

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law 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),

ORDER

-by-

**Benjamin Jurgielewicz and Jurgielewicz Duck Farm
d/b/a Jurgielewicz Duck Farm,**

DEC Case No.
R1-20081103-224

Respondents.

This administrative enforcement proceeding concerns allegations that respondents Benjamin Jurgielewicz and Jurgielewicz Duck Farm d/b/a Jurgielewicz Duck Farm violated various of the conditions in their current (and past) State Pollutant Discharge Elimination System (SPDES) permits. Staff of the New York State Department of Environmental Conservation (Department or DEC) alleged, among other things, that respondents exceeded effluent limits relating to ultimate oxygen demand, total suspended solids, oil and grease, settleable solids, and coliform. In addition, Department staff alleged that respondents failed to comply with other conditions of their SPDES permit including, but not limited to, the timely filing of discharge monitoring reports and engineering reports that were required pursuant to a schedule of compliance.

These alleged violations arose out of respondents' operation of a duck farm in the Town of Brookhaven, Suffolk County (duck farm), and the discharge of wastewater from the duck farm to West Mill Pond, a tributary of the Forge River.

Department staff commenced this proceeding against respondents by service of a notice hearing and complaint dated December 5, 2008. Respondents answered by papers dated January 21, 2009. Respondents agreed to accept Department's service of amended papers. Staff filed a motion for order without hearing dated June 9, 2009 in lieu of filing an amended complaint.

In its motion, Department staff set forth sixteen (16) causes of action. Department staff alleged that respondents violated various terms and conditions of their SPDES permit, as well as provisions of article 17 of the Environmental Conservation Law (ECL) and implementing regulations at 6 NYCRR part 750. ECL 17-0803 makes it unlawful to discharge pollutants to the waters of the state from any outlet or point source without a SPDES permit or in a manner other than as prescribed by such permit (see also 6 NYCRR 750-1.4[a]). For these violations,

Department staff requested a civil penalty of six hundred thousand dollars (\$600,000) and an order directing respondents to follow a schedule of compliance included in the motion.

Respondents, by papers dated August 28, 2009, opposed Department staff's motion but admitted some of the alleged violations. Respondents contended that a hearing was necessary to resolve factual disputes associated with the violations that they contested, as well as to determine the appropriate relief.

The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell. Subsequently, Save the Forge River (SFR) filed a petition to intervene dated August 14, 2009. SFR's petition, which was granted by ALJ O'Connell, supported Department staff's motion and request for relief, and requested remediation as part of a closure plan.

In a ruling dated April 29, 2010, ALJ O'Connell granted Department staff's motion for order without hearing with respect to liability, concluding that respondents were liable for the violations charged. However, the ALJ denied Department staff's motion as to relief. After a period of discovery, by notice dated November 18, 2010 and supporting papers, Department staff moved to renew its motion for order without hearing with respect to relief. Following the submission of papers by the parties to this proceeding on the motion to renew, the ALJ prepared the attached ruling dated September 14, 2011.

The record is clear that respondents' discharge of wastewater effluent in violation of their permit and applicable legal requirements has adversely impacted the water quality and riverine habitat of the Forge River. Accordingly, I hereby affirm the ALJ's April 29, 2010 ruling as to liability.

I also adopt the attached ruling on the motion to renew concerning relief dated September 14, 2011, subject to my comments below. In the ruling on the motion to renew, the ALJ concludes that the civil penalty of \$600,000 requested by Department staff is reasonable given the actual environmental harm associated with the demonstrated violations. The ALJ also determined that no mitigating factors existed that would serve as a basis for reducing the requested penalty.¹

In light of the environmental harm and significant pollution arising from respondents' activities, including but not limited to the ongoing and longstanding nature of the violations, the significant water quality impairment of the Forge River, and respondents' failure over a number of years to comply with their SPDES permit, a civil penalty of \$600,000 is warranted. As discussed below, I am directing respondents to submit and implement a closure plan for the duck farm that will include remedial measures to address environmental problems arising from respondents' illegal activities. These measures, which are necessary to ensure proper cleanup of the environment, will require the outlay of substantial sums. In addition, I note that the

¹ The ALJ noted that respondents were given the opportunity to support their claim that they were unable to pay the penalty, but the information that respondents provided was insufficient. The ALJ further noted that some of that information was unverifiable and contained several significant inconsistencies (see ALJ's Ruling dated September 4, 2011, at 34-40; see also Affidavit of Sharon L. Brooks, sworn to on November 5, 2010, in support of motion to renew).

Jurgielewicz Duck Farm has filed for bankruptcy under Chapter 11 of the federal Bankruptcy Code (see, e.g., Exhibit A to Affidavit of Daniel L. Gordon, sworn to on January 10, 2011). In light of these circumstances, I have decided to suspend four hundred fifty thousand dollars (\$450,000) of the penalty, contingent upon respondents fully complying with the terms and conditions of this order, including but not limited to the submission and implementation of the closure plan. The nonsuspended portion of the penalty (one hundred fifty thousand dollars [\$150,000]) shall be due and payable within thirty (30) days of the service of this order upon respondents.

Department staff also seeks additional relief in the form of an order: (1) revoking or suspending respondents' SPDES permit; (2) immediately enjoining respondents from any further wastewater discharges that would allow additional violations to occur; and (3) directing respondents to submit an approvable closure plan.

The ALJ determined that, based on the number and duration of respondents' violations, respondents' SPDES permit should be either suspended or revoked (see 6 NYCRR 750-2.1[e]). According to the ALJ, the suspension or revocation should remain in effect until respondents can demonstrate that the practices and treatment facilities at the duck farm will ensure that wastewater discharges comply with the effluent limits in the SPDES permit. The record demonstrates that respondents' violations are serious and longstanding, and have resulted in a significant adverse impact on water resources of the State. Based on this record, revocation of respondents' SPDES permit (No. NY-0008125) for the duck farm is warranted, and I hereby revoke respondents' permit, effective immediately. Accordingly, any further discharges from the duck farm are prohibited (see ECL 17-0803; 6 NYCRR 750-1.4[a]). In addition, the ECL provides the Department with the authority to enjoin persons from continuing such violations (see, e.g., ECL 71-1929[1]).

As noted, Department staff seeks an order directing respondents to submit an approvable closure plan for the duck farm. According to Department staff, the closure plan must address all parts of the wastewater system, including the removal of stockpiled duck manure. The ALJ indicates that before a closure plan is ordered, Department staff needs to provide additional guidance about the scope of the requested plan. Based upon my review of the record, including but not limited to the affidavit of DEC environmental engineer Anthony Y. Leung, sworn to November 18, 2010, and the applicable regulations relative to closure, I conclude that it is not necessary for Department staff to provide additional guidance in order to direct respondents to prepare a closure plan. The record and applicable legal standards provide a sufficient basis for the preparation of such a plan. Accordingly, respondents are to prepare an approvable closure plan for the duck farm and submit it to Department staff within sixty (60) days of the service of this order on respondents.

The closure plan shall address the closure of all aspects of the wastewater system, including but not limited to, the proper removal of all stockpiled duck manure, as well as the implementation of measures to eliminate on-site and off-site environmental impacts arising from the activities of the duck farm. The closure plan shall comply with the applicable closure requirements for disposal systems that are set forth in 6 NYCRR 750-2.11. In addition, the closure plan shall establish milestone dates for the implementation and completion of closure and

remedial activities at the duck farm, identify any environmental consulting firms that would be assisting respondents in closing the duck farm, and provide access to Department staff to oversee the closure and remedial activities.

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

- I. Department staff's renewed motion for order without hearing is granted. ALJ O'Connell's April 29, 2010 ruling on liability is affirmed.
- II. Respondents Benjamin Jurgielewicz and Jurgielewicz Duck Farm d/b/a Jurgielewicz Duck Farm are adjudged to have violated ECL 17-0803, 6 NYCRR 750-1.4(a), and various terms and conditions of SPDES Permit No. NY-0008125, including terms and conditions relating to effluent limits, filing of discharge monitoring reports, and filing of engineering reports pursuant to a compliance schedule.
- III. Respondents Benjamin Jurgielewicz and Jurgielewicz Duck Farm d/b/a Jurgielewicz Duck Farm are hereby jointly and severally assessed a civil penalty in the amount of six hundred thousand dollars (\$600,000), of which four hundred thousand fifty dollars (\$450,000) is suspended, contingent upon respondents complying with the terms and conditions of this order, including but not limited to the submission and implementation of a closure plan for the duck farm in accordance with paragraph V of this order. The non-suspended portion of the civil penalty (that is, one hundred fifty thousand dollars [\$150,000]) shall be due and payable within thirty (30) days of the service of this order upon respondents.

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

Vernon Rail, Esq.
Assistant Regional Attorney
NYS DEC
Office of General Counsel, Region 1
Stony Brook University
50 Circle Road
Stony Brook, New York 11790-3409

- IV. Should respondents fail to satisfy the terms and conditions of this order, the suspended portion of the penalty (that is, four hundred fifty thousand dollars [\$450,000]) shall become immediately due and payable and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

- V. Within sixty days of the service of this order upon respondents, respondents shall submit to Department staff an approvable closure plan for the duck farm. The closure plan shall include:
- A. measures to close all aspects of the wastewater system at the duck farm;
 - B. measures to properly remove all stockpiled duck manure;
 - C. remedial actions to address all non-compliant wastewater discharges and any other environmental violations arising from the activities at the duck farm;
 - D. milestone dates for the implementation and completion of closure activities at the duck farm that will ensure that these activities are accomplished in a timely manner;
 - E. procedures for access to Department staff to oversee the closure and remedial activities at the duck farm; and
 - F. measures to address the applicable requirements for the closure of disposal systems set forth at 6 NYCRR 750-2.11.
- VI. Respondents' SPDES Permit No. NY-0008125 is hereby revoked, effective immediately. Respondents are directed to take all necessary actions to halt any further wastewater discharges that would allow additional violations to continue to occur.
- VII. All communications from respondents to the Department concerning this order shall be directed to Assistant Regional Attorney Vernon Rail, at the address set forth in paragraph III of this order.

VIII. The provisions, terms and conditions of this order shall bind respondents Benjamin Jurgielewicz and Jurgielewicz Duck Farm d/b/a Jurgielewicz Duck Farm, and their agents, heirs, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

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

Dated: December 9, 2011
Albany, New York

NEW YORK STATE:
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

Ruling on Department
Staff's Motion to
Renew

Benjamin Jurgielewicz and
Jurgielewicz Duck Farm d/b/a
Jurgielewicz Duck Farm.

DEC Case No.
R1-20081103-224

Respondents

September 14, 2011

Background and Proceedings

I. June 9, 2009 Motion for Order without Hearing

In a motion dated June 9, 2009, Staff from the Department's Region 1 Office, located in Stony Brook, New York (Department staff) moved for an order without hearing against Benjamin Jurgielewicz and Jurgielewicz Duck Farm (Respondents) (see Title 6 of the Official Compilation of Codes Rules and Regulations of the State of New York [6 NYCRR] § 622.12). According to the June 9, 2009 motion, Benjamin Jurgielewicz owns real property in the Town of Brookhaven (Suffolk County) located at Tax Map District 200, Section 788, Block 1, Lot 1.006, which is adjacent to West Mill Pond. At this location, Mr. Jurgielewicz operates the Jurgielewicz Duck Farm.

Respondents have held State Pollutant Discharge Elimination System (SPDES) Permit No. NY-0008125 since February 1975, and several times Department staff has issued renewal SPDES permits. Over the years, Respondents' SPDES permits have authorized the discharge of treated wastewater from the duck farm to West Mill Pond, a tributary of the Forge River.

Department staff conducted a full technical review of the SPDES permit in 2005, and issued a draft permit in May 2005. Subsequently, modifications to the SPDES permit became effective on March 28, 2008. The terms and conditions of the SPDES permit specify effluent limits and monitoring requirements for various parameters, including but not limited to, flow, ultimate oxygen demand (UOD), total suspended solids (TSS), settleable solids,

oil and grease (O&G), total coliform, and residual chlorine. The March 2008 modifications to the SPDES permit also included a schedule of compliance to upgrade wastewater treatment facilities at the duck farm to comply with effluent limits and monitoring requirements by November 1, 2009.

In sixteen causes of action, the June 9, 2009 motion alleged that Respondents violated the terms and conditions of the SPDES permit, as well as provisions of the Environmental Conservation Law of the State of New York (ECL) article 17 (Water Pollution Control), and implementing regulations at 6 NYCRR part 750. For these alleged violations, Department staff requested an Order from the Commissioner granting the motion; assessing a total civil penalty of \$600,000; and directing Respondents to follow the requirements outlined in a schedule of compliance included with the June 9, 2009 motion.

With papers dated August 28, 2009, Respondents replied to Department staff's June 6, 2009 motion for order without hearing. Although Respondents opposed Department staff's June 6, 2009 motion, Respondents admitted some of the alleged violations. Respondents contended, however, that a hearing was necessary to resolve factual disputes associated with the violations they contested, as well as to determine the appropriate relief.

With a cover letter dated January 15, 2010, Respondents' environmental counsel advised that Respondents filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code on January 12, 2010. Subsequently, Respondents' bankruptcy counsel advised that the Department was identified as a creditor in the bankruptcy proceeding. Also, Respondents' bankruptcy counsel acknowledged that the bankruptcy proceeding does not bar the Department from enforcing the terms and conditions of Respondents' SPDES permit.

A. Petition to Intervene

With a cover letter dated August 14, 2009, Save the Forge River, Inc. (SFR) petitioned to intervene in the captioned matter pursuant to 6 NYCRR 622.10(f). Respondents and Department staff opposed SFR's petition to intervene. In their respective papers, Respondents and Department staff argued that SFR's petition did not meet the standards for intervention

outlined at 6 NYCRR 622.10(f). Nevertheless, in a ruling dated April 29, 2010, I granted SFR's August 14, 2009 petition to intervene.

B. April 29, 2010 Ruling

In the April 29, 2010 ruling, I also granted Department staff's June 9, 2009 motion for order without hearing with respect to liability. With respect to relief, however, I denied Department staff's motion. I concluded there were several factual issues associated with determining the appropriate civil penalty, such as Respondents' ability to pay the civil penalty requested by Department staff. In addition, I determined there were factual issues related to compliance and remediation.

Discovery commenced in May 2010. During monthly telephone conferences, the parties provided status reports about discovery concerning the captioned administrative enforcement matter. In addition, the parties reported about the status of the federal bankruptcy proceeding.

II. Motion to Renew

With a notice dated November 18, 2010 and supporting papers, Department staff moves to renew the June 9, 2009 motion for order without hearing with respect to relief. Vernon Rail, Esq., Assistant Regional Attorney, DEC Region 1, filed the motion on behalf of Department staff. A list of Department staff's papers related to the November 18, 2010 motion is provided in Appendix A to this ruling.

