

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

ORDER

DEC Case No.
PBS.2-149802.10.2018

-by-

618 RIVERSIDE DRIVE OWNERS, INC.,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent 618 Riverside Drive Owners, Inc., violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility at 640 West 139th Street, New York, New York (facility), on or before June 18, 2017, the date on which the facility's prior registration expired. Located at the facility, which is listed as an apartment/office building, is an aboveground storage tank with a capacity of 4,000 gallons (see Hearing Exhibits 4 and 5).

On July 23, 2019, an adjudicatory hearing was convened before Michele Stefanucci, Administrative Law Judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Stefanucci prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ's hearing 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 September 13, 2018, and failed to appear for the adjudicatory hearing scheduled in the matter for October 15, 2018 and reconvened on July 23, 2019 (see Hearing Report at 4 [Finding of Fact No. 9]).

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 Hearing Report at 4-6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 23, 2019, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim and proved its case on the merits by a preponderance of the evidence (see Hearing Report at 5-6). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent was required to renew the registration of its PBS facility on or before June 18, 2017 (see ECL 17-1009[2]; Hearing Report at 3 [Finding of Fact No. 4], 5). Respondent's failure to properly renew the registration of its facility violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of title 10 of article 17 and its implementing regulations.

Department staff, in its papers, sought a civil penalty in the amount of ten thousand dollars (\$10,000). Absent aggravating or mitigating factors, where a facility has not registered or renewed its registration for two to five years, Department staff has generally requested a civil penalty of seven thousand five hundred dollars (\$7,500). (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2 [penalty ranges for PBS registration violations concerning heating oil tanks in New York City]). At hearing, Department staff however maintained that a higher penalty of ten thousand dollars (\$10,000) was warranted (see Hearing Report at 6). Respondent had previously executed a consent order in 2012 to address a PBS registration violation at the facility (see Hearing Exhibit 6). Department staff cited respondent's past history of noncompliance with the PBS program as an aggravating factor (see Hearing Report at 6).

I concur with Department staff that the penalty staff has requested is authorized and appropriate under the circumstances here (see Matter of JG 542 Associates LLC, Order of the Commissioner, June 12, 2017, at 2 [higher penalty ranges for PBS registration violations are appropriate where the respondent has a history of noncompliance]).

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent. I also direct that respondent submit to the Department a petroleum bulk storage application for the facility within fifteen (15) days of service of this order upon it, together with all applicable registration fees.

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 618 Riverside Drive Owners, Inc., waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 618 Riverside Drive Owners, Inc., violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 640 West 139th Street, New York, New York, on or before June 18, 2017, the date the prior registration expired.

- III. Within fifteen (15) days of the service of this order upon respondent 618 Riverside Drive Owners, Inc., 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 618 Riverside Drive Owners, Inc., 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 618 Riverside Drive Owners Inc., 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: August 26, 2019
Albany, New York

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

HEARING REPORT

DEC Case No.
PBS.2-149802.10.2018

-by-

618 RIVERSIDE DRIVE OWNERS, INC.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 618 Riverside Drive Owners, Inc. (respondent) with a notice of hearing and complaint, dated August 1, 2018, alleging a violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) for failing to renew the registration of its petroleum bulk storage facility located at 640 West 139th Street, New York, New York, on or before June 18, 2017, the date on which its prior registration expired. The complaint seeks an order of the Commissioner:

- (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c);
- (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000);
- (3) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of service of the Commissioner's order by remitting the applicable registration fee along with a complete registration application; and,
- (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Because 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 serving the New York State Department of State on August 1, 2018 (see Staff Exhibit 8). Department staff provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about August 1, 2018 (see id.). Respondent failed to file an answer to the complaint.

As stated in the notice of hearing, on October 15, 2018, an adjudicatory hearing was convened before Administrative Law Judge (ALJ) Michael S. Caruso. Department staff was represented by Deborah Gorman, Esq., Senior Attorney, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent. Department staff requested that the matter be adjourned in contemplation of settling the matter with respondent. ALJ Caruso adjourned the matter and

noted for the record that if the matter did not settle, it would be reconvened upon request by staff and notice to the respondent.

The matter did not settle, and Department staff requested that the matter be reconvened. On February 19, 2019, the Office of Hearings and Mediation Services (OHMS) served a notice of hearing on respondent by first class mail, advising respondent that the hearing would be reconvened on April 8, 2019. On April 8, 2019, Ms. Gorman appeared before ALJ Caruso on behalf of Department staff. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing and proffered a staff witness. Noting for the record that respondent had not answered the complaint and failed to appear for the adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. ALJ Caruso reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b), and indicated that, upon staff's request, the hearing would be reconvened on a subsequent date and on notice to respondent.

