

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.2-154083.4.2016

BLUE LABEL GROUP, LLC,

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Blue Label Group, LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d) by failing to register its petroleum bulk storage facility (facility) at 30-63 33rd Street, Astoria, New York (facility) within 30 days of the transfer of ownership of the facility to it. Located at the facility is an aboveground storage tank with a capacity of 1,500 gallons.

On July 11, 2016, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of the DEC Office of Hearings and Mediation Services. ALJ Caruso 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 March 24, 2016, and failed to appear for the adjudicatory hearing scheduled in the matter on April 26, 2016 and reconvened on July 11, 2016 (see Hearing Report at 4 [Finding of Fact No. 10]).

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 4-6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 11, 2016, 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.

Respondent was required to register the facility following the transfer of ownership of the facility to it (see ECL 17-1009[2]; Hearing Report, at 5). The record demonstrates that respondent failed to register the facility from the date of its purchase of the facility on December

23, 2008 until some time after this proceeding commenced. Subsequent to the transfer of the facility and continuing until October 11, 2015, respondent, in addition to violating ECL 17-1009, was also in violation of the registration requirement of former 6 NYCRR 612.2(b). Department staff did not allege the regulatory provision in former 6 NYCRR part 612 in its papers. Department staff did cite the applicable facility registration requirement at 6 NYCRR 613-1.9(d) which became effective on October 11, 2015, and replaced 6 NYCRR 612.2(b). The violation of 613-1.9(d) began on October 11, 2015 until the commencement of this proceeding. In future matters, Department staff should cite violations of both regulatory sections where, as here, the violations commenced prior to and continued after October 11, 2015.

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 of ten thousand dollars (\$10,000). Although respondent submitted a PBS application to register the facility on or about May 21, 2016 (see Hearing Report, at 3 [Finding of Fact No. 7]), respondent's registration was due on or before January 22, 2009 (see id.) and no explanation appears in this record for the multi-year delay in meeting the applicable legal obligation.

At the hearing, Department staff moved to correct and amend its pleadings: (a) to correct the date the registration was due; and (b) to withdraw its request that respondent be directed to submit a registration application and applicable fees as respondent had done so during the pendency of this matter and the application was being processed at the time of the July 11, 2016 hearing. The ALJ granted staff's motion.

Where an owner has not registered the facility for more than five years, and no other violations or mitigating or aggravating factors exist, a civil penalty of ten thousand dollars (\$10,000) would be consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). In this matter, a civil penalty of ten thousand dollars (\$10,000) was recommended by the ALJ (see Hearing Report, at 6).

As noted, respondent filed a PBS application with the Department during the pendency of this proceeding (see Hearing Report, at 3 [Finding of Fact 7]; see also Hearing Exhibit 7). Department staff, by email dated August 5, 2016, indicated that staff determined that the application was complete. Staff also advised that the registration fee was received.

Respondent was not in compliance with the regulatory requirements for a substantial period of time and a civil penalty in the range of what is customarily assessed is appropriate. However, in recognition of respondent's filing of the application and requisite fee prior to the issuance of this order, a slight reduction in the recommended penalty would be appropriate. Based on this record, I have determined to reduce the recommended civil penalty by five hundred dollars (\$500), thereby assessing a civil penalty in the amount of nine thousand five hundred dollars (\$9,500). I am directing respondent to pay the penalty within thirty (30) days of the service of this order upon it.

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HEARING REPORT

DEC Case No.
PBS.2-154083.4.2016

-by-

BLUE LABEL GROUP, LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Blue Label Group, LLC (respondent) with a notice of hearing and complaint, dated February 16, 2016, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d) for failing to register its petroleum bulk storage facility located at 30-63 33rd Street, Astoria, New York within 30 days of the transfer of ownership of the facility to it. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d); (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 along with a complete registration application; and (4) 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 serving the New York State Department of State on February 16, 2016 (see Staff Exhibit 3). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on February 16, 2016 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for March 24, 2016, as directed in the notice of hearing and accompanying cover letter (see Staff Exhibit 2).

As stated in the notice of hearing, on April 26, 2016, an adjudicatory hearing was convened before me 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 Yvonne M. Ward, 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.