Subsequently, the parties agreed to the following schedule. The response to Department staff's November 18, 2010 motion from Respondents and SFR was due by January 11, 2011. Department staff's reply was due by February 4, 2011.

With a cover letter dated January 11, 2011, Respondents' environmental counsel, Jonathon Sinnreich, Esq. (Sinnreich, Kosakoff & Messina, LLP, Central Islip), filed a response opposing Department staff's November 18, 2010 motion to renew. A list of Respondents' papers is provided in Appendix B to this ruling.

With a cover letter dated January 11, 2011, SFR filed a response. In this matter, SFR is represented by Reed W. Super, Esq. (Super Law Group, LLC, New York) and Susan J. Krahm, Esq. (The Environmental Law Clinic, Columbia University School of Law, New York). A list of SFR's papers is provided in Appendix C to this ruling.

Department staff filed a timely reply on February 4, 2011. A list of Department staff's reply papers is provided in Appendix A to this ruling.

A. Department Staff

In his affirmation dated November 18, 2010 (¶ 11), Mr. Rail states that Department staff received new information, subsequent to the April 29, 2010 ruling, that was not available prior to filing the June 9, 2009 motion. This information came from Respondents in response to discovery demands and other submissions related to the current SPDES permit, as well as from the Office of the New York State Attorney General. Department staff argues that the new information addresses the factual issues identified in the April 29, 2010 ruling concerning civil penalty and remediation, and provides a basis for determining the issues related to relief without an adjudicatory hearing.

With reference to Department staff's affidavits and the attached exhibits, which include the new information obtained subsequent to the April 29, 2010 ruling, Department staff contends the following. First, the wastewater discharges from the duck farm are a key nutrient source causing adverse environmental impacts to the Forge River (¶¶ 17-27 of Mr. Rail's November 18, 2010 affirmation). Second, Respondents received a substantial economic benefit by avoiding compliance with the terms and conditions of their SPDES permit (¶¶ 28-43 of Mr. Rail's November 18, 2010 affirmation). Third, the violations identified in the April 29, 2010 ruling are of a continuous nature, and the continuous nature of these violations should be considered an aggravating factor in determining the appropriate civil penalty (¶¶ 44-48 of Mr. Rail's November 18, 2010 affirmation). Fourth, Respondents failed to demonstrate that they are unable to pay a civil penalty (¶¶ 49-52 of Mr. Rail's November 18, 2010 affirmation). Finally, Department staff has determined that cause exists to revoke the SPDES permit (¶¶ 53-64 of Mr. Rail's November 18, 2010 affirmation).

In the November 18, 2010 motion to renew, Department staff seeks the following relief. Department staff requests a total civil penalty of \$600,000, and seeks revocation of the SPDES permit. In addition, Department staff requests that the Commissioner enjoin Respondents from any further wastewater discharges from the duck farm, and direct Respondents to submit a closure plan for Department staff's review and approval.

B. Respondents

Respondents object to Department staff's motion to renew because, according to Respondents, all of the evidence included with the November 18, 2010 motion to renew was available to Department staff prior to the June 9, 2009 motion for order without hearing. Respondents argue that Department staff could have sought discovery of this evidence prior to filing the June 9, 2009 motion, but did not.

Respondents note further that the reports prepared by the Stony Brook University, School of Marine and Atmospheric Sciences (SoMAS reports¹), which are the basis for Department staff's contention that the wastewater from the duck farm is a significant source of nitrogen pollution in the Forge River, were available prior to the Department staff's June 9, 2009 motion. Respondents argue further that Department staff did not offer the SoMAS reports with the November 18, 2010 motion in admissible form. According to Respondents, the SoMAS reports are hearsay because they come from an unauthenticated third party.

Respondents assert that Department staff, in the November 18, 2010 motion to renew, is unlawfully attempting to introduce and rely upon violations not initially alleged in the June 9, 2009 motion. Respondents contend that Department staff has not demonstrated the newly alleged violations. Respondents assert further that Department staff now seeks additional relief, in the form of permit revocation, which Department staff did not request in the June 9, 2009 motion for order without hearing.

¹ The SoMAS reports are attached to Anthony Leung's November 18, 2010 affidavit as Exhibit 3. Mr. Leung is an Environmental Engineer III, and serves as the Permit and Grants Program Supervisor, Division of Water, DEC Region 1.

Respondents argue that the November 18, 2010 motion to renew is duplicative of the June 9, 2009 motion for order without hearing and, therefore, abusive. In addition, they argue that the November 18, 2010 motion violates their due process rights. To support these arguments, Respondents cite to Civil Practice Law and Rules (CPLR) § 2221(e)(2 and 3), *Matter of Bath Petroleum, Inc., et al.*, Ruling on Respondents' Motions *In Limine*, July 7, 2005 (DEC Case No. R8-1088-97-07), *Matter of 2526 Valentine, LLC*, Ruling on Motion for Default Judgment, January 6, 2009 (DEC Case No. R2-20070604-242),² and additional authorities identified in the memorandum of law.

Respondents also contend that Department staff has impeded Respondents' ability to achieve compliance with the terms and conditions of the March 2008 SPDES permit. Contrary to Department staff's assertions, Respondents argue that, since February 6, 2010, they have attempted to meet with Department staff to discuss how the duck farm could be brought into environmental compliance under the difficult circumstances of the federal bankruptcy proceeding. In his January 11, 2011 affirmation (¶¶ 6-16), Mr. Sinnreich outlines the efforts undertaken by Respondents to schedule a meeting with Department staff.

According to Respondents, Department staff and Respondents cannot agree about how operations at the duck farm should come into compliance. Department staff has required a denitrification system. Respondents contend, however, that the denitrification system cannot be properly designed until a clarifier and other system upgrades are installed and operating. Respondents characterize these circumstances as a classic "catch-22." Respondents argue that Department staff's November 18, 2010 motion to renew should be denied.

² Respondents incorrectly state in their January 11, 2011 memorandum of law (at 17) that the New York State Freshwater Appeals Board considered the *Matter of 2526 Valentine, LLC, supra*. The matter, however, was a DEC administrative enforcement proceeding decided by the Commissioner concerning alleged violations of ECL Article 17 and implementing regulations at 6 NYCRR Parts 612 and 613, as well as provisions of the Navigation Law and implementing regulations at 17 NYCRR Part 32. These statutes and rules regulate petroleum bulk storage facilities and prohibit the discharge of petroleum products to the State's surface and groundwaters.

C. Save the Forge River, Inc. (SFR)

SFR supports Department staff's motion to renew, and argues that the Commissioner should grant the motion in all respects. SFR notes that Department staff now seeks permit revocation and an immediate injunction against further wastewater discharges. As a result, SFR states that its request for relief and that requested by Department staff are "now fully in accordance" (SFR's January 11, 2011 brief at 2). If the Commissioner grants Department staff's motion, SFR requests that the Commissioner order remediation as part of the closure plan.

With respect to the requested civil penalty of \$600,000. SFR accepts Department staff's request in the interest of arriving at a final, prompt remedy for Respondents' violations. If, however, the Commissioner does not grant the motion and a hearing is required, SFR reverses the right to seek the civil penalty relief it initially requested in its petition to intervene.

Discussion and Rulings

III. Respondents' Objections

Each of Respondents' objections to Department staff's November 18, 2010 motion to renew is addressed below. For the reasons discussed below, Respondents' objections are without merit.

A. New Information

As authorities for the November 18, 2010 motion to renew, Department staff relies upon 6 NYCRR 622.6(c) and CPLR 2221. Section 622.6(c) outlines the rules for motion practice with respect to the Department's administrative enforcement hearings. In the context of civil judicial proceedings, CPLR 2221(e) authorizes a motion for leave to renew. According to CPLR 2221(e)(2), such a motion must be based on either new facts not offered on the prior motion or a change in law. In addition, CPLR 2221(e)(3) requires the moving party to provide a

reasonable justification for failing to present such facts as part of the prior motion.

The evidence, which Department staff asserts was not previously available, consists of the following: (1) the June 2010 SoMAS reports; (2) a February 2007 phone log from Applied Technologies; (3) statements made by Benjamin Jurgielewicz during a bankruptcy meeting held in February 2010; (4) Respondents' June 2010 Engineering Report; (5) Department staff's July 2010 responsive comments; (6) Respondents' September 2010 revised Engineering Report; and (7) Department staff's October 2010 responsive comments.

Respondents contend, however, that Department staff has not complied with the requirements outlined in CPLR 2221(e)(2 and 3). Respondents argue that the motion to renew should not be a second attempt to prevail where, as here, a party fails to exercise due diligence with its first presentation. To support this argument, Respondents cite *Sobin v Tylutki*, 59 AD3d 701 (2^d Dept 2009) and *Stocklas v Auto Solutions of Glenville, Inc.*, 9 AD3d 622, 625 (3^d Dept 2004). (Respondents' January 11, 2011 memorandum of law at 6.)

Respondents argue further that they are being subjected to successive motions for summary judgment under the guise of a motion to renew. Respondents offered the following case law to demonstrate that such a practice is prohibited. (See *Matter of Bath Petroleum, Inc., et al.*, Ruling on Respondents' Motions In Limine, July 7, 2005 [DEC Case No. R8-1088-97-07]; *Taylor v Brooklyn Hosp.*, 187 AD2d 714, 715 [2^d Dept 1992]; *Soto v City of New York*, 37 AD3d 589, 589 [2^d Dept 2007]; *Abramoff v Fed. Ins. Co.*, 48 AD2d 676, 676 [2^d Dept 1975]; *Marine Midland Bank v Fisher*, 85 AD2d 905, 906 [4th Dept 1981]; *Chelsea Piers Mgmt. v. Forest Elec. Corp.*, 281 AD2d 252, 252 [1st Dept 2001]; and *Larusso v Katz*, Index No. 16712/2004, 2005 WL 6341320 [Sup. Ct. Bronx Co. Oct. 7, 2008]). (Respondents' January 11, 2011 memorandum of law at 7-8.)

With reference to Mr. Leung's November 18, 2010 affidavit (at ¶ 11), Respondents state that the SoMAS reports are dated from April through August 2009. For example, the *Nutrient Report* and the *Oceanography Report* are both dated April 2009, and the *Ecology Report* is dated May 2009 (Exhibit 3 to Mr. Leung's November 18, 2010 affidavit). Respondents assert that some, or a substantial portion, of the data presented in the

SoMAS reports were available to Department staff prior to the June 9, 2009 motion for order without hearing. In addition, Mr. Leung referenced the SoMAS reports in his first affidavit (¶ 9 of Mr. Leung's June 9, 2009 affidavit). Finally, Respondents note that the cover page of the *Nutrient Report* was "revised" on November 2010, which implies that an earlier version of the report was available prior to that date. (Respondents' January 11, 2011 memorandum of law at 8.)

Respondents argue that the justification that Department staff offers for not providing the SoMAS reports with the June 9, 2009 motion for order without hearing is inadequate. Respondents characterize Mr. Leung's affidavit, and his statements that he received the final versions of the SoMAS reports from Dr. R. Lawrence Swanson on June 4, 2010 (¶ 11 of Mr. Leung's November 18, 2010 affidavit) as hearsay. Respondents observe that Mr. Leung does not state whether, and if so, when he received earlier versions of the SoMAS reports. Respondents argue that the best evidence to establish when the SoMAS reports became available would be with an affidavit from Dr. Swanson. (Respondent's January 11, 2011 memorandum of law at 13.)

Respondents also object that Department staff waited more than five months to file the November 18, 2010 motion after Department staff received the "final" versions of the SoMAS reports on June 4, 2010. Respondents cite *Cole-Hatchard v Grand Union* (270 AD2d 447, 448 [2^d Dept 2000]) for the proposition that the lower court "improvidently exercised its discretion in granting leave to renew" when the movant did not offer any excuse for the seven-month delay in making the motion.

Department staff addresses Respondents' objections in its February 4, 2011 reply. In his February 4, 2011 affirmation (at ¶ 15), Mr. Rail states that Department staff provided an adequate justification about when the SoMAS reports became available, and refers to Mr. Leung's February 4, 2011 affidavit with attached exhibits.

Exhibit 2 to Mr. Leung's February 4, 2011 affidavit is a copy of a letter dated January 31, 2011 from Jeffrey Kassner, Director of the Division of Environmental Protection, Town of Brookhaven (the Town). According to Mr. Kassner's January 31, 2011 letter, the Town retained all notes, drafts and preliminary reports during the multi-year study period. In May 2010, the

Town approved the final reports and released them to the Task Force members on May 26, 2010. Subsequently, the Town posted the reports on its website and provided DEC Region 1, Division of Water, with an electronic copy.

Discussion and Ruling: In *Valentine, supra* (at 3-4) the Chief Administrative Law Judge considered a motion to renew filed by Department staff, pursuant to 6 NYCRR 622.6(c) and CPLR 2221(e). Referencing CPLR 2221(e)(3), the Chief ALJ held that the moving party must provide a reasonable explanation for failing to submit the new evidence on the original motion.

Respondents' reliance on *Bath Petroleum et al, supra*, however, is misplaced. The captioned matter and the *Matter of Bath Petroleum et al, supra*, are distinguishable. For example, the *Bath Petroleum* ruling cited by Respondents is the tenth to address a series of prehearing motions. In *Bath Petroleum et al, supra*, Bath Respondents moved to preclude Department staff from introducing allegedly irrelevant evidence at hearing. In denying the motion, the ALJ determined that the evidence would be relevant to the issue of relief. In addition, the ALJ noted that a motion for summary judgment had been considered and denied. (See *Matter of E.I.L. Petroleum, Inc.*, Ruling on Respondents' Motion for Summary Judgment and Staff's Motion to Amend and Cross-Motion for Order Without Hearing, March 27, 2000 [Though characterized as a motion for summary judgment, the ALJ determined that Bath respondents were actually moving to dismiss charges alleged in a complaint based upon a defective pleading].)

With respect to the captioned matter, I conclude that Department staff has provided an adequate explanation for renewing its motion for an order without hearing consistent with 6 NYCRR 622.6(c) and CPLR 2221(e). The evidence offered with the November 18, 2010 motion to renew was not available in final form when Department staff filed the June 9, 2009 motion for order without hearing. In addition, it is significant to note that the November 18, 2010 motion to renew concerns only relief, and not Respondents' liability, which was determined in the April 29, 2010 ruling. Whether Department staff prevails on its November 18, 2010 motion to renew is a separate issue that is discussed further below.

