

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

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In the Matter of the Alleged Violations of Articles 27 and 71 of the New York State Environmental Conservation Law and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

**ORDER**

-by-

DEC File No.  
R1-20110613-196

**ROBERT DALCAMO,**

Respondent.

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This administrative enforcement proceeding concerns allegations that respondent Robert Dalcamo (respondent) violated New York State Environmental Conservation Law (ECL) articles 27 and 71, and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by: (i) causing or allowing the disposal of more than 70 cubic yards of solid waste at property that is not an authorized solid waste disposal facility, in violation of 6 NYCRR 360-1.5(a); and (ii) causing or allowing the construction and operation of a solid waste management facility without a valid permit, in violation of 6 NYCRR 360-1.7(a)(1)(i).<sup>1</sup>

Staff of the Department of Environmental Conservation (DEC or Department) commenced this administrative enforcement proceeding by personal service on respondent of the following documents: (i) notice of motion for an order without hearing in lieu of complaint; (ii) affirmation of Vernon G. Rail (Rail Aff.) dated January 13, 2012, attaching exhibits; (iii) affidavit of Timothy Fay (Fay Aff.) dated January 13, 2012, attaching exhibits; and (iv) affidavit of James Wade dated January 12, 2012 (Wade Aff.), attaching an exhibit. Accordingly, service was accomplished in accordance with 6 NYCRR 622.12.

Department staff requests that I: (i) hold that respondent is liable for violating ECL articles 27 and 71, 6 NYCRR 360-1.5(a) , and 6 NYCRR 360-1.7(a)(1)(i); (ii) enjoin respondent from further actions causing such violations or additional violations to continue; (iii) order respondent to pay a civil penalty of forty-five thousand dollars (\$45,000), and suspend an additional penalty of forty-five thousand dollars (\$45,000) contingent upon compliance with the terms and conditions of this order; (iv) direct respondent to clean up the facility pursuant to “an approvable cleanup plan” to be submitted to the Department; and (v) in the event that respondent fails to “timely satisfy the legal obligations imposed upon him” by this order, permanently enjoin

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<sup>1</sup> Environmental Conservation Officers observed significant quantities of solid waste during inspections at the site in both 2008 and 2011 (see summary report of Administrative Law Judge P. Nicholas Garlick, at 2-3, Findings of Fact 2, 6). Respondent pleaded guilty in August 2011 to a criminal violation of 6 NYCRR 360-1.5(a) (*id.* at Findings of Fact 3, 5).

respondent from seeking DEC authority for any regulated environmental activity or from engaging in any regulated solid waste activity within the State (see Rail Aff., at 6-7, ¶¶ I-V).<sup>2</sup> Staff also requests that I order that all solid waste removed from the facility be disposed of at a DEC-authorized facility, and that respondent submit copies of all disposal tickets to the Department's Division of Materials Management (see Wade Aff., at 3, ¶ 9).

Respondent has failed to respond to Department staff's motion for order without hearing.

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached summary report. ALJ Garlick recommends that I grant Department staff's unopposed motion for order without hearing, and that I: (i) hold respondent liable for the alleged violations; (ii) assess a civil penalty of ninety thousand dollars (\$90,000), none of which is suspended; (iii) order respondent to submit an approvable cleanup plan within thirty (30) days of service of this order; (iv) order respondent to comply with the terms of the cleanup plan; and (v) order respondent to provide copies of all disposal tickets to Department staff for verification that all solid waste from the site has been disposed of at a DEC-authorized facility (Summary Report, at 9).

Following receipt of the ALJ's summary report and upon review of the record, I directed that the summary report be circulated to the parties as a recommended decision. The summary report was so circulated by Assistant Commissioner for Hearings and Mediation Services Louis Alexander under cover of a letter dated August 23, 2013. Department staff and respondent Dalcamo were provided the opportunity to file comments on the summary report by September 27, 2013.

