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

In the Matter

- of -

the Alleged Violations of Sections 9-0301 and 9-0303 of
the Environmental Conservation Law (ECL) of
the State of New York

- by -

CRAIG D. KINCADE,

Respondent.

DEC VISTA Index Nos. CO6-20061107-24 and CO6-20080331-9

DECISION AND ORDER OF THE COMMISSIONER

June 11, 2015

DECISION AND ORDER OF THE COMMISSIONER

In this administrative enforcement proceeding, respondent Craig D. Kincade is alleged to have maintained an unpermitted dock and steps, and cut, removed, injured, or destroyed trees and other vegetation on State forest preserve lands adjoining the Stillwater Reservoir in the Town of Webb, Herkimer County. The State forest preserve lands at issue are located to the east of respondent's property and include an upland parcel of land between the eastern boundary of respondent's property and the shore of the Stillwater Reservoir, and lands below the mean high water level of and submerged under the reservoir (see Map [10-25-06], Contino Affidavit [Affid],[1] Exhibit [Exh] 1).

Staff of the Department of Environmental Conservation (Department) commenced this proceeding by service of a notice of hearing and complaint dated December 15, 2006 (see Department Attorney Brief, Exh B). In the complaint, Department staff alleged three causes of action:

(1) that at various times between May 25, 2001 and November 2, 2006, respondent violated ECL 9-0303(1)[2] by cutting, removing, injuring, or destroying trees or other property on State land without authorization;

(2) that between 2003 and December 12, 2006, respondent violated ECL 9-0303(2)[3] by maintaining steps from his property leading to the shore of Stillwater Reservoir, across State lands; and

(3) that between at least the summer of 2005 and December 12, 2006, respondent violated ECL 9-0301(1)[4] by maintaining a floating dock and ramp over submerged State lands and attaching the dock to State lands, thereby restricting the free use of those lands by all the people of the State.

Respondent, appearing pro se, filed an answer dated January 1, 2007, in which he pleaded not guilty to the three charges (see Contino Affid, Exh 22). Respondent also raised various defenses, including his claim that as a riparian land owner, he has the right to wharf out to the navigable waters of the Stillwater Reservoir. Respondent also claimed he has approval for the steps and dock from the Hudson River-Black River Regulating District.

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[1] The Contino Affidavit is located at Exhibit G to the Department's Attorney Brief.

[2] ECL 9-0303(1) provides that "no person shall cut, remove, injure, destroy or cause to be cut, removed, injured or destroyed any trees or timber or other property thereon or enter upon [State] lands with intent to do so."

[3] ECL 9-0303(2) provides that "[n]o building shall be erected, used or maintained upon state lands except under permits from the department."

[4] ECL 9-0301(1) provides that "[a]ll lands in the . . . Adirondack park . . . now owned or which may hereafter be acquired by the state, shall be forever reserved and maintained for the free use of all the people."

Department staff subsequently filed a motion for order without hearing dated July 30, 2008 (see Department Attorney Brief, Exh A). The motion sets forth the following four causes of action:

(1) that at various times between May 25, 2001 and August 24, 2007, respondent violated ECL 9-0303(1) by cutting, removing, injuring or destroying trees or other property on State land without authorization;

(2) that between at least June 30, 2003 and at least August 30, 2007, respondent violated ECL 9-0303(2) by maintaining a floating dock and ramp over submerged State lands and attaching the dock to State lands;

(3) that between at least the fall of 2003 and July 30, 2008, respondent violated ECL 9-0303(2) by maintaining stone steps from his property to the shore of Stillwater Reservoir, across State lands; and

(4) that between at least June 30, 2003 and at least August 30, 2007, respondent violated ECL 9-0301(1) by maintaining a floating dock and ramp over submerged State lands and attaching the dock to State lands, thereby restricting the free use of such lands by all the people.

By its motion, Department staff requested that the Commissioner issue an order holding respondent liable for the violations enumerated above and assessing a $1,000 penalty, $750 of which to be suspended provided that respondent complies with the corrective measures that staff recommended that included the removal of the floating dock and the stone steps.

Respondent filed a response to the motion dated October 3, 2008. The matter was assigned to Administrative Law Judge (ALJ) Richard A. Sherman, who adjourned the proceeding pending settlement negotiations between the parties. When negotiations failed to produce a settlement, the ALJ prepared the attached summary report. In the report, the ALJ recommends that Department staff's motion for order without hearing be granted, and that respondent be held liable for the violations charged in the motion. The ALJ further recommends that respondent be assessed a civil penalty in the amount of $400, with the entire amount suspended provided respondent removes the floating dock and stone steps from State land.

For the reasons that follow, I adopt the ALJ's findings of fact, conclusions of law, and recommendations subject to my comments below.

I. Summary Judgment on Unpleaded Causes of Action

As an initial matter, the operative pleadings in this matter require clarification. As noted by the ALJ (see Hearing Report, at 1 n 1), the charges against respondent as described in Department staff's motion for order without hearing differ from those pleaded in the complaint

(compare Motion for Order Without Hearing [7-30-08] with Complaint, Department Attorney Brief, Exh B). Specifically, in the motion, Department staff increased the time periods for the three charges pleaded in the complaint. Staff also added a new specification for the alleged violation of ECL 9-0303(2), namely, that between at least June 30, 2003, and at least August 30, 2007, respondent violated ECL 9-0303(2) by allegedly fastening a dock to State forest preserve lands by means of stakes and a ramp, without permission from the Department. Also, Department staff added a second case number (VISTA Index No. CO6-20080331-9) to the motion, in addition to the number appearing on the complaint (VISTA Index No. CO6-20061107-24). Department staff made these changes without express notice to respondent that the complaint was being modified by the motion, and without seeking permission from the ALJ or the Commissioner prior to making the changes.

The Department Uniform Enforcement Hearing Procedures (see 6 NYCRR part 622) authorize Department staff to commence an enforcement proceeding by service of a motion for order without hearing in lieu of or in addition to a complaint (see 6 NYCRR 622.12[a]). When the motion is served in lieu of the complaint, Department staff is required to plead all of its causes of action in the motion, and the motion serves as the complaint in the proceeding.

Where, as in this case, a motion for order without hearing is served in addition to a complaint, the motion for order without hearing is the administrative equivalent of a motion for summary judgment on the previously served complaint (see 6 NYCRR 622.12[d] [a contested motion for order without hearing will be granted if the cause of action is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party]).

The general rule is that summary judgment may not be granted on causes of action not pleaded in the complaint (see Weinstock v Handler, 254 AD2d 165, 166 [1st Dept 1998]). However, a tribunal may award summary judgment on an unpleaded cause of action upon a finding that (1) the proof supports the unpleaded cause of action, and (2) the opposing party has not been misled to its prejudice (see id.; see also Home Sav. of Am., FSB v Coconut Is. Props., Ltd., 226 AD2d 1138, 1139 [4th Dept 1996], lv dismissed 90 NY2d 935 [1997]). In this case, Department staff alleged sufficient facts in the complaint to place respondent on notice of a possible cause of action for a second violation of ECL 9-0303(2) arising from the alleged fastening of the dock to State lands by means of stakes and a ramp. Moreover, Department staff expressly raised the additional cause of action in its motion, and the proof submitted on the motion supports the additional cause of action (see Boyle v Marsh & McLennan Cos., 50 AD3d 1587, 1588 [4th Dept], lv denied 11 NY3d 705 [2008]). Staff's proof also supports the additional time frames alleged in the motion for the remaining causes of action. Respondent had a full opportunity to challenge staff's charges as modified by the motion, and review of respondent's submissions reveals that respondent was aware of the charges and the relief requested by staff (see id.). Accordingly, respondent would not be prejudiced by an award of summary judgment on the causes of action as pleaded in the motion.

Although summary judgment may be awarded in this case on the unpleaded claims, staff should not adopt this practice in future cases. The Department's regulations contain certain

procedural safeguards that should be observed when, as in this case, staff seeks to modify the charges after an answer has been served. For example, after the time to answer the complaint has expired, Department staff may make a motion on notice to the respondent, seeking permission from the ALJ or the Commissioner to amend the complaint (see 6 NYCRR 622.5[b]). Similarly, where the proceeding is commenced by motion for order without hearing in lieu of complaint, and the time to respond to the motion has expired, the charges in the motion may also be amended on notice to the respondent and by leave of the ALJ or Commissioner (see Matter of White, Order of the Commissioner, Aug. 13, 2008, at 1-2). Department staff may also move to conform the pleadings to the proof, again, on notice to the respondent and by permission of the ALJ or Commissioner (see Matter of Wilder, ALJ Hearing Report, at 3-4, adopted by Order of the Acting Commissioner, Sept. 27, 2005).

In consideration of the foregoing, in the future whenever Department staff moves for an order without hearing on charges that differ from those charged in a previously filed complaint in that proceeding, staff is expected to follow the same procedures that are required for amending a complaint.

II. Violations

I agree with the ALJ that Department staff established its entitlement to summary judgment on the issue of respondent's liability for the four causes of action alleged in the motion (see 6 NYCRR 622.12[d]; Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 3-4). The use restrictions Department staff alleges respondent violated in the four causes of action apply to the forest preserve lands within the Adirondack Park (see ECL 9-0301; ECL 9-0303). The "forest preserve" is defined as "the lands owned or hereafter acquired by the state" in the forest preserve counties, including Herkimer County (ECL 9-0101[6]). The "Adirondack Park" is defined as "all lands located in the forest preserve counties of the Adirondacks" within certain boundaries described in the statute (ECL 9-0101[1]).

Respondent does not dispute that the subject parcel is owned by the State. He argues, however, that the State-owned parcel is not "forest preserve" land. In addition, respondent asserts that he has approval for the steps and dock pursuant to a letter from the HRBRRD to his father, Chet Kincade, dated June 23, 2003 (see Letter from Craig Kincade to James McClymonds, Chief Administrative Law Judge [10-3-08], Exh 6).

