

In the Matter of the Alleged
Violation of Article 17 of the
New York State Environmental
Conservation Law and Title 6
of the Official Compilation of
Codes, Rules and Regulations
of the State of New York

ORDER

Case No: 7-129453

- by -

JAMES ROGAN,

Respondent.

WHEREAS :

1. Pursuant to a notice of hearing and complaint dated January 23, 2004, staff of the New York State Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against James Rogan ("respondent").
2. The complaint asserted that respondent failed to timely register his petroleum bulk storage facility, as required by section 17-1009 of the Environmental Conservation Law ("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"). The Department's records revealed that the registration for respondent's petroleum bulk storage facility, located at 825 Danby Road, Ithaca, New York, expired on June 5, 2002.
3. Respondent was served with the notice of hearing and complaint via certified mail (no. 1272 4032), return receipt requested, as stated in the affidavit of service sworn to by Lisa M. Cerniglia on April 16, 2004. A copy of the certified mail return receipt accompanied the motion, indicating that item no. 1272 4032 was signed for on January 26, 2004.
4. The notice of hearing stated that failure to submit an answer to the complaint within twenty days of receipt of the notice of hearing and complaint, or to appear at a pre-hearing conference scheduled for February 23,

2004 at the Department's Region 7 offices in Syracuse, New York, would result in a default and waiver of respondent's right to a hearing.

5. Service of process complied with 6 NYCRR 622.3.
6. Respondent failed to appear for the pre-hearing conference, and failed to serve an answer to the complaint or otherwise oppose the relief sought by Department staff.
7. On April 23, 2004, Department staff made a motion for default judgment pursuant to 6 NYCRR 622.15, by filing the motion with the Office of Hearings and Mediation Services. No response to the motion for default judgment was received from respondent.
8. The matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa. A copy of the ALJ's summary report on motion for default judgment, which I adopt subject to the comments in this order, is attached.

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.
- II. Respondent is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations in the complaint are deemed admitted, and respondent is found to have violated ECL 17-1009 and 6 NYCRR 612.2.
- III. Respondent is assessed a civil penalty in the amount of seven thousand five hundred dollars (\$7,500). Respondent shall, within ten days of receipt of this order, pay this penalty by cashier's check, certified check or money order payable to the order of "NYSDEC," and send by certified mail or overnight delivery, or hand deliver the payment to the Department at the following address: Scott A. Herron, Esq., Senior Attorney, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.
- IV. Within thirty days of the date of this order, respondent shall submit to the Department a completed

application to register its petroleum bulk storage facility, as well as a certified check or money order in the amount of the registration fees required pursuant to 6 NYCRR 612.3.

- V. All communications with the Department concerning this order shall be made to: Scott A. Herron, Esq., Senior Attorney, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.
- VI. The provisions, terms and conditions of this order shall bind respondent and his heirs and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

/s/

By: Erin M. Crotty, Commissioner

Dated: Albany, New York
October 18, 2004

(VIA CERTIFIED MAIL)

James Rogan
Mark IV Gasoline
825 Danby Road
Ithaca, New York 14850

(VIA REGULAR MAIL)

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JAMES ROGAN,

Respondent.

**Summary Report On
Motion for Default
Judgment**

Case No. 7-129453
June 18, 2004

PROCEEDINGS

Pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Section 622.15, Staff of the New York State Department of Environmental Conservation ("Department Staff") has moved for a default judgment against the Respondent, James Rogan. Department Staff made its motion on April 23, 2004 by filing the following papers with the Department's Office of Hearings and Mediation Services:

1. A Notice of Motion for Default Judgment, dated April 16, 2004;
2. The Affirmation of Scott A. Herron In Support of Motion for Default Judgment (the "Herron Affirmation"), dated April 16, 2004;
3. The Affidavit of Richard Coriale, sworn to April 12, 2004 (the "Coriale Affidavit");
4. An Affidavit of Service, sworn to on April 16, 2004; and
5. A proposed order.

On April 23, 2004, Department Staff mailed the motion for default judgment to Respondent. The case was assigned to Administrative Law Judge ("ALJ") Maria E. Villa.

On or about January 23, 2004, Department Staff mailed to Respondent via certified mail (no. 1272 4032), return receipt requested, a notice of hearing and complaint, both dated January 23, 2004. The receipt for certified mail for item no. 1272 4032 was signed by Wendy Darling on January 26, 2004. Pursuant to 6

NYCRR Section 622.6, the time for Respondent to answer or otherwise move with respect to the complaint expired on or about February 17, 2004. The Herron Affirmation states that Respondent failed to serve an answer to the complaint.