B. SoMAS Reports

In addition to the alleged procedural defect, Respondents argue, in the alternative, that the SoMAS reports are "a classic example of inadmissible compound hearsay," and irrelevant (Respondents' January 11, 2011 memorandum of law at 16). Respondents acknowledge that the rules of evidence need not be strictly applied (see 6 NYCRR 622.11[a][3]), and that hearsay evidence is admissible. However, Respondents cite *Valentine, supra*, (at 4) where the Chief ALJ rejected Department staff's "double hearsay" evidence.

Respondents argue that the SoMAS reports are "compound hearsay" from numerous sources that have not been subject to *voir dire* or cross-examination. Respondents argue further that the SoMAS reports would provide a "thin" record on which to base an order revoking the duck farm's SPDES permit. Respondents conclude that a hearing concerning the requested relief should be convened consistent with the April 29, 2010 ruling. (Respondents' January 11, 2011 memorandum of law at 19.)

Respondents also argue that the SoMAS reports are irrelevant. According to Respondents, many of the studies about the Forge River that are discussed in the SoMAS reports were undertaken long before the captioned administrative enforcement proceeding commenced. Respondents contend that the *Ecology Report* (at 20-23), the *History Report* (at 20-23), the *Nutrient Report* (at 18-21), and the *Sediment Report* (at 19-20) are based, in part, on studies undertaken more than 40 years ago. Respondents note that the relevance and reliability of the data discussed in the SoMAS reports can only be determined by cross-examining the authors of the reports. (Respondents' January 11, 2011 memorandum of law at 21.)

Respondents note further that they spent over \$1.5 million between 2006 and 2008 to upgrade the wastewater treatment facilities at the duck farm consistent with the terms and conditions of the 2005 Order on Consent. The purpose of these upgrades was to improve the duck farm's environmental compliance, and to ameliorate any potential adverse environmental impacts associated with discharges that exceeded the effluent limits prescribed in the SPDES permit. In addition, Respondents dredged sediment from the duck farm's aeration lagoons and West Mill Pond. Respondents argue that the SoMAS reports are silent about the effects that the upgrades to

the duck farm's treatment facilities and other work, undertaken between 2006 and 2008, had on the water quality of the Forge River. (Respondents' January 11, 2011 memorandum of law at 21-23.)

Department staff argues that the SoMAS reports are admissible. Department staff notes that Respondents' liability for the violations alleged in the June 9, 2009 motion has been proven. Department staff is offering the SoMAS reports to supplement the findings of the US Army Corps of Engineers' report that SFR submitted as Exhibit B to Mr. Super's August 14, 2009 affirmation. (¶¶ 18 and 19 of Mr. Rail's February 4, 2011 affirmation.)

Discussion and Ruling: The SoMAS reports are relevant to the captioned matter because they document how anthropomorphic activities, such as residential development and duck farming, among other things, in the Forge River watershed have adversely impacted the water quality of the river.

Moreover, the information presented in the SoMAS reports is reliable. The reports were prepared for the Town by the Stony Brook University, School of Marine and Atmospheric Sciences, and the Suffolk County Department of Health Services. They are scholarly reports that include original research and data collection, as well as a review of the existing published literature, which dates from 1951 to 2010 (see e.g., *Nutrient Report* at 18-21; *Ecology Report* at 20-23; *History Report* at 20-23 [includes a map from 1836]; *Sediment Report* at 19-20; and *Oceanography Report* at 40-41). The text of the reports is replete with references, which are fully identified at the end of each report, and include, among many others, materials prepared by Applied Technologies, Respondent's engineering consultants (see e.g., *Oceanography Report*, April 2009 at 40 referencing Applied's *Effluent Mixing Study*, dated 29 June 2007).

C. Permit Revocation

In the June 9, 2009 motion for order without hearing (¶¶ 42-45 of Ms. Wilkinson's June 9, 2009 affirmation), Department staff alleged that Respondents did not meet the schedule of compliance incorporated into the March 28, 2008 SPDES permit. The schedule of compliance set dates for filing various reports

and plans related to upgrading the wastewater treatment facilities at the duck farm (Exhibit 3 at 11 of 13 to Ms. Haas's June 10, 2009 affidavit). As outlined in the April 29, 2010 ruling (at 7-8, 13-16, 68-69, and 73), I determined that the alleged violations associated with Respondents' failure to comply with the schedule of compliance occurred.

Department staff alleges in the November 18, 2010 motion that Respondents have not complied with the schedule since the June 9, 2009 motion was filed. According to Department staff, Respondents submitted an engineering report that was two years late. Department staff determined the engineering report was not approvable. (¶ 57 of Mr. Rail's November 18, 2010 affirmation; Exhibits 3 and 4 to Mr. Leung's February 4, 2011 affidavit.)

Citing provisions of 6 NYCRR 750-2.1, Department staff contends that noncompliance with the terms and conditions of a SPDES permit are violations of the ECL and the federal Clean Water Act, and that such violations are grounds for permit revocation, among other things. As noted above, Department staff requests, in the November 18, 2010 motion, that the Commissioner revoke Respondents' March 28, 2008 SPDES permit, and direct Respondents to file a closure plan as required pursuant to 6 NYCRR 750-2.11(c)(1)(i-ii). In the alternative, Department staff requests that the Commissioner suspend the SPDES permit, and direct Respondents to cease all wastewater discharges from the duck farm until they have submitted an approvable engineering report and plans for the wastewater system required by the SPDES permit. (¶¶ 54, 62 and 64 of Mr. Rail's November 18, 2010 affirmation.)

Respondents object to this relief, and assert that Department staff did not provide adequate notice. Respondents note that Department staff did not initially seek permit revocation in the June 9, 2009 motion. Respondents argue that granting Department staff's new request for relief, as outlined in the November 18, 2010 motion, would violate their due process rights (see *Murphy v Murphy*, 24 NY 2d 150, 157 [1969]). (Respondents' January 11, 2011 memorandum of law at 28-29.)

Respondents argue further that with the November 18, 2010 motion, Department staff is inappropriately attempting, at the eleventh hour, to amend pleadings without obtaining leave from the ALJ as required by 6 NYCRR 622.5(b). According to

Respondents, they have been denied the opportunity to prepare an adequate defense to these new pleadings. (Respondents' January 11, 2011 memorandum of law at 30-31.)

SFR argues that permit suspension or revocation is authorized (see 6 NYCRR 622.18[e] and 6 NYCRR 750-2.1), and supported by the record with respect to the captioned matter. SFR requests, therefore, that the Commissioner grant Department staff's November 18, 2010 motion for the requested relief. According to SFR, the duck farm should not be allowed to operate unless and until it can do so in compliance with all applicable environmental requirements. (SFR's January 11, 2011 brief at 9-10.)

According to Department staff, Respondents have been on notice that permit revocation could be the result of this administrative enforcement action. Department staff notes that SFR requested permit suspension in its petition to intervene. With reference to the April 29, 2010 ruling (at 64), Department staff notes further that the purpose of the adjudicatory hearing was to determine the appropriate relief, which included, among other things, the possibility of permit suspension or revocation. (¶¶ 20-22 of Mr. Rail's February 4, 2011 affirmation.)

To support the request for permit revocation, Department staff cites to *Matthews v Eldridge*, 425 US 319 (1976). According to Department staff, *Matthews* (at 335) outlines a three part test for determining whether an individual has received adequate due process when subject to the administrative process. Department staff states that the Staff's June 9, 2009 motion for order without hearing, and its November 18, 2010 motion to renew comply with the requirements outlined in 6 NYCRR 622.12 and CPLR 2221. Department staff asserts that Respondents' due process rights have been preserved. (¶¶ 23-24 of Mr. Rail's February 4, 2011 affirmation.)

Discussion and Ruling: Respondents' objection concerning Department staff's request for permit revocation is without merit. With service of Department staff's June 9, 2009 motion, Respondents received notice that permit revocation was a possible outcome of this administrative enforcement action (see e.g., ¶ 16 of Ms. Wilkinson's June 9, 2009 affirmation ["Any permit noncompliance is a violation of the Environmental Conservation Law and the Clean Water Act and is grounds for:

enforcement action; for permit suspension, revocation or modification..."])). Also, Department staff requested "such other relief as the Commissioner shall deem just, necessary and appropriate" (¶ V of Ms. Wilkinson's June 9, 2009 affirmation at 14).

In addition, the April 29, 2010 ruling (at 58-61) granted SFR's petition to intervene, and identified issues for adjudication related to the relief proposed in SFR's petition. One issue was whether the duck farm's SPDES permit should be suspended until Respondents come into compliance with the terms and conditions of the SPDES permit (April 29, 2010 ruling at 64).

Finally, Respondents received notice of Department staff's request for permit revocation with service of the November 18, 2010 motion. Subsequently, Respondents had the opportunity to respond to the November 18, 2010 motion, and took advantage of that opportunity when they filed their January 11, 2011 response.

IV. Liability

Respondents' liability for the violations alleged in Department staff's June 9, 2009 motion for order without hearing has been established. The April 29, 2010 ruling (at 12-20, 30-40, and 64-73) identifies each alleged violation, evaluates the evidence offered by the parties, and concludes that Respondents are responsible for all alleged violations.

V. Relief

Upon review of the June 9, 2009 motion for order without hearing and the responding papers filed by Respondents and by SFR, I determined there were factual issues related to Department staff's request for relief that would require a hearing (April 29, 2010 ruling at 44-45; 61-64).

With the availability of new information subsequent to the June 9, 2009 motion, Department staff filed the instant motion. Upon review of the November 18, 2010 motion to renew and the responding papers, I conclude there are no longer any factual issues associated with relief. For the reasons outlined below,

I, therefore, recommend that the Commissioner conclude that the Respondents are responsible for the violations alleged in the June 9, 2009 motion for order without hearing, and grant Department staff's request for relief.

A. Civil Penalty

Citing ECL 71-1929, Department staff stated in the June 9, 2009 motion for order without hearing that the Commissioner may assess a civil penalty of \$37,500 per day for each violation, and an additional civil penalty of \$37,500 for each day that the violation continues. According to Department staff, Respondents are responsible for 171 violations, and that the total maximum civil penalty would exceed \$6 million. Department staff argued that the alleged violations have continued for several years without any resolution or remediation. Nevertheless, Department staff requested \$37,500 for each of the 16 causes of action for a total requested civil penalty of \$600,000 (16 causes of action x \$37,500 = \$600,000). (¶¶ 61 and 62 from Ms. Wilkinson's June 9, 2009 affirmation.)

In the November 18, 2010 motion to renew, Department staff seeks the same civil penalty (¶ 48 of Mr. Rail's November 18, 2010 affirmation). Department staff contends that the requested civil penalty is appropriate for the following reasons. First, Respondents realized a substantial economic benefit by failing to comply with the schedule of compliance incorporated into the current SPDES permit. Second, wastewater discharges from the duck farm in excess of the SPDES permit effluent limits have adversely impacted the water quality of the Forge River. Finally, the continuous nature of the violations should be considered an aggravating factor in determining the appropriate civil penalty. (¶¶ 25, 39, 43 and 45 of Mr. Rail's November 18, 2010 affirmation.)

To support the civil penalty request, Department staff relies on the guidance outlined in the Commissioner's *Civil Penalty Policy* (DEE-1), dated June 20, 1990. DEE-1 divides the civil penalty calculation into two components. The first concerns the economic benefit. According to DEE-1 (§ IV.C.1), a respondent obtains an economic benefit by avoiding costs related to compliance with statutory and regulatory requirements. DEE-1 recommends (*id.*) that every effort should be made to calculate and recover the economic benefit of noncompliance.

The second component associated with the civil penalty calculation is the gravity component. Generally, the gravity component considers the potential or actual harm that resulted from the violations, and the significance of the violations to a particular regulatory scheme. (DEE-1 § IV.D.) After the economic benefit and the gravity components are determined, the final civil penalty may be adjusted based on factors such as respondent's culpability, respondent's cooperation to resolve the violations, respondent's history of non-compliance, and respondent's ability to pay a civil penalty, among other things. (DEE-1 § IV.E.)

1. Economic Benefit Component

In the June 9, 2009 motion for order without hearing, Department staff asserted, as the tenth cause of action, that Respondents violated the terms of the SPDES permit because they did not submit an engineering report with plans and specifications prepared by a professional engineer, as well as an operations and maintenance manual also prepared by a professional engineer. As required by Item 2 of the Schedule of Compliance, the report and manual were due by June 1, 2008 for Department staff's review. (Exhibit 3 at 11 of 13, Condition [a] of Ms. Haas's June 10, 2009 affidavit; ¶ 7 of Mr. Leung's November 18, 2010 affidavit and Exhibit 2.) In the April 29, 2010 ruling (at 14), I concluded that Department staff's proof established the violation alleged in the tenth cause of action. In addition, I noted that Respondents admitted the violation.

In his November 18, 2010 affidavit (¶ 21), Mr. Leung states that Respondents' consulting engineers (Applied Technologies, Brookfield, Wisconsin) subsequently filed an engineering report on June 14, 2010. Exhibit 6 to Mr. Leung's November 18, 2010 affidavit is a copy of the June 14, 2010 engineering report.

Mr. Leung reviewed the June 14, 2010 engineering report (¶ 22 of Mr. Leung's November 18, 2010 affidavit). In a memorandum dated July 14, 2010 (Exhibit 7 to Mr. Leung's November 18, 2010 affidavit), Mr. Leung outlined the deficiencies of the engineering report. Respondents' consulting engineers filed a second engineering report in the form of a letter dated September 25, 2010, which is attached to Mr. Leung's November 18, 2010 affidavit (¶ 23) as Exhibit 8.

The September 25, 2010 engineering report identifies and reviews the existing wastewater treatment facilities at the duck farm, and recommends improvements. The recommendations include installing the following: (1) a clarifier system; (2) a denitrification system; and (3) aerators. The September 25, 2010 engineering report estimates the capital costs of these improvements. The approximate cost for the clarifier would be \$350,000. The estimated costs for the denitrification system and the aerators would be \$250,000, and \$133,000, respectively. The sum of these costs is \$733,000. (Exhibit 8 to Mr. Leung's November 18, 2010 affidavit.) Based on the September 25, 2010 report from Respondents' consulting engineers, Department staff contends that Respondents realized an economic benefit of at least \$733,000 by not installing these improvements as required by the schedule of compliance incorporated into the SPDES permit (§ 43 of Mr. Rail's November 18, 2010 affirmation).

In their January 11, 2011 response, Respondents neither contest the estimated costs of the improvements outlined in the September 25, 2010 engineering report, nor offer alternative cost estimates for improving the wastewater treatment facilities at the duck farm. Respondents, however, filed a subsequent engineering report dated January 10, 2011, which is attached as Exhibit B to Daniel L. Gordon's January 10, 2011 affidavit.

