STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 23 of the New York State Environmental Conservation Law

-by-

GEORGE ANDERSON and DOUGLAS ANDERSON,

Respondents.

ORDER

DEC Case No. R9-20110922-36

This administrative enforcement proceeding concerns allegations by staff of the New York Department of Environmental Conservation (Department or DEC) that respondents violated Environmental Conservation Law (ECL) § 23-2711(1) when, in 2010 and 2011, they conducted mining activities at 137 Bragg Road in the Town of Carroll, Chautauqua County (site), without the required Department permit.

The matter was initially commenced by service on both respondents of a Notice of Hearing and Complaint dated November 28, 2011. After the matter was assigned to Administrative Law Judge (ALJ) Edward Buhrmaster, a hearing was scheduled for June 5, 2013, but was adjourned twice to accommodate respondent George Anderson's medical treatments.

Following the second adjournment, which adjourned the hearing without date, Department staff served a motion for order without hearing. Staff's motion seeks an order:

(i) holding respondents in violation of ECL 23-2711(1) and ECL 71-1307;

(ii) directing respondents to cease mining at the site and to reclaim the property to the satisfaction of Department staff within 30 days after issuance of the order or, in the alternative, if respondents seek to engage in regulated mining activities at the site, directing respondents to submit a complete and acceptable mining permit application within 30 days of issuance of the order; and

(iii) directing respondents to pay, jointly and severally, a civil penalty in the amount of $86,520 (see Motion for Order Without Hearing, at Wherefore Clause ¶¶ I-IV).

Staff's motion was supported by an affidavit of Paul Giachetti, a mined land reclamation specialist with the Department, with attached exhibits, and an affirmation of Teresa J. Mucha, Esq., an Assistant Regional Attorney for Region 9, with attached exhibits. In response to staff's motion, George Anderson submitted a letter that was co-

signed by respondent Douglas Anderson. Respondents submitted no affidavits or other evidence in response to staff's motion papers.

Following the parties' submissions, ALJ Buhrmaster prepared the attached hearing report (Hearing Report), in which he made findings of fact based upon the parties' submissions, and concluded that respondents violated ECL 23-2711(1) by mining more than 750 cubic yards of minerals within twelve successive calendar months from the site (Hearing Report, at 16). ALJ Buhrmaster recommended that I:

(i) grant Department staff's motion for order without hearing and issue an order holding that respondents violated ECL 23-2711(1);
(ii) direct respondents to immediately cease all mining at the site and reclaim the site or, if they seek to engage in regulated mining activities at the site, submit a complete and acceptable permit application to Department staff; and
(iii) hold respondents jointly and severally liable for a civil penalty in the amount of $50,000 (id.).

Upon review of the record I adopt ALJ Buhrmaster's hearing report, subject to my comments below.

Department staff has supported its request for a civil penalty by submitting an analysis based upon the applicable statute, ECL 71-1307(1), and the Department's Civil Penalty Policy, DEE-1 (issued June 20, 1990) (see Affidavit of Paul Giachetti, sworn to August 1, 2013 [Giachetti Aff.] ¶¶ 22-41). ECL 71-1307(1) provides that any person who violates any provision of article 23 of the ECL shall be liable for a civil penalty not to exceed eight thousand dollars and an additional penalty of two thousand dollars for each day during which the violation continues. Staff determined the statutory maximum possible penalty to be $982,000, which represents the sum of eight thousand dollars for the first day of violation and two thousand dollars for each of the 487 days (September 1, 2010 to December 31, 2011) of continuing violation. Staff then considered the transactions with the Town of Carroll and Nelson Bros, Inc., relating to the loads of gravel, during this period to calculate a "minimum" penalty, and made an upward penalty adjustment based on economic benefit to respondents of the violations. Staff then made a further upward adjustment of 40% based on respondents' culpability, lack of cooperation, history of noncompliance, potential harm for mining without conditions imposed under an approved mined land use plan and reclamation plan and the importance of such permits to the regulatory scheme (see id., Exhibit [Ex.] E). Based on its analysis, staff requested a total civil penalty of $86,250.

As ALJ Buhrmaster stated, "[t]he absence of a mining permit is a serious violation" (Hearing Report, at 10), and the ALJ recounted prior violations by respondents dating back to 1982 (see id. at 10-12). The ALJ also noted that the site has never been properly permitted (see id. at 11; see also Giachetti Aff. ¶ 32 [referencing respondent George Anderson's knowledge of the requirement for a mining permit and his long history of noncompliance with New York's Mined Land Reclamation Law]). The ALJ

also stated that respondents have brought several actions in court relating to the Department's attempts to enforce the ECL against them, and have been assessed sanctions for initiating such litigation (see id. at 12-15; see also Affirmation of Teresa J. Mucha dated August 1, 2013 [Mucha Aff.], Ex. F [transcript of hearing before New York State Supreme Court Justice James H. Dillon]).

In considering the penalty to be assessed, both staff's request and the ALJ's recommendation are well within the statutory maximum that could be imposed here.[1] In considering staff's penalty request, I am not relying on staff's formula in determining the penalty. Certain aspects of staff's calculations are unclear, including the reason for establishing a "minimum" penalty based on the transactions with the Town of Carroll and Nelson Bros, Inc., and the use of 40% as an upward adjustment.

