

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

In the Matter of Alleged Violations of Article 12 of the Navigation
Law by:

LAURIE LAFRANCE,

Respondent.

ORDER

DEC Case No.
R6-20170926-55

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Laurie LaFrance violated Navigation Law §§ 173 and 176 as a result of the discharge of petroleum from a drum on property that respondent owns at 7190 State Route 3 in the hamlet of Cranberry Lake, Town of Clifton, St. Lawrence County (site). The site is the location of a former marina situated contiguous to Cranberry Lake.

Administrative Law Judge (ALJ) Lisa A. Wilkinson of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear at a pre-hearing conference scheduled for May 23, 2018 (see Default Summary Report at 4 [Finding of Fact No. 10]).

On June 27, 2018, Department staff served a motion for default judgment upon respondent. An affidavit in support of the motion submitted by Region 6 Regional Attorney Randall C. Young sworn to June 26, 2018 (Young Affidavit) was included with staff's papers.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Default Summary Report at 6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with, and in support of the motion, provide enough facts to enable me to determine that petroleum was discharged at the site and that respondent failed to adequately contain the discharge until considerably after the discharge occurred (see e.g. Young Affidavit ¶¶ 8-12). As noted in the Draft Summary Report, as of July 22, 2017, waste oil was leaking from a drum and oily rags were left outside at the site (see Default Summary Report, at 3 [Finding of Fact No. 4]; see also Complaint dated May 3, 2018, ¶ 10).

Section 192 of the Navigation Law establishes a penalty of twenty-five thousand dollars (\$25,000) for each offense of the Navigation Law. Department staff seeks a civil penalty of five

hundred dollars (\$500) for violating Navigation Law § 173 (which prohibits the discharge of petroleum) and one thousand dollars (\$1,000) for violating Navigation Law § 176 (which obligates a person discharging petroleum to immediately undertake to contain the discharge), for a total civil penalty of one thousand five hundred dollars (\$1,500).

Department counsel states that Department staff would generally seek a higher penalty for a discharge of petroleum to the environment, but staff took into account several mitigating factors in this case. These factors include that the marina at the site which had been operated by respondent's late husband is no longer in business, the discharge was "comparatively small," respondent engaged a contractor to remediate the site (albeit after the enforcement action was commenced), and respondent's contractor undertook remedial actions that went beyond addressing the violations alleged by staff ("including the removal of drums and a tank that were not subject to this enforcement action") (see Young Affidavit ¶ 22; Default Summary Report at 6). Based on this record, the requested penalty of one thousand five hundred dollars (\$1,500) is authorized and appropriate.

Although staff has requested that the civil penalty be paid within fifteen (15) days of the service of this order, based on my review of this matter I am providing some additional time for the payment of the civil penalty. I hereby direct that respondent submit the civil penalty to the Department within forty-five (45) days of service of this order upon respondent.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer the complaint or appear at the pre-hearing conference, respondent Laurie LaFrance waived her right to be heard in this matter.

II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Laurie LaFrance is determined to have violated Navigation Law § 173 as a result of a discharge of petroleum on property she owns located at 7190 State Route 3 in the hamlet of Cranberry Lake, Town of Clifton, St. Lawrence County, New York and Navigation Law § 176 by failing to contain the discharge.

III. Within forty-five (45) days of service of this order upon respondent Laurie LaFrance, respondent shall pay a civil penalty in the amount of one thousand five hundred dollars (\$1,500) by certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation.

IV. The penalty payment shall be sent to the following address:

New York State Department of Environmental Conservation
Region 6
317 Washington Street
Watertown, New York 13601-3787
Attn. Randall Young, Esq.

V. Any questions or other correspondence regarding this order shall be addressed to Randall Young, Esq. at the address indicated in paragraph IV of this order.

VI. The provisions, terms, and conditions of this order shall bind respondent Laurie La France, and her agents, successors and assigns in any and all capacities.

_____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
September 12, 2018

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

In the Matter of the Alleged Violations of Article 12 of the
Navigation Law by:

**DEFAULT
SUMMARY
REPORT**

LAURIE LAFRANCE,

DEC Case No.
R6-20170926-55

Respondent.

Appearances:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Randall C. Young, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- No appearance for respondent Laurie LaFrance.

