STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Proposed Revocation of Mined Land Reclamation Permit No. 5-1638-00021/00001 Based Upon Alleged Violations

ORDER

-by-

MAYVILLE ENTERPRISES, INC.,

Respondent.

Background

In this proceeding, staff of the Department of Environmental Conservation (Department) seeks an order revoking Mined Land Reclamation Permit No. 5-1638-00021/00001, held by Mayville Enterprises, Inc. (respondent), relating to the Church Road Gravel Mine located in the Town of Dickinson, Franklin County, New York. Department staff seeks revocation of respondent's permit based upon respondent's alleged violation of a consent order entered into in May 2015 relating to the mining operations, as well as respondent's pattern of environmental noncompliance with respect to respondent's mining operations and with respect to respondent's petroleum bulk storage (PBS) facility known as the 4-Way Quick Stop, located at 1210 County Route 5, in the Town of Dickinson, Franklin County, New York. Department staff commenced this proceeding by letters dated November 6, 2015 and December 3, 2015, and respondent requested a hearing, by letters dated November 19, 2015 and December 7, 2015. Respondent also served an answer dated February 11, 2016.

The matter was referred to the Department's Office of Hearings and Mediation Services for adjudicatory proceedings and assigned to Administrative Law Judge (ALJ) D. Scott Bassinson. Following respondent's motion for summary judgment dated May 26, 2016, and Department staff's cross-motion for order without hearing dated July 8, 2016, the ALJ prepared a ruling and summary report, which is attached. The ALJ denied respondent's motion for summary judgment, and recommends that I grant Department staff's cross-motion for order without hearing and revoke respondent's mining permit.

As discussed below, I adopt the ALJ's findings of fact and conclusions of law, subject to my comments below, grant Department staff's cross-motion for order without hearing, and hereby revoke respondent's Mined Land Reclamation Permit No. 5-1638-00021/00001 due to respondent's violation of a May 2015 consent order by failing to timely pay the payable civil penalty. In addition, respondent's pattern of environmental noncompliance with respect to its mining and other operations constitutes a separate basis to revoke the permit.

Discussion

I agree with and adopt the ALJ's legal analysis regarding my authority to revoke respondent's permit (see Ruling and Summary Report at 16-17). A permit may be revoked where the permittee has violated a prior order on consent. A permit may also be revoked where the permittee has evidenced a pattern of environmental noncompliance (see id.). As discussed below, the facts here warrant revocation of respondent's permit on either ground.

Respondent became a permittee to operate the mine in 2009 (see Ruling and Summary Report at 3, Finding of Fact No. 5). The record establishes that, beginning no later than March 2012 and in the months and years that followed, respondent committed a number of violations of its mining permit as well as relevant mining statutes and regulations, including:

- mining an area larger than allowed under the permit;
- failing to increase its reclamation bond accordingly;
- building a second road into the mine without Departmental approval;
- stockpiling large rocks at the mine;
- failing to pay permit fees;
- failing to apply to renew its permit as required under the regulations; and
- operating the mine for more than two years without any permit, notwithstanding directions from Department staff to stop mining and reclaim the site

(see generally Ruling and Summary Report at 4-9, Findings of Fact Nos. 9-34).

The record establishes that respondent ignored staff's correspondence relating to these violations, or simply refused to comply, culminating in the commencement of an administrative enforcement proceeding as to which respondent defaulted, and a motion for a default judgment to which respondent filed no response. Although respondent ultimately entered into Order on Consent No. R5-20130515-2076 (2015 Mining Order) to resolve all of these violations, respondent failed to comply with the 2015 Mining Order by failing to make a timely payment of the civil penalty imposed by that order.

Department staff thereafter sent a letter to respondent in September 2015 and, citing respondent's failure to pay the $7,500 payable civil penalty under the 2015 Mining Order, demanded payment of $23,000, comprised of (i) both the payable and suspended civil penalties under the 2015 Mining Order, totaling $15,000, and (ii) $8,000 pursuant to ECL 71-1307(1) for violating the 2015 Mining Order (see id. at 9, Findings of Fact Nos. 36-38). Instead of paying the entire $23,000 demanded by staff, respondent sent in a check in the amount of $7,500 only, the already overdue payable portion of the penalty under the 2015 Mining Order (see id., Finding of Fact No. 39). Department staff returned respondent's check uncashed, and thereafter initiated this revocation proceeding (see id. at 9-10, 15-16, Findings of Fact Nos. 40, 68, 70).

In its motion for summary judgment, respondent argues that several bases for dismissing the revocation proceeding exist, including that respondent's principal Mr. Roger Mayville forgot to pay the civil penalty on time due to personal circumstances, and that Department staff extended the time by which respondent could make the payment (see e.g. Ruling and Summary

Report at 17-19). I agree with the ALJ's conclusions that forgetting to pay the civil penalty is not a valid basis for failing to make the required payment, and that respondent's claim that its payment deadline was extended by staff has no merit (see id.). The ALJ determined that no basis existed for dismissing the revocation proceeding and denied respondent's motion for summary judgment. Based on this record, I concur with the ALJ's denial of respondent's motion (see e.g. Ruling and Summary Report at 17-21).

Respondent's failure to make timely payment of the civil penalty under the 2015 Mining Order, thereby violating the order, is sufficient without more to support a decision to revoke respondent's permit (see 6 NYCRR 621.13[a][5] ["permits may be … revoked at any time by the department on the basis of … noncompliance with previously issued … orders of the commissioner … related to the permitted activity"]; see also Ruling and Summary Report at 16-17, 21-22). I hereby revoke respondent's mining permit for violating the 2015 Mining Order.

In addition, I agree with the ALJ's conclusion that respondent has evidenced a pattern of environmental noncompliance, both with respect to its mining operations and operations subject to statutes and regulations governing its petroleum bulk storage (PBS) facility, and that such pattern of noncompliance provides an additional basis for revoking respondent's mining permit (see Ruling and Summary Report at 10-16, Findings of Fact Nos. 42-67; see also id. at 16-17, 22-24).

As with respondent's mining operation, respondent was essentially unresponsive to staff's repeated efforts to get respondent to come into compliance at its PBS facility. Although respondent ultimately entered into an order on consent in 2015 (Order on Consent No. R5-20121116-2027 [2015 PBS Order]) to resolve all of its PBS violations, respondent failed to make a timely payment of the civil penalty under that order, and remains in violation of both the 2015 PBS Order and the underlying 2013 PBS order (see Ruling and Summary Report at 13-15, Findings of Fact Nos. 57-67). Department staff has established as a matter of law that respondent has committed several violations of – and continues to violate – PBS statutes and regulations, as well as consent orders it entered into in 2013 and 2015 relating to its PBS violations. [1]

Over many years, respondent has demonstrated a pattern of environmental noncompliance including continuing violations of applicable statutes and regulations, while simply ignoring Department staff's repeated efforts to elicit and obtain respondent's compliance. Accordingly, as noted, respondent's pattern of environmental noncompliance with respect to its mining operations and PBS facility provides an independent basis to revoke its mining permit in addition to a revocation arising from its failure to comply with the 2015 Mining Order.

I have considered the other arguments raised by respondent and, to the extent not addressed above, find them to be without merit.

[1] Respondent's continuing violations include failing to inform the Department as to the status or location of five petroleum storage tanks that had been at the facility (see e.g. Ruling and Summary Report at 13-15, Findings of Fact Nos. 54, 60, 66, 67).

Notwithstanding the revocation of respondent's mining permit, respondent has a continuing obligation to comply with the 2015 Mining Order (see Matter of Benaim, Order of the Commissioner, January 27, 2014, at 5; Matter of 35-60 74th Street Realty LLC, Order of the Commissioner, June 4, 2013, at 2-3), to the extent that the consent order provisions are still applicable. In this regard, respondent is obligated to remit to Department staff all penalties due and outstanding under the 2015 Mining Order, including amounts that had been suspended and are now due arising from respondent's failure to comply with the order. Furthermore, respondent remains obligated to comply with the reclamation requirements for the Church Road Gravel mine set forth in Schedule A of the 2015 Mining Order, in addition to the statutory and regulatory requirements governing mined land reclamation (see, e.g., ECL 23-2713 and 23-2715 and 6 NYCRR 422.1 and 422.3). Respondent also remains subject to the 2015 PBS Order and the underlying 2013 PBS order, including but not limited to the payment of civil penalties that are due and outstanding.

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

I. Department staff's cross-motion for order without hearing is granted.

II. Respondent Mayville Enterprises, Inc. is adjudged to have violated Order on Consent No. R5-20130515-2076 relating to the Church Road Gravel Mine located in Dickinson Center, Franklin County, New York, by failing to pay timely the payable civil penalty pursuant to that order.

III. Respondent Mayville Enterprises, Inc. is adjudged to have violated Order on Consent R5-20121116-2027 relating to respondent's petroleum bulk storage facility, known as the 4-Way Quick Stop, located at 1210 County Route 5, in the Town of Dickinson, Franklin County, New York, by failing to pay timely the payable civil penalty pursuant to that order.

