

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Article 17 of the  
Environmental Conservation Law (ECL) and  
Parts 703 and 750 of Title 6 of the Official  
Compilation of Codes, Rules and Regulations  
of the State of New York (6 NYCRR),

- by -

**JOSEPH VADNEY and ANNE MARIE VADNEY,**

Respondents.

DEC File No. R4-2009-0603-94

DECISION AND ORDER OF THE ACTING COMMISSIONER

September 2, 2015

## DECISION AND ORDER OF THE ACTING COMMISSIONER

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding against respondents Joseph Vadney and Anne Marie Vadney (respondents) by service of a notice of hearing and complaint dated July 19, 2010. In the complaint, staff alleged that respondents are liable for two violations arising from construction activities that occurred on approximately 4 acres of a 24.7 acre site (Tax Map ID No. 144.00-1-48.1) owned by respondent Anne Marie Vadney located at 1627 NYS Route 9W in the Town of Coeymans, Albany County.

Specifically, Department staff alleged that respondent Anne Marie Vadney, as owner, and respondent Joseph Vadney, as operator, (1) engaged in construction activities at the site on May 21, 2008, without filing a notice of intent for coverage under the Department's General Permit for Stormwater Discharges from Construction Activity, in violation of ECL 17-0505 and 6 NYCRR 750-1.4; and (2) discharged storm water from the site on May 4, 2009, causing turbidity in the Class C stream on the site (H-214-7; see 6 NYCRR 863.6, Table I, Item No. 544)<sup>1</sup> in continuing violation of State water quality standards at 6 NYCRR 703.2. The alleged construction activities included filling and grading operations on the site.

For the violations charged, Department staff seeks an order imposing civil penalties in the amount of \$20,000, with \$10,000 suspended provided respondents undertake certain remedial activities.

Respondents filed an amended answer dated February 24, 2012. The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick. After conducting a hearing on February 22, 2012, ALJ Garlick prepared the attached hearing report. The ALJ recommends that I hold respondents liable for the violations charged in the complaint, and impose the penalties and remedial relief sought by Department staff. However, the ALJ recommends

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<sup>1</sup> As noted by the Administrative Law Judge, Department staff erroneously identified stream no. H-214-7 as a Class D, rather than a Class C, stream (see Hearing Report at 10 n 2; at 13 n 3 [citing 6 NYCRR 863.6, Table I, Item No. 544]). As also noted by the Administrative Law Judge, the water quality standard alleged to have been violated -- turbidity -- is the same for both Class C and Class D streams (see 6 NYCRR 703.2). Thus, any pleading error has not prejudiced respondents.

that I suspend the entire \$20,000 penalty, provided respondents undertake certain remedial activities.

I adopt in part the ALJ's hearing report as my decision in this matter, subject to the following comments.

#### DISCUSSION

Under the Department's regulations, discharges requiring a SPDES permit include storm water discharges regulated under section 122.26 of title 40 of the Code of Federal Regulations (CFR) (see 6 NYCRR 750-1.4[b]). Activities that meet the definition of "construction activities," as defined under 40 CFR 122.26(b)(14)(x), (15)(i), and (15)(ii), constitute construction of a point source under ECL 17-0505 (see generally Matter of Kinderhook Lake Corp., DEC Declaratory Ruling 17-02 at 11-12 [surface run off from construction requires a SPDES permit]; see also Matter of Palumbo Block Company, Inc., Decision of the Commissioner, August 18, 2003, at 5).

The Department is authorized to issue general permits for certain discharges, including storm water discharges (see ECL 70-0117[6]; 6 NYCRR 750-1.21; see also 40 CFR 122.28). Pursuant to that authority, the Department has issued SPDES General Permits for Stormwater Discharges from Construction Activity, which are applicable to construction activities involving soil disturbances of one or more acres, among other things (see Permit No. GP-02-01, effective Jan. 8, 2003 [2003 General Permit], ¶ I.B, at 2; Permit No. GP-0-08-001, effective May 1, 2008 [2008 General Permit], ¶ I.A, at 3).<sup>2</sup> Thus, instead of seeking an individual SPDES permit, an owner or operator could seek to obtain coverage under the applicable General Permit, prior to commencing regulated construction activities.

General permits issued by the Department set forth the applicability of the permit and the conditions that apply to any discharge authorized by the permit (see ECL 70-0117[6][c]; 6 NYCRR 750-1.21[c]). Under the regulations and the General Permits, an owner or operator of construction activities that was eligible for coverage under the General Permits must have obtained coverage prior to the commencement of construction activities (see 6 NYCRR 750-1.21[d][1]; 6 NYCRR 750-1.2[a][60];

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<sup>2</sup> The SPDES General Permit for Stormwater Discharges from Construction Activity Permit No. GP-0-08-001 was effective from May 1, 2008 to April 30, 2010. Permit No. GP-0-08-001 was replaced by Permit No. GP-0-10-001 effective January 29, 2010 to January 28, 2015 (2010 General Permit).

2003 General Permit, ¶ I.E.1, at 6; 2008 General Permit, Preface). To obtain coverage under the General Permits, the owner or operator of eligible construction activities was required to file a notice of intent (NOI) form with the Department (see 6 NYCRR 750-1.21[d][1]; 2003 General Permit, ¶ I.D, at 4; 2008 General Permit, ¶ II.A, at 6). The owner or operator was not to commence construction activities until their authorization to discharge under the General Permit went into effect (see 2003 General Permit, ¶ I.E.1, at 6; 2008 General Permit, ¶ II.B.1, at 6; see also ECL 17-0505). The authorization to discharge did not go into effect until all authorization criteria were satisfied, including the filing of the NOI, the preparation of a final storm water pollution prevention plan (SWPPP), and the passage of the NOI review period (generally five days), among other criteria (see 2003 General Permit, ¶ I.D, at 4-6; 2008 General Permit, ¶ II.B.1, at 6-8).

--First Cause of Action

In its first cause of action, Department staff charges that respondents commenced and continued regulated construction activities at the site without having filed a NOI for coverage under a General Permit<sup>3</sup> in violation of ECL 17-0505 and 6 NYCRR 750-1.4.<sup>4</sup> As concluded in the hearing report (see Hearing Report at 12-13), Department staff carried its burden of proving this violation by a preponderance of the record evidence (see 6 NYCRR 622.11[b][1], [c]). The record establishes that construction activities involving soil disturbances of at least 3.3 acres began in September 2007, but that a NOI for coverage under the General Permit was not filed with the Department until March

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<sup>3</sup> In its complaint, Department staff charged respondents for violating the 2010 General Permit, which did not go into effect until January 29, 2010. The permits applicable to the violations established on this record are the 2003 and 2008 General Permits, of which I take judicial notice. Respondents were aware that the Department charged them for violating the Department's general permits for stormwater discharges from construction activity. The operative terms of the three General Permits applicable here are substantially similar. Moreover, respondents did not object that Department staff charged the 2010 General Permit, and not the 2003 and 2008 General Permits in effect at the time of the alleged violation. Thus, I conclude that respondents will not be prejudiced if the pleadings are conformed to the proof. Accordingly, the complaint is corrected to charge violations of the 2003 and 2008 General Permits.

<sup>4</sup> Paragraph 18 of the complaint contains a typographical error. The paragraph should cite 6 NYCRR 750-1.4, not 6 NYCRR 740-1.4, a regulation that does not exist. The complaint's remaining reference to section 750-1.4 is correct (see Complaint ¶ 6).

