

**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 2-608521YW

-by-

**163 LEFFERTS PLACE HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

Staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) alleges in this matter that respondent 163 Lefferts Place Housing Development Fund Corporation violated 6 NYCRR 612.2 by failing to renew the registration for its petroleum storage facility located at 163 Lefferts Place, Brooklyn, New York (“facility”). The facility’s registration expired on March 10, 2008.

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 163 Lefferts Place Housing Development Fund Corporation failed to file an answer to the complaint dated March 14, 2014, that Department staff served in this matter, failed to appear at a pre-hearing conference scheduled for April 22, 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 May 23, 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), 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 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, at 2; see also Hearing Exhibit 1 [Department staff complaint, ¶¶ 20, 22 and 23] and Exhibit 5 [respondent's violation has continued for more than six years]). Respondent is also directed to submit to the Department a petroleum bulk storage registration application for the facility, plus applicable registration 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 163 Lefferts Place Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 163 Lefferts 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 it owns and which is located at 163 Lefferts Place, Brooklyn, 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 registration application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent 163 Lefferts 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.

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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 2-608521YW

-by-

163 LEFFERTS PLACE HOUSING DEVELOPMENT FUND
CORPORATION,

Respondent.

Procedural History

Respondent 163 Lefferts Place Housing Development Fund Corporation (“HDFC”) was served with a notice of hearing and complaint dated March 14, 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 163 Lefferts Place, Brooklyn, New York 11238. 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 March 19, 2014. Consistent with CPLR 3215(g)(4), respondent was also served with the notice of hearing and complaint by regular mail on March 19, 2014. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 22, 2014, as directed in the cover letter, dated March 17, 2014, and served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May 23, 2014, as directed in the notice of hearing.

On May 23, 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 Yvonne M. Ward, Esq., of the Spills 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 orally moved for a default judgment pursuant to 6 NYCRR 622.15, but 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 163 Lefferts Place Housing Development Fund Corporation is the owner of a petroleum storage facility ("facility") having a capacity of over 1,100 gallons located at 163 Lefferts Place, Brooklyn, New York 11238. In particular, petroleum storage tank number 1 at the facility has a capacity of 1,500 gallons and is located aboveground. (Department Staff Exhibits 3, 4 and 5.)
2. Respondent is an active domestic business corporation in the State of New York. (Department Staff Exhibit 8.)
3. Pursuant to a registration renewal application filed by respondent, dated February 20, 2003, and received by the Department that same date, the Department renewed Petroleum Bulk Storage ("PBS") Certificate Number 2-608521

- previously issued to respondent's facility. The renewed registration became effective March 10, 2003, and expired on March 10, 2008. (Department Staff Exhibits 3, 4 and 5.)
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 May 22, 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 March 10, 2008, the date on which PBS Certificate 2-608521 expired. (Testimony of Brooke Turallo; Department Staff Exhibits 4 and 5.)
 7. As shown by Receipt for Service No. 201403250324 issued by the New York State Department of State, respondent was served, on March 19, 2014, pursuant to section 306 of the Business Corporation Law with a notice of hearing and complaint dated March 14, 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 163 Lefferts Place, Brooklyn, New York 11238. Consistent with CPLR 3215(g)(4), the notice of hearing and complaint was also served on respondent by regular mail on March 19, 2014. (Department Staff Exhibits 1 and 2.)
 8. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 22, 2014, as directed in the cover letter, dated March 17, 2014, and served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May 23, 2014, as directed in the notice of hearing. (Department Staff Exhibit 1 and Hearing Record.)

Discussion

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 2-608521 on March 10, 2008, 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 April 22, 2014, as directed in the cover letter, dated March 17, 2014, and served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May 23, 2014, 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 on May 23, 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 more than six 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 163 Lefferts Place, Brooklyn, New York 11238, on or before March 10, 2008, 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
June 2, 2014

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS*Matter of 163 Lefferts Place Housing Development Fund Corporation – Brooklyn, New York*

May 23, 2014 – Region 2 Office

DEC Case No. 2-608521YW - Edrol File No. 050622125317

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Yvonne M. Ward, Esq., to respondent, dated March 17, 2014. Notice of Hearing and Complaint, dated March 14, 2014. Statement of Readiness, dated March 14, 2014. Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, sworn to March 17, 2014.	✓	✓	Department Staff	
2	Affidavit of Service of Brooke Turallo, sworn to May 16, 2014. NYS Department of State (“DOS”) Receipt for Service, dated March 19, 2014.	✓	✓	Department Staff	
3	PBS Application dated February 20, 2003, and received February 20, 2003.	✓	✓	Department Staff	
4	PBS Program Facility Information Report, printed May 22, 2014.	✓	✓	Department Staff	
5	PBS Certificate No. 2-608521 issued March 10, 2003, expiration date March 10, 2008.	✓	✓	Department Staff	
6	New York City Department of Finance ACRIS Title Search, dated May 22, 2014.	✓	✓	Department Staff	
7	Deed to respondent, dated November 19, 1992.	✓	✓	Department Staff	
8	NYS DOS Corporate Entity Information, dated May 22, 2014.	✓	✓	Department Staff	
9	Affirmation of Yvonne M. Ward, Esq., dated May 21, 2014.	✓	✓	Department Staff	