

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

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

ORDER

DEC Case No. 01-05
R9-20010212-4

- by -

MARIO PUGLIESE,

Respondent.

Pursuant to a notice of hearing and complaint dated May 11, 2004, staff of the New York State Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against respondent Mario Pugliese. The complaint alleged that respondent violated Environmental Conservation Law ("ECL") 17-1009(2) and 6 NYCRR 612.2(a)(2) by failing to timely renew the petroleum bulk storage registration for his facility located at 537 East Delevan Avenue in Buffalo, New York.

Department staff served respondent with the notice of hearing and complaint by registered mail, which was delivered to his address in Niagara Falls, Ontario, Canada, on May 20, 2004.

The time for respondent to serve an answer expired on June 9, 2004. No answer was filed in a timely manner.

Department staff filed a motion, dated February 3, 2005, with the Department's Office of Hearings and Mediation Services, seeking a default judgment against respondent. The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster, who prepared the attached default summary report dated March 2, 2005. I adopt the ALJ's report as my decision in this matter, subject to the comments herein.

The Department's Part 622 enforcement hearing regulations state that service of the notice of hearing and complaint must be by personal service consistent with the Civil Practice Law and Rules or by certified mail (see 6 NYCRR 622.3[a][3]). Where personal service and service by certified mail is impracticable, "upon application by [Department] staff

the ALJ may provide for an alternative method of service consistent with CPLR section 308.5" (id.).

Where, as here, certified mail was not available for mail service of the notice of hearing and complaint upon respondent whose address for service of process is located in Canada, registered mail was the functional equivalent of the certified mail method of service authorized by the Department's regulations.

Department staff, however, did not first make an application to the ALJ for authorization to use registered mail as an alternative method of service. Under the particular circumstances of this case, I do not view this failure as rendering the service of the notice of hearing and complaint defective. I note that the ALJ in his default summary report reviewed the procedures that Department staff followed, and approved the manner and method of service that Department staff employed. Moreover, proof of receipt of the notice of hearing and complaint was adequately established by a letter from Canada Post confirming their delivery date and by respondent's own admission to Department staff of their receipt. I would caution that in the future, however, an application for an alternative method of service should be made to the ALJ prior to its use.

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

I. Department staff's motion for a default judgment against respondent Mario Pugliese is granted.

II. Pursuant to 6 NYCRR 622.15, respondent is adjudged to be in default and to have waived his right to a hearing in this proceeding. As a consequence of the default, respondent is deemed to have admitted the factual allegations in the complaint.

III. Respondent is adjudged to have violated ECL 17-1009(2) and 6 NYCRR 612.2(a)(2) by failing to timely renew the registration for his petroleum bulk storage facility.

IV. Respondent is assessed a civil penalty pursuant to ECL 71-1929 in the amount of two thousand dollars (\$2,000). No later than 30 days after the date of service of this order upon respondent, payment of this penalty shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered to the Department at the following address: New York State Department of Environmental Conservation,

Region 9, 270 Michigan Avenue, Buffalo, New York, 14203-2999,
Attn: Joseph J. Hausbeck, Assistant Regional Attorney.

V. Within thirty (30) days of the date of service of this order upon respondent, respondent shall submit to the Department a completed application to re-register the petroleum bulk storage facility located at 537 East Delevan Avenue, Buffalo, New York, together with the required registration fee in the amount of two hundred fifty dollars (\$250).

VI. All communications from respondent to Department staff concerning this order shall be made to Joseph J. Hausbeck, Assistant Regional Attorney, NYSDEC, 270 Michigan Avenue, Buffalo, New York, 14203-2999.

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

For the New York State Department
of Environmental Conservation

By: _____/s/
Denise M. Sheehan
Acting Commissioner

Dated: Albany, New York
June 8, 2005

To: (by Registered Mail)
Mario Pugliese
4412 Maplewood Avenue
Niagara Falls, Ontario
Canada L2E6H2

(by Regular Mail)
Joseph J. Hausbeck, Esq.
Assistant Regional Attorney
New York State Department of Environmental Conservation
Division of Legal Affairs, Region 9
270 Michigan Avenue
Buffalo, New York 14203-2999

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of an Alleged Violation
of Article 17 of the Environmental
Conservation Law ("ECL") and Part 612
of Title 6 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York ("6 NYCRR") by:

DEFAULT
SUMMARY
REPORT

MARIO PUGLIESE,
Respondent.

