

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violation of Article 27 of the New York Environmental Conservation Law (“ECL”),
Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of
New York (“6 NYCRR”), and NYSDEC Permit No. 3-5510-000361-00001,

- by -

QUEEN CITY RECYCLE CENTER, INC.,

Respondent.

DEC Case No. CO3-20120613-2

DECISION AND ORDER OF THE COMMISSIONER

December 12, 2013

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding concerns the alleged failure of respondent Queen City Recycle Center, Inc. (respondent) to pay the annual environmental monitor fee for fiscal year 2012-2013 in accordance with the terms and conditions of respondent's Part 360 Permit No. 3-5510-000361-00001 (Part 360 permit), ECL article 27 and the requirements of 6 NYCRR 360-1.11(a)(2)(iii). According to staff of the Department of Environmental Conservation (Department), respondent was overdue in paying its annual environmental monitor fee for fiscal year 2012-2013 in the amount of fourteen thousand three hundred dollars (\$14,300), which fee was due on or before April 8, 2012. In this proceeding, Department staff also requested a civil penalty in the amount of twenty-five thousand dollars (\$25,000) for the failure to pay the environmental monitor fee.

Respondent owns and operates a solid waste management facility located at 19 Cliff Street, New Rochelle, New York (facility). At the facility, respondent is authorized to accept construction and demolition debris from residential, commercial and institutional sources subject to the terms and conditions in its Department-issued permit. Respondent's permit was issued effective October 27, 2008 and, pursuant to permit special conditions 44 through 46, respondent is required to fund an on-site environmental monitor (see Hearing Exhibit 2). The permit, which was due to expire on October 26, 2013, was renewed effective September 23, 2013 and authorizes the continued operation of the facility until September 23, 2018. The permit renewal also contains a provision relating to an environmental monitor for the facility.¹

In accordance with 6 NYCRR 622.3(a)(3), staff commenced this proceeding by personal service upon respondent of a notice of hearing and complaint dated June 28, 2012. The matter was assigned to Administrative Law Judge (ALJ) Molly McBride.

Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter for September 18, 2012, as directed in the notice of hearing. Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer has expired, and has not been extended by Department staff.

Subsequent to the hearing held on September 18, 2012, the hearing was reconvened on March 21, 2013, to allow Department staff to present evidence on the merits of its claims. At the hearing, staff offered seven exhibits which were received into evidence.² After the hearing concluded,³ ALJ McBride prepared the attached hearing report, which I adopt subject to my comments below.⁴

¹ I am taking official notice of the renewed permit, which is part of the official records of the Department, pursuant to 6 NYCRR 622.11(a)(5).

² Five of the exhibits had been marked for identification at the September 18, 2012 hearing. For a listing of the exhibits, see the exhibit chart to the attached ALJ hearing report.

³ The Edirol (electronic recording device) number for the March 21, 2013 hearing session is referenced in the exhibit chart attached to the ALJ's hearing report. The Edirol number for the September 18, 2012 hearing session is 0310119111426.

In its complaint, Department staff alleges that respondent failed to comply with its Part 360 permit which requires respondent to submit annual environmental monitor fees to the Department (see Exhibit 1, Complaint, at para 7). Staff alleges that respondent failed to submit payment for the annual environmental monitor fee for fiscal year 2012-2013 (see *id.*, para 15). Department staff also alleges that respondent violated 6 NYCRR 360-1.11, which establishes various requirements governing the funding of and payment for an environmental monitoring position (see 6 NYCRR 360-1.11[a][2][i]-[v]). Subparagraph (iii) of 6 NYCRR 360-1.11(a)(2) provides that, within thirty (30) calendar days after receipt of written notice from the Department that payment is due, the owner or operator of the facility shall forward the amount due to the Department.

Because respondent failed to file an answer to the complaint and failed to appear at the adjudicatory hearing, staff is entitled to a default judgment pursuant to 6 NYCRR 622.15 with respect to its claim that respondent, by failing to submit its annual environmental monitor fee for fiscal year 2012-2013, was in violation of its Part 360 permit and 6 NYCRR 360-1.11(a)(2)(iii).⁵ Furthermore, at the March 21, 2013 hearing session, Department staff presented a prima facie case on the merits with respect to respondent's violation of its Part 360 permit and 6 NYCRR 360-1.11(a)(2)(iii), and proved its case by a preponderance of the evidence with respect to respondent's failure to pay the environmental monitor fee. Accordingly, Department staff is entitled to a judgment based on record evidence on that issue.⁶