On June 25, 2019, OHMS served a notice of hearing on respondent by first class mail, advising respondent that the hearing would be reconvened on July 22, 2019 and each day thereafter as necessary. On July 23, 2019, the adjudicatory hearing was reconvened before the undersigned at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by Sarah Cinquemani, Esq., Excelsior Fellow. No one appeared on behalf of respondent.

Department staff orally renewed its motion for a default judgment. Department staff called one witness, Benjamin Conlon, Associate Attorney with the Department's Office of General Counsel, and Section Chief in the Bureau of Remediation. In all, ten (10) exhibits were received in evidence.¹

Applicable Regulatory Provision

613-1.9 Registration

* * *

“(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.”

¹ At hearing, Department staff moved to keep the record open to correct a date reference in the affidavit of service (Exhibit 8). I granted staff's motion. Staff submitted the corrected affidavit on July 24, 2019, and the record was closed.

Findings of Fact

The following facts are found based upon the preponderance of evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent 618 Riverside Drive Owners, Inc. is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 640 West 139th Street, New York, New York, (Block 2087, Lot 50) (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 4,000 gallons and is located aboveground. (See Exhibits 3, 4, and 5.)
2. The address for the facility, 640 West 139th Street, New York, New York, is also known as 618-620 Riverside Drive, New York, New York, because the facility is on a corner formed by the intersection of Riverside Drive and West 139th Street, New York, New York. (See Exhibit 2; Testimony of Benjamin Conlon [Conlon Testimony].)
3. Respondent is an active domestic business corporation in the State of New York (see Conlon Testimony; Staff Exhibit 7).
4. Pursuant to a registration application received November 5, 2012, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-149802 to 618 Riverside Drive Owners, Inc. identified on the certificate as the owner of the facility, on December 13, 2012, with an expiration date of June 18, 2017. The PBS application received by Department staff on November 5, 2012, identifies the owner as 618 Riverside Drive Owners, Inc. (See Conlon Testimony; Staff Exhibits 3, 4, and 5.)
5. On November 16, 1989, Kostas Tsiskakis and Panagiotis Moutsakis, by deed, transferred all right, title and interest in the facility to respondent 618 Riverside Drive Owners, Inc., the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, on Reel 1641, Page 2054. (See Conlon Testimony; Staff Exhibit 2.)
6. Benjamin Conlon is an Associate Attorney in the Department's Office of General Counsel, serving as a Section Chief in the Bureau of Remediation, whose responsibilities include enforcement of the Petroleum Bulk Storage, Chemical Bulk Storage, and Major Oil Storage Facilities laws and regulations. Mr. Conlon is authorized to access and inspect the Department's unified information system (UIS) and the electronic repository for scanned documents known as DecDOCS. The UIS and DecDOCS are databases maintained by the Department and contain petroleum bulk storage facility records filed with the Department, which records include petroleum bulk storage facility registrations filed pursuant to 6 NYCRR 613-1.9. (See Conlon Testimony.)
7. On July 22, 2019, Benjamin Conlon searched the petroleum bulk storage facility records contained in the Department's UIS and DecDOCS databases for any petroleum bulk storage facility registration application filed by respondent for the facility. Mr. Conlon

determined that respondent's registration expired on June 18, 2017 and, as of July 22, 2019, had not been renewed. (See Conlon Testimony; see also Staff Exhibits 3 and 5.)

8. As shown by Receipt for Service No. 201808080220 issued by the New York State Department of State, respondent was served personally, on August 1, 2018, pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated August 1, 2018, 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 petroleum bulk storage facility located at 640 West 139th Street, New York, New York, on or before June 18, 2017, 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 August 1, 2018. (See Staff Exhibits 1 and 8.)
9. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for September 13, 2018, as directed in the notice of hearing and the accompanying cover letter, and failed to appear for the adjudicatory hearing initially scheduled in the matter for October 15, 2018, and later reconvened on July 23, 2019, as directed in the notices of hearing. (See Hearing ediol recording.)

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 a 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" (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 September 13, 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 for October 15, 2018 and reconvened on July 23, 2018, as directed in the notices of hearing. Department staff has submitted a proposed order.