In my review of the record, I noted that staff's papers contained a few typographical errors relating to some of the statutes and regulations cited. Although the text of the submissions and the cited statutes and other documents cited indicated that these were inadvertent typographical, rather than substantive, errors (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 4), I directed Assistant Commissioner Alexander to contact Department staff and respondent with respect to the necessary corrections. In his August 23, 2013 letter, the Assistant Commissioner listed the corrections to be made to the papers and

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<sup>2</sup> In the "Causes of Action" section of the Rail Affirmation, staff alleges violations of specific solid waste regulations, but does not cite statutory provisions. In the "Applicable Law" section of the Rail Affirmation, however, staff specifically refers to ECL 27-0707(1) (which, like 6 NYCRR 360-1.7(a)(i) cited in staff's second cause of action, prohibits the operation of a new solid waste management facility absent a permit) and ECL 27-2703(1)(b)(ii) (which sets penalties for violations of titles 3 or 7 of ECL article 27, and provides for injunctive relief) (See Rail Aff. ¶¶ 9, 12; see also note 3, below). Finally, in the "Wherefore" clause, staff requests that I hold respondent liable for violating "Articles 27 and 71 of the ECL" (Rail Aff. at 7, ¶ I). Although it is preferable to include the specific statutory provisions in the causes of action as well as elsewhere in the pleading, I hold that staff's papers are sufficiently specific to apprise respondent of the charges against him and to allow him to prepare an adequate defense (see e.g. D'Ambrosio v Dept. of Health, 4 NY3d 133, 140-141 [2005]; Matter of Carney's Restaurant, Inc. v State of New York, 89 AD3d 1250, 1254 [3d Dept 2011]; see also CPLR 3026 [pleadings shall be liberally construed, and defects ignored if a substantial right of a party is not prejudiced]).

requested Department staff to confirm the citation corrections.<sup>3</sup> By letter dated September 6, 2013, Department staff confirmed that the citations should be so corrected, and no objection to the corrections was received from respondent. Accordingly, Department staff's papers are amended to incorporate the corrections noted in the August 23, 2013 letter and referenced in footnote 3 to this order.

Department staff provided its comments on the ALJ's summary report by letter dated September 26, 2013. By e-mail dated September 27, 2013, which was the final date for filing comments on the summary report, the office of Stephen R. Jellenik, Esq., respondent's attorney, informed Chief Administrative Law Judge James T. McClymonds of the Office of Hearings and Mediation Services that Mr. Jellenik was no longer representing respondent. Because the notice of the withdrawal of respondent's attorney was provided on the deadline date for the filing of comments, respondent, by letter dated September 27, 2013, was provided with an extension until October 31, 2013 to file comments on the ALJ's summary report. Respondent did not file any comments, and the record closed on October 31, 2013.

I adopt the ALJ's summary report as my decision in this matter, subject to my comments below.

### Liability

Staff brings this motion for an order without hearing pursuant to 6 NYCRR 622.12, which is governed by the same principles that govern summary judgment pursuant to CPLR 3212 (see Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2). Initially, I adopt the ALJ's findings of fact (see Summary Report, at 2-3), and hold that Department staff has submitted evidence sufficient to demonstrate that respondent has committed the alleged violations. Because Department staff has satisfied its burden of proof on the motion for an order without hearing in lieu of complaint, and respondent has failed to respond, I grant staff's motion and hold that respondent is liable for the alleged violations.

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<sup>3</sup> Specifically, staff cited ECL "71-2707(1)(b)(ii)" relating to penalties for releases of solid waste, whereas it is ECL 71-2703(1)(b)(ii) that contains the penalties discussion to which the papers refer (compare Rail Aff. ¶ 12 with ECL 71-2703[1][b][iii]). Similarly, the papers referred to ECL "71-2707(4)" as containing the definition of "release" whereas the definition of "release" is found in ECL 71-2703(4) (compare Rail Aff. ¶ 13 with ECL 71-2703[4]). Finally, staff papers refer to respondent's guilty plea as relating to 6 NYCRR 360-1.7(a)(1)(i), when the plea was to a violation of 6 NYCRR 360-1.5(a) (compare Rail Aff. ¶ 20 with Rail Aff. Ex. 2, at 5).

The papers also contained additional typographical errors such as the address of the site and the year certain charges were made against respondent (see e.g. Wade Aff. ¶6 and Ex. 1; Fay Aff. ¶4). The ALJ contacted staff and obtained the correct information (see email exchange between ALJ Garlick and Department staff counsel Rail, dated April 23, 2012). Copies of the e-mail exchanges between the ALJ and staff were also attached to the August 23, 2013 letter to the parties, and respondent was afforded the opportunity to comment on the accuracy of the information. Respondent did not challenge the accuracy of the information.

