STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

-by-

DEC Case No.
R4-2017-1026-258

MERRICK TRUCKING CORP.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Merrick Trucking Corp. violated ECL article 27 and 6 NYCRR 360.9(b)(3), for disposing solid waste at an unauthorized facility located on the north side of New York State Route 81 approximately 0.6 miles east of Medway Earlton Road in Earlton, Greene County, New York (site). The complaint requests that I: (i) find respondent in violation of 6 NYCRR 360.9(b)(3); and (ii) assess a civil penalty of no less than fifty thousand dollars ($50,000).

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff (*see* Default Summary Report at 4 [Finding of Fact No. 13]). As a result, Department staff submitted a written motion for default judgment with supporting papers.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see* Default Summary Report at 6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Although staff pleaded a violation of 6 NYCRR 360.9(b)(3), that regulatory provision was not in effect at the time of the alleged violations (*see* Default Summary Report at 2). Pursuant to CPLR 2001, the ALJ corrected the pleading error and applied former 6 NYCRR 360-1.5. As corrected by the ALJ, the pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent improperly disposed solid waste at an unauthorized facility in violation of ECL article 27 and former 6 NYCRR 360-1.5.

As the ALJ noted, beginning on April 17, 2017 through September 14, 2017, respondent hauled 161 loads of "overs" which respondent deposited at the site (*see* Default Summary Report

at 3 [Finding of Fact No. 3]). The loads of "overs" consisted of topsoil, rocks, bricks, processed paint wood, electrical wiring, piping, foam, tiles, metals, and plastics (*see id.* [Finding of Fact No. 4]), and their disposal at the site was unlawful (*see* Affidavit of Brian Maglienti sworn to August 25, 2021, ¶¶ 8-17; *see also* Affirmation of Karen S. Lavery dated August 25, 2021, ¶¶ 8,10).

ECL 71-2703, which applies to the statutory and regulatory violation at issue in this proceeding, provides for a penalty not to exceed seven thousand five hundred dollars ($7,500) for each violation and an additional penalty of not more than one thousand five hundred dollars ($1,500) per day for each violation.

In its complaint, Department staff seeks a civil penalty in the amount of no less than fifty thousand dollars ($50,000). In its motion papers, however, Department staff requested a civil penalty of one hundred twenty-two thousand dollars ($122,000). The ALJ properly limited the amount of penalty on the default motion to the amount stated in the complaint. The penalty assessed in a default judgment cannot exceed the amount demanded in the complaint, absent notice to respondent that a greater penalty would be sought (*see e.g. Matter of 134-15 Rock Management Corp., et al.*, Order of the Commissioner, December 10, 2008, at 4; *see also* CPLR 3215[b]).

I note that staff used the modifier of "no less than" $50,000 in its complaint with respect to the penalty amount. The use of the phrase "no less than" a specific dollar amount in a complaint introduces an ambiguity into the papers. The phrase does not provide adequate notice to a respondent as to any specific civil penalty greater than the amount stated which staff may be seeking for the alleged violations (*see Matter of Reliable Heating Oil, Inc*, Order of the Commissioner, October 13, 2013, at 2-3). In this matter, the complaint's reference to a civil penalty of "no less than" $50,000 could mean any figure between $50,000 and the maximum penalty calculated by the ALJ, which amounted to over one million dollars (*see* Default Summary Report at 6). Accordingly, the use of the phrase "no less than" does not provide support on this default for an increase in the $50,000 amount referenced in the complaint.

I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of this order upon respondent.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Merrick Trucking Corp. waived its right to a hearing.

II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Merrick Trucking Corp. is determined to have violated ECL article 27 and former 6 NYCRR 360-1.5, by disposing solid waste at an unauthorized facility, on the north side of New York State Route 81 approximately 0.6 miles east of Medway Earlton Road in Earlton, Greene County, New York, beginning April 17, 2017 through September 14, 2017.

