STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 9 of the Environmental Conservation Law,

- by -

KATHERINE L. WILSON and JAMES W. WILSON,

Respondents.

ORDER

VISTA Index No. CO6-20061107-27

Staff of the New York State Department of Environmental Conservation (“Department”) commenced this administrative enforcement proceeding against respondents Katherine L. Wilson and James W. Wilson, by service of a notice of hearing and complaint, both dated December 12, 2006.

In accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), respondents were served by certified mail with copies of the notice of hearing and complaint on December 18, 2006, at 1196 Dryden Road, Ithaca, New York.

The complaint alleges that respondents

1. Cut, removed, injured, or destroyed trees or other property on State lands, in violation of ECL 9-0303(1).

2. Maintained a staircase, dock, stone circle fire pit, and clothesline on State lands, in violation of ECL 9-0303(2).

3. Maintained a dock over State lands, thereby restricting the free use of such lands by all the people, in violation of ECL 9-0301(1).

Pursuant to 6 NYCRR 622.4(a), respondents' time to serve an answer to the notice of hearing and complaint expired on January 8, 2007, and has not been extended by Department staff.

Department staff filed a notice of motion and motion for default judgment, dated April 6, 2007, with the Department’s Office of Hearings and Mediation Services. The notice and motion were also served upon respondents by first class mail.

Subsequently, at the request of the parties, the Chief Administrative Law Judge adjourned the matter by letter dated May 16, 2007. The adjournment was granted to allow the parties time to negotiate a possible settlement.

By letter dated April 15, 2008, Department staff advised that no settlement had been reached, and staff renewed its request for a determination on its motion for default judgment. By letter dated April 24, 2008, staff withdrew the allegations in its complaint relating to the dock and requested modification to the relief sought under the complaint. Respondents did not file a response to either of staff's letters.

The matter was assigned to Administrative Law Judge ("ALJ") Richard A. Sherman, who prepared the attached summary report. I adopt the ALJ's report as my decision in this matter.

Based upon the record, I conclude that the civil penalty and the corrective actions recommended by the ALJ are appropriate.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondents Katherine L. Wilson and James W. Wilson are adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondents contained in the complaint, as modified by staff's letter dated April 24, 2008, are deemed to have been admitted by respondents.

III. Respondents are adjudged to have violated the following laws:

A. ECL 9-0303(1) by cutting, removing, injuring, or destroying at least two trees on State lands between 1998 and November 2, 2006, without authorization from the Department.

B. ECL 9-0303(1) by cutting, removing, injuring, or destroying vegetative ground cover on State lands at various times from 1998 through November 2, 2006, inclusive, without authorization from the Department.

C. ECL 9-0303(2) by maintaining an eight-tread staircase, stone circle fire pit, and clothesline on State lands between 1998 and December 12, 2006, without authorization from the Department.

IV. Respondents are hereby jointly and severally assessed a civil penalty in the amount of one thousand dollars ($1,000). The civil penalty shall be suspended in its entirety provided that respondents timely complete, to the satisfaction of Department staff, the corrective actions set forth under paragraph VI below.

V. If respondents fail to timely complete any of the corrective actions set forth in paragraph VI below to the satisfaction of Department staff, the suspended penalty shall immediately become due and payable. 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: New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-5500, Attn: Charles E. Sullivan, Jr., Esq.

VI. On or before April 15, 2009, respondents shall (i) remove all structures from State lands between respondents' property and the shore of Stillwater Reservoir, including the eight-tread staircase, stone circle fire pit, and clothesline; and (ii) cease all unlawful activities on those State lands, including the management (e.g., cutting or mowing) of vegetative ground cover, and storage of personal property.

VII. All communications from respondent to the Department concerning this order shall be made to Charles E. Sullivan, Jr., Esq. at the address noted in paragraph V above.

