STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 12 of the Navigation Law, Articles 15, 17, 25 and 27 of the New York State Environmental Conservation Law ("ECL") and Parts 360, 608, 661 and 750 et seq. of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

PILE FOUNDATION CONSTRUCTION COMPANY, INC.,

- and -

ANTHONY RIVARA, personally and as President of Pile Foundation Construction Company, Inc.,

Respondents.

ORDER

DEC File No.
R2-20090406-241

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding by service of a motion for order without hearing in lieu of complaint. In the motion, staff charged respondents Pile Foundation Construction Company, Inc. (Pile Foundation), and Anthony Rivara (Rivara), personally and as President of Pile Foundation Construction Company, Inc., for multiple violations of an order on consent effective January 16, 2009 (DEC File No. R2-20030731-194, et al.)(2009 consent order).[1] The 2009 consent order addressed violations of the Environmental Conservation Law (ECL) caused by respondents' construction work and the operation of unseaworthy barges at different sites in New York Harbor.

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[1] The 2009 consent order is attached as Exhibit 1 to the affidavit of Andrew Walker, DEC Marine Biologist 1 (Walker Affid).

For the reasons that follow, I grant Department staff's motion in part.

Background

The undisputed facts, determinable as a matter of law on this motion for order without hearing (the Departmental equivalent of summary judgment under CPLR 3212 [see 6 NYCRR 622.12(d)]), are as follows.

The Department issued permits to the New York City Department of Parks and Recreation (City Parks Department) on June 24, 2004 for the reconstruction of the promenade at the John V. Lindsay East River Park in Manhattan (see 2009 Consent Order, at 8, ¶44). The City Parks Department subsequently received coverage under a SPDES general permit for stormwater discharges from construction activities (id.).

The City Parks Department hired respondent Pile Foundation for the reconstruction work (see 2009 Consent Order, at 8, ¶45; Drescher Affirmation dated April 14, 2009 [Drescher Affirm], at 3, ¶17). Respondent Anthony Rivara is the sole shareholder and president of respondent Pile Foundation (see 2009 Consent Order, at 3, ¶10). The contract value of the East River Park waterfront work was $54 million (see Drescher Affirm, at 3, ¶17).

- 2007 Consent Order

In 2007, the Department executed a consent order with the City and respondents arising from violations associated with the reconstruction work (see Order on Consent effective July 17, 2007 [DEC File No. R2-20060427-229][Exh 2 to the Walker Affid] [2007 consent order]).

The 2007 consent order settled charges that the City Parks Department and respondents Pile Foundation and Rivara's construction activities, among other things, caused unpermitted discharges of sediments into the East River on multiple occasions, and contaminated tidal wetlands and waterways adjacent to the park, in violation of the ECL and the permits issued to the City Parks Department for the project (see id. at 7-8, ¶¶ 41-50). Among the other charges addressed by the 2007 consent order were respondents' failure to employ best management practices, failure to contain disturbed areas and failure to maintain sediment and erosion control measures (see id.).

The 2007 consent order imposed a payable civil penalty of $150,000, and a suspended penalty of $50,000 provided that the City Parks Department and respondents "strictly and timely" complied with the terms of the order and its attached schedule of compliance (see id. at 9-10). The $150,000 payable penalty was paid. After the Department issued a notice of non-compliance of the 2007 consent order by letter dated September 4, 2007 (2007 Notice of Non-Compliance, Exh I to the Drescher Affirm), the $50,000 suspended penalty was paid as well (see Drescher Affirm, at 1-2, ¶¶3-4).[2]

- 2009 Consent Order

In 2009, the Department executed a second consent order with respondents[3] arising from additional violations at the John V. Lindsay East River Park and the area immediately seaward of the park's promenade (identified as Site 5 in the 2009 consent order), as well as violations at four other sites, including:

- three waterfront parcels in the borough of Queens, located at Beach Channel Drive and Beach 108th Street (Site 1);
- the water area next to Pier 88 at 711 12th Avenue in Manhattan (Site 2);
- the water area south of Pier 97 located in the Hudson River Park, in Manhattan (Site 3); and

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[2] In the 2007 notice of non-compliance, Department staff notified respondents and the City that, during an August 28, 2007 site inspection, staff observed numerous violations of the 2007 consent order. Attached to the 2007 notice of non-compliance were fifteen (15) photographs with captions that documented the lack of soil and bank protection measures, the inadequacy of erosion and sediment controls, the absence of perimeter controls in certain areas and the breach or inadequacy of such controls in other areas, poor site maintenance, and the placement of soil and loose material in a manner that could lead to its discharge to the East River.

Staff also stated that it reserved all other rights "associated with the respondents' continuing, blatant failure to comply with the [2007] consent order and the various permit requirements [that applied to the construction work]" (see 2007 Notice of Non-Compliance, at 2).

[3] Respondent Rivara executed the 2009 consent order individually, as the corporate officer responsible for respondent Pile Foundation's environmental compliance (see 2009 Consent Order, at 3 [¶10], 28). As noted, the 2009 consent order became effective on January 16, 2009. Respondent Rivara had also similarly signed the 2007 consent order.

- the area of Barbadoes Basin in the borough of Queens, north of the northern end of Beach 80th Street (Site 4).

(see 2009 Consent Order, at 3-16).

Among the numerous violations identified in the 2009 consent order were the sinking of respondents' barges in the navigable waters of the State and in regulated tidal wetlands at Sites 3 and 4 and respondents' allowing the sunken barges to remain on the bottom of the waterways,[4] constructing a bulkhead that deviated from the plans approved in the permit issued for the work at Site 1 (and failing to report the presence of a visible sheen on the water), undertaking construction activities during times that put aquatic species overwintering in the area of Site 2 at risk, damaging tidal wetlands and adjacent areas arising from attempts to remove sunken barges at Site 4 (including the removal and destruction of protected vegetation), and failing to install and properly maintain erosion control measures, thereby allowing the continued discharge of sediment and other pollutants into the East River at Site 5 (see id. at 4-11, 14-16). Department staff also charged respondents with keeping and operating unseaworthy and derelict barges at Site 5, the hulls of which were breaking apart, and allowing foam pieces from a barge to enter the waterway (see id. at 9-10, 15).[5]

The 2009 consent order imposed a penalty of $15,000 jointly and severally against respondent Pile Foundation and the New York City Department of Citywide Administrative Services for the violations at Site 1 (see id. at 17). In addition, the order imposed a total penalty of $120,000 jointly and severally against respondent Pile Foundation and respondent Rivara for the violations at Sites 2, 3, and 4 (see id. at 17-18), of which $15,000 was suspended provided respondents complied with certain remedial obligations related to Site 4 (see id. at 18).

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[4] In November 2006, respondents moved a barge that had sunk at Site 2 to Site 3, where it sank within the navigable waters of the state and within a regulated tidal wetland (see 2009 Consent Order, at 7, ¶35). The barge was left moored at the pier and sat on the bottom of the Hudson River until on or about April 2008 (see id. at 7, ¶36). At Site 4, two barges that respondents owned sank in October 2007 within navigable waters of the State and within a regulated tidal wetland. Respondents' initial efforts to refloat the barges were unsuccessful. Respondents then used a front-end loader and other equipment to assist in the removal of the barges, which damaged the regulated tidal wetland and adjacent area (see id. at 7-8, ¶¶37-42).

[5] The consent order referenced violations of Environmental Conservation Law articles 15, 17, 25 and 27, the Navigation Law, and their accompanying regulations.

Finally, the order imposed a total penalty of $150,000 jointly and severally against respondent Pile Foundation, respondent Rivara, Howard Porsche (the foreman of construction activities at Site 5), and the City Parks Department, for the violations at Site 5 (see id.).

