

**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

-by-

DEC Case No.
PBS.2-213705.9.2018

241 WEST 108 LTD.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 241 West 108 Ltd. violated ECL 17-1009 and 6 NYCRR 613-1.9 by failing to renew the registration of its petroleum bulk storage (PBS) facility on or before June 30, 2017, the date on which its prior registration expired. Respondent's facility is located at 241 West 108th Street, New York, New York (facility), and includes an aboveground PBS tank with a capacity of 5,000 gallons.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter and 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 August 13, 2018, and failed to appear for the adjudicatory hearing scheduled for September 13, 2018 (*see* Default Summary Report at 3 [Finding of Fact No. 8]). At the September 13, 2018, adjudicatory hearing at which Chief ALJ James T. McClymonds presided, Department staff made an oral motion for a default judgment. Chief ALJ McClymonds reserved on the motion and Department staff later submitted a written motion for default judgment with supporting papers. Thereafter, as noted above, the matter was assigned to ALJ Caruso.

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 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its PBS facility on or before June 30, 2017, the date on which

its prior registration expired and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c).

Department counsel correctly points out that the requirement to register PBS facilities is one of the “cornerstones” of the PBS regulatory scheme (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated March 13, 2019, ¶ 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Department staff, in its complaint, sought a penalty of ten thousand dollars (\$10,000). In its default papers and proposed order, Department staff seeks to reduce the civil penalty to five thousand dollars (\$5,000). ECL 71-1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In proceedings similar to this one, Department staff has requested penalties that take into account the duration of the violation. For those facilities that have violated the registration requirement within the past two years, Department staff has, absent other violations, generally, requested a penalty of five thousand dollars (\$5,000) (*see Matter of 12 Martense Associates, LLC*, Order of the Commissioner, December 19, 2011, at 2). In this matter, respondent was required to register its facility on or before June 30, 2017. Based on this record, the requested penalty of five thousand dollars (\$5,000) 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, together with a completed petroleum bulk storage application for the facility plus 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 default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent 241 West 108 Ltd. waived its right to be heard at the hearing.
- II. Based on the pleadings and papers submitted with and in support of Department staff’s motion, respondent 241 West 108 Ltd. is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew registration of its PBS facility located at 241 West 108th Street, New York, New York on or before June 30, 2017, the date on which its prior registration expired.
- III. Within fifteen (15) days of the service of this order upon respondent 241 West 108 Ltd., respondent shall submit to the Department a complete petroleum bulk storage application for the facility which includes, among other information, the correct corporate name of the facility owner, plus applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent 241 West 108 Ltd., respondent 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 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 241 West 108 Ltd., and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
May 21, 2019

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**

-by-

DEC Case No.
PBS.2-213705.9.2018

241 WEST 108 LTD.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 241 West 108 Ltd. (respondent) with a notice of hearing and complaint, dated July 5, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), for failing to renew the registration of its petroleum bulk storage (PBS) facility located at 241 West 108th Street, New York, New York (facility). The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c); (ii) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (iii) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application; and (iv) granting such other and further relief as the Commissioner shall deem just and appropriate.

Inasmuch as respondent is an active domestic corporation in the State of New York, service of the notice of hearing and complaint on respondent was made by personally serving the New York State Department of State on July 5, 2018 (*see* Motion for Default Judgment, Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on July 5, 2018 (*see id.*). Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for August 13, 2018, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on September 13, 2018, an adjudicatory hearing was convened before Chief Administrative Law Judge James T. McClymonds. 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. No one appeared on behalf of respondent.

Chief ALJ McClymonds noted 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. Chief ALJ McClymonds reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On March 19, 2019, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on March 19, 2019 (*see* Affirmation of Service of Deborah Gorman, dated March 19, 2019). On March 25, 2019, the matter was assigned to me.

Applicable Regulatory Provision

Section 613-1.9. Registration.

* * *

“(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 pleadings and papers submitted with and in support of staff’s motion for a default judgment:

1. Respondent 241 West 108 Ltd. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 241 West 108th Street, New York, New York. In particular, PBS tank number 001 at the facility has a capacity of 5,000 gallons and is located aboveground (*see* Motion for Default Judgment, Exhibits D, E, F, and G).
2. Respondent is an active domestic business corporation in the State of New York (*see* Motion for Default Judgment, Exhibit H).
3. On July 17, 1985, Aaron Ziegelman and William K. Langfan transferred all right, title and interest in the facility to 241 West 108 Ltd., the facility’s current owner. This deed is

recorded in the Office of the City Register of the City of New York, in reel 944 Page 1949 (*see* Motion for Default Judgment, Exhibit D).¹

