

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.2-509655.2.2019

-by-

**1314 GRAND CONCOURSE REALTY CORP.,**

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 1314 Grand Concourse Realty Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility at 1314 Grand Concourse, Bronx, New York (facility) on or before February 4, 2016, the date on which the prior registration expired. Located at the facility is an aboveground storage tank with a capacity of 4,000 gallons.

On July 22, 2019, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Caruso prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for January 7, 2019, and failed to appear for the adjudicatory hearing scheduled in the matter for February 6, 2019 and reconvened on July 22, 2019 (*see* Hearing Report at 4 [Finding of Fact No. 8]).

In the matter before me, the record demonstrates that respondent 1314 Grand Concourse Realty Corp. is the current owner of the facility (*see* Hearing Report at 3 [Finding of Fact No. 4]). As the ALJ notes, respondent was required to register the petroleum bulk storage facility within thirty (30) days of the transfer of the ownership of the facility to it and failed to do so (*see* Hearing Report at 5). The ALJ has conformed the pleadings to the proof and concluded that respondent violated former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1) by its failure to register the facility within thirty (30) days of the transfer of the facility to it.

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

At the hearing on July 22, 2019, Department staff presented proof of facts sufficient to enable me to determine that respondent failed to register its petroleum bulk storage facility upon the transfer of the facility to it, and thereby violated ECL 17-1009, former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1). Accordingly, staff is entitled to a judgment based upon the facts proven.

Department staff, in its complaint, sought a civil penalty of ten thousand dollars (\$10,000). 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. At hearing, Department staff moved to reduce the penalty to seven thousand five hundred dollars (\$7,500). ALJ Caruso granted staff's motion (*see* Hearing Report at 5-6). Based on this record, the requested penalty of seven thousand five hundred dollars (\$7,500) is authorized and appropriate (*see id.* at 6).

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. This new application must include the correct name of the owner of the facility.

**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 1314 Grand Concourse Realty Corp. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 1314 Grand Concourse Realty Corp. violated ECL 17-1009, former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1), by failing to register the petroleum bulk storage facility located at 1314 Grand Concourse, Bronx, New York within thirty (30) days of the transfer of the facility to it.
- III. Within fifteen (15) days of the service of this order upon respondent 1314 Grand Concourse Realty Corp., respondent shall submit to the Department a complete petroleum bulk storage application for the facility, including the correct name of the owner of the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent 1314 Grand Concourse Realty Corp., 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 1314 Grand Concourse Realty Corp., 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.2-509655.2.2019

-by-

**1314 GRAND CONCOURSE REALTY CORP.,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 1314 Grand Concourse Realty Corp. (respondent) with a notice of hearing and complaint, dated November 5, 2018, alleging a violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) for failing to renew the registration of its petroleum bulk storage facility located at 1314 Grand Concourse, Bronx, New York on or before February 4, 2016, the date on which its prior registration expired. The complaint seeks an order of the Commissioner: (1) finding respondent in violation of 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 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 business corporation 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 November 5, 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 November 5, 2018 (*see id.*). Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for January 7, 2019, as directed in the notice of hearing and accompanying cover letter (*see* Staff Exhibit 1).

As stated in the notice of hearing, on February 6, 2019, an adjudicatory hearing was convened before the undersigned. 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 and proffered a staff witness. Noting for the record that respondent had not answered the complaint, had not appeared 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), 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. On July 22, 2019, the adjudicatory hearing was reconvened before me at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by law student intern Nicholas Wall, 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, nine (9) exhibits were received in evidence.

#### Applicable Regulatory Provision

##### 613-1.9 Registration

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“(c) *Renewal*. Registration must be renewed 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 the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section.”

#### 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 1314 Grand Concourse Realty Corp. (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 1314 Grand Concourse, Bronx, New York (facility). Petroleum storage tank number 001 at the facility has a capacity of 4,000 gallons and is located aboveground. *See* Testimony of Benjamin Conlon (Conlon Testimony); Staff Exhibits 2, 3, 4, and 5.

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<sup>1</sup> Law student interns, under the immediate supervision of a supervising attorney, are authorized to represent the Department in contested and uncontested matters pursuant to the order of the Appellate Division, Third Department dated February 15, 2018 (effective through August 31, 2020).

2. Respondent is an active domestic business corporation in the State of New York. *See* Conlon Testimony; Staff Exhibit 6.
3. Pursuant to a registration application received November 22, 2010, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-509655 to Herbert and Mary Ann Tscherne identified on the certificate as the owners of the facility, on November 24, 2010 with an expiration date of February 4, 2016. The PBS application received by Department staff on November 22, 2010 identifies the owners as Herbert and Mary Ann Tscherne and identifies the facility as 1314 Grand Concourse Realty Corp. *See* Conlon Testimony; Staff Exhibits 3 and 5.
4. On March 4, 2003, Herbert Tscherne and Mary Ann Tscherne, by deed, transferred all right, title and interest in the facility to respondent 1314 Grand Concourse Realty Corp., 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. 2003000317534. *See* Conlon Testimony; Staff Exhibit 2.
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 the registration expired on February 4, 2016 and, as of July 22, 2019, had not been renewed. *See* Conlon Testimony; *see also* Staff Exhibits 3, 4, and 5.
7. As shown by Receipt for Service No. 201811160240 issued by the New York State Department of State, respondent was served personally, on November 5, 2018, pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated November 5, 2018 alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its petroleum bulk storage facility located at 1314 Grand Concourse, Bronx, New York on or before February 4, 2016, the date the prior registration expired. 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 November 5, 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 January 7, 2019 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 February 6, 2019 and reconvened on July 22, 2018, 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 January 7, 2019, 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 for February 6, 2019 and reconvened on July 22, 2019, as directed in the notices of hearing. Department staff has submitted a proposed order.