III. Within thirty (30) days of the service of this order upon respondent Merrick Trucking Corp., respondent shall pay a civil penalty in the amount of fifty thousand dollars ($50,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

IV. The penalty payment shall be sent to the following address:

Office of General Counsel
NYS Department of Environmental Conservation
Region 4, 1130 North Westcott Road
Schenectady, New York 12306
Attn: Karen S. Lavery, Esq.

V. Any questions or other correspondence regarding this order shall also be addressed to Karen S. Lavery, Esq. at the address referenced in paragraph IV of this order.

VI. The provisions, terms, and conditions of this order shall bind respondent Merrick Trucking Corp., and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: January 31, 2022
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

DEFAULT SUMMARY REPORT

DEC Case No.
R4-2017-1026-258

-by-

MERRICK TRUCKING CORP.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Merrick Trucking Corp. (respondent) with a notice of hearing and complaint, dated January 7, 2021, alleging a violation of 6 NYCRR 360.9(b)(3), for disposing solid waste at an unauthorized facility located on Route 81 in Earlton, New York (site). The complaint seeks an order of the Commissioner: (i) finding respondent in violation of 6 NYCRR 360.9(b)(3); and (ii) assessing a civil penalty of no less than fifty thousand dollars ($50,000).

Inasmuch as respondent is an active domestic corporation in the State of New York, service of the notice of hearing and complaint on respondent was made by personally serving the New York State Department of State on January 19, 2021 (*see* Affirmation of Karen S. Lavery [Lavery Affirmation], dated August 25, 2021, Exhibit B [Receipt for Service] and Affidavit of Service of Melissa Evans, sworn to February 25, 2021). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on August 25, 2021 (*see* Affidavit of Mailing of Karen S. Lavery, sworn to August 25, 2021). Respondent failed to file an answer to the complaint, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit A).

By cover letter dated August 25, 2021, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent's attorney on August 25, 2021 (*see* Affidavit of Service of Karen S. Lavery, sworn to August 25, 2021).

Applicable Regulatory Provision

Department staff alleges that respondent violated 6 NYCRR 360.9, which became effective November 4, 2017. Staff also alleges that the disposal occurred from April 15, 2017 through September 14, 2017. Staff does not discuss whether the alleged violation was considered to be of a continuing nature after September 14, 2017. Accordingly, I conclude that 6 NYCRR 360.9 does not apply to violations that occurred before the regulation's enactment.

I may, however, correct staff's pleading error. During the time of the alleged violations, former 6 NYCRR 360-1.5 prohibited disposal of solid waste at unauthorized facilities. Civil Practice Law and Rules (CPLR) § 2001 authorizes the court to disregard or "correct, sua sponte, any defect, provided any substantial right of the party is not prejudiced." (*See Albilia v Hillcrest General Hospital and Rosenfeld*, 124 AD2d 499, 500 [1st Dept 1986].) In this case, correction of the pleadings is appropriate to ensure the correct regulatory violation is used in any Commissioner's order issued in this matter. Respondent is not prejudiced by this correction because the solid waste disposal prohibition in the former and current regulation are virtually identical, and the underlying alleged facts constitute a violation in either case. In addition, respondent was fairly apprised that Department staff intended to seek judgment against respondent related to respondent's disposing of solid waste at the site. Accordingly, I ignore and correct staff's pleading error and apply 6 NYCRR part 360 in effect at the time of the alleged violations. Former section 350-1.5 of 6 NYCRR provided:

> "360-1.5 Prohibited Disposal.
>
> "(a) Solid waste disposal facilities.
>
> "Except as provided for in Subparts 360-10 and 360-17 of this Part, no person shall dispose of solid waste in this State except at:
>
> "(1) a disposal facility exempt from the requirements of this Part; or
>
> "(2) a disposal facility authorized to accept such waste for disposal pursuant to this Part or to a department-issued or court-issued order."[1]

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff's motion for a default judgment:

1. Respondent, Merrick Trucking Corp., is a freight shipping and trucking company operating out of 1566 Park Avenue, Merrick, New York. (*See* Notice of Motion for Default Judgement, Exhibit A, Complaint ¶ 3.)

