

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations of Articles 23 and 71 of the
Environmental Conservation Law (ECL), and Part 551 of Title 6
of the Official Compilation of Codes, Rules and Regulations of
the State of New York (6 NYCRR)

ORDER

- by -

DEC Case No.
CO8-20190705-79

ELINOR J. RICE,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Elinor J. Rice violated ECL 71-1305(2) and 6 NYCRR 551.2(b) by failing to file a statement of oil and gas produced, sold, purchased or stored (annual well report) for calendar year 2018 by March 31, 2019. According to staff, the report was due for a natural gas well that respondent operates in Batavia, New York, and which is known as the Gibson gas well (American Petroleum Institute [API] No. 31-037-00651-00-00).

Administrative Law Judge (ALJ) Richard A. Sherman of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary 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 scheduled for August 5, 2020 (*see* Default Summary Report at 1, 3 [Findings of Fact Nos. 7 and 8]). At the August 5, 2020 adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Sherman reserved on the motion, and Department staff later submitted a written motion for default judgment with supporting papers on notice to respondent.

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* Default Summary Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to submit an annual well report for the Gibson gas well for calendar year 2018 and, therefore, has violated 6 NYCRR 551.2(b) and committed an offense pursuant to ECL 71-1305(2).¹ (*See Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at

¹ ECL 71-1305(2) reads, in pertinent part, "Offenses. It shall be unlawful for any person to . . . (2) Violate any of the provisions of or fail to perform any duty imposed by article 23 [of the ECL] or any rule or regulation promulgated thereunder." ECL 71-1307 (1) provides administrative sanctions, including the imposition of civil penalties, on any person who violates any provision of ECL article 23 or commits any offense described in ECL 71-

1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)] *see also* CPLR 3215[f]).

Department staff correctly points out that the requirement to file annual well reports is important to determining the status of the State's resources given the potential or actual environmental harm that may result from the lack of accurate, annual information about well activity. The identification of non-producing wells for plugging is significant for the prevention of groundwater contamination (*see* Motion for Default Judgment, Exhibit A, Affirmation of Anne Haas, Esq., dated August 27, 2020, ¶ 13; *see also* Affidavit of Ted Loukides, sworn to August 26, 2020, ¶ 12).

Department staff, in its complaint, sought a total civil penalty of one thousand five hundred dollars (\$1,500). ECL 71-1307(1), which applies to the statutory and regulatory violations at issue in this proceeding, provides for a civil penalty of up to eight thousand dollars (\$8,000) per violation and an additional civil penalty of two thousand dollars (\$2,000) for each day that the violation continues. In other proceedings of this nature, Department staff has requested similar civil penalties (*see Matter of Gilray*, Order of the Commissioner, March 4, 2015, at 2, and *Matter of Buffalo China, Inc.*, Order of the Commissioner, October 27, 2013, at 2). In those cases, a civil penalty of \$1,500 was assessed for each time that a well owner or operator failed to timely submit an annual well report.

In this matter, respondent was required to file an annual well report by March 31, 2019 for calendar year 2018, and failed to do so. This violation has continued as respondent had still not filed an annual well report for calendar year 2018 as of August 26, 2020. (*See* Default Summary Report at 3 [Finding of Fact No. 9].) Moreover, as the ALJ notes, Department staff had advised respondent of the filing obligation, but this was ignored (*see* Default Summary Report at 2-3 [Findings of Fact Nos. 3, 4 and 5]).

I concur with Department staff and the ALJ that the requested civil penalty of one thousand five hundred dollars (\$1,500) is authorized and appropriate. I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of this order upon her. In addition, I direct that respondent submit the delinquent annual well report for calendar year 2018 within thirty (30) days of the service of this order upon her.

Upon good cause shown by respondent, Department staff may at its discretion extend the period for the payment of the civil penalty. Any request by respondent for an extension must be submitted in writing and provide sufficient explanation and documentation in support of the request.

