

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.
2-468975NJB2

-by-

ADONAI REALTY L.P.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (“Department”) that Adonai Realty L.P. (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister the petroleum bulk storage facility at 1036 Intervale Avenue, Bronx, New York, within thirty (30) days of the transfer of ownership of the facility to it. Located at the facility is a 2,000 gallon aboveground petroleum bulk storage tank.

Administrative Law Judge (“ALJ”) D. Scott Bassinson of the Department’s Office of Hearings and Mediation Services was initially assigned to this matter, and presided at the August 6, 2015 adjudicatory hearing. After Department staff filed a motion for a default judgment with supporting documents, the matter was reassigned to ALJ Daniel P. O’Connell, who 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 July 7, 2015, and failed to appear for the adjudicatory hearing scheduled in the matter on August 6, 2015 (see Default Summary Report at 3 [Finding of Fact No. 7]). At the August 6, 2015 adjudicatory hearing, Department staff made an oral motion for a default judgment. The ALJ reserved on the motion, and Department staff later submitted for the ALJ’s consideration a 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. Staff’s papers submitted in support of its motion for default judgment provide proof of the facts sufficient to support staff’s claim that respondent failed to reregister the petroleum bulk storage facility located at 1036 Intervale Avenue, Bronx, New York, within 30 days after it became owner of the facility, in violation of ECL 17-1009 and 6 NYCRR 612.2(b).

Department staff seeks a civil penalty in the amount of ten thousand dollars (\$10,000) (see Motion for Default Judgment, Exhibit A [Complaint, Wherefore Clause ¶ II]). ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for the violation cited here, and the requested penalty is substantially below this statutory amount.

Staff's requested civil penalty of ten thousand dollars (\$10,000) is in accordance with general penalty guidelines for violations of greater 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's application to reregister the facility was due within thirty (30) days of October 8, 2004, when respondent became owner of the facility, and respondent has failed to reregister the facility since that time (see Default Summary Report at 3 [Finding of Fact Nos. 4 and 5]). 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.¹

Staff's request that I order respondent to "permanently cease and desist from any and all future violations of the ECL and the Rules and Regulations promulgated pursuant thereto" is unnecessary (see Exhibit I [Staff Proposed Order], at ¶ III; see also Motion for Default Judgment, at Wherefore Clause ¶ IV). Respondent is required to comply with the ECL and the applicable regulations, and further language to that effect is not needed.

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 Adonai Realty L.P. waived its right to be heard at the hearing.
- II. Moreover, based upon proof of the facts submitted, respondent Adonai Realty L.P. is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum storage facility located at 1036 Intervale Avenue, Bronx, New York within 30 days of becoming the owner of the facility.
- III. Within fifteen (15) days of the service of this order upon respondent Adonai Realty L.P., respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.

¹ Although Department staff, in its complaint, requested that the civil penalty, applicable registration fees and petroleum bulk storage application be submitted within fifteen (15) days of the service of the order upon respondent, Department staff's proposed order called for submission within thirty (30) days. The ALJ has recommended fifteen (15) days, which comports with the time period established in prior orders addressing these types of violations, and which I am directing here.

IV. Within fifteen (15) days of the service of this order upon respondent Adonai Realty L.P., 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 Adonai Realty L.P., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Acting Commissioner

Dated: Albany, New York
February 19, 2016

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.
2-468975NJB2

-by-

ADONAI REALTY L.P.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department staff) duly served Adonai Realty L.P. (Adonai) with a notice of hearing and complaint, dated June 9, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), for failing to reregister its petroleum bulk storage (PBS) facility located at 1036 Intervale Avenue, Bronx, New York, within 30 days after Adonai became the owner of the facility. The complaint seeks an order from the Commissioner that:

1. Finds Adonai in violation of ECL 17-1009 and 6 NYCRR 612.2(b);
2. Assesses a civil penalty in the amount of ten thousand dollars (\$10,000);
3. Directs Adonai to reregister its PBS facility within fifteen (15) days of service of the Commissioner's order on Adonai, remit the applicable registration fee, and submit a complete registration application; and
4. Grants such other and further relief as the Commissioner shall deem just and appropriate.

Adonai is an active domestic limited partnership in the State of New York. Therefore, Department staff served the notice of hearing and complaint on Adonai by personally serving the New York State Secretary of State pursuant to Partnership Law § 121-109(a)(1) on June 9, 2015 (*see* Motion for Default Judgment [Motion], Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to Adonai by first class mail on June 9, 2015 (*see id.*). Although directed in the cover letter served with the notice of hearing and complaint (*see* Motion, Exhibit A), Adonai did not file an answer to the complaint, and failed to appear at the pre-hearing conference scheduled for July 7, 2015 (*see* Motion, Exhibit B, Affirmation of Deborah Gorman, Esq. [Gorman Aff.] ¶¶ 4-5).

As stated in the June 9, 2015 notice of hearing, an adjudicatory hearing convened on August 6, 2015 before Administrative Law Judge (ALJ) D. Scott Bassinson 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 Adonai.

