STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 23 of the Environmental Conservation Law ("ECL") of the State of New York and Part 421of Title 6 the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC Case No.
R6-20130419-13

-by-

SEYMOUR EXCAVATING INC. and BURTON D. SEYMOUR,

Respondents.

This administrative enforcement proceeding involves allegations by the staff of the New York State Department of Environmental Conservation ("Department" or "staff") that: (i) respondents Seymour Excavating Inc. and Burton D. Seymour (collectively "respondents") violated ECL 23-2711(1) and 6 NYCRR 421.1(a) by mining without a permit at a site known as the Seymour-Acee Gravel Pit, located in the Town of Vernon, Oneida County ("site"); and (ii) respondent Seymour Excavating Inc. violated two provisions of an order on consent dated November 9, 2011 ("2011 Consent Order") by mining at the site before a new mining permit was issued and by failing to provide timely a valid reclamation bond.

An amended notice of hearing dated April 23, 2014, and a complaint dated January 29, 2014, were served on both respondents on May 7, 2014. The notice of hearing stated, among other things, that failure to serve an answer would constitute a default and waiver of respondents' right to be heard (see Exhibit ["Ex."] 1, notice of hearing, at 1). The notice of hearing also informed respondents that a pre-hearing conference would be held, and that failure to appear at the pre-hearing conference would constitute a default and waiver of respondents' right to a hearing (id. at 1-2). By letter dated June 3, 2014, hand-delivered to respondent Seymour Excavating Inc., staff notified respondents that a pre-hearing conference would be held on June 17, 2014 at 1:00 p.m. (see Ex. 3).

Respondents failed to serve or file an answer, and failed to appear at the June 17, 2014 pre-hearing conference. At the pre-hearing conference, Department staff made an oral motion to Administrative Law Judge ("ALJ") D. Scott Bassinson for a default judgment pursuant to 6 NYCRR 622.15, based upon respondents' failure to answer the complaint, and also sought judgment on the merits.

The ALJ prepared a hearing report dated June 27, 2014, in which he made findings of fact, and recommends that I: (i) grant Department staff's motion for default against respondent Seymour Excavating Inc. pursuant to the provisions of 6 NYCRR 622.15; (ii) conclude, based

upon proof adduced at the hearing, that Seymour Excavating Inc. committed the three violations alleged in the complaint; (iii) dismiss the complaint as against respondent Burton D. Seymour, without prejudice; and (iv) direct Seymour Excavating Inc. to: (a) cease and refrain from mining at the site until such time as it is authorized to conduct mining activity at the site pursuant to a permit issued by the Department; (b) submit, within sixty (60) days of service of this order on respondent, an approvable written notice of mining termination reclamation schedule and plan in accordance with 6 NYCRR 423.3; (c) permit staff to enter the site for inspection and investigation purposes, including but not limited to ascertaining Seymour Excavating Inc.'s compliance with the ECL, the applicable regulations, and the Consent Order in DEC Case No. R6-20110621-33; and (d) pay a civil penalty in the amount of fourteen thousand dollars ($14,000) (see Hearing Report at 8-9).

I adopt the findings of fact, the legal analysis and the recommendations of the ALJ. I concur with the ALJ that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15 as against respondent Seymour Excavating Inc.. Furthermore, at the hearing conducted on June 17, 2014, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence, as against respondent Seymour Excavating Inc. (see Hearing Report, at 4-5). Accordingly, staff is entitled to a judgment based on record evidence as against respondent Seymour Excavating Inc. I also agree with the ALJ that the complaint as against respondent Burton D. Seymour should be dismissed, without prejudice.

Finally, based on the record of this proceeding, the civil penalty in the amount of fourteen thousand dollars ($14,000) is authorized and appropriate.

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

I. The complaint as against respondent Burton D. Seymour is dismissed, without prejudice.

II. Department staff's motion for default judgment pursuant to 6 NYCRR 622.15 is granted as against respondent Seymour Excavating Inc. By failing to answer or appear in this proceeding, respondent Seymour Excavating Inc. waived its right to be heard at a hearing.