As noted by the ALJ, in 1908, the New York State Court of Appeals decided People v Fisher (190 NY 468) addressing the Forest, Fish and Game Commission's jurisdiction over State lands acquired for the Stillwater Reservoir (see Hearing Report, at 8-9). The Commission had commenced an action pursuant to the Forest, Fish and Game Law to recover damages for the removal of trees from an unrelated parcel of land located between the flow line of Stillwater Reservoir and a boundary line described by the right-angle survey. The trees had been removed by the former owner of the parcel after the State acquired the parcel. The former owner argued that the land on which the trees were cut was not within the forest preserve and, thus, the action under the Forest, Fish and Game Law could not be sustained.

In Fisher, the Court held that lands appropriated by the Superintendent of Public Works pursuant to the Canal Law vested in the People of the State and were forest preserve lands subject to the control of the Forest, Fish and Game Commission (see id. at 481). "The lands upon which the trees were cut are wild forest lands owned by the state within the forest preserve, and although acquired pursuant to the statutes relating to the canals and works belonging to the state connected with the canals, were acquired for purposes and objects directly connected with the forest preserve and the preservation and supply of water in the streams leading from the forest preserve. . . . The lands in question are not only owned by the state, but their retention as wild forest lands is within the spirit as well as the letter of the statute creating and defining the preserve. The control of such forest lands should be and is with the forest, fish and game commission and the action was, therefore, properly brought pursuant to the Forest, Fish and Game Law" (id. at 480-481). Thus, the Court expressly recognized that the State lands purchased by the Superintendent of Public Works pursuant to the right-angle survey for the development of the Stillwater Reservoir were forest preserve lands subject to the jurisdiction of the Forest, Fish and Game Commission.

Beginning in 1911, the Legislature undertook major reforms of the State's conservation laws and agencies. In chapter 647 of the Laws of 1911, the Conservation Law was enacted (see L 1911, ch 647, § 1), and a Conservation Department in charge of a Conservation Commission comprised of three commissioners was created (see id. § 2). The Conservation Commission was given all the powers of, among other entities, the Forest, Fish and Game Commission and the Commissioners of Water Power on Black River (see id.). Jurisdiction over and responsibility for the care and custody of the forest preserve and the Adirondack Park, together with permitting authority over uses of the forest preserve, was continued through the creation of a reorganized Conservation Department in 1926 (see L 1926, ch 619) and the establishment of the Department of Environmental Conservation in 1970 (see L 1970, ch 140).

I agree with the ALJ that Department staff established that the lands east of respondent's parcel adjacent to and under the waters of the Stillwater Reservoir are State forest preserve lands under the jurisdiction of the Department (see Summary Report at 7-9).

In addition, although it is not charged in this case, the Department also has jurisdiction over the site of the dock under ECL article 15, title 5 (Protection of Waters). The Stillwater Reservoir is a navigable water of the State to which the public has access for boating, fishing, swimming, and other recreational uses (see Matter of Serth, Decision of the Commissioner, Dec. 19, 2012, at 7-8). Thus, any excavation, filling, or other modifications within the Stillwater Reservoir associated with the placement of a dock requires a permit from the Department pursuant to ECL 15-0505 (see also Navigation Law § 31). This requirement applies regardless of whether the lands underlying the waters of Stillwater Reservoir are public lands, or private lands (see Navigation Law §§ 37, 31), which they are not in the location of respondent's dock. Thus, the installation of a dock below the mean high water level of the Stillwater Reservoir would require an ECL article 15 permit from the Department as well.

In sum, at all times relevant to this proceeding, the State lands to the east of respondent's parcel have been forest preserve lands within the Adirondack Park subject to the jurisdiction of the Department. Thus, respondent's construction and maintenance of the steps across State land without approval from the Department constitutes a violation of ECL 9-0303(2). Respondent's attachment of a dock to State lands by means of stakes and a ramp also constitutes a violation of ECL 9-0303(2). Respondent's cutting of vegetation on the State land to the east of his parcel constitutes a violation of ECL 9-0303(1). And finally, by maintaining a floating dock and ramp over submerged State lands and attaching the dock to those State lands, thereby restricting the free use of those lands by all the people of the State, respondent also violated ECL 9-0301(1) (see Matter of Bartell, Order of the Commissioner, Oct. 14, 2010, at 3). Accordingly, Department staff has established the violations alleged in the motion.

III. Defenses

For the reasons stated by the ALJ, I also reject the defenses raised by respondent (see, e.g., riparian rights [Summary Report, at 9-12], Kimball Road [Summary Report at 12-16], and claims of estoppel and double jeopardy [Summary Report, at 16-17]).

I agree with the ALJ and conclude that respondent failed to establish that he is a riparian property owner with the right to wharf out to the navigable waters of the Stillwater Reservoir at the location of the steps and dock at issue (see Summary Report at 9-12). While a question of fact may exist concerning whether respondent's property abuts the mean high water level of the Reservoir at the northeast corner of his parcel, respondent's property does not abut the mean high water level at the location of the steps and dock. I agree that respondent has no right to trespass upon the State lands to the east of his property to access the Reservoir (see Kearns v Thilberg, 76 AD3d 705, 707 [2d Dept 2010]).

As noted above, respondent also asserts that he has approval from the Hudson River-Black River Regulating District (HRBRRD) for the steps and dock. However, any approval respondent may have received from the District did not abrogate the need to obtain approvals from the Department. The Department has broad authority to regulate uses of forest preserve lands and to protect the navigability of the State's waters. Accordingly, to the extent respondent had approval from HRBRRD to place a dock below the mean high water mark of the Stillwater Reservoir, respondent still needed approval from the Department under both ECL article 9 and article 15. Indeed, HRBRRD's letter noted that authorization from other State and federal agencies may be required prior to commencing the work referenced in the letter. I agree with the ALJ that respondent's letter from the HRBRRD does not provide a defense to the violations established (see Summary Report at 19-20).

For the reasons stated by the ALJ, I further agree that respondent's defense based upon a road respondent refers to as Kimball Road lacks merit. As to the remaining defenses raised by respondent, including estoppel and double jeopardy, I agree with the ALJ that they lack merit (see Summary Report at 16-17).

IV. Penalty and Corrective Measures

ECL 71-0703 supplies the appropriate penalty provision for the violations that staff has charged in this proceeding, that is a civil penalty "of not less than ten nor more than one hundred dollars" (see ECL 71-0703[1]; Summary Report, at 20-21). Based on my review of the record, I hereby adopt the ALJ's recommendation as to a civil penalty of four hundred dollars ($400).

Staff requests, and the ALJ recommends, that I issue an order directing respondent to remove, and not replace, the floating dock (which would include the ramp) and stone steps within thirty (30) days of the date of my order. The ALJ recommends that the penalty be suspended contingent upon respondent complying with the terms and conditions of this order, including the removal of these structures. I concur with the ALJ's recommendation.

However, if respondent fails to remove these structures, staff requests that I direct staff to remove them and seek reimbursement from respondent for the cost of removal. I concur with staff's request. These corrective measures are appropriate and authorized (see Summary Report, at 23 [citing ECL 9-0105(1) and ECL 9-0303(6)]).

In addition, I hereby direct that respondent shall immediately cease any and all vegetative cover management and storage of personal property on State lands located between the easterly boundary of respondent's land as described in the deed to respondent dated May 25, 2001, recorded in the Office of the Clerk of Herkimer County, Book 895 of Deeds, page 335, and the waters of Stillwater Reservoir.

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

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

II. Respondent Craig D. Kincade is hereby adjudged to have committed the following violations:

A. at various times between May 25, 2001 and August 24, 2007, respondent violated ECL 9-0303(1) by cutting, removing, injuring, or destroying trees or other property on State forest preserve land without authorization;

B. between at least June 30, 2003, and at least August 30, 2007, respondent violated ECL 9-0303(2) by maintaining a floating dock on and over State forest preserve lands, and fastening the dock to those lands by means of stakes and a ramp, without permission from the Department;

C. between at least the fall of 2003 and July 30, 2008, respondent violated ECL 9-0303(2) by maintaining steps from his property leading to the shore of Stillwater Reservoir, across State forest preserve lands; and

D. between at least June 30, 2003 and at least August 30, 2007, respondent violated ECL 9-0301(1) by maintaining a floating dock and ramp over submerged State forest preserve lands and attaching the dock to State forest preserve lands, thereby restricting the free use of those lands by all the people of the State.

III. Respondent Craig D. Kincade is hereby assessed a total civil penalty in the amount of four hundred dollars ($400). Of the total penalty assessed, four hundred dollars ($400) shall be suspended, contingent upon respondent complying with the terms and conditions of this decision and order. Should respondent fail to satisfy the terms and conditions of this decision and order, the suspended penalty shall become immediately due and payable upon notice by the Department. 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:

Scott W. Crisafulli, Esq.[5]
Deputy Counsel
New York State Department of
Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500.

IV. Respondent Craig D. Kincade is hereby ordered to remove, and not replace, the floating dock (including the ramp) and stone steps from State land within thirty (30) days of the date this decision and order is served upon respondent. Should respondent fail to remove the floating dock and stone steps within thirty (30) days after service of this decision and order upon respondent, Department staff is directed to remove the dock and steps, and seek reimbursement from respondent for the cost of removal.

V. Respondent Craig D. Kincade shall immediately cease any and all vegetative cover management and storage of personal property on State lands located between the easterly boundary of respondent's land as described in the deed to respondent dated May 25, 2001, recorded in the Office of the Clerk of Herkimer County, Book 895 of Deeds, page 335, and the waters of Stillwater Reservoir.

VI. All communications from respondent to the Department concerning this decision and order shall be made to Scott W. Crisafulli, Esq., at the address listed in paragraph III of this decision and order.

[5] Because the original Departmental attorney who handled this matter subsequently retired, Deputy Counsel Scott Crisafulli is listed here for purposes of any further contact relative to this decision and order.

