

**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**

-by-

DEC Case No.  
PBS.2-326151.9.2017

**366 SOUTH 5 LLC,**

Respondent.

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This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent 366 SOUTH 5 LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage (PBS) facility at 366 South 5th Street, Brooklyn, New York (facility) within thirty (30) days of the date that it acquired the facility. Respondent acquired the facility on July 16, 2001, and thus was required to register the facility no later than August 15, 2001. Located at the facility is a 4,000-gallon aboveground petroleum bulk storage tank.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Caruso 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 11, 2017, and failed to appear for the adjudicatory hearing scheduled for September 11, 2017 (see Default Summary Report at 3 [Finding of Fact No. 8]). At the September 11, 2017 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Caruso, presiding at the September 11 hearing, reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers.

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. Staff's papers submitted in support of its motion for default judgment provide proof of the facts sufficient to support staff's claim that respondent failed to register its PBS facility located at 366 South 5th Street, Brooklyn, New York, within thirty (30) days of the date

that it acquired the facility, in violation of ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(d)(1).<sup>1</sup>

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 October 2, 2017, ¶ 16). 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 seeks a civil penalty in the amount of ten thousand dollars (\$10,000). 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. Staff's requested civil penalty of ten thousand dollars (\$10,000) is in accordance with general penalty guidelines for violations of PBS registration requirements for certain facilities in New York City where violations continue for more than five years, as is the case here (see e.g. Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2). Respondent was required to register the facility no later than August 15, 2001 but has failed to do so (see Default Summary Report at 3 [Findings of Fact Nos. 5-6]). Based on this record, the requested penalty of ten thousand dollars (\$10,000) 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. In addition, I direct that respondent submit a petroleum bulk storage application for the facility, plus applicable registration fees, to the Department within fifteen (15) days of the service of this order upon respondent.

**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 366 SOUTH 5 LLC waived its right to be heard at the hearing.
- II. Respondent 366 SOUTH 5 LLC is adjudged to have violated (a) ECL 17-1009 and (b) since October 11, 2015, 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 366 South 5th Street, Brooklyn, New York within thirty (30) days of transfer of ownership to it on July 16, 2001.
- III. Within fifteen (15) days of the service of this order upon respondent 366 SOUTH 5 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 366 SOUTH 5 LLC, respondent shall pay a civil penalty in the amount of ten thousand dollars

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<sup>1</sup> As referenced in the Default Summary Report, 6 NYCRR 613-1.9 replaced former 6 NYCRR 612.2 which similarly included the transfer of ownership registration requirement.

(\$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, 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, 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 366 SOUTH 5 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: Albany, New York  
November 13, 2017

To: 366 SOUTH 5 LLC  
Attn: Frontgate Management  
694 Myrtle Avenue, 575  
Brooklyn, New York 11205

(Via Certified Mail)

366 SOUTH 5 LLC  
543 Bedford Avenue, Suite 230  
Brooklyn, New York 11211

(Via Certified Mail)

Deborah Gorman, Esq.  
Remediation Bureau  
Office of General Counsel  
New York State Department of  
Environmental Conservation  
625 Broadway, 14th Floor  
Albany, New York 12233-1500

(Via Intra-Agency Mail)

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),

**DEFAULT SUMMARY  
REPORT**

-by-

DEC Case No.  
PBS.2-326151.9.2017

**366 SOUTH 5 LLC,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 366 SOUTH 5 LLC (respondent) with a notice of hearing and complaint, dated July 10, 2017, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), for failing to register its petroleum bulk storage (PBS) facility located at 366 South 5th Street, Brooklyn, New York (facility) within thirty (30) days of the date (July 16, 2001) that it acquired the facility. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1); (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 limited liability company 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 10, 2017 (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 10, 2017 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for August 11, 2017, 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, an adjudicatory hearing was convened on September 11, 2017 before the undersigned Administrative Law Judge (ALJ) by telephone conference with Department staff at the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21<sup>st</sup> Street, Long Island City, New York and the undersigned in the Department's Central Office at 625

Broadway, Albany, New York. 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.

I 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. I 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). Moreover, I noted Department staff's readiness for hearing, noted the failure of respondent to appear and advised staff that, if staff wished to proceed with the hearing on the matter at a later date, that the hearing would be re-convened on notice to respondent. On October 2, 2017, staff submitted a written motion for a default judgment with supporting papers (see Appendix A, attached hereto [listing documents submitted on motion]).<sup>1</sup> Department staff served the motion and supporting papers on respondent by first class mail on October 2, 2017 (see Affirmation of Service of Deborah Gorman, dated October 2, 2017).

#### Applicable Regulatory Provision

Section 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 transfer.”

#### 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 366 SOUTH 5 LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 366 South 5th Street, Brooklyn, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 4,000 gallons and is located aboveground. See Motion for Default Judgment, Exhibits D, E, F, and G.

