

**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), Part 750 et seq. of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), and SPDES MSGP Permit #NYR00D160

by

XPO LOGISTICS FREIGHT, INC.,

Respondent.

ORDER

DEC Case No.
CO 1-20201120-177

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) alleges that respondent XPO Logistics Freight, Inc. (respondent) violated ECL article 17, 6 NYCRR 750-2.5(a)(1) 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 July 1 through December 31, 2019, January 1 through June 30, 2020, and July 1 through December 31, 2020, reporting periods for respondent's facility located at 130 South 4th Street, Bay Shore, 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 MSGP;
- (2) directing respondent to submit the overdue complete semiannual DMRs;
- (3) assessing a civil penalty in the amount of six thousand eight hundred forty dollars (\$6,840); and
- (4) granting such other relief as the Commissioner may deem appropriate.

On January 11, 2022, an adjudicatory hearing was convened before Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services. ALJ Caruso 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 XPO Logistics Freight, 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 January 11, 2022 (*see* Hearing Report at 4 [Finding of Fact No. 15]).

As a consequence of respondent XPO Logistics Freight, 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 6). At the hearing on January 11, 2022, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim (*see id.*; *see also* Hearing Report, at 4-5). I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15.

The proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to file complete discharge monitoring reports for the July 1 through December 31, 2019, January 1 through June 30, 2020, and July 1 through December 31, 2020, reporting periods, in violation of 6 NYCRR 750-2.5 (a)(1) and the MSGP. The Department is entitled to judgment upon the facts proven.

In its complaint, Department staff seeks a civil penalty in the amount of six thousand eight hundred forty dollars (\$6,840). At hearing, however, Department staff requested a civil penalty of nine thousand two hundred dollars (\$9,200). The ALJ properly limited the amount of penalty on the default motion to the amount stated in the complaint. The penalty assessed in a default judgment cannot exceed the amount demanded in the complaint, absent notice to respondent that a greater penalty would be sought (*see e.g. Matter of 134-15 Rock Management Corp., et al.*, Order of the Commissioner, December 10, 2008, at 4; *see also* CPLR 3215[b]).

Based on the above, the ALJ recommends that I impose a civil penalty of \$6,840 as requested in Department staff's complaint. 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 XPO Logistics Freight, Inc. waived its right to be heard at the hearing.
- II. Based upon evidence in the record, respondent XPO Logistics Freight, Inc., violated 6 NYCRR 750-2.5(a)(1) 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 July 1 through December 31, 2019, January 1 through June 30, 2020, and July 1 through December 31, 2020, reporting periods.
- III. Within thirty (30) days of the service of this order upon respondent XPO Logistics Freight, Inc., respondent shall submit to the Department a complete semiannual discharge monitoring report for the following reporting periods:

- A. July 1 through December 31, 2019;
 - B. January 1 through June 30, 2020; and
 - C. July 1 through December 31, 2020.
- IV. Respondent XPO Logistics Freight, Inc., is hereby assessed a civil penalty in the amount of six thousand eight hundred forty dollars (\$6,840). 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 reports referenced in paragraph III of this order and the penalty payment shall be sent to the following address:
- Kenson Jeffrey, 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 XPO Logistics Freight, 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
February 9, 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), Part 750 et seq. of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), and SPDES MSGP Permit #NYR00D160

by

XPO LOGISTICS FREIGHT, INC.,

Respondent.

HEARING REPORT

DEC Case No.
CO 1-20201120-177

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent XPO Logistics Freight, Inc. (respondent) with a notice of hearing and complaint dated September 28 and 30, 2021, respectively, alleging a violation of ECL article 17, 6 NYCRR 750-2.5 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 July 1 through December 31, 2019, January 1 through June 30, 2020, and July 1 through December 31, 2020, reporting periods for respondent's facility located at 130 South 4th Street, Bay Shore, 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 MSGP; (2) directing respondent to submit the overdue semiannual DMRs; (3) assessing a civil penalty in the amount of six thousand eight hundred forty dollars (\$6,840.00); and (4) granting such other relief as the Commissioner may deem appropriate.¹

Service of the notice of hearing and complaint was made by certified mail, return receipt requested, and was received by respondent on October 7, 2021 (*see* Staff Exhibit 1). Respondent did not answer the complaint. The matter was noticed for hearing on January 11, 2022. By notice of hearing dated December 13, 2021, and served upon the parties, the undersigned administrative law judge (ALJ) provided detailed instructions for attending the virtual hearing by videoconference or telephone. The notice also instructed the parties to call the

¹ Paragraph 19 of Department staff's complaint states, "Staff repeats and re-alleges paragraphs 1-13, as if set out at length herein." This is a typographical error and should read, "Staff repeats and re-alleges paragraphs 1-18, as if set out herein." Because this typographical error does not prejudice respondent, I am correcting the error sua sponte (*see* CPLR 2001).

