

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.2-205389.10.2016

-by-

ZOHOV REALTY CORP.,

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Environmental Conservation (Department) that respondent Zohov Realty Corp. (respondent) violated ECL 17-1009 and 6 NYCRR 613-1.9(c) by failing to renew the registration of its petroleum bulk storage facility on or before July 20, 1997, the date on which its prior registration expired. Respondent’s facility is located at 972 East 14 Street, Brooklyn, New York and includes an underground storage tank with a capacity of 3,000 gallons.

Administrative Law Judge (ALJ) D. Scott Bassinson of the DEC’s Office of Hearings and Mediation Services was assigned to the 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 September 27, 2016, and failed to appear for the adjudicatory hearing scheduled in the matter on October 27, 2016 (see Default Summary Report at 3 [Finding of Fact No. 6]).

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 4-5). 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 facts sufficient to support staff’s claim that respondent failed to renew the registration of its petroleum bulk storage facility on or before July 20, 1997, the date on which its prior registration expired.

The record demonstrates that respondent was required to renew its registration by July 20, 1997 (see ECL 17-1009[2]; Default Summary Report at 3 [Finding of Fact No. 3]). In addition to ECL 17-1009, Department staff referenced in its papers the applicable facility

registration requirement at 6 NYCRR 613-1.9(c), which became effective on October 11, 2015 and which replaced the previous registration provision in 6 NYCRR part 612.

Department staff seeks a civil penalty of ten thousand dollars (\$10,000) (see Motion for Default Judgment, Exhibit A [Complaint, Wherefore Clause, at II]). 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. As noted, respondent has failed to renew the registration for the facility since July 20, 1997 when the registration expired (see Default Summary Report at 3 [Finding of Fact No. 3]). Where, as here, an owner has not registered the facility for more than five years from the expiration date, a civil penalty of ten thousand dollars (\$10,000) is consistent with administrative precedent (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). I agree with the ALJ that the ten thousand dollars (\$10,000) sought by staff is authorized and appropriate (see Default Summary Report at 4-5).¹

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 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 Zohov Realty Corp. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Zohov Realty Corp. violated (a) ECL 17-1009 and (b) since October 11, 2015, 6 NYCRR 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 972 East 14 Street, Brooklyn, New York.
- III. Within fifteen (15) days of the service of this order upon respondent Zohov Realty 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 Zohov Realty 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.

¹ Although staff only sought a civil penalty of ten thousand dollars (\$10,000), the failure to register a petroleum bulk storage facility for such an extended period of time could support a higher penalty as appropriate (see Default Summary Report, at 5).

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DEFAULT SUMMARY REPORT

DEC Case No.
PBS.2-205389.10.2016

-by-

ZOHOV REALTY CORP.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent Zohov Realty Corp. (“respondent”) with a notice of hearing and complaint, dated August 23, 2016, 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 facility located at 972 East 14 Street, Brooklyn, New York on or before July 20, 1997, 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 the service of the Commissioner’s order by remitting the applicable registration fee, including any past registration fees, along with a complete registration application; and (4) 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 serving the New York State Department of State on August 23, 2016. See Staff Exhibit (“Staff Ex.”) C. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on August 23, 2016. See id. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for September 27, 2016, as directed in the notice of hearing and accompanying cover letter. See Staff Ex. B, ¶¶ 4-5.

As stated in the notice of hearing, on October 27, 2016, an adjudicatory hearing was convened before the undersigned Administrative Law Judge (“ALJ”) 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 Yvonne M. Ward, Esq. of the Remediation Bureau in the Department’s Office of General Counsel. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a staff witness. Noting 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, and stated that staff would be submitting motion papers in support of the motion for a default judgment. I reserved on the oral default motion pending service and filing of the motion papers and any response thereto.

Staff has submitted a Notice of Motion for Default Judgment, a Motion for Default Judgment, both dated November 16, 2016, and nine exhibits.¹ Respondent has failed to file any response to staff’s motion for default judgment.

Applicable Regulatory Provision

613-1.9 Registration.²

* * *

“(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 documents submitted with and in support of staff’s motion for a default judgment:

1. Respondent Zohov Realty Corp. (“respondent”) is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 972 East 14 Street, Brooklyn, New York (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 3,000 gallons and is located underground. See Staff Exs. D, E, F, and G.
2. Respondent is an active domestic business corporation in the State of New York. See Staff Ex. H.

¹ A list of the exhibits submitted by staff in support of its motion for default judgment is attached hereto as Appendix A.

² Effective October 11, 2015, 6 NYCRR § 613-1.9(c) replaced 6 NYCRR § 612.2(a)(2), which stated: “(a) *Existing facilities*. . . . (2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred.” ECL § 17-1009(2) requires facility registrations to be “renewed every five years or whenever ownership of a facility is transferred, whichever occurs first.”

