

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

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In the Matter of the Alleged Violation  
of Article 23 of the Environmental  
Conservation Law,

**ORDER**

- by -

**MARC DELLA VILLA,**

Respondent.

DEC Case No.  
R4-2004-0708-83

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Pursuant to a notice of hearing and complaint dated August 18, 2004, staff of the New York State Department of Environmental Conservation ("Department staff") commenced an administrative enforcement proceeding against respondent Marc Della Villa, alleging that he violated Environmental Conservation Law ("ECL") § 23-2711(1) by mining in an area not approved for that purpose and in greater quantity than was permitted under his Department-approved plan.

Department staff personally served Mr. Della Villa with the notice of hearing and complaint on August 31, 2004 in accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The complaint states that the Department approved a plan permitting respondent to engage in limited mining at a site in the Town of Rotterdam, Schenectady County. The complaint alleged that respondent's approved plan permitted 4,600 cubic yards to be mined from a specific 0.29 acre area. The complaint further alleged that upon inspection on June 30, 2004, Department staff determined that respondent had mined approximately 14,000 cubic yards from an area about 150 feet west of the approved site.

The complaint alleges that respondent violated ECL 23-2711(1). This section requires a permit to mine more than 750 cubic yards or 1,000 tons, whichever is less, of material within a twelve month period. The complaint states that respondent mined a quantity greater than 750 cubic yards or 1,000 tons outside of the approved site, which is mining without a permit and, therefore, a violation of ECL 23-2711(1).

The time for respondent to serve an answer expired on

September 20, 2004. No answer was filed in a timely manner.

Department staff made a motion, dated September 23, 2004, for a default judgment. Accompanying the motion was an affidavit of Department Environmental Conservation Officer Kurt Swan addressing personal service of the notice of hearing and complaint, an affidavit of Department mined land reclamation specialist Christopher McKelvey addressing the nature of the alleged violation, and an affirmation of Department staff attorney Richard Ostrov addressing the circumstances of the default.

The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster, who prepared the attached default summary report dated October 5, 2004. I adopt this report as my own, subject to my comments herein.

The civil penalty sought by Department staff in its motion is the maximum statutorily permitted amount for a one-time violation of ECL article 23 (see ECL 71-1307[1]). Due to the obvious deviation from the area clearly delineated in the Department-approved plan and the large-scale nature of the violation, in addition to other factors, the penalty is appropriate in this instance.

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. Respondent is adjudged to be in default and to have waived his right to a hearing in this proceeding. As a consequence of the default, Department staff's allegations against respondent in the complaint are deemed to have been admitted by him, and respondent is adjudged to have violated ECL 23-2711(1).

II. Respondent is assessed a civil penalty in the amount of five thousand dollars (\$5,000) pursuant to ECL 71-1307(1). No later than 30 days after the date of this order, payment of this penalty shall be made in the form of a certified or cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered 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.

III. Respondent shall:

1. Immediately cease all mining and mining-related activities at the site unless pursuant to the requirements for reclamation required under this order.

2. Immediately cease the importation, storage, disposal and/or backfilling within the area of excavation with any material not listed in 6 NYCRR 360-7.1(b)(1)(i).

3. Within 30 days of the date of this order, reclaim the entire area affected by mining activities by completing the following activities:

(a) Grade the entire site so that the maximum slope is no less than 2 horizontal on 1 vertical;

(b) Provide a minimum of six inches of cover material, with a soil composition capable of sustaining plant growth, over the entire affected acreage;

(c) Fertilize, seed and mulch so as to provide a 75 percent vegetative cover over the entire affected area; and

(d) Notify the Department upon completion of reclamation work and the establishment of the required vegetative cover, to allow Department Staff to conduct a site inspection.

4. Maintain the vegetative cover on the reclaimed mining area.

5. Reclaim the site to only the original grade.

IV. All communications between respondent and Department staff 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.



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

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In the Matter of the Alleged Violation  
of Article 23 of the Environmental  
Conservation Law, by:

**DEFAULT SUMMARY  
REPORT**

**MARC DELLA VILLA,**

Respondent.

