STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Navigation Law Article 12, and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("17 NYCRR") Part 32

ORDER

- by –

U.S.A. ENVIRONMENTAL SERVICES CORP.,
and
TRUE BLUE ENVIRONMENTAL SERVICES, CORP.,

DEC File Nos.:
R2-20070420-182
R2-20080623-318

Respondents.

Respondents U.S.A. Environmental Services Corp. and True Blue Environmental Services, Corp. are active domestic business corporations with offices located at 206 Grandview Avenue, Staten Island, New York (the "facility"). At the facility, respondents operate a business that removes and repairs petroleum tanks, and cleans up petroleum spills.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by personally serving copies of the notice of hearing and complaint, both dated May 5, 2009, upon each respondent on May 29, 2009.

Based upon inspections of the facility that Department staff conducted on February 8, 2007, October 10, 2007, May 28, 2008, and May 4, 2009, Department staff alleged that respondents:

- discharged petroleum at the facility, in violation of Navigation Law § 173, on each of the four inspection dates;

- failed to report the unauthorized petroleum discharges at the facility, in violation of Navigation Law § 175 and 17 NYCRR 32.3, on each of the four inspection dates; and

- failed to contain the unauthorized discharges of petroleum, in violation of Navigation Law § 176 and 17 NYCRR 32.5, on each of the four inspection dates.

The May 5, 2009 notice of hearing advised respondents that staff had scheduled a pre-hearing conference at 10:00 a.m. on June 1, 2009 at the Department's Region 2 Office in Long Island City, New York, and further advised respondents to file an answer within 20 days of the receipt of the complaint. Pursuant to 6 NYCRR 622.4(a), respondents' time to answer the complaint expired on June 18, 2009, and was not extended by Department staff. Respondents neither appeared at the June 1, 2009 pre-hearing conference nor filed an answer.

With a cover letter dated September 15, 2009, Department staff provided the Office of Hearings and Mediation Services with a copy of a motion for default judgment dated July 29, 2009 and supporting papers. The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

The affirmation of John K. Urda, Esq., Assistant Regional Attorney, dated July 29, 2009, details the factors that support the requested civil penalty of one hundred eleven thousand, eight hundred dollars ($111,800). These factors included the economic benefit that respondents realized from non-compliance, respondents' lack of cooperation with respect to addressing the violations, and respondents' familiarity with the Navigation Law and implementing regulations considering the nature of their business.

Navigation Law § 192 provides for a penalty of up to $25,000 for each offense. The record, which sets forth the violations that Department staff found during each of the four facility inspections, fully supports the civil penalty of $111,800 that Department staff has requested. In imposing the civil penalty requested by staff and recommended by ALJ O'Connell, I am directing respondents to remit payment of the civil penalty within thirty (30) days of service of this order upon them.

Department staff also requested that respondents be directed to correct the violations that were identified during the facility inspections. The relief that Department staff requested is authorized and appropriate. Respondents are to provide Department staff with a remediation plan to address the

cleanup of the petroleum discharges at the facility within thirty days of service of this order.

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. Respondents U.S.A. Environmental Services Corp. and True Blue Environmental Services, Corp. are adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondents, as set forth in Department staff's May 5, 2009 complaint, are deemed to have been admitted by respondents.

III. Respondents USA Environmental Services Corp. and True Blue Environmental Services, Corp. are adjudged to have violated Navigation Law §§ 173, 175 and 176, and 17 NYCRR 32.3 and 32.5, on each of the four inspection dates identified in the May 5, 2009 complaint, at their facility located at 206 Grandview Avenue, Staten Island, New York.

IV. Respondents U.S.A. Environmental Services Corp. and True Blue Environmental Services, Corp. are jointly and severally assessed a civil penalty of one hundred eleven thousand, eight hundred dollars ($111,800). The civil penalty is due and payable within thirty (30) days after service of this order upon respondents. Payment of the civil penalty shall be by cashier's check, certified check, or money order drawn to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to John K. Urda, Esq., Assistant Regional Attorney, NYSDEC – Region 2, 47-40 21st Street, Long Island City, New York 11101-5407.

V. Respondents, within thirty (30) days of the service of this order upon them, shall submit an approvable remediation plan to Department staff to address the cleanup of the petroleum discharges at the facility. Subsequent to written notice of Department staff's approval of the plan, respondents shall implement the plan within thirty (30) days of the date of the notice.

VI. All communications from respondents to the Department concerning this order shall be directed to John K. Urda, Esq., Assistant Regional Attorney, NYSDEC – Region 2, 47-40 21st Street, Long Island City, New York 11101-5407.

VII. The provisions, terms, and conditions of this order shall bind respondents U.S.A. Environmental Services Corp. and True Blue Environmental Services, Corp., and their agents, successors and assigns, in any and all capacities.

