STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Subdivisions 190.8(g) and 190.8(w) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

ESTATE OF REAH L. RYAN, TERRY J. RYAN, JOYCE TOLOSKY, TIMOTHY J. RYAN, THOMAS J. RYAN, SALLY CUMMINGS BELDEN, VERIZON NEW YORK INC., and NEW YORK STATE ELECTRIC AND GAS CORPORATION,

Respondents.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

DEC VISTA Index No. CO5-20090701-46

October 15, 2010

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Scott Abrahamson of counsel), for staff of the Department of Environmental Conservation

-- Brickwedde Law Firm (Richard J. Brickwedde of counsel), for respondents Estate of Reah L. Ryan, Terry J. Ryan, Joyce Tolosky, Timothy J. Ryan, Thomas J. Ryan, and Sally Cummings Belden

-- Verizon New York Inc., Legal Department (Kelion N. Kasler of counsel), for respondent Verizon New York Inc.

-- Hiscock & Barclay (Thomas F. Walsh of counsel), for respondent New York State Electric and Gas Corporation

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE
ON MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION

By motion for order without hearing in lieu of complaint, staff of the Department of Environmental Conservation (Department) alleges that individual respondents Estate of Reah L. Ryan, Terry J. Ryan, Joyce Tolosky, Timothy J. Ryan, Thomas J. Ryan, and Sally Cummings Belden are maintaining camps on State land without permission of the Department, and that respondents Verizon New York Inc. and New York State Electric and Gas Corporation (NYSEG) are providing utilities to those camps on structures placed on State land without permission from the Department. The camps are located on the southeast shore of Chazy Lake, in the Town of Dannemora, Clinton County. Department staff alleges that the maintenance of the camps and other structures on State land, and the clearing of vegetation by mowing around the camps constitute violations of 6 NYCRR 190.8(g) and 190.8(w).

In response, the individual respondents move to dismiss the Department's complaint for lack of subject matter jurisdiction. For the reasons that follow, respondents' motion to dismiss is denied.

PROCEEDINGS

Pursuant to 6 NYCRR 622.12(a), Department staff commenced this administrative enforcement proceeding by service of an August 7, 2009, motion for order without hearing in lieu of complaint. Upon the filing of the motion with the Department's Office of Hearings and Mediation Services (OHMS), the matter was assigned to the undersigned presiding Chief Administrative Law Judge (ALJ).

In its motion, which serves as the complaint in this matter, staff alleges that respondents Estate of Reah L. Ryan, Terry J. Ryan, Joyce Tolosky, Timothy J. Ryan, and Thomas J. Ryan (the Ryan respondents) maintain a camp known as the Ryan Camp on State lands located along the southeast shore of Chazy Lake in Lot 293 Hanna Murray Allotment, Township 5, Old Military Tract, Town of Dannemora, Clinton County. The camp allegedly consists of a two-story building with porches and a one-story addition, a shed, an outhouse, a septic system and cover,

propane tanks, a boat launch and dock, utility poles, and electric and telephone wires. Staff charges that since September 18, 2007, the Ryan respondents have maintained the Ryan Camp on State land without the Department's permission in violation of 6 NYCRR 190.8(w). Staff further charges that since July 1, 2009, the Ryan respondents have injured vegetative ground cover by mowing on State land in violation of 6 NYCRR 190.8(g).

With respect to respondent Sally Cummings Belden, staff alleges that she maintains a camp known as the Belden Camp also on Lot 293. The camp allegedly consists of a one and one-half story building with decks, an outhouse, a fire ring, and a utility pole with electric and telephone wires. Staff charges that since at least 1994, respondent Belden has maintained the Belden Camp on State land without the Department's permission in violation of section 190.8(w). Staff also alleges that since July 1, 2009, respondent Belden has injured vegetative ground cover by mowing on State land in violation of section 190.8(g).

With respect to respondents Verizon and NYSEG, Department staff alleges that since at least March 4, 1970, respondents have maintained utility poles with electric and telephone wires on State land without the Department's permission in violation of section 190.8(w). The poles and wires allegedly run to the Ryan and Belden Camps.

As to relief, Department staff seeks removal of the Ryan and Belden Camps, and the utility poles and electric and telephone lines running to the camps. Staff also seeks a Commissioner order directing Verizon and NYSEG to immediately cease services to the camps. Staff also requests assessment of a civil penalty in the amount of $100,000 against the Ryan respondents, $90,000 of which would be suspended provided they remove the Ryan Camp within 30 days of the Commissioner's order in this matter. Staff seeks a civil penalty in the amount of $5,000 against respondent Belden, $4,500 to be suspended provided the Belden Camp is removed within 30 days of the Commissioner's order in this matter.

