

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

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In the Matter of Alleged Violations of  
Article 19 of the New York State  
Environmental Conservation Law ("ECL")  
and Part 203 of Title 6 of the Official  
Compilation of Codes, Rules and  
Regulations of the State of New York  
("NYCRR")

**ORDER**

DEC Case No.:  
D2-1002-05-04<sup>1</sup>

- by -

**UNION TRUCKING INC.,**

Respondent.

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Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Union Trucking Inc. by service of a notice of hearing and complaint dated June 5, 2006.

In accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), one original and one copy of the notice of hearing and complaint was hand delivered to the New York State Department of State on June 5, 2006, pursuant to Business Corporation Law § 306(b). Thereafter, also on June 5, 2006, an additional copy of the notice of hearing and complaint was sent by first class mail to respondent's last known address at 1407 Avenue Z, Brooklyn, New York, pursuant to CPLR 3215(g)(4).

The complaint alleged violations of the Environmental Conservation Law ("ECL") and 6 NYCRR part 230 arising out of respondent's ownership and/or operation of a gasoline transport vehicle as defined in 6 NYCRR 230.1(b)(5). According to the complaint, on March 30, 2005, Department staff observed respondent's gasoline transport vehicle unloading gasoline at the

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<sup>1</sup>By memorandum dated February 1, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

Pit Stop Mini Mart located at 819 Main Street, New Rochelle, New York, in violation of the provisions of ECL article 19 and 6 NYCRR part 230. As a result of these violations, Department staff issued three separate appearance tickets to respondent on March 30, 2005. The complaint alleged three causes of action based upon these appearance tickets. Specifically, the complaint alleged that respondent:

1. Failed to display a marking, near the U.S. Department of Transportation certificate plate of its gasoline transport vehicle, in letters and numerals at least two inches high, which reads NYS DEC and provides the date on which the gasoline transport vehicle was last tested, in violation of ECL article 19 and 6 NYCRR 230.4(a)(3);
2. Failed to connect and ensure proper operation of the Stage I vapor collection and control system when gasoline from its gasoline transport vehicle was being unloaded at the gasoline dispensing site known as Pit Stop Mini Mart, located at 819 Main Street, New Rochelle, New York, in violation of ECL article 19 and 6 NYCRR 230.2(f)(4); and
3. Failed to perform an annual pressure-vacuum test on its gasoline transport vehicle, in violation of ECL article 19 and 6 NYCRR 230.4(b).

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on June 30, 2006, and has not been extended by Department staff. Respondent failed to file a timely answer or otherwise appear. Respondent also failed to appear at the pre-hearing conference held on August 1, 2006. Accordingly, respondent is in default and has waived the right to a hearing.

Department staff filed a motion for default judgment, dated December 27, 2006, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Mark D. Sanza, who prepared the attached default summary report. I adopt ALJ Sanza's report as my decision in this matter, subject to the following comments.

Based upon the record, I conclude that the proposed civil penalty and remedial measures sought by Department staff to address the violations are appropriate. I also conclude that the remedial measures are authorized and warranted, and the recommended dates by which respondent is to achieve compliance

with applicable regulatory standards are reasonable.

**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 against respondent Union Trucking Inc. is granted.

II. Respondent is adjudged to be in default and to have waived the right to a hearing in this administrative enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 230.4(a)(3) on March 30, 2005 by failing to display a marking, near the U.S. Department of Transportation certificate plate of its gasoline transport vehicle, in letters and numerals at least two inches high, which reads NYS DEC and provides the date on which the gasoline transport vehicle was last tested.

IV. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 230.2(f)(4) on March 30, 2005 by failing to connect and ensure proper operation of the Stage I vapor collection and control system when gasoline from its gasoline transport vehicle was being unloaded at the gasoline dispensing site known as Pit Stop Mini Mart, located at 819 Main Street, New Rochelle, New York.

V. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 230.4(b) on March 30, 2005 by failing to perform an annual pressure-vacuum test on its gasoline transport vehicle.

