

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (“ECL”) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC Case No.
2-256706NJB2

-by-

RH 1218 CORP.,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (“Department”) that RH 1218 Corp. (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister the petroleum bulk storage facility located at 1218 University Ave., Bronx, New York, within thirty (30) days of the transfer of ownership of the facility to it. Located at the facility is a 1,500-gallon aboveground petroleum bulk storage tank.

Administrative Law Judge (“ALJ”) D. Scott Bassinson of the Department’s Office of Hearings and Mediation Services was assigned to this matter. ALJ Bassinson 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. 7]). At the August 6, 2015 adjudicatory hearing, Department staff made an oral motion for a default judgment. The ALJ reserved on the motion, and Department staff later submitted for the ALJ’s consideration a 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. 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 reregister the petroleum bulk storage facility located at 1218 University Ave., Bronx, New York, within 30 days after it became owner of the facility, in violation of ECL 17-1009 and 6 NYCRR 612.2(b) (see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

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.

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). Here, respondent's application to reregister the facility was due within thirty (30) days of May 13, 2005, when respondent became owner of the facility, and respondent has failed to reregister the facility since that time (see Default Summary Report at 3 [Finding of Fact No. 5]). 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.¹

Staff requests 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.

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 RH 1218 Corp. waived its right to be heard at the hearing.
- II. Moreover, based upon proof of the facts submitted, respondent RH 1218 Corp. is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum storage facility located at 1218 University Ave., Bronx, New York within 30 days of becoming owner of the facility.
- III. Within fifteen (15) days of the service of this order upon respondent RH 1218 Corp., respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.

¹ 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 RH 1218 Corp., 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 RH 1218 Corp., 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
January 28, 2016

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

DEC Case No.
2-256706NJB2

-by-

RH 1218 CORP.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent RH 1218 Corp. (“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(b), for failing to reregister its petroleum bulk storage facility located at 1218 University Ave., Bronx, New York within 30 days after it became owner of the facility. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of ECL § 17-1009 and 6 NYCRR § 612.2(b); (ii) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (iii) directing respondent to reregister 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 (“Ex.”) 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, Ex. B, at ¶¶ 4-5.

As stated in the notice of hearing, an adjudicatory hearing was convened on August 6, 2015 before the undersigned, at the Department’s Region 2 offices, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York. Department staff was represented by Deborah Gorman, Esq., 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.

Noting for the record that respondent had failed to answer the complaint, failed to appear for the prehearing 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 and held the record open. Staff has now submitted a written motion for a default judgment with supporting papers. See Appendix A, attached hereto (listing documents submitted on motion).

Applicable Regulatory Provision

Section 612.2. Registration of Facilities. ¹

“(a) *Existing facilities.*

“(1) Within one year of the effective date of these regulations, the owner of any petroleum storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.

* * *

“(b) *Transfer of ownership.* If ownership of the facility changes, the new owner must reregister the facility with the department within 30 days of ownership transfer.”

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 RH 1218 Corp. (“respondent”) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 1218 University Ave., Bronx, NY (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 1,500 gallons and is located above ground. See Motion for Default Judgment, Exs. D, E, F, and G.
2. Respondent is an active domestic business corporation in the State of New York. See Motion for Default Judgment, Ex. H.
3. On January 8, 2002, the Department issued Petroleum Bulk Storage (“PBS”) Registration Certificate No. 2-256706 to Tre Amici Realty, LLC, owner of the facility at that time. This registration expired on January 8, 2007. At the bottom of the Certificate, in bold

¹ Part 612 was repealed, effective subsequent to the commencement of this proceeding, and replaced by a revised Part 613. The registration requirements applicable upon transfer of ownership of the real property on which a PBS facility is located have been expanded, and are now found at 6 NYCRR § 613-1.9(d)(1)-(5). For purposes of the violations alleged in this matter, the prior Part 612 applies.

capital letters, is the following: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” See Motion for Default Judgment, Ex. F.