Department staff indicated that it was prepared to proceed with the hearing, proffering a 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 moved orally for a default judgment pursuant to 6 NYCRR 622.15. I 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, I noted Department staff's readiness for hearing, noted the failure of respondent to appear and advised staff that if staff wished to proceed with the hearing on the matter at a later date, that the hearing would be reconvened on notice to respondent.

The Office of Hearings and Mediation Services served a Notice of Hearing dated June 6, 2016 on respondent by first class mail advising respondent that the hearing in this matter would be reconvened on July 11, 2016 at 10:00 am. At 10:13 am on July 11, 2016, the adjudicatory hearing was reconvened before the undersigned at the Department's Central Office at 625 Broadway, Albany, New York 12233. Department staff was represented by law student intern Tyler D. Wuest under the supervision of Yvonne M. Ward, Esq., Remediation Bureau, Office of General Counsel. No one appeared on behalf of respondent.

Department staff orally renewed its motion for a default judgment and also sought judgment on the merits. Department staff called one witness, Benjamin Conlon, Associate Attorney with the Department's Office of General Counsel, and Section Chief in the Bureau of Remediation. In all, twelve (12) exhibits were received in evidence.

Applicable Regulatory Provision

613-1.9 Registration ¹

* * *

“(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 preponderance of evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent Blue Label Group, LLC (respondent) is the owner of a petroleum bulk storage

¹ Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, "(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." ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

- facility having a capacity of over 1,100 gallons located at 30-63 33rd Street, Astoria, NY (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 1,500 gallons and is located aboveground. See Testimony of Benjamin Conlon; Staff Exhibits 6, 7, 9 and 10.
2. Respondent is an active domestic limited liability company in the State of New York. See Testimony of Benjamin Conlon; Staff Exhibit 4.
 3. On November 26, 2007, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-154083 to Enver Dervisevic, who owned the facility at that time. This registration expired on January 21, 2013. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” See Testimony of Benjamin Conlon; Staff Exhibit 9.)
 4. On December 23, 2008, Enver Dervisevic and Raza Dervisevic, by deed, transferred all right, title and interest in the facility to respondent Blue Label Group, 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 Register File No. 2008000492386. See Testimony of Benjamin Conlon; Staff Exhibit 5.
 5. Benjamin Conlon is an Associate Attorney in the Department’s Office of General Counsel, serving as a Section Chief in the Bureau of Remediation, whose responsibilities include enforcement of the Petroleum Bulk Storage, Chemical Bulk Storage, and Major Oil Storage Facilities laws and regulations. Mr. Conlon 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 613-1.9. See Testimony of Benjamin Conlon.
 6. On July 8, 2016, Benjamin Conlon 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 Benjamin Conlon.
 7. As a result of his search, Benjamin Conlon determined that respondent had not registered the facility since respondent took ownership on December 23, 2008. Respondent submitted a PBS application to register the facility on or about May 21, 2016 that was received on June 2, 2016. Respondent was required to register the facility within thirty days of transfer of the facility to it. The registration was due on or before January 22, 2009. See Testimony of Benjamin Conlon; see also Staff Exhibit 10 (includes handwritten initials of witness reflecting that he checked database on July 8, 2016).
 8. Department staff determined the application was incomplete and provided respondent with a notice of incomplete application dated June 20, 2016. Respondent resubmitted the

- application with payment of the correct registration fee, which was received by Department staff on July 5, 2016. At the time of the hearing, Department staff was processing the application. See Testimony of Benjamin Conlon; Staff Exhibits 7 and 8.
9. As shown by Receipt for Service No. 201602250009 issued by the New York State Department of State, respondent was served personally, on February 16, 2016, pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated February 16, 2016, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9, together with a cover letter, statement of readiness and supporting affirmation, for failure to register its petroleum bulk storage facility located at 30-63 33rd Street, Astoria, New York within 30 days of the transfer of ownership of the facility to it. 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 February 16, 2016. The address for first class mailing was determined by searching the public New York City Housing Preservation & Development website. See Staff Exhibit 2; see also Hearing Record.
 10. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for March 24, 2016, 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 April 26, 2016 and reconvened on July 11, 2016, as directed in the notices of hearing. 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); 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 register its petroleum bulk storage facility located at 30-63 33rd Street, Astoria, New York within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009.² Respondent was in violation of 6 NYCRR 613-1.9(d) from the effective date of the current part 613, October 11, 2015.

