

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.
PBS. R2-608034.2.2019

-by-

VASZER REALTY LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Vaszer Realty 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 October 9, 2017, the date on which its prior registration expired. Respondent's facility, which is listed as an apartment/office building, is located at 353 East Mosholu Parkway North, Bronx, New York, and includes an aboveground petroleum bulk storage tank with a capacity of 3,000 gallons (*see* Hearing Exhibits 5 and 7).

Administrative Law Judge (ALJ) Michele M. Stefanucci of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ's hearing 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, and failed to appear for the adjudicatory hearing (*see* Hearing Report at 4 [Finding of Fact 8]). At the July 23, 2019 adjudicatory hearing, Department staff made an oral motion for a default judgment and presented its case on the merits.

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* Hearing Report at 5-6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The proof adduced at hearing provides 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 October 9, 2017, the date on which its prior registration expired and, therefore, is in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c).

At hearing, Department counsel indicated that the requirement to register PBS facilities is one of the "cornerstones" of the PBS regulatory scheme (*see* Hearing ediorol recording). 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.

In its complaint, Department staff requested a civil penalty of ten thousand dollars (\$10,000). At hearing, Department staff sought a modified penalty 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 (*see Matter of 12 Martense Associates, LLC*, Order of the Commissioner, December 19, 2011, at 2). For those facilities that have violated the registration requirement for less than two years, Department staff has requested, absent aggravating circumstances, a penalty of five thousand dollars (\$5,000).

In this case, respondent was required to register the facility on or before October 9, 2017. Although respondent has been out of compliance for less than two years, Department staff has sought a penalty higher than five thousand dollars (\$5,000) due to an aggravating circumstance – that is, respondent’s prior failure of respondent to timely register the PBS facility following its acquisition of the facility (*see* Hearing Report at 5; Staff Exhibit 6). Specifically, Department staff is requesting a civil penalty of seven thousand five hundred dollars (\$7,500).

Increasing a civil penalty based on aggravating circumstances (or, alternatively, lowering a penalty in light of mitigating circumstances) requires a case-specific review. As part of the proceeding, testimony should be provided, together with relevant documentary evidence, in support of the aggravating (or mitigating) circumstance. For example, where a violation of a prior consent order involving PBS violations is cited as a justification for increasing the penalty, the consent order should be presented as an exhibit and staff’s testimony should address the consent order violations that would justify a higher penalty. Where an increase in penalty is based on a previous failure to timely register a facility, documentation of the past failure to register, including any relevant correspondence between the Department and respondent(s) relating to that failure, should, as appropriate, be offered in the proceeding.

Department staff contends that respondent’s failure to comply previously with a registration timeframe warrants the increase in the civil penalty for this latest registration violation. The hearing exhibits demonstrate that respondent Vaszer Realty LLC acquired the facility from Renewal Realty Corp. on October 9, 2012 (*see* Hearing Exhibit 3) but that the Department did not receive respondent Vaszer Realty LLC’s application regarding a change of ownership until December 11, 2015 (*see* Hearing Exhibit 6; *see also* Hearing Exhibit 7).¹ Pursuant to the Department’s regulations (*see* former 6 NYCRR 612.2[b]), new owner Vaszer Realty LLC was required to submit a registration application as to the change of ownership within thirty (30) days of the transfer of the facility to it and failed to do so.

Respondent’s prior failure to timely register the facility on acquiring the facility constitutes an aggravating circumstance that is relevant to the determination of the civil penalty in the pending matter regarding its lateness in renewing its most current registration.

¹ For purposes of the record, submitting the petroleum bulk storage certificate of the prior owner that was in effect at the time of the transfer of the facility to respondent Vaszer Realty LLC would have been useful.

The hearing exhibits provide support for Department staff's request to increase the civil penalty to seven thousand five hundred dollars (\$7,500). On this record, staff's requested penalty is authorized and appropriate.

