

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

In the Matter of Alleged Violations
of Articles 25 and 71 of the New York
State Environmental Conservation Law
("ECL") and Part 661 of Title 6 of the
Official Compilation of Codes, Rules
and Regulations of the State of New
York ("6 NYCRR"),

**RULING ON DEPARTMENT
STAFF'S MOTION FOR
DEFAULT JUDGMENT**

- by -

DEC Case No.
R1-20061026-268

ANTHONY J. SEGRETO,
Respondent.

Appearances:

- Alison H. Crocker, Deputy Commissioner and General Counsel
(Vernon G. Rail, Esq., of counsel) for staff of the New York
State Department of Environmental Conservation.
- Anthony J. Segreto, respondent, pro se.

PROCEEDINGS

On or about April 30, 2007, staff of the Department of
Environmental Conservation ("Department") commenced this
administrative enforcement proceeding against respondent Anthony
J. Segreto, by mailing copies of a notice of pre-hearing
conference, notice of hearing and verified complaint, each dated
April 30, 2007, via certified mail, to respondent at the
following two addresses: (i) 135 Blue Point Road, Oakdale, New
York 11769; and (ii) 5677 Mistridge Drive, Rancho Palos Verdes,
California 90275-4918.

According to the verified complaint, respondent is the
owner of real property located at 135 Blue Point Road, Oakdale,
Town of Islip, County of Suffolk, State of New York, having
Suffolk County Tax Number 500-378-2-25 (the "site"). The
verified complaint maintains that the site contains regulated
tidal wetlands subject to the jurisdiction of the Department
pursuant to Environmental Conservation Law ("ECL") § 25-0401(1),
and part 661 of title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York ("6 NYCRR").

Specifically, the verified complaint alleges that:

1. On or before December 5, 2005, respondent violated ECL 25-0401(1) and 6 NYCRR part 661 by causing and/or permitting to be caused, the clearing of vegetation in the regulated adjacent area to a regulated tidal wetland at the subject site without the required Department permit; and
2. On or before December 5, 2005, respondent violated ECL 25-0401(1) and 6 NYCRR part 661 by causing and/or permitting to be caused, the placement of fill in the regulated adjacent area to a regulated tidal wetland at the subject site without the required Department permit.¹

The April 30, 2007 notice of pre-hearing conference and notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and verified complaint. As provided for by 6 NYCRR 622.8, the notice of pre-hearing conference and notice of hearing also scheduled a pre-hearing conference for May 30, 2007 at the Department's Region 1 office in Stony Brook, New York. The notice of pre-hearing conference and notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondent would be in default and would waive his right to a hearing under 6 NYCRR 622.15.

Department Staff's Default Motion

With a cover letter dated September 27, 2007, Vernon G. Rail, Esq., Assistant Regional Attorney with the Division of Legal Affairs in the Department's Region 1 office, filed a notice of motion for default judgment and motion for default judgment, both dated September 25, 2007, along with supporting papers against respondent with the Department's Office of Hearings and Mediation Services. The supporting papers consist of an affirmation by Mr. Rail dated September 25, 2007 alleging that respondent failed to file a timely answer, along with attached Exhibits marked "A" through "H."

Exhibit "A" is a copy of an envelope mailed sometime in

¹ See ¶¶ TENTH and ELEVENTH of Department staff's verified complaint dated April 30, 2007 attached as Exhibit "C" to Department staff's default motion.

early May 2007 by the Department's Region 1 office to respondent, via certified mail, at 135 Blue Point Road, Oakdale, New York 11769. The envelope indicates that it was forwarded by the U.S. Postal Service to respondent's address at 5677 Mistridge Drive, Rancho Palos Verdes, California 90275-4918 on May 5, 2007. The envelope was then marked "Returned To Sender - Unclaimed" by the U.S. Postal Service in Palos Verdes Peninsula, California, and was subsequently returned to, and received by, the Department's Region 1 office on June 5, 2007.

Exhibit "B" is a copy of an envelope mailed sometime in early May 2007 by the Department's Region 1 office to respondent, via certified mail, at his address at 5677 Mistridge Drive, Rancho Palos Verdes, California 90275-4918. The envelope was marked "Returned To Sender - Unclaimed" by the U.S. Postal Service in Palos Verdes Peninsula, California, and was subsequently returned to, and received by, the Department's Region 1 office on June 5, 2007.

