STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

Alleged Violation of Article 27
of the Environmental Conservation Law of the State
of New York and Parts 360 and 364 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York,

-by-

TRINITY TRANSPORTATION CORPORATION,

Respondent.

DEC File No. R1-20111206-200

DECISION AND ORDER OF THE COMMISSIONER

July 13, 2022

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation ("Department," "DEC" or "staff") that respondent Trinity Transportation Corporation ("respondent" or "Trinity") violated New York State Environmental Conservation Law ("ECL") section 27-0707, and parts 360 and 364 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by causing or allowing the unauthorized: (i) release of 24 drums of solid waste into the environment at an unauthorized facility; (ii) delivery to and disposal of 24 drums of regulated waste at an unauthorized facility; (iii) collection or removal of a regulated waste without a valid transporter permit; and (iv) transportation of a regulated waste without a valid transporter permit.[1]

Based on the entire record, including the parties' submissions relating to staff's motion for order without hearing, as well as the testimony and exhibits admitted at the adjudicatory hearing before Administrative Law Judge ("ALJ") Nicholas P. Garlick, I hold that respondent is liable for several of the regulatory violations alleged by staff. Subject to my comments below, I adopt the conclusions of law set forth in ALJ Garlick's Ruling dated February 12, 2013 ("February 2013 Ruling") and the findings of fact set forth in the ALJ's hearing report, which is attached hereto.

I. PROCEDURAL BACKGROUND

Department staff commenced this proceeding by serving on respondent the following documents: (i) Notice of motion for order without hearing; (ii) Affirmation of Vernon G. Rail, Esq. dated August 14, 2012 ("Rail Aff.");[2] (iii) Affidavit of Peter Hourigan, DEC staff engineer in the Department's Region 1 office, sworn to on August 14, 2012 ("Hourigan Aff."), attaching six exhibits; and (iv) a memorandum of law. Department staff has asserted eight causes of action,[3] and has requested that I issue an order: (i) holding respondent liable for violating "Articles 27 and 71 of the ECL,"[4] 6 NYCRR 360-1.5(a)(2), and 364.2(a)(1)-(3); (ii) enjoining

[1] The statutory and regulatory citations in this decision and order are to the statutes and regulations that were in effect during the period when the alleged violations occurred.

[2] Mr. Rail's signed affirmation, submitted as part of staff's motion, is actually a redline draft of his affirmation which reveals minor edits made to the document. Staff should ensure that documents that are signed, served and submitted in administrative proceedings are final versions, not drafts.

[3] Staff has asserted the eight causes of action in pairs. Each cause of action asserts certain violations with respect to one of respondent's trucks involved, and its "paired" cause of action asserts the same violations with respect to a second of respondent's trucks.

[4] Staff alleges in the first and second causes of action that respondent violated ECL 27-0707 as well as regulations, but does not request in the Wherefore Clause that I hold respondent liable for violating that statutory provision. In addition, the Wherefore Clause seeks a holding that respondent violated "Articles 27 and 71 of the ECL," but staff does not allege a violation of any specific provision of ECL article 71.

respondent from any further actions causing such violations or additional violations to continue; (iii) directing respondent to pay a civil penalty "not to be less than" $57,500; and (iv) in the event respondent "fails to timely satisfy the legal obligations imposed upon him" by this decision and order, permanently enjoining respondent "from either seeking DEC authority for any regulated environmental activity, or from engaging in any regulated solid waste activity within the State of New York" (Rail Aff. at 9, Wherefore Clause ¶¶ I-IV).

Following an agreed-upon extension of time to respond, respondent served the following papers in opposition to staff's motion: (i) Affirmation of Michael E. White, Esq. dated September 7, 2012 ("White Aff."); and (ii) Affidavit of John Whitton, sworn to on September 7, 2012 ("Whitton Aff."), attaching two exhibits. In addition to disclaiming liability and asserting that staff had failed to meet its initial burden on the motion for order without hearing, respondent asserted that staff's motion was deficient with respect to civil penalty (see White Aff. at 10-12, ¶¶ 49-58). In addition, respondent asserted that staff's motion "represents selective enforcement/inconsistent application of the ECL and regulations promulgated thereunder," and "disparate and unequal treatment of TRINITY as compared to the real culpable parties in this incident" (see id. at 12 ¶ 59), and that, should a hearing be held, two other entities ([i] Action Distributors and [ii] Scott D Haulers/The Demolition Specialist) would be necessary parties (see id. at 12-13, ¶¶ 59-62).

Staff thereafter served the following reply papers: (i) Reply Affirmation of Vernon G. Rail, Esq. dated September 21, 2012; and (ii) Reply Affidavit of Peter Hourigan, sworn to on September 20, 2012, attaching three exhibits. Respondent served the following sur-reply papers: (i) Sur-Reply Affirmation of Michael E. White, Esq., dated September 2012, attaching one exhibit ("White Sur-Reply"); and (ii) Sur-Reply Affidavit of John Whitton, sworn to on September 28, 2012.

On February 12, 2013, ALJ Garlick issued the February 2013 Ruling granting staff's motion for order without hearing with respect to liability, but denying the motion with respect to civil penalty. The ALJ found that there were "substantial questions of fact regarding the civil penalty amount requested by DEC Staff" (February 2013 Ruling at 10). On June 12 and 13, 2013, the ALJ presided over an adjudicatory hearing regarding civil penalties, at which six witnesses testified. The parties thereafter filed closing briefs dated July 26, 2013.

II. FACTS

In his hearing report, the ALJ stated that the 29 findings of fact therein supersede the findings of fact set forth in the February 2013 Ruling (see Hearing Report at 2). I adopt the findings of fact in the hearing report, subject to my comments below.

The record established that, on September 7, 2010, three trucks operated by respondent picked up loads of waste from a transfer station in Babylon, New York operated by Omni Recycling of Babylon, Inc. ("Omni"). At that time, respondent did not possess a permit to

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Rather, staff's papers include a discussion of ECL 71-2703 with respect to establishing an appropriate civil penalty (see Rail Aff. at 3, ¶¶ 16 and 17).

transport "regulated waste"[5] pursuant to 6 NYCRR Part 364 (see Hearing Report at 2 [Finding of Fact ("FOF") No. 1]; see also Hearing Exhibit ["Ex."] 18 [respondent's Part 364 permit that expired in January 2000]). After picking up the loads, respondent's trucks traveled to the Town of Brookhaven ("Town") Landfill, located in Yaphank, Suffolk County, New York, to dispose of their contents (see Hearing Report at 2 [FOF Nos. 2-4]; id. at 4 [FOF No. 9]; see also Exs. 36 and 38). The Town's permit authorizes the landfill to accept, among other types of waste, clean fill including both unprocessed and pulverized construction and demolition debris, but does not authorize the landfill to accept "regulated waste" (see Hearing Report at 2 [FOF No. 1]; see also Exs. 1, 19, 20).

After respondent's trucks arrived at the landfill, one truck tipped its load, and a second truck began to tip its load. At that time, landfill employees noticed that, in addition to construction and demolition ("C&D") debris, the dumped material included drums and other containers. Respondent's third truck was prevented at that time from tipping its load (see Hearing Report at 2-3 [FOF Nos. 4, 5]).[6]

At the time of these events, Peter Hourigan, a Department employee who had served as on-site environmental monitor at the landfill for approximately seven years, and Michael DesGaines, Environmental Facilities Manager for the Town, were meeting at an office at the landfill. After Mr. DesGaines received a telephone call from landfill employees concerning the loads tipped by respondent's trucks, he and Mr. Hourigan drove to the tipping site at the landfill. Mr. Hourigan there observed the dumped material, and took several color photographs of the waste piles, which included drums and containers (see Hearing Transcript ["Tr."] at 7-8; 13-15); see also Ex. 13; Hearing Report at 3 [FOF No. 5]). Mr. DesGaines called John Whitton, respondent's general manager, and Mr. Whitton arrived at the landfill within 35-40 minutes (see Tr. at 385; see also Ex. 38 [Whitton handwritten statement stating, among other things, "Call to landfill … Brought up to face of landfill to inspect 2 lds of C&D brought into B.H. [presumably "Brookhaven"] by TTC trks [likely means "Trinity Transportation Corporation trucks"] #53 & #57. Loads were brought in from Omni Recycling"]).

Several drums and containers – some of which contained liquids and others which contained solids[7] – were segregated that day from the waste pile and were later moved to another location at the landfill and covered with a plastic tarp.

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[5] "Regulated waste" is a solid waste and includes, among other types of waste, "industrial-commercial waste," which is any solid waste "which originates at, is generated by, or occurs as a result of any industrial or commercial activity" (ECL 27-0303[2], [4]; 6 NYCRR 364.1[d][2], [3]).

[6] The third truck was allowed the next day to dump its load of waste at the landfill, after the Town determined that the material in the truck did not include drums (see Hearing Report at 2 [FOF No. 4]; Tr. at 91).

[7] The record does not clearly establish the number of drums and containers present in respondent's two truckloads of waste that were tipped at the landfill on September 7, 2010, or that were ultimately removed from the landfill (see Hearing Report at 3 [FOF No. 6]). Mr. Hourigan's September 7, 2010 inspection report states that the tipped material contained "a minimum of 30 barrels (most 55 gal. drums)" (Ex. 23, at page 3 of 5). Mr. Whitton's handwritten notes regarding a September 16, 2010 meeting at the landfill state that "[w]e have 43 steel drums, 17 containing liquid, 13 cardboard drums[,] 6 containing powder and

Omni and respondent immediately commenced an investigation to determine the source of the drums and containers. A security videotape of Omni's facility showed that an entity identified as Scott D Haulers/The Demolition Specialist ("Scott D Haulers") had brought the drums to the Omni facility in an open top roll off container (see Ex. 36, at 1; see also Tr. at 461). After Scott D Haulers left the container at the Omni facility, an Omni employee "pushed the load to the 'outbound' pile in the C&D building," but "did not notify any supervisors of the drum contamination, which was more than obvious in the load" (Ex. 36 at 1; see also Tr. at 401). Further investigation led to a determination that the drums and containers had originated from an entity identified both as "Action Distributors" and "Closeout Guide" ("Action Distributors") (see Tr. at 399-401; see also Ex. 36, at 1). Several meetings were held involving respondent and representatives of Department staff, Omni and the Town. Representatives of Scott D Haulers and Action Distributors also attended at least one meeting at the landfill regarding the drums and containers (see Exs. 36, 38).

Although aware of the existence of the videotape showing that the drums were delivered to Omni by Scott D Haulers, and that the drums were traced back to Action Distributors, staff did not seek to enforce against Omni, Scott D Haulers, or Action Distributors.[8]

In response to its disposal of drums and containers at the landfill, respondent brought personnel and equipment to the landfill on more than one occasion, to segregate the drums and containers from other waste and to secure them in a separate location at the landfill. Respondent also covered them with plastic tarp (see e.g. Tr. at 390-391; 394-395; 410-411; 441-442; 477-478; 483-484; 492-493; 500-501; see also Hearing Report at 4-5 [FOF No. 12]; id. at 6-7 [FOF No. 23]; Ex. 38, at 2).

