

**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.
Case: 2-607459NYW

-by-

**962-68 ANDERSON AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,**

Respondent.

This administrative enforcement proceeding addresses the allegations of staff of the New York State Department of Environmental Conservation (“Department”) that respondent 962-68 Anderson Avenue Housing Development Fund Corporation (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum storage facility at 964 Anderson Avenue, Bronx, New York (“facility”) within 30 days of taking title to it on June 29, 2000.¹ Located at the facility is a 2,000-gallon aboveground petroleum bulk storage tank.

On April 21, 2015, an adjudicatory hearing was convened before Michael Caruso, Administrative Law Judge (“ALJ”) of the Department’s Office of Hearings and Mediation Services at the Department’s Region 2 offices, Long Island City, New York. Department staff was represented by Yvonne M. Ward, Esq., Senior Attorney with the Department’s Office of General Counsel. 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 pre-hearing conference and failed to appear for the adjudicatory hearing, Department staff moved orally 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.

¹ Part 612 of 6 NYCRR was repealed, effective subsequent to the commencement of this proceeding, and replaced by a revised Part 613. The registration requirements applicable to transfers of ownership are now found at 6 NYCRR 613-1.9(d). For purposes of the violation alleged in this matter, however, the prior part 612 applies.

The hearing was re-convened on July 21, 2015, before ALJ P. Nicholas Garlick. ALJ Garlick 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 962-68 Anderson Avenue Housing Development Fund Corporation failed to file an answer to the February 12, 2015 complaint Department staff served in this matter. Respondent also failed to appear at a pre-hearing conference scheduled for March 24, 2015, and failed to appear for the adjudicatory hearing scheduled in the matter on April 21, 2015 (see Hearing Report at 5 [Finding of Fact No. 8]).

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 6-7). I concur that Department staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Furthermore, at the hearing conducted on July 21, 2015, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 6). Accordingly, Department staff is entitled to a judgment based on record evidence.

ECL 71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff, in its papers, sought a payable civil penalty in the amount of ten thousand dollars (\$10,000), and the requested penalty is substantially less than the statutory maximum penalty that could be imposed.

Respondent has failed to reregister the facility for more than fourteen (14) years (see Hearing Report at 4 [Finding of Fact 6]).² In these types of cases, where facilities have not registered or renewed their registrations for more than five years, a civil penalty of ten thousand dollars (\$10,000) is authorized and appropriate (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2). Here, respondent's application to reregister the facility was due within thirty days of June 29, 2000 when ownership of the facility was transferred to respondent.

I also direct that respondent submit to the Department an application to register the facility within fifteen (15) days of service of this order upon it, together with all applicable registration fees.

² The record shows that the prior owner, the New York City Department of Housing, Preservation and Development ("NYCDHPD") reregistered the facility in February 2002 (see Hearing Report, at 4 fn 5; Hearing Exhibit 5). It was respondent 962-68 Anderson Avenue Housing Development Fund Corporation's responsibility, however, to reregister the facility within thirty (30) days of the transfer of the facility to it on June 29, 2000, which respondent failed to do (see 6 NYCRR 612.2[b] ["If ownership of the facility changes, the new owner must reregister the facility with the department within 30 days of ownership transfer"]). Nothing in the record indicates that NYCDHPD was the owner of the facility in 2002 when NYCDHPD submitted a renewal registration (see 6 NYCRR 612.2[a] [registration as owner's responsibility]). The unauthorized NYCDHPD registration expired on February 27, 2007 and nothing in the record indicates that respondent sought to properly register the facility after that date.

