

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

In the Matter of the Alleged
Violations of Article 17 of the
Environmental Conservation Law
("ECL") and Parts 612 through 614 of
Title 6 of the Official Compilation
of Codes, Rules and Regulations of
the State of New York ("6 NYCRR"),

ORDER

- by -

**CATANIA ENTERPRISES, INC.
d/b/a SANDY POND MARINA &
CAMPGROUND,**

VISTA Index No.
R7-20080620-72

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Catania Enterprises, Inc., doing business as Sandy Pond Marina & Campground, by service of a motion for order without hearing dated May 12, 2009. In accordance with 6 NYCRR 622.3(a)(3), respondent was personally served with a copy of the notice of hearing and complaint on May 15, 2009.

Respondent owns and operates a petroleum bulk storage ("PBS") facility at 3303 County Route 15, Pulaski, Oswego County, New York (the "PBS facility"). Department staff's motion for order without hearing alleges that respondent failed to comply with the terms of Consent Order R7-20080620-72 that respondent signed in 2008 ("2008 Consent Order") to resolve violations relating to its two thousand gallon gasoline tank ("tank number 001"). The 2008 Consent Order listed violations of ECL article 17 and the PBS regulations (6 NYCRR parts 612 through 614) with respect to facility registration, maintenance of spill prevention equipment, labeling, and recordkeeping requirements. Specifically, Department staff alleges in the motion for order without hearing that respondent:

- failed to pay the Department three thousand dollars (\$3,000) of the civil penalty of three thousand five hundred dollars (\$3,500) that was due pursuant to the 2008 Consent Order;

and

- failed to provide the Department with a photograph of tank number 001 with the proper labeling, the previous four weekly leak detection records for tank number 001, and the previous three ten-day reconciliation records for that tank.

Respondent did not answer or otherwise respond to the motion for order without hearing, and Department staff requested that the motion be processed as an unopposed motion for order without hearing. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois, who prepared the attached summary report. I adopt the ALJ's summary report as my decision in this matter, subject to the following comments.

Based upon the record, I conclude that the proposed civil penalty of five thousand dollars (\$5,000) for violation of the 2008 Consent Order is appropriate. Department staff did not specify a time period in which respondent is to pay the penalty, and I hereby determine, based on the circumstances of this matter, that payment is to be made within sixty (60) days of the service of this order upon respondent.

Department staff also requested that respondent be directed to pay the amount that is still outstanding under the 2008 Consent Order and to furnish the documentation required to be submitted by the terms of the 2008 Consent Order. Respondent's consent order obligations have been outstanding for some time, and notwithstanding Department staff's efforts to obtain compliance, respondent has failed to comply.

Accordingly, I conclude that a shorter period for compliance with the terms of the 2008 Consent Order is warranted. Payment of the three thousand dollars (\$3,000) due under the 2008 Consent Order and the submission of the documentation that was required by the 2008 Consent Order is to be furnished to the Department within thirty (30) days of the service of this order upon respondent.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for an order without hearing is granted.

II. Respondent Catania Enterprises, Inc., is adjudged to have violated the terms of Consent Order R7-20080620-72 that was

executed on October 27, 2008.

III. Respondent Catania Enterprises, Inc., is hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000) for its violation of Consent Order R7-20080620-72, which penalty shall be due and payable within sixty (60) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed or delivered to the Department at the following address: New York State Department of Environmental Conservation, Region 7 Office, 615 Erie Boulevard West, Syracuse, New York 13204-2400, Attn: Assistant Regional Attorney Barbara A. McGinn.

IV. Nothing in this order relieves respondent of its obligation to pay the three thousand dollars (\$3,000) of the civil penalty under Consent Order R7-20080620-72 that remains outstanding. Respondent is directed to submit the three thousand dollars (\$3,000) which remains outstanding to the Department within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed or delivered to the Department at the following address: New York State Department of Environmental Conservation, Region 7 Office, 615 Erie Boulevard West, Syracuse, New York 13204-2400, Attn: Assistant Regional Attorney Barbara A. McGinn.