VII. The provisions, terms, and conditions of this decision and order shall bind respondent Craig D. Kincade, and his agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: June 11, 2015
Albany, New York

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 -

CRAIG D. KINCADE,

Respondent.

SUMMARY REPORT

VISTA Index Nos.
CO6-20061107-24
CO6-20080331-9

PROCEEDINGS

This summary report addresses a motion for order without hearing filed with the Office of Hearings and Mediation Services by staff of the New York State Department of Environmental Conservation (DEC or Department) on September 26, 2008. Pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), staff may serve a motion for order without hearing in lieu of or in addition to a complaint.[1] Staff served the motion on respondent Craig D. Kincade on July 30, 2008. By its motion, staff alleges that respondent violated certain provisions of article 9 of the Environmental Conservation Law (ECL) by his unauthorized use of State forest preserve lands in the Town of Webb, Herkimer County, and by restricting the free use of those lands by the public.

The matter was adjourned to afford the parties the opportunity to pursue a negotiated settlement and the parties provided this office with periodic updates regarding the negotiations through the end of 2011. As part of the parties' effort to resolve the dispute, respondent had the subject parcel surveyed by a professional land surveyor in late 2011. The parties remained unable to resolve the matter and, by letter dated December 16, 2011, Department staff requested that this office issue a ruling on staff's 2008 motion for order without hearing. By letter dated December 20, 2011, I directed respondent to file a stamped copy of his parcel survey (respondent's survey) with this office, and authorized respondent to file any additional arguments of law, affidavits, or other materials concerning the import of respondent's survey relative to the issues before this office. My letter also authorized staff to file a response to respondent's filing.

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[1] Department staff also served a complaint (see Attorney Brief in Support of Motion for Order Without Hearing [staff brief], July 30, 2008, exhibit B), dated December 15, 2006, on respondent and respondent served an answer (see id., exhibit 22 of exhibit G), dated January 1, 2007. The charges set forth under the complaint are similar, although not identical, to the charges set forth in the motion for order without hearing. This summary report addresses only the charges as set forth in staff's motion for order without hearing.

Department staff's filing of September 26, 2008 is voluminous and includes dozens of exhibits, most of which were filed by staff as attachments to other exhibits. For ease of reference, unless otherwise indicated, exhibit references used in this report are those used by staff to denominate the exhibits to its brief in support of the motion.[2] These exhibits include the motion (staff brief, exhibit A), copies of correspondence and other documents, and the following affidavits:

- exhibit C - affidavit of John M. Scanlon, Forest Ranger, DEC, sworn to on May 1, 2008;
- exhibit D - affidavit of John P. Keating, Real Estate Officer 2, DEC, sworn to on April 28, 2008;
- exhibit E - affidavit of Keith W. Rivers, Forester I, DEC, sworn to April 28, 2008;
- exhibit G - affidavit, together with 22 exhibits, of Michael J. Contino, Real Property Supervisor (Real Estate Specialist 2), DEC, sworn to July 17, 2008;
- exhibit I - affidavit of David Stephen Smith, Regional Forester, Region 6, DEC, sworn to April 28, 2008;
- exhibit L - affidavit of Douglas R. Ashline, Program Specialist, DEC, sworn to July 18, 2008;
- exhibit M - affidavit of James F. Fresco, Assessor of the Town of Webb, sworn to May 7, 2008;
- exhibit N - affidavit of Alina Damato, Assistant Land Surveyor 2, DEC, sworn to April 29, 2008;
- exhibit O - affidavit of Francis LaFlair, Regional Operations Supervisor, Region 6, DEC, dated December 18, 2006;
- exhibit P - affidavit of Brent Planty, Conservation Operations Supervisor, DEC, sworn to May 28, 2008;
- exhibit Q - affidavit of Glenn A. LaFave, Executive Director of the Hudson River – Black River Regulating District, sworn to January 3, 2007; and
- exhibit U - affidavit of Thomas J. Kovach, Professional Land Surveyor, Brantingham, New York, sworn to July 16, 2008.

Respondent, acting pro se, filed papers (response) in opposition to the motion under cover letter dated October 3, 2008. The response consists of the cover letter and 22 exhibits. The exhibits include correspondence, deeds, portions of maps, photographs and a variety of other documents. Respondent filed no affidavits with his response.

In addition to the motion and response, the parties filed further responsive papers, both in 2008 and, after negotiations failed, in late 2011 and early 2012. Of particular note is respondent's filing dated December 31, 2011, enclosing respondent's survey, and

[2] The staff brief is attached as exhibit 5 to Department staff's "service affirmation and brief" (service affirmation), dated September 26, 2008. The service affirmation also includes, as exhibits 2 and 3, respectively, an affidavit of service of the motion on respondent by certified mail, sworn to July 30, 2008, and the postal service return receipt, signed by respondent on August 5, 2008.

Department staff's response dated January 19, 2012.[3] These filings focus on respondent's claim that his parcel enjoys riparian rights and on the import of such rights relative to Department staff's allegations.

Department Staff's Allegations

By its motion, Department staff alleges that respondent engaged in unauthorized activities on State land that is adjacent to the eastern boundary of respondent's property (Kincade parcel) in the Town of Webb, Herkimer County. The State land at issue (site) extends eastward from the boundary of the Kincade parcel to Stillwater Reservoir and includes the near shore area of the reservoir. The motion sets forth the following four causes of action:[4]

1. "At various times between May 25, 2001 and August 24, 2007, on [the site], Respondent cut, removed, injured or destroyed trees [or] other property without authorization" (staff brief, exhibit A [motion at 1]), in violation of ECL 9-0303(1).

2. "Between at least June 30, 2003 and at least August 30, 2007, on [the site], Respondent maintained on, and over, . . . State Forest Preserve lands[,] without permission of [the Department,] a floating dock fastened to those lands by means of stakes and a ramp leading to the shore from the dock" (id.), in violation of ECL 9-0303(2).

3. "Between at least the Fall of 2003 and [July 30, 2008], on [the site], Respondent maintained stone steps from his property leading to the shore of the Stillwater Reservoir, across State lands" (id. at 1-2), in violation of ECL 9-0303(2).

4. "Between at least June 30, 2003 and at least August 30, 2007, on [the site], Respondent maintained on, and over, . . . State Forest Preserve lands[,] without permission of [the Department,] a floating dock fastened to those lands by means of stakes and a ramp leading to the shore of the Stillwater Reservoir from the dock, thereby restricting the free use of such lands by all the people" (id. at 2) in violation of ECL 9-0301(1).

Department staff requests that the Commissioner issue an order (i) holding respondent liable for the violations enumerated above; (ii) assessing a $1,000 penalty against respondent, $750 of which is to be suspended provided that respondent complies with the order; and (iii) directing respondent to remove (and not replace) the dock and the stone steps from the site. Staff further requests that the Commissioner direct staff to remove the offending materials from the site in the event that respondent fails to do so

[3] In or about February 2012, respondent filed an unauthorized response to staff's January 19, 2012 filing. Although respondent's February 2012 filing was unauthorized, I have considered the filing in this summary report.

[4] The motion does not denominate the alleged violations as causes of action. Rather, the motion sets forth each of the four violations charged as a "**SPECIFICATION**" (staff brief, exhibit A).

and to seek reimbursement from respondent for the cost of removal (staff brief, exhibit A [motion at 2]).

Additionally, Department staff requests a directive from the Commissioner establishing a statewide procedure for dealing with private property found on State-owned lands. Specifically, staff requests that "the Commissioner direct Department staff, when encountering on State lands property the ownership of which cannot be immediately located, to place a sticker on such property that informs its owner that the Department will cause the removal and disposition of such property if such property is not removed from State land by a date certain identified on the sticker . . . and that such owner will be charged the reasonable cost of removal and disposition of such property" (staff brief, exhibit A [motion at 2]).[5]

Respondent's Position

Respondent entered a general denial of Department staff's charges (response at 1 [stating that he is "**Not Guilty** on all alleged violations"]). As discussed below, respondent denies certain, though not all, of staff's factual allegations. Respondent also advances several arguments in his defense; principal among these is that his use of the State land at issue is justified because his parcel enjoys riparian rights to Stillwater Reservoir (id.).

FINDINGS OF FACT

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

1. Respondent Craig D. Kincade owns property (Kincade parcel) located in the Town of Webb, Herkimer County, near the shoreline of Stillwater Reservoir (see response at 12, exhibit 14; respondent filing, Dec. 31, 2011, attachment [respondent's survey]; staff brief, exhibits A [motion at 1], G [Contino affidavit, exhibits 12, 13]).

2. The easterly boundary of the Kincade parcel abuts lands owned by the State of New York, near the shoreline of Stillwater Reservoir (respondent filing, Dec. 31, 2011, attachment [respondent's survey]; staff brief, exhibits D [Keating affidavit ¶ 3], G [Contino affidavit ¶ C, exhibit 1]).

3. The extreme northeast corner of the Kincade parcel, although normally dry, is sometimes flooded by the waters of Stillwater Reservoir (response at 13, exhibit 15; staff brief, exhibits G [Contino affidavit ¶¶ N, U, exhibit 21], J, L [Ashline affidavit ¶ 7]).

[5] Staff's request to establish a statewide procedure in relation to private property found on State-owned lands is essentially a request for a rulemaking or policy directive. Because this form of relief is not available through an adjudicatory proceeding, this aspect of staff's request for relief will not be further addressed in these proceedings.

4. Vegetation on the site was cut at various times between 1998 and August 30, 2007 (staff brief, exhibits C [Scanlon affidavit ¶ E.4, photographs 2, 3, 5, 6 (and accompanying text)], D [Keating affidavit ¶ 3, photograph 2], E [Rivers affidavit ¶¶ 4-5; photographs 1-8[6]], N [Damato affidavit ¶ 3, photographs 18, 19]; response at 15-16, exhibits 6 [photograph 2], 17 [photographs 2-5]).

