

**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 #NYR00F193

-by-

ORDER

DEC Case No.
CO 3-20200115-30

BROOKFIELD RESOURCE MANAGEMENT INC.

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) alleges that respondent Brookfield Resource Management Inc. violated 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) (#NYR00F193) (hereinafter MSGP) by failing to comply with various filing requirements. Specifically staff alleges that respondent either failed to timely submit or incompletely submitted the following reports for its facility located at 2105 & 2109 Route 9A, Albany Post Rd., Montrose, New York:

- an Annual Certification Report (ACR) for the 2019 and 2020 reporting years; and
- semiannual Discharge Monitoring Reports (DMRs) for the January 1, 2019 through June 30, 2019, July 1, 2019 through December 31, 2019, January 1, 2020 through June 30, 2020, and July 1, 2020 through December 31, 2020 reporting periods, for respondent's facility.

Staff's complaint seeks an order of the Commissioner:

- finding respondent in violation of 6 NYCRR 750-2.5 and the MSGP;
- directing respondent to submit the overdue ACRs and DMRs;
- assessing a civil penalty in the amount of fifteen thousand and twenty dollars (\$15,020); and
- granting such other relief as the Commissioner may deem appropriate.

In January 2022, an adjudicatory hearing was convened before Administrative Law Judge (ALJ) Molly McBride of the Department's Office of Hearings and Mediation Services. ALJ McBride 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 Brookfield Resource Management Inc. failed to file an answer to the complaint served by Department staff in this matter and failed to appear at the adjudicatory hearing (*see* Hearing Report at 4 [Finding of Fact No. 16]).

As a consequence of respondent Brookfield Resource Management 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 4-5, 6). At the adjudicatory hearing, Department staff presented proof of facts sufficient to enable me to determine that staff has a viable claim (*see* Hearing Report, at 5). I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15.

The proof adduced at the hearing demonstrates by a preponderance of the evidence that respondent failed to file an ACR for the 2019 and 2020 reporting years, and failed to submit semiannual DMRs for the January 1, 2019 through June 30, 2019, 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 (*see* Hearing Report at 3 [Findings of Fact Nos. 10 and 11]). Accordingly, Department staff is entitled to judgment upon the facts proven.

ECL 71-1929 authorizes a penalty of up to \$37,500 for the violations at issue in this proceeding. In its complaint, Department staff seeks a civil penalty in the amount of fifteen thousand and twenty dollars (\$15,020). The ALJ recommends that I impose a civil penalty of \$15,020 as requested by Department staff. Based on the record before me, including consideration of staff's penalty calculation (*see* Hearing Exhibit No. 9), the penalty requested is authorized and appropriate.

I also direct that respondent file the overdue reports within thirty (30) days of the service of this order upon it.

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 Brookfield Resource Management Inc. waived its right to be heard at the hearing.

- II. Based upon evidence in the record, respondent Brookfield Resource Management Inc., violated 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) (#NYR00F193) by failing to file an Annual Certification Report for the 2019 and 2020 reporting years, and by failing to submit semiannual Discharge Monitoring Reports for the January 1, 2019 through June 30, 2019, 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 2105 & 2109 Route 9A, Albany Post Rd., Montrose, New York.
- III. Within thirty (30) days of the service of this order upon respondent Brookfield Resource Management Inc., respondent shall submit to the Department:
- A. complete Annual Certification Reports for the 2019 and 2020 reporting years; and
 - B. complete semiannual Discharge Monitoring Reports for the following reporting periods:
 - 1. January 1 through June 30, 2019;
 - 2. July 1 through December 31, 2019;
 - 3. January 1 through June 30, 2020; and
 - 4. July 1 through December 31, 2020.
- IV. Respondent Brookfield Resource Management Inc. is hereby assessed a civil penalty in the amount of fifteen thousand and twenty dollars (\$15,020). 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 reports referenced in paragraph III of this order and the penalty payment referenced in paragraph IV shall be sent to the following address:

Dena Putnick, Esq.
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500.

**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 #NYR00F193

by

Brookfield Resource Management Inc.

Respondent.

HEARING REPORT

DEC Case No.

CO 3-20200115-30

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent Brookfield Resource Management Inc. (respondent) with a notice of hearing and complaint dated September 28, 2021, 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 submit an Annual Certification Report (ACR) for the 2019 and 2020 reporting years, and for failing to submit semiannual Discharge Monitoring Report(s) (DMR or DMRs) for the January 1 through June 30, 2019, 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 2105 & 2109 Rt.9A, Albany Post Rd Montrose, 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 ACRs and semiannual DMRs; (3) assessing a civil penalty in the amount of fifteen thousand and twenty dollars (\$15,020); 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 October 6, 2021 (*see* Staff Exhibit 1). Respondent did not answer the complaint. The matter was noticed for hearing on January 14, 2022. By notice of hearing dated December 14, 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 Office of Hearings and Mediation Services (OHMS) if the parties experienced difficulty joining the virtual hearing. At 10:05 a.m. on January 14, 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, nine (9) 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). Part VI. A.1 of the MSGP requires permittees submit to the Department an Annual Certification Report ("ACR") covering January 1 to December 31 on an annual basis by January 28 of the following calendar year. The MSGP requires permittees submit their ACRs for the 2019 and 2020 calendar years by mailing a paper form or for by using the Department's online ACR.

