

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

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

**RULING**

DEC Case No.  
R4-2015-0624-75

- by -

**VON ROLL USA, INC.,**

Respondent.

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General  
Counsel (Dusty Renee Tinsley, Assistant Regional Attorney,  
of counsel), for staff of the Department of Environmental  
Conservation

-- McNamee, Lochner, Titus & Williams, P.C., (John J.  
Privitera and Dana P. Stanton), for respondent Von Roll  
USA, Inc.

Proceedings

By notice of motion for order without hearing in lieu of  
complaint dated May 25, 2016, staff of the New York State  
Department of Environmental Conservation (DEC or Department)  
commenced this enforcement proceeding against respondent Von  
Roll USA, Inc. (respondent) for alleged violations of 6 NYCRR  
750-1.4(a) and 750.2.1(e), and State Pollution Discharge  
Elimination System (SPDES) Permit No. NY-0074489. On May 25,  
2016, Department staff served its notice of motion and  
supporting statements and attachments on respondent's attorney,  
John Privitera. Mr. Privitera accepted service on behalf of  
respondent on June 3, 2016.

On July 5, 2016, respondent filed and served a memorandum of law and supporting statements and exhibits in opposition to Department staff's motion. By letter dated July 6, 2016, Department staff supplemented its motion. By letter dated July 26, 2016, Chief Administrative Law Judge (CALJ) James T. McClymonds (McClymonds) advised the parties that the matter had been assigned to me.

### Staff's Charges

Department staff's papers consist of the notice of motion for order without hearing, dated May 25, 2016; motion for order without hearing, dated May 25, 2016; affirmation of Dusty Renee Tinsley (Tinsley Affirmation), dated May 25, 2016; and the affidavit of James Malcomb (Malcomb Affidavit), sworn to May 25, 2016. The Tinsley Affirmation sets forth a single cause of action and has a proposed order attached as Attachment 1. The Malcomb Affidavit has the following exhibits attached:

- Attachment 1 - SPDES Permit Number NY - 0074489, with an effective date of December 1, 1996 and expiration date of December 1, 2001 issued to Insulating Materials Inc.
- Attachment 2 - Cover letter dated December 28, 2006 from James J. Eldred (Division of Environmental Permits, Region 4) to Donna M. Mellon, Von Roll USA, Inc. with an application for permit transfer dated December 28, 2006 attached.
- Attachment 3 - Memorandum from Mark Klotz, Director, Division of Water to Regional Water Engineers, Bureau Directors, Section Chiefs regarding Division of Water Technical and Operational Guidance Series (TOGS) 1.4.2, with TOGS 1.4.2 attached.
- Attachment 4 - Memorandum dated September 21, 1995 from Steven A. Herman, EPA Assistant Administrator to Water Management Division Directors, Regions I-X, Regional Counsels regarding Revision of NPDES Significant Noncompliance (SNC) Criteria to Address Violations of Non-Monthly Average Limits, with Significant Noncompliance (SNC) Criteria for National Pollutant Discharge Elimination System Violations attached.
- Attachment 5 - Von Roll USA, Inc., SPDES No. NY-0074489 Discharge Monitoring Reports (DMRs) for:

January, February, April, September and October 2012 with September 2012 SPDES Discharge Data Sheet; January, July and December 2013 with December 2013 SPDES Discharge Data Sheet; January, February, April, September, October and November 2014; January, February and March 2015; and March 2016.

- Attachment 6 - Department of Environmental Conservation DEE-1: Civil Penalty Policy (June 20, 1990).
- Attachment 7 - Matter of Von Roll Isola USA, Inc., Order on Consent, DEC File No. R4-2001-0710-83 dated February 14, 2002.
- Attachment 8 - Notice of Violation dated February 12, 2014.

By letter dated June 7, 2016 to CALJ McClymonds, Department staff explained how service was completed. Staff annexed the following six attachments in support of staff's letter:

- Attachment 1 - U.S. Postal Service Certified Mail Receipt and signed return receipt card.
- Attachment 2 - Copy of the May 25, 2016 cover letter from Department staff to John Privitera.
- Attachment 3 - June 1, 2016 email from John Privitera to Dusty Renee Tinsley advising staff he was not authorized to accept service.
- Attachment 4 - June 1, 2016 email from Dusty Renee Tinsley to John Privitera regarding acceptance of service.
- Attachment 5 - June 3, 2016 email from John Privitera advising Dusty Renee Tinsley that he had been directed to accept service on behalf of respondent and requested time to serve a response.
- Attachment 6 - June 6, 2016 email from Dusty Renee Tinsley to John Privitera regarding time to serve a response.

