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.

ORDER

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

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding against respondent Eugene F. Bartell by service of a motion for order without hearing dated April 29, 2008. Staff alleged that respondent violated provisions of article 9 of the New York Environmental Conservation Law (ECL) by his unauthorized use of the State forest preserve lands (State land) adjacent to respondent's property in the Town of Webb, Herkimer County, extending from the easterly boundary of respondent's property to, and including, the near shore area of Stillwater Reservoir.

The matter was assigned to Administrative Law Judge (ALJ) Richard A. Sherman. By ruling dated June 11, 2009, the ALJ held that staff's motion and supporting papers established, as a matter of law, that respondent committed the following violations:

1. at various times between 1998 and November 2, 2006, respondent cut, removed, injured, or destroyed trees or other property on the State land in the form of vegetation cutting and management, without authorization, in violation of ECL 9-0303(1) (ALJ Ruling at 16-17, 21); and

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) (ALJ Ruling at 18, 21).

The ALJ also held that Department staff failed to establish, as a matter of law, that respondent violated certain other provisions of the ECL. Neither party appealed from the ALJ's June 11, 2009 Ruling on liability. On June 12, 2009, staff withdrew the remaining alleged violations that the ALJ ruled required a hearing and requested a final decision from the Commissioner on the violations found by the ALJ.

On June 25, 2009, respondent requested that the ALJ's summary report be circulated as a recommended decision to provide respondent with an opportunity to comment on the report.

Department staff did not object, and the Commissioner granted respondent's request (see 6 NYCRR 622.18[a][2]). The Recommended Decision and Summary Report was circulated on July 16, 2009, and is attached to this order. The Recommended Decision and Summary Report only addresses the relief requested by staff. Department counsel advised by letter[1] that Department staff had no comment on the Recommended Decision and Summary Report. Under cover letter dated August 21, 2009, respondent filed comments.

Upon review of the record, including the comments, dated August 21, 2009, submitted by respondent on the Recommended Decision and Summary Report, I adopt the ALJ's Ruling dated June 11, 2009, and the Recommended Decision and Summary Report, dated July 16, 2009, as my decision in this matter, subject to the following comments. Based upon the record, I conclude that the ALJ's ruling and recommendations on liability, civil penalty, and corrective actions are appropriate.

As to respondent's comments to the Recommended Decision and Summary Report, I find that respondent is reiterating arguments that he raised earlier in this proceeding and were addressed by the ALJ in his June 11, 2009, Ruling. In sum, respondent is claiming the following:

(1) he is being treated unfairly in comparison to property owners along the Great Sacandaga Lake who benefit from a regulatory permitting system that has not been adopted for the Stillwater Reservoir;

(2) a material issue of fact exists concerning a boundary line and applicable surveys;

(3) his predecessors in interest obtained a prescriptive easement for access to the shoreline;

(4) his admitted maintenance of State lands did not involve cutting, removing, injuring, or destroying trees in violation of ECL 9-0303(1);

(5) the improvements that respondent is accused of erecting on State lands do not qualify as structures or buildings under ECL 9-0303(2); and

(6) his admission to a DEC Forest Ranger relating to his ownership of the dock should not be used against him.[2]

[1] Staff's letter is dated April 29, 2008. This date is incorrect because the ALJ did not issue his Recommended Decision and Summary Report until July 16, 2009, and the letter was received by the Office of Hearings and Mediation Services on July 16, 2009.

[2] This comment was initially raised in a cross-motion to exclude the alleged admission and to adjourn the proceedings pending the establishment of a permit procedure for the Stillwater Reservoir that respondent and others were lobbying the legislature to adopt.

I determine that ALJ Sherman addressed these arguments in his June 11, 2009, Ruling, and I accept the ALJ's analysis and rationale rejecting them.[3] Chief among ALJ Sherman's rejection of some of these arguments was respondent's lack of admissible proof to support them.

Finally, the ALJ ruled in his June 11, 2009, Ruling that two of the alleged violations could not be determined on a motion for order without hearing and instead required a hearing. These alleged violations concerned whether (1) the mere presence of the floating dock and associated personalty on and over State lands restricted the free use of those State lands by other persons, in violation of ECL 9-0301(1), and (2) whether respondent has used or maintained a stone circle fire pit, in violation of ECL 9-0303(2).

