

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

Rulings on:

(1) Motion for Order
without hearing,
and
(2) Petition to
Intervene

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

DEC Case No.
R1-20081103-224

April 29, 2010

Respondents

Proceedings

I. Motion for Order without Hearing

With a cover letter dated June 9, 2009, Staff from the Department's Region 1 Office, Stony Brook, New York (Department staff) provided the Office of Hearings and Mediation Services (OHMS) with a copy of a motion for order without hearing dated June 9, 2009 with supporting papers (see Title 6 of the Official Compilation of Codes Rules and Regulations of the State of New York [6 NYCRR] § 622.12). In this matter, Department staff is represented by Kari E. Wilkinson, Esq., Assistant Regional Attorney. Appendix A to this ruling is a list of the papers filed by Department staff.

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.

In sixteen causes of action, the June 9, 2009 motion alleges that Mr. Jurgielewicz and the Jurgielewicz Duck Farm (collectively, Respondents) violated the terms and conditions of the state pollutant discharge elimination system (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 requests an Order from the Commissioner that grants the motion for order without hearing; assesses a total civil penalty of \$600,000; and directs Respondents to comply with Schedule A (see Wilkinson Affirmation, Exhibit D), which outlines the activities that Respondents must undertake so that the treated wastewater discharges from the duck farm would comply with the effluent limitations of the SPDES permit.

Respondents, by their legal counsel, Jonathon Sinnreich, Esq. (Sinnreich, Kosakoff & Messina, LLP, Central Islip, New York), replied to Department staff's June 6, 2009 motion for order without hearing. Respondents' reply papers are dated August 28, 2009. Appendix B to this ruling is a list of the documents in Respondents' reply. Although Respondents oppose Department staff's June 6, 2009 motion, Respondents admit some of the alleged violations. Respondents contend, however, that a hearing is necessary to resolve factual disputes associated with the violations they contest, as well as to determine the appropriate relief.

With leave from the Chief Administrative Law Judge, Department staff responded to Respondents' reply. Department staff's response is dated October 9, 2009.

In a letter dated October 19, 2009, Respondents, Department staff and Save the Forge River, Inc., were advised that the captioned matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell.

With a cover letter dated January 15, 2010, Mr. Sinnreich advised that Respondents filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code on January 11, 2010. During a telephone conference call convened on February 5, 2010, Respondents' bankruptcy counsel advised that the Department was identified as a creditor in the bankruptcy proceeding. Also, counsel acknowledged that the bankruptcy proceeding does not bar the Department from enforcing the terms and conditions of Respondents' SPDES permit.

II. Petition to Intervene

With a cover letter dated August 14, 2009, Save the Forge River, Inc. (SFR), by its legal counsel, Reed W. Super, Esq.

(Super Law Group, LLC, New York, New York) and Susan J. Kraham, Esq., (The Environmental Law Clinic, Columbia University School of Law, New York, New York) petitioned to intervene in the captioned matter pursuant to 6 NYCRR 622.10(f). Appendix C is a list of the documents submitted with the petition to intervene.

Respondents and Department staff oppose SFR's petition to intervene. Respondents' affirmation in opposition is dated September 25, 2009. Department staff's opposition is dated September 28, 2009. In their respective papers, Respondents and Department staff argue that SFR's petition does not meet the standards for intervention outlined at 6 NYCRR 622.10(f).

Discussion

I. Commencement of Proceedings and Motion for Order without Hearing

With service of a notice of hearing, pre-hearing conference and complaint dated December 5, 2008 upon Respondents, Department staff duly commenced the captioned administrative enforcement action. With a cover letter dated January 21, 2009, Respondents filed an answer.

In addition to a notice of hearing and complaint, Department staff may serve a motion for order without hearing. With service of the motion upon a respondent, Department staff must also send a copy of the motion papers to the Chief ALJ with proof of service of the motion upon the respondent. (See 622.3[b][1] and 622.12[a].)

Ms. Wilkinson states, in her June 9, 2009 affirmation (¶¶ 9 and 10), that Respondents agreed to accept service of an amended notice of hearing and complaint. However, Department staff served the June 6, 2009 motion for order without hearing rather than serve an amended complaint.

After service of the June 6, 2009 motion, Department staff consented to an extension of time for Respondents to file their reply papers. OHMS received them on August 31, 2009. Consequently, there are no issues related to the commencement of this administrative enforcement action and the subsequent service of Department staff's June 6, 2009 motion for order without hearing.

A motion for order without hearing must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. (See 6 NYCRR 622.12[d]; Civil Practice Law and Rules [CPLR] § 3212[b].)

An attorney's affirmation "has no probative force" unless the attorney has first-hand knowledge of the facts at issue (Siegel, NY Prac § 281, at 442 [3d ed] [citation omitted]). In 2003, the Commissioner elaborated on the standard for granting a motion for order without hearing, which is equivalent to the standard applied for summary judgment:

The moving party on a summary judgment motion has the burden of establishing his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor. The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. [A supporting] affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof. The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.

(*Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [internal quotation marks and citations omitted].)

Additionally, the weight of the evidence is not considered on a motion for order without hearing.

Rather, the issue is whether the moving party has offered sufficient evidence to support a prima facie case for summary judgment. The test for sufficiency of evidence in the administrative context is the substantial evidence test -- whether the factual finding is supported by the kind of evidence on which

responsible persons are accustomed to rely in serious affairs.

(*Matter of Tractor Supply Co.*, Decision and Order of the Commissioner, August 8, 2008, at 3 [internal quotation marks and citations omitted].)

A. SPDES Permit Renewals

Respondents have held SPDES Permit No. NY-008125 since February 1975 (¶ 7 Haas Affidavit). Since 1975, Department staff has issued renewal SPDES permits several times. 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. Permit renewal terms, relevant to the captioned enforcement action, are effective from June 1, 2001 to June 1, 2006 (see Haas Affidavit, Exhibit 2), and from March 28, 2008 to January 7, 2012 (see Haas Affidavit, Exhibit 3).

Department staff conducted a full technical review of the duck farm's SPDES permit in 2005, and issued a draft permit in May 2005. The draft SPDES permit included a revised effluent limit for total nitrogen, among other things. The draft SPDES permit was revised for a second time in December 2007. (¶ 10 Leung Affidavit.)

Subsequently, modifications to Respondents' SPDES permit became effective on March 28, 2008. During the intervening time from June 1, 2006 to March 28, 2008, Respondents operated the duck farm pursuant to the terms and conditions of the SPDES permit, effective from June 1, 2001 to June 1, 2006, as provided for by State Administrative Procedure Act (SAPA) § 401(2). (¶ 8 Haas Affidavit; ¶ 6 Leung Affidavit.)

The terms and conditions of the SPDES permits 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 compliance schedule to upgrade the facility to meet effluent limits and monitoring requirements by November 1, 2009. (See Haas Affidavit, Exhibits 2 and 3; ¶ 10 Leung Affidavit.)

B. Enforcement and Order on Consent

In 2004, Department staff and the Suffolk County District Attorney's Office commenced a criminal enforcement action against Mr. Jurgielewicz and the duck farm because the wastewater discharge from the duck farm had created a delta in West Mill Pond. The criminal enforcement action was resolved with the execution of an administrative Order on Consent (DEC File No. R1-20040511-232) dated February 7, 2005 (see Wilkinson Affirmation, Exhibit A). The February 7, 2005 Order on Consent required Mr. Jurgielewicz to dredge West Mill Pond, among other things. In addition, Department staff imposed some modifications to the SPDES permit, as discussed above. (¶ 2 Hass Affidavit; ¶ 7 Leung Affidavit.)

C. Alleged Violations

In Ms. Wilkinson's June 9, 2009 affirmation (¶¶ 18-60), Department staff outlines the charges alleged against Respondents in sixteen causes of action.

1. Reported Effluent Limits

The violations alleged in the first through eighth causes of action are based on information that Respondents reported on the discharge monitoring reports (DMRs) filed with the Department. In the first cause of action (¶¶ 18-20 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily average effluent limits prescribed in the SPDES permit for ultimate oxygen demand (UOD) on 33 occasions between January 2005 and February 2009. As the second cause of action (¶¶ 21-23 Wilkinson Affirmation), Department staff contends that Respondents exceeded the daily maximum effluent limits prescribed in the SPDES permit for UOD on 30 occasions between March 2005 and December 2008.

In the third cause of action (¶¶ 24-26 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily average effluent limit prescribed in the SPDES permit for total suspended solids (TSS) on 24 occasions between January 2005 and February 2009. For the fourth cause of action (¶¶ 27-

29 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily maximum effluent limit prescribed in the SPDES permit for TSS in June 2006; and March, April, May, June, July and August 2007.

As the fifth cause of action (¶¶ 30-32 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily average effluent limit prescribed in the SPDES permit for oil and grease (O&G) on 22 occasions from March 2005 to November 2008. In the sixth cause of action (¶¶ 33-35 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily maximum effluent limit prescribed in the SPDES permit for O&G on 23 occasions between October 2005 and February 2009.

For the seventh cause of action (¶¶ 36-38 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily maximum effluent limit prescribed in the SPDES permit for settleable solids on 21 occasions from March 2005 through January 2009.

As the eighth cause of action (¶¶ 39-41 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily maximum effluent limit prescribed in the SPDES permit for coliform in October and December 2005; January, April, May, and November 2006; February, June and July 2007; December 2008; and January 2009.

2. Compliance Schedule

The violations alleged in the ninth through thirteenth causes of action relate to the requirements outlined in the SPDES permit that became effective on March 28, 2008, and which includes a schedule of compliance (see Haas Affidavit, Exhibit 3 at 11 of 13). In the ninth cause of action (¶¶ 42-45 Wilkinson Affirmation), Department staff asserts that Respondents did not submit a comprehensive nutrient management plan to Department staff by April 1, 2008 as required by Item 1 of the compliance schedule (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a]). In addition, Department staff contends that the required comprehensive management plan is overdue by 433 days, based on the date of Department staff's motion.

As the tenth cause of action (¶¶ 44-45 Wilkinson Affirmation), Department staff asserts that Respondents 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 to Department staff by June 1, 2008 as required by Item 2 of the compliance schedule (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a]). Department staff contends that the required documents are overdue by 372 days, based on the date of Department staff's motion.

For the eleventh cause of action (§§ 46-47 Wilkinson Affirmation), Department staff asserts that on three separate occasions, Respondents did not submit notices of compliance or noncompliance to Department staff within 14 days following the dates established in Items 1 through 3 of the compliance schedule (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [b]). Department staff contends that the required notices were not received as of June 8, 2009.

In the twelfth cause of action (§§ 48-49 Wilkinson Affirmation) Department staff asserts that Respondents did not submit a best management practices plan to Department staff by June 1, 2008 as required by special condition No. 2 of the SPDES permit (see Haas Affidavit, Exhibit 3 at 12 of 13). Using the date of the motion (*i.e.*, June 8, 2009), Department staff contends that the plan is overdue by 372 days.

For the thirteenth cause of action (§§ 50-51 Wilkinson Affirmation), Department staff asserts that on 37 occasions, Respondents did not submit a noncompliance report and Permit Attachment B (Incident Report) as necessary with each DMR when discharges exceeded effluent limits prescribed in the SPDES permit (see Haas Affidavit, Exhibit 2 at 4 of 4, Condition [d]; and Exhibit 3 at 10 of 13, Condition [c]).

3. Missing and Late-filed DMRs

For the remaining causes of action, Department staff alleges that Respondents did not file discharge monitoring reports (DMRs), or failed to file them on time. As the fourteenth cause of action (§§ 52-53 Wilkinson Affirmation), Department staff asserts that Respondents did not submit any DMRs for September, October, November and December 2007, and from January 2008 through September 2008.

With respect to the SPDES permit effective March 28, 2008, DMRs are due 28 days after the end of the reporting period (see Haas Affidavit, Exhibit 3 at 10 of 13, Condition [b]). In the fifteenth cause of action (¶¶ 54-56 Wilkinson Affirmation), Department staff asserts that Respondents untimely filed the DMRs for October, November and December 2008, and for January and February 2009 in violation of the terms and conditions of the SPDES permit.

With respect to the SPDES permit in effect from June 1, 2006 to March 27, 2008, DMRs were due 45 days after the end of the reporting period (see Haas Affidavit, Exhibit 2 at 4 of 4, Condition [d]). For the sixteenth cause of action (¶¶ 57-59 Wilkinson Affirmation), Department staff asserts that Respondents submitted DMRs more than 45 days after the end of the reporting period on 21 occasions from February 2005 through May 2007.

D. Department Staff's Evidence

To demonstrate the violations alleged in the June 6, 2009 motion for order without hearing, Department staff provided the following evidence. Cathy A. Haas is a New York State licensed professional engineer, and holds a Bachelor of Science in Mechanical Engineering from the State University of New York at Binghamton. Since 2006, Ms. Haas has been an Environmental Engineer II with the Department's Division of Water in Region 1. From 1997 to 2006, Ms. Haas was an Environmental Engineer I with the Department's Division of Water in Region 1. Ms. Haas's responsibilities include reviewing SPDES permit applications and renewal applications, and inspecting facilities with SPDES permits for compliance. Ms. Haas is familiar with the Jurgielewicz Duck Farm.

For this matter, Ms. Haas prepared an affidavit, sworn to June 10, 2009. Attached to Ms. Haas's affidavit is a copy of her resume (Exhibit 1); copies of the SPDES permits for the duck farm (Exhibits 2 and 3); copies of the relevant discharge monitoring reports for the duck farm (Exhibit 4); and tables of DMR violations for 2005, 2006, 2007, 2008, and for January and February 2009 (Exhibit 5).

Staff's proof also includes an affidavit by Anthony L. Leung, sworn to June 9, 2009. Mr. Leung is a New York State

licensed professional engineer, and holds a Bachelor of Science in Chemical Engineering from the University of Colorado at Boulder. Mr. Leung also holds a Master of Business Administration from the University of Colorado at Boulder.

Since 2000, Mr. Leung has been an Environmental Engineer III with the Department's Division of Water in Region 1, and is the SPDES Permit and Grants Program Supervisor. From 1998 to 2000, Mr. Leung was an Environmental Engineer II with the Department's Division of Water in Region 1. Mr. Leung supervises staff in the Division of Water including Ms. Haas, and is responsible for the implementation of the SPDES permit program in Region 1. Mr. Leung is familiar with the Jurgielewicz Duck Farm. Exhibit 1 to Mr. Leung's June 9, 2009 affidavit is a copy of his resume.

II. Respondents' Reply

Respondents oppose Department staff's motion for order without hearing. However, Respondents do not contest their liability with respect to the reporting and other violations alleged in the ninth through sixteenth causes of action (§§ 2 and 13 Sinnreich Affirmation). Respondents argue there are issues of fact that require a hearing with respect to the charges alleged in the first through eighth causes of action. In addition, Respondents argue a hearing is necessary to determine the appropriate relief. (§§ 2 and 14 Sinnreich Affirmation.)

A. Disputed Issues of Fact

Concerning the first through eighth causes of action, Respondents contend that the data reported in their DMRs is inaccurate due to calculation and methodological errors (§§ 3 Sinnreich Affirmation). To support his argument, Respondents offer an affidavit by Dennis J. Totzke, P.E., President of Applied Technologies, Inc. Given these reporting errors, which were inadvertent, Respondents argue they should have the opportunity at a hearing to present the correct data. (§§ 15-23 Sinnreich Affirmation.)

Respondents state that they were not able to obtain any discovery in this matter. In addition, Respondents argue that

they filed requests pursuant to the Freedom of Information Law (FOIL) for documents relevant to Department staff's motion. According to Respondents, Department staff has not yet responded to the FOIL requests. Without reference to any authority, Respondents contend that it would be unlawful to grant Department staff's motion with respect to the requested relief without providing Respondents with an opportunity for discovery. (¶ 5, 40-42 Sinnreich Affirmation.)

Though not expressly cited, it appears that Respondents are referring to CPLR 3212(f). Pursuant to CPLR 3212(f), when facts essential to justify opposition exist, but cannot be stated, a motion for summary judgment must be denied until disclosure has been taken.

With respect to the violations alleged in the June 9, 2009 motion for order without hearing, Department staff is relying primarily on the DMRs filed by Respondents. For the allegations related to the documentation that Respondents were required to file pursuant to the terms of the permit but did not, Department staff is relying on a search of the Department's records. As discussed below, Respondents do not offer any of the documents that members of Department staff state, in their respective affidavits, are missing. Consequently, with respect to liability, Respondents have not shown that disclosure of additional facts is necessary to oppose the motion for order without hearing. With respect to relief, however, Respondents will have an opportunity to seek disclosure before the hearing commences.

B. Respondents' Evidence

Respondents offered the following evidence to show there are factual disputes that require adjudication. Dennis E. Totzke is a professional engineer and President of Applied Technologies, Inc. (Brookfield, Wisconsin). For this matter, Mr. Totzke prepared an affidavit sworn to August 27, 2009.

Mr. Totzke holds a Bachelor of Science in Electrical Engineering and a Master of Science in Sanitary Engineering from Marquette University. According to Mr. Totzke's resume (Totzke Affidavit, Exhibit 1), he has over 30 years experience in the analysis, design, and operation of industrial and municipal water and wastewater treatment systems. Respondents retained

Mr. Totzke and his firm to examine the impacts of wastewater discharges from the duck farm on West Mill Pond, and to review the data recorded on Respondents' DMRs (¶ 2 Totzke Affidavit).

