STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

RULING

DEC Case No.
R2-20130905-376

-by-

AMERICAN AUTO BODY & RECOVERY INC. and SALVATORE S. "SAMMY" ABATE,

Respondents.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation ("Department") alleges that American Auto Body & Recovery, Inc. and Salvatore S. "Sammy" Abate ("respondents") violated the ECL, and the New York Navigation Law ("NL") and its implementing regulations, due to the leakage of petroleum product from a tractor-trailer. Respondent American Auto Body & Recovery, Inc., an active domestic business corporation engaged in the business of towing and repairing motor vehicles, is located at 60-05 Flushing Avenue, Maspeth, Queens, New York ("facility"). Respondent Salvatore S. "Sammy" Abate is the owner, manager and operator of American Auto Body & Recovery, Inc.

Department staff served a notice of hearing and complaint upon respondents by certified mail on May 9, 2014 (see Affirmation of John K. Urda in Support of Motion for Default Judgment and Order ["Urda Affirmation"], ¶¶ 6 and 7, and Exhibit ["Ex."] B). Department staff's complaint alleges that, on May 16, 2012, following notice by New York City Police Department personnel of an abandoned tractor-trailer in Queens, respondents removed the tractor-trailer to the facility (see Complaint ¶ 4). The trailer, which was leaking petroleum product, was stored at the facility until May 18, 2012 (see id. ¶¶ 4-5). The tractor and trailer were owned separately (id. ¶ 6). On May 18, 2012, the owner of the tractor arrived at the facility to take possession of it, but respondent Abate refused to release the tractor without the leaking trailer, and advised the tractor owner to take the trailer and abandon it at another location (see id. ¶¶ 6, 8). The tractor owner abandoned the leaking trailer on 56th Road near 49th Street in Queens, where the trailer allegedly discharged waste oil onto the street and into the New York City sewer system (see id. ¶ 11).

The complaint asserts four causes of action, alleging that respondents:

(1) violated ECL 71-2711(3) by releasing to an unauthorized person a trailer leaking petroleum;

(2) violated NL 173 by allowing a tractor-trailer discharging petroleum to be taken from the site and driven on public highways;

(3) violated NL 175, 17 NYCRR 32.3 and ECL 17-1743[1] by failing to report to the Department the petroleum discharge; and

(4) violated NL 176 and 17 NYCRR 32.5 by failing to contain or clean up the petroleum discharge (see Complaint ¶¶ 22-33).

The complaint requests that I issue an order finding respondents liable on each of the four causes of action and impose on respondents a civil penalty in the amount of $75,000 (see id. at 6, Wherefore Clause ¶¶ 1-5).

Respondents failed to answer the complaint, although their answer was due on or before May 29, 2014, and respondents failed to appear at the scheduled pre-hearing conference on June 4, 2014 at 10:00 a.m. at the Department's Region 2 offices, 47-40 21st Street, Long Island City, New York, as set forth in the notice of hearing.

By papers dated June 4, 2014, Department staff moved for a default judgment and order. On June 13, 2014, Environmental Conservation Officer J. Wesley Leubner personally served the default motion on respondents. In support of its motion for a default judgment and order, Department staff has submitted the Urda Affirmation, which: (1) alleges facts relating to the causes of action; (2) attaches proof of service of the notice of hearing and complaint on respondents, and asserts that respondents have defaulted; (3) discusses the basis for the proposed civil penalty; and (4) attaches a proposed order. Staff has not submitted an affidavit of any person with personal knowledge of the facts alleged, or any other documents relating to the incident.

After service of the motion for a default judgment and order, the matter was referred to the Office of Hearings and Mediation Services and was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick. ALJ Garlick prepared the attached default summary report ("ALJ Report"). The ALJ recommends that, with respect to the first cause of action, alleging a violation of ECL 71-2711(3), I deny staff's motion because the statute relates to a criminal violation not appropriate for adjudication in this administrative context (see ALJ Report at 5). I adopt the ALJ's recommendation with respect to the first cause of action and dismiss the claim for lack of subject matter jurisdiction.