With the approval of the Department, respondent hired contractor Eastern Environmental Solutions, Inc. ("Eastern") to take samples from the drums and containers (see Hearing Report at 5-6 [FOF Nos. 15, 20, 21]; see also Tr. at 463-464). Respondent also paid for the testing of the contents of the drums and containers (see e.g. Tr. at 434-435). Although the testing results were generally inconclusive, the results indicated that one drum (drum #10) contained methyl ethyl ketone, a listed hazardous waste (see Hearing Report at 6 [FOF No. 22]; see also Ex. 17]). Because of the inconclusive nature of the sampling results, it was ultimately determined to treat the drums and containers as though they contained hazardous waste, and they were ultimately

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3 empty plastic drums" (Ex. 38). Mr. Whitton's notes regarding a September 21, 2010 meeting at the landfill state that 27 drums were marked and their contents were to be sampled and tested (id.). Sampling results reflect that 25 drums were tested (see Ex. 17). A hazardous waste manifest reflects that 23 drums of material were ultimately transported from the site and disposed of as hazardous waste and one (1) other drum of nonhazardous waste (see Ex. 14; see also Tr. at 363-364 [testimony of Region 1 environmental engineer]). Although the ALJ did not make a finding of fact with respect to the exact number of drums and containers at issue (see Hearing Report at 3, FOF No. 6), the record contains evidence sufficient to support a finding that a minimum of 24 drums and containers were present in respondent's two truckloads of waste that were tipped at the landfill.

[8] The ALJ properly rejected respondent's claim of selective enforcement (see February 2013 Ruling at 11-12). It is however unclear in this record why none of the other entities involved here – Omni, Scott D Haulers, or Action Distributors -- were not investigated further.

transported, on May 3, 2011, and disposed of as hazardous waste (see Hearing Report at 7 [FOF No. 24], id. at 8 [FOF No. 29]; see Ex. 14).

Relatedly, DEC's staff engineer had determined that the materials were regulated waste, specifically industrial-commercial waste. He based that determination, among other things, on Eastern's manifest (see Ex. 4) (Hourigan Aff. at 5-6 ¶ 20; see also Hourigan Reply Affidavit dated September 20, 2022 at 3 ¶ 8 [noting liquid nature of much of the waste and that the waste was generated by a distributor of cosmetics no longer doing business]).

The record reflects that three issues delayed the final removal and disposal of the drums and containers from the landfill: (i) the promptness and competence of the contractor Eastern; (ii) staff's requirement of a certain specificity of testing; and (iii) the difficulty in obtaining an EPA number to include in the hazardous waste manifest accompanying the drums and containers to final disposal (see e.g. Hearing Report at 7-8 [FOF Nos. 24-28]; see also Tr. at 207-211 [Hourigan testimony]; 433-434 [Whitton testimony]; 486-488 [DesGaines testimony]; Ex. 16, at 1-3, 14-34; Exs. 31, 36).

III. STANDARD OF REVIEW

In this enforcement proceeding, the recommendations contained in the ALJ's hearing report are advisory in nature, and my review is de novo (see e.g. Matter of Sil-Tone Collision, Inc. v Foschio, 63 NY2d 406, 411 [1984]. Although an ALJ's report is entitled to weight, especially to the extent that determination of material facts may turn on resolving the credibility of witnesses appearing at hearing, a Commissioner is not bound by, and may overrule, the ALJ's findings of fact and make his own findings, provided they are supported by record evidence (see Simpson v Wolansky, 38 NY2d 391, 394 [1975]; Matter of Jackson's Marina, Inc. v Jorling, 193 AD2d 863, 866 [3d Dept 1993]; Matter of New York City Dept. of Sanitation, Decision of the Commissioner, July 2, 2012, at 9-10).

IV. DISCUSSION

Respondent's post-hearing brief argues against the civil penalty proposed by staff, and also challenges the ALJ's February 2013 Ruling granting staff's motion for order without hearing and finding respondent liable for the alleged violations (see e.g. Closing Argument dated July 26, 2013 ["Resp. Cl. Br."] at 1-2, 3-4, 8-9). Respondent specifically "requests review of the Findings of Fact, Conclusions of Law and ruling on liability as determined in the [February 2013] Ruling" (id. at 13). The testimony and exhibits admitted at the adjudicatory hearing establish a full record for my review of the ALJ's determinations with respect to both liability and penalty. In addition, staff's post-hearing brief challenges some of the ALJ's evidentiary rulings (see Staff's closing brief dated July 26, 2013 ["Staff Cl. Br."] at 1-2). I address these issues below.

A. Evidentiary Rulings

I reject staff's challenge to the ALJ's (i) ruling admitting Exhibits 27, 28 and 30 into evidence; and (ii) ruling that proposed Exhibit 34 was inadmissible. Citing Matter of Avis Rent a Car System, LLC, Order of the Commissioner, March 24, 2009, staff argues that Exhibits 27, 28 and 30 should be excluded because they "may be used to question liability," and the only issue at the hearing related to civil penalty (Staff Cl. Br. at 2). In Avis, the respondent had defaulted, and respondent offered the evidence with respect to liability after it had waived its rights to do so by defaulting. By comparison, respondent here does not cite these exhibits to support its argument that the ALJ erred in finding respondent liable. Rather, these exhibits were offered with respect to (i) staff's failure to include other responsible parties; and (ii) the culpability element of penalty analysis (see e.g. Resp. Cl. Br. at 7, 9-10). The ALJ did not err by receiving these exhibits into evidence.

Proposed Exhibit 34, which the ALJ ruled was inadmissible, is a July 27, 2000 letter from the then-regional permit administrator to Omni modifying Omni's Part 360 permit and attaching the permit (which contains an expiration date of April 14, 2001) and earlier correspondence. Respondent is not mentioned anywhere in the exhibit, and was not copied on any of the correspondence. Staff argues that Exhibit 34 should be admitted to demonstrate that respondent Trinity had knowledge of special condition #8 of Omni's permit because both entities have one common principal.[9] Staff argues that, assuming such knowledge would be imputed to Trinity, it is relevant to Trinity's "level of culpability and/or willful ignorance" (Staff Cl. Br. at 12-13).

The ALJ correctly rejected this proffered exhibit. The mere fact that Omni and Trinity have a common principal is not, without more, sufficient to impute to Trinity knowledge of a special condition in an Omni permit that expired years before the date of the alleged violations. Moreover, staff could have, but did not, examine Mr. Whitton – a general manager employed by Trinity – with respect to whether he had general or specific knowledge of the Omni permit. Nor did staff name Omni as a party or subpoena any Omni witness, either with respect to providing a foundation for the admission of this exhibit, or for demonstrating the relationship between Omni and Trinity and any knowledge that Trinity may have had with respect to Omni's permit.

B. Liability

To provide context for the analysis of the claims and defenses below, a brief review of the relevant statutory and regulatory provisions regarding transportation and disposal of solid waste is set forth.

[9] The ALJ listed Patricia DiMatteo, Gina Core and Carolyn Core as the owners of respondent (see Hearing Report at 2 [FOF No. 1]), and Ms. DiMatteo and Anthony Core as owners of Omni (see Hearing Report at 2 [FOF No. 2]).

1. Types of Waste

The ECL defines "solid waste" to include "putrescible and non-putrescible materials or substances discarded[10] or rejected as being spent, useless, [or] worthless … including but not limited to garbage, refuse, [and] industrial and commercial waste" (ECL 27-0701[1]; see also 6 NYCRR 360-1.2[a][1]; 6 NYCRR 364.1[d]). "Waste" includes "refuse, . . . and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations …." (ECL 27-0303[7]). "Industrial-commercial waste" is defined as "a waste which originates at, is generated by, or occurs as a result of any industrial or commercial activity" (ECL 27-0303[2]; see also 6 NYCRR 360-1.2[b][88]). "Regulated waste" is defined as "a solid waste" and includes "industrial-commercial waste" (see 6 NYCRR 364.1[d][2]).

"Construction and demolition ("C&D") debris" means "uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of utilities, structures and roads," and includes "empty buckets 10 gallons or less in size and having no more than one inch of residue remaining on the bottom …." (6 NYCRR 360-1.2[b][38]). Specifically excluded from the definition of "C&D debris" are "drums, containers greater than 10 gallons in size, [and] any containers having more than one inch of residue remaining on the bottom" (id.).

Thus, as the record demonstrates, the drums and containers at issue are "solid waste," "industrial-commercial" waste, and "regulated waste," and are specifically excluded from the definition of "C&D debris."

2. Prohibitions Regarding Transportation of Regulated Waste

The legislature's express purpose in enacting title 3 of ECL article 27, entitled "Waste Transporter Permits," was "to protect the environment from mishandling and mismanagement of all regulated wastes transported from the site of generation to the site of ultimate treatment, storage or disposal and to prevent a discharge of wastes into the environment, whether accidental or intentional, except at a site approved for the treatment, storage or disposal of such wastes" (ECL 27-0301). In that regard, "no person shall engage in the transportation of regulated waste originating or terminating at a location in this state without a permit" (ECL 27-0305[1]). Pursuant to the Department's waste transporter regulations, 6 NYCRR Part 364, the collection or removal of any regulated waste from its point of origin, generation or occurrence, the transportation of any regulated waste, and the delivery of any regulated waste to a treatment, storage or disposal facility, are all expressly prohibited "except pursuant to and in accordance with a valid permit" (6 NYCRR 364.2[a][1]; see also 6 NYCRR 364.2[a][2] & [3]).

The evidence in this case established that, at the time respondent's trucks collected the loads of waste containing the drums and containers at the Omni facility, transported and delivered them to, and tipped them at, the Town's landfill, respondent did not possess a part 364 permit authorizing such collection, transportation, or delivery of regulated waste (see Hearing Report at 2 [FOF No. 1]; Hourigan Aff. at 6, ¶ 21).

[10] A material is considered "discarded" if, among things, it is "abandoned by being disposed of" (6 NYCRR 360-1.2[a][2]).

3. Prohibitions Regarding Disposal of Solid Waste

"Disposal" occurs when, among other things, material is "discharged, deposited … dumped, spilled, leaked or placed … on any land … so that such material or any constituent thereof may enter the environment" (6 NYCRR 360-1.2[a][3]; see also ECL 27-0303[1] [disposal "means the … discharge, deposit… dumping … or placing of any substance so that such substance or any related constituent thereof may enter the environment"]; see also 6 NYCRR 364.1[c][3]). "Discharge" includes "the accidental or intentional spilling, leaking … emptying or dumping of any solid waste … on any … land…." (6 NYCRR 360-1.2[b][51]). Department regulations expressly prohibit the disposal of solid waste at a facility unless the facility is authorized to accept such waste (see 6 NYCRR 360-1.5[a][2]).

The evidence in this case established that the Town's landfill permit authorized it to accept disposal of C&D debris, but not regulated waste (see Exs. 19, 20).

4. Staff's Causes of Action

a. First and Second Causes of Action[11]

Staff alleges that respondent violated ECL 27-0707, 6 NYCRR 360-1.5(a)(2) and 6 NYCRR 364.2(a)(3), by causing or allowing the unauthorized release of twenty-four individual drums of solid waste into the environment at an unauthorized disposal facility (see Rail Aff. at 6, ¶ 27).

Based on the entire record, including testimony and exhibits admitted at the adjudicatory hearing, I hold that respondent violated 6 NYCRR 360-1.5(a)(2) by disposing of the drums and containers at the Town's landfill. Section 360-1.5(a)(2) prohibits the disposal of solid waste except at a disposal facility authorized to accept such waste for disposal. The Town's landfill permit in this case authorizes the disposal of, among other things, C&D debris, but the drums and containers disposed of by respondent are specifically excluded by regulation from the definition of C&D debris (see 6 NYCRR 360-1.2[b][38]).[12]

With respect to the ALJ's conclusion that respondent violated ECL 27-0707, I note that . ECL 27-0707 is entitled "Permits for new solid waste management facilities." Staff has simply cited the section in its papers without identifying any subdivision or sub-paragraph within that section that might apply in this case, and without providing argument regarding its applicability. Without more, I decline to hold that respondent violated ECL 27-0707.

