NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Section 480-a of the Real Property Tax Law and Part 199 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

WALTER E. FARNHOLTZ,

Respondent.

ORDER

DEC Case No.
R7-20090728-81

Respondent Walter E. Farnholtz owns property in the Town of Truxton, Cortland County, New York. In 1991, he committed one hundred acres of the property to forest crop production pursuant to Real Property Tax Law ("RPTL") § 480-a and part 199 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") (the "eligible tract"). Sometime in 1993 or 1994, respondent constructed a cabin within the boundaries of the eligible tract.

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") commenced this administrative enforcement proceeding by service of an Intent to File Notice of Violation ("notice of intent"),[1] dated April 27, 2009, by certified mail, on respondent. The notice of intent alleges that respondent, by constructing the cabin within the boundaries of the eligible tract, converted one acre that he previously had committed to forest crop production. By letter dated July 22, 2009, respondent requested a hearing on allegations set forth in the notice of intent. Pursuant to 6 NYCRR 622.3(b)(2), the notice of intent takes the place of the complaint in this proceeding and respondent's request for a hearing takes the place of the answer.

This matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Richard A. Sherman. After conducting an adjudicatory hearing in accordance with the procedures of the State Administrative Procedure Act and 6 NYCRR Part 622 (see 6 NYCRR 199.10[b]), ALJ Sherman prepared the attached hearing report. The ALJ found that respondent converted one acre of the eligible tract and accordingly violated RPTL 480-a(7)(a)(i). The ALJ recommends that a notice of violation be issued. I adopt the ALJ's hearing report as my decision in this matter.

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[1] The notice of intent was issued by staff pursuant to 6 NYCRR 199.10(a), which requires that, where the Department determines that a notice of violation is to be issued, the Department must "notify the [land] owner in writing of its intention to issue [the] notice of violation . . . at least 30 days prior to the issuance of such notice of violation."

I hereby direct Department staff to issue a notice of violation to respondent in accordance with RPTL 480-a(7) and 6 NYCRR 199.10. The Real Property Tax Law provides that, in addition to the owner, the Department shall give notice of violation to the county treasurer of the county or counties in which such tract is located (see RPTL 480-a[7][f]). The applicable regulations further provide that notice be given to the local assessor (see 6 NYCRR 199.10[e]). Accordingly, Department staff is directed to send a copy of the notice of violation, together with a copy of this order, to the County Treasurer of the County of Cortland and the Assessor of the Town of Truxton.

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

I. Respondent Walter E. Farnholtz is adjudged to have violated RPTL 480-a(7)(a)(i) by constructing a cabin within the eligible tract that he owns in the Town of Truxton, Cortland County, New York, and thereby converting one acre of the eligible tract that had been committed to forest crop production.

II. Department staff shall issue a notice of violation to respondent and shall transmit copies of such notice, together with a copy of this order, to the County Treasurer of the County of Cortland and to the Assessor of the Town of Truxton.

III. All communications from respondent to the Department concerning this order shall be made to Margaret A. Sheen, Esq., Assistant Regional Attorney, NYSDEC Region 7, 615 Erie Boulevard West, Syracuse, New York, 13204-2400.

IV. The provisions, terms, and conditions of this order shall bind respondent Walter E. Farnholtz and his agents, successors and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

/s/

By: _____

Alexander B. Grannis
Commissioner

Dated: March 31, 2010
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

the Alleged Violations of
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- by -

WALTER E. FARNHOLTZ,

Respondent.

DEC Case No. R7-20090728-81

HEARING REPORT

- by -

/s/

_____

Richard A. Sherman
Administrative Law Judge

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") commenced this administrative enforcement proceeding by service of an Intent to File Notice of Violation ("Notice of Intent"),[1] dated April 27, 2009, by certified mail, on Walter E. Farnholtz ("respondent"). The Notice of Intent alleges that respondent converted one acre of a tract of forest land that respondent had committed to forest crop production pursuant to Real Property Tax Law ("RPTL") § 480-a and part 199 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). By letter dated July 22, 2009, respondent requested a hearing on the allegations set forth in the Notice of Intent. Pursuant to 6 NYCRR 622.3(b)(2), the Notice of Intent takes the place of the complaint in this proceeding and respondent's request for a hearing takes the place of the answer.[2]

