STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

RULING OF THE COMMISSIONER
DEC Case No. R7-20150527-71

-by-

GREENE TECHNOLOGIES INCORPORATED,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Greene Technologies Incorporated (respondent) violated several provisions of article 17 the ECL, its implementing regulations, and the terms of respondent's State Pollution Discharge Elimination System (SPDES) permit.

On December 15, 2015, Department staff sent to respondent by certified mail a notice of hearing and amended complaint, which respondent received on December 17, 2015 (see Affirmation of Margaret A. Sheen, Esq., dated March 3, 2016 [Sheen Affirmation], ¶ 2, and Exhibits [Exs.] A and B). Department staff's amended complaint alleges that respondent operates a metal fabricating and plating facility which includes a wastewater treatment plant that discharges effluents into a creek (see id. Ex. B, Amended Complaint ¶ 4). The amended complaint alleges further that respondent's SPDES permit – which, according to the amended complaint, expired on October 31, 2014 (see id.) – contained sampling, monitoring and reporting requirements (see id. ¶¶ 4-11), and that respondent violated such requirements (see id. ¶¶ 19-28).

The amended complaint asserts five causes of action, including:

(1) failing to submit quarterly whole effluent toxicity sampling, and submitting incomplete discharge monitoring reports (DMRs) for quarters ending June, September, and December 2014, and March, June, and September 2015 (First Cause of Action);

(2) failing to submit semi-annual mercury sampling and submitting incomplete DMRs for process wastewater outfall 001S for June 2014, December 2014 and June 2015 (Second Cause of Action);

(3) exceeding the limit specified in the SPDES permit for zinc during March, April, May, July, August, and September 2014, and January, March, June, July, August and September 2015 (Third Cause of Action);

(4) failing to report daily maximum loadings for hexavalent chromium, nickel, copper, zinc, and iron from March through October 2014, and from December 2014 through January 2015 (Fourth Cause of Action); and

(5) failing to submit a monthly DMR for November 2014 (Fifth Cause of Action).

(see Amended Complaint ¶¶ 19-28). The complaint seeks an order of the Commissioner which:

(1) finds respondent liable for the violations alleged in the amended complaint;
(2) imposes a civil penalty of one hundred ten thousand dollars ($110,000);
(3) orders respondent to cease and desist from future violations;
(4) orders respondent to comply with the items listed in a schedule of compliance attached to the amended complaint; and
(5) orders such other and further relief as may be just and proper

(see Amended Complaint, Wherefore Clause, ¶¶ A-E).

Respondent failed to file or serve an answer to the amended complaint (see Sheen Affirmation ¶¶ 3-4). By papers dated March 3, 2016, Department staff moved for a default judgment. Department staff has submitted proof of service on respondent of the motion for a default judgment (see Letter from M. Sheen dated April 13, 2016). Respondent has not filed any papers in response to staff's motion.

In support of the motion for default judgment, Department staff submitted: (i) a Motion for Default Judgment and Order; and (ii) the Sheen Affirmation, which: (a) alleges that respondent committed the violations set forth in the amended complaint; (b) attaches proof of service on respondent of the notice of hearing and amended complaint, and asserts that respondent has defaulted; (c) discusses the basis for the proposed civil penalty; and (d) attaches a proposed "Judgment and Order."

Staff has not submitted an affidavit of any person with personal knowledge of the facts alleged, or any other documents relating to claims asserted in the amended complaint.

This matter was assigned to Administrative Law Judge (ALJ) Molly McBride, who prepared the attached default summary report (ALJ Report). The ALJ recommends that I grant Department staff's motion for a default judgment, hold that respondent committed the violations alleged in the amended complaint, impose a civil penalty of one hundred ten thousand dollars ($110,000), and direct respondent to comply with the schedule of compliance attached to the amended complaint.

I deny staff's motion for a default judgment, without prejudice, and remand this matter to the ALJ for further proceedings consistent with this ruling. Accordingly, I do not adopt the ALJ's recommendations.