5. Sixteen or more stone steps, forming the lower portion of a stairway that begins at the top of a bank on the Kincade parcel, were located on the State land at issue between the fall of 2003 and July 30, 2008 (response at 5 [admitting ownership of the stairway]; staff brief, exhibits C [Scanlon affidavit ¶¶ E.2, E.4.ii, photographs 2-6], N [Damato affidavit ¶ 3, photographs 1-3]).

6. A floating dock and ramp were located on the State land at issue during the boating season each year between June 30, 2003 and August 30, 2007, inclusive (see response at 8 [respondent statement that the floating dock "is a boat . . . it has only been on the reservoir during the summer season (July & August) and at the end of the summer season all my boats are take[n] out and put into storage" (parenthetical in original)]; staff brief, exhibits D [Keating affidavit ¶ 3, photograph 1]), C [Scanlon affidavit ¶¶ E.2, E.3, photographs 1, 8, 12]),[7] E [Rivers affidavit ¶ 4.E, photograph 5]).

DISCUSSION

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

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[6] The Rivers affidavit and accompanying photographs relate observations he made on August 30, 2007, six days after the end-date of the violation charged in staff's motion. Nevertheless, Mr. Rivers' observations are pertinent both because they were made shortly after the end-date of the alleged violation and because he attests that, without vegetative management, tree seedlings and saplings would establish themselves within one or two years in open areas like that observed on the State land at issue here, and within three to five years the seedlings of some tree species would be several feet high (id. [Rivers affidavit ¶ 4.A]).

[7] I note that the Scanlon affidavit states that the affiant observed "storage of personal property" on the State land at issue at various times "between 1998 and 2006" (id. ¶ E.4). The affidavit does not, however, expressly state that the dock was one of the items of personal property observed, except on August 23, 2006 and August 24, 2007 (see id. ¶ E). Nevertheless, as noted, respondent admits that he places the floating dock (which he asserts is a boat) on the reservoir each year and does not deny that the dock was placed in service during the period alleged by staff in its motion. Accordingly, respondent does not deny staff's allegation with regard to the dates alleged and, therefore, the dates are deemed admitted (see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [stating that "[t]he failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact"]).

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]). Importantly, 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 should be granted in its entirety.

State Land and the Forest Preserve

Pursuant to ECL 9-0101(6), the "'forest preserve' shall include [with certain exceptions not relevant here] the lands owned or hereafter acquired by the state" within enumerated counties (forest preserve counties). Stillwater Reservoir is located in Herkimer County, which is among the designated forest preserve counties (see id.). The reservoir is operated by the Hudson River – Black River Regulating District (Regulating District) "for the purpose of regulating the flow of streams, when required by the public welfare, including public health and safety" (ECL 15-2103[1]). Although respondent does not contest that the reservoir and the uplands along his parcel's eastern boundary are owned by the State, he nevertheless argues that the State land at issue is not forest preserve (see respondent filing, Dec. 31, 2011, at 3 [stating that "[w]e know the State of New York owns the land, but is it Forest Preserve [land]?"]).

As respondent is aware, however, the Department has taken similar enforcement action against property owners along Stillwater Reservoir to the south of the Kincade parcel and the Commissioner has twice held such owners liable for the unauthorized use of forest preserve land (see Matter of Bartell, Order of the Commissioner, Oct. 14, 2010; Matter of Wilson, Order of the Commissioner, Dec. 18, 2008; see also letter from this office to the parties, Nov. 2, 2010 [directing the parties' attention to the Commissioner's orders in Bartell and Wilson]). Moreover, as noted in a ruling in Bartell, the Court of Appeals held in 1908 that the land acquired for Stillwater Reservoir is part of the forest preserve (Bartell, ALJ Ruling, June 11, 2009, at 4-5 n 5 [citing People v Fisher (190 NY 468)], adopted by Order of the Commissioner, Oct. 14, 2010, at 2).

Despite the foregoing, respondent argues that the State lands at issue are not forest preserve lands (response at 7). The easterly boundary of what is now the Kincade parcel was established by the right angle survey in 1898 when the State acquired land to raise the level of Stillwater reservoir "for the use of the Canals" (staff brief, exhibit G [Contino affidavit, exhibit 3 at 1[8]]). As noted in Fisher, the right angle survey "was done as described by the surveyor as follows, viz.: 'We would go just as far as we could this way, until we saw that we were going to run into the flow [i.e., the area that was to be flooded] and then we would turn and go the other way and turn a right angle. In that way we went around the whole flow ground.' This survey included within straight lines the bays, arms and flowline of the reservoir" (Fisher at 472). Respondent argues that lands acquired for canal purposes are not forest preserve lands and asserts that the New York State Attorney General has issued opinions to that effect (response at 7).

Although respondent did not cite to a specific opinion of the Attorney General, there are opinions of the Attorney General that support respondent's contention that canal lands are not forest preserve lands. Of particular note is a 1918 opinion (1918 opinion) that discusses this issue in some detail. The 1918 opinion concerns lands acquired by the State for two reservoirs, the Hinckley reservoir and Delta reservoir. The lands at issue

[8] The quoted text is from the original certification on an 1898 map that depicts the relevant portion of the right angle survey. Exhibit 3 contains a second certification, dated April 29, 2008, by the Herkimer County Clerk certifying that the exhibit is a "correct transcript" of the original.

were located within forest preserve counties and were acquired "for the improvement of the Erie canal" (1918 Ops Atty Gen 191, 192). The 1918 opinion states that "the lands at the Hinckley and Delta reservoirs including the lands between the flow line and boundary of the area appropriated are not part of the Forest Preserve" (id. at 206). The Hinckley and Delta reservoirs, like Stillwater Reservoir, were acquired for canal purposes (Hinckley and Delta for purposes of the Erie Canal and Stillwater for purposes of the Black River Canal) and are located in forest preserve counties (id. at 192).

In the 1918 opinion, the Attorney General placed substantial weight on the fact that State-owned canal lands, like forest preserve lands, enjoyed constitutional protection. The 1918 opinion cites former New York Constitution article VII, § 8, which expressly provided that certain State-owned canals "shall remain property of the state and under its management forever" (1918 Ops Atty Gen 191, 195). Therefore, the Attorney General opined, "the Constitution makers gave equal dignity and force to the work of the canals and the Forest Preserve" (id. at 196). The Attorney General further opined, however, that "[i]f such lands should later become part of the Forest Preserve, it would be because of some other compelling reason, possibly such as the abandonment of the lands for canal purposes" (id. at 197). That is precisely what has happened with the former canal lands that are at issue in this proceeding.

The lands acquired by the State within the right angle survey were acquired to enlarge Stillwater Reservoir for use of the Black River Canal, and that canal was abandoned in the 1920s (see http://www.blackrivercanalmuseum.com/CanalHistory.htm [accessed Jan. 31, 2013] [stating that the Black River Canal was "abandoned by the state in 1922"]; see also Board of Black River Regulating Dist. v Ogsbury, 203 AD 43, 44 [4th Dept 1922] [discussing the then pending acquisition of additional lands to enlarge Stillwater Reservoir, not for canal purposes, but for regulating "the flow of the Black river and its tributaries so that disastrous and destructive floods may be prevented and a somewhat constant flow of water may be secured in the streams in dry seasons"]). Notably, the constitutional provision cited by the Attorney General has been amended and no longer includes the Black River Canal among the canals that are protected (see NY Const, art XV, § 1 [listing only "the Erie canal, the Oswego canal, the Champlain canal, and the Cayuga and Seneca canals"]). As noted above, the Regulating District now operates Stillwater Reservoir to control the flow of the Black River and its tributaries, and not for canal purposes.

In addition to these changes in the law, I note that the 1918 opinion of the Attorney General, while warranting due consideration, is not binding on the courts (see e.g. Matter of American Tel. & Tel. Co. v State Tax Commn., 61 NY2d 393, 404 [1984] [stating that "an opinion of the Attorney-General is an element to be considered but is not binding on the courts"]; Matter of Levine v Regan, 109 AD2d 1016, 1017 [3d Dept 1985] [stating "we reject petitioner's contention that the Attorney-General's opinion in a previous matter . . . is controlling"], affd 66 NY2d 958 [1985]).

In Fisher, the Court held that the lands within the right angle survey "although acquired pursuant to the statutes relating to the canals and works belonging to the state

connected with the canals, were acquired for purposes and objects directly connected with the forest preserve and the preservation and supply of water in the streams leading from the forest preserve . . . their retention as wild forest lands is within the spirit as well as the letter of the statute creating and defining the preserve" (id. at 480-481). The Court expressly upheld the authority of the "forest, fish and game commission," to bring an action against the former owner of the lands at issue for trespass and removal of trees on forest preserve lands (id. at 481).

In a more recent case, the Appellate Division, Third Department, held that lands acquired by the State that are located within a forest preserve county become part of the forest preserve even where such lands "lie in a populous area . . . unsuitable for wild forest purposes" (People v Patenaude, 286 AD 140, at 141 [1955] [holding that "whatever [the lands] may be in fact, they are in law part of the 'forest preserve'"]). In another case, however, the Third Department concluded that a property was not part of the forest preserve despite the fact that it was acquired by the State and was located within a forest preserve county. The Court based its determination on the fact that the land was acquired pursuant to statutory authority that expressly excluded the land from the forest preserve (see Matter of the Town of Indian Lake v State Bd. of Equalization & Assessment of State of NY, 26 AD2d 707 [1966] [noting that both provisions of "the Conservation Law under which the . . . tract was acquired specifically state that property received there under does not become part of the forest preserve"]).

Here, although the State land at issue was originally acquired for use of the canals, that use was long ago abandoned. Moreover, over 100 years ago, the Court of Appeals held that the lands acquired by the State for Stillwater Reservoir were properly part of the forest preserve. Respondent has not identified, nor have I found, any express statutory provision or other controlling authority that would exclude the State lands at issue from inclusion in the forest preserve.[9] Accordingly, I conclude that the State land at issue is part of the forest preserve.

