

**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.2-203122.6.2020

PROVIDENCE ROCK, INC.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Providence Rock, Inc. violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its petroleum bulk storage (PBS) facility within thirty (30) days of the date (December 28, 2012) that it acquired the property. Respondent's facility is located at 57-02 Hoffman Drive, Elmhurst, New York, and includes an underground petroleum bulk storage tank with a capacity of 3,000 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, 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 January 21, 2021 (*see* Default Summary Report at 3 [Finding of Fact No. 9]). At the January 21, 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). 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 register its PBS facility within thirty (30) days of the date it acquired the facility and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

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 July 8, 2021, ¶¶ 15). 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 (*see id.* at ¶¶ 15-16).

Department staff seeks a civil penalty in the amount of ten thousand dollars (\$10,000). 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 [*Martense*], at 2). Pursuant to *Martense*, for those facilities where registrations are more than five years overdue, Department staff generally seeks a civil penalty of ten thousand dollars (\$10,000) (*see id.*).

Respondent was required to register its facility within thirty (30) days of the date (December 28, 2012) that it acquired the facility, but failed to do so (*see* Default Summary Report at 3 [Findings of Fact Nos. 3, 5 and 6]). In this case, I am imposing a penalty of ten thousand dollars (\$10,000) because respondent’s violation exceeded five years from, January 27, 2018, the date by which the registration was due (*see* 6 NYCRR 613.9[d][1][registration due within 30 days after transfer]).

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 Providence Rock, Inc. 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 Providence Rock, Inc. is determined to have violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1), by failing to register its PBS facility located at 57-02 Hoffman Drive, Elmhurst, New York within thirty (30) days of the date (December 28, 2012) that it acquired the facility.
- III. Within fifteen (15) days of the service of this order upon respondent Providence Rock, Inc., 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 Providence Rock, 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 Providence Rock, Inc., and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Louis Alexander
Deputy Commissioner¹

Dated: Albany, New York
August 17, 2021

¹ 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. A copy of the delegation memorandum is on file in the Office of Hearings and Mediation Services.

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.2-203122.6.2020

PROVIDENCE ROCK, INC.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Providence Rock, Inc. (respondent) with a notice of hearing and complaint, dated March 6, 2020, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9(d)(1), for failing to register its petroleum bulk storage (PBS) facility located at 57-02 Hoffman Drive, Elmhurst, New York (facility) within thirty (30) days of the date (December 28, 2012) it acquired the property. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1); (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 not-for-profit 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 March 6, 2020 (*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 6, 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 May 7, 2020, and June 9, 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 B). 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.

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 July 20, 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 July 20, 2021 (*see Affirmation of Service of Deborah Gorman*, dated July 20, 2021).

Applicable Regulatory Provision

Section 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 transfer.”

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 Providence Rock, Inc. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 57-02 Hoffman Drive, Elmhurst, New York (facility). In particular, PBS tank number 009 at the facility has a capacity of 3,000 gallons and is located underground. (*See Motion for Default Judgment*, Exhibits D, E, F, and G.)
2. Respondent is an active domestic not-for-profit corporation in the State of New York.

¹ Effective October 11, 2015, 6 NYCRR 613-6.9 replaced 6 NYCRR 612.2, Registration of Facilities, which read in part, “(b) *Transfer of ownership.* If the 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.”

See Motion for Default Judgment, Exhibit H.