On November 20, 2009, an administrative enforcement hearing was held at the DEC Region 7 sub-office in Cortland, New York, to consider Department staff's allegations. Pursuant to 6 NYCRR 199.10(b), this office provided written notice of the hearing to both respondent and the Assessor of the Town of Truxton,[3] by certified mail dated November 10, 2009. The hearing was held in accordance with the provisions of the Department's uniform enforcement hearing procedures (6 NYCRR part 622). Staff was represented by Margaret Sheen, Assistant Regional Attorney, DEC Region 7, who called two witnesses: Matthew Swayze, Senior Forester, DEC Region 7; and Richard Pancoe, Supervising Forester, DEC Region 7. Respondent, a former attorney (see transcript at 16), appeared pro se and called only himself as a witness. A list of the exhibits received into evidence is appended to this hearing report.

Shortly after the hearing convened, respondent expressed his desire to discuss a possible settlement with Department staff and staff agreed to a brief adjournment for that purpose. The parties were unable to settle the matter and, therefore, the hearing was reconvened.

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[1] The Notice of Intent was issued by staff pursuant to 6 NYCRR 199.10(a), which requires that, where the Department determines that a notice of violation is to be issued, the Department must "notify the [land] owner in writing of its intention to issue [the] notice of violation . . . at least 30 days prior to the issuance of such notice of violation."

[2] In his opening statement, respondent asserted that certain procedural irregularities occurred prior to the commencement of the hearing. Specifically, respondent asserted that neither a pre-hearing conference nor a statement of readiness were utilized in this proceeding and that both are required by the Department's enforcement hearing regulations (transcript at 7). Pursuant to 6 NYCRR 622.8(a), however, a pre-hearing conference is required only where "notice thereof is provided in the notice of hearing," and no pre-hearing conference was noticed in this proceeding. With regard to the statement of readiness, the regulations provide only that this office is required to schedule a hearing upon receipt of a properly filed statement. The regulations do not preclude this office from scheduling a hearing in the absence of a statement of readiness (see 6 NYCRR 622.9). Moreover, a statement of readiness would have served little purpose here; the hearing was held at the written request of respondent, the hearing date was discussed with the parties during a conference call on November 5, 2009, and respondent was provided with written notice of the hearing by certified mail dated November 10, 2009.

[3] Pursuant to 6 NYCRR 199.10(b), the real property assessor having jurisdiction over the forest tract at issue must be given notice of the hearing and an opportunity to be heard. During a conference call with the Assessor of the Town of Truxton and the parties on November 5, 2009, the assessor advised that he did not intend to participate in the hearing, and he did not participate.

This office received the hearing transcript on December 18, 2009. I made arrangements for the parties to review the transcript and authorized the parties to file errata, if they deemed it necessary, on or before January 19, 2010. Because no errata were filed, the hearing record closed on January 19, 2010.

FINDINGS OF FACT

1. At all times relevant to these proceedings, respondent Walter E. Farnholtz was the owner of a 100 acre tract (the "eligible tract") of forest land located on property (Tax Map Number 39.00-01-08.10) in the Town of Truxton, Cortland County (exhibit 2; transcript at 63).

2. Respondent filed an application with the Department in 1991 for a certificate of approval in relation to the eligible tract, and the Department issued the certificate of approval (certificate number 11-12) to respondent in 1991 (exhibit 2; transcript at 64).

3. Respondent filed annual commitments with the Department declaring in each filing that the entire eligible tract would be committed to the "ten year work schedule . . . listed on the certificate of approval issued by the [DEC] Regional Forester" and acknowledging that "conversion of any part of the certified eligible tract . . . will result in a penalty as provided in [RPTL 480-a(7)]" (exhibit 4; see also transcript at 73-74).

4. Respondent constructed a cabin within the boundaries of the eligible tract, near the west bank of Westcott Brook[4] (exhibit 9; transcript at 13, 76), sometime in 1993 or 1994 (transcript at 57, 67-68).

5. Department staff inspected various sections of the 100 acre eligible tract over the past 20 years and had knowledge of the cabin several years prior to commencing this enforcement proceeding (see transcript at 64-71; exhibits 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19). The precise date that staff first became aware of the cabin is not established in the record.

