

**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 Part 612 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 2-328669NTM

-by-

West 161 LLC,

Respondent.

On January 30, 2013, an adjudicatory hearing was convened before Molly T. McBride, 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 West 161 LLC violated 6 NYCRR 612.2(b). Specifically Department staff alleged that respondent failed to re-register its petroleum storage facility located at 517 West 161st Street, New York, New York ("facility"), within 30 days of the transfer of ownership of the facility to it in August 2007. The facility contains a fuel oil tank with a capacity of 5,000 gallons.

ALJ McBride prepared the attached hearing report, which I adopt as my decision in this matter. As set forth in the ALJ's hearing report, respondent West 161 LLC failed to file an answer to the complaint served by Department staff in this matter and failed to appear at the adjudicatory hearing scheduled for January 30, 2013, as directed in the letter sent to respondent on November 2, 2012 (see Hearing Report, at 3 [Finding of Fact No. 9]).

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 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.

ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of titles 1 through 11 and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto, which would include violations of 6 NYCRR part 612. In proceedings similar to this one, Department staff has requested penalties that take into account the duration of the violation. For those facilities that have violated the registration requirement within

the prior 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 (see 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

Department staff, in its papers, sought a penalty of ten thousand dollars (\$10,000) but moved at the hearing to amend the complaint to request a penalty of seven thousand five hundred dollars (\$7,500). The property transfer occurred in August 2007 (see Department Staff Exhibit 6). Respondent did not file a petroleum bulk storage application until August 2011, following which the Department issued a petroleum bulk storage certificate to respondent on September 2, 2011 (see Department Staff Exhibits 9 and 10). Accordingly, respondent was in violation for approximately four years. Based on this period of violation and the civil penalties imposed in similar cases, the requested penalty of seven thousand five hundred dollars (\$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 West 161 LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent West 161 LLC is adjudged to have violated 6 NYCRR 612.2(b) for failing to re-register its petroleum storage facility located at 517 West 161st Street, New York, New York, within thirty (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 West 161 LLC 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. 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

- IV. Any questions or other correspondence regarding this order shall also be addressed to Brooke Turallo at the address referenced in paragraph III of this order.
- V. The provisions, terms and conditions of this order shall bind respondent West 161 LLC, 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
March 5, 2013

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 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 2-328669NTM

-by-

West 161 LLC,

Respondent.

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Procedural History

Respondent West 161 LLC was served with a notice of hearing and complaint dated June 6, 2011 alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to re-register its petroleum storage facility located at 517 West 161St St., New York, NY within 30 days of ownership of the facility. 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 re-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 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 June 30, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on June 23, 2011. Respondent failed to file an answer to the complaint. Further, by letter dated October 11, 2012 respondent was noticed to appear for an adjudicatory hearing in the Department’s Region 2 office on November 14, 2012. As a result of Super Storm Sandy, Department staff adjourned the hearing to January 30, 2013 and respondent was notified of that rescheduled date by letter dated November 2, 2012.

An adjudicatory hearing was convened before Administrative Law Judge (“ALJ”) Molly T. McBride 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 on January 30, 2013. Department staff was represented by Scott Caruso, Esq., Section Chief, Spill and Bulk Storage Section, Office of General Counsel, New York

¹ As discussed below, at the hearing, Department staff requested a lower penalty amount of \$7,500.

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 paralegal Brooke Turallo. Noting for the record that respondent had failed to answer the complaint, failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. The ALJ granted the default motion. Department staff orally moved to amend the complaint by moving to reduce the civil penalty amount it was seeking from ten thousand dollars (\$10,000.00) to seven thousand five hundred dollars (\$7,500.00). While pointing out the vital importance of current registrant information in the administration of the Department's PBS program, Department staff noted that the facility has been out of registration for approximately three years. According to Department staff, the \$7,500 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. The motion was granted.

Department staff called one witness, Brooke Turallo, paralegal. In all, eleven (11) 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 West 161 LLC, is the owner of a petroleum storage facility having a capacity of 5000 gallons located at 517 West 161st Street, New York, New York (Department Staff Exhibits 6, 9, 10,11.)
2. Respondent is an active domestic limited liability company in the State of New York. (Department Staff Exhibit 3.)
3. Respondent purchased the property located at 517 West 161st Street, New York, New York on August 15, 2007 from 517 West 161 LLC, Bradley Lewart, Isaac Eisenstein, Harry Eisenstein (Department Staff Exhibit 6.)
4. Pursuant to a registration application filed by 517 Realty dated July 15, 2002, the Department issued a Petroleum Bulk Storage (PBS) Certificate Number 2-328669 registering the petroleum storage facility. This registration expired on October 2, 2007. (Department Staff Exhibits 7, 8.)
5. Brooke Turallo is a paralegal who works in the Department's Office of General Counsel and who is trained to search and review the 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)
6. On January 29, 2013, Brooke Turallo searched the petroleum storage facility records of the Department for any facility registration filed by respondent for the facility. (Testimony of Brooke Turallo)
7. As a result of her search, Brooke Turallo determined that respondent had not filed an application to re-register the facility's registration within 30 days of its purchase of the facility nor as of June 6, 2011. (Testimony of Brooke Turallo)
8. As shown by Receipt for Service No. 201107180233 issued by the New York State Department of State, respondent was served, on June 30, 2011, pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated June 6, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to re-register the petroleum storage facility located at 517 West 161st Street, New York, New York. The notice of hearing and complaint was also served on respondent by regular mail on June 23, 2011. (Department Staff Exhibit 2.)
9. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter for January 30, 2013. (Department Staff Exhibit 2, 5 and Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to re-register its petroleum storage facility within 30 days of purchase of the facility in violation of 6 NYCRR 612.2.

The record shows that respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on January 30, 2013, as directed in the letter of November 2, 2012. 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 re-register its petroleum storage facility registration in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

At the hearing, Department staff requested a reduction in the penalty requested, to ensure consistency with the penalty amounts sought in similar cases. In particular, Department staff noted that the violation has continued for more than three years. Accordingly, Department staff requested that the penalty be reduced from \$10,000 to \$7,500. 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 re-register the petroleum storage facility it owns located at 517 West 161st Street, New York, NY, based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500.00); and
4. Directing such other and further relief as he may deem just and proper.

/s/

Molly T. McBride
Administrative Law Judge

Dated: Albany, New York
February 11, 2013

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of West 161 LLC

PBS 2-328669NTM

January 30, 2013

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Notice of Hearing and Complaint, dated June 6, 2011 and supporting documents	x	x	Department Staff	
2	Affidavit of Service of Brooke Turallo, sworn to January 29, 2013, including NYS Department of State receipt	x	x	Department Staff	
3	NYS Dept of State Div of Corporations Entity Information sheet dated January 28, 2013	x	x	Department Staff	
4	Notice of Motion for default, attached pleadings dated October 11, 2012	x	x	Department Staff	
5	Rescheduled Hearing Notice dated November 2, 2012	x	x	Department Staff	
6	Bargain and Sale Deed dated August 15, 2007 and NYC Dept of Finance filing receipt for Deed dated August 15, 2007	x	x	Department Staff	
7	Petroleum Bulk Storage application dated July 15, 2002	x	x	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
8	PBS certificate dated July 22, 2002	x	x	Department Staff	
9	PBS Application dated August 19, 2011	x	x	Department Staff	
10	PBS Certificate dated September 2, 2011	x	x	Department Staff	
11	PBS Facility Information Report	x	x	Department Staff	