

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC CASE NO.
2-602886NGD

-by-

SDM REALTY LLC,

Respondent.

This administrative enforcement proceeding addresses the allegations of staff of the New York State Department of Environmental Conservation (“Department”) that respondent SDM Realty LLC (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2(b)¹ by failing to register the petroleum storage facility at 1185 Lebanon Street, Bronx, New York (“facility”) within thirty (30) days of the date (February 6, 2014) that it acquired the facility. A 5,000-gallon aboveground petroleum bulk storage tank is located at the facility.

On May 19, 2015, an adjudicatory hearing was convened before Administrative Law Judge (“ALJ”) Michael Caruso of Department’s Office of Hearings and Mediation Services (“OHMS”) at the Department’s Region 2 offices, Long Island City, New York. Department staff was represented by Deborah Gorman, Esq. No one appeared on behalf of respondent.

At the hearing, Department staff indicated that it was prepared to proceed, and proffered a program staff witness. Noting for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. The ALJ reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). The ALJ noted Department staff’s readiness for hearing and noted the failure of respondent to appear. The ALJ advised that the hearing, in the absence of respondent, would be convened on a subsequent date.

On July 21, 2015, the adjudicatory hearing was reconvened before ALJ P. Nicholas Garlick. ALJ Garlick prepared the attached hearing report, which I adopt as my decision in this matter subject to my comments below.

¹ Part 612 was repealed, effective subsequent to the commencement of this proceeding, and replaced by a revised part 613. The registration requirements applicable to transfers of ownership are now found at 6 NYCRR 613-1.9(d). For the purposes of the violation alleged in this matter, however, the prior part 612 applies.

As set forth in the ALJ's hearing report, respondent SDM Realty LLC failed to file an answer to the complaint that Department staff served in this matter. Respondent also failed to appear at a pre-hearing conference scheduled for April 21, 2015, and failed to appear for the adjudicatory hearing scheduled for May 19, 2015 (see Hearing Report at 4 [Finding of Fact No. 9]).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for default be granted (see Hearing Report, at 5). I concur that Department staff is entitled to a default judgment pursuant to 6 NYCRR 622.15. Furthermore, at the hearing conducted on July 21, 2015, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 5). Accordingly, Department staff is entitled to a judgment based on record evidence.

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff, in its papers, sought a civil penalty of ten thousand dollars (\$10,000). The ALJ granted Department staff's motion to amend its pleadings to reduce the civil penalty to five thousand dollars (\$5,000). In these types of cases, where facilities have not registered or renewed their registrations within the past two years, and no other violations or mitigating or aggravating factors exist, a civil penalty of five thousand dollars (\$5,000) has been assessed (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). Here, respondent's application to register the facility was due within thirty days of February 6, 2014, the date when ownership of the facility was transferred to respondent. Respondent has failed to register the facility for over one year (see Hearing Report at 4 [Findings of Fact 4, 7]). The requested penalty of five thousand dollars (\$5,000) is authorized and appropriate.

I also direct that respondent submit a complete registration application to the Department 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 SDM Realty LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent SDM Realty LLC is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to register its petroleum storage facility located at 1185 Lebanon Street, Bronx, New York, within thirty (30) days of the date when ownership of the facility was transferred to it.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent SDM Realty LLC shall submit to the Department a complete petroleum bulk storage registration application for the facility, plus applicable registration fees.

- IV. Within fifteen (15) days of the service of this order upon respondent, respondent SDM Realty LLC 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 facility petroleum bulk storage registration application, applicable registration fees, and the penalty payment shall be sent to the following address:
- Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: 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 SDM Realty LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/
By: _____
Basil Seggos
Acting Commissioner

Dated: March 18, 2016
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 of the State of New York (“ECL”) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York of the State of New York (“6 NYCRR”)

