

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

In the Matter of the Alleged Violations of Article 12 of the New York State Navigation Law and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (17 NYCRR),

ORDER

DEC Case No.
R2-20160209-55

-by-

JOHNEY CONSTRUCTION CORP.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that Johney Construction Corp. (respondent) violated New York State Navigation Law §§ 173, 175 and 176, and 17 NYCRR 32.3 and 32.5 when, on January 11, 2016, respondent, during renovation work at 85-39 260th Street, Floral Park, Queens, New York (site), intentionally discharged heating oil into the ground at the site, failed to report the discharge, and failed to contain or clean up the discharge.

Department staff commenced this proceeding by service on respondent by certified mail of a motion for order without hearing in lieu of complaint, together with (a) an affidavit of a staff environmental engineer, and (b) a supporting affirmation of counsel for staff. Respondent has not responded to staff's motion papers.

Department staff seeks a Commissioner's order:

- (a) finding that respondent committed the violations alleged;
- (b) imposing on respondent a civil penalty in the amount of sixty thousand dollars (\$60,000); and
- (c) granting such other and further relief as may be deemed just, proper and equitable under the circumstances.

The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell of the Department's Office of Hearings and Mediation Services. ALJ O'Connell prepared the attached Summary Report on Motion for Order Without Hearing (Summary Report), which I adopt as my decision in this matter, subject to my comments below.

I concur with the ALJ's conclusion that Department staff has submitted evidence sufficient to establish its entitlement to judgment as a matter of law on the violations alleged in the motion.

Navigation Law § 173(1) prohibits the discharge of petroleum, which by definition includes the heating oil at issue here (see Navigation Law § 172[15]). Any person who causes a discharge must immediately notify the Department, but in no case later than two hours after the discharge (see Navigation Law § 175 and 17 NYCRR 32.3). Navigation Law § 176 and 17 NYCRR 32.5 require the person responsible for the discharge to contain it, and promptly clean up and remove the discharge.

The record establishes that Johney Construction Corp. was not authorized to discharge the heating oil at the site and intentionally dumped the oil into the ground, and failed to report, contain or clean up the discharge. In sum, respondent has violated each of the statutory and regulatory provisions cited by Department staff in its motion.

Department staff has requested, and the ALJ has recommended, that I impose a civil penalty in the amount of sixty thousand dollars (\$60,000). To support the requested penalty, Department staff considered the Department's Civil Penalty Policy (DEE-1), the Order on Consent Enforcement Policy (DEE-2), the Bulk Storage and Spill Response Enforcement Policy (DEE-4), the Spill Site Remediation under Departmental Order Enforcement Policy (DEE-18), and several prior Commissioner orders (see Affirmation of John K. Urda in Support of Motion for an Order Without a Hearing, dated April 12, 2016 [Urda Affirmation] at ¶¶ 25-35).

The civil penalty sought by Department staff is authorized and appropriate. As noted by Department staff, Navigation Law § 192 authorizes a penalty of up to \$25,000 per day for each violation (see Urda Affirmation ¶ 15). Where a violation is of a continuing nature, each day during which it continues shall constitute an "additional, separate and distinct offense" (Navigation Law § 192).

As Department staff contends, respondent's intentional dumping is an aggravating factor that warrants a significant penalty. Not only did respondent intentionally dump the heating oil into the ground, respondent failed to comply with staff's directive that respondent remediate the site (see Affidavit of Rashad Omar sworn to April 12, 2016 [Omar Affidavit], ¶¶ 8-9). As a result of respondent's uncooperative behavior and its failure to address the discharge, it was the owner of the site who retained a contractor to clean up the discharge, which involved excavation and disposal of approximately 19 tons of contaminated soil (see Summary Report at 3 [Finding of Fact No. 9]; see also Omar Affidavit, ¶ 10).

