

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations
of Article 17 of the Environmental
Conservation Law of the State of New York,
Section 750 *et seq.* of the Official
Compilation of Codes, Rules and Regulations
of the State of New York and SPDES Permit
ID# NYR00E256,¹

ORDER

DEC File No.
C0 3-20140107-01

-by-

NORTH JERSEY TRAILER & TRUCK SERVICE, INC.,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation ("Department") alleges that respondent North Jersey Trailer & Truck Service, Inc. ("respondent"), failed to file an annual certification report ("ACR") by March 31, 2013 for calendar year 2012. Based on this failure to file, staff alleged that respondent violated article 17 of the Environmental Conservation Law ("ECL"), section 750-2.5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") and SPDES Permit ID# NYR00E256.

Respondent is a foreign business corporation that owns and/or operates a facility located at Cannon Hill Drive, Goshen, New York (see Exh 2]). The facility discharges stormwater associated with industrial activity from one or more point sources.

On August 19, 2008, respondent submitted a Notice of Intent seeking coverage for the facility's discharges under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities ("MSGP") that was in effect at that time (GP-0-06-002). Following receipt of the Notice of Intent, Department granted coverage to the facility under ID# NYR00E256 (see Exh. 2). Coverage for the facility was maintained under subsequent MSGPs under the same permit identification number

¹ The caption has been modified to reflect the assigned identification number for respondent's permit (see Exhibit ["Exh"] 2, at 1; Exh 1 [Complaint], ¶¶ 9-10).

(see Exh 1 [Complaint], ¶ 10).

By notice of violation dated July 22, 2013, Department staff notified respondent that it had failed to timely submit an ACR for calendar year 2012 (Exh 3). Respondent did not respond to the notice of violation.

Subsequently, Department staff served on respondent, by certified mail, a notice of hearing and complaint along with a cover letter, supporting affidavit and proposed consent order, which respondent received on May 12, 2014 (see Exh 7). Accordingly, service of process was accomplished pursuant to 6 NYCRR 622.3. Respondent did not serve an answer to the complaint, and did not appear for the adjudicatory hearing that was held on July 8, 2014.

In its complaint, Department staff requests that the Commissioner issue an order:

- (1) finding respondent liable for violating 6 NYCRR 750-2.5 (which requires that a permittee comply with all recording, reporting, monitoring and sampling requirements of its SPDES permit) and its permit, for failing to file an ACR for calendar year 2012;
- (2) assessing a civil penalty in the amount of five thousand dollars (\$5,000);
- (3) directing respondent to submit the overdue ACR for calendar year 2012; and
- (4) granting such other and further relief as the Commissioner may deem just and appropriate.

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

- (1) denying Department staff's motion, made at the July 8, 2014 adjudicatory hearing at which respondent failed to appear, for a default judgment pursuant to the provisions of 6 NYCRR 622.15;
- (2) holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated 6 NYCRR 750-

2.5 by failing to submit an ACR for calendar year 2012;

- (3) directing respondent to submit an ACR for calendar year 2012; and
- (4) directing respondent to pay a civil penalty in the amount of five thousand dollars (\$5,000) within fifteen (15) days of service of the Commissioner's order.

Based on the record, I adopt, in part, the Hearing Report as my decision in this matter.

Staff's Motion for Default Judgment

As noted in the ALJ's report, Department staff moved for a default order and judgment in this matter. The record shows that: (1) Department staff duly served the notice of hearing and complaint, which respondent received on May 12, 2014; (2) respondent failed to file an answer to the complaint; and (3) respondent failed to appear for the adjudicatory hearing scheduled in the matter on July 8, 2014, as directed in the notice of hearing. The ALJ concluded, however, that staff had not satisfied all of the requirements of 6 NYCRR 622.15 because staff did not provide a proposed order (see Hearing Report, at 5; 6 NYCRR 622.15[b][3]).