IV. Respondent Mayville Enterprises, Inc. is adjudged to have a significant and persistent pattern of environmental noncompliance with respect to its operations of the Church Road Gravel Mine and the 4-Way Quick Stop petroleum bulk storage facility, in addition to its failure to comply with the terms of Order on Consent No. R5-20130515-2076 and Order on Consent No. R5-20121116-2027.

V. Based upon the respondent Mayville Enterprises, Inc.'s violation of Order on Consent No. R5-20130515-2076, respondent's Mined Land Reclamation Permit No. 5-1638-00021/00001 is hereby revoked. In addition, based on this record, respondent Mayville Enterprises, Inc.'s significant and persistent pattern of environmental noncompliance with respect to its operations of the Church Road Gravel Mine and the 4-Way Quick Stop petroleum bulk storage facility, provides an independent basis for revocation of respondent's Mined Land Reclamation Permit No. 5-1638-00021/00001.

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

Scott Abrahamson, Esq.
Assistant Regional Attorney
New York State Department of Environmental Conservation
Office of General Counsel, Region 5
1115 State Route 86
P.O. Box 296
Ray Brook New York 12977-0296

VII. The provisions, terms, and conditions of this order shall bind respondent Mayville Enterprises, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: February 28, 2017
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Proposed Revocation of Mined Land Reclamation Permit No. 5-1638-00021/00001 Based Upon Alleged Violations

RULING AND SUMMARY REPORT

-by-

MAYVILLE ENTERPRISES, INC.,

Respondent.

A. BACKGROUND AND SUMMARY

By letters dated November 6, 2015 and December 3, 2015, staff of the Department of Environmental Conservation ("Department") notified Mayville Enterprises, Inc. ("respondent") of the Department's intent to revoke Mined Land Reclamation Permit No. 5-1638-00021/00001 ("Permit"), which authorizes respondent to operate the Church Road Gravel Mine located in Dickinson Center, Franklin County, New York. By letters dated November 19, 2015 and December 7, 2015, pursuant to section 621.13(d) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), respondent, through its counsel, requested a hearing on the Department's intent to revoke. In addition, on February 11, 2016, respondent served an "Answer" which denies the allegations in staff's notices to revoke, and asserts what it refers to as eight affirmative defenses.[1]

On or about May 26, 2016, respondent filed a motion for summary judgment. On or about July 8, 2016, Department staff responded to respondent's motion for summary judgment and served a cross-motion for order without hearing.[2] By letter dated July 25, 2016, respondent stated, among other things, that respondent would not file additional papers in opposition to staff's cross-motion, and that respondent's initial papers on its motion for summary judgment would serve as such opposition.

As part of its cross-motion, Department staff has provided a list entitled "Facts Not in Dispute." See Affidavit of Scott Abrahamson, sworn to July 8, 2016 ("Abrahamson Aff.") at ¶¶ 9-29. A party is deemed to have admitted facts that it does not deny in response to a motion for order without hearing, see e.g. Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4. I have reviewed the May 24, 2016 affidavit of Roger Mayville and considered whether any statements of material fact therein – as to which Mr.

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[1] These submissions constitute the pleadings in this enforcement proceeding. See 6 NYCRR § 622.3(b)(2).

[2] The parties' papers submitted with respect to the motion and cross-motion are listed in Appendix A attached hereto.

Mayville has sworn under penalty of perjury – controvert the assertions of "facts not in dispute" contained in staff's cross-motion for order without hearing.

Both parties, having made dispositive motions, acknowledge that this matter is amenable to summary resolution. As discussed below, I conclude that no genuine issue of material fact exists regarding the fitness of respondent to continue to hold its mining permit. I deny respondent's motion for summary judgment, and recommend that the Commissioner grant Department staff's cross-motion for order without hearing on the issue of liability.

As to the relief sought by Department staff, the parties agree that respondent failed to make timely payment of the payable civil penalty under an order on consent relating to respondent's mining operations. Under applicable regulations, failure to comply with an order on consent is a sufficient basis for revoking respondent's permit.

In addition to establishing this violation, however, Department staff has also demonstrated as a matter of law that respondent has evidenced a pattern of environmental non-compliance over a period of several years by committing multiple violations of statutory and regulatory provisions governing mining and by violating the terms of its mining permit. Over the course of several years, respondent ignored many letters sent by Department staff, including letters seeking to resolve respondent's violations without having to proceed to formal adjudication, and letters seeking information and reminding respondent to apply to renew its mining permit at least 30 days prior to the expiration of its then-existing permit. While ignoring the many letters from Department staff, respondent continued to operate its mine without a permit for more than two years. After the many letters and conferences failed to result in respondent coming into compliance, Department staff served a notice of hearing and complaint on respondent, which respondent also ignored. Staff thereafter moved for a default judgment, to which respondent did not file a response. After entering into an order on consent to resolve that matter, respondent then failed to comply with its terms.

Moreover, respondent's pattern of non-compliance is not limited to mining; it has included repeated and continuing violations of statutes, regulations, and orders on consent concerning its petroleum bulk storage ("PBS") facility. Respondent committed, and admitted to, multiple PBS violations, entered into an order on consent in 2013 and then failed to comply with its terms. Department staff thereafter served a notice of hearing and complaint regarding the PBS violations and the violations of the PBS order on consent, which respondent ignored. Staff then moved for a default judgment, to which respondent did not file a response. After entering into another order on consent in 2015 relating to the PBS violations, respondent failed to comply with its terms. According to Department staff's submissions on the present motion and cross-motion, in addition to respondent's failure to comply with the PBS orders on consent, respondent's underlying PBS violations are continuing. Respondent does not deny that the PBS violations are continuing.

I therefore deny respondent's motion for summary judgment, and recommend that the Commissioner (i) grant Department staff's cross-motion for order without hearing; and (ii) revoke respondent's Mined Land Reclamation Permit No. 5-1638-00021/00001.

B. FINDINGS OF FACT

Based upon the documents and sworn affidavit testimony submitted by the parties, which (i) establish facts as to which the parties are in agreement; (ii) establish facts which are not denied by the opposing party, see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4; and (iii) raise matters as to which I take official notice, see 6 NYCRR § 622.11(a)(5), I conclude that there is no genuine issue that would require a hearing regarding the following facts:

1. Respondent Mayville Enterprises, Inc. is an active New York business corporation.[3]

2. At all times relevant here, Roger Mayville has been an officer of respondent Mayville Enterprises, Inc., including serving as Vice President and Chief Executive Officer. See Affidavit of Roger Mayville, sworn to May 24, 2016 ("Mayville Aff.") ¶ 1 and Exhibit ("Ex.") A thereto, at ¶ 3; see also Abrahamson Aff., Statement of Facts Not in Dispute, ¶ 17[4] and Ex. 1 thereto (consent orders signed by Mr. Mayville in his capacity as Vice President of Mayville Enterprises, Inc.).

3. Mr. Mayville is the responsible corporate officer for Mayville Enterprises, Inc., oversees its day-to-day operations, and is responsible for ensuring the company's compliance with all applicable laws and regulations. See Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 14; see also id. Ex. 1, first attached order on consent, at ¶ 4.

Facts Relating to Church Road Mine Violations, Permit and Consent Order

4. Joseph Barbeito, a Mined Land Reclamation Specialist 2 who has worked for the Department since 1998, has been assigned to the Church Road Gravel Mine, located in the Town of Dickinson, Franklin County, New York, since 2009, when the Department approved the transfer of an existing permit to Mayville Enterprises, Inc. See Affidavit of Joseph Barbeito, sworn to July 8, 2016 ("Barbeito Aff."); see also id. Ex. 1 (Letter dated October 13, 2009 enclosing approved permit transfer form and permit).

5. The mining permit transferred to Mayville Enterprises, Inc. in October 2009 ("2009 Mining Permit") had an effective date of October 13, 2009 and an expiration date of April 14, 2013. See Barbeito Aff. Ex. 1, 2009 Mining Permit, at 1.

[3] I take official notice of the records of the New York State Department of State Division of Corporations Entity Information. See https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY (search Mayville Enterprises, Inc.).

[4] References to those portions of Mr. Abrahamson's affidavit referred to as "Facts Not in Dispute," specifically paragraphs 9-29 of that affidavit, shall be cited herein as follows: "Statement of Facts Not in Dispute, Abrahamson Aff. ¶ __."

6. The 2009 Mining Permit contained special and general conditions, and stated, among other things, as follows: "By acceptance of this permit, the permittee agrees that the permit is contingent upon strict compliance with the ECL, all applicable regulations, and all conditions included as part of this permit." Barbeito Aff. Ex. 1, 2009 Mining Permit, at 1.

7. The 2009 Mining Permit limited to four acres the area that could be affected by mining. See Barbeito Aff. ¶ 7; see also 2009 Mining Permit at 1 ("Authorized Activity" cites approved operations involving a total of 4 acres of affected land over the permit term).

8. The 2009 Mining Permit stated that "[t]he permittee must submit a renewal application at least 30 days before permit expiration for the following permit authorizations: Mined Land Reclamation." 2009 Mining Permit at 5, ¶ 4.