DISCUSSION

Real Property Tax Law § 480-a provides a tax exemption for certain privately owned forest lands. The law is intended "to provide a means by which present and future forest lands may be protected and enhanced as a viable segment of the State's economy and to assist in the protection of the environmental benefits of the State's forest resources" (6 NYCRR 199.2).

Pursuant to RPTL 480-a(2)(a), an owner of a tract of 50 or more contiguous acres of forest land may apply to the Department for certification that the tract is eligible for the forest land tax exemption. If the Department determines that the tract is eligible for the tax exemption,

[4] Sometimes spelled "Westscott Brook" in the record.

it issues a certificate of approval to the land owner, together with an approved management plan[5] and a certified commitment[6] (id.). To qualify for the forest land tax exemption, the land owner must file an application for the exemption, accompanied by the certified commitment, with the appropriate real property assessor and also file the certificate of approval with the appropriate county clerk's office (RPTL 480-a[3][a]). Thereafter, to continue receiving the tax exemption, the land owner must annually file a new certified commitment, committing the eligible tract to forest crop production for the next ten succeeding years, with the assessor (id.).

In accordance with RPTL 480-a(7), the Department must, after providing the land owner with notice and an opportunity to be heard, issue a notice of violation under certain circumstances. These circumstances include where the Department has determined that a certified tract or portion thereof has been converted to a use that precludes management of the land for forest crop production (RPTL 480-a[7][a][i]). Lands that are converted from forest crop production are no longer eligible for the forest tax exemption and the tract owner is subject to a penalty commensurate with the extent of the conversion (see RPTL 480-a[7][c], [d], [e]). Where the Department determines that a violation has occurred, it will provide a notice of violation to the county treasurer of the county where the tract is located and the county treasurer will then compute the appropriate penalty and interest charges (RPTL 480-a[7][f]).

Department staff bears the burden of proof on all charges and matters that it affirmatively asserts in the Notice of Intent (see 6 NYCRR 622.11[b][1]) and respondent bears the burden of proof on all affirmative defenses (see 6 NYCRR 622.11[b][2]). The party bearing the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).

Department Staff's Allegations

Department staff alleges that respondent violated RPTL 480-a(7)(a)(i) by converting one acre of respondent's eligible tract to a use that precludes that acre from being managed for forest crop production (exhibit 3 [Notice of Intent]; transcript at 5-6). Specifically, staff alleges that respondent's construction and maintenance of a cabin on the eligible tract precludes the area occupied by and immediately surrounding the cabin from use for forest crop production (transcript at 15, 55). Staff testified that in addition to "[t]he cabin itself [interfering with forest crop production], trees around it were not cut and in the immediate vicinity around the cabin the stand was not thinned" (id. at 55). Because staff determined that the acre occupied by and surrounding the cabin is no longer suitable for forest crop production, staff seeks to revoke the certificate of approval for that acre of the eligible tract.

[5] As applicable here, an approved management plan is a Department approved plan for the management of an eligible tract. The plan contains the requirements and standards to ensure the continuing production of a merchantable forest crop (see RPTL 480-a[1][a][i]).

[6] A certified commitment is a declaration made by the land owner, and certified by the Department, stating that the eligible tract will remain committed to continued forest crop production for the next ten succeeding years (see RPTL 480-a[1][b], [2][a]).

Respondent's Forest Management Plan Amendment

Although respondent does not concede that the cabin offends the forest tax law, he voluntarily amended his forest management plan "to remove that one acre that is so offensive"[7] several months prior to the hearing (transcript at 7; see also exhibit 2 [New York State Forest Tax Law Amendment: Farnhotlz Property, dated June 1, 2009]). Respondent argues, essentially, that his voluntary removal of the acre surrounding and including the cabin renders this revocation proceeding moot. He testified that he spoke with "the real property tax service office and to the assessor, both of which see no problem with handling the removal [of] this one acre in that fashion" (transcript at 7).

Respondent's voluntary amendment of his forest management plan and his other efforts to resolve this matter are noteworthy. However, these actions do not alter the fact that the law requires the Department to issue a notice of violation under certain circumstances. The controlling statute expressly states that where it is determined that a partial conversion has occurred, "[t]he Department *shall* . . . issue a notice of violation" (RPTL 480-a[7][a] [emphasis supplied]). The statute provides some discretion to staff to determine that a violation has not occurred where the land owner's failure to comply with the law was "due to reasons beyond the control of the owner" and the violation can be readily corrected. This discretion, however, does not extend to conversions (see RPTL 480-a[7][a], [b] [providing that the department "may determine that a violation [other than a conversion] has not occurred if the failure to comply was due to reasons beyond the control of the owner and such failure can be corrected forthwith without significant effect on the overall purpose of the management plan"]; see also 6 NYCRR 199.10[d]).

