

**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.  
PBS.2-323381.5.2020

-by-

**NYSANDY3 NBP9 LLC,**

Respondent.

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This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent NYSANDY3 NBP9 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 February 27, 2019, the date on which its prior registration expired. Respondent's facility is located at 3013 Valentine Avenue, Bronx, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 7,500 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, 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 and failed to appear for the adjudicatory hearing scheduled for April 14, 2021 (*see* Default Summary Report at 3-4 [Finding of Fact No. 11]). At the April 14, 2021, 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, 6). 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 February 27, 2019, the date on which its prior 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 H, Affirmation of Kyle T. Pero, Esq., dated August 24, 2021, ¶ 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 account for the duration of the violation (*see Matter of 12 Martense Assoc., LLC*, Order of the Commissioner, December 19, 2011 [*12 Martense*], at 2). Pursuant to *12 Martense*, for those facilities where registrations are more than two years but less than five years overdue, Department staff generally seeks a civil penalty of seven thousand five hundred dollars (\$7,500) (*see id.*). Respondent was required to renew the registration of its PBS facility by February 27, 2019, but failed to do so (*see* Default Summary Report at 3 [Findings of Fact Nos. 4, 5, and 6]).

In cases, such as here, in which one of the penalty date “thresholds” under *12 Martense* is passed during the period between service of the notice of hearing and complaint and the date of the default motion papers, the penalty amount based on the longer period of time is appropriate (*see Matter of Promesa Court Residences Ltd. Partnership*, Order of the Commissioner, September 11, 2017, at 3). In this case, then, I am imposing a penalty of seven thousand five hundred dollars (\$7,500) because respondent’s violation exceeded two years as of the date of staff’s motion for default judgment.

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 am directing respondent, also within fifteen (15) days of the service of this order, to submit to the Department a complete petroleum bulk storage application for the facility, plus applicable and past due 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 NYSANDY3 NBP9 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 NYSANDY3 NBP9 LLC is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(c), by failing to renew the registration of its PBS facility located at 3013 Valentine Avenue, Bronx, New York, on or before February 27, 2019, the date on which its prior registration expired.

- III. Within fifteen (15) days of the service of this order upon respondent NYSANDY3 NBP9 LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent NYSANDY3 NBP9 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: Kyle T. Pero, Esq.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Kyle T. Pero, Esq. at the address referenced in paragraph V of this order.
- VII. The provisions, terms, and conditions of this order shall bind respondent NYSANDY3 NBP9 LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By:                   /s/  
Louis A. Alexander  
Deputy Commissioner<sup>1</sup>

Dated: Albany, New York  
March 10, 2022

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<sup>1</sup> By memorandum dated June 12, 2020, Commissioner Basil Seggos delegated the decision-making authority in Region 2 PBS registration matters to the Deputy Commissioner for Hearings and Mediation Services. This memorandum was reissued on March 7, 2022. Copies of the original and reissued delegation memoranda are on file in the Office of Hearings and Mediation Services.

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.  
PBS.2-323381.5.2020

**NYSANDY3 NBP9 LLC,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent NYSANDY3 NBP9 LLC (respondent) with a notice of hearing and complaint, dated February 4, 2020, 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 3013 Valentine Avenue, Bronx, New York (facility). 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 February 4, 2020 (*see* Motion for Default Judgment, Exhibit B). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about February 4, 2020 (*see id.*). Respondent failed to file an answer to the complaint, 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, a pre-hearing conference and an adjudicatory hearing were scheduled for April 8, 2020, and May 7, 2020, respectively. However, the pre-hearing conference and hearing were adjourned due to shutdowns associated with the COVID-19 pandemic (*see* Motion for Default Judgment, Exhibit H). Subsequently, Department staff requested to convene the hearing on January 21, 2021, and the Office of Hearings and Mediation Services (OHMS) served a notice of hearing on respondent notifying respondent that a virtual

adjudicatory hearing would be convened on January 21, 2021 (*see id.*; Hearing Record). Pursuant to the notice, the virtual adjudicatory hearing was convened before me on January 21, 2021 (*see id.*). 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 the respondent expressed an interest in settling the matter, and staff requested an adjournment of the matter. By scheduling order and notice of adjourned hearing, dated January 22, 2021, I directed the parties to settle the matter by February 26, 2021, or appear at the adjourned virtual hearing scheduled for April 14, 2021. The matter did not settle, and I convened the hearing as scheduled. Department staff was represented by Deborah Gorman, Esq. No one appeared on behalf of respondent.

