

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

In the Matter of 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.
R1-20060717-177

- by -

**LMR SERVICES CORP. a/k/a BBR
ROLLOFF SERVICES, and THOMAS
BONSERA, MICHAEL BONSER, JR.,
and CHRISTOPHER BONSER,**

Respondents.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this proceeding to enforce provisions of article 27 of the Environmental Conservation Law ("ECL") and of part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by service of a notice of hearing and verified complaint pursuant to 6 NYCRR 622.3(a)(1). The notice of hearing and verified complaint, both dated October 17, 2006, were served upon respondent LMR Services Corp. a/k/a BBR Rolloff Services (hereinafter "LMR Services"), and respondents Thomas Bonser, Michael Bonser, Jr., and Christopher Bonser (collectively, the "Bonser respondents"), by certified mail at LMR Services' designated corporate address in accordance with 6 NYCRR 622.3(a)(3).¹

Department staff charged respondents with owning or operating two solid waste facilities known as LMR Services upon

¹In addition, on October 17, 2006, Department staff mailed a copy of the same notice of hearing and verified complaint, via certified mail, to respondents' attorney, Randy Scott Zelin, Esq. Further, on October 17, 2006 another copy of the notice of hearing and verified complaint was sent by Department staff, via certified mail, to respondent Christopher Bonser at 158 Third Street, Saint James, New York. The method used by staff to serve both of these additional copies of its notice of hearing and verified complaint was in accordance with 6 NYCRR 622.3(a)(3).

property located at 35 Gilpin Avenue, Hauppauge (Suffolk County), New York ("Hauppauge facility"), and at 80 Dupont Street, Plainview (Nassau County), New York ("Plainview facility"). The complaint maintains that respondents' facilities are "solid waste management facilities" as described in ECL 27-0701 and 6 NYCRR 360-1.2, and are operating without permits in violation of ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i).

According to the verified complaint, on January 24, 2006, the Department's Division of Law Enforcement issued five separate administrative charging instruments for various violations of the State's solid waste regulations at respondents' Plainview facility. Thereafter, the complaint maintains that Department staff conducted three separate inspections of respondents' Plainview facility on February 6, 2006, May 30, 2006, and July 6, 2006 and, during each inspection, staff documented continuing violations of ECL article 27 and 6 NYCRR part 360. Following the inspections of respondents' Plainview facility, the complaint alleges that two separate Notices of Violation, dated June 2, 2006 and July 7, 2006, respectively, were sent by Department staff by mail to respondents.

The verified complaint also alleges that, on August 2, 2006, Department staff conducted an inspection of respondents' Hauppauge facility and documented certain violations of 6 NYCRR 360-1 and 6 NYCRR 360-8. As a result of the deficiencies and violations noted by staff, the Department's verified complaint alleged five separate causes of action based upon the charging instruments on January 24, 2006, and eleven separate causes of action based upon the subsequent inspections of the Plainview and Hauppauge facilities in 2006 as follows:

1. Respondents violated ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i) on January 24, 2006 by operating a solid waste management facility at the Plainview facility without a Department permit or other authorization;
2. Respondents violated 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the most recent annual report for the Plainview facility available upon request by the Department;
3. Respondents violated 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the operation and maintenance report for the Plainview facility available upon request by the Department;

4. Respondents violated 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the contingency plan for the Plainview facility available upon request by the Department;
5. Respondents violated 6 NYCRR 360-1.5 on January 24, 2006 by disposing solid waste at the Plainview facility without the requisite Department permit or authorization;
6. Respondents violated ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on February 6, 2006 by operating a construction and demolition debris processing facility at the Plainview facility without a Department permit or other authorization;
7. Respondents violated 6 NYCRR 360-1.14(j) on February 6, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;
8. Respondents violated 6 NYCRR 360-1.14(k) on February 6, 2006 by failing to control dust at the Plainview facility;
9. Respondents violated ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on May 30, 2006 by operating a construction and demolition debris processing facility at the Plainview facility without a Department permit or other authorization;
10. Respondents violated 6 NYCRR 360-1.14(j) on May 30, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;
11. Respondents violated 6 NYCRR 360-1.14(k) on May 30, 2006 by failing to control dust at the Plainview facility;
12. Respondents violated ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on July 6, 2006 by operating a construction and demolition debris processing facility at the Plainview facility without a Department permit or other authorization;
13. Respondents violated 6 NYCRR 360-1.14(j) on July 6, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;

14. Respondents violated 6 NYCRR 360-1.14(k) on July 6, 2006 by failing to control dust at the Plainview facility;

15. Respondents violated ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i) on August 2, 2006 by operating a solid waste management facility at the Hauppauge facility without a Department permit or other authorization; and

16. Respondents violated 6 NYCRR 360-8.4(b) on August 2, 2006 by commencing operation of a landfill at the Hauppauge facility located in a deep flow recharge area.