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 962-68 Anderson Avenue Housing Development Fund Corporation waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 962-68 Anderson Avenue Housing Development Fund Corporation is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum storage facility located at 964 Anderson Avenue, Bronx, New York within thirty (30) days of the transfer of the facility to it.
- III. Within fifteen (15) days of the service of this order upon respondent 962-68 Anderson Avenue Housing Development Fund Corporation, 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 962-68 Anderson Avenue 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: Yvonne M. Ward, Esq.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Yvonne M. Ward, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this order shall bind respondent 962-68 Anderson Avenue 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/_____
Basil Seggos
Acting Commissioner

Dated: March 31, 2016
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.
2-607459NYW

-by-

**962-68 ANDERSON AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,**

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (“Department”) served respondent 962-68 Anderson Avenue Housing Development Fund Corporation (“respondent”) with a notice of hearing and complaint, dated February 12, 2015. The complaint alleges a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), for failure to timely reregister its petroleum bulk storage facility located at 964 Anderson Avenue, Bronx, New York, 10452, within 30 days after it became the owner of the facility on June 29, 2000. 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); (3) directing respondent to reregister its petroleum bulk 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(b); and (4) granting such other and further relief as the Commissioner shall deem just and appropriate.

Inasmuch as respondent is an active domestic business corporation 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 February 20, 2015 (see Staff Exhibit [“Staff Ex.”] 3, ¶ 3). Department Staff also provided additional service by sending the notice of hearing and complaint to respondent by mail on or about February 20, 2015 (Staff Ex. 3, ¶ 4). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for March 24, 2015, as directed in the cover letter served with the notice of hearing and complaint.

On April 8, 2015, Department staff counsel Ward left a voice message for Luis Garcia, property manager of Garcia Management Corporation (Staff Ex. 9, ¶ 3¹).

As stated in the notice of hearing, on April 21, 2015, an adjudicatory hearing was convened before Administrative Law Judge (“ALJ”) Michael Caruso of the Department’s 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 Yvonne M. Ward, Esq., Senior Attorney, 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 pre-hearing 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 April 23, 2015, Department staff counsel Ward emailed certain documents and instructions (presumably the cover letter, notice of hearing, complaint, statement of readiness, proposed consent order and supporting affidavit) to Angel Garcia of Garcia Management Corporation in response to a request she received from him (Staff Ex. 9, ¶ 4²). On April 24, 2015, Ms. Ward received a telephone call from Luis Garcia with another request to email documents and instructions which were again emailed with an agreement that they be returned by May 1, 2015 (Staff Ex. 9, ¶ 4³). On May 4, 2015, another email reminder was sent requesting the documents be returned by May 8, 2015. As of July 27, 2015 no documents or response has been received (Staff Ex. 9, ¶ 4⁴).

On July 21, 2015, the adjudicatory hearing was reconvened before the undersigned ALJ at the Department’s Central Office at 625 Broadway, Albany, New York 12233. Department staff was represented by Benjamin Conlon, Esq., Associate Attorney and Christopher J. Babiarz, Law Intern, from the Department’s Office of General Counsel. Department staff orally renewed its motion for a default judgment, and also sought judgment on the merits. Department staff called one witness, Cynthia Freedman, an Environmental Program Specialist 2 in the Registration and Permit Section of the Department’s Division of Environmental Remediation. In all, ten (10) exhibits were received in evidence. The administrative hearing record was held open at the

¹ There are two paragraphs numbered 3, this is a reference to the first.

² There are two paragraphs numbered 4, this is a reference to the first.

³ There are two paragraphs numbered 3, this is a reference to the second.

⁴ There are two paragraphs numbered 4, this is a reference to the second.

hearing to allow Department staff to submit a revised proposed order, which was received on July 27, 2015, when the record closed.

On July 28, 2015, OHMS received a revised affirmation by email from Ms. Ward (dated July 27, 2015).

By letter dated August 17, 2015, I wrote to Ms. Ward, with a copy sent to the respondent, asking if she wished to include the revised affirmation in the record.

By letter dated August 19, 2015, Ms. Ward responded that she wished to replace her affirmation which was entered into the record at the hearing (Staff Ex. 9) with the revised affirmation.

By letter dated September 15, 2015, I granted this request.

