

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC CASE NO.
2-609074YW

-by-

EV 1ST AVENUE PROPERTY OWNER, L.P.,

Respondent.

On June 4, 2014, an adjudicatory hearing was convened before D. Scott Bassinson, Administrative Law Judge (“ALJ”) of the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation (“Department”). The hearing addressed the allegations of Department staff that respondent EV 1st Avenue Property Owner, L.P. (“respondent”) violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 101 Third Avenue, New York, New York (“facility”), within 30 days after it became the owner of the facility.

ALJ Bassinson prepared the attached hearing report, which I adopt as my decision in this matter. As set forth in the ALJ’s hearing report, respondent EV 1st Avenue Property Owner, L.P. 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 22, 2014, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on May 23, 2014, as directed in the notice of hearing (see Hearing Report, at 4 [Finding of Fact No. 9]).

As a consequence of respondent’s failure to answer or appear in this matter, the ALJ recommended that Department staff’s motion for default be granted (see Hearing Report, at 5), and I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Furthermore, at the hearing Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 5). Accordingly, staff is entitled to a judgment based on record evidence.

In its papers, Department staff sought a civil penalty of ten thousand dollars (\$10,000) (see Staff Ex. 1, Complaint, at Wherefore Clause ¶ II). At the hearing, the ALJ granted staff’s motion to reduce the requested civil penalty to five thousand dollars (\$5,000) (see Hearing Report, at 2). Respondent has failed to reregister its facility since it acquired the property in September 2013, and the civil penalty requested by staff is authorized and appropriate (see ECL 71-1929; see also Matter of 12 Martense Associates LLC, Order of the Commissioner, December

19, 2011, at 2). Respondent is also directed to submit to the Department a petroleum bulk storage registration application for the facility, plus applicable registration fees, within fifteen (15) days of the service of this order upon it.

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 EV 1st Avenue Property Owner, L.P. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent EV 1st Avenue Property Owner, L.P. is adjudged to have violated 6 NYCRR 612.2 for failing to reregister its petroleum storage facility located at 101 Third Avenue, New York, New York, within 30 days after it became the owner of the facility.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent EV 1st Avenue Property Owner, L.P. shall submit to the Department a petroleum bulk storage registration application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent EV 1st Avenue Property Owner, L.P. shall pay a civil penalty in the amount of five thousand dollars (\$5,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The facility petroleum bulk storage registration application, applicable registration fees, and the penalty payment shall be sent to the following address:

Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Brooke Turallo.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Brooke Turallo at the address referenced in paragraph V of this order.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) 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.
2-609074YW

-by-

EV 1ST AVENUE PROPERTY OWNER, L.P.,

Respondent.

Procedural History

Respondent EV 1st Avenue Property Owner, L.P. (“respondent”) was served with a notice of hearing and complaint, dated March 20, 2014, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum storage facility located at 101 Third Avenue, New York, New York, within 30 days after it became the owner of the facility. The complaint seeks an order of the Commissioner: (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2; (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (3) directing respondent to reregister its petroleum storage facility within fifteen (15) days of the service of the Commissioner’s order upon respondent; and (4) granting such other and further relief as the Commissioner may deem just and proper.

Inasmuch as respondent is an active domestic limited partnership 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 21, 2014. Respondent was also served with the notice of hearing and complaint by regular mail on March 21, 2014. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 22, 2014, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on May 23, 2014, an adjudicatory hearing was convened before Administrative Law Judge (“ALJ”) Richard R. Wissler of the Department of Environmental Conservation’s (“Department”) Office of Hearings and Mediation Services (“OHMS”) at the Department’s Region 2 offices, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407. Department staff was represented by Scott Caruso, Esq., Section Chief, Spill and Bulk Storage Section, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a program staff witness. Noting for the record that respondent had failed to answer the complaint, failed to appear for the prehearing conference and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. The ALJ reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). Moreover, the ALJ noted Department staff's readiness for hearing and noted the failure of the respondent to appear. The ALJ advised that the hearing, in the absence of respondent, would be convened on a subsequent date.

On June 4, 2014, the adjudicatory hearing was convened before the undersigned ALJ at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by Scott W. Caruso, Esq. Department staff orally renewed its motion for a default judgment, and also sought judgment on the merits.

Staff also made a motion to amend the complaint to reduce the requested penalty from ten thousand dollars (\$10,000) to five thousand dollars (\$5,000), in accordance with general penalty guidelines as set forth in Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2 (civil penalty of \$5,000 is appropriate for registration violations of less than two years' duration). Reduction of the penalty requested in the complaint in this matter does not raise the same due process concerns as would a request to increase the penalty in a default situation (see Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 2-3; see also CPLR 3215[b] (default judgment "shall not exceed in amount ... that demanded in the complaint")), and the requested reduction does not otherwise prejudice respondent. I therefore granted staff's motion to amend at the June 4, 2014 hearing (see 6 NYCRR 622.5[b] ["a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ ... and absent prejudice to the ability of any other party to respond"]).

Department staff called one witness, Brooke Turallo, a Legal Assistant in the Department's Office of General Counsel's Petroleum Spill and Bulk Storage ("PBS") Section. In all, eight (8) exhibits were received in evidence.

Applicable Regulatory Provision

Section 612.2. Registration of facilities.

(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.

(2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred.

