

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

In the Matter of the Alleged Violations
of Article 27 of the 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

DEC Case No.
R4-2007-10250152

- by -

GREG NIGRO,

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Greg Nigro, by service of a notice of hearing and complaint dated March 11, 2008. In accordance with 6 NYCRR 622.3(a)(3), the complaint, together with a notice of hearing, was sent by certified mail and received by respondent on March 20, 2008.

The complaint alleged that based upon Department staff's October 23, 2007, inspection at respondent's premises located at 2330 NY Route 67, Johnsonville, New York, respondent had approximately 10,000 waste tires on the site and that some of the tires appeared to have been recently placed, while others were weathered and overgrown with vegetation. Respondent's storage of approximately 10,000 waste tires on the site without a permit is a violation of 6 NYCRR 360-13.1(b).

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on or about April 9, 2008, and has not been extended by Department staff. Respondent failed to file an answer to the complaint.

Department staff filed a motion for default judgment, dated April 25, 2008, with the Department's Office of Hearings and Mediation Services. Respondent was mailed a copy of Department staff's motion. The time to respond to the motion expired on May 5, 2008. Respondent did not respond to the motion.

The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick, who prepared the attached default

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

Department staff's complaint alleges facts sufficient to establish the violation alleged. Accordingly, respondent's liability for the counts charged is established as a result of his default in answering the complaint.

Section 71-2703(1) of the Environmental Conservation Law ("ECL") authorizes the Commissioner to impose an administrative penalty for the violation of titles 3 or 7 of article 27 or any rule or regulation promulgated pursuant to those titles. Section 360-13.1(b), which respondent has violated, falls within ECL 71-2703(1). The administrative penalty is not to exceed \$7,500 for a first violation and \$1,500 for each day the violation continues. Based on the record of this proceeding, the ALJ recommends that staff's request for a civil penalty of \$40,000 be assessed, and I adopt that recommendation.

Based upon staff's complaint and motion papers, the ALJ also recommends that I adopt Department staff's request that the respondent be directed to remove the waste tires from his property and properly dispose of them. Based upon my review of the record, I also adopt that recommendation.

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.

II. Respondent Greg Nigro is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

III. Respondent Greg Nigro is adjudged to have violated 6 NYCRR 360-13.1 by storing approximately 10,000 waste tires without a solid waste management facility permit on his property located at 2330 NY Route 67, Johnsonville, New York.

IV. Respondent Greg Nigro, is assessed a civil penalty in the amount of forty thousand dollars (\$40,000), which is due and payable within thirty (30) days after service of this order on respondent. Payment of this penalty shall be made by cashier's check, certified check, or money order drawn to the order of the

TO: Mr. Greg Nigro (via Certified Mail)
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**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Article 27 of the Environmental
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**DEFAULT SUMMARY
REPORT**

DEC Case No.
R4-2007-10250152

- by -

GREG NIGRO,

Respondent.

Proceedings

On March 20, 2008, by certified mail, staff of the New York State Department of Environmental Conservation's (DEC staff) Region 4 office served the respondent Greg Nigro with a notice of hearing and complaint. In the complaint, staff alleged a violation of Article 27 of the Environmental Conservation Law (ECL), and its implementing regulations 6 NYCRR Part 360 related to a pile of approximately 10,000 waste tires on land owned and operated by the respondent located at 2330 NY Route 67, Johnsonville, New York. The respondent received the notice of hearing and complaint on March 20, 2008. Pursuant to 6 NYCRR 622.4(a), the respondent had 20 days from receipt of the complaint to serve an answer; that date was April 9, 2008 and no answer has been received. Pursuant to § 622.15 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by papers dated April 25, 2008, DEC staff mailed the respondent a notice of motion for default judgment and filed a copy of this motion with the Department's Office of Hearings and Mediation Services (OHMS). Chief Administrative Law Judge James T. McClymonds assigned this matter to me on May 6, 2008.

