

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

In the Matter of the Alleged Violations of Article 17 of
the New York State Environmental Conservation Law (ECL)
and Title 6 Part 703 of the Official Compilation of Codes,
Rules and Regulations of the State of New York (NYCRR),

RULING

DEC Case No.
R8-2017-1002-1550

- by -

CHARLES MILLER,

Respondent.

Appearances:

- Thomas S. Berkman, General Counsel (Dusty Renee Tinsley, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- George F. Newton, Esq. for respondent Charles Miller

PROCEEDINGS

This ruling addresses a motion for default judgment brought by staff of the Department of Environmental Conservation (Department) against respondent Charles Miller (respondent), who owns and operates a farm on property located at 3151 Hopkins Road, Canandaigua, New York, Ontario County (Site), and a motion brought by respondent to reopen the default.

Staff commenced this enforcement proceeding with a notice of hearing and complaint dated November 10, 2017 (Complaint). The Complaint alleges that respondent discharged organic matter in the form of agricultural process waste water through point sources on the Site into the waters of the State without a State Pollutant Discharge Elimination System (SPDES) permit, and that the discharge caused a visible contrast to the natural conditions of the waters in violation of ECL 17-0505 and 17-0501(1), and 6 NYCRR part 703.

Staff served the Complaint on respondent by certified mail, return receipt requested, on November 17, 2017, addressed to Charles Miller, 3272 Hickox Road, Canandaigua, NY 14424, certified mail no. 7016 2070 0001 0174 1393 (*see* Affirmation of Dusty Renee Tinsley, Esq.,

dated January 30, 2018 [Tinsley Aff], at ¶¶ 3-4 and Exhibits 1 [attachments a and b]¹ and 2).² Staff has submitted copies of: (i) the certified mail receipt that was signed on behalf of respondent; and (ii) the U.S. Postal Service tracking sheet, reflecting that the notice of hearing and complaint were delivered on November 20, 2017 (*see* Tinsley Aff, Exhibits 1 and 2). Thus, service of the notice of hearing and complaint on respondent was complete on November 20, 2017 (*see* 6 NYCRR 622.3[a][3]).

The notice of hearing stated that respondent was required to “file a written answer to the charges of the violations alleged within twenty (20) days of receipt of the Complaint,” and that failure to serve a timely written answer “will result in a default and a waiver of your right to a hearing; and, pursuant to 6 NYCRR 622.15, an Order may be issued against you granting the relief requested in the attached Complaint” (Tinsley Aff, Exhibit 1 [notice of hearing]). Respondent failed to answer the Complaint (*see* Tinsley Aff ¶ 5).

Staff moved for a default judgment by notice of motion and motion for default judgment and order dated January 29, 2018 (Motion). Staff served the Motion on respondent by first class mail on January 30, 2018 (*see* Letter from Dusty Renee Tinsley to ALJ Wilkinson dated February 14, 2018, attaching affidavit of service of Tammy Schubmehl sworn to February 13, 2018).

By letter dated February 15, 2018, I asked Ms. Tinsley to clarify the remedial relief staff was requesting with respect to a tank located on the Site. Ms. Tinsley replied by letter dated February 20, 2018, stating:

At the time of the violation cited in the Complaint, no Best Management Practices (BMPs) were being utilized to address silage leachate or barnyard runoff at the Site. Respondent installed the tank at the Site after learning of the violations cited in the Complaint in an attempt to resolve the violations. The tank installed, however, is too small to address all silage leachate and barnyard runoff. The failure to have a tank large enough to capture all Site leachate and runoff will result in high flow leachate and runoff continuing to be discharged into the Mud Creek tributary (Class C) on the Site and flowing into Mud Creek (Class C).

¹ Exhibit 1 to the Tinsley’s affirmation includes two attachments. Attachment “a” is a copy of the U.S. Postal Service Domestic Return Receipts, signed on November 20, 2017 by Ellen Miller, which is a duplicate of Exhibit 2. Attachment “b” is a one-page transmittal letter from Ms. Tinsley to Charles Miller, dated November 10, 2017, which is a duplicate of the transmittal letter in Exhibit 1.

² Four exhibits are attached to the Tinsley affirmation and six exhibits are attached to the affidavit of Nancy Rice, an Environmental Engineer 1 in the Department’s Region 8 office. The exhibits attached to Ms. Tinsley’s affirmation are cited in this report as “Exhibit” followed by the exhibit number. The exhibits attached to the affidavit of Nancy Rice are cited in this report as “exhibit” followed by the exhibit number.

Furthermore, the inadequately sized tank was installed as a stand-alone resolution rather than as part of a Best Management Practices (BMPs) plan. Due to the close proximity of the Mud Creek tributary to the bunk and barnyard, it is imperative that the tank, or any other BMP implemented at the Site, be appropriately sized and managed. For these reasons, the Complaint and Motion reference the tank in discussion of the requested remedial action.