4. Pursuant to a registration application received May 2, 2012, the Department issued PBS Certificate Number 2-213705 to respondent 241 West 108 LTD. on June 12, 2012 with an expiration date of June 30, 2017 (*see* Motion for Default Judgment, Exhibits E, F and G).²
5. On June 29, 2018, a search of the Department's PBS registration database revealed that respondent's registration expired on June 30, 2017 and, as of June 29, 2018, had not been renewed (*see* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated July 5, 2018, ¶¶ 9-12; *see also* Exhibit G).
6. As of March 13, 2019, respondent had not registered the facility (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated March 13, 2019, ¶ 9; *see also* Exhibit G).
7. As shown by Receipt of Service No. 201807230206 issued by the New York State Department of State, respondent was served personally, on July 5, 2018 pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated July 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 PBS facility located at 241 West 108th Street, New York, New York. 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 July 5, 2018 (*see* Motion for Default Judgment, Exhibit C).
8. Respondent failed to file an answer to the complaint, failed to appear at the pre-hearing conference scheduled for August 13, 2018, as directed in the cover letter and notice of hearing served with the complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on September 13, 2018, as directed in the notice of hearing (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., ¶¶ 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 waiver of respondent's right to a

¹ Although the first page of the deed states it is dated July 17, 1965, the notarized acknowledgements and the records of the Office of the City Register demonstrate that the deed was executed July 17, 1985.

² The application refers to the owner as 241 West 108th St LTD (*see* Exhibit E) and the certificate and facility information report refer to the owner as 241 West 108 St LTD (*see* Exhibits F and G). Respondent owners' legal name, however, is 241 West 108 Ltd. (*see* Exhibits D and H).

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 a 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[s]” alleged in the complaint (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3). Staff is required to support its 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 [*Samber*], 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 August 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 September 13, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit J). Based upon the foregoing, the Department is entitled to default judgment in this matter pursuant to the provisions 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (*see* Affirmation of Service of Deborah Gorman, Esq., dated March 19, 2019).

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 renew the registration of its petroleum bulk storage facility located at 241 West 108th Street, New York, New York, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) (*see Samber* at 1).

Staff’s complaint requested a civil penalty in the amount of ten thousand dollars (\$10,000). In its motion for default judgment and proposed order, Department staff seeks to reduce the civil penalty to five thousand dollars (\$5,000). Staff’s submissions on the motion for default judgment elaborate on the requested penalty, discussing the Department’s Civil Penalty Policy, DEE-1, and administrative precedent relating to similar violations (*see* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause ¶ II; *see also* Exhibit B, Gorman

Affirmation, dated March 13, 2019, ¶¶ 13-19). Accordingly, staff's motion to reduce the civil penalty to five thousand dollars (\$5,000) should be granted because respondent is not prejudiced by reducing the penalty requested.

I find that Department staff's request for a civil penalty in the amount of five thousand dollars (\$5,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 241 West 108th Street, New York, New York on or before June 30, 2017, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent 241 West 108 Ltd. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 241 West 108 Ltd. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 241 West 108th Street, New York, New York on or before June 30, 2017, the date the prior registration expired;
3. Directing respondent 241 West 108 Ltd. to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, including correction of the facility owner's corporate name, together with the applicable registration fees;
4. Directing respondent 241 West 108 Ltd. to pay a civil penalty in the amount of five thousand dollars (\$5,000) 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/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
April 17, 2019

Appendix A

Matter of 241 West 108 LTD.
DEC File No. PBS.2.213705.9.2018
Motion for Default Judgment

1. Cover letter, dated March 19, 2019, addressed to Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers.
2. Notice of Motion for Default Judgment dated March 13, 2019.
3. Motion for Default Judgment dated March 13, 2019, attaching Exhibits A and B;
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., dated July 5, 2018;
 - B. Affirmation of Deborah Gorman, Esq., dated March 13, 2019, attaching Exhibits C-H and J;
 - C. Affidavit of Service of Dale Thiel, sworn to March 19, 2019, attaching Department of State Receipt for Service, dated July 5, 2018, reflecting service upon respondent pursuant to section 306 of the Business Corporation Law;
 - D. Printout of search on Automated City Register Information System (ACRIS), dated February 15, 2019, attaching deed dated July 17, 1985;
 - E. Petroleum Bulk Storage (PBS) Application from 241 West 108th Stth LTD, PBS No. 2-213705, received May 2, 2012;
 - F. PBS Certificate, PBS No. 2-213705 issued to 241 West 108th Stth LTD, on June 12, 2012, with an expiration date of June 30, 2017;
 - G. Facility Information Report, PBS No. 2-213705, printed March 15, 2019;
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 241 West 108 LTD., reflecting information through February 14, 2019;
 - J. Draft Order.³
4. Affirmation of Service of Deborah Gorman, Esq., dated March 19, 2019.

³ There is no Exhibit I.