

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

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In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) of the State of New York, Part 750 et seq. of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York and SPDES permit # NY0227200,

**ORDER**

DEC Case No.  
CO 1-20181023-04

-by-

**ROBO AUTOMATIC CAR WASH INC.,**

Respondent.

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In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) alleges that respondent Robo Automatic Car Wash Inc. (respondent) violated ECL article 17, 6 NYCRR 750-2.5(a)(1) and State Pollutant Discharge Elimination System (SPDES) Permit NY0227200 (permit) when it failed to file the monthly discharge monitoring report (DMR) for the months of January 2018 and December 2018 for respondent's facility located at 601 Montauk Highway East in East Patchogue, New York. The complaint seeks an order of the Commissioner:

- (1) finding respondent in violation of ECL article 17, 6 NYCRR 750-2.5(a)(1) and the permit;
- (2) directing respondent to submit the January 2018 and December 2018 DMR;
- (3) assessing a civil penalty in the amount of three thousand four hundred twenty dollars (\$3,420); and
- (4) granting such other relief as the Commissioner may deem appropriate.

On June 18, 2019, an adjudicatory hearing was convened before Administrative Law Judge (ALJ) Michele M. Stefanucci of the Department's Office of Hearings and Mediation Services. ALJ Stefanucci prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

The record demonstrates that Department staff served the notice of hearing and complaint upon respondent. As set forth in the hearing report, respondent Robo Automatic Car Wash Inc., failed to file an answer to the complaint served by Department staff in this matter and failed to appear at the adjudicatory hearing scheduled for June 18, 2019 (*see* Hearing Report at 3 [Finding of Fact No. 12]).

As a consequence of respondent Robo Automatic Car Wash Inc.'s failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see* Hearing Report at 4). At the hearing on June 18, 2019, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim (*see id.*; *see also* Hearing Exhibit 11 [Affidavit of Joshua Lin, sworn to April 19, 2019, ¶¶ 3 and 4] [Lin Affidavit]). I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15.<sup>1</sup>

The proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to file the December 2018 DMR and failed to submit the January 2018 DMR until November 14, 2018 which was months after the filing deadline (*see* Lin Affidavit, at ¶¶ 4 and 6), in violation of 6 NYCRR 750-2.5 (a)(1) and the permit. The Department is entitled to judgment upon the facts proven.

Based on the above, the ALJ recommends that I impose a civil penalty of \$3,420 as requested by Department staff. ECL 71-1929 authorizes a penalty up to \$37,500 for the violations at issue in this proceeding. Accordingly, the penalty requested 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 Robo Automatic Car Wash Inc. waived its right to be heard at the hearing.
- II. Based upon evidence in the record, respondent Robo Automatic Car Wash Inc., violated 6 NYCRR 750-2.5(a)(1) and State Pollutant Discharge Elimination System (SPDES) Permit NY0227200 by failing to file the December 2018 discharge monitoring report and by not filing the January 2018 discharge monitoring report until November 2018.
- III. Within thirty (30) days of the service of this order upon respondent Robo Automatic Car Wash Inc., respondent shall submit to the Department the December 2018 discharge monitoring report.
- IV. Respondent Robo Automatic Car Wash, Inc., is hereby assessed a civil penalty in the amount of three thousand four hundred twenty dollars (\$3,420). Respondent shall

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<sup>1</sup> Department staff provided its proposed order by email dated June 19, 2019.

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 December 2018 discharge monitoring report and the penalty payment shall be sent to the following address:

Lisa Covert, Esq.  
Office of General Counsel  
New York State Department of Environmental Conservation  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-1500

- VI. The provisions, terms and conditions of this order shall bind respondent Robo Automatic Car Wash 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  
August 5, 2019

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

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In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) of the State of New York, Part 750 et seq. of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York and SPDES permit # NY0227200,

-by-

**ROBO AUTOMATIC CAR WASH INC.,**

Respondent.

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**HEARING REPORT**

DEC Case No.  
CO 1-20181023-04

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Robo Automatic Car Wash Inc. (respondent) with a notice of hearing and complaint dated April 23, 2019, alleging a violation of ECL article 17, 6 NYCRR 750-2.5(a)(1) and State Pollutant Discharge Elimination System (SPDES) Permit NY0227200 (permit) for the failure to file the January 2018 and December 2018 discharge monitoring reports (DMRs) for respondent's facility located in East Patchogue, New York. The complaint seeks an order of the Commissioner:

- (1) finding respondent in violation of 6 NYCRR 750-2.5(a)(1) and the permit;
- (2) directing respondent to submit the January 2018 and December 2018 DMRs;
- (3) assessing a civil penalty in the amount of three thousand four hundred twenty dollars (\$3,420); and
- (4) granting such other relief as the Commissioner may deem appropriate.

