

**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 Permit ID No. NY 0068080,

ORDER

DEC Case No.
R1-20151104-01

-by-

FEDERAL REALTY INVESTMENT TRUST,

Respondent.

Respondent Federal Realty Investment Trust (“respondent”) is the permittee on the State Pollutant Discharge Elimination System (“SPDES”) permit ID No. NY 0068080 (the “Permit”) for a facility known as the Melville Mall Sewage Treatment Plant, located in Huntington, Suffolk County, New York. The facility discharges to the waters of the State of New York pursuant to the terms of the Permit.¹

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (“Department”) alleged that respondent violated: (i) article 17 of the New York State Environmental Conservation Law (“ECL”); (ii) section 750-2.5(a)(1) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”); and (iii) the terms of the Permit.

Department staff alleged violations based upon deficiencies in the Discharge Monitoring Report (“DMR”) for December 2014 and the DMR for June 2015 that respondent was required to submit to the Department. Specifically, Department staff identified missing or incomplete information for groundwater sampling location GMW-3 with respect to the December 2014 DMR (see Hearing Exhibit B [notice of violation dated March 5, 2015]) and missing or incomplete information for groundwater sampling locations GMW-1, GMW-2 and GMW-3 with respect to the June 2015 DMR (see Hearing Exhibit C [notice of violation dated September 1, 2015]). According to the terms of the Permit, respondent is required to take samples and measurements at GMW-1, GMW-2 and GMW-3 (see Hearing Exhibit A, Permit at 5-6). Respondent did not respond to either notice of violation.

¹ Department staff, in its papers, states that respondent “owns and/or operates” the facility (see Hearing Exhibit D [Compliant, ¶ 3]). From this phrasing, it is unclear if respondent is the owner, the operator or both the owner and operator of the facility. In future proceedings, staff should indicate clearly whether the named respondent is the owner, the operator or both.

Department staff served respondent with a notice of hearing and complaint dated March 16, 2016. Service was made via certified mail, and was received by respondent on March 21, 2016. Service of process was accomplished in accordance with 6 NYCRR 622.3. Pursuant to 6 NYCRR 622.4(a), respondent was required to file an answer within twenty days after receipt of the notice of hearing and complaint. Respondent failed to answer the complaint.

The notice of hearing informed respondent that an adjudicatory hearing would be held on May 19, 2016. Respondent did not appear at the hearing.

The matter was assigned to Administrative Law Judge (“ALJ”) Maria E. Villa, who prepared the attached hearing report. I hereby adopt the ALJ’s hearing report as my decision in this matter, subject to my comments below.

Department staff seeks an order finding respondent liable for the violations and imposing a civil penalty in the amount of six thousand dollars (\$6,000). Section 71-1929 of the ECL provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of the provisions of article 17 and the regulations promulgated thereto, which includes the regulation at issue here, and any permit issued thereunder. Department staff also requests that respondent be directed to submit a complete DMR for December 2014 and a complete DMR for June 2015.

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, and I concur that Department 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. Department Staff is therefore entitled to judgment on the merits.

Based upon Department staff’s submissions, I conclude that the civil penalty and the remedial measure are 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 Department staff’s complaint or appear in this proceeding, respondent Federal Realty Investment Trust is found to be in default, to have admitted the factual allegations set forth in Department staff’s complaint, and to have waived its right to a hearing in this matter.
- II. Based upon record evidence, respondent Federal Realty Investment Trust is adjudged to have violated 6 NYCRR 750.2-5(a)(1), and SPDES permit ID No. NY 0068080, by failing to submit complete Discharge Monitoring Reports to the Department for the months of December 2014 and June 2015.
- III. Respondent Federal Realty Investment Trust is assessed a civil penalty in the amount of six thousand dollars (\$6,000). Within fifteen (15) days after service of this order

on respondent, payment shall be made in the form of a cashier's check, certified check or bank check payable to the order of the "New York State Department of Environmental Conservation" and delivered to the Department at the following address:

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

- IV. Within fifteen (15) days after the date of service of this order on respondent Federal Realty Investment Trust, respondent shall submit to Carol Conyers, Esq., at the address set forth in paragraph III of this order, a complete Discharge Monitoring Report for December 2014 and a complete Discharge Monitoring Report for June 2015 which addresses the deficiencies noted in the Department's March 5, 2015 and September 1, 2015 notices of violation, respectively.
- V. All communications between respondent and Department staff concerning this order shall be directed to Carol Conyers, Esq., at the address referenced in paragraph III of this order.
- VI. The provisions, terms and conditions of this order shall bind respondent Federal Realty Investment Trust 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
June 21, 2016

**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”) and Part 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”)

**HEARING
REPORT**

-by-

DEC Case No.
R1-20151104-01

FEDERAL REALTY INVESTMENT TRUST,

Respondent.