I noted for the record that respondent had failed to answer the complaint 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). By cover letter dated August 24, 2021, 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 August 24, 2021 (*see* Affirmation of Service of Kyle T. Pero, dated August 24, 2021).

#### Applicable Regulatory Provision

Section 613-1.9. Registration.

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“(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 NYSANDY3 NBP9 LLC is the owner of a PBS facility having a capacity of over 1,100 gallons located at 3013 Valentine Avenue, Bronx, New York (facility). In particular, PBS tank number 012 at the facility has a capacity of 7,500 gallons and is located aboveground. (*See* Motion for Default Judgment, Exhibits C, D, E, and F.)
2. Respondent is an active domestic limited liability company in the State of New York. (*See* Motion for Default Judgment, Exhibit G.)

3. On February 27, 2014, 3013 Realty LLC transferred all right, title and interest in the facility to NYSANDY3 NBP9 LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York in City Register File No. 2014000077191. (*See* Motion for Default Judgment, Exhibit C.)
4. Pursuant to a registration application submitted by respondent NYSANDY3 NBP9 LLC and received April 20, 2015, the Department issued PBS Certificate Number 2-323381 to "NYSANDY3 NPB LLC" on May 14, 2015, with an expiration date of February 27, 2019. (*See* Motion for Default Judgment, Exhibits D, E, and F.)
5. On January 31, 2020, a search of the Department's PBS registration database revealed that the registration for the facility expired on February 27, 2019, and, as of January 31, 2020, had not been renewed. (*See* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated February 4, 2020, ¶¶ 9-12.)
6. As of August 24, 2021, respondent had not registered the facility. (*See* Motion for Default Judgment, Exhibit H, Affirmation of Kyle T. Pero, Esq. (Pero Affirmation), dated August 24, 2021, ¶ 9; *see also* Exhibit F.)
7. As shown by Receipt for Service No. 202002200569 issued by the New York State Department of State, respondent was served personally, on February 4, 2020 pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated February 4, 2020, 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 3013 Valentine Avenue, Bronx, New York. Consistent with 6 NYCRR 622.15(d)(2) and 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 February 4, 2020. (*See* Motion for Default Judgment, Exhibit B.)
8. On or about November 9, 2020, the Office of Hearings and Mediation Services served a notice of hearing on respondent by first class mail notifying respondent that the virtual adjudicatory hearing would be held on January 21, 2021. The notice of hearing provided detailed instructions for appearing by videoconference or telephone. (*See* Notice of Hearing, dated November 9, 2020.)
9. At the hearing on January 21, 2021, the matter was adjourned pending settlement. A scheduling order and notice of adjourned hearing was served on respondent by first class mail on January 22, 2021. (*See* Hearing Record.)
10. The matter did not settle, and the hearing was re-convened on April 14, 2021, pursuant to the notice of adjourned hearing. (*See* Hearing Record.)
11. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on April 14, 2021, as directed in the notice

of adjourned hearing. (See Motion for Default Judgment, Exhibit H, Pero Affirmation, ¶¶ 4-6; Hearing Record.)

12. On August 26, 2021, Department staff advised me that staff had been contacted by respondent, and staff requested an extension of time to pursue settlement of the matter.
13. After repeated extensions of time, the parties failed to settle the matter. On December 17, 2021, I advised the parties that if the matter had not completely settled by December 31, 2021, that I would address Department staff's motion and make recommendations to the Commissioner. As of the date of this report, the matter has not settled.

### 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, respondent's failure to appear at the hearing constitutes a default and waiver of respondent's right to a hearing (*see* 6 NYCRR 622.15[a]).

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:

- "(1) proof of service upon respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- "(2) proof of respondent's failure to appear or failure to file a timely answer;
- "(3) consistent with CPLR 3215(f), proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim;
- "(4) a concise statement of the relief requested;
- "(5) a statement of authority and support for any penalty or relief requested; and
- "(6) proof of mailing the notice required by [6 NYCRR 622.15(d)], where applicable." (*see* 6 NYCRR 622.15[b][1] - [6] [effective September 16, 2020]).