Department staff extended respondents' time to file an answer to the October 17, 2006 verified complaint to April 13, 2007. Respondents failed to file an answer by then and, to date, have failed to file an answer to the Department's verified complaint.

Department staff filed a motion for default judgment, dated April 19, 2007, with the Department's Office of Hearings and Mediation Services. Department staff also served the motion upon respondents' attorney by mail pursuant to CPLR 2103(b) and 3215(g). The matter was assigned to Administrative Law Judge ("ALJ") Mark D. Sanza, who prepared the attached default summary report. I adopt ALJ Sanza's report as my decision in this matter, subject to the following comments.

Based upon the record, I conclude that the proposed civil penalty for the violations at the Hauppauge and Plainview facilities and remedial measures sought by Department staff to address the violations at the Plainview facility are authorized and appropriate. I also conclude that the dates recommended by staff by which respondents are to undertake the remedial measures at the Plainview facility are reasonable. Finally, based on this record, I direct that respondents remove the solid waste from the Hauppauge facility within forty-five days after service of this order, provide for post-removal inspection by Department staff and undertake, as necessary, sampling and appropriate remediation.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment against respondents LMR Services Corp. a/k/a BBR Rolloff Services, Thomas Bonsera, Michael Bonsera, Jr., and Christopher Bonsera, is granted.

II. Respondents are adjudged to be in default and to have waived the right to a hearing in this administrative enforcement proceeding. Accordingly, the factual allegations against respondents, as contained in the verified complaint, are deemed to have been admitted by respondents.

III. Respondents are adjudged to have violated:

A. ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i) on January 24, 2006 by operating a solid waste management facility at the Plainview facility without a Department permit or other authorization;

B. 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the most recent annual report for the Plainview facility available upon request by the Department;

C. 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the operation and maintenance report for the Plainview facility available upon request by the Department;

D. 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the contingency plan for the Plainview facility available upon request by the Department;

E. 6 NYCRR 360-1.5 on January 24, 2006 by disposing solid waste at the Plainview facility without the requisite Department permit or authorization;

F. ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on February 6, 2006 by operating a construction and demolition debris processing facility at the Plainview facility without a Department permit or other authorization;

G. 6 NYCRR 360-1.14(j) on February 6, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;

H. 6 NYCRR 360-1.14(k) on February 6, 2006 by failing to control dust at the Plainview facility;

I. ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on May 30, 2006 by operating a construction and demolition debris processing facility at the Plainview facility without a Department permit

or other authorization;

J. 6 NYCRR 360-1.14(j) on May 30, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;

K. 6 NYCRR 360-1.14(k) on May 30, 2006 by failing to control dust at the Plainview facility;

L. ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on July 6, 2006 by operating a construction and demolition debris processing facility at the Plainview facility without a Department permit or other authorization;

M. 6 NYCRR 360-1.14(j) on July 6, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;

N. 6 NYCRR 360-1.14(k) on July 6, 2006 by failing to control dust at the Plainview facility;

O. ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i) on August 2, 2006 by operating a solid waste management facility at the Hauppauge facility without a Department permit or other authorization; and

P. 6 NYCRR 360-8.4(b) on August 2, 2006 by commencing construction or operation of a landfill at the Hauppauge facility located in a deep flow recharge area.

IV. Respondents shall immediately stop allowing any solid waste, including but not limited to construction and demolition debris, to come onto the Plainview and Hauppauge facilities in any manner or method, or for any purpose.