Remedial obligations for the restoration of Site 4 were included in a schedule of compliance attached to and made part of the consent order. Those obligations included providing a restoration plan for Site 4 to the Department for approval within 60 days of the effective date of the order (see id. at 22-24). The restoration plan was to include a planting plan, the scope and extent of which was to be determined in consultation with the City Parks Department, a monitoring plan and a debris removal plan (see id.).

The 2009 consent order also required that, within 30 days of the effective date of the order, respondents were to mark each barge they "own, operate or utilize within the State of New York" with a display of the name "Pile Foundation Construction Company, Inc.," a name or number identifying each individual barge, and "an active, valid" telephone number for the company (see id. at 22, ¶2). The letters and numbers for the display were to be no less than 12 inches in height and maintained in a legible condition so as to be readily discernable during daylight hours at a distance of 200 feet (see id.). In addition, within 35 days of the effective date of the 2009 consent order, respondents were to submit to the Department an inventory of the barges so marked with the names or numbers and current locations (see id.).

- 2009 Notice of Non-Compliance/Motion for Order Without Hearing

Inspections conducted by Department staff on March 26, 2009, and April 13, 2009, revealed that respondents were operating barges without the markings required by the 2009 consent order (see Walker Affid, at 2-3; Drescher Affirm, at 2-3). In addition, as of April 13, 2009, respondents had failed to submit a restoration plan for Site 4 or the inventory of marked barges (see Walker Affid, at 2, ¶¶7-9 [failure to submit restoration plan], ¶¶14-15 [failure to submit an inventory of marked barges]). Accordingly, Department staff issued a notice of non-compliance with respect to the 2009 consent order demanding payment of the $15,000 suspended penalty for failure to submit the required restoration plan (see Notice of Non-

Compliance dated April 14, 2009 [2009 Notice of Non-Compliance]).

Also, by notice of motion and motion for order without hearing dated April 14, 2009 (motion for order without hearing), which serves as the complaint in this proceeding, Department staff charged respondents with a failure to comply with the 2009 consent order, specifically referencing the following violations by respondents:

(1) failure to submit a proposed restoration plan for Site 4 to the Department for review and approval within 60 days of the effective date of the order as required by paragraph 3 of the order's schedule of compliance;
(2) failure to mark respondents' barges within 30 days of the effective date of the order as required by paragraph 2 of the schedule of compliance; and
(3) failure to submit an inventory of marked barges to the Department within 35 days of the effective date of the order as required by paragraph 2 of the schedule of compliance.

See 2009 Consent Order, at 22.[6] For the violations, staff seeks a Commissioner order:

(1) directing respondents to immediately come into compliance with the 2009 consent order;
(2) imposing a payable civil penalty on respondents in the amount of no less than $150,000, and holding respondents jointly and severally liable for the penalty;
(3) imposing an additional suspended penalty on respondents in an amount the Commissioner deems appropriate to ensure compliance, for which respondents are to be held jointly and severally liable; and
(4) ordering respondents to pay the $15,000 penalty suspended in the 2009 consent order (see Motion for Order Without Hearing, at 2).

In opposition to staff's motion, respondents filed an affidavit of respondent Anthony Rivara dated May 19, 2009 (Rivara affidavit), which serves as the answer in this matter. The matter was assigned to Administrative Law Judge (ALJ) Molly T. McBride. In a ruling dated March 28, 2011 (ALJ March 2011 ruling), ALJ McBride granted partial summary judgment to Department staff on the issue of liability, and set the matter

[6] Department staff also stated that respondents had failed to communicate with DEC Marine Biologist Andrew Walker with respect to the schedule of compliance, as required by paragraph 1 of that schedule.

down for a hearing to determine the appropriate penalty (see 6 NYCRR 622.12[f]).

