

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.2-364665.6.2017

-by-

**G&M PROPERTIES HP HOUSING DEVELOPMENT
FUND COMPANY, INC. (1585 East 172nd Street, 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. violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage facility at 1585 East 172nd Street, Bronx, New York (facility) within 30 days of the transfer of ownership of the facility to it on December 23, 2013. Located at the facility is an aboveground storage tank with a capacity of 3,000 gallons.

On July 20, 2017, an adjudicatory hearing was convened before D. Scott Bassinson, Administrative Law Judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Bassinson 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 for 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 proof of facts sufficient to support its 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 following the transfer of ownership of the facility to it (see ECL 17-1009[2]; Hearing Report at 4-5). Respondent submitted a registration application that Department staff received in October 2016 which Department staff determined to be incomplete. Department staff, by notice dated November 28, 2016, advised respondent of the deficiencies in the application (see Hearing Exhibit 6), but respondent has failed to correct them. 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). At the hearing, Department staff moved to amend its pleadings to reduce the civil penalty to seven thousand five hundred dollars (\$7,500), and the ALJ granted 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. violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility located at 1585 East 172nd Street, 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 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 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 19, 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.2-364665.6.2017

-by-

**G&M PROPERTIES HP HOUSING DEVELOPMENT
FUND COMPANY, INC. (1585 East 172nd Street, 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 6 NYCRR 613-1.9(d)(1) for failing to register its petroleum bulk storage facility located at 1585 East 172nd Street, Bronx, New York within 30 days of the transfer of ownership of the facility to it. 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 shall deem just and appropriate.

Inasmuch as respondent is an active domestic not-for-profit corporation 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 April 10, 2017. See Staff Exhibit 3. Department staff also served respondent by sending the notice of hearing and complaint to respondent by first class mail on April 10, 2017. See 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. See Staff Exhibit 2.

As stated in the notice of hearing, on June 12, 2017, an adjudicatory hearing was convened before the undersigned 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., Senior Attorney, 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, 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. I 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, I noted Department staff's readiness for hearing, noted 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 advising respondent that the hearing in this matter would be reconvened on July 20, 2017. On July 20, 2017, the adjudicatory hearing was reconvened before the undersigned at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by law student intern Jennifer Pierce under the supervision of Benjamin Conlon, Esq., Associate Attorney with the Department's Office of General Counsel, and Section Chief in the Bureau of Remediation. No one appeared on behalf of the respondent.

Department staff orally renewed its motion for a default judgment and also sought judgment on the merits. Department staff called one witness, Dale Thiel, Legal Assistant II for the New York State Department of Environmental Conservation. In all, ten (10) exhibits were received in evidence.

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 preponderance of evidence presented at the

¹ 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."

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 over 1,100 gallons located at 1585 East 172nd Street, 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; Staff Exhibits 6, 7, 8, and 9.
2. Respondent is an active not-for-profit corporation in the State of New York. See Testimony of Dale Thiel; Staff Exhibit 4.
3. On November 25, 2013, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-364665 to Zadar Realty LLC, who owned 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; Staff Exhibit 8.
4. On December 23, 2013, Zadar Realty 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. 2014000011010. See Testimony of Dale Thiel; Staff Exhibit 7.
5. Dale Thiel is a Legal Assistant II for the New York State Department of Environmental Conservation, whose main responsibility is the enforcement of PBS registrations for Region 2. 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.
6. On June 23, 2017, Dale 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.
7. As a result of her search, Dale Thiel determined that respondent had not registered the facility since respondent took ownership on December 23, 2013. Respondent submitted a PBS application to register the facility on or about September 26, 2016 that was received on October 14, 2016. 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; see also Staff Exhibit 6.
8. As shown by Receipt for Service No. 201704240218 issued by the New York State Department of State, respondent was served personally, 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(d)(1), together with a cover letter, statement of readiness and supporting affirmation, for failure to register its petroleum bulk storage facility located at 1585 East 172nd Street, Bronx, New York within 30 days of the transfer of ownership of the facility to it. 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 April 10, 2017. See Staff Exhibits 2 and 3; see also Hearing Record.

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 notice of hearing and the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing scheduled in the matter for 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 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. 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 has presented proof of facts sufficient to demonstrate that respondent failed to register its petroleum bulk storage facility located at 1585 East 172nd Street, Bronx, 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).

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 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 for 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 adduced 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 1585 East 172nd Street, Bronx, 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). The Department is entitled to judgment upon the facts proven.

At the July 20, 2017 hearing, Department staff moved orally to amend the complaint to reduce the civil penalty requested from ten thousand dollars (\$10,000) to seven thousand five hundred dollars (\$7,500). Pursuant to 6 NYCRR 622.10(b)(1)(i), I granted Department staff's motion to amend the pleadings, as there is no prejudice to respondent in reducing the penalty requested. This requested civil penalty 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 1585 East 172nd Street, Bronx, New York within 30 days of the transfer of ownership of the facility to it;
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 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) within fifteen (15) days of service of the Commissioner's order.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: August 3, 2017
Albany, New York

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of G&M Properties HP Housing Development Fund Company, Inc.,
 1585 East 172nd Street, Bronx, New York 10472 – DEC Case No. PBS.2-364665.6.2017
 July 20, 2017 – Central Office
 Edrol File No. 031228121706

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 intern Jennifer Pierce.	✓	✓	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, attaching New York State Department of State Receipt for Service dated April 10, 2017.	✓	✓	Department Staff	
4	NYS Department of State Entity Information regarding respondent.	✓	✓	Department Staff	

5	PBS Application, dated November 11, 2013 and Bargain and Sale Deed with Covenants, dated September 12, 2011.	✓	✓	Department Staff	
6	Notice of Incomplete Application dated November 28, 2016.	✓	✓	Department Staff	
7	New York City Department of Finance, ACRIS Title Search, dated June 23, 2017 and deed to respondent, dated December 23, 2013.	✓	✓	Department Staff	
8	PBS Registration Certificate No.2-364665 issued November 25, 2013, expiration date September 14, 2016.	✓	✓	Department Staff	
9	PBS Program Facility Information Report, printed June 23, 2017.	✓	✓	Department Staff	
10	Affirmation of attempted contact by Deborah Gorman, dated June 29, 2017.	✓	✓	Department Staff	
11	Proposed Order.	✓	No	Department Staff	