While I agree that the second alleged violation regarding the stone circle fire pit concerns a disputed issue of fact, and thus is not appropriately disposed of on a motion for order without hearing, I disagree that the first alleged violation would require a hearing. Rather, I agree with Department staff that as a matter of law, the mere presence of unpermitted structures on State lands, in violation of ECL 9-0303(2), restricts the free use by other persons of State lands, here located in the Adirondack Park, in violation of ECL 9-0301(1) (see Attorney's Brief in Support of Motion for Order Without Hearing, dated April 29, 2008, at 7-8; Attorney's Brief Replying to Respondent's Brief in Opposition to Motion for Order Without Hearing and In Opposition to Respondent's Cross Motions, dated Sept. 25, 2008, at 8-9). However, because staff withdrew this alleged violation, respondent is not adjudged to have violated ECL 9-0301(1) on the grounds that his construction of the floating dock and associated personalty restricted the free use of State lands.

To the extent that respondent has raised other arguments in his comments to the Recommended Decision, those arguments have been considered and rejected.

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 granted in part.

II. Respondent Eugene F. Bartell's cross-motion to exclude alleged statements by him and to adjourn the proceedings is denied.

III. Respondent Eugene F. Bartell is adjudged to have violated the following provisions of the ECL:

a. ECL 9-0303(1) by cutting, removing, injuring, or destroying trees or other property on the State land in the form of vegetation cutting and management, without authorization, at various times between 1998 and November 2, 2006; and

[3] Respondent further argues that he should be granted a temporary revocable permit to use State land. Respondent filed an application for a temporary revocable permit on June 15, 2009, well after this enforcement proceeding was commenced; thus, that application is not relevant to this proceeding.

b. ECL 9-0303(2) by maintaining a nine-tread staircase with handrails, a dock with outriggers and cornerposts, and a wood and concrete bench on the State land without authorization between 1998 and December 13, 2006, and on August 24, 2007.

IV. Respondent Eugene F. Bartell is assessed a civil penalty in the amount of five hundred dollars ($500), all of which is suspended provided that respondent complies with the corrective actions in paragraph V below. If respondent fails to timely complete any of the corrective actions to the satisfaction of Department staff, the suspended penalty shall immediately become due and payable. 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 address in paragraph VI below.

V. On or before 30 days after service of this order upon respondent, respondent Eugene F. Bartell is directed to remove the nine-tread staircase with handrails, the dock with outriggers and cornerposts, and the wood and concrete bench from the State land and to cease placing structures on the State land. If respondent fails to remove these structures, staff is directed to remove them and seek reimbursement from respondent for the cost of removal.

VI. All communications from respondent to the Department concerning this order shall be made to

Sandra Garlick, Esq.
New York State Department of
Environmental Conservation
Office of General Counsel
625 Broadway
Albany, NY 12233-1500

VII. The provisions, terms, and conditions of this order shall bind respondent Eugene F. Bartell, his agents, heirs, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: October 14, 2010
Albany, New York

Attachment: Recommended Decision and Summary Report, dated July 16, 2009

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,	RECOMMENDED DECISION AND SUMMARY REPORT
- by -	
EUGENE F. BARTELL,	VISTA Index Nos. CO6-20061107-28 CO6-20080314-3
Respondent.	

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Eugene F. Bartell by service of a motion for order without hearing dated April 29, 2008. By its motion, staff alleged that respondent violated provisions of article 9 of the Environmental Conservation Law ("ECL") by his unauthorized use of the State forest preserve lands ("State land") immediately adjacent to respondent's property in the Town of Webb, Herkimer County, extending from the easterly boundary of respondent's property to, and including, the near shore area of Stillwater Reservoir.

This recommended decision and summary report ("summary report") addresses only Department staff's request for relief as set forth in the motion for order without hearing and supporting papers. Respondent's liability for the violations alleged in the motion was addressed by ruling ("ruling") dated June 11, 2009.[1] The ruling held that staff's motion and supporting papers established, as a matter of law, that respondent committed the following violations:

> 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) (ruling at 17, 21); and
>
> 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) (ruling at 18, 21).

The ruling also held that staff failed to establish, as a matter of law, that respondent interfered with the free use of the State land in violation of ECL 9-0301(1) and also failed

[1] Further details on the proceedings and the filings of the parties prior to June 11, 2009 are provided in the ruling (ruling at 1-2).

to establish that respondent used or maintained a fire pit on the State land in violation of ECL 9-0303(2) (collectively, the "unresolved charges") (ruling at 18). Lastly, the ruling advised the parties that an adjudicatory hearing would be necessary to address the unresolved charges. Neither party requested permission to file an expedited appeal from the ruling (see 6 NYCRR 622.10[d]).

On June 12, 2009 Department staff withdrew the unresolved charges and requested a final decision from the Commissioner. Staff asserts that the relief it requested in its motion for order without hearing may be granted on the basis of respondent's liability for the violations already established by the ruling. Staff's withdrawal of the unresolved charges eliminates the need for a hearing. Accordingly, pursuant to 6 NYCRR 622.12(d), this summary report is to be submitted to the Commissioner for a final decision.