V. Within thirty (30) days after service of this order upon respondent, respondent shall submit the following information to the Department relating to its PBS facility:

- A. a photograph of tank number 001 properly labeled;
- B. the previous four (4) weekly leak detection records for tank number 001; and
- C. the previous three (3) ten-day reconciliation records for tank number 001.

VI. All communications from respondent to the Department concerning this order shall be made to Assistant Regional Attorney Barbara A. McGinn, New York State Department of Environmental Conservation, Region 7 Office, 615 Erie Boulevard West, Syracuse, New York 13204-2400.

VII. The provisions, terms and conditions of this order shall bind respondent and its agents, successors and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: July 23, 2009
Albany, New York

In the Matter of Alleged Violations
of Environmental Conservation Law
article 17 and parts 612 through 614 of
title 6 of the Official Compilation of
Codes, Rules and Regulations of the State
of New York by

SUMMARY REPORT

CATANIA ENTERPRISES, INC.
d/b/a Sandy Pond Marina &
Campground,

VISTA Index No.
R7-20080620-72

July 22, 2009

Respondent.

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative proceeding by serving a motion for order without hearing upon Catania Enterprises, Inc., d/b/a Sandy Pond Marina & Campground, 3303 County Route 15, Pulaski, New York 13142 (the "Respondent") on May 15, 2009. The motion and supporting papers were personally served upon David Catania, President of the Respondent. The motion was made pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The motion for order without hearing alleges that the Respondent violated an order on consent dated October 27, 2008 that resolved the Respondent's earlier violations of certain requirements applicable to a petroleum bulk storage facility owned and operated by the Respondent at its Pulaski address above. The order on consent was issued for violations of Environmental Conservation Law ("ECL") article 17, title 10 (Control of the bulk storage of petroleum) and 6 NYCRR parts 612 through 614. The violations involved the facility's registration, equipment maintenance, recordkeeping, and labeling of a tank, as described further below.

On May 27, 2009, DEC Staff transmitted to the Department of Environmental Conservation's Office of Hearings and Mediation Services ("OHMS") a copy of the notice of motion, the motion for order without hearing and its supporting papers, and an affidavit of service. These documents were mailed by Barbara A. McGinn, Esq., Assistant Regional Attorney, DEC Region 7, to Chief Administrative Law Judge ("ALJ") James T. McClymonds at the OHMS address in Albany, New York.

The supporting papers consist of a brief; an affidavit of Kevin C. Kemp, Environmental Engineer 1, DEC Region 7 and documents and photographs attached with Mr. Kemp's affidavit; and

an affidavit of Ms. McGinn, to which are attached copies of the October 27, 2008 order on consent, an October 27, 2008 letter transmitting a receipt for a penalty payment, a January 8, 2009 letter from Ms. McGinn to the Respondent with proof of service, and an April 14, 2009 letter from Ms. McGinn to the Respondent.

In its motion for order without hearing, DEC Staff seeks an order of the Commissioner that would find that the Respondent violated most of the requirements of the order on consent, direct the Respondent to comply with the remaining terms of the order on consent, and assess an additional civil penalty of \$5,000.00 against the Respondent.

On June 26, 2009, Chief ALJ McClymonds wrote to Ms. McGinn by e-mail, stating that OHMS had not received an answer from the Respondent to the motion for order without hearing. Chief ALJ McClymonds asked whether DEC Staff had received an answer, and also asked whether DEC Staff intended to file a motion for a default judgment or wished to have the motion processed as an unopposed motion for order without hearing.

Ms. McGinn responded by e-mail on June 29, 2009, stating that she had not received an answer from the Respondent and asking that the case proceed as an unopposed motion for order without hearing. On June 30, 2009, Chief ALJ McClymonds sent a letter to the Respondent, with a copy to DEC Staff, stating that the matter was assigned to ALJ Susan J. DuBois (the undersigned). Chief ALJ McClymonds's June 30, 2009 letter to the Respondent has not been returned to OHMS by the Postal Service, leading to a conclusion that it was delivered. As of the date of this report, I have received no correspondence or other contacts from or on behalf of the Respondent concerning this matter.