9. During a March 16, 2012 inspection of the Church Road Gravel Mine, Mr. Barbeito observed that mining activities had disturbed an area "that was much larger than the 4 acres allowed" in the 2009 Mining Permit. Barbeito Aff. ¶ 11. Mayville Enterprises, Inc. had not applied for Departmental approval to modify the 2009 Mining Permit to allow an affected area greater than 4 acres. See id.

10. During the March 16, 2012 inspection, Mr. Barbeito also observed that Mayville Enterprises, Inc. had stockpiled large rocks at the mine "that would need to be buried in order to comply" with conditions of the 2009 Mining Permit. See Barbeito Aff. ¶ 12; see also id. Ex. 2 (inspection report).

11. Mr. Barbeito requested that Mr. Mayville and Mayville Enterprises, Inc. provide an updated mining map that showed the area affected by mining activities. See Barbeito Aff. ¶14 and Ex. 2.

12. Although Mr. Barbeito sent his inspection report noting the violations to Mr. Mayville and Mayville Enterprises, Inc., he received no response to the report or the requests contained therein. See Barbeito Aff. ¶ 15.

13. By letter dated February 11, 2013, Mr. Barbeito advised Mr. Mayville and Mayville Enterprises, Inc. that the 2009 Mining Permit would expire on April 14, 2013, and identified the items that Mr. Mayville and Mayville Enterprises, Inc. had to submit to renew the 2009 Mining Permit. See Barbeito Aff. ¶¶ 16-17 and Ex. 3.

14. Mr. Barbeito's February 11, 2013 letter to Mr. Mayville and Mayville Enterprises, Inc. also stated the following:

> Under the requirements of your permit, the renewal application must be sent in at least 30 days prior to the permits' [sic] expiration date. This timely submission will allow you to continue operating under your existing expired permit, until the renewal is issued. Failure to submit your renewal application at least thirty (30) days prior to the permits' [sic] expiration may result in loss of operating privileges until a renewal is issued.
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> Barbeito Aff. Ex. 3.

15. Neither Mr. Mayville nor Mayville Enterprises, Inc. submitted an application to renew the 2009 Mining Permit on or before 30 days prior to the expiration date of the 2009 Mining Permit. See Barbeito Aff. ¶ 18. Under cover letter dated May 3, 2013, Mayville Enterprises, Inc., through John T. Carr, P.E. of the engineering firm Blue Mountain Engineering, PLLC, submitted an application to renew the 2009 Mining Permit, along with an organization report and an updated mining plan. See id. and Ex. 4.

16. In 2013, Erin Donhauser, an Environmental Analyst 1 in the Department's Region 5 Division of Environmental Permits, was assigned to process an application by Mayville Enterprises, Inc. to renew the 2009 Mining Permit. See Affidavit of Erin Donhauser, sworn to July 8, 2016 ("Donhauser Aff."), at ¶ 5.

17. By letter dated May 13, 2013, Ms. Donhauser informed Mayville Enterprises, Inc. that the application to renew the 2009 Mining Permit was both "untimely and insufficient" and that, as a result, "permitted activities will not be authorized following expiration of the existing permit until the permit is renewed." Donhauser Aff. Ex. 1; see also id. ("the [State Administrative Procedures Act] allows your current permit to continue in effect beyond its expiration date … but only if the renewal application submission is both timely and sufficient"). Ms. Donhauser's May 13, 2013 letter was addressed to Mayville Enterprises, Inc., and a copy of the letter was sent to respondent's engineer John Carr. See id.

18. In addition to informing Mayville Enterprises, Inc. that the 2009 Mining Permit had expired, Ms. Donhauser identified additional information that Mayville Enterprises, Inc. was required to provide "no later than 06/03/2013." Donhauser Aff. Ex. 1.

19. By letter dated June 13, 2013, Mr. Barbeito informed Mayville Enterprises, Inc. that the reclamation bond for the mine had to be increased from $23,000 to $40,000 based on the calculation of estimated final reclamation costs. See Barbeito Aff. ¶ 24 and Ex. 5.

20. After June 2013 Mr. Barbeito did not receive proof that Mayville Enterprises, Inc. had increased the bond for the mine. See Barbeito Aff. ¶¶ 25-26.

21. On October 16, 2013, Mr. Barbeito viewed the mine site from Church Road, and observed large processing equipment on the site, a stockpile of large rocks within the mine site, and the presence of a second access road into the mine for which there had been no Department authorization. On the following day, Mr. Barbeito prepared an inspection report summarizing his observations. See Barbeito Aff. ¶¶ 27-28 and Ex. 6 (Mined Land Inspection Report signed and dated October 17, 2013).

22. The inspection report summarized Mr. Barbeito's observations made on October 16, 2013, listed inspection items including that the permit had expired on April 14, 2013 and that a second, unauthorized, access road had been created, and stated the following:

> The permittee is notified that the entire mine site must be reclaimed immediately and within two years of the permits expiration date, noted below. Furthermore, mining is no longer authorized at the site and only reclamation activities can be conducted. The property was not entered and only viewed from the County Road. The use of processing equipment located at the pit, is not allowed and considered to be a mining related action. The permittee was requested to increase the reclamation bond during the permit renewal and has refused to do so, causing the permit to expire, additionally. Regulatory fees are overdue for this past year, 2013, additionally. Interest will continue to accrue and annual reg. fees will continue, until mine site if fully reclaimed.
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> Barbeito Aff. Ex. 6.

23. On November 27, 2013, engineer Mr. Carr sent an email to Mr. Barbeito acknowledging that Mr. Mayville and Mayville Enterprises, Inc. had received a report from Mr. Barbeito and, among other things, that the boulders had been removed from the site. See Barbeito Aff. Ex. 7.

24. By email dated December 2, 2013, Mr. Barbeito responded to Mr. Carr's email stating, among other things, that Mr. Mayville had failed to pay permit fees for the past year, that Mr. Mayville refused Mr. Barbeito's request for a $40,000 reclamation bond, and that, if Mr. Mayville and Mayville Enterprises, Inc. wanted to renew the permit, Mr. Barbeito needed access to the site to conduct an inspection. See id.

25. Counsel for Department staff sent a letter to Mr. Mayville and Mayville Enterprises, Inc. dated January 24, 2014, informing them that the issues

relating to the mine (also referred to as the "Waverly Pit") had been referred for the commencement of an enforcement action. See Abrahamson Aff. ¶ 46 and Ex. 8. The letter identified the following alleged violations at the mine: (i) engaging in mining operations without a permit since April 14, 2013; (ii) failing to increase the amount of financial security for mine reclamation; and (iii) building a second road into the mine without the Department's prior approval. See Abrahamson Aff. Ex. 8. Counsel attached a proposed order on consent "[i]n an effort to resolve this matter before the Department commences an enforcement action." Id. The letter requested that Mr. Mayville and Mayville Enterprises, Inc. sign the proposed order on consent and return it to the Department by February 7, 2014. See id. Neither Mr. Mayville nor Mayville Enterprises, Inc. returned a signed order on consent by February 7, 2014. See Abrahamson Aff. ¶ 46.

26. A May 5, 2014 letter, from counsel then representing Mr. Mayville and Mayville Enterprises, Inc. to counsel for Department staff, acknowledged that staff counsel had called on May 2, 2014 regarding the status of the file relating to the mine. See Abrahamson Aff. Ex. 12. Counsel for Mr. Mayville and Mayville Enterprises, Inc. stated that he was awaiting a report from consultant John Carr before responding. See id.

27. In a letter dated February 9, 2015, counsel for Department staff recounted an October 6, 2014 conversation involving Department staff and counsel for Mr. Mayville and Mayville Enterprises, Inc. regarding the mine and a matter relating to respondent's petroleum bulk storage ("PBS") facility. See Abrahamson Aff. Ex. 4. Counsel for staff stated, among other things, that "[w]e concluded the phone call with the understanding that your clients would hire John Carr, P.E. to help with both the PBS and mining issues. We were to have received a report of some sort from Mr. Carr by the end of October. We have received nothing." Id. The letter states further that it enclosed an order to address the violations at the mine. See id.

28. In March 2015, Department staff served on Mr. Mayville and Mayville Enterprises, Inc. a notice of hearing and complaint ("2015 Mining Complaint") naming as respondents Mayville Enterprises, Inc. and Roger Mayville in his individual capacity. See Abrahamson Aff. Ex. 9. The complaint asserted three causes of action, (i) mining without a permit; (ii) increasing affected area without approval; and (iii) constructing unapproved access road, and sought an order from the Commissioner finding Mr. Mayville and Mayville Enterprises, Inc. liable and imposing a civil penalty of $50,000 jointly and severally on Mr. Mayville and Mayville Enterprises, Inc., of which $10,000 would be payable and $40,000 suspended contingent upon compliance with the Commissioner's order. See id.

