

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

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

**ORDER**

DEC Case No.  
R4-2007-0627-84

- by -

**JAMES R. BURKE,**

Respondent.

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Staff of the New York State Department of Environmental Conservation ("Department") commenced this enforcement proceeding against respondent James R. Burke by service of a notice of motion for order without hearing and supporting documents on September 26, 2008. Department staff alleged that respondent Burke disposed of approximately seventy (70) waste trailers at an unauthorized location that he owned at 276 State Highway 163 in the Town of Minden, Montgomery County, New York (the "site"), in violation of 6 NYCRR 360-1.5(a)(2). Staff also alleged that respondent was operating a solid waste management facility at the site without a valid Department-issued permit, in violation of 6 NYCRR 360-1.7(a)(1)(i).

Respondent's attorney submitted an affirmation in opposition to Department staff's motion for order without hearing.

Where a motion for order without hearing is contested, it will be granted if, upon all the papers and proof filed, the causes of action are established sufficiently to warrant granting summary judgment under the Civil Practice Law and Rules (see 6 NYCRR 622.12[d]; Matter of Linden Latimer Holdings, LLC, Order of the Commissioner, July 15, 2008, at 3-4).

The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger who prepared the attached hearing report, which I adopt as my decision in this matter subject to my comments below.

The record demonstrates that Department staff carried its burden of making a prima facie showing of entitlement to

summary judgment as a matter of law with respect to each violation alleged. Respondent failed to establish the existence of any material issue of fact that would require a hearing.

The civil penalty of thirty thousand dollars (of which ten thousand dollars would be suspended contingent upon respondent's compliance with this order) that Department staff has requested is authorized and appropriate.

Department staff has also requested that respondent cease disposing of any solid waste at the site and, within ninety (90) days of this order, that he remove and properly dispose of all the waste trailers at the site (see Affidavit of George Elston, sworn to on September 20, 2008, at ¶ 27).

Based on this record, Department staff's request is appropriate. To confirm that the waste trailers have been properly disposed, I direct that respondent also provide Department staff, within ninety (90) days of service of this order upon him, with written documentation that includes the name and address of the location or locations where the waste trailers have been disposed.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted.

II. Respondent James R. Burke is adjudged to have violated 6 NYCRR 360-1.5(a)(2), by disposing of waste trailers at an unauthorized location, and 6 NYCRR 360-1.7(a)(1)(i), by operating a solid waste management facility without a valid Department-issued permit.

III. Respondent James R. Burke is hereby assessed a civil penalty in the amount of thirty thousand dollars (\$30,000), ten thousand dollars (\$10,000) of which shall be suspended on the condition that respondent complies with this order. The non-suspended portion of the civil penalty (that is, twenty thousand dollars [\$20,000]) shall be due and payable within thirty (30) days of 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 "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Karen S. Lavery, Esq.  
Division of Legal Affairs, Region 4  
New York State Department of Environmental Conservation  
1130 North Westcott Road  
Schenectady, New York 12306-2014

Should respondent fail to comply with this order, the suspended portion of the civil penalty (that is, ten thousand dollars [\$10,000]) shall become immediately due and payable, and respondent shall submit that amount in the same form and to the same address as the non-suspended portion of the penalty.

IV. Upon service of this order upon respondent, respondent shall cease to dispose of any solid waste at the site. Within ninety (90) days of the service of this order upon respondent, respondent shall remove and properly dispose of all the waste trailers at the site and provide Department staff with written documentation that includes the name and address of the location or locations where the waste trailers were disposed.

V. All communications from respondent to the Department concerning this order shall be made to Karen S. Lavery, Esq., Division of Legal Affairs, Region 4, New York State Department of Environmental Conservation, 1130 North Westcott Road, Schenectady, New York 12306-2014.

VI. The provisions, terms and conditions of this order shall bind respondent James R. Burke, and his successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

/s/

By:

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Alexander B. Grannis  
Commissioner

Dated: March 16, 2009  
Albany, New York

TO: James R. Burke (VIA CERTIFIED MAIL)  
State Highway 163  
Fort Plain, NY 13339

Richard P. Weinheimer, Esq. (VIA CERTIFIED MAIL)  
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Schenectady, New York 12306-2014

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

In the Matter

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the Alleged Violations of Article 27  
of the New York State Environmental  
Conservation Law and Part 360 of Title 6  
of the New York Compilation of Codes,  
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- by -

**JAMES R. BURKE,**  
Respondent.

DEC Case No. R4-2007-0627-84

HEARING REPORT

/s/

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Helene G. Goldberger  
Administrative Law Judge

## Summary of Ruling

The Department of Environmental Conservation's (DEC or Department) staff's motion for summary order is granted. I recommend that the relief requested by staff be modified as described below.