Discussion

When a respondent fails to answer or otherwise appear in response to a notice of hearing and complaint, Department staff may move, either orally or in writing, for a default judgment (see 6 NYCRR 622.15). In the event Department staff takes this course, staff must satisfy the requirements of 6 NYCRR 622.15(b).[1]

In addition, prior Commissioner rulings, decisions and orders are clear that, to obtain a default judgment, staff must also submit some proof of facts sufficient to support the claims charged in a complaint (see e.g. Matter of American Auto Body & Recovery Inc., Ruling of the Commissioner, July 2, 2015 [American Auto Body], at 3; Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).[2]

As stated in American Auto Body, requiring the submission of affidavits and documentary evidence to support a default judgment is meant to assure that the record is sufficient to support the Commissioner's order in any subsequent judicial proceedings, and to bring administrative default procedures into conformity with the requirements for default judgments under CPLR 3215 (see American Auto Body, at 3; see also CPLR 3215[f]; Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 [2003]).

It is not necessary that staff make a prima facie showing sufficient for summary judgment. The motion for default judgment should include, but not be limited to, one or more affidavits based upon personal knowledge, and related documents (see id.). Although the type of documents to be supplied will vary depending upon the proceeding, staff should include any notice of violation and inspection report relating to the specific allegations in the charging instrument, and if compliance with a permit, registration or license is at issue, a copy of such document.

As set forth above, the complaint in this matter includes five causes of action, each of which alleges that respondent violated its SPDES permit, ECL 17-0803, 6 NYCRR 750-1.13, and 6 NYCRR 750-2.5. ECL 17-0803 generally prohibits the discharge of pollutants to the waters of the state from "any outlet or point source" without a SPDES permit, and authorizes the Department to require by regulation that every applicant for such a permit "shall file such information at such times and in such form as the department may reasonably require." Section 750-1.13 of the regulations addresses monitoring requirements in SPDES permits, and section 750-2.5 requires permittees to comply with all recording, reporting, monitoring and sampling

[1] When a default judgment motion is made in writing, in addition to the requirements of 6 NYCRR 622.15(b), staff must also provide proof of service of the motion for a default judgment on a respondent (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009, at 1-2).

[2] In Matter of Farmer (Decision and Order of the Commissioner, October 22, 2009), the Commissioner required submission of facts sufficient to support the claim charged in a complaint or on a motion for order without hearing in lieu of complaint enforcing petroleum bulk storage ("PBS") facility regulations (see id. at 3 [requiring staff to provide a copy of the facility's PBS registration (if one has been issued); the PBS facility's information report, if any; and any notice of violation]).

requirements of a SPDES permit, and addresses sampling, certification, recording, testing and other requirements.

Staff's papers submitted on the motion for default judgment are insufficient to provide some evidence of the causes of action alleged. Staff's papers do not include an affidavit of personal knowledge or any documents relating to underlying facts which could support the claims alleged. For example, staff has not submitted a copy of the SPDES permit at issue, or the affidavit of a staff representative responsible for monitoring respondent's compliance with its permit.

The amended complaint also presents mixed factual and legal questions that cannot be resolved without some factual or explanatory support in motion papers. For example, neither the amended complaint nor the papers submitted on staff's motion explain how respondent could have committed violations of its SPDES permit requirements for months or years after the permit expired (compare Amended Complaint ¶ 4 [alleging that respondent's SPDES permit expired on October 31, 2014] with id. ¶ 20 [alleging permit violations in December 2014 and March, June and September 2015], ¶ 22 [alleging permit violations in December 2014 and June 2015], ¶ 24 [alleging permit violations in January, March, and June through September 2015], ¶ 26 [alleging permit violations in December 2014 through January 2015], and ¶ 28 [alleging permit violation in November 2014]). Staff does not allege, or submit any proof, that the permit obligations continued after the permit expired, or that respondent has been operating without a permit.[3]

The ALJ Report concludes that default judgment is appropriate because "[i]t is reasonable to infer from the affirmation of [the staff] attorney … that she reviewed the Department's records regarding the facility, respondent and the SPDES permit at issue, and verified the alleged violations detailed in the amended complaint" (ALJ Report at 4). The ALJ is incorrect. Although an attorney's affirmation is an appropriate vehicle by which to establish the circumstances of a respondent's default (i.e., stating that the notice of hearing and complaint were served on respondent, attaching an affidavit of service, and stating that no answer has been received), an attorney's affirmation without more is insufficient to establish any fact regarding the underlying violation.