29. Mr. Mayville and Mayville Enterprises, Inc. failed to answer the 2015 Mining Complaint. Department staff thereafter sought a default judgment by

motion papers dated April 17, 2015, and scheduled a default hearing for May 12, 2015. See Abrahamson Aff. ¶ 49 and Ex. 10.

30. On April 15 and 16, 2015, Mr. Barbeito traveled to the mining site, observed that Mr. Mayville and Mayville Enterprises, Inc. continued to operate the Church Road Gravel Mine, and sent a notice of violation dated May 4, 2015. See Barbeito Aff. ¶ 34 and Ex. 8. The notice of violation letter stated, among other things, that the permit for mining at the site had expired on April 14, 2013 and had not been renewed, that Mr. Mayville and Mayville Enterprises, Inc. may be liable for a civil penalty of $8,000, plus an additional penalty of $2,000 for each day that the violation continues, and that continued operation of the mine may subject Mr. Mayville and Mayville Enterprises, Inc. to civil penalties and criminal sanctions. See Barbeito Aff. Ex. 8.

31. On May 11, 2015, respondent Mayville Enterprises, Inc., through its Vice President and Chief Executive Officer Roger Mayville, and Mr. Mayville, in his individual capacity, entered into Order on Consent No. R5-20130515-2076 ("2015 Mining Order"), effective May 15, 2015, admitting to several violations of the New York Mined Land Reclamation Law, Environmental Conservation Law ("ECL") article 23, and its implementing regulations, at the Church Road Gravel Mine. See Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 11; see also Mayville Aff. Ex. A.

32. Specifically, in the 2015 Mining Order, Mayville Enterprises, Inc. and Mr. Mayville admitted to the following violations:

    a. increasing the area of affected land without prior approval by the Department;
    b. mining without a valid permit since April 14, 2013;
    c. constructing a second access road into the mine without prior approval by the Department; and
    d. failing to furnish adequate financial security.

    See 2015 Mining Order ¶¶ 27-30.

33. In the 2015 Mining Order, Mayville Enterprises, Inc. and Mr. Mayville consented to be held jointly and severally liable for a civil penalty of $15,000 for the violations set forth in the 2015 Mining Order, of which $7,500 was to be paid no later than 90 days after the effective date of the 2015 Mining Order, and $7,500 was suspended on the condition that Mayville Enterprises, Inc. and Mr. Mayville complied with the 2015 Mining Order and the schedule of compliance attached thereto. See Statement of Facts Not in Dispute, Abrahamson ¶ 19; see also Mayville Aff. ¶ 5 (acknowledging that the $7,500 payment was due on or before August 17, 2015) and Ex. A, 2015 Mining Order, at 6, ¶ I(C).

34. Neither Mr. Mayville nor Mayville Enterprises, Inc. paid the $7,500 payable penalty required under the 2015 Mining Order by the due date set forth in the 2015 Mining Order. See Mayville Aff. ¶ 7 ("I entirely forgot to make the payment of $7,500 by August 17, 2015"); see also Norfolk Aff. ¶ 5 ("Mr. Roger Mayville on behalf of Respondent failed to make payment of the civil penalty by August 17, 2015"); Abrahamson Aff. ¶¶ 16, 50.

35. On August 24, 2015, the Department issued to respondent Mayville Enterprises, Inc. Mined Land Reclamation Permit, No. 5-1638-0002/00001 for the Church Road Gravel Mine. See Mayville Aff., at ¶ 8 and Ex. B; see also Norfolk Aff., at ¶ 4; Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 10.

36. On or about September 17, 2015, Department staff sent a letter to Mr. Mayville and Mayville Enterprises, Inc. entitled "Notice of Violation and Demand for Suspended Penalties" relating to the Church Road Gravel Mine. See Mayville Aff. Ex. C; see also Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 18.

37. In the September 17, 2015 letter, staff asserted that Mayville Enterprises, Inc. failed to pay the $7,500 payable civil penalty as required under the 2015 Mining Order, and that staff was now seeking a total of $23,000, comprised of (i) the entire $15,000 civil penalty set forth in the 2015 Mining Order; and (ii) and an additional $8,000, citing ECL § 71-1307(1). See Mayville Aff. Ex. C.

38. Staff's September 17, 2015 letter stated that "[f]ailure to pay the entire amount by October 30, 2015" would result in referral of the matter to the New York Attorney General's office for enforcement. Mayville Aff. Ex. C.

39. By letter dated October 29, 2015, counsel for Mr. Mayville and Mayville Enterprises, Inc. submitted to Department staff a check for $7,500, stating that that "[w]e are submitting herewith the agreed upon civil penalty due in the amount of $7,500." Norfolk Aff. Ex. A. The letter included the case number of the 2015 Mining Order and the Mined Land ID number 50849. See id. and Mayville Aff. Exs. A and B.

40. By letter dated October 30, 2015, counsel for Department staff returned the check for $7,500 that had been sent to the Department on behalf of Mr. Mayville and Mayville Enterprises, Inc. The letter stated, among other things, as follows:

> At this time, your clients are liable for a penalty of $23,000 for the violation of [the 2015 Mining Order] …. Your clients failed to comply with the terms of orders they signed on May 11, 2015. I served demand letters on your clients, which … explained to your clients their failure to comply with the orders and stated that, as a

result, the Department was seeking to impose additional penalties. The Department is entitled to the additional penalties pursuant to the terms of the orders …. I am returning the two checks[5] because they do not satisfy the terms of the demand letters and you have not stated whether your clients intend to remit the balance before close of business today.

Norfolk Aff. Ex. D.

41. After Mr. Mayville's daughter, who lives in Tennessee, became ill following complications during her pregnancy, Mr. Mayville traveled to Tennessee "three to four times" during the summer of 2015 and stayed there "for weeks at a time during the summer of 2015." Mayville Aff. ¶ 7.

Facts Relating to PBS Facility Violations and Consent Orders

42. On October 19, 2011, Benjamin Hankins, an environmental engineer with the Department's Region 5 office, inspected petroleum bulk storage ("PBS") facility No. 5-600627, known as the "4-Way Quick Stop," located at 1210 County Route 5, in the Town of Dickinson, Franklin County, New York. See Affidavit of Benjamin Hankins, sworn to July 7, 2016 ("Hankins Aff."), at ¶ 8.

43. Following his inspection of the facility, Mr. Hankins sent to Roger Mayville a notice of violation letter dated October 31, 2011 ("2011 PBS NOV") identifying what Mr. Hankins determined to be seventeen violations of PBS regulations. See Hankins Aff. ¶ 8, and Exhibit 1. Mr. Hankins enclosed a copy of the inspection checklist with his October 31, 2011 letter. Id.

44. Mr. Hankins referred the matter to the Regional Attorney for enforcement after he did not receive a response from Mr. Mayville to the 2011 PBS NOV. See Hankins Aff. ¶ 9.

45. On May 22, 2013, respondent Mayville Enterprises, Inc., through its Vice President Roger Mayville, entered into Order on Consent No. R5-20121116-2027 ("2013 PBS Order"), effective May 24, 2013, admitting to PBS violations of regulations applicable to the 4-Way Quick Stop PBS facility. See Affirmation of Michelle Crew, Esq. dated July 7, 2016 ("Crew Aff."), at ¶¶ 5-11, and Ex. 1; see also Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 12; see also id. ¶ 33, and Ex. 1 thereto.

46. Specifically, in the 2013 PBS Order, Mayville Enterprises, Inc. admitted to the following violations:

[5] As discussed below, see Findings of Fact Nos. 64-65, respondent's counsel also tendered – and Department staff returned – a check for $10,000 relating to the 2015 PBS Order.

a. failure to display certificate;
b. registration not current or valid;
c. failure to maintain dispense sumps for tanks 001, 002, and 003 at the facility;
d. failure to permanently or temporarily close tanks properly, for tanks 001, 002, 003, and 004;
e. failure to maintain top sumps for tanks 001, 002, and 003;
f. failure to properly color-code fill ports for tanks 003 and 005;[6]
g. tank 005 not welded steel;
h. no surface coating for tank 005;[7]
i. tank 005 resting on soil, not cathodically protected;
j. no impermeable barrier under tank 005;
k. no leak monitoring between tank bottom and impermeable barrier for tank 005;
l. no monthly inspections for tanks 001, 002, 003, 004 and 005;
m. no secondary containment for tank 005;
n. failure to maintain secondary containment for tanks 001, 002, 003 and 004;
o. no gauge or high level alarm for tanks 004 and 005;
p. failure to maintain overfill prevention (gauge) for tanks 001, 002, and 003;
q. no design/working capacity and identification number for tanks 004 and 005;[8] and
r. no operation valve installed on tank 005.

See 2013 PBS Order at 2-3.

47. In the 2013 PBS Order, Mayville Enterprises, Inc. consented to being assessed a civil penalty of $8,050 for the violations set forth in the 2013 PBS Order, of which $1,610 was to be paid no later than 30 days after the effective date of the 2013 PBS Order, and $6,440 was suspended on the condition that Mayville Enterprises, Inc. complied with the Schedule "A" schedule of compliance attached thereto. See id. ¶¶ I(A)-(C).

