

**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 2-607525AL

-by-

FURS BY GIGI, LTD.,

Respondent.

This matter addresses the allegations of staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) that respondent Furs By Gigi, Ltd. (“respondent”) violated ECL 17-1009 and 6 NYCRR 612.2 by failing to renew the registration for its petroleum storage facility located at 42-43 147th Street, Flushing, New York (“facility”). The facility’s registration had expired on May 29, 2012.

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 Furs By Gigi, Ltd. failed to file an answer to the complaint, dated July 7, 2014, that Department staff served in this matter. Respondent also failed to appear at a pre-hearing conference scheduled for August 6, 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 September 9, 2014, as directed in the notice of hearing (see Hearing Report at 3-4 [Findings of Fact Nos. 7 and 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 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 initially sought a civil penalty in the amount of ten thousand dollars (\$10,000) (see Exhibit 1 [Complaint, Wherefore Clause, at II]). Department staff moved to amend its complaint to reduce the civil penalty to seven thousand five hundred dollars (\$7,500) (see Hearing Report at 2). 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 seven thousand five hundred dollars (\$7,500) is in accordance with general penalty guidelines for violations of greater than two years but less 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 6 [respondent's violation has continued for approximately two and one-half years as of the date of hearing]). Respondent is also 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 Furs By Gigi, Ltd. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Furs By Gigi, Ltd. is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2 for failing to renew the petroleum bulk storage registration for the petroleum storage facility that it owns at 42-43 147th Street, Flushing, New York.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent Furs By Gigi, Ltd. shall submit to the Department an application to renew the facility's bulk storage registration, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent Furs By Gigi, Ltd. shall pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500) 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.

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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 2-607525AL

-by-

FURS BY GIGI, LTD.,

Respondent.

Procedural History

Respondent Furs By Gigi, Ltd. (“respondent”) was served with a notice of hearing and complaint dated July 7, 2014, 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 located at 42-43 147th Street, Flushing, New York 11355. 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)¹; (3) directing respondent to 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 proper.

Inasmuch as respondent is an active domestic business corporation in the State of New York, service of the notice of hearing and complaint was made on the New York State Secretary of State on July 10, 2014. Consistent with CPLR 3215(g)(4), respondent was also served with the notice of hearing and complaint by regular mail on July 10, 2014. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for August 6, 2014, as directed in the cover letter, dated July 7, 2014, and served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on September 9, 2014, as directed in the notice of hearing.

On September 9, 2014, the matter was called for adjudicatory hearing before Administrative Law Judge (“ALJ”) Michael S. Caruso 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

¹ As will be discussed herein, at the hearing, Department staff moved to reduce the civil penalty amount to \$7,500.

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 Caruso 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 Adriana Le Blan, Esq., an attorney with the Department's Office of General Counsel, Bureau of Remediation, 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 Caruso on September 9, 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 moved to amend their complaint by reducing the penalty amount it was seeking from \$10,000 to \$7,500, as this lesser amount reflected the penalties assessed by the Department in similar cases, consistent with the Commissioner's guidance set forth in Matter of 12 Martense Associates, LLC, Order of the Commissioner, December 19, 2011 ("Martense Associates"). This motion to amend the complaint was granted. Finally, 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, Ashley R. Welsch, a Legal Intern 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 Furs By Gigi, Ltd. is the owner of a petroleum storage facility (“facility”) having a capacity of over 1,100 gallons located at 42-43 147th Street, Flushing, New York 11355. In particular, petroleum storage Tank No. 002 at the facility has a capacity of 2,500 gallons and is located aboveground. (Department Staff Exhibits 1, 4, 5, 6 and 7.)
2. Respondent is an active domestic business corporation in the State of New York. (Department Staff Exhibit 3.)
3. Pursuant to a registration renewal application filed by respondent, dated January 24, 2007, and received by the Department on January 29, 2007, the Department renewed Petroleum Bulk Storage (“PBS”) Certificate Number 2-607525 previously issued to respondent’s facility. The renewed registration became effective January 30, 2007, and expired on May 29, 2012. (Department Staff Exhibits 5, 6 and 7.)
4. Ashley R. Welsch is a Legal Intern 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 Ashley R. Welsch.)
5. On December 17, 2014, Ashley R. Welsch 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 Ashley R. Welsch.)
6. As a result of her search, Ashley R. Welsch determined that respondent had not renewed the registration for the facility since May 29, 2012, the date on which PBS Certificate 2-607525 expired. (Testimony of Ashley R. Welsch; Department Staff Exhibits 6 and 7.)
7. As shown by Receipt for Service No. 201407140046 issued by the New York State Department of State, respondent was served, on July 10, 2014, pursuant to section 306 of the Business Corporation Law with a notice of hearing and complaint dated July 7, 2014, 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 located at 42-43 147th Street, Flushing, New York 11355. Consistent with CPLR 3215(g)(4), the notice of hearing and complaint was also served on respondent by regular mail on July 10, 2014. (Department Staff Exhibits 1 and 2.)

8. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for August 6, 2014, as directed in the cover letter, dated July 7, 2014, and served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on September 9, 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 renew its petroleum storage facility registration either before or after the expiration of PBS Certificate Number 2-607525 on May 29, 2012, in violation of ECL 17-1009 and 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. The record further shows that respondent failed to appear at a pre-hearing conference scheduled for August 6, 2014, as directed in the cover letter, dated July 7, 2014, served with the notice of hearing and complaint, and that respondent failed to appear for the adjudicatory hearing scheduled in the matter on September 9, 2014, as directed in the notice of hearing. Moreover, pursuant to its granted request, the prayer for relief articulated in Department staff's complaint, as amended, 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 on December 18, 2014, in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to renew its petroleum storage facility registration in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

As noted, the hearing record indicates that the facility's registration has been expired for more than two and one-half years. The \$7,500 penalty Department staff seeks is consistent with the penalty amounts sought in similar cases, the Commissioner's guidance set forth in Martense Associates, 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 6 NYCRR 612.2 for failure to renew the registration for a petroleum storage facility it owns located at 42-43 147th Street, Flushing, New York 11355, on or before May 29, 2012, based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to submit a registration application to the Department for the above facility, and pay the applicable registration fees;
4. Directing respondent to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500); 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 Furs By Gigi, Ltd. – Flushing, New York*

December 18, 2014 – Central Office

DEC Case No. 2-607525AL - Ediol File No. 010527071951

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Adriana Le Blan, Esq., to respondent, dated July 7, 2014. Notice of Hearing and Complaint, dated July 7, 2014. Statement of Readiness, dated July 7, 2014. Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, sworn to July 8, 2014.	✓	✓	Department Staff	
2	Affidavit of Service of Brooke Turallo, sworn to December 8, 2014. NYS Department of State ("DOS") Receipt for Service, dated July 10, 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 August 1, 2001.	✓	✓	Department Staff	
5	PBS Application dated January 24, 2007, and received January 29, 2007.	✓	✓	Department Staff	
6	PBS Certificate No. 2-607525 issued January 30, 2007, expiration date May 29, 2012.	✓	✓	Department Staff	
7	PBS Program Facility Information Report, printed December 17, 2014.	✓	✓	Department Staff	
8	Affirmation of Adriana Le Blan, Esq., dated December 18, 2014.	✓	✓	Department Staff	