NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the Environmental Conservation Law of the State of New York (ECL) Article 17, and the New York State Navigation Law Article 12, by 366 Avenue Y Development Corporation, Respondent.	Ruling on Motion for Default Judgment DEC Case No: R2-20090522-316 April 23, 2010

Proceedings

With a cover letter dated January 5, 2010, Staff from the Department's Region 2 Office (Department staff) filed a notice of motion for default judgment, and a motion for default judgment with supporting papers (*see* Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] § 622.15). Department staff's notice and motion are dated January 5, 2010. In this matter, Department staff is represented by John K. Urda, Esq., Assistant Regional Attorney. A list of the documents provided by Department staff is attached to this ruling as Appendix A.

According to Mr. Urda's affirmation dated January 5, 2010, 366 Avenue Y Development Corporation (Respondent) is an active domestic business corporation that owns property at 366 Avenue Y, Brooklyn (Kings County), New York. Respondent's property is the site of a petroleum spill (Spill No. 9511519). (¶¶ 3, 4 Urda Affirmation; Exhibit A.)

Exhibit B to Mr. Urda's affirmation is a copy of a stipulation between Department staff and Respondent effective February 14, 2007. Pursuant to the terms of the February 14, 2007 stipulation, Respondent agreed to file an investigation summary report within 60 days of the effective date of the stipulation. Subsequently, within 120 days of the effective date of the stipulation, Respondent agreed to file a remediation action plan with Department staff. Within 45 days from Department staff's approval of the remediation action plan, Respondent agreed to implement the approved plan, and remediate the petroleum spill.

Mr. Urda states that the investigation summary report was due by April 16, 2007, and that Respondent did not file the report (¶ 7 Urda Affirmation). After several unsuccessful

attempts to gain Respondent's cooperation, Department staff served a notice of hearing and complaint dated August 4, 2009 by certified mail, return receipt requested (¶ 8, 9 Urda Affirmation; Exhibit C). After Respondent failed to filed a timely answer, and attend a pre-hearing conference (¶ 10 Urda Affirmation), Department staff filed the January 5, 2010 motion for a default judgment (*see* 6 NYCRR 622.15[a]).

In a letter dated January 11, 2010, Norman S. Langer, Esq. (Brooklyn, New York), identified himself as Respondent's legal counsel, and acknowledged that he received a copy of Department staff's January 5, 2010 motion for default judgment. Accordingly, Respondent has appeared in these proceedings.

For the following reasons, Mr. Langer requests that Department staff's motion for default judgment be held in abeyance. Mr. Langer states that Respondent retained Landmark Consultants, Inc. to remediate the petroleum spill at the 366 Avenue Y property. The agreed upon cost for the remediation was $110,000, and that as of January 2010, Respondent had paid Landmark Consultants $80,000. According to Mr. Langer, Landmark Consultants now demands an additional $80,000 from Respondent. Mr. Langer explains that he will be initiating a civil proceeding on his client's behalf in Supreme Court, Kings County, to resolve this contractual dispute. Mr. Langer notes that Jeffrey Vought, a member of Region 2 Department staff is aware of the circumstances associated with the remediation of the 366 Avenue Y property.

By letter dated January 12, 2010, Chief Administrative Law Judge (ALJ) James T. McClymonds advised the parties that the captioned matter was assigned to ALJ Daniel P. O'Connell.

With leave, Mr. Urda filed a letter dated January 22, 2010 that responds to Mr. Langer's request to hold the captioned matter in abeyance. For the following reasons, Department staff objects. Department staff notes that the applicable regulations do not provide for a request to hold the motion in abeyance. Department staff argues that Respondent's January 11, 2010 letter is not properly an opposition to the default motion because it does not address the merits of the motion, or the underlying allegations. Department staff contends that the dispute between Respondent and its consultant is beyond the scope of the captioned matter. Finally, Department staff argues

further that Respondent's January 11, 2010 letter does not meet the standard to reopen a default (*see* 6 NYCRR 622.15[d]).

In addition, Department staff objects to Mr. Langer's characterization that the site has been remediated. Mr. Urda reports that he conferred with Mr. Vought. According to Mr. Vought, he last spoke with Respondent's representative on November 6, 2008. At that time, Mr. Vought advised Respondent that additional remediation was necessary, which included endpoint sampling and well installation. Department staff requests a ruling on the merits of the January 5, 2010 default motion.

Discussion

I. Commencement of an Enforcement Proceeding

Department staff may commence an administrative proceeding by serving a notice of hearing and a complaint (*see* 6 NYCRR 622.3[a][1]). Service of the notice of hearing and complaint must be by personal service consistent with the Civil Practice Law and Rules (CPLR) or by certified mail. Service by certified mail will be considered complete when the notice of hearing and complaint are received. (*See* 6 NYCRR 622.3[a][3].)