At this time, I take the opportunity to review the Department's procedures when respondents fail to appear in administrative enforcement proceedings. When a respondent fails to answer or otherwise appear in response to a notice of hearing, Department staff may move,

⁴ In the hearing report and in staff's papers, respondent is referred to as either "Queen City Recycle Center, Inc." or "Queen City Recycling Center, Inc." (emphasis added). According to the New York State Department of State's Division of Corporations, the entity's current name is "Queen City Recycle Center, Inc." and that name is used in this order. The references to "Queen City Recycling Center, Inc." in the hearing report (see Hearing Report, Findings of Fact nos. 1 and 2, at 3) are hereby revised to read "Queen City Recycle Center, Inc.".

⁵ The hearing report states that the motion was based upon respondent's failure to answer the complaint dated June 28, 2012 and respondent's failure to appear for a prehearing conference. No prehearing conference, however, was scheduled in this proceeding. A review of the record indicates that staff's motion was properly based upon respondent's failure to answer the complaint and its failure to appear at the hearing in this matter, and the hearing report's reference to a prehearing conference is hereby stricken.

⁶ Although staff's papers provide a basis to find liability under 6 NYCRR 360-1.11(a)(2)(iii), staff cited the general section of 6 NYCRR 360-1.11. Where, as here, a section is comprised of a number of subsections, paragraphs, or subparagraphs, staff should designate the particular subsection(s), paragraph(s) and subparagraph(s) at issue. Furthermore, I note that the complaint did reference 360-1.11(a)(2)(iv), which requires an owner or operator of a facility that fails to submit environmental monitoring payments by the required submission date to immediately cease acceptance of any and all solid waste at the facility and to commence closure of the facility in accordance with 6 NYCRR part 360 and its permit. No demonstration was made that facility had not ceased acceptance of solid waste or had not commenced closure, and accordingly I do not find a violation of 6 NYCRR 360-1.11(a)(2)(iv). Staff, in alleging a violation of the ECL, referenced ECL 27-0703(2) which authorizes the Department to adopt and promulgate rules governing the operation of solid waste management facilities. That ECL section does not provide an additional legal basis in support of the violation here.

either orally or in writing, for a default judgment (see 6 NYCRR 622.15). In the event Department staff takes this course, staff will have to satisfy the requirements of 6 NYCRR 622.15(b).⁷ In addition, consistent with the requirements applicable to default judgment motions under the CPLR, this decision and order directs that staff must submit proof of the facts constituting the claim charged (see CPLR 3215[f]; see also Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 [2003]). Upon submission of the motion and supporting materials, the ALJ will review the record to determine whether staff's papers have stated a claim, and that staff's penalty request and remedial relief are supported (see Woodson, 100 NY2d at 71). In Matter of Farmer (Decision and Order of the Commissioner, October 22, 2009), the Commissioner required submission of facts sufficient to support the claim(s) charged in a complaint or on a motion for order without hearing in lieu of complaint enforcing petroleum bulk storage (PBS) facility regulations (see id. at 3 [requiring staff to provide a copy of the facility's PBS registration (if one has been issued); the PBS facility's information report, if any; and any notice of violation]). Accordingly, by this decision and order, the requirement that Department staff provide proof of the facts sufficient to support the claim shall be applicable to all default judgment motions, including those made outside the PBS context. Although the record may not be as developed as when a matter is tried on the merits in absentia, this procedure nonetheless assures that the record is sufficient to support the Commissioner's order in any subsequent judicial proceedings.

Where, however, as in this proceeding, a respondent fails to appear at a duly noticed administrative enforcement hearing and Department staff has demonstrated its readiness to proceed, the preference is for Department staff to try its case in the respondent's absence. This assures that the record, based upon live testimony in addition to documentary evidence, is sufficient to support the Commissioner's order in any subsequent judicial proceedings.

After the ALJ forwarded her hearing report to my office, Department staff advised Chief Administrative Law Judge James T. McClymonds, by letter dated July 10, 2013, that Queen City Recycle Center, Inc. had recently submitted checks in payment of the outstanding fiscal year 2012-2013 environmental monitor fee, and also the environmental monitor fee for fiscal year 2013-2014. As a result, the outstanding fee obligation for fiscal year 2012-2013, which is the subject of this proceeding, has been addressed. However, in its July 10, 2013 letter, staff stated that, because respondent was over a year late in submitting the required fee for fiscal year 2012-2013 and because a hearing was required on this matter, the original civil penalty request in the amount of twenty-five thousand dollars (\$25,000) should be assessed against respondent.⁸

Pursuant to my direction, Assistant Commissioner for Hearings and Mediation Services Louis Alexander advised respondent, by letter dated July 18, 2013 (which was sent by both

⁷ When a default judgment motion is made in writing, in addition to the requirements of 6 NYCRR 622.15(b), staff must also provide proof of service of the motion for a default judgment on a respondent (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009, at 1-2).

