

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

In the Matter of the Alleged Violation
of Article 23 of the Environmental
Conservation Law (ECL) of the State of
New York and Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
(6 NYCRR),

ORDER

- by -

DEC Case No.
1534-2015DK

RUSSELL A WEISE, JR.,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department) alleges that respondent Russell A Weise, Jr. committed various violations with respect to three gas wells (known as the 3144 Stroebel, Reed 4 and Weise 1 wells¹) that he owns in the Town of Sherman, Chautauqua County, New York; and a sand and gravel mine that he owns in the Town of Mina, Chautauqua County, New York (sand and gravel mine). Specifically, as to the three wells, Department staff listed five causes of action, alleging that respondent violated:

- 6 NYCRR 551.2(b), for failing to file timely annual well reports for the 2007 through 2014 production years for the three wells (part of first cause of action);
- 6 NYCRR 551.4, for failing to maintain adequate financial security for the wells (part of first cause of action);
- 6 NYCRR 551.1, for failing to maintain a current organizational report for the wells (part of first cause of action);

¹ The API Well Numbers are as follows: 3144 Stroebel -- API Well Number 31-013-15015-00-00; Reed 4 -- API Well Number 31-013-16510-00-00; and Weise 1 well -- API Well Number, 31-013-17046-00-00.

- 6 NYCRR 555.3(c), for failing to plug the three wells upon the expiration of the period of abandonment (second cause of action); and
- 6 NYCRR 556.2(b), for failing to prevent gas from escaping the wells into the atmosphere (third cause of action).

As to the sand and gravel mine, Department staff alleged that respondent violated:

- 6 NYCRR 422, for failing to reclaim the sand and gravel mine (fourth cause of action); and
- Order on Consent No. R9-20091015-54, for failing to backfill over-excavated areas and reclaim the east and south mine faces of the sand and gravel mine as required by the terms of the order on consent (fifth cause of action).

On September 16, 2016, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of the Department's Office of Hearings and Mediation Services, to address these violations. ALJ Caruso prepared the attached hearing report, which I adopt as my decision in this matter, subject to the following comments.

As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear for the adjudicatory hearing scheduled in the matter on September 16, 2016, as was directed in the notice of hearing (see Hearing Report at 7 [Finding of Fact No. 31]).

Staff orally moved for a default judgment at hearing. The ALJ recommended that Department staff's motion for default be granted on four of staff's causes of action, including:

-- first cause of action -- failure to file the required annual well reports, failure to maintain a current organizational report, and failure to maintain financial security);

-- third cause of action -- failure to prevent gas escaping from the wells into the atmosphere;

-- fourth cause of action -- failure to properly reclaim the sand and gravel mine; and

-- fifth of the cause of action -- failure to comply with a prior order on consent concerning the sand and gravel mine.

See Hearing Report at 8-10. I concur that staff is entitled to a judgment on default on these four causes of action pursuant to 6 NYCRR 622.15.

Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence on those four causes of action (see Hearing Report at 10). Respondent Russell A Weise, Jr. has failed to submit reports for the three wells since 2007, and, notwithstanding the efforts of Department staff to obtain respondent's compliance, nothing in this record indicates that respondent made an effort to address this failure to file the reports (see e.g. Hearing Exhibit N [2012, 2013, 2014 and 2015 correspondence from Department staff to respondent]).

Department staff's proof also demonstrated that respondent Russell A Weise, Jr. failed to maintain adequate financial security, in violation of 6 NYCRR 551.4; failed to maintain a current organizational report, in violation of 6 NYCRR 551.1; and failed to prevent gas from escaping the 3144 Stroebel and Reed 4 wells, in violation of 6 NYCRR 556.2(b) (see Hearing Report at 5-7 [Findings of Fact Nos. 23-29]).

With respect to the sand and gravel mine, Department staff's proof demonstrates that respondent has been operating his mine without a valid permit since April 11, 2009. The proof also demonstrates that respondent failed to reclaim the sand and gravel mine within two years of the expiration of respondent's sand and gravel mine permit, in violation of 6 NYCRR 422.3(e) (see Hearing Report at 4 [Finding of Fact No. 8]); and failed to perform the remedial and reclamation activities at the sand and gravel mine, in violation of Order on Consent No. R9-20091015-54 (see Hearing Report at 4 [Findings of Fact Nos. 6 and 9]).

Department staff, in its papers, sought a penalty of twenty-five thousand dollars (\$25,000), and the ALJ recommended that respondent Russell A Weise, Jr. be directed to pay this amount. ECL 71-1307, which would apply to the violations at issue here, provides for a penalty of up to eight thousand dollars (\$8,000) for the first day of violation and up to two

thousand dollars (\$2,000) per day for each day the violation continues.

Notwithstanding the fact that Department staff did not prove its second cause of action, based on the record before me the penalty that Department staff requested and the ALJ recommends is authorized and appropriate for the violations found (see Hearing Report at 10-11).

In addition, Department staff has requested and the ALJ has recommended various corrective actions. I have considered the recommendations of the ALJ for respondent Russell A Weise, Jr. to:

- submit the annual well reports for the 3144 Stroebel, Reed 4 and Weise 1 wells for the 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014 production years;
- post \$5,000 financial security for each well;
- submit an updated organizational report;
- reclaim the sand and gravel mine; and
- repair and produce or plug and abandon each of the three wells.

In addition, the ALJ recommends that respondent Russell A Weise, Jr. be directed to reimburse the oil and gas account referenced at ECL 23-1903(1)(a), in accordance with ECL 23-0305(8), with the full amount of any and all expenditures made by the Department for well plugging required for respondent's wells.

