STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 9[1] of the Environmental Conservation Law of the State of New York ("ECL") and Title 6, Part 190, of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC Case No. R5-20111108-1076

-by-

JAMES R. SMITH, JR.,

Respondent.

This administrative enforcement proceeding involves allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondent James R. Smith, Jr., illegally directed loggers to enter upon State-owned forest land, which was adjacent to his property in the Town of Malone, Franklin County, to cut and remove trees that were growing on that State land. The State land is part of the Titusville State Forest, a reforestation area outside of the Adirondack Park. This reforestation area was acquired by the State pursuant to ECL 9-0501 and is not part of the forest preserve.

Staff personally served a notice of hearing and complaint on Mr. Smith on November 16, 2012. Staff, in its complaint, set forth three causes of action, alleging that respondent:

(1) without legal right or permission, caused loggers to enter State lands and cut and remove 308 trees, in violation of ECL 9-0303(1);

(2) caused the loggers to enter on State lands and cut and remove 308 trees, in violation of 6 NYCRR 190.8(g); and

(3) caused loggers to enter State land with motorized vehicles and equipment in order to cut and remove 308 trees, in violation of 6 NYCRR 190.8(m).

Respondent filed an answer dated January 7, 2013, in which he raised six affirmative defenses. After the completion of discovery and the parties' failure to reach a settlement, staff submitted a statement of readiness dated February 13, 2014 to proceed with an adjudicatory hearing (see Hearing Exhibit ["Exh"] C). The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster (see letter dated February 24, 2014 from Chief Administrative Law Judge James T. McClymonds, Hearing Exh D). An adjudicatory hearing was convened before

[1] Staff of the New York State Department of Environmental Conservation cited a violation of Article 71 of the ECL in the caption of its pleadings. No violation of Article 71, however, was referenced in staff's complaint (see Hearing Exhibit A).

ALJ Buhrmaster on May 15 and 16, 2014. The ALJ prepared the attached hearing report, finding respondent liable for the alleged violations and recommending a penalty of $74,765.97.

I hereby adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

The ALJ, after an extensive review of the evidence relating to the boundaries of the State land and respondent's property (see, e.g., Hearing Report at 16-21), rejected respondent's contentions that no entry on State land occurred. The ALJ found that respondent caused an entry onto State land, but determined that the number of trees cut and removed with a mechanical harvester was 284, a figure slightly lower than staff's allegation (see Hearing Report at 9 [Finding of Fact 26], 10 [Finding of Fact 32]). The tire rutting at the location of the cutting indicated heavy equipment operation in the area of the trespass (see, e.g., Hearing Report at 9-10 [Findings of Fact 27-29]).

The ALJ also considered each of the affirmative defenses that respondent raised. The ALJ recommended that the first three affirmative defenses (respondent's challenge to the property line, the timing of the Department's survey, and no stated cause of action) should be disregarded on the ground that they are not affirmative defenses, and the remaining affirmative defenses (statute of limitations, res judicata and collateral estoppel) should be rejected on the merits (see Hearing Report at 22-24). I concur with the ALJ's recommendation.

ECL 71-0703(6)(a) provides that, in addition to any other penalty provided by law, any person who violates ECL 9-0303(1) shall be liable for a civil penalty of two hundred fifty dollars ($250) per tree or treble damages, based on the stumpage value of such tree, or both. In considering the civil penalty, the ALJ determined that the second cause of action (for the violation of 6 NYCRR 190.8[g]) was multiplicative of the first cause of action (for the violation of ECL 9-0303[1]). Accordingly, he found that separate penalties for both causes of action were not warranted (see Hearing Report at 26), and I agree.

With respect to the civil penalty, the ALJ recommended as follows:

> --for the violations of ECL 9-0303(1), a penalty of $250 dollars for each of the 284 trees cut and removed ($250 x 284 = $71,000). In addition, the ALJ proposed assessing treble damages based on the stumpage value of the trees (that is, $1,221.99 x 3 = $3,665.97), for a total of $74,665.97; and
>
> --for the violation of 6 NYCRR 190.8(m)(use of motor vehicles on State land under the jurisdiction of the Department outside the forest preserve), a civil penalty of one hundred dollars ($100).

The civil penalty, combining the amounts recommended for the two violations, would be seventy four thousand seven hundred sixty-five dollars and ninety-seven cents ($74,765.97).

The extensive cutting of trees on State land, respondent's indifference for and disregard of boundary lines, the loss of the market value of these trees to the State, and the resulting

environmental damage arising from this illegal activity warrant a significant penalty. Based on the record before me, the recommended penalty is authorized and appropriate.

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

I. Respondent James R. Smith, Jr. is adjudged to have violated ECL 9-0303(1) and 6 NYCRR 190.8(m) for causing the cutting and removal of 284 trees on State-owned forest land in the Town of Malone, Franklin County and the use of motor vehicles on State land in conjunction with the cutting and removal of the trees.

II. Respondent James R. Smith, Jr. is hereby assessed a civil penalty in the amount of seventy-four thousand seven hundred sixty-five dollars and ninety-seven cents ($74,765.97).

Within sixty days (60) days of the service of this order upon respondent, respondent shall pay the civil penalty, in its entirety, by certified check, cashier's check or money order made payable to the order of the "New York State Department of Environmental Conservation." Payment shall be submitted by certified mail, overnight delivery, or by hand delivery to the Department at the following address:

New York State Department of Environmental Conservation
Region 5
P.O. Box 296
1115 NYS Route 86
Ray Brook, New York 12977
Attn: Scott Abrahamson, Esq.

III. Any questions or other correspondence regarding this order shall also be addressed to Scott Abrahamson, Esq. at the address referenced in paragraph II of this order.

IV. The provisions, terms and conditions of this order shall bind respondent James R. Smith, Jr., 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: July 2, 2015
Albany, New York

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

In the Matter

- of -

Alleged Violations of Articles 9 and 71 of the New York State Environmental Conservation Law ("ECL") and Title 6, Part 190, of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR")

- by –

JAMES R. SMITH, JR.

Respondent

NYSDEC Case No. R5-20111108-1076

HEARING REPORT

- by –

_____/s/_____
Edward Buhrmaster
Administrative Law Judge

November 19, 2014

PROCEEDINGS

This enforcement matter was initiated by personal service of a Notice of Hearing and Complaint (Exhibit A) on the respondent, James R. Smith, Jr., at his residence on November 16, 2012. The complaint, dated November 14, 2012, alleged that in or about November 2008, Mr. Smith caused an entry upon State-owned forest land in the Town of Malone, Franklin County, with motorized vehicles and equipment. According to the complaint, this entry resulted in the cutting and removal of 308 trees that were growing on that land.

An answer to the complaint (Exhibit B), dated January 7, 2013, was filed on Mr. Smith's behalf by his attorney, Thomas M. Murnane of Stafford, Piller, Murnane, Kelleher & Trombley, PLLC, in Plattsburgh, New York.

After the completion of discovery and the parties' failure to reach a settlement, Department of Environmental Conservation ("DEC") Staff counsel Scott Abrahamson submitted a statement of readiness to proceed with an adjudicatory hearing (Exhibit C), consistent with Section 622.9 of Title 6 of the Codes, Rules and Regulations of the State of New York ("6 NYCRR 622.9"), on February 13, 2014. Upon receipt of the statement of readiness at DEC's Office of Hearings and Mediation Services ("OHMS"), the matter was assigned to me by James T. McClymonds, DEC's Chief Administrative Law Judge, as confirmed by his letter of February 24, 2014 (Exhibit D).

After a conference call with the parties' counsel, I issued a notice (Exhibit E) confirming that the hearing in this matter would commence at 10 a.m. on May 15, 2014, at DEC's Region 5 office in Ray Brook, and would continue throughout that day and on May 16, 2014, to the extent necessary to complete the record. The hearing was held as scheduled on both days. Upon completion of the evidentiary record, the parties requested, and were afforded, an opportunity to submit closing briefs.

Three witnesses testified for DEC Staff: Thomas Gliddi, DEC Region 5 forest ranger; Carolyn Wiggin, DEC Region 5 land surveyor; and Sean Reynolds, senior forester. Mr. Smith testified, and two other witnesses testified on his behalf: Herbert Boyce, a consulting forester with Northwoods Forest

Consultants, LLC, in Jay, New York; and Dean Lashway, a land surveyor in Altona, New York.

The evidentiary record consists of a 440-page transcript compiled from the two days of testimony, as well as various documents. Attached to this hearing report is an exhibit list of the 15 documents that were presented by the parties and marked for identification; all but one (No. 9) were received in evidence. The list also includes five documents (A - E) that I took into the record myself, not as evidence but to confirm how this matter proceeded to hearing.

Rather than make oral closing statements, counsel for the parties requested an opportunity to submit post-hearing briefs. After receiving several requested extensions of the briefing deadline, the parties submitted their post-hearing briefs electronically on September 5, 2014.