V. Respondents are hereby jointly and severally assessed a civil penalty in the amount of fifty thousand dollars (\$50,000). The civil penalty shall be due and payable within thirty (30) days after the service of this order upon respondents. 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:

Vernon G. Rail, Esq.
New York State Department of Environmental Conservation
Region 1 Headquarters
50 Circle Drive
Stony Brook, New York 11790-2356

VI. With respect to the Plainview facility, respondents are hereby directed to:

- A. Starting within fifteen (15) days after service of this order, remove and transport all construction and demolition debris from the Plainview facility to locations that are authorized to accept construction and demolition debris;
- B. Starting within fifteen (15) days after service of this order, remove and transport all solid waste including but not limited to mattresses, toys, and clothing from the Plainview facility to locations that are authorized to accept solid waste;
- C. Starting within fifteen (15) days after service of this order, remove and transport all oil-based paint cans and containers marked "POISON" from the Plainview facility to locations that are authorized to accept such material;
- D. Starting within thirty (30) days after service of this order, remove and transport approximately fifteen thousand (15,000) cubic yards of soil that is mixed with concrete and asphalt from the Plainview facility to locations that are authorized to accept such material. Any screening/sifting of the material to separate sand and bank-run soils for use off-site as clean fill must be approved by Department staff;
- E. Provide no less than five (5) days advance notice to the following individual of the start of each of the removal activities from the Plainview facility required by subparagraphs A, B, C, and D of this paragraph:

Syed Rahman, P.E.
Regional Solid Waste Engineer
New York State Department of
Environmental Conservation
Region 1 Headquarters, SUNY Campus

50 Circle Road
Stony Brook, New York 11790-3409;

- F. Provide the Department's Region 1 Regional Solid Waste Engineer on a weekly basis with copies of all disposal facility tickets, manifests and any other documentation verifying the volume of each load and appropriate disposal of the waste identified in subparagraphs A, B, and C of this paragraph and the disposal or other handling of the soil identified in subparagraph D of this paragraph;
- G. Use only such transport vehicles that are authorized to transport the waste and materials set forth in subparagraphs A, B, C and D of this paragraph;
- H. Complete all work at the Plainview facility required by this paragraph within one hundred and five (105) days after service of this order;
- I. Advise the Department, in writing, within five (5) days of completing the work at the Plainview facility required by subparagraphs A, B, C and D of this paragraph; and
- J. Allow Department staff to conduct post-removal inspection of the Plainview facility in order to verify the status of the work required by this order and to determine if there are any visual indications of soil contamination at the site. In the event that soil contamination is indicated, respondents shall undertake, at their expense, sampling as directed by Department staff. Any samples taken shall be evaluated at approved laboratories. Based on the sampling results, respondents shall undertake, at their expense, any appropriate remediation that may be required by Department staff.

VII. With respect to the Hauppauge facility, respondents are hereby directed to:

- A. Starting within fifteen (15) days after service of this order, remove and transport to authorized facilities and only in vehicles permitted to transport such waste, all solid waste from the

Hauppauge facility;

- B. Provide no less than five (5) days advance notice to the following individual of the start of the waste removal activities from the Hauppauge facility:

Syed Rahman, P.E.
Regional Solid Waste Engineer
New York State Department of
Environmental Conservation
Region 1 Headquarters, SUNY Campus
50 Circle Road
Stony Brook, New York 11790-3409;

- C. Provide the Department's Region 1 Regional Solid Waste Engineer with copies of all disposal facility tickets, manifests and any other documentation verifying the volume of each load and appropriate disposal of the waste identified in subparagraph A of this paragraph;
- D. Complete all work at the Hauppauge facility within forty-five (45) days after service of this order;
- E. Advise the Department, in writing, within five (5) days of completing the work at the Hauppauge facility required by subparagraph A of this paragraph; and
- F. Allow post-removal inspection of the Hauppauge facility by Department staff to verify the status of the work required by this order and to determine if there are any visual indications of soil contamination at the site. In the event that soil contamination is indicated, respondents shall undertake, at their expense, sampling as directed by Department staff. Any samples taken shall be evaluated at approved laboratories. Based on the sampling results, respondents shall undertake, at their expense, any appropriate remediation that may be required by Department staff.

VIII. All communications from respondents to the Department concerning this order shall be made to: Vernon G. Rail, Esq., New York State Department of Environmental Conservation, Region 1 Headquarters, 50 Circle Drive, Stony Brook, New York 11790-2356.