The recommendations are appropriate, and I have incorporated them into this order with certain modifications as to the due dates. The due dates will be measured from the service of the order upon respondent. Furthermore, with respect to the engaging of a contractor to plug and abandon the wells, I am providing that Department staff may extend the time period upon good cause shown by respondent Russell A Weise, Jr.

Staff has requested that respondent reimburse the oil and gas account for expenditures made by the State for reclamation of the sand and gravel mine. No legal authority has been provided in support of allowing for such reimbursement, and I do not accept this request. Staff has also requested that respondent be directed to cooperate fully with the State and

refrain from any activities that interfere with the State, its employees, contractors or agents in the event the State should seek access to respondent's wells or sand and gravel mine. Respondent is required by law to allow for access and not to interfere with the Department (see, e.g., 6 NYCRR 424.2 [Department access to mines] and 6 NYCRR 550.5 [Department access to oil and gas property]) and staff has not shown that any further directive is necessary here.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted on staff's first, third, fourth and fifth causes of action. By failing to answer or appear in this proceeding, respondent Russell A Weise, Jr. waived his right to be heard at the hearing.
- II. Department staff's motion for a default judgment on staff's second cause of action is denied.
- III. Moreover, based upon record evidence it is adjudged that:
 - A. Respondent Russell A Weise, Jr. violated 6 NYCRR 551.2(b) by failing to timely file complete and accurate annual well reports for the 2007 through 2014 production years for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells (API Well Numbers 31-013-15015-00-00, 31-013-16510-00-00 and 31-013-17046-00-00, respectively) that respondent owns in the Town of Sherman, Chautauqua County, New York.
 - B. Respondent Russell A Weise, Jr. violated 6 NYCRR 551.4 by failing to maintain adequate financial security for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells.
 - C. Respondent Russell A Weise, Jr. violated 6 NYCRR 551.1 by failing to maintain a current organizational report for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells.

- D. Respondent Russell A Weise, Jr. violated 6 NYCRR 556.2(b) by failing to prevent gas from escaping from respondent's 3144 Stroebel and Reed 4 wells.
- E. Respondent Russell A Weise, Jr. violated 6 NYCRR 422.3(e) by failing to reclaim the sand and gravel mine that respondent owns in the Town of Mina, Chautauqua County, New York, within two years of the expiration of respondent's mining permit.
- F. Respondent Russell A Weise, Jr. violated Order on Consent No. R9-20091015-54 by failing to backfill over-excavated areas and reclaim, seed, fertilize and mulch the east and south mine faces of the sand and gravel mine.

IV. Within thirty (30) days of the service of this order upon respondent Russell A Weise, Jr.:

- A. Respondent Russell A Weise, Jr. shall submit the annual well reports for the 2007 through 2014 production years for the 3144 Stroebel, Reed 4 and Weise 1 wells to the Department.
- B. Respondent Russell A Weise, Jr. shall post a five thousand dollar (\$5,000) financial security for each well for a total of fifteen thousand dollars (\$15,000) financial security.
- C. Respondent Russell A Weise, Jr. shall submit an updated organizational report reflecting current organizational information for the wells to the Department.

V. Respondent Russell A Weise, Jr. is hereby assessed a civil penalty in the amount of twenty-five thousand dollars (\$25,000). Respondent shall pay the twenty-five thousand dollars (\$25,000) civil penalty within thirty (30) days of the service of this order upon respondent. Payment is to be 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. Respondent Russell A Weise, Jr. shall either repair and produce or plug and abandon the 3144 Stroebel, Reed 4 and Weise 1 wells.

- A. For the wells that will be repaired and produced, respondent Russell A Weise, Jr. shall repair and produce the wells within thirty (30) days of the service of this order upon him and immediately notify the Department when the repairs have been completed.
- B. For the wells that will be plugged and abandoned, respondent Russell A Weise, Jr. shall:
 - 1. Within thirty (30) days of the service of this order upon him, submit a notice of intention to plug and abandon each well to the Department.
 - 2. Within one hundred eighty (180) days of the service of this order upon him, contract with a registered New York State plugging contractor to permanently plug and abandon each well in accordance with ECL article 23 and 6 NYCRR part 555 and have the wells plugged and abandoned during that one hundred eighty (180) day period. Department staff may extend this time period up to one hundred eighty (180) days upon good cause shown by respondent.
 - 3. Within thirty (30) days after completion of plugging operations, submit a plugging report to the Department.

VII. The annual well reports, the financial security, the organizational report, the notice of completed repairs or the notice of intention to plug and abandon the 3144 Stroebel, Reed 4 and Weise 1 wells, the plugging report, and the civil penalty payment shall be sent to the following address:

NYS Department of Environmental Conservation
Division of Mineral Resources
Oil and Gas Compliance Enforcement Section
625 Broadway, 3rd Floor
Albany, New York 12233-6500
Attn: Theodore N. Loukides, Chief.

VIII. Respondent Russell A Weise, Jr. shall reimburse the oil and gas account referenced at ECL 23-1903(1)(a), in accordance with ECL 23-0305(8), the full amount of any and all expenditures made by the Department for well

plugging required at respondent's wells. Upon completion of any such plugging of respondent's wells, the Department shall notify respondent of the costs so incurred by the Department and respondent shall pay these costs within thirty (30) days of receipt of such notification.

