

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation 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”),

ORDER

DEC Case No.
2-605692NSC

-by-

XHIKU LLC,

Respondent.

On August 4, 2014, an adjudicatory hearing was convened before D. Scott Bassinson, 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 XHIKU LLC (“respondent”) violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 2214 84th Street, Brooklyn, New York (“facility”), within 30 days after it became the owner of the facility.

ALJ Bassinson prepared the attached hearing report, which I adopt as my decision in this matter. As set forth in the ALJ’s hearing report, respondent XHIKU 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 July 1, 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 July 29, 2014, as directed in the notice of hearing (see Hearing Report at 4 [Finding of Fact No. 9]).

As a consequence of respondent’s failure to answer or appear in this matter, the ALJ recommends that Department staff’s motion for default be granted (see Hearing Report, at 4-5). Pursuant to 6 NYCRR 622.15(b), a motion for default judgment may be made orally on the record or in writing and must contain:

- “(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- “(2) proof of respondent’s failure to appear or failure to file a timely answer; and
- “(3) a proposed order.”

In this matter, staff requested that the Commissioner adopt the findings and relief contained in the wherefore clause of staff’s amended complaint as staff’s proposed order (see Hearing Report at 5 n 1). Although a separately drafted proposed order is generally proffered by Department staff for purposes of satisfying 6 NYCRR 622.15(b)(3), staff may orally move to treat specific

language in its complaint or its motion for order without hearing as the proposed order. If staff relies on identified provisions in its pleadings or motion as its draft order, those provisions must be sufficient to enable the administrative law judge to make a finding that the requirements of 6 NYCRR 622.15(b) have been adequately met (see 6 NYCRR 622.15[c]). The ALJ so concluded here and, upon my review of the record, I agree that staff's motion to treat specific language in its amended complaint as the proposed order satisfied 6 NYCRR 622.15(b)(3), and the requirements of 6 NYCRR 622.15(b) were adequately met.

Furthermore, at the hearing conducted on August 4, 2014, 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). Accordingly, staff is entitled to a judgment based on record evidence.

In its papers, Department staff sought a civil penalty of ten thousand dollars (\$10,000) (see Staff Ex. 2, Complaint, at Wherefore Clause ¶ II). At the August 4, 2014, hearing, the ALJ granted staff's motion to reduce the requested civil penalty to five thousand dollars (\$5,000) (see Hearing Report, at 2). Respondent has failed to reregister its facility since it acquired the property on November 14, 2013, and the civil penalty requested by staff is authorized and appropriate (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). Respondent is also directed to submit to the Department a petroleum bulk storage registration application for the facility, plus applicable registration fees, within fifteen (15) days of the service of this order upon it.

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 XHIKU LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent XHIKU LLC is adjudged to have violated 6 NYCRR 612.2 for failing to reregister its petroleum storage facility located at 2214 84th Street, Brooklyn, New York, within 30 days after it became the owner of the facility.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent XHIKU LLC 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 XHIKU 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
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 XHIKU LLC, and 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: September 22, 2014
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation 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.
2-605692NSC

-by-

XHIKU LLC,

Respondent.

Procedural History

Respondent XHIKU LLC (“respondent”) was served with a notice of hearing and complaint, dated May 29, 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 2214 84th Street, Brooklyn, New York, within 30 days after it became the owner 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); (3) directing respondent to reregister its petroleum storage facility within fifteen (15) days of the service of the Commissioner’s order upon respondent, by remitting the registration fee set forth in ECL 17-1009(2) and a complete registration application in accordance with 6 NYCRR 612.2; and (4) granting such other and further relief as the Commissioner may deem just and proper.

Inasmuch as respondent is an active limited liability company 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 May 30, 2014 (see Staff Exhibit [“Staff Ex.”] 3). Respondent was also served with the notice of hearing and complaint by regular mail on May 30, 2014. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for July 1, 2014, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on July 29, 2014, 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 Benjamin Conlon, Esq., Chief, Remediation Bureau, 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 respondent to appear. The ALJ advised that the hearing, in the absence of respondent, would be convened on a subsequent date.

On August 4, 2014, the adjudicatory hearing was convened before the undersigned ALJ at the Department's Central Office at 625 Broadway, Albany, New York 12233. Department staff was represented by Alec Gladd, a law intern authorized to represent Department staff pursuant to an order of the Appellate Division, Third Department, dated May 20, 2014 (see Staff Ex. 1). Department staff orally renewed its motion for a default judgment, and also sought judgment on the merits.

Staff also made a motion to amend the complaint to reduce the requested penalty from ten thousand dollars (\$10,000) to five thousand dollars (\$5,000), in accordance with general penalty guidelines as set forth in Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2 (civil penalty of \$5,000 is appropriate for registration violations of less than two years' duration). Reduction of the penalty requested in the complaint in this matter does not raise the same due process concerns as would a request to increase the penalty in a default situation (see Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 2-3; see also CPLR 3215[b] (default judgment "shall not exceed in amount ... that demanded in the complaint")), and the requested reduction does not otherwise prejudice respondent. I therefore granted staff's motion to amend at the August 4, 2014 hearing (see 6 NYCRR 622.5[b] ["a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ ... and absent prejudice to the ability of any other party to respond"]).

Department staff called one witness, Alexander Belonis, a law intern whose duties included working in the Department's Office of General Counsel's Petroleum Spill and Bulk Storage ("PBS") Section. In all, nine (9) 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.

