STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law and Title 6 of the Codes, Rules and Regulations of the State of New York, by:

CONEY ISLAND DEVELOPMENT CORP., LLC,

Respondent.

RULING OF THE ADMINISTRATIVE LAW JUDGE

(No. C0-0001-04-11)

Summary

By papers dated November 29, 2004, Staff of the Department of Environmental Conservation ("Department Staff") moved for an order without hearing against Coney Island Development Corp., LLC, pursuant to Section 622.12 of Title 6 of the Codes, Rules and Regulations of the State of New York [6 NYCRR 622.12]. Department Staff's motion asserts that the Respondent violated Environmental Conservation Law (ECL) Article 27-0907 and 6 NYCRR Sections 372.2(c)(2) and (4), 373-2.5(e) and 373-3.5(e) in relation to its failure to timely submit an annual hazardous waste report for the year 2003.

Staff's motion must be denied because its supporting papers lack evidence about the Respondent's activities from which one may conclude that it had an obligation to meet any of the cited requirements. In particular, Staff's papers contain only conclusory assertions that the Respondent is a "generator" of hazardous waste, as defined at ECL Section 27-0908(1)(b), and that it was required to file a 2003 hazardous waste report. Evidence to support these assertions is not part of Staff's papers, so there is no way to confirm the accuracy of the assertions.

Though the Respondent has not answered Staff's motion for order without hearing, Staff has failed to make a prima facie showing of its entitlement to judgment as a matter of law, because it has failed to provide specific evidence for each element of any of the asserted causes of action. Department Staff shall either make a new motion which provides this evidence, or appear at a hearing at which evidence for the alleged violation of 6 NYCRR 372.2(c)(2) - - the only one which is adequately pleaded - - may be made part of a record that I can evaluate to determine if the violation is substantiated.

Background

Department Staff initiated this action by serving a motion for order without hearing dated November 29, 2004. Apart from the motion itself, supporting papers include an affirmation of G. Stephen Hamilton, hazardous waste compliance counsel for the Department's division of environmental enforcement; an affidavit of Earnest Robbins, an environmental program specialist with the Department's division of solid and hazardous materials; and a memorandum of law. As required by 6 NYCRR 622.12(b), the motion includes a statement that a response must be filed within 20 days of receipt of the motion and that failure to answer constitutes a default.

By letter dated January 3, 2005, Mr. Hamilton informed the Department's chief administrative law judge, James McClymonds, that the time to respond to the motion had passed and that there had been no communication from Coney Island Development Corp., LLC. Attached to Mr. Hamilton's letter was an affidavit of Elissa Armater, a Department employee, indicating service of the motion papers by certified mail; as well as a return receipt indicating delivery of the papers, addressed to the Respondent, on December 7, 2004, at 160 Broadway - 15th Floor, New York, New York, 10038. Also attached was a proposed order for the Commissioner's signature, and a "service affirmation brief" in which Mr. Hamilton argued that the Respondent had waived its rights to contest Department Staff's assertions and the relief Staff seeks in this matter.

Staff requests, and claims it is entitled to, a decision on its motion for order without hearing. Staff also claims it is entitled to, but does not seek, a default judgment pursuant to 6 NYCRR 622.15. In terms of relief, Staff requests a three thousand dollar ($3,000) civil penalty and submission of a 2003 annual report within 10 days of a Commissioner's order. (Staff's proposed order extends this time frame to 20 days.)

Within 20 days of receipt of a motion for order without hearing, a respondent must file a response with the Department's Chief ALJ, such response to include supporting affidavits and other available documentation [6 NYCRR 622.12(c)]. No response to Staff's motion has been received by the Chief ALJ or Department Staff.

Discussion

Department Staff has moved for an order without hearing for violations of ECL Section 27-0907 as well as 6 NYCRR 372.2(c)(2)

and (4), 373-2.5(e) and 373-3.5(e). The motion must be denied, however. According to the Department's regulations, such a motion is to be served "with supporting affidavits reciting all the material facts and other available documentary evidence." [6 NYCRR 622.12(a)]. Staff's papers demonstrate, on a factual basis, that the Respondent failed to submit a 2003 hazardous waste report, but not that it was required to submit such a report. Facts and documentation to support key contentions in Staff's papers have not been presented.