## Remedial Relief

I also grant in part staff's requested remedial relief, and order respondent: (i) to submit to Department staff, within thirty (30) days of service of this order on respondent, an approvable cleanup plan for the site; (ii) to remove and dispose of the solid waste at the site in accordance with such cleanup plan; (iii) to dispose of the solid waste at a DEC-authorized solid waste management facility; and (iv) to submit to Department staff for verification copies of all disposal tickets relating to the disposal of the solid waste from the site.

Staff has also requested that, if respondent fails to comply with the terms and conditions of this order, I include language in the order to permanently enjoin him from seeking Department authority to engage in, or from engaging in, any regulated solid waste activity within the State (Rail Aff., at 7 ¶ V). The ALJ did not address this request.

In its September 26, 2013 comments on the ALJ's summary report, Department staff repeats its request for injunctive relief, and asks that I issue an order holding that, if respondent "fails to fulfill legal obligations imposed in a Commissioner's decision and order," respondent will be subject to a "lifetime ban" with respect to being involved in any DEC-regulated activity (see Sept. 26, 2013 letter, at 2). Based upon the record evidence in this matter, however, I decline to grant this requested relief.

In its initial submissions, Department staff did not provide any legal authority in support of its position specifically associated with this requested relief. Staff discussed respondent's compliance history and penalties to be assessed, and referred to a 1993 ALJ ruling – in a matter in which respondent was not a party. That ruling includes as a finding of fact that a Robert Dalcamo pleaded guilty in 1991 to three counts of endangering the environment by illegal dumping and states that, as part of his sentence, "Dalcamo was also prohibited from any future involvement in any environment related business or activity" (see Rail Aff. ¶¶ 16, 28 [citing Matter of Johnson, Rulings of ALJ, Nov. 22, 1993]).<sup>4</sup> The ALJ ruling in Matter of Johnson did not attach any document relating to the criminal proceeding to which the ruling refers.

The best evidence of the nature of the "prohibition" to which the Matter of Johnson ruling refers would be the guilty plea and/or the sentencing order of the court in which the plea was entered (see e.g. Matter of Kings Park Energy, LLC, Supplemental Ruling of the ALJ, Sept. 12, 2002, at 6 ["Evidence of a violation that has been adjudicated or admitted by the violator should enter the record principally through the document which reflects the result of the adjudication or admission"]). Staff has not provided either of these documents, and concedes that the status of the "prohibition" is unclear (see Sept. 26, 2013 letter, at 2). Because the record in this matter does not demonstrate how long the "prohibition" referred to in Matter of Johnson was to remain in effect, staff requests relief in the alternative, asking that, as part of the remedy for the violations alleged in this matter, I either "impose, restate or reinstitute a lifetime ban" against respondent (see Sept. 26, 2013 letter, at 2).

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<sup>4</sup> Although the "Robert Dalcamo" referred to in the 1993 ruling may be the same person as respondent here, the record in this matter contains no information to confirm that fact.

In addition to citing Matter of Johnson, staff cites ECL article 71 and the Department's Record of Compliance Enforcement Policy (rev. March 5, 1993) (DEE-16) (see also <http://www.dec.ny.gov/regulations/25244.html>) as legal authority for imposing the requested lifetime ban on respondent. ECL article 71 authorizes injunctive relief based upon violations of title 7 of article 27, or of a Commissioner's order issued thereunder (see e.g. ECL 71-2703[1][a], [b][ii]). Commissioner's Policy DEE-16 provides guidance to Department staff "to ensure that persons who are unsuitable to carry out responsibilities under Department permits, certificates, licenses or grants, are not authorized to do so" (see DEE-16, at 1; see also <http://www.dec.ny.gov/regulations/25244.html>).

Although a lifetime ban may be appropriate in a particular case, the record in this matter is insufficient to support such a holding. Should respondent fail to comply with all of the terms and conditions of this order, the Department may seek further relief including referral to the Office of the Attorney General for judicial enforcement. Should respondent apply in the future for a permit from the Department, staff may at that time determine whether, based on his record of compliance and other considerations, the application should be denied (see e.g. DEE-16, at 6-7; see also <http://www.dec.ny.gov/regulations/25244.html>).