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 is granted.
- II. Respondent Johney Construction Corp. is adjudged to have violated:
 - A. Navigation Law § 173, by discharging petroleum on January 11, 2016 into the ground in the backyard of a residence located at 85-39 260th Street, Floral Park (Queens County), New York;
 - B. Navigation Law § 175 and 17 NYCRR 32.3, by failing to report the January 11, 2016 petroleum discharge; and
 - C. Navigation Law § 176 and 17 NYCRR 32.5, by failing to contain and clean up the January 11, 2016 petroleum discharge.
- III. I hereby impose on respondent Johney Construction Corp. a civil penalty in the amount of sixty thousand dollars (\$60,000) for the violations established. Within thirty (30) days of service of this order on respondent Johney Construction Corp., respondent shall pay the civil penalty in the form of a certified check, cashier's check or money order payable to the New York State Department of Environmental Conservation.

The civil penalty shall be sent to the following address:

John K. Urda, Esq.
Office of General Counsel
NYS Department of Environmental Conservation
Region 2
One Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101

- IV. All questions and correspondence regarding this order shall be addressed to John K. Urda, Esq. at the address referenced in paragraph III of this order.

- V. The provisions, terms and conditions of this order shall bind respondent Johney Construction Corp. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: July 11, 2017
Albany, New York

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 12
of the New York State Navigation Law and Title 17 of the
Official Compilation of Codes, Rules and Regulations of
the State of New York Part 32, by

Summary Report on Motion for
Order without Hearing

DEC Case No.:
R2-20160209-55

JOHNEY CONSTRUCTION CORP.,

Respondent.

November 18, 2016

Proceedings

Staff from the Region 2 Office (Long Island City) of the New York State Department of Environmental Conservation (the Department) commenced this administrative enforcement proceeding with service of a notice of motion dated April 12, 2016, and supporting papers, upon Johney Construction Corp.,¹ (Johney Construction). The Department served the motion papers by certified mail, return receipt requested, and Johney Construction received them on April 16, 2016 (*see* Affirmation of Service dated May 31, 2016, ¶¶ 1 and 3, Exhibit A).

The Department seeks an Order from the Commissioner which finds that Johney Construction violated various provisions of the Navigation Law and implementing regulations, and assesses a total civil penalty of \$60,000. The notice of motion advised Johney Construction that a response to the motion was due within 20 days following its receipt. The notice of motion advised further that the failure to respond in a timely manner would result in a default and waiver of Johney Construction's right to respond to the motion or to have a hearing.

With a cover letter dated May 31, 2016, the Department provided the Office of Hearings and Mediation Services (OHMS) with a copy of the motion papers, which included an affirmation of service dated May 31, 2016. A list of the documents included with the Department's motion papers is appended to this summary report as Appendix A.

The captioned enforcement proceeding was assigned to me on June 27, 2016. Upon review of the Department's papers, I have prepared this summary report, which recommends that the Commissioner grant the Department's unopposed motion.

¹ The corporate name as filed with the New York State Department of State (*see* Mr. Urda's April 12, 2016 affirmation [Urda Aff.] ¶ 3, Exhibit A).

I. Motion for Order Without Hearing

Pursuant to 6 NYCRR 622.3(b)(1), the Department may commence an administrative enforcement proceeding by serving a motion for order without hearing, in lieu of a complaint (*see also* 6 NYCRR 622.12[a]). According to the April 12, 2016 motion, Johney Construction discharged waste fuel oil into the backyard of a residential property located in Floral Park (Queens County), New York, on January 11, 2016, while closing and removing a 275-gallon aboveground heating oil tank from the basement of the residence (*see* Urda Aff. ¶ 7). The Department alleged that the discharge was unauthorized and, therefore, a violation of Navigation Law § 173 (*see* Urda Aff. ¶ 17). The Department alleged further that Johney Construction did not report the spill, which is a violation of Navigation Law § 175 and 17 NYCRR 32.3 (*see* Urda Aff. ¶ 20). Finally, the Department alleged that Johney Construction did not remediate the discharge, which is a violation of Navigation Law § 176 and 17 NYCRR 32.5 (*see* Urda Aff. ¶ 23). For these alleged violations, the Department seeks an Order from the Commissioner that assesses a total civil penalty of \$60,000, pursuant to Navigation Law § 192 (*see* Urda Aff. ¶ 25).