By correspondence dated September 8, 2014, DEC Staff counsel proposed several transcript corrections, which were not opposed by respondent. I made these corrections and subsequently proposed others after reviewing the transcript during completion of this hearing report. My proposed transcript corrections were circulated to the parties' counsel on October 23, 2014, with a directive that any objections to them be filed in writing by October 31, 2014. Because no objections were filed, the transcript now includes my corrections as well.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, Mr. Smith, without legal right or permission, directed loggers on his property to enter upon adjacent State land, part of the Titusville State Forest, where they cut and removed 308 trees that were growing there. This is charged in a first cause of action as a violation of Environmental Conservation Law ("ECL") 9-0303(1), and in a second cause of action as a violation of 6 NYCRR 190.8(g). The use of motorized vehicles and equipment to cut and remove the

trees is charged separately, in a third cause of action, as a violation of 6 NYCRR 190.8(m).

Pursuant to ECL 71-0703(6)(a), DEC Staff is seeking a civil penalty of $250 per tree that it alleges was cut and removed, totaling $77,000 ($250 x 308), as well as treble damages of $4,335 (based on a total stumpage value of $1,445 for the timber). For the operation of motor vehicles and equipment on state lands, DEC Staff is seeking a separate penalty of $100, pursuant to ECL 71-0703(1).

Combining the penalties for the various alleged violations, the total requested penalty is $81,435. While acknowledging this is a substantial amount, DEC Staff says it is warranted because of Mr. Smith's alleged indifference to the correct location of the boundary between his property (which he owns with two others not charged in this matter) and property to the south (which is forest land belonging to New York State).

Position of Respondent

Mr. Smith submitted an answer denying DEC Staff's charges and pleading six affirmative defenses, which are discussed below. Mr. Smith says there is substantial and continuing confusion about the boundary between his property and the State's property to the south. Mr. Smith maintains that, at the time of the alleged incident, he had reason to believe the tree cutting was restricted to his property, and notes that the survey on which the State relies was not performed until the year after the cutting occurred.

Mr. Smith says that he has been in the forestry business for about 40 years, is very cognizant of how boundaries are marked in the forest, and had discussed the disputed property line with Mr. Gliddi, the DEC forest ranger, many times in conjunction with prior cuttings performed on his property since he purchased it in 2004. He denies entering a contract with anyone to log his property in 2008, and claims the cutting that occurred that year was approved by one of his employees, without his knowledge, on the assumption that he would not object to it, and was initiated without his knowledge. Mr. Smith acknowledges that when he learned the work had started, he consented to it,

marked what he understood to be his southern property line, and told the loggers to cut to that line.

Mr. Smith maintains that he has no prior violations of laws or regulations governing forestry, including those enforced by DEC. Furthermore, he points out that criminal charges stemming from this incident were dismissed with prejudice.

Should the Commissioner find that DEC Staff adequately proved its charges, Mr. Smith says that no civil penalties should be imposed. Also, asserting that he had cause to believe that the land upon which the alleged trespass occurred was his own, Mr. Smith argues that the maximum civil penalty that should be imposed in this matter is $1,445.00, the stipulated stumpage value of the trees that were removed from that land.

FINDINGS OF FACT

1. James R. Smith, Jr., of 3055 Route 9 in Peru, New York, earns his living as a logger, and has been in the logging business all his life, as the owner of Smith's Logging since 1977, and prior to that with his father, who was a logger as well. (Smith: transcript, pages 338 and 339.)

2. Mr. Smith owns two adjacent parcels totaling more than 80 acres along the west side of Duane Road (also known as Studley Hill Road) in the Town of Malone, Franklin County. He owns these parcels (for purposes of this report, referred to collectively as the "Smith property") as a tenant in common with two other individuals, Wayne Dashnaw and Martin Hanbury, the three having purchased the parcels in 2004 from Eleanor Boyea. (Smith: transcript, page 338. See also Exhibit No. 2, a regional map on which the area of the Smith property is highlighted; sheet one of Exhibit No. 4, a DEC survey map indicating the two parcels that constitute the Smith property; and Exhibit No. 7, a warranty deed from Boyea to Smith, Dashnaw and Hanbury.)

3. The Smith property is bordered on the east by Duane Road, and on the north, west and south by State-owned land that is part of the Titusville State Forest, a reforestation area outside the Adirondack Park and the forest preserve, acquired by the State pursuant to ECL 9-0501. (Gliddi: transcript, pages 42

and 43; see also Deed, Exhibit No. 6, at 7; Department Staff's post-hearing brief at 5.)

4. In the spring of 2005, while on routine patrol along Duane Road, Thomas Gliddi, a DEC forest ranger, noticed logging operations on the Smith property, and spoke to Mr. Smith about them. (Exhibit No. 1, paragraph 2; Gliddi: transcript, pages 54 – 59.)

5. To ensure there were no illegal incursions onto State land, Mr. Gliddi attempted to find the boundary lines of the Smith property. He was able to locate the southeast survey monument along Duane Road (#1 on sheet one of Exhibit No. 4), from which he walked west, following yellow paint on the trees, the customary method used by DEC to mark its property lines. However, he was initially unable to locate the southwest survey monument, as the yellow painted line, which was also posted with state forest signs, terminated in an old timber harvest. After numerous attempts and many weeks, Mr. Gliddi was able to locate the southwest survey monument (#2 on sheet one of Exhibit No. 4); however, there was no yellow paint to indicate where the southern boundary went from it. (Exhibit No. 1, paragraph 3; Gliddi: transcript, pages 56 and 57.)

6. The southern property line of the Smith property is about a half-mile long, and one cannot see from one end to the other. Walking west from Duane Road, there is a steep rise for about 200 feet, then a plateau, and then another rise followed by another plateau. (Gliddi: transcript, pages 79 – 81; Wiggin: transcript, pages 218 and 219.)

7. Using a handheld Garmin GPS unit and the Terrain Navigator computer program, Mr. Gliddi placed the southern survey monuments and painted the yellow boundary line onto a topographic map (Exhibit No. 3). It appeared to Mr. Gliddi that the yellow line (a dashed line highlighted in yellow on Exhibit No. 3) was placed in the wrong place, well south of where it should have been when the monuments were connected by a straight line (highlighted in green on Exhibit No. 3). (Exhibit No. 1, paragraph 3; Gliddi: transcript, page 58.)

8. Prior to this discovery by Mr. Gliddi, Mr. Smith had selectively cut up to the yellow-painted line that New York

State had indicated was the boundary. DEC Region 5's Division of Lands and Forests was notified of the boundary line discrepancy and timber harvest on May 19, 2005. However, no action was taken against Mr. Smith, because he had cut up to the boundary line that the State had indicated was its own. (Exhibit No. 1, paragraph 3; Gliddi: transcript, page 58.)

9. During a subsequent site inspection, Mr. Gliddi met Mr. Smith at the southwest corner monument, where Mr. Smith was attempting to locate the western boundary of his property. Mr. Gliddi informed Mr. Smith of the southern boundary line discrepancy and that Smith had cut onto State land. Mr. Smith told Mr. Gliddi that no further cutting was going to occur in that area and that he was going to have his property surveyed to establish the boundary line and therefore get the most out of his investment. (Exhibit No. 1, paragraph 3; Gliddi: transcript, pages 58 and 59.)

10. From the spring of 2005 to the spring of 2007, Mr. Gliddi made periodic inspections of the State boundary lines around the Smith property. Although timber harvesting still occurred on the Smith property, there was no further activity in the area of the southern boundary line or any apparent incursions onto State land. Mr. Gliddi attempted to locate the southern boundary line, walking between the corner monuments with a compass. However, the line was always bowed southward onto State land, as Mr. Gliddi determined by use of the track log of his State-issued Garmin GPS and Terrain Navigator computer program. (Exhibit No. 1, paragraph 4.)

11. During the summer of 2007, Mr. Gliddi had discussions with Mr. Smith at his property. Mr. Smith told Mr. Gliddi that he wanted to do further cutting along the southern portion of his property and that he wanted to know where he could cut. Mr. Gliddi told Mr. Smith that it was his responsibility to know where his property lines were but that he would flag a rough estimate of the boundary line, erring onto the Smith property to prevent cutting onto State land. (Exhibit No. 1, paragraph 5; Gliddi: transcript, page 59.)

12. On July 6, 2007, after obtaining approval from DEC Region 5, Mr. Gliddi marked an approximate boundary line location with flagging consisting of pink, non-biodegradable

ribbons tied at eye level around tree trunks and branches, so that one could see from one ribbon to the next. He told Mr. Smith that this flagging represented a crude estimate of the line's location and that he had erred onto the Smith property so as to prevent encroachment upon State land. The pink-flagged line was put in place by use of Mr. Gliddi's State-issued Garmin GPS, using the Terrain Navigator computer program to ensure the pink line was indeed on the Smith property. (Exhibit No. 1, paragraph 5; Gliddi: transcript, pages 59 - 63.)

13. On November 25, 2008, while on routine patrol along Duane Road, Mr. Gliddi observed equipment from Robert Butts Logging loading logs onto a truck at the Smith property. (An "x" on Exhibit No. 3 indicates where this activity occurred.) (Exhibit No. 1, paragraph 6; Gliddi: transcript, pages 64 and 65.)

14. Mr. Gliddi stopped to talk to the job supervisor, John Joy, an employee of the logging company, about the southern boundary discrepancy. Mr. Joy said that Mr. Smith had told Mr. Butts about the discrepancy, and that during the week of November 10, 2008, Mr. Smith had worked on-site to determine what he thought was the location of the boundary line, which he had painted on the trees in orange. (Exhibit No. 1, paragraph 6; Gliddi: transcript, pages 66, 94 and 95.)

