

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway
Albany, New York 12233-1010

In the Matter

- of the -

Alleged Violations of Article 17
of the New York State Environmental Conservation Law
and Parts 750 and 751 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York,

-by-

CARNEY'S RESTAURANT, INC.,

and

ROBERT CARNEY,

Respondents.

DEC Case No. R5-20070221-671

DECISION AND ORDER OF THE COMMISSIONER

January 14, 2010

DECISION AND ORDER OF THE COMMISSIONER

Robert Carney and Carney's Restaurant, Inc. (collectively, "respondents") own and operate a sewage disposal system ("disposal system" or "facility") at Carney's Restaurant, located at 17 Main Street, Ballston Lake, Saratoga County, New York (the "restaurant"). The facility has operated subject to a State Pollutant Discharge Elimination System ("SPDES") permit that regulates discharges from the facility to the surface waters of an unnamed tributary of Ballston Lake, which is a water of the State of New York. The New York State Department of Environmental Conservation ("Department") issued the SPDES permit to Robert Carney. The SPDES permit became effective as of January 1, 1993.¹

Respondents' failure to comply with the laws and regulations that govern the SPDES permit has been longstanding, serious and uncorrected. As far back as 1997, a Department staff inspection revealed that the disposal system was not in compliance with the effluent limitations of the SPDES permit. In addition, grease was observed floating in the effluent and the receiving waters, and deposits of black sludge were present at the outfall. No sampling of the facility effluent had been completed. See, e.g., Hearing Exh 7, ¶¶ 3-6; Hearing Report, at 2 (Finding of Fact No. 6).

The Department has entered into four separate orders on consent with Carney's Restaurant, Inc. to address the environmental problems relating to the sewage disposal system. The consent orders were signed in 1998 ("1998 Consent Order"), 2001 ("2001 Interim Consent Order"), 2003 ("2003 Consent Order"), and 2005 ("2005 Consent Order") (collectively, the "consent orders") (see Hearing Exhs 7-10). Robert Carney, the president of Carney's Restaurant, Inc., executed each of those orders on behalf of Carney's Restaurant, Inc. The consent orders set forth requirements for remedial measures, the replacement of the disposal system, compliance activities, and various other action items (see id.). Compliance timeframes were also established. Respondents consistently failed to comply with the obligations set forth in the consent orders, and have not completed the corrective actions to which they committed (see, e.g., Hearing Exh 15 [noting failure of Carney's Restaurant, Inc., to meet any of the milestones in the 2005 Consent Order]; see also Hearing Exhs 11-12B [photographs of discharges of effluent from the disposal system in 2006]).

In a notice of hearing and complaint dated May 30, 2008, Department staff alleges that respondents violated article 17 of the Environmental Conservation Law ("ECL") and parts 750 and 751² of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Specifically, Department staff alleges that respondents:

¹ The SPDES permit expired on January 1, 1998 (see Hearing Exhibit ["Exh"] 4). The permit was renewed twice. The first renewal, which was for the period January 13, 1999 through January 31, 2004, was also issued to Robert Carney as permittee (see Hearing Exh 5). The SPDES permit was subsequently renewed for a term beginning on January 31, 2004, and for which Robert Carney and Carney's Restaurant, Inc., were listed under "Permittee Contact Name" (see Hearing Exh 6). The SPDES permit was revoked as of September 13, 2006 (see Hearing Exh 15; Hearing Transcript, at 197; see also Hearing Report, at 13).

² Part 751 was repealed in 2003, but was in effect when certain of the violations took place.

-- violated various provisions of the 2005 Consent Order to address deficiencies in their sewage disposal system. Department staff alleges that respondents failed to submit an approvable plan to the Department detailing either the replacement of respondents' existing wastewater treatment system through the construction of a new wastewater treatment system or the construction of a new subsurface disposal system on lands adjacent to respondents' property, and failed to start and complete construction of an approved system. In addition, Department staff alleges that respondents failed to comply with the interim requirements of the 2005 Consent Order, including pumping the restaurant's grease traps and septic tank on a regular basis, monitoring the flows on a daily basis, and conducting proper maintenance of the pump station and other treatment components, and that they continued to discharge sanitary sewage from the restaurant until December 14, 2006;

-- violated ECL 17-0505, by constructing and using a point source for the discharge of sanitary waste to a water of the State without possessing a SPDES permit for that point source;

-- violated ECL 17-0701(1)(b), by failing to have a SPDES permit for the operation of the disposal system between September 14, 2006 and December 14, 2006;

-- violated 6 NYCRR 750-2.8, by connecting two rental houses located on their premises to the disposal system without Department approval;

-- violated 6 NYCRR 751.1(a), by discharging sanitary sewage to the waters of the State without a SPDES permit between September 14, 2006 and December 14, 2006; and

-- violated the terms of their SPDES permit, including, among others, exceeding effluent limits, failing to monitor effluent, and failing to comply with reporting requirements and other compliance milestones.

The matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa. A hearing was conducted on December 4, 2008, and the parties subsequently filed post-hearing briefs in February 2009. The parties notified the ALJ in March 2009 that they would not be filing reply briefs.

The ALJ prepared a hearing report, a copy of which is attached ("hearing report"). The ALJ concludes that respondents failed to comply with the four consent orders. In addition, she concludes that respondents violated the terms of the SPDES permit by failing to submit annual summary reports, by failing to maintain the disposal system and by failing to report a non-compliance event. Furthermore, the ALJ determines that respondents violated 6 NYCRR 750-2.8 by connecting two rental houses located on their premises to the disposal system without any authorization. The ALJ also concludes that, between September 14, 2006 and December 14, 2006, respondents discharged sanitary sewage, a pollutant, from the disposal system, a point source, to an unnamed tributary of Ballston Lake, without a SPDES

permit. Based upon my review of the record, I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

As set forth in this record, respondents' violations extend back to 1997 when Department staff determined that respondents' facility was exceeding the effluent limits in the SPDES permit. Subsequent Department staff inspections in 2000 and 2006 identified additional and continuing violations (see, e.g., Hearing Report, at 3 [Finding of Fact No. 13 (facility effluent limits had been exceeded, no monitoring of effluent through sampling, and failure to comply with reporting requirements)] & 5 [Finding of Fact No. 22 (unauthorized connections to respondents' disposal system)]).

As noted, Department staff endeavored to bring respondents into compliance through the negotiation of four separate consent orders. Respondents, who failed to meet their obligations under these orders, are not in any way exempt from the legal requirements that govern discharges to the waters of the State. This record clearly demonstrates respondents' significant violations of the provisions of the ECL and requirements applicable to the SPDES permit and the operation of the facility, and their failure over a period of many years to correct those violations. This is particularly egregious in light of respondents' history of broken promises. In each of the four consent orders respondents committed to address and resolve facility violations. In each instance, respondents failed to do so.

Respondent Robert Carney has maintained that he should not bear any personal liability in this matter. The ALJ fully addressed respondent Carney's arguments and concludes that the record supports holding Robert Carney liable, in addition to respondent Carney's Restaurant, Inc., for the violations. I concur with the ALJ's evaluation of applicable legal authorities and Department precedent (see Hearing Report, at 5-9). The record demonstrates that Mr. Carney has responsibility for, and managerial involvement in, the operation and maintenance of the disposal system. Respondent Carney is also responsible for the facility's compliance with the terms and conditions of the SPDES permit. His failure to ensure the disposal system's compliance with the SPDES permit and the provisions of the consent orders is amply demonstrated by this record.

The longstanding nature of the illegal activities and the failure of respondents to comply with their legal obligations warrant a substantial penalty in this matter. The environment deserves no less. It would be unfair to members of the regulated community who are similarly situated and who dedicate the resources necessary to comply with the applicable environmental requirements if these respondents were not appropriately penalized for their serious and longstanding violations. The Department has provided respondents with numerous opportunities to come into compliance, beginning in 1998. The Department relied on respondents' representations that the violations would be promptly addressed and on their commitments to resolve the violations in accordance with the agreed upon timeframes. For more than a decade, respondents failed to meet their commitments. This proceeding, and the penalties that Department staff has proposed, are the result of respondents' inaction.

With respect to penalty, the ALJ has prepared a penalty calculation chart that lists the civil penalties that Department staff has requested, which total \$454,500. The ALJ suggests that some reduction or suspension of penalties may be appropriate in light of respondents' financial circumstances and efforts to come into compliance. I do not, based on this record, see that any reduction is warranted based on respondents' compliance efforts which have been limited and unsatisfactory. I note that Department staff is requesting penalties far below those authorized by section 71-1929 of the ECL, and also is not applying the "civil penalty severity multiplier" (see Hearing Report, at 14 [multiplier applied where a respondent is a repeat violator and has not engaged in required corrective actions]). Indeed, respondents' longstanding violations and the environmental and public health impact of the illegal discharges on Ballston Lake and its tributary would justify even higher penalty amounts.