After several adjournments of the penalty hearing, in part to allow respondents to obtain counsel, respondents requested permission to present their case on papers. Although respondents were given until February 10, 2012, to submit written opposition to Department staff's request for penalties, they failed to do so.

Accordingly, the ALJ prepared the attached summary report (ALJ Summary Report). In the report, the ALJ recommends that I issue an order granting Department staff's request for penalties in the amount of $150,000 for the violations of the 2009 consent order, and directing respondents to pay the $15,000 penalty suspended in that order.

Discussion

As discussed below, I affirm in part the ALJ's March 2011 ruling on the issue of liability, and adopt in part the ALJ's Summary Report as my decision in this matter.

Liability

On the issue of liability, I agree with the ALJ that Department staff established its entitlement to judgment as a matter of law for the violation of the 2009 consent order relating to the failure to submit a restoration plan for Site 4, and that respondents' arguments failed to raise a triable issue of fact with respect to liability on those violations (see ALJ March 2011 Ruling, at 2-3). For the reasons discussed below, I am not accepting the ALJ's recommendation on liability with respect to respondents' failure to mark their barges.

Respondents offered two arguments in their defense with respect to the submission of a restoration plan and the marking of the barges. First, respondents contend that they were unable to submit the required restoration plan for Site 4 because they did not receive guidance from the City of New York concerning the scope and extent of the planting work until May 12, 2009, almost two months after the plan was due, and almost a month after the notice of non-compliance was issued in this matter. I agree with the ALJ that the lack of guidance from the City is neither a defense to liability nor a factor in mitigation of penalty (see ALJ Summary Report, at 2-3). Nothing in the record indicates that respondents communicated to the Department any

problems that they were having consulting with the City. Nor have respondents offered to submit the restoration plan subsequent to the receipt of the City's guidance.

Second, with respect to the marking of respondents' barges (see paragraph 2 of the schedule of compliance of the 2009 consent order), respondents argue that the markings required by the consent order would violate the vessel documentation requirements established by the United States Coast Guard. In support of their argument, respondents reference frequently asked questions (FAQs) posted at the website of the National Vessel Documentation Center, United States Department of Homeland Security (see Exh C to the Rivara Affid; see also http://www.uscg.mil/hq/cg5/nvdc/nvdcfaq.asp [noted on the bottom of Exh C to the Rivara Affid]). Respondents argue that the Coast Guard limits barge names to 33 characters, whereas they argue that the consent order would require them to mark their barges with a total of 52 characters – the name "Pile Foundation Construction Company, Inc.," a name or number identifying each individual barge, and respondent Pile Foundation's phone number.

With respect to this perceived discrepancy between the Coast Guard's requirements relating to the number of characters that can be used in markings and the consent order's requirements, the record before me is insufficient to conclude that the marking requirement required by the schedule of compliance in the 2009 consent order complies with federal requirements. Although nothing in the record indicates that respondents undertook any effort to obtain further information from the Coast Guard to clarify the marking requirement, the record does not reflect that Department staff made any contact with the Coast Guard to address this perceived discrepancy. Nor is this potential conflict with federal requirements specifically resolved in the ALJ's March 2011 ruling. Accordingly, I am not, for purposes of this order, finding respondents liable for a failure to mark their barges as specified in paragraph 2 of the schedule of compliance.[7]

Penalty

On the issue of penalty, the $150,000 payable penalty sought by Department staff is significantly below the amount authorized by law, even without including the charge relating to the marking of the barges (see Department Staff Mem of Law in

[7] Respondents are to comply with paragraph 2 of the schedule of compliance to the extent of providing Department staff with an inventory of their barges and where those barges are located.

