

**STATE OF NEW YORK
LAKE GEORGE PARK COMMISSION**

In the Matter of the Application of the
Lake George Park Commission,

Petitioner,

- against -

**CHRISTOPHER PELERIN, individually and
d/b/a ADIRONDACK BOAT RENTAL COMPANY
and RICHARD PATNODE,**

**RULING
AND
DEFAULT SUMMARY
REPORT**

NYSDEC Case No.
2017-71594

Respondents.

Appearances of Counsel:

-- Bartlett, Pontiff, Stewart & Rhodes, P.C. (Eileen M. Haynes of counsel), for staff of the Lake George Park Commission

-- No appearance for respondents

Proceedings

By notice of hearing and complaint dated July 7, 2016, staff of the New York State Lake George Park Commission (Commission) commenced this enforcement proceeding against respondents Christopher Pelerin, individually and d/b/a Adirondack Boat Rental Company, and Richard Patnode (respondents) for alleged violations of Environmental Conservation Law article 43, and 6 NYCRR parts 645 and 646.

The complaint alleges for a first cause of action that respondent Pelerin, individually and d/b/a Adirondack Boat Rental Company, operated a Class A marina servicing the waters of Lake George without a permit in violation of 6 NYCRR 646-1.2(a)(1), rented personal watercraft (PWC) without providing customers with a guide or ensuring customers were familiar with the rules and regulations of the Commission in violation of 6 NYCRR 646-1.2(b)(9), and operated a quick launch by launching

rented vessels on Lake George from public boat launches. For a second cause of action, the complaint alleges respondent Patnode operated a Class B marina without registering the marina with the Commission in violation of 6 NYCRR 646-1.3(a) and failed to pay the annual fees required for docks used for commercial purposes in violation of 6 NYCRR 645-7.6(a) and (d).

The complaint seeks an order:

- (i) finding that respondent Pelerin, individually and d/b/a Adirondack Boat Rental Company, violated 6 NYCRR 646-1.2(a)(1) by operating a Class A marina servicing the waters of Lake George without a permit and 6 NYCRR 190.24(4)[sic]¹ by conducting business at boat launch sites on Lake George;
- (ii) assessing a penalty against respondent Pelerin, individually and d/b/a Adirondack Boat Rental Company, of five hundred dollars (\$500) for the violation of 6 NYCRR 646-1.2(a)(1) and an additionally penalty of five hundred dollars (\$500) for each day the violation continues;
- (iii) finding that respondent Patnode violated 6 NYCRR 646-1.3(a) by operating a Class B marina without having registered the marina;
- (iv) finding that respondent Patnode violated 6 NYCRR 645-7.6(a) and (d) by failing to pay annual commercial dock fees;
- (v) assessing a penalty against respondent Patnode of five hundred dollars (\$500) for the violation of 6 NYCRR 646-1.3(a) and an additionally penalty of five hundred dollars (\$500) for each day the violation continues;
- (vi) assessing a penalty against respondent Patnode of five hundred dollars (\$500) for the violation of 6 NYCRR 645-7.6(a) and (d) and an additionally penalty of five hundred dollars (\$500) for each day the violation continues;
- (vii) determining the amount of commercial dock fees due the Commission from respondent Patnode;
- (viii) the assessment of a penalty against respondent Patnode pursuant to 6 NYCRR 645-7.4(a) and (b) for non-payment of regulatory fees;
- (ix) enjoining respondent Pelerin, individually and d/b/a Adirondack Boat Rental Company, from continuing the

¹ The reference should be 6 NYCRR 190.24(b)(4).

- operation of a Class A marina and committing further violations of the Commission's regulations;
- (x) enjoining respondent Patnode from continuing operation of a Class B marina and committing further violations of the Commission's regulations; and
 - (xi) awarding the Commission the costs of this proceeding, and such other, further and different relief, as in the opinion of the hearing officer may be just and proper.