Moreover, the ALJ's statement that it is "reasonable to infer" that staff counsel "verified the alleged violations" in the amended complaint is misleading. Nothing in the record supports a conclusion that any fact has been "verified," by counsel or anyone else. The amended complaint is not a "verified complaint" (see e.g. CPLR 3020[a] ["A verification is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true"]).

[3] The amended complaint also alleges, "[u]pon information and belief," that respondent "was and is … a corporation duly authorized and registered to do business in New York State" (Amended Complaint ¶ 2). According to New York Department of State records, of which I take official notice (see 6 NYCRR 622.11[a][5]), however, respondent was dissolved by proclamation, and its authority was annulled, on April 27, 2011 (see http://www.dos.ny.gov/corps/bus_entity_search.html [search "Greene Technologies" with "status type" of "all"]). Although a dissolved corporation may properly be a respondent in an administrative proceeding, this example is indicative of the difficulties that may be occasioned if default judgments are granted (and alleged facts deemed to be true) without some proof of facts supporting the claim.

The ALJ Report states that the staff counsel "notes in her affirmation she participated in settlement discussions with respondent at the pre-hearing conference held herein and prepared a proposed Order on Consent" (ALJ Report, at 4). The language in the staff attorney's affirmation addresses only what respondent allegedly did not do; nowhere does it note expressly any participation by the staff attorney herself in settlement discussions, and nowhere does it state that she prepared a proposed Order on Consent, as the ALJ's report suggests (see Sheen Affirmation ¶ 8[a]).

As stated in American Auto Body, on a review of a motion for default judgment, it is the obligation of the ALJ to review the record and the motion papers to determine whether staff's papers have stated a claim, and that staff's motion, remedial relief and penalty request are supported properly (see American Auto Body, at 3; see also Queen City Recycle Center, Inc., at 3). It is not appropriate to infer facts that are not stated in any of the papers, or to infer from those un-stated facts that staff is entitled to judgment on its claims.

It is important to note that, in this matter, a default judgment would subject respondent to a civil penalty of one hundred ten thousand dollars ($110,000). The large amount of the proposed penalty underscores the importance of ensuring that substantive requirements are satisfied before a default judgment is entered.

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

I. Department staff's motion pursuant to 6 NYCRR 622.15 for a default judgment and order is denied, without prejudice;

II. This matter is hereby remanded to ALJ McBride for further proceedings consistent with this ruling.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: November 10, 2016
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Part 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

DEFAULT SUMMARY REPORT

DEC Case No.
R7-20150527-71

-by-

GREENE TECHNOLOGIES INCORPORATED,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department staff) duly served Greene Technologies Incorporated (Greene) with a notice of hearing and amended complaint, dated December 15, 2015, alleging violations of ECL 17-0803, 6 NYCRR 750-1.13 and 6 NYCRR 750-2.5, for failing to submit quarterly discharge whole effluent toxicity sampling, submitting incomplete discharge monitoring reports, failing to submit semi-annual mercury sampling, submitting incomplete discharge monitoring reports for process water, and exceeding the limit specified in an expired SPDES permit for zinc and iron at its custom metal fabrication facility (Facility) located at Grande and Clinton Street, Greene, Chenango County, New York. The amended complaint seeks an order from the Commissioner that:

1. Finds Greene violated the terms of its SPDES permit, ECL 17-0803, 6 NYCRR 750-1.13, and 6 NYCRR 750-2.5;
2. Assesses a civil penalty in the amount of one hundred and ten thousand dollars ($110,000);
3. Orders respondent to cease and desist from any and all future violations of the terms of its SPDES permit, ECL 17-0803, 6 NYCRR 750-1.13, and 6 NYCRR 750-2.5;
4. Orders respondent to comply with the Schedule of Compliance[1]; and
5. Orders such other and further relief as the Commissioner shall deem just and appropriate.

Greene is a corporation duly authorized and registered to do business in New York State. Department staff served the notice of hearing and amended complaint on Greene by certified mail return receipt requested on December 15, 2015 (Motion for Default Judgment [Motion], Exhibit A) and respondent received same on December 17, 2015 (*id*). Although directed to in the cover letter served with the notice of hearing and amended complaint (Motion, Exhibit B),

[1] Department staff submitted a proposed Judgment and Order with the motion for default judgment which includes a Schedule of Compliance (See Motion, Exhibit C).