Case No. 01-05
R9-20010212-4

Proceedings

On May 15, 2004, Staff of the Department of Environmental Conservation sent a notice of hearing and complaint to Mario Pugliese, Respondent. The notice of hearing and complaint were sent by registered mail to Mr. Pugliese's address in Niagara Falls, Ontario, Canada, and delivered at that address on May 20, 2004.

The hearing notice advised Mr. Pugliese that, pursuant to 6 NYCRR 622.4, he was required to serve an answer upon the Department within 20 days of receiving the complaint. The notice also advised Mr. Pugliese that failure to make timely service of an answer would result in a default and waiver of his right to a hearing.

By written motion dated February 3, 2005, Department Staff counsel Joseph J. Hausbeck moved for a default judgment against Mr. Pugliese. The motion is based on Mr. Pugliese's failure to timely file an answer to the complaint. Staff's motion papers include a copy of the notice of hearing and complaint, Mr. Hausbeck's affirmation (with attachments) describing the circumstances of the default, Mr. Hausbeck's affidavit in respect to the components of Staff's proposed civil penalty, and an affidavit of Andrea Skalski, an engineer in the Department's Region 9 petroleum bulk storage unit, explaining the basis of the alleged violation of ECL Section 17-1009(2) and 6 NYCRR 612.2(a)(2), based on Mr. Pugliese's failure to timely renew the petroleum bulk storage registration for his facility at 537 East Delevan Avenue in Buffalo.

The motion papers were sent to James T. McClymonds, the Department's chief administrative law judge, who then assigned the matter to me.

Findings of Fact

1. On May 15, 2004, Joseph Hausbeck, a Department attorney, mailed the notice of hearing and complaint in this matter to Mario Pugliese, 4412 Maplewood Avenue, Niagara Falls, Ontario, Canada, L2E6H2. This is the most recent address in the Department's records for correspondence to Mr. Pugliese.

2. The notice of hearing and complaint (copies of which are attached to Mr. Hausbeck's affirmation as Exhibit "A") were mailed to Mr. Pugliese by United States Postal Service registered mail, as certified mail receipt service is unavailable through the postal service for mail addressed to Canada. (Mr. Hausbeck's affidavit of service by registered mail is attached to his affirmation as Exhibit "B".)

3. The U.S. postal service web site provides a "Track & Confirm" service for registered mail items. The site indicates that the registered mail item, identified by the number assigned at its mailing, was delivered in Canada on May 20, 2004. (A copy of the "Track & Confirm" page, as retrieved by Mr. Hausbeck, is attached to his affirmation as Exhibit "D".)

4. On May 20, 2004, Mr. Pugliese contacted Francine Gallego, an environmental engineer in the Department's Region 9 spills unit in Buffalo. Ms. Gallego is assigned to Spill No. 9710497, involving property at 537 East Delevan Avenue, Buffalo. That property contains a petroleum bulk storage facility which was last registered with the Department on February 20, 1997, as World-Series-of-Sports-NY Inc., under the ownership and operation of Mr. Pugliese.

5. For several years, the Department has been investigating potential sources of groundwater contamination on the property at 537 East Delevan Avenue. For some time, the Department has been seeking to obtain access to the property for the purpose of removing two out-of-use, unregistered 15,000-gallon underground storage tanks that Department Staff believes are causing this contamination.

6. Ms. Gallego has written to and spoken with Mr. Pugliese on various occasions regarding the property and the removal of the underground storage tanks. When he contacted Ms. Gallego on May 20, 2004, Mr. Pugliese informed her that he would be able to remove the tanks within six weeks, and that he would write to her within one week and provide her with the exact date for removal. However, he has neither provided a removal date nor removed the tanks.

