

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC Case No.
R5-20121206-2042

-by-

MARK A. DEMEO,

Respondent.

This administrative enforcement proceeding concerns alleged violations by respondent Mark A. DeMeo (respondent) of Environmental Conservation Law (ECL) article 9 and 6 NYCRR part 190. Specifically, staff of the New York State Department of Environmental Conservation (Department or DEC) alleges that respondent has encroached upon State forest preserve lands adjacent to his store, the Campers Last Stop, which is located at 324 Houseman Street, Town of Northampton, Fulton County (DeMeo property).

The matter was originally assigned to Administrative Law Judge (ALJ) Edward Buhrmaster. The ALJ conducted a hearing in accordance with the Department's enforcement hearing procedures (6 NYCRR part 622) and prepared a hearing report dated June 10, 2015 (2015 Hearing Report). By order dated August 15, 2016 (2016 Order), I adjudged respondent to have violated ECL 9-0303(2) and 6 NYCRR 190.8(w) by his use and maintenance of the portion of the Campers Last Stop store that is situated on State land. A civil penalty in the amount of \$100 was assessed against respondent (see 2016 Order at 3, 5). However, I concluded that the record needed to be supplemented in order to formulate the appropriate remedial relief, and I remanded the matter for further consideration (see id. at 4-5).

Due to the retirement of ALJ Buhrmaster, the remand was reassigned to ALJ Richard Sherman. ALJ Sherman, in accordance with the 2016 Order, convened a hearing on February 16, 2017, to further develop the record with respect to remedial relief. As set forth in the 2016 Order, I directed the parties to address the following issues:

- the expected duration of future use of the Campers Last Stop store and its estimated structural life;
- the existence of any other structures and infrastructure on respondent's property that are also encroachments on State lands;
- the date when any such other structures or infrastructure were constructed or placed on State lands;
- the party responsible for creating those encroachments; and

- options for addressing the encroachments (see 2016 Order at 4-5).¹

ALJ Sherman prepared the attached supplemental hearing report in which he recommends that respondent be given five years to remove that part of the Campers Last Stop store that encroaches on State land (see Supplemental Hearing Report at 12). As for other encroachments upon State land, the ALJ recommends their removal within ninety (90) days (see id. at 12). I adopt in part the ALJ's supplemental hearing report as my decision in this matter subject to my comments in this order. Notably, with respect to the Campers Last Stop store, I do not adopt the ALJ's recommendation but am allowing for the store's continued operation subject to the specific conditions contained in this order. As for the additional encroachments, this order modifies the time period for their removal to one hundred twenty (120) days from the service of this order upon respondent.

DISCUSSION

Campers Last Stop Store

The Campers Last Stop store (a seasonal business that respondent operates [business]) is located outside the entrance booth of the Northampton Beach public campground and day use area that is operated by the Department.² The supplemental hearing report indicates that respondent has no plans to retire or otherwise cease operation of the Campers Last Stop store (see Supplemental Hearing Report at 2 [Finding of Fact No. 24]). Accordingly, the length of time respondent intends to operate the business is indeterminate.

Based on evidence presented at the remand hearing, ALJ Sherman concluded, and all parties are in agreement, that the Campers Last Stop store was in place at the time respondent purchased the DeMeo property in 1996 (see 2015 Hearing Report at 5 [Campers Last Stop store was built in the 1940s or 1950s "long before [Mr. DeMeo] bought the property"], 7 [Finding of Fact No. 7]).

An old fence line that runs behind the Campers Last Stop store was thought to be the boundary line between the DeMeo property and State forest preserve land such that there was no encroachment on State land. In July 2000, a DEC team began a survey of the DEC campground "as a basis for ensuring the correct location of a new boundary fence that would replace [the] existing fence erected by the State" (2015 Hearing Report at 6 [Finding of Fact No. 8]). The survey, which was completed in 2002, revealed that the fence line on the west side of Houseman Street did not represent the boundary between State land and the DeMeo property, but that the boundary line actually ran through a portion of the Campers Last Stop store and a covered patio

¹ Additionally, I requested further information relating to the contacts, if any, between the parties from the date of respondent's November 6, 2003 letter to Department staff (in which respondent stated that he had engaged a surveyor) and the commencement of this proceeding in January 2014 (see 2016 Order at 4, n 3). Department staff counsel subsequently provided an affirmation stating that "staff and respondent did not correspond with respect to this matter in writing until February 22, 2013" (Hearing Exhibit 59 [Affirmation of Scott Abrahamson dated February 6, 2017 at 2, ¶ 11]).

² See 2015 Hearing Report at 6 (Finding of Fact No. 6).

attached to the store's north end (see 2015 Hearing Report at 7 [Finding of Fact Nos. 11 and 12]; see also id. at 10-15, 19-23, Hearing Exhibit 4 [DEC survey map³]).

Additional Encroachments

The following six additional structures on the DeMeo property have also been identified as encroaching on State land:

- three electrical outlets on wood posts;
- a 3" diameter PVC cleanout pipe;
- a section of wood fence (approximately 8' long);
- the southwest corner of the 28' by 42' storage building (encroaching 1' onto State land);
- a concrete block fireplace; and
- a portion of a partially enclosed shed (encroaching 6.7' onto State land) (collectively, additional encroachments).

See 2017 Supplemental Hearing Report at 4-5. Based on the testimony of Department staff and the exhibits presented at the remand hearing, ALJ Sherman concluded that Department staff established that respondent is responsible for all the additional encroachments (see Supplemental Hearing Report at 6 [Finding of Fact No. 26]).

With regards to the 28' by 42' storage building and the partially enclosed shed, Department staff established that the additional encroachments associated with these structures post-date the field work undertaken for the 2002 survey (see Supplemental Hearing Report at 6). Respondent testified at the remand hearing that, although he did not originally construct the 28' x 42' shed, he had "done things to that building" (Hearing Transcript [tr] at 607; see also Supplemental Hearing Report at 6).

As to the other structures identified by Department staff (the three electrical outlets on wood posts, the 3" diameter PVC cleanout pipe, the section of wood fence, and the concrete block fireplace), evidence at the remand hearing indicates that all these encroachments were in place at the time respondent purchased the property (see Supplemental Hearing Report at 5-6).⁴

³ Map of Lot 9 Haring Patent and Lot 27 Northampton Patent made by Scott C. Orr, Licensed Surveyor which map is on file with the New York State Department of Environmental Conservation as Map No. 11,709.

⁴ Department staff indicated that these additional items would not have been identified on the 2002 survey because the survey only identifies structures that are permanent in nature (see Supplemental Hearing Report at 5). Accordingly, the 2002 survey does not depict electrical posts, propane tanks, fire pits or other similar structures (id.).

Options for Addressing the Encroachments

In the 2016 Order, I directed that the parties evaluate options for addressing the encroachments. These options, which were addressed in the supplemental hearing, are further reviewed below.⁵

--Lease, Sale, or Exchange of State Land/Boundary Line Agreement

It is well settled that the New York State Constitution prohibits the lease, sale, or exchange or taking of any portion of the forest preserve (see NY Const, art XIV, § 1). Here, the land on which the encroachments are present is part of the forest preserve. Accordingly, I agree with ALJ Sherman that the Department does not have the authority to sell, lease, or exchange the State land at issue to respondent, absent a constitutional amendment. Furthermore, in light of the foregoing and the State's 2002 survey, no boundary line agreement would be appropriate or available as an option.⁶

--Temporary Revocable Permit (TRP)

Consideration has been given as to whether a temporary revocable permit (TRP) would be appropriate in the circumstances here. The Department issues TRPs “in its sole discretion for the temporary use of State lands . . . only for activities that are in compliance with all constitutional and statutory, and regulatory requirements” (DEC Program Policy, ONR-3 [revised May 26, 2011] at II). Respondent's activity is not in compliance, and the Department cannot issue a TRP in the circumstances of this matter. To the extent that the supplemental hearing report may suggest otherwise, the supplemental hearing report is not adopted.

