

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York, Article 12 of the Navigation Law of the State of New York, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC File No.
R2-20060711-286

-by-

**GLADIATOR REALTY CORP. and
CANAL MANAGEMENT CORP.,**

Respondents.

This administrative enforcement proceeding concerns the alleged discharge of petroleum and the failure to comply with applicable New York State petroleum bulk storage regulations at a petroleum bulk storage facility (“facility”) located at 381 Canal Place, Bronx, New York (the “site”).

Respondent Gladiator Realty Corp. (“Gladiator”) is the owner of the site. On September 17, 2003 a tank removal firm found petroleum-contaminated soil and water at the site and notified the New York State Department of Environmental Conservation (“Department”).

Department staff commenced this proceeding against respondent Gladiator by serving a notice of hearing and complaint dated April 2, 2008, by certified mail. Respondent received the papers on April 7, 2008.¹ Department staff’s complaint sets forth seven causes of action arising from the illegal discharge of petroleum at the site, the failure to contain that discharge, the failure to properly close one of the facility’s underground storage tanks, and other non-compliance issues with the applicable State petroleum bulk storage regulations. As set forth in the complaint, Department staff visited and inspected the site immediately upon notification of the spill on September 17, 2003, and thereafter on February 16 and June 26, 2006, and noted various site deficiencies.

Although respondent failed to file an answer in accordance with the time requirements in 6 NYCRR 622.4(a), it later submitted information to Department staff

¹ Although Department staff named Canal Management Corp. as a respondent in the complaint, staff did not complete service of the complaint on Canal Management Corp., and no jurisdiction over that respondent was obtained. Department staff is not proceeding against Canal Management Corp. in its default motion and, accordingly, this order addresses only respondent Gladiator Realty Corp.

relating to the November 2003 closure of three underground tanks at the site. Subsequently, Department staff moved for a default judgment on three of the seven causes of action in its original complaint. The three causes of action are as follows:

- the illegal discharge of petroleum by respondent at the site. Specifically, Department staff alleges that respondent Gladiator discharged petroleum at the site into the waters of the state, which caused or contributed to a contravention of State water quality standards, in violation of section 17-0501 of the Environmental Conservation Law (“ECL”). In addition, Department staff alleges that, by discharging petroleum into the waters of the State without a permit, respondent violated section 17-0807 of the ECL and section 173 of the Navigation Law;
- the failure of respondent to immediately undertake containment of the discharge of petroleum at the site, in violation of section 176 of the Navigation Law and 17 NYCRR 32.5; and
- the failure of respondent to properly close a 2,000-gallon underground tank at the facility, in violation of 6 NYCRR 613.9(b).²

Department staff served the notice of motion, motion for default judgment, and accompanying papers on respondent Gladiator by certified mail on February 2, 2009 (see Affidavit of Service of Sheila Warner dated February 2, 2009), but the mailing was returned unclaimed. Department staff re-served the notice of motion and motion, together with the accompanying papers, on respondent Gladiator by regular mail on February 6, 2009 (see Affidavit of Service of Sheila Warner dated February 6, 2009), and again the mailing was returned unclaimed. Department staff, however, had obtained jurisdiction over respondent Gladiator upon respondent’s receipt of the initial notice of hearing and complaint. Service of this subsequent default motion is governed by section 2103 of the Civil Practice Law and Rules, and is complete upon mailing (see 6 NYCRR 622.6[a][1] and CPLR 2103[c][service upon a party], [f][definition of mailing]). Department staff’s mailing of the motion by regular mail satisfied the applicable service requirements for the default motion.³

² Attached to the Notice of Motion and Motion for Default Judgment and Order is the Affirmation of John K. Urda in Support of Motion for Default Judgment and Order which includes six exhibits (Exhibit A: Notice of Hearing and Complaint; Exhibit B: Affidavit of Service of the Notice of Hearing and Complaint, with supporting postal service documentation; Exhibit C: Indenture dated November 15, 1999 between Bronx Leasing, Inc. and Gladiator Realty Corp., and related recording information; Exhibit D: Telecopy cover sheet dated May 13, 2008 from Gladiator Realty Corp. [Jacob] to the Department’s Petroleum Bulk Storage Unit [Nick Lombardo], with various petroleum bulk storage application information; Exhibit E: Telecopy dated January 26, 2009 from Associated Environmental Services, Ltd. to Department staff attorney John Urda, Esq., containing information relating to the removal of one tank and the decommissioning of two tanks at the site in November 2003; and Exhibit F: a draft order prepared by Department staff).

