

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.2-608837.5.2016

-by-

**63 MORNINGSIDE AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,**

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Conservation (Department or DEC) that respondent 63 Morningside Avenue Housing Development Fund Corporation 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 April 14, 2013, the date on which its prior registration expired. Respondent's facility is located at 63 Morningside Avenue, New York, New York and includes an aboveground storage tank with a capacity of 2,000 gallons.

On July 11, 2016, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of the DEC's Office of Hearings and Mediation Services. ALJ Caruso 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 April 26, 2016, and failed to appear for the adjudicatory hearing scheduled in the matter on May 26, 2016 and reconvened on July 11, 2016 (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 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. At the hearing on July 11, 2016, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report at 4-5). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent was required to renew its registration once the registration expired on April 14, 2013 (see ECL 17-1009[2]; Hearing Report, at 4). At that time and continuing until October 11, 2015, respondent was also in violation of the registration

requirement at former 6 NYCRR 612.2(a), although Department staff did not reference that regulatory provision in its papers. Department staff did reference the applicable facility registration requirement at 6 NYCRR 613-1.9(c), which became effective on October 11, 2015 and which replaced the previous registration provision in 6 NYCRR part 612. In future matters, Department staff should cite violations of both regulatory sections where, as here, the violations commenced prior to and continued after October 11, 2015.

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff, in its papers, sought a civil penalty of ten thousand dollars (\$10,000). At the hearing, Department staff moved to amend its pleadings to reduce the civil penalty to seven thousand five hundred dollars (\$7,500), and the ALJ granted staff's motion.

As noted, respondent has failed to renew the registration for the facility since April 14, 2013 when the registration expired (see Hearing Report at 3 [Finding of Fact No. 7]). Where, as here, an owner has not registered the facility for more than two years but less than five years from the expiration date, and no other violations or mitigating or aggravating factors exist, a civil penalty of seven thousand five hundred dollars (\$7,500) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). The requested penalty of seven thousand five hundred dollars (\$7,500) is authorized and appropriate.

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 63 Morningside Avenue Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 63 Morningside Avenue Housing Development Fund Corporation violated (a) ECL 17-1009 and (b) since October 11, 2015, 6 NYCRR 613-1.9(c), for failing to renew the registration of its petroleum bulk storage facility located at 63 Morningside Avenue, New York, New York.
- III. Within fifteen (15) days of the service of this order upon respondent 63 Morningside Avenue Housing Development Fund Corporation, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.

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HEARING REPORT

DEC Case No.
PBS.2-608837.5.2016

-by-

**63 MORNINGSIDE AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent 63 Morningside Avenue Housing Development Fund Corporation (respondent) with a notice of hearing and complaint, dated March 22, 2016, 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 facility located at 63 Morningside Avenue, New York, New York on or before April 14, 2013, 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 the 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.

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 serving the New York State Department of State on March 22, 2016 (see Staff Exhibit 3). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on March 22, 2016 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 26, 2016, as directed in the notice of hearing and accompanying cover letter (see Staff Exhibit 2).

As stated in the notice of hearing, on May 26, 2016, an adjudicatory hearing was convened before Administrative Law Judge (ALJ) Daniel O'Connell at the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21st 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.

Department staff indicated that it was prepared to proceed with the hearing, proffering a staff witness. 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. ALJ O’Connell 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). Moreover, ALJ O’Connell 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, that the hearing would be re-convened on notice to respondent.

The Office of Hearings and Mediation Services served a Notice of Hearing dated June 6, 2016 on respondent by first class mail advising respondent that the hearing in this matter would be reconvened on July 11, 2016 at 10:00 am. At 12:37 pm on July 11, 2016, the adjudicatory hearing was reconvened before the undersigned at the Department’s Central Office at 625 Broadway, Albany, New York 12233. Department staff was represented by law student intern Nadia S. Alirahi under the supervision of Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel. No one appeared on behalf of the respondent.

Department staff orally renewed its motion for a default judgment and also sought judgment on the merits. 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.

Applicable Regulatory Provision

613-1.9 Registration ¹

* * *

“(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 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.”

