

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article
27 of the Environmental Conservation Law of the
State of New York and Part 360 of the Official
Compilation of Codes, Rules and Regulations of
the State of New York and Registration #39M10

ORDER

-- by --

Case No. R4-2002-1122-140A

DARRYL BARTON,

Respondent.

WHEREAS:

1. Pursuant to Section 622.15 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the New York State Department of Environmental Conservation ("Department") duly served a notice of hearing and complaint upon Darryl Barton ("respondent").
2. The notice of hearing included a statement that failure to timely answer or failure to attend a pre-hearing conference would result in a default under 6 NYCRR 622.15 and a waiver of respondent's right to a hearing.
3. The affidavit of Environmental Conservation Officer T.R. Harrington states that respondent was personally served with a copy of the notice of hearing and complaint on January 29, 2004.
4. In the complaint, Department staff alleged four causes of action relating to respondent's recycling facility (registration #39M10) located on Domenico Road in the Town of Burlington, Otsego County ("recycling facility" or "site"). The causes of action alleged by Department staff are summarized below:
 - (i) respondent failed to submit annual reports for the recycling facility for seven years, in violation of 6 NYCRR 360-1.8(h)(8);
 - (ii) respondent failed to retain records of unauthorized waste that it accepted and the final disposition of that waste, in violation of 6 NYCRR 360-1.14(i);
 - (iii) respondent failed to confine waste on the site, in violation of 6 NYCRR 360-1.14(j); and
 - (iv) respondent operated a solid waste management facility without a permit, in violation of 6 NYCRR 360-1.7(a)(1)(i).

5. By affidavit of George Elston, sworn to April 9, 2004, Department staff addressed the violations alleged in the complaint, including the violation that respondent received materials that he was not authorized to receive at the recycling facility and was therefore operating a solid waste management facility without a permit. The affidavit of George Elston also established that the proposed penalty was appropriate, based on the nature and the duration of the violations. Among the aggravating factors cited in the affidavit were respondent's failure to comply with requests over a number of years to bring the recycling facility into compliance with its registration, respondent's poor management of the recycling facility including problems with litter, and respondent's bringing of non-recyclable material to the recycling facility and disposing it on the site.

6. By affirmation of Ann Lapinski, Esq. dated April 9, 2004, Department staff establishes that respondent failed to serve an answer on Department staff within 20 days of his receipt of the notice of hearing and complaint or in an otherwise timely manner and that respondent failed to attend the pre-hearing conference in this matter. Failure to answer a complaint or to attend a pre-hearing conference are grounds for a default judgment pursuant to 6 NYCRR 622.15. Accordingly, Department staff's allegations against respondent in the complaint are deemed to have been admitted by respondent.

7. A copy of the notice of motion and supporting papers seeking the judgment by default were filed with the Office of Hearings and Mediation Services and the matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick. A copy of the ALJ's Summary Report is attached, which I adopt.

NOW, THEREFORE, having considered this matter, it is ORDERED that:

- I. Department staff's motion for a default judgment is granted and, pursuant to 6 NYCRR 622.15, respondent is found to be in default and to have violated 6 NYCRR 360-1.8(h)(8), 360-1.14(i), 360-1.14(j), and 360-1.7(a)(1)(i), as charged by Department staff in the complaint.
- II. Respondent Darryl Barton is assessed a civil penalty of seven thousand five hundred dollars (\$7,500) to be paid within 30 days from the date of service of a copy of this order on respondent. Payment of this penalty shall be by cashier's check, certified check or money order drawn to the order of "New York State Department Environmental Conservation" and delivered to Ann Lapinski, Esq., New York State Department of Environmental Conservation, Region 4, 1150 North Westcott Road, Schenectady, NY 12306.
- III. Within thirty (30) days from the date of service of a copy of this order on respondent, respondent shall remove all solid waste and recyclable materials from the site ("removed material") to a facility or facilities authorized to receive such solid waste and recyclable materials. Within sixty (60) days from the date of service of a copy of this order on respondent, respondent shall submit receipts or other documents to Department staff that demonstrate that all the removed material from the site was properly disposed or recycled. Such receipts or documents shall include the names and addresses of the facilities to which the removed material was taken for disposal or recycling, the dates on which the removed material was taken to facilities for disposal or recycling, a description of the types and amount of removed material taken to each such facility, and any other information that Department staff may direct respondent to provide with respect to

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SUMMARY REPORT

-- by --

Case No. R4-2002-1122-140A

DARRYL BARTON,

Respondent.

PROCEEDINGS

By a Complaint dated January 12, 2004, staff of the Department of Environmental Conservation ("DEC Staff") alleged four causes of action against Darryl Barton ("respondent") for violations related to respondent's recycling facility (registration # 39M10) located on Domenico Road in the Town of Burlington, Otsego County. The causes of action alleged by DEC Staff are summarized below:

- (i) respondent failed to submit annual reports for 1996, 1997, 1998, 1999, 2000, 2001, and 2002, in violation of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York. ("6 NYCRR") 360-1.8(h)(8);
- (ii) respondent failed to retain records of unauthorized waste accepted and the final disposition, in violation of 6 NYCRR 360-1.14(i);
- (iii) respondent failed to confine waste on the site, in violation of 6 NYCRR 360-1.14(j); and
- (iv) respondent operated a solid waste management facility without a permit, in violation of 6 NYCRR 360-1.7(a)(1)(i).

By notice of motion dated April 9, 2004, DEC Staff sought a judgment by default against respondent for these alleged violations. In support of the motion, DEC Staff submitted an affirmation of DEC Staff Attorney Ann Lapinski and the affidavit of George Elston, a member of DEC Staff.

The Notice of Hearing and Complaint were personally served on respondent by Environmental Conservation Officer T. R. Harrington on January 29, 2004 and an affidavit of personal service is included with the default motion. To date, respondent has failed to serve an answer or otherwise move, although the time to do so expired on or about February 18, 2004.

The penalty of seven thousand five hundred dollars (\$7,500) sought by DEC Staff is consistent

with the Department's Civil Penalty Policy. DEC Staff provide the following justification for the monetary penalty: that respondent has failed to comply with requests made over the past seven years to bring the facility into compliance and the site is poorly managed with waste and litter spread across the property.

In addition to the monetary penalty, DEC Staff also seek an order of the Commissioner to require respondent to take certain remedial and corrective actions including the cleaning up of the site and the revocation of respondent's registration.

The Notice of Motion for Default Judgment and supporting papers were mailed to respondent on or about April 9, 2004. Respondent has not opposed the motion.

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 OF FACT

- II On January 29, 2004, DEC Staff personally served a Notice of Hearing and Complaint on the respondent. The time to answer or otherwise move expired on or about February 18, 2004. No answer has been served to date.
- II Respondent failed to appear at a pre-hearing conference scheduled and held on February 3, 2004 at the NYSDEC Region 4 Office.
- II Staff mailed the motion for default judgment and supporting papers on respondent on or about April 9, 2004. Respondent has not opposed said motion.
- II The requirements for a default judgment have been adequately met as prescribed by 6 NYCRR 622.15(b).

CONCLUSION

The motion for default judgment should be granted. This Default Summary Report and a proposed Order (attached hereto) are referred to the Commissioner for final determination.

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

To: Ann Lapinski, Esq.
Assistant Regional Attorney
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Mr. Darryl Barton
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