

**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 2-607789NAL

- by -

EXETER 13172 DE, LLC,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation ("Department") that Exeter 13172 DE, LLC ("respondent") violated 6 NYCRR 612.2(b) by failing to register its petroleum storage facility located at 24-36 43rd Street, Long Island City, New York ("facility") within 30 days of the transfer of ownership of the facility to it.

On September 9, 2014, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services. ALJ Caruso 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 served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for August 6, 2014, and failed to appear for the adjudicatory hearing scheduled in the matter on September 9, 2014 (see Hearing Report at 5 [Finding of Fact No. 10]).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing

Report at 5-6). 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 5-6). Accordingly, staff is entitled to a judgment based on record evidence.

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff, in its papers, sought a civil penalty of ten thousand dollars (\$10,000). The ALJ granted Department staff's motion to amend its pleadings to reduce the civil penalty to five thousand dollars (\$5,000). Department staff orally moved to have the findings and relief requested in the wherefore clause of staff's complaint, as amended, adopted as staff's proposed order. The ALJ also granted this motion.

In these types of cases, where facilities have not registered or renewed their registrations within the past two years, and no other violations or mitigating or aggravating factors exist, a civil penalty of five thousand dollars (\$5,000) has been requested and assessed (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). Here, respondent acquired the facility in May 2013 and has not registered the facility since that time (see Hearing Report at 4 [Finding of Fact 7]). The requested penalty of five thousand dollars (\$5,000) is authorized and appropriate.

I also direct that respondent submit a registration application to the Department for the facility within fifteen (15) days of service of this order upon it, together with all applicable registration fees.

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 Exeter 13172 DE, LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Exeter 13172 DE, LLC is adjudged to have violated 6 NYCRR

612.2(b) for failing to register its petroleum storage facility located at 24-36 43rd Street, Long Island City, New York, within 30 days of the transfer of ownership of the facility to it.

- III. Within fifteen (15) days of the service of this order upon respondent Exeter 13172 DE, LLC, it 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 Exeter 13172 DE, LLC shall pay a civil penalty in the amount of five thousand dollars (\$5,000) 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
NYS 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 Exeter 13172 DE, LLC, 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: Albany, New York
March 10, 2015

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of Article 17 of the Environmental
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**HEARING
REPORT**

DEC Case No.
PBS 2-
607789NAL

- by -

EXETER 13172 DE, LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation ("Department") served Respondent Exeter 13172 DE, LLC ("respondent") with a notice of hearing and complaint, dated July 7, 2014, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum storage facility located at 24-36 43rd Street, Long Island City, NY 11103, within 30 days of the transfer of ownership of the facility to it. 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 reregister its petroleum storage 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 unauthorized foreign limited liability company owning real property and doing business in the State of New York,¹ service of the notice of hearing and complaint on respondent was made by certified mail on respondent's registered agent on July 10, 2014 (see 6 NYCRR

¹ Respondent has not registered its Delaware limited liability company with the New York State Department of State. Personal jurisdiction over respondent is present because of respondent's ownership of real property in New York (see CPLR 302[a][4] Personal jurisdiction by acts of non-domiciliaries.)

622.3[a][3]).² The certified mail was received on July 14, 2014. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by regular mail on July 10, 2014. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for August 6, 2014, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on September 9, 2014, an adjudicatory hearing was convened before the undersigned Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services 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 Adriana Le Blan, Esq., volunteer attorney, Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500 and Benjamin Conlon, Esq., Chief, Remediation Bureau, Office of General Counsel. 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. I 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, I noted Department staff's readiness for hearing, noted the failure of respondent to appear and advised that the hearing, in the absence of respondent, would be convened at a subsequent time or on a subsequent date.

At 1:55 pm on September 9, 2014, the adjudicatory hearing was convened before me at the Department's Region 2 offices. Department staff was represented by volunteer attorney Adriana Le Blan, Esq. under the supervision of Benjamin Conlon, Esq. Department staff orally renewed its motion for a default judgment and also sought judgment on the merits.

Department staff called one witness, Brooke Turallo, a paralegal in the Department's Office of General Counsel. In all, eight (8) exhibits were received in evidence.

² Respondent is a Delaware limited liability company, and its registered agent is listed on the Delaware Department of State: Division of Corporations online services database (Exhibit 3).

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.

Findings of Fact

The following findings of fact are found based upon the preponderance of evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent Exeter 13172 DE, LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 24-36 43rd Street, Long Island City, New York 11103 ("facility"). In particular, petroleum storage tank number 1 at the facility has a capacity of 5,000 gallons and is located above ground. (Testimony of Brooke Turallo; Staff Exhibits 4, 5, 6 and 7.)³
2. Respondent is a limited liability company registered in the State of Delaware, owning real property and doing business in the State of New York. (Testimony of Brooke Turallo; Staff Exhibits 3 and 4.)
3. On March 26, 2007, the Department issued Petroleum Bulk Storage ("PBS") Registration Certificate No. 2-607789 to Mate Matura & Sons, which owned the facility at that time. This registration expired on May 24, 2012. Moreover, in bold capital letters, at the bottom of the Certificate is

³ Staff demonstrated by a preponderance of evidence that the tank capacity is 5,000 gallons and not the 4,999 gallons listed in the 2007 application and certificate.

the following declaration: "THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE." (Testimony of Brooke Turallo; Staff Exhibit 6.)

