

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

In the Matter of the Alleged Violations of Article 17 of
the Environmental Conservation Law of the State of New York
(ECL) and Section 750-2.5 of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of
New York (6 NYCRR),

ORDER

DEC Case No:
CO 2-20090929-18

-by-

AALBA AUTO WRECKING INC.,

Respondent.

On June 16, 2010, an adjudicatory hearing was convened before Richard R. Wissler, Administrative Law Judge (ALJ) of the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation (Department). The hearing addressed allegations of Department staff that respondent AALBA Auto Wrecking Inc., failed to file annual discharge monitoring reports (DMRs) for calendar years 2007 and 2008, as required by the Department's State Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit No. GP-0-06-002 (SPDES MSGP), for a facility it owns and operates at 151 Woodward Avenue, Ridgewood, New York.

By memorandum dated June 29, 2010, Alexander B. Grannis, Commissioner of the Department, delegated decision making authority in this matter to the undersigned, Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services.

ALJ Wissler prepared the attached hearing report, which I adopt as my decision in this matter subject to my comments below. As set forth in the hearing report, respondent is required to file annual DMRs pursuant to the SPDES MSGP. In addition, as noted in the hearing report, section 750-2.5 of 6 NYCRR requires filing of monitoring reports as specified by the Department. Based on the record, respondent's DMR for calendar year 2007 was filed late and did not include the required testing data (see Hearing Exh 11A). Although it cannot be determined from this record whether respondent's DMR for calendar year 2008 was timely filed, the DMR was incomplete as it also failed to include the required testing data (see Hearing Exh 11B).

Respondent failed to file an answer to the complaint served by Department staff in this matter, and failed to appear for the adjudicatory hearing held on June 16, 2010.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommended that Department staff's motion for default be granted, and I concur with the ALJ that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15. Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 4). Accordingly, the ALJ concluded, and I concur, that staff is entitled to a judgment based on record evidence.

The civil penalty requested by Department staff and recommended by the ALJ is authorized. As part of the relief, Department staff request that I direct respondent to submit "the overdue 2007 and 2008 MSGP Annual DMR" (see Hearing Exh 7 [unnumbered third page]). Based on the record before me, respondent in its late filing of the DMR for calendar year 2007 indicated that it did not perform analytical testing during calendar year 2007 (see Hearing Exh 11A). Respondent similarly indicated that it did not conduct any testing in 2008 (see Hearing Exh 11B). In light of those representations, which were not disputed at the hearing, I decline to direct respondent to refile what would simply be incomplete DMR reports for calendar years 2007 and 2008.

I note, however, that respondent committed to Department staff that it would conduct testing in 2008 (see Hearing Exh 11A, at 2, 4 [respondent statements that the required testing would be performed during 2008])), but failed to do so. Should similar circumstances occur in future proceedings involving the filing of DMRs where respondents pledge to perform the required testing but fail to do so, Department staff should consider requesting substantially higher civil penalties.

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 AALBA Auto Wrecking Inc. waived its right to be heard at the hearing.
- II. Furthermore, based on record evidence, respondent AALBA Auto Wrecking Inc. is adjudged to have violated 6 NYCRR 750-2.5 and the Department's SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit No. GP-0-06-002 (General Permit), for failure to timely submit its DMR for calendar year 2007 and for failure to file a complete DMR for calendar year 2008 for its facility at 151 Woodward Avenue, Ridgewood, New York.
- III. Within fifteen (15) days of the service of this order upon respondent, respondent shall pay a civil penalty in the amount of five thousand dollars (\$5,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

IV. The penalty payment shall be sent to the following address:

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

V. Any questions or other correspondence regarding this order, other than the submission of the penalty payment as set forth in paragraph V of this order, shall be addressed to:

Meredith Streeter, P.E., Chief
Compliance Assurance Section, Bureau of Water Compliance
Division of Water
New York State Department of Environmental Conservation
625 Broadway, 4th Floor
Albany, New York 12233-3506.

VI. The provisions, terms and conditions of this order shall bind respondent AALBA Auto Wrecking Inc., its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Louis Alexander
Assistant Commissioner

Dated: Albany, New York
August 3, 2010

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 of the State of New York
(ECL) and Section 750-2.5 of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of
New York (6 NYCRR),

HEARING REPORT

DEC Case No:
CO 2-20090929-18

-by-

AALBA AUTO WRECKING INC.,

Respondent.

