**STATE OF NEW YORK**
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations of the Environmental Conservation Law ("ECL") Articles 19 and 27 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

**GLENVILLE FIRE DISTRICT #5,**

Respondent.

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**RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR DEFAULT JUDGMENT**

DEC File No. R4-2011-0930-112

August 14, 2012

Appearances of Counsel:

-- Steven C. Russo, Deputy Commissioner and General Counsel (Jill T. Phillips of counsel), for staff of the Department of Environmental Conservation

-- Hannigan Law Firm PLLC (Terence S. Hannigan of counsel) for respondent Glenville Fire District #5

## RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR DEFAULT JUDGMENT

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) moves for a default judgment against respondent Glenville Fire District #5 pursuant to 6 NYCRR 622.15. Staff filed the motion, which is based upon respondent's failure to file an answer to an administrative complaint, eight days after the answer was due.

Respondent opposes the motion and cross-moves for leave to file an answer within ten days after the date of this ruling. For the reasons that follow, Department staff's motion is denied, and respondent's cross motion is granted.

### PROCEEDINGS

Department staff commenced this proceeding by service of a notice of hearing and complaint dated June 11, 2012. In

the complaint, staff alleges that on August 27, 2011, staff observed a person unloading household debris and furniture from a trailer, and placing it on a large pile of existing solid waste located in a yard approximate 200 feet from respondent's firehouse located on Sacandaga Road in Scotia, Town of Glenville, Schenectady County. Staff further alleges that on September 6, 2011, a staff inspection of the site revealed that that pile had grown in size, and contained burned and partially burned waste material. On April 23, 2012, Department staff received a letter from the New York State Division of Homeland Security and Emergency Services Office of Fire Prevention and Control (OFPC) indicating that OFPC could not state that open burning of the pile constituted a verifiable live fire training exercise in compliance with 6 NYCRR part 215.

Accordingly, Department staff charged respondent with (1) accepting and disposing of solid waste at the site in violation of 6 NYCRR 360-1.5(a)(2) and 360-1.7(a)(1)(i), and (2) open burning at the site in violation of 6 NYCRR 215.2. Staff seeks a civil penalty in the amount of $7,500, an order requiring respondent to cease and desist all open burning at the site, and an order directing respondent to properly dispose of the waste pile within 14 days of the effective date of the order.

Pursuant to 6 NYCRR 622.3(a)(3), staff served the notice of hearing and complaint by certified mail, return receipt requested. The United States Postal Service reported that the mailing was received by respondent on June 13, 2012, thereby completing service pursuant to section 622.3(a)(3).

Pursuant to 6 NYCRR 622.4(a), respondent had 20 days, or until July 3, 2012, to serve an answer. When Department staff did not receive an answer, on July 11, 2012, staff filed a motion for a default judgment pursuant to 6 NYCRR 622.15 with the Department's Office of Hearings and Mediation Services (OHMS). Staff also served the motion for a default judgment on respondent on July 11, 2012.

By letter dated July 18, 2012, respondent's attorney contacted Department staff's attorney, and requested an extension of time to answer the complaint. Respondent's attorney explained that the June 11, 2012 complaint was delivered to respondent's firehouse on June 14, 2012. The attorney further noted that the volunteer board meets once a

month on the second Tuesday, and that the matter was not presented to the board until the July 10, 2012 meeting. Respondent requested that staff consent to an extension to answer until August 15, 2012, the day following the next board meeting, and requested that staff withdraw its default judgment motion. In a letter dated July 20, 2012, respondent's attorney acknowledged receipt of staff's default judgment motion and requested an immediate response to his July 18, 2012 letter.

By letter dated July 19, 2012, Department staff indicated that because the motion for a default judgment had been filed, respondent's request should be directed to the Department's Chief Administrative Law Judge (ALJ). Staff further indicated that it would not agree to withdraw its motion for a default judgment, because the Department had received no contact from respondent since the June 14, 2012 service of the complaint "and there is no basis in law for an extension of time" (Phillips Letter [7-19-12]).

On July 20, 2012, respondent requested, and I granted, an extension of time to respond to Department staff's motion for a default judgment. Respondent filed an attorney's affirmation and memorandum of law in opposition to staff's motion on July 30, 2012. In the attorney's affirmation, respondent cross-moves pursuant to 6 NYCRR 622.6(f) for an extension of ten days from the date of the ALJ's ruling within which to submit an answer. Department staff did not file a response to respondent's cross motion.

## DISCUSSION

Respondent argues that it has meritorious defenses to staff's charges and a reasonable excuse for its default in answering the complaint within 20 days. As to its reasonable excuse, respondent notes that the complaint was served between regularly scheduled monthly meetings of its volunteer board. Respondent further argues that the Department was not prejudiced by its brief delay in responding to staff's charges -- a delay of 15 days between the date the answer was due to the date respondent's counsel requested an extension of time to answer (citing, e.g., Puchner v Nastke, 91 AD3d 1261, 1262 [3d Dept 2012] [no prejudice to plaintiff from defendant's "relatively brief delay" of two months in answering]).

As to its meritorious defenses, respondent submits affidavits from its chief, assistant chief, and board members denying that any live fire burning of any pile occurred during 2011 and 2012. Respondent further denies that it operated a solid waste management facility at the site. To the contrary, respondent alleges that in early 2012, items other than brush and some Class "A" combustibles that may be burned during live fire training were removed from the site (see Training Policy - Live Fire Training, Attorney Affidavit, Exh E).

Respondent has made a sufficient showing to warrant reopening its default in answering. Pursuant to 6 NYCRR 622.15(d), a default in answering may be reopened upon a showing that a meritorious defense is likely to exist and that good cause for the default exists. Consulting standards applicable to default judgment motions under CPLR 3215 (see Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004, at 2), whether good cause -- or reasonable excuse under the CPLR -- for the default exists depends upon the extent of the delay, whether the opposing party has been prejudiced, whether the defaulting party has been willful, and the "strong public policy" in favor of resolving cases on the merits (Puchner v Nastke, 91 AD3d at 1262; see also Huckle v CDH Corp., 30 AD3d 878, 879-880 [3d Dept 2006] [CPLR 3215 motion]).

Here, there is no evidence that respondent was willful in failing to answer within the regulatory 20 days. Nor is there evidence that Department staff was prejudiced in any way by respondent's 15-day delay in seeking to answer the complaint. Moreover, respondent's affidavits are sufficient to show potentially meritorious defenses to the charges in the complaint. Accordingly, Department staff's motion for a default judgment should be denied, and respondent's request to file a late answer should be granted.

RULING

Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is denied.

Respondent's cross motion pursuant to 6 NYCRR 622.6(f) for an extension of time to serve an answer is granted. Respondent shall serve an answer to Department staff's June 11, 2012, complaint within 10 days of the date of this ruling.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: August 14, 2012
Albany, New York