

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

RULING ON MOTION

- By -

ANTHONY COSTA a/k/a ANTHONY GAGLIARDI,  
TERRY ANN 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 & EXCAVATION, INC.,

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

December 13, 2006

Respondents.

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#### SUMMARY

Anthony Costa and his wife Terry Ann Gagliardi have moved to vacate their default, which was determined on the issue of liability only, and allow them to answer. There is a question of fact as to whether Terry Ann Gagliardi was personally served. The record contains an affidavit of personal service, but Ms. Gagliardi states in her affidavit that she did not receive the complaint. Accordingly, a hearing solely on issue of service will be convened directly. Respondent Anthony Costa has failed to show either that good cause for his default exists or that a meritorious defense is likely to exist. Accordingly, his motion to answer with respect to liability is denied. However, Anthony Costa is entitled to appear and present evidence at the upcoming hearing on the civil penalty to be assessed and remediation to be required.

#### PROCEDURAL HISTORY

In a ruling on DEC Staff's motion for order without hearing dated June 28, 2006, I held that DEC Staff had proven a total of 24 of the 71 violations alleged. Of the nine named respondents,

only two, Kathleen Krieg and Alfred Galpine, opposed DEC Staff's motion for order without hearing. After determining liability on the 24 violations, I further ruled that a hearing would be necessary on the remaining 47 alleged violations not proven as well as the issues of civil penalty amount and remediation at the site.

By letter dated July 24, 2006, respondents' counsel informed me that he had been retained by Respondents Anthony Costa and Terry Ann Gagliardi in this matter and requested no further proceedings in this matter be scheduled pending a motion to vacate their default and file a late answer.

With a cover letter dated August 11, 2006, respondents Anthony Costa and Terry Ann Gagliardi filed a motion: to vacate their default; for leave to file a late answer; and to stay any further proceedings pending a determination of the motion and any related appeals. Accompanying this motion were sworn affidavits by Anthony Costa and Terry Ann Gagliardi, and a memorandum of law by their counsel.

With a cover letter dated August 22, 2006, DEC Staff filed an affirmation in opposition to respondents' motion. In its cover letter, DEC Staff announced that it was withdrawing the 47 alleged violations which were not proven on its motion for order without hearing and requested that a hearing be scheduled to determine the civil penalty and appropriate remediation on the 24 violations proven.

With a cover letter dated August 29 2006, respondents Anthony Costa and Terry Ann Gagliardi filed a reply affirmation.

By letter dated September 20, 2006, respondents Anthony Costa and Terry Ann Gagliardi requested a ruling on their motion.

By letter dated October 4, 2006, I reminded the parties of the requirements of the ex parte rule (6 NYCRR 622.16), and that copies of any filings be served on all the parties to this matter.

#### RESPONDENTS' MOTION

The standard for reopening a default in a DEC administrative enforcement hearing is found at 6 NYCRR 622.15(d) which states that such motion "must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with CPLR section 5015. The ALJ may grant a motion to reopen a default upon a

showing that a meritorious defense is likely to exist and that good cause for the default exists."

In order to show respondents' good cause for not answering, respondents' counsel contends that Terry Ann Gagliardi was not served with the complaint. In her sworn affidavit, Terry Ann Gagliardi swears "I never received a copy of the complaint in this action" and that she "was just unaware of it until recently." This appears to contradict evidence in the record, specifically affidavits of personal service by Environmental Conservation Officer Jason DeAngelis stating he served both the complaint and motion for order without hearing on both Terry Ann Gagliardi and Anthony Costa at their home on November 28, 2005 at 10:45 a.m. Thus, a question of fact is raised regarding whether or not Ms. Gagliardi was served which can only be resolved after an evidentiary hearing on this limited question. If it is determined she was not served, and if DEC Staff wishes to continue to proceed against her, DEC Staff must serve her which would allow her an opportunity to answer. However, if it is determined she was served, she has not shown good cause for the default.

With respect to Anthony Costa, counsel argues that his default was caused by the fact that "for approximately the past year and a half he has been involved in a criminal suit which has exhausted his time and financial resources" which left him unable to retain counsel to represent him in this matter until recently. DEC Staff notes in a footnote to its affirmation in opposition to the motion that Mr. Costa was sentenced to approximately nine years in prison on bank fraud and assault related charges. DEC Staff argues that Mr. Costa's admission that he did consult his criminal attorney regarding this civil matter precludes him from showing good cause for not answering. Respondents' counsel cites no authority for its claim that being involved in a criminal case is a reasonable excuse for not answering in a civil case. Mr. Costa has not shown that he has good cause for his failure to answer. Rather, the record shows that he was personally served, consulted an attorney regarding this matter and decided not to answer. Mr. Costa has not demonstrated good cause for his default exists and the motion is denied with respect to Mr. Costa.

#### MERITORIOUS DEFENSE

In its original complaint, DEC Staff alleged that the respondents Anthony Costa and Terry Ann Gagliardi had committed twenty-four separate violations of which eight were proven on its

motion. DEC Staff has withdrawn the remaining sixteen alleged violations. The eight violations proven by DEC Staff in its motion for order without hearing include two related to the unpermitted alteration of a stream bed and six related to unpermitted activities in a wetland.

Respondents assert that their unidentified experts' "preliminary inspection indicates that there was no wetland, stream or functioning waterway there in the first place, just a ditch and therefore no violation at all exists." Apart from this statement, respondents make no offer of proof to support their defense and no affidavit of merits is provided.

In addition to showing that good cause for the default exists, in order to meet the standard in 6 NYCRR 622.15(d), the burden is on the respondent to show that a meritorious defense is likely to exist. In this case, DEC Staff has presented evidence that the stream on the property was a tributary of Lemon Creek and listed as Class B fresh surface waters pursuant to 6 NYCRR 890. This evidence includes an aerial photograph from DEC's GIS 2004 aerial image data base. In addition, DEC Staff has presented evidence that the area disturbed on the property was a portion of regulated wetland AR-33 and its adjacent area. In response, the respondents offer no proof that a meritorious defense is likely to exist. The identity of the "experts" is not disclosed, nor are their qualifications or any statements made by them. The basis of the preliminary opinion of the "experts," that "there was no wetland, stream or functioning waterway" is not disclosed, and the respondents failed to rebut the evidence cited by DEC Staff and relied on in my Ruling on Motions, dated June 28, 2006. In order to show the likelihood of the existence of a meritorious defense some offer of proof must be made, either in the form of an affidavit of merits or other form of proof. In this case, the respondent Anthony Costa has not offered any evidence that calls into question the findings of liability. Respondent Anthony Costa has failed to show that a meritorious defense is likely to exist.

#### RULING

In DEC administrative enforcement cases, DEC Staff has the burden of proving by a preponderance of the evidence that jurisdiction over defendant was obtained. Ordinarily, an affidavit of personal service is sufficient to support a finding of jurisdiction, but in this case, respondent Terry Ann Gagliardi has sworn she never received a copy of the complaint. Accordingly, this threshold factual question must be resolved and

a hearing will be convened only on the issue of whether or not Terry Ann Gagliardi was personally served. Anthony Costa has failed to demonstrate either that he has good cause for his default or that a meritorious defense is likely to exist. Accordingly, Mr. Costa's motion is denied.

December 13, 2006  
Albany, New York

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/s/  
P. Nicholas Garlick  
Administrative Law Judge

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