STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 27 and 71 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Committed

- by -

DAVID PARENT, JR., Individually, and as Administrator and a Distributee of the Estate of David Parent, Sr., Deceased,

Respondent.

ORDER

DEC Case No. 3-20000808-156

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceedings as against respondent David Parent, Jr., by service of a notice of hearing and complaint dated April 7, 2004. Department staff personally served the notice of hearing and complaint upon respondent outside the State on April 13, 2004, in a manner consistent with the CPLR (see 6 NYCRR 622.4[a][3]; CPLR 308[4]; CPLR 313).

The notice of hearing and complaint alleged that respondent David Parent, Jr., has an interest in certain real property located at Union Valley Road, Town of Carmel, County of Putnam, New York (the "site") in that he is the administrator of the estate of the late David Parent, Sr., the record owner of the site, and a distributee of that estate. The complaint also alleges that, from 1986 to 1997, the site contained an automobile junk yard and large amounts of accumulated waste tires numbering approximately 20,000 to 100,000. The complaint alleged that as of June 23, 2003, at least 20,000 to 40,000 waste tires remain at the site. The complaint further alleged that:

(1) respondent violated 6 NYCRR 360-13.1(b) and 360-1.5(a) by storing well more than 1,000 waste tires without first having obtained a permit to do so from at least June 14, 2001 until the date of the complaint; and

(2) respondent violated a January 13, 1997 order on

consent entered into by respondent by failing to submit certain annual reports to the Department in 1998, 1999, 2000, 2001, 2002, and 2003.

Respondent failed to serve an answer to the complaint or otherwise appear in this matter. On September 13, 2004, staff filed a motion for a default judgment pursuant to 6 NYCRR 622.15 with the Department's Office of Hearings and Mediation Services.

The matter was assigned to Chief Administrative Law Judge ("ALJ") James T. McClymonds, who prepared the attached default summary report dated September 27, 2005. I adopt the Chief ALJ's report as my decision in this matter, subject to my comments herein.

Because respondent's facility is a "noncompliant waste tire stockpile" as that term is defined in ECL 27-1901(6), the abatement measures Department staff seeks to have imposed in this matter are authorized by ECL 27-1907. Moreover, the penalty recommended by Chief ALJ McClymonds is warranted by the circumstances of this case and consistent with the penalty-assessment formula I have adopted in other noncompliant waste tire stockpile cases (see Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005).

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted. Respondent is adjudged to be in default and to have waived his right to a hearing in this proceeding. As a consequence of the default, Department staff's allegations against respondent in the complaint are deemed to have been admitted by him.

II. Respondent is adjudged to be an operator of a waste tire disposal facility as that term is defined by 6 NYCRR 360-13.1(f).

III. Respondent is adjudged to have violated:

A. 6 NYCRR 360-13.1(b) and 360-1.5(a) by storing well more than 1,000 waste tires at the site without first having obtained a permit to do so from at least June 14, 2001 until the date of the complaint; and

B. the terms of the January 13, 1997 order on consent (Case No. 3-0828) by failing to submit annual reports to the Department in 1998, 1999, 2000, 2001, 2002, and 2003.

IV. As a result of the above violations, respondent's site is determined to be a "noncompliant waste tire stockpile" as that term is defined by ECL 27-1901(6).

V. Respondent is assessed a civil penalty pursuant to ECL 71-2703. The penalty shall be the sum of $50,000 plus, if respondent fails to comply with any requirement set forth in this order, the sum of two dollars ($2) for each twenty (20) pounds of waste tires that the State of New York shall have to manage under ECL article 27, title 19.

A. No later than 30 days after the date of service of this order upon respondent, respondent shall submit payment of $50,000 to the Department. Payment shall be in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered by certified mail, overnight delivery or hand delivery to the Department at the following address: Vincent Altieri, Esq., Regional Attorney, Region 3, New York State Department of Environmental Conservation, 21 South Putt Corners Road, New Paltz, New York 12561.

B. The remainder of the civil penalty, if any, shall be due and payable within 30 days after Department staff serves a demand for such upon respondent.

