

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

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York (ECL) and Part 360-12 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

DEC Case No:
CO2-20130325-01

-by-

H & S REPAIR CORP.,¹

Respondent.

On June 21, 2013, an adjudicatory hearing was convened before Richard R. Wissler, Administrative Law Judge (ALJ) of the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation (Department). The hearing addressed the allegations of Department staff that respondent H & S Repair Corp. failed to file an annual report for calendar year 2010 for the vehicle dismantling facility it operates at 127-27 Willets Point Boulevard, Corona, New York 11368.

ALJ Wissler prepared the attached hearing report (Hearing Report), which I adopt as my decision in this matter, subject to my comments below. As stated in the hearing report, respondent's facility is subject to the annual reporting requirements set forth in ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c) (see Hearing Report, at 2-3; see also Complaint, Hearing Exhibit [Ex.] B, ¶¶ 3-9).

Respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear for the adjudicatory hearing held on June 21, 2013.

As a consequence of respondent's failure to answer or appear in this matter, Department staff moved for a default judgment. The ALJ has recommended that Department staff's motion for default be granted (see Hearing Report, at 4-5), and I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15. Furthermore, at the hearing, Department staff presented a prima facie case on the merits that respondent violated ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c) and proved its case by a preponderance of the evidence (see Hearing Report, at 4). Accordingly, staff is entitled to a judgment based on record evidence.

¹ Although Department staff's caption identifies the respondent as "H & S Repair Corporation," the official name of respondent, as reflected in records of the New York Department of State, is "H & S Repair Corp." I have therefore corrected the caption to reflect accurately the official name of respondent (see CPLR 2001). Department staff should, in the preparation of its papers for proceedings, confirm the accuracy of corporate and business entity names with the information that appears in the New York State Department of State website database.

According to the records of the New York State Department of State, H & S Repair Corp. was dissolved as of January 26, 2011 (Hearing Ex. E). However, respondent's obligation to file its annual report accrued on January 1, 2011, the day after the prior year during which it operated. Although the regulations provide a 60-day grace period within which a facility may file its annual report, the obligation to file accrues on January 1 (see 6 NYCRR 360-12.1[c] [annual report must be filed "no later than 60 days after the first day of January following each year of operation or portion thereof"]). Where, as here, the violation relates to events that occurred prior to the dissolution of a business – here, the obligation to submit an annual report for the year 2010 for the vehicle dismantling facility that respondent operated – the subsequent dissolution of that business has no bearing on the proceeding (see Business Corporation Law §§ 1006[a][4] & [b] and 1009; Matter of Quadrozzi Concrete Corp., Order of the Commissioner, June 17, 2013, at 1-2).

Based upon the record of this proceeding, the civil penalty in the amount of five thousand dollars (\$5,000) and the relief requested by Department staff and recommended by the ALJ are 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 H & S Repair Corp. waived its right to be heard at the hearing.
- II. Based upon record evidence, respondent H & S Repair Corp. is adjudged to have violated ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c), by failing to submit an annual report for the year 2010 for the vehicle dismantling facility it operates at 127-27 Willets Point Boulevard, Corona, New York.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent H & S Repair Corp. shall submit to the Department the annual report for calendar year 2010, in accordance with the requirements of ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c).
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent H & S Repair Corp. shall pay a civil penalty in the amount of five thousand dollars (\$5,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The annual report for calendar year 2010 and the penalty payment, as referenced in paragraphs III and IV, respectively, of this order, shall be sent to the following address:

Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Elissa Armater.

VI. Any questions or other correspondence regarding this order shall be addressed to:

Richard Clarkson, P.E.
Division of Materials Management, Facilities Section
New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7260.

VII. The provisions, terms and conditions of this order shall bind respondent H & S Repair Corp. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
November 1, 2013

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of
the Environmental Conservation Law of the State of New York
("ECL") and Part 360-12 of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of
New York ("6 NYCRR")

HEARING REPORT

DEC Case No:
CO2-20130325-01

-by-

H & S REPAIR CORP.,

Respondent.

Procedural History

Respondent H & S Repair Corp. ("respondent") was served by staff of the New York State Department of Environmental Conservation ("Department") with a notice of hearing and complaint, dated March 29, 2013, alleging a violation of ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c), for failure to submit an annual report for the year 2010 for the vehicle dismantling facility it operates at 127-27 Willets Point Boulevard, Corona, New York 11368. The complaint seeks the following relief: (1) a finding that respondent is in violation of the cited ECL statute and 6 NYCRR regulation; (2) a direction that respondent submit the overdue 2010 vehicle dismantling annual report; (3) the assessment of a civil penalty in the amount of \$5,000.00; and (4) such other relief as the Commissioner may deem just and proper. In addition, the notice of hearing advised respondent that any answer to the complaint must be filed by April 29, 2013, and that an adjudicatory hearing in the matter was scheduled for May 21, 2013, requiring its appearance. As shown by a United States Postal Service ("USPS") Track and Confirm email, service of the notice of hearing and complaint on respondent by certified mail was made on April 3, 2013. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled on May 21, 2013.