### Civil Penalty

With respect to penalty, Department staff relies on ECL 71-2703(1)(b)(ii)<sup>5</sup> and the Department's Civil Penalty Policy (DEE-1, dated June 20, 1990), and has calculated that more than one hundred fifty (150) days elapsed from the date of respondent's August 2011 guilty plea to a misdemeanor violation of 6 NYCRR 360-1.5(a)<sup>6</sup> until the date the current motion was made. Staff cut the period of violation in half, however, because the parties attempted during that period to negotiate a cleanup plan. Staff has therefore calculated the maximum penalty for one violation, for a seventy-five (75) day period, as one million six hundred and eighty-seven thousand five hundred dollars (\$1,687,500) (see Rail Aff. ¶¶ 26-27). Citing the costs associated with a cleanup of the site, Department staff has recommended that I set aside most of the daily penalty multiplier, but impose the maximum payable penalty of twenty-two thousand five hundred dollars for each of the two violations, for a total of forty-five thousand dollars (\$45,000). This penalty would be payable within thirty (30) days of service of the order on respondent.

In addition, staff requests that I impose but suspend an additional forty-five thousand dollar (\$45,000) civil penalty, which suspension would be contingent on respondent's strict compliance with the terms and conditions of this order, and future compliance with New York solid waste law (id. ¶ 29; see also id. at 7, ¶ III). Although the ALJ has recommended that I assess a payable penalty of ninety thousand dollars (\$90,000) without suspending any portion of

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<sup>5</sup> ECL 71-2703(1)(b)(ii) provides for a penalty up to twenty-two thousand five hundred dollars (\$22,500) for each violation, and an additional penalty of up to twenty-two thousand five hundred dollars (\$22,500) for each day during which the violation continues.

<sup>6</sup> The record reflects that respondent pleaded guilty to criminal charges relating to the disposal of solid waste at the site (see Rail Aff. ¶¶ 17-19, and Exs. 1-3). The criminal proceeding did not, however, provide for any civil penalty or injunctive relief relating to removal and proper disposal of the solid waste, which relief is sought here.

it, the pleadings in this matter did not provide notice to respondent that staff was seeking a payable penalty of \$90,000 with no suspended amount. Furthermore, in consideration of the expenditures necessary to clean up the site, a suspension of a portion of the penalty would be appropriate based on this record. I therefore grant staff's request, and assess a civil penalty of ninety thousand dollars (\$90,000), of which forty-five thousand dollars (\$45,000) shall be payable within thirty (30) days of service of this order upon respondent, and forty-five thousand dollars (\$45,000) shall be suspended contingent upon respondent's compliance with the terms and conditions of this order.<sup>7</sup>

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted.
- II. Respondent Robert Dalcamo is adjudged to have violated:
  - A. 6 NYCRR 360-1.5(a) by causing or allowing the disposal of more than 70 cubic yards of solid waste at property that is not an authorized solid waste disposal facility; and
  - B. 6 NYCRR 360-1.7(a)(1)(i) by causing or allowing the construction and operation of a solid waste management facility without a valid permit.
- III. Within thirty (30) days of service of this order on respondent, respondent Robert Dalcamo shall submit to the Department an approvable cleanup plan with respect to the solid waste at the site.
- IV. Within thirty (30) days after the Department has provided notice to respondent that staff has approved the cleanup plan submitted pursuant to paragraph III of this order, respondent Robert Dalcamo shall remove the solid waste from the site in compliance with the terms of the approved cleanup plan, and shall provide to Department staff for verification copies of all disposal tickets confirming that all solid waste from the site has been disposed of at a DEC-authorized facility.
- V. Respondent Robert Dalcamo is hereby assessed a civil penalty in the amount of forty-five thousand dollars (\$45,000), which shall be due and payable within thirty (30) days of the service of this order upon respondent. Respondent Robert Dalcamo is hereby assessed an additional suspended civil penalty in the amount of forty-five

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<sup>7</sup> As the ALJ notes, Department staff did not refer to or utilize the Department's Solid Waste Enforcement Policy (OGC 8, dated November 17, 2010) as part of its penalty analysis (see Summary Report, at 5). The ALJ points out that Appendix I to OGC 8 is "difficult to understand and apply" (*id.* at 7). I have previously reviewed this appendix and have directed Department staff to revisit the chart to determine what revisions may be necessary (see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 4 n 10). Department staff may also wish to reiterate in the footnote to the chart that the penalty that is calculated using the Appendix I chart may not exceed the statutory maximum penalty for the number of violations.

thousand dollars (\$45,000), which suspension is contingent upon his compliance with the terms and conditions of this order.

