

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.2-113948.7.2017

-by-

144 EAST 36TH STREET CORPORATION,

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Environmental Conservation (Department) that respondent 144 East 36th Street Corporation (respondent) violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility on or before March 24, 2012, the date on which its prior registration expired. Respondent's facility is located at 144 East 36th Street, New York, New York, and includes an underground storage tank with a capacity of 3,000 gallons.

Administrative Law Judge (ALJ) Maria E. Villa of the DEC's Office of Hearings and Mediation Services was assigned to the matter. ALJ Villa prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary 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 June 12, 2017, and failed to appear for the adjudicatory hearing scheduled in the matter on July 12, 2017 (see Default Summary Report at 3 [Finding of Fact No. 7]).

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 Default Summary Report at 4-5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Staff's papers submitted in support of its motion for default judgment provide proof of facts sufficient to support staff's claim that respondent failed to renew the registration of its petroleum bulk storage facility on or before March 24, 2012, the date on which its registration expired.

The record demonstrates that respondent was required to renew its registration by March 24, 2012, the date its prior registration expired (see ECL 17-1009[2]; 6 NYCRR 613-1.9[c];

Default Summary Report at 3 [Findings of Fact Nos. 4, 5]). Respondent's failure to renew the facility's registration violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Department staff seeks a civil penalty of ten thousand dollars (\$10,000) (see Motion for Default Judgment, Exhibit A [Complaint, Wherefore Clause, at II]). 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. As noted, respondent has failed to renew the registration for the facility since March 24, 2012, when the registration expired (see Default Summary Report at 3 [Findings of Fact Nos. 4, 5]). Where, as here, an owner has not registered the facility for more than five years from the expiration date, a civil penalty of ten thousand dollars (\$10,000) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). I agree with the ALJ that the ten thousand dollars (\$10,000) sought by staff is authorized and appropriate (see Default Summary Report at 4-5).

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 and past due 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 144 East 36th Street Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 144 East 36th Street Corporation violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility located at 144 East 36th Street, New York, New York.
- III. Within fifteen (15) days of the service of this order upon respondent 144 East 36th Street Corporation, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent 144 East 36th Street Corporation, 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, 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 144 East 36th Street Corporation, 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: October 3, 2017
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**DEFAULT SUMMARY
REPORT**

DEC Case No.
PBS.2-113948.7.2017

-by-

144 EAST 36TH STREET CORPORATION,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 144 East 36th Street Corporation (respondent) with a notice of hearing and complaint, dated May 10, 2017, alleging that respondent violated ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), when respondent failed to renew the registration of its petroleum bulk storage facility located at 144 East 36th Street, New York, New York on or before March 24, 2012, 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 the service of the Commissioner's order by remitting the applicable registration fee, including any past registration fees, along with a complete registration application; and (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Respondent is an active domestic business corporation in the State of New York, and service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State on May 10, 2017 (Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on May 10, 2017 (*id.*). Respondent failed to file an answer to the complaint. The notice of hearing and accompanying cover letter directed respondent to appear at a pre-hearing conference scheduled for June 12, 2017 and to appear at an adjudicatory hearing scheduled for July 12, 2017 (*see* Exhibits A and B). Respondent failed to appear at the pre-hearing conference and the adjudicatory hearing.

As stated in the notice of hearing, on July 12, 2017, an adjudicatory hearing was convened at 12:43 p.m. by video conference before Administrative Law Judge (ALJ) Michael S. Caruso. The ALJ was located at the Department's central offices, 625 Broadway, Albany, New York, and counsel for staff were located 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. of the Remediation Bureau in the Department's Office of General Counsel. 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, and stated that staff would be submitting motion papers in support of the motion for a default judgment. ALJ Caruso reserved on the oral default motion pending service and filing of the motion papers and any response thereto.

Staff has submitted a Notice of Motion for Default Judgment, a Motion for Default Judgment, and the Affirmation of Deborah Gorman, Esq., all dated July 24, 2017, and ten exhibits.¹ Respondent has failed to file any response to staff's motion for default judgment.

Applicable Regulatory Provision

613-1.9 Registration.²

* * *

“(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 documents submitted with and in support of staff's motion for a default judgment:

1. Respondent 144 East 36th Street Corporation (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 144 East 36th Street, New York, New York (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 3,000 gallons and is located underground. See Exhibits D, E, F, and H.

¹ A list of the exhibits submitted by staff in support of its motion for default judgment is attached hereto as Appendix A.

² Effective October 11, 2015, 6 NYCRR 613-1.9(c) replaced 6 NYCRR 612.2(a)(2), which stated: “(a) *Existing facilities*. . . (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.” ECL 17-1009(2) requires facility registrations to be “renewed every five years or whenever ownership of a facility is transferred, whichever occurs first.”

