

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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.2-279633.10.2018

-by-

**WINGATE REALTY, LLC,**

Respondent.

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This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Wingate 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 at 2686 Bailey Avenue, Bronx, New York (facility) on or before July 14, 2017, the date on which its prior registration expired. Located at the facility is an aboveground storage tank with a capacity of 5,000 gallons.

On July 22, 2019, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of DEC's Office of Hearings and Mediation Services. ALJ Caruso 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 and failed to appear for the adjudicatory hearing scheduled in the matter for April 8, 2019 and reconvened on July 22, 2019 (*see* Hearing Report at 4 [Finding of Fact No. 8]).

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 4-6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

At the hearing on July 22, 2019, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim and proved its case on the merits by a preponderance of the evidence (*see* Hearing Report at 5-6). Accordingly, staff is entitled to a judgment based on record evidence.

The record demonstrates that respondent was required to renew the registration of its PBS facility on or before July 14, 2017 (*see* ECL 17-1009[2]; Hearing Report at 4-5). Respondent's

failure to properly renew the registration of its facility violated ECL 17-1009 and 6 NYCRR 613-1.9(c).

Department staff, in its complaint, sought a civil penalty of ten thousand dollars (\$10,000). ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of title 10 of article 17 and its implementing regulations. At hearing, Department staff moved to reduce the penalty to seven thousand five hundred dollars (\$7,500). ALJ Caruso granted staff's motion.

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). In cases, such as here, in which one of the penalty date "thresholds" under *12 Martense Associates* and its progeny is passed during the period between service of the notice of hearing and complaint and the date of the adjudicatory hearing, the penalty amount based on the longer period of time is appropriate (*see Matter of Promesa Court Residences Limited Partnership*, Order of the Commissioner, September 11, 2017, at 3). In this case, then, I am imposing a penalty of seven thousand five hundred dollars (\$7,500) because the duration of respondent's violation exceeds two years but is less than five years as of the date of the hearing (*see* Hearing Report at 5).

I direct that respondent submit the civil penalty to the Department within fifteen (15) days of the service of this order upon respondent. I also direct that respondent submit to the Department a petroleum bulk storage application for the facility within fifteen (15) days of service of this order upon it, together with all applicable 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 Wingate Realty, LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Wingate 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 2686 Bailey Avenue, Bronx, New York on or before July 14, 2017, the date the prior registration expired.
- III. Within fifteen (15) days of the service of this order upon respondent Wingate Realty, LLC, respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent Wingate 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 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, 14<sup>th</sup> 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 Wingate 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: August 28, 2019  
Albany, New York

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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.2-279633.10.2018

-by-

**WINGATE REALTY, LLC,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Wingate Realty, LLC (respondent) with a notice of hearing and complaint, dated August 1, 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 2686 Bailey Avenue, Bronx, New York on or before July 14, 2017, the date on which its prior registration expired. The complaint seeks an order of the Commissioner: (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 613-1.9(c); (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (3) 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 (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Because respondent is an active domestic 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 August 1, 2018 (*see* Staff Exhibit 3). Department staff provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about August 1, 2018 (*see id.*). Respondent failed to file an answer to the complaint.

As stated in the notice of hearing, on October 15, 2018, an adjudicatory hearing was convened before the undersigned. 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. I adjourned the matter and noted for the record that if the matter did not settle, it would be reconvened upon request by staff and notice to respondent.

The matter did not settle, and Department staff requested that the matter be reconvened. On February 19, 2019, the Office of Hearings and Mediation Services (OHMS) served a notice of hearing on respondent by first class mail, advising respondent that the hearing would be reconvened on April 8, 2019 (*see* Staff Exhibit 2). On April 8, 2019, Ms. Gorman appeared before me on behalf of Department staff. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing and proffered a staff witness. Noting for the record that respondent had not answered the complaint and failed to appear for the reconvened adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. I reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b), and indicated that, upon staff's request, the hearing would be reconvened on a subsequent date and on 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. On July 22, 2019, the adjudicatory hearing was reconvened before me at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by law student intern Lexus Jahnke, 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, ten (10) 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 Wingate Realty, LLC (respondent) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 2686 Bailey Avenue, Bronx, New York (facility). Petroleum storage tank number 100 at the facility has a capacity of 5,000 gallons and is located aboveground in a subterranean vault. See Testimony of Benjamin Conlon (Conlon Testimony); Staff Exhibits 4, 6, 7, and 8.
2. Respondent is an active domestic limited liability company in the State of New York. *See* Conlon Testimony; Staff Exhibit 5.
3. Pursuant to a registration application received May 29, 2012, the Department issued Petroleum Bulk Storage (PBS) Registration Certificate No. 2-279633 to Wingate Realty LLC identified on the certificate as the owner of the facility, on July 18, 2012 with an expiration date of July 14, 2017. The PBS application received by Department staff on May 29, 2012 identifies the owner as Wingate Realty LLC. *See* Conlon Testimony; Staff Exhibits 7 and 8.
4. On April 24, 1995, Alice L. Kulick, by deed, transferred all right, title and interest in the facility to respondent Wingate Realty, LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, on Reel 1389, Page 1272. *See* Conlon Testimony; Staff Exhibit 4.
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 July 14, 2017 and, as of July 22, 2019, had not been renewed. *See* Conlon Testimony; *see also* Staff Exhibits 6 and 8.
7. As shown by Receipt for Service No. 201808080277 issued by the New York State Department of State, respondent was served personally, on August 1, 2018, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated August 1, 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 2686 Bailey Avenue, Bronx, New York on or before July 14, 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 August 1, 2018. *See* Staff Exhibits 1 and 3; *see also* Hearing Record.

8. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter for April 8, 2019 and reconvened on July 22, 2019, as directed in the notices of hearing. *See* 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, 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 April 8, 2019 and reconvened on July 22, 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 2686 Bailey Avenue, Bronx, New York on or before July 14, 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 2686 Bailey Avenue, 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. Department staff has generally requested a penalty of five thousand dollars (\$5,000) for violations extending up to two years, seven thousand five hundred dollars (\$7,500) for violations extending from two to five years, and ten thousand dollars (\$10,000) for violations exceeding five years in duration (*see 12 Martense Associates*, at 2).

In this matter, the two-year threshold for applying a civil penalty of seven thousand five hundred dollars (\$7,500) was reached on July 14, 2019, after service of the notice of hearing and complaint but before the date of the reconvened hearing. Staff's proof demonstrates the violation continued as of July 22, 2019. "In cases, such as here, in which one of the penalty date "thresholds" under *12 Martense Associates* and its progeny is passed during the period between service of the notice of hearing and complaint and the date of the adjudicatory hearing or submission of default motion papers, it is appropriate to seek the penalty amount related to the longer period" (*see Matter of Promesa Court Residences Limited Partnership*, Order of the Commissioner, September 11, 2017, at 3; *see also Matter of 1160 President Street Housing Development Fund Corporation*, Order of the Commissioner, October 3, 2017, at 2). Accordingly, staff moved to modify the penalty requested to seven thousand five hundred dollars (\$7,500). I granted staff's motion at hearing.

Department staff's proposed order seeks a civil penalty of seven thousand five hundred dollars (\$7,500). This requested civil penalty is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see 12 Martense Associates*, at 2).



### Conclusion of Law

By failing to renew the registration of its PBS facility located at 2686 Bailey Avenue, Bronx, New York on or before July 14, 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 Wingate 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 Wingate 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 2686 Bailey Avenue, Bronx, New York on or before July 14, 2017, the date the prior registration expired;
3. Directing respondent Wingate 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 Wingate 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/

Michael S. Caruso  
Administrative Law Judge

Dated: July 29, 2019  
Albany, New York

**EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS**

*Matter of Wingate Realty, LLC*  
 2686 Bailey Avenue, Bronx, New York – DEC Case No. PBS.2-279633.10.2018  
 July 22, 2019 – Central Office  
 Edrol File No. 190722145022

| 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 August 1, 2018 | ✓     | ✓       | Department Staff |       |
| 2           | Notice of Hearing dated February 19, 2019   | ✓     | ✓       | Department Staff |       |
| 3           | Affidavit of Service of Dale Thiel, sworn to July 19, 2019 with New York State Department of State Receipt for Service dated August 1, 2018                                 | ✓     | ✓       | Department Staff |       |
| 4           | New York City Department of Finance, ACRIS Title Search, dated July 18, 2019, and deed to respondent, dated April 24, 1995  | ✓     | ✓       | Department Staff | FN1   |
| 5           | NYS Department of State Entity Information, current through July 17, 2019   | ✓     | ✓       | Department Staff | FN1   |

| Exhibit No. | Description   | ID'd? | Rec'd ? | Offered By       | Notes          |
|-------------|---|-------|---------|------------------|----------------|
| 6           | PBS Program Facility Information Report, printed July 18, 2019                  | ✓     | ✓       | Department Staff | FN1            |
| 7           | PBS Application received May 29, 2012 from Wingate Realty LLC                   | ✓     | ✓       | Department Staff | FN1            |
| 8           | PBS Registration Certificate issued July 8, 2012, expiration date July 14, 2017 | ✓     | ✓       | Department Staff | FN1            |
| 9           | Affirmation of attempted contact of Deborah Gorman, dated July 18, 2019         | ✓     | ✓       | Department Staff |                |
| 10          | Proposed Order  | ✓     | ✓       | Department Staff |                |
|             | Notice of Hearing dated June 25, 2019   |       |         |                  | OHMS File Copy |

<sup>1</sup> Witness testified that databases were searched, and documents were reviewed on July 22, 2019. Witness initialed and dated the exhibit to confirm information remained accurate as of July 22, 2019.