II. Response

A response to a motion for order without hearing is due within 20 days after receipt of the motion, and the failure to file a response constitutes a default (*see* 6 NYCRR 622.12[b] and [c]). Johney Construction received the Department's April 12, 2016 notice of motion and supporting papers on April 16, 2016 (*see* Affirmation of Service dated May 31, 2016, Exhibit A.) Therefore, Johney Construction's response was due by May 6, 2016.

To date, neither the Region 2 Department staff nor OHMS has received a response from Johney Construction to the Department's April 12, 2016 motion for order without hearing.² Therefore, Johney Construction has defaulted, which constitutes a waiver of its right to a hearing (*see* 6 NYCRR 622.12[b]).

Findings of Fact

The facts established as a matter of law are:

1. By certified mail, return receipt requested, the Department served a copy of the April 12, 2016 notice of motion and supporting papers upon Johney Construction Corp. (Johney Construction) at 135-15 127th Street, South Ozone Park, New York 11420 (*see* Affirmation of Service dated May 31, 2016).

² Via email dated May 31, 2016 (9:42 a.m.), Mr. Urda provided Andrea Limongello, Esq. (Raneri, Light & O'Dell, PLLC [White Plains, New York]) with an electronic copy of the Department's April 12, 2016 notice of motion and supporting papers. Subsequently, in an email dated May 31, 2016 (10:19 a.m.), Ms. Limongello advised Mr. Urda that her firm no longer represented Johney Construction, and forwarded Mr. Urda's May 31, 2016 email to Ronald Steinvurzel, Esq., (Steinvurzel & Levy Law Group [White Plains, New York]). In an email dated May 31, 2016 (10:30 a.m.), Mr. Steinvurzel advised Mr. Urda that Johney Construction had not retained his firm in this matter.

2. On April 16, 2016, Johney Construction received the Department's April 12, 2016 notice of motion and supporting papers (*see* Affirmation of Service dated May 31, 2016, Exhibit A). Johney Construction's response was due by May 6, 2016 (*see* 6 NYCRR 622.12[b] and [c]). As of the date of this summary report, Johney Construction did not respond to the Department's April 12, 2016 notice of motion and supporting papers.
3. Johney Construction is an active domestic business corporation authorized to do business in the State of New York. Johney Construction's business address is 135-15 127th Street, South Ozone Park, New York 11420. (*See* Urda Aff. ¶ 3, Exhibit A.)
4. Prior to January 11, 2016, a home owner hired Johney Construction to renovate a residence located at 85-39 260th Street, Floral Park (Queens County), New York (the site). During the renovations, employees from Johney Construction dumped residual heating oil from a 275-gallon aboveground oil storage tank, located in the basement of the residence, into a hole in the backyard. (*See* Mr. Omar's Affidavit, sworn to April 12, 2016 [Omar Aff.] ¶¶ 6 and 7.)
5. On January 11, 2016, authorities from the City of New York forwarded a report to the Department that a petroleum discharge had occurred at the site. Rashad Omar, an Environmental Engineer from the Department's Bureau of Spill Prevention and Response, and other members of staff from the Department's Region 2 office, inspected the site. Mr. Omar's investigation confirmed that an unknown amount of petroleum had been discharged into a hole in the backyard of the site. (*See* Omar Aff. ¶¶ 1, 5, 6 and 7, Exhibit B.)
6. As part of his investigation of the petroleum spill (Spill No. 1510107), Mr. Omar completed a spill report form (*see* Omar Aff. ¶ 4 and 5, Exhibit A).
7. In a letter dated February 2, 2016, Mr. Omar advised Johney Construction that the petroleum released at the site was a violation of Navigation Law § 173, and directed Johney Construction to clean up and remove the discharge from the site, as required by Navigation Law § 176. In addition, Mr. Omar's letter directed Johney Construction to provide a report by March 2, 2016 that explained the cause of the spill and described the cleanup activities undertaken at the site, among other things. (*See* Omar Aff. ¶ 8, Exhibit C.)
8. Johney Construction did not respond to Mr. Omar's February 2, 2016 letter (*see* Omar Aff. ¶ 9).
9. The property owner retained a contractor to clean up the unauthorized petroleum spill. The cleanup required an excavation of about 19 tons of contaminated soil from the site. (*See* Omar Aff. ¶ 10, Exhibit A.)