However, I am taking into account the cost of the measures to meet the applicable obligations for this facility, and also recognizing the economics related to this ongoing business (see, e.g., Hearing Transcript, at 288-294 [testimony regarding restaurant finances]). Accordingly, I am making some modifications to the penalty.

With respect to the violations of the 2005 Consent Order, which total \$254,500, I have determined to suspend the civil penalties for those violations on the condition that respondents submit an approvable plan for the replacement of the disposal system ("plan") or other alternative that is acceptable to Department staff within thirty (30) days of the service of this order upon them. The plan shall include milestone dates for the facility upgrades or replacement, provide for regular status reports from respondents to Department staff regarding remedial efforts, list the interim requirements set forth in the 2005 Consent Order and the status of respondents' compliance with those requirements, provide written confirmation that any hookups to the disposal system that have not been approved by the Department have been disconnected, and describe how wastewater from any such prior illegal hookups is currently being handled. If respondents (a) fail to submit the plan, (b) submit a plan that Department staff determines is unsatisfactory, or (c) fail to pay the unsuspended portion of the civil penalty, the suspended penalty amount of \$254,500 will be immediately due and payable.

With respect to the civil penalties for the SPDES permit violations, discharging without a valid permit, and illegal wastewater treatment system collections, which total \$145,500, I see no basis for any reduction and respondents shall be liable, jointly and severally, for this amount.

Although not part of Department staff's complaint, Department staff requested in its closing brief that respondents be directed to pay the penalty amounts that were suspended under the 1998 Consent Order, 2003 Consent Order, and 2005 Consent Order. Under these three orders, the Department suspended all or a significant portion of the penalty conditioned on compliance with the terms of the orders (which never occurred). The suspended amounts were as follows:

<u>Consent Order</u>	<u>Suspended Amount</u>
1998	\$36,000 ³
2003	\$10,000
2005	<u>\$8,500</u>
Total Suspended Amount Requested	\$54,500

Department staff contended that both Robert Carney, in his individual capacity, and Carney's Restaurant, Inc., in its corporate capacity, were jointly and severally liable for these suspended penalties for their failure to comply with the terms and conditions of the orders (see Department Staff Post-Hearing Brief, at 36-39).

The record is clear that respondent Robert Carney, in addition to Carney's Restaurant, Inc., is liable for the various SPDES permit violations, the violations for discharging without a valid permit and the illegal waste water treatment system connections, as well as the failure to implement the remedial obligations required by the consent orders (see, e.g., Hearing Report, at 5-9 [referencing, in part, his status as responsible corporate officer, his managerial responsibility for operation of the facility, and his personal operation and maintenance of the facility including the authority to retain engineering and consulting firms to address the violations]). However, the language of the consent orders is insufficient to establish respondent Robert Carney's personal liability for the monetary penalties imposed, including the suspended penalties. Although he signed all three orders, he did so only in his capacity as an officer of the corporate respondent (Carney's Restaurant, Inc.). Furthermore, with respect to the 1998 and 2003 Consent Orders, only Carney's Restaurant, Inc. was listed as a respondent for purposes of the penalty. Although the 2005 Consent Order listed Robert Carney in the caption as respondent, he signed the order only in his capacity as president of the corporate respondent, and he did not sign as an individual. In addition, the language of the 2005 Consent Order variously refers to respondents (plural) or respondent (singular) in terms of the penalty (see Hearing Exh 10, ¶¶ I & II) which creates further ambiguity. In consideration of the record before me, Mr. Carney, in his individual capacity, shall not be liable for payment of the suspended penalties (see Matter of 125 Broadway, LLC and Michael O'Brien, Decision and Order of the Commissioner, December 15, 2006, at 6).

In contrast, the liability of Carney's Restaurant, Inc., for payment of the suspended penalties in the event that the terms of the orders were not met is clear under the language of the orders. Accordingly, Department staff's request that Carney's Restaurant, Inc., pay the suspended penalties under the 1998, 2003 and 2005 Consent Orders is granted and such payment is directed by this order.

³ Pursuant to the 1998 Consent Order, \$36,500 of the \$40,000 civil penalty was suspended. Department staff's closing brief requests a lesser amount of \$36,000 (see Hearing Report, at 10).

NOW, THEREFORE, having considered these matters and being duly advised, it is **ORDERED** that:

- I. Respondent Robert Carney is adjudged to have violated ECL 17-0505 and 17-0701, 6 NYCRR 750-2.8, and various terms and conditions of the SPDES permit (including the failure to submit annual summary reports [6 NYCRR 750-2.5], failure to properly maintain a wastewater treatment system [6 NYCRR 750-2.8(a)(2)], and failure to notify the Department of a non-compliance event [6 NYCRR 750-2.7]). In addition, respondent Robert Carney is adjudged to have violated the provisions of: Order on Consent (File No. R5-2231-97-11) effective November 18, 1998; Interim Order on Consent (File No. R5-20000501-12) effective February 2, 2001; Order on Consent (File No. R5-20000501-12) effective March 17, 2003; and Order on Consent (Case No. R5-20000501-12) effective November 22, 2005.
- II. Respondent Carney's Restaurant, Inc., is adjudged to have violated ECL 17-0505 and 17-0701, 6 NYCRR 750-2.8, and various terms and conditions of the SPDES permit (including the failure to submit annual summary reports [6 NYCRR 750-2.5], failure to properly maintain a wastewater treatment system [6 NYCRR 750-2.8(a)(2)], and failure to notify the Department of a non-compliance event [6 NYCRR 750-2.7]). In addition, respondent Carney's Restaurant, Inc., is adjudged to have violated the provisions of: Order on Consent (File No. R5-2231-97-11) effective November 18, 1998; Interim Order on Consent (File No. R5-20000501-12) effective February 2, 2001; Order on Consent (File No. R5-20000501-12) effective March 17, 2003; and Order on Consent (Case No. R5-20000501-12) effective November 22, 2005.
- III. Respondent Robert Carney and Carney's Restaurant, Inc., are assessed, jointly and severally, a civil penalty in the amount of four hundred thousand dollars (\$400,000), of which two hundred and fifty-four thousand five hundred dollars (\$254,500) is suspended on the condition that respondents submit an approvable plan for the replacement of the disposal system or an alternative to handle their waste water acceptable to the Department (the "plan") to Department staff within thirty (30) days of the service of this order upon them. The plan shall also:
 - include milestone dates for the facility upgrades or replacement;
 - provide for regular status reports from respondents to Department staff regarding remedial efforts;
 - list the interim requirements under the 2005 Consent Order and the status of respondents' compliance with those requirements; and
 - provide written confirmation that any hookups to the disposal system that have not been approved by the Department have been disconnected, and describe how wastewater from any such prior illegal hookups is currently being handled.

The payment of the unsuspended portion of one hundred forty-five thousand and five hundred dollars (\$145,500) shall be due and payable within sixty (60) days of the service of this order. Should respondents (a) fail to submit the plan within thirty (30) days of the service of this order upon them, (b) submit a plan that Department staff determines to be unsatisfactory, or (c) fail to pay the unsuspended portion of the penalty in accordance with the terms of this order, the suspended portion of the penalty (\$254,500) shall become immediately due and payable.

- IV. In addition to the civil penalties imposed in paragraph III of this order, respondent Carney's Restaurant, Inc., is also directed to pay fifty-four thousand five hundred dollars (\$54,500), which constitutes penalties that were suspended pursuant to the consent orders that Carney's Restaurant, Inc., executed with the New York State Department of Environmental Conservation in 1998, 2003 and 2005. The payment of the fifty-four thousand five hundred dollars (\$54,500) shall be due and payable within sixty (60) days of the service of this order upon respondent Carney's Restaurant, Inc.
- V. Payment of the civil penalties referenced in paragraphs III and IV of this order shall be by cashier's check, certified check, or money order drawn to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to Khai H. Gibbs, Esq., Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1500.
- VI. All communications from respondents to the Department concerning this order shall be made to Khai H. Gibbs, Esq., Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1500.