[11] As stated above at n. 3, staff has alleged one cause of action for each of respondent's two trucks that tipped loads at the Town's landfill on September 7, 2010.

[12] As discussed below at § IV.C of this decision and order, I also hold that respondent's disposal caused a "release" of the drums and containers into the environment.

With respect to staff's assertion in the First and Second Causes of Action that respondent violated 6 NYCRR 364.2(a)(3) by causing a "release," the ALJ did not explicitly address staff's allegations in these causes of action that respondent violated section 364.2(a)(3) (see February 2013 Ruling, at 7, 12). Upon a review of the record, the First and Second Causes of Action to the extent that they reference 6 NYCRR 364.2(a)(3) are subsumed by the language in the Third and Fourth Causes of Action as it relates to that regulatory section. It is on the basis of the language set forth in the Third and Fourth Causes of Action, and discussions relating thereto, that I hold that 6 NYCRR 364.2(a)(3) was violated.

b. Third through Eighth Causes of Action

Staff alleges that respondent violated all three subparagraphs of 6 NYCRR 364.2(a), by causing or allowing the unauthorized: (i) collection or removal of a regulated waste without having a Part 364 transporter permit, in violation of 6 NYCRR 364.2(a)(1) (see Rail Aff. at 7, ¶ 29 [Fifth and Sixth Causes of Action]); (ii) transportation of a regulated waste without having a Part 364 transporter permit, in violation of 6 NYCRR 364.2(a)(2) (see id. at 6, ¶ 30 [Seventh and Eighth Causes of Action]); [13] and (iii) delivery and disposal of twenty-four individual drums of regulated waste at an unauthorized disposal facility, in violation of 6 NYCRR 364.2(a)(3) (see id. at 6, ¶ 28 [Third and Fourth Causes of Action]).

Based on the entire record, including testimony and exhibits admitted at the hearing, I hold that respondent violated all three of these regulatory provisions when it collected the regulated waste at the Omni facility, transported and delivered the regulated waste to, and disposed of the regulated waste at, the landfill, all without possessing a valid Part 364 permit authorizing these actions.

C. Civil Penalty

Pursuant to ECL 71-2703(1)(a), any person who violates any provision of titles 3 or 7 of article 27, or of any regulation promulgated thereunder, shall be liable for a penalty up to $7,500 for each such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violations continues. The civil penalty for each such violation is increased up to $11,250 in circumstances in which the violation "causes the release of solid waste into the environment" (see ECL 71-2703[1][b][i]).[14] The statute defines "release" for purposes of this section as "any pumping, pouring, emitting, emptying, discharge, deposit, injection, dumping, spilling or placing of a substance" (ECL 71-2703[4]).

Department staff alleges that respondent's disposal of regulated waste resulted in two types of "releases," thereby triggering the higher penalty set forth in ECL 71-2703(1)(b)(i).

[13] Staff's papers include two "Sixth" causes of action and do not include a "Seventh" cause of action (see Rail Aff. at 7). I am treating the second "Sixth" cause of action as the "Seventh" cause of action.

[14] In its closing brief, staff twice cites ECL "71-2753(1)(b)(i)" (see Staff Cl. Br. at 6, 7), a provision that does not exist. I presume this is a typographical error, and staff intended to cite ECL 71-2703(1)(b)(i) (staff does provide the correct numerical section elsewhere in its papers, see e.g. id.).

First, staff asserts that "the drums alone, whether full or empty, constitute a solid waste which was not authorized for disposal at the Landfill" (Staff Cl. Br. at 6; see also id. at 7 [point heading stating "Drums Dumped at Landfill Constituted a Release of Solid Waste to the Environment"]). Second, staff argues that a "cloud of dust" allegedly related to the tipping of respondent's first truck was a "release," and that the tipped drums were actually leaking their contents after being deposited at the landfill, thereby causing a "release" (see Staff Cl. Br. at 7; Tr. at 21 [Hourigan testimony that the drums were "punctured sufficiently that they're, in my opinion … leaking"]).

Respondent argued that there was no evidence to substantiate a release. Respondent also argued that the cloud of dust was not witnessed by Department staff, and that the evidence reflected that the dust may have been caused by landfill personnel (see Resp. Cl. Br. at 4). In addition, respondent argues that there was no "release" into the environment because the evidence did not establish that the drums and containers were leaking or spilling their contents (see id. at 3-4).

The ALJ found that it was "not necessary to address" staff's first argument that the disposal of drums and containers, without more, constituted a "release" for purposes of ECL 71-2703 (see Hearing Report at 11). He determined that a "release" occurred with respect to the first of respondent's trucks based upon testimony by Messrs. Hourigan and DesGaines (see Hearing Report at 11-12). With respect to the second truck, the ALJ has recommended that I "review the photos [taken of the waste at the landfill] and accept the opinion of Mr. Hourigan that some of the drums from the second truck leaked" (see Hearing Report at 12-13).

Based upon my review of the record, including but not limited to the testimony of DEC staff and the photographic exhibits (see Exhibit 13), it is clear that because, by discharging, depositing, dumping, and placing the drums and containers at and onto the landfill, respondent caused a "release of solid waste into the environment" under ECL 71-2703(4). Therefore the applicable maximum statutory civil penalty under ECL 71-2703(1)(b)(i) for the two violations of 6 NYCRR 360-1.5(a)(2) (the first and second causes of action), is $22,500 ($11,250 x 2).

The maximum statutory civil penalty under ECL 71-2703(1)(a) for the other six regulatory violations (the third through eighth causes of action), is $45,000 ($7,500 x 6). Thus, I agree with the ALJ and staff that the total maximum statutory civil penalty for the violations proved in this matter is $67,500 (see Hearing Report at 13). In its closing brief, staff has provided a discussion of several factors under the Department's Civil Penalty Policy (DEE-1, June 20, 1990), including economic benefit and aggravating and mitigating circumstances (see Staff Cl. Br. at 7-12). Staff recommends that I impose a civil penalty of $57,500, reflecting a reduction of $10,000 from the statutory maximum, based upon what staff refers to as respondent's cooperation (Staff Cl. Br. at 10-12). All of these factors are discussed briefly below.

Penalties under the Department's Civil Penalty Policy are intended in part to "persuade the violator to take precautions against falling into non-compliance again, as well as persuade others not to violate the law" (DEE-1, at § III). Respondent's violations are clearly not minor. Respondent, however, claims that it did not know that the loads contained drums and containers, and therefore did not intend to transport and dispose of them (see Resp. Cl. Br. at 9 ["[f]or

worker safety reasons as directed by the transfer station, the drivers of the Trinity Transportation trucks remain in the cab of their trucks while the trucks are loaded"]). Knowledge or intent, however, are not elements of these violations, and pleading ignorance does not absolve respondent of its obligation to know the nature of the waste it transports and disposes.[15]

1. Economic Benefit

I agree with the ALJ that the record does not support staff's claim that respondent enjoyed an economic benefit of $12,300 by its violations. There is no evidence that respondent is currently in the business of hauling regulated waste, or that respondent intended to load and dispose of the drums and containers without paying the regulatory fees. In addition, there is apparently no history of violations on the part of respondent (see e.g. Tr. at 271 [testimony of Region 1 enforcement coordinator that he did not remember any violations by respondent before this one]). Finally, respondent incurred costs rather than benefits as a result of its disposal of the drums and containers although, as discussed below, the amount of such costs is uncertain.

I do not however adopt the ALJ's factual finding that respondent incurred an economic cost of approximately $75,000 for testing, shipping and disposal of the drums (see Hearing Report at 8 [FOF No. 30]; see also Hearing Report at 20-22). Respondent submitted no documentary proof to support Mr. Whitton's statement that the "moving, storage, sampling, testing and ultimate transport and disposal of the material was done at TRINITY's sole cost and expense at a cost of over … $75,000" (Whitton Aff. 3, ¶ 20). Other evidence reflects, for example, that Omni, rather than respondent, incurred costs relating to moving the drums at the landfill (see e.g. Tr. at 411, 443 [Omni's equipment and crew moved the drums at the landfill]). Moreover, respondent does not explain what costs, if any, related to "storage" of the drums. Finally, although the record contains testimony that respondent hired the consultant Eastern for sampling and testing the contents of the drums and containers, and ultimately arranging for their final disposal, respondent again offers no documentary proof that it contracted with or paid Eastern.

2. Gravity of Violations

The gravity component of the civil penalty analysis requires consideration of potential harm and actual damage caused by the violations, and the relative importance of the type of violation in the regulatory scheme (see DEE-1, at 6-8). Respondent's violations posed the risk of potential harm and actual damage to people and the environment. Testing of the drum contents revealed that at least one of the drums contained methyl ethyl ketone, a hazardous waste. The record does not, however, establish that the contents of that drum, or the disposal of the other

[15] For this reason, I do not adopt the ALJ's statement that "[t]here is nothing in the record to indicate that the respondent knew or should have known of the contents of its trucks" (Hearing Report at 16; see also id. at 19 [respondent "did not know, nor should have known that the drums were on its trucks"]; id. at 21 [stating that respondent's employees "had no way of knowing" that impermissible wastes had been loaded on the trucks]). Respondent is responsible for implementing safeguards and related measures to ensure that it is aware of the nature of the wastes it collects, transports and disposes of.

drums and containers at the landfill, caused actual damage. The drums and containers were quickly segregated after respondent's trucks dumped them in the landfill.

With respect to the importance to the regulatory scheme, the regulations that respondent violated are essential to achieving the goals of ECL article 27. Indeed, respondent's actions here are directly contrary to the legislature's expressly declared intent and purpose in enacting title 3 of ECL article 27 (see ECL 27-0301; see also ECL 27-0305[1]).

3. Culpability

Staff argues that respondent had control over all the relevant events (picking up, transporting and tipping the loads). Staff then focuses its culpability argument on the relationship between respondent and Omni, claiming that "[i]t is reasonable to presume" that these related entities "would or should share regulatory knowledge and expertise needed … to have avoided the occurrence of the subject incident" (Staff Cl. Br. at 9). Staff also describes Omni as respondent's biggest customer, and states that respondent has "economic dependency on Omni's business relationship" (id. at 10). Staff also argues that "it is equally reasonable to presume" that the common principal of the respondent and Omni, and other owners of the two entities "would have put safeguards in place to prevent such an incident" (id.). Staff seeks an imposition of a "significant penalty" on respondent to "serve as a deterrent to all DEC regulated businesses that Ms. DiMatteo and the Core family may own" (id.).

Staff's references to things it believes would be "reasonable to presume" is not persuasive. Staff did not name Omni as a respondent, notwithstanding that the regulated waste was improperly loaded onto respondent's trucks by Omni employees at the Omni facility. Nor did staff call as a witness any Omni employee or owner or, apparently, seek any discovery from Omni. Absent any evidence regarding what, if anything, was actually shared between Omni and respondent, and the actual nature of their economic relationship, Staff's requested presumptions in addressing respondent's culpability are not adopted. As the ALJ recommends, I will limit my consideration of the appropriate civil penalty to respondent's actions (see Hearing Report at 17).