ECL Section 27-0907(6) requires the Department Commissioner to promulgate regulations establishing standards which shall be applicable to generators of hazardous waste, such standards to include submission of an annual report to the Commissioner, and additional reports at such times as the Commissioner deems necessary, respecting:

- - The quantities and composition of hazardous wastes generated during a specified time period;
- - The disposition of these hazardous wastes;
- - The efforts undertaken during the year to reduce waste volume or quantity and toxicity;
- - The changes in volume or quantity and toxicity of waste actually achieved during the year in question in comparison with previous years;
- - Certification on the part of the generator that it has in place a program to reduce the volume or quantity and toxicity of hazardous wastes to the degree determined by the generator to be economically practicable or, if a hazardous waste reduction plan is required by and reviewable under the ECL, a program that meets the statutory requirements; and
- - Certification that the treatment, storage or disposal method utilized by the generator is that practicable method currently available which minimizes present and future threats to human health and the environment.

The regulations promulgated pursuant to the statute are 6 NYCRR 372.2(c)(2), for annual reports, and 6 NYCRR 372.2(c)(4), for additional reports. Section 372.2(c)(2)(i) states that generators who ship any hazardous waste offsite to a treatment, storage or disposal facility located within the United States must submit an annual report to the Department no later than March 1 for the preceding calendar year, such report to include the following information:

- - The Environmental Protection Agency (EPA) identification number, name and address of the generator;
- - The calendar year covered by the report;

- - The EPA identification number, name and address for each offsite treatment, storage or disposal facility in the U.S. to which waste was shipped during the year;

- - The name and EPA identification number of each transporter used during the reporting year for shipments to a treatment, storage or disposal facility within the U.S.;

- - A description, EPA hazardous waste number, DOT hazardous class, and quantity of each hazardous waste shipped offsite for shipments to a treatment, storage or disposal facility within the U.S.;

- - A description of the efforts undertaken during the year to reduce the volume and toxicity of the waste generated;

- - A description of the changes in volume and toxicity of the waste actually achieved during the year in comparison with previous years to the extent such information is available for years prior to 1984; and

- - A certification signed by the generator or authorized representative.

According to 6 NYCRR 372.2(c)(2)(ii), any generator who treats or disposes of hazardous waste onsite must submit an annual report covering those wastes in accordance with the provisions of 6 NYCRR 373-2.5(e). Those provisions include many of the same reporting requirements as those under 6 NYCRR 372.2(c)(2)(i), as well as others addressing treatment and disposal. Section 373-2.5(e) applies to hazardous waste treatment, storage and disposal facilities with final status (in other words, those that have permits). Another section, 373-3.5(e), contains identical requirements for facilities with interim status (those that may operate as a temporary measure prior to completing permit processing requirements). [Interim status is discussed at 6 NYCRR 373-1.3(a).] The annual report under 6 NYCRR 372.2(c)(2)(ii) is also due no later than March 1 for the preceding calendar year.

Mr. Hamilton's affirmation, which is part of Staff's motion papers, states that the Respondent violated ECL 27-0907 as well as 6 NYCRR 372.2(c) (2) and (4), 373-2.5(e) and 373-3.5(e) when it failed to submit an annual hazardous waste report for the 2003 calendar year by March 1, 2004. His affirmation also states that the Respondent remains in violation because the report still has not been submitted.

A hazardous waste generator's failure to timely submit an annual report is not a violation of ECL 27-0907, which imposes duties on the Department Commissioner; it is a violation of a regulatory requirement promulgated pursuant to that statute. It is a violation of 6 NYCRR 372.2(c)(2)(i) if the generator ships

hazardous waste offsite to a treatment, storage or disposal facility within the U.S., and it is a violation of 6 NYCRR 372.2(c)(2)(ii) if the generator treats or disposes of hazardous waste onsite. It is not a violation of 6 NYCRR 372.2(c)(4) because that section applies to additional reports, apart from the annual report, concerning the quantities and disposition of wastes, that the Commissioner may require generators to furnish, if necessary. Nor is it a violation of 6 NYCRR 373-2.5(e) and 373-3.5(a), as those sections apply to hazardous waste treatment, storage and disposal facilities.

