

**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 2-601041NBT

- by -

**GRAND CONCOURSE EAST HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

This administrative enforcement proceeding involves allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondent Grand Concourse East Housing Development Fund Corporation ("respondent") violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 274 Bonner Place, Bronx, New York ("facility"), within 30 days of the transfer of ownership of the facility to it. On July 30, 2013, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services. The matter was then assigned to ALJ P. Nicholas Garlick for preparation of a hearing report.

ALJ Garlick 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, failed to appear at a pre-hearing conference scheduled for June 21, 2013, 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 July 23, 2013, as directed in the notice of hearing (see Hearing Report, at 5 [Finding of Fact No. 9]).

I affirm the ALJ's ruling granting Department staff's motion to amend the pleadings to correct respondent's legal name.

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 7), 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 6-7). Accordingly, staff is entitled to a judgment based on record evidence.

Department staff seeks a civil penalty in the amount of ten thousand dollars (\$10,000). Respondent has failed to reregister its facility for approximately eighteen years, and the civil penalty requested by staff is authorized and appropriate, and is consistent with administrative precedent (see, e.g., 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2 [penalties of ten thousand dollars (\$10,000) for facilities where registration overdue for more than five years]).

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. The pleadings are amended to correct respondent's name.
- II. 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 Grand Concourse East Housing Development Fund Corporation waived its right to be heard at the hearing.
- III. Moreover, based upon record evidence, respondent Grand Concourse East Housing Development Fund Corporation is adjudged to have violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 274 Bonner Place, Bronx, New York, within 30 days of the transfer of ownership of the facility to it.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent Grand Concourse East Housing Development Fund Corporation shall submit to the Department a petroleum bulk storage facility registration application, plus applicable registration fees.

- V. Within fifteen (15) days of the service of this order upon respondent, respondent Grand Concourse East Housing Development Fund Corporation 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.
- VI. The facility petroleum bulk storage 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.
- VII. Any questions or other correspondence regarding this order shall also be addressed to Brooke Turallo at the address referenced in paragraph VI of this order.
- VIII. The provisions, terms and conditions of this order shall bind respondent Grand Concourse East Housing Development Fund Corporation, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: Albany, New York
November 27, 2013

**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"),

HEARING REPORT

DEC Case No.
PBS 2-601041NBT

- by -

**GRAND CONCOURSE EAST HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation ("Department") served respondent Grand Concourse East Housing Development Fund Corporation ("respondent") was served with a notice of hearing and complaint, dated May 22, 2013, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum storage facility located at 274 Bonner Place, Bronx, New York 10456, 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); (3) directing respondent to reregister its petroleum storage 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 not-for-profit corporation in the State of New York, service of the notice of hearing and complaint on respondent was made by personally serving the New York State Department of State on May 24, 2013. Consistent with Civil Practice Law and Rules ("CPLR") 3215(g)(4), additional service of the notice of hearing and

complaint was provided to respondent by regular mail on May 24, 2013. Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for June 21, 2013, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on July 23, 2013, an adjudicatory hearing was convened before Administrative Law Judge ("ALJ") Richard R. Wissler and ALJ Michael S. Caruso of the Department's Office of Hearings and Mediation Services 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 ALJs 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 ALJs noted Department staff's readiness for hearing and noted the failure of respondent to appear. The ALJs advised that the hearing would be convened on a subsequent date.

On July 30, 2013, the adjudicatory hearing was convened before ALJ Caruso at the Department's Central Office at 625 Broadway, Albany, New York 12233. At this stage of the proceedings, and pursuant to an order of the Appellate Division, Third Department, issued in accordance with its rules at 22 NYCRR 805.5, Department staff was represented by law student intern Kelly O'Donovan under the supervision of Scott W. Caruso, Esq., Section Chief of the Department's Spill and Bulk Storage Section. Department staff orally renewed its motion for a default judgment, moved to amend the pleadings to correct respondent's name, and also sought judgment on the merits.

