STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 11 of the Environmental Conservation Law of the State of New York and Part 111 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

RULING

DEC Case Number:
R5-20121024-2023

- by -

BRIAN J. BEACH,

Respondent.

PROCEEDINGS

This ruling addresses a motion for order without hearing in lieu of complaint (motion) filed with the Office of Hearings and Mediation Services by staff of the New York State Department of Environmental Conservation (DEC or Department) on November 13, 2012. 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), staff may serve a motion for order without hearing in lieu of or in addition to a complaint. Staff mailed the motion to counsel for respondent Brian J. Beach on November 7, 2012. By its motion, staff alleges that respondent violated certain provisions of article 11 of the Environmental Conservation Law (ECL) and 6 NYCRR part 111 by directing the unauthorized construction and placement of a driveway on State lands used for the Chateaugay Fish Hatchery in Franklin County. The driveway extends from property (respondent's parcel) owned by respondent in the Town of Chateaugay, Franklin County, across State land to Fish Hatchery Road.

By email dated November 26, 2012, the Chief Administrative Law Judge (CALJ) approved a schedule for respondent's response to the motion, and for further responsive pleadings by the parties. Consistent with the schedule approved by the CALJ, respondent served his response to the motion on November 26, 2012, staff served a reply on December 20, 2012, and respondent served a sur-reply on January 3, 2013.

In support of its motion,[1] Department staff filed the following affirmations and affidavits, most of which include attached exhibits:

- affirmation (staff affirmation) of Scott Abrahamson, Assistant Regional Attorney, DEC, Region 5, dated November 7, 2012;

[1] Department staff's motion bears the caption: "Notice of Motion." Nevertheless, the document consists of both the motion and the notice of motion (see motion at 1 [stating that staff "moves the Commissioner of Environmental Conservation for an order . . . in favor of staff and against Respondent for violation of the Environmental Conservation Law ('ECL') § 11-2113 and 6 NYCRR 111.2(e)"]).

- affidavit of Thomas Gliddi, Forest Ranger, DEC, Region 5, sworn to on November 7, 2012;
- affidavit of Carolyn Wiggin, Assistant Land Surveyor 3, DEC, Region 5, sworn to on November 7, 2012;
- reply affirmation of Scott Abrahamson, Assistant Regional Attorney, DEC, Region 5, dated December 20, 2012;
- reply affidavit of Neal McCarthy, Fish Culturalist II, DEC, Region 5, sworn to on December 19, 2012; and
- reply affidavit of Carolyn Wiggin, Assistant Land Surveyor 3, DEC, Region 5, sworn to on December 18, 2012.

In opposition to the motion, respondent filed the following affidavits, some of which include attached exhibits:

- affidavit of Frank Sears, Lake Placid, New York, sworn to November 18, 2012;
- affidavit of John Sampica, Chateaugay, New York, sworn to November 19, 2012;
- affidavit of Patrick Collins, Chateaugay, New York, sworn to November 19, 2012;
- affidavit of Kirby Cook, Town Highway Superintendent, Chateaugay, New York, sworn to November 21, 2012;
- affidavit of Kip Cassavaw, licensed land surveyor, Bellmont, New York, sworn to November 19, 2012; and
- affidavit of Brian S. Stewart, attorney for respondent, Malone, New York, sworn to January 3, 2013.

Department Staff's Allegations

By its motion, Department staff alleges that "on or about October 10 and October 11, 2012, Respondent caused or directed the construction and placement of a private driveway over lands . . . now used as the Chateaugay State Fish Hatchery and . . . injured or destroyed plants growing on State land" in violation of ECL 11-2113 and 6 NYCRR 111.2(e) (motion at 1). Although it is not clear from the motion, staff's affirmation states that staff is charging respondent with two distinct violations: one violation of ECL 11-2113 for having "engaged in an activity that has been posted" (staff affirmation ¶ 22), and one violation of 6 NYCRR 111.2(e) for "causing trees that were growing on the Hatchery Land to be injured, removed or destroyed" (staff affirmation ¶ 26).[2] Staff seeks a $100 civil penalty for the first alleged violation and a $200 penalty for the second (staff affirmation ¶¶ 28-29).

