

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 13, Title 3 of the Environmental Conservation Law (ECL) of the State of New York, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

-by-

DEC Case No.
CO1-20190213-52

REYNOLD MOHAMMED,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) alleges that respondent Reynold Mohammed violated 6 NYCRR 50.2(a)(1) by failing, during calendar year 2018, to timely submit four vessel trip reports (VTRs) or reports stating that no trips were made. The complaint seeks an order: (i) holding respondent in violation of 6 NYCRR 50.2(a)(1); (ii) assessing a civil penalty in the amount of one thousand dollars (\$1,000); and (iii) directing respondent to submit the missing VTRs.

On June 4, 2019, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of the Department's Office of Hearings and Mediation Services, to address these violations. ALJ Caruso prepared the attached hearing report, which I adopt as my decision in this matter, subject to the following comments. As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear for the adjudicatory hearing convened on June 4, 2019 (*see* Hearing Report at 4 [Finding of Fact No. 21]).

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* Hearing Report at 5-6). At the hearing on June 4, 2019, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim (*see id.*). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

The record demonstrates that respondent, as a holder of a commercial whelk license, was required to submit monthly VTRs for calendar year 2018 but failed to do so for the months of June, July, August and September 2018. By failing to timely file either the VTRs or reports stating that respondent did not fish in those months, respondent violated 6 NYCRR 50.2(a)(1)

(see Hearing Report at 5-6). Accordingly, Department staff is entitled to judgment based on record evidence.

Department staff made several efforts to obtain respondent's compliance with the filing requirements (see Hearing Report at 3 [Findings of Fact 10-18]; see also Hearing Exhibits 6, 7, 8, and 9). On October 15, 2018, Department staff mailed respondent a postcard notice indicating respondent had not filed the required reports. The postcard notice advised respondent to file the missing VTRs immediately and that failure to submit the required reports may result in fines, permit suspension, or further enforcement action. Respondent did not file the missing VTRs in response to staff's notice. Department staff mailed respondent a notice dated November 13, 2018 indicating that respondent had not filed the required reports and that, if the missing reports were not submitted, the matter could be referred for legal action. Respondent did not file the reports in response to Department staff's November 13, 2018 notice.

Subsequently, Department staff sent a notice dated January 4, 2019 directing that respondent file the reports and noting, if the reports were not filed, respondent would be subject to civil penalties. Again, respondent did not file the reports. Department staff again reached out to respondent by postcard on February 4, 2019 directing that respondent file the reports immediately. Respondent did not file the missing reports in response to this further request. As the record demonstrates, respondent has persistently ignored staff's requests to satisfy the reporting requirements, and, as noted, respondent failed to answer or appear in this administrative proceeding.

The reporting requirements imposed by the regulations are important to fisheries management strategies. Specifically, the VTRs assist the State in managing fishing quotas, assessing fishing stocks and analyzing the contribution of commercial fishing to New York's economy (see Hearing Report at 5; see also Hearing Exhibit 4 at 1 [Vessel Trip Report (VTR) Information Packet]).

Based on the above, the ALJ recommends that I impose a civil penalty of \$1,000 as requested by Department staff. Department staff requests that a penalty of \$250 be assessed for each of the four months that respondent failed to submit his VTRs. In the circumstances of this matter, ECL 71-0925(7) imposes a civil penalty of \$250 per violation for the violation of 6 NYCRR 50.2(a)(1). The penalty requested is supported and appropriate.

Department staff's complaint is silent regarding when the penalty must be paid, but staff's proposed order directs payment within thirty (30) days of the order. Upon consideration, I am directing respondent to pay the civil penalty within thirty (30) days of respondent's receipt of this order. In addition, I am directing respondent to submit the June, July, August and September VTRs for 2018 to Department staff within thirty (30) days of respondent's receipt of this order.

