

**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 2-268690NMW

-by-

PALUSHAJ PROPERTIES LLC,

Respondent.

This matter addresses the allegations of staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) that respondent Palushaj Properties LLC violated 6 NYCRR 612.2 by failing to renew the registration for its petroleum storage facility located at 685 East 228th Street, Bronx, New York (“facility”). The facility’s registration had expired on December 9, 2004.

The matter was assigned to Richard R. Wissler, Administrative Law Judge (“ALJ”) of the Department’s Office of Hearings and Mediation Services. ALJ Wissler 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 Palushaj Properties LLC failed to file an answer to the complaint dated May 4, 2012 that Department staff served in this matter, failed to appear at a pre-hearing conference scheduled for June 14, 2012, 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 20, 2012, as directed in the notice of hearing. Because of other scheduled hearings, the matter was not heard on July 20, 2012. Subsequent hearing dates were rescheduled due, in part, to the impact of Hurricane Sandy, and the hearing was convened on June 21, 2013. Respondent failed to appear on any subsequent rescheduled hearing date (see Hearing Report, at 4-5 [Findings of Fact Nos. 8 and 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 5). Accordingly, staff is entitled to a judgment based on record evidence.

Department staff seeks a civil penalty of ten thousand dollars (\$10,000) in this matter. ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars per day for each violation, and the requested penalty is substantially below this statutory amount. Staff's requested penalty of ten thousand dollars (\$10,000) is in accordance with general penalty guidelines for violations of greater than five years as is the case here (see, e.g., Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011 [Martense Associates], at 2; see also Hearing Exhibits 2 [Department staff complaint, ¶¶ 20, 21 and 22] and 9 [respondent's violation continued for more than seven and one-half years]).

As set forth in Martense Associates, mitigating (or aggravating) factors may be considered in assessment of the penalty (see id., at 2). Here, following the staff's first service of papers in May 2012, respondent filed an application to renew its facility registration (see Hearing Exhibit 10 [DEC receipt of respondent's application on May 17, 2012]). Although staff determined that this submission was incomplete (see Hearing Exhibit 10 [letter dated June 26, 2012 from staff to respondent setting forth reasons for incompleteness of application]), respondent addressed these deficiencies and the registration was renewed as of August 15, 2012 (see Hearing Exhibits 11 and 12). For purposes of penalty assessment, I am taking into account that respondent renewed its registration during the pendency of this proceeding, and, accordingly, am reducing the civil penalty to eight thousand dollars (\$8,000).

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 Palushaj Properties LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Palushaj Properties LLC is adjudged to have violated 6 NYCRR 612.2 for failing to renew the petroleum bulk storage registration for the petroleum storage facility that it owns and which is located at 685 East 228th Street, Bronx, New York.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent Palushaj Properties LLC shall pay a civil penalty in the amount of eight thousand dollars (\$8,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

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 2-268690NMW

-by-

PALUSHAJ PROPERTIES LLC,

Respondent.

Procedural History

Respondent Palushaj Properties LLC was served with a notice of hearing and complaint dated May 4, 2012, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to renew the registration of its petroleum storage facility located at 685 East 228th Street, Bronx, New York 10466. 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 register its petroleum storage facility within fifteen (15) days of the service of the Commissioner’s order upon respondent¹; 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 was made on the New York State Secretary of State on May 10, 2012. Consistent with CPLR 3215(g)(4), respondent was also served with the notice of hearing and complaint by regular mail on May 10, 2012. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for June 14, 2012, 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 20, 2012, as directed in the notice of hearing. Due to other scheduled hearings, the matter was not heard on July 20, 2012.

By notice of motion for default dated October 11, 2012, respondent was advised that the adjudicatory hearing in this matter would be held at 11:00 AM on November 14, 2012, in the Department’s Region 2 office in Long Island City, and that if respondent failed to appear at that time, the Department would move for a default judgment against it seeking the relief indicated in the complaint. As a result of the impact of Hurricane Sandy to the Region 2 area, by notice of motion for default dated November 2, 2012, the

¹ As noted below, inasmuch as respondent did renew the registration for the facility effective August 15, 2012, Department staff moved at the hearing held on July 30, 2013, to amend the complaint by deleting this requested relief. The motion was granted.

adjudicatory hearing was rescheduled for January 30, 2013, at 11:00 AM. Respondent did not respond to the motion nor appear for the adjudicatory hearing on January 30, 2013. However, due to other scheduled hearings, the matter was not heard on January 30, 2013.

