

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (“ECL”) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC Case No.
PBS 2-601054NYW

-by-

**444-451 ORANGE BUILDINGS HOUSING DEVELOPMENT
FUND CORPORATION,**

Respondent.

This matter addresses the allegations of staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) that respondent 444-451 Orange Buildings Housing Development Fund Corporation (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to re-register its petroleum storage facility located at 451 West 166th Street, New York, New York (“facility”), within 30 days of the transfer of ownership of the facility to it in calendar year 2004.

The matter was assigned to Richard R. Wissler, Administrative Law Judge (“ALJ”) of the Department’s Office of Hearings and Mediation Services. ALJ Wissler prepared the attached hearing report, which I adopt as my decision in this matter subject to my comments below.

As set forth in the ALJ’s hearing report, respondent 444-451 Orange Buildings Housing Development Fund Corporation failed to file an answer to the complaint dated September 18, 2014, that Department staff served in this matter. Respondent also failed to appear at a pre-hearing conference scheduled for October 23, 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 November 18, 2014, as directed in the notice of hearing (see Hearing Report at 4 [Findings of Fact Nos. 8 and 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 4-5). 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.

Department staff seeks a civil penalty in the amount of ten thousand dollars (\$10,000) (see Exhibit 1 [Complaint, Wherefore Clause, at II]). 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. Staff's requested penalty of ten thousand dollars (\$10,000) is in accordance with general penalty guidelines for violations of greater than five years as is the case here (see, e.g., Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, at 2; see also Hearing Exhibit 4 [respondent's ownership of the facility is more than ten years]). The civil penalty shall be due within fifteen (15) days of the service of the order upon it.

In addition, respondent is hereby directed to submit a facility 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 444-451 Orange Buildings Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 444-451 Orange Buildings Housing Development Fund Corporation is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) for failing to re-register its petroleum storage facility located at 451 West 166th Street, New York, New York, 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 444-451 Orange Buildings Housing Development Fund Corporation shall submit to the Department a petroleum bulk storage registration for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent 444-451 Orange Buildings Housing Development Fund Corporation 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 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 444-451 Orange Buildings Housing Development Fund Corporation and 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: March 10, 2015
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 (“ECL”) of the State of New
York 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 2-601054NYW

-by-

444-451 ORANGE BUILDINGS HOUSING DEVELOPMENT
FUND CORPORATION,

Respondent.

Procedural History

Respondent 444-451 Orange Buildings Housing Development Fund Corporation (“respondent”) was served with a notice of hearing and complaint dated September 18, 2014, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), for failure to re-register its petroleum storage facility located at 451 West 166th Street, New York, New York 10032 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(b); (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000.00); (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 appropriate.

Inasmuch as respondent is an active domestic business corporation in the State of New York, pursuant to Section 306 of the Business Corporation Law of New York State, service of the notice of hearing and complaint was made on the New York State Secretary of State on September 23, 2014. Consistent with CPLR 3215(g)(4), respondent was also served with the notice of hearing and complaint by regular mail on September 23, 2014. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for October 23, 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 November 18, 2014, as directed in the notice of hearing.

On November 18, 2014, the matter was called for adjudicatory hearing before Administrative Law Judge (“ALJ”) D. Scott Bassinson 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. At that time, Department staff

noted its appearance and stated its readiness to proceed to an adjudicatory hearing, proffering a witness. No one appeared on behalf of respondent. Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15, noting for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference, and failed to appear for the adjudicatory hearing. Moreover, Department staff reiterated its readiness to proceed to hearing. ALJ Bassinson reserved on the motion for default and directed that an adjudicatory hearing in absentia be scheduled for a subsequent date.

