

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

In the Matter of the Alleged Violations of New York State
Navigation Law §§ 173 and 175

ORDER

- by -

DEC Case No.
R5-20151222-2192

**BURCH LOGGING, LLC and GREGORY A. BURCH JR.,
Individually,**

Respondents.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department) that respondents Burch Logging LLC¹ (Burch Logging) and Gregory A. Burch, Jr., individually, violated New York State Navigation Law § 173(1), by discharging petroleum, and § 175, by failing to report the discharges, at the following two properties: 49 McKie Hollow Road, Town of White Creek, Washington County, New York and 86 Midline Road, Town of Ballston, Saratoga County, New York. The discharges occurred during logging work at the two properties.

Department staff commenced this proceeding by personal service of a notice of hearing and complaint upon respondent Gregory A. Burch, Jr. on February 17, 2016 (*see* Exhibit 4 [Affidavit of Stephen R. Gonyeau sworn to February 17, 2016]; Hearing Report at 8 [Finding of Fact No. 33]). Respondent Burch Logging, LLC was served by personal service upon the Secretary of State on February 16, 2016, and by first class mail in accordance with CPLR 3215(g)(4) (*see* Exhibit 1; Hearing Report at 8-9 [Findings of Fact Nos. 32, 34, 35 and 38]).

Department staff seeks a Commissioner order:

- finding that respondents Burch Logging LLC and Gregory A. Burch, Jr., individually, violated the provisions alleged;
- imposing upon respondents Burch Logging LLC and Gregory A. Burch, Jr., individually, a civil penalty in the amount of twenty thousand dollars (\$20,000); and
- granting such other and further relief as may be appropriate.

¹ New York State Department of State records indicate that the correct name is Burch Logging LLC (*see* Exhibit 28).

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

As set forth in record, respondents failed to answer the complaint served by Department staff, failed to appear at the prehearing conference scheduled for March 10, 2016, and failed to appear at the hearing scheduled for May 9, 2017 (*see* Hearing Report at 2, 10-11). At the hearing, Department staff moved for a default judgment (*see* Hearing Report at 2). Staff provided proof of service upon respondents of the notice of hearing and complaint and motions in this proceeding and a proposed order (*see* Hearing Report at 10-11). As a consequence of respondents' failure to answer or appear in this matter, Department staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Furthermore, Department staff presented its case on the merits at the May 9, 2017 hearing, calling three witnesses to testify and offering a number of exhibits, all of which were received into evidence. I agree with ALJ Wilkinson that the record evidence demonstrates that respondents violated Navigation Law § 173(1) and Navigation Law § 175 by discharging petroleum at two separate properties and failing to report the spills (*see* Hearing Report at 11-14).

As indicated, Department staff seeks an order imposing a civil penalty on respondents in the amount of twenty thousand dollars (\$20,000).² Section 192 of the Navigation Law provides for a civil penalty of up to twenty-five thousand dollars (\$25,000) per day for each violation of the provisions of article 12 of the Navigation Law or any regulation promulgated thereunder. Department staff's request in this proceeding is well below the maximum statutory penalty (*see* Hearing Report at 15; Exhibit 25 [calculations based on the agency's penalty matrix]). Based upon the record, I conclude that the civil penalty in the amount of twenty thousand dollars (\$20,000) requested by Department staff and recommended by the ALJ, is 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 the complaint, failing to appear at the prehearing conference and failing to appear at the hearing, respondents Burch Logging LLC and Gregory A. Burch, Jr., individually, waived their right to be heard at the hearing.
- II. Based upon a preponderance of the evidence, respondents Burch Logging LLC and Gregory A. Burch, Jr., individually, are adjudged to have violated:

² I note that Department staff arranged for a State spill contractor to remediate both properties (*see* Hearing Report at 8 [Finding of Fact No. 31]).

- A. Navigation Law § 173(1) by discharging petroleum on property located at 49 McKie Hollow Road in the Town of White Creek, Washington County, New York, and on property located between 68 and 86 Midline Road in the Town of Ballston, Saratoga County, New York; and
- B. Navigation Law § 175 by failing to report the two discharges of petroleum.
- III. Respondents Burch Logging LLC and Gregory A. Burch, Jr., individually, are hereby assessed a civil penalty in the amount of twenty thousand dollars (\$20,000), jointly and severally, for the violations identified in paragraph II of this order.
- IV. Within thirty (30) days of the service of this order upon respondents Burch Logging LLC and Gregory A. Burch, Jr., respondents shall pay the civil penalty in the amount of twenty thousand dollars (\$20,000) by certified check, cashier's check or money order made payable to the "New York State Department of Environmental Conservation" and delivered to the following address:
- Scott Abrahamson, Esq., Assistant Regional Attorney
New York State Department of Environmental Conservation
Office of General Counsel Region 5
1115 NYS Route 86
P.O. Box 296
Ray Brook, New York 12977.
- V. Any questions or other correspondence regarding this order shall also be addressed to Scott Abrahamson, Esq. at the address referenced in paragraph IV of this order.
- VI. The provisions, terms and conditions of this order shall bind respondents Burch Logging LLC and Gregory A. Burch, Jr., individually, and their 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
March 6, 2019

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

In the Matter of the Alleged Violations of New York State
Navigation Law §§ 173 and 175

**HEARING
REPORT**

- by -

**BURCH LOGGING, LLC and GREGORY A. BURCH JR.,
Individually**

DEC Case No.
R5-20151222-2192

Respondents.

Appearances:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Scott Abrahamson, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- No appearance for respondents Burch Logging LLC¹ and Gregory A. Burch, Jr.

PROCEDURAL HISTORY

By notice of hearing and complaint dated February 8, 2016 (Complaint), staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondents Burch Logging LLC (Burch Logging) and Gregory A. Burch, Jr. (Gregory Burch), individually, for violations of the New York State Navigation Law.

The Complaint alleges that respondents caused a discharge of a petroleum-based hydraulic fluid at a logging site at 49 McKie Hollow Road in the Town of White Creek, Washington County (McKie Hollow site) and a logging site located off Midline Road in the Town of Ballston, Saratoga County (Midline Road site), and failed to report the petroleum spills at these sites. The Complaint seeks an order of the Commissioner holding respondents liable for the alleged violations and assessing a civil penalty against respondent Burch Logging in its corporate capacity and Gregory A. Burch in his individual capacity, jointly and severally, in the amount of \$20,000. (*See* Complaint at ¶ 5 and Wherefore clause ¶¶ I, II and III.)

¹ New York State Department of State records indicate that the correct name is Burch Logging LLC (*see* Exhibit 28).

The notice of hearing advised respondents that a written answer must be filed within twenty days of respondents' receipt of the complaint and that the failure to timely answer the complaint or attend the prehearing conference scheduled for March 10, 2016 at the Department's offices in Warrensburg, New York, would constitute a default and a waiver of respondents' right to a hearing. Respondents failed to answer the Complaint and failed appear at the mandatory prehearing conference.

On February 24, 2017, Department staff served respondents with a notice of motion for default judgment dated February 22, 2017 (Motion). The notice stated that a default hearing was scheduled for April 25, 2017 at the Department's offices in Warrensburg, New York, that Department staff would be prepared to establish that respondents are jointly and severally liable for the discharges of hydraulic fluid as described in the complaint and for the failure to report such discharge to the Department, and that Department staff would seek a penalty in the amount of \$20,000. (*See* Motion ¶¶ 19-20.)

On March 21, 2017, staff mailed a statement of readiness to respondents together with a cover letter dated the same day, advising respondents that the default hearing date would be held on May 9, 2017 at 1:00 p.m. at the Department's offices in Warrensburg, New York.

Respondents did not appear at the default hearing which took place as scheduled on May 9, 2017. I presided, and the Department was represented by Scott Abrahamson, Esq., Assistant Regional Attorney, Region 5. At the hearing, Mr. Abrahamson moved for a default judgment pursuant to 6 NYCRR 622.15, and also elected to proceed with a hearing in respondents' absence. Mr. Abrahamson also moved to amend the complaint to strike Gregory A. Burch, Jr. I reserved on the motion to amend pending staff's submission of a revised complaint (*see* Hearing Record, File 4 at 0:07). Department staff called three witnesses: Environmental Conservation Officer (ECO) Stephen Gonyea; ECO Brian Toth; and Andrew Frank, an environmental engineer in the Division of Environmental Remediation, Region 5.

An audio recording was made of the hearing, consisting of four separate files that were copied onto a CD and are included with this hearing record. The audio recording will be referred to herein as "CD File ___."

By email dated May 12, 2017, Mr. Abrahamson advised me that he wanted to reconsider his motion to amend the complaint because he had become aware of potentially material and relevant information concerning Mr. Burch's liability as a responsible corporate officer that was not available to him at the time of the hearing, and requested that the record be left open so that he could investigate this information. I granted his request. Mr. Abrahamson also provided pages from the DeLORME Atlas and Gazetteer for New York, which I have marked as exhibit 30, that provide the source of the topographical maps in staff exhibits 13 and 18.

By letter dated August 1, 2017, Mr. Abrahamson withdrew his motion to strike Gregory A. Burch from the Complaint, and requested that I admit two additional exhibits into the record and close the record: (1) an affidavit of Tracey Egan, the owner 68-86 Midline Road; and (2) New York State Department of State corporate entity records for Burch Logging LLC. I directed Mr. Abrahamson to serve these papers on respondent Gregory Burch and provide him an opportunity to submit comments to me. On August 18, 2017, I received an affidavit of mailing from Renee Fitzgerald, including a letter from Scott Abrahamson addressed to Mr. Burch, attaching the new information and advising Mr. Burch that he had until September 1, 2017 to submit comments to me (*see* Exhibit 29). I received no response from Mr. Burch.

By letter dated October 30, 2017, I advised respondent Gregory Burch, individually and in his representative capacity, that a default hearing was held in his absence on May 9, 2017 and provided him with a copy of the audio recording. I gave Mr. Burch until November 21, 2017 to submit a request to reopen the hearing record. Having received no response from Mr. Burch by November 21, the hearing record closed on November 22, 2017.

By this report, I admit into evidence exhibit 4, the affidavit of service of ECO Gonyea on Gregory A. Burch, which was not admitted at the hearing due to the pendency of staff's motion to strike Gregory Burch from the complaint. I also admit exhibits 27-30 into evidence. A list of exhibits admitted into evidence is attached to this report.

As set forth below, this report recommends that the Commissioner grant Department staff's motion for a default judgment, hold respondents jointly and severally liable for the charges pleaded in the complaint, and impose a civil penalty on respondents in the amount of \$20,000 as requested by Department staff.

FINDINGS OF FACT

Burch Logging LLC

1. Burch Logging LLC (Burch Logging) was organized by Gregory A. Burch, Jr. (Gregory Burch) pursuant to section 203 of the Limited Liability Company Law. The company is located in Washington County. According to documents filed with the Department of State, the mailing address for service of process is 38 Hansen Way, Salem, New York 12865. (*See* Exhibit 29 [Articles of Organization of Burch Logging LLC].)
2. Gregory Burch signed the certificate of publication of the formation of Burch Logging LLC on April 23, 2012 and identified himself as an authorized person. (*See* Exhibit 27 [Certificate of Publication of Burch Logging LLC].)

McKie Hollow Site

3. On July 22, 2015 at 3:24 p.m., the Department received a report of a spill at 49 McKie Hollow Road in the Town of White Creek, Washington County, New York (McKie Hollow site). The spill was reported by the property owner or his agent (*see* Testimony of Andrew Frank, File 2 at 3 9:07). The Department assigned spill number 1504297 to the incident. (*See* Exhibit 14.)
4. Andrew Frank, an environmental engineer in the Division of Environmental Remediation, Region 5, was the on-call spill responder on July 22, 2017. Mr. Frank has worked for the Department for 18 years and has a degree in chemical engineering from the State University of New York at Buffalo. (*See* Testimony of Andrew Frank, CD File 3 at 0:02.)
5. Mr. Frank called the property owner of the McKie Hollow Road site at approximately 3:30 p.m. and arranged a site visit for the following day. Andrew Frank met the property owner at the site on July 23, 2015. The property owner was an elderly man who had worked with a third party to make arrangements for a logging project on his property. (*See* Exhibit 14; Testimony of Andrew Frank, File 3 at 9:53.)
6. During the July 23rd site visit, Mr. Frank observed evidence of multiple petroleum spills, buckets containing hydraulic fluid, partially used buckets, and logging equipment, including strappings and items used to tie down loads, on the site. The five gallon buckets of hydraulic fluid were scattered around the area. (*See* Testimony of Andrew Frank, CD File 3 at 10:30.)
7. Mr. Frank took three photographs during his site visit. The photograph in exhibit 15 shows a large pile of debris approximately six feet high by eight feet long. The placement of the debris at the site concealed the presence of petroleum contaminated soils. Mr. Frank observed visible staining and significant contamination under the pile of debris. (*See* Testimony of Andrew Frank, CD File 3 at 14:22 and Exhibit 15.)
8. Mr. Frank observed soil on the site that was slippery and greasy when he examined it with his gloves and appeared wet, although the areas surrounding the wet soil were dry. He could also smell a metal petroleum odor, which is characteristic of a petroleum spill. (*See* Testimony of Andrew Frank, CD File 3 at 16:05.)
9. Mr. Frank observed another area of stained soil north of the area shown in exhibit 15. The spill in this area did not penetrate as deep into the soil as the area in exhibit 15. Mr. Frank examined the staining and concluded that it resulted from hydraulic fluids

associated with logging operations. (*See* Testimony of Andrew Frank, CD File 3 at 17:27 and Exhibit 16.)

10. Mr. Frank observed discarded items from logging operations, including a number of hydraulic buckets indicative of logging operations that required hydraulic fluid to refuel heavy equipment. (*See* Testimony of Andrew Frank, CD File 3 at 18:52; Exhibit 17.)
11. After the site visit, Mr. Frank tried to call Gregory Burch, whom the property owner identified as the logger, at the phone number the property owner had given Mr. Frank, but Mr. Frank could not reach him. He confirmed that Gregory Burch had not reported the spill and referred the matter to the Division of Law Enforcement so that Mr. Burch could be tracked down. Mr. Frank spoke to ECO Gonyea regarding the spill and the complaint he had received from a landowner regarding logging operations on his property. (*See* Testimony of Andrew Frank, File 3 at 20:00.)
12. ECO Gonyea and Mr. Frank met with the property owner at the McKie Hollow site on July 28, 2015. At that time, ECO Gonyea observed two areas of stained soil and five gallon buckets, some of which were empty and others which contained hydraulic liquid that would be used to operate a tractor. ECO Gonyea has investigated other spills similar to this spill and recognized the stained the soil was from a petroleum spill. (*See* Testimony of ECO Gonyea, CD File 1 at 9:20; Exhibit 9.)
13. ECO Gonyea prepared a call for service report documenting the complaint and noting Greg Burch. as a potentially responsible party (*see* Testimony of Stephen Gonyea, File 1 at 5:26; Exhibit 9).
14. On August 5, 2015, ECO Gonyea and Andrew Frank met with Gregory Burch at the McKie Hollow site. Mr. Burch told them that he had a problem with his log loader leaking fluid, however, he did not think that the spill was as big as it appeared that day. Staff explained what steps Mr. Burch needed to take to clean up the site. Mr. Burch told staff he was going to make arrangements to clean up the spill. ECO Gonyea issued Mr. Burch a Notice of Violation (NOV) for the prohibited discharge of petroleum and the failure to report a discharge. (*See* Testimony of Stephen Gonyea, CD File 1 at 11:52; Testimony of Andrew Frank, CD File 3 at 26:04; Exhibit 9.)
15. Gregory Burch did not clean up the McKie Hollow site. The Department hired an authorized contractor, National Vacuum Corporation, to clean up the site in late August 2015 pursuant to a standby contract. (*See* Testimony of Andrew Frank, CD File 3 at 28:10, 46:00; Exhibit 24.)

16. Mr. Frank searched the Department's spills database and found no record that Gregory Burch or Burch Logging had reported the spill at the McKie Hollow site (*see* Testimony of Andrew Frank, CD File 3 at 30:51).

Midline Road Site

17. Tracey Egan lives at 959 State Route 50 in Ballston Lake, New York. Ms. Egan co-owns property located on Midline Road in the Town of Ballston, Saratoga County, with two other individuals. The property does not have a street address, but the access is generally located between 68 Midline Road and 86 Midline Road (Affidavit of Tracy Egan sworn to July 19, 2017; Exhibit 27 [Eagan Aff], ¶ 4 [Midline Road site]).
18. On December 29, 2014, Ms. Egan signed a timber harvest agreement with Saratoga Land Management Corporation to have trees cut from the Midline Road property (*see* Eagan Aff, Exhibit 1). The agreement specified that all the logging work would be performed by Burch Logging (*see* Eagan Aff, Exhibit 1, ¶ 12). The agreement terminated on December 31, 2015. Ms. Egan worked directly with Gregory Burch, Jr. on the details of the logging operation (*see* Eagan Aff ¶ 5).
19. On or about July 31, 2015, ECO Gonyea learned that Gregory Burch was also conducting logging operations at a site in Saratoga County in the Town of Ballston on Midline Road. ECO Gonyea advised Andrew Frank of the logging operations. Andrew Frank inspected the site on July 31, 2015 and identified a puddle of hydraulic oil on the ground and soil staining, all of which were near or under log processing equipment on the site. Mr. Frank took four photographs where he observed the spills. (*See* Testimony of Andrew Frank, CD File 3 at 35:00; Exhibits 20-23.)
20. Mr. Frank observed the cutter, the main piece of equipment used to cut the logs to the desired length, and logs off to the right where they were being staged. The Burch Logging LLC logo appeared on the equipment along with an associated phone number. Drums and buckets that contained hydraulic fluid were found under the equipment. (*see id.*)
21. Mr. Frank observed evidence of oil leakage underneath the cutter in the vicinity of the hydraulic buckets and the presence of pooled hydraulic fluid on the ground. He placed an oil absorbent cloth on the puddle and observed that oil wicked aggressively into the cloth and saturated it completely, indicating the puddle was comprised of oil, not water. (*See* Testimony of Andrew Frank, CD File 3 at 44:45; Exhibit 22.)

22. According to Mr. Frank, oil does not evaporate. Rather, the oil in the puddle would seep into the ground, bind to the soils, and migrate into stormwater or groundwater. (*See* Testimony of Andrew Frank, CD File 3 at 42:18.)
23. The logging equipment made heavy use of hydraulic oil as indicated by the numerous buckets containing hydraulic fluids that Mr. Frank found at the site (*see* Testimony of Andrew Frank, CD File 3 at 42:55; Exhibit 23).
24. Following the site visit, Mr. Frank reported the spill to the Department's spill hotline at 1:00 p.m. on July 31, 2015 and spill number 1505091 was assigned. (*See* Testimony of Andrew Frank, CD File 3 at 35:00; Exhibit 19.)
25. Mr. Frank visited the Midline Road site again on August 10, 2015 and observed that the petroleum spill had not been cleaned up (*see* Testimony of Andrew Frank, CD File 3 at 35:00).
26. ECO Brian Toth was assigned to the Midline Road property project in early August 2015. ECO Toth has worked for the Department for ten years. He visited the site on August 13, 2015 and observed large-sized logging equipment on the site and spills in the same locations Andrew Frank had photographed. (*See* Testimony of ECO Brian Toth, CD File 2 at 0:02, 6:38.)
27. ECO Toth observed oil leakage and significant staining of soils in the area where the logging skidder was located and estimated that more than ten gallons of hydraulic fluid had spilled. He described the spill as a big spill. (*See* Testimony of Brian Toth, CD File 2 7:38.)
28. On August 24, 2015, ECO Toth met Gregory Burch in Schuylerville and issued him a NOV and administrative appearance tickets (ACATs) for the discharge of petroleum and the failure to report a spill (*see* Testimony of Stephen Gonyea, CD File 2 at 12:33; Exhibits 12, 12A, and 12B).
29. Gregory Burch stopped logging the Midline Road property in mid-September of 2015 and advised Ms. Eagan that he would provide an accounting of the amount of timber he had removed. Ms. Eagan received three invoices from Gregory Burch during the time he was removing timber from the property. Ms. Eagan met Gregory Burch to pick up the last payment from him in 2015 in Saratoga Springs. She did not interact with anyone else from Burch Logging. (*See* Eagan Aff ¶ 6.)

Remediation

30. Gregory Burch did not clean up either spill site. Andrew Frank advised him that the Department needed the sites cleaned up by an authorized contractor. Mr. Burch told Mr. Frank that he would accept invoices from the State spill contractor the Department hired to clean up the site (*see* Testimony of Andrew Frank, CD File 3 at 28:10).
31. The Department arranged for National Vacuum, a State spill contractor, to clean up the spill sites. National Vacuum cleaned up the McKie Hollow site on August 26, 2015 and the Midline Road site on August 27, 2015 at a total cost of \$2,738.60. (*See* Testimony of Andrew Frank at 48:10; Exhibit 24.)

Service

32. On February 16, 2016, Elissa Armater, Legal Assistant 2 in the Office of General Counsel of the New York State Department of Environmental Conservation, personally delivered two duplicate copies of the notice of hearing and complaint dated February 6, 2016 (Complaint) and the Department's *Guide to Enforcement Hearings*, along with the service of process cover sheet, to an employee of the New York State Department of State, located at One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231 (*see* Affidavit of Elissa Armater sworn to February 17, 2016, Exhibit 1).
33. On February 17, 2016, ECO Stephen R. Gonyeau personally served a copy of the Complaint on Gregory A. Burch, Jr. (*see* Affidavit of Stephen R. Gonyeau sworn to February 17, 2016, Exhibit 4).
34. On February 17, 2016, Renee Fitzgerald, Secretary 1 in the Department's Region 5 Office of General Counsel in Raybrook, New York, mailed a CPLR 3215(g)(4)(i) and (ii) notice to Burch Logging LLC by first class mail. The mailing included a copy of the Complaint, a copy of Department's *Guide to Enforcement Hearings*, and a letter signed by Assistant Regional Attorney Scott Abrahamson dated February 17, 2016, to Burch Logging LLC c/o Gregory A. Burch Jr., P.O. Box 104 Salem, New York 12865. The letter advised respondents in bold face type that the Department had previously served the Complaint on Burch Logging LLC by delivering two duplicate copies of the same to the New York State Department of State at its offices in Albany, New York. (*See* Affidavit of Renee Fitzgerald sworn to February 17, 2016, Exhibit 2.)
35. On February 22, 2017, Renee Fitzgerald mailed a second CPLR 3215(g)(4)(i) and (ii) notice to Burch Logging LLC by first class mail. The mailing included a copy of the Complaint, a copy of Department's *Guide to Enforcement Hearings* to Burch, and a letter signed by Assistant Regional Attorney Scott Abrahamson dated February 22, 2017, to