- VII. The provisions, terms and conditions of this order shall bind respondents Robert Carney and Carney's Restaurant, Inc., and their successors, heirs and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____ /s/
Alexander B. Grannis
Commissioner

Dated: January 14, 2010
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway, First Floor
Albany, New York 12233-1550

In the Matter

of the

Alleged Violations of Article 17
of the New York State Environmental Conservation Law (“ECL”)
and Parts 750 and 751 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York (“6 NYCRR”)

-by-

CARNEY’S RESTAURANT, INC.
and
ROBERT CARNEY,
Respondents.

Case No. R5-20070221-671

HEARING REPORT

/s/

Maria E. Villa
Administrative Law Judge

June 2, 2009

PROCEEDINGS

In a notice of hearing and complaint dated May 30, 2008, staff of the New York State Department of Environmental Conservation (“Department Staff”) alleged that respondents, Carney’s Restaurant, Inc. and Robert Carney (collectively, “Respondents”) were jointly and severally liable for violations of the terms and conditions of a State Pollutant Discharge Elimination System (“SPDES”) permit. In addition, Department Staff alleged that Respondents failed to comply with four orders on consent, and violated Article 17 of the New York State Environmental Conservation Law (“ECL”) and Parts 750 and 751 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”). The violations alleged arose out of Respondents’ operation and maintenance of a sewage disposal system at 17 Main Street, Ballston Lake, Saratoga County, New York (the “Facility”). Department Staff sought a civil penalty of \$455,000, costs, and an order of the Commissioner directing Respondents to refrain from unauthorized discharges of wastewater to the waters of the State.

Department Staff received Respondents’ timely answer, including three affirmative defenses, on June 19, 2008. On August 1, 2008, Department Staff filed a statement of readiness, pursuant to Section 622.9 of 6 NYCRR. The hearing took place on December 4, 2008 at the Department’s Central Office in Albany, New York. Khai H. Gibbs, Esq., Assistant Counsel, and Scott W. Crisafulli, Esq., Associate Counsel, appeared on behalf of Department Staff. Department Staff called three witnesses: William Wasilauski, the Regional Water Engineer for the Department’s Region 5 office; Robert W. Streeter, an Environmental Program Specialist II in the Department’s Region 5 Division of Water office; and Sharon Brooks, the Supervising Economist for the Economic Support Unit in the Department’s Office of General Counsel.

Respondents were represented by Charles A. Sarris, Esq., of the law firm of Kouray & Kouray, 525 State Street, Schenectady, New York. Respondent Robert Carney and his wife, Rosemary Carney, testified on behalf of Respondents.

At the conclusion of the hearing, the administrative law judge (“ALJ”) directed the parties to produce certain documents identified during the testimony at the hearing. Specifically, the ALJ directed Department Staff and Respondents to produce the engineering reports or drawings that were submitted with the initial SPDES application, any notifications of noncompliance sent by Respondents to the Department, and any monthly and quarterly monitoring reports or annual summary reports submitted by Respondents during the period when the alleged violations occurred. Transcript at 304-312 (hereinafter “Tr. at ___”). The ALJ reiterated this direction in a letter dated December 8, 2008. In response, by letter dated December 18, 2008, Department Staff submitted the Affidavit of Robert W. Streeter, sworn to December 17, 2008 (the “Streeter Affidavit”), with accompanying documents.¹ Exhibits (hereinafter “Exh. ___”) 24-49.

¹ Both the Streeter Affidavit and the documents accompanying it have been marked for identification and received into the record. A revised Exhibit Chart is attached to this hearing report.

The parties requested the opportunity to file post-hearing briefs. Initial briefs were filed on February 12, 2009. By letter dated March 12, 2009, Department Staff advised that it would not be submitting a reply brief. By e-mail dated March 12, 2009, Respondents advised the ALJ that no reply brief would be filed on their behalf.

FINDINGS OF FACT

1. Respondents, Robert Carney and Carney's Restaurant, Inc., own and operate a sewage disposal system located at 17 Main Street, Ballston Lake, Saratoga County, New York. The Facility's system includes a grease trap, septic tank and sand filter, with a surface water discharge to an unnamed tributary of Ballston Lake. The real property on which the Facility is located was transferred to Carney's Associates LLC on or about April 22, 1999.
2. Respondent Robert Carney purchased the property on October 18, 1982, and began to operate Carney's Restaurant in the late 1980s. In or about the Spring of 1992, a new septic system was installed at the Facility at a cost of approximately \$100,000.
3. Respondent Robert Carney is the chief executive officer and president of Respondent Carney's Restaurant, Inc.
4. Respondent Robert Carney is the sole officer and sole shareholder of Respondent Carney's Restaurant, Inc.
5. On January 1, 1993, the Department issued a SPDES permit for the Facility to Respondent Robert Carney. The permit listed Robert Carney as the permittee. The expiration date of the permit was January 1, 1998.
6. An inspection by Department Staff on or about October 20, 1997 revealed that the Facility's effluent limits had been exceeded, that Respondents failed to monitor effluent through sampling, and failed to comply with the permit's reporting requirements. Grease was observed floating in the effluent, and there was a black sludge deposit at the outfall, which indicates that the septic tank's sand filter was not operating properly and had likely been plugged by grease.
7. On October 27, 1997, the Department issued a notice of violation.
8. On November 12, 1997, the Department modified Respondents' SPDES permit to include an annual reporting requirement.
9. On November 18, 1998, Respondents² entered into an order on consent (the "1998 Order"), and agreed to a schedule of compliance, including corrective actions and reporting

² As discussed more fully below, recent decisions have reached different conclusions as to individual liability for violations of orders on consent and the attendant responsibility for the associated penalties, including suspended penalties, where an order on consent names only a corporate respondent. This hearing report refers to Respondents, collectively, recognizing that the Commissioner may determine that Robert

requirements.³ Respondent Robert Carney signed the 1998 Order as president of Carney's Restaurant, Inc., which is the only named respondent. Respondents also agreed to pay a civil penalty of \$40,000, with all but \$3,500 of the penalty suspended subject to Respondents' strict compliance with the order.

10. Respondents failed to submit a complete professional engineering report by August 15, 1998, and did not commence construction of an approved corrective action by September 15, 1998, or complete construction of an approved corrective action by October 1998, all as required by the 1998 Order.

11. Respondents paid the \$3,500 penalty, but have not paid any portion of the suspended penalty imposed in the 1998 Order, in the amount of \$36,500.

12. The SPDES permit was renewed twice, effective January 13, 1999 through January 31, 2004, and effective January 31, 2004 through January 31, 2009.

13. On or about March 1, 2000, Department Staff inspected the Facility. The inspection revealed that the Facility's effluent limits had been exceeded. In addition, the inspection revealed that Respondents had failed to monitor effluent through sampling, and had failed to comply with reporting requirements.

14. On March 8, 2000, the Department issued a notice of violation.

15. On February 2, 2001, Respondents entered into an interim order on consent (the "2001 Order"). Respondent Robert Carney signed the 2001 Order as president of Carney's Restaurant, Inc., which is the only named respondent. Pursuant to the terms of that interim order, Respondents agreed to conduct monthly wastewater monitoring and sampling, and submit reports to the Department.

16. Respondents failed to perform the required monitoring or meet the effluent limits set forth in the SPDES permit. Respondents also failed to meet the compliance schedule established in the interim order.

Carney, who was not a named party in the 1998 and 2003 Orders, and did not sign the 2005 Order in his individual capacity, is not liable for the suspended penalties Department Staff seeks for the failure to comply with the Orders' requirements.

³ The 1998 Order became effective on November 18, 1998, the date that it was signed by the Regional Director of the Department's Region 5 office. Respondent Robert Carney signed the 1998 Order on behalf of Respondent Carney's Restaurant, Inc. on November 3, 1998. The 1998 Order includes a Schedule of Compliance, with dates prior to the effective date of the 1998 Order. Specifically, the Schedule of Compliance requires commencement of construction of an approved corrective action by September 15, 1998, with completion thirty days later (October 15, 1998). Although the time limits set forth in the Schedule of Compliance preceded the 1998 Order's effective date, it is undisputed that the corrective action has yet to be undertaken or completed.

17. On March 17, 2003, Respondents entered into an order on consent (the “2003 Order”), agreeing to a schedule of compliance, including deadlines for collection and submission of data and approvable plans, and the commencement and completion dates for an approvable project. Respondent Robert Carney signed the 2003 Order as president of Carney’s Restaurant, Inc., which is the only named respondent. Respondents agreed further to pay a civil penalty of \$10,000, all of which was suspended subject to Respondents’ compliance with the 2003 Order.

18. Respondents failed to meet the compliance dates specified in Schedule A of the 2003 Order. Specifically, Respondents did not begin construction of an approved project by September 1, 2003, and complete that construction by November 1, 2003. Respondents failed to perform wastewater monitoring or comply with the effluent limits established in the permit.