- IX. Within one hundred eighty (180) days of the service of this order upon respondent, respondent Russell A Weise, Jr. shall reclaim the sand and gravel mine in accordance with the previously authorized NYS Mining Permit No. 9-02686 (DEC Permit No. 9-0652-00005/00001-1) and the regulatory requirements contained in 6 NYCRR 422.3 with such reclamation including any necessary backfilling (specifically adjacent to the east property line) to achieve compliance with 6 NYCRR part 422. All reclamation work shall be subject to Department review and approval.
- X. Any questions or other correspondence regarding this order shall be addressed to Theodore N. Loukides at the address referenced in paragraph VII of this order.
- XI. The provisions, terms and conditions of this order shall bind respondent Russell A Weise, Jr. and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: April 3, 2017
Albany, New York

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

In the Matter of the Alleged Violation
of Article 23 of the Environmental
Conservation Law (ECL) of the State of
New York and Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
(6 NYCRR),

HEARING REPORT

DEC Case No.
1534-2015DK

- by -

Russell A Weise, Jr.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Russell A Weise, Jr. (respondent) with a notice of hearing and complaint dated August 21, 2015, alleging violations of:

- 6 NYCRR 551.2(b), for failure to file timely annual well reports for the 2007 through 2014 production years for three wells (known as the 3144 Stroebel, Reed 4 and Weise 1 wells) owned by respondent in the Town of Sherman, Chautauqua County, New York;
- 6 NYCRR 551.4 for failure to maintain adequate financial security;
- 6 NYCRR 551.1 for failure to maintain a current organizational report;
- 6 NYCRR 555.3(c) for failure to plug the three wells;
- 6 NYCRR 556.2(b) for failure to prevent gas from escaping the wells into the atmosphere;
- 6 NYCRR 422 for failure to reclaim a sand and gravel mine owned by respondent in the Town of Mina, Chautauqua County, New York; and
- Order on Consent No. R9-20091015-54 for failure to backfill over-excavated areas and reclaim the east and south mine faces of the sand and gravel mine.

The wells are designated by American Petroleum Institute (API) Well Numbers 31-013-15015-00-00, 31-013-16510-00-00 and 31-013-17046-00-00, respectively.

The complaint seeks an order of the Commissioner (1) finding respondent in violation of 6 NYCRR 551.2, 551.4, 556.2(b), 555.3(c), and 422;¹ ECL 23-2713(2) and 71-1305(3); (2) assessing a civil penalty in the amount of twenty-five thousand dollars (\$25,000); (3) directing respondent to comply with the schedule of compliance included in the papers served on respondent; (4) ordering respondent to cooperate fully with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in the event the State should seek access to respondent's wells or mine site; (5) ordering respondent to reimburse the oil and gas account, in accordance with ECL 23-0305(8), the full amount of any and all expenditures made by the State from the oil and gas account for well plugging required at respondent's wells or reclamation at the mine site; and (6) granting such other and further relief as the Commissioner shall deem just and appropriate.

Service of the notice of hearing and complaint was made by certified mail and was received by respondent on August 25, 2015 (see 6 NYCRR 622.3[a][3]). Respondent did not answer the complaint, but respondent, through his attorney, appeared at the September 29, 2015 hearing in the Department's Region 9 offices located at 270 Michigan Avenue, Buffalo, New York. The matter was adjourned at the request of the parties.

The Office of Hearings and Mediation Services served a notice of hearing dated August 9, 2016 on respondent and his attorney by first class mail advising respondent that the hearing in this matter would be reconvened on September 16, 2016 at 10:00 a.m. The notice of hearing advised respondent that if respondent could not attend the hearing in person, other arrangements could be made by contacting the undersigned administrative law judge. At 10:20 a.m. on September 16, 2016, the adjudicatory hearing was reconvened before me at the Department's Central Office at 625 Broadway, Albany, New York.

Department staff was represented by David H. Keehn, Esq., Associate Attorney, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. No one appeared on behalf of respondent.

¹ The wherefore clause of staff's complaint omits the violation of 6 NYCRR 551.1 alleged in staff's first cause of action.

Department staff indicated that it was prepared to proceed with the hearing, proffering two program staff witnesses. Noting for the record that respondent had failed to answer the complaint, and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. I reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). Department staff also sought judgment on the merits.

Department staff called two witnesses: Lucas Mahoney, Mined Land Reclamation Specialist 2, Division of Mineral Resources, DEC Region 9; and Christopher J. McKelvey, Mined Land Reclamation Specialist 3, Division of Mineral Resources, DEC Central Office. Mr. Mahoney testified by videoconference from the Department's Region 9 sub-office located at 182 East Union Street, Suite 3, Allegany, New York. In all, seventeen (17) exhibits were received in evidence.

Findings of Fact

1. Respondent Russell A Weise, Jr. (Weise) maintains an address at 209 Park Street, Sherman, New York. (Staff Exhibits A, B, D, E, G, H, I, M, N and O; Testimony of Christopher J. McKelvey.)
2. Respondent Weise owns and operates a surface unconsolidated sand and gravel mine in the Town of Mina, Chautauqua County, New York (Weise Gravel Mine) under NYS Mining Permit No. 9-02686, DEC Permit No. 9-0652-00005/00001-1 (Mining Permit). (Staff Exhibits D, H, I, J, and K; Testimony of Lucas Mahoney.)
3. Respondent Weise entered into Order on Consent/Stipulation No. BU 0008-0193 with the Department dated February 19, 1993 for failing to comply with the Mining Permit and agreed to pay a one thousand dollar (\$1,000) civil penalty. (Staff Exhibit D; Testimony of Lucas Mahoney.)
4. Respondent Weise entered into Short Form Order on Consent No. R9-4151-94-06 with the Department dated July 18, 1994 for mining without a valid mining permit at the Weise Gravel Mine and agreed to pay a five hundred dollar (\$500) civil penalty. (Staff Exhibit E; Testimony of Lucas Mahoney.)
5. Respondent Weise entered into Short Form Order on Consent

No. R9-20000620-48 with the Department dated June 27, 2000 for stockpiling overburden outside the approved life of mine limits in violation of General Condition 17 of the Mining Permit and agreed to pay a five hundred dollar (\$500) civil penalty. (Staff Exhibit G; Testimony of Lucas Mahoney.)