The complaint states that Respondent owns a petroleum bulk storage facility located at 825 Danby Road, Ithaca, New York, and alleges that Respondent failed to register the facility with the Department, in violation of 6 NYCRR section 612.2 and ECL section 17-1009. Section 612.2(a)(1) provides that the owner of any petroleum bulk storage facility having a capacity of over 1,100 gallons must register the facility with the Department. Section 612.2(a)(2) states that the facility's registration must be renewed every five years from the date of the last valid registration until the Department receives written notification that the facility has been permanently closed or that ownership of the facility has been transferred. ECL section 17-1009(2) [effective until April 1, 2004] provides that all owners must register a petroleum bulk storage facility with the Department. The version of the statute that became effective on April 1, 2004 contains essentially identical language.

According to the complaint, the Department's records indicate that Respondent's petroleum bulk storage facility registration expired on June 5, 2002. The Coriale Affidavit states that the Department's records show that James Rogan is the owner of the facility. The Coriale Affidavit goes on to state that, as of the date of the Affidavit, the facility remained in violation of 6 NYCRR section 612.2 and ECL section 17-1009. The complaint seeks a penalty of \$7,500, as well as an order requiring Respondent to submit a completed application to register the facility and a certified check or money order in the amount of the registration fees required under 6 NYCRR section 612.3. The relief requested in Department Staff's motion for default judgment is similar.

With respect to the penalty sought, the Herron Affirmation states that the petroleum bulk storage facility registration requirement "is one of the cornerstones of the petroleum bulk storage regulatory scheme," and states further that "[t]he failure to comply with this regulatory requirement inhibits the regulatory oversights mandated by Title 10 of Article 17 of the ECL." Herron Affirmation, ¶ 8. According to the Herron Affirmation, Respondent avoided compliance costs by failing to register the facility, and that this violation has existed since June 5, 2002, and continues as of the date of the Affirmation. Id. Based upon these facts, the Herron Affirmation contends that the \$7,500 penalty requested is appropriate under the

Department's Civil Penalty Policy and ECL section 71-1929, which provides for a penalty of up to \$37,500 per day for each violation of titles 1 through 11 inclusive and title 19 of article 17, or the implementing regulations.

The Notice of Hearing required that Respondent attend a pre-hearing conference, pursuant to 6 NYCRR Section 622.8. The Herron Affirmation states that Respondent failed to appear at the pre-hearing conference, which was scheduled for 11:50 a.m. on February 23, 2004 at the Department's Region 7 offices at 615 Erie Boulevard West, Syracuse, New York.

Pursuant to 6 NYCRR Section 622.6(c)(3), the time for Respondent to file a response to Department Staff's motion for a default judgment expired on or about May 3, 2004. No response has been received as of the date of this summary report.

Default Procedures

Section 622.15 of 6 NYCRR, "Default procedures," provides in pertinent part:

1. A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent's right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.
2. The motion for a default judgment may be made orally on the record or in writing and must contain:
 - (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
 - (2) proof of the respondent's failure to appear or failure to file a timely answer; and
 - (3) a proposed order.

3. Upon a finding by the ALJ that the requirements of subdivision (b) of this section have been adequately met, the ALJ will submit a summary report, which will be limited to a description of the circumstances of the default, and the proposed order to the commissioner.

The following Findings are based upon the papers submitted, as identified above.

FINDINGS

1. The notice of hearing and complaint were sent certified mail, return receipt requested, addressed to James Rogan, Mark IV Gasoline, 825 Danby Road, Ithaca, New York 14850.
2. The United States Postal Service returned the return receipt for certified mail, signed by Wendy Darling on January 26, 2004. A copy of the return receipt is attached as Exhibit D to the motion.
3. No response to the complaint has been received.
4. Respondent owns a petroleum bulk storage facility located at 825 Danby Road, Ithaca, New York 14850. The Department's records indicate that the facility's registration expired on June 5, 2002, and no renewal of the facility's registration has been received.
5. The notice of hearing and complaint required Respondent to appear at a pre-hearing conference on February 23, 2004 at the Department's Region 7 offices at 615 Erie Boulevard West, Syracuse, New York. Respondent failed to appear at the pre-hearing conference.
6. By letter dated April 23, 2004, the motion for default judgment was filed with the Office of Hearings and Mediation Services, and mailed to Respondent.
7. As of April 23, 2004 (the date of the motion papers), Respondent had not served an answer or otherwise moved with respect to the complaint.
8. No response to the Department's motion for default judgment has been filed.
9. The requirements for a default judgment have been met adequately as prescribed by 6 NYCRR section 622.15(b).

CONCLUSION AND RECOMMENDATION

Respondent violated ECL section 17-1009(2) and 6 NYCRR section 612.2(a)(2) by failing to register his petroleum bulk storage facility with the Department. Respondent defaulted by failing to answer the complaint and failing to appear for the pre-hearing conference. Moreover, Department Staff's complaint sets forth a *prima facie* case with respect to each cause of action articulated and provides the jurisdictional basis upon which the relief requested can be ordered by the Commissioner. The motion for a default judgment can be granted. This summary report and proposed order (attached hereto) are referred to the Commissioner for final determination.

/s/

Maria E. Villa
Administrative Law Judge

Albany, New York
June 18, 2004

(VIA CERTIFIED MAIL)

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825 Danby Road
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