48. The 2013 PBS Order required Mayville Enterprises, Inc. to submit, within thirty days of the effective date of the 2013 PBS Order, photographic or other documentary evidence reflecting compliance with the schedule of compliance.

[6] This paragraph in the 2013 PBS Order also includes the parenthetical phrase "004 also found during the inspection," but does not provide an explanation of the meaning of this phrase. See 2013 PBS Order at 2, ¶ 7(f).

[7] This paragraph in the 2013 PBS Order also includes the parenthetical phrase "tanks 001, 002, 003 and 004 also found during the inspection," but does not provide an explanation of the meaning of this phrase. See 2013 PBS Order at 2, ¶ 7(h).

[8] This paragraph in the 2013 PBS Order also includes the parenthetical phrase "001, 002, and 003 also found during the inspection," but does not provide an explanation of the meaning of this phrase. See 2013 PBS Order at 3, ¶ 7(q).

See 2013 PBS Order, at 8-10, ¶¶ 1, 3-15. Pursuant to the 2013 PBS Order, Mayville Enterprises, Inc. was required to send the submissions to Mr. Hankins. See id. at 4, ¶ II.A.

49. In addition to the submissions due within 30 days of the effective date of the 2013 PBS Order, the 2013 PBS Order required Mayville Enterprises, Inc. to submit to the Department a signed PBS application form and application fee within 5 days of the effective date of the order. See 2013 PBS Order, at 8, ¶ 2; see also Hankins Aff. ¶ 12. Roger Mayville submitted to the Department a PBS application form and fee for the 4 Way Quick Stop facility, which was received by the Department on April 12, 2013. See Hankins Aff. Ex. 2. Roger Mayville signed the form as "Owner" of the facility, and identified himself as the facility owner in the "facility owner" box on the form. See id.

50. By letter dated December 12, 2013, Michelle Crew, Esq., the Regional Attorney for the Department's Region 5, informed Mr. Mayville and Mayville Enterprises, Inc. that Department staff had not received any of the submissions required to be submitted within 30 days of the effective date of the 2013 PBS Order. See Crew Aff. ¶¶ 12-13, and Ex. 2. Ms. Crew's letter stated that, "[t]o avoid further enforcement for violating the terms of the [2013 PBS Order]," respondent must make the additional submissions within ten days of the date of the letter. Id.

51. On September 5, 2014, Regional Attorney Crew sent a letter to Mr. Mayville and Mayville Enterprises, Inc. stating that Mayville Enterprises, Inc. was in violation of the 2013 PBS Order, and demanding payment of $6,440, the amount of civil penalty that had been suspended contingent upon compliance with the 2013 PBS Order. See Crew Aff. ¶¶ 14-15, and Ex. 3; see also Abrahamson Aff. Ex. 1.

52. Notwithstanding Ms. Crew's letters to Mr. Mayville and Mayville Enterprises, Inc., Mayville Enterprises, Inc. did not comply with the schedule of compliance in the 2013 PBS Order, and did not render payment of the un-suspended penalty of $6,440. See Crew Aff. ¶ 16. In 2015, Ms. Crew directed assistant regional attorney Abrahamson to commence an administrative enforcement proceeding against Mr. Mayville and Mayville Enterprises, Inc. See id. ¶ 17.

53. By letter dated February 9, 2015, counsel for Department staff wrote a letter to counsel for Mayville Enterprises, Inc. and Roger Mayville, summarizing the failure of Mayville Enterprises, Inc. to comply with the 2013 PBS Order, and recounting a teleconference held on October 6, 2014 during which the parties discussed the failure of Mr. Mayville and Mayville Enterprises, Inc. to comply with the terms of the 2013 PBS Order, and issues relating to a sand and gravel pit known as the "Waverly Pit."[9] See

[9] The Church Road Gravel Mine at issue here was also known as the "Waverly Pit." See Abrahamson Aff. ¶ 34.

Abrahamson Aff. Ex. 4. Staff demanded payment of the suspended penalty under the 2013 PBS Order. Id. Mr. Mayville and Mayville Enterprises, Inc. did not tender payment. See Abrahamson Aff. ¶ 34.

54. During the October 6, 2014 teleconference, Department staff learned that the five petroleum storage tanks inspected by Mr. Hankins at the facility in 2011 had been moved to another location, but neither Mr. Mayville nor his counsel would provide the new location. See Hankins Aff. ¶ 19.

55. Department staff thereafter served a notice of hearing and complaint ("2015 PBS Complaint") naming as respondents Mayville Enterprises, Inc. and Roger Mayville in his individual capacity. See Abrahamson Aff. Ex. 5. The complaint sought a Commissioner's order finding that Mr. Mayville and Mayville Enterprises, Inc. violated the terms of 2013 PBS Order, and imposing a civil penalty of $11,440 jointly and severally upon Mr. Mayville and Mayville Enterprises, Inc. See id.

56. Neither Mayville Enterprises, Inc. nor Roger Mayville served an answer to the 2015 PBS Complaint, and Department staff thereafter served a motion for default judgment. See Abrahamson Aff. ¶ 36, and Ex. 6.

57. On May 11, 2015, Roger Mayville signed Order on Consent No. R5-20121116-2027 ("2015 PBS Order"), as Vice President of Mayville Enterprises, Inc., and in his individual capacity. See Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 13; see also id. Ex. 1. In the 2015 PBS Order, Mr. Mayville and Mayville Enterprises, Inc. admitted that they (i) failed to comply with the 2013 PBS Order; (ii) received but never responded to Department staff's December 2013, September 2014 and February 2015 letters; and (iii) failed to answer staff's March 2015 complaint, admitting default. See 2015 PBS Order at ¶¶ 9-15.

58. Pursuant to the 2015 PBS Order, Mr. Mayville and Mayville Enterprises, Inc. agreed to the imposition of a civil penalty in the amount of $20,000, of which (i) $10,000 was due and payable within 90 days of the effective date of the order; and (ii) $10,000 was suspended conditioned on compliance with the order and its schedule of compliance. See Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 20; see also 2015 PBS Order at 3, ¶¶ I.A-C.

59. Neither Mr. Mayville nor Mayville Enterprises, Inc. paid the payable $10,000 civil penalty within 90 days of the effective date of 2015 PBS Order. See Abrahamson Aff. ¶ 40.

60. The schedule of compliance attached to the 2015 PBS Order required that, within 30 days of the effective date of the order, respondents submit to Mr. Hankins documentary, photographic or other proof that would demonstrate either (i) complete compliance with the schedule of compliance in the 2013

PBS Order; or (ii) that respondents had permanently closed the five PBS tanks at the 4 Way Quick Stop PBS facility in accordance with 6 NYCRR 613.9(b), (c) and (d). See 2015 PBS Order, at 13.

61. The 2015 PBS Order provided that, in the event respondents failed to comply with the order's schedule of compliance, the Department could elect to impose stipulated per-day penalties in addition to seeking the suspended penalty and additional penalties under ECL § 71-1929(1). See Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 20; see also 2015 PBS Order at 4, ¶¶ I.D-E.

62. Department staff sent to Mr. Mayville and Mayville Enterprises, Inc. a notice of violation and demand for suspended penalties by letter dated September 17, 2015. In the letter, staff asserted that Mayville Enterprises, Inc. failed to pay the $10,000 payable civil penalty as required under the 2015 PBS Order, and that staff was now seeking a total of $30,000, comprised of (i) the entire $20,000 civil penalty set forth in the 2015 PBS Order; and (ii) an additional $10,000, citing ECL § 71-1929(1). See Abrahamson Aff. ¶¶ 40-41 and Ex. 7.

63. Staff's September 17, 2015 letter stated that "[f]ailure to pay the entire amount by October 30, 2015" would result in referral of the matter to the New York Attorney General's office for enforcement. Abrahamson Aff. Ex. 7.

64. By letter dated October 29, 2015, counsel for Mr. Mayville and Mayville Enterprises, Inc. submitted to Department staff a check for $10,000, stating that that "[w]e are submitting herewith the agreed upon civil penalty due in the amount of $10,000." Affirmation of Matthew D. Norfolk, Esq. dated May 26, 2016 ("Norfolk Aff."), Ex. A. The letter included the case number of the 2015 PBS Consent Order. See id.

65. By letter dated October 30, 2015, counsel for Department staff returned the check for $10,000 that had been sent to the Department on behalf of Mr. Mayville and Mayville Enterprises, Inc. Staff's October 30, 2015 letter stated, among other things, as follows:

> At this time, your clients are liable for … a penalty of $30,000 for the violation of [the 2015 PBS Order] …. Your clients failed to comply with the terms of orders they signed on May 11, 2015. I served demand letters on your clients, which … explained to your clients their failure to comply with the orders and stated that, as a result, the Department was seeking to impose additional penalties. The Department is entitled to the additional penalties pursuant to the terms of the orders …. I am returning the two checks[10] because

[10] As discussed above, see Finding of Fact Nos. 39-40, respondent's counsel also tendered – and Department staff returned – a check for $7,500 relating to the 2015 Mining Order.

they do not satisfy the terms of the demand letters and you have not stated whether your clients intend to remit the balance before close of business today.