At the August 6, 2015 adjudicatory hearing, Department staff noted for the record that Adonai did not answer the complaint, and failed to appear at the pre-hearing conference. As noted above, Adonai did not appear at the adjudicatory hearing. Consequently, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. ALJ Bassinson reserved on the oral motion and held the record open. Department staff has now submitted a written motion for a default judgment with supporting papers. Attached to this default summary report as Appendix A is a list of the documents that Department staff submitted with the motion.

Applicable Regulatory Provision

Section 612.2. Registration of Facilities.¹

“(a) *Existing facilities.*

“(1) Within one year of the effective date of these regulations, the owner of any petroleum storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.”

* * *

“(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.”

Findings of Fact

The following facts are found based upon the documents submitted with and in support of Department staff’s motion for a default judgment:

1. Respondent Adonai Realty L.P. (Adonai) owns a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 1036 Intervale Avenue, Bronx, New York (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 2,000 gallons and is located above ground. (*See* Motion, Exhibits D, E, F, and G.)
2. Adonai is an active domestic limited partnership in the State of New York (*see* Motion, Exhibit H).

¹ Subsequent to the commencement of this proceeding, 6 NYCRR Part 612 and other related regulations were repealed, and replaced by a revised 6 NYCRR Part 613, effective October 11, 2015. The registration requirements applicable upon transfer of ownership of real property on which a PBS facility is located have been expanded, and are now found at 6 NYCRR 613-1.9(d)(1)-(5). For purposes of the violations alleged in this matter, the prior version of 6 NYCRR Part 612 applies.

3. On March 5, 2001, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-468975 to the NYC/HPD/DAMP. This registration expired on March 6, 2004. At the bottom of the Certificate, in bold capital letters, is the following: “**THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.**” (*See* Motion, Exhibit F.)
4. On October 8, 2004, the Neighborhood Partnership Housing Development Fund Company, Inc., conveyed all right, title and interest in the facility to Adonai Realty L.P. (*See* Motion, Exhibit D.)
5. Yvonne M. Ward, Esq., is an attorney in the Department’s Office of General Counsel, and is familiar with the Department’s procedures regarding issuance of petroleum bulk storage facility registration certificates. On May 29, 2015, Ms. Ward searched the Department’s petroleum bulk storage registration database, which showed the following. The combined capacity of the tank at Adonai’s facility exceeded 1,100 gallons. As of the date of Ms. Ward’s database search, the registration for PBS facility No. 2-468975 neither reflected that the current owner of the facility is Adonai, nor that the tank at the facility had been removed or closed in accordance with applicable regulations. (*See* Motion, Exhibit A, Affirmation of Yvonne M. Ward, Esq. [Ward Aff.] ¶¶ 2-10, 12.)²
6. Department staff commenced the captioned proceeding by personally serving the New York State Secretary of State, pursuant to the Partnership Law § 121-109(a)(1), with a copy of a cover letter, the notice of hearing, and the complaint, all dated June 9, 2015. Consistent with CPLR 3215(g)(4), Department staff also provided additional service of the notice of hearing and complaint as well as notice of the service on the Secretary of State to Adonai by first class mail on June 9, 2015. (*See* Motion, Exhibit C including attached Receipt for Service No. 201506230009.)
7. Adonai did not answer the complaint, and failed to appear at the pre-hearing conference scheduled for July 7, 2015, as directed in the cover letter served with the notice of hearing and complaint. Also, Adonai did not appear at the August 6, 2015 adjudicatory hearing, as directed in the notice of hearing. (*See* Motion, Exhibit B, Gorman Aff. ¶¶ 4-6.)

Discussion

A respondent must file an answer within 20 days after receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent’s failure to timely file an answer “constitutes a default and a waiver of respondent’s right to a hearing” (6 NYCRR 622.15[a]). Attendance at a pre-hearing conference, when scheduled, is mandatory, and the failure to do so “constitutes a

² In her affirmation (*see* Motion, Exhibit A, Ward Aff. ¶ 11), Ms. Ward states that the Department issued a PBS certificate for Adonai’s facility on February 4, 2002. The documents submitted on the motion, however, show that the Department issued the certificate for this facility on March 5, 2001, which expired on March 6, 2004 (*see* Motion, Exhibits F and G). The error may be a misreading of the Facility Information Report submitted with the motion, which states that the certificate was **printed** on February 4, 2002 (*see* Motion, Exhibit G). Immediately below that entry, the same document states that the certificate was **issued** on March 5, 2001 (*see id.*).

default and a waiver of the opportunity for a hearing” (6 NYCRR 622.8[c]). Furthermore, “[a] respondent’s ... failure to appear at the hearing ... constitutes a default and waiver of respondent’s right to a hearing” (6 NYCRR 622.15[a]).

Department staff may move for a default judgment when a respondent does not answer a complaint, or fails to appear for either a pre-hearing conference or the adjudicatory hearing. Such motion must contain the following: (1) proof of service of the notice of hearing and complaint upon respondent; (2) proof that respondent did not appear or file a timely answer; and (3) a proposed order (*see* 6 NYCRR 622.15[b][1]-[3]).