As noted above, after Respondent failed to comply with the terms and conditions of the February 14, 2007 stipulation (¶ 7 Urda Affirmation; Exhibit B), Department staff commenced an administrative proceeding with service of a notice of hearing and complaint dated August 4, 2009 (¶ 8, 9 Urda Affirmation; Exhibits C and D).

Exhibit D to Mr. Urda's affirmation includes an affidavit of service by Sheila Warner, sworn to August 4, 2009. According to the affidavit of service, Ms. Warner sent copies of the August 4, 2009 notice of hearing and complaint, by certified mail, return receipt requested, to the following: (1) 366 Avenue Y Development Corporation, 1578 Hewlitt Avenue, Hewlitt, New York 11557, and (2) to Respondent in care of Mr. Langer at 3047 Avenue U, 2nd Floor, Brooklyn, New York 11229.

In addition to Ms. Warner's affidavit of service, Exhibit D also includes a "track and confirm" printout from the US Postal Service for the item sent to Mr. Langer. The track and confirm

printout shows delivery at 10:53 a.m. on August 6, 2009. As part of Exhibit D, Department staff also includes a copy of the signed domestic return receipt for the item sent to Mr. Langer.

According to the information maintained by the New York State Department of State, Division of Corporations, 366 Avenue Y Development Corporation is an active domestic corporation. Norman S. Langer, Esq., is identified as the agent who will accept process on behalf of the corporation.

Based on this proof, I conclude that Department staff duly commenced an administrative enforcement proceeding by serving a notice of hearing and a complaint upon Respondent in a manner consistent with the applicable regulations. In addition, I find that Mr. Langer, as Respondent's duly authorized agent, received the August 4, 2009 notice of hearing and complaint on August 6, 2009.

Department staff's August 4, 2009 notice of hearing (Exhibit C) scheduled a pre-hearing conference for September 7, 2009, and advised Respondent that an answer to the complaint was due within 20 days following receipt of the notice of hearing and complaint (*see* 6 NYCRR 622.4). The notice advised further that if Respondent failed either to attend the September 7, 2009 pre-hearing conference, or to file a timely answer, then Respondent would be in default, and waive its right to a hearing (*see* 6 NYCRR 622.15[a]).

Because Mr. Langer received the notice of hearing and complaint on August 6, 2009, Respondent's answer was due by August 26, 2009. Respondent, however, did not file any answer, and did not attend the September 7, 2009 pre-hearing conference (¶ 10 Urda Affirmation).

II. Motion for Default Judgment

Pursuant to 6 NYCRR 622.15(a), a respondent's failure either to appear at a scheduled pre-hearing conference, or to file a timely answer to a complaint constitutes a default and waiver of that respondent's right to a hearing. The consequences of a default are that the respondent waives the right to a hearing, and is deemed to have admitted the factual allegations of the complaint on the issue of liability for the violations alleged (*see* 6 NYCRR 622.15[a]; *Matter of Alvin Hunt*, Decision and Order, July 25, 2006, at 4-5; *Rokina Opt. Co., Inc.*

v Camera King, Inc., 63 NY2d 728, 730 [1984]; *Reynolds Securities, Inc., v Underwriters Bank and Trust Co.*, 44 NY2d 568, 572 [1978]; M*cClelland v Climax Hosiery Mills*, 252 NY 347, 351 [1930]).

Under these circumstances, Department staff may move for a default judgment. Department staff's motion must include the following:

1. proof of service of the notice of hearing and complaint;

2. proof of respondent's failure to file a timely answer or to appear; and

3. a proposed order (*see* 6 NYCRR 622.15[b]).

For the following reasons, Department staff has met the requirements for a default judgment as outlined in 6 NYCRR 622.15. First, as noted above, Department staff demonstrated that it duly commenced an administrative enforcement proceeding with service of the August 4, 2009 notice of hearing and complaint upon 366 Avenue Y Development Corporation.

Second, Respondent received the August 4, 2009 notice of hearing and complaint on August 6, 2009. The notice of hearing advised Respondent that an answer to the complaint was due within 20 days from the date of receipt, and that a pre-hearing conference had been scheduled for September 7, 2009. Mr. Urda's January 5, 2010 affirmation (¶ 10) demonstrates that Respondent neither filed any answer, nor appeared at the September 7, 2009 pre-hearing conference.

Third, Staff submitted, as required by 6 NYCRR 622.15(b), a proposed order (Urda Affirmation; Exhibit E). Finally, consistent with the Commissioner's directive in *Matter of Derrick Dudley* (Decision and Order, dated July 24, 2009, at 2), Department staff provided Respondent with a copy of the January 5, 2010 motion for default judgment.

