STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York (ECL) and Section 750-1.4(b) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

DEC Case No. R5-20141211-2148

- by -

ROCKY L. DANIELS,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (DEC or Department) that respondent Rocky L. Daniels violated provisions of ECL article 17 and 6 NYCRR 750-1.4(b) by operating a log-processing and chipping facility (facility) at 113 Daniels Road, Greenfield, New York (site), without a State Pollutant Discharge Elimination System (SPDES) permit.

Department staff commenced this proceeding by service of a notice of hearing and complaint, both dated April 29, 2015. The notice established the date for a pre-hearing conference (June 25, 2015) which respondent attended pro se. Respondent, however, did not serve an answer to the complaint. Staff subsequently served a notice of default hearing and notice of motion to amend the complaint, dated July 23, 2015. On August 25, 2015, an administrative hearing to consider Department staff's allegations was held before Administrative Law Judge (ALJ) Richard A. Sherman of the DEC Office of Hearings and Mediation Services. Respondent attended the hearing pro se. The ALJ prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

Liability

As set forth in the hearing report, the ALJ concluded that Department staff met its burden of proof and established that respondent is liable for violations of the ECL and 6 NYCRR by operating a log processing and chipping facility at the site without a SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (Industrial Activity General Permit) (see Hearing Report at 6-7).

I concur with the ALJ's determination that respondent's activity at the site requires coverage under the Industrial Activity General Permit, and that respondent failed to obtain coverage. Although respondent filed a notice of intent for an Industrial Activity General Permit,

staff noted a number of deficiencies in respondent's Stormwater Pollution Prevention Plan (see e.g. page 1 of Hearing Exhibit 8) that respondent did not address.

The ALJ concludes that staff did not carry its burden with respect to respondent's alleged violation of the general permit for stormwater discharges from construction activity (Construction Activity Stormwater General Permit) (see Hearing Report at 4-6). Department staff's complaint sets forth one cause of action referencing a time period when the log processing and chipping facility was in operation (see Complaint ¶ 51; see also Hearing Exhibit 5 [Notice of Violation citing violations relating to the Industrial Activity General Permit]). The record, which does not indicate whether construction activities occurred during that time period, appears ambiguous as to whether violations of the Construction Activity Stormwater General Permit are being pursued, in addition to violations of the Industrial Activity General Permit. Department staff has, however, clearly established respondent's liability for operating the facility without an Industrial Activity General Permit (which liability supports the civil penalty and remedial relief that staff has requested). Accordingly, I am not reaching the issue of liability in relation to the Construction Activity Stormwater General Permit.

Penalty and Remedial Relief

The ALJ recommends that I impose a civil penalty in the amount of twelve thousand five hundred dollars ($12,500), as requested by Department staff. This amount is substantially below the maximum that would be authorized under the law (see Hearing Report at 7-8 [citing ECL 71-1929(1)]). While that penalty amount is authorized under the circumstances presented here, the record reflects that staff characterized the potential for harm from operations at the site as "towards the low" end, and there is no allegation that respondent's activities at the site resulted in an actual discharge of pollutants to a receiving water (see Hearing Report at 8-9). Upon consideration of the record in this proceeding, I conclude that suspension of five thousand dollars ($5,000) of the civil penalty is appropriate, contingent upon respondent complying with the terms and conditions of this order. Respondent shall submit the non-suspended portion of the penalty (seven thousand five hundred dollars [$7,500]) to the Department within thirty (30) days of the service of this order upon him. In the event that respondent fails to comply with the terms and conditions of this order, the suspended portion of the penalty shall become immediately due and payable.

Respondent must immediately cease its activities at the site that require a SPDES Multi-Sector General Permit for Industrial Activity until he files for, and Department staff approves, a SPDES Multi-Sector General Permit for Industrial Activity for the site under the general permit (GP-0-12-001) that became effective on October 1, 2012. Alternatively, if respondent elects to discontinue operations at the site, respondent must within thirty (30) days submit an approvable closure plan to Department staff that details the closure activities and a timetable for their completion. "Approvable" means a plan that can be approved by the Department with only minimal revision.

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

I. Respondent Rocky L. Daniels is hereby adjudged to have violated ECL 17-0505, 17-0701(1)(a) and 6 NYCRR 750-1.4(b) by operating a log processing and chipping facility at the site without a SPDES Multi-Sector General Permit for Industrial Activity.

II. Respondent Rocky L. Daniels is hereby assessed a total civil penalty in the amount of twelve thousand five hundred dollars ($12,500). Of this amount, seven thousand five hundred dollars ($7,500) shall be payable within thirty (30) days of service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

New York State Department of Environmental Conservation
Region 5, Office of General Counsel
1115 NYS Route 86
P.O. Box 296
Ray Brook, New York 12977
Attn: Scott Abrahamson, Esq.

The remaining portion of the penalty assessed, five thousand dollars ($5,000), shall be suspended, contingent upon respondent complying with the terms and conditions of this order. Should respondent fail to comply with the terms and conditions of this order, the suspended penalty shall become immediately due and payable upon notice by Department staff and shall be mailed to the Department at the address referenced in this paragraph.

III. Within thirty (30) days of the service of this order upon respondent Rocky L. Daniels, respondent shall submit to the Department either: (a) an approvable closure plan for the site; or (b) an approvable notice of intent for coverage under the SPDES Multi-Sector General Permit for Industrial Activity (GP-0-12-001). With respect to any closure plan, Department staff may modify the timeframes established by the plan, upon good cause shown by respondent.

IV. Any questions or other correspondence regarding this order shall be directed to Scott Abrahamson, Esq., Assistant Regional Attorney, at the address referenced in paragraph II of this order.

V. The provisions, terms and conditions of this order shall bind respondent Rocky L. Daniels, his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
May 22, 2017

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

In the Matter

- of -

the Alleged Violations of Article 17 of
the Environmental Conservation Law of the State of New York (ECL)
and Section 750-1.4(b) of Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of New York (6 NYCRR)

- by -

ROCKY L. DANIELS,

Respondent.

DEC Case No. R5-20141211-2148

HEARING REPORT

- by -

_____/s/_____
Richard A. Sherman
Administrative Law Judge

December 18, 2015

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint, both dated April 29, 2015, on respondent Rocky L. Daniels by certified mail and by personal service. The complaint alleges that respondent violated provisions of ECL article 17 and 6 NYCRR 750-1.4(b) by operating a log-processing and chipping facility (facility), located at 113 Daniels Road, Greenfield, New York (site), without a State Pollutant Discharge Elimination (SPDES) permit. Respondent did not serve an answer.

Department staff served a notice of default hearing and notice of motion to amend the complaint (notice of default), dated July 23, 2015, on respondent by certified mail and by personal service. The notice of default advised respondent that a default hearing would be convened "to consider the complaint" on August 25, 2015 at the Department's offices, 232 Golf Course Road, Warrensburg, New York (notice of default at 1). The matter was assigned to me on July 31, 2015.

Pursuant to the notice of default, an administrative enforcement hearing was held on August 25, 2015 to consider Department staff's allegations. The hearing was held in accordance with the provisions of the Department's uniform enforcement hearing procedures, 6 NYCRR part 622. Staff was represented by Scott Abrahamson, Assistant Regional Attorney, DEC Region 5, who called two witnesses: Beth Magee, Division of Environmental Permits, DEC Region 5; and Robert Streeter, Division of Water, DEC Region 5. Respondent testified on his own behalf and called no other witnesses.

At the close of the hearing, neither party requested the opportunity to file written closing briefs and none were authorized. Accordingly, I advised the parties that the record would close upon my receipt of the transcript. This office received the hearing transcript on September 9, 2015.

As detailed below, on the basis of the record established in this proceeding, this hearing report recommends that the Commissioner issue an order (i) adjudging respondent to have violated ECL 17-0505, ECL 17-0701(1)(a) and 6 NYCRR 750-1.4(b); and (ii) assessing a civil penalty in the amount of $12,500.

FINDINGS OF FACT

1. Respondent operates a log chipping and processing facility located at 113 Daniels Road, Greenfield, New York (hearing transcript [tr] at 12, 13, 18, 60-62; exhibit 2 at 1).

2. On or about July 21, 2009, the Department received a complaint from the code enforcement officer for the Town of Greenfield concerning stormwater management at the site (tr at 10-11; exhibit 2 at 1).

3. On December 2, 2009, Department staff conducted a field investigation of the site, photographed the facility, confirmed that a log chipping and processing operation was being run at the site, and confirmed that the facility was not covered by a SPDES permit (tr at 11, 13, 18; exhibits 2 at 1; 3, 4).