2009 (see Findings of Fact Nos. 6, 16, 21, Hearing Report at 5-7).

I also agree with the ALJ that respondents Ann Marie Vadney and Joseph Vadney are liable for the violation, as owner and operator respectively (see Hearing Report at 10-12). Under the General Permits, "owner or operator" means the person, persons or legal entity which owns or leases the property on which the construction activity is occurring; or an entity that has operational control over the construction plans and specifications, including the ability to make modifications to the plans and specifications (see 2008 General Permit, Appendix A at 28; 2003 General Permit, ¶ I.D.1, at 4, and ¶ V.H, at 19; see also 6 NYCRR 750-1.2[a][60]). Here, respondent Ann Marie Vadney is the owner of the site on which the construction activities occurred (see Finding of Fact No. 1, Hearing Report at 4; Amended Answer ¶ 1). As the site owner, Ms. Vadney is liable for the failure to obtain coverage under the General Permits, or otherwise obtain an individual SPDES permit, prior to the commencement of construction activities on the site.

Respondents argue that respondent Joseph Vadney is not liable as an operator. Instead, respondents assert that Bohl Construction, the contractor respondents engaged to place fill on the site, was the operator. I agree with the ALJ, however, that the preponderance of record evidence establishes that Mr. Vadney was a person with operational control over the construction activities, including the authority to make decisions concerning modifications to the plans and specifications of the project, and the project's compliance with environmental regulatory requirements (see Hearing Report at 11-12; see also Matter of Carney's Restaurant, Inc. v State of New York, 89 AD3d 1250, 1253-1254 [3d Dept 2011]; Matter of Jackson's Marina, Inc. v Jorling, 193 AD2d 863, 866 [3d Dept 1993]). Accordingly, Mr. Vadney was an operator of the construction activities and, therefore, liable for the failure to obtain coverage under the General Permits or otherwise obtain an individual SPDES permit for the project prior to commencing the regulated small construction activities. The circumstance that another entity might also be liable as an operator is not a defense to Mr. Vadney's liability for his role in the violation.

Respondents also argue that Department staff failed to establish that a SPDES permit was required for the work conducted at the site because staff did not prove that pollutants were discharged into the stream at the site or some other water body as a result of a disturbance from the work at

the site. I disagree. New York's SPDES permit program is preventative and does not require an actual discharge before a permit is required. The plain language of ECL 17-0505 requires a SPDES permit before the "making" of an outlet or point source with the potential to discharge to the waters of the State (ECL 17-0505). As noted above, construction activity involving land disturbances of one acre or more is considered to be a point source under the CWA and New York's SPDES permit program that has the potential to discharge storm water to the waters of the State. Thus, respondents were required to obtain a SPDES permit or seek coverage under the General Permits prior to beginning construction activities at the site (see ECL 17-0505; 2003 General Permit, ¶ I.E.1, at 6; 2008 General Permit, Preface), and Department staff carried its burden of proving on this record that respondents failed to do so.

Moreover, even assuming an actual discharge of pollutants is required to prove a violation of the SPDES permit requirement -- which it is not -- I agree with the ALJ that staff proved actual unpermitted storm water discharges in this proceeding (see Finding of Fact Nos. 9-11, Hearing Report at 5-6; Hearing Report at 13). The preponderance of record evidence, and the reasonable inferences drawn from that evidence (see Schneider v Kings Highway Hosp. Ctr., 67 NY2d 743, 744 [1986]), demonstrate that on at least two occasions in 2008 and 2009, soil disturbances at the site caused the discharge of sediments into the adjoining stream resulting in the violation of the water quality standard for turbidity in the stream.<sup>5</sup> Thus, Department staff established pollutants were discharged from the site into the waters of the State without a valid SPDES permit.

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<sup>5</sup> Under article 17, unpermitted discharges of pollutants from an outlet or point source are prohibited (see ECL 17-0701[1]; ECL 17-0803). An "outlet" is defined, among other things, as the point of emergence of any water-borne sewage, industrial waste, or "other wastes" into the waters of the State (ECL 17-0105[11]). "Other waste" is defined as any discarded matter not sewage or industrial waste that may cause or might reasonably be expected to cause pollution of the waters of the State in contravention of State water quality standards adopted pursuant to ECL article 17 (ECL 17-0105[6]). Under the State water quality standards adopted pursuant to article 17 for Class C waters, discharges may not increase turbidity so as to cause a substantial visible contrast to natural conditions (see 6 NYCRR 703.2). As previously concluded, sediment that causes turbidity meets the definition of other waste (see DEC Declaratory Ruling 12-02, at 9). Therefore, the discharge of sediments from a small construction site through storm water runoff that causes, or may reasonably be expected to cause, an increase in turbidity in adjoining water bodies is a discharge of pollutants under ECL article 17.

--Second Cause of Action

In its second cause of action, Department staff alleged that storm water discharges from the site caused a visible contrast to the natural conditions of stream H-214-7-P200C, a Class C stream, in continuous violation of the State water quality standard governing turbidity found at 6 NYCRR 703.2. The ALJ concluded that Department staff proved this violation (see Hearing Report at 13-15), and I agree.

ECL 17-0501 prohibits the direct or indirect discharge of organic or inorganic matter into the waters of the State in a manner that causes or contributes to a condition in contravention of the State water quality standards adopted by the Department pursuant to ECL article 17. The General Permits also provide that it is a violation of the permits and the ECL for any discharge to either cause or contribute to a violation of water quality standards as contained in parts 700 through 705 of 6 NYCRR (see 2003 General Permit, ¶ 1.A, at 2; 2008 General Permit, ¶ I.B, at 3).

Under the State water quality standards adopted pursuant to article 17 for Class C waters, discharges may not increase turbidity so as to cause a substantial visible contrast to natural conditions (see 6 NYCRR 703.2). Here, a preponderance of the record evidence, and the reasonable inferences drawn from that evidence, demonstrate that in 2008 and 2009, storm water discharges from the construction activities caused or contributed to the contravention of the State water quality standard for turbidity in the adjoining Class C stream. As owner and operator of the construction site, respectively, respondent Ann Marie Vadney and respondent Joseph Vadney are liable for the violations of the State water quality standard.

--Penalty and Remedial Relief

Finally, for the reasons stated by the ALJ, I conclude that the total civil penalty of twenty thousand dollars (\$20,000) and remedial relief sought by Department staff is authorized and justified by the record in this proceeding (see Hearing Report at 15-18). I disagree with the ALJ, however, that the entire civil penalty should be suspended in this proceeding contingent upon respondents' compliance with their remedial obligations. While respondents' contractor, Bohl Construction, may share some of the responsibility for the violations established in this proceeding, respondents are not

entirely blameless. On the other hand, respondents have made significant expenditures to begin addressing conditions at the site (see Hearing Report, at 16-17 [referencing expenditures of over \$60,000]; Hearing Exhibit R-16), and the remedial work is estimated to cost a considerable amount (see Hearing Report, at 17; Hearing Exhibit R-15). Accordingly, of the civil penalty requested by Department staff, I am imposing a payable portion of two thousand dollars (\$2,000) and suspending the remainder.

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

I. Respondents Joseph Vadney and Ann Marie Vadney, as the operator and owner, respectively, of the construction activities occurring at 1627 NYS Route 9W in the Town of Coeymans, Albany County, are adjudged to be jointly and severally liable for the failure to obtain a SPDES permit or apply for coverage under the Department's General Permits for Stormwater Discharges from Construction Activity, in violation of ECL 17-0505 and 6 NYCRR 750-1.4.

