STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 23 and 71 of the Environmental Conservation Law,

- by -

COBLESKILL STONE PRODUCTS, INC.,

Respondent.

ORDER

DEC Case No. R4-2008-0721-112

Pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the New York State Department of Environmental Conservation ("Department") served a notice and a motion for order without hearing dated February 9, 2009, together with supporting papers, upon respondent Cobleskill Stone Products, Inc. Department staff alleged that respondent exceeded the limit of 133 decibels ("dB") at a blasting event at a mine that respondent owns and operates in Lexington/Prattsville, Greene County, New York (the "mine"), and thereby violated Environmental Conservation Law ("ECL") article 23 (Mineral Resources), ECL 71-1305(2), and respondent's mining permit.

Respondent served a notice of cross-motion to dismiss dated February 25, 2009, together with supporting papers. Department staff submitted a reply dated March 9, 2009 in opposition to respondent's cross-motion.

The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger who prepared the attached Summary Hearing Report (the "Report"). The ALJ determined that Department staff failed to meet its burden of proof and that Department staff's motion should be denied. The ALJ further determined that respondent's cross-motion to dismiss (which the ALJ converted to a motion for summary order) should be granted.

I concur with the ALJ that Department's motion for order without hearing should be denied. On a motion for order without hearing, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations

alleged (see Cheeseman v Inserra Supermarkets, Inc., 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has done so, "it is imperative that a [party] opposing a ... motion for summary judgment assemble, lay bare and reveal his proofs" in admissible form (id. at 958 [quoting Du Pont v Town of Horseheads, 163 AD2d 643, 645 [3d Dept 1990]). Facts appearing in the movant's papers that the opposing party fails to controvert are deemed to be admitted (see Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975]; Matter of Linden Latimer Holdings, LLC, Order of the Commissioner, July 15, 2008, at 3-4.

Respondent operates the mine subject to an air blast limit of 133 dB established by the Department (see letter dated April 25, 2008 from the Department's Division of Environmental Permits to respondent). On June 3, 2008 respondent conducted a blast event that registered 133.4 dB on a seismograph at a nearby residence. In its cross-motion to dismiss Department staff's motion, respondent contended that the measuring equipment, based on manufacturer specifications, has a margin of error of ±0.4 dB, that the actual blast may have been as low as 133.0 dB, and that Department staff had not shown that the blast in fact exceeded the 133 dB limitation (see Affidavit of Douglas Rudenko, sworn to February 23, 2009). Furthermore, respondent argued that fractional readings were inappropriate for this type of measurement and were not scientifically or statistically justifiable (see id., see also Affidavit of Paul H. Griggs, sworn to February 23, 2009).

Although Department staff submitted a reply dated March 9, 2009, it failed to address respondent's technical arguments with an affidavit of a person qualified to do so (see Report, at 7). The ALJ, upon converting respondent's cross-motion to dismiss to a motion for summary order, then provided the parties with an opportunity to submit further proof (see letter dated March 24, 2009 from ALJ Goldberger to Department staff and respondent [citing State Board of Equalization and Assessment v Kerwick, 72 AD2d 292, 301 (3d Dept 1980), affd, 52 NY2d 557 (1981)]). No further submissions were received, however.

Based on the record before me, Department staff has not met its burden and Department staff's motion for order without hearing in lieu of complaint is denied.

The ALJ also recommended that respondent's cross-motion to dismiss be granted. I decline to do so. Although respondent argued that the margin of error for this measuring equipment and the use of fractional readings demonstrated that no exceedance occurred, those arguments are not dispositive on the existing

administrative record that is before me. Accordingly, I am remanding this matter to the ALJ for further proceedings.

Based on my review of the alleged violations and the relief being requested, however, efforts to resolve this matter through settlement, and thereby avoid adjudication, would appear appropriate. To the extent that the parties pursue settlement and conclude that mediation might be beneficial, I would encourage the parties to consider using the services of an ALJ from the Office of Hearings and Mediation Services as mediator. If settlement discussions are initiated, I direct the ALJ to postpone the commencement of any adjudication for such period of time that she deems appropriate.