Although the ALJ determined that a substantial monetary penalty was warranted (see Hearing Report, at 9), he concluded that staff's penalty request was "excessive," and recommended a penalty of $50,000. The ALJ's recommended penalty was "based on the understanding that while the respondents' operations posed a risk of environmental harm, there is no evidence of the actual harm they have caused. Nor is there evidence that the mining occurred in an especially sensitive environmental setting" (id.; see also id. at 10).

I decline to adopt the ALJ's recommended penalty amount, which I conclude is based in part on too narrow an application of the gravity component factors established by DEE-1. DEE-1 sets forth two preliminary gravity factor components: (1) potential harm and actual damage; and (2) importance to the regulatory scheme (see DEE-1, at 7-8). "Potential Harm and Actual Damage" focuses on "whether and to what extent the respondent's violation resulted in or could potentially result in loss or harm to the environment or human health" (see DEE-1, at 7 [emphasis added]). The longer a violation continues uncorrected or unremediated, "the greater is the risk of harm to and loss of benefit from the natural resource and, correspondingly, the greater the size of the gravity component" (see id., at 8). "Importance to the Regulatory Scheme" focuses on "the importance of the violated requirement in achieving the goal of the underlying statute" (see id.). For an individual or entity to undertake an action that requires a DEC permit, without first obtaining the permit, "is always a serious matter" (id.).

In this instance, the record is clear that respondents conducted an unpermitted mining operation in violation of the Environmental Conservation Law, without any approved reclamation plan (see, e.g., Giachetti Aff., ¶ 29). The gravel pit at the site was mined for a two year period without a permit (see Hearing Report, at 4 [Finding of Fact No. 2]). There is no question that the operation of this mine for a substantial period of time during which considerable gravel material was extracted and removed, absent any permit and any Department-approved reclamation plan, could potentially result in loss or harm to the environment. Furthermore, the respondents' failure to obtain the required

[1] A review of the papers indicates that the maximum statutory calculation should be $980,000 -- that is, $8,000 for September 1, 2010 and $972,000 for the period September 2, 2010 through December 31, 2011 ($2,000 times 486 days).

mining permit thwarts the intent of the statute (see ECL 23-2703[1]) and undermines the Department's ability to review, and establish appropriate conditions governing, the mining activities on the site. Ensuring that mining activities subject to the State's Mined Land Reclamation Law are conducted in accordance with its requirements is of high priority to the Department's regulatory framework. Accordingly, respondents' illegal activities warrant a substantial penalty.[2]

For purposes of my evaluation, I have first considered the maximum possible statutory penalty that could apply pursuant to ECL 71-1307(1). I have already addressed in this order the preliminary gravity component factors -- potential harm and actual damage and importance of the permit in question to the regulatory scheme -- that support a substantial penalty. Furthermore, as staff indicates, respondents' noncompliance with the State's Mined Land Reclamation Law has resulted in their avoidance of substantial costs (see Giachetti Aff., ¶ 27). The ALJ properly noted that the civil penalty must be sufficient to recover the economic benefit of respondents' noncompliance (see Hearing Report, at 9-10). Staff has also analyzed penalty adjustment factors under DEE-1 (see DEE-1, at 9-11), including culpability, history of noncompliance and lack of cooperation (see, Giachetti Aff, ¶¶ 32-40 [documenting, in part, approximately thirty years of respondent noncompliance with the State's Mined Land Reclamation Law; see also Hearing Report, at 10-11 [discussing the seriousness of respondents' noncompliant activities, including the absence of a reclamation plan to ensure a return of the property to productive use once mining has ceased]). Respondents' culpability, history of noncompliance, and lack of cooperation, in addition to the gravity component factors, respondents' avoidance of substantial costs, and the need to recover the economic benefit of noncompliance, further support a substantial penalty in this matter.

Based on this record, I conclude that a penalty closer to the amount recommended by Department staff is reasonable and authorized. Accordingly, I hereby assess against respondents, jointly and severally, a civil penalty in the amount of eighty thousand dollars ($80,000), to be paid within thirty (30) days of service of this order on each respondent. As to the remedial options requested by Department staff and recommended by the ALJ, such relief is authorized and warranted. Respondents shall immediately cease all mining at the site and either reclaim the site or, if they want to engage in regulated mining activities, submit a complete and acceptable permit application to Department staff, within thirty (30) days of service of this order on each respondent.

Finally, I agree with the ALJ and reject respondents' arguments alleging violations of their rights under the federal and state constitutions (see Hearing Report, at 13-14). In this regard, given the broad public health, safety and environmental protection purposes of the State's Mined Land Reclamation Law, including wise resource management and the strong public policy in favor of the reclamation of mined sites (see

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[2] To the extent that the ALJ is suggesting in his discussion of harm that it would be helpful for staff in such enforcement proceedings to provide a more detailed description of the site, the mining operation itself, and the environmental resources that may or have been impacted (e.g., specific water resources) , I concur. However, based on this record, staff has provided a sufficient demonstration with respect to the preliminary gravity component factors.

ECL 23-2703; Matter of Frew Run Gravel Prods., Inc. v Town of Carroll, 71 NY2d 126, 132-133 [1987]), the reasonable regulation of mining in New York is clearly within the valid exercise of the State's police powers.

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for an order without hearing is granted. Respondents George Anderson and Douglas Anderson, jointly and severally, are adjudged to have violated ECL 23-2711(1) by conducting mining activities at 137 Bragg Road in the Town of Carroll, Chautauqua County (site), without the required Department permit.