By letter dated July 6, 2016 to CALJ McClymonds, Department staff supplemented staff's motion papers by providing a copy of the June 7, 2011 renewal of respondent's SPDES Permit No. NY-0074489. The effective date of the renewal permit is December 1, 2011, and the expiration date is November 30, 2016.

Department staff alleges that respondent violated the following:

1. 6 NYCRR 750-1.4(a) for discharging or causing a discharge of a pollutant without a SPDES permit issued to respondent with respect to such discharge and in a manner other than as prescribed by the permit;
2. 6 NYCRR 750-2.1(e) for failing to comply with the terms and conditions of the SPDES permit; and
3. SPDES Permit No. NY-0074489 for exceeding permit discharge limits for total phenolics (2), toluene (3), zinc (13), and total copper (1).

Based upon these alleged violations, Department staff seeks an order: finding respondent in violation of 6 NYCRR 750-1.4(a) and 750-2.1(e), and SPDES Permit No. NY-0074489, and directing respondent to perform the following within thirty days of the effective date of the Commissioner's order:

- pay a civil penalty of \$76,237 with \$16,237 of penalty suspended provided respondent complies with the Commissioner's order;
- install automatic samplers at the two locations specified in the SPDES Outfall Contaminant Reduction Report (i.e. MH-4 and MH-19);
- submit a completed Filtration Media Change-Out Log, Metalzorb Life Expectancy Table, related analytical data and dates of media replacement along with the monthly DMRs, continuing until twelve months of DMRs have been submitted by the facility which contain no violations of the SPDES effluent limits;
- prepare and implement a zinc sampling and analysis plan (Plan) for non-contact cooling water used in Building 33 with sampling and analysis pursuant to the Plan to continue for one year;
- submit Plan data to the Department on a quarterly basis to document that concentrations have been reduced below SPDES permit effluent limits; and
- submit to the Department a revised best management practices (BMP) plan to reflect work completed during the preparation of the SPDES Outfall Contaminate Reduction Report and for any new manufacturing or process control equipment to be installed as part of the recent expansion project at the facility.
- If zinc concentrations continue to be a concern, submit a contingency plan within thirty days of the Department's notice. The contingency plan will be subject to the Department's review, comment and final approval.

### Respondent's Position

In opposition to Department staff's motion, respondent submitted a memorandum of law dated July 5, 2016; the affirmation of John J. Privitera (Privitera Affirmation), dated July 5, 2016; and the affidavit of Santino Cardella (Cardella affidavit), sworn to July 5, 2016. The Cardella Affidavit has the following exhibits attached:

- Exhibit A - SPDES Outfall Contaminant Reduction Report for Von Roll USA, Inc. dated December 2015;
- Exhibit B - Correspondence from Adirondack Environmental Services, Inc. to Von Roll USA, Inc., dated June 30, 2016 regarding analysis of water supply sample with lab report;
- Exhibit C - Correspondence from Adirondack Environmental Services, Inc. to Von Roll USA, Inc., dated June 30, 2016 regarding zinc survey with lab report; and
- Exhibit D - Correspondence from Adirondack Environmental Services, Inc. to Von Roll USA, Inc., dated July 1, 2016 regarding analysis of outfall 001 samples with lab report.

Respondent argues that staff's motion should be denied for the following reasons:

1. Any alleged permit violations have been isolated and minor and were quickly addressed by respondent;
2. Exceedances of zinc effluent limits are caused by the incoming Schenectady water supply;
3. Respondent developed and implemented a zinc sampling and analysis plan and submitted it to the Department;
4. Respondent has done everything Department staff has asked to track down and prevent zinc discharges;
5. The permit limit for zinc is indefensible;
6. Respondent has a due process right to a hearing;
7. Respondent has raised material issues of fact regarding the nature of the violations precluding summary judgment;
8. Department staff has only produced an expired permit;
9. The Department's TOGS 1.4.2 does not support commencing an enforcement action for the violations alleged;
10. Department staff has not established significant non-compliance of major and significant minor point source discharges or that the enforcement activities are

necessary to protect public health and the best use of the waters of the State;

11. Respondent is entitled to a hearing on the appropriateness of the penalties sought by Department staff; and
12. Respondent is entitled to a hearing on the appropriateness and scope of the injunctive relief sought by staff.

### FINDINGS OF FACT

Based upon the papers filed by Department staff and respondent, I make the following findings of fact determinable as a matter of law on this motion for order without hearing, which is the Departmental equivalent of summary judgment (see 6 NYCRR 622.12[e]).