Procedural History

Respondent Laurie LaFrance (respondent) is the owner of property located at 7190 State Route 3 in the hamlet of Cranberry Lake, Town of Clifton, St. Lawrence County (Site). On May 3, 2018, staff of the New York State Department of Environmental Conservation (Department) served respondent with a notice of hearing and complaint dated May 3, 2018 (complaint), alleging violations of sections 173 and 176 of the New York Navigation Law for discharging petroleum at the Site and failing to contain the discharge.

The complaint seeks an order of the Commissioner (1) finding respondent in violation of Navigation Law §§ 173 and 176, and (2) imposing a civil penalty in the amount of one thousand five hundred dollars (\$1,500), apportioned as follows: \$500 for violating Navigation Law § 173 by discharging petroleum; and \$1,000 for violating Navigation Law § 176 by failing to contain the discharge.

Department staff served the notice of hearing and complaint on respondent at her residence at 299 Aviation Road, Queensbury, New York 12804-1028 by certified mail on May 3, 2018 (*see* affidavit of April L. Sears, sworn to May 10, 2018 [Sears Aff]). The notice of hearing and complaint were delivered on May 7, 2018, and the receipt was returned signed by Colin Fraser, whom Mr. Young attests, upon information and belief, is respondent's son-in-law (affidavit of Randall C. Young sworn to June 26, 2018 [Young affidavit], ¶¶ 14-16). The notice of hearing informed respondent that an answer was due within 20 days, and that a pre-hearing conference was scheduled for May 23, 2018 at the Department's offices at 317 Washington

Street, Watertown, New York at 1:30 p.m. Respondent did not appear at the pre-hearing conference and did not answer the complaint within 20 days as required pursuant to 6 NYCRR 622.4(a).

Pursuant to section 622.15 of 6 NYCRR, Department staff moved for a default judgment on June 27, 2018, and served respondent with a notice of motion and motion dated the same day (Motion). Department staff's motion papers included a notice of motion and motion, an affidavit from Randall C. Young, Region 6 Regional Attorney, with two exhibits, and an affidavit of service (affidavit of service of April Sears, sworn to June 27, 2018). Staff also submitted a copy of the notice of hearing and complaint to which eight exhibits were attached and an affidavit of service (affidavit of April Sears, sworn to May 10, 2018). A list of exhibits is attached to this report.

Ms. LaFrance did not respond to Department staff's motion. As set forth below, this report recommends that the Commissioner grant Department staff's motion.

Default Provisions

In accordance with section 622.4(a) of 6 NYCRR, a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1] - [3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6). In addition, in support of a motion for a default judgment, staff must "submit some proof of facts sufficient to support the claims charged in a complaint" (*Matter of Greene Technologies Inc.*, Ruling of the Commissioner, November 10, 2016, at 3; *see also Matter of American Auto Body & Recovery Inc.*, Ruling of the Commissioner, July 2, 2015, at 3; *Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3). Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also State v Williams*, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and CPLR 3215[f]). Department staff's motion papers are sufficient

to state a claim and to support staff's request for a determination of liability on the part of respondent and an assessment of a civil penalty.

Findings of Fact

1. Respondent Laurie LaFrance owns the property located at 7190 State Route 3, Cranberry Lake, in the Town of Clifton, St. Lawrence County (Site) (Young Affidavit ¶ 4; complaint, Exhibits 1 and 2.)
2. The Site is located between State Highway 3 and the waters of Cranberry Lake (Young Affidavit ¶ 5) and is the site of a former marina (complaint ¶ 4).
3. A photograph of a drum located on the Site on or about July 19, 2017 shows oil coating the sides of the drum and staining the ground at the base of the drum (complaint ¶ 11).
4. As of July 22, 2017, waste oil was leaking from a drum and oily rags left outside at the site (complaint ¶ 10).
5. By letter dated July 25, 2017, Matthew W. Duffany, an Environmental Engineer in the Department's Region 6 office, advised respondent that the contents of one drum located on respondent's property behind a chain link fence were "leaking onto the ground," and that she was responsible as the owner of the property for having the contents of the drums on the property characterized, properly disposing of the drums, and addressing any associated impacts to ground water if applicable. Mr. Duffany also advised respondent that if she failed to complete the work to remove the drums and address any impacts, the Department would retain a contractor and seek reimbursement. (Complaint, Exhibit 4.)
6. By letter dated September 1, 2017, Mr. Duffany advised respondent that Department staff had made several attempts to contact her at the phone number she provided and asked that she call staff to discuss the requirements to remediate the situation. Mr. Duffany reiterated that the State would seek reimbursement if it incurred costs. (Complaint, Exhibit 5.)
7. Department staff referred the matter for enforcement on September 25, 2017 after respondent failed to remove the drum and contaminated soils or grant Department staff access to the property (Young Affidavit ¶ 10).
8. Randall Young, Region 6 Regional Attorney, advised respondent by letter dated October 11, 2017, that the Division of Environmental Remediation had referred the matter for enforcement, provided a consent order for respondent to execute, and