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 bulk 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

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

1. Respondent 962-68 Anderson Avenue Housing Development Fund Corporation is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 964 Anderson Avenue, Bronx New York, 10452 (“facility”). In particular, petroleum bulk storage tank number ONE at the facility has a capacity of 2,000 gallons and is located aboveground (Testimony of Cynthia Freedman, Staff Exs. 4, 5, 6 and 7).
2. As of July 16, 2015, respondent was an active domestic business corporation in

the State of New York (Testimony of Cynthia Freedman, Staff Ex. 8).

3. The facility was acquired by respondent by deed dated June 29, 2000 from the New York City Department of Housing, Preservation and Development (“NYCDHPD”). This deed is recorded in the Office of the City Register of the City of New York (reel 1802, page 2223) (Testimony of Cynthia Freedman, Staff Ex. 4).
4. Cynthia Freedman is an Environmental Program Specialist 2 in the Registration and Permit Section of the Department’s Division of Environmental Remediation. Ms. Freedman has been employed in that position for twelve and a half years and is authorized to access, search and inspect the Department’s unified information system (“UIS”) and the electronic repository of scanned documents known as DecDOCs. The UIS and DecDOCs are databases maintained by the Department and contain petroleum bulk storage facility records filed with the Department, which records include petroleum bulk storage facility registrations filed pursuant to 6 NYCRR 612.2 (Testimony of Cynthia Freedman).
5. On July 21, 2015, Cynthia Freedman searched the petroleum bulk storage facility records contained in the Department’s UIS and DecDOCs databases for any petroleum facility registration or renewal registration or any petroleum bulk storage facility reregistration filed by respondent for the facility⁵ (Testimony of Cynthia Freedman).
6. As a result of her searches, Cynthia Freedman determined that respondent had not reregistered the facility at any time after assuming its ownership on June 29, 2000 (Testimony of Cynthia Freedman).
7. As shown by Receipt for Service No. 201502200356 issued by the New York State Department of State, respondent was served on February 20, 2015, pursuant to section 306 of the Business Corporation Law with a notice of hearing and complaint dated February 20, 2015, alleging a violation of ECL 17-1009 and its

⁵ Ms. Freedman did testify that on February 26, 2002, the Department received a Petroleum Bulk Storage (“PBS”) application from NYCDHPD seeking to register the facility at issue in this case (Staff Ex. 5). On February 27, 2002, the Department issued PBS Certificate Number 2-607459, registering the PBS facility, to NYCDHPD (Staff Ex. 6). This registration expired on February 27, 2007 (id.). Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE” (id.). At the hearing, Ms. Freedman testified that she speculated that NYCDHPD had submitted the application in error and had, in other cases, submitted PBS applications for properties that it no longer owned. Department staff counsel Conlon stated at the hearing that at the time the 2002 application was made, the Department was involved in a substantial enforcement effort to get NYCDHPD and other New York City governmental agencies to comply with the PBS regulations (Hearing Record).

implementing regulation, 6 NYCRR 612.2(b), together with a cover letter, statement of readiness and supporting affidavit, for failure to reregister its petroleum bulk storage facility located 964 Anderson Avenue, Bronx, New York, within 30 days of the transfer of ownership of the facility to it. Consistent with CPLR 3215(g)(4), Department staff also sent the notice of hearing and complaint, together with notice that the notice of hearing and complaint was originally served on the Secretary of State, to respondent by regular mail on or about March 20, 2015 (Staff Ex. 3).

8. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for March 24, 2015, 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 April 21, 2015, 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 bulk storage facility located at 964 Anderson Avenue, Bronx, New York, 10452, within 30 days of the transfer of ownership of the facility to it on June 29, 2000, in violation of ECL 17-1009 and 6 NYCRR 612.2(b). The fact the NYCDHPD mistakenly registered this facility in 2002 does not

affect respondent's responsibility to reregister the facility within 30 days of taking ownership of it, nor does affect respondent's liability for the alleged violation.