Benjamin Jurgielewicz is the general partner and sole proprietor of the Jurgielewicz Duck Farm. Mr. Jurgielewicz prepared an affidavit for this matter, sworn to August 28, 2009. The Jurgielewicz Duck Farm was started by Bronislaw Jurgielewicz, Benjamin Jurgielewicz's grandfather, in 1919. Benjamin Jurgielewicz is a third generation duck farmer, and has worked full time at the duck farm since graduating from college in 1981. (¶ 2 Jurgielewicz Affidavit.)

In his affidavit, Mr. Jurgielewicz explains that he inherited the duck farm from his father in 1991, and has endeavored to keep the duck farm a viable business in order to preserve a part of Long Island's agricultural history (¶ 4 Jurgielewicz Affidavit). Mr. Jurgielewicz states further that he has invested considerable effort, time, and money to comply with environmental requirements, and intends to bring the farm's wastewater treatment facilities into compliance with the terms and conditions of the SPDES permit (¶¶ 5-6, 20-23 Jurgielewicz Affidavit). Mr. Jurgielewicz provides information concerning his and the duck farm's financial condition (¶¶ 16-19 Jurgielewicz Affidavit).

Jeffrey S. Fuchs is a certified public account and a member of the accounting firm of Esposito, Fuchs, Taormina and Company (Central Islip, New York). Since 1993, Mr. Fuchs has been the independent certified public account for Mr. Jurgielewicz and the Jurgielewicz Duck Farm. For this matter, Mr. Fuchs prepared an affidavit, sworn to August 28, 2009. In his affidavit, Mr. Fuchs provides a review of the financial records for the Jurgielewicz Duck Farm from 2004 through 2008. In part, Mr. Fuchs's affidavit is offered to show that Respondents are not able to pay the requested civil penalty of \$600,000.

III. Rulings on Staff's Motion for Order without Hearing

For the reasons outlined below, I grant Department staff's June 9, 2009 motion for order without hearing with respect to liability. With respect to relief, however, I deny Department staff's motion. A hearing will be necessary to determine the appropriate relief.

A. Ninth, Tenth, Eleventh and Twelfth Causes of Action

As noted above, the violations alleged in the ninth through twelfth causes of action relate to the requirements outlined in the SPDES permit effective from March 28, 2008 through January 7, 2012, which include requirements outlined in a compliance schedule (see Haas Affidavit, Exhibit 3) Respondents do not contest liability with respect to the violations alleged in these causes of action (¶ 2 Sinnreich Affirmation; ¶ 25-26 Jurgielewicz Affidavit).

1. Ninth Cause of Action

Department staff asserts that Respondents violated the terms of the SPDES permit because they did not submit a comprehensive nutrient management plan to Department staff by April 1, 2008 as required by Item 1 of the compliance schedule (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a]). In her June 10, 2009 affidavit (¶ 13), Ms. Haas states that on or about June 8, 2009, she and other members of Department staff searched the Department's files maintained at the Central Office in Albany, New York and at the Region 1 Office in Stony Brook, New York. Based on that search, Ms. Haas reports that Respondents did not file the required comprehensive nutrient management plan with the Department.

In addition to Department staff's proof, Mr. Jurgielewicz admits, in his August 28, 2009 affidavit (¶ 26), that the allegation concerning Respondents' noncompliance with the permit condition is "accurate and cannot be disputed." He acknowledges further that his failure to comply is serious, but argues that the violation has had no direct or immediate adverse impact on the environment of West Mill Pond or the Forge River (¶ 26 Jurgielewicz Affidavit).

Department staff's proof establishes the violation alleged in the ninth cause of action. In addition, Respondents admit the violation. Therefore, I conclude that Respondents violated Item No. 1 of the compliance schedule incorporated into Respondents' SPDES permit effective March 28, 2008 through January 7, 2012 (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a]). As of the date of Department staff's June 8,

2009 motion, Respondents have not complied with this permit requirement.

2. Tenth Cause of Action

Department staff asserts 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 to Department staff by June 1, 2008 as required by Item 2 of the Compliance Schedule (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a]). In her June 10, 2009 affidavit (¶ 14), Ms. Haas states that on or about June 8, 2009, she and other members of Department staff searched the Department's files maintained at the Central Office in Albany, New York and at the Region 1 Office in Stony Brook, New York. Based on that search, Ms. Haas reports that Respondents filed neither the required engineering report with plans and specifications, nor the operations and maintenance manual. (See also ¶ 11 Leung Affidavit.)

In addition to Department staff's proof, Mr. Jurgielewicz admits, in his August 28, 2009 affidavit (¶ 26), that the allegation concerning Respondents' noncompliance is "accurate and cannot be disputed." He acknowledges further that his failure to comply with the requirement is serious, but argues that the violation has had no direct and immediate adverse impact on the environment of West Mill Pond or the Forge River (¶ 26 Jurgielewicz Affidavit).

Department staff's proof establishes the violation alleged in the tenth cause of action. Moreover, Respondents admit the violation. Therefore, I conclude that Respondents violated Item No. 2 of the compliance schedule incorporated into Respondents' SPDES permit effective March 28, 2008 through January 7, 2012 (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a]). As of the date of Department staff's June 8, 2009 motion, Respondents have not complied with this permit requirement.

3. Eleventh Cause of Action

Department staff asserts that on three separate occasions, Respondents violated the conditions of their SPDES permit

because they did not submit notices of compliance or noncompliance to Department staff within 14 days following the dates established in Items 1 through 3 of the compliance schedule (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [b]). In her June 10, 2009 affidavit (¶ 15), Ms. Haas states that on or about June 8, 2009, she and other members of Department staff searched the Department's files maintained at the Central Office in Albany, New York and at the Region 1 Office in Stony Brook, New York. Based on that search, Ms. Haas reports that Respondents did not file any of the required notices of compliance or noncompliance with respect to Item Nos. 1 through 3 of the compliance schedule.¹

In addition to Department staff's proof, Mr. Jurgielewicz admits, in his August 28, 2009 affidavit (¶ 26), that the allegation concerning noncompliance is "accurate and cannot be disputed." He acknowledges further that his failure to comply with the requirement is serious, but argues that the violation has had no direct and immediate adverse impact on the environment of West Mill Pond or the Forge River (¶ 26 Jurgielewicz Affidavit).

Department staff's proof establishes the violation alleged in the eleventh cause of action. In addition, Respondents admit the violation. Therefore, I conclude that Respondents did not timely file three notices of compliance or noncompliance as required by Condition [b] of the compliance schedule incorporated into Respondents' SPDES permit effective March 28, 2008 through January 7, 2012 (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [b]). As of the date of Department staff's June 8, 2009 motion, Respondents have not complied with this permit requirement.

¹ As noted above, Item No. 1 from the compliance schedule required Respondents to submit a comprehensive nutrient management plan by April 1, 2008. Item No. 2 required 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. Item No. 2 was due by June 1, 2008. Item No. 3 required Respondents to commence the construction activities that were supposed to be described in the engineering report and depicted in the plans and specifications by August 1, 2008.

4. Twelfth Cause of Action

Department staff asserts that Respondents violated the conditions of the SPDES permit because they did not submit a best management practices plan to Department staff by June 1, 2008 as required by special condition No. 2 of the SPDES permit (see Haas Affidavit, Exhibit 3 at 12 of 13). In her June 10, 2009 affidavit (¶ 16), Ms. Haas states that on or about June 8, 2009, she and other members of Department staff searched the Department's files. Based on that search, Ms. Haas reports that Respondents did not file the required best management practices plan by June 1, 2008. (See also ¶ 11 Leung Affidavit.)

In addition to Department staff's proof, Mr. Jurgielewicz admits, in his August 28, 2009 affidavit (¶ 26), that the allegation concerning Respondents' noncompliance is "accurate and cannot be disputed." He acknowledges further that his failure to comply with the requirement is serious, but argues that the violation has had no direct and immediate adverse impact on the environment of West Mill Pond or the Forge River (¶ 26 Jurgielewicz Affidavit).

Department staff's proof establishes the violation alleged in the twelfth cause of action. Moreover, Respondents admit the violation. Therefore, I conclude that Respondents violated special condition No. 2 of the SPDES permit (see Haas Affidavit, Exhibit 3 at 12 of 13).

B. Fourteenth, Fifteenth and Sixteenth Causes of Action

In these causes of action, Department staff alleges that Respondents failed to file DMRs for particular months or filed them late. Respondents do not contest liability with respect to the violations alleged in these causes of action (¶ 2 Sinnreich Affirmation; ¶ 27-29 Jurgielewicz Affidavit). Each cause of action is addressed below.

1. Fourteenth Cause of Action

The SPDES permit requires Respondents to file a completed and signed DMR form for each month. (see Haas Affidavit,

Exhibit 2 at 4 of 4, Condition [b], and Exhibit 3 at 10 of 13, Condition [b]). As the fourteenth cause of action (¶¶ 52-53 Wilkinson Affirmation), Department staff asserts that Respondents did not submit 13 DMRs.

In her June 10, 2009 affidavit (¶ 18-19), Ms. Haas states that on or about June 8, 2009, she and other members of Department staff searched the Department's files. Based on that search, Ms. Haas reports that Respondents did not file 13 DMRs. In 2007, Department staff did not receive DMRs for September, October, November and December. In 2008, Department staff did not receive DMRS for January through September. (See also ¶ 11 Leung Affidavit.)

In addition to Department staff's proof, Mr. Jurgielewicz admits, in his August 28, 2009 affidavit (¶ 27), that the allegation concerning Respondents' noncompliance is "accurate and cannot be disputed." He states that his failure to file DMRs was not an attempt to withhold information from the Department. According to Mr. Jurgielewicz, he collected water samples and had them analyzed; however, he did not report the results on DMRs (¶ 28 Jurgielewicz Affidavit). He argues that the violation has had no direct and immediate adverse impact on the environment of West Mill Pond or the Forge River (¶ 29 Jurgielewicz Affidavit).

Department staff's proof establishes the violations alleged in the fourteenth cause of action. Moreover, Respondents admit the violation. Therefore, I conclude that Respondents violated the reporting requirement of the SPDES permit (see Haas Affidavit, Exhibit 2 at 4 of 4, Condition [b], and Exhibit 3 at 10 of 13, Condition [b]) concerning the submission of monthly DMRs.

2. Fifteenth Cause of Action

For the SPDES permit effective March 28, 2008, Respondents must file DMRS on a monthly basis no later than the 28th day of the month following the end of each reporting period. (see Haas Affidavit, Exhibit 3 at 10 of 13, Condition [b]). In the fifteenth cause of action (¶¶ 54-56 Wilkinson Affirmation), Department staff asserts that Respondents failed to timely file DMRs for October, November and December 2008, and for January

and February 2009 in violation of the terms and conditions of the SPDES permit.

In her June 10, 2009 affidavit (¶ 21), Ms. Haas states that after reviewing the DMRs, Respondents submitted five of them late. Ms. Haas observes that Mr. Jurgielewicz signed and dated the DMRs for October, November and December 2008, and those for January and February 2009 more than 28 days after the end of the reporting period. (See also ¶ 11 Leung Affidavit.)

Specifically, the October 2008 DMR was due by November 28, 2008; however, Mr. Jurgielewicz dated it February 27, 2009 (3 months late). The November 2008 DMR was due by December 28, 2008, but it is dated February 27, 2009 (2 months late). The December 2008 DMR was due by January 28, 2009, but it is dated February 27, 2009 (1 month late). The January 2009 DMR was due by February 28, 2009, but it is dated March 13, 2009 (2 weeks late). The February 2009 DMR was due by March 28, 2009, but it is dated April 6, 2009 (1 week late). (See Haas Affidavit, Exhibits 4 and 5.)

In addition to Department staff's proof, Mr. Jurgielewicz admits, in his August 28, 2009 affidavit (¶ 27), that the allegation concerning Respondents' noncompliance is "accurate and cannot be disputed." He states that his failure to file DMRs in a timely manner was not an attempt to withhold information from the Department. According to Mr. Jurgielewicz, he collected water samples and had them analyzed, but did not timely submit the DMRs (¶ 28 Jurgielewicz Affidavit). He argues that the violation has had no direct and immediate adverse impact on the environment of West Mill Pond or the Forge River. According to Mr. Jurgielewicz, staff from the New York State Department of Environmental Conservation, the Department of Health, and other regulatory agencies have often inspected the duck farm, and have stated that Mr. Jurgielewicz runs a clean operation. (¶ 29 Jurgielewicz Affidavit.)

Department staff's proof establishes the violations alleged in the fifteenth cause of action. Moreover, Respondents admit the violations. Therefore, I conclude that Respondents violated the reporting requirement of the SPDES permit (see Haas Affidavit, Exhibit 3 at 10 of 13, Condition [b]) concerning the untimely submission of five DMRs.

3. Sixteenth Cause of Action

Pursuant to the terms of the SPDES permit in effect for 2005, 2006, and 2007, Respondents were required to file DMRs on a monthly basis no later than 45 days following the end of each reporting period. (see Haas Affidavit, Exhibit 2 at 4 of 4, Condition [b]). For the sixteenth cause of action (¶¶ 57-59 Wilkinson Affirmation), Department staff asserts that on 21 occasions from February 2005 through May 2007, Respondents submitted DMRs more than 45 days after the end of the reporting period.

In her June 10, 2009 affidavit (¶ 20), Ms. Haas states that she reviewed the DMRs filed by Respondents and found 19 that Respondents submitted after the 45-day reporting period. Ms. Haas determined that Respondents failed to submit timely DMRs for the following months:

1. In 2005, February, March, April, May, June, July, August, October, November and December;
2. In 2006, January, February, March, April, May, June, and July; and
3. In 2007, February, March, April, and May.

Department staff provided copies of these DMRs, which show that Mr. Jurgielewicz signed and dated them more than 45 days after the end of the reporting period.² (Haas Affidavit, Exhibits 4 and 5; ¶ 11 Leung Affidavit.)

In addition to Department staff's proof, Mr. Jurgielewicz admits, in his August 28, 2009 affidavit (¶ 27), that the allegation concerning Respondents' noncompliance is "accurate and cannot be disputed." He states that his failure to file DMRs in a timely manner was not an attempt to withhold information from the Department. According to Mr. Jurgielewicz, he collected water samples and had them analyzed, but did not timely submit the DMRs (¶ 28 Jurgielewicz Affidavit). He argues that the violation has had no direct and immediate adverse impact on the environment of West Mill Pond or the Forge River.

² According to Ms. Wilkinson's Affirmation (¶ 57), Respondents filed 21 DMRs late. However, according to Ms. Haas's Affidavit (¶ 20), Respondents filed 19 DMRs late. Staff's proof (see Haas Affidavit, Exhibits 4 and 5) demonstrates that Respondents filed 21 DMRs late.

According to Mr. Jurgielewicz, staff from the New York State Department of Environmental Conservation, the Department of Health, and other regulatory agencies have often inspected the duck farm, and have stated that Mr. Jurgielewicz runs a clean operation. (¶ 29 Jurgielewicz Affidavit.)

Department staff's proof establishes the violations alleged in the sixteenth cause of action. Moreover, Respondents admit the violations. Therefore, I conclude that Respondents violated the reporting requirement outlined in the SPDES permit (see Haas Affidavit, Exhibit 2 at 40 of 4, Condition [b]) with respect to the untimely submission of 21 DMRs.

C. First through Eighth Causes of Action

The violations alleged in the first through eighth causes of action are based on information that Respondents reported on DMRs filed with the Department. Respondents' SPDES permits in effect from 2005 to the present set forth effluent limits for such parameters as ultimate oxygen demand (UOD), total suspended solids (TSS), settleable solids, oil and grease (O&G), and coliform. Effluent limits for some of these parameters include a daily average concentration and a daily maximum concentration. Pursuant to the conditions of the SPDES permits, the effluent limits for the parameters considered in the captioned enforcement action required weekly sampling. (see Haas Affidavit, Exhibit 2 at 2 of 4, and Exhibit 3 at 3 of 13 through 5 of 13.)

1. Parameters and Effluent Limits

The terms and conditions of the SPDES permits (see Haas Affidavit, Exhibits 2 and 3) specify effluent limits and monitoring required for various parameters. The following discussion addresses ultimate oxygen demand (UOD), total suspended solids (TSS), oil and grease (O&G), settleable solids, and coliform. Although Mr. Jurgielewicz incorrectly reported the effluent limit concentrations for these parameters on the DMRs, Respondents contend that he did so unintentionally.

a) Ultimate Oxygen Demand

Monitoring the biochemical oxygen demand (BOD) measures the level of organic contamination in wastewater. BOD is the quantity of oxygen needed to biochemically oxidize the organic matter over a period of time, under specified conditions. The analysis presumes that with an excessive concentration of oxygen, the aerobic biological decomposition of the organic waste will continue until all the waste is consumed. (Totzke Affidavit, Exhibit B, Attachment 1.)

The ultimate oxygen demand (UOD) considers the amount of oxygen required for the oxidation of waste, as well as the amount of oxygen required for new cell synthesis. UOD concentrations are based on a calculation that includes BOD and total Kjeldahl nitrogen (TKN). (Totzke Affidavit, Exhibit B, Attachment 1.) The TKN value is the quantity of ammonia in a wastewater sample that is released during the acid digestion of organic nitrogen compounds.