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 63 Morningside Avenue Housing Development Fund Corporation (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 63 Morningside Avenue, New York, NY (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 2,000 gallons and is located aboveground. See Testimony of Benjamin Conlon; Staff Exhibits 5, 6, 7, and 8.
2. Respondent is an active domestic business corporation in the State of New York. See Testimony of Benjamin Conlon; Staff Exhibit 4.
3. On August 25, 2011, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-608837 to respondent. This registration expired on April 14, 2013. See Testimony of Benjamin Conlon; Staff Exhibit 7.
4. On June 11, 2001, the City of New York, by deed, transferred all right, title and interest in the facility to respondent 63 Morningside Avenue Housing Development Fund Corporation, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 3333, Page 679. See Testimony of Benjamin Conlon; Staff Exhibit 5.
5. 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 Testimony of Benjamin Conlon.
6. On July 8, 2016, 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 or renewal registration filed by respondent for the facility. See Testimony of Benjamin Conlon.
7. As a result of his search, Benjamin Conlon confirmed that respondent had not renewed the registration of the facility since the prior registration expired on April 14, 2013. See Testimony of Benjamin Conlon; see also Staff Exhibit 8 (includes handwritten initials of witness reflecting that he checked database on July 8, 2016).
8. As shown by Receipt for Service No. 201603240604 issued by the New York State Department of State, respondent was served personally, on March 22, 2016, pursuant to

section 306 of the Business Corporation Law with a notice of hearing and complaint dated March 22, 2016, 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 63 Morningside Avenue, New York, New York on or before April 14, 2013, the date that 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 March 22, 2016. See Staff Exhibits 2 and 3; see also Hearing Record.

9. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for April 26, 2016, as directed in the notice of hearing and accompanying cover letter, and failed to appear for the adjudicatory hearing scheduled in the matter on May 26, 2016 and reconvened on July 11, 2016, as directed in the notices of hearing. See 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).

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 proof presents a prima facie case demonstrating that respondent failed to renew the registration of its petroleum bulk storage facility located at 63 Morningside Avenue, New York, New York on or before April 14, 2013, the date that the prior registration expired, in violation of ECL 17-1009. Respondent was in violation of 6 NYCRR 613-1.9(c) from the effective date of part 613, October 11, 2015.

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 April 26, 2016, 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 in the matter on May 26, 2016 and reconvened on July 11, 2016, as directed in the notices of hearing. Department staff provided its proposed order at the July 11, 2016 hearing. 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 63 Morningside Avenue, New York, New York on or before April 14, 2013, the date that the prior registration expired, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c). The Department is entitled to judgment upon the facts proven. At the July 11, 2016 hearing, Department staff moved orally to amend the complaint to reduce the civil penalty requested from ten thousand dollars (\$10,000) to seven thousand five hundred dollars (\$7,500). Pursuant to 6 NYCRR 622.10(b)(1)(i), I granted Department staff's motion to amend the pleadings, as there is no prejudice to respondent in reducing the penalty requested.

Department staff's proposed order seeks a civil penalty of seven thousand five hundred dollars (\$7,500). 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 e.g. Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2.

Recommendation

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

1. Granting Department staff's motion for default, holding respondent 63 Morningside Avenue Housing Development Fund Corporation in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent 63 Morningside Avenue Housing Development Fund Corporation violated ECL 17-1009 by failing to renew the registration of its petroleum bulk storage facility located at 63 Morningside Avenue, New York, New York on or before April 14, 2013, the date that the prior registration expired;
3. Directing respondent 63 Morningside Avenue Housing Development Fund Corporation 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 63 Morningside Avenue Housing Development Fund Corporation 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/

Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
July 15, 2016

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of 63 Morningside Avenue Housing Development Fund Corporation
 63 Morningside Avenue, New York, New York – DEC Case No. PBS.2-608837.5.2016
 July 11, 2016 – Central Office
 Edrol File No. 021219094700

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|---|-------|---------|------------------|-------|
| 1 | May 25, 2016 Practice Order of the Appellate Division, Third Department (Peters, P.J.), for appointment of law interns, including, Nadia S. Alirahi. | ✓ | ✓ | Department Staff | |
| 2 | Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, all dated March 22, 2016 and an undated Affirmation of Deborah Gorman. | ✓ | ✓ | Department Staff | |
| 3 | Affidavit of Service of Dale Thiel, sworn to July 7, 2016 with New York State Department of State Receipt for Service dated March 22, 2016. | ✓ | ✓ | Department Staff | |
| 4 | NYS Department of State Entity Information, dated July 6, 2016. | ✓ | ✓ | Department Staff | |
| 5 | New York City Department of Finance, ACRIS Title Search, dated July 8, 2016 and deed to respondent, dated June 11, 2001. | ✓ | ✓ | Department Staff | |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|--|-------|------------|------------------|-------|
| 6 | PBS Application, dated August 2, 2011. | ✓ | ✓ | Department Staff | |
| 7 | PBS Registration Certificate issued August 25, 2011, expiration date April 14, 2013. | ✓ | ✓ | Department Staff | |
| 8 | PBS Program Facility Information Report, dated July 7, 2016. | ✓ | ✓ | Department Staff | |
| 9 | Affirmation of attempted contact by Deborah Gorman, dated June 14, 2016. | ✓ | ✓ | Department Staff | |
| 10 | Proposed Order. | ✓ | ✓ | Department Staff | |