STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Sections 9-0301 and 9-0303 of the Environmental Conservation Law of the State of New York,

- by -

EUGENE F. BARTELL,

Respondent.

RULING

VISTA Index Nos.
CO6-20061107-28
CO6-20080314-3

PROCEEDINGS

This ruling addresses a motion for order without hearing ("MOWH"), dated April 29, 2008, filed by staff of the New York State Department of Environmental Conservation ("DEC" or "Department"). Staff served the MOWH on respondent Eugene F. Bartell on April 29, 2008, pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). By its MOWH, staff alleges that respondent violated provisions of article 9 of the Environmental Conservation Law ("ECL") by his unauthorized use of State forest preserve lands in Herkimer County, and by restricting the free use of those lands by the public.[1]

This matter first came before the Office of Hearings and Mediation Services upon the filing of respondent's papers in opposition to the MOWH, under cover letter dated September 4, 2008.[2] Respondent's filing included the following:

- a notice of cross motion ("cross motion") to exclude alleged statements by respondent and to adjourn the proceedings, dated September 3, 2008;
- a memorandum of law ("respondent memorandum") in opposition to the MOWH and in support of the cross motion, dated September 3, 2008;

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[1] Department staff also served a complaint, dated December 12, 2006, on respondent and his wife, Carolyn Bartell. The charges set forth under the complaint are similar, although not identical, to the charges set forth in the MOWH. After being granted an extension by staff, the respondents named in the complaint served a timely answer under cover letter dated January 24, 2007. As provided by 6 NYCRR 622.12(a), staff may serve a motion for order without hearing in lieu of or in addition to a complaint. This ruling addresses only the charges as set forth in the MOWH and the liability of Eugene F. Bartell, the sole respondent named in the MOWH.

[2] Although Department staff served respondent with the MOWH on April 29, 2008, staff did not file the MOWH with the Office of Hearings and Mediation Services at that time (see 6 NYCRR 622.12[a] [stating that an MOWH is to be sent to the Chief Administrative Law Judge simultaneously with service on respondent or as soon as practicable thereafter]).

- an affidavit ("Gerstman affidavit") of Marc S. Gerstman, Esq., counsel to respondent, dated September 3, 2008;
- an affidavit ("Bartell affidavit") of respondent, dated September 3, 2008; and
- an affidavit ("Kleinke affidavit") of Edward F. Kleinke, III, Registered Landscape Architect, dated September 10, 2008.[3]

Under cover letter dated September 25, 2008, Department staff forwarded a copy of the MOWH, a brief in reply to respondent's filing in opposition to the MOWH, and supporting papers to the Department's Chief Administrative Law Judge ("ALJ"), James T. McClymonds. The Chief ALJ assigned the matter to me.

Department staff's filings of September 25, 2008 include the following:

- an affidavit of service of the MOWH on respondent, dated April 29, 2008;
- an attorney's brief ("staff brief") in support of the MOWH, dated April 29, 2008;
- the MOWH, dated April 29, 2008;
- an affidavit ("Scanlon affidavit") of John M. Scanlon, Forest Ranger, DEC, dated April 21, 2008;
- an affidavit ("Keating affidavit") of John P. Keating, Real Estate Officer 2, DEC, dated April 16, 2008;
- an affidavit ("Contino affidavit") of Michael J. Contino, Real Estate Specialist 2, DEC, dated April 11, 2008;
- an affidavit ("Rivers affidavit") of Keith W. Rivers, Forester I, DEC, dated April 11, 2008;
- an affidavit ("Damato affidavit") of Alina Damato, Assistant Land Surveyor 2, DEC, dated April 17, 2008;
- an affidavit ("LaFlair affidavit") of Francis LaFlair, Regional Operations Supervisor, Region 6, DEC, dated December 18, 2006;
- a reply brief ("staff reply brief"), dated September 25, 2008, in response to respondent's filing in opposition to the MOWH; and
- a second affidavit ("Contino reply affidavit") of Michael J. Contino, dated September 24, 2008.

By letter dated September 30, 2008, Department staff acknowledged that it had neglected to request permission to file its brief in reply to respondent's filing in opposition to the MOWH (see 6 NYCRR 622.6[c][3] [providing that, after service of a motion and any response thereto, further responsive pleadings are allowed only on permission of the ALJ]). Staff requested permission, nunc pro tunc, to file its reply and stated that it would not oppose a further responsive pleading by respondent. Respondent did not oppose staff's request and, by letter ruling dated October 15, 2008, I granted

[3] The affidavit of Mr. Kleinke originally filed with respondent's papers contained errors and respondent filed a corrected version under cover letter dated September 8, 2008. Respondent also filed, under cover letter dated September 25, 2008, a full scale version of the map that was attached as exhibit D to the Kleinke affidavit. In this ruling, all references to the Kleinke affidavit and exhibit D are to the corrected affidavit and the full scale map, respectively.

staff's request and further stated that respondent could, at his discretion, submit a response to staff's reply.

On October 31, 2008 the parties advised this office that Department staff was evaluating an offer of settlement from respondent. Respondent requested an extension to file his response to staff's reply, pending the outcome of settlement negotiations. Staff advised that it did not oppose respondent's request and I granted the extension.

Subsequently, the parties advised that they were unable to settle the matter and respondent timely filed its response to staff's reply under cover letter dated January 16, 2009, thereby completing the parties' pleadings on the MOWH. Respondent's response consisted of an attorney's brief ("respondent reply brief") and attached exhibits.

As detailed below, I conclude that Department staff has met its burden and established as a matter of law that respondent committed some, but not all, of the violations set forth in the MOWH. Because there are outstanding factual disputes that require adjudication, further proceedings are necessary and I make no recommendations regarding staff's request for relief.

POSITIONS OF THE PARTIES

Department Staff's Allegations

By its MOWH, staff alleges that respondent engaged in unauthorized activities on State forest preserve lands within the Adirondack Park. The forest preserve land at issue ("State land") is immediately adjacent to respondent's property ("Bartell parcel") in the Town of Webb, Herkimer County, extending eastward from the easterly boundary of the Bartell parcel to, and including, the near shore area of Stillwater Reservoir. The MOWH sets forth the following three causes of action:

1. At various times between 1998 and November 2, 2006, respondent cut, removed, injured or destroyed trees or other property on the State land without authorization, in violation of ECL 9-0303(1).

2. Between 1998 and December 13, 2006, and on August 24, 2007, respondent maintained a nine-tread staircase with handrails, a dock with outriggers and cornerposts, a stone circle firepit, and a wood and concrete bench on the State land without authorization, in violation of ECL 9-0303(2).

3. Between 1998 and December 13, 2006, and on August 24, 2007, respondent maintained a floating dock over and attached to the State land, thereby restricting the free use of the State land by all the people, in violation of ECL 9-0301(1).

