STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

RULING ON MOTION FOR DEFAULT JUDGMENT

DEC Case No. R2-20100428-132

- by -

CREEKHILL REALTY, LLC,

Respondent.

By notice of motion dated February 24, 2011, staff of the New York State Department of Environmental Conservation (DEC or Department) moved for a default judgment against respondent Creekhill Realty, LLC (Creekhill). For the reasons that follow, staff's motion is denied without prejudice.

Proceedings

On September 27, 2010, Department staff commenced this administrative enforcement proceeding against respondent Creekhill by serving a copy of a notice of hearing and complaint by certified mail return receipt requested at the service address listed with the New York State Department of State, Divisions of Corporations. See, Affirmation (Aff.) of John K. Urda, Assistant Regional Attorney, ¶ 6; Exhibits (Ex.) B and C to staff's notice of motion. According to the United States Postal Service "track & confirm" and the return receipt provided by staff, the respondent received the papers on October 1, 2010. See, Ex. C. In the affirmation of the Assistant Regional Attorney in support of staff's motion for default judgment, Mr. Urda states that Creekhill failed to answer the complaint and also failed to appear at the prehearing conference scheduled in the notice of hearing for October 29, 2010. Urda Affirmation (Aff.) ¶ 7.

The complaint alleges that since August 2006, the respondent has been the owner of a residential building and petroleum bulk storage (PBS) facility located at 1070 St. Nicholas Avenue, New York, New York. Urda Aff. ¶¶ 3-4. The PBS storage facility is identified in Department records as PBS number 2-306487 and consists of a 5,000 gallon storage tank installed in 1950. Urda Aff. ¶ 4. The complaint sets forth five causes of action: 1) respondent failed to renew facility registration in violation of ECL § 17-1009 and 6 NYCRR § 612.2(a); 2) respondent failed to transfer ownership of the facility registration in violation of 6 NYCRR § 612.2(b); 3) respondent failed to display the facility's PBS registration certificate on

the premises in violation of 6 NYCRR § 612.2(e); respondent failed to perform leak detection in violation of 6 NYCRR § 613.4(a)(2); and 5) respondent failed to test the facility tank and piping system for tightness in violation of 6 NYCRR § 613.5(a). The staff is seeking a penalty of $73,706.25, which it has calculated as 0.0005% of the statutory maximum penalty allowed by law.

In paragraph 5 of the complaint, the staff explains that on January 27, 2004, a petroleum storage tank tester called the Department's spill hotline to report a tightness test failure at the site and the Department opened NYSDEC spill number 0312046 for the site. According to staff's complaint, the spill remains open and unaddressed. Despite this claim, the staff does not address the spill in any of its causes of action and does not request any injunctive relief in the complaint or motion related to this spill.

On March 18, 2011, Chief Administrative Law Judge James T. McClymonds assigned this matter to me. As of the date of this ruling, the Office of Hearings and Mediation Services (OHMS) has not received any response to staff's motion.

DISCUSSION

In accordance with the Department's uniform enforcement regulations, Department staff may commence an administrative proceeding by a notice of hearing and complaint. 6 NYCRR § 622.3(a)(1). Section 622.3(a)(3) provides that "[s]ervice of the notice of hearing must be by personal service consistent with the CPLR or by certified mail. Where service is by certified mail, service shall be complete when the notice of hearing and complaint is received."

Section 622.15(a) of 6 NYCRR provides that a respondent's failure to file a timely answer or to appear at a pre-hearing conference constitutes a default and a waiver of the respondent's right to a hearing. Section 622.15(b) contains the requirements for staff's default motion:

1. Proof of service upon the respondent of the notice of hearing and complaint or other document which commenced the proceeding;

2. Proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and

3. A proposed order.

The staff has provided the affidavit of service signed by Megan Joplin in which Ms. Joplin avers that she mailed the notice of hearing and complaint to Creekhill Realty, LLC by certified mail on September 27, 2010. See, Ex. C to notice of motion. In addition, staff includes the confirmation from the U.S. Postal Service which indicates that the papers were delivered to the respondent on October 1, 2010 and a copy of the certified mail return receipt that further confirms delivery to the respondent. *Id.*

Mr. Urda affirms that the respondent has filed to file an answer or appear at the pre-hearing conference. Urda Aff., ¶ 7. Finally, the staff has included a proposed order with its motion papers. Ex. D.

Despite staff's production of the basic elements for a default judgment, the notice of hearing is defective and therefore, I must deny the motion. It appears that the notice of hearing was drafted based upon a boilerplate form. While the caption indicates alleged violations of Article 17, the body of the notice refers to Article 19 (Air Pollution Control). While this may have been construed at first as a minor typographical error, the third paragraph on page 2 of the notice refers to law and regulations that are not referenced in the complaint – ECL § 72-0201(7) and 6 NYCRR §§ 481.8 and 621.14.

ECL § 72-0201(7) refers to circumstances where a person fails to pay a fee and the ability of the Department to suspend a permit until such fee is paid. When registering a PBS facility with the Department, the Department is authorized to exact a fee pursuant to ECL § 17-1009(2). Section 481.8 of 6 NYCRR reiterates the provisions of ECL § 72-0201(7). However, nowhere in the complaint is there mention of the failure of the respondent to pay a fee or is there a reference to either ECL § 72-0201(7) or 6 NYCRR § 481.8. Thus, the notice does not comport with the complaint.

Section 621.14 of 6 NYCRR is entitled *Special Provisions* and addresses various circumstances concerning permit issuance. This regulation does not appear to bear any relationship to the proceedings. There is no requirement cited by the staff that a permit was involved in this matter.

Because the respondent has not appeared in this matter, there is no way to determine if these references caused any confusion on its part. State Administrative Procedure Act (SAPA) § 301(2) requires that parties shall be given reasonable notice of a hearing including "a statement of the legal authority and jurisdiction under which the hearing is to be held . . .". While the staff has provided the correct sections of law and regulation in the complaint, there is no way to determine whether the notice's defects caused confusion. Because a default judgment denies a respondent a hearing and grants summary relief to the staff, the papers should not present any doubt that correct and clear notice has been provided. This has not occurred in this proceeding and therefore, I deny the motion.

In the event that staff recommences this proceeding, I encourage it to address the status of the spill in the complaint and if necessary, request appropriate relief to address any contamination that remains.

RULING

Department staff's motion for a default judgment is denied without prejudice.

/s/

Helene G. Goldberger
Administrative Law Judge

Dated: April 6, 2011
Albany, New York

TO: Creekhill Realty, LLC
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