

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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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.  
2-288853JB2

-by-

**MAVINO REALTY CO., INC.,**

Respondent.

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This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department) that Mavino Realty Co., Inc. (respondent) violated ECL 17-1009 and 6 NYCRR 612.2 by failing to renew the registration of its petroleum bulk storage facility at 2440 Bronx Park East, Bronx, New York. Located at the facility is a 5,000-gallon aboveground petroleum bulk storage tank.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Caruso 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 July 7, 2015, and failed to appear for the adjudicatory hearing scheduled in the matter on August 6, 2015 (see Default Summary Report at 3 [Finding of Fact No. 6]). At the August 6, 2015 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ D. Scott Bassinson, presiding at the August 6 hearing, reserved on the motion, and Department staff later submitted a motion for default judgment with supporting papers. The matter was then assigned to ALJ Caruso.

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. Staff's papers submitted in support of its motion for default judgment provide proof of the facts sufficient to support staff's claim that respondent failed to renew the registration of its petroleum bulk storage facility located at 2440 Bronx Park East, Bronx, New York, in violation of ECL 17-1009 and 6 NYCRR 612.2(a)(2).

Department staff seeks a civil penalty in the amount of ten thousand dollars (\$10,000) (see Motion for Default Judgment, Exhibit A [Complaint, Wherefore Clause, at II]). ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation, and the requested penalty is substantially below this statutory amount.

Respondent's registration of the facility expired on October 23, 2002 and has not been renewed (see Default Summary Report at 2 - 3 [Findings of Fact Nos. 3 and 4]). Staff's requested penalty of ten thousand dollars (\$10,000) is in accordance with general penalty guidelines for violations of greater than five years as is the case here (see e.g. Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2). Based on this record, the requested penalty of ten thousand dollars (\$10,000) 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, I direct that respondent submit a petroleum bulk storage application for the facility, plus applicable registration fees, to the Department within fifteen (15) days of the service of this order upon respondent.<sup>1</sup>

Staff's request that I order respondent to "permanently cease and desist from any and all future violations of the ECL and the Rules and Regulations promulgated pursuant thereto" is unnecessary (see Exhibit I [Staff Proposed Order], at ¶ III; see also Motion for Default Judgment, at Wherefore Clause ¶ IV). Respondent is required to comply with the ECL and the applicable regulations, and further language to that effect is not needed (see Matter of Adonai Realty L.P., Order of the Acting Commissioner, February 19, 2016, at 2).

**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 Mavino Realty Co., Inc. waived its right to be heard at the hearing.
- II. Moreover, based upon proof of the facts submitted, respondent Mavino Realty Co., Inc. is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(a)(2) by failing to renew the registration of its petroleum bulk storage facility located at 2440 Bronx Park East, Bronx, New York.
- III. Within fifteen (15) days of the service of this order upon respondent Mavino Realty Co., Inc., respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.

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<sup>1</sup> Although Department staff, in its complaint, requested that the civil penalty, applicable registration fees and petroleum bulk storage application be submitted within fifteen (15) days of the service of the order upon respondent, Department staff's proposed order called for submission within thirty (30) days. The ALJ has recommended fifteen (15) days, which comports with the time period established in prior orders addressing these types of violations, and which I am directing here.

- IV. Within fifteen (15) days of the service of this order upon respondent Mavino Realty Co., Inc., 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 Mavino Realty Co., 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  
Acting Commissioner

Dated: Albany, New York  
March 3, 2016

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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.  
2-288853JB2

**MAVINO REALTY CO., INC.,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Mavino Realty Co., Inc. (respondent) with a notice of hearing and complaint, dated June 9, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2,<sup>1</sup> for failing to renew the registration of its petroleum bulk storage (PBS) facility located at 2440 Bronx Park East, Bronx, New York. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2; (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 may deem just and appropriate.

Inasmuch as respondent is an active domestic business corporation 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 June 9, 2015 (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 June 9, 2015 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for July 7, 2015, as directed in the cover letter served with the notice of hearing and complaint (see Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, an adjudicatory hearing was convened on August 6, 2015 before Administrative Law Judge (ALJ) D. Scott Bassinson at the Department's Region 2

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<sup>1</sup> Staff's papers cite the general section of 6 NYCRR 612.2, rather than the specific provision at issue here, 6 NYCRR 612.2(a)(2). Staff's pleadings should include the particular section(s), paragraph(s) and subparagraph(s) of the statute or regulation at issue.

offices, 1 Hunter's Point Plaza, 47-40 21<sup>st</sup> Street, Long Island City, New York. 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 Bassinson 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 Bassinson reserved on the oral motion and held the record open. Staff submitted a written motion for a default judgment with supporting papers (see Appendix A, attached hereto [listing documents submitted on motion]). The matter was assigned to the undersigned ALJ.

#### Applicable Regulatory Provision

Section 612.2. Registration of Facilities.<sup>2</sup>

“(a) *Existing facilities.*

\* \* \*

“(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.”

#### Findings of Fact

The following facts are found based upon the documents submitted with and in support of staff's motion for a default judgment:

1. Respondent Mavino Realty Co., Inc. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 2440 Bronx Park East, Bronx, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 5,000 gallons and is located above ground. (See Motion for Default Judgment, Exhibits D, E, F, and G.)
2. Respondent is an active domestic business corporation in the State of New York. (See Motion for Default Judgment, Exhibit H.)
3. Pursuant to a registration application filed by respondent, dated January 3, 2000, and received by the Department on January 18, 2000, the Department issued respondent PBS Certificate Number 2-288853, registering respondent's PBS facility. This registration expired on October 23, 2002. (See Motion for Default Judgment, Exhibits E and F.)