Procedural History

Respondent Federal Realty Investment Trust (“respondent”) was served with a notice of hearing and complaint dated March 16, 2016, alleging violations of Article 17 of the New York Environmental Conservation Law (“ECL”), Section 750-2.5 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 ID No. NY0068080 (the “Permit”). Respondent is the permittee named on the SPDES permit for the Melville Mall Sewage Treatment Plant, located in Huntington, Suffolk County, New York.¹ Department Staff’s complaint alleged that respondent failed to submit timely, complete discharge monitoring reports (“DMRs”) due in December 2014 and June 2015.

The complaint seeks an order of the Commissioner: (1) finding respondent in violation of Article 17 of the ECL, Section 750-2.5 of 6 NYCRR, and the Permit; (2) ordering respondent to submit DMRs for the December 2014 and June 2015 reporting periods; and (3) imposing a civil penalty of six thousand dollars (\$6,000).

The notice of hearing advised respondent that any answer to the complaint was due by May 16, 2016, and that respondent’s appearance was required at an adjudicatory hearing scheduled for 11:00 a.m. on Thursday, May 19, 2016 at the Department’s Region 1 offices at 50 Circle Road, Stony Brook, New York.

¹ The named respondent in Department Staff’s complaint is “Federal Realty Investment Trust.” Although the first page of the SPDES permit reflects the full name, the SPDES permit itself states that the permittee’s name is “Federal Investment Trust.” Both notices of violation were sent to “Federal Realty Investment Trust.” The same mailing address appears on the pleadings, the SPDES permit, and the notices of violation. Because the mailing addresses are consistent, this discrepancy is not prejudicial to respondent, and service was properly effected. See, e.g., Matter of G & J Ready Mix & Masonry Supply, Inc., Hearing Report, June 19, 2013, at 6 (June 19, 2013), adopted by id., Order of the Commissioner, at 2 (August 27, 2013).

Respondent failed to answer the complaint, and did not appear at the hearing, which took place as scheduled on May 19, 2016. Administrative Law Judge (“ALJ”) Maria E. Villa presided, and the Department was represented by Susan Schindler, Esq., Assistant Regional Attorney, Region 1. At the hearing, Department Staff moved for a default judgment pursuant to Section 622.15 of 6 NYCRR, and also elected to proceed with a hearing in respondent’s absence.

Department Staff called one witness, Wann-Jo Sun, an Environmental Engineer II in the Department’s Region 1 office Division of Water. Mr. Sun has a Ph D. in engineering, and is also a professional engineer licensed by the State of New York. Department Staff offered eight exhibits, A through H, all of which were received in evidence. A chart of those exhibits is attached to this report.

As set forth below, this report recommends that the Commissioner grant Department Staff’s motion for a default judgment.

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) 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.”

In accordance with Section 622.4(a) of 6 NYCRR, 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 action. As applicable herein, the Department's default procedures in an enforcement action, found at Section 622.15 of 6 NYCRR, provide that:

- (a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent’s right to a hearing. If any of these events occurs the department staff 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 or in writing and must contain:
 - (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
 - (2) proof of the respondent's failure to appear or failure to file a timely answer; and
 - (3) a proposed order.

As the Commissioner stated in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated 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 Matter of Queen City Recycle Center, Inc., the Commissioner stated that “consistent with the requirements applicable to default judgment motions under the CPLR, this decision and order directs that staff must submit proof of the facts constituting the claim charged.” Decision and Order dated December 12, 2013, at 3 (citations omitted). The Commissioner went on to direct that “[u]pon submission of the motion and supporting materials, the ALJ will review the record to determine whether staff’s papers have stated a claim, and that staff’s penalty request and remedial relief are supported.” Id. (citations omitted).

In this case, Department Staff provided proof at the hearing of those factual allegations, and established that Department Staff was entitled to the relief requested.