Burch Logging LLC, c/o Gregory A. Burch Jr., 38 Hansen Way, Salem, New York 12865. The letter advised respondents in bold face type that the Department had previously served the Complaint on Burch Logging LLC by delivering two duplicate copies of the same to the New York State Department of State at its offices in Albany, New York. (*See Exhibit 3.*)

36. On February 24, 2017, Ms. Fitzgerald mailed two copies of the notice of motion for default judgment dated February 22, 2017 (Motion) by first class mail addressed to Mr. Gregory A. Burch Jr., 38 Hansen Way, Salem, New York 12865 and Burch Logging LLC c/o Mr. Gregory A. Burch Jr. 38 Hansen Way, Salem, New York 12865. The mailing included the Complaint, an affirmation of Scott Abrahamson, and a cover letter signed by Scott Abrahamson dated February 22, 2017. (*See Exhibit 5.*)
37. On March 21, 2017, Renee Fitzgerald mailed two duplicate statements of readiness for adjudicatory hearing and cover letters from Scott Abrahamson to Mr. Gregory A. Burch and Burch Logging LLC by certified mail, return receipt requested, to 1078 Colvin Hill Road, Danby, Vermont 05739. Mr. Abrahamson's letter advised respondents that a hearing would be held on May 9, 2017 at the Department's offices in Warrensburg, New York. The mailing included six attachments, including the previously served Motion and the Complaint, and associated attachments. (*See Exhibit 6.*)
38. On March 21, 2017, Renee Fitzgerald mailed a copy of the notice of hearing and complaint by first class mail to Burch Logging LLC, c/o Gregory A. Burch Jr., at 1078 Colvin Hill Road, Danby, Vermont 05739. The mailing included a copy of the Department's Guide to Enforcement Hearings to Burch, and a letter signed by Assistant Regional Attorney Scott Abrahamson dated March 13, 2017. The letter advised respondents in bold face type that the Department had previously served the Complaint on Burch Logging by the New York State Department of State at its offices in Albany, New York. (*See Exhibit 7.*)
39. On August 15, 2017, Renee Fitzgerald mailed two letters to Gregory A. Burch, Jr. One letter was from Assistant Regional Attorney Scott Abrahamson addressed to Gregory A. Burch, Jr., dated August 15, 2017. The second letter was from Scott Abrahamson addressed to ALJ Lisa Wilkinson dated August 1, 2017 with attachments. Mr. Abrahamson's letter to Mr. Burch advised him that the record was being held open to consider additional information and that he had until September 1, 2017 to submit a response to ALJ Wilkinson concerning those materials.

DISCUSSION

Default Judgment

A respondent upon whom a complaint has been served must serve an answer on Department staff within twenty days of receiving a complaint (*see* 6 NYCRR 622.4[a]). The failure to timely serve an answer constitutes a default and a waiver of respondent's right to a hearing (*see id.*; 6 NYCRR 622.15[a]). The failure to attend a duly scheduled pre-hearing conference scheduled in the notice of hearing is also a default and may result in a waiver of respondent's right to a hearing (*see* 6 NYCRR 622.3[a][2]; 6 NYCRR 622.15[a]).

When a respondent fails to answer a complaint or appear for the pre-hearing conference scheduled in the notice of hearing, Department staff may make a motion for a default judgment (*see* 6 NYCRR 622.15[a]). A motion for a default judgment must contain: (1) proof of service upon the respondent of the notice of hearing and complaint; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order (6 NYCRR 622.15). Where Department staff has obtained personal jurisdiction over a corporation by personally serving the notice of hearing and complaint on the Secretary of State pursuant to Business Corporation Law § 306(b), staff must also provide proof of notice of service consistent with CPLR 3215(g)(4) (*see Matter of Milu, Inc.*, Order of the Commissioner, May 25, 2007, at 1; *Matter of Polanaya Corp.*, Order of the Acting Commissioner, April 12, 2005, at 1). The notice requirement also applies to a company organized under the Limited Liability Company Law (*see e.g. Matter of Palushaj Properties LLC*, Order of the Commissioner, October 27, 2013). The notice consists of service by first class mail of the notice of hearing and complaint, together with notice to respondent that service upon the corporation is being or was made pursuant to Business Corporation Law § 306(b) (*see* CPLR 3215[g][4][i], [ii]) and must be made at least twenty days before the entry of a judgment against respondent (*see* CPLR 3215[g][4][i]).

Staff's papers, accepted into evidence at the hearing, establish that the Complaint was personally served upon respondent Gregory A. Burch Jr (*see* Exhibit 4; Finding of Fact No. 32). Staff served Burch Logging by serving the Secretary of State and following up with the requisite notice of service pursuant to CPLR 3215(g)(4)(i) and (ii) (*see* Exhibits 1, 2, 3, 7; Hearing Record at 7:50; Finding of Fact Nos. 31, 33, 34, 37). In addition, staff served the Motion on respondents (*see* Exhibit 5; Finding of Fact No. 35). Thereafter, Staff mailed the statement of readiness for adjudicatory hearing, attaching all documents previously served, to both respondents by certified mail, return receipt requested, on March 21, 2017, and provided the return receipts signed by respondent Gregory Burch on behalf of himself and Burch Logging (*see* Exhibit 6; Finding of Fact No. 36).

Staff has established that respondents failed to answer the Complaint and failed to appear at the prehearing conference that was held on March 10, 2016. Staff has also submitted a proposed order with its Motion (*see* Hearing Record at 1:47, 15:00 and Exhibit 5 [notice of motion for default judgment]; Exhibit 8).

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” (*see Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6). Department staff, however, must provide some proof of facts sufficient to support the causes of action pleaded in the complaint (*see Matter of Queen City Recycle Center*, Decision and Order of the Commissioner, December 12, 2013, at 3 [consistent with CPLR 3215(f), requiring staff on motions for default judgment to offer proof of facts constituting the claim charged]). As discussed below, Department staff has met its burden and is entitled to a default judgment on the facts proven and the reasonable inferences that can be drawn from them.

Background

Navigation Law § 173, prohibits the discharge of petroleum except as may be provided by the conditions of a State or federal permit (*see* Navigation Law § 173 [1]). A prohibited discharge includes any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the State or onto lands from which it might flow or drain into said waters (*see* Navigation Law § 172[8]). Waters of the State include both surface and groundwater (*see* Navigation Law § 172 [18]). Petroleum includes oil or petroleum of any kind and in any form such as fuel oil, hydraulic fluid, and gasoline (*see* Navigation Law § 172 [15]).

Courts have held that even when there is “nothing in the record to positively demonstrate” that spilled oil might have flowed through the ground into groundwater, or the nature and extent of the resulting harm, “judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater ... and thereby cause ecological damage” (*see Merrill Transport Company v New York*, 94 AD2d 39, 42-43 [3d Dept 1983], *lv denied* 60 NY2d 555; *see also Domermuth Petroleum Equip. & Maint. Corp. v Herzog & Hopkins Inc.*, 111 AD2d 957 [3d Dept 1985]; *Guidice v Patterson Oil*, 51 Misc 3d 313, 319 [Sup Ct, New York County 2016]). Thus, proof of actual harm to the environment is not necessary to establish liability under the Navigation Law for a discharge of petroleum (*see id.*). “[I]t is enough that the discharge resulted from the Respondent's failure to provide secondary containment, and that the discharge could have contaminated the waters of the state, whether or not it actually did” (*Matter of Locaparra, D/B/A L&L Scrap Metals*, Final Decision and Order of the Commissioner, June 16, 2003, Hearing Report at 6).

A person who discharges petroleum must promptly report the spill to the Department. The failure to timely notify the Department constitutes a violation and subjects the discharger to liability under section 192 of the Navigation Law. (*See* Navigation Law § 175 and 17 NYCRR 32.5.)

Navigation Law Violations

At the adjudicatory hearing, Department staff provided sufficient testimonial and documentary evidence to establish respondents' joint and several liability for the discharge of petroleum in violation of Navigation Law § 173(1) and for the failure to report the discharge of petroleum in violation of Navigation Law § 175, and the appropriateness of the requested penalty for those violations (*see Matter of Queen City Recycle Center*, Decision and Order of the Commissioner, December 12, 2013, at 3).

Andrew Frank and ECOs Toth and Gonyea testified, and provided documentary evidence, including spill reports and photographs, demonstrating that respondents were conducting logging operations at the McKie Hollow Road site and the Midline Road site, that the logging equipment utilized by respondents leaked hydraulic fluid onto the ground, and that the hydraulic fluid remained on the ground until a Department authorized spill contractor remediated the sites. Mr. Frank and ECOs Toth and Gonyea inspected the sites and observed puddles of hydraulic fluid on the ground, areas of stained soil, some of which was significant, soil that was slippery and greasy although surrounding areas were dry, empty and partially filled buckets of hydraulic fluid used to operate logging equipment, and other discarded items associated with logging operations (*see* Finding of Fact Nos. 3-28).

At the adjudicatory hearing, Mr. Frank testified that a presumption exists that oil on the ground has the capacity and likelihood of reaching water depending on the geology of the site. Oil will migrate through the soil and come into contact with water either through rain or by percolating through the soil until it reaches groundwater. Nothing particular to the geology of the McKie Hollow Road site or the Midline Road site would, according to Mr. Frank, preclude the oil that had spilled on the sites from reaching groundwater (*see* Testimony of Andrew Frank, CD File 3 at 58:35; Finding of Fact No. 26). As discussed above, courts have taken judicial notice that oil spilled onto land can seep through the ground and into surface and groundwaters (*see Guidice*, 51 Misc 3d at 319; *Domermuth Petroleum*, 111 AD2d at 959; *Merrill Transp. Co.*, 94 AD2d at 42-43).

Andrew Frank and ECOs Toth and Gonyea have extensive experience with oil spills and provided credible testimony that the spills they observed on the subject properties resulted from a petroleum based product. They also spoke directly with respondent Gregory Burch who indicated that his logging equipment was leaking hydraulic fluid and that he would try to clean

up the properties (*see* Finding of Facts Nos. 4, 11, 13, 14, 25-27). In addition, Andrew Frank checked the Department's spill database and confirmed that neither Gregory Burch or Burch Logging had reported the spills (*see* Finding of Fact Nos. 15, 19). When Mr. Burch failed to clean up the sites, the Department arranged for an authorized spill contractor to perform the necessary remediation in August 2015 (*see* Findings of Fact Nos. 29-30).

Based on the foregoing, Department staff has made a *prima facie* showing based on the record evidence that respondents discharged petroleum in violation of Navigation Law § 173(1) and failed to report the discharge in violation of Navigation Law § 175.

Liability of Gregory A. Burch, Jr.

Department staff seeks to hold Gregory Burch individually liable for violations alleged in the complaint as a responsible corporate officer. Specifically, the complaint alleges that Gregory A. Burch, Jr. is the responsible corporate officer for respondent Burch Logging LLC, oversees its day-to-day operations and is responsible for ensuring the company's compliance with applicable laws and regulations, including article 12 of the Navigation Law. (*See* Exhibit 4, Complaint at ¶ 5 and Wherefore clause ¶¶ I, II and III.)