On July 7, 2016, Commission staff served its notice of hearing and complaint on respondents by certified mail return receipt requested. Respondents received the certified mail on July 11, 2016. The notice of hearing instructed respondents that a written answer must be filed within twenty days of respondents' receipt of the complaint. The notice of hearing also advised respondents that failure to timely answer the complaint or attend the pre-hearing conference, scheduled for July 29, 2016, would result in a default and waiver of respondents' right to a hearing. Respondents failed to answer the complaint and failed to appear at the pre-hearing conference.

Motion for Default Judgment

By cover letter dated February 27, 2017, Commission staff filed and served a motion for an order of default pursuant to 6 NYCRR 622.15. The motion papers were served on respondents by certified mail, return receipt requested, and by first class mail on February 28, 2017. By letter dated March 6, 2017, Chief Administrative Law Judge James T. McClymonds advised Commission staff and respondents that the matter had been assigned to me.

In addition to the February 27, 2017 transmittal letter, Commission staff's motion papers consist of the notice of motion, dated February 27, 2017; the affidavit of Eileen M. Haynes (Haynes Affidavit), sworn to February 27, 2017, with five exhibits attached; the affidavit of Roger Smith (Smith Affidavit), sworn to February 16, 2017, with one exhibit attached; and the affidavit of Joe Johns (Johns Affidavit), sworn to February 14, 2017, with twenty exhibits attached. See Appendix A attached hereto.

Discussion

Because the penalty requested in this matter exceeds five thousand dollars (\$5,000), the Commission referred the enforcement of the matter to the New York State Department of Environmental Conservation (Department) Office of Hearings and Mediation Services pursuant to ECL 71-3305(3), which requires the procedures of ECL 71-1709 to be followed. With one exception that does not apply here, the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622) are applied to any proceeding brought pursuant to ECL 71-1709 (see 6 NYCRR 622.1[a][2]).

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint, unless the time to answer is extended by consent of staff or ruling of the ALJ (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 a 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, Commission 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]).

In DEC enforcement proceedings, 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). I apply these precedents to the instant proceeding.

Liability of Christopher Pelerin, individually and d/b/a Adirondack Boat Rental Company

In its motion, Commission staff alleges respondent Pelerin, individually and d/b/a Adirondack Boat Rental Company, (i) operated a Class A marina without a permit in violation of 6 NYCRR 646-1.2(a)(1) (92 violations); (ii) operated a quick launch in violation of 6 NYCRR 646-1.2(a)(2)(31 violations); and (iii) rented PWC to third parties without: ensuring the users read the rules and regulations of the Commission governing the operation of PWC; requiring the PWC users to sign a form indicating the user had read the rules and regulations; and providing a tour guide for the PWC users in violation of 6 NYCRR 646-1.2(b)(9)(12 violations).

Pursuant to 6 NYCRR 646-1.2(a)(1), no person shall construct, expand or operate a Class A marina servicing the waters of Lake George without obtaining a permit from the Commission. A Class A marina is defined, in part, "as any facility located in whole or in part within the park which provides services or berthing places for vessels by engaging in . . . the sale, lease, rental or charter of vessels of any type" or operating "a quick launch facility servicing the waters of Lake George regardless of the location where the vessels are stored" (see 6 NYCRR 645-2.1[f][2] and [5]).

Commission staff has demonstrated that Adirondack Boat Rental Company rents pontoon boats and PWC and operates a quick launch facility at various public boat launches on Lake George. I conclude, however, that a person cannot violate 6 NYCRR 646-1.2(a)(2) as that regulatory provision states, "No permit shall be issued for the construction, operation or expansion of a quick launch facility which was not in existence and operating, or for which no permit was issued, prior to the effective date of these regulations." That regulatory provision acts as a prohibition on the Commission, not the regulated community.

Because a Class A marina permit is required to operate a quick launch, it is the provisions of 6 NYCRR 646-1.2(a)(1) that are violated when operating a quick launch facility. Accordingly, proof that a person is operating a quick launch facility is one of several ways to demonstrate that the person is operating a Class A marina (see 6 NYCRR 645-2.1[f][1]-[6]) and is required to have a permit. If staff proves that a vessel launched from a public boat launch and has collaborating proof the same vessel was rented on Lake George that day, it is one violation not two. Conversely, staff may be able to demonstrate

that quick launches of vessels occurred on different days than those days alleged for vessel rentals or demonstrate the quick launched vessel is a different vessel from those staff proved through rental information. In that situation, the violation would be in addition to those proven by rental agreements, statements by customers on the lake or other evidence.

