

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

---

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

**ORDER**

DEC Case No.  
R4-2008-0703-103

- by -

**LAWRENCE G. WHITE,**

Respondent.

---

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this administrative enforcement proceeding against respondent Lawrence G. White, by service of a notice of hearing and complaint dated May 22, 2009. In accordance with 6 NYCRR 622.3(a)(3), the complaint, together with a notice of hearing, was served upon respondent by personal service on June 24, 2009.

The complaint alleged that respondent committed two violations of 6 NYCRR part 360 on property that he owns on Pannis Road<sup>1</sup> (tax map nos. 51-1-5.1 and 51-1-5.2) in the Town of Wright, Schoharie County, New York ("the site"). Specifically, the complaint alleged that respondent, by disposing of construction material at the site without a permit, violated 6 NYCRR 360-1.5(a)(2) and 6 NYCRR 360-1.7(a)(1)(i) of the Department's solid waste regulations.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on or about July 14, 2009, and was not extended by Department staff. Respondent failed to timely file an answer to the complaint.

Department staff filed a motion for default judgment, dated August 20, 2009, with the Department's Office of Hearings and Mediation Services. Respondent subsequently acknowledged receipt of Department staff's motion (see Respondent's Affidavit in

---

<sup>1</sup> The papers submitted by the parties reference the road as either Pannis Road or Panis Road, and the former spelling is used in this order.

Support of Motion to Open Default and to Serve Answer, September 16, 2009, ¶10, at 3).

The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick. By papers dated September 16, 2009, respondent moved to reopen the default. The ALJ did not receive respondent's September 16, 2009 papers until November 20, 2009, apparently as a result of an error in the initial transmission of the papers.

The ALJ held a conference call with the parties on November 20, 2009, to review the status of the matter. During the conference call, Department staff stated that it opposed respondent's motion to reopen the default, but indicated that it would not be filing a written response in opposition.

The ALJ prepared the attached ruling and default summary report which I adopt as my decision in this matter subject to my comments below.

With respect to the default, respondent in its papers has failed to demonstrate that good cause for the default exists. As discussed by the ALJ, respondent's argument that he and his attorney were unable to respond because they were engaged in other activities is insufficient to reopen the default.

Once an administrative law judge concludes that the requirements for a default judgment set forth at 6 NYCRR 622.15 have been met, the ALJ must determine whether the complaint states a claim upon which relief may be granted, and must consider whether the requested civil penalty and any remediation are warranted and sufficiently supported (see Matter of Alvin Hunt, Decision and Order of the Commissioner, July 25, 2006, at 4-5).

Department staff's complaint alleges facts that state a claim upon which relief may be granted. As set forth in the complaint, respondent disposed of construction material at an unpermitted facility, in violation of 6 NYCRR 360-1.5(a)(2), and is operating an unpermitted solid waste management facility at the site, in violation of 6 NYCRR 360-1.7(a)(1)(i). Nothing in the record indicates that the site is otherwise exempt from the solid waste facility management permitting requirements contained in 6 NYCRR part 360.

Section 71-2703(1) of the Environmental Conservation Law ("ECL") authorizes the Commissioner to impose an administrative penalty for the violation of titles 3 or 7 (which title relates

to solid waste management activities) of article 27 or any rule or regulation promulgated pursuant thereto not to exceed \$7,500 for a first violation and \$1,500 for each day the violation continues. Based on the record of this proceeding, the ALJ recommends that the staff-requested civil penalty of \$15,000 be assessed. In addition, the statute provides that the Commissioner may enjoin any person from continuing the violation (see id.).

Department staff's papers do not indicate the duration of the violations noted at the site. Respondent, however, has indicated that he had been dealing with Department staff for more than one year with respect to the site (see Respondent's Affidavit in Support of Motion to Open Default and to Serve Answer, September 16, 2009, ¶5, at 1-2). Although the record does not indicate the estimated amount of the material disposed, or the extent of the disposal area at the site, the record is sufficient to support the recommended civil penalty.

