

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

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

- by -

**HURON ENTERPRISES, LLC,
WAFLEF FARMS, INC., PAUL WAFLEF,
and SUSAN WAFLEF,**

Respondents.

ORDER

DEC File No.
R8-20160503-40

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department or DEC) alleged that respondents Huron Enterprises, LLC, WafleF Farms, Inc., Paul WafleF and Susan WafleF clear-cut trees and disposed fill in New York State regulated freshwater wetland NW-3 (freshwater wetland NW-3 or wetland NW-3) and its adjacent area. Wetland NW-3 and its adjacent area are located at 10748 Slaght Road and 10817 Slaght Road in Wolcott, Town of Huron, Wayne County. Department staff alleged that respondents' activities violated ECL article 24 (New York State Freshwater Wetlands Act) and 6 NYCRR part 663 (Freshwater Wetlands Permit Requirements).

Procedural Background

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint upon respondents Huron Enterprises, LLC, Paul WafleF and WafleF Nursery and Orchard. Staff amended the complaint twice. The first amended complaint, among other things, substituted WafleF Farms, Inc. for WafleF Nursery and Orchard. The second amended complaint added Susan WafleF as a respondent and added the property at 10817 Slaght Road to the area where the alleged violations occurred.¹

The second amended complaint, which is the basis for this proceeding, alleged two causes of action:

- (i) respondents clear-cut trees within freshwater wetland NW-3 and its adjacent area without a DEC permit, in violation of ECL 24-0701(1) and ECL 24-0703(1); and

¹ For a more detailed review of the pre-hearing proceedings, including motion practice, *see* Hearing Report of Administrative Law Judge P. Nicholas Garlick attached hereto, at 1-5.

(ii) respondents placed fill within freshwater wetland NW-3 and its adjacent area without a DEC permit, in violation of ECL 24-0701(1) and ECL 24-0703(1). *See* Hearing Exhibit 24 (Second Amended Complaint ¶¶ 20-27). In the second amended complaint, Department staff requested an order:

- finding that respondents violated ECL article 24 and title 6 of the NYCRR;²
- imposing a civil penalty “in an amount no less than” three thousand dollars (\$3,000);
- directing that respondents conduct certain remedial restoration activities in wetland NW-3 and its adjacent area in order to restore wetland NW-3 and its adjacent area, obtain all required permits to conduct those remedial restoration activities, and submit annual monitoring reports to the Department for five years;
- setting stipulated penalties of five thousand dollars (\$5,000) for each future violation of the order by respondents; and
- granting such other relief as may be deemed just, proper and equitable under the circumstances.

See Hearing Exhibit 24 (Second Amended Complaint at Wherefore clause).

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick who prepared the attached hearing report. I hereby adopt the ALJ’s findings of fact as corrected by this order and modify the ALJ’s findings of fact, the ALJ’s determinations on liability, civil penalty, and remedial relief, and the ALJ’s recommendations as discussed below.

Factual Background

Wetland NW-3 appears on the official New York State Freshwater Wetlands Map, Wayne County, Map 6 of 20 which was promulgated on June 25, 1986 (*see* Hearing Exhibit 33; Hearing Transcript [Tr.] at 61). No amendments to the map have been made (*see* Hearing Report at 5 [Finding of Fact No. 1]; Hearing Tr. at 50, 116).

Freshwater wetland NW-3 is mapped on two tax parcels in the Town of Huron, Wayne County: 10748 Slaght Road and 10817 Slaght Road (*see* Hearing Exhibit 34). The property located at 10748 Slaght Road is owned by Huron Enterprises, LLC and is 217 acres in size (*see* Hearing Report at 5-6, n. 2;³ Hearing Tr. at 33), of which 13.74 acres are within freshwater wetland NW-3 and 9.26 acres are in its adjacent area (*see* Hearing Report at 5 [Finding of Fact No. 2]; Hearing Exhibit 34; Hearing Tr. at 59-60⁴). The property located at 10817 Slaght Road is owned by Paul Wafler and Susan Wafler and is 9.68 acres in size (*see* Hearing Exhibit 30), of

² Staff’s causes of action in the second amended complaint did not reference any specific sections of part 663 of title 6 of the NYCRR.

³ Contrary to the ALJ’s statement in note 2, Hearing Exhibit 29 does reference Huron Enterprises, LLC’s ownership of 10748 Slaght Road and does not reference its ownership of 10662 Slaght Road.

⁴ The transcript page references in Finding of Fact No. 2 (Hearing Report at 5-6) are hereby corrected in this order from “57” to “59-60”.

which 1.59 acres are within freshwater wetland NW-3 and 1.83 acres are in its adjacent area (Hearing Report at 5-6 [Finding of Fact No. 2]; Hearing Exhibit 34; Hearing Tr. at 59-60).⁵

Paul Wafler testified that he was told by someone other than a DEC employee that the area in which he conducted clear-cutting and filling was not on the State wetland maps, and that he relied on that statement (*see* Hearing Tr. at 196). Mr. Wafler referenced his reliance on that statement as a “big mistake” (*id.*). No evidence exists in this record that Mr. Wafler or any other respondent ever contacted the DEC regional office or any DEC employee to verify whether any portion of 10748 Slaght Road or 10817 Slaght Road was on the State’s freshwater wetland maps or was in a wetland adjacent area.

Between October 2013 and November 2015, Paul Wafler removed or caused to be removed trees from wetland NW-3 and its adjacent area on 10748 Slaght Road and 10817 Slaght Road (*see* Hearing Report at 6 [Finding of Fact No. 5]; Affidavit of Steven Miller, sworn to August 28, 2017 [Miller Aff.], ¶¶ 15-20; *see also* Hearing Tr. at 66-78). Mr. Wafler then developed a tree nursery on the clear-cut land (*see* Hearing Report at 12).

Department staff conducted a site visit in which clear-cutting and filling in wetland NW-3 and in the adjacent area were observed (*see* Hearing Tr. at 74-75, 78-82). According to Department staff witness Steven Miller, a Biologist 1 (Ecologist) in the Bureau of Habitat in the DEC’s Region 8 office, an estimated eighteen acres “had been cleared of all trees” (*see* Miller Aff. ¶ 16).

None of respondents applied for or received a Department permit to conduct the clear-cutting or the placement of fill in freshwater wetland NW-3 or its adjacent area (*see* Hearing Report at 6 [Finding of Fact No. 6]; Hearing Tr. at 93-94).

Mr. Wafler has been the subject of an enforcement action conducted by the U.S. Army Corps of Engineers, Buffalo District (Army Corps) for filling of 4.68 acres of a federal jurisdiction wetland on his property, in addition to the filling of an intermittent stream (*see* Hearing Exhibits 1, 2 and 8). The Army Corps communications with Mr. Wafler confirmed that federal jurisdictional wetlands were present on the Slaght Road property (*see* Hearing Exhibit 2). Mr. Wafler also received a February 14, 2017 letter from the Army Corps directing him to submit a restoration plan to the Army Corps to remediate his discharge of fill in the onsite federal wetland (see Hearing Exhibit 8 [restoration plan to include tree and shrub planting specific to growing on wetland areas, and a wetland seed mix to be distributed in the wetland impact area]).

⁵ *See* footnote 4 of this Order.

Liability

Named Respondents

As noted, Department staff's second amended complaint names four respondents – Huron Enterprises, LLC, Wafler Farms, Inc., Paul Wafler and Susan Wafler. Mr. Wafler serves as the president of both Huron Enterprises, LLC and Wafler Farms, Inc. (*see* Hearing Report at 6; Hearing Exhibit 4).

The ALJ concluded that Huron Enterprises, LLC, which is the owner of the property at 10748 Slaght Road, is liable for the violations that occurred on that property. Paul Wafler's liability arises from his cutting of trees and removal of the stumps and the placement of fill in freshwater wetland NW-3 and its adjacent area at both 10748 and 10817 Slaght Road, and his co-ownership of 10817 Slaght Road with his wife Susan Wafler. Susan Wafler's liability arises from her co-ownership with Paul Wafler of 10817 Slaght Road (*see* Hearing Report at 7-8).

The ALJ stated that no information existed in the record to hold Wafler Farms, Inc. liable for the clear-cutting or filling in wetland NW-3 (*see* Hearing Report at 7). Based upon my review, I concur with the ALJ's determination with respect to Wafler Farms, Inc. The complaint, insofar as it relates to Wafler Farms, Inc., is dismissed.

The ALJ recommends that I consider Paul Wafler as the only proper respondent (*see* Hearing Report at 7-8). The ALJ however provides no adequate legal basis or discussion for me to conflate the liability of Huron Enterprises, LLC and Susan Wafler with that of Paul Wafler, or otherwise reject the liability of Huron Enterprises LLC and Susan Wafler in this proceeding, and I decline to do so.

