STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York (ECL) and Part 360 (1993 and 2017) and Part 361 (2017) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

DEC Case No. R6-20180313-14

-by-

ONTARIO RETREAD, INC.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (DEC or Department) that respondent Ontario Retread, Inc. violated ECL article 27, and 6 NYCRR parts 360 and 361, at real property that respondent owns located at 15640 Van Wormer Road, Ellisburg, Jefferson County, New York (site).

As set forth in Department staff's complaint dated July 13, 2018, an inspection that Department staff conducted on July 21, 2017 revealed the presence of approximately 12,600 to 14,000 waste tires at the site (Complaint, ¶ 16; see also Hearing Exhibit 4 [site visit memorandum dated July 27, 2017]). Department staff alleged for its first cause of action that respondent violated 6 NYCRR 360-1.5(a)(1) (1993) and 360.9 (2017) by disposing of waste tires at the site (see Complaint ¶ 10). Department staff's second cause of action stated that if respondent was not disposing of waste tires at the site, respondent was in violation of the regulations governing storage of waste tires (see Complaint, ¶ 25). [1]

Staff moved for a default judgment pursuant to 6 NYCRR 622.15. Administrative Law Judge (ALJ) Maria E. Villa[2] prepared the attached hearing report, which I adopt as my decision in this matter subject to my comments below.

Respondent had operated a tire-retreading facility at the site "until circa 1995" (Complaint ¶ 21). According to the records maintained by the New York Secretary of State, Ontario Retread, Inc. was dissolved by proclamation on December 24, 1997 (see Hearing Report

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[1] Based upon my review of the record, the tires at the site had been disposed there, not stored. Accordingly, I am dismissing the second cause of action.

[2] This matter was heard before Administrative Law Judge Michael Caruso at a calendar call on August 16, 2018, and was later reassigned to ALJ Villa.

at 4 [Finding of Fact No. 1]; see also Hearing Exhibit 3). Although Ontario Retread, Inc. was dissolved by proclamation, the corporation continues to own the property in its corporate name. (see Exhibit 1; Hearing Record ["HR"] at 12:55).

Based on staff's inspection, an estimated 12,600 to 14,000 waste tires and remnants of tires were disposed of at the site, many of which are located in and around a collapsed building (see Hearing Exhibit 4). Vegetation grew in and around the waste tires at the site, and other debris was mingled with the tires (see id.; see also Hearing Exhibit 5A-5L [photographs of site]; Complaint ¶ 17). The Department has not authorized respondent to dispose of waste tires or other solid waste at the site (see Complaint ¶ 23) or to store waste tires at the facility (see Complaint ¶ 39).

As noted, although Ontario Retread, Inc. was dissolved by proclamation, the corporation continues to own the site. The filing of a certificate of dissolution does not entirely terminate corporate existence, and a corporation may be held liable on a cause of action which accrues after dissolution (see Camacho v New York City Transit Auth., 115 AD2d 691 [2d Dept 1985] [citations omitted]; see also Matter of AMI Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2017, at 5). Respondent's corporate existence has continued for the purposes of winding up the corporation's affairs, being sued and participating in administrative proceedings.

The notice of hearing served with the complaint indicated that an answer to the complaint was due within twenty days of service of the complaint. The notice of hearing stated further that a pre-hearing conference was scheduled for 10:15 a.m. on August 16, 2018, at the Department's Region 6 office in Watertown. The notice indicated that respondent could appear personally or by a representative.

The notice advised respondent that the failure to appear at the pre-hearing conference would constitute a default and a waiver of respondent's right to be heard, that the hearing record would be opened, and that Department staff would move for a default judgment imposing penalties and injunctive relief as requested in Department staff's complaint. Department staff, by its complaint, sought a civil penalty in the amount of thirty-seven thousand eight hundred dollars ($37,800).

Respondent did not appear at the pre-hearing conference and Department staff moved for a default judgment against respondent. The record establishes that Department staff served the notice of hearing and complaint upon respondent, respondent failed to file an answer to the complaint, and failed to appear at the pre-hearing conference as directed in the notice of hearing served with the complaint. Department staff also submitted a proposed order and is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient for me to conclude that respondent's disposal of more than 1,000 waste tires at the site constituted the unpermitted disposal of solid waste at the site. Moreover, at the hearing, Department staff made a prima facie case that respondent violated 6 NYCRR 360-

1.5(a)(1) (1993) and 360.9 (2017), as alleged in the complaint's first cause of action. Accordingly, Department staff is entitled to a judgment based upon record evidence.