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 or appear in this proceeding, respondent Reynold Mohammed waived his right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Reynold Mohammed violated 6 NYCRR 50.2(a)(1) by failing to file four monthly vessel trip reports for the 2018 calendar year or a "NYS Not Fishing Form – 2018" for the months of June, July, August and September 2018 for respondent's whelk permit.
- III. Within thirty (30) days of the service of this order upon respondent Reynold Mohammed, respondent shall submit to the Department the four monthly vessel trip reports that are due for 2018.
- IV. Respondent Reynold Mohammed is hereby assessed a civil penalty in the amount of one thousand dollars (\$1,000). Respondent shall pay the penalty within thirty (30) days of the service of this order upon respondent. Payment is to be by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The vessel trip reports and the penalty payment shall be sent to the following address:

Anne Haas, Esq.
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
- VI. The provisions, terms and conditions of this order shall bind respondent Reynold Mohammed and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
June 11, 2019

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 13, Title 3 of the Environmental Conservation Law (ECL) of the State of New York, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

HEARING REPORT

-by-

DEC Case No.
CO1-20190213-52

REYNOLD MOHAMMED,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Reynold Mohammed (respondent) with a notice of hearing and complaint, dated April 4, 2019, alleging a violation of ECL 13-0330 and its implementing regulation, 6 NYCRR 50.2(a)(1), for failing to timely submit four vessel trip reports (VTRs) or reports stating that no trips were made relating to respondent's commercial whelk license. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of 6 NYCRR 50.2(a); (ii) assessing a civil penalty in the amount of one thousand dollars (\$1,000); and (iii) granting such other relief as the Commissioner may deem appropriate.

Service of the notice of hearing and complaint on respondent was made by certified mail and was received by respondent on April 6, 2019 (*see* Affidavit of Service of Bonnie Pedone, sworn to April 16, 2019). Respondent did not answer the complaint.

As provided in the notice of hearing, an adjudicatory hearing was convened before the undersigned on June 4, 2019 at 11:00 a.m. The hearing was held via video conference. Department staff was present at the Department's Division of Marine Resources offices at 205 N. Belle Mead Road, East Setauket, New York. Department staff was represented by Anne Haas, Esq, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a staff witness. Noting for the record that respondent had failed to answer the complaint and failed to appear for the adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15 and also sought judgment on the merits.

Department staff called one witness, Julia Socrates, Marine Biologist II, Division of Marine Resources. In all, nine (9) exhibits were received in evidence.

Findings of Fact

The following facts are found based upon the proof adduced at hearing:

1. Respondent Reynold Mohammed applied for and received Shellfish Digger Permit #23918 and Whelk Permit #1376 for the year 2018 (*see* Testimony of Julia Socrates [Socrates Testimony]; Staff Exhibit 3).
2. Whelk permit holders are required to file monthly VTRs with the Department by the 15th of the following month even if the permit holder did not fish (*see* Socrates Testimony; Staff Exhibit 4).
3. When a whelk permit holder does not fish, the permit holder must submit a VTR to the Department indicating the permit holder “DID NOT FISH” and the duration that the respective permits were not fished (*see* Staff Exhibit 4, Vessel Trip Report Form at 1 and Instructions at 2).
4. Instead of filing monthly VTRs reporting that the permit holder did not fish during the previous month, a whelk permit holder may file a NYS Not Fishing Form with the Department affirming that the permit holder will not be fishing the permits held during any or all months of the calendar year (*see* Socrates Testimony; Staff Exhibit 4, NYS Not Fishing Form - 2018).
5. Respondent submitted a NYS Not Fishing Form on May 24, 2018 indicating he would not be fishing his whelk permit in January through May and October through December in 2018 (*see* Socrates Testimony; Staff Exhibit 5).
6. Whelk permit holders may submit monthly paper VTRs to the Department by mail, personal delivery, fax or scan and email, or fulfill their requirements by submitting the VTRs online through the Standard Atlantic Fisheries Information System (SAFIS) which was developed and is maintained by the Atlantic Coastal Cooperative Statistics Program, a partnership of state and federal agencies including the Department (*see* Socrates Testimony; Staff Exhibits 4, 7 and 8).
7. Department staff enters VTR information received from permit holders into the New York Fisheries Information on Sales and Harvest (NYFISH) database maintained by the Department (*see* Socrates Testimony).
8. Department staff searches the paper records, scanned files, and the NYFISH and SAFIS databases, as well as the National Marine Fisheries Service database, several times a year to determine what permit holders have not filed VTRs or a NYS Not Fishing Form (*id.*)