Riparian Rights

Department staff argues that riparian rights "do not attach to landowners (sic) along artificially created water bodies" (staff brief at 8 [citing Caflisch v Clymer Power Corp., 125 Misc 243 (Sup Ct, Chautauqua County 1925)]). Perhaps in recognition of the limited treatment of this issue by New York courts, staff later states only that "it does not appear" that riparian rights attach to properties along artificial water bodies (id. at 10; see also Lipton v Bruce, 9 AD2d 573 [3d Dept 1959] [leaving open the question of whether riparian rights attach to properties along a reservoir, but holding that the property at issue did not enjoy riparian rights because "there is a strip of land . . . which is never flooded" between the property and the shoreline of the reservoir]). In its last filing on the instant motion, staff acknowledges that respondent's survey indicates that "the **corner** of his

[9] Current law expressly provides that three percent of the lands constituting the forest preserve may be used for the purposes of title 21 of ECL article 15 (river regulation by storage reservoirs), but the statute does not state that such lands cease to be part of the forest preserve (see ECL 15-2111[2]).

property touches the high flow line for the Stillwater reservoir" and states that, as a littoral owner, respondent "is within his rights to erect and maintain a dock extending from his property . . . at [the] location where his property touches the mean high flow line" (staff filing, Jan. 19, 2012, at 1).

I do not consider it necessary to determine whether respondent's claim of riparian rights is valid for the purposes of ruling on staff's motion for order without hearing. At most, respondent claims ownership of a few feet along the mean high water line of Stillwater Reservoir at the northwest corner of his parcel (see respondent filing, Dec. 31, 2011, attachment [respondent's survey]). Respondent's survey identifies the mean high water mark line as the "edge of vegetation" and depicts no more than three feet of the high water line running across the corner of the Kincade parcel (id.).

Department staff does not concede, and I do not hold, that the edge of vegetation as depicted on respondent's survey is the shoreline of Stillwater Reservoir for the purposes of establishing whether the Kincade parcel enjoys riparian rights. Indeed, there is much in the record to call this into question. Staff did extensive research to ascertain the average high water mark of Stillwater Reservoir. For the most recent period analyzed by staff, the period from 1996 to 2004, staff determined that the elevation of the average high water mark of the reservoir was 1677.61 feet (see staff brief, exhibit L [Ashline affidavit at 4]). This is more than twenty inches below the 1679.39 elevation noted on respondent's survey as the elevation of the edge of vegetation on the Kincade parcel. Moreover, staff filed a survey of the Kincade parcel, together with an affidavit by the surveyor, that depicts the lowest elevation of the parcel to be at 1679.6 feet (staff brief, exhibit G [Contino affidavit ¶¶ S-U, exhibit 20]).

Additionally, I note that ECL 15-2101(11) defines the "high flow line" of a reservoir to mean "the line which will be made around a reservoir by the water therein when it is at the level of the crest of the reservoir spillway." Pursuant to ECL 15-2133(1), a regulating district "shall not permit the water in any reservoir to rise above the high flow line thereof, except during floods or other emergencies." According to the Regulating District's website, the spillway crest at the Stillwater dam is at an elevation of 1679.3 feet (see http://www.hrbrrd.com/bulletin_files/Stargetelevation.pdf [accessed Jan. 25, 2013] [also showing that the "historic average elevation" of Stillwater Reservoir ranges from approximately 1664.5 feet to just over 1678 feet each year]). The elevation of the spillway crest was also used to describe the shoreline boundary in a 1992 deed that conveyed lands along Stillwater Reservoir to the Regulating District (see response, exhibit 12 [deed into the Regulating District describing "a point in the shoreline of the Stillwater Reservoir at elevation 1679.3" and setting a boundary line of the parcel as running along the "shoreline elevation contour of 1679.3"]).

For the purposes of deciding the instant motion, I will assume, without deciding, that the edge of vegetation as shown on respondent's survey is the shoreline of Stillwater Reservoir and that, therefore, the Kincade parcel has riparian rights to the reservoir.[10]

[10] As discussed above, because the water body at issue is a reservoir, the Kincade parcel may lack riparian rights irrespective of whether it touches the waters of Stillwater Reservoir.

Even under these assumptions, however, respondent may be held liable for the violations alleged by Department staff. This is because riparian rights do not include the right to trespass upon uplands owned by another (see Kearns v Thilburg, 76 AD3d 705, 707 [2d Dept 2010] [holding that "[t]he riparian rights of an uplands owner are limited, however, to the waters in front of that owner's property and do not extend to the frontage of the adjoining parcel. Moreover, an uplands owner does not acquire the right to use or access the water fronting a neighboring parcel . . ." (citations omitted)]).

Respondent's own survey plainly depicts that there is a wedge-shaped upland area along the eastern boundary of the Kincade parcel that is owned by the State (see respondent filing, Dec. 31, 2011, attachment). As shown on respondent's survey, the stone stairway erected by respondent crosses this State-owned upland. This upland area is also the area where staff alleges respondent has undertaken vegetative management. Accordingly, respondent may not rely upon his assertion of riparian rights as a defense against staff's allegations concerning respondent's stairway and vegetative management on the State lands at issue.

With regard to the floating dock, all of the photographic evidence depicting the location of the dock relative to the shoreline depicts the dock extending out generally in line with the base of respondent's stairway (see response, exhibit 6 [photograph at 7], exhibit 17 [photographs at 4-6]; staff brief, exhibits C [Scanlon affidavit (photographs 8, 12)], D [Keating affidavit (photograph 1)], E [Rivers affidavit (photograph 5)]). As noted above, the lower portion of respondent's stairway is located entirely on State land. Accordingly, Department staff's allegations regarding respondent's floating dock do not concern the use of the foreshore and waters adjacent to the three feet of shoreline that respondent claims is on the northeast corner of his parcel.

In addition to his argument that his parcel enjoys riparian rights because of its frontage on Stillwater Reservoir, respondent argues that his parcel retains riparian rights to the reservoir pursuant to the chain of title for his parcel. Specifically, respondent proffers a 1901 deed which conveyed certain lands of the Adirondack Timber and Mineral Company. Respondent asserts that the deed reserved "the rights at all times, on the part of the said Grantor and his Assigns to a reasonable use of the shore of the Reservoir" and respondent argues that those rights extend to his parcel (response at 7, exhibit 9). Staff responds that the 1901 deed relates to land "located well to the north of Respondent's parcel and is not connected in any way to his parcel and the 1902 deed that is in Respondent's chain of title" (staff filing, Oct. 17, 2008, at 3).

The 1901 deed does not appear in the deeds identified by staff as comprising "the chain of title to the Respondent's parcel from 1898 forward" (staff brief, exhibit G [Contino affidavit ¶ L]; see also id. [Contino affidavit ¶ F.1.ii [listing all deeds in respondent's chain of title since 1898]). Moreover, the 1901 deed states that the subject lands are being conveyed to Elon R. Brown and not, as respondent asserts, to "Titus Meigs" (response at 7, exhibit 9). The deed into Titus Meigs and Ferris Meigs that is in the chain of title for the Kincade parcel is the 1902 deed identified by staff and it does not contain a reservation of the right to use of the shore of Stillwater Reservoir (see staff

brief, exhibit G [Contino affidavit ¶ F.1.ii, exhibit 4]). In any event, where a parcel having riparian rights is subdivided, only those parcels that remain contiguous to the water body retain those rights, unless the deed to a noncontiguous parcel expressly reserves riparian rights (see Durham v Ingrassia, 105 Misc 2d 191, 200 [NY Sup Ct, Nassau County 1980] [holding that "it must be noted where a tract of land . . . abuts a waterway, and a portion thereof . . . not contiguous to the waterway is conveyed to separate owners, such conveyance deprives the noncontiguous portions so transferred of their 'riparian' status; unless a specific reservation of riparian rights is placed in the deed"]). The 1918 deed that subdivided what is now the Kincade parcel from a larger tract does not contain a reservation of rights to use Stillwater Reservoir (staff brief, exhibit G [Contino affidavit, exhibit 7] [deed by James and Lucy Dunbar conveying "Lot No. 2, of [the] Dunbar Cottage Lots"]).

I conclude that the riparian rights enjoyed by the Kincade parcel, if any, are the result of its having frontage on the mean high water line of Stillwater Reservoir. Because the area adjacent to where respondent claims frontage on Stillwater Reservoir is not the area that is the subject of this proceeding, I further conclude that the issue of whether the Kincade parcel has riparian rights is immaterial to these proceedings.

Kimball Road

In addition to his assertion that the northeast corner of his parcel is below the mean high water mark of Stillwater Reservoir, respondent also asserts that this same northeast corner touches a public road. Specifically, respondent asserts that there is "a public road that runs just in front [i.e., on the reservoir side] of my property called the Kimball [R]oad" (response at 9). Based on this assertion, he argues that "any use of the land under the water in front [of] my land would have been on the public road that is neither the jurisdiction of the DEC nor [the Regulating District]" (id. at 11). This argument fails for several reasons.

First, assuming that all other issues relating to respondent's Kimball Road argument were resolved in respondent's favor, the assertion that the dock is always floating above Kimball Road presents an impossibility. As the record plainly reflects, the water level of Stillwater Reservoir fluctuates widely, sometimes exposing substantial portions of the foreshore near the Kincade parcel (see e.g. staff brief, exhibits C [Scanlon affidavit, photographs 1, 2, 12], E [Rivers affidavit, photographs 2, 5], N [Damato affidavit, photograph 17) and sometimes reaching to or near the northeast corner of the Kincade parcel (see e.g. response, exhibits 15, 17 at 4-6; staff brief, exhibits D [Keating affidavit, photograph 1], G [Contino affidavit, exhibit 21], J at 3-9; see also staff brief, exhibit L [Ashline affidavit at 3-9]). These fluctuations in the location of the shoreline necessitate corresponding changes in the location of respondent's dock. Accordingly, at most, respondent's dock floats above Kimball Road only on those occasions when the level of the reservoir dictates that it must.