Department staff requests that the Commissioner issue an order (i) holding respondent liable for the violations enumerated above; (ii) assessing a $300 penalty against respondent; and (iii) directing respondent to remove the driveway from the State land and restore the affected land to a condition that is acceptable to staff (staff affirmation ¶ 42).

[2] I note that the Commissioner has directed staff to clearly denominate each cause of action in the charging instrument (Matter of RGLL, Inc., Decision and Order, Dec. 29, 2009, at 5 n 4 ["Numbering the alleged violations or causes of action would have been helpful, and I direct staff counsel to do this for all future matters"]).

Respondent's Position

Respondent denies that he has violated either ECL 11-2113 or 6 NYCRR 111.2(e) (see response ¶ 6[c] [denying "each and every allegation" contained in staff affirmation ¶¶ 22, 26]). Respondent also advances six affirmative defenses. Most of respondent's defenses argue that the construction of the driveway was legal because respondent's parcel held an easement or other right of access over the subject land (response at 7-10). Additionally, respondent argues that the subject land was not posted until after the driveway was constructed and, therefore, he did not violate ECL 11-2113 (response at 10-11). Lastly, respondent argues that the Department's determination to deny access to a public highway and post the land was made in violation of the State Environmental Review Act (SEQRA) and, therefore, the "action . . . was void and without effect" (response at 11).

FINDINGS OF FACT

Based upon the papers filed by Department staff and respondent, I make the following findings of fact (see 6 NYCRR 622.12[e]):

1. The Chateaugay Fish Hatchery is located on the northern portion of approximately 14 acres of State-owned land (State land) in Franklin County (Wiggin affidavit ¶ 9, exhibit 2 [survey depicting the four parcels that comprise the State land at issue and noting the acreage of each parcel]).

2. The Chateaugay Fish Hatchery is accessed via Fish Hatchery Road, which extends eastward from its intersection with State Route 11, turns sharply north near the southeast corner of respondent's parcel, and ends at the fish hatchery (see Wiggin affidavit ¶¶ 9, 17 [describing Fish Hatchery Road as extending east from State Route 11, turning "sharply northward before ending at the Fish Hatchery buildings"], exhibit 2; Cassavaw affidavit, exhibit A [survey map depicting the southern portion of Fish Hatchery Road and noting that the fish hatchery is located to the north]).

3. On or about October 10 and 11, 2012, respondent directed the construction and placement of a driveway extending south from respondent's parcel to the northern edge of the east-west portion of Fish Hatchery Road (response ¶ 1.a).

4. The southern boundary line of respondent's parcel is more than 60 feet north of the nearest paved edge of Fish Hatchery Road (response ¶ 4.f.ii; see also Wiggin affidavit ¶¶ 21, 27, 32, exhibit 6).

5. The State of New York acquired the land along the southern boundary of respondent's parcel under deed dated May 29, 1928 (Wiggin affidavit ¶¶ 7-8, exhibit 1).

6. The State acquired the land "pursuant to Chapter 517, Laws of 1927" (Wiggin affidavit, exhibit 1 at 1), which appropriated funds for, among other things, "[p]lanting of fish,

and supplies and equipment for establishing and maintaining rearing stations, including purchase of land" (staff affirmation, exhibit 1 at 1233).

DISCUSSION

Service of Process

Department staff sent the motion to respondent's counsel by ordinary mail. Prior to mailing the motion, staff sought and obtained the consent of respondent's counsel to serve the motion on him rather than on respondent (see affidavit of service, Nov. 7, 2012, ¶ 6, attachment). As discussed below, this method of service is improper.

Pursuant to 6 NYCRR 622.12(a) a motion for order without hearing in lieu of complaint must be served "in the same manner" as a notice of hearing and complaint. Pursuant to 6 NYCRR 622.3(a)(3), unless an alternative method is authorized by the ALJ, a notice of hearing and complaint must be served "by personal service consistent with the CPLR or by certified mail." Staff did not seek authorization from this office for an alternative means of service nor did staff serve the motion by certified mail. Accordingly, staff must demonstrate that it served the motion "by personal service consistent with the CPLR."

