STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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"),

- by -

JEFFREY SMI,

Respondent.

ORDER

DEC File No.
R4-2008-0515-67

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Jeffrey Smi by serving a notice of hearing and complaint by certified mail which respondent received on March 25, 2009.

The complaint alleges that on April 28, 2008, respondent Jeffrey Smi, an operator of a truck for Capital Vacuum, discharged carpet cleaning wastewater from the truck's tank onto Aviation Road in the Town of Colonie, New York. As a result of this discharge, Department staff alleges that respondent violated 6 NYCRR 360-1.5(a), which prohibits the improper disposal of waste. According to the complaint, the truck's tank could hold up to 120 gallons of wastewater and respondent stated that the tank was "full of wastewater" at the time that he discharged the tank's contents (Department Staff Complaint, at ¶ 6).

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on April 14, 2009, and has not been extended by Department staff.

Department staff filed a motion for default judgment, dated July 23, 2009, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois, who prepared the attached summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

The ALJ in her report discusses whether the Department's

Civil Penalty Policy might support a reduction in the staff-requested penalty of seven thousand five hundred dollars ($7,500). Respondent however, by defaulting, has failed to present any argument or evidence that would justify a reduction of the penalty based upon ability to pay, absence of prior violations or other mitigating factors. Respondent illegally discharged wastewater to the environment which, absent any response from respondent and based on this record, warrants imposition of the staff-requested civil penalty.

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.

II. Respondent Jeffrey Smi is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have violated 6 NYCRR 360-1.5(a).

IV. Respondent is hereby assessed a civil penalty in the amount of seven thousand five hundred dollars ($7,500), which penalty shall be due and payable within thirty (30) days after 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" and mailed or delivered to the Department at the following address: New York State Department of Environmental Conservation, Region 4, 1130 North Westcott Road, Schenectady, New York 12306, Attn: Jill Phillips, Esq.

V. All communications from respondent to the Department concerning this order shall be made to Assistant Regional Attorney Jill Phillips, New York State Department of Environmental Conservation, Region 4, 1130 North Westcott Road, Schenectady, New York 12306.

VI. The provisions, terms and conditions of this order shall bind respondent Jeffrey Smi and his agents, successors and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: August 11, 2009
Albany, New York

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Environmental Conservation Law article 27 and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

JEFFREY SMI,

Respondent.

SUMMARY REPORT

DEC File No. R4-2008-0515-67

August 4, 2009

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative proceeding by serving a notice of hearing and complaint upon Jeffrey Smi ("Respondent") by certified mail, return receipt requested, on March 25, 2009. The complaint alleged that the Respondent violated part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR part 360") by disposing of carpet cleaning wastewater on a road in the Town of Colonie, New York.

On July 23, 2009, DEC Staff moved for a default judgment and order against the Respondent on the basis that the Respondent had failed to file a timely answer to the complaint. In support of its motion, DEC Staff submitted the following documents: an affirmation of Jill T. Phillips, Assistant Regional Attorney, DEC Region 4; an affidavit of Kathleen Fabrey concerning service of the notice of hearing and complaint; a copy of the notice of hearing and complaint; and a proposed order.

The motion for a default judgment was made pursuant to 6 NYCRR 622.15. In its motion, DEC Staff sought an order of the Commissioner finding the Respondent liable for the alleged violation and requiring the Respondent to pay a civil penalty of $7,500, and such other relief as may be just, proper and appropriate.

The motion was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois (the undersigned), as stated in the July 24, 2009 letter sent by Chief ALJ James T. McClymonds to the Respondent and DEC Staff.

As of the date of this report, I have not received any correspondence or contact from or on behalf of the Respondent concerning this matter.

DEFAULT PROCEDURES

Subdivision 622.15(a) of 6 NYCRR (Default Procedures) provides that a respondent's failure to file a timely answer constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or to file a timely answer; and (3) a proposed order."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]."

