

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.  
2-605319NVS

-by-

**555 EAST 169 HOLDINGS LLC,**

Respondent.

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This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (“Department”) that 555 East 169 Holdings LLC (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister the petroleum bulk storage facility located at 553-555 East 169th Street, Bronx, New York, within thirty (30) days of the transfer of ownership of the facility to it. Located at the facility is a 2,500-gallon aboveground petroleum bulk storage tank.

Administrative Law Judge (“ALJ”) D. Scott Bassinson of the Department’s Office of Hearings and Mediation Services was assigned to this matter. ALJ Bassinson 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 November 4, 2015, and failed to appear for the adjudicatory hearing scheduled in the matter on December 8, 2015 (see Default Summary Report at 3 [Finding of Fact No. 7]). At the December 8, 2015 adjudicatory hearing, Department staff made an oral motion for a default judgment and submitted a 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 reregister the petroleum bulk storage facility located at 553-555 East 169<sup>th</sup> Street, Bronx, New York, within 30 days after it became owner of the facility, in violation of ECL 17-1009 and 6 NYCRR 612.2(b).

Department staff initially sought a civil penalty in the amount of ten thousand dollars (\$10,000) (see Motion for Default Judgment, Exhibit A [Complaint, Wherefore Clause, at II]). In its motion papers, however, staff seeks a civil penalty of seven thousand five hundred dollars (\$7,500) (see Default Summary Report at 4-5). ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation, and the requested penalty is substantially below this statutory amount.

Staff's requested penalty of seven thousand five hundred dollars (\$7,500) is in accordance with general penalty guidelines for petroleum bulk storage registration violations of greater than two years but less 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). Here, respondent's application to reregister the facility was due within thirty (30) days of August 2, 2013, when respondent became owner of the facility, and respondent has failed to reregister the facility since that time (see Default Summary Report at 3 [Finding of Fact No. 5]). Based on this record, the requested penalty of seven thousand five hundred dollars (\$7,500) 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.<sup>1</sup>

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 thereto" is unnecessary (see Exhibit I [Staff Proposed Order], at ¶ 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 RH 1218 Corp., Order of the Commissioner, January 28, 2016, at 2).

**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 555 East 169 Holdings LLC waived its right to be heard at the hearing.
- II. Moreover, based upon proof of the facts submitted, respondent 555 East 169 Holdings LLC is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) for failing to reregister its petroleum storage facility located at 553-555 East 169th Street, Bronx, New York within 30 days of becoming owner of the facility.

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<sup>1</sup> 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.

- III. Within fifteen (15) days of the service of this order upon respondent 555 East 169 Holdings 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 555 East 169 Holdings LLC, 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, 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 555 East 169 Holdings 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  
Acting Commissioner

Dated: Albany, New York  
February 9, 2016

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**

DEC Case No.  
2-605319NVS

-by-

**555 EAST 169 HOLDINGS LLC,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent 555 East 169 Holdings LLC (“respondent”) with a notice of hearing and complaint, dated September 28, 2015, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 612.2(b), for failing to reregister its petroleum bulk storage facility located at 553-555 East 169<sup>th</sup> Street, Bronx, New York within 30 days after it became owner of the facility. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL § 17-1009 and 6 NYCRR § 612.2(b); (ii) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (iii) directing respondent to reregister 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 may 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 serving the New York State Department of State on September 28, 2015. See Motion for Default Judgment, Exhibit (“Ex.”) C. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on September 28, 2015. See id. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for November 4, 2015, as directed in the cover letter served with the notice of hearing and complaint. See Motion for Default Judgment, Ex. B, at ¶¶ 4-5.

As stated in the notice of hearing, an adjudicatory hearing was convened on December 8, 2015 before the undersigned, at the Department’s Region 2 offices, 1 Hunter’s Point Plaza, 47-40 21<sup>st</sup> Street, Long Island City, 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.

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 submitted a motion for a default judgment with supporting papers. See Appendix A, attached hereto (listing documents submitted on motion). I reserved on the oral motion for a default judgment pending my review of the papers submitted in support of the motion.

#### Applicable Regulatory Provision

Section 612.2. Registration of Facilities. <sup>1</sup>

“(a) *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.

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“(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.”

#### 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 555 East 169 Holdings LLC (“respondent”) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 553-555 East 169<sup>th</sup> Street, Bronx, NY (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 2,500 gallons and is located above ground. See Motion for Default Judgment, Exs. D, E, F, and G.
2. Respondent is an active domestic limited liability company in the State of New York. See Motion for Default Judgment, Ex. H.
3. On December 21, 2005, the Department issued Petroleum Bulk Storage (“PBS”) Registration Certificate No. 2-605319 to Dora Khaykin, owner of the facility at that time. This registration expired on February 28, 2011. At the bottom of the Certificate, in bold

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<sup>1</sup> Part 612 was repealed, effective subsequent to the commencement of this proceeding, and replaced by a revised Part 613. The registration requirements applicable upon transfer of ownership of the real property on which a PBS facility is located have been expanded, and are now found at 6 NYCRR § 613-1.9(d)(1)-(5). For purposes of the violations alleged in this matter, the prior Part 612 applies.

capital letters, is the following: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” See Motion for Default Judgment, Ex. F.