Department staff requests that the Commissioner issue an order (i) holding respondent liable for the violations enumerated above; (ii) assessing a $1,000 penalty

against respondent, $750 of which is to be suspended provided that respondent complies with the order; and (iii) directing respondent to remove (and not replace) the dock, staircase, bench and other materials from the State land. Staff further requests that the Commissioner direct staff to remove the offending materials from the State land in the event that respondent fails to do so and to seek reimbursement from respondent for the cost of removal.

Additionally, Department staff requests a directive from the Commissioner establishing a State-wide procedure for dealing with private property found on State owned lands. Specifically, staff requests that "the Commissioner direct Department staff, when encountering on State lands property the ownership of which cannot be immediately ascertained, to place a sticker on such property that informs its owner that the Department will cause the removal and disposition of such property if such property is not removed from State land by a date certain identified on the sticker and that such owner will be charged the reasonable cost of removal and disposition of such property" (MOWH at 2-3).[4]

Respondent's Answer

Respondent argues that the MOWH must be denied because there are triable issues of fact that must be resolved through adjudication. Additionally, respondent raises questions of law and equity in his defense and cross moves to exclude his alleged admission and to adjourn this proceeding.

-- Triable Issues of Fact

First, respondent argues that land transactions in the early 1900s may "preserve a reservation of rights within the chain of title of the [Bartell parcel] to use and enjoy the shoreline created by the reservoir" (respondent memorandum at 1). Respondent also argues that the precise location of the boundary between the Bartell parcel and the State land is in dispute (id. at 2). Moreover, respondent asserts, the Department has previously acknowledged that "land surveys in the general area of the Reservoir are unreliable" and, according to respondent, this includes the "right angle survey"[5] that established the easterly boundary of the Bartell parcel (id.).

[4] As noted above, because there are unresolved issues concerning liability, this ruling makes no determination with regard to Department staff's request for relief against respondent. I note, however, that staff's request to establish a State-wide procedure in relation to private property found on State owned lands is essentially a request for a rulemaking or policy directive. Because this form of relief is not available through an adjudicatory proceeding, this aspect of staff's request for relief will not be further addressed in these proceedings.

[5] The right angle survey was undertaken in 1897 to demarcate the boundary of the State owned lands surrounding Stillwater reservoir. The survey is known as the right angle survey because of the method used by the surveyor to establish the boundary. Specifically, "It was done as described by the surveyor as follows, viz.: 'We would go just as far as we could this way, until we saw that we were going to run into the flow and then we would turn and go the other way and turn a right angle. In that way we went around the whole flow ground.' This survey included within straight lines the bays, arms and flowline of the reservoir" (People v Fisher, 190 NY 468,

With respect to ECL 9-0303(1), respondent argues that Department staff's allegation that he engaged in "vegetative management, [a] term not defined in the ECL[,]" does not provide a basis for holding that respondent violated the statute (respondent memorandum at 4). Respondent argues that ECL 9-0303(1) is intended to prohibit injury or loss of "timber [which] implies large trees suitable for carpentry or use[] as building materials" (id.). Respondent further argues that, applying this interpretation of the statute, respondent "never cut, removed, injured, or destroyed trees or other property" on the State land, and that "any work done has been the minimum necessary to maintain the quality of the natural environment in the area" (id.). Respondent also indicates that some form of vegetative management on the State land has been a longstanding practice and states that "The land . . . was maintained, i.e., mowed and the brush neatly trimmed" in 1964 when respondent's parents purchased the Bartell parcel (Bartell affidavit ¶¶ 7, 10). Lastly, respondent asserts that staff has proffered no evidence . . . directly establishing or depicting Respondent[] engaging in prohibited activity on State land" (respondent memorandum at 4).

As to the dock and other structures on the State land, respondent states that he recalls these or similar structures being on the State land when he first visited the site nearly 60 years ago (Bartell affidavit ¶¶ 7, 8, 10). Respondent argues that these structures do not fall within the prohibition against buildings in ECL 9-0303(2) because, in the absence of an express statutory or regulatory definition, the term "building" must be given its "natural and most obvious" meaning (respondent memorandum at 5 [citing McKinney's Statutes §94]). Respondent cites to "Merriam-webster.com" and states that "Merriam Webster defines 'building' to be a, 'usually roofed and walled structure built for permanent use (as for a dwelling)'" (id.).

With regard to ECL 9-0301(1), respondent denies that he ever prohibited the general public from using the State land (Bartell affidavit ¶ 29). Moreover, respondent states that he has "allowed other camp owners, their guests and the general public to transit, as a matter of convenience, across our private backyard[6] . . . to the Stillwater hamlet proper" (Bartell affidavit ¶ 30). Additionally, respondent's counsel states that Department staff has not "identified one person by name or description who claims to have been excluded [from the State land]" and further states that respondent "do[es] not oppose the reasonable placement of [a sign indicating that the State land is open to the general public]" (respondent memorandum at 4).

-- Estoppel

Respondent also argues that the Department has long condoned respondent's use of the State land. Respondent states that a camp has existed on the Bartell parcel for

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472 [1908] [also holding, at 480-481, that the lands within the right angle survey are State forest preserve lands and that "their retention as wild forest lands is within the spirit as well as the letter of the statute creating and defining the preserve"]).

[6] The phrase "private backyard" refers to the western portion of the Bartell parcel. Respondent refers to the State land, which is on the lakeside and eastward of his camp, as being at the "front" of his camp (Bartell affidavit ¶¶ 10, 29).

generations and that the Department did not previously object to the open and ongoing use of the State land by respondent and by prior owners of the parcel (respondent memorandum at 3; Bartell affidavit ¶¶ 7-12). Although respondent acknowledges that he was "aware" that the land beyond the easterly boundary of the Bartell parcel belonged to the State, he states that he "understood that our right to access the water would also not be impaired by the State" (Bartell affidavit ¶ 9). Moreover, respondent notes that over 30 years ago the Department evaluated the issue of whether the camp on the Bartell parcel encroached upon the State land and, by letter dated April 25, 1972, the Director of the Department's Division of Lands and Forests, concurred with the recommendation of regional staff to allow the encroachment to remain (id. ¶¶ 17-18, exhibits B, C).[7]

-- Equal Protection

Respondent argues that this enforcement proceeding violates his right to equal protection as guaranteed by the United States and New York State Constitutions. Respondent asserts that he is similarly situated to persons who own camps along or near the shoreline of Great Sacandaga Lake. Respondent further asserts that, rather than pursuing enforcement against property owners along Great Sacandaga Lake who use State owned lands adjacent to their parcels, the State established a permitting system that allows Great Sacandaga Lake property owners to use the State owned lands. Respondent argues that "Given the similarities in usage, history, and location, it is hard to fathom what legitimate state interest could be rationally used to justify inequitable treatment in the given case" (respondent memorandum at 8). Respondent requests that the Department establish a permitting system for Stillwater property owners and argues that the Department already possesses the authority to do so (id.).