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<sup>2</sup> Part 612 was repealed, effective subsequent to the commencement of this proceeding, and replaced by a revised part 613. The registration requirements applicable to renewals are now found at 6 NYCRR 613-1.9(c). For the purposes of the violations alleged in this matter, the prior part 612 applies.

4. Deborah Gorman is an attorney in the Department's Office of General Counsel, and is familiar with the Department's procedures regarding issuance of PBS registration certificates. Ms. Gorman reviewed the results of a May 28, 2015 search of the Department's PBS registration database, which revealed, among other things, that (i) the capacity of the tank at respondent's facility exceeded 1,100 gallons; and (ii) as of the date of the database search, the PBS registration for PBS facility No. 2-288853 had expired and had not been renewed. (See Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq. at ¶¶ 9-12; see also Exhibit F.)
5. As shown by Receipt for Service No. 201506230044 issued by the New York State Department of State, on June 9, 2015, pursuant to section 306 of the Business Corporation Law, Department staff served respondent with a notice of hearing and complaint dated June 9, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its PBS facility located at 2440 Bronx Park East, Bronx, 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 June 9, 2015. (See Motion for Default Judgment, Exhibit C.)
6. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for July 7, 2015, 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 August 6, 2015, as directed in the notice of hearing. (See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq. [Gorman Affirmation] dated January 7, 2016, at ¶¶ 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 unless extended by staff or ruling of the ALJ (see 6 NYCRR 622.4[a]).<sup>3</sup> 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

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<sup>3</sup> In this proceeding, staff's notice of hearing advises respondent that an answer must be served within 20 days of respondent's receipt of the notice of hearing and complaint. Staff's cover letter, however, advises respondent "the enclosed notice of hearing and complaint requires you to file an answer within thirty (30) days of receiving this notice of hearing and complaint" (see Motion for Default Judgment, Exhibit A). I will treat this disparity as providing respondent thirty days to serve its answer.

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]).

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 July 7, 2015, 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 on August 6, 2015, as directed in the notice of hearing. In addition, Department staff has submitted a proposed order (see Motion for Default Judgment, Exhibit I). 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 January 7, 2016 letter from Deborah Gorman, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent).

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 submissions in support of the motion for a default judgment provide proof of the facts sufficient to support staff's claim that respondent failed to renew the registration of its PBS facility located at 2440 Bronx Park East, Bronx, New York, in violation of ECL 17-1009 and 6 NYCRR 612.2(a)(2).

Department staff seeks a civil penalty in the amount of ten thousand dollars (\$10,000), and 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 past precedent relating to similar violations (see Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause ¶ II; see also Exhibit B, Gorman Affirmation, at ¶¶ 13-18).

I find that staff's request for a civil penalty in the amount of ten thousand dollars (\$10,000) 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).<sup>4</sup>

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<sup>4</sup> In its motion for a default judgment, Department staff has also requested that the Commissioner "[d]irect[] Respondents [sic] to permanently cease and desist from any and all future violations of the ECL and the Rules and Regulations promulgated pursuant thereto" (Motion for Default Judgment, at Wherefore Clause ¶ IV; see also id. Exhibit I, Proposed Order, at Ordering Clause ¶ III). Respondent is already required to comply with the ECL and relevant regulations. I therefore recommend that the Commissioner hold that staff's request in this regard is unnecessary.

Conclusion of Law

By failing to renew the registration of its petroleum bulk storage facility located at 2440 Bronx Park East, Bronx, New York, respondent violated ECL 17-1009 and 6 NYCRR 612.2(a)(2).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Mavino Realty Co., Inc. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Mavino Realty Co., Inc. violated ECL 17-1009 and 6 NYCRR 612.2(a)(2) by failing to renew the registration of its petroleum bulk storage facility located at 2440 Bronx Park East, Bronx, New York;
3. Directing respondent Mavino Realty Co., Inc. 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 the applicable registration fees;
4. Directing respondent Mavino Realty Co., Inc. 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 he may deem just and appropriate.

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: Albany, New York  
February 19, 2016



## APPENDIX A

*Matter of Mavino Realty Co., Inc.*  
DEC File No. R2-288853JB2  
Motion for Default Judgment

1. Cover letter, dated January 7, 2016, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, noting that respondent was served with copies of the motion papers through the NYS Secretary of State and by first class mail
2. Notice of Motion for Default Judgment dated January 7, 2016
3. Motion for Default Judgment, attaching the following exhibits:
  - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, all dated June 9, 2015, and an undated Affirmation of Deborah Gorman, Esq.
  - B. Affirmation of Deborah Gorman, Esq., dated January 7, 2016
  - C. Affidavit of Service of Kara Paulsen sworn to January 4, 2016, attaching Department of State Receipt for Service dated June 9, 2015 reflecting service upon respondent pursuant to section 306 of the Business Corporation Law
  - D. Printout of search on Automated City Register Information System (ACRIS), dated January 4, 2016, attaching deed dated August 10, 1998
  - E. Petroleum Bulk Storage (PBS) Application, PBS No. 2-288853, dated January 3, 2000
  - F. PBS Certificate, PBS No. 2-288853, issued January 18, 2000, expired October 23, 2002
  - G. Facility Information Report, PBS No. 2-288853, printed December 30, 2015
  - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Mavino Realty Co., Inc., reflecting information through December 31, 2015
  - I. Draft Order