Office of Hearings and Mediation Services (OHMS) if the parties experienced difficulty joining the virtual hearing. At 10:05 a.m. on January 11, 2022, I convened the virtual adjudicatory hearing by videoconference and telephone conference. Department staff was present by videoconference.

Department staff was represented by Kenson Jeffrey, Esq., Senior 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. I reserved on the default motion, allowing the record to remain open for Department staff to present its case.

Department staff called one witness, Erik Schmitt, Environmental Engineer 2 in the Department's Division of Water, Central Office. In all, four (4) exhibits were received in evidence. Pursuant to 6 NYCRR 622.11(a)(5), I took official notice of the MSGP (GP-0-17-004).

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 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

1. Respondent XPO Logistics Freight, Inc. applied for coverage under the SPDES MSGP in a notice of intent on June 25, 2018. Department staff assigned SPDES Permit ID No. NYR00D160 to respondent's permit. (*See* Testimony of Erik Schmitt [Schmitt Testimony]; Staff Exhibit 2, Notice of Intent.)²
2. Respondent is the owner/operator of a facility called "XPO Logistics Freight, Inc" a land transportation and/or warehousing facility conducting repair, maintenance and storage of vehicles and trailers, which has a street address of 130 South 4th Street, Bayshore, New

² Department staff identified the date of the notice of intent by the file name of the electronically saved notice of intent – "Application.MSGP.NYR00D160.2018-06-25.NOI."

York 11706. (*See Schmitt Testimony; Staff Exhibit 2, Notice of Intent.*)

3. Respondent's facility is covered under Sector P of the MSGP. (*See Schmitt Testimony; Staff Exhibit 2, Notice of Intent at 4; MSGP at 131-134.*)
4. Respondent received coverage under the MSGP. (*See Schmitt Testimony.*)
5. 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 Schmitt Testimony; MSGP at 37, 44-45.*)
6. The DMRs are filed electronically using the United States Environmental Protection Agency's (EPA) NetDMR system. (*See Schmitt Testimony.*)
7. EPA's NetDMR system sends reminders to filers if the filer's DMR is overdue or unsigned. Automated reminders are sent 3, 7, 14 and 21 days after the due date of the facility's DMR. (*See Schmitt Testimony.*)
8. Erik Schmitt is an employee of the Department and is an Environmental Engineer 2 in the Department's Division of Water, Central Office. Mr. Schmitt'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 the MSGP. (*See Schmitt Testimony.*)
9. Erik Schmitt searched the Department's DMR records for all DMRs filed by respondent. (*See Schmitt Testimony.*)
10. As a result of his search, Mr. Schmitt determined that respondent had not filed the complete semiannual DMRs for the July 1 through December 31, 2019, January 1 through June 30, 2020, and July 1 through December 31, 2020, reporting periods, which were still outstanding at the time of the hearing. (*See Schmitt Testimony.*)
11. Respondent had filed DMRs for the three reporting periods but failed to provide benchmark sampling results required by the MSGP. (*See Schmitt Testimony; MSGP at 35, 37, 46, 134.*)
12. After respondent failed to timely file a complete semiannual DMR for the July 1 through December 31, 2019, reporting period, Department staff mailed a notice of violation dated August 3, 2020, to respondent reminding respondent to submit the DMR. (*See Schmitt Testimony; Staff Exhibit 3.*)
13. Respondent did not respond to staff's notice of violation or submit a complete DMR. (*Schmitt Testimony.*)
14. Service of the cover letter, notice of hearing, and complaint, statement of readiness all

dated September 28 and 30, 2021 was made by certified mail and was received by respondent on October 7, 2021. (See Staff Exhibit 1.)

15. A notice of hearing dated December 13, 2021, providing instructions for attending the virtual hearing was served on respondent by first class mail. (See Hearing Record.)
16. Respondent failed to file an answer to the complaint and failed to appear at the adjudicatory hearing scheduled in the matter on January 11, 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] [effective September 16, 2020]).

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]).

In this case, Department staff presents proof sufficient to demonstrate that respondent failed to submit complete semiannual DMRs for the July 1 through December 31, 2019, January

1 through June 30, 2020, and July 1 through December 31, 2020, reporting periods for respondent's facility located at 130 South 4th Street, Bay Shore, New York within twenty-eight days of the end of each reporting period, the date that each semiannual DMR was due the Department, in violation of 6 NYCRR 750-2.5 and the MSGP. As of the date of the hearing respondent had not filed the three missing complete semiannual DMRs for 2019 and 2020.