III. Moreover, based upon record evidence, respondent Seymour Excavating Inc. is adjudged to have violated:

A. ECL 23-2711(1) and 6 NYCRR 421.1(a), by mining without a permit;

B. subsection I.A of the November 9, 2011 Consent Order in DEC Case No. R6-20110621-33, by mining at the site before a new permit was issued; and

C. subsection I.D of the November 9, 2011 Consent Order in DEC Case No. R6-20110621-33, by failing to provide a valid reclamation bond in the amount of

$76,000 by June 1, 2012 as directed by Department staff, and by failing to comply with this direction until July 18, 2013, more than one year later.

IV. Respondent Seymour Excavating Inc. shall immediately cease and refrain from mining at the site until such time as it is authorized to conduct mining activity at the site pursuant to a permit issued by the Department.

V. Respondent Seymour Excavating Inc. shall submit, within sixty (60) days of service of this order upon it, an approvable written notice of mining termination and reclamation schedule and plan in accordance with 6 NYCRR 423.3, including the following:

A. Grade, re-spread topsoil, and plant vegetation on all affected land at the site within 60 days;

B. All affected land at the site shall be successfully vegetated with a permanent stand of plants capable of regeneration and succession which assures 75% coverage of the planted area within 12 months. Any planted area where vegetation has not grown shall not exceed one-half acre within a two-acre area; and

C. Complete reclamation of all affected lands within 12 months.

For purposes of this order, "approvable" shall mean approved by the Department with only minimal revision. "Minimal revision" shall mean revised and resubmitted to the Department within fifteen (15) days of notification by the Department of revisions that are necessary.

VI. Respondent Seymour Excavating Inc. shall permit staff to enter the site for inspection and investigation purposes, including but not limited to ascertaining Seymour Excavating Inc.'s compliance with the ECL, the applicable regulations, and the Consent Order in DEC Case No. R6-20110621-33.

VII. Respondent Seymour Excavating Inc. is hereby assessed a civil penalty in the amount of fourteen thousand dollars ($14,000), which is due and payable within thirty (30) days of the service of a copy of this order upon it. Payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation." The penalty payment shall be sent by certified mail, overnight delivery, or hand delivery to the Department at the following address:

Nels Magnuson, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 6
317 Washington St.
Watertown, NY 13601.

VIII. All communications from respondent to the Department concerning this order shall be directed to Nels Magnuson, Esq., at the address referenced in paragraph VII of this order.

IX. The provisions, terms and conditions of this order shall bind Seymour Excavating Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: September 29, 2014
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 23 of the Environmental Conservation Law ("ECL") of the State of New York and Part 421of Title 6 the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

-by-

SEYMOUR EXCAVATING INC. and BURTON D. SEYMOUR,

Respondents.

HEARING REPORT

DEC Case No.
R6-20130419-13

Procedural History

Respondents Seymour Excavating Inc. ("Seymour Excavating") and Burton D. Seymour (collectively "respondents") were served with an amended notice of hearing and complaint on May 7, 2014 (see Hearing Exhibit ["Ex."] 2). The complaint alleges that: (i) both respondents violated ECL 23-2711(1) and 6 NYCRR 421.1(a) by mining without a permit at a site known as the Seymour-Acee Gravel Pit, located in the Town of Vernon, Oneida County ("site"), after proposing to mine more than 1,000 tons or 750 cubic yards of material from the site; (ii) respondent Seymour Excavating violated subsection I.A of an order on consent dated November 9, 2011 ("2011 Consent Order") by mining at the site before a new mining permit was issued; and (iii) respondent Seymour Excavating violated subsection I.D of the 2011 Consent Order when it failed to provide by June 1, 2012 a valid reclamation bond in the amount of $76,000 (see Ex. 1).

Staff requests that the Commissioner issue an order: (i) holding that both respondents violated ECL 23-2711(1) and 6 NYCRR 421.1(a); (ii) holding that Seymour Excavating violated subsections I.A and I.D of the 2011 Consent Order; (iii) imposing on respondents a civil penalty in the amount of fourteen thousand dollars ($14,000); (iv) "[s]uspending an appropriate portion, but not more than half, of the total penalty to ensure compliance with any Order that may be issued;" (v) requiring respondents to submit, within 60 days of the order of the Commissioner, an approvable written notice of mining termination reclamation schedule and plan in accordance with 6 NYCRR 423.3;[1] and (vi) permitting staff to enter respondents' facility, or areas in the

[1] This request reflects changes made to the complaint pursuant to staff's motion to amend the complaint, made at the June 17, 2014 pre-hearing conference. Staff's motion to amend requested that paragraphs VII and VIII, set forth at page 6 of the complaint, be combined, and that the following phrase be deleted from former ¶ VII: "an approvable permit application to close the mine and reclaim all affected land." Because there is no prejudice to respondents with respect to the proposed amendment, which simply combines two paragraphs of the complaint into one, and seeks no additional relief, I granted staff's motion to amend the complaint pursuant to 6 NYCRR 622.5(b) ("a party

vicinity of respondents' facility under respondents' control, for inspection and investigation purposes.