2. Respondent is an active domestic business corporation in the State of New York. (*See* Lavery Affirmation, ¶ 2, Exhibit A.)

[1] Paragraph 360.9(b)(3) of 6 NYCRR (effective November 4, 2017) provides: "(b) Person(s) must not: (3) dispose of waste, beyond initial collection, except at: (i) a disposal facility exempt from the requirements of Part 360 or 363 of this Title; or (ii) a disposal facility authorized by the department to accept the waste."

3. Beginning April 17, 2017 through September 14, 2017, the respondent hauled 161 loads of "overs" which respondent deposited at property located on Route 81, Coxsackie, New York (site). (*See* Notice of Motion for Default Judgement, Exhibit A, Complaint, ¶ 7.)

4. Each load of "overs" consisted of 28 to 30 yards worth of topsoil and leftover materials. The "overs" consisted of rocks, bricks, soil, processed painted wood, treated wood, oriented strand board, plywood, particle board, electrical wiring, piping, foam, tiles, metals, and plastics. (*See* Notice of Motion for Default Judgement, Exhibit A, Complaint, ¶ 8; Affidavit of Brian Maglienti [Maglienti Affidavit], sworn to August 25, 2021, ¶¶ 9, 13, Exhibit A.)

5. Respondent admitted to transporting 180-190 loads of "overs" to the site between August 2, 2016 and September 15, 2017. The generator of the overs paid respondent $400 to $700 per load, paying $700 per load of overs hauled to the site. (*See* Notice of Motion for Default Judgment, Exhibit A, Complaint, ¶ 9; Lavery Affirmation, Exhibit C; Maglienti Affidavit, ¶¶ 11, 13.)

6. Brian Maglienti is employed in the Department's Region 4 office as a Professional Engineer II in the Division of Materials Management. (*See* Maglienti Affidavit, ¶ 1.)

7. As part of his duties, Mr. Maglienti inspects solid waste management facilities for compliance with solid waste regulations. (*See* Maglienti Affidavit, ¶ 4.)

8. On September 15, 2017, Mr. Maglienti inspected the site and observed that approximately 3,000 cubic yards/1,050 tons of C&D debris had been disposed at the site, which constitutes solid waste disposal. (*See* Maglienti Affidavit, ¶¶ 10, 13, 16, 17, Exhibit A.)

9. Respondent did not pay the site owner any fees for the disposal of the 161 loads of "overs." (*See* Notice of Motion for Default Judgement, Exhibit A, Complaint, ¶ 10; Lavery Affirmation, Exhibit C.)

10. As shown by Receipt for Service No. 202102230158 issued by the New York State Department of State, respondent was served personally, on January 19, 2021 pursuant to section 306 of the Business Corporation Law, with a notice of hearing and complaint dated January 7, 2021, alleging a violation of ECL article 27 and 6 NYCRR 360.9(b)(3), together with a cover letter, for disposing waste, beyond its initial collection, at Route 81, Earlton, New York. (*See* Lavery Affirmation, Exhibit B; Affidavit of Service of Melissa Evans, sworn to February 25, 2021.)

11. Consistent with 6 NYCRR 622.15(d)(2) and CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by first class mail on or about August 25, 2021. (*See* Affidavit of Mailing of Karen S. Lavery, sworn to August 25, 2021.)

12. On August 25, 2021, staff served the motion papers on respondent's attorney. (*See* Affidavit of Service of Karen S. Lavery, sworn to August 25, 2021.)

13. Respondent failed to file an answer to the complaint and did not respond to staff's motion for a default judgment. (*See* Motion for Default Judgment, Exhibit A, Affirmation of Karen Lavery, Esq., ¶ 6; Hearing Record.)