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

I. Department staff's motion dated February 9, 2009, for order without hearing in lieu of complaint against respondent Cobleskill Stone Products, Inc. is denied.

II. Respondent Cobleskill Stone Products, Inc.'s cross-motion seeking dismissal of Department staff's motion for order without hearing is denied.

III. This matter is remanded for further proceedings, consistent with this Order.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: May 26, 2009
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 23 and 71 of the Environmental Conservation Law by:

COBLESKILL STONE PRODUCTS, INC.,

Respondent.

DEC Case No.
R4-2008-0721-112

SUMMARY HEARING REPORT

- by -

/s/
_____
Helene G. Goldberger
Administrative Law Judge

Proceedings

Department staff is represented by Jill Phillips, Assistant Regional Attorney of the Department's Region 4 office. The respondent is represented by John Holmes, Esq., Cobleskill, New York.

On February 9, 2009, the New York State Department of Environmental Conservation (DEC or Department) staff commenced this enforcement proceeding by serving a notice of motion for order without hearing and supporting papers upon the respondent, Cobleskill Stone Products, Inc. (CSP), by certified mail. In its motion for summary order, staff alleges that the respondent is in violation of Environmental Conservation Law (ECL) Article 23 and ECL § 71-1305(2) for exceeding the limit of 133 decibels (dB) for blasting events at CSP's mine known as Falke's Quarry located in Lexington/Prattsville, New York (Greene County). On February 26, 2009, the Department's Office of Hearings and Mediation Services (OHMS) received the respondent's notice of cross-motion to dismiss with supporting papers. On March 9, 2009, Ms. Phillips submitted the Department's reply.

By letter dated March 10, 2009, Chief Administrative Law Judge James T. McClymonds informed the parties that this matter had been assigned to me as the ALJ.

In support of staff's motion, Assistant Regional Attorney Phillips submitted:

1) notice of motion for order without hearing dated February 9, 2009;
2) motion for order without hearing dated February 9, 2009;
3) affirmation of Jill Phillips dated February 9, 2009;
4) affidavit of Allan Hewitt, Mined Land Reclamation Specialist II dated February 9, 2009 with the following attachments:
5) Attachment A: letter dated April 25, 2008 to Emil Galasso of CSP regarding Department-initiated modifications for Falke's Quarry Mined Land Reclamation (MLR) permit with attachments: blasting chart - ground vibration limits; letter dated April 3, 2003 from John H. Feltman to Emil Galasso with transferred permit for mining of sandstone at Falke's Quarry; and
6) Attachment B: copy of blast report and seismograph reading from June 3, 2008 blasting event.

In support of its motion to dismiss, respondent submitted the following:

1) notice of cross-motion for order of dismissal dated February 25, 2009;
2) affidavit of Douglas Rudenko, Vice President and Northeast Regional Manager of Vibra-Tech Engineers, Inc. dated February 23, 2009, attached to which is his curriculum vitae and the specifications of the seismograph used to measure the blast at issue;
3) affidavit of Paul H. Griggs, Principal Geologist, Griggs-Lang Consulting Geologists dated February 23, 2009, attached to which is his curriculum vitae;
4) affirmation of John Holmes, Esq. dated February 25, 2009 attached to which is a letter dated June 10,2008 from Mr. Holmes to the DEC Records Access Officer, a letter dated July 2, 2008 from Ms. Toni Mauceri to Mr. Holmes in response to his Freedom of Information Law (FOIL) request, and a letter dated July 11, 2008 from Mr. Rick Georgeson, public information officer to Mr. Holmes regarding the FOIL request;
5) brief on behalf of CSP;
6) excerpts from *Chemical Principles*, Third Edition by Richard Dickerson, Harry B. Gray and Gilbert P. Haights, Jr.; and
7) United States Department of the Interior, Office of Surface Mining, Reclamation and Enforcement, *Report of Investigations 8485, Structure Response and Damage Produced by Airblast from Surface Mining* by David E. Siskind, Virgil J. Stachura, Mark S. Stagg, and John W. Kopp.