However, I do not accept respondent's invitation to include in the penalty calculus consideration that staff did not name as additional respondents Scott D Haulers and Action Distributors, described by respondent as "the real culpable parties" (Resp. Cl. Br. at 9). Staff's failure to join other respondents is not relevant to the imposition of a penalty on respondent which committed eight violations.

4. Aggravating and Mitigating Factors

In accordance with OGC #8, the Department's Solid Waste Enforcement Policy (November 17, 2010),[16] the presence of certain mitigating factors, including timeliness in correcting the violation, history of past violations and cooperative efforts toward compliance, may support the reduction of the penalty from the statutory maximum (see OGC #8 at § III A.).

[16] Staff did not include in its closing brief any reference to or discussion of OGC #8.

In the present case, respondent has no history of violations and was cooperative with staff and the Town (see Hearing Report at 18-19). Witness testimony and documents established that respondent was responsive and cooperative throughout the period from the initial dumping of the drums and containers at the landfill in September 2010 to their ultimate removal from the landfill and final disposal in May 2011 (see e.g. Tr. at 163 [Hourigan describing respondent's general manager Whitton as "very interested … very responsive, very cooperative"]; 203 [Hourigan considered Whitton and Trinity to "absolutely" be continuing to cooperate]; 207 [no resistance by Whitton or Trinity to treating material in drums and containers as hazardous waste, even though tests were not dispositive, and disposal of waste as hazardous waste would be more expensive]; see also Tr. at 486-488 [DesGaines testimony that Trinity "did what they had to do," and there was never a time when Trinity was not responsive to DesGaines's demands]); see also Ex. 31 [January 3, 2011 email from Hourigan to Whitton stating that Whitton's and Omni's "immediate response to this situation when it first surfaced, and your continued attention to resolving it right up to the time Eastern got involved, convinced me that you were sincere in your efforts"]).

The record reflects that much of the cause of the delay in the ultimate removal and disposal of the drums and containers related to respondent's contractor Eastern, testing requirements, and obtaining a proper EPA generator number for the manifest. It nevertheless took eight months to have the drums and containers ultimately removed from the landfill and properly disposed of elsewhere.[17]

Staff also argues that respondent's "failure to self-report" the violations, and failure to enter into a consent order, comprise a lack of cooperation (see Staff Cl. Br. at 10-12). I agree with the ALJ that these arguments are not persuasive, but for reasons that differ from those of the ALJ.

Staff argues that respondent does not "fully acknowledge their failure to self-report their receipt, transport and disposal of the drums prior to the drums being observed and reported by others at the Landfill" (id. at 11). The evidence established, however, that the Department was aware of the release of the drums and containers before respondent's general manager learned of the release (see Tr. 8-10 [Hourigan testimony that he was at the landfill at the time of the release, went to the tipping site with DesGaines, personally observed waste pile, contacted the regional materials manager engineer and alerted an ECO to travel to the site]; see also id. at 10-15 [Hourigan testimony that DesGaines contacted respondent or Omni, or both]).

Respondent's refusal to sign a consent order containing a penalty it believed was too high is not a failure to cooperate and should not be considered an aggravating factor in determining

[17] I do not adopt the ALJ's discussion of and calculations using the chart in the Appendix to OGC #8 (see Hearing Report at 21). At the time of this proceeding, the Appendix to OGC #8 contained a number of misprints and needed further clarification (see Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 4 n. 10). For this matter, I have relied for penalty analysis on the applicable statutory language of ECL 71-2703, as well as the provisions of DEE-1 and OGC #8 (but not to the chart in the Appendix to OGC #8). I note that OGC #8 was subsequently revised effective December 9, 2015.

the appropriate civil penalty. Exercising one's right to a hearing is simply availing oneself of that which due process affords. It bears mention, however, that requiring the Department to incur the expense of time and resources of an adjudicatory hearing often results in penalty amounts that "must, on average and consistent with consideration of fairness, be significantly higher than the penalty amounts that DEC accepts in orders which are entered into voluntarily …. [T]his variation in penalty amounts does not penalize respondents for choosing to go to a hearing; it is a benefit and incentive offered to those who settle" (ALJ Hearing Report in Matter of Jerome Transmissions Corp., at 26-27, adopted by Order of the Commissioner, May 28, 2013; see also DEE-1 at § II).[18]

In considering the appropriate civil penalty, I note that respondent's lack of intent, and subsequent cooperation do not excuse the violations. Violations of this kind are serious. There is, however, no evidence that respondent knew that the loads contained regulated waste, or that respondent intended to transport and dispose of such waste. Nor is there evidence of actual damage resulting from these violations. Moreover, once apprised of the illegal disposal of the drums and containers, respondent was responsive and cooperative, and expended resources and an uncertain amount of money relocating and securing the drums and containers, testing their contents, and ultimately disposing of them as hazardous waste. Finally, respondent has no history of non-compliance.

As noted, the ALJ and staff concluded that the total maximum statutory civil penalty for the violations proved in this matter is $67,500. Staff recommended a reduction of $10,000 in light of respondent's cooperation for a penalty of $57,500. The ALJ has recommended a civil penalty in the amount of twenty-five thousand dollars ($25,000), based on his review including a consideration of respondent's additional costs (see Hearing Report at 21-22). As set forth in the discussion on civil penalty in this decision and order, I do not fully agree with the ALJ's assessment and calculation. However, I do agree that the activities of respondent to address and correct the violations merits a substantial reduction of the civil penalty from the calculated $67,500. Accordingly, I am reducing the penalty from $67,500 to $33,750. Based upon my review of the record and in the circumstances presented here, a civil penalty of $33,750 is authorized and appropriate. Accordingly, I am assessing a civil penalty upon respondent of thirty-three thousand seven hundred and fifty dollars ($33,750).

D. Other Requested Relief

Staff requests that my decision and order in this matter "enjoin[] [r]espondent from any further actions causing such violations or additional violations to continue" (Rail Aff. at 9, ¶ II of the Wherefore Clause). It is unnecessary to issue such an order, because respondent is already bound to comply with law, and any further or additional violations will subject respondent to additional civil or criminal enforcement proceedings.

[18] I do not adopt the ALJ's statement that respondent's request for a hearing "was a request to be treated fairly" (Hearing Report at 19). The ALJ cites nothing in the record supporting this characterization of respondent's possible motivations for going to hearing. Respondent stated clearly that its motivation for refusing to sign the consent order, and for going to hearing, was because the penalty amount in the proposed consent order was "exorbitant" (Resp. Cl. Br. at 11), and "unreasonable" (White Sur-Reply at 10-11, ¶ 19).

Similarly, I decline to grant staff's request in its initial motion that, if respondent fails to comply with the terms and conditions of this decision and order, I include language in the decision and order to permanently enjoin respondent from seeking Department authority to engage in, or from engaging in, any regulated solid waste activity within the State (Rail Aff., at 9, ¶ IV of the Wherefore Clause). Staff did not address this issue in its closing brief, and the ALJ did not address this request in the February 2013 Ruling or his hearing report.

The Department's Record of Compliance Enforcement Policy (DEE-16, rev. March 5, 1993) provides guidance to Department staff "to ensure that persons who are unsuitable to carry out responsibilities under Department permits, certificates, licenses or grants, are not authorized to do so" (DEE-16, at § I). Should respondent fail to comply with the terms and conditions of this decision and order, the Department may seek further relief including referral to the Office of the Attorney General for judicial enforcement. Moreover, should respondent apply in the future for a permit from the Department, staff may at that time determine whether, based on respondent's record of compliance and other considerations, the application should be denied (see e.g. DEE-16, at § IV).

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

I. Respondent Trinity Transportation Corporation is adjudged to have violated:

A. 6 NYCRR 360-1.5(a)(2) on two occasions when two of its trucks disposed of regulated waste at a disposal facility that was not authorized to accept such waste;

B. 6 NYCRR 364.2(a)(1) on two occasions when two of its trucks collected and removed regulated waste from the Omni Recycling of Babylon, Inc. facility in Babylon, New York, without a valid permit issued pursuant to 6 NYCRR Part 364;

C. 6 NYCRR 364.2(a)(2) on two occasions when two of its trucks transported regulated waste without a valid permit issued pursuant to 6 NYCRR Part 364; and

D. 6 NYCRR 364.2(a)(3) on two occasions when two of its trucks delivered regulated waste to a treatment, storage or disposal facility, and otherwise disposed of and relinquished possession of regulated waste without a valid permit issued pursuant to 6 NYCRR Part 364.

II. Respondent Trinity Transportation Corporation is hereby assessed a civil penalty in the amount of thirty-three thousand seven hundred and fifty dollars ($33,750), which shall be due and payable within thirty (30) days of the service of this order upon respondent.

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." The payment shall be mailed or otherwise delivered to the Department at the following address:

Craig Elgut, Esq.[19]
Regional Attorney
Region 1, NYSDEC
SUNY @ Stony Brook
50 Circle Road
Stony Brook, New York 11790

III. All communications from respondent to the Department concerning this order shall be directed to Craig Elgut, Esq., at the address referenced in paragraph II of this order.

IV. The provisions, terms and conditions of this order shall bind respondent Trinity Transportation Corporation, 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: July 13, 2022
Albany, New York

[19] Vernon G. Rail, Esq., the attorney for Department staff who was responsible for handling this matter, has retired. Accordingly, communications and submissions pursuant to this decision and order are to be directed to the Regional Attorney for Region 1.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violation of Article 27 of the Environmental Conservation Law of the State of New York and Parts 360 and 364 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

-by-

TRINITY TRANSPORTATION CORPORATION,

Respondent.

DEC File No. R1-20111206-200

HEARING REPORT

/s/
P. Nicholas Garlick
Administrative Law Judge

SUMMARY

A February 12, 2013 ruling in this matter recommended that the Commissioner issue an order finding Trinity Transportation Corporation (respondent) liable for eight causes of action alleged in a contested motion for order without hearing brought by the staff of the New York State Department of Environmental Conservation (DEC Staff). The ruling also determined that material questions of fact existed regarding DEC Staff's requested payable civil penalty of $57,500. An administrative hearing was held on June 12 and 13, 2013 to develop the record regarding the appropriate amount of civil penalty to be assessed. Upon consideration of the entirety of the record, this report recommends that the Commissioner impose a payable civil penalty of $25,000 in his order for the violations proven.

PROCEEDINGS

The proceedings section of the February 12, 2013 ruling addressed the events in this case from the initiation of this enforcement matter by DEC Staff by papers dated August 14, 2012 through the issuance of the ruling on liability dated February 12, 2013.

Following the issuance of the ruling, a conference call was held with the parties on February 22, 2013. On this call it was agreed that the penalty hearing would go forward on April 9, 2013. A notice of hearing was issued on March 11, 2013.

The parties requested an adjournment in order to allow time for mediation to occur. This request was granted on March 21, 2013 and the hearing rescheduled for June 12, 2013. A mediation session was convened on April 3, 2013 at a DEC Region 1 calendar call with Administrative Law Judge (ALJ) Richard Wissler. The parties were unable to settle the matter.

Conference calls were held with the parties on May 1, 2013 and June 10, 2013 to discuss arrangements for the hearing.

The hearing was convened at DEC's Region 1 headquarters on June 12, 2013 and continued the following day.

Transcripts were received on July 1, 2013 and a final conference call occurred on July 9, 2013 to discuss closing the record.

Closing briefs were received on July 29, 2013. Missing pages of Exhibit 17 were received on August 12, 2013 and the record closed on that day.