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, respondent's failure to appear at the hearing constitutes a default and waiver of respondent's right to a hearing (*see* 6 NYCRR 622.15[a]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain:

> "(1) proof of service upon respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
> "(2) proof of respondent's failure to appear or failure to file a timely answer;
> "(3) consistent with CPLR 3215(f), proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim;
> "(4) a concise statement of the relief requested;
> "(5) a statement of authority and support for any penalty or relief requested; and
> "(6) proof of mailing the notice required by [6 NYCRR 622.15(d)], where applicable."
> (*see* 6 NYCRR 622.15[b][1] - [6] [effective September 16, 2020]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018 [*Samber*], at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* 6 NYCRR 622.15[b][3], CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint, as directed in the cover letter and notice of hearing served with the complaint; (iii) Department staff's papers provide proof of the facts sufficient to support the violations alleged, as corrected herein, and enable me to determine that staff has a viable claim; (iv) Department staff's papers include a concise statement of the relief requested (*see* Motion for Default Judgment, Wherefore Clause;

and Exhibit A thereto, Complaint, Wherefore Clause; Lavery Affirmation, Exhibit D, Proposed Order); (v) staff's motion includes a statement of authority and support for the penalty and relief requested (*see* Maglienti Affidavit, ¶¶ 18-28; Lavery Affirmation, ¶¶ 11-16); and (vi) Department staff provided proof of service of the motion papers on respondent (*see* Affidavit of Service of Karen S. Lavery, sworn to August 25, 2021). Respondent did not file or serve a response to staff's motion. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent disposed solid waste at the site, in violation of former 6 NYCRR 360-1.5 (*see Samber* at 1).

Staff's complaint requested a civil penalty in the amount "NO LESS THAN $50,000 (fifty thousand dollars) the total amount to be determined at the time of the hearing" (*see* Motion for Default Judgment, Exhibit A, Complaint, Wherefore Clause). Staff's Motion for Default Judgment requested a civil penalty in the amount of one hundred twenty-two thousand dollars ($122,000). Staff's motion for a default judgment elaborates on the requested penalty, discussing ECL 71-2703 and the Department's Civil Penalty Policy, DEE-1.

ECL section 71-2703 provides that "any person who violates any of the provisions of, or 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 violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues, and may also be subject to injunctive relief,"

Department staff supported its penalty request by following the Civil Penalty Policy (DEE-1) and applying considerations such as the duration and number of violations to arrive at maximum penalty of $298,500 and a minimum penalty of $141,000. Staff then reduced the minimum penalty to $50,000 based on respondent's lack of history of noncompliance, respondent's assistance in remediating the site, and staff exercising enforcement discretion due to the remediation of the site. Staff calculated the economic benefit to be $72,000 by multiplying the lower of the payments, $400, received by respondent for hauling materials from the generator times the 180 loads respondent admitted hauling.[2] Staff requests a total penalty of $122,000.

I disagree with staff's calculation of the maximum penalty of $298,500. Each load of waste disposed of at the site constituted a separate violation rather than a continuing violation as applied by staff. Using the 161 loads pleaded in the complaint, the maximum penalty would be $1,207,500 (161 x $7,500), and that figure does not take into account the duration of each separate violation. In addition, in computing the economic benefit, staff exercised its discretion and applied the lower amount of payment, $400, received by respondent but multiplied that amount by the number of loads admitted by respondent rather than what was pleaded. Applying the $400 used by staff, the economic benefit should have been $400 times 161 loads or $64,400.

[2] The $72,000 economic benefit arrived at by staff conflicts with staff's pleading an economic benefit of $121,000 (*see* Finding of Fact No. 3). Staff pleaded 161 loads of "overs" (C & D debris) were disposed at the site and that respondent received $700 per load for a total economic benefit of $121,000.

