

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.2-609008.3.2018

-by-

LAWRENCE DARROW,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Lawrence Darrow violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration for his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park, New York (facility) before it expired on May 29, 2008. An underground storage tank with a capacity of 2,500 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 was required to renew the registration for the facility prior to May 29, 2008 (see ECL 17-1009[2]; Hearing Report at 2 [Finding of Fact No. 2] 4; Exhibit 8). By letter dated September 18, 2008, Department advised respondent that his recently filed petroleum bulk storage application was incomplete because the tank at the facility was overdue for tightness testing (see Hearing Report at 3 [Finding of Fact No. 3; Exhibit 7]). Respondent did not provide the information necessary to renew the registration. 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). Where, as here, an owner has not renewed the registration for the facility for more than five years a civil penalty of ten thousand dollars (\$10,000) 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 ten thousand dollars (\$10,000) is authorized and appropriate. The civil penalty is to be submitted 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 proof of tank tightness and all applicable registration fees. Respondent's failure to test his petroleum bulk storage tank in accordance with the legal requirements may justify further proceedings and the imposition of substantial additional penalties.

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, Lawrence Darrow waived his right to be heard at the hearing.
- II. Moreover, based upon record evidence, Lawrence Darrow violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to timely renew the registration of his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park, New York prior to the expiration of the facility's registration on May 29, 2008.
- III. Within fifteen (15) days of the service of this order upon respondent, Lawrence Darrow shall submit to the Department a complete petroleum bulk storage application for the facility, with proof of tank tightness as well as all applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, Lawrence Darrow 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 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 Lawrence Darrow, and his 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 24, 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.2-609008.3.2018

-by-

LAWRENCE DARROW,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) duly served Lawrence Darrow (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 his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park (Queens County), New York 11417 before the registration expired on May 29, 2008. 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 his 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.

Department staff served the notice of hearing and complaint upon respondent by certified mail, return receipt requested on or about January 2, 2018. Mr. Darrow received the notice of hearing and complaint on January 12, 2018. (*See Exhibit 3.*) Respondent failed to 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 did not 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 Chuqiao Wang, 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 the facility's registration 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 by Department staff, the party with the burden of proof, at the hearing:

1. Lawrence Darrow owns a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 103-02 Rockaway Boulevard, Ozone Park (Queens County), New York 11417 (facility). Petroleum storage tank number 001 at the facility has a capacity of 2,500 gallons and is located underground. (*See* Exhibits 4, 5, 6, 7, and 8; testimony of Benjamin Conlon [Conlon Testimony]).²
2. On May 29, 2003, the Department issued Petroleum Bulk Storage Certificate No. 2-609008 to Lawrence Darrow. The expiration date of the certificate was May 29, 2008. (*See* Exhibit 8; Conlon Testimony.)

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. By letter dated September 18, 2008, Department staff advised respondent that his recently filed petroleum bulk storage registration application was incomplete because the tank at the facility was overdue for tightness testing (*see* Exhibit 7; 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 13 and 16, 2018 showed that respondent had failed to file any application to renew the tank registration (*see* Conlon Testimony).
5. On January 2, 2018, pursuant to 6 NYCRR 622.3(a)(3), Department staff served respondent with a cover letter, notice of hearing and complaint, a statement of readiness, and supporting affirmation, all dated January 2, 2018. In the complaint, staff alleged that respondent violated ECL 17-1009 and its implementing regulation at 6 NYCRR 613-1.9(c) by failing to renew the registration of his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park (Queens County), New York 11417 prior to May 29, 2008. (*See* Exhibits 2 and 3 [Affidavit of Service of Dale Thiel, sworn to July 2, 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, 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 his 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 his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park, New York (*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 for his 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 civil 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 his registration exceeds five years. I therefore recommend that the Commissioner assess a civil penalty in the amount of ten thousand dollars (\$10,000), as requested by Department staff.

Conclusion of Law

By failing to timely renew the registration of his PBS facility at 103-02 Rockaway Boulevard, Ozone Park, New York 11417, 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 Lawrence Darrow 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 his petroleum bulk storage facility located at 103-02 Rockaway Boulevard, Ozone Park, New York 11417;
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, as well as proof of tank tightness;
4. Directing Lawrence Darrow 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
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 19, 2018
Albany, New York

Exhibit Chart – PBS Expedited Proceeding
Matter of Lawrence Darrow
 DEC Case No. PBS.2-609008.3.2018
 July 17, 2018 – DEC Central Office
 Edrol File No. 180717110336

Exhibit	Description
1	May 29, 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 July 2, 2018, upon Lawrence Darrow by certified mail, return receipt requested on January 2, 2018
4	New York City Department of Finance July 13, 2018 ACRIS search, with July 9, 2002 deed to respondent
5	PBS Program Facility Information Report, printed June 13, 2018
6	PBS Application (marked received on May 8, 2003)
7	PBS Application (marked received on September 18, 2008)
8	Petroleum Bulk Storage Certificate No. 2-609008, issued May 29, 2003; expiration date: May 29, 2008
9	June 22, 2018 Affirmation of Deborah Gorman
10	Proposed Order
11	June 13, 2018 Notice of Hearing