

**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 of the State of New York (6 NYCRR),

RULING

DEC Case Number:
2-601159NJB2

-by-

**976 Simpson Street Housing Development
Fund Corporation,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent 976 Simpson Street Housing Development Fund Corporation (respondent) with a cover letter, notice of hearing, and complaint, all of which are dated June 9, 2015. The complaint alleges that respondent violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to timely reregister a petroleum bulk storage (PBS) facility (facility) located at 976 Simpson Street, Bronx, New York. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2(b); (2) assessing a civil penalty in the amount of \$10,000; (3) directing respondent to reregister the facility within 15 days of service of the order; and (4) granting such other relief as the Commissioner may deem appropriate.

In accordance with 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint was made on June 9, 2015, by personally delivering duplicate copies of the cover letter, notice of hearing and complaint to an authorized representative of the Secretary of State at the office of the Department of State in Albany. Staff also mailed the cover letter, notice of hearing, and complaint on or about June 9, 2015 to 100 Gold Street - #7Z5, New York, New York 10038. Respondent did not file an answer to the complaint.

This ruling addresses Department staff's February 26, 2016 motion for default judgment against respondent 976 Simpson Street Housing Development Fund Corporation. The motion was assigned to me on March 10, 2016.

For the reasons set forth below, Department staff's motion for default judgment is denied without prejudice.

Discussion and Conclusions

By its complaint, Department staff alleges that respondent failed to reregister a PBS facility located at 976 Simpson Street, Bronx, New York, after respondent became the owner of the facility on March 20, 2001 (motion, exhibit A, complaint ¶¶ 20, 24). Staff asserts that respondent failed to file a timely answer to the complaint and failed to appear at the scheduled pre-hearing conference (motion at 1). Staff, therefore, moves for a default judgment against respondent (id. at 2).

The Department's uniform enforcement hearing procedures state that all motions made prior to a hearing must be filed in writing with the administrative law judge and must be served on all parties (6 NYCRR 622.6[c][1]; see also Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009, at 2 [directing staff "to serve motions for default judgment upon respondents" in Department enforcement proceedings]). Pursuant to 6 NYCRR 622.6(a)(1), service of interlocutory papers, such as the instant motion, is governed by CPLR 2103, except that service upon a respondent's duly authorized representative may be made by the same means that are authorized for service upon an attorney.

Department staff's motion papers indicate that staff attempted service of the motion by two means: (1) "service on [the] Secretary of State;" and (2) service by first class mail to "100 Gold Street #7Z5, New York[,] New York 10038" (motion, cover letter addressed to Hon. James McClymonds, dated February 26, 2016).

Pursuant to CPLR 2103 where, as here, a party has not appeared by an attorney (or a representative) service of papers upon a party is authorized provided that service is made by one of five enumerated means. Service on the Secretary of State, which is an authorized means for service of process on a domestic or authorized foreign corporation, is not an authorized means for service of interlocutory papers under CPLR 2103.

Service by mail to an unrepresented party is authorized, provided that papers are mailed to the address designated by the party for that purpose or, if no address is designated, to the party's last known address (CPLR 2103[b][2], [c]).

Here, the address to which Department staff mailed the instant motion is not that of respondent. Rather, the address used by staff is the address of the former owner of the facility. As noted on several documents provided by staff in support of its motion, the prior owner of the facility is located at 100 Gold Street #7Z5, New York, New York 10038 (see motion, exhibits D at 2 [deed into respondent identifying, "as Grantor," the City of New York, Department of Housing Preservation and Development, "having its principal office at 100 Gold Street, New York, New York 10038 ('HPD)"], F, G [exhibits F and G list the facility owner as "NYC/HPD/DAMP" with an address of 100 Gold St # 7Z5, New York, NY 10038]).

The record indicates that respondent's address is 976 Simpson Street, Bronx, New York 10459 (motion, exhibits D at 2 [deed into respondent identifying respondent "as Grantee," "having its principal office at 976 Simpson Street, Bronx, New York 10459"], H [Department of State, Entity Information printout, setting forth the address to which DOS will mail process as

"976 SIMPSON STREET, BRONX, NEW YORK 10459"]). Accordingly, staff did not satisfy the requirements for service by mail set forth under CPLR 2103.

I conclude that Department staff failed to effect service of the motion for default judgment upon respondent. Therefore the motion is denied without prejudice.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
June 23, 2016