NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Navigation Law article 12 and Environmental Conservation Law (ECL) article 17, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 613 by

Ruling on Department Staff's Motion for Order without Hearing

DEC Case No. R2-20030109-9

Robani Energy Incorporated and
Crystal Transportation Corporation,
RESPONDENTS.

June 28, 2004

**Proceedings**

This administrative enforcement action commenced with service of a notice of hearing and a complaint both dated January 15, 2003 upon Robani Energy Incorporated (Robani) and Crystal Transportation Corporation (Crystal) by certified mail, return receipt requested. The complaint asserts that Robani is a licensed corporation in New York State with its principal office at Starr Ridge Road, Brewster, New York 10509, and that Crystal is a licensed corporation in New York State with its principal office at 2010 White Plains Road, Bronx, New York 10462. According to the complaint, Robani and Crystal discharged, on April 9, 1999, more than 90 gallons of No. 2 fuel oil onto the basement floor of 60 Hamilton Terrace (the site), which is where Dr. Eli and Elena Avila (the Avilas)[1] used to reside.

In the complaint, Department Staff alleged that Robani and Crystal violated Navigation Law §§ 173, 175, and 176, and 17 NYCRR 32.5 when they discharged petroleum to the waters of the state without a permit, failed to contain the discharge, and failed to notify the Department of the discharge in a timely manner. It is unknown whether Robani or Crystal answered the January 15, 2003 complaint (*see* 6 NYCRR 622.4[a]).

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[1] With service of a notice of hearing and complaint dated April 22, 2003, Department Staff commenced an enforcement action against the Avilas (DEC Case No. R2-20030422-102). According to the April 22, 2003 complaint, the Avilas own the house at 60 Hamilton Terrace, and discovered a petroleum spill there on April 9, 1999. The April 22, 2003 complaint alleges that the Avilas violated 6 NYCRR 613.8 because they did not notify the Department of the spill at the site within two hours after discovering it. Rather, the Avilas allegedly reported the petroleum spill to the Department on December 10, 2002, some 44 months later. With a notice of motion dated April 16, 2004 and attached supporting papers, Department Staff moved for an order without hearing against Dr. Eli Avila. There, as here, Department Staff will defer issues concerning damages or relief to a hearing. A ruling granting Department Staff's motion for order without hearing as to the issue of liability against Dr. Avila was issued on June 28, 2004.

Subsequently, with a notice of motion dated April 21, 2004, Department Staff moved for an order without hearing pursuant to 6 NYCRR 622.12. In the motion, Department Staff asserts, for the first time in this proceeding, that Robani and Crystal violated 6 NYCRR 613.8 because they knew about the petroleum spill at the site on April 9, 1999 but failed to report it to the Department within two hours of its discovery.

Department Staff's papers consist of the notice of motion, an affidavit of service of the motion by Maxima Colon sworn to April 21, 2004, and an affirmation by David S. Rubinton, Esq., Assistant Regional Attorney. Attorney Rubinton attached three exhibits (D, E and F) to his affirmation. Exhibit D is a supporting affirmation by Gary Rawlins, Esq. from the law offices of Mark Kressner, Esq., dated June 12, 2002. Attached to Attorney Rawlins' affirmation is a copy of an appearance ticket (No. E 098 260 829) issued by Keith Williams from the New York City Department of Environmental Protection (NYC DEP). Exhibit D was submitted as part of a civil action in Supreme Court, New York County (Index No. 113217/99) between the Avilas, as plaintiffs, and Robani and Crystal, as co-defendants.

Attached as Exhibit E to the motion for order without hearing are copies of the notice of hearing and the complaint both dated January 15, 2003. Exhibit F is an affidavit of Jeffrey Vought sworn to March 4, 2004. This affidavit is identical to the one attached to Department Staff's motion concerning the Avilas (DEC Case No. R2-20030422-102). As noted above, the Avilas resided where the spill occurred. In the related administrative enforcement case concerning the Avilas, Mr. Vought's March 4, 2004 affidavit is identified as Exhibit S.

By its motion, Department Staff seeks a ruling limited to whether Robani and Crystal violated the notification requirement in 6 NYCRR 613.8. Attorney Rubinton's affirmation states that Department Staff "will defer to a live hearing at a later date to determine the issue of penalties in this case" (Attorney Rubinton's affirmation, paragraph 1).

Robani and Crystal oppose Department Staff's motion for order without hearing. Robani filed an affirmation by Christopher P. Foley, Esq., from the law firm of McCormick, Dunne & Foley, New York, New York dated June 17, 2004. Subsequently, Attorney Foley filed a letter dated June 18, 2004 to supplement the June 17, 2004 affirmation. Crystal filed an affirmation by Brian T. Stapleton, Esq., from the law firm of Carroll, McNulty & Kull, LLC, New York, New York dated June 18, 2004. The Office of Hearings and Mediation Services received Robani's and Crystal's respective papers in a timely manner on June 18, 2004.

