NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

by

DEC Case No.
R1-20170720-198

WASTE AWAY CARTING NY, INC., WASTE AWAY CARTING INC., and BEN PICCOLO individually and as operator of Waste Away Carting NY, Inc. and/or Waste Away Carting Inc.,

Respondents.

New York State Department of Environmental Conservation (DEC or Department) staff commenced this administrative enforcement proceeding by service of notice of hearing and complaint, dated August 3, 2017 on respondents Waste Away Carting NY, Inc. (Waste Away NY), and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc. (Piccolo) (collectively, respondents). The complaint alleged that respondents violated: (i) former 6 NYCRR 360-1.5(a) by disposing of solid waste material without a permit; and (ii) ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i) by receiving and storing solid waste material, specifically, construction and demolition (C&D) debris, without a permit, at a facility operated by respondents Waste Away NY and Piccolo located at 899 Long Island Avenue, Deer Park, New York (facility or site).

On August 19, 2019, Administrative Law Judge (ALJ) Michael S. Caruso issued a summary report concluding that respondents Waste Away Carting NY, Inc. and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc., violated former 6 NYCRR 360-1.5(a) by disposing of solid waste at the site without a permit, and violated ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i) by receiving and storing solid waste, in the form of C&D debris, at the facility without a permit. The ALJ concluded that Department staff failed to fully develop the record on a penalty but recommended that I assess a civil penalty of fifteen thousand dollars ($15,000).

By interim decision and order dated February 12, 2020, I adjudged respondents Waste Away NY and Piccolo to have violated former 6 NYCRR 360-1.5(a), ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i). I concluded, however, that the record required further development on the civil penalty and remanded the matter to the Office of Hearings and Mediation Services (*see Matter of Waste Away Carting NY, Inc.*, Interim Decision and Order of the Commissioner, February 12, 2020 [Interim Decision], at 2-4). I specifically noted that, in an adjudicatory

proceeding, Department staff "should request a specific penalty amount, and should provide an explanation of how that amount was determined, with reference to:

--the potential statutory maximum;
--the DEE-1 guidance;
--any program specific guidance document(s) . . .;
--other similar cases; and
--as relevant, any aggravating and mitigating circumstances relevant to the matter"

(Interim Decision at 4). I also referenced other factors, including the economic benefit of noncompliance, the gravity of the violations (including the actual or potential environmental harm), and the culpability of a respondent's conduct that must be considered (*see id.*).

Following the remand and based on its submissions, Department staff requested a civil penalty in the amount of five hundred sixty-one thousand dollars ($561,000). The ALJ has prepared a supplemental summary report, which is attached to this order and which I adopt, subject to my comments below.

According to Department staff, the solid waste disposal and storage violations were first observed on May 31, 2017, and continued until at least November 19, 2017, when Department staff revisited the site, for a total of 182 days (*see* Affidavit of MD Benazir Zaman Khan, sworn to March 30, 2020 [Khan Affidavit], ¶¶ 4,6). Respondents did not submit any response to Department staff's request for a civil penalty in the amount of $561,000 and, therefore, have failed to provide any material fact that would require a hearing. As the ALJ states, on this unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the civil penalty requested (*see* Supplemental Summary Report at 3-4).

ECL 71-2703(1)(a) provides that the penalty for any person who violates the provisions of, or who fails to perform any duty imposed by title 3 or 7 of article 27 or any rule or regulation promulgated pursuant thereto shall be liable for a civil penalty not to exceed seven thousand five dollars for each such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues.