### Proceedings

\_\_\_\_\_ Department staff is represented by Karen Lavery, Esq. of the Department's Region 4 office located in Schenectady, New York. The respondent is represented by Richard P. Weinheimer, Esq. in Fort Plain, New York.

The Department staff commenced this enforcement proceeding against the respondent, James R. Burke, by service of a notice of motion for order without hearing and supporting documents on or about September 26, 2008. In an affidavit of service dated October 23, 2008, Ms. Kathleen Fabrey states that staff's motion and supporting documents were served by certified mail and attached to the affidavit are the green card showing proof of delivery on September 27, 2008 and also the U.S. Postal Service tracking information from its website showing delivery on September 29, 2008.<sup>1</sup> In its motion papers, staff alleges violations of the solid waste laws and regulations regarding the operation of an illegal landfill in Minden, New York.

Specifically, in the motion for order without hearing, the staff alleges that the respondent: (1) is in violation of § 360-1.5(a)(2) of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) by disposing of waste trailers at an unauthorized location; and 2) is in violation of 6 NYCRR § 360-1.7(a)(1)(i) by operating a solid waste management facility without a Department-issued Part 360 solid waste permit.

On September 29, 2008, the Department's Office of Hearings and Mediation Services (OHMS) received the staff's motion for order without hearing and on October 20, 2008, the OHMS received the respondent's affirmation in response. On October 23, 2008, Ms. Lavery called me, as the administrative law judge (ALJ) assigned to this matter, and asked permission to reply to the respondent's submission. I granted this request and pursuant to

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<sup>1</sup>While these dates are at variance, the green card shows the date that presumably the recipient wrote in and which may have been incorrect. In any case, the respondent does not challenge having received the motion papers and made a timely response.

my directive, staff's reply was mailed on October 31, 2008 and received by this office on November 3, 2008.

In support of staff's motion, Ms. Lavery submitted:

- 1) a notice of motion for order without hearing dated September 26, 2008
- 2) motion for order without hearing dated September 26, 2008
- 3) affirmation of Karen Lavery in support of notice of motion for order without hearing dated September 26, 2008 with 1990 Civil Penalty Policy annexed as Exhibit 1
- 4) affidavit of George Elston in support of motion for order without hearing dated September 26, 2008 with aerial photograph from Yahoo.com annexed as Exhibit 1 and Stipulation of Settlement in Town of Minden v. Burke dated January 18, 2001 annexed as Exhibit 2
- 5) reply affirmation of Karen Lavery in support of motion for order without hearing dated October 31, 2008, and
- 6) reply affidavit of George Elston in response to respondent's attorney's affirmation dated October 31, 2008 with copy of deed to the subject property annexed as Exhibit A.

In support of the respondent's opposition, Mr. Weinheimer submitted:

- 1) attorney's affirmation dated October 17, 2008.

#### **FINDINGS OF FACT**

Because the respondent has not produced an affidavit or any documentary evidence from an individual with personal knowledge of the facts, the only facts before this forum are those presented by Department staff.

1. The respondent owns property at 276 State Highway 163 in Minden, Fort Plain, New York. Affidavit of George Elston, ¶ 4.
2. George Elston, a Principal Engineering Technician with the Department, inspected the respondent's property on two occasions - May 30, 2007 and August 19, 2008. Id.
3. On both of these occasions, he observed approximately 70 discarded waste trailers on this site. Id., at ¶ 11; Exhibit 1 annexed to Elston Aff.
4. In a stipulation of settlement dated January 18, 2001, in Town of Minden v. Burke (Montgomery Co. Town Court), the respondent agreed to remove a portion of the trailers then

located on the property by May 1, 2001, to maintain the remaining portion of the trailers on a specific area of the property for the purpose of dismantling and preparing the materials for disposal or recycling, to remove all other debris from the property, and to maintain only a limited number of saleable mobile homes on a portion of the property. See, Exhibit 2 annexed to Elston affidavit.

5. Based upon Mr. Elston's observations, the respondent has not adhered to this stipulation with the Town of Minden.

6. In 2007 and 2008, DEC staff member Elston inspected the respondent's site at Highway 163 and observed that the respondent had disposed of waste trailers at the site without a Part 360 permit and was operating an unpermitted landfill.