For the SPDES permit effective from 2001 through 2006, the daily average effluent limit for UOD varied during the year. From June 1 to October 31, the limit was 300 pounds. From November 1 through November 31, the daily average effluent limit for UOD was 330 pounds. From December 1 through February 28, the daily average effluent limit for UOD was 550 pounds. From March 1 through May 31, the daily average effluent limit for UOD was 330 pounds. (See Haas Affidavit, Exhibit 2 at 2 of 4.)

With respect to the current SPDES permit effective March 28, 2008, the daily average effluent limit for UOD varies during the year. The daily average discharge limits are the same for the same periods as those prescribed in the SPDES permit effective from 2001 through 2006 (see Haas Affidavit, Exhibit 3 at 3 of 13 through 5 of 13).

For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for UOD also varied during the year. From June 1 to October 31 the limit was 600 pounds. From November 1 through November 31, the limit was 660 pounds. From December 1 through February 28, the daily maximum effluent limit for UOD was 1100 pounds. From March 1 through May 31, the limit was 660 pounds. (See Haas Affidavit, Exhibit 2 at 2 of 4.)

With respect to the current SPDES permit effective March 28, 2008, the daily maximum effluent limit for UOD varies during the year. The daily maximum limits are the same for the same periods as those prescribed in the SPDES permit effective from 2001 through 2006 (see Haas Affidavit, Exhibit 3 at 3 of 13 through 5 of 13).

b) Total Suspended Solids

The effluent limit for TSS does not vary during the year. For the SPDES permit effective from 2001 through 2006, the daily average effluent limit for TSS was 183 pounds. With respect to the current SPDES permit effective March 28, 2008, the daily average effluent limit for TSS is 183 pounds. (See Haas Affidavit, Exhibit 2 at 2 of 4 and Exhibit 3 at 3 of 13 through 5 of 13.)

For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for TSS was 367 pounds. With respect to the current SPDES permit, the daily maximum effluent limit for TSS is also 367 pounds. (See Haas Affidavit, Exhibit 2 at 2 of 4 and Exhibit 3 at 3 of 13 through 5 of 13.)

c) Oil and Grease

For the SPDES permit effective from 2001 through 2006, the daily average effluent limit for oil and grease (O&G) was 22 pounds. With respect to the current SPDES, the daily average effluent limit for O&G is the same. (See Haas Affidavit, Exhibit 2 at 2 of 4 and Exhibit 3 at 3 of 13 through 5 of 13.)

For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for O&G was 38 pounds. With respect to the current SPDES permit effective March 28, 2008, the daily maximum effluent limit for O&G is also 38 pounds. (See Haas Affidavit, Exhibit 2 at 2 of 4 and Exhibit 3 at 3 of 13 through 5 of 13.)

d) Settleable Solids

For the SPDES permit effective from 2001 through 2006, Respondents were required to monitor the daily average effluent limit for settleable solids, and to report the discharge concentration in milliliters per liter on the DMRs. Similarly, the current SPDES permit does not limit the daily average effluent limit for settleable solids. (See Haas Affidavit, Exhibit 2 at 2 of 4 and Exhibit 3 at 3 of 13 through 5 of 13.)

For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for settleable solids was limited to 0.3 milliliters per liter. With respect to the current SPDES, the daily maximum effluent limit for settleable solids is 0.3 milligrams per liter.³ (See Haas Affidavit, Exhibit 2 at 2 of 4 and Exhibit 3 at 3 of 13 through 5 of 13.)

e) Coliform

For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for coliform bacteria was limited to 400 colonies per 100 milliliters. With respect to the current SPDES permit, the daily maximum effluent limit for coliform (7-day geometric mean) is limited to 400 colonies per 100 milliliters. (See Haas Affidavit, Exhibit 2 at 2 of 4 and Exhibit 3 at 3 of 13 through 5 of 13.) Other effluent limits for coliform are prescribed in the SPDES permits. Respondents' compliance with these additional parameters, however, is beyond the scope of this administrative enforcement proceeding.

2. Discharge Monitoring Reports

To demonstrate this set of alleged violations, Department staff provided copies of the DMRs that Mr. Jurgielewicz filed with the Department's Region 1 office (see Haas Affidavit, Exhibit 4). Printed on each DMR is the SPDES permit number (NY0008125), the name and address of the permittee (Jurgielewicz

³ With respect to settleable solids, there is a change in units of concentration from milliliters per liter to milligrams per liter. The references to the SPDES permits are provided above.

Duck Farm, PO Box 68, Moriches, NY 11955), the name of the facility (Jurgielewicz Duck Farm), the contact person (Benjamin Jurgielewicz), and the monitoring period. At the bottom of each DMR page is a certification that the wastewater samples were collected and analyzed by qualified personnel, and that the information reported on the DMR is true and accurate. Each DMR offered by Department staff is dated and signed by Mr. Jurgielewicz as the principal executive officer or authorized agent.

The effluent parameters regulated by the SPDES permit are listed on the left side of the DMRs. On each form, space is provided to enter the discharge concentration for each parameter after the wastewater sample is analyzed by the laboratory. Underneath each space, the effluent limit for each parameter, as prescribed in the SPDES permit, is preprinted on the DMR. As a result, it is very easy to compare the laboratory results with the permitted effluent limit. Space is provided to fill in the frequency of the analysis for each effluent parameter, and the sample type.

3. Mr. Totzke's Analysis

To support the argument that Department staff's June 9, 2009 motion for order without hearing should be denied because there are material issues of fact that require adjudication (§ 2 Sinnreich Affirmation), Respondents offer Mr. Totzke's affidavit, sworn to August 27, 2009, and attached exhibits. As noted above, Mr. Totzke is a professional engineer and President of Applied Technologies, Inc. (Brookfield, Wisconsin).

According to Mr. Totzke's affidavit (§ 4[c]), he and his staff reviewed the data concerning the wastewater samples collected in 2009, among other things. Based on this review, Mr. Totzke concludes that Mr. Jurgielewicz "made miscalculations in both computing and converting concentrations reported in the DMRs" (§ 4[c] Totzke Affidavit). If Mr. Jurgielewicz had used the correct method to calculate the concentrations reported in the DMRs, Mr. Totzke opines that all of the effluent limit concentrations reported in the DMRs would have been lower, and that the wastewater discharged from the duck farm would have generally complied with the effluent limits prescribed in the SPDES permits (§ 4[c] Totzke Affidavit).

Mr. Totzke's review focused on two categories of effluent parameters. The first was the daily average effluent limit for UOD (¶¶ 7, 11, 12, 14 Totzke Affidavit). The second parameter addressed by Mr. Totzke was the effluent limit concerning fat, oil and grease (FOG)⁴ (¶ 15 Totzke Affidavit). Mr. Totzke's affidavit is silent, however, about the concentrations for the effluent limits reported on the DMRs for total suspended solids, settleable solids, and coliform.⁵

a) Ultimate Oxygen Demand

Reference is made to Exhibit B attached to Mr. Totzke's affidavit. Exhibit B consists of a Client Memorandum dated August 27, 2009 prepared by Mr. Totzke and his staff with a set of Attachments numbered 1 through 9.⁶

Attachment 1 provides definitions of the terms biochemical oxygen demand (BOD₅ and BOD₂₈) carbonaceous biochemical oxygen demand (CBOD₅), and ultimate oxygen demand (UOD). In Table 1 of Attachment 1, Mr. Totzke notes that over time the method prescribed in the SPDES permit for determining UOD has changed. From February 1, 1991 to January 6, 2007, the effluent limit for UOD was equivalent to 28-day BOD. Mr. Totzke notes that with a 28-day period, oxidation is about 95 to 99 percent complete. However, running a BOD test for 28 days is not an approved method by Standard Methods, according to Mr. Totzke.

Mr. Totzke states that from January 7, 2007 to April 30, 2009, the effluent limit for UOD was the sum of 1.5 times CBOD₅, and 4.5 times total Kjeldahl nitrogen (TKN). In this calculation, 1.5 and 4.5 are constants. CBOD₅ is a measure of the oxygen demand of a wastewater sample that has been

⁴ The parameter identified in the SPDES permits is "oil and grease" (Haas Affidavit, Exhibit 2 at 2 of 4 and Exhibit 3 at 3 and 4 of 13). Respondents' papers refer to "fat, oil and grease," and abbreviate the parameter as "FOG" (see ¶¶ 3, 15, 21 Sinnreich Affirmation; ¶ 15 and Exhibit B, Attachment 9).

⁵ Alleged violations related to total suspended solids are asserted in the third and fourth causes of action. Alleged violations related to settleable solids are asserted in the seventh cause of action. Alleged violations related to coliform are asserted in the eighth cause of action.

⁶ Attachment 2 describes the results of a dye tracer study. This information is not relevant to the issue of liability. As discussed further below, however, this information relates to the issue of relief.

chemically adjusted to exclude oxygen demand contributed by the oxidation of nitrogenous compounds. In the laboratory assay, Mr. Totzke explains that a chemical is added to suppress the nitrification reaction. Mr. Totzke does not provide a detailed definition of total Kjeldahl nitrogen in the Attachments to Exhibit B.

Mr. Totzke states further that during the term of the current SPDES permit from May 1, 2009 to January 7, 2012, UOD is the sum of 1.5 times CBOD₅, and 4.5 times TKN. Mr. Totzke notes that, unlike the prior SPDES permit, the current permit prescribes effluent limit concentrations for CBOD₅ (see Haas Affidavit, Exhibit 3 at 4 of 13). Mr. Totzke notes further that in prior versions of the SPDES permits, the duck farm was required to monitor TKN and report it in pounds per day. With respect to the current SPDES permit, the duck farm is required to monitor TKN, but report it in milligrams per liter. (See Attachment 3.)

The tables in Attachment 4 outline the parameters that the duck farm was required to monitor during the three periods discussed above; how often the duck farm was required to monitor these parameters; and whether the duck farm complied with monitoring requirements. Table 2 shows that for the period from January 6, 2007 through April 9, 2009, Respondents did not collect a weekly grab sample to measure CBOD₅ as required by the SPDES permit. Mr. Totzke states that CBOD₅ was only monitored weekly in March and April 2009. As noted above (see Attachment 1, Table 1), obtaining a concentration for CBOD₅ is required to calculate UOD from January 6, 2007 through April 9, 2009. Though not expressly stated by Mr. Totzke in Attachment 4, Respondents' failure to analyze wastewater samples for CBOD₅ would imply that Respondents did not have all necessary data to calculate a UOD concentration for the DMRs (see Attachment 6).

Exhibit B to Mr. Totzke's affidavit also includes Attachments 5 and 6. Attachment 5 consists of two tables that reflect a review of the laboratory data sheets for wastewater samples collected at the duck farm for 2006 and 2007, and the information reported on the corresponding DMRs. Attachment 6 is a narrative description of the information presented in the Attachment 5 tables.

Mr. Totzke states that Respondents did not correctly calculate UOD concentrations for the 2007 DMRs because

wastewater samples were not tested for CBOD₅. Rather, concentrations for BOD₂₈ were inappropriately used to determine UOD throughout 2007. According to Mr. Totzke, the UOD concentrations reported on the DMRs in 2007 were high, and that accurate UOD concentrations cannot be determined without CBOD₅ data. In contrast, Mr. Totzke observes that wastewater samples were analyzed for CBOD₅ in 2009, and that these concentrations were less than or equal to BOD₅. (See Attachments 6 and 8.)

In Attachment 6, Mr. Totzke states further that he and his staff evaluated the UOD concentrations reported on the DMRs for 2007, and reports the results in a table identified as Attachment 7. In the first two columns of Attachment 7, the UOD concentration, which was reported on the DMRs, was the same as the BOD₂₈. The concentrations reported in the third column are the BOD₅ concentrations determined by laboratory analysis. Reported in the fourth column are the calculated concentrations for UOD based, in part, on the BOD₅ concentrations reported in the third column. Mr. Totzke observes that the calculated concentrations for UOD are significantly less than the concentrations originally reported in the DMRs (*i.e.*, BOD₂₈ concentrations), and contends that the actual concentrations for UOD would be even lower if actual CBOD₅ data were available because ammonia levels would not be duplicated.

b) Oil and Grease

Mr. Totzke's affidavit (¶ 15) also addresses the results reported on the duck farm's DMRs for oil and grease. With respect to this parameter, Mr. Totzke and his staff graphed the laboratory results for the period from June 2006 through July 2009 (see Totzke Affidavit, Exhibit B, Attachment 9). According to Mr. Totzke, the graph shows that O&G concentrations were "low" prior to June 2006. In late June 2006, O&G concentrations began to rise and peaked in April 2007. O&G concentrations stayed high until April 2008 when the concentrations decreased. (see Totzke Affidavit, Exhibit B.)

Mr. Totzke explains (¶ 15 Totzke Affidavit, and Exhibit B) that during this period Respondents were executing the dredging plan outlined in Schedule A to the February 7, 2005 Order on Consent (see Wilkinson Affirmation, Exhibit A). The plan required Respondents to dredge a portion of West Mill Pond, and the aeration lagoon. The former body of water receives the

wastewater discharge from the duck farm's treatment facility. The aeration lagoon is part of the duck farm's wastewater treatment facility.

Mr. Totzke offers two potential explanations for the "dramatic rise" in the O&G effluent concentrations. First, a polymer may have been used during dredging operations that impacted the laboratory analysis for O&G, which resulted in false positives. Mr. Totzke's firm contacted Maximum Laboratories, which analyses the duck farm's wastewater samples. According to Mr. Totzke, the laboratory responded as follows:

[T]here is a slight chance that the FOG values obtained during this period were affected by the polymer, however the only way to know definitively would be to conduct a test using a sample of the polymer to determine its effect (§ 15 Totzke Affidavit).

Second, Mr. Totzke reports that United States Environmental Protection Agency (US EPA) implemented a change to the testing method for O&G in April 2009. To evaluate the effect that the change in the testing method may have had on O&G concentrations, it would be necessary to analyze wastewater samples for O&G using the testing method in effect prior to April 2009, and compare the results using the testing method in effect after April 2009. (§ 15 Totzke Affidavit and Exhibit B.)

Mr. Jurgielewicz states in his affidavit (§ 32) that the effluent limit concentrations reported in the DMRs are incorrect and, therefore, unreliable based the information and analysis presented in Mr. Totzke's affidavit. (Also see §§ 33-37 Jurgielewicz Affidavit.)

4. Department Staff's Reply

With leave from the Chief ALJ, Department staff filed a reply in response to Respondents' motion in opposition to the June 9, 2009 motion for order without hearing. Department staff argues that Respondents' claim that they reported the concentrations on the DMRs in error are unsubstantiated and not relevant to past violations of the SPDES permits.

Department staff also notes that Mr. Jurgielewicz signed the certification for the DMRs that he submitted, and in so doing, certified that he is directly responsible for the information submitted in the DMRs, and that the information reported was true, accurate and complete. Department staff's argument with respect to the certification is very persuasive. To effectively administer the SPDES permit program, Department staff must be able to rely on the information submitted by permittees on the DMRs.

This is not to say that a permittee could never revise the information previously reported on a DMR. As soon as an error is discovered, a permittee should file an amended DMR with the appropriate explanation. However, the commencement of an enforcement action based on information reported on DMRs should not be considered an opportunity for a permittee to revisit the data and, as here, retain a consultant to evaluate previously submitted data. Department staff points out in its response that at no time prior to the motion for order without hearing did Respondents contact the Department to correct any errors on the duck farm's previously filed DMRs.

Department staff offers additional comments. First, Department staff states that Respondents' proffer focuses on calculating UOD effluent limit concentrations reported in the 2006 and 2007 DMRs. According to Department staff, Respondents' assertion is incorrect that the effective date of the SPDES permit identified as Exhibit 3 to Ms. Haas's Affidavit was January 7, 2007.

Department staff notes that from June 1, 2006 through March 28, 2008, Respondents and Department staff were discussing modifications to the SPDES permit, and that in March 2008, Respondents withdrew their objections. Department staff concludes that the effective date of the SPDES renewal permit was March 28, 2008. Department staff argues that prior to March 28, 2008, Respondents were required to calculate UOD effluent limits by using the BOD₂₈ method outlined in the prior permit, which is identified as Exhibit 2 to Ms. Haas's affidavit. Department staff concludes that prior to March 28, 2008, Respondents did not incorrectly calculate UOD effluent limits.

Second, Department staff contends that Respondents' argument that O&G concentrations reported in DMRs may have been inaccurate due to the presence of a polymer is not relevant to

the issue of liability. Department staff argues that Respondents should not be allowed to explain away past permit violations.

5. Third, Fourth, Seventh and Eight Causes of Action

Respondents assert generally there are issues of fact that require adjudication concerning the first through ninth causes of action. As noted above, however, Mr. Totzke's affidavit is silent about the concentrations for the effluent limits reported on the DMRs concerning total suspended solids, settleable solids, and coliform. Alleged violations related to total suspended solids are asserted in the third and fourth causes of action. Alleged violations related to settleable solids are asserted in the seventh cause of action. Alleged violations related to coliform are asserted in the eighth cause of action.