The illegal disposal of construction material at the site must cease and the disposal area at the site needs to be remediated or otherwise closed in accordance with applicable regulatory requirements. To that end, respondent is directed to file with Department staff, within thirty (30) days of the service of this order upon him, an approvable work plan to remediate or close the disposal area at the site. Such remediation or closure must also address any non-disposal areas at the site that have been impacted by the disposal activity.

Based on the record before me, and in recognition of the costs of remediation or closure, I have determined to suspend half of the civil penalty conditioned on respondent's remediation or closure of the disposal area at the site within ninety (90) days of the service of this order upon him, subject to any extensions of time granted by the Regional Director for DEC Region 4.

To provide confirmation of proper off-site disposal, in the event that respondent transports material disposed at the site to some other location for disposal, respondent shall provide Department staff with the name and address of that location and copies of all approvals and documentation relating to that subsequent disposal.

**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's motion to reopen the default is denied.

III. Respondent Lawrence G. White 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.

IV. Respondent Lawrence G. White is adjudged to have violated 6 NYCRR 360-1.5(a)(2) and 6 NYCRR 360-1.7(a)(1)(i) on property he owns located on Pannis Road, Town of Wright, Schoharie County, New York (tax map nos. 51-1-5.1 and 51-1-5.2).

V. Respondent Lawrence G. White, is assessed a civil penalty in the amount of fifteen thousand dollars (\$15,000), of which seven thousand five hundred dollars (\$7,500) is suspended on the condition that respondent, within ninety (90) days of the service of this order upon him:

A. Remediate or close the disposal area at the site, and

B. Address any non-disposal areas on the site that have been impacted by disposal activity,

subject to any extension of time granted by the Regional Director for DEC Region 4.

VI. The non-suspended portion of the civil penalty (that is, seven thousand five hundred dollars [\$7,500]) is due and payable within thirty (30) days after service of this order on respondent. Payment of this penalty shall be made by cashier's check, certified check, or money order drawn to the order of the "New York State Department of Environmental Conservation" and delivered to:

Jill Phillips, Esq.  
Assistant Regional Attorney  
NYSDEC - Region 4  
1130 North Westcott Road  
Schenectady, New York 12306.

Should respondent fail to remediate or close the disposal area at the site in the timeframe established under this order or comply with other conditions set forth in this order (including but not limited to the filing of a work plan with Department staff and the timely payment of the non-suspended portion of the penalty), the suspended portion of the penalty shall become immediately due and payable. In the event that the suspended portion of the penalty becomes due and payable, it is to be submitted in the same form and to the same address as set forth above.

VII. Respondent is directed to immediately stop any disposal of waste at the site.

VIII. Within thirty (30) days of the effective date of this order, respondent shall submit to the Department an approvable work plan which addresses the remediation of the site, or provides for the closure of the disposal area at the site. The work plan, once approved by the Department, will become enforceable under this order. The work plan is to include:

- a schedule of the activities that respondent will be undertaking to remediate or close the disposal area at the site;
- any measures necessary to address non-disposal areas on the site that have been impacted by the disposal activity;
- and a description of each activity or measure.

IX. In the event that respondent transports material that has been disposed at the site to some other location for disposal, respondent shall provide Department staff with the name and address of that location and copies of all approvals and documentation relating to that subsequent disposal.

X. All communications from respondent to the Department concerning this order shall be made to:

Jill Phillips, Esq.  
Assistant Regional Attorney  
NYSDEC - Region 4  
1130 North Westcott Road  
Schenectady, New York 12306,

provided, however, that any request for an extension of time to complete the remediation or closure of the disposal area at the site shall be submitted to the Region 4 Regional Director Eugene Kelly, at the referenced address, with a copy to Assistant Regional Attorney Jill Phillips.

XI. The provisions, terms, and conditions of this order shall bind respondent Lawrence G. White, and his agents, successors and assigns, in any and all capacities.