7. During the May 20 conversation, Mr. Pugliese repeatedly asked Ms. Gallego if he was violating any laws. Ms. Gallego advised him that his underground storage tanks were unregistered, in violation of regulations governing petroleum bulk storage.

8. On May 20, 2004, Ms. Gallego contacted Mr. Hausbeck and advised him of her conversation with Mr. Pugliese. Mr. Hausbeck informed her that he had recently sent a notice of hearing and complaint to Mr. Pugliese for the petroleum bulk storage registration violation. Ms. Gallego suggested that Mr. Hausbeck call Mr. Pugliese and provided him with Mr. Pugliese's phone number.

9. On June 9, 2004, Mr. Hausbeck contacted Mr. Pugliese by phone, and they discussed removal of the underground storage tanks from the 537 East Delevan Avenue property. Mr. Pugliese told Mr. Hausbeck that he would not allow the state to remove the tanks because he had been informed that he could be responsible for the cost. Mr. Pugliese said he would contact a contractor for an estimate and get back to the Department after he had done so.

10. During the June 9 conversation, Mr. Pugliese told Mr. Hausbeck that he had received the notice of hearing and complaint regarding his failure to re-register the petroleum bulk storage facility. Mr. Hausbeck told Mr. Pugliese that this violation still had to be addressed, adding that the papers had nothing to do with the investigation and remediation of contamination at the facility or the discussions concerning removal of the underground storage tanks.

11. Mr. Hausbeck reminded Mr. Pugliese on June 9 that he was required to provide an answer within 20 days of the complaint's receipt. Mr. Pugliese told Mr. Hausbeck that he would contact an attorney and that the Department would receive a response within the 20-day period. However, the Department has received no response to date.

12. On June 29, 2004, Mr. Hausbeck received a letter from Canada Post confirming that the delivery date for the notice of hearing and complaint (identified in the letter by its registration number) was May 20, 2004. The letter included the scanned signature of the recipient of the item, Shelley Pugliese. (A copy of the letter is attached to Mr. Hausbeck's affirmation as Exhibit "E".)

13. On July 7, 2004, Mr. Hausbeck wrote to Mr. Pugliese, advising him that the Department had received confirmation that

the notice of hearing and complaint had been delivered on May 20, 2004. Mr. Pugliese was advised that because he had failed to serve an answer to the complaint, Department Staff would seek a default judgement against him pursuant to 6 NYCRR 622.15. (A copy of Mr. Hausbeck's letter is attached to his affirmation as Exhibit "F".)

14. The hearing notice received by Mr. Pugliese advised him that, pursuant to 6 NYCRR 622.4(a), he had 20 days from receipt of the complaint to serve an answer, and that failure to make timely service of an answer would result in a default and waiver of his right to a hearing.

15. The time for Mr. Pugliese to serve an answer to the complaint expired on June 9, 2004, and has not been extended by the Department.

16. Not only has Mr. Pugliese not served an answer to the complaint, he has had no contact with the Department since June 9, 2004.

Discussion

The following discussion addresses the basis for a default judgment, the nature of the alleged violation, and Department Staff's penalty considerations.

- - Basis for Default Judgment

According to the Department's hearing regulations, a respondent's failure to file a timely answer constitutes a default and waiver of his right to a hearing. [See 6 NYCRR 622.15(a).] When such a failure occurs, Department Staff may move for a default judgment, such motion to 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 file a timely answer; and

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

Department Staff's papers contain all three of these elements, and therefore its motion may be granted.

Proof of service of the notice and complaint is demonstrated by the "Track & Confirm" service of the U.S. postal service as well as the letter from Canada Post confirming the delivery date

of May 20, 2004. Though the Canada Post letter includes the scanned signature of Shelley Pugliese as recipient, Mr. Pugliese himself acknowledged receiving the notice of hearing and complaint during his June 9, 2004, conversation with Mr. Hausbeck.

