STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15, Title 27 of the Environmental Conservation Law ("ECL") and Part 666 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC Case No. R1-20051102-240

- by -

DONALD SUTHERLAND,

Respondent.

This administrative enforcement action addresses violations arising from respondent Donald Sutherland's operation of a commercial business, known as Gramma's Flower Cottage, in a scenic river corridor of Carmens River.

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this administrative enforcement action by service of a notice of hearing and complaint upon Donald Sutherland ("respondent") in November 2005. Department staff alleged that respondent violated title 27 of ECL article 15 (Wild, Scenic and Recreational Rivers System) and 6 NYCRR part 666, by

- conducting a commercial business (Gramma's Flower Cottage) at 2891 Montauk Highway, Brookhaven, New York (the "site") within the scenic river corridor of Carmens River;
- constructing a wooden fence and a chain link fence at the site without the required permit;
- constructing a parking lot within the scenic river corridor; and
- erecting signs at the site that failed to meet regulatory standards or were otherwise prohibited.

The violations are alleged to have occurred on or before May 6, 2005. Respondent filed an answer, denying the allegations and stating ten affirmative defenses.

The matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell of the Department's Office of Hearings and Mediation Services. ALJ O'Connell conducted a hearing and prepared the attached hearing report. The ALJ found that respondent violated various regulations issued pursuant to ECL article 15, title 27, by operating a commercial business, constructing a fence and constructing a parking lot in the scenic river corridor of Carmens River, without a permit from the Department. With respect to the fence construction, the ALJ concluded that the allegations concerning the construction of a wooden fence and the construction of a chain link fence constituted a single violation. The ALJ concluded that respondent displayed an oversized sign that is prohibited by the applicable regulations. With respect to the remaining signs at issue, the ALJ concluded that Department staff failed to demonstrate that those signs were at the site on or before May 6, 2005, as alleged in the November 2005 complaint.

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

Respondent raised several threshold legal issues in this proceeding. The first related to the sufficiency of Department staff's complaint which was neither signed nor dated by a Department attorney. Department staff served upon respondent three documents: a "Notice of Hearing, Pre-hearing Conference and Complaint," a "Verification" and a "Verified Complaint." All three documents contained a line for the Department attorney to sign and a blank line for the month and day to be entered. However, none of the documents was signed and no month and day were entered on any of the documents. Typed on each of the documents, however, was the name, address and telephone number of the Department staff attorney for the matter. The documents also included the information required to commence a proceeding, as set forth in 6 NYCRR 622.3(a)(1) and (2).

While the Department's regulations do not require that a Department staff attorney sign and date a complaint in an administrative enforcement hearing, it is my expectation and direction that Department attorneys sign and date their complaints.[1] However, even if there were a legal requirement to sign the complaint, respondent in this proceeding would be deemed to have waived any objection to the omission of the

[1] Although the complaint in this matter was apparently intended by Department staff to be a verified complaint, complaints in DEC administrative enforcement hearings are not required to be verified (see 6 NYCRR 622.3[a]).

signature and date on the complaint. Respondent did not object to these omissions promptly, did not raise any objections in its answer to the omissions and indeed did not object to them until the first day of the hearing, almost two years after the documents were served on him (see Civil Practice Law and Rules ["CPLR"] § 2101(f); see also CPLR 3022). Moreover, respondent failed to demonstrate any prejudice due to the omitted signature and date. As noted, the complaint (as well as the two other documents served at the same time) notified respondent of the name, address and telephone number of the DEC staff attorney. Subsequent documents, including the statement of readiness that was filed with the Office of Hearings and Mediation Services and served on respondent, and various briefs filed by Department staff, included the signature of the Department attorney and the date of the document.

Respondent also argued that the Department lacked jurisdiction over respondent's property. He contended that Department staff did not comply with the requirements outlined in 6 NYCRR 666.6 for establishing the boundaries of the river area because of Department staff's failure to file a copy of the Carmens River Corridor Map with the County Clerk of Suffolk County prior to the commencement of the enforcement action.

The site at issue in this proceeding is within the scenic river area of the Carmens River, and this is not affected by any nonfiling of the Carmens River Corridor Map with the Suffolk County Clerk prior to the commencement of the enforcement action. ECL 15-2711 provides for establishing detailed boundaries of river areas associated with wild, scenic and recreational rivers, with the boundaries not to exceed a width of one-half mile from each bank (see also, ECL 15-2703[9][definition of "river area"]). Section 666.6(f) of 6 NYCRR provides that, upon designation of a river as part of the wild, scenic and recreational rivers system and until boundaries are established, the river area shall be that area within one-half mile of each bank of the river and the provisions of 6 NYCRR part 666 will be applicable within that area. The site is both within the river area of the Carmens River as depicted in the March 4, 1977 Decision and Order that established the river area boundaries for the Carmens and Connetquot Rivers, and within one-half mile of the bank of the Carmens River in a section designated as a scenic river pursuant to ECL 15-2714(2)(f)(see, e.g., Hearing Transcript, at 190 [site "about a third of a mile" from the Carmens River]; see also Hearing Exhs 7 [map entitled Carmans (sic) WSR River Corridor, depicting scenic corridor portions of Carmens River], 9 [aerial photo

depicting river corridor boundaries showing site within corridor boundaries], and 21).

Respondent also argued that the agricultural nature of his activities exempted Gramma's Flower Cottage from the regulatory requirements governing wild, scenic and recreational rivers, including the permitting requirement. The ALJ has comprehensively addressed respondent's arguments relating to agricultural activities and applicable regulatory exemptions, and found them unavailing (see Hearing Report, at 22-33). I concur with the ALJ's determinations.

At the time of the alleged violations, respondent's operation, Gramma's Flower Cottage, was a recently-established garden store for the sale of plants grown or raised elsewhere, plus sales of other items such as pots and bags of top soil and mulch. As set forth in the hearing report, the operation constitutes a "commercial use" as that term is defined at 6 NYCRR 666.3(k), and is subject to the Department's permitting requirements (see, e.g., 6 NYCRR 666.2[g]). Because the plants that were sold were not grown or raised directly on the site, the operation was not an agricultural use under the regulations (see 6 NYCRR 666.3[d]).

As noted, the ALJ recommended that respondent be held liable for one oversized sign at the site. Based upon my review of the record, Department staff did not proffer any evidence that the oversized sign was on the site on or before the date of May 6, 2005 as alleged in the complaint.[2] Accordingly, I decline to find a violation of the applicable regulations governing signs in a scenic corridor.

Department staff in its complaint requested a civil penalty in the amount of $112,500. In its closing brief dated May 29, 2008 ("Staff Closing Brief"), Department staff reduced the civil penalty it was requesting to fifty thousand dollars ($50,000), noting that the main goal of the enforcement proceeding was to cease the commercial operation at the site and restore the site to its prior condition (see Staff Closing Brief, at 20). The ALJ concluded that a penalty of $50,000 was appropriate for the remaining violations, in part because of their duration (see Hearing Report, at 44-48). Based upon my review of the record, I concur that a penalty of $50,000 is warranted and authorized. Although I am dismissing the count regarding the oversized sign,

[2] See, e.g., Hearing Transcript at 191-92 (no recollection of presence of signs during Department staff site visit on May 6, 2005).

the violations relating to commercial use of the site, and constructing fencing and a parking lot are significant. The penalty of $50,000 is within the statutory maximum for those violations, and no further reduction in the penalty is merited.

In addition, the remedial measures proposed by Department staff (removal and disposal of gravel from the site, and restoration of the parking lot area at the site) are appropriate and authorized. I am also directing that respondent cease any commercial activity at the site within thirty (30) days after service of this order, unless it has obtained any and all required permits and approvals for that activity.

Based on my review of the record, the restoration of the site is an overriding consideration. In light of the anticipated cost for this restoration, I am suspending twenty-five thousand dollars ($25,000) of the fifty thousand dollar ($50,000) penalty conditioned upon respondent's timely preparation and implementation of a remediation plan for the site and compliance with the other requirements of this order. I am directing that respondent submit the remediation plan to Department staff within sixty (60) days of the service of this order upon respondent. However, I encourage respondent to discuss the plan and its contents with Department staff prior to its submission.

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

I. Respondent Donald Sutherland is adjudged to have violated 6 NYCRR part 666 by engaging in the following unpermitted activities at 2891 Montauk Highway, Brookhaven, New York (the "site"), which is located in the scenic river corridor of the Carmens River:

   A. establishing a commercial use (Gramma's Flower Cottage), in violation of 6 NYCRR 666.13(K)(3);

   B. constructing fencing, in violation of 6 NYCRR 666.13(D)(7); and

   C. causing or allowing the construction of an approximately 10,000 square foot parking lot, in violation of 6 NYCRR 666.13(K)(3).

II. Respondent Donald Sutherland is hereby assessed a civil penalty in the amount of fifty thousand dollars

($50,000), of which twenty-five thousand dollars ($25,000) is suspended on the condition that respondent complies with the requirements of this order (including but not limited to the payment of the unsuspended portion of the penalty and the filing of a remediation plan pursuant to paragraph IV of this order).

The non-suspended portion of the penalty (twenty-five thousand dollars [$25,000]) is due and payable within sixty (60) days after service of this order upon respondent. 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: Kari E. Wilkinson, Esq., Assistant Regional Attorney, NYSDEC Region 1, 50 Circle Road, Stony Brook, New York 11790-3409. Should respondent fail to comply with the requirements of this order, the suspended portion of the penalty shall become immediately due and payable and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

III. Respondent Donald Sutherland shall cease operation of Gramma's Flower Cottage or any other commercial business at the site within thirty (30) days after service of this order, unless respondent obtains all required permits and approvals from the Department and any other governmental agency having jurisdiction over the site.

IV. Within sixty (60) days after service of this order upon respondent, respondent shall submit an approvable remediation plan for the site to Department Staff. Upon approval by Department staff, respondent shall implement the remediation plan. The plan shall provide for:

A. the removal of all gravel from the parking lot at the site and disposal of the gravel at an off-site location approved by the Department;

B. the restoration of the parking lot area at the site by either seeding it with a perennial grass seed mixture, or by undertaking other plantings that are approved by Department staff;

C. the monitoring of the site for a period of three years and the undertaking of any further

replacement, reseeding or replanting to ensure successful site restoration; and

D. a schedule for the completion of the work set forth in the plan, with appropriate milestone dates.

Following approval of the remediation plan by Department staff, respondent may not make any modifications to the remediation plan without the written consent of Department staff.

V. All communications from respondent to the Department concerning this order shall be made to Kari E. Wilkinson, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation Region 1, 50 Circle Road, Stony Brook, New York, 11790-3409.

VI. The provisions, terms, and conditions of this order shall bind respondent Donald Sutherland, his heirs, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: June 23, 2010
Albany, New York

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

In the Matter

- of -

Alleged Violations of the Environmental Conservation Law of the State of New York (ECL) Article 15 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 666

by

DONALD SUTHERLAND,
Respondent.

DEC Case No. R1-20051102-240

HEARING REPORT

- by -

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

March 9, 2009

Proceedings

Department staff from the Region 1 Office of the New York State Department of Environmental Conservation (Department staff) initiated the captioned enforcement matter by duly serving a notice of hearing, pre-hearing conference and complaint; verification; and verified complaint upon Donald Sutherland (Respondent).[1] By his counsel, Peter R. McGreevy, Esq. (McGreevy & Henle, LLP, Riverhead, New York), Mr. Sutherland filed an answer dated August 21, 2006.

In the November 2005 complaint, Department staff asserts that Donald Sutherland owns property located at 2891 Montauk Highway in the Town of Brookhaven (Suffolk County), which is identified in the Suffolk County Tax Map as 0200-848-2-4, and others (*see* Exhibits 23 and 25; *cf* Exhibit 26). In addition, the complaint asserts that Mr. Sutherland operates a commercial business known as Gramma's Flower Cottage at this property.

According to the November 2005 complaint, Mr. Sutherland's property is regulated pursuant to Environmental Conservation Law (ECL) article 15, title 27 (Wild, Scenic and Recreational Rivers System) and implementing regulations at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 666 (Regulation or Administration and Management of the Wild, Scenic and Recreational Rivers System in New York State Excepting Private Land in the Adirondack Park) because the property is located within the scenic river area of the Carmens River.[2] In six causes of action, Department staff alleges that Mr. Sutherland violated various provisions of 6 NYCRR part 666 on or before May 6, 2005 by operating Gramma's Flower Cottage without a permit from the Department. In the

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[1] Department staff's papers consisting of the notice of hearing, pre-hearing conference and complaint, verification, and verified complaint were neither signed by counsel nor dated. In Department staff's April 25, 2007 statement of readiness, Kari Wilkinson, Esq., Assistant Regional Attorney, states that Department staff personally served Mr. Sutherland with the notice of hearing and complaint on November 10, 2005. Also, in his affirmation dated August 24, 2007, Peter R. McGreevy, Esq., Respondent's first counsel, states in paragraph 5 that "[t]he instant action was brought by service of a Notice of Hearing by counsel for the Complainant on November 5, 2005." Therefore, the captioned enforcement action commenced in November 2005.

[2] Spelled as such in the statute (*see* ECL 15-2714[2][f]). In the November 2005 complaint, the river is identified as the "Carmans river." The statutory spelling will be used in this Hearing Report.

November 2005 complaint, Department staff requests an order from the Commissioner that would assess a total civil penalty of $112,200 and direct Mr. Sutherland to remediate his property.

With a cover letter dated April 25, 2007, Kari Wilkinson, Esq., Assistant Regional Attorney, filed a statement of readiness on behalf of Department staff pursuant to the requirements outlined at 6 NYCRR 622.9. Subsequently, with a cover letter dated April 30, 2007, Ms. Wilkinson provided the Office of Hearings and Mediation Services with copies of Department staff's papers and Mr. Sutherland's August 21, 2006 Answer. The matter was assigned to me on May 9, 2007. After a telephone conference call with the parties' counsel on June 11, 2007, the adjudicatory hearing was scheduled for August 28 and 29, 2007.

I. Motion for Leave to Withdraw as Respondent's Counsel

On August 17, 2007, I initiated another telephone conference with the parties' counsel to inquire whether the parties were ready for the adjudicatory hearing. During the conference call, Ms. Wilkinson stated that Department staff had served its first discovery demand upon Mr. Sutherland's counsel on February 5, 2007, but had not received any response. Mr. McGreevy stated that although he had asked his client on numerous occasions to provide him with any documents responsive to Department staff's discovery demand, his client had ignored his many requests. Ms. Wilkinson stated that Department staff would file a motion pursuant to 6 NYCRR 622.7(c)(3), and move to preclude from the hearing record any documents responsive to Department staff's February 5, 2007 discovery demand. Ms. Wilkinson filed Department staff's motion and supporting papers with a cover letter dated August 20, 2007.

