STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law (ECL) of the State of New York, Parts 364 and 372 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), and a Part 364 Permit,

RULING

DEC Case No.
R8-20180123-13

- by -

LACY'S EXPRESS, INC.,

Respondent.

Appearances of Counsel:

-- Thomas Berkman, Deputy Commissioner and General Counsel (Dudley Loew, Acting Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Brown Duke & Fogel, P.C. (Michael A. Fogel of counsel) and Periconi, LLC (James J. Periconi of counsel) for respondent

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint upon respondent Lacy's Express, Inc. (respondent) on July 9, 2020, pursuant to 6 NYCRR 622.3(a)(3) (*see* affidavit of service of Marcia Persson, sworn to April 6, 2021). The notice of hearing and complaint were received by respondent on July 13, 2020.

The complaint alleges that on May 2, June 5 and June 21, 2017, respondent accepted and transported isopropanol/toluene, a hazardous waste, without a hazardous waste manifest from Veolia ES Technical Solutions, LLC (Veolia) located in Middlesex, New Jersey to Eastman Kodak Company (Eastman Kodak) located in Rochester, New York. Department staff alleges respondent violated 6 NYCRR 372.3(b)(2), 372.3(b)(6)(i) and 364-4.8(n) and respondent's part 364 transporter permit. Department staff requests the imposition of a thirty-six thousand dollar ($36,000) civil penalty against respondent.

Respondent did not answer the complaint. On April 6, 2021, Department staff submitted a written motion for default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on the motion]). Department staff served the motion and supporting papers on respondent by priority mail on April 6, 2021 (*see* affidavit of service of Marcia Persson, sworn to May 14, 2021).

By letter dated April 12, 2021, Chief Administrative Law Judge (ALJ) James T. McClymonds advised the parties that the matter had been assigned to the undersigned ALJ. By letter dated May 5, 2021, respondent filed papers in opposition to staff's motion (*see* Appendix A). Respondent argues that respondent should be allowed to file a late answer to the complaint because good cause exists for respondent's default and respondent has a meritorious defense to staff's complaint. Respondent's opposition constitutes a cross-motion to reopen the default and for leave to file a late answer. Respondent also requests that staff's motion for default judgment be denied. In the alternative, if respondent is not allowed to answer the complaint and default judgment is granted on liability, respondent requests that a hearing be held on the penalty requested by Department staff.

According to William H. Ferrell, Jr., CEO of respondent, respondent received Department staff's notice of hearing and complaint on July 13, 2020, and Mr. Ferrell immediately called the office of the Department's Commissioner. Although respondent had previously been represented by counsel in the parties' attempts to negotiate a settlement, respondent asserts that respondent was not represented at the time the notice of hearing and complaint were served on respondent. Mr. Ferrell did not speak with the Commissioner, but his call was referred to the Department's Office of General Counsel. Respondent subsequently received a telephone call from Scott Crisafulli, Deputy General Counsel for the Department. According to respondent, Mr. Crisafulli asked Mr. Ferrell to send him relevant documentation relating to the matter. Mr. Ferrell emailed the documentation to Mr. Crisafulli on August 11, 2020. Mr. Ferrell further claims that he did not hear back from the Department until he received staff's motion for a default judgment. (*See* affidavit of William H. Ferrell, Jr., sworn to May 5, 2021 [Ferrell Affidavit], ¶¶ 8-14.)

As a defense to staff's complaint, respondent asserts that on the dates in question, respondent believed it was transporting a product, not hazardous waste. Therefore, respondent argues that it had no reason to believe that the material needed to be accompanied by a hazardous waste manifest. Respondent also states that respondent had no reason to question Veolia regarding the shipments at issue because the shipments were accompanied by bills of lading and in the past Veolia had provided manifests when hazardous waste was being shipped. (*See* Ferrell Affidavit, ¶¶ 19-22.) Respondent also claims that based on its prior dealings with Veolia, if a hazardous waste manifest was required, respondent believes Veolia would have provided a manifest at the time of transport. Because Veolia did not on the three occasions at issue, respondent claims it believed that a product was being transported. (*Id.* ¶ 24.)

