STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

- by –

JOHN IOANNOU,

DEC File No.: R1-20061018-260

Respondent.

Respondent John Ioannou owns property located at 1257 Plandome Road, Plandome Manor (Nassau County), New York, (the "site"). By letter dated April 10, 2006, staff of the New York State Department of Environmental Conservation ("Department") issued a notice of violation to respondent Ioannou for failure to obtain a State Pollution Discharge Elimination System ("SPDES") General Permit for Stormwater Discharges from Construction Activities ("Stormwater General Permit") for construction activities at the site. Because respondent had already begun work at the site absent the Stormwater General Permit, Department staff directed that he immediately cease all construction activities, and provided the opportunity for him to enter into an order on consent with the Department to address the violations. Respondent, however, failed to respond.

Department staff subsequently commenced this administrative enforcement proceeding by serving copies of the notice of hearing and complaint, both dated February 5, 2008, upon respondent by certified mail. Respondent received the notice of hearing and complaint on February 8, 2008. Department staff served an amended notice of hearing and complaint, both dated May 1, 2008, upon respondent by certified mail. On May 5, 2008, respondent received the amended complaint.

Department staff alleged in its papers that respondent:

- discharged stormwater at the site without the required Stormwater General Permit, in violation of ECL 17-0505 and 6 NYCRR 750-1.4, on March 22, 2006;

- discharged stormwater at the site without the required Stormwater General Permit, in violation of ECL 17-0505 and 6 NYCRR part 750, on April 25, 2006; and

- discharged stormwater at the site without the required Stormwater General Permit, in violation of ECL 17-0803 and 6 NYCRR 750-1.4, on April 25, 2006.

The February 5, 2008 notice of hearing advised respondent to file an answer within 20 days of the receipt of the complaint. Pursuant to 6 NYCRR 622.4(a), respondent's time to answer the complaint expired on February 28, 2008, and was not extended by Department staff. Respondent failed to file an answer.

The May 1, 2008 amended notice of hearing advised respondent to file an answer within 20 days of the receipt of the amended complaint. Pursuant to 6 NYCRR 622.4(a), respondent's time to answer the amended complaint expired on May 26, 2008, and was not extended by Department staff. Respondent again failed to file an answer.

With a cover letter dated October 2, 2008, Department staff provided the Office of Hearings and Mediation Services with copies of its September 26, 2008 motion for default judgment, together with supporting papers. This matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

Department staff's papers reference respondent's failure to obtain the Stormwater General Permit prior to his commencement of construction activities at the site. The activities included clearing, grading and excavating resulting in land disturbance of equal to or greater than one acre (see document entitled "Appendix 'I'" in Exhibit A to the Affirmation of Assistant Regional Attorney Kari Wilkinson, Esq., dated September 26, 2008 ["Wilkinson Affirmation"]). Department staff papers detail respondent's lack of cooperation, including his failure to respond to the proposed order on consent to address the

violations, file any responding papers in this administrative enforcement proceeding, or attend the pre-hearing conference (see generally Wilkinson Affirmation). Accordingly, Department staff is requesting a civil penalty of one hundred twelve thousand, five hundred dollars ($112,500).

ECL 71-1929 provides that a person who violates any of the provisions of, or who fails to perform any duty imposed by, titles 1 through 11 and title 19 of article 17 or the rules, regulations, orders or determinations of the commissioner promulgated thereto, shall be liable to a penalty of up to $37,500 per day for each violation. Department staff has alleged violations of ECL 17-0505 (which prohibits certain acts without a valid SPDES permit), 17-0803 (which prohibits discharge of pollutants to the waters of the state without a SPDES permit), and 6 NYCRR 750-1.4 (requirements to obtain a SPDES permit) in this proceeding.

The ALJ found that respondent's ongoing construction activity without a stormwater general permit represented a continuing violation of ECL article 17 and 6 NYCRR 750-1.4 for the period from March 22, 2006 until April 25, 2006. Accordingly, per day penalties under ECL 71-1929 may properly be imposed (see, e.g., Matter of MB Recycling Unlimited, Inc., Order of the Commissioner, at 2 [August 2, 1993]). Because the continuing violation extended more than a month, ECL 71-1929 would authorize imposing a penalty of greater than one million dollars. Department staff's requested penalty of $112,500 is within the allowable maximum, and supported by this record. Accordingly, I do not have to reach the question, in considering the calculation of the penalty, whether violations of ECL 17-0505 and ECL 17-0803, which statutory provisions are cited by staff, are separate offenses authorizing the imposition of multiple penalties for violations arising out of the same course of conduct.

With respect to the civil penalty, I am directing respondent to submit payment of the civil penalty to the Department within thirty (30) days of service of this order upon him.