Department Staff's case for violation of 6 NYCRR 372.2(c)(2) is premised on the statement in Mr. Hamilton's affirmation that Coney Island Development Corp., LLC, is a "generator" of hazardous waste as that term is defined in ECL Section 27-0908. Evidence for this legal conclusion does not appear in Mr. Hamilton's affirmation or elsewhere in the motion papers. According to ECL Section 27-0908(1)(b), a "generator" is "any person, by site, whose act or process produces hazardous waste or whose act first causes a hazardous waste to become subject to regulation." There is no evidence of the acts or processes in which the Respondent is involved, and how those acts generate hazardous waste. The site of the Respondent's activities, and their scope, are also unknown, and there is no evidence whether the Respondent treats or disposes of generated waste onsite, or whether it ships any or all of the waste offsite for treatment, storage or disposal. (Though it is alleged that the Respondent is a hazardous waste generator, there is no specific allegation that the Respondent owns or operates a treatment, storage or disposal facility.)

The affidavit of Mr. Robbins states that, based on Department manifest records for 2003, he determined that the Respondent was required to file a 2003 hazardous waste report, in accordance with ECL Section 27-0907 and 6 NYCRR 372.2(c)(2) and (4), 373-2.5(e) and 373-3.5(e). However, the particular records he reviewed are not specified or attached to Staff's motion. Furthermore, there is no explanation of how these records led Mr. Robbins to his conclusion regarding the Respondent's duty to report.

Department Staff's motion for order without hearing must be denied because its supporting papers do not establish all elements of the one cause of action which has been adequately pleaded - - violation of 6 NYCRR 372.2(c)(2). The affidavit of Mr. Robbins establishes that the Respondent did not file a 2003 annual report prior to the March 1, 2004, deadline, though at one point in the affidavit, addressing the maximum possible penalty,

Mr. Robbins incorrectly states that the Respondent has been in violation since May 1, 2004. What Staff has not established on a factual basis is that the Respondent was a generator of hazardous waste, and therefore was required to submit such a report. Conclusory statements that the Respondent is a generator and that it was required to submit a report, as contained in Staff's papers, do not adequately substitute for the recitation of material facts supporting these conclusions, consistent with 6 NYCRR 622.12(a).

As the Commissioner noted recently in Matter of Richard Locaparra, d/b/a L & L Scrap Metals:

"The moving party on a summary judgment motion has the burden of establishing 'his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor (CPLR 3212, subd [b]).' [Friends of Animals v. Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979).] The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. [See Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).] The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion."

[Final Decision and Order of the Commissioner, June 16, 2003, page 4.]

Department Staff's affidavit of mail service, coupled with the return receipt indicating delivery to Coney Island Development Corp., are adequate to demonstrate service of the motion for order without hearing. No response to the motion has been made, and therefore the Respondent could be held in default, at least with regard to the violation of 6 NYCRR 372.2(c)(2), the one cause of action which has been adequately pleaded, and for which relief could be granted. However, Staff has said that it wants this matter decided on its merits, and not on the basis of a default. To accomplish this, Staff must serve a new motion that corrects the defects of this one, or appear at a hearing at which the evidence supporting the violation of 6 NYCRR 372.2(c)(2) shall be fully presented. That would include evidence that the Respondent was a hazardous waste generator in 2003, the year for which the report is sought.

Any new motion for order without hearing must clearly state the violations that are alleged, to address an ambiguity created by a discrepancy between the motion papers and the draft order

that Staff subsequently developed for the Commissioner's signature. As noted above, the motion papers allege several violations. However, the proposed order addresses only one, a violation of 6 NYCRR 372.2(c)(2). If the other causes of action have been withdrawn, this has not been stated explicitly.

Ruling

The motion for order without hearing is denied. A copy of any new such motion and its supporting papers shall be sent to the Chief ALJ, consistent with 6 NYCRR 622.12(a). If instead Staff wants a hearing on the alleged violation of 6 NYCRR 372.2(c)(2), it shall contact me directly for establishment of a date and hearing location.

/s/
Edward Buhrmaster
Administrative Law Judge

Albany, New York
January 12, 2005

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