VIII. The provisions, terms, and conditions of this order shall bind respondents Katherine L. Wilson and James W. Wilson, their agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Alexander B. Grannis
Commissioner

Dated: December 18, 2008
Albany, New York

TO: Katherine L. Wilson (Via Certified Mail)
1196 Dryden Road
Ithaca, New York 14850

James W. Wilson (Via Certified Mail)
1196 Dryden Road
Ithaca, New York 14850

Charles E. Sullivan, Jr., Esq. (Via Regular Mail)
New York State Department of
Environmental Conservation
625 Broadway
Albany, New York 12233-5500

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 9 of the Environmental Conservation Law,

- by -

KATHERINE L. WILSON and JAMES W. WILSON,

Respondents.

SUMMARY REPORT

VISTA Index No. CO6-20061107-27

Proceedings

Staff of the Department of Environmental Conservation ("Department") commenced this proceeding against respondents Katherine L. Wilson and James W. Wilson by service of a notice of hearing and complaint, both dated December 12, 2006. The notice of hearing advised respondents that an answer must be served within 20 days of their receipt of the complaint. Respondents did not file an answer.

The complaint alleges that respondents' activities on State lands within the Adirondack Park, and adjacent to respondents' property, in the Town of Webb, Herkimer County, violated Environmental Conservation Law ("ECL") article 9. The alleged violations include clearing of trees and other vegetation, maintenance of a dock on the waters of Stillwater Reservoir, and maintenance of a wooden staircase.

By notice and motion, both dated April 6, 2007, staff moved for a default judgment against respondents. Together with the notice and motion for default judgment, staff submitted an affirmation and attorney's brief in support of the motion, which included numerous exhibits, summarized as follows:

Exhibit A:	an affidavit of service
Exhibit B:	a copy of the notice of hearing and complaint, together with a proposed settlement in the form of an order on consent
Exhibit C:	proof of service upon respondent Katherine L. Wilson
Exhibit D:	proof of service upon respondent James W. Wilson
Exhibits E-H:	four affidavits by Department staff
Exhibit I:	an affidavit by the Executive Director of the Hudson River - Black River Regulating District

Exhibit J: documents relating to the legislative history of ECL 71-0703
Exhibit K: several prior orders of the Commissioner
Exhibit L: letter to respondents dated September 5, 2003
Exhibit M: a copy of the 1946 Court of Appeals decision in Saltser & Weinsier, Inc. v McGoldrick
Exhibit N: a copy of the 1992 Court of Appeals decision in Mercy Hosp. of Watertown v New York State Dept. of Social Services
Exhibit O: a proposed order

Respondents did not submit a response to Department staff's motion for default judgment. However, Department staff and respondents entered into settlement negotiations and requested adjournment of this matter pending the outcome of those negotiations. Accordingly, by letter dated May 16, 2007, the Chief Administrative Law Judge adjourned the matter.

By letter dated April 15, 2008, Department staff advised this office that no settlement had been reached and renewed its request for a determination on its motion for default judgment. Subsequently, by letter dated April 24, 2008, staff withdrew the allegations in its complaint relating to the dock and requested modification to the relief sought under the complaint. Both of these letters were on notice to the respondents, but respondents did not file a response to either letter.

Default Procedures

Pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.15(b), a motion for default judgment must contain the following: (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order. Pursuant to 6 NYCRR 622.15(c), the assigned Administrative Law Judge is to determine whether "the requirements of subdivision (b) . . . have been adequately met."

Findings

The following findings are based upon the papers submitted by staff, as identified above.

1. On December 13, 2006, Department staff served two copies of the notice of hearing and complaint by certified mail,

return receipt requested, upon respondents. Staff mailed one copy to Katherine L. Wilson and the other copy to James W. Wilson.

2. Both copies of the notice of hearing and complaint were received and signed for at respondents' address, 1196 Dryden Road Ithaca, New York, on December 18, 2006.

3. The notice of hearing advised respondents that they must answer the complaint within 20 days and that failure to answer would result in a default and waiver of respondents' right to a hearing.