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 its 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 [*Samber*], at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* 6 NYCRR 622.15[b][3], 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, as directed in the cover letter and notice of hearing served with the complaint, and respondent failed to

appear for the adjudicatory hearing scheduled on April 14, 2021, as directed in the January 22, 2021 scheduling order and notice of adjourned hearing; (iii) Department staff's papers provide proof of the facts sufficient to support the violations alleged and enable me to determine that staff has a viable claim; (iv) Department staff's papers include a concise statement of the relief requested (*see* Motion for Default Judgment, Wherefore Clause; Exhibit A, Complaint; Exhibit I, Proposed Order); (v) staff's motion includes a statement of authority and support for the penalty and relief requested (*see* Exhibit H, Pero Affirmation, ¶¶ 13-19); and (vi) Department staff provided proof of service of the motion papers on respondent (*see* Affirmation of Service of Kyle T. Pero, dated August 24, 2021). Respondent did not file or serve a response to staff's motion. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

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 3013 Valentine Avenue, Bronx, New York, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) (*see Samber* 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 hundred 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 H, Pero Affirmation, ¶¶ 13-19). Typically, Department staff seeks to reduce the penalty to seven thousand five hundred dollars (\$7,500) for violations with a duration or more than two years but less than five years, as is the case here (*see e.g. Matter of 12 Martense Assoc. LLC* [12 Martense Assoc.], Order of the Commissioner, December 19, 2011, at 2). Accordingly, staff's motion to reduce the civil penalty to seven thousand five hundred dollars (\$7,500) is granted because respondent is not prejudiced by reducing the penalty requested.

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In proceedings concerning violations of PBS registration requirements in the New York City area, calculation of an appropriate penalty turns in part on the duration of the violations (*see e.g. Matter of 540 Jackson Realty Corp.*, Order of the Commissioner, May 18, 2016, at 2; *see also 12 Martense Assoc.*, at 2).

In this matter, the two-year threshold for applying a civil penalty of seven thousand five hundred dollars (\$7,500) was reached on February 27, 2021, after service of the notice of hearing and complaint, but before the April 14, 2021, hearing and the August 24, 2021, submission of staff's motion for default judgment. Staff's papers demonstrate the violation continued as of August 24, 2021. "In cases, such as here, in which one of the penalty 'thresholds' under *12 Martense Associates* and its progeny is passed during the period between service of the notice of hearing and complaint and the date of the adjudicatory hearing or submission of default motion papers, it is appropriate to seek the penalty amount related to the longer period" (*see Matter of Promesa Court Residences Limited Partnership*, Order of the Commissioner, September 11,



2017, at 3; *see also Matter of 1160 President Street Housing Development Fund Corporation*, Order of the Commissioner, October 3, 2017, at 2).

Accordingly, I find that staff's request for a civil penalty in the amount of seven thousand five hundred 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. 12 Martense Assoc.*, Order of the Commissioner, December 19, 2011, at 2).

#### Conclusion of Law

By failing to renew the registration of its PBS facility located at 3013 Valentine Avenue, Bronx, New York on or before February 27, 2019, 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 NYSANDY3 NBP9 LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent NYSANDY3 NBP9 LLC violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 3013 Valentine Avenue, Bronx, New York on or before February 27, 2019, the date the prior registration expired;
3. Directing respondent NYSANDY3 NBP9 LLC 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 NYSANDY3 NBP9 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  
February 28, 2022

## APPENDIX A

*NYSANDY3 NBP9 LLC*  
DEC File No. PBS.2-323381.5.2020  
Motion for Default Judgment

1. Cover letter, dated August 24, 2021, addressed to then Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers
2. Notice of Motion for Default Judgment, dated August 24, 2021
3. Motion for Default Judgment, dated August 24, 2021, attaching Exhibits A and H:
  - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., dated February 4, 2020
  - H. Affirmation of Kyle T. Pero, Esq., dated August 24, 2021, attaching Exhibits B, C, D, E, F, G, and I:
    - B. Affidavit of Service of Alicia Pasos, sworn to February 24, 2022, attaching Department of State Receipt for Service, dated February 4, 2020, reflecting service upon respondent pursuant to section 303 of the Limited Liability Company Law
    - C. Printout of search on Automated City Register Information System (ACRIS), dated March 5, 2021, attaching deed dated February 27, 2014
    - D. Petroleum Bulk Storage (PBS) Application from NYSANDY3 NBP9 LLC PBS No. 2-323381, received April 20, 2015
    - E. PBS Certificate, PBS No. 2-323381 issued to "NYSANDY3 NBP LLC" on May 14, 2015, with an expiration date of February 27, 2019
    - F. Facility Information Report, PBS No. 2-323381, printed March 5, 2021
    - G. NYS Department of State, Division of Corporations, Entity Information Sheet regarding NYSANDY3 NBP9 LLC, reflecting information through March 24, 2021
    - I. Draft Order
4. Affirmation of Service of Kyle T. Pero, Esq., dated August 24, 2021
5. Notice of Hearing, dated November 9, 2020
6. Scheduling Order and Notice of Adjourned Hearing, dated January 22, 2021