The recommended improvements to the wastewater treatment facilities outlined in the January 10, 2011 engineering report are slightly different from those proposed in the September 25, 2010 report. The differences proposed in the latter engineering report reflect proposed operational changes that Mr. Gordon outlines in his reorganization plan (§ 15 of Mr. Gordon's January 10, 2011 affidavit). The January 10, 2011 engineering report, however, does not provide any estimated costs for the recommended improvements to the wastewater treatment facilities.

As noted above, DEE-1 recommends that every effort should be made to calculate and recover the economic benefit of noncompliance (§ IV.C.1). I conclude that the estimated costs of the proposed improvements to the wastewater treatment facilities at the duck farm, which are outlined in the September 25, 2010 report (Exhibit 8 to Mr. Leung's November 18, 2010 affidavit), are reliable because they were provided by Applied Technologies, Inc., Respondents' consulting engineers.

Accordingly, I find that the economic benefit associated with Respondents' noncompliance is at least \$733,000.

2. Gravity Component

The gravity component (DEE-1 § IV.D) considers the potential or actual harm that resulted from the violations, and the significance of the violations to a particular regulatory scheme. In the April 29, 2010 ruling (at 63), I determined that the underlying factual dispute relevant to the gravity component of the civil penalty was whether, and if so, to what extent do, the wastewater discharges from the duck farm adversely impact the water quality of the Forge River.

Based on the release of new information not available at the time of Department staff's June 9, 2009 motion for order without hearing, and the disclosure of documents subsequent to the April 29, 2010 ruling, Department staff argues there are no longer any factual disputes related to the gravity component of the requested civil penalty (¶ 11 of Mr. Rail's November 18, 2010 affirmation). The new information consists of the set of reports prepared by the School of Marine and Atmospheric Sciences at SUNY Stony Brook. In particular, Department staff argues that the *Nutrient Report* documents how effluent from the duck farm has adversely impacted the water quality, and that sediments have accumulated in West Mill Pond and other sections of the Forge River that have adversely impacted the riverine habitat (¶¶ 17, 18, 20 and 25 of Mr. Rail's November 18, 2010 affirmation; ¶ 3 of Mr. Rail's February 4, 2011 affirmation).

SFR argues there are no factual disputes about whether the wastewater discharges from the duck farm adversely impact the water quality of the Forge River. According to SFR, the results of the SoMAS reports support the gravity component of Department staff's civil penalty request because actual environmental harm has resulted from the established violations. (SFR's January 11, 2011 brief at 3, 6-9.)

Respondents raise legal and procedural objections about the SoMAS reports, which are addressed in § III.A and § III.B of this ruling. Respondents argue, in the alternative, that the SoMAS reports do not support Department staff's position that wastewater discharges from the duck farm adversely impact the water quality of the Forge River (¶ 3 of Mr. Sinnreich's January

11, 2011 affirmation; Respondent's January 11, 2011 memorandum of law at 23-24).

For example, Respondents note that the *History Report* (at 16) concludes that the eutrophication of the Forge River is the result of the complex interplay of decades of natural and man-made causes, and that the single most important one is "unchecked residential development" (Respondent's January 11, 2011 memorandum of law at 24). Respondents refer to Figure 3 from the *Ecology Report* (at 26) to support the proposition that the concentration of nitrogen associated with wastewater discharges from the duck farm has progressively decreased over time compared to the concentration of nitrogen associated with wastewater discharges from septic systems and cesspools, and the application of fertilizers (Respondent's January 11, 2011 memorandum of law at 24-25).

Respondents acknowledge their legal obligation to fully comply with the terms and conditions of the March 2008 SPDES permit. With respect to the gravity component of the civil penalty calculation, however, Respondents argue that full compliance would not eliminate the majority of nitrogen and other nutrients that enter the Forge River watershed from residential development. Respondents object to the requested civil penalty when the local government has failed to properly regulate residential development. (Respondent's January 11, 2011 memorandum of law at 25-26).

The proof offered to support the gravity component of the civil penalty is addressed below.

a) The SoMAS Reports

With a November 2005 resolution, the Town of Brookhaven established the Forge River Protection Task Force to investigate the water quality of the Forge River. Mr. Leung served as the Department's representative on the Task Force since January 2006. (¶¶ 9-10 of Mr. Leung's November 18, 2010 affidavit.)

The Town and Suffolk County Department of Health retained the services of the Stony Brook University's School of Marine and Atmospheric Sciences (SoMAS) to study the water quality of the Forge River. SoMAS published the results of the study in five reports beginning in 2009. Mr. Leung received the final

version on June 4, 2010. (¶ 11 of Mr. Leung's November 18, 2010 affidavit.) Exhibit 3 to Mr. Leung's affidavit consists of the five reports, which are entitled:

1. *The Forge River Nutrient Report (Nutrient Report);*
2. *Some Aspects of Forge River Ecology (Ecology Report);*
3. *What History Reveals about Forge River Pollution (History Report);*
4. *Sediment Quality Characterization for the Forge River, Long Island (Sediment Report);* and
5. *Aspects of the Physical Oceanography of the Forge River (Oceanography Report).*

The *Nutrient Report* identifies the sources and distribution of nutrients (primarily nitrogen) in the water column of the Forge River and its tributaries. The report explains the effect of these nutrients on the water quality of the Forge River. (*Nutrient Report* at 1.)

The Forge River is an estuary that flows south into Moriches Bay. Moriches Bay is part of the Long Island south shore lagoon system. As part of the Long Island south shore lagoon system, the flow of the Forge River is restricted and, therefore, naturally susceptible to the accumulation of nutrients, rich organic sediments, and eutrophication. (*Nutrient Report* at 2.)

Coastal eutrophication occurs when waterways are rich with nutrients, such as nitrogen and phosphorus. Nutrients enter the waterway from groundwater, runoff from land, and the atmosphere. Excess nutrients fertilize the waterway, and cause the overproduction of phytoplankton and algae. The microbial degradation of this organic matter can lead to hypoxic (low dissolved oxygen concentrations) or anoxic (no oxygen) conditions. (*Nutrient Report* at 2.) Under these conditions, marine life and biodiversity decrease, and the overall health of the riverine habitat degrades (*Ecology Report* at 6).

The *Nutrient Report* identifies the sources of nitrogen that accumulate in the Forge River, and estimates the concentration of nitrogen. The largest source of nitrogen to the Forge River is associated with groundwater flows within the watershed (*Nutrient Report* at 12). The volume of groundwater entering the Forge River can be estimated by measuring the salinity of the incoming and outgoing tidal volumes, the volume of water between

the high and low water, and the stream flow during the tidal cycle (*Oceanography Report* at 11-12.)

The primary source of nitrogen in the groundwater flowing into the Forge River is from cesspools and septic tanks associated with residential development. A secondary source of nitrogen in the groundwater is from the application of commercial and residential fertilizers. Approximately 64% of the nitrogen entering the Forge River comes from groundwater flows. (*Nutrient Report* at 12-14.)

The second largest source of nitrogen to the Forge River is from surface water sources that include its tributaries. East Mill Pond and West Mill Pond are the largest tributaries with the highest flow rates to the Forge River. West Mill Pond is about 72% of the total flow from the two ponds, and contributes the largest amount of nitrogen from non-groundwater sources. Nitrogen from West Mill Pond is associated with the duck farms (*i.e.*, the Jurgielewicz Duck Farm and the Titmus [or South] Duck Farm).³ The *Nutrient Report* estimates that the amount of nitrogen from ducks is 91,730 lbs. per year, which is approximately 19% of the nitrogen entering the Forge River. (*Nutrient Report* at 13-14; *Oceanography Report* at 11.) According to Mr. Leung, this estimate is conservative because it does not consider operations at the slaughter house on the South Farm (¶ 13 of Mr. Leung's November 18, 2010 affidavit).

Tidal exchange removes about 85% of the total amount of nitrogen that enters the Forge River. In addition, some nitrogen is removed from the water column when it becomes buried in sediments. (*Nutrient Report* at 14; *Ecology Report* at 7.)

Mr. Leung acknowledges that groundwater flow contains septic nitrogen, which is the largest source of nitrogen in the Forge River. Mr. Leung acknowledges further that the Suffolk County Department of Health has jurisdiction over the regulation of residential septic systems. Mr. Leung notes that the Forge River Task Force is investigating adverse environmental impacts associated with residential septic systems in the Forge River drainage basin. (¶ 6 of Mr. Leung's February 4, 2011 affidavit.)

³ The Jurgielewicz's purchased the Titmus Duck Farm in 2008 (¶ 12 of Mr. Jurgielewicz's August 28, 2009 affidavit).

Nevertheless, Mr. Leung states that the Department has jurisdiction over the duck farm via the SPDES permit program. With reference to the *Nutrient Report* (at 14), Mr. Leung states further that ducks contribute about 19% of the nitrogen entering the Forge River. Mr. Leung concludes that the Department has the responsibility to protect the environment by ensuring that either wastewater discharges from the duck farm comply with the effluent limits set forth in the SPDES permit, or noncompliant discharges from the duck farm cease. (¶ 6 of Mr. Leung's February 4, 2011 affidavit.)

b) US Army Corps of Engineers' Reports

In addition to the SoMAS reports, Department staff relies on the February 2009 report prepared by US Army Corps of Engineers to demonstrate the allegation that wastewater discharges from the duck farm adversely impact the water quality of the Forge River. The February 2009 report is entitled, *Long Island Duck Farm History and Ecosystem Restoration Opportunities, Suffolk County, Long Island, New York*, and is attached to Mr. Super's affirmation dated August 14, 2009 as part of Exhibit B. (¶ 12 of Mr. Rail's February 4, 2011 affirmation.)

Exhibit B to Mr. Super's August 14, 2009 affirmation (at ¶ 5) consists of four documents. The first is a copy of a Fact Sheet dated March 2008 concerning the Forge River Watershed, Long Island, New York, *Ecosystem Restoration*, prepared by the US Army Corps of Engineers, New York District. The fact sheet identifies potential problems associated with the river habitat and water quality. The fact sheet recommends a reconnaissance study of the Forge River watershed to evaluate adverse environmental impacts, and to develop remediation plans.

The second document associated with Exhibit B is a copy of the July 2008 *Reconnaissance Study for the Forge River Watershed*. The purpose of the study, which was prepared by the US Army Corps of Engineers, is to evaluate environmental restoration plans. The July 2008 Reconnaissance Study identifies reports previously prepared by the US Army Corps, such as, *Analysis of the South Shore of Long Island, New York* (June 1997), and *Resource Study for the Great South Bay and Adjoining Lesser Bays and Inlets, Long Island, New York* (June 1975), among others, as well as reports not prepared by the US

Army Corps, including the February 2008 draft report entitled, *Water Quality Trends at Selected Streams Impacted by Duck Farm Operations*.

Based upon a review of the reports referenced in the July 2008 Reconnaissance Study and two site visits, the July 2008 Reconnaissance Study describes the conditions of the Forge River watershed, which include the following. The results of limited samples from the sub-surface sediments collected from the Forge River show elevated concentrations of nitrogen and phosphorus. Siltation has occurred in the Forge River and its tributaries. Some of the siltation is extensive. Siltation limits water flow and circulation, which may increase deposition rates and exacerbate water quality problems. Wildlife species, such as marine finfish, shellfish and birds, are excluded from the watershed due to impaired water quality and degraded habitat.

The July 2008 Reconnaissance Study outlines alternatives for restoring the aquatic and terrestrial habitats in the watershed, and improving the water quality of the Forge River and its tributaries. One alternative is taking no-action, which the US Army Corps must consider to comply with the requirements of the National Environmental Policy Act. Other alternatives include improving the management of point and non-point sources, and increasing circulation in the Forge River through dredging.

The third document associated with Exhibit B is a copy of various pages (cover, table of contents and pp 1-7) from the February 2008 report prepared by the Suffolk County Department of Health Services (SCDHS) entitled, *Water Quality Trends at Selected Streams Impacted by Duck Farm Operations*. The Suffolk County February 2008 report reviews the data from past studies conducted in Moriches Bay and Great South Bay by researchers from the Woods Hole Oceanographic Institute in the early to mid-1950s.⁴ In addition, data collected by SCDHS Office of Water

⁴ Redfield, A.C. 1951. Report on a survey of the hydrography of Great South Bay made during the summer of 1950 for the Town of Islip, NY. Woods Hole Oceanographic Institution. Unpublished manuscript. Ref. No. 50-48. 30pp.

Redfield, A.C. 1952. Report to the Towns of Brookhaven and Islip, NY, on the hydrography of Great South Bay and Moriches Bay. Woods Hole Oceanographic Institution. Unpublished manuscript. Ref. No. 52-26. 80pp.

Ryther, J.H. 1954. The Ecology of phytoplankton blooms in Moriches Bay and Great South Bay, Long Island, New York. *The Biological Bulletin*, 106: 198-209.

Resources from 1970-1999, as part of a routine stream sampling program, and by SCDHS Office of Ecology from 1976-2006, for various environmental management programs, are presented in the Suffolk County February 2008 report. The results of additional samples collected from the Forge River from 2005-2007 are also reported. As noted above the US Army Corps reviewed the Suffolk County February 2008 report before preparing the July 2008 Reconnaissance Study.

According to the Suffolk County February 2008 report, at one time or another, there were ten duck farms on the Forge River and its tributaries. The report also states that water samples have routinely been collected from East Mill Pond and West Mill Pond from the early 1970s. For East Mill Pond, the data show that the concentration of ammonia-nitrogen has generally decreased over time as the number of duck farms decreased. For West Mill Pond, however, the data show that concentrations of ammonia-nitrogen and phosphorous have increased as duck farming continues. At present, average concentrations of ammonia and total nitrogen in West Mill Pond are four times greater than those in East Mill Pond. Also, average concentrations of ortho-phosphate in West Mill Pond are an order of magnitude greater than those in East Mill Pond. (Suffolk County February 2008 report at 17, 19, 30-31.)

The Suffolk County February 2008 report (at 2, 31) states, however, that the monitoring data is limited, particularly during times when most duck farms were active. As a result, the report concludes that the significance of apparent water quality trends, and the relationship of these results with former duck farm operations, are uncertain.

Finally, as noted above, the fourth document associated with Exhibit B is a copy of pages 1 through 7 from the February 2009 US Army Corps of Engineers report entitled, *Long Island Duck Farm History and Ecosystem Restoration Opportunities, Suffolk County, Long Island, New York*. The stated objectives of the report (at 1) are to detail the environmental concerns

Ryther, J.H., R.F. Vaccaro, C.S. Yentsch, and E.M. Hulbert. 1957. Report on a survey of the chemistry and hydrography of Great South Bay and Moriches Bay made in June, 1957 for the Town of Islip, New York. Woods Hole Oceanographic Institution. Unpublished manuscript. Ref. No. 57-59. 16pp.

