

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State 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 to Vacate Ruling dated June 28, 2004

DEC Case No. R2-20030422-102

Dr. Eli Avila and Elena Avila,
RESPONDENTS.

August 18, 2004

Proceedings

In a letter dated August 3, 2004, Department Staff moves to vacate my ruling dated June 28, 2004 concerning its motion for order without hearing dated April 16, 2004. In addition, Department Staff states that it withdraws the April 16, 2004 motion, and that it will commence a new action against Respondents related to alleged violations of Navigation Law article 12. According to Department Staff's August 3, 2004 letter, Respondents agree to discontinue the action related to the April 16, 2004 motion for order without hearing, and do not object to Department Staff commencing a new action.

This administrative enforcement action commenced with service of a notice of hearing and complaint both dated April 22, 2003 upon Eli and Elena Avila (the Avilas) concerning an alleged oil spill at their home located at 60 Hamilton Terrace, New York, New York. According to the complaint, the Avilas became aware of a petroleum spill on April 9, 1999 when they discovered more than 90 gallons of fuel oil on the floor of their basement. The complaint alleges that the Avilas violated 6 NYCRR 613.8 because they did not notify the Department of the petroleum spill at their home within two hours of its discovery.

With a notice of motion dated April 16, 2004, Department Staff moved for an order without hearing pursuant to 6 NYCRR 622.12. The Avilas opposed Department Staff's motion for order without hearing, and filed an affirmation by Zara Sarkisova, Esq., dated May 25, 2004 and an affidavit by Dr. Eli N. Avila sworn to May 27, 2004.

After considering the parties' papers, I issued a ruling dated June 28, 2004, which granted Department Staff's motion for order without hearing with respect to Dr. Eli Avila's liability. Consistent with Department Staff's request, the ruling also scheduled a hearing with respect to relief. The June 28, 2004 ruling included findings of fact established as a matter of law pursuant to 6 NYCRR 622.12.

Subsequently, I discovered Department guidance documents, not part of the record of this case, concerning the applicability of 6 NYCRR part 613 to the Avilas. That information consisted of: (1) *Final Guidance and Responsiveness Summary regarding Petroleum Spill Reporting*, effective May 1, 1996; (2) Section 1.1 of the *Spill Guidance Manual*, "Spill Reporting and Initial Notification Requirements;" and (3) the index for the *Spill Guidance Manual*. The latter two documents are available on the Department's website at: <http://www.dec.state.ny.us/website/der/spills/guidance/spillguidancemanual/>.

Upon review of these documents, I held a conference call on July 12, 2004 with the parties, and stated that I found it necessary to revisit the issue whether 6 NYCRR part 613 applies to the Avilas. During the conference call, the parties and I developed a briefing schedule to address this legal question. By letter dated July 8, 2004, I established a briefing schedule, and provided the parties with copies of the guidance documents.

Discussion and Ruling

Pursuant to 6 NYCRR 622.10(b)(1), I have the discretion to vacate a ruling (*see McMahon v. City of New York* 105 AD2d 101; CPLR 5015). Although Department Staff has withdrawn its April 16, 2004 motion for order without hearing, which essentially discontinues the captioned enforcement action, I found, as a matter of law, in the June 28, 2004 ruling that the reporting requirement in 6 NYCRR 613.8 applied to the Avilas, based on the record before me. The applicability criteria at 6 NYCRR 613.1(b), and the guidance documents identified above establish that the reporting requirement would not apply, however. Accordingly, I grant Department Staff's motion to vacate my June 28, 2004 ruling.

Vacatur means that any findings of fact or conclusions made in the June 28, 2004 ruling are no longer valid and, therefore, may not be relied upon in any future enforcement action against the Avilas concerning the events that allegedly occurred at their home in April 9, 1999.

Further Proceedings

Because the captioned enforcement action is discontinued, no further proceedings are necessary. In addition, the briefing schedule set forth in my letter dated July 8, 2004 is cancelled.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: August 18, 2004
Albany, New York

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