Support of Motion for Order Without Hearing dated April 14, 2009 [Staff Mem of Law], at 3-5, ¶¶16-21 [penalty of up to $308,000 for violating the 2009 consent order by failing to submit the restoration plan, calculated pursuant to the penalty provisions of ECL 71-1127(1), ECL 71-2503(1), and ECL 71-2703(1)], and ¶¶26-28 [penalty of up to $2,100,000 for violating the 2009 consent order (noting that the consent order, in part, was also based on a failure to comply with various titles of ECL article 17 and their accompanying regulations), calculated pursuant to the penalty provisions of ECL 71-1929(1)]; see also ALJ Summary Report, at 3-4).

With respect to respondents' ability to pay the requested penalty, respondents offer what they purport to be a one page statement of personal financial condition of respondent Rivara and his wife (see Rivara Affid, at 6). The statement is not in admissible form, however. Although respondent Rivara claims that the statement of personal financial condition was prepared by his accountants (see Rivara Affid, at 5, ¶18), respondent Rivara neither identifies the accountants nor provides any support for his claim that accountants prepared this statement. Furthermore, no backup support is provided for the asset and liability amounts that appear on the statement. In any event, the statement of financial condition does not, in any way, purport to establish the financial condition of respondent Pile Foundation. Thus, respondents fail to raise a triable issue of fact concerning their ability to pay the penalty.

Moreover, based on this record, multiple aggravating factors exist in this case, warranting a substantial civil penalty (see Civil Penalty Policy, Commissioner Policy DEE-1, June 20, 1990, ¶IV.E). Respondents have a demonstrated history of continuing noncompliance with environmental standards and consent orders to which they have agreed, and the conditions of the 2009 consent order that they violated are significant. In particular, the restoration plan for Site 4 is an important first step in the remediation of the damage that respondents' barges have caused in sensitive wetland and adjacent areas, including but not limited to the removal and destruction of protected vegetation. Furthermore, the penalties imposed against respondents under both the 2007 consent order (total of $200,000) and the 2009 consent order (total of $285,000) have clearly failed to have the desired deterrent effect on respondents (see Staff Mem of Law, at 5-8).

These aggravating factors, together with the factors cited by the ALJ (see ALJ Summary Report, at 4), support the $150,000

payable civil penalty sought by Department staff in this proceeding. These factors also support a further civil penalty of $350,000, which is suspended provided respondents comply with the 2009 consent order and its schedule of compliance (see Motion for Order Without Hearing, at 2), except with respect to the barge marking requirement in paragraph 2 of that schedule.[8]

In addition, respondents are liable for the $15,000 penalty suspended in the 2009 consent order relating to the redress of violations at Site 4 where respondents' activities caused significant damage to a regulated tidal wetland and adjacent area.[9]

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for an order without hearing is granted in part and denied in part.

II. Respondents Pile Foundation Construction Company, Inc., and Anthony Rivara, individually, are adjudged to have violated the order on consent, effective January 16, 2009 (DEC File No. R2-20030731-194, et al.), except that respondents are not being found liable with respect to the failure to mark their barges as specified in paragraph 2 of the schedule of compliance in that order.

III. A. Respondents Pile Foundation Construction Company, Inc., and Anthony Rivara, individually, are jointly and severally liable for a total civil penalty in the amount of five hundred thousand dollars ($500,000). Of the total, one hundred and fifty thousand dollars ($150,000) is due and payable within thirty (30) days after service of this order upon respondents.

Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

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[8] No portion of the penalty imposed is based on the charge relating to respondents' failure to mark their barges.

[9] To the extent that Department staff is seeking a separate penalty for respondents' failure to timely pay the suspended portion of the 2009 consent order penalty after staff made the demand for such payment on April 14, 2009 (see Staff Mem of Law, at 9, ¶38c; 2009 Notice of Non-Compliance, at 2), such penalty is included in the total civil penalty of $500,000 imposed by this order.

Udo M. Drescher, Esq.
Assistant Regional Attorney
New York State Department of
Environmental Conservation
Region 2
One Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101.