4. On May 31, 2013, Marko Martura, executor of the estate of Ive Matura, and Mate Matura, Jr., administrator of the estate of Mate Matura, Sr., by deed, transferred all right, title and interest in the facility to respondent Exeter 13172 DE, LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2013000237386, Document ID 2013060401111003. (Testimony of Brooke Turallo; Staff Exhibit 4.)
5. Brooke Turallo is a paralegal in the Department's Office of General Counsel, PBS Section, who is authorized to access and inspect the Department's unified information system ("UIS"). The UIS is a database maintained by the Department and contains petroleum storage facility records filed with the Department, which records include petroleum storage facility registrations filed pursuant to 6 NYCRR 612.2. (Testimony of Brooke Turallo; see also Staff Exhibit 1, Affidavit of Brooke Turallo.)
6. On September 8, 2014, Brooke Turallo searched the petroleum storage facility records contained in the Department's UIS for any petroleum facility registration or renewal registration or any petroleum storage facility re-registration filed by respondent for the facility. (Testimony of Brooke Turallo; Staff Exhibit 7.)
7. As a result of her search, Brooke Turallo determined that respondent had not reregistered the facility at any time after assuming its ownership on May 31, 2013. (Testimony of Brooke Turallo; Staff Exhibits 4 and 7.)
8. As shown by the signed certified mail receipt, respondent was served, on July 14, 2014, pursuant to 6 NYCRR 622.3(a)(3) with a notice of hearing and complaint dated July 7, 2014, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, together with a statement of readiness and supporting affidavit, for failure to reregister its petroleum storage facility located at 24-36 43rd Street, Long Island City, New York 11103, within 30 days of the transfer of ownership of the facility to it. Department staff also provided additional service by sending the notice of hearing and complaint to

respondent by regular mail on July 10, 2014. (Staff Exhibit 2.)

9. The cover letter to the notice of hearing and complaint advised respondent that small businesses may have the option to use a streamlined adjudicatory proceeding conducted by telephone conference or videoconference as provided by State Administrative Law 308, and that to elect that option to contact Brooke Turallo. Respondent did not contact Ms. Turallo or otherwise make such an election (Hearing Record; Staff Exhibit 1.)
10. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for August 6, 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 September 9, 2014, as directed in the notice of hearing. (Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to reregister its petroleum storage facility located at 24-36 43rd Street, Long Island City, New York 11103, within 30 days of the transfer of ownership of the facility to it, 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 August 6, 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 September 9, 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 in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to reregister its petroleum storage facility within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven. At the September 9, 2014 hearing, Department staff orally moved to amend the pleadings to reduce the civil penalty requested to five thousand dollars (\$5,000). Pursuant to 6 NYCRR

622.10(b)(1)(i), I granted Department staff's motion to amend the pleadings as there is no prejudice to respondent in reducing the penalty requested. Department staff also orally moved to adopt the finding and relief requested in the wherefore clause of its complaint, as amended, as staff's proposed order. I granted Department staff's motion.

Department staff's proposed order and the five thousand dollar (\$5,000) civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (see e.g. Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. granting Department staff's motion for default, holding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 24-36 43rd Street, Long Island City, New York 11103, within 30 days of the transfer of ownership of the facility to it;
3. directing respondent to submit a registration application to the Department for the above facility within fifteen (15) days of service of the Commissioner's order together with the applicable registration fees;
4. directing respondent to pay a civil penalty in the amount of five thousand dollars (\$5,000) within fifteen (15) days of service of the Commissioner's order; and

5. directing such other and further relief as he may deem just and proper.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
September 10, 2014

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Exeter 13172 DE, LLC, 24-36 43rd Street, Long Island City, New York – DEC Case No. 2-607789NAL
 September 9, 2014 – Region 2 Office
 Edrol File No. 010216105602

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Adriana Le Blan, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, all dated July 7, 2014 and Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, dated July 8, 2014	✓	✓	Department Staff	
2	Affidavit of Service of Angela Houle, dated September 8, 2014 with certified mail receipt of July 14, 2014 delivery; and Affidavit of Service of Brooke Turallo, dated September 8, 2014.	✓	✓	Department Staff	
3	Delaware Department of State, Division of Corporations, Entity Details, dated September 8, 2014; and NYS Department of State Entity search results, dated September 8, 2014.	✓	✓	Department Staff	
4	New York City Department of Finance, ACRIS Title Search, dated September 8, 2014 and deed to respondent, dated May 31, 2014.	✓	✓	Department Staff	
5	PBS Application, dated March 19, 2007	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	PBS Registration Certificate, issued March 26, 2007, expiration date May 24, 2012	✓	✓	Department Staff	
7	PBS Program Facility Information Report, dated September 8, 2014.	✓	✓	Department Staff	
8	Affirmation of attempted contact by Adriana Le Blan, sworn to September 8, 2014.	✓	✓	Department Staff	