

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York (“ECL”) and Section 612.2 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC Case No.
PBS 2-601583

-by-

374 SOUTH 5TH LLC,

Respondent.

On June 2, 2011, an adjudicatory hearing was convened before Richard R. Wissler, Administrative Law Judge (“ALJ”) of the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation (“Department”). The hearing addressed the allegations of Department staff that respondent 374 South 5th LLC violated 6 NYCRR 612.2 by failing to reregister its petroleum bulk storage (“PBS”) facility located at 374 South 5th Street, Brooklyn, New York 11211 (“facility”), within 30 days of the transfer of ownership of the facility to it.

ALJ Wissler prepared the attached hearing report, which I adopt as my decision in this matter. As set forth in the ALJ’s hearing report, respondent 374 South 5th LLC 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 April 18, 2011, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing scheduled in the matter on May 18, 2011, as directed in the notice of hearing (see Hearing Report, at 4 [Finding of Fact No. 10]).

As a consequence of respondent’s failure to answer or appear in this matter, the ALJ recommended that Department staff’s motion for default be granted (see Hearing Report, at 4), and I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Furthermore, at the hearing Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 4). Accordingly, staff is entitled to a judgment based on record evidence.

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 374 South 5th LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 374 South 5th LLC is adjudged to have violated 6 NYCRR 612.2 for failing to reregister its petroleum bulk storage facility located at 374 South 5th Street, Brooklyn, New York 11211, within 30 days of the transfer of ownership of the facility to it.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent shall submit to the Department a petroleum bulk storage facility re-registration application, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent 374 South 5th LLC shall pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500.00) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The facility petroleum bulk storage re-registration application, applicable registration fees, and the penalty payment shall be sent to the following address:

Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Brooke Turallo.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Brooke Turallo at the address referenced in paragraph V of this order.

- VII. The provisions, terms and conditions of this order shall bind respondent 374 South 5th LLC, its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
June 22, 2011

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of
the Environmental Conservation Law of the State of New York
("ECL") and Section 612.2 of 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 2-601583

-by-

374 SOUTH 5TH LLC,

Respondent.

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Procedural History

Respondent 374 South 5th LLC was served with a notice of hearing and complaint, dated March 8, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum bulk storage ("PBS") facility located at 374 South 5th Street, Brooklyn, New York 11211, within 30 days of the transfer of ownership of the facility to it. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2; (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000)¹; (3) directing respondent to reregister its PBS facility within fifteen (15) days of the service of the Commissioner's Order; and (4) granting such other and further relief as the Commissioner may deem just and proper.

Inasmuch as 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 March 14, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on March 14, 2011. Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for April 18, 2011, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on May 18, 2011, an adjudicatory hearing was convened before Administrative Law Judge ("ALJ") Richard R. Wissler of the Department of Environmental Conservation's ("Department") Office of Hearings and Mediation Services ("OHMS") at the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407. Department staff was represented by Scott Caruso, Esq., Section Chief, Spill and Bulk Storage Section, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. No one appeared on behalf of respondent.

¹ As discussed below, at the hearing, Department staff requested a lower penalty amount of \$7,500.

Department staff indicated that it was prepared to proceed with the hearing, proffering a program staff witness. Noting for the record that respondent had failed to answer the complaint, failed to appear for the prehearing conference and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. The ALJ 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). Moreover, the ALJ noted Department staff's readiness for hearing and noted the failure of the respondent to appear. The ALJ advised that the hearing, in the absence of the respondent, would be convened on a subsequent date.

On June 2, 2011, the adjudicatory hearing was convened before ALJ Wissler at the Department's Central Office at 625 Broadway, Albany, New York. At this stage of the proceedings, Department staff was represented by Mary E. Wojcik, Esq., Senior Attorney, Spills and Bulk Storage Section, Bureau of Remediation and Revitalization. Department staff orally renewed its motion for a default judgment, and also sought judgment on the merits. Department staff called one witness, Cynthia Freedman, Environmental Program Specialist 2 in the Department's Division of Environmental Remediation, Registration and Permits Section, in the Department's Central Office. In all, eight (8) exhibits were received in evidence.

Applicable Regulatory Provision

Section 612.2. Registration of Facilities

(a) Existing facilities.

(1) Within one year of the effective date of these regulations, the owner of any petroleum storage facility having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.

(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.

(b) Transfer of ownership. If ownership of the facility changes, the new owner must reregister the facility with the department within 30 days of ownership transfer.

