

**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 Part 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**RULING**

DEC Case No.  
R6-20150428-29

- by -

**WATERBURY SQUARE, INC.,**

Respondent.

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Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Nels G. Magnuson, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Kiernan Professional Group, LLP (James M. Kernan, PE, Esq., of counsel) for respondent Waterbury Square, Inc.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Waterbury Square, Inc. (respondent) with a notice of hearing and complaint, dated January 27, 2016, alleging:

- (i) a violation of 6 NYCRR 612.2(b), for failing to reregister respondent's petroleum bulk storage (PBS) facility located at 107 River Street, Oriskany, NY 13424 within thirty (30) days of the date (September 12, 2014) that respondent acquired the facility; and

- (ii) a violation of 6 NYCRR 613.9(b), for failing to properly close tanks permanently out of service at respondent's PBS facility.<sup>1</sup>

The complaint seeks an order of the Commissioner: (1) finding respondent in violation of 6 NYCRR 612.2(b) and 613.9(b); (2) assessing a civil penalty of at least fifteen thousand dollars (\$15,000) with an appropriate portion of the penalty, but not more than seven thousand five hundred dollars (\$7,500) suspended to ensure compliance with the order; (3) directing respondent to submit an approvable PBS registration application together with applicable fees in accordance with 6 NYCRR 613-1.9 within 10 days of the Commissioner's order; (4) directing respondent to permanently close the underground storage tank system in accordance with 6 NYCRR 613-3.5(b) and permanently close the aboveground storage tank in accordance with 6 NYCRR 613-4.5(b) within 60 days of the Commissioner's order; (5) directing respondent to provide any duly designated officer, employee or agent of the Department entry to respondent's PBS facility or areas in the vicinity of respondent's facility which may be under the control of respondent, and as to which Respondent has authority to provide access to others and any areas under respondent's control necessary to gain access thereto, for the purposes of inspection; sampling and testing that the Department deems necessary; ascertaining respondent's compliance with the ECL, the Navigation Law, the regulations promulgated thereto, and provisions of the order; (6) reserving all rights of the Department and the State regarding civil or criminal actions for matters not specifically alleged in this proceeding; and (7) granting such other and further relief as the Commissioner may deem just and proper.

Department staff commenced this proceeding by serving respondent by certified mail, return receipt requested, pursuant to 6 NYCRR 622.3(a)(2). The cover letter was addressed to James

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<sup>1</sup> Parts 612 and 613 were repealed, effective subsequent to the inspection of the premises, and replaced by a revised part 613. The registration requirements applicable for facilities transferred to new owners are now found at 6 NYCRR 613-1.9(d). The requirements for the closure of underground storage tanks and aboveground storage tanks are now found at 6 NYCRR 613-3.5 and 613-4.5, respectively. For the purposes of the violations alleged in this matter, the prior parts 612 and 613 apply.

M. Kernan, PE, Esq., President, Waterbury Square, Inc., 1310 Utica Street, P.O. Box 855, Oriskany, New York 13424.<sup>2</sup>

Pursuant to the notice of hearing, a pre-hearing conference was held before the undersigned Administrative Law Judge (ALJ) on March 8, 2016. Department staff was represented by Nels G. Magnuson, Esq., Assistant Regional Attorney with Ronald F. Novak, PE, an engineer in the Department's Division of Environmental Remediation, Region 6 also in attendance. Respondent was represented by Kernan Professional Group, LLP (David Bagley, Esq., of counsel) with Frederick Davis, president of respondent in attendance.

During the pre-hearing conference, Department staff noted that Mr. Kernan objected to service of the notice of hearing because he was not the president of respondent. Mr. Davis acknowledged that he signed the certified mail receipt for the service of the notice of hearing and complaint. Respondent stated, on the record, that respondent would accept the previous service if staff acknowledges that Mr. Davis is the president of respondent, not Mr. Kernan. Staff acknowledged that fact, and respondent indicated it just needed a little more time to file a response to the complaint. The parties agreed, on the record, that respondent would either sign and return the Department staff's order on consent by March 18, 2016 or serve Department staff with an answer to the complaint by March 18, 2016. This agreement was memorialized in a letter from the undersigned dated March 9, 2016.

Respondent returned a signed order on consent to Department staff under cover of March 18, 2016. Respondent made substantive changes to the order on consent that were not acceptable to the Department. As revised, the order on consent was rejected by staff. After failing to resolve the matter, Department staff served a notice of hearing dated April 11, 2016 advising respondent that a hearing would be held on May 5, 2016 at the offices of NYSDEC, 14<sup>th</sup> Floor, 207 Genesee Street, Utica, New York. The notice indicated staff was prepared to move for a default judgment on the record.

The day before the scheduled hearing, respondent served a proposed order to show cause and supporting petition and documents on Department staff, the Attorney General, and the undersigned. Respondent seeks Supreme Court relief from a

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<sup>2</sup> Respondent's address for service of process on file with the New York State Department of State is "Waterbury Square, Inc., 1310 Utica Street, Oriskany, New York 13424." (See Complaint, Exhibit A)

default being entered against respondent, even though respondent accepted the Department's service during the March 8, 2016 pre-hearing conference and has not served an answer to the complaint.