VI. Respondent shall comply with the following schedule of compliance:

A. Respondent shall immediately stop allowing any waste tires to come onto the site in any manner or method, or for any purpose, including but not limited to nor exemplified by, acceptance, sufferance, authorization, deposit, or storage.

B. Respondent shall submit a plan for the removal of the tires at the site ("stockpile elimination plan") to the Department in approvable form no later than 21 calendar days after the effective date of this order.

C. Respondent shall remove all tires already at the site, including tires buried pursuant to the violated order on consent, in accordance with the Department-approved stockpile elimination plan, beginning no later than 60 calendar days after the effective date of this order, and transport such tires to

Department-authorized locations by vehicles permitted under 6 NYCRR part 364.

D(1). On the first calendar day of each calendar month following the month in which this order shall take effect, respondent shall submit by means of delivery by the United States Postal Service, private courier service, or hand delivery, a written report to the Department at the following address:

New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253
ATTN: Jeffrey Schmitt, P.E.
RE: 3-20000808-156

with a copy of the report being sent to the following:

New York State Department of Environmental Conservation
21 South Putt Corners Road
New Paltz, New York 12561
ATTN: Vincent Altieri, Esq.
RE: 3-20000808-156.

(2). Each such report shall contain the following information: the name, address, and telephone number of the facility or facilities where the waste tires were taken during the previous month (or in the case of the first such report, those days in the previous month that the order shall have been in effect) and, with respect to each such facility, the number of waste tires accepted there that month.

(3). Each report required to be submitted to the Department shall contain the following certification at the beginning of each such report:

I, David Parent, Jr., do hereby certify that I reviewed the following report; that based on my knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; that the New York State Department of Environmental Conservation has the right to rely upon the information contained in this report as being truthful and accurate and to conclude that the report does not omit any

material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; and that I know that any false statement made in this certification or in this report shall be punishable pursuant to section 210.45 of the Penal Law, and as may be otherwise authorized by law.

VII. Should respondent fail to comply with paragraph VI of this order, respondent shall provide employees and agents of the Department unrestricted access to the site to remove and manage all remaining waste tires in accordance with the waste tire management hierarchy set out in ECL 27-1903; and shall also provide access to any facility, property, or records owned, operated, controlled, or maintained by respondent, in order to inspect or perform such tests and to undertake such activities as the Department may deem appropriate, to copy such records, or to perform any other lawful duty or responsibility; and respondent shall not interfere with, and shall not cause interference with, and shall cooperate with, the work of those individuals.

VIII. All communications from respondent to Department staff concerning the order shall be made to Vincent Altieri, Esq., Regional Attorney, Region 3, at the following address:

New York State Department of Environmental Conservation
21 South Putt Corners Road
New Paltz, New York 12561
ATTN: Vincent Altieri, Esq.
RE: 3-20000808-156

with a copy of such communication being sent to the following:

New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253
ATTN: Jeffrey Schmitt, P.E.
RE: 3-20000808-156.

IX. The provisions, terms and conditions of this order shall bind respondent and his heirs and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: Denise M. Sheehan
Acting Commissioner

Dated: Albany, New York
October 5, 2005

TO: (via Certified Mail)
David S. Parent, Jr.
62 Miry Brook Road
Danbury, Connecticut 06810

(via Certified Mail)
David S. Parent, Jr.
P.O. Box 396
Mahopac, New York 10541-0396

(via Regular Mail)
Vincent Altieri, Esq.
Regional Attorney, Region 3
New York State Department of Environmental Conservation
21 South Putt Corners Road
New Paltz, New York 12561

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DAVID PARENT, JR.,
Individually, and as Administrator and a Distributee of the Estate of David Parent, Sr., Deceased,

Respondent.

SUMMARY REPORT

DEC Case No.
3-20000808-156

Appearances:

-- Jennifer David Hesse, Assistant Regional Attorney, for the New York State Department of Environmental Conservation.

-- No appearance for respondent David Parent, Jr.

Proceedings

By notice of motion dated September 13, 2004, staff of the Department of Environmental Conservation ("Department") seek a default judgment, pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") § 622.15, as against respondent David Parent, Jr., for the alleged violations of Environmental Conservation Law ("ECL") article 27, its implementing regulations and the terms of an order of the Commissioner issued pursuant thereto. For the reasons that follow, I recommend that the Acting Commissioner grant Department staff's motion.