NYSEG filed a September 22, 2009, response to Department staff's motion, which serves as NYSEG's answer in this proceeding. By motion papers dated September 25, 2009, the Ryan and Belden respondents moved to dismiss Department staff's motion for order without hearing for lack of subject matter

jurisdiction. Upon consent of staff, the response to Department staff's motion by the Ryan and Belden respondents and Verizon will not be due until 30 days after the motion to dismiss is decided.

Department staff filed a response dated October 13, 2009, to the motion to dismiss. I subsequently authorized the filing of reply and sur-reply papers. The Ryan and Belden respondents filed a reply memorandum of law dated November 3, 2009. Department staff filed a sur-reply dated November 18, 2009. No further submissions were authorized or received.

DISCUSSION

I. Subject Matter Jurisdiction

The Ryan and Belden respondents contend that through these administrative enforcement proceedings, Department staff seeks to determine title to lands it alleges are owned by the State, eject respondents from that property, fine them for their occupancy, and require them to remove or destroy the physical improvements on the property and restore the property to its "natural state" (Resps' Mem in Support of Mot to Dismiss [9-25-09], at 1). Respondents assert that nothing in the Environmental Conservation Law (ECL) authorizes the Department to use administrative proceedings to determine title to real property or bring an ejectment proceeding. Instead, respondents argue that the ECL gives the Department the authority only to refer the matter to the New York State Attorney General for prosecution of a trespass or ejectment action in State court pursuant to statutes such as Real Property Actions and Proceedings Law (RPAPL) article 15 (see ECL 71-0505). Accordingly, respondents move to dismiss the Department's administrative complaint for lack of subject matter jurisdiction.

Whether a judicial body has subject matter jurisdiction depends upon whether the tribunal has the power, conferred by law, to entertain the case before it (see Matter of Fry v Village of Tarrytown, 89 NY2d 714, 718 [1997]). In the administrative context, an administrative agency possesses all the powers expressly delegated to it by the Legislature, and those powers required by necessary implication (see Matter of Mercy Hosp. v New York State Dept. of Social Servs., 79 NY2d 197, 203-204 [1992]; Matter of Consolidated Edison Co. of New

York v Department of Envtl. Conservation, 71 NY2d 186, 191 [1988]; Matter of City of New York v State of New York Commn. on Cable Tel., 47 NY2d 89, 92 [1979]). "This is especially true where . . . the Legislature has delegated administrative duties in broad terms, leaving the agency to determine what specific standards and procedures are most suitable to accomplish the legislative goals" (Matter of Mercy Hosp., 79 NY2d at 203-204).

At the outset, it must be noted that the Department is not using these proceedings to administratively prosecute an action pursuant to RPAPL article 15, or any other article of the RPAPL for that matter, to determine a claim of title, nor does the Department seek to prosecute a common law trespass action. Instead, Department staff is seeking to enforce article 9 of the ECL. Specifically, Department staff is seeking to enforce the legislative restrictions on use of State land found in ECL 9-0303, which provides that "[n]o building shall be erected, used or maintained upon state lands except under permits from the department" (ECL 9-0303[2]), and which prohibits injury to trees, timber, and other vegetation on State land (see ECL 9-0303[1]). ECL 9-0303 further provides that "[t]he department may dispose of any improvements upon state lands under such conditions as it deems to be in the public interest" (ECL 9-0303[6]).

The Legislature has expressly granted the Department broad powers to protect State lands under its jurisdiction. Among the Department's general powers is the power to "[p]rovide for the care, custody, and control of the forest preserve" (ECL 3-0301[1][d]). The Department also has the power to administer and manage non-forest preserve lands under its jurisdiction "for purpose of preserving, protecting and enhancing the natural resource value for which the property was acquired or to which it is dedicated, employing all appropriate management activities" (ECL 3-0301[2][v]).[1] The Department is further authorized to "[a]dopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of" the ECL (ECL 3-0301[2][m]), and to adopt standards

[1] Department staff alleges that the lands involved in this proceeding are non-forest preserve State lands originally under the jurisdiction of the Department of Corrections (see Keating Affidavit [7-15-09], at 3). Staff further alleges that in 1966, pursuant to the authority granted to the Commissioner of General Services under Public Lands Law § 3(4), the Commissioner of General Services transferred jurisdiction of the lands from the Department of Corrections to the Department of Environmental Conservation for conservation purposes (see id. at 3-4).

and criteria to carry out the purposes and provisions of the ECL (see ECL 3-0301[2][a]).