--Removal

Based on this record, removal is an appropriate consideration with respect to the encroachments on State land and was addressed in the supplemental hearing report (see Supplemental Hearing Report, at 10-11, 12). The factors for consideration in any removal, either of the Campers Last Stop store or the additional encroachments reviewed in the supplemental hearing, vary and are addressed below.

--Camper's Last Stop Store

With respect to the store, I have taken into account the unique circumstances of this matter. Respondent did not construct the store – in fact, the store was constructed and operated

⁵ In the supplemental hearing report, ALJ Sherman discusses two additional options for addressing the encroachments at issue – (a) prosecutorial discretion and (b) an order on consent (see Supplemental Hearing Report at 7, 9). Here, Department staff made the determination to prosecute this matter and the issue of prosecutorial discretion is moot. Although Department staff has the authority to resolve violations by consent order, the record in this matter indicates that Department staff and respondent were unable to so resolve the violations (id.).

⁶ At the 2015 hearing, respondent proffered the testimony of a licensed land surveyor who testified that the old fence line was the boundary line between State land and the DeMeo property. Respondent did not prevail on that point (see 2016 Order at 3; see also Supplemental Hearing Report at 10). Accordingly, ECL 9-0105(13) would not apply.

years before respondent purchased the property. The longstanding perception that a certain fence line represented the boundary between the DeMeo property and State land was not corrected until the aforementioned 2002 DEC survey which revealed that a portion of the Campers Last Stop store encroached on State land.

Directing the immediate removal of the encroaching portion of the store would impair the viability of this seasonal business and have a significant financial impact. As noted in the Supplemental Hearing Report, respondent testified that removing the encroaching portion and remodeling the portion of the store that does not encroach on State land would cost approximately \$68,000 (see Supplemental Hearing Report at 10; tr at 627-28). Under this option, respondent would lose eight feet of the existing structure and would be “left with the store that’s really not usable” (tr at 705). The second option relocating the store into the 28' by 42' storage building, removing the portion of the existing store's structure that encroaches on State land, and remodeling the portion of the existing store that does not encroach on State land, would cost \$84,900 (Supplemental Hearing Report at 10; see also tr at 628, 705).⁷

In consideration of these factors, respondent may continue to use the store for the current seasonal business, provided that if respondent conveys, sells, leases, gifts, devises, bequests, exchanges or otherwise transfers the real property, the store, the business or any other interest whatsoever in the real property, store or business to any individual or any entity, respondent or his designee must notify the Department and immediately modify the Campers Last Stop store to eliminate any encroachments on State land prior to the conveyance, sale, lease, gifting, devise, bequest, exchange or other transfer of the real property, the store, the business or any other interest whatsoever.

Furthermore, if respondent at any time (1) discontinues his operation of the business; (2) undertakes any modification to the store or modifies or constructs any other structure that results in a further encroachment on State land; or (3) fails to comply with any of the terms and conditions of this order (including but not limited to the removal of the additional encroachments), respondent must then modify the Campers Last Stop store to remove all encroachments on State land. In the event of damage to any portion of the Campers Last Stop store that is currently located on State land, respondent shall replace that portion of the store on land owned by respondent.

Also, respondent Mark A. DeMeo is hereby directed to record an amended deed with the County Clerk of Fulton County (County Clerk) stating that (a) a portion of the improvements on the real property owned by respondent and described therein encroaches on State forest preserve land in violation of ECL article 9 (encroaching portion), and (b) by order of the Commissioner of Environmental Conservation, the encroaching portion must be removed prior to the transfer of the real property described therein, the store, the business or any other interest whatsoever in the real property, the store or the business to any individual or any entity, whether by conveyance, sale, lease, gift, devise, bequest, exchange or other transfer.

⁷ Cost estimates were provided by Middle Grove Property Maintenance with respect to the renovation of the Campers Last Stop store and to the turning of the outbuilding into a store (see Hearing Exhibit 61 [renovation of camp store -- \$68,000]; Hearing Exhibit 62 [turning outbuilding into a camp store]).

Such amended deed is to be recorded with the County Clerk within ninety (90) days of the service of this order upon respondent. Respondent is also directed to include this order and Hearing Exhibit 4 (DEC Map No. 11,709 dated April 17, 2002, which is also attached to this order) as attachments to the amended deed. At least forty-five (45) days prior to the recording of the amended deed, respondent shall provide a copy of the proposed amended deed to Department staff for staff's review and approval. Department staff shall notify respondent of any revisions that respondent needs to make to the amended deed prior to its recording in the Office of the County Clerk. Respondent shall, within fourteen (14) days following the recording of the amended deed with the County Clerk, submit written proof of the amended deed's recording to Department staff.

Respondent shall include language in the amended deed that acknowledges the restrictions being imposed by this order. Upon the recording of the amended deed with this order and Hearing Exhibit 4 as attachments, this restrictive covenant shall run with the land, to the benefit of the State as the appurtenant landowner.

--Additional Encroachments

Based on the record developed at the 2015 hearing and the remand hearing, I agree with ALJ Sherman that immediate removal of the additional encroachments on State land is warranted and appropriate. As noted, these additional encroachments include:

- three electrical outlets on wood posts;
- a 3" diameter PVC cleanout pipe;
- a section of wood fence (approximately 8' long);
- the southwest corner of the 28' by 42' storage building (encroaching 1' onto State land);
- a concrete block fireplace; and
- a portion of a partially enclosed shed (encroaching 6.7' onto State land).

Respondent shall submit an approvable⁸ removal plan for these additional encroachments to Department staff within thirty (30) days of the service of this order upon him. The removal must be accomplished in a manner that restores the State land to a natural, undisturbed condition. As requested by Department staff in its complaint, this should include filling holes and other areas of excavation, grading to create a uniform and smooth soil surface, applying an adequate layer of topsoil, seeding with appropriate seed mix, and other appropriate restorative remediation measures. A timetable for completing the removal of the additional encroachments, together with the remediation proposed, is to be detailed in the removal plan. The removal plan must provide for the removal of the additional encroachments and completion of remedial activities no later than one hundred twenty (120) days after the service of this order upon respondent. Within thirty (30) days of the completion of the removal of the additional encroachments and the remediation, respondent shall furnish a report to Department staff documenting the work that has been accomplished together with photographs of the areas addressed.

⁸ "Approvable" is that which can be approved by the Department with only minimal revision.

If respondent (i) fails to timely submit, in approvable form, a removal plan for the additional encroachments to the Department; (ii) fails to implement the approved removal plan in accordance with the timeframes and activities set forth therein, or (iii) fails to comply with any term or condition of this order, Department staff may exercise the Department's authority under ECL 9-0303(6) to remove or otherwise dispose of the additional encroachments under such conditions as Department staff deems to be in the public interest. In the event that the Department conducts removal of the additional encroachments and associated remediation, respondent shall reimburse the Department for all costs incurred within thirty (30) days of receipt of a demand from Department staff.