Based on the record in this case, staff's failure to submit a proposed order is not fatal to its motion for a default. The record contains communications between staff counsel and the ALJ, in which staff inquired whether the ALJ wanted staff to prepare a proposed order, and the ALJ stated that, if staff was comfortable with its submissions, there was no need to prepare a draft order. Given these communications, I do not adopt the ALJ's recommendation to deny staff's motion for a default judgment. On the specific record of this proceeding, to do so would be prejudicial, and I hereby grant Department staff's motion for a default judgment (see 6 NYCRR 622.6[f]).²

² I have recently addressed the requirement of a proposed order in the context of 6 NYCRR 622.15(b). Although a separately drafted proposed order is generally proffered by Department staff for purposes of satisfying 6 NYCRR 622.15(b)(3), staff may orally move to treat specific language in its complaint or its motion for order without hearing as the proposed order (see XHIKU, LLC, Order of the Commissioner, September 22, 2014, at 1-2). If, however, staff relies on identified provisions in its pleadings or motion as its draft order, those provisions must be sufficient to enable the administrative law judge to make a finding that the requirements of 6 NYCRR

Prima Facie Case on the Merits

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 failed to file an ACR for calendar year 2012. Accordingly, Department staff is entitled to a judgment based on the record evidence.

Civil Penalty and ACR Submission

Department staff requests that I assess a civil penalty of five thousand dollars (\$5,000). DEC staff's penalty request is authorized and appropriate (see ECL 71-1929[1]). In addition, Department staff's request that respondent be directed to provide an ACR for calendar year 2012 is warranted and appropriate.³

The ALJ recommended that respondent pay the penalty within fifteen (15) days of service of my order upon it. I adopt the ALJ's recommendation and also direct that respondent submit the ACR for calendar year 2012 within that same fifteen (15) day time period.

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

- I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default order and judgment is hereby granted. By failing to answer the complaint in this matter, respondent waived its right to be heard at the hearing. Accordingly, the allegations of the complaint are deemed to have been admitted by respondent.

622.15(b) have been adequately met (see XHIKU, LLC, at 2). The preference, however, is for staff to prepare a written proposed order.

³ The Hearing Report, in Finding of Fact 2 (see Hearing Report, at 3), states that Robert Sybesma is respondent's CEO. The record is unclear as to Mr. Sybesma's position (see Exh 2). Corporate records maintained by the New York State Department of State, of which I take official notice (see 6 NYCRR 622.11[a][5]), list a Charles Sybesma as respondent's CEO. Accordingly, Finding of Fact 2 is modified to read: "On August 19, 2008, Robert Sybesma, on behalf of respondent, signed a Notice of Intent seeking coverage for the facility under former MSGP (GP-0-06-002) and the facility was assigned ID# NYR00E256." This modification also corrects the permit identification number in Finding of Fact 2 in the Hearing Report.

- II. Moreover, based on record evidence, respondent North Jersey Trailer & Truck Service, Inc. is adjudged to have violated 6 NYCRR 750-2.5 and its permit (under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities) ID #NYR00E256, by failing to submit an Annual Certification Report to Department staff by March 31, 2013 for calendar year 2012.
- III. Respondent North Jersey Trailer & Truck Service, Inc. is hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000). Within fifteen (15) days of the service of this order on respondent, payment shall be by cashier's check, certified check, or money order payable to the order of the New York State Department and mailed or hand-delivered to:
- Scott Crisafulli, Esq.
Deputy Counsel
Office of General Counsel
New York State Department of Environmental
Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
- IV. Within fifteen (15) days of the service of this order on respondent North Jersey Trailer & Truck Service, Inc., respondent shall submit an Annual Certification Report for calendar year 2012 to Scott Crisafulli, Esq., at the address set forth in paragraph III of this order.
- V. All communications from respondent to the Department concerning this order shall be directed to Scott Crisafulli, Esq., at the address set forth in paragraph III of this order.

VI. The provisions, terms and conditions of this order shall bind respondent North Jersey Trailer & Truck Service, Inc., and its agents, successors, and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

By: _____ /s/
Joseph J. Martens
Commissioner

Dated: January 28, 2015
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations
of Article 17 of the Environmental
Conservation Law of the State of New York,
Section 750 *et seq.* of the Official
Compilation of Codes, Rules and Regulations
of the State of New York and SPDES Permits
GP-0-06-002, GP-0-11-009, and GP-0-12-001,

HEARING REPORT

DEC File No.
CO 3-20140107-01

-by-

NORTH JERSEY TRAILER & TRUCK SERVICE, INC.,

Respondent.

SUMMARY

This hearing report recommends that the Commissioner issue an order: (1) finding the respondent, North Jersey Trailer & Truck Service, Inc. liable for failing to timely submit an annual compliance report (ACR) for 2012 in violation of 6 NYCRR 750-2.5; (2) directing the respondent to submit the missing ACR; and (3) imposing a payable \$5,000 civil penalty.