requested a response by October 27, 2017 (complaint Exhibit 6).

9. Service of the notice of hearing and complaint dated May 3, 2018 was made by certified mail and was received by Colin R. Fraser on May 7, 2018 (Sears Affidavit ¶ B and C).
10. The notice of hearing notified respondent that a pre-hearing conference was scheduled for May 23, 2018 at 1:30 p.m. at the Department's Region 6 offices located at 317 Washington Street, Watertown, New York (Young Affidavit ¶ 17). Respondent failed to answer the complaint, and did not appear at the pre-hearing conference. (*Id.* ¶¶ 19 and 20.)
11. Service of the motion for a default judgment was made by first class mail on June 27, 2018 (affidavit of April Sears sworn to June 27, 2018 [Sears Aff 2] ¶ B). As of the date of this report, respondent has not replied to the motion.
12. Randall Young, Region 6 Regional Attorney, submitted an affidavit in support of the motion for default judgment. He is personally familiar with the proceedings in this matter and has seen the property at 7190 State Route 3, Cranberry Lake, Town of Clifton, New York while spending time in the hamlet of Cranberry Lake and boating on Cranberry Lake. Mr. Young is aware of remedial actions taken at the Site and other facts relevant to this matter through discussions with Department staff and review of the Department's files. (Young Affidavit ¶ 4.)
13. Respondent failed to answer the complaint, failed to appear for the pre-hearing conference on May 23, 2018, and failed to respond to Department Staff's motion for a default judgment (Young Affidavit ¶¶ 18-20).

Discussion

Section 173 of the Navigation Law prohibits the discharge of petroleum. Section 176 of the Navigation Law provides that any person discharging petroleum in the manner prohibited by Section 173 shall immediately undertake to control such discharge. An owner of contaminated property who has control over activities occurring on the property, and reason to believe that petroleum products are stored there, may be liable as a discharger (*see State of New York v Green*, 96 NY2d 403, 407 [2001]). Proof of fault is not a predicate to liability (*see id.*).

Department staff's motion was accompanied by an affidavit from Randall Young, Region 6 Regional Attorney. Mr. Young is familiar with the property, the remedial work done at the property and the Department's files in this matter. He has also discussed the matter with Department staff (Young Affidavit ¶ 4). According to Mr. Young, a business known as

Emporium Marina formerly operated at the Site and, upon information and belief, respondent's husband William LaFrance operated Emporium Marina prior to his death in January 2010 (Young Affidavit ¶ 5). Thus, respondent had reason to know that drums were stored on the Site and that the drums contained petroleum products.

Department staff's motion papers include letters from Department staff to respondent that demonstrate staff's attempts to resolve the alleged violations. Department staff wrote to respondent at her residence on July 25, 2017, requesting that she remove the leaking drum and contaminated soils, or provide Site access to Department staff and State contractors so they could address the discharge (*see* complaint, Exhibit 4). Staff wrote a second letter to respondent on September 1, 2017, after she failed to remove the drum and contaminated soils, or grant staff access to the Site (*see* complaint, Exhibit 5). Staff noted that it was under the impression, based on an initial conversation with respondent, that respondent was working with an environmental contractor and that staff had made several subsequent, unsuccessful attempts to contact respondent at the phone number she provided. On October 11, 2017, Mr. Young sent respondent a proposed consent order alleging violations of the Navigation Law (*see* complaint Exhibit 6). Respondent did not execute the consent order. On or about December 4, 2017, a contractor hired by respondent removed the drum and contaminated soils from the Site (*see* Young Affidavit ¶ 12; complaint, Exhibit 8).

