STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 12 of the New York State Navigation Law and Articles 15, 17, 25 and 27 of the New York State Environmental Conservation Law and Parts 360, 608, 661 and 750 et seq. of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR")

RULING OF THE ADMINISTRATIVE LAW JUDGE

-by-

NYSDEC File No. R2-20090406-241

PILE FOUNDATION CONSTRUCTION COMPANY, INC. and ANTHONY RIVARA, personally and as president of Pile Foundation Construction Company, Inc.,

Respondents.

Background

In lieu of a notice of hearing and complaint, Staff of the Department of Environmental Conservation ("DEC") moved for an order without hearing against the respondents named above on April 14, 2009. Respondent Anthony Rivara (Rivara), individually and as president of Pile Foundation Construction Company, Inc. (Pile), opposed the motion in papers dated May 19, 2009.

Position of DEC Staff

Respondents entered into an Order on Consent (Order) with the Department dated January 16, 2009 concerning violations of ECL Articles 15, 17, 25 and 27 and Navigation Law section 173, 175 and 176 at five different sites in New York harbor. DEC staff alleges that the Order was violated by respondents as follows:

1) The Order directed respondents to submit a restoration plan for a site identified as Site 4. The restoration plan was to be submitted within 60 days of the January 16, 2009 order. Respondents did not submit the restoration plan for Site 4.

2) The Order directed respondents to mark all four sides of each barge they own, operate or utilize within the State of New York with the display name "Pile Foundation Construction Company, Inc." as well as an active phone number and a marker number for each barge within 30 days of the Order. The letters and numbers were to be no less than 12 inches in height and maintained in legible condition where

they are readily discernible during daylight hours at a distance of 200 feet. Department Staff conducted a site visit on March 26, 2009 and of the two barges observed, neither was marked as directed.

3) The Order directed respondents to submit an inventory of the barges so marked with the names or numbers and current location within 35 days of the order and no inventory was submitted.

Department Staff has requested the following relief: a) respondents come into compliance with the Order immediately; b) respondents pay a penalty of $150,000.00, plus payment of the penalty which was suspended in the Order in the amount of $15,000.00.[1]

Position of Respondents

Respondents acknowledge that they did not comply with Order but offer explanations for the failure to comply. Respondents, by the Rivara affidavit, acknowledge that the restoration plan was not timely submitted because they had to wait for the New York City Parks and Recreation Office to give them direction as to the restoration of the involved site. Respondents submitted as an attachment to the Rivara affidavit a copy of an email from John Natoli at the NYC Parks Department dated May 12, 2009 which gives respondents the scope and removal requirements for the restoration plan. (Rivara affidavit, Exhibit A). Mr. Rivara indicates in his affidavit that he immediately contacted NYC Parks office but received no response until the May 12, 2009 email from Mr. Natoli.

As for the barge markings, respondents state that the markings directed in the Order are illegal. The Department of Homeland Security regulations limit markings on barges like the ones at issue, to 33 letters and/or numbers and the Order requires 52 letters and numbers. To document this assertion, attached to the Rivara affidavit as Exhibit B, is a copy of an email from Joseph K. Johnson of the United States Coast Guard that identifies the National Vessel Documentation center webpage and directs Mr. Rivara to the "FAQ" section for assistance. The email from Mr. Johnson is dated May 11, 2009. The Rivara affidavit states that the "FAQ" page referred to by Mr. Johnson indicates that only 33 letters may be placed on the barges at issue.

Mr. Rivara asks that the motion be denied or that a hearing be held to further review the circumstances for the delay. Also, he asks that the issue of penalties be decided after a hearing so that more explanation can be offered.

Discussion

DEC regulation provides that a contested motion for order without hearing will be granted if, upon all the papers and proof filed, a cause of action is established sufficiently to warrant granting summary judgment under the Civil Practice Law and Rules ("CPLR"). On the other hand, the motion must be denied with respect to particular causes of action if any party

[1] The January 2009 Order on Consent ordered respondents to pay a penalty of $30,000.00 for the violations at Site 4, of that, $15,000.00 was suspended provided that respondents complied with the order.

shows the existence of substantive disputes of facts sufficient to require a hearing. (See 6 NYCRR 622.12[d] and [e].)

