STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the New York State Environmental Conservation Law (ECL) and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

ORDER

DEC Case No.
R9-20170302-22

-by-

BENTLEY TREE CARE, LLC and
BENTLEY-RIPLEY FARMS, INC.,

Respondents.

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Bentley Tree Care, LLC and respondent Bentley-Ripley Farms, Inc. violated (a) ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i) by operating a solid waste management facility without a permit; and (b) former 6 NYCRR 360-1.5(a)(1) and (2) by disposing of solid waste at a facility not authorized as a solid waste disposal facility, at property located on East Main Road, Ripley, Chautauqua County, New York (site) (*see* Hearing Report at 3 [Finding of Fact No. 3]; *see also* Hearing Exhibit 14).[1]

Staff in its complaint requested that the Commissioner issue an order: (1) finding respondents liable for the violations; (2) imposing on respondents a civil penalty in the amount of forty-eight thousand dollars ($48,000); (3) directing respondents to perform the following corrective actions: (a) cease acceptance and disposal of solid waste at the facility; (b) submit a disposal plan acceptable to the Department "to address the cleanup of the contaminated soil pile and accumulated residues;" (c) include the name of the disposal location and waste transporter; and (d) remove all waste from the facility in accordance with a Department-approved disposal plan; and (4) for such other and further relief as may be just, proper and appropriate. See Complaint dated October 16, 2017, at 3-4.

The matter was assigned to Administrative Law Judge (ALJ) D. Scott Bassinson who prepared the attached hearing report which I adopt in part as my decision in this matter, subject to my comments below.

A wood processing facility is located at the site where wood is brought to be processed into firewood and mulch for individuals and institutions (*see* Hearing Report at 4 [Finding of Fact No. 11]). The wood processing facility, including numerous piles of material, covers an estimated three acres (*see* Hearing Transcript dated February 21, 2018, at 19, 23, and 94).

[1] Part 360 of 6 NYCRR and its various subparts were amended, with the amendments becoming effective November 2017 (*see* Hearing Report at 1, fn 1).

Approximately 100 truckloads of wood material are brought to the site annually (*see* Hearing Report at 4 [Finding of Fact No. 12]). Department staff, during its visit to the site in September 2015, observed piles of tree stumps and limbs, what appeared to be utility poles and an appliance (*see id.* at 3 [Finding of Fact No. 7]). Department staff revisited the site in September 2017 where staff described, in addition to piles of tree stumps and limbs, the presence of wire, fence posts, metal, tree debris, "pressure-treated fence posts," and demolition debris (*see id.* at 3-4 [Findings of Fact Nos. 9 and 10]).

Liability

During the adjudicatory hearing, Department staff moved for a default judgment against respondent Bentley-Ripley Farms, Inc. for failure to answer the complaint and the ALJ reserved on the motion. In the hearing report, the ALJ, upon reviewing the record, recommended that I deny Department staff's motion for a default judgment and dismiss the claims as against Bentley-Ripley Farms, Inc. (*see* Hearing Report at 6-9, 14). Based on the analysis that the ALJ presented, I concur with the ALJ's recommendation.[2]

With respect to the remaining respondent, Bentley Tree Care, LLC, the ALJ found respondent Bentley Tree Care, LLC liable for a violation of ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i) by its operation of a solid waste management facility without a permit at the site (*see* Hearing Report at 9-10, 13). The ALJ, however, concluded that staff failed to meet its burden with respect to staff's second allegation that respondent disposed of solid waste at a facility not authorized as a solid waste disposal facility (*see* Hearing Record at 10-13). I adopt the ALJ's findings of liability with respect to respondent Bentley Tree Care, LLC.

Civil Penalty

Department staff sought the imposition of a civil penalty in the amount of forty-eight thousand dollars ($48,000). In its reference to the penalty, Department staff cited ECL 71-4003 which is the general civil penalty statute that provides for a penalty of $1,000 for each violation and $1,000 for each day such violation continues.

The ALJ indicates that the complaint and the record are deficient as to the discussion of the civil penalty and, consequently, recommends that, for the one violation found against respondent Bentley Tree Care, LLC, I impose a civil penalty in the amount of one thousand dollars ($1,000) (*see* Hearing Report at 13).

The ALJ is correct that staff should, in its papers and/or in its presentation at hearing, address how a proposed penalty is calculated. Such calculation would include, in addition to the applicable statutory penalty provisions, relevant Departmental policy guidance, administrative precedent, and aggravating or mitigating circumstances, among other factors (*see e.g.*, *Matter of Waste Away Carting of NY, Inc.*, Interim Decision and Order of the Commissioner, February 12, 2020, at 4).

[2] During the hearing respondent Bentley-Ripley Farms, Inc. filed a motion for leave to serve a late answer. With the dismissal of the claims against that respondent, the motion for leave to serve a late answer is now moot.

Notwithstanding the ALJ's conclusion, the record before me supports a higher penalty than the substantial reduction that the ALJ proposes. As noted, the record indicates that wire, metal, demolition debris and other unauthorized materials, in addition to wood and wood products, were received at this unpermitted and unregistered wood processing facility and there was commingling of the waste (*see* Hearing Report at 3-4 [Findings of Fact Nos. 7, 9 and 10]; *see also* Hearing Transcript dated February 21, 2018, at 23, 30-31, 41-42, and 52-53). Such unauthorized waste and commingling were observed at the site on two separate occasions (September 2015 and September 2017). The waste materials were at the site for some duration, although the exact period of time is not indicated.

ECL 71-2703, which is referenced by the ALJ and would apply to the violations that staff cites,[3] provides for a civil penalty not to exceed seven thousand five hundred dollars ($7,500) for each such violation and an additional penalty of not more than one thousand five hundred dollars ($1,500) for each day that the violation continues. As one of the two counts have been dismissed, a reduction in the requested penalty is appropriate. Based upon the violations identified in the two separate inspections, I am imposing a civil penalty of seven thousand five hundred dollars ($7,500) for the violations identified in 2015 and seven thousand five hundred dollars ($7,500) for the violations identified in 2017, for a total of fifteen thousand dollars ($15,000).[4] Although this amount is below what was requested, on this record the penalty is authorized and appropriate. Respondent Bentley Tree Care, LLC is directed to pay the penalty within thirty (30) days of the service of this order upon it.