Department staff called one witness, Robert Caserta, a law student intern in the Department's Office of General Counsel, Spill Prevention and Bulk Storage Section. In all, eight (8) exhibits were received in evidence. After the hearing

concluded, the matter was assigned to the undersigned ALJ for preparation of a hearing report.

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

The following findings of fact are found based upon the preponderance of record evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent Grand Concourse East Housing Development Fund Corporation is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 274 Bonner Place, Bronx, New York 10456 ("facility"). In particular, petroleum storage tank number 1 at the facility has a capacity of 4,000 gallons and is located above ground (Staff Exhibits 6 and 7).
2. Respondent is an active domestic not-for-profit corporation

in the State of New York (Staff Exhibit 3).

3. On October 21, 1992, the Department issued Petroleum Bulk Storage ("PBS") Registration Certificate Number 2-601041 to the City of New York Department of Housing Preservation and Development, which owned the facility at that time. This registration expired on October 21, 1997. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: "THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE" (Testimony of Caserta; Staff Exhibit 7).
4. On June 30, 1995, the City of New York, by deed, transferred all right, title and interest in the facility to respondent Grand Concourse East Housing Development Fund Corporation, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, Reel No. 1345 at Page 969 (Testimony of Caserta; Staff Exhibit 4).
5. Robert Caserta is a law student intern in the Department's Office of General Counsel, Petroleum Spill and Bulk Storage Section, who is authorized to access and inspect the Department's unified information system ("UIS"). The UIS is a database maintained by the Department and contains petroleum storage facility records filed with the Department, which records include petroleum storage facility registrations filed pursuant to 6 NYCRR 612.2 (Testimony of Caserta; Staff Exhibit 1).
6. On July 29, 2013, Robert Caserta searched the petroleum storage facility records contained in the Department's UIS for any petroleum facility registration or renewal registration or any petroleum storage facility re-registration filed by respondent for the facility (Testimony of Caserta; Staff Exhibit 8).
7. As a result of his search, Robert Caserta determined that respondent had not reregistered the facility at any time after assuming its ownership on June 30, 1995. (Testimony of Caserta; Staff Exhibits 6 and 7.)
8. As shown by Receipt for Service No. 201305280306 issued by the New York State Department of State, respondent was served, on May 24, 2013, pursuant to section 306 of the Not-For-Profit Corporation Law with a notice of hearing and complaint dated May 22, 2013, alleging a violation of ECL

17-1009 and its implementing regulation, 6 NYCRR 612.2, together with a statement of readiness and supporting affidavit, for failure to reregister its petroleum storage facility located at 274 Bonner Place, Bronx, New York 10456, within 30 days of the transfer of ownership of the facility to it. Consistent with CPLR 3215(g)(4), additional service of the notice of hearing and complaint was provided to respondent by regular mail on May 24, 2013 (Staff Exhibit 5).

9. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for June 21, 2013, 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 July 23, 2013, as directed in the notice of hearing (Hearing Record).

Discussion

Department staff's papers are captioned and pleaded against "Grand Concourse East HDFC." However, the correct legal name of the corporate entity is Grand Concourse East Housing Development Fund Corporation as reflected in the deed (Staff Exhibit 4), the Department of State, Division of Corporations, Entity Information (Staff Exhibit 3) and the Department of State's Service Receipt attached to the affidavit of service (Staff Exhibit 5). At the July 30, 2013 hearing, ALJ Caruso granted Department staff's motion to amend the pleadings to correct respondent's name as reflected in this hearing report and its caption.

