

**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.2-089982.5.2018

NUSSBAUM ASSOCIATES COMPANY, LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Nussbaum Associates Company, LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage (PBS) facility on or before March 24, 2017, the date on which its prior registration expired. Respondent's facility is located at 495 West 186th Street, New York, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 5,000 gallons.

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter and 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 April 10, 2018, and failed to appear for the adjudicatory hearing scheduled for May 10, 2018 (see Default Summary Report at 3-4 [Finding of Fact No. 10]). At the May 10, 2018 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Caruso reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers.

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. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to renew the registration of its PBS facility on or before March 24, 2017, the date on which its registration expired, and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c).

Department counsel correctly points out that the requirement to register PBS facilities is one of the “cornerstones” of the PBS regulatory scheme (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated September 12, 2018, ¶ 14). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health.

Department staff seeks a civil penalty in the amount of seven thousand five hundred dollars (\$7,500). ECL 71-1929(1), which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In proceedings similar to this one, Department staff has requested penalties that take into account the duration of the violation. For those facilities that have violated the registration requirement within the past two years, Department staff has, absent other violations, generally requested a penalty of five thousand dollars (\$5,000). For registration violations that extend from two to five years, Department staff has generally requested a penalty of seven thousand five hundred dollars (\$7,500). For those facilities where registrations are more than five years overdue, Department staff has generally requested a penalty of ten thousand dollars (\$10,000). However, to the extent that mitigating or aggravating factors exist, such factors are considered for purposes of the penalty request (*see* 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

Department staff, in its papers, sought a penalty of ten thousand dollars (\$10,000) but moved at the hearing to amend the complaint to request a lower penalty of seven thousand five hundred dollars (\$7,500). The duration of the violation is less than two years, but staff demonstrated that respondent has a history of noncompliance with the PBS registration requirements. Staff's requested civil penalty of seven thousand five hundred dollars (\$7,500) is in accordance with general penalty guidelines for violations of PBS registration requirements for certain facilities in New York City where a violation is less than two years but aggravating factors are considered in support of a higher penalty, as is the case here (*see e.g.* Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2). Respondent was required to renew the registration of its facility no later than March 24, 2017 but failed to do so (*see* Default Summary Report at 3 [Findings of Fact Nos. 5, 7 and 8]), and respondent previously entered into an order on consent for failing to register, which resulted in the registration that expired on March 24, 2017 (*see* Default Summary Report at 5; Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated September 12, 2018, first ¶ 12 and Exhibit I). Based on this record, the requested penalty of seven thousand five hundred dollars (\$7,500) 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, including the correct name of the facility owner, plus applicable registration fees, to the Department within fifteen (15) days of the service of this order upon respondent.

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 Nussbaum Associates Company, LLC waived its right to be heard at the hearing.
- II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Nussbaum Associates Company, LLC is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 495 West 186th Street, New York, New York on or before March 24, 2017, the date the prior registration expired.
- III. Within fifteen (15) days of the service of this order upon respondent Nussbaum Associates Company, LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, including the correct name of the facility owner, plus applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent Nussbaum Associates Company, LLC, 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 Nussbaum Associates Company, 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: Albany, New York
October 9, 2018

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),

**DEFAULT SUMMARY
REPORT**

-by-

DEC Case No.
PBS.2-089982.5.2018

NUSSBAUM ASSOCIATES COMPANY, LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Nussbaum Associates Company, LLC (respondent) with a notice of hearing and complaint, dated March 5, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), for failing to renew the registration of its petroleum bulk storage (PBS) facility located at 495 West 186th Street, New York, New York (facility) on or before March 24, 2017, the date on which its prior registration expired. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c); (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 shall deem just and appropriate.

Inasmuch as respondent is an active domestic limited liability company 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 March 5, 2018 (*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 March 5, 2018 (*see id.*). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit A).

As stated in the notice of hearing, on May 10, 2018, an adjudicatory hearing was convened before the undersigned. 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.

I 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. I reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). On September 12, 2018, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on September 14, 2018 (*see* Affirmation of Service of Deborah Gorman, dated September 14, 2018).

Applicable Regulatory Provision

Section 613-1.9. Registration.

* * *

“(c) *Renewal*. Registration must be renewed every five years from the date of the last valid registration certificate until the department receives written notice and documentation from the facility owner that the facility has been permanently closed in accordance with section 613-2.6(b), 613-3.5(b), or 613-4.5(b) of this Part, or that ownership of the facility has been transferred in accordance with subdivision (d) of this section.”

Findings of Fact

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

1. Respondent Nussbaum Associates Company, LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 495 West 186th Street, New York, New York (facility). In particular, PBS tank number 001 at the facility has a capacity of 5,000 gallons and is located aboveground. *See* Motion for Default Judgment, Exhibits E, F, and G.
2. Respondent is an active domestic limited liability company in the State of New York. *See* Motion for Default Judgment, Exhibit H.
3. On July 19, 1996, Shirley Nussbaum, Eric Nussbaum, Deena Nussbaum and Herbert Nussbaum transferred all right, title and interest in the facility to Nussbaum Associates Company, LLC, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 2364 Page 1341. *See* Motion for Default Judgment, Exhibit D.