19. The 2003 Order imposed a suspended penalty of \$10,000, which has not been paid.

20. On March 26, 2003, the Department renewed the SPDES permit for the Facility. Carney’s Restaurant, Inc. and Robert A. Carney were listed as permittees, and Respondent Robert Carney signed the application in his capacity as president.

21. On November 22, 2005, Respondents Robert Carney and Carney’s Restaurant, Inc. entered into an order on consent (the “2005 Order”). The 2005 Order required Respondents to pay a \$10,000 civil penalty, with \$8,500 suspended subject to Respondents’ compliance with the 2005 Order. Respondents agreed to a schedule of compliance that included deadlines for the submission of a preliminary engineering report, an approvable plan for the replacement of the Facility’s system or its alternative, requirements related to interim activities,⁴ “hold and haul”⁵ provisions, as well as commencement and completion dates for construction of an approvable project. In addition, Respondents agreed that the Facility would cease discharging effluent and that Respondents would surrender the SPDES permit if construction of an approved system was not completed by July 31, 2006.

⁴ The 2005 Order required Respondents to undertake certain monitoring and maintenance until construction of a new system was completed. Specifically, Respondents were required to pump the grease trap and septic tank of the existing system on a regular basis to prevent the carryover of grease and solids to the disposal system. In addition, Respondents were required to monitor flows on a daily basis, and to conduct proper maintenance of the pump station, and other treatment components, as necessary. Exh. 10, Schedule A, at ¶ 7(a), (b), and (c).

⁵ “Hold and haul” refers to the requirement in the 2005 Order that obliged Respondents, in the event that Respondents failed to submit an approvable plan by January 31, 2006, to plug the Facility’s septic tank outlet, and install tanks and controls to allow wastewater to be pumped and transported to a wastewater treatment plant. This procedure was to have been implemented by April 30, 2006. Exh. 10, Schedule A, ¶ 3.

22. During an inspection on January 4, 2006, Department Staff observed that two rental houses had been connected to the Facility's system. The two rental houses are located on Respondents' property,⁶ but were not included in Respondents' SPDES permit.
23. Respondents failed to submit approvable plans by or before January 31, 2006, as required by the 2005 Order.
24. Respondents paid the \$1,500 penalty imposed by the 2005 Order, but failed to pay the suspended portion of the penalty, in the amount of \$8,500.
25. On December 14, 2006, Respondents commenced the "hold and haul" procedure required pursuant to the 2005 Order.
26. Beginning at midnight on July 31, 2006 through December 14, 2006, Respondents discharged sanitary waste without a valid SPDES permit. By letter dated August 29, 2006, Department Staff afforded Respondents additional time (until midnight on September 13, 2006) to cease discharging from the Facility.

DISCUSSION

Statutory and Regulatory Requirements

Department Staff's complaint alleged that Respondents Robert Carney and Carney's Restaurant, Inc. were "persons" within the meaning of Section 17-0105(1) of the ECL, and Sections 661.4(w) and 750-1.2(a)(64) of 6 NYCRR, and that Respondents owned and operated a sewage disposal system which discharges sanitary sewage to the surface waters of an unnamed tributary of Ballston Lake. Exh. 1, ¶¶ 5 and 6. The tributary in question is a Class "D" stream, and constitutes waters of the State of New York, as defined at Section 17-0105(2) of the ECL and Section 750-1.2(a)(97) of 6 NYCRR. *Id.*, ¶¶ 6, 10.

It is undisputed that the Facility's sewage treatment process is a "disposal system," defined at Section 750-1.2(a)(29) of 6 NYCRR as "a system for disposing of sewage, storm water, industrial waste or other wastes, including sewer systems and treatment works." The Facility is also a "point source," and the sanitary sewage treated by the system is a "pollutant," within the meaning of the SPDES statute and regulations. *See* ECL §§ 17-0105(16) and (4); 6 NYCRR §§ 750-1.2(a)(65), (66), and (77).

Individual Liability of Respondent Robert Carney

Respondent Robert Carney argued that Department Staff failed to establish his individual liability for the violations alleged in the complaint. Respondents' first affirmative defense stated that the Department "failed to state a cause of action against Robert Carney

⁶ At the hearing, Ms. Brooks testified that on April 22, 1999, certain parcels of real property were conveyed to an entity entitled Carney's Associates LLC. Those properties included, among others, the restaurant at 17 Main Street, the location of the Facility. Tr. at 180.

individually. All documents executed and all actions taken by Robert Carney were executed and taken solely in his capacity as President of Carney's Restaurant, Inc." Exh. 2, ¶ 6. In their second affirmative defense, Respondents contended that because Respondent Robert Carney never acted in an individual capacity, "neither the State of New York nor the Department of Environmental Conservation has jurisdiction over Robert Carney individually." Id., ¶ 7.

Respondent Robert Carney maintained that he signed all of the SPDES permit applications only in his capacity as president of Carney's Restaurant, Inc., and pointed out that the 1998 Order, the 2001 Interim Order, and the 2003 Order identify Carney's Restaurant, Inc. as the sole respondent. Exhs. 4, 6, 7, 8, 9 and 18. Respondents' closing brief observed that the 2005 Order added Robert Carney as a respondent, but no signature line was provided for Mr. Carney's signature as an individual. Respondents' Brief, at 4. Respondents also noted that the 2000, 2003, 2004 and 2005 SPDES program fee invoices and the check stubs identified the permittee as Carney's Restaurant, Inc. Exhs. 20, 21, 22, and 23. Consequently, Respondent Robert Carney took the position that he could not be subject to penalties for the violations alleged in Department Staff's complaint.

This position is not supported by the record, which compels the conclusion that Respondent Robert Carney, individually, is jointly and severally liable with Respondent Carney's Restaurant, Inc. for the violations at the Facility. This is because "[i]n cases where the statutory violation does not require any showing of wrongdoing, liability attaches to managerial officers of a corporation where it is shown that, by virtue of the relationship the officer bore to the corporation, he or she had the power to prevent the violation." Matter of Sheldon Galfunt, Commissioner's Decision and Order, at 2, 1993 WL 267967, *2 (May 5, 1993) (citing United States v. Park, 421 U.S. 658 (1975)).

It is undisputed that Mr. Carney is the president and chief executive officer of the corporation that operates the Facility, and therefore "can be held liable for statutory violations arising from operations for which he has managerial responsibility." Matter of McPartlin, ALJ's Hearing Report, at 7-8, 1994 WL 734537, at 3 (December 29, 1994) (citing United States v. Park, supra; United States v. Dotterweich, 320 U.S. 277 (1943)). The record demonstrates that Respondent Robert Carney had managerial responsibility for the operation of the Facility, and for the Facility's compliance with the terms and conditions of the permit. He personally operated and maintained the Facility, and retained the engineering and consulting firms that were involved in Respondents' attempts to bring the Facility into compliance.

The Supreme Court's decision in United States v. Park upheld the lower court's jury charge in a case involving the sale of adulterated food by a large national food store chain. The Supreme Court found that the charge did not permit the jury to find guilt solely on the basis of the respondent's corporate status. 421 U.S. at 674. "[R]ather, it fairly advised the jury that to find guilt it must find respondent 'had a responsible relation to the situation,' and 'by virtue of his position . . . had . . . authority and responsibility to deal with the situation.'" Id. Accordingly, in a situation such as this one, the record must demonstrate that the

individual is in a position of responsibility which allows that person to influence corporate policies or activities, and by virtue of that position, the person could have influenced the corporate actions which constituted the violations. Moreover, the individual's actions or inaction must have facilitated the violations. As the Court held,

[t]he concept of a “responsible relationship” to, or a “responsible share” in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

Id. at 673-74.

Here, the evidence demonstrated that Respondent Robert Carney, as president and chief executive officer of Respondent Carney's Restaurant, Inc., was in a position of responsibility which allowed him to influence corporate activities. Mr. Carney owns all of the company's shares. Tr. at 205, 262. He signed all of the orders on consent on behalf of the corporation, and his signature appears on all of the SPDES permit applications. Exhs. 6, 7, 8, 9, and 18. For the same reasons, the record establishes the requisite nexus between Mr. Carney's position as president and sole shareholder, as well as the individual who oversaw the day-to-day operations of the Facility, and the violations in question. It is undisputed that Mr. Carney's involvement in the operation and maintenance of the Facility, and in the violations alleged, was significant. “By establishing ‘active wrongful conduct or culpable inaction’ on the part of a corporate officer, individual liability can be inferred.” Matter of Jahada, ALJ's Hearing Report, at 20, 2006 WL 3391341, * 15 (November 21, 2006) (citing State v. Markowitz, 273 A.D.2d 637, 642 (3rd Dept. 2000), lv. denied, 95 N.Y.2d 770 (2000)).