In addition, ECL 71-1929 provides that a person who violates article 17 of the ECL or its regulations may be enjoined from continuing such a violation. Department staff

requested that respondent be directed to cease all construction activities at the site until he obtains the required Stormwater General Permit. It is unclear on this record whether respondent has completed construction activities or is continuing to engage in onsite activities that would require a Stormwater General Permit. Accordingly, I am directing respondent, within thirty days of the service of this order upon him, to notify Department staff in writing whether any construction activities that were part of the activities identified in Department staff's 2006 notice of violation are ongoing at the site ("notification"). If such activities are ongoing, respondent is to cease immediately all such activities and provide Department staff with a completed Stormwater General Permit notice of intent form and stormwater pollution prevention plan, together with the notification.

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 John Ioannou 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 set forth in Department staff's complaint dated May 1, 2008, are deemed to have been admitted by respondent.

III. Respondent John Ioannou is adjudged to have violated ECL 17-0505 and 17-0803 and 6 NYCRR 750-1.4 with respect to construction activities at 1257 Plandome Road, Plandome Manor, New York.

IV. Respondent John Ioannou is assessed a civil penalty of one hundred twelve thousand, five hundred dollars ($112,500). The civil penalty is due and payable within thirty (30) days after service of this order upon respondent. Payment of the civil penalty shall be by cashier's check, certified check, or money order drawn to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to Kari Wilkinson, Esq., Assistant Regional Attorney, NYSDEC – Region 1, Stony Brook University, 50 Circle Road, Stony Brook, New York 11790-3409.

V. Respondent, within thirty days of the service of this order upon him, shall notify Department staff in writing whether any construction activities that were part of the activities identified in Department staff's 2006 notice of violation are ongoing at the site ("notification"). If such activities are ongoing, respondent shall immediately cease such activities and provide Department staff with a completed Stormwater General Permit notice of intent and stormwater pollution prevention plan, together with the notification.

VI. All communications from respondent to the Department concerning this order shall be directed to Kari Wilkinson, Esq., Assistant Regional Attorney, NYSDEC – Region 1, Stony Brook University, 50 Circle Road, Stony Brook, New York 11790-3409.

VII. The provisions, terms, and conditions of this order shall bind respondent John Ioannou 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: Albany, New York
November 19, 2009

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Environmental Conservation Law Article 17, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 750 - by – **JOHN IOANNOU**, Respondent.	Default Summary Report DEC File Nos.: R1-20061018-260

Proceedings

Staff from the Region 1 Office of the Department of Environmental Conservation (Department staff) commenced this administrative enforcement proceeding by serving a notice of hearing and complaint, both dated February 5, 2008, by certified mail, return receipt requested upon John Ioannou (Respondent). Subsequently, Department staff served an amended notice of hearing and complaint, both dated May 1, 2008 by certified mail, return receipt requested upon Respondent.

The February 8, 2008 complaint and the May 1, 2008 amended complaint allege that Respondent owns property at 1257 Plandome Road, Plandome Manor (Nassau County), New York (the site). According to the May 1, 2008 amended complaint, Respondent violated provisions of the New York State Environmental Conservation Law (ECL) article 17 and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 750 when he failed to obtain a General State Pollutant Discharge Elimination System (SPDES) permit from the Department before undertaking construction activities at the site. For the alleged violations, Department staff requests an order from the Commissioner that assesses a civil penalty of $112,500 and enjoins Respondent from undertaking any work at the site until he obtains the required SPDES permit.

Motion for Default Judgment

With a cover letter dated October 2, 2008, Department staff provided the Office of Hearings and Mediation Services with a motion for default judgment and supporting papers. This matter

was assigned to me on October 15, 2008. Staff's motion papers consist of the following documents:

1. Notice of motion for default judgment and order, dated September 26, 2008.

2. Motion for default judgment and order, dated September 26, 2008.

3. Affirmation in support of the motion for default judgment and order by Kari Wilkinson, Esq., Assistant Regional Attorney, dated September 26, 2008, with attached Exhibits A through G:

    a. Exhibit A is a copy of a cover letter dated April 10, 2006 from William H. Spitz, Regional Water Manager, DEC Region 1, with attached notice of violation, and proposed order on consent sent to Respondent by certified mail, return receipt requested;

    b. Exhibit B is a signed copy of the domestic return receipt for the February 5, 2008 notice of hearing and complaint;

    c. Exhibit C is a copy of the US Postal Service track and confirm results concerning delivery of the February 5, 2008 notice of hearing and complaint;

    d. Exhibit D is a copy of the February 5, 2008 notice of hearing and complaint;

    e. Exhibit E is a signed copy of the domestic return receipt for the May 1, 2008 amended notice of hearing and complaint;

    f. Exhibit F is a copy of the May 1, 2008 amended notice of hearing and complaint; and

    g. Exhibit G is a draft order.