Department staff was prepared to proceed to hearing on May 21, 2013, however, as the undersigned Administrative Law Judge ("ALJ") was engaged in other adjudicatory hearings at that time, the matter was adjourned for hearing until June 21, 2013. As a courtesy, by letter dated May 23, 2013, sent by certified mail, respondent was advised of the adjournment of the hearing to June 21, 2013. A USPS Track and Confirm email indicates respondent received the letter on June 18, 2013. Respondent did not contact Department staff in response to the May 23, 2013, letter and did not appear for the hearing on June 21, 2013.

On June 21, 2013, the adjudicatory hearing was convened before the undersigned ALJ of the Department's Office of Hearings and Mediation Services ("OHMS") in the Department's Region 2 office, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101. Department staff was represented by Megan Joplin, Esq., Assistant Regional Attorney, Region 2. No one appeared on behalf of respondent. Department staff moved for a default judgment in the

matter and, in addition, elected to proceed with a hearing in the matter in the absence of respondent.

Department staff called one witness, Stephanie Salvemini, an Engineering Geologist 1 in the Department's Region 2 Division of Materials Management. Department staff submitted seven (7) exhibits, all of which were received in evidence.

Applicable Statutory and Regulatory Provisions

ECL 27-2303(1): "Regulation of vehicle dismantling facilities

All vehicle dismantlers owning or controlling a facility for the dismantling of end of life vehicles on site shall be subject to the requirements of this title.

1. An annual report shall be submitted to the department, to be included on the department's website, including, but not be limited to, the following:

- (a) the number of end of life vehicles received at the facility;
- (b) the number of end of life vehicles crushed and removed from the facility;
- (c) the number of end of life vehicles stored at the facility at the end of the reporting year;
- (d) the approximate area at the facility used for storage of end of life vehicles;
- (e) the quantities of waste vehicle fluids extracted from end of life vehicles received and their disposition, including the quantity sold, used on-site, stored on-site, and disposed; and
- (f) the number and if applicable nature of any violation of all applicable rules and regulations of the state."

6 NYCRR 360-12.1(c) "Applicability

(c) Automobile dismantlers reporting requirements. Automobile dismantlers, scrap metal processors, automobile junkyards, facilities that recover metal from sludges that are not hazardous waste which are required to be managed at a facility subject to regulation under Part 373 or 374 of this Title, and metal salvage facilities are exempt from regulation under this Part, except as follows: the owner or operator of each of these facilities must provide the department with an annual report that details how the waste fluids (including, but not limited to, refrigerants, oil and transmission fluids) are disposed. Duplicate originals of this report must be submitted to the department's central office and the office of the department administering the region within which the facility is located no later than 60 days after the first day of January following each year of operation or portion thereof."

ECL 71-4003: "General civil penalty

Except as otherwise specifically provided elsewhere in this chapter, a person who violates any provision of this chapter, or any rule, regulation or order promulgated pursuant thereto, or the terms or conditions of any permit issued thereunder, shall be liable to a civil penalty of not more than one thousand dollars, and an additional civil penalty of not more than one thousand dollars for each day during which each such violation continues. Any civil penalty provided for by this chapter may be assessed following a hearing or opportunity to be heard."

Findings of Fact

1. H & S Repair Corp. (“respondent”) operates a vehicle dismantling facility located at 127-27 Willets Point Boulevard, Corona, New York 11368 (“facility”). (Exhibits B and E.)
2. The facility dismantles end of life vehicles which are defined in ECL 27-2301(4) as motor vehicles sold, given, or otherwise disposed of as junk or salvage. (Exhibit B.)
3. Pursuant to ECL 27-2303 (1), all vehicle dismantlers owning or controlling a facility for the dismantling of end of life vehicles on site are to submit an annual report to the Department summarizing such activity including, but not limited to, number of vehicles received at the facility, stored at the facility, and crushed and removed from the facility. (Exhibit B.)
4. Pursuant to 6 NYCRR 360-12.1 (c), an owner or operator of a vehicle dismantling facility must submit duplicate originals of its annual report to the Department’s Central Office and the office of the Department administrating the region within which the facility is located within sixty days of the first day of January of the following calendar year. (Exhibit B.)
5. From July 8, 2004, until it was dissolved by proclamation or annulment of authority on January 26, 2011, and became inactive, respondent was an active domestic business corporation in the State of New York. (Exhibits B and E.)
6. Stephanie Salvemini is an Engineering Geologist 1 in the Department’s Region 2 Division of Materials Management whose duties include the care, custody, examination and maintenance of the records maintained by the Department with respect to vehicle dismantling facilities. (Testimony of Stephanie Salvemini, Hearing Record.)
7. On June 21, 2013, Stephanie Salvemini conducted a search of the Department’s vehicle dismantling facility database and determined that respondent had not filed the annual report required by ECL 27-2303(1) for the 2010 operating year. (Testimony of Stephanie Salvemini, Hearing Record.)
8. By certified mail, the Department issued respondent a Notice of Violation (“NOV”), dated August 10, 2012, for failure to submit a Vehicle Dismantling Facility Annual Report for the 2010 operating year by March 4, 2011. The NOV directed respondent to submit a completed report for 2010. As indicated in a United States Postal Service (“USPS”) Track and Confirm email, respondent received the NOV on August 13, 2012. (Exhibit A.)
9. Respondent was served by certified mail with a notice of hearing and complaint, dated March 29, 2013, alleging violations of ECL 27-2303 (1) and 6 NYCRR 360-12.1 (c) for failure to submit a Vehicle Dismantling Facility Annual Report for the 2010 operating

