

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

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)

-by-

ORDER

DEC Case No.
CO 4-20220201-10

BILL'S AUTO AND COMMERCIAL TOWING, INC.,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) alleges that respondent Bill's Auto and Commercial Towing, Inc. (respondent) violated ECL article 17, 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1), and 750-2.1(e) and State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-17-004) (hereinafter MSGP) when it failed to file a complete semiannual discharge monitoring report (DMR) for the January 1 through June 30, 2021 reporting period for respondent's facility located at 1448 State Route 145, Middleburgh, New York. The complaint seeks an order of the Commissioner:

- (1) finding respondent in violation of 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1), and 750-2.1(e) and the MSGP;
- (2) directing respondent to submit the overdue semiannual DMR;
- (3) assessing a civil penalty in the amount of four thousand six hundred forty dollars (\$4,640); and
- (4) granting such other relief as the Commissioner may deem appropriate.

Administrative Law Judge (ALJ) Molly T. McBride of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear for the adjudicatory hearing scheduled for August 3, 2022 (*see* Default Summary Report at 4 [Finding of Fact No. 15]). At the August 3, 2022, adjudicatory hearing, Department staff made an oral motion for a default judgment. ALJ Elizabeth A. Phillips, presiding at the hearing, reserved on the motion,

and Department staff later submitted a written motion for default judgment with supporting papers.

As a consequence of respondent's failure to answer or appear in this matter, ALJ McBride recommends that Department staff's motion for a default judgment be granted (*see* Default Summary Report at 6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to submit a complete semiannual DMR for the January 1 through June 30, 2021 reporting period for respondent's facility located at 1448 State Route 145, Middleburgh, New York within twenty-eight days of the end of the reporting period, the date that the semiannual DMR was due to be submitted to the Department. Accordingly, respondent is in violation of 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1) and 750-2.1(e) and the MSGP.

Department staff correctly points out that the requirement to submit complete and accurate DMRs is essential to the Department's mission (*see* Motion for Default Judgment, Exhibit A, Affirmation of Anne Haas, Esq., dated November 1, 2022, ¶ 14; Affidavit of Ryan Waldron [Waldron Affidavit] sworn to October 31, 2022, ¶ 12). DMRs enable the Department to determine "compliance with the MSGP, identify unpermitted discharges, and evaluate potential environmental and other harms" (Waldron Affidavit ¶ 12).

Department staff seeks a civil penalty in the amount of four thousand six hundred forty dollars (\$4,640). Respondent repeatedly failed to correct the violation and has a history of noncompliance (*see* Waldron Affidavit, ¶ 11 and Exhibit 4). Based on the above, the ALJ recommends that I impose a civil penalty of four thousand six hundred forty dollars (\$4,640) as requested in Department staff's complaint. ECL 71-1929(1) authorizes a penalty up to \$37,500 for the violation at issue in this proceeding. The penalty requested here by staff is authorized and appropriate.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Bill's Auto and Commercial Towing, Inc. waived its right to be heard at the hearing.
- II. Based upon the pleadings and papers submitted with and in support of Department staff's motion, respondent Bill's Auto and Commercial Towing, Inc. is determined to have violated 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1), and 750-2.1(e) and State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-17-004) by failing to file a complete semiannual discharge monitoring report for the January 1 through June 30, 2021 reporting period.

- III. Within thirty (30) days of the service of this order upon Bill's Auto and Commercial Towing, Inc. shall submit to the Department a complete semiannual discharge monitoring report for the January 1 through June 30, 2021 reporting period.
- IV. Respondent Bill's Auto and Commercial Towing, Inc. is hereby assessed a civil penalty in the amount of four thousand six hundred forty dollars (\$4,640). Respondent shall pay the penalty within thirty (30) days of the service of this order upon respondent. Payment is to be by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The discharge monitoring report referenced in paragraph III of this order and the penalty payment set forth in paragraph IV of this order shall be sent to the following address:

Anne Haas, Esq.
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500.

- VI. The provisions, terms and conditions of this order shall bind respondent Bill's Auto and Commercial Towing, Inc. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: */s/*
Basil Seggos
Commissioner

Dated: Albany, New York
December 8, 2022

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

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)

-by-

**DEFAULT SUMMARY
REPORT**

BILL'S AUTO AND COMMERCIAL TOWING INC.,

DEC Case No.
CO 4-20220201-10

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent Bill's Auto and Commercial Towing, Inc., (respondent) with a notice of hearing and complaint dated June 9, 2022 alleging a violation of ECL article 17, 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1), and 750-2.1(e) and State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-17-004) (hereinafter MSGP) for failing to file a complete semiannual discharge monitoring report (DMR) for the January 1 through June 30, 2021 reporting period for respondent's facility located at 1448 State Route 145 Middleburgh, New York. The complaint seeks an order of the Commissioner: (1) finding respondent in violation of 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1), and 750-2.1(e) and the MSGP; (2) directing respondent to submit the overdue semiannual DMR; (3) assessing a civil penalty in the amount of four thousand six hundred forty dollars (\$4,640.00); and (4) granting such other relief as the Commissioner may deem appropriate.