During the August 17, 2007 conference call, Mr. McGreevy stated that he would be filing a motion for leave to withdraw as Mr. Sutherland's counsel due to his client's lack of cooperation, which prevented Mr. McGreevy from preparing for the upcoming hearing. With a cover letter dated August 24, 2007, Mr. McGreevy filed the motion and an affirmation dated August 24, 2007.

Referring to Civil Practice Law and Rule (CPLR) § 321(b)(2) Mr. McGreevy requested leave to withdraw as Mr. Sutherland's

counsel. In his affirmation, Mr. McGreevy stated, among other things, that his client: (1) failed to cooperate with his attorney; (2) insisted that his attorney present a claim or defense in the captioned matter that is not warranted under New York law; (3) conducted himself in a manner which renders it unreasonably difficult to represent Mr. Sutherland; and (4) insisted that Mr. McGreevy engage in conduct which is contrary to his counsel's judgment and advice. In addition to requesting leave to withdraw, Mr. McGreevy also requested a 30-day adjournment to allow Mr. Sutherland the opportunity to retain new legal counsel.

Because I received Mr. McGreevy's motion on August 27, 2007, which was the day before the hearing, I initiated a telephone conference call with the parties to hear from Department staff about Mr. McGreevy's motion. Ms. Wilkinson stated that Department staff opposed Mr. Sutherland's motion for an adjournment. Ms. Wilkinson expressed concern that Mr. Sutherland would attempt to delay the proceeding further by not cooperating with any new counsel that he may retain. Ms. Wilkinson stated further that Department staff was prepared to go forward on August 28, 2007 as scheduled.

In response to Department staff's opposition to the adjournment, Mr. McGreevy stated that Mr. Sutherland would be prejudiced if the hearing commenced as scheduled on August 28, 2007.

During the August 27, 2007 telephone conference, I allowed Mr. McGreevy and his firm to withdraw as Respondent's counsel, and adjourned the hearing to October 2, 2007. Subsequently, on August 27, 2007, I issued a notice of adjournment and a ruling concerning Mr. McGreevy's motion for leave to withdraw. Because the August 27, 2007 ruling granted Mr. McGreevy's request, I sent a copy of the ruling to Mr. Sutherland by certified mail, return receipt requested.[3]

In addition to adjourning the hearing to October 2, 2007, the August 27, 2007 ruling provided Mr. Sutherland with the opportunity to retain new legal counsel by September 21, 2007,

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[3] After providing Mr. Sutherland with two notices of the certified mail, the US Postal Service returned the August 27, 2007 ruling to OHMS on September 24, 2007 as unclaimed. At my direction, OHMS staff sent a second copy of the August 27, 2007 ruling to Mr. Sutherland on September 24, 2007 by regular mail. (Tr. pp. 5-6.)

and directed his new legal counsel to file a notice of appearance by that date. The August 27, 2007 ruling advised Mr. Sutherland that, pursuant to 6 NYCRR 622.9(e), his failure to appear at the October 2, 2007 hearing would constitute a default and waiver of his right to a hearing.

Finally, in the August 27, 2007 ruling, I reserved on Department staff's August 20, 2007 motion made pursuant to 6 NYCRR 622.7(c)(3) to preclude from the hearing record any documents responsive to Department staff's February 5, 2007 discovery demand.

II. Respondent's Second Motion for Adjournment

As scheduled by the August 27, 2007 ruling, the hearing commenced at 10:00 a.m. on October 2, 2007 at the Department's Region 1 Offices on the SUNY Stony Brook Campus. Department staff appeared by Ms. Wilkinson. Mr. Sutherland appeared by J. Lee Snead, Esq. (Bellport, New York).

Mr. Snead stated that Mr. Sutherland had retained him at about noon on October 1, 2007. According to Mr. Snead, his new client had learned "on Saturday" (*i.e.,* September 29, 2007) that the hearing would commence on October 2, 2007. (Tr. pp. 5-12.) At the October 2, 2007 hearing, Mr. Snead filed: (1) a notice of motion for adjournment of hearing dated October 2, 2007; (2) an affirmation by Mr. Snead also dated October 2, 2007; and (3) an affidavit by Mr. Sutherland sworn to October 2, 2007. Mr. Snead stated that he was recently retained as Mr. Sutherland's legal counsel; did not know whether he had received a complete file; and he was not able to prepare adequately for the hearing because Mr. Sutherland had retained him on the eve of trial.

Department staff objected to Respondent's second motion to adjourn the hearing. Ms. Wilkinson stated that in early September 2007, she sent Mr. Sutherland copies of Department staff's February 5, 2007 discovery demand, as well as Department staff's August 20, 2007 motion to preclude. Ms. Wilkinson stated further that Mr. Sutherland had called her on September 24, 2007 about the hearing and left a message. In addition, Ms. Wilkinson said that she received telephone calls after 4:00 p.m. on Monday, October 1, 2007 from two different attorneys concerning this matter. Department staff argued that Mr.

Sutherland was attempting to delay the hearing by waiting until the last minute to retain new legal counsel. (Tr. p. 13.)

Ms. Wilkinson explained further that Department staff had subpoenaed three witness for the October 2, 2007 hearing, and that all three witnesses had appeared. In order to avoid having to re-serve the subpoenas with the attendant costs, Department staff requested that the hearing go forward as scheduled. Over Mr. Snead's objection, I denied his motion for an adjournment. I directed Department staff to call the three subpoenaed witnesses. I allowed Mr. Snead to postpone his cross-examination of Department staff's witnesses to a later date. (Tr. pp. 20-22.)

III. Additional Discovery

After hearing the direct testimony of Messrs. Howarth, Piersa and Rignola on October 2, 2007, the proceedings adjourned until a telephone conference call on October 16, 2007. During the October 16, 2007 conference call, the parties discussed Department staff's February 5, 2007 discovery demand; the information that Mr. Sutherland had provided; and whether Mr. Sutherland would be providing any additional information responsive to Department staff's discover demand. In addition, Mr. Snead requested, and I granted, leave to serve a discovery demand on Department staff. Mr. Snead also identified a set of documents that he wanted to offer at the hearing, and agreed to provide Department staff and me with copies of these documents before the hearing reconvened.

Subsequently, Mr. Snead identified additional documents that he intended to offer at the hearing; provided Department staff and me with copies of those documents; and identified his witnesses. During a telephone conference call on December 12, 2007, Mr. Snead stated that Department staff had not yet responded to his discovery demand, and Ms. Wilkinson agreed to do so promptly. In addition, Mr. Snead advised that he would not cross-examine Messrs. Howarth, Piersa and Rignola.

In a letter dated December 13, 2007, which summarized the discussion from the December 12, 2007 telephone conference call, I scheduled the hearing for February 26 and 27, 2008. Also, I directed Mr. Snead to serve any witness subpoenas by January 28, 2008.

IV. February 26, 2008

As scheduled, the hearing concerning the captioned matter continued at 10:00 a.m. on February 26, 2008 at the Department's Region 1 Offices, and concluded on that date. Ms. Wilkinson represented Department staff and completed Department staff's direct case by calling Robert Marsh, Manager for the Bureau of Habitat at the Department's Region 1 Office. During the October 2, 2007 hearing session, George Howarth, Edward Piersa and Frank Rignola testified on behalf of Department staff. Mr. Howarth resides at 2881 Montauk Highway, which is adjacent to Mr. Sutherland's property. Mr. Piersa and Mr. Rignola are Investigators with the Attorney's Office for the Town of Brookhaven.

At the February 26, 2008 hearing session, Mr. Snead represented Mr. Sutherland and called three witnesses. Daniel Panico is the Senior Deputy County Clerk from the Suffolk County Clerk's Office. Lawrence Davidson is the Micrographics Manager from the Suffolk County Clerk's Office. Raymond Negron, Esq., is an Assistant Town Attorney for the Town of Brookhaven.

The parties filed timely briefs. The hearing record closed on June 24, 2008 upon the timely receipt of the parties' reply briefs.[4]

Findings of Fact

1. Since May 2005, Donald Sutherland has held an ownership interest in the property located at 2891 Montauk Highway in the Town of Brookhaven, Suffolk County, New York. The property at 2891 Montauk Highway consists of three

[4] With a cover letter dated October 31, 2008, I forwarded to the parties' counsel copies of correspondence that I received from Claire Goad dated October 28, 2008. I provided the parties until November 21, 2008 to file any comments about Ms. Goad's correspondence. I received a letter dated November 18, 2008 from Ms. Wilkinson on behalf of Department staff. I received a letter dated November 20, 2008 from Mr. Snead on behalf of Mr. Sutherland. In his November 20, 2008 letter, Mr. Snead correctly notes, among other things, that Ms. Goad was not a party to the proceeding, and that her October 28, 2008 correspondence was outside the hearing record and, therefore, should not be considered. Ms. Goad's comments were not considered during the review of the evidentiary record developed at hearing.

contiguous lots identified by lot numbers 0200-848-2-5, 0200-848-2-6, and 0200-848-2-7. Respectively, the lots are 0.5 acres, 1.5 acres and 1.3 acres, which is about 3.3 contiguous acres (Exhibits 23 and 25).

2. Mr. Sutherland operates a commercial business at the 2891 Montauk Highway location known as Gramma's Flower Cottage. Mr. Sutherland commenced the commercial use of this property on or before May 6, 2005 without any permit from the Department.

3. Mr. Sutherland's property at 2891 Montauk Highway in the Town of Brookhaven is about a third of a mile from the bank of the Carmens River.

4. Various sections of the Carmens River are designated as recreational and scenic. The section of the Carmens River relevant to this proceeding is designated as scenic, and is described as extending for approximately 2½ miles from the south side of the Sunrise Highway, southerly to the mouth at its confluence with the Great South Bay (*see* ECL 15-2714[2][f]).

5. In a Decision and Order dated March 4, 1977 (Exhibit 8), the Commissioner established the river area boundaries for the Carmens and Connetquot Rivers. Appended to the Commissioner's March 4, 1977 Decision and Order are the Final Environmental Impact Statement dated January 12, 1977, and Appendix A. Appendix A describes the boundary areas for the two rivers. In Appendix A, the description of the boundary area concerning the section of the Carmens River relevant to this proceeding is on pages iii - iv.

6. Exhibit 7 is a copy of a map entitled, *Carmans [sic] WSR River Corridor*. The boundaries of the river area and the various designations are overlaid on a New York State Department of Transportation (NYS DOT) quadrangle. The name of the quadrangle is not part of this hearing record.

7. With a cover letter dated November 9, 2007 from Daniel Lewis, a Biologist at the Department's Region 1 Office, the Department provided the Suffolk County Clerk with a copy of a map entitled, Carmans WSR River Corridor, among other things.

8. In May 2005, Mr. Sutherland brought in annual and perennial flowers and plants to sell at the 2891 Montauk Highway site. The source of the annuals is not identified in the hearing record; however, Mr. Sutherland grew the perennials at another location, which he owns. In addition, Mr. Sutherland rents a 12-acre parcel of property in the Town of Riverhead where he grew mums and pumpkins that he subsequently brought to the 2891 Montauk Highway site, and offered them for sale.

9. Suffolk County Resolution No. 1014-2006 is dated September 19, 2006 and was approved on October 3, 2006 (Exhibit 23). Resolution No. 1014-2006 authorizes the inclusion of new parcels of property into existing agricultural districts in Suffolk County. In the Town of Brookhaven, Mr. Sullivan's property at 2891 Montauk Highway appears on the list of approved parcels, among others, for inclusion into Suffolk County Agricultural District No. 3. On February 6, 2007, Thomas Lindberg, First Deputy Commissioner, New York State Department of Agriculture and Markets, reviewed Resolution No. 1014-2006, and approved the inclusion of the properties, including Mr. Sutherland's located at 2891 Montauk Highway, into Suffolk County's agricultural districts.

10. Robert Somers, Ph.D., is the Chief of the Agricultural Protection Unit, New York State Department of Agriculture and Markets. After visiting Gramma's Flower Cottage on May 22, 2007, Dr. Somers prepared a field report dated May 23, 2007. The purpose of Dr. Somers' site visit was to determine whether Mr. Sutherland's business is a farm operation pursuant to New York State Agriculture and Markets Law (AML) § 301(11). Based on his observations and his conversation with Mr. Sutherland, Dr. Somers concluded that Gramma's Flower Cottage is a farm operation as that term is defined in AML § 301(11).

11. Frank Rignola is an investigator from the Brookhaven Town Attorney's Office. Mr. Rignola visited Gramma's Flower Cottage on May 5, 2005, and about a year later on May 13, 2006. During these site visits, Mr. Rignola took photographs (Exhibit 5). The photographs from the May 5, 2005 site visit (Exhibit 5A – 5I) show that: all plants are in flats or other containers; there are no greenhouses on the 2891 Montauk Highway site; and the flats of plants

were brought to the 2891 Montauk Highway site in rented trucks. Based on this evidence, none of the plants observed by Mr. Rignola during his May 5, 2005 site visit were grown at the 2891 Montauk Highway property on or before May 6, 2005.

12. Robert Marsh is the Regional Manager for the Bureau of Habitat in the Department's Region 1 Office. Mr. Marsh went to Mr. Sutherland's property at 2891 Montauk Highway on May 6, 2005. In addition to plants, Mr. Marsh observed products, such as pots, and bags of top soil and mulch being offered for sale. Mr. Marsh's observations during his May 6, 2005 site visit demonstrate that the horticultural specialties offered for sale at Gramma's Flower Cottage were not grown or raised directly at the 2891 Montauk Highway site on or before May 6, 2005.

13. On May 4, 2005, Mr. Sutherland installed a 6-foot high, wood-stockade fence along three sides of the property located at 2891 Montauk Highway. Mr. Rignola observed a chain-link fence and a wood-stockade fence on Mr. Sutherland's property during his May 5, 2005 site visit.

14. Mr. Marsh's enforcement report (Exhibit 11) includes a sketch of Mr. Sutherland's property on which Mr. Marsh drew the approximate location of the wood-stockade fence and the chain-link fence. Department staff did not issue a permit to Mr. Sutherland to install any fencing on the property located at 2891 Montauk Highway.

15. George Howarth has resided at 2881 Montauk Highway for 26 years. Mr. Howarth's property is adjacent to Mr. Sutherland's. On the morning of May 4, 2005, Mr. Howarth observed large dump trucks at Mr. Sutherland's property dumping reconstituted concrete aggregate (RCA) in the area of the front lawn. He took photographs, which depict the piles of RCA (Exhibits 1A – 1C). When Mr. Howarth returned home from work on May 4, 2005, the piles of RCA dumped on Mr. Sutherland's property had been graded and compacted to form a parking lot.

16. Mr. Rignola observed the parking lot on Mr. Sutherland's property during his May 5, 2005 site visit (Exhibit 5E, Tr. p. 59).

17. Mr. Marsh's enforcement report (Exhibit 11) includes a sketch of Mr. Sutherland's property on which Mr. Marsh drew the approximate dimensions of the parking lot (200 feet by 50 feet), which is about 10,000 square feet. Department staff did not issue a permit to Mr. Sutherland to construct a parking lot on the property located at 2891 Montauk Highway.