Respondent also asserts as an affirmative defense that Department staff's three-year delay in pursuing this matter was unreasonable pursuant to *Matter of Cortlandt Nursing Home v Axelrod* (66 NY2d 169, 178 [1985], *cert denied* 476 US 1115 [1986]). *Cortlandt* addresses the State Administrative Procedure Act (SAPA) § 301 requirement that the parties in an adjudicatory proceeding shall be afforded an opportunity for hearing within a reasonable time. Respondent's papers allege the factual elements of a *Cortlandt* defense — delay, injury to the respondent's

private interests, and a significant and irreparable prejudice to respondent's defense of the proceeding resulting from the delay. (*See* affirmation of Michael A. Fogel, dated May 5, 2021, ¶¶ 45-51.)

Respondent requests that staff's motion for a default judgment be denied, and that respondent be granted leave to file an answer to the complaint.

Department staff opposes respondent's motion to reopen the default (*see* Appendix A). Staff argues that respondent has not shown good cause or reasonable excuse for the default or the existence of a meritorious defense to the violations alleged by staff. Department staff claims respondent's course of conduct from the date of the alleged violations, through staff's attempts to compromise the matter by order on consent, and after staff served respondent with the complaint, displays a pattern of ignoring Department staff and a willful disregard of the notice of hearing and complaint. According to Department staff, respondent did not request and was not granted an extension to answer when respondent discussed the matter with Mr. Crisafulli on July 23 and August 11, 2020. (*See* reply affirmation of Dudley Loew, dated May 28, 2021 [Loew Reply], ¶¶ 107-119; reply affirmation of Scott Crisafulli, dated May 18, 2021 [Crisafulli Reply], ¶¶ 6-12.)

Department staff claims that nothing in respondent's cross-motion demonstrates that a meritorious defense to the alleged violations is likely to exist. Staff argues that respondent does not cite any specific regulatory exemption or exclusion in support of respondent's argument that the transported isopropanol/toluene was a product. In addition, staff argues that respondent has not provided any proof that the isopropanol/toluene in question was a product. Staff points to the fact that Eastman Kodak reclaimed the isopropanol/toluene and therefore it was not a product and no evidence can be provided to change that fact. Staff further argues that respondent relies on speculation to support its argument that it was transporting a product. (*See* Loew Reply, ¶¶ 25-45.)

In addition, Department staff argues that any delay in commencing this proceeding was caused by respondent and that respondent's papers fail to properly demonstrate the required elements of a *Cortlandt* defense (*see* Loew Reply, ¶¶ 53-103).

DISCUSSION

Under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622), an answer to a complaint must be served "[w]ithin twenty (20) days of receiving the notice of hearing and complaint or an amended complaint, respondent must serve on department staff an answer signed by respondent, respondent's attorney or other authorized representative. The time to answer may be extended by consent of department staff or by permission of the ALJ. Failure to make timely service of an answer constitutes a default and a waiver of the respondent's right to a hearing." (6 NYCRR 622.4[a].)

In addition, an ALJ possesses the discretion to reopen the default in answering upon a showing that a meritorious defense is likely to exist and that good cause for the default exists (*see* 6 NYCRR 622.15[f]). In opposing respondent's argument that good cause exists for respondent's default, Department staff relies, in part, on respondent's alleged conduct leading up to the service of the complaint. My review, however, must weigh whether respondent had a

reasonable excuse that lead to the default. Accordingly, on respondent's cross motion, I am considering the events occurring after service of the complaint to determine whether a reasonable excuse has been stated.

Respondent explained that it did not timely answer the complaint because Mr. Ferrell decided to call the Commissioner's office directly upon receipt of the notice of hearing and complaint. That call, and an email, were responded to by Mr. Crisafulli and two telephone discussions between Mr. Ferrell and Mr. Crisafulli followed. According to Mr. Ferrell, Mr. Crisafulli promised to look at the documents that respondent emailed to him and get back to Mr. Ferrell. Mr. Ferrell claims he did not hear from the Department again until he was served with the motion for default judgment. (Ferrell Affidavit, ¶¶ 10-12.) Mr. Crisafulli, however, states that he left a telephone message with Mr. Ferrell on January 15, 2021 "with a final offer of settlement" and advised Mr. Ferrell that Mr. Loew would follow up with him. (Crisafulli Reply, ¶ 10.) Mr. Loew followed up by leaving a voicemail with Mr. Ferrell on January 22, 2021, but Mr. Ferrell did not respond to either voicemail. (Loew Reply, ¶¶ 125-126.)