Discussion

According to the Department's regulations, a respondent's failure to file a timely answer to a complaint constitutes a default and waiver of respondent's right to a hearing. 6 NYCRR §§ 622.12(b), 622.15(a). In these circumstances, Department staff may move for a default judgment, the motion to contain:

(1) proof of service of the notice of hearing and complaint or motion for order without hearing;

(2) proof of the respondent's failure to file a timely answer; and

(3) a proposed order.

6 NYCRR § 622.15(b).

Attached to the affirmation of Jill Phillips, Assistant Regional Attorney, dated April 25, 2008 ("Phillips Affirmation"), are DEC Staff member Kathleen Fabrey's affidavit of service of the notice of hearing and complaint dated March 11, 2008, as well as copies of the certified mail receipts and United States Postal Service "track & confirm" statement indicating that the respondent received the pleadings on March 20, 2008. See, Exhibit A. Also attached to DEC Staff's papers is the affidavit of DEC Staff member Richard Forgea, dated April 25, 2008 ("Forgea Affidavit"), related to the civil penalty amount sought. In her affirmation, Ms. Phillips states that staff has not received an answer to the complaint, and the time to file one has passed. See, Phillips Affirmation, ¶ 5; 6 NYCRR § 622.4(a).

Staff has also submitted a copy of the notice of hearing and complaint (Exhibit B) and a proposed order (Exhibit C) attached to Ms. Phillips's affirmation.

Based upon the above submissions, the staff has met the requirements for a default judgment.

Penalty

_____ In his affidavit, Mr. Forgea requests a civil penalty of \$40,000 in satisfaction of the violation alleged in the complaint and in the motion papers. Staff calculated the statutory maximum for this violation as \$282,000. The \$40,000 civil penalty sought was derived by multiplying the approximately 10,000 tires at the site by \$4, the per tire disposal cost (Forgea Affidavit, ¶ 6). In addition to the monetary penalty request, staff requests that the Commissioner order the respondent to immediately stop accepting additional tires at the site and, within 180 days of the Commissioner's Order, to remove all waste tires from the site and provide to the Department written proof of the disposal at a permitted or otherwise authorized facility within 180 days of the Commissioner's Order.

ECL § 71-2703(1) provides for a maximum penalty for violations of 6 NYCRR 360-13.1 of "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." DEC staff's request for a penalty of \$40,000 is significantly less than the maximum calculated penalty that could be imposed.

The Department's 1990 Civil Penalty Policy ("CPP") requires that the gravity of the violations (CPP IV.C) and the economic benefits of the non-compliance (CPP IV.D) be assessed. The CPP also allows penalty adjustments. (CPP IV.E). The factors to consider with respect to gravity are (1) potential harm and actual damage caused by the violations (CPP IV.D.2.a) and (2) relative importance of the type of violations in the context of the Department's overall regulatory scheme (CPP IV.D.2.b). The penalty may be adjusted based on culpability, violator cooperation, history of noncompliance, ability to pay, or other unique factors. (CPP IV.E.)

While staff has not produced any information as to the amount of money the respondent saved by not complying with the applicable regulations, it is reasonable to infer that the respondent enjoyed an economic benefit equal to the cost others may have paid him to dispose of and store the tires on his property. Additionally, because the respondent has not responded to the complaint or appeared to contest this motion, there is no evidence of violator cooperation, a lack of ability to pay (CPP IV.E.4), or any unique factors (CPP IV.E.5) that would mitigate the relief staff seeks.

Recommendation and Conclusion

Staff's motion for a default judgment meets the requirements of 6 NYCRR § 622.15(b). In addition, I find staff's request for a civil penalty of \$40,000 and removal of the waste tires at the site appropriate. Therefore, in accordance with 6 NYCRR § 622.15(c), this summary report is submitted to the Commissioner, accompanied by a proposed order.

Dated: Albany, New York
November 3, 2008

/s/

P. Nicholas Garlick
Administrative Law Judge

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