The circumstances at the site warrant a substantial penalty. The illegal disposal of waste tires creates a substantial risk to public health by creating breeding habitat for mosquitoes and other vectors (see Hearing Report at 4 [Finding of Fact No. 4]). Such disposal creates a risk of fire, endangering public health and safety, and leading to the release of pollutants to the air, land, and waters of the State. I note also that respondent realized an economic benefit by disposing of the waste tires without properly managing them (see Hearing Report at 5).

The civil penalty that Department staff seeks is consistent with the applicable provisions of ECL 71-2703 which authorizes penalties for violations of title 7 of ECL article 27 (see Complaint ¶ 9), which are present here. Staff's requested penalty, which is less than the maximum allowed, is consistent with penalties imposed for similar violations, given the number of waste tires disposed of at the site. Accordingly, the proposed civil penalty is authorized and appropriate.

I hereby direct respondent to pay the civil penalty within thirty (30) days of the service of this order upon it.

Department staff has requested that my order incorporate language stating that, as resources allow, staff is to engage a contractor to remove the waste tires from the facility pursuant to ECL 27-1907 using money from the Waste Tire Management and Recycling Fund and other money that may be available. Department staff has also requested that respondent be directed to cooperate with Department staff and Department's contractors regarding investigation and removal of the waste tires from the site, and refrain from any act that would interfere with the Department's investigation and remediation of the site.

In addition, Department staff sought language in the order to reserve the Department's rights to seek recovery of the cost of investigation and remediation of the site under ECL 27-1907(3), (4) and (5). Staff has also requested that certain notifications regarding the removal work be provided.

The language that staff requests is reasonable and appropriate and has been included in this order.

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

I. Department staff's motion for default pursuant to the provisions of 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Ontario Retread, Inc. waived its right to be heard at the hearing.

II. Based upon record evidence, respondent Ontario Retread, Inc. violated 6 NYCRR 360-1.5(a)(1) (1993) and 360.9 (2017), as alleged in the first cause of action in the

complaint.

III. The second cause of action in the complaint is dismissed.

IV. As resources allow, Department staff shall engage a contractor to remove the waste tires from the site, pursuant to ECL 27-1907, using money from the Waste Tire Management and Recycling Fund, and other funds that may be available. Respondent Ontario Retread, Inc. shall cooperate with Department staff and the Department's contractors regarding investigation and removal of the waste tires from the site, and refrain from any act that would interfere with the investigation and remediation of the site.

V. At least ten (10) and not more than thirty (30) days prior to beginning work at the site, Department staff shall notify respondent Ontario Retread, Inc. of the date upon which removal of the waste tires from the site will commence, by posting a conspicuous notice at the site, and by mailing notification to respondent by United States first class mail, sent to respondent's last known mailing address.

VI. The rights of the State of New York to seek recovery of the cost of investigation and remediation of the site under ECL 27-1907(3), (4), and (5), are hereby reserved.

VII. Within thirty (30) days of service of this order upon it, respondent Ontario Retread, Inc. is ordered to pay a civil penalty in the amount of thirty-seven thousand eight hundred dollars ($37,800) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation." The civil penalty payment shall be sent to the following address:

Randall C. Young, Esq.
Regional Attorney
NYS DEC Region 6
Dulles State Office Building
317 Washington Street
Watertown, New York 13601-3787.

VIII. Any other correspondence or questions regarding this order shall be directed to the attention of Randall C. Young, Esq., at the address referenced above.

IX. The provisions, terms and conditions of this order shall bind respondent Ontario Retread, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

_____/s/_____
By: Basil Seggos
Commissioner

Dated: Albany, New York
January 11, 2019

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York ("ECL") and Part 360 (1993 and 2017) and Part 361 (2017) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

HEARING REPORT

DEC No. R6-20180313-14

-by-

ONTARIO RETREAD, INC.

Respondent.

