

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.
PBS.2-612306.3.2018

-by-

**AVENUE C TENANTS HOUSING
DEVELOPMENT FUND CORPORATION,**

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Avenue C Tenants Housing Development Fund Corporation (Avenue C Tenants) violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration for its petroleum bulk storage facility located at 73-75 Avenue C, New York, New York (facility) before it expired on December 27, 2016. An aboveground storage tank with a capacity of 2,000 gallons is located at the facility.

On July 17, 2018, an adjudicatory hearing was convened before Daniel P. O'Connell, an administrative law judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ O'Connell 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 February 7, 2018, and failed to appear for the adjudicatory hearing scheduled for March 9, 2018 and reconvened on July 17, 2018 (see Hearing Report at 3 [Finding of Fact No.7]).

Respondent failed to answer or appear in this matter, and 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 July 17, 2018, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim, and proved its case on the merits by a preponderance of the evidence (see id.). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent Avenue C Tenants was required to renew the registration for the facility by December 27, 2016 (see ECL 17-1009[2]; Hearing Report at 3 [Finding of Fact No. 3], 4; see also Hearing Exhibit 8). Respondent's failure to renew the registration for the facility violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of title 10 of article 17 and its implementing regulations. Department staff, in its papers, sought a civil penalty in the amount of ten thousand dollars (\$10,000). At the hearing, Department staff modified its civil penalty request to five thousand dollars (\$5,000). Where, as here, an owner has not renewed the registration for a facility for less than 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. Respondent is to submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent.

I also direct that respondent submit to the Department a petroleum bulk storage application for the facility within fifteen (15) days of service of this order upon respondent, 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, Avenue C Tenants Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, Avenue C Tenants Housing Development Fund Corporation violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to timely renew the registration of its petroleum bulk storage facility located at 73-75 Avenue C, New York, New York prior to the expiration of its registration on December 27, 2016.
- III. Within fifteen (15) days of the service of this order upon respondent, Avenue C Tenants Housing Development Fund Corporation 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, Avenue C Tenants 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.

- 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 Avenue C Tenants Housing Development Fund Corporation, 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: September 28, 2018
Albany, New York

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.
PBS.2-612306.3.2018

-by-

**AVENUE C TENANTS HOUSING
DEVELOPMENT FUND CORPORATION,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) duly served Avenue C Tenants Housing Development Fund Corporation (Avenue C Tenants, or respondent) with a notice of hearing and complaint, dated January 2, 2018, alleging that respondent violated ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), when respondent failed to timely renew the registration for its petroleum bulk storage facility located at 73-75 Avenue C, New York (New York County), New York 10009 before the registration expired on December 27, 2016. Based on the alleged violation, Department staff requested an order from the Commissioner: (1) concluding that respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c); (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 by remitting the applicable registration fee, including any past registration fees, along with a complete registration application; and (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Respondent is an active domestic not-for-profit corporation (*see* Exhibit 4). Department staff served the notice of hearing and complaint upon respondent by serving the New York State Department of State on January 2, 2018. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about January 2, 2018. (*See* Exhibit 3.) Respondent did not answer the complaint. The notice of hearing and accompanying cover letter directed respondent to appear at a pre-hearing conference scheduled for February 7, 2018, and to appear at an adjudicatory hearing scheduled for March 9, 2018 (*see* Exhibit 2). Respondent failed to appear at either the pre-hearing conference or the adjudicatory hearing.

As stated in the notice of hearing, on March 9, 2018, an adjudicatory hearing was convened at 12:43 p.m. by video conference before administrative law judge (ALJ) Michael S.

Caruso. The ALJ was at the Department's Central offices located at 625 Broadway, Albany, New York, and counsel for staff was at the Department's Region 2 offices located at 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York. Department staff was represented by Deborah Gorman, Esq. of the Remediation Bureau in the Department's Office of General Counsel. No one appeared on behalf of respondent.