Greene did not file an answer to the amended complaint within 20 days of receiving the notice of hearing and amended complaint (Motion for Default Judgment and Order and Affirmation of Margaret Sheen, Esq. [Sheen Aff. ¶ 3]).

Applicable Regulatory Provisions

Section 750-1.13 of 6 NYCRR provides:

" Monitoring requirements in SPDES permits.

> " (a) Any discharge authorized by a SPDES permit shall be subject to such requirements for monitoring the intake, discharge, waters of the State or other source or sink as may be reasonably required by the department to determine compliance with effluent limitations and water quality standards that are or may be effected by the discharge; including the installation, use, and maintenance of monitoring equipment or methods . . . .
>
> "(b) Any discharge authorized by a SPDES permit that is not a minor project (as defined in Part 621 of this Title); which the regional administrator requests, in writing, be monitored; which contains toxic pollutants for which effluent limitations have been established by the administrator pursuant to section 307(a) of the act and 40 CFR Parts 129 and 405-471 inclusive (see section 750-1.24 of this Subpart); or to which the department applies this section; shall, upon inclusion of such requirements in the SPDES permit, be monitored by the permittee for at least the following:
>
> (1) flow; and
>
> (2) the following pollutants:
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> (i) pollutants (measured either directly or indirectly through the use of accepted correlation coefficients or equivalent measurements) that are subject to tracking, reduction, elimination or limitation under the provisions of the permit; and
>
> (ii) any pollutants in addition to the above, which EPA requests, in writing and in accordance with agreements between EPA and the department, be monitored."

Section 750-2.5 provides;

"Routine monitoring, recording, and reporting.

> "(a) (1) The permittee shall comply with all recording, reporting, monitoring and sampling requirements specified in the permit."

Findings of Fact

The following facts are found based upon the documents submitted with and in support of Department staff's motion for a default judgment:

1. Respondent Greene Technologies Incorporated owns a custom metal fabrication facility which includes a wastewater treatment plant to process water that discharges through outfall 001 located at Greene and Clinton Street, Greene, Chenango County, New York. (Motion, Exhibit B).

2. Greene is a corporation duly authorized and registered to do business in New York State (Motion, Exhibit B).

3. The Department issued SPDES Permit NY0086479, which expired on October 31, 2014, and required respondent to do the following:

   (a) perform quarterly whole effluent toxicity sampling and to submit complete discharge monitoring reports for process wastewater outfall 001Q quarterly;
   (b) perform semi-annual mercury sampling and to submit discharge monitoring reports for process wastewater outfall 001S;
   (c) meet specific permit standards for zinc;
   (d) report daily maximum loadings for iron and average monthly flow rate;
   (e) report daily maximum loadings for hexavalent chromium, nickel, copper and zinc; and
   (f) submit monthly discharge monitoring reports (Motion, Exhibit B).

4. Department staff commenced the captioned proceeding by serving respondent by certified mail return receipt requested on December 15, 2015 (Motion, Exhibits A & B). Department staff submitted the signed certified mail return receipt card evidencing service upon respondent on December 17, 2015 (Motion, Exhibit A).

5. Respondent Greene did not answer the amended complaint as directed in the notice of hearing and amended complaint (Motion, Sheen Aff. ¶ 3).

6. Respondent violated the terms of the SPDES permit issued to it for the custom metal fabrication facility located at Grande and Clinton Street, Greene, Chenango County, New York, by failing to submit quarterly discharge whole effluent toxicity sampling, submitting incomplete discharge monitoring reports, failing to submit semi-annual mercury sampling, submitting incomplete discharge monitoring reports for process water, and exceeding the limit specified in an expired SPDES permit for zinc and iron.

Discussion

A respondent must file an answer within 20 days after receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to timely file an answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]).

Department staff may move for a default judgment when a respondent does not answer a complaint. Such motion must contain the following: (1) proof of service of the notice of hearing and complaint upon respondent; (2) proof that respondent did not appear or file a timely answer; and (3) a proposed order (*see* 6 NYCRR 622.15[b][1]-[3]).