-- Respondent's Alleged Admission

Respondent also moves to strike his alleged admission to a DEC forest ranger concerning the ownership of the floating dock. Respondent's motion is premised on the argument that his "indelible right to counsel attached when the DEC filed its complaint against him" and that the DEC forest ranger "was prohibited from questioning him or from attempting to elicit an admission outside of the presence of counsel" (respondent memorandum at 10 [citations omitted]). Respondent further argues that the DEC forest ranger who elicited the admission was "intimately familiar with the Bartell camp and the administrative enforcement action that had been filed against [the Bartells]" (id. at 11). Respondent also argues that the forest ranger's questioning was coercive in that the ranger took "advantage of what had been a cordial and familial atmosphere among the residents and rangers on the Reservoir" (id.).

[7] Respondent also filed an "email letter" from a now retired forest ranger setting forth the ranger's recollection of the Department's review "during or about the year 1972" of various encroachments on State owned lands along Stillwater Reservoir, including the State land at issue here (respondent reply brief at 2, exhibit A). The retired forest ranger notes that the Department determined at that time that no further encroachment should be allowed, but that no action was to be taken against the existing encroachments at the Bartell and neighboring parcels.

-- Adjournment

Lastly, respondent moves to adjourn this proceeding. Respondent asserts that he has repeatedly sought to negotiate a settlement with Department staff and that, as part of these negotiations, State Senator James L. Seward has been involved in "on-going efforts" to establish a permitting system that would authorize respondent's continued use of the State land (respondent memorandum at 11). These efforts, respondent argues, should be exhausted before this action proceeds (respondent memorandum at 5-6, 11; see also Gerstman affidavit, exhibit B [series of letters from Senator Seward to the Department]).

Staff Reply

In reply to respondent's argument that the Bartell parcel may have access rights to the reservoir, Department staff argues that no such rights exist because "none was reserved in the chain of title, none can be implied from it, the Bartell parcel deed does not identify a flowline boundary, and the waters of Stillwater Reservoir do not touch any Bartell parcel boundary" (staff reply brief at 8[8]). Staff states that respondent "has provided no factual basis" to support the conclusion that respondent may have riparian rights (Contino reply affidavit ¶ B.1.ii). Specifically, staff asserts, there is nothing in the record to demonstrate that the Bartell parcel itself shares any boundary with the reservoir (id. ¶¶ B.1.ii.*a, b*). Moreover, the Bartell parcel was carved out of lands that were owned by the Adirondack Timber and Mineral Company ("ATMC") at the time of the right angle survey and the 1898 appropriation, therefore, respondent's discussion concerning deeds for lands held by entities other than ATMC is irrelevant (id. ¶ B.12).

Department staff argues that the evidence filed by respondent purporting to call into question the location of the boundary between the Bartell parcel and the State land reflects either a "complete misunderstanding of the simple, clear record of realty transactions . . . or [an] unfinished and incomplete review of th[at] record" (staff reply brief at 2). Staff states that the easterly boundary was "explicitly identify[ied as] the 1898 appropriation line [as established by the 1897 right angle survey]" in a 1916 deed and that boundary line has been carried forward in each subsequent deed in the Bartell parcel chain, including the deed to respondent (Contino reply affidavit ¶ B.1.ii.*a.2.*; see also Contino affidavit, exhibit 1 [DEC survey map depicting, inter alia, State owned lands east of the Bartell parcel and stating, at note 4, that lands inside the right angle survey were appropriated by the State in 1898]).

Moreover, Department staff's surveyor attests that he personally undertook an in-field survey to confirm the location of the boundary between the Bartell parcel and the State land, while respondent's expert did not (Contino reply affidavit ¶ B.1.i.). Staff's surveyor further attests that he has been a New York State licensed land surveyor for twenty years and, as such, is authorized under the New York State Education Law to

[8] Note that citations to the staff reply brief are to page numbers. Although paragraphs in the reply brief are numbered, some paragraphs continue for two or more pages and, therefore, page references are of greater utility.

undertake land surveys (Contino affidavit ¶ A; see Education Law § 7204). Staff's surveyor represents that, while establishing the boundary between the Bartell parcel and the State land, he "closely adhered to professional standards applicable to the profession of land surveying in New York State" (Contino reply affidavit ¶ B.1.i). In addition, staff asserts, respondent's expert, a registered landscape architect, is not a licensed land surveyor and "cannot make surveys for official approval or recording" (id. [citing Education Law § 7321]).

Department staff's reply also challenges respondent's statements and defenses relative to the specific violations alleged under the MOWH. Regarding the allegation that respondent violated ECL 9-0301(1) by prohibiting the free use of the State land by the general public, staff argues that respondent has mischaracterized the charge. Staff argues that the question is not whether respondent denied access to members of the public who requested access, but rather whether respondent's "floating dock and associated personalty on and over State land . . . prevented any member of the public from using that same land for purposes authorized for the general public to engage in" (staff reply brief at 9).

With regard to the allegation that respondent violated ECL 9-0303(1) by engaging in vegetative management, Department staff argues that this provision applies to more than just the cutting of trees or timber. Staff argues that the statutory phrase "or other property" plainly demonstrates that the legislature intended to "protect not only trees and timber but also other state property on state land" (staff reply brief at 10). Staff also argues that the act of vegetative management, particularly mowing, results in the cutting of trees in the early stages of development and "effectively prevents the growth of trees that would otherwise grow on the Forest Preserve" (id.). Lastly, staff asserts that there is no denial of this alleged violation in the Bartell affidavit and, therefore, respondent has failed to proffer evidence to refute the charge (id. at 11).

FINDINGS OF FACT

Based upon the papers filed by Department staff and respondent, I make the following findings of fact:

1. Respondent Eugene F. Bartell, together with his wife Carolyn Bartell, own property ("Bartell parcel") located in the Town of Webb, Herkimer County, that is proximate to Stillwater Reservoir (see MOWH at 1; Contino affidavit, exhibits 1, 12; Bartell affidavit ¶ 4, exhibit A).

2. The easterly boundary of the Bartell parcel abuts lands owned by the State of New York, less than 150 feet from the apparent high water mark of Stillwater Reservoir (Contino affidavit, exhibit 1; Kleinke affidavit ¶ 26).

3. The vegetation on the State land was cut at various times between 1998 and 2006 (Scanlon affidavit ¶¶ E.3.i, E.5, photographs 1, 10, 11; Rivers affidavit ¶ 4.E, photograph 5[9]; Damato affidavit ¶ 3, photographs 2, 3, 4, 5).