The Department's enforcement hearing procedures state that service of the notice of hearing and complaint must be by personal service consistent with the Civil Practice Law and Rules or by certified mail, and that where service is by certified mail, service shall be complete when the notice of hearing and complaint is received. [6 NYCRR 622.3(a)(3).] In this case, service was by registered mail rather than certified mail, because, as Mr. Hausbeck affirms, certified mail receipt service is unavailable through the U.S. postal service for mail addressed to Canada.

Service by registered mail in this case was the functional equivalent of service by certified mail within the United States, because Department Staff was provided a mailing receipt and online access to the delivery status. Though the Department does not have a signed U.S. postal service return receipt, it has a letter from Canada Post with the scanned signature of the recipient. Any doubt whether the notice of hearing and complaint reached Mr. Pugliese personally is resolved by his admission to Mr. Hausbeck that he received them.

Mr. Pugliese's failure to file a timely answer is demonstrated by Mr. Hausbeck's affirmation. The notice of hearing and complaint having been delivered on May 20, 2004, to his address then on file with the Department, Mr. Pugliese had until June 9, 2004, to file an answer. No answer was filed by that deadline, and none has been filed since, according to Mr. Hausbeck.

Department Staff's papers include a proposed order, which is attached to Mr. Hausbeck's affirmation as Exhibit "G".

- - Nature of the Alleged Violation

The complaint states that Mr. Pugliese owns a petroleum bulk storage facility at 537 East Delevan Avenue in Buffalo, and that such facility has a petroleum storage capacity in excess of 1,100 gallons. According to the complaint, Mr. Pugliese registered the facility by papers dated February 19, 1997, which were received by the Department on February 20, 1997. The complaint then states that, though required to renew the registration with the

Department on or before February 20, 2002, Mr. Pugliese failed to do so, in violation of ECL 17-1009(2) and 6 NYCRR 612.2(a)(2).

These provisions require the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons to register the facility with the Department, such registration to be renewed every five years or whenever title to the facility is transferred, whichever occurs first. A facility that is out of service must maintain its registration, but a facility that has been permanently closed does not, provided the Department has received written notice of the closure.

Because all elements of the alleged violation are asserted in Staff's complaint, the complaint states a cause of action for which relief may be granted.

- - Penalty Considerations

Department Staff's proposed order requests an assessed and payable civil penalty of \$2,000 and a direction that Mr. Pugliese submit to the Department a completed application to re-register his petroleum bulk storage facility, together with the required \$250 registration fee. To support the requested penalty, Mr. Hausbeck has provided an affidavit identifying the penalty components.

The Commissioner's civil penalty policy provides that the starting point for any penalty calculation should be a computation of the statutory maximum for each provable violation. In February of 2002, ECL 71-1929 provided for a penalty not to exceed \$25,000 per day for each violation; in May of 2003, the statutory maximum rose to \$37,500 per day. Considering the obligation to renew the registration as a continuing violation, the maximum penalty allowed by statute would be excessive, Mr. Hausbeck acknowledges. However, even viewing the violation as a one-time occurrence on February 20, 2002, the day the renewal was due, Staff's requested penalty of \$2,000 is still well below the statutory maximum.

The Department has issued a Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22), which provides a suggested penalty range of \$500 to \$5,000 for failures to register under 6 NYCRR 612.2. As Staff points out, DEE-22 affords Department attorneys discretion to increase, decrease or suspend a civil penalty in accordance with the Commissioner's civil penalty policy, which addresses all violations of the ECL and the Department's regulations. Also, by DEE-22's own terms,

its penalty ranges do not apply to the resolution of violations after a notice of hearing and complaint have been served.

Department Staff argue that the requested \$2,000 penalty is consistent with the Commissioner's civil penalty policy, which provides that a penalty should include both a benefit component and a gravity component.

