

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

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In the Matter of the Alleged Violations of  
Article 12 of the New York State  
Navigation Law and Part 32 of  
Title 17 of the Official Compilation of Codes,  
Rules and Regulations of the State  
of New York (“17 NYCRR”),

**ORDER**

DEC Case No.  
R2-20150917-503

-by-

**ZENITH MANAGEMENT I LLC,**

Respondent.

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This administrative enforcement proceeding involves a December 2014 discharge of petroleum and failure to clean up the discharge at property and an apartment building that respondent Zenith Management I LLC (“respondent”) owns at 108-20 48th Avenue, Corona, Queens County, New York. Staff of the New York State Department of Environmental Conservation (“DEC” or “Department”) commenced this proceeding against respondent by service of a notice of hearing and complaint dated January 29, 2016. Service of process was made by certified mail, received by respondent on February 6, 2016, in accordance with section 622.3 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

The notice of hearing included a notice of a pre-hearing conference scheduled for February 23, 2016 at the Department’s Region 2 office. Respondent did not appear for the pre-hearing conference.

The complaint alleges that respondent violated sections 173 and 176 of article 12 of the New York State Navigation Law (“NL”) and 17 NYCRR 32.5. Pursuant to 6 NYCRR 622.4(a), respondent was required to file an answer within twenty days after receipt of the notice of hearing and complaint. Respondent failed to answer the complaint. In addition, respondent did not appear at the pre-hearing conference scheduled in the notice of hearing. Department staff moved for a default judgment and order by motion dated February 29, 2016.

The matter was assigned to Administrative Law Judge (“ALJ”) Maria E. Villa, who prepared the attached default summary report. I adopt the ALJ’s report as my decision in this matter, subject to my comments below.

Department staff seeks an order holding respondent liable for the cited violations, imposing a civil penalty of fifty thousand dollars (\$50,000), and directing respondent to take corrective action to address the spill. 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, and I concur that Department staff is entitled to a default judgment.

Section 192 of the Navigation Law provides for a civil penalty of up to twenty-five thousand dollars (\$25,000) per day for each violation of the provisions of article 12 of the Navigation Law or any regulation promulgated thereunder. Based upon Department staff's submissions, I conclude that the civil penalty that Department staff has requested, and that the ALJ has recommended, is authorized and appropriate (see Default Summary Report, at 5; Affirmation of John K. Urda, Esq., dated February 29, 2016, ¶¶ 10-21 [providing basis for the requested penalty]).

I note that respondent has failed to address the discharge, notwithstanding staff's efforts to obtain compliance (see Affidavit of Hiralkumar Patel, sworn to February 29, 2016 ["Patel Aff"], ¶¶ 6-8). Department staff has outlined remedial measures that should be implemented to address the spill (see January 9, 2015 letter from Hiralkumar Patel, DEC Environmental Engineer I, to Zenith Management I LLC, attached as Exhibit B to Patel Aff), and has requested that respondent complete remediation pursuant to a Department approved workplan. Based upon my review, the remedial measures and workplan requested by Department staff and recommended by the ALJ are also authorized and warranted.

**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 Department staff's complaint or appear in this proceeding, respondent Zenith Management I LLC is found to be in default, to have admitted the factual allegations set forth in Department staff's complaint, and to have waived its right to a hearing in this matter.
- II. Respondent Zenith Management I LLC is adjudged to have violated sections 173 and 176 of the Navigation Law, and 17 NYCRR 32.5.
- III. Respondent Zenith Management I LLC shall pay a civil penalty in the amount of fifty thousand dollars (\$50,000) within 30 (thirty) days after service of this order on respondent. Payment shall be made in the form of a cashier's check, certified check or bank check payable to the order of the "Environmental Protection and Spill Compensation Fund" and delivered to the Department at the following address:

New York State Department of Environmental Conservation  
Region 2  
47-40 21st Street  
Long Island City, New York 11101  
Attention: John K. Urda, Esq.

- IV. Within 30 (thirty) days after the date of service of this order on respondent Zenith Management I LLC, respondent shall submit to Department staff a workplan in acceptable form providing for full investigation and remediation of the subject petroleum spill, including an implementation schedule.
- V. All communications between respondent and Department staff concerning this order shall be made to John K. Urda, Esq., at the address referenced in paragraph III of this order.
- VI. The provisions, terms and conditions of this order shall bind respondent Zenith Management I LLC and its agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_  
/s/  
Basil Seggos  
Commissioner

Dated: June 17, 2016  
Albany, New York

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

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In the Matter of the Alleged Violations of Article  
12 of the New York State Navigation Law and Part  
32 of Title 17 of the Official Compilation of Codes,  
Rules and Regulations of the State of New York  
("17 NYCRR")

**DEFAULT  
SUMMARY  
REPORT**

-by-

**ZENITH MANAGEMENT I LLC,**

DEC Case No.  
R2-20150917-503

Respondent.