Procedural History and Background

On July 16, 2018, staff of the New York State Department of Environmental Conservation ("Department" or "DEC") served respondent Ontario Retread, Inc. ("respondent") with a notice of hearing and complaint dated July 13, 2018. The complaint included two causes of action alleging violations of ECL Article 27, and Parts 360 and 361 of 6 NYCRR, at real property respondent owns located at 15640 Van Wormer Road, Ellisburg, Jefferson County, New York ("site").

An inspection by Department Staff on July 21, 2017 revealed the presence of approximately 12,600 to 14,000 waste tires at the site. Complaint, ¶ 16; Exhibit 4; Hearing Recording (hereinafter "HR") at 7:00. The complaint alleged that respondent violated Sections 360-1.5(a)(1) (1993) and 360.9 (2017) of 6 NYCRR by disposing of waste tires at the site. The second cause of action stated that "if Respondent did not dispose of waste tires at the facility, Respondent violated 6 NYCRR Part 360-13.1(b) (1993) and 6 NYCRR Part 360 (2017)[1] by storing more than 1,000 waste tires without a permit."[2] Complaint, ¶ 25.

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[1] In addition, Department Staff cites to Section 361-6.4 ("Permit Application Requirements") which requires any non-exempt facility, or one not subject to the registration requirements of Section 361-6.3, to obtain a permit. Complaint, ¶ 27.

[2] In the proposed order submitted as part of Department Staff's motion for default, and at the hearing, Department Staff argued that the tires at the site were disposed there, not stored, and that accordingly, the second cause of action was moot. Proposed Staff Order, at 2; HR at 1:44. The record supports Department Staff's contention, and therefore this report discusses only the first cause of action, and recommends that the second cause of action be dismissed.

The complaint seeks an order of the Commissioner:

(1) finding that respondent violated 6 NYCRR 360-1.5(a)(1) (1993) and 360.9 (2017), by disposing of waste tires at the site, or in the alternative, that respondent violated the regulations applicable to storage of waste tires at the site;
(2) directing Department Staff to engage a contractor, as resources allow, to remove the waste tires from the site using money from the Waste Tire Management and Recycling Fund and other funds that may be available;
(3) ordering respondent to cooperate with Department Staff and contractors in the investigation and removal of the waste tires;
(4) reserving the Department's rights to seek recovery of the costs of investigation and remediation of the site; and
(5) imposing a civil penalty in the amount of thirty-seven thousand eight hundred dollars ($37,800) to be paid within ten days.

Complaint, Wherefore Clause, ¶¶ I-V.

The notice of hearing served with the complaint indicated that an answer to the complaint was due within twenty days of service of the complaint. Respondent did not answer the complaint.

The notice of hearing stated further that a pre-hearing conference was scheduled for 10:15 a.m. on August 16, 2018, at the Department's Region 6 office in Watertown. The notice indicated that respondent could appear personally or by a representative.

In the notice, respondent was advised that the failure to file an answer or to appear at the pre-hearing conference would constitute a default and a waiver of respondent's right to be heard, that the hearing record would be opened, and that Department Staff would move for a default judgment. The notice further stated that upon making the motion for default judgment, Department Staff would be seeking an order of the Commissioner imposing a civil penalty of $37,800 for the violations alleged in the complaint.

On August 16, 2018, pursuant to the notice of hearing, a pre-hearing conference was convened before administrative law judge ("ALJ") Michael S. Caruso[3] at the Department's Region 6 office in Watertown. This matter was called. Department Staff was represented by Randall A. Young, Esq., Regional Attorney for Region 6. Respondent did not appear.

Pursuant to 6 NYCRR 622.15, Mr. Young, on behalf of Department Staff, moved on the record for a default judgment against respondent based upon respondent's failure to answer the complaint and appear for the pre-hearing conference. Jennifer Lauzon, P.E., a professional engineer in the Department's Region 6 Division of Materials Management, testified on behalf of Department Staff. Department Staff submitted five exhibits, all of which were received into the record. A list of those exhibits is attached.

[3] After the hearing, this matter was reassigned to ALJ Maria E. Villa, who prepared this hearing report.