4. On May 13, 2005, Tre Amici Realty LLC conveyed all right, title and interest in the facility to respondent RH 1218 Corp. See Motion for Default Judgment, Ex. D.
5. Yvonne M. Ward is an attorney in the Department’s Office of General Counsel, and is familiar with the Department’s procedures regarding issuance of petroleum bulk storage facility registration certificates. On May 29, 2015, Ms. Ward searched the Department’s petroleum bulk storage registration database, which revealed, among other things, that (i) the combined capacity of the tanks at respondent’s facility exceeded 1,100 gallons; and (ii) as of the date of Ms. Ward’s database search, the PBS registration for PBS facility No. 2-256706 did not reflect the current owner of the facility, and did not reflect that tanks at the facility had been removed or closed in accordance with applicable regulations. See Motion for Default Judgment, Ex. A, Affirmation of Yvonne M. Ward, Esq. (“Ward Aff.”), at ¶¶ 2-10, 12.²
6. As shown by Receipt for Service No. 201506230015 issued by the New York State Department of State, on June 9, 2015, Department staff served respondent pursuant to section 306 of the Business Corporation Law 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(b), together with a cover letter, statement of readiness and supporting affirmation, for failure to reregister its petroleum bulk storage facility located at 1218 University Ave., Bronx, New York within 30 days after becoming owner of the facility. 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, Ex. C.
7. 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, Ex. B, 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. 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-

² Ms. Ward states that the Department issued a PBS certificate for respondent’s facility on January 11, 2002. See Ward Aff. ¶ 11. The documents submitted on the motion reflect, however, that the certificate for this facility was issued on January 8, 2002 and expired on January 8, 2007. See Motion for Default Judgment, Exs. F, G. The error may be a misreading of Facility Information Report submitted with the motion, which states that the certificate was printed on January 11, 2002. See Motion for Default Judgment, Ex. G. Immediately below that entry, the same document states that the certificate was issued on January 8, 2002. See id.

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).

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, Ex. 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 D. 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 reregister the petroleum bulk storage facility located at 1218 University Ave., Bronx, New York, within 30 days after it became owner of the facility, in violation of ECL § 17-1009 and 6 NYCRR § 612.2(b).

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, Ex. A, Complaint, at Wherefore Clause ¶ II; see also Ex. B, Gorman Aff., 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 2.³

³ In its motion for a default judgment, Department staff has also requested that the Commissioner “direct[] Respondents [sic] to permanently cease and desist from any and all future violations of the ECL and the Rules and

Recommendation

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

1. Granting Department staff's motion for default judgment, holding respondent RH 1218 Corp. in default pursuant to the provisions of 6 NYCRR § 622.15;
2. Holding that respondent RH 1218 Corp. violated ECL § 17-1009 and 6 NYCRR § 612.2(b) by failing to reregister its petroleum bulk storage facility located at 1218 University Ave., Bronx, New York within 30 days after becoming owner of the facility;
3. Directing respondent RH 1218 Corp. 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 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/_____
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
January 22, 2016

Regulations promulgated pursuant thereto.” Motion for Default Judgment, at Wherefore Clause ¶ IV; see also id. Ex. I, Proposed Order, at Ordering Clause ¶ III. This request is unnecessary. 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.

APPENDIX A

Matter of RH 1218 Corp.
DEC File No. R2-256706NJB2
Motion for Default Judgment

1. Cover letter, dated January 7, 2016, addressed to Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services, noting that respondent was served with copies 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 Yvonne M. Ward, Esq.
 - B. Affirmation of Deborah Gorman, Esq., dated January 7, 2016
 - C. Affidavit of Service of Kara Paulsen dated 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 May 13, 2005
 - E. Petroleum Bulk Storage ("PBS") Application, PBS No. 2-256706, dated December 19, 2001
 - F. PBS Certificate, PBS No. 2-256706, issued January 8, 2002, expired January 8, 2007
 - G. Facility Information Report, PBS No. 2-256706, printed December 18, 2015
 - H. NYS Department of State Entity Information Sheet regarding RH 1218 Corp., reflecting information through December 31, 2015
 - I. Draft Order