

**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,
Rules and Regulations of the State of
New York (6 NYCRR),

Ruling

DEC File No.
R8-2016-0503-40

- by -

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

Respondents.

PROCEEDINGS

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

The notice instructed respondents that written answers must be filed within twenty days of respondents' receipt of the complaint. Department staff counsel stated that no answer had been received from any of the respondents (see Tinsley Affirmation ¶6).² The notice also set a pre-hearing conference

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

² As discussed below, a letter was received from Mr. Wafler, dated October 24, 2016, denying, at least in part, Department staff's alleged violations (Miller affidavit, Exh. E).

for October 25, 2016, which Paul Wafler attended on behalf of himself, individually (see Tinsley Affirmation ¶5).³

In a letter dated March 9, 2017, Department staff requested permission to amend its notice of hearing and complaint (see Tinsley Affirmation, ¶7). This request was sent both to respondents named in the original complaint as well as those named in the caption above (see Tinsley Affirmation, ¶7). No response from respondents to this request was received (see Tinsley Affirmation ¶ 8). By ruling dated April 12, 2017, Chief Administrative Law Judge James T. McClymonds granted Department staff's request (see Tinsley Affirmation, Exhibit 5).

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

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

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

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

³ In a letter dated October 24, 2016, Mr. Wafler also referenced a pre-hearing meeting that was scheduled to occur on November 16, 2016 (Miller affidavit, Exh. E).

In a ruling dated August 15, 2017, I denied Department staff's motion because its papers did not provide proof of facts to support the claim.

In papers dated August 30, 2017, Department staff made a second motion for default pursuant to 6 NYCRR 622.15. Staff's new papers consisted of a cover letter, a motion for default judgment and order, the affirmation of Dusty Renee Tinsley with eight exhibits attached, and the affidavit of Steven Miller with thirteen exhibits attached.

To date, no response to this motion has been received.

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

DISCUSSION

As noted above, this is Department staff's second motion for a default judgment, the first being denied by ruling dated August 15, 2017. In my prior ruling, I determined that Department staff had presented insufficient proof that the named respondents were liable for the violations alleged. In the instant motion, Department staff has provided additional exhibits, including information from the New York State Department of State's Division of Corporations about Huron Enterprises, LLC (Affidavit of Stephen Miller [Miller affidavit], Exh. A) and Wafler Farms, Inc. (Miller affidavit, Exh. D). Also provided is information regarding real property taxes for the site of the alleged violations (Miller affidavit Exhs. B & C), as well as an October 24, 2016 letter from Mr. Wafler regarding this enforcement action, which Department staff provided to demonstrate that Mr. Wafler is president of Wafler Farms, Inc. (Miller affidavit, Exh. E). Thus, Department staff have now provided sufficient proof of the named respondents' relationships with each other and the site of the alleged violations. Nevertheless, as discussed below, the new information included with this second default motion as well as apparent discrepancies in the proof regarding the size of the area where the violations occurred warrant a denial of this motion as well.

Under the relevant DEC regulations, respondents' failure to timely file an answer constitutes a default and a waiver of respondents' right to a hearing (6 NYCRR 622.15[a]). Department staff's motion for a default judgment must include proof of service of the notice of hearing and complaint, proof of respondents' failure to file a timely answer, and a proposed order (see 6 NYCRR 622.15[b]). In addition, staff must serve the default motion papers on respondents or their representatives (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009). As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Commissioner Decision and Order, July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]."

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

As mentioned above, included with this second default motion is an October 24, 2016 letter from Mr. Wafler (Miller affidavit, Exh. E). Department staff does not address the text of this letter in its papers but the date of the letter (October 24, 2016) is significant. The original notice of hearing and complaint was served on September 19, 2016 (Tinsley affirmation, Exh. 2) and the prehearing conference in this matter was originally scheduled for October 25, 2016. The content of the letter is also significant because in his first paragraph Mr. Wafler states that until a prehearing conference scheduled for November 16, 2016, he cannot provide an answer, which appears to be a request to Department staff to extend the time to answer. From the record it is impossible to know whether this request was granted because Department staff do not address the contents

of the letter. In addition, Mr. Wafler's second paragraph seems to refer to discussions and possible agreement regarding an adjustment to the size of the wetland in question, as well as a denial regarding the existence of an intermittent stream on the site. Finally, in his concluding paragraph, he states that the trees harvested from the area in question would not grow in a wet area and states that after the harvest the land was seeded with crimson clover in March 2016.

It is concerning that Department staff failed to disclose this letter in its original default motion and only now provides it to show Mr. Wafler's relationship to Wafler Farms, Inc. Clearly from this letter, Mr. Wafler appeared in this proceeding *pro se* and the contents show that he denied, at least in part, Department staff's alleged violations. Department staff do not address why this letter was not treated as a late-filed answer. It raises the question as to what, if any, other relevant communications between the parties are in the possession of Department staff and have not been disclosed. It also shows that Mr. Wafler (and perhaps the other respondents) has appeared in this matter and is entitled to be heard on the requested penalty amount as well as the proposed remediation, at a minimum.