18. On May 8, 2005, Mr. Howarth took a photograph (Exhibit 1E) of a sign on Mr. Sutherland's property with the wording "Gramma's Flower Cottage." According to Mr. Howarth, the dimensions of the sign are about 4 to 6 feet high, and 18 to 20 feet long, which would be 72 to 120 square feet.

19. Mr. Marsh returned to Gramma's Flower Cottage on May 18, 2005 and saw the sign that Mr. Howarth photographed on May 8, 2005. Mr. Marsh photographed the sign, which is identified as Exhibit 13-4. The sign is attached to the chain-link fence, and is 4 feet by 18 feet, which is 72 square feet. Department staff did not issue any permit to Mr. Sutherland to display this sign.

Discussion

As noted above, Department staff asserts in the November 2005 complaint, that Mr. Sutherland owns real property located at 2891 Montauk Highway in the Town of Brookhaven, and that Mr. Sutherland operates a commercial business at this location, known as Gramma's Flower Cottage. Department staff contends further that Mr. Sutherland's property is regulated pursuant to ECL article 15, title 27 (Wild, Scenic and Recreational Rivers System) and implementing regulations at 6 NYCRR part 666 because the property is located within the scenic river area of the Carmens River. In six causes of action, Department staff alleges that Mr. Sutherland violated various provisions of 6 NYCRR part 666 on or before May 6, 2005 by operating Gramma's Flower Cottage without a permit from the Department.

By his first attorney, Mr. Sutherland filed an answer dated August 21, 2006. In paragraph 2 of the August 21, 2006 answer, Mr. Sutherland "admits that [at] all times herein mentioned, defendant, Donald Sutherland held an ownership interest in the property known as 2891 Montauk Highway, Brookhaven, New York." In addition, Exhibits 22, 23, 25, and 26, offered by Mr.

Sutherland at the hearing over Department staff's objection, also establish that he owns the property located at 2891 Montauk Highway. For example, Exhibit 22 states that Mr. Sutherland purchased the property located at 2891 Montauk Highway in May 2005, and that the property is about two acres. Exhibits 23, 25 and 26 also prove that Mr. Sutherland owns the property at 2891 Montauk Highway in the Town of Brookhaven, and that the property consists of three contiguous lots identified by lot numbers 0200-848-2-5, 0200-848-2-6, and 0200-848-2-7. Respectively, the lots are 0.5 acres, 1.5 acres and 1.3 acres, which totals about 3.3 contiguous acres.

In the August 21, 2006 answer, Mr. Sutherland denies the violations alleged in the six causes of action, and asserts ten affirmative defenses. Mr. Sutherland's affirmative defenses are summarized as follows:

1. the activities at the site are part of a "farm operation" as defined by the AML;

2. the site is an "agriculture use" as defined in 6 NYCRR 666.3(d);

3. any structures on the site are "agricultural use structures" as defined in 6 NYCRR 666.3(e);

4. pursuant to 6 NYCRR 666.13(I)(4)(b),[5] agricultural uses do not require a permit;

5. pursuant to 6 NYCRR 666.13(D)(1), agricultural use structures do not require a permit;

6. the activities at the site are not commercial activities as defined at 6 NYCRR 666.13(K)(3);

7. Mr. Sutherland did not engage in any activity that required a permit pursuant to 6 NYCRR 666.13(D)(7);

8. Mr. Sutherland did not engage in any activity that required a permit pursuant to 6 NYCRR 666.13(G)(4)(b);

[5] Capital letters (A through L) are used in the Table of Use Guidelines outlined at 6 NYCRR 666.13.

9. legislation pending before the Suffolk County legislature would include the subject property in the Suffolk County Agricultural District; and

10. other defenses that may become available during the discovery process.

After he retained Mr. Snead as his new legal counsel, Mr. Sutherland did not withdraw his August 21, 2006 answer. During the course of the hearing, Mr. Snead asserted three additional affirmative defenses on his client's behalf. First, Department staff's November 2005 complaint is invalid because Ms. Wilkinson, who is Department staff's legal counsel with respect to this matter, did not sign and date any of Department staff's papers including the notice of hearing, pre-hearing conference and complaint; verification; and the verified complaint. Second, Respondent contends that the Department lacks subject matter jurisdiction over his property because Department staff did not file a map of the river corridor consistent with the applicable regulatory requirements. Third, Mr. Sutherland asserts that Department staff's determination not to prosecute the captioned matter until April 25, 2007 negates any civil penalty that the Commissioner could assess.

I. Threshold Legal Issues

Mr. Sutherland raises two threshold issues. The first concerns the validity of Department staff's November 2005 complaint. The second relates to the regulatory requirements for filing a map of the Carmens River corridor with the Suffolk County Clerk's Office. Each issue is addressed below.

A. Department staff's November 2005 Complaint

With a cover letter dated April 25, 2007, Ms. Wilkinson filed a statement of readiness as required by 6 NYCRR 622.9. Ms. Wilkinson signed and dated the statement of readiness on April 25, 2007. In the statement, Ms. Wilkinson states, in pertinent part, that:

> [O]n November 10, 2005, a Notice of Hearing and Complaint was personally served on the above named respondent in a manner which complies with the

procedures established in 6 NYCRR Part 622. An answer has been served by respondent.

The copies of the notice of hearing, pre-hearing conference, and complaint; verification; and verified complaint enclosed with Department staff's April 30, 2007 cover letter to the Chief Administrative Law Judge were neither signed nor dated. Mr. Snead stated at the October 2, 2007 hearing session, that his copies of these documents were not signed or dated (Tr. pp. 10, 21).

In his closing brief (pp. 1, 3-5), Mr. Sutherland reiterates his statements from the October 2, 2007 hearing session, and states further that the documents related to the notice of hearing and the complaint that were provided to his first attorney (*i.e.,* Mr. McGreevy) were also not signed or dated. (*See* Exhibit 1 to Respondent's May 29, 2008 closing brief.) With reference to 6 NYCRR 622.11(b)(1), Mr. Sutherland notes that Department staff has the burden of proof on all charges that "they affirmatively assert in the instrument which initiated the proceeding." Because Ms. Wilkinson did not sign and date the verification and the complaint, Mr. Sutherland argues that Department staff has not "affirmatively asserted" any charges against him.

In the alternative, Mr. Sutherland argues that without a signed complaint, the allegations asserted in it are not sufficiently supported. Mr. Sutherland cites *Matter of B&G Diversified, Inc.*, Commissioner's Order dated August 15, 1994 (WL 550063) to support these arguments. Mr. Sutherland states that in *B&G Diversified*, the ALJ properly ruled to exclude an unsigned letter, not issued on DEC letterhead, as evidence. Finally, Mr. Sutherland contends that the unsigned, undated complaint related to the captioned matter has no evidentiary value and, therefore, cannot serve as an affirmative assertion of the matters alleged in it. (Respondent's closing brief, p. 5.)

In its reply brief (p. 2), Department staff references Civil Practice Law and Rules (CPLR) § 3022, and contends, without further elaboration, that an adverse party may treat a pleading served without sufficient verification as a nullity only after providing the party who provided the initial pleading or notice with due diligence. Department staff notes that Mr. Sutherland did not raise this issue in his answer, and that his

attorney raised the objection for the first time at the hearing. According to Department staff, Mr. Sutherland's objection about the unsigned documents was untimely because the objection was made at the hearing.

Pursuant to 6 NYCRR 622.3(a)(1), Department staff may commence an administrative enforcement proceeding with service of a notice of hearing and a complaint. The complaint must contain the following:

1) a statement of the legal authority and jurisdiction under which the proceeding is to be held;

2) a reference to the particular sections of the statute, rules and regulations involved; and

3) a concise statement of the matters asserted.

The notice of hearing must state that the hearing date will be set by the Office of Hearings upon receipt of a statement of readiness from Department staff. In addition, the notice of hearing may set the time, date, and place for a pre-hearing conference, and must state that any exemption and affirmative defense must be raised in a timely served answer. Finally, the notice of hearing must state that the failure either to attend a pre-hearing conference, if one is scheduled, or to file a timely answer will result in a default and waiver of respondent's right to a hearing. (*See* 6 NYCRR 622.3[a][2].) Service of the notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail (*see* 6 NYCRR 622.3[a][3]).

The content of Department staff's November 2005 complaint complies with the requirements outlined in 6 NYCRR 622.3(a)(1). In addition, the content of the related notice of hearing complies with the requirements outlined in 6 NYCRR 622.3(a)(2). Service of the November 2005 notice of hearing and complaint is not at issue in this proceeding because Mr. McGreevy, Mr. Sutherland's initial counsel, appeared at the scheduled pre-hearing conference, and subsequently filed an answer dated August 21, 2006.[6] The procedures outlined in State Administrative Procedure Act (SAPA) article 3 concerning adjudicatory hearings, and 6 NYCRR part 622 do not require the

[6] Mr. McGreevy dated and signed the August 21, 2006 answer, but did not include a verification (*see* CPLR 3022). Mr. McGreevy did not object to Department staff's unsigned, undated papers.

parties or their representatives to sign and date their respective pleadings. In addition, there is no requirement that the pleadings relative to this matter must be verified (*see* CPLR 3020). Consequently, there is no infirmity with the November 2005 complaint; it provides Mr. Sutherland with sufficient notice of the charges alleged against him.

Finally, I note that Department staff did not offer the November 2005 complaint as evidence to prove the alleged violations. Rather, to demonstrate the violations alleged in the unsigned, undated complaint, Department staff offered the sworn testimony of several witnesses and other documentary evidence at the hearing. Whether Department staff has met its burden of proof is discussed thoroughly below.

B. Amendment of Pleadings

Throughout the hearing and in his closing brief and reply, Mr. Sutherland notes that the complaint asserts that the violations allegedly took place "on or before May 6, 2005," and objects to a consideration of any other time frame. In his closing brief (pp. 21-23), Mr. Sutherland argues that the Commissioner should not consider any evidence of alleged violations subsequent to May 6, 2005 because that evidence would exceed the scope of the time asserted in Department staff's complaint. Mr. Sutherland reiterates this objection in his reply brief (p. 2), and contends that Department staff, in the closing brief, inappropriately attempts to expand the scope of the alleged violations to include a period "on or about" May 6, 2005. Mr. Sutherland emphasizes the distinction between "on or before" May 6, 2005, and "on or about" May 6, 2005.

Mr. Sutherland's objection is directed to the fifth and sixth causes of action. In these two causes of action, Department staff alleges that Mr. Sutherland violated two different provisions of 6 NYCRR 666.13(G)(4), which regulates signage in scenic river corridors. The photographic evidence presented at the hearing, however, shows that the signs were present at the site after May 6, 2005 rather than "on or before" May 6, 2005, as asserted in the November 2005 complaint.

At no time since service of the notice of hearing and complaint upon Mr. Sutherland did Department staff move to amend the November 2005 complaint to change the time when the alleged

violations took place. Neither at the conclusion of the hearing nor in the closing brief, did Department staff move to amend the pleadings to conform with the proof.

Nevertheless, with respect to the sixth cause of action, I choose to amend the pleadings to conform with the proof sua sponte (*see* 6 NYCRR 622.5[b] and CPLR 3025[c]). I conclude that Mr. Sutherland is not prejudiced by this amendment. With respect to the sixth cause of action, I am considering evidence obtained on May 8, 2005, which is two days after the time alleged in the complaint. The November 2005 complaint provided Mr. Sutherland with notice of the alleged violation of 6 NYCRR 666.13(G)(4)(b) concerning the display of an oversized sign at the site.

C. Subject Matter Jurisdiction

According to Mr. Sutherland, the Department lacks subject matter jurisdiction over his property. Mr. Sutherland argues that Department staff did not comply with the requirements outlined in 6 NYCRR 666.6 for establishing the boundaries of the river area. In addition, Mr. Sutherland contends that the activities at the site are an "agricultural farm operation" as defined in AML. Mr. Sutherland contends further that the statutory definition in AML preempts the regulatory definition provided in 6 NYCRR part 666. Based on the discussion that follows, however, I conclude that the provisions of 6 NYCRR part 666 are applicable to Mr. Sutherland's property located at 2891 Montauk Highway in the Town of Brookhaven, Suffolk County. Mr. Sutherland's reliance on the agricultural exemptions provided in AML and 6 NYCRR part 666 is misplaced.

1. Boundaries of River Areas

Pursuant to ECL 15-2714(2), three sections of the Carmens River are designated as a scenic river. The scenic section of the Carmens River relevant to this proceeding is described as extending for approximately 2½ miles from the south side of the Sunrise Highway, southerly to the mouth at its confluence with the Great South Bay (*see* ECL 15-2714[2][f]). Scenic rivers are those rivers, or sections of rivers, that are free from diversions or impoundments except for log dams; have limited road access with areas that are largely primitive and

undeveloped; or are used for agriculture, forest management and other dispersed human activities that do not interfere with public use and enjoyment of the rivers and their shores (*see* ECL 15-2707[2][b] and 6 NYCRR 666.4[b]).

Pursuant to 6 NYCRR 666.2(g), all new land use or development in a river area must be undertaken in compliance with regulatory standards. The regulations prohibit new land uses or development in the river area without first obtaining a permit from the Department. ECL 15-2711 authorizes the Commissioner to designate the regulated river area. This area includes the designated river, or its section, as well as the land area in its immediate environs as established by the Commissioner's order. Until the Commissioner issues an order pursuant to ECL 15-2711, the river area shall include the area within ½ mile of each bank of the river. (*See* 6 NYCRR 666.3[yy].) Management of scenic river areas should focus on preserving and restoring their natural scenic qualities (*see* 6 NYCRR 666.4[b]).

Section 666.6 outlines the procedures for establishing the boundaries of the river areas. The procedures include public hearings with the prior publication of notices in the Department's *Environmental Notice Bulletin* (*ENB*) and a local newspaper (*see* 6 NYCRR 666.6[b]). After the boundary of the river area has been established, the Commissioner

> will file a map and narrative description of same with the clerk of each county in which the designated portion of the river is located (6 NYCRR 666.6[d]).

In addition, 6 NYCRR 666.6(d) requires the Commissioner to notify the affected local governments and state agencies, and to provide them with a copy of the map and narrative description of the boundary. The Department is also required to publish a notice of establishment of the boundary in the *ENB* and, upon request, provide any interested parties with a copy of the map and narrative (*see* 6 NYCRR 666.6[d]). Pursuant to 6 NYCRR 666.6(f), the regulations are applicable within ½ mile from each bank of the river, upon its designation in the river system and until the Commissioner establishes boundaries for the river area.

Through Mr. Marsh's testimony, Department staff offered Exhibits 7 and 8. Exhibit 7 is a copy of a map entitled,

Carmans [sic] WSR River Corridor. The boundaries of the river area and the various designations are overlaid on a New York State Department of Transportation (NYS DOT) quadrangle. The name of the quadrangle is not part of this hearing record.