FINDINGS OF FACT

1. Staff of the Department of Environmental Conservation ("DEC Staff") served a notice of hearing and complaint upon Jeffrey Smi ("Respondent"), 8 Winding Brook Road, Guilderland, New York, 12084 by certified mail, return receipt requested. The Respondent received the notice of hearing and complaint on March 25, 2009, as demonstrated by the domestic return receipt and the United States Postal Service track and confirm search results attached with the affidavit of Kathleen Fabrey.

2. The notice of hearing stated that the Respondent must file a written answer within twenty days of receipt of the complaint, and that the answer was to be filed by serving it by mail upon the Department attorney who signed the notice of hearing. The notice of hearing stated that failure to serve a timely written answer in this matter would result in a default and a waiver of the Respondent's right to a hearing, and may result in an order granting the relief requested in the complaint.

3. As of July 23, 2009 (the date of the affirmation of Jill Phillips, Esq.), the Respondent had not filed an answer to the complaint.

4. The Respondent, at the time of the alleged violation, was employed by Capital Vacuum and operated a tank truck for the company. On April 28, 2008, the Respondent was operating a Capital Vacuum truck on Aviation Road in the Town of Colonie, New York (Albany County). The truck has a 120 gallon tank that holds

wastewater from carpet cleaning. The company uses Formula 77, Enz-All, Microban and Truckmont Detergent in its carpet cleaning process. The Respondent told a member of DEC Staff[1] that the tank on the truck was full of wastewater from the day before and that the Respondent emptied the tank on Aviation Road while on his way to a job in Clifton Park, New York.

DISCUSSION

The affidavit and affirmation submitted with the motion for a default judgment demonstrate that the Respondent is in default in this matter.

The complaint alleges that the Respondent violated 6 NYCRR section 360-1.5(a). This section states: "Except as provided for in Subparts 360-10 and 360-17 of this Part [subparts applicable to regulated medical waste], no person shall dispose of solid waste in this State except at: (1) a disposal facility exempt from the requirements of this Part; or (2) a disposal facility authorized to accept such waste for disposal pursuant to this Part or to a department-issued or court-issued order."

Section 360-1.2(a)(1) of 6 NYCRR defines solid waste as "...any garbage, refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility and other discarded materials including solid, liquid, semi-solid, or contained gaseous material, resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources subject to permit under 33 USC 1342 [National Pollutant Discharge Elimination System]" or nuclear materials not relevant here. Section 360-1.2(a)(4) identifies exceptions to this definition that are not applicable to this case.

Section 360-1.2(a)(2) of 6 NYCRR provides, in part, that a material is discarded if it is abandoned by being disposed of. Section 360-1.2(a)(3) states, "A material is disposed of if it is discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any

[1] The name of the DEC Staff member to whom the Respondent spoke is not identified in the record concerning this motion.

constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water."

The wastewater from carpet cleaning that the Respondent discharged onto a road is solid waste. The act of discharging this material onto the road was disposal of solid waste in a manner that violated 6 NYCRR 360-1.5(a).

ECL section 71-2703(1) provides, in part, that any person who violates any provision of ECL article 27, title 3 or 7, or any rule or regulation promulgated pursuant thereto, shall be liable for a civil penalty not to exceed $7,500 for each violation and an additional penalty of not more than $1,500 for each day during which such violation continues. Part 360 of 6 NYCRR was promulgated pursuant to ECL article 27, title 7, among other authority.

DEC Staff sought a penalty of $7,500 for the violation alleged in this matter, and argued that there "was actual impact to the environment from Respondent's discharge of the liquid waste." The complaint and other documents submitted by DEC Staff did not describe the impact, other than to describe the waste and to state it was discharged onto Aviation Road in Colonie. There is no indication of, for example, the effect the waste had or would have on fish, wildlife or vegetation, or on humans who might come in contact with the waste. The Respondent, however, defaulted and did not present any evidence concerning impacts or lack of them. It is not unreasonable to infer that wastewater containing detergent and materials cleaned off from carpets would be likely to have adverse effects if, for example, it ran into a body of surface water.