II. Respondents George Anderson and Douglas Anderson, jointly and severally, are assessed a civil penalty in the amount of eighty thousand dollars ($80,000), which shall be due and payable within thirty (30) days of service of this order upon each respondent. Payment shall be made in the form of a cashier's check, certified check, or money order made payable to the order of the "New York State Department of Environmental Conservation," and shall be mailed or hand-delivered to:

New York State Department of Environmental Conservation
Region 9 Office
270 Michigan Avenue
Buffalo, New York 14203-2999
Attention: Teresa J. Mucha, Assistant Regional Attorney

III. Respondents George Anderson and Douglas Anderson shall immediately cease all mining at the site and, within thirty (30) days after service of this order upon each respondent, shall reclaim the property to the satisfaction of the Department, in accordance with 6 NYCRR 422.3, including the following:

A. Removal of machinery, refuse, spoil and personal property and related equipment from the site;
B. Backfilling or cutting any slopes to achieve grades of 2:1;
C. Replacing topsoil over the affected areas; and
D. Seeding and mulching reclaimed areas with a perennial grass/legume mix.

IV. In the alternative to the provisions of paragraph III above, if respondents George Anderson and Douglas Anderson want to engage in regulated mining activities at the site, they must submit, within thirty (30) days of service of this order upon each respondent, a complete and acceptable mining permit application to the Department.

V. Any questions or other correspondence regarding this order shall also be addressed to the attention of Teresa J. Mucha, Esq. at the address referenced in paragraph II of this order.

VI. The provisions, terms and conditions of this order shall bind respondents George Anderson and Douglas Anderson, and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: ___________/s/__________
Joseph J. Martens
Commissioner

Dated: Albany, New York
March 6, 2014

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NY 12233-1550

In the Matter

\- of -

Alleged violations of Article 23 of the New York State Environmental Conservation Law by:

GEORGE ANDERSON and
DOUGLAS ANDERSON,

Respondents.

NYSDEC Case No. R9-20110922-36

HEARING REPORT

\- by -

______________/s/_____________
Edward Buhrmaster
Administrative Law Judge

November 5, 2013

PROCEEDINGS

Department of Environmental Conservation ("DEC") Staff initiated this action by personal service of a notice of hearing and complaint, dated November 28, 2011, on both George and Douglas Anderson, respondents. The complaint charged the respondents with mining without a required DEC permit, in violation of Environmental Conservation Law ("ECL") Section 23-2711(1). Neither respondent filed a formal answer to the complaint; however, George Anderson moved, unsuccessfully, for a stay of the action in State Supreme Court.

After reasonable attempts to settle the matter, including the scheduling of a calendar call at which the respondents failed to appear, DEC Staff filed a statement of readiness, dated April 5, 2013, with DEC's Chief Administrative Law Judge, James T. McClymonds, who then assigned the matter to me.

By a hearing notice dated May 7, 2013, I scheduled a hearing to commence on June 5, 2013, at DEC's Region 9 office in Buffalo. In order to accommodate George Anderson's medical treatments, the hearing was subsequently adjourned to July 10, 2013, and then adjourned without date. DEC Staff consented to both adjournments; however, at the time of the second adjournment, DEC Staff stated its intent to serve a motion for order without hearing, rather than have the hearing rescheduled again.

DEC Staff's motion for order without hearing, the administrative equivalent of a summary judgment motion, was made consistent with Section 622.12 of Title 6 of the New York Codes, Rules and Regulations ("6 NYCRR 622.12"). Apart from the motion itself, dated August 1, 2013, DEC Staff's papers include a supporting affirmation of Teresa J. Mucha, an assistant Region 9 attorney, and a supporting affidavit of Paul Giachetti, a mined land reclamation specialist in DEC's Division of Mineral Resources, who claims knowledge of the facts and circumstances of the violations alleged in the complaint.

DEC Staff sent its papers to George and Douglas Anderson on August 2, 2013, by certified mail, return receipt requested. According to the certified mail return receipt cards produced by Ms. Mucha, the papers were delivered to and signed for by Douglas Anderson on August 6, 2013, and by George Anderson on August 7, 2013.

In its papers, DEC Staff said a response to its motion would be due within 20 days of the respondents' receipt of it. The respondents co-signed a letter dated August 13, 2013, requesting an additional 30 days from the return date so that they might file an appropriate response, citing unspecified "personal situations" that did not allow for a response in the timeframe set by DEC Staff. DEC Staff said that it did not oppose the request, and, for that reason, I extended the respondents' deadline to September 26, 2013, as confirmed in my letter of August 27, 2013.

By letter of September 24, 2013, George Anderson responded to DEC Staff's motion. The letter was co-signed by Douglas Anderson, indicating his approval of it.

Unlike DEC Staff's motion papers, the Andersons' response did not include supporting affidavits. However, it did include George Anderson's notice of appeal from a U.S. District Court Decision and Order denying him injunctive relief.

By letter of September 26, 2013, DEC Staff provided a copy of the Decision and Order referred to by Mr. Anderson, and said that it stemmed from a federal court action that is not related to DEC's motion for order without hearing. Apart from that, DEC Staff said that the notice of appeal and the underlying order demonstrate that there is no court-ordered injunction that would preclude the adjudication of this administrative enforcement action.

