

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.2-601045.6.2017

-by-

**PROMESA COURT RESIDENCES
LIMITED PARTNERSHIP,**

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Promesa Court Residences Limited Partnership violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility at 954 Anderson Avenue, Bronx, New York (facility) within 30 days of the transfer of ownership of the facility to it on June 26, 2012. Located at the facility is an aboveground storage tank with a capacity of 2,500 gallons.

On July 20, 2017, an adjudicatory hearing was convened before D. Scott Bassinson, Administrative Law Judge (ALJ) of the DEC's Office of Hearings and Mediation Services. ALJ Bassinson 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 May 12, 2017, and failed to appear for the adjudicatory hearing scheduled in the matter for June 12, 2017 and reconvened on July 20, 2017 (see Hearing Report at 4 [Finding of Fact No. 8]).

Liability

Because 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 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 20, 2017, Department staff presented proof of facts sufficient to support its 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 register the facility following the transfer of ownership of the facility to it (see ECL 17-1009[2]; Hearing Report at 4-5). Respondent failed to register the facility from the date of its purchase of the facility on June 26, 2012 through July 20, 2017, the date of the reconvened adjudicatory hearing. Respondent's failure to properly register the facility violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Civil Penalty

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. In its complaint, Department staff seeks a civil penalty in the amount of ten thousand dollars (\$10,000).

As the ALJ discusses in his hearing report, an appropriate penalty in petroleum bulk storage registration cases such as this one involves calculating the duration of the violation (see Hearing Report at 5). The duration of the violation is typically calculated as the period between the commencement of the violation and the service of the notice of hearing and complaint. Utilizing this methodology, 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, as set forth in Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2.

In this case, the duration of the violation from the date respondent purchased the facility (June 26, 2012) to date of filing and service of the complaint (April 10, 2017) was more than two but less than five years (see Hearing Report at 5). Where, as here, a complaint based upon PBS registration violations seeks a penalty of ten thousand dollars (\$10,000), but the duration of the violation is between two and five years, Department staff has often made a motion at the adjudicatory hearing or in motion papers to reduce the requested penalty from ten thousand dollars (\$10,000) to seven thousand five hundred dollars (\$7,500). See e.g. Matter of G&M Properties HP Housing Development Fund Company, Inc. (1268 Stratford Avenue, Bronx, New York), Order of the Commissioner, August 11, 2017, at 2 (staff motion at hearing to reduce the requested penalty); see also Matter of RCASCO Properties Inc., Order of the Commissioner, November 28, 2016, at 2 (staff's request in motion papers to reduce requested penalty).

In this case, however, staff has not moved to reduce the penalty requested in the complaint, and seeks an order imposing a penalty of ten thousand dollars (\$10,000). Staff argues that a penalty of ten thousand dollars (\$10,000) is appropriate here because the period from the commencement of the violation (June 26, 2012) to the date of the adjudicatory hearing (July 20, 2017) exceeds five years.

The ALJ agreed with staff, finding that a penalty of ten thousand dollars (\$10,000) is authorized and appropriate here (see Hearing Report at 5-6). The ALJ reasoned that (i) respondent was on notice of the requested penalty amount, which was set forth in the complaint; and (ii) Department staff's witness at the hearing testified that she checked the relevant databases

on the morning of the July 20, 2017, and determined that respondent had still not filed an application to register the facility as of that day.

I agree with the ALJ's analysis. Respondent was served with a notice of hearing and complaint in April 2017. Respondent thereafter failed to answer the complaint within 20 days of receipt of the complaint, failed to appear at the May 12, 2017 pre-hearing conference, failed to appear for the hearing on June 12, 2017, and then failed to appear at reconvened hearing, although fully on notice. Staff confirmed, on the morning of the hearing, that respondent had failed to register its petroleum bulk storage facility for more than five years.

In cases, such as here, in which one of the penalty date "thresholds" under 12 Martense Associates and its progeny is passed during the period between service of the notice of hearing and complaint and the date of the adjudicatory hearing or submission of default motion papers, it is appropriate to seek the penalty amount related to the longer period. In this case, then, it is appropriate to impose a penalty of ten thousand dollars (\$10,000) because respondent's violation exceeded more than five years as of the date of the adjudicatory hearing.

