STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Articles 9 and 15 of the Environmental Conservation Law and Parts 190 and 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

WALTER W. FRENCH,

Respondent.

DEC No. R6-20060313-14

DECISION AND ORDER OF THE COMMISSIONER

July 20, 2007

DECISION AND ORDER OF THE COMMISSIONER

This matter arises from an administrative enforcement proceeding commenced by staff of the Department of Environmental Conservation ("Department" or "DEC") for alleged violations of the Environmental Conservation Law ("ECL") and related implementing regulations stemming from respondent's reconstruction of a floating camp structure on Cranberry Lake in May 2005.

Factual and Procedural Background

In accordance with section 622.12(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), respondent Walter W. French was served by certified mail with a copy of a notice of motion for order without hearing, together with supporting affidavits and other documentary evidence, on September 23, 2006. The motion for order without hearing was served in lieu of complaint in this matter (see 6 NYCRR 622.12[a]).

The notice of motion for order without hearing and memorandum in support of the motion alleged violations of ECL articles 9 and 15, and 6 NYCRR parts 190 and 608, related to respondent's reconstruction of a floating camp structure upon the

waters of Cranberry Lake located within the boundaries of the Adirondack State Park in the Town of Clifton, St. Lawrence County.

The memorandum in support of Department staff's September 22, 2006 motion for order without hearing, which serves as the complaint in this proceeding, alleged the following two causes of action:

1. Respondent violated the provisions of ECL 9-0303(2) and 6 NYCRR 190.3(b) and 190.5 by erecting an unpermitted structure on State-owned lands in May 2005; and
2. Respondent violated the provisions of ECL 15-0503(1)(b) and 6 NYCRR 608.4(b) by erecting a structure in, on, or above the navigable waters of the State without a permit in May 2005.

Department staff's papers in support of its motion consisted of the memorandum of then Regional Attorney James T. King, Esq., dated September 22, 2006, along with attached exhibits marked A, B, and C. Exhibit A is an affidavit of Robert H. Barstow, a Lieutenant in the Department's Division of Forest Protection and Fire Management, sworn to September 7, 2005.

Lieutenant Barstow’s affidavit provides an account of the discovery of respondent working on the floating camp on Cranberry Lake in May 2005 and describes the camp in some detail. In addition, Lieutenant Barstow’s affidavit includes a color photograph depicting the floating camp as it existed in May 2005. The photograph shows that the floating camp is located less than 150 feet from the nearest shore or bank of Cranberry Lake. As of the date of Lieutenant Barstow’s affidavit, respondent had not removed the camp from the waters of Cranberry Lake.

Exhibit B of staff’s papers is a June 6, 2006 letter of Alan C. Bauder, Submerged Lands and Natural Resources Manager, Bureau of Land Management at the State of New York’s Office of General Services, to DEC Regional Attorney King. Mr. Bauder’s letter includes a description of the State’s history of ownership and title to the bed of Cranberry Lake, as well as a statement that “the Office of General Services has not issued permits, leases nor grants of lands underwater on Cranberry Lake.”

Exhibit C of staff’s papers is an affidavit of Roger C. Backus, Chairman of the Oswegatchie River-Cranberry Reservoir Regulating District Corporation (“Regulating District”), sworn to September 17, 2006. Mr. Backus’ affidavit describes the relationship between the Regulating District and the Department

in reviewing permit applications for docks on Cranberry Lake and states that the "Regulating District has not issued a permit for the construction, maintenance, reconstruction or any other activity to Walter W. French."

Pursuant to 6 NYCRR 622.12(c), respondent was required to file a response to Department staff's motion for order without hearing within 20 days of receipt of the motion. Respondent filed an answer dated October 11, 2006, and the affidavit of respondent, sworn to October 11, 2006, along with supporting documents in opposition to staff's motion with the Department's Office of Hearings and Mediation Services on October 16, 2006.[1]

Respondent admitted that, in May 2005, he was "effecting a seasonal replacement on a 'float camp' which had been overcome with water in the winter of 2004" and that the "floating camp is secured to posts driven into the land under the water of Cranberry Lake." Additionally, respondent stated that he "pulled significant portions of the sunken 'float camp' out of

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[1] One of the documents submitted by respondent (Exhibit E) is a copy of a letter to respondent from Sandra L. LeBarron, Regional Director of Department Region 6, dated June 23, 2006. This letter advised respondent that floating camps on Cranberry Lake were prohibited by law and requested that the camp at issue be removed by August 22, 2006. Lieutenant Barstow's affidavit indicates that respondent had not removed the camp as of September 2006.

the water and reused them . . . including portions of the roof, the platform and the walls" (see Affidavit of Walter French sworn to October 11, 2006, at ¶2, and Respondent's "Answer to DEC Motion" dated October 11, 2006).

Respondent's primary defense to the violations alleged by Department staff consisted of his contention that he was merely repairing a pre-existing floating camp that had been on the waters of Cranberry Lake for decades. Respondent asserted that this particular floating camp had been previously owned by an individual named Theodore Tesmer. According to respondent, prior to Mr. Tesmer's death in 2000, Mr. Tesmer had advised respondent that, at some unknown point in time, "rules changed and no new 'float camps' could be built" on Cranberry Lake (see Affidavit of Walter French sworn to October 11, 2006, at ¶12).