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 March 24, 2016, as directed in the notice of hearing and accompanying cover letter; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on April 26, 2016 and reconvened on July 11, 2016, as directed in the notices of hearing. Department staff provided its proposed order at the July 11, 2016 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 register its petroleum bulk storage facility located at 30-63 33rd Street, Astoria, New York within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009. The Department is entitled to judgment upon the facts proven. At the July 11, 2016 hearing, Department staff moved orally to conform the pleadings to the proof and correct the date that respondent's registration was due from January 21, 2013 to January 22, 2009 and to amend the complaint to withdraw staff's request that the respondent be directed to register the facility and submit the appropriate fees. Pursuant to 6 NYCRR 622.10(b)(1)(i), I granted Department staff's motion to correct and amend the pleadings, as there is no prejudice to respondent in correcting the erroneous dates or removing the request that respondent be directed to submit an application and payment because the application and payment are currently being processed by Department staff.

Department staff's proposed order and the ten thousand dollar (\$10,000) 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. Respondent submitted a PBS application more than seven years after it was due. Respondent did not otherwise appear or answer the complaint and was in default at the time the application was submitted. I conclude that respondent's late filing of the application does not mitigate the penalty requested by staff.

Recommendation

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

² ECL 17-1009 does not provide a 30 day grace period to register a facility after ownership is transferred. As noted above, 6 NYCRR 613-1.9(d) and former 6 NYCRR 612.2(b) both provide a 30 day grace period to register. In this matter, I am recognizing the 30 day grace period created by the implementing regulations with respect to the violation of ECL 17-1009.

1. Granting Department staff's motion for default, holding respondent Blue Label Group, LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Blue Label Group, LLC violated ECL 17-1009 by failing to register its petroleum bulk storage facility located at 30-63 33rd Street, Astoria, New York within 30 days of the transfer of ownership of the facility to it;
3. Directing respondent to pay a civil penalty in the amount of ten thousand dollars (\$10,000) within fifteen (15) days of service of the Commissioner's order; and
4. Directing such other and further relief as he may deem just and appropriate.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
July 15, 2016

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Blue Label Group, LLC
 30-63 33rd Street, Astoria, New York – DEC Case No. PBS.2-154083.4.2016
 July 11, 2016 – Central Office
 EDIROL File Nos. 021219071311 and 021219094154

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	May 25, 2016 Practice Order of the Appellate Division, Third Department (Peters, P.J.), for appointment of law interns, including, Tyler D. Wuest.	✓	✓	Department Staff	
2	Cover Letter from Yvonne M. Ward, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, all dated February 16, 2016 and an undated Affirmation of Yvonne M. Ward.	✓	✓	Department Staff	
3	Affidavit of Service of Dale Thiel, sworn to July 7, 2016 with New York State Department of State Receipt for Service dated February 16, 2016.	✓	✓	Department Staff	
4	NYS Department of State Entity Information, dated July 1, 2016.	✓	✓	Department Staff	
5	New York City Department of Finance, ACRIS Title Search, dated July 1 and 7, 2016 and deed to respondent, dated December 23, 2008.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	PBS Application, dated November 22, 2007.	✓	✓	Department Staff	
7	Emails between Benjamin Conlon and Jack Aversa with PBS Application, dated May 21, 2016, received June 2, 2016, resubmitted and received July 5, 2016.	✓	✓	Department Staff	
8	Notice of Incomplete Application dated June 20, 2016.	✓	✓	Department Staff	
9	PBS Registration Certificate issued November 26, 2007, expiration date January 21, 2013.	✓	✓	Department Staff	
10	PBS Program Facility Information Report, dated July 8, 2016.	✓	✓	Department Staff	
11	Affirmation of attempted contact by Yvonne M. Ward, dated June 22, 2016.	✓	✓	Department Staff	
12	Proposed Order	✓	✓	Department Staff	