II. Respondents Joseph Vadney and Ann Marie Vadney, as the operator and owner, respectively, of the construction activities occurring at 1627 NYS Route 9W in the Town of Coeymans, Albany County, are adjudged to be jointly and severally liable for the discharge of storm water from the site that caused or contributed to a visible contrast to the natural conditions of stream H-214-7-P200C, a Class C stream, in continuous violation of the State water quality standard governing turbidity at 6 NYCRR 703.2 and, therefore, are liable for violations of ECL 17-0501 and the 2008 General Permit.

III. Respondents Joseph Vadney and Ann Marie Vadney, being liable for the violations determined in paragraphs I and II above are hereby assessed, jointly and severally, a total civil penalty of twenty thousand dollars (\$20,000). Of the total penalty assessed, eighteen thousand dollars (\$18,000) shall be suspended, contingent upon respondents' complying with the terms and conditions of this decision and order. The non-suspended portion of the penalty (that is, two thousand dollars [\$2,000]) shall be due and payable within thirty (30) days after service of this order upon respondents.

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



Richard Ostrov, Esq.  
Regional Attorney  
New York State Department of  
Environmental Conservation  
Office of General Counsel, Region 4  
1130 North Westcott Road  
Schenectady, New York 12306.<sup>6</sup>

Should respondents fail to satisfy the terms and conditions of this decision and order, the suspended portion of the penalty (that is, eighteen thousand dollars [\$18,000]) shall become immediately due and payable upon notice by Department staff and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

IV. Upon service of this decision and order upon respondents, respondents shall immediately repair and implement on-site erosion and sediment controls and stabilization measures to prevent the mobilization and transport of soils from the site. Where inspection indicates that the implemented measures are ineffective in preventing the mobilization and transport of soils from the property, the measures shall be modified under the direction of a "qualified inspector" as that term is defined in the General Permits, such as a certified professional in erosion and sediment control, a licensed professional engineer, or a registered landscape architect.

V. Within thirty (30) days of service of this decision and order upon respondents, respondents shall provide to the Department's Region 4 Division of Water written documentation of measures taken to prevent the mobilization and transport of soils from the property and to mitigate the on-going water quality violations. Respondents shall also include any corrective actions taken in response to any inspections conducted pursuant to paragraph IV of this order.

VI. Respondents are directed to implement the stormwater pollution prevention plan (SWPPP) for the site within thirty (30) days of service of this decision and order upon respondents.

VII. All communications from respondents to the Department concerning this decision and order shall be made to Richard

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<sup>6</sup> The attorney who originally represented Department staff in this proceeding has transferred to another state agency. The Regional Attorney for Region 4 is hereby designated as the contact for purposes of this decision and order.

Ostrov, Esq., at the address listed in paragraph III of this order.

VIII. The provisions, terms, and conditions of this decision and order shall bind respondents Joseph Vadney and Ann Marie Vadney, and their agents, successors, and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Marc Gerstman  
Acting Commissioner

Dated: September 2, 2015  
Albany, New York

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York ("ECL") and Parts 703 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

by

**Joseph Vadney and  
Ann Marie Vadney,**

Respondents.

DEC # R4-2009-0603-94

Hearing Report

/s/

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P. Nicholas Garlick  
Administrative Law Judge

### **SUMMARY**

This administrative enforcement action addresses alleged violations that occurred at 1627 NYS Route 9W in the Town of Coeymans, Albany County, New York (site). Staff of the New York State Department of Environmental Conservation (DEC Staff) alleges that the respondents, Joseph Vadney and his sister Ann Marie Vadney, are liable for two violations related to fill brought to the site. Specifically, DEC Staff alleges the respondents: (1) commenced and continued construction activities at the site without first filing a notice of intent for coverage under the NYSDEC general permit for stormwater discharges from construction activity (GP-0-10-001) (General Permit) in violation of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) §750-1.4 and Environmental Conservation Law (ECL) §17-0505; and (2) caused stormwater discharges with a substantial visible contrast to the natural conditions of a stream at the site in violation of 6 NYCRR 703.2. This report recommends that the Commissioner issue an order: (1) finding the respondents liable for the violations; and (2) imposing a civil penalty of twenty thousand dollars, which would be suspended upon the condition that the respondents meet the following conditions: (1) immediately repair and implement on-site erosion and sediment controls and stabilization measures; (2) provide DEC Staff with written documentation of the measures taken; and (3) implement the approved Stormwater Pollution Prevention Plan (SWPPP) for the site.

### **PROCEEDINGS**

DEC Staff commenced this administrative enforcement action by service of a notice of hearing and complaint, dated July 19, 2010, upon the respondents.

Respondents' then-attorney filed an answer dated October 28, 2010 which denied the causes of action alleged and raised four affirmative defenses.

DEC Staff filed a statement of readiness with the Office of Hearings and Mediation Services (OHMS) dated December 22, 2010. Copies of the pleadings were received by OHMS on January 5, 2011. The matter was assigned to me on January 7, 2011.

After conference calls with the parties on January 11 and 24, 2011, the parties requested the matter be referred for mediation. Administrative Law Judge (ALJ) Molly T. McBride was

assigned. By letter dated December 7, 2011, ALJ McBride returned the file to me, following the failure of mediation efforts in this matter.

On December 12, 2011, I sent an email to DEC Staff counsel and the Vadneys (who at this time were not represented by counsel) in an effort to schedule the hearing. DEC Staff responded the next day and indicated that DEC Staff was available during the third week in January 2012.

By letter dated December 14, 2011, I again asked the Vadneys about their availability for a hearing. No response was received, however, the Vadneys had apparently changed their address.

On December 28, 2011, I again sent an email to the Vadneys stating my intention to issue a notice of hearing setting the date of the hearing, if I did not hear from them. On January 1, 2012, the Vadneys emailed that they would be in touch during the next week. Having not heard from the Vadneys, on January 4, 2012, I issued a notice of hearing on January 4, 2012. This notice set the date of the hearing as January 24, 2012.

With identical letters dated January 1, 2012 and received by OHMS on January 6 and 10, 2012, Ann Marie and Joseph Vadney responded to the December 28, 2011 email. These letters set forth twelve questions that they insisted must be answered before a hearing could commence. These letters also provided correct respondents' addresses.

By letter dated January 9, 2012, I responded to Ms. Vadney and the next day, I wrote in response to Mr. Vadney. I attempted to answer two of the questions raised in the letters and directed DEC Staff to be prepared to answer nine others at the start of the hearing. The last question dealt with the mediation process and was beyond my purview.

By identical letters dated January 11, 2012, Mr. and Ms. Vadney again stated their position that they needed the answers to all their questions before the hearing commenced.

By letter dated January 13, 2012, I again stated to the Vadneys that DEC Staff would be prepared to answer their questions at the start of the hearing.

By email dated January 18, 2012, the Vadneys requested that mediation recommence. They also raised issues regarding witness

availability and outstanding freedom of information law (FOIL) requests to both DEC Staff and the NYS Department of Transportation.

I forwarded the Vadneys' request to resume mediation to DEC Staff who replied on January 19, 2012 that since mediation had not worked before, it was DEC Staff's position that the hearing should go forward. I then emailed the Vadneys and explained that mediation required the voluntary participation of the parties, and since DEC Staff refused to resume the mediation, the hearing would go forward.

On January 20, 2012, I received an email from William Nolan, Esq., stating that he had been engaged by the Vadneys and requesting an adjournment.

