

**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 2-234354TM

-by-

SPRING STREET ASSETS, INC.,

Respondent.

On August 30, 2011, an adjudicatory hearing was convened before Maria E. Villa, Administrative Law Judge (“ALJ”) of the Office of Hearings and Mediation Services for the New York State Department of Environmental Conservation (“Department”). The hearing addressed Department staff’s motion for a default judgment based upon the failure of respondent Spring Street Assets, Inc. (“respondent”) to answer or appear in connection with Department staff’s June 8, 2011, complaint. In its complaint, Department staff alleged that respondent violated 6 NYCRR 612.2 by failing to renew the registration for its petroleum bulk storage facility at 176 Elizabeth Street (a/k/a 12 Spring Street), New York, New York (“site”). Respondent owns the site, where an aboveground 1,500 gallon capacity petroleum bulk storage tank is located (see Staff Exhibits 2, 3, 5, and 9).

ALJ Villa prepared the attached default summary report, which I adopt as my decision in this matter. As set forth in the ALJ’s report, respondent Spring Street Assets, Inc. 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 this matter on August 30, 2011, as directed in the notice of hearing (see Default Summary Report, at 4-5 [Finding of Fact No. 5]).

As a consequence of respondent’s failure to answer or appear in this matter, the ALJ recommended that Department staff’s motion for a default judgment be granted (see Default Summary Report, at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

In its complaint, Department staff requested a penalty of ten thousand dollars (\$10,000). The proposed order submitted by Department Staff in its motion for default judgment requests a penalty of seven thousand five hundred dollars (\$7,500). ECL 71-

1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation, and the requested penalty is below this statutory amount.

In proceedings concerning the violation of the petroleum bulk storage tank registration requirements for fuel oil tanks in New York City apartment buildings, Department staff has requested penalties that take into account the duration of the violation. For those facilities that have not registered or renewed their registrations within the past two years, Department staff has, absent other violations, generally requested a penalty of five thousand dollars (\$5,000). For registration violations that extend from two to five years, Department staff has generally requested a penalty of seven thousand five hundred dollars (\$7,500). For those facilities where registrations are more than five years overdue, Department staff has generally requested a penalty of ten thousand dollars (\$10,000). However, to the extent that mitigating or aggravating factors exist, such factors are considered for purposes of the penalty request.

The amount requested in this case is consistent with the Department's penalty policies and agency precedent. I note that the violation in this matter has continued for more than four years (see Staff Exhibit 1 [Department Staff Complaint, at ¶¶ 22 and 23]). Based on this record, the requested penalty of \$7,500 is authorized and appropriate.

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 Spring Street Assets, Inc. waived its right to be heard at the hearing. Accordingly, the allegations of the complaint are deemed to have been admitted by respondent.
- II. Based upon the allegations of the complaint, and the documents submitted in support of the motion, respondent Spring Street Assets, Inc. is adjudged to have violated 6 NYCRR 612.2 for failing to renew the petroleum bulk storage registration for the petroleum bulk storage facility located at 176 Elizabeth Street (a/k/a 12 Spring Street), New York, 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 fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent Spring Street Assets, Inc. 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 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 Spring Street Assets, Inc., 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 30, 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"),

DEFAULT SUMMARY
REPORT

DEC CASE NO.
PBS2-234354TM

-by-

SPRING STREET ASSETS, INC.,
Respondent.

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Procedural History

Respondent Spring Street Assets, Inc. 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 for its petroleum bulk storage facility located at 176 Elizabeth Street (a/k/a 12 Spring Street) 10012, New York, New York. 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 renew its PBS facility registration 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 business corporation in the State of New York, service of the notice of hearing and complaint on respondent was made by serving the New York State Department 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 and 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.

As stated in the notice of hearing, on August 30, 2011, an adjudicatory hearing was convened before Administrative Law Judge ("ALJ") Maria E. Villa 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 Although the penalty requested in the complaint is \$10,000, the proposed order submitted by Department Staff in support of its motion for default requests a lower penalty 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 August 10, 2012, rather than electing to proceed with a hearing in the respondent's absence, Department staff provided OHMS with the documentation required by 6 NYCRR 622.15(b) in support of its oral motion for a default judgment made on August 30, 2011. In particular, Department staff submitted the following documents for the record:

1. A proposed Commissioner's order.
2. The notice of hearing and complaint dated June 9, 2011, with attachments, including an affidavit of Deborah Gorman sworn to on June 10, 2011, and a cover letter to respondent dated June 9, 2011.
3. An affidavit of service sworn to by Brooke Turallo on August 8, 2012, stating that on June 21, 2011, she sent respondent a copy of the notice of hearing and complaint, with attachments and cover letter, as indicated above, by United States Postal Service ("USPS") regular mail. Moreover, the affidavit states that she served respondent, an active domestic business corporation in New York, by serving the Secretary of State of the State of New York on June 21, 2011.
4. A copy of the Entity Information web page maintained by the New York State Department of State Division of Corporations indicating respondent's status as an active domestic business corporation.
5. A copy of the abstract of title for the subject property maintained by the New York City Office of the City Register and generated from the City's public website, the Automated City Register Information System ("ACRIS").
6. A copy of the recorded deed showing fee ownership of the facility by respondent as of December 20, 1988.
7. A copy of the petroleum bulk storage ("PBS") application filed by respondent with the Department to register the facility, dated March 15, 2003.
8. A copy of the facility information report maintained by the Department for the facility.

9. A copy of PBS certificate number 2-234354 issued by the Department on April 1, 2003. The certificate shows an expiration date of April 1, 2008.
10. The affidavit of Brooke Turallo, sworn to August 8, 2012, attesting to the service of the notice of hearing and complaint on respondent, as well as a second affidavit sworn to that same date. The second affidavit stated that by letter dated March 13, 2012, Ms. Turallo requested the respondent to contact the Department, and/or submit an answer, and advised that if a settlement was not reached by March 30, 2012, the Department would move forward with legal action. The affidavit stated further that as of August 8, 2012, the Department had not been contacted by the respondent regarding this matter.

In its proposed order, Department staff has noted that the facility has been out of registration since April of 2008. The requested penalty amount of \$7,500 is consistent with penalty amounts imposed by the Department in similar cases.

Default Provisions

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the proceeding. As applicable herein, the Department's default procedures in an enforcement proceeding, found at 6 NYCRR 622.15, provide:

“(a) A respondent’s failure to file a timely answer ... constitutes a default and a waiver of respondent’s right to a hearing. If [this] occurs the department staff may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record ... and must contain:

- (1) proof of service upon the respondent of the notice of hearing and complaint...;
- (2) proof of the respondent’s failure ... to file a timely answer; and
- (3) a proposed order.”

As the Commissioner stated in the decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted].” Accordingly, the following findings of fact are based upon the documents submitted into the record, as identified above.

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 Spring Street Assets, Inc. is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 176 Elizabeth Street (a/k/a Spring Street), New York, New York 10012 ("facility"). A 1,500 gallon above ground storage tank is located at the facility. (Staff Exhibits 2, 3, 5, and 9.)
2. Pursuant to a registration application filed by respondent with the Department on March 15, 2003, the Department issued Petroleum Bulk Storage ("PBS") Certificate Number 2-234354. The certificate was issued on April 1, 2003, and expired on April 1, 2008. (Staff Exhibits 2, 3, and 5.)
3. On December 20, 1988, respondent by deed acquired all right, title and interest in the facility. (Staff Exhibit 9.)
4. On or before April 1, 2008, the Department did not receive a registration renewal application from respondent. (Staff Exhibit 1.)
5. 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.

6. Respondent is an active domestic business corporation in the State of New York. (Staff Exhibit 7.)
7. On June 21, 2011, service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State, pursuant to section 303 of the Limited Liability Company Law. The receipt for service issued by the Department of State in this matter is number 201107110009. Respondent was also served by US Postal Service regular mail on June 21, 2011. (Staff Exhibit 4.)

Discussion

The record of this proceeding demonstrates that respondent failed to renew the registration for its petroleum bulk storage facility located at 176 Elizabeth Street (a/k/a 12 Spring Street), New York, New York 10012 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.

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 its petroleum bulk storage facility located at 176 Elizabeth Street (a/k/a 12 Spring Street) 10012;
3. Directing respondent to submit a registration renewal application to the Department for the above facility and applicable registration fees;
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/

Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
August 22, 2012

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Spring Street Assets, Inc. – Region 2

August 30, 2011

Edirol File No. 020929103321

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness; and affidavit of Deborah Gorman in support, sworn to June 10, 2011.	x	x	Department Staff	
2	PBS Application	x	x	Department Staff	
3	Facility Information Report	x	x	Department Staff	
4	Affidavit of Service of Brooke Turallo, sworn to August 8, 2012, including NYS Department of State receipt	x	x	Department Staff	
5	PBS Certification, issued April 1, 2003; expired April 1, 2008	x	x	Department Staff	
6	Affidavit of Brooke Turallo, sworn to August 8, 2012, with attached March 13, 2012 letter from Brooke Turallo to Spring Street Assets, Inc.	x	x	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	New York Department of State Entity Information printout	x	x	Department Staff	
8	ACRIS Search Results	x	x	Department Staff	
9	Deed	x	x	Department Staff	