

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.2-250937.6.2017

**G & M PROPERTIES HP HOUSING DEVELOPMENT
FUND COMPANY, INC. (1350-1352 University Avenue,
Bronx, New York),**

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent G & M Properties HP Housing Development Fund Company, Inc. (respondent) violated ECL 17-1009 and 6 NYCRR 613-1.9(d) by failing to register its petroleum bulk storage facility (facility) at 1350-1352 University Avenue, Bronx, New York (facility) within 30 days of the transfer of ownership of the facility to it on December 23, 2013. An aboveground storage tank with a capacity of 3,000 gallons is located at the facility.

On July 20, 2017, an adjudicatory hearing was convened before Maria E. Villa, Administrative Law Judge (ALJ) of the DEC 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 May 12, 2017, and failed to appear for the adjudicatory hearing scheduled in the matter on June 12, 2017 and reconvened on July 20, 2017 (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 recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 4-5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 20, 2017, 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.

Respondent was required to register the facility following the transfer of ownership of the facility to it in December 2013 (see ECL 17-1009[2]; 6 NYCRR 613-1.9(d)(1); Hearing Report at 5). Respondent submitted a registration application that Department staff received on October 14, 2016, which was incomplete. Although Department staff provided respondent with a notice of incomplete application dated November 28, 2016 detailing the deficiencies to be addressed, respondent has not submitted a complete application. Respondent's failure to properly register the facility violates 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 of ten thousand dollars (\$10,000). At the July 20, 2017 hearing, Department staff moved to amend its complaint to reduce the penalty amount to seven thousand five hundred dollars (\$7,500). The ALJ granted Department staff's motion. Where, as here, an owner has not registered the facility for more than two years but less than five years, and no other violations or mitigating or aggravating factors exist, a civil penalty of seven thousand five hundred dollars (\$7,500) 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 seven thousand five hundred dollars (\$7,500) is authorized and appropriate.

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 it, 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 G & M Properties HP Housing Development Fund Company, Inc. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent G & M Properties HP Housing Development Fund Company, Inc. is adjudged to have violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility located at 1350-1352 University Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to it.
- III. Within fifteen (15) days of the service of this order upon respondent G & M Properties HP Housing Development Fund Company, Inc., respondent shall submit a complete registration application for the facility, along with the applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent G & M Properties HP Housing Development Fund Company, Inc., 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 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 G & M Properties HP Housing Development Fund Company, Inc., 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 9, 2017
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.2-250937.6.2017

-by-

**G & M PROPERTIES HP HOUSING
DEVELOPMENT FUND COMPANY, INC.
(1350-1352 University Avenue, Bronx, New York).**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent G & M Properties HP Housing Development Fund Company, Inc. (respondent) with a notice of hearing and complaint, dated April 10, 2017, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d), for failing to register its petroleum bulk storage facility located at 1350-1352 University Avenue, Bronx, New York within thirty days of the transfer of ownership of the facility 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 service of the Commissioner's order by remitting the applicable registration fee along with a complete registration application; and (4) granting such other and further relief as the Commissioner may deem just and appropriate.

Respondent is an active domestic not-for-profit corporation in the State of New York, and service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State on April 10, 2017 (Exhibit 3). Department staff also served the notice of hearing and complaint upon respondent by first class mail on April 10, 2017 (*id.*). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for May 12, 2017, as directed in the notice of hearing and accompanying cover letter (Exhibit 2).

As stated in the notice of hearing, on June 12, 2017, an adjudicatory hearing was convened at the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York before administrative law judge (ALJ) D. Scott Bassinson. 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.

Department staff indicated that it was prepared to proceed with the hearing, and offered a witness. Noting for the record that respondent had not answered the complaint, had not appeared 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 Bassinson 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). The ALJ noted Department staff's readiness for hearing as well as the failure of respondent to appear, and advised staff that if staff wished to proceed with the hearing on the matter at a later date, the hearing would be reconvened on notice to respondent.

The Office of Hearings and Mediation Services served a Notice of Hearing dated June 16, 2017 on respondent by first class mail. The Notice of Hearing advised respondent that the hearing would reconvene on July 20, 2017 at 9:30 a.m., and the hearing took place on that date and at that time at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by law student intern Theodore Gifford, under the supervision of Benjamin Conlon, Esq., Remediation Bureau, Office of General Counsel. No one appeared on behalf of respondent.

Department staff orally renewed its motion for a default judgment and also sought judgment on the merits.¹ Department staff called one witness, Dale Thiel, a Legal Assistant II for the Department's Office of General Counsel. Eleven exhibits were received in evidence.

Applicable Regulatory Provision²

613-1.9 (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.

¹ At the July 20, 2017 hearing, Department staff moved to amend its complaint to reduce the penalty amount requested from \$10,000 to seven thousand five hundred dollars (\$7,500). The ALJ granted staff's motion pursuant to 6 NYCRR 622.10(b)(1)(i), as respondent was not prejudiced by the penalty reduction.

² Effective October 11, 2015, 6 NYCRR 613-1.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, "(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." ECL 17-1009(2) requires facility registrations to be "renewed every five years or whenever ownership of a facility is transferred, whichever occurs first."