B. Of the total penalty imposed in paragraph III.A, three hundred and fifty thousand dollars ($350,000) is suspended provided respondents comply with the terms and conditions of this order, and come into compliance with the terms and conditions of the 2009 consent order, including the schedule of compliance attached to and a part of the 2009 consent order (except with respect to the marking of barges in paragraph 2 of the schedule of compliance), within thirty (30) days after service of this order upon respondents. Should respondents fail to comply with any of the terms and conditions of this order or the 2009 consent order (except with respect to the marking of barges), the suspended penalty of three hundred fifty thousand dollars ($350,000) shall become immediately due and payable upon notice by Department staff, and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

IV. Within thirty (30) days after service of this order upon respondents, respondents shall pay the fifteen thousand dollar ($15,000) penalty suspended in the 2009 consent order with respect to violations at Site 4. It shall be made payable to the NYS Marine Resources Account and otherwise submitted in the same manner as the penalty imposed in paragraph III.A above.

V. All communications from respondents to the Department concerning this order shall be made to Udo M. Drescher, Esq., Assistant Regional Attorney, at the address provided in paragraph III.A above.

VI. The provisions, terms and conditions of this order shall bind respondents Pile Foundation Construction Company, Inc., and Anthony Rivara, individually, and their agents, successors and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

/s/

By: ____

Joseph J. Martens
Commissioner

Dated: May 17, 2013
Albany, New York

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 12 of the New York State Navigation Law and Articles 15, 17, 25 and 27 of the New York State Environmental Conservation Law and Parts 360, 608, 661 and 750 et seq. of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR")

-by-

PILE FOUNDATION CONSTRUCTION COMPANY, INC. and ANTHONY RIVARA, personally and as president of Pile Foundation Construction Company, Inc.,

Respondents.

SUMMARY REPORT OF THE ADMINISTRATIVE LAW JUDGE

NYSDEC File No. R2-20090406-241

BACKGROUND

In lieu of a notice of hearing and complaint, staff of the Department of Environmental Conservation (DEC) moved for an order without hearing against the respondents named above on April 14, 2009. Respondent Anthony Rivara (Rivara, respondent), individually and as president of Pile Foundation Construction Company, Inc. (Pile, respondent), opposed the motion in papers dated May 19, 2009. The motion was referred to the DEC's Office of Hearings and Mediation Services (OHMS) and assigned to Administrative Law Judge (ALJ) Molly T. McBride. ALJ McBride issued a ruling on the motion on March 28, 2011 granting the motion for order without hearing with respect to liability and set the matter down for a hearing on Department staff's request for penalties.

Pursuant to the March 28, 2011 ruling, a conference call was held on April 11, 2011 with Udo Drescher, Esq., DEC assistant regional attorney, and Mark A. Rosen, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, counsel for respondents to schedule the penalty hearing. A hearing date of May 24, 2011 was set. By email dated May 5, 2011, respondent Rivara requested an adjournment of the penalty hearing so that he could retain counsel to represent respondents at the hearing. The email did not explain why the firm previously appearing for respondents was no longer representing them. The request was granted by ALJ McBride after the parties indicated that they were entering into settlement discussions. (See May 11, 2011 email of ALJ McBride to parties.)

By email dated July 5, 2011, Mr. Drescher indicated that Department staff was ready to proceed to hearing on the issue of penalties. After several communications between the parties and the ALJ, by email dated December 8, 2011 a hearing date was set for January 10, 2012 in the DEC's Region 2 office. The email sent to Mr. Rivara and Mr. Drescher confirmed the date and requested witness lists be submitted by January 3, 2012. (See McBride December 8, 2011 email.) Mr. Drescher submitted Department staff's witness list by email dated January 3, 2012. By email dated January 9, 2012 Mr. Rivara requested the hearing be delayed 45 days. (See Rivara email dated January 9, 2012) The request was denied. A conference call was held on January 9, 2012 to confirm the hearing was proceeding on

January 10, 2012. Mr. Rivara again requested an adjournment. His request was denied during the call. Mr. Rivara stated that he did not have an attorney to represent him at the hearing and that he did not want to appear at the hearing without an attorney so he elected to submit his opposition to Department staff's request for penalties in writing. Mr. Rivara was given 30 days to submit his opposing papers and Mr. Drescher was granted an opportunity to reply to the opposing papers.