At the hearing, Mr. Wafler questioned whether wetland NW-3 had been properly mapped in 1986. However, the Department's Region 8 Regional Attorney stated in a letter to Mr. Wafler dated October 27, 2016 (*see* Hearing Exhibit 7) that the statute of limitations for making such a challenge to the mapping had expired. In the letter, DEC staff counsel asserted that if Mr. Wafler believed that wetland NW-3 no longer had the characteristics of a freshwater wetland, the proper procedure would be to seek to have the State wetland map amended or apply for a permit to conduct clear-cutting and fill activities (*see id.* at 1). The responsible course for Mr. Wafler and the other respondents, in light of the State mapping, would have been to check with the Department whether the proposed activities were compliant with State law. This they did not do.

Staff's Second Amended Complaint

As noted above, staff's second amended complaint alleges violations of ECL 24-0701(1) and ECL 24-0703(1). ECL 24-0701(1) reads as follows:

“After issuance of the official freshwater wetlands map of the state, or of any selected section or region thereof, any person desiring to conduct on freshwater wetlands as so designated thereon any of the regulated activities set forth in subdivision two of this section must obtain a permit as provided in this title.”

Subdivision two, cited in ECL 24-0701(1), lists various activities in wetlands or their adjacent areas that are subject to regulation which would include the activities subject to this proceeding.

Staff also cites violations of ECL 24-0703(1) which in part states, in part “[a]ny person proposing to conduct or cause to be conducted a regulated activity upon any freshwater wetland shall file an application for a permit with the clerk of the local government having jurisdiction or the department, as the case may be” (emphasis added).

Although not referenced in the causes of action in the second amended complaint, staff at hearing cited sections of 6 NYCRR part 663 with respect to the alleged violations (*see e.g.* Hearing Tr. at 3, 29, 85 [6 NYCRR 663.20 (reference should have been to 663.4[d][20][filling of wetland or its adjacent area)]], 94, 125, 126 and 144).⁶

--First Cause of Action

In its first cause of action, Department staff alleged that respondents clear-cut wetland NW-3 and its adjacent area without applying for or obtaining the necessary Department permit. Clear-cutting in a mapped wetland, or the adjacent area within 100 feet of a mapped wetland, is an activity requiring a permit under ECL 24-0701 (*see also* 6 NYCRR 663.4[a] & [d][Item 22]). Although the Freshwater Wetlands Act excludes the selective cutting of timber for growing agricultural products from requiring a permit (*see* ECL 24-0701[4]), clear-cutting timber for agricultural purposes is not excluded.

Department staff established that there was a mapped freshwater wetland on the wetland map that was adopted in 1986, and that map has not been amended. Therefore, a permit was required under ECL 24-0701(1) and ECL 24-0703(1) for these clear-cutting activities that were undertaken. In this regard, respondents should have contacted the Department to discuss the proposed clear-cutting activities. Respondents failed to do so, and Mr. Wafler’s testimony that he did not think there was a wetland at that location, and his reliance on the comment of some unidentified individual, is insufficient to waive the permit requirement.⁷

Based on the record before me, no dispute exists that Paul Wafler clear-cut trees in NW-3, a mapped wetland, and its adjacent area and that none of respondents applied for a permit from the Department as the law requires. Accordingly, I find Paul Wafler who did the clear-cutting and property owner Huron Enterprises, LLC liable for the violations at 10748 Slaght

⁶ The Hearing Report cites to Parts 663 and 665 of 6 NYCRR. Part 663 applies to Department wetland permitting requirements which are relevant to this proceeding. Part 665 (references to which appear on pages 9, 10 and 11 of the hearing report) applies to local governmental permitting standards and is not applicable to this proceeding. The ALJ, in referencing regulatory provisions with respect to filling and clear-cutting, should have noted 6 NYCRR 663.4(d)(Item 20)(filling, including filling for agricultural purposes) and 6 NYCRR 663.4(d)(Item 22)(clear-cutting timber), rather than referencing subsections of Part 665. I also note and correct an error in the Hearing Report regarding the statute that authorizes a civil penalty for the violation of ECL article 24 (*see* Hearing Report at 12 which references “ECL 72-23-3(1)” – this should read “ECL 71-2303(1)”).

⁷ *Matter of D.B.S. Realty Inc. v State Dept. of Env'tl. Conservation*, 201 AD2d 168, 172 [3d Dept 1994] (“persons desiring to conduct regulated activities on a freshwater wetland without a DEC permit do so at their peril”).

Road. Liable for the violations at 10817 Slaght Road are Paul Wafler (who did the clear-cutting and is a co-owner of the property) and Susan Wafler (co-owner of the property).

--Second Cause of Action

In the second cause of action, Department staff alleged that respondents placed fill in freshwater wetland NW-3 and its adjacent area without applying for or obtaining the necessary Department permit.

Placing fill in a freshwater wetland requires a permit (*see* ECL 24-0701[1]; *see also* 6 NYCRR 663.4 [a] & [d][20]). The placement of fill in the adjacent area to a freshwater wetland also requires a permit (*see id.*). None of the respondents obtained a permit to place fill or otherwise discharge fill in wetland NW-3 or its adjacent area.

The ALJ found that the fill was from soils from wetland NW-3 and its adjacent area, but that there was no evidence that off-site fill had been disposed on wetland NW-3 or its adjacent area (*see* Hearing Report at 12). Accordingly, the ALJ concluded that staff failed to meet its burden with respect to the liability of respondents Huron Enterprises LLC, Paul Wafler and Susan Wafler as under the second cause of action – that is the placement of fill in wetland NW-3 and its adjacent area without applying for or obtaining the necessary Department permit.

I reject the ALJ’s determination that Department staff did not meet its burden. The ALJ attempts to draw a distinction between whether the fill is from an off-site location (and therefore a violation) or whether the fill is generated on-site (and therefore not a violation). This distinction is not supportable. “Filling” is defined as “depositing any soil, stones, sand, gravel, mud, rubbish or fill of any kind, including spoil resulting from dredging or draining activities” (6 NYCRR 663.2[o][emphasis added]). The definition of fill does not incorporate a locational source as to where the fill originated. The ALJ’s suggestion that fill arising from activities in a wetland or its adjacent area can be redeposited in a wetland or its adjacent area without a Department permit is not correct. This issue has been clearly addressed in a prior administrative proceeding (*see* ALJ hearing report at 8 in Matter of Francis, adopted by Order of the Commissioner dated April 26, 2011 [“a permit is required to place fill material in a freshwater wetland, [or] its adjacent area . . . , regardless of whether the material is from on-site or off-site”]).

As the record demonstrates, fill was generated by activities in wetland NW-3 and its adjacent area and then was placed back in wetland NW-3 and adjacent area (*see e.g.* Hearing Report at 80-81, 86) without legal authorization. Accordingly, respondents are liable as to the second cause of action as follows: Paul Wafler who did the filling and Huron Enterprises, LLC as property owner are liable for the fill violations at 10748 Slaght Road. Liable for the fill violations at 10817 Slaght Road are Paul Wafler (as co-owner of the property and the individual who did the filling) and Susan Wafler (as co-owner of the property).

Civil Penalty

ECL 71-2303(1), in part, provides that any person who violates, disobeys or disregards any provision of article twenty-four or any rule or regulation thereof shall be liable for a civil penalty of not to exceed eleven thousand dollars for every such violation.

Department staff requested a civil penalty of three thousand dollars (\$3,000) for the two violations in its second amended complaint. At hearing, staff addressed its penalty calculation and the guidances that it utilized (*see* Hearing Tr. at 97-105). The ALJ notes that nowhere in staff's papers is the suggested civil penalty amount apportioned between the two specific violations (*see* Hearing Report at 13). Nor is there any division of the civil penalty between the two Slaght Road properties. The ALJ suggests the possibility of an equal division between the two violations (that is, \$1,500 for each violation) (*see* Hearing Report at 13).

The ALJ recommended that Paul Wafler be assessed a civil penalty of \$1,500, solely for the violation of ECL 24-0701(1) and 24-0703(1) with respect to the first cause of action – clear-cutting trees within freshwater wetland NW-3 without a DEC permit. I do not adopt that penalty recommendation. I hold that staff proved both the violations that it alleged (clear-cutting and filling) and therefore I am assessing the entire amount of civil penalty that Department staff requested. I have determined that Huron Enterprises, LLC, Paul Wafler and Susan Wafler are liable parties (although only Paul Wafler as to both Slaght Road properties). Based on the record before me, I apportion the civil penalty between the two properties, taking into account the more significant area that was impacted on 10748 Slaght Road (*see* Hearing Tr. at 56-59, 77-78; *see also* Hearing Exhibits 34 and 37)⁸ -- \$2,000 for the violations at 10748 Slaght Road (\$1,000 for the clear-cutting and \$1,000 for the filling) and \$1,000 for the violations at 10817 Slaght Road (\$500 for the clear-cutting and \$500 for the filling).