Norfolk Aff. Ex. D.

66. As of the July 7, 2016 date of his affidavit, Mr. Hankins had not received anything from Mr. Mayville or Mayville Enterprises, Inc. demonstrating complete compliance with the 2013 PBS Order or that Mr. Mayville or Mayville Enterprises, Inc. had permanently closed the five PBS tanks at the 4-Way Quick Stop PBS facility in accordance with 6 NYCRR § 613.9(b), (c) and (d). See Hankins Aff. ¶ 26. Mr. Hankins states further that, as of that date, Mr. Mayville and Mayville Enterprises, Inc. "have still failed to disclose to me the location or locations of the five petroleum storage tanks I saw at the Facility in 2011." Id.

67. As of July 7, 2016, the only item in the 2013 PBS Order schedule of compliance with which Mr. Mayville and Mayville Enterprises, Inc. had complied was submission of the application for a PBS certificate. See Hankins Aff. ¶¶ 16-17, 26.

Facts Relating to the Revocation Proceeding

68. By letter dated November 6, 2015, Department staff notified Mayville Enterprises, Inc. that the Department intended to revoke the mining permit for the Church Road Gravel Mine. See Norfolk Aff. Ex. E; see also Statement of Facts Not in Dispute, Abrahamson Aff. ¶ 23. Staff cited as a basis for revocation of the permit Mayville Enterprises, Inc.'s failure to pay timely the $7,500 civil penalty under the 2015 Mining Order, and Mayville Enterprises, Inc.'s failure to comply with the terms of the 2015 Mining Order after having been notified of its failure to pay the penalty. See id. Department staff also stated that, pursuant to 6 NYCRR § 621.13(a)(4), "the Department may revoke a permit at any time for noncompliance with an order of the Commissioner." Id.

69. By letter dated November 19, 2015, counsel for Mr. Mayville and Mayville Enterprises, Inc. responded to Department staff's November 6, 2015 notice of intent to revoke. See Norfolk Aff. Ex. F. In addition to stating that 6 NYCRR § 621.13(a)(4) (the provision cited by Department staff as the basis for revocation) does not govern non-compliance with an order of the Commissioner, counsel requested that the Department reconsider the revocation, and requested a hearing to determine whether the permit should be revoked. See id.

70. Department staff sent a revised notice of intent to revoke permit letter dated December 3, 2015, correcting its citation of authority to 6 NYCRR §

621.13(a)(5), and stating, among other things, that "staff will assert that Mayville Enterprises, Inc. has demonstrated a pattern of environmental non-compliance, which also may serve as a basis for permit revocation." Norfolk Aff. Ex. G. Department staff included more than two pages of bulleted paragraphs comprising the facts that staff alleges "will support staff's allegation that Mayville Enterprises, Inc. engaged in a pattern of environmental noncompliance." Id.

71. Mayville Enterprises, Inc. served an "Answer" in response to staff's December 3, 2015 letter, in which it denied every allegation asserted in the December 3, 2015 letter, and asserted what it refers to as eight "affirmative defenses." See Answer dated February 11, 2016, Norfolk Aff. Ex. I.

C. DISCUSSION AND CONCLUSIONS OF LAW

1. Summary Judgment and Motion for Order Without Hearing

As set forth above, the parties have each made dispositive motions: Respondent has moved for summary judgment, and Department staff has cross-moved for an order without hearing. The motions are governed by the same standards. See 6 NYCRR § 622.12(d) (a contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR). CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." See also Matter of Frank Perotta, Partial Summary Order of the Commissioner, January 10, 1996, at 1 ("Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law") (adopting ALJ Summary Report). Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. See Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4).

2. Standards for Permit Revocation

Mined Land Reclamation Permits, such as the permit at issue here, are governed by the Uniform Procedures Act ("UPA"), ECL § 70-0107(3)(i). See also 6 NYCRR § 621.1(i). Pursuant to the UPA, the Department has the authority to revoke a permit after providing to the permit holder an opportunity for a hearing. See ECL § 70-0115(1). Permits may be revoked "at any time by the department on the basis of any ground set forth in" 6 NYCRR § 621.13(a). Moreover, the Department is empowered "to administer and enforce the provisions of [ECL article 23, title 27] and any rule or regulation promulgated thereunder or order issued pursuant thereto." ECL § 23-2709(1)(b).

Courts have long recognized that licensing officials such as the Department have implicit authority to determine the fitness and suitability of permittees and applicants. See e.g. Barton Trucking Corp. v O'Connell, 7 N.Y.2d 299, 307-309 (1959) ("a licensing official has implicit

discretion to pass upon the fitness of an applicant"); Matter of Olsen v Town of Saugerties, 161 A.D.2d 1077, 1078 (3d Dept. 1990); Matter of Bio-Tech Mills Inc. v Williams, 105 A.D.2d 301 (3d Dept. 1985), aff'd for reasons stated below, 65 N.Y.2d 855 (1985). Commissioner decisions and orders are in accord. See e.g. Matter of Bardin, Order of the Commissioner, March 5, 2014; Matter of Karta Corp., Order of the Commissioner, August 10, 2010, adopting Hearing Report, at 24-26 (extended discussion of record of compliance as a basis for permit denial); Matter of Al Turi Landfill, Inc., Decision of the Commissioner, April 15, 1999.

These considerations have been incorporated into the Department's Record of Compliance Enforcement Policy (rev. March 5, 1993) ("Compliance Policy" or "DEE-16"). See http://www.dec.ny.gov/regulations/25244.html. The Compliance Policy is intended "to ensure that persons who are unsuitable to carry out responsibilities under Department permits … are not authorized to do so." DEE-16, ¶ I. The Compliance Policy acknowledges that a legislative requirement that some activities require permits "creates not only an authorization but a command to the permitting and licensing authority to take reasonable steps to ensure that the applicant is a fit and proper person to engage in the permitted or licensed activity." Id. ¶ III.

The Compliance Policy identifies events which "should be considered a basis for exercising the Department's discretion in … revoking a permit," including:

> Whether a permittee … has been determined in an administrative … proceeding to have violated any provision of the ECL, a related order or determination of the Commissioner, any regulation of the Department, any condition or term of any permit issued by the Department, or any similar statute, regulation, order or permit condition of the federal or other state government, or agency, on one or more occasions and in the opinion of the Department, the violation that was the basis for the action posed a significant potential threat to the environment or human health, or is part of a pattern of non-compliance.

Id. ¶ IV.

3. **Respondent's Motion for Summary Judgment**

Respondent's motion for summary judgment is based upon the following factual assertions and legal arguments:[11]

- Mr. Mayville and Mayville Enterprises, Inc. did not make a timely payment of the $7,500 payable civil penalty under the 2015 Mining Order because Mr. Mayville was "distracted with [his] business affairs and forgetful of the due date," due to his daughter's medical condition, see Mayville Aff. ¶¶ 6, 7, 10; Mayville Memorandum of Law in Support of Motion for Summary Judgment, dated May 26, 2016 ("Resp. Mem.") at 5;

[11] Although respondent's summary judgment papers include arguments that appear to track some of the "affirmative defenses" asserted in its Answer, respondent specifically identifies in its papers only the seventh "affirmative defense," which relates to notice of the effective date of revocation. See Norfolk Aff. ¶ 14; Mayville Memorandum of Law in Support of Motion for Summary Judgment, dated May 26, 2016, at 8-9.

- Department staff extended the due date by which Mr. Mayville and Mayville Enterprises, Inc. were required to pay the $7,500 penalty under the 2015 Mining Order, from August 2015 to October 30, 2015, see id. ¶ 9; see also Norfolk Aff. ¶¶ 5, 23. Mr. Mayville and Mayville Enterprises, Inc. sent a check for $7,500 to Department staff by October 30, 2015, but Department staff rejected the payment, see Norfolk Aff. ¶¶ 6, 26, and Ex. A;

- Respondent's failure to renew its permit in 2013, its continued mining without a permit, and its unauthorized installation of an access road at the site, were all corrected prior to staff's issuance of the notice of intent to revoke the mining permit, and the 2015 Mining Order has res judicata effect barring staff from pursuing additional claims based on that misconduct, see Norfolk Aff. ¶ 19; see also id. ¶¶ 20-22 (citing other facts as to which respondent claims res judicata applies);

- Ten of the seventeen reasons cited by Department staff in support of its request for revocation "have absolutely nothing to do with" the mine or the mining permit, and "are not valid and acceptable grounds" for revoking the mining permit, see Norfolk Aff. ¶ 16. Facts relating to respondent's PBS facility, violations at that facility, and the 2015 PBS Order do not relate to the mining permit, and do not fall under any of the grounds for permit revocation found at 6 NYCRR § 621.13(a), see Norfolk Aff. ¶¶ 17-18;

- The Amended Complaint[12] failed to comply with 6 NYCRR § 621.13(c) because it does not provide notice of the effective date of revocation.