4. Staff proffered evidence that a forest ranger cut down two "danger trees on the State lands to the immediate north of the boat launch area [i.e., near the southern boundary of the State land as defined above]" and also cut down some tree limbs along the boundary between the Bartell parcel and the State land (LaFlair affidavit ¶ C).

5. A nine-tread staircase with handrails, a dock with outriggers and cornerposts, a stone circle firepit, and a wood and concrete bench were located on the State land between 1998 and 2006 (Scanlon affidavit ¶¶ E.3.ii-iii, E.5, photographs 2, 3; Keating affidavit ¶ 3, photographs 1, 2; Damato affidavit ¶ 3, photographs 1, 2, 3).

6. A nine-tread staircase with handrails, a dock with outriggers and cornerposts, a stone circle firepit, and a wood and concrete bench were located on the State land on August 24, 2007 (Scanlon affidavit ¶ E.4, photographs 4, 5, 7, 9, 11, 12).

DISCUSSION

Section 622.12(d) of 6 NYCRR establishes the standard for granting a contested motion for order without hearing, the functional equivalent of a motion for summary judgment in this proceeding. Specifically, if "the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party" the motion will be granted (id.).

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. An attorney's affidavit "has no probative force" unless the attorney has first hand knowledge of the facts at issue (Siegel, NY Prac § 281, at 442 [3d ed] [citation omitted]). Accordingly, the documentary evidence and affidavits submitted by the parties form the basis for my determination of the motion.

In 2003, the Commissioner elaborated on the standard for granting summary judgment:

> "The moving party on a summary judgment motion has the burden of establishing his cause of action or defense sufficiently to warrant the court

[9] The Rivers affidavit and accompanying photographs relate observations made on August 30, 2007, outside the dates charged in the MOWH. Nevertheless, Mr. Rivers' observations are pertinent to this finding of fact because he attests that, without vegetative management, tree seedlings and saplings would establish themselves within one or two years in open areas like that observed on the State land at issue here, and within three to five years the seedlings of some tree species would be several feet high (id.).

> as a matter of law in directing judgment in his favor. The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. [A supporting] affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof. The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact."

(Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [internal quotation marks and citations omitted].)

Additionally, on a motion for order without hearing, the "weight of evidence is not considered. Rather, the issue is whether the moving party has offered sufficient evidence to support a prima facie case for summary judgment. The test for sufficiency of evidence in the administrative context is the substantial evidence test -- whether the factual finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs" (Matter of Tractor Supply, Decision and Order of the Commissioner, August 8, 2008, at 3 [internal quotation marks and citations omitted]).

Applying this standard to Department staff's MOWH, I conclude that staff's motion for order without hearing should be granted in part and denied in part.

Boundary of the State Land

Respondent challenges Department staff's determination of the location of the boundary between the Bartell parcel and the State land. This boundary was established over a century ago by the right angle survey (see footnote 5, supra) and has been the subject of a series of in-field surveys undertaken by State licensed land surveyors. The most recent survey, undertaken by DEC surveyor Contino, located existing in-field monuments, set additional monuments along the boundary line, and reconfirmed the precise location of the boundary.

To contest staff's determination of the boundary line, respondent proffers an affidavit of a State licensed landscape architect who raises questions concerning the accuracy of the surveys. Respondent's expert, however, did not undertake an in-field survey to establish the boundary and is not authorized to do so under the State Education Law (see State Education Law § 7321 [expressly stating that practice of landscape architecture "shall not include the making of land surveys or final land plats for official approval or recording"]).

Moreover, most of the statements made by respondent's expert concerning the location of the boundary between the Bartell parcel and the State land are speculative or conclusory and, therefore, of no probative force. Where respondent's expert sets forth a

specific factual assertion challenging staff's determination of the boundary line, he fails to provide support for the assertion. For example, respondent's expert states that "contrary to the alleged right angle survey, the deeds for the Bartell camp contain a legal description that extends to the flow line of the Stillwater Reservoir. This description remains in the deeds until approximately 1916" (Kleinke affidavit ¶ 20). However, respondent's expert does not identify the specific deeds in the Bartell parcel chain that designate the flow line as the property boundary. Additionally, he later states that "The 0.43 acre parcel, presently known as the Bartell property . . . , was established by deed . . . dated 9/16/1916" (id. ¶ 24). Given that the boundaries of the Bartell parcel were "established by" the 1916 deed, it is that deed and subsequent deeds in the Bartell parcel chain that are controlling. Unless incorporated into the 1916 deed, boundaries described in pre-1916 deeds for larger parcels that once encompassed the Bartell parcel are of no moment. The current deed, like the 1916 deed, for the Bartell parcel identifies the "State line" (see Contino affidavit, exhibit 12), and not the flow line, as the parcel's easterly boundary and respondent does not state that this is in error.

I conclude that respondent's proffer is insufficient, as a matter of law, to establish that there is a factual dispute in need of adjudication concerning the location of the boundary between the Bartell parcel and the State land (see Ramos v Howard Industries, Inc., 10 NY3d 218, 224 [2008] [stating that a non-moving party "in order to defeat summary judgment, . . . must raise a triable question of fact by offering competent evidence which, if credited by the [fact finder], is sufficient to rebut [the moving party's] evidence. An expert's affidavit - offered as the only evidence to defeat summary judgment - must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor" (internal quotation marks and citations omitted)]).

Reservation of Riparian Rights

Respondent also argues that, irrespective of the boundary location, the Bartell parcel retains riparian rights to use the Stillwater Reservoir. Respondent's expert states that the Bartell parcel "may have ultimately been subdivided from the lands owned by Mary Fisher" (Kleinke affidavit ¶ 21). He quotes from a 1966 DEC memorandum that references a clause in a deed for certain lands conveyed to the State by Clarence Fisher and Rachel Ingals Fisher providing for "public access, across Fisher Lands known as the Dunbar Club Reservation to State Land in the northerly part of Township 5" (id. ¶ 35). Respondent's expert concludes that "Given the potential common origin of the parcels in question . . . as arguably from lands previously owned by Mary Fisher, reference to the reservation of rights at the Dunbar Club Reservation must be evaluated" (id. ¶ 36).

As with respondent's factual assertions concerning the location of the boundary line, respondent's assertions here are largely speculative or conclusory and, accordingly, have no probative force. Department staff has made a prima facie showing that the Bartell parcel does not share a boundary with, or have riparian rights to, the Stillwater Reservoir. Statements by respondent's expert that the Bartell parcel "may have" been subdivided from, or "arguably" shares a "potential common origin" with, lands other than

those identified by Department staff are insufficient to defeat staff's prima facie showing (see Ramos, 10 NY3d at 224).