In addition, respondent fails to establish the location of Kimball Road in relation to the Kincade parcel or, more particularly, in relation to where he floats his dock.

Respondent proffers a partial copy of an undated, unsigned map (exhibit 12 map) and asserts that it establishes that the northeast corner of his parcel touches the edge of Kimball Road (response at 11, exhibit 12 at 9[11]). The exhibit 12 map, however, depicts the boundaries of the Kincade parcel in a manner that is inconsistent with all of the other maps in the record that depict the boundaries of the parcel. The exhibit 12 map depicts three contiguous parcels of equal size (the dimensions of the parcels are not stated and no scale is provided) along the western boundary line of lands owned by the "State of New York" (id.). Respondent asserts that the northernmost of these three contiguous parcels is now the Kincade parcel.[12] The exhibit 12 map also depicts what appears to be the present-day high flow line of Stillwater Reservoir. Respondent asserts that the map demonstrates that the northeast corner of his parcel is both at the edge of Kimball Road and on "the lake side of the high water mark" (response at 11).

No other map filed by the parties depicts the Kincade parcel as one of three contiguous parcels of the same size (see e.g. response, exhibits 4 at 1-3 [undated portions of three tax maps, respondent states the second map depicts a correction done by the Town of Webb in 1999 (response at 3)], 5 at 1 [undated map], 14 at 2 [1993 Kovach survey]; respondent filing, Dec. 31, 2011, attachment [respondent's survey]; staff brief, exhibit G [Contino affidavit, exhibits 1 (2006 Department survey), 15 (1971 DEC survey), 17 (1927 Dunbar subdivision map), 18 (1924 map of lands to be flowed), 20 (2007 DEC spot elevations map)]). Where sufficient information on the relevant boundary lines is provided, the parcels along the western boundary of the State lands near the Kincade parcel are depicted as a mix of 100-foot wide lots and 50-foot wide lots, with the Kincade parcel shown as a 50 foot-wide lot sandwiched between two 100-foot wide lots. This is also consistent with the deeds in the chain of title for the Kincade parcel which describe the parcel's eastern boundary line along the State land as being 50 feet wide (see e.g. staff brief, exhibit G [Contino affidavit, exhibits 7 at 1 (1918 deed conveying "Lot No. 2, of [the] Dunbar Cottage Lots" from Dunbar to Harrington and Foster)], 12 at 2 (1999 deed conveying the same described parcel from Arthur C. Kincade to himself and respondent[13])]).

I conclude that the parcel identified by respondent as the Kincade parcel on the exhibit 12 map is not an accurate depiction of respondent's parcel. Accordingly, the exhibit 12 map is not probative of the location of the northeast corner of the Kincade parcel in relation to Kimball Road or the high flow line of Stillwater Reservoir.

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[11] The road depicted on the exhibit 12 map is not named. There is only one map in the record on which the name Kimball Road appears to have been on the original version of the map (see response, exhibit 11 at 4). The name Kimball Road also appears on one other map, but that map is a copy of a portion of the right angle survey map upon which the name Kimball Road has been added (see id. at 5; cf. id. at 3; staff brief, exhibit G [Contino affidavit, exhibit 3 (certified copy of the original right angle survey map)]).

[12] The northernmost parcel is marked, apparently by respondent, as "Kincade Now" (id.).

[13] There is also a 2001 deed into respondent alone, reserving a life estate to Arthur Kincade, but that deed does not contain a metes and bounds description of the parcel and instead refers back to the 1999 deed for the parcel description (id. [Contino affidavit, exhibit 13]).

Among the maps filed by Department staff is a map (takings map) of "Lands to be Taken, Flowed or Damaged" that was created in May 1923 by the former Black River Regulating District when it was in the process of acquiring lands that were to be flooded when the height of Stillwater Dam was raised (staff brief, exhibit G [Contino affidavit, exhibit 18]). The takings map bears a certification by the Department that it is a "true and complete" copy of the original map which is maintained by the Department. Like respondent's exhibit 12 map, the takings map depicts the present-day high flow line of the reservoir (id. [depicting the "High Flow Line" of the "Area to be Flowed" by raising the Stillwater Dam]). The takings map depicts the Kincade parcel as being 50 feet wide, sandwiched between two 100-foot wide parcels, with the high flow line passing to the north of the northeast corner of the Kincade parcel.[14] The takings map depicts Kimball Road (as an unnamed road) crossing the State land boundary line, not at the Kincade parcel, but near the northeast corner of the 100-foot wide parcel to the immediate north of the Kincade parcel (id.).

The right angle survey also depicts Kimball Road (again, as an unnamed road). The lot that is today the Kincade parcel did not exist at the time that the right angle survey was created, however, the right angle survey map shows the section of the State land boundary where the Kincade parcel is now located. Specifically, the Kincade parcel is located along the section of the right angle survey line (north-south line) that runs north-south, just north of the Carthage and Lake Champlain Road (see staff brief, exhibit G [Contino affidavit, exhibit 3 (the north-south line is depicted near the center of the map)]). Using the southernmost point of the north-south line as the starting point, the map shows Kimball Road crossing the north-south line approximately 750 feet to the north. Using the same starting point on the 2006 Department survey (staff brief, exhibit G [Contino affidavit, exhibit 1]) the northeast corner of the Kincade parcel is depicted as less than 650 feet to the north on the north-south line. Accordingly, these maps, like the takings map, indicate that the northern boundary line of the Kincade Parcel intersects the State land boundary line approximately 100 feet south of Kimball Road.

Not only does respondent err with respect to the location of Kimball Road in relation to the Kincade parcel, respondent also fails to introduce evidence that would support his assertion that Kimball Road was once, and is now, a public roadway (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980] [holding that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment; Matter of Locaparra at 4 [stating that "a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof"]).

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[14] This is also consistent with the 1924 deed under which the State acquired that portion of the parcel (north parcel) to the north of the Kincade parcel that was to be flooded by the raising of the dam. The 1924 deed describes the portion of the north parcel that is to be flooded and states that the eastern boundary, measured south from the northeast corner of the north parcel, will be "about 94 feet" (see staff brief, exhibit G [Contino affidavit, exhibit 14 at 1]). The eastern boundary of the north parcel is 100 feet long (see id. exhibits 17, 18, 20; response, exhibit 14). Accordingly, the 1924 deed indicates that the flowed land intersects the eastern boundary of the north parcel approximately six feet north of the northeast corner of the Kincade parcel.

Respondent's argument that his dock floats over Kimball Road and is, therefore, not under DEC jurisdiction, is in conflict with his assertion that Kimball Road is a public highway. If it is true that the road is submerged under water that is of sufficient depth to float respondent's dock, then it is also true that the road is impassable to normal foot or vehicular traffic (see Ciarelli v Lynch, 69 AD3d 1008, 1010-1011 [3d Dept 2010] [holding that when determining whether a public road has been abandoned "the relevant inquiry is whether travel on the road, whether by vehicle or on foot, continued to occur in forms reasonably normal, along the lines of an existing street" (internal quotation marks and citations omitted)]). The record clearly establishes that the portion of Kimball Road that passed nearest to the Kincade parcel is sometimes submerged below the waters of Stillwater Reservoir and that significant portions of the road are now at elevations below the crest of Stillwater Dam (see response at 13, exhibit 15; staff brief, exhibit G [Contino affidavit ¶ T, exhibits 18, 21]). Despite the foregoing, respondent argues that parts of the road are exposed every year when the water level of the reservoir is low, thereby allowing "the public and tax payers to get . . . to their properties to perform repairs or upgrades" (response at 9).

Respondent's assertion that Kimball Road is exposed and used every year is not supported by any photographs, affidavits, or other evidence proffered by respondent[15] (cf. Ciarelli, 69 AD3d at 1011 [noting that "[p]hotographs of the road show it to be in relatively good condition, and it would be readily accessible had plaintiffs not obstructed its path"]). The photographs in the record that depict the exposed foreshore of Stillwater Reservoir near the Kincade parcel show only beach and rock, nothing approximating a roadway or its vestiges (see e.g. staff brief, exhibits C [Scanlon affidavit, photographs 1, 2, 6, 7 (note that the small boathouse pictured is on the parcel to the north of the Kincade parcel and is located approximately where respondent asserts Kimball Road ran), 12], E [Rivers affidavit, photographs 2, 5]).

Moreover, the assertion that certain properties are accessible by car when the reservoir is low does not establish that Kimball Road exists as a public roadway today. Low reservoir levels may allow vehicles to travel on lands that are flooded at other times regardless of whether there was once a road on those lands. Even assuming that access to these properties is made via the former route of Kimball Road, an assumption for which there is no evidence in the record, the occasional use of that route would not undermine the determination that the road was abandoned (see Abess v Rowland, 13 AD3d 790, 792

[15] Respondent proffered a copy of a lease to a non-party that was granted by the Town of Webb for use of a portion of an abandoned road "to be used and occupied only and solely to support a floating wooden dock" (respondent filing, Nov. 1, 2008, attachment ¶ 3). That lease, however, does not relate to Kimball Road. Rather, the lease relates to a section of the former Carthage and Lake Champlain Road and, therefore, has no bearing on whether Kimball Road exists today as a public roadway (see id., attachment ¶ 2 [stating that the abandoned road is depicted on "the attached July 25, 2000 Survey Map No. 11593" (although respondent failed to include the referenced map, the map is included in staff's filings [see staff brief, exhibit G (Contino affidavit, exhibit 16)] and depicts the area to the south of the Kincade parcel and a portion of the former "Carthage – Lake Champlain Road")]).