On February 27, 2018, I asked Department staff to clarify certain photographs depicted in exhibit 3 of Nancy Rice's affidavit. Ms. Tinsley submitted a supplemental affidavit from Ms. Rice on March 5, 2018 with attached exhibits A, B, and C.

By letter dated March 28, 2018, George Newton, Esq. appeared on behalf of respondent and requested an opportunity for respondent to be heard on the merits and file a response to staff's Motion. I advised Mr. Newton by letter dated April 12, 2018 to make a motion to reopen the default in accordance with 6 NYCRR 622.15(d) and explained that respondent could contest the proposed civil penalty and remediation even if respondent did not contest liability for the underlying charges. Mr. Newton moved to reopen the default by an unsworn affidavit dated April 27, 2018 (Affidavit of George F. Newton, Esq. dated April 27, 2018 [Newton Aff]). Department staff opposes respondent's motion (affirmation of Dusty Tinsley dated May 10, 2018 [Tinsley Aff 2]).

I grant staff's Motion to the extent of holding respondent liable for the violations alleged in the first cause of action in the Complaint and otherwise deny the motion. I grant respondent's motion to reopen the default insofar as allowing respondent the opportunity to be heard on the civil penalty and remedial relief and otherwise deny respondent's motion. A list of the parties' submissions considered on these motions is attached to this ruling.

FINDINGS OF FACT

The following facts are based upon the pleadings and the documents submitted with and in support of staff's motion for a default judgment:

1. Charles Miller (respondent) is an individual, who, with Ellen Miller, owns property located at 3151 Hopkins Road, Canandaigua, New York, Ontario County (Site) (*see* Tinsley Aff, Exhibit 3, affidavit of Nancy Rice sworn to January 30, 2018 [Rice Aff]), ¶3 and exhibit 1).
2. Respondent operates a farm at the Site with cows, a barnyard, and a barn (Rice Aff, ¶ 4 and exhibit 3, page 1 of 4 [photographs]).

3. Nancy Rice is employed by the Department as an Environmental Engineer 1 in the Division of Water at the Department's Region 8 office in Avon, New York (Rice Aff ¶ 1).
4. Ms. Rice regularly conducts inspections of sites and facilities throughout Region 8, which includes the counties of Chemung, Genesee, Livingston, Monroe, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, and Yates, for compliance with article 17 of the ECL (water pollution control) and the regulations prescribing State water quality standards under 6 NYCRR part 703 (Rice Aff ¶¶ 1-2).
5. Ms. Rice inspected the Site and locations along the Mud Creek tributary and Mud Creek on September 26, 2017. She documented her inspection with photographs which are included in exhibit 3 of her affidavit. (Rice Aff ¶ 13 and exhibit 3.)
6. According to Ms. Rice, a tributary of Mud Creek (Mud Creek tributary), known locally as Schaeffer Creek³, flows through the Site. The Mud Creek tributary is identified in the Department's regulations as Ont 66-12-52-23-51 and is a Class C stream pursuant to 6 NYCRR 898.4 Table I, Item No. 174. (*See* Rice Aff ¶¶ 9-10.)
7. Mud Creek is identified as Ont 66-12-52-23 in the Department's regulations and is classified as a Class C stream pursuant to 6 NYCRR 898.4 Table I, Item No. 132. The Mud Creek tributary flows into Mud Creek (*see* Rice Aff ¶ 11; supplemental affidavit of Nancy Rice sworn to March 5, 2018 [Rice Aff 2], ¶ 4).
8. Mud Creek and the Mud Creek tributary are wholly or partially within New York State and constitute "waters" or "waters of the state" within the meaning of ECL 17-0105(2) (Rice Aff ¶ 12 and exhibit 2).
9. Ms. Rice attested that, based on her inspection, she concluded that between September 15, 2017 and September 26, 2017, an unknown volume of organic matter in the form of agriculture process waste water, including bunk silage leachate and manure from the barnyard, was discharged into the Mud Creek tributary from point sources on the Site. The point sources consisted of drainage ditches located on the Site through which the

³ Staff's papers include three different spellings for the local name of Mud Creek (*see* affidavit of Nancy Rice sworn to February January 30, 2018, exhibit 2 [Schaeffer Creek] and exhibit 3 [Schaffer Creek]; affirmation of Dusty Renee Tinsley dated January ¶ 18 [Shaefer Creek]). The spelling appearing in exhibit 2 of Ms. Rice's affidavit, Schaeffer Creek, is used in this report. Exhibit 2 is a copy of a map and property information print out from Ontario County Online Resources found at <http://www.co.ontario.ny.us/714/OnCor>. Schaeffer Creek is identified as index number Ont. 66-12-52-23-51 on the jurisdictional quadrangle map J-10_{NE} for the Finger Lakes Drainage Basin Article 14 Oswego River Drainage Basin Series in 6 NYCRR 898.7. Item no. 174 on 6 NYCRR 898.4 Table I classifies stream Ont. 66-12-52-23-51 as a Class C water.

organic matter flowed directly into the Mud Creek tributary. From the Mud Creek tributary, the organic matter eventually flowed into Mud Creek. (Rice Aff ¶ 18.)