⁸ By letter dated July 19, 2013 to the Office of Hearings and Mediation Services (on which respondent was copied), staff advised that, when the check for payment of the fiscal year 2012-2013 environmental monitor fee was finally submitted, respondent did not include any transmittal letter or other document providing any explanation for the late submission of the fee.

certified and first class mail), that it had until August 2, 2013 to reply to staff's renewal of its penalty request. No response was received from respondent.⁹

ECL 71-2703 provides that any person who violates any of the provisions of, or who fails to perform any duty imposed by title 3 or 7 of article 27 or any term or condition of a permit issued pursuant to title 3 or 7 of ECL article 27 shall be liable for a civil 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) for each day during which such violation continues. Respondent's permit was issued pursuant to title 7 of ECL article 27 (see Hearing Exhibit 2). In support of the requested civil penalty, staff noted that the civil penalty requested is far less than the statutory maximum authorized by the ECL (see Hearing Exhibit 5).¹⁰

Facilities subject to the ECL must comply with applicable statutory provisions, regulations and permits. The failure to so comply may result in significant adverse impacts to public health or the environment. To ensure proper implementation, the Department may require that a facility fund an on-site environmental monitor, as was the case here. With respect to certain solid waste management facilities, the environmental monitoring program can help to ensure that adverse environmental impacts associated with the improper handling of solid waste are prevented (see Hearing Exhibit 1, Affidavit of Shawn Vitas, sworn to June 14, 2012, at unnumbered page 3). Failure to pay a required environmental monitor fee on a timely basis impairs the operation of the monitoring program and the Department's efforts to ensure facility compliance with applicable statutory, regulatory and permit requirements.

In this matter, respondent ignored the administrative enforcement proceeding. It failed to file an answer to Department staff's complaint, and did not attend the hearing. Even though respondent subsequently submitted the environmental monitor fee for fiscal year 2012-2013, it has not offered any reason for the delay of more than a year in payment of the fee. When given the opportunity to respond to staff's July 10, 2013 renewed request for assessment of a penalty, respondent did not do so.

⁹ The certified mailing was returned as "unclaimed;" however, the first class mailing was not returned. It is reasonable to conclude that, as the certified mailing was returned as "unclaimed" rather than "undeliverable," respondent received the first class mailing (see ALJ Hearing Report, Matter of GSI of Virginia, Inc., April 27, 2007, at 17-18, adopted by Order of the Commissioner, May 31, 2007).

¹⁰ In addition, staff indicated that the requested amount is in accordance with the Department's enforcement guidance memorandum entitled "OGC 8, Solid Waste Enforcement Policy," dated November 17, 2010 (SW Enforcement Policy). The SW Enforcement Policy provides, among other things, a detailed discussion of penalty considerations for solid waste management facilities, and includes an appendix which provides a chart that sets forth a penalty range guide for determination of the gravity component of a penalty. A review of that appendix chart indicates that it contains misprints in the headings and, accordingly, needs clarification. Specifically, it appears that the references to Class I, Class II and Class III violations in the headings in the top row and horizontal column should not be included, but the headings should simply be labeled MAJOR, MODERATE, and MINOR. I hereby direct Department staff to review the chart and its headings, make appropriate revisions and add any necessary clarifying language. For purposes of consideration of the civil penalty in this proceeding, I have relied on the applicable statutory language in ECL 71-2703 and the SW Enforcement Policy, except for the chart in the appendix to that policy.

Based on this record, I agree that a civil penalty is warranted. However, I have also considered that nothing in the record indicates any other past or current violations at this facility or that the facility has previously been subject to any consent order relating to its operation. Furthermore, the facility has now paid its environmental monitor fee obligations, both for the fiscal year that was the subject of this proceeding and the current fiscal year. In light of these circumstances, a reduced civil penalty is warranted. Accordingly, I am assessing upon respondent a civil penalty in the amount of five thousand five dollars (\$5,000), rather than the twenty-five thousand dollar (\$25,000) civil penalty that staff had requested. Respondent is hereby directed to pay the civil penalty within thirty (30) days of the service of this order upon it.