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 it, 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, respondent Promesa Court Residences Limited Partnership waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Promesa Court Residences Limited Partnership violated ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(d)(1), for failing to register its petroleum bulk storage facility located at 954 Anderson Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to it.
- III. Within fifteen (15) days of the service of this order upon respondent Promesa Court Residences Limited Partnership, 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 Promesa Court Residences Limited Partnership, respondent 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 respondent Promesa Court Residences Limited Partnership, 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: Albany, New York
September 11, 2017

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.2-601045.6.2017

-by-

**PROMESA COURT RESIDENCES
LIMITED PARTNERSHIP,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Promesa Court Residences Limited Partnership (respondent) with a notice of hearing and complaint, dated April 10, 2017, alleging a violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) for failing to register its petroleum bulk storage facility located at 954 Anderson Avenue, Bronx, 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)(1); (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 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 shall deem just and appropriate.

Because respondent is an active domestic limited partnership 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 April 10, 2017. See Staff Exhibit 3. Department staff provided additional service by sending the notice of hearing and complaint to respondent by first class mail on April 10, 2017. See id. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for May 12, 2017, as directed in the notice of hearing and accompanying cover letter. See Staff Exhibit 2.

As stated in the notice of hearing, on June 12, 2017, an adjudicatory hearing was convened before the undersigned 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., Senior Attorney, 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, the hearing would be reconvened on notice to respondent.

The Office of Hearings and Mediation Services served a notice of hearing dated June 16, 2017 on respondent by first class mail, advising respondent that the hearing in this matter would be reconvened on July 20, 2017. On July 20, 2017, the adjudicatory hearing was reconvened before the undersigned at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by law student intern Ryan Whelpley under the supervision of Benjamin Conlon, Esq., Associate Attorney with the Department's Office of General Counsel, and Section Chief in the Bureau of Remediation. 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, Dale Thiel, Legal Assistant II for the New York State Department of Environmental Conservation. In all, nine (9) 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 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."

1. Respondent Promesa Court Residences Limited Partnership (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 954 Anderson Avenue, Bronx, New York (facility). In particular, petroleum storage tank number 1 at the facility has a capacity of 2,500 gallons and is located aboveground. See Testimony of Dale Thiel; Staff Exhibits 6, 7 and 8.
2. Respondent is an active domestic limited partnership in the State of New York. See Testimony of Dale Thiel; Staff Exhibit 4.
3. On October 5, 2011, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-601045 to “Promesa Court LP,” identified on the certificate as the owner of the facility at that time. In bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” See Testimony of Dale Thiel; Staff Exhibits 7 and 8.
4. On June 26, 2012, Promesa Court Limited Partnership, by deed, transferred all right, title and interest in the facility to respondent Promesa Court Residences Limited Partnership, 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. 2012000292439. See Testimony of Dale Thiel; Staff Exhibit 6.
5. Dale Thiel is a Legal Assistant II for the New York State Department of Environmental Conservation, whose main responsibility is the enforcement of PBS registrations for Region 2. Ms. Thiel 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 Dale Thiel.
6. On July 20, 2017, Dale Thiel searched the petroleum bulk storage facility records contained in the Department’s UIS and DecDOCS databases for any petroleum bulk storage facility registration filed by respondent for the facility. In addition, staff contacted Region 2 and permitting staff to determine whether any application to register the facility had been received. Ms. Thiel determined that, as of July 20, 2017, respondent had failed to file a petroleum bulk storage facility registration application since respondent took ownership on June 26, 2012. See Testimony of Dale Thiel; see also Staff Exhibit 6.
7. As shown by Receipt for Service No. 201704240211 issued by the New York State Department of State, respondent was served personally, on April 10, 2017, pursuant to section 121-109 of the Revised Limited Partnership Act, with a notice of hearing and complaint dated April 10, 2017, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), together with a cover letter, statement of readiness and supporting affirmation, for failure to register its petroleum bulk storage facility located at 954 Anderson Avenue, Bronx, 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 April 10, 2017. See Staff Exhibits 2 and 3; see also Hearing Record.

8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for May 12, 2017, as directed in the notice of hearing and the accompanying cover letter, and failed to appear for the adjudicatory hearing scheduled in the matter for June 12, 2017 and reconvened on July 20, 2017, 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 a 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 has presented proof of facts sufficient to demonstrate that respondent failed to register its petroleum bulk storage facility located at 954 Anderson Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to it in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

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 May 12, 2017, as directed in the notice of hearing and 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 June 12, 2017 and reconvened on July 20, 2017, as directed in the notices of hearing. Department staff provided its

proposed order at the July 20, 2017 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 954 Anderson Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1). The Department is entitled to judgment upon the facts proven.