These hydrography reports are referenced in the SoMAS Reports.

associated with past duck farming, to develop restoration plans, and to prioritize areas for restoration. The pages from the February 2009 US Army Corps of Engineers report provided with Exhibit B address the first objective.

According to the February 2009 US Army Corps of Engineers report (at 3-5), off site impacts from duck farm operations are twofold. First, the nutrients (primarily nitrogen and phosphorous), suspended solids, and coliform bacteria in the wastewater discharged from the duck farms degrade the quality of the receiving waters. As a result, the predominate algae species have changed, and are now dominated by smaller forms. Algae, concentrated in the tens of billions of cells per liter, turn the water a pea green color. Other factors such as shallow water depths, and low tidal flushing rates increase the water temperature, which in turn, contribute to the excessive algae blooms. (*Id.*)

The second impact is that a thick layer of duck sludge that blankets the bottom of streams and tributaries. The sludge has altered the riverine habitat. It has a high organic content and is a concentrated source of bacteria, nitrogen, phosphorous, potassium and biological oxygen demand. As this organic matter decomposes, dissolved oxygen becomes depleted, and the resulting anaerobic digestion produces hydrogen sulfide gas. Although the number of duck farms has substantially diminished since the 1960s, substantial deposits of duck sludge, and the effects associated with it, remain. (*Id.*)

Based on the foregoing, wastewater discharges from Jurgielewicz Duck Farm in excess of the effluent limits prescribed in the SPDES permit related to several parameters, among them, ultimate oxygen demand, total suspended solids, settleable solids, oil and grease, and coliform, have adversely impacted the water quality of West Mill Pond and the Forge River.

c) Dye Test

In response to Department staff's June 9, 2009 motion for order without hearing, Respondents offered the results from a March 2007 dye test in West Mill Pond as part of Dennis E. Totzke's August 27, 2009 affidavit (Exhibit B, Attachment 2). Mr. Totzke is a member of Respondents' consulting engineers,

Applied Technologies, Inc. Respondents offered this information to support the assertion that wastewater discharges from the duck farm did not adversely impact the water quality of the Forge River.

However, in the November 18, 2010 motion to renew, Department staff challenges the explanation offered by Mr. Totzke concerning the results of the March 2007 dye test. In its January 11, 2011 response, SFR also challenges that explanation.

According to Mr. Leung, the March 2007 dye test conducted by Applied Technologies, Inc. was not performed to assess the environmental impacts of the wastewater discharges from the duck farm. Rather, the purpose of the dye test was to verify that a higher percentage of water from West Mill Pond could be used to mix with the wastewater effluent. Mr. Leung states that Department staff used the results from the dye test to recalculate the water quality limits in the March 2008 SPDES permit. In the March 2008 SPDES permit, the effluent limit concentrations for UOD and total nitrogen were decreased from the limits prescribed in the SPDES permit in effect prior to March 2008. (¶ 15 of Mr. Leung's November 18, 2010 affidavit.)

Mr. Leung states further that Mr. Totzke's description concerning the flow of water from West Mill Pond to the Atlantic Ocean is inaccurate. Absent from Mr. Totzke's description, and significant from Mr. Leung's perspective, is that the Forge River flows into Moriches Bay rather than directly into the Atlantic Ocean. According to Mr. Leung, extensive water quality modeling would be required to determine whether, and if so when, any effluent from the duck farm reaches the Atlantic Ocean. (¶ 17 of Mr. Leung's November 18, 2010 affidavit.)

With reference to a February 16, 2007 telephone log entry made by Respondents' consulting engineers and obtained through discovery (Exhibit 5 to Mr. Leung's November 18, 2010 affidavit), Mr. Leung states in his November 18, 2011 affidavit (¶ 19) that the recommendation to include a clarifier at the duck farm demonstrates an inconsistency in Mr. Totzke's statements, particularly his conclusion that effluent discharges from the duck farm do not adversely impact the water quality of the Forge River.

In addition, SFR argues that Respondents' initial contention that effluent from the duck farm reaches the Atlantic Ocean within 3.5 days (¶ 8 of Mr. Totzke's August 27, 2009 affidavit, Exhibit B, Attachment 2) is not supported by any evidence (SFR January 11, 2011 brief at 4, 6).

Tidal flow in the Forge River ends at the Montauk Highway where two box weirs impound East Mill Pond and West Mill Pond. West Mill Pond is depicted on a map dated 1836. Also, East and West Mill Ponds are depicted on a map from 1873. (*History Report* at 2 and 4.) Consistent with the SoMAS *History Report*, Exhibit A to Ms. Kraham's January 11, 2011 affirmation is a map from the Google Earth website, which depicts the location of the dam that impounds West Mill Pond in relationship to the Forge River and its outlet into Moriches Bay.

Exhibit D to Ms. Kraham's January 11, 2011 affidavit is a copy of a letter dated November 3, 2006 by Mr. Totzke and Gerald L. Bills, from Applied Technologies, Inc., to members of Department staff, including Mr. Leung. The November 3, 2006 letter explains, among other things, that the objectives of the March 2007 dye test were to determine the volume of water in West Mill Pond that would be available for mixing with the effluent from the duck farm, and to calculate the carbonaceous biochemical oxygen demand (CBOD₅) effluent limit for the March 2008 SPDES permit. Based on this letter, SFR argues that Respondents mischaracterized the purpose and results of the dye test when they responded to Department staff's June 9, 2009 motion for order without hearing (SFR's January 11, 2011 brief at 4 and 7).

According to Department staff, the results of the March 2007 dye test do not support Mr. Totzke's statement that the travel time of wastewater effluent from the duck farm to the Atlantic Ocean is short and, the Respondents' contention that wastewater effluent from the duck farm do not adversely impact the water quality of the Forge River (¶¶ 16, 19 and 21-23 of Mr. Rail's November 18, 2010 affirmation; ¶¶ 15-18 of Mr. Leung's November 18 2010 affidavit). Respondents' January 11, 2011 filing, however, is silent about the purpose and results of the March 2007 dye test discussed in Mr. Totzke's August 27, 2009 affidavit, and does not respond to the arguments and proof presented with Department staff's November 18, 2010 motion.

d) Discussion

Of the documents included with Exhibit B that are attached to Mr. Super's August 14, 2009 affirmation, I assign substantial weight to the SCDHS February 2008 report. This report includes data concerning water samples collected from East and West Mill Ponds from the early 1970s to 2007. The data establish the following trends. First, with respect to East Mill Pond, concentrations of nitrogen and phosphorous have decreased over time as the number of duck farms decreases. Second, with respect to West Mill Pond, concentrations of nitrogen and phosphorous have increased over time as duck farms remain in operation. (SCDHS February 2008 report at 17-21.)

Based on the geographic information related to the Forge River that Department staff provided with the November 18, 2010 motion to renew, and that SFR provided with its January 11, 2011 response, Mr. Totzke's statement that discharges from the duck farm flow rapidly from the Forge River to the Atlantic Ocean is not reliable.

Finally, the SoMAS reports provide specific information about the Forge River, and demonstrate that wastewater discharges from the duck farm have adversely impacted its water quality and the riverine habitat. Furthermore, the SoMAS reports quantify the adverse impact of the wastewater discharges from the duck farm. Although the duck farm is a significant source of nitrogen and phosphorous, the SoMAS reports demonstrate that the more significant source of nitrogen and phosphorous is related to groundwater discharges from residential septic systems.

With respect to the gravity component of the civil penalty calculation, the fact that Respondents' wastewater discharges are neither the only, nor the most significant source, of pollution should not be considered a mitigating factor. Rather, as Department staff correctly points out, the scope of the Department's jurisdiction is limited to the wastewater discharges from the duck farm. As determined in the April 29, 2010 ruling, Respondents have frequently exceeded the effluent limits for several parameters prescribed in the March 2008 SPDES permit. Moreover, Respondents acknowledge that they must comply with the terms and conditions of their SPDES permit.

Based on the foregoing, I conclude that the requested civil penalty of \$600,000 is reasonable given the actual environmental harm associated with the demonstrated violations.

3. Civil Penalty Adjustment Factors

After the economic benefit and the gravity components are determined, the final civil penalty may be adjusted based on factors such as respondent's culpability, respondent's cooperation to resolve the violations, respondent's history of non-compliance, and respondent's ability to pay a civil penalty, among other things. (DEE-1 § IV.E.)

Respondents assert two mitigating factors, which they argue should either significantly reduce the requested civil penalty, or obviate the need to assess any civil penalty. The first is Respondents' willingness to cooperate with Department staff to bring operations at the duck farm into compliance with the terms and conditions of the March 2008 SPDES permit. For the second factor, Respondents assert that they are not able to pay any civil penalty. Department staff and SFR contend, however, that the continuous nature of the demonstrated violations should be considered an aggravating factor that further justifies the requested civil penalty. These factors are discussed below.

a) Respondents' Level of Cooperation

Respondents acknowledge that the duck farm cannot continue to operate unless it complies with permit conditions and all other applicable statutory and regulatory requirements. Accordingly, Respondents offer the following to demonstrate their efforts to cooperatively resolve the disputes related to this administrative enforcement proceeding.

In response to Department staff's June 9, 2009 motion for order without hearing, Respondents assert that they borrowed almost \$2 million to comply with environmental requirements such as, cleaning up the composting facilities, and dredging West Mill Pond and the duck farm's aeration lagoon (¶ 10 of Mr. Sinnreich's August 28, 2009 affirmation). Also, Mr. Jurgielewicz stated that he used the proceeds from selling the duck farm's development rights to Suffolk County and the Town, in part, to pay off debts associated with environmental

improvements (¶¶ 8-9, 17, 21 and 22, and Exhibit B of Mr. Jurgielewicz's August 28, 2009 affidavit; ¶¶ 6 and 7 of Mr. Fuchs's August 28, 2009 affidavit, and Exhibits C and D).

Subsequently, in his January 11, 2011 affirmation (¶¶ 4-23), Mr. Sinnreich asserts that Department staff actively impeded Respondents' ability to achieve compliance with the terms and conditions of the March 2008 SPDES permit. Mr. Sinnreich outlines, in detail, the efforts that Respondents, Respondents' consultants, and he made to schedule meetings with Department staff in order to discuss operations at the duck farm, and to work out a plan to bring these operations into compliance (*id.*).

In addition to Mr. Sinnreich's January 11, 2011 affirmation, Respondents offer an affidavit by Daniel L. Gordon, sworn to January 10, 2011, with attached exhibits. Mr. Gordon is President of Couak Capital Corporation (Couak). One purpose of Mr. Gordon's affidavit and exhibits is to demonstrate the efforts that Respondents took to meet with Department staff and to develop a plan to upgrade operations at the duck farm. (¶¶ 4 and 6 of Mr. Sinnreich's January 11, 2011 affirmation.)

According to Mr. Sinnreich, he telephoned Ms. Wilkinson on February 6, 2010 to schedule a meeting. Ms. Wilkinson agreed to schedule a meeting, but advised that she would have to confer with Department Staff and would telephone Mr. Sinnreich to schedule the meeting. Ms. Wilkinson telephoned Mr. Sinnreich on March 4, 2010, but no meeting was scheduled. Mr. Sinnreich telephoned Department staff on March 22, 2010 to schedule a meeting, and followed up with an email dated March 25, 2010, which is attached to his January 11, 2011 affirmation as Exhibit A. When Mr. Sinnreich did not hear back from Department staff, he spoke with Mr. Rail on April 1, 2010. Mr. Rail advised that he would have to confer with other members of Department staff as well as Assistant Attorney General Isaac Cheng, Esq., before he could schedule a meeting. In addition, Mr. Rail requested a "business plan" from Couak to guide the Department staff's consideration of Respondents' March 29, 2010 transfer application (see 6 NYCRR 750-1.17 [Transfer of permit]). With a cover letter dated April 7, 2010, Mr. Sinnreich filed the business plan, and a copy of it is attached to his January 11, 2011 affirmation as Exhibit B. Mr. Sinnreich states that Department staff did not respond to the proposed business plan. On June 4, 2010, a meeting was held with Mr. Gordon,

Respondents' counsel, Department staff, a representative for SFR, and Mr. Cheng. (¶¶ 7-11, 16 of Mr. Sinnreich's January 11, 2011 affirmation.)

Respondents' counsel contends further that the parties dispute the need for a denitrification system and its design. Respondents maintain that installation of a clarifier and other upgrades may either obviate the need for a denitrification system, or otherwise impact its design, particularly the size of the system. In addition, Respondents have sought guidance from Department staff about how to integrate the north farm (*i.e.*, the former Titmus duck farm) with the Jurgielewicz duck farm because the SPDES permit for the Titmus duck farm has expired. The integration of the two farms would also impact the design of the denitrification system. Without any input from Department staff, Respondents contend that they are stuck in a classic "catch 22" situation despite Respondents' willingness to come into compliance. (¶¶ 19, 20, 21 of Mr. Sinnreich's January 11, 2011 affirmation.)

In his January 10, 2011 affidavit, Mr. Gordon states that he is the President of Couak, which is a wholly owned subsidiary of Rosedale Cooley & Co., LP. Since March 2010, Couak has provided debtor-in-possession financing for the duck farm. Mr. Gordon states further that during the bankruptcy proceeding, Couak offered to purchase the duck farm's assets. An auction was held, and Couak was the highest, and only, bidder. According to Mr. Gordon, the sale was cancelled because the Department refused to transfer the SPDES permit from the duck farm to Couak, and to discuss the conditions whereby the Department would authorize such a transfer. (¶ 1 of Mr. Gordon's January 10, 2011 affidavit.)

Mr. Gordon states that he attempted, on behalf of Couak, to meet with Department staff to seek guidance about how to integrate the wastewater treatment facilities at the Titmus duck farm into the facilities at the Jurgielewicz duck farm to ensure compliance with the applicable statutory and regulatory requirements. With reference to Mr. Sinnreich's affirmation, Mr. Gordon states further that Department staff did not respond to Respondents' many requests for guidance. (¶¶ 11 and 12 of Mr. Gordon's January 10, 2011 affidavit.)

With the benefit of working capital from Couak, Mr. Gordon explains that the duck farm implemented the following procedures

to move toward permit compliance. WASTE, Inc. was retained to service, maintain, and operate the existing wastewater treatment facilities at the duck farm, and to complete and file discharge monitoring reports (DMRs). Wastewater samples are being collected and analyzed by a testing company, and the results have been reported in the DMRs filed by WASTE, Inc. Couak prepared a preliminary business plan related to operations and environmental upgrades at the duck farm. Finally, Couak retained Respondents' consulting engineers, Applied Technologies, Inc., to prepare a preliminary engineering report. According to Mr. Gordon, Department staff's refusal to approve the preliminary engineering report prevented Respondents from obtaining a \$300,000 grant from the Suffolk County Soil and Water Conservation District. Respondents had intended to use the grant to purchase and install the required clarifier. (¶ 14 of Mr. Gordon's January 10, 2011 affidavit.)

