

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

In the Matter of the Alleged Violations of Article 27 of
New York State Environmental Conservation Law (“ECL”)
and Part 360-12 of Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of New
York (“6 NYCRR”),

ORDER

DEC Case No:
CO2-20151026-537

-by-

J & M USED AUTO PARTS, INC.,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) that respondent J & M Used Auto Parts, Inc. failed to file an annual report for the year 2014 for the vehicle dismantling facility it operates at 5201 Farragut Road, Brooklyn, New York.

On December 15, 2015, staff personally served respondent with a notice of hearing and complaint dated November 9, 2015. On April 8, 2016, an adjudicatory hearing was convened before D. Scott Bassinson, Administrative Law Judge (“ALJ”) of the DEC’s Office of Hearings and Mediation Services.

ALJ Bassinson 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 vehicle dismantling facility is subject to the annual reporting requirements set forth in ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c) (see Hearing Report, at 2-3; see also Complaint, Hearing Exhibit [Ex.] 1, ¶¶ 3-9).

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 April 8, 2016. As a consequence of respondent’s failure to answer or appear in this matter, Department staff moved for a default judgment. The ALJ has recommended that Department staff’s motion for default be granted (see Hearing Report, at 4-5), and I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15.

ECL 71-4003 authorizes a civil penalty of \$1,000 for each violation and an additional \$1,000 for each day the violations continues. Based upon the record of this proceeding, the civil penalty in the amount of five thousand dollars (\$5,000) that Department staff requests and that the ALJ recommends is authorized and appropriate. In addition, Department staff requests, and the ALJ recommends, that respondent be directed to submit the annual report for the year 2014 for its vehicle dismantling facility to the Department within fifteen (15) days of the service of this order upon respondent. This relief 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 J & M Used Auto Parts, Inc. waived its right to be heard at the hearing.

II. Respondent J & M Used Auto Parts, Inc. is adjudged to have violated ECL 27-2303(1) and its implementing regulation, 6 NYCRR 360-12.1(c), by failing to submit an annual report for the year 2014 for the vehicle dismantling facility it operates at 5201 Farragut Road, Brooklyn, New York.

III. Within fifteen (15) days of the service of this order upon respondent, respondent J & M Used Auto Parts, Inc. shall submit to the Department the annual report for its vehicle dismantling facility for the year 2014.

IV. Within fifteen (15) days of the service of this order upon respondent, respondent J & M Used Auto Parts, Inc. 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."

V. The annual report for the year 2014 and the penalty payment, as referenced in paragraphs III and IV, respectively, of this order, 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.

VI. Any questions or other correspondence regarding this order shall be addressed to:

Richard Clarkson, P.E.
Division of Materials Management, Facilities Section
New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7260.

VII. The provisions, terms and conditions of this order shall bind respondent J & M Used Auto Parts, 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
July 15, 2016

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

In the Matter of the Alleged Violations of Article 27 of
New York State Environmental Conservation Law (“ECL”)
and Part 360-12 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:
CO2-20151026-537

-by-

J & M USED AUTO PARTS, INC.,

Respondent.

Procedural History

Respondent J & M Used Auto Parts, Inc. (“respondent”) was served with a notice of hearing and complaint, dated November 9, 2015, in which staff of the Department of Environmental Conservation (“Department”) allege that respondent violated ECL § 27-2303(1) and its implementing regulation, 6 NYCRR § 360-12.1(c), by failing to submit an annual report for the year 2014 for the vehicle dismantling facility it owns and/or operates at 5201 Farragut Road, Brooklyn, New York. The complaint requests that the Commissioner issue an order: (1) finding that respondent committed the violation alleged; (2) directing respondent to submit the Vehicle Dismantling Annual Report for calendar year 2014; (3) assessing a civil penalty in the amount of \$5,000; and (4) granting such other relief as the Commissioner may deem appropriate.

The notice of hearing stated that (i) respondent was required to serve an answer to the complaint no later than December 18, 2015; (ii) a hearing would be held on January 19, 2016; and (iii) failure to file a timely answer or failure to appear at the hearing would constitute a default, and waiver of respondent’s right to a hearing.