The notice of hearing stated, among other things, that respondents were required to serve a written answer to the complaint within 20 days after receipt, that failure to serve an answer would constitute a default and waiver of respondents' right to be heard, and that staff may thereafter move for a default judgment against respondents at any time (see Ex. 1, notice of hearing, at 1). The notice of hearing also informed respondents that a pre-hearing conference would be held, and that failure to appear at the pre-hearing conference would constitute a default and waiver of respondents' right to a hearing (id. at 1-2). By letter dated June 3, 2014, hand-delivered to Seymour Excavating, staff notified respondents that a pre-hearing conference would be held on June 17, 2014 at 1:00 p.m. (see Ex. 3).

Respondents failed to serve or file an answer, and failed to appear at the June 17, 2014 pre-hearing conference. At the pre-hearing conference, Department staff made an oral motion pursuant to 6 NYCRR 622.15 for a default judgment based upon respondents' failure to answer the complaint, and also sought judgment on the merits. In support of its motion for a default judgment, staff called Christopher M. Lucidi, a Region 9 Mined Land Reclamation Specialist, to provide testimony, and submitted twelve exhibits, all of which were received into evidence (see Exhibit Chart, attached hereto). Staff also submitted a proposed order.

Findings of Fact

1. Respondent Seymour Excavating Inc. ("Seymour Excavating") is a New York business corporation (Complaint ["Compl."] ¶ 3; see also Ex. 4 [NYS Department of State, Division of Corporations, Entity Information Page]).

2. Pursuant to a Mined Land Reclamation Permit issued by the Department, DEC Permit ID No. 6-3060-00039/00003, Seymour Excavating and Marone S. Acee were authorized to mine surface unconsolidated sand and gravel from a 111.5 acre parcel owned by Marone Acee, and located on Hunt Road in Vernon, New York. The permit became effective on December 6, 2004, and contained an expiration date of December 5, 2009 (Compl. ¶ 4; see also Ex. 5).

3. Respondent Burton D. Seymour is President and Chief Executive Officer of Seymour Excavating (Compl. ¶ 3; see also Ex. 4; Ex. 7 [Appendix at fifth unnumbered page, Mining Permit Application signed by Burton Seymour as President of Seymour Excavating]).

4. On November 4, 2009, staff received from Seymour Excavating an application to renew the Mined Land Reclamation Permit. On April 12, 2011, the Department notified Seymour Excavating that the application to renew was denied because Seymour Excavating had not paid outstanding regulatory fees and the reclamation bond for the site

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may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ … absent prejudice to the ability of any other party to respond").

had been canceled and not replaced within 30 days after receiving notice of cancellation (Ex. 6 at 1, ¶ 3; see also Ex. 1 at 1, ¶ 4).

5. On June 3, 2011, staff notified Seymour Excavating that, because its application to renew the permit was denied, "there shall be no mining activity at the site" (Ex. 6 at 2, ¶ 4). At a June 16, 2011 staff inspection of the site, however, mining activity was observed (id.; see also id. at 3, ¶ 14).

6. Seymour Excavating entered into a consent order with the Department, effective November 9, 2011, in which Seymour Excavating admitted certain violations and agreed to, among other things: (i) cease all mining activity at the site until a new mining permit was issued (Ex. 6 at 4, § I.A); and (ii) obtain a valid reclamation bond for the site on or before January 31, 2012 in an amount determined by the Department, pursuant to 6 NYCRR part 423 (id. at 5, § I.D).

7. On April 11, 2012, the Department received an application by Seymour Excavating for a new mining permit for the site, in which Seymour Excavating proposed to mine more than 1,000 tons of minerals during each year of the proposed five year permit (Compl. at 2, ¶ 7; Ex. 7, Appendix at fifth unnumbered page, and page 5 of 21 of the attached Full Environmental Assessment Form).