I encourage respondent to consult with Department staff in the preparation of the removal plan to ensure its compliance with this order and the applicable environmental requirements. Department staff may, at its discretion, modify timeframes relating to the removal plan on good cause shown (which must be provided in writing) by respondent.

DEC staff shall have the right, subject to the rules and guidances of the Department, to inspect the DeMeo property to ensure compliance with this order, including but not limited to, (a) the status of the encroachment relating to the Campers Last Stop store, and (b) the removal of the additional encroachments.

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

- I. Respondent Mark A. DeMeo is hereby adjudged to have violated ECL 9-0303(2) and 6 NYCRR 190.8(w) by using and maintaining the following additional encroachments on State forest preserve land:
 - A. three electrical outlets on wood posts;
 - B. a 3" diameter PVC cleanout pipe;
 - C. a section of wood fence (approximately 8' long);
 - D. the southwest corner of a 28' by 42' storage building (encroaching 1' onto State land);
 - E. a concrete block fireplace; and
 - F. a portion of a partially enclosed shed (encroaching 6.7' onto State land).⁹

- II. Respondent Mark A. DeMeo may continue to use the Campers Last Stop store provided that if respondent conveys, sells, leases, gifts, devises, bequests, exchanges, or otherwise transfers the real property, the store, the business or any other interest whatsoever to any individual or any entity, respondent or his designee must notify the Department and immediately modify the Campers Last Stop store prior to the conveyance, sale, lease, gifting, devise, bequest, exchange, or other transfer of the real property, the store, the business or any interest therein to eliminate any encroachments on State land. If respondent (i) discontinues his

⁹ As noted on page 1 of this order, the 2016 Order held that respondent Mark A. DeMeo's use and maintenance of the Campers Last Stop store which in part encroached on State land violates ECL 9-0303(2) and 6 NYCRR 190.8(w).

operation of the business, (ii) undertakes any modification to the store or modifies or constructs any other structure that results in a further encroachment on State land, or (iii) fails to comply with any of the terms and conditions of this order (including but not limited to the removal of the additional encroachments), respondent must then modify the Campers Last Stop store to remove all encroachments on State land.

In the event of damage to any portion of the Campers Last Stop store, currently located on State land, respondent shall replace that portion of the store on land currently owned by respondent.

- III. Respondent Mark A. DeMeo is hereby directed to submit a plan for removing the additional encroachments (removal plan) to Department staff for its review and approval within thirty (30) days of the service of this order upon him. The removal plan shall provide for the removal of the additional encroachments and completion of remedial activities no later than one hundred twenty (120) days from the service of this order upon him. The additional encroachments include:
- A. three electrical outlets on wood posts;
 - B. a 3" diameter PVC cleanout pipe;
 - C. a section of wood fence (approximately 8' long);
 - D. the southwest corner of a 28' by 42' storage building (encroaching 1' onto State land);
 - E. a concrete block fireplace; and
 - F. a portion of a partially enclosed shed (encroaching 6.7' onto State land) (collectively, additional encroachments).

The removal plan must address the procedures for the removal of the additional encroachments, and timeframes for completion of the removal and remediation activities. The removal of the additional encroachments must be accomplished in a manner that restores the real property to a natural, undisturbed condition including filling holes and other areas of excavation, grading to create a uniform and smooth soil surface, applying an adequate layer of topsoil, seeding with appropriate seed mix, and other appropriate restorative remediation measures. Within thirty (30) days of the completion of the removal of the additional encroachments and the remediation, respondent shall furnish a report to Department staff documenting the work that has been accomplished together with photographs of the areas addressed.

Department staff may, at its discretion, modify timeframes relating to the removal plan on good cause shown (which must be provided in writing) by respondent.

- IV. If respondent Mark A. DeMeo (i) fails to timely submit a removal plan to the Department in approvable form (that is, in a form that can be approved or approved with only minor revision) for the additional encroachments; (ii) fails to implement the approved removal plan in accordance with the timeframes and

activities set forth in the plan, or (iii) fails to comply with any term or condition of this order, Department staff may exercise the Department's authority under ECL 9-0303(6) to remove or otherwise dispose of the additional encroachments under such conditions as the Department deems to be in the public interest. In the event that the Department conducts such removal and associated remediation, respondent shall reimburse the Department for all costs and expenses that the Department incurred within thirty (30) days of receipt of a demand from Department staff.

- V. With respect to the Campers Last Stop store, respondent Mark A. DeMeo shall record an amended deed with the County Clerk of Fulton County (County Clerk) that states that a portion of the improvements which include the Campers Last Stop store are located on the real property described in the amended deed and encroach on State forest preserve land in violation of ECL article 9 (encroaching portion), and that by order of the Commissioner of Environmental Conservation, the encroaching portion is to be removed prior to the transfer of the real property described therein, the store, the business or any other interest whatsoever therein, whether by conveyance, sale, lease, gift, devise, bequest, exchange or other transfer. Respondent must attach this order of the Commissioner and Hearing Exhibit 4 (DEC Map No. 11,709 dated April 17, 2002 which is attached hereto) in recordable form to the amended deed. Such amended deed is to be recorded with the County Clerk within ninety (90) days of the service of this order upon respondent. The amended deed shall include language that respondent acknowledges the restrictions imposed by this order and that the restrictive covenant shall run with the land.

At least forty-five (45) days prior to the recording of the amended deed, respondent shall provide a copy of the proposed amended deed to Department staff for staff's review and approval. Department staff shall notify respondent of any revisions that respondent needs to make to the amended deed prior to its recording in the Office of the County Clerk. Respondent shall, within fourteen (14) days following the recording of the amended deed, submit to Department staff written proof of the recording of the amended deed with the Office of the County Clerk of Fulton County.

- VI. All questions and correspondence regarding this order shall be addressed to Scott Abrahamson, Esq. at the following address:

Scott Abrahamson, Esq.
NYS Department of Environmental Conservation, Region 5
1115 NYS Route 86
P.O. Box 296
Ray Brook, New York 12977-0296

- VII. The provisions, terms, and conditions of this order shall bind respondent Mark A. DeMeo and his agents, successors and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

_____/s/_____
Basil Seggos
Commissioner

Dated: May 21, 2019
Albany, New York

I hereby certify that:

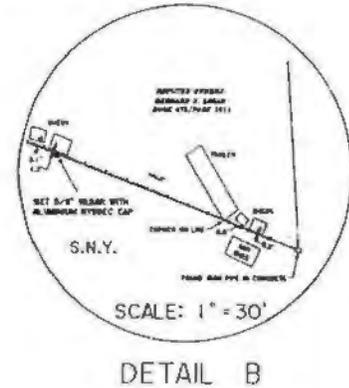
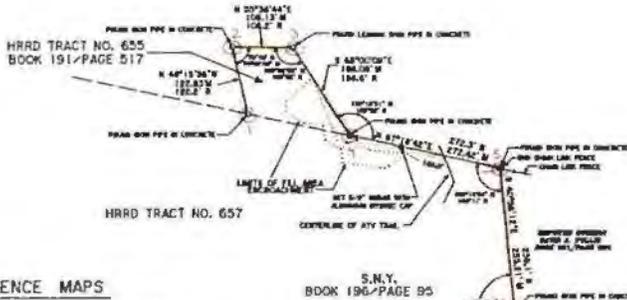
- 1) The foregoing survey map is a true and complete copy of the original instrument on file in this office and its installation in the ordinary course of business to the New York State Department of Environmental Conservation, Bureau of Real Property;
- 2) It is in the ordinary course of business of the Bureau of Real Property to install survey maps;
- 3) I am the Superintendent of the Real Property Bureau and the custodian of this map;
- 4) The foregoing is an official record of the State of New York, Department of Environmental Conservation.