year. This certified mailing bore USPS Label Number 71901050579922909331. As indicated in a USPS Track and Confirm email, respondent received the notice of hearing and complaint on April 3, 2013. (Exhibits B and C.)

10. The notice of hearing advised Respondent that it was required to file an answer to the complaint by April 29, 2013, and that an adjudicatory hearing in this matter would be convened on May 21, 2013, at the Department's Region 2 offices. (Exhibit B.)
11. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled for May 21, 2013. (Hearing Record.)
12. Because of the number of other hearings scheduled and heard on May 21, 2013, the adjudicatory hearing in this matter was rescheduled for June 21, 2013, at the Department's Region 2 offices. (Exhibit E.)
13. A second notice of hearing, dated May 23, 2013, was sent by certified mail to respondent indicating that the hearing in the matter originally scheduled for May 21, 2013, had been adjourned to June 21, 2013. This certified mailing bore USPS Label Number 70072560000125500952. As indicated in a USPS Track and Confirm email, Respondent received the notice June 18, 2013. (Exhibit E.)
14. Respondent failed to appear for the adjudicatory hearing rescheduled for June 21, 2013. (Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to submit an annual report detailing the operation of its vehicle dismantling facility for the year 2010 within 60 days of January 1, 2011, in violation of ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c).

The record shows that respondent, as directed in the notice of hearing, failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on May 21, 2013. In addition, respondent failed to appear for the adjudicatory hearing rescheduled for June 21, 2013. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to submit an annual report for the year 2010, in violation of ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c). Pursuant to Business Corporation Law 1006 (b), respondent's dissolution on January 26, 2011, did not obviate its responsibility to file an annual report for 2010 since the duty to file the report arose on January 1, 2011. The Department is entitled to judgment upon the facts proven.

Department staff's proposed relief and the \$5,000 civil penalty it seeks are consistent with the Department's penalty policy and the Office of General Counsel's Program Policy Number 8 entitled, "Solid Waste Enforcement Policy." (Exhibit G.) Moreover, the annual report in this matter has been overdue for more than two years, despite efforts by the Department in the interim to secure its filing. (Exhibit A.) Thus, due to the ongoing nature of the violation, a civil penalty of \$5,000 is consistent with the scope of penalty authorized by ECL 71-4003.

Recommendation

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

1. Granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. Finding respondent in violation of ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c), based upon the proof adduced at the hearing conducted in the absence of respondent, for failure to submit an annual report for the year 2010 for an auto dismantling facility it operates located at 127-27 Willets Point Boulevard, Corona, New York 11368;
3. Directing respondent to submit the annual report for 2010 to the Department for the above facility;
4. Directing respondent to pay a civil penalty in the amount of five thousand dollars (\$5,000.00); and
5. Directing such other and further relief as he may deem just and proper.

_____/s/_____
Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
August 2, 2013

EXHIBIT CHART – DMM EXPEDITED PROCEEDINGS

Matter of H&S Repair Corp. – Corona, New York – DEC Case No. 2-20130325-01

June 21, 2013 – Region 2

Edirol File No. 040721122003

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
A	Notice of Violation for failure to submit a Vehicle Dismantling Facility Annual Report for operating year 2010, including USPS attachments	✓	✓	Department Staff	Deemed in Evidence
B	Notice of Hearing, dated March 29, 2013, and Complaint, dated March 29, 2013	✓	✓	Department Staff	
C	Affidavit of Service of Elissa Armater, sworn to May 10, 2013, including USPS attachments	✓	✓	Department Staff	
D	Cover Letter from Scott Crisafulli, Esq. to Respondent, dated March 29, 2013, served with the Notice of Hearing and Complaint	✓	✓	Department Staff	
E	Second Notice of Hearing, dated May 23, 2013, including USPS attachments, and NYS DOS Corporate Entity Searches, dated May 20, 2013 and June 19, 2013	✓	✓	Department Staff	
F	Affidavit in Support of Notice of Hearing and Complaint of Richard Clarkson, dated March 28, 2013	✓	✓	Department Staff	
G	Penalty Calculation	✓	✓	Department Staff	