Although Respondents do not admit the violations alleged in the third, fourth, seventh and eighth causes of action, as they do with respect to the violations alleged in the ninth through twelfth, and fourteenth through sixteenth causes of action, Respondents offer no evidence to refute the violations alleged in the third, fourth, seventh and eighth causes of action. As noted above, a responding party must lay bare its proof (see *Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003 at 4 referencing *Hanson v Ontario Milk Producers Coop., Inc.*, 58 Misc 2d 138, 141-142 [Sup Ct, Oswego County 1968]). Respondents have not done so with respect to the violations alleged in the third, fourth, seventh and eighth causes of action.

Accordingly, I conclude there are no issues of fact with respect to the violations alleged in the third, fourth, seventh and eighth causes of action. I conclude further that Respondents are liable for the following violations:

1. As asserted in the third cause of action (¶¶ 24-26 Wilkinson Affirmation), Respondents exceeded the daily average total suspended solids (TSS) effluent limit prescribed in the SPDES permits on 24 occasions between January 2005 and February 2009;
2. As asserted in the fourth cause of action (¶¶ 27-29 Wilkinson Affirmation), Respondents exceeded the daily

maximum TSS effluent limit prescribed in the SPDES permits in June 2006; and in March, April, May, June, July and August 2007;

3. As asserted in the seventh cause of action (¶¶ 36-38 Wilkinson Affirmation), Respondents exceeded the daily maximum settleable solids effluent limit prescribed in the SPDES permits on 21 occasions from March 2005 through January 2009; and
4. As asserted in the eighth cause of action (¶¶ 39-41 Wilkinson Affirmation), Respondents exceeded the daily maximum coliform effluent limit prescribed in the SPDES permits in October and December 2005; in January, April, May, and November 2006; in February, June and July 2007; in December 2008; and in January 2009.

Department staff demonstrated these violations by providing copies of the DMRs filed by Mr. Jurgielewicz (see Haas Affidavit, Exhibit 4). The relevant DMRs show that the reported concentrations for TSS, settleable solids and coliform exceeded the effluent limits prescribed in the SPDES permits for these parameters.

6. First Causes of Action

The first cause of action (¶¶ 18-20 Wilkinson Affirmation) relates to the daily average UOD effluent limits prescribed in the SPDES permit. The relevant period considered in this administrative enforcement proceeding is from January 2005 to February 2009. Mr. Totzke's analysis, however, is limited to a review of the daily average UOD concentrations that Mr. Jurgielewicz reported in the DMRs for 2006 and 2007 (see Totzke Affidavit, Exhibit B, Attachments 5 and 6). Therefore, contrary to their arguments, Respondents offer nothing to refute Department staff's proof with respect to the reported concentrations for the daily average UOD effluent limit for 2005, 2008, and January and February 2009. As a result, there are no factual disputes associated with the daily average effluent limit concentrations for UOD that Mr. Jurgielewicz reported in the DMRs for 2005, 2008, and January and February 2009. Department staff demonstrated the violations alleged in the June 9, 2009 motion by providing copies of the DMRs that Mr. Jurgielewicz filed with the Department.

For 2006, Mr. Totzke and his staff calculated the daily average UOD effluent limit concentrations from the laboratory data sheets, and recorded them on page 1 of the table identified as Attachment 5 (Totzke Affidavit, Exhibit B). Mr. Totzke explains that when the calculated concentration is the same as that reported by Mr. Jurgielewicz in the DMRs, a check (✓) appears on Attachment 5 for this parameter. If the calculated concentration is different from that reported by Mr. Jurgielewicz on the DMRs, then the calculated concentration is also recorded on Attachment 5.

According to Attachment 5 (page 1), calculated concentrations for the daily average UOD effluent limit were different from those that Mr. Jurgielewicz reported on the March (1209 lbs/day) and December (1544 lbs/day) 2006 DMRs. Mr. Totzke does not offer an opinion about whether the differences recorded in Attachment 5 are statistically significant from what Mr. Jurgielewicz initially reported on the DMRs. All other concentrations for the daily average UOD effluent limit calculated by Mr. Totzke are the same as those initially reported by Mr. Jurgielewicz.

Moreover, all daily average UOD effluent limit concentrations reported in Attachment 5, including the revised concentrations for March and December 2006, exceed the SPDES permit effluent limits for this parameter. Consequently, the information provided by Respondents does not refute Department staff's proof, and does not raise any factual issues requiring adjudication.

In a similar manner, Mr. Totzke and his staff calculated the daily average UOD effluent limit concentrations from the 2007 laboratory data sheets, and recorded them on page 2 of Attachment 5 (see Totzke Affidavit, Exhibit B). As before, when the calculated concentration is the same as that reported by Mr. Jurgielewicz on the DMRs, a check (✓) appears on Attachment 5 for this parameter. If the calculated concentration is different from what Mr. Jurgielewicz reported on the DMRs, then the calculated concentration is also recorded on Attachment 5 (at 2).

According to Attachment 5 (page 2), the calculated concentrations for the daily average UOD effluent limit were different from what Mr. Jurgielewicz reported on the 2007 DMRs

for February (661 lbs/day), March (2307 lbs/day), May (4448 lbs/day), July (4005 lbs/day), August (5981 lbs/day), and September (4311 lbs/day). Mr. Totzke does not offer an opinion about whether the differences recorded in Attachment 5 are statistically significant from what Mr. Jurgielewicz initially reported in the DMRs.

For the other months in 2007, the concentrations for the daily average UOD effluent limit are the same as those initially reported by Mr. Jurgielewicz in the DMRs. All daily average UOD effluent limit concentrations, including the revised concentrations, exceed the SPDES permit effluent limits for this parameter.⁷ The information provided by Respondents in Attachment 5, therefore, does not refute Department staff's proof, and does not raise any factual issues requiring adjudication.

In addition to the data presented in Attachment 5, Respondents also present data related exclusively to the daily average UOD effluent limit concentrations for 2007 in a second table identified as Attachment 7 (see Totzke Affidavit, Exhibit B). As noted above, Mr. Totzke explains in Attachment 6 that the UOD effluent limit concentrations for 2007 presented in Attachment 7 are calculated using two methods. The first set of daily average UOD effluent limit concentrations, which are reported in the first and second columns of Attachment 7, are based on BOD₂₈.⁸ As previously noted, these concentrations are very similar to what Mr. Jurgielewicz reported in the DMRs, and exceed the daily average UOD effluent limits prescribed in the SPDES permit. The second set of daily average UOD effluent limit concentrations, which are reported in the third and fourth columns of Attachment 7, are based on BOD₅ as a substitute for CBOD₅.

⁷ For February 2007, the calculated daily average UOD effluent limit concentration offered by Respondents is 661 lbs/day, which exceeds the permitted effluent limit. The reported concentration, however, was 315 lbs/day, which does not exceed the permitted effluent limit of 550 lbs/day. Based on the initial concentration that Mr. Jurgielewicz reported, Department staff did not allege that Respondents exceeded the daily average UOD effluent limit for February 2007. In the absence of an alleged violation, any additional information concerning the daily average UOD effluent limit for February 2007 is beyond the scope of this proceeding.

⁸ Mr. Totzke reported these concentrations in Attachment 5.

For 2007, Department staff alleges that Respondents exceeded the daily average UOD effluent limits in January, March, April, May, June, July and August.⁹ Although the concentrations reported in Attachment 7 for the daily average UOD effluent limit that Mr. Totzke calculated using the second method are less than the concentrations originally reported by Mr. Jurgielewicz on the DMRs, all concentrations, except for January 2007, exceed the effluent limits prescribed in the SPDES permit. Mr. Totzke does not offer an opinion about whether the differences recorded in Attachment 7 are statistically significant from what Mr. Jurgielewicz initially reported on the DMRs.

In the February 2007 DMR, Mr. Jurgielewicz reported the daily average UOD effluent limit as 315 pounds per day, which is less than the effluent limit of 550 pounds per day. Consequently, Department staff did not allege, in the June 9, 2009 motion, that Respondents exceeded the daily average UOD effluent limit in February 2007. Ironically, the second method that Mr. Totzke used to calculate the daily average UOD effluent limit for February 2007 resulted in a concentration of 637 pounds per day, which exceeds the SPDES permit effluent limit of 550 pounds per day.

Mr. Totzke states (see Totzke Affidavit, Exhibit B, Attachment 6) that if Respondents had analyzed wastewater samples in 2007 for CBOD₅, the concentrations for the daily average UOD effluent limit "would most likely be lower" because ammonia levels would not be duplicated. Mr. Totzke bases this conclusion on his review of the CBOD₅ data for 2009, which he states is consistently less than or equal to BOD₅ concentrations (see Totzke Affidavit, Exhibit B, Attachments 6 and 9). The data presented in Attachment 9, however, are laboratory results for wastewater samples collected in March, April, May, June and July 2009. As noted above the relevant period considered in this administrative enforcement proceeding includes up to February 2009. With respect to CBOD₅, Respondents offer no data from January and February 2009.

With respect to whether Respondents exceeded the daily average UOD effluent limits prescribed in the SPDES permits, Respondents failed to offer evidence sufficient to refute Department staff's prima facie showing. Accordingly,

⁹ In 2007, Respondents did not submit DMRs for September, October, November and December.

Respondents have not raised any factual issues that require adjudication. Given the information reported on the DMRs filed by Mr. Jurgielewicz, Department staff, therefore, proved that Respondents exceeded the daily average UOD effluent limits prescribed in the SPDES permits on the following occasions:

1. In 2005, January, March, June, July, August, September, October, November and December;
2. In 2006, January, February, March, April, May, June, July, August, September, October, November and December;
3. In 2007, January, March, April, May, June, July and August;
4. In 2008, October, November and December; and
5. In 2009, January and February.

7. Second Cause of Action

The second cause of action (¶¶ 21-23 Wilkinson Affirmation) concerns the daily maximum UOD effluent limit. Mr. Totzke's analysis, however, is limited to a review of the daily average UOD concentrations (see Totzke Affidavit, Exhibit B). Therefore, contrary to their arguments, Respondents offer nothing to refute Department staff's prima facie showing that Respondents exceeded the daily maximum UOD effluent limits prescribed in the SPDES permits.

As a result, no factual disputes associated with this parameter exist. Department staff demonstrated the violations alleged in the June 9, 2009 motion by providing copies of the DMRs that Mr. Jurgielewicz filed with the Department. These DMRs show that Respondents exceeded the daily maximum UOD effluent limits prescribed in the SPDES permits for the following months:

1. In 2005, March, June, July, August, September, October, November and December;
2. In 2006, January, February, March, April, May, June, July, August, September, October, November and December;

3. In 2007, January, March, April, May, June, July and August;
and
4. In 2008, October, November and December.

8. Fifth Cause of Action

With respect to the fifth cause of action (¶¶ 30-32 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily average oil and grease (O&G) effluent limit prescribed in the SPDES permit on 22 occasions from March 2005 to November 2008. Mr. Totzke observes in his affidavit (¶ 15) that prior to June 2006, daily average O&G effluent limit concentrations reported on the DMRs were low, and that subsequent to June 2006, these concentrations peaked in April 2007, and remained high for about one year. Mr. Totzke observes further (¶ 15 Totzke Affidavit) that the concentrations decreased after April 2008. Mr. Totzke presents this information graphically in Attachment 9 (see Totzke Affidavit, Exhibit B).

Mr. Totzke asserts that false positive results could have been caused by two factors. The first is a polymer, which may have been used during the dredging process, and that could have artificially increased the daily average O&G effluent limit concentrations. The second is a change to the testing protocol that took effect in April 2009. (¶ 15 Totzke Affidavit, and Exhibit B.)

Schedule A to the February 7, 2005 Order on Consent (¶ 6 Wilkinson Affirmation, Exhibit A) required Mr. Jurgielewicz to provide Department staff with a plan to dredge the aeration lagoon, as well as a portion of West Mill Pond. The aeration lagoon is part of the duck farm's wastewater treatment facility, and is located upstream from the wastewater sample collection point. West Mill Pond is the receiving water for Respondents' treated wastewater discharges; it is downstream from the wastewater sample collection point.

Following the Department staff's review and approval, the February 7, 2005 Order on Consent required Mr. Jurgielewicz to implement the approved dredging plan. The dredging plan was not offered with any of the parties' papers. It is not known whether Mr. Jurgielewicz fully implemented the approved plan.

Nevertheless, Respondents retained Hydro Press, LLC and paid the company \$175,841.21 (see Fuchs Affidavit, Exhibit D). The exact services provided by Hydro Press, LLC, however, are not known.

As noted above, when considering a motion for order without hearing, the weight of the evidence is not considered. Rather, the issue is whether the moving party has offered sufficient evidence to support a prima facie case for summary judgment. (*Matter of Tractor Supply Co.*, Decision and Order of the Commissioner, August 8, 2008, at 3 [internal quotation marks and citations omitted].) For the reasons discussed below, Respondents do not raise a triable issue of fact concerning the daily average O&G effluent limit concentrations reported by Mr. Jurgielewicz in the DMRs.

Upon review of their papers, I conclude that Respondents did not offer sufficient evidence to show that a polymer may have affected the daily average O&G effluent concentrations. For example, Respondents did not offer any information about the dredging operation at the duck farm such as whether, and if so when, the aeration lagoon was dredged, and whether, and if so, what type of polymer was used when the aeration lagoon was dredged. This information could have been provided in an affidavit by a representative from the firm that undertook the dredging.¹⁰ In addition, Respondents did not offer any additional information from Mr. Totzke, or any information from a representative of the laboratory, explaining how a polymer could influence the test results.

The second factor that may have impacted the daily average O&G effluent limit concentrations is not relevant to this proceeding. Mr. Totzke reports in Exhibit B that the change in the testing protocol occurred in April 2009. However, Department staff's motion alleges violations concerning this parameter through November 2008. In addition, Department staff does not allege any violations after February 2009. Therefore, the April 2009 implementation of the new testing protocol did not impact any of the results reported on the DMRs that are the subject of this administrative enforcement proceeding.

¹⁰ Exhibit D to Mr. Fuchs's affidavit provides a list of expenses paid by Respondents with funds obtained from the sale of the development rights. Although Hydro Press, LLC, is listed as the dredge company for environmental work on Exhibit D, it is not known whether this firm was the only one to undertake dredging activities. Considering Respondents' papers in the most favorable light, no additional inference can reasonably be made.

Therefore, I conclude that Department staff established the violations alleged in the June 9, 2009 motion concerning this parameter by providing copies of the relevant DMRs, which show that Respondents exceeded the daily average O&G effluent limits prescribed in the SPDES permits for the following months:

1. In 2005, March, October, November and December;
2. In 2006, April, May, June, July, August, September, October, November and December;
3. In 2007, January, February, March, April, May, June, July and August; and
4. In November 2008.

9. Sixth Cause of Action

In the sixth cause of action (¶¶ 33-35 Wilkinson Affirmation), Department staff asserts that Respondents exceeded the daily maximum effluent limit prescribed in the SPDES permit for O&G on 23 occasions between October 2005 and February 2009. Mr. Totzke's analysis, however, is limited to a review of the daily average O&G concentrations, and is silent about the daily maximum O&G effluent limit (see Totzke Affidavit, Exhibit B). Therefore, contrary to their arguments, Respondents offer nothing to refute Department staff's prima facie showing that Respondents exceeded the daily maximum O&G effluent limit prescribed in the SPDES permits.

As a result, no factual disputes associated with this parameter exist. Department staff demonstrated the violations alleged in the June 9, 2009 motion by providing copies of the DMRs that Mr. Jurgielewicz filed with the Department. These DMRs show that Respondents exceeded the daily maximum O&G effluent limit prescribed in the SPDES permits for the following months:

1. In 2005, October, November and December;
2. In 2006, April, May, June, July, August, September, October, November and December;

3. In 2007, January, February, March, April, May, June, July and August;
4. In 2008, October and November; and
5. In February 2009.

D. Thirteenth Cause of Action

According to the terms of the SPDES permits (see Haas Affidavit, Exhibit 2 at 4 of 4, Condition [d], and Exhibit 3 at 10 of 13, Condition [c] and Permit Attachment B [Incident Report]), Respondents are required to file a noncompliance report when effluent limits are exceeded. A completed copy of Permit Attachment B is required pursuant to the terms of the SPDES permit effective March 28, 2008. For the thirteenth cause of action (¶¶ 50-51 Wilkinson Affirmation), Department staff asserts that on 37 occasions, Respondents failed to submit noncompliance reports and, subsequent to March 2008, completed copies of Permit Attachment B, with each DMR when a effluent limit was exceeded.

In her June 10, 2009 affidavit (¶ 17), Ms. Haas states that on or about June 8, 2009, she and other members of Department staff searched the Department's files. Based on that search, Ms. Haas states further that on 37 occasions Respondents did not file the required noncompliance reports and copies of the subsequently required Attachment B. (See also ¶ 11 Leung Affidavit.)

The violation alleged in the thirteenth cause of action is related to those alleged in the first through eighth causes of action. Respondents contend that their arguments concerning the calculation of effluent limit concentrations and the violations alleged in the first through eighth causes of action are related to this cause of action. These arguments are not persuasive for the following reasons.

First, I have concluded, as outlined above, there are no disputed issues of fact concerning the violations alleged in the first through eighth causes of action. Second, Respondents had an obligation, pursuant to the terms of the SPDES permit, to simultaneously file the noncompliance reports and, as later required by the SPDES permit that became effective on March 28,

2008, copies of Permit Attachment B with the DMRs when Respondents reported concentrations in excess of permit effluent limits.

