STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 24 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 (NYCRR), Part 663 by

RULING: MOTION FOR DEFAULT

William M. Smith, III

DEC File No. R4-2008-0902-132

Respondent.

PROCEEDINGS

By Notice of Motion dated May 27, 2009, Staff of the Department of Environmental Conservation (DEC, Department) sought a judgment by default against WILLIAM M. SMITH, III (Smith, respondent) concerning alleged violations of article 24 of the Environmental Conservation Law (ECL) and title 6 of NYCRR, part 663. Respondent was served a Notice of Hearing and Complaint on November 12, 2008. The Complaint alleged that respondent placed fill in a wetland to create a parking lot without a permit. The Notice of Hearing and Complaint does not direct respondent to appear for a pre-hearing conference.

In support of its default motion, DEC submitted an affirmation of assistant regional attorney Jill Phillips, Esq. dated May 27, 2009, a proposed Order, and proof of proper service of the Notice of Hearing and Complaint on respondent on November 12, 2008.

Respondent opposed the motion for default judgment by letter dated June 23, 2009.

DEFAULT PROCEDURES:

Section 622.15, "Default Procedures" provides, in pertinent part: "(b) The 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; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

DISCUSSION

The Notice of Hearing and Complaint was served on respondent on November 12, 2008.

Section 622.3(a)(2) of 6 NYCRR states that a notice of hearing "may set forth the date, time and place of a pre-hearing conference." The Notice served herein did not set forth a date for a pre-hearing conference. It is acknowledged by Department staff that respondent and Department staff engaged in settlement discussions after service of the Notice of Hearing and Complaint. There is no indication in Department staff's papers as to when those discussions began. Attached as an exhibit to the May 27, 2009 affirmation of assistant regional attorney Jill Phillips is a letter to respondent dated March 19, 2009. The letter indicates that Department staff granted respondent an extension of time to answer the complaint to April 16, 2009. The letter also stated that an order on consent was sent to Mr. Smith on December 29, 2008 and was not responded to by respondent. The certified mailing receipt attached as an exhibit to the Phillips affirmation confirms delivery of the March 19, 2009 letter to respondent's mailing address on March 27, 2009. No formal answer has been served to date.

Department staff served the motion for default judgment on respondent by mail on May 27, 2009. Respondent sent a letter to this office on June 23, 2009. The letter states that he "obeyed the wetland buffer zone when I graded and elevated a parking area with gravel." (Smith letter, June 23, 2009.) The letter also contains a complaint from Mr. Smith that the Department is responsible for elevated water levels on his property.

The default provisions of Part 622 are meant to address circumstances where a respondent has been absent from the proceedings - failure to answer, failure to appear at a pre-hearing conference, or failure to appear at a hearing. 6 NYCRR 622.15. ***Matter of Wiebicke, Jr.*** *2003 N.Y. Env. LEXIS 69* (September 18, 2003). In ***Wiebicke***, the respondent submitted a letter in response to the Department's complaint, denying allegations in the complaint and offering a defense. Department staff then moved for a default judgment. Administrative Law Judge (ALJ) Helene G. Goldberger noted to "find a default in these circumstances would be unfair as it would deny an individual, who has responded to staff's complaint and is unrepresented by counsel, the opportunity to fully present his version of the facts. This has not been the practice of this Department as demonstrated in ***Matter of Robert Michaels*** *2003 N.Y. Env. LEXIS 37* (May 19, 2003)." ***Matter of Wiebicke*** *supra* at 4-5. In ***Michaels***, the Commissioner decided the case on the merits, ignoring the technical default of respondent having failed to serve an answer to the complaint. Respondent Michaels appeared at the pre-hearing conference but did not serve an answer. As noted above, respondent Smith engaged in settlement discussions with Department staff and sent a letter opposing the default motion. There was no pre-hearing conference noticed in the Notice of Hearing and Complaint for respondent. However, it is acknowledged that respondent contacted Department staff and engaged in negotiations to resolve the matter. The default motion was not brought until after settlement negotiations failed so it can be presumed that respondent contacted Department staff in a timely manner when served with the Notice of Hearing and Complaint. Respondent has not been absent from these proceedings. Respondent entered into settlement negotiations and endeavored to resolve the matter with Department staff. Respondent also responded to the default motion by contacting this office. Respondent has shown efforts to legally appear in the action and has attempted to oppose the allegations of the complaint. On the basis of this record, it would be unfair to grant judgment in default.

The following Findings are based upon the papers submitted, as identified above.

FINDINGS OF FACT

1. Respondent WILLIAM M. SMITH, III was served a Notice of Hearing and Complaint on November 12, 2008.

2. Department staff and respondent entered into settlement discussions after service of the complaint.

3. During the settlement discussions, respondent requested and was granted an extension of time to serve an answer to the complaint. The time was extended to April 16, 2009.

4. By letter dated December 29, 2008, Department staff forwarded an order on consent to respondent. Respondent did not sign the order on consent.

5. Department staff served the motion for default judgment on respondent on May 27, 2009. The motion was also sent to the Department's Office of Hearings and Mediation Services (OHMS). Respondent opposed the motion by letter to OHMS dated June 23, 2009.

CONCLUSION OF LAW

Department staff has not demonstrated that it has met the requirements for a default judgment as set out in 6 NYCRR 622.15 and a default judgment should not be entered.

RULING

The motion for default judgment is denied. I am directing that respondent and Department staff contact my office by October 1, 2010 to schedule a conference call to discuss scheduling a hearing in this matter or to schedule mediation.

/s/

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Molly T. McBride
Administrative Law Judge

Dated: September 20, 2010
Albany, New York

To: Jill Phillips, Esq.
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