Department staff asserts that the information presented in Mr. Gordon's January 10, 2011 affidavit is irrelevant because he has no training or previous experience with either duck farming or wastewater management. Department staff notes that Mr. Gordon is not a party to the proceeding, and that his involvement with the duck farm began after the commencement of the captioned administrative enforcement proceeding. (¶ 4 of Mr. Rail's February 4, 2011 affirmation.) In addition to being irrelevant, Department staff contends that Mr. Gordon's affidavit is unreliable because Couak has a monetary interest in the duck farm and its continued operations. (¶ 4 [at 15-16] of Mr. Rail's February 4, 2011 affirmation.)

The environmental improvements identified in Respondents' August 28, 2009 response, and the associated costs, do not demonstrate Respondents' efforts to cooperate and to resolve the violations alleged in the June 9, 2009 motion for order without hearing. These improvements were required by either the 2007 Order on Consent or the schedule of compliance incorporated into the March 2008 SPDES permit. In part, it was Respondents' failure to meet the milestones outlined in the schedule of compliance that prompted Department staff to commence the captioned enforcement matter.

Also, Respondents' repeated attempts to meet with Department staff as outlined in their January 11, 2011 response do not demonstrate a cooperative effort by them to resolve the violations alleged in the June 9, 2009 motion. As outlined in

their January 11, 2011 response, Respondents' initial request for a meeting with Department staff came after Respondents filed the bankruptcy petition, and after Couak agreed to provide working capital for the duck farm.

When Respondents requested a meeting with Department staff on February 6, 2010, I was reviewing the parties' submissions concerning Department staff's June 9, 2009 motion, and a ruling from me was pending. Because Respondents admitted to several of the violations alleged in the June 9, 2009 (¶¶ 13-14 of Mr. Sinnreich's August 28, 2009 affirmation), Department staff reasonably anticipated that it would prevail on the merits. Under these circumstances, Department staff may not have been inclined to negotiate a settlement.

A respondent's level of cooperation may be considered a mitigating factor in determining the appropriate civil penalty. DEE-1, however, does not require Department staff to participate in settlement discussions while an administrative enforcement proceeding is pending. Nevertheless, all parties are encouraged to resolve disputes, and the parties may reach stipulations any time prior to receipt of the ALJ's report (see 6 NYCRR 622.18[c]).

I conclude that the circumstances discussed above do not constitute a mitigating factor that would serve as a basis for reducing the requested civil penalty.

b) Respondents' Ability to Pay a Civil Penalty

Respondents assert that they cannot pay the requested civil penalty. To support this assertion, Respondents initially provided an affidavit by Benjamin Jurgielewicz, sworn to August 28, 2009. In addition, Respondents provided an affidavit by Jeffrey S. Fuchs, sworn to August 28, 2009, with Exhibits A through D. The exhibits offered with Mr. Fuchs's affidavit are a set of tables that present the financial history of the duck farm from 2004 to 2008. The August 28, 2009 affidavits filed by Messrs. Jurgielewicz and Fuchs, and the exhibits attached to these affidavits are summarized in the April 29, 2010 ruling (at 42-44).

In the November 18, 2010 motion to renew, Department staff argues that Respondents failed to meet their burden to show that

they cannot pay the requested civil penalty. Department staff states that it requested financial information from Respondents as part of discovery subsequent to the April 29, 2010 ruling. Sharon L. Brooks, Associate Economist, from the Bureau of Remediation and Revitalization, reviewed the materials provided by the Respondents, and determined that it was insufficient to find that Respondents cannot pay the requested civil penalty. (¶¶ 49-50 of Mr. Rail's November 18, 2009 affirmation.)

To support her determination, Ms. Brooks prepared an affidavit, sworn to November 5, 2010, with Exhibit 1. Exhibit 1 is a copy of Ms. Brooks's resume. In her November 5, 2010 affidavit, Ms. Brooks states that she reviewed copies of the following documents. They are:

- a) IRS Form 1065 filed by the duck farm (EIN #11-1684917) for 2006, 2007 and 2008;
- b) IRS Form 1040 filed by Benjamin and Christine Jurgielewicz for 2006, 2007, 2008 and 2009;
- c) Financial statements for the duck farm for 2006, 2007 and 2008, which had been reviewed by Mr. Fuchs or other members of his accounting firm;
- d) Personal financial statements of Mr. and Mrs. Jurgielewicz for 2006, 2007 and 2008;
- e) A partially completed individual ability to pay (INDY) form generated with a US Environmental Protection Agency (US EPA) computer model;
- f) Corporate information forms for 2006, 2007 and 2008; and
- g) A handwritten list of checks, listed by year with the note, "Environmental."

Copies of these documents are not part of the record. (¶¶ 6, 7, and 11 of Ms. Brooks's November 5, 2010 affidavit.)

Based on her review of the documents identified above, Ms. Brooks concludes as follows. The IRS forms (*i.e.*, Items a and b) were not signed, which makes it impossible to determine whether the copies of the forms provided to the Department are identical to those filed with the IRS. The financial statements

(e.g., Items c and d) were not audited prior to being disclosed, and cannot be authenticated. The checks listed in Item g, were not substantiated with bank statements. Information requested by Department staff is missing, according to Ms. Brooks. For example, Respondents only provided every other page of IRS Form 1040 for 2009, and they did not provide any copies of the IRS 1065 partnership forms. (¶¶ 14, 15 and 18 of Ms. Brooks's November 5, 2010 affidavit.)

In her November 5, 2011 affidavit, Ms. Brooks outlines discrepancies among the financial documents that Respondents provided. For example, IRS 1065 forms for 2006-2008 show total distributions to Benjamin Jurgielewicz of about \$275,000. These distributions, however, are not shown on Mr. Jurgielewicz's IRS 1045 returns for the corresponding years, but are identified as distributions from the partnership to Mr. Jurgielewicz. Ms. Brooks notes that during this period, Respondents claim that the duck farm was losing millions of dollars. (¶ 20 of Ms. Brooks's November 5, 2010 affidavit.)

In addition, IRS 1065 forms for 2006-2008 show guaranteed payments, of various amounts, to Paul Jurgielewicz totaling \$235,000. Respondents offered nothing to show that Paul Jurgielewicz owns any percentage of the partnership, and did not explain why Paul Jurgielewicz received any payments. (¶ 21 of Ms. Brooks's November 5, 2010 affidavit.)

According to Ms. Brooks, the individual ability to pay forms and the personal finance statements provided by Respondents show that Benjamin Jurgielewicz has not paid any living expenses outside of food and clothing. These documents show that Mr. Jurgielewicz did not pay any property taxes, and did not report any expenses associated with heat, utilities, and automobiles. Although the duck farm or another entity may have paid these expenses, Ms. Brooks notes that Respondents provided no information to that effect. Also, these documents show that Mr. Jurgielewicz's personal net worth is zero, and that the balances in his checking and savings accounts are zero. Ms. Brooks observes, however, that records show a credit card balance of \$40,000, and a Sallie Mae debt of \$180,000. (¶¶ 23, 24 and 25 of Ms. Brooks's November 5, 2010 affidavit.)

Ms. Brooks further states that, on the one hand, the IRS 1045 tax returns filed by Mr. and Mrs. Jurgielewicz for 2006-2009 show little or no personal income. On the other hand, the

IRS 1065 tax returns for the duck farm, during the same period, disclose that Mr. Jurgielewicz contributed more than \$1 million to the duck farm. Respondents did not provide any information about the source, or sources, of these personal contributions. Based on these and other discrepancies in the financial materials that Respondents gave to Department staff, Ms. Brooks concludes that Respondents did not demonstrate that they cannot pay the requested civil penalty. (¶ 26 and 30 of Ms. Brooks's November 5, 2010 affidavit.)

According to Ms. Brooks, Department staff requested financial information and tax returns for other entities related to Respondents, but did not receive any of this information. Department staff sought additional information about the following:

- a) Jurgielewicz Feeds, LLC;
- b) Jurgielewicz Trucking, Inc.;
- c) South Shore Acres, Inc (EIN #11-2319615);
- d) South Side Packers, Inc. (EIN #34-1552433);
- e) Jurgielewicz Estates, LLC (EIN #11-3376068);
- f) Jurgielewicz Duck Farm doing business as (d/b/a) Benjamin & Paul Jurgielewicz;
- g) Jurgielewicz Hatcheries, LLC; and
- h) Jurgielewicz Duck Farm, LP.

Ms. Brooks notes that the above listed entities may share income, expenses, as well as other financial resources or obligations with Respondents. Ms. Brooks notes further that without any information related to these other entities, a complete understanding of Respondents' finances is not known. (¶¶ 16 and 17 of Ms. Brooks's November 5, 2010 affidavit.)

With their January 11, 2011 response, Respondents offer an affidavit by Mr. Gordon, sworn to January 10, 2011. As noted above, Mr. Gordon is President of Couak Capital Corporation (Couak), which is a wholly owned subsidiary of Rosedale Cooley & Co., LP. Couak is providing debtor-in-possession financing to

the duck farm as it is reorganized. (¶ 1 of Mr. Gordon's January 10, 2011 affidavit.) Mr. Gordon's affidavit does not respond to Ms. Brooks's review of the financial information Respondents provided through discovery.

Mr. Gordon attached three exhibits to his January 10, 2011 affidavit. Exhibit A consists of copies of the Jurgielewicz Duck Farm bankruptcy petition, signed by Benjamin Jurgielewicz, General Partner, dated January 12, 2010, and accompanying disclosure schedules. Exhibit B is a copy of the engineering report signed by Dennis E. Totzke, P.E., from Applied Technologies, Inc., dated January 10, 2011. Implementation of the operational changes and equipment enhancements outlined in the January 10, 2011 engineering report would bring the duck farm into compliance with the terms and conditions of the March 2008 SPDES permit, according to Mr. Gordon. Exhibit C is a partial copy of the transcript (pp 42-44) from the December 21, 2010 bankruptcy proceeding. (¶¶ 7, 17 and 18 of Mr. Gordon's January 10, 2011 affidavit.)

Mr. Gordon states that Couak performed an in-depth review and evaluation of the duck farm's financial status and operations. Based on upon this review, Couak determined that the duck farm was insolvent and had not been profitable for many years. Mr. Gordon states further that the costs associated with the requirements outlined in the 2007 Order on Consent, such as dredging West Mill Pond and the aeration lagoons, exceeded \$1 million and, in part, drove the duck farm into bankruptcy. (¶ 6 of Mr. Gordon's January 10, 2011 affidavit.)

Mr. Gordon states further that when Respondents filed for bankruptcy in early January 2010, the ducks at the farm had not been fed in days, and the Long Island Power Authority was preparing to shut off electric power to the duck farm. According to Mr. Gordon, vendors would not deliver any products or provide any services to the duck farm unless they were paid with either cash or a certified check. In addition, Mr. Jurgielewicz had not taken a paycheck from the duck farm in three months. Mr. Gordon concludes that, under these circumstances, Respondents do not have the financial means to operate the duck farm much less implement any additional environmental improvements or pay a civil penalty. (¶8 of Mr. Gordon's January 10, 2011 affidavit.)

In Department staff's February 4, 2011 reply, Mr. Rail argues that Respondents did not meet their burden to show they cannot pay a civil penalty. To support this argument, Mr. Rail refers to Ms. Brooks's November 18, 2010 affidavit. (¶ 3 of Mr. Rail's February 4, 2011 affirmation.) Department staff notes that if the Commissioner assesses the requested civil penalty, Respondents would, nonetheless, have "the protections afforded to them by the bankruptcy court to fend off any creditor claims that the bankruptcy court determines cannot be satisfied by the Respondents/Debtor" (¶ 4 [at 15-16] of Mr. Rail's February 4, 2011 affirmation).

As noted above, DEE-1 (§ IV.E.4) states that a respondent has the burden to demonstrate an inability to pay, and that when the violator fails to provide sufficient credible information, Department staff should disregard this factor. DEE-1 (*id.*) states further that that adjusting a civil penalty based on a respondent's inability to pay would require a significant amount of financial information.

The evidence offered by Respondents to support the claim that they could not pay the requested civil penalty is limited to Mr. Jurgielewicz's August 28, 2009 affidavit, Mr. Fuchs's August 28, 2009 affidavit with attached exhibits, and Mr. Gordon's January 10, 2011 affidavit with attached Exhibits A, B and C. The August 2009 affidavits by Messrs. Jurgielewicz and Fuchs were sufficient to raise a fact issue for adjudication, as discussed in my April 29, 2010 ruling (at 42-44). This evidence, however, is not sufficient to demonstrate that Respondents could not pay the requested civil penalty based on the new evidence that Department staff presents in the November 18, 2010 motion to renew. With their January 11, 2011 response to Department staff's November 18, 2010 motion to renew, Respondents do not offer any of the financial information disclosed to Department staff, which Ms. Brooks reviewed before preparing her November 18, 2010 affidavit.

Based on Ms. Brooks's review of the information provided by Respondents, I find that Respondents, though given the opportunity, did not provide sufficient information to demonstrate that they could not pay the requested civil penalty. As detailed in Ms. Brooks's November 18, 2010 affidavit, some of the financial information that Respondents provided could not be verified. Ms. Brooks also identified several significant inconsistencies in the information that Respondents provided.

Of particular concern is the absence of any information about entities potentially related to Respondents. Although Ms. Brooks outlined all the defects associated with Respondents' financial information in her November 18, 2010 affidavit, it is significant to note that Respondents' January 11, 2011 response is silent about all of these concerns. In the absence of a sufficient showing by Respondents that they cannot pay a civil penalty, I recommend that the requested civil penalty not be reduced.

c) Continuous Nature of Violations

The March 2008 SPDES permit incorporates a schedule of compliance to improve the wastewater treatment facilities at the duck farm (Exhibit 3 [page 11 of 13] to Ms. Haas's June 10, 2009 affidavit). Among other things, the schedule required Respondents to prepare various plans and reports, and to submit them to Department staff for review by specific dates. Subsequent to Department staff's review and approval of the required plans and reports, Respondents were required to implement the plans. The latest date in the schedule of compliance was November 1, 2009. The parties did not submit any evidence to show that the dates in the schedule of compliance changed.

In the Department staff's June 9, 2009 motion for order without hearing, Department staff alleged, as the ninth through thirteenth causes of action, that Respondents failed to comply with the terms and conditions of the schedule of compliance (¶¶ 42-51 of Ms. Wilkinson's June 9, 2009 affirmation). I determined, in the April 29, 2010 ruling (at 68-69), that these violations occurred.