Motion for Default and Applicable Regulations

Section 622.4(a) of 6 NYCRR states that a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. Section 622.15 provides that "(a) [a] respondent's failure to file a timely answer … constitutes a default and a waiver of respondent's right to a hearing. If [this] occurs the department staff may make a motion to the ALJ for a default judgment. (b) The motion for a default judgment may be made orally on the record … and must contain: (1) proof of service upon the respondent of the notice of hearing and complaint … ; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

As the Commissioner stated in *Matter of Alvin Hunt, d/b/a Our Cleaners* (Decision and Order dated July 25, 2006, at 3), "[t]he consequences of a default is [sic] that the respondent waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint or other accusatory instrument on the issue of liability for the violations charged." Moreover, the Commissioner has stated, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Id. at 6.

In addition, in support of a motion for a default judgment, Department Staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. *Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3. Department Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that Department Staff has a viable claim. *Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 (citing *Woodson v Mendon Leasing Corp.*, 100 N. Y. 2nd 62, 70-71 (2003)).

The record establishes that Department Staff served the notice of hearing and complaint upon respondent, respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference as directed in the notice of hearing served with the complaint. At the hearing, Department Staff submitted a proposed order. The Department is entitled to a default judgment in this matter pursuant to the provisions of Section 622.15 of 6 NYCRR.

During Department Staff's inspection on July 21, 2017, between 12,600 and 14,000 tires were observed in a dilapidated building and strewn about the ground, with overgrown vegetation and moss covering the tires. The site was not authorized to accept solid waste, and respondent, the record owner of the site, was no longer doing business and had been dissolved by proclamation in 1997. Nothing indicated that any effort had been made to address the waste present at the site.

The proof offered at the hearing is sufficient to conclude that Department Staff established that respondent violated Sections 360-1.5(a)(1) (1993) and 6 NYCRR Part 360 (2017) by disposing of over 1,000 waste tires at the site. Section 360-1.5(a)(1) (1993) prohibits the disposal of solid waste except at an authorized disposal facility. Similarly, Section 360.9 (2017) prohibits solid waste disposal except at either an exempt or authorized disposal facility. Accordingly, respondent is liable for the violation alleged in Department Staff's first cause of action.

Findings of Fact

1. Respondent Ontario Retread, Inc. is a corporation that has held title to property at 15640 Van Wormer Road, Ellisburg, Jefferson County, New York since 1994. The site is adjacent to Van Wormer Road and U.S. Highway 11. Complaint, ¶ 5; Exhibit 1. Respondent filed a certificate of incorporation with the New York Secretary of State on March 8, 1990, and was dissolved by proclamation published on December 24, 1997. Exhibits 2 and 3. Ontario Retread never completed winding up its affairs, and still owns the site. Complaint, ¶ 6.

2. On July 21, 2017, Department Staff inspected the site. Complaint, ¶ 7; Exhibit 4; HR at 4:40. The site was very overgrown, and the roof of a building located onsite had almost entirely collapsed. Exhibit 4. The building contained several piles of tires. Id. Department Staff estimated that the building contained approximately 13,333 tires. Id.

3. A separate garage on the property was empty, but tires were scattered around on the ground in front of the structure. Exhibit 4. Because the site was overgrown with vegetation, it was difficult to estimate the total number of tires. Exhibit 4. Department Staff estimated that the site contained between 12,600 and 14,000 tires. Complaint, ¶ 16; Exhibit 4; HR at 7:00. Trees were growing on the site, and some of the tires were covered in moss. HR at 7:00. In addition, strips of old tire tread, and barrels and cardboard containers were observed. HR at 7:50.

4. At the hearing, Department Staff's expert witness, Jennifer Lauzon, P.E., testified concerning the risks associated with waste tire stockpiles, including the risk of fire. HR at 9:55. Ms. Lauzon testified that tire fires are difficult to extinguish, and that any runoff would be contaminated. Id. In addition, waste tires provide a breeding ground for mosquitoes, which can carry disease. Id.

5. Ms. Lauzon stated that remediation at the site would require that the tires be removed from the property and taken to a permitted facility to be recycled or chipped. HR at 10:45.