Discussion

A motion for order without hearing is governed by the same standards as are applicable to motions for summary judgment under the CPLR (*see* 6 NYCRR § 622.12[d]). On an unopposed motion for order without hearing, the issue is whether the Department has established its entitlement to summary judgment on the violations alleged in the motion (*see Matter of Edelstein*, Order of the Commissioner, July 18, 2014, at 2; *Matter of Hunt*, Decision and Order of the Commissioner, July 25, 2006, at 7 n2).

I. Service of the Department's Motion

Pursuant to 6 NYCRR 622.3(b)(1) and 622.12 (a), the Department may commence an administrative enforcement proceeding by serving a motion for order without hearing, in lieu of a complaint. Service must be by personal service consistent with the CPLR or by certified mail (*see* 6 NYCRR 622.3[a][3]).

By certified mail, return receipt requested, the Department served a copy of the April 12, 2016 notice of motion and supporting papers upon Johney Construction at 135-15 127th Street, South Ozone Park, New York 11420. On April 16, 2016, Johney Construction received the Department's motion. (*See* Affirmation of Service dated May 31, 2016, Exhibit A.)

With service of the Department's April 12, 2016 notice of motion and supporting papers upon Johney Construction, by certified mail, return receipt requested, the Department duly commenced the captioned enforcement proceeding in a manner consistent with the requirements outlined in 6 NYCRR 622.3 and 622.12.

II. Liability

With respect to the alleged violations, I conclude that the Department has met the initial burden to show that Johney Construction violated provisions of Navigation Law article 12 and its implementing regulations. Pursuant to 6 NYCRR 622.12(a), the Department supported the motion for order without hearing with the following.

Attached to Mr. Urda's April 12, 2016 affirmation as Exhibit A is a copy of Johney Construction's New York State Department of State, Division of Corporations, entity information page. The information demonstrates that Johney Construction is an active domestic business corporation authorized to do business in the State of New York (*see* Urda Aff. ¶ 3, Exhibit A).

In further support of the motion, the Department provided an affidavit by Rashad Omar, sworn to April 12, 2016, which includes Exhibits A, B, and C. Mr. Omar is an Environmental Engineer in the Bureau of Spill Prevention and Response at the Department's Region 2 office.

Mr. Omar's regular duties include responding to and investigating petroleum discharges in the five boroughs of the City of New York. Mr. Omar directs and manages the response and remediation associated with petroleum discharges. (*See Omar Aff. ¶¶ 1 and 2.*)

According to Mr. Omar's April 12, 2016 affidavit, on January 11, 2016, he investigated a petroleum oil spill at a residence located at 85-39 260th Street, Floral Park (Queens County), New York (the site). Mr. Omar received information about the spill from authorities at the City of New York, who had been contacted by a neighboring property owner. As part of his investigation of the petroleum spill, Mr. Omar prepared the NYSDEC spill report form (Spill No. 1510107), and attached a copy of it to his affidavit as Exhibit A. The spill report form documents the details of the investigation into the petroleum spill and the eventual remediation of the site. (*See Omar Aff. ¶¶ 5 and 6, Exhibit A.*)

During renovations of the residence located at the site, employees from Johney Construction dumped residual heating oil from a 275-gallon aboveground oil storage tank, located in the basement of the residence, into a hole in the backyard (*see Omar Aff. ¶¶ 6 and 7*). Exhibit B to Mr. Omar's affidavit is a copy of a photograph taken at the site during the January 11, 2016 inspection, which depicts a hole with oil in it.