IX. The provisions, terms and conditions of this order shall bind respondents LMR Services Corp. a/k/a BBR Rolloff Services, Thomas Bonsera, Michael Bonsera, Jr., and Christopher Bonsera, and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: August 23, 2007
Albany, New York

TO: Randy Scott Zelin, Esq. (By certified mail)
Randy Scott Zelin, P.C.
Attorney for Respondents
675 Old Country Road
Westbury, New York 11590

LMR Services Corp. (By certified mail)
1 Forsythia Lane
Jericho, New York 11753

Christopher Bonsera (By certified mail)
158 Third Street
Saint James, New York 11780

Christopher Bonsera (By certified mail)
c/o LMR Services Corp.
1 Forsythia Lane
Jericho, New York 11753

Thomas Bonsera (By certified mail)
c/o LMR Services Corp.
1 Forsythia Lane
Jericho, New York 11753

Michael Bonsera, Jr. (By certified mail)
c/o LMR Services Corp.
1 Forsythia Lane
Jericho, New York 11753

Vernon G. Rail, Esq. (By regular mail)
Assistant Regional Attorney
New York State Department of
Environmental Conservation
Region 1 Headquarters
50 Circle Road
Stony Brook, New York 11790-2356

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

In the Matter of 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"),

**DEFAULT
SUMMARY REPORT**

DEC Case No.
R1-20060717-177

- by -

**LMR SERVICES CORP. a/k/a BBR
ROLLOFF SERVICES, and THOMAS
BONSERA, MICHAEL BONSER, JR.,
and CHRISTOPHER BONSER,**

Respondents.

Proceedings

On October 17, 2006, staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent LMR Services Corp. a/k/a BBR Rolloff Services (hereinafter "LMR Services"), and respondents Thomas Bonsera, Michael Bonsera, Jr., and Christopher Bonsera (collectively, the "Bonsera respondents"), by mailing a copy of a notice of hearing and verified complaint, dated October 17, 2006, via certified mail, to respondent LMR Services and the Bonsera respondents at 1 Forsythia Lane, Jericho, New York.¹

In addition, on October 17, 2006, Department staff mailed a copy of the same notice of hearing and verified complaint, via certified mail, to respondents' attorney, Randy Scott Zelin, Esq., at 675 Old Country Road, Westbury, New York. On or about the same date, Department staff sent a copy of the

¹ A search of the New York State Department of State, Division of Corporations, website conducted on May 31, 2007 revealed that respondent LMR Services Corp. is currently registered as an "active" domestic business entity with a principal office located at 1 Forsythia Lane, Jericho, New York 11753, with service of process at the same address in care of respondent Michael Bonsera, Jr. The search revealed no listing for BBR Rolloff Services with the Department of State (see http://dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_...).

notice of hearing and verified complaint, via certified mail, to respondent Christopher Bonsera at 158 Third Street, Saint James, New York.

According to the complaint, the Bonsera respondents own or operate two solid waste facilities known as LMR Services upon property located at 35 Gilpin Avenue, Hauppauge (Suffolk County), New York (hereinafter "Hauppauge facility"), and at 80 Dupont Street, Plainview (Nassau County), New York (hereinafter "Plainview facility"). The complaint maintains that respondents' facilities are "solid waste management facilities" as described in Environmental Conservation Law ("ECL") § 27-0701, and section 360-1.2 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The complaint alleges that, on January 24, 2006, the Department's Division of Law Enforcement issued five separate administrative charging instruments to respondent Christopher Bonsera for various violations of 6 NYCRR 360-1 at respondents' Plainview facility. Thereafter, according to the complaint, Department staff conducted three separate inspections of respondents' Plainview facility on February 6, 2006, May 30, 2006, and July 6, 2006 and, during each inspection, staff documented continuing violations of ECL article 27 and 6 NYCRR part 360. Following the latter two inspections of respondents' Plainview facility, the complaint maintains that two separate Notices of Violation, dated June 2, 2006 and July 7, 2006, respectively, were sent by Department staff to respondents by mail at P.O. Box 77, Syosset, New York.