VI. Respondent Union Trucking Inc. is hereby assessed a civil penalty in the amount of twelve thousand dollars (\$12,000). The civil penalty shall be due and payable within thirty (30) days after the 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 to the Department at the following address:

Michael J. Derevlany, Esq.  
New York State Department of Environmental Conservation  
Division of Environmental Enforcement



TO: Union Trucking Inc. (By certified mail)  
1407 Avenue Z  
Brooklyn, New York 11235

Michael J. Derevlany, Esq. (By regular mail)  
New York State Department of  
Environmental Conservation  
Division of Environmental Enforcement  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-5500

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

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In the Matter of Alleged Violations of  
Article 19 of the New York State  
Environmental Conservation Law ("ECL")  
and Part 230 of Title 6 of the Official  
Compilation of Codes, Rules and  
Regulations of the State of New York  
("6 NYCRR")

**DEFAULT  
SUMMARY REPORT**

DEC Case No.:  
D2-1002-05-04

- by -

**UNION TRUCKING INC.,**

Respondent.

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**Proceedings**

On June 5, 2006, staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Union Trucking Inc. by hand delivering an original and one copy of a notice of hearing and complaint, both dated June 5, 2006, upon the New York State Department of State, pursuant to Business Corporation Law § 306(b). Thereafter, on the same date, Department staff served an additional copy of the June 5, 2006 notice of hearing and complaint upon respondent by first class mail at respondent's last known address, pursuant to CPLR 3215(g)(4).

According to the complaint, respondent Union Trucking Inc., has a place of business at 1407 Avenue Z, Brooklyn, New York, and owns or operates a gasoline transport vehicle as defined in section 230.1(b)(5) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), as well as the stage I vapor collection and control system on the vehicle.

The complaint alleges that, at approximately 2:50 p.m. on March 30, 2005, Department staff observed respondent's gasoline transport vehicle unloading gasoline at the Pit Stop Mini Mart located at 819 Main Street, New Rochelle, New York, in violation of the provisions of Environmental Conservation Law ("ECL") article 19 and 6 NYCRR part 230. As a result of these violations, Department staff issued three separate appearance tickets to respondent on March 30, 2005. The complaint alleged three causes of action based upon these appearance tickets as follows:

1. Respondent violated ECL article 19 and 6 NYCRR 230.4(a)(3) by failing to display a marking, near the U.S. Department of Transportation certificate of its gasoline transport vehicle, in letters and numerals at least two inches high, which reads NYS DEC and provides the date on which the gasoline transport vehicle was last tested;
2. Respondent violated ECL article 19 and 6 NYCRR 230.2(f)(4) by failing to connect and ensure proper protection of the stage I vapor collection and control system on the gasoline transport vehicle when gasoline was being unloaded at the gasoline dispensing site known as Pit Stop Mini Mart, located at 819 Main Street, New Rochelle, New York; and
3. Respondent violated ECL article 19 and 6 NYCRR 230.4(b) by failing to perform an annual pressure-vacuum test on its gasoline transport vehicle.

The June 5, 2006 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent Union Trucking Inc. must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and complaint. As provided for by 6 NYCRR 622.8, the notice of hearing also scheduled a pre-hearing conference for August 1, 2006 at 10:30 a.m. at the Department's Region 2 headquarters in Long Island City, New York. The notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondent would be in default and would waive its right to a hearing.

With a cover letter dated December 28, 2006, Michael J. Derevlany, Esq., compliance counsel for the Division of Air Resources within the Department's Division of Environmental Enforcement, filed a notice of motion and a motion, both dated December 27, 2006, with supporting papers for a default judgment against respondent Union Trucking Inc. The supporting papers consisted of an affirmation by Mr. Derevlany dated December 27, 2006, which documents respondent's failure to file a timely answer and failure to appear, along with attached Exhibits marked A, B, C, and D.

Exhibit A contains a copy of the notice of hearing and complaint, both dated June 5, 2006, as well as copies of the three appearance tickets issued to respondent for the alleged violations on March 30, 2005. Exhibit B is an affidavit of service for the notice of hearing and complaint upon respondent

sworn to by Department staff attorney Alyce M. Gilbert, Esq. on December 27, 2006. Exhibit C is a technical affidavit of Department staff engineer Robert Waterfall sworn to on December 27, 2006. Exhibit D is a technical affidavit of Department staff scientist Thomas Gentile sworn to on December 27, 2006. The technical affidavits of Department staff describe the environmental harm associated with respondent's violations of the cited provisions of ECL article 19 and 6 NYCRR part 230. Pursuant to 6 NYCRR 622.15(b), Department staff also provided a copy of a proposed order with its default motion papers.

The bases for staff's motion for default judgment, as set forth in Mr. Derevlany's affirmation, are respondent's failure to file a timely answer to the June 5, 2006 complaint, and respondent's failure to appear at the August 1, 2006 pre-hearing conference. Mr. Derevlany's cover letter of December 28, 2006, which accompanied Department staff's default motion, indicates that a copy of the motion and supporting papers, as described above, was mailed to respondent Union Trucking Inc. at 1407 Avenue Z, Brooklyn, New York.