Service of the notice of hearing and complaint was made by certified mail, return receipt requested, and was received by respondent on June 13, 2022 (*see* Motion for Default Judgment Exhibit C). Respondent did not answer the complaint. The matter was noticed for hearing on August 3, 2022. The notice of hearing provided detailed instructions for attending the virtual hearing by videoconference or telephone. The notice also instructed the parties to call the Office of Hearings and Mediation Services (OHMS) if the parties experienced difficulty joining the virtual hearing. At or about 10:00 a.m. on August 3, 2022, Administrative Law Judge (ALJ) Elizabeth A. Phillips convened the virtual adjudicatory hearing by videoconference and telephone conference. Department staff was represented by Anne Haas, Esq., Senior Attorney. No one appeared on behalf of respondent.

ALJ Phillips noted for the record that respondent had failed to answer the complaint and failed to appear for the adjudicatory hearing. Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. ALJ Phillips reserved on the oral motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). By cover letter dated November 1, 2022, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on November 1, 2022 (*see* Affidavit of Service of Melissa Evans, sworn to November 1, 2022). On November 1, 2022, the matter was assigned to me.

Applicable Regulatory Provisions

Section 750-2.5(a)(1) of 6 NYCRR states that a permittee “shall comply with all recording, reporting, monitoring and sampling requirements specified in the permit.” Section 750-2.5(e)(1) provides that the permittee “shall submit the results of any wastewater or ambient monitoring results required by the permit at the end of each month, unless otherwise specified by the department.” Section 750-2.1(e) states that a permittee “must comply with all terms and conditions of the permit.”

The MSGP requires the owner or operator to submit completed semiannual DMRs to the Department within 28 days following each semiannual reporting period (*see* MSGP Part VI at 44-45; Table IV.1 at 37). The semi-annual monitoring periods are January 1 through June 30 and July 1 through December 31 of each year (*see* MSGP Table IV.2 at 37).

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff’s motion for a default judgment:

1. Respondent Bill’s Auto and Commercial Towing, Inc. applied for coverage under the SPDES MSGP in a notice of intent on April 4, 2019. Department staff assigned SPDES Permit ID No. NYR00B837 to respondent’s permit. (*See* Affidavit of Ryan Waldron [Waldron Affidavit], sworn to October 31, 2022, ¶ 5, Exhibit 1; Motion for Default Judgment, Exhibit B, Complaint ¶ 7.)
2. Ryan Waldron is an employee of the Department and is an Environmental Engineer 1 in the Department’s Division of Water, Central Office. Mr. Waldron is the Chief of the Compliance Assurance Section in the Bureau of Water Compliance. Mr. Waldron has access to and is the custodian of Department records related to the SPDES program of the State of New York, including DMRs filed pursuant to the MSGP. (*See* Waldron Affidavit ¶¶ 1-3.)
3. Respondent is the owner/operator of a facility called “Bill’s Auto and Commercial Towing, Inc.” which has a street address of 1448 State Route 145 Middleburgh, New

York 11433. (See Waldron Affidavit Exhibit 1, Notice of Intent.)

