

**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.2-317233.2.2018

**611 W. 112 ST. REALTY CORP.,**

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 611 W. 112 St. Realty Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility on or before July 7, 2012, the date on which its prior registration expired. Respondent's facility is located at 611 W. 112th Street, New York, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 2,700 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 January 8, 2018, and failed to appear for the adjudicatory hearing scheduled for February 7, 2018 (see Default Summary Report at 3 [Finding of Fact No. 8]). At the February 7, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Caruso 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. The pleadings and the papers submitted with and in support of the motion provide enough 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 July 7, 2012, the date on which its registration expired, in violation of ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-

1.9(c)<sup>1</sup> (see Matter of Samber Holding Corp., Order of the Commissioner, March 12, 2018, at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)]; see also State v Williams, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and CPLR 3215[f]).

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 5, 2018, ¶ 15). 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 renew the registration of its facility no later than July 7, 2012 but 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 611 W. 112 St. Realty Corp. 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 611 W. 112 St. Realty Corp. is determined to have violated ECL 17-1009 and, since October 11, 2015, 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 611 W. 112th Street, New York, New York on or before July 7, 2012, the date the prior registration expired.
- III. Within fifteen (15) days of the service of this order upon respondent 611 W. 112 St. Realty Corp., respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable and past due registration fees.

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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 registration renewal requirement.

- IV. Within fifteen (15) days of the service of this order upon respondent 611 W. 112 St. 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 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 611 W. 112 St. Realty Corp., 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  
April 11, 2018

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.2-317233.2.2018

**611 W. 112 ST. REALTY CORP.,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 611 W. 112 St. Realty Corp. (respondent) with a notice of hearing and complaint, dated December 11, 2017, 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 611 W. 112th Street, New York, New York (facility) on or before July 7, 2012, the date on which its prior registration expired. 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 business 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 December 11, 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 December 11, 2017 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for January 8, 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, an adjudicatory hearing was convened on February 7, 2018 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. 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, the hearing would be re-convened on notice to respondent. On March 5, 2018, 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 5, 2018 (see Affirmation of Service of Deborah Gorman, dated March 15, 2018).

#### Applicable Regulatory Provision

Section 613-1.9. Registration.<sup>1</sup>

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“(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 611 W. 112 St. Realty Corp. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 611 W. 112th Street, New York, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 2,700 gallons and is located aboveground. See Motion for Default Judgment, Exhibits E, F, and H.

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<sup>1</sup> Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, “(a) *Existing facilities*. . . (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.” 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 business corporation in the State of New York. See Motion for Default Judgment, Exhibit I.
3. On June 28, 1984, 611 Realty Co. transferred all right, title and interest in the facility to 611 W. 112 St. Realty Corp., the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 808 Page 1528. See Motion for Default Judgment, Exhibit D.
4. Pursuant to a registration application dated March 26, 2007, the Department issued PBS Certificate Number 2-317233 to 611 W. 112 St. Realty Corp., the owner of the facility, on April 5, 2007 with an expiration date of July 7, 2012. See Motion for Default Judgment, Exhibits E and F.
5. On December 7, 2017, a search of the Department's PBS registration database revealed that respondent's registration expired on July 7, 2012 and, as of December 7, 2017, had not been renewed. See Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated December 11, 2017, ¶¶ 9-12; see also Exhibit H.
6. As of February 28, 2018, respondent had not registered the facility. See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated March 5, 2018, ¶¶ 9-10; see also Exhibit H.
7. As shown by Receipt for Service No. 201712290189 issued by the New York State Department of State, respondent was served personally, on December 11, 2017, pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated December 11, 2017, 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 611 W. 112th Street, New York, New York on or before July 7, 2012, the date the prior registration expired. 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 December 11, 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 January 8, 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 February 7, 2018, as directed in the notice of hearing. See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated March 5, 2018, ¶¶ 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 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]).

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 their 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, at 1 [citing Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003)]; see also State v Williams, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and 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 January 8, 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 February 7, 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 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 March 15, 2018, ¶ 2).

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 611 W. 112th Street, New York, New York on or before July 7, 2012, the date on which its registration expired, in violation of ECL 17-1009 (see Matter of Samber Holding Corp., Order of the

Commissioner at 1). Respondent was in violation of 6 NYCRR 613-1.9(c) 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 March 5, 2018, ¶¶ 14-19).

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 renew the registration of its PBS facility located at 611 W. 112th Street, New York, New York on or before July 7, 2012, the date the prior registration expired, 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 611 W. 112 St. Realty Corp. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent 611 W. 112 St. Realty Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 611 W. 112th Street, New York, New York on or before July 7, 2012, the date the prior registration expired;
3. Directing respondent 611 W. 112 St. Realty Corp. 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 611 W. 112 St. Realty Corp. 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  
March 23, 2018

## APPENDIX A

*Matter of 611 W. 112 St. Realty Corp.*  
DEC File No. PBS.2-317233.2.2018  
Motion for Default Judgment

1. Cover letter, dated March 5, 2018, 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 March 5, 2018
3. Motion for Default Judgment, dated March 5, 2018, attaching Exhibits A and B:
  - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated December 11, 2017
  - B. Affirmation of Deborah Gorman, Esq., dated March 5, 2018, attaching Exhibits C – F and H – J:
  - C. Affidavit of Service of Dale Thiel, sworn to February 28, 2018, attaching Department of State Receipt for Service, dated December 11, 2017, 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 28, 2018, attaching deed dated June 28, 1984
  - E. Petroleum Bulk Storage (PBS) Application from 611 W. 112 St Realty Corp, PBS No. 2-317233, dated March 26, 2007
  - F. PBS Certificate, PBS No. 2-317233 issued to 611 W. 112 St Realty Corp on April 5, 2007, expired July 7, 2012
  - H. Facility Information Report, PBS No. 2-317233, printed February 28, 2018
  - I. NYS Department of State, Division of Corporations, Entity Information Sheet regarding 611 W. 112 St Realty Corp, reflecting information through February 27, 2018
  - J. Draft Order
4. Affirmation of Service of Deborah Gorman, dated March 15, 2018