Procedural History

On May 12, 2014, Staff of the New York State Department of Environmental Conservation (Department) served respondent North Jersey Trailer & Truck Service, Inc. (respondent) with a notice of hearing and complaint, dated May 7, 2014. The complaint alleged a single violation, specifically, that the respondent failed to timely submit an ACR for 2012. This ACR was required by the Department's State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities (MSGP).

The complaint seeks an order of the Commissioner (1) finding respondent liable for violating of 6 NYCRR 750-2.5, for failing to file the ACR; (2) assessing a civil penalty in the amount of five thousand dollars (\$5,000); (3) directing respondent to submit the missing ACR; and (4) granting such other and further relief as the Commissioner may deem just and proper.

As stated in the notice of hearing, on July 8, 2014, an adjudicatory hearing was convened before Administrative Law Judge (ALJ) P. Nicholas Garlick of the Department's Office of Hearings and Mediation Services at the Department's Region 3 offices, 21 South Putt Corners Road, New Paltz, New York 12561. Department staff was represented by Scott Crisafulli, Esq., Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. No one appeared on behalf of the respondent. At the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. The ALJ reserved on the default motion, allowing an adjudicatory hearing to be convened. Pursuant to an order of the Appellate Division, Third Department, issued in accordance with its rules at 22 NYCRR 805.5, Department staff was also represented by law student intern Stephen Carney under the supervision of Scott Crisafulli, Esq.

Department staff called one witness, Meredith U. Streeter, P.E., a DEC Staff engineer. In all, eight (8) exhibits were received in evidence.

Applicable Regulatory Provision

The Federal Clean Water Act provides that stormwater discharges associated with industrial activity from a point source (including discharges through a municipal separate storm sewer system) to waters of the United States are unlawful, unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit. In New York, the United States Environmental Protection Agency (EPA) has approved the state program which is enacted through the administration of the SPDES program.

Articles 3 and 17 of the ECL and 6 NYCRR 750 *et seq.* require any person discharging a pollutant from a point source to the waters of New York State to have a SPDES permit issued by the Department. The Department has developed and issued a SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities (MSGP). Three versions of the SPDES MSGP that were in effect at different times during 2012 and relevant to this matter. First, GP-0-06-002 was effective between March 28, 2007 and March 27, 2012 (Exh. 4); second, GP-0-11-009 was effective between March 28, 2012 and September 30, 2012 (Exh. 5); and third, GP-0-12-001 became effective on October 1, 2012 (Exh. 6) and remains in effect.

A discharger who is subject to the stormwater SPDES regulations may be eligible to obtain coverage under a general permit by submitting a Notice of Intent (NOI) form to the Department, as the respondent did in this case. The three versions of the general permit in effect in 2012 each required the respondent to submit an ACR to the Department.¹ In addition, permittees are required to take and report monitoring results as specified by the Department pursuant to 6 NYCRR 750-2.5.

Section 71-1929 of the ECL states that a person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder shall be liable for a penalty not to exceed \$37,500 per day for each violation.

Findings of Fact

The following findings of fact are found based upon the preponderance of record evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent North Jersey Trailer and Truck Service, Inc. is a foreign business corporation that owns and/or operates a facility located at Cannon Hill Drive, New Hampton, New York. This facility discharges stormwater associated with industrial activity from one or more point sources.
2. On August 19, 2008, Robert Sybesma, CEO of the respondent corporation, signed a Notice of Intent seeking coverage for the facility under former MSGP (GP-0-06-002) and the facility was assigned ID# NYR00E266 (Exh. 2).
3. The respondent was required to submit an Annual Certification Report to Department staff by March 31, 2013.

¹ The version of the general permit in effect until March 27, 2012 (GP-0-06-002) required submission of these reports by March 31st of the following year. The version of the general permit in effect between March 28, 2012 and September 30, 2012 (GP-0-11-009) also required submission of these reports by March 31st of the following year. The third version of the general permit effective from October 1, 2012 through the end of the year (GP-0-12-001) required submission of these reports by February 28th of the following year.

The respondent has not submitted an ACR.

4. By notice of violation dated July 22, 2013, Department staff notified the respondent that it had failed to timely submit an Annual Certification Report (Exh. 3).
5. The notice of hearing and complaint, along with a cover letter, supporting affidavit and proposed consent order, were served on the respondent by certified mail on May 12, 2014 (Exh. 7).
6. Respondent failed to file an answer to the complaint as required by June 9, 2014, as directed in the cover letter served with the notice of hearing and complaint, and failed to appear for the adjudicatory hearing held on July 8, 2014, as directed in the notice of hearing (Hearing Record).
7. As of the date of the hearing in this matter, the respondent has failed to submit an ACR for 2012.