[3d Dept 2004] [holding that "occasional, limited use will not defeat a finding of abandonment"]).

It is also not clear that Kimball Road was ever used as a public highway. No records have been proffered that establish the road was once open to the public. The right angle survey map depicts Kimball Road as an unnamed dead-end road, less than a mile long, that extended north from what was then the Carthage and Lake Champlain Road to the site of an earlier dam on the Beaver River (staff brief, exhibit G [Contino affidavit, exhibit 3]). Kimball Road is the only road that is depicted in the vicinity of the dam site and may have been nothing more than an access road. The current site of Stillwater Dam is accessed, appropriately enough, via Necessary Dam Road. Unlike Kimball Road, which ran to the east of the Kincade Parcel, below the elevation of the current high flow line of Stillwater Reservoir, Necessary Dam Road runs on uplands to the west of the Kincade parcel (see http://www.dec.ny.gov/docs/regions_pdf/stillwat.pdf [accessed Feb. 7, 2013]; response, exhibit 4 [tax maps depicting the portion of Necessary Dam Road nearest to the Kincade parcel]). A 1927 map of the area, signed by a licensed professional engineer and land surveyor, does not depict Kimball Road at all, but does depict the southern portion of a "Road to Dam" at the location of Necessary Dam Road (see staff brief, exhibit G [Contino affidavit, exhibit 17]).

Additionally, as depicted on the right angle survey map, Kimball Road was located entirely on lands then owned by the Adirondack Timber & Mineral Company (ATMC), and was partially within and partially without the boundaries of the right angle survey (staff brief, exhibit G [Contino affidavit, exhibit 3]). The two sections of Kimball Road that were outside the right angle survey boundary were appropriated from ATMC by the State as discrete parcels (see id. [Contino affidavit, exhibit 2 at 2 (note that the two sections of Kimball Road are described under the heading "Description of Road to be Condemned on the Land of the Adirondack Timber & Mineral Company" and the "beginning" points in the deed descriptions for the parcels are denoted on the right angle survey map)]). If Kimball Road had been a public highway, the State would not have needed to appropriate the land from ATMC in order to use the road.

From all of the foregoing, I conclude that respondent's arguments concerning Kimball Road are without merit and unsupported by evidence. Accordingly, respondent may not rely upon use of Kimball Road as a defense against staff's allegation that respondent maintained his floating dock over State land without authorization from the Department.

Other Issues Raised by Respondent

--Estoppel

Respondent argues that "DEC has recognized that the up land owners have been utilizing the state land in front of them for reasonable use of recreation for the past ninety years" and questions the legality of the Department's current enforcement effort (response at 2). Essentially, respondent's argument is one of estoppel. Regardless of whether

respondent is able to establish the elements of estoppel, the defense of estoppel is unavailable to respondent in the context of this proceeding. It is well settled that a governmental unit may not be estopped from the proper discharge of its statutory duties (see e.g. Matter of Schorr v New York City Dept. of Housing Preserv. and Dev., 10 NY3d 776, 779, [2008] [stating that "It is well settled that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (internal quotation marks and citations omitted)]; Matter of Parkview Assoc. v City of New York, 71 NY2d 274, 282 [1988] [holding that "estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results"] [citations omitted]). Here, the Department has a clear statutory duty to protect forest preserve land and the Department's prior acquiescence toward respondent's activities cannot serve to foreclose the Department from fulfilling that duty.

--Double Jeopardy

Respondent states that he was issued a ticket in December 2003 for replacing the stairs from his parcel to the reservoir. He further states that he was scheduled to attend a hearing on the ticket sometime in early 2004, but that he had to cancel because of health reasons. He asserts that he was later advised by the Department that if he "didn't [hear] from anybody by [December 31,] 2004 that the ticket would be thrown out" (response at 6). Respondent argues that, since he was not subsequently contacted about the ticket, the matter was resolved and he asks, "is the DEC allowed to play double jeopardy?" (id.).

This argument is without merit. The 2003 ticket issued to respondent was not adjudicated nor was it formally resolved through an order on consent or other means. Moreover, the charge set forth under the 2003 ticket alleges that respondent excavated the bank of the reservoir below the mean high water line in violation of ECL 15-0505(1) (see response, exhibit 7). That alleged violation is not charged as part of the instant proceeding. Accordingly, it cannot be said that respondent has twice been put in jeopardy for the same offense (see People v Gause, 19 NY3d 390, 394 [2012] [holding that "[a]t its core, double jeopardy precludes the government from prosecuting a defendant for the same offense after an acquittal or a conviction; or from imposing multiple punishments for the same offense in successive proceedings" (internal quotation marks and citations omitted)]).

First Cause of Action

By its first cause of action, Department staff alleges that at various times between May 25, 2001 and August 24, 2007, respondent cut, removed, injured or destroyed trees or other property on State land without authorization, in violation of ECL 9-0303(1). Respondent denies the allegation (response at 15).

Respondent does not deny that the vegetation on the eastern portion of the Kincade parcel is similar in appearance to the vegetation on the adjoining State land east

of his parcel. Respondent also acknowledges that "the pattern of vegetation" in the subject area "has not changed in forty plus years" (response at 15-16 [referring to exhibit 17 at 2]). The vegetation in much of this area, on both sides of the State land boundary, has a lawn-like appearance, with little variety in plant species, and is generally uniform in height (see e.g. response, exhibit 17 at 2-6; staff brief exhibits C [Scanlon affidavit ¶¶ E.2-E.4, photographs 2, 3, 6, 12], D [Keating affidavit ¶ 3, photograph 2], E [Rivers affidavit ¶¶ 4.A, 4.C-4.D, photographs 1, 3-4], N [Damato affidavit, photograph 19]). Respondent denies that he has actively managed the vegetation on the State-owned portion of this area and argues that the lawn-like appearance is the result of foraging by wildlife (response at 16, exhibit 17 [photographs at 4-6]). He states that he has observed ducks, squirrels, chipmunks, geese and ravens foraging on the site (id.).

Department staff filed the affidavit of a DEC forester with extensive forestry experience in support of this cause of action (see staff brief, exhibit E [Rivers affidavit ¶¶ 1-3]). The forester attests that the conditions he observed on the site "clearly demonstrate prolonged vegetative maintenance . . . The most compelling indicator of maintenance is a low density of mature trees and lack of tree seedlings and/or saplings" (id. [Rivers affidavit ¶ 4.A]). Attached to the forester's affidavit are a series of photographs that portray the differences between areas where vegetation has been actively managed and areas where the vegetation has generally been left in its natural state. Of particular note are the forester's comparisons between photographs of the State land at issue and adjacent or nearby State lands where the vegetation has not been actively managed (id. [Rivers affidavit ¶ 4, photographs 1 through 8]). As staff's proffer demonstrates, the routine management of vegetation at the site results in the destruction of young trees and other plants and prevents them from reaching maturity (id.). Staff's proffer establishes that vegetation at the site was actively managed at various times from 1998 through August 30, 2007 (see findings of fact ¶ 4).

I conclude that Department staff has met its burden to establish that respondent violated ECL 9-0303(1) by cutting, removing, injuring, or destroying trees or other property on the site without authorization during the time period alleged in the complaint. Staff has filed sufficient evidence in admissible form to establish a prima facie case as to this cause of action. In response, respondent has offered conjecture. Respondent's speculation that the foraging of wild animals may have resulted in the lawn-like appearance of the site is not sufficient to defeat staff's proffer and does not raise an issue of fact that warrants adjudication (see Zuckerman v City of New York, 49 NY2d 557, 562, supra; Siegel v City of New York, 86 AD3d 452, 455 [1st Dept 2011] [holding that an "unsupported assertion . . . is mere conjecture and fails to raise a triable issue of fact"]).

Second Cause of Action

By its second cause of action, Department staff alleges that between at least June 30, 2003 and August 30, 2007, respondent maintained an unauthorized floating dock on, over, and attached to State land in violation of ECL 9-0303(2). Respondent denies

that he maintains a dock on the reservoir and argues that the alleged dock is actually a pontoon boat (response at 8).

For the purposes of determining the instant motion, I accept as true respondent's assertion that the floating dock is a pontoon boat. This, however, is a distinction without a difference in the context of this proceeding. Respondent is clearly using the subject pontoon boat as a floating dock; it is fixed to the underwater lands of the State by steel rods or pipes, it has an access ramp attached to it that extends onto the shore, and respondent moors other watercraft to it (see staff brief exhibits C [Scanlon affidavit ¶¶ E.1-E.3, photographs 1 (and accompanying text at 4), 8 (and accompanying text at 8), 12 (and accompanying text at 8)], D [Keating affidavit ¶ 3, photograph 1], E [Rivers affidavit ¶ 4.E, photograph 5]). Moreover, although he denies that the subject pontoon boat is a floating dock, respondent admits that he owns both it and the watercraft that are typically moored to it (see findings of fact ¶ 6; see also staff brief, exhibit F [respondent letter, Dec. 17, 2007, at 2 (stating that a DEC employee was "trespassing on my dock without permission")]).

I conclude that Department staff met its burden to establish that respondent violated ECL 9-0303(2) by maintaining an unauthorized floating dock on, over, and attached to State land. Specifically, I conclude that respondent maintained the dock on State land during the boating season each year between 2003 and 2007, inclusive (see findings of fact ¶ 6).

Third Cause of Action

By its third cause of action, Department staff alleges that between at least the fall of 2003 and July 30, 2008, respondent maintained stone steps on State land extending from the Kincade parcel to the shore of Stillwater Reservoir in violation of ECL 9-0303(2). Respondent admits that he built and maintains the stone steps on the State land adjacent to his parcel, but argues that he built the stairway under authorization from the Regulating District (response at 5).