MOTIONS FOR ORDERS WITHOUT HEARING

Section 622.12 of 6 NYCRR provides that, "In lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence ... The motion shall include a statement that a response must be filed with the Chief ALJ within 20 days after the receipt of the motion and that the failure to answer constitutes a default ... Within 20 days of receipt of such motion, the respondent must file a response with the Chief ALJ which shall also include supporting affidavits and other available documentary evidence."

A motion for order without hearing pursuant to 6 NYCRR 622.12 is governed by the same principles as a motion for summary judgment pursuant to New York Civil Practice Law and Rules ("CPLR") section 3212 (Matter of Amanda J. Bice, ALJ Hearing Report, April 11, 2006, at 6, adopted by Commissioner's Order, April 19, 2006). In the present case, DEC Staff's affidavits establish its cause of action sufficiently to warrant granting summary judgment under the CPLR. The Respondent did not file any response to DEC Staff's motion and consequently did not raise any triable issue of fact.

FINDINGS OF FACT

1. Catania Enterprises, Inc. (the "Respondent") owns and operates a petroleum bulk storage ("PBS") facility located at 3303 County Route 15, Pulaski, Oswego County, New York 13142. The Respondent does business as the Sandy Pond Marina & Campground.
2. On October 20, 2008, David A. Catania signed an order on consent, as President of the Respondent, in which the Respondent admitted to violations of ECL section 17-1007 and several sections of 6 NYCRR parts 612, 613 and 614. The order on consent was signed by Kenneth P. Lynch, Regional Director, DEC Region 7, on October 27, 2008 and is the order on consent in Case No. R7-20080620-72, PBS No. 7-437883.
3. In the order on consent, the Respondent admitted to the following violations:
 - (a) failure to display a registration certificate, in violation of 6 NYCRR 612.2;
 - (b) failure to maintain a current and valid PBS registration certificate, in violation of 6 NYCRR 612.2;
 - (c) failure to maintain spill prevention equipment for tank number 001, in violation of 6 NYCRR 613.3(d);
 - (d) failure to properly label tank number 001, in violation of 6 NYCRR 614.3(a)(1) and (2);
 - (e) failure to maintain weekly leak detection records for tank number 001, in violation of 6 NYCRR 613.5(b)(4);
 - (f) failure to properly reconcile inventory records for tank number 001, in violation of ECL 17-1007 and 6 NYCRR 613.4(a); and

(g) failure to properly maintain piping leak detection equipment for tank number 001, in violation of 6 NYCRR 613.3(d) (order on consent, sections 4 and 7).

4. The order on consent required the Respondent to pay a civil penalty in the amount of \$3,500.00 for the above violations, with the first payment of \$500.00 due with return of the order and the remainder to be paid in monthly installments of \$500.00 (order on consent, section I.A). The order on consent also required the Respondent, within 30 days of the effective date of the order, to do the following: (A) send DEC a photograph of tank number 001 with the proper label; (B) send DEC the previous four weekly leak detection records; and (C) send DEC the previous three ten-day reconciliation records (order on consent, section III).

5. On or about October 27, 2008, the Respondent paid the first \$500.00 installment of the penalty. As of May 12, 2009, the date of Ms. McGinn's affidavit, the Respondent had not paid the remaining \$3,000.00 portion of the penalty. As of May 12, 2009, DEC Staff had not received the photograph or any of the documents required in section III of the order on consent (McGinn affidavit, paragraphs 3, 5 and 6, and Exhibit C; Kemp affidavit, paragraphs 4 through 7).

6. During January through April of 2009, Ms. McGinn made numerous telephone calls to the Respondent, at a telephone number she had used for contacting the Respondent in the summer and fall of 2008, but got a recording that stated the number was disconnected or no longer in service. Ms. McGinn wrote to the Respondent on January 8, 2009, informing the Respondent it had failed to meet the deadlines in the order on consent. The letter asked the Respondent to send the payments and documents required by the order on consent, to avoid further penalties. The letter was sent return receipt requested and was received by the Respondent on January 24, 2009 as demonstrated by Mr. Catania's signature on the return receipt. The Respondent did not reply to the letter (McGinn affidavit, paragraphs 7, 8 and 9, and Exhibits D and E).