Case No. R4-2004-0708-83

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Proceedings

On August 31, 2004, Staff of the Department of Environmental Conservation personally served a notice of hearing and complaint, both dated August 18, 2004, upon Marc Della Villa, Respondent. The notice advised Mr. Della Villa of his duty to serve an answer to the complaint within 20 days of his receipt of it.

By written motion dated September 23, 2004, Department Staff moved for a default judgment against Mr. Della Villa. The motion was based on Mr. Della Villa's failure to file a timely answer to the complaint.

The motion papers were sent to James McClymonds, the Department's chief administrative law judge, who assigned the matter to me.

Findings of Fact

1. At 11:30 a.m. on August 31, 2004, Department Environmental Conservation Officer ("ECO") Kurt Swan personally served a copy of the notice of hearing and complaint in this matter by delivering a copy of these papers to Mr. Della Villa at 1666 Roma Avenue, Schenectady, New York.

2. Among other things, the hearing notice advised Mr. Della Villa that within 20 days of his receipt of the complaint, he was required to serve Richard Ostrov, a Department Staff attorney, with his answer to the complaint, and that failure to timely answer would result in a default and a waiver of Mr. Della Villa's right to a hearing.

3. Mr. Della Villa failed to file an answer to the complaint on or before September 20, 2004.

## Discussion

### - - Satisfaction of Default Requirements

According to the Department's hearing regulations, a respondent's failure to file a timely answer constitutes a default and a waiver of the respondent's right to a hearing. [See Section 622.15(a) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").] When such a failure occurs, Department Staff may move for a default judgment, such motion to contain:

- (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- (2) proof of the respondent's failure to file a timely answer; and
- (3) a proposed order. [See 6 NYCRR 622.15(b).]

Department Staff's papers contain all three of these elements, and therefore its motion may be granted.

First, ECO Swan's affidavit of personal service (attached as Exhibit "A" to Mr. Ostrov's affirmation in support of the motion for default judgment) adequately demonstrates that the notice of hearing and complaint were served upon Mr. Della Villa on August 31, 2004.

The Department's enforcement hearing procedures provide that service of the notice of hearing and complaint must be by personal service consistent with the New York State Civil Practice Law and Rules ("CPLR") or by certified mail. [See 6 NYCRR 622.3(a)(3).] CPLR Section 308(1) allows for personal service upon a natural person by delivering the summons within the state to the person to be served.

According to ECO Swan's affidavit, that is how service was effected here; the ECO delivered a copy of the notice of hearing and complaint personally to Mr. Della Villa at 1666 Roma Avenue, Schenectady. ECO Swan asserts that the person served was Mr. Della Villa, and his affidavit contains a physical description of the person served.

After receiving the notice of hearing and complaint on August 31, 2004, Mr. Della Villa had 20 days to serve an answer upon Department Staff. According to Mr. Ostrov's affirmation in support of the motion for default judgment, Mr. Della Villa failed to file an answer on or before September 20, 2004.

Because September 20 was the 20-day deadline, Mr. Ostrov's affirmation proves Mr. Della Villa's failure to file a timely answer, the second element in the regulations.

Third, as required by 6 NYCRR 622.15(b)(3), Department Staff's motion for default judgment contains a proposed order for the Commissioner's signature. The proposed order would grant the same relief that is requested in the complaint that was served upon Mr. Della Villa, which means that he was on notice as to the potential consequences of his default.

- - Cause of Action

The complaint in this matter charges Mr. Della Villa with violation of ECL Section 23-2711(1). In relevant part, that section states that a Department permit is required for the mining of more than 1,000 tons or 750 cubic yards, whichever is less, of minerals from the earth within 12 successive calendar months.

According to the complaint, on November 12, 2002, Mr. Della Villa submitted a mined land use plan through his consultant for the mining of 0.29 acres of land approximately 120 feet south of Westside Avenue, approximately 400 feet west from its intersection with Wedgewood Heights, in the Town of Rotterdam, Schenectady County. The mining site was intended as a borrow pit for a nearby construction and demolition debris landfill that is to be closed pursuant to a court order.