Ms. Gorman said that staff was prepared to proceed with the hearing, and proffered a 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 moved orally for a default judgment pursuant to 6 NYCRR 622.15. ALJ Caruso reserved on the motion, and the hearing was rescheduled for July 17, 2018. At the hearing held on July 17, 2018 before ALJ Daniel P. O'Connell, respondent again failed to appear. Department staff renewed the motion for default judgment. Department staff was represented by Jason Lettieri, a legal intern with the Department (*see* Exhibit 1), and Deborah Gorman, Esq., Senior Attorney, Office of General Counsel.

Applicable Regulatory Provision

Section 613-1.9(c) of 6 NYCRR requires the facility owner to renew its facility 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 either the facility has been permanently closed in accordance the prescribed regulatory requirements, or the ownership has been duly transferred.¹

Findings of Fact

Section 622.11(c) states that the party bearing the burden of proof must sustain that burden by a preponderance of the evidence. The following findings are based upon the preponderance of evidence presented at the hearing:

1. Avenue C Tenants owns a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 73-75 Avenue C, New York (New York County), New York 10009 (facility). Petroleum storage tank number 001 at the facility has a capacity of 2,000 gallons and is located aboveground. (*See* Exhibits 5, 6, 7, and 8; testimony of Benjamin Conlon [Conlon Testimony]).²
2. Respondent is an active domestic not-for-profit corporation (*see* Exhibit 4).

¹ ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

² Benjamin Conlon, Esq. is an associate attorney in the Department's Office of General Counsel. Mr. Conlon is a Section Chief in the Bureau of Remediation. His responsibilities include enforcement of the Petroleum Bulk Storage laws and regulations. He is authorized to access and inspect the Department's unified information system ("UIS"), and the electronic repository for scanned documents ("DecDOCS"). The UIS and DecDOCS are databases maintained by the Department, and contain petroleum bulk storage facility records, including registrations filed pursuant to Section 613-1.9 of 6 NYCRR. (*See* Conlon Testimony.)

3. On December 11, 2014, the Department issued Petroleum Bulk Storage Certificate No. 2-612306 to Avenue C Tenants. The expiration date of the certificate was December 27, 2016. (*See* Exhibit 8; Conlon Testimony.)
4. On December 27, 2017, a search of the Department's PBS registration database revealed that respondent had not submitted an application to renew the tank registration (*see* Exhibit 2 [January 2, 2018 Affirmation of Deborah Gorman, Esq., ¶¶ 9-12]). Similar searches conducted on July 12 and 16, 2018 showed that respondent had failed to file an application to renew the tank registration (*see* Conlon Testimony).
5. On January 2, 2018, pursuant to Section 306 of the Not-For-Profit Corporation Law, respondent was served with a cover letter, notice of hearing and complaint, a statement of readiness, and supporting affirmation, all dated January 2, 2018, alleging that respondent violated ECL 17-1009 and its implementing regulation at 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility located at 73-75 Avenue C, New York (New York County), New York 10009 prior to December 27, 2016. 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 January 2, 2018. (*See* Exhibits 2 and 3 [Affidavit of Service of Dale Thiel, sworn to June 22, 2018, ¶¶ 3-4].)
6. The Department had prior contact with respondent, and although settlement was discussed, Department staff was unable to make further contact with respondent (*see* Exhibit 9 [June 22, 2018 Affirmation of Deborah Gorman, ¶¶ 3 and 5].)
7. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for February 7, 2018, and failed to appear for the adjudicatory hearing scheduled in the matter for March 9, 2018, and reconvened on July 17, 2018 (*see* 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]). Finally, 6 NYCRR 622.15(a) states that "[a] respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and a waiver of respondent's right to a hearing."

When, as here, a respondent fails to answer a complaint or does not appear for a pre-hearing conference or hearing, Department staff may move for a default judgment. Such a motion must contain the following: (1) proof of service upon respondent of the notice of hearing and complaint; (2) proof of respondent's failure to appear or to file a timely answer; and (3) a proposed order (*see* 6 NYCRR 622.15[b][1-3]).

