STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

2526 VALENTINE LLC,

Respondent.

RULING OF THE ADMINISTRATIVE LAW JUDGE ON MOTION FOR DEFAULT JUDGMENT

DEC Case No. R2-20070604-242

Staff of the Department of Environmental Conservation ("Department") moves for a default judgment against respondent 2526 Valentine LLC ("respondent"). For the reasons that follow, Department staff's motion is denied without prejudice.

PROCEEDINGS

On November 29, 2007, Department staff initiated this administrative enforcement proceeding against respondent 2526 Valentine LLC ("respondent"), by serving a copy of a second notice of hearing dated November 29, 2007, and a complaint dated September 19, 2007.[1] Service of the papers commencing the action was accomplished by certified mail (see 6 NYCRR 622.3[a][3]).[2]

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[1] Staff initially attempted to commence the proceeding by means of a notice of hearing dated September 19, 2007. Because of an omission in the original notice, staff re-commenced the action with a second notice of hearing.

[2] On September 4, 2008, Department staff provided the Administrative Law Judge with a copy of a letter sent to respondent with an attached affidavit of additional service pursuant to CPLR 3215(g)(4) of the second notice of hearing and complaint. The affidavit averred that the second notice of hearing and complaint were mailed by regular mail and were accompanied by a notice to respondent that service was pursuant to Business Corporation Law § 306(b) (service of process on Secretary of State as agent of a domestic corporation). Staff provided no proof on this motion, however, that the second notice

According to staff's complaint, respondent is the owner of a residential building and petroleum bulk storage ("PBS") facility at property located at 60 East 177th Street, Bronx, New York (identified as PBS Facility #2-309370 in the Department's database), and is the owner of a residential building and PBS facility at property located at 2526 Valentine Avenue, Bronx, New York (identified as PBS Facility #2-290335 in the Department's database). The complaint contends that respondent acquired both of these PBS facilities ("East 177th Street" and "2526 Valentine Avenue") on December 1, 2003.

The complaint alleges that, on April 23, 2007, the Department's spills telephone hotline received notification from the New York City Department of Environmental Protection of a petroleum discharge ("spill") at respondent's East 177th Street facility. The spill was allegedly caused "by boiler failure and resulted in the accumulation of oil in the building" (Complaint, ¶ 7). Staff alleges that respondent failed to notify the Department of the spill and failed to immediately contain and remediate the spill which, according to staff, remains active and unaddressed by respondent (spill number 0700945). In addition, staff's complaint indicates that, since acquiring the East 177th Street PBS facility in December 2003, respondent has failed to register one 3,000-gallon aboveground storage tank ("AST") containing #2 fuel oil on that property with the Department.

The complaint also alleges that, since acquiring the Valentine Avenue PBS facility in December 2003, respondent has failed to register one 5,000-gallon AST containing #2 fuel oil on that property with the Department.

Based upon the foregoing, staff alleged four separate causes of action against respondent as follows:

1. Respondent violated Environmental Conservation Law ("ECL") §§ 17-0501 and 17-0807, and Navigation Law ("NL") § 173 at 60 East 177th Street, Bronx, New York, by illegally discharging petroleum into the waters of the State without a permit from April 23, 2007, to the date of the complaint;

2. Respondent violated ECL 17-1743, section 613.8 of

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of hearing and complaint were served pursuant Business Corporation Law § 306(b). Thus, the purpose or effect of the affidavit of service pursuant to CPLR 3215 is not clear.

title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), NL § 175, and 17 NYCRR 32.3 by failing to notify the Department of a petroleum discharge at 60 East 177th Street, Bronx, New York, from April 23, 2007, to the date of the complaint;

3. Respondent violated NL § 176 and 17 NYCRR 32.5 by failing to immediately undertake containment of a petroleum discharge at 60 East 177th Street, Bronx, New York from April 23, 2007, to the date of the complaint; and

4. A. Respondent violated 6 NYCRR 612.2(b) by failing to properly register the PBS facility at 60 East 177th Street, Bronx, New York from December 31, 2003 (30 days after taking title to that property); and

B. Respondent violated 6 NYCRR 612.2(b) by failing to properly register the PBS facility at 2526 Valentine Avenue, Bronx, New York from December 31, 2003 (30 days after taking title to that property).

The November 29, 2007, second notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent must serve an answer upon Department staff within twenty (20) days of receiving the complaint. As provided for by 6 NYCRR 622.8, the second notice of hearing also scheduled a pre-hearing conference for December 19, 2007, at the Department's Region 2 headquarters in Long Island City, New York. The second notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondent would be in default and would waive its right to a hearing (see 6 NYCRR 622.3 and 622.15). Department staff's affirmation in support of its motion for a default judgment states that respondent's attorney appeared for the December 19, 2007, pre-hearing conference (see Urda Affirmation, ¶ 8).[3]

On December 10, 2007, the Department's Office of Hearings and Mediation Services ("OHMS") received a letter dated December 5, 2007, from Michele Staley, on respondent's letterhead. The letter stated that Ms. Staley's office is the