[1] Staff did not reference a violation of ECL 17-1743 in the Wherefore Clause of its complaint and, accordingly, it is not being considered here.

The ALJ recommends that I grant Department staff's motion for a default judgment with respect to the second, third and fourth causes of action alleged in the complaint (see ALJ Report at 5-6). As discussed below, I do not adopt the ALJ's recommendations to grant a default judgment with respect to the second, third and fourth causes of action. I deny staff's motion for a default judgment with respect to those causes of action, without prejudice.

I remand the matter to the ALJ for further proceedings consistent with this ruling.

Discussion

When a respondent fails to answer or otherwise appear in response to a notice of hearing and complaint, Department staff may move, either orally or in writing, for a default judgment (see 6 NYCRR 622.15). In the event Department staff takes this course, staff must satisfy the requirements of 6 NYCRR 622.15(b).[2] Prior Commissioner decisions and orders are clear that, to obtain a default judgment, staff must also submit some proof of facts sufficient to support the claims charged in a complaint or set forth in a motion for order without hearing in lieu of complaint.

In Matter of Queen City Recycle Center, Inc. (Decision and Order of the Commissioner, December 12, 2013), I reviewed the Department's procedures when a respondent fails to appear in administrative enforcement proceedings. Consistent with the requirements applicable to default judgment motions under the CPLR, staff was directed to submit some proof of the facts constituting the claims charged (see id. at 3).[3] Requiring the submission of documentary evidence to support a default judgment is meant to assure that the record is sufficient to support the Commissioner's order in any subsequent judicial proceedings and to bring administrative default procedures into conformity with the requirements for default judgments under CPLR 3215 (see CPLR 3215[f]; see also Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 [2003]).

On a review of a motion for default judgment, it is the obligation of the ALJ to review the record and the motion papers to determine whether staff's papers have stated a claim, and that staff's motion, remedial relief and penalty request are supported properly (see Queen City, at 3). Such support should include, but not be limited to, one or more affidavits based upon personal knowledge and related documents. In this matter, documents such as a spill report form or a notice of violation, together with any other appropriate documentation relating to the incident, should also have been provided.

[2] When a default judgment motion is made in writing, in addition to the requirements of 6 NYCRR 622.15(b), staff must also provide proof of service of the motion for a default judgment on a respondent (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009, at 1-2).

[3] In Matter of Farmer (Decision and Order of the Commissioner, October 22, 2009), the Commissioner required submission of facts sufficient to support the claim charged in a complaint or on a motion for order without hearing in lieu of complaint enforcing petroleum bulk storage ("PBS") facility regulations (see id. at 3 [requiring staff to provide a copy of the facility's PBS registration (if one has been issued); the PBS facility's information report, if any; and any notice of violation]).

As set forth above, the complaint in this matter includes four causes of action. The first cause of action alleges that, by releasing to an unauthorized person a trailer leaking petroleum, respondents violated ECL 71-2711(3) (see Complaint ¶ 23). Under ECL 71-2711(3), a person who knowingly or recklessly engages in conduct which causes the release of a substance hazardous to public health, safety or the environment, is guilty of endangering public health, safety or the environment in the fourth degree, a class A misdemeanor. A criminal statute such as ECL 71-2711(3) is not justiciable in this administrative forum. Staff's motion for a default judgment with respect to the first cause of action is therefore denied, and the claim is dismissed for lack of subject matter jurisdiction.

With respect to the second, third and fourth causes of action, staff's motion for default judgment and order includes no proof of facts sufficient to adequately support those causes of action. Staff has submitted an affirmation of counsel which alleges facts but is not based upon counsel's personal knowledge. Staff has submitted no affidavit of an individual with such personal knowledge, and has submitted no documents relating to the events alleged in the complaint. Because staff has provided no proof to support the second, third or fourth causes of action, I do not accept the ALJ's recommendations with respect to them. I deny staff's motion for a default judgment and order with respect to those causes of action, without prejudice, and remand this matter to the ALJ for further proceedings consistent with this ruling.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Department staff's motion pursuant to 6 NYCRR 622.15 for a default judgment and order with respect to the first cause of action in the complaint, alleging a violation of ECL 71-2711(3), is denied, and that cause of action is hereby dismissed for lack of subject matter jurisdiction.