4. An unnamed tributary to Loughberry Lake passes near the site, several feet to the east of the site's property line (tr at 21, 35; exhibit 6 at 7 [item 11]).

5. Loughberry Lake is a drinking water source for the City of Saratoga Springs (tr at 21-22).

6. The grading at the site allows stormwater runoff to flow toward the unnamed tributary (tr at 22).

7. On or about December 4, 2009, Department staff advised respondent that his facility was required to have coverage under the SPDES Multi-Sector General Permit (MSGP) for Industrial Activity and explained how to obtain coverage (exhibits 2 at 1, 5 at 1; tr at 19-20).

8. By Notice of Violation (NOV) dated April 20, 2010, Department staff again advised respondent of the need for coverage under the SPDES "Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity" (exhibit 5 at 1).

9. Respondent applied for coverage under the General Permit for Stormwater Discharges from Construction Activity on or about November 1, 2010 by filing a DEC "Notice of Intent" (NOI) (exhibit 7).

10. Respondent applied for coverage under the MSGP on or about November 1, 2010 by filing a DEC "Notice of Intent or Termination" (NOIT) (exhibit 6).

11. By letter dated November 17, 2010, Department staff advised respondent that revisions to the Stormwater Pollution Prevention Plan (SWPPP) he submitted were necessary to satisfy certain provisions of the MSGP (exhibit 8).

12. By letters dated May 16 and September 22, 2014, Department staff again advised respondent of need to obtain coverage under the MSGP and to submit an acceptable SWPPP (exhibits 9, 10).

13. Respondent has not filed an acceptable SWPPP (tr at 38-39, 56-58, 73-76).

14. On October 30, 2014, Department staff conducted another field investigation of the site, photographed the facility, and confirmed that the log chipping and processing operation continued to be operated at the site (tr at 58-61; exhibits 11-14).

DISCUSSION

Department staff bears the burden of proof on all its charges and must prove the factual allegations underlying those charges by a preponderance of the evidence (see 6 NYCRR 622.11[b][1], [c]). Where a respondent asserts an affirmative defense, the respondent bears the burden of proof and must prove facts in support of the defense by a preponderance of the evidence (see 6 NYCRR 622.11[b][2], [c]).

Department Staff Motion for Default and to Amend the Complaint

Department staff served a notice of default hearing and motion to amend the complaint on respondent under cover letter dated July 24, 2015. In accordance with the notice of default, I convened a hearing on August 25, 2015 at the Department's offices in Warrensburg. At the hearing, staff acknowledged that respondent had appeared at the pre-hearing conference that was scheduled under the initial (April 29, 2015) notice of hearing, but moved for a default judgment against respondent on the basis of his failure to file a written answer to the complaint (tr at 80-81). Staff also moved to amend the complaint.

-- Motion for Default

With regard to Department staff's motion for default, I hold that staff satisfied the requirements of 6 NYCRR 622.15(b). Specifically, staff (i) provided proof of service of the complaint upon respondent, (ii) established that respondent did not file an answer to the complaint, and (iii) provided a proposed order (see id.). Nevertheless, for the reasons set forth below, I deny the motion.

Respondent appeared, pro se, at both the June 25, 2015 pre-hearing conference and the August 25, 2015 hearing, and participated in the proceedings. Although respondent failed to file an answer, there is no indication that he did so in an effort to delay or frustrate the enforcement process. While there may be circumstances under which a motion for default should be granted against a respondent who appears at hearing, I do not consider respondent's actions here sufficient to warrant such an outcome. Rather, because respondent has participated in these proceedings and has sought to address the allegations raised by staff, it is appropriate for the Department to determine respondent's liability on the merits rather than by default. The Department's objective in any enforcement action is not simply to prevail, but to correctly ascertain whether a respondent has violated the environmental conservation law and, if so, to assess appropriate penalties or other relief (see e.g. DEC, Civil Penalty Policy, DEE-1, § II [June 20, 1990] [stating that the Department's enforcement policy is to "punish the violator and deter future violations"]).