10. Exhibit B of Ms. Rice's supplemental affidavit depicts the location of the Mud Creek tributary on the Site, other nearby tributaries in the vicinity of the Site, and the location where the Mud Creek tributary and other tributaries converge at Mud Creek. Exhibit B also shows the location of Farm Lane at the FA-BA Farm and the 5 & 20 Bridge, both of which are located north and downstream of the Site and are depicted in the photographs in exhibit 3 of Ms. Rice's affidavit. (*See* Rice Aff, exhibit 2; Rice Aff 2 ¶ 3 and exhibit B.)
11. Ms. Rice took photographs on September 26, 2017 documenting the conditions in the Mud Creek tributary and in Mud Creek following the discharges. The discharge of organic material from respondent's property into the Mud Creek tributary and Mud Creek caused a substantial visible contrast to natural conditions. (Rice Aff ¶¶ 18-19 and exhibit 3).⁴
12. The photographs on page 1 of exhibit 3 of Ms. Rice's affidavit show (1) the leachate path containing agricultural waste (photograph 1-1), (2) the barnyard (photograph 1-2), (3) the barnyard roof with no means to divert the wastewater away from the leachate path (photograph 1-3), and (4) cows and runoff with direct access to the Mud Creek tributary (photograph 1-4) (Rice Aff ¶ 19a.; exhibits 3 [photographs page 1]).
13. The photographs on page 2 of exhibit 3 of Ms. Rice's affidavit show leachate (photograph 2-1), the bunk⁵ discharge path (photograph 2-2), and a leachate pool near the barnyard (photograph 2-3) and the bunk discharge path (photograph 2-4) (Rice Aff ¶ 19b and exhibit 3 page 2.). The leachate and leachate pool are the source of the organic matter that ran off the pad, followed a drainage ditch, and entered the Mud Creek tributary via a point source on the Site (*see* Rice Aff ¶¶ 18-19; Rice Aff 2 ¶ 2, exhibit A [photographs b, c and d with corresponding markings]; Tinsley Affirmation ¶¶ 28-29).
14. The photographs on page 3 of exhibit 3 of Ms. Rice's affidavit show the conditions of Mud Creek downstream of where the discharge of organic matter entered the Mud Creek

⁴ The photographs in exhibit 3 to Ms. Rice's affidavit are identified in this ruling based on the page on which they appear and are numbered 1 through 4, starting from the top left (photograph 1) to the bottom right (photograph 4). For example, photograph 1-1 is the upper left photograph of page 1.

⁵ The bunk and pad are shown in photograph a of exhibit A of Ms. Rice's supplemental affidavit. The bunk consists of a low lying area behind the barn where agricultural waste water leachate collects and runs onto an area designated as the pad from where the leachate ultimately flows down a discharge path via a drainage ditch into the Mud Creek tributary. According to <https://www.merriam-webster.com> the definition of the word "bunk" includes a feeding trough for farm animals, especially cattle.

tributary. The photographs were taken at a farm, known as FA-BA farm, which is north and downstream of the Site. The Mud creek tributary flows from the Site and into Mud Creek. Mud creek in turn flows through the FA-BA Farm fields. The photographs show foaming and black discoloration of the water in Mud Creek. Ms. Rice attested that the condition of Mud Creek indicates an extreme organic loading to the water due to the discharge of leachate and manure from the Site that entered the Mud Creek tributary and ultimately flowed into Mud Creek. (See Rice Aff ¶¶ 18-19 and exhibit 3, page 3; Rice Aff 2 ¶¶ 3-4 and exhibit B.)