Respondents were given until February 10, 2012 to submit written opposition to Department staff's request for penalties. Respondents did not submit any written opposition. Respondents opposed the penalty in 2009 only, through papers submitted by respondents' attorney at the time, Mark A. Rosen, Esq., McElroy, Deutsch, Mulvaney & Carpenter, LLP. In those papers, respondents requested that the issue of penalties be decided after a hearing so that more explanation could be offered regarding the violations alleged.

Department Staff has requested respondents pay a penalty of $150,000.00, plus payment of the penalty which was suspended in the Order on Consent in the amount of $15,000.00.[1]

DISCUSSION -- PENALTY

The hearing that was to be held in January 2012 was to determine what penalty, if any, should be assessed against respondents with respect to the order granting Department staff's motion for order without hearing. As noted above, respondents had failed to comply with an order on consent that directed the following:

1) Respondents to submit a restoration plan for a site identified as Site 4. The restoration plan was to be submitted within 60 days of the January 16, 2009 order. Respondents did not submit the restoration plan for Site 4.

2) Respondents to mark all four sides of each barge they own, operate or utilize within the State of New York with the display name "Pile Foundation Construction Company, Inc." as well as an active phone number and a marker number for each barge within 30 days of the Order. Department Staff conducted a site visit on March 26, 2009 and of the two barges observed, neither was marked as directed.

3) Respondents to submit an inventory of the barges so marked with the names or numbers and current location within 35 days of the order and no inventory was submitted.

Respondents have acknowledged that they did not comply with Order but offer explanations for the failure to comply. Each issue will be addressed separately:

1) Respondents, by the Rivara affidavit submitted in opposition to the motion for order without hearing, acknowledge that the restoration plan was not timely submitted as they had to wait for the New York City Parks and Recreation Office to give them direction as to the restoration of the involved site. Respondents submitted, as an attachment to the Rivara affidavit, a copy of an email from John Natoli at the NYC Parks Department dated May 12, 2009 which gives respondents the scope and removal requirements for the restoration plan (Rivara affidavit, Exhibit A). Mr. Rivara indicates in his affidavit that he immediately contacted NYC Parks office after ordered by DEC to submit a restoration plan but received no response until the May 12, 2009 email from Mr. Natoli. Respondents claim, therefore,

[1] The January 2009 Order on Consent ordered respondents to pay a penalty of $30,000.00 for the violations at Site 4, of that, $15,000.00 was suspended provided that respondents complied with the order.

that the restoration plan submission was delayed solely as a result of their waiting for a response from the NYC Department of Parks and not due to any fault of their own. Respondents claim that all restoration at the site had to be approved and directed by NYC Parks. Respondents have not shown that they made any effort to communicate to NYC Parks the deadlines imposed by the DEC, nor did they offer any evidence that they kept in communication with the DEC as they sought to work with NYC Parks.

2) As for the barge markings, respondents state that the markings directed in the Order are illegal. According to respondents, the Department of Homeland Security regulations limit markings on barges, like the ones at issue, to 33 letters and/or numbers. The order on consent requires 52 letters and numbers. To document this assertion, attached to the Rivara affidavit as Exhibit B, is a copy of an email from Joseph K. Johnson of the United States Coast Guard that identifies the National Vessel Documentation center webpage and directs Mr. Rivara to the "FAQ" section for assistance. The email from Mr. Johnson is dated May 11, 2009. The Rivara affidavit states that the "FAQ" page referred to by Mr. Johnson indicates that only 33 letters may be placed on the barges at issue. Respondents did not offer any proof of any specific conversations with the Department of Homeland Security, nor did they make any effort to work with the DEC on this issue when they encountered a problem complying with the order on consent.