8. Christopher M. Lucidi, Mined Land Reclamation Specialist in the Department's Region 6 offices, calculated the amount of the reclamation bond for the proposed mining as $76,000, and sent a letter dated April 25, 2012 to respondents informing them of the bond amount, and that the bond was to be submitted to the Department no later than June 1, 2012 (Lucidi Testimony; see also Ex. 8).

9. When Mr. Lucidi inspected the site on April 8, 2013, he observed an excavator removing material from the mine face, a front loader placing that material onto trucks, and the trucks thereafter driving off the mine site (Lucidi Testimony; see also Ex. 10 [April 16, 2013 notice of violation attaching report of April 8, 2013 site inspection]; Ex. 11 [8 photographs taken by Mr. Lucidi during the April 8, 2013 site inspection]).

10. The photographs taken at the site by Mr. Lucidi during his April 8, 2013 inspection reflect that the words "Seymour Excavating" were painted on the doors of the trucks at the site (Ex. 11).

11. By letter dated April 23, 2013, Department staff informed respondents that the April 12, 2012 permit application was denied because of the failure to obtain a valid reclamation bond in the amount determined by the Department (Ex. 9).

12. On July 18, 2013, the Department received notice of a bond in the amount of $76,000 relating to the mining operations at the site (Lucidi Testimony; see also Ex. 12).

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (see 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; see also 6 NYCRR 622.15[a]).

Upon a respondent's failure to answer a complaint and/or failure to appear for a pre-hearing conference, Department staff may make a motion to an Administrative Law Judge ("ALJ") for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (see 6 NYCRR 622.15[b][1]-[3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

In this matter, upon respondents' failure to appear at the June 17, 2014 pre-hearing conference, Department staff made an oral motion for a default judgment to the undersigned ALJ, and submitted proof of service on respondents, proof of respondents' failure to appear or to file a timely answer, and a proposed order. Staff also submitted documents and testimony sufficient to support its claims against respondent Seymour Excavating.

As discussed below, I recommend that the Commissioner issue an order holding that respondent Seymour Excavating Inc. is liable for the three violations alleged against it in the complaint. I also recommend, however, that the Commissioner dismiss the complaint without prejudice as to Burton D. Seymour, because staff has failed to submit proof of the facts sufficient to support the claim against him individually.

Liability of Seymour Excavating Inc.

The proof submitted establishes staff's entitlement to a default judgment against Seymour Excavating for all three causes of action asserted against it. As to the first cause of action, the proof in support of the claim was sufficient to establish that Seymour Excavating was engaged in mining activity on April 8, 2013 but did not at the time possess a permit authorizing such activity. By mining without a permit, Seymour Excavating violated ECL 23-2711(1) and 6 NYCRR 421.1(a).

With respect to the second cause of action, subsection I.A of the 2011 Consent Order requires that Seymour Excavating "cease all mining activity at the site until a new mining permit is issued for the site" (Ex. 6 at 4, § I.A). The proof in support of the claim was sufficient to

establish that Seymour Excavating was engaged in mining activity on April 8, 2013 without a permit, thereby violating subsection I.A of the 2011 Consent Order.

With respect to the third cause of action, subsection I.D of the 2011 Consent Order requires Seymour Excavating to obtain a valid reclamation bond for the site on or before January 31, 2012 (id. at 5, § I.D). By letter dated April 25, 2012, staff required that Seymour Excavating submit financial security totaling $76,000 no later than June 1, 2012 (see Ex. 8). The proof in support of the claim was sufficient to establish that Seymour Excavating did not submit the required financial security until July 18, 2013 (Lucidi Testimony; see also Ex. 12), thereby violating subsection I.D of the 2011 Consent Order.

I therefore recommend that the Commissioner hold that Seymour Excavating committed all three violations alleged in the complaint.

Liability of Burton D. Seymour

The first cause of action asserts that Burton D. Seymour violated ECL 23-2711 and 6 NYCRR 421.1(a) by mining at the site without a mining permit after proposing to mine more than 1,000 tons or 750 cubic yards of material from the site within one year. Neither the complaint nor any of the proof offered at the June 17, 2014 proceeding, however, describes or establishes any individual actions by Mr. Seymour sufficient to support the claim.