With respect to ECL article 9 specifically, the Legislature expressly granted the Department the power, duty, and authority to "[e]xercise care, custody and control of the several preserves, parks and other state lands" described in article 9 (ECL 09-0105[1]) and to "[m]ake necessary rules and regulations to secure proper enforcement of the provisions" of article 9 (ECL 09-0105[3]). The Department is further authorized to

> "[b]ring any action or proceeding for the following purposes:
> a. to enforce the state's rights or interests in real property which an owner of land would be authorized to bring in like cases;
> b. to insure the enforcement of the provisions of this article;
> c. to determine in trespass, ejectment or other suitable actions, the title to any land claimed adversely to the state;
> d. to cancel tax sales or to set aside cancellations of tax sales"

(ECL 9-0105[9]; see also ECL 71-0505).

The Department's regulations alleged to have been violated in this proceeding prohibit the maintenance of unpermitted structures or other properties on State lands (see 6 NYCRR 190.8[w]), and the destruction or injury to plants and other vegetation growing on State lands (see 6 NYCRR 190.8[g]). The Department's authority to promulgate these regulations and the substance of their provisions fall squarely within the exercise of the Department's broad power to preserve and protect the forest preserve and other State lands under its jurisdiction, to enforce the provisions of ECL article 9, including ECL 9-0303(1) and (2), and to adopt rules and regulations to further those purposes.

The issue raised by respondents is whether the Department has the authority to enforce these duly promulgated and authorized regulatory provisions through administrative enforcement proceedings. An examination of the authorizing

statutes reveals express legislative authority to conduct administrative hearings in this context. To assist the Department in carrying out the environmental policies of the State, as set forth in ECL 1-0101, the Legislature expressly authorized the Department to hold administrative hearings, and provided the Department with the power to compel the testimony of witnesses and issue subpoenas in furtherance of that authority (see ECL 3-0301[2][h]).

In addition to the general grant to the Department of the authority to conduct administrative hearings, the Legislature expressly authorized the Department to conduct hearings for the enforcement of the ECL. ECL 71-4003 expressly provides that "[a]ny civil penalty provided for by this chapter [the ECL] may be assessed following a hearing or opportunity to be heard." This statutory provision was specifically enacted by the Legislature in 1982 to clarify that the Department had the power to conduct administrative hearings to impose any penalty provided for in the ECL (see Letter from Senator Dunne, May 4, 1982, Bill Jacket, L 1982, ch 76). Accordingly, the Department has the express statutory authority to conduct administrative hearings to assess the civil penalties authorized for the violations of ECL article 9 (see ECL 71-0703; Matter of Wilson, Order of the Commissioner, Dec. 18, 2008).

In addition to the express authority to conduct administrative hearings to enforce the provisions of ECL article 9, the Department is also expressly authorized to designate a hearing officer, to administer oaths, to require the attendance of witnesses, and to issue subpoenas in those hearings (see ECL 71-0503). Taken all together, these statutory provisions granting the Department broad statutory powers to protect and preserve State lands, to enforce the provisions of ECL article 9, and to conduct administrative hearings reveal clear Legislative intent to authorize the Department to use administrative proceedings to determine violations of ECL article 9 and impose civil penalties and remedial relief through those proceedings (see Matter of Grossman v Hilleboe, 16 AD2d 893, 893-894 [1st Dept 1962]; Portville Forest Prods., Inc. v Commissioner of New York State Dept. of Envtl. Conservation, 117 Misc 2d 770, 772 [Sup Ct, Livingston County 1982]).

Respondents assert that the Department lacks the authority to administratively resolve title disputes. However, the Legislature determined to prohibit unpermitted structures on

State land and, thereby, made State ownership an element of the violation. Having so defined the violation, and having vested within the Department the authority to conduct administrative hearings to adjudicate violations of the ECL and to impose penalties for those violations, the Legislature clearly intended to grant the Department the power to inquire into and factually determine whether the alleged violation involved State land (see Matter of Johnson Orchards & Farms, Inc., 70 Misc 2d 647, 648-649 [Sup Ct, Albany County 1972]). The Legislature could not have intended to require the Department to commence judicial proceedings whenever a title or ownership dispute was raised as a defense in an administrative enforcement proceeding authorized by the ECL. To conclude otherwise would effectively prevent the agency from administratively enforcing ECL article 9, notwithstanding the express Legislative authorization to do so.