4. Respondent's facility is covered under Sectors M and N-3 of the MSGP. (See Waldron Affidavit Exhibit 1, Notice of Intent at 4; MSGP at 108-125.)
5. Respondent received coverage under the MSGP effective May 2, 2019. (See Waldron Affidavit ¶ 5; Motion for Default Judgment, Exhibit B, Complaint ¶ 7.)
6. Pursuant to the terms of the MSGP, respondent was required to file semi-annual DMRs for the January 1 through June 30 and July 1 through December 31 reporting periods within 28 days after the end of each monitoring period. (See Waldron Affidavit ¶ 6; Motion for Default Judgment, Exhibit B, Complaint ¶ 13.)
7. The DMRs are filed electronically using the United States Environmental Protection Agency's (EPA) NetDMR system. (See Waldron Affidavit ¶ 6; Motion for Default Judgment, Exhibit B, Complaint ¶¶ 13-14.)
8. Respondent did not file a complete semiannual DMR for the January 1 through June 30, 2021 reporting period. (See Waldron Affidavit ¶ 7.)
9. As a result of respondent's failure to timely submit the semiannual DMR, Department staff mailed a notice of violation (NOV) to respondent on September 2, 2021. The NOV advised respondent that respondent had failed to submit a DMR for the first semiannual reporting period of 2021, or submitted an incomplete DMR, and instructed respondent to file the missing DMR through NetDMR within 30 days. The NOV also advised respondent failure to submit the DMR within 30 days may result in penalties of up to \$37,500 per day. (See Waldron Affidavit ¶ 8, Exhibit 2.)
10. Respondent did not respond to staff's NOV or submit a complete DMR. (See Waldron Affidavit ¶ 8.)
11. On February 15, 2022, Department staff mailed respondent an order on consent in an attempt to settle the matter. The cover letter directed respondent to submit the missing DMR, signed order and a penalty payment by March 17, 2022. Respondent failed to submit the DMR, order and payment and did not respond to staff's offer. (See Waldron Affidavit ¶ 9, Exhibit 3.)
12. As of October 31, 2022, respondent had not filed a DMR for the January 1 through June 30, 2021 reporting period. (See Waldron Affidavit ¶ 10.)
13. Respondent has a history of noncompliance having failed register for the NetDMR reporting system and has failed to file a single DMR or annual certification report (ACR) as required by the MSGP. Department staff sent respondent at least two previous NOV's. (See Waldron Affidavit ¶ 11.)
14. Service of the cover letter, notice of hearing, and complaint, statement of readiness all

dated June 9, 2022 was made by certified mail and was received by respondent on June 13, 2022. (See Motion for Default Judgment Exhibit C, Affidavit of Service of Melissa Evans, sworn to October 20, 2022.)

15. Respondent failed to file an answer to the complaint and failed to appear at the adjudicatory hearing scheduled in the matter on August 3, 2022, as directed in the notice of hearing. (See Hearing Record.)

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain:

- "(1) proof of service upon respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- "(2) proof of respondent's failure to appear or failure to file a timely answer;
- "(3) consistent with CPLR 3215(f), proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim;
- "(4) a concise statement of the relief requested;
- "(5) a statement of authority and support for any penalty or relief requested; and
- "(6) proof of mailing the notice required by [6 NYCRR 622.15(d)], where applicable." (See 6 NYCRR 622.15[b][1] - [6].)

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim[s]" alleged in the complaint. (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.) Staff is required to support its motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018 [*Samber*], at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint, as directed

in the notice of hearing served with the complaint; (iii) respondent failed to appear for the adjudicatory hearing scheduled on August 3, 2022, as directed in the notice of hearing; (iv) Department staff's complaint includes a concise statement of the relief requested; (v) staff's motion includes a statement of authority and support for the penalty and relief requested (*see* Affirmation of Anne Haas, Esq., [Haas Affirmation] dated November 1, 2022, ¶¶ 10-17; Waldron Affidavit ¶ 12), and (vi) Department staff provided proof of service of the motion papers on respondent (*see* Affidavit of Service of Melissa Evans, sworn to November 1, 2022). Respondent did not file or serve a response to staff's motion. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Department staff's submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to submit a complete semiannual DMR for the January 1 through June 30, 2021 reporting period for respondent's facility located at 1448 State Route 145 Middleburgh, New York within twenty-eight days of the end of the reporting period, the date that the semiannual DMR is due the Department, in violation of 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1) and 750-2.1(e) and the MSGP (*see Samber* at 1). As of the date of staff's motion respondent had not filed the missing complete semiannual DMR for the January 1 through June 30, 2021 reporting period.

Penalty

Department staff's complaint and motion for default judgment request the Commissioner impose a civil penalty of four thousand six hundred forty dollars (\$4,640.00). Staff's submissions on the motion for default judgment elaborate on the requested penalty, discussing the Department's Civil Penalty Policy, DEE-1 and the Division of Water Technical and Operational Guidance Series (TOGS) 1.4.2 (Compliance and Enforcement of SPDES Permits [June 24, 2010]), as well the importance of reporting requirements, the duration of the violation, and respondent's history of noncompliance. (*See* Haas Affirmation ¶¶ 10-17; Waldron Affidavit ¶ 12.)

ECL 71-1929(1) provides for a civil penalty of up to \$37,500 per day for each violation of the provisions of ECL article 17, and the regulations promulgated thereto. The total maximum statutory penalty for the violation proven by staff, as of the date of staff's complaint is eleven million eight hundred fifty thousand dollars (\$11,850,000).