Exhibit 8 is a copy of the Commissioner's March 4, 1977 Decision and Order concerning the establishment of the river area boundaries for the Carmens and Connetquot Rivers. Appended to the Commissioner's March 4, 1977 Decision and Order are the Final Environmental Impact Statement, which according to the Decision and Order is dated January 12, 1977, and Appendix A, which provides descriptions of the boundary areas for the two rivers. In Appendix A, the description of the boundary area concerning the section of the Carmens River, relevant to this proceeding, is on pages iii - iv.

During his testimony, Robert Marsh, Regional Manager, Bureau of Habitat, explained that Exhibit 7 was generated from the "GIS database" maintained by the central office of the Bureau of Habitat. According to Mr. Marsh, Department staff are able to impose the description provided in Exhibit 8 onto an electronic form of the quadrangle and subsequently print out a copy of the map identified as Exhibit 7. (Tr. p. 77-78.) Mr. Marsh testified that a copy of the Carmens Wild, Scenic, and Recreational River Corridor map has not been filed with the Suffolk County Clerk. Mr. Marsh stated further that Department staff sent a copy of the map to the clerk, but the map "has not been officially filed." (Tr. pp. 84, 86, 87.) Mr. Marsh is not aware of whether the Suffolk County Clerk provided Department staff with an acknowledgment for the receipt of the Commissioner's March 4, 1977 Decision and Order (Tr. p. 85).

As part of Mr. Sutherland's direct case, Daniel Panico and Lawrence Davidson testified. Messrs. Panico and Davidson are from the Suffolk County Clerk's Office. Mr. Panico has worked in the clerk's office since December 2003. In November 2007, he was the Assistant to the County Clerk. At the time of the hearing, Mr. Panico was the Senior Deputy County Clerk. (Tr. p. 204.) According to Mr. Panico, the Suffolk County Clerk's Office maintains documents dating back to the 1600s, which is when Suffolk County was formed (Tr. p. 208).

Mr. Panico explained that in November 2007, he asked Lawrence Davidson, who is the Senior Micrographics Manager in the clerk's office, to search the files for the Department of

Environmental Conservation's Wild, Scenic and Recreational River Corridor maps. (Tr. p. 205.) Mr. Snead had made the request on behalf of his client subsequent to the October 2, 2007 hearing session. After searching the files, Mr. Panico explained further that he advised Mr. Snead that the clerk's office did not have any river corridor maps. Mr. Panico noted, however, that some maps did arrive from the Department, and they are identified in the hearing record as Exhibit 21. (Tr. p. 206.)

Exhibit 21 consists of two documents that Department staff sent to the Suffolk County Clerk's Office. The first document is a cover letter dated November 9, 2007 from Daniel Lewis, a Biologist from the Department's Region 1 Office. In his November 9, 2007 letter, Mr. Lewis requests that the Suffolk County Clerk keep a copy of the enclosed map with the County's copies of the Department's freshwater wetlands maps. The second document associated with Exhibit 21 is a copy of the Carmens River corridor map; it is identical to the map identified as Exhibit 7 in the hearing record. The two documents collectively identified as Exhibit 21 are certified copies from the Suffolk County Clerk's Office and bear the raised seal of Suffolk County.

Lawrence Davidson is the Senior Micrographics Manager for the Suffolk County Clerk's Office, who has worked in the clerk's office since August 1979. He has been the manager for five or six years. In November 2007, Mr. Davidson testified that Mr. Panico asked him to look for the Department's wild, scenic and recreational river corridor maps. (Tr. p. 210.) Mr. Davidson testified that initially he could not find any maps. He checked the original index books that were in use until the 1980's. He also searched the card index. The search did find coastal and freshwater wetlands maps, but nothing related to wild, scenic and recreational rivers. (Tr. p. 211.)

According to his unrefuted testimony, Mr. Davidson looked through the wetlands maps to determine whether the wild, scenic and recreational river maps were inadvertently filed with them. Mr. Davidson reported to Mr. Panico that the maps on file at the clerk's office related only to wetlands and not to wild, scenic and recreational rivers. (Tr. p. 212.) Subsequent to his initial search, Mr. Davidson testified that the clerk's office received documents from the Department. Mr. Davidson made certified copies and gave the certified copies to Mr. Panico.

(Tr. p. 215.) These documents are collectively identified in the hearing record as Exhibit 21.

During his cross-examination, Mr. Davidson testified that he did not specifically look for the Commissioner's March 4, 1977 Decision and Order. Rather, he was searching for the river corridor maps. (Tr. p. 216.) Exhibit A to Department staff's closing brief is a certification from the Suffolk County Clerk dated May 21, 2008, which states that the clerk's office received a copy of the Commissioner's March 4, 1977 Decision and Order with attachments (*see* Exhibit 8) on May 9, 1977.

Mr. Marsh's testimony establishes that the Department has not complied with the filing requirements outlined at 6 NYCRR 666.6(d). As noted above, 6 NYCRR 666.6(d) requires, among other things, that the Commissioner file a map and narrative description with the county clerk. During the administrative enforcement hearing, Department staff, however, did not demonstrate that the Commissioner had filed a copy of the map of the river boundary area for the Carmens River with the Suffolk County Clerk prior to the commencement of the captioned enforcement action. The credible testimony of Respondent's witnesses, Messrs. Panico and Davidson, corroborates Mr. Marsh's testimony.

Citing *City of New York v 10-12 Cooper Square, Inc.*, 7 Misc. 3d 253 (Sup Ct New York County, 2004, quoting *In re Whitman*, 225 NY 1 [1918]), Department staff argues there is a presumption that the Commissioner filed the Carmens River map with the Suffolk County Clerk because the clerk received the Commissioner's March 4, 1977 Decision and Order with attachments on May 9, 1977. (Department staff's closing brief pp. 6-8.) In his reply brief (p. 5), Respondent cites *People ex rel Wallington Apt. v Miller*, 288 NY 31, 33 (1942), and argues that the presumption of regularity is rebuttable. Mr. Sutherland contends that he has overcome the presumption that the Commissioner duly filed the map with the county clerk through the testimony of Messrs. Panico and Davidson. These witnesses testified that they conducted a search of the clerk's files and did not find the Carmens River map.

For the following reasons, Department staff's presumption argument concerning the filing of the Carmens River map pursuant to 6 NYCRR 666.6(d) is not persuasive. First, the basis for Department staff's argument is that on May 9, 1977, the county

clerk received the Commissioner's March 4, 1977 Decision and Order with attachments.[7] Department staff, however, has improperly attempted to establish this fact by providing a certification from the Suffolk County Clerk dated May 21, 2008 as Exhibit A to Department staff's closing brief. The clerk's certification post-dates the administrative enforcement hearing held on October 2, 2007 and February 26, 2008. The purpose of the closing brief is to provide argument about the evidence offered at hearing, not to offer additional evidence for consideration. Therefore, the Commissioner should not assign any weight to Exhibit A attached to Department staff's closing brief.

Second, the filing requirement of 6 NYCRR 666.6(d) is twofold. In addition to the boundary determination, the Commissioner is required to file the map. Department staff's untimely attempt to demonstrate that the Commissioner filed the March 4, 1977 Decision and Order with the Suffolk County Clerk on May 9, 1977 does not demonstrate that the required map was also filed at the same time. Third, Mr. Marsh's testimony establishes, in the first instance, that the map was not duly filed, which contradicts the presumption that Department staff is trying to advance. Finally, the credible testimony offered by Messrs. Panico and Davidson establishes, independently from Department staff's testimony, that the Carmens River map was not on file with the Suffolk County Clerk at the time of the alleged violations.

The issue now becomes whether Mr. Sutherland's property could be regulated if it is located within ½ mile of the Carmens River as provided by 6 NYCRR 666.6(f) (*also see* ECL 15-2703[9] and 6 NYCRR 666.3[yy]) irrespective of the filing requirements at 6 NYCRR 666.6(d). Department staff argues that the Department has jurisdiction over Mr. Sutherland's property because it is located within ½ mile of the river. To support this argument, Department staff refers to Mr. Marsh's testimony where he stated that Mr. Sutherland's property is about a third of a mile from the Carmens River (Tr. p. 190).

Mr. Sutherland disagrees with Department staff's argument. Mr. Sutherland contends that the statutory intent is to protect

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[7] Exhibit 8 does not establish this fact. Rather, Exhibit 8 demonstrates that the Commissioner complied, in part, with the requirements outlined in ECL 15-2711 by establishing the boundaries of the river area (*also see* 6 NYCRR 666.6).

the river rather than the river corridor (Respondent's closing brief, pp. 17-20), and that the scope of the Department's jurisdiction is 100 feet from the river bank (Respondent's closing brief, p. 23). In his reply brief (pp. 8-9), Mr. Sutherland argues that Mr. Marsh's testimony about the distance of his property from the river bank is not credible.

The location of Mr. Sutherland's property with respect to the bank of the Carmens River is a fact question. Contrary to Mr. Sutherland's argument, I find that Mr. Marsh's testimony about Mr. Sutherland's property being "about a third of a mile" (Tr. p. 190) from the Carmens River is credible. Mr. Sutherland correctly points out that Mr. Marsh estimated the distance based on the size of the lots located between Mr. Sutherland's property and the Carmens River (Tr. p. 190). Nevertheless, Mr. Sutherland offered nothing to contradict Mr. Marsh's testimony or refute the basis for Mr. Marsh's estimation.

Accordingly, I find that Mr. Sutherland's property is approximately one third mile from the Carmens River based on Mr. Marsh's testimony. Pursuant to the description provided in ECL 15-2714(2)(f), this portion of the Carmens River is a scenic river as that term is defined at ECL 15-2707(2)(b) (*also see* 6 NYCRR 666.4[b]). Because one third mile is less that ½ mile, I conclude that activities undertaken on Mr. Sutherland's property may be regulated pursuant to ECL 15-2703[9] (*also see* 6 NYCRR 666.3[yy] and 6 NYCRR 666.6[f]).

2. The Agricultural Nature of Respondent's Activities

Mr. Sutherland asserts that the activities undertaken on his property are agricultural in nature. Accordingly, he relies on the agricultural exemptions provided in 6 NYCRR part 666. In addition, Mr. Sutherland argues that provisions of the AML preempt any regulatory requirements outlined in 6 NYCRR part 666. The exemptions from 6 NYCRR part 666 asserted by Mr. Sutherland in his August 21, 2006 answer are discussed below.

In his closing brief (p. 10), Mr. Sutherland argues that his property is "land used in agricultural production" as that term is defined in the AML § 301(4), and that the activities undertaken there are "farm operations" as defined in AML §

301(11).[8] Mr. Sutherland argues further that the New York State Legislature through the AML has established the public policy to promote, foster and encourage the agricultural industry in New York State. Given these public policy objectives, Mr. Sutherland asserts that the AML, rather than the Wild, Scenic and Recreational Rivers System Act (ECL article 15, title 27), controls with respect to the questions of whether he is using his property for agricultural purposes and whether his activities are farm operations. To support his argument, Mr. Sutherland refers to Exhibits 22, 23, 24, 25, 26 and 27.

Exhibit 22 is a certified copy of a letter dated November 16, 2005 by Robert Somers, Ph.D., Chief of the Agricultural Protection Unit from the New York State Department of Agriculture and Markets to Mr. Sutherland concerning Gramma's Flower Cottage. Dr. Somers' November 16, 2005 letter summarizes a telephone conversation held on that date between Mr. Sutherland and him.

According to Dr. Somers' November 16, 2005 letter, Mr. Sutherland grows perennials and sells them on a two acre parcel located at 2891 Montauk Highway in Brookhaven, which he purchased in May 2005. Dr. Somers' letter states further that in May 2005, Mr. Sutherland brought in annuals and perennials to sell at the 2891 Montauk Highway site. The source of the annuals is not identified in Dr. Somers' letter, but the November 16, 2005 letter states that Mr. Sutherland grew the perennials at another facility, which he owns. The November 16, 2005 letter also states that Mr. Sutherland rents a 12-acre parcel of property in the Town of Riverhead where he grows mums and pumpkins that he subsequently brings to the 2891 Montauk Highway site, and offers for sale. Dr. Somers concludes that the activities conducted at Gramma's Flower Cottage are "part of a farm operation" pursuant to AML § 301(11). The remainder of Dr. Somers' November 16, 2005 letter outlines the Department of Agriculture and Market's general guidance concerning the operations of a nursery/greenhouse, pursuant to AML § 305-a(1).

Exhibit 23 is a certified copy of a letter dated February 6, 2007 from Thomas Lindberg, First Deputy Commissioner of the

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[8] New York State Agriculture and Markets Law Article 24-AA consists of Sections 300-310. Article 24-AA entitled, "Agricultural Districts," provides for the designation of agricultural districts by county legislative bodies to protect agricultural lands and to encourage the use of agricultural land for the production of food and other agricultural products (*see* AML § 300).

Department of Agriculture and Markets to Tim Laube, Clerk of the Suffolk County Legislature. Attached to Commissioner Lindberg's February 6, 2007 letter is a copy of correspondence dated December 6, 2006 from Roy Fedelem, Principal Planner, Suffolk County Agricultural and Farmland Protection Board to Ron Mead of the Department of Agriculture and Markets, and a copy of Suffolk County Resolution No. 1014-2006.

Suffolk County Resolution No. 1014-2006, is dated September 19, 2006 and was approved on October 3, 2006. Resolution No. 1014-2006 authorizes the inclusion of new parcels of property into existing agricultural districts in Suffolk County. In the Town of Brookhaven, Mr. Sullivan's property at 2891 Montauk Highway appears on the list of approved parcels, among others, for inclusion into Suffolk County Agricultural District No. 3. Mr. Fedelem's December 6, 2006 letter forwards a copy of Suffolk County Resolution No. 1014-2006 to Mr. Mead at the Department of Agriculture and Markets.

Commissioner Lindberg's February 6, 2007 letter acknowledges receipt of Suffolk County Resolution No. 1014-2006, and concludes that it is feasible to include the pre-approved properties into Suffolk County's agricultural districts. Commissioner Lindberg concludes further that including these properties, Mr. Sutherland's among them, would serve the public interest and assist in maintaining a viable agricultural industry within the previously established agricultural districts.

Exhibit 24 is a certified copy of a nursery registration certificate notice and license issued by the Department of Agriculture and Markets to Gramma's Flower Cottage (Establishment No. 476050) on October 16, 2007. The certificate and license expired on November 30, 2008.

Exhibit 25 is a copy of a letter dated June 8, 2006 from Roy Fedelem, Principal Planner, Suffolk County Agricultural and Farmland Protection Board to Mr. Sutherland. Mr. Fedelem's June 8, 2006 letter refers to property identified by Tax map Nos. 0200-848-2-5, 0200-848-2-6 and 0200-848-2-7, and states that he visited Mr. Sutherland's farm. In the June 8, 2006 letter, Mr. Fedelem reports that the Suffolk County Agricultural and Farmland Protection Board voted to include Mr. Sutherland's farm in the 2006 annual renewal, and that the Board will prepare a resolution (*see* Exhibit 23) for the Suffolk County Legislature's

consideration. Attached to Mr. Fedelem's June 8, 2006 letter is a copy of a nursery registration certificate and license issued by the Department of Agriculture and Markets for Gramma's Flower Cottage (Establishment No. 476050) (*cf* Exhibit 24). The Department of Agriculture and Markets issued the certificate and license on August 16, 2005, and it expired on November 30, 2006.