Subsequently, Mr. Omar advised Johney Construction, by letter dated February 2, 2016, that the petroleum release at the site was a violation of Navigation Law § 173. Mr. Omar directed Johney Construction to clean up and remove the discharged fuel oil from the site as required by Navigation Law § 176. In addition, the letter further directed Johney Construction to provide a report by March 2, 2016 that explains the cause of the spill and describes the cleanup activities that would be undertaken at the site, among other things. Mr. Omar attached a copy of the February 2, 2016 correspondence as Exhibit C to his affidavit. (*See Omar Aff. ¶ 8, Exhibit C.*)

Because Johney Construction did not respond to Mr. Omar's February 2, 2016 letter (*see Omar Aff. ¶ 9*), the property owner retained a contractor to clean up the unauthorized petroleum spill. The cleanup required an excavation that removed about 19 tons of contaminated soil from the site (*see Omar Aff. ¶ 10, Exhibit A*).

Navigation Law § 173 prohibits the unauthorized discharge of petroleum. Mr. Omar's investigation, as outlined in his April 12, 2016 affidavit and Exhibit A, show that Johney Construction was not authorized to discharge the petroleum at the site. Therefore, Johney Construction violated Navigation Law § 173 on January 11, 2016 when it discharged the residual heating oil from a 275-gallon aboveground oil storage tank into a hole in the backyard at the site.

Pursuant to Navigation Law § 175, any person responsible for causing a discharge must notify the Department within two hours after the discharge (*see also 17 NYCRR 32.3*). As noted above, Johney Construction was responsible for the petroleum discharge; however, Johney Construction did not report the spill to the Department. Rather, the Department learned about the spill from authorities at the City of New York, who had been contacted by a neighboring property owner. Therefore, Johney Construction violated Navigation Law § 175 and

implementing regulations at 17 NYCRR 32.3 when Johney Construction failed to report the spill at the site in a timely manner.

When a discharge occurs, Navigation Law § 176(1) requires the responsible person to contain the discharge immediately. In addition, Navigation Law § 176(2)(a) requires the responsible person to promptly cleanup and remove the discharge. In his February 2, 2016 letter, Mr. Omar directed Johney Construction to clean up and remove the discharge from the site as required by Navigation Law § 176. In addition, Mr. Omar's letter further directed Johney Construction to provide a report by March 2, 2016 that explains the cause of the spill and describes the cleanup activities that would be undertaken at the site, among other things. Johney Construction did not respond to the Department's February 2, 2016 correspondence, and the property owner eventually hired a different contractor to clean up the petroleum discharge. Therefore, Johney Construction violated Navigation Law § 176 and implementing regulations at 17 NYCRR 32.5 when Johney Construction failed to contain the spill and clean it up.

III. Relief

Navigation Law § 192 authorizes a civil penalty of \$25,000 for each violation. Also, each day that a violation continues constitutes an additional, separate and distinct offense. In the motion, the Department requested a total civil penalty of \$60,000 for the three demonstrated violations (*see* Urda Aff. ¶¶ 15 and 25.)

With respect to the proposed relief, I conclude that the Department has met the initial burden to show that the Department is entitled to the requested civil penalty. Pursuant to 6 NYCRR 622.12(a), the Department supported the requested relief. The Department referred to the following guidance documents: (1) the Civil Penalty Policy (DEE-1); (2) the Bulk Storage and Spill Response Enforcement Policy (DEE-4); and (3) the Spill Site Remediation under Departmental Order Enforcement Policy (DEE-18) (*see* Urda Aff. ¶ 26).

According to the Department, the requested civil penalty would be consistent with the purposes and objectives of these guidance documents, as well as previous administrative decisions.³ Concerning the captioned matter, the Department contended that the discharge was intentional, and occurred in a densely populated area. The Department noted that these circumstances are similar to the fact pattern in *Matter of WR Plumbing and Heating Corp.*, Commissioner's Order dated December 31, 2012. (*See* Urda Aff. ¶¶ 28 and 29.)