Department staff's proof establishes the violation alleged in the thirteenth cause of action. Therefore, I conclude that on 37 occasions, Respondents violated the condition in the respective SPDES permit (see Haas Affidavit, Exhibit 2 at 4 of 4, Condition [d], and Exhibit 3 at 10 of 13, Condition [c] and Permit Attachment B [Incident Report]), that required Respondents to file noncompliance reports and copies of Permit Attachment A. Because the concentrations reported on the DMRs for one or more parameters exceeded the effluent limits prescribed in the SPDES permits, the violations occurred during the following months:

1. In 2005, January, February, March, April, May, June, July, August, September, October, November and December;
2. In 2006, January, February, March, April, May, June, July, August, September, October, November and December;
3. In 2007, January, February, March, April, May, June, July and August;
4. In 2008, October, November and December; and
5. In January and February 2009.

E. Relief

Citing ECL 71-1929, Department staff states 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 argues that the violations alleged in the motion have continued for several years without any resolution or remediation. Nevertheless, Department staff requests \$37,500 for each of the 16 causes of action for a total requested civil penalty of \$600,000 (16 x \$37,500 = \$600,000).

In addition to the requested civil penalty, Department staff requests that the Commissioner direct Respondents to comply with the requirements outlined in Schedule A, which is attached to Ms. Wilkinson's Affirmation as Exhibit D. Schedule A would require Respondents to retain a certified wastewater treatment operator to oversee operations at the wastewater treatment plant, the wastewater collection system, and the aeration lagoon. In addition, Schedule A would require Respondents to retain a professional engineer to develop the various plans, and to design and oversee the construction of the facilities outlined in the schedule of compliance incorporated into the SPDES permit (see Haas Affidavit, Exhibit 3 at 11 and 12 of 13). The purpose of Schedule A is to ensure that wastewater discharges from the duck farm comply with the terms and conditions of the current SPDES permit.

1. Respondents' Reply

With respect to relief, Respondents assert three issues that require an adjudicatory hearing. First, Respondents contend there are issues of fact related to the actual severity and potential harm associated with the wastewater discharges from the duck farm. According to Respondents, the Department's *Civil Penalty Policy* (see DEE-1, June 20, 1990, § IV[G]) requires a consideration of the gravity of the violations, and the resultant potential environmental harm. (¶ 28 Sinnreich Affirmation.)

Respondents argue that Department staff offered no evidence to demonstrate that the alleged violations resulted in actual harm to the receiving waters. Respondents state that Mr. Leung refers to a study in his affidavit (see ¶ 9), undertaken by Stony Brook University, School of Marine and Atmospheric Sciences (SoMAS), which concludes that the wastewater discharge from the duck farm is the second largest source of nitrogen entering the Forge River drainage basin. Respondents note that Department staff did not include a copy of the report undertaken by SoMAS with the motion papers, and has yet to provide Respondents with a copy of it, though requested pursuant to New York State Freedom of Information Law (FOIL). In contrast, Respondents refer to Mr. Totzke's affidavit and Exhibit B, which includes Attachments 1 through 9. (¶¶ 29, 30 Sinnreich Affirmation.)

In Attachment 2 (Totzke Affidavit, Exhibit B), Mr. Totzke explains that he and his staff conducted dye tracer studies of West Mill Pond and the Forge River. The studies were undertaken in March 1979, and March and April 2007. Prior to the second dye tracer study, Respondents had installed a diffuser at the discharge point. The purpose of the diffuser is to facilitate the mixing of the treated effluent discharged from the duck farm with the receiving waters in West Mill Pond.

The purpose of the studies was to determine the travel time of the effluent discharged from the duck farm to the Forge River dam, where the Forge River discharges to the Atlantic Ocean. Based on the studies, the travel time is 3.5 hours (*i.e.*, 0.15 days). Mr. Totzke explains that over 95% of the effluent discharged from the duck farm passes the dam after 5 days. Given this short travel time, Mr. Totzke concludes that the oxygen uptake by the effluent discharged from the duck farms is minimal. (See Totzke Affidavit, Exhibit B, Attachment 2.)

Second, Respondents argue (¶ 28 Sinnreich Affirmation) there is an issue about their ability to pay any civil penalty, and refer to the Department's *Civil Penalty Policy* (see DEE-1, June 20, 1990, § IV[I][7]), which recommends a consideration of this factor. According to Respondents, they have spent more than \$2 million to comply with requirements outlined in the 2005 Order on Consent. In light of these costs already incurred, Respondents contend that the requested civil penalty is excessive. Respondents contend further that payment of the requested civil penalty would put the duck farm out of business. (See ¶¶ 27, 32 Sinnreich Affirmation, ¶¶ 16-19 Jurgielewicz Affidavit.)

To further support the contention that they are not able to pay the requested civil penalty, Respondents offer an affidavit by Jeffery Fuchs, sworn to August 28, 2009 with attached Exhibits A through D. Mr. Fuchs is a certified public account from the firm of Esposito, Fuchs, Taormina and Company (Central Islip, New York). Since 1993, Mr. Fuchs has served as Mr. Jurgielewicz's accountant, as well as the accountant for the duck farm. (¶¶ 1 and 2 Fuchs Affidavit.)

In response to Department staff's June 9, 2009 motion for order without hearing, Mr. Fuchs reviewed Mr. Jurgielewicz's personal financial records, as well as those of the duck farm from 2004 to 2008. The purpose of the review was to assess the

financial performance and status of the duck farm, as well as Mr. Jurgielewicz's personal income derived from operations at the duck farm. (¶ 3 Fuchs Affidavit.)

Based upon his review, Mr. Fuchs outlined the following conclusions in his affidavit and attached Exhibits. First, the duck farm has operated at a substantial net loss in four of the last five years. The net loss in 2007 was about \$2.1 million dollars. In 2007, the two largest expenditures were duck feed due to a worldwide increase in the price of grain, and environmental compliance projects. (¶ 4 Fuchs Affirmation, and Exhibit A.)

Second, Mr. Fuchs provides a chart that outlines the duck farm's current or short-term (*i.e.*, less than one year) liabilities and its long-term liabilities. In 2008, the duck farm's total liabilities exceeded \$4 million. According to Mr. Fuchs, the debt is the result of borrowing to pay for environmental upgrades, which include the dredging of the aeration lagoon and West Mill Pond in 2006. (¶ 5 Fuchs Affirmation, and Exhibit B.)

Third, Exhibit C to Mr. Fuchs's affidavit is a list of environmental compliance and remediation costs from 2004 to 2008. The expenditures in 2006 totaled \$1.3 million, and were associated with cleaning up the composting area and the dredging, as identified above. (¶ 6 Fuchs Affirmation, and Exhibit C.)

Fourth, Mr. Jurgielewicz states that in May 2007, he accepted a proposal to sell the development rights to the duck farm to Suffolk County and the Town of Brookhaven for about \$5.6 million. The intent of the sale was to preserve and protect a traditional Long Island farm. (¶ 8 Jurgielewicz Affidavit.)

Contrary to public perception, Mr. Jurgielewicz states further that the sale of the development rights was not a windfall. Rather, Mr. Jurgielewicz explains that he used the proceeds from the sale of the development rights to pay bills related to feed, utilities, environmental improvements, and back payroll taxes, among other things. In addition, Mr. Jurgielewicz purchased the neighboring Titmus Duck Farm to use as a hatchery and, thereby, improve the duck farm's future business performance. According to Mr. Jurgielewicz, he did not

personally benefit from the sale of the property rights. (¶ 9 Jurgielewicz Affidavit.)

Mr. Fuchs provides a breakdown of how the proceeds from the sale of the development rights were distributed to three payees. The Suffolk County Treasurer received about \$83,000 for real estate taxes. Hyrdro Press, LLC received about \$176,000 for unspecified environmental work. Suffolk County Nation Bank received the balance, which was distributed among various feed companies, insurance companies, and Long Island Power Authority, among others. Mr. Fuchs notes that Mr. Jurgielewicz did not receive any of the proceeds from the sale of the property rights for his personal use. (¶ 7 Fuchs Affirmation, and Exhibit D.)

Finally, Respondents contend there is a public policy issue concerning the continued operation of this agricultural activity. (¶¶ 4, 24-28 Sinnreich Affirmation.) Respondents argue that the intent of Section 3 of the New York State Agriculture and Markets Law, and Section 85-405 of the Code for the Town of Brookhaven is to conserve agricultural lands, and to promote agricultural businesses such as the duck farm. Respondents note that the duck farm employs at least 60 unskilled laborers, and that these jobs would be lost, if the Commissioner assessed the requested civil penalty. (¶¶ 34-37 Sinnreich Affirmation.)

2. Department Staff's Reply

With respect to Respondents' proposed issue concerning environmental harm, Department staff argues in its October 9, 2009 reply that the June 9, 2009 motion does not allege that Respondents violated water quality standards. As a result, Department staff argues that water quality standards are not at issue in this administrative enforcement proceeding.

3. Discussion and Ruling

Respondents correctly note that the Commissioner should consider several factors in determining the appropriate civil penalty, and that these factors are outlined in the Department's *Civil Penalty Policy* (DEE-1, June 20, 1990). Two among them are environmental harm, and a respondent's ability to pay a civil penalty. The scope of this administrative proceeding is to

determine whether Respondents complied with the terms and conditions of the relevant SPDES permit, the ECL and the implementing regulations. Considerations related to the intent of the New York State Agriculture and Markets Law and local laws, however, are beyond the scope of this proceeding.

Department staff correctly notes that the water quality standards are not at issue in this administrative enforcement proceeding. However, Respondents' failure, over the course of several years, to comply with various effluent limits prescribed in the SPDES permits reasonably demonstrates the potential for environmental harm. The purpose of the effluent limits prescribed in the SPDES permits is to preserve the quality of the receiving waters. If discharges to the receiving waters often exceed effluent limits, which is the case here, then the quality of the receiving waters may not be preserved, and the potential for adverse environmental impacts is highly likely.

Respondents' evidence demonstrates that they have invested significant capital in environmental compliance projects at the duck farm. Respondents' investment, however, is significantly incomplete. Some of the established violations discussed above show that Respondents have yet to comply with additional SPDES permit conditions concerning the development and implementation of a comprehensive nutrient management plan, and facilities that control residual chlorine concentrations and seasonal nitrogen limits, and maintain dissolved oxygen limits. Also, Respondents have neither developed nor implemented a best management practices plan. (See Haas Affidavit, Exhibit 3 at 11 and 12 of 13.)

The cost of complying with these additional permit conditions is not known, and a record about these costs should be developed at a hearing. Additional information concerning the current fiscal status of the duck farm would assist in determining whether the requested civil penalty is appropriate. Accordingly, I deny Department staff's June 9, 2009 motion for order without hearing with respect to the issue of relief. Staff's request that the Commissioner direct Respondents to implement the requirements outlined in Schedule A is addressed in the next section of this ruling.

IV. Petition to Intervene

As noted above, Save the Forge River, Inc., by its legal counsel, petitioned to intervene in the matter pursuant to 6 NYCRR 622.10(f). Respondents and Department staff oppose the petition to intervene. For the reasons discussed below, I grant Save the Forge River's petition to intervene. The hearing, however, will be limited to issues concerning relief.

The Forge River is a tidal estuary, about four miles in length, located in the Town of Brookhaven, Suffolk County on the South Shore of Long Island. The freshwater tributaries to the Forge River are West Mill Pond, East Mill Pond, Ely Creek, Poospatuck Creek and Second Neck Creek. The Forge River flows south to Moriches Bay, and then to the Atlantic Ocean.

Respondents' SPDES permit authorizes the discharge of treated wastewater from the duck farm to West Mill Pond. The record of this matter, as developed to date, references two studies concerning the water quality of the Forge River and its tributaries (see ¶ 9 Leung Affidavit; Super Affirmation, Exhibit B). These studies show excessively high concentrations of nitrogen in the Forge River, which has created an hypoxic (low oxygen) condition. As a result, shellfish, fish and other wildlife cannot use the Forge River as habitat. However, Respondents' consultants offered studies to show that the duck farm's wastewater discharges travel to the Atlantic Ocean within 3.5 hours (see Totzke Affidavit, Exhibit B, Attachment 2).

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

According to its verified petition dated August 14, 2009, SFR was formed in 2005 by local residents to address the pollution in the Forge River and its associated adverse impacts. Several SFR members own property and live along the Forge River and its tributaries. SFR argues that its members have been harmed by Respondents' activities and Department staff's failure to enforce the terms and conditions of the SPDES permit. (¶¶ 59, 61 SFR Petition; Lupski and Dolezal Affidavits.)

All individuals of the Unkechaug Indian Nation are members of SFR. According to SFR's verified petition, the Unkechaug

Nation is a sovereign entity recognized by New York State. Members of the Unkechaug Nation reside on a 55-acre reservation located on the banks of the Forge River and the Poospatuck Creek. SFR contends that the Unkechaug Indian Nation has interests in the Forge River and its tributaries that are distinct from the general public. (¶¶ 1, 2, 4 and 10 Wallace Affidavit.) With reference to the Commissioner's Policy entitled, *Contact, Cooperation, and Consultation with Indian Nations* (CP-42, March 27, 2009), SFR argues that the Department must be sensitive to the concerns of Indian Nations, and consider these concerns when undertaking actions, such as the captioned enforcement proceeding. (¶¶ 62, 65 SFR Petition.)

1. SFR's Private Rights

In its petition and supporting papers, SFR outlines its relationship to the matter involved, as well as the nature of the evidence and arguments it would present at the administrative enforcement hearing (see 6 NYCRR 622.10[f][2]). SFR argues that its members have private rights that would be adversely affected. These private rights include the following: (1) adverse impacts to the members' recreational use of the Forge River and its tributaries; (2) adverse health effects associated with excessive water pollution; (3) decreased property values; and (4) adverse impacts to the culture and way of life of the Unkechaug Indian Nation. (SFR Memorandum of Law at 19-20, 25.)

Among the information filed with its petition, SFR filed three affidavits from its members. Ronald Lupski is a carpenter, who has resided at 71 Overlook Drive, Mastic, New York, with his wife, Esther, for 12 years. The backyard of Mr. Lupski's property is adjacent to Second North Creek, which is ½ mile upstream from the Forge River. Mr. Lupski has a dock that extends from his property into Second North Creek. Mr. Lupski is the President of SFR, and helped to form the group in 2005. According to Mr. Lupski, SFR is a community organization devoted to improving the environmental conditions of the Forge River, its tributaries, and Long Island's South Shore Estuary. (¶¶ 1, 2 and 5 Lupski Affidavit.)

Mr. Lupski states that the Forge River and its tributaries are extremely polluted, and that a source of the pollution is the Jurgielewicz Duck Farm, which has a history of not complying

with its SPDES permit. Mr. Lupski states further that the pollution is so significant that direct contact with the water, such as with the eyes or mouth, would result in serious illness. In addition, the river and its tributaries give off an offensive sulfur odor. (¶ 3 Lupski Affidavit.)

In his youth and up until a few years ago, Mr. Lupski enjoyed the Forge River for swimming, fishing and kayaking. He states that he can no longer undertake these activities, and prohibits his children and grandchildren from engaging in these activities, given the polluted nature of the Forge River. If the water quality of the Forge River improved, Mr. Lupski would like to resume these activities, and would encourage his children and grandchildren to do the same. Mr. Lupski contends that the polluted nature of the Forge River has adversely impacted the value of his property. (¶¶ 6, 7, 8 and 9 Lupski Affidavit.)

Finally, Mr. Lupski explains in his affidavit that his wife's health has been adversely impacted by the pollution collecting in the Forge River. On June 21, 2005, Esther Lupski visited Dr. Atul N. Shah for a chronic cough. Dr. Shah concluded that Mrs. Lupski's cough was caused by the strong sulfur odor emanating from the polluted Forge River. (¶ 10 Lupski Affidavit.)

John Dolezal is the Treasurer for SFR. He is a retired police officer, who has resided at 85 Overlook Drive, Mastic, New York for about 30 years. Mr. Dolezal's property is adjacent to Second North Creek, and it is about 30 yards upstream from the Forge River. Prior to residing at 85 Overlook Drive, Mr. Dolezal owned property at 56 Riveria Drive, which is located on the Forge River. (¶¶ 1, 2 and 5 Dolezal Affidavit.)

Mr. Dolezal explains that he has lived near the Forge River all his life. From the 1950s, Mr. Dolezal boated, swam and fished in the Forge River until between 1965 and 1970. Subsequently, he stopped swimming and fishing due to noxious odors. Although Mr. Dolezal continues to boat on the Forge River, he avoids any direct contact with the water. According to Mr. Dolezal, the polluted nature of the Forge River is well known and, as a result, property values have declined. (¶¶ 6, 7 and 10 Dolezal Affidavit.)

Harry B. Wallace is the elected Chief of the Unkechaug Nation. Since 1991, Chief Wallace has resided at 207 Poospatuck Lane on the Poospatuck Indian Reservation in Mastic (Town of Brookhaven, Suffolk County). According to Chief Wallace, the Poospatuck Reservation abuts the Poospatuck Creek, the Forge River and the mouth of Moriches Bay. Chief Wallace states that the word "Poospatuck" means "where the waters meet." Members of the Unkechaug Nation have resided along the Poospatuck Creek for more than 4,000 years. Members of Chief Wallace's family have resided along the Poospatuck Creek for more than nine generations. (¶ 1, 2 and 3 Wallace Affidavit.)