Exhibit 26 is a copy of a letter dated March 30, 2007 from William Kimball, Director of the Division of Agricultural Protection and Development Services, New York State Department of Agriculture and Markets to Honorable Brian X. Foley, Supervisor, Town of Brookhaven. The purpose of Mr. Kimball's March 30, 2007 letter is to respond to a request by Mr. Sutherland to review the Town of Brookhaven's zoning code and its applicability to the activities at 2891 Montauk Highway within the context of AML § 305-a(1). According to the March 30, 2007 letter, Mr. Sutherland's property was placed into Suffolk County Agricultural District No. 3 on February 6, 2007 (*see* Exhibit 23). In his March 30, 2007 letter, Mr. Kimball also states that officials from the Department of Agriculture and Markets visited Mr. Sutherland's property on June 12, 2006. Mr. Kimball explains further that the Department of Agriculture and Markets will evaluate whether the Town's zoning code unreasonably restricts activities at Gramma's Flower Cottage. Finally, Mr. Kimball encourages the Town of Brookhaven to provide any additional information that the Department of Agriculture and Markets should consider in its evaluation of the town zoning code.

Whether the Town of Brookhaven responded to Mr. Kimball's March 30, 2007 letter and, if so, what the Town provided in response, is not part of the hearing record. In addition, to the extent that the Department of Agriculture and Markets evaluated the town zoning code, the evaluation is not part of this hearing record.

Exhibit 27 is a certified copy of an e-mail message dated June 12, 2007 from Danielle C. Cordier, Esq., Senior Attorney, Counsel's Office, Department of Agriculture and Markets to Ms. Wilkinson. A field report prepared by Dr. Somers and dated May 23, 2007 concerning Gramma's Flower Cottage is attached to Ms. Cordier's June 12, 2007 e-mail message. In his field report, Dr. Somers states that he visited Gramma's Flower Cottage on May 22, 2007 to determine whether Mr. Sutherland's business is a farm operation pursuant to AML § 301(11). Based on his

observations and his conversation with Mr. Sutherland, Dr. Somers concludes in the May 23, 2007 field report that Gramma's Flower Cottage is part of a "farm operation" as that term is defined in AML § 301(11).

Mr. Sutherland argues further in his closing brief (pp. 11-12) that ECL article 15, title 27 acknowledges that agriculture is a wholly consistent use, in general and, in particular, that scenic river areas may include areas partially or predominately used for agriculture (*see* ECL 15-2707[2][b]). Mr. Sutherland notes that the Wild, Scenic and Recreational River Act does not define the terms "agriculture" or "agricultural use." Rather, the term, "agricultural use" is defined in the regulations (*see* 6 NYCRR 666.3[d]). According to Mr. Sutherland, Department staff interprets the regulatory definition of the term "agricultural use" too narrowly in the absence of a statutory definition of that term in the Wild, Scenic and Recreational Rivers Act, and given the public policy to promote agriculture pursuant to the New York State Constitution (Exhibit 22 references New York State Constitution Article XIV, Section 4) and the AML.

Mr. Sutherland notes in his closing brief (pp. 13-16) that AML Article 3[9] was enacted in 1922, and that ECL article 15, title 27 was enacted in 1980. Mr. Sutherland contends that when the Legislature drafted ECL article 15, title 27, it was aware of the statutory definition of the terms "agriculture" and "agricultural use" in the AML and, therefore, incorporated the legislative intent of the former statute into the latter statute.[10] Mr. Sutherland concludes that the meaning of any and all references to agriculture in ECL article 15, title 27 and 6 NYCRR part 666 must be consistent with the provisions of the AML.

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[9] AML Article 3 includes Sections 32 through 45-c, and is entitled, "Investigation; Practice and Procedure; Violations; Penalties." Among other things, this statute authorizes the Commissioner of the Department of Agriculture and Markets to implement and enforce the AML, and provides for judicial review of the Commissioner's rules, orders and directives. Mr. Sutherland characterizes this statute as part of "the police powers of the state" (Respondent's closing brief, p. 10).

[10] In his closing brief (p. 12), Respondent cites the following case law to support his contention: *In re: Cooper*, 22 NY 67, 76, 88 (1860); *Behan v. People*, 17 NY 516 (1858); *Theurer v Trustees of Columbia University*, 59 AD2d 196, 198 (3d Dept 1977); McKinney's Statutes §§ 126, 222.

In its reply brief (pp. 2-3), Department staff argues that pursuant to ECL article 15, title 27, the Legislature authorized the Commissioner to promulgate regulations to implement the Wild, Scenic and Recreational Rivers Act and, as a result, the Commissioner duly promulgated 6 NYCRR part 666, which includes a definition of the term, "agricultural use" (*see* 6 NYCRR 666.3[d]). Department staff argues further that the courts have given deference to the rational, reasonable and consistent interpretation of the statutes and regulations that the Department enforces (*see Matter of Trump-Equitable Fifth Avenue Co. v Gliedman*, 62 NY2d 539, 545).

In his reply brief (pp. 12-16), Mr. Sutherland argues that Department staff no longer has any authority to construe the meaning of the terms "agriculture" and "agricultural use" because the Legislature transferred that authority from the Department of Environmental Conservation to the Department of Agriculture and Markets with the creation of the Advisory Council on Agriculture (AML § 309 [*see* McKinney's 1980 Session Laws of New York, Chapter 74 Section 14]). According to Mr. Sutherland, the Advisory Council advises the Commissioner of the Department of Agriculture and Markets, and other stated agency heads about whether particular land uses are agricultural in nature (AML § 309[8]). Mr. Sutherland also cites *Kurcsic v Merchants Mut. Ins. Co.* (42 NY2d 451, 459) for the proposition that if Department staff's interpretation of a regulation runs counter to the clear wording of a statutory provision, no weight should be accorded to Department staff's interpretation. Mr. Sutherland concludes, therefore, that no weight can be assigned to Mr. Marsh's opinion concerning his interpretation of the regulatory definition of the term agricultural use provided at 6 NYCRR 666.3(d).

According to Department staff (reply brief, p. 4), Mr. Sutherland has offered proof that the Department of Agriculture and Markets considers his business to be a "farm operation." Department staff argues, however, there is a clear difference between a farm operation as defined in the AML and land used for the production of agricultural products. Department staff argues further that the regulatory definition of the term, "agricultural use," at 6 NYCRR 666.3(d) is consistent with the AML.

a) Farm Operations and Commercial Uses

Pursuant to 6 NYCRR 622.11(a)(5), I take official notice of the definitions provided in AML § 301, as well as the determination by the New York State Department of Agriculture and Markets outlined in Dr. Somers' November 16, 2005 letter (Exhibit 22) that the activities conducted at Gramma's Flower Cottage are part of "a farm operation," as that term is defined at AML § 301(11). In addition, I also take official notice that Mr. Sutherland's property located at 2891 Montauk Highway was incorporated into Suffolk County Agricultural District No. 3 on February 6, 2007 (Exhibit 23).

Pursuant to AML § 301(2)(d), "crops, livestock and livestock products" include "horticultural specialties" such as nursery stock, ornamental shrubs, ornamental trees and flowers. A "farm operation" means the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise. In addition, a farm operation may consist of one or more parcels of land, owned or rented, that may be contiguous or noncontiguous to each other. (*See* AML § 301[11].)

Pursuant to 6 NYCRR 666.3(k), a "commercial use" means:

> any use involving the offer for sale or rental, sale, rental or distribution of goods, services or commodities or the provision of recreation facilities or activities for a fee, but not including the manufacturing of goods or commodities.

I conclude, therefore, that a farm operation as defined at AML § 301(11), such as Gramma's Flower Cottage, is a commercial use, as that term is defined at 6 NYCRR 666.3(k). Accordingly, Gramma's Flower Cottage is regulated pursuant to 6 NYCRR part 666. I conclude further that the statutory definition of a farm operation at AML § 301(11) does not provide for an exemption from the Wild, Scenic and Recreational Rivers Act or its implementing regulations.

b) Agricultural Uses

In scenic river areas, agricultural uses are authorized and encouraged pursuant to ECL article 15, title 27. One of many criteria for classifying a river as scenic is the partial or predominate use of the river area for agriculture (*see* ECL 15-2707[2][b]). Also, in scenic river areas, the continuation of agricultural practices and the propagation of crops are expressly permitted uses (*see* ECL 15-2709[2][b]). Pursuant to 6 NYCRR 666.3(d), an "agricultural use" means:

> any management of any land for the production of agricultural products including crops; field crops; fruit; vegetables; horticultural specialties; livestock and livestock products; including the sale of products **grown or raised directly on such land**, and the construction, alteration or maintenance of fences, agricultural roads, agricultural drainage systems and farm ponds, but not including land used for the processing of any agricultural product (emphasis added).

The parties dispute whether Mr. Sutherland's activities at Gramma's Flower Cottage are an agricultural use, and the focus of the dispute is whether the products sold at Gramma's Flower Cottage were "grown or raised directly on such land." According to Department staff, Mr. Sutherland does not grow agricultural products at the site. However, based on AML § 301(11), Mr. Sutherland argues that his farm operation, as defined at AML § 301(11), is an agricultural use, within the meaning of 6 NYCRR 666.3(d).

To demonstrate its contention, Department staff offered the testimony of the following witnesses. George Howarth resides at 2881 Montauk Highway, which is the property immediately adjacent to Mr. Sutherland's (Tr. p. 24). Edward Piersa is an Investigator from the Town of Brookhaven Attorney's Office (Tr. p. 40). Frank Rignola is also an Investigator from the Town of Brookhaven Attorney's Office (Tr. p. 55). As noted above, Mr. Marsh is the Regional Manager for the Bureau of Habitat (Tr. p. 73).

Mr. Sutherland offered no witnesses to rebut the testimony proffered by Department staff's witnesses. In his reply brief (pp. 9-10), however, Mr. Sutherland contends that Mr. Howarth's testimony is not reliable because Mr. Howarth testified that he almost never saw any activity next door, and that most of the products had been removed from the site in the late fall of 2005 (Tr. p. 34). Mr. Sutherland also notes that Mr. Howarth testified that he went on the site only once to complain about noise (Tr. p. 10).

Mr. Sutherland contends further that Mr. Piersa's testimony is not conclusive, and contends further that Department staff failed to prove that no plants were being grown in the ground at the site. Moreover, Mr. Sutherland notes that Department staff offered no testimony about the circumstances on the site on or before May 6, 2005, which is the period alleged in the complaint.

I accept Mr. Sutherland's argument that Mr. Howarth's testimony concerning whether products were grown or raised directly on the site is unreliable. Therefore, with respect to this fact issue, I do not assign any weight to Mr. Howarth's testimony.

According to the Huntley statement (Exhibit 3) offered through Mr. Piersa's testimony, the perennials were grown on-site, but the annuals were not. Based on Exhibit 3, the annuals were grown in Riverhead, although the actual location is not part of the hearing record. However, Mr. Piersa's site visit took place on May 13, 2006, which is after the period asserted in the complaint when the violations allegedly took place. Consequently, with respect to this fact issue, I do not assign any weight to Mr. Piersa's testimony and the Huntley statement, which was obtained during Mr. Piersa's May 13, 2006 inspection.

Mr. Rignola went to the site three times (Tr. p. 56). When Mr. Rignola went to the site on May 5, 2005, he took a set of photographs (Exhibits 5A, 5B, 5C, 5D, 5E and 5F), which substantiate the testimony he offered at the hearing. Based on this evidence, to which I assign substantial weight, I find that the perennials were not grown at the 2891 Montauk Highway property. Mr. Rignola's testimony, and the relevant photographs taken on May 5, 2005 show that: (1) all plants are in flats or other containers; (2) there are no greenhouses on the 2891 Montauk Highway site; and (3) the flats of plants were brought

to the 2891 Montauk Highway site in rented trucks. Based on this evidence, I find further that none of the plants depicted in Exhibits 5A, 5B, 5C, 5D, 5E and 5F were grown at the 2891 Montauk Highway property on or before May 6, 2005.

I also assign significant weight to Mr. Marsh's opinion about the nature of the activities at Gramma's Flower Cottage at the time of his site visit on May 6, 2005. In Mr. Marsh's view, plants "grown or raised directly on such land" (6 NYCRR 666.3[d]) requires that the plants must be set in the ground. In addition, Mr. Marsh associates the sale of other products, such as pots, and bags of top soil and mulch to be part of a commercial use (*see* 6 NYCRR 666.3[k]), rather than an agricultural use (*see* 6 NYCRR 666.3[d]). Mr. Marsh's observations during his May 6, 2005 site visit demonstrate that the horticultural specialties offered for sale at Gramma's Flower Cottage were not grown or raised directly at the 2891 Montauk Highway site on or before May 6, 2005.

With Exhibits 22 and 27, Mr. Sutherland attempts to establish that his farm operation is part of a State certified agricultural district. Dr. Somers opined in his November 16, 2005 letter (Exhibit 22) that a farm operation may consist of a number of parcels, contiguous or not, that the farmer owns or leases, and which are located in State certified agricultural districts (*see* AML § 301[11]). In addition, Dr. Somers' May 23, 2007 field review (Exhibit 27) states that he observed growing areas at the 2891 Montauk Highway property. Rather than observing beds of perennials, however, Dr. Somers observed areas where one, two and three-gallon plastic containers were filled with perennials that had been placed on the site. Dr. Somers concludes that the perennials were grown on the site in these containers. In addition, Mr. Sutherland also relies on Exhibits 22 and 27 to demonstrate that the activities at Gramma's Flower Cottage are agricultural uses pursuant to 6 NYCRR 666.3(d), which are generally exempt from the regulatory requirements outlined in 6 NYCRR part 666.

Mr. Sutherland's reliance on Exhibits 22 and 27, however, is misplaced. There is no evidence in the record of this hearing to show that, at the time of the alleged violations (*i.e.,* on or before May 6, 2005), the property located at 2891 Montauk Highway and the other parcels that Mr. Sutherland may have owned or rented were part of any agricultural district certified by the New York State Department of Agriculture and

Markets. Rather, Exhibit 23 shows that Mr. Sutherland's property at 2891 Montauk Highway did not become part of Suffolk County Agricultural District No. 3 until February 6, 2007, some twenty-one months after the time of the alleged violations. The certification that Mr. Sutherland's property located at 2891 Montauk Highway has become part of Suffolk County Agricultural District No. 3 should not be applied retroactively.

