

**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 Part 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) and SPDES Permit #NYR00B244

ORDER

-by-

DEC Case No.
CO 3-20151021-01

ROBERT L. MILLER, JR.,

Respondent.

I. Background

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) alleges that respondent Robert L. Miller, Jr. violated ECL article 17, 6 NYCRR 750-2.5 and the provisions of the State Pollutant Discharge Elimination System (SPDES) multi-sector general permit for stormwater discharges associated with industrial activity, ID No. GP-0-12-001 (MSGP), when he failed to file by February 28, 2015 an annual discharge monitoring report (DMR) for calendar year 2014.

Respondent is the “owner/operator” of an automobile salvage business known as “A&T Auto Parts,” located at 191 Cardinal Road, Hyde Park, New York (see Hearing Exhibit [Ex.] 1 at page 2 of 10). On May 7, 2013, respondent signed a notice of intent (NOI) to be covered under the MSGP (see Ex. 1). Following receipt of the NOI, the Department granted coverage to respondent under ID No. NYR00B244 (see id. at page 4 of 10).

Department staff served on respondent by certified mail a cover letter, notice of hearing and complaint, all dated March 17, 2016, in which Department staff alleged that respondent failed to timely submit a required DMR for the facility (see Ex. 5; see also Ex. 10).¹ Respondent received staff’s papers on March 19, 2016 (see Ex. 7). Respondent failed to file an answer to the complaint, and failed to appear at the adjudicatory hearing held on May 24, 2016 (see Hearing Report at 4 [Finding of Fact No. 4]; see also Exs. 5, 8).

¹ The cover letter to respondent stated that the adjudicatory hearing would be held at the Department’s Region 3 offices, 21 South Putt Corners Road, New Paltz, New York (see Ex. 8). Staff did not include the regional office street address in the notice of hearing (see Ex. 5). In future proceedings, staff should include the street address of the adjudicatory hearing location in the notice of hearing in addition to the cover letter to respondent.

Department staff's complaint, as amended at the May 24, 2016 hearing,² seeks an order (i) holding that respondent violated ECL article 17, 6 NYCRR 750-2.5 and the MSGP by failing to submit the 2014 MSGP annual DMR; (ii) directing respondent to submit the DMR; and (iii) imposing on respondent a civil penalty in the amount of \$6,000 (see Hearing Report at 4-5).

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached hearing report. Judge Garlick recommends that I issue an order:

- (i) granting Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15, made at the May 24, 2016 hearing based upon respondent's failure to answer the complaint and failure to appear at the hearing;
- (ii) holding that respondent violated 6 NYCRR 750-2.5 and the MSGP;
- (iii) directing respondent to file the 2014 MSGP annual DMR; and
- (iv) directing respondent to pay a civil penalty in the amount of \$6,000 (see Hearing Report at 6).

Based on the record, I adopt the findings of fact and the ALJ's recommendations, subject to my comments below.

II. Discussion

A. Liability

The sole cause of action in the complaint alleges that respondent violated "ECL Article 17, 6 NYCRR § 750-2.5, and the Permit" (Ex. 5, Complaint ¶ 19). The cause of action does not identify any specific statutory provision within ECL article 17 that respondent is alleged to have violated (see Ex. 5, Complaint ¶¶ 14-19).³

The record, however, supports a holding that respondent violated Department regulations and the requirements of the MSGP. The complaint alleges that respondent violated 6 NYCRR

² The initial complaint also alleged that respondent failed to file an annual compliance report (ACR) for calendar year 2014, and sought a civil penalty of \$12,000. Department staff made an oral motion at the May 24, 2016 hearing to amend the complaint to remove the ACR-related allegation and reduce the amount of the requested civil penalty from \$12,000 to \$6,000. The presiding administrative law judge granted staff's motion to amend in both respects (see Hearing Report at 4-5).

³ Although Department staff identifies ECL 17-0815(8) in the "Enforceable Provisions of Law" section of the complaint, see id. at ¶ 10), that section addresses the Department's obligations with respect to the contents of SPDES permits, not a permittee's reporting requirements:

SPDES permits shall include the following provisions, terms, requirements and conditions:

* * *

8. recording, reporting, monitoring, and sampling requirements applicable under the [Federal Water Pollution Control] Act.

(ECL 17-0815[8]).

