

**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 Part 612 of Title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR") of the State of New York,

ORDER

DEC Case No.
2-329223

- by -

609 WEST 151ST STREET, LLC,

Respondent.

Pursuant to 6 NYCRR 622.3, staff of the New York State Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against respondent 609 West 151st Street, LLC, by service on May 7, 2004 of a notice of hearing and complaint dated May 4, 2004.

The complaint alleged that:

1. respondent is the owner of a petroleum bulk storage ("PBS") facility ("facility") located at 609 West 151st Street, New York, New York; and
2. respondent failed to renew the registration for its facility in a timely manner as required by ECL 17-1009 and 6 NYCRR 612.2.

Pursuant to 6 NYCRR 622.4(a), respondent's time for serving an answer to the complaint expired on June 1, 2004 and such time has not been extended. Respondent failed to answer or move with respect to the complaint or otherwise appear in this proceeding.

Department staff filed a motion for a default judgment with the Department's Office of Hearings and Mediation Services by notice of motion dated July 8, 2004. Department staff provided clarification with a cover letter dated October 14, 2004. The matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell, who prepared the attached summary report. The ALJ's summary report is adopted as my decision in this matter, subject to the comments herein.

ECL 71-1929 provides that any person who violates any provision or fails to perform any duty imposed by titles 1 through 11 and title 19 of ECL article 17 or any rule, regulation, order or determination of the commissioner promulgated thereto shall be liable for a civil penalty not to exceed thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. The penalty sought by Department staff is justified and warranted by the circumstances of this case.

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 is granted.

II. Pursuant to 6 NYCRR 622.15, respondent is adjudged to be in default and to have waived its right to a hearing in this matter. Accordingly, respondent is deemed to have admitted the factual allegations in the complaint.

III. Respondent is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2 by failing to timely renew its PBS registration from October 23, 2002 to November 21, 2003.

IV. Respondent is assessed a civil penalty in the amount of seven thousand five hundred dollars (\$7,500.00), which is due and payable no later than 30 days after service of this order. Such payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the Department at the following address: New York State Department of Environmental Conservation, Legal Affairs, 14th floor, Attn: Benjamin A. Conlon, Esq., 625 Broadway, Albany, New York 12233-5500.

V. All communications from respondent to the Department concerning this order shall be made to Associate Attorney Benjamin A. Conlon, Esq., New York State Department of Environmental Conservation, 625 Broadway, 14th floor, Albany, New York 12233-5500.

VI. The provisions, terms and conditions of this order shall bind respondent and its successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: Denise M. Sheehan
Acting Commissioner

Dated: Albany, New York
April 11, 2005

To: 609 West 151st Street, LLC (via certified mail)
One West Red Oak Lane
White Plains, New York 10604

Benjamin A. Conlon, Esq. (via regular mail)
Associate Attorney
NYS Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, N.Y. 12233-5500

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

Summary Report

DEC Case No. 2-329223

609 West 151st Street, LLC,
Respondent.

Proceedings

Staff of the Department of Environmental Conservation (Department staff) commenced this administrative enforcement action with service of a notice of hearing and complaint dated May 4, 2004 by certified mail return receipt requested upon 609 West 151st Street, LLC (respondent). The complaint alleges that respondent violated ECL 17-1009 and 6 NYCRR 612.2 by not registering its petroleum bulk storage (PBS) facility located at 609 West 151st Street, (New York County) in a timely manner. In the May 4, 2004 complaint, Department staff requested an Order from the Commissioner that assesses a total civil penalty of \$7,500, and such other relief that the Commissioner deems just and appropriate.

The hearing notice states that, pursuant to 6 NYCRR 622.4, respondent was required, within 20 days of receiving the notice and complaint, to serve upon Department staff an answer signed by respondent, its attorney, or other authorized representative. The notice also advises respondent that, pursuant to 6 NYCRR 622.8, a pre-hearing conference was to have been held at 4:30 p.m. on May 20, 2004, at the Department's offices in Long Island City, in order for respondent and Department staff to resolve, clarify and define the issues between them. Finally, the notice informs respondent that its failure to make timely service of an answer, or to attend the scheduled pre-hearing conference, would result in a default and waiver of respondent's right to a hearing.

With a notice of motion dated July 8, 2004, Department staff filed a motion for default judgment pursuant to 6 NYCRR 622.15. Consistent with the May 4, 2004 complaint, the motion requests an order from the Commissioner finding the default, imposing a \$7,500 civil penalty, requiring respondent to register its PBS facility, and directing respondent not to violate the applicable law and regulations.

After the Office of Hearings and Mediation Services received a copy of the default motion, this matter was assigned to me. By letter dated September 28, 2004, I requested additional information from Department staff upon review of the motion papers.