II. Department staff's motion pursuant to 6 NYCRR 622.15 for a default judgment and order with respect to the second, third and fourth causes of action in the complaint, is denied without prejudice to renew.

III. This matter is hereby remanded to ALJ Garlick for further proceedings consistent with this ruling.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: July 2, 2015
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law, ("ECL"), Article 12 of the New York State Navigation Law and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("17 NYCRR"),

DEFAULT SUMMARY REPORT

DEC file # R2-20130905-376

-by-

AMERICAN AUTO BODY & RECOVERY INC. and SALVATORE S. "SAMMY" ABATE,

Respondents.

This summary report addresses a motion for default judgment, pursuant to 6 NYCRR 622.15, by staff of the New York State Department of Environmental Conservation ("Department staff") against American Auto Body & Recovery, Inc. and Salvatore S. "Sammy" Abate ("respondents"). American Auto Body & Recovery, Inc. is an active domestic business corporation engaged in the business of towing and repairing motor vehicles and located at 60-05 Flushing Avenue, Maspeth, Queens, New York. Salvatore S. "Sammy" Abate is the owner, manager and operator of American Auto Body & Recovery, Inc.

Department staff served a notice of hearing and complaint upon respondents by certified mail on May 9, 2014. The respondents failed to answer, though such answer was due on or before May 29, 2014, and failed to appear at the scheduled pre-hearing conference on June 4, 2014 at 10:00 a.m. at DEC's Region 2 headquarters, 47-40 21st Street, Long Island City, New York. By papers dated June 4, 2014, Department staff moved for a default judgment and order. This motion was personally served on respondents by Environmental Conservation Officer J. Wesley Leubner on June 13, 2014. Department staff's motion papers included: (1) the notice of motion for default judgment and order; (2) the motion for default judgment and order; and (3) the affirmation of Department staff counsel John K. Urda. Attached to Mr. Urda's affirmation are: (1) information from the New York State Department of State's Division of Corporation's website; (2) postal receipts indicating service of the notice of hearing and complaint on the respondents; and (3) a proposed order.

Department staff's complaint alleges four causes of action related to events that occurred between May 16 and May 18, 2012, specifically, that respondents, who have a contract with the New York City Police Department to tow and store abandoned vehicles, removed an abandoned, stolen tractor and trailer to the facility at 60-05 Flushing Avenue, Maspeth, Queens, on May 16, 2012. The trailer, which was visibly leaking petroleum

product, was stored at the facility until May 18, 2012. That day, the separate owners of the tractor and the trailer were identified and the owner of the tractor arrived at the facility to take possession of it. Mr. Abate refused to release the tractor unless the trailer was also removed and advised the tractor owner to take the trailer and abandon it at another location. The tractor owner complied and the leaking trailer was abandoned on 56th Road near 49th Street in Queens, where it discharged waste oil onto the street and into the New York City sewer system. The tractor owner resolved violations of the ECL through a consent order in a separate enforcement action.

In its complaint, Department staff alleges that the respondents violated: (1) ECL §71-2711(3) by releasing a trailer leaking petroleum to the tractor owner, a party unauthorized to take possession of the trailer; (2) Navigation Law §173 by allowing the leaking trailer to be taken from its facility and driven on public highways; (3) Navigation Law §175, Section 32.3 of 17 NYCRR, and ECL §17-1743 by failing to report the discharge of petroleum; and (4) Navigation Law §176 and section 32.5 of 17 NYCRR by failing to contain and cleanup the discharge of petroleum.

The complaint seeks an order of the Commissioner: (1) finding respondents liable for the violations alleged in the complaint; and (2) ordering respondents to pay a civil penalty in the amount of $75,000.

Default Provisions

Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for 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."