Accordingly, DEC Staff requested that the record be closed and that a determination be made on its pending motion.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, George Anderson and his son, Douglas Anderson, engaged in mining activities without a required permit under New York State's Mined Land Reclamation Law ("MLRL"), in violation of ECL Articles 23 and 71, at property owned by George Anderson at 137 Bragg Road in the Town of Carroll, Chautauqua County. More particularly, DEC Staff asserts that the Andersons mined at least 2,943 cubic yards of material from the property within a 12 successive calendar month period from 2010 through 2011, in violation of ECL Section 23-2711(1).

Relief Requested by DEC Staff

DEC Staff requests an order finding the respondents in violation of ECL Sections 23-2711(1) and 71-1307, and directing them to pay, jointly and severally, a civil penalty in the amount of $86,520.

DEC Staff also requests that the respondents be directed to immediately cease all mining at the property and to reclaim the property to the satisfaction of DEC Staff, in accordance with 6 NYCRR 422.3, by no later than 30 days after the order's issuance. At a minimum, DEC Staff asserts, the reclamation must include the removal of machinery, refuse, spoil, personal property and related equipment; the backfilling or cutting of any slopes to achieve grades of 2:1; the replacement of topsoil over the affected areas; and the seeding of reclamation areas with a perennial grass/legume mix, as well as the mulching of such areas.

As an alternative to reclamation, should the respondents want to engage in regulated mining activities at the property, DEC Staff requests that they be ordered to submit a complete and acceptable mining permit application within 30 days of issuance of an order.

Position of the Respondents

According to the respondents, DEC lacks jurisdiction over this matter because it involves constitutional issues. The respondents say that the New York State Constitution does not empower the State Legislature to regulate private individuals with laws regarding mining and the sale of minerals to support a family. Also, the respondents claim that DEC Staff's motion for order without hearing is a re-argument of a 1996 action that was dismissed with prejudice in New York State Supreme Court.

FINDINGS OF FACT

The following facts are determined as a matter of law on DEC Staff's motion for order without hearing.

1. Respondent George Anderson owns property at 137 Bragg Road in the Town of Carroll, Chautauqua County.

2. This property contains a gravel pit at which mining occurred during the years 2010 and 2011, in the absence of a permit under the MLRL (ECL Article 23, Title 27) authorizing such activity.

3. During calendar year 2011, Nelson Bros. Inc., a construction business in Frewsburg, New York, purchased 2,015 cubic yards of gravel from the Anderson pit.

4. Nelson Bros. paid $16,000 for the gravel in six checks written between July 2011 and February 2012 to Douglas Anderson, George Anderson's son.

5. Richard Nelson, the owner of Nelson Bros., negotiated the purchase of the gravel with George Anderson. The gravel was loaded into Nelson Bros. trucks by equipment operated at the mine site by Douglas Anderson.

6. The Town of Carroll purchased 133 cubic yards of gravel from the Anderson mine on September 1, 2010, and purchased another 263 cubic yards from the Anderson mine on September 7, 2010.

7. The Town paid $2,376 to Douglas Anderson for the gravel purchased in September 2010.

8. The Town of Carroll purchased a total of 532 cubic yards of gravel from the Anderson mine in July 2011.

9. The Town paid $3,724 to Douglas Anderson for the gravel purchased in July 2011.

10. The gravel purchased by the Town of Carroll was loaded into Town trucks by a bucket loader operated by Douglas Anderson. The trucks then conveyed the gravel to locations where it was used for road projects including paving.

11. While at the Anderson mine on July 13, 2011, Paul Giachetti, a DEC mineral resources specialist, verbally advised Douglas Anderson of DEC's mining permit requirement. However, he was ignored by Mr. Anderson, who continued to load trucks with mined material.

12. The Anderson mine was the subject of a prior DEC enforcement action against George Anderson that culminated in a Commissioner's order, dated October 22, 1985.

13. In that matter, the Commissioner found that George Anderson violated ECL Section 23-2711 during the years from 1982 to 1984 by mining more than 1,000 tons of minerals in 12 consecutive months without a DEC permit. The Commissioner also found that George Anderson had acted with disregard of the MLRL despite repeated warnings by DEC Staff and had avoided the costs of reclaiming the mine site.

14. Apart from assessing a civil penalty, the Commissioner directed George Anderson to comply with the permitting requirement, and ordered that he either submit a complete and acceptable mining permit application or close and reclaim the mine to the satisfaction of DEC Staff.

DISCUSSION

Motions for order without hearing, made pursuant to 6 NYCRR 622.12, are governed by the same standards as apply to summary judgment motions under New York State Civil Practice Law and Rules ("CPLR") Section 3212 [see 6 NYCRR 622.12(d)]. Consistent with CPLR Section 3212(b), the party moving for summary judgment has the initial burden of establishing its claims sufficiently to warrant directing judgment in the movant's favor as a matter of law, and carries this burden by offering sufficient evidence to demonstrate the absence of any material issues of fact.

This matter involves claims that George Anderson and his son, Douglas Anderson, engaged in mining activities in 2010 and 2011 without a required MLRL permit at property located at 137 Bragg Road in the Town of Carroll, Chautauqua County. These claims are substantiated by the affidavit of DEC mining specialist Paul Giachetti as well as the exhibits attached to that document.

As explained in his affidavit, Mr. Giachetti is familiar with the facts and circumstances of this matter based on his investigation of the respondents' activities at the mine site, as well as his review of DEC's file, which confirmed that the activities were conducted in the absence of a permit issued under the MLRL.

Establishing the Violation

Mr. Giachetti writes that while at the site on July 12 and 13, 2011, he observed a bucket loader operated by Douglas Anderson loading mined materials into Town of Carroll trucks.

Mr. Giachetti took photographs of this activity, which are attached to his affidavit as Exhibits A and B.

Mr. Giachetti adds that on July 12, 2011, he followed one of the Town trucks from the mine to a project site where the materials were being used in a road paving project. On July 13, 2011, Mr. Giachetti traveled to the Town of Carroll Highway Department, and spoke to Thomas Allison, the highway superintendent. Mr. Allison signed an affidavit confirming the Town's purchases of crushed gravel from the Anderson mine not only in July 2011, but in September 2010 as well. According to Mr. Allison, the gravel was purchased for road projects and loaded into the Town trucks by Douglas Anderson, to whom the Town made payments.

Mr. Allison's affidavit (Exhibit D of the Giachetti affidavit) includes two certified vouchers submitted by Douglas Anderson, one approved on September 11, 2010, and the other approved on July 13, 2011. The vouchers detail the amount of material purchased as well as the amount of money paid to Douglas Anderson in each of the two years.

Mr. Giachetti also writes that on July 13, 2011, he stopped at a construction project located on Route 60 at the west end of Frewsburg, and that the general contractor advised him that the mined materials used there were transported from the Anderson mine by a company named Nelson Bros. That same day, at the Nelson Bros. facility, also in Frewsburg, Mr. Giachetti spoke to Richard Nelson, the company's owner.

Mr. Nelson signed an affidavit (attached to Mr. Giachetti's affidavit as Exhibit C) confirming that Nelson Bros. purchased 2,015 cubic yards of gravel in calendar year 2011 from the Anderson mine, which Mr. Nelson understood to be owned and operated by respondent George Anderson, with whom he negotiated the material's purchase. Mr. Nelson writes that in 2011, Douglas Anderson operated the equipment at the mine site to load the gravel into trucks owned by Nelson Bros. Furthermore, he writes that payments were made directly to Douglas Anderson, as evidenced by copies of cancelled checks that are included with his affidavit.

According to DEC regulation, the response to a motion for order without hearing, like the motion itself, "shall also include supporting affidavits and other available documentary evidence." [See 6 NYCRR 622.12(c)]. However, the respondents' letter of September 24, 2013, which serves as that response,

includes no affidavits or other information contradicting the factual assertions made in the affidavits of Mr. Giachetti, Mr. Allison and Mr. Nelson. Therefore, those affidavits, supplied by DEC Staff, are the basis of my findings of fact.

According to ECL Section 23-2711(1), any person who mines or proposes to mine from each mine site more than 1,000 tons or 750 cubic yards, whichever is less, of minerals from the earth within 12 successive calendar months shall not engage in such mining unless a permit for such mining operation has been obtained from DEC. For purposes of this statute, mining includes not just the extraction of the minerals and their preparation and processing, but "the removal of such minerals through sale or exchange, or for commercial, industrial or municipal use" [ECL Section 23-2705(8)].

That George and Douglas Anderson were both involved in the mining activity is demonstrated by DEC's affidavits and the documents attached to them. Mr. Giachetti writes that George Anderson owns the mine site at 137 Bragg Road in the Town of Carroll. Also, Mr. Nelson says that he negotiated his gravel purchases with George Anderson, who he understands to be the mine's owner and operator.

According to Mr. Nelson, Douglas Anderson operated the equipment at the mine site to load gravel into his company's trucks. According to Mr. Allison, Douglas Anderson also loaded the town trucks at the mine site.

Finally, both Nelson Bros. and the Town of Carroll paid Douglas Anderson for the mined material, as evidenced by the documents, including vouchers and cancelled checks, which are attached to the affidavits of Mr. Nelson and Mr. Allison.

That the mining activities from 2010 and 2011 occurred without a MLRL permit is demonstrated by the affidavit of Mr. Giachetti, as well as the lack of any assertion by the respondents that such a permit had been issued. In fact, the respondents argue that DEC is not empowered to regulate the mine and, therefore, no DEC permit is required.

Pursuant to ECL Section 23-2711(1), a permit would have been needed once 750 cubic yards of minerals were mined over a period of 12 successive calendar months. Restricting consideration to the sales made to the Town of Carroll, the 750 cubic yard threshold would have been crossed in July 2011, by

adding the 532 yards of crushed gravel sold in that month to the 396 cubic yards of crushed gravel sold in September 2010.

By itself, the sale of 2,015 cubic yards of gravel to Nelson Bros. during 2011 would also have triggered an exceedance of the 750 cubic yard threshold at some point during that calendar year. However, because it is unknown how much was sold to Nelson Bros. each month, one cannot determine exactly when that would have happened. The fact that the Nelson Bros. checks to Douglas Anderson were written between July 8, 2011, and February 10, 2012, suggests that the sales were clustered during the latter part of 2011. Needless to say, when the sales to the Town (928 cubic yards) and to Nelson Bros. (2,015 cubic yards) are combined, it is clear that, at least for a time, the mine was operating substantially above the permitting threshold, even though DEC Staff has not demonstrated that all 2,943 cubic yards were mined during the same 12-month period.

Mr. Giachetti writes in his affidavit that Mr. Nelson told him he knew of several other customers who routinely purchased gravel from the Anderson mine during the 2010 and 2011 time period. However, these customers are not named, nor is it known how much they purchased, and during which months. At any rate, the existence of customers other than the Town and Nelson Bros. is not necessary to prove the violation of ECL Section 23-2711(1).

That violation has been established as a matter of law, the respondents having raised no triable issue of fact. Accordingly, the motion for order without hearing may be granted.

Civil Penalty Considerations

To calculate an appropriate civil penalty for the violation of ECL Section 23-2711(1), Mr. Giachetti writes that DEC Staff consulted the Commissioner’s Civil Penalty Policy, DEE-1, as issued on June 20, 1990. That policy requires that, as a starting point, one establish the statutory maximum civil penalty that may be assessed, and then derive an appropriate civil penalty from a number of considerations, including the economic benefit of non-compliance, the gravity of the violations, and the culpability of the respondents’ conduct.

According to ECL Section 71-1307(1), any person who violates any provision of ECL Article 23 shall be liable for a civil penalty not to exceed $8,000 and an additional penalty of

$2,000 for each day during which such violation continues. In this case, Mr. Giachetti calculated a maximum penalty of $982,000 on the basis of a violation commencing on September 1, 2010, the date of the first known purchase by the Town of Carroll, and continuing daily through December 31, 2011, as shown in his penalty calculations. His selection of September 1, 2010, as the violation start date is consistent with the Commissioner's Order of September 1, 1993, in Matter of Carlson Associates, which also involved mining without a permit.

In Carlson, the assigned Administrative Law Judge ("ALJ") limited the violation charged by DEC Staff to the period after which it was clearly established that the jurisdictional threshold had been exceeded for the preceding 12 calendar months. The Commissioner called this an error, finding that "so long as the jurisdictional amount is mined, any day of operation without a permit within the twelve month period, whether or not it occurred before the jurisdictional amount was reached, would constitute a violation of ECL Article 23." On appeal, the Appellate Division of State Supreme Court reversed a trial court order that had annulled the Commissioner's determination as arbitrary and capricious, and said it "was not irrational" for the Commissioner to determine that the miners were in violation of ECL Section 23-2711 for each day of the 12-month period in which they were mining without a permit. [Carlson Associates v. Jorling, 204 A.D.2d 540 (2d Dept. 1994), leave to appeal denied, 83 N.Y.2d 991 (1994).]

Had the Andersons maintained their operations below the jurisdictional threshold, their mine would not have required a permit from DEC, and the documented 2010 sales, for 396 cubic yards of product, would not have been illegal. However, combining its 2010 and 2011 sales, the mine's operations reached a level of significance where DEC oversight was mandated, both to protect the environment from the impacts of site activities, and to ensure proper site reclamation once those activities were completed.

Because the jurisdictional threshold was exceeded without a permit in place, a substantial monetary penalty is warranted. That penalty must be sufficient to recover the economic benefit of non-compliance, including an annual regulatory fee of $700 (for a mine less than five acres in size) and minimum financial security of $5,000, both of which Mr. Giachetti writes would have been required had a permit been obtained. Also, the penalty must reflect that the $22,100 paid to the respondents ($16,000 by Nelson Bros., and $6,100 by the Town of Carroll)

stemmed from activities that should have been permitted, but were not.

According to the penalty policy, removal of the economic benefit of non-compliance merely evens the score between violators and those who do comply with the law; therefore, to be a deterrent, a penalty must include a gravity component, which reflects the seriousness of the violation, and accounts for the relative importance of the type of violation in the regulatory scheme as well as the potential harm and actual damage caused by the violation. (DEE-1, Section IV.D.1.)

As the penalty policy states, undertaking any action which requires a DEC permit, without first obtaining the permit, "is always a serious matter, not a mere 'technical' or 'paper work' violation, even if the activity is otherwise in compliance. Failure to first obtain required permits deprives DEC of the opportunity to satisfy its obligation of review and control of regulated activities. Failure to assess significant penalties for such violations would be unfair to those who voluntarily comply with the law by satisfying the requirements of the permit process." (DEE-1, Section IV.D.2.b.)

The absence of a mining permit is a serious violation because, as Mr. Giachetti points out, that permit is required to ensure that activities are performed in accordance with an approved mining plan describing the operation, as well as a reclamation plan that ensures a return of the property to productive use once mining has ceased. [See ECL Section 23-2713, discussing the elements of the mined land-use plan required under ECL Section 23-2711 as part of a complete application for a new mining permit.]

DEC Staff has presented no evidence of the actual environmental harm which resulted from the respondents' mining operation. On the other hand, there is certainly a risk of harm when operations are not conducted pursuant to a plan approved by DEC, and consistent with permit conditions intended to protect the environment.

According to the Commissioner's policy, the penalty derived from the gravity component may be adjusted in relation to factors including culpability, violator cooperation, and history of non-compliance. (DEE-1, Section IV.E.)

As noted in my findings of fact, George Anderson has a history of non-compliance stemming from unpermitted sand and

gravel mining at this same site during the early 1980's. In a Commissioner's order of October 22, 1985 (a copy of which is attached as Exhibit F to Mr. Giachetti's affidavit), Mr. Anderson was assessed a $5,000 penalty for mining more than 1,000 tons of minerals in 12 consecutive months without a permit, in each of the years 1982, 1983 and 1984. According to the order, and as confirmed in the hearing report attached to it, George Anderson acted with disregard of the permitting requirement of ECL Section 23-2711, despite repeated warnings by DEC Staff, while avoiding the costs of site reclamation. (At the time of this prior violation, ECL Section 23-2711(1) said a permit was required for the mining of more than 1,000 tons of minerals from the earth within 12 successive calendar months. By the time of the current violation, this provision had been amended to require a permit for the mining of more than 1,000 tons or 750 cubic yards, whichever is less, of minerals from the earth within 12 successive calendar months.)