Moreover, the Department's adjudicatory proceedings provide a forum virtually identical to a civil judicial proceeding and, thus, provide a competent forum in which to resolve challenges to State ownership. Administrative enforcement proceedings are governed by the Department's Uniform Enforcement Hearing Procedures (see 6 NYCRR part 622 [Part 622]). Under Part 622, parties are afforded the full panoply of rights required by due process and the State Administrative Procedure Act (SAPA) to ensure a fair and impartial hearing on a record (see SAPA art 3). These rights include the right to notice of the violations, the right to a hearing on a record before an impartial hearing officer, the right to present witnesses and testimony, and the right to cross examination, among other rights. These rights are virtually identical to the rights a disputant would be afforded in a civil judicial forum, and allow for the full development of the evidentiary record on any fact issue. Thus, the Department's administrative adjudicatory process provides a competent forum for the resolution of factual disputes, including ownership disputes, arising under the ECL and its implementing regulations.

Citing Civil Practice Law and Rules (CPLR) § 103 (form of civil judicial proceedings), respondents argue that the reference in ECL 9-0105(9) to "any action or proceeding" can only mean an action or proceeding brought in a civil judicial forum by the Attorney General (see also ECL 71-0505[2]). However, ECL 9-0105(9) does not limit actions or proceedings only to civil judicial proceedings (see CPLR 105[d] [defining civil judicial proceeding]). Moreover, the CPLR does not apply

to administrative proceedings (see CPLR 101; Matter of United States Power Squadrons v State Human Rights Appeal Bd., 84 AD2d 318, 325 [2d Dept 1981], affd 59 NY2d 401 [1983]). Although some sections of the CPLR have been incorporated by reference in Part 622, and the Commissioner has drawn on standards and procedures from the CPLR to fill gaps in Part 622, the definition of civil judicial proceeding found in CPLR 105 has not been adopted by the ECL, Part 622, or administrative decisional law. Accordingly, the reference to "any action or proceeding" in ECL 9-0105(9) should not be read as limited to only civil judicial proceedings defined by the CPLR, particularly where the Legislature has expressly granted the Department the authority to conduct administrative adjudicatory proceedings under the ECL (see ECL 3-0301[2][h]; ECL 71-4003).

Nor do the penalty provisions for ECL article 9 compel a contrary conclusion. ECL 71-0703(1) authorizes both criminal fines and civil penalties for any violation of article 9 or the rules and regulations promulgated pursuant to article 9. As noted above, ECL 71-4003 expressly authorizes the Department to impose any civil penalty provided for in the ECL through an administrative hearing. Contrary to respondents' assertion, ECL 71-0703 does not provide only for criminal sanctions that can only be imposed in criminal judicial proceedings.

In support of their argument that the Department is limited to an ejectment action in civil court, respondents rely on a 1998 letter from Regional Attorney Christopher Lacombe. In that letter, the Regional Attorney indicated that he had recommended to the Department's General Counsel that the Belden matter be referred to the Attorney General for commencement of an ejectment action (see Lacombe Letter [7-3-98], Brickwedde Affirmation, Exh A). However, the fact that the Regional Attorney recommended initiation of an ejectment action does not mean that other actions or proceedings, both judicial and administrative, are unavailable to the Department. Moreover, the Regional Attorney's 1998 recommendation does not estop the Department from pursuing any action or proceeding available to it, including this administrative enforcement proceeding (see Matter of Wedinger v Goldberger, 71 NY2d 428, 440-441 [1988]; Matter of Parkview Assocs. v City of New York, 71 NY2d 274, 282 [1988]).

Finally, respondents' argument may be read as suggesting that because common law ejectment or trespass actions

may be available to the Department, offenses under ECL article 9 may not be separately prosecuted. However, the circumstance that a proceeding under ECL article 9 and its regulations might resemble trespass or ejectment actions, and might result in relief to the Department similar to that obtainable in those actions, does not mean that offenses under ECL article 9 may not be separately enforced, or that administrative proceedings are unavailable to the Department for the enforcement of those violations. The Legislature is free, within constitutional limits, to define civil violations and sanctions, even where the same conduct might result in liability under multiple theories (see Matter of Barnes v Tofany, 27 NY2d 74, 78 [1970]). Accordingly, the Legislature was free to authorize a statutory offense under ECL article 9 separate from the common law claims, and to authorize separate punishment for the violations of those offenses. Thus, notwithstanding the availability of trespass and ejectment actions to the Department, it was within the Legislature's power to provide the Department the additional option of separately prosecuting violations of ECL article 9.

Moreover, the Legislature was free to provide a civil administrative forum for the prosecution of ECL article 9 violations (see Barnes, 27 NY2d at 78). Thus, the Department may use its legislatively authorized administrative proceedings to enforce article 9 violations, notwithstanding the availability of civil and criminal judicial forums.