15. The photograph on page 4 of exhibit 3 of Ms. Rice's affidavit captioned "State Route 5 & 20 Bridge" shows foaming and black discoloration of Mud Creek as a result of the discharge of leachate and manure at the Site which entered the Mud Creek tributary and flowed into Mud Creek. The 5 & 20 Bridge is northwest and downstream of the Site, and south of Farm Lane at the FA-BA Farm. (See Rice Aff, exhibit 3, photograph 4-3; Rice Aff 2 ¶ 5 and exhibit B.)
16. The photograph on page 4 of exhibit 3 captioned "Clean water just upstream of bunk discharge" shows the Mud Creek tributary approximately ten feet upstream of the Site where the water in the Mud Creek tributary is clear and does not exhibit the foaming and discoloration observed in the Mud Creek tributary and Mud Creek downstream of the discharge at the Site. (See Rice Aff exhibit 3, page 4, photograph 4-4; Rice Aff 2 ¶ 6.)
17. Ms. Rice reviewed the Department's permit records and determined that the Department had not issued respondent a SPDES permit to discharge agricultural process waste water such as bunk silage leachate and manure into the Mud Creek tributary or Mud Creek (Rice Aff ¶ 20).
18. Department staff served the notice of hearing and complaint on respondent by certified mail return receipt requested on November 17, 2018 (Tinsley Aff ¶¶ 3-4 and Exhibits 1 and 2). The signed certified mail receipt and the U.S. Postal Service tracking sheet indicate that the notice of hearing and complaint was delivered on November 20, 2017 (see Tinsley Aff, Exhibits 1 and 2).
19. Respondent did not answer the Complaint (Tinsley Aff ¶ 5).

DISCUSSION

Default Judgment

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (see 6 NYCRR 622.4[a]). A respondent's

failure to file a timely answer “constitutes a default and a waiver of respondent’s right to a hearing” (6 NYCRR 622.15[a]). If a respondent fails to answer a complaint, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent’s failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1]-[3]).

The record demonstrates that Department staff has satisfied the requirements of section 622.15: (i) Department staff served the Complaint upon respondent (Tinsley Aff ¶¶ 3-4 and Exhibits 1 and 2); (ii) respondent failed to answer to the Complaint within 20 days (Tinsley Aff ¶ 5); and (iii) Department staff has submitted a proposed order (*see* Tinsley Aff, Exhibit 4). In addition, the record establishes that staff served respondent with the Motion and supporting papers by first class mail on January 30, 2018 (*see* January 30, 2018 letter from Dusty Renee Tinsley, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent; February 14, 2018 letter from Dusty Renee Tinsley to ALJ Wilkinson attaching affidavit of service of Tammy Schubmehl sworn to February 13, 2018).

Counsel for respondent moved to reopen the default by affidavit dated April 27, 2018 (Newton Aff). Pursuant to 6 NYCRR 622.15(d), a default in answering may be reopened upon a showing that a meritorious defense is likely to exist and that good cause for the default exists. Guided by standards applicable to default judgment motions under CPLR 3215 (*see Matter of Makhan Singh*, Decision and Order of the Commissioner, March 19, 2004, at 2), whether good cause — or reasonable excuse under the CPLR — for the default exists depends upon the extent of the delay, whether the opposing party has been prejudiced, whether the defaulting party has been willful, and the “strong public policy” in favor of resolving cases on the merits (*Puchner v Nastke*, 91 AD3d 1261, 1262 [3d Dept 2012]; *see also Huckle v CDH Corp.*, 30 AD3d 878, 879-880 [3d Dept 2006] [CPLR 3215 motion]).

With respect to respondent’s default in answering the complaint, respondent provides no explanation or excuse for his failure to do so (*see Matter of HCIR Service, Inc.*, Decision and Order of the Commissioner, October 23, 2006, at 4-5). Counsel states in his unsworn affidavit that respondent “ameliorated the problem” within 30 days of receiving the notice of hearing and complaint and that respondent never received a notice of a hearing date or a statement of readiness for adjudicatory hearing (Newton Aff ¶¶ 7-8). Counsel contends that without any hearing date, the Millers (respondent and his wife) “must have presumed the abatement that they performed was sufficient” (Newton Aff ¶ 10) and that they do not have the resources to pay an \$8,000 civil penalty (Newton Aff ¶¶ 12-13). Counsel did not submit his affidavit under penalty of perjury, nor did he state that he was familiar with the facts and circumstances of this case or the Miller’s financial position. Counsel also failed to provide an affidavit from respondent to corroborate the statements in his affidavit regarding the Miller’s financial resources or their presumption that the remediation they performed satisfied the Department.

In opposition to respondent's motion, Department staff contends that the notice of hearing advised respondent that failure to answer the complaint within 20 days would result in a default and a waiver of his right to a hearing. Staff argues that respondent's claimed confusion over not receiving a statement of readiness and a hearing date is without merit as neither is a prerequisite to finding a respondent in default for failing to answer the Complaint. Staff further argues that respondent's age and financial resources and counsel's lack of knowledge of environmental laws or regulations do not constitute good cause for respondent's default.

I concur with Department staff that respondent has not demonstrated a reasonable excuse for failing to answer the Complaint. The Complaint stated that if respondent failed to submit an answer he could be held in default. Respondent's obligation to answer the complaint does not depend on the Department setting a hearing date or serving respondent with a statement of readiness. Respondent could have answered the Complaint and raised his inability to pay as a defense to staff's proposed civil penalty. Respondent's lack of financial resources or his age are not affirmative defenses to liability for violating environmental laws and regulations and do not excuse his failure to answer the Complaint.