Corrective Action

As previously noted, Department staff, in its complaint, requested that respondent: cease the acceptance and disposal of solid waste at the facility; submit a disposal plan acceptable to the Department "to address the cleanup of the contaminated soil pile and accumulated residues," which plan is to include the name of the disposal location and waste transporter; and remove all waste from the facility in accordance with a Department-approved disposal plan.

The ALJ did not accept Department staff's request but rather recommended that respondent Bentley Tree Care, LLC, allow Department staff access to the site to determine: (a) whether additional remedial activities are required with respect to solid waste at the site and, if so, to submit to the Department an approvable plan to properly dispose of such solid waste; and (b) the character and extent of current operations at the site. The ALJ also directed respondent Bentley Tree Care, LLC to apply for a permit if current operations at the site, as determined by Department staff, require such a permit. No timeframes for compliance were included in the ALJ's recommendations.

Upon consideration, I am adopting staff's request for corrective action at the site with modifications and am imposing appropriate timeframes for these actions. As modified, I am directing the following corrective actions:

[3] ECL 71-4003 specifies that its penalty provision applies, "[e]xcept as otherwise specifically provided elsewhere in this chapter" and here the penalty language in ECL 71-2703 would be applicable.

[4] The ALJ was not able to determine how long materials were present onsite (*see e.g.,* Hearing Report at 11).

-- within thirty (30) days of the service of this order upon it, respondent shall submit a report to the Department describing the character and extent of the current operations at the site, the identity of any unauthorized waste at the site (including, but not limited to, appliances, metal material [including wire], and adulterated wood or wood products), and the extent of commingling of such waste;

-- within thirty (30) days of the service of this order upon it, respondent shall submit to the Department an approvable[5] plan for the disposal of all unauthorized waste at the site, including waste that has been improperly commingled. The plan, among other things, shall include the manner of disposal, the name of the waste transporter and disposal facility which respondent will be using for the transport and disposal of such waste, and appropriate documentation demonstrating that the waste transporter and disposal facility are authorized, respectively, to transport and receive the waste, and the timetable for disposal; and

--within sixty (60) days of the service of this order upon it, respondent shall, following consultation with Department staff: (a) submit to the Department an application for a permit and any other approvals required for the operations at the site and the receipt of materials at the site that are subject to the Department's jurisdiction; or (b) provide documentation that all site operations that would require Department permits or approvals have ceased and all unauthorized wastes have been removed.

Department staff, at its sole discretion, may extend the corrective action timeframes contained in this order upon good cause shown by respondent. Any request by respondent to extend any of these corrective action timeframes must be in writing and provide sufficient documentation in support of the request.

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

I. Based on record evidence, respondent Bentley Tree Care, LLC violated ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i) by its operating of a solid waste management facility without a permit at a site located on East Main Road, Ripley, New York.

II. The allegation that respondent Bentley Tree Care, LLC violated former 6 NYCRR 360-1.5(a)(1) and (2) by disposing of solid waste at a facility not authorized as a solid waste disposal facility, at a site located on East Main Road, Ripley, New York is dismissed.

III. The complaint against respondent Bentley-Ripley Farms, Inc. is dismissed.

[5] "Approvable" means a plan that can be approved by Department staff with only minimal revision.

IV. Respondent Bentley Tree Care, LLC is hereby assessed a civil penalty in the amount of fifteen thousand dollars ($15,000). Respondent shall pay the penalty within thirty (30) days of the service of this order upon respondent. Payment is to be by certified check, cashier's check or money order made payable to the "New York State Department of Environmental Conservation."

V. Respondent Bentley Tree Care, LLC is directed to undertake the following corrective action with respect to the site located on East Main Road, Ripley, New York:

A. within thirty (30) days of the service of this order upon it, respondent shall submit a report to the Department describing the character and extent of the current operations at the site, identifying any unauthorized waste at the site (including, but not limited to, appliances, metal material [including wire], and adulterated wood or wood products), and the extent of commingling of such waste;

B. within thirty (30) days of the service of this order upon it, respondent shall submit an approvable plan to the Department for the disposal of all unauthorized waste at the site, including waste that has been improperly commingled. The plan, among other things, shall include: the manner of disposal; the name of the waste transporter and disposal facility which respondent will be using for the transport and disposal of such waste, and appropriate documentation demonstrating that the waste transporter and disposal facility are authorized, respectively, to transport and receive the waste; and the timetable for disposal; and

C. within sixty (60) days of the service of this order upon it, respondent shall, following consultation with Department staff:
   1. submit to the Department an application for a permit and any other approvals required for the operations at the site and the receipt of materials at the site that are subject to the Department's jurisdiction; or
   2. provide documentation that all site operations that would require Department permits or approvals have ceased and all unauthorized wastes have been removed.

Department staff may, at its sole discretion, extend the timeframes contained in this Paragraph V of the order upon good cause shown by respondent. Any request by respondent to extend any of these corrective action timeframes must be in writing and provide sufficient documentation in support of the request.

VI. The civil penalty payment shall be sent to the following address:

Maureen Brady, Esq.[6]
Regional Attorney
New York State Department of Environmental Conservation
Region 9, Office of General Counsel
270 Michigan Avenue
Buffalo, New York 14203

VII. Any questions or other correspondence regarding this order shall also be addressed to Maureen Brady, Esq, at the addressed referenced in Paragraph VI of this order.

VIII. The provisions, terms and conditions of this order shall bind respondent Bentley Tree Care, LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: March 2, 2022
Albany, New York

[6] The assistant regional attorney from DEC Region 9 who handled this matter has transferred to another of the Department's regional offices. Accordingly, the Region 9 Regional Attorney is now being listed as the contact for this matter.

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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-by-

BENTLEY TREE CARE, LLC and
BENTLEY-RIPLEY FARMS, INC.,

Respondents.