Robert A. Taylor

REGISTERED SURVEYOR
LICENSED SURVEYOR NO. 100
DATE 07/20/02



11709

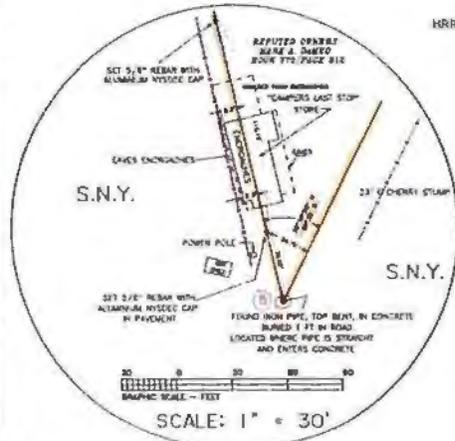


REFERENCE MAPS

- 1) MAP ENTITLED "SURVEY OF LANDS TO BE ACCORDED UNDER THE PARK & RECREATION LAND ACQUISITION BOARD ACT" FULTON ST. PRODUCA, CAPITALS S. ACCORDING TO A SURVEY MADE BY ALLEN E. HADEN, DATED AUGUST 1, 1963. FILED IN THE SURVEY OFFICE IN ALBANY AS MAP N 8454.
- 2) HUDSON RIVER REGULATING DISTRICT, MAP ENTITLED "SACANDAGA RESERVOIR - SOUTH SIDE MAP SHEET NUMBER 24. FILE 8111-4.
- 3) HUDSON RIVER REGULATING DISTRICT, MAP ENTITLED "SACANDAGA RESERVOIR, SECTION OF TRACT NO. 475."
- 4) HUDSON RIVER REGULATING DISTRICT, MAP ENTITLED "SACANDAGA RESERVOIR, SECTION OF TRACT NO. 608."
- 5) HUDSON RIVER REGULATING DISTRICT, MAP ENTITLED "SACANDAGA RESERVOIR, SECTION OF TRACT NO. 607."
- 6) MAP ENTITLED "SURVEY MAP OF LANDS TO BE CONVEYED TO NORTHAMPTON BEACH & MARINE, INC. TOWN OF NORTHAMPTON, FULTON COUNTY, NEW YORK." ACCORDING TO A SURVEY MADE BY JOHN FERGUSON P.L.S. 49086. DATED JUNE 14, 1930.
- 7) MAP ENTITLED "SURVEY OF LANDS OF JOHN L. BIZZARD & ANTHONY S. ABATE, TOWN OF NORTHAMPTON, FULTON COUNTY, NEW YORK." ACCORDING TO A SURVEY MADE BY JOHN FERGUSON P.L.S. 49086. DATED OCT 2, 1937.

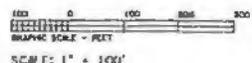
REFERENCE FIELDBOOKS

- 1) HUDSON RIVER REGULATING DISTRICT, FIELDBOOK No. 24, PAGES 88-90 AND PAGES 92-94.
- 2) HUDSON RIVER REGULATING DISTRICT, FIELDBOOK No. 24, PAGES 32-35.



LEGEND

- SET 5/8" NEARBY ALUMINUM STYRENE CAP ON BOUNDARY LINE UNLESS NOTED OTHERWISE.
- Y— FENCE LINE
- M MEASURED
- R RECORD
- HRRD HUDSON RIVER REGULATING DISTRICT



STATE OF NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION
BUREAU OF REAL PROPERTY

MAP SHOWING A PORTION OF LANDS OF THE STATE OF NEW YORK, SITUATE IN
LOT 9 HARING PATENT
8
LOT 27 NORTHAMPTON PATENT

NORTHAMPTON BEACH CAMPSIDING
TOWN OF NORTHAMPTON
FULTON COUNTY
STATE OF NEW YORK

1. THESE MAPS ARE AN UNQUALIFIED SURVEY AND SHOULD NOT BE USED FOR ANY PURPOSE OTHER THAN THAT FOR WHICH THEY WERE PREPARED WITHOUT THE NECESSARY AND APPROPRIATE CONSENT OF THE SURVEYOR AND CONSULTATION WITH THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

DATE 7/27/02 SURVEYOR *Robert A. Taylor*
DATE 7/27/02 SURVEYOR *Robert A. Taylor*

SURVEY NO. 8-1210 FIELD BOOK: S.C.O. 813 pgs. 3-27-133-136
MAP NUMBER: R.P. 4022428
W.C. MAY 2002 MAP NO. 11,709

Estimated 4 acres

"ALTERATION OF THIS DOCUMENT, EXCEPT BY A LICENSED LAND SURVEYOR IS ILLEGAL."

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

In the Matter

- of -

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

- by -

Mark A. DeMeo,

Respondent.

DEC Case No. R5-20121206-2042

SUPPLEMENTAL HEARING REPORT

- by -

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

May 5, 2017

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint, both dated January 21, 2014, on respondent Mark A. DeMeo by certified mail and by personal service. The complaint alleges that respondent violated provisions of ECL article 9 and 6 NYCRR part 190 by his use and maintenance of that portion of a store, known as the Campers Last Stop store,¹ that is situated on State forest preserve lands adjacent to property respondent owns at 324 Houseman Street, Town of Northampton, Fulton County (DeMeo property).

The matter was assigned to Administrative Law Judge (ALJ) Edward Buhrmaster who presided over the prior adjudicatory hearing (2015 hearing) and issued a hearing report (2015 hearing report), dated June 10, 2015. By order (2016 order) dated August 15, 2016, the Commissioner adjudged respondent to have violated ECL 9-0303(2) and 6 NYCRR 190.8(w) by his use and maintenance of the portion of the Campers Last Stop store that is situated on State land. The Commissioner also assessed a \$100 penalty on respondent.

The Commissioner concluded, however, that the record lacked sufficient information to formulate appropriate remedial relief to address respondent's violations. The Commissioner stated that, "[f]or example, the record does not furnish information regarding how much longer respondent intends to operate his seasonal business on the property or the anticipated structural life of the camp store" (2016 order at 4). The Commissioner remanded the matter to the Office of Hearings and Mediation Services (OHMS) to "further develop the record with respect to remedial relief" (2016 order at 5).²

In accordance with the 2016 order, I convened the remand hearing on February 16, 2017 to further develop the record with respect to remedial relief. The remand hearing was held in accordance with the provisions of the Department's uniform enforcement hearing procedures, 6 NYCRR part 622. Staff was represented by Scott Abrahamson, Assistant Regional Attorney, DEC Region 5, who called three witnesses: Scott Orr, DEC Senior Land Surveyor; Walter Kozach, DEC Assistant Land Surveyor 3; and Michael Naughton, DEC Associate Counsel. Respondent was represented by Keith Gorman, Esq., and called one witness: Mark DeMeo, the respondent.

At the outset of the remand hearing, Department staff stated that it had identified seven specific matters set forth in the 2016 order that the Commissioner wanted addressed on remand. Staff identified these seven matters as: (1) "the existence of additional encroachments [other than the Campers Last Stop store], if any;" (2) "when these additional encroachments were placed on

¹ The store is sometimes identified in the record as the "Camper's" Last Stop store and sometimes identified as the "Campers" Last Stop store. Consistent with the Commissioner's 2016 order and the 2015 hearing report, I continue the use of the latter term (i.e., Campers Last Stop store) in this supplemental hearing report.