By subsequent notice of motion for default dated May 16, 2013, respondent was advised that the adjudicatory hearing in this matter would be held at 2:00 PM on June 21, 2013, in the Department's Region 2 office in Long Island City, and that if respondent failed to appear at that time, the Department would move for a default judgment against it seeking the relief indicated in the complaint. Respondent did not respond to the motion nor appear for the adjudicatory hearing on June 21, 2013.

As stated in the notice of motion dated May 16, 2013, on June 21, 2013, 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.

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 July 30, 2013, the adjudicatory hearing was convened before ALJ Richard R. Wissler at the Department's Central Office, 625 Broadway, Albany, New York 12233. 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 legal interns Caitlin Davie and Robert Caserta 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, inasmuch as respondent had renewed the registration for the subject petroleum storage facility effective August 15, 2012, Department staff orally moved to amend the complaint by moving to omit the relief

sought in the complaint seeking a Commissioner's order directing respondent to renew its registration for the facility. The motion to amend was granted.

Department staff called one witness, Brooke Turallo, a Legal Assistant in the Department's Office of General Counsel's Petroleum Spill and Bulk Storage ("PBS") Section in Albany. In all, fourteen (14) 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 Palushaj Properties LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 685 East 228th Street, Bronx, New York 10466. In particular, petroleum storage tank number 001 at the facility has a capacity of 4,000 gallons and is located aboveground. (Department Staff Exhibits 6, 8, 9, 10, 11, 12 and 13.)
2. Respondent is an active domestic limited liability company in the State of New York. (Department Staff Exhibit 5.)
3. Pursuant to a registration application filed by respondent, dated November 18, 1999, and received by the Department on November 29, 1999, the Department issued respondent Petroleum Bulk Storage (PBS) Certificate Number 2-268690,

- effective December 9, 1999, registering respondent's petroleum storage facility. This registration expired on December 9, 2004. (Department Staff Exhibits 8 and 9.)
4. Brooke Turallo is a Legal Assistant in the Department's Office of General Counsel's Petroleum Spill and Bulk Storage ("PBS") Section who is authorized to access, search and inspect the Department's unified information system ("UIS"). The UIS is a database maintained by the Department that contains petroleum storage facility records filed with the Department, which records include petroleum storage facility renewal registrations filed pursuant to 6 NYCRR 612.2. (Testimony of Brooke Turallo.)
 5. On July 30, 2013, Brooke Turallo searched the petroleum storage facility records contained in the Department's UIS for any petroleum facility renewal registration filed by respondent for the facility. (Testimony of Brooke Turallo.)
 6. As a result of her search, Brooke Turallo determined that respondent had renewed the registration for the facility as of August 15, 2012, and that this was the first and only time the registration had been renewed since December 9, 2004, the date on which PBS Certificate 2-268690 expired. (Testimony of Brooke Turallo; Department Staff Exhibits 10, 11, 12 and 13.)
 7. As shown by Receipt for Service No. 201205160145 issued by the New York State Department of State, respondent was served, on May 10, 2012, pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated May 4, 2012, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to renew the registration of its petroleum storage facility located at 685 East 228th Street, Bronx, New York 10466. Consistent with CPLR 3215(g)(4), the notice of hearing and complaint was also served on respondent by regular mail on May 10, 2012. (Department Staff Exhibits 2 and 7.)
 8. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for June 14, 2012, 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 20, 2012, as directed in the notice of hearing. (Department Staff Exhibit 2 and Hearing Record.)
 9. The adjudicatory hearing in the matter scheduled for July 20, 2012, was rescheduled for November 14, 2012, but was rescheduled again, due to the impacts of Hurricane Sandy on the Department's Region 2 area, to January 30, 2013. Because of the number of other hearings conducted on January 30, 2013, the matter was adjourned to June 21, 2013. For each subsequent rescheduling of the hearing, respondent was duly served with a notice of motion for default notifying respondent of the adjourned hearing date and further advising that upon its failure to respond to the motion or appear for the hearing that the Department

would seek a default judgment against it for the relief indicated in the complaint dated May 4, 2012. Respondent did not respond to any of the motions rescheduling the matter and did not appear at any subsequent adjourned date for the hearing in this matter, again, including the hearing date of June 21, 2013. (Department Staff Exhibits 2, 3 and 4, and Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to renew its petroleum storage facility registration until August 15, 2012, more than seven and one-half years after the expiration of PBS Certificate Number 2-268690 on December 9, 2004, in violation of 6 NYCRR 612.2.

