

**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"),
Section 750 et seq. of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR"), and State Pollutant Discharge
Elimination System ("SPDES")
Permit No. NYR00D695

ORDER

**DEC Case No. :
CO2-20121011-2**

-by-

G & J READY MIX & MASONRY SUPPLY, INC.,

Respondent.

This administrative enforcement proceeding addressed the allegations of staff of the New York State Department of Environmental Conservation ("Department") that respondent G & J Ready Mix & Masonry Supply, Inc. failed to file an annual discharge monitoring report ("DMR") for calendar year 2011 and failed to file an annual certification report ("ACR") for calendar year 2011 for its facility located at 183-30 Jamaica Avenue, Hollis, New York. On May 21, 2013, an adjudicatory hearing was convened before Richard R. Wissler and Michael S. Caruso, Administrative Law Judges ("ALJs") of the Department's Office of Hearings and Mediation Services.

ALJs Caruso and Wissler prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As stated in the hearing report, respondent's facility is subject to the annual DMR and ACR filing requirements set forth in the Department's SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit No. GP-0-06-002. As noted in the hearing report, section 750-2.5(e) of 6 NYCRR also requires filing of monitoring reports as specified by the Department.

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 May 21, 2013.

I concur with the ALJs' amendment of the pleadings, pursuant to CPLR 2001, to correct respondent's legal name.

As a consequence of respondent's failure to answer or appear in this matter, the ALJs recommended that Department staff's motion for default be granted, and I concur 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 7). Accordingly, staff is entitled to a judgment based on record evidence.

The relief and civil penalty requested by Department staff and recommended by the ALJs are authorized and appropriate.

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

- I. The pleadings are amended as stated in the hearing report.
- II. 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 G & J Ready Mix & Masonry Supply, Inc. waived its right to be heard at the hearing.
- III. Furthermore, based upon record evidence respondent G & J Ready Mix & Masonry Supply, Inc. is adjudged to have violated 6 NYCRR 750-2.5(e) and the Department's SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit No. GP-0-06-002 ("SPDES MSGP"), for failing to submit an annual discharge monitoring report for calendar year 2011 and for failing to submit an annual certification report for calendar year 2011, for its facility located at 183-30 Jamaica Avenue, Hollis, New York.
- IV. Within fifteen (15) days of the service of this order upon respondent, respondent G & J Ready Mix & Masonry Supply, Inc. shall submit to the Department an annual discharge monitoring report and an annual certification report for calendar year 2011, in accordance with the requirements of the SPDES MSGP.
- V. Within fifteen (15) days of the service of this order upon respondent, respondent G & J Ready Mix & Masonry

Supply, Inc. shall pay a civil penalty in the amount of ten thousand dollars (\$10,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

- VI. The annual discharge monitoring report, the annual certification report for calendar year 2011, and the penalty payment shall be sent to the following address:

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

- VII. Any questions or other correspondence regarding this order, other than those relating to the submission of the annual discharge monitoring report and the annual certification report for calendar year 2011 and the penalty payment, shall be addressed to:

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

- VIII. The provisions, terms and conditions of this order shall bind respondent G & J Ready Mix & Masonry Supply, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
August 27, 2013

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HEARING REPORT

**DEC Case No.
CO2-20121011-2**

-by-

G & J READY MIX & MASONRY SUPPLY, INC.,

Respondent.

Procedural History

Respondent G & J Ready Mix & Masonry Supply, Inc. ("respondent") was served with a notice of hearing and complaint, dated March 21, 2013, alleging two (2) violations of 6 NYCRR 750-2.5(e) for failure to file an annual discharge monitoring report ("DMR") for the year 2011 and failure to file an annual certification report ("ACR") for the year 2011, 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 G & J Ready Mix & Masonry Supply, Inc. ("facility"), located at 183-30 Jamaica Avenue, Hollis, NY 11423. Upon respondent's filing of a notice of intent, dated August 6, 2007, received by the Department on August 13, 2007, and designated SPDES Permit No. NYR00D695, respondent had sought coverage for the facility under the General Permit.

The complaint seeks the following relief: (1) a determination that respondent is in violation of the cited regulation and the General Permit; (2) a direction that respondent submit the overdue 2011 DMR and ACR; (3) the assessment of a civil penalty in the amount of \$10,000; 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 April 21, 2013, and

that an adjudicatory hearing in the matter was scheduled for May 21, 2013, 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 made on March 23, 2013. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled on May 21, 2013.

On May 21, 2013, the adjudicatory hearing was convened before Administrative Law Judge ("ALJ") Richard R. Wissler and ALJ Michael S. Caruso 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. Department staff was represented by Megan Joplin, Esq., Assistant Regional Attorney, Region 2. No one appeared on behalf of respondent. Department staff moved for a default judgment in the matter and, in addition, elected to proceed with a hearing in the matter in the absence of respondent.

Department staff called one witness, Imdadul Islam, P.E., an Environmental Engineer 2, in the Department's Region 2 Division of Water. Department staff submitted eleven (11) exhibits, all of which were received in evidence, including General 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.

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."