FINDINGS OF FACT

The February 12, 2013 ruling contained a section entitled "findings of fact" which is superceded in its entirety by those set forth below.

1. Respondent Trinity Transportation Corporation is an active Domestic Business Corporation (New York State Department of State ID# 1765391). The respondent does not possess a valid permit to receive and transport regulated waste pursuant to 6 NYCRR part 364 (t. 61, Exh. 18). The respondent is involved in the transportation of solid waste as well as the operator of a transfer station for the Town of Brookhaven (t. 377-8). The stockholders of the respondent are: Patricia DiMatteo, Gina Core and Carolyn Core (t. 235 & 448). The respondent is one of a number of related companies including Omni Recycling of Babylon, Inc. (Omni) (Exh. 32, p. 2).

2. Omni Recycling of Babylon, Inc. (Omni) operates a transfer station in Babylon, New York. The stockholders of Omni are: Anthony E. Core (51%) and Patricia DiMatteo (49%) (Exh. 33, p. 2).

3. The Town of Brookhaven (Suffolk County) operates a landfill in Yaphank, New York. This landfill has been issued a valid DEC permit, DEC # 1-4722-00030/00004, and is not authorized to accept regulated waste (Exh. 1).

4. On September 7, 2010, three trucks operated by the respondent arrived at the Brookhaven Landfill and the first and second trucks tipped their loads on the working face of the landfill (t. 8). Landfill employees immediately noticed that the trucks contained waste that the landfill was not permitted to accept, namely drums and other containers greater than ten gallons in size (t. 475). The third truck was prevented from tipping and sent to the transfer station at the landfill to await further instructions (t. 166). After discussions, the trailer of the third truck was left at the landfill overnight and the next day it was returned to Omni where its contents were examined and no additional drums were found (t. 390). The third truck was permitted to tip its cargo at the landfill the next day (t. 91).

5. The waste tipped from the first and second trucks included construction and demolition ("C & D") debris, and a number of drums larger than ten gallons in size containing unknown substances (t. 9).[1] DEC Staff member Peter Hourigan, an on-site environmental monitor at the landfill, was in a meeting at the time with Michael DesGaines, Environmental Facilities Manager for the Town of Brookhaven, in Mr. DesGaines' office. Mr. DesGaines received a phone call reporting an unusual cloud of dust occurred when a bulldozer had moved waste tipped from the first truck (t. 491). Mr. DesGaines and Mr. Hourigan then drove from the office to the tipping site (t. 9). Mr. Hourigan observed the trucks that had dumped their loads and took photos of the waste piles which included drums (Exh. 13, photos 2, 3, 4, 6 & 7). He also completed an inspection report regarding the incident (Exh. 3).

6. The exact number of drums tipped is not entirely clear from the record.[2] Some of the drums were crushed, some were missing lids and others were intact (t. 19-24). Some of the drums were empty (t. 110).

7. Shortly after arriving on the working face of the landfill, Mr. DesGaines began implementation of the landfill's emergency plan. Among those responding to this emergency were: representatives of the Town's fire department and Haz Mat team (t. 10); John Whitton (general manager of the respondent corporation) (t. 386); and Environmental Conservation Officer (ECO) Lagree (t. 300-302, Exh. 35). The area where the material

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[1] In an email dated March 10, 2011, Lou Bascelli (an employee of Eastern Environmental Solutions, Inc.) stated that the exact nature of the contents of many of the drums appeared to be waste mixtures from an unknown process as well as virgin material (Exh. 16, p. 10).

[2] DEC Staff member Hourigan's inspection report written on the date of the incident states that there were a minimum of thirty barrels (Exh. 23, p. 3). Photos of the loads dumped by the two trucks also show numerous containers (Exh. 13). Perhaps the best information comes from the handwritten notes of John Whitton, general manager of the respondent corporation, dated September 16, 2010. In his notes, Mr. Whitton states there were 43 steel drums (17 containing liquid), 13 cardboard drums (6 containing powder) and 3 empty plastic drums (Exh. 38, p. 1). Mr. Whitton testified that two or three of the drums were approximately half full and the rest had residual waste, a couple of inches of material in the bottom (t. 392).

was tipped was quarantined and no additional dumping occurred while the investigation was underway (t. 476). Town employees then undertook the initial work of moving the material into a pile away from other wastes to ensure nobody would have access to it (t. 477).

8. Discussions regarding the appropriate response to the situation began immediately and involved Mr. Hourigan, Mr. DesGaines and Mr. Whitton (Exh. 38). None of them had ever encountered a situation like this before (t. 397, 489).

9. While Mr. Whitton was involved in these discussions, Brian Nohs, the manager of Omni, conducted his own investigation (t. 401). This investigation disclosed that the respondent's trucks containing the drums had been loaded at the Omni transfer facility (Exh. 36). Security video from Omni showed that these drums had been brought to the transfer facility in a roll-off container owned and operated by Scott D. Haulers/The Demolition Specialist (t. 401, 461). Omni's investigation revealed that the drums had originated at Action Distributors (a/k/a The Closeout Guide), 55 Engineer's Lane, Farmingdale, New York (Exh. 36). Mr. Nohs went to this location and took photos of other drums at this location (Exhs. 27 & 28). According to a September 9, 2010 email from Mr. Hourigan, Action Distributors had been in the cosmetics business. It had recently gone out of business and had placed the drums in the roll off container (Exh. 8). DEC Staff did not conduct any investigation regarding the source of the drums (t. 127).

10. A meeting was held at the landfill on September 16, 2010 which was attended by Mr. Whitton, Mr. Nohs, Mr. Hourigan and Mr. DesGaines. Representatives of Scott D. Haulers and Action Distributors were invited but did not attend. The purpose of this meeting was to attempt to identify the contents of the drums and decide on the appropriate disposition of the materials. At the meeting, DEC Staff authorized the removal of the drums from the waste pile.

11. Also on September 16, 2010, at the request of the Town of Brookhaven, the respondent dispatched a crew to cover the segregated waste containing the drums due to the threat of rain and the possible spread of contaminants (Exh. 38, p. 2).

12. On September 17, 2010, the respondent sent a crew, under the direction of Mr. Whitton, to the landfill and pulled the drums that were not empty out of the pile of C & D waste and placed these drums on waterproof tarps and covered them with

additional tarps (t. 493). Some of the empty drums were also pulled out and used to anchor the tarps (t. 395). The remaining C & D waste was arranged for DEC Staff to inspect (t. 396, Exh. 38, p. 2).[3] Mr. Whitton testified that he had not had any OSHA hazardous waste training and that the people handling the drums wore gloves, but no other personal protective equipment (t. 443-4).

13. Also on September 17, 2010, DEC Staff member Hourigan sent an email setting forth a proposed course of action to be taken with respect to the drums. First, the drums would be removed from the waste. Second, the labels should be read (if possible) and cross referenced with Material Safety Data Sheets (MSDS) (Exh. 25). Third, if there was more than one drum of a substance, one of the drums should be sampled for the D series RCRA wastes, pH and flashpoint. Finally, if only one drum of a product existed or if a label could not be read, it would be tested (Exh. 24).

14. On September 20, 2010, DEC Staff member Hourigan took photographs of the drums that had been placed on the tarps at the landfill (Exh. 13, photos 1 & 5).

15. At some point during this time, the respondent signed a contract with Eastern Environmental Solutions, Inc. (Eastern) to sample, test and arrange for final disposition of the drums (t. 432, 446). Before hiring Eastern, Mr. Whitton okayed it with Mr. Hourigan (DEC Staff) (t. 463).

16. On September 21, 2010, another meeting was held at the landfill with Mr. Whitton, Mr. Nohs, Mr. Hourigan, Mr. DesGaines, a representative of Scott D. Haulers and a representative of Action Distributors/The Close Out Guide, with counsel (Exh. 38, p. 2). The representative of Action Distributors/The Close Out Guide did not provide any MSDS sheets for the materials in the drums. Mr. Hourigan and Mr. Whitton agreed that the contents of all of the drums needed to be sampled and tested (Exh. 38, p. 2).

17. After the meeting, those assembled went to inspect the drums on the working face of the landfill. While on the working face, the representative of Scott D. Haulers stated that he

[3] Some of the empty drums were not moved to the area where those that contained material were moved (t. 34, 110, 111). There is nothing in the record indicating the final disposition of these empty drums.

wanted nothing to do with the situation and that he was going to remove his container which was located at 55 Engineer's Lane and remove any additional drums (shown in Exh. 28) that had been placed in it (t. 419; Exh. 36, p. 2). Mr. Nohs returned to the site the following day and took additional photos of these other drums after the container had been removed (t. 419, Exh. 30).[4]

18. Following the September 21, 2010 meeting, Mr. Whitton, Mr. Nohs and Mr. Hourigan marked the drums under the tarps at the landfill with spray paint with the assistance of several laborers (Exh. 38, p. 3).

19. Also, on September 21, 2010, counsel for The Close Out Guide wrote to Omni refusing to pay for the cost of testing the materials tipped at the landfill (Exh. 29).

20. On September 22, 2010, another meeting occurred at the landfill with Mr. Whitton, Mr. Nohs, Mr. Hourigan, Mr. DesGaines, and representatives of Eastern. After the meeting, they proceeded to the landfill face and 27 samples were taken from the drums (Exh. 38, p. 3).

21. The samples taken from the drums were submitted to EcoTest Laboratories Inc in North Babylon, New York on September 22, 2010 and the results are dated September 30, 2010 (Exh. 17).

22. On October 6, 2010, another meeting occurred at the landfill which was attended by Mr. Whitton, Mr. Nohs, Mr. Hourigan, Mr. DesGaines and Scott Hamarich (Eastern). At this meeting, the results of the testing of the contents of the drums were discussed (t. 49). The test results were not definitive as to whether the material in most of the drums was hazardous or not (t. 50). One drum (#10) tested as being hazardous, based on EPA standards, because of the presence of methyl ethyl ketone at a concentration of 650,000 micrograms per kilogram (t. 54). The other samples contained substances that interfered with the testing that prevented accuracy of the testing (t. 56, 329). It was agreed that additional testing would be attempted to determine if hazardous waste was present (t. 50).

23. As discussions regarding the fate of the drums continued, the landfill grew around the quarantined area until the surface of the landfill was 16 to 20 feet higher than where the drums were located (t. 483). About three or four weeks after the

[4] There is no information in the record regarding the disposition of the drums in these photos.

drums were placed under the tarps, the drums were moved into a lined roll-off container (t. 21) and temporarily stored at another location at the landfill over the landfill's double liner (t. 500). The movement of the drums was done by the respondent (t. 411). After the drums and tarps were removed to the container, Eastern collected soil samples from the area and shared the results with the Town (t. 498).[5]

24. On January 3, 2011, a series of emails were exchanged between Mr. Hourigan and Mr. Whitton discussing the fact that because of the nature of the materials in the drums, there were no laboratories that could test the samples to the required level of 200 parts per billion (Exh. 16, pp. 1-4). Because the testing of the contents of the drums was inconclusive, Mr. Hourigan advised the respondent to dispose of the drums as hazardous material (Exh. 38, p.2).

25. In the second week of February 2011, Mr. Whitton faxed a document about shipping the drums to Mr. Hourigan for comment (Exh. 16, p. 7). DEC Staff's comments were then forwarded to Eastern later that month (Exh. 16, p. 9). On March 7, 2011, Mr. Bascelli (Eastern) responded (Exh. 16, p. 10) and this response was then forwarded to Mr. Hourigan on March 10, 2011 (Exh. 16, p. 12).