#### **Findings of Fact**

1. On June 5, 2006, Department staff attorney Alyce M. Gilbert, Esq. served a notice of hearing and complaint, both dated June 5, 2006, in DEC Case No.: D2-1002-05-04 upon respondent Union Trucking Inc. by hand delivering one original and one copy of the notice of hearing and complaint to the New York State Department of State pursuant to Business Corporation Law § 306(b).
2. On June 5, 2006, Department staff attorney Alyce M. Gilbert, Esq. served an additional copy of the June 5, 2006 notice of hearing and complaint upon respondent, by first class mail at respondent's last known address, pursuant to CPLR 3215(g)(4).
3. The June 5, 2006 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent Union Trucking Inc. must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and complaint. As provided for by 6 NYCRR 622.8, the notice of hearing also scheduled a pre-hearing conference for August 1, 2006 at 10:30 a.m. at the Department's Region 2 headquarters in Long Island City, New York. The notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondent would be in default and would waive its right to a hearing.



4. With respect to the June 5, 2006 complaint, the time for respondent Union Trucking Inc. to serve an answer expired on June 30, 2006. As of the date of Department staff's default motion, respondent had not filed an answer.
5. With respect to the August 1, 2006 pre-hearing conference, respondent failed to appear at the time and place as set forth in the June 5, 2006 notice of hearing.

### **Discussion**

Pursuant to the Department's enforcement hearing regulations, a respondent's failure either 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 [see 6 NYCRR 622.15(a)]. Under these circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), staff's motion must contain:

- a. Proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
- b. Proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and
- c. A proposed order.

The December 27, 2006 affidavit of service of Department staff attorney Alyce M. Gilbert, Esq. demonstrates service of the June 5, 2006 notice of hearing and complaint upon respondent in a manner consistent with the requirements set forth in 6 NYCRR 622.3(a)(3), Business Corporation Law § 306(b), and CPLR 3215(g)(4). (See Matter of Polanaya Corp., Order of the Acting Commissioner, April 12, 2005, at 1). In addition, the December 27, 2006 affirmation of Department staff attorney Michael J. Derevlany, Esq. demonstrates that respondent did not timely file any answer to the June 5, 2006 complaint and did not appear at the pre-hearing conference held on August 1, 2006. Based on these circumstances, respondent Union Trucking Inc. has defaulted and waived its right to a hearing, and Department staff is entitled to a default judgment pursuant to 6 NYCRR 622.15(a).

Department staff has provided a proposed order with its default motion papers. The proposed order would assess a total civil penalty of \$12,000, and would require respondent to comply with the applicable requirements of 6 NYCRR part 230.

When a respondent defaults, he waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, however, still has the obligation to prove damages. (See Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 3-4).

Any person, which includes a corporation (see ECL 19-0107[1] and 6 NYCRR 200.1[bi]), who violates any provision of article 19 or any code, rule or regulation which was promulgated thereto shall be liable, in the case of a first violation, for a penalty not less than three hundred seventy-five dollars nor more than fifteen thousand dollars for said violation and an additional penalty of not to exceed fifteen thousand dollars for said violation for each day during which such violation continues. Department staff are unaware of any specific prior 6 NYCRR part 230 violations with respondent's subject gasoline transport vehicle. (See affirmation of Michael J. Derevlany dated December 27, 2006 - "History of Noncompliance").

Here, Department staff has proposed a total civil penalty that is substantially less than the potential maximum, particularly given the potential environmental harm that may result from these violations, as well as the continuous nature of them. In addition, the requested civil penalty is consistent with civil penalties assessed in similar cases.

Finally, staff's default motion includes a schedule to bring respondent's gasoline transport vehicle into compliance with the applicable regulations within thirty (30) days of the date of service of a copy of an order in this matter. I find that the dates in the compliance schedule outlined in the default motion are reasonable.

### **Conclusions**

1. Respondent Union Trucking Inc. has defaulted and, therefore, has waived the right to a hearing with respect to liability for the violations alleged in the complaint.
2. Department staff has provided a justification for the requested civil penalty and compliance schedule.

**Recommendation**

The motion for default judgment should be granted, and an order issued as described above.

/s/

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Mark D. Sanza  
Administrative Law Judge

January 24, 2007  
Albany, New York