CPLR 3212(b) states that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Summary judgment is granted sparingly and is inappropriate if there is any doubt regarding the existence of a triable fact on which liability is genuinely controverted.

Summary judgment would be appropriate here as there is no triable issue concerning compliance with the order on Consent. Mr. Rivara acknowledges the failure to comply with the Order. While respondents may have had complications or problems complying with the Order, they offered no explanation as to why they waited until Department staff commenced this proceeding before notifying Department staff as to the reasons for the noncompliance.

Penalty

Department Staff has requested that respondents pay the portion of the penalty that was suspended in the January 2009 Order, $15,000, and an additional penalty of $150,000.00.

Department staff has identified the maximum penalty allowed for each violation and requested a penalty that is significantly less than the maximum for each. The maximum penalty for the compliance plan violation is in excess of $300,000. Section 71-1127 of the ECL directs that any person who fails to comply with an order of the Department issued pursuant to ECL Article 15 is liable for a penalty of not more than five hundred dollars for the initial violation and one hundred dollars for each day during which the violation continues. The violation for failure to submit a compliance plan began sixty (60) days after the Order became effective, March 16, 2009. Section 71-2503(1)[2] of the ECL provides for a penalty of up to ten thousand dollars per day for a violation of Article 25 (Tidal Wetlands Act) of the ECL. The compliance plan was to remediate the site where respondents violated the tidal wetlands regulations. Accordingly, the maximum penalty allowed for the restoration plan violations is well in excess of the $150,000.00 requested by Department Staff.

The maximum penalty for the failure to mark the barges is in excess of $2,666,000. Pursuant to ECL section 71-1127(1) the maximum penalty is $6,000 with an additional maximum penalty of $560,000 pursuant to ECL section 71-2503(1)(a). Also in Department staff's motion papers, it is noted that the compliance order addresses violations of ECL Article 17 for respondents' use of unseaworthy barges. The violation of Article 17 provides for an additional penalty of thirty-seven thousand five hundred dollars per day. (See ECL 71-1929[1]) This violation would allow for a significant penalty.

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2 Any person who violates, disobeys or disregards any provision of article twenty-five shall be liable to the people of the state for a civil penalty of not to exceed ten thousand dollars for every such violation, to be assessed, after a hearing or opportunity to be heard, by the Commissioner. Each violation shall be a separate and distinct violation and, in the case of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation.

The Department has a Civil Penalty Policy[3] ("Policy"). It serves as guidance in calculating a penalty in an enforcement case. The policy states that " The penalty should equal the gravity component, plus the benefit component." The benefit component is defined as the economic benefit that results from a failure to comply with the law. The gravity component is to be reflective of the seriousness of the violation. Department staff notes that while it is unable to calculate an exact economic benefit realized by respondents for failing to timely comply with the restoration plan, by entering into the consent order with the department, respondents were allowed to continue the project which had a contract value of $54,000,000.00.[4] Further, Department staff alleges there was an economic gain realized by continuing to use the barges that were to be pulled from use and re-marked.

The gravity component is also addressed by Department staff. The respondent damaged the natural resources of the State as well as ignored a consent order, impeding the work of the Department in this and other enforcement matters.

Department staff adequately addressed the Department's Civil Penalty Policy in calculating the penalty requested. Respondents object to the penalty amount and request a hearing to explain the cause of the violations and to be heard further regarding any penalties. I agree with Staff that given the serious nature of the violations and the respondent's refusal to comply with the Order, a penalty is justified. There are issues in dispute regarding the reasons for non-compliance with the order on consent. Further inquiry into any economic gain that respondents realized from the delay as well as the cause(s) of the delay is required to determine the appropriate penalty.

Ruling

Department staff's motion for order without hearing is granted in part. A hearing will be held on Department staff's request for penalties. I will contact the parties by telephone on April 11, 2011 at 10:00 a.m. to schedule the penalty hearing.

[3]NYS Dept. of Environmental Conservation Civil Penalty Policy, June 20, 1990.

[4] Department staff Memorandum of Law, page 5, paragraph 29(b).

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

Albany, New York
March 28, 2011