Exhibit "C" contains copies of Department staff's notice of pre-hearing conference, notice of hearing and verified complaint, each dated April 30, 2007. The complaint is verified by Megan J. Joplin, Esq., Assistant Regional Attorney, of the Department's Region 1 office. Exhibit "D" is a copy of the affidavit of personal service of Environmental Conservation Officer Chrisman Starczek, sworn to on June 28, 2007, indicating that a copy of the Department's notice of hearing and complaint was personally served upon respondent at 135 Blue Point Road, Oakdale, New York on June 15, 2007.

Exhibit "E" is a copy of a letter dated June 20, 2007 from Megan J. Joplin, Esq., Assistant Regional Attorney, to respondent concerning a telephone conversation held between Ms. Joplin and respondent on June 20, 2007. Ms. Joplin's letter, which was mailed to respondent at both his Oakdale, New York and Rancho Palos Verdes, California addresses, states that the pre-hearing conference in this proceeding was re-scheduled to take place on Wednesday, July 11, 2007 at the Department's Region 1 office in Stony Brook, New York. Ms. Joplin's letter also states that respondent's failure to appear at the July 11, 2007 pre-hearing conference would constitute grounds for entry of a default judgment against him pursuant to 6 NYCRR 622.15.

Exhibit "F" contains a copy of a "New York State Department of Environmental Conservation Division of Legal Affairs Sign-In Sheet" for the pre-hearing conference held on July 11, 2007 between Department staff from Region 1 and respondent. Respondent's signature appears on the sign-in sheet

and the sheet indicates that his wife, Linda M. Segreto, was in attendance as well (see Exhibit "F"). Also included in Exhibit "F" is a copy of a letter dated July 19, 2007 from Assistant Regional Attorney Vernon G. Rail to respondent concerning the July 11, 2007 pre-hearing conference.² Mr. Rail's letter to respondent states that, even though the time in which to answer staff's verified complaint in this proceeding had expired, Mr. Rail was granting respondent an extension to file a verified answer by or before August 20, 2007.³ Mr. Rail's letter to respondent, sent via both certified and first class mail to respondent's Oakdale, New York address, also states that respondent's failure to answer the Department's complaint by August 20, 2007 will be grounds for entry of a default judgment against him pursuant to 6 NYCRR 622.15 (see id.).

Exhibit "G" is a copy of a two-page typewritten letter dated August 20, 2007 from respondent to Assistant Regional Attorney Vernon Rail and Peter Scully, Regional Director, of the Department's Region 1 office.⁴ Respondent's August 20, 2007 letter to Mssrs. Rail and Scully was sent on behalf of "Mr. and Mrs. Anthony Segreto, Owners of Pepperidge Hall Estate Lodge, 135 Blue Point Road, Oakdale, New York 11769." The letter does not bear respondent's signature. Moreover, respondent's letter does not address either the merits of, or causes of action alleged in, the Department's verified complaint, nor does it raise any affirmative defenses. Instead, respondent's August 20, 2007 letter to Mssrs. Rail and Scully consists almost entirely of generalized grievances concerning alleged mismanagement of the Department's Region 1 office (see Exhibit "G"). Copies of respondent's August 20, 2007 letter directed to Mssrs. Rail and Scully were also purportedly sent to Hon. Ginny Fields, NY State Assembly Representative, Hon. Bob Lindsay, Suffolk County Representative, and Hon. Alexander Grannis, Commissioner of the Department ("Commissioner Grannis") (see id.).

² According to Mr. Rail's affirmation submitted in support of staff's default motion, Ms. Joplin was transferred to the Department's Region 2 office on or about July 8, 2007 and, as a result, this matter was reassigned to Mr. Rail (see ¶ 6 of Mr. Rail's affirmation dated September 25, 2007).

³ Pursuant to 6 NYCRR 622.4(a), Department staff may extend the time to answer.

⁴ Respondent's letter appears to have been sent to Mssrs. Rail and Scully via facsimile transmission on August 20, 2007 (see Exhibit "G").

Lastly, pursuant to 6 NYCRR 622.15(b), Exhibit "H" is a copy of Department staff's proposed order for its default motion.⁵

Department staff's September 27, 2007 cover letter accompanying its default motion indicates that the motion papers, as described above, were mailed to respondent at both his Oakdale, New York and Rancho Palos Verdes, California addresses, as well as to the Department's Chief Administrative Law Judge ("CALJ") in accordance with 6 NYCRR 622.6(c)(1).