For the New York State Department
Of Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: Albany, New York
November 16, 2009

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Navigation Law Article 12, and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 32	Default Summary Report
- by –	
U.S.A. ENVIRONMENTAL SERVICES CORP., **and** **TRUE BLUE ENVIRONMENTAL SERVICES, CORP.**	DEC File Nos.: R2-20070420-182 R2-20080623-318
Respondents.	

Proceedings

Staff from the Region 2 Office of the Department of Environmental Conservation (Department staff) commenced this administrative enforcement proceeding by serving a notice of hearing and complaint, both dated May 5, 2009, by personal service upon U.S.A. Environmental Services Corp., and upon True Blue Environmental Services, Corp. (Respondents).

The May 5, 2009 complaint alleges that Respondents are active domestic business corporations with offices located at 206 Grandview Avenue, Staten Island (Tax Block 1257, Lot 68 - Richmond County), New York (the site). According to the complaint, Respondents operate a business from this site that removes and repairs petroleum tanks, and cleans up petroleum spills.

In three causes of action, the May 5, 2009 complaint alleges that Respondents violated various provisions of Navigation Law Article 12 and implementing regulations at Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (17 NYCRR) Part 32 (Oil Spill Prevention and Control). For these alleged violations, Department staff requests an order from the Commissioner that assesses a civil penalty and directs Respondents to remediate the site pursuant to an approved work plan.

Motion for Default Judgment

With a cover letter dated September 15, 2009, Department staff provided the Office of Hearings and Mediation Services

with a motion for default judgment and supporting papers. This matter was assigned to me on September 22, 2009. Staff's motion papers consist of the following documents:

1. Notice of motion for default judgment and order, dated July 29, 2009.

2. Motion for default judgment and order, dated July 29, 2009.

3. Affirmation in support of the motion for default judgment and order by John K. Urda, Esq., Assistant Regional Attorney, dated July 29, 2009, with five attached exhibits:

    a. Exhibit A is a copy of the notice of hearing and the complaint, both dated May 5, 2009;

    b. Exhibit B is an affidavit of personal service by Environmental Conservation Officer (ECO) David P. Thomas sworn on July 27, 2009;

    c. Exhibit C is a copy of a New York State Department of Environmental Conservation (NYS DEC) spill response form concerning Spill No. 0850258, created on May 29, 2008;

    d. Exhibit D is a copy of a NYS DEC spill response form concerning Spill No. 0901388, created on May 4, 2009; and

    e. Exhibit E is a draft order.

4. Affidavit of service pursuant to Civil Practice Law and Rules (CPLR) § 3215(g) by Brandon Harrell sworn on July 29, 2009.[1]

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[1] CPLR 3215(g)(4)(i) states in full that "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." Although the pending default judgment is based upon the non-appearance of corporate respondents, compliance with CPLR 3215(g)(4)(i) is not necessary because Department staff duly commenced the captioned matter by personally serving the May 5, 2009 notice of hearing and complaint upon Respondents (*see* 6 NYCRR 622.3[a][3]). Consequently, the additional service of the May 5, 2009 notice of hearing and complaint by

5. Affidavit of service by Brook Turallo sworn on August 28, 2009 concerning service of Staff's July 29, 2009 motion for default judgment upon Respondents.

Pursuant to 6 NYCRR 622.15(a), a respondent's failure either to appear at a pre-hearing conference (*see* 6 NYCRR 622.8), or to file a timely answer to a complaint constitutes a default and waiver of a respondent's right to a hearing. Under these circumstances, Department staff may move for a default judgment. Staff's motion must include: (1) proof of service of the notice of hearing and complaint; (2) proof of the respondent's failure either to appear at a pre-hearing conference or to file a timely answer; and (3) a proposed order (*see* 6 NYCRR 622.15[b]).

I. Commencement of the Enforcement Proceeding and Service of the Motion for Default Judgment

For the following reasons, Staff has met the requirements set forth in 6 NYCRR 622.15. First, ECO Thomas' July 27, 2009 affidavit of service (Exhibit B), demonstrates that Department staff personally served Respondents with copies of the May 5, 2009 notice of hearing and complaint, and that each Respondent received a copy of the May 5, 2009 notice of hearing and complaint on May 29, 2009. Personal service is authorized pursuant to 6 NYCRR 622.3(a)(3). Accordingly, I conclude that Department staff duly commenced the captioned administrative enforcement proceeding (*see* 6 NYCRR 622.3[a][1]).

Second, the May 5, 2009 notice of hearing advised Respondents that they must file an answer within 20 days of the receipt of the complaint (Exhibit A). Because Respondents received the May 5, 2009 notice of hearing and complaint on May 29, 2009 (Exhibit B), Respondents' answer was due 20 days hence, which was June 18, 2009. Mr. Urda's July 29, 2009 affirmation demonstrates that Respondents did not answer the May 5, 2009 complaint. In the absence of any answer from Respondents, I conclude that, pursuant to 6 NYCRR 622.15(a), Respondents have defaulted and waived their right to a hearing.