III. Respondent's Request

As noted above, Respondent's counsel, in a letter dated January 11, 2010, requested that Department staff's motion for default judgment be held in abeyance pending a resolution of a contractual dispute between Respondent and its consultant

concerning the remediation costs. Department staff's arguments for opposing Respondent's request are outlined above. I am persuaded by Department staff's arguments concerning Respondent's request.

Conspicuously absent from Respondent's request are assertions that it complied with the terms and conditions of the February 14, 2007 stipulation; it answered the August 4, 2009 complaint; and that it appeared at the September 7, 2009 pre-hearing conference. Moreover, Respondent does not argue, nor do I conclude, that the basis for Respondent's request could be considered a meritorious defense. Respondent offered nothing to show that good cause for the default exists. (*See* 6 NYCRR 622.15[d].) Therefore, I deny Respondent's request to hold Department staff's motion for default judgment in abeyance pending a resolution of the disputes between Respondent and its consultant.

IV. Liability

After the ALJ concludes that Department staff has met the requirements outlined at 6 NYCRR 622.15, the ALJ must then determine whether the complaint states a claim upon which relief may be granted, and must consider whether the requested relief is warranted and sufficiently supported (*Alvin Hunt*, *supra*, at 4-5). Upon review of the motion papers, I conclude that the August 4, 2009 complaint (*see* Urda Affirmation, Exhibit C) states claims upon which the Commissioner may grant the relief requested by Department staff.

In the August 4, 2009 complaint, Department staff alleges that Respondent violated the February 14, 2007 stipulation by not filing the required investigation summary report by April 16, 2007 (*see* Urda Affirmation, Exhibit C). By its terms, the February 14, 2007 stipulation "is equivalent to an order pursuant to ECL § 17-0303 and a directive pursuant to N[avigation] L[aw] § 176 and is enforceable as such" (Urda Affirmation, ¶ 6 Exhibit B).

As noted above, Respondent agreed, pursuant to the terms of the February 14, 2007 stipulation, to file an investigation summary report within 60 days from the effective date of the stipulation. Subsequently, within 120 days from the effective date of the stipulation, Respondent agreed to file a remediation action plan with Department staff. Within 45 days from

Department staff's approval of the remediation action plan, Respondent agreed to implement the approved plan. Respondent did not file the required investigation summary report (¶ 7 Urda affirmation). Therefore, I conclude that Respondent violated the terms of the February 14, 2007 stipulation.

Proof of the allegations concerning liability is not required pursuant to 6 NYCRR 622.15. However, where, as here, Department staff's motion papers include evidence to support the factual assertions underlying the claims of liability, the Commissioner has determined that the evidence may be examined to confirm whether the claims are meritorious. (*See Alvin Hunt*, *supra*, at 7.)

I conclude that the factual allegations of the August 4, 2009 complaint state a meritorious claim that Respondent violated the terms and conditions of the February 14, 2007 stipulation and, as a result, Respondent also violated provisions of ECL article 17 and the Navigation Law. I find further that Respondent has yet to provide the required investigation summary report and the remediation action plan for Department staff's review and approval. Therefore, the Commissioner may grant default judgment against Respondents on the issue of liability.

V. Relief

A respondent in default, however, is not deemed to have admitted the allegation of damages in the complaint (*see Rokina*, 63 NY2d at 730; *Reynolds Securities*, 44 NY2d at 572; *McClelland*, 252 NY at 351). As a result, when a respondent defaults, only liability for the violations alleged in the complaint is established as a matter of law. Damages must still be proven. Consequently, Department staff must offer some proof with its motion to support both the requested civil penalty and any necessary remedial measures. (*See Alvin Hunt*, *supra*, at 4.) In addition, when, as here, a respondent has appeared, the respondent is entitled to be heard at the penalty phase hearing (*see e.g. McClelland*, at 351).

A. Civil Penalty

In the August 4, 2009 complaint, Department staff requests an order from the Commissioner that would assess a total civil penalty of not less than $37,500. In the motion for default

judgment, Department staff seeks the same civil penalty. To support the civil penalty request, Department staff refers to ECL 71-1929, which authorizes a civil penalty not to exceed $37,500 per day for each violation, and that each day a violation continues is considered a separate violation. In addition, Department staff refers to Navigation Law § 192, which provides for a civil penalty of up to $25,000 per day for each violation.

In his January 5, 2010 affirmation (¶ 17), Mr. Urda states that the requested civil penalty is authorized by ECL 71-1929 and Navigation Law § 192. Mr. Urda states further (¶ 16) that Department staff's civil penalty request is reasonable and consistent with the Department's *Civil Penalty Policy* (Division of Environmental Enforcement [DEE] - 1, June 20, 1990), and the *Bulk Storage and Spill Response Enforcement Policy* (DEE – 4, March 15, 1991).