Staff's complaint is sufficient in terms of pleading corporate officer responsibility (*see Matter of Turtle Oil Co., Inc.*, Order of the Commissioner, February 13, 2017, at 2). To establish Mr. Burch's liability under the responsible corporate officer doctrine, staff must demonstrate that Mr. Burch had responsibility over the activities of Burch Logging that caused the violations and was in a position to prevent the violations (*see Matter of Supreme Energy Corp.*, Decision and Order of the Commissioner, April 11, 2014, at 25-26). Such a demonstration can be made with an offer of proof that Gregory Burch had direct responsibility for the operations, directed noncompliant activities to take place, was the sole officer and shareholder of the corporation, or that he alone made the decisions that are the subject of the violations (*see Matter of Seymour Excavating Inc.*, Order of the Commissioner, September 29, 2014). Based on the record evidence, I find that Department staff has satisfied its burden.

Department staff provided records from the Department of State showing that Gregory Burch was a corporate official of Burch Logging. According to the articles of organization of respondent Burch Logging LLC, Gregory Burch was the organizer of the limited liability company (*see* Exhibit 27). He also signed the certificate of publication of the formation of Burch Logging LLC on April 23, 2012 as an authorized person (*id.*). Pursuant to the Limited Liability Company Law, an "authorized person" is a person, whether or not a member of the limited liability company, who is authorized by the operating agreement, or otherwise, to act on behalf of a limited liability company (*see* Limited Liability Company Law § 102[c]).

Department staff also provided an affidavit from Tracy Eagan, the owner of the Midline Road property spill site. Ms. Eagan attested that the timber harvest agreement she executed specified that Burch Logging would perform the logging activities on her property and that she and “Gregory Burch, Jr. of Burch Logging LLC” would agree on the selection of trees for harvest (*see* Eagan Aff at 2, ¶ 5 and attached Exhibit 1, ¶¶ 12-13). According to Ms. Eagan, she did not interact with anyone other than Gregory Burch (*see* Eagan Aff at ¶ 6). Mr. Burch provided Ms. Eagan an accounting of the timber he removed from her property, and paid her directly (*see* Eagan Aff at ¶ 6).

The testimony of Department staff also supports holding Gregory Burch individually liable as a responsible corporate officer. ECO Toth and ECO Gonyea both testified that they issued a NOV to Gregory Burch, one for the McKie Hollow site and one for the Midline Road site, respectively (*see* Testimony of Stephen Gonyea, CD File 2 at 13:34; Testimony of Brian Toth, CD File 3 at 13:30; Exhibits 10 and 12). ECO Gonyea was familiar with Gregory Burch from another site, and met with him at the McKie Hollow Road site along with Mr. Frank. Mr. Burch admitted that he had a leak in one of his machines and did not believe the problem was as serious as staff claimed (*see* Testimony of Stephen Gonyea, CD File 2 at 11:29). ECO Toth testified that when he met with Mr. Burch to issue him the NOV, Mr. Burch told him that he had tried to clean up the spill and was surprised that his efforts were not good enough (*see* Testimony of Brian Toth, CD File 3 at 15:06).

Andrew Frank testified that Gregory Burch could have taken some simple steps to capture the petroleum from the logging equipment if he did not want to repair it such as putting secondary containment under the equipment, like a plastic kiddie pool, that would have prevented the petroleum from spilling onto the ground. Mr. Frank said that if the oil was properly captured, it could be disposed of in the standard waste stream. Mr. Frank also explained that Mr. Burch could have taken steps to repair the hydraulic lines that had malfunctioned and leaked petroleum, stating that there are a lot of moving parts to logging equipment and steps must be taken to ensure that the equipment is properly maintained. Some logging trucks, according to Mr. Frank, are outfitted with response equipment so that spills can be dealt with expeditiously. (*See* Testimony of Andrew Frank, CD File 3 at 1:09.00.)

Based on the foregoing, I conclude that staff has made a prima facie showing based on the record evidence that Gregory Burch directed the logging activities that precipitated the alleged violations and that he alone could have prevented the violations by maintaining and repairing the logging equipment he operated on behalf of Burch Logging and utilized at the McKie Hollow Road and Midline Road sites, and having adequate supplies on hand to contain any petroleum spills before they reached the ground.

Violations and Civil Penalty

Section 192 of the Navigation Law provides for a civil penalty of up to twenty-five thousand dollars (\$25,000) per day for each violation of the provisions of article 12 of the Navigation Law or any regulation promulgated thereunder. Department staff alleged that respondents violated (1) Navigation Law § 173(1) by discharging petroleum at two different logging sites and (2) Navigation Law § 175 by failing to report the discharges. The statutory maximum penalty, taking into account the two discharges and the failure to report the two discharges, would be \$100,000.

At the hearing Department staff demonstrated that the penalty amount requested is consistent with the Department's prior practice as well as its penalty policies and applicable provisions of the Navigation Law. Andrew Frank utilized a spill assessment penalty matrix developed by the Department to implement the Civil Penalty Policy (DEE-1 [1990]) in spills cases. The matrix generates a ballpark civil penalty estimate. The matrix takes into account the nature of the spill, the associated public health and environmental risks, and aggravating and mitigating factors. Utilizing the penalty matrix, and taking into account the two separate spills and the failure to report those spills, Mr. Frank calculated a civil penalty in the range of \$23,750-27,500 (*see* Testimony of Andrew Frank, CD File 3 at 53:32 and Exhibit 25.)

Mr. Frank further testified that the State had to pay \$2,738.60 to clean up the two sites, that the spills were sizeable, messy and occurred on private property, that staff does not typically encounter someone who persistently fails to maintain their equipment, and that reporting spills is essential to protecting the environment and the public from migration. According to Mr. Frank, respondents could have utilized straightforward measures to ensure that the logging equipment was properly maintained and that necessary supplies were on hand to contain the hydraulic fluid if a spill occurred, but failed to do so. (*See* CD File 3 at 1:06-1:13.)

In light of the statutory maximum discussed above, the penalty requested is authorized, reasonable and consistent with the purposes and objectives of the Department's penalty policies.