In this matter, the record demonstrates that respondent is the current owner of the facility and failed to register the facility in its name within thirty days of the transfer of the property to respondent. The record also demonstrates that ownership of the facility was transferred back and forth between the Tschernes and 1314 Grand Concourse Realty Corp. several times between 1988 and 2003 (*see* Staff Exhibit 2). According to Department of State records, 1314 Grand

Concourse Realty Corp. was initially formed on May 12, 1987 and was dissolved by proclamation on September 29, 1993. On October 2, 2002, 1314 Grand Concourse Realty Corp. was formed again by filing with the Department of State. On March 4, 2003, the Tschernes transferred the property back to 1314 Grand Concourse Realty Corp (*see* Staff Exhibit 6). The record also demonstrates, at a minimum, that Mr. Tscherne is involved in 1314 Grand Concourse Realty Corp. because he signed the real property transfer report on behalf of the sellers and the buyer, which indicated that one of the buyers was also a seller and the full sale price was \$0.00 (*see* Staff Exhibit 2).

Rather than prosecute this matter as a failure to register within thirty days of transfer, in violation of former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1), Department staff chose to treat the PBS registration certificate issued to the Tschernes as one that has expired but needs to be renewed by respondent with the correct owner identified in the renewal application. By law, respondent was required to register the facility on or before April 3, 2003. The Tschernes, however, continued to register the facility in their names with a facility name of 1314 Grand Concourse Realty Corp. until the expiration of the registration on February 4, 2016. Based on the record herein, I am sua sponte conforming the pleadings to the proof and conclude that respondent violated former 6 NYCRR 612.2(b) and current 6 NYCRR 613-1.9(d)(1) by failing to register the facility within thirty days of transfer of the facility to respondent.

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 of its petroleum bulk storage facility located at 1314 Grand Concourse, 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) (*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 1314 Grand Concourse, Bronx, New York, 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. For the purpose of calculating the appropriate penalty and the registration fees due the Department, Department staff treated February 4, 2016, the date the registration issued to the Tschernes expired, as the date the violation commenced. At hearing, Department staff moved to reduce the penalty to seven thousand five hundred dollars (\$7,500), which is the penalty

generally requested for violations extending from two to five years. I granted staff's motion to reduce the penalty.

Department staff's proposed order seeks a civil penalty of 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 renew the registration of its PBS facility located at 1314 Grand Concourse, Bronx, New York on or before February 4, 2016, the date the prior registration expired, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

#### Recommendations

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

1. Granting Department staff's motion for default, holding 1314 Grand Concourse Realty Corp. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent 1314 Grand Concourse Realty Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 1314 Grand Concourse, Bronx, New York within 30 days of the transfer of ownership of the facility to it;
3. Directing respondent 1314 Grand Concourse Realty Corp. 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, including correction of the facility owner's name, together with applicable registration fees;
4. Directing respondent 1314 Grand Concourse Realty Corp. 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/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: July 30, 2019  
Albany, New York

**EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS**

*Matter of 1314 Grand Concourse Realty Corp.*  
 1314 Grand Concourse, Bronx, New York – DEC Case No. PBS.2-509655.2.2019  
 July 22, 2019 – Central Office  
 Edrol File No. 190722122120

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 November 5, 2018	✓	✓	Department Staff	
2	New York City Department of Finance, ACRIS Title Search, dated July 15, 2019, and deed to respondent, dated March 4, 2003	✓	✓	Department Staff	FN1
3	PBS Application received November 22, 2010 from Herbert & Mary Ann Tscherne	✓	✓	Department Staff	FN1
4	PBS Program Facility Information Report, printed July 15, 2019	✓	✓	Department Staff	FN1
5	PBS Registration Certificate issued November 24, 2010, expiration date February 4, 2016	✓	✓	Department Staff	FN1

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	NYS Department of State Entity Information, current through July 18, 2019	✓	✓	Department Staff	FN1
7	Affidavit of Service of Dale Thiel, sworn to July 19, 2019 with New York State Department of State Receipt for Service dated November 5, 2018	✓	✓	Department Staff	
8	Affirmation of attempted contact of Deborah Gorman, dated July 17, 2019	✓	✓	Department Staff	
9	Proposed Order	✓	✓	Department Staff	
	Notice of Hearing dated June 25, 2019				OHMS File Copy

<sup>1</sup> Witness testified that databases were searched, and documents were reviewed on July 22, 2019. Witness initialed and dated the exhibit to confirm information remained accurate as of July 22, 2019.