The hearing was held on May 5, 2016 at 10:05 a.m. Appearing before me were Mr. Magnuson and Mr. Novak, for Department staff, and Mr. Kernan and Mr. Davis, for respondent. The parties engaged in lengthy discussions but reached no resolution of the alleged violations. Respondent continued to argue that Department had not obtained jurisdiction even though respondent had now appeared before me twice, previously accepted service and moved for extra time to respond to the complaint. Mr. Kernan acknowledged that respondent received the notice of hearing and complaint. Respondent moved for an adjournment of this proceeding until the order to show cause was determined as well as two other Supreme Court matters regarding the real property and equipment thereon.

When questioned, respondent did not provide a reasonable excuse for its default or demonstrate it had a meritorious defense to Department staff's allegations. Respondent referred to two court proceedings: one regarding the ownership of the equipment located at the facility; and the other, a quiet title action regarding the real property. Respondent did not demonstrate whether the second action would affect title to the real property where the PBS tanks are located.

According to Mr. Novak, the underground PBS tank contains approximately 4,000 gallons of product.<sup>3</sup> Mr. Novak's estimate is based on a March 2015 inspection of respondent's facility. In 2016, a consultant hired by respondent estimated the same tank contains approximately 7,000 gallons of product. Department staff is concerned that the tank may be taking on water and leaking into the environment due to the age and construction of the tank. Respondent indicated its willingness to remove the liquid and sludge from both tanks, but desired something in writing from the Department requiring respondent to do so. Staff moved for a ruling directing respondent to remove the product from both PBS tanks during the pendency of this matter. Respondent did not object to that course of action.

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<sup>3</sup>According to the previous registration of the facility, there are two PBS tanks located at the facility. The underground PBS tank has a capacity of 12,000 gallons, and the aboveground PBS tank has a capacity of 2,000 gallons. (See Complaint, Exhibit C.)

## Discussion

In an administrative proceeding conducted pursuant to 6 NYCRR part 622, the respondent may seek relief from the assigned ALJ for any number of reasons, including motions to dismiss Department staff's complaint based on any of the CPLR 3211 defenses. Respondents may also seek relief from a default by requesting that the ALJ excuse the default and, in the event that a default has been entered, requesting that the Commissioner vacate the default. (See RO Acquisition Corp., and Industrial Finishing Products, Inc., Ruling of the Commissioner on Motion to Vacate Default, July 23, 2012; Gladiator Realty Corp., and Canal Management Corp., Order of the Commissioner, July 1, 2010; Glenville Fire District #5, Ruling of the Chief Administrative Law Judge on Motion for Default Judgement, August 14, 2012.)

It is the burden of the respondent in this proceeding to demonstrate that good cause or reasonable excuse for the default exists.<sup>4</sup> Good cause depends upon the "extent of the delay, whether the opposing party has been prejudiced, whether the defaulting party has been willful, and the 'strong public policy' in favor of resolving cases on the merits (Puchner v Nastke, 91 AD3d at 1262; see also Huckle v CDH Corp., 30 AD3d 878, 879-880 [3d Dept 2006] [CPLR 3215 motion].)" (See Glenville Fire District #5 at 4.)

To date, respondent's conduct has been willful as respondent refuses to answer the complaint because it believed service was defective and the complaint contains factual errors. Those are the very issues that an answer or motion to dismiss are supposed to address. Respondent has not moved to excuse its default. Instead, respondent seeks relief from the Supreme Court. Nonetheless, I see no prejudice to Department staff by giving respondent a third opportunity to answer the complaint.

## **Ruling**

Respondent's motion to adjourn this proceeding is denied, and respondent is directed to serve an answer to the complaint on Department staff within twenty (20) days of respondent's

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<sup>4</sup> On this record, I conclude that respondent's reference to the quiet title action does not raise a reasonable excuse or meritorious defense to this proceeding. When "the imminence of any decision in the quiet title action is uncertain, [it] does not provide a basis for a stay of the Department's proceedings." (See Matter of Winter 1-A [Fortuna Energy, Inc.], Ruling and Interim Decision of the Commissioner, October 20, 2008 at 5.)

receipt of this ruling. Respondent shall simultaneously file the answer with the Office of Hearings and Mediation Services.

Department staff's request that respondent be directed to remove the petroleum product from the PBS tanks is granted, and respondent is directed to remove any liquid and sludge from the underground and aboveground storage tank systems at the facility with thirty (30) days of receipt of this ruling. All product removed from the tank systems must be disposed of in accordance with all applicable state and federal requirements. Respondent will provide Department staff with a report within forty-five (45) days of receipt of this ruling demonstrating the proper removal of all liquid and sludge from the tank systems and its proper disposal.

SO ORDERED,  
/s/

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Michael S. Caruso  
Administrative Law Judge

Dated: Albany, New York  
May 10, 2016