

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Articles 15, 17 and
24 of the New York State Environmental
Conservation Law, and Title 6, Parts 608 and
663 of the Official Compilation of Codes,
Rules and Regulations of the State of New
York,

- by -

**ANTHONY COSTA a/k/a ANTHONY GAGLIARDI, TERRYANN GAGLIARDI,
JEANNETTE GAGLIARDI, KATHLEEN A. KRIEG, ALFRED GALPINE, CLOVER
DRAINAGE, INC., THOMAS J. KEARNS, individually and as owner of
Clover Drainage, Inc., L. PETROSINO, INC. and JOHN IPPOLITO
TRUCKING & EXCAVATING, INC.,**

Respondents.

DEC File Nos. R2-20050622-187 and R2-20050622-188

INTERIM DECISION OF THE COMMISSIONER

June 22, 2007

INTERIM DECISION OF THE COMMISSIONER

Department staff commenced this administrative enforcement proceeding by service of an October 3, 2005 complaint. The complaint alleged 71 separate violations against nine respondents, including respondent Anthony Costa and his wife, respondent Terry Ann Gagliardi. The alleged violations arose from the installation of a pipe and fill behind two houses located in Staten Island, New York, during the summer of 2005. The Department alleged various violations of ECL articles 15 (protection of waters) and 24 (freshwater wetlands), and their implementing regulations. Respondents Costa and Gagliardi are the owners of one of the houses.

Respondents Costa and Gagliardi failed to file answers to the complaint. On October 5, 2005, Department staff moved, among other things, for an order without hearing on its complaint pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Respondents Costa and Gagliardi did not respond to the motion.

Administrative Law Judge ("ALJ") P. Nicholas Garlick issued a ruling on staff's motion on June 28, 2006. In that ruling, among other things, ALJ Garlick determined that staff established the liability of respondents Costa and Gagliardi for eight of the 24 separate violations alleged against them, and directed that a hearing on the issue of penalty be held.

On August 11, 2006, respondents Costa and Gagliardi filed a motion to vacate their default in answering the complaint, for leave to file a late answer, and to stay any further proceedings pending resolution of their motion. Department staff opposed the motion.

On December 13, 2006, ALJ Garlick issued a ruling (1) denying respondent Costa's motion in its entirety, and (2) granting respondent Gagliardi's motion to the extent of directing a hearing on the issue whether Department staff personally served the complaint upon respondent Gagliardi. As to respondent Gagliardi, the ALJ concluded that she raised a factual issue concerning whether the Department properly obtained personal jurisdiction over her. As to respondent Costa, the ALJ concluded that he failed to establish good cause for his default in answering and failed to establish, with an affidavit of merit, a meritorious defense to the complaint.

On December 19, 2006, respondents Costa and Gagliardi

filed an appeal with the Commissioner challenging the ALJ's December 13, 2006 ruling. Department staff filed an affirmation in opposition, arguing that no expedited interlocutory appeal lies as of right from the ALJ's ruling. Staff also argues that even assuming respondents had properly moved for leave to appeal, they failed to meet the standards for granting leave.

Respondents filed an reply affirmation arguing that Department staff's affirmation in opposition to the appeal was untimely, and that they satisfied the "undue prejudice" standard for granting leave to appeal.

Department staff filed a letter dated January 19, 2007, objecting to respondents' reply affirmation as unauthorized and requesting that the affirmation be disregarded.

As an initial matter, Department staff's affirmation in opposition is untimely and, therefore, will not be considered on this appeal. Moreover, respondents' reply affirmation was not authorized and, therefore, will also not be considered.

Respondents' appeal must be dismissed. Under the Department's uniform enforcement hearing procedures (6 NYCRR part 622 ["Part 622"]), any ruling of an ALJ may be appealed to the Commissioner as of right after the completion of all testimony (see 6 NYCRR 622.10[d][1]). In this case, the penalty phase of the hearing has not yet been conducted. Thus, an appeal pursuant to 6 NYCRR 622.10(d)(1) is not yet available.

Part 622 also authorizes expedited, interlocutory appeals prior to the completion of the hearing process. However, except for ALJ rulings denying recusal motions, parties must move for leave to file an expedited appeal before appeals from interlocutory ALJ rulings will be entertained (see 6 NYCRR 622.10[d][2]; Matter of Bath Petroleum Storage, Inc., Commissioner's Second Interim Decision, Jan. 26, 2005, at 2). ALJ Garlick's December 13, 2006 ruling did not deny a motion for recusal. Accordingly, the December 13, 2006 ruling is not appealable as of right on an expedited, interlocutory basis and, thus, respondents' appeal should be dismissed on that ground.

Instead of appealing as of right, respondents were required to seek permission for leave to file the expedited, interlocutory appeal. Respondents, however, failed to file a formal motion for leave to appeal. Moreover, even assuming respondents' unauthorized reply affirmation is considered, which it is not, such reply is insufficient to serve as a motion for leave or otherwise demonstrate that the standards for granting

leave to appeal are satisfied (see 6 NYCRR 622.10[d][2][ii]).

Accordingly, respondents' appeal is dismissed and the matter is remanded to the ALJ for further proceedings consistent with this interim decision.

For the New York State Department
of Environmental Conservation

/s/

By: Alexander B. Grannis
Commissioner

Dated: June 22, 2007
Albany, New York

cc:

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