With respect to the action or inaction of the corporate officer in question, Respondent Robert Carney's failure to ensure the Facility's compliance with the requirements of the consent orders that he signed, and lack of compliance with the terms and conditions of the permit, was undisputed. Until the hold and haul procedure was implemented (significantly after the date established in the 2005 Order), the Facility continued to discharge effluent to a Class D stream. Pursuant to Section 17-0505, that effluent is a “pollutant.”⁷ Department Staff's witness testified that the discharge at the outlet of the system at the Facility was odorous, slightly foaming, not clear, and that bacterial growth was present at the bottom of the pipe. Tr. at 106; Exh. 11. According to Department Staff's witness, these observations are consistent with an improperly operating septic tank sand filter. Tr. at 117.

⁷ Section 17-0105(17) of the ECL defines “pollutant” to mean, among other things, “sewage, garbage, sewage sludge . . . discharged into water” Section 17-0105(4) provides that the term “sewage” means “the water-carried human or animal wastes from residences, buildings, industrial establishments or other places, together with such ground water infiltration and surface water as may be present.”

Where, as here, a regulatory scheme implicates public health concerns, it is particularly appropriate to invoke the responsible corporate officer doctrine to hold an individual corporate officer liable, assuming that the factors articulated in United States v. Park, *supra*, have been established in the record. Moreover,

[i]t is well established that a corporate officer may be held criminally liable for violations of statutes enacted to protect the public health, safety and welfare, where that officer had the authority and responsibility to prevent the violation. . . . The rationale for holding corporate officers criminally responsible is even more persuasive where only civil liability is involved.

Matter of Sheldon Galfunt, Commissioner's Decision and Order, at 2, 1993 WL 267967, *1-2 (May 5, 1993) (citing United States v. Park, *supra*, United States v. Dotterweich, *supra*, United States v. Hodges X-Ray, Inc., 759 F.2d 557 (5th Cir. 1985)); see Matter of Jahada, *supra*, at 19, 2006 WL 3391341, * 15.

The cases Respondents cited in their closing brief stand for the proposition that liability cannot be imposed upon an individual who signs a document in his or her capacity as a corporate officer. Castel v. Jean Norihiko Sherlock Corp., 159 A.D.2d 233, 233 (1st Dept. 1990); Namrod Construction Co., Inc. v. F.V.B. Contracting Corp., 116 A.D.2d 556, 556-57 (2nd Dept. 1986). The general principle articulated in these cases is not applicable here, where the record establishes that the individual in question was personally involved in the Facility's operation, which was undisputed by Respondents. Moreover, as stated in Matter of Galfunt, *supra*,

it is not necessary to determine whether Respondent [] facilitated the violations or whether he acted reasonably in exercising his supervisory authority. The fact that he was directly responsible for operations and had managerial authority to prevent the violation is sufficient to establish his liability. Whether and to what extent he acted negligently or consciously wrongfully need not be proven to establish his liability but would be considered as one factor in determining an appropriate civil penalty.

Commissioner's Decision and Order, at 2; 1993 WL 267967, * 2. In this case, Robert Carney is listed as the permittee on the SPDES permit applications, and the fact that he signed the initial and renewal applications as president of Carney's Restaurant, Inc. cannot excuse his failure to ensure that the Facility was properly maintained and operated. Exhs. 4, 5, 6, and 18.

Respondents also relied upon the Third Department's decision in Matter of Delford Industries, Inc. v. New York State Dep't of Env't'l Conservation, 171 A.D.2d 941 (1991). In Delford, the Third Department modified the lower court's determination upholding the respondent Commissioner's finding of liability with respect to individual petitioners for

violations of a consent order. Id. at 944. The Third Department reasoned that the language of the consent order immunized the individual petitioners from liability. Id. at 943. That language expressly stated that “[t]he provisions of this Order shall be deemed to bind [Delford], its officers, directors, agents, employees, successors and assigns, and all persons, firms and corporations acting under or for it, but shall in no way create or impose any personal liability on any of them, except [Delford], its successors and assigns.” Id. The court concluded that the Department “impermissibly attempted to avoid the grant of immunity, and, in effect, imposed personal liability for claimed violations of the consent order.” Id. at 944.

None of the consent orders in this proceeding include such express language, and consequently, Delford is not controlling. While only the 2005 Order names Robert Carney individually as a respondent, as discussed below, the Commissioner may determine that Robert Carney can be held liable for Respondents’ failure to comply with the provisions of the 1998 and 2003 Orders, in light of his active involvement in the operation and maintenance of the Facility. Accordingly, liability for the penalties assessed against Respondent Carney’s Restaurant, Inc. could also be shared by Respondent Robert Carney, who is equally culpable for the Facility’s violations.

As part of the relief requested, Department Staff sought payment of the suspended penalties from the 1998, 2003 and 2005 Orders. As discussed in greater detail below, each of the orders on consent (the 1998, 2003, and 2005 Orders) suspended all or a portion of the payable penalty, conditioned on compliance with the terms of the orders. Department Staff took the position that the corporate respondent, Carney’s Restaurant, Inc., and Robert Carney individually, were jointly and severally responsible for the suspended penalties due and owing.

There is conflicting precedent in the Department’s administrative cases with respect to this point. In Matter of Jahada, supra, the Commissioner required the payment of suspended penalties in a circumstance where an individual respondent signed a consent order only in his corporate capacity, but was determined to be a responsible corporate officer. Commissioner’s Order, at 6, 2006 WL 3391341, * 4. In a subsequent decision, the Commissioner declined to require that an individual respondent pay suspended penalties, despite the Commissioner’s determination that the individual respondent was liable as a responsible corporate officer for the violations committed by co-respondent, a limited liability corporation. Matter of 125 Broadway, LLC, Decision and Order of the Commissioner, at 6, 2006 WL 3739385, *3 (Dec. 15, 2006).

If the Commissioner elects to apply Matter of 125 Broadway in this proceeding, Respondent Robert Carney would not be required to pay any portion of the suspended penalties imposed in the 1998, 2003 or 2005 Orders, in the total amount of \$54,500. Nevertheless, Respondent Robert Carney would still be liable for the penalties imposed for violations of the 2005 Order, specifically, the failure to submit an approvable plan for replacement of the system, and the failure to plug the septic tank outlet and begin “hold and haul.” The penalties for those violations amount to \$254,000. In the alternative, the

Commissioner could determine that Respondent Robert Carney is liable, as a responsible corporate officer, for the suspended penalties in all three Orders, as well as the penalties for failing to undertake the corrective action required by the 2005 Order, but decline to require payment from Respondent Robert Carney individually.

This reduction in the penalty amount and waiver of suspended penalties would take into account Respondent Robert Carney's efforts to come into compliance, as well as the ambiguity in the 2005 Order. Although the 2005 Order names Robert Carney as a Respondent, the text of the Order is inconsistent, referring in some instances to plural "respondents" and in others to a single "respondent." Exh. 10. Moreover, the 2005 Order does not contain a signature line for Robert Carney, individually. Instead, the document was signed for Respondent Carney's Restaurant, Inc. by Robert Carney, as president. Under the circumstances, the Commissioner may elect to reduce the amount of penalties to be assessed against Respondent Robert Carney, while the corporate respondent would still be liable for the entire penalty amount. The discussion of the consent orders that follows refers to "Respondents" collectively, recognizing that the Commissioner's order in this proceeding may distinguish between the individual and corporate respondents in imposing liability or assessing penalties.

Consent Orders

The 1998 Order, effective November 15, 1998, required that a professional engineering report be submitted by August 15, 1998. Exh. 7 at 3, ¶ I(a). Pursuant to the terms of the 1998 Order, the report was to evaluate the conditions and problems that led to the failure of the Facility's system, and include a proposal for corrective action to allow for proper treatment and disposal of the wastewater generated at the Facility. *Id.* The schedule of compliance included in the 1998 Order required that construction of an approved corrective action commence by September 15, 1998, and be completed by October 15, 1998. *Id.*

It is undisputed that these deadlines were not met. Tr. at 86-87, 264. As a result, Respondents are liable for the suspended portion of the penalty imposed in the 1998 Order, which provided that all but \$3,500 of the \$40,000 penalty would be suspended. Exh. 7 at 3, ¶ 1. Respondents are therefore liable for a penalty of \$36,500, but Department Staff's closing brief, at pp. 36,-37, requests a lesser amount of \$36,000.⁸ This discrepancy was not explained. Accordingly, the Commissioner's order should impose a penalty of \$36,000 for violations of the 1998 Order.

