

**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 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), and SPDES Permit # NYR00E653,

ORDER

-by-

DEC Case No.
CO 1-20160831-01

R. P. M. MARINE, INC.,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (DEC or Department) that respondent R. P. M. Marine, Inc. violated ECL article 17, 6 NYCRR 750-2.5 and the provisions of the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, ID No. GP-0-12-001 (MSGP), when respondent failed to file by February 28, 2016 an annual discharge monitoring report (DMR) for calendar year 2015.

Respondent is the “owner/operator” of a marina known as “RPM Marine Inc.,” located at 711 West Montauk Highway, Lindenhurst, New York (see Hearing Exhibit [Ex.] B at pages 1 and 2 of 10). Respondent repairs, maintains and stores marine vessels at the marina. On March 18, 2013, respondent signed a notice of intent (NOI) to be covered under the MSGP (see Ex. B). Following receipt of the NOI, the Department granted coverage to respondent under ID No. NYR00E653 (see id. at page 4 of 10).

Department staff served on respondent by certified mail a cover letter, notice of hearing and complaint, all dated December 13, 2016, in which Department staff alleged that respondent failed to timely submit a required DMR for the facility. Respondent received Department staff’s papers on December 17, 2016. Respondent failed to file an answer to the complaint, and failed to appear at the adjudicatory hearing held on March 30, 2017 (see Hearing Report at 3 [Finding of Fact No. 13]).

Department staff’s complaint seeks an order (i) holding that respondent violated ECL article 17, 6 NYCRR 750-2.5 and the MSGP by failing to submit the 2015 MSGP annual DMR; (ii) directing respondent to submit the DMR; and (iii) imposing on respondent a civil penalty in the amount of \$6,000 (see Hearing Report at 1).

On March 30, 2017, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of the DEC'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.

As a consequence of respondent'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, 6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. At the hearing on March 30, 2017, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see id.). Accordingly, staff is entitled to a judgment based on record evidence.

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff, in its papers, sought a civil penalty of six thousand dollars (\$6,000). The ALJ stated that Department staff failed to demonstrate how it arrived at its base penalty calculation before applying the multiplier provided in the Division of Water Technical and Operational Guidance Series (TOGS) 1.4.2 (Compliance and Enforcement of SPDES Permits [June 24, 2010]) (Hearing Report at 5). The ALJ applied the base penalty provided in the TOGS and calculated a total penalty of \$3,000 (see id.). I concur with the ALJ's determination that staff's method of calculating the base penalty was unclear. In similar future proceedings, staff should provide further clarification in its base penalty determination.

After the hearing and before the record was closed, Department staff moved to amend its complaint to reduce the requested penalty from six thousand dollars (\$6,000) to one thousand five hundred dollars (\$1,500), payable in eight equal quarterly installments of one hundred eighty-seven and fifty cents (\$187.50). Staff based the requested reduction on staff's analysis of respondent's financial circumstances that was provided subsequent to the hearing in this matter.

I concur with the recommendation to reduce the civil penalty. Generally, a civil penalty assessed in a Commissioner's order is to be paid on a specified date in its entirety. Partial payments that extend over a period of time are not preferred. Based on staff's request for a periodic payment period based on its evaluation of respondent's financial circumstances, is acceptable under the circumstances of this matter. I have set forth the schedule for installment payments in paragraph IV of this order.

In addition, Department staff's request that respondent be directed to submit a DMR for calendar year 2015 is warranted and appropriate. I direct that respondent submit the DMR for calendar year 2015 to the Department within fifteen (15) days of the service of this order upon it, as requested by staff in its proposed order (see Ex. G).¹

¹ Staff has requested that notification be made to respondent in this order that the civil penalty is a debt that may be referred to the New York State Attorney General or to the New York State Department of Taxation and Finance for collection of the entire amount owed, in the event of default. Such a notification is more appropriately addressed in the body of the transmittal letter from the Chief Administrative Law Judge of the DEC's Office of Hearings and Mediation Services that accompanies service of this order on respondent (see Hearing Report at 5).