Respondent claimed that Mr. Tesmer had also informed him that "so long as the original 'float camp' remained in or on the water, the camps could be maintained" but "[p]ortions of the original 'float camp' had to be utilized for any seasonal replacement or maintenance needed" (id.). Relying upon this information, respondent argued that the floating camp he was repairing in May 2005 was subject to this "grandfather clause" as purportedly described by Mr. Tesmer to respondent and, as such,

the camp was exempt from the Department's regulatory and permitting requirements.

The matter was assigned to Administrative Law Judge ("ALJ") Molly T. McBride, who prepared the attached ruling and report. ALJ McBride concluded that staff's motion and supporting papers established that respondent Walter W. French had reconstructed a floating camp on Cranberry Lake in May 2005 without permits and in violation of applicable statutes and regulations.

Based upon the record, I affirm ALJ McBride's ruling granting staff's motion for order without hearing and hereby adopt ALJ McBride's report as my decision in this matter, subject to the following comments.

Discussion

A motion for order without hearing pursuant to 6 NYCRR 622.12 is governed by the same principles as a motion for summary judgment pursuant to New York Civil Practice Law and Rules ("CPLR") § 3212. Section 622.12(d) of 6 NYCRR provides that a motion for order without hearing "will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment

under the CPLR in favor of any party."

On a motion for summary judgment pursuant to the CPLR, a "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law . . . . The party opposing the motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests . . . .'[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (<u>Gilbert Frank Corp. v Federal Ins. Co.</u>, 70 NY2d 966, 967 [1988] [citations omitted] [quoting <u>Zuckerman v City of New York</u>, 49 NY2d 557, 562 (1980)]).

Thus, on a motion for order without hearing, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (<u>see</u> <u>Cheeseman v Inserra Supermarkets, Inc.</u>, 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has done so, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (<u>id</u>.). Facts appearing in the movant's papers that the opposing party fails to controvert are deemed to be admitted (<u>see</u> <u>Kuehne &</u>

Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975]).

In this proceeding, respondent submitted a response to Department staff's motion. As ALJ McBride's report relates, in addition to Department staff's proof in support of its motion, respondent's own statements in the papers submitted in opposition to Department staff's motion further support holding against respondent in this action.

First Cause of Action: Use of State Lands

The use of Forest Preserve lands, as limited by former New York State Constitution, article 7, § 7 (now New York State Constitution, article 14, § 1), is set forth in ECL article 9. ECL 9-0301(1) provides that all lands in the Adirondack Park "shall be forever reserved and maintained for the free use of all the people." Article 9 further provides specific mandates directed at protecting Forest Preserve and other State lands from encroachment, illegal cutting or removal of vegetative or other material components, fire and misuse. With respect to structures, ECL 9-0303(2) specifically provides: "In order to protect the state lands described in this article the following provisions shall apply: . . . 2. Structures. No building shall be erected, used or maintained upon state lands except under permits from the department."

Part 190 of 6 NYCRR implements ECL article 9 and provides further specifications concerning the use of State lands. With respect to the location of camps on State lands, 6 NYCRR 190.3(b) provides: "Camping is prohibited within 150 feet of any road, trail, spring, stream, pond or other body of water except at camping areas designated by the department."[2]

The Department designates camping areas on State lands under its jurisdiction through Unit Management Plans ("UMPs").[3] The area within the Adirondack Park where respondent undertook activities in connection with the floating camp on Cranberry Lake in May 2005 is encompassed by the Five Ponds Wilderness Area ("Five Ponds") UMP.[4] The Department has delineated certain

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[2] "Camp" means "any form of temporary shelter, including but not limited to a tent, motor home travel trailer, mobile home, or the use of any vehicle for shelter or sleeping" (see 6 NYCRR 190.0[b][2]).

[3] State lands under the Department's jurisdiction include the Forest Preserve, State forests, and wildlife management areas (see ECL 3-0301[1][d] and 9-0105). On State lands in the Adirondack Park, UMPs are intended, among other things, to identify opportunities for recreational use and management objectives for public use that are consistent with land classification guidelines and the character of the lands involved (see Executive Law § 816). While UMPs are prepared by Department staff, the UMP process also involves public notice, hearings, and opportunities for public participation prior to final approval.

[4] The Five Ponds UMP was initially developed by the Department in July 1987 and, since then, has been subsequently revised, with the most recent final approval in April 1994 (for a copy of the Five Ponds UMP, see www.dec.ny.gov/lands/22576.html).

locations within the geographic area encompassed by the Five Ponds UMP as designated "camping areas." This includes a number of areas along the shore of Cranberry Lake. However, neither the lake bed nor the waters of Cranberry Lake are designated as camping areas in the Five Ponds UMP. Moreover, since 1987, floating camps on Cranberry Lake, such as the one respondent reconstructed in May 2005, are identified in the Five Ponds UMP as illegally trespassing on State-owned land (see Five Ponds UMP, April 1994, at 23).[5]

With respect to camp structures, 6 NYCRR 190.5 lists the types of structures that are permissible on State lands. Pursuant to this section, the only structures that the Department will permit on State lands are the following: (i) lean-tos (open camps) with current (existing) permits; (ii) temporary wooden platforms erected in connection with a tent camping permit; and (iii) portable canvas houses with or without platforms (see 6 NYCRR 190.5[a]-[c], [f], and [g]). Floating camps, such as the one respondent was working on in May 2005, are not listed as permissible structures under section 190.5.