A conference call was held with the parties on January 23, 2012 and I granted respondents' request for an adjournment. A second call was held on February 6, 2012. During this call it was agreed that the hearing would go forward on February 22, 2012. The parties also agreed that there were no outstanding discovery or FOIL requests.

On February 22, 2012, an administrative hearing was convened at DEC's Region 4 headquarters, 1130 North Westcott Road, Schenectady, New York 12306 at 10:00 a.m. The hearing concluded at 12:15 p.m.

The respondents provided an amended answer dated February 27, 2012.

Closing briefs were dated April 5, 2012 and reply briefs were dated April 20, 2012.

### **APPEARANCES**

At the hearing, DEC Staff was represented by Jill Phillips, Esq. DEC Staff called one witness, DEC Staff member Jeffrey McCullough, Environmental Engineer I.

The respondents were represented by William Nolan, Esq. of the law firm Whiteman, Osterman & Hanna LLP, One Commerce Plaza, Albany, New York. Respondent Joseph Vadney testified at the hearing.

**FINDINGS OF FACT**

1. Respondent Ann Marie Vadney is the owner of the site which is a 24.7 acre parcel of land located at 1627 NYS Route 9W in the Town of Coeymans, Albany County, New York (Tax Map ID 144.00-1-48.1) (t. 56). The property is approximately 1,800 feet deep (east to west) and 600 feet long (north to south). A stream (identified as H-214-7 in 6 NYCRR 863.6 item 544) bisects the property, running north to south, and approximately 4-5 acres lie on the west side of the stream, bordering Route 9W (t. 57).
2. Respondent Joseph Vadney runs a used car lot and an automotive repair shop at the site and has done so for about thirty years (t. 56). The site also contains a storage facility (t. 57).
3. On June 28, 2000, Mr. and Ms. Vadney requested a special use permit from the Town of Coeymans Zoning Board of Appeals at a regularly scheduled meeting. At this time, Ms. Vadney did not hold title to the property, but was making payments on a land purchase contract she had executed with the then-owners. The permit was requested for the continued excavation of a portion of the site. Mr. Vadney testified before the Board that he was in the process of filling a large hole on the property, that he had filled in approximately four hundred feet so far, and that he needed to fill in another approximately one hundred and fifty feet.<sup>1</sup> The Board noted that inspections of the site were done by both NYS Department of Transportation and Department of Environmental Conservation. At the meeting, the Board approved a Negative Declaration pursuant to the State Environmental Quality Review Act and conditionally approved the special use permit. Among the conditions was a requirement that excavation continue in accordance with state and local law (Exh. R-1).
4. At some point near the end of 2007, a representative of Sano-Rubin Construction Services arrived at the site and talked to Mr. Vadney about placing fill that originated from a job in Albany at the site (t. 60). The fill came from work at the Albany Community Charter School, Krank St., Albany, New York (Exh. R-2). Mr. Vadney responded he would be interested in using the fill to access the back

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<sup>1</sup> It is not clear where on the property the filling occurred or if the respondent is referring to cubic feet.

portion of the property, on the other side of the stream (t. 60).

5. Two or three weeks after Mr. Vadney was first contacted about the placement of fill at the site, Mr. Don Quay, President of Bohl Construction, contacted Mr. Vadney and a meeting was held (t. 62). After the meeting, fill was placed on the site beginning in September 2007 (t. 65). No financial compensation was received for the placement of the fill (t. 64) and no written contract was executed.
6. The amount of fill placed at the site was more than Mr. Vadney expected (t. 64). The filling operation was supervised by Mr. Quay, who was at the site every day, directing the bulldozer operators and truck drivers (t. 65). The record does contain affidavits from two dump truck operators who report transporting and dumping ten truck loads, each, per day for the period beginning in mid-September 2007 until the end of November 2007 (Exhs. R-3 and R-4). After Mr. Vadney realized that too much fill was being deposited at the site in late November 2007, he asked the filling to stop and it ceased (t. 86). The verbal agreement was that 50,000 cubic yards of material would be brought to the site, and Mr. Vadney stopped the filling after 70,000 cubic yards were deposited (Exh. R-8).
7. At one point during the work at the site, a bulldozer operator reported to Mr. Vadney that he had collapsed a pipe (t. 66). This pipe allowed water to flow south through the property and its collapse resulted in the backing up of water onto the neighboring property owned by Ms. Sidowsky (t. 67). Mr. Vadney reported the situation to Mr. Quay on four or five occasions (t. 67-68).
8. In Spring 2008, Mr. Quay brought a large excavator to the site and a truckload of 36 inch PVC pipe. The excavator remained at the site for a week and a half and then was removed. Nothing was done with the pipe, which was left on the property (t. 68).
9. On May 21, 2008, DEC Staff member Jeffrey McCullough met with Mr. Larry Conrad, code enforcement officer for the Town of Coeymans (t. 36). Mr. Conrad brought Mr. McCullough to the site where Mr. McCullough observed filling of a stream and wetland area (t. 5, Exh. DEC-1). The stream had backed up and was forming a pond (t. 6). Mr. McCullough did not take any water samples (t. 37).



10. Following the site visit, Mr. McCullough sent a certified letter to Ann Marie Vadney (Exh. DEC-2). This letter served as a Notice of Violation and requested immediate action be taken to ensure no future water quality violations occurred at the site. The letter indicated that: (1) neither respondent filed a notice of intent for coverage under DEC's General Permit for Stormwater Discharges from Construction Activities (GP-0-08-001) before the May 21, 2008 inspection; (2) construction activities at the site failed to comply with the conditions of the permit; (3) proper inspections were not undertaken; and (4) the proper practices were not in place to control stormwater (t. 7). The letter concluded that activities on the site had the potential to cause turbidity, siltation or deposition into adjacent waterbodies (t. 8).
11. On June 13, 2008, DEC Staff member Jeffrey McCullough met with Joseph Vadney. Mr. McCullough explained to Mr. Vadney that a Notice of Intent for General Permit coverage was necessary and steps would need to be taken to stabilize the exposed soils on the site (t. 9). During the visit Mr. McCullough observed that the stream at the site was murky and picking up sediment (t. 10). Field notes of this visit were made (Exh. DEC-3) and photographs taken (Exh. DEC-4).
12. After meeting with Mr. McCullough, Mr. Vadney went to talk to Mr. Quay (t. 70).
13. Mr. Vadney then retained Sterling Environmental Engineering, P.C. (Sterling) to address the situation (t. 73). A conference call was held with DEC Staff and a representative of the United States Army Corps of Engineers on January 20, 2009 (Exh. R-6), and a meeting was held on February 18, 2009 at the site (Exh. R-7).
14. With a cover letter dated March 3, 2009, Sterling provided DEC Staff with a plan for interim erosion and sediment control at the site (Exh. R-7).
15. On March 3, 2009, Mr. Vadney's then-attorney sent an email to the U.S. Army Corps of Engineers requesting that enforcement action be taken against Bohl Contracting.
16. A notice of intent for coverage under the general permit was submitted for the site on March 3, 2009 by Sterling

(Exh. DEC-5). DEC Staff responded with an acknowledgment dated March 11, 2009 (Exh. DEC-6).