#### Position of Staff

It is the staff's position that the respondent has illegally disposed of waste trailers on the property located at 276 State Highway 163, Minden, Fort Plain, New York in violation of 6 NYCRR §§ 360-1.5(a)(2) and 360-1.7(a)(1)(i). Staff maintains that the respondent has avoided paying \$70,000 in disposal costs for the proper disposal of these trailers in addition to saving approximately \$8,400 in interest on that sum (at an 8% interest rate). The staff argues that this unlawful disposal poses risk to the environment because the trailers and their contents are exposed to the weather and their deterioration could result in polluting constituents entering the environment. The staff further states that the failure to have a permit has meant that the respondent has avoided an environmental review of this landfill - a serious violation of the environmental laws.

Accordingly, the staff requests a penalty of \$30,000 with \$10,000 suspended pending the respondent's cooperation with disposal of the trailers within 90 days of the effective date of a Commissioner's order. The staff calculated that the respondent was liable for \$7500 for one day of illegal disposal based upon the inspection on May 30, 2007 and \$7500 for the operation of an illegal landfill plus an additional \$1500 for each day of operation between May 30, 2007 and August 19, 2008, for a total of \$676,500.

#### Respondent's Position

The respondent's attorney, Richard P. Weinheimer, Esq., has submitted an affirmation in opposition to the staff's motion for order without hearing. In this affirmation, Mr. Weinheimer

challenges the staff's definitions of "person", the specification of the location of the premises, the "factual basis of how materials (if any) were discharged into the environment", how the premises met the criteria of a solid waste management facility, the characterization of the "articles upon the property" as waste trailers, and the application of the Part 360 permit requirements to this matter. Weinheimer Aff., ¶¶ 5 - 13. In addition, Mr. Weinheimer explains that the respondent is already in ongoing negotiations with the Department with respect to two other locations and therefore, ". . . the subject of this matter are [sic] in the process of being addressed." *Id.*, at ¶ 14. The respondent disputes the Department's calculation of the penalties stating that the staff has failed to provide a basis for the economic benefit or gravity component. *Id.* at ¶ 15-18. Mr. Weinheimer concludes his affirmation by asking that the staff's case be dismissed or alternatively that the matter be set down for hearing. *Id.*, ¶ 19.

#### DISCUSSION

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with a factual affidavit in addition to the affirmation of Assistant Regional Attorney Lavery and the documentary evidence that is annexed to these documents. The respondent has failed to provide any affidavits or factual evidence in response. Instead, the respondent's counsel has submitted an attorney's affirmation with no evidence of any personal knowledge of the facts at issue. Thus, there can be no doubt that summary judgment in favor of staff is appropriate as the respondent "failed to establish the existence of any material issue of fact which would require hearing." *Edgar v. Jorling*, 225 AD2d 770, 771 (2d Dep't 1996), lv to appeal den, 89 NY2d 802 (1996); 6 NYCRR § 622.12(c). As noted by Ms. Lavery in her reply affirmation, it is essential that a party opposing summary judgment submit competent evidence rather than conclusions or speculation in order to defeat the motion. *See, Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

To address Mr. Weinheimer's criticisms of the staff's motion, with respect to the definition of "person" in 6 NYCRR § 360-1.2(b)(117), given the breadth of this definition that includes any individual, I fail to find how respondent Burke could not fit within its terms. Weinheimer Aff., ¶ 5. Mr. Weinheimer questions the specificity of the location (Weinheimer Aff., ¶ 6), but DEC technician Elston provides the address of the location in his affidavit. Moreover, to supplement this address and his description of the premises at issue, Mr. Elston provided an aerial map that is available on the Internet. Elston Aff.,

¶ 4; Exhibit 1 annexed to affidavit. And, in his reply affidavit Mr. Elston also supplies a copy of the deed that is filed in the Montgomery County Clerk's Office. Elston Reply Aff., Exhibit A.

Mr. Weinheimer challenges Ms. Lavery's affirmation with respect to the factual basis of how materials were discharged into the environment. If he is challenging the precise environmental impacts of the trailers on the environment, as noted by Mr. Elston in his reply affidavit, this is only potentially relevant to the penalty and not to a determination of liability as the violations are based upon the illegal disposal of solid waste and the unpermitted operation of a landfill. Elston Reply Aff., ¶ 3.

