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

Ruling

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

File No. R4-2005-1201-122

Respondent.

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Proceedings

On March 10, 2006, pursuant to § 622.15 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), staff of the Region 4 office of the New York State Department of Environmental Conservation (DEC or Department) filed a notice of motion for default judgment with the Department's Office of Hearings and Mediation Services (OHMS). The notice of motion and supporting papers provide that on February 2, 2006, staff served respondent Roger Bresee by certified mail with a notice of hearing and complaint concerning alleged violations of Article 9 of the Environmental Conservation Law (ECL) for failure to comply with permit requirements relating to removal of trees from State lands in Delaware County. Included with staff's motion papers are copies of the certified mail and return card that indicate that Mr. Bresee received the notice of hearing and complaint and signed for them. While the return card does not indicate a date for such service, Ms. Fabrey, of the Region 4 office, obtained from the U.S. Post Office website the confirmation of the delivery date - February 4, 2006. See, Attachment 3 to Fabrey Affidavit.

The notice of hearing states that the respondent must serve his answer to the complaint within twenty days of receipt of the complaint or be subject to a default and waiver of the right to a hearing. The respondent failed to serve his answer within the twenty days provided by the regulation and to date no answer has been filed. See, 6 NYCRR § 622.4(a).

Discussion

Failure to answer a complaint is a basis for a default judgment pursuant to 6 NYCRR § 622.15. This regulation requires that a motion for a default judgment contain (1) proof of service upon the respondent of the document which commenced the proceeding; (2) proof of the respondent's failure to appear or to timely file an answer; and (3) a proposed order. The staff has submitted an affidavit of service of the notice of hearing and complaint as well as a copy of the certified mail receipt indicating receipt by the respondent and support from the U.S. Postal Service's website of the date of such receipt - February 4, 2006. This documentation proves that

staff served its notice and complaint consistent with the requirements of 6 NYCRR § 622.3(3). In addition, Assistant Regional Attorney Richard Ostrov has affirmed that the respondent has failed to serve an answer and the time to serve said answer - February 24, 2006 - has passed. 6 NYCRR § 622.4(a).

While there is no question about the respondent's liability with respect to the violations based upon his default, the staff's request for penalties is not as clear. Staff cites to ECL § 71-0703(5) in support of its request for treble damages. However, this section of law pertains to criminal sanctions. Section 71-0703(6) provides for penalties of \$250 per tree or treble damages based upon stumpage value or both for violations of ECL § 9-0303(1). However, staff's assessment is based upon the amount it cost the Department to replant the trees and not the stumpage value. Because there are no allegations made by staff as to the number of trees cut or the stumpage value, I cannot apply ECL § 71-0703(6). Section 71-0703(7) provides that the Commissioner may assess a monetary payment to make restorations in these cases but that would mean the respondent would only be liable for \$4, 684.14. Given the nature of the violation, this may be inadequate. Accordingly, I ask that staff submit an affidavit to further support the requested penalty.

Conclusion

Staff's motion for a default judgment meets the requirement of 6 NYCRR § 622.15(b) as outlined above. However, because the penalties requested were not supported by staff, I am requesting that additional information be submitted on the question of penalties alone.

/s/

Dated: Albany, New York
March 15, 2006

Helene G. Goldberger
Administrative Law Judge