Department staff made a prima facie showing that the maximum statutory penalty, based on the duration of the violations, is $561,000 (*see* Supplemental Summary Report at 3-4). Staff also made a prima facie showing through an attorney's affirmation that the owner of the property, Mica Realty & Construction Corp., which is not a respondent in this matter, spent in excess of $120,000 removing and disposing the contaminated solid waste that respondents abandoned at the site (*see* Affirmation of Marshall M. Stern, Esq., dated March 24, 2020 [Stern Affirmation], ¶¶ 2, 6). Staff demonstrated that C&D debris was contaminated and that the potential harm from storing and disposing the solid waste over Long Island's sole source aquifer warranted a high penalty (*see* Affirmation of David S. Rubinton, Esq., dated April 3, 2020 [Rubinton Affirmation], ¶ 7; *see also* Khan Affidavit, ¶¶ 6, 7).

The Department's Civil Penalty Policy dated June 20, 1990 (DEE-1) directs Department staff to make every effort to calculate and recover the economic benefit of non-compliance. Based on this record, I concur that the economic benefit of non-compliance is $120,000, which reflects monies that the owner of the property spent to remove the contaminated solid waste from the site. That economic benefit, however, does not reflect any revenue gained by respondents' illegal operation or the other benefits of delayed compliance (*see* Rubinton Affirmation, ¶¶ 6, 8). Our State laws and regulations mandate the proper handling and disposal of solid waste and, based on this record, an additional gravity component is warranted. Further, as the Department's attorney states, "[a]s Long Island contains a sole source aquifer, it is critically important that solid waste be properly handled and disposed in Long Island" (*see id.,* ¶ 7).

Although Department staff did not calculate a dollar amount for the gravity component of the penalty, the ALJ considered the remaining $441,000 of the requested $561,000 civil penalty to be attributed to the gravity component (*see* Supplemental Summary Report at 4). DEE-1 requires an analysis of the potential harm or actual damage caused by the violations and an analysis of the importance of the type of violation. As the ALJ notes, the regulations at issue here were promulgated, in part, to prevent the unpermitted release of solid waste into the environment and to control where and how solid waste is managed and disposed (*see id.* at 5). Here, the site of the illegal operation was located over a sole source aquifer, and as a result the potential for harm was increased. Relatedly, the solid waste at the site was contaminated (*see Matter of Waste Away Carting NY, Inc.*, Interim Decision and Order of the Commissioner, February 12, 2020, at 3, n3; *see also* Khan Affidavit ¶¶ 6, 7). The longer a violation continues uncorrected, the greater the risk of harm and, correspondingly, the greater the amount of the gravity component.

In evaluating an appropriate civil penalty, the ALJ has thoroughly considered the applicable statutory authority, related Departmental guidance, administrative precedent and relevant aggravating factors (*see* Supplemental Summary Report, at 4-5). Based on his evaluation, the ALJ has determined that a $125,000 gravity component penalty should be added to the $120,000 economic benefit component, for the assessment of a total civil penalty of two hundred forty-five thousand dollars ($245,000). I concur with the ALJ's assessment that this penalty is authorized and appropriate. I hereby direct that respondents pay this civil penalty to the Department within thirty (30) days of service of this order upon them.

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

I. Within thirty (30) days of service of this order upon respondents Waste Away Carting NY, Inc. and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc., respondents shall pay a civil penalty in the amount of two hundred forty-five thousand dollars ($245,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

II. The civil penalty payment shall be mailed to the following address:

David S. Rubinton, Esq.
Assistant Regional Attorney
NYSDEC- Region 1
SUNY @ Stony Brook
50 Circle Road
Stony Brook, New York 11790

III. Any questions or other correspondence regarding this order shall also be addressed to David Rubinton, Esq. at the address referenced in paragraph II of this order.

IV. The provisions, terms, and conditions of this order shall bind respondents Waste Away Carting NY, Inc. and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc., and their agents, successors and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos

Dated: Albany, New York
January 5, 2021

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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by

WASTE AWAY CARTING NY, INC., WASTE AWAY CARTING INC., and BEN PICCOLO individually and as operator of Waste Away Carting NY, Inc. and/or Waste Away Carting Inc.,

Respondents.