(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

1. Respondent EV 1ST Avenue Property Owner, L.P. is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 101 Third Avenue, New York, New York (“facility”). In particular, petroleum storage tank number 1 at the facility has a capacity of 3,000 gallons and is located aboveground (Staff Exhibits [“Staff Exs.”] 4, 6 and 7).
2. Respondent is an active domestic limited partnership in the State of New York (Staff Ex. 3).
3. On July 7, 2003, the Department issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-609074, registering the PBS facility, to 99-105 3 Ave Realty LLC (Staff Ex. 7). This registration expired on July 7, 2008 (*id.*; *see also* Staff Ex. 4). Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE” (Staff Ex. 7).
4. On September 18, 2013, Village JV 49 ½ First Avenue LLC, by deed, transferred all right, title and interest in the facility to respondent EV 1st Avenue Property Owner, L.P., the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, City Register File No. (“CRFN”) 2013000440466 (Staff Ex. 5).
5. Brooke Turallo is a Legal Assistant in the PBS Section of the Department’s Office of General Counsel, and is authorized to access, search and inspect the Department’s unified information system (“UIS”) and “D2” databases. The UIS is a database maintained by the Department that contains petroleum storage facility records filed with the Department, which records include petroleum storage facility registrations filed pursuant to 6 NYCRR 612.2. The Department has very recently begun utilizing the D2 database with respect to the storage of information with respect to petroleum storage facilities (Testimony of Brooke Turallo).
6. On June 4, 2014, Brooke Turallo searched the petroleum storage facility records contained in the Department’s UIS and D2 databases for any petroleum facility registration or renewal registration or any petroleum storage facility re-registration filed by respondent for the facility (Testimony of Brooke Turallo).

7. As a result of her searches, Brooke Turallo determined that respondent had not reregistered the facility at any time after assuming its ownership on September 18, 2013 (Testimony of Brooke Turallo).
8. As shown by Receipt for Service No. 201403280271 issued by the New York State Department of State, respondent was served on March 21, 2014, pursuant to section 121-109 of the Revised Limited Partnership Act with a notice of hearing and complaint dated March 20, 2014, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum storage facility located at 101 Third Avenue, New York, New York, within 30 days after acquiring the facility. The notice of hearing and complaint was also served on respondent by regular mail on March 21, 2014 (Staff Ex. 2).
9. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 22, 2014, as directed in the cover letter served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May 23, 2014, as directed in the notice of hearing (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 (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 and/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" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

In this case, Department staff's proof presents a prima facie case demonstrating that respondent failed to reregister its petroleum storage facility located at 101 Third Avenue, New York, New York, within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2.

The record shows that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 22, 2014, as directed in the cover letter served with the notice of hearing and complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on May 23, 2014, as directed in the notice of hearing. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to reregister its petroleum storage facility within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

The \$5,000 civil penalty that Department staff seeks is consistent with the Department's penalty policy and administrative precedent, as well as applicable provisions of ECL article 71.

Recommendation

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

1. Granting Department staff's motion for default, finding respondent EV 1st Avenue Property Owner, L.P. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding, based upon the proof adduced at the adjudicatory hearing, that respondent EV 1st Avenue Property Owner, L.P. violated 6 NYCRR 612.2 when it failed to reregister its petroleum storage facility located at 101 Third Avenue, New York, New York, within 30 days after it became the owner of the facility;
3. Directing respondent EV 1st Avenue Property Owner, L.P. to submit to the Department, within fifteen (15) days of service of the order on respondent, a registration application for the above facility, accompanied by past due and current registration fees;
4. Directing respondent EV 1st Avenue Property Owner, L.P. to pay a civil penalty in the amount of five thousand dollars (\$5,000); and

5. Directing such other and further relief as he may deem just and proper.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
June 5, 2014

EXHIBIT CHART – PBS EXPEDITED PROCEEDING

Matter of EV 1st Avenue Property Owner, L.P.

June 4, 2014 – Central Office, 625 Broadway, Albany, NY

DEC Case No. 2-609074YW - Ediol File No. 050704133556

Exhibit No.	Description	ID'd	Rec'd	Offered By	Notes
1	Cover Letter from Yvonne M. Ward, Esq., to respondent, dated March 20, 2014. Notice of Hearing and Complaint, dated March 20, 2014. Statement of Readiness, dated March 20, 2014. Affidavit of Brooke Turallo, sworn to March 20, 2014.	✓	✓	Department Staff	
2	Affidavit of Service of Brooke Turallo, sworn to, May 16, 2014, attaching NYS Department of State (“DOS”) Receipt for Service, dated, March 21, 2014.	✓	✓	Department Staff	
3	NYS DOS Corporate Entity Information, dated June 4, 2014.	✓	✓	Department Staff	
4	PBS Program Facility Information Report, printed June 4, 2014.	✓	✓	Department Staff	
5	New York City Department of Finance ACRIS Title Search, dated June 4, 2014. Deed to respondent, dated September 18, 2013.	✓	✓	Department Staff	
6	PBS Application/Information Correction form filed by 99-105 3 Ave Realty LLC, for PBS No. 2-609074, received June 22, 2004.	✓	✓	Department Staff	
7	PBS Certificate No. 2-609074 issued July 7, 2003, expiration date July 7, 2008.	✓	✓	Department Staff	
8	Affirmation of Yvonne M. Ward, Esq. dated May 21, 2014.	✓	✓	Department Staff	