In summary, the civil penalty assessments are as follows:

- (i) for the clear-cutting of trees and placement of fill within freshwater wetland NW-3 and its adjacent area without a permit in violation of ECL 24-0701(1) and ECL 24-0703(1) at 10748 Slaght Road, a civil penalty of two thousand dollars (\$2,000) is assessed, jointly and severally, on Paul Wafler and Huron Enterprises, LLC; and
- (ii) for the clear-cutting of trees and placement of fill within freshwater wetland NW-3 and its adjacent area without a permit in violation of ECL 24-0701(1) and ECL 24-0703(1) at 10817 Slaght Road, a civil penalty of one thousand dollars (\$1,000) is assessed, jointly and severally, on Paul Wafler and Susan Wafler.

The civil penalties hereby assessed are authorized and appropriate.

⁸ Department staff had inverted the acreages of the two Slaght Road properties in Hearing Exhibit 34, which they corrected at the hearing (*see* Hearing Tr. at 56, 59).

Remedial Relief

Department staff requested that I include in my order various remediation-oriented measures for respondents to undertake at the two properties. These included directing respondents:

- not to further disturb wetland NW-3 and its adjacent area;
- immediately seed the impacted freshwater wetland (but not the adjacent area) with annual rye and apply an inch of straw mulch, or if the order is issued after November 1, seed and mulch no later than April 1 of the following year;
- submit a wetland restoration plan (including an implementation schedule) to Department staff for approval developed by a non-governmental organization with practical experience in wetland mitigation, remediation and restoration;
- obtain any necessary permits for implementing the wetland restoration plan;
- submit annual monitoring reports to Department staff for at least five years or until restoration goals in the plan are met; and
- impose a stipulated penalty of five thousand dollars for each future violation of the order by respondents.

For the reasons stated by the ALJ, it is not necessary for me to include language directing respondents not to further disturb wetland NW-3 and its adjacent area. As the ALJ notes, respondents are bound by the provisions of the ECL, relating to its requirements or prohibitions (*see* Hearing Report at 14). Furthermore, the justification for using stipulated penalties here is unclear. I concur with the ALJ that a penalty for any future violations should be addressed on a case-by-case basis, rather than setting a specific amount in this order.

ALJ Garlick did not recommend that restoration be required because he concluded that the record does not support Department's staff assertion that the area depicted on the official New York State Freshwater Wetlands Map, Wayne County, Map 6 of 20 was, in fact, a wetland prior to the alleged violations (*see* Hearing Report at 19). The ALJ references, for example, that Mr. Wafler testified that he and his father had installed tiles to drain the land prior to the promulgation of the wetland map in 1986 (*see* Hearing Tr. at 200).

I find however that the ALJ's overall analysis on remedial relief (*see* Hearing Report at 14-19) to be incomplete and inconsistent with this record. It is clear that the wetland at issue here was a State regulated wetland that has been mapped since 1986. At hearing, Department staff's evaluation of wetland NW-3 was set forth by DEC biologist Steven Miller whose general job responsibilities include the mapping and delineation of wetlands (*see* Hearing Tr. at 24-25). Department staff's review of the property in question, including its use of a Geographic Information System (GIS), and its accompanying evaluation at the hearing demonstrate the impact on wetland NW-3 and adjacent area (*see* Miller Aff. ¶¶ 16-22); Hearing Exhibit 34 [superimposition of wetland from DEC map onto the Slaughter Road properties] and Exhibit 35 [first page]).⁹ Although Department staff recalculated the areal extent of wetland NW-3 to be

⁹ Mr. Wafler noted that the Army Corps had visited the site in 2016 and estimated that the area for wetland NW-3 measured 4.68 acres, less than the 12.4 acres required to be jurisdictional under the New York State Freshwater Wetlands Act and Department regulations (*see* Hearing Tr. at 198; Hearing Exhibit 2 [letter from the Buffalo

13.7 acres, it is a size greater than the minimum required for a New York State wetland (*see* Hearing Tr. at 59-61, 117).

Although the criteria for delineation of federal and New York State wetlands are not identical, the fact that Army Corps identified federal jurisdictional wetland areas on the property runs counter to the ALJ's proposition that no wetland existed prior to respondents' clear-cutting and filling activity (*see* Hearing Exhibit 2 [based on May 11, 2016 Army Corps staff observations, an in-office resource review, and the assessment of aerial photographs, determination made that activities on Slaght Road property resulted in the discharge of fill to a federal jurisdictional wetland]). I note also that the Army Corps directed respondent Paul Wafler to coordinate with the Army Corps and New York State as to the federal and state wetland enforcement actions (*see* Hearing Exhibit 8).

Based on the record, however, I do not find that Department staff has met its burden with respect to its request for the full range of restoration proposed. There is no discussion or explanation as to the extent of restoration to be undertaken (*e.g.* whether the tree nursery is to be removed in part or in whole, or what areas of fill are to be remediated), and it is unclear as to the specific wetland benefits that are to be achieved.

However, I believe it is appropriate to require that respondents provide the Department with further information regarding the site and its present and future condition. In that regard, I am hereby directing respondents, within sixty (60) days of the service of this order upon them, to:

- provide Department staff with color photographs of wetland NW-3 and adjacent area that were impacted by respondents' actions; and
- provide Department staff with a written description of the protective measures that it has taken with respect to wetland NW-3 and its adjacent area.

Following this submission, respondents are to provide Department staff with an annual report on August 1, 2023, through and including August 1, 2025, detailing with appropriate photographs, the condition of wetland NW-3 and adjacent area. Failure to submit these reports will constitute a violation of this order. These requirements are authorized and appropriate.

Furthermore, if wetland NW-3 should evidence erosion or lack of vegetative cover, respondents are to advise the Department in writing of the protective measures that respondents will undertake to correct those conditions. As part of any such protective measures, if respondents plant trees and shrubs these must be those that grow in wetland areas. Any seeding must be a wetland seed mix. Respondents shall consult with Department staff as to the best means to address any adjacent area to wetland NW-3 that is eroded or lacks vegetative cover and

District, Army Corps, to Paul Wafler dated September 16, 2016 (Army Corps letter)]; *see also* 6 NYCRR 663.2[p]). However, although the Army Corps letter on which Mr. Wafler relies addresses filling of 4.68 acres of a federal jurisdictional wetland on this property, the Army Corps letter addresses only the areal extent of the federal jurisdictional wetland area that was filled and does not state that this is the total wetland area on the property and does not provide an estimate of that portion of the property that constitutes a New York State regulated freshwater wetland or adjacent area.

implement restorative measures accordingly. Following all restorative activities, respondents are to provide the Department with a narrative written summary of the actions taken with accompanying photographs. In addition, respondents shall allow Department staff access to wetland NW-3 and its adjacent area to assess the need for and efficacy of restoration efforts.

Nothing in this order supersedes the federal wetland requirements to which respondents are subject, nor does this order alter the Army Corps' direction that respondent Paul Wafler restore the filled areas and undertake any other remedial measures that the Army Corps may impose (*see* Hearing Exhibit 8).

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Respondents Huron Enterprises, LLC and Paul Wafler are adjudged to have violated ECL 24-0701(1) and ECL 24-0703(1) for causing or allowing the clear-cutting trees and placement of fill within freshwater wetland NW-3 and its adjacent area without a permit at 10748 Slaght Road.
- II. Respondents Paul Wafler and Susan Wafler are adjudged to have violated ECL 24-0701(1) and ECL 24-0703(1) for causing or allowing the clear-cutting of trees and placement of fill within freshwater wetland NW-3 and its adjacent area without a permit at 10817 Slaght Road.
- III. The complaint against respondent Wafler Farms, Inc. is hereby dismissed.
- IV. I hereby assess a civil penalty in the amount of three thousand dollars (\$3,000), apportioned as follows:
 - A. A civil penalty of two thousand dollars (\$2,000) assessed, jointly and severally, on respondents Paul Wafler and Huron Enterprises, LLC, for causing or allowing the clear-cutting of trees and placement of fill within freshwater wetland NW-3 and its adjacent area at 10748 Slaght Road; and
 - B. A civil penalty of one thousand dollars (\$1,000) assessed, jointly and severally, on respondents Paul Wafler and Susan Wafler, for causing or allowing the clear-cutting of trees and placement of fill within freshwater wetland NW-3 and its adjacent area at 10817 Slaght Road.
- V. Within sixty (60) days of the service of this order upon respondents Huron Enterprises, LLC, Paul Wafler, and Susan Wafler, payment of the civil penalties as set forth in paragraph IV of this order is to be submitted by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation at the address noted in paragraph VII of this order.