1. Respondent Von Roll USA, Inc. owns and operates a manufacturing facility at 200 Von Roll Drive, Schenectady, New York (facility). (Malcolm Affidavit at ¶ 4, Attachment 2; Cardella Affidavit at ¶ 2, Exhibit A.)
2. Respondent Von Roll USA, Inc. discharges cooling water and storm water from its facility to the Poentic Kill pursuant to SPDES Permit No. NY-0074489. (Malcolm Affidavit at ¶ 4, Attachments 1, 2 and 5; Cardella Affidavit at ¶ 2, Exhibit A.)
3. Respondent's SPDES Permit sets daily maximum limits on: total copper of 0.024 mg/L; total phenolics of 0.008 mg/L; toluene of 0.05 mg/L; and zinc of 0.3 mg/L. (Malcolm Affidavit at ¶ 8, Attachments 1, 2 and 5.)
4. Respondent submitted monthly discharge monitoring reports (MDMRs) to the Department reporting the facility's pollutant discharges to the Poentic Kill. (Malcolm Affidavit at ¶¶ 10-11, Attachments 1, 2 and 5.)
5. Respondent discharged total phenolics in excess of the 0.008 mg/L maximum daily limit in September 2012 (0.137 mg/L) and April 2014 (0.034 mg/L). Malcolm Affidavit at ¶ 13, Attachment 5.)<sup>1</sup>

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<sup>1</sup> Department staff rounded the numbers to the nearest hundredth. I use the numbers recorded in the MDMRs.

6. Respondent discharged toluene in excess of the 0.05 mg/L maximum daily limit in September 2012 (1,700 mg/L), October 2012 (<1.00 mg/L) and January 2013 (<1.00 mg/L). (Malcolm Affidavit at ¶¶ 13-14, Attachment 5.)
7. Respondent discharged zinc in excess of the 0.3 mg/L maximum daily limit in January 2012 (0.663 mg/L)(2 exceedances), February 2012 (0.87 mg/L)(2 exceedances), July 2013 (0.559 mg/L) (2 exceedances), December 2013 (0.38 mg/L) (2 exceedances), January 2014 (0.523 mg/L)(2 exceedances, February 2014 (0.432 mg/L)(2 exceedances), September 2014 (0.316 mg/L)(1 exceedance), October 2014 (0.323 mg/L)(1 exceedance), November 2014 (0.468 mg/L)(2 exceedances), January 2015 (0.434 mg/L)((1 exceedance), February 2015 (0.482 mg/L)(3 exceedances), March 2015 (0.602 mg/L)(3 exceedances), and March 2016 (0.336 mg/L)(1 exceedance). (Malcolm Affidavit at ¶¶ 13-14, Attachment 5.)<sup>2</sup>
8. Respondent discharged total copper in excess of the 0.024 mg/L maximum daily limit in April 2012 (0.027 mg/L). (Malcolm Affidavit at ¶ 14, Attachment 5.)<sup>3</sup>
9. Respondent self-reported the discharges in the MDMRs and admits the 19 reported violations of its SPDES Permit alleged in staff's motion. (Malcolm Affidavit at ¶ 11-15, Attachment 5; Cardella Affidavit at ¶ 4-9, Exhibit A.)

## DISCUSSION

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR. (See 6 NYCRR 622.12[d].) "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." (Matter of Frank Perotta, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report.) CPLR 3212(b) provides 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."

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<sup>2</sup> Id.

<sup>3</sup> Id.

Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. (See Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003, at 4.)

In this instance, Department staff must establish its cause of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by tendering evidentiary proof in admissible form. It is Department staff's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged by staff. I conclude that in this proceeding staff has met its initial burden.

Staff's papers demonstrate that respondent Von Roll USA, Inc. owns and operates a manufacturing facility at 200 Von Roll Drive, Schenectady, New York. As the owner, operator and permittee, respondent is responsible for complying with the statutory, regulatory and permit requirements for its facility, including all conditions of the permit.

Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with an affidavit from an environmental engineer that describes the violations of the ECL, 6 NYCRR 750-1.4(a) and 750-2.1(e) and the effluent limits set forth in respondent's SPDES Permit No. NY-0074489. Department staff's proof presents a prima facie case demonstrating that respondent discharged pollutants to the Poentic Kill in excess of limits set forth in respondent's permit. In particular, staff's proof demonstrates that respondent's discharge exceeded the permit levels for: (i) total phenolics in September 2012 and April 2014; (ii) toluene in September 2012, October 2012 and January 2013; (iii) zinc in January 2012, February 2012, July 2013, December 2013, January 2014, February 2014, September 2014, October 2014, November 2014, January 2015, February 2015, March 2015, and March 2016; and (iv) total copper in April 2012.