² As noted in the 2016 order, ALJ Buhrmaster retired and, therefore, the remand was assigned to another ALJ (2016 order at 4 n 4).

state land;" (3) "who is responsible for placing [the additional encroachments] on state land;" (4) "the expected duration of the future use of the Camper's Last Stop Store;" (5) "the estimated structural life of the store;" (6) "the number of contacts that Mr. DeMeo and the Department . . . had between 2003 and 2014;" and (7) "options for addressing the encroachments" (transcript [tr] 509-510). I indicated that the issues identified by staff were consistent with my reading of the 2016 order and asked respondent's counsel if he had anything to add or subtract from the listed issues. Respondent's counsel stated that he did not (tr at 510).

At the close of the remand hearing, the parties agreed to make their respective closing arguments orally on the record, and neither party requested the opportunity to file written closing briefs. Accordingly, I advised the parties that the record would close upon my receipt of the transcript. This office received the original hearing transcript on March 28, 2017.

As detailed below, on the basis of the record established in this proceeding, I recommend that the Commissioner issue an order directing respondent to remove all of the structures that encroach upon State land along its boundary with the DeMeo property. I further recommend that the removal be conducted in accordance with a Department-approved plan that, among other things, allows respondent up to five years to complete the removal.

FINDINGS OF FACT

As stated in the 2016 order, the Commissioner adopted the 2015 hearing report subject to certain exceptions, none of which pertain to the findings of fact set forth in that report (see 2016 order at 2). Accordingly, the findings of fact set forth in the 2015 hearing report remain operative. Those findings of fact consist of 23 enumerated paragraphs and, therefore, the findings of fact enumerated below begin with paragraph 24.

24. Respondent has no current plans to retire or otherwise cease operations at the Campers Last Stop store (tr at 645).
25. The structure housing the Campers Last Stop store is currently sound and has an approximate life span of 18 years (tr at 644-645).
26. In addition to the Campers Last Stop store and attached structures (such as the exhaust fan, electric meter, and propane fuel tank), there are eight structures (additional encroachments) that encroach on State land along the boundary with the DeMeo property (exhibit 45; tr at 528-539). These eight additional encroachments consist of three electrical outlets on wood posts, a 3" PVC cleanout pipe, a section of wood fence (approximately 8' long), the southwest corner of a 28' by 42' storage building (encroaching 1' onto State land), a concrete block fireplace, and a portion of a partially enclosed shed (encroaching approximately 6.7' onto State land) (id.).
27. All of the additional encroachments identified in paragraph 26 above existed prior to respondent's acquisition of the DeMeo property except for the encroachments caused by the 28' by 42' storage building and the partially enclosed shed (see findings of fact ¶ 7

[stating that the Campers Last Stop store was constructed at least 50 years ago], ¶ 22 [stating that respondent built the 28' by 42' storage building]; tr at 535-536, 539, 543-544 [Orr testimony that the 28' by 42' storage building and the partially enclosed shed did not encroach on State land in 2002]).

DISCUSSION

Under the 2016 order, respondent was adjudged to be in violation of ECL 9-0303(2) and 6 NYCRR 190.8(w), and was assessed a penalty in the amount of \$100 (see 2016 order at 5, ¶¶ 1, 2). As directed by the Commissioner, this supplemental hearing report addresses only issues related to remedial relief. The Commissioner identified several issues that he determined should be further development on remand. Specifically, the Commissioner directed that:

"upon remand, consideration should be given to:

- the expected duration of future use of the Campers Last Stop store and its estimated structural life;
- the existence of any other structures and infrastructure on respondent's property that are also encroachments on State lands, the date when any such structures or infrastructure were constructed or placed on State lands, and who was responsible for creating those encroachments; and
- options to consider for addressing the encroachments"

(2016 order at 4-5). Additionally, in a footnote, the Commissioner noted that "the record does not reflect the number of contacts, if any, initiated by either party between respondent's [November 6,] 2003 letter and the commencement of this proceeding in January 2014" and directed that "[t]his should be more fully explored upon remand" (2016 order at 4 n 3). These issues are addressed seriatim below.

The Expected Duration of Future Use of the Campers Last Stop store

The Commissioner requested "information regarding how much longer respondent intends to operate his seasonal business" (2016 order at 4). As Department staff noted at the outset of the remand hearing, this issue was for Mr. DeMeo to address and staff did not proffer evidence related to the expected duration of future use of the Campers Last Stop store (tr at 509). Mr. DeMeo testified that he had no plans to retire or otherwise cease operations at the Campers Last Stop store (tr at 645). Accordingly, the length of time respondent intends to operate the business is indeterminate.

The Estimated Structural Life of the Campers Last Stop store

The Commissioner directed that the remand hearing consider the "estimated structural life" of the Campers Last Stop store (2016 order at 4). Department staff advised at the outset of

the remand hearing that they were not qualified to speak to this issue and did not proffer evidence related to the structural life of the Campers Last Stop store (tr at 509). Mr. DeMeo, who was a construction contractor for 25 years, testified that he estimated the structural life of the Campers Last Stop store to be about 18 years (tr at 644-645, 647). Staff did not contest this estimate, nor did staff question the accuracy or basis for the estimate on cross examination. Accordingly, I accept Mr. DeMeo's estimate of the structural life of the store.

The Existence of Additional Structures that Encroach on State Lands

By its complaint, Department staff requests that the Commissioner issue an order directing respondent to "remove from State Lands any portion of the building known as Camper's Last Stop Store and to restore the State Lands" (complaint at 4, wherefore clause ¶ II). At the 2015 hearing, ALJ Buhrmaster granted staff's request to amend the complaint to, among other things, allege that other structures, in addition to the Campers Last Stop store, encroach on State land (see 2015 hearing report at 27). The 2015 hearing report recommends that staff determine what "other structures on Mr. DeMeo's property . . . also encroach on State land, so that these encroachments are removed in conjunction with the encroachment created by the store structure" (2015 hearing report at 37).

The Commissioner directed that the remand hearing consider "the existence of any other structures and infrastructure [i.e., structures other than the Campers Last Stop store] on respondent's property that are also encroachments on State lands" (2016 order at 4).

In October and November 2016, Scott Orr, a DEC senior land surveyor, led a survey team that undertook a survey (2016 survey) of the DeMeo property and the adjacent State land to identify structures encroaching on State land (exhibit 45 [survey map, dated Nov. 30, 2016]; tr at 523 [Orr testimony that he "was the land surveyor in charge of the survey"]; tr at 551 [Kozach testimony concerning survey field work at the site in October and November, 2016]).

At the remand hearing, Department staff provided extensive testimony and proffered several exhibits on the issue of additional encroachments (see e.g. tr at 528-539; exhibits 45, 50-55). In addition to the Campers Last Stop store (including items attached to the store such as the exhaust fan, electric meter, and propane fuel tank), staff identified the following structures as additional encroachments on State land from the DeMeo property:

- 1) three electrical outlets on wood posts;
- 2) a 3" diameter PVC cleanout pipe;
- 3) a section of wood fence (approximately 8' long);
- 4) the southwest corner of the 28' by 42' storage building (encroaching 1' onto State land);
- 5) a concrete block fireplace; and
- 6) a portion of a partially enclosed shed (encroaching 6.7' onto State land)

(exhibit 45; tr at 528-539).³ Respondent did not dispute that these structures are on State land, but stated that they were all on-site at the time that he purchased the DeMeo property in 1996 (tr at 610).