Based on the information from the Department of Agriculture and Markets that Mr. Sutherland offered for the record, the other noncontiguous parcels of a farm operation must also be located in a State certified agricultural district. However, Mr. Sutherland offered no other information about where the other parcels associated with his farm operation are located, and whether these other parcels were located within State certified agricultural districts at the time of the alleged violations.

In order to avail himself of the affirmative defense that his farm operation at 2891 Montauk Highway is an agricultural use, Mr. Sutherland must demonstrate that on or before May 6, 2005, his operation was consistent with the requirements outlined at 6 NYCRR 666.3(d). Mr. Sutherland's argument concerning the preemptive nature of the AML in this case is without merit. Mr. Sutherland is inappropriately attempting to shift the scope of this administrative enforcement action away from compliance with the Wild, Scenic and Recreational Rivers Act to the AML.

Pursuant to the AML, the New York State Legislature has authorized counties to identify properties that should be incorporated into State certified agricultural districts. Pursuant to ECL article 15, title 27, the New York State Legislature has also designated scenic rivers, and authorized the Department of Environmental Conservation to promulgate regulations to preserve the quality of the scenic river areas.

Regardless of whether Mr. Sutherland's activities at Gramma's Flower Cottage are part of a farm operation, as defined at AML § 301(11), Mr. Sutherland has failed to demonstrate that his activities are an agricultural use consistent with the requirements outlined at 6 NYCRR 666.3(d). The regulatory definition requires crops and horticultural specialties to be grown or raised directly on the land, and Mr. Sutherland has failed to demonstrate that his farm operation is consistent with

this requirement. Moreover, Department staff has offered competent evidence to show that the crops and horticultural specialties offered for sale at Gramma's Flower Cottage were not grown or raised directly on the land, within the period alleged in the November 2005 complaint.

In his May 23, 2007 field review (Exhibit 27), Dr. Somers notes that farmers may import crops from other farms to sell at their operation for a number of reasons. Dr. Somers states further that his agency finds this practice acceptable, "but has not established a percentage of on-farm versus off the farm products for that purpose." Dr. Somers acknowledges that his agency considers the circumstances of a particular case in making this determination. In Exhibit 26, Mr. Kimball notes that the Department of Agriculture and Markets considers the applicability of other State laws, regulations and standards. The information offered by Mr. Sutherland from the Department of Agriculture and Markets recognizes the need for a case by case evaluation that considers other State requirements, which in this case concerning Gramma's Flower Cottage would include compliance with ECL article 15, title 27.

Contrary to Mr. Sutherland's arguments, there is nothing inconsistent with the New York State Legislature's determinations to designate scenic rivers and authorize the Department to promulgate regulations to preserve the quality of the scenic river area, while authorizing counties to identify properties that should be incorporated into State certified agricultural districts. I conclude that Mr. Sutherland failed to demonstrate that his farm operation at 2891 Montauk Highway was an agricultural use, pursuant to 6 NYCRR 666.3(d), on or before May 6, 2005.

II. Liability

Mr. Sutherland argues that Department staff failed to prove that he owns the property located at 2891 Montauk Highway in the Town of Brookhaven, Suffolk County (reply brief, p. 1). Nevertheless, as noted above, Mr. Sutherland admits to owning the property in his August 21, 2006 answer.

In addition, Exhibits 22, 23, 25 and 26 also establish that Mr. Sutherland purchased the property located at 2891 Montauk Highway in May 2005, and that he has operated Gramma's Flower

Cottage at the location since that time. For example, in his November 16, 2005 letter (Exhibit 22), Dr. Somers states, among other things, that Mr. Sutherland purchased the property located at 2891 Montauk Highway in Brookhaven in May 2005. Exhibit 23 includes a copy of Suffolk County Resolution No. 1014-2006, which authorizes the inclusion of new parcels of property into existing agricultural districts in Suffolk County including Mr. Sullivan's property at 2891 Montauk Highway. In his letter dated June 8, 2006 (Exhibit 25), Mr. Fedelem from the Suffolk County Agricultural and Farmland Protection Board refers to property identified by Tax map Nos. 0200-848-2-5, 0200-848-2-6 and 0200-848-2-7, and states that Mr. Sutherland owns these parcels and that he has visited the property located at 2891 Montauk Highway.

Finally, as noted above, Exhibit 26 is a copy of a letter dated March 30, 2007 from William Kimball, Director of the Division of Agricultural Protection and Development Services, New York State Department of Agriculture and Markets. In his March 30, 2007 letter, Mr. Kimball refers to the tax map lot numbers of Mr. Sutherland's property at 2891 Montauk Highway, and states that officials from the Department of Agriculture and Markets visited this property on June 12, 2006. Consequently, based on the foregoing, there is substantial evidence in the record of this hearing on which to base findings that: (1) Mr. Sutherland owns the property located at 2891 Montauk Highway in the Town of Brookhaven, Suffolk County: (2) he has owned the property since May 2005; and (3) as of March 30, 2007, he continues to own the property at this location.

With reference to the table of use guidelines at 6 NYCRR 666.13, Department staff alleges six causes of action in the November 2005 complaint. Each cause of action is discussed below.

A. First Cause of Action

In the first cause of action, Department staff alleges that Mr. Sutherland violated 6 NYCRR 666.13(K)(3) on or before May 6, 2006 by operating a commercial business known as Gramma's Flower Cottage at 2891 Montauk Highway. Department staff asserts that a commercial use, such as Gramma's Flower Cottage, in the scenic river area is prohibited by the regulations. However, Mr.

Sutherland argues (closing brief pp. 22-23) that Department staff failed to prove this charge.

Pursuant to 6 NYCRR 666.13(K)(3), "[o]ther commercial, industrial, or institutional uses" are prohibited in scenic river areas. The regulation refers to Notes (i) through (xi). These notes require, generally, that [Note (i)] new development must be screened from the view of the river and may not exceed 34 feet in height; [Note (ii)] new lots must be greater than 3 acres, and 30% of the lot must remain undeveloped; [Note (iii)] existing lots that are smaller than 3 acres may be developed for industrial, commercial and institutional uses as long as the development conforms to the other provisions of these notes; [Note (iv)] lot coverage may not exceed 10% of the lot area; [Note (v)] developments must be setback a minimum of 100 feet from public roads except where the setback would interfere with the setback from the river or other resources; [Note (vi)] development must not occur on slopes of 15% or greater; [Note (vii)] natural drainage systems must be maintained; [Note (viii)] priority must be given to providing and maintaining wildlife travel corridors; [Note (ix)] the release of harmful effluent to surface or ground waters is prohibited; [Note (x)] water usage for commercial purposes is limited to that allowed for residential uses; and [Note (xi)] new commercial, industrial and institutional uses must be set back 500 feet from the river bank, flood plain areas, wetlands and tributaries.

Pursuant AML § 301(11), activities at Gramma's Flower Cottage, located at 2891 Montauk Highway in the Town of Brookhaven, constitute a farm operation which, by statutory definition, is a commercial enterprise consistent with the meaning of the term "commercial use" in 6 NYCRR 666.3(d). For the reasons outlined above (*see* § I.B.2.b of this Report), Gramma's Flower Cottage is not an agricultural use.

The unrefuted testimony of Department staff's witnesses establishes that Mr. Sutherland commenced the commercial use of his property on or before May 6, 2005 without a permit from the Department. First, George Howarth testified that he has resided at 2881 Montauk Highway in the Town of Brookhaven for 26 years (Tr. p. 24), and that his property is adjacent to Mr. Sutherland's (p. 25). Mr. Howarth testified further that on May 4, 2005, he observed the following activities on Mr. Sutherland's property. At approximately 6:00 a.m., a large dump truck came to the site and dumped several loads of RCA

(reconstituted concrete aggregate [Tr. p. 39]) on the front lawn. When Mr. Howarth returned home from work later that day, the RCA had been spread out to create a parking lot on Mr. Sutherland's property between the sidewalk and the front of the existing house. (Tr. pp. 26, 27, 29.) Exhibits 1A through 1C are a set of photographs taken by Mr. Howarth on May 4, 2005, which depict the piles of RCA on Mr. Sutherland's property. Mr. Howarth also testified that Mr. Sutherland had installed a 6-foot high, wood-stockade fence around the perimeter of his property on May 4, 2005 (Tr. p. 25).

Second, Mr. Rignola visited the 2891 Montauk Highway property on May 5, 2005, and took several photographs identified as Exhibits 5A through 5F. On this date, Mr. Rignola observed the parking area, flats of flowers and other plants, as well as bags of top soil, mulch and other landscaping materials. (Tr. pp. 58-59.) Mr. Rignola's observations of Mr. Sutherland's property on May 5, 2005 are corroborated by the photographs he took during the sight visit.

Third, Mr. Marsh visited the property located at 2891 Montauk Highway on May 6, 2005 and completed an enforcement report identified as Exhibit 11. Mr. Marsh's observation on May 6, 2005 were similar to those of Mr. Rignola the day before. On May 6, 2005, Mr. Marsh observed the gravel parking lot, fencing, and people unloading trucks filled with flats of plants and flowers, and bags of top soil and mulch. (Tr. pp. 101-102.)

Finally, Exhibit 14 is a copy of a notice of violation dated June 6, 2005 from Gregory Kozlowski, the former Regional Manager of the Bureau of Habitat. The June 6, 2005 notice of violations alleges that violations occurred at Mr. Sutherland's property "on or before" May 6, 2005, and advises Mr. Sutherland that Department staff had not issued any permit pursuant to 6 NYCRR part 666.

Based on the forgoing, I conclude that Mr. Sutherland commenced the commercial use of his property on or before May 6, 2005 without a permit from the Department in violation of 6 NYCRR 666.13(K)(3).

Note (iii) of 6 NYCRR 666.13(K) states that commercial uses may be developed on existing lots that are smaller than three acres provided the development conforms with the provisions outlined in the other referenced notes. Based on Exhibit 23,

Mr. Sutherland's property at 2891 Montauk Highway consists of three lots, which total 3.3 acres (cf Exhibit 22, which states that the Montauk Highway property is two acres). Had Mr. Sutherland discussed the development of his property with Department staff prior to commencing his commercial use on or before May 6, 2005, Department staff would have had the opportunity to review the proposed development to determine whether Mr. Sutherland could have developed the 2891 Montauk Highway property in a manner consistent with the requirements outlined in 6 NYCRR part 666. For example, in addition to the size of the lot being limited to three acres, Note (v) at 6 NYCRR 666.13(K)(3) requires development to be setback a minimum of 100 feet from public roads except where such setbacks would interfere with the setback from the river or other resources.

Finally, it is important to note that in his March 30, 2007 letter to Brookhaven Town Supervisor Foley (Exhibit 26), Director Kimball acknowledges that the Department of Agriculture and Markets considers the applicability of other State laws, regulations and standards to a proposed farm operation. The record of this hearing does not include any information about whether the Department of Agriculture and Markets knew that Mr. Sutherland's property at 2891 Montauk Highway is located within the Carmens River scenic area. Had Mr. Sutherland consulted with staff from the Departments of Environmental Conservation and Agriculture and Markets before commencing commercial operations at 2891 Montauk Highway, it may have been possible to develop a use for his property that promotes agriculture and which complies with the development restrictions in 6 NYCRR part 666. The Commissioner should consider Mr. Sutherland's blatant disregard of the regulatory standards outlined at 6 NYCRR part 666, and his attempt to retroactively obtain favorable determinations from a sister State agency as a way to avoid this enforcement action as significant aggravating factors with respect to determining the appropriate civil penalty.

B. The Second and Third Causes of Action

In the second cause of action, Department staff alleges that Mr. Sutherland violated 6 NYCRR 666.13(D)(7) on or before May 6, 2005 by constructing a wood fence at the 2891 Montauk Highway site without a permit from the Department. In the third cause of action, Department staff further alleges that Mr. Sutherland violated 6 NYCRR 666.13(D)(7) on or before May 6,

2005 by constructing a chain-link fence at the 2891 Montauk Highway site without a permit from the Department. The distinction between the second and third causes of action is the type of fencing allegedly installed at the site without a permit.

Mr. Sutherland argues that a fence is a "structure" as that term is defined at 6 NYCRR 666.3(jjj). He argues further that an "agricultural use" may include the construction, alteration or maintenance of a fence (*see* 6 NYCRR 666.3[d]), and that a fence should be considered an "agricultural use structure" (*see* 6 NYCRR 666.3[e]). Mr. Sutherland also notes that no permit is required in order to construct any agricultural use structure farther than 100 feet from the bank of a scenic river (*see* 6 NYCRR 666.13[D][1]). Referring to Exhibit 19, which is a brochure entitled, *The New York State Wild, Scenic and Recreational River System on Long Island*, Mr. Sutherland asserts that a fence is authorized when it is located more than 250 feet from the bank of a scenic river. Mr. Sutherland notes that, according to Mr. Marsh's testimony, his property is about 1/3 mile from the Carmens River. (Respondent's closing brief, pp. 23-24.)

In his November 16, 2005 letter (Exhibit 22), Dr. Somers states that the New York State Department of Agriculture and Markets considers requirements for buffers, screening, or setbacks to be unreasonably restrictive. According to Dr. Somers, local requirements for screening farm operations with fences suggest that those operations are objectionable or different from other forms of land use where screening is not required.

Because the construction of a fence may be a component of an agriculture use, the regulations, under certain conditions, authorize their installation in scenic river areas. However, a fence may also be considered an "improvement" (*see* 6 NYCRR 666.3[w]), or a "structure" (*see* 6 NYCRR 666.3[jjj]), which are distinct, by operation of the regulation, from "an agricultural use structure" (*see* 6 NYCRR 666.3[e]).[11] Consequently, when Department staff is reviewing a permit application for a project

[11] The regulatory definition of the term "agricultural use" includes the "construction, alteration or maintenance of fences" (*see* 6 NYCRR 666.3[d]), but fences are not expressly identified as an "agricultural use structure" (*see* 6 NYCRR 666.3[e]). The parties did not offer any arguments about the significance of this distinction.

that includes a fence, the applicant must provide a detailed description and set forth the purpose for the structure or improvement (*see* 6 NYCRR 666.8[a]). Based on the application materials, Department staff can then determine whether the proposed fence is an improvement, a structure, or part of an agricultural use.

As part of an affirmative defense, Mr. Sutherland has the burden to offer an explanation about why the fencing at Gramma's Flower Cottage should be considered part of an agricultural use rather than an improvement or a structure. However, Mr. Sutherland did not offer any explanation for the fence at the hearing, and its purpose is unknown. Based on the hearing record, I conclude that Mr. Sutherland's fencing is in the nature of a structure or an improvement, and not part of an agricultural use. Therefore, Mr. Sutherland's unsubstantiated contentions that the fencing on his property is exempt from the permitting requirements of 6 NYCRR part 666 are not persuasive.