Inasmuch as Department staff has made a prima facie showing on the violations noted above, the burden shifts to respondent to raise triable issues of fact. A respondent opposing staff's motion for an order without hearing must also lay bare its proof. The New York State Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions,



expressions of hope or unsubstantiated allegations or assertions are insufficient." (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) General denials are insufficient to raise an issue of fact on a summary judgment motion. (See Matter of Gruen v Deyo, 218 AD2d 865, 866 [3rd Dept 1995]; Bronowski v Magnus Enter., Inc., 61 AD2d 879 [4th Dept 1978].)

As noted above, respondent does not deny Department staff's allegations regarding the violations, but in fact admits the effluent violations (Finding of Fact No. 9).

Respondent argues that denying respondent the right to a hearing where respondent can confront and cross examine witnesses violates respondent's constitutional rights and right to due process. I disagree. Respondent has been provided with notice and an opportunity to be heard on the issue of liability. On staff's motion for an order without hearing, respondent had the burden of raising a triable issue of fact on the issue of liability.<sup>4</sup> Respondent failed to do so.

Accordingly, Department staff has made a prima facie showing of entitlement to summary judgment on the issue of liability against respondent. I conclude that respondent is liable for violating 6 NYCRR 750-1.4(a), 750-2.1(e) and SPDES Permit No. NY-0074489.

#### Penalty and Relief

Department staff requests that respondent be assessed a civil penalty of \$76,237 with \$16,237 of penalty suspended provided respondent complies with the Commissioner's order. Staff also requests, as detailed above, that respondent be directed to submit various plans and reports to the Department and perform various tasks.

Respondent challenges the appropriateness of the penalty and relief requested by Department staff due to the nature of the violations and respondent's cooperation in investigating and addressing the violations. Respondent claims that respondent

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<sup>4</sup> Although respondent raised an issue regarding the cause of exceedances of respondent's SPDES permit discharge limits, those violations carry strict liability. "It is enough to show that the Respondent did not comply with the established limits of its SPDES permit, and the reasons for non-compliance are relevant only to the issue of the Department's requested relief" such as the extent those reasons may bear on culpability as a penalty factor. (See Matter of Saddle Mountain Corp., Inc., Rulings of the ALJ, April 25, 2002, at 3.)

has already provided staff with some of the reports and plans requested as part of staff's relief in this matter. Moreover, respondent claims that its investigation into the exceedances for zinc in its discharge concludes that the exceedances are attributable to the incoming municipal water supply used for cooling water, which has a concentration of zinc higher than the permitted discharge level.

I conclude that respondent has raised triable issues of fact regarding the appropriateness of the civil penalty and relief requested by Department staff.

#### **SUMMARY**

In sum, Department staff has established its entitlement to summary judgment on the issue of liability for the violations of 6 NYCRR 750-1.4(a) and 750-2.1(e) and the effluent limits set forth in respondent Von Roll USA, Inc.'s SPDES Permit No. NY-0074489. Department staff's motion for order without hearing should be granted on the issue of liability but otherwise denied for the reasons stated above.

#### **RULING**

Based upon the foregoing discussion, my ruling on Department staff's motion for order without hearing is as follows.

1. Department staff's May 25, 2016 motion for order without hearing is granted on the issue of liability against respondent Von Roll USA, Inc. on the violations of 6 NYCRR 750-1.4(a) and 750-2.1(e) and SPDES Permit No. NY-0074489 for exceeding the permitted discharges for:
  - A. Total phenolics in September 2012 and April 2014;
  - B. Toluene in September 2012, October 2012 and January 2013;
  - C. Zinc in January 2012, February 2012, July 2013, December 2013, January 2014, February 2014, September 2014, October 2014, November 2014, January 2015, February 2015, March 2015, and March 2016; and
  - D. Total copper in April 2012.

2. The civil penalty and remedial relief requested in Department staff's motion for order without hearing is denied.
3. Pursuant to 6 NYCRR 622.12(e), Department staff's motion for order without hearing and supporting papers and respondent's papers in opposition are deemed to be the complaint and answer, respectively, for the purposes of this proceeding.

Accordingly, Department staff's motion for order without hearing is granted in part and otherwise denied, as detailed herein. A conference call will be scheduled after the parties have been served with this ruling to schedule the hearing on the penalty and relief requested in this matter.

/s/

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Michael S. Caruso  
Administrative Law Judge

Dated: November 1, 2016  
Albany, New York