

**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 2-454591

-by-

TOWER REALTY, INC.,

Respondent.

On June 2, 2011, 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 Department staff’s motion for a default judgment based upon the failure of respondent Tower Realty, Inc. (“respondent”), to answer or appear in connection with the allegations in Department staff’s March 8, 2011, complaint that respondent violated 6 NYCRR 612.2 by failing to reregister its petroleum bulk storage (“PBS”) facility located at 552 Parkside Avenue, Brooklyn, New York 11226 (“facility”), within 30 days of the transfer of ownership of the facility to it.

ALJ Wissler prepared the attached default summary report, which I adopt as my decision in this matter. As set forth in the ALJ’s report, respondent Tower Realty, 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 April 18, 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 May 18, 2011, as directed in the notice of hearing (see Default Summary Report, at 4 [Finding of Fact No. 6]).

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 Default Summary Report, at 5), and I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Department staff requested a 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. The amount requested is consistent with the Department’s penalty policies. I note that the violation in this matter has continued for about ten years (see

Hearing Exhibit 2 [Department Staff Complaint, at ¶¶ 22 and 23]). Based on this record, the requested penalty of ten thousand dollars (\$10,000) 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 Tower Realty, 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, as supported by the documentary evidence, respondent Tower Realty, Inc. is adjudged to have violated 6 NYCRR 612.2 for failing to reregister its petroleum bulk storage ("PBS") facility located at 552 Parkside Avenue, Brooklyn, New York 11226, 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, respondent shall submit to the Department a petroleum bulk storage facility re-registration application, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent Tower Realty, Inc. 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 facility petroleum bulk storage re-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 Tower Realty, Inc., 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
July 1, 2011

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.
PBS 2-454591

-by-

TOWER REALTY, INC.,

Respondent.

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Procedural History

Respondent Tower Realty, Inc. was served with a notice of hearing and complaint, dated March 8, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum bulk storage ("PBS") facility located at 252 Parkside Avenue, Brooklyn, New York 11226, 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 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 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 March 14, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on March 8, 2011. Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for April 18, 2011, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on May 18, 2011, 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 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.

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 June 2, 2011, the adjudicatory hearing was convened before ALJ Richard R. Wissler at the Department's Central Office at 625 Broadway, Albany, New York. Department staff was represented by Scott Caruso, Esq., Section Chief, Spill and Bulk Storage Section, of the Department's Office of General Counsel. Rather than electing to proceed with a hearing in the respondent's absence, Department staff renewed its oral motion for a default judgment pursuant to 6 NYCRR 622.15, originally made on May 18, 2011, and submitted for the record the documentation required by 6 NYCRR 622.15(b). 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 March 8, 2011, with attachments, including an affidavit of Brooke Turallo sworn to on March 9, 2011, and a cover letter to respondent dated March 8, 2011.
3. An affidavit of service sworn to by Brooke Turallo on March 17, 2011, stating that on March 14, 2011, she sent the 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 the respondent, an active domestic business corporation in New York, by serving the Secretary of State of the State of New York on March 14, 2011.
4. A copy of 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. An affirmation of Mary E. Wojcik, Esq., dated May 17, 2011, indicating her inability to determine, by an internet search conducted on May 2, 2011, a telephone contact number for respondent.
6. An affirmation of Mary E. Wojcik, Esq., dated June 1, 2011, attesting to the service of the notice of hearing and complaint on respondent, and the failure of the respondent to answer the complaint, to appear at the prehearing conference and to appear for the adjudicatory hearing.

As part of its motion for a default judgment in this matter, Department staff, orally on the record, provided justification for the ten thousand (\$10,000) civil penalty it sought, pointing out the vital importance of current registrant information in the administration of the Department's PBS program, and that the penalty sought was consistent with both the range of penalty authorized in ECL article 71 and was identical to the penalty amounts imposed by the Department in similar cases.

Pursuant to 6 NYCRR 622.11(a)(5), on June 16, 2011, I took official notice of certain records maintained by the Department regarding the facility. In particular, I took official notice of the Petroleum Bulk Storage Application filed by a prior owner of the facility, dated October 7, 1998 (OHMS Exhibit 1) and the Facility Information Report maintained by the Department for this facility (OHMS Exhibit 2).

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 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, Tower Realty, Inc., is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 552 Parkside Avenue, Brooklyn, New York 11226 (“facility”). In particular, facility has a combined storage capacity of 3,000 gallons. (Staff Exhibit 2 and OHMS Exhibits 1 and 2.)
2. Pursuant to a registration application filed by a prior owner of the facility, the Department on October 13, 1998, renewed Petroleum Bulk Storage (“PBS”) Certificate Number 2-454591. PBS Certificates are not transferrable to a new owner. (Staff Exhibit 2 and OHMS Exhibits 1 and 2.)
3. On July 2, 2001, respondent by deed acquired all right, title and interest in the facility. (Staff Exhibit 2.)
4. On or before August 2, 2001, the Department did not receive a re-registration application from respondent. (Staff Exhibit 2.)
5. The records of the Department do not indicate respondent as the current owner of the facility. (Staff Exhibit 2.)
6. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 18, 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 May 18, 2011, as directed in the notice of hearing. (Hearing Record.)

7. Respondent is an active domestic business corporation in the State of New York. (Staff Exhibit 4.)
8. On March 14, 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 306 of the Business Corporation Law. The receipt for service issued by the Department of State in this matter is number 201103180488. Respondent was also served by US Postal Service regular mail on March 8, 2011. (Staff Exhibits 3 and 6.)

Discussion

The record of this proceeding demonstrates that respondent failed to reregister its PBS facility located at 552 Parkside Avenue, Brooklyn, New York 11226 within 30 days of the transfer of ownership of the facility to it, 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 April 18, 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 May 18, 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 \$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 reregister its PBS facility located at 552 Parkside Avenue, Brooklyn, New York 11226, within 30 days of the transfer of ownership of the facility to it, as alleged in the complaint;
3. Directing respondent to submit a re-registration 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 20, 2011

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Tower Realty, Inc. – PBS No. 2-454591 - Region 2

June 2, 2011

Edirol File No. 020702130912

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Staff 1	Proposed Commissioner's Order	✓	✓	Department Staff	
Staff 2	Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness (all dated March 8, 2011); and affidavit in support of Brooke Turallo, sworn to March 9, 2011.	✓	✓	Department Staff	
Staff 3	Affidavit of Service of Brook Turallo, sworn to May 17, 2011, including receipt for service on New York State Department of State.	✓	✓	Department Staff	
Staff 4	NYSDOS Corporate Status Information.	✓	✓	Department Staff	
Staff 5	Affirmation of Mary E. Wojcik, Esq., dated May 17, 2011.	✓	✓	Department Staff	
Staff 6	Affirmation of Mary Wojcik, Esq., dated June 1, 2011.	✓	✓	Department Staff	
OHMS 1	Petroleum Bulk Storage Application of prior facility owner 552 Park Avenue Realty Corp., dated October 7, 1998.	NA	NA	OHMS	Official notice taken June 16, 2011.
OHMS 2	Facility Information Report	NA	NA	OHMS	Official notice taken June 16, 2011.