Third, Staff submitted a proposed order, as required by 6 NYCRR 622.15(b) (Exhibit E).

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first class mail, as outlined in Mr. Harrell's July 29, 2009 affidavit, was unnecessary, and not a requirement for obtaining a default judgment.

Section 622.15 does not prescribe the circumstances under which a defaulting respondent is entitled to notice of Department staff's motion for default judgment. In *Matter of Makhan Singh and L.I.C. Petroleum, Inc.* (Decision and Order, March 19, 2004, at 2-3), the Commissioner reviewed CPLR 3215(g)(1), which requires notice of an application for default judgment only where the defending party has appeared, or where more than one year has elapsed between the date of the default and the motion. These circumstances are not relevant here.

Recently, the Commissioner revisited the notice question in *Matter of Derrick Dudley* (Decision and Order, dated July 24, 2009). In *Dudley* (at 2), the Commissioner directed Staff in all administrative enforcement proceedings to serve motions for default judgment upon respondents and their representatives (if known) even where such service is not required under CPLR 3215(g)(1). The Commissioner's directive became effective on August 24, 2009.

Department staff commenced the captioned enforcement proceeding in May 2009, and Staff's motion for default judgment is dated July 29, 2009. Based on Mr. Urda's July 29, 2009 affirmation, neither Respondents, nor their representatives, have appeared in this proceeding. In addition, Department staff's motion for default judgment predates the effective date of the Commissioner's directive prescribed in *Dudley*. Given these circumstances, Staff was not required to serve Respondents with copies of the July 29, 2009 default motion papers (*see Makhan Singh,* at 2-3).

Nevertheless, Department staff attempted to serve each Respondent with a copy of the July 29, 2009 motion for default judgment. As described in Brook Turallo's August 28, 2009 affidavit of service, and with reference to Business Corporation Law § 306, Staff personally delivered copies of the motion for default judgment and supporting papers to the Secretary of the New York State Department of State.[2] As discussed above,

[2] Pursuant to Business Corporation Law § 306, the Secretary of the New York State Department of State is an agent of a domestic or authorized foreign corporation for service of process. The term "process" means judicial process and all notices "required or permitted by law to be personally served on a domestic or foreign corporation, for the purpose of acquiring jurisdiction of such corporation..." (Business Corporation Law § 102[a][11]). Where, as here, Staff has duly commenced a proceeding, 6 NYCRR 622.6[a][1] states that CPLR 2103 will govern service of papers upon a respondent, and a

however, Staff was not required to serve the default motion upon Respondents in this proceeding. Therefore, any proof that Staff provided in this regard is immaterial.

To date, the Office of Hearings and Mediation Services has not received any reply from Respondents concerning Staff's motion. Staff's July 29, 2009 motion for default judgment is, therefore, unopposed.

II. Liability

After the administrative law judge (ALJ) concludes that the requirements outlined at 6 NYCRR 622.15 have been met, the ALJ must then determine whether the complaint states a claim upon which relief may be granted, and must consider whether the requested civil penalty and remediation are warranted and sufficiently supported (*Matter of Alvin Hunt*, Decision and Order, July 25, 2006, at 4-5). Upon review of the motion papers, I conclude that the May 5, 2009 complaint states claims upon which the Commissioner may grant the relief requested by Staff.

In three causes of action, Department staff alleges, in the May 5, 2009 complaint, that Respondents violated Navigation Law Article 12 when they discharged petroleum (*see* Navigation Law § 173), failed to report the unauthorized discharges (*see* Navigation Law § 175 and 17 NYCRR 32.3), and failed to contain the petroleum discharges (*see* Navigation Law § 176 and 17 NYCRR 32.5).

Each cause of action in the May 5, 2009 complaint consists of four counts. According to Mr. Urda's affirmation, the counts are based on Staff's four site visits. Staff inspected the site on February 8, 2007, October 10, 2007, May 28, 2008 and May 4, 2009. Staff's observations during these inspections serve as the bases for the alleged violations.

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respondent's attorney or other duly authorized representative. Among the methods for service of papers prescribed in CPLR 2103 after the commencement of a proceeding, none provide for serving the Secretary of the New York State Department of State (*see* CPLR 2103[c]). For the reasons discussed above, the significance of any distinction between relying upon the Secretary of the New York State Department of State as an agent for service of process to commence a proceeding, and as an agent for service of motion papers after a proceeding has been duly commenced, is beyond the scope of the captioned matter.

Proof of the allegations concerning liability is not required pursuant to 6 NYCRR 622.15. However, where, as here, Staff's motion papers include evidence to support the factual assertions underlying the claims of liability, the Commissioner has determined that the evidence may be examined to confirm whether the claims are meritorious. (*see Alvin Hunt*, supra at 7.)