I note that, in support of its position that the motion for default should be granted, staff offered the Commissioner's Order in Matter of Daby (June 16, 2015). Therein, the Commissioner granted Department staff's motion for default judgment despite the fact that the respondent had appeared at a pre-hearing conference (id. at 3, Default Summary Report at 4 [noting the respondent failed to answer the complaint, but "did appear for the scheduled

conference"]). Unlike the instant matter, however, the respondent in Daby did not appear for the hearing. Accordingly, Daby is distinguishable.

-- Motion to Amend the Complaint

By its motion to amend the complaint, Department staff seeks to (1) eliminate two of the named respondents (both of which appear to be DBAs used by respondent); (2) correct the name of the remaining respondent by changing his middle initial; and (3) increase the penalty request from $10,000 to $12,500 (other minor changes, essentially conforming the complaint to the three amendments noted above, were also proposed by staff). At the hearing, I referenced the proposed amendments and asked Mr. Daniels whether he objected. Respondent stated that he did not think the amendments were fair (tr at 5).

Given the limited nature of Department staff's proposed amendments and the advance notice of the amendments that staff provided to respondent, I determined that respondent's ability to respond to the complaint, as amended, was not prejudiced (see 6 NYCRR 622.5[b]). Accordingly, at the hearing, I granted staff's request to amend the complaint and deemed the proposed amendments, as set forth in the notice of default, to be incorporated into the complaint (tr at 5).

Department Staff's Allegations

By its complaint, Department staff alleges a single cause of action. Staff alleges that "[f]rom December 2, 2009 to October 30, 2014, Respondent[] violated ECL § 17-0505, ECL § 17-0701(1)(a), and 6 NYCRR 750-1.4(b) by conducting activities at the Site without a SPDES Permit" (complaint ¶ 51). Both ECL 17-0505 and 17-0701(1)(a) prohibit the making or use of a point source discharging into the waters of the State without a SPDES permit. A "point source" is broadly defined under ECL article 17 (see 17-0105[16]) and, as discussed below, stormwater from certain activities is regulated as a point source.

The complaint contains factual allegations that relate to two types of SPDES general permits: (i) the Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity, and (ii) the General Permit for Stormwater Discharges from Construction Activity (Construction Stormwater General Permit). The cause of action, however, does not specify whether staff is alleging that respondent violated the SPDES requirement in relation to the MSGP, the Construction Stormwater General Permit, or both. Accordingly, both general permits are addressed below.

-- Construction Stormwater General Permit

With certain exceptions that are not applicable here, "permits shall be required in accordance with 40 CFR 122.26" for discharges of stormwater that are not to groundwater (6 NYCRR 750-1.4[b]). Construction activities that require permit coverage are defined at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15). In general terms, unless an individual SPDES permit is obtained, a facility that engages in construction activity that will disturb one acre or more of land

is required to obtain coverage under the Construction Stormwater General Permit (see tr at 20; http://www.dec.ny.gov/chemical/43133.html [accessed Dec. 11, 2015]).

Although the complaint includes allegations relating to the Construction Stormwater General Permit (see e.g. ¶¶ 21-25, 33), Department staff proffered little evidence at the hearing in support of these allegations. For example, the written communications from program staff to respondent often do not mention the requirement for respondent to obtain coverage under the Construction Stormwater General Permit. In contrast, all of the correspondence references the requirement for respondent to obtain coverage under the MSGP.

Beginning with the NOV from Department staff to respondent dated April 20, 2010, and in each subsequent correspondence with respondent through the end-date of the violation set forth in the complaint (October 30, 2014), the MSGP appears to be staff's central concern. The NOV cites only the requirement for the facility to be covered under the MSGP and does not mention the Construction Stormwater General Permit (exhibit 5). The November 17, 2010 letter from staff to respondent concerning respondent's proposed SWPPP mentions both general permits, but begins with staff's critique of the SWPPP requirements associated with the MSGP (exhibit 8). The May 16, 2014 and September 22, 2014 letters from staff (advising respondent that the Department was renewing its demand that respondent obtain coverage under a SPDES general permit) refer only to the need for applicant to obtain coverage under the MSGP (exhibits 9, 10).

I also note that the "Complaint Investigation Form," completed by Department staff at or about the time of staff's initial investigation of the site, states that "[a] log chipping operation is being run at the facility" and that respondent was advised of the need for his facility to be covered under the MSGP (exhibit 2 at 1; tr at 13 [staff testimony that the form was "completed after conducting my inspection of the site"]). The form makes no reference to the Construction Stormwater General Permit (exhibit 2). Additionally, the testimony of Mr. Streeter, who, since April 2014, has been the member of program staff responsible for resolving this matter (see tr at 53), is devoid of any mention of whether the facility must be covered under the Construction Stormwater General Permit (see id. at 51-78). Rather, Mr. Streeter consistently refers only to the need for the facility to be covered under the MSGP (see e.g. id. at 54, 62, 72).