Proof of Facts

A motion for default judgment must include proof of the facts constituting the claim charged in addition to satisfying the procedural requirements of NYCRR 622.15 (*see Matter of Queen City Recycle Center, Inc.*, Order of the Commissioner, December 12, 2013, at 3 (directing that staff's default motion papers must be consistent with CPLR 3215[f])). A party seeking a default judgment is "required to allege enough facts to enable the court to determine that a viable cause of action exists" (*Jacobsen v S & F Service Center*, 131 AD3d 450, 451 [2d Dept 2015]; *see also Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1). A party seeking to excuse a default in answering a complaint must show that a meritorious defense is likely to exist (6 NYCRR 622.15[d]). As discussed below, I find that Department staff's papers set forth facts sufficient to establish a viable claim that respondent discharged process agricultural waste into waters of the State from a point source and without a permit in violation of ECL 17-0505, and that the discharge violated State water quality standards as set forth in ECL 17-0501(1) and 6 NYCRR 703.2. I further find that respondent has failed to raise a meritorious defense to liability for these charges and that his failure to answer the Complaint is not excused.

Department staff is seeking a judgment with respect to the first cause of action in the Complaint, which alleges that respondent violated ECL 17-0501(1), ECL 17-0505, and 6 NYCRR 703.2 (Complaint ¶ 17). According to the Complaint, between September 15, 2017 and September 26, 2017, respondent violated State water quality standards by discharging organic matter "in the form of agricultural process waste water such as bunk silage leachate and manure,

from the barnyard, . . . through point sources, in the form of drainage ditches, into the waters of the [S]tate causing a visible contrast to natural conditions” (Complaint ¶ 15).⁶ The Complaint further alleges that respondent did not have a SPDES permit authorizing the discharge of pollutants into State waters (Complaint ¶ 16).

Section 17-0501(1) of the ECL makes it unlawful for any person to discharge organic material into the waters of the State that causes or contributes to a condition that contravenes State water quality standards. Waters of the state include streams and creeks and all other bodies of surface or underground water that are wholly or partially within the State (ECL 17-0105[2]). The Mud Creek tributary and Mud Creek are located within New York State, are classified as Class C streams, and constitute waters of the State under the ECL (Findings of Fact nos. 6-8). State water quality standards applicable to class C streams are set forth in 6 NYCRR 703.2. Relevant to this proceeding is the standard for turbidity, which states that there shall be no increase in turbidity that will cause a substantial visible contrast to natural conditions (*see* 6 NYCRR 703.2).

Staff has demonstrated that farming operations on the Site generated organic matter in the form of agricultural process waste water that included bunk silage leachate and manure from the barnyard (*see* Rice Aff ¶¶ 18-19, exhibit 3, page 1; Rice Aff 2 ¶ 2; exhibit A, photograph a). Ms. Rice attested that the bunk silage leachate and manure from the barnyard collects in a pool on the Site and runs “uncontrollably off the pad,” “follows a ditch through the trees,” and “enter[s] the Mud creek tributary . . . via a point source discharge” (*see* Rice Aff 2 ¶ 2, exhibit A, photograph c [the pad], photographs b and d [the ditch]). The photographs Ms. Rice took of the Site during her inspection support these claims. The photographs show the barnyard and cows, the bunk, leachate pool and pad near the barnyard and cows, as well as the barnyard roof with no means to divert the wastewater from the path which follows drainage ditches that flow into the Mud Creek tributary (*see* Rice Aff ¶¶ 18-19, exhibit 3, pages 1 and 2; Rice Aff 2 ¶ 2, exhibit A, photographs b and d). Ms. Rice explained that the Mud Creek tributary flows through the Site and ultimately reaches a confluence with Mud Creek (*see* Rice Aff, ¶ 18, exhibit 2; Rice Aff 2 ¶¶ 3-5, exhibit B).

With respect to the turbidity standard (6 NYCRR 703.2), Ms. Rice photographed Mud Creek at points downstream of the discharge at the Site where the water exhibited dark discoloration and foaming. She attested that this discoloration of the water “was due to an extreme organic loading to Mud Creek due to discharge of leachate and manure from the Site, which causes degradation of the waterbody.” (*See* Rice Aff 2 ¶¶ 3-4 [referring to Rice Aff, exhibit 3, page 3].) The photographs demonstrate that the water in the Mud Creek tributary

⁶ The Complaint also alleged that the discharge sufficiently depleted oxygen levels so as to deter fish survival in contravention of the section 703.2 standard for suspended, colloidal and settleable solids (*see* Complaint ¶ 15). However, Department staff has withdrawn this alleged violation (*see* Tinsley Aff ¶ 31 n 1).

upstream of where the discharges occurred is clear and does not exhibit the foaming and discoloration she observed in the Mud Creek tributary downstream of the discharges or downstream in Mud Creek (*see* Rice Aff exhibit 3, page 4, photograph 4-4 [Clean water just upstream of bunk discharge]). Ms. Rice’s attestations and the comparison of upstream and downstream conditions as shown in the photographs she submitted, support a reasonable inference that the discharge of organic matter from the Site to the Mud Creek tributary between September 15 and 26, 2017 caused a visible contrast to natural conditions in the Mud Creek tributary. The photographs also support a reasonable inference that the organic material discharged to the Mud Creek tributary traveled downstream and impacted Mud Creek. (*See* Rice Aff, ¶¶ 18-19, exhibit 3, pages 3-4; Rice Aff 2 ¶¶ 3-7, exhibit B.)

Department staff has also established that respondent’s discharge of organic material into the Mud Creek tributary from drainage ditches on his property violated ECL 17-0505, which prohibits any person from making or using an outlet or point source that discharges into the waters of the State without a valid SPDES permit issued pursuant to ECL article 17, title 8. ECL article 17, title 8, in turn, prohibits the discharge of pollutants to the waters of the State from any outlet or point source without a SPDES permit (*see* ECL 17-0803). “Pollutant” includes “agricultural waste discharged into water” (ECL 17-0105[17]).

The Department’s regulations broadly define the term point source to include “any discernible confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged” (6 NYCRR 700.1[a][45]). Ms. Rice photographed a drainage ditch on the Site during her inspection (*see* Rice Aff, exhibit 3, page 2). As discussed, Department staff has demonstrated that organic agricultural waste matter from respondent’s farming operations was discharged into the drainage ditches on the Site, entered the Mud Creek tributary and, ultimately, flowed into Mud Creek. Ms. Rice attested that she searched the Department’s records and found no evidence that the Department had issued a SPDES permit to respondent to authorize the discharge (Rice Aff ¶ 20). Therefore, Department staff has submitted sufficient proof to demonstrate a viable claim that respondent violated ECL 17-0505.

Counsel for respondent makes a general request to be heard on the merits, but fails to raise a factual challenge to Department staff’s claims that respondent discharged agricultural process waste water through point sources on the Site into the waters of the State without a SPDES permit, and that the discharge resulted in a violation of State water quality standards. Department staff correctly points out that respondent has not raised a meritorious defense to liability on these charges. The allegations in the Complaint and staff’s papers submitted in support of the Motion, and the reasonable inferences drawn from them, are sufficient to grant a default judgment that respondent discharged organic matter into the waters of the State in violation of State water quality standards for turbidity in 6 NYCRR 703.2, that the discharge was

prohibited by ECL 17-0501(1), and that the discharge occurred without a SPDES permit in violation of ECL 17-0505. Accordingly, staff's motion for a default judgment on the issue of liability should be granted and respondent's motion to reopen the default should be denied.

Civil Penalty and Remedial Relief

Department staff seeks an order from the Commissioner imposing a payable civil penalty of \$8,000 (Motion ¶ 3). ECL 71-1929(1) provides that “[a] person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto” is liable for a penalty of up to \$37,500 per day. In determining the requested penalty, Department staff utilized the Civil Penalty Policy (DEE-1, June 20, 1990), the Water Pollution Control Enforcement Policy (*see* Rice Aff exhibit 5, DEE-3) and the Division of Water Technical and Operational Guidance Series (1.4.2) Compliance and Enforcement of SPDES permits (June 24, 2010) (TOGS 1.4.2) (*see* Rice Aff, exhibit 6).

Staff contends that a key measure of the Department's performance in addressing water pollution is protecting and improving water quality to support the best usage of the State's waters (*see* Rice Aff, exhibit 5, DEE-3 at II). DEE-3 states that the Department must take appropriate action against violators to achieve these objectives and assess civil penalties where environmental damage has occurred, or where substantial administrative efforts are required to bring a source into compliance with regulatory requirements (*see id.*). To staff's point, the stated objectives of DEE-3 are to “establish a credible ‘enforcement presence’ in the mind of the regulated community so that non-compliance is deterred and so that the regulatory process is fair and equitable to all,” and to “provide consistency and unity to the sanctions imposed” (*see* DEE-3 at II Background, objectives 2 and 3).

Department staff calculated the base civil penalty calculation to be \$120,000. Staff determined that the violations continued for 12 days, adding to the gravity of the violation, but that information was lacking to calculate the economic benefit. Staff also noted that respondent had been cooperative and incurred costs to address the violations, justifying a reduction in the civil penalty, and that respondent had no prior history of non-compliance. Staff was not aware of an inability to pay on the part of respondent. Based on these considerations, staff determined that an appropriate civil penalty was \$8,000. Staff's proposed civil penalty is consistent with the ECL and Department policies and is reasonable.⁷ (*See* Tinsley Aff ¶ 34[k]-[n].)