The Date When Structures Were Constructed or Placed on State Lands

The Commissioner directed that the remand hearing consider "the date when any [additional encroachments] were constructed or placed on State lands" (2016 order at 4-5). It is undisputed that the Campers Last Stop store was in place at the time respondent purchased the DeMeo property (see 2015 hearing report at 5 [stating that "DEC Staff concedes the structure was built in the 1940s or 1950s, long before [respondent] bought the property"]). As to the other structures identified by staff as additional encroachments on State land from the DeMeo property, respondent testified that all of those structures predated his purchase of the property (tr at 610).

Mr. Orr, the Department's senior land surveyor assigned to this matter, was uncertain whether all of the additional encroachments were on State land at the time of his 2002 survey (see e.g. tr at 538 [Orr testimony that "I really don't know" whether the block fireplace was on State land at the time of the 2002 survey]). He was unequivocal, however, with regard to the 28' by 42' storage building and the partially enclosed shed on the DeMeo property. Mr. Orr testified that those two structures did not encroach on State land in 2002 (tr at 535-536, 538-539). Mr. Orr distinguished between these structures and the other additional encroachments identified by staff on the basis that these two structures are more permanent (tr at 531 [Orr testimony that he would probably not include "a moveable item" on a survey because "usually when you're doing a boundary survey you only locate items that are permanent in nature"]).

The 2002 survey corroborates Mr. Orr's testimony. The survey depicts the Campers Last Stop store as the only structure encroaching on State land from the DeMeo property in 2002. That same survey depicts a small shed located approximately 300' northwest of the store, beyond the northern boundary of the DeMeo property, that encroaches one foot onto State land. Other buildings and sheds on are also depicted along the State land boundary lines shown on the 2002 survey. (See exhibit 4.) Consistent with Mr. Orr's testimony, the 2002 survey does not depict electrical posts, propane tanks, fire pits or other similar structures (id.; tr at 531).

³ Another structure, a wood slat fence along the northern boundary of the DeMeo property, was identified as a possible encroachment from the DeMeo property. However, the witnesses for the Department testified that they did not know whether the fence was owned by respondent or by the property owner to the north of the DeMeo property (see tr at 544-545, 564). Respondent testified that the fence was not his and that, to his knowledge, the fence belonged to the property owner to the north (tr at 612). Additionally, I note that Department staff did not determine the location of the store's septic system (tr at 540-541 [Orr testimony that the approximate location of underground structures may be ascertained from the landowner or a utility company, but that their location may be surveyed only if the structures are visible]). Mr. DeMeo testified that the septic system is located on the south side of the store, in the vicinity of the overhang on the store's south wall (tr at 650-652 [DeMeo testimony that the septic system is "[s]omewhere in that area"]; see also exhibit 45 [depicting the location of the overhang]). On this record, I make no finding with regard to whether the septic system encroaches on State land.

Mr. DeMeo testified that all of the additional encroachments were in place at the time he purchased the DeMeo property (tr at 610). With regard to the 28' by 42' storage building, however, he testified that although he did not originally construct it, he had "done things to that building" (tr at 607-608). At the 2015 hearing, a neighboring property owner testified that Mr. DeMeo expanded the 28' by 42' storage building after its roof collapsed in 2008, resulting in the encroachment onto State land (tr at 291-293, 304). The neighbor also testified that what is now the partially enclosed shed was formerly the front porch of a trailer owned by Mr. DeMeo that has since been removed (tr at 287, 301-302; see also exhibit 38-A [diagram depicting the former location of the trailer]). Neither the trailer nor the shed are shown on the 2002 survey.

On this record, I conclude that Department staff established that the encroachment of the 28' by 42' storage building and the partially enclosed shed onto State land occurred after the date of the field work for the 2002 survey. I also conclude that the other additional encroachments (i.e., the three electrical outlets on wood posts, the 3" diameter PVC cleanout pipe, the section of wood fence, and the concrete block fireplace) were all in place prior to respondent's acquisition of the DeMeo property.

Who Was Responsible for Creating the Additional Encroachments

Respondent is responsible for creating the encroachments on State land associated with the 28' by 42' storage building and by the partially enclosed shed. As discussed in the previous section, the record demonstrates that Mr. DeMeo constructed or expanded the 28' by 42' storage building and constructed or placed the partially enclosed shed, resulting in these structures encroaching on State land.

As to the other additional encroachments (i.e., the three electrical outlets on wood posts, the 3" diameter PVC cleanout pipe, the section of wood fence, and the concrete block fireplace), the record indicates that they were in place prior to respondent's acquisition of the DeMeo property. Accordingly, those additional encroachments were not created by Mr. DeMeo. It is possible that they were created by John Blizzard, the grantor on the deed into Mr. DeMeo, but that is not established on the record (see exhibit 21 [DeMeo property deed]).

Options to Consider for Addressing the Encroachments

Department staff argues that "the State and the Department have almost no options to deal with the encroachments. There are constitutional restrictions on the [State land] that's affected by the encroachments" (tr at 698). Staff argues that the State land at issue cannot be sold, leased, or transferred to respondent and that other possible avenues that would allow respondent to continue his use of the State land at issue are unavailable under the circumstances presented here. For example, staff argues that ECL 9-0105(13), which provides authority for the Department to enter a boundary line agreement under certain circumstances, is unavailable here because no "honest dispute" exists regarding the location of the boundary line between the State land and the DeMeo property (tr at 698-699). In staff's view, "the only viable option" available to resolve this matter is to set "a date certain by which Mr. DeMeo would have to remove all of the encroachments from the state land" (tr at 700).

Respondent asserts that "Mr. DeMeo for many years was under the erroneous assumption that [an old fence behind the store⁴] was the [property] line" (tr at 702). Respondent also asserts that, "upon information and belief," the fence was "installed by New York State" (tr at 701-702). Respondent argues that "the State installed the fence that set the [boundary dispute] in motion" and, therefore, "a boundary agreement should have been proposed" or, alternatively, the Department should have exercised "enforcement discretion" to resolve the matter (tr at 702-703).

Respondent also argues that "New York State, by taking [the land] and making Mr. DeMeo tear his building down, they gain eight feet of property still enclosed by a fence of their own, so the benefit to New York State, as opposed to . . . the loss of the store to the consumer and the cost to Mr. DeMeo to either move the store or . . . relocate the store to the [28' by 42' storage] building, or whack off eight feet of the current store is just financially imprudent [for] a seasonal business" (tr at 704-705). Respondent's counsel stated that respondent is not opposed to removing the smaller items that encroach on State land, but asserted that removing the encroachment caused by the store would be "really cumbersome financially" (tr at 707).

The options discussed at the hearing are addressed below.

-- Boundary Line Agreement

Staff proffered testimony that no honest dispute exists here because the boundary line has now been adjudicated and, therefore, is not in contention (tr at 580-581). Staff also established that, from 2002 until just prior to the 2015 hearing, respondent failed to produce a survey to support his assertion that the boundary ran along the old fence line behind the Campers Last Stop store (tr at 686-687, 699; see also 2015 hearing report at 7, findings of fact ¶ 14 [noting that respondent was provided a copy of the Department's 2002 survey on May 31, 2002]). I agree with Department staff that the 2016 order settled any dispute over the location of the boundary line and, therefore, a boundary line agreement is no longer available.