9. As a result of staff's searches, staff determined respondent had not filed VTRs for June, July, August and September 2018 (*id.*).
10. On October 15, 2018, Department staff mailed respondent a postcard notice indicating that as of October 3, 2018, respondent had not filed VTRs for June through August 2018 and directing respondent to file the missing VTRs immediately (*see* Socrates Testimony; Staff Exhibit 6).
11. Respondent did not file the missing VTRs or otherwise respond to the postcard notice from Department staff (*see* Socrates Testimony).
12. On November 14, 2018, Department staff mailed respondent a notice, dated November 13, 2018, entitled "Failure To Submit State Vessel Trip Reports For 2018," indicating respondent had not submitted VTRs for June through August of 2018. The notice also directed respondent to submit the missing VTRs by December 17, 2018, and advised respondent of the consequences of failing to submit the VTRs (*see* Socrates Testimony; Staff Exhibit 7).
13. Respondent did not file the missing VTRs or otherwise respond to the November 13, 2018 notice from Department staff (*see* Socrates Testimony).
14. On January 5, 2019, Department staff mailed respondent a Notice of Violation regarding respondent's failure to submit VTRs for 2018, dated January 4, 2019, indicating respondent had not submitted VTRs for June through August of 2018 and directing respondent to submit the missing VTRs by February 4, 2019 (*see* Socrates Testimony; Staff Exhibit 8).
15. Respondent did not file the missing VTRs or otherwise respond to the January 4, 2019 notice from Department staff (*see* Socrates Testimony).
16. Department staff searched the paper records, scanned files, and databases in January 2019 and determined respondent had not filed VTRs for June through September 2018 (*see* Socrates Testimony).
17. On February 4, 2019, Department staff mailed respondent a post card notice indicating as of February 1, 2019, respondent had not filed VTRs for June through September 2018 and directing respondent to file the missing VTRs immediately (*see* Socrates Testimony; Staff Exhibit 9).
18. Respondent did not file the missing VTRs or otherwise respond to the postcard notice from Department staff (*see* Socrates Testimony).
19. Julia Socrates is a Marine Biologist II and currently the Chief of the Marine Habitat Bureau and formerly the Data Management Unit leader in the Department's Division of Marine Resources. Ms. Socrates is familiar with the Department's procedures regarding

issuance of commercial fishery permits, the reporting requirements for commercial permit holders, and the records maintained by the Department, the Atlantic Coastal Cooperative Statistics Program and the National Marine Fisheries Service (*see* Socrates Testimony).

20. As shown by the affidavit of service, respondent was served by certified mail, on April 6, 2019, with a notice of hearing and complaint dated April 4, 2019, alleging a violation of 6 NYCRR 50.2(a)(1), together with a statement of readiness, for failure to file VTRs for the months of June, July, August and September 2018 (*see* Staff Exhibit 2). Respondent received the notice of hearing and complaint on April 6, 2019 (*id.*).
21. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in this matter for June 4, 2019, as directed in the notice of hearing (*see* Hearing Record).

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). 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]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing"]).

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" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (*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* CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; and (ii) respondent failed to file an answer to the complaint and

failed to appear for the adjudicatory hearing convened on June 4, 2019, as directed in the notice of hearing. Department staff provided its proposed order at the June 4, 2019 hearing.

Pursuant to 6 NYCRR 50.2(a)(1), holders of commercial whelk licenses shall complete and submit an accurate fishing VTR for each commercial fishing trip, detailing all fishing activities and all species landed within 15 days after the end of each month or at a frequency specified by the Department in writing. VTRs shall be completed, signed, and submitted to the Department for each month. If no fishing trips were made during a month, a report must be submitted stating no trips were made for that month.

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent did not file four monthly VTRs in 2018 in violation of 6 NYCRR 50.2(a)(1) (*see e.g. Matter of Samber Holding Corp.*, Order of the Commissioner at 1). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing demonstrates by a preponderance of the evidence that respondent failed to file four monthly VTRs for 2018 and failed to file a NYS Not Fishing Form - 2018 for respondent's whelk permit for June through September 2018, in violation of 6 NYCRR 50.2(a)(1). The Department is entitled to judgment upon the facts proven.