The record establishes that the criteria outlined at 6 NYCRR 622.15(b)(1)-(3) for a motion for a default judgment have been met. Department staff duly served the notice of hearing and complaint upon Adonai. In addition to serving the Secretary of State pursuant to Partnership Law § 121-109(a)(1), Department staff provided additional notice to respondent consistent with CPLR 3215(g)(4). Adonai did not answer the complaint and failed to appear at a pre-hearing conference scheduled for July 7, 2015. Adonai did not appear at the adjudicatory hearing scheduled on August 6, 2015, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion, Exhibit I). In addition, staff also served Adonai with copies of the motion for default judgment and supporting papers (*see* January 7, 2016 letter from Deborah Gorman, Esq., to Chief ALJ James McClymonds enclosing motion papers and copying of same to Adonai).

The Commissioner has held that “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them” (*Alvin Hunt, d/b/a Our Cleaners*, Decision and Order dated July 25, 2006 at 6 [citations omitted]). In addition, to sustain a motion for a default judgment, Department staff must “provide proof of the facts sufficient to support the claim” (*Queen City Recycle Center, Inc.*, Decision and Order dated December 12, 2013 at 3).

In this case, Department staff’s submissions with the motion for a default judgment demonstrate staff’s claim that Adonai violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister the petroleum bulk storage facility located at 1036 Intervale Avenue in the Bronx, within 30 days after Adonai became the owner of the facility.

Department staff seeks a civil penalty of ten thousand dollars (\$10,000). Staff’s submissions on the motion for a default judgment elaborate upon the requested civil penalty by discussing the Department’s Civil Penalty Policy (DEE-1 dated June 20, 1990), and administrative precedent relating to similar violations. (*See* Motion, Exhibit A [Complaint at Wherefore Clause ¶ II]; *see also* Motion, Exhibit B, Gorman Aff. ¶¶13-18.) I conclude that Department staff’s request for a ten thousand dollars (\$10,000) civil penalty is consistent with the Department’s civil penalty policy, as well as the applicable provisions of ECL Article 71 and administrative precedent. (*See e.g., 12 Martense Associates, LLC*, Order dated December 19, 2011 at 2.)³

³ In its motion for a default judgment, Department staff also requested that the Commissioner “direct[] Respondents [sic] to permanently cease and desist from any and all future violations of the ECL and the Rules and Regulations promulgated pursuant thereto” (Motion at Wherefore Clause ¶ IV; *see also*, Motion, Exhibit I, Proposed Order at

Recommendations

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

1. Grants Department staff's motion for default judgment, holding respondent Adonai Realty L.P. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Concludes that respondent Adonai Realty L.P. violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum bulk storage facility located at 1036 Intervale Avenue, Bronx, New York, within 30 days after becoming the owner of the PBS facility on October 8, 2004;
3. Directs respondent Adonai Realty L.P. to submit to the Department, within fifteen (15) days after service of the Commissioner's order, a complete registration application for the facility with any applicable registration fees;
4. Directs Adonai Realty L.P. 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. Directs such other and further relief as the Commissioner may deem just and appropriate.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
February 8, 2016

Ordering Clause ¶ III). This request is unnecessary because Adonai must already comply with the applicable provisions of the ECL and implementing regulations.

APPENDIX A

Matter of Adonai Realty L.P.
DEC File No. 2-468975NJB2
Motion for Default Judgment

1. Cover letter dated January 7, 2016, addressed to Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services, noting that Adonai was served with copies through the New York State Secretary of State and by first class mail.
2. Notice of Motion for Default Judgment dated January 7, 2016.
3. Motion for Default Judgment with the following Exhibits:
 - A. Cover letter, Notice of Hearing, Complaint, and Statement of Readiness, all dated June 9, 2015, as well as an undated Affirmation of Yvonne M. Ward, Esq.;
 - B. Affirmation of Deborah Gorman, Esq., dated January 7, 2016;
 - C. Affidavit of Service by Kara Paulsen sworn to January 4, 2016, with Department of State Receipt for Service dated June 9, 2015 demonstrating service upon Adonai pursuant to Revised Limited Partnership Act § 121-109;
 - D. Printout of search on Automated City Register Information System ("ACRIS"), dated January 5, 2016, and deed dated October 8, 2004;
 - E. Petroleum Bulk Storage (PBS) Application No. 2-468975 dated February 26, 2001;
 - F. PBS Certificate No. 2-468975 issued on March 5, 2001, which expired on March 6, 2004, and printed on January 5, 2016;
 - G. Facility Information Report PBS No. 2-468975 issued on March 5, 2001, noting that the registration expired on March 6, 2004, and that the certificate was printed on February 4, 2002;
 - H. New York State Department of State Entity Information Sheet regarding Adonai Realty L.P. reflecting information through January 4, 2016; and
 - I. Draft Order.