Pursuant to 6 NYCRR 622.15(a), a respondent's failure either to appear at a pre-hearing conference (*see* 6 NYCRR 622.8), or to file a timely answer to a complaint constitutes a default and waiver of a respondent's right to a hearing. Under these circumstances, Department staff may move for a default

judgment. Staff's motion must include: (1) proof of service of the notice of hearing and complaint; (2) proof of the respondent's failure either to appear at a pre-hearing conference or to file a timely answer; and (3) a proposed order (*see* 6 NYCRR 622.15[b]).

I. Commencement of the Enforcement Proceeding and Service of the Motion for Default Judgment

For the following reasons, Staff has met the requirements set forth in 6 NYCRR 622.15. Exhibit B, which is a signed copy of the domestic return receipt, and Exhibit C, which is a copy of the US Postal Service track and confirm results, demonstrate that Staff served the February 5, 2008 notice of hearing and complaint by certified mail, return receipt requested. This method of service is authorized by 6 NYCRR 622.3(a)(3). Accordingly, Staff duly commenced the captioned administrative enforcement proceeding (*see* 6 NYCRR 622.3[a][1]).

The February 5, 2008 notice of hearing advised Respondent that he must file an answer within 20 days of the receipt of the complaint (Exhibit D). Respondent received the February 5, 2008 notice of hearing and complaint on February 8, 2008 (Exhibit C). Therefore, his answer was due by February 28, 2008.

As noted above, Exhibit E is a signed copy of the domestic return receipt concerning the May 1, 2008 amended notice of hearing and complaint. Exhibit E demonstrates that Department staff served the May 1, 2008 amended notice of hearing and complaint upon Respondent by certified mail, return receipt requested (see 6 NYCRR 622.3[a][3]).

With respect to the May 1, 2008 amended notice of hearing, Respondent was advised that he must file an answer within 20 days of the receipt of the amended complaint (Exhibit F), which he received on May 5, 2008 (Exhibit E). Accordingly, Respondent's answer was due by May 26, 2008.

Ms. Wilkinson's September 26, 2008 affirmation demonstrates that Respondent answered neither the February 5, 2008 complaint (¶ 6), nor the amended May 1, 2008 complaint (¶ 11). In the absence of any answer from Respondent, I conclude that, pursuant to 6 NYCRR 622.15(a), Respondent has defaulted and waived his right to a hearing.

Finally, Staff submitted a proposed order, as required by 6 NYCRR 622.15(b) (Exhibit G).

Section 622.15 does not prescribe the circumstances under which a defaulting respondent is entitled to notice of Department staff's motion for default judgment. In *Matter of Makhan Singh and L.I.C. Petroleum, Inc.* (Decision and Order, March 19, 2004, at 2-3), the Commissioner reviewed CPLR 3215(g)(1), which requires notice of an application for default judgment only where the defending party has appeared, or where more than one year has elapsed between the date of the default and the motion. These circumstances are not relevant here. Accordingly, Department staff was not required to serve a copy of the September 26, 2008 motion for default judgment upon Respondent.[1]

II. Liability

After the administrative law judge (ALJ) concludes that the requirements outlined at 6 NYCRR 622.15 have been met, the ALJ must then determine whether the complaint states a claim upon which relief may be granted, and must consider whether the requested civil penalty and remediation are warranted and sufficiently supported (*Matter of Alvin Hunt*, Decision and Order, July 25, 2006, at 4-5). Upon review of the motion papers, I conclude that the May 1, 2008 amended complaint states claims upon which the Commissioner may grant the relief requested by Staff.

In the May 1, 2008 amended complaint, Department staff alleges three violations. ECL 17-0505 prohibits making or using point sources that discharge into the waters of the State without first obtaining the SPDES permit required by ECL 17-0701. The implementing regulations mirror the requirement to obtain a permit (*see* 6 NYCRR 750-1.4[a]), and expressly state that a permit is required to control stormwater discharges (*see* 6 NYCRR 750-1.4[b]). Department staff asserts that Respondent violated ECL 17-0505 and 6 NYCRR 750-1.4 on March 22, 2006 and

[1] Recently, the Commissioner revisited the notice question in *Matter of Derrick Dudley* (Decision and Order, dated July 24, 2009). In *Dudley* (at 2), the Commissioner directed Staff in all administrative enforcement proceedings to serve motions for default judgment upon respondents and their representatives (if known) even where such service is not required under CPLR 3215(g)(1). The Commissioner's directive, which became effective on August 24, 2009, is not applicable to this proceeding.

again on April 25, 2006, when he allegedly failed to obtain the required SPDES permit prior to undertaking construction activities at the site. Each day that a violation occurs constitutes a separate violation (*see* ECL 71-1929[1]).