3. On December 28, 2012, Faith Ministries, Inc. transferred all right, title and interest in the facility to Providence Rock, 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. 2013000066720. (*See Motion for Default Judgment, Exhibit D.*)
4. Pursuant to a registration application received August 4, 2003, the Department issued PBS Certificate Number 2-203122 to Faith Ministries Inc. with an expiration date of August 6, 2008. (*See Motion for Default Judgment, Exhibits E, F and G.*)
5. On March 5, 2020, a search of the Department's PBS registration database revealed that respondent failed to timely re-register the facility as required by 6 NYCRR 613-1.9(d)(1). (*See Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated March 6, 2020, ¶¶ 9-12.*)
6. As of July 20, 2021, respondent had not registered the facility. (*See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated July 20, 2021, ¶¶ 8-9; Exhibit G.*)
7. As shown by Receipt for Service No. 202003190321 issued by the New York State Department of State, respondent was served personally, on March 6, 2020 pursuant to section 306 of the Not-For-Profit Corporation Law, with a notice of hearing and complaint dated March 6, 2020, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 613-1.9, together with a cover letter, statement of readiness and supporting affirmation, for failure to register its PBS facility located at 57-02 Hoffman Drive, Elmhurst, New York within thirty (30) days of the date it acquired the facility. 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 March 6, 2020. (*See Motion for Default Judgment, Exhibit C.*)
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 instructions for appearing by videoconference or telephone. (*See Notice of Hearing, dated November 9, 2020.*)
9. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on January 21, 2021, as directed in the notice of hearing. (*See Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., ¶¶ 4-6; 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, 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 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 [*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 January 21, 2021, as directed in the November 9, 2020, notice of 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 J [proposed order]); (v) staff's motion includes a statement of authority and support for the penalty and relief requested (*see* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, dated July 20, 2021, ¶¶ 14-19); and (vi) Department staff provided proof of service of the motion papers on respondent (*see* Affirmation of Service of Deborah Gorman, dated July 20, 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 register its petroleum bulk storage facility located at 57-02 Hoffman Drive, Elmhurst, New York within thirty (30) days after it acquired the facility, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) (*see Samber* at 1).

Staff's complaint requested a civil penalty in the amount of ten thousand dollars (\$10,000). 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 July 20, 2021, ¶¶ 14-19*).

In this matter, the five-year threshold for applying a civil penalty of ten thousand dollars (\$10,000) was reached on January 27, 2018. Staff's papers demonstrate the violation continued as of July 20, 2021. Accordingly, staff's motion for a civil penalty of ten thousand dollars (\$10,000), as discussed above, should be granted.

I conclude 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. 12 Martense Assoc., Order of the Commissioner, December 19, 2011, at 2*).

Conclusion of Law

By failing to register its PBS facility located at 57-02 Hoffman Drive, Elmhurst, New York within thirty (30) days of the date (December 28, 2012) that it acquired the facility, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1).

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent Providence Rock, Inc. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Providence Rock, Inc. violated ECL 17-1009 and 6 NYCRR 613-1.9(d)(1) by failing to register its PBS facility located at 57-02 Hoffman Drive, Elmhurst, New York within thirty (30) days of the date (December 28, 2012) that it acquired the facility;
3. Directing respondent Providence Rock, 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 Providence Rock, 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
August 11, 2021

APPENDIX A

Matter of Providence Rock, Inc.
DEC File No. PBS.2-608469.5.2020
Motion for Default Judgment

1. Cover letter, dated July 20, 2021, 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 July 20, 2021
3. Motion for Default Judgment, dated July 20, 2021, attaching Exhibits A and B:
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., all dated March 6, 2020
 - B. Affirmation of Deborah Gorman, Esq., dated July 20, 2021, attaching Exhibits C – J:
 - C. Affidavit of Service of Alicia Pasos, sworn to July 8, 2021, attaching Department of State Receipt for Service, dated March 6, 2020, reflecting service upon respondent pursuant to section 306 of the Not-For-Profit Corporation Law
 - D. Printout of search on Automated City Register Information System (ACRIS), dated July 7, 2021, attaching deed dated December 28, 2012
 - E. Petroleum Bulk Storage (PBS) Application from Faith Ministries Inc., PBS No. 2-203122, dated August 4, 2003
 - F. PBS Certificate, PBS No. 2-203122 issued to Faith Ministries Inc. on August 6, 2003, with an expiration date of August 6, 2008
 - G. Facility Information Report, PBS No. 2-203122, printed July 6, 2021
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Providence Rock, Inc., reflecting information through July 7, 2021
 - J. Draft Order²
4. Affirmation of Service of Deborah Gorman, dated July 20, 2021
5. Notice of Hearing, dated November 9, 2020

² There is no Exhibit I.