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 640 West 139th Street, New York, New York, on or before June 18, 2017, the date on which its registration expired, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) (see Matter of Samber Holding Corp. at 1). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to renew the registration of its petroleum bulk storage facility located at 640 West 139th Street, New York, New York, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c). The Department is entitled to judgment upon the facts proven.

In its complaint, Department staff seeks an order imposing a civil penalty of ten thousand dollars (\$10,000). ECL 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In proceedings concerning violations of PBS registration requirements in the New York City area, calculation of an appropriate penalty turns in part on the duration of the violations (see e.g. Matter of 540 Jackson Realty Corp., Order of the Commissioner, May 18, 2016, at 2; see also Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011 [12 Martense Associates], at 2).

Absent aggravating or mitigating factors, Department staff has generally requested a penalty of five thousand dollars (\$5,000) for violations extending up to two years, seven thousand five hundred dollars (\$7,500) for violations extending from two to five years, and ten thousand dollars (\$10,000) for violations exceeding five years in duration (see 12 Martense Associates at 2).

I note that in this matter, the two-year threshold for applying a civil penalty of seven thousand five hundred dollars (\$7,500) was reached on June 18, 2019, after service of the notice of hearing and complaint but before the date of the reconvened adjudicatory hearing. Staff's proof demonstrates the violation continued as of July 22, 2019. Under 12 Martense Associates and its progeny, if the "threshold" date occurs between service of the notice of hearing and complaint and the date of the adjudicatory hearing, it would be appropriate to award the penalty

amount (\$7,500) related to the longer period (see Matter of Promesa Court Residences LP., Order of the Commissioner, September 11, 2017, at 3; see also Matter of 1160 President Street Hous. Dev. Fund Corp., Order of the Commissioner, October 3, 2017, at 2).

However, at the hearing and in their proposed order, Department staff requested a penalty of ten thousand dollars (\$10,000), citing respondent's history of noncompliance with the PBS program as an aggravating factor (see Hearing ediol recording; see also Staff Exhibit 10; Staff Exhibit 6 [Order on Consent Case No 2-149802 dated November 30, 2012]). This requested civil penalty is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (see 12 Martense Associates, at 2; Matter of JG 542 Assocs. LLC, Order of the Commissioner, June 12, 2017, at 2).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 640 West 139th Street, New York, New York, on or before June 18, 2017, the date the prior registration expired, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendations

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

1. Granting Department staff's motion for default, holding respondent 618 Riverside Drive Owners, Inc., in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent 618 Riverside Drive Owners, Inc., violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility located at 640 West 139th Street New York, New York, on or before June 18, 2017, the date the prior registration expired;
3. Directing respondent 618 Riverside Drive Owners, Inc., to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete petroleum bulk storage registration application for the facility, together with applicable registration fees;
4. Directing respondent 618 Riverside Drive Owners, Inc., 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/_____
Michele M. Stefanucci
Administrative Law Judge

Dated: July 26, 2019
Albany, New York

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of 618 Riverside Drive Owners, Inc.
 640 West 139th Street, New York, New York – DEC Case No. PBS.2-149802.10.2018
 July 23, 2019 – Central Office
 Edrol File No. 190723101856

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, and Affirmation of Deborah Gorman all dated August 1, 2018.	✓	✓	Department Staff	
2	New York City Department of Finance, ACRIS Title Search, dated June 19, 2019, and deed to respondent, dated November 16, 1989.	✓	✓	Department Staff	FN1
3	PBS Program Facility Information Report, printed June 20, 2019.	✓	✓	Department Staff	FN1
4	PBS Application, received November 15, 2012 from 618 Riverside Drive Owners, Inc. for 640 West 139 Street, New York, New York.	✓	✓	Department Staff	FN1
5	PBS Registration Certificate issued December 13, 2012, expiration date June 18, 2017.	✓	✓	Department Staff	FN1
6	Order on Consent dated November 30, 2012.	✓	✓	Department Staff	FN1

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	NYS Department of State Entity Information, current through July 15, 2019.	✓	✓	Department Staff	FN1
8	Affidavit of Service of Dale Thiel, sworn to July 19, 2019 with New York State Department of State Receipt for Service dated August 1, 2018.	✓	✓	Department Staff	
9	Affirmation of attempted contract of Deborah Gorman, dated July 17, 2019.	✓	✓	Department Staff	
10	Proposed Order.	✓	✓	Department Staff	
	Notices of Hearing from OHMS dated February 19, 2019.				OHMS File Copy

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¹ Witness testified that databases were searched, and documents were reviewed on July 22, 2019. Witness initialed and dated the exhibit to confirm information remained accurate as of July 22, 2019.