17. On June 2, 2009, Sterling submitted a Restoration Plan for the site to DEC Staff and the U.S. Army Corps of Engineers (Exh. R-9).
18. DEC Staff member McCullough visited the site again on July 1, 2009 and took field notes (Exh. DEC-7). During this visit he noted that: the site was overwhelmed with weeds; erosion was occurring in the stream channel; and erosion and sediment control measures were not properly installed. He also noted that the water leaving the site was cloudy and had a visible contrast to it (t. 18). He also took several photographs of the site on this visit (Exh. DEC-8).
19. On July 15, 2009, Sterling submitted additional information about the SWPPP to DEC Staff (Exh R-10).
20. DEC Staff member McCullough visited the site again on September 15, 2009 and took field notes (Exh. DEC-10). During this visit he observed that some silt fencing had been installed at the site but that there was no measurable improvement to the site since his last visit (t. 24).
21. In an effort to get DEC Staff to prosecute Bohl Construction for the conditions at the site, Mr. Vadney obtained two affidavits from dump truck drivers who had deposited fill at the site (t. 71, Exhs. R-3 and R-4). These affidavits were executed in December 2009. Bohl Construction contended that it had disturbed less than one acre at the site, while Mr. Vadney asserts the area is about 3.3 acres (t. 71).
22. With a cover letter dated August 6, 2009, Sterling submitted a revised SWPPP to DEC Staff (Exh. R-11).
23. By letter dated August 12, 2009, DEC Staff member McCullough informed Sterling that the revised stormwater pollution prevention plan was adequate (DEC Exh. 9 & R-12). The stormwater pollution prevention plan for the site was never implemented (t. 22). Some silt fencing was installed and at one point some hay or straw was placed over the exposed soils (t. 41).
24. By letter dated August 21, 2009, Sterling provided DEC Staff with updates to the SWPPP (Exh. R-13).

25. After the SWPPP was approved by DEC Staff, Mr. Vadney gave a copy to Mr. Quay, who, after reviewing it, told Mr. Vadney that Bohl could not afford to implement it (t. 76).
26. On November 24, 2009, Mr. Vadney obtained an estimate for implementing the SWPPP from Aota Construction Corporation for \$157,276 (Exh. R-14). On May 11, 2010, Mr. Vadney's then-attorney obtained a quote for implementing the SWPPP from William M. Larned & Sons, Inc. for \$173,221 (Exh. R-15). Mr. Vadney estimates that he and his sister have spent approximately \$60,000 to date to address the situation at the site (Exh. R-16, T. 81).

## **DISCUSSION**

This discussion makes recommendations to the Commissioner regarding: (1) the liability of the Vadneys for the alleged violations; (2) the appropriate civil penalty amount; and (3) the appropriate remediation to be required. However, making these recommendations, a preliminary dispute regarding the admissibility of certain proposed exhibits must be addressed.

### ***The Admissibility of Exhibits DEC-4, DEC-8 and DEC-11***

At the hearing, respondents' counsel objected to the introduction of three exhibits offered by DEC Staff: (1) DEC-4, a series of six color photos of the site taken by DEC Staff member McCullough on June 13, 2008; (2) DEC-8, a series of four color photos of the site taken by DEC Staff member McCullough on July 1, 2009; and (3) DEC-11 a series of three color photographs apparently from the website Google Earth. The basis for respondents' counsel's objection was that DEC Staff had failed to provide copies of these exhibits prior to the hearing, as requested (t. 12, 20 and 29). I reserved ruling on these objections at the hearing to allow the parties to provide additional information.

Both parties waived discovery before the hearing. However, a series of requests were made by the respondents pursuant to the Freedom of Information Law (FOIL). At the end of the hearing, I permitted respondents' counsel to submit the FOIL requests which he contended required the production of the contested exhibits (t. 95). Attached to an email dated February 29, 2012, counsel sent copies of FOIL requests which were received into evidence (Exh. ALJ-1). This exhibit does not

contain complete copies of the FOIL requests and on a conference call on March 16, 2012 respondents' counsel explained that the Vadneys did not have copies of all their FOIL requests. DEC Staff counsel also stated that DEC did not retain copies of all the requests because the files had been purged. Following the conference call on March 16, 2012, DEC Staff counsel provided a copy of a FOIL request that the respondents did not have and this was also received into evidence (Exh. ALJ-2). These exhibits indicate a FOIL request was made on February 17, 2009, #2009-067, but this request is not in the record. A response from DEC Staff dated February 2009 is part of Exhibit ALJ-1. The Vadneys made a second request by letter dated July 9, 2009 (#2009-251) which DEC Staff responded to on July 22, 2009 and August 12, 2009 (these letters are part of Exhibit ALJ-1). Exhibit ALJ-2 contains a February 12, 2011 letter from the Vadneys listing information requested in prior FOIL requests but not provided. As DEC Staff states in its brief, there is no specific request for photographs in the FOIL requests in the record and the exhibits should be admitted into evidence. In its reply brief, the respondents argue that the photographs should not be admitted. There is no allegation that the respondents would be prejudiced by the inclusion of these exhibits in the record.

DEC Staff member McCullough testified that he took the photos in Exhibit DEC-4 at the site on June 13, 2008 and the photos in Exhibit DEC-8 at the site on July 1, 2009. He also testified that these photos fairly and accurately describe the site on these days (t. 12). The respondents do not contest the veracity of the photos, only that they should have been provided pursuant to the various FOIL requests. However, after reviewing the information in exhibits ALJ-1 and ALJ-2, there is no specific request for photographs, nor is there a request for all documents relating to the site. The requests seek spill response reports, all correspondence, emails, reports, telephone contacts, notes, summaries of site visits and copies of regulations. The Vadneys may have requested the photographs in a FOIL request not in the record, but they have not presented evidence of this. Therefore, it is appropriate to move exhibits DEC-4 and DEC-8 into evidence in this proceeding.

Exhibit DEC-11 is a set of three aerial photographs of the site apparently from Google Earth with various dates on them purporting to show the condition of the site before, during and after the fill was deposited on the site. Mr. McCullough testified that he had not seen this exhibit before it was shown to him by DEC Staff counsel at the hearing (t. 26). In fact,

DEC Staff offers no testimony about how these photographs were obtained or whether they are accurate. Because of this, it is not appropriate to move exhibit DEC-11 into evidence.

### ***Liability***

In its complaint DEC Staff alleges two causes of action: (1) the respondents commenced and continued construction activities at the site without first filing a notice of intent for coverage under the NYSDEC General Permit for stormwater discharges from construction activity (GP-0-10-001) in violation of 6 NYCRR 750-1.4 and ECL 17-0505; and (2) the activities at the site caused stormwater discharges with a substantial visible contrast to the natural conditions of stream (H-214-7-P200C, class D)<sup>2</sup> due to soils not properly stabilized in violation of 6 NYCRR 703.2. In their answer, the respondents deny that they are liable for the two causes of action and ask that the complaint be dismissed.

In its complaint, DEC Staff alleges that Ann Marie Vadney is the owner of the site (¶ 1) and that Joseph Vadney was the operator of the site at the time of the violations (¶ 2). As owner and operator of the site, both are liable for the violations alleged (Complaint ¶10 & ¶11). In its original answer (dated October 28, 2010), then-counsel for the respondents admitted that Ms. Vadney was the owner and Mr. Vadney was the operator (¶1 & ¶2). However, when Mr. Vadney was shown a copy of this answer during his testimony at the hearing, he stated he had not reviewed the answer before it was filed, did not authorize its filing, did not retain the attorney who filed the answer, and never paid him (t. 88-90). At the close of the hearing, respondents' attorney requested leave to file an amended answer so as to deny DEC Staff's claim that Mr. Vadney was the operator (t. 96). I granted this request over the objection of DEC Staff (t. 97). Respondents' counsel filed an amended answer, dated February 24, 2012, which denies Mr. Vadney was the operator (¶ 2). During a conference call on March 16, 2012, DEC Staff indicated that it did not wish to move to reopen the record in light of the amended answer.