In Matter of Alvin Hunt d/b/a Our Cleaners (Decision and Order of the Commissioner, July 25, 2006), the Commissioner set forth the process to be followed by an administrative law judge ("ALJ") in reviewing a default motion. First, an examination of the proof of service of notice of hearing and complaint is required as well as the proof of the respondent's failure to appear or file a timely answer. Then, an ALJ must consider whether the complaint states a claim upon which relief may be granted and if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported.

In this case, Department staff has met the requirements of 6 NYCRR 622.15 and the complaint sets forth a claim for which relief can be granted with respect to the second, third and fourth causes of action. In these causes of action, the complaint alleges that the respondents violated: (1) Navigation Law §173 by allowing the leaking trailer to be taken from its facility and driven on public highways; (2) Navigation Law §175, Section 32.3 of 17 NYCRR, and ECL 17-1743 by failing to report the discharge of

petroleum; and (3) Navigation Law §176 and section 32.5 of 17 NYCRR by failing to contain and cleanup the discharge of petroleum. Based on the information included in Department staff's papers, Department staff is entitled to a default judgment in these causes of action.

With respect to the first cause of action, Department staff alleges that the respondents violated ECL §71-2711(3) by releasing a trailer leaking petroleum to the tractor owner, a party unauthorized to take possession of the trailer and in doing so endangered the public health, safety or the environment in the fourth degree. The law clearly states that this violation is a class A misdemeanor. Because the alleged violation is criminal in nature, the DEC administrative hearing process is not the appropriate forum to try this allegation. It properly belongs in criminal court. Accordingly, Department staff's motion for default with respect to the first cause of action should be denied.

As the Commissioner stated Hunt, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]." Accordingly, the findings of fact set forth below are based upon the documents submitted into the record, as identified in the attached exhibit list.

Applicable Regulatory Provisions

Section 71-2711(3) of the ECL makes it a Class A misdemeanor to knowingly or recklessly engage in conduct which causes the release to the environment of a substance hazardous to public health, safety or the environment. Section 17-1743 of the ECL requires a person in actual or constructive possession of more than 1,100 gallons of petroleum to immediately notify Department staff when a spill is discovered. Section 173 of the Navigation Law prohibits the discharge of petroleum. Section 175 of the Navigation Law and 17 NYCRR 32.3 require any person with knowledge of a spill, leak or discharge of petroleum to report the incident to the Department immediately. Section 176 of the Navigation Law and 17 NYCRR 32.5 require any person discharging petroleum in a prohibited manner to undertake to clean up and remove the discharge immediately. Section 192 of the Navigation Law provides that any person who violates any provision of Article 12 of the Navigation Law or its implementing regulations shall be liable for a penalty not to exceed twenty-five thousand dollars per day.

Findings of Fact and Conclusions of Law

1. Respondent American Auto Body & Recovery, Inc. is an active domestic business corporation engaged in the business of towing and repairing motor vehicles and located at 60-05 Flushing Avenue, Maspeth, Queens, New York. Respondent Salvatore S. "Sammy" Abate is the owner, manager and operator of American Auto Body & Recovery, Inc.

2. Respondents have a contract with the New York City Police Department to tow and store abandoned vehicles.

3. On May 16, 2012, respondents removed an abandoned, stolen tractor and trailer to the facility at 60-05 Flushing Avenue, Maspeth, Queens, New York. The trailer, which was visibly leaking petroleum product, was stored at the facility until May 18, 2012.

4. On May 18, 2012, the separate owners of the tractor and the trailer were identified and the owner of the tractor arrived at the facility to take possession of it. Respondent Abate refused to release the tractor unless the trailer was also removed and advised the tractor owner to take the trailer and abandon it at another location. The tractor owner complied and the leaking trailer was abandoned on 56th Road near 49th Street in Queens, where it discharged waste oil onto the street and into the New York City sewer system. The tractor owner resolved violations of the ECL through a consent order in a separate enforcement action.

5. Respondents violated Navigation Law §173 by allowing the leaking trailer to be taken from its facility and driven on public highways.

6. Respondents violated Navigation Law §175, Section 32.3 of 17 NYCRR, and ECL 17-1743 by failing to report the discharge of petroleum.