The notice of hearing and complaint were served personally on respondent on December 15, 2015. Respondent failed to file an answer to the complaint. Respondent did not appear on January 19, 2016, the original hearing date. The adjudicatory hearing was rescheduled for March 24, 2016 and, with prior notice to respondent, rescheduled again for April 8, 2016.

On April 8, 2016, the adjudicatory hearing was convened before the undersigned in the Department’s Region 2 office, 1 Hunter’s Point Plaza, 47-40 21st Street, Long Island City, New York 11101. Department staff was represented by John Nehila, Esq., Associate Regional Attorney, Region 2. No one appeared on behalf of respondent. Department staff made an oral motion for a default judgment at that time.

Department staff called one witness, Stephanie Salvemini, an Engineering Geologist 1 in the Department’s Region 2 Division of Materials Management. Department staff submitted eight (8) exhibits, all of which were received in evidence.

Applicable Statutory and Regulatory Provisions

ECL § 27-2303(1). Regulation of vehicle dismantling facilities

All vehicle dismantlers owning or controlling a facility for the dismantling of end of life vehicles on site shall be subject to the requirements of this title.

1. An annual report shall be submitted to the department, to be included on the department's website, including, but not be limited to, the following:

- (a) the number of end of life vehicles received at the facility;
- (b) the number of end of life vehicles crushed and removed from the facility;
- (c) the number of end of life vehicles stored at the facility at the end of the reporting year;
- (d) the approximate area at the facility used for storage of end of life vehicles;
- (e) the quantities of waste vehicle fluids extracted from end of life vehicles received and their disposition, including the quantity sold, used on-site, stored on-site, and disposed; and
- (f) the number and if applicable nature of any violation of all applicable rules and regulations of the state.

6 NYCRR § 360-12.1 Applicability.

(c) *Automobile dismantlers reporting requirements.* Automobile dismantlers, scrap metal processors, automobile junkyards, facilities that recover metal from sludges that are not hazardous waste which are required to be managed at a facility subject to regulation under Part 373 or 374 of this Title, and metal salvage facilities are exempt from regulation under this Part, except as follows: the owner or operator of each of these facilities must provide the department with an annual report that details how the waste fluids (including, but not limited to, refrigerants, oil and transmission fluids) are disposed. Duplicate originals of this report must be submitted to the department's central office and the office of the department administrating the region within which the facility is located no later than 60 days after the first day of January following each year of operation or portion thereof.

ECL § 71-4003. General civil penalty

Except as otherwise specifically provided elsewhere in this chapter, a person who violates any provision of this chapter, or any rule, regulation or order promulgated pursuant thereto, or the terms or conditions of any permit issued thereunder, shall be liable to a civil penalty of not more than one thousand dollars, and an

additional civil penalty of not more than one thousand dollars for each day during which each such violation continues. Any civil penalty provided for by this chapter may be assessed following a hearing or opportunity to be heard.

Findings of Fact

1. J & M Used Auto Parts, Inc. (“respondent”) owns and/or operates a vehicle dismantling facility located at 5201 Farragut Road, Brooklyn, New York (“facility”). See Hearing Exhibit (“Ex.”) 1.
2. Although required to file an annual report pursuant to ECL § 27-2303(1), respondent failed to file such report for the 2014 reporting year. See Ex. 1; Affidavit of Richard Clarkson, sworn to November 9, 2015 (“Clarkson Aff.”), at ¶¶ 3-6.
3. On or about September 9, 2015, Department staff sent to respondent a notice of violation (“NOV”), attaching a “blank” annual report form pre-populated by facility-specific information. Respondent failed to respond to the NOV. See Ex. 1, Clarkson Aff., at ¶ 5; see also Ex. 2.
4. On December 11, 2015, Elissa Armater, a Legal Assistant in the Department’s Office of General Counsel, sent a copy of the notice of hearing and complaint to Stephanie Salvemini, an Engineering Geologist 1 in the Department’s Region 2 Division of Materials Management, so that the documents could be personally served on respondent. See Ex. 8, Affidavit of Service of Elissa Armater, sworn to March 30, 2016.
5. On December 15, 2015, Stephanie Salvemini traveled to the facility and personally served the notice of hearing and complaint on respondent. See Testimony of Stephanie Salvemini, Hearing Record.
6. The notice of hearing advised respondent that (i) respondent was required to file an answer to the complaint no later than December 18, 2015; (ii) a hearing would be held on January 19, 2016 at the Department’s Region 2 offices; and (iii) failure to file a timely answer or failure to appear at the hearing would constitute a default, and waiver of respondent’s right to a hearing. See Ex. 1.
7. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled for January 19, 2016. See Hearing Record.
8. On March 29, 2016, Department staff sent to respondent by first class mail a letter informing respondent that the adjudicatory hearing in this matter was rescheduled for April 8, 2016, at 11:00 a.m. at the Department’s Region 2 offices. See Exs. 6 (letter) and 7 (Affidavit of Service of Elissa Armater, sworn to March 30, 2016).