15. Mr. Joy told Mr. Gliddi that Mr. Smith had indicated to him that the pink flagging Mr. Gliddi had placed in 2007 was incorrect and that the logging company should harvest up to the orange painted line, which Mr. Joy said the company had begun to do. (Exhibit No. 1, paragraph 6; Gliddi: transcript, page 66.)

16. Inspecting the logging operation, Mr. Gliddi noted that some of his pink flagging remained near the southeast corner of Smith's property, but that further west the flagging was missing. He also used his Garmin GPS to locate the survey markers and orange painted line, which bowed southward, south of the pink line he had put in. He told Mr. Joy that he thought there were problems with the southern boundary and that further cutting should be avoided in this area. (Exhibit No. 1, paragraph 6; Gliddi: transcript, pages 67 - 69 and 95.)

17. Using the Terrain Navigator computer program, Mr. Gliddi then determined that the orange painted line encroached upon the State forest in certain sections where the logging company had already harvested up to that line. (Exhibit No. 1, paragraph 6; Gliddi: transcript, page 68.)

18. On November 30, 2008, Mr. Gliddi notified Mr. Butts of this determination, to which Mr. Butts responded that his crew had just followed the property line indicated by Mr. Smith. Mr. Butts then assured Mr. Gliddi that he would do no further work in the area of encroachment until the boundary line issue was resolved. (Exhibit No. 1, paragraph 6; Gliddi: transcript, pages 69 and 97.)

19. On December 1, 2008, Mr. Gliddi informed DEC's Region 5 Division of Lands and Forests about the potential trespass onto State forest land from the Smith property, adding that a survey was needed to determine the extent of any encroachment. (Exhibit No. 1, paragraph 7; Gliddi: transcript, pages 69 and 70.)

20. In March and April 2009, a survey of the boundaries between the Smith property and the State forest was conducted by DEC's Bureau of Real Property. As part of the survey, the corner monuments of the Smith property (#1 to #6) were located and identified (as shown on sheet one of Exhibit No. 4) and the area of State property on which recent logging had occurred (highlighted on sheet 2 of Exhibit No. 4, beyond the southern boundary of the Smith property) was established to be about 1.87 acres. (Wiggin: transcript, pages 141 - 152.)

21. DEC's survey maps, dated May 13, 2009, were drafted by Carolyn Wiggin and signed by Floyd Lampart, both DEC land surveyors. Because their survey had good closure, indicated by the negligible error between the original and final coordinate values, the resulting maps have a high degree of reliability. (Wiggin: transcript, pages 152 - 154.)

22. Furthermore, sheet 1 of DEC's survey maps closely replicates a 1980 survey map of the Smith property (Exhibit No. 5) that was prepared by Dana L. Drake on behalf of Gerald and Bernice Shannon, prior landowners who sold to Ms. Boyea. The Drake survey map is referred to in Exhibit No. 7, the deed from

Boyea to Smith, Dashnaw and Hanbury. After reviewing this deed, DEC Staff retrieved the map from Mr. Drake and used it to identify the monuments he had set. Upon locating the monuments, Staff took its own measurements, which were then incorporated into its own survey maps. (Wiggin: transcript, pages 155 - 175.)

23. While conducting their survey, DEC's surveyors found more than 10 trees with survey-type blazes along what they determined to be the southern boundary of the Smith property, which is identified as a green-highlighted line on sheet 1 of Exhibit No. 4. (Sheet 2 of Exhibit No. 4, which shows detail along the southern boundary, indicates the locations of deciduous and coniferous trees on which the blazes were found.) (Wiggin: transcript, pages 154 – 156.)

24. By hacking into one of the blazed trees to assess its growth since the blazing occurred, DEC's surveyors determined that the blazes had been made about 30 years earlier, likely by Mr. Drake, to indicate the location of the property boundary. (Wiggin: transcript, pages 154 - 156.)

25. On May 18, 2009, DEC senior forester Sean Reynolds, escorted by Mr. Gliddi and working with other DEC foresters, performed a stump tally in the area of the alleged 2008 timber trespass. (Reynolds: transcript, pages 228 - 231.)

26. DEC Staff determined that 308 trees had been cut and removed, as reflected in the three pages of tally sheets included in Exhibit No. 8. However, on the complete hearing record, I find that 284 trees had been cut and removed, as discussed further below.

27. During the May 18, 2009, site visit, Mr. Reynolds observed tire rutting indicative of heavy equipment operation in the area of the trespass, as well as turning up of the ground indicative of something having being pulled or dragged across the surface. (Reynolds: transcript, pages 239 and 240.)

28. The ground disturbance was consistent with operation in the trespass area of a log skidder and a large mechanized harvester. A mechanized harvester (or feller buncher) employs a shear, or "hot saw," which is a rotating circular blade that cuts trees at the stump level, while at the same time grasping

them in a pair of pinchers, which allows the equipment operator to place the cut trees in whatever location the operator chooses, to make it easier for the skidder to pick them up. (Reynolds: transcript, pages 241 - 243.)

29. The skidder tracks observed by Mr. Reynolds crossed multiple times between the State land trespass area and the Smith property, along the Smith property's southern boundary as determined by the DEC survey. (Reynolds: transcript, pages 247 and 248.)

30. Observing from the State land trespass area, Mr. Reynolds saw that everything on the Smith property, at a distance as far as 200 or 300 yards from the State's property line, had been cut in some manner, some areas more heavily than others. (Reynolds: transcript, pages 249 and 250.)

31. On July 12, 2010, Herbert Boyce, a forester hired by Mr. Smith, performed his own stump tally in the 1.87-acre area where the alleged timber trespass occurred. (Boyce: transcript, page 113.)

32. According to his report (Exhibit No. 10) prepared after this field work, Mr. Boyce counted and measured 294 stumps in this area: 284 stumps that he concluded were cut by a mechanical harvester with a circular saw head, in November and December 2008, the time of the alleged violations; and 10 stumps he concluded were cut by a chain saw prior to that period but since 2004, when Mr. Smith purchased his property. (Exhibit No. 10; Boyce: transcript, pages 114 – 117.)

33. Based on seven comparable timber sales conducted around the time of the 2008 harvest, Mr. Boyce concluded that the total stumpage value for the trees cut in 2008 by a mechanical harvester was $1,221.99, and that the total stumpage value for the trees cut by chain saw was $223.05. (Exhibit No. 10.)

34. In addition, Mr. Boyce observed stumps from what he concluded was the cutting of trees by chain saw prior to 2004, which he did not count or measure, because the cutting was presumed to predate Mr. Smith's property purchase. (Exhibit No. 10; Boyce: transcript, page 115.)

35. There was evidence of rot in many of the stumps reviewed in both parties' stump tallies, and this rot would have reduced the value of trees affected by it. (Reynolds: transcript, page 262; Boyce: transcript, pages 115 and 122.)

36. Overall, the timber removed from the trespass area was not of high quality, and there was better-quality, more mature timber further south on the State land, outside the trespass area. (Boyce: transcript, pages 135 and 136.)

37. Mills will buy only fairly solid trees, while trees exhibiting excessive decay are sold as pulp wood or firewood. (Boyce: transcript, page 123.)

38. According to Mr. Smith, the logs resulting from the cutting in November 2008 went to Tupper Lake Hardwoods, and a lot of the firewood generated by the cutting was sold locally, with some being brought to Keeseville. (Exhibit No. 15.)

DISCUSSION

This matter involves charges that Mr. Smith caused the cutting and removal of 308 trees on State land, part of the Titusville State Forest, in conjunction with a logging operation on his own neighboring property in November 2008. To prove the charges, DEC presented testimony from Forest Ranger Gliddi, who witnessed the logging; Ms. Wiggin, who surveyed the lines between the Smith property and the property owned by the State; and Mr. Reynolds, who participated in a stump tally to calculate the value of the timber that was removed.

In his answer, Mr. Smith acknowledged his property ownership, which is shared with two other individuals, but denied DEC Staff's charges. Having reviewed the full record, I conclude that DEC Staff proved its charges by a preponderance of evidence, though I find that 284 trees were cut and removed with a mechanical harvester, adopting the number presented in Mr. Boyce's report. Furthermore, I find that there was an entry onto State land, and that Mr. Smith caused this entry to occur.

Involvement of Mr. Smith in Alleged Violations

In its complaint, DEC Staff alleged that Mr. Smith, without legal right or permission, caused a logging company to enter upon the State forest and to cut and remove trees that were growing there. DEC Staff's evidence of the logging, and of Mr. Smith's direction of the activity, consisted of the testimony and written statement of Mr. Gliddi, who observed equipment from Robert Butts Logging Company on Mr. Smith's property on November 25, 2008, while Gliddi was on routine patrol along Duane Road.

According to Mr. Gliddi, Mr. Joy, the job supervisor, told him that Mr. Smith had been to the property during the week of November 10, 2008, and had painted in orange what Smith understood to be his southern property line. Mr. Joy told Gliddi that Smith had then instructed Joy to harvest up to that line, which was south of the pink-flagged line that Gliddi had previously established.