SUPPLEMENTAL SUMMARY REPORT

DEC Case No. R1-20170720-198

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (David S. Rubinton of counsel), for staff of the Department of Environmental Conservation

-- Waste Away Carting NY, Inc. and Ben Piccolo, respondents pro se

PROCEEDINGS

New York State Department of Environmental Conservation (DEC or Department) staff commenced this administrative enforcement proceeding by service of notice of hearing and complaint, dated August 3, 2017 on respondents Waste Away Carting NY, Inc. (Waste Away NY), and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc. (Piccolo) (collectively, respondents). The complaint alleged that respondents violated: (i) former 6 NYCRR 360-1.5(a) by disposing of solid waste material without a permit; and (ii) ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i) by receiving and storing solid waste material, specifically, construction and demolition (C&D) debris, without a permit, at a facility operated by respondents Waste Away NY and Piccolo located at 899 Long Island Avenue, Deer Park, New York (facility or site).[1]

On February 13, 2019, Department staff served a notice of motion for order without hearing and supporting papers on respondents' attorney. Respondents' attorney requested and was granted permission to withdraw by ruling dated June 26, 2019. The ruling also directed

[1] The solid waste management facility regulations, 6 NYCRR part 360, were repealed and replaced by 6 NYCRR parts 360 – 366 and 369, effective November 4, 2017. The violations stated in the complaint allegedly occurred on May 31, 2017. Accordingly, the former 6 NYCRR part 360 and its subparts are applicable to this matter.

respondents to obtain new counsel and advised respondents that if respondents failed to retain new counsel within thirty (30) days of the date of the ruling, Department staff's motion for order without hearing would be considered as an unopposed motion and ruled upon accordingly (*see Matter of Waste Away Carting NY, Inc.*, Ruling on Motion to Withdraw, June 26, 2019). Respondents failed to retain a new attorney and did not respond to Department staff's motion papers.

On August 19, 2019, I issued a summary report concluding that respondents Waste Away Carting NY, Inc. and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc., violated former 6 NYCRR 360-1.5(a) by disposing of solid waste at the site without a permit, and violated ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i) by receiving and storing solid waste, in the form of C&D debris, at the facility without a permit. In addition, I concluded that Department staff failed to fully develop the record on a penalty but recommended that the Commissioner assess a civil penalty of fifteen thousand dollars ($15,000).

By interim decision and order dated February 12, 2020, the Commissioner adjudged respondents Waste Away NY and Piccolo to have violated former 6 NYCRR 360-1.5(a), ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i). The Commissioner concluded, however, that the record required further development on the civil penalty and remanded the matter to the Office of Hearings and Mediation Services (*see Matter of Waste Away Carting NY, Inc.*, Interim Decision and Order of the Commissioner, February 12, 2020, at 2-4). By letter dated February 23, 2020, I advised the parties that the record would be further developed by submission of papers, and directed Department staff to request a specific penalty amount and to provide support for that amount through the application of DEE-1: Civil Penalty Policy (June 20, 1990) (DEE-1) and OGC-8: Solid Waste Enforcement Policy (November 17, 2010) (OGC-8). On February 24, 2020, DEC staff advised me that they were engaged in settlement discussions with a new attorney representing respondents. The new attorney, however, has not made an appearance by submission or otherwise in this matter.

The matter did not settle, and on April 3, 2020, Department staff served papers in support of staff's penalty request on respondents. A response from respondents was due on May 7, 2020. To date, no papers or communications have been received from respondents. Accordingly, I review staff's papers as an unopposed motion for order without hearing on the issue of the appropriate civil penalty.

Department staff requests a civil penalty in the amount of $561,000.00. In support of the request, Department staff submitted the affirmation of David S. Rubinton, Esq., (Rubinton Aff.) dated April 3, 2020; the affidavit of MD Benazir Zaman Khan, P.E. (Khan Aff.), sworn to March 20, 2020; and the affirmation of Marshall M. Stern, Esq. (Stern Aff.), dated March 24, 2020.