The complaint also alleges that, on August 2, 2006, Department staff conducted an inspection of respondents' Hauppauge facility and documented certain violations of 6 NYCRR 360-1 and 360-8. As a result of the deficiencies and violations noted by staff, the Department's complaint alleged five separate causes of action based upon the charging instruments issued to respondent Christopher Bonsera on January 24, 2006, and eleven separate causes of action based upon the subsequent inspections of respondents' Plainview and Hauppauge facilities in 2006 as follows:

1. Respondents violated ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i) on January 24, 2006 by operating a solid waste management facility at the Plainview facility without a Department permit or other authorization;

2. Respondents violated 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the most recent annual report for the Plainview facility available upon request by the Department;
3. Respondents violated 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the operation and maintenance report for the Plainview facility available upon request by the Department;
4. Respondents violated 6 NYCRR 360-1.14(u)(1) on January 24, 2006 by failing to have the contingency plan for the Plainview facility available upon request by the Department;
5. Respondents violated 6 NYCRR 360-1.5 on January 24, 2006 by disposing solid waste at the Plainview facility without the requisite Department permit or authorization;
6. Respondents violated ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on February 6, 2006 by operating a construction and demolition ("C&D") debris processing facility at the Plainview facility without a Department permit or other authorization;
7. Respondents violated 6 NYCRR 360-1.14(j) on February 6, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;
8. Respondents violated 6 NYCRR 360-1.14(k) on February 6, 2006 by failing to control dust at the Plainview facility;
9. Respondents violated ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on May 30, 2006 by operating a C&D debris processing facility at the Plainview facility without a Department permit or other authorization;
10. Respondents violated 6 NYCRR 360-1.14(j) on May 30, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;
11. Respondents violated 6 NYCRR 360-1.14(k) on May 30, 2006 by failing to control dust at the Plainview facility;
12. Respondents violated ECL 27-0707(1), 6 NYCRR 360-16.1(c), and 6 NYCRR 360-1.7(a)(1)(i) on July 6, 2006 by operating a C&D debris processing facility at the Plainview

facility without a Department permit or other authorization;

13. Respondents violated 6 NYCRR 360-1.14(j) on July 6, 2006 by failing to construct a fence or implement other suitable means to confine blowing litter to the Plainview facility;

14. Respondents violated 6 NYCRR 360-1.14(k) on July 6, 2006 by failing to control dust at the Plainview facility;

15. Respondents violated ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i) on August 2, 2006 by operating a solid waste management facility at the Hauppauge facility without a Department permit or other authorization; and

16. Respondents violated 6 NYCRR 360-8.4(b) on August 2, 2006 by commencing operation of a landfill at the Hauppauge facility located in a deep flow recharge area.

The October 17, 2006 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondents must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and verified complaint. As provided for by 6 NYCRR 622.8, the notice of hearing also scheduled a pre-hearing conference for November 29, 2006 at the Department's Region 1 headquarters in Stony Brook, New York. The notice of hearing stated that if respondents failed either to file an answer or to attend the pre-hearing conference as scheduled, respondents would be in default and would waive their right to a hearing.

With a cover letter dated April 19, 2007, Vernon G. Rail, Esq., Assistant Regional Attorney with the Department's Division of Legal Affairs in Region 1, filed a notice of motion for default judgment and motion for default judgment, both dated April 19, 2007, along with supporting papers against respondents with the Department's Office of Hearings and Mediation Services. The supporting papers consisted of an affirmation by Mr. Rail dated April 19, 2007, which documents respondent's failure to file a timely answer, along with attached Exhibits marked "A" through "K."

Exhibit "A" contains a copy of a letter dated October 17, 2006 from Mr. Rail to Randy Scott Zelin, Esq., enclosing a copy of the October 17, 2006 notice of hearing and verified complaint against respondents. Exhibit "B" contains copies of the signed certified mail receipts for the Department's service of the notice of hearing and verified complaint upon respondent LMR Services on November 11, 2006, and upon respondent

Christopher Bonsera on October 28, 2006. Exhibit "C" is a copy of a "NYS DEC-Region 1 Division of Legal Affairs Sign-In Sheet" for a meeting on November 6, 2006 between Department staff and Randy Zelin, Esq. on behalf of respondents. Exhibit "D" is a copy of a "Fax Cover Sheet" from Randy Scott Zelin, Esq. to Mr. Rail dated November 22, 2006 concerning respondents' consent to inspections and search of their records. Exhibit "E" is a copy of a written "Inspection Report" with diagrams, numerical data, and photographs stemming from an inspection of respondents' Plainview facility by Department staff on December 6, 2006.