4. Respondents did not file an answer to the complaint on or before January 8, 2007,[1] and Department staff did not grant an extension to respondents. As of April 6, 2007, the date of staff's motion for default judgment, staff had not received an answer to the complaint.

5. Staff included a proposed order with its motion for default judgment.

Discussion

In accordance with 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint was made by certified mail and was complete upon respondents' receipt of these documents on December 18, 2006.

Respondents failed to submit an answer to the complaint, and the time to answer expired on January 8, 2007. In accordance with 6 NYCRR 622.15(a), respondents' failure to answer the complaint constitutes a default and waiver of respondents' right to a hearing.

Liability

The complaint, as modified by Department staff's withdrawal of allegations relating to the dock, alleges that respondents violated provisions of ECL article 9. Specifically, the complaint alleges that respondents violated ECL 9-0303(1) by cutting, removing, injuring, or destroying trees or other property on State lands without authorization from the

[1] The 20th day after service was complete fell on Sunday, January 7, 2007; therefore, respondents' answer was due on or before January 8, 2007 (see General Construction Law § 25 and 6 NYCRR 622.6[b][1]).

Department. The complaint also alleges that respondents violated ECL 9-0303(2) by maintaining an eight-tread staircase, stone circle fire pit, and clothesline on State lands without authorization from the Department.

By operation of the default, respondents are deemed to have admitted Department staff's factual allegations and have waived their right to a hearing. Staff's motion for default judgment sets forth factual allegations that demonstrate respondents' liability for the remaining causes of action alleged in the complaint. Therefore, respondents' liability is established.

With regard to Department staff's allegation that the maintenance of an eight-tread staircase, fire pit, or clothesline on State lands contravenes the prohibition against structures contained in ECL 9-0303(2), I note that the term "structures" is not defined in ECL article 9 or its implementing regulations. However, staff's interpretation of what constitutes a structure is consistent with the Department's duty to ensure that State lands in the Adirondack Park are "forever reserved and maintained for the free use of all the people" (ECL 9-0301[1]). The placement of stairs, clotheslines, fire pits, and other structures on State lands may interfere with the free use of these lands by directly impeding access or by creating the impression that the land is privately owned (see also Executive Law § 802[62] [defining "structure" under the Adirondack Park Agency Act to mean "any object constructed, installed or placed on land to facilitate land use and development or subdivision of land, such as buildings, sheds, single family dwellings, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto"]).

Department staff's allegation that respondents' landscaping activities on State lands, such as cutting ground cover or other vegetation, violate ECL 9-0303(1) is consistent with both the statutory language and its implementing regulations. Specifically, ECL 9-0303(1) provides that "no person shall cut, remove, injure, destroy . . . any trees or timber or other property [on State lands described in ECL article 9]," and 6 NYCRR 190.8(g) provides that no person shall "deface, remove, destroy or otherwise injure in any manner whatsoever any tree, flower, shrub, fern, moss or other plant, rock, fossil or mineral found or growing on State land."

Thus, as further detailed below, the remaining allegations set forth in the complaint, all of which are deemed admitted as a consequence of respondents' default, establish that

respondents committed multiple violations of ECL 9-0303(1) and 9-0303(2).

Penalty

By their default, respondents are only deemed to have admitted the factual allegations in the complaint, and Department staff still must establish that the relief sought is appropriate (see Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 4-5). Here, staff seeks a $1,000 penalty, all of which is to be suspended provided that respondents undertake and maintain corrective actions specified by the Department.

Staff counsel argues that the maximum penalty authorized by statute for respondents' violations is $500 per violation, with an additional penalty of $500 for each day during which each violation continues, as set forth in ECL 71-4003. I cannot agree. Section 71-4003 is applicable only where a penalty is not specifically provided for elsewhere in the ECL. As staff counsel acknowledges, civil penalties for violations relating to ECL article 9 are provided for under ECL 71-0703. Counsel argues, however, that the civil penalty provision of ECL 71-0703(1) is not applicable to the instant proceeding because it may be assessed only "upon conviction," in a criminal proceeding.