- VI. Within sixty (60) days of the service of this order upon respondents Huron Enterprises. LLC, Paul Wafler, and Susan Wafler, respondents are directed to:
- A, provide the Department with color photographs of wetland NW-3 and its adjacent area that were impacted by respondents' actions; and
 - B. provide the Department with a written description of the protective measures that they have taken with respect to the restoration of wetland NW-3 and its adjacent area.

In addition, respondents Huron Enterprises. LLC, Paul Wafler, and Susan Wafler are to provide Department staff with an annual report on August 1, 2023, through and including August 1, 2025, detailing with appropriate photographs the condition of wetland NW-3 and adjacent area.

If wetland NW-3 should evidence erosion or lack of vegetative cover, respondents are to advise the Department in writing of the protective measures that respondents will undertake to correct those conditions. As part of any such protective measures, if respondents plant trees and shrubs these must be those that grow in wetland areas. Any seeding must be a wetland seed mix. Respondents shall consult with Department staff as to the best means to address any adjacent area to wetland NW-3 that is eroded or lacks vegetative cover and implement restorative measures accordingly. Following all restorative activities, respondents are to provide the Department with a narrative written summary of the actions taken with accompanying photographs. In addition, respondents shall allow Department staff access to wetland NW-3 and its adjacent area to assess the need for and efficacy of restoration efforts.

- VII. Respondents Huron Enterprises. LLC, Paul Wafler, and Susan Wafler shall direct any questions concerning this order, and file submissions required by paragraph VI of this order to:

Dusty Renee Tinsley, Esq.
Assistant Regional Attorney
New York Department of Environmental Conservation
Region 8
6274 East Avon-Lima Road
Avon, New York 14414.

VIII. The provisions, terms and conditions of this order shall bind respondents Huron Enterprises. LLC, Paul Wafler, and Susan Wafler 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: June 21, 2022
Albany, New York

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

In the Matter of the Alleged Violations
of the Environmental Conservation Law
(ECL) Article 24 and Part 663 of Title 6
of the Official Compilation of Codes,
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Hearing Report

DEC File No.
R8-20160503-40

- by -

**Huron Enterprises LLC,
Wafler Farms, Inc., Paul Wafler,
and Susan Wafler,**

Respondents.

SUMMARY

Staff of the Department of Environmental Conservation (Department or DEC) alleges that the four named respondents have illegally clear-cut and filled freshwater wetland NW-3 on property they own or operate in the Town of Huron, Wayne County, New York. This report recommends that the Commissioner find one of the respondents, Paul Wafler, liable for a single violation of clear cutting in NW-3 and impose a payable civil penalty of \$1,500. Although NW-3 was duly mapped as a freshwater wetland in 1986, based on the information in this record, it has not been shown that a jurisdictional freshwater wetland existed at the site immediately prior to the actions of Mr. Wafler and, therefore, the Commissioner should not order any remediation.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of the original notice of hearing, pre-hearing conference, and complaint as well as a complaint, dated September 19, 2016, upon respondents Huron Enterprises, LLC, Wafler Nursery and Orchard, and Paul Wafler by certified mail return receipt requested (Exh. 3).¹ This version of the complaint alleged two causes of action. First, Department staff

¹ As explained below, the complaint has been amended to correct spelling errors in this original complaint as reflected in the caption above.

alleged that respondents clear-cut trees within freshwater wetland NW-3 without a permit, in violation of ECL 24-0701(1) and ECL 24-0703(1). In the second cause of action, Department staff alleges respondents placed fill within freshwater wetland NW-3 without a permit in violation of ECL 24-0701(1) and ECL 24-0703(1). The complaint listed the site of the violations as 10748 Slaughter Road in Wolcott, Town of Huron, Wayne County.

By letter dated September 26, 2016, Mr. Wafler contacted Department staff requesting additional information and seeking to reschedule the pre-hearing conference (Exh. 4). Several other communications occurred between the parties, including a letter from Department staff dated September 29, 2016 and at least one phone call, however, the contents of these are not included in this hearing record.

By letter dated October 18, 2016, Department staff rescheduled the pre-hearing conference for November 16, 2016 and extended the time to serve an answer until November 3, 2016 (Exh. 5).

By letter dated October 24, 2016, Mr. Wafler asserted that the area claimed to be wetland was overstated and that the species of trees harvested from the area would not grow in wet areas. He also stated that 4" tile lines had been put in the ground in 1982, before the area was mapped by the Department and NW-3 was designated a jurisdictional freshwater wetland (Exh. 6).

By letter dated October 27, 2016, Department staff declined to extend Mr. Wafler's time to answer until after the pre-hearing conference and argued that the time to challenge the original mapping of NW-3 in 1986 had expired (Exh. 7).

The pre-hearing conference occurred on November 16, 2016.

In a letter dated March 9, 2017, Department staff filed its first motion in this matter, requesting permission to amend its original notice of hearing and complaint, which was sent both to respondents named in the original complaint as well as those named in the new caption (Exh. 9).

In a ruling dated April 12, 2017, Department staff's request was granted by Chief Administrative Law Judge (ALJ) James McClymonds (Exh. 10).

Department staff then served an amended notice of hearing and an amended complaint, dated April 12, 2017, upon respondents Huron Enterprises, LLC, Wafler Farms, Inc., and Paul Wafler by certified mail return receipt requested. Respondents received the pleadings on April 19, 2017. The amended complaint alleged the same two causes of action as the first complaint (Exh. 11).

In papers dated May 30, 2017, Department staff filed a second motion in this matter, a motion for default judgment pursuant to 6 NYCRR 622.15. Staff's papers consisted of a cover letter, a motion for default judgment and order, the affirmation of Dusty Renee Tinsley with nine exhibits attached, and the affidavit of Steven Miller with seven exhibits attached. In its default motion, Department staff sought an order of the Commissioner: (1) finding respondents in default for failing to file an answer; (2) finding respondents jointly and severally liable for the alleged violations; (3) assessing a total civil penalty of \$3,000; and (4) requiring restoration of freshwater wetland NW-3 and its adjacent area (Exh. 12). These papers were received by respondents on May 31, 2017 (Exh. 12).

By ruling dated August 15, 2017, ALJ Garlick ruled that Department staff had not met its burden of providing facts sufficient to support its claim against respondents. Specifically, the ruling stated that Department staff had failed to show respondents' relationship to the property where the violations were alleged. In addition, it noted that the complaint only alleged violations in NW-3 itself yet sought an order requiring remediation of both the wetland and the adjacent area (Exh. 15).

In papers dated August 30, 2017, Department staff filed its third motion renewing its motion for default pursuant to 6 NYCRR 622.15. Included with this motion were additional documents meant to address the deficiencies identified in the prior ruling. This default motion also sought an order of the Commissioner: (1) finding respondents in default for failing to file an answer; (2) finding respondents jointly and severally liable for the alleged violations; (3) assessing a total civil penalty of \$3,000; and (4) requiring restoration of freshwater wetland NW-3 and its adjacent area (Exh. 16). This motion was mailed to respondents on September 11, 2017 (Exh. 17).

In a ruling dated August 21, 2018, ALJ Garlick again denied Department staff's default motion noting that among the newly disclosed documents included with the motion papers was a copy of an October 24, 2016 letter from Mr. Wafler showing he had

appeared in this proceeding pro se, and which contained a denial. Because of this appearance, the ruling concluded that Department staff had not met its burden to provide proof of the facts sufficient to support its motion for default. It also informed the parties that they would be contacted to schedule a conference call to discuss the next steps in this matter (Exh. 18).

After providing notice to the parties, a conference call occurred at 11:00 am on September 14, 2018. Only Department staff, represented by Ms. Tinsley, participated. During this call it was agreed an administrative hearing in this matter would occur on October 25, 2018 at the Department's Region 8 office in Avon, New York. A notice of hearing was duly issued on September 25, 2018 (Exh. 19).

In a four-page letter motion dated October 12, 2018, Department staff moved to cancel the hearing and requested permission to again amend its papers (Exh. 20).

By letter dated October 22, 2018, ALJ Garlick cancelled the hearing (Exh. 21).

With a cover letter dated November 5, 2018, Department staff provided an affidavit of service stating that its second motion to amend its complaint had been mailed to respondents on October 12, 2018 (Exh. 22).