First, Mr. Seymour did not, in his individual capacity, "propose[] to mine" at the site; the applicant for a new permit was Seymour Excavating (see Ex. 7). Second, staff made no factual allegations or offered any proof to demonstrate that Mr. Seymour was personally involved in the mining activities that Mr. Lucidi observed at the site on April 8, 2013. Mr. Lucidi did not testify that he saw Mr. Seymour at the site that day, and staff offered no proof of any actions taken by Mr. Seymour with respect to the mining observed on that day. The claim against Mr. Seymour appears to be based solely on: (i) the allegation that he is "president and owner" of Seymour Excavating (Compl. ¶ 3); and (ii) an "Entity Information" sheet from the Department of State's website identifying Mr. Seymour as Chief Executive Officer of Seymour Excavating (see Ex. 4). This is not sufficient, without more, to support the claim that Mr. Seymour mined without a permit.

Staff did not allege or offer any proof that Mr. Seymour should be held liable under the responsible corporate officer doctrine. As set forth above, the complaint alleges that Mr. Seymour is the president and owner of Seymour Excavating, and the evidence reflects that Mr. Seymour is Chief Executive Officer of Seymour Excavating and that he signed the mining permit application as President of Seymour Excavating (see Ex. 7). The complaint contains no allegations, and staff offered no proof, however, that Mr. Seymour had direct responsibility for the operations, directed that the mining activities take place, was the sole member of the corporation, or that he alone made the decisions that are the subject of the violations in this matter (see e.g. Matter of Supreme Energy Corporation, Supreme Energy, LLC, and Frederick Karam, Decision and Order of the Commissioner, April 11, 2014, at 25-27).

Nor has staff alleged that Mr. Seymour should be held liable under the doctrine of

piercing the corporate veil. Establishing liability under this theory requires allegations and proof that: (i) the corporate officer exercised complete domination over the corporation concerning the transaction at issue; and (ii) such domination was used to commit a fraud or wrong against the plaintiff (see id. at 27 [citing cases]). Staff here has neither made such allegations nor submitted proof sufficient to support this theory.

Therefore, staff has not submitted proof sufficient to support its cause of action against Burton D. Seymour, and I recommend that the Commissioner dismiss the complaint against him, without prejudice.

Civil Penalty

In its complaint, staff seeks a total civil penalty of "at least" fourteen thousand dollars ($14,000),[2] comprised of the following: (i) pursuant to ECL 71-1307(1), $8,000 against both respondents for violating ECL 23-2711 and 6 NYCRR 421.1(a), as alleged in the first cause of action in the complaint;[3] and (ii) $6,000 against respondent Seymour Excavating for violating subsections I.A and I.D of the 2011 Consent Order (see Compl. at 5, ¶ IV).[4]

ECL 71-1307(1) provides that any person who violates any provision of ECL article 23 "shall be liable … for a civil penalty not to exceed eight thousand dollars and an additional penalty of two thousand dollars for each day during which such violation continues …." The complaint and the evidence provided at the June 17, 2014 proceeding relate to the mining activity being conducted by Seymour Excavating on April 8, 2013. Thus, only one day's violation has been established, and the maximum that could be assessed for that violation is $8,000.

Although it may be appropriate in some circumstances to reduce the amount of the maximum penalty, respondent Seymour Excavating has a history of non-compliance. For example, Seymour Excavating admitted in the 2011 Consent Order that it was conducting mining

[2] Given due process concerns, I will consider Department staff to have requested a penalty in the exact amount of fourteen thousand dollars ($14,000) (see e.g., Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 3 [absent notice to a respondent that Department staff will seek a penalty higher than the amount stated in the complaint, due process concerns limit the penalty to the specific amount referenced in the complaint]).

[3] Staff did not provide a proposed allocation of the requested amount as between the two respondents, or argue that the penalty should be assessed jointly and severally. Given that I am recommending that the claim against Burton D. Seymour be dismissed without prejudice, the discussion herein relates to an appropriate penalty for Seymour Excavating's violation only.