3. On June 17, 1993, the Department issued to respondent Petroleum Bulk Storage (“PBS”) Registration Certificate No. 2-205389. This registration expired on July 20, 1997. See Staff Exs. E, F, G.
4. On September 4, 1980, Leon Fried, Beatrice Fried, Bernice Brandmark and Israel Fried, by deed, transferred all right, title and interest in the facility to respondent Zohov Realty Corp., the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, in Reel 1185, Page 285. See Staff Ex. D.
5. As shown by Receipt for Service No. 201608230434 issued by the New York State Department of State, respondent was served personally on August 23, 2016, pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated August 23, 2016, 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 972 East 14 Street, Brooklyn, New York on or before July 20, 1997, the date that 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 August 23, 2016. See Staff Ex. B, Affirmation of Yvonne M. Ward, Esq. in Support of Motion for Default Judgment, dated November 16, 2016 (“Ward Aff.”), ¶¶ 2-3; see also Staff Ex. C, Affidavit of Service of Dale L. Thiel, sworn to November 16, 2016.
6. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for September 27, 2016, as directed in the notice of hearing and accompanying cover letter, and failed to appear for the adjudicatory hearing scheduled in the matter on October 27, 2016, as directed in the notice of hearing. See Staff Ex. B, Ward Aff., 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-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 “also submit some proof of the facts sufficient to support the claims charged in the complaint.” Matter of Greene Technologies Incorporated, Ruling of the Commissioner, November 10, 2016, at 3; Matter of American Auto Body & Recovery Inc., Ruling of the Commissioner, July 2, 2015, at 3; Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

In this case, Department staff’s motion papers demonstrate that respondent failed to renew the registration of its petroleum bulk storage facility located at 972 East 14 Street, Brooklyn, New York on or before July 20, 1997, the date that the prior registration expired, in violation of ECL § 17-1009. Respondent has also been in violation of 6 NYCRR § 613-1.9(c) from the effective date of Part 613, October 11, 2015.³

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 September 27, 2016, as directed in the cover letter served with the notice of hearing and complaint, and in the notice of hearing; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on October 27, 2016, as directed in both the cover letter and the notice of hearing. Department staff has submitted a proposed order with its motion papers. See Staff Ex. I. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to 6 NYCRR § 622.15. Staff also served respondent with copies of the motion for default judgment and supporting papers. See November 16, 2016 letter from Yvonne M. Ward, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent.

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 renew the registration of its petroleum bulk storage facility located at 972 East 14 Street, Brooklyn, New York on or before July 20, 1997, the date that the prior registration expired, in violation of ECL § 17-1009 and, from its October 11, 2015 effective date, 6 NYCRR § 613-1.9(c).

Department staff seeks 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. 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

³ Staff has not alleged that, for the period from July 20, 1997 to October 10, 2015, respondent was in violation of former section 612.2(a)(2) of the regulations. Staff has alleged, however, that respondent was in violation of the governing statute, ECL § 17-1009, from July 20, 1997 forward. See e.g. Complaint ¶¶ 22-24.

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.

The record in this matter reflects that, as of the date of the service and filing of the notice of hearing and complaint in this matter, respondent's failure to renew its registration exceeded nineteen years. The extended time period during which respondent has failed to renew its registration, along with respondent's failure to answer the complaint, and its failure to appear at the pre-hearing conference and the adjudicatory hearing, might be considered aggravating factors supporting a civil penalty higher than that requested by staff in this matter. Given due process concerns, however, a penalty higher than that requested in the complaint cannot be imposed. See Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 2-3. I therefore recommend that the Commissioner impose a civil penalty in the amount of ten thousand dollars (\$10,000), as requested by Department staff.

Recommendations

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

1. Granting Department staff's motion for default, holding respondent Zohov Realty Corp. in default pursuant to the provisions of 6 NYCRR § 622.15;
2. Holding that respondent Zohov Realty Corp. violated ECL § 17-1009 and, from October 11, 2015 forward, 6 NYCRR § 613-1.9(c), by failing to renew the registration of its petroleum bulk storage facility located at 972 East 14 Street, Brooklyn, New York on or before July 20, 1997, the date that the prior registration expired;
3. Directing respondent Zohov Realty 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 applicable and past due registration fees;
4. Directing respondent Zohov Realty Corp. 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
November 28, 2016

APPENDIX A

Matter of Zohov Realty Corp.

DEC Case No. PBS.2-205389.10.2016

Exhibits to Staff Motion for Default Judgment dated November 16, 2016

Exhibit	Description
A	Cover letter, Notice of Hearing, Complaint, Statement of Readiness, all dated August 23, 2016
B	Affirmation of Yvonne M. Ward, Esq., dated November 16, 2016
C	Affidavit of Service of Dale L. Thiel, sworn to November 16, 2016, attaching NYS Department of State Receipt for Service No. 201608230434
D	New York City Department of Finance ACRIS Title Search, dated November 16, 2016. Deed to respondent dated September 4, 1980
E	PBS Application form filed for PBS No. 2-205389, dated June 14, 1993
F	PBS Certificate, PBS No. 2-205389, issued June 17, 1993
G	Facility Information Report, PBS No. 2-205389, printed November 16, 2016
H	NYS DOS Corporate Entity Information, dated November 16, 2016
I	Proposed Order