The 2003 Order, effective March 17, 2003, imposed a \$10,000 penalty, all of which was suspended provided Respondents complied with the 2003 Order's schedule of compliance. Exh. 9. It is undisputed that Respondents did not begin construction of an approvable project by September 1, 2003, or complete construction by November 1, 2003, as

⁸ Department Staff's penalty calculation (Exhibit 17) requests a total of \$55,000 for the unpaid suspended penalties, which would be consistent with a \$36,500 suspended penalty in connection with the 1998 Order.

required by the 2003 Order. Tr. at 95, 264. Despite this noncompliance, the unrebutted testimony of Department Staff's witness establishes further that Respondents never paid the \$10,000 suspended penalty. Tr. at 49. Respondents are therefore liable for a penalty of \$10,000, and that penalty should be imposed by the Commissioner.

The 2005 Order became effective on November 22, 2005. Among other things, the 2005 Order required Respondents to submit a preliminary engineering report to the Department, including an investigation into the replacement of the Facility's existing system, the use of adjacent properties for an alternate system, and an analysis of soil, percolation rates and flow data from the Facility. Exh. 10. It is undisputed that the preliminary engineering report has not been submitted. Tr. at 97-98.

The 2005 Order further required Respondents to submit an approvable plan to the Department by January 31, 2006, to either replace the Facility's existing system by constructing a new system, or to construct a new subsurface disposal system on property adjacent to the Facility. Exh. 10. The plan was to be prepared by a professional engineer. It is undisputed that the engineering plan has not been submitted. Tr. at 98-99.

If Respondents failed to submit an approvable plan by January 31, 2006, the 2005 Order required Respondents to plug the Facility's septic tank outlet, and install tanks and controls to allow wastewater to be pumped and transported to a wastewater treatment plant. Exh. 10. Pursuant to the terms of the 2005 Order, this "hold and haul" procedure was to have been implemented by April 30, 2006. Exh. 10.

Mr. Streeter, Department Staff's witness, testified that he observed a discharge from the Facility's system during a site visit in May of 2006, and at subsequent visits on September 14, 2006 and December 7, 2006. Tr. at 112-113. The witness testified credibly that the 2005 Order's requirement to commence "hold and haul" was not satisfied until December 14, 2006, and Respondents did not rebut this testimony. Tr. at 99, 112-116. According to the witness, as of December 14, 2006, the outlet was plugged and wastewater was being transported off-site for disposal. Tr. at 117-118.

The 2005 Order also required Respondents to begin construction of an approved wastewater treatment system by May 15, 2006, and to complete construction by July 31, 2006. Exh. 10, Schedule A.4 and A.5. Department Staff inspected the Facility on May 26, 2006, and confirmed that Respondents had not commenced construction, nor had Respondents undertaken any of the required corrective actions. Tr. at 113. Respondents did not offer any testimony or evidence to the contrary, nor did they dispute that construction of the approved system was not completed by July 31, 2006.

SPDES Permit Violations

At the hearing, Department Staff established that Respondents violated certain terms and conditions of the Facility's SPDES permit. Sections 71-0505 and 17-0701 of the ECL prohibit any person from discharging to the waters of the State without a Department-issued

SPDES permit, or in a manner not in accordance with the permit. Part 750, and its predecessor, Part 751 (effective until May, 2003), contain similar provisions.

It is undisputed that the Department issued a SPDES permit to Respondents in 1993, and that the permit was renewed twice. Exhs. 4, 5, and 6. The renewals continued all of the pertinent terms and conditions of the initial 1993 permit. At the hearing, the evidence established that Respondents failed to submit eight annual summary reports to the Department, as required by the permit. Each annual summary report was to have identified and assessed six non-toxic parameters for the Facility. Respondents submitted only one Annual Summary Report, for the year 1999, which did not include all the required parameters, and was therefore incomplete. Exh. 24 (Streeter Affidavit, at ¶ 7(b)).

The SPDES permit also required Respondents to maintain the septic system properly. Respondents failed to do so, as demonstrated at the hearing through photographs introduced by Department Staff, and the testimony of Department Staff's witnesses that the grease traps for the system were not maintained. Tr. at 82-83, 108, 192, 197, 200. This testimony was unrebutted, and in fact was confirmed by Respondent's admission that the system was not properly maintained. Tr. at 221, 270.

In addition, Department Staff asserted that Respondents failed to report the improper discharge at the Facility, as well as the lack of proper maintenance, in violation of the terms of the permit. Respondent Robert Carney's testimony in opposition to these allegations was inconsistent and contradictory, and failed to rebut Department Staff's evidence to the contrary. Tr. at 221, 267-69.

Department Staff's complaint did not include separate causes of action specifically charging the SPDES permit violations, although those violations were referenced in the complaint as well as the Orders. Exh. 4, at ¶¶ 12, 17, 19, 22, and 25; Exhs. 7-10. In this instance, it is appropriate to amend the complaint to conform to the proof presented by Department Staff at the hearing (see Matter of Cerio, 228 A.D.2d 676, 677 (2nd Dept. 1996) (“[p]leadings may be amended to conform to the proof at any time ‘provided no prejudice is shown (see [Civil Practice Law and Rules] 3025[a])’” (citations omitted); Matter of Costa, Commissioner's Decision and Order, at 2, fn. 4 (February 19, 2009), citing Matter of Wilder, Hearing Report, at 3-4, 2005 N.Y. Env. LEXIS 56, *13, adopted by Supplemental Order of the Commissioner, September 27, 2005 (noting that Section 3025 authorizes amendment of pleadings to conform both factual allegations, as well as theories of liability, to the evidence) (citations omitted)). Such amendment is “committed almost entirely to the discretion of the trial court.” Gonfiantini v. Zino, 184 A.D.2d 368, 369 (1st Dept. 1992) (citations omitted). “Where no prejudice is shown, the amendment may be allowed during or even after trial.” Id. (citations omitted).

Respondents did not object, either at the hearing or in post-hearing submissions, to the SPDES violations alleged on the basis that those violations were not specifically charged in the complaint. Respondents in this case were offered the opportunity to file a post-hearing brief, and did not address the SPDES violations alleged. Moreover, Respondents declined to

file a reply to Department Staff's brief, which specifically discussed the SPDES violations and the basis for the penalties sought. Under the circumstances, Respondents cannot claim, nor have they argued, that they were surprised or prejudiced. The pleadings are hereby conformed to the proof to clarify that the violations of the SPDES permit, demonstrated by Department Staff at the hearing, are separate causes of action for which a penalty may be assessed.

Other Violations

Department Staff alleged that Respondents' SPDES permit was deemed null and void as of midnight, July 31, 2006, pursuant to the terms of the 2005 Order. Exh. 10, Schedule A.6, ¶ 3. The 2005 Order also required Respondents to cease discharging waste water from the Facility at that time. At the hearing, Department Staff established, through the unrefuted testimony of Mr. Streeter, that Respondents continued to discharge waste water from the Facility until December 14, 2006, in contravention of the terms of the 2005 Order, despite the lack of a valid permit. Respondents did not offer any testimony or documentary evidence to the contrary, and therefore this violation is established by the facts adduced at hearing. By letter dated August 29, 2006, Department Staff afforded Respondents additional time (until midnight on September 13, 2006) to cease discharging from the Facility. Exh. 15. Accordingly, Department Staff's penalty calculation uses the period from September 13, 2006 to December 14, 2006 as the time period of the violation.

In addition, Department Staff's witness testified that during an inspection on January 4, 2007, Respondent Robert Carney admitted that there were two waste water connections to the Facility that were not authorized by the permit, and had not been approved by the Department. Tr. at 122-23, 126. The two additional waste water sources originated from two buildings at 15 and 19 Main Street, as distinct from the restaurant, located at 17 Main Street. Tr. at 220, 234-35, 246.

Respondents did not dispute that the two buildings were connected to the Facility, nor do Respondents dispute that one of the buildings (15 Main Street) was illegally connected to the waste water treatment system. Tr. at 248. Respondents contended that the connection from 19 Main Street, a separate two-story apartment building, was included as part of the original 1993 permit, but the SPDES permit does not support this assertion. Tr. at 234, 279; Exhs. 4, 5, and 6. In addition, Respondent Robert Carney admitted that he applied for the 1993 SPDES permit solely for the restaurant. Tr. at 251.