Department staff explained that the requested penalty was determined using TOGS 1.4.2. Staff determined the base penalty for failing to submit a complete 2021 semiannual DMR is one thousand one hundred sixty dollars (\$1,160).¹ Staff then applied a multiplier (a calculated adjustment factor that takes respondent's culpability, cooperation, history of non-compliance and other factors into consideration) of 2 to the penalty to arrive at a settlement penalty of two thousand three hundred twenty dollars (\$2,320). In its complaint and motion, staff requested a penalty of four thousand six hundred forty dollars (\$4,640).

¹ The base penalty provided in TOGS 1.4.2 is \$1,000 for each DMR not filed. The penalty is then adjusted for inflation (*see* TOGS 1.4.2 at 44).

I note that the base penalty amounts set forth in TOGS 1.4.2 are to be “used only for settlement purposes” and are to be adjusted every two years for inflation and deflation (*see* TOGS 1.4.2 at 30). Moreover, TOGS 1.4.2 “provides the minimum enforcement response and penalty” (TOGS 1.4.2 at 2). Thus, if an enforcement matter is not settled and instead proceeds to an administrative enforcement hearing, the civil penalty amounts set forth under TOGS 1.4.2 are not controlling.

Here, Department staff provided support for the total penalty four thousand six hundred forty dollars (\$4,640). Respondent repeatedly failed to correct the violations and submit the required DMR. Respondent’s history of noncompliance is an aggravating factor. Accordingly, I find that the four thousand six hundred forty dollars (\$4,640.00) civil penalty requested in staff’s complaint and motion is well below the statutory maximum and is appropriate under the circumstances presented here.

Remedial Action

In addition to the above, Department staff requests that the Commissioner direct respondent to file the overdue 2021 semi-annual DMR. The remedial relief requested is warranted and appropriate.

Conclusion of Law

By failing to file a complete semiannual DMR for the January 1 through June 30, 2021 reporting period for respondent’s facility located at 1448 State Route 145 Middleburgh, New York, respondent violated 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1), and 750-2.1(e) and the SPDES MSGP.

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff’s motion for default, and finding respondent Bill’s Auto and Commercial Towing, Inc. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Bill’s Auto and Commercial Towing, Inc. violated 6 NYCRR 750-2.5(a)(1), 750-2.5(e)(1), and 750-2.1(e) and the New York State Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit No. GP-0-17-004;
3. Directing respondent Bill’s Auto and Commercial Towing, Inc. to submit a complete semiannual DMR for the January 1 through June 30, 2021, reporting period;
4. Directing respondent Bill’s Auto and Commercial Towing, Inc. to pay a civil penalty of four thousand six hundred forty dollars (\$4,640.00); and

5. Directing such other relief as the Commissioner may deem appropriate.

/s/
Molly T. McBride
Administrative Law Judge

Dated: Albany, New York
December 2, 2022

APPENDIX A

Bill's Auto and Commercial Towing, Inc.,
DEC File No. CO 4-20220201-10
Motion for Default Judgment

- Cover letter, dated November 1, 2022, addressed to Administrative Law Judge Elizabeth Phillips of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers
 - Notice of Motion for Default Judgment, dated November 1, 2022
 - Motion for Default Judgment, dated November 1, 2022, attaching Exhibit A and Affidavit of Ryan Waldron:
 - A. Affirmation of Anne Haas, dated November 1, 2022, attaching Exhibits B - C:
 - B. Cover letter, Notice of Hearing, Complaint, and Statement of Readiness, dated June 9, 2022 and Order on Consent
 - C. Affidavit of Service of Melissa Evans, sworn to October 20, 2022 attaching United States Postal Service delivery confirmation, dated July 25, 2022, reflecting service upon respondent on June 11, 2022
 - D. NYS Department of State, Division of Corporations, Entity Information Sheet regarding Bill's Auto and Commercial Towing, Inc,
- Affidavit of Ryan Waldron, sworn to October 31, 2022 attaching Exhibits 1-4:
1. Notice of Intent (GP-0-17-004) from Bill's Auto and Commercial Towing, Inc.,
 2. Notice of Violation, dated September 2, 2021
 3. Cover letter, dated February 15, 2022 with Order on Consent
 4. Notice of Violation, dated August 29, 2018
Notice of Violation, August 3, 2020
- Affidavit of Service (motion papers) of Melissa Evans, sworn to November 1, 2022
 - State Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-17-004) (March 1, 2018, modified March 2, 2020) – Official Notice Taken