At the hearing, Mr. Smith denied entering into a contract with anyone to log on his property during 2008, and said he did not learn that the logging was actually happening until about November 1, 2008, after a hospital stay. (Transcript, page 353.) Mr. Smith said that, during his hospitalization, he was visited by Dale Estes, an individual who was working for him at that time. (Transcript, pages 354 and 410.) According to Mr. Smith, Mr. Estes asked about having Mr. Butts do some logging on Smith's property, since Butts was looking for a month's work. (Transcript, pages 354 and 411.) Mr. Smith said that he told Mr. Estes he would "think about it," but that Mr. Estes interpreted this as "yes," and that Butts was already working at the property when Mr. Smith was released from the hospital. (Transcript, pages 354 and 411.) Mr. Smith said it would not be accurate to say that he asked Mr. Butts to cut wood on his property, but that Butts was not a trespasser either, because Mr. Estes gave him permission to do so. (Transcript, pages 409 and 410.)

Mr. Smith explained that Mr. Estes had assumed Smith would have no problem with Mr. Butts logging the property because Butts had worked for Smith before, and because Smith had talked about "getting someone to come in" to the property and chip a lot of low-grade timber there. (Transcript, page 410.) Mr.

Smith said that when he learned the work had started, he went to the property and told Butts to stop cutting and leave, “but I calmed down after a while, and said, okay, you’re already here. I was going to have this section sent out and it’s mostly chipped wood. I was going to have somebody do it anyway, so here, you might as well do it.” (Transcript, page 411.)

Mr. Smith said it was only at this point, in November 2008, that he gave Mr. Butts permission to cut wood on his property, more particularly, in the southeast section, which he described as overgrown pasture land. (Transcript, pages 411 and 412.) Mr. Smith acknowledged that he put orange paint on some of the trees on what he thought to be his southern boundary line, and marked the line with orange flagging as well. (Transcript, pages 354, 355 and 413.) He said that he walked the property with Mr. Butts and his harvester, Mr. Joy, pointing out the orange paint and flagging as the boundary of the State land, and telling them to stop cutting at that boundary. (Transcript, pages 412 - 414.)

Mr. Smith’s testimony that it was Mr. Estes, not himself, who initially approved the logging operation, and that he was not aware of the operation until after it started, was unconvincing in several respects. First, Mr. Smith did not present Mr. Estes as a witness to corroborate this testimony. Second, it is unreasonable to think that Mr. Estes would have allowed the operation without Smith’s approval, or while Smith was still considering the proposal. Third, during Mr. Smith’s cross-examination, DEC Staff counsel presented a typewritten statement (Exhibit No. 15) which bears Smith’s signature, indicating that he “got” Mr. Butts to come up in October 2008, that Butts “was going to do some cutting for me,” and that Smith “advised him [Butts] and his man John [Joy] that there could be a problem with the south line,” which Smith said he then painted orange.

Mr. Smith acknowledged his signature on the statement, as well as his initials at the end of it. (Transcript, pages 396 – 399.) However, he denied familiarity with the statement itself, which was part of the file in the related criminal matter. Mr. Smith said that a DEC criminal investigator, Ken Bruno, made a handwritten statement from a conversation with him, but that he

never had a chance to read that statement and was not presented with a typewritten statement at any time. (Transcript, pages 396 - 398.) He said the typewritten statement, which is dated February 19, 2009, contains "a lot of mistakes" that he would have corrected had he seen it before. (Transcript, page 405.) When I asked if he could explain why his signature appeared on the statement, Mr. Smith said he thought the signature had been forged. (Transcript, pages 405 – 407.) However, he offered no support for this contention, and I do not deem it credible.

Counsel for Mr. Smith objected to receipt of the typewritten statement, since Mr. Smith claimed he had never before seen it, and because it was not sworn and notarized. (Transcript, pages 399 and 400.) However, I received it on the basis that it had been sufficiently authenticated as a statement made in the context of the criminal case. (Transcript, pages 403 and 404.) In fact, Mr. Smith's counsel acknowledged that he had received a copy of the statement from the Franklin County District Attorney's office as part of his own discovery in the criminal matter, and that he later produced a copy of it pursuant to DEC Staff counsel's demand in February 2013 for "each and every statement made by any witnesses relating in any way to the allegations set forth in the Department's complaint, whether oral, written, transcribed, or otherwise recorded, signed or unsigned and regardless of how obtained." (Transcript, pages 417 - 419.)

DEC Staff counsel said that he subsequently learned that Mr. Bruno was involved in preparing the statement, and saw it in Mr. Bruno's file. (Transcript, page 417.) According to DEC Staff counsel, Exhibit No. 15 was represented by Mr. Bruno to be the original typewritten statement, which DEC Staff counsel said he was given three days before this hearing started. (Transcript, pages 417 - 419.)

As Mr. Smith's counsel points out, the statement is not sworn to or notarized. However, it is recorded on a form that states it "need be sworn only if court specifically requires oath." Sworn or not, it is relevant, for impeachment purposes, as a prior statement that is inconsistent with Mr. Smith's testimony that he was not aware of the logging operation when it

began, and that the operation was initially approved not by himself, but by Mr. Estes.

More pertinent to the charges, the statement is also relevant as Mr. Smith's admission that he determined how far south the logging would proceed. After all, the logging of Smith's own property was not illegal; the only illegality was the incursion onto the adjacent State land.

According to Smith's statement, he advised Butts and Joy "that there could be a problem with the south line. I told them I would mark the line and I painted it with orange paint. . . I told [them] to cut to the orange line." This portion of the statement is consistent with the account that Joy gave Gliddi on November 25, 2008, when Gliddi first encountered the logging operation.

In his statement, Mr. Smith also says that his orange painted line followed flags that he and Gliddi had previously placed. However, Mr. Gliddi testified that, in the area of the State land incursion, the orange painted line was south of the pink line that Gliddi had flagged in July 2007, and that, due to the logging, some of the trees with pink flagging had been removed. (Transcript, pages 67 and 68.)

According to Mr. Smith's statement, Mr. Gliddi had done his flagging "four or five years ago" and a lot of Gliddi's flags had "fallen off" the trees before Smith painted the orange line. However, Mr. Gliddi testified that his flagging was done only one year earlier, and that the flags were biodegradable plastic "firmly attached" by square knots to tree trunks or branches, such that they would have been expected to last "for quite a while." (Transcript, pages 62 and 93.) Mr. Gliddi acknowledged that flagged branches can blow down from snow or wind, but also said that where he had flagged boundary lines when he first came to the area in 2000, the flagging "is still there today." (Transcript, page 62.)

The fact that Smith did not intend his orange painted line to match Gliddi's pink flagged line is underscored by Gliddi's affidavit, which recounts his conversation with Mr. Joy. According to the affidavit, Mr. Smith told Mr. Joy that the pink flagging Gliddi had placed in 2007 was incorrect and that the

loggers should harvest up to the orange painted line, which Mr. Smith had determined was the true southern boundary of his property.

Entry onto State Land

The record demonstrates not only Mr. Smith's direction of the 2008 logging operation, but the incursion of that operation onto forest land owned by the State. The entry onto State land was shown by the testimony of Ms. Wiggin, the DEC surveyor who became involved in this matter in March 2009. Ms. Wiggin was asked to find the property line along the State land, so it could be determined whether that land was affected by the logging. (Transcript, page 141.)

With two other surveyors - her colleague Doug Hazelden and supervisor Floyd Lampart – Ms. Wiggin performed the field work for the two survey maps received as Exhibit No. 4. Ms. Wiggin ran the survey instrument that electronically measured the distances and angles around the Smith property, and entered the field information into the computer, allowing her to draft the two sheets that were then signed by Mr. Lampart. (Transcript, page 143.) The first sheet of Exhibit No. 4 shows the boundaries of the Smith property, and the second sheet shows detail along the southern boundary of that property, where the violations occurred.

As Ms. Wiggin explained, the surveyors established the boundaries of the Smith property, where that boundary is not formed by Duane Road, by locating the corner monuments and then drawing lines from one to the next. The corner monuments, consisting of metal pipes or bars, were found by reference to a map (Exhibit No. 5) that was developed as part of a 1979 survey conducted by Dana Drake, which is referenced in the Smith deed (Exhibit No. 7). (Transcript, page 165.) Mr. Drake surveyed the property for Gerald and Bernice Shannon (transcript, pages 158 and 159), who later sold it to Eleanor Boyea, from whom Mr. Smith and his partners then acquired it. (Transcript, page 164.)

Using Mr. Drake's survey map, Ms. Wiggin testified that it took two or three days for her survey team to find the corner monuments that Drake had set, which stand no more than a foot or two above the ground. (Transcript, page 152.) The southern

boundary was then established as the line highlighted in green between monument #1, in the southeast corner, and monument #2, in the southwest corner, on the first sheet of Exhibit No. 4 (the DEC survey map) and also on Exhibit No. 5 (the Drake map).

Sheet 1 of DEC's survey maps closely replicates the Drake map because they are both derived from the same monuments. As Ms. Wiggin explained, the bearings and distances of the lines drawn on the DEC survey map are not significantly different from those recorded on the Drake map and the Smith deed (transcript, page 175), although DEC's standard is to run clockwise around a parcel, whereas Mr. Drake went counterclockwise instead. (Transcript, page 167.) Therefore, on Drake's map the green highlighted line is designated as south 85 degrees 58 minutes east, and on DEC's map that same line is labelled as north 85 degrees 58 minutes west, "northwest being the same as southeast just travelling in the opposite direction," as Ms. Wiggin explained. (Transcript, page 167.)