Of the twelve violations alleged regarding the PWC regulations, one of the alleged violations involved Adam Porter, a former business associate of respondent Pelerin and Adirondack Boat Rental Company. The violation involving Mr. Porter resulted in him receiving five appearance tickets, including the violation of 6 NYCRR 646-1.2(b)(9). According to the Johns Affidavit, Mr. Porter was found guilty and paid a fine for those violations (see Johns Affidavit at ¶ 15).

Moreover, Commission staff's complaint requests an order finding respondent Christopher Pelerin, individually and d/b/a Adirondack Boat Rental Company, violated 6 NYCRR 646-1.2(a)(1) and 6 NYCRR 190.24(b)(4).² The complaint seeks a penalty of five hundred dollars (\$500) for each day respondent violated 6 NYCRR 646-1.2(a)(1). Because staff did not request a finding that respondent violated 6 NYCRR 646-1.2(b)(9) and request a penalty for that violation in the complaint, staff cannot request it now on staff's motion.³

I do not determine, however, the number of violations proven by Commission staff on the first cause of action. The evidence in this matter demonstrates that Adirondack Boat Rental Company is a limited liability company (see Johns Affidavit, Exhibit J - Adirondack Boat Rental Company, LLC, Power Boat Rental Contract). The public records of the New York State Department of State, of which I take official notice (see 6 NYCRR 622.11[a] [5]), list Adirondack Boat Rental Company, LLC as an active domestic limited liability company with offices in Essex County, New York. The company filed its articles of organization on February 19, 2015. Sixty of staff's alleged 92 violations for operating a Class A marina without a permit are supported by the rental agreement between the Adirondack Boat Rental Company, LLC and respondent Patnode.

² Commission staff did not plead a violation of 6 NYCRR 190.24(b)(4) in the complaint.

³ See CPLR 3215(b), which provides that in the case of a default, the relief granted "shall not exceed in amount or differ in type from that demanded in the complaint." See also Lape v Lape, 23 AD2d 539 (1st Dept 1965), holding that the court cannot grant relief not demanded in the complaint.

Staff's proof demonstrates respondent Pelerin performed a few quick launches (see Johns Affidavit at ¶ 36), while the majority of staff's proof demonstrates that boats and PWCs were rented to customers by Adirondack Boat Rental Company (see Johns Affidavit at ¶¶ 15, 17, 18, 19, 22, 24, 26, 35, 36, 37, 41 and 42). Except for a few isolated incidents, the proof does not demonstrate who performed the launches of Adirondack Boat Rental Company vessels. On this record, staff has failed to prove that respondent Pelerin operated a Class A marina, individually or d/b/a Adirondack Boat Rental Company.

Notwithstanding the fact that staff presents proof that Adirondack Boat Rental Company, LLC operated a Class A marina without a permit, staff did not plead against a limited liability company or demonstrate service on a limited liability company. Nor did staff plead the elements for responsible corporate officer liability against respondent Pelerin.⁴

Therefore, I conclude staff has not pleaded facts or submitted proof sufficient to support its first cause of action against Christopher Pelerin, individually and d/b/a Adirondack Boat Rental Company. Staff's motion for an order on default on the first cause of action is denied.

Liability of Richard Patnode

Commission staff alleges respondent Patnode operated a Class B marina without registering the marina with the Commission in violation of 6 NYCRR 646-1.3(a) and without paying dock fees in violation of 645-7.6. On motion, staff does not seek payment of the dock fees required by 6 NYCRR 645-7.6. Commission staff has demonstrated respondent Patnode allowed a pontoon boat registered to Adirondack Boat Rental Company to be berthed at his slip on an association dock located on Lake George (see Smith Affidavit at ¶ 3).