Chief Wallace states that the Unkechaug Nation is a sovereign entity recognized under federal common law, and New York State Law. The Unkechaug Nation has maintained political and economic relations with New York State since colonial times. The Church of the Unkechaug Nation is the oldest mission church in New York State, and was established in 1750. (¶ 3 Wallace Affidavit.)

According to Chief Wallace, the Unkechaug Nation is a founding member of SFR, and all tribal members are members of SFR. Chief Wallace describes the Poospatuck Creek and the Forge River as the lifeblood of the Unkechaug Nation. Members of the Unkechaug Nation used to rely on these waterways for sustenance, and for cultural and economic activities. For example, members of the Unkechaug Nation used to collect shellfish (razorback and quahog clams, scallops and crabs) from the Poospatuck Creek and the Forge River. They would fish for eel and flounder. Chief Wallace states that the shellfish and fish were abundant until 1991, and that these populations dropped substantially because of the poor water quality. Chief Wallace attributes this adverse impact, at least in part, to the wastewater discharges from the duck farm. (¶¶ 4, 6 and 7 Wallace Affidavit.)

Chief Wallace explains that members of the Unkechaug Nation used to operate a dock and marina where canoes, paddleboats and boat slips were rented. These facilities were also used to launch deep-sea fishing expeditions. When the water quality deteriorated, however, the dock and marina were shut down because the operation was not economically viable. (¶ 8 Wallace Affidavit.)

Members of the Unkechaug Nation used to conduct sacred cultural ceremonies at the mouth of the Forge River. Chief

Wallace explains, however, that the water quality has become so poor that these ceremonies have been substantially curtailed. Chief Wallace concludes that if the water quality of the Forge River improved, the members of the Unkechaug Nation could once again use the river and rely on its once abundant resources in the previous manner. (¶ 7, 8 and 9 Wallace Affidavit.)

SFR argues that Department staff cannot adequately represent the private rights of its members for the following reasons. First, SFR contends that Department staff's role in this proceeding is to look after the interests of the public at large. In so doing, SFR argues that Department staff cannot be relied upon to adequately represent the interests of SFR's members. Second, SFR notes that prior enforcement actions against these Respondents have not resulted in compliance. SFR asserts that with respect to the captioned matter, Department staff's request for relief is rather limited. Based on these circumstances, SFR concludes that Department staff's request for relief would not result in compliance with the SPDES permit. SFR argues that its members would continue to be adversely impacted by Respondents' lack of compliance. (SFR Memorandum of Law at 28, 30.)

2. SFR's Request for Additional Relief

SFR requests that the Commissioner should issue an order that would grant the following relief. First, SFR contends that Respondents should be required to provide a financial assurance that they can develop the plans, as well as design, construct and operate the wastewater treatment facilities at the duck farm in compliance with the terms and conditions of the SPDES permit (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a]). SFR notes that Respondents' alleged failure to comply with these SPDES permit conditions are being considered in causes of action nine, ten, eleven and twelve of this administrative enforcement action. With respect to the captioned matter, SFR observes that Schedule A (see Wilkinson Affirmation, Exhibit D) would extend the compliance dates for these requirements into the future. Finally, SFR notes that Respondents have made no showing that they are attempting to comply with these requirements, and contends that the reason may be, in part, that Respondents cannot afford to undertake them. To support this contention, SFR notes that Respondents used a portion of the proceeds from

the sale of the development rights to pay back-taxes. (SFR Memorandum of Law at 30, 38-40.)

Second, SFR contends that Respondents are not operating the wastewater treatment facilities at the duck farm in compliance with the terms and conditions of the SPDES permit, and could not do so until they have implemented the requirements outlined in the compliance schedule (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a]). Consequently, SFR argues that Respondents' authorization to discharge wastewater should be suspended while Respondents develop and construct the improvements required by the SPDES permit. SFR contends that Department staff has authority to revoke or suspend the permit, but has not done so despite the continued, excessive violations. To support this contention, SFR notes that various causes of action in this administrative proceeding allege that Respondents have routinely exceeded effluent limit concentrations and failed to submit DMRs in a timely manner. Therefore, to prevent future violations, SFR argues that the Commissioner should prohibit Respondents from discharging any wastewater from the duck farm unless and until Respondents demonstrate to the Department that they have changed operations at the duck farm so that discharges would comply with all effluent limitations. (SFR Memorandum of Law at 30, 42-43.)

Third, SFR contends that the wastewater discharges have significantly contributed to the deterioration of the Forge River watershed, and that Respondents must be held accountable for any environmental harm associated with the duck farm's wastewater discharges. Therefore, SFR seeks an Order that would require SFR to restore the adversely impacted resources. Although the 2005 Order on Consent required Respondents to dredge portions of West Mill Pond, SFR notes that Department staff is not seeking any remediation in the captioned enforcement action. SFR notes further that Department staff issued a notice of violation dated December 5, 2008 concerning the placement of fill and the discharge of pollutants in a regulated freshwater wetland, and alleged a violation of ECL article 24 in the December 5, 2008 notice of hearing and complaint. However, Department staff's June 9, 2009 motion for order without hearing does not include the alleged ECL article 24 violation. SFR requests that the effluent limitations related to nitrogen concentrations should be lowered, and that Respondents should be required to install aeration devices to

increase oxygen levels in the receiving waters. (SFR Memorandum of Law at 30-31, 44-45.)

Fourth, in order to discourage future violations, SFR requests that any assessed civil penalty should be substantially increased from what Department staff requests in the motion. SFR asserts that Department staff's civil penalty request of \$600,000 is too low given Respondents poor compliance history and the number of violations being considered in this matter. Under these circumstances, SFR argues that a \$600,000 civil penalty would not deter Respondents from future violations. Although the 2005 Order on Consent assessed a civil penalty, SFR notes further that the penalty was suspended pending compliance with the terms and conditions of the 2005 Order on Consent (see Wilkinson Affirmation, Exhibit A). SFR notes further that Respondents did not fully comply with the requirements outlined in Schedule A attached to the 2005 Order on Consent, and asserts that Department staff did not attempt to collect the suspended civil penalty. SFR recommends that the suspended civil penalty assessed in the 2005 Order on Consent should be put in escrow or be used to post a bond as part of its request for a financial assurance. (SFR Memorandum of Law at 31, 46-49.)

Finally, SFR requests that the Commissioner's order should provide a schedule that would assess additional "stipulated" civil penalties that would become payable if Respondents violate the terms and conditions of the Commissioner's Order, such as Schedule A (see Wilkinson Affirmation, Exhibit D). SFR contends that any suspended civil penalties should become payable, and Department staff should attempt to collect them. As an alternative to additional civil penalties, SFR recommends that the scope of any remediation could be expanded. According to SFR, the purpose of the stipulated relief is to avoid the need to commence another administrative enforcement action. (SFR Memorandum of Law at 31, 46-50.)

3. Additional Violations

SFR supports Department staff's June 9, 2009 motion for order without hearing, and argues that Department staff meets the requirements for obtaining summary judgment. SFR notes that the vast majority of the violations alleged in the June 9, 2009 motion are established by the DMRs that Respondents completed and filed with the Department. In addition, SFR argues there

can be no dispute that Respondents failed to timely file DMRs and other documents required by the SPDES permit (SFR Memorandum of Law at 32-34.)

SFR characterizes the allegations asserted in the motion as the "tip of the iceberg," and contends there are many more, readily-established violations, which allegedly occurred since January 2004, that Department staff did not include in the June 9, 2009 motion. SFR sorts the alleged violations into thirteen categories (SFR Memorandum of Law at 34-37).

Generally, the proposed allegations are similar to those asserted in the June 9, 2009 motion for order, and include, for example, additional dates when Respondents either failed to file DMRs, or reported effluent limit concentrations on DMRs in excess of the SPDES permit. Other proposed allegations expand upon those asserted in the motion. For example, in the tenth cause of action, Department staff alleges that Respondents did not file an engineering report and plans on June 1, 2008 as required by the SPDES permit (see Haas Affidavit, Exhibit 3 at 11 of 13, Condition [a][2]). Subsequent permit conditions (see e.g. Haas Affidavit, Exhibit 3 at 11 of 13, Conditions [a][3] and [4]) require Respondents to commence construction by August 1, 2009, and to complete construction by October 1, 2009, respectively. Because these two due dates have passed, SFR proposes that Respondents failure to comply with these conditions should also be considered in the captioned enforcement matter. (SFR Memorandum of Law at 34-37.)

SFR contends there are three reasons to include the additional allegations it has proposed. First, the proposed allegations demonstrate that the violations asserted in Department staff's motion are a limited subset of the total number of violations associated with operations at the duck farm. Second, the proposed allegations are relevant to determining the appropriate civil penalty because they would demonstrate an extensive history of noncompliance and Respondents' lack of good faith to comply with permit conditions. Third, in the event there is a hearing to consider the causes of action asserted in the June 9, 2009 motion for order without hearing, SFR contends that the additional proposed allegations could also be considered at the hearing. (SFR Memorandum of Law at 37.)

B. Department staff's Opposition

Department staff opposes SFR's August 14, 2009 motion to intervene. In a response dated September 28, 2009, Department staff outlines its arguments.

1. SFR's Private Rights

Department staff disputes SFR's claim that its members would suffer an environmental impact that is different from what the public at large would suffer. Department staff notes that SFR did not quantify any difference in alleged harm that its members suffer as a result of the duck farm's wastewater discharges. According to Department staff, there are numerous public access points along the Forge River and its tributaries. Department staff argues that the general public, in addition to SFR's members, use and would continue to use the Forge River for recreational purposes. Department staff concludes that the potential harm that SFR's members may suffer is substantially the same as what members of the general public may experience. (Department staff's Opposition at 2.)

Department staff asserts that Mrs. Lupski's claim (see ¶ 10 Lupski Affidavit) that the negative health effects, which she has experienced, are directly associated with the pollution in the river is unsubstantiated. The basis, in part, for Department staff's assertion is that SFR did not provide any evidence to show that the wastewater discharge from the duck farm is the major source of pollution in the Forge River. (Department staff's Opposition at 2.)

With respect to decreasing property values, Department staff contends that SFR's assertion in this regard is unsubstantiated. Department staff argues there are a number of factors that could impact property values in the vicinity of the Forge River, among them, the current global recession. Department staff argues further that the Commissioner cannot grant any relief to SFR's members if their assertion about decreasing property values is true. (Department staff's Opposition at 2-3.)

Department staff references SFR's mission statement from its website (see www.savetheforgeriver.us), which states, in part, that its purpose is to advocate for the Forge River as

well as the South Shore Estuary. Department staff argues that the public as a whole would embrace and support such a mission statement. Therefore, Department staff concludes that SFR is not unique in its perspective, but shares the public's view. (Department staff's Opposition at 3.)

2. Representation of SFR's Interests

Department staff asserts that it can adequately represent SFR's members in this matter because the private rights that SFR contends are being harmed are the same rights and interests that Department staff has a duty to protect. To support this assertion, Department staff notes that it is the principal state agency charged with enforcing the Environmental Conservation Law, and cites to ECL 1-10101(1) and the *Matter of Town of Riverhead*, Commissioner's Interim Decision, November 20, 2000, in support. (Department staff's Opposition at 3-4.)

3. Department Staff's Request for Relief

Department staff argues that the requested relief in this matter would not substantially adversely affect the rights of SFR's members. According to Department staff, the proposed Schedule A (see Wilkinson Affirmation, Exhibit D) is a comprehensive schedule of corrective action. When implemented, Department staff argues that Respondents would comply with the SPDES permit and all other applicable environmental laws. (Department staff's Opposition at 4-5.)

With respect to remediation, Department staff argues that deference should be given to its assessment of what restoration, if any, Respondents should undertake. According to Department staff, SFR does not provide any information to support its request for additional dredging and aeration. Finally, Department staff contends that its civil penalty request of \$600,000 is within the Department's civil penalty guidelines. Contrary to SFR's claim, Department staff argues that the requested civil penalty would deter future noncompliance, and would allow Respondents to implement the requirements needed to comply with the SPDES permit. (Department staff's Opposition at 5.)

4. Additional Allegations

Department staff objects to including the additional allegations that SFR proposes in its petition to intervene. Department staff states that it carefully considered the merits of every potential violation and developed a case that Respondents could not contravene. Department staff explains further that the June 9, 2009 motion for order without hearing was intended to expedite the enforcement process because a lengthy administrative hearing would not have been in the best interest of the Department or the public. According to Department staff, a result of including the additional allegations proposed by SFR would be a lengthy hearing. Department staff claims that some of the additional allegations proposed by SFR (e.g., Respondents' alleged failure to accurately report effluent limit concentrations) cannot be enforced in this administrative enforcement proceeding. In closing, Department staff notes that it has the discretion to commence subsequent administrative enforcement proceedings against Respondents whenever necessary. (Department staff's Opposition at 5-6.)

C. Respondents' Opposition

Like Department staff, Respondents also oppose SFR's August 14, 2009 motion to intervene. In an affirmation dated September 25, 2009 by Mr. Sinnreich, Respondents state that they support the arguments made by Department staff in opposing SFR's petition to intervene, and provide additional arguments.

Respondents note that prior to filing its petition to intervene, SFR made similar arguments, and requested similar relief in a letter to Department staff dated August 11, 2009 (see SFR Memorandum of Law, Exhibit Y). In the August 11, 2009 letter, SFR requested that Department staff modify, suspend or revoke the duck farm's SPDES permit due to a long, persistent pattern of noncompliance. Respondents replied with a letter dated September 11, 2009 (see Sinnreich Affirmation [September 25, 2009], Exhibit A).

Respondents argue that SFR's petition to intervene does not offer many details about its members. Absent more information, Respondents contend that SFR's members may be limited to Chief

Wallace and Messrs. Lupski and Dolezal. (¶ 3[i] Sinnreich Affirmation [September 25, 2009].)

Respondents argue further that SFR's petition does not include any scientifically reliable data, to demonstrate that wastewater discharges from the duck farm significantly caused the water quality of the Forge River to deteriorate. Respondents acknowledge that the US Army Corps of Engineers has prepared a report entitled, *Forge River Watershed [March 2008]* (see SFR Memorandum of Law, Exhibit B), but argue that the findings of the report do not support SFR's contentions. Rather, the US Army Corps' report identifies numerous pollution sources, which include nine other duck farms as past sources, and current sources such as the use of residential fertilizers, failing septic systems, and stormwater runoff. Respondents argue that SFR's participation in any hearing concerning the June 9, 2009 motion would not significantly contribute to the development of the record. (¶ 3[ii] Sinnreich Affirmation [September 25, 2009], and Exhibit A.)

In contrast, Respondents referred to the analyses conducted by Mr. Totzke. According to Mr. Totzke, Respondents did not properly calculate some effluent limit concentrations from laboratory data sheets. In addition, Mr. Totzke and his staff conducted dye tracer studies. The results of these studies show that the travel time for wastewater discharges from the duck farm to the Forge River dam was 3.5 hours or 0.15 days. (Sinnreich Affirmation [September 25, 2009], Exhibit A; Totzke Affidavit, Exhibit B, Attachments 2, 5 and 6.)

Respondents oppose the additional relief requested by SFR in its petition to intervene. Respondents object to the immediate suspension or revocation of the SPDES permit. Respondents note that the Jurgielewicz Duck Farm was established in 1919, and is the only surviving duck farm on Long Island today. In addition, Respondents employ 60 labors. The suspension or revocation of its SPDES permit would put the duck farm out of business and the laborers would lose their jobs. (Sinnreich Affirmation [September 25, 2009], ¶ 1 of Exhibit A.)

D. SFR's Request for Leave to Reply

In a cover letter dated November 2, 2009, Mr. Super requested leave to reply to Respondents' and Department staff's

respective oppositions to SFR's petition to intervene. With the November 2, 2009 cover letter, Mr. Super enclosed his reply memorandum of law.

By letter dated November 5, 2009 from Mr. Sinnreich, Respondents objected to SFR's request for leave to file a reply, and argue that SFR's reply memorandum should not be considered. By letter dated November 9, 2009 from Ms. Wilkinson, Department staff also objected to SFR's request for leave to file a reply, and similarly argues that SFR's reply memorandum should not be considered.

Mr. Super, on behalf of SFR, responded with a letter dated November 11, 2009. SFR contends that it enclosed the reply memorandum with its request for leave to file a reply in order to conserve resources and to avoid any unnecessary delay in deciding the pending motions.

Respondents presented additional objections in a letter dated November 11, 2009 by Mr. Sinnreich.

E. Ruling and Discussion

For the reasons outlined below, I grant, in part, and deny, in part, SFR's petition to intervene. A consideration of the reply enclosed with SFR's request for leave dated November 2, 2009 was not necessary to come to this determination.

Pursuant to 6 NYCRR 622.10(f)(1), intervention in an administrative enforcement hearing by a third party is permitted for good cause shown. Section 622.10(f)(2) of 6 NYCRR outlines the information that a prospective intervener must include in its petition. The standard for intervention is provided at 6 NYCRR 622.10(f)(3). In *Riverhead, supra.*, the Commissioner provided additional guidance concerning the standard for intervention. Persons seeking to intervene in an enforcement proceeding must satisfy three requirements:

1. They have private rights;
2. Such rights would be substantially adversely affected by the relief requested; and

3. Such rights cannot be adequately represented by the parties at this hearing.

A petitioning party can show it has a private interest that would not be adequately represented by the parties when the proposed remediation of a site where violations allegedly occurred would affect the private property rights of adjacent landowners (see Feller, *DEC's New Hearing Rules*, 5 Environmental Law in New York [Matthew Bender & Co., Inc.] April 1994 at 62). Third parties have been granted intervention when owners of a residence sought to protect their private property interests in the remediation of their residence (see *Matter of Terminix Intl. Co., LP*, ALJ Ruling on Petition to Intervene, Feb. 9, 1999), and when neighbors sought to demonstrate nuisance and health impacts on their properties (see *Matter of Mosher Marbel Mfg., Ltd.*, ALJ Ruling on Motion for Intervention, Dec. 12, 1998).