DEC's survey maps include a highlighted area, south of the Smith property, representing approximately 1.87 acres of State land that the survey team determined had been recently logged. According to Ms. Wiggin, she and her colleagues traversed that area, setting up survey instruments and measuring angles and distances. (Transcript, pages 147 and 148.)

As Ms. Wiggin explained, the State acquired the land south of the Smith property from Niagara Mohawk Power Corp. in 1950, as evidenced by a deed received as Exhibit No. 6. (Transcript, page 170.) Ms. Wiggin said that she reviewed the property description in that deed to verify the boundary between the Smith property and the State land, and that the deed confirmed the survey that was later conducted by Mr. Drake. (Transcript, pages 170 – 173.) She also said that Schedule "A" of Mr. Smith's own deed (Exhibit No. 7) provides a good description of his property boundaries in terms of bearings and distances, one that matches the information on the Drake survey map (Exhibit No. 5).

Ms. Wiggin said that, in her professional opinion, the Smith deed accurately describes the boundary between his property and State land to the south, and there is no reason to dispute that description or Mr. Drake's survey work, on which

the description is based. She added that her research uncovered no records that the boundary had been disputed in the three decades since the Drake survey was completed. (Transcript, pages 176 and 177.)

In summary, Ms. Wiggin's survey maps (Exhibit No. 4) highlight the entry onto State land which is the basis of DEC Staff's charges. These maps' depiction of Mr. Smith's southern property line is consistent with that line's depiction in the map prepared by Mr. Drake (Exhibit No. 5), whose survey forms the basis of the property description in Mr. Smith's deed (Exhibit No. 7).

To rebut Staff's charges, Mr. Smith offered testimony from another surveyor, Dean Lashway, who suggested that the actual property line might be south of that surveyed by DEC Staff, along the line of an old barbed wire fence buried in the duff just below the ground surface. Remnants of this fence line, extending east and west of the logged area, are highlighted in yellow marker on sheet 2 of Exhibit No. 4, which indicates that the fencing was discovered 0.4 feet beneath the duff. Were this recognized as the actual property line, the logging would have caused virtually no incursion onto State land, as Mr. Lashway pointed out in his testimony. (Transcript, page 307.)

Mr. Lashway testified that a portion of the same fence line is also shown on Mr. Drake's survey map (Exhibit No. 5), where it is similarly highlighted, and that close to that line is a point just east of monument #2, the surveyed southwestern corner of the Smith property, where Mr. Drake found a pin, which is described in DEC Staff's survey maps as an iron pipe standing 2 feet tall in stones 12.55 feet south of the line that Staff surveyed. (Transcript, pages 299- 301.)

Mr. Lashway said the location of the pin and the location of the fence line, at the point where it crosses Mr. Smith's western property line, both likely had a role in fixing where Mr. Drake set monument #2 during his survey work in 1979. (Transcript, pages 300 and 301.) Furthermore, he said that, in his opinion, the fence line may represent a title line that existed prior to the State acquiring its property in great lots No. 10 and No. 15, as depicted on Exhibit No. 11, which Ms.

Wiggin described as a deed plot prepared in 1882. (Wiggin: transcript, page 207; Lashway: transcript, pages 302 – 304.)

Mr. Lashway said that, on Exhibit No. 11, this title line is the uppermost green-highlighted line, dividing great lot No. 10 more or less in half from east to west and then crossing into the center of lot No. 15. (Transcript, pages 303 and 304.) He also identified the line as a property boundary described in a 1925 deed (Exhibit No. 12) that is referenced in the 1950 deed between Niagara Mohawk and the State of New York (Exhibit No. 6). (Transcript, pages 307 – 322.)

The southwest, northwest and northeast corners of Lot No. 10 are shown both on the Drake survey map, and on sheet one of DEC's survey maps, as points 2A, 3 and 4A, respectively. According to the first paragraph of the schedule attached to Mr. Smith's deed (Exhibit No. 7), Parcel I of his property is "situate" in the north half of Lot No. 10, and bounded on the south by the south half of that lot. However, as Mr. Lashway explained, Mr. Drake's survey did not split the lot equally from north to south, since the western boundary of Mr. Smith's share of the parcel is 1405.80 feet in length, while the western boundary of the State's share, to the south, is 1234.20 feet in length.

Mr. Lashway attributed this discrepancy to the role of the fence line traversing the lot in an east-west direction. (Transcript, pages 298 – 300.) He acknowledged that Mr. Smith's southern property boundary, as surveyed by Mr. Drake, does not correspond to the fence line shown on Drake's map. However, he added that if the fence line, as ancient evidence of an earlier boundary, were accepted as the current boundary as well, it is "very likely" that the area between the fence line, as extended across Lot No. 10, and the surveyed line (in essence, the logged area at issue in this matter) "could be owned by someone other than the State of New York," possibly by Mr. Smith and his partners. (Transcript, pages 321 – 323.)

Speaking for DEC Staff, Ms. Wiggin de-emphasized the significance of the barbed wire fence, which she said her survey team had located with a metal detector. (Transcript, page 188.) She said it was "not necessarily for a surveyor to decide if it's a boundary," adding that the fence could merely represent a

“possession line,” meaning “evidence as far as where people may have occupied to,” based on their understanding as to where one property ended and another began. (Transcript, page 191.) There is no mention of the barbed wire fence in the deeds presented by the parties, nor did Mr. Drake appear as a witness to explain its significance to him.

Convincingly, Ms. Wiggin explained that an old barbed wire fence could, in some cases, be the best evidence of a property boundary line, but only if there are no corner monuments and the fence runs generally in a straight line. Here, she said, the fence line bows out from the corners of the property, and, more important, there are “bearings and distance calls, and monuments, manmade monuments that we found,” all referenced in Mr. Smith’s deed, from which the southern property boundary could be reliably ascertained. (Transcript, pages 190, 208 and 217.)

Ms. Wiggin described a hierarchy of evidence used by surveyors that prioritizes monumented lines, as called for in deeds, when determining property boundaries. Such evidence, she said, is more reliable than descriptions based on adjoining landowners or acreage. (Transcript, page 216.)

Because, for the property boundary at issue, the deed had bearing and distance calls, and references to man-made monuments that were found in the field, Ms. Wiggin said DEC Staff relied on this information in drawing its line. (Transcript, page 217.) She stressed that, for a private landowner like Mr. Smith, DEC Staff prefers to rely on information in the owner’s own deed (in this case, from Mr. Drake’s survey work) so as not to stir up trouble, especially where, as here, that information has been accepted for 30 years. (Transcript, pages 212 and 217.)

In its post-hearing brief, DEC Staff argues convincingly that Mr. Smith cannot rely on his deed’s archaic description of his property as being the north half of Lot No. 10, based on an 1891 deed and a map of similar vintage. DEC Staff also points to language in his deed that the premises are conveyed “expressly subject to . . . any state of facts which an accurate survey would show.” Because Mr. Smith’s deed contains a modern description of Parcel I drawn directly from the survey prepared by Mr. Drake in 1979, Staff maintains – correctly, in my opinion

- that the deed forecloses any other interpretation of the parcel that is contrary to that description and Mr. Drake's survey map.

In his testimony, Mr. Gliddi said that he had asked in 2005 that DEC's Division of Lands and Forests survey Mr. Smith's southern property line, due to logging that Smith was then doing near it. (Transcript, page 84.) Ms. Wiggin said she was not personally aware of this, though she added such requests would have been directed to and handled by her supervisor, Mr. Lampart. (Transcript, page 213.)

Ms. Wiggin emphasized that DEC receives many similar requests - from its own staff as well as from neighboring landowners - to survey State property boundaries, but has a tremendous backlog, and "we have many requests that languish for years because we don't have the staff to do every request that comes in." (Transcript, page 213.) She added that mapping the boundary between the State's land and Mr. Smith's property was a priority when she received the assignment in 2009, but only because of the possibility that a timber trespass had occurred during the previous year. (Transcript, pages 214 and 215.)

Correctly, Ms. Wiggin stressed that private owners are responsible to survey and mark their property boundaries before cutting against the State, especially where the indicators in the field are confusing. (Transcript, page 217.) Likewise, Mr. Lashway said that, without a doubt, he would recommend a survey of Mr. Smith's southern property boundary, given the conflict between the fence line and the monumented line on Mr. Drake's survey map. (Transcript, pages 333 and 334.) Even Mr. Smith, speaking to Mr. Gliddi in 2005, said he was going to have the boundary surveyed, so he could make the most of his property investment. (Exhibit No. 1, paragraph 3.) Had he done this, the subsequent timber trespass might have been avoided.

Affirmative Defenses

Apart from denying DEC Staff's charges, Mr. Smith claimed six affirmative defenses in his answer to the complaint. To understand the facts and theory supporting these defenses, I led the parties' counsel through a discussion of each of them prior to the hearing's conclusion. (Transcript, pages 425 to 436.)

