

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL") of the State of New York and Part 612 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC Case Number:
2-316520JB2

-by-

540 JACKSON REALTY CORP.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation ("Department") that 540 Jackson Realty Corp. ("respondent") violated ECL 17-1009 and 6 NYCRR 612.2 by failing to renew the registration for the petroleum bulk storage ("PBS") facility located at 540 Jackson Avenue, Bronx, New York. Located at the facility is a 4,000-gallon petroleum bulk storage tank. Department served respondent with a cover letter, notice of hearing and complaint, all of which are dated June 9, 2015. Subsequently, Department staff served respondent with a notice of motion for default judgment and a motion, both dated February 26, 2016.

Administrative Law Judge ("ALJ") Richard A. Sherman of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Sherman 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 540 Jackson Realty Corp. failed to file an answer to the complaint served by Department staff in this matter and failed to appear at either the pre-hearing conference or the adjudicatory hearing scheduled for this matter (see Default Summary Report at 3 [Finding of Fact No. 8]).

As a consequence of respondent 540 Jackson Realty Corp.'s failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for default be granted (see Default Summary Report at 5), and 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 renew the registration of its petroleum bulk storage facility located at 540 Jackson Avenue, Bronx, New York in violation of ECL 17-1009 and 6 NYCRR 612.2(a)(2).

Respondent's facility registration expired on July 10, 2007 and has not been renewed. ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation, including violations of the petroleum bulk storage registration requirements.

In proceedings concerning violations of the petroleum bulk storage tank registration requirements for heating oil tanks in New York City apartment buildings, Department staff's penalty requests take into account the duration of the violations (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). For those facilities that have not registered or renewed their registrations within the past two years, Department staff has generally requested a penalty of five thousand dollars (\$5,000). For registration violations that extend from two to five years, Department staff has generally requested a penalty of seven thousand five hundred dollars (\$7,500). For those facilities where registrations are more than five years overdue, Department staff has generally requested a penalty of ten thousand dollars (\$10,000). To the extent that mitigating or aggravating factors exist, however, such factors are considered for purposes of the penalty request (see id.). Commissioner orders have utilized this penalty matrix to address violations of registration requirements in these circumstances.

Respondent 540 Jackson Realty Corp. has been in violation of 6 NYCRR 612.2(a)(2) for nearly eight years prior to the service of the notice of hearing and complaint. Department staff's requested penalty of ten thousand dollars (\$10,000) is in accordance with general penalty guidelines for violations of greater than five years, as is the case here, and 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.¹

Staff's request that I order respondent to "permanently cease and desist from any and all future violations of the ECL and the Rules and Regulations promulgated pursuant thereto" is unnecessary (see Exhibit E [Staff Proposed Order], ¶ III; see also Motion for Default Judgment, at Wherefore Clause ¶ IV). Respondent is required to comply with the ECL and the applicable regulations, and further language to that effect is not needed (see Matter of Adonai Realty L.P., Order of the Acting Commissioner, February 19, 2016, at 2).

¹ Although Department staff, in its complaint, requested that the civil penalty, applicable registration fees and petroleum bulk storage application be submitted within fifteen (15) days of the service of the order upon respondent, Department staff's proposed order called for submission within thirty (30) days. The ALJ has recommended fifteen (15) days, which comports with the time period established in prior orders addressing these types of violations, and which I am directing here.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Department staff's motion for a default judgment against respondent 540 Jackson Realty Corp. pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent 540 Jackson Realty Corp. waived its right to be heard.
- II. Moreover, based upon proof of the facts submitted, respondent 540 Jackson Realty Corp. is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(a)(2) by failing to renew the registration of its petroleum bulk storage facility located at 540 Jackson Avenue, Bronx, New York.
- III. Within fifteen (15) days of the service of this order upon respondent 540 Jackson Realty Corp., 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 540 Jackson Realty Corp., 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, 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 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 540 Jackson Realty Corp., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Basil Seggos
Acting Commissioner

Dated: Albany, New York
May18, 2016

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Part 612 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**DEFAULT
SUMMARY REPORT**

DEC Case Number:
2-316520JB2

-by-

540 JACKSON REALTY CORP.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent 540 Jackson Realty Corp. (respondent) with a cover letter, notice of hearing and complaint, all of which are dated June 9, 2015. The complaint alleges that respondent violated ECL 17-1009 and 6 NYCRR 612.2 by respondent's failure to timely renew the registration for a petroleum bulk storage (PBS) facility (facility) located at 540 Jackson Avenue, Bronx, New York. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2; (2) assessing a civil penalty in the amount of \$10,000; (3) directing respondent to register the facility within 15 days of service of the order; and (4) granting such other relief as the Commissioner may deem appropriate.

In accordance with 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint was made on June 9, 2015, by personally delivering duplicate copies of the cover letter, notice of hearing and complaint to an authorized representative of the Secretary of State at the office of the Department of State in Albany. Staff also served the cover letter, notice of hearing and complaint on or about June 9, 2015 by mailing copies to respondent at respondent's last known address.

