

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

In the Matter of the Alleged Violation
of Article 9 of the Environmental
Conservation Law ("ECL"),

ORDER

DEC Case No.
R4-2005-1201-112

- by -

**ROGER BRESEE, d/b/a BRESEE TREE &
FORESTRY MANAGEMENT,**

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Roger Bresee, doing business as Bresee Tree & Forestry Management, by service of a notice of hearing and complaint dated February 2, 2006.

In accordance with 6 NYCRR 622.3(a)(3), the notice of hearing and complaint was mailed to respondent by certified mail, return receipt requested, on February 2, 2006. Respondent received the complaint on February 4, 2006, thereby completing service (see 6 NYCRR 622.3[a][3]).

The complaint alleged that respondent entered into a "Sale of Products Agreement and Permit for Use of State Lands" ("agreement and permit") with the Department. The agreement and permit authorized respondent to harvest 210 cords of Red Pine from State lands in Delaware County at a sale price of \$4,200, provided that respondent replant the 20-acre stand with 18,000 Norway spruce seedlings, to be supplied by the Department. The complaint further alleged that although respondent removed the Red Pine, he failed to replant the stand as required, even though he was given a one-year extension of time to do so. Accordingly, by violating the agreement and permit issued under the authority of Environmental Conservation Law ("ECL") 9-0505(1), respondent was alleged to have illegally removed trees from State land in violation of ECL 9-0303(1). Accordingly, Department staff sought treble damages in the amount of \$14,052.42, that is, three times the cost the Department incurred to have the trees replanted.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on February 24, 2006, and has not been extended by Department Staff.

Department Staff filed a motion for default judgment, dated March 9, 2006, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger. ALJ Goldberger issued a ruling dated March 15, 2006, in which she held respondent liable on default for the alleged violation of ECL 9-0303(1). ALJ Goldberger requested, however, that Department staff provide further support for the requested penalty. By affirmation dated August 10, 2006, staff reduced the penalty sought to \$12,600 and provided a rationale for the amount. Based upon staff's submissions, ALJ Goldberger prepared the attached default summary report. I adopt the ALJ's ruling and default summary report as my decision in this matter, subject to the following comments.

Based upon respondent's default, I agree that respondent is liable for the alleged violation of ECL 9-0303(1). That provision prohibits the removal of trees from State land, except as provided for under ECL 9-0505, among other provisions. ECL 9-0505(1) authorizes the Commissioner to sell trees on State land "upon such terms as may be deemed by [the Commissioner] to be for the best interests of the state." Because respondent violated the terms of his agreement and permit by failing to replant the stand after removing the trees, he violated the prohibition under ECL 9-0303(1).

I also conclude that the civil penalty sought in Department staff's August 10, 2006 submission is appropriate. ECL 71-0703(6)(a), as amended effective March 1, 2004, provides for a civil penalty of \$250 per tree or treble damages, or both, for a violation of ECL 9-0303(1). Damages are measured by the stumpage value of the trees, not the cost of replanting as originally sought by staff (see ECL 71-0703[6][a], [c]). Here, the stumpage value of the trees is evidenced by the arm's-length sale of the trees to respondent under the agreement and permit -- \$4,200 (see ECL 71-0703[6][c]). Thus, treble damages in the amount of \$12,600 are consistent with the statute.

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

III. Respondent is adjudged to have violated ECL 9-0303(1) by violating the conditions of his agreement and permit issued under the authority of ECL 9-0505.

IV. Respondent Roger Bresee is hereby assessed a civil penalty in the amount of TWELVE THOUSAND SIX HUNDRED DOLLARS (\$12,600). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: New York State Department of Environmental Conservation, Region 4, 1150 North Westcott Road, Schenectady, New York 12306, ATTN: Richard Ostrov, Esq., Assistant Regional Attorney.

V. All communications from respondent to the Department concerning this order shall be made to Richard Ostrov, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 4, 1150 North Westcott Road, Schenectady, New York 12306.

VI. The provisions, terms and conditions of this order shall bind respondent Roger Bresee, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/
Denise M. Sheehan
Commissioner

Dated: September 11, 2006
Albany, New York

TO: Mr. Roger Bresee (VIA CERTIFIED MAIL)
P.O. Box 14
West Davenport, New York 13860

Richard Ostrov, Esq. (VIA REGULAR MAIL)
Assistant Regional Attorney
New York State Department of Environmental Conservation
Region 4
1150 North Westcott Road
Schenectady, New York 12306

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 9
of the Environmental Conservation Law of the State
of New York by:

Default Summary Report
File No. R4-2005-1201-122

Roger Bresee d/b/a
Bresee Tree & Forestry Management,

Respondent.

Proceedings

Pursuant to § 622.15 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), on March 10, 2006 staff of the Region 4 office of the New York State Department of Environmental Conservation (DEC or Department) filed a motion for a default judgment with the Department's Office of Hearings and Mediation Services (OHMS). Staff's underlying complaint alleged that the respondent failed to adhere to the terms of a "Sale of Products Agreement and Permit for Use of State Lands" dated April 28, 2003 that permitted respondent to harvest 210 cords of Red Pine from State lands in Delaware County. A condition of this agreement required respondent to replant the subject 20 acre stand with 18,000 Norway spruce seedlings supplied by DEC by no later than May 15, 2004. The staff alleged that respondent had failed to replant the stand.

Administrative Law Judge (ALJ) Helene G. Goldberger issued a ruling dated March 15, 2006 (received by staff on August 10, 2006) finding that the staff's motion for a default judgment met the requirements of 6 NYCRR § 622.15(b) and that the respondent was liable for violation of Environmental Conservation Law (ECL) § 9-0303(1). See, ruling attached hereto. However, the ALJ requested clarification with respect to the penalty requested.

By affirmation dated August 14, 2006, Assistant Regional Attorney Richard Ostrov explained that the "Sale of Products Agreement and Permit for Use of State Lands" (Agreement) that comprised the agreement between the respondent and the State with respect to this timber sale provides the stumpage value of the wood to be \$4200. See, Attachment 1 to the complaint. Mr. Ostrov stated that based upon ECL § 71-0703(5) the staff is seeking a penalty of \$12,600. This section of the ECL, which

formerly allowed treble damages for illegal cutting of trees on State lands, was amended in 2003 and now applies only in criminal matters.

Discussion

The submission of staff reduces the \$14,0552.42 penalty requested in the initial moving papers. This sum had been based upon a tripling of the Department's cost of replanting the trees - \$4,684.12. See, complaint, ¶ 17. As noted above, staff now seeks a penalty of \$12,600 - a tripling of the stumpage value. In the March 15, 2006 ruling, I explained that ECL § 71-0703(5) was amended in 2003 to apply only to criminal proceedings. For this non-criminal matter, ECL § 71-0703(6) provides for a penalty of \$250 per tree or treble damages based on the stumpage value of such tree, or both, for violations of ECL § 9-0303(1). Mr. Ostrov's affirmation setting forth the staff's reduced penalty as \$12,600 - three times the amount of the stumpage value based upon the Agreement is consistent with ECL § 71-0703(6).

Conclusion

As set forth in the attached ruling, staff's motion for a default judgment meets the requirements of 6 NYCRR § 622.12(b). The staff's affirmation amends the requested penalty in conformity with ECL § 71-0703(6) and accordingly, I recommend that the Commissioner order the respondent to pay a penalty of \$12,600.

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

Dated: Albany, New York
August 15, 2006