By letter dated March 9, 2009, Assistant Regional Attorney Phillips submitted staff's reply to respondent's cross-motion with:

1) reply to notice of cross motion for order of dismissal dated March 9, 2009, signed by Ms. Phillips.

Based upon my review of all the papers, I determined that it was appropriate to convert the respondent's motion to one for summary order. By letter dated March 24, 2009, I informed the parties accordingly and invited them to submit additional information in support of their respective cases. See, State Board of Equalization and Assessment v. Kerwick, 72 AD2d 292, 301 (3d Dep't 1980), aff'd, 52 NY2d 557 (1981). By electronic mail

of March 26, 2009, Mr. Holmes informed me that the respondent would not be providing anything further on these motions unless staff made an additional submission. The deadline for submissions was April 3, 2009 and I have not received anything further from staff.

Staff's Position

Staff alleges that on June 3, 2008, respondent CSP, the owner and operator of Falke's Quarry located in Lexington/Pratt, Greene County, New York, violated Articles 23 and 71 of the ECL by conducting a blast event that registered 133.4 dB on a seismograph. The respondent operates pursuant to a MLR permit that contains an air blast limit condition of 133 dB that became effective on May 13, 2008. In response to CSP's claim that the seismograph's microphone has a margin of error of 0.4 and therefore it was possible that the blast did not exceed the permit limitation, Ms. Phillips argues the permit makes no provision for a margin of error and the increase of 0.4 dB represents an increase of 4.7% in magnitude.

Staff recommends the maximum penalty permissible pursuant to ECL § 71-1307(1), the Department's regulatory initiative to provide "uniform conditions for blasting events . . .," and the impact on neighbors to the mine.

Respondent's Position

The respondent contends that the difference in airblast or peak air overpressure (the movement of air caused by a blast) between 133.0 dB and 133.4 dB is small and unlikely to be detected by humans. In addition, CSP explains that seismographs, like "all measuring apparatus and machines" have a "built-in margin of error." The seismograph in question is "read" by a microphone that has a margin of error of plus or minus 0.4 dB as provided by the manufacturer. Thus, CSP maintains that the actual measurements could have been as low as 133.0 dB or as high as 133.8 dB. CSP also provides that the Bureau of Mines publication from which the 133 dB limit was derived contains only whole numbers for reporting dB values and therefore 133.4 dB "would be rounded to 133 dB." The respondent also explains that the overpressure resulting from this blast was caused by naturally occurring fractures in the rock as opposed to faulty blasting practices. And, that the imposition of a $5,000 fine, if liability is found, is disproportionate to the incident which resulted in no complaints to the respondent or indications of any property damage.

FINDINGS OF FACT

1. Cobleskill Stone Products, Inc. is the permittee for a mine located on Falke Road in Lexington and Prattsville, Greene County, New York. This mine consists of a surface consolidated mine (sandstone quarry) and a surface unconsolidated mine (sand & gravel).

2. In April 2003, the Department issued a MLR permit to CSP for this operation. In April 2008, the Department issued to the respondent the uniform blasting conditions that DEC was requiring statewide. Included in these permit modifications, were requirements that "[a]ll blasts shall be monitored with a properly calibrated seismograph" and the air blast limit for CSP's mine was set at 133 dB.

3. The blasting limit was derived from United States Bureau of Mines (USBM) standards to limit vibration levels from blasting.

4. On June 3, 2008, CSP conducted a blasting event at the Falke Quarry which resulted in a seismograph level of 133.4 dB at the Palermo residence.

5. The seismograph at the Palermo residence is a MultiSeis V. Air overpressure (or air blast as set forth in MLR permit) is detected and read by a microphone. According to the manufacturer of this equipment, the margin of error of the microphone is plus or minus 0.4 dB. Therefore, the actual measurement of the blast could have been as low as 133.0 dB or as high as 133.8 dB.