With respect to Department staff's request for findings of liability on the causes of action, in addition to the requirements for a default judgment set forth in the relevant regulations, the Commissioner requires that "consistent with the requirements applicable to default judgment motions under the CPLR ... staff must submit proof of the facts constituting the claim charged" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3 [citations omitted]). The Commissioner went on to direct that "[u]pon submission of the motion and supporting materials, the ALJ will review the record to determine whether staff's papers have stated a claim, and that staff's penalty request and remedial relief are supported" (*id.* [citation omitted]). As explained below, the proof submitted with Department staff's second motion is insufficient for the Commissioner to grant the instant motion.

In his affidavit, Mr. Miller states that wetland NW-3 is located on respondents' property and was, until respondents' actions, forested and approximately 18 acres in size (Miller affidavit, ¶11). As proof of this claim, he provides a copy of the official freshwater wetland map which was promulgated on June 25, 1986 (Miller affidavit, Exh. G). This map shows NW-3

on the north side of Slaght Road and roughly in the shape of a sock. Also attached to Mr. Miller's affidavit are three historical aerial photographs of the area: (1) the first, from June 1963, shows a forested area that Mr. Miller has circled as the area where NW-3 would later be mapped; (2) the second, from 1985, also shows a forested area that Mr. Miller has circled as the area where NW-3 would later be mapped; and (3) the third, from 1995, upon which Mr. Miller has drawn the sock shape on the forested area where he believes NW-3 existed (it should be noted that Mr. Miller's drawing extends over Slaght Road indicating the road is part of the wetland) (Miller affidavit, Exh. J). Mr. Miller also provides before and after aerial photos which show the forested area as it existed in September 2013 and cleared area in July 2015 (Miller affidavit, Exh. I). On Exhibit I, Mr. Miller circles the area of disturbance which seems to be only the top (northern) half of the sock shaped NW-3 and no disturbance to the bottom (southern) half is apparent. In his affidavit, Mr. Miller states that approximately 18 acres of NW-3 was cleared and fill had been placed therein (Miller affidavit, ¶16 & ¶25) and provided photos he took of the area in November 2015 (Miller affidavit, Exhs. H & L). It is impossible based on the record, to reconcile Mr. Miller's statement that the entire size of NW-3 is 18 acres with his claim that the area of clearcutting is 18 acres, because the aerial photo from 2015 only shows half the wetland had been cut.

Department staff's proof raises additional issues besides the questions regarding the size of NW-3 and the area impacted by respondents' actions. First, while the 1986 official freshwater wetlands map shows NW-3, Mr. Miller makes no statement that it actually existed in the area in question at the time of the violation (a fact contested by Mr. Wafler in his October 24, 2016 letter). Second, Department staff and Mr. Wafler apparently had discussions regarding the size of something, perhaps NW-3, and Mr. Wafler makes reference to an area 300' x 300' (or approximately 2.25 acres) which is not explained in this record. Third, Department staff do not allege any violation occurred within the adjacent area of NW-3, though it seeks remediation in this area.

Because factual issues concerning the violations alleged by Department staff are raised on this motion, it is inappropriate for me to recommend that the Commissioner issue the order finding respondents liable for the violations alleged. In addition, Mr. Wafler's October 24, 2016 letter demonstrates an appearance in this matter, which entitles respondents to be heard on the requested penalty and proposed remediation.

Exhibit Chart

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

Attached to the Affirmation of Dusty Renee Tinsley, Esq. dated August 30, 2017

Exhibit #	Description
1	Cover Letter, Notice of Hearing, Complaint and affidavit of service
2	Certified mailing receipts
3	Amended notice of hearing and amended complaint undated and unsigned
	NOTE: No exhibit 4 is included
5	Ruling on request to amend
6	Cover letter, amended notice of hearing, amended complaint, affidavit of service, and mailing receipts
7	Mailing receipts
8	Affidavit of Steven Miller with seven attachments (listed below)
9	Proposed order

Attached to the affidavit of Steven Miller dated August 28, 2017

Exhibit #	Description
A	NYSDOS Division of Corporation's information regarding Huron Enterprises, LLC
B	Real property assessment data from Wayne County
C	2017 tax assessment toll
D	NYSDOS Division of Corporation's information regarding Wafler Farms, Inc.
E	Letter from Paul Wafler dated October 24, 2016
F	Information regarding Wafler Nursery
G	Wetland map for NW-3
H	Photographs taken November 2015
I	Google earth photographs
J	Historical photographs
L	Photographs taken November 2015
M	DEC's Civil Penalty Policy
N	Freshwater Wetlands Enforcement Policy