⁴ The responsible corporate officer doctrine has also been applied to limited liability companies and their members (see Matter of 125 Broadway, LLC, Decision and Order of the Commissioner, Dec. 15, 2006, at 5, and Default Summary Report, at 7-11). To establish liability under the responsible corporate officer doctrine, it must be shown that the corporate officer had responsibility over activities of the business that caused the violations and was in a position to prevent the violations (see Matter of Supreme Energy Corp., Decision and Order of the Commissioner, April 11, 2014, at 25-26; see also Matter of Turtle Oil Co., Inc., Order of the Commissioner, February 13, 2017, at 2).

The Commission's regulations define a Class B marina as "any dock, wharf or mooring made available for use by any person as a berthing place for one motorized vessel or one non-motorized vessel 18 feet in length or more not registered to the owner of the property, regardless of remuneration or profit" (see 6 NYCRR 645-2.1[g]). In order to avoid a violation of the Commission's registration and dock fee requirements, respondent Patnode entered into a rental agreement with Adirondack Boat Rental Company, LLC commencing June 1, 2015. The rental agreement has no termination date (see Johns Affidavit, Exhibit J).

In support of the 128 days Commission staff alleges respondent Patnode operated an unregistered Class B marina, staff argues that pursuant to Navigation Law ¶ 71-d(1-a) respondent Patnode could not rent the vessel for a period exceeding sixty days (see Smith Affidavit at ¶¶ 3 and 9; Johns Affidavit at ¶¶ 23, 27 and 30). In determining the 128 days of violation, staff did not count the sixty days of rental. I agree.

Commission staff has provided proof sufficient to support staff's claim that respondent Patnode operated an unregistered Class B marina for 128 days in violation of 6 NYCRR 646-1.3(a)(see id.).

The record establishes that: (i) Commission staff served the notice of hearing and complaint upon respondent Patnode; (ii) respondent Patnode failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for July 19, 2016, as directed in the notice of hearing. In addition, Commission staff has submitted a proposed order (see Haynes Affidavit, Exhibit E).

Based upon the foregoing, Commission staff is entitled to a default judgment against respondent Patnode pursuant to 6 NYCRR 622.15. Staff also served respondent Patnode with copies of the motion for default judgment and supporting papers (see Affidavit of Service).

Penalty

The penalty provisions of ECL 71-3303 read,

Any person who violates any provision of, or fails to perform any duty imposed by article forty-three of this chapter or any rule or regulation promulgated

pursuant thereto, or any term or condition of any certificate or permit issued pursuant thereto, or any final determination or order of the Lake George park commission made pursuant to article forty-three of this chapter shall be liable for a civil penalty not to exceed five hundred dollars for each such violation and an additional penalty of five hundred dollars for each day during which such violation continues, to be assessed by the Lake George park commission after an opportunity to be heard, or by the court in any action or proceeding initiated by the attorney general in the name of the Lake George park commission. In addition thereto, such person may, by similar process, be enjoined from continuing such violation, and any permit or certificate issued to such person may be revoked or suspended, or a pending renewal application denied based upon such violation.

Commission staff requests a penalty of five hundred dollars (\$500) and an additional penalty of five hundred dollars (\$500) for each day respondent Patnode's violation continued. Staff has proven 128 days of violation for a total civil penalty of sixty-four thousand dollars (\$64,000).

Staff cites respondent Patnode's repeated violations and disregard of the Commission's authority and regulations in support of the penalty. I agree. The record reflects respondent Patnode's continuing refusal to comply with the law and regulations, and moreover, respondent's repeated attempts to circumvent the regulations. The civil penalty of sixty-four thousand dollars (\$64,000) is supported and appropriate.

Staff also requests that respondent Patnode be enjoined from operating a Class B marina without first registering the marina with the Commission. The injunctive relief is supported and appropriate.

CONCLUSION OF LAW

By failing to register his dock slip on Lake George as a Class B marina, respondent Richard Patnode violated 6 NYCRR 646-1.3(a).

RULING

Based upon the foregoing, my ruling on Commission staff's motion is as follows.

1. Commission staff's motion for an order of default on staff's first cause of action against respondent Christopher Pelerin, individually and d/b/a Adirondack Boat Rental Company, is denied, without prejudice; and
2. Commission staff's motion for an order of default on staff's second cause of action against respondent Richard Patnode is granted.