On December 18, 2014, the adjudicatory hearing in the matter was convened before OHMS ALJ Richard R. Wissler at the Department's central office, 625 Broadway, Albany, New York 12233-1500. Department staff was represented by Yvonne M. Ward, Esq., a Senior Attorney with the Department's Office of General Counsel, Spills and Bulk Storage Section, Materials Management Bureau, 625 Broadway, Albany, New York 12233-1500. Department staff orally renewed its motion for a default judgment pursuant to 6 NYCRR 622.15, made before ALJ Bassinson on November 18, 2014. ALJ Wissler reserved on the motion pending Department staff's satisfaction of the requirements set forth in 6 NYCRR 622.15(b). In addition, Department staff requested that its prayer for relief in the complaint, as amended, be deemed its proposed order, as required by 6 NYCRR 622.15(b)(3), which request was granted. Department staff also stated that it sought judgment on the merits, indicating its readiness to proceed to hearing. Department staff called one witness, Brooke Turallo, a Legal Assistant in the Department's Office of General Counsel's Spills and Bulk Storage Section in Albany. In all, eight (8) 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 444-451 Orange Buildings Housing Development Fund Corporation is the owner of a petroleum storage facility having a capacity of more than 1,100 gallons located at 451 West 166th Street, New York, New York 10032 (“facility”). In particular, Tank No. 1 at the facility has a capacity of 4,000 gallons and is located aboveground. (Department Staff Exhibits 1, 4, 5, 6 and 7.)
2. Respondent is a domestic business corporation in the State of New York. (Department Staff Exhibit 3.)
3. Pursuant to a registration application filed by the then owner of the facility, the City of New York Department of Housing Preservation and Development, dated July 24, 2002, the Department, on August 8, 2002, issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-601054, registering the facility. This registration expired on October 21, 2007. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” (Department Staff Exhibits 4, 5, 6 and 7.)
4. On May 25, 2004, the City of New York, acting by and through its Department of Housing Preservation and Development, by deed, transferred all right, title and interest in the facility to respondent 444-451 Orange Buildings Housing Development Fund Corporation, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, Document ID No. 2004060100249001. (Department Staff Exhibit 4.)
5. Brooke Turallo is a Legal Assistant in the Department’s Office of General Counsel’s Spills 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 renewal registrations filed pursuant to 6 NYCRR 612.2. (Testimony of Brooke Turallo.)
6. On December 17, 2014, Brooke Turallo searched the petroleum storage facility records contained in the Department’s UIS for any petroleum facility renewal registration filed by respondent for its 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 within 30 days of the transfer of the ownership of the facility to it, nor had respondent done so as of December 17, 2014, the date of her search. (Testimony of Brooke Turallo.)
8. As shown by Receipt for Service No. 201409240074 issued by the New York State Department of State, pursuant to Section 306 of the Business Corporation Law of New York State, respondent was served on September 23, 2014, with a notice of hearing and complaint dated September 18, 2014, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), for failure to re-register the petroleum storage facility located at 451 West 166th Street, New York, New York 10032 within thirty days of the transfer of ownership of the facility to it. Consistent with CPLR 3215(g)(4), respondent was also served with the notice of hearing and complaint by regular mail on September 23, 2014. (Department Staff Exhibit 2.)
9. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for October 23, 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 November 18, 2014, as directed in the notice of hearing. (Department Staff Exhibit 1 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 the transfer of ownership of the facility to it in violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b).

The record shows that respondent failed to file an answer to the duly served complaint; failed to appear at a pre-hearing conference scheduled for October 23, 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 November 18, 2014, as directed in the notice of hearing. In addition, pursuant to its granted request, the prayer for relief articulated in Department staff's complaint constitutes the proposed Commissioner's order in this matter. Department staff has satisfied the requirements of 6 NYCRR 622.15 and is entitled to a default judgment in this matter.

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 in violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b). The Department is entitled to judgment upon the facts proven.

The hearing record indicates that the facility's registration has been expired for more than seven years. The \$10,000.00 penalty Department staff seeks is consistent with the penalty amounts sought in similar cases, the Commissioner's guidance set forth in

Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011, and 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 ECL 17-1009 and 6 NYCRR 612.2(b) for failure to re-register the petroleum storage facility it owns located at 451 West 166th Street, New York, New York 10032, based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to submit a re-registration application to the Department for the above facility and pay the applicable registration fee;
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
January 26, 2015

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of 444-451 Orange Buildings Housing Development Fund Corporation – New York, New York

December 18, 2014 – Central Office

DEC Case No. 2-601054NYW - Edrol File No. 010527081524

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Yvonne M. Ward, Esq., to respondent, dated September 18, 2014. Notice of Hearing and Complaint, dated September 18, 2014. Statement of Readiness, dated September 18, 2014. Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, sworn to September 19, 2014.	✓	✓	Department Staff	
2	Affidavit of Service of Brooke Turallo, sworn to December 11, 2014. NYS Department of State (“DOS”) Receipt for Service, dated September 23, 2014.	✓	✓	Department Staff	
3	NYS DOS Corporate Entity Information, dated December 17, 2014.	✓	✓	Department Staff	
4	New York City Department of Finance ACRIS Title Search, dated December 17, 2014. Deed to respondent, dated May 25, 2004.	✓	✓	Department Staff	
5	PBS Application dated July 24, 2002, and processed August 8, 2002.	✓	✓	Department Staff	
6	PBS Certificate No. 2-601054 issued August 8, 2002, expiration date October 21, 2007.	✓	✓	Department Staff	

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7	PBS Program Facility Information Report, printed December 17, 2014.	✓	✓	Department Staff	
8	Affirmation of Yvonne M. Ward, Esq., dated December 17, 2014.	✓	✓	Department Staff	