2. Respondent is an active domestic business corporation in the State of New York. See Exhibit I.
3. On November 2, 1970, Maria Ronay transferred all right, title and interest in the facility to respondent 144 East 36th Street Corporation, the facility's current owner. See Exhibit D.
4. On February 7, 2007, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-113948 to 144 East 36th Street Corporation, the owner of the facility. The certificate contained an expiration date of March 24, 2012. See Exhibit F.
5. On May 4, 2017, a search of the Department's PBS registration database revealed that respondent's registration had expired on March 24, 2012 and, as of May 4, 2017, had not been renewed. See Exhibit A, Affirmation of Deborah Gorman, Esq. dated May 10, 2017, ¶¶ 9-12. After the time to register the tank had expired, respondent sent two applications to the Department, both of which were already two years overdue from the time the registration expired. See Exhibit G; Exhibit B (Affirmation of Deborah Gorman, Esq. in Support of Motion for Default Judgment, dated July 24, 2017), ¶¶ 9 and 10. On August 25, 2014 and January 5, 2015, the Department sent notices to respondent, advising respondent that the applications were incomplete and could not be processed. Id. According to the Department, the applications did not include information relating to spill prevention and piping, and did not include overdue tightness testing submissions. Id. No subsequent applications were received. Exhibit B, ¶ 10.
6. As shown by Receipt for Service No. 201705110941 issued by the New York State Department of State, respondent was served personally on May 10, 2017, pursuant to Section 306 of the Business Corporation Law, with a cover letter, notice of hearing and complaint, a statement of readiness, and supporting affirmation, all dated May 10, 2017, alleging that respondent violated ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 144 East 36th Street, New York, New York on or before March 24, 2012, the date that 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 May 10, 2017. See Exhibit B, ¶¶ 2-3; see also Exhibit C, Affidavit of Service of Dale Thiel, sworn to July 20, 2017, ¶¶ 3-4.
7. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for June 12, 2017, and failed to appear for the adjudicatory hearing scheduled in the matter for July 12, 2017. See Exhibit B, at ¶¶ 4-6.

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 “also submit some proof of the facts sufficient to support the claims charged in the complaint.” Matter of Greene Technologies Incorporated, Ruling of the Commissioner, November 10, 2016, at 3; Matter of American Auto Body & Recovery Inc., Ruling of the Commissioner, July 2, 2015, at 3; Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

The 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 June 12, 2017, as directed in the cover letter served with the notice of hearing and complaint, and in the notice of hearing; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on July 12, 2017, as directed in both the cover letter and the notice of hearing. Department staff has submitted a proposed order with its motion papers. See Exhibit J. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers. See July 24, 2017 letter from Deborah Gorman, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent.

Department staff’s submissions in support of the motion for a default judgment provide proof of the facts sufficient to support staff’s claim that respondent failed to renew the registration of its petroleum bulk storage facility located at 144 East 36th Street, New York, New York on or before March 24, 2012, the date that the prior registration expired, in violation of ECL 17-1009. Respondent has also been in violation of 6 NYCRR 613-1.9(c) since the effective date of Part 613, October 11, 2015.

Department staff seeks 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 for this type of facility 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.

The record in this matter reflects that, as of the date of the service and filing of the notice of hearing and complaint in this matter, respondent's failure to renew its registration exceeded five years. I therefore recommend that the Commissioner impose a civil penalty in the amount of ten thousand dollars (\$10,000), as requested by Department staff.

Recommendations

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

1. Granting Department staff's motion for default, holding respondent 144 East 36th Street Corporation in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 144 East 36th Street Corporation violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 144 East 36th Street, New York, New York on or before March 24, 2012, the date that the prior registration expired;
3. Directing respondent 144 East 36th Street Corporation to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, together with applicable registration fees;
4. Directing respondent 144 East 36th Street Corporation 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/_____
Maria E. Villa
Administrative Law Judge

Dated: September 13, 2017
Albany, New York

APPENDIX A

Matter of 144 East 36th Street Corporation

DEC Case No. PBS.2-113948.7.2017

Exhibits to Staff Motion for Default Judgment dated July 24, 2017

Exhibit	Description
A	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, all dated May 10, 2017
B	July 24, 2017 Affirmation of Deborah Gorman in Support of Motion for Default Judgment
C	Affidavit of Service of Dale Thiel, sworn to July 20, 2017 with New York State Department of State Receipt for Service dated May 10, 2017
D	New York City Department of Finance July 19, 2017 ACRIS search, with November 2, 1970 deed to respondent
E	PBS Application (marked received February 5, 2007)
F	Petroleum Bulk Storage Certificate No. 2-113948, issued February 7, 2007; expiration date March 24, 2012
G	August 25, 2014 and January 5, 2015 Notices of Incomplete Application
H	PBS Program Facility Information Report, printed July 19, 2017
I	NYS Department of State Entity Information
J	Proposed Order