6. Respondent Weise entered into Order on Consent No. R9-20091015-54 with the Department dated August 16, 2010 for mining outside of the mining limits set forth in the mined land use plan in violation of General Condition 17 and Special Condition 1 of the Mining Permit, and agreed to pay a four thousand five hundred dollar (\$4,500) civil penalty. Respondent agreed to backfill over-excavated areas and reclaim the east and south mine faces to slopes not steeper than 1.0 (vertical) to 2.0 (horizontal) by August 1, 2010, with the backfilling sufficient to ensure that the rim of the reclaimed slope is not less than 25 feet from property line. Respondent also agreed to seed, fertilize and mulch the reclaimed east and south slopes in accordance with the approved plan by September 1, 2010. (Staff Exhibit H; Testimony of Lucas Mahoney.)
7. Respondent Weise's Mining Permit was renewed by the Department on July 16, 2004 and expired on April 10, 2009. (Staff Exhibit I; Testimony of Lucas Mahoney.)
8. The Department has not renewed the expired mining permit, and respondent Weise has not reclaimed the Weise Gravel Mine. (Staff Exhibits J, K and L; Testimony of Lucas Mahoney.)
9. Respondent Weise did not perform the work required in the 2010 consent order. (Staff Exhibits J, K and L; Testimony of Lucas Mahoney.)
10. Department staff inspected respondent's mine on April 1, 2014 and August 17, 2015 and witnessed respondent's continued operation of the mine without a permit. (Staff Exhibits J, K and L; Testimony of Lucas Mahoney.)
11. Respondent Weise maintained a \$15,000 financial security for the mined land reclamation of the Weise Gravel Mine, which was seized by the Department. Respondent has not reposted the required financial security. (Testimony of Lucas Mahoney.)
12. The Department is still holding the \$15,000 financial

security, which is insufficient to reclaim the Weise Gravel Mine. (Testimony of Lucas Mahoney.)

13. Respondent Weise owns the wells designated as API Well Numbers 31-013-15015-00-00, 31-013-16510-00-00 and 31-013-17046-00-00 and known as the 3144 Stroebel, Reed 4 and Weise 1 wells, respectively, located in the Town of Sherman, Chautauqua County, New York. (Staff Exhibits A and M; Testimony of Christopher J. McKelvey.)
14. Respondent Weise is required to file annual well reports (AWRs) with the Department for each production year for each well respondent owns on a form supplied by the Department, as typified by Department staff's Exhibit M, an AWR filed by respondent Weise for the production year 2005. (Testimony of Christopher J. McKelvey; Staff Exhibit M.)
15. The Department supplies the AWR form to owners or other responsible parties by regular mail in January of each year immediately following the production year for which the AWR is required. The AWR must be filed by March 31 of that year. As a courtesy, if the Department does not timely receive the required AWR, it sends out a letter reminding the owners or other responsible parties of their obligation to file the AWRs, and enclosing another copy of the AWR form. (Testimony of Christopher J. McKelvey; Staff Exhibit N [correspondence to respondent dated January 18 and June 1, 2012; January 9 and July 15, 2013; January 9 and July 3, 2014; January 13 and July 13, 2015].)
16. Each AWR form filled in by the owner or other responsible party and filed with the Department must be signed by them on the signature line indicated in the form. (Testimony of Christopher J. McKelvey; Staff Exhibits M and N.)
17. Above the signature line in the AWR form is the following certification made by the person executing the form:
"Certification: I understand that Environmental Conservation Law (ECL) Sec. 23-0305 requires me to file complete and accurate well records on a form provided by NYSDEC and that ECL Sec. 71-1307 provides that knowingly violating ECL Sec. 23-0305 is punishable as a misdemeanor. I certify under penalty of perjury that the information provided above is complete and accurate." (Staff Exhibit M.)
18. Respondent Weise executed AWR forms for the 3144 Stroebel well for production years 1995 through 2006, for the Reed 4

well for production years 1992 through 2006, and for the Weise 1 well for production years 1994 through 2006, containing the certification indicated in Finding of Fact 17 and filed the AWRs with the Department. (Testimony of Christopher J. McKelvey; Staff Exhibits M and Q.)

19. Christopher McKelvey is an employee of the Department and is a Mined Land Reclamation Specialist 3 in the Department's Division of Mineral Resources. Mr. McKelvey's duties include the care, custody, and maintenance of the records pertaining to the oil, gas and solution mining program of the State of New York. These records are kept in a database maintained by the Department and include all AWRs filed pursuant to 6 NYCRR 551.2. (Testimony of Christopher J. McKelvey.)
20. On August 19, 2015 and September 13, 2016, Christopher McKelvey searched the Department's oil, gas and solution mining database for all AWRs filed by respondent. (Testimony of Christopher J. McKelvey; Staff Exhibit A, Affidavit of Christopher J. McKelvey, sworn to August 21, 2015 at ¶ 11; Staff Exhibit Q.)
21. As a result of his search, Christopher McKelvey determined that respondent Weise had not timely filed acceptable AWRs for the 2007 through 2014 production years for his 3144 Stroebel, Reed 4 and Weise 1 wells. (Testimony of Christopher J. McKelvey; Staff Exhibit A, Affidavit of Christopher J. McKelvey, sworn to August 21, 2015 at ¶ 12; Staff Exhibit Q.)
22. Respondent was responsible for filing the annual well reports referenced in Finding of Fact No. 21 and as of the date of the hearing had not done so. (Testimony of Christopher J. McKelvey.)
23. The Department inspected the Reed 4 and Weise 1 wells on September 10, 2014 and witnessed the following:
 - A. minor leaks at the top of the surface casing on the Reed 4 well; and
 - B. the Weise 1 well was shut-in at the wellhead. (Staff Exhibit P; Testimony of Christopher J. McKelvey.)
24. The Department inspected the 3144 Stroebel, Reed 4 and Weise 1 wells on April 3, 2015 and witnessed the following:
 - A. a gas leak at the wellhead on the 3144 Stroebel well; and