Findings of Fact

1. The dwelling place or usual place of abode of respondent David Parent, Jr., is located at 62 Miry Brook Road, Danbury, Connecticut, 06810.

2. On the morning of April 13, 2004, Officer David M. Clayton, then an investigator (now a Lieutenant) in the Department's Division of Law Enforcement, Region 3, together with Connecticut Department of Environmental Protection ("DEP") Police Officer J. Esteban, made three separate attempts to personally serve a notice of hearing and complaint dated April 7, 2004, upon respondent or other natural person at 62 Miry Brook Road. Although someone was in the dwelling, each time, such person or persons failed to answer the door and, each time, the officers affixed a copy of a notice of hearing and complaint dated April 7, 2004 to the door.

3. On April 19, 2004, an additional copy of the April 7, 2004 notice of hearing and complaint was sent by first class mail to respondent at 62 Miry Brook Road, Danbury, Connecticut, 06810. On April 21, 2004, an additional copy of the notice of hearing and complaint was sent by first class mail to respondent at P.O. Box 396, Mahopac, New York, 10541-0396.

4. The April 7, 2004, complaint alleges that respondent has an interest in certain real property located at Union Valley Road, Town of Carmel, County of Putnam, New York (the "site"), by virtue of being the administrator of the estate of David Parent, Sr., deceased, the record owner of the site, and by virtue of being a distributee of said estate.

5. The complaint further alleges that from 1986 to 1997, the site contained an automobile junkyard and approximately 20,000 to 100,000 waste tires.

6. On January 13, 1997, respondent, together with respondent's then tenant Mahopac Auto Wreckers, Inc., entered into an order on consent with the Department. In the order on consent, respondent agreed, among other things, to cover the waste tire pile with an approved cap and to maintain the integrity of the cap. Respondent also agreed to submit annual reports to the Department, which were to include dated photographic documentation of the integrity of the cap.

7. The complaint alleges that although respondent filed the first annual report in 1997, respondent failed to submit reports in 1998, 1999, 2000, 2001, 2002, or 2003.

8. The complaint also alleges that inspections by Department staff on June 14, 2001, July 24, 2001, November 30, 2001 and June 23, 2003, revealed piles of approximately 20,000 to 40,000 waste tires remaining at the site. In addition, the November 30, 2001 inspection revealed an erosion gully exposing

buried tires.

9. The first cause of action pleaded in the complaint alleges that from at least June 14, 2001 until the present, respondent unlawfully stored more than 1,000 waste tires without a permit in violation of 6 NYCRR 360-13.1(b) and 360-1.5(a). Accordingly, the complaint alleges that respondent has been operating a noncompliant waste tire stockpile, as that term is defined in ECL 27-1901(6), since at least June 14, 2001.

10. The second cause of action pleaded in the complaint alleges that respondent violated the January 13, 1997 order on consent by failing to submit annual reports to the Department in 1998, 1999, 2000, 2001, 2002 and 2003, documenting the integrity of the cap.

11. The notice of hearing indicated that respondent was required to serve an answer within 20 days of receipt of the notice, and that the failure to do so would result in a default and a waiver of respondent's right to a hearing. The notice also indicated that respondent was required to attend a pre-hearing conference on May 17, 2004, and that the failure to appear would also result in a default and a waiver of respondent's right to a hearing.

12. Respondent failed to appear at the May 17, 2004 pre-hearing conference. Moreover, no answer to the complaint has been received by the Department.

13. Department staff filed a notice of motion for a default judgment dated September 13, 2004, with the Department's Office of Hearings and Mediation Services. The matter was assigned to James T. McClymonds, Chief Administrative Law Judge.

14. Accompanying staff's notice of motion are an affirmation in support of the motion by Jennifer David Hesse, Esq., Assistant Regional Attorney, Region 3; an affidavit of personal service by Officer David M. Clayton, with exhibits; a copy of the April 7, 2004 notice of hearing and complaint; April 19, and April 21, 2004 affidavits of mail service by Jennifer J. Cutter; an affidavit of Parimal Mehta discussing staff's requested civil penalty, with exhibits; and a proposed order.