Findings of Fact

1. Respondent Federal Realty Investment Trust is the permittee named on SPDES permit ID No. NY0068080 for the Melville Mall Sewage Treatment Plant (“STP”), located in Huntington, Suffolk County, New York (Exhibit A).
2. Pursuant to the terms of the Permit, respondent is required to file DMRs monthly. Exhibit A, at 9. The reports are due no later than the 28th day of the month following each reporting period. Id. The permit also contains provisions that address groundwater monitoring well (“GMW”) reporting. The violations at issue in this proceeding relate to the GMW DMRs, which are required by the permit to be filed every three months. Exhibit A, at 5.
3. By letter dated March 5, 2015, Department Staff notified respondent that the DMR for GMW3, which was due for the period ending December 31, 2014, had not been received, or was incomplete. Exhibit B. Respondent was advised that, in order to resolve the violation without a financial penalty, respondent was required to complete the attachment to the notice of violation and return the attachment along with the required DMR within thirty days. Id. Respondent did not do so. Hearing Record; Exhibit D.
4. By letter dated September 1, 2015, Department Staff notified respondent that the DMRs for GMW1 and GMW2, as well as GMW3, which were due for the period ending June 30, 2015, had not been received, or were incomplete. Exhibit C. Respondent was advised that, in order to resolve the violation without a financial penalty, respondent was required to complete the attachment to the notice of violation and return the attachment along with the required DMRs within thirty days. Id. Respondent did not do so. Hearing Record; Exhibit D.
5. Service of the notice of hearing and complaint dated March 16, 2016 was made by certified mail and was received by respondent on March 21, 2016. Exhibits D, E, and F. The notice of hearing notified respondent that an answer to the complaint was due by May 16, 2016. Exhibits D and E. The notice of hearing also notified respondent that a

hearing was scheduled for May 19, 2016 at 11:00 a.m. at the Department's Region 1 offices located at 50 Circle Road, Stony Brook, New York. Exhibit D. Respondent failed to answer the complaint, and did not appear at the May 19, 2016 hearing. Hearing Record.

Discussion

The evidence adduced at hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to submit DMRs for the December 2014 and June 2015 reporting periods, in violation of Section 750-2.5(a)(1) of 6 NYCRR, and the express provisions of the Permit. The record shows that respondent was served the notice of hearing and complaint and failed to file an answer to the complaint and failed to appear at the adjudicatory hearing scheduled for May 19, 2016. Department Staff is entitled to a default judgment in this matter pursuant to the provisions of Section 622.15 of 6 NYCRR.

At the hearing, Department Staff noted that the penalty amount requested is consistent with the Department's prior practice, as well as the Department's penalty policies and applicable provisions of the ECL. Department Staff noted respondent's failure to cooperate with the Department's efforts to resolve this matter.

Section 71-1929 provides for a civil penalty of up to \$37,500 per day for each violation of the provisions of Article 17 of the ECL, and the regulations promulgated thereto. Department Staff requested a \$6,000 total penalty for the violations. Exhibits D and G. The base penalty calculated for the December 2014 violation was \$1,000. The base penalty calculated for the June 2015 violations was \$1,000. Based upon respondent's failure to cooperate and history of noncompliance, Department Staff applied a multiplier to arrive at a total penalty of \$6,000. Exhibit G.

In light of the statutory maximum, which would authorize a penalty of \$37,500 per day for each violation, the penalty requested is reasonable and consistent with the purposes and objectives of the Department's penalty policies (see Division of Water Technical and Operational Guidance ("TOGs") 1.4.2 (Compliance and Enforcement of SPDES Permits (June 24, 2010))). Department Staff also requested that the Commissioner order respondent to submit DMRs for December 2014 and June 2015. Exhibit D (complaint wherefore clause, ¶ II).

Recommendations

Based upon the foregoing, the Commissioner should issue an order:

1. Granting Department Staff's motion for default, and finding respondent in default pursuant to the provisions of Section 622.15 of 6 NYCRR;
2. Holding respondent in violation of Article 17 of the ECL, Section 750-2.5(a)(1) of 6 NYCRR, and the provisions of SPDES permit ID No. NY0068080;
3. Directing respondent to submit DMRs for the December, 2014 (GMW3) and June, 2015 reporting periods (GMW1, GMW2, and GMW3); and

4. Directing respondent to pay a civil penalty of six thousand dollars (\$6,000).

/s/

Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
May 26, 2016

EXHIBIT CHART
Matter of Federal Realty Investment Trust
 May 19, 2016
 Edrol No. 021027072700

Exhibit	Description	Marked for Identification	Received
A	SPDES Permit ID No. NY 0068080 with renewal letter	✓	✓
B	March 5, 2015 Notice of Violation	✓	✓
C	September 1, 2015 Notice of Violation	✓	✓
D	March 16, 2016 notice of hearing and complaint with statement of readiness, Affidavit of Meredith U. Streeter, sworn to March 15, 2016, and proposed order on consent	✓	✓
E	March 16, 2016 complaint cover letter	✓	✓
F	Affidavit of service of Elissa Armater, sworn to April 26, 2016, with attached U.S. Post Office notice of delivery on March 21, 2016	✓	✓
G	Department Staff's Penalty Calculation Sheet	✓	✓
H	Proposed Order	✓	✓