[4] Although the complaint separates the requested $6,000 into two components - $3,000 for each of the two violations of the 2011 Consent Order – staff clarified at the June 17, 2014 proceeding that the $6,000 is the total amount of suspended penalty under the 2011 Consent Order. The 2011 Consent Order imposed a civil penalty of $8,000, of which $2,000 was payable and $6,000 was suspended, provided that the Department "may vacate the suspension and assess the penalty, or any part of it, for a violation of this order or the [ECL]" (Ex. 6 at 5, § II). Since the 2011 Consent Order would allow recovery of the entire suspended penalty upon just one violation of its provisions, I will treat staff's penalty request as one for the entirety of the $6,000 suspended penalty, and not allocate portions of it to each of the second and third causes of action.

activity on June 16, 2011, notwithstanding that the Department notified respondent less than two weeks earlier, on June 3, 2011, that "there shall be no mining activity at the site" because Seymour Excavating's permit renewal application had been denied (2011 Consent Order, at 2 ¶ 4). Moreover, Seymour Excavating agreed in the 2011 Consent Order to "cease all mining activity at the site until a new mining permit is issued for the site" (id. at 4, § I.A). As of April 8, 2013, when staff site inspection revealed that respondent was mining at the site, no new mining permit had been issued for the site.

Having found that respondent Seymour Excavating violated ECL 23-2711 by mining without a permit, and that this is not the first time that Seymour Excavating has done so, I recommend that the Commissioner assess a civil penalty in the amount of eight thousand dollars ($8,000) against Seymour Excavating on the first cause of action.

Having also determined that Seymour Excavating violated two provisions of the 2011 Consent Order, I recommend that the Commissioner assess an additional civil penalty of six thousand dollars ($6,000) against Seymour Excavating on the second and third causes of action, representing the amount of the suspended penalty from that consent order.[5] I therefore recommend that the Commissioner impose upon respondent Seymour Excavating a total civil penalty of fourteen thousand dollars ($14,000), to be paid within thirty (30) days of service of the Commissioner's order on respondent.[6]

Remedial Relief

Staff requests that the Commissioner direct "respondents" to submit, within 60 days of service of the order on respondents, an approvable[7] written notice of mining termination and reclamation schedule and plan in accordance with 6 NYCRR 423.3, including the following:

- Grade, re-spread topsoil, and plant vegetation on all affected land at the site within 60 days;
- All affected land at the site shall be successfully vegetated with a permanent stand of plants capable of regeneration and succession which assures 75% coverage of the

[5] Staff refers to ECL 71-1307 in the second and third causes of action, but that provision does not explicitly state that violation of a consent order authorizes the imposition of a penalty under that provision. ECL 71-1307(1) does, however, authorize a civil penalty of up to $8,000 against any person who "commits any offense described in section 71-1305 of this title." Under ECL 71-1305, entitled "Offenses," it is unlawful for any person to, among other things, "[v]iolate any of the provisions of or fail to perform any duty imposed by article 23 … or any order … made pursuant thereto" (see ECL 71-1305[2]). Therefore, each violation of a consent order is an "offense" under ECL 71-1305(2), and subjects the violator to a penalty of up to $8,000 pursuant to ECL 71-1307(1).

[6] Given the history of Seymour Excavating's non-compliance, I do not recommend that the Commissioner suspend any portion of the civil penalty, notwithstanding staff's request to suspend "an appropriate portion" of the penalty (Compl. at 6, ¶ V).

[7] In its complaint, staff defines "approvable" as "approved by the Department with only minimal revision" (Compl. at 6, ¶ VIII.D). In addition, staff defines "minimal revision" as "revised and resubmitted to the Department within fifteen (15) days of notification by the Department of revisions that are necessary" (id.). I recommend that, for purposes of the order in this matter, the Commissioner adopt staff's definitions of "approvable" and "minimal revision."

planted area within 12 months. Any planted area where vegetation has not grown shall not exceed on-half acre within a two acre area; and

- Complete reclamation of all affected lands within 12 months

(Compl. at 6, ¶ VIII).

I find that, with respect to respondent Seymour Excavating, this requested relief is reasonable, and recommend that the Commissioner direct Seymour Excavating to comply with all of the items set forth above, within 60 days of service of the Commissioner's order on respondent Seymour Excavating.

In addition, staff seeks an order directing "respondents" to permit staff to enter the facility for inspection and investigation purposes, including but not limited to ascertaining Seymour Excavating's compliance with the ECL, applicable regulations, and the Consent Order in Case #R6-20110621-33 (id. at 7, ¶ X). Again, as to respondent Seymour Excavating, this requested relief is reasonable, and I recommend that the Commissioner include this direction in his order.