As discussed below, respondent has failed to meet its initial burden of putting on a prima facie case entitling it to judgment as a matter of law under any of these factual assertions and legal arguments. I therefore deny respondent's motion.

a. Forgetting to Pay the Civil Penalty

Forgetting to pay a civil penalty because of being "distracted" is not a valid basis for violating the terms of a consent order; nor does this factual assertion warrant granting respondent judgment as a matter of law. Without in any way minimizing what appears to be a difficult family situation that existed when the penalty payment was due, the record contains no evidence that Mr. Mayville informed the Department prior to the first notice of revocation that he had forgotten to pay the penalty due to his daughter's medical condition. Indeed, the record before me reflects that the first mention of this "reason" for Mr. Mayville's failure to pay the civil penalty on time is in Mr. Mayville's May 24, 2016 affidavit submitted in support of Mayville Enterprises, Inc.'s motion for summary judgment, more than nine months after the payment was due.

[12] Respondent refers to Department staff's second letter-notice of revocation, dated December 3, 2015, as the "Amended Complaint." See Norfolk Aff. ¶ 12.

b. Whether Department Staff Extended the Deadline by Which Respondent Could Pay the Civil Penalty Under the 2015 Mining Order

Respondent has failed to establish a prima facie case that Department staff extended the deadline by which to pay the $7,500 payable penalty required by the 2015 Mining Order. Indeed, this argument fails for at least two reasons: First, the terms of the 2015 Mining Order, including the deadline to pay the original payable civil penalty, could only be changed "by written Order of the Commissioner or Commissioner's designee" under three circumstances, none of which is present here. See 2015 Mining Order, at 7, ¶ III and 8 ¶ VII. Respondent offers no evidence to support modification of the consent order, and staff counsel Abrahamson states that he does not have the authority to amend the terms of the 2015 Mining Order. See Abrahamson Aff. ¶¶ 31-32

Second, to the extent that respondent claims that Department staff's September 17, 2015 letter-demand extended respondent's time to pay only the payable penalty, such claim is not credible, as a matter of law. Staff's September 17, 2015 letter clearly states that respondent failed to pay the payable civil penalty and did not make arrangements to delay the payment. See Mayville Aff. Ex. C. The letter demands payment of $23,000 – not $7,500 – and states that "[f]ailure to pay the entire amount by October 30, 2015" would result in an enforcement action brought by the Attorney General. Id. (emphasis added). Department staff did not extend respondent's time in which to pay the $7,500 payable penalty under the 2015 Mining Order. No evidence supports a claim that, after respondent missed the payment deadline, Department staff agreed to accept payment of only the $7,500 payable penalty in full satisfaction of respondent's liability. Indeed, Department staff's rejection of respondent's proffered payment of only $7,500 is evidence to the contrary. Respondent has failed to demonstrate its entitlement to judgment as a matter of law on this ground.

c. Res Judicata and Collateral Estoppel

Respondent's counsel asserts that the 2015 Mining Order "has *res judicata* effect barring DEC Staff from pursuing additional claims on the alleged misconduct of Respondent at issue on the initial enforcement proceeding," Norfolk Aff. ¶ 19 (italics in original), and that res judicata bars the Department from "seeking additional penalties against Respondent for the alleged misconduct at issue in the first proceeding." Id. ¶ 20; see also Answer, First Affirmative Defense (asserting as affirmative defenses res judicata and collateral estoppel).

Respondent has submitted no legal argument or authority to support counsel's assertion. Department staff has not asserted a new "claim" against respondent for the violations that were resolved in the 2015 Mining Order. Staff is not seeking to re-charge respondent with the violations referred to in, and resolved by, the 2015 Mining Order. See e.g. Staff Memorandum of Law ("Staff Mem.") at 3-4, ¶ 15 ("Department staff does not seek to relitigate any of the violations stated in the 2015 Orders"). There is no identity of issues or claims in this proceeding and the proceeding leading to the 2015 Mining Order. Staff merely cites the violations to which respondent admitted in the 2015 Mining Order (and the 2015 PBS Order) as evidence of respondent's pattern of environmental non-compliance.

Staff has also stated that one basis for seeking to revoke respondent's permit is respondent's failure to make timely payment of the payable penalty under the 2015 Mining Order. The 2015 Mining Order cannot have res judicata effect with respect to staff's allegation that respondent violated that very order.

Respondent claims that res judicata bars the Department from "seeking additional penalties." According to respondent, Department staff's September 17, 2015 letter "demanded new, additional penalties amounting to $15,500." Norfolk Aff. ¶ 5. Although not entirely clear, it appears that the $15,500 figure referred to by respondent's counsel is comprised of (i) the $7,500 suspended penalty under the 2015 Mining Order which, under the terms of that order, became payable when respondent violated the order; and (ii) an $8,000 penalty pursuant to ECL § 71-1307(1). See Abrahamson Aff. Ex. 7 (September 17, 2015 letter demanding payment of $23,000, comprised of (i) $15,000, representing the payable and suspended penalties under the 2015 Mining Order; and (ii) $8,000, pursuant to ECL § 71-1307(1)). Both the suspended penalty and the penalty pursuant to ECL § 71-1307(1) are based upon respondent's alleged violation of the 2015 Mining Order itself, not on the underlying violations set forth in the order. As stated above, there has been no prior proceeding involving a determination regarding respondent's violation of the 2015 Mining Order, and therefore res judicata does not apply.

d. The Relevance of Issues Relating to PBS Violations and the 2015 PBS Order

In its December 3, 2015 notice of intent to revoke, staff cites respondent's admitted violations of PBS statutes and regulations, as well as continuing violations of the 2015 PBS Order, as additional evidence of respondent's pattern of environmental non-compliance. Respondent argues in its motion for summary judgment that PBS-related violations are irrelevant to a determination of respondent's fitness to possess a mining permit. See Norfolk Aff. ¶¶ 16-18; see also Answer, Second Affirmative Defense. Respondent argues that the PBS-related facts do not fall within the scope of any of the bases for revocation set forth in 6 NYCRR § 621.13(a)(1)-(6), and therefore cannot serve as a basis for revoking respondent's mined land reclamation permit. The regulation, however, merely states that the Department "[p]ermits may be … revoked at any time by the department on the basis of any ground set forth in paragraphs [a](1) through (6) of this subdivision." The regulation does not state that permits may be revoked only under one or more of those six grounds.

Moreover, the case law is clear that a licensing authority such as the Department has the "implicit authority" to determine the fitness of a permittee. The Department's Record of Compliance Policy incorporates this case law, expressly stating that, in exercising its discretion to determine whether to revoke a permit, the Department may consider whether the permittee has "violated *any* provision of the ECL, *any* related order … of the Commissioner, *any* regulation of the Department, *any* condition of *any* permit issued by the Department." DEE-16 (italics added). Respondent cites no authority for the proposition that, when determining whether a permittee has a history and pattern of environmental non-compliance, the Department is limited to consideration of a permittee's compliance under only the particular program subject to the permit at issue (here, mining).

Thus, the Department may properly consider respondent's past violations of ECL statutes and Department regulations relating to its PBS facility, and its continuing violations of the 2015 PBS Order, in addition to the prior violations under relevant mining statutes and regulations, and the 2015 Mining Order, when determining the fitness of respondent to possess *any* permit, including its mined land reclamation permit.

e. Staff's Alleged Failure to Comply With 6 NYCRR § 621.13(c)

The regulations regarding permit revocation state, in relevant part, that the notice of intent to revoke "must state the effective date, contingent upon administrative appeals, of the … revocation." 6 NYCRR § 621.13(c). In its motion for summary judgment, respondent argues that this matter should be dismissed because the "Amended Complaint," that is, Department staff's revised notice of intent to revoke, dated December 3, 2015, "failed to provide notice of the effective date of revocation of the Permit." Norfolk Aff. ¶ 14; see also Mayville Mem. at 6-9; Answer, Seventh Affirmative Defense.

In response, Department staff argues that (i) the November 6, 2015 notice of intent to revoke cited section 621.13(c) and stated that the effective date of revocation would be November 30, 2015; (ii) in response to staff's November 6, 2015 notice of intent to revoke, respondent requested a hearing; and (iii) given respondent's request for a hearing, it would have been "absurd and unnecessary" to include another effective date of revocation in the December 3, 2015 notice of intent to revoke.

I agree with Department staff that, given that respondent had already requested a hearing following the initial notice of intent to revoke, it was not necessary to include another effective date of revocation in staff's December 3, 2015 revised notice of intent to revoke. Because respondent had already requested a hearing, the permit at issue "will remain in effect until a decision is issued by the commissioner" after the hearing. See 6 NYCRR § 621.13(e). Respondent therefore already received the benefit of and protection afforded by the provision allowing a hearing request; that is, the permit will remain effective at least until such time as the Commissioner issues a decision.[13]

Given the foregoing, I deny respondent's motion for summary judgment.

4. Department Staff's Cross-Motion for Order Without Hearing

As discussed above, the Commissioner possesses the implicit and explicit authority to revoke respondent's permit. See discussion above at 16-17. As discussed below, Department staff has met its burden on its cross-motion for an order without hearing to establish a prima facie case entitling it to the relief requested.

