

**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 2-147370NTM

-by-

151 WEST 78 STREET REALTY LLC,

Respondent.

On August 30, 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 151 West 78 Street Realty LLC (“respondent”), to answer or appear in connection with the allegations in Department staff’s June 9, 2011, complaint that respondent violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 151 West 78th Street, New York, New York 10024 (“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 151 West 78 Street Realty 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 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 (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 (\$37,500) 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 more than six

(6) 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 151 West 78 Street Realty LLC 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 151 West 78 Street Realty LLC is adjudged to have violated 6 NYCRR 612.2 for failing to reregister its petroleum storage facility located at 151 West 78th Street, New York, New York, 10024, 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 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 151 West 78 Street Realty LLC shall pay a civil penalty in the amount of ten thousand dollars (\$10,000) 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 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 151 West 78 Street Realty LLC, 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
December 19, 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.
PBS2-147370NTM

-by-

151 WEST 78 STREET REALTY LLC,
Respondent.

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Procedural History

Respondent 151 West 78 Street Realty LLC was served with a notice of hearing and complaint, dated June 9, 2011, 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 151 West 78th Street, New York, New York, 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 (\$10,000.00); (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 domestic 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 June 29, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on June 29, 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") 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 October 27, 2011, 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 Nadia Arginteanu 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 October 19, 2011, stating that on June 29, 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 limited liability company in New York, by serving the Secretary of State of the State of New York on June 29, 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 limited liability company.
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 October 27, 2005.
7. A copy of the petroleum bulk storage ("PBS") application filed by a prior owner of the facility with the Department to register the facility, dated May 7, 2002.
8. A copy of the facility information report maintained by the Department for the facility.

9. A copy of PBS certificate number 2-147370 issued by the Department on May 31, 2002, that expired on August 26, 2007.
10. An affirmation of Scott W. Caruso, Esq., dated October 20, 2011, attesting to the service of the notice of hearing and complaint on respondent, and the failure of respondent to answer the complaint, to appear at the prehearing conference and to appear for the adjudicatory hearing, and, moreover, attesting to his inability to determine, by an internet search conducted on August 18, 2011, a telephone contact number for respondent.

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 151 West 78 Street Realty LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 151 West 78th Street, New York, New York, 10024 (“facility”). In particular, facility has a combined storage capacity of 1,500 gallons. (Staff Exhibits 2, 5, 6, 7, 8 and 9.)
2. Pursuant to a registration application filed by a prior owner of the facility, the Department on May 31, 2002, issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-147370. PBS Certificates are not transferrable to a new owner. (Staff Exhibits 2, 7, 8 and 9.)
3. On October 27, 2005, respondent by deed acquired all right, title and interest in the facility. (Staff Exhibits 2 and 6.)
4. On or before November 26, 2005, 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 Exhibits 2, 7, 8 and 9.)
6. 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. (Hearing Record and Staff Exhibit 10.)
7. Respondent is an active domestic limited liability company in the State of New York. (Staff Exhibit 4.)

8. On June 29, 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 201107150627. Respondent was also served by US Postal Service regular mail on June 29, 2011. (Staff Exhibit 3.)

Discussion

The record of this proceeding demonstrates that respondent failed to reregister its petroleum storage facility located at 151 West 78th Street, New York, New York, 10024 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 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 ten thousand dollar (\$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 petroleum storage facility located at 151 West 78th Street, New York, New York, 10024, 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
December 14, 2011

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of 151 West 78 Street Realty LLC – Region 2

August 30, 2011

Edirol File No. 020929103321

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|--|-------|---------|------------------|-------|
| 1 | Draft Default Order | ✓ | ✓ | Department Staff | |
| 2 | Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness (all dated June 9, 2011); and affidavit in support of Nadia Arginteanu, sworn to June 10, 2011. | ✓ | ✓ | Department Staff | |
| 3 | Affidavit of Service of Brooke Turallo, sworn to October 19, 2011, including NYS Department of State receipt | ✓ | ✓ | Department Staff | |
| 4 | New York Department of State Entity Information printout | ✓ | ✓ | Department Staff | |
| 5 | ACRIS Search Results | ✓ | ✓ | Department Staff | |
| 6 | Deed | ✓ | ✓ | Department Staff | |
| 7 | PBS Application | ✓ | ✓ | Department Staff | |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|---|-------|------------|---------------------|-------|
| 8 | Facility Information Report | ✓ | ✓ | Department Staff | |
| 9 | PBS Certification, issued May 31, 2002; expired August 26, 2007 | ✓ | ✓ | Department Staff | |
| 10 | Affirmation of Scott W. Caruso, Esq., dated October 20, 2011 | ✓ | ✓ | Department Staff | |