-- Prosecutorial Discretion

Prosecutorial discretion (i.e., the discretion to determine whether to bring, and how to prosecute, an enforcement action) is within the purview of Department staff (see Matter of Edelstein, Order of the Commissioner, dated July 18, 2014, at 3 n 1 [noting that "Department staff may exercise prosecutorial discretion and decide not to pursue . . . one or more violations"]; Matter of Dept. of Sanitation of the City of New York, Decision of the Commissioner, July 2, 2012, at 2 [noting that "Department staff exercised its prosecutorial discretion and decided to encourage [applicant] to complete the present permit application process rather than commence enforcement proceedings"]; see also 6 NYCRR 622.3[a][1], 622.12[a], 622.14[a] [setting forth various methods by which Department staff may commence an enforcement proceeding]). Once staff has made the determination that prosecution of a matter is warranted and initiates an enforcement proceeding before this office, the role of the ALJ is to conduct the hearing (see

⁴ As set forth in the findings of fact from the 2015 hearing, the fence runs on the west side Houseman Street, behind the Campers Last Stop store (2015 hearing report at 7, findings of fact ¶ 10; see also exhibit 4, detail A [depicting the fence to the west of the DeMeo property]).

generally 6 NYCRR 622.2[a], 622.10). Accordingly, I offer no opinion on staff's exercise of prosecutorial discretion in this matter.

-- Lease, Sell, or Exchange State Land

A Department staff witness testified that the New York State Constitution prohibits the Department from leasing, selling, or exchanging any portion of the forest preserve (tr at 575-578). The witness further testified that the State land where the encroachments are located is part of the forest preserve and that the land may be removed from the forest preserve only by constitutional amendment (*id.*). This testimony was uncontroverted by respondent and consistent with the relevant provisions of the New York State Constitution (*see* NY Const, art XIV, § 1). Accordingly, the Department does not have authority to sell, lease, or transfer the State land at issue to Mr. DeMeo.

-- Temporary Revocable Permits

The Commissioner, in large part, adopted the findings of fact and holdings set forth in the 2015 hearing report. A notable exception to this is that the Commissioner expressly declined to adopt ALJ Buhrmaster's holding concerning the Department's policy for the use of temporary revocable permits (TRPs) (*see* 2016 order at 3 n 1 [stating that "[o]ther than the statement that no record exists that the Department had issued a temporary revocable permit to respondent, I do not adopt the ALJ's comments on the use of temporary revocable permits"]). As noted in the 2015 hearing report, ALJ Buhrmaster reviewed the Department's TRP policy (*see* 2015 hearing report at 29) and held that "the [Campers Last Stop] store, as a structure, is not eligible for a temporary revocable permit" (*id.* at 36).

At the remand hearing, Department staff argued that the Department "can't issue a Temporary Revocable Permit for permanent structures, it's illogical" (tr at 699). In support of its position, staff proffered testimony describing the Department's TRP policy and practice. Staff's witness on this issue stated that "[t]he purpose of the policy is to allow private use of public state lands under the jurisdiction of the Department" (tr at 583). Staff's witness testified that, under the TRP policy, "staff are not authorized to issue a TRP to allow [permanent] structures to be constructed on state lands unless there is a deeded right or easement that the individual possesses" (tr at 585). This witness further testified that issuance of a TRP would not be an option to address the encroachments at issue here because TRPs are intended only "to allow the temporary use of state lands" (*id.*).

Department staff's position that a TRP may not be issued under the circumstances presented here is consistent with the ALJ's holding in the 2015 hearing report. Accordingly, staff's position appears to be in conflict with the Commissioner's refusal to adopt the ALJ's holding on this issue. As discussed below, I conclude that the relevant law and the Department's TRP policy provide discretion to the Department in relation to the issuance of a TRP for an existing structure on State land.

ECL 9-0303(2) states that "[n]o building shall be erected, used or maintained upon state lands except under permits from the department" (*see also* 6 NYCRR 190.8[w] [stating that "[n]o person shall erect, construct, install, maintain, store, discard or abandon any structure or any

other property on State lands . . . except if the structure or property is authorized by the department"). The TRP policy prohibits issuance of a TRP for "construction or installation of permanent facilities such as roads, bridges, trails, structures, towers or utility lines not authorized by law, deeded right or easement" (DEC Program Policy, ONR-3 [revised May 26, 2011] at II.C.3). By their express terms, neither ECL 9-0303(2) nor the TRP policy prohibit use and maintenance of existing buildings on State land if such use and maintenance is authorized by the Department. ECL 9-0303(2) allows such activities "under permits from the department" and, although the TRP policy precludes issuance of a TRP for the "construction or installation of permanent facilities," it does not preclude the issuance of a TRP for the use and maintenance of an existing structure. Accordingly, I conclude that a TRP may be issued to authorize the continued use of an existing structure.

Respondent has been adjudged only to have used and maintained a portion of the structure known as the Campers Last Stop store on State land (2016 order at 5). The provisions of the TRP policy cited by Department staff do not prohibit the issuance of a TRP for the use and maintenance of an existing structure on State land. Nevertheless, the policy states that it is intended only to authorize the "temporary use of State lands" (DEC Program Policy, ONR-3 at II). Accordingly, the use of a TRP, or series of TRPs, to indefinitely authorize the use of an existing structure on State land would not be consistent with the stated intent of the policy.

-- Order on Consent

Department staff counsel argues that "the only option we have in this situation is to offer Mr. DeMeo what we've offered him at least three times before, and that's an Order on Consent" (tr at 699-700). Indeed, staff counsel concludes by stating that his "recommendation would be, to save more state resources, that perhaps we try to negotiate an Order on Consent" (tr at 701). Counsel notes, however, that respondent has been offered an order on consent on previous occasions, but has declined to enter same (tr at 700). Respondent's counsel states that respondent is not opposed to an order on consent with regard to some of the smaller encroachments, but that removing the Campers Last Stop store from State land would be "really cumbersome financially" (tr at 707).

Orders on consent are frequently used to resolve enforcement matters and may be entered into even after a matter has been brought before this office for adjudication (see 6 NYCRR 622.18[c] [providing that "[w]here a stipulation is reached on all charges the hearing will be canceled and no further action of the commissioner will be required"]). By definition, however, an order on consent is available only on consent of the parties. Accordingly, a negotiated settlement is for the parties to pursue.

-- Commissioner's Order

As discussed above, many of the options to address the encroachments at issue are not available through this adjudicatory proceeding. The Commissioner may not, for example, issue an order directing that forest preserve land be sold, leased or transferred. Other options, such as a boundary line agreement, enforcement discretion or an order on consent are, or were, within the purview of Department staff.

The purpose of this supplemental hearing report is to address the issues raised by the Commissioner in the 2016 order and to present the Commissioner with findings of fact, conclusions of law and recommendations that will assist him in issuing a final decision (see 6 NYCRR 622.18[a], [b]). I concur with Department staff that all of the encroachments must be removed. Accordingly, this section will discuss factors that the Commissioner may wish to consider with regard to the manner and timing of the removal of the encroachments.

The record plainly establishes that the structure known as the Campers Last Stop store existed long before respondent purchased the DeMeo property. Indeed, the Commissioner noted that the structure that houses the Campers Last Stop store has existed for over 50 years and was operated as a store by the prior owner before respondent purchased the DeMeo property (2016 order at 3). I also note that, in his 2015 hearing report, ALJ Buhrmaster concluded that "the record lacks specific evidence that Mr. DeMeo was aware of [the fact that the store encroached on State land] when he acquired his property in 1996" (2015 hearing report at 36-37).