Findings of Fact

1. Respondent XHIKU LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 2214 84th Street, Brooklyn, New York (“facility”). In particular, petroleum storage tank number 1 at the facility has a capacity of 2,500 gallons and is located aboveground (Staff Ex. 2, Complaint [“Compl.”] ¶ 13; see also Staff Exs. 4, 6, and 7).
2. Respondent is an active domestic limited liability company in the State of New York (Staff Ex. 9).
3. On December 5, 2006, the Department issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-605692, registering the PBS facility, to Sam Radoncic (Staff Ex. 7). This registration expired on June 24, 2009 (id.). Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE” (id.).
4. As a result of a series of transactions, the facility was acquired by Haxhi Delishi on March 22, 2013 (Staff Ex. 8). On November 14, 2013, Haxhi Delishi, by deed, transferred all right, title and interest in the facility to respondent XHIKU LLC, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, City Register File No. (“CRFN”) 2013000490710 (id.).
5. Alexander Belonis is a law intern in the Department’s Office of General Counsel’s Petroleum Spill and Bulk Storage Section who is authorized to access, search and inspect the Department’s unified information system (“UIS”). The

UIS is a database maintained by the Department that 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 Alexander Belonis).

6. On August 4, 2014, Alexander Belonis searched the petroleum storage facility records contained in the Department's UIS database for any petroleum facility registration or renewal registration or any petroleum storage facility re-registration filed by respondent for the facility (Testimony of Alexander Belonis).
7. As a result of his searches, Alexander Belonis determined that respondent had not reregistered the facility at any time after assuming its ownership on November 14, 2013 (Testimony of Alexander Belonis).
8. As shown by Receipt for Service No. 201406100020 issued by the New York State Department of State, respondent was served on May 30, 2014, pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated May 29, 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 2214 84th Street, Brooklyn, New York, within 30 days of the transfer of ownership of the facility to it. The notice of hearing and complaint was also served on respondent by regular mail on May 30, 2014 (Staff Ex. 3).
9. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for July 1, 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 July 29, 2014, as directed in the notice of hearing (Hearing Record).

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (see 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; see also 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the

notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (see 6 NYCRR 622.15[b][1]-[3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

In this case, Department staff's proof presents a prima facie case demonstrating that respondent failed to reregister its petroleum storage facility located at 2214 84th Street, Brooklyn, New York, within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2.

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for July 1, 2014, as directed in the cover letter served with the notice of hearing and complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on July 29, 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.

Department staff's proposed order¹ and the \$5,000 civil penalty it seeks are consistent with the Department's penalty policy, prior decisions of the Commissioner, and 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 XHIKU LLC in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding, based upon the proof adduced at the adjudicatory hearing, that respondent XHIKU LLC violated 6 NYCRR 612.2 by failing to reregister its

¹ At the August 4, 2014 hearing, Department staff requested that the Commissioner adopt the findings and relief contained in the wherefore clause of staff's complaint, as amended herein, as staff's proposed order.

petroleum storage facility located at 2214 84th Street, Brooklyn, New York, within 30 days after it became the owner of the facility;

3. Directing respondent XHIKU LLC to submit to the Department, within fifteen (15) days of the service of the Commissioner's order upon respondent, a complete reregistration application for the facility, accompanied by past due and current registration fees;
4. Directing respondent XHIKU LLC to pay a civil penalty in the amount of five thousand dollars (\$5,000.00); and
5. Directing such other and further relief as he may deem just and proper.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
August 7, 2014

EXHIBIT CHART – PBS EXPEDITED PROCEEDING*Matter of XHIKU LLC*

August 4, 2014 – Central Office, 625 Broadway, Albany, NY

DEC Case No. 2-605692NSC - Edrol File No. 010111105708

Exhibit No.	Description	ID'd	Rec'd	Offered By	Notes
1	May 20, 2014 Order of the Appellate Division, Third Department, authorizing Alec Gladd to act as law intern, and August 4, 2014 consent of Ben Conlon, Esq. to appearance of Alec Gladd on behalf of staff.	✓	✓	Department Staff	
2	Cover Letter from Scott W. Caruso, Esq., to respondent, dated May 29, 2014. Notice of Hearing and Complaint, dated May 29, 2014. Statement of Readiness, dated May 29, 2014. Affidavit of Brooke Turallo, sworn to May 30, 2014.	✓	✓	Department Staff	
3	Affidavit of Service of Brooke Turallo, sworn to, May 30, 2014, attaching NYS Department of State (“DOS”) Receipt for Service, dated, May 30, 2014.	✓	✓	Department Staff	
4	PBS Application/change of ownership form filed by Sam Radoncic, for PBS No. 2-605692, received October 23, 2006 and December 4, 2006.	✓	✓	Department Staff	
5	Cover letter from Cynthia Freedman, Registration and Permits Section, dated June 27, 2014, returning attached PBS application by XHIKU LLC received by Department on June 25, 2014.	✓	✓	Department Staff	
6	PBS Program Facility Information Report, printed August 4, 2014.	✓	✓	Department Staff	
7	PBS Certificate No. 2-605692 issued December 5, 2006, expiration date June 24, 2009.	✓	✓	Department Staff	
8	New York City Department of Finance ACRIS Title Search, dated August 4, 2014. Deed to respondent, dated November 14, 2013.	✓	✓	Department Staff	
9	NYS DOS Corporate Entity Information, dated August 4, 2014.	✓	✓	Department Staff	