ECL 17-0803 prohibits the discharge of pollutants to the waters of the State from any outlet or point source without a SPDES permit. As the third violation, Staff alleges that Respondent violated ECL 17-0803 and 6 NYCRR 750-1.4 on or about April 25, 2006 when he discharged pollutants to the waters of the State from an outlet or point sources without a SPDES permit.

Proof of the allegations concerning liability is not required pursuant to 6 NYCRR 622.15. However, where, as here, Staff's motion papers include evidence to support the factual assertions underlying the claims of liability, the Commissioner has determined that the evidence may be examined to confirm whether the claims are meritorious. (*see Alvin Hunt*, supra at 7.)

As noted above, Exhibit A is a copy of Department staff's cover letter dated April 10, 2006 to Respondent. Staff enclosed, with the April 10, 2006 cover letter, a notice of violation, and a draft order on consent. These documents, which Department staff sent to Respondent by certified mail, return receipt requested (Wilkinson Affirmation, ¶ 2), advised him that a violation of ECL Article 17, and the implementing regulations, 6 NYCRR part 750, had occurred at the site on March 22, 2006 due to his failure to obtain a general SPDES permit for stormwater discharges from construction activities permit. The alleged violation is summarized in Appendix I, which is attached to the notice of violation (*see* Exhibit A). In addition, the Department staff directed Respondent to cease all activities at the site until he obtained the required SPDES permit.

Staff's April 10, 2006 letter and enclosures provided Respondent with the opportunity to settle the alleged violation, and advised Respondent to execute and return the proposed draft order on consent within 15 days from receipt of the notice of violation (*see* Exhibit A). Respondent did not respond to the notice of violation. Consequently, Staff asserts in the May 1, 2008 amended complaint that Respondent violated ECL 17-0505 and 6 NYCRR part 750 a second time on April 25, 2006, which is 15 days after Department staff requested that Respondent return a

signed copy of the proposed draft order on consent (*see* Exhibit F, 9th paragraph; Wilkinson Affirmation ¶ 3). Subsequently, Department staff commenced the captioned matter by duly serving the February 5, 2008 notice of hearing and complaint (Exhibits B, C and D; Wilkinson Affirmation ¶¶ 4-5), and later served the May 1, 2008 amended notice of hearing and complaint (Exhibits E and F; Wilkinson Affirmation ¶¶ 9-10).

I conclude that the factual allegations of the May 1, 2008 amended complaint state meritorious claims that Respondent violated provisions of ECL article 17 and implementing regulations on March 22, 2006 that continued until April 25, 2006 when Respondent undertook construction activities on the site without the required SPDES permit. Therefore, the Commissioner may grant default judgment against Respondents on the issue of liability.

III. Relief

A. Civil Penalty

In the May 1, 2008 amended complaint, Staff requests an order from the Commissioner that would assess a total civil penalty of $112,500, and direct Respondent to cease and desist any further construction activities on the site until he obtains the required general SPDES permit. To support the civil penalty request, Staff refers to ECL 71-1929, which authorizes a civil penalty not to exceed $37,500 per day for each violation, and that each day a violation continues is considered a separate violation.

In her September 26, 2008 affirmation (¶ 15), Ms. Wilkinson states that Staff is seeking the maximum single day penalty for each of the three violations alleged in the May 1, 2008 amended complaint. In addition, Ms. Wilkinson argued that the requested civil penalty is consistent with the Department's enforcement objectives.

Upon review of Staff's motion papers, I conclude that Department staff has provided a reasoned explanation for the requested civil penalty, particularly given the continuous nature of the violation. Moreover, Staff's request is within the potential maximum penalty authorized by law. Therefore, the Commissioner should assess a total civil penalty of $112,500.

B. Compliance

Department staff also requested that the Commissioner direct Respondent to cease all construction activities at the site until he obtains the required general SPDES permit to manage stormwater discharges at the site.

Under the terms of a general SPDES permit, an operator must file a Notice of Intent (NOI) and a stormwater pollution prevention plan (SWPPP). The purpose of the SWPPP is to protect surface water resources by controlling runoff and the discharge of pollutants at a construction site during storm events. Generally, after reviewing the NOI and SWPPP, Department staff would issue a letter that acknowledges receipt of the required information and documents, and which provides a permit identification number.

Conclusions and Recommendation

Based on the foregoing discussion, I conclude that Staff's September 26, 2008 motion for a default judgment meets the requirements outlined at 6 NYCRR 622.15(b) and related administrative precedents. In addition, Department staff has provided a reasoned explanation for the requested civil penalty. Therefore, in accordance with 6 NYCRR 622.15(c), I have prepared this summary report, and recommend that the Commissioner grant Department staff's motion for default judgment.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
November 12, 2009