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 with respect to the claim that respondent Queen City Recycle Center, Inc. has violated the terms and conditions of respondent's Part 360 Permit No. 3-5510-000361-00001 for failing, on or before April 8, 2012, to pay the annual environmental monitor fee for fiscal year 2012-2013 for the solid waste management facility that it owns and operates at 19 Cliff Street, New Rochelle, New York (facility). By failing to answer or appear in this proceeding, respondent Queen City Recycle Center, Inc. waived its right to be heard at the hearing.
- II. Based upon the testimony presented at the March 21, 2013 hearing, and the documentary evidence submitted by Department staff, respondent Queen City Recycle Center, Inc. is adjudged to have violated the terms and conditions of respondent's Part 360 Permit No. 3-5510-000361-00001 and 6 NYCRR 360-2.11(a)(2)(iii) for failing, on or before April 8, 2012, to pay the annual environmental monitor fee for fiscal year 2012-2013 for the facility.
- III. Respondent is assessed a civil penalty in the amount of five thousand dollars (\$5,000), which respondent is to pay within thirty (30) days of service of this order upon it. Payment shall be made in the form of a certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The penalty payment shall be sent to Elissa Armater at the following address:

Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Elissa Armater

IV. Any questions or other correspondence regarding this order shall be addressed to Scott Crisafulli, Esq., at the following address:

Scott Crisafulli, Esq.
Chief, Bureau of General Enforcement
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500

V. The provisions, terms and conditions of this order shall bind respondent Queen City Recycle Center, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: December 12, 2013
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

HEARING REPORT

DEC CASE NO:
CO-3-20120613-2

-by-

QUEEN CITY RECYCLE CENTER, INC. ,
Respondent.

-----X
Procedural History

Respondent QUEEN CITY RECYCLE CENTER, INC. ("respondent") was served with a notice of hearing and complaint dated June 28, 2012, alleging a violation of ECL Article 27, 6 NYCRR 360 and the terms and conditions of its Part 360 Permit #3-5510-000361-00001 for failing to pay Annual Environmental Monitor Fees for fiscal year 2012-2013 for the solid waste management facility that it owns and operates and which is located at 19 Cliff Street, New Rochelle, New York ("facility"). The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL Article 27 and 6 NYCRR 360-1.11(a)(2) for failure to make timely payment of Annual Environmental Monitoring Fees for fiscal year 2012-2013; (2) directing respondent to pay the Annual Environmental Monitoring fee in the amount of \$14,300.00; (3) assessing a civil penalty in the amount of twenty-five thousand dollars (\$25,000.00); and (4) granting such other and further relief as the Commissioner may deem just and proper.

Service of the notice of hearing and complaint was made by personal service upon respondent's representative on July 18, 2012. (Department Exhibit 4). Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on September 18, 2012, as directed in the notice of hearing.

As stated in the notice of hearing, on September 18, 2012, an adjudicatory hearing was scheduled at the Department's Region 3 office 21 South Putt Corners Road, New Paltz, New York 12561 and Administrative Law Judge ("ALJ") Molly T. McBride of the Department of Environmental Conservation's ("Department") Office of Hearings and Mediation Services ("OHMS") was present and called the matter for hearing. Department staff was represented by Scott Crisafulli, Esq., Associate Attorney, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. No one appeared on behalf of respondent. Department staff was prepared to proceed to hearing and had its witness, David Pollock, Engineer in the Department's Region 3 office present. In all, five (5) exhibits were marked for identification for the hearing.

Pursuant to 6 NYCRR 622.15, Mr. Crisafulli, on behalf of Department staff, orally moved for a default judgment based upon respondent's failure to answer the complaint dated June 28, 2012, and failure to appear for the prehearing conference scheduled in the notice of hearing served with that complaint.

After the close of the record on September 12, 2012, Department Staff submitted a supplemental affidavit of ECO Brian Toth regarding service of the notice of hearing and complaint on respondent. The supplemental affidavit detailed service on respondent and clarified why respondent was served at an address that is different than the address identified in the records submitted, including the notice of hearing and complaint. The supplemental affidavit satisfactorily addressed the issue of service.

After review of the records submitted and the offer of proof made by Department staff, ALJ McBride requested that the hearing be reconvened to allow testimony from Department staff regarding the substance of the alleged violations. The hearing record was reopened on March 21, 2013 and David Pollock testified for the Department. The record was closed on March 21, 2013. The hearing was recorded (Edirol No. 040420125951).