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*Procedural History*

Respondent Zenith Management I LLC ("respondent" or "Zenith") is the owner of property and a three-story apartment building at 108-20 48<sup>th</sup> Avenue, Corona, Queens County, New York (the "Site"). On February 6, 2016, staff of the New York State Department of Environmental Conservation ("Department") served respondent with a notice of hearing and complaint dated January 29, 2016, alleging violations of Section 173 of the New York Navigation Law for discharging petroleum. The complaint alleged further that respondent violated Section 176 of the Navigation Law and Section 32.5 of Title 17 of the Official Compilation of Codes, Rules, and Regulations of the State of New York ("17 NYCRR") for failing to contain the discharge.

The complaint seeks an order of the Commissioner: (1) finding respondent in violation of Navigation Law Sections 173 and 176, and 17 NYCRR Section 32.5; (2) ordering respondent to complete remediation of the subject spill pursuant to a Department-approved workplan; and (3) imposing a civil penalty of fifty thousand dollars (\$50,000).

Service of the notice of hearing and complaint was made by certified mail and was received by respondent on February 6, 2016. The notice of hearing informed respondent that a pre-hearing conference was scheduled for February 23, 2016 at 10:00 a.m. at the Department's Region 2 offices located at 47-40 21<sup>st</sup> Street, Long Island City, New York.

Respondent did not appear at the pre-hearing conference. An answer to the complaint was due by February 26, 2016, and no answer was received from respondent. Pursuant to Section 622.15 of 6 NYCRR, Department Staff moved for a default judgment on February 29, 2016.

Department Staff's motion included a notice of motion and the affirmation of John K. Urda, Esq. (the "Urda Affirmation"), both dated February 29, 2016. The Urda Affirmation included the following exhibits:

- A. New York State Department of State Division of Corporations entity information for respondent, and an April 10, 2002 deed;
- B. February 29, 2016 affirmation of service via certified mail, with United States Postal Service tracking and delivery receipt (Exhibit A); and
- C. A proposed order.

A copy of the notice of hearing and complaint, as well as the affidavit of Hiralkumar Patel, sworn to February 29, 2016 (the "Patel Affidavit"), accompanied the motion. Mr. Patel is an Environmental Engineer in the Region 2 Division of Environmental Remediation. The following exhibits were attached to the Patel Affidavit:

- A. Spill Report Form (Spill No. 1409716 (December 30, 2014));
- B. January 9, 2015 letter from Hiralkumar Patel to Zenith Management I LLC; and
- C. March 31, 2015 letter from Hiralkumar Patel to Zenith Management I LLC.

Finally, Department Staff provided the March 9, 2016 affirmation of John K. Urda, Esq. (the "Second Urda Affirmation") to establish service of the motion for default judgment upon respondent.

Zenith did not respond to Department Staff's motion for default. As set forth below, this report recommends that the Commissioner grant Department Staff's motion for a default judgment.

#### *Default Provisions*

In accordance with Section 622.4(a) of 6 NYCRR, a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the proceeding. As applicable herein, the Department's default procedures in an enforcement proceeding, found at Section 622.15 of 6 NYCRR, provide that:

(a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent's right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record or in writing and 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.

As the Commissioner stated in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted].” In Matter of Queen City Recycle Center, Inc., the Commissioner stated that “consistent with the requirements applicable to default judgment motions under the CPLR, this decision and order directs that staff must submit proof of the facts constituting the claim charged.” Decision and Order dated December 12, 2013, at 3 (citations omitted). The Commissioner went on to direct that “[u]pon submission of the motion and supporting materials, the ALJ will review the record to determine whether staff’s papers have stated a claim, and that staff’s penalty request and remedial relief are supported.” Id. (citations omitted).

In this case, Department Staff, in addition to the factual allegations of the complaint, provided documentation in Department’s motion for default in support of Department Staff’s causes of action. The documentation provided in Department Staff’s motion is sufficient to state a claim, and to support staff’s request for a penalty and remedial relief.

*Findings of Fact*

1. Respondent Zenith owns the property and a three-story apartment building at 108-20 48<sup>th</sup> Avenue, Corona, Queens County, New York. Respondent purchased the property by deed dated April 10, 2002. (Urda Affirmation, Exhibit A.)
2. On December 30, 2014, a fuel oil delivery company reported a discharge of number two fuel oil at the Site to the New York State Spills Hotline. The discharge was assigned NYSDEC spill number 1409716. (Patel Affidavit, Exhibit A.)
3. Mr. Patel inspected the Site on January 8, 2015. He noticed petroleum vapors in the lobby, and found that the Site included a 1,080 gallon underground storage tank beneath the basement floor. The tank stored number two fuel oil. The fuel oil line running beneath the basement floor between the tank and the sidewalk fill port had been uncovered, revealing petroleum-contaminated soil around the pipe. Excavated contaminated soil was stockpiled in the basement. (Patel Affidavit, ¶ 5).
4. Mr. Patel stated that later that day (January 8, 2015), he “spoke with the respondent’s principal and gave him specific direction to properly address the Spill.” (Patel Affidavit, ¶ 6). Mr. Patel followed up with a letter dated January 9, 2015. (Id.; Patel Affidavit, Exhibit B). Respondent did not address the spill, and on March 31, 2015, Mr. Patel sent another letter to respondent. (Patel Affirmation, ¶ 6; Exhibit C).
5. The spill has yet to be investigated or remediated. (Urda Affirmation, ¶ 19). The Site is a multifamily residential building in a heavily populated area in Queens, New York. (Id., ¶ 20).

