

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.2-607018.5.2017

-by-

83-85 BAXTER STREET, LLC,

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Environmental Conservation (Department) that respondent 83-85 Baxter Street, LLC (respondent) violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 83-85 Baxter Street, New York, New York within thirty (30) days of becoming owner of the facility. Respondent’s facility includes an aboveground storage tank with a capacity of 2,000 gallons.

The Department had issued a petroleum bulk storage certificate to Green Leaf Associates, LLC for the facility on June 28, 2011. By deed dated December 22, 2011, respondent 83-85 Baxter Street, LLC acquired the facility from Green Leaf Associates, LLC (see Default Summary Report, at 3 [Finding of Fact No. 4] & Staff Exhibit D).

Administrative Law Judge (ALJ) D. Scott Bassinson of the DEC’s Office of Hearings and Mediation Services was assigned to the 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 April 12, 2017, and failed to appear for the adjudicatory hearing scheduled in the matter on May 12, 2017 (see Default Summary Report at 3 [Finding of Fact No. 7]).

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 4-5). 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 facts sufficient to support staff’s claim that respondent failed to register its petroleum bulk storage facility located at 83-85 Baxter Street, New York, New York within thirty (30) days of becoming owner of the facility on December 22, 2011.

The record demonstrates that respondent was required to register its facility when it became owner of the facility (see ECL 17-1009[2]; Default Summary Report at 3 [Finding of Fact No. 4]). In addition to ECL 17-1009, Department staff referenced in its papers the applicable facility registration requirement at 6 NYCRR 613-1.9(d)(1), which became effective on October 11, 2015 and which replaced the previous registration provision in 6 NYCRR part 612.

Department staff seeks a civil penalty of ten thousand dollars (\$10,000) (see Motion for Default Judgment, Staff Exhibit A [Complaint, Wherefore Clause, at II]). 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. As noted, respondent has failed to register its facility within 30 days after become owner of the facility (see Default Summary Report at 3 [Findings of Fact Nos. 4, 5]). Where, as here, an owner has not registered the facility for more than five years, a civil penalty of ten thousand dollars (\$10,000) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). I agree with the ALJ that the ten thousand dollars (\$10,000) sought by staff is authorized and appropriate (see Default Summary Report at 5).

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 and past due 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 83-85 Baxter Street, LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 83-85 Baxter Street, LLC violated (a) ECL 17-1009 and (b) since October 11, 2015, 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 83-85 Baxter Street, New York, New York within thirty (30) days of becoming owner of the facility.
- III. Within fifteen (15) days of the service of this order upon respondent 83-85 Baxter Street, LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent 83-85 Baxter Street, LLC, 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, 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 83-85 Baxter Street, 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
Commissioner

Dated: Albany, New York
June 1, 2017

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”),

DEFAULT SUMMARY REPORT

DEC Case No.
PBS.2-607018.5.2017

-by-

83-85 BAXTER STREET, LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent 83-85 Baxter Street, LLC (“respondent”) with a notice of hearing and complaint, dated March 9, 2017, alleging that respondent violated ECL § 17-1009 and its implementing regulation, 6 NYCRR § 613-1.9(d)(1) when it failed to register its petroleum bulk storage facility located at 83-85 Baxter Street, New York, New York within 30 days of becoming owner of the facility. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL § 17-1009 and 6 NYCRR § 613-1.9(d)(1); (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 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 March 9, 2017. See Staff Exhibit (“Staff Ex.”) C. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on March 9, 2017. See id. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for April 12, 2017, and failed to appear at the adjudicatory hearing scheduled for May 12, 2017, as directed in the notice of hearing and accompanying cover letter. See Staff Ex. B, ¶¶ 4-6.

As stated in the notice of hearing, on May 12, 2017, an adjudicatory hearing was convened by video conference at 12:30 p.m. before the undersigned Administrative Law Judge (“ALJ”). The ALJ was located at the Department’s central offices, 625 Broadway, Albany, New York, and counsel for staff were located 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. of the Remediation Bureau in the Department's Office of General Counsel. 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, and stated that staff would be submitting motion papers in support of the motion for a default judgment. I reserved on the oral default motion pending service and filing of the motion papers and any response thereto.

Staff has submitted a Notice of Motion for Default Judgment, a Motion for Default Judgment, and the Affirmation of Deborah Gorman, Esq. in Support of Motion for Default Judgment, all dated May 15, 2017, and nine exhibits.¹ Respondent has failed to file any response to staff's motion for default judgment.

Applicable Regulatory Provision

613-1.9 Registration.²

* * *

“(d) *Application procedure for initial registration or transfer of ownership.* (1) If ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the department within 30 days after the 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 83-85 Baxter Street, LLC (“respondent”) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 83-85 Baxter Street, New York, New York (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 2,000 gallons and is located aboveground. See Staff Exs. D, E, F, and G.
2. Respondent is an active domestic limited liability company in the State of New York.

¹ A list of the exhibits submitted by staff in support of its motion for default judgment is attached hereto as Appendix A.

² Effective October 11, 2015, 6 NYCRR §613-1.9 replaced 6 NYCRR § 612.2(b), Registration of Facilities, which read in relevant part, "(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." ECL § 17-1009(2) requires facility registrations to be “renewed every five years or whenever ownership of a facility is transferred, whichever occurs first.”

See Staff Ex. H.

