

**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 2-203602NTM

-by-

East Harlem Lexington Housing Development Fund Company, Inc.,

Respondent.

On August 2, 2012, 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 East Harlem Lexington Housing Development Fund Company, Inc. violated 6 NYCRR 612.2 by failing to re-register its petroleum storage facility located at 135 East 122nd Street, New York, New York (“facility”), within 30 days of the transfer of ownership of the facility to it in calendar year 2009.¹

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 East Harlem Lexington Housing Development Fund Company, Inc. 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 July 27, 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 August 30, 2011, as directed in the notice of hearing (see Hearing Report, at 4 [Finding of Fact No. 9]).

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 5), 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 4-5). Accordingly, staff is entitled to a judgment based on record evidence.

Department staff, in its papers, sought a penalty of ten thousand dollars (\$10,000) but moved before the hearing to amend the complaint to request a penalty of seven

¹ Although Department staff refers to the facility address as 135 East 122 Street, the correct address is 135 East 122nd Street as shown on the property records for the facility (see Department staff Exhibit F).

thousand five hundred dollars (\$7,500). ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. I note that the violation in this matter has continued for approximately two and one-half years (see Department Staff Exhibit C [Complaint, ¶¶ 20-24]). Based on this record and the civil penalties imposed in similar cases, the requested penalty of seven thousand five hundred dollars (\$7,500) is authorized and appropriate.

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 East Harlem Lexington Housing Development Fund Company, Inc. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent East Harlem Lexington Housing Development Fund Company, Inc. is adjudged to have violated 6 NYCRR 612.2 for failing to re-register its petroleum storage facility located at 135 East 122nd Street, New York, New York, 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 East Harlem Lexington Housing Development Fund Company, Inc. 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 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 East Harlem Lexington Housing Development Fund Company, Inc., 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
August 30, 2012

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 2-203602NTM

-by-

EAST HARLEM LEXINGTON HOUSING DEVELOPMENT
FUND COMPANY, INC.,

Respondent.

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Procedural History

Respondent East Harlem Lexington Housing Development Fund Company, Inc. was served with a notice of hearing and complaint dated June 9, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to re-register its petroleum storage facility located at 135 East 122nd Street, New York, New York 10035 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)²; (3) directing respondent to re-register its petroleum storage facility within fifteen (15) days of the service of the Commissioner's order upon respondent; and (4) granting such other and further relief as the Commissioner may deem just and appropriate.

Inasmuch as respondent is an active domestic not-for-profit corporation in the State of New York, pursuant to Section 306 of the Not-For-Profit Corporation Law of New York State, service of the notice of hearing and complaint was made on the New York State Secretary of State on July 8, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on July 8, 2011. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for July 27, 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 August 30, 2011, as directed in the notice of hearing.

As stated in the notice of hearing, on August 30, 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

² As discussed below, at the hearing, Department staff requested a lower penalty amount of seven thousand five hundred dollars (\$7,500).

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 W. 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.

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 respondent to appear. The ALJ advised that the hearing, in the absence of respondent, would be convened on a subsequent date.

On August 2, 2012 the adjudicatory hearing was convened before ALJ Richard R. Wissler at the Department’s central office, 625 Broadway, Albany, New York.³ Pursuant to an order of the Appellate Division of the Third Judicial Department, issued in accordance with its Rules at 22 NYCRR 805.5, Department staff was represented by legal interns Vincenzo Sofia and Joshua Friedman under the supervision of Scott W. 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. Department staff orally renewed its motion for a default judgment, and also sought judgment on the merits.

Prior to the commencement of the hearing, Department staff orally moved to amend the complaint by moving to reduce the civil penalty amount it was seeking from ten thousand dollars (\$10,000) to seven thousand five hundred dollars (\$7,500). While pointing out the vital importance of current registrant information in the administration of the Department’s petroleum bulk storage (“PBS”) program, Department staff noted that the facility has been out of registration for approximately two and one half years. According to Department staff, the \$7,500 penalty sought was consistent with both the penalties authorized in ECL article 71 and the penalty amounts imposed by the Department in similar cases. The motion was granted.

Department staff called one witness, Dustin Howard, legal intern. In all, ten (10) exhibits were received in evidence.