By ruling dated November 28, 2018, Department's staff's motion to amend its complaint was granted (Exh. 23).

With a cover letter dated December 3, 2018, Department staff provided its second amended notice of hearing and second amended complaint (Exh. 24). This second amended complaint added Susan Wafler as a respondent and added property at 10817 Slaght Road (where a portion of NW-3 and its adjacent area lies) to the area where the violations occurred.

With a cover letter dated January 4, 2019, Department staff provided affidavits of service for the second amended complaint (Exh. 25).

With a cover letter dated January 17, 2019, Department staff provided a statement of readiness pursuant to 6 NYCRR 622.9 (Exh. 26).

On January 28, 2019, I held a conference call with the parties during which they agreed to try to mediate this dispute. This matter was then assigned to ALJ Daniel P. O'Connell as a settlement judge. The parties met on May 7, 2019 at the Department's Region 8 office in Avon. After reflecting on the mediation, in an email dated May 31, 2019, the Waflers informed ALJ O'Connell that the proposed settlement was not acceptable. Thereafter, the matter was returned to me by letter dated June 24, 2019.

On a conference call with the parties on July 17, 2019, a hearing date was agreed to and by notice dated July 23, 2019, a hearing was scheduled for September 11, 2019 at the Department's Region 8 office located at 6274 East Avon-Lima Road, Avon (Exh. 27).

The hearing occurred as scheduled. The Department was represented by Dusty Renee Tinsley, Assistant Regional Attorney, and called two witnesses, Steven Miller, staff Biologist 1 in the Bureau of Habitat, and Garrett Koplun, Forester 1. Respondents appeared pro se, Susan Wafler appeared on behalf of herself and Paul Wafler appeared on behalf of himself and as the president of both Wafler Farms, Inc. and Huron Enterprises, LLC. Mr. Wafler also testified, and the hearing concluded at approximately 3 pm.

The transcript was received on September 25, 2019. A closing brief on behalf of Department staff was received on November 22, 2019, at which time the record closed. Respondents did not file a closing brief.

FINDINGS OF FACT

1. Freshwater wetland NW-3 is described on the official New York State Freshwater Wetlands Map, Wayne County, Map 6 of 20, identified as the Department's North Wolcott Wetland Map, which was promulgated on June 25, 1986 pursuant to ECL 24-0301. No amendments to the map have been made. (Exh. 33.)
2. Freshwater wetland NW-3 is located on two tax parcels in the Town of Huron, Wayne County: 10748 Slaght Road and 10817 Slaght Road (Exh. 34). The property located at 10748 Slaght Road is owned by Huron Enterprises, LLC and is 217 acres in size (Exh. 29), of which 13.74 acres are within NW-3 and 9.26 acres are in its adjacent area (Exh. 34; t. 57). The property located at 10817 Slaght Road is owned by Paul Wafler and Susan Wafler and is 9.68 acres in size (Exh. 30), of which 1.59 acres are

within NW-3 and 1.83 acres are in its adjacent area (Exh. 34; t. 57).

3. Huron Enterprises, LLC is an active domestic limited liability company (Exh. 28).

4. Wafler Farms, Inc. is an active domestic business corporation (Exh. 31) that does business from 10748 Slaght Road (Exh. 32).

5. Between October 2013 (Exh. 35, p. 1) and November 2015 (Miller affidavit sworn to August 28, 2017, ¶15), Paul Wafler removed or caused to be removed all of the trees from NW-3 and its adjacent area on both 10748 and 10817 Slaght Road (t. 194).

6. None of respondents applied for or received a permit to conduct the activities undertaken in NW-3 (t. 93).

DISCUSSION

In its second amended complaint, Department staff seeks an order from the Commissioner: (1) finding respondents jointly and severally liable for the two causes of action alleged; (2) imposing a payable civil penalty of three thousand dollars (\$3,000); and (3) requiring the immediate seeding of NW-3 with annual rye and the submission of a wetland restoration plan for Department approval. Before discussing respondents' liability, civil penalty amount, and requested remediation, however, it is necessary to address whether the four respondents identified by Department staff are proper parties to this proceeding.

Respondents

As can be seen from the caption, the second amended complaint names four respondents: Huron Enterprises, LLC, Wafler Farms, Inc., Paul Wafler, and Susan Wafler. Ms. Wafler was added in the second amended complaint and was not identified as a party in either the original complaint or the first amended complaint. The four respondents are all related. The Waflers are married, and Mr. Wafler serves as the president of both Huron Enterprises, LLC and Wafler Farms, Inc. (Exh. 4).

Huron Enterprises, LLC is the owner of 10748 Slaght Road² and is properly named as respondent for the portion of the

² At the hearing, Mr. Miller testified that information he printed off the Wayne County tax website (Exh. 29) informed him that Huron Enterprises, LLC

alleged violation that occurred on that property. Department staff has only alleged a single violation relating to the clear-cutting of NW-3 and a single violation related to filling in NW-3, despite the fact that these violations occurred on two parcels, 10748 and 10817 Slaght Road (t. 96). There is no evidence, nor does Department staff attempt to argue or explain why Huron Enterprises, LLC should be held liable for the portion of the alleged violations that occurred on 10817 Slaght Road.

Department staff have presented no information as to why Wafler Farms, Inc. is properly named a respondent in this case. Department staff have shown that Wafler Farms, Inc. is a registered domestic business corporation (Exh. 31) and according to its website, operates at 10748 Slaght Road (Exh. 32), but other than operating at this address, Department staff offer no information about why this corporation should be held liable for the alleged filling or clear-cutting NW-3, and therefore, the Commissioner should determine that Wafler Farms, Inc. is not properly a respondent in this matter.

Paul Wafler appeared at the hearing and testified that he had undertaken the cutting of trees in NW-3 and the removal of stumps (t. 194-195). This information as well as his serving as president of Huron Enterprises, LLC and his co-ownership of 10817 with his wife establish that he is properly named as a respondent in this matter. In fact, an argument can be made that Department staff, in a better pleaded proceeding, would have only named Mr. Wafler as respondent.

Susan Wafler is the co-owner of 10817 Slaght Road (Exh. 30) and as such is a proper respondent for the portion of the alleged violations that occurred on that property. However, Department staff have shown no connection between Ms. Wafler and Huron Enterprises, LLC or the activities undertaken by her husband on the neighboring property, 10748 Slaght Road.

Given the deficiencies in the pleadings mentioned above, the fact that all the named respondents are linked, the relatively small civil penalty being sought, and the admission of Mr. Wafler that he was responsible for the work on the properties that resulted in the alleged violations, the

owned 10748 Slaght Road (t. 33). However, exhibit 29 only reports the LLC as owning 10662 Slaght Road. Other information in the record, specifically exhibit B to an affidavit of Mr. Miller dated August 28, 2017), which itself was labeled as exhibit 8 to Department Staff's second motion for default, establishes the LLC's ownership of 10748 Slaght Road.

Commissioner should consider Mr. Wafler as the only proper respondent in this matter.

Liability

In its second amended complaint (Exh. 24), dated December 3, 2018, Department staff alleges two violations in two causes of action: first, that respondents removed all trees within NW-3 and its adjacent area without a permit in violation of ECL 24-0701(1) and ECL 24-0703(1); and second, that respondents placed fill in NW-3 and its adjacent area without a permit in violation of ECL 24-0701(1) and ECL 24-0703(1). Each alleged violation is discussed below.

It is uncontested that the properties located at 10748 and 10817 Slaght Road contain the regulated area of NW-3, both the mapped wetland itself and its adjacent area. Department staff introduced a copy of the official wetlands map, North Wolcott Wetlands Map, which was promulgated on June 25, 1986 pursuant to ECL 24-0301 (Exh. 33) and establishes the Department's jurisdiction over the site. Nor is there a factual question as to the ownership of these parcels: Huron Enterprises, LLC owns 10748 Slaght Road, and Mr. and Ms. Wafler own 10817 Slaght Road.

The official wetland map describes NW-3 as being 18 acres in size and lists it as a class 3 wetland. The map has not been amended in the 33 years since it was promulgated. At the hearing, Department staff member Miller testified that he had recalculated the area of NW-3 as 15.3 acres (Exh. 34; t. 57). Mr. Miller's new calculation of the size of NW-3 is still greater than the 12.4 threshold for Department jurisdiction.

At the hearing, Mr. Wafler questioned whether NW-3 had been properly mapped in 1986 (t. 157-158). However, as correctly noted in a letter from Department staff's Regional Attorney to Mr. Wafler dated October 27, 2016 (Exh. 7), the statute of limitations for making such a challenge has long since expired. In his letter, staff counsel asserted that if Mr. Wafler believed NW-3 no longer had the characteristics of a freshwater wetland, the proper procedure was to seek to have the wetland map amended or apply for a permit for his actions, neither of which was done in this case.