To justify the requested civil penalty, Mr. Urda argues the following. First, Respondent has not cooperated with the Department to remediate the petroleum spill. Second, Respondent did not file the required investigation summary report, and corrective action plan. Third, Respondent did not answer the August 4, 2009 complaint, or appear at the September 7, 2009 pre-hearing conference. Finally, Mr. Urda asserts that Respondent gained an economic benefit from neglecting the petroleum spill at the 366 Avenue Y property. (¶ 18 Urda Affirmation.) Department staff, however, did not quantify the economic benefit that Respondent may have realized from not complying with the February 14, 2007 stipulation.

In his January 22, 2010, Mr. Langer does not object to the civil penalty that Department staff requests. Nevertheless, because the requested civil penalty is an element of damages or relief, I reserve on Department staff's request for an Order from the Commissioner that would assess a civil penalty of $37,500.

B. Spill Remediation

Department staff also requested that the Commissioner direct Respondent to comply with the terms of the February 14, 2007 stipulation, and remediate the petroleum spill. Department staff has demonstrated that Respondent did not comply with the terms of the February 14, 2007 stipulation by establishing that

Respondent did not file the investigation summary report or the remediation action plan. Upon receipt of these documents, Department staff would review, and either approve or disapprove the remediation action plan.

However, Mr. Langer contends in his letter dated January 11, 2010 that "the cleanup has been performed . . . but that the paperwork necessary to complete this matter has not been done." As noted above, Mr. Langer contends further that Mr. Vought of Department staff is familiar with all the circumstances related to this petroleum spill remediation at the 366 Avenue Y property.

In Mr. Urda's January 22, 2010 letter, Department staff disputes Respondent's contention that the site has been remediated. According to Mr. Urda, Mr. Vought does not agree that the site has been remediated. For example, according to Department staff's January 22, 2010 response, Mr. Vought advised Respondent to undertake endpoint sampling and to install monitoring wells.

Given the conflicting information concerning the status of the site remediation, I conclude that the requested relief may not be warranted and, at present, is not sufficiently supported. Where the ALJ has questions concerning the penalty phase of the motion, the ALJ may conduct an inquiry (*Matter of Alvin Hunt*, *supra*, at 5; *McClelland*, 252 NY at 351). Before the Commissioner issues an Order, I will convene a hearing to determine the current status of the remediation at the site. Therefore, I deny Department staff' motion for default judgment with respect to the requested remediation.

Conclusions

Based on the foregoing discussion, I conclude that, with respect to liability, Department staff's January 5, 2010 motion for a default judgment meets the requirements outlined at 6 NYCRR 622.15(b) and related administrative precedents. However, a hearing is necessary to determine the appropriate relief.

Further Proceedings

A hearing is necessary to determine whether the relief requested by Department staff is warranted. The purpose of the hearing will be to ascertain the current site conditions, and to determine what additional remediation, if any, is necessary.

I would like to hold a telephone conference call with the parties at 10:00 a.m. on May 13 or 14, 2010 to discuss the schedule for the hearing. By 4:30 p.m. on April 30, 2010, the parties shall advise me about their availability on May 13 or 14, 2010 for a telephone conference call. If a party is not available on these dates, then the party shall provide alternative times and dates for the conference call by April 30, 2010.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
April 23, 2010

Appendix A: Motion Papers

Appendix A

Matter of 366 Avenue Y Development Corporation
Motion Papers
DEC Case No.: R2-20090522-316

1. Notice of Motion for Default Judgment and Order, dated January 5, 2010.

2. Motion for Default Judgment and Order, dated January 5, 2010.

3. Affirmation of John K. Urda in Support of Motion for Default Judgment and Order, dated January 5, 2010 with attached Exhibits:

    a. Exhibit A – Bargain and Sale Deed for real property located at 366 Avenue Y, Brooklyn, New York, dated January 13, 2004.

    b. Exhibit B – Stipulation pursuant to Section 17-0303 of the Environmental Conservation Law and Section 176 of the Navigation Law by 366 Avenue Y Development Corporation (Joshua Golan) for Spill No. 9511519, effective February 14, 2007.

    c. Exhibit C – Notice of Hearing and Complaint dated August 4, 2009.

    d. Exhibit D – Affidavit of Service by Shelia Warner, sworn to August 4, 2009; Track and Confirmation printout for Item No. 7004 1350 0004 2635 6174; Copy of Signed Domestic Return Receipt for Item No. 7004 1350 0004 2635 6174.

    e. Exhibit E – Draft Order, DEC Case No. R2-20090522-316.

4. Letter dated January 11, 2010 by Norman S. Langer, Esq., 3047 Avenue U, Brooklyn, New York 11229 to Mr. Urda requesting that the motion be held in abeyance.

5. Letter dated January 22, 2010 by Mr. Urda (Department staff’s Response).