HEARING REPORT

DEC Case No.
R9-20170302-22

I. Background

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondents Bentley Tree Care, LLC and Bentley-Ripley Farms, Inc. (collectively "respondents") violated (i) ECL § 27-0707 and 6 NYCRR § 360-1.7(a)(1)(i) by operating a solid waste management facility without a permit; and (ii) 6 NYCRR § 360-1.5(a)(1) and (2) by disposing of solid waste at a facility not authorized as a solid waste disposal facility, at property located at 9353 East Main Road, Ripley, New York ("site" or "property").[1]

Staff requests that the Commissioner issue an order: (1) finding respondents liable for the violations; (2) imposing on respondents a civil penalty in the amount of forty-eight thousand dollars ($48,000); (3) directing respondents to perform the following corrective actions: (a) cease acceptance and disposal of solid waste at the facility; (b) submit a disposal plan acceptable to the Department "to address the cleanup of the contaminated soil pile and accumulated residues;" (c) include the name of the disposal location and waste transporter; and (d) remove all waste from the facility in accordance with a Department-approved disposal plan; and (4) for such other and further relief as may be just, proper and appropriate. See Complaint dated October 16, 2017, at 4, Wherefore Clause, ¶¶ I-IV.

A pre-hearing conference was held before the undersigned on November 30, 2017 in the Department's Region 9 offices in Buffalo, New York. Jennifer Dougherty, Esq. represented Department staff. Andrew D. Brautigam, Esq. appeared on behalf of both respondents. At the

[1] The complaint states that "[u]nless otherwise noted, all references herein to any statutes and regulations refer to those … in effect for the time period encompassed by this Complaint." Complaint at 2, ¶ 6. Part 360, comprised of Subparts 360-1 through 360-17, in effect at the times relevant to this proceeding, was repealed in 2017, and replaced by new Part 360, sections 360.1-360.22, effective 60 days after being filed on September 5, 2017 (that is, in November 2017). Because the events relevant to the claims in this proceeding all occurred prior to the effective date of the new Part 360 regulations, the claims in this case are governed by the former Part 360 regulations.

pre-hearing conference, counsel for Department staff noted that respondent Bentley-Ripley Farms, Inc. had not served an answer to the complaint, and agreed to an extension of time for that respondent to serve an answer.

An adjudicatory hearing was conducted on February 21, 2018 and March 14, 2018, before the undersigned and at the Department's Region 9 offices. At the beginning of the first day of hearing, Department staff moved for a default judgment against respondent Bentley-Ripley Farms, Inc. for failure to answer, and submitted papers in support of the motion. Counsel argued the motion on the record, and I reserved on the motion. See Hearing Transcript, February 21, 2018 ("Day I Tr.") at 6:20-9:1; 17:3-18:1.

At the beginning of the second day of hearing, respondent Bentley-Ripley Farms, Inc. filed a motion for leave to serve a late answer. I reserved on the motion pending service by Department staff of papers in opposition to respondent's motion. See Hearing Transcript, March 14, 2018 ("Day II Tr.") at 6:4-7:17. Staff thereafter served opposition papers dated March 21, 2018.

Over the course of the two days of hearing, Department staff called one witness to testify, and respondents called seven witnesses. Department staff submitted fourteen exhibits into the record, and respondents submitted six. A list of the exhibits is attached hereto as Appendix A.

At the close of Department staff's case-in-chief, respondents moved to dismiss the case arguing that Department staff failed to meet its evidentiary burden. See Day I Tr. at 100:12-102:18. I reserved on respondents' motion, see id. at 105:9-16, and respondents proceeded to put on their defense.

II. Findings of Fact

The following findings of fact are based upon a preponderance of the record evidence, the pleadings, exhibits admitted into evidence, and testimony provided at the hearing:

1. Respondent Bentley Tree Care, LLC is an active domestic limited liability company. See Complaint at 1, ¶ 2; see also Department of State Entity Information Sheet.[2]

2. Respondent Bentley-Ripley Farms, Inc. is an active domestic business corporation. See Complaint at 1, ¶ 3; see also Department of State Entity Information Sheet.[3]

[2] Department staff did not provide a copy of the entity information sheet for the record. I nevertheless take official notice of the information on the Department of State's corporations website. See https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY (search "Bentley Tree Care")

[3] Department staff did not provide a copy of the entity information sheet for the record. I nevertheless take official notice of the information on the Department of State's corporations website. See https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY (search "Bentley-Ripley").

3. This matter involves property located at 9353 East Main Road, Ripley New York. See Complaint at 2, ¶ 5; see also Day I Tr. at 61:2-21.

4. Nancy Loster has worked for the Department for approximately 33 years. Ms. Loster's current title is Environmental Engineering Technician III. See Day I Tr. at 28. Ms. Loster's responsibilities include inspection of solid waste facilities, assisting the Department's law enforcement in responding to solid waste disposal complaints, and assisting the regulated community and the public. See Day I Tr. at 29:16-24.

5. After an environmental conservation officer ("ECO") received a complaint concerning allegations of disposal at 9353 East Main Road in Ripley, New York, Ms. Loster searched Department records and determined that no solid waste permit or registration was associated with the property. See Day I Tr. at 30:13-31:1.

6. Ms. Loster and the ECO traveled to and entered onto the property on September 16, 2015. See Day I Tr. at 31:2-9; 62:24-63:3. Ms. Loster did not receive permission from the property owner to enter the property. See id. at 62:4-63:7. Ms. Loster took photographs on September 16, 2015 while on the property. See Hearing Exhibits ("Exs.") 1-3.

7. The photographs taken in 2015 show piles of tree stumps and limbs, see Exs. 1, 3, and what appear to be utility poles. See Ex. 2. Exhibit 1 also shows an appliance on the ground next to a pile of tree limbs. See Ex. 1.