On June 25, 2009 respondent requested that this summary report be circulated as a recommended decision to provide respondent with an opportunity to comment on the report (see 6 NYCRR 622.18[a][2]). Staff stated that it was not opposed to respondent's request, provided that staff would be afforded an equal opportunity to comment on the recommended decision.

The determination of whether to circulate a summary report as a recommended decision is at the discretion of the Commissioner, unless required by law (see 6 NYCRR 622.18[a][2]). The Commissioner has determined that, under the circumstances presented here, respondent's unopposed request should be granted. Accordingly, this summary report is being circulated to the parties as a recommended decision. Both parties may provide comments on the summary report in accordance with the schedule established below and the Commissioner will consider comments received from the parties in making his final determination on the motion for order without hearing.

DISCUSSION

Department staff requests that the Commissioner issue an order (i) holding respondent liable for the violations established under the ruling; (ii) assessing a penalty against respondent of no less than $50 but no more than $500;[2] and (iii) directing

[2] In its motion for order without hearing, staff requested a $1,000 penalty, with $750 suspended provided that respondent complied with the corrective measures requested by staff. Staff argued that the penalty request was appropriate under the penalty provisions of ECL 71-4003. However, staff acknowledged that section 71-4003 may not be applicable to the violations charged and stated that "should the Commissioner determine that ECL 71-0703.1 provides the proper civil penalty . . . for violations of ECL 9-0301.1 and 9-0303.2, then staff seek[s] a civil penalty in an amount no less than $50 but no more than $500" (Attorney's Brief in Support of Motion for Order Without Hearing ["staff brief"], dated April 29, 2008, at 9). The ruling held that ECL 71-0703(1) provides the appropriate penalty provision for the violations charged (ruling at 20-21). Accordingly, only the penalty requested by staff in accordance with the provisions of ECL 71-0703(1) is considered in this summary report.

respondent to remove (and not replace) the dock, staircase and bench 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.

Penalty

Section 71-0703(1) of the ECL provides that, with certain exceptions not relevant here, "any person who violates any provision of article 9 . . . shall be liable to a civil penalty of not less than ten nor more than one hundred dollars."[3] As described below, the maximum authorized penalty available for respondent's violations is $1,200.

The ruling held that respondent violated ECL 9-0303(1) at various times from 1998 through November 2, 2006, by cutting, removing, injuring, or destroying vegetation on the State land without authorization. For the purposes of this penalty calculation, I will assume that respondent committed this violation only once each year from 1998 through 2006, inclusive.[4] Accordingly, I conclude that the maximum penalty authorized for these violations is $900 (one violation in each of nine years, each subject to a maximum authorized penalty of $100 pursuant to ECL 71-0703[1]).

The ruling also held that respondent violated ECL 9-0303(2) between 1998 and December 13, 2006, and on August 24, 2007 by maintaining structures on the State land without authorization. Specifically, respondent maintained a nine-tread staircase, a dock, and a bench on the State land. The maximum penalty authorized for these violations is $300 (three violations,[5] each subject to a maximum authorized penalty of $100 pursuant to ECL 71-0703[1]).

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[3] Effective March 1, 2004, the penalty provisions of ECL 71-0703 were amended [the "2004 amendments"]. The 2004 amendments do not affect the penalty analysis because the penalty applicable to respondent's violations was not changed by the amendments.

[4] John Scanlon, a forest ranger with the Department, states that he "inspected the shoreline area [including the shoreline area along the State land] at least twice weekly from April through November [each year from 1998 through 2006]" (Affidavit of John M. Scanlon ["Scanlon affidavit"], dated April 21, 2008, at 2). Mr. Scanlon further states that "During each visit . . . that snow was not covering the ground, I also observed [the effects of] vegetative management (ground cover mowing, brush clearing, etc.) . . . on the State [land]" (id. at 3). Although it may be reasonably inferred from these statements that respondent routinely "managed" (i.e., cut or mowed) brush and ground cover during each growing season from 1998 through 2006, staff does not specifically allege that respondent engaged in this activity on multiple occasions each year. (See generally Matter of Wilson, Order of the Commissioner, dated December 18, 2008, adopting the Administrative Law Judge's Summary Report at 9 n 8 [applying a similar analysis under a similar fact pattern]).

[5] ECL 9-0303(2) provides that the erection, use or maintenance of a building on forest preserve lands constitutes a violation. Arguably, therefore, each use of the dock, stairs, or bench may be considered as a separate violation. Given the lack of argument or evidence on this record concerning respondent's usage or maintenance of these structures, the penalty calculation assumes only a per structure penalty.