Although Department staff provided support for the total penalty requested on the motion, I am constrained by the general principal that the penalty assessed in a default judgment cannot exceed that demanded in the complaint, absent notice to the respondent that a greater penalty would be sought (*see e.g. Matter of 134-15 Rock Management Corp., et al.*, Order of the Commissioner, December 10, 2008, at 4; *P&K Marble, Inc. v. Pearce*, 168 AD2d 439, 439-40 [2d Dept 1990]; *see also* CPLR 3215[b]). The service of the default motion papers does not satisfy the required notice. Staff could have filed a motion to amend the complaint to increase the penalty amount requested. If issue were joined and the matter proceeded to hearing, an oral motion would have sufficed. The Commissioner previously concluded, "[i]n such circumstances, the respondent would be on notice of staff's request to amend the complaint to increase the penalty, and would have an opportunity to respond and oppose such request. Where, however, a matter does not go to hearing because respondent has failed to appear, different circumstances are presented. Here, respondent was on notice of the specific dollar amount of civil penalty referenced in staff's complaint, with the indeterminate modifier 'no less than.'" (*See Matter of Reliable Heating Oil, Inc*, Order of the Commissioner, October 13, 2013, at 2-3.) The Commissioner held that the use of the phrase "no less than" a specific dollar amount in the complaint introduces an ambiguity that does not provide adequate notice to respondent as to any specific civil penalty amount greater than the amount stated that staff may be seeking for the alleged violations (*id.*). In this matter, the phrase "no less than $50,000" could mean any figure between $50,000 and $1,207,500. Accordingly, I am constrained by due process concerns to limit the penalty to the specific dollar amount referenced in the complaint.

I conclude that a civil penalty in the amount of fifty thousand dollars ($50,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71, administrative precedent and due process considerations.

Conclusion of Law

By disposing solid waste at an unauthorized facility, respondent violated ECL article 27 and former 6 NYCRR 360-1.5.

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default judgment, holding respondent Merrick Trucking Corp. in default pursuant to the provisions of 6 NYCRR 622.15;

2. Holding that respondent Merrick Trucking Corp. violated ECL article 27 and former 6 NYCRR 360-1.5 by disposing solid waste at an unauthorized facility;

3. Directing respondent Merrick Trucking Corp. to pay a civil penalty in the amount of fifty thousand dollars ($50,000) within thirty (30) days of service of the Commissioner's order; and

4. Directing such other and further relief as he may deem just and appropriate.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
December 15, 2021

APPENDIX A

Matter of Merrick Trucking Corp.
DEC File No. R4-2017-1026-258
Motion for Default Judgment

1. Staff Letter, dated August 25, 2021, addressed to Administrative Law Judge Michael Caruso of the Department's Office of Hearings and Mediation Services

2. Notice of Motion for Default Judgment dated August 25, 2021

3. Motion for Default Judgment, dated August 25, 2021, attaching Exhibit A:

    A. Cover letter, Notice of Hearing, and Complaint, all dated January 7, 2021

4. Affirmation in Support of Default Judgment, dated August 25, 2021, attaching Exhibits A, B, C, and D:

    A. NYSDOS Division of Corporations Printout for Respondent Corporation, dated January 6, 2021
    B. State of New York Department of State Receipt for Service of the Notice of Hearing and Complaint, dated January 19, 2021
    C. Supporting Deposition of Giovanni Lamanna, dated September 26, 2017
    D. Proposed Order

5. Affidavit of Service of Melissa Evans, sworn to February 25, 2021

6. Affidavit of Brian Maglienti in Support of Motion for Default Judgement, sworn to August 25, 2021, attaching Exhibit A:

    A. Solid Waste Management Facility Inspection Report, dated September 15, 2017

7. Affidavit of Kevin Cummings in Support of Motion for Default Judgement, sworn to June 9, 2021

8. Affidavit of Mailing of Karen S. Lavery, sworn to August 25, 2021

9. Affidavit of Service of Karen S. Lavery, sworn to August 25, 2021