It bears noting that Seymour Excavating has already agreed, in the 2011 Consent Order, to permit the Department access to the site "in order to make inspections to see that Respondent is in compliance" (Ex. 6, at 6, § IV). Moreover, the legislature has expressly authorized the Department, "by and through the commissioner, … to … [e]nter and inspect any property or premises … for the purpose of ascertaining compliance or noncompliance with any law, rule or regulation which may be promulgated pursuant to this chapter" (ECL 3-0301[2][g]).

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Dismissing the complaint as against respondent Burton D. Seymour, without prejudice;

2. Granting Department staff's motion for default against respondent Seymour Excavating Inc. pursuant to the provisions of 6 NYCRR 622.15;

3. Holding, based upon the proof adduced at the hearing, that respondent Seymour Excavating Inc. violated ECL 23-2711(1) and 6 NYCRR 421.1(a) by mining without a permit;

4. Holding, based upon the proof adduced at the hearing, that respondent Seymour Excavating Inc. violated subsection I.A of the Consent Order in DEC Case No. R6-20110621-33 by mining without a permit;

5. Holding, based upon the proof adduced at the hearing, that respondent Seymour Excavating Inc. violated subsection I.D of the Consent Order in DEC Case No. R6-

20110621-33 by failing to provide a valid reclamation bond in the amount of $76,000 until July 18, 2013;

6. Directing respondent Seymour Excavating Inc. to cease and refrain from mining at the site until such time as it is authorized to conduct mining activity at the site pursuant to a permit issued by the Department;

7. Directing respondent Seymour Excavating Inc. to submit, within 60 days of service of the order on respondent, an approvable written notice of mining termination reclamation schedule and plan in accordance with 6 NYCRR 423.3;

8. Directing respondent Seymour Excavating Inc. to permit staff to enter the facility for inspection and investigation purposes, including but not limited to ascertaining Seymour Excavating Inc.'s compliance with the ECL, the applicable regulations, and the Consent Order in DEC Case No. R6-20110621-33.

9. Directing respondent Seymour Excavating to pay a civil penalty in the amount of fourteen thousand dollars ($14,000), within thirty (30) days after service of the Commissioner's order on respondent; and

10. Directing such other and further relief as he may deem just and proper.

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

Dated: Albany, New York
June 27, 2014

EXHIBIT CHART

Matter of Seymour Excavating Inc. and Burton D. Seymour
June 17, 2014 – Region 6 Offices, 207 Genesee St., Utica, NY
DEC Case No. R6-20130419-13 - Edirol File No. 001124094444

Exhibit No.	Description	IDed	Rec'd	Offered By	Notes
1	Cover letter dated April 23, 2014, attaching Amended Notice of Hearing dated April 23, 2014, and Complaint dated January 29, 2014.	✓	✓	Department Staff	
2	Two Affidavits of Service, reflecting service on each respondent on May 7, 2014.	✓	✓	Department Staff	
3	June 3, 2014 letter from Nels G. Magnuson, Esq., Region 6 Assistant Regional Attorney, to respondent Burton D. Seymour and Seymour Excavating Inc.	✓	✓	Department Staff	
4	NYS DOS Corporate Entity Information, dated June 4, 2014.	✓	✓	Department Staff	
5	Cover letter dated December 6, 2004, attaching Mined Land Reclamation Permit No. 6-3060-00039/00003.	✓	✓	Department Staff	
6	Consent Order, Matter of Seymour Excavating Inc., DEC Case No. R6-20110621-33, effective November 9, 2011.	✓	✓	Department Staff	
7	Cover letter dated April 9, 2012, attaching Mined Land Use Plan Seymour Excavating, Inc. – Acee Pit, March 2012, prepared by Thomas Giles, Geologist, including mining permit application.	✓	✓	Department Staff	
8	April 25, 2012 letter from C. Lucidi to Burton Seymour and Seymour Excavating, Inc.	✓	✓	Department Staff	
9	April 23, 2013 letter from T. Tyoe to Burton Seymour and Seymour Excavating Inc.	✓	✓	Department Staff	
10	April 16, 2013 notice of violation attaching report of April 8, 2013 site inspection.	✓	✓	Department Staff	

Exhibit No.	Description	IDed	Rec'd	Offered By	Notes
11	Eight photographs	✓	✓	Department Staff	
12	Surety Bond Rider dated April 22, 2013, date-stamped received by the Department on July 18, 2013, and letter dated July 18, 2013 from J. Coons, Agency Program Aide, to Seymour Excavating Inc.	✓	✓	Department Staff	