Compatible or Supportive Use

Additionally, respondent argues that the cabin "does not preclude nor interfere with any kind of forest crop" nor "materially alter the forest land with any adverse effect" (transcript at 8). Respondent also argues that it is "questionable whether [the cabin is] permanent because it sits on small wooden posts which have and will continue to deteriorate" (id.). These arguments are grounded in the regulatory definition of a "compatible or supportive use" which is defined, in part, as:

> "any use of an eligible tract which is desired by the owner and compatible with or supportive of the continuing production of a merchantable forest crop. A use will be considered to be compatible or supportive unless it precludes forest crop production, involves permanent physical construction, or materially alters forest land with significant adverse impact upon the condition of forest crops"

(6 NYCRR 199.1[g]). What constitutes a "permanent structure" under the regulations is not further defined. Nevertheless, the cabin has been in place for approximately 15 years and respondent testified that the cabin "couldn't be moved" and that "it wasn't practical" to remove the cabin from the certified tract (transcript at 74-75). On this record, I conclude that the cabin is

[7] Pursuant to 6 NYCRR 199.6(a)(6)(v), forest management plans must list the acreage of each stand or forest management area estimated to the nearest whole acre.

a permanent structure for the purposes of the forest tax law and, therefore, the cabin is not a compatible or supportive use.

Moreover, irrespective of whether the cabin constitutes a permanent structure, it has indisputably precluded trees from growing within its footprint for the past 15 years and will continue to do so as long as it remains in place. In addition, Department staff's testimony regarding the lack of appropriate forest management activities (e.g., thinning of undesirable trees and harvesting of desirable trees) in the area surrounding the cabin was uncontroverted by respondent. Respondent argues that he does not "see how this cabin violates the 480-a" because no trees were cut in the area where the cabin was built and the existing "trees around the cabin are hemlock which are of low [commercial] value" (transcript at 80). This argument ignores the fact that the land occupied by and surrounding the cabin has not been managed to enhance forest crop production in accordance with respondent's approved management plan. Accordingly, I conclude that the construction and maintenance of the cabin precludes forest crop production on the land occupied by and surrounding the cabin.

Affirmative Defense of Laches

Respondent argues that "the equitable estoppel of laches"[8] is applicable under the circumstances presented here (transcript at 8). Respondent asserts that "DEC officers have known or should have known . . . about the existence of this cabin for the 15 years [it has] been in existence" (id. at 8-9). Respondent testified extensively regarding the various members of the Department that visited respondent's 100 acre eligible tract over the nearly two decades the tract has been in the forest land tax program (see transcript at 64-71).

Although respondent did not state that he knew that a particular member of the Department saw or had knowledge of the cabin, he testified that the "only north[-]south woods road through the property on the west side of Westcott Brook goes right next to the cabin" (id. at 67; see also id. at 43 [testimony of DEC Senior Forester Swayze stating that he was standing on the woods road, 10 feet away from the cabin, when he photographed the cabin). Additionally, respondent testified that he sometimes used his own vehicle to escort a DEC forester through parts of the eligible tract (id. at 66). Although the precise date that a Department staff member first became aware of the cabin cannot be established on this record, I conclude that respondent has established by a preponderance of evidence that staff had knowledge of the cabin several years prior to commencing this enforcement proceeding. Nevertheless, for the reasons discussed below, respondent's affirmative defense must fail.

Respondent's defense of laches is unavailing in this proceeding (see Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177 n 2 [1985] ["It is settled that the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest (citations omitted)"], cert denied 476 US 1115 [1986]). Rather, pursuant to State Administrative Procedure Act ("SAPA") § 301(1), "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time." The Court of Appeals elaborated on this standard in Cortlandt, holding that the determination of "whether a period of delay is reasonable within the meaning of State

[8] Throughout the transcript laches is misspelled as "latches."

Administrative Procedure Act § 301(1), an administrative body in the first instance, and the judiciary sitting in review, must weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation" (Cortlandt at 178).