Department staff asserts that it "personally served Respondent by mailing a copy of the notice of motion and motion . . . to [respondent's counsel] pursuant to CPLR Rule 2103(b)[(]2)" (staff affirmation ¶ 14). That provision of the CPLR, however, applies to service of interlocutory papers, and may not be relied upon to effect personal service. The methods authorized to effect personal service are set forth under article 3 of the CPLR. Where, as here, a respondent is a natural person, the authorized methods of service are set forth under CPLR 308. Absent circumstances that are not present here, CPLR 308 does not authorize service by mail alone,[3] nor does it authorize service upon an agent.[4] Accordingly, the method of service used by staff fails to satisfy the requirements of CPLR 308.[5]

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[3] Although CPLR 308 has no express provision for service by mail alone, CPLR 308(5) provides that, if other means of service prove impracticable, service may be made "in such manner as the court, upon motion without notice, directs."

[4] CPLR 308(3) provides for service upon the duly designated agent of a natural person, but that designation must be "in a writing, executed and acknowledged in the same manner as a deed, with the consent of the agent endorsed thereon" and must be "filed in the office of the clerk of the county in which the principal to be served resides or has its principal office" (CPLR 318). Staff does not maintain that respondent's counsel was designated in this manner.

[5] The method used for service of process must also satisfy the requirements of due process. This requires that the method of notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" Mullane v Central Hanover Bank & Trust Co., 339 US 306, 314 [1950]). The method of service used by staff does not offend due process as it was reasonably calculated to, and did, provide respondent with notice of the action.

The lack of personal service of the motion upon respondent is, however, not fatal to Department staff's motion. As noted, respondent's counsel consented to being served on behalf of his client. Consistent with that consent, respondent's counsel has not contested jurisdiction. The response filed by respondent's counsel, and verified by respondent (see response at 12), raises six affirmative defenses, none of which challenge the motion on the basis of personal jurisdiction (see response at 7-11). Because respondent did not contest personal jurisdiction in the response, or at any time since, respondent has waived his right to challenge these proceedings on the basis of the lack of personal service (see Goldenberg v Westchester County Health Care Corp., 16 NY3d 323, 327 [2011] [holding that the affirmative defense of lack of personal jurisdiction "[is] properly raised in either an answer or a pre-answer motion to dismiss" (internal citations omitted)]; McGowan v Hoffmeister, 15 AD3d 297 [1st Dept 2005] [holding that "[h]owever meritorious the affirmative defense might have been, the law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion . . . is waived"]).

Summary Judgment Standard

Pursuant to 6 NYCRR 622.12(d), "a contested 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."

New York courts have long held that summary judgment is a drastic remedy, to be granted only where it is clear that there are no material issues of fact to be adjudicated (see e.g. Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [holding that "[s]ummary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact" (internal quotation marks and citations omitted)]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957] [holding that "[t]his drastic remedy should not be granted where there is any doubt as to the existence" of material issues of fact]). As the Court noted in Sillman, when determining a motion for summary judgment, it is "'issue-finding, rather than issue-determination, [that] is the key to the procedure'" (id. at 404 [quoting Esteve v Abad, 271 AD 725, 727 (1st Dept 1947)]).

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. In 2003, the Commissioner elaborated on the standard for determining a motion for order without hearing:

> "The moving party on a summary judgment motion has the burden of establishing his cause of action or defense sufficiently to warrant the court 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]). Where a moving party establishes a prima facie case in its favor, the burden shifts to the responding party to proffer competent evidence in rebuttal (see Ramos v Howard Indus., Inc., 10 NY3d 218, 224 [2008] [stating that once the movant has "met its initial burden, in order to defeat summary judgment, [the non-moving party] must raise a triable question of fact by offering competent evidence which, if credited by the jury, is sufficient to rebut [the movant's] evidence" (internal quotation marks and citations omitted)]).

As discussed below, applying the summary judgment standard to Department staff's motion, I conclude that staff's motion for order without hearing must be denied.