The notice of hearing and complaint was served on respondent by certified mail, return receipt requested and was received by respondent on April 25, 2019 (*see* exhibits 7, 9). In addition, the Department served the Secretary of State on April 24, 2019 (*see* exhibit 8). Respondent did not answer the complaint. The matter was noticed for hearing on April 23, 2019 (*see* exhibit 5). At 10:10 a.m. on June 18, 2019, the adjudicatory hearing was convened before the undersigned Administrative Law Judge (ALJ) in room 116 of the Department's Region 1 office located at 50 Circle Road, Stony Brook, New York. Department staff was represented by Christopher F. Forstrom, Esq., Assistant Regional Attorney. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering one staff witness. Noting 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 and also sought judgment on the merits. At the hearing, Department staff sought to amend the relief requested in the complaint to include an order directing respondent to submit the April 2019 DMR. I reserved on both motions and allowed the record to remain open for Department staff to submit a proposed order as required by 6 NYCRR 622.15(b)(3). The record was closed on July 1, 2019.

Department staff called one witness, Brian Lee, Assistant Engineer in the Department's Division of Water, Region 1. Twelve (12) exhibits were received in evidence (*see* attached exhibit chart).

### 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."

The permit requires the permittee to submit a complete and signed DMR to the Department for each one (1) month reporting period. The reports are due no later than the 28<sup>th</sup> day of the month following the end of each reporting period (*see* exhibit 1 at p 9).

### Findings of Fact

1. Respondent is an active domestic business corporation in the State of New York. *See* exhibit 6.
2. Respondent has a street address of 601 Montauk Highway, East Patchogue, NY 11772. *See* exhibit 1.
3. Respondent obtained a SPDES permit for the discharge of sanitary wastewater (outfall 1) and treated rinse water (outfall 2) from the washing of automobiles. Department staff assigned SPDES No. NY0227200 to respondent's permit. *See* testimony of Brian Lee; exhibit 1.
4. Respondent's coverage under the permit became effective November 1, 2012, and expires October 31, 2022. *See* exhibit 1.
5. Pursuant to the terms of the permit, respondent was required to file the January 2018 DMR by February 28, 2018 and the December 2018 DMR by January 28, 2019. *See* testimony of Brian Lee; exhibit 1.

6. Brian Lee is an employee of the Department and is an Assistant Engineer in the Department's Division of Water, Region 1. Mr. Lee's duties include the care, custody and maintenance of records pertaining to the SPDES program of the State of New York. These records are maintained by the Department and include all DMRs filed pursuant to 6 NYCRR 750-2.5(e)(1). *See* testimony of Brian Lee.
7. Brian Lee searched the Department's DMR records for all DMRs filed by respondent. *See* testimony of Brian Lee.
8. As a result of his search, Brian Lee determined that respondent had not filed the DMR for December 2018. Respondent's December 2018 DMR was still outstanding at the time of the hearing. *See* testimony of Brian Lee; *see also* exhibit 11 (Affidavit of Joshua Lin, ¶¶ 3-4).
9. The Department received the DMR for January 2018 from the respondent on November 14, 2018. *See* testimony of Brian Lee; exhibit 2; *see also* exhibit 11 (Affidavit of Joshua Lin, ¶ 6).
10. The Department served the cover letter, notice of hearing, complaint, and statement of readiness all dated April 23, 2019, together with the affidavit of Joshua Lin, Assistant Engineer, sworn to April 19, 2019, upon the Secretary of State on April 24, 2019. *See* exhibit 8.
11. The Department served the cover letter, notice of hearing, complaint, and statement of readiness all dated April 23, 2019, together with the affidavit of Joshua Lin, Assistant Engineer, sworn to April 19, 2019, by certified mail and received by the respondent on April 25, 2019. *See* exhibits 7, 9.
12. Respondent failed to file an answer to the complaint and failed to appear at the adjudicatory hearing scheduled in the matter on June 18, 2019, 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 a 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 (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. *See* 6 NYCRR 622.15(b)(1)-(3).

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." *Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3.

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; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on June 18, 2019, as directed in the notice of hearing. Department staff provided its proposed order by email dated June 19, 2019. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Furthermore, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to file the December 2018 DMR and submitted the January 2018 DMR late, in violation of 6 NYCRR 750-2.5(a)(1) and the permit. The Department is entitled to judgment upon the facts proven.

