

**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 2-097721NBT

- by -

75 & 81 ORCHARD ASSOCIATES LLC,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation ("Department") that 75 & 81 Orchard Associates LLC ("respondent") violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 81-83 Orchard Street, New York, New York ("facility") within 30 days of the transfer of ownership of the facility to it.

On August 4, 2014, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services. ALJ Caruso 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 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, and failed to appear for the adjudicatory hearing scheduled in the matter on July 29, 2014 (see Hearing Report at 5 [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,

6), 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 5). Accordingly, staff is entitled to a judgment based on record evidence.

Department staff, in its papers, sought a penalty of ten thousand dollars (\$10,000). The ALJ granted Department staff's motion to amend its pleadings to reduce the civil penalty to five thousand dollars (\$5,000). Respondent has failed to reregister its facility for approximately one and a half years. The civil penalty that staff requests is authorized and appropriate and in accordance with administrative precedent in similar proceedings (see ECL 71-1929; see also 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). I hereby assess a civil penalty of five thousand dollars (\$5,000) as requested by staff and recommended by the ALJ. I also direct that respondent submit a registration application to the Department for the facility within fifteen (15) days of 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 75 & 81 Orchard Associates LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 75 & 81 Orchard Associates LLC is adjudged to have violated 6 NYCRR 612.2 for failing to reregister its petroleum storage facility located at 81-83 Orchard 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 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 75 & 81 Orchard Associates 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
NYS 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 75 & 81 Orchard Associates LLC, 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: Albany, New York
October 6, 2014

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of Article 17 of the Environmental
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HEARING REPORT

DEC Case No.
PBS 2-097721NBT

- by -

75 & 81 ORCHARD ASSOCIATES LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation ("Department") served Respondent 75 & 81 Orchard Associates LLC ("respondent") 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 81-83 Orchard Street, New York, New York 10002, 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 petroleum storage 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 personally serving the New York State Department of State on May 30, 2014 (see 6 NYCRR 622.3[a][3]; Limited Liability Company Law § 303). Department staff also provided additional service by sending the notice of hearing and complaint to respondent 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's Office of Hearings and Mediation Services 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 ALJ Michael S. Caruso at the Department's Central Office at 625 Broadway, Albany, New York 12233. At this stage of the proceedings, and pursuant to an order of the Appellate Division, Third Department, issued in accordance with its rules at 22 NYCRR 805.5, Department staff was represented by law student intern John Dow under the supervision of Benjamin Conlon, Esq. Department staff orally renewed its motion for a default judgment and also sought judgment on the merits.

Department staff called one witness, Adriana Le Blan, a volunteer attorney in the Department's Office of General Counsel. 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.

"(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

The following findings of fact are found based upon the preponderance of record evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent 75 & 81 Orchard Associates LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 81-83 Orchard Street, New York, New York 10002 ("facility"). In particular, petroleum storage tank number 1 at the facility has a capacity of 5,000 gallons and is located above ground. (Staff Exhibits 3, 4, 5, and 6.)
2. Respondent is an active domestic limited liability company in the State of New York. (Staff Exhibit 7.)
3. On October 2, 2006, the Department issued Petroleum Bulk Storage ("PBS") Registration Certificate No. 2-097721 to

Dermot Orchard Street, LLC, which owned the facility at that time. This registration expired on October 19, 2009. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: "THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE." (Testimony of Adrianna Le Blan; Staff Exhibit 4.)

4. On December 13, 2012, Dermot Orchard Street, LLC, by deed, transferred all right, title and interest in the facility to respondent 75 & 81 Orchard Associates LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Register File No. 2012000503523, Document ID 2012122001147001. (Testimony of Adriana Le Blan; Staff Exhibit 6.)
5. Adriana Le Blan is a volunteer attorney in the Department's Office of General Counsel, PBS Section, who is authorized to access and inspect the Department's unified information system ("UIS"). The UIS is a database maintained by the Department and 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 Adriana Le Blan; see also Staff Exhibit 2, Affidavit of Brooke Turallo.)
6. On August 4, 2014, Adriana Le Blan searched the petroleum storage facility records contained in the Department's UIS for any petroleum facility registration or renewal registration or any petroleum storage facility re-registration filed by respondent for the facility. (Testimony of Adriana Le Blan; Staff Exhibit 5.)
7. As a result of her search, Adriana Le Blan determined that respondent had not reregistered the facility at any time after assuming its ownership on December 13, 2012. (Testimony of Adriana Le Blan; Staff Exhibits 3, 4, and 5.)
8. As shown by Receipt for Service No. 201406090370 issued by the New York State Department of State, respondent was personally 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, together with a statement of readiness and supporting affidavit, for failure to reregister its petroleum storage facility located at 81-83 Orchard Street,

New York, New York 10002, within 30 days of the transfer of ownership of the facility to it. Department staff also provided additional service by sending the notice of hearing and complaint to respondent by regular mail on May 30, 2014. (Staff Exhibit 8.)

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

Department staff's proof presents a prima facie case demonstrating that respondent failed to reregister its petroleum storage facility located at 81-83 Orchard Street, New York, New York 10002, within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2.

The record shows that Department staff duly served the notice of hearing and complaint upon respondent; and that 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. 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. At the August 4, 2014 hearing, Department staff orally moved to amend the pleadings to reduce the civil penalty requested to five thousand dollars (\$5,000). Pursuant to 6 NYCRR 622.10(b)(1)(i), I granted Department staff's motion to amend the pleadings as there is no prejudice to respondent in reducing the penalty requested.

Department staff's proposed order¹ and the five thousand dollar (\$5,000) civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (see e.g. Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. granting Department staff's motion for default, holding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility located at 81-83 Orchard Street, New York, New York 10002, within 30 days of the transfer of ownership of the facility to it;
3. directing respondent to submit a reregistration application to the Department for the above facility within fifteen (15) days of service of the Commissioner's order together with the applicable registration fees;
4. directing respondent to pay a civil penalty in the amount of five thousand dollars (\$5,000) within fifteen (15) days of service of the Commissioner's order; and
5. directing such other and further relief as he may deem just and proper.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
August 5, 2014

¹At 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.

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of 75 & 81 Orchard Associates LLC, 81-83 Orchard Street, New York, New York – DEC Case No. 2-097721NBT
 August 4, 2014 – Central Office
 Edrol File No. 010111100630

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	May 20, 2014 Practice Order of the Appellate Division, Third Department (Peters, P.J.), for appointment of law interns, including, John Dow, with attached consent to appearance.	✓	✓	Department Staff	
2	Cover Letter from Scott W. Caruso, Esq. to respondent, dated May 29, 2014, with Notice of Hearing, Complaint, Statement of Readiness, and Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, all dated May 29, 2014	✓	✓	Department Staff	
3	PBS Application, dated July 18, 2006, and PBS Application (information correction), dated September 9, 2008	✓	✓	Department Staff	
4	PBS Registration Certificate, issued August 2, 2006, expiration date October 19, 2009	✓	✓	Department Staff	
5	PBS Program Facility Information Report, dated August 4, 2014.	✓	✓	Department Staff	

6	New York City Department of Finance, ACRIS Title Search, dated August 4, 2014 and deed to respondent, dated December 13, 2012.	✓	✓	Department Staff	
7	NYS Department of State Entity Information, dated August 4, 2014.	✓	✓	Department Staff	
8	Affidavit of Service of Brooke Turallo, dated July 31, 2014. NYS DOS Receipt for Service, dated May 30, 2014.	✓	✓	Department Staff	
9	Affirmation of attempted contact by John Dow, sworn to August 4, 2014.	✓	✓	Department Staff	