8. Ms. Loster returned to the site on September 28, 2017 to conduct an inspection, and took several photographs as part of that inspection. See Day I Tr. at 38:5-19; see also Exs. 4-13. All of Ms. Loster's observations, and all photographs she took on September 28, 2017, were made from the road or from a neighboring property. She did not enter onto the site on September 28, 2017. See Day I Tr. at 69:2-9. She did not attempt to replicate in 2017 the photographs she took in 2015, and did not go to the same exact locations in 2017 as she did in 2015. See Day I Tr. at 86:1-8.

9. Some of the photographs taken in 2017 show piles of tree stumps and limbs. See e.g. Exs. 4, 5. Other 2017 photographs show what Ms. Loster described as wire, fence posts, metal, tree debris, and "pressure-treated fence posts." Day I Tr. at 39:21-43:22; see Exs. 6-11.

10. One photograph taken in 2017 depicts what Ms. Loster described as "demolition debris from some sort of housing or building, possibly roofing materials also appeared to be on-site, too." Day I Tr. at 44:1-9; see Ex. 12. The material was generated from the replacement of the roof on William Bentley's home, located across the street from the site. The material was

taken to the Ellery landfill less than a week after being removed from Mr. Bentley's home. See Day II Tr. at 59:14-60:22.

11. Wood brought to the site has been processed into firewood and mulch for individuals and institutions. See e.g. Day I Tr. at 107:12-108:11; 112:1-24; 114:16-24 (testimony of Robert Bentley); id. at 130:14-17 (testimony of site employee Kurt Moore); id. at 145:6-146:2; 146:19-147:16 (testimony of Bentley Tree Care employee and supervisor Keith Lane); Day II Tr. at 45:17-46:19 (testimony of William Bentley). The operation has also included taking logs to sawmills. See Day I Tr. at 108:12-109:19 (testimony of Robert Bentley); id. at 146:12-17 (testimony of Keith Lane).

12. Approximately 100 truckloads of wood material are brought to the site annually. See Day I Tr. at 150:17-23. Wood brought to the site is usually processed within three months. See id. at 149:3-14 (Cross-examination of Keith Lane, see Day I Tr. at 139:9-15).

13. In 2017, tree-grinding and splitting equipment was purchased for use at the property. See Day II Tr. at 62:2-20; see also Exs. R3, R4, R5, R6.

14. Respondents' witness Albert Richnafsky inspected the property on February 17, 2018 and March 10, 2018. See Day II Tr. at 13:11-20. He "walked the entire property" on both inspections. See Day II Tr. at 13:24-14:6. He testified that materials depicted in staff's 2015 and 2017 photographs were no longer at the property. See Day II Tr. at 14:7-17:13; 23:22-26:16.

III. Discussion and Conclusions of Law

A. Relevant Statutory and Regulatory Provisions

The first cause of action alleges that "Respondent(s)" violated ECL § 27-0707 and former 6 NYCRR § 360-1.7(a)(1)(i). The statutory provision states, in relevant part, that "no person shall commence operation, including site preparation and construction, of a new solid waste management facility until such person has obtained a permit pursuant to this title." ECL § 27-0707(1). The regulation in effect at the times relevant to this proceeding states similarly that, with certain exceptions, "no person shall … construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to this Part." Former 6 NYCRR § 360-1.7(a)(1)(i).

The second cause of action alleges that "Respondent(s)" violated former 6 NYCRR §§ 360-1.5(a)(1) and (2), which provide in relevant part that, with exceptions not relevant here,

> no person shall dispose of solid waste in this State except at:
>
> (1) a disposal facility exempt from the requirements of this Part; or

(2) a disposal facility authorized to accept such waste for disposal pursuant to this Part or to a department-issued or court-issued order.

Several definitions are relevant to the analysis of staff's claims. Chief among them is the term "solid waste," defined to include, among other things, "any garbage, refuse … and other discarded materials including solid … material, resulting from industrial, commercial, mining and agricultural operations, and from community activities." Former 6 NYCRR § 360-1.2(a)(1). Material is "discarded" if it is "abandoned by being: (i) disposed of; . . . or (iii) accumulated [or] stored . . . instead of or before being disposed of." Former 6 NYCRR § 360-1.2(a)(2).

Excluded from the definition of "solid waste" were "discarded materials that the department has determined are being beneficially used pursuant to section 360-1.15 of this Subpart." See former 6 NYCRR § 360-1.2(a)(4)(vii). The "beneficial use" exclusion provided in relevant part as follows:

> The following items are not considered solid waste for the purposes of this Part when used as described in this subdivision:
>
> * * *
>
> (3) unadulterated wood, wood chips, or bark from land clearing, logging operations, utility line clearing and maintenance operations, pulp and paper production, and wood products manufacturing, when these materials are placed in commerce for service as mulch, landscaping … [or] wood fuel production….

Former 6 NYCRR § 360-1.15(b)(3).

A "solid waste management facility" was defined as

> Any facility employed beyond the initial solid waste collection process and managing solid waste, including but not limited to: storage areas or facilities … disposal facilities …. The term includes all structures, appurtenances, and improvements on the land used for the management or disposal of solid waste.

Former 6 NYCRR § 360-1.2(b)(158).

The regulations defined "storage" with respect to solid waste as "the containment of any solid waste in a manner which does not constitute disposal under section 360-1.2(a)(3) … provided, however, that any accumulation of solid waste for a period in excess of 18 months shall be deemed to constitute disposal." Former 6 NYCRR § 360-1.2(b)(164). Solid waste is considered "disposed" "if it is deposited … or placed into or on any land … so that such material or any constituent thereof may enter the environment…." Former 6 NYCRR § 360-1.2(a)(3).

The regulations defined "owner" as "a person who owns a solid waste management facility or part of one." Former 6 NYCRR § 360-1.2(b)(114). "Operation" was defined as "in the case of a solid waste … processing facility, … operation after startup; and in the case of any

other solid waste management facility, operation of the facility after initial receipt of solid waste." "Operator" and "facility operator" were defined as follows:

> the person responsible for the overall operation of a solid waste management facility or a part of a facility with the authority and knowledge to make and implement decisions, or whose actions or failure to act may result in noncompliance with the requirements of this Part or the department-approved operating conditions at the facility or on the property on which the facility is located.

