

**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 2-330701SC

-by-

**1555 SEABURY PLACE HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

In this matter, staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) alleges that respondent 1555 Seabury Place Housing Development Fund Corporation (“respondent”) violated 6 NYCRR 612.2 by failing to renew the registration for its petroleum storage facility located at 1555 Seabury Place, Bronx, New York (“facility”). The facility’s registration expired on August 17, 2005.

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 failed to file an answer to the complaint dated May 29, 2014, that Department staff served in this matter. Respondent also failed to appear at a pre-hearing conference scheduled for July 1, 2014, 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 29, 2014, as directed in the notice of hearing (see Hearing Report at 3 [Findings of Fact Nos. 7 and 8]).

As a consequence of respondent’s failure to answer or appear in this matter, the ALJ recommends 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 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 Assocs., LLC, Order of the Commissioner, December 19, 2011, at 2; see also Hearing Exhibit 5 [respondent's violation has continued for more than nine years]). Respondent is also directed to submit to the Department a petroleum bulk storage registration application for the facility, plus applicable fees, within fifteen (15) days of the service of this order upon it.

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 1555 Seabury Place Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 1555 Seabury Place Housing Development Fund Corporation 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 1555 Seabury Place, Bronx, New York.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent 1555 Seabury Place Housing Development Fund Corporation shall submit to the Department a petroleum bulk storage registration application for this facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent 1555 Seabury Place 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.
- V. 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.
- 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 1555 Seabury Place Housing Development Fund Corporation, and 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: October 24, 2014
Albany, New York

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 2-330701SC

-by-

1555 SEABURY PLACE HOUSING DEVELOPMENT
FUND CORPORATION,

Respondent.

Procedural History

Respondent 1555 Seabury Place Housing Development Fund Corporation (“HDFC”) was served with a notice of hearing and complaint dated May 29, 2014, 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 1555 Seabury Place, Bronx, New York 10460. 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 respondent; and (4) granting such other and further relief as the Commissioner may deem just and proper.

Inasmuch as respondent is an active domestic business corporation 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 30, 2014. Consistent with CPLR 3215(g)(4), respondent was also served with the notice of hearing and complaint by regular mail on May 30, 2014. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for July 1, 2014, as directed in the cover letter, dated May 29, 2014, and served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on July 29, 2014, as directed in the notice of hearing.

On July 29, 2014, 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 Benjamin Conlon, Esq., Bureau Chief, Office of General Counsel, Bureau of Remediation, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-

1500. No one appeared on behalf of respondent. Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15 and requested that its prayer for relief in the complaint be deemed its proposed order, as required by 6 NYCRR 622.15(b)(3), which request was granted. Department staff also stated that it sought judgment on the merits, indicating its readiness to proceed to hearing. Department staff called one witness, Brooke Turallo, a Legal Assistant in the Department's Office of General Counsel's Spills and Bulk Storage Section in Albany. In all, nine (9) 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 1555 Seabury Place Housing Development Fund Corporation is the owner of a petroleum storage facility ("facility") having a capacity of over 1,100 gallons located at 1555 Seabury Place, Bronx, New York 10460. In particular, petroleum storage tank number 001 at the facility has a capacity of 5,000 gallons and is located aboveground. (Department Staff Exhibits 1, 4, 5, 6 and 7.)
2. Respondent is an active domestic business corporation in the State of New York. (Department Staff Exhibit 2.)
3. Pursuant to a registration renewal application filed by respondent, dated June 6,

- 2000, and received by the Department on June 14, 2000, the Department renewed Petroleum Bulk Storage (“PBS”) Certificate Number 2-330701 previously issued to respondent’s facility. The renewed registration became effective June 28, 2000, and expired on August 17, 2005. (Department Staff Exhibits 4, 5 and 6.)
4. Brooke Turallo is a Legal Assistant in the Department’s Office of General Counsel’s Spills and Bulk Storage 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 29, 2014, Brooke Turallo searched the petroleum storage facility records contained in the Department’s UIS for any petroleum facility renewal registration filed by respondent for its facility. (Testimony of Brooke Turallo.)
 6. As a result of her search, Brooke Turallo determined that respondent had not renewed the registration for the facility since August 17, 2005, the date on which PBS Certificate 2-330701 expired. (Testimony of Brooke Turallo; Department Staff Exhibits 5 and 6.)
 7. As shown by Receipt for Service No. 201406090376 issued by the New York State Department of State, respondent was served, on May 30, 2014, pursuant to section 306 of the Business Corporation Law with a notice of hearing and complaint dated May 29, 2014, 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 1555 Seabury Place, Bronx, New York 10460. Consistent with CPLR 3215(g)(4), the notice of hearing and complaint was also served on respondent by regular mail on May 30, 2014. (Department Staff Exhibits 1, 3 and 9.)
 8. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for July 1, 2014, as directed in the cover letter, dated May 29, 2014, and served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on July 29, 2014, as directed in the notice of hearing. (Department Staff Exhibit 1 and Hearing Record.)