Moreover, Department staff, referencing recorded deeds and other documents, expressly and without equivocation rejects respondent's assertions concerning possible riparian rights associated with the Bartell parcel. For example, respondent's expert identifies a 1901 deed conveying certain lands of the Adirondack Timber and Mineral Company that he states contains "a reservation of rights to, 'a reasonable use of the shores of the Reservoir created . . .'" (Kleinke affidavit ¶ 39). Staff responds that the 1901 deed relates to "lands well to the north of, and unrelated to, the Bartell parcel" (Contino reply affidavit ¶ B.19.ii; see also id. exhibit D [map identifying lands conveyed by the 1901 deed]; Kleinke affidavit, exhibit H [the 1901 deed, describing the land conveyed consistent with staff's representation]). Respondent's expert also cites language in a 1932 deed conveying certain lands of Clarence Fisher and Florence Fisher Jackson that he states "granted significant rights and privileges from the Fishers to the People of the State of New York" (Kleinke affidavit ¶ 39). Staff responds that the 1932 deed relates to "lands nowhere near, and unrelated to, the Bartell parcel" (Contino reply affidavit ¶ B.19.vi[10]).

I conclude that respondent's proffer is insufficient, as a matter of law, to establish that there is a factual dispute in need of adjudication concerning the existence of riparian rights relative to the Bartell parcel.

Other Issues Raised by Respondent

--Estoppel

Regardless of whether respondent is able to establish the elements of estoppel, the defense of estoppel is unavailable to respondent in the context of this proceeding. To conclude otherwise would run contrary to the long-established rule that a governmental unit may not be estopped from the proper discharge of its statutory duties (see e.g. Matter of Schorr v New York City Dept. of Housing Preserv. and Dev., 10 NY3d 776, 779, [2008] [stating that "It is well settled that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (internal quotation marks and citations omitted)]). Here, the Department has a clear statutory duty to protect the State land and the Department's prior acquiescence toward respondent's activities cannot serve to foreclose the Department from fulfilling its duty.

[10] Staff states that "Only two of the parcels identified in the [1932] deed describe land in the western third of Township 5: the fourth and sixth parcels" (id.). However, the first parcel is also predominately in the western third of Township 5. Nevertheless, staff's assertion that none of the parcels identified in the 1932 deed included the Bartell parcel within its boundaries is correct (see Kleinke affidavit, exhibit I [the 1932 deed]; exhibit D [map depicting the first parcel from the 1932 deed to the south of the Bartell parcel and the fourth and sixth parcels to the north]).

--Equal Protection

In their respective filings, both respondent and Department staff question whether this office may consider and decide issues of constitutional law. While there is no general prohibition against State agencies determining constitutional issues raised in administrative proceedings,[11] there are certain constitutional claims that are not amenable to being determined at the administrative level. These include facial challenges to the validity of a statute (see Matter of Consol. Rail Corp. v Tax Appeals Trib. of the State of New York, 231 AD2d 140, 142 [3d Dept 1997] ["the Tribunal correctly declined to rule on the constitutional issue based on the fact that it had no jurisdiction to consider whether the statute is unconstitutional on its face"], appeal dismissed, 91 NY2d 848 [1997]; Matter of Perrotta v City of New York, 107 AD2d 320, 324 [1st Dept 1985] ["administrative agencies are not in a position to pass upon, for example, the constitutionality of a legislative enactment"]) and claims of selective enforcement (see Matter of 303 West 42nd Street Corp. v Klein, 46 NY2d 686, 693 n 5 [1985] ["Such a claim was properly brought only before a judicial tribunal"]). As discussed below, respondent's equal protection claim is neither a facial challenge to a statute nor a claim of selective enforcement. Rather, respondent's claim is a facial challenge to the regulations governing the use of forest preserve lands and, as such, is reviewable by this office (see e.g. Matter of Murtaugh v New York State Dept. of Envtl. Conservation, 42 AD3d 986, 988 [4th Dept 2007] [holding that petitioners failed to exhaust their administrative remedies with respect to a constitutional challenge to an agency regulation and dismissing the petition]).

Respondent expressly rejects Department staff's assertion that, to prevail on his equal protection claim, respondent must demonstrate that the alleged inequitable treatment "involve[s] a suspect class" (respondent reply brief at 3 [citing staff reply brief at 14]). The specific assertion made by staff is that respondent must demonstrate that he has been "selectively treated; and . . . that [selective] treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (staff reply brief

[11] See e.g. Matter of Zelinsky v Tax Appeals Trib. of the State of New York, 1 NY3d 85, 89 (2003) (confirming agency's rejection of as-applied constitutional challenges to an agency regulation under the Commerce and Due Process Clauses of the US Constitution), cert. denied 541 US 1009 (2004); Matter of New York State Employment Relations Bd. v Christ the King Regional High School, 90 NY2d 244, 248 (1997) (confirming agency's rejection of constitutional challenges under Free Exercise and Establishment Clauses of the US Constitution); Matter of Tamagni v Tax Appeals Trib. of the State of New York, 91 NY2d 530, 534 (1998) (confirming agency's rejection of a constitutional challenge under the Commerce Clause of the US Constitution [in the proceeding below, the Appellate Division also confirmed the agency's rejection of appellants' constitutional challenge under the New York State Constitution, that challenge was not pursued before the Court]), cert. denied 525 US 931 (1998); Matter of Allied Grocers Co-op., Inc. v Tax Appeals Tribunal, 162 AD2d 791, 792 (3d Dept 1990) (confirming agency's rejection of constitutional challenges under the Ex Post Facto and Due Process Clauses of the US Constitution).

at 14). This is the standard applicable to a claim of selective enforcement.[12] In contrast, respondent argues that "the appropriate test is whether the government action is rationally related to a legitimate state interest" (respondent reply brief at 3). This is the standard applicable to a facial attack on either a statute or a regulation where no fundamental right or protected class is involved.[13]

Here, the crux of respondent's argument is that the regulations applicable to property owners along Stillwater Reservoir differ from the regulations applicable to similarly situated property owners along Great Sacandaga Lake and the State has failed to "identif[y] a legitimate state interest rationally related to treating the two classes of landowners differently" (respondent memorandum at 7). Respondent asserts that Great Sacandaga Lake property owners may obtain permits, in accordance with 6 NYCRR part 606, to use forest preserve lands along Great Sacandaga Lake, while Stillwater property owners may not obtain permits to use forest preserve lands along Stillwater Reservoir. To remedy this alleged disparate treatment, respondent requests the promulgation of a regulation that will provide Stillwater property owners with access to the same type of permitting system that is now available to Great Sacandaga Lake property owners. Accordingly, respondent's equal protection claim raises a facial challenge to the regulations (or, more precisely, the lack of a regulation) governing use of waterfront forest preserve lands.