Findings of Fact

The following facts are found based upon the preponderance of the evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent G & M Properties HP Housing Development Fund Company, Inc. (respondent) is the owner of a petroleum bulk storage facility having a capacity of more than 1,100 gallons located at 1350-1352 University Avenue, Bronx, NY (facility). In particular, petroleum storage tank number 001 at the facility has a capacity of 3,000 gallons and is located aboveground. See Testimony of Dale Thiel; Exhibits 5, 6, 7, 8 and 9.
2. Respondent is an active domestic not-for-profit corporation in the State of New York. See Testimony of Dale Thiel; Exhibit 4.
3. On November 25, 2013, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-250937 to Kotor Equities LLC, the owner of the facility at that time. In bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” See Testimony of Dale Thiel; Exhibit 8.
4. On December 23, 2013, Kotor Equities LLC, by deed, transferred all right, title and interest in the facility to respondent G & M Properties HP Housing Development Fund Company, Inc., the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2014000011014. See Testimony of Dale Thiel; Exhibit 7.
5. Respondent submitted a PBS application to register the facility on or about September 26, 2016 that was received on October 14, 2016. See Testimony of Dale Thiel; Exhibit 6. Department staff determined the application was incomplete and provided respondent with a notice of incomplete application dated November 28, 2016. See Testimony of Dale Thiel; Exhibit 6. As of the date of the hearing, respondent had not submitted a complete application, and the tank at the facility remained unregistered. See Testimony of Dale Thiel.
6. Dale Thiel is a Legal Assistant II in the Department’s Office of General Counsel. Ms. Thiel is authorized to access and inspect the Department’s unified information system (UIS) and the electronic repository for scanned documents known as DecDOCS. The UIS and DecDOCS are databases maintained by the Department and contain petroleum bulk storage facility records filed with the Department, which records include petroleum bulk storage facility registrations filed pursuant to 6 NYCRR 613-1.9. See Testimony of Dale Thiel.

7. On July 20, 2017, Ms. Thiel searched the petroleum bulk storage facility records contained in the Department's UIS and DecDOCS databases for any petroleum bulk storage facility registration or renewal registration filed by respondent for the facility. See Testimony of Dale Thiel. As a result of this search, Ms. Thiel determined that respondent had not registered the facility since respondent took ownership on December 23, 2013.
8. As shown by Receipt for Service No. 201704240208 issued by the New York State Department of State, respondent was served on April 10, 2017, pursuant to section 306 of the Not-for-Profit Corporation Law, with a notice of hearing and complaint dated April 10, 2017, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9, together with a cover letter, statement of readiness and supporting affirmation, for failure to register its petroleum bulk storage facility located at 1350-1352 University Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to respondent. Consistent with CPLR 3215(g)(4), Department staff also effected service by sending the notice of hearing and complaint to respondent by first class mail on April 10, 2017. See Exhibits 3 and 4.
9. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for May 12, 2017, 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 June 12, 2017 and reconvened on July 20, 2017, as directed in the notices of hearing. See 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 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).

"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 register its petroleum bulk storage facility located at 1350-1352 University Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to respondent, in violation of ECL 17-1009. Respondent was in violation of 6 NYCRR 613-1.9(d) from the effective date of the current part 613, October 11, 2015.

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 May 12, 2017, as directed in the notice of hearing and accompanying cover letter; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on June 12, 2017 and reconvened on July 20, 2017, as directed in the notices of hearing. Department staff provided its proposed order at the July 20, 2017 hearing. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof at the hearing, conducted in respondent’s absence, demonstrates by a preponderance of the evidence that respondent failed to register its petroleum bulk storage facility located at 1350-1352 University Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to respondent, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d). The Department is entitled to judgment upon the facts proven.

The seven thousand five hundred dollar (\$7,500) civil penalty Department staff seeks 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.

Recommendation

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

1. Granting Department staff’s motion for default, holding respondent G & M Properties HP Housing Development Fund Company, Inc. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent G & M Properties HP Housing Development Fund Company, Inc. violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 1350-1352 University Avenue, Bronx, New York within 30 days of the transfer of ownership of the facility to respondent;

3. Directing respondent G & M Properties HP Housing Development Fund Company, Inc. to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete petroleum bulk storage registration application for the facility, together with applicable registration fees; and
4. Directing respondent G & M Properties HP Housing Development Fund Company, Inc. to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500), to register its petroleum bulk storage tank, and remit the registration fee required pursuant to 6 NYCRR 613-1.9, by certified check or money order, within fifteen (15) days of service of the Commissioner's order.

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

Dated: Albany, New York
August 8, 2017

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of G & M Properties HP Housing Development Fund Company, Inc.
 1350-52 University Avenue, Bronx, New York – DEC Case No. PBS.2-250937.6.2017
 July 20, 2017 – Central Office
 Edrol File No. 031228073931

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	June 6, 2017 Practice Order of the Appellate Division, Third Department (Peters, P.J.), for appointment of law interns, including Theodore Gifford.	✓	✓	Department Staff	
2	Cover Letter from Yvonne M. Ward, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, all dated April 10, 2017 and an undated Affirmation of Yvonne M. Ward.	✓	✓	Department Staff	
3	Affidavit of Service of Dale Thiel, sworn to July 12, 2017 with New York State Department of State Receipt for Service dated April 10, 2017.	✓	✓	Department Staff	
4	NYS Department of State Entity Information.	✓	✓	Department Staff	
5	PBS Application, dated November 11, 2013.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	Notice of Incomplete Application dated November 28, 2016.	✓	✓	Department Staff	
7	New York City Department of Finance, ACRIS Title Search, dated July 17 and 5, 2017 and deed to respondent, dated December 23, 2013.	✓	✓	Department Staff	
8	Petroleum Bulk Storage Certificate No. 2-250937 issued November 25, 2013; expiration date September 14, 2016.	✓	✓	Department Staff	
9	PBS Program Facility Information Report, printed July 18, 2017.	✓	✓	Department Staff	
10	Affirmation of attempted contact by Deborah Gorman, dated June 29, 2017.	✓	✓	Department Staff	
11	Proposed Order.	✓	✓	Department Staff	