4. On July 27, 2012, the Department entered into an order on consent with Nussbaum Associates [sic] Company, LLC, for failing to register its PBS facility located at 495 West 186th Street, New York, New York. The order on consent required respondent to submit an application within thirty (30) days of the order. The order was signed by respondent on July 2, 2012. *See* Motion for Default Judgment, Exhibit I.
5. Pursuant to a registration application dated July 10, 2012, the Department issued PBS Certificate Number 2-089982 to Herbert Nussbaum on September 20, 2012 with an expiration date of March 24, 2017. The application and certificate identify the owner as “Herbert Nussbaum” and identify the mailing addressee as Nussbaum Associates Company, LLC. *See* Motion for Default Judgment, Exhibits E, F and G.
6. Although the consent order required the owner of the facility, Nussbaum Associates Company, LLC to register the PBS facility, the application submitted pursuant to the order incorrectly identified Herbert Nussbaum as the owner of the facility, which carried over to the certificate issued by the Department. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated September 12, 2018, ¶ 8; *see also* Exhibits E, F and I.
7. On March 2, 2018, a search of the Department’s PBS registration database revealed that respondent’s registration expired on March 24, 2017 and, as of March 2, 2018, had not been renewed. *See* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated March 5, 2018, ¶¶ 9-12; *see also* Exhibit G.
8. As of September 12, 2018, respondent had not registered the facility. *See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., ¶ 9; *see also* Exhibit G.
9. As shown by Receipt for Service No. 201803120216 issued by the New York State Department of State, respondent was served personally, on March 5, 2018 pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated March 5, 2018, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(c), together with a cover letter, statement of readiness and supporting affirmation, for failure to renew the registration of its PBS facility located at 495 West 186th Street, New York, New York on or before March 24, 2017, the date the prior registration expired. 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 March 5, 2018. *See* Motion for Default Judgment, Exhibit C.
10. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on May 10, 2018, as directed in the notice of hearing. *See*

Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated September 12, 2018, ¶¶ 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 (*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]).

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[s]" alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also State v Williams*, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and CPLR 3215[f]).

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 April 10, 2018, as directed in the cover letter and notice of hearing served with the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled on May 10, 2018, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit J). 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* Affirmation of Service of Deborah Gorman, dated September 14, 2018, ¶ 3).

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent

failed to renew the registration of its petroleum bulk storage facility located at 495 West 186th Street, New York, New York on or before March 24, 2017, the date on which its registration expired, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) (*see Matter of Samber Holding Corp.*, Order of the Commissioner at 1).

Staff's complaint requested a civil penalty in the amount of ten thousand dollars (\$10,000). In its motion for default judgment and proposed order, Department staff seeks to reduce the civil penalty to seven thousand five thousand dollars (\$7,500). 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 administrative precedent relating to similar violations (*see* Motion for Default Judgment, Exhibit A, Complaint, at Wherefore Clause ¶ II; *see also* Exhibit B, Gorman Affirmation, dated May 15, 2018, ¶¶ 14-19). Typically, Department staff seeks to reduce the penalty to five thousand dollars (\$5,000) for violations with a duration less than two years, as is the case here. Staff, however, applied an aggravating factor to staff's penalty calculation due to respondent's history of noncompliance and the need for a previous order on consent requiring respondent to register the facility. Accordingly, staff's motion to reduce the civil penalty to seven thousand five thousand dollars (\$7,500) should be granted because respondent is not prejudiced by reducing the penalty requested.

I find that staff's request for a civil penalty in the amount of seven thousand five thousand dollars (\$7,500) 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).

In addition, I recommend that respondent be directed to correct the name of the owner of the facility on the PBS application to reflect that the limited liability company is the facility owner, not one of the family members.

Conclusion of Law

By failing to renew the registration of its PBS facility located at 495 West 186th Street, New York, New York on or before March 24, 2017, the date the prior registration expired, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Nussbaum Associates Company, LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Nussbaum Associates Company, LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility

located at 495 West 186th Street, New York, New York on or before March 24, 2017, the date the prior registration expired;

3. Directing respondent Nussbaum Associates Company, LLC to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete registration application for the facility, including correction of the facility owner's name, together with the applicable registration fees;
4. Directing respondent Nussbaum Associates Company, LLC 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; 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
October 5, 2018

APPENDIX A

Matter of Nussbaum Associates Company, LLC
DEC File No. PBS.2-089982.5.2018
Motion for Default Judgment

1. Cover letter, dated September 12, 2018, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers
2. Notice of Motion for Default Judgment dated September 12, 2018
3. Motion for Default Judgment, dated September 12, 2018, attaching Exhibits A and B:
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated March 5, 2018
 - B. Affirmation of Deborah Gorman, Esq., dated September 12, 2018, attaching Exhibits C – J:
 - C. Affidavit of Service of Dale Thiel, sworn to September 12, 2018, attaching Department of State Receipt for Service, dated March 5, 2018, reflecting service upon respondent pursuant to section 303 of the Limited Liability Company Law
 - D. Printout of search on Automated City Register Information System (ACRIS), dated August 20, 2018, attaching deed dated July 19, 1996
 - E. Petroleum Bulk Storage (PBS) Application from Nussbaum Associates Company, LLC, PBS No. 2-089982, dated July 10, 2012
 - F. PBS Certificate, PBS No. 2-089982 issued to "Herbert Nussbaum" on September 20, 2012, expired March 24, 2017
 - G. Facility Information Report, PBS No. 2-089982, printed August 20, 2018
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Nussbaum Associates Company, LLC, reflecting information through August 17, 2018
 - I. Matter of Nussbaum Associates [sic] Company, LLC, Order on Consent, Case No. 2-089982, dated July 27, 2012
 - J. Draft Order
4. Affirmation of Service of Deborah Gorman, dated September 14, 2018