750-2.5, entitled “Routine monitoring, recording, and reporting,” but does not specify one or more particular subdivisions of that regulation that respondent is alleged to have violated (see Ex. 5, Complaint ¶¶ 11, 19).⁴ As the ALJ states in the hearing report (see Hearing Report at 3), two subdivisions apply: (i) section 750-2.5(a)(1), which requires permittees to “comply with all recording, reporting, monitoring and sampling requirements specified in the permit,” and (ii) section 750-2.5(e), which requires the permittee to “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.”

In this matter, the MSGP required respondent to submit the 2014 annual DMR by February 28, 2015. Thus, respondent’s failure to submit the 2014 annual DMR as required by the MSGP violated both the MSGP and the applicable regulatory provisions.

I agree with the ALJ that Department staff’s motion for a default judgment should be granted. Staff has satisfied the requirements of 6 NYCRR 622.15(b)(1)-(3) by submitting proof of service on respondent of the notice of hearing and complaint, proof of respondent’s failure to answer or appear, and a proposed order (see Hearing Report at 4 [Finding of Fact No. 4]; see also Ex. 11 [proposed order]).

At the hearing, Department staff presented a prima facie case on the merits and established its case by a preponderance of the evidence (see Hearing Report at 5), demonstrating that respondent was required, but failed, to file a DMR for calendar year 2014. Accordingly, Department staff is entitled to a judgment based on the record evidence.

B. Civil Penalty and DMR Submission

Department staff requests that I assess a civil penalty of six thousand dollars (\$6,000). Although I concur with the ALJ that staff’s calculation varies from the penalty calculation factors set forth in TOGS 1.4.2 (see Hearing Report at 6), I have considered ECL 71-1929(1), the Department’s Civil Penalty Policy, administrative precedent in similar proceedings, TOGS 1.4.2 and this record, and have determined that the penalty request here, which is substantially lower than the amount that otherwise could be established under ECL 71-1929(1), is authorized and appropriate.

Department staff’s request that respondent be directed to submit a DMR for calendar year 2014 is warranted and appropriate.

Both the civil penalty and the DMR for calendar year 2014 are to be submitted to the Department within fifteen (15) days of the service of this order upon respondent, as requested by staff in its proposed order (see Ex. 11).

⁴ I reiterate that Department staff in its pleadings should specify particular sub-parts of statutes or regulations that a respondent is alleged to have violated (see e.g. Matter of Myers, Interim Decision and Order of the Commissioner, February 24, 2016, at 1 n 2; Matter of Stokes Waste Paper Co., Inc., Order of the Commissioner, September 24, 2015, at 2 n 2 [citing Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 2 n 6]).

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 Robert L. Miller, Jr. waived his right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Robert L. Miller, Jr. violated 6 NYCRR 750-2.5(a)(1) and 750-2.5(e), and the State Pollutant Discharge Elimination System (SPDES) multi-sector general permit for stormwater discharges associated with industrial activity, ID No. GP-0-12-001 (MSGP), when he failed to file by February 28, 2015 an annual discharge monitoring report (DMR) for calendar year 2014 for the facility with SPDES MSGP ID No. NYR00B244.
- III. Within fifteen (15) days of the service of this order upon respondent Robert L. Miller, Jr., respondent shall submit to the Department the annual DMR for calendar year 2014.
- IV. Within fifteen (15) days of the service of this order upon respondent Robert L. Miller, Jr., respondent shall pay a civil penalty in the amount of six thousand dollars (\$6,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The annual DMR for calendar year 2014 and the penalty payment shall be sent to the following address:

Carol Conyers, Esq.
Office of General Counsel
NYS Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Carol Conyers, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this order shall bind respondent Robert L. Miller, Jr., and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: March 20, 2017
Albany, New York

**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 Part 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) and SPDES Permit #NYR00B244

**HEARING
REPORT**

-by-

ROBERT L. MILLER, JR.,

DEC Case No.
CO 3-20151021-01

Respondent.

Summary

This report recommends that the Commissioner issue an order that: (1) grants Department staff’s motion for a default and holds respondent Robert L. Miller, Jr., in default pursuant to the provisions of 6 NYCRR 622.15; (2) holds respondent in violation of ECL article 17, 6 NYCRR 750-2.5, and the provisions of New York State Pollutant Discharge Elimination System (“SPDES”) multi-sector general permit for stormwater discharges associated with industrial activity ID No. GP-0-12-001 (“MSGP” or “General Permit”); (3) directs respondent to submit a 2014 MSGP annual discharge monitoring report (“DMR”); and (4) directs respondent to pay a civil penalty of six thousand dollars (\$6,000).