Both of these connections required Departmental approval, and a modification of the SPDES permit. Tr. at 126. No documentation was offered at the hearing to show that any request to modify the permit was made. Accordingly, the record shows that Respondents illegally connected two additional waste water sources to the Facility's permitted system.

RELIEF REQUESTED

Section 71-1929 of the ECL provides that any person who violates ECL Article 17, Titles 1-11 or Title 19, or the implementing regulations of those provisions, shall be liable for a civil penalty of up to \$37,500 per violation, for each day the violation continues. That provision also provides that violations of permits or orders issued pursuant to Article 17 are subject to the same penalty. Department Staff sought a total penalty of \$455,000 for the violations alleged. Attached to this hearing report is a chart setting forth the penalty calculation proposed by Department Staff, corrected to reflect a discrepancy between the amount set forth in Exhibit 17 (Department Staff's calculation, offered at hearing) and the amount requested in Department Staff's closing brief. Department Staff calculated the total amount of suspended penalties (\$8,500 for the 2005 Order, \$10,000 for the 2003 Order, and \$36,000 for the 1998 Order) as \$55,000, but based upon the \$36,000 figure requested in Department Staff's closing brief, the total is \$54,500. As discussed below, the total penalty amount may be further reduced, in the Commissioner's discretion, in light of the circumstances of this case.

Department Staff pointed out that the penalty requested was significantly below the statutory maximum authorized pursuant to Section 71-1929 of the ECL. According to Department Staff, the record supported the application of a "civil penalty severity multiplier," pursuant to the Department's internal guidance, specifically, Technical and Operational Guidance Series ("TOGS") No. 1.4.2, at Attachment 3, No. I.A.1, "because Respondent is a repeat violator and has not engaged in the required corrective actions set forth in the Orders, including sampling, reporting, notification, and system implementation requirements, and he knowingly continued to discharge in violation of an Order." Department Staff's Brief, at 3; Exh. 17. Nevertheless, Department Staff elected not to use the multiplier in calculating the penalty requested. Exh. 17.

The most significant portion of the penalty calculation was based upon the violations of the 2005 Order, including Respondents' failure to submit an approvable plan for a replacement system, and the failure to plug the septic tank outlet and begin "hold and haul." Exh. 17. In addition, Department Staff also sought payment of suspended penalties in connection with the 1998 Order, the 2003 Order, and the 2005 Order.

Respondents' arguments in opposition to Department Staff's penalty calculation were equitable in nature. Respondents did not dispute the violations, but pointed out that Mr. and Mrs. Carney are well-respected citizens of the community, and that Carney's Restaurant employs approximately 50 people. At the hearing, Mr. and Mrs. Carney testified concerning the efforts they had made, and the money they had spent attempting to bring the Facility into compliance. According to Mr. Carney, a new system was installed in the Spring of 1992, and between 1999 and 2002, the system was excavated, new piping was installed, and the excavation was backfilled. Tr. at 216-217. Respondents installed new tanks and larger pumps, and reduced water usage to keep the system operating properly. Tr. at 216-218, 222-223. Mr. Carney testified that they had cooperated with the Department, that Respondents had, in good faith, attempted to address the problems with the system, and that Respondents

had spent well over \$200,000 in doing so, hiring professional engineers and investigating potential solutions. Tr. at 127, 231. At this point, the septic system has been plugged, and wastewater is being transported off-site, at a cost of approximately \$1,000 per month. Tr. at 222.

The witness testified further that he had submitted plans for a new system to the Department, but Department Staff had not yet acted on them. Tr. at 223. According to Mr. Carney, the original estimate for the new system was approximately \$60,000, and that the change orders requested by Department Staff increased the cost to over \$200,000. Tr. at 223-224. According to Mr. Carney, he was contacted by an individual who stated that he was willing to undertake a pilot project to rejuvenate the system at a cost of approximately \$20,000, and that a proposal was submitted to the New York State Department of Health. Tr. at 225-227.

Department Staff introduced evidence that assets had been conveyed to another corporate entity, Carney's Associates LLC, but Department Staff's witness acknowledged that she had not investigated Respondents' liabilities. Exh. 16, Tr. at 182. Department Staff's witness, Ms. Brooks, also acknowledged that the values for the real property listed in Department Staff's exhibit were the assessed values, not an actual sale price, which could vary significantly in the current economic climate. Tr. at 186.

Respondents called Rosemary Carney to testify, and she pointed out that "restaurants operate on a very small margin," and that she and her husband had been struggling for a year just to keep the restaurant open. Tr. at 287-288. Mrs. Carney testified credibly that the property was encumbered by a mortgage of approximately \$500,000, and that Carney's Restaurant, Inc. has no assets other than working capital. Tr. at 293-94. The witness testified that the total approximate value of the three properties owned by Carney's Associates LLC (15, 17, and 19 Main Street) was \$600,000. Tr. at 299-300. With respect to Carney's Associates LLC, Mrs. Carney stated that "it breaks even or not even . . . it's always a struggle." Tr. at 294. She testified further that she and her husband had made every attempt to work with the Department to resolve the problems with the Facility's system. Tr. at 287. According to Mrs. Carney, six different lending institutions declined to lend the funds necessary for a new system at the Facility. Tr. at 290. Mrs. Carney went on to state that they made the decision to close the restaurant, and that a petition had been signed by over a thousand individuals and sent to the Governor in an effort to keep the business open. Tr. at 291.

This testimony was not rebutted by Department Staff, and could, in the Commissioner's discretion, serve as the basis for a reduction in the penalty amount. In addition, it is undisputed that Respondents hired engineers and attempted to work with the Department to resolve the problems with the system at the Facility.

The total penalty amount requested is \$455,000, and, as discussed above, that amount has been adjusted to \$454,500. Of that amount, \$54,500 represents the suspended penalties due as a result of violations of the consent orders (\$36,000 for the 1998 Order, \$10,000 for

the 2003 Order, and \$8,500 for the 2005 Order). As discussed above, the Commissioner could elect to require that only Respondent Carney's Restaurant, Inc. be responsible for the suspended penalties under those Orders, thus reducing Respondent Robert Carney's obligation by that amount, to \$400,000. The Commissioner could reduce Respondent Robert Carney's individual penalty further, in light of the ambiguity in the 2005 Order, to impose the penalties for the violations of that Order only upon the corporate respondent. Thus, Respondent Robert Carney's individual liability would decrease by \$254,500 (\$140,000 for failure to submit an approvable plan, and \$114,500 for failure to plug the septic tank outlet and begin "hold and haul"). These reductions would impose a total penalty of \$145,500 on Respondent Robert Carney, individually.

CONCLUSIONS AND RECOMMENDATION

Respondents failed to comply with the 1998, 2001, 2003 and 2005 Orders. In addition, Respondents violated the terms of the Facility's SPDES permit by failing to submit annual summary reports, failing to maintain the system, and failing to report a non-compliance event.

In addition, Respondents violated Section 750-2.8 of 6 NYCRR by altering the Facility's system without the Department's approval. Specifically, Respondents connected two rental houses located on Respondents' premises to the sewage disposal system without authorization.

Finally, between September 14, 2006 and December 14, 2006, Respondents discharged sanitary sewage, a pollutant, from the Facility, a point source, to a Class D stream constituting waters of the State without a SPDES permit. Specifically, sanitary sewage was discharged from Respondents' Facility to an unnamed tributary of Ballston Lake.

For all of the reasons set forth above, the Commissioner should find Respondents, Robert Carney and Carney's Restaurant, Inc. liable for the violations alleged in Department Staff's complaint. In his discretion, the Commissioner could elect to reduce or suspend some portion of the penalty requested by Department Staff, in light of Respondents' efforts to come into compliance, and in recognition of Respondents' financial circumstances. Department Staff's request for costs should be denied.