DEC Staff also argued that, "The pervasive nature of the violation shows indifference to compliance." The complaint and the motion papers do not allege repeated violations, nor that the Respondent has violated the ECL or its implementing regulations in the past. Despite this, the Respondent's failure to respond to the complaint and the nature of the violation (dumping waste onto a road) suggest that it would be appropriate to impose a substantial penalty.

The record does not indicate the amount of money the Respondent, or his employer, may have saved by discharging the waste onto a road rather than disposing of it properly. A search of past orders of the Commissioner did not reveal any prior orders that pertained to disposal of carpet cleaning waste, nor to disposal of waste on to a road in the manner alleged in this case. DEC Staff's motion papers did not identify any such cases

or the amount of penalties imposed for violations like the one alleged here. The Respondent, by defaulting, waived his opportunity to submit any evidence about lack of ability to pay the proposed penalty. Neither the complaint nor the motion for default judgment sought to require the Respondent to undertake any cleanup of the waste.

The Commissioner's Decision and Order in Matter of Alvin Hunt, d/b/a Our Cleaners stated:

> "On a motion for a default judgment, the ALJ reviews the proof offered in support of the penalty and remedial relief sought by staff, and makes a recommendation to the Commissioner whether such relief should be approved. In reviewing staff's submissions, the ALJ should consider whether the penalty sought (1) falls within the potential maximum penalty authorized by law, (2) is consistent with the Department's Civil Penalty Policy (Commissioner Policy DEE-1, June 20, 1990) and any other program specific guidance documents for assessing penalties after hearings (see Matter of Singh [Kuldeep], supra, at 10), (3) is warranted by the circumstances of the case (see Matter of Bice, Order of the Commissioner, April 19, 2006, at 2), and (4) is generally consistent with penalties imposed in other hearings in cases involving similar circumstances (see id.)..."
>
> "The ALJ's review of the penalty phase relief sought by staff is not an opportunity for the ALJ to substitute his or her own judgment for staff's. Where the penalty phase relief sought by staff reasonably satisfies the above criteria, the ALJ should recommend that the Commissioner impose the relief sought in the order on default. If, however, one or more of the above criteria are not satisfied, the ALJ may recommend an alternative penalty and provide an explanation of how the alternative penalty was determined, with reference to the above criteria." (Id., at 8-9).

In the present case, the penalty is consistent with these criteria with the possible exception that the Civil Penalty Policy may not support imposing the maximum penalty for this violation, due to the very limited proof concerning actual or potential environmental harm, the absence of proof of prior or multiple violations, and the absence of proof concerning avoided costs. No cases involving similar circumstances are documented, either in the motion papers or in the records of the DEC Office of Hearings and Mediation Services, that would allow for

comparison with penalties imposed in other hearings, nor are there any relevant guidance documents other than the Civil Penalty Policy.

CONCLUSIONS

1. Where service of a notice of hearing and complaint is by certified mail, service is complete when the notice of hearing and complaint are received by the respondent (6 NYCRR 622.3[a][3]). In the present case, service was complete on March 25, 2009. The Respondent's answer was due on or before April 14, 2009. The Respondent failed to submit a timely answer and is in default (6 NYCRR 622.4[a], 622.15[a]).

2. The Respondent violated 6 NYCRR 360-1.5(a) on April 28, 2008.

3. Pursuant to ECL section 71-2703(1), the Respondent is liable for a civil penalty not to exceed $7,500.

RECOMMENDATION

I recommend that the Commissioner issue an order imposing the relief sought in the motion for default judgment, unless the Commissioner determines that a penalty less than the maximum is appropriate.

/s/

Albany, New York
August 4, 2009

Susan J. DuBois
Administrative Law Judge