Respondent did not argue unreasonable delay within the meaning of SAPA or the Cortlandt decision, nor did he proffer evidence to establish whether factors, such as those enumerated in Cortlandt, would weigh in his favor. Moreover, it is clear that respondent's construction and maintenance of a cabin on the eligible tract is in contravention of the forest tax law and frustrates the State's objective of maintaining productive forests lands that are held in private hands. Respondent does not deny that he constructed and maintained the cabin and, therefore, any delay in bringing this matter forward did not prejudice respondent by undermining his ability to mount a defense to refute staff's principal allegations.

Additionally, where there has been a partial conversion of an eligible tract, the statutory penalty applies only to the acre or acres converted from forest crop production, not to the entire eligible tract. The penalty is computed by multiplying by five "the amount of the taxes that would have been levied on the forest land exemption" applicable to the converted land (RPTL 480-a[7][d], [e]). Here, the conversion pertains to only one acre out of the 100 that comprise respondent's eligible tract. Accordingly, respondent will retain much of the tax benefit derived from participating in the forest land tax program. Moreover, although the conversion occurred some 15 years ago, the penalty is limited to "a total of ten years" (id.). In effect, for each year beyond ten that the Department failed to identify the conversion and pursue enforcement, respondent retains the benefit of the conversion (i.e., the benefit of having a cabin on lands that should have remained committed to forest crop production) without being subject to a penalty. Accordingly, there is nothing in this record to demonstrate that respondent suffered injury or prejudice of a sufficient nature to conclude that he was not afforded a hearing within a reasonable time within the meaning of SAPA.

CONCLUSIONS AND RECOMMENDATIONS

There is no dispute that respondent constructed a cabin within the boundaries of respondent's certified eligible tract. Additionally, staff has established that the area occupied by and immediately surrounding the cabin is no longer suitable for forest crop production. Respondent's laches argument must be rejected. Laches is not available against the State in this administrative enforcement proceeding and respondent did not establish that he was denied a hearing within a reasonable time as required by SAPA.

On this record, I recommend that the Commissioner determine that respondent converted one acre of the eligible tract in violation of RPTL 480-a(7)(a)(i). Additionally, pursuant to 6 NYCRR 199.11(b), where a partial conversion of an eligible tract is established, "the certificate of approval shall be revoked with respect to the converted portion . . . and notice of such partial revocation shall be given to the owner, to the appropriate assessor(s) and to the clerk of the appropriate county or counties."

EXHIBIT LIST

Matter of Walter E. Farnholtz
DEC Case No. R7-20090728-81

Exhibit No.	Description
1	Photograph of cabin
2	1991 application documents (including: Commitment of Land to Continued Forest Crop Production, Application for Certificate of Approval, and the initial forest management plan); five year updates to the forest management plan (1996, 2001, 2006); and the forest management plan amendment (2009).
3	Notice of Intent and letters from DEC to respondent regarding the notice
4	Commitment of Land to Continued Forest Crop Production (various years)
5	Four photographs of cabin (2 during construction, 2 recent)
6	Invoices for culvert materials (2004)
7	Letter from DEC to respondent, dated May 20, 2004, regarding culverts on eligible tract
8	Excerpt from Black's Law Dictionary
9	Map of eligible tract with respondent's annotations
10	Photographs of eligible tract
11	Letter from Agricultural Stabilization and Conservation Service to respondent, dated November 12, 1996, regarding Stewardship Incentive Program
12	Certificate of Approval Amendment, dated June 9, 1992
13	Forest Tax Law Field Inspection Report, dated February 6, 1995
14	Management Guide for Forest Practice Act Cooperators (forest type map), undated
15	Forest Type Map, dated March 22, 1996
16	Letter from DEC to Respondent, dated February 6, 1995, regarding inspection of woodlot
17	Letter from respondent to DEC, dated March 1, 1995, regarding inspection of woodlot
18	Letter from respondent to DEC, dated February 28, 1996, regarding Forest Improvement Program completion
19	Handwritten Notes, dated February 26, 1996, regarding marking on Farnholtz property
20	Letter from respondent to DEC, undated, regarding extension for implementing forest management practices
21	Letter from respondent to DEC, dated February 14, 2000, regarding completion of forest management practices