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." The payment shall be mailed or otherwise delivered to the Department at the following address:

Vernon G. Rail, Esq.  
Assistant Regional Attorney  
Region 1, NYSDEC  
50 Circle Road, Stony Brook University  
Stony Brook, New York 11790

- VI. All communications from respondent to the Department concerning this order shall be directed to Vernon G. Rail, Esq., at the address referenced in paragraph V of this order.
- VII. The provisions, terms and conditions of this order shall bind respondent Robert Dalcamo, and his agents, successors and assigns, in any and all capacities.

For the New York State Department of  
Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Joseph J. Martens  
Commissioner

Dated: December 17, 2013  
Albany, New York

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**SUMMARY REPORT**

DEC CASE NO:  
R1-20110613-196

-by-

**ROBERT DALCAMO,**

Respondent.

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**SUMMARY**

This summary report recommends that the Commissioner grant an uncontested motion for order without hearing brought by the Staff of the Department of Environmental Conservation (DEC Staff) and find Robert Dalcamo (respondent) liable for: (1) causing or allowing the disposal of more than 70 cubic yards of solid waste at an unauthorized solid waste management facility in violation of 6 NYCRR 360-1.5(a)(2); and (2) constructing and operating an unauthorized solid waste management facility in violation of 6 NYCRR 360-1.7(a)(1)(i). These violations involve the illegal deposition of approximately four hundred and fifty-five (455) cubic yards of solid waste at a site located at 49 North Dunton Avenue, Medford, Suffolk County, New York. This report also recommends that the Commissioner include in his order a payable civil penalty of ninety thousand dollars (\$90,000). The Commissioner should also require the respondent to: (1) submit an approvable cleanup plan for the site to DEC Staff within 30 days of service of the Commissioner's order; (2) comply with the terms of the cleanup plan; and (3) provide copies of all disposal tickets to DEC Staff for verification to ensure that all disposal of solid waste from the site takes place at a DEC authorized facility.

**PROCEEDINGS**

By papers dated January 13, 2012, DEC Staff filed a motion for order without hearing with DEC's Office of Hearings and

Mediation Services (OHMS). DEC Staff's papers consisted of a notice of motion, an affirmation in support by DEC Staff counsel Vernon G. Rail, an affidavit in support by DEC Staff member James Wade, and an affidavit of Environmental Conservation Officer (ECO) Timothy Fay.

On February 15, 2012, this matter was assigned to me.

On April 23, 2012, DEC Staff provided a copy of an affidavit of service to OHMS. This affidavit by ECO Fay stated he served the respondent with the motion papers on January 16, 2012.

As of the date of this report, no response has been received from the respondent by either DEC Staff or OHMS.

### **FINDINGS OF FACT**

1. Respondent Robert Dalcamo is a tenant of 49 North Dunton Avenue, Medford, New York (site). The landlord is Ralph Iaacobellis. In 2008, Mr. Dalcamo operated a business which included depositing solid waste at the site.
2. On June 17, 2008, ECO Fay and ECO Ricky Wood inspected 49 North Dunton Avenue, Medford, New York. During this inspection the ECOs observed significant quantities of mixed construction and demolition debris at the site. ECO Fay questioned the respondent and he admitted that he knowingly allowed the construction and demolition debris to be trucked to the site from various job sites. The respondent also admitted that neither he nor the facility had any DEC authorization to receive and process the waste (Fay affidavit, ¶ 4).
3. Following this inspection, ECO Wood prepared and filed a misdemeanor information with the State of New York, County of Suffolk, First District Court, charging the respondent with knowingly operating an unauthorized solid waste management facility in violation of 6 NYCRR 360-1.7(a)(1)(i). ECO Wood also wrote Mr. Dalcamo three tickets which charged: (1) construction and operation of a new landfill in a deep flow recharge area in violation of 6 NYCRR 360-8.4(b); (2) causing or allowing the disposal of more than 70 cubic yards of solid waste at an unauthorized solid waste management facility in violation of 6 NYCRR 360-1.5(a); and (3) operating an unauthorized

solid waste management facility in violation of 6 NYCRR 360-1.7(a)(1)(i). (Rail affirmation, Exh. 1).