26. By email dated March 15, 2011, Eastern notified DEC Staff, the Town and the respondent that an EPA number for the generator would be required to complete the manifest and move the drums from the landfill (Exh. 16, p. 16).

27. On March 31, 2011, DEC Staff provided an EPA number for the Town's Landfill (so that the landfill would be considered the generator) which was needed for the manifest to be prepared. The number provided by DEC Staff was a RCRA number for the Brookhaven Landfill. (Exh. 16, p. 26). The number provided by DEC Staff (NYD980762736) was not used on the manifest as the generator number which appears is NYD038150264 (Exh. 14, box 1).[6]

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[5] In its closing brief, DEC Staff states that this information was not known to DEC Staff before the hearing and notes that these test results are not in the record. No testing was done at the site where the drums were tipped initially nor was any testing requested (t. 396).

[6] DEC Staff member Raza testified that there were several problems with the manifest including: (1) the contents of Drum #10 were incorrectly listed on the manifest in box 27a (t. 323) as were the contents of Drum #1 (t 327); the certification in

28. On April 5, 2011, the question then arose as to who should sign the manifest on behalf of the generator (Exh. 16, pp. 32, 33 & 34). The manifest was ultimately signed by Randy Little (Exh. 14, box 15).

29. The drums remained in the lined roll off container until, April 29, 2011, when Eastern removed the 24 drums which had been marked and tested from the landfill (Exh. 16, p. 48). The drums were then transported to Chemical Pollution Control, LLC for disposal on May 3, 2011 (Exh. 14). The landfill was not supposed to store hazardous waste for more than ninety days (t. 375).

30. The cost of moving, sampling, testing, transporting and disposing of the drums was over $75,000 and done at the respondent's expense (Whitton affidavit, September 7, 2012, ¶ 20). These costs involved both payments to vendors and internal costs for labor, materials and the use of machinery (t. 435). This total included approximately $28,000 for the removal of the materials from the landfill (t. 44).

DISCUSSION

As discussed in the February 12, 2013 ruling in this matter, DEC Staff established in its motion papers that the respondent was liable for eight violations when, on September 7, 2010, two trucks operated by the respondent tipped two loads of solid waste at the Brookhaven Landfill. Specifically, DEC Staff established that the respondent committed two violations 6 NYCRR 360-1.5(a) when the first and second trucks tipped loads of solid waste, that included regulated waste in the form of containers in excess of ten gallons in size, at the Brookhaven Landfill, which was not authorized to accept such waste. DEC Staff established that the respondent committed two violations each of 6 NYCRR 364.2(a)(1), (2) and (3) when the first and second trucks collected and removed, transported, and delivered loads of solid waste, that included regulated waste in the form of containers in excess of ten gallons in size, to the Brookhaven Landfill without possessing the necessary permit.

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box 15 was inaccurate (t 326); the generator number in box 1 does not currently belong to the Town of Brookhaven Landfill (t. 344); and the purported weight of each drum was unknown (t. 357). Mr. Raza stated that he would discuss these problems with his supervisor after the hearing was over (t. 353, 374).

The ruling also found that there were material questions of fact regarding the civil penalty amount requested by DEC Staff which required the convening of an administrative hearing pursuant to 6 NYCRR 622.12(f). Among the questions of fact identified in the ruling were: (1) whether the drums were leaking or leaked when tipped at the landfill and whether leaks or spills to the environment occurred as a result of the violations; (2) the number of drums involved and quantity of their contents; (3) the culpability of the respondent and the degree of control the respondent and its truck drivers had over the events that occurred; (4) the relationship between the respondent and Omni; and (5) the source of a billowing dust cloud that occurred after the first truck tipped. The ruling also noted that because the drums in question had been properly disposed of by the respondent's contractors and at the respondent's expense, no issue relating to remedy existed.

A hearing was convened on June 12 and 13, 2013 where the parties presented evidence regarding the appropriate amount of civil penalty. Following receipt of the transcripts, each party provided a closing brief that was timely submitted and postmarked by July 26, 2013. In addition to information in the record and the parties' briefs, two DEC guidance memoranda are relevant: the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) and DEC's Solid Waste Enforcement Policy (OGC 8, issued November 17, 2010).

Preliminary Matters

In its papers, DEC Staff raises several appeals of rulings made at the hearing for the Commissioner's review regarding the admissibility of certain exhibits which were either included or excluded in the hearing record. Specifically, DEC Staff argues that Exhibits 27, 28 and 30 were improperly admitted into evidence and Exhibit 34 was improperly excluded from evidence. Exhibits 27 and 28 each contain two black and white photographs of 55 Engineers Lane, Farmingdale, New York.[7] Exhibit 30 is a

[7] The photographs in Exhibit 27 are of the exterior of 55 Engineers Lane, the address where the drums originated. The photographs in Exhibit 28 are of the interior of this address. These photographs were taken by Mr. Nohs.

series of ten color photographs of the exterior of this address.[8] DEC Staff's argues that because the person who took these photos, Mr. Nohs, did not testify and because the photographs are being used by the respondent to dispute its liability for the violations alleged, they should be excluded from the record by the Commissioner. In addition to seeking to exclude these three exhibits from evidence, DEC Staff argues that Exhibit 34 was improperly excluded from evidence at the hearing. Exhibit 34 is a letter dated July 27, 2000 from DEC Staff to Omni modifying its solid waste management permit. DEC Staff argues that the ruling excluding it was improper because a portion of Omni and a portion of Trinity are both owned by the same person, Patricia DiMatteo. DEC Staff argues that the information in Exhibit 34 is relevant to the determination of the civil penalty amount in this case, specifically the respondent's control over the events constituting the violation. Since these appeals are properly addressed to the Commissioner, no analysis of DEC Staff's argument is necessary in this report.

In its papers, the respondent argues that evidence produced at the hearing supports its contention that liability for the violations was not proven in DEC Staff's motion for order without hearing and that the Commissioner should review the determinations of liability in the February 22, 2013 ruling. Specifically, the respondent argues that DEC Staff failed to show that both trucks involved were under the respondent's control.[9] Since this matter is before the Commissioner, no analysis of the respondent's argument is necessary in this report.

Civil Penalty Amount

DEC Staff seeks a payable civil penalty of $57,500 and states that it derived this amount after consideration of DEE-1, DEC's Civil Penalty Policy. Also relevant to the calculation of the civil penalty in this matter is OGC 8; however, DEC Staff does not address this document in its closing brief.

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[8] Exhibit 30 is the same as Exhibit 7, which was attached to the respondent's motion papers and is already in evidence. For this reason, DEC Staff's argument is moot.

[9] The notes of John Whitton state that on September 7, 2010 he went to the landfill to "inspect 2 lds of C&D brought into B.H. by TTC trks #53 + #57. Loads were brought in from Omni Recycling" (Exh. 38, p. 1).

Maximum Civil Penalty

DEE-1 states that the starting point of any penalty calculation should be a computation of the potential statutory maximum for all proven violations (§ IV.2). In this case, DEC Staff calculates that the maximum penalty that could be assessed for the eight violations is $67,500. This amount is the sum of the maximum civil penalties for each of the eight causes of action. For the first and second causes of action, violations of 6 NYCRR 360-1.5(a)(2), DEC Staff asserts that the maximum penalty for each violation is $11,250 (ECL 71-2703[1][b][i]). For the remaining six causes of action which were violations of 6 NYCRR 364.2(a)(1), (2) & (3), DEC Staff argues the maximum penalty is $7,500 for each violation (ECL 71-2703[1][a]).

A dispute exists regarding DEC Staff's calculation of the maximum civil penalty for the first two violations, the disposal of solid waste at an unauthorized facility (6 NYCRR 360-1.5[a][2}). DEC Staff's calculation is based on its contention that the violations caused a release to the environment and, therefore, the maximum civil penalty per violation is $11,250 (ECL 71-2703[1][b][i]). The respondent claims that its actions did not cause a release to the environment and the maximum civil penalty for each of these two violations is $7,500 (ECL 71-2703[1][a]).

DEC Staff argues that the record demonstrates that a release to the environment occurred in two ways. First, that the tipping of the drums at the landfill (even if they didn't leak) in the loads of C & D waste released the drums to the environment. Second, DEC Staff argues that the contents of the drums were released to the environment because some of the drums in both the first and second trucks were leaking. The respondent does not address DEC Staff's first argument but does assert that it did not cause a release to the environment. DEC Staff offers no authority for its first argument, that dumping the C&D loads containing the drums at the landfill caused a release of solid waste to the environment, as those terms are used in ECL 71-2703(1)(b)(i). It is not necessary to address DEC Staff's first argument because the evidence in the record shows that there were releases from some of the drums tipped at the landfill by both the first and second trucks as that term is defined in ECL 71-2703(4).

With respect to DEC Staff's second argument, that the violations caused a release of the contents of the drums to the environment, Mr. DesGaines testified that a cloud of white dust

was observed emanating from the load dumped by the first truck. The cloud was caused when a cardboard drum with a plastic bag in it containing powdery material was tipped and then struck by a loader or bulldozer spreading out the waste (t. 505-6). Mr. Hourigan also testified that this cloud of dust resulted from the dumping from the first truck (t. 8) and that the release of the dust was a momentary occurrence (t. 152). The respondent argues that this release was caused by the actions of landfill employees and not as a result of its actions. The Commissioner should reject the respondent's argument because as Mr. DesGaines stated in his testimony, it is a normal part of the landfill's operations for loads of tipped waste to be spread by machines after each load is dumped (t. 505-6). Had the respondent not delivered and tipped the drums at the landfill, the release to the environment would not have occurred. In addition to the release of a solid material in the form of dust, Mr. Hourigan testified that photo #3 (Exh. 13) was of the waste from the first truck and that some of the drums shown in photo #3 were crushed and punctured such that, in his opinion, they are leaking (t. 21). Therefore, the Commissioner should conclude that the maximum civil penalty for this violation is $11,250 (ECL 71-2703[1][b][i]).

For the load on the second truck, DEC Staff asserts that evidence in the record demonstrates that some of the drums in this load were leaking. DEC Staff relies upon the testimony of Mr. Hourigan and the photos he took on September 7, 2010 of the second truck and the waste from it (Exh. 13, photos #4, #6, & #7). In his testimony regarding photos #4 and #6 (Exh. 13), Mr. Hourigan did not address whether he thought the drums in those pictures were leaking (t. 21 – 22). He did testify that he had added a caption to photo 7 (Exh. 13) which reads "[d]rums tipped at landfill, some intact, some partially or completely crushed, releasing their contents to the landfill" (t. 85). On cross-examination Mr. Hourigan testified that he could not show any place in the photo where the leaks were evident (t. 135) but that in his opinion two of the containers in the photo were releasing their contents to the landfill (t. 136). He also testified that he never looked at drums on September 7, 2010 (t. 137) and could not recall if the drums had any contents (t. 136) or if he saw any contents coming out of the containers (t. 137). Other witnesses who saw the drums at the landfill on September 7, 2010 did not witness any release, other than the cloud of dust from the first truck. Mr. DesGaines testified that "there was nothing really leaking out or everything seemed to be pretty much contained" (t. 493). ECO Lagree viewed the barrels from a distance of about six feet and did not look inside any barrel

(t. 303). Mr. Whitton testified that he did not see any spillage from the containers (t. 393) and his notes from that day do not indicate any leakage (Exh. 38). While the testimony from the various witnesses is not entirely clear, the Commissioner should review the photos and accept the opinion of Mr. Hourigan that some of the drums from the second truck leaked. The photos show many damaged drums which are obviously not sealed.