3. On June 28, 2011, the Department issued to Green Leaf Associates LLC PBS Registration Certificate No. 2-607018. This registration expired on March 31, 2015. See Staff Exs. F, G. In bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” Staff Ex. F.
4. On December 22, 2011, Green Leaf Associates LLC, by deed, transferred all right, title and interest in the facility to respondent 83-85 Baxter Street, LLC, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2012000014137. See Staff Ex. D.
5. On March 6, 2017, a search of the Department’s PBS registration database revealed that the registration of the facility had expired on March 31, 2015, and did not reflect that respondent was the current owner of the facility. In addition, the database search did not reveal that the tanks at the facility had been removed or closed in place in accordance with DEC regulations. See Staff Ex. A, Affirmation of Deborah Gorman, Esq. dated March 9, 2017, ¶¶ 9-12.
6. As shown by Receipt for Service No. 201703160675 issued by the New York State Department of State, respondent was served personally on March 9, 2017, pursuant to section 303 of the New York Limited Liability Company Law, with a cover letter, notice of hearing and complaint, a statement of readiness, and supporting affirmation, all dated March 9, 2017, alleging that respondent violated ECL § 17-1009 and its implementing regulation, 6 NYCRR § 613-1.9(d)(1), when it failed to register its petroleum bulk storage facility located at 83-85 Baxter Street, New York, New York within 30 days of 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 March 9, 2017. See Staff Ex. B, Affirmation of Deborah Gorman, Esq. in Support of Motion for Default Judgment, dated May 15, 2017 (“Gorman Aff. II”), ¶¶ 2-3; see also Staff Ex. C, Affidavit of Service of Dale L. Thiel, sworn to May 9, 2017, ¶¶ 3-4.
7. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for April 12, 2017, and failed to appear for the adjudicatory hearing scheduled in the matter for May 12, 2017, as directed in the notice of hearing and accompanying cover letter. See Staff Ex. B, Gorman Aff. II, at ¶¶ 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 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 “also submit some proof of the facts sufficient to support the claims charged in the complaint.” Matter of Greene Technologies Incorporated, Ruling of the Commissioner, November 10, 2016, at 3; Matter of American Auto Body & Recovery Inc., Ruling of the Commissioner, July 2, 2015, at 3; Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 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 April 12, 2017, as directed in the cover letter served with the notice of hearing and complaint, and in the notice of hearing; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on May 12, 2017, as directed in both the cover letter and the notice of hearing. Department staff has submitted a proposed order with its motion papers. See Staff Ex. I. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to 6 NYCRR § 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers. See May 15, 2017 letter from Deborah Gorman, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent.

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 register its petroleum bulk storage facility located at 83-85 Baxter Street, New York, New York within 30 days of becoming owner of the facility, in violation of ECL § 17-1009. Respondent has also been in violation of 6 NYCRR § 613-1.9(d)(1) since the effective date of Part 613, October 11, 2015.³

³ Staff has not alleged that respondent violated former section 612.2(b) of the regulations, which was the relevant regulation for the period from January 21, 2012 (30 days after respondent became owner of the facility) to October 10, 2015 (the last day former regulation 6 NYCRR 612.2(b) was effective); rather, staff’s allegations regarding regulatory violations are limited to respondent’s failure to register its facility under 6 NYCRR § 613-1.9(d)(1), which became effective October 11, 2015. I note that the Commissioner has stated, on more than one occasion, that “Department staff should cite violations of both [the former and current] regulatory sections where, as here, the violations commenced prior to and continued after October 11, 2015.” Matter of Brighton House, Inc., Order of the Commissioner, January 20, 2017, at 2; see also Matter of RCASCO Properties, Inc., Order of the Commissioner, November 28, 2016, at 2 (same).

Department staff seeks 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. 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.

The record in this matter reflects that, as of the date of the service and filing of the notice of hearing and complaint in this matter, respondent’s failure to register its facility exceeded five years. I therefore recommend that the Commissioner impose a civil penalty in the amount of ten thousand dollars (\$10,000), as requested by Department staff.

Recommendations

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

1. Granting Department staff’s motion for default, holding respondent 83-85 Baxter Street, LLC in default pursuant to the provisions of 6 NYCRR § 622.15;
2. Holding that respondent 83-85 Baxter Street, LLC violated, and continues to violate, ECL § 17-1009 and, from October 11, 2015 forward, 6 NYCRR § 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 83-85 Baxter Street, New York, New York within 30 days of becoming owner of the facility;
3. Directing respondent 83-85 Baxter Street, 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 applicable and past due registration fees;
4. Directing respondent 83-85 Baxter Street, LLC 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/_____
D. Scott Bassinson
Administrative Law Judge

Dated: May 30, 2017
Albany, New York

APPENDIX A

Matter of 83-85 Baxter Street, LLC
DEC Case No. PBS.2-607018.5.2017
Exhibits to Staff Motion for Default Judgment dated May 15, 2017

Exhibit	Description
A	Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated March 9, 2017
B	Affirmation of Deborah Gorman, Esq., dated May 15, 2017
C	Affidavit of Service of Dale L. Thiel, sworn to May 9, 2017, attaching NYS Department of State Receipt for Service No. 201703160675
D	New York City Department of Finance ACRIS Title Search. Deed to respondent dated December 22, 2011
E	PBS Application form filed for PBS No. 2-607018, dated June 21, 2011
F	PBS Certificate, PBS No. 2-607018, issued June 28, 2011
G	Facility Information Report, PBS No. 2-607018, printed May 4, 2017
H	NYS DOS Corporate Entity Information, printed May 9, 2017
I	Proposed Order