³ Upon respondent’s failure to appear for the hearing on August 30, 2011, it waived its right to notice of any subsequent proceedings in this matter, including any hearing in absentia. On March 13, 2012, Department staff wrote respondent offering to resolve the matter without further proceedings. Respondent failed to respond to this letter (see Department Staff Exhibit G.). Department staff then proceeded to hearing on this matter on August 2, 2012.

Applicable Regulatory Provision

6 NYCRR 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 East Harlem Lexington Housing Development Fund Company, Inc., is the owner of a petroleum storage facility having a capacity of 3,000 gallons located at 135 East 122nd Street, New York, New York 10035. (Department Staff Exhibits C, F, I and J.)
2. Respondent is a domestic not-for-profit corporation in the State of New York. (Department Staff Exhibit E.)
3. Pursuant to a registration application filed by the then owner of the facility, Met-Paca II Associates, dated April 26, 2002, the Department, on May 31, 2002, issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-203602, registering the facility. This registration expired on August 24, 2007. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” (Department Staff Exhibits H and I.)
4. On December 17, 2009, Met-Paca II Associates, L.P., by bargain and sale deed without covenant against grantor’s acts, transferred all right, title and interest in the facility to respondent East Harlem Lexington Housing Development Fund

Company, Inc., the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, Document ID No. 2009122100889003. (Department Staff Exhibit F.)

5. Dustin Howard is a legal intern who worked in the Department's Office of General Counsel during the summer months of 2012, to and including the first week of August 2012. Mr. Howard was trained to search and review the petroleum storage facility records filed with the Department, which records include petroleum storage facility registrations filed pursuant to 6 NYCRR 612.2. (Testimony of Dustin Howard.)
6. On August 2, 2012, Dustin Howard searched the petroleum storage facility records of the Department for any facility registration filed by respondent for the facility. (Testimony of Dustin Howard.)
7. As a result of his search, Dustin Howard determined that respondent had not filed an application to re-register the facility within 30 days of its purchase of the facility nor as of August 2, 2012. (Testimony of Dustin Howard.)
8. As shown by Receipt for Service No. 201107220371 issued by the New York State Department of State, pursuant to Section 306 of the Not-For-Profit Corporation Law of New York State, respondent was served on July 8, 2011, with a notice of hearing and complaint dated June 9, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to re-register the petroleum storage facility located at 135 East 122nd Street, New York, New York 10035. The notice of hearing and complaint was also served on respondent by regular mail on July 8, 2011. (Department Staff Exhibit D.)
9. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for July 27, 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 August 30, 2011, as directed in the notice of hearing. (Department Staff Exhibit C and Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to re-register its petroleum storage facility within 30 days of purchase of the facility 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 July 27, 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 August 30, 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 re-register its petroleum storage facility 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. In particular, Department staff noted that the violation has continued for more than two years. Accordingly, Department staff requested that the penalty be reduced from ten thousand dollars (\$10,000) to seven thousand five hundred dollars (\$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 re-register the petroleum storage facility it owns located at 135 East 122nd Street, New York, New York 10035, 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 and pay the applicable registration fee;
4. Directing respondent to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500); 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
August 17, 2012

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of East Harlem Lexington HDFC (135 East 122nd Street) – Region 2

August 2, 2012

Edirol File No. 030902103244

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
A	May 9, 2012 order (Peters, PJ) for appointment of law interns including Vincenzo Sofia and Joshua Friedman	✓	✓	Department Staff	
B	Consent to the appearance of Vincenzo Sofia and Joshua Friedman	✓	✓	Department Staff	
C	Pleadings, including cover letter, notice of hearing, complaint, and statement of readiness (all dated June 9, 2011)	✓	✓	Department Staff	
D	Affidavit of Service of Brooke Turallo, sworn to July 30, 2012, including NYS Department of State receipt for service	✓	✓	Department Staff	
E	NYS Department of State Division of Corporations Entity Information sheet current through July 31, 2012	✓	✓	Department Staff	
F	Bargain and Sale Deed dated December 17, 2009 and NYC Dept. of Finance filing receipt for Deed dated December 17, 2009	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
G	Affidavit of Brooke Turallo sworn to July 30, 2012 with letter of March 31, 2012	✓	✓	Department Staff	
H	PBS Application	✓	✓	Department Staff	
I	PBS Certificate Number 2-203602, issued May 31, 2002; expired August 24, 2007	✓	✓	Department Staff	
J	PBS Facility Information Report	✓	✓	Department Staff	