As noted above, Exhibits C and D to Mr. Urda's July 29, 2009 affirmation are copies of the Department's spill response forms. Exhibit C is a copy of the spill response form concerning Spill No. 0850258, created on May 29, 2008. Exhibit D is a copy of the response form concerning Spill No. 0901388, created on May 4, 2009. The comments on these forms by members of Department staff demonstrate that Staff inspected the site on May 28, 2008 and May 4, 2009, respectively, and that during each inspection, Staff observed spillage of petroleum products from some of the 55-gallon drums (*see* May 5, 2009 complaint, 1st cause of action) in violation of Navigation Law § 173.

Exhibits C and D also demonstrate that Department staff reported the May 28, 2008 spill, and that Staff from the New York City Department of Environmental Protection reported the May 4, 2009 spill. This information demonstrates that Respondents neither reported the spills (*see* May 5, 2009 complaint, 2nd cause of action), which is a violation of Navigation Law § 175 and 17 NYCRR 32.3, nor attempted to contain them (*see* May 5, 2009 complaint, 3rd cause of action), which is a violation of Navigation Law § 176 and 17 NYCRR 32.5.

I conclude that the factual allegations of the May 5, 2009 complaint state meritorious claims that Respondents violated provisions of the Navigation Law and implementing regulations. In addition, Exhibits C and D confirm the allegations that are based on Staff's May 28, 2008 and May 4, 2009 site inspections. Therefore, the Commissioner may grant default judgment against Respondents on the issue of liability.

III. Relief

A. Civil Penalty

In the May 5, 2009 complaint, Staff requests an order from the Commissioner that would assess a total civil penalty not to exceed $86,900,000, and direct Respondents to remediate the

site. In the motion for default judgment, however, Staff requests a minimum civil penalty of $111,800. To support the civil penalty requested in the July 29, 2009 motion for default judgment, Staff refers to Navigation Law § 192. Section 192 authorizes a civil penalty of not more than $25,000 for each violation, and that each day a violation continues is considered a separate violation.

In his July 29, 2009 affirmation, Mr. Urda refers to the Department's enforcement policies, including the: (1) June 1990 Civil Penalty Policy (DEE-1); (2) March 1991 Bulk Storage and Spill Response Enforcement Policy (DEE-4); and (3) May 2003 Petroleum Bulk Storage Inspection Enforcement Policy (DEE-22). Based on these guidance documents, Staff argued that the following aggravating factors justify the requested civil penalty.

First, Department staff notes the continuous nature of the violations. Over the course of four inspections from February 2007 to May 2009, Staff observed petroleum products leaking from 55-gallon drums at the site. In each instance, Respondents did not report the spills, and Respondents did not clean up the spilled petroleum products. Staff argues that Respondents avoided substantial business costs by ignoring the applicable legal requirements and, consequently, obtained a significant economic benefit. Staff, however, did not attempt to quantitatively estimate the economic benefit that Respondents may have realized.

Second, Staff argues that Respondents are culpable due to the nature of their business. Staff notes that the focus of Respondents' business is cleaning up petroleum spills, as well as disposing waste petroleum and petroleum-contaminated soils and debris.

Third, Respondent's failure to comply with the regulations has threatened the public health and welfare of State residences, as well as the natural resources of the State, according to Staff. Finally, Staff contended that the requested civil penalty would deter Respondents and others from future violations of the Navigation Law.

Upon review of Staff's motion papers, I conclude that Department staff has provided a reasoned explanation for the requested civil penalty. Staff's request is within the

potential maximum penalty authorized by law and is consistent with the Department's guidance. Therefore, the Commissioner should jointly and severally assess a total civil penalty of $111,800.

B. Remediation

Department staff also requested that the Commissioner direct Respondents to remediate the site in a manner consistent with a plan approved by Staff. Pursuant to Navigation Law § 176(2)(a), the Commissioner may direct the discharger to cleanup and remove the petroleum discharge in accordance with environmental priorities and procedures established by the Department.

Ironically, Respondents operate a business that, in part, cleans up petroleum spills. Accordingly, the Commissioner should direct Respondents to prepare a remediation plan and submit it to Department staff for review and approval. Upon review by Department staff, the Commissioner should direct Respondents to implement the remediation plan and to clean up the site.

Conclusions and Recommendation

Based on the foregoing discussion, I conclude that Staff's motion for a default judgment meets the requirements outlined at 6 NYCRR 622.15(b) and related administrative precedents. In addition, Department staff has provided a reasoned explanation for the requested civil penalty, as well as the need to remediate the site. Therefore, in accordance with 6 NYCRR 622.15(c), I have prepared this summary report, and recommend that the Commissioner grant Department staff's motion for default judgment.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge