

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 24 of the New York State Environmental Conservation Law (ECL) and Parts 663 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

-by-

BABYLON RIDING CENTER, INC.,

DEC File No.
R1-20180906-183

Respondent.

This administrative proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that Babylon Riding Center, Inc. (BRC or respondent) violated ECL articles 17 (Water Pollution Control) and 24 (Freshwater Wetlands) and implementing provisions of 6 NYCRR parts 750 (Water Pollution Control) and 663 (Freshwater Wetlands Permit Requirements). Respondent operates an equestrian center which is located at 1500 Peconic Avenue in the Town of Babylon, Suffolk County, New York (site). Portions of the site are located in and adjacent to New York State freshwater wetland BW-1 and its regulated adjacent area. The site is also proximate to the Carlls River.

Department staff commenced this proceeding by service of a notice of hearing and complaint dated March 12, 2021. In its complaint, Department staff set forth five causes of action, alleging that BRC:

- (1) Caused or allowed the clearing of vegetation in a freshwater wetland without a DEC permit and thereby violated ECL article 24 and 6 NYCRR part 663;
- (2) Caused or allowed the clearing of vegetation in the adjacent area of a freshwater wetland without a DEC permit and thereby violated ECL article 24 and 6 NYCRR part 663;
- (3) Caused or allowed the placement of fill in a freshwater wetland without a DEC permit and thereby violated ECL article 24 and 6 NYCRR part 663;
- (4) Caused or allowed the placement of fill in the adjacent area of a freshwater wetland without a DEC permit and thereby violated ECL article 24 and 6 NYCRR part 663;
and

- (5) Caused the discharge of contaminated wastewater into a freshwater river (Carlls River), and thereby violated ECL 17-0501, 17-0505, 17-0701, 17-0803 and 6 NYCRR 750-1.4(a).¹

Department staff, in its complaint, requested an order:

- (1) Finding respondent in violation of ECL articles 17 and 24, and 6 NYCRR parts 663 and 750;
- (2) Enjoining respondent from any further actions causing the violations to continue;
- (3) Requiring respondent to submit an approvable restoration plan to the Department within thirty (30) days;
- (4) Directing respondent to pay a monetary civil penalty “to the fullest extent allowed by statute”; and
- (5) For such other relief as I may deem “just, proper, and appropriate.”

Administrative Law Judge (ALJ) Daniel O’Connell of the Department’s Office of Hearings and Mediation Services was assigned to this matter and prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear for the adjudicatory hearing that was held on December 17, 2021 (*see* Hearing Report at 3 [Finding of Fact No. 4]). At the hearing, Department staff moved orally for a default judgment and then presented its case on the merits (*see* Hearing Report at 1-2, 6-7).²

¹ Department staff, in its first four causes of action, did not fully detail specific references (*see* 6 NYCRR 622.3[a][1][ii] [complaint must contain “a reference to the particular sections, subsections, paragraphs and subparagraphs of the statutes, rules and regulations alleged to have been violated”]). Staff did correct any such omissions at the hearing.

² On the day of the hearing, but after the completion of the hearing, a representative of respondent requested that the hearing be rescheduled (*see* communication dated December 17, 2021 from ALJ O’Connell to Department staff and respondent). The ALJ denied that request but advised that respondent may move to reopen the default prior to my final determination. Respondent did not file a motion to reopen the default.

Liability

In this matter, the ALJ has comprehensively reviewed the issues relating to respondent's liability in the hearing report (*see* Hearing Report at 7-10). My comments follow.

--Freshwater Wetland Violations

As the ALJ notes, all persons seeking to undertake regulated activities on wetlands or their adjacent areas and for which those activities are not expressly exempted must obtain a permit or a letter of permission from the Department (*see* 6 NYCRR 663.4[a]). Portions of New York State freshwater wetland BW-1 and its adjacent area are part of the site (*see* Hearing Report at 3 [Finding of Fact No. 5]; Hearing Exhibit 2, Affidavit of Christina Knoll sworn to December 14, 2021 [Knoll Affidavit] ¶ 7). Respondent cleared vegetation from the freshwater wetland and its adjacent area (*see* Hearing Report at 7, 8; Knoll Affidavit ¶ 16) as corroborated by Department staff's site inspection on February 28, 2017. The record demonstrates that respondent had not been authorized by the Department to clear vegetation from the wetland or its adjacent area (*see* Hearing Report at 3 [Finding of Fact No. 7]; *see also* 6 NYCRR 663.4[d][23] [clear-cutting vegetation other than trees, except as part of an agricultural activity, is a regulated activity requiring a permit]). Accordingly, the ALJ determined that respondent violated 6 NYCRR 663.4(a) with respect to the clearing of vegetation, and that the violations have been ongoing since February 28, 2017.

Similarly, the record demonstrates that respondent placed fill on the southeast corner of the freshwater wetland and in eleven locations in the wetland's adjacent area. The record demonstrates that respondent had not been authorized by the Department to place fill in the wetland or its adjacent area (*see* Hearing Report at 3 [Finding of Fact No. 7]; *see also* 6 NYCRR 663.4[d][20] [filling, including filling for agricultural purposes, is a regulated activity requiring a permit]). The ALJ determined that respondent violated 6 NYCRR 663.4(a) and that the violations have been ongoing since Department's site inspection that was conducted on February 28, 2017 (*see* Hearing Report at 8,9).

I concur with the ALJ's determination with respect to the freshwater wetland violations and their ongoing nature.

--Water Pollution Control Violations

During various site visits, Department staff observed a large pile of uncovered horse manure and bedding within the boundary of the freshwater wetland and adjacent to the Carlls River (*see* Hearing Report at 4-5 [Findings of Fact Nos. 14, 20], 9; Knoll Affidavit ¶¶ 13, 22). The manure pile measured approximately 55 feet by 53 feet (*see id.*). Due to the location of this waste, runoff during storm events would move from the manure pile to the Carlls River (*see* Hearing Report at 4-5 [Finding of Fact No. 14]). Staff testified that no erosion control features or catch basin existed between the manure pile and the Carlls River (*see id.* [Finding of Fact No. 15], 10). A trench located next to the manure pile was collecting runoff from the manure pile (*see id.*). During staff's May 1, 2018 site visit, the BRC site operator stated that he would use a

front-end loader to scoop up the leachate collected in the trench and dump the contents of the front-end loader into the Carlls River (*see* Hearing Report at 5 [Finding of Fact No. 16]).

No permit had been issued by the Department to respondent to discharge any pollutant or contaminant to the Carlls River (*see* Hearing Report at 3 [Finding of Fact No. 7], 10). Visits of Department staff to the site, subsequent to the May 1, 2018 inspection, confirmed the continued presence of the manure pile (*see* Hearing Report at 5 [Finding of Fact No. 20]). Based on the activities at the site, the ALJ determined that the violations have been ongoing since May 1, 2018.

Department staff cited four statutory and one regulatory water pollution control violations. ECL 17-0701(1) and 17-0803, as well as 6 NYCRR 750-1.4(a), prohibit any person from discharging pollutants to the waters of the State without first obtaining a State Pollutant Discharge Elimination system (SPDES) permit. No exceptions to this permit requirement apply to the site activities here. In addition, ECL 17-0501 states that it shall be unlawful to discharge into the waters of the State such matter that would cause or contribute to a condition in contravention of the standards adopted by the Department. ECL 17-0505 prohibits the making or use of an outlet or point source discharging into the waters of the state without a valid SPDES permit.

Although staff did not specify in detail the standards that would be contravened in its papers, the adverse impacts on water quality of runoff from the manure pile was addressed at hearing (*see* Hearing Report at 5 [Finding of Fact No. 19]). In addition, “[p]ollutant” is defined to include “solid waste” and “sewage” (*see* 6 NYCRR 750-1.2[a][68]; *see also* 6 NYCRR 750-1.2[a][80] [definition of sewage]). The manner of use of the front-end loader at the site (scooping up waste material from the trench and depositing the waste into the Carlls River) would be a “point source” and constitutes a “discernible, confined and discrete conveyance” from which pollutants are being discharged (*see* 6 NYCRR 750-1.2 [a][67]). Respondent’s allowing the runoff from the manure pile also does not comport with legal requirements.

Based upon the record before me, including the lack of any SPDES permit and the activities conducted at the site, I conclude that respondent is in violation of ECL 17-0701(1), 17-0803, 17-0501, 17-0505, and 6 NYCRR 750-1.4(a). I adopt the ALJ’s determination that these violations have been ongoing since May 1, 2018.

Penalty and Remedial Action

--Civil Penalty

Two separate penalty provisions are applicable here. With respect to the wetland regulations, ECL 71-2303 provides for a civil penalty of \$11,000 for every violation of ECL article 24 and its implementing regulations. With respect to the unpermitted wastewater discharge, ECL 71-1929 provides that a person who violates any of the provisions of titles 1 through 11 inclusive of article 17 (which includes the statutory provisions at issue here) and its implementing regulations, is liable for a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation.

Staff requested a total civil penalty of one hundred ninety-one thousand five hundred dollars (\$191,500): \$154,000 for the wetland violations and \$37,500 for the wastewater discharge violations (*see* Hearing Report at 10). Staff noted two aggravating factors that supported its penalty request: (a) the continuous nature of the violations and their duration; and (b) respondent's lack of cooperation as to resolving the violations. Further justifying the civil penalty is the environmental sensitivity of the area that has been impacted. Freshwater wetland BW-1 is designated as a Class I wetland. This class of wetland provides the most critical of the State's wetland benefits (*see* 6 NYCRR 663.5[e] [description of Class I wetlands]; *see also* Hearing Report at 3 [Finding of Fact No. 6]). In addition, the Carlls River is designated as a Class C trout stream (*see id* at 5 [Finding of Fact No. 18]). I also take into consideration that respondent has obtained an economic benefit from not complying with the applicable environmental requirements.

Based on the record before me, the civil penalty that staff has requested and the ALJ has recommended is authorized and appropriate.

--Remedial Action Plan

Department staff requests that respondent undertake remedial action to address the violations referenced in this proceeding (*see* Hearing Report at 10). Staff requests that respondent restore the site by removing the fill from the wetland and the adjacent area. At hearing, staff indicated that the fill should be moved to upland areas to prevent the introduction of any pollutants into the wetlands and downstream waterways. Furthermore, staff requested that respondent be directed to remove the manure pile from the site as to prevent the discharge of contamination to the Carlls River. Finally staff requests that respondent be directed to restore the cleared areas by replanting those areas with native plant species.

The ALJ has recommended that this remedial action be included in my order, and I concur that it is authorized and appropriate.

To ensure that the removal of the fill and the manure pile are conducted in an environmentally safe and proper manner, I hereby direct respondent, within thirty (30) days of the service of this order upon it to submit an approvable³ plan to Department staff that addresses the removal activities to be taken and for the planting of native plant species in the cleared areas. Such plan shall detail the manner in which the fill and manure will be removed and the location or locations to which the material will be relocated. In addition, the plan is to detail the type of native plants that will be replanted in the cleared areas. Respondent is to complete the remedial action within sixty (60) days of the service of this order upon it. I hereby direct that the remedial action plan include a multi-year monitoring program with respect to the area that is restored that will provide a sufficient period of time to evaluate the regrowth of the plants and provide for any necessary replacement of any replantings that do not survive or otherwise need to be replaced.

Upon good cause shown by respondent, Department staff at its sole discretion may extend the submission date of the plan or the date by which the remedial action shall be

³ "Approvable" shall mean a plan that can be approved by the Department with only minimal revision.

completed. Respondent must document in writing its reason for any request to extend these dates beyond what is set forth in this order.

--Suspension of the Civil Penalty

I have taken into consideration the importance of addressing the removal of the environmental harm arising from respondent's activities that impacts the State's water resources in a Class I wetland and a Class C trout stream, and the need for respondent to promptly undertake environmental remediation at the site. The Department's freshwater wetland enforcement policy makes clear that the Department's primary objective in enforcement is the restoration of wetlands adversely affected by unlawful acts (*see* Freshwater Wetlands Enforcement Policy, Commissioner Policy DEE-6, February 4, 1992 § I [stating that "seeking restoration of wetland benefits and functions lost as the result of illegal activity" is the "primary goal" of the enforcement policy]).

Because of the cost of remediation that respondent is being directed to undertake and in consideration of the Department's policy regarding wetland restoration, as well as the need to address the water quality violations, I have determined to suspend one hundred twenty-five thousand dollars (\$125,000) of the civil penalty of one hundred ninety-one thousand five hundred dollars (\$191,500), contingent upon respondent's implementation of the required remedial action plan to Department staff's satisfaction and compliance with all other terms and conditions of this order. Accordingly the payable portion of the civil penalty will be sixty-six thousand five hundred dollars (\$66,500) which respondent is to submit to the Department within sixty (60) days of the service of this order upon it. In the event that respondent fails to comply with any term or condition of this order, the entire penalty shall be immediately due and owing.

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 Babylon Riding Center, Inc. waived its right to be heard at the hearing.
- II. Based on record evidence, respondent Babylon Riding Center, Inc. is adjudged to have violated the following:
 - A. 6 NYCRR 663.4(a) by causing or allowing the clearing of vegetation in freshwater wetland BW-1 without a DEC permit (*see* 6 NYCRR 663.4[d][23]);
 - B. 6 NYCRR 663.4(a) by causing or allowing the clearing of vegetation in the adjacent area of freshwater wetland BW-1 without a DEC permit (*see* 6 NYCRR 663.4[d][23]);

- C. 6 NYCRR 663.4(a) by causing or allowing the placement of fill in freshwater wetland BW-1 without a DEC permit (*see* 6 NYCRR 663.4[d][20]);
- D. 6 NYCRR 663.4(a) by causing or allowing the placement of fill in the adjacent area of freshwater wetland BW-1 without a DEC permit (*see* 6 NYCRR 663.4[d][20]); and
- E. ECL 17-0505, 17-0701(1), 17-0803, 17-0501 and 6 NYCRR 750-1.4(a) by causing the discharge of contaminated material and wastewater into the Carlls River.

III. Respondent Babylon Riding Center, Inc. is hereby assessed a civil penalty in the amount of one hundred ninety-one thousand five hundred dollars (\$191,500). Of this amount, one hundred twenty-five thousand dollars (\$125,000) is suspended contingent upon respondent's implementation of the required remedial action plan to Department staff's satisfaction and compliance with all other terms and conditions of this order.

Within sixty (60) days of the service of this order upon respondent, respondent shall pay the non-suspended portion of the penalty (that is, \$66,500) by certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation and submitted to the address set forth in paragraph V of this order.

In the event that respondent fails to comply with any term or condition of this order, including but not limited to the implementation of the required remedial action plan to Department staff's satisfaction, the suspended amount of the civil penalty (that is, one hundred twenty-five thousand dollars [\$125,000]) shall be immediately due and payable and shall be paid in the same manner and submitted to the same address as the non-suspended portion of the civil penalty.

IV. Respondent Babylon Riding Center, Inc., within thirty (30) days of the service of this order upon it, is directed to submit an approvable remedial action plan to the Department that:

- A. details the manner in which the fill that respondent placed in regulated freshwater wetland BW-1 and its adjacent area and the manure pile that it has created in the vicinity of the Carlls River will be removed and the location or locations to which the material will be relocated;
- B. provides information on respondent's restoration of the cleared areas of the site by the replanting of those areas with native plant species and the schedule for the replanting; and

- C. sets forth a multi-year monitoring program with respect to the area that is restored to provide a sufficient period of time evaluate the regrowth of the plants and provide for any necessary replacement of any replantings that do not survive or otherwise need to be replaced.

Respondent is to complete the implementation of the remedial action plan within sixty (60) days of the service of this order upon respondent.

Upon good cause shown by respondent, Department staff at its sole discretion may extend (a) the submission date of the plan or (b) the date by which the remedial action plan shall be completed. Respondent must document in writing its reasons for any request for an extension of these dates.

- V. Respondent Babylon Riding Center, Inc. shall submit the civil penalty payment and all other submissions, as well as any questions or correspondence regarding this order, to the following:

Kari Wilkinson, Esq.
Assistant Regional Attorney
NYSDEC Region 1
SUNY @ Stony Brook
50 Circle Road
Stony Brook, New York 11790

- VI. The provisions, terms and conditions of this order shall bind respondents Babylon Riding Center, 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: May 11, 2022
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Violations of Articles 17 and 24 of the New York State Environmental Conservation Law (ECL), and Parts 663 and 750 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR) by

Hearing Report

Babylon Riding Center, Inc.,
Respondent.

File No. R1-20180906-183

Proceedings

Staff of the New York State Department of Environmental Conservation (Department staff) served Babylon Riding Center, Inc. (BRC or respondent), with a notice of hearing and complaint, dated March 12, 2021, alleging violations of New York State Environmental Conservation Law (ECL) articles 17 (Water Pollution Control) and 24 (Freshwater Wetlands), and implementing provisions of title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR) parts 663 (Freshwater Wetlands Permit Requirements) and 750 (Water Pollution Control). BRC is located at 1500 Peconic Avenue in the Town of Babylon (Suffolk County, New York) (the site), and operates an equestrian center. Portions of the site are located in and adjacent to Freshwater Wetland BW-1.¹ Based on five causes of action, staff seeks an order from the Commissioner that: (i) finds BRC in violation of various provisions of ECL articles 17 and 24, and implementing regulations; (ii) directs respondent to submit an approvable restoration plan; (iii) assesses a total civil penalty of \$191,500; and (iv) grants such other and further relief the Commissioner may determine to be just and appropriate. (*See* Recording No. 2 at 25:13-27:00.)

BRC is a domestic business corporation, and actively registered with the New York State Department of State, Division of Corporations (*see* Exhibit 1). Department staff commenced the proceeding with service of the March 12, 2021, notice of hearing and complaint upon BRC by certified mail, return receipt requested. Department staff provided an affidavit of mailing by Karen Mascio, sworn to March 15, 2021. The US Postal Service provided Department staff with signed copies of the domestic return receipts (*i.e.*, green cards). (*See* Exhibit 14; Recording No. 1 at 5:39-05:50). The affidavit of mailing and the domestic return receipts demonstrate that Department staff commenced the captioned enforcement proceeding in a manner consistent with requirements outlined in 6 NYCRR 622.3.

Among other things, the March 12, 2021, notice advised that BRC's failure either to answer the complaint or to attend the hearing would result in a default and waiver of its right to a hearing (*see* Exhibit 14, *see also* 6 NYCRR 622.4[a] and 622.15[a]). BRC failed to answer the complaint. The notice of hearing advised further that the Office of Hearings and Mediation

¹ *See* United States Geological Service (USGS) Quadrangle titled, *Bay Shore West* (Map 34 of 39 for Suffolk County).

Services (OHMS) would set a date for an administrative enforcement hearing. (Recording No. 1 at 3:17-4:48; 5:52-5:56.)

Subsequently, Department staff asked OHMS to convene the hearing. The matter was assigned to me, and I issued a notice of hearing, dated November 22, 2021, that scheduled a virtual adjudicatory hearing for 10:00 a.m. on December 17, 2021, using the webex audiovisual conference platform. A representative for BRC did not appear at the December 17, 2021, hearing (Recording No. 1 at 3:00-3:17.) With a cover letter from Kari Wilkinson, Esq., Assistant Regional Attorney, dated December 15, 2021, Department staff sent BRC and me, by regular mail, with copies of the exhibits that staff expected to offer at the administrative enforcement hearing. (Recording No. 1 at 4:49-5:04.)

The administrative enforcement hearing convened as scheduled at 10:00 a.m. on December 17, 2021. Ms. Wilkinson represented Department staff. During the hearing, Department staff offered an affidavit from Cristina Knoll, sworn to December 14, 2021. While working in DEC Region 1 from October 2015 to June 2019, Ms. Knoll was a Biologist 1 (Wildlife) from the Bureau of Ecosystem Health. The following members of Department staff testified at the hearing: (1) Kevin A. Jennings, Biologist 2 (Ecology) from the Bureau of Ecosystem Health; (2) Brian K. Lee, Assistant Engineer (Environmental) from the Division of Water; and (3) Christopher Spies, Regional Enforcement Coordinator. As noted above, no one appeared on behalf of BRC.

Because BRC neither answered the complaint nor appeared at the December 17, 2021, administrative enforcement hearing, Department staff moved orally for a default judgment. Thereafter, staff presented its case on the merits. During the presentation, staff offered 14 exhibits through the witnesses' testimony. All proffered exhibits were received into the hearing record (Recording No. 2 at 16:20-23:27), and an exhibit chart is attached to this hearing report as Appendix A. Staff requested that I take official notice of data collected at the Republic Airport in 2017 and 2018 concerning local weather and precipitation events. I granted this request. (*See* 6 NYCRR 622.11[a][5]; Recording No. 1 at 7:09-8:43.) The administrative enforcement hearing was recorded, and the audio recording became available on December 21, 2021.² Whereupon, the record of the proceeding closed.

Findings of Fact

1. Babylon Riding Center, Inc. is registered with the New York State Department of State, Division of Corporations, as an active, domestic business corporation. BRC operates an equestrian center at 1500 Peconic Avenue, North Babylon, New York 11703. The address for service of process is 1191 Connetquot Avenue, Central Islip, New York 11702. (*See* Exhibit 1; ¶ 6 Knoll Affidavit; Recording No. 1 at 5:15-5:35; Recording No. 2 at 12:55-13:01.)

² The audio recording of the hearing consists of two segments. The first segment (Recording No. 1) is 42:24 minutes. During the first segment, Kevin A. Jennings testified. The second segment (Recording No. 2) is 27:06 minutes. During the second segment, Brian K. Lee and Christopher Spies testified.

2. Department staff commended the captioned enforcement proceeding by serving the March 12, 2021, notice of hearing and complaint upon BRC by certified mail, return receipt requested. With a cover letter December 15, 2021, Department staff also provided additional service by sending BRC copies of the exhibits to be offered at the administrative enforcement hearing by first class mail. For these two mailings, Department staff relied on the information on file with the New York State Department of State, Division of Corporations. (*See* Exhibit 14; Recording No. 1 at 4:49-5:04.)
3. OHMS served a notice of hearing dated November 22, 2021, on BRC by first class mail. The November 22, 2021, notice advised respondent that the virtual administrative enforcement hearing would be held at 10:00 a.m. on December 17, 2021, using the webex audiovisual conference platform (*see* Notice of Hearing dated November 22, 2021; Recording No. 1 at 3:00-3:17.)
4. BRC did not answer the complaint, and failed to appear for the administrative enforcement hearing held on December 17, 2021, as directed in the November 22, 2021, notice of hearing (Recording No. 1 at 3:00-4:48; 5:52-5:56).

I. Freshwater Wetland BW-1

5. Portions of Freshwater Wetland BW-1 and its regulated adjacent area are located on the site of the Babylon Riding Center. (*See* Exhibit 8; ¶ 7 Knoll Affidavit; Recording No. 1 at 12:20-13:29.) Department staff identified the boundary of the freshwater wetland on the site during the February 28, 2017, site inspection. In addition, staff relied on aerial photographs of the property, as well as characteristics of the neighboring properties as references. (Recording No. 15:08- 18:15; *see* Exhibit 9.)
6. Freshwater Wetland BW-1 is a Class I wetland. Class I wetlands provide the most critical of the State's wetland benefits. During the review of a permit application, a proposed reduction of benefits would be acceptable only in the most unusual circumstances. A permit could be issued only after determining that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefits that the Class I wetland provides. (Recording No. 1 at 37:05-37:25; *also see* 6 NYCRR 663.5[e].)
7. Department staff did not issue a permit to BRC either to conduct any regulated activities in or adjacent to Freshwater Wetland BW-1, or to discharge contaminated wastewater to the Carlls River (Recording No. 1 at 18:18-18:39).
8. On February 28, 2017, Department staff inspected BRC, took a set of 15 photographs, and observed: (1) a 55 ft by 53 ft pile of manure [Photo No. 1]; (2) one 42 ft by 34 ft pile of fill [Photo No. 2]; (3) a 14 ft by 8 ft pile of fill [Photo No. 3]; (4) a 12 ft by 12 ft pile of

wood debris and cleared vegetation [Photo No. 4]; (5) 3 piles of fill in an area measuring 36 ft by 32 ft [Photos Nos. 6 and 8]; (6) a berm measuring 20 ft by 27 ft [Photos Nos. 7 and 16]; (7) a stockpile of topsoil in an area measuring 64 ft by 46 ft [Photos Nos. 8 and 13]; (8) a berm measuring 30 ft by 6 ft [Photo No. 9]; (9) areas of topsoil located in and adjacent to Freshwater Wetland BW-1 at the southeast corner of the property [Photos Nos. 10, 11, 12, and 13]; (10) an area of fill in the form of horse manure in Freshwater Wetland BW-1 [Photo No. 14]; and (11) a 15 ft by 30 ft rock pile [Photo No. 15]. The 16 photographs taken by Department staff during the February 28, 2017, inspection are collectively identified as Exhibit 5. The photographs depict the location of the piles of manure, fill, wood debris, and topsoil in relation to the adjacent area and the boundary of Freshwater Wetland BW-1. (See ¶¶ 13-23 Knoll Affidavit; Recording No. 1 at 11:28-11:36; 20:20-20:37.)

9. Wetland vegetation provides habitat for wildlife, stabilizes the soils, and absorbs excess nutrients before the groundwater enters downstream surface waters. Clearcutting vegetation in the freshwater wetland removes these benefits. (Recording No. 1 at 19:57-20:19.)
10. The adjacent area buffers the wetland by preventing upland activities from occurring in the wetland. In addition, the adjacent area limits the introduction of pollutants into the freshwater wetland. Adjacent areas also provide wildlife habitat benefits. Clearcutting vegetation in the adjacent area of the freshwater wetland removes these benefits. (Recording No. 1 at 26:05-26:28.)
11. Placing fill in the freshwater wetland prevents the wetland from storing and retaining stormwater, which could result in downstream flooding. Also, fill will result in the loss of wildlife habitat. (Recording No. 1 at 28:16-29:55.)
12. Fill in the adjacent area changes the topography of the site and the permeability of the soils. Fill encourages the growth of upland vegetation rather than wetland vegetation in the filled area. Some of the fill observed on the site could introduce pollutants to the wetlands via runoff events. (Recording No. 1 at 36:30-37:00.)
13. The activities undertaken in and adjacent to Freshwater Wetland BW-1 provided respondent with an economic benefit by expanding the working area of the equestrian center. The economic benefit gained by respondent does not outweigh the loss of the benefits provided by the Class 1 freshwater wetland. (Recording No. 1 at 37:27-38:24.)

II. Wastewater Discharges

14. Department staff returned to the site on May 1, 2018, and observed a large pile consisting of horse manure and bedding on the site within the boundary of Freshwater Wetland BW-

1, and adjacent to the Carlls River.³ During the May 1, 2018, site visit, Department staff took a set of 4 photographs identified as Exhibit 12. Given the location of the manure pile with respect to the wetland and the Carlls River, runoff during storm events would move from the manure pile into the Carlls River. Exhibit 12D is a photograph of a trench located on the side of the manure pile, perpendicular to the Carlls River. Water and leachate from the manure pile collects in the trench. (Recording No. 2 at 2:22-4:11; 5:16-6:30; 13:00-13:21; *see* Exhibit 12.)

15. Staff observed no erosion control features, or a catch basin between the manure pile and the Carlls River. The manure pile was not covered. (Recording No. 2 at 6:45-7:05; *see* Exhibit 12B.)
16. Vincent Pizzirusso operates the Babylon Riding Center. He was at the site during staff's May 1, 2018, inspection. According to Department staff, Mr. Pizzirusso said that he would use a front-end loader to scoop up the leachate collected in the trench depicted in Exhibit 12D, and then dump the contents of the front-end loader into the Carlls River. (Recording No. 2 at 13:50-15:35.)
17. According to Department staff, a SPDES permit would be required to control the runoff discharged from the manure pile, and staff did not issue such a permit to the Babylon Riding Center (Recording No. 2 at 8:00-8:57).
18. The Carlls River is a Class C trout stream. (Recording No. 2 at 8:58-9:05.) The best usage of Class C waters is fishing. In addition, water quality must be suitable for primary and secondary contact recreation (*see* 6 NYCRR 701.8).
19. Runoff from the manure pile would adversely impact the water quality of the Carlls River. Staff explained that manure has high concentrations of nutrients. When manure is discharged to the river, micro-organisms living in the waterway will withdraw oxygen from the water to reduce the nutrient concentration. This process in turn reduces the amount of dissolved oxygen available for other organisms. Reduced concentrations of dissolved oxygen in the waterway will adversely impact trout and other fish, which absorb oxygen from the water for their metabolic processes. (Recording No. 2 at 9:20-9:46.)
20. In addition to the site visit on May 1, 2018, members of Department staff returned to BRC in July 2019, October 2020, March 2021, and on November 17, 2021. During each of these subsequent visits, staff observed the manure pile initially observed on February 28, 2017. (*See* ¶ 13 Knoll Affidavit; Exhibit 5, Photo No. 1; Recording No. 2 at 13:21-13:55, 15:40- 15:57.)

³ On February 28, 2017, Department staff observed the manure pile at this location on the site. At that time, it measured about 55 ft. by 53 ft. (*see* Exhibit 4; Exhibit 5, Photo No. 1).

Discussion

I. Default Procedures

A respondent upon whom a complaint has been served must file an answer within 20 days after 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, respondent's failure to appear at the hearing constitutes a default and waiver of a respondent's right to a hearing (*see* 6 NYCRR 622.15[a]).

When, as here, a respondent does not answer a complaint or fails to appear at the hearing, Department staff may move for a default judgment. Such a 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 (6 NYCRR 622.15[b][1-6] [effective September 16, 2020]).

The Commissioner has determined that "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]). The Commissioner determined further that to support 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, at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* 6 NYCRR 622.15[b][3], CPLR 3215[f]).

The record developed on December 17, 2021, establishes the following. Department staff served the notice of hearing and complaint upon BRC in a manner consistent with the regulations (*see* 6 NYCRR 622.3[a][3]). Respondent did not answer the complaint, as directed in the March 12, 2021, notice of hearing served with the complaint, and respondent failed to appear for the virtual administrative enforcement hearing scheduled for December 17, 2021, as directed in the November 22, 2021, notice of hearing. At the December 17, 2021, virtual administrative enforcement hearing, Department staff provided proof of the facts sufficient to support the violations alleged, and to allow me to determine that staff has a viable claim. The March 12, 2021, notice of hearing and complaint provide a concise statement of the relief requested. Staff's presentation at the December 17, 2021, hearing included a statement of authority and support for the penalty and relief requested. Finally, Department staff provided proof of service of the notice of hearing and complaint upon BRC.

Based on the foregoing, Department staff is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. In addition, as discussed further below, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent committed the violations charged in the complaint. Accordingly, Department staff is entitled to judgment on the facts proven at hearing.

II. Liability

In the March 12, 2021, complaint, Department staff alleged five causes of action. The first four causes of action allege violations of ECL article 24 (Freshwater Wetlands), and implementing provisions of 6 NYCRR part 663 (Freshwater Wetlands Permit Requirements). In the fifth cause of action, staff alleged a violation of ECL article 17 (Water Pollution Control), and implementing provisions of 6 NYCRR part 750 (State Pollutant Discharge Elimination System [SPDES] Permits). The bases for the allegations are staff's observations during site visits conducted on February 28, 2017, May 1, 2018, in July 2019, October 2020, March 2021, and on November 17, 2021, as well as the photographs taken during some of these site visits. Each cause of action is discussed below.

1. Clearing Vegetation from the Wetland (6 NYCRR 663.4[d][23])

Pursuant to 6 NYCRR 663.4(a), all persons seeking to undertake activities on wetlands or their adjacent areas, which are not expressly exempted (*see* ECL 24-0701, and 6 NYCRR 663.3, and 663.4[d]), must obtain either a permit or a letter of permission from the Department. Clearing vegetation from a freshwater wetland is a regulated activity (*see* 6 NYCRR 663.4[d][23]).

On February 28, 2017, Department staff observed an area of the site located in Freshwater Wetland BW-1 that respondent had cleared of vegetation (*see* Exhibit 4; Exhibit 5, Photo No. 4; Exhibit 9). The cleared wetland area measured 50 ft by 120 ft. Respondent did not have a permit from the Department to undertake this regulated activity. (Recording No. 1 at

18:15-19:57; 21:37-22:15; *see also* ¶ 16 Knoll Affidavit; Exhibit 10.⁴) Therefore, BRC violated 6 NYCRR 663.4(a). Subsequent site visits by Department staff show that the wetland area remains cleared. Consequently, the violation is ongoing since Department staff's inspection on February 28, 2017.

2. Clearing Vegetation from the Adjacent Area (6 NYCRR 663.4[d][23])

Pursuant to 6 NYCRR 663.4(a), all persons seeking to undertake activities on wetlands or their adjacent areas, which are not expressly exempted (*see* ECL 24-0701, and 6 NYCRR 663.3, and 663.4[d]), must obtain either a permit or a letter of permission from the Department . Clearing vegetation from the adjacent area of a freshwater wetland is a regulated activity (*see* 6 NYCRR 663.4[d][23]).

On February 28, 2017, Department staff observed an area of the site that respondent had cleared of vegetation (*see* Exhibit 4; Exhibit 5, Photo No. 4; Exhibit 9). The cleared area measured 50 ft by 120 ft, and a portion of it was located in the adjacent area of Freshwater Wetland BW-1. Respondent did not have a permit from the Department to undertake this regulated activity. (Recording at 22:18-26:06; *see* ¶ 16 Knoll Affidavit; Exhibit 10.) Therefore, BRC violated 6 NYCRR 663.4(a). The area remains cleared. Consequently, the violation is ongoing since February 28, 2017.

3. Filling Freshwater Wetland (6 NYCRR 663.4[d][20])

Pursuant to 6 NYCRR 663.4(a), all persons seeking to undertake activities on wetlands or their adjacent areas, which are not expressly exempted (*see* ECL 24-0701, and 6 NYCRR 663.3, and 663.4[d]), must obtain either a permit or a letter of permission from the Department. Placing fill in a freshwater wetland is a regulated activity (*see* 6 NYCRR 663.4[d][20]).

On February 28, 2017, Department staff observed that respondent had placed fill on the southeast corner of the site, which is part of Freshwater Wetland BW-1. The fill consisted of topsoil. (*See* Exhibit 4; Exhibit 5, Photo Nos. 9, 10, 11, 12; Exhibit 9). Respondent did not have a permit from the Department to undertake this regulated activity. (Recording No. 1 at 26:30-28:15; *see* ¶¶ 20 and 21 Knoll Affidavit.) Therefore, BRC violated 6 NYCRR 663.4(a). The fill remains in place. Consequently, the violation is ongoing since February 28, 2017.

⁴ Exhibit 10 is a set of two aerial photograph from Nearmap US, Inc. The first depicts the site on October 26, 2015. The second depicts the site on October 29, 2016, about one year later. A comparison of the two aerial images shows that vegetation from an area measuring 50 ft by 120 ft. was cleared between October 26, 2015, and October 29, 2016. A portion of the cleared area is in Freshwater Wetland BW-1, and the balance of the cleared area is in the adjacent area. (Recording No. 1 at 22:18-25:01.)

4. Filling Adjacent Area of Freshwater Wetland (6 NYCRR 663.4[d][20])

Pursuant to 6 NYCRR 663.4(a), all persons seeking to undertake activities on wetlands or their adjacent areas, which are not expressly exempted (*see* ECL 24-0701, and 6 NYCRR 663.3, and 663.4[d]), must obtain either a permit or a letter of permission from the Department. Filling the adjacent area of a freshwater wetland is a regulated activity (*see* 6 NYCRR 663.4[d][20]).

On February 28, 2017, Department staff observed that respondent had placed fill in the adjacent area of Freshwater Wetland BW-1. Respondent filled eleven different areas on the site. Among other things, the fill consisted of topsoil, rocks, wood debris, and discarded materials. One area of fill measures 32 ft. by 42 ft., and consisted of horse manure mixed with stall bedding. (*See* Exhibit 4; Exhibit 5, Photo Nos. 1, 2, 3, 4, 6, 7, 8, 9 and 13; Exhibit 9.) Respondent did not have a permit from the Department to undertake this regulated activity. (Recording at 29:58-36:30; *see* ¶¶ 13, 14, 15, 17, 18, 19 and 20 Knoll Affidavit.) Therefore, BRC violated 6 NYCRR 663.4(a). Each of the eleven areas filled is considered a separate violation.⁵ The fill remains in place. Consequently, the violations are ongoing since February 28, 2017.

5. Discharge of Wastewater (6 NYCRR 750-1.4[a])

ECL 17-0701 and 17-0803, as well as 6 NYCRR 750-1.4(a) prohibit any person from discharging pollutants to the waters of the State without first obtaining a State Pollutant Discharge Elimination System (SPDES) permit pursuant to ECL article 17, titles 7 or 8, and 6 NYCRR part 750. Generally, the discharge of substances that may contravene water quality standards is prohibited without first obtaining a SPDES permit from the Department (*see e.g.* ECL 17-0501 and 17-0505).

Department staff went to the site on May 1, 2018, and observed a large pile of horse manure and bedding on the site within the boundary of Freshwater Wetland BW-1, and adjacent to the Carlls River. During the May 1, 2018, site visit, Department staff took a set of 4 photographs identified as Exhibit 12(A-D). Given the location of the manure pile with respect to the wetland and the Carlls River, runoff would move from the manure pile into the Carlls River. (Recording No. 2:22-4:11; *see* Exhibit 12.)

Staff initially observed the manure pile at the site on February 28, 2017, when it measured about 55 ft. by 53 ft. (*see* Exhibit 4). During the May 1, 2018, site visit, staff photographed the manure pile again (*see* Exhibit 12C). Exhibit 12D is a photograph of a trench located next to the manure pile. Water and leachate from the manure pile collects in the trench. (Recording No. 2 at 5:16-6:30; *see* Exhibit 12D.)

⁵ *Matter of Linda Wilton and Costello Marine, Inc.*, Order of the Commissioner, February 1, 1991, at 1 (1991 WL 94068).

On May 1, 2018, no erosion control or catch basin existed between the manure pile and the Carlls River. In addition, the manure pile was not covered. (Recording No. 2 at 6:45-7:05; *see* Exhibit 12B.)

According to Department staff, a SPDES permit would be required to control the runoff discharged from the manure pile, and staff did not issue such a permit to BRC (Recording No. 2 at 8:00-8:57). These circumstances demonstrate that BRC violated ECL 17-0501 and 17-0505 by discharging substances to the waters of the State without a permit that would contravene water quality standards. The manure pile remains in place. Consequently, the violation is ongoing since staff's site visit on May 1, 2018.

III. Relief

With a motion for default judgment, staff must provide a concise statement of the relief requested (*see* 6 NYCRR 622.15[b][4]), and a statement of authority and support for any civil penalty or relief requested (*see* 6 NYCRR 622.15[b][5]). In the March 12, 2021, notice of hearing, staff noted that ECL 71-2303 provides for a civil penalty of \$11,000 for every violation of ECL article 24 and the implementing regulations. Department staff noted further that ECL 71-1929 provides for a civil penalty of \$37,500 per day for each violation of ECL article 17 and implementing regulations. (*See also* ¶¶ 13 and 14 March 12, 2021, complaint.)

Staff requested a total civil penalty of \$191,500. For violating ECL article 24 and implementing regulation at 6 NYCRR part 663, staff requested \$11,000 for each violation. Staff explained there is one count associated with clearing the wetland, clearing the adjacent area, and filling the wetland. With respect to the fill in the adjacent area, staff observed that respondent filled eleven separate areas on the site. (14 counts x \$11,000 = \$154,000).

