

**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 2-269328TM

-by-

PRESTIGE ASSOCIATES, LLC,

Respondent.

On July 20, 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 Prestige Associates, LLC violated 6 NYCRR 612.2 by failing to renew the registration for its petroleum storage facility located at 382 East 199th Street, Bronx, New York (“facility”).

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 Prestige Associates, 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 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. 8]).

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 4-5), 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). 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 requested a lower penalty of seven thousand five hundred dollars (\$7,500) at the hearing to be consistent with similar cases. 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. I note that the violation in

this matter has continued for about four years (see Hearing Exhibits 2 [Department staff complaint, ¶¶ 22 and 23] and 10). Based on this record, the requested penalty of seven thousand five hundred dollars (\$7,500) is authorized and appropriate, and is in accordance with prior determinations (see, e.g., Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2).

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 Prestige Associates, LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Prestige Associates, 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 382 East 199th Street, Bronx, New York.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent shall submit to the Department a petroleum bulk storage facility renewal application, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent Prestige Associates, LLC 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 renewal 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 Prestige Associates, LLC, 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
August 9, 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 2-269328TM

-by-

PRESTIGE ASSOCIATES, LLC,

Respondent.

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Procedural History

Respondent Prestige Associates, LLC was served with a notice of hearing and complaint dated June 8, 2011, 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 382 East 199th Street, Bronx, New York 10458. 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 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 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 Secretary of State on June 21, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on June 21, 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 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 July 20, 2012, the adjudicatory hearing was convened before ALJ Richard R. Wissler at the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407.² Pursuant to an order of the Third Judicial Department, issued in accordance with its Rules at 22 NYCRR 805.5, Department staff was represented by legal intern Dustin Howard 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 (\$10,000.00) to seven thousand five hundred dollars (\$7,500.00). While pointing out the vital importance of current registrant information in the administration of the Department's PBS program, Department staff noted that the facility has been out of registration for approximately three years. According to Department staff, the \$7,500 penalty sought was consistent with both the range of penalty authorized in ECL article 71 and was identical to the penalty amounts imposed by the Department in similar cases. The motion was granted.

Department staff called one witness, Nicholas Lombardo, Agency Program Aide with the Petroleum Bulk Storage (PBS) Unit of the Department's Region 2 office. In all, ten (10) exhibits were received in evidence.

² 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 February 29, 2012, Department staff wrote respondent offering to resolve the matter without further proceedings. Respondent failed to respond to this letter (see Department Staff Exhibit 4.). Department staff then proceeded to hearing on this matter on July 20, 2012.

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 Prestige Associates, LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 382 East 199th Street, Bronx, New York 10458. In particular, petroleum storage tank number 001 at the facility has a capacity of 2,000 gallons and is located aboveground. (Department Staff Exhibits 7, 8, 9 and 10.)
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 September 28, 2006, and received by the Department on October 10, 2006, the Department issued respondent Petroleum Bulk Storage (PBS) Certificate Number 2-269328, registering respondent's petroleum storage facility. This registration expired on April 3, 2008. (Department Staff Exhibits 8, 9 and 10.)
4. Nicholas Lombardo 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 storage facility registrations filed pursuant to 6 NYCRR 612.2. (Testimony of Nicholas Lombardo.)

5. On July 20, 2012, Nicholas Lombardo searched the petroleum storage facility records of the Department for any facility registration or renewal registration filed by respondent for the facility. (Testimony of Nicholas Lombardo.)
6. As a result of his search, Nicholas Lombardo determined that respondent had not renewed the facility's registration after April 3, 2008, the date on which PBS Certificate Number 2-269328 expired. (Testimony of Nicholas Lombardo and Department Staff Exhibits 9 and 10.)
7. As shown by Receipt for Service No. 201107110011 issued by the New York State Department of State, respondent was served, on June 21, 2011, pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated June 8, 2011, 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 382 East 199th Street, Bronx, New York 10458. The notice of hearing and complaint was also served on respondent by regular mail on June 21, 2011. (Department Staff Exhibits 2 and 3.)
8. 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 2 and Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to renew its petroleum storage facility registration on or after the expiration of PBS Certificate Number 2-269328 on April 3, 2008, 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 renew its petroleum storage facility registration 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 three years. Accordingly, 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 renew the registration for a petroleum storage facility it owns located at 382 East 199th Street, Bronx, New York 10458, based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to submit a registration renewal 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
August 1, 2012

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Prestige Associates, LLC – Region 2

July 20, 2012

Edirol File No. 030820123220

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	May 9, 2012 order for appointment of law interns, including Dustin Howard, Legal Intern (Peters, PJ) and Department's Consent to appearance of Dustin Howard, Legal Intern	✓	✓	Department Staff	
2	Pleadings, including: cover letter (dated June 9, 2011), notice of hearing, complaint, and statement of readiness (all dated June 8, 2011), with affidavit in support of Deborah Gorman, sworn to June 10, 2011	✓	✓	Department Staff	
3	Affidavit of Service of Brooke Turallo, sworn to July 19, 2012, including NYS Department of State receipt	✓	✓	Department Staff	
4	Affidavit of Service of Brooke Turallo, sworn to July 19, 2012, with copy of letter sent to the officers of respondent, dated February 29, 2012	✓	✓	Department Staff	
5	New York State Department of State Entity Information printout	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	ACRIS search and results	✓	✓	Department Staff	
7	Deed	✓	✓	Department Staff	
8	PBS Application	✓	✓	Department Staff	
9	Facility Information Report	✓	✓	Department Staff	
10	PBS Certificate Number 2-269328, issued October 10, 2006; expired April 3, 2008	✓	✓	Department Staff	