DEC Staff also responded to the defenses in its post-hearing brief. For the reasons stated below, the Commissioner should disregard the first three affirmative defenses, and should strike the others.

First Affirmative Defense – Property Line Dispute

Mr. Smith claims that the common property line between his property and that of the State, on his southern border, remains in dispute. According to DEC Staff, the property line is that between monuments #1 and #2, as shown on sheet one of Exhibit No. 4. However, Mr. Lashway, a witness for Mr. Smith, suggests that the line may be further south, along the course of a buried barbed wire fence, as shown on sheet two of Exhibit No. 4. (Transcript, pages 332 and 333.)

I find that the actual property line is the one identified by DEC Staff. Staff's line is supported by the testimony of Ms. Wiggin, and is consistent with the line drawn and apparently blazed by Mr. Drake, whose survey is referenced in Mr. Smith's deed.

At any rate, Mr. Smith's challenge to the property line is not an affirmative defense to the charges. Instead, it is the basis for his denial of liability, because, if the line were represented by the barbed wire fence, one could argue there was no trespass onto State property, and therefore no illegal cutting.

Second Affirmative Defense – Timing of DEC Survey

Mr. Smith claims that DEC Staff's survey maps were not completed until after his alleged trespass, an assertion not disputed by DEC Staff. In fact, the maps themselves are dated May 13, 2009, seven months after the alleged violations, which are charged to have occurred in or about November 2008.

DEC's survey was conducted after the alleged violations because it was done for law enforcement purposes, to ensure the timely prosecution of any trespass that could be demonstrated, as Ms. Wiggin testified (T: 214 – 215.) DEC was not obliged to conduct the survey prior to Mr. Smith's logging, since Mr. Smith had the responsibility to ensure that the logging was restricted

to his own property. For that reason, the timing of DEC's survey does not present an affirmative defense to its charges.

Third Affirmative Defense – No Stated Cause of Action

Mr. Smith claims that the causes of action alleged in the complaint fail to state a cause of action against him upon which relief can be granted. The basis for this claim was not explained in the answer, nor was counsel for Mr. Smith able to explain it at the hearing. In fact, the complaint includes three causes of action under law and regulations enforced by DEC, for which penalties are authorized by ECL 71-0703. Even if this were not the case, failure to state a cause of action is properly raised in a motion to dismiss the compliant, not as an affirmative defense. In any event, the claim is rendered academic by the proof in this case.

Fourth Affirmative Defense – Statute of Limitations

Mr. Smith says that the claims against him are barred by the applicable statute of limitations, without specifying the statute that applies. Statute of limitations periods, as provided for under the Civil Practice Law and Rules ("CPLR"), do not apply to administrative enforcement proceedings, as noted by me at the hearing (transcript, pages 429 – 431) and by DEC Staff in its post-hearing brief. [See discussion of statutes of limitations in Matter of Cobleskill Stone Products, Inc., Ruling of the Chief Administrative Law Judge, January 18, 2012.]

DEC's administrative hearings are governed by the requirement in State Administrative Procedure Act ("SAPA") 301(1) that all parties be afforded an opportunity for hearing within a reasonable time. At the hearing, counsel for Mr. Smith pointed out that four years passed between the alleged violations (in or about November 2008) and the service of the complaint (on November 16, 2012). However, he did not cite any particular prejudice this had caused to Mr. Smith's ability to defend against the charges, such that dismissal of the charges would be warranted. [See Matter of Manor Maintenance Corp., Order of the Commissioner, February 12, 1996, in which charges were dismissed because DEC Staff's delay in bringing them had substantially prejudiced the respondents.]

Fifth and Sixth Affirmative Defenses - - Res Judicata and Collateral Estoppel

Mr. Smith asserts that DEC's claims against him are barred by the doctrines of res judicata, which prevents the re-litigation of a cause of action, and collateral estoppel, which prevents the re-litigation of a particular issue.

In his closing brief, Mr. Smith says that, in July 2009, DEC filed criminal charges against him for the same events as are charged in this administrative proceeding. He says that he was originally charged with third-degree grand larceny, in violation of Section 155.35 of the Penal Law, that this charge was subsequently reduced to petit larceny by the Franklin County District Attorney's Office, and that the charge was ultimately dismissed with prejudice by the Hon. James R. Casitore, Jr., Malone Town Justice, on July 25, 2011.

Justice Casitore's order, received as Exhibit No. 14, indicates that the dismissal was based on a motion by Mr. Smith pursuant to Criminal Procedure Law ("CPL") Section 30.30, which addresses the right to a speedy trial. Because the dismissal was not on the merits, there having been no litigation of the underlying charge, it cannot possibly support claims of res judicata or collateral estoppel.

Civil Penalty Considerations

As noted above, DEC Staff's total requested penalty for the violations alleged in its complaint is $81,435.

For the cutting and removal of trees on State forest land, in violation of ECL 9-0303(1), DEC seeks a penalty of $77,000 pursuant to ECL 71-0703(6)(a). That provision states that in addition to any other penalty provided by law, any person who violates ECL 9-0303(1) "shall be liable to a civil penalty of two hundred fifty dollars per tree or treble damages, based on the stumpage value of the tree or both."

According to the complaint, Mr. Smith was responsible for the removal of 308 trees, a number Staff derived from its tally of cut stumps that was brought into the record as Exhibit No. 8

through the testimony of DEC forester Sean Reynolds. Mr. Reynolds entered the site on May 18, 2009, with a team including other foresters, and with Mr. Gliddi, who led them to the area of the alleged trespass. The tally incorporates data concerning the species of each tree and its stump diameter, which was used to calculate the value of the timber that was removed from the affected area. (Transcript, pages 228 – 239.)

For civil penalty assessment purposes, DEC Staff is seeking $250 for each of the 308 trees alleged to have been cut and removed (i.e., $77,000), as well as an additional penalty equivalent to treble damages of $4,335 (based on a total stumpage value of $1,445 for the timber that was taken). The $1,445 figure was the subject of a stipulation between the parties at the start of the hearing (transcript, pages 7 and 8), and is derived from a report of Mr. Smith's forester, Herbert Boyce, as the stumpage value of trees removed from the 1.87 acre area: 284 cut by mechanized harvester and another 10 cut by chain saw. (See pages 1 and 3 of Boyce report, received as Exhibit No. 10.)

In addition, DEC Staff is seeking a separate civil penalty of $100, for the operation of motorized vehicles and equipment on State lands, in violation of 6 NYCRR 190.8(m). That extra amount is derived from ECL 71-0703(1), which allows for a civil penalty of not less than $10 nor more than $100 for violation of a rule or regulation promulgated pursuant to ECL Article 9.

To calculate an appropriate total civil penalty in this case, DEC Staff properly relies on the Commissioner's Civil Penalty Policy ("CPP"), as issued on June 20, 1990. That policy states that the starting point of any penalty calculation should be a computation of the potential statutory maximum for all provable violations. (CPP Section IV.B.) Following that, an appropriate penalty is derived from a number of considerations, including the economic benefit of non-compliance, the gravity of the violations, and the culpability of the respondent's conduct.

In this case, DEC Staff contends that the statutory maximum penalty for all the violations charged in its complaint is $81,535, which is $100 more than the total penalty Staff is actually seeking. The difference is accounted for by Staff's voluntary withdrawal of its request for a $100 penalty for its

second cause of action, which addresses the destruction of trees growing on State land, in violation of 6 NYCRR 190.8(g). (Transcript, pages 9 and 10.)

During the hearing, I questioned Staff counsel whether the second cause of action (for violation of 6 NYCRR 190.8(g)) was multiplicative of the first cause of action (for violation of ECL 9-0303(1)). Staff counsel agreed with me that neither cause of action requires proof of a fact separate from the other. (See discussion at transcript pages 283 – 286.) For that reason, I find that separate penalties for both causes of action are not warranted, and, since DEC Staff is seeking a larger penalty for the first cause of action, a separate, though smaller, penalty for the second one as well would not be appropriate even if the request for such had been maintained.

In other words, I find that the total penalty proposed by DEC Staff is the statutory maximum allowable in this case, given the facts it has alleged. On the other hand, I also find that such penalty is not warranted on the facts that were actually demonstrated at the hearing. That is because while DEC Staff alleges, on the basis of its stump tally, that 308 trees were cut and removed during the logging operation that occurred in or about November 2008, a more conservative and more reliable number is 284, the one proposed by Mr. Boyce.

Both Mr. Reynolds and Mr. Boyce said that they conducted their stump tallies in the area of the alleged timber trespass. However, Mr. Reynolds said DEC Staff's tally did not make any distinctions between trees that may have been cut by a feller buncher as compared to trees that may have been cut by a chain saw. (Transcript, page 268.) Mr. Reynolds acknowledged seeing in the trespass area a bunch of rotting stumps representative of an old chain saw cut that had occurred a long time ago, but said he did not include those stumps in his tally. (Transcript, pages 267 and 268.)

On the other hand, Mr. Boyce indicated there were three sets of stumps that were cut at different times: old stumps that appeared to have been cut by a chain saw prior to Mr. Smith's purchase of his property in 2004, which he did not count; stumps cut more recently by a chain saw, which he did count; and stumps cut most recently, in November and December

2008, by a mechanical harvester with a circular saw head, which he also counted. (Exhibit No. 10, page one; transcript, pages 115 – 117 and 132 – 135.)