- B. gas bubbling from the wellhead on the Reed 4 well. (Staff Exhibit P; Testimony of Christopher J. McKelvey.)
25. Respondent maintained a \$5,000 financial assurance for each of the three wells. (Testimony of Christopher J. McKelvey.)
 26. The Department received a notice of cancellation from the bonding companies, and the Department demanded and received \$5,000 from two of the three bonds, for a total of \$10,000. The Department did not demand payment on the third \$5,000 bond, and the bond was cancelled. (Testimony of Christopher J. McKelvey.)
 27. The Department still holds the \$10,000 received from the two bonds. The funds are insufficient to plug respondent's wells. (Testimony of Christopher J. McKelvey.)
 28. Respondent has not reposted the three \$5,000 financial assurances. (Testimony of Christopher J. McKelvey.)
 29. Mr. McKelvey determined that respondent's phone number had changed but respondent has not provided the Department with his current phone number by filing an updated organizational report. (Testimony of Christopher J. McKelvey.)
 30. As shown by the affidavits of service of Keisha Rivera sworn to September 25, 2015, Department staff served the notice of hearing and complaint, order on consent, statement of readiness, and affidavit of Christopher J. McKelvey on respondent and his attorney by certified mail, pursuant to 6 NYCRR 622.3(a)(3), that were delivered on August 25, 2015. (Staff Exhibit B.)
 31. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on September 16, 2016, as directed in the notice of hearing. (Staff Exhibit C; Hearing Record.)

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint, unless the time to answer is extended by consent of staff or ruling of the ALJ (see 6 NYCRR 622.4[a]).² A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; see also 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and a waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, 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]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

Department staff's proof presents a prima facie case demonstrating that respondent Russell A Weise, Jr.:

1. failed to timely file complete and accurate AWRs for the 2007 through 2014 production years for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells, being those wells set forth in Finding of Fact No. 13, above, in violation of 6 NYCRR 551.2(b);
2. failed to maintain adequate financial security for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells, in violation of 6 NYCRR 551.4;

² In this matter, Department staff provided respondent thirty days to answer the complaint.

3. failed to maintain a current organizational report for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells, in violation of 6 NYCRR 551.1;
4. failed to prevent gas from escaping from the 3144 Stroebel and Reed 4 wells, in violation of 6 NYCRR 556.2(b);
5. failed to reclaim the Weise Gravel Mine within two years of the expiration of respondent's mining permit, in violation of 6 NYCRR 422.3(e);³ and
6. failed to backfill over-excavated areas and reclaim, seed, fertilize and mulch the east and south mine faces of the Weise Gravel Mine, in violation of Order on Consent No. R9-20091015-54.

At hearing Department staff moved to amend the complaint to change the violation noted in the second cause of action from a violation of 6 NYCRR 555.3(c)(temporary abandonment) to 6 NYCRR 555.2(c)(shut-in wells). Department staff, however, does not allege that the 3144 Stroebel, Reed 4 and Weise 1 wells were abandoned or shut-in for any period of time in excess of a lawful period of abandonment. Department staff's proof only demonstrates that the Weise 1 well was shut-in at the wellhead at the time of the September 10, 2014 inspection.

The Commissioner has previously held, "there is a presumption of abandonment based upon an owner/operator's failure to report well production as required" (Matter of Farrell, Order of the Commissioner, July 30, 1996 at 5). Staff, in this matter, has not expressly or implicitly pleaded or argued that the lack of reporting is presumptive evidence that the wells were in fact abandoned. Moreover, in this matter, Department staff presented evidence that the wells were operating and not shut-in, except for the one inspection of the Weise 1 well (see Staff Exhibit P, Inspection Items 16 and 17 on each well inspection report). I conclude staff has not made a prima facie showing that the 3144 Stroebel, Reed 4 and Weise 1 wells were abandoned for any period in excess of a lawful period of abandonment. Accordingly, staff's motion for default judgment on the second cause of action should be denied.

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; and (ii) respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter

³Department staff's complaint references part 422, but at hearing staff referred to the regulatory requirement that a mine must be reclaimed within two years of the cessation of mining activity, which in this instance is the date of the expiration of the permit.

on September 16, 2016, as directed in the notice of hearing. Department staff provided a proposed order subsequent to the hearing and the record was closed. The Department is entitled to a default judgment on staff's first, third, fourth and fifth causes of action pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent Weise failed to timely file complete and accurate AWRs for the 2007 through 2014 production years above in violation of 6 NYCRR 551.2(b). The proof also demonstrates that respondent failed to maintain adequate financial security, in violation of 6 NYCRR 551.4; failed to maintain a current organizational report, in violation of 6 NYCRR 551.1; failed to prevent gas from escaping the 3144 Stroebel and Reed 4 wells, in violation of 6 NYCRR 556.2(b); failed to reclaim the Weise Gravel Mine within two years of the expiration of respondent's mining permit, in violation of 6 NYCRR 422.3(e); and failed to perform the remedial and reclamation activities at the Weise Gravel Mine, in violation of Order on Consent No. R9-20091015-54. The Department is entitled to judgment upon the facts proven on staff's first, third, fourth and fifth causes of action.

