

**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

-by-

DEC Case No.
PBS.2-291455.10.2018

AUDUBON 550 W 171, LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Audubon 550 W 171, LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage (PBS) facility at 550-52 West 171st Street, New York, New York, within thirty (30) days of the transfer of ownership of the facility to it on July 28, 2015. Respondent's facility includes an aboveground petroleum bulk storage tank with a capacity of 5,000 gallons.

Administrative Law Judge (ALJ) P. Nicholas Garlick of the Department's Office of Hearings and Mediation Services was assigned to this matter and 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 September 13, 2018, and failed to appear for the adjudicatory hearing scheduled for October 15, 2018 (*see* Default Summary Report at 3 [Finding of Fact No. 7]). At the October 15, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Michael S. Caruso, who presided at the hearing, reserved on the motion, and Department staff later submitted a written 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. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to register its PBS facility thirty (30) days after acquiring the property on July 28, 2015 and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Department counsel correctly points out that the requirement to register PBS facilities is one of the “cornerstones” of the PBS regulatory scheme (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated April 30, 2019, ¶ 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Department staff, in its complaint, sought a penalty of ten thousand dollars (\$10,000). In its default papers and proposed order, Department staff seeks to reduce the civil penalty to seven thousand five hundred (\$7,500). ECL 71-1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In proceedings similar to this one, Department staff has requested penalties that take into account the duration of the violation. For New York City apartment building registration violations that extend from two to five years, Department staff has, absent other violations, generally requested a penalty of seven thousand five hundred (\$7,500) (*see Matter of 12 Martense Associates, LLC*, Order of the Commissioner, December 19, 2011, at 2). In this matter, respondent was required to register its facility on or before August 27, 2015. Based on this record, the requested penalty of seven thousand five hundred (\$7,500) 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, within fifteen (15) days of the service of this order upon respondent Audubon 550 W 171, LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility together with 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 Audubon 550 W 171, LLC waived its right to be heard at the hearing.
- II. Based on the pleadings and papers submitted with and in support of Department staff’s motion, respondent Audubon 550 W 171, LLC is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to timely register its PBS facility located at 550-52 West 171st Street, New York, New York within thirty (30) days following the transfer of the ownership of the facility to it on July 28, 2015.
- III. Within fifteen (15) days of the service of this order upon respondent Audubon 550 W 171, LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility together with applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent Audubon 550 W 171, LLC, respondent shall pay a civil penalty in the amount of seven

thousand five hundred dollars (\$7,500) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

V. 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 Audubon 550 W 171, 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
August 27, 2019

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**

-by-

DEC Case No.
PBS.2-291455.10.2018

Audubon 550 W 171, LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Audubon 550 W 171, LLC (respondent) 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(d)(1), for failing to register its petroleum bulk storage (PBS) facility located at 550-52 West 171st Street, New York, New York (facility) within 30 days of the transfer of ownership of the facility to it. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1); (ii) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (iii) directing respondent to register its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order, remit the applicable registration fee, and submit a complete registration application; and (iv) 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 personally serving the New York State Department of State on August 1, 2018 (*see* Motion for Default Judgment, Exhibit C). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on August 1, 2018 (*see id.*). 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 (*see* Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on October 15, 2018, an adjudicatory hearing was convened before Administrative Law Judge Michael S. Caruso. 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.

ALJ Caruso noted 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 Caruso reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On April 30, 2019, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on April 30, 2019 (*see* Affirmation of Service of Deborah Gorman, dated April 30, 2019).

Applicable Regulatory Provision

613-1.9 Registration ¹

* * *

(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 pleadings and papers submitted with and in support of staff's motion for a default judgment:

1. Respondent Audubon 550 W 171, LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 550-52 West 171st Street, New York, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 5,000 gallons and is located aboveground. *See* Motion for Default Judgment, Exhibits D, E, F, and G.
2. Respondent is an active domestic limited liability company in the State of New York. *See* Motion for Default Judgment, Exhibit H.

¹ ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first." In addition, for violations occurring before October 11, 2015 (the effective date of 6 NYCRR 613-1.9), Department staff's pleadings incorporate former 6 NYCRR 612.2(b) by reference, which read, "Transfer of Ownership. If ownership of a facility changes, the new owner must re-register the facility with the Department within thirty (30) days of ownership transfer."