Procedural History

On May 7, 2013, respondent Robert L. Miller, Jr. signed a notice of intent (“NOI”) to obtain coverage under the General Permit. On this NOI, respondent was listed as the owner/operator and the legally responsible party. His address was listed as 6 Kyle Court, Hyde Park, NY 12538. He was also listed as the contact person with the address of PO Box 292, Hyde Park, NY 12538. The NOI identified the facility as A&T Auto Parts and its address is listed as 191 Cardinal Road, Hyde Park, NY 12538. The mailing address provided for where the DMRs should be mailed is listed as A&T Auto Parts, PO Box 2034, Hyde Park, NY 12538. The address provided for where SPDES fee billing should be mailed is listed as A&T Auto Parts, 191 Cardinal Road, PO Box 2034, Hyde Park, NY 12538 (Exhibit [“Exh.”] 1).

Department staff assigned SPDES Permit ID No. NYR00B244 to respondent’s General Permit (see Exh. 1).¹ Staff subsequently generated a notice of violation dated April 16, 2015 and addressed it to A&T Auto Parts, 6 Kyle Court, Hyde Park, NY 12538 (Exh. 2).

¹ Department staff’s Statement of Readiness references the permit number as NYR00E256. The permit, however, indicates that the proper number is NYR00B244 (see Exh. 1) and this number is correctly referenced in staff’s Notice of hearing and complaint.

Department staff generated a cover letter dated October 21, 2015 (Exh. 3), which was addressed to Robert L. Miller, Jr., A&T Auto Parts, 6 Kyle Court, Hyde Park, NY 12538. A proposed consent order was attached to this cover letter (Exh. 4).

With a cover letter dated March 17, 2016 (Exh. 8), Department staff sent by certified mail a notice of hearing and complaint of the same date (Exh. 5), as well as a second proposed order on consent (Exh. 6). The notice of hearing and complaint were captioned Robert L. Miller, Jr., A&T Auto Parts, 191 Cardinal Road, Hyde Park, NY 12538, respondent. The complaint alleged that "Respondent owns and/or operates a facility known as A&T Auto Parts" (Complaint ¶ 6). The consent order was captioned Robert L. Miller, Jr. These documents were received by respondent on March 19, 2016 (Exh. 7 at 2-4; Exh. 12).

The notice of hearing advised respondent that any answer to the complaint was due by May 17, 2016, and that respondent's appearance was required at an adjudicatory hearing scheduled for 1:00 p.m. on Thursday, May 24, 2016 at the Department's regional office located in New Paltz, New York.

Respondent failed to answer the complaint, and did not appear at the hearing, which took place as scheduled on May 24, 2016. Administrative Law Judge ("ALJ") P. Nicholas Garlick presided, and the Department was represented by Caitlin Stevens, Esq., from the Department's Office of General Counsel. At the hearing, Department staff moved to amend the complaint. It also moved for a default judgment pursuant to 6 NYCRR 622.15, but elected to proceed with a hearing in respondent's absence. Department staff called one witness, Meredith Streeter, Environmental Engineer II, a professional engineer licensed by the State of New York. Department staff offered ten exhibits at the hearing. These exhibits are described in the attached exhibit list.

At the request of Department staff, the record was held open to allow for the submittal of the required proposed order. With an email dated May 31, 2016, Department staff counsel provided the proposed order (Exh. 11).

In a letter dated June 28, 2016, I requested proof from Department staff that the respondent had been given notice of the address of the hearing.

Department staff submitted, with a cover letter, a third affidavit of service dated July 5, 2016 (Exh. 12), which was received on July 7, 2016, at which time the record closed.

Proof of Service

There are three affidavits of service in the record. At the hearing, Department staff first offered an affidavit of Department staff member Elissa Armater dated May 3, 2016 (Exh. 7). This affidavit shows the respondent as Robert L. Miller, Jr./A&T Auto Parts but did not state the address to which the notice of hearing and complaint were mailed. It did have as attachments USPS tracking receipts showing a signature and delivery of the documents addressed to Robert L. Miller, Jr., at 191 Cardinal Road, Hyde Park, NY 12538.

After a recess requested by Department staff, a second affidavit also signed by Ms. Armater was introduced (Exh. 10). This affidavit, dated May 19, 2016, identified the respondent as A & T Auto Parts, Inc. and explained that the 191 Cardinal Road address was used because mail previously sent to the 6 Kyle Court address was returned “NO MAIL RECEPTACLE – UNABLE TO FORWARD.”

