to file an answer within thirty (30) days of receiving this notice of hearing and complaint" (see Motion for Default Judgment, Exhibit A). I will treat this disparity as providing respondent thirty days to serve its answer.

Staff's complaint requested a civil penalty in the amount of ten thousand dollars (\$10,000). In its motion for default judgment and proposed order, Department staff seeks to reduce the civil penalty to five thousand dollars (\$5,000). 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 past precedent relating to similar violations (see Motion for Default Judgment; see also Exhibit B, Gorman Affirmation, at ¶¶ 13-18). Staff's motion to reduce the penalty should be granted, as there is no prejudice to respondent in reducing the penalty requested.

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 and administrative precedent (see e.g. Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).⁴

Conclusion of Law

By failing to reregister its petroleum bulk storage facility located at 148 West 142nd Street, New York, New York within thirty days of the date that it acquired the facility, respondent violated ECL 17-1009 and 6 NYCRR 612.2(b).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent 148-158 West 142 Owners LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 148-158 West 142 Owners LLC violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum bulk storage facility located at 148 West 142nd Street, New York, New York within 30 days of the transfer of ownership of the facility to it;
3. Directing respondent 148-158 West 142 Owners 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 In its motion for a default judgment, Department staff has also requested that the Commissioner "[d]irect[] Respondents [sic] to permanently cease and desist from any and all future violations of the ECL and the Rules and Regulations promulgated pursuant thereto" (Motion for Default Judgment, at Wherefore Clause ¶ IV; see also id. Exhibit E, Proposed Order, at Ordering Clause ¶ III). Respondent is already required to comply with the ECL and relevant regulations. I therefore recommend that the Commissioner hold that staff's request in this regard is unnecessary.

4. Directing respondent 148-158 West 142 Owners 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 the Commissioner may deem just and appropriate.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
March 25, 2016

APPENDIX A

Matter of 148-158 West 142 Owners LLC
DEC File No. R2-602800NJB2
Motion for Default Judgment

1. Cover letter, dated February 26, 2016, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, noting that respondent was served with copies of the motion papers through the NYS Secretary of State and by first class mail
2. Notice of Motion for Default Judgment dated February 26, 2016
3. Motion for Default Judgment dated February 26, 2016, attaching the following exhibits:
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, all dated June 9, 2015, and an undated Affirmation of Yvonne M. Ward , Esq.
 - B. Affirmation of Deborah Gorman, Esq., dated February 26, 2016
 - C. Affidavit of Service of Kara Paulsen sworn to January 4, 2016, attaching Department of State Receipt for Service dated June 9, 2015 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 February 17, 2016, attaching deed dated August 6, 2014
 - E. Draft Order
 - F. PBS Certificate, PBS No. 2-602800, issued July 13, 2001, expired October 24, 2006
 - G. Facility Information Report, PBS No. 2-602800, printed February 17, 2016
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 148-158 West 142 Owners LLC, reflecting information through February 17, 2016