Mr. Reynolds explained the difference between cuttings by a chain saw and a mechanized feller, noting that "a mechanized feller cuts a tree in one motion," while "a person felling a tree with a chain saw makes a notch, and then they back-cut to directionally fell a tree. And once the tree falls and comes off the stump there's what we call a hinge that's left that the tree turns on. So, something cut with a mechanized harvester, it's one smooth, sheer cut across the stump." (Transcript, pages 268 and 269.)

All the evidence indicates that a mechanized harvester (or feller buncher) was involved in the logging operation undertaken in or about November 2008. There is no evidence that a chain saw was involved, and Mr. Boyce said that the stumps cut by a chain saw that he counted during his tally were cut prior to 2008. (Transcript, pages 116 and 117.)

For these reasons, I recommend that, for penalty assessment purposes, the Commissioner adopt Mr. Boyce's tally of 284 trees cut with a mechanical harvester during November and December 2008. Based on Mr. Boyce's testimony, the possibility exists that, since 2004, other trees were cut by chain saw in the alleged trespass area. However, there is no indication that this cutting was contemporaneous with the trespass charged in the complaint.

Mr. Boyce's tally of 284 trees cut with a mechanical harvester represents a more conservative and more reliable estimate of the number of trees lost during the 2008 timber trespass, as compared to DEC Staff's tally of 308. Because the cutting straddled the property line for a considerable distance, and because that line was not marked on the ground, I do not expect that the parties' tallies should be identical. Nevertheless, the tallies are relatively close to each other, and Mr. Boyce may have benefited to the extent he employed DEC's survey map, on which the line is drawn, during his work. Mr. Boyce testified he believed he had a copy of the map with him in the field (transcript, page 114), whereas Mr. Reynolds acknowledged twice that he and his team did not have the map

(transcript, pages 260 and 279). Mr. Reynolds said he and his team were led up the property line by Mr. Gliddi (transcript, pages 231 and 279), apparently relying on his understanding of where the line was.

Should the Commissioner accept the tally of 284 trees, he should also accept Mr. Boyce's calculated stumpage value of those trees of $1,221.99, since the stumpage value of $1,445, to which the parties stipulated, includes the value estimated by Mr. Boyce of trees cut by mechanical harvester as well as his estimated value of trees cut by chain saw.

Maximum Penalty Warranted

The penalties sought for the cutting and removal of trees in this matter are sought by DEC Staff pursuant to ECL 71-0703(6)(a), which provides that any person who violates ECL 9-0303 "shall be liable to a civil penalty of two hundred fifty dollars per tree or treble damages, based on the stumpage value of such tree or both." In this case, DEC Staff is seeking both $250 per tree and treble damages, and I conclude that this is warranted under the circumstances presented, and consistent with the Commissioner's penalty policy.

The penalty policy states that, to be a deterrent, a penalty must include a gravity component, which reflects the seriousness of the violation. That component addresses two factors: the potential harm and actual damage caused by the violation, and the relative importance of the type of violation in the regulatory scheme. (CPP Section IV.D.1.)

The first of these factors focuses on whether and to what extent the respondent's violations resulted or in could potentially result in loss or harm to the environment or human health. (CPP Section IV.D.2.a.) In this case, the trees' removal caused actual environmental harm, including tire rutting from the operation of heavy equipment, and other disturbance from the trees being pulled or dragged across the ground surface. On May 18, 2009, DEC investigator Ken Bruno took photographs (included as part of Exhibit No. 13) which show tree stumps and skidder trails on State land in the aftermath of the logging operation.

The second factor focuses on the importance of the violated requirement in achieving the goal of the underlying statute. (CPP Section IV.D.2.b.) Here, preventing the cutting and removal of trees from State lands, in the absence of legal right or permission, is directly related, and vitally important, to the stated goal of ECL 9-0303, which is the protection of those lands and the benefits they provide.

According to DEC's penalty policy, the gravity portion of a civil penalty may be adjusted upon a consideration of factors such as culpability, violator cooperation, history of non-compliance, and ability to pay. (CPP Section IV.E.) Culpability, the policy states, will only be considered in order to increase a penalty; where the violation is intentional, reckless or (in some situations) negligent, significant upward adjustment of the penalty is deemed appropriate. (CPP Section IV.E.1.)

In this case, DEC Staff argues that Mr. Smith was basically indifferent to his boundary with the State's property, and that this precipitated the timber trespass that occurred. I agree with this assessment, and find that the violation resulted from recklessness on Mr. Smith's part.

According to the penalty policy, in assessing the degree of intent, recklessness or negligence, one should consider both how much control the violator had over the events constituting the violation, and the foreseeability of the events constituting the violation. (CPP Section IV.E.1.)

As DEC Staff argues in its post-hearing brief, Mr. Smith had complete control over the cutting of trees on State land. Just prior to the violation, he gave permission for the logging on his own property, walked that property with the loggers, and established the orange line to which he told the loggers to cut. This line was south of the one previously flagged by Mr. Gliddi, and was established in the absence of a survey, which should have been performed to ensure against a timber trespass.

The importance of a survey to confirm the southern boundary was emphasized by DEC's surveyor witness, Ms. Wiggin, as well as by Mr. Smith's surveyor witness, Mr. Lashway. In fact, Mr. Gliddi said that in 2005, four years before the timber trespass,

Mr. Smith said he was going to have a survey done, though he never followed through on this.

In his written statement, Mr. Smith implied that his orange line was consistent with that previously flagged in pink by Mr. Gliddi. However, that was not consistent with Mr. Gliddi's testimony, or with the account given to Mr. Gliddi by Mr. Joy, who said that Mr. Smith had indicated to him that Gliddi's pink flagging was incorrect and that the logging company should harvest up to the orange line instead.

When he did his flagging, Mr. Gliddi told Mr. Smith that the pink line was only a rough estimate of the boundary line, and that it was Smith's responsibility to know the line's exact location. By directing his operation into the area south of the pink line, Mr. Smith could reasonably anticipate the resulting harm to the State forest, even if, as he maintains, he did not intend any trespass to occur.

According to the penalty policy, the cooperation of the violator in remedying a violation may be an appropriate factor to consider in adjusting a civil penalty. (CPP Section IV.E.2.) In its post-hearing brief, DEC Staff points out there was no evidence that Mr. Smith cooperated with Staff in any way; however, there is also no evidence that DEC Staff sought remedial action from Mr. Smith. On the topic of violator cooperation, DEC Staff argues that Mr. Smith showed contempt for the hearing by interrupting Ms. Wiggin's testimony with profanity. In fact, this did happen at one point, though I consider what was said a spontaneous utterance that, while inappropriate, does not warrant a penalty adjustment.

A history of violations subsequent to environmental enforcement actions is usually evidence that the violator has not been deterred by the previous enforcement response, meaning that, in the usual case, penalties on subsequent enforcement actions should be more severe. (CPP Section IV.E.3.) In his post-hearing brief, Mr. Smith highlights his testimony that he has been in the logging business all his life, as the owner of Smith's Logging since 1977, and has never before been charged with a violation of the ECL with respect to his logging activities. (Transcript, pages 338 and 339.) Also, he testified

that he had never been sued civilly for a timber trespass, either. (Transcript, page 423.)

Mr. Smith's assertions were not challenged by DEC Staff; in fact, Mr. Gliddi said DEC chose not to take action against Mr. Smith for an earlier timber trespass elsewhere along the same boundary, because Mr. Smith had merely cut up to a painted yellow line, posted with State forest signs, which DEC itself had indicated the boundary was. Shortly after that trespass, in 2005, Mr. Gliddi told Mr. Smith he had a "problem" with that line and that Mr. Smith had cut onto State land, at which point Mr. Smith said no further logging was going to occur in that area and that he was going to have his property surveyed. (Gliddi: transcript, page 58; Exhibit No. 1, paragraph 3.)

Finally, in some circumstances, DEC may consider the ability of a violator to pay a penalty in arriving at the method or structure for payment of final penalties. (CPP Section IV.E.4.) Mr. Smith did not assert or attempt to prove an inability to pay the penalty requested by DEC Staff, and DEC Staff argues that Mr. Smith is apparently a man of substantial means, pointing to his testimony that, on his own rather than with others, he owns approximately 5,000 acres of land in Clinton, Essex and Franklin counties. (Transcript, page 343.)

In his post-hearing brief, Mr. Smith argues that the maximum amount of the civil penalty that can be imposed in this matter is the stumpage value of trees in the alleged trespass area. This claim is premised on language in ECL 71-0703(6)(a) that, where a defendant establishes "by clear and convincing evidence, that when such defendant committed the violation, he or she had cause to believe that the land was his or her own," damages shall be awarded "on the basis of the stumpage value of such tree or trees in the market as if they were privately owned."

According to his post-hearing brief, Mr. Smith believed at the time of the alleged violation – and still believes - that the land upon which the alleged trespass occurred was his own land. However, that is not the same as having "cause" to believe that this was so.

There was testimony from Mr. Smith that he had noticed the remnants of a barbed wire fence when walking his property, and that he believed that the fence delineated his southern property line. (Transcript, page 357.) Also, it appears from DEC's maps that the logging stopped at or near the fence line, which suggests that the loggers operated from the same understanding.