Mr. Howarth's unrefuted testimony proves that Mr. Sutherland installed the 6-foot high, wood-stockade fence along three sides of the property located at 2891 Montauk Highway on May 4, 2005 (Tr. p. 25). The photographs (Exhibits 5A, 5B, 5D and 5E) taken by Mr. Rignola during his May 5, 2005 site visit depict the wood-stockade fence and the chain-link fence on Mr. Sutherland's property (Tr. pp. 58-59). Mr. Marsh's enforcement report (Exhibit 11) includes a sketch of Mr. Sutherland's property on which Mr. Marsh drew the approximate location of the two fences. In addition, Mr. Marsh testified that Department staff had not issued a permit to Mr. Sutherland to construct any fence on the property located at 2891 Montauk Highway (Tr. p. 112).

Except for an agricultural use, which was not demonstrated here, a permit is required, pursuant to 6 NYCRR 666.13(D)(7), to install fencing in scenic river areas. Therefore, Mr. Sutherland violated 6 NYCRR 666.13(D)(7) on or before May 6, 2005 by installing a 6-foot high, wood-stockade fence and a chain-link fence on his property, located in a scenic river area, without a permit from the Department.

There is a question whether the two different types of fencing constitute separate violations. In the *Matter of Linda Wilton and Costello Marine, Inc.* (Order, Feb. 1, 1991), the Commissioner determined that a single act that would require a

permit under three independent bases constituted three distinct violations. Pursuant to requirements outlined in 6 NYCRR part 666, Department staff would not be required to issue a permit for the wood-stockade fence, and then a separate permit for the chain-link fence. The factual circumstances of this matter are distinguishable from those in *Wilton*. Consequently, the principle in *Wilton* does not apply here.

In the alternative, separate violations could be found when a respondent installed the fences sequentially, as two separate acts. Under these circumstances, Department staff would need to show that one fence was installed on a particular day, and that the second fence was installed at a later time. With respect to the fencing observed on the site, Department staff offered no evidence to show that Respondent installed the fencing on the site as two separate acts.

I, therefore, conclude that the allegations asserted in the second and third causes of action constitute a single violation. Though one violation has occurred with respect to installing the two different types of fencing on the site, it is significant to note that Department staff's witnesses observed the fencing during subsequent site visits (Tr. pp 31-33, 44, 59-60, 111-112, 127, 192; and Exhibits 1D, 1E, 1F, 1G, 2B, 5G, 5H, 5I, 13-1, 13-3, 17A, and 17B), which demonstrates the continuing nature of this violation.

C. Fourth Cause of Action

In the fourth cause of action, Department staff alleges that Mr. Sutherland violated 6 NYCRR 666.13(K)(3) on or before May 6, 2005 by constructing a parking lot, without a permit from the Department, at the 2891 Montauk Highway site. According to the complaint, constructing a parking lot within a scenic river area is prohibited based on the theory that a parking lot is associated with a commercial, industrial or institutional use.

According to Mr. Sutherland, 6 NYCRR part 666 does not expressly prohibit the construction of a parking lot within a scenic river area. Mr. Sutherland argues that a parking lot, within the context of the regulations, may be considered to be a variety of different things. For example, a parking lot may be considered an "improvement" (*see* 6 NYCRR 666.3[w]), an "accessory structure" (*see* 6 NYCRR 666.3[a]), or an "accessory

use" (*see* 6 NYCRR 666.3[b]). Mr. Sutherland argues further that with a farm operation, a parking lot may be considered an agricultural road, which is part of an agricultural use (*see* 6 NYCRR 666.3[d]), for which no permit is required (*see* 6 NYCRR 666.13[I][4]). When located more than 250 feet from the bank of a scenic river, Mr. Sutherland concludes that the listed improvements, structures and accessory uses do not require a permit (*see* 6 NYCRR 666.13[J][7][Note (ii)(b)(1)]). (Respondent's closing brief, pp. 24-25.)

Mr. Howarth's unrefuted testimony and his photographs (Exhibits 1A, 1B and 1C) prove that Mr. Sutherland installed a parking lot at 2891 Montauk Highway on May 4, 2005 (Tr. p. 26-27, 39). Exhibit 5E is a photograph taken by Mr. Rignola during his May 5, 2005 site visit that depict the parking lot on Mr. Sutherland's property. Mr. Marsh's enforcement report (Exhibit 11) includes a sketch of Respondent's property on which Mr. Marsh drew the approximate dimensions of the parking lot (200 feet by 50 feet). In addition, Mr. Marsh testified that Department staff did not issue a permit to Mr. Sutherland to construct a parking lot on the property located at 2891 Montauk Highway (Tr. p. 111).

To be considered an accessory structure pursuant to 6 NYCRR 666.3(a), Mr. Sutherland's parking lot must be 800 square feet or less. Based on Mr. Marsh's enforcement report (Exhibit 11) the dimensions of the parking lot are 200 feet by 50 feet, which is 10,000 square feet. Mr. Sutherland offered nothing to rebut this evidence. Consequently, by operation of the regulation, the parking lot at Gramma's Flower Cottage is not an accessory structure.

To be considered an accessory use pursuant to 6 NYCRR 666.3(b), Mr. Sutherland's parking lot must "not change the character of the principal use of the structure or lot." Prior to Mr. Sutherland's purchase of the property at 2891 Montauk Highway, it was a private residence. The subsequent installation of the 10,000 square feet parking lot as part of the development of the farm operation at the site substantially changed the character of the previous principal use of the site from a residential use to a commercial one. Therefore, by operation of the regulation, the parking lot at Gramma's Flower Cottage is not an accessory use.

Pursuant to 6 NYCRR 666.3(w), parking lots may be considered improvements. In this case, I conclude that the parking lot at Gramma's Flower Cottage is an improvement associated with a commercial use. A permit is required to construct improvements such as a parking lot in a scenic river area. Therefore, Mr. Sutherland violated 6 NYCRR 666.13(K)(3) on or before May 6, 2005 by constructing a parking lot as part of his commercial use of the property without a permit from the Department.

D. Fifth and Sixth Causes of Action

Section 666.13(G) regulates signs and commercial sign directories in wild, scenic and recreational river areas. In the fifth and sixth causes of action, Department staff alleges that Mr. Sutherland violated 6 NYCRR 666.13(G)(4) on or before May 6, 2005 when he displayed signs on his property, which is located within the scenic river area. On property that is 500 feet or more from the scenic river bank, a permit is required to display signs that are up to three square feet (*see* 6 NYCRR 666.13[G][4][a]; Fifth Cause of Action). In scenic river areas, signs that are greater than three square feet are prohibited (*see* 6 NYCRR 666.13[G][4][b]; Sixth Cause of Action).

Various signs are displayed at Gramma's Flower Cottage, and are depicted in photographs identified as Exhibits 1H (September 22, 2006); 2A and 2G (May 13, 2006); 5P (May 13, 2006); and 15-1, 15-2 and 15-3 (September 28, 2005). The sizes of the signs depicted in these photographs vary, and appear to be greater than three square feet (*see* 6 NYCRR 666.13[G][4][a]). Department staff took the set of photographs, collectively identified as Exhibit 15, four months subsequent to May 6, 2005. The other photographs identified above were taken a year or more after the date of the alleged violations.

Because the photographs of these signs, identified in the preceding paragraph, were taken substantially after May 6, 2005, which is the date of the violations alleged in the November 2005 complaint, Department staff failed to demonstrate that the signs were at the site on or before May 6, 2005. Therefore, the Commissioner should dismiss the charge alleged in the fifth cause of action.

However, a large sign on Mr. Sutherland's property is depicted in Exhibit 1E, which is a photograph taken by Mr. Howarth on May 8, 2005. The wording on the sign is "Gramma's Flower Cottage." According to Mr. Howarth, the dimensions of the sign depicted in Exhibit 1E are 4 to 6 feet high by 18 to 20 feet long (Tr. p. 31), which would be 72 to 120 square feet.

During his May 25, 2005 site visit, Mr. Rignola took photographs of the Gramma's Flower Cottage sign on Mr. Sutherland's property. The sign is depicted in Exhibits 5G and 5I, and is the one observed by Mr. Howarth on May 8, 2005 (*see* Exhibit 1E).

Mr. Marsh testified that he could not recall whether he saw signs at Gramma's Flower Cottage during his May 6, 2005 site visit (Tr. p. 191). Mr. Marsh did not take any photographs during his May 6, 2005 site visit, but did when he returned to Gramma's Flower Cottage on May 18, 2005 and September 28, 2005.

Mr. Marsh testified further that on May 18, 2005, he saw signs at Mr. Sutherland's property (Tr. p. 192). Exhibit 13 is a set of the photographs taken by Mr. Marsh during his May 18, 2005 site visit (Tr. p. 110). In Exhibit 13-4, there is a sign attached to the chain-link fence with the wording "Gramma's Flower Cottage." The sign is 4 feet by 18 feet (Tr. p. 113), which is 72 square feet.

Department staff did not issue a permit to Mr. Sutherland to display the Gramma's Flower Cottage sign depicted in Exhibits 1E, 5G, 5I and 13-4 (Tr. p. 111). Signs greater than three square feet are prohibited in scenic river areas (*see* 6 NYCRR 666.13[G][4][b]). Given the size of the sign depicted in the referenced exhibits, Mr. Sutherland violated the provision at 6 NYCRR 666.13(G)(4)(b), which expressly prohibits such a sign.

As noted above, an amendment to conform the pleadings to the proof with respect to this sign would not prejudice Mr. Sutherland. Therefore, I conclude that Mr. Sutherland violated 6 NYCRR 666.13(G)(4)(b), as alleged in the sixth cause of action, by displaying the Gramma's Flower Cottage sign at the site on May 8, 2005.

III. Relief

In the November 2005 complaint Department staff requests, with reference to ECL 15-2723,[12] that the Commissioner assess a total civil penalty of $112,200 dollars, and direct Mr. Sutherland to stop operating Gramma's Flower Cottage at his property located at 2891 Montauk Highway, or any other commercial business, in the scenic river area.

In addition, Department staff requests that the Commissioner direct Mr. Sutherland to remove the signs for Gramma's Flower Cottage so that they are not visible from the Montauk Highway. Furthermore, Department staff requests that Mr. Sutherland be directed to remove the gravel from the parking lot, dispose of the gravel at an approved location off the site, and seed the disturbed area with a perennial grass mix. Each component of Department staff's request for relief is discussed below.

A. Civil Penalty

According to Department staff, ECL 15-2723 authorizes a civil penalty of not less than $100 and not more than $1,000 for each day that a violation occurs. Department staff requests a total civil penalty of $112,200 dollars in the November 2005 complaint. In its closing brief (pp. 19-20), Department staff provides a detailed civil penalty calculation.

According to Department staff, the total minimum civil penalty for all five causes of action would be $360,900. For the period from May 6, 2005 to April 30, 2007, Department staff contends there were two separate violations (the fencing and the gravel parking lot) that continued for 723 days. The total number of days for the two violations (2 violations x 723 days) is 1,446 days. For these violations over this period, Department staff contends that at $100 per violation per day, the total civil penalty would be $144,600.

[12] It appears that ECL 71-1127 provides additional statutory authority for the assessment of civil penalties for violations of ECL article 15, title 27. The total civil penalty requested by Department staff in the November 2005 complaint is consistent with the civil penalties authorized by ECL 71-1127.

For the period from May 8, 2005 to April 30, 2007, Department staff contends there were three separate violations (operating a commercial business, one sign over 10 square feet, and another sign over 3 square feet) that continued for 721 days. The total number of days for the three violations (3 violations x 721 days) is 2,163 days. For these violations over this period, Department staff contends that at $100 per violation per day, the total civil penalty would be $216,300. The sum of $144,600 and $216,300 is $360,900.

In its closing brief (pp. 19-20), Department staff states that the goal of the captioned enforcement action is to stop Mr. Sutherland from operating a commercial use in the scenic river area, and to restore the site. Accordingly, Department staff has reduced the requested total civil penalty from $112,200 to $50,000.

At the hearing, Mr. Sutherland offered the testimony of Raymond Negron, Esq., Assistant Town Attorney for the Town of Brookhaven, and argued that Mr. Negron's testimony was relevant to the civil penalty calculation (Tr. pp. 135-137, 141-145). With reference to Mr. Negron's testimony, Mr. Sutherland argues (closing brief, pp. 25-26) that in January 2006, Department staff had chosen not to move forward with the captioned administrative enforcement action due to a pending civil action initiated by the Town of Brookhaven associated with Mr. Sutherland's alleged failure to comply with the Town's zoning code. According to Mr. Sutherland, when in March or April 2007, the Town failed to prevail in its civil action, Department staff decided to pursue the captioned administrative matter. Mr. Sutherland contends that Department staff's determination to delay this administrative action was unreasonable, and argues that assessing a civil penalty now would be inappropriate. With reference to SAPA § 301 and *Heller v Chu*, 111 AD2d 1007 (3d Dept. 1985), Mr. Sutherland contends further that Department staff has attempted to "run up the tab" with respect to the civil penalty because the Commissioner may assess civil penalties for the continuous nature of the alleged violations.

Mr. Sutherland argues that the Commissioner should not assess any civil penalty. In the alternative, he argues that Department staff's decision to delay the hearing concerning the referenced enforcement action should be considered a significant mitigating factor that would substantially reduce the total civil penalty requested by Department staff. In his reply brief

(p. 16), Mr. Sutherland observes that Department staff's revised request for a $50,000 civil penalty in its closing brief is inconsistent with Department staff's initial request for a total civil penalty of $112,200 in the November 2005 complaint.

Since 2004, Mr. Negron has been an Assistant Town Attorney for the Town of Brookhaven, and has prosecuted violations of the Town's code including alleged land use violations (Tr. pp. 220-221). Mr. Negron prosecuted a case entitled, *Town of Brookhaven v. Donald Sutherland* [BRTO # 1044-06] (Tr. p. 222). In its civil action, the Town alleged that Mr. Sutherland was operating a commercial business in an A-1 residential neighborhood (Tr. p. 225). According to Mr. Negron, the Department did not want to move forward with the captioned administrative enforcement case while the Town was prosecuting its civil action (Tr. p. 227).

Exhibit 28 is a copy of an order to show cause and temporary restraining order (BRTO # 1044-06) issued by Suffolk County District Court Judge Patrick J. Barton on March 30, 2007 concerning the Town's civil action against Mr. Sutherland. The March 30, 2007 order enjoins Mr. Sutherland from operating Gramma's Flower Cottage. Attached to the March 30, 2007 order is an affirmation by Mr. Negron dated March 28, 2007, and an affidavit by Mr. Rignola. In his March 28, 2007 affirmation, Mr. Negron states, among other things, that Mr. Sutherland's property located at 2891 Montauk Highway is zoned A-1 Residential, and that Mr. Sutherland has been operating a business in violation of numerous provisions of the Brookhaven Town Code. Mr. Negron states further that the Town had served Mr. Sutherland with several summons since 2005.

In his affidavit (*see* Exhibit 28), Mr. Rignola states that he drove by Gramma's Flower Cottage on March 28, 2007 and observed a bi-fold sign at the site located in the town right-of-way. Mr. Rignola states further that, according to the sign, the business would be re-opening for the season in a few days on March 31, 2007.