After reviewing the file, I determined that the notice of hearing did not identify the street address of the Department’s regional office in New Paltz and, after conferring with the Chief Administrative Law Judge, I wrote to Department staff counsel to ask that proof be provided that respondent was given notice of the place of the hearing, as required by State Administrative Procedure Act (“SAPA”) § 301. With a cover letter dated July 5, 2016, Department staff provided a third affidavit of service by Ms. Armater, this one dated July 5, 2016 (Exh. 12). This affidavit stated that the cover letter (Exh. 8) was also served with the notice of hearing and complaint. This cover letter does include the street address of the Department’s regional office in New Paltz. Based on this representation, it is reasonable to conclude that respondent was provided the notice required by SAPA § 301.

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) 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.”

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the action. As applicable herein, the Department's default procedures in an enforcement action, found at 6 NYCRR 622.15, provide that:

- (a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent’s right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.
- (b) The motion for a default judgment may be made orally on the record or in writing and must contain:
 - (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
 - (2) proof of the respondent's failure to appear or failure to file a timely answer; and
 - (3) a proposed order.

As the Commissioner stated in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted].” In Matter of Queen City Recycle Center, Inc., the Commissioner stated that “consistent with the requirements applicable to default judgment motions under the CPLR, this decision and order directs that staff must submit proof of the facts constituting the claim charged” (Decision and Order dated December 12, 2013, at 3 [citations omitted]). The Commissioner went on to direct that “[u]pon submission of the motion and supporting materials, the ALJ will review the record to determine whether staff’s papers have stated a claim, and that staff’s penalty request and remedial relief are supported” (*id.* [citation omitted]).

In this case, Department staff provided proof at the hearing of those factual allegations, and established that Department staff was entitled to the relief requested.

Findings of Fact

1. Respondent Robert L. Miller, Jr. applied for coverage under New York State Pollutant Discharge Elimination System (“SPDES”) multi-sector general permit for stormwater discharges associated with industrial activity ID No. GP-0-12-001 (“MSGP” or “General Permit”) in a notice of intent signed on May 7, 2013 (Exh. 1). Department staff assigned SPDES Permit ID No. NYR00B244 to respondent’s General Permit.
2. Respondent Robert L. Miller, Jr. is the owner/operator of a facility called A&T Auto Parts, Inc., an automobile salvage yard, which has a street address of 191 Cardinal Road, Hyde Park, NY 12538 (Exh. 1).
3. Pursuant to the terms of the General Permit, respondent was required to file the 2014 MSGP annual DMR by February 28, 2015 (General Permit at 55, 57). No 2014 MSGP annual DMR was received by the Department (Hearing Transcript [“T.”] at 18:30).²
4. Service of the cover letter, notice of hearing, and complaint dated March 17, 2016 was made by certified mail and was received by respondent on March 19, 2016 (Exhs. 5, 6, 7, 8 and 12). The notice of hearing notified respondent that an answer to the complaint was due by May 17, 2016 (Exh. 5). The cover letter also notified respondent that a hearing was scheduled for May 24, 2016 at 1:00 p.m. at the Department’s Region 3 offices located at 21 South Putt Corners Road, New Paltz, New York (Exh. 8). Respondent failed to answer the complaint, and did not appear at the May 24, 2016 hearing (Hearing Record).

Discussion

At the opening of the hearing, Department staff counsel moved to amend the complaint to withdraw allegations relating to the respondent’s failure to submit an annual compliance report for calendar year 2014 and to reduce the requested penalty from \$12,000 to \$6,000. Staff’s motion was granted (T. at 5:00). The amended complaint seeks an order of the Commissioner:

² I hereby take official notice of the MSGP pursuant to 622.11(a)(5).

(1) finding respondent in violation of ECL article 17, 6 NYCRR 750-2.5, and the General Permit; (2) ordering respondent to submit the 2014 MSGP annual DMR; and (3) imposing a civil penalty of six thousand dollars (\$6,000).