Lastly, according to Department staff, a "Construction Stormwater General Permit would have been for the establishment or construction of the site of the processing facility, and then the Industrial Stormwater Permit is for the actual operation of the facility" (tr at 23). The complaint, however, does not allege when the facility was constructed, nor does it state what activities respondent allegedly engaged in that would constitute construction of the facility.[1] Moreover, while there is testimony from both of staff's witnesses concerning the operation of the facility, there is no testimony from either witness concerning the construction of the facility (see e.g. tr at 13 [Magee testimony that, upon her first visit to the site in December 2009, "there appeared to be a log-chipping-and-processing operation, actively in operation"], 60 [Streeter testimony that,

[1] As more fully addressed in the penalty discussion below, the complaint also omits any reference to the Department's guidance document for compliance and enforcement of SPDES permits as it relates to the Construction Stormwater General Permit. In contrast, the complaint expressly cites to the guidance document's penalty provisions for violations relating to MSGP requirements (see infra at 8).

upon his first visit to the site in October 2014, he observed "logs that were there and a pretty good size pile of chips, so it appeared that the site was still being used for that type of activity"]).

I conclude that Department staff has not carried its burden to demonstrate that respondent "violated ECL § 17-0505, ECL § 17-0701(1)(a), and 6 NYCRR 750-1.4(b) by conducting [construction] activities at the Site without a SPDES permit" as alleged in the complaint (complaint ¶ 51).

-- Multi-Sector General Permit

As noted above, Department staff repeatedly advised respondent that the facility needed to be covered under the Department's MSGP. The complaint alleges that, on staff's initial investigation of the site on December 2, 2009, staff determined that respondent was conducting a log processing and chipping operation at the site (complaint ¶¶ 7-8). The complaint further alleges that respondent's operations on the site required a SPDES permit and that respondent was promptly advised of the process required to obtain coverage under the MSGP (id. ¶¶ 9-13). Finally, the complaint alleges that "[a]s of the date of this complaint [April 29, 2015], the Department has not issued Respondent[] any form of SPDES permit that would authorize the operations at the Site" (id. ¶ 34). As discussed below, the record supports these allegations.

A Department staff witness testified that respondent "needed the Multi-Sector General Permit . . . because the activity that he was performing on the site, the log storage and chipping, falls into one of the categories that requires the industrial permit" (tr at 62). Both of Department staff's witnesses testified that respondent's log processing and chipping facility requires coverage under the MSGP (tr at 19-20, 54). I also note that the NOV sent to respondent in 2010, and included as an attachment to the complaint, expressly advised respondent that he was required to obtain coverage under the MSGP for "chipper milling" at the site "which falls under Standard Industrial Classification (SIC) Code 2421" (exhibit 5 at 1).

Stormwater discharges from industrial activities, like those from construction activities, are subject to permits in accordance with 40 CFR 122.26 (see 6 NYCRR 750 1.4[b]). Pursuant to 40 CFR 122.26(b)(14)(ii), stormwater discharges from certain categories of facilities, identified by SIC Codes, require a permit. Among the facilities that require a permit are those that fall within "Industry Group[] 242" (40 CFR 122.26[b][14][ii][2]). This Industry Group includes facilities identified under SIC Code 2421, such as wood chipper mills (see https://www.osha.gov/pls/imis/sic_manual.display?id=539&tab=description [accessed Dec. 11, 2015]). Accordingly, respondent's facility requires coverage under the MSGP.

The complaint alleges that "[a]s of the date of this complaint [April 29, 2015], Respondent[] [has] not submitted a Notice of Intent or Termination (NOIT) to seek coverage under the Department's SPDES Multi-sector General Permit" (complaint ¶ 32). This allegation is

[2] The current version of 40 CFR 122.26(b)(14)(ii) became effective on January 7, 2013 and, therefore, was in effect during the latter portion of the timeframe covered by the complaint. The former version required permit coverage for all "Facilities classified within Standard Industrial Classifications 24 (except 2434)" (40 CFR former 122.26[b][14][ii]). Thus, respondent's facility, classified as a SIC Code 2421 facility, was covered under both the current and former versions of 40 CFR 122.26(b)(14)(ii).

not supported by the record. A copy of the NOIT that was submitted by respondent on or about November 1, 2010 was received into evidence during the hearing (see exhibit 6; tr at 32 [staff testimony regarding the submission of the NOIT).