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Procedural History

Respondent/permittee AALBA Auto Wrecking Inc. (respondent) was served with a notice of hearing and complaint, dated April 9, 2010, alleging two (2) violations of 6 NYCRR 750-2.5(e) for failure to file annual discharge monitoring reports (DMRs) for the years 2007 and 2008, as required by State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, GP-0-06-002 (General Permit), for a facility known as AALBA Auto Wrecking Inc. (facility), located at 151 Woodward Avenue, Ridgewood, New York 11385. Upon its filing of a Notice of Intent, received by the Department on July 5, 2007, and designated NYR 00E025, respondent had sought coverage for the facility under the General Permit. The complaint seeks the following relief: (1) a finding that respondent is in violation of the cited regulation and the General Permit, (2) a direction that respondent submit the overdue DMRs, (3) the assessment of a civil penalty in the amount of \$5,000, and (4) such other relief as the Commissioner may deem just and proper. In addition, the notice of hearing advised respondent that any answer to the complaint must be filed by May 16, 2010, and that an adjudicatory hearing in the matter was scheduled for June 16, 2010, requiring its appearance. As shown by United States Postal Service (USPS) records, service of the notice of hearing and complaint on respondent by certified mail was completed on April 14, 2010. Inasmuch as respondent is an active business corporation in the State of New York, service of the notice of hearing and complaint was made on the Secretary of State on April 12, 2010. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled for June 16, 2010.

On June 16, 2010, the adjudicatory hearing was convened before the undersigned Administrative Law Judge (ALJ) of the Department of Environmental Conservation's (Department) Office of Hearings and Mediation Services (OHMS) in the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407. Department staff was represented by Scott W. Crisafulli, Esq., Chief of the Water Bureau. No one appeared on behalf of respondent.

Department staff called one witness, Holly Shear, an Environmental Program Specialist I in the SPDES Compliance Assurance Section of the Department's Division of Water. Department staff submitted ten (10) exhibits which were received in evidence. The undersigned took official notice of and received into evidence as an OHMS exhibit a copy of Permit No. GP-0-06-002 entitled "New York State Department of Environmental Conservation SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity," with an effective date of March 28, 2007, and an expiration date of March 27, 2012. At the close of the hearing, Department staff moved for a default judgment and subsequently submitted a proposed order.

Applicable Regulatory Provisions

6 NYCRR 750-1.2(a)(28): "Discharge monitoring report (DMR) means a report submitted by a permittee to the department summarizing the effluent monitoring results obtained by the permittee over periods of time as specified in the SPDES permit."

6 NYCRR 750-2.5(e)(1): "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. Such reports shall be made on the reporting forms supplied to the permittee by the department, in a format acceptable to the department, or by the electronic transfer of data as approved by the department. Electronic submissions shall conform to the format, standards and other conditions specified by the department. The regional water engineer may also require the submittal of such other information as is necessary to determine the validity of monitoring results submitted in accordance with permit requirements. In no event shall reports on discharges to surface waters required by this subdivision be submitted at a frequency of less than once per year."

Findings of Fact

1. Upon its filing of a Notice of Intent, received by the Department on July 5, 2007, and designated NYR 00E025, AALBA Auto Wrecking Inc. (respondent) sought coverage under the New York State Department of Environmental Conservation SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit No. GP-0-06-002 (General Permit) for a facility known as AALBA Auto Wrecking Inc. (facility), located at 151 Woodward Avenue, Ridgewood, New York 11385. On the Notice of Intent, respondent stated that it was "owner/operator" of the facility.
2. The facility is an automobile salvage yard and its standard industrial classification (SIC) Code is 5015.
3. Sector M of the General Permit at pages VIII.M-1 through VIII.M-6 lists the requirements applicable to stormwater discharges associated with industrial activities designated SIC Code 5015.
4. As provided on Table VIII-M-1 on page VIII.M-6 of the General Permit, automobile

salvage yards are required to monitor their stormwater discharges for certain pollutants of concern including total suspended solids, oil and grease, benzene, ethylbenzene, toluene, xylene, total recoverable aluminum, total recoverable iron and total recoverable lead.

