

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

In the Matter of the Alleged Violations of Article 24 of the Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 663,

RULING

DEC Case No.
R8-2018-0710-71

- by -

BRANDON MARTIN,

Respondent.

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges that respondent Brandon Martin (respondent), violated Article 24 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 663 by filling, grading, dredging, or constructing a residence, structure, or facility in a regulated wetland or adjacent area on property he owns at 5500 Fisher Road, Newark, New York (site). Department staff served a Notice of Hearing and Complaint on Respondent on August 3, 2018 (NOHC). By motion dated September 27, 2018, respondent moved pursuant to 6 NYCRR 622.4 to serve an answer beyond the twenty (20) day time period as provided for in 6 NYCRR Part 622 (motion). Department staff has opposed the motion by affirmation of Assistant Regional Attorney Dusty Renee Tinsley (Tinsley Affirm). For the reasons that follow, respondent's motion is granted.

I. PROCEEDINGS

Respondent was advised on July 30, 2018 by Assistant Regional Attorney Tinsley that a NOHC was being served on him, commencing an administrative enforcement proceeding (Tinsley Affirm at ¶3). Department staff served a NOHC on respondent on August 3, 2018 alleging that he violated Article 24 of the Environmental Conservation Law and 6 NYCRR Part 663 by filling, grading, dredging, or constructing a residence, structure, or facility in a regulated wetland or adjacent area at the site (NOHC and Tinsley Affirm at ¶11). Department staff has provided proof of service of the NOHC on Ashley Martin who signed the USPS return receipt card (Tinsley Affirm, Exhibit 2). Respondent contacted Ms. Tinsley on August 21, 2018 inquiring about the NOHC as he had not yet received it (Tinsley Affirm at ¶3). In response, Ms. Tinsley sent a copy of the NOHC to respondent by email on August 21, 2018 and respondent was encouraged to contact an attorney (Exhibit 4, NOHC). Department staff filed a Statement of Readiness on August 27, 2018 (Exhibit 5, NOHC). Respondent emailed Ms. Tinsley on

September 11 & 12, 2018 indicating his confusion with the process regarding the NOHC and Statement of Readiness and asking to discuss it with her on September 18, 2018 when they were scheduled to meet on another matter (Tinsley Affirm, Exhibit 6). Upon the filing of the Statement of Readiness, the matter was assigned to the undersigned Administrative Law Judge (ALJ).

A conference call was held on September 21, 2018 with Ms. Tinsley, Mr. Martin and respondent's attorney, Alan J. Knauf, Esq. A hearing date was set for November 19, 2018. Respondent's motion to file a late answer was served on September 27, 2018. Department staff's opposition to the motion was served October 5, 2018. Melissa

II. FINDINGS OF FACT

1. Respondent Brandon Martin resides at 5500 Fisher Road, Newark, New York 14513.
2. A portion of the site contains a Class 3 mapped freshwater wetland designated NE-23, identified on the Department's wetland map Newark Quad, Wayne County Map 17 of 20 and a 100-foot adjacent area surrounding the wetland (Tinsley Affirm at ¶4).
3. Department staff inspected the site on August 11, 2017 and alleged to have observed violations of ECL Article 24 and 6 NYCRR 663 (Tinsley Affirm at ¶5). Staff alleges respondent placed fill, graded, constructed a structure or dredged in the wetland and adjacent area without a permit (NOHC ¶29, 34, 39 & 44).
4. Department staff met with respondent on July 30, 2018 regarding the alleged violations (Tinsley Affirm ¶6).
5. Department staff served respondent with a Notice of Hearing and Complaint on August 3, 2018 (Tinsley Affirm, Exhibit 2). Pursuant to 6 NYCRR 622.4 respondent had twenty days from service of the complaint (August 23) to serve an Answer. No Answer was served by respondent by August 23, 2018.
6. Respondent contacted Ms. Tinsley on August 21, 2018 stating that he had not received the NOHC and inquiring about the status. Ms. Tinsley sent a copy of the NOHC to respondent via email in response to the inquiry on August 21, 2018 (Tinsley Affirm at ¶10 & 11).
7. Department staff served a Statement of Readiness on August 27, 2018 (Tinsley Affirm at ¶15).
8. Respondent emailed Ms. Tinsley on September 11, 2018 indicating confusion with the process (Tinsley Affirm at ¶17).

9. A letter from the Office of Hearings and Mediation Services was sent to the parties on September 10, 2018 to schedule a conference call. A call was held on September 21, 2018 with Ms. Tinsley, respondent and respondent's counsel, Alan J. Knauf, Esq. This was the first formal appearance of counsel. A hearing has been scheduled for November 19, 2018.
10. Respondent did not serve an Answer to the NOHC within 20 days of service.

III. DISCUSSION

Respondent has moved to belatedly file an answer and also for an order directing that the Department accept respondent's answer (motion). Part 622 of the Title 6 of the Official Compilation of Codes, Rules and Regulations applies to enforcement cases, such as the matter herein. Pursuant to 6 NYCRR 622.4(a) an answer must be served

a) Within 20 days of receiving the notice of hearing and complaint or an amended complaint, the respondent must serve on the department staff an answer signed by respondent, respondent's attorney or other authorized representative. The time to answer may be extended by consent of staff or by a ruling of the ALJ. Failure to make timely service of an answer shall constitute a default and a waiver of the respondent's right to a hearing.

Respondent's answer to the NOHC dated September 27, 2018 was attached to respondent's motion. The respondent asserts seven affirmative defenses. The motion does not provide any information as to the basis for the affirmative defenses. Ms. Tinsley's affirmation indicates that respondent and Department staff had at least one meeting regarding the alleged violations before the NOHC was served. Additionally, before the time to answer expired, respondent contacted Ms. Tinsley via email and he contacted Ms. Tinsley several times after that time period expired, and before counsel appeared on his behalf. Ms. Tinsley made efforts to encourage respondent to retain legal counsel to assist him (Tinsley Affirm). Respondent did not submit an affidavit in support of the motion so we have no explanation from him directly as to why he did not timely file an answer. His attorney alleges that he did not "fully understand the procedures related to this matter" (Knauf Affirm at ¶4). Respondent did respond in a timely manner to correspondence from this office as well as email from this office. He also made himself available for a conference call to discuss scheduling the enforcement hearing.

There is no dispute that the respondent did not timely serve answer to the NOHC. A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). If a respondent fails to answer a complaint, Department staff may make a motion to an ALJ for a default judgment. In this case, however, Department staff has not moved for default judgment.

The courts have generally favored a resolution of cases upon the merits (*see* *Spence v Davis*, 139 AD3d 703, 704 [2d Dept 2016]; *Gonzalez v Seejattan*, 123 AD3d 762, 763 [2d Dept 2014]). Section 622.4 allows the ALJ the authority to extend the time for service of an answer.

Examining the facts presented here, it is clear that respondent stayed engaged and diligent and did not abandon his defenses. There was a short period of delay in respondent serving an answer but I see no prejudice to staff due to the short delay. Staff was aware that respondent remained engaged with the Department. Respondent has raised seven (7) affirmative defenses. Public policy strongly favors the resolution of cases on the merits when possible (*Puchner v Nastke*, 91 AD3d 1261, 1262 [3d Dept 2012]).

RULING

Respondent's motion to serve and file a late answer is granted, and respondent's answer attached to his motion is accepted as filed.

_____/s/_____
Molly T. McBride
Administrative Law Judge

Dated: October 23, 2018
Albany, New York