The Commissioner has held that “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 “also submit some proof of the facts sufficient to support the claims charged in the complaint” (*Matter of Greene Technologies Incorporated*, Ruling of the Commissioner, November 10, 2016, at 3; *see also Matter of American Auto Body & Recovery Inc.*, Ruling of the Commissioner, July 2, 2015, at 3; *Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3). The proof submitted must be sufficient to enable the ALJ and the Commissioner to determine that Department staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1).

The record in this matter establishes the following. First, Department staff duly served the notice of hearing and complaint upon respondent. Second, respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for February 7, 2018 as directed in the cover letter served with the notice of hearing and complaint, and in the notice of hearing. Third, respondent failed to appear for the adjudicatory hearing scheduled in the matter on March 9, 2018, as directed in both the cover letter and the notice of hearing, and reconvened on July 17, 2018, as directed in the June 13, 2018 notice of hearing. (*See Exhibit 11.*) Department staff has submitted a proposed order with its motion (*see Exhibit 10*). Staff also served respondent with copies of the motion for default judgment and supporting papers.

Department staff’s submissions in support of the motion for a default judgment provide proof of the facts sufficient to enable the ALJ to determine that Department staff has a viable claim that respondent violated ECL 17-1009 and Section 613-1.9(c) of 6 NYCRR by failing to renew the registration of its petroleum bulk storage facility located at 73-75 Avenue C, New York, New York, by December 27, 2016 (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1). Department staff is entitled to a default judgment in this matter pursuant to 6 NYCRR 622.15.

Moreover, the proof presented at the hearing, conducted in respondent’s absence, demonstrates by a preponderance of the evidence that respondent failed to renew the registration of the its petroleum bulk storage tank. As of the date of the hearing, the tank remained unregistered. (*See Conlon Testimony.*) The Department is entitled to judgment on the merits.

Department staff requested a civil penalty of ten thousand dollars (\$10,000). 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, calculating an appropriate penalty depends, 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).

The record in this matter reflects that, as of the date of the service and filing of the notice of hearing and complaint in this matter, respondent's failure to renew its registration is less than two years. I therefore recommend that the Commissioner assess a civil penalty in the amount of five thousand dollars (\$5,000), as requested by Department staff.

Conclusion of Law

By failing to timely renew the registration of its PBS facility at 73-75 Avenue C, New York, New York 10009, respondent violated ECL 17-1009 and Section 613-1.9(c) of 6 NYCRR.

Recommendations

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

1. Granting Department staff's motion for default, holding Avenue C Tenants Housing Development Fund Corporation in default pursuant to 6 NYCRR 622.15;
2. Holding that, based upon the proof presented at the adjudicatory hearing, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility located at 73-75 Avenue C, New York, New York 10009.
3. Directing respondent 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 all applicable registration fees;
4. Directing Avenue C Tenants Housing Development Fund Corporation 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/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: September 26, 2018
Albany, New York

Exhibit Chart – PBS Expedited Proceeding
Matter of Avenue C Tenants Housing Development Fund Corporation
 DEC Case No. PBS.2-612306.3.2018
 July 17, 2018 – DEC Central Office
 Edrol File No. 180717100908

Exhibit	Description
1	May 30, 2018 Practice Order
2	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, all dated January 2, 2018
3	Affidavit of Service of Dale Thiel, sworn to June 22, 2018, with New York State Department of State Receipt for Service dated January 2, 2018
4	NYS Department of State Entity Information (current through July 11, 2018)
5	New York City Department of Finance July 12, 2018 ACRIS search, with December 16, 1981 deed to respondent
6	PBS Application (marked received on October 8, 2014 and November 5, 2014)
7	PBS Program Facility Information Report, printed on June 13, 2018; reviewed on July 12, 2018
8	Petroleum Bulk Storage Certificate No. 2-612306, issued December 11, 2014; expiration date: December 27, 2016
9	June 22, 2018 Affirmation of Deborah Gorman
10	Proposed Order
11	June 13, 2018 Notice of Hearing