Former 6 NYCRR § 360-1.2(b)(113).

B. Liability

1. Motion for Default Judgment Against Bentley-Ripley Farms, Inc.

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint. See 6 NYCRR § 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." See 6 NYCRR § 622.15(a). Upon a respondent's failure to answer a complaint, Department staff may make a motion to an administrative law judge ("ALJ") for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR § 622.15(b)(1) – (3).

As discussed above, the record clearly reflects that respondent Bentley-Ripley Farms, Inc. did not serve an answer to the complaint. In addition, staff submitted a proposed order as part of the packet of materials ("Motion Packet") handed up to the undersigned at the beginning of the February 21, 2018 hearing. see Day I Tr. at 6:20-9:1; 17:3-18:1.

With respect to service of the complaint, Department staff has submitted an affidavit of service which states, among other things, that the affiant served a cover letter, notice of hearing, complaint and proposed consent order upon Bentley-Ripley Farms, Inc. "by depositing a true copy of the same by mail, enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office." See Motion Packet, Affidavit of Service of Pamela Frasier, sworn to October 17, 2017,

Ms. Frasier's affidavit of service does not state that the complaint was served by certified mail, only that it was served by mail. This is potentially problematic, of course, since service of a notice of hearing and complaint must be "by personal service consistent with the CPLR or by certified mail." 6 NYCRR § 622.3(a)(3). The page in Motion Packet immediately following Ms. Frasier's affidavit of service contains copies of what appear to be signed certified mail receipts, one each for each respondent, reflecting a delivery date as October 20, 2017, three days after the "mailing" by Ms. Frasier. See Motion Packet. Neither Ms. Frasier's affidavit of service, nor the Affirmation of Jennifer Dougherty, Esq. dated February 21, 2018, however, refers to the copies of certified mail receipts or explains that those certified mail receipts relate to

Ms. Frasier's service of the notice of hearing and complaint. See Motion Packet. Finally, although the October 16, 2017 cover letter enclosing the notice of hearing and complaint states that it was sent "CERTIFIED RETURN RESPONSE REQUIRED," it does not contain a tracking number so that one could verify that the tracking numbers on the signed certified mail receipts match a tracking number on the cover letter and notice of hearing and complaint package.

Thus, the record regarding service on respondent Bentley-Ripley Farms, Inc. of the notice of hearing and complaint is not clear. Neither the affidavit of service nor the affirmation of counsel submitted in support of staff's motion for default states that the complaint was served by certified mail, and there is no statement that the submitted certified mail receipts relate to service of the complaint. Although one might infer from the documents submitted together but whose connection to each other is not established, that this respondent was served properly, I need not reach that question, because Department staff is not entitled to a default judgment against Bentley-Ripley Farms, Inc. for an additional reason, as discussed below.

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted). To support of a motion for a default judgment, however, staff must also "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3. Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim. See Matter of Samber Holding Corp., Order of the Commissioner, March 12, 2018, at 1 (citing Woodson v Mendon Leasing Corp., 100 N.Y.2d 62, 70-71 (2003)); see also State v Williams, 44 A.D.3d 1149, 1151-1152 (3d Dep't 2007); CPLR 3215(f) (requiring a default movant to file "proof of the facts constituting the claim").

The complaint in this matter contains two allegations specifically identifying respondent Bentley-Ripley Farms, Inc., alleging that this respondent (i) is a domestic business corporation authorized to do business in New York, see Complaint at 1, ¶ 3; and (ii) is a "person" as defined in ECL § 1-0303(18) and 6 NYCRR § 360-1.2(b)(117). The remaining allegations in the complaint do not distinguish between the two respondents, most often using the word "respondent(s)," which connotes a reference to one respondent or the other, or both. See e.g. Complaint at 2, ¶ 5 ("At all relevant times mentioned herein, Respondent(s) owned and/or operated a facility located at 9353 East Main Road, Ripley, New York, 14775"); id. at 4, ¶ 20 ("Respondent(s) are operating a solid waste disposal facility…."); id. ¶ 21 ("Respondent(s) acceptance of solid waste constitutes the operation of an illegal, unregistered and unauthorized solid waste disposal facility in violation of ECL § 27-0707 and 6 NYCRR 360-1.7(a)(1)(i)"); id. at 4, ¶ 24 ("Respondent(s) disposed of debris … in violation of 6 NYCRR 360-1.5(a)(1) and (2)").

At the hearing, counsel discussed respondent Bentley-Ripley Farms, Inc. with respect to staff's default motion. See Day I Tr. at 6:24-17:8. The only other references in the record to respondent Bentley-Ripley Farms, Inc. are as follows:

- Department staff counsel's assertion during staff's opening statement that this entity owned the property at issue, see Day I Tr. at 19:6-18;
- Respondents' counsel's statement that Bentley-Ripley Farms, Inc. is a business organization owned by Bill Bentley, see id. at 25:6-8;
- Respondents' counsel's statement that Bentley-Ripley Farms "qualif[ies] for a beneficial use," id. at 27:4-7;
- The following exchange between respondents' counsel and staff witness Nancy Loster:

> **Mr. Brautigam**: Ms. Loster, did there come a time, as far as you know, you entered the property owned by the Bentley-Ripley Farms?
>
> **Ms. Loster**: I – obviously, I did; not all of the way in, but I did step onto the property, yes.

Day I Tr. at 62:24-63:3.

- Ms. Loster's testimony that she did not witness Bentley-Ripley Farms removing certain material from the site, see Day I Tr. at 70:24-71:3;
- Ms. Loster's testimony that she did not know whether Bentley-Ripley Farms placed certain material on the site, see Day I Tr. at 88:1-4.

The complaint alleges that "Respondent(s) owned and/or operated" the site. At the hearing, Department staff did not submit any proof that respondent Bentley-Ripley Farms, Inc. owned any of the real property at issue in this case. As set forth above, counsel for staff merely made that assertion in staff's opening statement. No deed, property tax document, or other indicia of ownership was submitted for the record. Nor did any of the respondents' witnesses concede that this respondent owned the property at issue.