(c) New facilities. The owner must register any new facility with the department before it is placed in service.

(d) Substantially modified facilities. Within 30 days prior to substantially modifying a facility, the owner must notify the department of such modification on forms supplied by the department.

Findings of Fact

1. Respondent 374 South 5th LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 374 South 5th Street, Brooklyn, New York 11211 (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 4,019 gallons and is located aboveground. (Staff Exhibits F, G and H.)
2. Pursuant to a registration application filed by the then owner of the facility, 374 South 5th Street Realty Corp., and received by the Department on July 16, 1998, the Department, on July 16, 1998, issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-601583. This registration expired on August 27, 2003. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” (Staff Exhibits F and H.)
3. On March 31, 2009, 374 S. 5th Corp., a successor in interest to 374 South 5th Street Realty Corp., by bargain and sale deed with covenant against grantor’s acts, transferred all right, title and interest in the facility to respondent 374 South 5th LLC, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York as Document ID No. 2009040300545001. (Staff Exhibit D.)
4. Cynthia Freedman is an employee of the Department whose duties include the care, custody, and maintenance of the petroleum storage facility records filed with the Department, which records include petroleum facility registrations filed pursuant to 6 NYCRR 612.2. (Testimony of Freedman.)
5. Cynthia Freedman searched the petroleum storage facility records of the Department, including the Department’s databases, for any facility registration or renewal registration or any facility re-registration filed by respondent for the facility. (Testimony of Freedman.)
6. As a result of her search, Cynthia Freedman determined that respondent had not reregistered the facility at any time after assuming ownership, and that no application had been received since the August 27, 2003 expiration date of the registration issued on July 16, 1998. (Testimony of Freedman.)
7. Respondent is an active domestic limited liability company in the State of New York. (Staff Exhibit B.)
8. On March 14, 2011, service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State, pursuant to section 303 of the Limited Liability Company Law. The receipt for service issued by the Department of State in this matter is number 201103180524. Moreover, on

March 14, 2011, respondent was sent a copy of the notice of hearing and complaint by US Postal Service regular mail. (Staff Exhibit C.)

9. In an affirmation dated May 17, 2011, Mary E. Wojcik, Esq., counsel for Department staff, stated that she conducted an internet search for a phone number listed for respondent and was unable to find such a listing. (Staff Exhibit E.)
10. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 18, 2011, as directed in the cover letter served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May 18, 2011, as directed in the notice of hearing. (Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to reregister its PBS facility located at 374 South 5th Street, Brooklyn, New York 11211 within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2.

The record shows that respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 18, 2011, as directed in the cover letter served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May 18, 2011, as directed in the notice of hearing. 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 reregister its PBS facility within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

At the hearing, Department staff requested a reduction in the penalty requested, to ensure consistency with the penalty amounts sought in similar cases. Specifically, Department staff requested that the penalty be reduced from \$10,000 to \$7,500. Department staff's proposed order and the \$7,500 civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Recommendation

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

1. Granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15;

2. Finding respondent in violation of 6 NYCRR 612.2 for failure to reregister its PBS facility located at 374 South 5th Street, Brooklyn, New York 11211, within 30 days of the transfer of ownership of the facility to it, based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to submit a re-registration application to the Department for the above facility;
4. Directing respondent to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500.00); and
5. Directing such other and further relief as he may deem just and proper.

_____/s/_____
Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
June 17, 2011

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of 374 South 5th LLC – PBS 2-601583

Region 2

June 2, 2011

Edirol File No. 020702110122

Exhibit No.	Description	ID'd ? Y/N	Rec'd ? Y/N	Offered By
A	Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness (all dated March 8, 2011); and affidavit of Brooke Turallo, sworn to March 9, 2011.	Y	Y	Department Staff
B	NYSDOS Corporate Status Information	Y	Y	Department Staff
C	Affidavit of Service	Y	Y	Department Staff
D	NYC Automated City Register Information (ACRIS) Address Input Abstract of Title and Deed	Y	Y	Department Staff
E	Affirmation of Mary E. Wojcik, Esq. Petroleum Bulk Storage Certificate	Y	Y	Department Staff
F	Petroleum Bulk Storage Application	Y	Y	Department Staff
G	Facility Information Report	Y	Y	Department Staff
H	Petroleum Bulk Storage Certificate	Y	Y	Department Staff