To support this request, staff noted that Freshwater Wetland BW-1 is a Class 1 wetland. In addition, the violations have continued since staff's February 28, 2017, site inspection. Significant environmental harm has occurred. Respondent obtained economic benefits from the violations. Finally, respondent has not cooperated with Department staff to resolve these violations. According to staff, some violations that are the subject of this proceeding commenced in 2011 based on site visits conducted prior to February 2017. Staff requested restoration of the site by removing the fill from the wetland areas as well as the affected adjacent areas. All fill materials should be moved to upland areas to prevent the introduction of any pollutants into the wetlands, and downstream waterways, such as the Carlls River. In addition, respondent should restore the cleared areas of the site by replanting those areas with native plant species. (Recording No. 1 at 38:30-40:26.)

For the unpermitted wastewater discharge, staff requested \$37,500, which is the maximum amount provided by ECL 71-1929 (Recording No. 2 at 9:50-9:55). To support this request staff noted that the receiving waterbody is the Carlls River, a Class C trout stream, and that the violation has continued since May 1, 2018. In addition, staff seeks an order from the

Commissioner directing respondent to remove the manure pile from the site because it is the source of contamination (Recording No. 2 at 9:55-10:07).

Staff considered the continuous nature of the violations and their duration to be aggravating factors. As a second aggravating factor, staff argued that BRC has shown no effort to cooperate with Department staff to resolve the violations. Staff inspected the site on numerous occasions and observed that conditions have not improved. Accordingly, I conclude that staff's request for a total civil penalty in the amount of \$191,500 is consistent with the applicable provisions of ECL article 71, and the Department's penalty policies.

Conclusions of Law

1. Babylon Riding Center, Inc. violated 6 NYCRR 663.4(a) when it cleared vegetation from Freshwater Wetland BW-1 without a permit from the Department. Subsequent site visits by Department staff show that the area remains cleared. Consequently, the violation is ongoing since Department staff's inspection on February 28, 2017.
2. BRC violated 6 NYCRR 663.4(a) when it cleared vegetation from the adjacent area of Freshwater Wetland BW-1 without a permit from the Department. Subsequent site visits by Department staff show that the area remains cleared. Consequently, the violation is ongoing since Department staff's inspection on February 28, 2017.
3. Respondent violated 6 NYCRR 663.4(a) when it filled a portion of Freshwater Wetland BW-1 without a permit from the Department. Subsequent site visits by Department staff show that the area remains filled. Consequently, the violation is ongoing since Department staff's inspection on February 28, 2017.
4. Babylon Riding Center violated 6 NYCRR 663.4(a) when it filled eleven different portions of the area adjacent to Freshwater Wetland BW-1 without a permit from the Department. Subsequent site visits by Department staff show that the eleven filled areas remain unchanged. Consequently, the violations are ongoing since Department staff's inspection on February 28, 2017.
5. BRC violated ECL 17-0501 and 17-0505 by discharging substances to the Carlls River without a permit that would contravene water quality standards. The manure pile remains in place. Consequently, the violation is ongoing since staff's site visit on May 1, 2018.
6. Department staff is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Recommendations

1. The Commissioner should issue an order granting Department staff's motion for default judgment, and conclude that Babylon Riding Center is in default pursuant to 6 NYCRR 622.15.
2. Furthermore, the Commissioner should conclude that based on the proof adduced at the administrative enforcement hearing, Babylon Riding Center violated various provisions of ECL article 24 (Freshwater Wetlands) and implementing regulations, as well as ECL article 17 (State Pollutant Discharge Elimination System [SPDES] Permits) and implementing regulations, as alleged in the March 12, 2021, complaint.
3. The Commissioner should assess a total civil penalty of \$191,500.
4. Commissioner should direct Babylon Riding Center to restore the cleared areas, and remove the fill from the filled areas. In addition, the Commissioner should direct respondent to remove the manure pile from the site to prevent the discharge of substances to the Carlls River that would contravene water quality standards.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
March 16, 2022

Appendix A Exhibit Chart

Appendix A
Matter of Babylon Riding Center
DEC Case No. R1-20180906-183

Exhibit Chart

Hearing Date: December 17, 2021

Exhibit No.	Description	Received
1	Certified copy of the Deed (Liber D00013114 and Page 321). Entity Information from the New York State Department of State, Division of Corporations for Babylon Riding Center, Inc.	√
2	Affidavit of Christina A. Knoll, sworn to December 14, 2021.	√
3	Resume of Christina A. Knoll.	√
4	Aerial Photograph of Babylon Riding Center Legend – Location of Photographs taken on February 28, 2017.	√
5	Set of 16 Photographs of the Babylon Riding Center taken by C. Knoll on February 28, 2017.	√
6	Set of 2 Aerial Photographs of Babylon Riding Center Key 1 and Key 2 showing the compass direction of the photographs presented in Exhibit 5.	√
7	Resume of Kevin A. Jennings.	√
8	US Geological Survey Quadrangle - Bay Shore West Freshwater Wetlands Map for Suffolk County Map 34 of 39 Freshwater Wetland BW-1.	√
9	Aerial Photograph of Babylon Riding Center New York State Ortho Image Program Image dated: 2020.	√
10	Set of 2 Aerial Photographs of Babylon Riding Center NearMap US, Inc. Photo No. 1 dated October 26, 2015. Photo No. 2 dated October 29, 2016.	√

11	Resume of Brian K. Lee.	√
12A-D	Set of 4 Photographs of the Babylon Riding Center taken by B. Lee on May 1, 2018.	√
13	Resume of Christopher Spies.	√
14	Notice of Hearing and Complaint dated March 12, 2021. US Postal Service, Certified Mail Receipts. Affidavit of Mailing by Karen Mascio, sworn to March 15, 2021.	√

Official notice (*see* 6 NYCRR 622.11[a][5]) taken of Daily Precipitation in 2017 at Republic Airport, and Observed Weather in 2017 at Republic Airport, as well as Daily Precipitation in 2018 at Republic Airport, and Observed Weather in 2018 at Republic Airport (Recording No. 1 at 7:09-8:43).