Discussion

Pursuant to the Department's uniform enforcement hearing procedures, a respondent's failure to file a timely answer or appear at a duly scheduled pre-hearing conference

constitutes a default and a waiver of respondent's right to a hearing (see 6 NYCRR 622.15[a]). In the event of a default, Department staff is authorized to make a motion to the administrative law judge ("ALJ") for a default judgment (see id.).

A motion for a default judgment may be in writing and must contain: "(1) proof of service upon the respondent or 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" (6 NYCRR 622.15[b]).

Proof of Service

Department staff may commence an administrative enforcement proceeding by service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Service of the notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail (see 6 NYCRR 622.3[a][3]).

CPLR 308 authorizes personal service upon a natural person by delivering the summons to the person to be served, or by delivering the summons to a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person to be served, followed by mail service (see CPLR 308[1], [2]). Where service by either of these two methods cannot be made with due diligence, service may be accomplished by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode of the person to be served, and by mailing the summons to such person at his or her last known residence. The mailing must be effected within 20 days of such affixing (see CPLR 308[4]). This third method of service is commonly known as "nail and mail."

The CPLR provides that a person subject to the personal jurisdiction of the State (see CPLR 301, 302) may be served with a summons without the State, in the same manner as service is made within the State (see CPLR 313). Such service may be made by any person authorized to make service within the State who is a resident of the State (see id.).

Here, the documents submitted on Department staff's motion for a default judgment establish service of the notice of hearing and complaint by personal service consistent with the "nail and mail" method of service provided for in CPLR 308(4). Officer Clayton's affidavit establishes that respondent's dwelling place or usual place of abode is located at 62 Miry Brook Road, Danbury, Connecticut, 06810. The record also

demonstrates that Officer Clayton together with a Connecticut DEP Officer made diligent efforts to either personally serve respondent or deliver the notice of hearing and complaint to a person of suitable age and discretion at respondent's dwelling place or usual place of abode. Having failed that, Officer Clayton affixed the notice of hearing and complaint to the door of respondent's dwelling place or usual place of abode, and Department staff subsequently mailed the notice of hearing and complaint to respondent's last known residence. Service of the notice of hearing and complaint in Connecticut through the "nail and mail" method was accomplished in the same manner as such service is made within New York, and by New York residents authorized to make service within New York. Thus, Department staff has proved personal service upon respondent of the April 7, 2004 notice of hearing and complaint.

Proof of Respondent's Failure to Appear or Timely Answer

The notice of hearing notified respondent that he had twenty days from receipt of the notice of hearing and complaint to serve a written answer. Staff contends that the twenty days expired on May 5, 2004. Staff's submissions demonstrate that to date, respondent has failed to serve an answer or otherwise appear in this matter. Accordingly, staff has proven respondent's default.

Liability

As a consequence of respondent's default, respondent is deemed to have admitted the factual allegations of the complaint (see Matter of Singh [Kuldeep], Decision and Order of the Commissioner, Dec. 17, 2003, at 10; see also Rokina Optical Co., Inc. v Camera King, Inc., 63 NY2d 728, 730 [1984]; McClelland v Climax Hosiery Mills, 252 NY 347, 351 [1930]). The allegations of the April 7, 2004 complaint establish that the site is a facility storing more than 1,000 waste tires for longer than 60 days and, thus, a waste tire disposal facility (see 6 NYCRR 360-13.1[f]). The allegations also establish that respondent is an "operator" of the facility as that term is defined under 6 NYCRR 360-1.2(b)(113).

The allegations of the April 7, 2004 complaint also establish the two causes of action pleaded by Department staff:

> (1) that respondent violated 6 NYCRR 360-13.1(b) and 360-1.5(a) by storing well more than 1,000 waste tires without first having obtained a permit to do so from at least June 14, 2001 until the date of the complaint;

and

(2) that respondent violated the January 13, 1997 order on consent by failing to submit annual reports to the Department in 1998, 1999, 2000, 2001, 2002, and 2003.

Accordingly, respondent is deemed to have committed the violations alleged.