Exhibit "F" is a copy of a letter dated January 11, 2007 from Vernon Rail, Esq. to Randy Scott Zelin, Esq. enclosing a draft Schedule of Compliance for respondents and proposing a settlement meeting. Exhibit "G" is a copy of a letter from Mr. Zelin to Mr. Rail dated January 26, 2007 concerning an agreement to the draft compliance schedule. Exhibit "H" is a copy of a letter from Mr. Rail to Mr. Zelin dated April 3, 2007 concerning respondent Michael Bonsera, Jr. failing to appear at a conference on March 28, 2007 and respondents' failure to file an answer to the Department's October 17, 2006 verified complaint. The April 3, 2007 letter also noted that, in order for respondents to avoid a default judgment in this matter, respondents had to answer the Department's complaint by April 13, 2007. Exhibit "I" is a copy of a "Facsimile Transmittal Sheet" from Mr. Zelin to Mr. Rail dated April 16, 2007 concerning financial disclosure and scheduling. Exhibit "J" is a copy of a letter from Mr. Rail to Mr. Zelin dated April 17, 2007 concerning respondents' failure to settle this matter and failure to submit an answer or responsive pleading by April 13, 2007. Lastly, pursuant to 6 NYCRR 622.15(b), Exhibit "K" is a copy of Department staff's proposed order for its default motion.

Department staff's April 19, 2007 cover letter accompanying its default motion indicate that the motion papers were mailed to respondents' attorney, Randy Scott Zelin, Esq., at his business address and to the Department's Chief Administrative Law Judge ("Chief ALJ") in accordance with 6 NYCRR 622.6(c)(1). In a letter to Chief ALJ James McClymonds dated April 25, 2007, Mr. Zelin requested a twenty day extension of time to answer or move with respect to Department staff's motion.² By letter dated

² In a responsive letter of the same date to Mr. Zelin's April 25, 2007 request, Department attorney Vernon Rail, Esq. provided a copy of an October 27, 2006 letter from Mr. Zelin indicating that he represented "the defendants/respondents" in this matter and that he had received the Department's October 17,

May 1, 2007, Chief ALJ McClymonds denied Mr. Zelin's request for an extension as untimely because respondents' time to answer the October 17, 2006 verified complaint had expired, per Department staff's demand, on April 13, 2007. However, in his May 1, 2007 letter, Chief ALJ McClymonds granted respondents until May 15, 2007 to move to reopen the default and assigned the matter to me. To date, neither Mr. Zelin, nor anyone else on respondents' behalf, has filed a motion to reopen the default or otherwise served any papers in response to Department staff's motion.

Pursuant to the Department's regulations, all parties have five days after a motion is served to file a response (see 6 NYCRR 622.6[c][3]). When the time for performance of some act is measured from the service of an interlocutory paper (such as a motion), and service is made by mail, CPLR 2103(b)(2) gives the party so served five additional days within which to act (see also 6 NYCRR 622.6[b][2][i]). Thus, respondents had until April 29, 2007 to file a response to Department staff's motion with me. Respondents failed to do so. Further, respondents were afforded an additional opportunity to move to reopen the default until May 15, 2007 and failed to do so.

The basis for staff's motion for default judgment, as set forth in Mr. Rail's April 19, 2007 affirmation, is respondents' failure to file a timely answer to the October 17, 2006 verified complaint by April 13, 2007. Department staff's submissions which accompanied its default motion, indicate that a copy of the motion and supporting papers, as described above, was mailed to respondents' attorney Randy Scott Zelin, Esq. at 675 Old Country Road, Westbury, New York on April 19, 2007. Moreover, Mr. Zelin's April 25, 2007 letter to Chief ALJ McClymonds confirmed that he had received Department staff's April 19, 2007 default motion in this proceeding.

2006 "administrative complaint and proposed order on consent."

Findings of Fact

1. On October 17, 2006, Department staff attorney Vernon G. Rail, Esq. served a notice of hearing and verified complaint, both dated October 17, 2006, in DEC Case No. R1-20060717-177 upon respondent LMR Services Corp. by certified mail, return receipt requested, at its last known address at 1 Forsythia Lane, Jericho, New York pursuant to 6 NYCRR 622.3(a)(3).
2. On October 17, 2006, Department staff attorney Vernon G. Rail, Esq. served a notice of hearing and verified complaint, both dated October 17, 2006, in DEC Case No. R1-20060717-177 upon respondent Christopher Bonsera by certified mail, return receipt requested, at his last known address at 158 Third Street, Saint James, New York pursuant to 6 NYCRR 622.3(a)(3).
3. On October 17, 2006, Department staff attorney Vernon G. Rail, Esq. served an additional copy of the October 17, 2006 notice of hearing and verified complaint upon respondents' attorney, Randy Scott Zelin, Esq., by certified mail, return receipt requested, at Mr. Zelin's address at 675 Old Country Road, Westbury, New York pursuant to 6 NYCRR 622.3(a)(3) and CPLR 2103(b).³
4. The October 17, 2006 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondents must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and verified complaint. As provided for by 6 NYCRR 622.8, the notice of hearing also scheduled a pre-hearing conference for November 29, 2006 at the Department's Region 1 headquarters in Stony Brook, New York. The notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondents would be in default and would waive its right to a hearing.
5. With respect to the October 17, 2006 verified complaint, the time for respondents to serve an answer, per Department staff's written demand following settlement negotiations and attempts to resolve the matter, expired on April 13, 2007 (see Exhibits "H" and "J" attached to Department staff's