General Permit No. GP-0-06-002: "Part IV. MONITORING, REPORTING AND RETENTION OF RECORDS" "B. Reporting Monitoring Results and Annual Certification Reporting.

1. Annual Certification Report - The annual certification report is the primary mechanism for reporting to the Department. A copy of the annual certification report form is provided in Appendix C of this permit.

"a. Every facility covered by this general permit must complete and submit an annual certification report form in accordance with the submission deadlines in Table IV-4 [Monitoring Reporting Requirements, as applicable here, requiring the ACR to be filed annually].

"b. Monitoring results for benchmark parameters and numeric effluent limitations must be reported on Discharge Monitoring Report (DMR) forms that will be provided by the Department. The completed DMR forms and any additional monitoring requested by the Department, where applicable, must be submitted along with the annual certification report as described in Table IV-4 [Monitoring Reporting Requirements, as applicable here, requiring the DMR to be filed annually with the ACR]."

Default Provisions

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 proceeding. As applicable herein, the Department's default procedures in an enforcement proceeding, found at 6 NYCRR 622.15, provide:

"(a) A respondent's failure to file a timely answer . . . constitutes a default and a waiver of respondent's right to a hearing. If [this] occurs the department 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 . . . and must contain:

(1) proof of service upon the respondent of the notice of hearing and complaint . . . ;

(2) proof of the respondent's failure . . . to file a timely answer; and

(3) a proposed order."

As the Commissioner stated in the decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order, 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 this case, Department staff, in addition to the factual allegations of the complaint, provided proof at the hearing supporting staff's causes of action.

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. Upon its filing of a notice of intent, dated August 6, 2007, received by the Department on August 13, 2007, and designated SPDES Permit No. NYR00D695, G & J Ready Mix & Masonry Supply, 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 G & J Ready Mix & Masonry Supply, Inc. ("facility"), located at 183-30 Jamaica Avenue, Hollis, NY 11423. In the notice of intent, respondent stated that it was the "owner/operator" of the facility. (Exhibits 3 and 4.)
2. The facility manufactures concrete and its Standard Industrial Classification ("SIC") code is 3273. (Exhibit 4.)
3. Sector E of the General Permit at pages VIII.E-1 through VIII.E-2 lists the requirements applicable to stormwater discharges associated with industrial activities designated SIC code 3273. (Exhibit 3.)
4. As provided in Table VIII-E-2 on page VIII.E-2 of the General Permit, concrete manufacturing facilities are required to monitor their stormwater discharges for certain

pollutants of concern including total suspended solids, pH and total recoverable iron. (Exhibit 3.)

5. Pursuant to the direction found on pages 35 and 36 of the General Permit, Part IV.B, 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. The annual DMR is due by March 31st of the following calendar year. (Exhibit 3.)
6. Pursuant to the direction found on pages 35 and 36 of the General Permit, Part IV.B, the facility is required to file an annual certification report ("ACR") with the Department. The ACR is due by March 31st of the following calendar year. (Exhibit 3.)
7. Imdadul Islam, P.E., is an employee of the Department whose duties include the care, custody, and maintenance of the DMRs and ACRs filed with the Department. (Testimony of Imdadul Islam, Hearing Record.)
8. On May 21, 2013, Imdadul Islam searched the DMR and ACR files of the Department for any and all DMRs and ACRs filed by respondent or anyone else on behalf of the facility as required under the General Permit. (Testimony of Imdadul Islam, Hearing Record.)
9. As a result of his search, Imdadul Islam determined that no annual DMR was in the files of the Department for the facility for the year 2011 for the pollutants of concern indicated in Finding of Fact 4. (Testimony of Imdadul Islam, Hearing Record.)
10. As a result of his search, Imdadul Islam determined that no ACR was in the files of the Department for the facility for the year 2011. (Testimony of Imdadul Islam, Hearing Record.)
11. Respondent was served by certified mail with a notice of hearing and complaint, dated March 21, 2013, alleging two (2) violations of 6 NYCRR 750-2.5(e) for failure to file an annual DMR for the year 2011 and failure to file an ACR for the year 2011, as required by the General Permit, and as indicated in Findings of Fact 9 and 10. This certified mailing bore United States Postal Service ("USPS") Label Number 71901050579922908983. As indicated in a USPS Track

and Confirm email, respondent received the notice of hearing and complaint on March 23, 2013. (Exhibits 1, 2 and 8.)

12. The notice of hearing advised respondent that it was required to file an answer to the complaint by April 21, 2013, and that an adjudicatory hearing in this matter would be convened on May 21, 2013, at the Department's Region 2 offices. (Exhibits 1 and 2.)
13. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled for May 21, 2013. (Hearing Record.)

Discussion

Before discussing Department staff's case, certain discrepancies in Department staff's papers must be resolved. Department staff's papers are captioned and pleaded against GJ Ready Mix & Masonry Supply, Inc. However, the correct legal name of the corporate entity is G & J Ready Mix & Masonry Supply, Inc. as reflected in respondent's notice of intent (Exhibit 4) and the Department of State, Division of Corporations, Entity Information (Exhibit 11). All other exhibits in this matter use the incorrect GJ Ready Mix & Masonry Supply, Inc. Exhibits 5 and 7 although addressed to GJ Ready Mix & Masonry Supply, Inc., reference G & J Ready Mix & Masonry Supply, Inc. Respondent's address of 183-30 Jamaica Avenue, Hollis, NY 11423 is, however, correct in the pleadings and other exhibits.