Matter of Robert Carney and Carney's Restaurant, Inc.
DEC Case No. R5-20070221-671

PENALTY CALCULATION

Statutory/Regulatory Provision or Order Violated	Dates Of Violation (Department Staff's Penalty Calculation)	Period of Violation	Penalty Requested	Maximum Potential Penalty
SPDES Permit Violation: Failure to Submit Annual Summary Reports (6 NYCRR Section 750-2.5)	N/A: Respondents failed to submit eight annual summary reports, identifying six non-toxic parameters at the Facility (8 x 6 = 48 x \$250 = \$12,000)	N/A	\$12,000	Eight annual summary reports, six parameters each, at \$250 per parameter (8 x 6 = 48 x \$250 = \$12,000)
SPDES Permit Violation: Failure to Maintain Waste Water Treatment System (6 NYCRR Section 750-2.8(a)(2))	May 2, 2006 – September 13, 2006 (250 x 135 days = \$33,750)	135 days	\$33,750	\$37,500 x 135 days = \$5,062,500
SPDES Permit Violation: Failure to Report a Non-Compliance Event (6 NYCRR Section 750-2.7))	May 2, 2006 – September 13, 2006 (250 x 135 days = \$33,750)	135 days	\$33,750	\$37,500 x 135 days = \$5,062,500
Discharging Without a Valid Permit (ECL Section 17-0505))	September 13, 2006 – December 14, 2006 (500 x 92 days = \$46,000)	92 days	\$46,000	\$37,500 x 92 days = \$3,450,000
Illegal Waste Water Treatment System Connections (ECL Section 17-0701 and 6 NYCRR Section 750-2.8))	N/A	N/A	\$20,000	N/A

Statutory/Regulatory Provision or Order Violated	Dates Of Violation (Department Staff's Penalty Calculation)	Period of Violation	Penalty Requested	Maximum Potential Penalty
2005 Order on Consent: Failure to Submit an Approvable Plan for Replacement of System (ECL Section 71-1929)	January 31, 2006 – May 30, 2008 (absolute, or base penalty amount, is \$5,000 per month)	28 months	\$140,000	\$5,000 x 28 months = \$140,000
2005 Order on Consent: Failure to Plug Septic Tank Outlet and Begin "Hold and Haul" (ECL Section 71-1929)	April 30, 2006 – December 14, 2006 (absolute, or base penalty amount, is \$500 per day)	229 days	\$114,500	\$500 x 229 days = \$114,500
2005 Order on Consent: Suspended Penalty	N/A	N/A	\$8,500	2005 Order imposed a penalty of \$10,000, with all but \$1,500 suspended
2003 Order on Consent: Suspended Penalty	N/A	N/A	\$10,000	2003 Order imposed a penalty of \$10,000, all of which was suspended
1998 Order on Consent: Suspended Penalty	N/A	N/A	\$36,000 ¹	1998 Order imposed a penalty of \$40,000, with all but \$3,500 suspended

¹ In its closing brief, Department Staff sought a penalty of \$36,000, rather than \$36,500, for Respondents' failure to pay the suspended portion of the \$40,000 penalty imposed in the 1998 Order.

Penalty Calculation:

Failure to submit annual summary reports:	\$ 12,000
Failure to maintain waste water treatment system:	\$ 33,750
Failure to report non-compliance event:	\$ 33,750
Discharging without a valid permit:	\$ 46,000
Illegal waste water treatment system connections:	\$ 20,000
Violation of 2005 Order:	\$140,000
	\$114,500
Suspended penalty (2005 Order):	\$ 8,500
Suspended penalty (2003 Order):	\$ 10,000
Suspended penalty (1998 Order):	<u>\$ 36,000</u>
<u>GRAND TOTAL:</u>	<u>\$454,500</u>

Carney's Restaurant and Robert Carney
Enforcement Hearing
December 4, 2008

EXHIBIT LIST

Exhibit Number	Description	Offered By	ID	Received?	Notes
1	Notice of Hearing and Complaint (May 30, 2008)	N/A	√	√	
2	Answer (June 16, 2008)	N/A	√	√	
3	Statement of Readiness (July 30, 2008)	N/A	√	√	
4	1993 SPDES Permit with general conditions	Department Staff	√	√	
5	1999 SPDES Permit Renewal	Department Staff	√	√	
6	2004 SPDES Permit Renewal	Department Staff	√	√	
7	1998 Consent Order (11/18/98)	Department Staff	√	√	

Exhibit Number	Description	Offered By	ID	Received?	Notes
8	2001 Interim Consent Order (2/2/01)	Department Staff	√	√	
9	2003 Consent Order (3/17/03), with schedule of compliance	Department Staff	√	√	
10	2005 Consent Order (11/22/05), with schedule of compliance	Department Staff	√	√	
11	Inspector's Photos – May 2, 2006	Department Staff	√	√	
12A	Inspector's Photo – December 7, 2006	Department Staff	√	√	
12B	Inspector's Photo – December 7, 2006	Department Staff	√	√	
13	8/14/07 Engineer's Report (Wayne D. Kant, P.E.) – with map excerpt	Department Staff	√	√	
14	Newspaper Article – <i>Business Review</i> (9/25/08): "Carney's Pub Closing"	Department Staff	√	√	
15	August 29, 2006 letter from C. Lacombe, Esq., NYSDEC, to R. Carney and L. Chicatelli, Esq.	Department Staff	√	√	

Exhibit Number	Description	Offered By	ID	Received?	Notes
16	Property Chart – Carney Assets (created by S. Brooks, 12/1//08)	Department Staff	√	√	
17	Penalty Calculation (prepared by W. Wasilauski, 12/1/08), with Division of Water TOG 1.4.2	Department Staff	√	√	
18	August 22, 1989 SPDES Application	Respondent	√	√	
19	November 6, 1998 Notice of Complete Application	Respondent	√	√	
20	2000 SPDES Program Fee Invoice and check stub	Respondent	√	√	
21	2004 SPDES Program Fee Invoice and check stub	Respondent	√	√	
22	2003 SPDES Program Fee Invoice and check stub	Respondent	√	√	
23	2005 SPDES Program Fee Invoice and check stub	Respondent	√	√	

Exhibit Number	Description	Offered By	ID	Received?	Notes
24	Affidavit of Robert W. Streeter, sworn to December 17, 2008	N/A	√	√	
25	Post-it note: "Copies of original SPDES app from DEP file"	N/A	√	√	
26	August 18, 1989 letter from James E. Mitchell, P.E., The Environmental Design Partnership, to Al Matrose, NYS DEC, enclosing SPDES Application (2 pages) and sketch	N/A	√	√	
27	Post-it note: "Copy of Jim Mitchell letter telling us small house was connected after the system was built"	N/A	√	√	
28	June 1, 1993 letter from James E. Mitchell, P.E., The Environmental Design Partnership, to Randy Galusha, NYS DEC	N/A	√	√	
29	Post-it note: "Sample date for March & August '98"	N/A	√	√	

Exhibit Number	Description	Offered By	ID	Received?	Notes
30	Scilab Albany, Inc.: Sample No. 980826M; Sample No. 980305Q (2 pages)	N/A	√	√	
31	Post-it note: “Annual Monitoring report for 1999 (incomplete) and sample date for June & November ‘99”	N/A	√	√	
32	Handwritten note: “Never submitted flow data as requested in my March 8, 2000 letter”	N/A	√	√	
33	Annual Summary Report – 1999 (with two pages of sampling data attached)	N/A	√	√	
34	Post-it note: “Sample data for December ‘00, January, February, March ‘01 – Rec’d by department on 4/6/01”	N/A	√	√	
35	Handwritten notes	N/A	√	√	
36	Handwritten table: “Chris, here’s summary of attached results”	N/A	√	√	

Exhibit Number	Description	Offered By	ID	Received?	Notes
37	CNA Environmental Inc.: Samples 011020, 005030, 01214, 01562, 003911 (5 pages)	N/A	√	√	
38	Post-it note: "Sample results for September, March, February, January of '01 and December, October of '00"	N/A	√	√	
39	November 19, 2001 letter from Robert A. Carney to Chris Lacombe, NYS DEC	N/A	√	√	
40	Typewritten page with handwritten notes, with attached table (2 pages)	N/A	√	√	
41	CNA Environmental Inc.: Samples 014058, 011020, 01562, 01214, 005030, 003911 (two copies of this page, with a total of 7 pages)	N/A	√	√	
42	Post-it note: "Sample results for June '02"	N/A	√	√	

Exhibit Number	Description	Offered By	ID	Received?	Notes
43	Fax cover sheet from Terry Crannell to Marty Wolfson (August 22, 2002), with attached sampling results (022241)	N/A	√	√	
44	Post-it note: "Sample results from September '02"	N/A	√	√	
45	Fax cover sheet from Terry Crannell (November 7, 2002), with attached sampling results (023736) (1 page)	N/A	√	√	
46	Post-it note: "Sample results from May 2003. Received 6/19/03"	N/A	√	√	
47	June 16, 2003 letter from Martin M. Wolfson, P.E. to Randy Galusha, P.E., NYS DEC	N/A	√	√	
48	Sketch Plan: Martin Wolfson, P.E.	N/A	√	√	
49	Sampling data: 032298, 032194, 031966, 032507 (4 pages)	N/A	√	√	