FINDINGS OF FACT

In addition to the findings of fact included in the August 19, 2019 summary report, the following facts are found based upon the papers submitted in support of staff's penalty request:

1. Department staff observed that respondents Waste Away NY and Piccolo disposed of and stored solid waste at the site from at least May 31, 2017 to November 19, 2017, for a total of 182 days. (*See* Rubinton Aff. ¶ 4; Khan Aff. ¶¶ 4, 6-7.)

2. Respondents Waste Away NY and Piccolo used the site as an illegal transfer station without the knowledge and consent of the landlord, Mica Realty & Construction Corp. (Mica) and without paying rent. (*See* Stern Aff. ¶¶ 4-5.)

3. Mica spent in excess of $120,000 to clean up the solid waste left at the site by respondents. (*See* Stern Aff. ¶ 6.)

4. The site is located over Long Island's sole source aquifer. (Rubinton Aff. ¶ 7.)

DISCUSSION

As stated in the August 19, 2019 summary report, "[s]ummary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." (*Matter of Frank Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, *adopting* ALJ Summary Report.) This is equally true in determining the amount of statutory civil penalties to be imposed as it is in determining the underlying liability.

According to Department staff, the solid waste disposal and storage violations were first observed on May 31, 2017 and continued until at least November 19, 2017 when Department staff revisited the site, for a total of 182 days (*see* Rubinton Aff. ¶ 4; Khan Aff. ¶¶ 4, 6-7). Respondents have not submitted any response to Department staff's request for a civil penalty in the amount of $561,000 and, therefore, have failed to provide any material fact that would require a hearing. On this unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the civil penalty requested.

On this remand, Department staff carries the burden of establishing prima facie entitlement to summary judgment as a matter of law on the penalty sought. As discussed below, Department staff made a prima facie showing that the maximum statutory penalty, based on the duration of the violations, is $561,000. Staff also made a prima facie showing through an attorney's affirmation that the landlord, Mica, spent in excess of $120,000 removing and properly disposing the contaminated solid waste that respondents abandoned at the site. Accordingly, a portion of the total economic benefit to respondents has been presented. Staff demonstrated that C&D debris was contaminated and that the potential harm from storing and disposing the solid waste over Long Island's sole source aquifer warrants a high penalty.

Furthermore, staff demonstrated that respondents illegally obtained possession of the site and operated an unpermitted solid waste management facility. When confronted by the Department, respondents became uncooperative. (*See* Rubinton Aff. ¶¶ 6-8.)

In determining the maximum penalty, Department staff applied ECL 71-2703(1)(a), which provides, "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by title 3 or 7 of article 27 of this chapter or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty not to exceed seven thousand five hundred dollars for each such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues." The Commissioner adjudged respondents liable for the two violations charged. The total single day penalty for the two violations is $15,000. Both violations continued for 182 days resulting in an additional penalty of $3,000 per day multiplied by 182 days or $546,000. With the addition of the initial penalty, the maximum penalty allowed by ECL 71-2703(1)(a) is $561,000. Accordingly, Department staff's penalty request is supported by law, but the question remains whether a request for the statutory maximum of this magnitude is supported by Department precedent and whether it is appropriate under the circumstances. I am unaware of any Commissioner's orders accessing a statutory maximum when that maximum is based on a six month continuation of the proven violations.

DEE-1 requires an analysis in support of an appropriate penalty that includes a discussion of the potential statutory maximum, an estimate of the economic benefit of delayed compliance, and a determination of a gravity component for non-compliance. I review staff's requested penalty and staff's basis for the penalty through the application of DEE-1 as well as OGC-8.

DEE-1 directs Department staff to make every effort to calculate and recover the economic benefit of non-compliance. The assessment and recovery of the economic benefit component of a penalty merely levels the playing field between the violator and those that comply. I agree with Department staff that at a minimum the economic benefit component is $120,000. That economic benefit does not take into account any revenue gained by respondents' illegal operation or the other benefit of delayed compliance. Based on this record, I conclude that a $120,000 economic benefit of non-compliance is supported and appropriate. At a minimum, the penalties should remove the economic benefit from respondents' failure to comply with the law. That however, only levels the playing field between violators and those that voluntarily comply with the law. Accordingly, a gravity component is required.