Mr. Lashway said that, at least at one time prior to the State acquiring its land, the property line may actually have been that created by the barbed wire fence, which later became buried in the duff. However, there is no evidence that Mr. Smith consulted with Mr. Lashway prior to the 2008 timber trespass. Instead, it appears Mr. Lashway became involved only afterward, in which case Mr. Smith could not have relied on Lashway's judgment at the time the violation occurred.

In his post-hearing brief, Mr. Smith highlights witness testimony about the barbed wire fence and various colored ribbons, flagging, paint, blazes, and State property signs found along his southern property line, to suggest that there was confusion about the line's exact location in 2008. Photographs of these features, taken by Mr. Smith on September 11, 2009, are included as part of Exhibit No. 13.

These features are also displayed on DEC's survey maps, and Ms. Wiggin, who created those maps, acknowledged that, because the indicators were somewhat inconsistent, they would have generated "a lot of confusion" (T: 200). On the other hand, she added that, because of this confusion, Mr. Smith was especially responsible to know and mark his boundary before cutting against the State. (T: 217 – 218.)

This same point was made by DEC when it recommended approval of legislation, enacted in 2003, which raised the penalties for timber trespass to those now available. According to DEC's memorandum, included in the bill jacket:

"Forested land in New York State is often property owned by absentee landowners, boundaries are often poorly marked, and commonly forested property is seldom surveyed. Consequently, loggers often cross boundary lines and harvest timber that belongs to other property owners. This legislation seeks to cure this problem by increasing the penalties for taking the

timber of another, thereby increasing the cost to loggers who do not ascertain the boundaries in which they harvest or choose to ignore such boundaries. Current penalties are not high enough to deter the illegal taking of timber from state or private lands. This legislation, by increasing the penalties to allow for treble the stumpage value, will provide for greater deterrence for the knowing offender while at the same time promote more diligence and care on the part of legitimate timber harvesters to prevent inadvertent trespass or timber theft." (Memorandum of Thomas J. O'Connor, DEC assistant commissioner, dated September 24, 2003, Bill Jacket, L 2003, ch 602, at pages 13 and 14.)

Under cross-examination, Mr. Smith said that despite the confusion about his southern property boundary, it never occurred to him at some time to hire a surveyor. (Transcript, page 415.) While he sought and received some help from Mr. Gliddi instead, the reliable evidence indicates that, at the time of the 2008 logging operation, he directed the loggers to ignore the line Mr. Gliddi had previously marked for him, and directed them to a line farther south that he had marked for himself, which caused the timber trespass.

In summary, the maximum allowable civil penalty is warranted for the cutting and removal of trees from the State land, due to the seriousness of the violation, and the recklessness of Mr. Smith. Such penalty is warranted due to the gravity of the violation, to meet the penalty policy's goal of deterrence in both the general and specific sense. As the policy states:

"Penalties should persuade the violator to take precautions against falling into non-compliance again, as well as persuade others not to violate the law. Successful deterrence provides the best protection for the environment. In addition, it reduces resources necessary to enforce the laws by discouraging non-compliance." (CPP Section III, Objectives in Assessing Penalties.)

According to DEC's policy, penalties must include not only a gravity component, but a separate component intended to remove any economic benefit that results from a failure to comply with the law. (CPP Section III.) In this case, DEC Staff estimates

that benefit as being the stumpage value of the trees that were cut and removed. In his written statement, Mr. Smith said the logs went to Tupper Lake Hardwoods and a lot of the firewood was sold locally. In his testimony, Mr. Smith said he got no money from Mr. Butts, and received "nothing but a few cords of firewood" from the logging operation, as to which he said there was no written agreement. (Transcript, page 355.) Mr. Smith added that Mr. Butts cut very little valuable wood, and that most of what he cut was "low grade timber, pulp, and firewood." (Transcript, page 356.)

Because DEC Staff offered no evidence as to the economic benefit that accrued to Mr. Smith, my penalty recommendation is based entirely on the gravity component described in the Commissioner's policy. For the violation of ECL 9-0303(1), Mr. Smith should be liable not only for a civil penalty of $250 per tree, but treble damages based on the stumpage value of the 284 trees that were cut by mechanical harvester. The damages reflect the loss to the State from the market value of the trees, regardless of what Mr. Smith received for them.

As noted in DEC Staff's closing brief, Matter of Roger Bresee d/b/a Bresee Tree & Forestry Management (Commissioner's Decision and Order, September 11, 2006) provides precedent for the assessment of treble damages for violation of ECL 9-0303(1), pursuant to ECL 71-0703(6)(a). In Bresee, DEC did not demand the additional penalty of $250 per tree. However, as DEC Staff points out, Bresee is distinguishable because, in that matter, the respondent had an agreement with DEC, pursuant to ECL 9-0505, to cut trees on State land, and the violation stemmed from the failure to replant the stand, in violation of that agreement. Needless to say, Mr. Smith had no such agreement; to the contrary, Mr. Gliddi had cautioned him against cutting in the State forest.

Separate from the penalty for the cutting and removal of trees, DEC Staff seeks an additional $100 for the use of motorized vehicles and equipment on State land, which facilitated the logging operation. The unpermitted use of motor vehicles in the state forest, in violation of 6 NYCRR 190.8(m), is an activity for which Mr. Smith is liable for a penalty of not less than $10 nor more than $100, pursuant to ECL 71-

0703(1). The maximum penalty for this violation is warranted, given the tire rutting observed by Mr. Reynolds.

CONCLUSIONS

On or about November 2008, James R. Smith, Jr., without legal right or permission, caused the cutting and removal of 284 trees from the Titusville State Forest, in violation of ECL 9-0303(1) and 6 NYCRR 190.8(g).

As part of the cutting and removal of the trees, Mr. Smith caused the use of motor vehicles on state land, in violation of 6 NYCRR 190.8(m).

RECOMMENDATION

For the violation of ECL 9-0303(1), the Commissioner should assess a civil penalty equal to $250 for each of the 284 trees cut and removed by mechanical harvester ($250 x 284 = $71,000), as well as treble damages based on the stumpage value of these trees ($1,221.99 x 3 = $3,665.97), for a combined penalty of $74,665.97.

For the violation of 6 NYCRR 190.8(m), the Commissioner should assess a civil penalty of $100.

Combining these penalties, the total penalty for the violations alleged in this matter should be $74,765.97.

EXHIBIT LIST

JAMES R. SMITH, JR.

ALJ's Exhibits

A. Notice of Hearing and Complaint (11/14/12), with affidavit of personal service on James R. Smith, Jr. (12/4/12)

B. Answer of James R. Smith, Jr. (1/7/13)

C. Statement of Readiness for Adjudicatory Hearing (2/13/14)

D. Case Assignment Letter of Chief ALJ James T. McClymonds (2/24/14)

E. ALJ Buhrmaster's Notice of Hearing (4/7/14)

Parties' Exhibits

1. Statement of DEC Forest Ranger Thomas Gliddi (1/26/09)

2. Portion of JIMAPCO map highlighting area of Smith property in Town of Malone, Franklin County, New York

3. USGS Topographic Map, Owls Head Quadrangle, Franklin Co., NY (1968)

4. DEC survey map (sheet 1) indicating two parcels comprising the Smith property on Duane Road, with accompanying map (sheet 2) showing detail of southern property line, both prepared by DEC surveyors Floyd R. Lampart and Carolyn Wiggin (5/13/09)

5. Survey map of the Gerald and Bernice Shannon property, prepared by Dana Drake (2/2/80)

6. Deed from Niagara Mohawk Power Corp. to People of the State of New York (recorded 7/8/50)

7. Deed from Eleanor M. Boyea to James R. Smith, Jr., Wayne Dashnaw and Martin Hanbury (6/30/04)

8. Stump tally sheets and timber volume and value estimates for alleged Titusville Mountain State Forest Trespass, with explanatory e-mail of Sean Reynolds, DEC senior forester (6/4/09)

9. Photograph of log skidder

10. Stump Measurement, Timber Volume and Value Report for Smith property, submitted by Herbert Boyce, Northwoods Forest Consultants, LLC (7/16/10)

11. Portion of the Map of Middle and South Thirds of Township Nine, Macomb's Purchase, Malone, Franklin County, "Property of A.B. Parmelee & Son," copied with additions and corrections by H.K. Averill Jr. (1882), on file in the Franklin County Clerk's Office as Map No. 256 [Map Reference No. 1 on sheet one of Exhibit No. 4]

12. Deed from Fred and Priscilla Thomas to Floyd L. Carlisle (recorded 9/22/25) [referred to in Exhibit No. 6]

13. Photographs (001 to 019) taken 5/18/09 by Environmental Conservation Police Investigator K.A. Bruno, with narrative report; followed by photographs (1 to 23) taken 9/11/09 by by James R. Smith, Jr.

14. Order of Dismissal of Charges, People v. James R. Smith, Jr., by Hon. Frank R. Cositore, Jr., Malone Town Justice (7/25/11)

15. Deposition of James R. Smith, Jr. (2/19/09)

[NOTE: All of the above-referenced exhibits were received as part of the record with the exception of Exhibit No. 9, which was marked for identification only.]