6. The Department never authorized disposal of solid waste at the site. Complaint, ¶ 23.

7. On July 16, 2018, respondent was served with the notice of hearing and complaint pursuant to Section 306 of the Business Corporation Law. July 16, 2018 Affidavit of Service of Drew Wellette. In addition, respondent was served on December 11, 2018 by first-class mail, pursuant to Section 3215(g) of the New York Civil Practice Law and Rules. December 12, 2018 Affidavit of Service of April Sears. On December 17, 2018, the first-class mailing was returned as undeliverable. December 19, 2018 Affidavit of Service by Mail of April L. Sears.

Discussion

The record in this case shows that respondent's disposal of more than 1,000 waste tires at the site constituted the unpermitted operation of a solid waste disposal facility. Accordingly, Department Staff has made a *prima facie* case that respondent violated Sections 360-1.5(a)(1) (1993) and 360.9 (2017) of 6 NYCRR, as alleged in the complaint's first cause of action.

Because the tires were disposed of, not stored, the second cause of action is dismissed.

Although respondent was dissolved by proclamation on December 24, 1997, respondent's corporate existence continued for the purpose of winding up the corporation's affairs, being sued and participating in administrative proceedings. This is the case even if the activities giving rise to liability occurred after corporate dissolution. *Matter of AMI Auto Sales Corp.*, Decision and Order of the Commissioner at 5 (February 16, 2012); *Camacho v. New York City Transit Authority*, 115 A.D.2d 691, 693 (2nd Dept. 1985) ("A corporation may be held liable on a cause of action which accrues after dissolution" and jurisdiction over the corporation may be obtained by serving the Secretary of State) (citations omitted).

Respondent was served with the notice of hearing and complaint on July 16, 2018. Respondent failed to file an answer to the complaint and failed to appear for the August 16, 2018 pre-hearing conference. Although the subsequent first-class mailing was returned as undeliverable, a default judgment may be entered. CPLR Section 3215(g)(4)(ii) provides that where there has been compliance with the requirements of Section 3215(g)(4)(i) regarding service by first class mail, the failure of the respondent corporation to receive the first class mailing "shall not preclude the entry of default judgment." At the hearing, Department Staff submitted a proposed order. Department Staff is entitled to a default judgment in this matter pursuant to the provisions of Section 622.15 of 6 NYCRR.

Based upon its assessment of the conditions at the site and the totality of the circumstances of this case, Department Staff requested a penalty of thirty-seven thousand eight hundred dollars ($37,800). At the hearing, Department Staff stated that the penalty is based upon the estimated number of tires at the site ($3 - $4 per tire), and that Department Staff's primary concern is obtaining access to the site to effect a cleanup. According to Department Staff, respondent realized an economic benefit by disposing of the waste tires without properly managing them.

The civil penalty Department Staff seeks is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71, and the Commissioner should impose the penalty requested.

Recommendation

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

1. Granting Department Staff's motion for default pursuant to the provisions of 6 NYCRR 622.15;

2. a. Finding respondent in violation of Sections 360-1.5(a)(1) (1993) and 360.9 (2017) of 6 NYCRR, as alleged in the first cause of action in the complaint;

   b. Dismissing the second cause of action;

3. Pursuant to Section 27-1907 of the ECL, and as funds from the Waste Tire Management and Recycling Fund and other available funding and resources allow, directing Department Staff to engage a contractor to remove the waste tires from the facility;

4. Reserving the Department's rights to seek recovery of the costs of investigation and remediation of the facility, pursuant to Section 27-1907(3), (4) and (5) of the ECL;

5. Directing respondent, within thirty (30) days of service of the Commissioner's order on it, to pay a civil penalty in the amount of thirty-seven thousand eight hundred dollars ($37,800); and

6. Directing such other and further relief as he may deem just and proper.

_____/s/_____
Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
November 30, 2018

Matter of Ontario Retread, Inc.
Exhibits Received
Edirol 010318072356

Exhibit 1 – October 7, 1994 Deed

Exhibit 2 – Certificate of Incorporation (NYS Department of State)

Exhibit 3 – April 5, 2018 Department of State certification re: dissolution by proclamation

Exhibit 4 – July 27, 2017 memorandum from Jennifer Lauzon to Yuan Zeng re: site inspection

Exhibits 5(A) to 5(L) – Photographs