[3] According to Mr. Urda, respondent's attorney was advised at the pre-hearing conference that respondent's answer to staff's complaint was due by December 24, 2007 (see Urda Affirmation, ¶ 8).

management company for respondent. She indicated that when her office took over management of respondent's facilities in April 2007, she had not been informed of the spill by the prior management company. She further indicated that the spill was cleaned up by a licensed boiler company and that both PBS tanks had been registered. Attached to Ms. Staley's letter is an invoice from Eastmond & Sons, Inc., for a cleanup at and disposal of oil from the 60 East 177st Street site on July 17, 2006. Administrative Law Judge ("ALJ") Mark D. Sanza forwarded a copy of the Staley letter to counsel for Department staff.[4]

On March 18, 2008, John K. Urda, Esq., Assistant Regional Attorney with the Department's Division of Legal Affairs in Region 2, filed with OHMS a notice of motion and motion for default judgment, each dated March 18, 2008, along with supporting papers, against respondent. The supporting papers consist of an attorney affirmation by Mr. Urda dated March 18, 2008 ("Urda Affirmation"), along with attached Exhibits marked "A" through "C."

Exhibit "A" contains a copy of Department staff's second notice of hearing against respondent dated November 29, 2007, and staff's complaint against respondent dated September 19, 2007.

Exhibit "B" contains the affidavit of service of Department Region 2 staff employee Louise Munster sworn to November 29, 2007, averring that, on November 29, 2007, she served Department staff's second notice of hearing and complaint against respondent by certified mail, return receipt requested, at P.O. Box 231027, Great Neck, New York 11023-0027. Exhibit "B" also contains a copy of the certified mail receipt for service of staff's papers signed for, on behalf of respondent, at the above address on December 3, 2007.

Exhibit "C" is a copy of Department staff's proposed order for its default motion.

Department staff's March 18, 2008, notice of motion indicates that the motion and supporting papers, as described previously, were copied to respondent and to its attorney, Otis

[4] ALJ Sanza was originally assigned to Department staff's motion. Upon ALJ Sanza's recusal from the case, the matter was reassigned to Chief ALJ James T. McClymonds.

G. Allen, Esq., of Cohen Hochman & Allen.[5]

Pursuant to the Department's regulations, all parties have five days after a motion is served to file a response (see 6 NYCRR 622.6[c][3]). When the time for performance of some act is measured from the service of an interlocutory paper (such as a motion), and service is made by mail, the party so served has five additional days within which to act (see 6 NYCRR 622.7[b][2][i]). Thus, respondent had until March 28, 2008 to file a response to Department staff's default motion. To date, neither respondent's attorney, nor anyone else on respondent's behalf, has served or filed any papers in response to Department staff's motion for default judgment.

The basis for staff's motion for default judgment, as set forth in the Urda Affirmation, is respondent's failure to file a timely answer to staff's September 19, 2007 complaint by December 24, 2007 (20 days after respondent's receipt of staff's second notice of hearing and complaint) (see Urda Affirmation, ¶¶ 6, 7, and 9). Accordingly, Department staff seeks an order holding respondent liable for all four causes of action, imposing a civil penalty in the amount of $100,000, and requiring respondent to remediate the spill consistent with a Department approved work plan.

DISCUSSION

In accordance with the Department's uniform enforcement regulations, Department staff may commence an administrative enforcement proceeding by service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Service of a notice of hearing and complaint "must be by personal service consistent with the CPLR or by certified mail. Where service is by certified mail, service shall be complete when the notice of hearing and complaint is received" (see 6 NYCRR 622.3[a][3]).

A respondent's failure either to file a timely answer or to appear at a pre-hearing conference constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under those circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), staff's default motion must contain the following:

1. Proof of service upon the respondent of the notice

[5] By letter dated April 29, 2008, Mr. Allen subsequently withdrew as respondent's counsel in this proceeding.

of hearing and complaint or other such document which commenced the proceeding;

2. Proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and

3. A proposed order.

Service of the Motion for Default Judgment

Because the Department's regulations governing motions for a default judgment do not expressly prescribe the circumstances under which a defaulting respondent is entitled to notice of the motion by staff for a default judgment (see 6 NYCRR 622.15), the Department applies CPLR 3215(g) for the applicable procedures (see Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004, at 2-3). Under CPLR 3215(g)(1), notice of an application for a default judgment is required only where the defending party has appeared or where more than one year has elapsed between the date of the default and the motion (see Matter of Makhan Singh, at 2-3).

According to the Urda Affirmation, respondent "appeared" through its attorney in this action at a pre-hearing conference held on December 19, 2007 (see Urda Affirmation, ¶¶ 8 and 9). Thus, respondent was entitled to notice of Department staff's motion for a default judgment. However, Department staff has failed to establish that its motion was served upon respondent. Although Department staff's notice of motion indicates that it was copied to respondent and respondent's attorney, staff provides no affidavit of service or other proof indicating that the motion was in fact mailed to respondent or its attorney. Thus, because Department staff has failed to establish that it provided notice to respondent pursuant to CPLR 3215(g)(1), its motion must be denied without prejudice.