In his affirmation, Mr. Weinheimer questions the staff's identification of the site as containing a solid waste management facility pursuant to 6 NYCRR § 360-1.2(b)(158) or containing solid waste or being in violation of 6 NYCRR § 360-1.5(a)(2). Weinheimer, §§ 8-13. Mr. Elston describes in his affidavit the existence of approximately 70 waste trailers that had been disposed of over the years at this location. Elston Aff., ¶¶ 11, 13-15, 20. In his reply affidavit, Mr. Elston further elaborates that his "characterization of the trailers in [his] September 26, 2008 affidavit as 'discarded waste trailers' is based on the fact that they have remained on the site since at least 2001." Elston Reply Aff., ¶ 3. While this description could be more detailed, the respondent has provided not a shred of evidence to contest Mr. Elston's description.<sup>2</sup> Moreover, the inclusion by Mr. Elston of the stipulation of settlement in the Town of Minden's litigation against the respondent for maintaining these trailers on the same property bolsters the staff's claims. Exhibit 2 annexed to Elston Aff.

As Mr. Elston explains in his reply affidavit, 6 NYCRR § 360-1.2(a)(1) includes "other discarded materials" as within the definition of a solid waste. Section 360-1.2(b)(52) defines "disposal facility" as a facility where "solid waste is intentionally placed . . ." In its definition of "solid waste management facility," 6 NYCRR § 360-1.2(b)(158) includes "disposal facilities." Section 360-1.7(a)(1) requires a permit for

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<sup>2</sup> Mr. Elston notes in his reply affidavit that without a site visit to inspect the contents of these trailers, "Department staff may assume a worst case scenario." Elston Reply Aff., ¶ 3. Because the respondent did not cooperate with respect to setting up a site visit, staff's description of the trailers is by necessity somewhat limited.

operation of a solid waste management facility. Mr. Elston aptly notes in his reply affidavit that respondent's counsel fails to provide any facts that would indicate the respondent is exempt from these requirements or is not responsible for the illegal disposal of the trailers on his property.

As for Mr. Weinheimer's claims that the matter is already being addressed as part of negotiations with respect to two other locations, again, there is no factual information provided to support this claim. Mr. Elston provides a contrary portrayal regarding the alleged negotiations in his reply affidavit stating that one meeting occurred on October 29, 2007 and respondent failed to follow up to schedule a site visit and a timetable and plan for cleanup. Elston Reply Aff., ¶ 3. As for the two other locations cited by Mr. Weinheimer, Mr. Elston is persuasive in his statement that these only indicate a pattern of non-compliance. Id. He further notes that one of these sites was cleaned up pursuant to an order by the Town of Root and the other site was sold by the respondent to another party that cleaned up the site and therefore are irrelevant to this matter. Id.

With respect to the respondent's counsel's arguments concerning the requested penalty, the Department has asked for a very conservative penalty in light of the serious allegations and I do not find the staff's conclusions speculative.

In the final paragraph of the Weinheimer affirmation, counsel requests that the staff's proceeding be dismissed or alternatively that a hearing be held to "ventilate the issues before an impartial finder of fact." As repeatedly stated here, the respondent has not provided any factual information to rebut the staff's claims. Therefore, there is no basis to dismiss the proceeding nor are there shown to be any material issues of fact in question that would warrant a hearing.

As noted by staff, ECL § 71-2703(1) provides for a maximum penalty of \$7,500 for the initial day of violation of Article 27 and a maximum of \$1,500 for each day of violation thereafter. Staff has calculated the maximum penalty of \$676,500 beginning from the first day that the violation was noted at the site on May 30, 2007 and continuing until August 19, 2008, the second site visit. However, staff has only requested a penalty of \$30,000 with \$10,000 suspended pending the respondent's compliance with the Commissioner's order. Taking into account the respondent's history of non-compliance and the expense of removing the trailers, a higher suspended penalty is warranted but because the staff limited the penalty in its complaint to the aforementioned amount, I cannot increase it. See, Matter of 134-

15 Rock Management Corp., Commissioner's Order (December 10, 2008).

**CONCLUSION**

I recommend that staff's motion for summary order be granted with the requested relief as modified above. I recommend that the Commissioner order the respondent to pay a civil penalty of \$30,000 with \$10,000 suspended pending the respondent's legal removal of the waste trailers within 90 days of the effective date of the order.

Dated: Albany, New York  
November 5, 2008

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Fort Plain, NY 13339

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