In their briefs, both parties addressed the question of whether or not Joseph Vadney can be found liable as an operator of the site. DEC Staff asserts that both the facts of the case,

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<sup>2</sup> This stream is properly referred to as H-214-7 and is correctly categorized as a Class C stream, not class D (6 NYCRR 863.6, item 544).

including the actions of Mr. Vadney, and the applicable law lead to the conclusion that he is the operator. The respondents' counsel argues that the responsible operator in this case is Bohl Construction, the company that brought the fill to the site and bulldozed it into the position it now occupies.

The applicable DEC regulations define owner or operator to mean the owner or operator of any facility or activity subject to regulation under this part (6 NYCRR 750-1.2(a)(60)). The General Permit defines owner/operator to mean "the person, persons or legal entity which owns or leases the property on which the construction activity is occurring; and/or an entity that has operational control over the construction plans and specifications, including the ability to make modifications to the plans and specifications" (p. 32).

DEC Staff argues that evidence in the record supports the conclusion that Mr. Vadney is the operator, as defined in regulation and the General Permit. DEC Staff points to: (1) Mr. Vadney being listed as the owner or operator and signing as such on the March 3, 2009 Notice of Intent (Exh. DEC-5, p. 1 & 10); (2) the draft SWPPP which states Mr. Vadney has operational control of the site (Exh. R-11, p. 1, §1.1); and (3) the restoration plan submitted to U.S. Army Corps of Engineers which was submitted on Mr. Vadney's behalf (R-9). DEC Staff continues that in his testimony Mr. Vadney stated that he made arrangements for the fill to be brought to the site (t. 60), was aware of the filling while it was ongoing (t. 85), and directed that filling cease (t. 86). These facts, DEC Staff concludes, demonstrate that Mr. Vadney was the operator of the site.

Respondents' counsel argues that Bohl Construction is the responsible operator at the site, not Mr. Vadney. Counsel argues that: (1) Bohl Construction had full operational control over the fill project; (2) Bohl's machines were used at the site; and (3) Bohl's President, Don Quay, supervised the fill project on a daily basis. Counsel asserts that Bohl took responsibility for obtaining all permits and complying with all regulations and that Mr. Vadney did not supervise the work.

It is not explained in this record why DEC Staff chose not to pursue an enforcement action against Bohl Construction for its role at the site, nor is it possible to conclude if Bohl Construction was, in fact, an operator at the site (though it seems likely). However, it is possible, based on this record to conclude that Ms. Vadney is the owner of the site and that Mr. Vadney is an operator, as that term is used in the regulations

and General Permit. In addition to the evidence cited by DEC Staff, other evidence in the record shows Mr. Vadney's involvement in the fill project at the site. Mr. Vadney is listed as the contact for the fill site (Exh. R-2). Mr. Vadney attended meetings with DEC Staff and the U.S. Army Corps of Engineers on February 18, 2009 (Exh. R-7) and on July 1, 2009 (Exh. DEC-7). This evidence supports the conclusion that Mr. Vadney was the operator of the site as that term is defined in regulation and the General Permit.

#### First Cause of Action

In its first cause of action, DEC Staff alleges that the respondents commenced and continued construction activities at the site without first filing a notice of intent for coverage under the NYSDEC General Permit for stormwater discharges from construction activity (GP-0-10-001) in violation of 6 NYCRR 750-1.4 and ECL 17-0505 (Complaint ¶ 14-18). The respondent denies the allegation (Amended Answer ¶ 14-16, 18).

A permit issued in accordance with federal law (40 CFR 122.26) is required for discharges of stormwater (6 NYCRR 750-1.4(b)). New York's environmental regulations authorize DEC Staff to issue a general SPDES permit for construction activities to meet this federal requirement (6 NYCRR 750-1.21(b)(2)). DEC Staff has issued permit no. GP-0-10-001 entitled "SPDES General Permit for Stormwater Discharges from Construction Activities". This permit is now in effect and requires an owner or operator of a construction activity that results in soil disturbance of one or more acres to obtain coverage under the permit by filing a Notice of Intent prior to the commencement of construction activity.

In its brief, DEC Staff argues that evidence in the record shows the respondents are liable. Mr. Vadney testified that fill was brought to the site beginning in September 2007 (t. 65) and the Notice of Intent was filed on March 3, 2009 (Exh. DEC-5). The NOI states the area of disturbance was to be 3.3 acres (p. 3). DEC Staff points to definitions of: (1) "construction activities" which includes any clearing, grading, excavation, filling; and (2) "commencement of construction activities" which means the initial disturbance of soils (General Permit, Appendix A; at 30). DEC Staff concludes that the trigger for obtaining coverage under the General Permit is the commencement of construction activities, not the first release of a pollutant to the environment.

Respondents' counsel argues that DEC Staff failed to demonstrate that pollutants were discharged from the site as a result of the fill operation and, therefore, failed to demonstrate that a permit was required. He argues that DEC Staff has not demonstrated that this violation occurred. This argument is contradicted by evidence in the record including: (1) photos of the site taken by DEC Staff member McCullough during his site visit on June 13, 2008 which show bare earth next to the stream and no erosion controls in place (Exh. DEC-3); and (2) Mr. McCullough's testimony that during his June 13, 2008 visit he observed the stream as being murky and picking up sediment and materials that were being transported along its flow path (t. 10). He further testified that the murkiness was caused by the lack of soil and erosion controls at the site and this murkiness was in contrast with the natural condition of the site, which he stated was supposed to be clear (t. 10).

DEC Staff's argument is persuasive. The record shows that construction activities commenced in September 2007 and the respondents only filed for coverage under the General Permit more than a year later. The record also demonstrates the area of disturbance exceeded one acre. Accordingly, the Commissioner should conclude that DEC Staff has shown by a preponderance of the evidence that the respondents violated ECL 17-0505 and 6 NYCRR 750-1.4 by failing to file for coverage under the general permit before construction commenced. Accordingly, the respondents are liable for the first cause of action.

#### Second Cause of Action

In its second cause of action, DEC Staff alleges that the construction activities at the site caused stormwater discharges with a substantial visible contrast to the natural conditions of stream (H-214-7-P200C, class D)<sup>3</sup> due to soils not properly stabilized in violation of 6 NYCRR 703.2 (Complaint ¶ 19-21). Respondents deny the allegation (Amended Answer ¶ 19-21).

The General Permit states that it shall be a violation of the permit and the Environmental Conservation Law for any discharge to either cause or contribute to a violation of water

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<sup>3</sup> As discussed in the previous note, DEC Staff has not accurately referenced the stream in its complaint (6 NYCRR 863.6, item 544). This stream is classified as Class C. However, this error is immaterial because the turbidity standard in 6 NYCRR 703.2 is the same for both Class C and Class D streams.



quality standards as contained in 6 NYCRR 700 through 705 (Part I.B). The General Permit continues that there shall be no increase in turbidity that will cause a substantial visible contrast to natural conditions. Section 703.2 also states the narrative standard for turbidity for Class D streams as no increase that will cause a substantial visible contrast to natural conditions.