³ Department staff also served the notice of motion for default judgment and order, the motion, and accompanying papers, upon respondent by hand-delivering two copies of the documents to the New York State Department of State on February 24, 2009 (see Affidavit of Brooke Turallo dated March 9, 2009).

The matter was assigned to Administrative Law Judge (“ALJ”) Molly McBride, who prepared the attached default summary report. I adopt the report as my decision in this matter, subject to the following comments and modifications.

After an ALJ concludes that the default procedures outlined at 6 NYCRR 622.15 have been satisfied, the ALJ must determine whether the complaint states a claim upon which relief may be granted, and whether the requested civil penalty and remediation are warranted and sufficiently supported (see Matter of Alvin Hunt, Decision and Order of the Commissioner, July 25, 2006, at 4-5).

In this matter, the complaint states a claim upon which relief may be granted with respect to the failure of respondent to contain the discharge of petroleum and to properly close an underground storage tank. With respect to the illegal discharge of petroleum, Department staff cites to violations of section 173(1) of the Navigation Law and sections 17-0501 and 17-0807 of the ECL.⁴ The complaint states a claim with respect to section 173(1) of the Navigation Law, which expressly prohibits the discharge of petroleum, and ECL § 17-0807, which prohibits unpermitted discharges to the waters of the state. However, the complaint does not state a claim with respect to the violation of water quality standards under ECL § 17-0501 because it fails to identify the specific standard involved and what the standard is with respect to the receiving body of water (see Matter of John Amabile and Rose Amabile, d/b/a Annadale Laundries, Order of the Commissioner, July 12, 2006, at 3). Notwithstanding the foregoing, no penalty recalculation for this violation is required because the violations of ECL 17-0807 and Navigation Law 173(1) fully support the penalty requested by Department staff for these violations.

Department staff also requested in its complaint that respondent be directed to undertake investigation and remediation of contamination of the site pursuant to a Department-approved work plan. This request was renewed in the affirmation dated February 2, 2009 of Attorney John K. Urda in support of the motion for default judgment and order (see Affirmation, ¶ 49; see also Motion for Default Judgment, at 2). In

Although the Secretary of State is an agent of domestic corporations for service of process (see CPLR 311[a][1]; Business Corporation Law § 306), the Secretary of State is not, by statute, designated as an agent for service of motions (see CPLR 2103).

⁴ Department staff states, in its complaint, that it “consolidated” the 2003 discharge with a prior, open spill at the site that occurred in 1999 as a result of a “‘gross fail’ of a tank test” (see Complaint, ¶ 6). This spill occurred prior to respondent Gladiator’s purchase of the property, although the complaint states that Gladiator failed to conduct remedial activities requested by staff with respect to the tank in question (see id.). The ALJ concludes that Department staff is proceeding on both spills for purposes of the default motion (see Default Summary Report, at 2 [Findings #5]). However, my review of Department staff’s papers, including the draft order that Department staff has submitted, indicates that it is only seeking a determination of liability and penalties for the spill that was reported in September 2003, in addition to a determination of liability and penalties for respondent’s failure to properly close a petroleum bulk storage tank at the site.

addition, Department staff requested that respondent be ordered to bring the facility into compliance with all applicable state petroleum bulk storage regulations. The remedial relief that Department staff requested is authorized and warranted.