4. On June 7, 2011 and on June 13, 2011, members of DEC Staff met with the respondent in an attempt to administratively settle this matter and arrange cleanup of the site. These meetings were unsuccessful (Fay affidavit, ¶ 7 & 8).
5. On August 8, 2011, the respondent pled guilty in Suffolk County District Court to wrongfully, intentionally and knowingly disposing of solid waste in excess of 70 cubic yards at an unpermitted solid waste facility on June 17, 2008, in violation of 6 NYCRR 360-1.5(a). This guilty plea was the result of a plea bargain that resulted in other alleged violations being dropped. The respondent was fined \$3,750 (plus a surcharge) and conditionally discharged.
6. On September 14, 2011 DEC Staff member Wade visited the site and observed solid waste on the property in five separate piles (Wade affidavit, Exh. 1, photo 10). During this visit, Mr. Wade took photographs of the site (Wade affidavit, ¶ 7). The five piles are described below.
  - a. The first is a pile that contains approximately forty (40) cubic yards of broken concrete and asphalt (Wade affidavit, Exh. 1, photo 1).
  - b. The second is a pile that contains approximately fifty (50) cubic yards of oversized concrete, asphalt, brick and wood (Wade affidavit, Exh. 1, photos 2, 3 & 4).
  - c. The third is a pile that contains approximately three hundred and fifty (350) cubic yards of construction and demolition debris (Wade affidavit, Exh. 1, photos 5 & 6).
  - d. The fourth is a pile that contains approximately five (5) cubic yards of wood, rags and plastic waste (Wade affidavit, Exh. 1, photo 7).
  - e. The fifth is a pile that contains approximately ten (10) cubic yards of mixed broken concrete, bricks and asphalt (Wade affidavit, Exh. 1, photo 8 & 9).

## **DISCUSSION**

In its motion for order without hearing, DEC Staff requests that the Commissioner issue an order finding the respondent liable for two violations: (1) causing or allowing the disposal of more than 70 cubic yards of solid waste at an unauthorized solid waste management facility in violation of 6 NYCRR 360-1.5(a)(2); and (2) constructing and operating an unauthorized solid waste management facility in violation of 6 NYCRR 360-1.7(a)(1)(i). DEC Staff seeks a civil penalty of \$90,000, half of which is to be suspended contingent upon the respondent's compliance with other aspects of the Commissioner's order and future compliance with the ECL. In addition, DEC Staff asks the Commissioner to: (1) direct the respondent to submit an approvable cleanup plan for the site to DEC Staff; and (2) remove and dispose of the solid waste in accordance with the plan. DEC Staff requests the Commissioner to direct that all disposal of solid waste from the site must take place at a DEC authorized facility and that copies of all disposal tickets must be submitted to DEC Staff for verification.

## ***LIABILITY***

In this case, DEC Staff has moved for an order without hearing. Motions for order without hearing pursuant to 6 NYCRR 622.12 are the equivalent of summary judgment, and are governed by the standards and principles applicable to CPLR 3212 motions (see 6 NYCRR 622.12[d]). On the motion, Department staff bears the burden of establishing its entitlement to judgment as a matter of law on the violation charged (see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [and cases cited therein]). Department staff carries its burden by producing evidence sufficient to demonstrate the absence of any material issue of fact with respect to each element of the causes of action that are the subject of the motion (see id.).

In this case, the respondent has not appeared or in any way contested DEC Staff's motion. The record contains the respondent's guilty plea to wrongfully, intentionally and knowingly disposing of solid waste in excess of 70 cubic yards at an unpermitted solid waste facility, in violation of 6 NYCRR 360-1.5(a) (Rail affirmation, Exh. 2). Based on this admission and other evidence in the record, the Commissioner should conclude that DEC Staff has met its burden of proof with respect to the first cause of action.

In the second cause of action, DEC Staff alleges the respondent constructed and operated an unauthorized solid waste management facility in violation of 6 NYCRR 360-1.7(a)(1)(i). Based on the respondent's guilty plea, including his admission that the facility was unpermitted, the Commissioner should conclude that DEC Staff has met its burden of proof with respect to the second cause of action.

#### ***CIVIL PENALTY***

In addition to a finding of liability, DEC Staff seeks a total civil penalty of ninety thousand dollars (\$90,000). DEC Staff requests that half the amount, forty-five thousand dollars (\$45,000) be made payable and the other half be suspended, provided the respondent strictly complies with the other terms of the order and NYS solid waste law in the future. DEC Staff supports its request by citing ECL 71-2703(1)(b)(ii), which is applicable in this case. This section authorizes a civil penalty not to exceed twenty-two thousand five hundred dollars (\$22,500) for each violation and an additional penalty of twenty-two thousand five hundred dollars (\$22,500) per day that a violation continues. DEC Staff also cites the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990).