CONCLUSIONS OF LAW

As discussed herein, the hearing record establishes that: (i) Department staff served the notice of hearing and complaint upon respondents; (ii) respondents failed to file an answer to the complaint and failed to appear at a pre-hearing conference; and (iii) respondent failed to appear for the adjudicatory hearing. Department staff is therefore 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 respondents' absence, demonstrates by a preponderance of the evidence that respondents Gregory Burch and Burch Logging LLC: (1) violated Navigation Law § 173(1) by discharging petroleum on property located at 49 McKie Hollow Road in the Town of White Creek and on property located at 68-86 Midline Road in the Town of Ballston; and (2) violated Navigation Law § 175 by failing to report the discharges at 49 McKie Hollow Road and 68-86 Midline Road to the Department.

Department staff's proposed civil penalty in the amount of twenty thousand dollars (\$20,000) is consistent with the Department's penalty policy as well as applicable provisions of Navigation Law article 12 and administrative precedent.

RECOMMENDATION

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

1. Granting Department staff's motion for a default judgment, and finding respondents Burch Logging LLC and Gregory Burch, individually in default pursuant to the provisions of section 622.15 of 6 NYCRR;
2. Holding that respondents Burch Logging LLC and Gregory Burch, individually, violated Navigation Law § 173(1) by discharging petroleum on property located at 49 McKie Hollow Road in the Town of White Creek, and on property located 68-86 Midline Road in the Town of Ballston;
3. Holding that respondents Burch Logging, LLC and Gregory Burch, individually violated Navigation Law § 175 by failing to report the aforementioned discharges; and
4. Directing respondents to pay a civil penalty of twenty thousand dollars (\$20,000).

_____/s/_____
Lisa A. Wilkinson
Administrative Law Judge

EXHIBIT CHART
Matter of Burch Logging LLC and Gregory A. Burch, Jr.
DEC Case No. R5-20151222-2192 May 9, 2017

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
1	Affidavit of Service of Notice of Elissa Armater sworn to February 17, 2016 with Notice of Hearing and Complaint dated February 8, 2016 attached	✓	✓	Staff	
2	Affidavit of Service of Renee Fitzgerald sworn to February 17, 2016 of CPLR 3215(g)(i) and (ii) Notice and Mailing with Notice of Hearing and Complaint dated February 8, 2016 attached	✓	✓	Staff	
3	Affidavit of Service of Renee Fitzgerald sworn to February 22, 2017 of Second CPLR 3215(g)(i) and (ii) Notice and Mailing with Notice of Hearing and Complaint dated February 8, 2016 attached	✓	✓	Staff	
4	Affidavit of Service of Stephen Gonyea sworn to February 17, 2016 with Notice of Hearing and Complaint dated February 8, 2016 attached	✓	✓	Staff	

5	Affidavit of Service of Renee Fitzgerald sworn to February 24, 2017 with Notice of Motion for Default Judgment dated February 22, 2017 and Exhibits 1 through 5 attached	✓	✓	Staff	
6	Affidavit of Service of Renee Fitzgerald sworn to March 21, 2017 of Statement of Readiness for Adjudicatory Hearing dated March 21, 2017 and Exhibits 1 through 6 attached	✓	✓	Staff	
7	Affidavit of Service of Renee Fitzgerald sworn to March 21, 2017 of Third CPLR 3215(g) (i) and (ii) Notice and Mailing with Notice of Hearing and Complaint dated February 8, 2016 attached	✓	✓	Staff	
8	Proposed Order	✓	✓	Staff	
9	Call for Service McKie Hollow Road White Creek, New York July 28, 2015	✓	✓	Staff	
10	Notice of Violation - Gregory A. Burch Jr. issued August 13, 2015	✓	✓	Staff	
11	Call for Service 68-86 Midline Road Ballston Spa, New York August 24, 2015	✓	✓	Staff	

12	Notice of Violation - Gregory A. Burch Jr. August 27, 2015	✓	✓	Staff	
12-A	Administrative Ticket - Gregory A. Burch Prohibited Discharge of Petroleum August 24, 2015	✓	✓	Staff	
12-B	Administrative Ticket - Gregory A. Burch Failure to Report Discharge of Petroleum August 24, 2015	✓	✓	Staff	
13	Topographical Map 1	✓	✓	Staff	see exhibit 30
14	NYSDEC Spill Report Form Spill No. 1504297 - 49 McKie Hollow Road White Creek, New York	✓	✓	Staff	
15	Photograph	✓	✓	Staff	
16	Photograph	✓	✓	Staff	
17	Photograph	✓	✓	Staff	

18	Topographical Map 2	✓	✓	Staff	see exhibit 30
19	NYSDEC Spill Report Form Spill No. 1504297 - 68-86 Midline Road Ballston, New York	✓	✓	Staff	
20	Photograph	✓	✓	Staff	
21	Photograph	✓	✓	Staff	
22	Photograph	✓	✓	Staff	
23	Photograph	✓	✓	Staff	
24	Contractor Application for Payment Response Services Standby Contract National Vacuum Corp. October 27, 2015	✓	✓	Staff	
25	Penalty Matrix for Oil Spill Cases	✓	✓	Staff	

27*	Affidavit of Tracy Egan Sworn to July 19, 2017 with attached Forest Resource Management Contract between Tracy Egan and Saratoga Land Management Corporation	✓	✓	Staff	
28	New York State Department of State Records Regarding Burch Logging LLC: Articles of Organization and Certificate of Publication	✓	✓	Staff	
29	Affidavit of Service of Renee Fitzgerald sworn to August 15, 2017 of August 15, 2017 Letter addressed to Gregory A. Burch Jr. and August 1, 2017 Letter addressed to ALJ Wilkinson	✓	✓	staff	
30	DeLORME Atlas & Gazetteer™ for New York pages 66-67	✓	✓	staff	see exhibits 13 and 18

*There is no exhibit 26.