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; (iii) failed to appear at a pre-hearing conference scheduled for March 24, 2015, as directed in the cover letter served with the notice of hearing and complaint; and (iv) respondent failed to appear for the adjudicatory hearing scheduled in the matter on April 21, 2015, as directed in the notice of hearing. Department staff provided a draft proposed order at the July 21, 2015 hearing and a revised proposed order, which was received on July 27, 2015, when the record closed (Staff Ex. 10). Department staff 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 bulk storage facility within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009 and 6 NYCRR 612.2(b). The Department is entitled to judgment upon the facts proven.

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 and administrative precedent (see e.g. Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to reregister its petroleum bulk storage facility located 964 Anderson Avenue, Bronx, New York, 10452 within 30 days of transfer of ownership of the facility to it, the respondent violated ECL 17-1009 and 6 NYCRR 612.2(b).

Recommendation

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

1. granting Department staff's motion for default, finding respondent 962-68 Anderson Avenue Housing Development Fund Corporation in default pursuant to the provisions of 6 NYCRR 622.15;
2. holding that, based upon the proof adduced at the adjudicatory hearing, respondent 962-68 Anderson Avenue Housing Development Fund Corporation violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum bulk storage facility located at 964 Anderson Avenue, Bronx, New York, 10452, within 30 days after it became the owner of the facility;

3. directing respondent 962-68 Anderson Avenue Housing Development Fund Corporation to submit to the Department, within fifteen (15) days of the service of the Commissioner's order upon respondent, a complete registration application for the facility, together with applicable registration fees;
4. directing respondent 962-68 Anderson Avenue Housing Development Fund Corporation to pay a civil penalty in the amount of ten thousand dollars (\$10,000.00), 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 appropriate.

/s/

P. Nicholas Garlick
Administrative Law Judge

Dated: October 27, 2015
Albany, New York

EXHIBIT CHART – PBS EXPEDITED PROCEEDING

Matter of 962-68 Anderson Avenue Housing Development Fund Corporation

July 21, 2015 – Central Office, 625 Broadway, Albany, NY

DEC Case No. 2-607459NYW - Ediorol File No. 011228071345

Exhibit No.	Description	ID'd	Rec'd	Offered By	Notes
1	May 26, 2015 Practice Order of the Appellate Division, Third Department (Peters, P.J.), for appointment of law interns, including, Christopher J. Babiarz.	✓	✓	Department Staff	
2	Cover Letter from Yvonne M Ward, Esq., to respondent, February 12, 2015. Notice of Hearing and Complaint, dated February 12, 2015. Statement of Readiness, dated February 12, 2015. Affidavit of Brooke Turallo, sworn to February 18, 2015.	✓	✓	Department Staff	
3	Affidavit of Service of Brooke Turallo, sworn to July 17, 2015, attaching NYS Department of State (“DOS”) Receipt for Service, dated February 20, 2015.	✓	✓	Department Staff	
4	New York City Department of Finance ACRIS Title Search dated July 17 and 20, 2015. Deed to respondent, dated June 29, 2000.	✓	✓	Department Staff	
5	PBS Application of NYC Dept. of Housing, Preservation and Development (“NYCDHPD”) for PBS No. 2-607459, received on February 26, 2002.	✓	✓	Department Staff	
6	PBS Certificate No. 2-607459 issued to NYCDHPD on February 27, 2002, expiration date February 27, 2007.	✓	✓	Department Staff	
7	PBS Program Facility Information Report for PBS facility 2-607459 listing NYCDHPD as site owner, printed July 17, 2015.	✓	✓	Department Staff	
8	NYS DOS, Division of Corporations, Corporate Entity Information, current through July 16, 2015.	✓	✓	Department Staff	
9	Affirmation of Yvonne M. Ward, Esq., dated July 27, 2015 regarding attempts to contact respondent.	✓	✓	Department Staff	
10	Proposed Order.	✓	✓	Department Staff	The hearing record was held open to allow submission of a revised proposed order, which was received on July 27, 2015