³ Based upon the written submissions, I find that Mr. Zelin represents all respondents in this proceeding (see, e.g., discussion at footnote 2).

April 19, 2007 default motion). As of the date of Department staff's default motion, respondent had not filed an answer.

6. With respect to the November 29, 2006 pre-hearing conference, it appears that Department staff and respondents' attorney, Randy Scott Zelin, Esq., held a meeting at the Department's Region 1 headquarters on November 6, 2006 to discuss this matter (see Exhibit "C" attached to Department staff's default motion).

Discussion

In accordance with the Department's uniform enforcement regulations, Department staff may commence an administrative enforcement proceeding by service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Service of a notice of hearing and complaint "must be by personal service consistent with the CPLR or by certified mail. Where service is by certified mail, service shall be complete when the notice of hearing and complaint is received" (see 6 NYCRR 622.3[a][3]).

A respondent's failure either to file a timely answer or to appear at a pre-hearing conference constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under these circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), staff's default motion must contain the following:

- a. Proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
- b. Proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and
- c. A proposed order.

The April 19, 2007 affirmation of Department staff attorney Vernon G. Rail, Esq., demonstrates service of the October 17, 2006 notice of hearing and verified complaint upon respondents in a manner consistent with the requirements set forth in 6 NYCRR 622.3(a)(3) (see Exhibits "A" and "B" attached to Department staff's April 19, 2007 default motion). In addition, the April 19, 2007 affirmation of attorney Rail demonstrates that respondent did not timely file any answer to

the October 17, 2006 verified complaint by April 13, 2007 as demanded by the Department (see Exhibits "H" and "J" attached to Department staff's April 19, 2007 default motion).⁴

The Department's regulations governing motions for a default judgment do not prescribe the circumstances under which a defaulting respondent is entitled to notice of the application by staff for a default judgment (see 6 NYCRR 622.15). Under CPLR 3215(g)(1), notice of an application for a default judgment is required only where the defending party has appeared or where more than one year has elapsed between the date of the default and the motion (see Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004 at 2-3).

To date, according to Mr. Rail's affirmation submitted in support of staff's default motion and other written submissions, respondents have "appeared" in this action through their attorney, Randy Scott Zelin, Esq., but have otherwise failed to submit an answer to the verified complaint first served in October 2006 (see affirmation of Vernon G. Rail, Esq. dated April 19, 2007 at ¶¶ 5, 11, and 12). According to Mr. Rail's April 19, 2007 cover letter, Department staff mailed a copy of its motion papers in this proceeding to respondents' attorney, Randy Scott Zelin, Esq., at his business address. Mr. Zelin's April 25, 2007 letter to Chief ALJ McClymonds acknowledged that he had received Department staff's April 19, 2007 default motion against respondents in this proceeding.

Pursuant to 6 NYCRR 622.6(a)(1) and CPLR 2103(c), motion papers in Department proceedings may be served by mail. In accordance with the provisions of CPLR 2103(b)(2) and (c), and CPLR 3215(f) and (g), service by mail is complete upon proper posting, without regard to receipt. (See Tappis v National Van Lines, Inc., 43 Misc2d 157 [App Term, 1964]; A. & B. Service Station, Inc. v State, 50 AD2d 973 [3d Dept], lv denied 39 NY2d 709 [1975].) Thus, Department staff properly served the notice of motion and motion for default upon respondents' attorney in this case. To date, respondents have not filed any written response to the motion.

