

**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 2-130435

-by-
JOSEPHINE OWEN,

Respondent.

On June 2, 2011, an adjudicatory hearing was convened before Maria E. Villa, 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 Josephine Owen violated 6 NYCRR 612.2 by failing to reregister her petroleum bulk storage (“PBS”) facility located at 50 Clark Street, Brooklyn, New York 11201 (“facility”), within 30 days of the transfer of ownership of the facility to her.

ALJ Villa prepared the attached hearing report, which I adopt as my decision in this matter. As set forth in the ALJ’s hearing report, respondent Josephine Owen 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 April 18, 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 May 18, 2011, as directed in the notice of hearing (see Hearing Report, at 4 [Finding of Fact No. 10]).

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 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 per day for each violation, and the requested penalty is substantially below this statutory amount. Furthermore, respondent has been aware of this violation for some time and failed to correct it (see Hearing Report, at 3 [Finding of Fact 7]). Following commencement of this proceeding, Department staff called respondent on May 2, 2011 to discuss this matter. Although respondent indicated that she would return staff’s call later

that day when she reached her business office, she never returned the call or otherwise responded to Department staff (see Hearing Exhibit D, at paragraphs 3 and 4). 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 Josephine Owen waived her right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Josephine Owen is adjudged to have violated 6 NYCRR 612.2 for failing to reregister her petroleum bulk storage ("PBS") facility located at 50 Clark Street, Brooklyn, New York 11201, within 30 days of the transfer of ownership of the facility to her.
- 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 Josephine Owen shall pay a civil penalty in the amount of ten thousand dollars (\$10,000.00) 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 Josephine Owen, her agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
June 24, 2011

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"),

HEARING REPORT

DEC CASE NO:
PBS 2-130435

-by-

JOSEPHINE OWEN,

Respondent.

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Procedural History

Respondent, Josephine Owen, was served with a notice of hearing and complaint, dated February 24, 2011, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2, for failure to reregister her petroleum bulk storage ("PBS") facility located at 50 Clark Street, Brooklyn, New York 11201, within 30 days of the transfer of ownership of the facility to her. 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 her 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.

Respondent was served with the notice of hearing and complaint by certified mail on March 8, 2011. Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for April 18, 2011, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on May 18, 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. 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.

At the hearing, no one appeared on behalf of respondent, and Department staff advised the ALJ that respondent had not answered the complaint, and had failed to appear at the prehearing conference. Department staff indicated that it was prepared to proceed with the hearing, and that Department staff's witness was present. In addition,

Department staff moved for a default judgment, and the ALJ reserved on the motion, advising that the motion would be heard at a subsequent hearing, on a date to be determined.

On June 2, 2011, the adjudicatory hearing was convened before ALJ Maria E. Villa at the Department's Central Office at 625 Broadway, Albany, New York. At this stage of the proceeding, Department staff was represented by Mary Wojcik, Esq., Associate Attorney, Spills and Bulk Storage Section, Bureau of Remediation and Revitalization. Department staff renewed its motion for a default judgment, and also sought judgment on the merits. Department staff called one witness, Cynthia Freedman, Environmental Program Specialist 2 in the Department's Division of Environmental Remediation, Registration and Permits Section, in the Department's Central Office. 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, Josephine Owen, is the owner of a petroleum storage facility having a capacity of over 1,100 gallons located at 50 Clark Street, Brooklyn, New York 11201 ("facility"). In particular, petroleum storage tank number 001 at the facility has a capacity of 2,000 gallons and is located aboveground. (Staff Exhibits F, G and H.)

2. Pursuant to a registration application filed by the then owner of the facility, Anne E. Port, and received by the Department on June 20, 1997, the Department, on that date, issued Petroleum Bulk Storage (“PBS”) Certificate Number 2-130435, renewing the PBS facility’s registration. This registration expired on June 5, 2002. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: “THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE.” (Staff Exhibits F and H.)
3. On May 28, 2008, Jay-Mark Associates, LLC, by bargain and sale deed with covenant against grantor’s acts, transferred all right, title and interest in the facility to respondent, Josephine Owen, the facility’s current owner. This deed is recorded in the Office of the City Register of the City of New York as Document ID No. 2008060900227001. (Staff Exhibit C.)
4. Cynthia Freedman 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 Freedman.)
5. Cynthia Freedman searched the petroleum storage facility records of the Department, including the Department’s databases, for any facility registration or renewal registration or any facility re-registration filed by respondent for the facility. (Testimony of Freedman.)
6. As a result of her search, Cynthia Freedman determined that respondent had not reregistered the facility at any time after assuming ownership, and that no application had been received since the June 5, 2002 expiration date of the registration issued on June 20, 1997. (Testimony of Freedman.)
7. In an order on consent signed by respondent on September 24, 2009, and signed by the Commissioner on October 5, 2009, respondent acknowledged that she had failed to register the facility as required by 6 NYCRR 612.2. Respondent did submit a money order in the amount of \$1,000 in payment of the civil penalty imposed in the order on consent.¹ (Staff Exhibit E.)
8. The notice of hearing and complaint was served on respondent by certified mail on March 8, 2011. (Staff Exhibits A and B.)
9. In an affirmation dated May 16, 2011, counsel for Department staff advised that she had spoken with respondent on May 2, 2011, and at that time, respondent indicated that counsel had reached respondent at her home and that respondent would return the call when she reached her office. The call was not returned. (Staff Exhibit D.)

¹ At the hearing, Department Staff indicated that it was not seeking a finding of liability or a penalty for respondent’s non-compliance with the Order on Consent’s requirement to register the facility.

10. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 18, 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 May 18, 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 her PBS facility located at 50 Clark Street, Brooklyn, New York 11201 within 30 days of the transfer of ownership of the facility, 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 April 18, 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 May 18, 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 her PBS facility within 30 days of the transfer of ownership of the facility to her, 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 her PBS facility located at 50 Clark Street, Brooklyn, New York 11201, within 30 days of the transfer of ownership of the facility to her, 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/_____
Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
June 14, 2011

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of Josephine Owen – Region 2

June 2, 2011

Edirol File No. 020702124400

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
A	Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness (all dated February 24, 2011); and affidavit in support of Brooke Turallo, sworn to March 1, 2011.	✓	✓	Department Staff	
B	Affidavit of Service of Maria Mastroianni, sworn to May 17, 2011, including U.S. Postal Service printouts and track/confirm signature page	✓	✓	Department Staff	
C	Deed, including printout from New York City Automated City Register Information System and search information from NYS Department of Finance, Office of the City Register	✓	✓	Department Staff	
D	Affirmation of Mary Wojcik, Esq., dated May 16, 2011	✓	✓	Department Staff	
E	October 5, 2009 Order on Consent, with attached copy of \$1,000 money order dated September 24, 2009	✓	✓	Department Staff	
F	Petroleum Bulk Storage Application, received June 20, 1997	✓	✓	Department Staff	
G	Facility Information Report (printed 5/26/11)	✓	✓	Department Staff	
H	Petroleum Bulk Storage Certificate (issued 6/20/1997)	✓	✓	Department Staff	