By letter dated October 4, 2007, and sent to respondent at both his Oakdale, New York and Rancho Palos Verdes, California addresses, CALJ James T. McClymonds advised respondent that this proceeding had been assigned to me.⁶

Respondent's Submissions

On October 9, 2007, CALJ McClymonds received a copy of a three-page typewritten letter, dated October 2, 2007, that was sent by respondent to Assistant Regional Attorney Vernon G. Rail in the Department's Region 1 office. This letter does not bear respondent's signature. Copies of respondent's October 2, 2007 letter to Mr. Rail were also sent to Peter Scully, Regional Director of the Department's Region 1 office, and Commissioner Grannis. Among other things, respondent's October 2, 2007 letter to Mr. Rail responds to, and acknowledges receipt of, Department staff's September 25, 2007 notice of default judgment and order.

Included with respondent's October 2, 2007 letter to Mr. Rail is a copy of another two-page typewritten letter dated August 20, 2007 that respondent purportedly sent to Commissioner Grannis. Respondent's August 20, 2007 letter directed to

⁵ Department staff's default motion does not include a copy of a tidal wetlands map relating to respondent's property at 135 Blue Point Road, Oakdale, New York or the site allegedly subject to the verified complaint in this proceeding.

⁶ On October 10, 2007, the copy of CALJ McClymonds' October 4, 2007 assignment letter sent to respondent at his Oakdale, New York address was returned to the Department's Office of Hearing and Mediation Services by the U.S. Postal Service with the notation "Return To Sender - Temporarily Away" printed on the mailing envelope. To date, the copy of CALJ McClymonds' October 4, 2007 assignment letter sent to respondent at his Rancho Palos Verdes, California address has not been returned to the Department.

Commissioner Grannis was sent on behalf of "Mr. and Mrs. Anthony Segreto, Owners of Pepperidge Hall Estate Lodge, 135 Blue Point Road, Oakdale, New York 11769." This letter, like the August 20th letter to Mssrs. Rail and Scully (see Exhibit "G"), does not bear respondent's signature. Copies of respondent's August 20, 2007 letter to Commissioner Grannis were also purportedly sent to Hon. Ginny Fields, NY State Assembly Representative, Hon. Bob Lindsay, Suffolk County Representative, and Peter Scully, Regional Director of the Department's Region 1 office.

Attached to respondent's August 20, 2007 letter to Commissioner Grannis is a one-page typewritten copy of respondent's brief biographical history, as well as an undated three-page typewritten document entitled "Notes for Article 78 Filing - NYSDEC Region #1 - Preservation Of The Pepperidge Hall Estate Lodge." Notably, unlike the August 20th letter to Mssrs. Rail and Scully (see Exhibit "G"), respondent's August 20, 2007 submissions to Commissioner Grannis raise issues related to the property at 135 Blue Point Road, Oakdale, New York and the site subject to this proceeding. For example, respondent's August 20, 2007 letter to Commissioner Grannis concludes with the following affirmative statement:

"There are no endanger [*sic*] species on the site and it is not a 'tidal wetlands' site based on historical records dating to 1880s country [*sic*] records." (*emphasis added*)

Further, the three-page document entitled "Notes for Article 78 Filing - NYSDEC Region #1 - Preservation Of The Pepperidge Hall Estate Lodge" accompanying respondent's August 20, 2007 letter to Commissioner Grannis contains further denials about the presence of tidal wetlands on respondent's property and the site subject to staff's complaint including the following:

"The Lodge is now located on manmade wetlands but historically was always on a dry land site. All the water on the 3.6 acre site parcel has been manmade and/or altered in the past 40 years by events and community development which in turn has inflicted significant environmental destruction and alterations. The New York State Department of Environmental Conservation Region #1 claim of jurisdiction based on 'Tidal Wetlands' has no merit based on historical maps and photos dating back over 100 years."

* * *

"The NYSDEC Region #1 position based on the site being conserved as a state controlled 'Tidal Wetlands' parcel has no merit and restoring it to an unnatural state of 'Tidal Wetlands' is in total contradiction to the state charter."

* * *

"NYSDEC Region #1 classifying the 120 year old Lodge structure (which has been occupied and used as a lodge and residence continuously for the past 120 years and is compliant to all building codes) as a non conforming structure that 'needs to be flooded' because of its location, and 'should not be there' based on an erroneous classification as a state wetlands site (NYSDEC code for wetlands, non conforming structure location, circa 1970's) and delaying all actions to allow corrective action and attempting to inflicted [sic] damages on the 120 year old lodge via hurricane damage thereby achieve their desire of structure destruction and removal is contrary to NYSDEC Charter."