Based on these circumstances, respondent LMR Services Corp. a/k/a BBR Rolloff Services, and respondents Thomas Bonsera, Michael Bonsera, Jr., and Christopher Bonsera have defaulted and waived their right to a hearing, and Department staff is entitled

⁴ Pursuant to 6 NYCRR 622.4(a), staff may extend the time to answer.

to a default judgment pursuant to 6 NYCRR 622.15(a). By operation of the default, respondents are deemed to have admitted the factual allegations set forth in staff's verified complaint. Staff's motion papers also set forth sufficient factual allegations that demonstrate respondents' liability for each cause of action alleged by staff. Therefore, respondents' liability is established.

As previously noted, Department staff provided a proposed order with its default motion papers (see Exhibit "K"). The proposed order would assess a total civil penalty of \$50,000, and would require respondents to comply with applicable requirements of ECL article 27 and 6 NYCRR part 360 at its Plainview facility within certain specified time periods in accordance with a compliance schedule proposed by Department staff (see Exhibit "K" at 2) and other relief as the Commissioner deems just and proper.

When respondents default, they waive the right to a hearing and are deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, however, still has the obligation to prove damages (see Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 3-4).

Pursuant to ECL 71-2703(1), any person, which includes a corporation (see ECL 1-0303[18] and ECL 27-0303[3]), "who violates any of the provisions of, or who fails to perform any duty imposed by title 3 or 7 of article 27 of this chapter or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty not to exceed seven thousand five hundred dollars for each such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues."

In addition, pursuant to ECL 71-2703(3), "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by title 7 of article 27, with regard to the construction and operation of facilities for the disposal of construction and demolition debris or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty not to exceed fifteen thousand dollars and each day of such deposition shall constitute a separate violation and said civil penalty is in addition to any other fines or penalties which may be applied pursuant to this title."

Here, Department staff has proposed a total civil penalty of \$50,000 that is substantially less than the potential

maximum that could be assessed under the applicable provisions of law for each of the violations alleged. This is particularly relevant given the allegations concerning the disposal of C&D debris at respondents' Plainview and Hauppauge facilities, as well as the continuing nature of certain violations at respondents' Plainview facility as documented by Department staff's various inspections during 2006.

Moreover, respondents' operation of a landfill located over an area identified by the Department as a "deep flow recharge area" at its Hauppauge facility poses a potentially significant threat to the quality of groundwater and therefore the quality of drinking water derived from a sole source aquifer on Long Island (see ECL 27-0704[1][b] and Historical and Statutory Notes following ECL 27-0704; see also 6 NYCRR 360-8.4[b]). The civil penalty requested by Department staff is, therefore, appropriate.

Finally Department staff's default motion includes a schedule to bring respondents' Plainview facility into compliance with the applicable regulations within certain time periods following the date of service of a copy of an order in this matter. I conclude that the dates in the compliance schedule outlined in staff's default motion are authorized and reasonable. While Department staff did not include a similar schedule to bring respondents' Hauppauge facility into compliance with applicable regulations, I recommend that, pursuant to the provisions of ECL article 3, 27-0703, and 71-2703, the Commissioner direct respondents to bring the Hauppauge facility into compliance with the applicable regulations within certain time periods following the date of service of a copy of an order in this matter.

Conclusions

1. Respondents LMR Services Corp. a/k/a BBR Rolloff Services, and respondents Thomas Bonsera, Michael Bonsera, Jr., and Christopher Bonsera, have defaulted and, therefore, have waived the right to a hearing with respect to liability for the violations alleged in the verified complaint. By defaulting, respondents are deemed to have admitted the factual allegations set forth in the verified complaint.
2. Respondents' liability for the sixteen causes of action alleged in the verified complaint has been established.

3. Department staff's proposed total civil penalty of \$50,000 is rational and supported by the record. The penalty is justified particularly because of the environmental and human health risks that are posed by the types of violations committed by respondent. Furthermore, the total penalty is below the statutory maximum amounts under ECL 71-2703(1) and 71-2703(3) that could be assessed for the Part 360 violations established for the time periods encompassed by the verified complaint. On that basis, and given the continuing nature of the violations, the penalty requested by Department staff is amply supported.
4. Department staff has provided sufficient justification for the proposed compliance schedule for the Plainview facility.

Recommendation

The motion for default judgment should be granted, and an order issued as described above providing the relief requested by Department staff.

/s/

Mark D. Sanza
Administrative Law Judge

June 4, 2007
Albany, New York