Respondent's facial attack must be rejected because respondent has not identified a regulation that, on its face, precludes property owners along Stillwater Reservoir from

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[12] See e.g. Bower Associates v Town of Pleasant Valley, 2 NY3d 617, 631 (2004) (holding that the "[appellant's] equal protection claim sounds in selective enforcement. As such, a violation of equal protection arises where first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" [citation omitted]); Matter of Nazareth Home of Franciscan Sisters v Novello, 7 NY3d 538, 546-547 (2006) (holding that "As for petitioners' claim that DOH's rate-setting methodology favors nursing homes in the New York City area, they have not shown any intentional action by DOH to discriminate against facilities in western New York" [citing Matter of Samaritan Hosp. v Axelrod, 107 AD2d 911, 913 (3d Dept 1985) ("To support an equal protection argument, petitioner must show that any discriminatory effect of the regulations was the result of respondents' evil eye toward discrimination against petitioner" [internal quotation marks and citations omitted])]). Respondent does not argue that staff has acted with an "evil eye" nor is there anything in the record that would support such a claim.

[13] See Affronti v Crosson, 95 NY2d 713, 718-719 (2001) (holding that "Where a governmental classification is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional" [citation omitted]); see also Matter of Marquart v Perales, 142 AD2d 678, 679 (1988) (holding that "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because classifications are imperfect. If a reasonable basis is presented, the statute or regulation will pass constitutional muster" [citations omitted]).

obtaining a permit for use of forest preserve lands.[14] Moreover, the Department is authorized by statute to, and does, issue permits for the temporary use of forest preserve lands outside of the Great Sacandaga Lake area.[15] Although 6 NYCRR part 606 establishes an annual permit system specifically for use of forest preserve lands along Great Sacandaga Lake, ECL 9-0105(15) provides the Department with broad authority to issue permits for the temporary use of lands throughout the forest preserve. Accordingly, respondent has failed to provide a proper basis for a facial attack on the regulations.

Even assuming that respondent had identified regulations expressly precluding all property owners on Stillwater Reservoir from obtaining permits while granting all property owners on Great Sacandaga Lake access to a permit system, respondent would have a heavy burden to demonstrate that there was no rational basis for the unequal treatment (see Heller v Doe, 509 US 312, 320-321 [1993] [holding that, because statutes are presumed to be valid, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . whether or not the basis has a foundation in the record" (internal quotation marks and citation omitted)]; Rent Stabilization Assn. of New York City, Inc. v Higgins, 83 NY2d 156, 171 [1993] ["in this facial challenge, appellants bear the heavy burden of overcoming the presumption of constitutionality that attaches to the challenged [regulations]" (citations omitted)], cert. denied 512 US 1213 [1994]). This burden is significant and "courts may even hypothesize the Legislature's motivation or possible legitimate purpose [and] the State has no obligation to produce evidence to sustain the rationality of a statutory classification" (Affronti, 95 NY2d at 719 [internal quotation marks and citation omitted]).

The two reservoirs at issue here are of manifestly different character. Great Sacandaga Lake is a large reservoir with a surface area of nearly 25,000 acres, while Stillwater Reservoir is substantially smaller having a surface area of just over 6,000 acres. Great Sacandaga Lake is almost entirely surrounded by private land holdings, while Stillwater Reservoir is surrounded almost entirely by forest preserve (much of which is classified as "wilderness" or "wild forest"). Great Sacandaga Lake is located in the extreme southeastern portion of the Adirondack Park, proximate to significant population centers, while Stillwater Reservoir is located in the more remote western portion of the Adirondack Park. In short, Great Sacandaga Lake is a large and accessible body of water while Stillwater Reservoir is substantially smaller and more remote. (See map of the Adirondack Park at: http://www.dec.ny.gov/lands/4960.html.) These distinctions could readily form the basis for differing regulatory schemes concerning shoreline use.

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[14] The record indicates that sometime after respondent was advised that his alleged activities on the State land violated provisions of ECL article 9, he sought to negotiate a settlement that would include the creation of a permit system for Stillwater similar to that established under 6 NYCRR part 606. Clearly, however, respondent did not possess, nor had he applied for, a permit from the Department prior to Department staff's initiation of an enforcement action.

[15] These temporary use permits are designated by the Department as Temporary Revocable Permits ("TRPs"). The Department maintains a log of TRP applications under review and approved at: http://www.dec.ny.gov/lands/34466.html.

Because respondent has failed to demonstrate that there is a basis for a facial challenge to the governing regulations, and has not advanced arguments nor proffered evidence in support of a selective enforcement challenge, his equal protection claim is without merit.

--Respondent's Alleged Admission

Respondent's argument to strike his alleged admission to a DEC forest ranger is premised on the assertion that he was entitled to have counsel present at the time he was questioned by the ranger. However, "[a]side from certain narrow exceptions, the right to counsel does not extend to civil actions or administrative proceedings" (Matter of Baywood Elec. Corp. v New York State Dept of Labor, 232 AD2d 553, 554 [2d Dept 1996] [citations omitted]). I am not aware of any instance where the Department has struck the alleged admission of a respondent for want of counsel and, notably, all of the cases cited by respondent are in the context of criminal proceedings. Additionally, as noted above, the failure of a responding party to deny a fact alleged in the moving papers constitutes an admission of the fact. Respondent does not deny Department staff's factual allegations concerning his ownership of the dock.

--Adjournment

Respondent's request to adjourn these proceedings because of ongoing efforts by elected officials and others to establish a permitting system for use of State owned lands along Stillwater Reservoir is denied. It is not for this office to decide whether a proceeding brought by Department staff should be adjourned because of possible future changes to the applicable law.

First Cause of Action

By its first cause of action, Department staff alleges that respondent violated ECL 9-0303(1) by cutting, removing, injuring, or destroying trees or timber or other property on the State land without authorization. Respondent's argument that this provision should be limited to large trees suitable for carpentry or use as building materials is without merit. The purpose of ECL 9-0303, as stated therein, is to "protect the state lands described in this article ["article 9 lands"]." By its express terms ECL 9-0303(1) protects "trees or timber or other property" on article 9 lands (emphasis supplied). The plain meaning of this provision extends its protections not only to large trees or timber, but also to other State property such as saplings, shrubs, bushes and other plants. This plain meaning is consistent with the stated purpose of ECL 9-0303 (see also 6 NYCRR 190.8[g] [applicable to all persons entering upon or using article 9 lands and providing that no such person shall "deface, remove, destroy or otherwise injure in any manner whatsoever any tree, flower, shrub, fern, moss or other plant, rock, fossil or mineral found or growing on State land" without authorization]). Additionally, as staff's proffer demonstrates, the routine management of ground cover and other vegetation results in the

destruction of young trees and prevents them from reaching maturity (see Rivers affidavit ¶ 4.E, photograph 5).