Although Department staff does not calculate a dollar amount for the gravity component of the penalty, I consider the remaining $441,000 of the requested $561,000 to be attributed to the gravity component. DEE-1 requires an analysis of the potential harm or actual damage caused by the violations and an analysis of the importance of the type of violation in the regulatory scheme in determining a preliminary gravity penalty component (DEE-1 § IV, D). Here, given the location of the site over a sole source aquifer, the potential for harm is increased. Moreover, as elaborated in DEE-1, the longer a violation continues uncorrected, the greater the risk of harm and, correspondingly, the greater the amount of the gravity component.

Considering the importance of these violations to the regulatory scheme, I turn to the regulations and OGC-8. The regulations at issue here were promulgated, in part, to prevent the unpermitted release of solid waste into the environment and control where and how solid waste is managed and disposed. An additional concern is that the solid waste was also contaminated, but the extent or severity of the contamination was not provided by staff (*see Matter of Waste Away Carting NY, Inc.*, Interim Decision and Order of the Commissioner, February 12, 2020, at 3, n3). Therefore, I conclude that the violations proven here are important to the regulatory scheme and that the violations constituted more than a minor deviation from the regulatory scheme.

The OGC-8 penalty range guide provides guidance for calculating the gravity component penalty, using the potential for harm or actual damage as one axis in the table and the extent of deviation from the requirement/importance to the regulatory scheme as the other axis. Department staff did not provide testimony regarding the application of the penalty range guide to the facts in this matter. Based on the violations, the amount of waste involved, and discussions of different classes of violations in OGC-8, I conclude that the potential for harm was moderate as was the deviation from the requirement or importance to the regulatory scheme. According to the penalty range guide, the gravity component penalty should be 45%-60% of the statutory maximum.

DEE-1 and OGC-8 allow aggravating factors to be considered to increase the gravity component penalty. In this matter, DEC staff has demonstrated that respondents have been uncooperative in addressing the violations, thus causing the landlord to remove and properly dispose of the waste. I conclude that 5% should be added to the gravity component due to that aggravating factor. Accordingly, the total gravity component should be 50%-65% of the statutory maximum. I conclude that DEC policies support a gravity component penalty of $220,500 (.50 x $441,000).

In addition to the Department's penalty policies, I reviewed prior Commissioner orders involving the violation of 6 NYCRR 360-1.5(a) and 360-1.7(a)(1)(i) and found penalties ranging from $15,000 to $90,000 with a portion of the penalty suspended on the condition that remedial work was conducted by respondents (*see* e.g. *Matter of Dalcamo,* Order of the Commissioner, December 17, 2013; *Matter of White*, Order of the Commissioner, December 9, 2009; *Matter of LMR Services Corp.,* Order of the Commissioner, August 23, 2007; *Matter of A-1 Compaction Corp.*, Decision and Order of the Commissioner, June 22, 1994). Those matters, however, did not establish or assess an economic benefit component of the penalty. Therefore, I view that range of penalties as example of the gravity component penalty.

Based on the discussion above and the record before me, I conclude a $125,000 gravity component penalty is supported and appropriate. Therefore, I conclude that a total payable penalty of $245,000 comprised of a $120,000 economic benefit component and a $125,000 gravity component is supported and appropriate.

RECOMMENDATIONS

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

1. Directing respondents Waste Away Carting NY, Inc. and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc., to pay a civil penalty in the amount of two hundred forty-five thousand dollars ($245,000) within thirty (30) days of service of the Commissioner's order on respondents;

2. Directing such other further relief as the Commissioner may deem just, proper, and appropriate.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: June 15, 2020
Albany, New York