ECL 24-0701 prohibits any person from conducting a regulated activity in a freshwater wetland without first obtaining a permit. At the hearing, Department staff member Miller testified that he had reviewed the relevant files kept by

the Department and determined that none of respondents had either filed an application for a permit nor been issued a permit for any regulated activity in NW-3 (t. 93). This fact is not contested by respondents.

Department staff member Miller also testified that neither clear-cutting of trees nor filling in a freshwater wetland is allowed under the agricultural exemption found at 6 NYCRR 633.2(c)(2) (t. 85). This testimony is also not contested by respondents.

First Cause of Action

In its first cause of action, Department staff allege that respondents clear-cut NW-3 and its adjacent area without applying for or obtaining the necessary Department permit. Clear-cutting is defined at 6 NYCRR 663.2(i) as:

"any cutting of trees over six inches in diameter at breast height over any 10-year cutting cycle where the average residual basal area of trees over six inches in diameter at breast height remaining after such cutting is less than 30 square feet per acre, measured within the area harvested; provided, however, that where regeneration is assured by stand conditions such that after such cutting, the average residual basal area of trees at least one inch in diameter at breast height is at least 30 square feet per acre, measured within the area harvested, a clearcut will not be deemed to have taken place unless the average residual basal area of trees over six inches in diameter at breast height is less than 10 square feet per acre, similarly measured."

ECL 24-0701 prohibits any person from conducting a regulated activity in a freshwater wetland without first obtaining a permit. ECL 24-0703 requires any person proposing to undertake a regulated activity in a freshwater wetland to file an application for a permit. The clear-cutting of trees in a freshwater wetland is described as usually incompatible and requires a permit (6 NYCRR 665.7(g), item 22; t. 91). The clear-cutting of trees in the adjacent area of a freshwater wetland is described as usually compatible and requires a permit

(6 NYCRR 665.7(g), item 22; t. 92). As discussed above, none of respondents have applied for or received a permit in this case.

Department staff has offered ample evidence of the clear-cutting. The record contains the following aerial photographs: (1) a black and white photo dated June 26, 1963 showing the area that would be NW-3 to be forested (Exh. 36, at 1)³; (2) an infrared image of the area from 1985 of the area showing the area of NW-3 to be forested (Exh. 36, at 2; t. 73); (3) an infrared photograph taken between 1994 and 1999 showing NW-3 to be forested (Exh. 40, at 1; t. 129); (4) a black and white photograph showing NW-3 as forested from 2003 (Exh. 40, at 2; t. 132); (5) a color photograph showing NW-3 still forested from 2008, however, some of the trees in NW-3 had been removed along the lines in the image (Exh. 40, at 3; t. 133); and two photographs from 2015, one from Google Earth (Exh. 37; t. 76) and a second from the Department (Exh. 40, at 4; t. 135) showing the north eastern section of NW-3 cleared of trees and the remainder still forested.

After the date of the last of the aerial photographs, Department staff member Miller testified that he visited the site⁴ and saw that the entire area of NW-3 had been cleared of trees (t. 74-75). During this visit he took a photograph of the cleared area (Exh. 35, at 7).⁵ Department staff also offered the testimony of Garrett Koplun who had never visited the site but based his testimony on his review of aerial and ground level photographs of the area (t. 125). Department staff member Koplun testified, based on the review of the photos discussed above as well as a series of ground level photos taken in 2013 by Google Earth (Exh. 35, at 2-6), that based on the size of the trees in NW-3 prior to their cutting, that the area had been clear-cut, as that term is defined in 6 NYCRR 663 (t. 126-144).

³ Mr. Miller testified that he sketched the area of the wetland with a yellow line and the property boundaries with a green line (t. 71). It should be noted that these lines are only an approximation of the area and the shape of NW-3 is not the same as it appears on other photos or the official wetland map.

⁴ Mr. Miller testified he could not remember the date of his site visit exactly (and took no notes during the visit) but that it was either in 2015 (t. 74-75) or 2016 (t. 87, 109). His earlier affidavit, provided with Department staff's motions for default, place this visit in November 2015 (Exh. 16 in this record, see exhibit 8 to the default motion, ¶15).

⁵ Attached to Department staff's August 30, 2017 default motion (Exh. 16) is an affidavit from Mr. Miller (Exh. 8) that attaches other photos of the cleared area (Exh. H at 2-4) which were not discussed at the hearing.

The above evidence, plus the fact that Mr. Wafler admits to cutting the trees in NW-3 (t. 194), allows the Commissioner to conclude that Department staff has met its burden of showing that the violation alleged in the first cause of action did, in fact, occur.

Second cause of action

In its second cause of action, Department staff alleges that respondents placed fill in NW-3 and its adjacent area without applying for or obtaining the necessary Department permit. As discussed above, Department staff has shown that the area where the alleged violation occurred was a designated freshwater wetland and that none of respondents applied for or received a permit. Filling is defined at 6 NYCRR 663.2(o) as:

“depositing any soil, stones, sand, gravel, mud, rubbish or fill of any kind, including spoil resulting from dredging or draining activities.”

ECL 24-0701 prohibits any person from conducting a regulated activity in a freshwater wetland without first obtaining a permit. ECL 24-0703 requires any person proposing to undertake a regulated activity in a freshwater wetland to file an application for a permit. Placing fill in a freshwater wetland is described as incompatible and requires a permit (6 NYCRR 665.7(g), item 20; t. 93). The placement of fill in the adjacent area of a freshwater wetland is described as usually incompatible and requires a permit (6 NYCRR 665.7(g), item 20; t. 93). As discussed above, none of respondents have applied for or received a permit in this case.

At the hearing, Department staff member Miller testified that during his site visit he observed that stumps had been removed and the resulting holes had been filled with soil and that there was other evidence of soil being distributed at the site (t. 75, 80, 86). Mr. Miller also observed small piles of soil at the site (t. 81, 86). He also testified that the photo he took of the site during that visit showed that fill had been placed in NW-3 and its adjacent area (Exh. 35, at 7; t. 68). He also noted that the long, white building shown in this photo was built after 2013, but he did not indicate that it was placed in either NW-3 or its adjacent area (Exh. 35, at 7, 69).⁶

⁶ Attached to Department staff's August 30, 2017 default motion (Exh. 16) is an affidavit from Mr. Miller (Exh. 8) that attaches another photo of the area he says was filled (Exh. K), which was not discussed at the hearing.

At the hearing, Mr. Wafler testified. Throughout his testimony he appeared fully forthcoming and credible, explaining his actions on direct examination and elaborating on details when asked under cross examination. He admitted that he, and others under his direction, had removed all of the trees from NW-3 and its adjacent area. With respect to fill, he stated that no fill had been brought into the area (t. 173), an assertion not challenged by Department staff. He testified that after the trees were cut in both NW-3 and its adjacent area, the root balls of the larger trees were removed and flipped, allowed to dry out, tossed around (presumably to remove the earth), and then burned on site (t. 204). He also stated that the area around the base of the trees was higher than the surrounding land, due to tree growth. He admitted that removing the root balls created holes in the earth (t. 195). While he does not say so, photographs of the area, which is now a tree nursery (Exh. 43), indicate that these holes were then filled.

Reviewing the evidence in the record, it is not clear that Department staff has shown by a preponderance of the evidence that filling occurred at the site. The best interpretation of the testimony and photographs offered shows that soil in NW-3 and its adjacent area was disturbed, holes created and filled, but that no material from outside the area was deposited in either NW-3 or its adjacent area. Accordingly, the Commissioner should find that the violation alleged in the second cause of action is not proven on this record.

CIVIL PENALTY

In its second amended complaint, Department staff request that the Commissioner impose a payable civil penalty of at least three thousand dollars (\$3,000) upon respondents. At the hearing, Mr. Miller testified that ECL 72-23-3(1) authorizes a maximum civil penalty of \$11,000 for each violation and that because Department staff had alleged two violations, the maximum penalty that could be imposed in this case was \$22,000 (t. 95). Then, after considering the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990), he evaluated the appropriate penalty based on the gravity of the violation, the benefits received from the violation, and the adjustment factors identified in DEE-1 (t. 98). No gravity component was assessed because if NW-3 was remediated, Mr. Miller testified, the harm would be temporary (t. 100). Also, no benefit component was assessed because Department staff could not calculate the value of the trees removed from NW-3 (t. 98). He also noted the

cooperation of Mr. Wafler in attending the prehearing conference and calculated the requested civil penalty at \$3,000 (t. 100-101).⁷ Mr. Miller also testified that he reviewed the Department's Freshwater Wetland Enforcement Policy (DEE-6, issued February 4, 1992) and this review did not affect his penalty calculation (t. 105).