DEC Staff argues that the respondents neglected to install the necessary soil and erosion sediment control which resulted in turbidity in the stream running through the site in violation of 6 NYCRR 703. DEC Staff cites several pieces of evidence in the record, including: (1) photos of the site taken by DEC Staff member McCullough during his site visit on June 13, 2008 which show bare earth next to the stream and no erosion controls in place (Exh. DEC-3); (2) Mr. McCullough's field notes from his July 1, 2009 visit indicating he observed erosion in the stream channel (Exh. DEC-7); (3) photos of the site taken by Mr. McCullough on July 1, 2009, showing turbid water (Exh. DEC-8); and (4) Mr. McCullough's testimony that during his June 13, 2008 visit he observed the stream as being murky and picking up sediment and materials that were being transported along its flow path (t. 10). He further testified that the murkiness was caused by the lack of soil and erosion controls at the site and this murkiness was in contrast with the natural condition of the site, which he stated was supposed to be clear (t. 10).

Respondents' counsel argues that DEC Staff has not proved that the turbidity at the site was caused by his clients, because Mr. McCullough testified that he had not been to the site before his May 21, 2008 visit (t. 38) and, therefore, had no knowledge of the natural conditions of this particular stream. Counsel also argues that Mr. McCullough did not offer any evidence that the murkiness observed in the stream was caused by a discharge at the site. Counsel also argues that because Mr. McCullough did not take any water samples from the site and did no water testing (t. 37), that DEC Staff failed to establish the respondents' liability for this cause of action.

Respondents' counsel's arguments are not convincing and should be rejected by the Commissioner. DEC Staff has shown by a preponderance of the evidence that several acres of exposed soils existed at the site on both sides of the stream and that inadequate sediment controls were in place. Further, the photographs of the murky water and Mr. McCullough's testimony regarding his observations of the site lead to the reasonable inference that the murkiness in the water was caused by the

conditions at the site, for which the respondents were responsible. Based on the above, I recommend that the Commissioner conclude that the respondents caused stormwater discharges with a substantial visible contrast to the natural conditions of stream (H-214-7) due to soils not properly stabilized in violation of 6 NYCRR 703.2 and are liable for the second cause of action.

### ***Civil Penalty and Remediation***

DEC Staff seeks a civil penalty of twenty thousand dollars, of which ten thousand would be suspended upon the condition that the respondents: (1) immediately repair and implement on-site erosion and sediment controls and stabilization measures; (2) provide DEC Staff with written documentation of the measures taken; and (3) implement the approved SWPPP for the site. In their briefs, the respondents ask that no civil penalty be imposed and state that the implementation of the SWPPP at the site would be beyond their ability to afford.

Civil Penalty. DEC Staff requests the Commissioner include in his order a civil penalty of twenty thousand dollars, of which ten thousand would be suspended upon performance of the conditions stated above. DEC Staff notes that ECL 71-1929 provides for a maximum civil penalty of up to \$37,500 per day for each violation of any duty imposed by titles 1 through 11 and title 19 of Article 17 of the ECL, regulations promulgated thereunder, or the terms of any permit issued thereunder. This section also authorizes injunctive relief.

DEC's Civil Penalty Policy (DEE-1, issued June 20, 1990) and Division of Water Technical and Operational Guidance Series (TOGS) (1.4.2) entitled Compliance and Enforcement of SPDES Permits dated, June 24, 2010, set forth a framework for calculating the appropriate amount of the civil penalty. The starting point of this calculation is the statutory maximum. In this case the maximum civil penalty is over one million dollars. The first cause of action (undertaking construction activities without first filing a notice of intent for coverage under the NYSDEC General Permit) began in September 2007 and ended when the Notice of Intent was filed on March 3, 2009. Multiplying the number of days of the violation by the \$37,500 authorized by ECL 71-1929 results in a penalty far in excess of what DEC Staff is requesting. In its brief, DEC Staff refers to TOGS 1.4.2 which suggests a penalty of \$1,500 per day for failing to obtain coverage (p. 42) and \$5,000 per event for water quality

violations (p. 43). This also results in a civil penalty in excess of what DEC Staff is requesting in this case.

The next step set forth in DEE-1 is an assessment of the severity of the violation. In this case, DEC Staff argues that the respondents' failure to implement the necessary sediment and erosion control measures caused a significant environmental impact. DEC Staff points to Mr. McCullough's testimony as evidence of the seriousness of the violations (t. 34).

The next step is an analysis of the benefit component, or an estimate of the economic benefit enjoyed by the respondent as a result of delayed compliance. The Civil Penalty Policy states that every effort should be made to calculate and recover the economic benefit of non-compliance (p. 7). DEC Staff argues that the respondents enjoyed an economic benefit, compared to persons who complied with the law. Specifically, the respondents did not have to hire qualified inspectors to conduct the necessary site inspections and did not have to expend monies on soil and erosion control measures. DEC Staff does not attempt to quantify this benefit in its brief.

The next step is an analysis of the gravity component which reflects the seriousness of the violation. Two factors are identified as relevant to this analysis: (1) the potential harm and actual damage caused by the violation; and (2) the relative importance of the type of violation in the regulatory scheme (Civil Penalty Policy, p. 9). DEC Staff argues that these violations were serious and Mr. McCullough testified that the failure to file for a permit was a serious violation and the water quality violation was a very serious issue (t. 34).

Once the economic benefit and gravity components of a potential civil penalty are analyzed, the civil penalty amount should be adjusted using the following five factors: (1) the respondent's culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) any unique factors that exist. In this case, DEC Staff argues that the respondents are culpable and that they were cooperative, at first. The cooperation seems to have decreased over the dispute regarding enforcement against Bohl Construction and the dwindling financial resources of the respondents. DEC Staff makes no reference in its papers regarding any past violations by the respondents.

Respondents' counsel argues that no civil penalty should be imposed in this case for several reasons. He states that the

Vadneys have already spent over \$60,000 responding to the situation at the site, including expenses for surveying, engineering and legal services (Exh. R-16). He argues that the Vadneys have acted in good faith throughout the process by hiring a responsible engineering firm to design an acceptable SWPPP and restoration plan. According to counsel, the reason for the failure to implement the plans is not the fault of the Vadneys, rather it is due to the high cost of implementation. The two estimates in the record show a cost of \$157,276 (Exh. R-14) and \$173,221 (Exh. R-15). He continues that the Vadneys have no history of non-compliance and concludes that the imposition of a civil penalty would force them into debt and destroy their small business operation. He also reiterates the Vadneys' claim that DEC Staff should have pursued an enforcement action against Bohl Construction, the firm that brought the material to the site and did the work there.

DEC Staff rejects the Vadneys' claim regarding ability to pay and argues that the Vadneys have not provided sufficient proof of their lack of financial resources to address the violations. DEC Staff does not address the issue of enforcement against Bohl Construction.

In this case, it is appropriate that some civil penalty be imposed to capture the economic benefit enjoyed by the Vadneys as a result of their noncompliance. However, given the large cost of implementing the remediation measures, I recommend that the Commissioner suspend the entire \$20,000 civil penalty, upon the conditions requested by DEC Staff. It is troubling that the party who may have reaped most of the economic benefit in this case, Bohl Construction, is not a party to this enforcement action, nor has Bohl Construction been asked to contribute to the remediation of the situation at the site.

Site remediation. DEC Staff requests the Commissioner to order the respondents to immediately stabilize the site and implement the SWPPP. DEC Staff states that the implementation of the SWPPP will address the problem created by the work at the site that resulted in the creation of a sizable pond on neighboring property.

The respondents do not dispute that the remediation work is necessary and should be done. They claim that they do not have the resources to implement the plans, estimated between \$157,276 (Exh. R-14) and \$173,221 (Exh. R-15).