For the reasons discussed below, I conclude that a criminal conviction is not a predicate to assessing the civil penalty provided for under ECL 71-0703(1). Therefore, subject to the exceptions noted in ECL 71-0703(1), the maximum penalty authorized for the violations established in this matter is $100 per violation.

ECL 71-0703(1) reads, in its entirety, "[i]n order to secure the enforcement of the several sections of article 9 the following fines and civil penalties are provided:

> 1. Except as otherwise provided in subdivision 4, 5, 6 or 7 of this section, any person who violates any provision of article 9 or the rules, regulations or orders promulgated pursuant thereto or the terms of any permit issued thereunder, or who fails to perform any duty imposed by any provision thereof shall be guilty of a violation, and, upon conviction, shall be punished by a fine of not more than two hundred fifty dollars, or by imprisonment for not more than fifteen days, or by both such

> fine and imprisonment, and in addition thereto shall be liable to a civil penalty of not less than ten nor more than one hundred dollars" (emphasis added).

Staff counsel relies upon the text of the statute[2] and its legislative history to reach the conclusion that the civil penalty provision is applicable only "upon conviction" in a criminal proceeding.

In 1929, Conservation Law § 65.2[3] was amended by adding the phrase "and in addition thereto, shall be liable to a penalty of not less than ten nor more than one hundred dollars." Staff asserts that, although modified by subsequent legislation, the 1929 amendment was intended "to authorize the commencement of a civil action" for violations that were previously subject exclusively to criminal sanctions (Affirmation of Charles E. Sullivan, Jr. ["Sullivan affirmation"], dated April 6, 2007, at 5). Staff's interpretation is supported by the express terms of the 1929 amendment and by a letter dated March 14, 1929, in which the Commissioner of the Conservation Department advised Counsel to the Governor that the purpose of the amendment was "to make it possible to bring a civil action to recover a penalty from a person violating any rule or regulation of the Conservation Department, whereas under the present law the only action that can be brought for such a violation is a criminal action" (Sullivan affirmation, Exhibit J, attachment 8, at 7 [the "Commissioner's letter of 1929"][emphasis in original]).

At the time of the 1929 amendment, the Conservation Law had separate penalty provisions for violations of the law itself and for violations of Department rules and regulations. Conservation Law § 65.1 provided the penalty provision for violations of the law and section 65.2 provided the penalty provisions for violations of Department rules or regulations. Staff counsel argues that Conservation Law § 65.1 provided for only criminal sanctions and section 65.2, subsequent to the 1929 amendment, provided for both criminal and civil enforcement.

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[2] Effective March 1, 2004, the penalty provisions of ECL 71-0703 were amended [the "2004 amendments"]. The 2004 amendments do not affect the analysis of staff's argument because the statutory language relied upon by staff was not changed by the amendments.

[3] Through a series of amendments to the Conservation Law and subsequently to the ECL, Conservation Law § 65.2 became codified, in part, at ECL 71-0703(1).

Staff further argues that the merger of these provisions, in 1977, into a single penalty provision now codified at ECL 71-0703(1), created ambiguity with regard to whether the civil penalty was still available in the absence of a criminal conviction. Staff counsel concludes, based upon an analysis of the legislative history, that ECL 71-0703(1) is available exclusively in a criminal proceeding. Therefore, according to staff counsel, there is no specific penalty available in an administrative proceeding involving alleged violations of ECL article 9 and the penalty provision in ECL 71-4003 applies.