Mr. Wafler did not address the issue of the requested civil penalty in his testimony.

Nowhere in Department staff's papers or in Mr. Miller's testimony is the suggested civil penalty amount divided between the two alleged violations. Accordingly, the Commissioner may conclude that the amount for each is equal, or \$1,500 per violation. Since Department staff has only proven one of the alleged violations, respondent Paul Wafler should be ordered to pay a civil penalty in the amount of \$1,500.

REMEDIATION

In addition to finding respondents liable for the alleged violations and the payment of a civil penalty, Department staff requests that the Commissioner include in his order language directing respondents not to further disturb NW-3 and its adjacent area as well as to undertake restoration actions in the area of the alleged violations. Specifically, Department staff requests that respondents: (1) immediately seed the impacted freshwater wetland (but not the adjacent area) with annual rye and apply an inch of straw mulch, or if the order is issued after November 1, seed and mulch no later than April 1 of the following year; (2) submit a wetland restoration plan (including an implementation schedule) to Department staff for approval developed by a non-governmental organization with practical experience in wetland mitigation, remediation and restoration; (3) obtain any necessary permits for implementing this plan; and (4) submit annual monitoring reports to Department staff for at least five years or until restoration goals in the plan are met. Finally, Department staff also seeks the Commissioner to impose a stipulated penalty of \$5,000 for each future violation of the order by the respondents.

As a preliminary matter, Department staff's request that the Commissioner include language in his order directing

⁷ While not addressed in his testimony, attached to Department staff's second default motion (Exh. 16) is Mr. Miller's affidavit, sworn to August 28, 2017, which states that this alleged violation is the first for respondents (Exh. 8, ¶31g).

respondents not to further disturb NW-3 and its adjacent area is not necessary. Respondents are bound by the provisions of the ECL relating to freshwater wetlands and its prohibitions. Further, Department staff's request that language be included in the Commissioner's order stating that the penalty for any future violations related to NW-3 be stipulated at an amount of five thousand dollars (\$5,000) is also unnecessary and perhaps unwise. Any future violations should be addressed on a case-by-case basis and any future civil penalty should be based on the severity of any future violation, among other factors.

Department staff member Miller testified that the authority for Department staff's restoration request is the Department's freshwater wetlands enforcement policy (DEE-6, issued February 4, 1992) and that the primary goal of the policy is to enhance the preservation and protection of New York's freshwater wetlands by seeking the restoration of wetland benefits and functions lost as the result of illegal activity (t. 104; DEE-6 at 2). Citing DEE-6, Mr. Miller testified that it was important to restore NW-3 to its original state prior to the alleged violations and that removing the fill from the area and planting trees would restore the functions and values of the wetland (t. 107; DEE-6 at 10).

There are several problems with Department staff's request. First, Mr. Miller testified that NW-3 is classified as a class III wetland and that it was a deciduous forest (t. 52). However, he does not state which of the fifteen characteristics listed in 6 NYCRR 663.5(c) NW-3 might have contained, nor is there any evidence in the record containing this information.⁸ Mr. Miller may have meant to testify that NW-3 was classified as a deciduous swamp, as that term is defined in 6 NYCRR 664.6(a)(3) and used in 6 NYCRR 664.5(c)(2), but it would be improper at this point to make this inference. The second problem is how to interpret Mr. Miller's statement that NW-3 should be restored to its original state prior to the alleged violations (t. 107). It is unclear if Department staff is seeking to have NW-3 restored to its 1986 condition when it was originally mapped, or in 2008 after some clearing had been done along the laneways in the area (t. 133; Exh. 40, at 3) or some other time. It should be noted that no violation is alleged regarding the work shown in the 2008 aerial photo (Exh. 40, at 3). The third problem, discussed at length below, is that Mr.

⁸ In considering his final action in this matter, the Commissioner may wish to take official notice of information, such as the wetland classification sheets produced in 1986, that may provide details as to why NW-3 was originally classified as a class III freshwater wetland.

Wafler has provided convincing evidence that the area mapped as NW-3 and its adjacent area did not exhibit characteristics of a freshwater wetland prior to the alleged violations and requiring the replanting of trees would not result in a jurisdictional freshwater wetland located at the site.

Moreover, the record is devoid of any discussion of NW-3's specific benefits and functions. The Department's regulations provide a list of wetland benefits, including: flood and stormwater control, wildlife habitat, water supply, water quality, fisheries, food chains, recreation, open space, and educational and scientific research (6 NYCRR 664.3[b]). Mr. Miller did testify generally that clear-cutting results in the removal of vegetative cover, the ability of an area to absorb water and serve as habitat, and cause soil erosion, but offered no information about how the alleged clear-cutting affected NW-3 specifically (t. 91). Similarly, he testified generally that filling decreases the number and size of wetlands thereby decreasing their ability to collect runoff and prevent erosion and sediment deposition downstream, adversely impacts water quality, and that depositing dredged material can result in erosion and turbidity⁹, eliminate habitat for wildlife, alter the water table and ground flow, and irreversibly destroy a wetland (t. 92). Again however, Mr. Miller provided no information specific to NW-3. Without this information, it is difficult to know if the proposed remediation will restore the functions and values that may have existed in NW-3 before the alleged violations.

At the hearing, Mr. Wafler testified regarding the condition of the area identified as NW-3 and its adjacent area before the alleged violations. He contended that because of the natural topography, soils at the site, and historical water management on the farm, no DEC jurisdictional wetland existed at the site, either when the original mapping occurred in 1986 or prior to the alleged violations. As stated above, at all times Mr. Wafler appeared credible and accurate in his testimony, and it was not challenged by Department staff. A summary of his testimony follows.

Mr. Wafler began his testimony stating that in the late 1950's the northeast portion of NW-3 was all farmland and a small barn or other structure stood in the area (t. 157). In the 1960's, the farm began installing drainage tile to remove all the water draining into the area (t. 158). All the land he

⁹ The relevance of this testimony is unclear since it is not alleged that any dredged material was deposited in NW-3.

farms is drained using drainage tile (t. 159)¹⁰. The tiling of the area to the northwestern side of NW-3, which blocked all the seeping or draining of water into NW-3 was completed between 1972 and 1977 (t. 160-162). He stated that the natural drumlin topography of the area causes water to flow to the south through the area before turning and heading north (t. 161). Mr. Wafler and his father, now deceased, installed a total of seven drain lines in the mid-1970s, in a trench about eight feet wide, which moved the water that would have flowed into NW-3 (t. 161-162). A photo of these lines is included in the record (Exh. 41). The water collected was then drained into a ditch visible in photos (Exh. 40; at 1-2). After the drain tile had been installed, this land was not used for approximately 20 years as the Waflers were busy building their nursery (t. 166).

When Mr. Wafler began taking over the farming operations, he also began to maintain the areas over the drain tile and the drainage ditches (t. 166-167). He pointed to a 2008 aerial photo showing where laneways and drainage lines and ditches are mowed to prevent damming (t. 167; Exh. 40, at 3). He commented that the soil types in these areas are very light and dry allowing traffic to drive on the terrain any time of year (t. 167).¹¹ Referring to a 2015 aerial photo (Exh. 40, at 4), Mr. Wafler stated that the clear-cutting of the northeast half of NW-3 was done first because all of the drainage tile on the farm passes through that area and needed to be redirected to prevent flooding on other areas of the property (t. 168). He noted that this photo also shows an area of gravel in NW-3 and commented that Department staff offered no information on the topography of the area, which would have allowed a better understanding of how water flows on the farm (t. 169). Mr. Wafler testified that all the water on the south side of Slaughter Road that goes through drainage passed through lines in NW-3 on its way to Lake Ontario (t. 170). He also stated that an underground electric power line runs through the property (t. 171-172). He further testified that the visible paths through NW-3 are gravel roads that have always existed and are used for running irrigation lines (t. 171).

Mr. Wafler testified about the visit of representative of the Army Corps of Engineers (ACE) to the site who drove a two-wheel vehicle on to the site where he showed them where a wet area had existed some 40 years ago, before the drain tile was

¹⁰ He testified that the farm is approximately 1,200 acres (t. 188).

¹¹ It may assist the Commissioner in drafting his order to take official notice of soil maps of the area to confirm Mr. Wafler's testimony.

installed (t. 172). After the representatives of ACE left the site, Mr. Wafler received a letter stating that ACE had determined the area of fill to be 4.68 acres (t. 2),¹² which, he notes, is below the 12.4 minimum size for a DEC jurisdictional freshwater wetland. Mr. Wafler concluded this portion of his testimony by agreeing with Mr. Miller that the area cleared was deciduous forest (t. 173) but that the Department's original mapping in 1986 was in error (t. 174).

