

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

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 2-606717NMW

-by-

GARDEN OF EDEN ASSOCIATES, L.P.,

Respondent.

On August 30, 2011, an adjudicatory hearing was convened before Administrative Law Judge (“ALJ”) Maria E. Villa of the Office of Hearings and Mediation Services for 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 Garden of Eden Associates, L.P. (“respondent”) to answer or appear in connection with Department staff’s June 9, 2011, complaint. In its complaint, Department staff alleged that respondent violated 6 NYCRR 612.2 by failing to reregister its petroleum storage facility at 2211 Eighth Avenue, New York, New York 10026 (“site”), within 30 days of the transfer of ownership of the facility to it. Respondent owns the site (see Staff Exhibit 9) where an apartment building with a (7,500) gallon fuel oil aboveground tank is located (see Staff Exhibits 2, 3 and 4).

ALJ Villa prepared the attached default summary report, which I adopt as my decision in this matter. As set forth in the ALJ’s report, respondent Garden of Eden Associates, L.P. 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 27, 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 this matter on August 30, 2011, as directed in the notice of hearing (see Default Summary Report, at 5 [Finding of Fact No. 6]).

As a consequence of respondent’s failure to answer or appear in this matter, the ALJ recommended that Department staff’s motion for a default judgment be granted (see Default Summary Report, at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Department staff requested a penalty of ten thousand dollars (\$10,000) in this matter. 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 below this statutory amount.

In proceedings concerning the violation of the petroleum bulk storage tank registration requirements for heating oil tanks in New York City apartment buildings, Department staff has requested penalties that take into account the duration of the violation. For those facilities that have not registered or renewed their registrations within the past two years, Department staff has, absent other violations, generally requested a penalty of five thousand dollars (\$5,000). For registration violations that extend from two to five years, Department staff has generally requested a penalty of seven thousand five hundred dollars (\$7,500). For those facilities where registrations are more than five years overdue, Department staff has generally requested a penalty of ten thousand dollars (\$10,000). However, to the extent that mitigating or aggravating factors exist, such factors are considered for purposes of the penalty request.

The amount requested in this case is consistent with the Department's penalty policies and agency precedent. I note that the violation in this matter has continued for over ten years (see Staff Exhibit 1 [Department Staff Complaint, at ¶¶ 22 and 23]). Based on this record, the requested penalty of ten thousand dollars (\$10,000) 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 Garden of Eden Associates, L. P. waived its right to be heard at the hearing. Accordingly, the allegations of the complaint are deemed to have been admitted by respondent.
- II. Based upon the allegations of the complaint, and the documents submitted in support of the motion, respondent Garden of Eden Associates, L. P. is adjudged to have violated 6 NYCRR 612.2 for failing to register its petroleum storage facility located at 2211 Eighth Avenue, New York, New York 10026, within thirty (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 facility re-registration application, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent 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.

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.
PBS2-606717NMW

-by-

GARDEN OF EDEN ASSOCIATES, L.P.,
Respondent.

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Procedural History

Respondent Garden of Eden Associates, L.P. was served with a notice of hearing and complaint, dated June 9, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to register its petroleum storage facility located at 2211 Eighth Avenue, New York, New York 10026,¹ 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 PBS 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 partnership 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 June 21, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on June 21, 2011. Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for July 27, 2011, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on August 30, 2011, an adjudicatory hearing was convened before Administrative Law Judge ("ALJ") Maria E. Villa 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. 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.

¹ 2211 Eighth Avenue is also known as 2211-2223 8th Avenue. (Staff Exhibit 6, ¶ 7).

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 10, 2012, rather than electing to proceed with a hearing in the respondent's absence, Department staff provided OHMS with the documentation required by 6 NYCRR 622.15(b) in support of its oral motion for a default judgment made on August 30, 2011. In particular, Department staff submitted the following documents for the record:

1. A proposed Commissioner's order.
2. The notice of hearing and complaint dated June 9, 2011, with attachments, including an affidavit of Julia Connors sworn to on June 14, 2011, and a cover letter to respondent dated June 9, 2011.
3. An affidavit of service sworn to by Brooke Turallo on August 8, 2012 stating that on June 21, 2011, she sent respondent a copy of the notice of hearing and complaint, with attachments and cover letter, as indicated above, by United States Postal Service ("USPS") regular mail. Moreover, the affidavit states that she served respondent, an active domestic limited partnership in New York, by serving the Secretary of State of the State of New York on June 21, 2011.
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 partnership.
5. A copy of the abstract of title for the subject property maintained by the New York City Office of the City Register and generated from the City's public website, the Automated City Register Information System ("ACRIS").
6. A copy of the recorded deed showing fee ownership of the facility by respondent as of June 25, 2002.
7. A copy of the petroleum bulk storage ("PBS") application filed by a prior owner of the facility with the Department to register the facility, dated August 3, 2001.
8. A copy of the facility information report maintained by the Department for the facility.

9. A copy of PBS certificate number 2-606717 issued by the Department on August 20, 2001. The certificate has an expiration date of August 20, 2006.
10. The affidavit of Brooke Turallo, sworn to August 8, 2012, attesting to the service of the notice of hearing and complaint on respondent, as well as a second affidavit of Ms. Turallo sworn to that same date. The second affidavit stated that by letter dated March 6, 2012, Ms. Turallo requested the respondent to contact the Department, and/or submit an answer, and advised that if a settlement was not reached by March 20, 2012, the Department would move forward with legal action. The affidavit stated further that as of August 8, 2012, the Department had not been contacted by the respondent regarding this matter.

In its complaint, Department staff sought a penalty of ten thousand dollars (\$10,000). Based on the allegations in the complaint, the facility has been out of registration for more than ten years. The requested penalty amount is consistent with 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 staff 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 Garden of Eden Associates, L.P. is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 2211 Eighth Avenue, New York, New York 10026 ("facility"). In particular, there is a 7,500 gallon aboveground storage tank located at the facility. (Staff Exhibits 2, 3 and 4.)
2. Pursuant to a registration application filed by a prior owner of the facility, the Department on August 20, 2002, issued Petroleum Bulk Storage ("PBS") Certificate Number 2-606717. PBS Certificates are not transferrable to a new owner. (Staff Exhibits 2, 3 and 4.)
3. On June 25, 2002, respondent by deed acquired all right, title and interest in the facility. (Staff Exhibits 8 and 9.)
4. On or before July 25, 2002, the Department did not receive a re-registration application from respondent. (Staff Exhibit 1.)
5. The records of the Department do not indicate respondent as the current owner of the facility. (Staff Exhibits 1, 2, 3 and 4.)

6. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for July 27, 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 August 30, 2011, as directed in the notice of hearing.
7. Respondent is an active domestic limited partnership in the State of New York. (Staff Exhibit 7.)
8. On June 21, 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 201107110090. Respondent was also served by US Postal Service regular mail on June 21, 2011. (Staff Exhibit 5.)

Discussion

The record of this proceeding demonstrates that respondent failed to register its petroleum storage facility located at 2211 Eighth Avenue, New York, New York 10026, within 30 days of the transfer of ownership of the facility to it, 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 July 27, 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 August 30, 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.

Department staff's proposed order and the \$10,000 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 reregister petroleum storage facility located at 2211 Eighth Avenue, New York, New York 10026, within 30 days of the transfer of ownership of the facility to it, as alleged in the complaint;

3. Directing respondent to submit a re-registration application and applicable registration fees to the Department for the above facility;
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/

Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
August 21, 2012

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Garden of Eden Associates, L.P. – Region 2

August 30, 2011

Edirol File No. 020929103321

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness (all dated June 9, 2011); and affidavit of Julia Connors in support, sworn to June 14, 2011.	x	x	Department Staff	
2	PBS Application	x	x	Department Staff	
3	Facility Information Report	x	x	Department Staff	
4	PBS Certificate, issued August 20, 2001; expired August 20, 2006	x	x	Department Staff	
5	Affidavit of Service of Brooke Turallo, sworn to August 8, 2012, including NYS Department of State receipt	x	x	Department Staff	
6	Affidavit of Brooke Turallo, sworn to August 8, 2012, with attached March 6, 2012 letter from Brooke Turallo to Garden of Eden Associates, L.P. and Derek Broomes	x	x	Department Staff	
7	New York Department of State Entity Information printout	x	x	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
8	ACRIS Search Results	x	x	Department Staff	
9	Deed	x	x	Department Staff	