1305. Accordingly, respondent's failure to file an annual well report as required by 6 NYCRR 551.2[b]), a regulation promulgated under ECL article 23, subjects respondent to the sanctions established under ECL 71-1307(1).

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 Elinor J. Rice waived her right to be heard at the hearing.
- II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Elinor J. Rice has violated 6 NYCRR 551.2(b) by failing to file an annual well report with the Department for calendar year 2018 by March 31 of the following year and, accordingly has committed an offense pursuant to ECL 71-1305(2).
- III. Within thirty (30) days of the service of this order upon respondent Elinor J. Rice, respondent shall submit to the Department an annual well report, with respect to the Gibson gas well, for calendar year 2018.
- IV. Within thirty (30) days of the service of this order upon respondent Elinor J. Rice, respondent shall pay a total civil penalty in the amount of one thousand five hundred dollars (\$1,500) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation." Upon good cause shown by respondent, Department staff at its discretion may extend the period for the payment of the civil penalty. Any request by respondent for an extension must be submitted in writing and provide sufficient explanation and documentation in support of the request.
- V. The annual well report for calendar year 2018, and the civil penalty payment shall be mailed to the following address:

Office of General Counsel
NYS Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Anne Haas, Esq.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Anne Haas, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms, and conditions of this order shall bind respondent Elinor J. Rice, and her agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: January 4, 2021
Albany, New York

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

In the Matter of the Alleged Violations of Articles 23 and 71 of the New York State Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**DEFAULT
SUMMARY REPORT**

-by-

DEC Case No:
CO 8-20190705-79

ELINOR J. RICE,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent Elinor J. Rice (respondent) with a notice of hearing and complaint, both dated May 8, 2020. The complaint alleges that respondent owned or operated an oil and gas well in Batavia, New York, and that respondent violated ECL 71-1305(2) and 6 NYCRR 551.2(b) by failing to file a statement of oil and gas produced, sold, purchased or stored (annual well report) for calendar year 2018 by March 31, 2019. The complaint seeks an order of the Commissioner (1) finding respondent liable for the alleged violation; (2) directing respondent to submit the required annual well report to the Department; (3) assessing a civil penalty in the amount of \$1,500; and (4) granting such other relief as the Commissioner may deem appropriate.

In accordance with 6 NYCRR 622.3(a)(3), Department staff served the notice of hearing and complaint by certified mail on May 8, 2020. Service was complete upon the receipt of the notice of hearing and complaint on May 13, 2020 at the address designated by respondent (*id.*). The notice of hearing advised respondent that an answer to the complaint must be filed within 20 days of respondent's receipt of the notice, and further advised respondent that a hearing would be held on August 5, 2020 at the Department's Region 8 office in Avon to consider the complaint.

Because of the COVID-19 pandemic, the Office of Hearings and Mediation Services (OHMS) sent a subsequent notice of hearing (OHMS notice), dated July 16, 2020, to advise the parties that the August 5, 2020 hearing would be held virtually, rather than in-person. The OHMS notice provided the parties with directions on how to join the virtual hearing either by videoconference or by telephone, and also provided an OHMS telephone number for assistance. I convened the hearing, as scheduled, on August 5, 2020.

Respondent failed to file an answer to the complaint. Respondent also failed to appear for the adjudicatory hearing on August 5, 2020, as directed in the OHMS notice. At the hearing, Department staff orally moved for a default judgment against respondent. I reserved on staff's

oral motion and directed staff to file a written motion for default judgment, together with supporting papers, on notice to respondent.

In accordance with my directive at the hearing, Department staff filed a motion for default judgment (motion), dated August 27, 2020, against respondent and served a copy of the motion on respondent by ordinary mail. Respondent did not file a response to the motion and the time for a response has expired (*see* 6 NYCRR 622.6[b][2][i], [c][3] [providing parties with 10 days to file a response to a motion that is served by ordinary mail]).