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 R. P. M. Marine, Inc. waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent R. P. M. Marine, Inc. violated 6 NYCRR 750-2.5(a)(1) and 750-2.5(e), and the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, ID No. GP-0-12-001 (MSGP), when respondent failed to file an annual discharge monitoring report (DMR) for calendar year 2015 by February 28, 2016 for the facility with SPDES MSGP ID No. NYR00E653.
- III. Within fifteen (15) days of the service of this order upon respondent R. P. M. Marine, Inc., respondent shall submit to the Department the annual DMR for calendar year 2015.
- IV. Respondent R. P. M. Marine, Inc. is assessed a civil penalty in the amount of one thousand five hundred dollars (\$1,500), which shall be payable to the Department in eight payments of one hundred eighty-seven dollars and fifty cents (\$187.50). Respondent shall pay each installment of one hundred eighty-seven dollars and fifty cents (\$187.50) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The installments of one hundred eighty-seven dollars and fifty cents (\$187.50) shall be due on the following dates:

July 14, 2017,
September 15, 2017,
December 15, 2017,
March 15, 2018,
June 15, 2018,
September 14, 2018,
December 14, 2018, and
March 15, 2019.

V. The annual DMR for calendar year 2015 and the penalty payments shall be sent to the following address:

Carol Conyers, Esq.
Office of General Counsel
NYS Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500.

VI. Any questions or other correspondence regarding this order shall also be addressed to Carol Conyers, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this order shall bind respondent R. P. M. Marine, 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: June 21, 2017
Albany, New York

**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 #NYR00E653

by

R. P. M. MARINE, INC.,

Respondent.

HEARING REPORT

DEC Case No.
CO 1-20160831-01

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent R. P. M. Marine, Inc.¹ (respondent) with a notice of hearing and complaint dated December 13, 2016, alleging a violation of 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-0-12-001)(hereinafter MSGP) for failing to file a complete annual discharge monitoring report (DMR) for the 2015 calendar year for respondent's facility located at 711 West Montauk Highway, Lindenhurst, 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 2015 DMR; (3) assessing a civil penalty in the amount of six thousand dollars (\$6,000); and (4) granting such other relief as the Commissioner may deem appropriate.

Service of the notice of hearing and complaint was made by certified mail, return receipt requested, and was received by respondent on December 17, 2016 (see Staff Exhibit E). Respondent did not answer the complaint. The matter was noticed for hearing on February 28, 2017. Before the hearing date, Department staff requested the matter be adjourned for thirty days, which was granted by the Office of Hearings and Mediation Services (OHMS). OHMS served a notice of hearing dated February 28, 2017 on respondent by first class mail advising respondent that the hearing in this matter would be convened on March 30, 2017 at 10:00 a.m. At 10:16 a.m. on March 30, 2017, the adjudicatory hearing was convened before the undersigned administrative law judge (ALJ) by videoconference. Department staff was present at the Department's Region 1 office located at 50 Circle Road, Stony Brook, New York, the noticed

¹ Department staff's papers are captioned and pleaded against "RPM Marine Inc". As demonstrated by Staff Exhibit I, the legal name of the respondent is "R. P. M. Marine, Inc." Accordingly, I sua sponte amend the caption and references to reflect respondent's correct corporate name.

hearing location, in room B-008. The undersigned ALJ presided from room 1120 of the Department's Central Office located at 625 Broadway, Albany, New York.

Department staff was represented by Susan H. Schindler, 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. I reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b).

Department staff called one witness, Ryan Porciello, Environmental Program Specialist in the Department's Division of Water, Region 1. In all, nine (9) exhibits were received in evidence.

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 annual DMRs to the Department by February 28 of the year following the reporting period (see MSGP Part IV, C and D, at 55 and 57).

