

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.2-602050.3.2018

-by-

BEACH 119 LLC,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Beach 119 LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility at 131 Beach 119th Street, Rockaway Park, New York (facility) within 30 days of the transfer of ownership of the facility to respondent. Respondent took ownership of the facility on October 27, 2011. An underground storage tank with a capacity of 4,000 gallons is located at the facility.

On July 17, 2018, an adjudicatory hearing was convened before Maria E. Villa, an administrative law judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Villa 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 February 7, 2018, and failed to appear for the adjudicatory hearing scheduled for March 9, 2018 and reconvened on July 17, 2018 (see Hearing Report at 3 [Finding of Fact No.7]).

Respondent failed to answer or appear in this matter, and the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 3-4). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 17, 2018, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim, and proved its case on the merits by a preponderance of the evidence (see id.). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent was required to register the facility within 30 days of the transfer of ownership of the facility to it on October 27, 2011 (see ECL 17-1009[2]; Hearing Report at 4). Respondent's failure to properly register the facility violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of title 10 of article 17 and its implementing regulations. Department staff, in its papers, sought a civil penalty in the amount of ten thousand dollars (\$10,000). Where, as here, an owner has not registered the facility for more than five years, and no other violations or mitigating or aggravating factors exist, 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). The requested penalty of ten thousand dollars (\$10,000) is authorized and appropriate. The civil penalty is to be submitted to the Department within fifteen (15) days of the service of this order upon respondent.

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 respondent, 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 Beach 119 LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Beach 119 LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 131 Beach 119th Street, Rockaway Park, New York within thirty (30) days of the transfer of ownership of the facility to respondent.
- III. Within fifteen (15) days of the service of this order upon respondent Beach 119 LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent Beach 119 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, 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 Beach 119 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: August 15, 2018
Albany, New York

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),

**HEARING
REPORT**
DEC Case No.
PBS.2-602050.3.2018

-by-

BEACH 119 LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Beach 119 LLC (respondent) with a notice of hearing and complaint, dated January 2, 2018, alleging that respondent violated ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), when respondent failed to register its petroleum bulk storage facility located at 131 Beach 119th Street, Rockaway Park, New York on or before November 26, 2011, thirty days after the transfer of ownership to respondent. 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, including any past registration fees, along with a complete registration application; and (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Respondent is a foreign limited liability company, and service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State on January 2, 2018. Exhibit 3. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about January 2, 2018. Id. Respondent failed to file an answer to the complaint. The notice of hearing and accompanying cover letter directed respondent to appear at a pre-hearing conference scheduled for February 7, 2018, and to appear at an adjudicatory hearing scheduled for March 9, 2018. Exhibit 2. Respondent failed to appear at the pre-hearing conference and the adjudicatory hearing.

As stated in the notice of hearing, on March 9, 2018, an adjudicatory hearing was convened at 12:43 p.m. by video conference before administrative law judge ("ALJ") Michael S. Caruso. 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. ALJ Caruso reserved on the motion, and the hearing was rescheduled for July 17, 2018. At the hearing held on July 17, 2018 before ALJ Maria E. Villa, respondent again failed to appear, and Department staff renewed its motion for default judgment. Department staff was represented by Brian W. Lampert, a legal intern with the Department, and Deborah Gorman, Esq., Senior Attorney, Office of General Counsel.

Applicable Regulatory Provision

Section 613-1.9(d)(1) of 6 NYCRR provides that “[i]f 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.”¹

Findings of Fact

Section 622.11(c) states that the party bearing the burden of proof must sustain that burden by a preponderance of the evidence. The following findings are based upon the preponderance of evidence presented at the hearing:

1. Respondent Beach 119 LLC (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 131 Beach 119th Street, Rockaway Park, New York (facility). Petroleum storage tank number 001 at the facility has a capacity of 4,000 gallons and is located underground. Exhibits 6, 7, and 8; testimony of Benjamin Conlon (Conlon Testimony).²
2. Respondent is an active foreign limited liability company. Exhibit 5.
3. On December 21, 2009, the Department issued Petroleum Bulk Storage Certificate No. 2-602050 to First Rockaway Coast Corporation, the owner of the facility at that time. In bold capital letters, at the bottom of the Certificate, the Certificate states that “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” The expiration date of the certificate was January 4, 2015. Exhibit 6, 7, and 8; Conlon Testimony.

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.”

² Benjamin Conlon, Esq. is an associate attorney in the Department's Office of General Counsel. Mr. Conlon is a Section Chief in the Bureau of Remediation. His responsibilities include enforcement of the Petroleum Bulk Storage laws and regulations. He is authorized to access and inspect the Department's unified information system (“UIS”), and the electronic repository for scanned documents (“DecDOCS”). The UIS and DecDOCS are databases maintained by the Department, and contain petroleum bulk storage facility records, including registrations filed pursuant to Section 613-1.9 of 6 NYCRR. Conlon Testimony.