In his November 18, 2010 affidavit, Mr. Leung states that subsequent to the April 29, 2010 ruling, Respondents filed an engineering report on June 14, 2010 (Exhibit 6 to Mr. Leung's November 18, 2011 affidavit). Mr. Leung reviewed the report, and found it deficient (Exhibit 7 to Mr. Leung's November 18, 2011 affidavit). Mr. Leung states further that Respondents subsequently filed a second engineering report in the form of a letter dated September 27, 2010 (Exhibit 8 to Mr. Leung's November 18, 2011 affidavit). Upon review, Mr. Leung found the September 27, 2010 letter-report deficient (Exhibit 9 to Mr. Leung's November 18, 2011 affidavit). As of the date of the

November 18, 2010 motion to renew, Mr. Leung notes that Respondents had not complied with any of the deadlines outlined in the schedule of compliance. (¶¶ 21-24 and 27 of Mr. Leung's November 18, 2010 affidavit.)

Mr. Leung reviewed a third engineering report from Respondents' consulting engineers dated January 10, 2011 (see Exhibit B to Mr. Gordon's January 10, 2011 affidavit). Upon review of the January 10, 2011 engineering report, Mr. Leung determined that the report was not approvable. Mr. Leung prepared comments dated February 1, 2011 concerning the January 10, 2011 report, which are attached as Exhibit 3 to Mr. Leung's February 4, 2011 affidavit. (¶ 9 of Mr. Leung's February 4, 2011 affidavit.)

Mr. Leung offered the various engineering reports and his comments about them to show that, as of the date of Department staff's November 18, 2010 motion to renew, Respondents had not met the requirements outlined in the schedule of compliance incorporated into the March 2008 SPDES permit. (¶ 9 of Mr. Leung's February 4, 2011 affidavit.) Department staff argues, therefore, that the longer a violation continues uncorrected or unremediated, the greater the risk of harm to, and the loss of benefits from, the natural resource and, correspondingly, the greater the size of the gravity component associated with the civil penalty (DEE-1 § IV.D.2.a; and ¶ 44 of Mr. Rail's November 18, 2010 Affirmation).

In addition to the violations associated with the schedule of compliance, Mr. Leung refers to the duck farm's DMRs for June and July 2010 and a memorandum that he prepared dated October 12, 2010 (Exhibit 9 to Mr. Leung's November 18, 2011 affidavit). During the summer, the March 2008 SPDES permit limits UOD from the duck farm to 153 pounds per day (lb/day). The June 2010 DMR, however, shows a discharge of 3,409 lb/day of UOD, which is 2,128% above the allowable permit limit. The July 2010 DMR shows a discharge of 1,184 lb/day of UOD, which is 673% above the limit. During the summer, the March 2008 SPDES permit limits total nitrogen to 25 lb/day. The June 2010 DMR, however, shows a discharge of 319 lb/day, which is 1,176% above the permit limit. The July 2010 DMR shows a discharge of 187 lb/day, which is 648% above the limit. (¶ 26 of Mr. Leung's November 18, 2010 affidavit.)

SFR attached a copy of Respondents' November 2010 DMR as Exhibit C to Ms. Kraham's January 11, 2011 affirmation. According to the November 2010 DMR, Respondents exceeded the effluent limits for UOD, total suspended solids, total nitrogen, and carbonaceous biological oxygen demand. In addition, SFR provided a copy of a letter dated December 6, 2010 from Mr. Leung to Mr. Jurgielewicz as Exhibit B to Ms. Kraham's January 11, 2011 affirmation. Mr. Leung's December 6, 2010 letter reminds Respondents of their obligation to advise Department staff of any operational changes at the duck farm that would decrease process flow. The letter also states that Department staff's review of the DMRs shows that effluent limits for certain parameters have been exceeded, and that under such circumstances, Respondents are obliged to file noncompliance reports with the DMRs. (¶¶ 5 and 6 of Ms. Kraham's January 11, 2011 affirmation.) SFR argues that these ongoing permit violations are an aggravating factor with respect to the civil penalty calculation (SFR's January 11, 2011 brief at 9).

Respondents object to the evidence described above by Department staff and SFR that is offered to demonstrate the continuing nature of the violations asserted in the June 9, 2009 motion for order without hearing. Respondents assert that to rely on this evidence to justify the requested civil penalty would be a violation of due process. Respondents argue that any violations not initially alleged in the June 9, 2009 motion, and proven, should not be considered now unless Department staff amends its pleadings. (¶ 2[v] of Mr. Sinnreich's January 11, 2011 affirmation; Respondents' memorandum of law at 5 and 32.)

Regardless of whether any violations continued or new ones occurred subsequent to either service of the June 9, 2009 motion for order without hearing, or issuance of the April 29, 2010 ruling, Mr. Leung states that wastewater discharges from the duck farm consistently exceeded several effluent limits from 2005 to February 2009. To support this statement, Mr. Leung refers to Exhibit 1 attached to his February 4, 2011 affidavit. Exhibit 1 is a list of the number of DMR violations from January 31, 2005 to February 28, 2009. These violations correspond to the charges alleged in the June 9, 2009 motion. (¶ 5 of Mr. Leung's February 4, 2011 affidavit.)

The continuous nature of the violations alleged in the June 9, 2009 motion is not in dispute. For the reasons discussed in the April 29, 2010 ruling, Respondents reported excess effluent

limits for several parameters regulated by the SPDES permit from January 2005 to February 2009. On several occasions during that same period, Respondents either did not file DMRs, or did not file them on time, in violation of the terms and conditions of the SPDES permit (April 29, 2010 ruling at 69-70 and 73). I conclude that the continuous nature of these demonstrated violations, as asserted in the June 9, 2009 motion, should be considered an aggravating factor that provides justification for the requested civil penalty.

In order to determine the appropriate civil penalty, it is not necessary to reach the questions of whether new violations occurred, subsequent to service of the June 9, 2009 motion, or whether violations initially alleged in the June 9, 2009 motion for order without hearing continued.

4. Recommended Civil Penalty

In the June 9, 2009 motion for order without hearing, Department staff originally requested \$37,500 for each of the 16 causes of action for a total requested civil penalty of \$600,000 (16 causes of action x \$37,500 = \$600,000). Department staff seeks the same civil penalty in the November 18, 2010 motion to renew (¶ I of Mr. Rail's November 18, 2010 affirmation at 23).

For the reasons outlined above, Respondents obtained an economic benefit by avoiding costs related to compliance with statutory and regulatory requirements. The estimated economic benefit associated with Respondents' noncompliance is at least \$733,000. It is significant to note that the estimated economic benefit exceeds the requested civil penalty by more than \$100,000.

With the November 18, 2010 motion to renew, Department staff provided evidence to show that actual harm to the Forge River resulted from the violations. Residential development is the main source of nitrogen loading in the Forge River. The duck farm, nonetheless, is a significant secondary source of nitrogen loading particularly in West Mill Pond. As Department staff correctly argues, the Department has an obligation to enforce compliance among facilities, such as the duck farm, under its jurisdiction. The actual environmental harm as well as the continuous nature of the violations, which occurred from

January 2005 to February 2009, provide a reasonable basis for the requested civil penalty.

For the foregoing reasons, I recommend that the Commissioner assess a total civil penalty of \$600,000. This is the full amount requested by Department staff.

B. Permit Suspension or Revocation

Respondents objections concerning permit suspension or revocation have been addressed above. In the June 9, 2009 motion for order without hearing, Department staff requested "such other relief as the Commissioner shall deem just, necessary and appropriate" (¶ V of Ms. Wilkinson's June 9, 2009 affirmation at 14). With its petition to intervene, SFR expressly asked the Commissioner to prohibit further wastewater discharges from the duck farm until Respondents' could demonstrate compliance with the terms and conditions of the SPDES permit (SFR's August 14, 2009 brief at 42-44). Such a request reasonably implies permit suspension. In addition, SFR expressly requested that Department staff commence a permit revocation hearing pursuant to 6 NYCRR 621.13(b) (*id.*; ¶ 28 to Mr. Super's August 14, 2009 affirmation, and Exhibit Y). Finally, the April 29, 2010 ruling (at 51 and 64) provided the parties with the opportunity to develop a record about whether Respondent's SPDES permit should be suspended or revoked. Respondents, therefore, had notice of this potential outcome, and were provided with an opportunity to address the appropriateness of permit suspension or revocation.

Permit suspension or revocation would result in, at least, a temporary, if not the permanent, closure of the duck farm. In his August 28, 2009 affidavit (¶ 15), Mr. Jurgielewicz outlines the adverse economic impacts associated with permit suspension or revocation. In addition to Mr. Jurgielewicz, the supervisory staff for the duck farm consists of five other individuals. They are Mr. Jurgielewicz's brother, Paul, one clerical assistant, two people who oversee hatching, and a labor foreperson. The foreperson oversees 60 unskilled laborers who work on the duck farm and the processing plant. If the SPDES permit for the duck farm is suspended or revoked, Mr. Jurgielewicz states that the supervisory staff and laborers would lose their jobs.

Since Respondents filed their January 11, 2011 response to Department staff's November 18, 2010 motion to renew, it is not known whether any, and if so how many, people are currently employed at the duck farm. It would be reasonable to expect, however, that the number of employees working at the duck farm has been reduced, based on the operational changes outlined in Mr. Gordon's January 10, 2011 affidavit (¶ 15).

The regulations at 6 NYCRR 750-2.1(e) state, in pertinent part, that

[a]ny permit noncompliance constitutes a violation of the Environmental Conservation Law and the Clean Water Act and is grounds for: enforcement action; for permit suspension, revocation or modification; and for denial of a permit renewal application.

Based on the number and duration of established violations, as determined in the April 29, 2010 ruling (at 68-73), the Commissioner should either suspend or revoke Respondents' SPDES permit, and prohibit any further discharges from the duck farm. Permit suspension or revocation should remain in effect until Respondents can demonstrate that the practices and treatment facilities at the duck farm ensure that wastewater discharges would comply with the effluent limits for all parameters set forth in the SPDES permit.

C. Remediation and Closure Plan

Initially, SFR requested an order directing Respondents to restore West Mill Pond. SFR contended that restoration should include dredging West Mill Pond to remove sludge, installing aerators to improve oxygen levels, and funding a project to remove sea lettuce (*Ulva lactuca*) (SFR's August 14, 2009 brief at 45.)

In its response to the November 18, 2010 motion to renew, SFR supports Department staff's request for relief provided the Commissioner orders either permit revocation or suspension, and an immediate injunction against further wastewater discharges from the duck farm. SFR contends that substantial remediation of West Mill Pond is necessary; however, SFR would accept a closure plan that would provide for some remediation. (SFR's January 11, 2011 brief at 1-2.)

As part of its request for relief, Department staff seeks an order directing Respondents to "submit an approvable closure plan" (¶ IV of Mr. Rail's November 18, 2010 affirmation at 23). In his November 18, 2010 affidavit (¶ 29), Mr. Leung requests a closure plan. According to Mr. Leung, the closure plan must address all parts of the wastewater system, "including removal of stockpiled duck manure" (*id.*).

Respondents' January 11, 2011 response is silent about remediating West Mill Pond, and developing a closure plan for the duck farm. In his January 10, 2011 affidavit (¶¶ 15 and 16), Mr. Gordon states that Respondents have implemented a number of changes to scale back activities at the duck farm in order to significantly reduce the volume of wastewater discharged from the duck farm. These changes, however, do not appear to address how to close the duck farm.

Before the Commissioner could order Respondents to prepare a closure plan, Department staff would need to provide additional guidance about the scope of the requested plan. I recommend that the Commissioner reserve on this portion of the request until Department staff provides additional details about the scope of the closure plan.

Findings of Fact

The findings of fact set forth in the April 29, 2010 ruling (at 64-73) are incorporated by reference in to this ruling. In addition, the following findings of fact are established, as a matter of law, for the purpose of this proceeding.

I. The Forge River

1. The Forge River is an estuary that flows south into Moriches Bay. Moriches Bay is part of the Long Island south shore lagoon system. (*Nutrient Report* at 2.)
2. Tidal flow in the Forge River extends up to the Montauk Highway where two box weirs are located. These weirs impound East Mill Pond and West Mill Pond. (*History Report* at 2 and 4; Exhibit A to Ms. Kraham's January 11, 2011 affirmation.)

II. Economic Benefit

3. The September 25, 2010 engineering report by Applied Technologies, Inc., identifies and reviews the existing wastewater treatment facilities at the Jurgielewicz Duck Farm. The engineering report recommends the installation of the following improvements: (1) a clarifier system, (2) a denitrification system, and (3) aerators.
4. The September 25, 2010 engineering report estimates the capital costs of these improvements. The approximate cost for the clarifier would be \$350,000. The estimated costs for the denitrification system and the aerators would be \$250,000, and \$133,000, respectively. The sum of these costs is \$733,000. (Exhibit 8 to Mr. Leung's November 18, 2010 affidavit.)
5. Based on the September 25, 2010 engineering report, Respondents realized an economic benefit of at least \$733,000 by not installing these improvements in violation of the terms and conditions of the March 2008 SPDES permit.

III. Gravity Component

6. Nutrients enter the Forge River from groundwater, runoff from land, and the atmosphere. Excess nutrients fertilize the waterway, and cause the overproduction of phytoplankton and algae. The microbial degradation of this organic matter can lead to hypoxic (low dissolved oxygen concentrations) or anoxic (no oxygen) conditions. (*Nutrient Report* at 2.) Under these conditions, marine life and biodiversity decrease, and the overall health of the riverine habitat degrades (*Ecology Report* at 6).
7. The largest source of nitrogen to the Forge River is associated with groundwater flows within the watershed (*Nutrient Report* at 12). The volume of groundwater entering the Forge River can be estimated by measuring the salinity of the incoming and outgoing tidal volumes, the volume of water between the high and low water, and

the stream flow during the tidal cycle (*Oceanography Report* at 11-12.)

8. The primary source of nitrogen in the groundwater flowing into the Forge River is from cesspools and septic tanks associated with residential development. A secondary source of nitrogen in the groundwater is from the application of commercial and residential fertilizers. Approximately 64% of the nitrogen entering the Forge River comes from groundwater flows. (*Nutrient Report* at 12-14.)
9. The second largest source of nitrogen to the Forge River is from surface water sources that include its tributaries. East Mill Pond and West Mill Pond are the largest tributaries with the highest flow rates to the Forge River. West Mill Pond is about 72% of the total flow from the two ponds, and contributes the largest amount of nitrogen from non-groundwater sources. Nitrogen from West Mill Pond is associated with the Jurgielewicz Duck Farm. The amount of nitrogen from ducks is estimated at 91,730 lbs. per year, which is approximately 19% of the nitrogen entering the Forge River. (*Nutrient Report* at 13-14; *Oceanography Report* at 11.)
10. Tidal exchange removes about 85% of the total amount of nitrogen that enters the Forge River. In addition, some nitrogen is removed from the water column when it becomes buried in sediments. (*Nutrient Report* at 14; *Ecology Report* at 7.)
11. Off site impacts from duck farm operations are twofold. First, the nutrients (primarily nitrogen and phosphorous), suspended solids, and coliform bacteria in the wastewater discharged from the duck farm degrade the quality of the receiving waters. As a result, the predominate algae species have changed, and are now dominated by smaller forms. Algae, concentrated in the tens of billions of cells per liter, turn the water a pea green color. Other factors such as shallow water depths, and low tidal flushing rates increase the water temperature, which in turn, contribute to the excessive algae blooms. (February 2009 US Army Corps of Engineers

report at 3-5; ¶ 5 and Exhibit B to Mr. Super's August 14, 2009 affirmation.)