On April 6, 2021, Department staff served its motion for default judgment papers on respondent by priority mail. Staff, however, did not provide tracking information for when the priority mail was delivered (*see* affidavit of service of Marcia Persson, sworn to May 14, 2021). Accordingly, I treat staff's service as service by first class mail for the purpose of determining when a response to the motion was due. Pursuant to 6 NYCRR 622.6(a)(3), respondent had five days after the motion was served to serve a response. Pursuant to CPLR 2103(b)(2) and 6 NYCRR 622.6(b)(2)(i), five days are added to the prescribed period for responding to staff's motion when the motion is served by first class mail. Accordingly, respondent had ten days or until April 16, 2021 to respond to staff's motion. After being served with staff's motion, respondent retained an attorney (Ferrell Affidavit, ¶ 13). On April 16, 2021, respondent's attorney contacted Mr. Loew to discuss the matter. Following emails exchanged on April 20 and 21, 2021, respondent's time to respond to the motion was extended until May 5, 2021. (*See* Fogel to Loew email, dated April 20, 2021; Loew to Fogel email, dated April 21, 2021.) The response was timely submitted on May 5, 2021.

To determine whether good cause or a reasonable excuse 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" (*Matter of Miller*, Ruling of the ALJ, June 12, 2018 at 7, *citing Puchner v Nastke*, 91 AD3d 1261, 1262 [3d Dept 2012]; *see also Huckle v CDH Corp*., 30 AD3d 878, 879-880 [3d Dept 2006] [CPLR 3215 motion]).

I find there has not been a significant delay in this matter. As noted above, the complaint was served on respondent on July 13, 2020. Accordingly, respondent's answer was due on August 2, 2020. When Mr. Ferrell and Mr. Crisafulli discussed this matter on July 23 and August 11, 2020, there may not have been a request or grant of an extension of the time to answer the complaint. It does appear, however, respondent expected that those discussions may lead to a potential resolution of the matter. It wasn't until five months after the August 11, 2020 discussion that a final settlement offer was offered to Mr. Ferrell. Respondent states that it believed the long delay in hearing from Department staff was due to the pandemic (*see* Ferrell Affidavit, ¶ 11). Although respondent did not attempt to contact Mr. Crisafulli or Mr. Loew after

they left voicemails for him in January 2021, Mr. Ferrell did retain counsel as soon as respondent was served with staff's motion (*see* Ferrell Affidavit, ¶ 13).

As discussed above, respondent immediately set about opposing staff's motion and timely opposed the motion. Notwithstanding respondent's failure to respond to the January 2021 continued offers of settlement from Department staff, respondent's default does not appear to be willful because respondent immediately reached out to the Department and reasonably believed that the communications with the Department may resolve the matter. I find it was reasonable for respondent to believe that the delay in hearing back from the Department after the August 11, 2021 discussion with Mr. Crisafulli was due, in part, to pandemic related delays.

Department staff alleges that staff will be prejudiced if respondent is granted permission to file a late answer. Staff notes that a significant amount of time and resources were expended in attempting to settle the matter with respondent as well as in assembling the documents for staff's motion for default. Staff also argues that if respondent's motion is granted it will send a signal to the regulated community that serving an answer to a complaint is optional despite the express language in 6 NYCRR 622.4(a) regarding a default and respondent's waiver of its right to a hearing. I disagree. It falls within the sound discretion of the ALJ to extend the time to answer and to decide motions to reopen a default in answering. The prejudice that staff claims to suffer is unconvincing because the effort staff has put into this enforcement proceeding to date is transferrable to a hearing on the merits. Lastly, serving an answer to a complaint is not optional, it is required. On a case by case basis, motions to reopen defaults are provided for by law and will be considered in light of the circumstances constituting the default. Considering the unique circumstances of this matter, including the communications between the Department and respondent, I conclude that respondent has shown a reasonable excuse for its default.