HEARING REPORT

DEC CASE NO.
2-602886NDG

-by-

SDM REALTY LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent SDM Realty LLC (“respondent”) with a notice of hearing and complaint, dated March 20, 2015. The complaint alleges a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), for failure to reregister its petroleum bulk storage facility located at 1185 Lebanon Street, Bronx, New York, 10460, within 30 days after it became the owner of the facility. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2(b); (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (3) directing respondent to reregister its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner’s order upon respondent, by remitting the registration fee set forth in ECL 17-1009(2) and a complete registration application in accordance with 6 NYCRR 612.2(b); and (4) granting such other and further relief as the Commissioner shall 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 March 20, 2015 (see Staff Exhibit [“Staff Ex.”] 3). Respondent was also served with the notice of hearing and complaint by regular mail on or about March 20, 2015. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 21, 2015, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on May 19, 2015, an adjudicatory hearing was convened before Administrative Law Judge (“ALJ”) Michael Caruso of Department’s Office of Hearings and Mediation Services (“OHMS”) at the Department’s Region 2 offices, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York 11101-

5407. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a program staff witness. Noting for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. The ALJ reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). Moreover, the ALJ noted Department staff's readiness for hearing and noted the failure of respondent to appear. The ALJ advised that the hearing, in the absence of respondent, would be convened on a subsequent date.

On July 21, 2015, the adjudicatory hearing was reconvened before the undersigned ALJ at the Department's Central Office at 625 Broadway, Albany, New York 12233. Department staff was represented by Benjamin Conlon, Esq., Associate Attorney, and John A. Maine, Law Intern, from the Department's Office of General Counsel. Department staff orally renewed its motion for a default judgment and also sought judgment on the merits. The administrative hearing record was held open at the hearing to allow Department staff to submit a revised proposed order, which was received on July 27, 2015, when the record closed.

Department staff called one witness, Cynthia Freedman, an Environmental Program Specialist 2 in the Registration and Permit Section of the Department's Division of Environmental Remediation. In all, ten (10) exhibits were received in evidence.

Applicable Regulatory Provision

Section 612.2. Registration of facilities.

“(a) *Existing facilities.*

“(1) Within one year of the effective date of these regulations, the owner of any petroleum bulk storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.

“(2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred.

“(b) *Transfer of ownership.* If ownership of the facility changes, the new owner must reregister the facility with the department within 30 days of ownership transfer.”

Findings of Fact

The following findings of fact are found based upon the preponderance of the evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent SDM Realty LLC is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 1185 Lebanon Street, Bronx New York, 10460 (“facility”). In particular, petroleum bulk storage tank number 001 at the facility has a capacity of 5,000 gallons and is located aboveground (Testimony of Cynthia Freedman, Staff Exs. 4, 5, 7 and 8).
2. As of July 10, 2015, respondent was an active domestic limited liability company in the State of New York (Testimony of Cynthia Freedman, Staff Ex. 6).
3. On June 4, 2009, the Department issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-602886, registering the PBS facility, to 1185 LEBANON ST. LLC which owned the facility at the time. This registration expired on April 29, 2014. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE” (Testimony of Cynthia Freedman, Staff Ex. 7).
4. The facility was acquired by respondent by deed dated February 6, 2014. This deed is recorded in the Office of the City Register of the City of New York, City Register File No. (“CRFN”) 2014000073861 (Testimony of Cynthia Freedman, Staff Ex. 5).
5. Cynthia Freedman is an Environmental Program Specialist 2 in the Registration and Permit Section of the Department’s Division of Environmental Remediation. Ms. Freedman has been employed in that position for twelve and a half years and is authorized to access, search and inspect the Department’s unified information system (“UIS”) and the electronic repository of 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 612.2 (Testimony of Cynthia Freedman).
6. On July 21, 2015, Cynthia Freedman searched the petroleum bulk storage facility records contained in the Department’s UIS and DecDOCs databases for any petroleum facility registration or renewal registration or any petroleum bulk storage facility reregistration filed by respondent for the facility (Testimony of Cynthia Freedman).
7. As a result of her searches, Cynthia Freedman determined that respondent had not reregistered the facility at any time after assuming its ownership on February 6, 2014 (Testimony of Cynthia Freedman).

8. As shown by Receipt for Service No. 201503300249 issued by the New York State Department of State, respondent was served on March 20, 2015, pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated March 20, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), together with a cover letter, statement of readiness and supporting affidavit for failure to reregister its petroleum bulk storage facility located 1185 Lebanon Street, Bronx, New York, 10460 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 regular mail on or about March 20, 2015 (Staff Ex. 3).
9. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 21, 2015, as directed in the cover letter served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May 19, 2015, as directed in the notice of hearing (Hearing Record).