DEC's Civil Penalty Policy and Solid Waste Enforcement Policy (OGC 8, issued November 17, 2010) set forth a framework for calculating the appropriate amount of the civil penalty. The starting point of this calculation is the statutory maximum. This is followed by an analysis of the severity of the violation, the gravity component, the benefit component, and consideration of any relevant adjustments. DEC Staff's papers include information regarding its requested civil penalty, but DEC Staff counsel does not make reference to DEC's Solid Waste Enforcement Policy and no analysis of its contents is provided.

#### *The potential statutory maximum civil penalty*

DEC's Civil Penalty Policy states that penalty calculations for violations should begin with an analysis of the potential statutory maximum penalty. In his affirmation, DEC Staff counsel Rail states that more than 150 days elapsed from the time the respondent pled guilty until the filing of the instant motion and during this time, the violations continued. He reasons that half that time was spent in discussions between the parties to attempt to find a satisfactory resolution which would ensure a DEC supervised cleanup of the site. He concludes that a reasonable calculation to determine the maximum civil penalty

would be to multiply \$22,500 by the 75 days for a total penalty of more than \$1.68 million per violation. Based on this calculation, the total potential statutory maximum is more than \$3.3 million.

#### *The severity of the violation*

The next step set forth in the Solid Waste Enforcement Policy involves a determination about the severity of the violation. The policy establishes three classes of violations, Class I being the most serious. While the examples set forth in the policy do not specifically address the violation proven in this case, the narrative descriptions indicate that this violation is most likely a Class I violation because it is an unpermitted activity with no apparent operational control.

#### *The benefit component*

The next step set forth in both the Department's Civil Penalty policy and Solid Waste Enforcement Policy is an analysis of the benefit component or an estimate of the economic benefit enjoyed by the respondent as a result of delayed compliance. The Civil Penalty Policy states that every effort should be made to calculate and recover the economic benefit of non-compliance (p. 7). DEC Staff offers nothing in its papers regarding the respondent's benefit from the alleged violations. While it is likely that the respondent enjoyed some economic benefit from the violations, it is impossible to quantify this amount based on this record.

#### *The gravity component*

The next step is an analysis of the gravity component which reflects the seriousness of the violation. Two factors are identified as relevant to this analysis: (1) the potential harm and actual damage caused by the violation; and (2) the relative importance of the type of violation in the regulatory scheme (Civil Penalty Policy, p. 9). The Solid Waste Enforcement Policy states that a determination of the gravity component, using Appendix I of this document, should be undertaken. DEC Staff offers nothing in its papers regarding the potential for harm, actual damage, or importance to the regulatory scheme of the violations. However, from the information in the record, it is possible to conclude that the release of approximately 450 cubic yards of solid waste to the environment in an unpermitted landfill presents a significant potential harm. Furthermore, the permitting of landfills is very important to the regulatory

scheme. Accordingly, the Commissioner should conclude that the violations reflect a significant gravity component.

#### *Penalty adjustments*

Once the economic benefit and gravity components of a potential civil penalty are analyzed, the civil penalty amount should be adjusted using the following five factors: (1) the respondent's culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) any unique factors that exist. In this case, DEC Staff argues that no mitigating circumstances exist. DEC Staff states that the respondent has a history of non-compliance, including a solid waste felony conviction.<sup>1</sup> In addition, DEC Staff contends that the respondent knowingly committed the violations and has failed to cooperate in remediating them. Based on this, the Commissioner should conclude that no penalty adjustments are warranted.

#### *Civil Penalty: Conclusion*

The final step in calculating the appropriate civil penalty in this case is to apply Appendix I of the Solid Waste Enforcement Policy. Appendix I is difficult to understand and apply. The chart in the appendix supplies a range of percentages to be applied to the maximum penalty allowed by law. However, there is no explanation in the policy of how the chart is to be used in assessing the appropriate civil penalty. The Appendix seems to suggest that for Class I violations that a range of 85% - 100% of the maximum penalty should be imposed. Since this is the respondent's second offense, the Appendix then states that this amount should be doubled and further states that since this case was not settled by consent order, the