[13] I note that, although respondent ultimately raised this issue as an affirmative defense in its February 2016 "Answer," it did not mention the issue in its December 7, 2015 response to staff's December 3, 2015 revised notice of intention to revoke. See Norfolk Aff. Ex. H.

a. The Commissioner May Revoke Respondent's Permit Under 6 NYCRR § 621.13(a)(5)

Department regulations state that "[p]ermits may be … revoked at any time by the department on the basis of … noncompliance with previously issued … orders of the commissioner … related to the permitted activity." 6 NYCRR § 621.13(a)(5). Department staff alleges that respondent violated the 2015 Mining Order by failing to pay the $7,500 civil penalty on or before the date it was due under the 2015 Mining Order.

Respondent admits that it failed to pay the $7,500 by the August due date under the 2015 Mining Order. See Finding of Fact No. 34, above; see also Mayville Aff. ¶ 7 ("I entirely forgot to make the payment of $7,500 by August 17, 2015"); Norfolk Aff. ¶ 5 ("Mr. Roger Mayville on behalf of Respondent failed to make payment of the civil penalty by August 17, 2015"). Respondent also admits that its failure to comply with the 2015 Mining Order "arguably provides grounds under 6 NYCRR § 621.13(a)(5) for revocation (*i.e.*, non-compliance with an Order of the Commissioner)." Norfolk Aff. ¶ 23. Respondent argues, however, that staff extended until October 30, 2015 respondent's time to pay the $7,500 civil penalty under the 2015 Mining Order, and respondent paid by that date. See id.

As discussed above, however, I find not credible, as a matter of law, respondent's claim that Department staff extended the deadline by which to pay the payable penalty. Department staff's September 17, 2015 letter clearly states that, due to respondent's failure to pay timely the $7,500 payable penalty due under the 2015 Mining Order, staff was seeking both the payable and suspended penalties under that order, as well as penalties under ECL § 71-1307(1) for violating the 2015 Mining Order. Staff demanded that respondent pay a total of $23,000 in penalties by October 30, 2015; staff's letter does not state that respondent could resolve the matter by paying the payable civil penalty by that date.

Section 621.13(a)(5) therefore provides a basis, without more, for revoking respondent's permit.

b. Respondent's Permit May Be Revoked Based Upon Respondent's Pattern of Environmental Non-Compliance

Contrary to respondent's arguments, its non-compliance did not commence during the summer of 2015, when Mr. Mayville's daughter faced some health issues. The record establishes as a matter of law that respondent Mayville Enterprises, Inc. repeatedly ignored its statutory, regulatory and permit obligations, establishing a long history and pattern of environmental non-compliance. This pattern of environmental non-compliance is an additional basis for revoking respondent's permit. See generally Findings of Fact Nos. 4-41. Specifically,

- Respondent failed to respond to staff's 2012 inspection report identifying several violations at the mine, see Findings of Fact Nos. 9-12;

- Although Department staff sent a letter dated February 11, 2013 notifying respondent that respondent was required to apply to renew its mining permit at least thirty days in

advance of its April 13, 2013 expiration date, respondent failed to submit an application to renew its permit until three weeks after its permit had expired. Failure to file an application to renew at least 30 days before the expiration of respondent's permit violated applicable regulations and the terms of the respondent's permit, see 6 NYCRR § 421.1(e); see also Barbeito Aff. Ex. 1, 2009 Mining Permit, at 5, ¶ 4; Findings of Fact Nos. 13-15;

- Although informed by letter dated May 13, 2013 that its application was "untimely and insufficient," and that mining activities at the mine were no longer authorized because the permit expired, respondent continued to operate the mine without a permit – for more than two years, see Findings of Fact Nos. 17, 18, 25, 30; see also Mayville Aff. Ex. A (2015 Mining Order) at 5, ¶ 28;

- For more than two years, respondent ignored or refused to comply with Department staff's letter dated June 13, 2013 stating that respondent was required to increase its reclamation bond because it was mining an area larger than authorized in its permit, see Findings of Fact Nos. 19, 20, 22, 24; see also Mayville Aff. Ex. A (2015 Mining Order), at 13 (Schedule of Compliance provisions relating to reclamation bond);

- In March 2015, Department staff served a notice of hearing and complaint, naming respondent and its principal Mr. Mayville as respondents, regarding alleged violations at the mine. Neither respondent nor Mr. Mayville served an answer to the complaint, see Findings of Fact Nos. 28 and 29;

- Respondent continued operating the mine in April 2015, although its permit had expired two years earlier, and after having been served with, and failing to answer, a notice of hearing and complaint, see Finding of Fact No. 30;

- Respondent did not respond to Department staff's October 31, 2011 notice of violation concerning respondent's PBS facility, see Findings of Fact Nos. 43-44;

- Respondent entered into the 2013 PBS Order, admitting to eighteen violations at the PBS facility, but then failed to comply with the schedule of compliance of the PBS Order, including failing to make the required submissions reflecting that respondent had come into compliance, see Findings of Fact Nos. 45-49;

- Department staff sent letters to respondent in December 2013 and September 2014, noting respondent's violations of the 2013 PBS Order and demanding payment of the suspended penalty under that order, but respondent did not pay the suspended penalty and did not comply with the requirements of the 2013 PBS Order, see Findings of Fact Nos. 50-53;

- Respondent has moved the five petroleum storage tanks from the PBS facility to another location, but has not informed Department staff as to the current location of the tanks, see Finding of Fact No. 54;

- In 2015, Department staff served a notice of hearing and complaint, naming respondent and its principal Mr. Mayville as respondents, regarding the alleged violations of the 2013 PBS Order. Neither respondent nor Mr. Mayville served an answer to the complaint, see Findings of Fact Nos. 55-56;

- Respondent, Mr. Mayville and the Department entered into the 2015 PBS Order in May 2015, in which respondent and Mr. Mayville admitted to failing to comply with the 2013 PBS Order, failing to respond to Department staff's letters from December 2013, September 2014 and February 2015, and failing to answer the complaint. Neither respondent nor Mr. Mayville paid the payable civil penalty of $10,000 by the date it was due under the 2015 PBS Order, and respondent and Mr. Mayville have failed to comply with the schedule of compliance in the 2015 PBS Order, see Findings of Fact Nos. 57-65;

- As late as July 7, 2016, respondent continued to fail to comply with the 2015 PBS Order, including failing to inform Department staff of the condition or location of the five PBS tanks. The only provision of the 2013 PBS Order with which respondent has complied was the submission of an application for a PBS certificate, see Findings of Fact Nos. 66-67.

D. CONCLUSION, RULING AND RECOMMENDATION

I conclude, based on the evidence submitted by the parties, that the foregoing facts demonstrate, as a matter of law, that respondent Mayville Enterprises, Inc. has a long history and pattern of environmental non-compliance. Respondent's pattern of environmental non-compliance, including its admitted violation of the 2015 Mining Order, provide sufficient grounds for the Commissioner to revoke respondent's permit. I therefore (i) deny respondent's motion for summary judgment; and (ii) recommend that the Commissioner (a) grant Department staff's cross-motion for order without hearing, and (b) revoke respondent's Mined Land Reclamation Permit No. 5-1638-00021/00001.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: January 24, 2017
Albany, New York

APPENDIX A

Matter of Proposed Revocation of Mined Land
Reclamation Permit No. 5-1638-00021/00001 Based Upon
Alleged Violations by Mayville Enterprises, Inc.

Papers Submitted with Respect to Motion for Summary Judgment by Mayville Enterprises, Inc. and Cross-Motion by Department Staff for Order Without Hearing

1. Notice of Motion for Summary Judgment, dated May 26, 2016
2. Affidavit of Roger Mayville in Support of Motion for Summary Judgment, sworn to May 24, 2016, attaching Exhibits A-C
3. Attorney Affirmation of Matthew D. Norfolk, Esq. in Support of Motion for Summary Judgment, dated May 26, 2016, attaching Exhibits A-K
4. Memorandum of Law in Support of Motion for Summary Judgment, dated May 26, 2016
5. Affidavit of Service of Mary B. McAllister, sworn to May 26, 2016
6. Notice of Cross-Motion for Order Without Hearing and Response to Motion for Summary Judgment, dated July 8, 2016
7. Affidavit of Benjamin Hankins, sworn to July 7, 2016, attaching Exhibits 1-2
8. Affidavit of Erin M. Donhauser, sworn to July 8, 2016, attaching Exhibit 1
9. Affidavit of Joseph Barbeito, sworn to July 8, 2016, attaching Exhibits 1-8
10. Affidavit of Scott Abrahamson, Esq., sworn to July 8, 2016, attaching Exhibits 1-13
11. Affirmation of Michelle Crew, Esq., dated July 7, 2016, attaching Exhibits 1-3
12. Memorandum of Law, dated July 8, 2016
13. Attorney Affirmation of Service dated July 11, 2016
14. Letter from Matthew D. Norfolk, Esq., dated July 25, 2016