We conclude that the use of GJ is not fatal to Department staff's case. Civil Practice Law and Rules ("CPLR") § 2001 authorizes the court to disregard or "correct, sua sponte, any defect, provided any substantial right of the party is not prejudiced." (See Albilis v Hillcrest General Hospital and Rosenfeld, 124 AD2d 499, 500 [1st Dept 1986].) In this case, correction of the pleadings is appropriate to ensure the correct legal name of respondent is used in any Commissioner's order issued in this matter. Respondent is not prejudiced by this correction because all correspondence and service were made on the intended respondent's correct address, and the pleadings (including the caption) and all dispositive documents reference the intended respondent's SPDES Permit No. NYR00D695. Respondent was fairly apprised that Department staff intended to seek judgment against respondent related to respondent's SPDES permit obligations. (See Albilis, at 500; see also Ryan v Nationwide Mutual Insurance Co., 20 AD2d 270, 271-272 [4th Dept

1964] [plaintiff allowed to change captioned name of defendant where the intended defendant was served and fairly apprised that it was party to the action]; Smith v Hennesey, 266 AD2d 692 [3d Dept 1999][court properly disregarded mistake in complaint in which last two words of defendant's assumed name were transposed]; State of New York Higher Educ. Servs. Corp. v Sparozic, 35 AD3d 1069, 1070 [3d Dept 2006], lv dismissed 8 NY3d 958 [2007] [misspelling of defendant's name on summons with notice and affidavit of service was a mere irregularity which did not affect jurisdiction over defendant].) Therefore, we hereby deem the caption to the notice of hearing and complaint and the pleadings to be amended to correct respondent's name to G & J Ready Mix & Masonry Supply, Inc. as reflected in this hearing report and its caption.

Department staff's proof presents a prima facie case demonstrating that respondent failed to submit an annual DMR and an annual ACR for the year 2011, 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 was served the notice of hearing and complaint and, 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 May 21, 2013. 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 an annual DMR and an annual ACR for the year 2011, in violation of 6 NYCRR 750-2.5(e) and of the express provisions of General Permit GP-0-06-002. The Department is entitled to judgment upon the facts proven.

Department staff's proposed relief and the \$10,000 civil penalty it seeks are consistent with the Department's penalty policy; the Division of Water's Technical and Operational Guidance Series ("TOGS") 1.4.2, entitled "Compliance and Enforcement of SPDES Permits;" and the penalty provisions of ECL 71-1929.

Recommendation

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

1. adopting the amendment of the caption and pleadings as provided in this hearing report;

2. granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
3. holding, based upon a preponderance of the record evidence, that respondent violated 6 NYCRR 750-2.5(e) and General Permit GP-0-06-002 by failing to file an annual discharge monitoring report ("DMR") for the year 2011 and failing to file an annual certification report ("ACR") for the year 2011, as required by the General Permit for a facility known as G & J Ready Mix & Masonry Supply, Inc. ("facility"), located at 183-30 Jamaica Avenue, Hollis, NY 11423;
4. directing respondent to submit the annual DMR and the annual ACR for 2011 to the Department for the above facility; and
5. directing respondent to pay a civil penalty in the amount of ten thousand dollars (\$10,000.00).

/s/
Michael S. Caruso
Administrative Law Judge

/s/
Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
June 19, 2013

EXHIBIT CHART – DMR/ACR EXPEDITED PROCEEDINGS*Matter of G & J Ready Mix & Masonry Supply, Inc. – Hollis, New York – DEC Case No. 2-20121011-2*

May 21, 2013 – Region 2

Edirol No. 040620113540

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Notice of Hearing, dated March 21, 2013	✓	✓	Department Staff	
2	Complaint, dated March 21, 2013	✓	✓	Department Staff	
3	SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit No. GP-0-06-002, effective March 28, 2007, through March 27, 2012	✓	✓	Department Staff	
4	Notice of Intent, dated August 6, 2007	✓	✓	Department Staff	
5	Notice of Violation for failure to submit ACR for calendar year 2011 dated June 28, 2012	✓	✓	Department Staff	
6	Notice of Violation for failure to submit DMR for calendar year 2011 dated June 28, 2012	✓	✓	Department Staff	
7	Cover letter from Scott Crisafulli, Esq. to Respondent, dated October 12, 2012 re: Consent Order	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
8	Affidavit of Service of Elissa Armateer sworn to May 10, 2013 with USPS attachments	✓	✓	Department Staff	
9	Cover letter from Scott Crisafulli, Esq. to Respondent, dated March 21, 2013, served with the Notice of Hearing and Complaint	✓	✓	Department Staff	
10	Penalty Calculation	✓	✓	Department Staff	
11	Department of State, Division of Corporations, Entity Information for Respondent	✓	✓	Department Staff	