In addition an email from Eastern (Bascelli) dated March 7, 2011 states that some of the drums pulled from the piles were damaged and not in a condition to be shipped without their contents being transferred (Exh. 16, p. 10). A preponderance of the evidence in the record supports the conclusion that some of the drums from both the first and second trucks released their contents at the landfill. Therefore, for the purposes of the calculation of the maximum civil penalty, the Commissioner should conclude that DEC Staff's calculation is correct and that the maximum penalty for the first two causes of action is $11,250 each as set forth in ECL 71-2703(1)(b)(i). Therefore, the correct maximum civil penalty in this case is $67,500.

Benefit Component

Next, DEE-1 requires a calculation of the benefit component or an estimate of the economic benefit enjoyed by the respondent as a result of the violations (§ IV.3). This estimate includes the benefit of delayed compliance including the present value of avoided capital and operating costs and permanently avoided costs which would have been expended had compliance occurred when required. DEE-1 states that every effort should be made to calculate and recover the economic benefit of non-compliance.

In its closing brief, DEC Staff argues that the respondent enjoyed an economic benefit of $12,300. DEC Staff bases this estimate on the cost of permitting a fleet of twenty trucks pursuant to 6 NYCRR 364 ($2,300) (t.333) and then estimates that the cost of complying with the record keeping and insurance requirements of such regulations at $10,000. The respondent argues that it did not enjoy any economic benefit from the violations and that the result of these violations created an economic burden on the respondent: namely the $75,000 the respondent spent to test, ship and dispose of the drums.

The Commissioner should reject DEC Staff's estimate of the economic benefit that the respondent enjoyed because the respondent is not in the business of hauling regulated waste and

did not intend to haul such in this case. Rather, the Commissioner should conclude that the respondent enjoyed no economic benefit in this case but instead incurred an economic cost of approximately $75,000 for testing, shipping and disposal of the drums.

Gravity Component

DEE-1 next requires an evaluation of the gravity component which reflects the seriousness of the violation assessing: (1) the potential harm and actual damage caused by the violation; and (2) the relative importance of the type of violation to the regulatory scheme (§ IV.D).

In its closing brief, DEC Staff identifies two potential harms caused by the violations. First, DEC Staff argues that the illegal disposal of the drums at the landfill placed landfill employees and those who handled the drums at risk of exposure to hazardous waste. Second, the DEC Staff notes that had either of the trucks been involved in an accident on the way to the landfill, that the public (and perhaps first responders) could have potentially been placed in harm's way. The respondent does not address the potential harm issue. DEC Staff is correct that these violations did risk some potential harm to landfill workers and members of the public and, therefore, the Commissioner should consider the potential harm as moderate.

DEC Staff does not argue that any actual damage occurred as a result of the violations and the evidence in the record shows that while there was a release, it occurred at the landfill which has a number of design features to protect the environment, including a double liner and a leachate collection system (t. 80, 412). There is no evidence of damage to natural resources or human health. The violation was immediately observed and properly responded to and the piles of waste containing the drums were isolated on September 7, 2010. On September 17, the drums were moved under tarps, the contents were tested, and then later into a lined container. Eventually, the drums were moved to a disposal facility. So the Commissioner should conclude that there was no actual damage as a result of these violations.

With respect to the importance to the regulatory scheme, DEC Staff argues that the respondent's failure to obtain a waste transporter permit pursuant to 6 NYCRR 364 was a serious matter. The respondent does not dispute that the disposal of the drums at the landfill was a serious matter, but argues that others,

such as Scott D. Haulers and Action Distributors/The Close Out Guide are the parties ultimately responsible for the violations and that DEC Staff should have pursued enforcement actions against these parties. The record demonstrates that the respondent did not intend to transport the waste in question, nor did it (or any of its employees) know that the drums were loaded on its trucks. Rather, it intended to transport C & D waste from the transfer station to the landfill, a lawful activity. It is very important to the regulatory scheme to ensure that wastes, such as the drums in this case, are disposed of only at appropriate facilities and the Commissioner should consider these violations to be of major importance to the regulatory scheme.

Penalty Adjustments

Finally, DEE-1 requires the evaluation of several factors as penalty adjustments to ensure the flexibility and equity in DEC's penalty system (§ IV.5). These factors are: culpability, the violator's cooperation, the history of non-compliance, ability to pay, and unique factors.

Culpability. DEC Staff acknowledges that the actions at the transfer station were, in part, responsible for the violations and argues that the respondent should pay a large civil penalty based on the actions of Omni. This is because: (1) Patricia DiMatteo is a part owner of both the respondent and Omni; (2) the other owners of the corporations share the same last name (and are presumably family members); (3) Omni is the respondent's largest customer; and (4) the respondent and Omni's coordinated response to this incident. DEC Staff argues that these facts demonstrate the extent of control and culpability that is shared by the two entities. In its motion papers, DEC Staff argues that the respondent had full control over all the events that occurred from the point of the waste being received by the respondent at the transfer station to its dumping at the landfill and the violations were the result of the respondent failing to have adequate controls in effect to prevent such violations.

In its brief, the respondent argues that it did not have full control over the events surrounding the incident, as DEC Staff claims. The respondent argues that the two trucks in question were loaded by employees of the transfer station (Omni) and that the drivers of the trucks were required to stay in the cabs of their vehicles for their own safety (Whitton sur-reply affidavit dated September 28, 2012, ¶ 11; t. 68, 140). The

respondent continues that when the trucks were unloading at the landfill, the drivers who were unloading the trucks did not have a direct view of the loads being tipped (t. 143).

The respondent also argues that the real culpable parties in this case are the generator of the drums (Action Distributors/The Closeout Guide) and the hauler who dumped the drums at the transfer station (Scott D. Haulers/The Demolition Specialist) and that DEC Staff improperly chose to pursue an enforcement action only against the respondent. The respondent concludes that while DEC Staff knew about these other parties and the other drums at the generator's location, it did not pursue any investigation despite the fact that there may have been a potential substantial risk to the public and harm to the environment by the other waste remaining at the generator's location.

The evidence in the record demonstrates that the respondent has only limited culpability in this case. The respondent's actions consisted of having its two drivers arrive at the transfer station, sit in the truck while they were loaded, drive to the landfill and tip the loads. There is nothing in the record to indicate that the respondent knew or should have known of the contents of its trucks. According to Mr. Whitton's "summary of events" (Exh. 36), the videotape[10] of events at Omni show an open top roll off container was dumped at the transfer station by Scott D Haulers/The Demolition Specialist. It contained the drums and then a loader operator pushed the load to the outbound pile at the facility (without notifying his supervisors) even though it "was more than obvious" that there were drums in the load (Exh. 36, p. 1). This evidence indicates that a large portion of the culpability for these violations should be borne by entities other than the respondent.

The Commissioner should reject DEC Staff's arguments that the respondent had control over the events at the transfer

[10] Mr. Hourigan was notified about the existence of this videotape on September 7, 2010 (Exh. 23, p. 5) but he never watched it (t. 170). Mr. Conover (DEC Staff) testified that he had requested a copy of the videotape from: (1) Omni but could not remember when (t. 282); (2) the respondent's counsel's firm, but couldn't remember who he talked to (t. 282); and (3) Mr. Hourigan (t. 280). Mr. Conover never received the video. At the hearing, DEC Staff requested a copy of the videotape be provided and the respondent provided it after the hearing concluded.

station and that a large civil penalty should be imposed on the respondent based on the actions of Omni. The respondent and Omni are separate corporations and distinct legal entities. While it is true that Ms. DiMatteo owns stock in both companies, the imposition of a civil penalty on the respondent for the actions of Omni is not appropriate. DEC Staff exercised its prosecutorial discretion when it decided in this matter not to do its own investigation of the source of the drums and to only seek enforcement against the respondent. The Commissioner should limit his consideration of the appropriate civil penalty amount in this case to the actions of the respondent.

Violator's cooperation. DEC Staff makes several arguments regarding the respondent's cooperation. First, DEC Staff argues in its closing brief that the Commissioner should not consider the respondent cooperative because of the eight month delay in arranging for the testing, shipping and disposal of the drums. Second, DEC Staff argues that the respondent's failure to self-report the presence of the drums on its trucks is evidence of its lack of cooperation. And finally, DEC Staff argues that another incidence of the respondent's lack of cooperation was its failure to enter into a consent order to resolve these violations.

The respondent claims it has been cooperative with DEC Staff and the Town since the events of September 7, 2010 and that it responded immediately to the incident, segregated the drums, secured them, and arranged for and paid for the testing, shipment and disposal of the drums. The respondent (and Omni) even conducted its own investigation regarding the source of the drums (t. 459), notified DEC Staff of the presence of a videotape of events at Omni the day the violations occurred (Exh 23, p. 5), presented DEC Staff with photos of other drums at the generator's address (Exhs. 27, 28 & 30) and provided the names of the other parties involved (Exh. 26). The respondent also states that it was willing to enter into a consent order but that DEC Staff's civil penalty demand was exorbitant and that it should not be penalized for exercising its right to a hearing. The respondent repeats its argument that DEC Staff ignored other responsible parties involved in this matter.

DEC Staff claims the reason it took nearly eight months to remove and dispose of the drums at the landfill was a result of the actions of the respondent. The respondent cites three reasons for the delay: (1) the negligence of Eastern, the contractor hired to test, ship and arrange for disposal of the waste; (2) the time taken trying to find a laboratory to test

the contents of the drums; and (3) problems associated with the preparation of the manifest, including the need for a generator number and questions regarding who was the appropriate person to sign it (t. 433).

A review of the information in the record is useful to determine the extent of the respondent's cooperation. Mr. Whitton testified that he arrived at the landfill on September 7, 2010, thirty-five to forty minutes after receiving a phone call from Mr. DesGaines (t. 386) and spent approximately three hours there (Exh. 38, p. 1). On September 17, 2010, Mr. Whitton supervised the removal of the drums from the waste pile and their placement under tarps (t. 493). During this time the respondent engaged Eastern, after consultation with DEC Staff, to sample, test and arrange for final disposition of the drums (t. 432, 446). The respondent attended meetings at the landfill on September 16, 21, 22, and October 6, 2010. The respondent then arranged to move the drums into a lined roll-off container (t. 21). In the following two months, efforts were made to find a laboratory that could test the contents of the drums so as to be able to conclude that the contents were not hazardous; however, because of the nature of the content, such testing was not possible (Exh. 16, pp. 1 & 3). In an email dated January 3, 2011, Mr. Hourigan stated his continued confidence in the respondent's efforts (Exh. 16, p. 2) and Mr. Hourigan testified he thought the respondent was cooperating the best it could (t. 203). Based on the above, the Commissioner should conclude that the respondent was fully cooperative with DEC Staff from the time of the incident through the beginning of January 2011.

