

Order Has Been Vacated (See Ruling of the Acting Commissioner Dated February 16, 2016)
STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC Case No.
2-603962NJB

-by-

3525 DECATUR AVENUE LLC,

Respondent.

On May 12, 2015, an adjudicatory hearing was convened before Molly T. McBride, 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 the allegations of Department staff that respondent 3525 Decatur Avenue LLC (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 3525 Decatur Avenue, Bronx, New York (“facility”) within 30 days of becoming owner of the facility. Located at the facility is an aboveground petroleum bulk storage tank with a capacity of 5,000 gallons.

ALJ McBride 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 3525 Decatur Avenue LLC 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 February 24, 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 March 24, 2015, as directed in the notice of hearing (see Hearing Report at 4 [Finding of Fact No. 9]).

On March 23, 2004, the Department issued Petroleum Bulk Storage Registration Certificate 2-603962 to Decatur Ave. Holding Co., LLC, which owned the facility at that time. In bold capital letters, at the bottom of the Certificate was the following declaration “THIS REGISTRATION IS NON-TRANSFERABLE” (see Hearing Exhibit 5). By deed dated December 28, 2005, Decatur Ave. Holding Co., LLC transferred all right, title and interest in the facility to respondent 3525 Decatur Avenue LLC (see Hearing Exhibit 7).

Where ownership of a facility changes, the new owner must reregister the facility with the Department within 30 days of ownership transfer (see 6 NYCRR 612.2[b]). Respondent 3525 Decatur Avenue LLC has not reregistered the facility at any time after acquiring ownership on December 28, 2005 (see Hearing Exhibit 1, Complaint, at ¶¶ 20, 22-24; see also Hearing Report, at 3 [Findings of Fact 6 and 7]).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for default be granted (see Hearing Report, at 5). Pursuant to 6 NYCRR 622.15(b), a motion for default judgment may be made orally on the record or in writing and must contain:

- “(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- “(2) proof of the respondent's failure to appear or failure to file a timely answer; and
- “(3) a proposed order.”

In this matter, staff requested that the Commissioner adopt the findings and relief contained in the wherefore clause of staff's complaint as staff's proposed order (see Hearing Report at 5 n 1). Although it is preferred that Department staff submit a separately drafted proposed order for purposes of satisfying 6 NYCRR 622.15(b)(3), staff may move orally to treat specific language in its complaint or its motion for order without hearing as the proposed order. If staff relies on identified provisions in its pleadings or motion as its draft order, those provisions must be sufficient to enable the administrative law judge to make a finding that the requirements of 6 NYCRR 622.15(b) have been adequately met (see 6 NYCRR 622.15[c]). The ALJ so concluded here and, upon my review of the record, I agree that staff's motion to treat specific language in its complaint as the proposed order satisfied 6 NYCRR 622.15(b)(3), and the requirements of 6 NYCRR 622.15(b) were adequately met.

At the hearing conducted on May 12, 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 5). Accordingly, staff is entitled to a judgment based on record evidence.

In its papers, Department staff sought a civil penalty of ten thousand dollars (\$10,000) (see Hearing Exhibit 1, Complaint, at Wherefore Clause ¶ II). Respondent has failed to reregister its facility since it acquired ownership of the facility, and the civil penalty requested by staff is authorized and appropriate (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2 [where registrations are more than five years overdue, penalty is generally ten thousand dollars]).

Respondent is also directed to submit to the Department a petroleum bulk storage registration application for the facility, plus applicable registration fees, within fifteen (15) days of the service of this order upon it.

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 3525 Decatur Avenue LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 3525 Decatur Avenue LLC is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum storage facility located at 3525 Decatur Avenue, Bronx, New York within 30 days of becoming owner of the facility.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent 3525 Decatur Avenue LLC shall submit to the Department a 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 3525 Decatur Avenue LLC shall pay a civil penalty in the amount of ten thousand dollars (\$10,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The facility petroleum bulk storage registration application, applicable registration fees, and the penalty payment shall be sent to the following address:

Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Jonathan Barker.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Jonathan Barker 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 of the State of New York (“ECL”) 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.
2-603962NJB

-by-

3525 DECATUR AVENUE LLC,

Respondent.

Procedural History

Respondent 3525 DECATUR AVENUE LLC (“respondent”) was served with a notice of hearing and complaint, dated January 23, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum storage facility within 30 days of becoming the owner for the facility located at 3525 Decatur Avenue, Bronx, New York. 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 reregister its petroleum storage facility within fifteen (15) days of the service of the Commissioner’s order upon respondent, by remitting the registration fee set forth in ECL 17-1009(2) and a complete registration application in accordance with 6 NYCRR 612.2(b); and (4) granting such other and further relief as the Commissioner may deem just and appropriate.

Inasmuch as respondent is an active 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 January 26, 2015 (see Staff Exhibit [“Staff Ex.”] 2). Respondent was also served with the notice of hearing and complaint by regular mail on January 26, 2015. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for February 24, 2015, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on March 24, 2015, an adjudicatory hearing was convened before Administrative Law Judge (“ALJ”) Richard Wissler of the Department of Environmental Conservation’s (“Department”) Office of Hearings and Mediation Services (“OHMS”) 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., Senior Attorney, 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 pre-hearing conference and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. The ALJ 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, the ALJ noted Department staff's readiness for hearing and noted the failure of respondent to appear. The ALJ advised that the hearing, in the absence of respondent, would be convened on a subsequent date.

On May 12, 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 Benjamin Conlon, Esq., Associate Attorney in the Department's Office of General Counsel. Department staff orally renewed its motion for a default judgment, and also sought judgment on the merits.