The State Land and Fish Hatchery Road

Respondent does not dispute that he directed the construction and placement of a private driveway on State land between respondent's parcel and Fish Hatchery Road (response ¶ 1.a). There is also no dispute between the parties with regard to the location of the driveway in relation to the State land and Fish Hatchery Road (see Wiggin reply affidavit ¶¶ 10, 22 [confirming the accuracy of the site survey filed by respondent]). As detailed below, the crux of the dispute between the parties is the status of Fish Hatchery Road and of the State land at the location of the driveway.

The State land is shaped somewhat like a backward L with an enlarged upper half (see Wiggin affidavit ¶ 9, exhibit 2). Fish Hatchery Road enters the State land at its southwestern boundary (i.e., at the bottom left of the backward L), continues east on the State land, then turns sharply north (at the crook of the L) and continues on the north-south portion of the State land (i.e., the vertical portion of the L) until reaching the fish hatchery (see findings of fact ¶ 2). Measured perpendicular to the course of Fish Hatchery Road, the southern portion of the State land (roughly the lower half of the L) is 100 feet wide (id.). The Chateaugay Fish Hatchery is located on the broader, northern portion of the State land (see Wiggin affidavit ¶ 17 [noting that Fish Hatchery Road turns "northward before ending at the Fish Hatchery buildings"]; Cassavaw affidavit, exhibits A [survey map depicting the southern portion of Fish Hatchery Road and noting that the fish hatchery is located to the north], G [1942 aerial photograph depicting, at far right, Fish Hatchery Road and the Chateaugay Fish Hatchery]). Thus, the southern portion of the State land is relatively narrow and essentially straddles Fish Hatchery Road, while the northern portion is much wider and accommodates the fish hatchery.

Department staff argues that the entirety of the State land falls within the protection of ECL 11-2113 and 6 NYCRR 111.2(e). Respondent argues that the Fish Hatchery Road is a public highway and that the southern portion of the State land is the right-of-way for Fish Hatchery Road. Respondent further argues that, as an adjoining landowner, he has the right to cross the right-of-way to access the Fish Hatchery Road (respondent memorandum at 2).

The right of an adjoining landowner to access a public highway is well established (see e.g. Matter of Scoglio v County of Suffolk, 85 NY2d 709, 712 [1995] [holding that "[a]n owner of land adjoining a highway or street possesses, as an incident to such ownership, easements of light, air and access . . . regardless of whether the owner owns the fee of the highway or street itself"]). This right of access includes the right to cross the right-of-way surrounding a highway (see Griefer v County of Sullivan, 246 AD 385, 387 [3d Dept 1936] [holding that lands acquired by the State for highway use "became a part of the right-of-way of the new highway and as such were burdened with the usual right of access in the plaintiff as an abutting owner. She had access over this right-of-way to the pavement of the new highway for the entire distance that her lands fronted upon the new highway"], affd. 273 NY 515 [1937]; see also Scoglio, 85 NY2d at 712 [citing Griefer and holding that "[t]he evident intent of the statute [i.e., Highway Law § 125, governing the "sale, conveyance, grant or lease" of excess lands within a right-of-way] is to protect the abutting landowner and prevent the abridgement or extinguishment of the rights traditionally attaching to lands adjoining a highway"]).

Accordingly, if Fish Hatchery Road is a public highway and respondent's parcel abuts the right-of-way, respondent has the right of reasonable access to the road, subject to any applicable traffic regulations (Northern Lights Shopping Ctr. v State of New York, 20 AD2d 415, 420-421 [1964] [holding that "access means reasonable ingress to and egress from abutting land to a system of public highways, subject to reasonable traffic regulations"], affd 15 NY2d 688 [1965], cert denied 382 US 826 [1965]).

Respondent proffered several affidavits to establish the factual basis for his assertion that he has the right to access Fish Hatchery Road. With regard to whether Fish Hatchery Road is a public highway, respondent offers the affidavit of the Town Highway Superintendent for the Town of Chateaugay. The superintendant states that he has been employed by the Town Highway Department since 1978 and has held the position of superintendent since 1989. He states that "[t]he entire length of the Fish Hatchery Road is a town road" (Cook affidavit ¶ 7), and that during his tenure with the Highway Department, "the Town has maintained, plowed, paved and repaired the entire six[-]tenths mile length of [Fish Hatchery Road]" up to the gate of the fish hatchery (id. ¶ 8-9). Additionally, he states that Fish Hatchery Road is included on the New York State Department of Transportation "CHIPS[6] list . . . showing the name and length of every town road" (id. ¶ 10) and has "appear[ed] on the official County Highway map as a town road" since 1966 (id. ¶¶ 11-12).