According to Mr. Hausbeck, the benefit component is minimal in this case. Staff represents that the underground storage tanks at Mr. Pugliese's facility are not in operation at this time and have never been in operation during any period of his ownership. According to Staff, the property upon which the facility is located was the subject of a hazardous waste remediation project when Mr. Pugliese acquired it from Vibratex, Inc., the prior owner. Mr. Pugliese occupied the property for a time, but the property is now abandoned and unoccupied. Accordingly, Mr. Hausbeck argues that there has been no enhanced value to any business or property as a result of non-compliance, though Mr. Pugliese has delayed paying the \$250 for several years, which is why Staff has attributed \$500 of its requested penalty to economic benefit.

Pursuant to the Commissioner's civil penalty policy, removing the benefit of non-compliance only places the violator in the position it would have if compliance had been achieved in a timely manner. For that reason, a gravity component - - involving consideration of the potential harm and actual damage attributable to the violation, as well as the importance of compliance to the regulatory scheme - - may be included as a deterrent.

According to Mr. Hausbeck, there are no known damages as a result of Mr. Pugliese's failure to renew the registration of the facility. Mr. Hausbeck writes that the prior owner of the property continues to monitor the property following a hazardous waste remediation project that was undertaken by the prior owner and initiated prior to Mr. Pugliese's acquisition of the premises.

Mr. Hausbeck acknowledges that after acquiring the property, Mr. Pugliese did register the pre-existing underground storage tanks, which are believed to be the source of petroleum contamination that has since been detected. Mr. Pugliese, Mr. Hausbeck writes, provided access to the Department for investigation purposes, but, at the time of the default motion, was still reluctant to provide the Department with access for remediation purposes. Accordingly, Staff has made a referral to

the State Attorney General's office for assistance in obtaining access for remedial activity. Staff argues that the risk of harm from existing contamination will continue until remediation is completed, but that this risk is unrelated to the violation of failure to renew the facility's registration. As a result, no portion of the requested civil penalty is related to the potential harm or actual damage attributable to the violation.

The Commissioner's civil penalty policy states that, to view the importance of compliance to the regulatory scheme, one looks to the importance of the violated requirement in achieving the goal of the underlying statute. Staff argues that while some might consider the facility's registration to be only a ministerial, revenue-raising function, it is still a cornerstone of the petroleum bulk storage program, because it enables the Department to identify both the facility itself and those who are responsible for violations at the facility.

Mr. Pugliese registered the facility in 1997, but failed to renew that registration, Staff asserts. According to Mr. Hausbeck, although ownership of the realty has since been transferred on two occasions to other entities, no new application for registration has ever been filed with the Department, and Mr. Pugliese remains the owner of record. Moreover, Mr. Hausbeck writes, Mr. Pugliese has admitted involvement in forming these other entities, is the only individual known to the Department to be associated with these other entities, and is the only individual interacting with the Department as to issues associated with registration of the facility and access to the facility for investigation and remediation purposes.

Staff has attributed \$1,500 of its requested penalty to the importance of compliance to the regulatory scheme, adding that failure to account for this would be unfair to those who voluntarily comply with the law and maintain their registrations.

Finally, the Department may consider adjustments to the gravity component of the civil penalty. In this case, Staff argues, both aggravating and mitigating factors would appear to apply. Mr. Hausbeck writes that culpability could be considered an aggravating factor, but that inability to pay could be a mitigating factor, as evidenced by the fact that the facility is located in a deteriorating neighborhood, is not in operation, and appears to be abandoned, real property taxes having been unpaid since the year 2000. Another mitigating factor, Staff concedes, is the cooperation Mr. Pugliese has shown, at least in relation to the investigation of petroleum contamination at the property.

The Department submits that, overall, any aggravating and mitigating factors neutralize each other, and warrant no upward or downward penalty adjustment.

Conclusions

1. By failing to answer Department Staff's complaint in a timely manner, the Respondent, Mario Pugliese, has defaulted and waived his right to a hearing in this matter.

2. Department Staff's request for a \$2,000 penalty is rationally supported by evidence in its papers.

Recommendation

The Commissioner should sign an order granting the default motion and providing Department Staff the relief requested in its proposed order.

_____/s/_____
Edward Buhrmaster
Administrative Law Judge

Albany, New York
March 2, 2005