9. Respondent failed to appear for the adjudicatory hearing rescheduled for April 8, 2016. See Hearing Record.

Discussion

A respondent served with a notice of hearing and complaint must serve an answer within 20 days of receiving the 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 hearing is mandatory, and "failure to appear at the hearing ... constitutes a default and waiver of respondent's right to a hearing." 6 NYCRR § 622.15(a).

Upon a respondent's failure to answer a complaint or attend a pre-hearing conference, Department staff may make a motion to an administrative law judge ("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).

The record in this matter 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 failed to appear for a hearing originally scheduled for January 19, 2016, as set forth in the notice of hearing, and failed to appear for the hearing rescheduled for April 8, 2016, notwithstanding having been provided notice of the rescheduling; and (iii) staff has submitted a proposed order. See Findings of Fact 4, 5, 8, and 9. Staff has therefore satisfied the requirements of 6 NYCRR § 622.15(b).

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.

Department staff's submissions provide proof of the facts sufficient to support the cause of action asserted in the complaint. The record shows that respondent failed to submit an annual report for the year 2014, in violation of ECL § 27-2303(1) and its implementing regulation, 6 NYCRR § 360-12.1(c). Staff is thus entitled to a default judgment.

As set forth above, ECL § 71-4003 authorizes a civil penalty of \$1,000 for each violation, and an additional \$1,000 for each day the violation continues. Staff calculated the maximum statutory penalty to be \$252,000. See Ex. 3. Department Staff's request for a civil penalty of \$5,000 is authorized and appropriate on this record.

Recommendation

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

1. Granting Department staff's motion for default, finding respondent J & M Used Auto Parts, Inc. in default pursuant to the provisions of 6 NYCRR 622.15;
2. Finding that respondent J & M Used Auto Parts, Inc. violated ECL § 27-2303(1) and 6 NYCRR § 360-12.1(c) by failing to submit an annual report for the year 2014 for an auto dismantling facility it owns and/or operates located at 5201 Farragut Road, Brooklyn, New York;
3. Directing respondent J & M Used Auto Parts, Inc. to submit, within fifteen (15) days of service of the order on respondent, the annual report for 2014 to the Department for the above facility;
4. Directing respondent to pay, within fifteen (15) days of service of the order on respondent, a civil penalty in the amount of five thousand dollars (\$5,000); and
5. Directing such other and further relief as he may deem just and proper.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
June 9, 2016

EXHIBIT CHART

Matter of J & M Used Auto Parts, Inc. – DEC Case No. 2-20151026-537

April 8, 2016 – Region 2

Edirol File No. 020916093046

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter, Notice of Hearing, Complaint, Statement of Readiness, and Affidavit, all dated November 9, 2015	✓	✓	Department Staff	
2	Notice of Violation letter dated September 9, 2015	✓	✓	Department Staff	
3	Penalty Calculation Sheet	✓	✓	Department Staff	
4	Commissioner's Order in <u>Matter of J & M Used Auto Parts, Inc.</u> , August 27, 2013	✓	✓	Department Staff	
5	Letter from J. Andaloro, Esq. to J & M Used Auto Parts, Inc. regarding rescheduling of hearing from January 19, 2016 to March 24, 2016	✓	✓	Department Staff	
6	Letter from J. Andaloro, Esq. to J & M Used Auto Parts, Inc. regarding rescheduling of hearing for April 8, 2016	✓	✓	Department Staff	
7	Affidavit of Service of Elissa Armater sworn to March 30, 2016	✓	✓	Department Staff	
8	Affidavit of Service of Elissa Armater sworn to March 30, 2016	✓	✓	Department Staff	