The ALJ recommends that respondent Gladiator be ordered to submit a remediation work plan to Department staff within forty-five (45) days of the date of the service of an order upon respondent. The ALJ also recommends that respondent Gladiator be directed to bring the facility into compliance with the petroleum bulk storage regulations. I am directing respondent, within forty-five (45) days of the service of this order, to submit an approvable work plan to the Department for the investigation and remediation of petroleum contamination at the site, and the correction of any violations of the State's petroleum bulk storage regulations. As part of the work plan, respondent shall provide a schedule for the investigation and remediation activities and for the petroleum bulk storage compliance activities that it will be undertaking at the site. Department staff may direct that modifications be made to the plan based on site conditions and requirements.

Department staff has requested a total penalty of eighty-two thousand five hundred dollars (\$82,500). The ALJ recommends that one-half of the civil penalty be suspended if respondent Gladiator completes the Department-approved remediation at the site. Department staff did not request that any portion of the penalty be suspended. Because of the long duration of the violations, the failure of Gladiator to respond to a number of Department staff communications, and its default in this proceeding, I decline to suspend any portion of the penalty.

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

- I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.
- II. Respondent Gladiator Realty Corp. is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as set forth in Department staff's complaint dated April 2, 2008, are deemed to have been admitted by respondent.
- III. Respondent Gladiator Realty Corp. is adjudged to have violated section 17-0807 of the Environmental Conservation Law, sections 173 and 176 of the Navigation Law, 17 NYCRR 32.5 and 6 NYCRR 613.9(b).
- IV. Respondent Gladiator Realty Corp is hereby assessed a civil penalty in the amount of eighty-two thousand five hundred dollars (\$82,500). The civil penalty is due and payable within thirty (30) days after service of this order upon respondent. Payment

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of
Article 17 of the Environmental Conservation
Law of the State of New York, Article 12 of the
New York State Navigation Law and Titles
6 and 17 of the Official Compilation of Codes, Rules and
Regulations of the State of New York (NYCRR) by

DEFAULT
SUMMARY REPORT

GLADIATOR REALTY CORP. and
CANAL MANAGEMENT CORP.,

DEC File No.
R2-20060711-286

Respondents.

Proceedings

By Notice of Motion dated February 2, 2009, Staff of the Department of Environmental Conservation (DEC, Department) sought a judgment by default against GLADIATOR REALTY CORP.¹ (Gladiator, respondent) concerning alleged violations of Article 17 of the Environmental Conservation Law (ECL), Article 12 of the Navigation Law of New York State (NL) and Titles 6 and 17 of NYCRR. On April 7, 2008 Staff served a Notice of Hearing and Complaint dated April 2, 2008 on respondent GLADIATOR REALTY CORP. The complaint alleged that respondent Gladiator caused a discharge of petroleum into the waters of the State without a permit in violation of ECL 17-0807 and NL §173; caused a discharge of petroleum into the waters of the State which caused or contributed to a condition in contravention of the standards adopted pursuant to ECL 17-0301; failed to undertake containment of the discharge; failed to perform tightness testing on petroleum bulk storage (PBS) tanks; failed to properly close an underground PBS tank; failed to perform leak detection for two PBS tanks; failed to display facility registration certificate for the PBS tanks; and failed to properly color code two PBS tank fill ports. Respondent Gladiator contacted Department Staff in 2008 and in 2009 and, as a result, Department Staff has withdrawn four causes of action in the complaint. Department Staff moved for a default judgment on three causes of action:

- a) illegal discharge of petroleum;
- b) failure to immediately undertake containment of discharge;

¹ Department Staff named Canal Management Corp. as a respondent in the complaint but did not complete service on the corporation. Canal Management Corp. has since dissolved and staff has not pursued the default judgment against Canal Management Corp.

c) failure to properly close an underground storage tank.

In support of its default motion, DEC submitted an affirmation of Assistant Regional Attorney John K. Urda, Esq. dated February 2, 2009, a proposed Order and proof of proper service of the Notice of Hearing and Complaint on respondent on April 7, 2008 as well as proof of service by mail of the motion for default judgment on respondent Gladiator on February 2, 2009.

