

**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 2-234982

-by-

2735 CRESTON ASSOCIATES LLC,

Respondent.

On July 21, 2010, 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 2735 Creston Associates LLC violated 6 NYCRR 612.2 by failing to renew the registration for its petroleum bulk storage (PBS) facility located at 2735 Creston Avenue, Bronx, New York. At the hearing, Department staff was represented by Scott W. Caruso, Esq., Section Chief, Spill and Bulk Storage Section of the Department's Office of General Counsel, Albany, New York. No one appeared on behalf of respondent.

ALJ Richard 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 2735 Creston 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 June 16, 2010, as directed in the cover letter served with the notice of hearing and complaint, and, as noted, failed to appear for the adjudicatory hearing scheduled in the matter on July 21, 2010, as directed in the notice of hearing (see Hearing Report, at 3 [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 3), 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 3). Accordingly, staff is entitled to a judgment based on record evidence.

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 2735 Creston Associates LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 2735 Creston Associates LLC is adjudged to have violated 6 NYCRR 612.2 for failing to renew the petroleum bulk storage registration for the petroleum bulk storage facility that it owns and which is located at 2735 Creston Avenue, Bronx, New York 10468.
- 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 2735 Creston Associates LLC shall pay a civil penalty in the amount of ten thousand dollars (\$10,000.00) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The petroleum bulk storage facility 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 2735 Creston Associates LLC its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: Albany, New York
August 16, 2010

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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HEARING REPORT

DEC CASE NO:
PBS 2-234982

-by-

2735 CRESTON ASSOCIATES LLC,

Respondent.

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Procedural History

Respondent, 2735 Creston Associates LLC, was served with a notice of hearing and complaint, dated May 5, 2010, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to renew the registration of its petroleum bulk storage (PBS) facility located at 2735 Creston Avenue, Bronx, New York 10468. 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 PBS 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 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 May 12, 2010. Respondent was also served with the notice of hearing and complaint by regular mail on May 12, 2010. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for June 16, 2010, 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 21, 2010, as directed in the notice of hearing.

On July 21, 2010, an adjudicatory hearing was convened before the undersigned Administrative Law Judge (ALJ) 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 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 called one witness, Nicholas Lombardo, Agency Program Aide with the PBS Unit of the Department's Region 2 office. In all, eight (8) 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, 2735 Creston Associates LLC, is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 2735 Creston Avenue, Bronx, New York 10468. In particular, petroleum storage tank number 001 at the facility has a capacity of 2,000 gallons and is located aboveground.
2. Respondent is an active domestic limited liability company in the State of New York.
3. Pursuant to a registration application filed by respondent, on November 5, 1997, the Department issued respondent Petroleum Bulk Storage (PBS) Certificate number 2-234982, registering respondent's PBS facility. This registration expired on November 5, 2002.
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 facility registrations filed pursuant to 6 NYCRR 612.2.

5. On July 21, 2010, Nicholas Lombardo searched the petroleum storage facility records of the Department for any facility registration or renewal registration filed by respondent for the facility.
6. As a result of his search, Nicholas Lombardo determined that respondent had not renewed the facility's registration after November 5, 2002, the date on which PBS Certificate 2-234982 expired.
7. As shown by Receipt for Service No. 201005130254 issued by the New York State Department of State, respondent was served, on May 12, 2010, pursuant to Section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated May 5, 2010, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to renew the registration of its PBS facility located at 2735 Creston Avenue, Bronx, New York 10468. The notice of hearing and complaint was also served on respondent by regular mail on May 12, 2010.
8. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for June 16, 2010, 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 21, 2010, as directed in the notice of hearing.

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to renew its PBS registration on or after the expiration of PBS Certificate 2-234982 on November 5, 2002, 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 June 16, 2010, 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 21, 2010, 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 PBS facility registration in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

Department staff's proposed order and the \$10,000 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 2735 Creston Avenue, Bronx, New York 10468, 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
July 23, 2010