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[5] The Five Ponds UMP states at page 23: "Marleau (1986) documents many other cases of early occupancy of [lands in these areas] while explaining the pattern of development.

This use continues today with the discovery of occasional illegal camps on the area and, most blatantly, in the presence of floating camps on nearby Cranberry Lake."

The facts in this record, coupled with respondent's admission that this floating camp is secured to posts driven into the land under the waters of Cranberry Lake, demonstrate that respondent violated ECL 9-0303(2) when he reconstructed an unpermitted structure (the floating camp) on State-owned land (Cranberry Lake) in May 2005. It is undisputed that all of the property adjoining and surrounding the floating camp at issue here is located in the Adirondack Park. The bed of Cranberry Lake is owned by the State (see Exhibit B to Department staff's motion). Floating camps, such as the one respondent was working on in May 2005, are not listed as permissible structures under section 190.5 and, as previously noted, are identified in the Five Ponds UMP as trespassing on State land.[6]

Further, the facts in this record, and particularly Lieutenant Barstow's description and photograph of the floating camp, establish that respondent reconstructed a floating camp within 150 feet of Cranberry Lake in May 2005 in a State-owned area that was not designated by the Department as a camping site in the applicable Five Ponds UMP. Accordingly, respondent's reconstruction of the floating camp violated 6 NYCRR 190.3(b).

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[6] Under the circumstances of this case, 6 NYCRR 190.5 does not provide a separate theory of liability and, thus, a separate violation of that section is not established. Section 190.5 simply clarifies that the floating camp is not a structure permissible under ECL 9-0303(2).

Respondent raised no triable issue of fact sufficient to rebut Department staff's prima facie showing of respondent's liability under ECL 9-0303(2) and 6 NYCRR 190.3(b). To the extent that respondent seeks to invoke 6 NYCRR 190.5 in support of his argument that the use of the floating camp is "grandfathered," that regulatory provision is clearly inapplicable. As discussed above, while 6 NYCRR 190.5 allows for some existing structures on State lands, those structures are limited to lean-tos (open camps), temporary wooden platforms and portable canvas houses (see 6 NYCRR 190.5[b]-[f]).

Even assuming for purposes of this proceeding that the floating camp could somehow be deemed an existing lean-to (which it is not), respondent's "grandfathering" argument still fails because the regulation prohibits the "transfer of existing lean-tos (open camps)" and provides that current permits for lean-tos (open camps) will be cancelled "upon the death of the permittee" (see 6 NYCRR 190.5[b], [c][1]). According to respondent, the previous owner of the floating camp, Theodore Tesmer, died in 2000. Thus, even if Mr. Tesmer had a permit for a lean-to (open camp), and no such permit has been proffered in this proceeding, such permit expired upon his death and could not have been transferred to respondent.

Second Cause of Action: Protection of Waters

Title 5 of ECL article 15, generally known as the Stream Protection Act, requires a permit to erect, place, construct, reconstruct, or expand a "dock, wharf, platform, breakwater, mooring, or other structure in, on or above waters" in New York (ECL 15-0503[1][b]).[7]

Part 608 of 6 NYCRR, entitled "Use and Protection of Waters," contains the implementing regulations for ECL article 15. Section 608.4 applies to docks, moorings, and other specified water-related structures, and provides that, with certain limited exceptions, a Department-issued permit is required to "construct, reconstruct, modify, repair or change the use of any" such structure "on or above the navigable waters of the State" (6 NYCRR 608.4[b][1]).[8]

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[7] "Waters" include "lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York, and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction." ECL 15-0107(4).

[8] Navigable waters of the State means "all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation. It does not include waters that are surrounded by land held in single private ownership at every point in their

Both ECL 15-0503(1)(b) and 6 NYCRR 608.4(c)(1) contain a similar exception from permit requirements for designated activities related to specified water-related structures where:

> "a lease or other appropriate conveyance of an interest authorizing the use and occupancy of state-owned lands underwater has been obtained from the commissioner of general services pursuant to subdivision seven of section seventy-five of the public lands law" (see ECL 15-0503[1][b]).[9]

As previously discussed with respect to the allegations in Department staff's first cause of action, it is undisputed that the State owns the entire underwater bed of Cranberry Lake, and that the Office of General Services has not issued any permits, leases or grants of lands underwater of Cranberry Lake to anyone (see Exhibit B to Department staff's motion).[10] The noted exceptions from permit requirements for the floating camp

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total area." 6 NYCRR 608.1(l).

[9] Section 608.4(c)(1) states that a permit is not required for "docks, piers, wharfs, platforms, moorings and other structures placed on, in or above State-owned lands under water for which a lease or other appropriate conveyance of interest authorizing the use and occupancy of such lands has been obtained from the Commissioner of General Services." See also 6 NYCRR 608.4(a) which "applies to the construction, reconstruction or repair of docks, piers, wharfs, platforms, breakwaters and the installation of moorings, in, on or above the navigable waters of the State lying above underwater lands not owned by the State. Use of State-owned lands under water generally required [sic] a lease, easement, permit or other interest from the Commissioner of the New York State Office of General Services, pursuant to regulations implementing the Public Lands Law."