Discussion

Before discussing the proof adduced during the hearing of this matter, certain discrepancies between that proof and allegations in Department staff’s complaint (Department Staff Exhibit 1) should be noted. First, the word “Corporation” in respondent’s name in Department staff’s caption of the action and Paragraph 21 of the complaint is misspelled as “Corporation.” (Parenthetically, this misspelling is consistent

throughout the other documents also served with the complaint.) Second, Paragraphs 14 and 15 of the complaint allege that respondent's facility has a combined PBS capacity of 2,000 gallons. Department Staff Exhibits 5 and 6 show that the capacity is 5,000 gallons, comprised of a single tank. Moreover, Department Staff Exhibit 4, a PBS application filled out by respondent on June 6, 2000, indicates a tank with a capacity of 4,999 gallons. (Department staff explains that this one gallon discrepancy is an attempt by respondent to bring the facility's stated capacity to below the 5,000 gallon threshold and, therefore, qualify for a lesser registration renewal fee. [See Paragraph 10 of the complaint, Department Staff Exhibit 1.]) Third, and finally, Paragraphs 20, 22 and 23 of the complaint allege that respondent's PBS facility registration expired on August 28, 2002, and should have been renewed on or before that date. Department Staff Exhibits 5 and 6 show that the registration expired on August 17, 2005.

Although they are noted, I do not find these discrepancies fatal to the relief requested by Department staff in this matter. With respect to the misspelling of the word "corporation," I find that this minor error presents no prejudice to the respondent and I choose to disregard it. The de minimus and non-prejudicial nature of this error is supported by the fact that the complaint was accepted for service by the Department of State. (See Department Staff Exhibits 3 and 9.) With respect to the capacity of the facility misstated in the complaint as 2,000 gallons and not 5,000 gallons, I find this error de minimus and non-prejudicial, as well. The PBS law and regulations at issue here are applicable to facilities with an aggregate storage capacity of 1,100 gallons or more. Accordingly, whether the capacity of respondent's facility was 2,000 gallons, as inaccurately alleged in the complaint, or 5,000 as demonstrated by the proof, the facility is still subject to the law and regulations governing PBS facilities, including the requirement to maintain a current facility registration. Finally, the proof shows that the facility has been out of registration for nine years, beginning August 17, 2005, and not twelve years, beginning August 28, 2002, as inaccurately alleged in the complaint. I find this error de minimus and non-prejudicial. The complaint seeks a penalty of \$10,000, an amount of which respondent was fully aware. Based upon Department guidance and prior practice and orders of the Commissioner, a \$10,000 penalty is appropriate in matters where a facility has been out of registration for more than five years, a threshold substantially exceeded in this case.

Department staff's proof presents a prima facie case demonstrating that respondent failed to renew its petroleum storage facility registration either before or after the expiration of PBS Certificate Number 2-330701 on August 17, 2005, 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 July 1, 2014, as directed in the cover letter, dated May 29, 2014, and served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on July 29, 2014, as directed in the notice of hearing. Moreover, pursuant to its granted request, the prayer for relief articulated in Department staff's complaint constitutes the proposed

Commissioner's order in this matter. The Department has satisfied the requirements of 6 NYCRR 622.15 and is entitled to a default judgment in this matter.

Moreover, the proof adduced at the hearing, conducted on July 29, 2014, 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 has been expired for nine years. 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 1555 Seabury Place, Bronx, New York 10460, on or before August 17, 2005, 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 ten thousand dollars (\$10,000.00); 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 15, 2014

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of 1555 Seabury Place Housing Development Fund Corporation – Bronx, New York

July 29, 2014 – Region 2 Office

DEC Case No. 2-330701SC - Ediol File No. 050828140045

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Scott W. Caruso, Esq., to respondent, dated May 29, 2014. Notice of Hearing and Complaint, dated May 29, 2014. Statement of Readiness, dated May 29, 2014. Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, sworn to May 30, 2014.	✓	✓	Department Staff	
2	NYS Department of State (“DOS”) Corporate Entity Information, dated July 9, 2014.	✓	✓	Department Staff	
3	NYS DOS Receipt for Service, dated May 30, 2014.	✓	✓	Department Staff	
4	PBS Application dated June 6, 2000, and received June 14, 2000.	✓	✓	Department Staff	
5	PBS Certificate No. 2-330701 issued June 28, 2000, expiration date August 17, 2005.	✓	✓	Department Staff	
6	PBS Program Facility Information Report, printed July 24, 2014.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	New York City Department of Finance ACRIS Title Search, dated July 29, 2014, and Deed to respondent, dated February 14, 1983.	✓	✓	Department Staff	
8	Affirmation of John Dow, acknowledged July 29, 2014.	✓	✓	Department Staff	
9	Affidavit of Service of Brooke Turallo, sworn to July 31, 2014, and NYS DOS Receipt for Service, dated May 30, 2014.	✓	✓	Department Staff	