Pursuant to ECL § 71-1929, any person violating Article 17, Titles 1-11, or the applicable regulations, or any permit issued pursuant to those statutes or regulations, is subject to a civil penalty not to exceed thirty-seven thousand five hundred dollars (\$37,500) per day, for each violation, as well as injunctive relief.

Findings of Fact

1. Respondent Brookfield Resource Management Inc. applied for coverage under the SPDES MSGP in a notice of intent on March 19, 2018. Department staff assigned SPDES Permit ID No. NYR00F193 to respondent's permit. (*See* Testimony of Erik Schmitt [Schmitt Testimony]; Staff Exhibit 2, Notice of Intent.)
2. Respondent Brookfield Resource Management Inc. ("Respondent") owns and/or

operates a facility located at 2105 & 2109 Rt. 9A, Albany Post Road Montrose, NY, which discharges stormwater associated with industrial activity from one or more point sources. (*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 semiannual 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. Further, pursuant to the terms of the MSGP, respondent was required to file an Annual Certification Report for the January 1 through December 31 reporting period within 28 days after the end of the 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 and the ACRs are filed each calendar year by mailing a paper form or for by using the Department's online ACR. (*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 the Chief of SPDES Compliance in the DEC Division of Water and is an Environmental Engineer. 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 semiannual DMRs for the January 1 through June 30, 2019, 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. As a result of his search, Mr. Schmitt determined that respondent had not filed the Annual Certification Report (ACR) for the 2019 and 2020 reporting years. (*See Schmitt Testimony.*)
12. After respondent failed to timely file complete semiannual DMRs and the 2019 and 2020 ACRs, Department staff mailed notices of violation to respondent reminding respondent to submit the ACR and DMR. (*See Schmitt Testimony; Staff Exhibits 3-8.*)

13. Respondent did not respond to staff's notices of violation or submit the DMRs or ACRs. (Schmitt Testimony.)
14. Service of the cover letter, notice of hearing, and complaint, statement of readiness all dated September 28, 2021 was made by certified mail and was received by respondent on October 6, 2021. (See Staff Exhibit 1.)
15. A notice of hearing dated December 14, 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 14, 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 semiannual DMRs for the January 1 through June 30, 2019, July 1 through December 31, 2019, January 1 through June 30, 2020, and July 1 through December 31, 2020 reporting periods, and the Annual Certification Reports for 2019 and 2020 for respondent's facility located at 2105 and 2109 Rt. 9A, Albany Post Road Montrose, New York within twenty-eight days of the end of each reporting period, the date that each semiannual DMR and the 2019 & 2020 ACR were due to 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 missing semiannual DMRs for 2019 and 2020 or the ACR for 2019 & 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 14, 2022, 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 9). 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 semiannual DMRs for the January 1 through June 30, 2019, 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 and, failed to file the 2019 and 2020 Annual Certification Report 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 fifteen thousand and twenty dollars (\$15,020). 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.

Mr. Schmitt further testified that he had prepared a penalty calculation sheet (Staff Exhibit 9) 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 and 2020 semiannual DMRs and the 2019 and 2020 ACR is \$1,140 for each missing filing. 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 and 2020 violation.

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.

In light of the foregoing, I find that the fifteen thousand and twenty dollar (\$15,020) 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 ACRs and the 2019 and 2020 semiannual 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 Brookfield Resource Management 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 Brookfield Resource Management 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 Brookfield Resource Management Inc to submit a complete:
 - a. semiannual DMR for the January 1 through June 30, 2019 reporting period;
 - b. semiannual DMR for the July 1 through December 31, 2019, reporting period;
 - c. semiannual DMR for the January 1 through June 30, 2020, reporting period;

- d. semiannual DMR for the July 1 through December 31, 2020, reporting period;
 - e. Annual Certification Reports for 2019 and 2020;
4. Directing respondent Brookfield Resource Management Inc. to pay a civil penalty of fifteen thousand and twenty dollars (\$15,020); and
5. Directing such other relief as the Commissioner may deem appropriate.

_____/S/
Molly McBride
Administrative Law Judge

Dated: Albany, New York
April 26, 2022

EXHIBIT CHART – DMR EXPEDITED PROCEEDINGS

Matter of Brookfield Resource Management Inc.
 2105 & 2109 Rt. 9A, Albany Post Road, Montrose, New York – DEC Case No. CO 3-20200115-30
 January 14, 2022 – Region 3 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 Brookfield Resource Management Inc.	✓	✓	Department Staff	
3	Notice of Violation, dated September 12, 2019	✓	✓	Department Staff	
4	Notice of Violation, dated July 30, 2020	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
5	Notice of Violation, dated August 3, 2020	✓	✓	Department Staff	
6	Notice of Violation, dated November 11, 2020	✓	✓	Department Staff	
7	Notice of Violation, dated April 1, 2021	✓	✓	Department Staff	
8	Notice of Violation, dated April 26, 2021	✓	✓	Department Staff	
9	Penalty Calculation for Failure to Submit DMRs for NY – Brookfield Resource Management Inc.	✓	✓	Department Staff	
	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 14, 2021				Hearing Record