[10] It is not disputed that Cranberry Lake is both a water of the State and a navigable water of the State (see ECL 15-0107[4] and 6 NYCRR 608.1[l]).

structure on Cranberry Lake at issue are not applicable to respondent here (see ECL 15-0503[1][b] and 6 NYCRR 608.4[c][2]). Therefore, respondent was required to obtain a permit from the Department pursuant to ECL article 15 before engaging in any activities associated with the floating camp prior to May 2005.

Respondent acknowledges that he did not seek, nor did he obtain, a permit as required under ECL article 15 in order to repair or reconstruct the floating camp structure on Cranberry Lake at any time prior to May 2005. Instead, respondent argues that the floating camp he repaired was subject to certain "grandfathering" exceptions contained in, and applicable to, the regulatory provisions cited in Department staff's second cause of action.

These regulatory exceptions are raised by respondent in the context of his defense that the floating camp was previously owned by Theodore Tesmer and had been located on Cranberry Lake for the past 30 years. Respondent claims that Mr. Tesmer advised him that "so long as the original 'float camp' remained in or on the water, the camps could be maintained" but "[p]ortions of the original 'float camp' had to be utilized for any seasonal replacement or maintenance needed" (see Affidavit of Walter French sworn to October 11, 2006, at ¶12).

Respondent's "grandfathering" defense is based upon the provisions of ECL 15-0503(3)(c) which exempts from the requirement of a permit for "[s]easonal replacement or reinstallation of" a dock, wharf, platform, breakwater, mooring, or other structure in, on or above waters of the State "installed prior to the effective date of this paragraph" (i.e., 1972).[11] Even assuming, as respondent contends, that the floating camp on Cranberry Lake that he worked on in May 2005 was in existence prior to the enactment of ECL 15-0503(3)(c), Department staff made a prima facie showing that respondent's work on the camp consisted of substantially more than mere "seasonal replacement or reinstallation." Respondent fails to raise a triable issue of fact supporting a contrary conclusion.

While the phrase "seasonal replacement or reinstallation" is not specifically defined in either ECL article 15 or the Part 608 implementing regulations, nevertheless, its meaning can be derived from the provisions of ECL 15-0503(1)(b) and 6 NYCRR 608.4. For instance, ECL 15-0503(1)(b) states:

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[11] See also 6 NYCRR 608.4(c)(5) which exempts from permitting requirements the "seasonal replacement or reinstallation of floating docks and other structures exceeding the criteria in paragraph (2) of this subdivision [i.e., a docking facility providing dockage for more than five boats and encompassing within its perimeter an area greater than 4000 square feet], legally existing prior to May 4, 1993, or for which a permit has been obtained under this Part."

> "The term 'reconstructed' as used in relation to docks, wharves, platforms, breakwaters, mooring or other structures pursuant to this paragraph shall mean the <u>substantial rebuilding</u> of structures or facilities and shall not apply to ordinary maintenance or repair of existing functional structures or facilities, such as repainting, redriving pilings or replacing broken boards in docks" (<u>emphasis added</u>).

Similarly, 6 NYCRR 608.4(c)(7) refers to:

> "ordinary maintenance and repair of structures such as repainting, redriving piles or replacing boards in docks. Maintenance and repair does <u>not</u> include substantial reconstruction of structures" (<u>emphasis added</u>).

Here, even if respondent's account of the circumstances and events related to the history of the floating camp at issue is accepted as true, respondent's admissions and description of his activities on Cranberry Lake in May 2005 demonstrated that he had "reconstructed" the structure as that term is used in ECL 15-0503(1)(b).

For example, respondent admitted that the "floating camp is secured to posts driven into the land under the water of Cranberry Lake" and that he had seen it floating on the water "for the last 30 years." Moreover, respondent admitted that the camp "had been overcome with water in the winter of 2004." The circumstance that the camp was underwater in the winter of 2004 is evidence that it was not "seasonally" removed and later replaced. Thus, as noted in the Five Ponds UMP, the structure

was a continuing fixture on Cranberry Lake for decades.

Further, respondent admitted that he "pulled significant portions of the sunken 'float camp' out of the water and reused them . . . including portions of the roof, the platform and the walls" (see affidavit of Walter French sworn to October 11, 2006, at ¶2). Such activities are more than ordinary maintenance or repair such as repainting or replacing boards and, instead, amounted to substantial rebuilding and reconstruction of the camp. Moreover, the photograph accompanying Lieutenant Barstow's affidavit depicting the camp in May 2005 shows that respondent utilized new building materials including new dimensional lumber, plywood, hardware, and pre-hung exterior door for the reconstruction rather than re-used materials from the previous float camp.

Respondent did not claim to have any actual ownership interest in the floating camp that he was reconstructing in May 2005. However, such a relationship is not required for purposes of establishing respondent's liability for the alleged violations. The statute and regulations cited by Department staff in both its first and second causes of action regulate the nature and type of activity that can be conducted on State-owned lands and State waters without regard to whether the person or

entity seeking to engage in the regulated activity has a proprietary interest in the property.