The September 28, 2004 letter notes that although Department staff's proposed order would require respondent to submit an application to register the PBS facility, the May 4, 2004 cover letter for the hearing notice states that, according to the Department's records, respondent registered its PBS facility. This suggests that respondent had complied with the registration requirement and, therefore, would not need to re-register the PBS facility at this time.

The September 28, 2004 letter also notes that the affirmation by Department staff's attorney justifies the proposed civil penalty, in part, on the "duration" of the violation of the registration requirement. However, the motion papers are silent about the duration of the violation. Therefore, I requested information about when the prior registration expired and when respondent filed a renewal registration to determine the duration of the violation.

With a cover letter dated October 14, 2004 and an affidavit sworn to October 14, 2004, Department staff responded to my request for clarification. According to Department staff's October 14, 2004 affidavit, the facility's PBS registration expired on October 23, 2002, and that the facility remained unregistered until November 21, 2003. Therefore, the violation continued for 13 months.

I mailed a copy of the September 28, 2004 letter to respondent. Respondent, however, did not reply to it.

Findings of Fact

1. On May 7, 2004, Department staff served a copy of the notice of hearing and complaint in this matter upon 609 West 151st Street, LLC, by certified mail return receipt requested. Staff sent the notice of hearing and complaint to 609 West 151st Street, LLC, One West Red Oak Lane, White Plains, New York 10604.

2. The signed domestic return receipt shows that respondent received the May 4, 2004 notice of hearing and complaint on May 10, 2004.
3. With respect to the notice of hearing and complaint dated May 4, 2004, the time for respondent to serve an answer to the complaint expired on June 1, 2004.¹ To date, respondent has not filed an answer.

Discussion

A respondent's failure either to file a timely answer to the complaint, or if an answer has been filed, to appear at the pre-hearing conference constitutes a default and a waiver of respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under these circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), Department staff's motion must contain:

- (1) Proof of service upon respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
- (2) Proof of respondent's failure to appear at a pre-hearing conference, or to file a timely answer; and
- (3) A proposed order.

The affidavit of mail service dated June 9, 2004 demonstrates service of the May 4, 2004 notice of hearing and complaint upon respondent in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3). The signed domestic return receipt establishes that respondent received the notice of hearing and complaint on May 10, 2004. In addition, the affirmation by counsel for Department staff demonstrates that respondent neither answered the complaint, nor appeared at the pre-hearing conference on May 20, 2004.

The pre-hearing conference, however, was scheduled on May 20, 2004, which was prior to the return date for respondent's

¹ Twenty calendar days (see 6 NYCRR 622.4[a]) from May 10, 2004 was Sunday, May 30, and May 31, 2004 was Memorial Day, a legal State holiday. Therefore, the answer was due by the next business day, which was June 1, 2004.

answer (June 1, 2004). The Commissioner has determined that a respondent's failure to appear at a pre-hearing conference cannot serve as the basis for a default judgment where, as here, the pre-hearing conference was scheduled before the return date for the answer (see *Matter of Underwood*, Order of the Commissioner, January 27, 2004, at 2; *Matter of Kuldeep Singh*, Decision and Order of the Commissioner, December 17, 2003, at 8). Therefore, the conclusion that respondent has defaulted and waived its right to a hearing pursuant to 6 NYCRR 622.15(a) is based exclusively on the finding that respondent has not answered the May 4, 2004 complaint.

Department staff has provided a proposed Order with its motion papers. ECL 71-1929 authorizes civil penalties of up to \$37,500 per day for violations of ECL article 17, title 10 and the implementing regulations at 6 NYCRR parts 612, 613 and 614. The proposed Order would assess a total civil penalty of \$7,500.

According to Department staff's October 14, 2004 affidavit, respondent's facility was not registered from October 23, 2002 to November 21, 2003, a period of 13 months. In addition, the Department issued three notices to respondent about its facility's non-compliance.

The requested civil penalty of \$7,500 is substantially less than the statutory maximum authorized in ECL 71-1929. It is justified here given the duration of the violation as well as respondent's lack of cooperation. Prior to respondent eventually renewing the registration for its PBS facility, Department staff sent three notices to remind respondent of its obligation to renew the registration for its facility. In addition, respondent did not answer the complaint.

Based on the information provided by Department staff's October 14, 2004 affidavit, the proposed order should be modified because the registration for the PBS facility has been renewed, thereby obviating the need to require respondent to submit another registration application. Nevertheless, respondent's obligation to file a timely renewal before the expiration of the current registration continues.

Conclusion

Respondent has defaulted on its obligation to file an answer. As a result, 609 West 151st Street, LLC, has defaulted and waived its right to a hearing.

Recommendations

The Commissioner should conclude that respondent has defaulted and waived its right to a hearing, and sign Department staff's proposed Order as modified.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
October 26, 2004

To: 609 West 151st Street, LLC via certified mail
One West Red Oak Lane
White Plains, New York 10604

Benjamin A. Conlon, Esq.
NYS Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500