For the New York State Department of  
Environmental Conservation

/s/

By:

\_\_\_\_\_  
Alexander B. Grannis  
Commissioner

Dated: December 9, 2009  
Albany, New York

**NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

---

In the Matter of the Alleged Violations  
of Article 27 of the Environmental  
Conservation Law and Part 360 of the  
Official Compilation of Codes, Rules and  
Regulations of the State of New York,

**RULING and DEFAULT  
SUMMARY REPORT**

DEC Case No.  
R4-2008-0703-103

- by -

**LAWRENCE G. WHITE,**

Respondent.

---

Summary

This ruling and default summary report denies respondent's motion to reopen his default because he has failed to show a reasonable excuse for his failure to timely answer and recommends that the Commissioner grant the motion made by the staff of the Department of Environmental Conservation (DEC Staff) for a default judgment.

Proceedings

On June 24, 2009, Environmental Conservation Officer Chris Valenty served respondent Lawrence G. White with a notice of hearing and complaint. In the complaint, staff alleged two violations of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 360 related to respondent's dumping and disposing of construction material on two parcels of land he owns located on Pannis Road, Wright, New York (tax map #s 51-1-5.1 and 51-1-5.2) (Schoharie County). Specifically, the complaint alleged respondent violated: (1) 6 NYCRR 360-1.5(a) by disposing of construction material at the site and covering it with fill; and (2) 6 NYCRR 360-1.7(a)(1) by operating a solid waste management facility at the site without a permit.

Pursuant to 6 NYCRR 622.4(a), respondent had 20 days from receipt of the complaint to serve an answer. That date was July 14, 2009, and no answer was received. Respondent did send a fax to DEC Staff counsel on July 14, 2009, stating he would contact DEC Staff member George Elston to schedule a site visit and review Mr. White's plan. The fax also stated that respondent's counsel would be contacting DEC Staff counsel.

Pursuant to 6 NYCRR 622.15, by papers dated August 20, 2009, DEC staff filed a copy of a default motion with the Department's Office of Hearings and Mediation Services (OHMS). Chief Administrative Law Judge James T. McClymonds assigned this matter to me on August 21, 2009.

By letter dated August 27, 2009, respondent's counsel wrote to DEC Staff counsel explaining he had just been retained and requesting an extension of time to file an answer. By letter dated September 3, 2009, DEC Staff counsel declined respondent's counsel's request. On September 9, 2009, respondent's counsel telephoned me to inform me that he would be filing a motion to reopen the default. I then confirmed this by email to both parties.

By papers dated September 16, 2009, but not received until November 20, 2009, due to an email transmission error, respondent moved to reopen his default and serve an answer. A conference call was held on November 20, 2009, with the parties. On this call DEC Staff stated its opposition to respondent's motion but declined the opportunity to reply in writing.

#### Discussion

\_\_\_\_Two motions are pending: (1) respondent's motion to reopen his default; and (2) DEC Staff's motion for a default judgment.

#### **Respondent's motion to reopen the default**

By papers dated September 16, 2009, but not received until November 20, 2009, respondent moved to reopen his default and serve an answer. His papers consisted of an affidavit, a proposed verified answer and a cover letter from his counsel.

In his affidavit, respondent acknowledges receipt of the May 22, 2009, complaint and the motion for default. He states that for a period of over one year, he and his engineer had been in contact with various DEC Staff members regarding the site. These contacts included at least one meeting at the site and DEC Staff's directing excavations at the site, which respondent claims he was in the process of remediating. In both his affidavit and his proposed answer, respondent denies placing any material at the site, rather he claims that the material was either placed at the site prior to his ownership or after his ownership without his consent, permission or knowledge.



The record includes a copy of a fax that respondent sent to DEC Staff counsel on the twentieth day after he was served with the complaint. This fax states he would contact DEC Staff member George Elston to schedule a site visit and review Mr. White's plan. The fax also stated that respondent's counsel would be contacting DEC Staff counsel.