Proposed Penalty

In its motion, Department staff sought a civil penalty of $64,100 from respondent, which staff described as the maximum penalty for the initial violation and the maximum penalty for each day that the structure remained from May 26, 2005 until September 22, 2006 (the date of staff's motion). Specifically, Department staff requested a penalty of $64,000 pursuant to ECL 71-1127(1)(for violation of ECL article 15 and its implementing regulations) and $100 pursuant to ECL 71-0703 (for violation of ECL article 9 and its implementing regulations).

ALJ McBride identified in her hearing report certain corrections to staff's calculation which resulted in a reduction of the proposed penalty. As noted by ALJ McBride, ECL 71-1127(1) provides for a civil penalty for any violation of article 15 of "not more than five hundred dollars for such violation and an additional civil penalty of not more than one hundred dollars for each day during which such violation continues, and, in addition thereto, such person may be enjoined from continuing such violation." ALJ McBride calculated respondent's penalty to be $500 for the violation plus a civil penalty of $48,200 calculated

as follows: a penalty period of 482 days at $100 per day, for a total penalty of $48,700. In addition to the proposed penalty, ALJ McBride also recommended, pursuant to ECL 71-1127(1) that respondent be directed to remove the camp from the waters of Cranberry Lake.

ALJ McBride's analysis of the proposed penalty in her hearing report appears, however, to be based solely upon the provisions of ECL 71-1127(1), which only applies to violations of ECL article 15. Because respondent has also violated ECL 9-0303(2) and 6 NYCRR 190.3, and Department staff requested a penalty for those violations, an analysis of any penalty should also include the enforcement provisions applicable to ECL article 9. In that regard, ECL 71-0703(1) states, in pertinent part:

> ". . . any person who violates any provision of article 9 or the rules, regulations or orders promulgated 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."

Thus, for respondent's violation of ECL 9-0303(2) arising from its reconstruction of an unpermitted structure on State-owned lands in May 2005, respondent is liable for a civil penalty of up to $100. By adding the penalty for the violation of ECL article

9 and 6 NYCRR 190.3 to the previous amount calculated by ALJ McBride, respondent's total penalty is $48,800.[12]

In addition, ECL 9-0303(6) provides that the Department "may dispose of any improvements upon state lands under such conditions as it deems to be to the public interest."[13] Under the circumstances, the floating camp respondent reconstructed in May 2005 is an "improvement" upon State-owned lands (Cranberry Lake) in the Adirondack Park and, as such, can be disposed of by the Department as it deems appropriate.

Based upon the record and foregoing discussion, I conclude that a civil penalty of $48,800 is authorized and appropriate. I also conclude that the remedial measures recommended by the ALJ to address the violations by respondent Walter W. French are authorized and appropriate, and the recommended date by which respondent is to achieve compliance is

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[12] Respondent's violation of 6 NYCRR 190.3, which prohibits camping within 150 feet of areas other than those designated by the Department, is a violation separate from his violation of ECL 9-0303(2), making respondent liable for an additional civil penalty of up to one hundred dollars. Thus, the total penalty authorized for the Department's first cause of action is $200. However, because Department staff's complaint limited the penalty for the first cause of action to $100, only $100 is imposed.

[13] An "improvement" is "an addition to real property, whether permanent or not" (<u>see</u> Black's Law Dictionary 773 [8th ed 2004]).

reasonable.

However, based on my review of the record of this proceeding, I have determined to further modify the penalty. In recognition of the need for the prompt removal of the illegal structure from Cranberry Lake and the expenses that will likely be associated with such removal, I have determined to suspend $24,400 of the $48,800 penalty contingent upon respondent's prompt and full compliance with the remedial measures set forth in this decision and order, including but not limited to the removal of the entire floating camp structure.

Moreover, to ensure that the removal of the structure is conducted in an environmentally protective manner, I am directing respondent to submit in writing an approvable removal plan ("removal plan") to Department staff no later than thirty days after service of this decision and order. The removal plan must (a) describe the procedures that respondent will take in the removal of the structure (including but not limited to the posts driven into the land under the waters of Cranberry Lake), and (b) provide that the removal of the structure (including but not limited to the posts driven into the land under the waters of Cranberry Lake) shall be completed no later than ninety days after service of this decision and order. For purposes of this

decision and order, an approvable removal plan shall mean a plan that can be approved by Department staff either as submitted by respondent or subject only to minimal revision. I direct Department staff to notify respondent in writing within ten (10) business days following receipt of the plan whether the plan is approvable as submitted, whether any minimal revisions are necessary or whether the plan is rejected.

Respondent’s failure to submit an approvable removal plan, to remove the structure in accordance with the removal plan as approved by Department staff, or to meet the time periods specified in this decision and order shall be deemed grounds for the Department to remove the structure and to assert any other rights of recovery against respondent for costs and expenses.

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

I. Pursuant to 6 NYCRR 622.12, Department staff’s motion for order without hearing is hereby granted.

II. Respondent is adjudged to have violated ECL 9-0303(2) by reconstructing an unpermitted structure on State-owned lands in May 2005.

