

**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 2-6030339MW

-by-

THE GERKEN BUILDING CORPORATION,

Respondent.

On November 17, 2010, an adjudicatory hearing was convened before Richard A. Sherman, 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 the allegations of Department staff that respondent The Gerken Building Corporation violated 6 NYCRR 612.2 by failing to renew the registration for its petroleum bulk storage (PBS) facility located at 90 West Broadway, New York, New York 10007 (facility).

ALJ Sherman prepared the attached hearing report, which I adopt as my decision in this matter. As set forth in the ALJ's hearing report, respondent The Gerken Building Corporation 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 October 20, 2010, as directed in the cover letter served with the notice of hearing and complaint; and failed to appear at the adjudicatory hearing on November 17, 2010, as directed in the notice of hearing (see Hearing Report, at 3). Accordingly, respondent waived its right to a hearing in this matter.

At the hearing, Department staff presented a prima facie case on the merits and proved its case by a preponderance of the evidence (see id.). Accordingly, staff is entitled to a judgment based on record evidence.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. By failing to answer or appear in this proceeding, respondent The Gerken Building Corporation waived its right to be heard at the adjudicatory hearing.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

-----X
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),

HEARING REPORT

DEC CASE NO:
PBS 2-6030339MW

-by-

THE GERKEN BUILDING CORPORATION,

Respondent.

-----X
Procedural History

Respondent The Gerken Building Corporation was served with a notice of hearing and complaint, both dated September 16, 2010, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to renew the registration of its petroleum bulk storage (PBS) facility located at 90 West Broadway, New York, New York 10007. 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 register 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 business corporation in the State of New York, service of the notice of hearing and complaint was made on the New York Secretary of State on September 17, 2010. Respondent was also served with the notice of hearing and complaint by regular mail. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for October 20, 2010, 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 November 17, 2010, as directed in the notice of hearing.

On November 17, 2010, an adjudicatory hearing was convened before the undersigned Administrative Law Judge (ALJ) 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 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 12233-5500. No one appeared on behalf of respondent.

Department staff called one witness, Nicholas Lombardo, Agency Program Aide with the PBS Unit of the Department's Region 2 office. Seven (7) 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 The Gerken Building Corporation is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 90 West Broadway, New York, New York 10007. In particular, petroleum storage tank number 001 at the facility has a capacity of 3,000 gallons and is located aboveground in contact with soil.
2. Respondent is an active domestic business corporation in the State of New York.
3. Pursuant to a registration application filed by respondent, the Department issued respondent Petroleum Bulk Storage (PBS) Certificate number 2-603039, registering respondent's PBS facility. This certificate expired on June 11, 2007.
4. Nicholas Lombardo is an employee of the Department whose duties include the care, custody, and maintenance of the petroleum storage facility records filed with

the Department, which records include petroleum facility registrations filed pursuant to 6 NYCRR 612.2.

5. On November 17, 2010, Nicholas Lombardo searched the petroleum storage facility records of the Department for any facility registration or renewal registration filed by respondent for the facility.
6. As a result of his search, Nicholas Lombardo determined that, as of November 17, 2010, respondent had not renewed the facility's PBS certificate which expired on June 11, 2007.
7. As evidenced by Receipt for Service No. 201009240328 issued by the New York State Department of State, respondent was served, on September 17, 2010, pursuant to Section 306 of the Business Corporation Law with a notice of hearing and complaint dated September 16, 2010, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to renew the registration of its PBS facility located at 90 West Broadway, New York, New York 10007. As evidenced by Department staff's affidavit of service, the notice of hearing and complaint was also served on respondent by regular mail.
8. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for October 20, 2010, 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 June 11, 2007, as directed in the notice of hearing.

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to renew its PBS registration by or after the expiration of PBS Certificate 2-603039 on June 11, 2007, 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 October 20, 2010, 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 November 17, 2010, as directed in the notice of hearing. Accordingly, pursuant to the provisions of 6 NYCRR 622.15, the Department is entitled to a default judgment and respondent has waived its right to a hearing in this matter.

Despite respondent's default, Department staff elected to proceed with the adjudicatory hearing. The proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to renew its PBS facility registration in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

The relief requested by Department staff is 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. Finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2 for failure to renew the registration for a petroleum storage facility it owns located at 90 West Broadway, New York, New York 10007, based upon the proof adduced at the adjudicatory hearing;
2. Directing respondent to submit a registration renewal application to the Department for the above facility;
3. Directing respondent to pay a civil penalty in the amount of ten thousand dollars (\$10,000.00); and
4. Directing such other and further relief as he may deem just and proper.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
November 30, 2010

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of The Gerken Building Corporation

November 17, 2010

Exhibit No.	Description	ID'd Y/N	Rec'd Y/N	Offered By
1	Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness (all dated September 16, 2010); and affidavit in support, sworn to September 17, 2010.	Y	Y	Department Staff
2	Affidavit of Service	Y	Y	Department Staff
3	NYSDOS Corporate Status Information	Y	Y	Department Staff
4	Facility Information Report (printed November 17, 2010)	Y	Y	Department Staff
5	Petroleum Bulk Storage Certificate (issued March 27, 2002)	Y	Y	Department Staff
6	Affirmation of staff counsel, dated November 16, 2010	Y	Y	Department Staff
7	NYC Automated City Register Information System (ACRIS) Address Input Printout and Deed	Y	Y	Department Staff