3) No inventory was submitted with respect to the marked barges since the barges were not marked as ordered in the order on consent.

Department Staff has requested that respondents pay the portion of the penalty that was suspended in the January 2009 Order, $15,000, and pay an additional penalty of $150,000.00. Department staff has identified the maximum penalty allowed for each violation and requested a penalty that is significantly less than the maximum for each.

The maximum penalty for the failure to comply with the Order on Consent is in excess of $300,000. At the time of this violation, Section 71-1127 of the ECL directed that any person who fails to comply with an order of the Department issued pursuant to ECL Article 15 (Water Resources) is liable for a penalty of not more than five hundred dollars for the initial violation and one hundred dollars for each day during which the violation continues. The violation for failure to submit a compliance plan began sixty (60) days after the Order became effective, March 16, 2009. Section 71-2503(1)[2] of the ECL provides for a penalty of up to ten thousand dollars per violation of Article 25 (Tidal Wetlands Act) of the ECL. The compliance plan was to remediate the site where respondents violated the tidal wetlands regulations.

The maximum penalty for the failure to mark the barges is in excess of $2,666,000. Department staff indicates that pursuant to ECL section 71-1127(1) the penalty is $6,000 with an additional maximum penalty of $560,000 ($10,000/day) pursuant to ECL section 71-2503(1). Also, in Department staff's motion papers, it is noted that the Order on Consent addresses violations of ECL Article 17 for respondents' use of unseaworthy barges. The violation of Article 17 provides for an additional penalty of

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2 "Any person who violates, disobeys or disregards any provision of article twenty-five shall be liable to the people of the state for a civil penalty of not to exceed ten thousand dollars for every such violation, to be assessed, after a hearing or opportunity to be heard, by the commissioner. Each violation shall be a separate and distinct violation and, in the case of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation."

thirty-seven thousand five hundred dollars per day. (See ECL 71-1929[1].) This violation would allow for a significant penalty.

The Department has a Civil Penalty Policy[3] (Policy). It serves as guidance in calculating a penalty in an enforcement case. The policy states that "The penalty should equal the gravity component, plus the benefit component". The benefit component is defined as the economic benefit that results from a failure to comply with the law. The gravity component is to be reflective of the seriousness of the violation.

Department staff notes that while it is unable to calculate an exact economic benefit realized by respondents for failing to timely comply with the restoration plan, by entering into the consent order with the Department, respondents were allowed to continue the project which had a contract value of $54,000,000.00.[4] Department staff alleges there was an economic gain realized by continuing to use the barges that were to be pulled from use and re-marked. There would have been a period of time that the barges were not able to be used while they were being re-marked, presumably. That loss of use likely would have resulted in a delay in the project completion and a cost to respondents while the project was delayed. There would also be a cost savings by not paying to have the barges marked. It is impossible to calculate the value of the noncompliance with the information submitted.

The gravity component is also addressed by Department staff. Respondents damaged the natural resources of the State as well as ignored a consent order, impeding the work of the Department in this and other enforcement matters.

Department staff adequately addressed the Department's Civil Penalty Policy in calculating the penalty requested while respondents submitted no detailed opposition. Department staff has adequately detailed the serious nature of the violations.

RECOMMENDATION

I recommend that the Commissioner issue an order granting Department staff's request for a penalty in the amount of one hundred and fifty thousand dollars ($150,000.00) and that such penalty be due and owing upon service of the Order. I also recommend that respondents immediately pay the fifteen thousand dollar ($15,000) penalty due and owing pursuant to the order on consent that is the subject of the motion.

/s/

Albany, New York
February 28, 2013

Molly T. McBride
Administrative Law Judge

[3]NYS Dept. of Environmental Conservation Civil Penalty Policy, June 20, 1990.

[4] Department staff Memorandum of Law, page 5, paragraph 29(b).