The 1985 order directed George Anderson to submit a mining permit application or, in the alternative, to close and reclaim the mine site to DEC Staff's satisfaction. When he did neither, a complaint was filed in State Supreme Court to enforce the order. While that complaint was ultimately dismissed, the Commissioner's order was not, and George Anderson was permitted to mine his property, but only subject to compliance with the ECL. (See Order of State Supreme Court Justice Joseph Gerace, dated January 26, 1996, attached as Exhibit G to Mr. Giachetti's affidavit.)

In its pending motion, DEC Staff stresses that it is not seeking enforcement of the 1985 order, and that the present action is not based on the facts and violations underlying that order. Instead, the order has been offered, and may be considered, as part of a history of non-compliance, and as a factor bearing on culpability, since it indicates prior knowledge of DEC's permitting requirement. That essentially the same violation was charged in the prior and pending actions also indicates that the monetary penalty assessed in the prior action was not a sufficient deterrent, and that if the pending charge is upheld, a higher penalty for it is warranted.

Finally, the fact that the Bragg Road site has never been properly permitted indicates a lack of violator cooperation. According to the 1985 order, George Anderson ignored DEC Staff's repeated warnings about his non-compliance with the permitting requirement. Douglas Anderson ignored a similar warning when approached at the mine site on July 13, 2011, by Mr. Giachetti,

according to the affidavit Mr. Giachetti submitted. As DEC Staff argues, it would be inequitable for the Andersons to benefit from their disregard of the MLRL to the detriment of those who are legally mining in accordance with permits issued by DEC.

Anderson Defenses

As noted above, the respondents take the position that DEC lacks jurisdiction in this matter, and that the State Legislature is not empowered to regulate them as private individuals conducting mining activities to support a family.

Rather than file an answer to the complaint served by DEC Staff, George Anderson brought an Order to Show Cause in Supreme Court, Chautauqua County, in December 2011, as explained in the affirmation of Ms. Mucha. In that proceeding, George Anderson asked the court to stay this administrative action. The Order to Show Cause (attached as Exhibit E to Ms. Mucha's affirmation) was dismissed, and George Anderson was sanctioned for bringing a meritless action. The bench decision was followed by an Order and Judgment, both dated March 26, 2012. The Order, attached as Exhibit F to Ms. Mucha's affirmation, incorporates the February 6, 2012, hearing minutes. The Judgment, attached as Exhibit G to Ms. Mucha's affirmation, awarded costs to the State.

In seeking a stay of this action, George Anderson argued that it is in violation of Justice Gerace's 1996 order, referred to above. However, at the hearing on his request, Justice James H. Dillon affirmed the State's reading of that order, which is that George Anderson's mining activities are "subject to the proper rules and regulations" of the ECL. (See transcript of the February 6, 2012, hearing, page 16, lines 11 to 15, included as part of Exhibit F of Ms. Mucha's affirmation.) Answering George Anderson's argument that this action is basically a "repeat performance" of matters that were adjudicated in relation to the 1985 Commissioner's order, Justice Dillon noted that Justice Gerace's order said that "further activities have to be in concert with the [ECL]," meaning that it did not preclude anyone from enforcing the law in the future. (See transcript page 8, line 13, to page 9, line 11.)

Upon my assignment to this matter, I received a letter of April 12, 2013, from George Anderson, co-signed by Douglas Anderson, informing me that a motion for a temporary injunction had been submitted to the U.S. District Court for the Western District of New York, apparently to prevent the planned hearing

from going forward. In my notice of hearing, dated May 7, 2013, I wrote that I was unaware of any such injunction having been issued, and that until one was issued and provided to me by the respondents, they should expect the hearing to proceed as scheduled.

With its letter of September 26, 2013, DEC Staff provided a copy of a Decision and Order, dated August 19, 2013, of the U.S. District Court for the Western District of New York, denying George Anderson's motion for a temporary injunction. In his response to DEC Staff's motion for order without hearing, dated September 24, 2013, George Anderson provided a copy of a notice of his pro se appeal of that decision to the U.S. Court of Appeals for the Second Circuit.

To date, I have received nothing from a court indicating that this matter cannot be heard and decided by DEC. In fact, DEC has explicit statutory authority to administer and enforce the provisions of the MLRL. [See ECL Section 23-0303, regarding administration of ECL Article 23 generally, and ECL Section 23-2709(1)(b), regarding the administration and enforcement of the MLRL in particular.]

ECL Section 23-2719 states that the provisions of the MLRL and any rules and regulations promulgated thereunder shall be enforced pursuant to Title 13 of Article 71. Pursuant to ECL Section 71-1307(1), any person who violates any provision of ECL Article 23 shall be liable for a civil penalty not to exceed $8,000 and an additional penalty of $2,000 for each day during which such violation continues, to be assessed by the Commissioner after a hearing or opportunity to be heard. ECL Section 71-1307(1) also provides that the Commissioner has the power, following a hearing conducted pursuant to DEC's rules and regulations, to direct the violator to cease the violation and reclaim and repair the affected site to a condition acceptable to the Commissioner, to the extent possible within a reasonable time and under the Commissioner's direction and supervision. As a consequence, all aspects of the relief requested by DEC Staff are authorized by statute.