Discussion

Staff's Motion for Order without Hearing

Grounds for Summary Order

Section 622.12 provides that "[a] contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor any party." 6 NYCRR 622.12(d). "The motion must be denied . . . if any party shows the existence of substantive disputes of facts sufficient to require a hearing." 6 NYCRR 622.12(e). Summary judgment, under the CPLR, is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to a judgment as a matter of law. CPLR § 3213(b);

Friends of Animals v. Association of Fur Mfgrs., 46 NY2d 1065, 1067 (1979).

The basic facts with respect to the June 3, 2008 blast are not in contest. The parties agree that the blast took place on that date and that the seismograph at the Palmero residence registered at 133.4 dB. In its reply papers, staff does not argue with the respondent's statement that the equipment that measured the blast has a margin of error of 0.4 dB. Staff's reply consists only of a document signed by Ms. Phillips rather than a Department Division of Minerals staff person such as Mr. Hewitt. In this submission, Ms. Phillips addresses the margin of error argument by stating that the "[r]espondent's permit contains a 133.0 dB regulatory limit and contains no margin of error which would effectively change the limit."

The respondent does not dispute the regulatory limit.[1] CSP is saying that the equipment, like many measuring devices, has a margin of error and therefore there is no proof that the mine actually exceeded the limit. This is further bolstered by the affidavit of Douglas Rudenko, the Vice President of Vibra-Tech Engineers and a certified geologist, in which Mr. Rudenko states that the document upon which DEC relied upon to set the blasting limits (and appended to the respondent's papers) does not contain any fractional dB readings. Mr. Rudenko explains that this is because of the limitations on accuracy of the measurement devices.

Paul H. Griggs, a geologist and principal with Griggs-Lang Consulting Geologists, the consulting geologist for the respondent, also submitted an affidavit in support of the respondent's position. He maintains that the principle of "Significant Figures" bears on this issue because it provides that "it is not appropriate to interpret a measurement to the nearest tenth of a unit unless the instrument is capable of making measurements with an accuracy of 0.1 units." He concludes that because the Multiseis V seismograph is not accurate to the tenth of a decibel, the reading of 133.4 dB should be interpreted as 133 dB. He further states that if the USBM intended the overpressure limits to be rounded to the nearest tenth of a decibel, the limit would have been set at 133.0 dB.

[1] While the staff's reply refers to a limit of 133.0 dB, the permit modification provides for a limit of "133 dB." Hewitt Affidavit, Attachment A.

The staff has not responded to these arguments with any facts presented by a person with qualifications to do so. The statutory standard for the proof required on a motion for summary judgment is provided in CPLR 3212(b). In summary, the motion must include an affidavit of a person having knowledge of the facts, together with the pleadings and other available facts. See, S.J. Capelin Associates, Inc. v. Globe Mfg. Corp, 34 NY2d 3008, 341-343. By providing only the submission of its attorney who has made a legal argument that does not respond to the respondent's technical ones, staff has not met this burden.

Penalties

The Department staff has requested the following relief from the Commissioner to address the alleged violation:

1) Payment of a civil penalty of $5,000;

2) Submission of a prevention plan for high air blast levels, and a resolution plan detailing a methodology to alter the design to minimize high air blast levels within 60 days of the service of the Commissioner's order; and

3) Prohibition of blasting until the requirements set forth in paragraph 2 above are complied with.

The respondent contends that the proposed fine of $5,000 is excessive because it is the maximum fine and is the same penalty exacted in the Pattersonville, NY quarry incident where fly rock struck a bus traveling on the NYS Thruway resulting in personal and property damage. The respondent submitted the affidavit of Mr. Griggs in which he contends that the overpressure caused by the Falke's Quarry blast was a result of naturally occurring rock fractures rather than improper mining practices. Moreover, the respondent states that the June 3 blast did not result in any personal or property damage. Therefore, CSP argues that it should not be penalized to the same extent as an entity whose actions did result in damage and which was at fault for utilizing improper blasting methods.