Respondent claims that based on the documentation provided by Veolia, respondent reasonably believed it was transporting a product not subject to the manifesting requirements of 6 NYCRR part 372. On this motion, the law only requires respondent to make "a showing of sufficient facts to demonstrate, on a prima facie basis, that a defense existed" (*Santander Consumer USA, Inc. v Kobi Auto Collision & Paint Center*, 166 AD3d 1365, 1366 [3d Dept 2018]). A summary judgment standard is not applied to motions brought pursuant to CPLR 5015(a)(1) or 6 NYCRR 622.4(f) (*see e.g. Lai v Montes*, 182 AD3d 646 [3d Dept 2020]). While respondent's stated defense may ultimately prove unsuccessful, I find respondent has shown that a meritorious defense is likely to exist.

In Department staff's opposition to respondent's cross motion, staff argues that respondent's defense is not supported by the law or facts. Such a conclusion, however, would require a determination of the defense on the merits, which goes beyond the determination of the motions before me. In this matter, the opposing positions of the parties raise factual, legal and policy questions that should only be decided after issue is joined. Similarly, the parties raise factual and legal questions regarding a *Cortlandt* defense that should only be decided on the merits.

For the limited purpose of reopening respondent's default in answering, I conclude that the likelihood of a meritorious defense has been shown by respondent.

RULING

Department staff's motion for default judgment is denied. Respondent's motion to serve and file a late answer is granted. Respondent is directed to serve and file its answer within ten days of service of this ruling on respondent. If respondent fails to serve and file an answer as directed herein, staff may renew its motion for default judgment on the papers already filed and served.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: July 6, 2021
Albany, New York

APPENDIX A

Matter of Lacy's Express, Inc.
DEC Case No. R8-20180123-13
Motion for Default Judgment

Department Staff's Papers

- Cover letter and Notice of Motion for Default Judgment and Order, dated April 6, 2021
- Motion for Default Judgment, dated April 6, 2021
- Affirmation of Dudley D. Loew, dated April 6, 2021, attaching Exhibits A-C:
    A. Affidavit of Service of Marcia Persson, sworn to April 6, 2021, with cover letter, notice of hearing and complaint, all dated July 9, 2020, USPS delivery confirmation and email dated July 9, 2020 attached
    B. Matter of Veolia ES Technical Solutions, L.L.C., Order of Consent, June 9, 2020
    C. Matter of Eastman Kodak Company, Order on Consent, May 4, 2018
    D. Proposed Order
- Affidavit of Matthew Gillette, P.E. in support for default judgment, sworn to April 6, 2021, attaching Exhibits E-G:
    E. Bills of Lading for UN1993 Flammable Liquids, N.O.S. (Isopropanol, Toluene) 3, II (ERG #128) M-6-1731 Isopropanol/Toluene, dated May 2, June 2, and June 21, 2017, transported from Veolia ES Technical Solutions to Eastman Kodak by Lacy's Express, Inc., with related Certified Product Analysis and Invoice attached for each shipment
    F. Part 364 Waste Transporter Permit No. NJ-268 issued to Lacy's Express, Inc., effective October 23, 2020 (Modification) with SWMS permit information attached
    G. 17 Uniform Hazardous Waste Manifests with Bills of Lading and Land Disposal Restriction Notification Forms for UN1993 Flammable Liquids, n.o.s. (Toluene) (Isopropanol), 3, II, RQ (D001), transported from Veolia ES Technical Solutions to Eastman Kodak by Lacy's Express, Inc.
    H. Eastman Kodak Solvent Information Form, dated June 25, 2012
    I. Justification for Requested Penalty
    J. Email correspondence between Dudley D. Loew and Joseph M. DiNicola, Jr., dated May 10, May 31, September 30 and October 8, 2019