Applicable Regulatory Provision

§ 360-1.11 Permit provisions, Solid Waste Management Facilities

(a) Mitigation of adverse impacts. (1) The provisions of each permit issued pursuant to this Part must assure, to the extent practicable, that the permitted activity will pose no significant adverse impact on public health, safety or welfare, the environment or natural resources, and that the activity will comply with the requirements identified in this Subpart and the applicable Subpart pertaining to such a facility, and with other applicable laws and regulations. To provide such assurance, the department may impose conditions on such a permit, including but not limited to or exemplified by the following: inspection, financial assurance, technical data gathering and reporting, data analysis, quality control, quality assurance, sampling, monitoring (including the imposition of on-site environmental monitors), reporting and verification.

(2) In the case of on-site environmental monitors, funding shall be established with the department as follows:

(i) Within 15 calendar days after receipt of written notice from the department, the initial amount to be paid for environmental monitoring sufficient to pay all costs associated with the department's provisions of environmental compliance monitoring for such facility for the first year, the owner or operator shall submit to the department, the sum of money as

determined by the department. This sum will be used toward payment of the first year costs for such monitoring. Costs for which payment must be made include, but are not limited to direct personal service costs and fringe benefits of the on-site environmental monitor(s) and full-time monitor supervisor(s), including the cost of replacement personnel for the monitor position; direct non-personal service costs including purchase or lease of a vehicle and its full operating costs; any appropriate chemical sampling and analysis; inflation and negotiated salary increases; and overhead and support costs at the approved federal indirect cost rate.

(ii) The on-site environmental monitoring payment sum shall be subject to quarterly revision by the department. Quarterly payments shall be made by the owner or operator for as long as the facility is subject to department regulations.

(iii) Within 30 calendar days after receipt of written notice from the department that payment is due, the owner or operator of the facility shall forward the amount due the department indicating which facility this amount is coming from. Payments are to be in advance of the period in which they will be expended.

(iv) In the event that the owner or operator of the facility fails to submit any of the environmental monitoring payments by the required submission dates, such owner or operator shall immediately cease acceptance of any and all solid waste of any kind at the facility and shall commence closure of the facility in accordance with the requirements of this Part and any permit or order to which the owner or operator is subject. Such cessation of waste acceptance shall be automatic, without the necessity of prior hearing or judicial review.

Findings of Fact

1. Respondent Queen City Recycling Center, Inc. owns and operates a solid waste management facility which is located at 19 Cliff Street, New Rochelle, New York. (Department Staff Exhibits 1 and 2, Testimony of David Pollock.)
2. Respondent Queen City Recycling Center, Inc. was issued DEC permit number 3-5510-000361/00001 ("permit") to operate a solid waste facility at 19 Cliff Street, New Rochelle, New York effective October 27, 2008. (Department Staff Exhibit 2, Pollock Testimony.)
3. Pursuant to the permit issued to respondent, respondent was to fund environmental monitoring services to be performed by the Department. The permit directs that the fees are to be paid in advance of the period in which the fees will be expended. (Department Staff Exhibit 2, p. 9.)
4. Department staff, by letter dated March 8, 2012, sent respondent an invoice for environmental monitoring at the facility for the period of April 1, 2012- March 31, 2013. The fee of \$14,300.00 was due on April 8, 2012. (Department Staff Exhibit 3.)

5. Respondent failed to pay the environmental monitor invoice that was due on April 8, 2012. (Department Staff Exhibit 1, Pollock Testimony.)
6. Shawn Vitas is an employee of the Department and is an associate accountant in the Revenue Accounting Unit of the Division of Management and Budget. His duties include the billing and tracking of payments on a statewide basis from facilities that are required to maintain an account for Annual Environmental Monitoring Fees with the Department. He maintains a list of permittees which are required to pay Annual Environmental Monitoring Fees as well as other related duties. Based upon his review of the Department's records and his discussions with the Department's Division of Material Management which is responsible for solid waste management facility permits, he has determined that respondent failed to pay the fee due on April 8, 2012 (Vitas affidavit, Department Staff Exhibits 1, 2 & 3.)
7. As a result of respondent's failure to pay the required fee, the Department issued a Notice of Violation (NOV) on May 11, 2012. Respondent failed to respond to the NOV. (Vitas affidavit, Department Staff Exhibit 1.)
8. Service of the notice of hearing and complaint dated June 28, 2012, on respondent alleging a violation of ECL Article 27 and its implementing regulation, 6 NYCRR 360-1.11(a)(2) for respondent's failure to pay the Annual Environmental Monitoring Fee for the fiscal year beginning April 1, 2012 as indicated in Finding of Fact 4, above, was made personally on respondent's representative on July 18, 2012. (Department Staff Exhibit 4.)¹
9. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on September 18, 2012, as directed in the notice of hearing. (Department Staff Exhibit 1; Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to pay the Annual Environmental Monitoring Fee for fiscal year beginning April 1, 2012, being set forth in Finding of Fact 4, above, in violation of ECL Article 27 and its implementing regulation, 6 NYCRR 360-1.11(a)(2).