The record establishes that the criteria outlined at 6 NYCRR 622.15(b)(1)-(3) for a motion for a default judgment have been met. Department staff duly served Greene with the notice of hearing and amended complaint by certified mail return receipt requested on December 15, 2015 (Motion, Exhibit A). Greene did not answer the amended complaint. Department staff has submitted a proposed order (Motion, Exhibit C). In addition, staff also served Greene with copies of the motion for default judgment and supporting papers (March 3, 2016 letter from Margaret A. Sheen, Esq. to Chief ALJ James McClymonds enclosing motion papers and copying of same to Greene).

The Commissioner has held that "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006 at 6 [citations omitted]). In addition, to sustain a motion for a default judgment, Department staff must "provide proof of the facts sufficient to support the claim" (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3). In this case, the affirmation of Margaret Sheen details the alleged violations and notes that Ms. Sheen, an attorney in the Department's Office of General Counsel, is "fully familiar with all of the facts and circumstances of this matter as set forth in this affirmation" (Motion, Sheen Aff. ¶ 1). Ms. Sheen notes in her affirmation she participated in settlement discussions with respondent at the pre-hearing conference held herein and prepared a proposed Order on Consent. It is reasonable to infer from the affirmation of attorney Sheen that she reviewed the Department's records regarding the facility, respondent and the SPDES permit at issue, and verified the alleged violations detailed in the amended complaint.

In this case, Department staff's submissions with the motion for a default judgment demonstrate staff's claim that Greene violated ECL 17-0803, 6 NYCRR 750-1.13 and 6 NYCRR 750-2.5 by failing to comply with the terms of SPDES Permit NY0086479 issued to Greene, which expired on October 31, 2014.

Penalty

Department staff seeks a civil penalty of one hundred and ten thousand dollars ($110,000). Staff's submissions on the motion for a default judgment support the requested civil penalty by addressing the Department's Civil Penalty Policy (DEE-1 dated June 20, 1990) and with an in depth calculation based upon the Division of Water's Technical & Operational Guidance Series (TOGS) 1.4.2 Compliance and Enforcement of SPDES Permits, issued June 2010 (Motion, Sheen Aff. ¶ 8). TOGS 1.4.2 is a guidance document used by Department staff and made available to the regulated community to provide guidance with regards to the Department's role in ensuring compliance with SPDES permits issued by the Department.

The Department strives for Statewide uniformity in its oversight of SPDES permits to allow for maximum compliance and, therefore, maximum protection of the waters of the State. When conditions of a permit are neither met nor implemented according to a schedule, water quality may be negatively impacted. SPDES permits are issued for the sole purpose of protecting the waters of the State. Compliance with the terms of the SPDES permits, including the self-reporting requirements and pollutant specific effluent limits, is critical to the protection of the waters of the State.

Once the violations occurred, Department staff allowed Greene to correct the violations voluntarily, as per TOGS 1.4.2. The Department's goal, once a violation of a SPDES permit has occurred, is to have the discharger "return to compliance and to deter the recurrence of violations by the violator and other parties in the regulated community" (TOGS 1.4.2, Appendix A). Respondent did not comply with the Department's request to return to compliance. Department staff states that this lack of voluntary compliance warrants a higher penalty (Motion, Sheen affirmation ¶ 8). The SPDES permit at issue sets limits for zinc, hexavalent chromium, nickel, copper and iron, and requires reports regarding mercury levels, discharge monitoring reports for process water, and quarterly discharge whole effluent toxicity sampling.

Greene's failure to comply with the SPDES permit issued to it is a violation of ECL 17-0803. Violations of Article 17 of the ECL are governed by ECL 71-1929. ECL 71-1929 provides, in part, "A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive… or the terms of any permit issued thereunder, shall be liable to a penalty of not to ***exceed thirty-seven thousand five hundred dollars per day for each violation***" (ECL 17-1929[1] emphasis added). The Department's Civil Penalty Policy does provide for a lower penalty amount in the case of voluntary compliance, but respondent did not and has not voluntarily complied with the Department's request to come into compliance as per the affirmation of Margaret Sheen, Esq. and, as evidenced by its failure to appear in this proceeding.