For the reasons set forth below, I recommend that Department staff's motion for default judgment be granted.

Applicable Regulatory Provisions

Pursuant to 6 NYCRR 551.2(b):

"[e]ach person who first produces, sells or purchases oil and gas produced in the State and the operator of each gas storage facility in the State must file with the department on a form the department prescribes a statement of the oil and gas produced, sold, purchased or stored. The information contained in this statement must be compiled on a calendar year basis and must be filed no later than March 31st next following the close of the calendar year, unless the department requires otherwise."

Findings of Fact

1. Respondent Elinor J. Rice is the operator of the Gibson gas well (API well identification number 31-037-00651-00-00) located in Batavia, New York (affidavit of Ted Loukides [Loukides affidavit], sworn to Aug. 26, 2020, ¶¶ 4, 6; *id.* exhibits 1, 3).
2. In November 2018 respondent submitted an organizational report¹ to the Department designating herself as the point of contact for correspondence and service of papers, and listing her mailing address as 4085 W. Main St. Rd., Batavia, New York, 14020 (Loukides affidavit ¶ 5; *id.* exhibit 2).
3. By letter dated January 8, 2019, Department staff reminded respondent of her obligation to complete and file an annual well report for calendar year 2018 and provided respondent with a partially completed annual well report form to facilitate respondent's compliance (Loukides affidavit ¶ 9; *id.* exhibit 5).
4. By certified mail dated May 9, 2019, Department staff sent a notice of violation to respondent notifying her that she had failed to timely file the 2018 annual well report and affording respondent 30 days to file the required report or face further enforcement. The notice of violation also advised respondent that noncompliance could result in penalties

¹ As relevant here, pursuant to 6 NYCRR 551.1(a), each person who is a principal or acts as an agent for another in the production in the State of oil or gas must file an organizational report with the Department.

of up to \$8,000 per violation, and additional penalties of up to \$2,000 for each day that the violation continued (Loukides affidavit ¶ 10; *id.* exhibit 6).

5. By certified mail dated July 17, 2019, Department staff sent a second notice of violation to respondent notifying her that she continued to be in violation of the requirement to file the 2018 annual well report. Department staff enclosed an order on consent with the notice of violation and advised respondent that she had 30 days to settle the matter or face further enforcement action (Loukides affidavit ¶ 11; *id.* exhibit 8).
6. By certified mail dated May 8, 2020, Department staff served a notice of hearing and complaint on respondent (motion exhibit B [notice of hearing and complaint]; motion exhibit C [affidavit of service with attached U.S. Postal Service proof of delivery]). Service was complete on May 13, 2020 upon the receipt of the notice of hearing and complaint at the address designated by respondent (motion exhibit C; *see also* 6 NYCRR 622.3[a][3][stating that, where service is by certified mail, "service shall be complete when the notice of hearing and complaint is received"]).
7. Respondent failed to file an answer to the complaint (motion, exhibit A [affirmation of Anne Haas, affirmed Aug. 27, 2020] [Haas affirmation] ¶ 3).
8. Respondent failed to appear for the adjudicatory hearing on August 5, 2020, as directed in the OHMS notice (Haas affirmation ¶ 5; motion exhibit D [OHMS notice]; recording at 2:30²). Because the initial notice of hearing sent to respondent by Department staff had directed respondent to appear at the Department's Region 8 office, staff confirmed on the record that respondent did not personally appear at the Region 8 office for the hearing (recording at 2:45).
9. As of August 26, 2020, respondent had failed to file the 2018 annual well report for the Gibson gas well (Loukides affidavit ¶¶ 3, 4, 8 [stating that affiant is a custodian of the Department's records relating to oil and gas wells, that affiant reviewed the Department's records, and that affiant determined that respondent had not submitted the 2018 annual well report for the Gibson gas well]).