Department staff called one witness, Jonathan Barker, a paralegal in the DEC Office of General Counsel whose duties included working in the Department's Office of General Counsel's Petroleum Spill and Bulk Storage ("PBS") Section. 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.

(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

1. Respondent 3525 DECATUR AVENUE LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 3525 Decatur Avenue, Bronx, New York (“facility”). In particular, the petroleum storage tank at the facility has a capacity of 5,000 gallons and is located aboveground (Staff Ex. 1, Complaint [“Compl.”] ¶ 13; see also Staff Exs. 4, 5, and 6).
2. Respondent is an active domestic limited liability company in the State of New York (Staff Ex. 3).
3. On January 23, 2004, the Department issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-603962, reregistering the PBS facility, to Decatur Ave. Holding Co., LLC. (Staff Ex. 5). This registration expired on March 8, 2009 (id.).
4. The facility was acquired by respondent by deed dated December 28, 2005 (Staff Ex. 7). This deed is recorded in the Office of the City Register of the City of New York. (id.)
5. Jonathan Barker is a paralegal in the Department’s Office of General Counsel’s Petroleum Spill and Bulk Storage Section who is authorized to access, search and inspect the Department’s unified information system (“UIS”). The UIS is a database maintained by the Department that contains petroleum storage facility records filed with the Department, which records include petroleum storage facility registrations filed pursuant to 6 NYCRR 612.2 (Testimony of Jonathan Barker).
6. Jonathan Barker searched the petroleum storage facility records contained in the Department’s UIS database for any petroleum facility registration or renewal registration or any petroleum storage facility re-registration filed by respondent for the facility (Testimony of Jonathan Barker).
7. As a result of his searches, Jonathan Barker determined that respondent had not reregistered the facility after the registration expired in 2009 (Testimony of Jonathan Barker).
8. As shown by Receipt for Service No. 201501300519 issued by the New York State Department of State, respondent was served on January 26, 2015, pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated January 23, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), for failure to reregister its petroleum storage facility located, 3525 Decatur Avenue, Bronx, New York within 30 days of becoming the owner. The notice of hearing and complaint was also served on respondent by regular mail on January 26, 2015 (Staff Ex. 2).

9. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for February 24, 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 March 24, 2015, as directed in the notice of hearing (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 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 reregister its petroleum storage facility located at 3525 Decatur Avenue, Bronx, New York within 30 days of becoming the owner, in violation of ECL 17-1009 and 6 NYCRR 612.2(b).

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 February 24, 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 March 24, 2015, as directed in the notice of 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 reregister its petroleum storage facility in violation of ECL 17-1009 and 6 NYCRR 612.2(b). The Department is entitled to judgment upon the facts proven.

Department staff's proposed order¹ and the \$10,000 civil penalty it seeks are consistent with the Department's penalty policy, prior decisions of the Commissioner, and applicable provisions of ECL article 71.

Recommendation

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

1. Granting Department staff's motion for default, finding respondent 3525 DECATUR AVENUE LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding, based upon the proof adduced at the adjudicatory hearing, that respondent 3525 DECATUR AVENUE LLC violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum storage facility located at 3525 Decatur Avenue, Bronx, New York, within 30 days after it became the owner of the facility;
3. Directing respondent 3525 DECATUR AVENUE LLC to submit to the Department, within fifteen (15) days of the service of the Commissioner's order upon respondent, a complete registration application for the facility, accompanied by past due and current registration fees;
4. Directing respondent 3525 DECATUR AVENUE LLC to pay a civil penalty in the amount of ten thousand dollars (\$10,000.00); and
5. Directing such other and further relief as he may deem just and proper.

/s/

Molly T. McBride
Administrative Law Judge

Dated: Albany, New York
June 4, 2015

¹ At the May 12, 2015 hearing, Department staff requested that the Commissioner adopt as staff's proposed order the findings and relief contained in the wherefore clause of staff's complaint.

EXHIBIT CHART – PBS EXPEDITED PROCEEDING*Matter of 3525 Decatur Avenue LLC*

May 12, 2015 – Central Office, 625 Broadway, Albany, NY

DEC Case No. 2-603962NJB - Edrol File No 011019093650

Exhibit No.	Description	ID'd	Rec'd	Offered By	Notes
1	Cover Letter from Benjamin Conlon, Esq., to respondent, January 23, 2015. Notice of Hearing and Complaint, dated January 23, 2015. Statement of Readiness, dated January 23, 2015. Affidavit of Brooke Turallo, sworn to January 23, 2015.	✓	✓	Department Staff	
2	Affidavit of Service of Brooke Turallo, sworn to, May 7, 2015, attaching NYS Department of State (“DOS”) Receipt for Service, dated January 26, 2015.	✓	✓	Department Staff	
3	NYS DOS Corporate Entity Information, dated May 1, 2015.	✓	✓	Department Staff	
4	PBS Application, renewal, of Decatur Ave. Holding Co., LLC.. for PBS No. 2-603962, processed January 23, 2004.	✓	✓	Department Staff	
5	PBS Certificate No. 2-603962 issued January 23, 2004, expiration date March 8, 2009. .	✓	✓	Department Staff	
6	PBS Program Facility Information Report, printed May 4, 2015.	✓	✓	Department Staff	
7	New York City Department of Finance ACRIS Title Search dated May 7, 2015. Deed to respondent, dated December 28, 2005.	✓	✓	Department Staff	
8	Affirmation of Deborah Gorman, Esq., dated May 5, 2015 regarding attempts to contact respondent.	✓	✓	Department Staff	