4. On August 2, 2013, Richard Tolchin, Esq., as referee in an action entitled VNB New York Corp. v. 553 E. 169<sup>th</sup> LLC, Dora Khaykin, and the City of New York Environmental Control Board, Index No. 382054/10 (Sup. Ct., Bronx County), conveyed all right, title and interest in the facility to respondent 555 East 169 Holdings LLC. See Motion for Default Judgment, Ex. 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 petroleum bulk storage facility registration certificates. On September 25, 2015, Ms. Gorman searched the Department’s petroleum bulk storage registration database, which revealed, among other things, that (i) the combined capacity of the tanks at respondent’s facility exceeded 1,100 gallons; (ii) on December 21, 2005, the Department issued a PBS certificate for respondent’s facility, bearing the number 2-605319; and (iii) as of the date of Ms. Gorman’s database search, the PBS registration for PBS facility No. 2-605319 did not reflect the current owner of the facility, and did not reflect that tanks at the facility had been removed or closed in accordance with applicable regulations. See Motion for Default Judgment, Ex. A, Undated Affirmation of Deborah Gorman, Esq., at ¶¶ 2-12.
6. As shown by Receipt for Service No. 201510050345 issued by the New York State Department of State, on September 28, 2015, Department staff served respondent pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated September 28, 2015, alleging a violation of ECL § 17-1009 and its implementing regulation, 6 NYCRR § 612.2(b), together with a cover letter, statement of readiness and supporting affirmation, for failure to reregister its petroleum bulk storage facility located at 553-555 East 169<sup>th</sup> Street, Bronx, New York within 30 days after becoming owner of 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 September 28, 2015. See Motion for Default Judgment, Ex. C.
7. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for November 4, 2015, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on December 8, 2015, as directed in the notice of hearing. See Motion for Default Judgment, Ex. B, Affirmation of Deborah Gorman, Esq. dated December 7, 2015, at ¶¶ 4-5; see also 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 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 November 4, 2015, 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 December 8, 2015, as directed in the notice of hearing. In addition, Department staff has submitted a proposed order. See Motion for Default Judgment, Ex. 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 December 8, 2015 letter from D. Gorman, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent.

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 reregister the petroleum bulk storage facility located at 553-555 East 169<sup>th</sup> Street, Bronx, New York, within 30 days after it became owner of the facility, in violation of ECL § 17-1009 and 6 NYCRR § 612.2(b).

Although the complaint seeks a civil penalty in the amount of ten thousand dollars (\$10,000), see Motion for Default Judgment, Ex. A, Complaint, at Wherefore Clause ¶ II, Department staff’s motion papers reflect that staff seeks a civil penalty in the amount of seven thousand five hundred dollars (\$7,500). See Motion for Default Judgment, at Wherefore Clause ¶ II; see also Motion for Default Judgment, Ex. B, Gorman Affirmation, at ¶¶ 12-17; id. Ex. I, Proposed Order, at Ordering Clause ¶ I. I find that proposed reduction of the penalty requested in this matter does not raise the same due process concerns as would a request to increase the penalty in a default situation. See Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 2-3; see also CPLR 3215(b) (default judgment “shall not exceed in amount ... that demanded in the complaint”), and the requested reduction does not

otherwise prejudice respondent. In any event, Department served the default motion papers on respondent, and therefore respondent is on notice of staff's request to reduce the civil penalty.<sup>2</sup>

Department staff's request for a seven thousand five hundred dollars (\$7,500) civil penalty 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 (for registration violations that extend from two to five years, staff has generally requested a penalty of \$7,500).

### Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent 555 East 169 Holdings LLC in default pursuant to the provisions of 6 NYCRR § 622.15;
2. Holding that respondent 555 East 169 Holdings LLC violated ECL § 17-1009 and 6 NYCRR § 612.2(b) by failing to reregister its petroleum bulk storage facility located at 553-555 East 169<sup>th</sup> Street, Bronx, New York within 30 days after becoming owner of the facility;
3. Directing respondent 555 East 169 Holdings 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 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/\_\_\_\_\_  
D. Scott Bassinson  
Administrative Law Judge

Dated: Albany, New York  
December 21, 2015

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<sup>2</sup> In its motion for a default judgment, Department staff has also requested that the Commissioner's order "direct[] Respondents [sic] to permanently cease and desist from any and all future violations of the ECL and the Rules and Regulations promulgated pursuant thereto." Motion for Default Judgment, at Wherefore Clause ¶ IV; see also id. Ex. I, Proposed Order, at Ordering Clause ¶ III. This request is unnecessary. Respondent is already required to comply with the ECL and relevant regulations. I therefore recommend that the Commissioner hold that staff's request in this regard is unnecessary.

## APPENDIX A

*Matter of 555 East 169 Holdings LLC*  
DEC File No. R2-605319NVS  
Motion for Default Judgment

1. Cover letter, dated December 8, 2015, addressed to Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services, noting that respondent was served with copies through the NYS Secretary of State and by first class mail
2. Notice of Motion for Default Judgment dated December 7, 2015
3. Motion for Default Judgment, attaching the following exhibits:
  - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, all dated September 28, 2015, and an undated Affirmation of Deborah Gorman, Esq.
  - B. Affirmation of Deborah Gorman, Esq., dated December 7, 2015
  - C. Affidavit of Service of Lisa Kranick dated December 3, 2015, attaching Department of State Receipt for Service dated September 28, 2015 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 December 4, 2015, attaching deed dated August 2, 2013.
  - E. Petroleum Bulk Storage ("PBS") Application, PBS No. 2-605319, dated December 1, 2005
  - F. PBS Certificate, PBS No. 2-605319, issued December 21, 2005, expired February 28, 2011
  - G. Facility Information Report, PBS No. 2-605319, printed November 20, 2015
  - H. NYS Department of State Entity Information Sheet regarding 555 East 169 Holdings LLC, reflecting information through December 3, 2015
  - I. Draft Order