Although Department staff emphasizes the Town Highway Superintendent's admission that he has "no personal knowledge of exactly how or when the Fish Hatchery Road became a town road" (see Cook affidavit ¶ 16; staff reply memorandum ¶ 23), staff does not directly contest the superintendant's representations regarding the town's use and maintenance of Fish Hatchery Road as a town road. The failure of the highway superintendant to establish how and when Fish Hatchery Road became a public highway does not necessarily impugn his sworn statement that the road is, and for decades has been, a town road. I conclude that respondent has

[6] According to the New York State Department of Transportation website, "CHIPS" refers to the "Consolidated Local Street and Highway Improvement Program" which was established by the legislature in 1981 (see https://www.dot.ny.gov/programs/chips [accessed Apr. 11, 2013]).

raised a material issue of fact with regard to the status of Fish Hatchery Road at the location of respondent's driveway.

In addition to the highway superintendant's affidavit, respondent filed the affidavits of individuals who are familiar with the historical use of Fish Hatchery Road. These affidavits support respondent's assertion that the road has been used by members of the public for many years (see e.g. Sampica affidavit ¶¶ 4-13 [stating that "men and vehicles" used Fish Hatchery Road to access and work nearby hay fields throughout the 1950s and 1960s]; Sears ¶¶ 3-10 stating that he owned the respondent's parcel from 1991 through 1995 and that "men and vehicles" used Fish Hatchery Road to access and work the hay fields multiple times each year during the time he owned the property]). Additionally, I note that the Department's website invites the public to visit the hatchery year round (see DEC Region 5 Fish Hatcheries, http://www.dec.ny.gov/outdoor/21664.html [accessed Apr. 18, 2013] [stating that the hatchery has "Visiting Hours: 8 am-3 pm every day year round"]). Public access to the fish hatchery is via Fish Hatchery Road which, as noted previously, is maintained and plowed by the town up to the gate of the hatchery.

Of course, if Fish Hatchery Road is determined to be a public highway, it still must be established that the State land used by respondent to access the road is within the right-of-way for the road. The distance from the edge of pavement to respondent's parcel at the location of the driveway is at least 60 feet (see findings of fact ¶ 4). Department staff argues that this area of State land is not necessary for, or part of, the right-of-way for Fish Hatchery Road (staff reply memorandum ¶¶ 56-65). Respondent argues that this area is part of the right-of-way.

Respondent filed the affidavit of a licensed land surveyor who avers that the 100-foot wide right-of-way was necessary because of the topography of the land where Fish Hatchery Road was built. He states that, in order to cross a small creek and deep ravine, a culvert and a large amount of fill had to be placed at the site (Cassavaw affidavit ¶¶ 8-10, exhibit A [survey depicting the land features and improvements]). He further states that the fill is held in place by a retaining wall and opines that, in order to maintain the retaining wall, men and machinery would require "a strip of land . . . approximately 20 feet in width north of the northernmost section of the retaining wall" (id. ¶¶ 11-12). He concludes that the area north of Fish Hatchery Road, where it abuts respondent's parcel "represents a reasonable and appropriate amount of land for the State to have acquired in order to construct the Fish Hatchery Road" (id. ¶ 18). Similarly, the town highway superintendant states that the retaining wall holds in place "an enormous amount of fill" and opines that "any substantial work to be done to repair that retaining wall will require the placement of men and machinery north of the retaining wall" (Cook affidavit ¶¶ 18, 20). Respondent also proffers documentation from Department records and from the New York State Department of Transportation in further support of his position that the State land at the location of the driveway is part of the Fish Hatchery Road right-of-way (see Stewart affidavit, Jan. 3, 2013, ¶¶ 15-29; exhibits G-M).