While it is troubling that Bohl Construction was not made a party to this proceeding by DEC Staff, the respondents are liable for the conditions at the site and should be required to implement the required remediation. Therefore, the Commissioner should include in his order language that requires the respondents to: (1) immediately repair and implement on-site erosion and sediment controls and stabilization measures; (2) provide DEC Staff with written documentation of the measures taken; and (3) implement the approved SWPPP for the site.

### ***Respondents Affirmative Defenses***

In their answer, the respondents raise four affirmative defenses. In their first affirmative defense, the respondents claim that the complaint fails to state a cause of action. This claim is not an affirmative defense (see Matter of Original Italian Pizza, LLC, Ruling of the Chief ALJ, Dec. 15, 2010, at 9) and, in any event, is rendered academic by the proof in this case. In their second affirmative defense, the respondents claim that the complaint lacks subject matter jurisdiction over the matters alleged. This claim is easily rejected because all the alleged violations involve DEC administered statutes and regulations. In their third affirmative defense, the respondents argue that the complaint is barred by the doctrine of equitable estoppel; however, equitable estoppel may not be asserted against a governmental entity discharging its statutory duties and, thus, is not a defense in this matter (see Matter of Bartel, ALJ Ruling, June 11, 2009, at 12).

In their fourth affirmative defense, the respondents argue that they are entitled to an exception from the permitting requirements (see 6 NYCRR 622.4(c) (defense based upon inapplicability of permit requirement constitutes an affirmative defense)). This claim is without merit and not supported by the record in this matter. Neither DEC Staff nor the respondents' counsel addresses this affirmative defense in their briefs. DEC's administrative enforcement hearing regulations state that the respondent bears the burden of proof regarding all affirmative defenses (6 NYCRR 622.11(b)(2)). In this case, the respondents have failed to produce any proof or make any arguments regarding the affirmative defense.

Based on the above, the Commissioner should dismiss the respondents' defenses.

**CONCLUSIONS OF LAW**

1. Respondent Ann Marie Vadney, as the owner of the site located at 1627 NYS Route 9W in the Town of Coeymans, Albany County, New York (Tax Map ID 144.00-1-48.1) (t. 56), is liable for commencing and continuing construction activities at the site without first filing a notice of intent for coverage under the NYSDEC General Permit for stormwater discharges from construction activity (GP-0-10-001) in violation of 6 NYCRR 750-1.4 and ECL 17-0505.

2. Respondent Joseph Vadney, as the operator of the site located at 1627 NYS Route 9W in the Town of Coeymans, Albany County, New York (Tax Map ID 144.00-1-48.1) (t. 56), is liable for commencing and continuing construction activities at the site without first filing a notice of intent for coverage under the NYSDEC General Permit for stormwater discharges from construction activity (GP-0-10-001) in violation of 6 NYCRR 750-1.4 and ECL 17-0505.

3. Respondent Ann Marie Vadney, as the owner of the site located at 1627 NYS Route 9W in the Town of Coeymans, Albany County, New York (Tax Map ID 144.00-1-48.1) (t. 56), is liable for the construction activities at the site that caused stormwater discharges with a substantial visible contrast to the natural conditions of the stream in violation of 6 NYCRR 703.2.

4. Respondent Joseph Vadney, as the operator of the site located at 1627 NYS Route 9W in the Town of Coeymans, Albany County, New York (Tax Map ID 144.00-1-48.1) (t. 56), is liable for the construction activities at the site that caused stormwater discharges with a substantial visible contrast to the natural conditions of the stream in violation of 6 NYCRR 703.2.

5. ECL 71-1929 provides for a maximum civil penalty of up to \$37,500 per day for each violation of Article 17 of the ECL and regulations promulgated thereunder as well as injunctive relief.

**RECOMMENDATION**

Based on the information in the record and the discussion above, the Commissioner should issue an order that finds the respondents, Joseph Vadney and his sister Ann Marie Vadney, liable for two violations: (1) commencing and continuing construction activities at the site without first filing a notice of intent for coverage under the NYSDEC General Permit for stormwater discharges from construction activity (GP-0-10-

001) in violation of 6 NYCRR 750-1.4 and ECL 17-0505; and (2) causing stormwater discharges with a substantial visible contrast to the natural conditions of a stream due to soils not properly stabilized in violation of 6 NYCRR 703.2. The Commissioner should include in the order a civil penalty of twenty thousand dollars, which would be suspended upon the condition that the respondents: (1) immediately repair and implement on-site erosion and sediment controls and stabilization measures; (2) provide DEC Staff with written documentation of the measures taken; and (3) implement the approved SWPPP for the site.

**Matter of Vadney  
R4-2009-0603-94**

**FINAL EXHIBIT LIST**

| #      | Description   | Identification | Evidence |
|--------|---|----------------|----------|
| DEC-1  | McCullough notes 5/21/08                                  | Y              | Y        |
| DEC-2  | Letter from McCullough to Vadney 6/3/08                   | Y              | Y        |
| DEC-3  | McCullough notes 6/13/08                                  | Y              | Y        |
| DEC-4  | 6 photos taken 6.13.08                                    | Y              | Y        |
| DEC-5  | NOI from Sterling to DEC 3/3/09                           | Y              | Y        |
| DEC-6  | Letter from DEC to Vadney 3/11/09                         | Y              | Y        |
| DEC-7  | McCullough notes 7/1/09                                   | Y              | Y        |
| DEC-8  | 4 photos taken 7/1/09                                     | Y              | Y        |
| DEC-9  | letter from DEC to Sterling 8/12/09                       | Y              | Y        |
| DEC-10 | McCullough notes 9/15/09                                  | Y              | Y        |
| DEC-11 | 3 photos from google earth                                | Y              | N        |
| DEC-12 | Copy of Togs 1.4.2  | Y              | Y        |
| R-1    | Town of Coeymans ZBA material 7/26/00                     | Y              | Y        |
| R-2    | Sano-Rubin's Addendum #7 8/7/07                           | Y              | Y        |
| R-3    | Affidavit of Lawrence M. Tune 12/4/09                     | Y              | Y        |
| R-4    | Affidavit of Thomas Barry, Jr. 12/3/09                    | Y              | Y        |
| R-5    | Email from Kohn to McCullough 7/2/08                      | Y              | Y        |
| R-6    | Sterling phone call report 1/20/09                        | Y              | Y        |
| R-7    | Letter from Sterling to McCullough 3/3/09                 | Y              | Y        |
| R-8    | Email from Bowitch to Gitchell 3/5/09                     | Y              | Y        |
| R-9    | Letter from Sterling to Gitchell 6/2/09, restoration plan | Y              | Y        |
| R-10   | Letter from Sterling to McCullough 7/15/09                | Y              | Y        |
| R-11   | Letter from Sterling to McCullough 8/6/09                 | Y              | Y        |
| R-12   | Letter from McCullough to Sterling 8/12/09                | Y              | Y        |
| R-13   | Letter from Sterling to McCullough 8/21/09                | Y              | Y        |
| R-14   | Proposal by Iota Construction 11/24/09                    | Y              | Y        |
| R-15   | Email from Miller to Vadney 5/11/10                       | Y              | Y        |
| R-16   | Respondents' estimated costs                              | Y              | Y        |
| ALJ-1  | Email from Nolan to ALJ with attachments 2/29/12          | Y              | Y        |
| ALJ-2  | Email from Vadney to Phillips w/ att. 2/22/11             | Y              | Y        |