

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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.2-146528.10.2018

-by-

**1004 SECOND AVENUE PARTNERS LLC,**

Respondent.

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This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent 1004 Second Avenue Partners LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility at 301 East 53<sup>rd</sup> Street, New York, New York (facility) within 30 days of the transfer of ownership of the facility to it on May 14, 2015. Located at the facility is a petroleum bulk storage tank with a capacity of 4000 gallons.

On July 23, 2019, an adjudicatory hearing was convened before Michele M. Stefanucci, Administrative Law Judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Stefanucci 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 September 13, 2018, and failed to appear for the adjudicatory hearing scheduled in the matter for October 15, 2018 and reconvened on July 23, 2019 (*see* Hearing Report at 4 [Finding of Fact No. 8]).

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

At the hearing on July 23, 2019, 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* Hearing ediol tape recording ). 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 on May 14, 2015 (*see* ECL 17-1009[2]; Hearing Report at 5-6). Respondent's failure to properly register the facility violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

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 complaint, sought a civil penalty in the amount of ten thousand dollars (\$10,000). At hearing and in its proposed order, staff modified the civil penalty request to seven thousand five hundred dollars (\$7,500). Where, as here, an owner has not registered the facility for more than two but less than five years, and no other violations or mitigating or aggravating factors exist, a civil penalty of seven thousand five hundred (\$7,500) is consistent with administrative precedent (*see Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011, at 2 [penalty ranges for PBS registration violations concerning heating oil tanks in New York City]). The requested penalty of seven thousand five hundred dollars (\$7,500) is authorized and appropriate.

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent. I also direct that respondent submit to the Department a petroleum bulk storage application for the facility within fifteen (15) days of service of this order upon 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 1004 Second Avenue Partners LLC, waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 1004 Second Avenue Partners LLC, violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 301 East 53<sup>rd</sup> Street, New York, New York, within thirty (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 1004 Second Avenue Partners LLC, 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 1004 Second Avenue Partners LLC, respondent shall pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500) 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, 14<sup>th</sup> 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 1004 Second Avenue Partners LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: September 24, 2019  
Albany, New York

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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.2-146528.10.2018

-by-

**1004 SECOND AVENUE PARTNERS LLC,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 1004 Second Avenue Partners LLC (respondent) with a notice of hearing and complaint, dated August 1, 2018, 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 301 East 53<sup>rd</sup> Street, New York, New York, within 30 days of the transfer of ownership of the facility to it. The complaint seeks an order of the Commissioner:

- finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1);
- assessing a civil penalty in the amount of ten thousand dollars (\$10,000);
- 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
- granting such other and further relief as the Commissioner shall deem just and appropriate.

Because 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 August 1, 2018 (*see* Staff Exhibit 7). Department staff provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about August 1, 2018 (*see id.*). Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for September 13, 2018, as directed in the notice of hearing and accompanying cover letter (*see* Staff Exhibit 1).

As stated in the notice of hearing, on October 15, 2018, an adjudicatory hearing was convened before Administrative Law Judge Michael Caruso. 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. 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), and indicated that, upon staff's request, the hearing would be reconvened on a subsequent date and on notice to respondent.

The matter did not settle, and Department staff requested that the matter be reconvened. On February 19, 2019, the Office of Hearings and Mediation Services (OHMS) served a notice of hearing on respondent by first class mail, advising respondent that the hearing would be reconvened on April 8, 2019. On April 8, 2019, Ms. Gorman appeared before ALJ Caruso on behalf of Department staff. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing and proffered a staff witness. Noting for the record that respondent had not answered the complaint and failed to appear for the reconvened adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. ALJ Caruso 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), and indicated that upon staff's request, the hearing would be reconvened on a subsequent date and on notice to respondent.

On June 25, 2019, the Office of Hearings and Mediation Services served a notice of hearing on respondent by first class mail, advising respondent that the hearing would be reconvened on July 22, 2019, and each day thereafter. On July 23, 2019, 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 John Veiszlemlein, under the supervision of the Office of General Counsel.<sup>1</sup> No one appeared on behalf of respondent.

Department staff orally renewed its motion for a default judgment. 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, eleven (11) exhibits were received in evidence.

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<sup>1</sup> The law student intern program is authorized by an Order of the New York State Appellate Division, Third Department, dated February 15, 2018.