Department staff does not directly challenge respondent's factual statements regarding the location and purpose of the culvert, fill, and retaining wall, but does argue that respondent has failed to show that a 100-foot wide right-of-way is necessary at the location where respondent constructed his driveway (staff reply memorandum ¶¶ 56-65). Staff asserts that the driveway is

"over 130 feet away from the bank of the deep ravine" (id. ¶ 58; Wiggin reply affidavit ¶ 17 [stating that "the centerline" of respondent's driveway is 132 feet from the top of the ravine]). Staff argues that there are no highway-related improvements near the location where respondent's driveway crosses onto the State land and that an existing "line of large trees . . . thirty (30) feet from the centerline of Fish Hatchery Road" should be deemed to be the "bounds of Fish Hatchery Road" at the location of respondent's driveway (staff reply memorandum ¶¶ 60, 64; Wiggin reply affidavit ¶¶ 14, 18).

Both parties have proffered competent evidence in support of their respective positions regarding the existence and dimensions of the Fish Hatchery Road right-of-way. Neither party has established its entitlement to a decision in its favor as a matter of law on these issues. Accordingly, I conclude that respondent has raised material issues of fact with regard to the right-of-way of Fish Hatchery Road at the location of respondent's driveway.

As noted at the outset of this discussion, summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of material issues of fact. Further, where both parties have presented competent evidence on a material issue of fact, the weight of that evidence is not considered at this stage of the proceedings (see Alvarez v NewYork City Hous. Auth., 295 AD2d 225, 226 [1st Dept 2002] [holding that "inconsistencies in the several accounts of the incident go to the weight of the evidence, not its competence, and the value to be accorded to the evidence is a matter for resolution by the trier of fact"]). Here, both parties have introduced affidavits and documentary evidence that could support determinations in their favor. Accordingly, I conclude that the parties' filings establish that there are disputes over material issues of fact that warrant adjudication and, therefore, staff's motion for order without hearing is denied.

Staff Motion to Amend its Pleading

Staff also moves to amend its motion for order without hearing to add an allegation that respondent violated ECL 9-1501 by his removal of two trees from State land. Respondent objects and argues that staff's amendment would introduce factual issues that were not raised in the original motion. Respondent also asserts that staff's motion is not premised on new evidence and the proposed additional violation should have been charged in the original motion for order without hearing.

In Department enforcement proceedings, consistent with the CPLR, motions to amend pleadings are to be freely granted in the absence of prejudice to the non-moving party (see 6 NYCRR 622.5[b]; CPLR 3025[b]). Here, as respondent notes, the factual allegation that respondent removed trees from State land was contained in staff's original filings on its motion for order without hearing (see motion at 1 [alleging that respondent "injured or destroyed plants" on State land]; Gliddi affidavit ¶ 7 [stating that during construction of the driveway, "trees had been removed"]). Although respondent has raised certain defenses, he admits that "two small pine trees were removed" to construct the driveway (response ¶ 1.h). Under these circumstances, and given that respondent will have ample time to prepare a defense prior to hearing, I see no prejudice to respondent in adding the additional charge proposed by staff.

Staff's motion to amend its motion for order without hearing is granted. Specifically, the motion for order without hearing is amended to add a cause of action alleging that respondent "removed two trees" from lands of another without the consent of the owner in violation of ECL 9-1501 (see staff reply ¶¶ 15, 16). Respondent may, at his discretion, file an amended answer addressing the additional cause of action within 20 days of his receipt of this ruling. In that regard, I note that I will deem all of respondent's filings to date as responsive to the additional cause of action and, therefore, respondent need not file an amended answer to repeat arguments or assertions previously made.

CONCLUSION

Department staff's motion for order without hearing is denied. Staff's motion to amend its motion for order without hearing is granted. Pursuant to 6 NYCRR 622.12(e), staff's motion papers and respondent's responsive papers are now deemed to be the complaint and answer, respectively, for the purposes of this proceeding. I will contact the parties shortly after they have been served with this ruling to schedule the hearing on this matter. Lastly, I remind the parties that mediation services are available through this office and I encourage the parties to seek a mutually acceptable resolution to this matter.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: May 3, 2013
Albany, New York