

**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”),

**ORDER**

DEC Case No.  
PBS 2-608921BT

-by-

**81 PULASKI STREET, LLC,**

Respondent.

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On August 4, 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 81 Pulaski Street, LLC (“respondent”), to answer or appear in connection with the allegations in Department staff’s April 27, 2011, complaint that respondent violated 6 NYCRR 612.2 by failing to renew the registration of its petroleum storage facility located at 81 Pulaski Street, Brooklyn, New York 11213 (“facility”).

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 81 Pulaski Street, 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 June 29, 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 July 27, 2011, as directed in the notice of hearing (see Default Summary Report, at 5 [Finding of Fact No. 4]).

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 6), and I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Department staff, in its papers, requested a penalty of ten thousand dollars (\$10,000), but requested a lower penalty of seven thousand five hundred dollars (\$7,500) at the hearing to be consistent with the penalty amounts sought in similar cases. ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars per day for each violation, and the requested penalty is substantially below this statutory amount. I note that the violation in this matter has continued for more than three years (see

Hearing Exhibit 7). Based on this record 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 81 Pulaski Street, LLC waived its right to be heard at the hearing. Accordingly, the allegations in the complaint are deemed to have been admitted by respondent.
- II. Based upon the allegations in the complaint, as supported by the documentary evidence, respondent 81 Pulaski Street, LLC is adjudged to have violated 6 NYCRR 612.2 for failing to renew the registration of its petroleum storage facility located at 81 Pulaski Street, Brooklyn, New York 11213.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent shall submit to the Department a petroleum bulk storage facility registration renewal application, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent 81 Pulaski Street, LLC shall pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500.00) 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 renewal 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, 14<sup>th</sup> 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 81 Pulaski Street, 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  
September 13, 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:  
PBS 2-608921BT

-by-

81 PULASKI STREET, LLC,  
Respondent.

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Procedural History

Respondent 81 Pulaski Street, LLC was served with a notice of hearing and complaint, dated April 27, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to renew the registration of its petroleum storage facility (“facility”) located at 81 Pulaski Street, Brooklyn, New York 11213. 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)<sup>1</sup>; (3) directing respondent to register its 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 May 5, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on May 5, 2011. Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for June 29, 2011, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on July 27, 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 21<sup>st</sup> 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.

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<sup>1</sup> As discussed below, as part of its motion for default, Department staff requested a lower penalty amount of \$7,500.

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 August 4, 2011, the adjudicatory hearing was convened before ALJ Richard R. Wissler at the Department's Central Office at 625 Broadway, Albany, New York. Pursuant to an order of the Third Judicial Department, issued in accordance with its Rules at 22 NYCRR 805.5, Department staff was represented by legal intern Nadia Arginteanu under the supervision of Scott W. 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. Rather than electing to proceed with a hearing in the respondent's absence, Department staff renewed its oral motion for a default judgment pursuant to 6 NYCRR 622.15, originally made on July 27, 2011, and submitted for the record certain documentation including that required by 6 NYCRR 622.15(b). In particular, Department staff submitted the following documents for the record (Department Staff Exhibits 1 through 11):

1. A proposed Commissioner's order.
2. The notice of hearing and complaint dated April 27, 2011, with attachments, including an affidavit of Brooke Turallo sworn to on April 29, 2011, and a cover letter to respondent dated April 27, 2011.
3. An affidavit of service sworn to by Brooke Turallo on August 3, 2011, stating that on May 5, 2011, she served the respondent, an active domestic limited liability company in New York, by serving the Secretary of State of the State of New York.
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 petroleum bulk storage ("PBS") application filed by respondent with the Department to register the facility, dated February 24, 2003.
6. A copy of the facility information report maintained by the Department for the facility.
7. A copy of PBS certificate number 2-608921 issued by the Department on April 29, 2003, that expired on April 29, 2008.

8. An affidavit of Nadia Arginteanu sworn to and dated August 3, 2011, attesting to her unsuccessful attempts to contact respondent's current property manager.
9. A copy of the recorded deed showing fee ownership of the facility by respondent.
10. An affirmation of Scott W. Caruso, Esq., dated August 4, 2011, indicating that respondent was served with the notice of hearing and complaint on May 5, 2011; that respondent did not answer the complaint; that respondent failed to appear for a pre-hearing conference on June 29, 2011; and that respondent did not appear for the hearing convened in the matter on July 27, 2011.
11. A copy of the order of the Third Judicial Department, issued in accordance with its Rules at 22 NYCRR 805.5, and dated April 27, 2011, authorizing legal intern Nadia Arginteanu to appear on behalf of the Department under the supervision of Scott W. 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.

As part of its motion for a default judgment in this matter, Department staff orally moved to reduce the civil penalty amount it sought from ten thousand dollars (\$10,000) to seven thousand five hundred dollars (\$7,500). 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 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.

#### 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 81 Pulaski Street, LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 81 Pulaski Street, Brooklyn, New York 11213 (“facility”). In particular, facility has a combined storage capacity of 4,000 gallons. (Staff Exhibits 2, 5, 6, 7 and 9.)
2. Pursuant to a registration application filed by respondent, the Department on April 29, 2003, issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-608921 for the facility. This certificate expired on April 29, 2008. (Staff Exhibits 2, 5, 6 and 7.)

3. On or before April 29, 2008, the Department did not receive a renewal registration application from respondent. (Staff Exhibit 2.)
4. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for June 29, 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 July 27, 2011, as directed in the notice of hearing. (Hearing Record and Staff Exhibit 10.)
5. Respondent is an active domestic limited liability company in the State of New York. (Staff Exhibit 4.)
6. On May 5, 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 201105160345. Respondent was also served by US Postal Service regular mail on May 5, 2011. (Staff Exhibit 3.)

#### Discussion

The record of this proceeding demonstrates that respondent failed to renew the registration of its petroleum storage facility located at 81 Pulaski Street, Brooklyn, New York 11213, on or prior to its expiration on April 29, 2008, 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 June 29, 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 July 27, 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.

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 renew the registration for its petroleum storage facility located at 81 Pulaski Street, Brooklyn, New York 11213, on or before April 29, 2008, the date on which its facility registration expired, as alleged in the complaint;
3. Directing respondent to submit a renewal registration application to the Department for the above facility;
4. Directing respondent to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500.00); 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  
September 1, 2011

**EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS**

*Matter of 81 Pulaski Street, LLC – Region 2*

*August 4, 2011*

Edirol File No. 020903135312

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 April 27, 2011), with affidavit in support of Brooke Turallo, sworn to April 29, 2011	✓	✓	Department Staff	
3	Affidavit of Service of Brooke Turallo, sworn to August 3, 2011, including NYS Department of State receipt	✓	✓	Department Staff	
4	New York State Department of State Entity Information printout	✓	✓	Department Staff	
5	PBS Application	✓	✓	Department Staff	
6	Facility Information Report	✓	✓	Department Staff	
7	PBS Certificate, issued April 29, 2003; expired April 29, 2008	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
8	Affidavit of Nadia Arginteanu, sworn to August 3, 2011 re: search for contact number	✓	✓	Department Staff	
9	Deed	✓	✓	Department Staff	
10	August 4, 2011 Affirmation of Scott W. Caruso, Esq.	✓	✓	Department Staff	
11	April 27, 2011 order (Mercure) authorizing appearance of law interns, with attached consent to appearance of Nadia Arginteanu	✓	✓	Department Staff	