Department staff acknowledges that respondent sought permission to build the stairway from a State agency that respondent thought was authorized to grant such permission (staff filing, Oct. 17, 2008, at 2). Nevertheless, staff argues that because the Department, and not the Regulating District, has jurisdiction over the site, respondent violated ECL 9-0303(2) by constructing and maintaining the stairway. Staff states that it took respondent's effort to obtain permission for the stairs into account and, therefore, staff is not seeking a penalty in relation to this cause of action (id.).

Notably, the Regulating District's letter to respondent authorizing the placement of the stone steps advises respondent that the authorization pertains only to "land below elevation 1679.3 feet," the elevation of the crest of the Stillwater Dam spillway (response, exhibit 6 at 1). Accordingly, the portion of respondent's stairway that was built on State land above 1679.3 feet was not authorized by the letter from the Regulating District (see respondent filing, Dec. 31, 2011, attachment [respondent's survey]; staff

brief, exhibit G [Contino affidavit, exhibit 20]). More importantly, although the Regulating District has authority over the operation of Stillwater Reservoir "for the purpose of regulating the flow of streams, when required by the public welfare" (ECL 15-2103[1]), the Department has the authority and the duty to enforce the provisions of ECL article 9 within the forest preserve (see ECL 9-0105). Finally, as discussed above, estoppel is not available against the state under the circumstances presented here (see supra at 16-17).

Department staff has met its burden of proof to establish that respondent maintained stone steps on State land without authorization in violation of ECL 9-0303(2) from fall 2003 to July 30, 2008.

Fourth Cause of Action

By its fourth cause of action, Department staff alleges that between at least June 30, 2003 and August 30, 2007 respondent violated ECL 9-0301(1) by maintaining an unauthorized floating dock on, over, and attached to State land, thereby restricting the free use of such lands by all the people. Respondent denies the allegation (response at 8).

Because I have determined that respondent has maintained a floating dock on State land in violation of ECL 9-0303(2) (see second cause of action), respondent is liable as a matter of law for violation of ECL 9-0301(1) (see Matter of Bartell, Order of the Commissioner, Oct. 14, 2010, at 3 [holding 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)"]). Accordingly, I conclude that, during the boating season each year between 2003 and 2007, inclusive, respondent interfered with the free use of State land by all the people (see findings of fact ¶ 6).

Penalty

Department staff argues that the maximum penalty authorized by statute for respondent's violations is $500 per violation, with an additional penalty of $500 for each day during which each violation continues, as set forth in ECL 71-4003 (staff brief at 14-15). Section 71-4003 sets forth the general civil penalty for violations of the Environmental Conservation Law where no specific penalty is provided for elsewhere in the ECL. As staff counsel acknowledges, civil penalties for violations relating to ECL article 9 are provided for under ECL 71-0703. Staff counsel argues, however, that "ECL 71-0703.1 relates to the criminal sentencing of a defendant for violating ECL Article 9" and "does not apply to the determination of civil penalty for administrative enforcement purposes" (id. at 19).

Department staff's arguments concerning the applicability of ECL 71-4003 were considered at length and rejected in a previous matter before this office involving similar facts and allegations (see Matter of Bartell, ALJ Ruling, June 11, 2009 at 18-21 [concluding that "staff's claim that ECL 71-0703(1) does not apply to administrative

enforcement matters is without merit"], adopted by Order of the Commissioner, Oct. 14, 2010, at 2-3). Accordingly, the ECL 71-0703 supplies the appropriate penalty provision for the violations charged by staff in this proceeding.

In its brief, Department staff states that, "should the Commissioner determine that ECL 71-0703.1 provides the proper civil penalty . . . , then staff seek[s] a civil penalty of no less than $40 but no more than $400" (staff brief at 15). Section 71-0703(1) 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."[16] As noted below, the maximum authorized penalty available for respondent's violations is in excess of the $400 requested by staff.

Staff established that respondent violated ECL 9-0303(1) at various times between May 25, 2001 and August 24, 2007, by cutting, removing, injuring, or destroying vegetation on State land. For the purposes of this penalty calculation, I will assume that respondent committed this violation only once each year from 2001 through 2007, inclusive.[17] Accordingly, I conclude that the maximum penalty authorized for these violations is $700 (one violation in each of seven years, each subject to a maximum authorized penalty of $100 pursuant to ECL 71-0703[1]).

With regard to respondent's violations of ECL 9-0303(2), I note that this provision reads, in its entirety, "Structures. No building[18] shall be erected, used or maintained upon state lands except under permits from the department." Arguably, each use of his floating

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

[17] A forest ranger with the Department states that he "inspected the shoreline area [adjacent to the Kincade parcel] at least twice weekly from April through November [each year from 1998 through 2006]" (staff brief, exhibit C [Scanlon affidavit ¶ C]). He further states that "[d]uring 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 at issue]" (id. [Scanlon affidavit ¶ E.4]). The ranger also states that he observed the effects of "vegetative management" on the site during an August 24, 2007 inspection (id. [Scanlon affidavit at 8 (describing photograph 6)]). 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 2007, staff does not specifically allege that respondent engaged in this activity on multiple occasions each year. Under these circumstances, calculating the penalty using one violation per year is appropriate (see Matter of Bartell, Order of the Commissioner, Oct. 14, 2010, at 2-3, adopting ALJ Summary Report at 3 n 4; Matter of Wilson, Order of the Commissioner, Dec. 18, 2008, at 2, adopting ALJ Summary Report at 9 n 8).

[18] The Commissioner expressly adopted a broad definition to the word "building" as used in this provision of the ECL (see Matter of Bartell, Order of the Commissioner, Oct. 14, 2010, at 2-3, adopting ALJ Ruling, June 11, 2009, at 17 [concluding that "to narrowly construe the term buildings as urged by respondent would be inconsistent with the Department's duty under ECL 9-0303 to protect article 9 lands. That is, to allow all manner of structures to be erected, used and maintained on article 9 lands, except for those that happen to be suitable for human habitation, cannot be said to be protective of these lands"]).

dock or stairs by respondent could be considered as a separate violation. However, given the lack of argument or evidence on this record concerning respondent's usage of these structures, this penalty calculation focuses on respondent's erection and maintenance of the structures on State land.

Staff established that respondent violated ECL 9-0303(2) by maintaining a floating dock on the State land at issue without authorization each year from 2003 to 2007, inclusive. As admitted by respondent, the floating dock was removed at the end of each boating season and returned at the beginning of the following boating season (see findings of fact ¶ 6). I conclude the maximum penalty authorized for this violation is $500 (one violation for each year that staff alleges that respondent placed and maintained his floating dock on the State land at issue, with each violation having a maximum authorized penalty of $100 pursuant to ECL 71-0703[1]).

Staff established that respondent violated ECL 9-0303(2) from the fall of 2003 through and including July 30, 2008 by maintaining stone steps on the State land at issue without authorization. Unlike respondent's dock, the steps remain in place once erected; therefore, I count this as one violation. I conclude the maximum penalty authorized for this violation is $100 (one violation having a maximum authorized penalty of $100 pursuant to ECL 71-0703[1]).

Staff established that respondent violated ECL 9-0301(1) by maintaining a floating dock on the State land at issue, thereby restricting the free use of such land by all the people, each year from 2003 to 2007, inclusive. I conclude that the maximum penalty available for these violations is $500 (one violation for each year that staff alleges that respondent placed and maintained his floating dock on the State land at issue, with each violation having a maximum authorized penalty of $100 pursuant to ECL 71-0703[1]).

As outlined above, the $400 penalty requested by Department staff is well within the maximum penalty available under the statute. Staff argues that a penalty is warranted in this matter because respondent has had the use and enjoyment of the State land at issue for many years, essentially using the land "as an extension of Respondent's parcel" (staff brief at 21). 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 "clearly was on notice" since at least 2003 that his use of the State land at issue was unauthorized and he took no corrective action (id. at 22).

Consistent with prior Commissioner orders on similar matters, I recommend that the Commissioner assess the $400 penalty requested by staff and suspend the entire amount provided respondent complies with the corrective measures set forth below (see Bartell, Order of the Commissioner, Oct. 14, 2010, at 4; Matter of Wilson, Order of the Commissioner, Dec. 18, 2008, at 3).

Corrective Measures

Staff requests that the Commissioner issue an order directing respondent to remove, and not replace, the floating dock and stone steps from State land within 30 days of the date of the Commissioner's order. Further, if respondent fails to remove these structures, staff requests that the Commissioner direct staff to remove them and seek reimbursement from respondent for the cost of removal.

These corrective measures are appropriate and authorized. Section 9-0105(1) of the ECL states that "[f]or the purpose of carrying out the provisions of [ECL article 9], the department shall have the power, duty and authority to . . . [e]xercise 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." As set forth in this summary report, respondent's maintenance and use of the dock and stairs on forest preserve lands is in violation of ECL article 9. Accordingly, the Commissioner has the authority to order respondent to remove, or have staff remove, these unauthorized improvements from the forest preserve.

CONCLUSIONS OF LAW

1. At various times between May 25, 2001 and August 24, 2007, respondent cut, removed, injured or destroyed trees or other property on State land without authorization, in violation of ECL 9-0303(1).

2. At various times between June 30, 2003 and August 30, 2007, inclusive, respondent maintained an unauthorized floating dock on, over, and attached to State land in violation of ECL 9-0303(2).

3. Between the fall of 2003 and July 30, 2008, respondent maintained stone steps on State land in violation of ECL 9-0303(2).

4. At various times between June 30, 2003 and August 30, 2007, inclusive, respondent maintained an unauthorized floating dock on, over, and attached to State land, thereby restricting the free use of such lands by all the people in violation of ECL 9-0301(1).

RECOMMENDATIONS

I recommend that the Commissioner issue an order (i) holding respondent liable for the violations charged by Department staff, as modified by this summary report, and (ii) assessing a penalty against respondent in the amount of $400, the entire amount of which to be suspended provided that respondent removes the floating dock and stone

steps from the State land at issue on or before 30 days from the date of the order of the Commissioner.

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

Dated: March 15, 2013
Albany, New York