Discussion

In this matter, Department staff has moved for a default judgment and order and requested that the Commissioner: (1) find the respondent liable for the violations alleged; (2) impose a payable civil penalty of \$5,000; and (3) require the respondent to submit the missing ACR. Each aspect of Department staff's request is discussed below.

Department staff's motion for a default judgment. Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment 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."

In Matter of Alvin Hunt d/b/a Our Cleaners (Decision and Order of the Commissioner, July 25, 2006), the Commissioner set forth the process to be followed by an ALJ in reviewing a default motion. First, an examination of the proof of service of notice of hearing and complaint is required, as well as the

proof of the respondent's failure to appear or file a timely answer. Then an ALJ must consider whether the complaint states a claim upon which relief may be granted and if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported.

In this case, the record shows that: (1) Department staff duly served the notice of hearing and complaint upon respondent on May 12, 2014; (2) the respondent failed to file an answer to the complaint; and (3) the respondent failed to appear for the adjudicatory hearing scheduled in the matter on July 8, 2014, as directed in the notice of hearing. However, Department staff has not met all of the requirements of 6 NYCRR 622.15 because it has failed to provide a proposed order. Accordingly, the Commissioner should deny Department staff's request for a default judgment.

Liability. Department staff's proof presents a prima facie case demonstrating that respondent failed to file an annual certification report (ACR) for 2012. At the hearing, Department staff engineer Streeter testified that the deadline for submission of the ACR was March 31st of the year after the reporting year (in Exh. 4, Part 4 and Exh. 5) and was changed to February 28 (in Exh. 6). Ms. Streeter also testified that she reviewed the file prior to the hearing and that no ACR had been filed by the respondent for 2012. She also testified that no response was received from the respondent to the July 22, 2013 notice of violation or to the May 7, 2014 notice of hearing and complaint, which was served upon the respondent on May 12, 2014.

Based on the proof adduced at the hearing, conducted in respondent's absence, Department staff has demonstrated by a preponderance of the evidence that respondent failed to submit an ACR for 2012. The Commissioner should conclude that Department staff is entitled to judgment upon the facts proven.

Civil Penalty. At the hearing, Department staff engineer Streeter testified that she prepared a written penalty calculation for this case (Exh. 8). Ms. Streeter noted that the maximum penalty allowed by law would be \$37,500 but that Department staff was only seeking a payable civil penalty of \$5,000 in this case. Using Department guidance document TOGS 1.4.2 Compliance and Enforcement of SPDES Permits 6/24/10, the base penalty for this violation is \$1,000. Ms. Streeter used a multiplier of 5x this amount, based upon the respondent's failure to respond, failure to cooperate and failure to resolve this matter before hearing. Department staff's requested

payable civil penalty of five thousand dollars (\$5,000) is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71. The Commissioner should impose a \$5,000 payable civil penalty.

The Missing Report. In addition to a finding of liability and the imposition of a payable civil penalty, Department staff requests the Commissioner include language in his order requiring the respondent to provide the missing ACR. At the hearing, Department staff engineer Streeter testified that the ACR provides information to the Department regarding activities at the site. In the absence of the required ACR, Department staff is unable to evaluate whether or not the respondent's discharge is causing an adverse impact on the environment. Based on this testimony, the Commissioner should require the respondent to submit an ACR for 2012 in his order.

Recommendation

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

1. denying Department staff's motion for default and not holding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated 6 NYCRR 750-2.5 by failing to submit an ACR for 2012;
3. directing respondent to submit an ACR for 2012;
4. directing respondent to pay a civil penalty in the amount of five thousand dollars (\$5,000) within fifteen (15) days of service of the Commissioner's order; and
5. directing such other and further relief as he may deem just and proper.

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

Dated: November 12, 2014
Albany, New York

Exhibit List

- Exh. 1 Cover letter, Notice of Hearing, Complaint, and Statement of Readiness all dated May 7, 2014, and Affidavit in Support dated May 6, 2014.
- Exh. 2 Notice of Intent or Termination dated August 19, 2008.
- Exh. 3 Notice of Violation dated July 22, 2013.
- Exh. 4 NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION SPDES MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY Permit No. GP-0-6-002.
- Exh. 5 NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION SPDES MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY Permit No. GP-0-11-009.
- Exh. 6 NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION SPDES MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY Permit No. GP-0-12-001.
- Exh. 7 USPS receipt.
- Exh. 8 Proposed penalty calculation.