Although respondent argues that ECL 9-0303(1) should be narrowly construed, respondent does not deny Department staff's factual allegations[16] concerning vegetative management on the State land. Respondent's failure to deny these allegations constitutes an admission. Additionally, the record is replete with testimonial and photographic evidence demonstrating that the State land was essentially used as an extension of respondent's property.

Accordingly, staff has met its burden to establish that respondent violated ECL 9-0303(1).

Second Cause of Action

By its second cause of action, Department staff alleges respondent violated ECL 9-0303(2) by maintaining a nine-tread staircase, dock, fire pit, and bench on the State land. Respondent argues that the term "buildings" is not defined in ECL article 9 or its implementing regulations and should be narrowly construed. Department staff argues that "buildings" should be interpreted more broadly so as to include docks and other structures.

ECL 9-0303(2) reads, in its entirety: "Structures. No building shall be erected, used or maintained upon [article 9 lands] except under permits from the Department." The term "building" may properly be defined as "[s]omething that is built, as for human habitation; a structure" (The American Heritage Dictionary at 250 [3d ed 1996]; see also Executive Law § 802[62] [defining "structure" under the Adirondack Park Agency Act to mean "any object constructed, installed or placed on land to facilitate land use and development or subdivision of land, such as buildings, sheds, single family dwellings, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto"]). Although this definition, like that cited by respondent, includes a structure created for human habitation within its reach, it does not exclude structures built for other purposes. Moreover, to narrowly construe the term buildings as urged by respondent would be inconsistent with the Department's duty under ECL 9-0303 to protect article 9 lands. That is, to allow all manner of structures to be erected, used and maintained on article 9 lands, except for those that happen to be suitable for human habitation, cannot be said to be protective of these lands.

As with the first cause of action, respondent argues that the statutory provision at issue should be narrowly construed, but does not deny the substance of Department

[16] The MOWH paraphrases the language from ECL 9-0303(1) without alleging the specific acts that respondent engaged in that violated the statute. The factual basis for respondent's alleged violation of ECL 9-0303(1) is set forth in Department staff's supporting papers (see e.g. Scanlon affidavit ¶ E.5 [attesting that he "observed vegetative management (ground cover mowing, brush clearing, *etc*.)" on the State land during the growing seasons of each year between 1998 and 2006, inclusive], and accompanying photographs).

staff's factual allegations. Respondent does state, however, that a fire pit, bench, floating dock and stairs were all present at or around the time his parents purchased the Bartell parcel in 1964 (see Bartell affidavit ¶¶ 7, 10, 11). Unlike the other structures, all of which contain wooden components, the fire pit appears to be little more than a pile of rocks and requires little or no maintenance. There is also nothing in the record that indicates respondent has used the fire pit. While the dock and other structures have undoubtedly received routine use, photographs filed by staff appear to indicate the fire pit has remained unused in recent years (see e.g. Scanlon affidavit, at 15 [photograph showing the fire pit overgrown with vegetation in August 2007] and Keating affidavit at 3 [photograph showing the fire pit overgrown with vegetation in June 2003]). With the exception of the fire pit, the evidence proffered by staff in support of the MOWH is sufficient to establish a prima facie case that respondent has maintained and used structures on the State land.

I conclude that staff has met its burden to establish that respondent violated ECL 9-0303(2) by maintaining and using a staircase, dock, and bench on the State land. However, staff has failed to meet its burden with regard to whether respondent has used or maintained the stone circle fire pit.

Third Cause of Action

By its third cause of action, Department staff alleges respondent's maintenance of a dock on the State land violates ECL 9-0301(1) by restricting the use of the land by all the people. Section 9-0301(1) requires that all article 9 lands, including the State land at issue here, be "forever reserved and maintained for the free use of all the people." The placement and maintenance of a dock on the State land may interfere with the free use of the land by impeding access or by creating the impression that the land is privately owned. However, respondent expressly denies that he precluded anyone from accessing the State land (Bartell affidavit ¶ 29). He also states that he has always "allowed . . . the general public to transit, as a matter of convenience, across our private backyard [i.e., the westerly portion of the Bartell parcel] . . . to the Stillwater hamlet proper" (id. ¶ 30). Additionally, staff has not alleged that respondent affirmatively denied access to any person or that any person has claimed that respondent, or respondent's maintenance and use of a dock, precluded them from using the State land.

On this record, I conclude that there is a material factual dispute with regard to whether respondent violated ECL 9-0301(1) by interfering with the free use of the State land. Both parties have presented competent evidence that could support a holding in their favor on this cause of action. Accordingly, this cause of action may not be resolved as a matter of law and requires adjudication.

Penalty

Department staff argues that the maximum penalty authorized by statute for respondent's violations is $500 per violation, with an additional penalty of $500 for each day during which each violation continues, as set forth in ECL 71-4003. Section 71-4003

sets forth the general civil penalty for violations relating to the Environmental Conservation Law where no penalty is specifically provided for elsewhere in the ECL. As staff counsel acknowledges, civil penalties for violations relating to ECL article 9 are provided for under ECL 71-0703. Staff counsel argues, however, that "ECL 71-0703.1 clearly does *not* apply to this proceeding since this is an administrative, not criminal, proceeding; and ECL 71-0703.1 applies exclusively to criminal proceedings" (staff reply brief at 13 [emphasis in original]).[17]

For the reasons discussed below, I conclude that the civil penalty provided for under ECL 71-0703(1) is applicable to the violations alleged by staff. Therefore, subject to the exceptions noted in ECL 71-0703(1), the maximum penalty authorized for the violations established in this matter is $100 per violation.

ECL 71-0703(1) reads, in its entirety, "In order to secure the enforcement of the several sections of article 9 the following fines and civil penalties are provided:

> 1. Except as otherwise provided in subdivision 4, 5, 6 or 7 of this section, any person who violates any provision of article 9 or the rules, regulations or orders promulgated pursuant thereto or the terms of any permit issued thereunder, or who fails to perform any duty imposed by any provision thereof shall be guilty of a violation, and, upon conviction, shall be punished by a fine of not more than two hundred fifty dollars, or by imprisonment for not more than fifteen days, or by both such fine and imprisonment, and in addition thereto shall be liable to a civil penalty of not less than ten nor more than one hundred dollars" (emphasis added).[18]

Staff counsel argues that this language sets forth only "sanctions a criminal court would impose in a criminal proceeding" and that in this regard the statute is "quite unambiguous and the words used are quite plain and clear" (staff brief at 13). Staff notes that the statute uses the words "*guilty* of," "*violation*," and "upon *conviction*," all of which are "used in the context of criminal prosecutions" (id. [quoting ECL 71-0703(1) (emphasis supplied by staff)]). Staff contrasts these terms to the phrase "shall be liable to" used "when the same section discusses civil liability" (id.).[19]

Department staff, citing Matter of O'Brophy, Decision and Order of the Commissioner (August 4, 1992), acknowledges that the Department has previously imposed penalties under ECL 71-0703(1) for violations of ECL article 9. Staff argues,

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[17] Staff counsel had argued in its filings that the legislative history of ECL 71-0703(1) indicated that it was intended to be exclusively a criminal sanction. By letter to the Chief ALJ, dated February 9, 2009, staff counsel withdrew this argument and now relies solely upon the "clear language of the statute."