RECOMMENDATION

Based upon the foregoing, I recommend the Lake George Park Commission issue an order:

1. Granting Lake George Park Commission staff's motion for default judgment on staff's second cause of action, holding respondent Richard Patnode in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Richard Patnode violated 6 NYCRR 646-1.3(a) by operating a Class B marina without registering the marina with the Lake George Park Commission;
3. Directing respondent Richard Patnode to pay a civil penalty in the amount of sixty-four thousand dollars (\$64,000) to the Lake George Park Commission within thirty days (30) of the service of the Lake George Park Commission's order upon respondent;
4. Enjoining respondent Richard Patnode from operating a Class B marina without first registering the marina with the Lake George Park Commission;
5. Severing the enforcement matter against respondent Richard Patnode from the matter against respondent Christopher Pelerin, individually and d/b/a Adirondack Boat Rental Company; and

6. Directing such other and further relief as the Lake George Park Commission may deem just and appropriate.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: April 17, 2017
Albany, New York

APPENDIX A

*Matter of Christopher Pelerin, individually and d/b/a Adirondack Boat Rental Company and Richard Patnode,
Motion for an Order of Default*

1. Notice of Motion, dated February 27, 2017.
2. Affidavit of Eileen M. Haynes, sworn to February 27, 2017, attaching the following exhibits:
 - A. Correspondence dated November 23, 2015 from Eileen M. Haynes, Esq. to Richard Patenode regarding notice of violation;
 - B. Correspondence from Eileen M. Haynes, Esq., dated April 4 and May 26, 2016, to Mark C. Rehm, Esq. regarding violations of Christopher Pelerin d/b/a Adirondack Boat Rentals and Richard Patenode;
 - C. Cover letter from Eileen M. Haynes, Esq. to respondents with notice of hearing and complaint attached, all dated July 7, 2016;
 - D. Copies of USPS signed return receipts for certified mail on respondents; and
 - E. Proposed order.
3. Affidavit of Roger Smith, sworn to February 16, 2017, attaching the following exhibits:
 - A. Email exchange between Roger Smith and Scott Pelerin, dated July 27 and 29, 2015.
4. Affidavit of Joe Johns, sworn to February 14, 2017, attaching the following exhibits:
 - A. Email from Adam Porter to Lake George Park Commission dated March 6, 2015;
 - B. Notice of Need for Permit addressed to Adam Porter, Adirondack Boat Rental Company from Lake George Park Commission, dated March 11, 2015;
 - C. Tickets (5) issued to Adam Porter on June 22, 2015;
 - D. Copy of photograph of pontoon boat;
 - E. Correspondence from Sergeant Joe Johns to Robert Mitchell, dated July 17, 2015 regarding notice of violation;
 - F. Copy of photograph of truck with wave runner rental information on window;

- G. Correspondence from Sergeant Joe Johns to Richard Patnode, dated July 17, 2015 regarding, notice of violation;
- H. Copy of photo of pontoon boat;
- I. Notes from Joe Johns' log book;
- J. Adirondack Boat Rental Company, LLC, "Power Boat Rental Contract" with Richard Patnode, dated June 1, 2015;
- K. Camping Receipt and Permit, Rogers Rock Campground issued to Mike Maurer and Mooring Buoy Receipt and Permit issued to Mike Maurer, dated July 25, 2016 and valid July 25, 2016 to July 30, 2016;
- L. Lake George Park Commission Investigation Report regarding Adirondack Boat Rental and Mary Reed, dated August 2, 2016;
- M. Copy of photograph of wave runner;
- N. Copy of photograph of two wave runners docked;
- O. Supporting deposition of George Getz, dated August 5, 2016;
- P. Copy of ticket issued to Christopher Pelerin, dated August 14, 2016;
- Q. Supporting deposition of Thomas Dyk, dated August 16, 2016;
- R. Lake George Park Commission Investigation Report dated September 4, 2016;
- S. Webpages of Adirondack Boat Rental Company (<http://adkboatrental.com>), dated August 18, 2015 and Facebook page of Adirondack Boat Rental Company, dated May 23, 2016; and
- T. Spreadsheet of public launch records at various Lake George locations, from May through September 2016.