5. Pursuant to the direction found on pages 35 and 36 of the General Permit, the facility is required to file annual discharge monitoring reports (DMRs) with the Department summarizing its monitoring results for the pollutants of concern listed in Finding of Fact 4.
6. Holly Shear is an employee of the Department whose duties include the care, custody, and maintenance of the DMRs filed with the Department.
7. On June 16, 2010, Holly Shear searched the DMR files of the Department for any and all DMRs filed by respondent or anyone else on behalf of the facility as required under the General Permit.
8. As a result of her search, Holly Shear determined that respondent had filed annual DMR forms for 2007 and 2008 but that both were incomplete inasmuch as they contained no sampling results for the pollutants of concern listed in Finding of Fact 4.
9. Due to the transfer of the facility to a new owner, by Notice of Termination received by the Department on October 13, 2009, respondent terminated coverage under the General Permit.
10. The Department served respondent by certified mail with the notice of hearing and complaint in this matter, dated April 9, 2010, alleging two (2) violations of 6 NYCRR 750-2.5(e) for failure to submit properly completed annual DMRs for 2007 and 2008 for the facility, as indicated in Finding of Fact 8. As shown by United States Postal Service (USPS) records, service of the notice of hearing and complaint on respondent by certified mail was completed on April 14, 2010. Inasmuch as respondent is an active business corporation in the State of New York, service of the notice of hearing and complaint was made on the Secretary of State on April 12, 2010.
11. The notice of hearing advised respondent that it was required to file an answer to the complaint by May 16, 2010, and that an adjudicatory hearing in this matter would be convened on June 16, 2010, at the Department's Region 2 offices.
12. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled for June 16, 2010.

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to submit properly completed annual DMRs for the years 2007 and 2008 for its facility, in violation of 6 NYCRR 750-2.5(e) and of the express provisions of General Permit GP-0-06-002.

The record shows that respondent, as directed in the notice of hearing, failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on June 16, 2010. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to submit properly completed DMRs for the years 2007 and 2008 for its facility, in violation of 6 NYCRR 750-2.5(e). The Department is entitled to judgment upon the facts proven.

Department staff's proposed order and the \$5,000 civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Recommendation

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

1. Granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. Finding respondent in violation of 6 NYCRR 750-2.5(e) for failure to submit properly completed DMRs for the years 2007 and 2008, in violation of 6 NYCRR 750-2.5(e), for a facility it owns located at 151 Woodward Avenue, Ridgewood, New York 11385, based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to submit properly completed DMRs for 2007 and 2008 to the Department for the above facility;
4. Directing respondent to pay a civil penalty in the amount of five thousand dollars (\$5,000.00); and
5. Directing such other and further relief as he may deem just and proper.

/s/

Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
August 2, 2010

EXHIBIT CHART – DMR EXPEDITED PROCEEDINGS

Matter of AALBA Auto Wrecking Inc.
June 16, 2010 – Region 2

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Notice of Intent	✓	✓	Department Staff	
2	August 14, 2008 Notice of Violation for failure to submit DMR for calendar year 2007	✓		Department Staff	Not offered
3	July 9, 2009 Notice of Violation for failure to submit DMR for calendar year 2008	✓		Department Staff	Not offered
4A	Affidavit of Service of Elissa Armater, sworn to June 12, 2010	✓	✓	Department Staff	
4B	Affidavit of Service of Jodi Aubin, sworn to June 12, 2010	✓	✓	Department Staff	
5	April 9, 2010 cover letter from Scott Crisafulli, Esq. to Respondent	✓	✓	Department Staff	
6	April 9, 2010 Notice of Hearing	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	April 9, 2010 Complaint	✓	✓	Department Staff	
8	April 9, 2010 Statement of Readiness	✓	✓	Department Staff	
9	Affidavit in Support of Notice of Hearing and Complaint (Holly Shear), sworn to April 8, 2010	✓	✓	Department Staff	
10	Penalty Calculation	✓	✓	Department Staff	
11A	DMR (2007)	✓	✓	Department Staff	
11B	DMR (2008)	✓	✓	Department Staff	
12	Notice of Intent	✓	✓	Department Staff	
OHMS A	SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity	✓	✓	Official Notice	