Respondent's Papers

- Cover letter dated May 5, 2021
- Affirmation of Michael A. Fogel, dated May 5, 2021
- Affidavit of William H. Ferrell, Jr., sworn to May 5, 2021, attaching Exhibits 1-2:
    1. - Email from William Ferrell, Jr. to Scott Crisafulli, dated August 11, 2020
    - Correspondence from Dudley D. Loew to William H. Ferrell, dated January 25, 2018 (2) with order on consent attached

- Invoice from Lacy's to Veolia ES for May 1, 2017 shipping with Lacy's Express, Inc. Bill of Lading, Veolia ESA Technical Solutions Bill of Lading
- Email correspondence between Marcella DePalma (Veolia) and Jason Ferrell (Lacy's), dated April 21 and 26, 2017
- Copy of Federal Register, Vol. 70, No. 144, July 28, 2005, pp. 43638 and 436640
- Invoice from Lacy's to Veolia ES for June 2, 2017 shipping with Lacy's Express, Inc. Bill of Lading, Veolia ESA Technical Solutions Bill of Lading, verification of driver's time
- Email correspondence between Marcella DePalma (Veolia) and Jason Ferrell (Lacy's), dated May 25, 26 and 31, 2017
- Invoice from Lacy's to Veolia ES for June 19, 2017 shipping with Lacy's Express, Inc. Bill of Lading, Veolia ESA Technical Solutions Bill of Lading, verification of driver's time
- Email correspondence between Marcella DePalma (Veolia) and Jason Ferrell (Lacy's), dated June 5, 6, 9 and 13, 2017
- Correspondence from Dudley D. Loew to William H. Ferrell, dated June 23, 2020 with order on consent and invoice attached

2. Part 364 Waste Transporter Permit No. NJ-268 issued to Lacy's Express, Inc., effective October 1, 2020 (Renewal)

Department Staff's Reply Papers

- Cover letter dated May 28, 2021
- Reply Affirmation of Dudley Loew, dated May 28, 2021, attaching Exhibits A-G:
  - A. Affidavit of Service of Marcia Persson, sworn to May 14, 2021 (service of default motion papers)
  - B. Email correspondence from New Jersey DEP to Matthew Gillette, dated April 22, 2021 forwarding October 3, 2017 email regarding Kodak's receipt and management of IPA-Toluene from Veolia
  - C-1. Bills of Lading for UN1993 Flammable Liquids, N.O.S. (Isopropanol, Toluene) 3, II (ERG #128) M-6-1731 Isopropanol/Toluene, dated May 2, June 2, June 19, and June 21, 2017, transported from Veolia ES Technical Solutions to Eastman Kodak by Lacy's Express, Inc. (3) and Environmental Transport Group Inc. (1)
  - C-2. 17 Uniform Hazardous Waste Manifests with Bills of Lading and Land Disposal Restriction Notification Forms for UN1993 Flammable Liquids, n.o.s. (Toluene) (Isopropanol), 3, II, RQ (D001), transported from Veolia ES Technical Solutions to Eastman Kodak by Lacy's Express, Inc.
  - C-3. 4 Uniform Hazardous Waste Manifests with Land Disposal Restriction Notification Forms for UN1993 Flammable Liquids, n.o.s. (Toluene) (Isopropanol), 3, II, RQ (D001), transported from Veolia ES Technical Solutions to Eastman Kodak by Environmental Transport Group Inc.
  - D. Eastman Kodak Solvent Information Form, dated June 25, 2012
  - E. January 25, 2018 correspondence from Dudley Loew to William H. Ferrell, Jr.

F. Email correspondence between Dudley D. Loew and Joseph M. DiNicola, Jr., from February 15, 2018 to June 23, 2020
G. June 23, 2020 correspondence from Dudley Loew to William H. Ferrell, Jr.

- Reply Affidavit of Matthew Gillette, sworn to March 25, 2021, attaching Exhibit A:
  A. Kodak Solvent Recovery webpages

- Reply Affidavit of Scott Crisafulli, sworn to May 18, 2021, attaching Exhibits A-1 and A-2:
  A-1. Email from William Ferrell, Jr. to the Commissioner, dated July 15, 2020
  A-2. Email the DEC Commissioner form from the Department's website https://www.dec.ny.gov/about/407.html