The complaint states that on November 13, 2002, Department Staff approved the plan, which authorized Mr. Della Villa to remove a total of 4,600 cubic yards of material from the 0.29-acre site. The complaint adds, however, that during a June 30, 2004, inspection, Department Staff found that:

(A) Excavation had occurred not in the 0.29-acre area, but in a separate area approximately 150 feet to the west of it; and

(B) Excavation in this unapproved area had involved the mining of about 14,000 cubic yards of material.

The Department's complaint states a cause of action under ECL Section 23-2711 because it alleges that Mr. Della Villa mined more material than the statute allows, in an area that was not permitted for mining by the Department.

- - Penalty Factors

As stated in its complaint, Department Staff requests a civil penalty of Five Thousand Dollars (\$5,000) in this matter.

The penalty is sought pursuant to ECL Section 71-1307(1), which provides that any person who violates any provision of ECL Article 23 shall be liable for a civil penalty not to exceed \$5,000 and an additional penalty of \$1,000 for each day during which such violation continues, to be assessed by the Commissioner after a hearing or opportunity to be heard. Mr. Della Villa was afforded an opportunity to be heard, which he waived by not filing a timely answer to the complaint.

Department Staff's requested \$5,000 penalty is the maximum allowed for a one-time violation of ECL Article 23. In his affirmation in support of the motion for default judgment, Mr. Ostrov cites the following factors to justify assessment of this penalty:

(1) The Department-approved mining plan is unambiguous as to the location and size of the area in which mining is approved. In fact, that area is clearly delineated on a map that is part of the approved plan.

(2) The large-scale nature of the violation shows a complete indifference to compliance with the mining plan. According to Christopher McKelvey, a Department mined land reclamation specialist, Mr. Della Villa mined about 1.55 acres of area, all of it outside of the approved 0.29-acre area, removing approximately 14,000 cubic yards of soil when he was approved to mine only 4,600 cubic yards in total.

(3) A follow-up Staff inspection of the area on September 16, 2004, found that Mr. Della Villa had removed an additional 400 cubic yards from the area outside of the approved mining site, which could be charged as a second violation of ECL Section 23-2711(1) under an amended complaint.

(4) The authorized material from the mine was to be used in the closure of an illegal construction and demolition debris landfill as ordered by a state court. According to Mr. McKelvey, Mr. Della Villa is currently in contempt of the court order.

Under these circumstances, Department Staff's proposed civil penalty is rational and supported by evidence in its papers. The penalty is also consistent with the Commissioner's civil penalty policy, which is designed to assess and collect penalties in a manner that will assist the Department in efficiently and fairly deterring and punishing violations. The penalty sought by Department Staff is warranted given the gravity of the violation, which consists of mining outside of the permitted area, as well as the large scale of the violation in terms of both the area



that was illegally mined and the amount of material that was removed.

Department Staff also proposes that Mr. Della Villa be required to implement particular measures to reclaim the area he mined and to make sure that it remains reclaimed. These measures are set out in Staff's complaint and restated in its proposed order. Mr. McKelvey's affidavit, supplied as part of the motion for default judgment, confirms that these measures are necessary.

### Conclusions

1. By failing to answer Department Staff's complaint in a timely manner, the Respondent, Marc Della Villa, has defaulted and waived his right to a hearing in this matter.

2. Department Staff's proposed \$5,000 civil penalty should be assessed, and Mr. Della Villa should be ordered to undertake the measures outlined by Staff to assure reclamation of the area affected by the illegal mining. These measures are set out in the proposed order which is attached to this hearing report. In terms of relief, that order is consistent with the one drafted by Department Staff.

### Recommendation

The Commissioner should sign the attached order confirming the default and providing the relief requested by Department Staff.

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Edward Buhrmaster  
Administrative Law Judge

Albany, New York  
October 5, 2004