After careful consideration of Department staff's arguments and the legislative history of ECL 71-0703(1), I conclude that the penalty provisions of ECL 71-0703 are applicable to the violations alleged in this proceeding. The merger of the penalty provisions formerly found in Conservation Law §§ 65.1 and 65.2 cannot be said to have resulted in the civil penalty being available only through a criminal proceeding. When the Legislature amended Conservation Law § 65.2 in 1929, section 65.1 already contained a nearly identical provision for civil penalties. Thus, Conservation Law § 65.1, which applied to violations of the law itself (i.e., violations of article III of the Conservation Law) already provided for imposition of a non-criminal penalty. Conversely, Conservation Law § 65.2, which applied to violations of "any rule or regulation established by the department, pursuant to [article III]," provided only for criminal prosecution. Therefore, subsequent to the amendment of 1929, both Conservation Law §§ 65.1 and 65.2 provided for imposition of civil penalties without resort to criminal enforcement, thereby "enabl[ing] the Conservation Department to enforce the law by the imposition of less severe penalties" (Commissioner's letter of 1929).

When the successor provisions of Conservation Law §§ 65.1 and 65.2 were merged by the Legislature in 1977, the enforcement provisions for violations of the law and violations of Department regulations were combined into a single paragraph. The phrase providing for non-criminal penalties was retained. Therefore, I find no basis to conclude that the merger of these provisions was intended to eliminate the provision for civil penalties in the absence of a criminal conviction. ECL 71-0703(1) provides an express provision for assessing a civil penalty for violations of ECL article 9 and its implementing regulations. Accordingly, ECL 71-4003 is not applicable to this proceeding.

In light of the foregoing, the maximum authorized penalty for each violation established by Department staff is

$100, subject to the exceptions[4] noted in ECL 71-0703(1). On the basis of the allegations set forth in the complaint, as supplemented by the affidavits of Department staff,[5] I conclude that staff has established the following violations:

1. Between 1998 and November 2, 2006, respondents cut, removed, injured, or destroyed at least two[6] trees on State lands without authorization to do so, in violation of ECL 9-0303(1) and 6 NYCRR 190.8(g) (see Damato affidavit, photograph nos. 6, 7, 11, and accompanying text). The maximum penalty authorized for these violations is $200 (two violations, each subject to a maximum authorized penalty of $100[7] pursuant to ECL 71-0703[1]).

2. At various times from 1998 through November 2, 2006, respondents cut, removed, injured, or destroyed vegetation on State lands without authorization to do so, in violation of ECL 9-0303(1) and 6 NYCRR

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[4] One of these exceptions imposes a higher penalty for violations involving trees on State lands (see ECL 71-0703[6] [providing that persons who violate ECL 09-0303(1) "shall be liable to a civil penalty of two hundred fifty dollars per tree or treble damages . . . or both"]).

[5] As the Commissioner has held, "affidavits may be examined to confirm the factual allegations of the complaint or to otherwise assure the reviewer that the Department has a meritorious claim against the respondent" (Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7 [internal citation omitted]).

[6] Department staff does not specify the number of trees cut, removed, injured, or destroyed, but the Damato affidavit repeatedly refers to tree "stumps" (i.e., two or more) in the text describing photographs of State lands adjoining respondents' property.

[7] Pursuant to the 2004 amendments, violations of ECL 9-0303(1) involving trees on State lands are now subject to a civil penalty of "two hundred fifty dollars per tree or treble damages, based on the stumpage value of such tree or both" (ECL 71-0703[6]). However, staff did not allege a specific date relative to respondents' cutting of trees on State lands. Therefore, the violations by respondents that relate to the cutting of trees may predate the 2004 amendments. Accordingly, I decline to apply the higher penalty provision available under the 2004 amendments. Rather, I have applied the one hundred dollar civil penalty provided for under ECL 71-0703(1) for violations of ECL article 9, which remains unchanged under the 2004 amendments.

190.8(g).[8] Specifically, respondents cut, removed, injured, or destroyed vegetative ground cover on State lands (see Scanlon affidavit, at 2-3 and photograph no. 6; Damato affidavit, photograph nos. 5, 6, 7, 8, and accompanying text). The maximum penalty authorized for these violations is $900 (nine violations, each subject to a maximum authorized penalty of $100 pursuant to ECL 71-0703[1]).

