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

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| In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law 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) Part 612 by | RULING ON MOTION FOR A DEFAULT JUDGMENT |
| DOUGLAS MURRAY, | DEC File No. R6-19991228-109 |
| Respondent. | |

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Appearances:

-- Randall C. Young, Assistant Regional Attorney, for the NYS Department of Environmental Conservation.

-- No appearance for Douglas Murray, respondent.

## Proceedings

By notice of motion dated May 13, 2003, staff of the Department of Environmental Conservation ("Department") seeks, pursuant to 6 NYCRR 622.15, a default judgment against respondent Douglas Murray for alleged violations of article 17 of the Environmental Conservation Law ("ECL") and its implementing regulations. For the reasons that follow, Department staff's motion is denied.

## Findings of Fact

1. A cover letter, notice of hearing, and complaint, all dated September 12, 2000, were prepared and signed by George E. Mead III, former Regional Attorney, Region 6. In the complaint, Department staff alleged that respondent violated ECL 17-1009 and 6 NYCRR 612.2 by failing to register a petroleum bulk storage facility located at 1183 Main Street, Chippewa, New York, 13623.

2. The case file concerning this matter does not contain an affidavit of service by someone

with personal knowledge indicating that the notice of hearing and complaint were mailed to respondent.

3. The case file does contain, however, a certified mail receipt indicating that mail was sent to respondent on September 12, 2000. It also contains a domestic return receipt indicating that the certified mail sent on September 12, 2000, was delivered on September 18, 2000, to respondent at the 1183 Main Street address. The return receipt was signed by Chris Murray. The certified mail receipt and domestic return receipt do not indicate, however, the nature of the mail sent on September 12, 2000, and received on September 18, 2000.

4. In May 2003, the case was reassigned to Randall C. Young, Assistant Regional Attorney. On May 13, 2003, Mr. Young served upon respondent a notice of motion, a motion for a default judgment, and supporting affidavits and exhibits. Among the supporting materials attached to the motion was a copy of the September 12, 2000 complaint. The notice of motion for a default judgment was properly served upon respondent by certified mail, return receipt requested.

5. Respondent has not filed an answer, responded to the motion for a default judgment, or otherwise appeared in this matter.

## Discussion

Section of 622.15(b) of 6 NYCRR, "Default Procedures," provides:

"[A] motion for a default judgment . . . must contain:

> "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
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> "(2) proof of the respondent's failure to appear or failure to file a timely answer; and
>
> "(3) a proposed order."

Section 622.3 of 6 NYCRR authorizes service of the notice of hearing and complaint "by personal service consistent with the CPLR or by certified mail" (6 NYCRR 622.3[a][3]). Where service is by certified mail, service is complete when the notice of hearing and complaint is received (see id.). Staff's motion for a default judgment is premised upon respondent's failure to answer the September 12, 2000 complaint. Thus, before staff's motion may be granted, it must be shown that the September 12, 2000 complaint was mailed to and received by respondent.

Ordinarily, proof of mailing of a complaint is established by an affidavit of mailing duly executed by a person with personal knowledge that the complaint was actually mailed (see Heffernan v Village of Munsey Park, 133 AD2d 139, 140 [2d Dept 1987]; see also Prince,

Richardson on Evidence § 3-128 [Farrell 11th ed]). Proof of mailing may also be established by proof of an office practice and procedure followed in the regular course of business that shows that the notice was duly addressed and mailed (see id.). When relying upon proof of a course of business or office practice to prove mailing, it must be shown, by someone with personal knowledge, that the usual procedures were followed in that particular case (see Capra v Lumbermens Mut. Cas. Co., 43 AD2d 986, 986 [3d Dept 1974]; Felician v State Farm Mut. Ins. Co., 113 Misc 2d 825, 829 [1982] [when relying upon proof of office practice to prove mailing, it must be shown that the letter in question was placed in the usual office receptacle for outgoing mail]).

In this case, no affidavit of mailing, duly executed by a person with personal knowledge, was produced establishing that the complaint was actually mailed to respondent. Instead, staff offers a March 12, 2004 affidavit of Ardis Seifried, Secretary 1 in the office of Region 6 Division of Legal Affairs, whose duty it is to handle mail received and sent by the office. The affidavit establishes that during the relevant time period, the standard practice was for attorneys to prepare drafts of documents, then give them to Ms. Seifried for final typing and mailing. The affidavit also establishes the standard office practice for certified mailings and the filing of return receipts received by the office into the appropriate case files. However, the affidavit fails to establish that Mr. Mead gave the September 12, 2000 complaint to Ms. Seifried for certified mailing, or that the standard certified mail practice was used in this case. Moreover, nothing in the papers excludes the possibility that something other than the September 12, 2000 complaint was received by respondent on September 18, 2000.

Staff contends that the motion for a default judgment may be granted because the default motion was properly served upon respondent, that respondent had the opportunity to preserve his rights by requesting a hearing, and that he failed to respond in any way. This contention, however, overlooks the requirement under section 622.15 that a motion for a default judgment contain proof that the notice of hearing and complaint was served upon the respondent. The circumstance that a copy of the complaint was attached to the motion is of no moment. The regulations do not authorize commencement of an administrative enforcement proceeding by attaching the complaint to a motion for a default judgment (see 6 NYCRR 622.3). Thus, personal jurisdiction over respondent was not obtained through the default motion. Moreover, the default motion is, by its very terms, premised upon the failure of respondent to answer a complaint allegedly served in September 2000, and not a complaint served in May 2003. Thus, the motion fails by its own terms.

## Conclusions of Law and Ruling

Staff fails to prove that the September 12, 2000 complaint was mailed to and, thus, received by respondent. Because the motion does not contain proof of service upon respondent of the notice of hearing and complaint or such other document which commenced the proceeding, the requirements for a default judgment have not been satisfied. Accordingly, staff's motion for a default judgment is denied.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: Albany, New York
May 5, 2004

To: Randall C. Young, Esq.
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