Mr. Wafler also testified about the conditions in and around NW-3 as it exists now and introduced a series of photographs of the tree nursery that now occupies the land. The first photograph, taken on September 3, 2019, after three days of rain totaling 2.5 inches, shows the center of NW-3 where the second crop of apple trees grows (t. 177; Exh. 42, at 1). Mr. Wafler stated that this area is some of the driest land on the farm and that these trees cannot "take any wet feet" and are a valuable crop worth approximately \$70,000 per acre (t. 177-178). The next photograph was taken the same day also in NW-3 and shows workers budding the trees on moving platform, which Mr. Wafler notes shows the wheels of the machine cut only a quarter of an inch into the soil (t. 178; Exh. 42, at 2). The third photograph, taken the same day, this time in the northeastern portion of NW-3, shows the same moving platform and again Mr. Wafler notes the small amount of soil being caught in the tires (t. 179; Exh. 42, at 3). The fourth photograph, also taken on September 3, 2019, shows the southeastern portion of NW-3 which shows where peach trees are grown, and Mr. Wafler comments that peaches will not grow in any water (t. 179; Exh. 42, at 4). The fifth, sixth, seventh, eighth, and ninth photographs all show various views of NW-3 all taken on the same day (t. 180; Exh. 42, at 5-9).

Mr. Wafler also provided three photographs taken outside of NW-3 on September 3, 2019, showing that these other areas are wetter than the land in NW-3. The first photograph shows rutting in the soil caused by the machine (t. 181; Exh. 43, at 1). The second shows workers working without machines because the ground is too wet (t. 181; Exh. 43, at 2). The third shows a machine stopped because if it is moved 100 feet forward, Mr. Wafler says it will get stuck (t. 181; Exh. 43, at 3). At the hearing, Mr. Wafler stated that because the farm had received 0.6" of rain the night before, all of the machines he uses had to be parked, except the one running in NW-3 (t. 182).

¹² Mr. Wafler does not agree with ACE's assessment of the size of the wetland, testifying that the area in question was approximately 300'x 300' feet that was drained in the 1970s (t. 197 - 198).

Mr. Wafler also provided a series of photographs taken in 2018. The first shows the area of NW-3 looking north from NW-3 taken in November 2018, after trees were harvested from that area, and Mr. Wafler noted that there are no ruts or erosion in the area (t. 182-3; Exh. 44, p. 1). The second photograph, taken in June 2018, shows the same area before the trees were removed and after tremendous rain (t. 183; Exh. 44, p. 2). The third photograph, taken in December 2018 shows one of the laneways through north central portion of NW-3 and the Wafilers' dog running along it. The final photograph in the record shows an area on the farm outside of NW-3 taken in November 2018 which Mr. Wafler testified shows standing water and ruts after the trees were harvested (t. 185; Exh. 45).

Mr. Wafler concluded his direct testimony by stating that he had harvested gravel off some of the knobs in NW-3 about twenty years ago (t. 188). He acknowledged that there was an area, perhaps 300' x 300', that could have been classified as wetlands in the past (t. 188) but that this area had been drained in the 1970s (t. 98). On cross-examination, he stated that he harvested quite a bit of cherry from NW-3 when it was cleared, a species that does not grow in wet areas (t. 202). He stated that he would have never cleared the land if he thought it could be a mapped wetland and notes that he has much land that borders wetlands and is aware of the regulations but could not imagine that this area, among the driest on his farm would be mapped (t. 188). He concluded that it would be "asinine" and impractical for him to clear wetlands for the type of agriculture he is undertaking (t. 189).

This is a summary of the record upon which the Commissioner must decide whether or not to order restoration of the area known as NW-3. Department staff has shown that NW-3 was duly mapped in 1986 as a type III freshwater wetland but have not shown why or what wetland characteristics it exhibited. Department staff has also shown that the area was forested before the violations but has not challenged Mr. Wafler's testimony that cherry trees were growing in the area.¹³ In contrast, Mr. Wafler has provided credible testimony that the water supply to NW-3 was interrupted and redirected before NW-3 was mapped and that the area had been historically used in

¹³ Department staff member Koplun testified from an aerial photograph (Exh. 40) and his professional experience that NW-3 likely contained soft maple and ash trees (t. 150), however, this testimony is undermined by his inability to identify the species in a similar wooded area on the south side of Slight Road (t. 152).

agriculture. He also described the area within NW-3 as among the driest area on his farm and testified that both the topography and soils of the area argue against the area being a wetland. Regarding the vegetation at the site, his statements about removing cherry trees and planting apple and peach trees in the area also support a claim that the area is relatively dry. His testimony coupled with the ACE's forensic wetland delineation showing an area of less than five acres as wetland, supports Mr. Wafler's claim that no DEC jurisdictional freshwater wetland existed at the site prior to the alleged violations.

Taken in total, this record does not support Department staff's assertion that the area depicted on the official New York State Freshwater Wetlands Map, Wayne County, Map 6 of 20 of the Department's North Wolcott Wetland Map was, in fact, a wetland prior to the alleged violations. It is most likely that the efforts of Mr. Wafler and his father before New York State's freshwater wetland law took effect drained the area and it remains in that same condition today. Because of this, the Commissioner should not require any restoration efforts.

CONCLUSION AND RECOMMENDATION

This is a difficult case. Under ideal circumstances, Mr. Wafler would have called Department staff before undertaking his work in NW-3, and based on the evidence in this record, Department staff would have concluded, after visiting the site, that no jurisdictional wetland existed at the site. This would have allowed Mr. Wafler to undertake the clear-cutting of the area and the planting of his tree nursery. However, he did not do this, and it is appropriate that some penalty be imposed for undertaking his work in NW-3 without first consulting Department staff. A payable civil penalty of \$1,500 is appropriate based on these facts. However, as discussed above, the record does not support the conclusion that a freshwater wetland existed at the site prior to Mr. Wafler's actions and so restoration is not appropriate.

Therefore, based on the evidence in the record, as discussed above, the Commissioner should issue an order finding respondent Paul Wafler removed all the trees within NW-3 and its adjacent area without a permit in violation of ECL 24-0701(1) and ECL 24-0703(1). The order should require Mr. Wafler to pay a civil penalty of \$1,500.

/s/
P. Nicholas Garlick
Administrative Law Judge

Dated: November 26, 2019
Albany, New York

Exhibit Chart

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

Exhibit #	Description
1	2/11/16 letter from ACOE to P. Wafler
2	9/16/16 NOV from ACOE to P. Wafler
3	9/19/16 cover letter, notice, and complaint with affidavit of service
4	9/26/16 letter from P. Wafler to Department staff
5	10/18/16 letter from Department staff to P. Wafler
6	10/25/16 letter from P. Wafler to ACOE and Department staff
7	10/27/16 letter from Department staff to P. Wafler
8	2/14/17 letter from ACOE to P. Wafler
9	Department staff's first motion to amend its complaint
10	Ruling granting first motion to amend the complain
11	4/12/17 Cover letter, amended notice of hearing and amended complaint
12	5/26/17 First motion for default papers
13	6/13/17 letter requesting proof of service
14	6/21/17 Affidavit of service of default papers
15	8/15/17 Ruling denying motion for default
16	8/30/17 second motion for default papers
17	9/11/17 affidavit of service for default motion

18	8/21/18 ruling denying second default motion
19	First notice of hearing dated 9/25/18
20	10/12/18 request to amend complaint and postpone hearing
21	10/22/18 letter cancelling hearing
22	Affidavit of service of second motion to amend complaint
23	7/28/18 ruling granting motion to amend complaint
24	12/3/18 Cover letter and second amended notice of hearing and complaint
25	1/4/19 cover letter and affidavit of service of amended complaint
26	1/17/19 statement of readiness
27	7/23/19 second notice of hearing
28	NYSDOS information about Huron Enterprises, LLC
29	Tax information regarding 10748 Slaght Road
30	Tax information regarding 10817 Slaght Road
31	NYSDOS information regarding Wafler Farms, Inc.
32	Webpage for Wafler Nursery
33	NYS FW Map Wayne County, map 6 of 20
34	Map of NW-3
35	Google Earth photos of NW-3
36	Historical aerial photos
37	Google Earth photo
38	DEE-1: Civil Penalty policy
39	DEE-6: Freshwater wetland enforcement policy
40	Aerial photos
41	Wafler photos of tiling

42	Wafler photos of area
43	Wafler photos of area
44	Wafler photos of area
45	Wafler photos of area