3. Pursuant to a registration application received July 25, 2012, the Department issued PBS Certificate Number 2-291455 to Baxter 18 Realty Co., LLC, respondent's predecessor in interest, on August 31, 2012 with an expiration date of July 28, 2017. In bold capital letters, at the bottom of the Certificate is the following declaration: "THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE." *See* Motion for Default Judgment, Exhibits E, F and G.
4. On July 28, 2015, Baxter 18 Realty Co., LLC transferred all right, title and interest in the facility to Audubon 550 W 171, LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York (Document ID: 2015073000620001001EF0B9). *See* Motion for Default Judgment, Exhibit D.
5. As of April 30, 2019, the facility had not been registered by the new owner, Audubon 550 W 171, LLC. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated April 30, 2019, ¶¶8 & 9; *see also* Exhibit G.
6. As shown by Receipt for Service No. 201808080410 issued by the New York State Department of State, respondent was served personally, on August 1, 2018 pursuant to section 303 of the Limited Liability Company 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(d)(1), together with a cover letter, statement of readiness and supporting affirmation, for failure to timely re-register its PBS facility located at 550-52 West 171st Street, New York, New York. 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* Motion for Default Judgment, Exhibit C.
7. 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 cover letter and notice of hearing served with the complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on October 15, 2018, as directed in the notice of hearing. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., ¶¶ 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 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[s]" alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, June 5, 2013, at 3.) Staff is required to support its 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 [*Samber*], at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* 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 on October 15, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit J). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (*see* Affirmation of Service of Deborah Gorman, dated April 30, 2019, ¶ 3).

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 register its petroleum bulk storage facility located at 550-52 West 171st Street, New York, New York, within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) (*see Samber* at 1).

Staff's complaint requested a civil penalty in the amount of ten thousand dollars (\$10,000). In its motion for default judgment and proposed order, Department staff seeks to reduce the civil penalty to seven thousand five hundred (\$7,500). Staff's submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department's Civil Penalty Policy, DEE-1, and administrative precedent relating to similar violations (*see* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause ¶ II; *see also* Exhibit B, Gorman Affirmation, dated April 30, 2019, ¶¶ 13-18). Accordingly, staff's motion to reduce the civil penalty to seven thousand five hundred (\$7,500) should be granted because respondent is not prejudiced by reducing the penalty requested.

I find that staff's request for a civil penalty in the amount of seven thousand five hundred dollars (\$7,500) 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).

Conclusion of Law

By failing to register its PBS facility located at 550-52 West 171st Street, New York, New York, within 30 days of the transfer of ownership of the facility to it, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Audubon 550 W 171, LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Audubon 550 W 171, LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to timely register its PBS facility located at 550-52 West 171st Street, New York, New York within 30 days of the transfer of ownership of the facility to it;
3. Directing respondent Audubon 550 W 171, LLC to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, including correction of the facility owner's corporate name, together with the applicable registration fees;
4. Directing respondent Audubon 550 W 171, LLC to pay a civil penalty in the amount of seven thousand five hundred (\$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/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
August 23, 2019

APPENDIX A

Matter of Audubon 550 W 171, LLC
DEC File No. PBS.2-291455.10.2018
Motion for Default Judgment

1. Cover letter, dated April 30, 2019, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers
2. Notice of Motion for Default Judgment dated April 30, 2019
3. Motion for Default Judgment, dated April 30, 2019, attaching Exhibits A and B:
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated August 1, 2018
 - B. Affirmation of Deborah Gorman, Esq., dated April 30, 2019, attaching Exhibits C – H and J
 - C. Affidavit of Service of Dale Thiel, sworn to April 30, 2019, attaching Department of State Receipt for Service, dated August 1, 2018, reflecting service upon respondent pursuant to section 303 of the Limited liability Company Law
 - D. Printout of search on Automated City Register Information System (ACRIS), dated April 18, 2019, attaching deed dated July 28, 2015
 - E. Petroleum Bulk Storage (PBS) Application from Baxter 18 Realty Co., LLC, PBS No. 2-291455, received July 25, 2012
 - F. PBS Certificate, PBS No. 2-291455 issued to Baxter 18 Realty Co., LLC on August 31, 2012, with an expiration date of July 28, 2017
 - G. Facility Information Report, PBS No. 2-291455, printed April 17, 2019
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Audubon 550 W 171, LLC, reflecting information through April 17, 2019
 - J. Draft Order²
4. Affirmation of Service of Deborah Gorman, dated April 30, 2019

² There is no Exhibit I.