Although it is clear that respondent submitted an NOIT, it is also clear that it was determined to be unacceptable by the Department (see tr at 39). Staff advised respondent of the deficiencies in the NOIT and provided respondent with the opportunity to correct the deficiencies (see tr at 41-43; exhibit 8). Respondent, however, never successfully completed the NOIT application process (tr at 43, 75-76 [testimony concerning unsuccessful effort to complete the SWPPP in June 2010]; exhibit 15 [email exchange between staff and potential engineer for respondent concerning what remained to be done to complete the SWPPP]). Accordingly, Department staff has established that respondent failed to file an acceptable MSGP application and that respondent has never obtained coverage under the MSGP.

I conclude that Department staff has carried its burden to demonstrate that respondent "violated ECL § 17-0505, ECL § 17-0701(1)(a), and 6 NYCRR 750-1.4(b) by conducting [industrial] activities at the Site without a SPDES permit" (complaint ¶ 51).

Relief

By its complaint, Department staff requests that the Commissioner issue an order assessing a penalty of $12,500 (complaint, wherefore clause ¶ II [as amended]). Staff further requests that the Commissioner direct respondent "to cease all activities at the Site that would require a SPDES permit from the Department, until the required SPDES permit is obtained" (id., wherefore clause ¶ III). For the reasons discussed below, I recommend that the Commissioner issue an order assessing a penalty of $12,500.

-- Commissioner Directive

I do not recommend that the Commissioner direct respondent to cease activities at the site that require a SPDES permit. In the absence of a permit, such activities are unlawful. Therefore, by engaging in these activities, respondent would be subject to further enforcement action and penalties regardless of whether the Commissioner directs respondent to stop.

-- Penalty

As discussed above, Department staff met its burden and has established that respondent violated ECL 17-0505, 17-0701(1)(a) and 6 NYCRR 750-1.4(b) by conducting a covered industrial activity at the site without first obtaining coverage under the MSGP. Staff requests that the Commissioner assess a penalty in the amount of $12,500.

The penalty provision for violations of titles 5 or 7 of ECL article 17, or their implementing regulations, is found at ECL 71-1929(1), which states, in part:

> "[a] person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive . . . of article 17, or the rules,

regulations . . . promulgated thereto . . . shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation."

The cause of action in the complaint alleges that respondent was in violation of ECL 17-0505, ECL 17-0701(1)(a) and 6 NYCRR 750-1.4(b) for 1,794 days, from December 2, 2009 through October 30, 2014. These dates are supported by the record and correspond to the dates of Department staff's first and last[3] inspections of the site (see tr at 11, 58-60; exhibits 2-4, 11-14). Imposing the maximum statutory penalty for the duration of the violation alleged by staff would result in a penalty in the tens of millions of dollars.

As noted above, Department staff requests a penalty in the amount of $12,500. In support of its request, staff cites both to ECL 71-1929(1) and to DEC, Division of Water, Technical & Operational Guidance Series (TOGS) 1.4.2, Compliance and Enforcement of SPDES Permits (complaint ¶¶ 49, 52-53, 55-56, 58; tr at 66-67).

Department staff states that the prior version of TOGS 1.4.2, which was in effect at the time that staff alleges the violation began, "did not provide a specific penalty amount for failure to apply for coverage under a General Permit" (complaint ¶ 52). Therefore, staff relies on the statutory penalty provision in its penalty calculation for the period from staff's first inspection of the site, through June 24, 2010, the effective date of the current version of TOGS 1.4.2 (id. ¶¶ 53-55, 58).