In sum, the Legislature expressly authorized the Department to enforce the provisions of ECL article 9, to conduct administrative hearings to hear and determine violations of the ECL, and to impose civil penalties and other sanctions through those proceedings. Accordingly, OHMS has the authority, conferred by law, to entertain this proceeding and resolve the legal and factual issues raised in this proceeding. Thus, respondents' motion to dismiss for lack of subject matter jurisdiction should be denied.

II. Failure to Describe Belden Property

Respondents argue two additional grounds for dismissing the Department's complaint. First, respondents argue that by failing to provide a metes and bounds description of the Belden property, staff has failed to sufficiently describe the property subject to this administrative proceeding making "the present administrative proceeding inappropriate for summary

motion without hearing" (Resps' Mem of Law in Support of Mot to Dismiss, at 5).

A pre-answer motion to dismiss is addressed to the sufficiency of the pleadings where, as here, the motion is unaccompanied by evidentiary material (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Thus, the issue is whether staff's complaint states a claim against respondent Belden (see CPLR 3211[a][7]). To determine whether a complaint states a claim, the facts alleged in the complaint are accepted as true, the proponent of the complaint is given the benefit of every possible favorable inference, and the complaint is examined to determine whether the facts as alleged fall within any cognizable legal theory (see Leon v Martinez, 84 NY2d at 87-88). In addition, affidavits submitted in support of a complaint may be considered to preserve inartfully pleaded, but potentially meritorious claims (see Rovello v Orofino Realty Co., 40 NY2d 633, 635-636 [1976]).

In this case, Department staff alleges in its motion, which constitutes the complaint in this matter, that respondent Belden maintains a camp consisting of a one and one-half story building with decks, an outhouse, a fire ring, and a utility pole with electric and telephone wires running to the building, and that the camp is located on a portion of a lot located on the southeast shore of Chazy Lake that is owned by the State (see, e.g., Mot for Order Without Hearing, at 2). In addition, staff alleges that respondent Belden lacks the Department's permission to maintain the camp on State land. Accepting these facts as true, Department staff has stated a claim for the violation of 6 NYCRR 190.8(w).

Department staff also alleges that respondent Belden has injured vegetative ground cover around the camp by mowing, and has done so without the Department's permission. Accepting these facts as true, Department staff has also stated a claim for the violation of 6 NYCRR 190.8(g).

Even assuming that the facts as alleged in the complaint are insufficient to state the asserted claims, which they are not, Department staff has also provided an affidavit and other documentary evidence supporting the complaint that demonstrate that it potentially has meritorious claims against respondent Belden. This evidence includes the affidavit of Floyd Lampart and accompanying exhibits that document the

location of Lot 293 and the location of the Belden Camp on that lot. Staff also submitted documentary evidence in support of its allegation that Lot 293 is owned by the State. Thus, staff's complaint and accompanying affidavits sufficiently describe the location of State land and the location of the Belden Camp on that land, even without the submission of a metes and bounds description of the Belden Camp. Accordingly, respondents' motion to dismiss the charges against respondent Belden for failure to state a claim should be denied.

III. Failure to Define "Natural State"

As an additional ground for dismissal, respondents argue that Department staff seeks a summary order requiring that the property allegedly owned by the State be returned to its "natural state." Respondents assert, however, that the term "natural state" is not defined by Department staff and, therefore, a summary order may not be issued.

Respondents appear to be challenging the relief sought by the Department in this case. However, respondents do not identify where in the pleadings staff is seeking return of the State lands to their "natural state." Examining the relief sought by the Department, staff seeks only the removal of the Ryan and Belden Camps (see Mot for Order Without Hearing, at 3). Without deciding whether the relief sought is warranted in this case, an order directing the removal of unpermitted structures on State land falls within the Department's authority to dispose of improvements on State lands (see ECL 9-0303[6]; Matter of Bartell, Order of the Commissioner, Oct. 14, 2010, at 4; Matter of Wilson, Order of the Commissioner, Dec. 18, 2008, at 3; Matter of French, Decision and Order of the Commissioner, July 20, 2007, at 22-23). Accordingly, the relief sought by Department staff is sufficiently cognizable to survive respondents' motion to dismiss.

RULING

The Ryan and Belden respondents' motion to dismiss Department staff's motion for order without hearing in lieu of complaint for lack of subject matter jurisdiction is denied in its entirety.

The Ryan respondents, respondent Belden, and respondent Verizon have thirty (30) days from the date of this ruling to file a response to Department staff motion.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: October 15, 2010
Albany, New York