Accordingly, the maximum penalty authorized for respondent's violations is $1,200. Department staff's request for a penalty of no less than $50 but no more than $500 is well below the maximum. Staff argues that a penalty is warranted because respondent has had the use and enjoyment of the State land, including the State owned waterfront, "without assuming any tax burden therefor" (staff brief at 16). Staff also argues that the forest preserve lands are intended for the use and enjoyment of the general public, "not for the private enjoyment of any particular individual" and respondent's violations "did direct violence to the achievement of that public purpose" (id.). Additionally, staff states that respondent has been aware that his use of the State land was unauthorized for several years and has not taken corrective action (id. at 17).

Respondent argues that "the maximum amount that could be assessed would be $250[6] and that entire amount should be suspended" (respondent's memorandum of law ["respondent memorandum"], dated September 3, 2008, at 6-7). Respondent asserts that the State land has been used by adjacent property owners for nearly a century and that the use of the State land has historically been sanctioned by State regulators, including the Department (id. at 7). In response to staff's assertion that he should have taken corrective action years ago, respondent argues that "The passage of several years time since DEC first initiated this action is of no fault of Respondents" (id.). Respondent asserts that he entered into good faith negotiations with the Department in 2003 when he was made aware of the Department's concerns and that the failure of the Department to pursue the matter after those negotiations led him to "believe[] that the matter had been resolved" (id.).

Under the circumstances presented here, I recommend a $500 penalty, with the entire amount suspended provided that respondent implements the corrective measures described below. Given the modest size of the payable penalty sought by staff, it is clear that staff's principal objective is the removal of respondent's improvements from the State land. It is also clear from the record that respondent's principal objective is not the avoidance of the proposed penalty, but the maintenance of the status quo. Respondent, like those who owned respondent's parcel before him, has enjoyed the use of the State land as, essentially, an extension of his parcel. This use has been without authorization, but, prior to commencement of the instant proceeding, it was also largely tolerated by the Department. On this record, I conclude that a monetary penalty is not appropriate. Implementation of the corrective measures will bring the longstanding unauthorized use of the State land to an end and, provided that respondent implements the corrective measures, I recommend that no monetary penalty be assessed.

[6] It is not clear how respondent determined $250 to be the "maximum amount that could be assessed." In his memorandum of law, respondent misstates staff's penalty request under ECL 71-0703(1) as being for "no less than $50 but no more than $250" (respondent memorandum at 6). As previously noted (supra at 2), staff's actual request is for no less than $50 but no more than $500.

Injunctive Relief

Staff requests that the Commissioner issue an order directing respondent to remove (and not replace) the dock, staircase and bench from the State land. Respondent argues that "Neither ECL 71-0703 nor 71-4003 provide for the equitable remedies the Department seeks in its brief" (respondent memorandum at 10).

The argument that the Commissioner lacks authority to impose injunctive relief to address respondent's violations is without merit. Section 9-0105 of the ECL expressly states, "For the purpose of carrying out the provisions of [ECL article 9], the department shall have the power, duty and authority to: 1. Exercise care, custody and control of the several preserves, parks and other state lands described in this article." Additionally, ECL 9-0303(6) authorizes the Department to "dispose of any improvements upon state lands under such conditions as it deems to be in the public interest" (see Matter of French, Decision and Order of the Commissioner, July 20, 2007, at 22 [citing ECL 9-0303(6) as authority for injunctive relief in relation to violations of ECL article 9]). The ruling determined that respondent's maintenance and use of the dock, staircase and bench on forest preserve lands is in violation of ECL article 9. Accordingly, the Commissioner has the authority to order respondent to remove these unauthorized improvements from the forest preserve.

RECOMMENDATION

I recommend that the Commissioner issue an order:

1. holding that:

   (a) 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); and

   (b) 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);

2. assessing a civil penalty against respondent in the amount of $500 (five hundred dollars), all of which is to be suspended provided that respondent complies with the corrective action below; and

3. requiring respondent to remove, on or before 30 days after the date the Commissioner's order in this matter is issued, the existing staircase, dock, and bench from the State land and to cease placing improvements on the State land.

COMMENTS

At the Commissioner's direction, this summary report is being circulated to the parties as a recommended decision. Comments by the parties on the recommended decision must be received by 4:00 p.m. on Friday, August 7, 2009 and no responses to comments are authorized.

The parties are directed to send the original and two copies of any comments to Commissioner Alexander B. Grannis, c/o Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1010. One copy must also be sent to opposing counsel and must be sent at the same time and in the same manner as the transmittal to the Commissioner. The Commissioner will not accept submissions by electronic mail, or via facsimile.

/s/

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Richard A. Sherman
Administrative Law Judge

Dated: July 16, 2009
Albany, New York