III. Respondent is adjudged to have violated 6 NYCRR 190.3 by camping on State lands in an area that the Department has not designated for camping.

IV. Respondent is adjudged to have violated the provisions of ECL 15-0503(1)(b) and 6 NYCRR 608.4 by erecting a structure upon the navigable waters of the State in May 2005 without a permit.

V. Respondent Walter W. French is hereby assessed a civil penalty in the amount of forty-eight thousand eight hundred dollars ($48,800), of which twenty-four thousand four hundred dollars ($24,400) is suspended on the condition that respondent comply with the conditions set forth in paragraph VI of this decision and order. The non-suspended portion of the civil penalty ($24,400) shall be due and payable within thirty (30) days after the service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Regional Attorney
New York State Department of Environmental Conservation
Region 6 Office
317 Washington Street
Watertown, New York 13601

Should respondent Walter W. French fail to comply with the conditions set forth in paragraph VI, the suspended portion of the penalty ($24,400) shall become immediately due and payable and is to be submitted in the same form and in the same manner as the non-suspended portion of the penalty.

VI. A. In addition to the payment of a civil penalty, no later than thirty (30) days after service of this decision and order, respondent Walter W. French is hereby directed to submit in writing an approvable removal plan ("removal plan") to Department staff. The removal plan must describe the procedures that respondent will take in the removal of the entire floating camp structure from State land and the waters of Cranberry Lake (including but not limited to the posts driven into the land under the waters of Cranberry Lake). The removal plan must also provide that the removal of the entire floating camp structure (including but not limited to the posts driven into the land under the water of Cranberry Lake) shall be completed no later than ninety (90) days after service of this decision and order.

B. Respondent's failure to submit an approvable removal plan to Department staff, to remove the structure in accordance with the removal plan as approved by Department staff, or to meet the time periods specified in paragraph VI.A shall be deemed grounds for the Department to remove the structure and to assert any other rights of recovery as may exist against respondent for such costs and expenses incurred pursuant to ECL 71-0505(1), 71-0509, or 71-1103, or any other applicable legal authority.

VII. All communications from respondent to the Department concerning this order shall be made to: Regional Attorney, New York State Department of Environmental Conservation, Region 6 Office, 317 Washington Street, Watertown, New York 13601.

VIII. The provisions, terms and conditions of this order shall bind respondent Walter W. French, and his agents, successors and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

By: /s/
Alexander B. Grannis
Commissioner

Dated: July 20, 2007
Albany, New York

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Watertown, New York 13601

STATE OF NEW YORK:
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Articles 9 and 15 of the Environmental Conservation Law and Parts 190 and 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by:

WALTER W. FRENCH,

Respondent.

RULING AND REPORT ON MOTION FOR ORDER WITHOUT HEARING

DEC Case No. R6-20060313-14

Procedural Background

The New York State Department of Environmental Conservation (DEC Staff, Department) commenced this administrative enforcement proceeding pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) section 622.12 by service of a notice of motion for order without hearing in lieu of complaint on or about September 22, 2006 on Walter W. French (respondent). DEC Staff submitted the following in support of the motion: an affirmation of regional attorney James T. King, Esq., and the affidavit of Robert H. Barstow, Department Staff. Respondent, by answer and affidavit of Walter French, both dated October 11, 2006, opposed the motion.

Staff's motion was filed with the Office of Hearings and Mediation Services and was assigned to Administrative Law Judge (ALJ) Molly T. McBride.

Background

Respondent allegedly constructed a floating camp on Cranberry Lake, located in the Adirondack Park, County of St. Lawrence, in 2005 and 2006 without a permit, in violation of Environmental Conservation Law (ECL) sections 9-0303(2) and 15-0503. Department Staff has requested that the Commissioner impose a civil penalty upon respondent and that respondent be directed to remove the camp and, if respondent does not remove

the camp in a reasonable time, that the camp be removed at respondent's expense.

Staff's Position

Department Staff has asked for an Order of the Commissioner which finds that respondent violated ECL sections 9-0303(2) and 15-0503 and 6 NYCRR sections 190.3, 190.5 and 608.4. It is alleged by Department Staff that respondent was observed by Department Staff constructing a floating camp on Cranberry Lake in May, 2005. Respondent does not own property adjoining the lake, all property adjoining the camp is owned by the People of the State of New York. Department Staff also presented a letter from the NYS Office of General Services which states that the State also owns the lake bed. Respondent did not obtain a permit for the construction from the Department, nor from the New York State Office of General Services, the Oswegatchie River-Cranberry Reservoir Regulating District Corporation (public benefit corporation responsible for Cranberry Lake) or the Adirondack Park Agency. ECL section 9-0301 directs that all land located in the Adirondack Park shall be preserved and maintained for the free use of all people and section 9-0303(2) provides that no structures shall be erected, used or maintained on State lands except under permits issued by the Department. ECL section 3-0301(2)(m) authorizes the Department to adopt rules and regulations to effectuate the purposes of the ECL and, the Department enacted 6 NYCRR Part 190 which regulates camping on State owned land.