The factual circumstances of this administrative enforcement action are distinguishable from the case law cited by Mr. Sutherland. In *Heller* (*supra* at 1008), the State Tax Commission convened an administrative hearing on May 27, 1980 against Harry Heller for failing to pay State income taxes in 1965 and 1966. Subsequently, the State Tax Commission issued a determination on April 6, 1984, which upheld the May 3, 1968

notice of deficiency for failing to pay taxes in 1965 and 1966. The court annulled the State Tax Commission's determination due to the inordinate and unexplained delay.

Mr. Sutherland's arguments concerning the civil penalty calculation are not persuasive. Mr. Sutherland offered nothing to show why the requested civil penalty should be reduced. The hearing record establishes that Department staff duly commenced the captioned administrative enforcement action in November 2005 with service of a notice of hearing and complaint for violations allegedly committed on or before May 6, 2005. With service of the November 2005 complaint, Mr. Sutherland was on notice that Department staff was seeking a total civil penalty of $112,200. In addition, Department staff scheduled a pre-hearing conference for December 14, 2005, and Mr. McGreevy, who was Mr. Sutherland's first attorney, appeared at the conference.

When a settlement could not be reached, Mr. McGreevy filed the August 21, 2006 answer. Subsequently, Mr. McGreevy moved to be relieved as counsel, and requested an adjournment of the hearing after Department staff filed its April 25, 2007 statement of readiness so that Mr. Sutherland could retain new legal counsel.[13] Department staff has returned to the site on several occasions since service of the November 2005 complaint (Tr. pp. 125-126; Exhibit 17).[14] At the October 2, 2007 hearing, Mr. Snead requested an additional adjournment because Mr. Sutherland had retained him a day or two before. Contrary to Mr. Sutherland's arguments, Department staff has pursued the prosecution of this administrative case actively. Therefore, I conclude that the hearing concerning the captioned matter was held in a reasonable amount of time (*see* SAPA § 301[1]).

In the discussion concerning liability, I have identified aggravating factors that the Commissioner may wish to consider in determining the appropriate civil penalty. They are the continuous nature of the demonstrated violations, and Mr. Sutherland's disregard for the Department's permitting process, as well as the apparent disregard of the town code (Exhibit 28).

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[13] *See* Mr. McGreevy's August 24, 2007 affirmation related to his motion to be relieved as counsel.

[14] Exhibit 17 is a series of photographs that Mr. Marsh took on February 25, 2008 site visit.

In its closing brief (p. 20), Department staff requests a total civil penalty of $50,000, which is less than half the amount initially requested in the November 2005 complaint (*i.e.*, $112,200). For the reasons discussed in detail above, Department staff's revised request is reasonable. Therefore, at minimum, the Commissioner should assess a total civil penalty of $50,000. The Commissioner should apportion the total amount equally among the demonstrated violations, which continued for more than 6 months.[15]

Alternatively, there is a sufficient basis in the record for the Commissioner to assess the full amount that Department staff initially requested in the November 2005 complaint. If the Commissioner determines that the appropriate civil penalty is the amount initially requested by Department staff, the Commissioner could apportion the total amount equally among the demonstrated violations, which continued for more than 6 months.

B. Remediation

In addition to authorizing the assessment of civil penalties, ECL 15-2723 authorizes the Commissioner to compel compliance with the requirements outlined in ECL article 15, title 27 and its implementing regulations. In the November 2005 complaint, Department staff requests an Order from the Commissioner that would direct Mr. Sutherland to stop operating Gramma's Flower Cottage and, which would direct him to remove the signs and the gravel from the parking area. After removing the gravel, Department staff requests that Mr. Sutherland be directed to seed the area with a perennial grass mix. In its closing brief (pp. 20-21), Department staff reiterates its request for an Order that would direct remediation sought in the complaint as described above.

Mr. Sutherland does not present any arguments in his post-hearing filings about Department staff's request for remediation.

Department staff has satisfied it burden of proof, and demonstrated that Mr. Sutherland violated various provisions of 6 NYCRR part 666. Accordingly, the Commissioner should direct

[15] The six month period extends from May 6, 2005, when the violation began, to November 2005, when Department staff commenced the captioned enforcement action with service of the notice of hearing and complaint.

Mr. Sutherland to immediately cease any commercial operations at the 2891 Montauk Highway site, and to remediate the site, as soon as possible, by removing the gravel from the parking area and re-seeding the area with a perennial grass mix.

Evidence (Exhibit 22) offered by Mr. Sutherland demonstrates that he owns or rents other parcels as part of his farm operation. Detailed information about these additional properties is not part of the hearing record. Nevertheless, it may be possible for Mr. Sutherland to move the retail portion of his farm operation to one of these alternative locations.

Mr. Sutherland has correctly pointed out that one of the recognized activities authorized by the scenic river designation is agricultural. In consultation with Department staff and after obtaining the necessary approvals, it may be possible for Mr. Sutherland to modify his current activities at the 2891 Montauk Highway property so as to be an agricultural use consistent with the definition provided at 6 NYCRR part 666.3(d).

Conclusions

1. The content of Department staff's November 2005 complaint complies with the requirements outlined in 6 NYCRR 622.3(a)(1). In addition, the content of the related notice of hearing complies with the requirements outlined in 6 NYCRR 622.3(a)(2). The procedures outlined in SAPA article 3 concerning adjudicatory hearings, and 6 NYCRR part 622 do not require the parties or their representatives to sign and date their respective pleadings. In addition, there is no requirement that the pleadings relative to this matter must be verified (see CPLR 3020). Consequently, there is no infirmity with the November 2005 complaint; it provides Mr. Sutherland with notice of the charges alleged against him.

2. Mr. Sutherland's property is approximately one third mile from the bank of the Carmens River. Pursuant to the description provided in ECL 15-2714(2)(f), this section of the Carmens River is a scenic river as that term is defined at ECL 15-2707(2)(b) (also see 6 NYCRR 666.4[b]). Because one third mile is less that ½ mile, the activities undertaken on Mr. Sutherland's property, which are the

subject of the captioned administrative enforcement matter, are regulated pursuant to ECL 15-2703(9) (also see 6 NYCRR 666.3[yy] and 6 NYCRR 666.6[f]).

3. Because Gramma's Flower Cottage is a farm operation, as defined at AML § 301(11), it is also a commercial use, as that term is defined at 6 NYCRR 666.3(k). Accordingly, Gramma's Flower Cottage is regulated pursuant to 6 NYCRR part 666.

4. The statutory definition at AML § 301(11) of a farm operation does not provide for an exemption from the Wild, Scenic and Recreational Rivers Act (*see* ECL article 15, title 27) or its implementing regulations at 6 NYCRR part 666.

5. With respect to designated scenic river areas, the regulatory definition of an agricultural use at 6 NYCRR 666.3(d) is more restrictive than the statutory definition of a farm operation at AML § 301(11). The regulatory definition requires crops and horticultural specialties to be grown or raised directly on the land but, with respect to a farm operation, crops and horticultural specialties may be grown or raised in containers. On May 6, 2005, Mr. Sutherland did not grow any crops or horticultural specialties directly on his property located at 2891 Montauk Highway consistent with 6 NYCRR 666.3(d). Therefore, Mr. Sutherland failed to demonstrate that his farm operation at 2891 Montauk Highway was an agricultural use, pursuant to 6 NYCRR 666.3(d).

6. Pursuant to 6 NYCRR 666.13(K)(3), commercial, industrial, or institutional uses are prohibited in scenic river areas. Gramma's Flower Cottage, located at 2891 Montauk Highway in the Town of Brookhaven, is a commercial use as defined at 6 NYCRR 666.3(d). Mr. Sutherland commenced the commercial use of his property on or before May 6, 2005 without a permit from the Department in violation of 6 NYCRR 666.13(K)(3).

7. Except for an agricultural use, which Mr. Sutherland did not demonstrate here, a permit is required, pursuant to 6 NYCRR 666.13(D)(7), to install fencing in scenic river areas. Therefore, Mr. Sutherland violated 6 NYCRR 666.13(D)(7) on or before May 6, 2005 by installing a 6-

foot high wood-stockade fence and a chain-link fence on his property, located in a scenic river area, without a permit from the Department.

8. To be considered an accessory structure pursuant to 6 NYCRR 666.3(a), Mr. Sutherland's parking lot must be 800 square feet or less. The parking lot, however, is 10,000 square feet. Consequently, the parking lot at Gramma's Flower Cottage is not an accessory structure.

9. To be considered an accessory use pursuant to 6 NYCRR 666.3(b), Mr. Sutherland's parking lot must "not change the character of the principal use of the structure or lot." Prior to Mr. Sutherland's purchase of the property at 2891 Montauk Highway, it was a private residence. The subsequent installation of the 10,000 square feet parking lot as part of the development of the farm operation at the site substantially changed the character of the previous principal use of the site as a residence. Therefore, the parking lot at Gramma's Flower Cottage is not an accessory use.

10. Pursuant to 6 NYCRR 666.3(w), parking lots may be considered improvements. In this case, the parking lot at Gramma's Flower Cottage is an improvement associated with a commercial use. Pursuant to 6 NYCRR part 666, a permit is required to construct improvements such as a parking lot in a scenic river area, and Department staff did not issue any permit to Mr. Sutherland to construct a parking lot. Therefore, Mr. Sutherland violated 6 NYCRR 666.13(K)(3) on or before May 6, 2005 by constructing a parking lot without a permit from the Department as part of his commercial use of the property.

11. Section 666.13(G)(4)(a) regulates signs in scenic river areas that are up to three square feet. Department staff failed to demonstrate that Mr. Sutherland was displaying the signs depicted in Exhibits 1H (September 22, 2006); 2A and 2G (May 13, 2006); 5P (May 13, 2006); and 15-1, 15-2 and 15-3 (September 28, 2005) at the site on or before May 6, 2005 as alleged in the November 2005 complaint. Therefore, the Commissioner should dismiss the charge alleged in the fifth cause of action.

12. Department staff did not issue a permit to Mr. Sutherland to display a sign with the wording, “Gramma’s Flower Cottage.” The size of this sign is 72 square feet. The requirement at 6 NYCRR 666.13(G)(4)(b) expressly prohibits signs larger than three square feet, such as this one. Therefore, Mr. Sutherland violated 6 NYCRR 666.13(G)(4)(b), as alleged in the sixth cause of action, by displaying the Gramma’s Flower Cottage sign at the site on May 8, 2005.

Recommendations

1. The Commissioner should conclude that Mr. Sutherland violated various provisions of 6 NYCRR 666.13 as alleged in the November 2005 complaint. For the reasons outlined above, however, the Commissioner should dismiss the charge alleged in the fifth cause of action.

2. For the demonstrated violations, the Commissioner should assess a total civil penalty of not less than $50,000. The total maximum civil penalty should not exceed $112,200.

3. The Commissioner should direct Mr. Sutherland to immediately cease all commercial operations associated with Gramma’s Flower Cottage located at 2891 Montauk Highway in the Town of Brookhaven, Suffolk County.

4. The Commissioner should direct Mr. Sutherland to remediate the property located at 2891 Montauk Highway in the Town of Brookhaven, Suffolk County.

Attachment: Exhibit List

Exhibit List

Matter of Donald Sutherland
DEC Case No. R1-200551102-240

October 2, 2007

1. Photographs (A-H) dated May 4, 2005.

2. Photographs (A-L) taken by Mr. Piersa on May 13, 2007.

3. Huntley Notice dated May 15, 2006.

4. Four advertisements for Gramma's Flower Cottage.

5. Photographs (A-R) taken by Mr. Rignola on May 5, 2005 (A-F), May 25, 2005 (G-I), and May 13, 2006 (J-R).

February 26, 2008

6. Resume of Robert F. Marsh.

7. River Corridor Map for the Carmans River.

8. Commissioner's Decision and Order dated March 4, 1977 concerning the boundaries for the Carmans and Connetquot Rivers.

9. Aerial Photograph.

10. Aerial Photograph.

11. Enforcement Report for a field inspection by Mr. Marsh on May 6, 2005.

12. ACAT (No. AC634852, dated May 7, 2005).

13. Photographs (1-7). Taken by Mr. Marsh on May 18, 2005.

14. Notice of Violation dated June 6, 2005

15. Photographs (1-3). Taken by Mr. Marsh on September 28, 2005.

16. ACATs (No. AC687223 dated April 21, 2006, and No. AC687234 dated April 21, 2006).

17. Photographs (A-E). Taken by Mr. Marsh on February 25, 2008.

18. Set of letters, correspondence and newspaper articles received by Department staff concerning the captioned enforcement action.

19. Pamphlet entitled, The New York State Wild, Scenic and Recreational River System on Long Island.

20. Letter dated October 21, 1994 from Ray E. Cowen, P.E., Region 1 Director, NYSDEC to Edward P. Romaine, Suffolk County Clerk.

21. Letter dated November 9, 2007 from Daniel E. Lewis, Biologist to Suffolk County Clerk and enclosed copy of the River Corridor Map for the Carmans River. The map was filed with the clerk on November 16, 2007 (certified copies of cover letter and map).

22. Letter dated November 16, 2005 from Robert Somers, Ph.D., Chief Agriculture Protection Unit to Donald Sutherland, Gramma’s Flower Cottage.

23. Letter dated February 6, 2007 from Thomas Lindberg, First Deputy Commissioner, NYS Dept. of Ag and Markets to Tim Laube, Clerk Suffolk County Legislature with attachments.

24. Certificate Notice - Nursery Registration Certificate. Establishment No. 476050. Date Issued: 10/16/2007; Expires 11/30/2008.

25. Letter dated June 8, 2006 from Roy Fedelem, Principal Planner, Suffolk County Agriculture and Farmland Protection Board to Donald Sutherland with attached Certificate Notice - Nursery Registration Certificate. Establishment No. 476050 Date Issued: 08/16/2005; Expires 11/30/2006.

26. Letter dated March 30, 2007 from William Kimball, Director, Division of Agricultural Protection and Development Services, NYS Dept. of Ag and Markets to Hon. Brian X. Foley, Supervisor, Town of Brookhaven.

27. E-mail message dated June 12, 2007 from Danielle Cordier with attached Field Review by Bob Somers dated May 23, 2007.

28. Order to Show Cause and Temporary Restraining Order (BRTO# 1044-06) by Hon. Patrick J. Barton, DCJ, 6th District Suffolk County dated April 2, 2007 regarding Town of Brookhaven v. Donald Sutherland with attached Affirmation by Raymon Negron, Esq., affirmed March 28, 2007 and Affidavit by Investigator Frank Rignola sworn to March 28, 2007.

All exhibits received into evidence except for Exhibits 17 and 18 (Tr. pp. 127, 133). With respect to Exhibit 16, ACAT No. AC687223 dated April 21, 2006 was not received, and ACAT No. AC687234 dated April 21, 2006 was received into evidence (Tr. pp. 123-124).