For the period of violation that falls within the effective date of the current version of TOGS 1.4.2, Department staff states that the guidance "assigns a penalty of $3,000 per event" (complaint ¶ 56). The specific penalty amount that staff cites to from TOGS 1.4.2 is provided for in the base penalty table for violations of relating to the MSGP (id. ¶¶ 56 [citing TOGS 1.4.2, base penalty table "H"], 58; tr at 67). Staff states that its penalty request represents a small percentage of "the sum of the maximum statutory penalty . . . and the $3,000 penalty assigned to the . . . violation by the 2010 T.O.G.S" (complaint ¶ 58). Notably, although the complaint includes allegations relating to the Construction Stormwater General Permit, staff's penalty request does not specify a penalty amount for respondent's construction activity and makes no reference to TOGS 1.4.2, base penalty table "G," which provides penalty amounts for violations of the Construction Stormwater General Permit requirements (see id. ¶¶ 52-58; tr at 66-67).

As noted by staff, under the guidance in TOGS 1.4.2, the failure to obtain coverage under the MSGP is subject to a base penalty of $3,000 per event. I note, however, that the base penalty tables set forth under TOGS 1.4.2 are to be "used only for settlement purposes" (TOGS 1.4.2, cover memorandum at 2). Moreover, the guidance under TOGS 1.4.2 "provides the minimum enforcement response and penalty" (TOGS 1.4.2 at 2 [emphasis supplied]). Accordingly, where an enforcement matter is not settled and instead progresses to an administrative enforcement hearing, the penalty amounts set forth under TOGS 1.4.2 are not controlling.

[3] Staff uses the October 30, 2014 inspection date as the end date of the alleged violation and refers to the site visit on that day as the last "official" inspection of the site (tr at 66). I note that a staff member testified that he "drove by" the site on August 1, 2015 and that the facility "still appeared like it was in operation" at that time (id. at 64). Staff, however, did not elect to extend the period of the alleged violation through August 1, 2015.

The record here demonstrates that respondent was not entirely unresponsive to Department staff's demand that he obtain coverage under the MSGP. After he was advised of the need for coverage, respondent filed an application for coverage under the MSGP and consulted with an engineer in an unsuccessful effort to develop an approvable SWPPP for the site. I also note that staff has not alleged that respondent's activities at the site resulted in an actual discharge of pollutants to a receiving water (tr at 22, 69). Additionally, staff stated that the site is "relatively level where [the] operation is" and characterized the potential for harm from operations at the site as "towards the low" end (tr at 70).

The record also demonstrates, however, that respondent failed to obtain coverage under the MSGP for a period of nearly five years after being advised of the need for coverage. Further, while the potential harm from respondent's operations may be low, the unnamed tributary that runs just to the east of the site empties into Loughberry Lake, which is a drinking water source for the City of Saratoga Springs.

Given the factors discussed above, I conclude that the penalty requested by Department staff is reasonable and appropriate. Accordingly, I recommend that the Commissioner assess a penalty in the amount requested by staff.

CONCLUSIONS AND RECOMMENDATIONS

As detailed above, I conclude that Department staff has met its burden to establish that respondent violated ECL 17-0505, 17-0701(1)(a) and 6 NYCRR 750-1.4(b) by conducting a covered industrial activity at the site without obtaining coverage under the MSGP. I recommend that the Commissioner issue an order assessing a civil penalty in the amount of $12,500.

EXHIBIT LIST

Matter of Rocky L. Daniels
DEC Case No. R5-20141211-2148

Exhibit No.	Rec'd (Y/N)	Description
1	Y	Map depicting general location of site
2	Y	DEC Complaint Investigation Form (Complaint #09-021)
3	Y	Photograph (disturbed soil and heavy equipment at site)
4	Y	Photograph (heavy equipment at site)
5	Y	Notice of Violation, dated April 20, 2010, with certified return receipt attached
6	Y	DEC Notice of Intent or Termination (NOIT) form, dated Nov. 1, 2010
7	Y	DEC Notice of Intent (NOI) form, dated Nov. 1, 2010
8	Y	Letter, dated Nov. 17, 2010, re: SWPPP deficiencies
9	Y	Letter, dated May 16, 2014, re: MSGP requirement
10	Y	Letter, dated Sept. 22, 2014, re: MSGP requirement
11	Y	Photograph (view of site from road)
12	Y	Photograph (heavy equipment at site)
13	Y	Photograph (log piles at site)
14	Y	Photograph (wood chip pile at site)
15	Y	Email exchange, most recent dated June 30, 2015, re: respondent's failure to engage an engineer to develop SWPPP
16	Y	Proposed Commissioner's order
17	Y	Deed and other real property documents for site