In his affirmation, Attorney Foley provides three reasons, on behalf of Robani, why Department Staff's motion for order without hearing should be denied. First, Robani asserts that the reporting requirement in 6 NYCRR 613.8 only applies to persons who own or operate petroleum bulk storage facilities of 1,100 gallons or more. To support this assertion, Robani cites the ALJ's ruling in the *Matter of Donald Middleton; Middleton, Kontokosta Associates, Ltd.,* DEC Case No. R1-6039, dated October 14, 1998. Robani acknowledges that the

Commissioner overruled the ALJ in a ruling dated December 31, 1998, but argues that the ALJ's reasoning was rational, and the Commissioner's was not.

Robani argues further that the notification requirement in 6 NYCRR 613.8 is unenforceable because the regulatory requirement exceeds the scope of the authorizing statute. To support this argument, Robani cites *Boreali v Axelrod*, 71 NY2d 1.

Third, Robani contends that the evidence filed with Department Staff's motion for order without hearing is not in the proper form. To support this contention, Robani cites *Zuckerman v City of New York*, 49 NY2d 557. According to Robani, Attorney Rubinton's affirmation and Attorney Rawlins' affirmation (*see* Exhibit D to Department Staff's motion for order without hearing) are not admissible because these two attorneys do not have personal knowledge of the events alleged to have occurred at the site. Robani concludes that Department Staff did not meet its burden with respect to the motion.

In the June 18, 2004 letter, Robani observes that Department Staff's motion for order without hearing alleges a violation of 6 NYCRR 613.8, but the January 15, 2003 complaint alleges violations of the Navigation Law. Robani argues that Department Staff cannot seek summary relief for a charge that was not originally alleged in the complaint.

By its counsel's affirmation, Crystal incorporates by reference the facts and arguments presented in Attorney Foley's affirmation.

**Discussion**

Pursuant to 6 NYCRR 622.12(a), Department Staff may move for an order without hearing "[i]n lieu of or in addition to a notice of hearing and complaint." Although a motion for order without hearing is an alternative method for commencing a proceeding (*see* 6 NYCRR 622.3[b][1]), Department Staff chose to commence this enforcement action with service of a notice of hearing and complaint. Consequently, any subsequent motion for order without hearing must relate to the original charges alleged in the January 15, 2003 complaint, unless Department Staff amends the original charges.

Here, Department Staff did not amend the complaint before service of the notice of motion for order without hearing, or seek leave to amend the complaint as part of the motion for order without hearing. Department Staff's motion papers, in general, and Attorney Rubinton's affirmation, in particular, offer nothing about the status of the charges in the January 15, 2003 complaint concerning the alleged violations of the Navigation Law. It cannot be determined from Department Staff's papers whether the alleged violations of the Navigation Law have been resolved or withdrawn. It is unknown whether Department Staff wants to add the alleged violation of 6 NYCRR 613.8 to the three alleged violations of the Navigation Law or substitute this new charge for the original charges.

Given this lack of clarity, Robani and Crystal do not have adequate notice of the charges alleged against them, and I do not know what charges are before me. Therefore, I deny Department Staff's motion for order without hearing. A hearing will be necessary to determine liability and relief.

Prior to the hearing, Department Staff shall provide a concise state of the matters asserted (*see* 6 NYCRR 622.3[a][1][iii]). The Department Staff shall clarify whether the charges to be considered at hearing are the ones alleged in the January 15, 2003 complaint concerning Navigation Law §§ 173, 174 and 175, an alleged violation of 6 NYCRR 613.8, or some combination of these charges. After Department Staff provides this clarification, and depending on what the charges are, Robani and Crystal will have 20 days either to amend their original, respective answers, if Respondents filed answers to the January 15, 2003 complaint, or file new answers in a manner consistent with the requirements outlined in 6 NYCRR 622.4(a).

**Ruling**

Department Staff's motion for order without hearing is denied.

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Daniel P. O'Connell
Administrative Law Judge

Dated: June 28, 2004
Albany, New York

To: Christopher P. Foley, Esq.
McCormick, Dunne & Foley
61 Broadway, Suite 2100
New York, New York 10006-2767

Robani Energy, Inc
Starr Ridge Road
Brewster, New York 10509

Brian T. Stapleton, Esq.
Carrol, McNulty & Kull, LLC
270 Madison Avenue, 13th Floor
New York, New York 10016

Gilbert F. Rella
Crystal Transportation, Corp.
2010 White Plains Road
Bronx, New York 10462

David S. Rubinton, Esq.
Assistant Regional Attorney
NYS DEC Region 2

47-40 21st Street
Long Island City, New York 11101-5407