Counsel for respondent argues that Charles Miller and his wife are elderly farmers who do not have the resources to pay an \$8,000 civil penalty, and that any judgment against them

⁷ Although staff has withdrawn the alleged violation of the section 703.2 suspended, colloidal and settleable solids water quality standard, the requested penalty is amply supported by the remaining violations.

could mean foreclosure and homelessness (Newton Aff ¶ 12-13). Counsel did not provide any evidence or attestation by respondent to support this claim.

A respondent who fails to answer a complaint has the right to contest remedial relief and civil penalty sought by Department staff (*see McClland v Climax Hosiery Mills*, 252 NY2D 347, 351 [1930]; *Amusement Bus. Underwriters v American Intl. Group*, 66 NY2D 878, 880 [1985]). Although a defaulting defendant admits all of the traversable allegations in the complaint, *i.e.*, allegations capable of being denied, including the issue of liability, an allegation of damages is not a traversable allegation, and a defaulting defendant does not admit plaintiff's assessment of damages (*see McClland v Climax Hosiery Mills* 252 NY2d at 351; *Amusement Bus. Underwriters v American Intl. Group*, 66 NY2D at 880). A defendant who appears in an action is entitled to notice of the inquest on damages, and an opportunity to offer proof in mitigation of damages (*see id.*; *see also Eden Park Health Services, Inc. v Estes*, 2 AD2d 1186 [3d Dept 2003]; *see also* 22 NYCRR 202.46 [Damages, inquest after default; proof]).

Because respondent has appeared in this proceeding through counsel, I will allow respondent the opportunity to present evidence with respect to the remedial relief and civil penalty proposed by Department staff at an adjudicatory hearing. The Civil Penalty Policy allows the Department to adjust the gravity portion of the civil penalty based on a respondent's lack of financial resources (*see* Civil Penalty Policy, DEE 1, at E.4). The record does not contain sufficient information to evaluate counsel's claim that respondent cannot afford to pay a civil penalty. I note that under the Civil Penalty Policy respondent has the burden to demonstrate his inability to pay, and the adjustment will "normally require a significant amount of financial information specific to the violator" to be provided to the Department for review (*see id.*). I will require that respondent provide relevant financial information to Department staff to evaluate in advance of the adjudicatory hearing. If respondent fails to provide the required information, he will waive his opportunity to contest the penalty proposed by Department staff. I further note that any adjustments to the civil penalty are in the sole discretion of the Department, and may depend on whether respondent is able to address the underlying violations (*see id.*).

Respondent's counsel also raises a question of fact with respect to the sufficiency of respondent's corrective action. Counsel asserts that "within thirty days [of receiving the notice of hearing], the Millers ameliorated the problem" and submitted an invoice for \$1,299, apparently representing monies respondent paid to a contractor to address the violation (*see* Newton Aff ¶ 7 and attached invoice). Department staff has proposed specific remedial measures (*see* Complaint, Wherefore Clause, ¶ II; *see also* Tinsley Aff ¶ 38[d]), and contends that respondent's corrective actions were not sufficient to address the problem (*see* Letter from Dusty Tinsley to ALJ Wilkinson letter dated February 15, 2018). Because a question of fact exists whether respondent has adequately addressed the agricultural process wastewater discharges at the Site, I will include this issue for adjudication along with the civil penalty.

Following the issuance of this ruling, I will contact the parties to establish a schedule for respondent to submit relevant financial information and for the adjudicatory hearing.

CONCLUSION AND RECOMMENDATION

Department staff has established its entitlement to a default judgment holding respondent liable for violating ECL 17-0501(1) and 6 NYCRR 703.2 by discharging organic matter into the waters of the State which resulted in a visible contrast to natural conditions, and ECL 17-0505 by discharging organic matter from a point source into the waters of the State without a SPDES permit. Respondent has raised adjudicable issues with respect to the amount of the civil penalty and the remedial relief. Therefore, prior to issuing a final recommendation for the Commissioner, I will hold an adjudicatory hearing on these issues and will include my recommendations in a report issued after the hearing.

RULING

- I. Department staff's motion for default judgment is granted on the issue of respondent's liability for violating ECL 17-0501(1), ECL 17-0505, and 6 NYCRR 703.2. Staff's motion is otherwise denied.

- II. Respondent's motion to reopen the default is denied. However, respondent is allowed an opportunity to be heard on the amount of the civil penalty and the remedial relief to be imposed in this matter. I will schedule an adjudicatory hearing for that purpose.