Department staff also did not submit any evidence regarding any actions by respondent Bentley-Ripley Farms, Inc., including but not limited to any activities relating to the causes of action asserted here, such as having or exercising responsibility for storage of solid waste or the operation of a solid waste facility at the property. Staff's witness Ms. Loster did not testify that she witnessed any activities of Bentley-Ripley Farms, Inc., and neither counsel elicited testimony from respondents' many witnesses that Bentley-Ripley Farms, Inc. committed any specific act relating to disposal at or operation of the facility.

Thus, staff has not submitted "proof of the facts sufficient to support the claim[s]" alleged in this proceeding against Bentley-Ripley Farms, Inc. There is no evidence that respondent Bentley-Ripley Farms, Inc. owned or operated a solid waste management facility without a permit, or disposed of solid waste at the site. I therefore recommend that the

Commissioner deny Department staff's motion for a default judgment and dismiss the claims as against Bentley-Ripley Farms, Inc.[4]

2. Liability Based Upon the Full Record

Department staff bears the burden of proving, by a preponderance of the evidence, "all charges and matters which they affirmatively assert" in the cause of action. See 6 NYCRR §§ 622.11(b)(1), (c). To satisfy such burden with respect to both causes of action in this case, staff must prove that (i) the material at issue was "solid waste;" (ii) that respondent "operated" a "solid waste management facility" without a permit (first cause of action); and (iii) respondent "disposed" of solid waste at a non-exempt, unpermitted facility (second cause of action).

Department staff's evidence in support of its case-in-chief was comprised of (i) the testimony of Ms. Loster, who visited the site in 2015 and in 2017; (ii) photographs that Ms. Loster took during those site visits, see Exs. 1-13; and (iii) one aerial photograph from the Department's GIS website that Ms. Loster printed. See Ex. 14.

a. Are the Materials at Issue "Solid Waste?"

During her September 16, 2015 site visit, Ms. Loster entered onto the property and took photographs. See Findings of Fact No. 6. All three of the 2015 photographs offered by staff at the hearing were received into evidence. See Exs. 1-3. Exhibit 1 shows a field with two piles of tree limbs, trunks and stumps. In the center of that photograph is what appears to be a metal appliance. Exhibit 2 depicts what Ms. Loster described as "[u]tility poles, which contain creosote." Day I Tr. at 35:2-5. Exhibit 3 shows what Ms. Loster described as "wood waste" with "brush and trees and bushes growing over the top of it." Day I Tr. at 36:20-37:24.

The materials depicted in these photographs would comprise "solid waste" if not otherwise exempted or excluded from the definition. See former 6 NYCRR § 360-1.2(a)(1) (definition of "solid waste"). Respondents' position is that the tree limbs, trunks, stumps and "wood waste" are subject to the "beneficial use" exemption from the definition of solid waste, because that material is placed into commerce as mulch, firewood and other products. See e.g. Day I Tr. at 27:4-10; see former 6 NYCRR § 360-1.15(b)(3).

Even if applicable to the wood in the photographs, the exclusion would not apply to the metal appliance shown in Exhibit 1, the utility poles shown in Exhibit 2, the wire and pressure-treated fence posts shown in Exhibits 6-11, the roofing materials shown in Exhibit 12, or the "mattress and tarps" shown in Exhibit 13. See Day I Tr. at 45:8-19 (Loster description of Exhibit 13). These materials are "solid waste" under the regulations. In addition, to the extent any wood materials at the site were not "unadulterated wood, wood chips, or bark from land clearing, logging operations, utility line clearing and maintenance operations, pulp and paper

[4] Because I find that Department staff is not entitled to a default judgment against respondent Bentley-Ripley Farms, Inc., I need not address respondent's motion seeking leave to file a late answer.

production, and wood products manufacturing," former 6 NYCRR § 360-1.15(b)(3),[5] they would also be considered "solid waste."

b. Did Respondents Operate a Solid Waste Management Facility?

As the Commissioner has held, solid waste that qualifies for a regulatory beneficial use determination remains solid waste until it is actually used in the manner described in the beneficial use determination regulation. See Matter of BCD Tire Chip Manufacturing, Inc., Decision and Order of the Commissioner, March 26, 2013, at 5 ("[u]nder the regulatory BUD, tire chips stop being solid waste when they are used as fuel for energy recovery, not before") (emphasis added). In this case, the evidence clearly established that large amounts of wood have been brought onto, stored, and processed at the property. For example, Keith Lane, a Bentley Tree Care supervisory employee who has worked for the company for approximately six years, testified that approximately 100 truckloads of wood material are brought to the site annually, and wood brought to the site is processed "I'd say, within three months." Day II Tr. at 149:3-14; see also Findings of Fact Nos. 11 and 12.[6]

Thus, assuming the wood material would ultimately qualify for a beneficial use exclusion, such exclusion would not attach until the wood was processed and placed into commerce as set forth in the regulations. The wood remains solid waste until that time. Moreover, the wire and fencing materials shown in the 2017 photographs comprise "solid waste" subject to the regulation. I therefore recommend that the Commissioner hold that respondent Bentley Tree Care, LLC violated ECL § 27-0707 and former 6 NYCRR § 360-1.7(a)(1)(i) by operating a solid waste management facility without a permit.

c. Were the Materials "Disposed" of at the Site?

As set forth above, under the regulations in effect at the relevant times, solid waste was considered "disposed" when stored for more than 18 months. See former 6 NYCRR § 360-1.2(b)(164). As discussed below, Department staff has failed to prove that any of the material in the photographs was stored on the property in excess of 18 months.

As discussed above, staff witness Loster traveled to the site twice, in 2015 and 2017, and took photographs at each visit. With respect to the three photographs in evidence regarding Ms. Loster's 2015 site visit, she testified that she took those photographs while located on the property at issue, but did not provide her exact location when she took the photographs, or the exact location on the property of the material reflected in those photographs. See e.g. Day I Tr. at 31:22-32:11 (describing materials depicted in Ex. 1 photograph, but not providing any description of the location on the property of the materials); see id. at 34:25-35:9 (same with respect to Ex. 2); 36:20-38:4 (same with respect to Ex. 3).

