

**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.2-208744.9.2019

SHANA 1 CORP.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Shana 1 Corp. 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 June 2, 2018, the date on which its prior registration expired. Respondent's facility is located at 556 West 141st Street, New York, New York, and includes an aboveground 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 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 August 8, 2019, and failed to appear for the adjudicatory hearing scheduled for September 6, 2019 (*see* Default Summary Report at 3 [Finding of Fact No. 8]). At the September 6, 2019 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 June 2, 2018, 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 B, Affirmation of Deborah Gorman, Esq., dated June 3, 2020, ¶ 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, in its complaint, sought a penalty 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 take into account the duration of the violation (*see Matter of 12 Martense Assoc. LLC*, Order of the Commissioner, December 19, 2011, at 2). In its motion for default judgment and proposed order, Department staff seeks to reduce the civil penalty to five thousand dollars (\$5,000). Where, as here, an owner has not registered the facility for up to two years, and no other violations or mitigating or aggravating factors exist, a civil penalty of five thousand dollars (\$5,000) is consistent with administrative precedent (*see 12 Martense Assoc. LLC*, at 2). The requested penalty of five thousand dollars (\$5,000) is authorized and appropriate.¹

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 to the Department within fifteen (15) days of the service of this order upon respondent, 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 Shana 1 Corp. 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 Shana 1 Corp. 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 556 West 141st Street, New York, New York, on or before June 2, 2018, the date on which its prior registration expired.
- III. Within fifteen (15) days of the service of this order upon respondent Shana 1 Corp., 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 Shana 1 Corp., respondent shall pay a civil penalty in the amount of five thousand dollars

¹The two-year threshold for applying a civil penalty of seven thousand five hundred dollars (\$7,500) was reached on June 2, 2020, one day before the submission of staff’s motion for default judgment, but Department staff chose to apply the lower penalty because the motion papers and supporting documents were prepared prior to the June 2, 2020 threshold (*see* correspondence from Deborah Gorman, dated July 7, 2020; *see also* Exhibit G, printed April 3, 2020).

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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.2-208744.9.2019

SHANA 1 CORP.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Shana 1 Corp. (respondent) with a notice of hearing and complaint, dated June 5, 2019, 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 556 West 141st Street, New York, 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 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 5, 2019 (*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 or about June 5, 2019 (*see id.*). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for August 8, 2019, 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 September 6, 2019, an adjudicatory hearing was convened before me. 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). By cover letter dated June 3, 2020, 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 or about June 3, 2020 (*see* Affirmation of Service of Deborah Gorman, dated July 7, 2020).

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. Shana 1 Corp. is the owner of a PBS facility having a capacity of over 1,100 gallons located at 556 West 141st Street, New York, New York (facility). In particular, PBS tank number 556 at the facility has a capacity of 3,000 gallons and is located aboveground. (*See* Motion for Default Judgment, Exhibits D, E, F, and G.)
2. Respondent is an active domestic business corporation in the State of New York. (*See* Motion for Default Judgment, Exhibit H.)
3. On June 2, 2008, Howard Plotkin transferred all right, title and interest in the facility to Shana 1 Corp., the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, City Register File No. 2008000235300. (*See* Motion for Default Judgment, Exhibit D.)
4. Pursuant to a registration application received May 21, 2013, the Department issued PBS Certificate Number 2-208744 to Shana 1 Corp. on May 22, 2013 with an expiration date of June 2, 2018. (*See* Motion for Default Judgment, Exhibits E, F, G.)
5. On June 30, 2019, a search of the Department’s PBS registration database revealed that the registration for the facility expired on June 2, 2018 and, as of May 30, 2019, had not

been renewed. (*See* Motion for Default Judgment, Exhibit A, Affirmation of Deborah Gorman, Esq., dated June 5, 2019, ¶¶ 9-12.)

6. As of June 3, 2020, respondent had not registered the facility. (*See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated June 3, 2020, ¶ 9.)
7. As shown by Receipt for Service No. 201906130053 issued by the New York State Department of State, respondent was served personally, on June 5, 2019, pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated June 5, 2019, 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 556 West 141st Street, New York, New York. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about June 5, 2019. (*See* Motion for Default Judgment, Exhibit C.)
8. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for August 8, 2019, 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 September 6, 2019, as directed in the notice of hearing. (*See* Motion for Default Judgment, Exhibit B, Affirmation of Deborah Gorman, Esq., dated June 3, 2020, ¶¶ 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 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* 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 August 8, 2019, 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 for September 6, 2019, as directed in the notice of hearing. Department staff has submitted a proposed order (*see* Motion for Default Judgment, Exhibit I). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers (*see* Affirmation of Service of Deborah Gorman, dated July 7, 2020, ¶ 2).

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 556 West 141st Street, New York, 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 five thousand dollars (\$5,000). 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, Affirmation of Deborah Gorman, dated June 3, 2020, ¶¶ 13-18). 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 (*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 five thousand dollars (\$5,000) should be granted because respondent is not prejudiced by reducing the penalty requested.¹

I conclude that staff’s request for a civil penalty in the amount of five thousand dollars (\$5,000) is consistent with the Department’s penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see 12 Martense Assoc.*, at 2).

¹ In this matter, the two-year threshold for applying a civil penalty of seven thousand five hundred dollars (\$7,500) was reached on June 2, 2020, after service of the notice of hearing and complaint, but one day before the submission of staff’s motion for default judgment. Because Department staff prepared the motion papers before the June 2, 2020 threshold, staff chose to apply the lower penalty (*see* correspondence from Deborah Gorman, dated July 7, 2020; *see also* Exhibit G, printed April 3, 2020).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 556 West 141st Street, New York, New York on or before June 2, 2018, 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 Shana 1 Corp. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Shana 1 Corp. violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its PBS facility located at 556 West 141st Street, New York, New York on or before June 2, 2018, the date the prior registration expired;
3. Directing respondent Shana 1 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 Shana 1 Corp. to pay a civil penalty in the amount of five thousand dollars (\$5,000) 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
July 16, 2020

APPENDIX A

Matter of Shana 1 Corp.
DEC File No. PBS.2-208744.9.2019
Motion for Default Judgment

1. Cover letter, dated June 3, 2020, addressed to 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 June 3, 2020.
3. Motion for Default Judgment, dated June 3, 2020, attaching Exhibits A and B;
 - A. Cover letter, Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman, Esq., dated June 5, 2019;
 - B. Affirmation of Deborah Gorman, Esq., dated June 3, 2020, attaching Exhibits C, D, E, F, G, H, and I;
 - C. Affidavit of Service of Dale Thiel, sworn to May 21, 2020, attaching Department of State Receipt for Service, dated June 5, 2019, 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 April 3, 2020, attaching deed dated June 2, 2008;
 - E. Petroleum Bulk Storage (PBS) Application from Shana 1 Corp. PBS No. 2-208744, received May 21, 2013;
 - F. PBS Certificate, PBS No. 2-208744 issued to Shana 1 Corp on May 22, 2013 with an expiration date of June 2, 2018;
 - G. Facility Information Report, PBS No. 2-208744, printed April 3, 2020;
 - H. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Shana 1 Corp., reflecting information through April 2, 2020;
 - I. Draft Order.
4. Correspondence from Deborah Gorman, Esq., dated July 7, 2020.
5. Affirmation of Service of Deborah Gorman, Esq., dated July 7, 2020.