While a copy of respondent's August 20, 2007 letter with attachments to Commissioner Grannis was apparently sent to Peter Scully, Regional Director of the Department's Region 1 office, it is not clear from Department staff's motion papers that copies of same were provided to Assistant Regional Attorney Vernon G. Rail, because copies of the letter and attachments were not included as an exhibit to Department staff's default motion. Nevertheless, viewing respondent's August 20, 2007 letter and attachments to Commissioner Grannis denying the presence of tidal wetlands at the site in the light most favorable to respondent, such denials constitute an answer, albeit unsigned and unverified, on behalf of a pro se party in this proceeding.⁷

⁷ Department staff correctly note that respondent's August 20, 2007 letter directed to Messrs. Rail and Scully was neither signed nor verified by respondent in accordance with the provisions of CPLR 3020(a) and 6 NYCRR 622.4 (see ¶¶ 10 and 11 of Mr. Rail's September 25, 2007 affirmation, and Exhibit "G" attached thereto). Similarly, respondent's August 20, 2007 letter and attachments to Commissioner Grannis do not bear respondent's signature.

DISCUSSION

In accordance with the Department's uniform enforcement regulations, Department staff may commence an administrative enforcement proceeding by service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Service of a notice of hearing and complaint "must be by personal service consistent with the CPLR or by certified mail. Where service is by certified mail, service shall be complete when the notice of hearing and complaint is received" (see 6 NYCRR 622.3[a][3]).

A respondent's failure either to file a timely answer or to appear at a pre-hearing conference constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under those circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), staff's default motion must contain the following:

1. Proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
2. Proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and
3. A proposed order.

The September 25, 2007 affirmation of Department staff attorney Vernon G. Rail, Esq., shows that staff's initial attempts to serve papers commencing this action upon respondent at his two addresses by certified mail were not successful (see ¶ 2 of Mr. Rail's affirmation, and Exhibits "A" and "B" attached thereto). However, Mr. Rail's September 25, 2007 affirmation does demonstrate service of the April 30, 2007 notice of pre-hearing conference, notice of hearing and verified complaint upon respondent by personal service at his Oakdale, New York address on June 15, 2007 (see ¶ 3 of Mr. Rail's affirmation, and Exhibit "D" attached thereto). This method of service is consistent with the requirements set forth in 6 NYCRR 622.3(a)(3).

According to Mr. Rail's September 25, 2007 affirmation, respondent (and his wife) appeared at the re-scheduled pre-hearing conference held with staff on July 11, 2007 in the Department's Region 1 office (see ¶ 7 of Mr. Rail's affirmation, and Exhibits "E" and "F" attached thereto). As such, respondent satisfied his obligation to appear at a pre-hearing conference under 6 NYCRR 622.8 and he cannot be found to be in default upon

this basis (see 6 NYCRR 622.15[a]).

Thereafter, Department staff gave respondent until August 20, 2007 to provide a verified answer to staff's verified complaint (see ¶ 8 of Mr. Rail's affirmation, and Exhibit "F" attached thereto). Respondent then sent two letters, both unsigned and dated August 20, 2007, to the Department. As noted, respondent's first letter, directed to Mssrs. Rail and Scully, was sent to the Department's Region 1 office by facsimile on August 20, 2007 (see ¶ 11 of Mr. Rail's affirmation, and Exhibit "G" attached thereto). Respondent's second letter (with the two attachments detailed previously), was directed to Commissioner Grannis and purportedly sent to the Department by ordinary mail on August 20, 2007 (see respondent's October 2, 2007 submission to the Department in response to staff's default motion).

Taken together, respondent's two August 20, 2007 letters to the Department, sent on the last day for filing an answer as agreed to by staff, also constitute a timely "appearance" in this action. Moreover, respondent's unsigned August 20, 2007 letter and three-page attachment entitled "Notes for Article 78 Filing - NYSDEC Region #1 - Preservation Of The Pepperidge Hall Estate Lodge," directed to Commissioner Grannis containing denials about the presence of tidal wetlands on respondent's property constitute a timely unverified answer.

The Department's regulations governing motions for a default judgment do not prescribe the circumstances under which a defaulting respondent is entitled to notice of the application by staff for a default judgment (see 6 NYCRR 622.15). Under CPLR 3215(g)(1), notice of an application for a default judgment is required only where the defending party has appeared or where more than one year has elapsed between the date of the default and the motion (see Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004 at 2-3).