Department staff's proposed civil penalty of twenty-five thousand dollars (\$25,000) is consistent with the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) as well as applicable provisions of ECL article 71. Respondent has a history of noncompliance ranging from the 1993, 1994, 2000 and 2010 orders on consent entered into with the Department to his failure to comply with the 2010 order on consent and failure to file annual well reports for the 2007 through 2014 production years. In addition, respondent Weise has been operating his gravel mine without a valid permit since April 11, 2009. Pursuant to 6 NYCRR 422.3(e), the gravel mine was required to be reclaimed within two years of the expiration of the permit or no later than April 10, 2011 (see Matter of Dimick, Order of the Commissioner, May 13, 2003). Respondent has not reclaimed the mine.

ECL 71-1307(1) provides "Any person who violates any provision of article 23 of this chapter or commits any offense described in section 71-1305 of this title shall be liable . . . for a civil penalty not to exceed eight thousand dollars and an additional penalty of two thousand dollars for each day during which such violation continues." ECL 71-1305 states it is unlawful for any person to violate any provisions of or fail to perform any duty imposed by ECL article 23 or any rule or

regulation promulgated thereunder or any order or condition of any permit (see ECL 71-0305[2]).

The maximum penalty for respondent's failure to submit the AWRs for the 2007 through 2014 production years, calculated using the number of days between the due dates for each AWR to the date of the complaint, August 21, 2015, is:

| | |
|-------------------|--|
| \$ 5,404,000 | - for the 2007 AWR due March 31, 2008 ⁴ |
| \$ 4,674,000 | - for the 2008 AWR due March 31, 2009 |
| \$ 3,936,000 | - for the 2009 AWR due March 31, 2010 |
| \$ 3,214,000 | - for the 2010 AWR due March 31, 2011 |
| \$ 2,482,000 | - for the 2011 AWR due March 31, 2012 |
| \$ 1,752,000 | - for the 2012 AWR due March 31, 2013 |
| \$ 1,022,000 | - for the 2013 AWR due March 31, 2014 |
| <u>\$ 292,000</u> | - for the 2014 AWR due March 31, 2015 |
| \$22,776,000 | |

Because there is no proof of the duration of respondent's failure to maintain adequate financial security, maintain a current organizational report, and failure to prevent gas from escaping the wells, I assign a maximum penalty of \$8,000 for each of those three violations or \$24,000 total.

For respondent's failure to reclaim the mine within two years of the April 10, 2009 expiration of the permit, I calculate the penalty from April 10, 2011 to the date of the complaint for a maximum civil penalty of \$3,194,000. The maximum civil penalty for respondent's failure to comply with the 2010 consent order is calculated from August 1, 2010 (the deadline for backfilling over-excavated areas and reclaiming the east and south mine faces) to the date of the complaint for a maximum civil penalty of \$3,398,000. The total maximum civil penalty on Department staff's first, third, fourth and fifth causes of action is \$29,392,000.

Although Department staff did not prove its second cause of action, I conclude that staff's requested penalty of twenty-five thousand dollars (\$25,000) is supported and appropriate on the remaining causes for the reasons stated above.

Department staff's complaint and schedule of compliance request respondent be ordered to file the required AWRs and

⁴ There are 2,699 days from March 31, 2008 to August 21, 2015. The first day is assigned a maximum penalty of \$8,000. The remaining 2,698 days are multiplied by \$2,000 for a total maximum penalty of \$8,000 + (2,698 x \$2,000) = \$5,404,000. The same approach was used to arrive at maximum penalties for the remaining years the AWRs were not filed.

updated organizational report and submit payment of the twenty-five thousand dollars (\$25,000) civil penalty immediately upon the effective date of the Commissioner's order. In addition, Department staff requests that the Commissioner order respondent to:

1. either repair and produce or plug and abandon each of respondent's wells and provide the appropriate notice to the Department regarding each well within thirty days of the effective date of the order;⁵
2. submit replacement financial security in the amount of fifteen thousand dollars (\$15,000)(\$5,000 for each well) within thirty days of the effective date of the order;
3. reclaim the entire mine site in accordance with the previously authorized NYS Mining Permit (DEC Permit No. 9-0652-00005/00001-1, Mine ID No. 90206) and minimum regulatory requirements contained in 6 NYCRR 422.3 with such reclamation including any necessary backfilling (specifically adjacent to the east property line) to achieve compliance with 6 NYCRR 422.2. All reclamation work shall be subject to Department review and approval;
4. cooperate fully with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in the event the State should seek access to respondent's wells or mine site; and
5. reimburse the oil and gas account referenced at ECL 23-1903(1)(a), in accordance with ECL 23-0305(8), the full amount of any and all expenditures made by the State for well plugging required at respondent's wells or reclamation of the mine site.

Although Department staff has not proven the wells have been abandoned and require plugging pursuant to 6 NYCRR 555.2, the law still authorizes the Commissioner to direct plugging of the wells to prevent the escape of gas into the atmosphere (see ECL 23-0305[8][d]). In this matter, Department staff has proven that two of the three wells have been leaking gas into the atmosphere (see Findings of Fact Nos. 23 and 24). I conclude the Commissioner can order respondent to either repair and produce or plug and abandon each of the wells.