[5] Ms. Loster testified that the beneficial use exclusion did not apply to wood shown in some of the photographs because it was mixed with adulterated wood and other solid waste. See e.g. Day I Tr. at 43:9-25 (regarding Ex. 11); 44:1-45:7 (regarding Ex. 12) 53:8-54:13.

[6] Mr. Lane also testified that approximately 100 truckloads of wood material were at the property as of the date of his testimony. See Day I Tr. at 149:15-150:7. As set forth in my recommendations, infra, staff should determine whether and the extent to which respondent's current operations are subject to the current solid waste regulations.

On cross-examination, Ms. Loster testified that, although she thought she was on the property at the time she took the photographs in 2015, she did not recall where on the property she was located when she took the Exhibit 1 photograph, and she did know where the property boundaries were for 9353 East Main Road. See Day I Tr. at 67:4

In September 2017, when Ms. Loster returned to the site, all of her observations "were made from the road or from the neighbor's property." She did not enter onto the property that day. See Day I Tr. at 69:2-9.

One cannot tell from the photographs whether any of the onsite material in the 2015 photographs is the same material depicted in the 2017 photographs. Ms. Loster testified generally that materials on-site in 2015 were also on-site in 2017. For example, Ms. Loster testified as follows with respect to Exhibit 4, a photograph she took in 2017:

> It's a large pile of tree limbs and stumps and land clearing debris disposed on the property. And it's actually the same -- same material I observed back in the year 2015, on September 16th.

Tr. at 38:23-39:1.

A review of Exhibits 1-3, the only 2015 photographs in the record, does not readily support Ms. Loster's general testimony. Her testimony did not include a comparison of Exhibit 4 with Exhibits 1-3 to establish what exactly was the "same material" she allegedly saw in both years. Given the generic-looking materials in the photographs, one simply cannot discern from reviewing the photographs what is the "same," and there is no additional evidence to establish that the materials in the photographs were even in the same location on the site.

The record is equally insufficient with respect to Exhibit 5, another 2017 photograph. After describing what is shown in that photograph, Ms. Loster testified that she "actually observed the same material on September -- on September 16, 2015." Tr. at 39:5-20. She described the fence on the right side of Exhibit 5 as the fence between the site and a neighbor's property. Id. None of the 2015 photographs, however, shows a fence or would allow one to infer that the piles of wood shown in the 2015 photographs are the same as those depicted in Exhibit 5.

With respect to Exhibit 2, which shows what Ms. Loster described as utility poles, she testified on cross-examination that she "believe[d]" that she saw those utility poles again during her 2017 return visit, but that she did not take a photograph of the poles in 2017 "because I did not enter the property." Day I Tr. at 72:1-9. Ms. Loster did not explain why, if she could actually see the poles from her vantage point off the property in 2017, she did not or could not take a photograph of what she saw. Moreover, she conceded that the poles depicted in Ex. 2 had no distinguishing marks that would allow her to (i) differentiate those poles from other utility poles, or (ii) know that poles she may have seen in 2017 were the same poles that she photographed in 2015. See id. at 72:10-21.

With respect to Exhibit 3, although Ms. Loster recalled where she was when she took that picture in 2015, she did not take a photograph from the same location in 2017. See Day I Tr. at 76:12-15. Staff's position, with respect to the wood waste depicted in Exhibit 3, is that the amount of "brush and trees and bushes growing over" the wood waste "indicate[s] it has been there for some time." Day I Tr. at 36:20-37:4; see also id. at 75:5-8 ("What I observed is tree -- brush growing and sumac trees and piles of other debris disposed of on the property, indicating it had been there for quite some time").[7] Upon cross-examination, however, Ms. Loster testified that, even though she believed the same pile shown in the 2015 photograph remained on the site in 2017, it is possible that the pile depicted in the photograph became overgrown in a matter of several months. See id. at 75:19-76:24.

Thus, the record contains two sets of photographs, taken from different physical locations (i.e., 2015 set from one or more locations on the property, 2017 set from one or more locations off of the property), but without sufficient evidence tying the two sets of photographs together to prove that materials in the 2015 photographs are the same as those shown in the 2017 photographs.

Department staff did not submit any proof that a global positioning system ("GPS") was used to determine the exact location at which a photograph was taken or the location of the materials depicted in the photographs. Of course, GPS is not required as an element of proof, but would have provided persuasive reference points to assist Department staff in establishing that, notwithstanding that photographs from the second site visit were taken from a different location, the "same materials" were shown in the photographs taken on the two site visits by Ms. Loster.

Department staff has therefore failed to establish that materials photographed in 2015 remained on-site in 2017, and thereby has failed to prove that such materials were stored on-site for more than 18 months, and had therefore been disposed of at the site, in violation of former 6 NYCRR §§ 360-5.1(a)(1) and (2).[8]

Several of the 2017 photographs depict wire and what Ms. Loster described as "pressure-treated fence posts." Day I Tr. at 43:18-22; see Exs. 6-11. None of the 2015 photographs in evidence show these materials. See Exs. 1-3. Although such materials would qualify as "solid waste" under the definition, staff has not provided proof sufficient to establish that these materials were stored on-site for a period in excess of 18 months.

Similarly, there is no evidence that the building and roofing materials shown in Exhibit 12 or the mattress and tarps shown in Exhibit 13, which photographs were taken in September 2017, were stored on-site in excess of 18 months.

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[7] Although not explicitly stated, this characterization was presumably intended to imply that the wood waste in the photograph had been stored on-site in excess of 18 months.

[8] Department staff did not submit a photograph from 2017 showing the appliance depicted in Exhibit 1. Ms. Loster admitted that she could not testify based on personal knowledge as to when the appliance depicted in Exhibit 1 was brought to the site or if, or when, it was removed from the site. See Day I Tr. at 69:14-22. Thus, there is no evidence that such appliance was stored on-site for more than 18 months.