Respondent has not opposed the motion for default judgment.

DEFAULT PROCEDURES:

Section 622.15, "Default Procedures" provides, in pertinent part: "(b) The motion for a 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."

The following Findings are based upon the papers submitted, as identified above.

FINDINGS

1. On April 7, 2008 Staff served a Notice of Hearing and Complaint dated April 2, 2008 on respondent GLADIATOR REALTY CORP. The time to answer or otherwise move has expired. No answer has been served to date. The Notice of Hearing and Complaint noticed a pre-hearing conference for May 14, 2008. Respondent did not appear for that conference.
2. Staff mailed the motion for default judgment and supporting papers to respondent Gladiator's business address by certified mail on February 2, 2009 and again on February 6, 2009. Gladiator has not opposed said motion.
3. Respondent Gladiator owns the property at 381 Canal Place, Bronx, New York (site).
4. Respondent Canal became the registered owner of a PBS facility at the site on September 13, 2003. Canal Management Corp. became an inactive corporation by dissolution on June 30, 2004. Gladiator has owned the site since November 15, 1999, and remains owner of the site.
5. A petroleum spill at the site was reported to the Department on September 17, 2003. A petroleum spill occurred at the site in 1999 as well. Department Staff has combined the two spills under one spill incident report number and is proceeding on both spills for purposes of this motion against Gladiator Realty Corp.

6. The 2003 spill has not been remediated to date.
7. Respondent Gladiator contacted Department Staff in 2008 and in 2009 and, as a result, Department Staff has withdrawn four causes of action in the complaint. Department Staff has not withdrawn three causes of action:
 - a) illegal discharge of petroleum;
 - b) failure to immediately undertake containment of discharge; and
 - c) failure to properly close an underground storage tank.
8. The requirements for a default judgment have been met as prescribed by 6 NYCRR 622.15(b).

CONCLUSION OF LAW

1. Respondent is responsible for a discharge of petroleum into the waters of the State at the site in violation of ECL 17-0501, 17-0807 and NL §173.
2. Respondent did not immediately contain the spill in violation of NL §176 and 17 NYCRR 32.5.
3. Respondent did not properly close a storage tank at the site in violation of 6 NYCRR 613.9(b).
4. Department Staff has demonstrated that it has met the requirements for a default judgment as set out in 6 NYCRR 622.15 and a default judgment should be entered.

CONCLUSION

The motion for default judgment should be granted. This Summary Report can be referred to the Commissioner for final determination.

PENALTIES

ECL 71-1929 provides that effective May 15, 2003, any person who violates Article 17 of the ECL is liable for a penalty of up to \$37,500 per day for each violation. Prior to May 15, 2003, the penalty amount was \$25,000 per day per violation. NL §192 provides for a penalty of \$25,000 per offense for any violation of Article 12 of the Navigation Law. For the three remaining causes of action, Department Staff has requested a penalty of thirty-seven thousand five hundred dollars (\$37,500) for the failure to immediately contain the spill; twenty thousand dollars (\$20,000) for failing to properly close one tank; and twenty-five thousand dollars (\$25,000) for the spill. Department staff has supported the penalty requests and the penalties are within the statutory range allowed.

RECOMMENDATION

I recommend that the Commissioner issue an order directing respondent Gladiator pay a total penalty of eighty-two thousand five hundred dollars (\$82,500). I recommend that one half of the penalty be suspended if respondent Gladiator completes Department approved remediation at the site. Department staff has requested that respondent Gladiator perform remediation of the site immediately, pursuant to a Department approved work plan. I recommend that respondent Gladiator be ordered to submit a work plan to Department staff within 45 days of the date of service of an order herein detailing the remediation plan for the site; and, that Gladiator implement the Department approved plan as directed by Department staff. Finally, Department staff has asked that respondent Gladiator be directed to bring the facility into compliance with all PBS regulations and I recommend that the Commissioner grant such relief.

/s/

Molly T. McBride
Administrative Law Judge

Dated: January 11, 2010
Albany, New York