[18] Effective March 1, 2004, the penalty provisions of ECL 71-0703 were amended [the "2004 amendments"]. The 2004 amendments do not affect the analysis of staff's argument because the statutory language relied upon by staff was not changed by the amendments.

[19] Staff does not elaborate on why the "contrasting" use of civil and criminal terms in the statute makes the statute applicable only to criminal proceedings.

however, that the sanctions set forth under ECL 71-0703(1) were used by prior staff "without analysis" and "accepted uncritically" by the Commissioner (staff brief at 14).

Department staff also acknowledges that the Department has imposed penalties for violations of ECL article 15 using the civil penalty provision in ECL 71-1107(1), which is worded similar to the civil penalty provision in ECL 71-0703(1). Staff argues, however, that the Order of the Commissioner in Matter of Kinsella (June 2, 1992), which expressly rejected the argument that a criminal conviction is a necessary predicate to assessing a civil penalty under 71-1107(1), "does not apply to this proceeding" because ECL 71-0703(1), and not 71-1107(1), is at issue here.[20]

Respondent opposes Department staff's assertion that ECL 71-4003 provides the appropriate penalty for the violations alleged in the MOWH. Rather, respondent argues that ECL 71-0703 is clearly applicable because it states "in no uncertain terms" that it applies to the enforcement of article 9 of the ECL (respondent memorandum at 6). Like staff, respondent cites to prior enforcement matters (e.g. Matter of French, Decision and Order of the Commissioner, July 20, 2007; Matter of Bresee, Order of the Commissioner, September 11, 2006) that involved violations of ECL article 9 for which the Commissioner imposed penalties in accordance with ECL 71-0703. Unlike staff, respondent argues these decisions applied the correct penalty provision. Respondent also argues, referring to the arguments set forth in the staff brief, that the public is entitled to know which penalty provisions apply to particular activities and the "idea that it would take more than 6 pages of a legal brief to explain which section of the ECL civil penalty provisions applies . . . is entirely without reason" (id.).

Department staff's claim that ECL 71-0703(1) does not apply to administrative enforcement matters is without merit. After setting forth the sanctions that may be imposed "upon conviction," ECL 71-0703(1) plainly states, "and in addition thereto [the violator] shall be liable to a civil penalty of not less than ten nor more than one hundred dollars."[21] The natural meaning of this phrase is that civil penalties are available separate and apart from those sanctions available "upon conviction." This reading is buttressed by the fact that the criminal sanctions are listed individually as "a fine . . . or . . . imprisonment . . . or by both such fine and imprisonment." The civil penalty, by contrast, is set off from the criminal sanctions by the phrase "and in addition thereto." Had the legislature intended the civil penalty to be available only though a criminal proceeding the statute would have provided that, upon conviction, a fine, imprisonment, civil penalty, or any combination thereof, could be imposed.[22, 23]

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[20] Although staff's assertion that section 71-0703(1) and 71-1107(1) apply to violations of different articles of the ECL is plainly true, staff makes no attempt to explain why it believes the similar language of these provisions should be read differently.

[21] As noted previously, ECL 71-0703(1) was amended in 2004. The quoted phrases, however, were unaltered by the 2004 amendments. Had the Legislature considered the Department's prior assessment of penalties under 71-0703(1) improper, it could have readily addressed the issue as part of the 2004 amendments.

[22] This reading of 71-0703(1) is also consistent with the legislative history of the statute (see Matter of Wilson, Order of the Commissioner, December 18, 2008, adopting Summary Report of

Lastly, I note that in addition to establishing a general civil penalty, ECL 71-4003 provides that "Any civil penalty provided for by this chapter [i.e., by the ECL] may be assessed following a hearing or opportunity to be heard [emphasis supplied]." Prior to 1982, this sentence had read, "Any civil penalty may be assessed following a hearing or opportunity to be heard" (see Historical and Statutory Notes, McKinney's Cons Laws of NY, Book 17 ½, ECL 71-4003). Although the pre-1982 language did not limit its reach to matters where the civil penalty provision of ECL 71-4003 was to be assessed, it also did not expressly state that it applied to civil penalties imposed under other provisions of the ECL. Any ambiguity with regard to the reach of this provision was eliminated by the 1982 amendment which added the phrase "provided for by this chapter." The text of ECL 71-0703(1) manifestly provides for a civil penalty. Accordingly, pursuant to ECL 71-4003, the civil penalty available under ECL 71-0703(1) may be imposed administratively.

CONCLUSIONS OF LAW

1. At various times between 1998 and November 2, 2006, respondent cut, removed, injured or destroyed trees or other property on the State land without authorization, in violation of ECL 9-0303(1).

2. Between 1998 and December 13, 2006, and on August 24, 2007, respondent maintained a nine-tread staircase with handrails, a dock with outriggers and cornerposts, and a wood and concrete bench on the State land without authorization, in violation of ECL 9-0303(2).

RECOMMENDATIONS

Respondent raised material issues of fact that require adjudication in relation to Department staff's allegation that respondent interfered with the free use of the State land by all the people and staff's allegation that respondent used or maintained a fire pit on the State land. Therefore, I reserve making recommendations to the Commissioner concerning the appropriate civil penalty and injunctive relief until after a complete record is developed on these outstanding issues at hearing.

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the ALJ at 6-7 [discussion of the legislative history of ECL 71-0703(1)]; see also Riley v County of Broome, 95 NY2d 455, 463 [2000] [stating that "The legislative history of [the statute at issue before the Court] confirms its plain language reading]").

[23] The question of whether a criminal court may impose the civil penalties under ECL 71-0703(1) is not before me and I make no determination in that regard.

FURTHER PROCEEDINGS

A hearing is necessary to resolve the disputed issues of material fact discussed above. I will initiate a telephone conference call with the parties on or about June 29, 2009. At that time, the parties should be prepared to discuss potential hearing dates in July and August.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: June 11, 2009
Albany, New York