Findings of Fact

1. Respondent R. P. M. Marine, Inc. applied for coverage under the SPDES MSGP in a notice of intent signed on March 18, 2013. Department staff assigned SPDES Permit ID No. NYR00E653 to respondent's permit. See Testimony of Ryan Porciello; Staff Exhibit B, Notice of Intent.
2. Respondent R. P. M. Marine, Inc. is the owner/operator of a facility called "RPM Marine Inc," a marina conducting repair, maintenance and storage of marine vessels, which has a street address of 711 West Montauk Highway, Lindenhurst, NY 11757. See Testimony of Ryan Porciello; Staff Exhibit B, Notice of Intent.
3. Respondent's marina is covered under Sector Q of the MSGP. See Testimony of Ryan Porciello; Staff Exhibit B, Notice of Intent at 7.
4. Respondent's coverage under the MSGP was effective June 12, 2013. See Testimony of

Ryan Porciello; Staff Exhibit B, MSGP Data Entry Supplement at 1.

5. Pursuant to the terms of the MSGP, respondent was required to file the 2015 annual DMR by February 28, 2016. See Testimony of Ryan Porciello; Staff Exhibit A at 55 and 57.
6. Respondent failed to timely file a DMR for the 2015 calendar year, and Department staff mailed a notice of violation dated April 26, 2016 to respondent reminding respondent to submit the DMR. See Testimony of Ryan Porciello; Staff Exhibit C.
7. Ryan Porciello is an employee of the Department and is an Environmental Program Specialist in the Department's Division of Water, Region 1. Mr. Porciello'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 Testimony of Ryan Porciello.
8. Ryan Porciello searched the Department's DMR records for all DMRs filed by respondent. See Testimony of Ryan Porciello.
9. As a result of his search, Ryan Porciello determined that respondent had not filed the DMR for the 2015 calendar year. Respondent's 2015 DMR was still outstanding at the time of the hearing. See Testimony of Ryan Porciello; see also Staff Exhibit D, Affidavit of Meredith U. Streeter, P.E., ¶¶ 3-6.
10. Respondent had filed DMRs for previous years. See Testimony of Ryan Porciello.
11. Respondent is an active domestic business corporation in the State of New York. See Staff Exhibits H and I.
12. Service of the cover letter, notice of hearing, and complaint, statement of readiness all dated December 13, 2016 together with the affidavit of Meredith U. Streeter, P.E. sworn to December 13, 2016 was made by certified mail and was received by respondent on December 17, 2016. See Testimony of Ryan Porciello; Staff Exhibit E.
13. Respondent failed to file an answer to the complaint and failed to appear at the adjudicatory hearing scheduled in the matter on March 30, 2017, 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.

In this case, Department staff presents proof sufficient to demonstrate that respondent failed to submit a DMR for the 2015 calendar year for respondent’s marina located at 711 West Montauk Highway, Lindenhurst, New York by February 28, 2016, the date that the 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 DMR for 2015.

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 March 30, 2017, as directed in the notice of hearing. Department staff provided its proposed order at the March 30, 2017 hearing. 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 the DMR for the 2015 calendar year, in violation of 6 NYCRR 750-2.5 and the MSGP. The Department is entitled to judgment upon the facts proven.

Department staff orally moved to amend the complaint, but later withdrew that motion. During the hearing, I requested that Department staff provide sufficient proof that respondent was incorporated in the State of New York, and staff presented Exhibit H, a letter from respondent on respondent’s letterhead, which was received into evidence. I kept the record open at the close of the hearing to allow staff to submit additional proof regarding respondent’s incorporation. By letter dated April 7, 2017, Department staff submitted Exhibit I in response to my request, which was received into evidence.

Penalty

The complaint requests the Commissioner impose a payable civil penalty of six thousand dollars (\$6,000). At the hearing, staff's witness, Ryan Porciello, 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.