6. Service of the notice of hearing and complaint dated January 29, 2016 was made by certified mail and was received by respondent on February 6, 2016. (Urda Affirmation, ¶¶ 4 and 5). The notice of hearing notified respondent that a pre-hearing conference was scheduled for February 23, 2016 at 10:00 a.m. at the Department's Region 2 offices located at 47-40 21<sup>st</sup> Street, Long Island City, New York. (*Id.*, ¶ 6). Respondent failed to answer the complaint, and did not appear at the February 23, 2016 pre-hearing conference. (*Id.*, ¶¶ 6 and 7).
7. Service of the motion for a default judgment was made by certified mail and was received by respondent on March 3, 2016. (Second Urda Affirmation, ¶¶ 1 and 3; Exhibit A). As of the date of this report, respondent has not replied to the motion.
8. Respondent failed to answer to the complaint, failed to appear for the pre-hearing conference on February 23, 2016, and failed to respond to Department Staff's motion for a default judgment. (Urda Affirmation, ¶¶ 6 and 7).

### Discussion

Section 173 of the Navigation Law prohibits the discharge of petroleum. Section 176 of the Navigation Law provides that any person discharging petroleum in the manner prohibited by Section 173 shall immediately undertake to control such discharge. Section 32.5 of 17 NYCRR states that “[a]ny person responsible for causing a discharge which is prohibited by section 173 of the Navigation Law shall take immediate steps to stop any continuation of the discharge and shall take all reasonable containment measures to the extent he is capable of doing so.”

Section 192 of the Navigation Law provides for a civil penalty of up to \$25,000 per day for each violation of the provisions of Article 12 of the Navigation Law. If the violation is of a continuing nature, each day during which it continues constitutes an additional, separate and distinct offense, subject to an additional \$25,000 penalty.

Department Staff provided documentation demonstrating that respondent discharged petroleum at the Site in violation of Navigation Law Section 173 and failed to contain the discharge of petroleum at the Site in violation of Navigation Law Section 176, and Section 32.5 of 17 NYCRR. On December 30, 2014, the Department was notified of a petroleum spill at the Site as a result of a breach of a fuel oil line running from the sidewalk fill port underground to the basement heating oil tank. Fuel oil was discharged to the soil beneath the basement floor surrounding the line.

During a telephone call on January 8, 2015, Department Staff directed Zenith's principal to complete specific steps to remediate the spill. (Patel Affidavit, ¶ 6). Department Staff followed up with a letter the next day (January 9, 2015), directing Zenith to complete the work by March 9, 2015. Zenith did not respond, and attempts to secure respondent's cooperation were unsuccessful. The spill has not been investigated or remediated, and the Site is a multi-family, residential building in a heavily populated area.

The record shows that respondent was served the notice of hearing and complaint and failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for February 23, 2016; and was served with the motion for default judgment and supporting papers, and failed to respond. The Department is entitled to a default judgment in this matter pursuant to the provisions of Section 622.15 of 6 NYCRR.

In its motion, Department Staff noted that the penalty amount requested is consistent with the Department's prior practice as well as its penalty policies and applicable provisions of the Navigation Law. Department Staff noted respondent's failure to cooperate with the Department's efforts to resolve this matter.

Section 192 of the Navigation Law provides for a civil penalty of up to \$25,000 per day for each violation of the provisions of Article 12 of the Navigation Law. Department Staff requested a \$50,000 penalty for the violations of Navigation Law Sections 173 and 176, as well as Section 32.5 of 17 NYCRR. In light of the statutory maximum, which would authorize a penalty of \$25,000 per day since December 30, 2014, the penalty requested is authorized, reasonable and consistent with the purposes and objectives of the Department's penalty policies. Department Staff also requested that the Commissioner order respondent to complete remediation of the spill pursuant to a Department-approved workplan.

Recommendations

Based upon the foregoing, the Commissioner should issue an order:

1. Granting Department Staff's motion for default, and finding respondent in default pursuant to the provisions of Section 622.15 of 6 NYCRR;
2. Holding respondent in violation of Section 173 of the Navigation Law for discharging petroleum at the Site;
3. Holding respondent in violation of Section 176 of the Navigation Law, and Section 32.5 of 17 NYCRR, for failing to contain the discharge;
4. Directing respondent to complete remediation of the spill pursuant to a Department-approved workplan; and
5. Directing respondent to pay a civil penalty of fifty thousand dollars (\$50,000).

/s/

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Maria E. Villa  
Administrative Law Judge

Dated: Albany, New York  
May 26, 2016