CPLR 2001 authorizes the court to disregard or correct, any mistake, omission, defect or irregularity, provided any substantial right of the party is not prejudiced. (See Albilialia v Hillcrest General Hospital and Rosenfeld, 124 AD2d 499, 500 [1st Dept 1986].) Department staff's use of the acronym, HDFC, is not fatal to staff's case, but correction of the pleadings is appropriate to ensure the correct legal name of respondent is used in any Commissioner's order issued in this matter. Respondent is not prejudiced by this correction because service was made to the intended respondent's correct name and address (see Department of State receipt attached to Staff Exhibit 5). Respondent was fairly apprised that Department staff intended to seek judgment against respondent related to respondent's PBS obligations. (See Albilialia, at 500; see also Ryan v Nationwide Mutual Insurance Co., 20 AD2d 270, 271-272 [4th Dept 1964])

[plaintiff allowed to change captioned name of defendant where the intended defendant was served and fairly apprised that it was party to the action]; Smith v Hennesey, 266 AD2d 692 [3d Dept 1999][court properly disregarded mistake in complaint in which last 2 words of defendant's assumed name were transposed]; State of New York Higher Educ. Servs. Corp. v Sparozic, 35 AD3d 1069, 1070 [3d Dept 2006], lv dismissed 8 NY3d 958 [2007] [misspelling of defendant's name on summons with notice and affidavit of service was a mere irregularity which did not affect jurisdiction over defendant].)

Department staff's proof presents a prima facie case demonstrating that respondent failed to reregister its petroleum storage facility located at 274 Bonner Place, Bronx, New York 10456, within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2.

The record shows that Department staff duly serve the notice of hearing and complaint; and that respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for June 21, 2013, 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 July 23, 2013, as directed in the notice of hearing. Attempts to contact respondent by telephone and email were unsuccessful (Testimony of Caserta; Staff Exhibit 8). 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 petroleum storage 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.

In its complaint, Department staff notes that ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) for each violation and each day the violation continues. In her closing statement at the hearing, Ms. O'Donovan stated the ten thousand dollar (\$10,000) civil penalty requested by Department staff is consistent with the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) and other administrative enforcement matters in which the Commissioner has imposed a payable civil penalty of ten thousand dollars (\$10,000) where respondents have failed to register PBS facilities for more than five years (see e.g. Matter of 12

Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

Recommendation

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

1. affirming the amendment of the caption and pleadings as provided in this hearing report;
2. granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
3. holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 274 Bonner Place, Bronx, New York 10456, within 30 days of the transfer of ownership of the facility to it;
4. directing respondent to submit a registration application to the Department for the above facility within fifteen (15) days of service of the Commissioner's order; and
5. directing respondent 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.

/s/

P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
August 23, 2013

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

*Matter of Grand Concourse East Housing Development Fund Corporation
274 Bonner Pl. – Bronx, New York – DEC Case No. 2-601041NBT
July 30, 2013 – Central Office
Edirol File No. 040829135315*

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Practice Order and Consent to Appearance of Kelly O'Donovan, dated July 29, 2013.	✓	✓	Department Staff	
2	Cover Letter from Scott Caruso, Esq. to respondent, dated May 22, 2013. Notice of Hearing and Complaint, dated May 22, 2013. Statement of Readiness, dated May 22, 2013. Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, dated May 22, 2013.	✓	✓	Department Staff	
3	NYS Department of State (“DOS”) Entity Information, dated July 26, 2013.	✓	✓	Department Staff	
4	New York City Department of Finance ACRIS Title Search, dated July 29, 2013. Deed to respondent, dated June 30, 1995.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
5	Affidavit of Service of Brooke Turallo, dated July 24, 2013. NYS DOS Receipt for Service, dated May 24, 2013.	✓	✓	Department Staff	
6	PBS Program Facility Information Report, dated July 29, 2013.	✓	✓	Department Staff	
7	PBS Application, dated September 2, 1992. PBS Registration Certificate, issued October 23, 1992, expiration date October 21, 1997.	✓	✓	Department Staff	
8	Affidavit of attempted contact by Robert Caserta, dated July 25, 2013. Email from Robert Caserta to respondent, dated July 1, 2013.	✓	✓	Department Staff	