3. Between 1998 and December 12, 2006, respondents maintained structures on State lands without authorization to do so, in violation of ECL 9-0303(2). Specifically, respondents maintained an eight-tread staircase, stone circle fire pit, and clothesline on State lands (see Damato affidavit, photograph nos. 6, 7, 8, 12, and accompanying text). The maximum penalty authorized for these violations is $300 (three violations, each subject to a maximum authorized penalty of $100 pursuant to ECL 71-0703[1]).

Therefore, as detailed above, the total maximum penalty authorized under ECL 71-0703(1) for the violations alleged by Department staff is $1,400.

Department staff requests a $1,000 penalty against respondents, all of which is to be suspended provided respondents undertake and maintain corrective actions, as specified by staff. Staff cites several factors for imposing a penalty upon respondents, including the benefit respondents received through use of State owned waterfront property as their own without paying property taxes on the land, and respondents' refusal to cease their unlawful activities despite being advised to do so by the Department. With regard to respondents' refusal to cease their unlawful activities, staff's filings include a letter to respondents dated September 5, 2003, demanding that "[a]ny inconsistent use or occupation of state lands . . . must cease before October 14, 2003" (Sullivan affirmation, Exhibit L).

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[8] For the purposes of this penalty calculation, I assume respondents committed this violation only once each year from 1998 through 2006, inclusive. John Scanlon, a forest ranger with the Department, stated that he “frequently . . . observed management of vegetative cover” on State lands adjacent to respondents’ property from 1998 through 2006 (Scanlon Affidavit, at 2). Although it may be reasonably inferred from this statement that respondents routinely “managed” (i.e., cut or mowed) the ground cover during each growing season from 1998 through 2006, staff does not specifically allege that respondents engage in this activity on multiple occasions each year.

Corrective Actions

By its motion for default judgment, as modified by Department staff's letter dated April 24, 2008, staff also seeks a Commissioner's order directing respondent to, "within 30 days after the date of the Commissioner's Order . . . cease . . . to engage in any vegetative cover management [and] in any maintenance or storage of personal property on State lands" adjoining respondents' property. Notably, Department staff's request for relief with regard to personal property is not limited to the items specifically cited in the complaint. Rather, staff requests that respondents cease all "maintenance and storage" of personal property on State lands. Accordingly, to the extent that respondents are maintaining other items of personal property on State lands that were not expressly noted in the complaint, these items must also be removed.

The requested corrective actions are authorized pursuant to ECL 9-0303(6) and 71-0703(7). Section 9-0303(6) of the ECL authorizes the Department to "dispose of any improvements upon state lands under such conditions as it deems to be in the public interest." Section 71-0703(7) provides that, "[i]n addition to the penalties otherwise provided, any person who violates any of the provisions of [ECL 9-0303(1)] . . . may be ordered by the commissioner or the court to make reparations for any permanent and substantial damage caused to the land" and further provides that those reparations shall "reasonably restore the lands affected by the violation to their condition immediately before the violation."

Conclusions

Department staff provided proof of service upon respondents of the notice of hearing and complaint. Respondents failed to answer the complaint. Therefore, respondents are in default and have waived their right to a hearing. The complaint states a claim upon which relief may be granted and there is sufficient basis to impose both a civil penalty and corrective action upon respondents.

Recommendation

I recommend that Department staff's motion for default judgment be granted. I further recommend that the Commissioner issue an order assessing a one thousand dollar ($1,000) penalty against respondents and directing respondents to, on or before April 15, 2009, (i) remove all personal property from the State lands between respondents' property and the shore of Stillwater

Reservoir, including the eight-tread wooden staircase, stone circle fire pit, and clothesline; and (ii) cease all unlawful activities on the State lands, including without limitation, management of vegetative cover and storage of personal property. Payment of the penalty should be suspended in its entirety, provided that respondents timely complete all the corrective actions, as directed by the Commissioner.

/s/
Richard A. Sherman
Administrative Law Judge

Dated: December 16, 2008
Albany, New York