4. On October 27, 2011, First Rockaway Coast Corp. transferred all right, title and interest in the facility to respondent Beach 119 LLC, the facility's current owner. Exhibit 4; Conlon Testimony.
5. On December 27, 2017, a search of the Department's PBS registration database revealed that respondent had not submitted an application to register the tank. January 2, 2018 Affirmation of Deborah Gorman, Esq., ¶¶ 9-12. A similar search conducted on July 17, 2018 showed that respondent had failed to file an application to register the tank as of that date. Conlon Testimony.
6. On January 2, 2018, pursuant to Section 303 of the Limited Liability Company Law, respondent was served with a cover letter, notice of hearing and complaint, a statement of readiness, and supporting affirmation, all dated January 2, 2018, alleging that respondent violated ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), by failing to renew the registration of its petroleum bulk storage facility located at 131 Beach 119th Street, Rockaway Park, New York within 30 days of the transfer of ownership of the facility to respondent. 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 January 2, 2018. Exhibit 2; Exhibit 3, Affidavit of Service of Dale Thiel, sworn to June 22, 2018, ¶¶ 3-4.
7. The Department had prior contact with respondent, and although settlement was discussed, Department staff was unable to make further contact with respondent. Exhibit 9; June 22, 2018 Affirmation of Deborah Gorman, ¶ 3-5. As a result, Department staff served respondent with the pleadings in this matter. *Id.*, ¶ 3. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for February 7, 2018, and failed to appear for the adjudicatory hearing scheduled in the matter for March 9, 2018, and reconvened on July 17, 2018. 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. 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. 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; see also 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 proof submitted must be sufficient to enable the ALJ and the Commissioner to determine that Department staff has a viable claim. See Matter of Samber Holding Corp., Order of the Commissioner, at 1.

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 February 7, 2018 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 March 9, 2018, as directed in both the cover letter and the notice of hearing, and reconvened on July 17, 2018, as directed in the June 13, 2018 notice of hearing. Exhibit 11. Department staff has submitted a proposed order with its motion. Exhibit 10. Staff also served respondent with copies of the motion for default judgment and supporting papers.

Department staff’s submissions in support of the motion for a default judgment provide proof of the facts sufficient to enable the ALJ to determine that Department staff has a viable claim that respondent violated ECL 17-1009 and Section 613-1.9(d)(1) of 6 NYCRR by failing to register its petroleum bulk storage facility located at 131 Beach 119th Street, Rockaway Park, New York on or before thirty (30) days from the date of the transfer of the property to respondent. See Matter of Samber Holding Corp., Order of the Commissioner, at 1. Department staff is entitled to a default judgment in this matter pursuant to 6 NYCRR 622.15.

Moreover, the proof presented at the hearing, conducted in respondent’s absence, demonstrates by a preponderance of the evidence that respondent failed to register its petroleum bulk storage tank within 30 days of transfer of ownership. As of the date of the hearing, the tank remained unregistered. Conlon Testimony. The Department is entitled to judgment on the merits.

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 renew its registration 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.

Conclusion of Law

By failing to register its PBS facility at 131 Beach 119th Street, Rockaway Park, New York, within 30 days of the transfer of the facility to respondent, respondent violated ECL 17-1009 and Section 613-1.9(d)(1) of 6 NYCRR.

Recommendations

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

1. Granting Department staff's motion for default, holding respondent Beach 119 LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof presented at the adjudicatory hearing, respondent Beach 119 LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 131 Beach 119th Street, Rockaway Park, New York on or before thirty (30) days from the date of the transfer of the property to respondent.
3. Directing respondent Beach 119 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 registration fees;
4. Directing respondent Beach 119 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 the Commissioner may deem just and appropriate.

_____/s/_____
Maria E. Villa
Administrative Law Judge

Dated: August 1, 2018
Albany, New York

Exhibit Chart – PBS Expedited Proceeding
Matter of Beach LLC 119
 DEC Case No. PBS.2-602050.3.2018
 July 17, 2018 – DEC Central Office
 Edrol File No. 180717090207

Exhibit	Description
1	May 30, 2018 Practice Order
2	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, all dated January 2, 2018
3	Affidavit of Service of Dale Thiel, sworn to June 22, 2018, with New York State Department of State Receipt for Service dated January 2, 2018
4	New York City Department of Finance July 12, 2018 ACRIS search, with October 27, 2011 deed to respondent
5	NYS Department of State Entity Information (current through July 11, 2018)
6	PBS Program Facility Information Report, printed July 12, 2018
7	PBS Application (marked received December 17, 2009)
8	Petroleum Bulk Storage Certificate No. 2-602050, issued December 21, 2009; expiration date: January 4, 2015 (2 certificates; 2 print dates (lower left corner))
9	June 22, 2018 Affirmation of Deborah Gorman
10	Proposed Order
11	June 13, 2018 Notice of Hearing