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<sup>1</sup> Department staff's notice of motion for default judgment is captioned with an incorrect case number, whereas the motion of default judgment and all other pleadings and papers are captioned with the correct case number. Because this typographical error does not prejudice respondent, the error is disregarded (see CPLR 2001).

<sup>2</sup> Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, “(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.” 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 limited liability company in the State of New York. See Motion for Default Judgment, Exhibit H.
3. Pursuant to a registration application dated October 2, 1997, the Department issued PBS Certificate Number 2-326151 to Liberato's Family Corporation, a previous owner of the facility, on October 10, 1997. That registration, which expired on October 10, 2002, was non-transferable. See Motion for Default Judgment, Exhibits E and F.
4. On July 16, 2001, Lipa Rubin, by deed, transferred all right, title and interest in the facility to respondent 366 South 5 LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 5368 Page 1448. See Motion for Default Judgment, Exhibit D.
5. Deborah Gorman is an attorney in the Department's Office of General Counsel, and is familiar with the Department's procedures regarding issuance of PBS facility registration certificates. Ms. Gorman reviewed the results of a July 6, 2017 search of the Department's PBS registration database, which revealed, among other things, that (i) the capacity of the tank at respondent's facility exceeded 1,100 gallons; and (ii) as of the date of the database search, the PBS registration for PBS facility No. 2-326151 did not reflect the current owner. See Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated July 10, 2017, ¶¶ 9-12; see also Exhibit G.
6. As of October 2, 2017, respondent had not registered the facility. See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated October 2, 2017, ¶¶ 8-11; see also Exhibit G.
7. As shown by Receipt for Service No. 201707200125 issued by the New York State Department of State, respondent was served personally, on July 10, 2017, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated July 10, 2017, 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 PBS facility located at 366 South 5th Street, Brooklyn, New York within thirty (30) days of the date that it acquired the facility. 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 July 10, 2017. See Motion for Default Judgment, Exhibit C.
8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for August 11, 2017, 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 11, 2017, as directed in the notice of hearing. See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated October 2, 2017, ¶¶ 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 unless extended by staff or ruling of the ALJ (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]).

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 11, 2017, as directed in the cover letter served with the notice of hearing and complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on September 11, 2017, as directed in the notice of hearing. In addition, Department staff has submitted a proposed order (see Motion for Default Judgment, Exhibit I). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 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, dated October 2, 2017, ¶ 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 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 register its PBS facility located at 366 South 5th Street, Brooklyn, New York within thirty (30) days of the date that it acquired the facility, in violation of ECL 17-1009. Respondent was in violation of 6 NYCRR 613-1.9(d)(1) from the effective date of the current part 613, October 11, 2015.

Department staff seeks a civil penalty in the amount of ten thousand dollars (\$10,000), and staff's submissions on the motion for a 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 October 2, 2017, ¶¶ 15-20).

I find that staff's request for a civil penalty in the amount of ten thousand dollars (\$10,000) is 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 register its PBS facility located at 366 South 5th Street, Brooklyn, New York within thirty (30) days of the date that it acquired the facility, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

#### Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent 366 SOUTH 5 LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 366 SOUTH 5 LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 366 South 5th Street, Brooklyn, New York within thirty (30) days of transfer of ownership of the facility to respondent;
3. Directing respondent 366 SOUTH 5 LLC 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 the applicable registration fees;
4. Directing respondent 366 SOUTH 5 LLC 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/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: Albany, New York  
November 1, 2017

## APPENDIX A

*Matter of 366 SOUTH 5 LLC*  
DEC File No. PBS.2-326151.9.2017  
Motion for Default Judgment

1. Cover letter, dated October 2, 2017, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers
2. Notice of Motion for Default Judgment dated October 2, 2017
3. Motion for Default Judgment, dated October 2, 2017, attaching Exhibits A and B:
  - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated July 10, 2017
  - B. Affirmation of Deborah Gorman, Esq., dated October 2, 2017, attaching Exhibits C - I:
  - C. Affidavit of Service of Dale Thiel, sworn to October 2, 2017, attaching Department of State Receipt for Service, dated July 10, 2017, reflecting service upon respondent pursuant to section 303 of the Limited Liability Company Law
  - D. Printout of search on Automated City Register Information System (ACRIS), dated October 2, 2017, attaching deed dated July 16, 2001
  - E. Petroleum Bulk Storage (PBS) Application from Liberato's Family Corp, PBS No. 2-326151, dated October 2, 1997
  - F. PBS Certificate, PBS No. 2-326151, issued to Liberato's Family Corporation on October 10, 1997, expired October 10, 2002
  - G. Facility Information Report, PBS No. 2-326151, printed October 2, 2017
  - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 366 SOUTH 5 LLC, reflecting information through September 29, 2017
  - I. Draft Order
4. Affirmation of Service of Deborah Gorman, dated October 2, 2017