Pursuant to 6 NYCRR 622.6(a)(1) and CPLR 2103(c), motion papers in Department proceedings may be served by mail. In accordance with the provisions of CPLR 2103(c), and CPLR 3215(f) and (g), service by mail is complete upon proper posting, without regard to receipt (see Tappis v National Van Lines, Inc., 43 Misc2d 157 [App Term, 1964]; A. & B. Service Station, Inc. v State, 50 AD2d 973 [3d Dept], lv denied 39 NY2d 709 [1975]).

Department staff's cover letter accompanying its default motion indicate that copies of its default motion and supporting papers, as previously described, were sent by ordinary mail to respondent at both his Oakdale, New York and Rancho Palos

Verdes, California addresses on September 27, 2007. In light of respondent's appearance at the pre-hearing conference and his written submissions to the Department on August 20, 2007, staff properly served its notice of motion for default judgment and order upon respondent in this case pursuant to CPLR 2103(c) and 3215(g).⁸

Pursuant to the Department's regulations, all parties have five days after a motion is served to file a response (see 6 NYCRR 622.6[c][3]). When the time for performance of some act is measured from the service of an interlocutory paper (such as a motion), and service is made by ordinary mail, 6 NYCRR 622.6(b)(2)(i) gives the party so served five additional days within which to act. Accordingly, respondent had 10 days, or until October 7, 2007, to file a response to Department staff's default motion with the Office of Hearings and Mediation services (see 6 NYCRR 622.6[b][2][i]).

Here, the tenth day, October 7, 2007 was a Sunday. The following day, Monday, October 8, 2007, was a public holiday (Columbus Day). Thus, papers in response to Department staff's default motion were due from respondent on Tuesday, October 9, 2007 (see General Construction Law § 20; see also 6 NYCRR 622.6[b][1]). With a submission dated October 2, 2007, and received by CALJ McClymonds on October 9, 2007, respondent provided a timely written response to Department staff's motion, which included evidence of respondent's timely service of an answer to staff's complaint.

The basis for staff's motion for default judgment, as set forth in Mr. Rail's September 25, 2007 affirmation, is respondents' alleged failure to file a timely verified answer to the April 30, 2007 verified complaint by August 20, 2007 (see ¶¶ 9-13 of Mr. Rail's affirmation, and Exhibit "G" attached thereto). However, under the facts and circumstances presented here, respondent's August 20, 2007 submissions to Commissioner Grannis, submitted on the last date given by Department staff to file an answer, are deemed to constitute a timely answer to the verified complaint.

In this particular case, the fact that respondent's August 20, 2007 submissions to the Department do not bear respondent's signature as typically required by CPLR 3020 is not

⁸ Respondent acknowledged receiving a copy of Department staff's default motion at his Rancho Palos Verdes, California address on October 2, 2007.

a fatal defect given respondent's self-described status as a professional engineer and industry executive, not an attorney.⁹ At a minimum, these submissions were adequate to put Department staff on notice of respondent's assertions regarding his liability and are sufficient to defeat staff's motion for default judgment. As such, respondent's submissions are entitled to the liberal construction generally afforded to papers submitted by pro se parties in administrative proceedings (see CPLR 3026; see also Title 48, Appendix A, of the Rules of the City of New York, "Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York," § 103[A][8] [Feb. 13, 2007]).¹⁰

RULING

For the foregoing reasons, Department staff's motion for default judgment against respondent is hereby denied. Department staff is directed to file a statement of readiness for adjudicatory hearing in this matter in accordance with 6 NYCRR 622.9(b) within twenty (20) days of the date of this ruling. Upon receipt of Department staff's statement of readiness for adjudicatory hearing, the undersigned will contact the parties in order to schedule a conference call with the parties for the purpose of scheduling a mutually convenient hearing date, time and location.

_____/s/_____
Mark D. Sanza
Administrative Law Judge

Dated: October 12, 2007
 Albany, New York

⁹ Further, while Department staff noted that respondent had not signed or otherwise verified his August 20, 2007 letter to Messrs. Rail and Scully (see ¶¶ 10 and 11 of Mr. Rail's September 25, 2007 affirmation, and Exhibit "G" attached thereto), it does not appear from staff's motion papers that, as the recipient of unverified papers, Department staff treated respondent's letter as defective and a nullity or provided respondent with an opportunity to remedy the defect (see CPLR 3022 and 3026; see also Westchester Life v Westchester Magazine Co., 85 NYS2d 34 [NY Sup 1948]).

¹⁰ See www.nyc.gov/html/oath/html/rules.html.

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