7. Ms. McGinn also wrote to the Respondent on April 14, 2009, by regular U.S. Mail, again asking the Respondent to comply with the order on consent and informing the Respondent that DEC Staff would pursue further enforcement action if the Respondent did not comply. This letter was not returned to the DEC Region 7 Office, which supports a finding that the Respondent received it, but the Respondent did not reply to the April 14, 2009 letter (McGinn affidavit, paragraphs 10 and 11, and Exhibit F).

8. On May 15, 2009, Environmental Conservation Officer Shawn J. Dussault served the motion for order without hearing and supporting papers upon Mr. Catania at 3303 County Route 15, Pulaski, New York.

DISCUSSION

The affidavits and exhibits submitted by DEC Staff demonstrate that the Respondent violated the October 27, 2008 order on consent as alleged in the motion for order without hearing. The Applicant did not submit any response, and did not show the existence of any substantive disputes of fact sufficient to require a hearing. DEC Staff's cause of action is established sufficiently to warrant granting summary judgment under the CPLR in favor of DEC Staff.

No triable issue of fact exists regarding either the Respondent's liability for the alleged violations or the amount of the civil penalty sought by DEC Staff for these violations.

As noted above, DEC Staff seeks an order of the Commissioner that would direct the Respondent to provide the photograph and documentation as directed in the order on consent, and to pay the remaining \$3,000.00 of the penalty that was imposed by the order on consent. In addition, DEC Staff requests that the Commissioner's order impose a new penalty of \$5,000.00 for failing to comply with the order on consent.

Under ECL section 71-1929, a person who fails to perform any duty imposed by an order of the Commissioner issued pursuant to ECL article 17, title 10 shall be liable for a civil penalty not to exceed \$37,500.00 per day for each violation. The penalty sought by DEC Staff for failure to comply with terms of the order on consent is authorized by this section.

The proposed penalty is also consistent with the DEC Civil Penalty Policy (Commissioner Policy DEE-1, issued on June 20, 1990), which identifies factors to be taken into account in arriving at penalties for violations of the ECL. These factors include, among others, the economic benefit gained by a respondent due to delayed compliance; cooperation (or lack of it) in remedying the violation; and a respondent's ability to pay a penalty.

In the present case, the Respondent received an economic benefit of at least \$3,000.00 by failing to pay most of the penalty it owed under the order on consent. Other than paying the initial \$500.00 of the penalty imposed by the order on

consent, the Respondent has been completely uncooperative and failed to respond to two letters seeking its compliance with the order on consent. Under the Civil Penalty Policy, a respondent has the burden to demonstrate inability to pay a penalty, if a respondent is arguing for reduction of a proposed penalty on this basis. The Respondent in this case has not responded to the motion for order without hearing, nor to Ms. McGinn's two letters, and has made no showing of inability to pay either the penalty imposed by the order on consent or the additional \$5,000.00 penalty sought in the motion for order without hearing. The Respondent has not shown any other reason to reduce the penalty sought in the motion for order without hearing.

CONCLUSIONS

1. The Respondent was served with the motion for order without hearing by personal service upon the President of the Respondent (CPLR 311[a][1]).
2. The Respondent violated DEC order on consent R7-20080620-72 by failing to pay \$3,000.00 of the total penalty imposed by the order on consent, and by failing to submit the photographs and documents required in section III of the order on consent.
3. The Respondent remains liable for complying with the remaining terms of the order on consent.
4. ECL section 71-1929 authorizes the additional penalty sought by DEC Staff for the Respondent's violation of the order on consent.

RECOMMENDATION

I recommend that the Commissioner grant the relief sought by DEC Staff in its motion for order without hearing.

Albany, New York
July 22, 2009

_____/s/_____
Susan J. DuBois
Administrative Law Judge