3. Conclusion

As noted above, I reserved on respondents' motion for judgment at the close of staff's case-in-chief. Respondents thereafter proceeded to put on their case, calling seven witnesses and entering six exhibits into evidence. Based upon the entire record, including the testimony and documents of respondents' witnesses, I recommend that the Commissioner hold that respondent Bentley Tree Care, LLC violated ECL § 27-0707 and former 6 NYCRR § 360-1.7(a)(1)(i) by operating a solid waste management facility without a permit. I also recommend that the Commissioner dismiss Department staff's second cause of action, because the record does not support a finding that respondents "disposed" of solid waste under the regulations.

C. Civil Penalty

Citing ECL § 71-4003, Department staff seeks the imposition of a penalty in the amount of forty-eight thousand dollars ($48,000). Section 71-4003 is the general civil penalty statute, providing for a penalty of $1,000 for each violation and $1,000 for each day such violation continues.

The complaint alleges violations of (i) ECL § 27-0707, which is part of title 7 of ECL article 27; and (ii) related solid waste regulations. ECL § 71-2703 provides for civil penalties to be imposed for violations of title 7 of ECL article 27, authorizing the imposition of a penalty of seven thousand five hundred dollars ($7,500) for each violation and an additional penalty of up to one thousand five hundred dollars ($1,500) for each day during which such violation continues. See ECL § 71-2703(1)(a).

The complaint provides no background or discussion of penalty, merely citing and paraphrasing the provisions of ECL § 71-4003, and requesting the total penalty of forty-eight thousand dollars ($48,000) in the Wherefore Clause. See Complaint at 2, ¶ 11; see also id. at 4, Wherefore Clause ¶ II. At the hearing, Department staff provided no testimony or argument to support the requested penalty. Staff did not cite or discuss OGC 8, the Solid Waste Enforcement Policy that includes provisions relating to penalty calculation for solid waste violations, or the Department's general Civil Penalty Policy. Moreover, staff provided no explanation as to why a civil penalty was not sought under ECL § 71-2703, which would apply to the violations of title 7 of ECL article 27 alleged here.

As set forth above, the penalty provision cited by staff, ECL § 71-4003, authorizes a penalty of $1,000 for each violation, and an additional penalty of $1,000 for each day the violation continues. Given that staff prevailed on one cause of action, establishing a violation of ECL § 27-0707 and related regulations, but provided no additional analysis to support the $48,000 penalty sought here, I recommend that the Commissioner impose a civil penalty in the amount of $1,000.

IV. Remedial Relief

The complaint requests that the Commissioner direct respondents to: (i) cease disposal of solid waste at the facility; (ii) cease acceptance of solid waste at the facility; (iii) submit a

disposal plan acceptable to the Department "to address the cleanup of the contaminated soil pile and accumulated residues," including the name of the disposal location and waste transporter; and (iv) remove all waste from the facility in accordance with the Department-approved plan. See Complaint at 4, Wherefore Clause ¶ III(a)-(d).

Although the record contains testimony that materials depicted in staff's 2015 and 2017 photographs is no longer at the site, see Findings of Fact No. 14, it is appropriate for Department staff to conduct a full inspection of the site to determine whether additional solid waste removal is required. Such inspection will inform the parties as to the extent to which additional cleanup is required and whether respondent must create a disposal plan relating thereto.

In addition, the inspection will inform Department staff regarding current operations at the site, to assist in determining whether respondent is required to obtain a permit for its operations. I note that respondent Bentley Tree Care, LLC apparently intends to continue operating a wood-processing facility at the site, as evidenced by the purchase of large grinding and splitting equipment, which has been brought to the property. See Findings of Fact No. 13.

V. Recommendations

Based on the foregoing, I recommend that the Commissioner issue an order:

A. Holding that respondent Bentley Tree Care, LLC violated ECL § 27-0707 and former 6 NYCRR § 360-1.7(a)(1)(i) by operating a solid waste management facility without a permit;

B. Dismissing the second cause of action as against respondent Bentley Tree Care, LLC;

C. Denying Department staff's motion for a default judgment and dismissing the complaint in its entirety as against respondent Bentley-Ripley Farms, Inc.;

D. Assessing against respondent Bentley Tree Care, LLC a civil penalty in the amount of $1,000, to be paid within thirty (30) days of service of the Commissioner's order on respondent Bentley Tree Care, LLC;

E. Directing respondent Bentley Tree Care, LLC, to allow Department staff access to the property to determine:

    1. whether additional remedial activities are required with respect to solid waste at the property and, if so, to submit to the Department an approvable plan to properly dispose of such solid waste; and

2. the character and extent of current operations at the site; and

F. Directing respondent Bentley Tree Care, LLC to apply for a permit if current operations at the site, as determined by Department staff, require such permit.

Dated: May 29, 2018
Albany, New York

/s/
D. Scott Bassinson
Administrative Law Judge

APPENDIX A

Matter of Bentley Tree Care, LLC and Bentley-Ripley Farms, Inc.
DEC Case No. R9-20170302-22
February 21, 2018 and March 14, 2018 – Adjudicatory Hearing

EXHIBITS IN EVIDENCE

Exhibit	Description
DEC 1	Photograph taken on September 16, 2015
DEC 2	Photograph taken on September 16, 2015
DEC 3	Photograph taken on September 16, 2015
DEC 4	Photograph taken on September 28, 2017
DEC 5	Photograph taken on September 28, 2017
DEC 6	Photograph taken on September 28, 2017
DEC 7	Photograph taken on September 28, 2017
DEC 8	Photograph taken on September 28, 2017
DEC 9	Photograph taken on September 28, 2017
DEC 10	Photograph taken on September 28, 2017
DEC 11	Photograph taken on September 28, 2017
DEC 12	Photograph taken on September 28, 2017
DEC 13	Photograph taken on September 28, 2017
DEC 14	Aerial photograph taken in 2012
R1	Photograph taken March 10, 2018
R2	Photograph taken March 10, 2018
R3	Photograph of tree grinder

R4	Photograph of wood splitter
R5	Photograph of wood splitter
R6	Photograph of track skid steer