The Department's enforcement goal is primarily compliance. The primary goal for setting a penalty is to deter future violations. "Penalties should persuade the violator to take precautions against falling into non-compliance again, as well as persuade others not to violate the law. Successful deterrence provides the best protection for the environment" (DEE-1[III]). It is the Department's policy that a penalty should remove any economic benefit a violator may have received by its failure to comply (*id.*). Additionally, the Department's Civil Penalty Policy directs that a penalty amount should be reflective of the seriousness of the violation to further deter future violations, known as the gravity component (*id.*). The Department looks at two factors when determining the gravity component: (a) potential harm and actual damage caused; and (b) relative importance of the type of violation in the regulatory scheme (DEE-1 [IV]).

The Department calculates the penalty in multiple steps. The first step is to determine the base penalty amount. The number of violations must be calculated and then an amount is recommended for each such violation at Appendix C of TOGS 1.4.2. Also, each base penalty, as per TOGS 1.4.2, has a multiplier that varies based upon the potential harm or actual damage done to the environment as a result of the violation. Department staff determined that the violations presented a "moderate impact to environment or human health, and designated use is threatened due to

violation," and a multiplier of 1.25 was used after the base penalty was calculated (TOGS 1.4.2 Appendix C).

After the base penalty and the environmental significance multiplier are calculated, the benefit and gravity components are examined. Department staff contends that the economic benefit realized by non-compliance is likely higher than the civil penalty requested as respondent had a total of 86 violations (Motion, Sheen affirmation ¶8). As to the gravity component, compliance with SPDES permit limits is critical and the required self-reporting and monitoring is equally important in allowing the Department to oversee permit holders. Finally, TOGS 1.4.2 provides that in addition to the penalty calculations addressed above, the Department may adjust the penalty amount based upon the following factors: culpability, cooperation, history of non-compliance, ability to pay and other unique factors (TOGS 1.4.2 Appendix B). Staff adjusted the penalty calculation up by a factor of 1.25 for the culpability factor, stating that the violations could easily have been avoided by complying with the terms of the SPDES permit. The calculation was adjusted to 1.1 for the cooperation factor as a result of respondent's failure to come into voluntary compliance. Department staff raised the penalty calculation by a factor of 1.25 for the failure to meet compliance due dates when reviewing the history factor, and adjusted the penalty by a factor of .75 based upon the permitted flow rate of <0.11 MGD as "other unique factor" (TOGS 1.4.2, Exhibit B, Table 2). The "ability to pay" factor could not be thoroughly addressed in the context of a default. However, Department staff noted that Greene has filed for Chapter 7 bankruptcy and therefore, the penalty requested is lower than the maximum penalty that could be assessed (Motion, Sheen Aff. ¶8).[2] The total calculated adjustment factor requested by staff based upon the above numbers is 1.29.

The total penalty of $110,000 requested was reached by taking the base penalty multiplied by environmental significance factor amount of $102,500 and multiplying it by the 1.29 adjustment factor. Department staff has adequately supported the penalty requested, including the calculated adjustment factor.

I conclude that Department staff's request for a one hundred and ten thousand dollars ($110,000) civil penalty is consistent with the Department's civil penalty policy, as well as the applicable provisions of ECL article 71 and administrative precedent. (*See e.g. Matter of 12 Martense Associates, LLC*, Order of the Commissioner, December 19, 2011 at 2.)

Recommendations

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

1. Grants Department staff's motion for default judgment, holding respondent Greene in default pursuant to the provisions of 6 NYCRR 622.15;

2. Concludes that respondent Greene violated ECL 17-0803, 6 NYCRR 750-1.13 and 6 NYCRR 750-2.5 by failing to comply with SPDES Permit NY0086479;

3. Directs respondent Greene to pay a civil penalty in the amount of one hundred and ten thousand dollars ($110,000) within thirty (30) days of service of the order;

[2] ECL 71-1929 allows for a penalty of $37,500 per day per violation.

4. Directs respondent Greene to comply with the Schedule of Compliance; and

5. Directs such other and further relief as the Commissioner may deem just and appropriate.

_____/s/_____
Molly T. McBride
Administrative Law Judge

Dated: June 24, 2016
Albany, New York