Respondent failed to file an answer to the complaint. Respondent also failed to appear at a pre-hearing conference scheduled for July 7, 2015, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing scheduled for August 6, 2015, as directed in the notice of hearing.

This default summary report addresses Department staff's motion for default judgment (motion) against respondent. The motion, dated February 26, 2016, was assigned to me on March 8, 2016. A list of the exhibits staff submitted with its motion is attached to this report.

For the reasons set forth below, I recommend that Department staff's motion for default judgment be granted.

Applicable Regulatory Provisions

At the time of the violations alleged in the complaint, 6 NYCRR 612.2(a)¹ provided that, for existing facilities:

"(1) Within one year of the effective date of these regulations, the owner of any petroleum storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.

"(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."

Findings of Fact

1. Respondent 540 Jackson Realty Corp. is an active New York State domestic business corporation (motion, exhibits B ¶ 11, H).
2. Respondent is the owner of a PBS facility located at 540 Jackson Avenue, Bronx, New York (motion, exhibits B ¶¶ 7-10, D, F, G).
3. On September 3, 2003, the Department issued a PBS registration certificate (certificate), PBS number 2-316520, for respondent's facility (motion, exhibits B ¶ 9, F [copy of the facility's PBS certificate]).
4. The certificate contains information provided by respondent and must be signed by the facility owner (or an authorized representative) and posted at the facility (motion, exhibits B ¶ 9, F [box at bottom right]; see also 6 NYCRR 612.2[e]). The PBS certificate states that the facility includes a 4000 gallon capacity PBS tank that is located aboveground (motion, exhibit F).
5. The certificate states that its expiration date is July 10, 2007 (motion, exhibits B ¶ 9, F).
6. The registration certificate for the facility, PBS number 2-316520, expired on July 10, 2007, and the Department has not received a renewal application for the facility (motion, exhibits A, affirmation of Deborah Gorman (undated) ¶¶ 8-12 [affirming that Ms. Gorman is "authorized to access, examine, and search" the Department's database for PBS facilities and that her examination of the database search results of May 28, 2015 confirmed that the PBS registration for the facility expired on July 10, 2007 and had not

¹ 6 NYCRR part 612 was repealed effective Oct. 11, 2015. The registration requirements for PBS facilities are now found at 6 NYCRR 613-1.9. Because the violations alleged in this matter occurred prior to its repeal, former 6 NYCRR part 612 applies here.

been renewed²]; B ¶ 9; G [PBS facility information report, printed on Dec. 30, 2015, indicating that the facility is "Active" and its "Reg[istration] Expires: 07/10/2007").

7. Department staff served the notice of hearing and complaint upon respondent on June 9, 2015 by personally delivering duplicate copies of the cover letter, notice of hearing and complaint to an authorized representative of the Secretary of State at the office of the Department of State in Albany (see motion, exhibit C). Staff also mailed a copy of the cover letter, notice of hearing and complaint to respondent by first class mail on or about June 9, 2015 (*id.*).
8. Respondent failed to file an answer within 20 days of respondent's receipt of the notice of hearing and complaint (motion, exhibit B ¶ 4), failed to appear at a pre-hearing conference scheduled for July 7, 2015, as directed in the cover letter served with the notice of hearing and complaint (*id.* ¶ 5), and failed to appear for the adjudicatory hearing scheduled for August 6, 2015, as directed in the notice of hearing (*id.* ¶ 6).

Discussion and Conclusions

Department staff moves for a default judgment against respondent. For the reasons set forth below, I conclude that staff's motion should be granted.

Department staff properly served the notice of hearing and complaint upon respondent. Staff served respondent by personally delivering duplicate copies of the cover letter, notice of hearing and complaint to an authorized representative of the Secretary of State at the office of the Department of State in Albany (findings of fact ¶ 7). This method of service of process is authorized under 6 NYCRR 622.3(a)(3) (see *id.* [authorizing service of process in accordance with the CPLR]; CPLR 311[a][1] [authorizing service of process on a corporation "pursuant to section three hundred six . . . of the business corporation law" (BCL)]; BCL § 306[b][1] [authorizing "[s]ervice of process on the secretary of state as agent of a domestic or authorized foreign corporation . . . by personally delivering to and leaving with the secretary of state or . . . any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process"]). Service of process on respondent was complete upon staff's service of the notice of hearing and complaint on the secretary of state (BCL § 306 [b][1] [stating that service of process on a corporation "shall be complete when the secretary of state is so served"]).

The record shows that respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for July 7, 2015, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing scheduled for August 6, 2015, as directed in the notice of hearing (see findings of fact ¶ 8).

² The Gorman affirmation states that the Department issued a PBS certificate to respondent's facility "on 1/29/2013" (motion, exhibit A ¶ 11). That date, however, is the date Department staff printed the certificate (*id.* exhibit F [bottom left corner]). The expiration date is correctly shown on the certificate as "07/10/2007" (*id.*).