Applicable Regulatory Provision

613-1.9 Registration <sup>2</sup>

\* \* \*

(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 1004 Second Avenue Partners LLC (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 301 East 53<sup>rd</sup> Street New York, New York (facility). In particular, petroleum storage tank number 002 at the facility has a capacity of 4000 gallons. *See* Testimony of Benjamin Conlon (Conlon Testimony); Staff Exhibits 2, 3, and 4.
2. Respondent is an active domestic limited liability company in the State of New York. *See* Conlon Testimony; Staff Exhibit 6.
3. Pursuant to a registration application received July 29, 2013, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-146528 to J.M. Properties identified on the certificate as the owner of the facility, on June 21, 2013 with an expiration date of July 2, 2017. In bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” The PBS application received by Department staff on June 29, 2013 identifies the then owner as J.M. Properties. *See* Conlon Testimony; Staff Exhibits 3 and 4.
4. On May 14, 2015, J.M. Properties, by deed, transferred all right, title and interest in the facility to respondent 1004 Second Avenue Partners, 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. 2015000181853. *See* Conlon Testimony; Staff Exhibit 5.

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<sup>2</sup> ECL 17-1009(2) requires facility registrations to be “renewed every five years or whenever ownership of a facility is transferred, whichever occurs first.” In addition, for violations occurring before October 11, 2015 (the effective date of 6 NYCRR 613-1.9), Department staff’s pleadings incorporate former 6 NYCRR 612.2(b) by reference, which read, “Transfer of Ownership. If ownership of a facility changes, the new owner must re-register the facility with the Department within thirty (30) days of ownership transfer.”

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* Conlon Testimony.
6. On July 22, 2019, 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 application filed by respondent for the facility. Mr. Conlon determined that, as of July 22, 2019, respondent had failed to file a petroleum bulk storage facility registration application since respondent took ownership on May 14, 2015. *See* Conlon Testimony; *see also* Staff Exhibits 2, 3, and 4.
7. As shown by Receipt for Service No. 201808080237 issued by the New York State Department of State, respondent was served personally, on August 1, 2018, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated August 1, 2018, 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 301 East 53<sup>rd</sup> Street, New York, 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 or about August 1, 2018. *See* Staff Exhibits 1 and 7; *see also* Hearing Record.
8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for September 13, 2018, 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 October 15, 2018, and reconvened on July 23, 2019, 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). Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* CPLR 3215[f]).

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 September 13, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on October 15, 2019 and reconvened on July 23, 2019, as directed in the notices of hearing. Department staff has submitted a proposed order.

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to register its petroleum bulk storage facility located at 301 East 53<sup>rd</sup> Street, New York, 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) (*see Matter of Samber Holding Corp.*, Order of the Commissioner at 1). Based upon the foregoing, 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 301 East 53<sup>rd</sup> Street, New York, 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. Absent mitigating or aggravating factors, staff has generally sought a civil penalty of seven thousand five hundred dollars (\$7,500) for owners of facilities that have been out of compliance for more than two but less than five years.

At hearing and in the proposed order, Department staff modified the civil penalty request to seven thousand five hundred dollars (\$7,500). This requested civil penalty is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see 12 Martense Associates*, at 2).

#### Conclusion of Law

By failing to register its PBS facility located at 301 East 53<sup>rd</sup> Street, New York, New York within 30 days of the transfer of ownership of the facility to it, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

#### Recommendations

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

1. Granting Department staff's motion for default, holding 1004 Second Avenue Partners 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 1004 Second Avenue Partners LLC, violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 301 East 53<sup>rd</sup> Street, New York, New York, within 30 days of the transfer of ownership of the facility to it;
3. Directing respondent 1004 Second Avenue Partners LLC, 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 1004 Second Avenue Partners LLC, to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500) 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/\_\_\_\_\_  
Michele M. Stefanucci  
Administrative Law Judge

Dated: August 8, 2019  
Albany, New York

**EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS**

*Matter of 1004 Second Avenue Partners LLC*  
 301 East 53<sup>rd</sup> Street, New York, New York – DEC Case No. PBS.2-146528.10.2018  
 July 23, 2019 – Central Office  
 Edrol File No. 190723091154

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman all dated August 1, 2018.	✓	✓	Department Staff	
2	PBS Program Facility Information Report, printed June 20, 2019.	✓	✓	Department Staff	
3	PBS Application, received July 29, 2013 for facility located at 301 East 53 <sup>rd</sup> Street, New York, New York.	✓	✓	Department Staff	
4	PBS Certificate issued June 21, 2013, expiration date July 2, 2017.	✓	✓	Department Staff	
5	New York City Department of Finance, ACRIS Title Search, dated June 19, 2019, and deed to respondent, dated May 14, 2015.	✓	✓	Department Staff	
6	NYS Dept. of State Entity Information current through July 15, 2019.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	Affidavit of Service of Dale Thiel, sworn to July 19, 2019, with New York State Department of State Receipt for Service dated August 1, 2018.	✓	✓	Department Staff	
8	Affirmation of attempted contact of Deborah Gorman, dated July 17, 2019.	✓	✓	Department Staff	
9	Request for new hearing date, dated June 18, 2019.	✓	✓	Department Staff	
10	Proposed Order.	✓	✓	Department Staff	
11	Notice of Hearing dated February 19, 2019.	✓	✓	Department Staff	