Department staff's papers included a photograph of the drum at the Site as of July 19, 2017 and a similar photograph taken on September 14, 2017 showing no changes in Site conditions (*see* complaint, Exhibits 3 and 7). Department staff also submitted a copy of the report dated March 1, 2018 prepared by NRC NY Environmental Services, Inc. for Laurie LaFrance for NYSDEC Spill Number 1704032 (*see* complaint, Exhibit 8). According to the report, NRC provided spill closure services, including the remediation of petroleum impacted soil, at the former Emporium Marine located at 7190 State Route 3 in Cranberry Lake on December 4, 2017 (complaint, Exhibit 8 at 1). The report explains that a spill occurred as a result of a 55-gallon poly drum failure, and approximately one-gallon of petroleum was released (*id.*).

Department staff's submissions establish that a discharge of petroleum occurred at the Site, and that respondent failed to contain the discharge in a timely manner. As the owner of the property where the discharge occurred, respondent is a responsible party under the Navigation Law (*State of New York v Green*, 96 NY2d 403, 407). The record also shows that Department staff served respondent with the notice of hearing and complaint and that respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for May 23, 2017. In addition, respondent was served with the motion for default judgment on June 27, 2018 and failed to respond.

Section 192 of the Navigation Law provides for a civil penalty of up to \$25,000 per day for each violation of the provisions of article 12 of the Navigation Law. Mr. Young states in his affidavit that in his experience, Department staff would generally seek a penalty substantially greater than \$1,500 for a discharge of petroleum to the environment and provided a copy of DEE-22 showing that a spill to a sump, which is not a discharge to the environment, has a penalty range of \$2,500 to \$7,500 (Young Affidavit ¶ 21). Mr. Young states the proposed penalty takes into account mitigating factors, including that the marina operated by respondent's husband at the Site is no longer in business, and that respondent had the contractors take actions beyond addressing the violations alleged by staff, including the removal of drums and a tank that were not subject to this enforcement action (*id.* ¶ 22). A penalty is warranted here given the effort Department staff had to expend over several months to have respondent remediate the spill. The requested penalty is far below the statutory penalty and below the penalty ranges in DEE-22 for less serious violations. Department staff is entitled to a default judgment in this matter pursuant to section 622.15 of 6 NYCRR.

Recommendations

Based upon the foregoing, the Commissioner should issue an order:

1. Granting Department staff's motion for default, and finding respondent in default pursuant to 6 NYCRR 622.15;
2. Holding respondent in violation of section 173 of the Navigation Law for discharging petroleum at the Site;
3. Holding respondent in violation of section 176 of the Navigation Law for failing to contain the discharge; and
4. Directing respondent to pay a civil penalty of one thousand five hundred (\$1,500) dollars.

_____/s/_____
Lisa A. Wilkinson
Administrative Law Judge

Dated: Albany, New York
August 8, 2018

EXHIBIT LIST
MATTER OF LAURIE LAFRANCE
DEC CASE NO. R6-20170926-55

Affidavit of Randall C. Young

The following exhibits were attached to the affidavit:

1. Exhibit RY-1 – DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy Penalty Schedule
2. Exhibit RY-2 – Proposed Order

Complaint dated May 3, 2018

The following exhibits were attached to the complaint:

1. Exhibit 1 - Real property deed for 7190 State Route 3, town of Clifton, St. Lawrence County, Liber 1028, page 688
2. Exhibit 2 - 2017 St. Lawrence County Real Property Tax roll for town of Clifton
3. Exhibit 3 - Photograph of drum at Site
4. Exhibit 4 – Letter from Matthew Duffany, P.E. Environmental Engineer, New York State Department of Environmental Conservation to Laurie LaFrance dated July 25, 2017
5. Exhibit 5 - Letter from Matthew Duffany, P.E. Environmental Engineer, New York State Department of Environmental Conservation to Laurie LaFrance dated September 1, 2017
6. Exhibit 6 - Letter from Randall C. Young, Regional Attorney, Region 6, New York State Department of Environmental Conservation to Laurie LaFrance dated October 11, 2017
7. Exhibit 7 – Photograph dated September 14, 2017 of site and uncontained drum
8. Exhibit 8 – Former Emporium Marine Spill Closure Services Report dated March 1, 2018.