The respondents claim that DEC lacks jurisdiction in this matter because it involves issues about the violation of their rights under the state and federal constitutions. In his response to DEC's motion for order without hearing, George Anderson writes that the "continuous" violation of these rights (which are not specified) is "reprehensible" and creates "knowing criminal violations" by those who continue these

proceedings. Furthermore, he writes that DEC lacks the authority to regulate any type of sales, and that nowhere in New York's constitution is the State Legislature empowered to regulate private individuals with laws regarding mining and the sales of minerals "to support a family." These "rights," Mr. Anderson maintains, are "best tempered by the U.S. Constitution," and go "to the very foundation of the American way of life, as understood by the founding fathers."

Similarly, in a letter of April 22, 2013, George Anderson objected to the scheduling of a hearing in this matter, because the "issues and actions" of DEC (which are not specified) violate state and federal constitutional standards (also unspecified), and that "administrative courts do not have any jurisdiction over constitutional matters." In that letter, Mr. Anderson chided DEC for alleged ignorance of its ALJ's ruling of June 11, 2009, in Matter of Eugene F. Bartell, which said that while there is no general prohibition against State agencies determining constitutional issues raised in administrative proceedings, there are certain constitutional claims, such as facial challenges to the validity of a statute, that are not amenable to being determined at the administrative level. (For support, the ruling cited Matter of Consol. Rail Corp. v. Tax Appeals Trib. of the State of New York, 231 AD2d 140, 142 [3d Dept 1997] ["the Tribunal correctly declined to rule on the constitutional issue based on the fact that it had no jurisdiction to consider whether the statute is unconstitutional on its face"], appeal dismissed, 91 NY2d 848 [1997]; Matter of Perrotta v. City of New York, 107 AD2d 320, 324 [1st Dept 1985] ["administrative agencies are not in a position to pass upon, for example, the constitutionality of a legislative enactment"]).

In her affirmation in support of DEC's motion for order without hearing, DEC Staff counsel agrees that allegations about the facial constitutionality of the MLRL must be raised in court. In fact, it is well-established that "an administrative tribunal is not the appropriate forum in which to challenge the constitutionality of a statute." [Quackenbush Hill Field, Interim Decision of the Commissioner, October 28, 2002.]

However, an administrative hearing is an appropriate forum to address constitutional defenses that do not involve the facial validity of a statute. Under the principle of exhaustion of remedies, respondents are obliged to raise certain constitutional issues and objections at the agency level, allowing the agency to consider them and avoid an alleged

constitutional error and to provide a remedy, if available. For instance, constitutional challenges to an agency's interpretation or application of a statute may be entertained, even if the agency cannot declare the statute unconstitutional under all circumstances. [See Matter of James W. McCulley, Ruling of the Chief ALJ, September 7, 2007, addressing a challenge to the validity of Executive Law Section 816.]

In this case, the respondents may be arguing that the MLRL, as applied to them, is an unconstitutional infringement on their rights, as private individuals, to mine in support of their families. However, if this is their actual argument, it is stated so vaguely that it cannot be fully understood, let alone answered. For instance, in their response to DEC Staff's motion, the respondents do not specify which particular provisions of the state and federal constitutions they believe to be in play. There is no exposition of the legal theory behind their claim, and no statement of facts supported by affidavits and other available evidence, as is required in a response to a motion for order without hearing. [See 6 NYCRR 622.12(c).] Under these circumstances, the respondents' assertions do not warrant further consideration. Nor is an adjudicatory hearing required, as there is no substantive dispute about the facts presented by DEC Staff, which are essentially uncontested.

Penalty Considerations

As noted above, DEC Staff requests an order assessing the respondents a civil penalty of $86,520, which was calculated by Mr. Giachetti in relation to the Commissioner's Penalty Policy, DEE-1. While I agree with DEC Staff that a substantial penalty is warranted in this case, I find that the penalty requested by DEC Staff is excessive, and recommend a penalty of $50,000 instead.

My recommendation is based on the understanding that while the respondents' operations posed a risk of environmental harm, there is no evidence of the actual harm they have caused. Nor is there evidence that the mining occurred in an especially sensitive environmental setting.

I find that a $50,000 civil penalty is sufficient to extract the demonstrated economic benefit to the respondents of non-compliance with the permitting requirement, while also accounting for the gravity of their violation, and taking due

consideration of their culpability and lack of cooperation with DEC.

The civil penalty should be assessed jointly and severally against the respondents, since the evidence indicates they were both involved in the unlawful mining operation.

CONCLUSIONS

Respondents George and Douglas Anderson violated ECL Section 23-2711(1) by mining more than 750 cubic yards of minerals within 12 successive calendar months from a site at 137 Bragg Road in the Town of Carroll, Chautauqua County. This violation commenced no later than September 1, 2010, and continued through the last calendar day of 2011, as charged by DEC Staff.

RECOMMENDATIONS

The Commissioner should grant DEC Staff's motion for order without hearing, and issue an order finding that the respondents violated ECL Section 23-2711(1). Though DEC Staff also alleges violation of ECL Section 71-1307, that provision merely establishes the sanctions for the violation of ECL Section 23-2711(1). Therefore, no violation of ECL Section 71-1307 may be established.

As requested by DEC Staff, the Commissioner's order should direct the respondents to immediately cease all mining at the 137 Bragg Road site, and to either reclaim the site or, if they want to engage in regulated mining activities, submit a complete and acceptable permit application to DEC Staff.

The Commissioner's order should hold the respondents jointly and severally liable for a civil penalty in the amount of $50,000.