

**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 2-467499NDK

-by-

THE MERRIAM TOWER LLC,

Respondent.

On July 27, 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 the allegations of Department staff that respondent The Merriam Tower LLC violated 6 NYCRR 612.2 by failing to reregister its petroleum bulk storage (“PBS”) facility located at 1261 Merriam Avenue, Bronx, New York (“facility”), within 30 days of the transfer of ownership of the facility to it.

ALJ Wissler 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 Merriam Tower 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 Hearing Report, at 3 [Finding of Fact No. 9]).

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), and 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, in its papers, requested a penalty of ten thousand dollars (\$10,000). 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 four years (see Hearing Exhibits 2 [Department staff complaint, ¶¶ 22 and 23])

and 5 [deed of sale to The Merriam Tower LLC]). 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 The Merriam Tower LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent The Merriam Tower LLC is adjudged to have violated 6 NYCRR 612.2 for failing to reregister its petroleum bulk storage facility located at 1261 Merriam Avenue, Bronx, New York 10452, within 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 The Merriam Tower LLC 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 re-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.

VII. The provisions, terms and conditions of this order shall bind respondent The Merriam Tower LLC, its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: Albany, New York
August 18, 2011

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 2-467499NDK

-by-

THE MERRIAM TOWER LLC,
Respondent.

-----X

Procedural History

Respondent The Merriam Tower LLC was served with a notice of hearing and complaint, dated May 6, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum bulk storage facility located at 1261 Merriam Avenue, Bronx, New York 10452, 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 petroleum bulk storage 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 31, 2011. Respondent was also served with the notice of hearing and complaint by regular mail on May 31, 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 21st Street, Long Island City, New York 11101-5407. 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 Wayne D. Prindle 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. No one appeared on behalf of respondent.

Department staff called one witness, Nicholas Lombardo, Agency Program Aide with the Petroleum Bulk Storage (“PBS”) Unit of the Department’s Region 2 office. In all, nine (9) 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 Merriam Tower LLC is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 1261 Merriam Avenue, Bronx, New York 10452 (“facility”). In particular, petroleum storage tank number 001 at the facility has a capacity of 5,000 gallons and is located aboveground. (Staff Exhibits 6, 7 and 8.)
2. Respondent is an active domestic limited liability company in the State of New York. (Staff Exhibit 3.)
3. Pursuant to a registration application filed by the then owner of the facility, 1261 Merriam Avenue LLC, dated December 1, 2005, the Department, on December 20, 2005, issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-467499,

registering the PBS facility. This registration expired on October 1, 2008. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” (Staff Exhibits 6, 7 and 8.)

4. On September 13, 2006, 1261 Merriam Avenue LLC, by bargain and sale deed with covenant against grantor’s acts, transferred all right, title and interest in the facility to respondent The Merriam Tower LLC, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York, Document ID No. 2006091500865006. (Staff Exhibit 5.)
5. 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. (Testimony of Lombardo.)
6. On July 27, 2011, Nicholas Lombardo searched the petroleum storage facility records of the Department for any facility registration or renewal registration or any facility re-registration filed by respondent for the facility. (Testimony of Lombardo.)
7. As a result of his search, Nicholas Lombardo determined that respondent had not reregistered the facility at any time after assuming its ownership. (Testimony of Lombardo.)
8. As shown by Receipt for Service No. 201106140262 issued by the New York State Department of State, respondent was served, on May 31, 2011, pursuant to section 303 of the Limited Liability Company Law with a notice of hearing and complaint dated May 6, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister its petroleum bulk storage (“PBS”) facility located at 1261 Merriam Avenue, Bronx, New York 10452, within 30 days of the transfer of ownership of the facility to it. The notice of hearing and complaint was also served on respondent by regular mail on May 31, 2011. (Staff Exhibits 2 and 4.)
9. 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.)

Discussion

Department staff’s proof presents a prima facie case demonstrating that respondent failed to reregister its PBS facility located at 1261 Merriam Avenue, Bronx,

New York 10452, 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 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.

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 PBS facility within 30 days of the transfer of ownership of the facility to it, in violation of 6 NYCRR 612.2. The Department is entitled to judgment upon the facts proven.

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 its PBS facility located at 1261 Merriam Avenue, Bronx, New York 10452, within 30 days of the transfer of ownership of the facility to it, based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to submit a re-registration application 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/

Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
August 9, 2011

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of The Merriam Tower LLC – Region 2

July 27, 2011

Edirol File No. 020826101805

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Consent to Appearance of Wayne D. Prindle, Legal Intern, with attached order dated May 25, 2011 (Mercure)	✓	✓	Department Staff	
2	Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness (all dated May 6, 2011); and affidavit in support of Brooke Turallo, sworn to May 9, 2011.	✓	✓	Department Staff	
3	New York State Department of State Entity Information printout	✓	✓	Department Staff	
4	Affidavit of Service of Brooke Turallo, sworn to July 26, 2011, including NYS Department of State receipt	✓	✓	Department Staff	
5	Deed, including identifier and search results	✓	✓	Department Staff	
6	PBS Application, dated December 20, 2005	✓	✓	Department Staff	
7	Facility Information Report	✓	✓	Department Staff	
8	PBS Certificate, dated December 20, 2005; expired October 1, 2008	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
9	Affidavit of Deborah Gorman, sworn to July 25, 2011 re: search for contact number	✓	✓	Department Staff	