Department staff served the motion, together with supporting papers, on respondent by first class mail (see letter from Deborah Gorman to Chief ALJ McClymonds, dated Feb. 26, 2016 [indicating that service of the motion on respondent was made by first class mail and by service on the Secretary of State]). This method of service of motion papers satisfies the requirements of 6 NYCRR 622.6(a)(1) and (c)(1).³ Staff included a proposed order with its motion papers (motion, exhibit E).

In light of the foregoing, Department staff has satisfied each of the requirements governing default procedures set forth at 6 NYCRR 622.15(b).

In addition to the requirements of 6 NYCRR 622.15(b), the Commissioner has directed that "Department staff provide proof of the facts sufficient to support the claim [with] all default judgment motions" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, Dec. 12, 2013, at 3). Further, where violations of PBS regulations are involved, the Commissioner has directed that staff include with its filings "a copy of the facility's PBS registration (if one has been issued); the PBS facility information report, if any; and any notice of violation that is a basis for Department staff's allegations" (Matter of Farmer, Order of the Commissioner, Oct. 22, 2009, at 3).

Here, Department staff has satisfied the Commissioner's directives noted above. Department staff presented the facility's registration certificate (findings of fact ¶ 3). The certificate states that the facility includes a 4000 gallon capacity PBS storage tank (findings of fact ¶ 4). The documentation submitted by staff further demonstrates that the Department issued a PBS certificate, PBS number 2-316520, for respondent's facility on September 3, 2003, and that the certificate expired on July 10, 2007 (findings of fact ¶¶ 3, 5). Lastly, staff proffered proof that the PBS registration for the facility has not been renewed (findings of fact ¶ 6). Accordingly, I conclude that staff's motion should be granted and respondent 540 Jackson Realty Corp. should be held liable for violating ECL 17-1009 and 6 NYCRR 612.2(a)(2).

By its motion and the complaint, Department staff requests a \$10,000 penalty. Staff argues that a penalty in this amount is consistent with the Department's civil penalty policy and DEC precedent. Among other things, staff asserts that PBS facility registration is a cornerstone of the PBS regulatory program and allows the Department to ascertain if a facility is complying with the PBS regulations (motion, exhibit B ¶ 14). Staff also cites Matter of 12 Martense Associates LLC (Order of the Commissioner, Dec. 19, 2011) as precedent for imposing a \$10,000 penalty here (id. ¶ 17). Although the Commissioner imposed only a \$5,000 penalty in 12 Martense, the Commissioner stated that a larger penalty may be appropriate where the failure to register extends over a period of more than five years (12 Martense at 2). Moreover, as noted by staff, the maximum statutory penalty available here is \$37,500 per day, per violation (motion, exhibit B ¶ 18 [citing ECL § 71-1929]). Given that the instant violation has extended over nearly eight years (i.e., from the expiration of the certificate [July 10, 2007] through the date of the complaint [June 9, 2015]), the maximum statutorily authorized penalty would be in the many tens of millions of dollars.

³ Pursuant to these regulatory provisions, all written motions and requests must be served on all parties in accordance with CPLR 2103. The method of service employed by Department staff here is consistent with CPLR 2103(c) which authorizes service of motion papers on a party by first class mail.

I conclude that the penalty requested by Department staff is both authorized and appropriate.

Recommendations

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

1. Granting Department staff's motion for a default judgment against respondent 540 Jackson Realty Corp.;
2. Holding respondent 540 Jackson Realty Corp. liable for violating ECL 17-1009 and 6 NYCRR 612.2(a)(2) by failing to renew the registration of its PBS facility located at 540 Jackson Avenue, Bronx, New York;
3. Directing respondent 540 Jackson Realty Corp. to pay a civil penalty in the amount of \$10,000 within 15 days of service of the Commissioner's order; and
4. Directing respondent 540 Jackson Realty Corp. to submit a complete PBS registration application and the required registration fee to the Department within 15 days of service of the Commissioner's order.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
March 22, 2016

Matter of 540 Jackson Realty Corp.

DEC Case Number: 2-316520JB2

Exhibits to Staff Motion for Default Judgment dated February 26, 2016

Exhibit	Description
A	Cover letter, Notice of Hearing, Complaint, Statement of Readiness (all dated June 9, 2015), and Affirmation of Deborah Gorman, Esq. (undated)
B	Affirmation of Deborah Gorman, Esq. (dated Feb. 26, 2016)
C	Affidavit of Service of Kara Paulsen (sworn on Jan. 4, 2016) with supporting NYS Department of State Receipt for Service
D	NYC Automated City Register Information System (ACRIS) parcel search printout (dated Feb. 16, 2016) and deed into respondent (dated Oct. 19, 1983)
E	Proposed Order
F	PBS Certificate, PBS number 2-316520 (issued Sept. 3, 2003)
G	PBS Facility Information Report, PBS number 2-316520 (printed Dec. 30, 2015)
H	NYS Department of State, Division of Corporations, Entity Information printout (current through Feb. 12, 2016) for respondent