ECL 15-0503(1)(b) prohibits the use or occupancy of State-owned lands underwater without a specific conveyance or lease. It also prohibits the construction or reconstruction of any dock or platform in, on or above the water without a permit. The section defines reconstruction to include substantial rebuilding and not ordinary maintenance or repair of existing functional structures.

Respondent's Position

Respondent acknowledges that in 2005 and 2006 he was repairing a floating camp that existed on Cranberry Lake in excess of 30 years. He denies that a permit was required for the work that he did. Respondent admits that the camp did sink into the water during the winter of 2004-2005. He also acknowledges that the camp is secured to posts driven into the land under the lake. Respondent maintains that since the structure is a floating camp, it is not a structure erected, used or maintained

on State-owned land, ECL section 9-0303(2) and 6 NYCRR sections 190.3 and 190.5 are not applicable, and no permit is required and his actions were not prohibited. Respondent also states that he was conducting seasonal repairs to the float camp that was owned by Theodore Tesmer. Mr. Tesmer died in 2000 and respondent does not identify who he believes owns the camp at this time. Mr. Tesmer reportedly told respondent that although float camps could no longer be built on the lake, this camp had a "grandfather clause" and that "so long as the camp remained in or on the water it could be maintained." (French affidavit p. 1). The work that was done in 2005 and 2006 by respondent included him pulling significant portions of the sunken float camp out of the lake and reusing portions of the roof, platform and walls in his reconstruction.

Respondent also argued that the motion should be denied with respect to the alleged violation of ECL section 15-0503 because the violation has been adjudicated. Respondent was issued a ticket for a violation of section 15-0503 by DEC Forest Ranger Siskavich in May, 2005. The matter was returnable in the Town of Clifton Justice Court. A plea agreement was entered into by the respondent and the assistant district attorney who was the prosecutor for the criminal matter. The Town of Clifton Court granted an order adjourning the matter in contemplation of dismissal for a six month period on January 11, 2006. The matter was not restored to the calendar during the six month adjournment period and as of July 11, 2006 was deemed dismissed. Respondent has argued that the Department can not prosecute the matter for a second time.

Discussion

A contested motion for order without hearing brought pursuant to 6 NYCRR section 622.12 shall be granted if, "upon all of the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party." [14]

The first cause of action alleges that respondent violated ECL section 9-0303(2) which prohibits the erection, use or maintenance of buildings on State lands without first obtaining a permit from the Department. Respondent's defense is that the camp is floating on the lake and therefore not on State land. Respondent does admit that the camp is anchored to the bottom of the lake. The land under Cranberry Lake is State owned land and

[14] 6 NYCRR §622.12(d).

respondent reconstructed the structure on that State owned land, without a permit.

Department Staff alleged that there was a ramp from the beach, State owned land, to the camp when Department Staff visited the site. Respondent denies any such ramp is in place. A question of fact remains on the issue of the ramp, however the cause of action can be resolved without a finding of fact on that issue since the respondent's actions in reconstructing the camp anchored to the lake bottom without a permit was in violation of ECL section 9-0303(2).

Department Staff has established the violation of 6 NYCRR 190.3. Section 190.3 prohibits camping within 150 feet of a water body except at those sites designated by the Department in the Unit Management Plan (UMP). The area in question is not a designated camp site in the UMP. In fact, floating camps on Cranberry Lake are specifically identified as trespassing in the UMP. Respondent's defense is that the regulations prohibit camping on State land within 150 feet of a water body and the floating camp is not "on State land" since it is floating in the lake. This is a meritless defense. The camp is anchored to the land under the lake, State owned land. Also, the camp sits within 150 feet of the water body since it is sitting on the water body. The Department identified the floating camps on Cranberry Lake, as early as 1987, as trespassing in the UMP. Respondent is attempting to circumvent the clear meaning of the statute and regulations.

Department Staff also alleged a violation of 6 NYCRR 190.5 which prohibits a structure such as the one reconstructed by respondent, on State owned land. Respondent's only defense is that the structure is not on State owned land. However, as noted above, the structure is on State owned land.

The second cause of action alleges that respondent violated ECL section 15-0503(1)(b) and 6 NYCRR section 608.4. ECL section 15-0503(1)(b) prohibits the erection, construction, reconstruction or expansion of a platform, among other things, in or above waters without a permit. Reconstruction is defined to include the substantial rebuilding of structures or facilities and not ordinary maintenance or repair such as repainting, redriving pilings or replacing broken boards in a dock. Section 608.4 prohibits the reconstruction of a structure on or above the navigable waters of the State without a permit.

Respondent acknowledges that he had no permit for the reconstruction of the camp. The camp sunk into the waters of

Cranberry Lake and according to respondent, only portions of the roof, the platform and the walls could be used in the reconstruction of the camp. Respondent argues that ECL 15-0503(3)(c) allows for the seasonal replacement or reinstallation of structures. A sunken camp that had to be brought up from the bottom of the Lake and reconstructed can not be considered a seasonal replacement. Respondent's answer states that he was not building a new structure but his description in his affidavit says otherwise. The camp sunk during the winter and had to be raised from the lake waters and reconstructed, using new materials for the roof, walls and platform. Respondent violated ECL 15-0503(1) and 6 NYCRR 608.4 by reconstructing the floating camp without a permit.