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<sup>1</sup> In a 1993 ruling of DEC Administrative Law Judge Pearlstein, a reference is made to Mr. Dalcamo pleading guilty on June 4, 1991 to three counts of endangering public health, safety, or the environment in violation of ECL 71-2713(3). These violations were the result of illegal dumping in Babylon, New York. On January 22, 1992, Mr. Dalcamo was sentenced to six months incarceration with five years probation; payment of \$51,000 restitution to the State of New York; and the execution of a confession of judgment in favor of the State in the amount of \$189,000. Mr. Dalcamo was also prohibited from future involvement in any environment related business or activity (Matter of Robert Johnson, Rulings of Administrative Law Judge, November 22, 1993 at 3).

penalty amount must be significantly higher. This would seemingly require the imposition of a civil penalty in excess of 100% of the statutory maximum, a legal impossibility.

The record of this proceeding justifies the imposition of a payable civil penalty of \$90,000, more than that requested by DEC Staff. In fact, the facts of this case in light of the Solid Waste Enforcement Policy seem to justify a substantially higher civil penalty. However, the Commissioner is limited by the fact that the respondent is only on notice that a \$90,000 penalty is being sought by DEC Staff. Based on the evidence in the record and the applicable DEC policies, the Commissioner should impose a ninety thousand dollar (\$90,000) payable civil penalty. DEC Staff's request that half the penalty be suspended is not supported by the record and the Solid Waste Enforcement Policy.

#### ***SITE REMEDIATION***

In addition to a finding of liability and the imposition of a civil penalty DEC Staff also asks the Commissioner to require the respondent to submit an approvable cleanup plan to DEC Staff to remove and dispose of the solid waste at the site. DEC Staff requests that the disposal of all the solid waste must take place at a DEC authorized facility and that copies of all disposal tickets must be submitted to DEC Staff for verification. Because the guilty plea in the criminal action did not provide a legal mechanism to order the respondent to clean up the site, DEC Staff attempted to negotiate a settlement to this matter with the respondent. When these efforts failed, DEC Staff then brought this action (Fay affidavit, ¶ 8). Based on the record of this matter, the Commissioner should: (1) direct the respondent to submit an approvable cleanup plan for the site to DEC Staff; (2) direct the respondent to remove and dispose of the solid waste in accordance with the plan; and (3) direct that all disposal of solid waste from the site take place at a DEC authorized facility, and that copies of all disposal tickets be submitted to DEC Staff for verification.

#### **CONCLUSIONS OF LAW**

1. Respondent Robert Dalcamo violated 6 NYCRR 360-1.5(a)(2) by causing or allowing the disposal of more than seventy (70) cubic yards of solid waste at 49 North Dunton Avenue, Medford, New York, which is not an authorized solid waste disposal facility.

2. Respondent Robert Dalcamo violated 6 NYCRR 360-1.7(a)(1)(i) by causing or allowing the construction and operation of a solid waste management facility at 49 North Dunton Avenue, Medford, New York, without a valid permit.

**RECOMMENDATION**

Based on the record in this matter and the analysis above, I recommend that the Commissioner issue an order that finds the respondent Robert Dalcamo liable for violating 6 NYCRR 360-1.5(a)(2) and 6 NYCRR 360-1.7(a)(1)(i). The order should also impose a payable civil penalty of ninety thousand dollars (\$90,000). Finally the Commissioner should require the respondent to: (1) submit an approvable cleanup plan for the site to DEC Staff within 30 days of service of the Commissioner's order; (2) comply with the terms of the cleanup plan; and (3) provide copies of all disposal tickets to DEC Staff for verification to ensure that all disposal of solid waste from the site takes place at a DEC authorized facility.

Albany, New York  
June 4, 2013

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P. Nicholas Garlick  
Administrative Law Judge

### **Exhibit List**

Attached to Mr. Wade's affidavit:

Exh. 1 - Ten color photos of the site

Attached to Mr. Vernon's affirmation:

Exh. 1 - Misdemeanor Information regarding Mr. Dalcamo,  
including excerpt from 6 NYCRR 360 and three tickets

Exh. 2 - Transcript of People v. Dalcamo, August 8, 2011

Exh. 3 - Transcript of Record - District Court, Suffolk  
County dated 8/8/11

Attached to Mr. Fay's affidavit:

Exh. 1 - Misdemeanor Information regarding Mr. Dalcamo,  
including excerpt from 6 NYCRR 360 and three tickets

Exh. 2 - Transcript of People v. Dalcamo, August 8, 2011