Mr. Porciello further testified that he had prepared a penalty calculation sheet (Staff Exhibit F) explaining Department staff's rationale for the requested penalty. Mr. Porciello 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 the DMR is \$2,000. Mr. Porciello then applied the multiplier (a calculated adjustment factor that takes respondent's culpability, cooperation, history of non-compliance and other factors into consideration) of 1.5 to that amount to arrive at a settlement penalty of \$3,000. Staff then doubled the penalty because the case went to hearing, resulting in Department staff's requested penalty of \$6,000. TOGS 1.4.2 provides a base penalty of \$1,000 for failing to submit a DMR. Staff failed to demonstrate how staff arrived at a base penalty of \$2,000. Applying a base penalty of \$1,000 and applying staff's multipliers results in a total penalty of \$3,000.

In Department staff's April 7, 2017 letter, staff moved to amend its complaint to reduce the civil penalty from six thousand dollars (\$6,000) to one thousand five hundred dollars (\$1,500) based on previously submitted financial documentation from respondent demonstrating economic hardship. Department staff requests that the penalty be paid in eight equal installments of one hundred eighty-seven and 50/100 dollars (\$187.50) with the first payment submitted to the Department no later than May 15, 2017 and the remaining payments submitted in quarterly installments, provided the Commissioner's order include "the standard notification that the penalty is a debt that may be referred to the New York State Attorney General or the New York State Department of Taxation and Finance for collection of the entire amount owed, in the event of default."

Staff bases its motion to reduce the penalty on financial documentation previously submitted by respondent, and reviewed by the staff economist who, after the hearing, determined that the respondent demonstrated economic hardship. As there is no prejudice to respondent in amending the complaint to reduce the penalty requested, I grant staff's motion. A penalty of \$1,500 is supported and appropriate. Staff's request that the penalty be paid in quarterly payments over two years is also supported and appropriate under the circumstances.

I cannot recommend, however, that the Commissioner's order include notification that the penalty is a debt that may be referred to the New York State Attorney General or the New York State Department of Taxation and Finance for collection, as requested by staff. As I have previously noted, that information is more appropriately addressed in the body of the transmittal letter serving the order on respondent, not in a Commissioner's order (see Matter of Waterbury Square, Inc., Summary Report at 6-7, fn 2, adopted by Order of the Commissioner, April 4, 2017).

Remedial Action

In addition to the above, Department staff requests that the Commissioner direct respondent to file the 2015 annual DMR. 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 R. P. M. Marine, 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 R. P. M. Marine, 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-0-12-001;
3. Directing respondent R. P. M. Marine, Inc. to submit a 2015 annual DMR;
4. Directing respondent R. P. M. Marine, Inc. to pay a civil penalty of one thousand five hundred dollars (\$1,500) in eight quarterly payments of one hundred eighty-seven and 50/100 (\$187.50); and
5. Directing such other relief as the Commissioner may deem appropriate.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
May 2, 2017

EXHIBIT CHART – DMR EXPEDITED PROCEEDINGS

Matter of R. P. M. Marine Inc.
 711 West Montauk Highway, Lindenhurst, New York 11757 – DEC Case No. CO 1-20160831-01
 March 30, 2017 – Region 1 and Central Office
 Edrol File No. 030907070817

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
A	State Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-12-001)(October 1, 2012)	✓	✓	Department Staff	
B	Notice of Intent from R. P. M. Marine Inc.	✓	✓	Department Staff	
C	Notice of Violation dated April 26, 2016	✓	✓	Department Staff	
D	Cover Letter from Carol Conyers, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, all dated December 13, 2016 and Affidavit of Meredith U. Streeter, sworn to December 13, 2016	✓	✓	Department Staff	
E	Affidavit of Service of Lisa M. Kranick, sworn to February 3, 2017 with USPS delivery confirmation and tracking attached.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
F	Penalty Calculation for Failure to Submit DMRs for NYR00E63 – R. P. M. Marine Inc.	✓	✓	Department Staff	
G	Proposed Order	✓	✓	Department Staff	
H	Correspondence from R. P. M. Marine, Inc. to Carol Conyers, Esq., dated March 28, 2016	✓	✓	Department Staff	
I	NYS Department of State Entity Information for R. P. M. Marine, Inc., current through April 3, 2017.	✓	✓	Department Staff	