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (see 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; see also 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (see 6 NYCRR 622.15[b][1]-[3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

In this case, Department staff's proof presents a prima facie case demonstrating that respondent failed to reregister its petroleum bulk storage facility located at 1185 Lebanon Street, 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 612.2(b).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint; (iii) respondent failed to appear at a pre-hearing conference scheduled for April 21, 2015, as directed in the cover letter served with the notice of hearing and complaint; and (iv) respondent failed to appear for the adjudicatory hearing scheduled in the matter on May 19, 2015, as directed in the notice of hearing. Department staff provided its proposed order at the July 21, 2015 hearing and a revised proposed order, which was received on July 27, 2015, when the record closed (Staff Ex. 10). The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to reregister its petroleum bulk storage facility within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009 and 6 NYCRR 612.2(b). The Department is entitled to judgment upon the facts proven. At the July 21, 2015 hearing, Department staff orally moved to amend the pleadings to reduce the civil penalty requested to five thousand dollars (\$5,000). Pursuant to 6 NYCRR 622.10(b)(1)(i), I granted Department staff's motion to amend the pleadings as there is no prejudice to respondent in reducing the penalty requested.

Department staff's proposed order and the five thousand dollar (\$5,000) 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).

Conclusion of Law

By failing to reregister its petroleum bulk storage facility located at 1185 Lebanon Street, Bronx, New York, 10460 within 30 days of transfer of ownership of the facility to it, the respondent violated ECL 17-1009 and 6 NYCRR 612.2(b).

Recommendation

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

1. granting Department staff's motion for default, holding respondent SDM Realty 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 SDM Realty LLC violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum bulk storage facility located at 1185

Lebanon Street, Bronx, New York, 10460, within 30 days after it became the owner of the facility;

3. directing respondent SDM Realty LLC to submit to the Department, within fifteen (15) days of the service of the Commissioner's order upon respondent, a complete registration application for the facility, together with applicable registration fees;
4. directing respondent SDM Realty LLC to pay a civil penalty in the amount of five thousand dollars (\$5,000.00), within fifteen (15) days of the service of the Commissioner's order upon respondent; and
5. directing such other and further relief as he may deem just and appropriate.

/s/

P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
October 27, 2015

EXHIBIT CHART – PBS EXPEDITED PROCEEDING*Matter of SDM Realty LLC*July 21, 2015 – Central Office, 625 Broadway, Albany, NY
DEC Case No. 2-602886NDG - Ediorl File No. 011228084208

Exhibit No.	Description	ID'd	Rec'd	Offered By	Notes
1	May 26, 2015 Practice Order of the Appellate Division, Third Department (Peters, P.J.), for appointment of law interns, including, John A. Maine.	✓	✓	Department Staff	
2	Cover Letter from Deborah Gorman, Esq., to respondent, dated March 20, 2015. Notice of Hearing and Complaint, dated March 20, 2015. Statement of Readiness, dated March 20, 2015. Affidavit of Brooke Turallo, sworn to March 18, 2015.	✓	✓	Department Staff	
3	Affidavit of Service of Brooke Turallo, sworn to July 17, 2015, attaching New York State Department of State (“DOS”) Receipt for Service, dated March 20, 2015.	✓	✓	Department Staff	
4	PBS Application by 1185 Lebanon St. LLC for PBS No. 2-602886, received on May 26, 2009.	✓	✓	Department Staff	
5	New York City Department of Finance ACRIIS Title Search dated July 17 & 20, 2015. Deed to respondent, dated February 6, 2014.	✓	✓	Department Staff	
6	NYS DOS, Division of Corporations, Corporate Entity Information, current through July 10, 2015.	✓	✓	Department Staff	
7	PBS certificate for facility # 2-602886 issued to 1185 Lebanon St. LLC on June 4, 2009, expiration date April 29, 2014.	✓	✓	Department Staff	
8	PBS Program Facility Information Report for facility # 2-602886, printed July 20, 2015.	✓	✓	Department Staff	
9	Affirmation of Deborah Gorman, Esq., dated July 17, 2015 regarding attempts to contact respondent.	✓	✓	Department Staff	
10	Proposed Order.	✓	✓	Department Staff	The hearing record was held open to allow submission of a revised proposed order, which was received on July 27, 2015