Mr. White states he then attempted to contact his attorney, who was busy with a protracted trial. He continues that during June, July and August 2009, he was very busy with construction projects including contracts at two local school districts and a project in Texas. He was finally able to contact his attorney on September 9, 2009, after DEC Staff's motion for default judgment was received.

Motions for reopening a default judgment are addressed in 6 NYCRR 622.15(d):

"(d) Any motion for a default judgment or motion to reopen a default must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with CPLR section 5015. The ALJ may grant a motion to reopen a default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists."

In his affidavit, respondent denies placing any material at the site. Rather, he claims that the material was either placed at the site prior to his ownership or after his ownership without his consent, permission or knowledge. This shows a meritorious defense. However, respondent fails to show good cause for the default. His claim that he was too busy to file an answer or talk to his attorney does not constitute good cause for default. If it were, nearly all defaults could be reopened. The Commissioner may wish to take notice of the fact that the respondent did contact DEC Staff counsel by fax within twenty days of being served with the complaint.

**Ruling:** Respondent's motion to reopen his default is denied because he has not demonstrated good cause for the default.

#### **DEC Staff's motion for default judgment**

\_\_\_\_ According to the Department's regulations, a respondent's failure to file a timely answer to a complaint constitutes a default and waiver of respondent's right to a hearing (6 NYCRR

622.12(b), 622.15(a)). In these circumstances, Department staff may move for a default judgment, the motion to contain: (1) proof of service of the notice of hearing and complaint or motion for order without hearing; (2) proof of the respondent's failure to file a timely answer; and (3) a proposed order (6 NYCRR 622.15(b)).

Attached to the affirmation of Jill Phillips, Assistant Regional Attorney, dated August 20, 2009 are Environmental Conservation Officer Chris Valenty's affidavit of personal service of the notice of hearing and complaint dated June 24, 2009. See, Exhibit A. Included in Ms. Phillips' affirmation is information related to the civil penalty amount sought. In her affirmation, Ms. Phillips states that staff has not received an answer to the complaint, and the time to file one has passed. See, Phillips Affirmation, ¶ 4; 6 NYCRR 622.4(a).

Staff has also submitted a copy of the notice of hearing and complaint (Exhibit B) and a proposed order (Exhibit C) attached to Ms. Phillips' affirmation.

Based upon the above submissions, the staff has met the requirements for a default judgment.

#### Penalty

\_\_\_\_\_ In her affirmation, Ms. Phillips requests a civil penalty of \$15,000 in satisfaction of the violations alleged in the complaint and in the motion papers. Ms. Phillips states that the civil penalty is within the range authorized by ECL 71-2703(1) and that the penalty is justified due to the fact that the dumping at the site and covering it with fill resulted in an actual impact to the environment, and that the pervasive nature of the violations demonstrated indifference to compliance. The requested penalty of \$15,000 is less than the \$20,000 requested in the complaint.

In addition to the civil penalty, DEC Staff also seeks the Commissioner to include in its order a provision requiring the respondent to submit to DEC Staff for approval within 30 days, a work plan which addresses the removal of the solid waste at the site or a closure plan which meets the requirements of section 360-7.3(b)(9). Upon approval by DEC Staff, the plan would become enforceable under the order.

ECL 71-2703(1) provides for a maximum penalty for violations of 6 NYCRR 360 of "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." DEC staff's request for a penalty of \$15,000 is significantly less than the maximum calculated penalty that could be imposed.

Recommendation and Conclusion

Respondent has failed to demonstrate that he is entitled to have the default reopened and his motion should be denied. DEC Staff's motion for a default judgment meets the requirements of 6 NYCRR 622.15(b). In addition, I find staff's request for a civil penalty of \$15,000 and submission of a work plan or closure plan for the site appropriate. Therefore, in accordance with 6 NYCRR 622.15(c), this summary report is submitted to the Commissioner, accompanied by a proposed order.

Dated: Albany, New York

/s/

\_\_\_\_\_  
P. Nicholas Garlick  
Administrative Law Judge