⁵ If respondent plugs any or all the wells, Department staff requests additional requirements be directed by the Commissioner (see Exhibit A "Schedule of Compliance for Department Order").

In addition, staff's request that respondent be ordered to reimburse the oil and gas account for any expenditures incurred by the State for well plugging is supported by ECL 23-0305(8)(e). ECL 23-0305(8), however, only applies to oil pools or fields and natural gas pools or fields and does not authorize the use of the oil and gas account funds for mine reclamation expenses. The Department's remedy for the failure of a permittee to commence or complete reclamation of a mine is found in ECL 23-2715(6). Staff, however, did not seek relief pursuant to ECL 23-2715(6). I conclude that respondent cannot be ordered to reimburse the oil and gas account for mine reclamation expenses incurred by the State.

Conclusions of Law

1. By failing to file the annual well reports for the 2007 through 2014 production years for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells, respondent Russell A Weise, Jr. violated 6 NYCRR 551.2(b).
2. By failing to maintain adequate financial security for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells, respondent Russell A Weise, Jr. violated 6 NYCRR 551.4.
3. By failing to maintain a current organizational report for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells, respondent Russell A Weise, Jr. violated 6 NYCRR 551.1.
4. By failing to prevent gas from escaping from respondent's 3144 Stroebel and Reed 4 wells, respondent Russell A Weise, Jr. violated 6 NYCRR 556.2(b).
5. By failing to reclaim the Weise Gravel Mine within two years of the expiration of respondent's gravel mine permit, respondent Russell A Weise, Jr. violated 6 NYCRR 422.3(e).
6. By failing to backfill over-excavated areas and reclaim, seed, fertilize and mulch the east and south mine faces of the Weise Gravel Mine, respondent Russell A Weise, Jr. violated Order on Consent No. R9-20091015-54.

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. granting Department staff's motion for default on staff's first, third, fourth and fifth causes of action;
2. denying Department staff's motion for default on staff's second cause of action;
3. holding that, based upon the proof adduced at the adjudicatory hearing, respondent Russell A Weise, Jr. violated the following:
 - a. 6 NYCRR 551.2(b) by failing to timely file complete and accurate annual well reports for the 2007 through 2014 production years for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells (API Well Numbers 31-013-15015-00-00, 31-013-16510-00-00 and 31-013-17046-00-00, respectively);
 - b. 6 NYCRR 551.4 by failing to maintain adequate financial security for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells;
 - c. 6 NYCRR 551.1 by failing to maintain a current organizational report for respondent's 3144 Stroebel, Reed 4 and Weise 1 wells;
 - d. 6 NYCRR 556.2(b) by failing to prevent gas from escaping from respondent's 3144 Stroebel and Reed 4 wells;
 - e. 6 NYCRR 422.3(e) by failing to reclaim the Weise Gravel Mine within two years of the expiration of respondent's sand and gravel mine permit; and
 - f. Order on Consent No. R9-20091015-54 by failing to backfill and grade over-excavated areas and reclaim, seed, fertilize and mulch the east and south mine faces of the Weise Gravel Mine;
4. directing respondent Russell A Weise, Jr. to file the required annual well reports with the Department within thirty (30) days of the service of the Commissioner's order upon respondent;
5. directing respondent Russell A Weise, Jr. to post a five thousand dollar (\$5,000) financial security for each well for a total of fifteen thousand dollars (\$15,000)

- financial security within thirty (30) days of the service of the Commissioner's order upon respondent;
6. directing respondent Russell A Weise, Jr. to file an updated organizational report within thirty (30) days of the service of the Commissioner's order upon respondent;
 7. directing respondent Russell A Weise, Jr. to pay a civil penalty in the amount of twenty-five thousand dollars (\$25,000) within thirty (30) days of the service of the Commissioner's order upon respondent;
 8. directing respondent Russell A Weise, Jr. to repair and produce or plug and abandon the 3144 Stroebel, Reed 4 and Weise 1 wells. For the wells that will be repaired and produced, directing respondent to repair and produce the wells within thirty (30) days of the service of the Commissioner's order upon respondent and notify the Department immediately upon completion of the repairs. For wells that will be plugged and abandoned, directing respondent to:
 - a. submit a notice of intention to plug and abandon each well to the Department within thirty (30) days of the service of the Commissioner's order upon respondent;
 - b. contract with a registered New York State plugging contractor to permanently plug and abandon each well in accordance with ECL article 23 and 6 NYCRR part 555 within one hundred eighty (180) days of the service of the Commissioner's order upon respondent; and
 - c. submit a plugging report within thirty (30) days after completion of plugging operations;
 9. directing respondent Russell A Weise, Jr. to reimburse the oil and gas account referenced at ECL 23-1903(1)(a), in accordance with ECL 23-0305(8), the full amount of any and all expenditures made by the state for well plugging expenditures required at respondent's wells;
 10. directing respondent Russell A Weise, Jr. to reclaim the entire mine site in accordance with the previously authorized NYS Mining Permit No. 9-02686 (DEC Permit No. 9-0652-00005/00001-1, Mine ID No. 90206) and the requirements of 6 NYCRR 422.3 with such reclamation including any necessary backfilling (specifically adjacent to the east property line) to achieve compliance

with 6 NYCRR 422.2. All reclamation work shall be subject to Department review and approval;

11. directing respondent Russell A Weise, Jr. to cooperate fully with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in the event the State should seek access to respondent's wells or mine site; and
12. directing such other and further relief as he may deem just and appropriate.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
December 21, 2016