I do not agree with respondent's argument that the Department can not prosecute this administratively because of the prior criminal proceeding. As an initial matter, this proceeding is a civil matter and is not barred by any prior criminal disposition. Respondent has provided no legal authority for his claim that because the matter was disposed of in a criminal proceeding, the Department is precluded from pursuing the matter in a civil proceeding. The ECL specifically provides for both criminal and administrative proceedings. (*Matter of Barnes v. Tofany 27 N.Y. 2d 74 (1970), Matter of NYS DEC v. ATTCO Metal Industries, Inc., ALJ Order Oct. 1, 1984, 1984 WL19296)* The dismissal of a criminal charge or an acquittal in a prior criminal proceeding against a defendant is not proof of innocence and does not bar, and has no collateral estoppel effect in, a subsequent civil proceeding against the same defendant arising out of the same incident (see *Reed v State of New York, 78 NY2d 1, 7-8 [1991]; Kalra v Kalra, 149 AD2d 409, 410-411 [2d Dept 1989]*). An acquittal in a prior criminal matter on issues upon which the People bore the burden of proof merely stands for the proposition that the People failed to meet the higher "beyond a reasonable doubt" standard applied in the criminal proceeding (see *Reed v State, 78 NY2d at 8*). In the Department's enforcement proceeding of *Matter of Liere, Decision and Order of the Commissioner, April 17, 2006,* the Commissioner held that the District Court's dismissal of the prior criminal proceeding against respondent did not bar a subsequent civil administrative enforcement proceeding, in which the lower "preponderance of evidence" standard is applied, even assuming the administrative proceeding arises at least in part out of the same incidents as the criminal proceeding (see id. at 2-3).

One point of interest is that the "ownership" of the camp is not at issue. Respondent has not claimed any ownership interest

in the structure. Respondent claims the camp was owned by a Theodore Tesmer for decades. Mr. Tesmer passed away in 2000. Mr. French makes no mention of any activity with regard to this floating camp from 2000 until 2004 when he claims he saw it floating in the lake. He reports that the next time he saw it, in the spring of 2005, it had sunk in the lake. He does not explain why he undertook repairs to the camp or if he intends to use the camp. He does argue that the camp has a "grandfather clause" because it has been in use for decades. Respondent asserts that he was told by Mr. Tesmer that so long as the camp continues in existence, it is not subject to the regulations cited by Department Staff. Respondent has offered no legal authority for this argument. The applicable sections of the ECL and related regulations make no mention of any exemption for structures in existence for an extended period of time. Because respondent is not the owner of the camp, he would not have any legal authority to make such an argument in any event.

Findings of Fact

After a review of the pleadings and papers submitted herein by the parties, I find that the following facts are not in dispute:

1. Respondent raised a sunken floating camp from Cranberry Lake in 2005.

2. Respondent reconstructed the floating camp in 2005 and 2006 without a permit.

3. Respondent does not claim any ownership rights to the camp.

4. New York State owns the land adjoining Cranberry Lake as well as the lake and the land underlying the lake.

Conclusions of Law

1. Respondent violated ECL section 9-0303(2) by reconstructing a floating camp on Cranberry Lake without a permit.

2. Respondent violated 6 NYCRR section 190.3(b) and 190.5 by reconstructing a floating camp on Cranberry Lake.

3. Respondent violated ECL section 15-0503 by reconstructing a camp on Cranberry Lake without a permit.

4. Respondent violated 6 NYCRR section 608.4(b) by reconstructing a camp on Cranberry Lake without a permit.

Penalty

Department Staff has requested a penalty of Sixty-Four Thousand One Hundred Dollars ($64,100), the maximum penalty authorized by ECL §71-1127(1). Section 71-1127(1) allows for a penalty for any violation of article 15 of the ECL, except section 15-1713, of not more than five hundred dollars plus an additional penalty of one hundred dollars for each day the penalty continued. In this case, Department Staff calculates the penalty period to be six hundred and thirty-five days, May 26, 2004 until September 22, 2006 (date of the motion). Department Staff has requested the maximum penalty due to respondent's actions of continuing to construct the camp and occupy it after being informed by the Department that the camp was in violation. Department Staff's pleadings allege that respondent was first observed by Staff reconstructing the floating camp on May 28, 2005. Respondent admits beginning the reconstruction in May, 2005. Staff has not explained why they chose the date of May, 2004. The correct penalty period would then be from May 28, 2005 until September 22, 2006, 482 days, and the correct penalty amount would be $500.00 plus $48,200.00. Further ECL section 71-1127 also provides that any person who violates article 15 shall be enjoined from continuing the violation, in this case, from allowing the camp to remain on the lake. Department Staff has asked that the camp be removed by respondent in 30 days or be removed at his expense.

Ruling

The motion for order without hearing is granted.

Recommendation

I recommend that the Commissioner issue an order: (1) granting the Department's motion for an order without hearing; (2) assessing a penalty against respondent in the amount of forty-eight thousand seven and hundred dollars ($48,700.00); (3) directing respondent to remove the camp within 30 days of receipt of the order; and (4) if respondent fails to remove the camp within the 30 days, that the camp be removed at the respondent's expense.

Dated: May 22, 2007
Albany, New York

/s/

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MOLLY T. MCBRIDE