I direct that respondent Vaszer Realty LLC submit the civil penalty of seven thousand five hundred dollars (\$7,500) to the Department within fifteen (15) days of the service of this order upon respondent. In addition, I direct that within fifteen (15) days of the service of this order upon respondent Vaszer Realty LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility together with 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 Vaszer Realty LLC waived its right to be heard at the hearing.
- II. Based on the pleadings and evidence adduced at hearing, respondent Vaszer Realty 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 353 East Mosholu Parkway North, Bronx, New York, on or before October 9, 2017, the date on which its prior registration expired.
- III. Within fifteen (15) days of the service of this order upon respondent Vaszer Realty LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility together with applicable and past due registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent Vaszer Realty 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 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 Vaszer Realty 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
September 24, 2019

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),

HEARING REPORT

DEC Case No.
PBS. 2-608034.2.2019

-by-

VASZER REALTY LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Vaszer Realty LLC, with a notice of hearing and complaint, dated November 5, 2018, alleging a violation of ECL 17-1009 and 6 NYCRR 613-1.9(c) for failing to renew the registration of its petroleum bulk storage facility located at 353 East Mosholu Parkway North, Bronx, New York, on or before October 9, 2017, the date on which its prior registration expired. The complaint seeks an order of the Commissioner:

- finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c);
- assessing a civil penalty in the amount of ten thousand dollars (\$10,000);
- directing respondent to register its petroleum bulk storage facility within fifteen (15) days of service of the Commissioner's order by remitting the applicable registration fee along with a complete registration application; and
- granting such other and further relief as the Commissioner shall deem just and appropriate.

Because respondent is an active limited liability company in the State of New York, service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State on November 5, 2018 (*see* Staff Exhibit 2). Department staff provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about November 5, 2018 (*see id.*). Respondent failed to file an answer to the complaint.

As stated in the notice of hearing, an adjudicatory hearing was convened on February 6, 2019, before Administrative Law Judge (ALJ) Michael Caruso (*see* Staff Exhibit 1). Department staff was represented by Deborah Gorman, Esq., Senior Attorney, 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 requested that the matter be adjourned in contemplation of settling the matter with respondent. The matter was adjourned and it was noted for the record that if the matter did not settle, it would be reconvened upon request by staff and notice to respondent.

On June 25, 2019, the Office of Hearings and Mediation Services served a notice of hearing on respondent by first class mail, advising respondent that the hearing would be reconvened on July 22, 2019, and each day thereafter. On July 23, 2019, the adjudicatory hearing was reconvened before the undersigned at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by Tyler Hepner, Esq., Excelsior Fellow, under the supervision of the Office of General Counsel. No one appeared on behalf of respondent.

Department staff orally renewed its motion for a default judgment. Department staff called one witness, Benjamin Conlon, Associate Attorney with the Department's Office of General Counsel, and Section Chief in the Bureau of Remediation. In all, nine (9) exhibits were received in evidence.

Applicable Regulatory Provision

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 preponderance of evidence presented at the hearing (*see* 6 NYCRR 622.11[c]):

1. Respondent Vaszer Realty LLC is the owner of a petroleum bulk storage facility with a capacity of over 1100 gallons located at 353 East Mosholu Parkway North, Bronx, New York (facility). Petroleum storage tank number 001 at the facility has a capacity of 3,000 gallons and is located aboveground. *See* Testimony of Benjamin Conlon [Conlon Testimony]; Staff Exhibits 5, 6, and 7.
2. Respondent is an active domestic limited liability company in the State of New York. *See* Conlon Testimony; Staff Exhibit 4.

3. Pursuant to a registration application received on December 11, 2015, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-608034 to Vaszer Realty LLC, identified on the certificate as the owner of the facility, on January 20, 2016, with an expiration date of October 9, 2017. The PBS application received by Department staff on December 11, 2015, identifies the owner as Vaszer Realty LLC. *See Conlon Testimony; Staff Exhibits 5, 6, and 7.*
4. On October 9, 2012, Renewal Realty Corp., by deed, transferred all right, title and interest in the facility to respondent Vaszer Realty LLC, 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. 2012000417031. *See Conlon Testimony; Staff Exhibit 3.*
5. Benjamin Conlon is an Associate Attorney in the Department's Office of General Counsel, serving as a Section Chief in the Bureau of Remediation, whose responsibilities include enforcement of the petroleum bulk storage, chemical bulk storage, and major oil storage facilities laws and regulations. Mr. Conlon is authorized to access and inspect the Department's unified information system (UIS) and the electronic repository for scanned documents known as DecDOCS. The UIS and DecDOCS are databases maintained by the Department and contain petroleum bulk storage facility records filed with the Department, which records include petroleum bulk storage facility registrations filed pursuant to 6 NYCRR 613-1.9. *See Conlon Testimony.*
6. On July 22, 2019, Benjamin Conlon searched the petroleum bulk storage facility records contained in the Department's UIS and DecDOCS databases for any petroleum bulk storage facility registration application filed by respondent for the facility. Mr. Conlon determined that respondent's registration expired on October 9, 2017, and, as of July 22, 2019, had not been renewed. *See Conlon Testimony; see also Staff Exhibits 6 and 7.*
7. As shown by Receipt for Service No. 201811190572 issued by the New York State Department of State, respondent was served personally, on November 5, 2018, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated November 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 petroleum bulk storage facility located at 353 East Mosholu Parkway North, Bronx, New York, on or before October 9, 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 November 5, 2018. *See Staff Exhibits 1 and 2.*
8. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter for February 6, 2019, and reconvened on July 23, 2019, as directed in the notices of hearing. *See Conlon Testimony.*