Discussion and Conclusions

Department staff moves for a default judgment against respondent. For the reasons set forth below, I conclude that staff's motion should be granted.

Department staff served the notice of hearing and complaint upon respondent by certified mail (findings of fact ¶ 6). This method of service of process is authorized under 6 NYCRR 622.3(a)(3). Service of process on respondent was complete on May 13, 2020 upon the receipt of the notice of hearing and complaint at the address designated by respondent (6 NYCRR 622.3[a][3]; findings of fact ¶¶ 2, 6).

² The hearing was video recorded. Citations to the video recording are denoted herein as "recording" followed by the approximate time that the cited material appears on the video.

The record shows that respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing on August 5, 2020, as directed in the OHMS notice (findings of fact ¶¶ 7-8).

Department staff served the motion, together with supporting papers, on respondent by first class mail (*see* affidavit of service of Melissa Evans, sworn to Aug. 27, 2020). This method of service of motion papers satisfies the requirements of 6 NYCRR 622.6(a)(1) and (c)(1).³ Staff included a proposed order with its motion papers (motion exhibit E).

In light of the foregoing, Department staff has satisfied each of the requirements governing default procedures set forth at 6 NYCRR 622.15(b).

In addition to the requirements of 6 NYCRR 622.15(b), the Commissioner has directed that "Department staff provide proof of the facts sufficient to support the claim [with] all default judgment motions" (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, Dec. 12, 2013, at 3).

Here, the motion and supporting papers are sufficient to establish respondent's liability for the violation alleged by Department staff. Pursuant to 6 NYCRR 551.2(b), each person who first produces, sells or purchases oil and gas produced in the State must file an annual well report with the Department by no later than March 31st following the close of the prior calendar year. Respondent operates the Gibson gas well (findings of fact ¶ 1) and, as of August 26, 2020, had not filed an annual well report for the well for calendar year 2018 (findings of fact ¶ 9). Accordingly, despite staff's repeated attempts to encourage respondent to comply with the filing requirement (findings of fact ¶¶ 3-5), respondent's 2018 annual well report for the Gibson gas well is more than a year overdue.

By its complaint and motion, Department staff requests a \$1,500 penalty. Staff argues that this penalty amount is consistent with the Department's civil penalty policy and DEC precedent. Staff notes that, pursuant to ECL 71-1307(1), the maximum penalty authorized for violations under ECL 71-1305 is \$8,000 per violation, plus an additional \$2,000 per day that the violation continues (Haas affirmation ¶ 11). Among other things, staff asserts that the annual well report requirement is important to the regulatory scheme because "[t]he Department relies on the information provided in [annual well reports] to identify non-producing wells for plugging" and that "[t]he failure to properly plug non-producing wells may result in contamination of ground water and/or the release harmful greenhouse [gases]" (*id.* ¶¶ 12-13; Loukides affidavit ¶ 12). Staff also cites prior enforcement matters wherein the Commissioner assessed a \$1,500 penalty for the failure to submit an annual well report (*id.* ¶ 14).

I conclude that the penalty requested by Department staff is both authorized and appropriate.

³ Pursuant to these regulatory provisions, all written motions and requests must be served on all parties in accordance with CPLR 2103. The method of service employed by Department staff here is consistent with CPLR 2103(c) which authorizes service of motion papers on a party by first class mail.

Recommendations

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

1. Granting Department staff's motion for a default judgment against respondent Elinor J. Rice;
2. Holding respondent Elinor J. Rice liable for violating ECL 71-1305(2) and 6 NYCRR 551.2(b) by failing to submit a 2018 annual well report to the Department;
3. Directing respondent Elinor J. Rice to pay a civil penalty in the amount of \$1,500 within 30 days of service of the Commissioner's order; and
4. Directing respondent Elinor J. Rice to submit a complete 2018 annual well report to the Department within 30 days of service of the Commissioner's order.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
September 11, 2020