The record shows that Department staff duly served the notice of hearing and complaint upon respondent; and that respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for June 14, 2012, 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 20, 2012, as directed in the notice of hearing. Moreover, respondent failed to respond to the subsequent notices of motion for default duly served upon it and failed to appear at any subsequently rescheduled hearing date, including the hearing date of June 21, 2013. Upon respondent's failure to appear for the hearing on June 21, 2013, it waived its right to notice of any subsequent proceedings in this matter, including the hearing in absentia held on July 30, 2013. 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 on July 30, 2013, in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to renew its petroleum storage facility registration in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

As noted, the hearing record indicates that the facility's registration was expired for more than seven and one-half years before being renewed by respondent. The \$10,000 penalty Department staff seeks is consistent with the penalty amounts sought in similar cases and 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 renew the registration for a petroleum storage facility it owns located at 685 East 228th

Street, Bronx, New York 10466, on or before December 9, 2004, based upon the proof adduced at the adjudicatory hearing;

3. Directing respondent to pay a civil penalty in the amount of ten thousand dollars (\$10,000.00); and
4. 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 15, 2013

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Palushaj Properties LLC – Bronx, New York – DEC Case No. 2-268690NMW
 July 30, 2013 – Central Office
 Edrol File No. 040829102615

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Practice Order and Consent to Appearance of Caitlin Davie and Robert Caserta, dated June 4, 2013 and July 29, 2013, respectively.	✓	✓	Department Staff	
2	Cover Letter from Scott Caruso, Esq. to respondent, dated May 4, 2012. Notice of Hearing and Complaint, dated May 4, 2012. Statement of Readiness, dated May 4, 2012. Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, sworn to May 7, 2012.	✓	✓	Department Staff	
3	Cover Letter from Scott Caruso, Esq. to respondent, dated October 11, 2012. Notice of Motion for Default, dated October 11, 2012. Third Cover Letter from Scott Caruso, Esq. to respondent, dated May 16, 2013. Third Notice of Motion for Default, dated May 16, 2013. Affidavit of Service of Brooke Turallo, sworn to June 11, 2013. Second Cover Letter from Scott Caruso, Esq. to respondent, dated November 2, 2012. Second Notice of Motion for Default, dated November 2, 2012.	✓	✓	Department Staff	
4	Cover Letter from Scott Caruso, Esq. to respondent, dated May 16, 2013. Notice of Motion for Default, dated May 16, 2013. Affidavit of Service of Brooke Turallo, sworn to June 11, 2013.	✓	✓	Department Staff	
5	NYS Department of State (“DOS”) Corporate Entity Information, dated July 29, 2013.	✓	✓	Department Staff	
6	New York City Department of Finance ACRIS Title Search, dated July 29, 2013. Deed to respondent, dated September 7, 1999.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	Affidavit of Service of Brooke Turallo, sworn to February 6, 2013. NYS DOS Receipt for Service, dated May 10, 2012.	✓	✓	Department Staff	
8	PBS Application dated November 18, 1999, and received November 29, 1999.	✓	✓	Department Staff	
9	PBS Certificate No. 2-268690 issued December 9, 1999, expiration date December 9, 2004.	✓	✓	Department Staff	
10	PBS Application and Fee Return Letter, dated June 26, 2012. PBS Application, received May 17, 2012. Deed to respondent, dated September 7, 1999. Returned check, dated May 14, 2012.	✓	✓	Department Staff	
11	PBS Application, received July 3, 2012. Deed to respondent, dated September 7, 1999. Copy of returned PBS Application and Fee Return Letter dated June 26, 2012, received July 3, 2012.	✓	✓	Department Staff	
12	PBS Certificate No. 2-268690 issued August 15, 2012, expiration date December 9, 2014.	✓	✓	Department Staff	
13	PBS Program Facility Information Report, printed July 29, 2013.	✓	✓	Department Staff	
14	Affirmation of Scott Caruso, Esq., dated June 20, 2013.	✓	✓	Department Staff	