Mr. Hourigan testified that, during the next four months while he and the Town were pressing for the materials to be removed from the landfill, there were periods where two or three weeks would pass without any information from the respondent (t. 199). On January 3, 2011, Eastern was to submit a proposal to remove and dispose of the drums (Exh. 16, p. 1). It was apparently not submitted and reviewed by DEC Staff until February 14, 2011 who provided comments (Exh. 16, p. 7). DEC Staff's comments were provided to Eastern who responded on March 10, 2011 (Exh. 16, p. 10). Four days later Eastern stated that it was working on the manifest and the classification of the drums (Exh. 16, pp. 14 & 15). On March 15, 2011, Eastern identified the need for the generator number for the manifest in order to move the drums (Exh. 16, p. 16). On March 29, 2011, Eastern again stated that it could not move the drums without a generator number and that the Town of Brookhaven had declined to provide one (Exh. 16, p. 20). On March 31, 2011, DEC Staff

provided a number for the manifest which was for the landfill (Exh. 16, p. 26), which Eastern accepted and agreed to use (Exh. 16, p. 29). On April 5, 2011, Eastern provided the waste profiles for DEC Staff review (Exh. 16, p. 32). DEC Staff provided comments on April 7, 2011 (Exh. 16, p. 38). The drums were finally removed on April 29, 2011 (Exh. 16, p. 48).

From this information, it seems to have taken Eastern two months to develop a proposal for disposing of the drums, from early January until March 2011. Then it took two weeks to get a generator number for the manifest. The delays during the month of April are unexplained in this record, but there is nothing to indicate that DEC Staff had requested the respondent to take specific actions that it did not take. It should be noted that during this time, all involved expressed frustration with the efforts of Eastern (Exh. 16, pp. 1, 2, 7, 13, 16). Mr. DesGaines testified that the respondent was always responsive to the Town's demands during this time (t. 488) and that the respondent's status with the Town did not change after this incident (t. 509).

Based on the above, the Commissioner should not conclude that the respondent was not cooperating with DEC Staff. DEC Staff does not identify any specific action that the respondent should have taken but did not, nor does DEC Staff state that the respondent ignored any specific request. DEC Staff only argues that it took too long to remove and dispose of the waste. DEC Staff did not request the respondent to replace Eastern as the contractor (t. 464).

Similarly, the Commissioner should reject DEC Staff's argument that the respondent's failure to self-report the presence of the drums on its trucks is evidence of its lack of cooperation. As discussed above, the record shows that the drums were loaded on the respondent's trucks without its knowledge and drums were discovered immediately when the trucks tipped at the landfill. The respondent did not know, nor should have known that the drums were on its trucks.

Finally, the Commissioner should reject DEC Staff's argument that its failure to enter into a consent order to resolve these violations demonstrates a lack of cooperation on the part of the respondent. The respondent's belief that a lower penalty was warranted in the circumstances of this case and its request for a hearing is not evidence of non-cooperation, rather it was a request to be treated fairly.

Respondent's history of non-compliance. At the hearing, the parties stipulated that the respondent's history of non-compliance was not an issue (t. 291) and that the respondent had no prior violations.

Ability to pay and Unique Factors. The respondent did not raise any issues at the hearing or in its brief regarding the ability to pay. Neither party has raised any issues which could be considered a unique factor.

DEC's Solid Waste Enforcement Policy (OGC 8)

In addition to DEE-1, a second Department policy document is relevant to the consideration of the appropriate amount of civil penalty in this matter, OGC 8: Solid Waste Enforcement Policy (issued on November 17, 2010). The objectives of this policy are to: (1) ensure compliance with solid waste laws, regulations and permits; (2) deter violations by regulated entities through credible and fair enforcement presence; and (3) impose sanctions consistently throughout the state. OGC 8 sets forth five steps required to apply this policy: (1) determining the severity of the violations; (2) determining the economic benefit; (3) determining the gravity of the violations; (4) adjusting the penalty to account for mitigating or aggravating factors; and (5) assuring a return to compliance and prevention of repeat violations. OGC 8 categorizes the severity of violations as Class I, Class II and Class III violations. It also provides a penalty range guide in Appendix 1.

As stated above, DEC Staff does not address this policy in its brief. Mr. Hourigan testified that this was a major event (t. 9) but that this was a subjective term based on the fact that he had never seen anything like this before (t. 151). DEC Staff member Conover testified that these violations were very serious (t. 251 – 2). The respondent does mention OGC-8 in its brief and argues, based on definitions contained in the policy, that the violations at issue are not Class I ("major") but rather Class II violations ("moderate"). The record supports this claim since, as discussed above, there was no actual damage to the environment or human health and the potential for harm was moderate. With respect to the extent of deviation from the regulatory requirements and the importance to the regulatory scheme, the violations in this case are quite serious, keeping hazardous and potentially hazardous waste out of C & D landfills is very important. Accordingly, DEC Staff's contention that this was a serious event should be given weight and violations considered a major deviation from regulatory requirements.

Using this analysis, the Appendix in OGC 8 yields a penalty range of 55% to 70% of the statutory maximum ($67,500) or a range of $37,125 to $47,250.

As discussed above, the respondent enjoyed no economic benefit from the violations but rather incurred costs of approximately $75,000 for the testing, shipping and disposal of the drums. The parties have stipulated that the respondent has no history of non-compliance nor have any violations since September 7, 2010 been shown. The record shows the respondent has returned to compliance and there have been no repeat violations.

Aggravating and mitigating factors have been discussed above. The record shows that it took approximately eight months from the date of the violation (September 7, 2010) until the drums were ultimately removed for disposal (April 28, 2011) and that toward the end of this time both DEC Staff and the Town were growing increasingly impatient at the delay. However, DEC Staff has not shown that the respondent is responsible for the entire delay or that there were actions it should have taken but didn't. Accordingly, the Commissioner should give this aggravating factor only a slight weight. With respect to mitigating factors, the facts in this case show that the respondent, like the landfill itself, did not know that the impermissible wastes had been loaded on its trucks and its employees had no way of knowing the same. The respondent should not be held responsible for action of Omni and its employees. There is nothing in the record to indicate that the either the respondent or the landfill intended to dispose of these wastes at the landfill. DEC Staff recognized this with respect to the landfill when it exercised its enforcement discretion and did not seek to penalize the landfill (t. 162). Similarly, the Commissioner should take the actual knowledge of the respondent and its intentions when considering the civil penalty amount. Likewise, the respondent was cooperative with DEC Staff and the landfill throughout the process, and was as frustrated with the disposal contractor as the other parties. Accordingly, the Commissioner should take these mitigating factors into consideration.

Based on the totality of the record, the Commissioner should impose a payable civil penalty of $25,000 in this case. He should start with a penalty at the lower end of the range of $37,125 to $47,250 suggested by OGC 8 and then lower it further based on the mitigating factors discussed above. This penalty, when combined with the additional costs of approximately

$75,000, will serve as a deterrent to other potential violators and is fair under the circumstances of the case.

RECOMMENDATION

Based on the record, the Commissioner should issue an order finding the respondent, Trinity Transportation Corporation, liable for the eight causes of action alleged by DEC Staff and discussed in the February 12, 2013 ruling. In addition he should impose a payable civil penalty of $25,000 on the respondent for the reasons set forth herein. As discussed, no remedial steps are necessary because the drums of waste were sent to an appropriate disposal facility.

EXHIBIT LIST[11]

Matter of Trinity Transportation Corporation
DEC #R1-20111206-200
(Final 8/12/13)

Number	Description	Id.	Evidence
1	solid waste management facility permit issued to the Town of Brookhaven on July 29, 2010 (formerly Exh. 1 to the affidavit of DEC Staff member Peter Hourigan)	Y	Y
2	a series of seven color photographs (formerly Exh. 2 to the affidavit of DEC Staff member Peter Hourigan)	Y	Y
3	a copy of a September 7, 2010 landfill inspection report (formerly Exh. 3 to the affidavit of DEC Staff member Peter Hourigan)	Y	Y
4	a copy of a manifest dated May 3, 2011 (formerly Exh. 4 to the affidavit of DEC Staff member Peter Hourigan)	Y	Y
5	a copy of an email dated May 25, 2011 (formerly Exh. 5 to the affidavit of DEC Staff member Peter Hourigan)	Y	Y
6	a copy of a waste transporter permit issued to the respondent effective February 25, 1999 (formerly Exh. 6 to the affidavit of DEC Staff member Peter Hourigan)	Y	Y
7	a series of ten color photographs (formerly Exh. A to the affidavit by John Whitton)	Y	Y
8	a copy of an email dated September 17, 2010 (formerly Exh. B to the affidavit by John Whitton)	Y	Y
9	a copy of an email dated January 3, 2011 (formerly Exh. 1 to the reply affidavit by DEC Staff member Hourigan)	Y	Y
10	a copy of a USEPA TCLP (formerly Exh. 2 to the reply affidavit by DEC Staff member Hourigan)	Y	Y

[11] Exhibits 1-12 were attached to the parties' papers considered in the February 12, 2013 ruling. The remaining Exhibits were introduced at the hearing on June 12 & 13, 2013.

11	a copy of laboratory results for drum #10 dated September 30, 2010 (formerly Exh. 3 to the reply affidavit by DEC Staff member Hourigan)	Y	Y
12	a copy of a letter dated April 3, 2012 (formerly Exh. A to the sur-reply affirmation of Michael E. White)	Y	Y
13	a series of seven color photographs (same as Exh. 2)	Y	Y
14	a copy of a manifest dated May 3, 2011 (same as Exh. 3)	Y	Y
15	a copy of an email dated January 3, 2011 (same as Exh. 9)	Y	Y
16	A series of emails between DEC Staff and respondent's representatives from 1/3/11 through 5/11/11	Y	Y
17	Copies of laboratory reports for drums #1 - #26 dated September 30, 2010.[12] The handwritten notes on these documents, other than the signatures at the bottom of the pages, are excluded from evidence (see t. 48).	Y	Y
18	a copy of a waste transporter permit issued to the respondent effective February 25, 1999 (same as Exh. 6)	Y	Y
19	solid waste management facility permit issued to the Town of Brookhaven on July 29, 2010 (same as Exh. 1)	Y	Y
20	Printout from DEC's website about Brookhaven landfill		withdrawn
21	Printout from DEC's website about ash monofill landfills		withdrawn
22	Printout from DEC's website about creosote	Y	Y
23	A copy of a September 7, 2010 landfill inspection report (same as Exh. 3)	Y	Y
24	Email dated 9/17/10	Y	Y
25	Copies of six black and white photographs with attached MSDS sheets	Y	Y
26	Emails dated 11/22/11	Y	Y
27	Two black and white photos	Y	Y

[1] The report for Drum #25 is not included in the exhibit. According to an email from DEC Staff counsel Rail on August 9, 2013, Drum #25 is not included in the hazardous waste manifest Exh. 14).

28	Two black and white photos	Y	Y
29	Letter dated 9/21/10 from attorney for The Closeout Guide	Y	Y
30	A series of ten color photos	Y	Y
31	A copy of an emails dated January 3, 2011 (contains Exh. 9)	Y	Y
32	Email dated 1/25/11 regarding record of compliance form for Trinity Transportation Corporation w/ attachments	Y	Y
33	Letter dated March 9, 2010 addressing additional information requests about the ownership of Omni Recycling of Babylon, Inc. w/ attachments	Y	Y
34	Letter dated July 27, 2000 modifying the permit of Omni Recycling of Babylon, Inc. w/ attached permit and letter dated April 17, 1996	Y	N
35	DEC complaint form dated 9/7/10 Call for Service #10-016840	Y	Y
36	Summary of events prepared by J. Whitton dated June 6, 2011	Y	Y
37	Printout from NYS DOT website Office of Modal Safety and Security	Y	Y
38	Handwritten notes of J. Whitton dated 9/7/10 through 9/22	Y	Y