I will contact the parties to arrange a conference call to discuss further proceedings in this matter, including the process for respondent's submission of financial information to the Department regarding his ability to pay and the scheduling of the adjudicatory hearing on the civil penalty and remedial relief.

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

Dated: June 12, 2018
Albany, New York

SUBMISSIONS

Matter of Charles Miller

DEC File No. R8-2017-1002-1550

1. Cover letter from Dusty Renee Tinsley to CALJ McClymonds dated January 30, 2018 attaching notice of motion and motion for default judgment and affidavits of Nancy Rice and Tammy Schubmehl
2. Motion for Default Judgment dated January 30, 2018
3. Affirmation of Dusty Renee Tinsley dated January 30, 2018 with the following Attachments:
 - (1) Exhibit 1: Cover letter from Dusty Renee Tinsley, Notice of Hearing and Complaint dated November 10, 2017; Affidavit of service of Tammy Schubmehl sworn to January 11, 2018 with: (1) attachment a: Certified mail return receipt no. 7016 2070 0001 0174 1393 and U.S. Postal Service tracking sheet for tracking no. 9509 9402 2118 6132 5462 70 reflecting delivery on November 20, 2017, and (2) attachment b: Cover letter from Dusty Renee Tinsley dated November 10, 2017 (duplicate of Exhibit 1)
 - (2) Exhibit 2: Certified mail return receipt no. 7016 2070 0001 0174 1393 and U.S. Postal Service tracking sheet for tracking no. 9509 9402 2118 6132 5462 70 reflecting delivery on November 20, 2017 (duplicate of Exhibit 1 attachment a)
 - (3) Exhibit 3 - Affidavit of Nancy Rice sworn to January 20, 2018 attaching the following exhibits:
 - a. exhibit 1 - 2017 Final Assessment Roll for Ontario County, Town of Canandaigua, showing tax map parcel 82.00-1-42.110, 3151 Hopkins Road, owned by Charles A. and Ellen A. Miller
 - b. exhibit 2 - Aerial map and County property information for 3151 Hopkins Road, Town of Canandaigua
 - c. exhibit 3 - Photolog of Charles Miller Farm dated September 26, 2017 (4 pages)
 - d. exhibit 4 - DEE-1 Civil Penalty Policy, June 20, 1990
 - e. exhibit 5-DEE-3 Water Pollution Control Enforcement Policy, December 13, 1984
 - f. exhibit 6 - Division of Water Technical and Operational Guidance Series (1.4.2) COMPLIANCE AND ENFORCEMENT OF SPDES PERMITS
 - (4) Exhibit 4 - Proposed Order
4. Cover letter from Dusty Renee Tinsley to ALJ Wilkinson dated February 14, 2018 attaching affidavit of service of Motion for Default Judgment dated February 13, 2018
5. Letter from Dusty Renee Tinsley to ALJ Wilkinson dated February 20, 2018 discussing the tank referenced in the Complaint and Motion for Default Judgment
6. Cover letter from Dusty Renee Tinsley to ALJ Wilkinson dated March 5, 2018 attaching supplemental affidavit of Nancy Rice dated March 5, 2018 with exhibits A, B, and C

7. Affidavit of George F. Newton, Esq. dated April 27, 2018
8. Affirmation of Dusty Rene Tinsley dated May 10, 2018 with the following attachments:
 - Notice of Violation dated September 28, 2018 issued to Charlie Miller, 3272 Hickox Road, Canandaigua, NY 14424
 - Letter dated October 11, 2017 regarding offer of settlement
 - Cover letter from Dusty Renee Tinsley and Notice of Hearing and Complaint dated November 10, 2017; Affidavit of service of Tammy Schubmehl sworn to January 11, 2018 (duplicate of Exhibit 1 attached to Tinsley Aff)
 - Cover letter from Dusty Renee Tinsley to CALJ McClymonds dated January 30, 2018 attaching Notice of Motion and Motion for Default Judgment and Order dated January 29, 2018, Affirmation of Dusty Renee Tinsley dated January 30, 2018, and affidavits of Nancy Rice and Tammy Schubmehl
 - Proposed Order
 - Cover Letter from Dusty Renee Tinsley to ALJ Wilkinson and Affidavit of Service of Tammy Schubmehl dated February 13, 2018
 - Letter from ALJ Wilkinson to Dusty Renee Tinsley dated February 15, 2018
 - Letter from Dusty Renee Tinsley to ALJ Wilkinson to Dusty Renee Tinsley dated February 20, 2018
 - Letter from ALJ Wilkinson to Dusty Renee Tinsley dated February 27, 2018
 - Letter from Dusty Renee Tinsley to ALJ Wilkinson dated March 5, 2018 attaching Supplemental Affidavit of Nancy Rice sworn to March 5, 2018