

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

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In the Matter of the Alleged Violations  
of the Environmental Conservation Law  
(ECL) Article 24 and Part 663 of Title 6  
of the Official Compilation of Codes,  
Rules and Regulations of the State of  
New York (6 NYCRR),

**Ruling**

DEC File No.  
R8-2016-0503-40

- by -

**Huron Enterprises LLC,  
Waffler Farms, Inc., and  
Paul Waffler,**

Respondents.

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**PROCEEDINGS**

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing, pre-hearing conference, and complaint as well as a complaint, dated September 19, 2016, upon respondents Huron Enterprises, LLC, Waffler Nursery and Orchard, and Paul Waffler by certified mail return receipt requested.<sup>1</sup> Respondents received the pleadings on September 21, 2016. (See Tinsley Affirmation, Exhibits 1 & 2).

The notice instructed respondents that written answers must be filed within twenty days of respondents' receipt of the complaint. No answer has been received from any of the respondents (see Tinsley Affirmation ¶6). The notice also set a pre-hearing conference for October 25, 2016 which Paul Waffler attended on behalf of himself, individually (see Tinsley Affirmation ¶5).

In a letter dated March 9, 2017, Department staff requested permission to amend its notice of hearing and complaint (see Tinsley Affirmation, Exhibit 3). This request was sent both to respondents named in the original complaint as well as those

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<sup>1</sup> As explained below, the complaint has been amended to alter the named respondents and correct spelling errors as reflected in the caption above.

named in the caption above (see Tinsley Affirmation, Exhibit 4). No response from respondents to this request was received (see Tinsley Affirmation ¶ 8). By ruling dated April 12, 2017, Department staff's request was granted (see Tinsley Affirmation, Exhibit 5).

Department staff served an amended notice of hearing and an amended complaint, dated April 12, 2017, upon respondents Huron Enterprises, LLC, Wafler Farms, Inc., and Paul Wafler by certified mail return receipt requested. Respondents received the pleadings on April 19, 2017 (see Tinsley Affirmation, Exhibits 6 & 7). None of respondents have served an answer to the amended complaint (see Tinsley Affirmation ¶ 13).

The amended complaint alleges two causes of action. First, Department staff alleges that respondents clearcut trees on their property within freshwater wetland NW-3 without a permit, in violation of ECL 24-0701(1) and ECL 24-0703(1). In the second cause of action, Department staff alleges respondents placed fill within freshwater wetland NW-3 without a permit in violation of ECL 24-0701(1) and ECL 24-0703(1).

In papers dated May 30, 2017, Department staff filed a motion for default judgment pursuant to 6 NYCRR 622.15. Staff's papers consisted of a cover letter, a motion for default judgment and order, the affirmation of Dusty Renee Tinsley with nine exhibits attached, and the affidavit of Steven Miller with seven exhibits attached. These motion papers were sent to respondents via certified mail/return receipt requested.

On June 5, 2017 this matter was referred to me and with a letter dated June 21, 2017, Department staff provided an affidavit of service as well as postal receipts demonstrating that respondents had received the default motion.

In its default motion, Department staff seeks an order of the Commissioner: (1) finding respondents in default for failing to file answers; (2) finding respondents jointly and severally liable for the alleged violations; (3) assessing a total civil penalty of \$3,000; and (4) requiring restoration of freshwater wetland NW-3 and its adjacent area.

#### **DISCUSSION**

Respondents' failure to timely file an answer constitutes a default and a waiver of respondents' right to a hearing (6 NYCRR

622.15[a]). Department staff's motion for a default judgment must include proof of service of the notice of hearing and complaint, proof of respondents' failure to file a timely answer, and a proposed order (see 6 NYCRR 622.15[b]). In addition, staff must serve the default motion papers on respondents or their representatives (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009).

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Commissioner 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 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 of the Commissioner, 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. [citation omitted]).

In the instant proceeding, Department staff has satisfied the requirements of 6 NYCRR 622.15(b) by providing proof of service of the amended notice of hearing and amended complaint (see Tinsley Affirmation, Exhs. 6 & 7), proof of respondents' failure to timely answer the amended complaint (see Tinsley Affirmation ¶ 15), and a proposed order (see Tinsley Affirmation, Exhibit 9). Respondents received the notice of hearing and complaint on April 19, 2017. Their answers were due on or about May 9, 2017. Ms. Tinsley's affirmation demonstrates that respondents have not filed any answers. In addition, Department staff served a copy of the motion for default judgment on respondents (see Affidavit of Service of Tammy Schubmehl, sworn to June 21, 2017) consistent with the Commissioner's directive in Dudley, supra. To date, the Office of Hearings and Mediation Services has not received a reply from respondents regarding Department staff's motion. Accordingly, staff's motion is unopposed.

While Department staff has submitted proof that clearcutting and filling did occur in freshwater wetland NW-3 and its adjacent area in its papers, it has failed to present sufficient proof that the named respondents are liable for these

violations. Specifically, the amended complaint makes several allegations, including: (1) Wafler Farms, Inc., Huron Enterprises LLC and Paul Wafler variously own property and/or operate at property located at 10748 Slaght Road in Wolcott, in the Town of Huron, New York (amended complaint ¶2); and (2) Paul Wafler is an owner or partial owner of Wafler Farms, Inc. and is an operator of respondents' property (amended complaint ¶3). These allegations are repeated in the fourth and fifth paragraphs of the affidavit of Steven Miller. However, Mr. Miller's statements are conclusory in nature and no statement of the basis of his knowledge of these facts is provided and no other proof of the respondents' relationship to the property or the alleged violations is provided so it is impossible to conclude that Department staff have provided sufficient proof of the facts constituting the claim charged.

In addition, it should be noted that while Department staff's papers discuss alleged clearcutting and filling in both freshwater wetland NW-3 and its adjacent area, the causes of action in the amended complaint allege that those violations only occurred in the wetland itself (see Amended Complaint ¶19 & ¶23). Finally, while the default motion seeks a finding that the respondents are in violation of both ECL article 24 and 6 NYCRR 663, the amended complaint only alleges violations of ECL article 24.

Accordingly, I conclude that Department staff has not met its burden to provide proof of the facts sufficient to support its claim against respondents. Therefore, the instant motion for default must be denied, without prejudice to renew.

Dated: August 15, 2017  
Albany, New York

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/s/  
P. Nicholas Garlick  
Administrative Law Judge

## Exhibit Chart

Matter of Huron Enterprises, LLC,  
Wafler Farms, Inc., and  
Paul Wafler

Attached to the Affirmation of Dusty Renee Tinsley, Esq. dated  
May 26, 2017

Exhibit #	Description
1	Cover Letter, Notice of Hearing, Complaint and affidavit of service
2	Certified mailing receipts
3	Request to amend complaint with original papers, mailing receipts and proposed amended papers attached
4	Affidavit of service of amended complaint with request to amend complaint and attachments attached
5	Ruling on request to amend
6	Cover letter, amended notice of hearing, amended complaint, affidavit of service, and mailing receipts
7	Mailing receipts
8	Affidavit of Steven Miller with seven attachments (listed below)
9	Proposed order

Attached to the affidavit of Steven Miller dated May 26, 2017

<b>Exhibit #</b>	<b>Description</b>
A	Wetland map for NW-3
B	Photographs taken November 2015
C	Google earth photographs
D	Historical photographs
E	Photographs taken November 2015
F	DEC's Civil Penalty Policy
G	Freshwater Wetlands Enforcement Policy

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