As in *W.R. Plumbing and Heating Corp.*, the Department argued (*see* Urda Aff. ¶ 29) that Johney Construction's violations are:

extremely serious as the respondent intentionally disposed of the fuel oil in the pits in the backyard in violation of the law. While the law does not require the

³ The Department cited *Matter of Zahav Enterprises LLC*, Commissioner's Order dated October 24, 2011; *Matter of Cherokee Partners*, Commissioner's Order dated March 2, 2011; *Matter of Mustang Bulk Carriers, Inc.*, Commissioner's Order dated November 10, 2010; and *Matter of Linden Latimer Holdings, LLC*, Commissioner's Order dated July 15, 2008 (*see* Urda Aff. ¶ 34).

Department staff to prove intent with respect to violations of the Navigation Law, the respondent's intentional actions should enhance any penalty. (Summary Hearing Report at 5.)

In addition to the intentional nature of the discharge, and Johney Construction's failure to report the January 11, 2016 spill, Johney Construction made no attempt to remediate the site. As a result, the property owner had to hire a contractor to remediate the violations for which Johney Construction was responsible. The Department argued that these circumstances demonstrate a lack of cooperation on the part of Johney Construction, which should be considered additional aggravating factors that further justify the requested civil penalty. (*See* Urda Aff. ¶ 32.)

The proof submitted with the Department's April 12, 2016 motion demonstrates that Johney Construction intentionally discharged a significant amount a petroleum fuel oil into the backyard of a densely populated residential neighborhood. Johney Construction made no effort to report the spill, or remediate the site after receiving notification that the spill had been discovered. The intentional nature of the violations, and Johney Construction's lack of cooperation to remediate the spill, and to respond to this duly commenced enforcement proceeding, justify the requested civil penalty.

Conclusions

1. With service of the Department's April 12, 2016 notice of motion and supporting papers upon Johney Construction, by certified mail, return receipt requested, the Department duly commenced the captioned enforcement proceeding in a manner consistent with the requirements outlined in 6 NYCRR 622.3 and 622.12.
2. Consistent with 6 NYCRR 622.12(a), the Department supported the April 12, 2016 motion for order without hearing, and established its entitlement to summary judgment on the alleged violations:
 - a. Johney Construction violated Navigation Law § 173 on January 11, 2016 when it discharged the residual heating oil from a 275-gallon aboveground oil storage tank into a hole in the backyard of a residence located at 85-39 260th Street, Floral Park (Queens County), New York.
 - b. Johney Construction violated Navigation Law § 175 and implementing regulations at 17 NYCRR 32.3 when Johney Construction failed to report the January 11, 2016 spill in a timely manner.
 - c. Johney Construction violated Navigation Law § 176 and implementing regulations at 17 NYCRR 32.5 when Johney Construction failed to contain the spill and clean it up.

Recommendation

The Commissioner should grant the Department's April 12, 2016 motion for order without hearing.

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

Dated: Albany, New York
November 18, 2016

Attachment: Appendix A

Appendix A

Matter of Johney Construction Corp.
DEC File No. R2-20160209-55
Motion for Order Without Hearing

1. Cover letter dated May 31, 2016 from John K. Urda, Esq., Assistant Regional Attorney, NYS DEC Region 2 to James T. McClymonds, Chief Administrative Law Judge, Office of Hearings and Mediation Services
2. Notice of Motion dated April 12, 2016
3. Affirmation of John K. Urda in Support of Motion for an Order without Hearing dated April 12, 2016

Exhibit A – New York State Department of State, Division of Corporations, Entity Information for Johney Construction Corp.

4. Affidavit of Rashad Omar in Support of Motion of an Order without Hearing, sworn to April 12, 2016

Exhibit A – NYS DEC Petroleum Spill Report Form (Spill No. 1510107)

Exhibit B – Photograph

Exhibit C – Letter dated February 2, 2016 from Rashad Omar, Environmental Engineer, NYS DEC Region 2 to Johney Construction Corp., 135-15 127th Street, South Ozone Park, New York 11420

5. Affirmation of Service by John K. Urda dated May 31, 2016

Exhibit A – US Postal Service tracking sheet (Tracking No. 70153010000092188906), and signed Domestic Return Receipt