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 a 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" (*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* 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 (iii) respondent failed to appear for the adjudicatory hearing scheduled for February 6, 2019 and reconvened on July 23, 2019, as directed in the notices of hearing. Department staff has submitted a proposed order.

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 353 East Mosholu Parkway North, Bronx, New York, on or before October 9, 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). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to renew the registration of its petroleum bulk storage facility located at 353 East Mosholu Parkway North, Bronx, New

York, in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c). The Department is entitled to judgment upon the facts proven.

In its complaint, Department staff seeks an order imposing a civil penalty of ten thousand dollars (\$10,000). ECL 71-1929(1) 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 Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011 [*12 Martense Associates*], at 2). Absent aggravating or mitigating facts, Department staff has generally requested a civil penalty of five thousand dollars (\$5,000) for violations extending up to two years (*see 12 Martense Associates* at 2).

At hearing and in Department staffs proposed order, staff seeks a modified civil penalty of seven thousand five hundred dollars (\$7,500) due to aggravating factors, specifically respondent's prior failure to timely register the petroleum bulk storage facility (*see Conlon Testimony*; Staff Exhibit 6). Based on the record in this proceeding, I find that this requested civil penalty is authorized and appropriate (*see JG 542 Associates LLC*, Order of the Commissioner, June 12, 2017, at 2).

Conclusion of Law

By failing to renew the registration of its PBS facility located at 353 East Mosholu Parkway North, Bronx, New York, on or before October 9, 2017, the date the prior registration expired, respondent violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Recommendations

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

1. Granting Department staff's motion for default, holding respondent Vaszer Realty LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Vaszer Realty LLC 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 353 East Mosholu Parkway North, Bronx, New York, on or before October 9, 2017, the date the prior registration expired;
3. Directing respondent Vaszer Realty LLC to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete petroleum bulk storage registration application for the facility, together with applicable registration fees;

4. Directing respondent Vaszer Realty 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/_____
Michele M. Stefanucci
Administrative Law Judge

Dated: August 7, 2019
Albany, New York

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Vaszer Realty, LLC
 353 East Mosholu Parkway North, Bronx, New York – DEC Case No. PBS.2-608034.2.2019
 July 23, 2019 – Central Office
 Edrol File No. 190723145019

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, Statement of Readiness, and Affirmation of Deborah Gorman all dated November 5, 2018.	✓	✓	Department Staff	
2	Affidavit of Service of Dale Thiel, sworn to July 19, 2019, with New York State Department of State Receipt for Service dated November 5, 2018.	✓	✓	Department Staff	
3	New York City Department of Finance, ACRIS Title Search, dated July 11, 2019, and deed to respondent, dated October 9, 2012.	✓	✓	Department Staff	
4	NYS Department of State Entity Information, current through July 10, 2019.	✓	✓	Department Staff	
5	PBS Program Facility Information Report, printed July 11, 2019.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	PBS Application, received December 11, 2015, for facility located at 353 East Mosholu Parkway North, Bronx, New York.	✓	✓	Department Staff	
7	PBS Registration Certificate issued January 20, 2016, expiration date October 9, 2017.	✓	✓	Department Staff	
8	Affirmation of attempted contact of Deborah Gorman, dated July 17, 2019.	✓	✓	Department Staff	
9	Proposed Order.	✓	✓	Department Staff	