12. The second impact is from a thick layer of duck sludge that blankets the bottom of Forge River and its tributaries. The sludge has altered the riverine habitat. It has a high organic content and is a concentrated source of bacteria, nitrogen, phosphorous, potassium and biological oxygen demand. As this organic matter decomposes, dissolved oxygen becomes depleted, and the resulting anaerobic digestion produces hydrogen sulfide gas. Although the number of duck farms has substantially diminished since the 1960s, substantial deposits of duck sludge, and the effects associated with it, remain. (February 2009 US Army Corps of Engineers report at 3-5; ¶ 5 and Exhibit B to Mr. Super's August 14, 2009 affirmation.)
13. Wastewater discharges from Jurgielewicz Duck Farm in excess of the effluent limits prescribed in the SPDES permit related to several parameters, among them, ultimate oxygen demand, total suspended solids, settleable solids, oil and grease, and coliform, adversely impacted the water quality of West Mill Pond and the Forge River.

IV. Respondents' Ability to Pay a Civil Penalty

14. On January 12, 2010, Benjamin Jurgielewicz, as general partner of the Jurgielewicz Duck Farm, filed a voluntary petition and supporting documents with the US Bankruptcy Court, Eastern District of New York, pursuant to Chapter 11 (Exhibit A to Mr. Gordon's January 10, 2011 affidavit).
15. In response to Department staff's discovery demands, Respondents provided copies of the following documents for Department staff's review:
 - a. IRS Form 1065 filed by the Jurgielewicz Duck Farm (EIN #11-1684917) for 2006, 2007 and 2008;
 - b. IRS Form 1040 filed by Benjamin and Christine Jurgielewicz for 2006, 2007, 2008 and 2009;

- c. Financial statements for the duck farm for 2006, 2007 and 2008, which had been reviewed by Mr. Fuchs or other members of his accounting firm;
 - d. Personal financial statements of Mr. and Mrs. Jurgielewicz for 2006, 2007 and 2008;
 - e. A partially completed individual ability to pay (INDY) form generated with a US Environmental Protection Agency (US EPA) computer model;
 - f. Corporate information forms for 2006, 2007 and 2008; and
 - g. A handwritten list of checks, listed by year with the note, "Environmental." (¶¶ 6, 7, and 11 of Ms. Brooks's November 5, 2010 affidavit.)
16. The above identified IRS forms (i.e., Items a and b) were not signed. Consequently, it is impossible to determine whether the copies of the forms provided to Department staff are identical to those filed with the IRS. The financial statements (e.g., Items c and c) were not audited prior to being disclosed, and cannot be authenticated. The checks listed in Item g, were not substantiated with bank statements. (¶¶ 14 and 15 of Ms. Brooks's November 5, 2010 affidavit.)
17. A number of discrepancies and inconsistencies exist among the financial documents that Respondents provided to Department staff. For example, IRS 1065 forms for 2006-2008 show total distributions to Benjamin Jurgielewicz of about \$275,000. These distributions, however, are not shown on Mr. Jurgielewicz's IRS 1045 returns for the corresponding years, but are identified as distributions from the partnership to Mr. Jurgielewicz. (¶ 20 of Ms. Brooks's November 5, 2010 affidavit.)
18. In addition, IRS 1065 forms for 2006-2008 show guaranteed payments, of various amounts, to Paul Jurgielewicz totaling \$235,000. Respondents offered nothing to show that Paul Jurgielewicz owns any percentage of the partnership, and did not explain why Paul Jurgielewicz

received any payments. (¶ 21 of Ms. Brooks's November 5, 2010 affidavit.)

19. The individual ability to pay forms and the personal finance statements provided by Respondents show that Benjamin Jurgielewicz has not paid any living expenses outside of food and clothing. These documents show that Mr. Jurgielewicz did not pay any property taxes, and did not report any expenses associated with heat, utilities, and automobiles. Although the duck farm or another entity may have paid these expenses, Respondents provided no information to that effect. Also, these documents show that Mr. Jurgielewicz's personal net worth is zero, and that the balances in his checking and savings accounts are zero. However, records show a credit card balance of \$40,000, and a Sallie Mae debt of \$180,000. (¶¶ 23, 24 and 25 of Ms. Brooks's November 5, 2010 affidavit.)
20. Finally, the IRS 1045 tax returns filed by Mr. and Mrs. Jurgielewicz for 2006-2009 show little or no personal income. During the same period, however, the IRS 1065 tax returns for the duck farm disclose that Mr. Jurgielewicz contributed more than \$1 million to the duck farm. Respondents did not provide any information about the source, or sources, of these personal contributions. (¶ 26 of Ms. Brooks's November 5, 2010 affidavit.)
21. Department staff requested financial information and tax returns for other entities related to Respondents, but did not receive any of this information. Department staff sought additional information about the following:
 - a. Jurgielewicz Feeds, LLC;
 - b. Jurgielewicz Trucking, Inc.;
 - c. South Shore Acres, Inc (EIN #11-2319615);
 - d. South Side Packers, Inc. (EIN #34-1552433);
 - e. Jurgielewicz Estates, LLC (EIN #11-3376068);
 - f. Jurgielewicz Duck Farm doing business as (d/b/a) Benjamin & Paul Jurgielewicz;

g. Jurgielewicz Hatcheries, LLC; and

h. Jurgielewicz Duck Farm, LP.

22. The above listed entities may share income, expenses, as well as other financial resources or obligations with Respondents. Without any information related to these other entities, a complete understanding of Respondents' finances cannot be determined. (¶¶ 16 and 17 of Ms. Brooks's November 5, 2010 affidavit.)
23. Respondents failed to provide sufficient information to demonstrate that they cannot pay a civil penalty.

V. Continuous Nature of the Violations

24. From 2005 to February 2009, wastewater discharges from the duck farm consistently exceeded the effluent limits prescribed in the SPDES permit for several parameters. (Exhibit 4 to Ms. Haas's June 10, 2009 affidavit; Exhibit 1 to Mr. Leung's February 4, 2011 affidavit.)

Conclusions

Conclusions Nos. 1 through 5, inclusive, as set forth in the April 29, 2010 ruling (at 73) are incorporated by reference in to this ruling. Additional conclusions are set forth below.

1. When renewing a motion for order without hearing based on the availability of new evidence, the moving party must provide a reasonable explanation for failing to submit the new evidence on the original motion (see 6 NYCRR 622.6[c], CPLR 2221[e] and *Valentine, supra* at 3-4). With respect to the captioned matter, Department staff provided an adequate explanation for renewing its motion for an order without hearing consistent with 6 NYCRR 622.6(c) and CPLR 2221(e).
2. The SoMAS reports are relevant to the captioned matter because they document how anthropomorphic activities, such as residential development and duck farming, in the Forge River watershed have adversely impacted the water quality of the river.

3. Moreover, the information presented in the SoMAS reports is reliable. The reports were prepared for the Town of Brookhaven by the Stony Brook University, School of Marine and Atmospheric Sciences, and the Suffolk County Department of Health Services. They are scholarly reports that include original research and data collection, as well as a search of the existing published literature that dates from 1951 to 2010.
4. Pursuant to 6 NYCRR 750-2.1(e) the Commissioner may suspend or revoke a SPDES permit for violations of the ECL and the federal Clean Water Act. On numerous occasions, Respondents received notice that a potential outcome of this enforcement action could be permit suspension or revocation. (See, e.g., ¶ 16 of Ms. Wilkinson's June 9, 2009 affirmation ["Any permit noncompliance is a violation of the Environmental Conservation Law and the Clean Water Act and is grounds for: enforcement action; for permit suspension, revocation or modification..."]; ¶ 28 of Mr. Super's August 14, 2009 affirmation, and Exhibit Y; April 29, 2010 ruling at 51 and 64).
5. In addition, Respondents received notice of Department staff's request for permit revocation with service of the November 18, 2010 motion. Subsequently, Respondents had the opportunity to respond to the November 18, 2010 motion, and took advantage of that opportunity when they filed their January 11, 2011 response.

Recommendations

1. The Commissioner should affirm the April 29, 2010 ruling, and grant Department staff's June 9, 2009 motion for order without hearing with respect to Respondents' liability.
2. The Commissioner should grant Department staff's April 29, 2010 motion to renew concerning relief.
3. The Commissioner should assess a total civil penalty of \$600,000 against Respondents, Benjamin Jurgielewicz and Jurgielewicz Duck Farm, doing business as Jurgielewicz Duck Farm.

4. The Commissioner should either suspend or revoke Respondents' March 2008 SPDES permit, and prohibit any wastewater discharges from the duck farm until Respondents can demonstrate compliance with the effluent limits set forth in the SPDES permit.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
September 14, 2011

Appendices

Appendix A: Department staff's Motion to Renew dated November 18, 2010, and Reply dated February 4, 2011.

Appendix B: Respondents' Response dated January 11, 2011.

Appendix C: Save the Forge River Inc.'s Response dated January 11, 2011.

Appendix A
Jurgielewicz Duck Farm
DEC Case No. R1-20081103-224

Department Staff's Motion to Renew and Reply

I. November 18, 2010 - Motion

Notice of Motion to Renew dated November 18, 2010

Affirmation in support of Motion to Renew by Vernon G. Rail
dated November 18, 2010

1. Exhibit 1 - Respondents' FOIL request and DEC response
2. Exhibit 2 - D. Totzke Affidavit-Attachment 2 and Figure 1
3. Exhibit 3 - Letters to Jurgielewicz Duck Farm from
Suffolk County Soil and Water Conservation District dated
September 2, 2010 and October 20, 2010.

Affidavit of Anthony Y. Leung sworn to November 18, 2010

1. Exhibit 1 - Mr. Leung's curriculum vitae
2. Exhibit 2 - Respondents' SPDES permit
3. Exhibit 3 - SoMAS Reports:
 - a. The Forge River Nutrient Report
 - b. What History Reveals about Forge River Pollution
 - c. Aspects of Physical Oceanography of Forge River
 - d. Sediment Quality Characterization of Forge River,
Long Island
 - e. Some Aspects of Forge River Ecology
4. Exhibit 4 - DEC Field Report for September 29, 2010
5. Exhibit 5 - Applied Technology phone log dated February
16, 2007
6. Exhibit 6 - Respondents' June 14, 2010 Engineering Report
7. Exhibit 7 - DEC Memo with comments in reply to
Respondents' June 14 Report

8. Exhibit 8 - Respondents' September 27, 2010 Engineering Report
9. Exhibit 9 - DEC Memo with comments in reply to Respondents' September 14 Report

Affidavit of Sharon Brooks sworn to November 5, 2010
Exhibit 1 - Ms. Brooks' curriculum vitae

Affidavit of Isaac Cheng sworn to November 5, 2010

1. Exhibit 1 - Audio disk of February 12, 2010 bankruptcy meeting
2. Exhibit 2 - I. Cheng letter dated September 30, 2010 to Respondents' bankruptcy counsel

II. February 4, 2011 - Reply

Affirmation in reply to Respondents' Opposition to Motion to Renew by Vernon G. Rail dated February 4, 2011

Affidavit of Anthony Y. Leung sworn to February 4, 2011

1. Exhibit 1 - DMR violations from June 2005 to February 2009
2. Exhibit 2 - Jeffery Kassner, AICP, Director of Environmental Protection, Town of Brookhaven, dated January 31, 2011 to Tony Leung, P.E., DEC Region 1
3. Exhibit 3 - Memorandum dated February 1, 2011 from Tony Leung to Vernon Rail, RE: Comments on the January 2011 Design Engineering Report for Jurgielewicz Duck Farm
4. Exhibit 4 - Preliminary Outline for Engineering Study for WWTP Upgrade, Jurgielewicz Duck Farm dated July 17, 2008 and email.

Appendix B
Jurgielewicz Duck farm
DEC Case No. R1-20081103-224

Respondents' Response dated January 11, 2011

Affirmation by Jonathan Sinnreich dated January 11, 2011

1. Exhibit A - Email dated March 25, 2010 from Jonathan Sinnreich to Gordon Daniel, RE: Jurgielewicz Duck Farm; email dated March 25, 2010 from Jonathan Sinnreich to Kari Wilkinson, RE: Jurgielewicz Duck Farm
2. Exhibit B - Letter dated April 7, 2010 from Jonathan Sinnreich to Vernon G. Rail, RE: Preliminary Business Plan, with enclosure; Letter dated April 7, 2010 from Jonathan Sinnreich to William H. Spitz (DEC Region 1, Division of Water), RE: Notice of Violation - Jurgielewicz Duck Farm
3. Exhibit C - Letter dated April 28, 2010 from Jonathan Sinnreich to William H. Spitz, RE: Notice of Violation - Jurgielewicz Duck Farm

Affidavit of Daniel L. Gordon sworn to January 10, 2011

1. Exhibit A - Voluntary Petition: United States Bankruptcy Court Eastern District of New York; Certificate of Resolution dated January 12, 2010; Affirmation by Benjamin Jurgielewicz with attachments (Local Bankruptcy Rule 1007-3)
2. Exhibit B - Design Engineering Report by Applied Technologies, Inc. dated January 2001 by
3. Exhibit C - Transcript of Proceedings held on December 21, 2010 before Hon. Dorothy Eisenberg, US Bankruptcy Judge

Memorandum of Law in Opposition to Motion to Renew dated January 11, 2011

Appendix C

Jurgielewicz Duck farm
DEC Case No. R1-20081103-224

Save the Forge River, Inc.'s Response dated January 11, 2011

Affirmation by Susan J. Kraham dated January 11, 2011

1. Exhibit A - Map of the Forge River and tributaries
2. Exhibit B - Letter dated December 6, 2010 from Tony Leung to Benjamin Jurgielewicz. Advisory letter on reporting requirements
3. Exhibit C -Jurgielewicz Duck Farm, Discharge Monitoring Report, November 2010

Brief in Response to DEC's Motion to Renew dated January 11, 2011

Affidavit of Service by Susan J. Kraham, dated January 11, 2011