In response to these arguments, Ms. Phillips cites to ECL § 71-1307(1) which allows for a maximum penalty of $5,000 and an additional penalty of $1,000 per day for violations of Article 23 of the ECL. She states that a primary objective of the Department's Civil Penalty Policy is to deter violations of the environmental laws and that it requires staff to use the maximum penalty as a starting place. Ms. Phillips notes that "the two

basic components of the policy are the setting of the gravity and the economic benefit portions of the penalty." She states that the intention of the Department's statewide initiative to modify MLR permits was to ensure that blasting practices are uniform, safe, and protective of the environment. She argues that because blasting is the cause of citizen complaints and can be intolerable to people at levels lower than that which would cause structural damage, the penalty is justified.

The Department's 1990 Civil Penalty Policy requires that several factors be assessed in determining a penalty. This policy requires that the gravity of the violation and the economic benefits of non-compliance be assessed. To assess the gravity of the offense, the policy sets forth these factors: a) potential harm and actual damage caused by the violations; and b) relative importance of the type of violations in the context of the Department's overall regulatory scheme.

As stated above, because the staff did not submit any evidence to rebut the respondent's argument regarding the margin of error of the measuring equipment, I am not able to find a violation of the permit. But assuming that an exceedance of the permit limit was found, it was small and there is no evidence presented of any damage nor any affidavit submitted by the residents in the house where the seismograph is situated to indicate the extent of the impact on them.

The Civil Penalty Policy also sets forth factors to be used to adjust the gravity component: a) culpability, b) violator cooperation, c) history of non-compliance, d) ability to pay, and e) unique factors. With respect to culpability, as presented by Mr. Griggs in his affidavit, the respondent demonstrated that fractures in the stone at this quarry allow for gas pockets to occur that may result in air overpressure. According to Mr. Griggs, CSP took a number of steps to avoid air overpressure. He contends that even with precautions taken, it is possible that gas will be released through fractures in the rock resulting in air overpressure. Staff did not respond to these statements and therefore, I am compelled to accept them. Accordingly, I do not find CSP culpable in this incident.

With respect to cooperation, staff does not indicate any efforts to work with the company on these issues and therefore, I have no ability to judge the level of cooperation. With respect to the compliance record of this respondent, staff has made no mention of prior violations and therefore, I must assume there has not been a problem with environmental compliance. With

respect to ability to pay, neither party has made any contentions regarding this factor.

The respondent did not argue that the blast limit was unimportant with respect to the regulatory scheme. Rather, CPS maintains that there was no proof of a violation of that limit and if there was one it was small.

As Ms. Phillips notes in her reply, the Civil Penalty Policy requires that all monetary penalty calculations begin with the potential statutory maximum dollar amount which could be assessed. But beyond that initial calculation, staff has not considered the mitigating factors or done any demonstrated comparisons to refine its penalty recommendation to the circumstances at issue.

I do not recommend any penalty in this case because staff has not established liability. If the Commissioner finds otherwise, I recommend that a hearing be held to determine the appropriate penalty.

Conclusions of Law

From the foregoing Findings of Fact and the discussion above, the following conclusions of law are established for the purposes of this motion:

1. There are no material issues of fact and staff's motion for order without hearing should be denied in its entirety.

2. Based upon the respondent's proof set forth in its cross-motion, the respondent's motion to dismiss which I have converted to a motion for summary order should be granted.

Ruling and Recommendation

Pursuant to 6 NYCRR § 622.12(d), the proof submitted by the Department staff in its motion for order without hearing failed to establish the violations sufficiently to warrant the granting of summary judgment under the CPLR. The respondents have presented unrebutted evidence that no exceedance of the blast limit has been established.

Accordingly, on the issue of respondent's liability for the violation alleged, Department's motion is denied in all respects. I recommend that in the event the Commissioner finds liability, a hearing be held on the appropriate penalty.

Dated: Albany, New York
April 9, 2009