Similar circumstances exist here. Some of SFR's members reside on the Forge River and its tributaries, and the receiving water for the wastewater discharges from the duck farm is West Mill Pond, a tributary to the Forge River. Although SFR did not show, by its petition, that any of its members reside on property adjacent to the duck farm, the petition does demonstrate that some members are downstream from the duck farm (e.g., Members of the Unkechaug Nation). In the affidavits included with SFR's petition, SFR members state that they can no longer use the Forge River for recreation, sustenance, and ceremonial purposes given current water quality conditions (see Lupski, Dolezal and Wallace Affidavits). In addition, at least one SFR member is experiencing health problems that may be related to the water quality of the Forge River (¶ 10 Lupski Affidavit).

As noted above, Department staff contends the potential harm that SFR's members may suffer is substantially the same as what members of the general public might experience. I disagree. Members of the public may choose whether and when to access the Forge River and its tributaries and, thereby, avoid any potential adverse impacts. SFR members, however, live adjacent to the river and its tributaries, and potential adverse impacts may be unavoidable. In their affidavits, SFR members explain that they did not move to the nuisance conditions that currently exist. Rather the water quality deteriorated over

time while SFR members were residing near the river and its tributaries.

Respondents' objections that SFR's petition does not provide details about its membership, and scientific information to substantiate its claims that the wastewater discharges from the duck farm have significantly adversely impacted the water quality of the Forge River and its tributaries are without merit. A petition to intervene must show there is a reasonable likelihood that private rights would be substantially adversely affected (see 6 NYCRR 622.10[f]). SFR's petition meets this standard. The petition need not include all the evidence that SFR would present at the adjudicatory hearing. Rather, a showing is needed. The hearing will provide the opportunity for SFR to present a direct case that will be subject to cross-examination by Respondents and Department staff. The fully developed record, will serve as the basis for the findings of fact and the Commissioner's final determination.

SFR's petition shows there is a reasonable likelihood that its members' private interest may be substantially adversely affected by the relief that Department staff requests. SFR requests, among other things, that the Commissioner direct Respondents to provide a financial assurance and to suspend the SPDES permit until Respondents bring the wastewater treatment facility into compliance. Although Department staff seeks an Order from the Commissioner directing Respondents to come into compliance with the terms and conditions of the SPDES permit, SFR notes that Respondents would be allowed to continue operations while they plan and construct additional details related to the wastewater treatment facility, and develop best management practices. SFR's petition shows there are factual disputes about whether the water quality of the Forge River and its tributaries would deteriorate further if Respondents are allowed to continue operating the duck farm during this interim period which, pursuant to the terms and conditions of the SPDES permit, should have been completed in 2009.

Finally, SFR shows that Department staff and Respondents cannot adequately represent the interests of SFR's members in this proceeding. Department staff and SFR want Respondents to comply with the terms of the SPDES permit. Respondents also acknowledge that they must comply, and argue that they have undertaken efforts to do so. Given the dispute associated with relief and whether Respondents should be allowed to operate

while they come into full compliance with the terms of the SPDES permit, SFR will be permitted to represent itself at the hearing.

1. Additional Issues related to Liability

As noted above, SFR supports Department staff's June 9, 2009 motion for order without hearing, but characterizes the allegations asserted in the motion as the "tip of the iceberg." In its petition, SFR has identified additional potential violations, and requests leave to adjudicate them.

Third party intervention in an administrative enforcement proceeding is not intended to undermine Department staff's role as the State's environmental prosecutor (see *Riverhead, supra.*). Therefore, where, as here, a petitioner seeks to intervene, in part, to prosecute environmental concerns and, thereby, to act as a private Attorney General, the petition must be denied to avoid encroaching upon Department staff's environmental enforcement role (see *id.*; *Matter of Environmental Waste Incineration, Inc.*, ALJ Ruling, Nov. 1, 1996). Accordingly, I deny that portion of SFR's petition insofar as it seeks to add more allegations than what are already asserted in the June 9, 2009 motion for order without hearing.

2. Issues Associated with Relief

There are two components to the relief sought in this proceeding. The first component is the civil penalty, and the second is compliance and remediation. There are factual issues associated with both components that require adjudication, as outlined below.

a) Civil Penalty

The Department's *Civil Penalty Policy* (DEE-1, June 20, 1990) outlines, generally, three sets of circumstances that may be considered in determining the appropriate civil penalty. They are the benefit component, the gravity component, and a set of penalty adjustment factors. The benefit component focuses on the economic benefit, which may include the avoided costs that a violator may have obtained through noncompliance with the ECL,

regulations, or permit conditions. The gravity component considers the actual or potential environmental harm associated with the violations. Penalty adjustment factors can be characterized as either aggravating or mitigating factors, and include a respondent's culpability, a respondent's willingness to cooperate with Department staff to resolve violations, a respondent's history of noncompliance, and respondent's ability to pay a civil penalty.

With respect to the benefit component, Respondents contend they have incurred significant costs from implementing the requirements outlined in the compliance schedule incorporated into the 2005 Order on Consent. Also, daily operating costs have been high. Respondents contend further that additional significant costs would be associated with implementing the requirements outlined in the compliance schedule that is incorporated into the SPDES permit (see Haas Affidavit, Exhibit 3 at 11 of 13 through 13 of 13; also see Schedule A [Wilkinson Affirmation, Exhibit D]). In addition to the expenditures that Respondents paid to comply with the 2005 Order on Consent, Respondents offered an affidavit from Jeffery Fuchs, a certified public accountant, to provide information about Respondents' ability to pay the civil penalty that the Commissioner may assess as part of this administrative enforcement action.

At the hearing, Respondents will have the opportunity to present financial information about the costs related to compliance with the 2005 Order on Consent; the potential costs concerning the implementation of the compliance schedule in the SPDES permit (see Haas Affidavit, Exhibit 3 at 11 of 13 through 13 of 13) and Schedule A (see Wilkinson Affidavit, Exhibit D); as well as daily operating costs. Respondents may also present information concerning the financial impacts that would result from permit suspension or revocation.

Department staff and SFR will have the opportunity to examine any evidence that Respondents may offer as it relates to the economic benefit associated with the demonstrated violations, and Respondents' ability to pay a civil penalty.

Respondents assert that the gravity component should be very low because the violations alleged in the motion for order without hearing did not result in any actual or potential environmental harm. To demonstrate this assertion, Respondents offered the results of Mr. Totzke's dye tracer studies.

According to the studies, the travel time for wastewater discharges from the duck farm to the Atlantic Ocean is 3.5 hours. (Totzke Affidavit, Exhibit B, Attachment 2.)

In contrast, Department staff refers to a Stony Brook University study conducted by the School of Marine and Atmospheric Sciences (SoMAS), which evaluated the water quality of the Forge River. According to the SoMAS study, the duck farm may be the second largest contributor of nitrogen being discharged to the Forge River drainage basin (¶ 9 Leung Affidavit). This study served as the basis for Department staff to initiate a full review of the SPDES permit, and to propose modifications in 2005 (¶ 10, Leung Affidavit).

SFR offered a study of the Forge River watershed by the US Army Corps of Engineers dated March 2008, to support its claim that the wastewater discharges from the duck farm adversely impact the water quality of the Forge River (Super Affirmation, Exhibit B).

The underlying factual dispute relevant to the gravity component of the civil penalty is whether, and if so, to what extent, does the wastewater discharge from the duck farm adversely impact the water quality of the Forge River and its tributaries. At the hearing, each party will have the opportunity to present a direct case with respect to the gravity component of the civil penalty. The other parties will have the opportunity to cross-examine the evidence that is offered. The record developed about this issue will also serve as the factual basis for determining the second component of relief concerning compliance and remediation.

The hearing will also provide the parties with the opportunity to address the penalty adjustments identified in the *Civil Penalty Policy*. On the one hand, SFR contends that Respondents are highly culpable for the violations, and that the violations demonstrate a history of noncompliance. On the other hand, Respondents argue that they have attempted to cooperate with Department staff to quickly resolve violations, and to bring the duck farm into compliance with the SPDES permit.

b) Compliance and Remediation

With the June 9, 2009 motion for order without hearing, Department staff includes Schedule A (see Wilkinson Affirmation, Exhibit D). In general, this schedule duplicates those components of the compliance schedule from the SPDES permit (*cf* Haas Affidavit, Exhibit 3 at 11 of 13 through 13 of 13). Department staff does not seek to suspend or revoke the SPDES permit for the duck farm while Respondents implement the terms of Schedule A.

SFR, however, requests that Respondents be required to post a financial assurance, and seeks permit suspension until Respondents are in compliance with the SPDES permit. Respondents note that permit suspension would permanently put them out of business. A determination about permit suspension relates, in part, to whether, and if so, to what extent, does the wastewater discharge from the duck farm adversely impact the water quality of the Forge River and its tributaries.

SFR also seeks an Order from the Commissioner that would require Respondents to remediate West Mill Pond in order to restore the water quality of the Forge River and its tributaries. Whether the Commissioner should grant this request for relief relates to the adverse environmental impacts, if any, associated with the wastewater discharges from the duck farm. As noted above, the parties will have the opportunity to address this issue at the adjudicatory hearing.

Findings of Fact

The following findings of fact are established, as a matter of law, for the purposes of this proceeding.

I. Jurgielewicz Duck Farm

1. In 1919, Bronislaw Jurgielewicz established the Jurgielewicz Duck Farm. The duck farm is located in the Town of Brookhaven, Suffolk County (Tax Map District 200, Section 788, Block 1, Lot 1.006). The duck farm is

adjacent to West Mill Pond, which is a tributary of the Forge River.

2. Benjamin Jurgielewicz is a third generation duck farmer, and has worked full-time at the duck farm since graduating from college in 1981. Mr. Jurgielewicz inherited the duck farm from his father in 1991, and has endeavored to keep the duck farm a viable business in order to preserve a part of Long Island's agricultural history.
3. At all times relevant to this proceeding, Benjamin Jurgielewicz has been the general partner and sole proprietor of the Jurgielewicz Duck Farm.

II. State Pollutant Discharge Elimination System Permit

4. The Jurgielewicz Duck Farm (Attention: Benjamin Jurgielewicz) has held SPDES Permit No. NY-008125 since February 1975. The SPDES permit has authorized the discharge of treated wastewater from the duck farm to West Mill Pond.
5. Since 1975, Department staff has renewed the SPDES permit several times. The permit renewal terms, relevant to the captioned enforcement action, are from June 1, 2001 to June 1, 2006, and from March 28, 2008 to January 27, 2012.
6. Department staff conducted a full technical review of the duck farm's SPDES permit in 2005, and issued a draft permit in May 2005. Subsequently, modifications became effective on March 28, 2008.
7. During the intervening time from June 1, 2006 to March 28, 2008, Respondents operated the duck farm pursuant to the terms and conditions of the SPDES permit effective from June 1, 2001 to June 1, 2006 permit as provided for by State Administrative Procedure Act (SAPA) § 401(2).

III. SPDES Permit Parameters and Effluent Limits

8. The terms and conditions of the SPDES permits 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, total coliform, and residual chlorine. The March 2008 modifications to the SPDES permit also included a compliance schedule to upgrade the facility to meet effluent limits and monitoring requirements by November 1, 2009.

IV. Ultimate Oxygen Demand (UOD)

9. For the SPDES permit effective from 2001 through 2006, the daily average effluent limit for ultimate oxygen demand (UOD) varied during the year. From June 1 to October 31 the daily average effluent limit for UOD was 300 pounds. From November 1 through November 31, the limit was 330 pounds. From December 1 through February 28, the limit was 550 pounds. From March 1 through May 31, the limit was 330 pounds.
10. With respect to the current SPDES permit effective from March 28, 2008 to June 1, 2012, the daily average effluent limit for UOD continues to vary during the year. The limits are the same as those prescribed in the SPDES permit effective from 2001 through 2006.
11. For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for UOD varied during the year. From June 1 to October 31 the daily maximum effluent limit for UOD was 600 pounds. From November 1 through November 31, the limit was 660 pounds. From December 1 through February 28, the limit was 1100 pounds. From March 1 through May 31, the limit was 660 pounds.
12. With respect to the current SPDES permit effective from March 28, 2008 to June 1, 2012, the daily maximum effluent limits for UOD continues to vary during the

year. The limits are the same as those prescribed in the SPDES permit effective from 2001 through 2006.

V. Total Suspended Solids (TSS)

13. The daily average effluent limit for total suspended solids (TSS) does not vary during the year. For the SPDES permit effective from 2001 through 2006, the daily average effluent limit for TSS was 183 pounds. With respect to the current SPDES permit, the daily average effluent limit for TSS is also 183 pounds.
14. The daily maximum effluent limit for TSS does not vary during the year. For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for TSS was 367 pounds. With respect to the current SPDES permit, the daily maximum effluent limit for TSS is also 367 pounds.

VI. Oil and Grease (O&G)

15. For the SPDES permit effective from 2001 through 2006, the daily average effluent limit for oil and grease (O&G) was 22 pounds. With respect to the current SPDES, the daily average effluent limit for O&G is 22 pounds.
16. For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for O&G was 38 pounds. With respect to the current SPDES permit effective March 28, 2008, the daily maximum effluent limit for O&G is also 38 pounds.

VII. Settleable Solids

17. For the SPDES permit effective from 2001 through 2006, Respondents were required to monitor the daily average effluent limit for settleable solids, and to report the discharge concentration in milliliters per liter on the DMRs.
18. For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for settleable solids

was 0.3 milliliters per liter. With respect to the current SPDES, the daily maximum effluent limit for settleable solids is 0.3 milligrams per liter.

VIII. Coliform

19. For the SPDES permit effective from 2001 through 2006, the daily maximum effluent limit for coliform bacteria was 400 colonies per 100 milliliters. With respect to the current SPDES permit, the daily maximum effluent limit for coliform (7-day geometric mean) is 400 colonies per 100 milliliters.
20. Other effluent limits for coliform are prescribed in the SPDES permits. However, Respondents' compliance with these additional parameters is beyond the scope of this administrative enforcement proceeding.

IX. Enforcement and Order on Consent

21. In 2004, Department staff and the Suffolk County District Attorney's Office commenced a criminal enforcement action against Mr. Jurgielewicz because the wastewater discharge from the duck farm created a delta in West Mill Pond. The criminal enforcement action was resolved with the execution of an administrative Order on Consent (DEC File No. R1-20040511-232) dated February 9, 2001, which among other things, required Mr. Jurgielewicz to dredge West Mill Pond.

X. Ninth, Tenth, Eleventh, and Twelfth Causes of Action

22. By April 1, 2008, the Schedule of Compliance on page 11 of 13 of the SPDES permit required Respondents to submit a comprehensive nutrient management plan to Department staff. As of the date of Department staff's June 9, 2009 motion for order without hearing, Respondents had not filed the required plan.
23. The Schedule of Compliance on page 11 of 13 of the SPDES permit required Respondents to 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 to Department staff by June 1, 2008. As of the date of Department staff's June 9, 2009 motion for order without hearing, Respondents had not filed the required plans, specifications and manual.
24. Though required by the Schedule of Compliance on page 11 of 13 of the SPDES permit, Respondents, on three separate occasions, did not submit notices of compliance or noncompliance to Department staff within 14 days following the established dates.
 25. By June 1, 2008, the Special Conditions entitled, Industry Best Management Practices on page 12 and 13 of 13 of the SPDES permit required Respondents to submit a best management practices plan to Department staff. As of the date of Department staff's June 9, 2009 motion for order without hearing, Respondents had not filed the required best management practices plan.

XI. Fourteenth, Fifteenth, and Sixteenth Causes of Action

26. The SPDES permits require Respondents to file a completed and signed DMR form for each month. Respondents did not submit DMRs in 2007 for September, October, November and December, and in 2008 from January through September. During the two year period, Respondents did not file 13 DMRs.
27. The SPDES permit, effective March 28, 2008, requires Respondents to file DMRS on a monthly basis no later than the 28th day of the month following the end of each reporting period. Respondents failed to timely file DMRS for the following months:
 - a. The October 2008 DMR was due by November 28, 2008; however, Mr. Jurgielewicz dated it February 27, 2009 (3 months late);
 - b. The November 2008 DMR was due by December 28, 2008, but it is dated February 27, 2009 (2 months late);

- c. The December 2008 DMR was due by January 28, 2009, but it is dated February 27, 2009 (1 month late);
 - d. The January 2009 DMR was due by February 28, 2009, but it is dated March 13, 2009 (2 weeks late); and
 - e. The February 2009 DMR was due by March 28, 2009, but it is dated April 6, 2009 (1 week late).
28. Pursuant to the terms of the SPDES permit in effect for 2005, 2006, and 2007, Respondents were required to file DMRs on a monthly basis no later than 45 days following the end of each reporting period. On 21 occasions from February 2005 through May 2007, Respondents submitted DMRs more than 45 days after the end of the reporting period as follows:
- a. In 2005, for February, March, April, May, June, July, August, October, November and December;
 - b. In 2006, for January, February, March, April, May, June, and July; and
 - c. In 2007, for February, March, April, and May.

