

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of
Articles 17 and 71 of the Environmental Conservation
Law of the State of New York, Article 12 of the New
York State Navigation Law and Title 17 of New York Code
of Rules and Regulations (NYCRR), by:

RULING

DEC Case No.R2-20060725-308

DORIS LYONS, LLC,

Respondent.

Procedural Background

By motion dated January 24, 2007 Staff of the Department of Environmental Conservation (DEC or Department Staff) moved for an order without hearing against Doris Lyons, LLC (respondent). The motion alleges respondent violated Article 17 of the Environmental Conservation Law (ECL), Article 12 of the Navigation Law of New York State (NL) and 17 NYCRR Part 32. Department staff submitted the following in support of the motion: affirmation of John K. Urda, Esq., assistant regional attorney, dated January 24, 2007 and affidavit of Rui-Jun Feng, environmental engineer I, in the NYS DEC Environmental Remediation Division dated January 24, 2007. Respondent and attorney Kathleen Bradshaw, Esq., counsel for respondent were served with the motion on January 26, 2007 by regular mail. Respondent has not appeared nor opposed the motion and the time to respond to the motion expired on February 23, 2007.

Staff's Position

Department Staff alleges that the respondent violated ECL 17-0501 and 17-0807 by discharging petroleum into the waters of the state, which caused or contributed to a condition in contravention of the standards adopted pursuant to ECL 17-0301. It is also alleged that the discharge without a federal or state permit violated NL 173 and that respondent violated NL 176 and 17 NYCRR 32.5 for failing to immediately undertake to contain the prohibited discharge.

Department Staff has requested the following penalties:
\$37,500.00 for the violations of ECL Article 17 and \$25,000.00

for the Navigation Law violations for a total penalty of \$62,500.00. Additionally, Department Staff has requested that respondent investigate and remediate the site under a Department approved plan.

Discussion

Section 622.12(d) of 6 NYCRR provides that (a) in lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence. A motion for order without hearing is governed by section 3212 of the Civil Practice Law and Rules of New York (CPLR). 6 NYCRR 622.12(d) CPLR 3212 allows for the granting of summary judgment when no issue of fact remains.

The evidence submitted by staff in support of its motion establishes that, since December 27, 2004, respondent was the owner of real property located at 632 East 227th Street, Bronx, New York (site). On May 9, 2005, the Department was notified by the New York City Fire Department of petroleum seepage at 4016 Carpenter Avenue, Bronx, New York. The 4016 Carpenter Avenue property is adjacent to the site. The NYC Fire Department reported to the Department that a discharge of petroleum at the site may have caused the seepage at the 4016 Carpenter Avenue property. The Department assigned spill number 0501576 to the incident (the spill). Department Staff's motion alleges that a discharge of petroleum on the site caused the seepage on the adjacent property. No evidence is offered in the moving papers to support the conclusion that a spill occurred at the site or that any discharge on the site was the cause of the seepage at the adjacent property.

Moreover, Staff did not submit any proof with its motion to establish that an applicable water quality standard was violated, what that standard was with respect to the receiving body of water, or even what water of the state, be it surface or ground water, was impacted by the spill at issue (see Matter of Morgan Oil Terminals Corp., Order of the Commissioner, Oct. 17, 1994; Matter of Kent, Order of the Commissioner, Dec. 7, 1992; and Matter of Amabile, Order of the Commissioner, July 12, 2006). Thus, Department staff has not established a violation of ECL 17-0501 and 17-0807 nor the alleged violations of the Navigation Law.

Ruling

The motion is denied. A hearing shall be held on the complaint within 90 days of this Ruling. A conference call will be held on March 3, 2008 at 10:00 a.m. with Department Staff and this office to schedule that hearing. The conference call will be initiated by the Office of Hearings.



Molly T. McBride
Administrative Law Judge

Dated: February 20, 2008
Albany, New York

TO: John Urda, Esq.
Assistant Regional Attorney
NYSDEC - Region 2
47-40 21st Street
Long Island City, NY 11101-5407

Kathleen Bradshaw, Esq.
3114 East Tremont Avenue
Bronx, NY 10461

Doris Lyons, LLC
548 Throgs Neck Expressway
Bronx, NY 10465