Department staff seeks a civil penalty in the amount of one thousand dollars (\$1,000). ECL 13-0330 authorizes the Department to promulgate regulations for the management of whelk including recordkeeping requirements for holders of commercial whelk licenses (*see* ECL 13-0330[6]). Paragraph 50.2(a) of 6 NYCRR was promulgated pursuant to ECL 13-0330. For violations of ECL 13-0330 or the regulations promulgated pursuant thereto, ECL 71-0925(7) provides that the civil penalty "shall be" the greater of \$250 or a dollar figure involving the number of fish, shellfish or crustaceans taken in violation of the law and regulations. Because this matter involves reporting violations, the civil penalty is a nondiscretionary penalty of \$250 per violation.

Department staff requests that the penalty of \$250 be assessed for each of the four months that respondent failed to submit his VTRs. Department staff described the importance of the VTRs to the regulatory scheme as the VTRs assist the State in managing fishing quotas, fishing stock assessments and analyzing what commercial fishing contributes to New York's economy. The data collected from VTRs is vital to the development of fisheries management strategies. Accordingly, I find staff's penalty request of \$1,000 is supported and appropriate. Department staff's complaint is silent regarding when the penalty must be paid, but staff's proposed order directs payment within thirty (30) days of the order. I recommend that respondent be directed to pay the civil penalty within thirty (30) days of respondent's receipt of the Commissioner's order.

Department staff's complaint requests that respondent be directed to submit the missing VTRs to the Department. I recommend the Commissioner grant staff's request and direct

respondent to submit the June, July, August and September VTRs for 2018 to Department staff within thirty (30) days of respondent's receipt of the Commissioner's order.

Conclusion of Law

By failing to file VTRs for June, July, August and September 2018, respondent, holder of Whelk Permit #1376, violated 6 NYCRR 50.2(a)(1).

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default judgment, holding respondent Reynold Mohammed in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Reynold Mohammed violated 6 NYCRR 50.2(a)(1) by failing to submit VTRs for the months of June, July, August and September in 2018;
3. Directing respondent Reynold Mohammed to pay a civil penalty in the amount of one thousand dollars (\$1,000) within thirty (30) days of service of the Commissioner's order;
4. Directing respondent Reynold Mohammed to submit VTRs for June, July, August and September 2018 to Department staff within thirty (30) days of service of the Commissioner's order; and
5. Directing such other and further relief as he may deem just and appropriate.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
June 7, 2019

EXHIBIT CHART – HEARING*Matter of Reynold Mohammed*

June 4, 2019

CO1-20190213-52

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Anne Haas, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, all dated April 4, 2019.	✓	✓	Department Staff	
2	Affidavit of Service of Bonnie Pedone, sworn to April 16, 2019 with USPS delivery confirmation and electronic signed receipt attached	✓	✓	Department Staff	
3	2018 Applications for Marine Permits (2) submitted by Reynold Mohammed on May 24, 2018 (with staff notations)	✓	✓	Department Staff	
4	Vessel Trip Report Form For New York State Permit Holders, NYS Not Fishing Form – 2018, Vessel Trip Report (VTR) Information Packet with instructions	✓	✓	Department Staff	
5	NYS Not Fishing Form - 2018 submitted by Reynold Mohammed on May 24, 2018 (with staff numerical notations)	✓	✓	Department Staff	
6	Copy of post card notice to Reynold Mohammed, noting as of October 3, 2018, vessel trip reports for June through August 2018 had not been submitted	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	Notice of Failure To Submit State Vessel Trip Reports For 2018 addressed to Reynold Mohammed dated November 13, 2018	✓	✓	Department Staff	
8	Notice of Violation - Failure To Submit State Vessel Trip Reports For 2018 addressed to Reynold Mohammed, dated January 4, 2019	✓	✓	Department Staff	
9	Copy of post card notice to Reynold Mohammed, noting as of February 1, 2019, vessel trip reports for June through September 2018 had not been submitted	✓	✓	Department Staff	