Liability

With respect to the default motion, the record shows that respondent was served the notice of hearing and complaint and failed to file an answer to the complaint and failed to appear at the adjudicatory hearing scheduled for May 24, 2016. Department staff has also provided a draft order (Exh. 11). Based on this, Department staff is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

With respect to the merits of Department staff's case, at the hearing, Department staff engineer Streeter testified that respondent had applied for coverage under the General Permit and that the General Permit required submission of the 2014 MSGP annual DMR no later than February 28, 2015. She further testified that she reviewed the Department's files in October 2015, February 2016, and May 2016 and did not find that respondent had filed the required 2014 MSGP annual DMR (T. at 14:00-19:30). She also testified that the 2014 MSGP annual DMR was to be filed on a form provided by the Department that was mailed to permittees the prior October along with a cover letter providing the deadline for submission (T. at 11:00). The address provided on the NOI for the DMR to be mailed to is A&T Auto Parts, PO Box 2034, Hyde Park, NY 12538 (Exh. 1). Ms. Streeter did not testify about which address the DMR form was sent to the respondent, and if it was sent to the 6 Kyle Court address it may not have been delivered. However, even if respondent never received the annual DMR form from Department staff, as a permittee he should have been aware of the terms and conditions of his permit and known that such form was required, even if Department staff failed to mail it to a deliverable address.

Based on the above, the evidence adduced at hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to submit the 2014 MSGP annual DMR, in violation of 6 NYCRR 750-2.5, and the express provisions of the General Permit.

Penalty Amount

The complaint, as amended at the hearing, requests the Commissioner impose a payable civil penalty of six thousand dollars (\$6,000). At the hearing, Department staff engineer Streeter testified that the maximum civil penalty for this violations is set forth in ECL 71-1929, which 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.

Ms. Streeter further testified that she had prepared a penalty calculation sheet (Exh. 9) explaining Department staff's rationale for the requested penalty. Ms. Streeter explained that the requested penalty was determined using a Departmental guidance document, Division of Water Technical and Operational Guidance Series ("TOGS") 1.4.2 (Compliance and Enforcement of SPDES Permits [June 24, 2010]). She testified that the base penalty for failing to submit a DMR is \$1,000 (TOGS 1.4.2, at 35) which she doubled because this was respondent's second violation

(T. at 40:20). She then multiplied this amount by 1.5 using an adjustment factor to take into account respondent's culpability, cooperation, history of non-compliance and other factors (T. at 40:00). Finally, this penalty amount was doubled because the case went to hearing (T. 42:15), resulting in Department staff's requested penalty of \$6,000. In considering Department staff's calculation, there appears to be some variation in staff's calculation from the penalty calculation set forth in TOGS 1.4.2. Although based on the evidence in the record, the Department's Civil Penalty Policy (DEE-1) dated June 20, 1990, and ECL 71-1929, Department staff's requested penalty would appear to be reasonable and appropriate, I note this variation for the Commissioner's consideration.

Remedial Action

In addition to the above, Department staff requests the Commissioner include language in his order requiring the respondent to file the 2014 MSGP annual DMR. Ms. Streeter testified that this information is important because Department staff cannot determine compliance with the permit without submission of the DMR and cannot determine if the discharge is having an adverse impact on the environment (T. at 37:00). Based on this, it is reasonable for the Commissioner to require the submission of the 2014 MSGP annual DMR in his order.

Recommendations

Based upon the foregoing, the Commissioner should issue an order:

1. Granting Department staff's motion for default, and finding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding respondent in violation of 6 NYCRR 750-2.5, and the provisions of New York State Pollutant Discharge Elimination System multi-sector general permit for stormwater discharges associated with industrial activity ID No. GP-0-12-001;
3. Directing respondent to submit a 2014 MSGP annual DMR; and
4. Directing respondent to pay a civil penalty of six thousand dollars (\$6,000).

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
March 3, 2017

EXHIBIT CHART
Matter of Robert L. Miller, Jr.
 May 24, 2016
 Edrol No. 021101101325

Exhibit	Description	Marked for Identification	Received
1	Notice of Intent	✓	✓
2	Notice of Violation dated April 16, 2015	✓	✓
3	Cover letter dated October 21, 2015	✓	✓
4	Proposed consent order	✓	✓
5	Notice of hearing, complaint and statement of readiness all dated March 17, 2016	✓	✓
6	Proposed consent order	✓	✓
7	Affidavit of service dated May 3, 2016	✓	✓
8	Cover letter dated March 17, 2016	✓	✓
9	Proposed penalty calculation	✓	✓
10	Affidavit of service dated May 19, 2016	✓	✓
11	Proposed Order	✓	✓
12	Affidavit of service dated July 5, 2016	✓	✓