Department staff's lack of proof of service of the motion for a default judgment may be easily cured. However, the complaint and Department staff's penalty analysis suffer several further deficiencies that must be addressed before any further proceedings are had in this matter. Those deficiencies are as follows.

Failure To State a Claim

On a motion for a default judgment, a defaulting respondent waives the right to a hearing on liability, and is

deemed to have admitted the factual allegations of the complaint (see 6 NYCRR 622.15[a]; Matter of Alvin Hunt d/b/a Our Cleaners, Commissioner Decision and Order, July 25, 2006, at 3-4). Thus, the ALJ and ultimately the Commissioner evaluate the complaint to determine whether the factual allegations of the complaint state a claim (see Matter of Alvin Hunt, at 4-5).

In its first cause of action, Department staff alleges that respondent violated ECL 17-0501, ECL 17-0807, and NL § 173 by illegally discharging petroleum into the waters of the State. However, staff's factual assertion supporting this cause of action is merely that a boiler failure resulted in "the accumulation of oil in the building" (Complaint, ¶ 2). The complaint contains no factual allegation that the accumulated oil directly or indirectly discharged to the waters of the State. Thus, the complaint fails to state a claim for violations of ECL 17-0501 or ECL 17-0807.[6]

Furthermore, to state a claim for a violation of ECL 17-0501, the complaint must also identify the State water quality standard allegedly contravened by the discharge (see Matter of Amabile, Commissioner Order, July 12, 2006, at 3; Matter of Kent, Commissioner Order, Dec. 7, 1992, at 1; Matter of Wiese, Commissioner Order, May 21, 1992, at 1). The complaint in this proceeding fails to identify a water quality standard established by 6 NYCRR part 700, et seq., that was allegedly contravened by the petroleum discharge.

Penalty and Remedial Relief

As noted above, when a respondent defaults, it waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, however, still has the obligation to prove damages and the need for any appropriate remedial relief (see Matter of Alvin Hunt, at 3-4, 8-9). With respect to penalty, the ALJ considers whether the penalty sought by Department staff and the justification provided in support fall within the maximum penalty provided for by statute, and is consistent with the Department's Civil Penalty Policy (Commissioner Policy DEE-1, June 20, 1990) and other specific

[6] Because Navigation Law § 173 prohibits discharges of petroleum without any further requirement of a discharge to the waters of the State, the complaint states a claim for the violation of the Navigation Law (see Matter of Kent, Commissioner Order, Dec. 7, 1992, at 1).

program policies, among other considerations (see Matter of Alvin Hunt, at 8-9). In this case, the Department's Petroleum Bulk Storage Inspection Enforcement Policy (DEC Program Policy DEE-22, May 21, 2003) and its PBS Penalty Schedule would apply.

With respect to the penalty sought by Department staff, staff calculated the maximum penalty available from the date of the alleged violations to the date of the complaint, September 19, 2007. The Department's own records, however, reveal that the PBS registration for the East 177th Street facility was renewed on or about August 3, 2007, thereby confirming Ms. Staley's assertion in her December 2005 letter. Thus, to calculate the maximum penalty to the date of the complaint for the count of the fourth cause of action related to the East 177th Street site is inappropriate. Moreover, the Department's records also reveal that the registration for the 2526 Valentine Ave. site was renewed on or about October 11, 2007. Although this date is after the date of the complaint, the fact that the registration was renewed is relevant to the consideration of the appropriate penalty, particularly where that renewal occurred before the motion for a default judgment was filed.

In addition, the documentation supplied by Ms. Staley suggests that the petroleum discharge at the East 177th Street site may have been remediated on or about July 17, 2006, over one year prior to the date of the complaint. Thus, to calculate the maximum available penalty for the first cause of action (discharge of petroleum) and the third cause of action (containment of discharge), without any indication that the spill may have been remediated, is also inappropriate. In addition, the fact that the site may have been remediated is also relevant to the remedial relief sought by Department staff.

Finally, with respect to penalty, in its analysis in support of its recommended penalty, Department staff makes no reference to DEE-22, or justify its variance from the recommended penalties provided for in the penalty schedule.

With respect to Department staff's failure to address the renewal of respondent's registrations for the two PBS facilities, or the potential remediation of the East 177th Street site, Department staff's obligation to adequately and accurately inform the ALJ and the Commissioner of the factual circumstances underlying a motion for a default judgment cannot be overly stressed. Presently, unlike default judgment motions under the CPLR (see CPLR 3215[f]), Department staff is not required on default judgment motions to provide factual affidavits or other proof in support of its default judgment motions under 6 NYCRR

part 622 (see Matter of Alvin Hunt, at 7). The circumstance that Department staff is not required on default judgment motions to support the factual assertions in its complaints, however, does not absolve staff from the obligation to assure that Commissioner orders imposing liability, monetary penalties, and remedial obligations are based upon actual facts, and not merely upon unconfirmed allegations. This is particularly true where the factual circumstances underlying a default judgment motion are reasonably ascertainable by reference to the Department's own records, or where relevant factual circumstances come to light, as in this case, that reasonably require further inquiry.

RULING

Department staff's motion for a default judgment is denied without prejudice.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: January 6, 2009
Albany, New York

TO: Attached Service List