Abatement Measures

Department staff seeks a determination that respondent operates a "noncompliant waste tire stockpile" and seeks abatement of that stockpile pursuant to ECL 27-1907. Because of the violations of the Department's regulations and the order on consent established by staff on this motion, respondent's facility is a "noncompliant waste tire stockpile" as that term is defined in ECL 27-1901(6). Accordingly, the abatement measures staff seeks are authorized by ECL 27-1907 and I recommend that the Commissioner impose such measures.

Penalty

Department staff also requests that a civil penalty be assessed against respondent. In support of this requested penalty, staff offers the affidavit of Parimal Mehta, an Environmental Engineer 1 in the Department's Division of Solid and Hazardous Materials, Region 3, justifying the penalty sought.

In Matter of Wilder (Supplemental Order of the Acting Commissioner, Sept. 27, 2005, adopting ALJ's Hearing Report, at 15-16), the Acting Commissioner recently adopted a penalty-assessment formula recommended by Department staff for use in noncompliant waste tire stockpile cases. That formula consists of the sum of a minimum penalty plus $2 for each 20 pounds of waste tires that the State of New York has to manage under the Waste Tire Management and Recycling Act of 2003 (see ECL art 27, tit 19). The rationale for the penalty-assessment formula is that it (1) provides for a minimum penalty, irrespective of respondent's compliance with the Commissioner's order, to punish respondent for the violations of the State's laws and regulations, and to deter future violations, (2) provides respondent with an incentive to comply with the remedial obligations imposed by the Commissioner's order, and (3) the "$2 per 20-pounds of tires managed" provision incorporates proportionality into the penalty calculation (see Matter of Wilder, ALJ's Hearing Report, at 16).

In this case, I recommend that the Acting Commissioner assess a penalty using the penalty-assessment formula established in Matter of Wilder. For the minimum penalty, I recommend that $50,000 be imposed. As demonstrated by Ms. Mehta's affidavit and considering the circumstances of this case, a $50,000 minimum penalty is justified, particularly given respondent's recalcitrance in meeting his obligations under the ECL and its implementing regulations, and under the 1997 consent order respondent executed with the Department. Moreover, even assuming that as many as 100,000 waste tires remain at the site, and respondent fails to comply with any remedial obligations imposed by the Acting Commissioner, the maximum penalty imposed under the formula would fall below the maximum penalty authorized by ECL 71-2703(a), as amended, as also demonstrated by Ms. Mehta's affidavit.

Conclusions of Law

1. Department staff established service upon respondent of the April 7, 2004 notice of hearing and complaint by personal service without the State in a manner consistent with the CPLR (see 6 NYCRR 622.3[a][3]; CPLR 308[4]; CPLR 313).

2. Department staff established respondent's failure to file a timely answer or otherwise appear in this matter.

3. Respondent is in default. Accordingly, respondent has waived his right to a hearing in the matter, and is deemed to have admitted the factual allegations of the April 7, 2004 complaint.

4. The allegations of the April 7, 2004 complaint establish the two causes of action pleaded by Department staff:

> (1) that respondent violated 6 NYCRR 360-13.1(b) and 360-1.5(a) by storing well more than 1,000 waste tires without first having obtained a permit to do so from at least June 14, 2001 until the date of the complaint; and
>
> (2) that respondent violated the January 13, 1997 order on consent by failing to submit annual reports to the Department in 1998, 1999, 2000, 2001, 2002, and 2003.

5. Because of the violations of the Department's regulations and the January 13, 1997 order on consent established by staff on its motion for a default judgment, respondent's facility is a "noncompliant waste tire stockpile" as that term is

defined by ECL 27-1901(6).

6. Because respondent's facility is a "noncompliant waste tire stockpile," the abatement measures sought by Department staff are authorized by ECL 27-1907.

7. A civil penalty equal to the sum of $50,000 plus $2 for each 20-pounds of waste tires the State has to manage under the Waste Tire Management and Recycling Act of 2003 is warranted based upon the circumstances of this case, and consistent with the penalty assessed in other non-compliant waste tire stockpile cases.

Recommendations

I recommend that the Commissioner:

1. grant Department staff's motion for a default judgment;

2. determine that respondent is in default and, as a consequence, liable for the violations alleged in the complaint;

3. impose the civil penalty recommended above; and

4. impose the abatement measures requested by Department staff.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: September 27, 2005
Albany, New York