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 January 11, 2021, as directed in the notice of hearing; (iv) Department staff's complaint includes a concise statement of the relief requested; and (v) staff presented testimony including a statement of authority and support for the penalty and relief requested (*see* Schmitt Testimony; Staff Exhibit 4). Based upon the foregoing, 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 file complete semiannual DMRs for the July 1 through December 31, 2019, January 1 through June 30, 2020, and July 1 through December 31, 2020, reporting periods, in violation of 6 NYCRR 750-2.5 and the MSGP. The Department is entitled to judgment upon the facts proven.

Penalty

The complaint requests the Commissioner impose a payable civil penalty of six thousand eight hundred forty dollars (\$6,840.00). At the hearing, staff's witness, Erik Schmitt, 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. The total maximum statutory penalty for the three violations proven by staff is one hundred twelve thousand five hundred dollars (\$112,500).

Mr. Schmitt further testified that he had prepared a penalty calculation sheet (Staff Exhibit 4) explaining Department staff's rationale for the requested penalty. Mr. Schmitt 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 for failing to submit a complete 2019 semiannual DMR is \$1,140, and the base penalty for failing to submit complete semiannual DMRs for 2020 is \$1,160 each.³ Mr. Schmitt 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 for the 2019 violation to arrive at a settlement penalty of \$4,600 ($\$1,140 \times 2 + \$1,160 + \$1,160$). At hearing, staff requested a penalty of \$9,200.

³ 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). No testimony was received explaining the number of times the penalty was adjusted for inflation to arrive at the stated base penalties.

In support of the penalty, Mr. Schmitt testified regarding the gravity of the violation and described discharge monitoring reports as an important component of the SPDES program. Department staff cannot determine whether there are unpermitted discharges of contaminants unless complete and accurate DMRs are timely submitted. In addition, respondent, as a Sector P facility, is required to sample and report for specific pollutants including petroleum products, benzene, ethylbenzene, toluene and xylene. Mr. Schmitt also testified that in addition to respondent's failure to correct the violations alleged in this matter that respondent has a history of non-compliance that resulted in at least one previous order on consent.

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 2, 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.

Although Department staff provided support for the total penalty requested at hearing, I am constrained by the general principal that the penalty assessed in a default judgment cannot exceed that demanded in the complaint, absent notice to the respondent that a greater penalty would be sought (*see e.g. Matter of 134-15 Rock Management Corp., et al.*, Order of the Commissioner, December 10, 2008, at 4; *P&K Marble, Inc. v. Pearce*, 168 AD2d 439, 439-40 [2d Dept 1990]; *see also* CPLR 3215[b]).

In light of the foregoing, I find that the six thousand eight hundred forty dollars (\$6,840.00) civil penalty requested in staff's complaint 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 2019 and 2020 semi-annual DMRs. The remedial relief requested 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 XPO Logistics Freight, Inc. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent XPO Logistics Freight, Inc. violated 6 NYCRR 750-2.5 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 XPO Logistics Freight, Inc. to submit a complete:

- a. semiannual DMR for the July 1 through December 31, 2019, reporting period;
 - b. semiannual DMR for the January 1 through June 30, 2020, reporting period; and
 - c. semiannual DMR for the July 1 through December 31, 2020, reporting period;
4. Directing respondent XPO Freight Logistics, Inc. to pay a civil penalty of six thousand eight hundred forty dollars (\$6,840.00); and
 5. Directing such other relief as the Commissioner may deem appropriate.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
February 1, 2022

EXHIBIT CHART – DMR EXPEDITED PROCEEDINGS

Matter of XPO Logistics Freight, Inc.
 130 South 4th Street, Bay Shore, New York – DEC Case No. CO 1-20201120-177
 January 11, 2022 – Region 1 and Central Office
 Webex

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
	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)			Department Staff	Official notice taken
1	Affidavit of Service of Melissa Evans, sworn to January 7, 2022 with USPS delivery confirmation attached.	✓	✓	Department Staff	
2	Notice of Intent (GP-0-17-004) from XPO Logistics Freight, Inc.	✓	✓	Department Staff	
3	Notice of Violation, dated August 3, 2020	✓	✓	Department Staff	
4	Penalty Calculation for Failure to Submit DMRs for NYR00D160 – XPO Logistics Freight, Inc.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
	Notice of Hearing, dated September 28, 2021, and Complaint and Statement of Readiness, dated September 30, 2021				Hearing Record
	Notice of Hearing (virtual), dated December 13, 2021				Hearing Record