The record shows that respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on September 18, 2012, as directed in the notice of hearing. The proof adduced at the hearing on March 21,

¹ Environmental Conservation Officer (ECO) Brian Toth served respondent with the Notice of Hearing and Complaint on July 18, 2012 at 225A Main Street, New Rochelle, NY. ECO Toth initially went to the address of record on the Department's records. A neighbor of that address advised ECO Toth to go to 225A Main Street, New Rochelle, NY. He traveled to that address and found offices for respondent and served respondent via Elinor Murphy, who identified herself as a person having authority to accept service for respondent. ECO Toth stated in a supplemental affidavit that the 225A Main Street address appeared to be an office of respondent.

2013, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to pay the Annual Environmental Monitoring Fee for fiscal year beginning April 1, 2012, being set forth in Finding of Fact 4, above, in violation of ECL Article 27 and its implementing regulation, 6 NYCRR 360-1.11(a)(2). The Department is entitled to judgment upon the facts proven.

As detailed in the affidavit of Shawn Vitas (Department Staff Exhibit 1), the Environmental Monitoring program is extremely important to the Department's solid waste program. The monitoring of facilities is the only way to ensure that adverse environmental impacts associated with improper handling and processing of solid waste are being prevented. With respect to penalty, Department staff submitted a penalty calculation that detailed that pursuant to ECL 71-2703, the statutory maximum penalty is one hundred and forty-one thousand dollars (\$141,000) (Department Staff Exhibit 5.) Department staff has requested a civil penalty of twenty-five thousand dollars (\$25,000.00). In support of the requested civil penalty, staff noted that the civil penalty amount is within the range authorized by section 71-2703 of the Environmental Conservation Law. The penalty requested is consistent with DEC's Civil Penalty Policy (See DEE-1, dated June 20, 1990). In addition, I have reviewed the Department's enforcement guidance memorandum entitled "OGC 8, Solid Waste Enforcement Policy," dated November 17, 2010 (SW Enforcement Policy), and determined that the staff-requested penalty was consistent with the SW Enforcement Policy.

Recommendation

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

1. Finding respondent in violation of ECL Article 27 and its implementing regulation, 6 NYCRR 360-1.11(a)(2), for failure to pay the Annual Environmental Monitoring Fee for fiscal year April 1, 2012- March 31, 2013 for the solid waste management facility it operates at 19 Cliff Street, New Rochelle, New York, as set forth in Finding of Fact 4;
2. Directing respondent to pay the Annual Environmental Monitoring Fee for fiscal year 2012-2013 in the amount of fourteen thousand three hundred dollars (\$14,300.00) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation within 30 days of the date of an order herein;
3. Directing respondent to pay a civil penalty in the amount of twenty-five thousand dollars (\$25,000); and
4. Directing such other and further relief as he may deem just and proper.

_____/s/_____
Molly T. McBride
Administrative Law Judge

Dated: Albany, New York
April 8, 2013

EXHIBIT CHART*Matter of Queen City Recycle Center, Inc. –*Edirol Number 040420125951March 21, 2013

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Pleadings, including: cover letter, notice of hearing, complaint, and statement of readiness (dated June 28, 2012); Affidavit of Shawn Vitas dated June 14, 2012.	✓	✓	Department Staff	
2	Permit issued to respondent pursuant to Part 360, dated October 27, 2008.	✓	✓	Department Staff	
3	Invoice for environmental monitoring fee and cover letter dated March 8, 2012	✓	✓	Department Staff	
4	Affidavit of Service of ECO Toth dated July 18,2012	✓	✓	Department Staff	
5	Penalty Calculation prepared by Staff	✓	✓	Department Staff	
6	Affidavit of ECO Toth dated December 5, 2012	✓	✓	Department Staff	
7	Affidavit of David Pollock dated November 23, 2012	✓	✓	Department Staff	