In its complaint, Department staff seeks an order imposing 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, calculation of an appropriate penalty turns 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.

As of the date of service of the notice of hearing and complaint in this matter, respondent's failure to register had lasted for four years, nine months and fifteen days, comprising the period between June 26, 2012 (date respondent became facility owner) and April 10, 2017 (date of complaint). In such circumstances, where the violation has lasted for more than two but less than five years, a civil penalty of seven thousand five hundred dollars (\$7,500) has been found to be consistent with 12 Martense Associates and its progeny.

As of July 20, 2017, the date of the hearing, however, respondent's violation had lasted five years and twenty-four days (June 26, 2012 – July 20, 2017). As reflected in the hearing record, Department staff checked the relevant Departmental databases on the morning of the hearing, and determined that respondent had not registered its petroleum bulk storage facility as of July 20, 2017. See Finding Fact No. 6.

At the adjudicatory hearing, staff requested that the time between the date of service of the notice of hearing and complaint and the date of the adjudicatory hearing should be included in calculating the appropriate penalty. In this case, because respondent's violation exceeded five years in duration if that period is included, staff seeks an order imposing a civil penalty of ten thousand dollars (\$10,000), which amount is consistent with 12 Martense Associates and its progeny for violations exceeding five years in duration.

I recommend that the Commissioner assess a civil penalty of ten thousand dollars (\$10,000) against respondent based upon the conclusion that, as of the date of the adjudicatory hearing, respondent's violation had exceeded five years in duration. First, a \$10,000 penalty is far below the penalty that could be assessed utilizing the statutory maximum of \$37,500 per day (imposing the maximum daily penalty for a period of five years would exceed \$68 million).

Moreover, respondent is on notice that staff may seek a ten thousand dollar (\$10,000) civil penalty; that is the amount requested in staff's complaint, which was duly served on respondent. Testimony at the hearing also established that staff checked the relevant databases on the morning of the hearing, and determined that respondent had not filed an application to register its facility, and had not registered its facility, as of July 20, 2017.

Given the multiple notices received by respondent following the commencement of this enforcement proceeding, it is appropriate, for purposes of calculating the civil penalty here, to add the period from service of the notice of hearing and complaint (April 10, 2017) to the date of the adjudicatory hearing (July 20, 2017). Because proof at the hearing established that respondent's violation continued at least through July 20, 2017, and therefore exceeded five years in duration as of that date, a penalty of ten thousand dollars (\$10,000) is authorized and appropriate.

Recommendations

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

1. Granting Department staff's motion for default, holding Promesa Court Residences Limited Partnership in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Promesa Court Residences Limited Partnership violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 954 Anderson Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to it;
3. Directing respondent Promesa Court Residences Limited Partnership to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete petroleum bulk storage registration application for the facility, together with applicable registration fees;
4. Directing respondent Promesa Court Residences Limited Partnership 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 he may deem just and appropriate.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: August 18, 2017
Albany, New York

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Promesa Court Residences Limited Partnership,
 954 Anderson Avenue, Bronx, New York 10452 – DEC Case No. PBS.2-601045.6.2017
 July 20, 2017 – Central Office
 Edrol File No. 031228112243

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	June 6, 2017 Practice Order of the Appellate Division, Third Department (Peters, P.J.), for appointment of law intern Ryan Whelpley.	✓	✓	Department Staff	
2	Cover Letter from Yvonne M. Ward, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, all dated April 10, 2017, and an undated Affirmation of Yvonne M. Ward.	✓	✓	Department Staff	
3	Affidavit of Service of Dale Thiel, sworn to July 12, 2017 with New York State Department of State Receipt for Service dated April 10, 2017.	✓	✓	Department Staff	
4	NYS Department of State Entity Information regarding respondent.	✓	✓	Department Staff	
5	PBS Application, dated September 22, 2011.	✓	✓	Department Staff	

6	New York City Department of Finance ACRIS Title Search, and Bargain and Sale Deed with Covenants, dated June 26, 2012.	✓	✓	Department Staff	
7	PBS Registration Certificate No. 2-601045 issued October 5, 2011, expiration date August 11, 2016.	✓	✓	Department Staff	
8	PBS Program Facility Information Report, printed June 27, 2017.	✓	✓	Department Staff	
9	Affirmation of attempted contact by Deborah Gorman, dated June 29, 2017.	✓	✓	Department Staff	
10	Proposed Order.	✓	NO	Department Staff	