At the hearing, Department staff made an oral motion to amend the relief requested in the complaint to include an order of the Commissioner directing respondent to file the DMR for April 2019. I note that respondent is required to comply with the terms of the permit, the ECL and all applicable regulations, thus further language to that effect is not needed (*see Matter of Adonai Realty L.P.*, Order of the Acting Commissioner, February 19, 2016 at 2).

### Penalty

The complaint requests the Commissioner impose a payable civil penalty of three thousand four hundred twenty dollars (\$3,420) (*see* exhibit 5 [Complaint at p 3]). At the hearing, staff's witness, Brian Lee, testified that the maximum civil penalty for this violation 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 (*see* Hearing Ediol Recording).

Mr. Lee further testified that he had prepared a penalty calculation sheet explaining Department staff's rationale for the requested penalty (*see* Hearing Ediol Recording; exhibit 12). Mr. Lee 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]). He testified that the base penalty, adjusted for inflation, for a failure to file the December 2018 DMR is \$1,140. In addition, the base penalty, adjusted for inflation, for the untimely filing of the January 2018 DMR, is \$570. Mr. Lee did not apply any penalty adjustment factors to the base penalty. Mr.

Lee then doubled the penalty ( $\$1140 + \$570 \times 2 = \$3,420$ ) because the case proceeded to hearing as opposed to settling.

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, Cover Memorandum at 2).<sup>1</sup> 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. In light of the foregoing, I find that the civil penalty requested by staff 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 December 2018 DMR. This remedial relief is warranted and appropriate.

### Recommendation

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

1. Granting Department staff’s motion for default, and finding respondent Robo Automatic Car Wash Inc., in default pursuant to 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Robo Automatic Car Wash Inc. violated 6 NYCRR 750-2.5 and State Pollutant Discharge Elimination System Discharge Permit NY0227200;
3. Directing respondent Robo Automatic Car Wash Inc., to submit the December 2018 DMR;
4. Directing respondent Robo Automatic Car Wash Inc., to pay a civil penalty of three thousand four hundred twenty dollars (\$3,420); and

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<sup>1</sup> At hearing, Mr. Lee testified that a 14% rate of inflation was applied to the base penalty (*see* Hearing Ediorol Recording).



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

\_\_\_\_\_/s/\_\_\_\_\_  
Michele M. Stefanucci  
Administrative Law Judge

Dated: Albany, New York  
July 3, 2019

## EXHIBIT CHART

*Matter of Robo Automatic Car Wash Inc* – DEC Case No. CO 1-20181023-04  
 601 Montauk Highway, East Patchogue, New York 11772 – Region 1  
 Edrol File No. 190618094346

| Exhibit No. | Description  | ID'd | Rec'd | Offered by       |
|-------------|--|------|-------|------------------|
| 1           | State Pollutant Discharge Elimination System Discharge Permit (NY00227200) (Effective November 1, 2012 - October 31, 2022).  | √    | √     | Department Staff |
| 2           | National Pollutant Discharge Elimination System Discharge (NPDES) Monitoring Report (DMR) for the period January 1, 2018 - January 31, 2018, received November 14, 2018. | √    | √     | Department Staff |
| 3           | Notice of Violation dated March 28, 2018.  | √    | √     | Department Staff |
| 4           | Notice of Violation dated February 20, 2019.   | √    | √     | Department Staff |
| 5           | Notice of Hearing and Complaint and Statement of Readiness dated April 23, 2019.   | √    | √     | Department Staff |
| 6           | NYS Department of State Entity Information for Robo Automatic Car Wash Inc, current through April 15, 2019.  | √    | √     | Department Staff |
| 7           | Affidavit of Service of Dale L. Thiel, sworn to May 22, 2019.  | √    | √     | Department Staff |
| 8           | Affidavit of Service of Bonnie Pedone sworn to May 21, 2019.   | √    | √     | Department Staff |

| Exhibit No. | Description   | ID'd | Rec'd | Offered by       |
|-------------|---|------|-------|------------------|
| 9           | USPS receipt dated April 23, 2019<br>Proof of delivery on April 25, 2019.                         | √    | √     | Department Staff |
| 10          | Cover Letter for Notice of Hearing and<br>Complaint dated April 23, 2019.                         | √    | √     | Department Staff |
| 11          | Affidavit of Joshua Lin in Support of<br>Notice of Hearing and Complaint dated<br>April 19, 2019. | √    | √     | Department Staff |
| 12          | Penalty Calculation for Failure to Submit<br>DMRs.  | √    | √     | Department Staff |