XII. First through Eighth Causes of Action

29. Based on the information that Mr. Jurgielewicz reported on the DMRs, Respondents exceeded the daily average UOD effluent limits prescribed in the SPDES permits on 32 occasions. The daily average UOD effluent concentrations were exceeded on the following months:
- a. In 2005, for January, March, June, July, August, September, October, November and December;
 - b. In 2006, for January, February, March, April, May, June, July, August, September, October, November and December;
 - c. In 2007, for January, March, April, May, June, July and August;
 - d. In 2008, for October, November and December; and

- e. In 2009, for January and February.
30. Respondents exceeded the daily maximum UOD effluent limits prescribed in the SPDES permits on 30 separate occasions. The daily maximum UOD effluent limits were exceeded on the following months:
- a. In 2005, for March, June, July, August, September, October, November and December;
 - b. In 2006, for January, February, March, April, May, June, July, August, September, October, November and December;
 - c. In 2007, for January, March, April, May, June, July and August; and
 - d. In 2008, for October, November and December.
31. Respondents exceeded the daily average TSS effluent limit prescribed in the SPDES permits on 24 occasions between January 2005 and February 2009.
32. Respondents exceeded the daily maximum TSS effluent limit prescribed in the SPDES permits in June 2006; and in March, April, May, June, July and August 2007.
33. Respondents exceeded the daily average O&G effluent limits prescribed in the SPDES permits for the following months:
- a. In 2005, for March, October, November and December;
 - b. In 2006, for April, May, June, July, August, September, October, November and December;
 - c. In 2007, for January, February, March, April, May, June, July and August; and
 - d. In November 2008.
34. Respondents exceeded the daily maximum O&G effluent limit prescribed in the SPDES permits for the following months:

- a. In 2005, for October, November and December;
 - b. In 2006, for April, May, June, July, August, September, October, November and December;
 - c. In 2007, for January, February, March, April, May, June, July and August;
 - d. In 2008, for October and November; and
 - e. In February 2009.
35. From March 2005 through January 2009, Respondents exceeded the daily maximum settleable solids effluent limit prescribed in the SPDES permits on 21 occasions.
36. Respondents exceeded the daily maximum coliform effluent limit prescribed in the SPDES permits in October and December 2005; January, April, May, and November 2006; February, June and July 2007; December 2008; and January 2009.

XIII. Thirteenth Cause of Action

37. The terms of the SPDES permits require Respondents to file a noncompliance report whenever effluent limits are exceeded. With respect to the SPDES permit effective March 28, 2008, a completed copy of Permit Attachment B is also required.
38. On 37 occasions, Respondents did not file the required noncompliance reports and, subsequent to March 28, 2008, copies of Permit Attachment A, on the following months:
- a. In 2005, for January, February, March, April, May, June, July, August, September, October, November and December;
 - b. In 2006, for January, February, March, April, May, June, July, August, September, October, November and December;
 - c. In 2007, for January, February, March, April, May, June, July and August;

- d. In 2008, for October, November and December; and
- e. In 2009, for January and February.

Conclusions

1. With service of a notice of hearing, pre-hearing conference and complaint dated December 5, 2008 upon Respondents, Department staff duly commenced the captioned administrative enforcement action in a manner consistent with 6 NYCRR 622.3.
2. In lieu of, or in addition to, a notice of hearing and complaint, Department staff may serve a motion for order without hearing (see 6 NYCRR 622.3[b][1] and 622.12[a]).
3. Upon review of the papers and proof filed by Department staff and Respondents, I conclude that the violations alleged in Department staff's June 9, 2009 motion for order without hearing are established sufficiently to warrant granting summary judgment under CPLR 3212(b) in favor of Department staff (see 6 NYCRR 622.12[d]).
4. ECL 17-0803 prohibits the discharge of pollutants to the State's waters from any outlet or point source without a SPDES permit. When, as here, a permit has been issued, discharges must be made in the manner prescribed by the permit. The implementing regulations (see 6 NYCRR part 750) mirror the requirements to obtain a SPDES permit, and to comply with the prescribed permit terms and conditions (see 6 NYCRR 750-1.4[a]).
5. Therefore, as discussed in detail above, Respondents violated various terms and conditions of the SPDES permit on numerous occasions from 2005 through February 2009. These violations include the following: (1) discharges that exceeded the prescribed effluent limits; (2) failure to file DMRs, and failure to file DMRs in a timely manner; and (3) failure to meet the deadlines outlined in the compliance schedule. Accordingly, Department staff's June 9, 2009 motion is granted with respect to liability.

6. However, upon review of the papers and proof filed by Department staff and Respondents, I conclude that the motion should be denied with respect to relief. Respondents have shown the existence of substantive factual disputes that require a hearing in order to determine the appropriate relief (see 6 NYCRR 622.12[e]).
7. Pursuant to 6 NYCRR 622.10(f)(1), intervention in an administrative enforcement hearing by a third party is permitted for good cause shown. Section 622.10(f)(2) of 6 NYCRR outlines the information that a prospective intervener must include in its petition. The standard for intervention is provided at 6 NYCRR 622.10(f)(3). Save the Forge River, Inc.'s petition meets the requirements to intervene in this administrative enforcement matter. Because the scope of the hearing is limited to the issue of relief, SFR's participation in the hearing will be so limited.

Further Proceedings

A hearing is necessary to resolve disputed issues related to relief. The purpose of the hearing will be to determine the appropriate civil penalty, and evaluate the various requests for compliance and remediation. For the reasons and in the manner discussed above, SFR is authorized to participate in the adjudicatory hearing.

I would like to hold a telephone conference call with the parties at 10:00 a.m. on May 13 or 14, 2010 to discuss the schedule for the hearing. By 4:30 p.m. on May 7, 2010, the parties shall advise me about their availability on May 13 or 14, 2010 for a telephone conference call. If a party is not available on these dates, then the party shall provide alternative times and dates for the conference call by May 7, 2010.

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

Dated: April 29, 2010
Albany, New York

Attachments: Appendix A - Department staff's June 9, 2009
Motion for Order without Hearing

Appendix B - Respondents' Reply Papers

Appendix C - Save the Forge River, Inc.'s
Petition to Intervene

Appendix A

Department Staff's Motion for Order without Hearing

Matter of Benjamin Jugielewicz and
Jurgielewicz Duck Farm
DEC No. R1-20081103-224

1. Memorandum of Law in Support of Motion.
2. Kari E. Wilkinson, Esq., Affirmation in support of Motion for Order without Hearing, dated June 9, 2009. Attached Exhibits:
 - a. Exhibit A - Order on Consent, dated February 7, 2005. File No. R1-20040511-232.
 - b. Exhibit B - Notice of Hearing, Pre-hearing Conference, and Complaint, dated December 5, 2008. Index No. R1-20081103-224.
 - c. Exhibit C - Cover letter dated January 21, 2009 from Jonathon Sinnreich, Esq. Respondents' Answer dated January 21, 2009.
 - d. Exhibit D - Schedule A, dated June 3, 2009.
3. Affidavit of Anthony Y. Leung, P.E., sworn to June 9, 2009. Attached Exhibit:
 - a. Exhibit 1 - Mr. Leung's Resume.
4. Affidavit of Cathy A. Haas, P.E., sworn to June 10, 2009. Attached Exhibits:
 - a. Exhibit 1 - Ms. Haas' Resume.
 - b. Exhibit 2 - State Pollutant Discharge Elimination System (SPDES) permit effective June 1, 2001 to June 1, 2006.
 - c. Exhibit 3 - SPDES permit effective March 1, 2008 to January 7, 2012.

- d. Exhibit 4 - Discharge Monitoring Reports (DMRs) January 2005 through February 2009.
 - e. Exhibit 5 - Table of DMR violations 2005; Table of DMR violations 2006; Table of DMR violations 2007; Table of DMR violations 2008; and Table of DMR violations 2009.
5. Reply to Opposition to Motion for Order without Hearing, dated October 9, 2009

Appendix B

Respondents' Reply Papers

Matter of Benjamin Jurgielewicz and
Jurgielewicz Duck Farm
DEC No. R1-20081103-224

1. Affirmation of Jonathon Sinnreich in Opposition to Motion for Order without Hearing, dated August 28, 2009. Attached Exhibits:
 - a. Exhibit A - Letters dated July 8, 2009 and August 11, 2009 from Shauna L. Segelke, Sinnreich, Kosakoff & Messina, LLP, to DEC Records Access Officer
 - b. Affidavit of Service by Shauna S. Segelke, sworn to August 28, 2009.
2. Affidavit of Benjamin Jurgielewicz in Opposition to the Motion for Order without Hearing, sworn to August 28, 2009. Attached Exhibits:
 - a. Exhibit A - Press Release dated May 9, 2007 entitled, *Town, County Preserve Family Duck Farm*.
 - b. Exhibit B - Jurgielewicz Duck Farm, Environmental Timeline.
3. Affirmation of Dennis E. Totzke, P.E., in Opposition to the Motion for Order without Hearing, sworn to August 27, 2009. Attached Exhibits:
 - a. Exhibit A - Mr. Totzke's Resume.
 - b. Exhibit B - Client Memorandum dated August 27, 2009, Project # 4489 with Attachments:
 - i. Attachment 1 - Biochemical oxygen demand definitions.
 - ii. Attachment 2 - Background information regarding dye tracer studies.
 - iii. Attachment 3 - Permit reporting requirements.
 - iv. Attachment 4 - Monitoring measuring frequency.

- v. Attachment 5 - Jurgielewicz Data vs DMRs (Tables 2006 and 2007).
 - vi. Attachment 6 - Description of Attachment 5 Tables.
 - vii. Attachment 7 - UOD Calculation Method Table.
 - viii. Attachment 8 - Jurgielewicz BOD₅ vs CBOD₅.
 - ix. Attachment 9 - FOG-Jurgielewicz Duck Farm.
4. Affidavit of Jeffrey S. Fuchs, CPA, in Opposition to the Motion for Order without Hearing. Attached Exhibits:
- a. Exhibit A - Jurgielewicz Duck Farm Financial History, Financials for Farm Operations (2004-2008).
 - b. Exhibit B - Jurgielewicz Duck Farm Financial History, Farm Indebtedness/Liabilities (2004-2008).
 - c. Exhibit C - Jurgielewicz Duck Farm Financial History, Environmental Compliance and Remediation Costs (2004-2008).
 - d. Exhibit D - Jurgielewicz Duck Farm Financial History, Development Rights Payment, Itemization for Payout Monies.
5. Affirmation of Jonathon Sinnreich in Opposition to Petition to Intervene, dated September 25, 2009. Attached Exhibits:
- a. Exhibit A - Letter dated September 11, 2009 from Mr. Sinnreich to Roger Evans, Regional Permit Administrator, NYSDEC - Region 1.
 - b. Affidavit of Service by Mary-Lou Mooney, sworn to September 25, 2009.

Appendix C

Verified Petition to Intervene
By Save the Forge River, Inc.

Matter of Benjamin Jurgielewicz and
Jurgielewicz Duck Farm
DEC No. R1-20081103-224

1. Verified Petition to Intervene by Reed W. Super, Esq., and Susan J. Kraham, Esq., dated August 14, 2009.
2. Verification by Ronald Lupski, sworn to August 9, 2009.
3. Save the Forge River Inc.'s Memorandum of Law in Support of: (1) Verified Petition to Intervene, and (2) DEC's Motion for Order without Hearing, dated August 14, 2009.
4. Affirmation of Reed W. Super in Support of: (1) Save the Forge River's verified Petition to Intervene, and (2) DEC's Motion for Order without Hearing, dated August 14, 2009.
Attached Exhibits:
 - a. Exhibit A - Letter dated February 4, 2009 from Reed W. Super to Benjamin Jurgielewicz. Notice of Violations and Intent to File Suit pursuant to § 505(a)(1) of the Federal Clean Water Act (33 USC 1365[a][1]). Attachments A through C.
 - b. Exhibit B - US Army Corps of Engineers, New York District. Forge River Watershed (Section 905[b] Reconnaissance Study), Long Island, New York, Ecosystem Restoration, March 2008.
 - c. Exhibit C - Letter dated August 9, 1989 from D.C. Gobbi, Senior Public Health Sanitarian, County of Suffolk, New York to Mr. Jurgielewicz.
 - d. Exhibit D - Annual Discharge Reports for 1995, 1996, and 1997.
 - e. Exhibit E - Cover letter dated May 15, 2001 from Barbara B. Rinaldi, Deputy Chief Permit Administrator, NYSDEC - Region 1, and enclosed renewal SPDES permit for the Jurgielewicz Duck Farm.

- f. Exhibit F - Order on Consent dated September 12, 2001 (Index No. CO1-20010711-2557).
- g. Exhibit G - Felony Complaint (02-991523), First District, Suffolk County. People v. Benjamin Jurgielewicz.
- h. Exhibit H - SIS Parameter Analysis Report for Ultimate Oxygen Demand, March 31, 1998 to June 30, 2002. Jurgielewicz Duck Farm (SPDES Permit No. NY0008125).
- i. Exhibit I - SIS Parameter Analysis Report for Total Suspended Solids, March 31, 1998 to June 30, 2002. Jurgielewicz Duck Farm (SPDES Permit No. NY0008125).
- j. Exhibit J - SIS Parameter Analysis Report for Settleable Solids, March 31, 1998 to June 30, 2002. Jurgielewicz Duck Farm (SPDES Permit No. NY0008125).
- k. Exhibit K - Order on Consent dated February 7, 2005 (File No. R1-20040511-232).
- l. Exhibit L - Notice of Intent to Modify Permit dated May 27, 2005 from Roger Evans, Deputy Regional Permit Administrator, NYSDEC - Region 1 with enclosed draft SPDES permit.
- m. Exhibit M - SIS Parameter Analysis Report for Ultimate Oxygen Demand, July 31, 2002 to February 28, 2005. Jurgielewicz Duck Farm (SPDES Permit No. NY0008125).
- n. Exhibit N - SIS Parameter Analysis Report for Total Suspended Solids, July 31, 2002 to February 28, 2005. Jurgielewicz Duck Farm (SPDES Permit No. NY0008125).
- o. Exhibit O - SIS Parameter Analysis Report for Settleable Solids, July 31, 2002 to February 28, 2005. Jurgielewicz Duck Farm (SPDES Permit No. NY0008125).
- p. Exhibit P - Letter dated March 7, 2006 from Tony Leung, P.E., Environmental Engineer 3, NYSDEC - Region

Appendix C - Verified Petition to Intervene

Matter of Benjamin Jurgielewicz,
and Jurgielewicz Duck Farm
DEC No. R1-20081103-224

1 to Mr. Jurgielewicz regarding proposed modifications to the SPDES permit for the Jurgielewicz Duck Farm.

- q. Exhibit Q - SIS Parameter Analysis Report for Ultimate Oxygen Demand, February 28, 2005 to November 30, 2005. Jurgielewicz Duck Farm (SPDES Permit No. NY0008125).
- r. Exhibit R - SIS Parameter Analysis Report for Total Suspended Solids, February 28, 2005 to November 30, 2005. Jurgielewicz Duck Farm (SPDES Permit No. NY0008125).
- s. Exhibit S - Letter dated May 31, 2006 from Cathy A. Haas, P.E., Environmental Engineer 1, NYSDEC - Region 1 to Mr. Jurgielewicz regarding Form NY-2C Supplement A.
- t. Exhibit T - SPDES Permit NY0008125 effective January 7, 2007 to January 7, 2012, modified March 1, 2008.
- u. Exhibit U - Letter dated January 25, 2008 from Roger Evans, Regional Permit Administrator, NYSDEC - Region 1 to Mr. Jurgielewicz responding to comments received during the notice of public comment period with enclosed modified SPDES permit.
- v. Exhibit V - Notices of Failure to Submit a DMR for the Jurgielewicz Duck Farm. Notices are dated April to December 2004; January to October and December 2005; January, March, April, May, June, July, August, October, December 2006; February, March, April, June, July, September, October, November, December 2007; and January to September 2008.
- w. Exhibit W - Notice of Violation dated December 5, 2008 concerning alleged violations of ECL Article 24.
- x. Exhibit X - Press Release dated May 9, 2007 from Suffolk County Supervisor, Town of Brookhaven entitled, *Town, County Preserve Family Duck Farm: Celebration of Local Farms, Vineyards, Restaurants.*

Appendix C - Verified Petition to Intervene

Matter of Benjamin Jurgielewicz,
and Jurgielewicz Duck Farm
DEC No. R1-20081103-224

- y. Exhibit Y - Letter dated August 11, 2009 from Reed W. Super to Roger Evans regarding Save the Forge River's request to modify, suspend or revoke the SPDES permit issued to the Jurgielewicz Duck Farm.

- 5. Affidavit of Ronald Lupski, President of Save the Forge River, Inc., sworn to June 18, 2009.

- 6. Affidavit of Harry B. Wallace, Chief Unkechaug Nation, sworn to May 14, 2009.

- 7. Affidavit of John Dolezal, Treasurer of Save the Forge River, Inc., sworn to June 10, 2009.