7. Respondents violated Navigation Law §176 and section 32.5 of 17 NYCRR by failing to contain and cleanup the discharge of petroleum.

8. On May 9, 2014, Department staff served the respondents with the notice of hearing and the complaint via certified mail. The respondents' time to answer expired on or before May 29, 2014. The notice of hearing scheduled a pre-hearing conference on June 4, 2014 at 10:00 a.m. at DEC's Region 2 headquarters, 47-40 21st Street, Long Island City, New York.

9. The respondents failed to answer the complaint or attend the pre-hearing conference.

10. The respondents were also served with a copy of the motion for a default judgment and order by letter dated June 13, 2014.

11. The $75,000 penalty and remedial and corrective relief sought by Department staff are authorized and warranted on this record.

Discussion

The record of this proceeding demonstrates that respondents violated: (1) Navigation Law §173 by allowing the leaking trailer to be taken from its facility and driven on public highways; (2) Navigation Law §175, Section 32.3 of 17 NYCRR, and ECL 17-1743 by failing to report the discharge of petroleum; and (3) Navigation Law §176 and section 32.5 of 17 NYCRR by failing to contain and cleanup the discharge of

petroleum. The record shows that respondents were served with the complaint on May 9, 2014 and did not answer the complaint. In addition, the respondents also failed to attend the prehearing conference scheduled for June 4, 2014 at 10:00 a.m. at DEC's Region 2 headquarters, 47-40, 21st Street, Long Island City, New York. The respondents were also served with a copy of Department staff's motion for a default judgment and order. The Department is entitled to a default judgment for these violations pursuant to the provisions of 6 NYCRR 622.15.

The first cause of action alleged by Department staff is that the respondents violated ECL §71-2711(3) by releasing a trailer leaking petroleum to the tractor owner, a party unauthorized to take possession of the trailer and in doing so endangered the public health, safety or the environment in the fourth degree. The law clearly states that this violation is a class A misdemeanor. Because the alleged violation is criminal in nature, the DEC administrative hearing process is not the appropriate forum to try this allegation. It properly belongs in criminal court. Accordingly, Department staff's motion for default with respect to the first cause of action should be denied.

According to the affirmation of Department staff counsel John K. Urda the requested penalty or $75,000 for the four alleged causes of action is reasonable and appropriate. In his affirmation, Mr. Urda states that consideration was given to the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990). Mr. Urda notes that the statutory maximum civil penalty is $25,000 per day, as authorized by Navigation Law §192 for the second, third and fourth causes of action. In determining the appropriate requested penalty in this case, Department staff considered the following factors: (1) the nature of the respondents' actions and failure to report the spill; (2) the respondents' lack of cooperation in resolving this matter; (3) the respondents' relationship with the New York City Police Department; and (4) the need to deter future violations.

While Department staff is entitled to a default only on three of the four causes of action alleged, all of the causes of action relate to a single, egregious series of actions undertaken by the respondents. Given the circumstances of these violations, even though one of the causes of action cannot be addressed in this administrative forum, based on this record, the $75,000 requested payable civil penalty is authorized and appropriate.

Recommendation

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

1. granting Department staff's motion for default, finding the respondents in default pursuant to the provisions of 6 NYCRR 622.15 for failing to appear at the prehearing conference and to answer the complaint;

2. not finding respondents in violation of ECL §71-2711(3) for releasing a trailer leaking petroleum to the tractor owner, a party unauthorized to take

possession of the trailer because this is a criminal allegation that belongs in Supreme Court.

3. finding respondents in violation of: (1) Navigation Law §173 by allowing the leaking trailer to be taken from its facility and driven on public highways; (2) Navigation Law §175, Section 32.3 of 17 NYCRR, and ECL 17-1743 by failing to report the discharge of petroleum; and (3) Navigation Law §176 and section 32.5 of 17 NYCRR by failing to contain and cleanup the discharge of petroleum.

4. directing respondents to pay a total civil penalty in the amount of $75,000 (seventy five thousand dollars).

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
September 23, 2014