EXHIBIT CHART – OIL & GAS WELL EXPEDITED PROCEEDINGS

Matter of Russell A Weise, Jr. – Town of Mina, Chautauqua County, New York – DEC Case No. 1534-2015DK

September 16, 2016 – Central Office

Edirol File No. 030224072646

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|---|-------|------------|------------------|-------|
| A | Cover Letter from David H. Keehn, Esq. to Russell A Weise, Jr. and Crandall Nyweide, Esq., dated August 21, 2015 with Notice of Hearing and Complaint, dated August 21, 2015, Order on Consent, Statement of Readiness, dated August 21, 2015, Affidavit of Christopher J. McKelvey sworn to August 21, 2015, Affidavit of Lucas A. Mahoney sworn to August 20, 2015, Schedule of Compliance and List of Wells. | ✓ | ✓ | Department Staff | |
| B | Affidavits of Service of Keisha Rivera, sworn to September 25, 2015, including USPS attachments. | ✓ | ✓ | Department Staff | |
| C | Notice of Hearing, dated August 9, 2016. | ✓ | ✓ | Department Staff | |
| D | Order on Consent/Stipulation, Number BU 0008-0193, Russell Weise, Jr, Respondent, dated February 19, 1993. | ✓ | ✓ | Department Staff | |
| E | Short From Order On Consent, No. R9-4151-94-06, Russell Weise, Jr., Respondent, dated July 18, 1994. | ✓ | ✓ | Department Staff | |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|--|-------|------------|------------------|-------|
| F | Correspondence dated May 30, 2000 from Paul M. Giachetti, Mined Land Reclamation Specialist 1 to ECO Robert E. O'Connor. | ✓ | ✓ | Department Staff | |
| G | Short From Order On Consent, No. R9-20000620-48, Russell Weise, Jr., Respondent, dated June 27, 2000. | ✓ | ✓ | Department Staff | |
| H | Order On Consent, File No. 09-77 R9-20091015-54, Russell Weise, Jr., Respondent, dated August 16, 2010. | ✓ | ✓ | Department Staff | |
| I | Correspondence dated July 16, 2004 from Kenneth C. Taft, Deputy Regional Permit Administrator to Russell Weise, Jr. renewing permit for Weise Gravel Mine with NYS Mining Permit No. 9-02686 attached. | ✓ | ✓ | Department Staff | |
| J | Photographs of Weise Gravel Mine – 1, 2, and 3 (4/1/2014), 4, 5, 6, 7, and 8 (8/17/2015). | ✓ | ✓ | Department Staff | |
| K | Video of Weise Gravel Mine taken by Michael Meyers April 1, 2014 – 4 minutes 47 seconds. | ✓ | ✓ | Department Staff | |
| L | Division of Mineral Resources, Mined Land Inspection Reports for Weise Gravel Mine (9) – 8/17/2015, 5/10/2012, 6/22/2011, 4/29/2011, 10/7/2010, 9/8/2010, 4/29/2010, 7/15/2009, and 5/6/2009. | ✓ | ✓ | Department Staff | |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|--|-------|------------|------------------|-------|
| M | Annual Well Report for 2005 production year certified by Russell A Weise, Jr. on July 24, 2006 and received by Department staff on July 26, 2006. | ✓ | ✓ | Department Staff | |
| N | <ul style="list-style-type: none"> - Letter to Russell A Weise, Jr. and Kay P. Weise from Donald J. Drazen, dated January 18, 2012 transmitting annual well report form for 2011 production year and reminding respondent to submit by March 31, 2012; Letter to Russell A Weise, Jr. and Kay P. Weise from Theodore N. Loukides, dated June 1, 2012, regarding missing 2011 Annual Well Report; - Letter to Russell A Weise, Jr. and Kay P. Weise from Donald J. Drazen, dated January 9, 2013 transmitting annual well report form for 2012 production year and reminding respondent to submit by March 31, 2013; Letter to Russell A Weise, Jr. and Kay P. Weise from John K. Dahl, dated July 15, 2013, regarding missing 2012 Annual Well Report; - Letter to Russell A Weise, Jr. and Kay P. Weise from Ted Loukides, dated January 9, 2014 transmitting annual well report form for 2013 production year and reminding respondent to submit by March 31, 2014; Letter to Russell A Weise, Jr. and Kay P. Weise from John K. Dahl, dated July 3, 2014, regarding missing 2013 Annual Well Report; - Letter to Russell A Weise, Jr. and Kay P. Weise from Ted Loukides, dated January 13, 2015 transmitting annual well report form for 2014 production year and reminding respondent to submit by March 31, 2015; Letter to Russell A Weise, Jr. and Kay P. Weise from John K. Dahl, dated July 13, 2015, regarding missing 2014 Annual Well Report. | ✓ | ✓ | Department Staff | |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|---|-------|------------|------------------|-------|
| O | Organizational Report affirmed by Russell A Weise, Jr. and Kay P. Weise on July 13, 1990. | ✓ | ✓ | Department Staff | |
| P | Well Inspection Reports for 3144 Stroebel (Weise) well dated 4/3/2015; Reed 4 well dated 9/10/2014; Reed 4 well dated 4/3/2015; Weise 1 well dated 9/10/2014; Weise 1 well dated 4/3/2015. | ✓ | ✓ | Department Staff | |
| Q | Annual Well Production Data for Russell A Weise, Jr. and Kay P. Weise for: 3144 Stroebel (Weise) well for years 1986 – 2006; Reed 4 well for years 1983, 1986 – 1990, 1992 – 2006; and Weise 1 well for years 1986 – 2006; generated on September 13, 2016. | ✓ | ✓ | Department Staff | |