Respondent has long asserted that the boundary line between the State land and the DeMeo property ran along the old fence line to the west of his property. Because the Campers Last Stop store and the other encroachments are all on the east side of the fence line, locating the property line at the fence line would result in these structures being situated on the DeMeo property rather than on State land (see exhibits 4, 45). At the 2015 hearing, respondent proffered the testimony of a licensed land surveyor who testified that in his professional opinion the fence line was on the boundary line (tr at 260-261, 380-381; see also exhibit 39 [map depicting property lines]). As reflected in Commissioner's 2016 order, however, respondent did not prevail on this point and the boundary line between the State land and the DeMeo property was determined to run through the store, more than ten feet to the east of the old fence line (2016 order at 3 [holding that "the evidence established that respondent's store encroaches on State lands by more than 8 feet"]; see also exhibit 4, detail A [depicting the old fence line (highlighted in pink) and the property line (highlighted in yellow)]).

Despite the outcome of the 2015 hearing, respondent testified at the remand hearing that he believed that the fence line was the property line at the time he purchased the DeMeo property and that he still believes the fence line is the property line (tr at 611-612).

Respondent proffered testimony and documents concerning the costs and complexities of removing the various encroachments. Respondent testified that to remove the portion of the Campers Last Stop store that encroaches on State land and remodel the portion of the store that does not encroach on State land would cost approximately \$68,000 (tr at 627-628). Respondent's counsel argued that, under this option, respondent would lose eight feet of the existing structure and would be "left with the store that's really not usable" (tr at 705). Respondent testified that to (i) relocate the store into the 28' by 42' storage building, (ii) remove the portion of the existing store's structure that encroaches on State land, and (iii) remodel the portion of the existing store that does not encroach on State land, would cost \$84,900 (tr at 628). Respondent proffered third party contract proposals in support of these cost estimates (see exhibits 61, 62). I note that respondent did not proffer evidence with regard to the cost of moving the store into the 28' by 42' storage building and razing, rather than remodeling, the structure that currently houses the store.

With regard to the additional encroachments, respondent testified that he did not consider the removal of those encroachments to be major undertakings (see e.g. tr at 648-649 [moving the electrical outlet and post is "not . . . [a] large project"], tr at 655-656 [removing the encroachment caused by the corner of the 28' by 42' storage building "is not a . . . huge job," and removing the encroachment caused by the shed is "not a huge job either"]).

Mr. DeMeo testified that the Campers Last Stop store is marginally profitable and that he is only able to "squeeze a small amount out of the camp store" (tr at 642). He further testified that it would take "ten years to allow the store operation to pay for . . . the remodel or the removal" of the encroachment caused by the store (tr at 643). Respondent provided tax returns from 2013, 2014, and 2015 in support of his testimony (see exhibits 63-65). Department staff objected to the receipt of the tax returns on the basis that staff had not seen the documents before the day of the remand hearing and that Mr. DeMeo had not pled "ability to pay" as an affirmative defense (tr at 633-634). Staff acknowledged, however, that it did not request the tax returns during discovery (id.). Moreover, while ability to pay is a penalty adjustment factor under the Department's Civil Penalty Policy (see Commissioner Policy, DEE-1 at IV.E.4), it is not an affirmative defense and need not be pled as such. Liability is already established in this matter and respondent has paid the civil penalty imposed by the Commissioner (see 2016 order at 5, ¶ I; tr at 700 [staff counsel statement that respondent "already paid the penalty"]). Here, on remand, our purpose is to more fully develop the record with regard to possible remedial options, and the respondent's income from the store is a relevant consideration.

Mr. DeMeo testified that he hoped that he and the State "would find something that would allow me to continue and make the appropriate repairs or removal and to give me time for those things to transpire" (tr at 645-646).

On the record developed through both the 2015 hearing and the remand hearing, a Commissioner's order directing respondent to remove all of the encroachments on State land identified in this supplemental hearing report is warranted and appropriate. As detailed in the conclusions and recommendations below, I recommend that respondent be afforded five years to complete the removal.

The Extent of Contacts Between Staff and Respondent Since 2003

The Commissioner also requested that the remand hearing "more fully explore" the "number of contacts, if any, initiated by either party between respondent's 2003 letter [in which respondent stated that he had engaged a surveyor] and the commencement of this proceeding in January 2014" (2016 order at 4 n 3) (see findings of fact 19, 20). On this issue, DEC staff proffered the affirmation of staff counsel, Mr. Abrahamson, wherein he states that he conducted a diligent search of Department records and opines that "staff and Mr. DeMeo did not correspond with respect to this proceeding in writing until February 22, 2013" (exhibit 59 ¶ 11). Beginning with a letter dated February 22, 2013, staff made repeated attempts to reach Mr. DeMeo (id. ¶¶ 13-17). Apparently in response to these attempts, Mr. DeMeo left a voice message with staff counsel on May 30, 2013 (id. ¶ 18).

After contact between the parties was reestablished, the parties attempted to resolve the matter by order on consent, but those efforts proved fruitless (exhibit 59 ¶¶ 19-26). Staff then served respondent with a notice of hearing and complaint in January 2014 (id. ¶ 27).

CONCLUSIONS AND RECOMMENDATIONS

As noted at the outset of this supplemental hearing report, the Commissioner remanded this matter to further develop the record with respect to remedial relief (see 2016 order at 5). The purpose of this supplemental hearing report is to address the issues raised by the Commissioner in the 2016 order and to present the Commissioner with findings of fact, conclusions of law and recommendations to assist him in issuing a final decision in this matter (see 6 NYCRR 622.18[a], [b]).

By his 2016 order, the Commissioner adopted ALJ Buhrmaster's holdings with regard to the location of the property line between the DeMeo property and the State land, and the extent of the encroachment of the Campers Last Stop store onto State land (2016 order at 2-3 [holding that "the evidence established that respondent's store encroaches on State lands by more than 8 feet"]; see also 2015 hearing report at 7, findings of fact ¶¶ 11, 12). As discussed above, I have concluded that the following additional encroachments exist: three electrical outlets on wood posts, a 3" PVC cleanout pipe, a section of wood fence (approximately 8' long), the southwest corner of a 28' by 42' storage building (encroaching 1' onto State land), a concrete block fireplace, and a portion of a partially enclosed shed (encroaching 6.7' onto State land) (see findings of fact ¶ 26).

I recommend that the Commissioner direct respondent to remove all of the encroachments on State land identified above. To that end, I recommend that respondent be directed to submit a plan (removal plan), within 60 days of his receipt of the Commissioner's order, to remove all of the encroachments on State land identified in this supplemental hearing report. The removal must be accomplished in a manner that restores the State land to a natural, undisturbed condition. As requested by Department staff in its complaint, this should include filling holes and other areas of excavation, burying boulders, grading to create a uniform and smooth soil surface, applying an adequate layer of topsoil, seeding with appropriate seed mix, and applying mulch. The plan submitted by Mr. DeMeo must establish procedures to be used for the removal of the encroachments, and timeframes for completion of the removal activities.

With regard to the timing of the removal, I recommend a two track approach. First, respondent's removal plan must provide for the prompt removal of all of the additional encroachments. I recommend respondent be given 90 days from the date of the Commissioner's order to remove the additional encroachments and return the State land to its natural, undisturbed condition.

Second, in recognition of the fact that the removal of the encroachment caused by the Campers Last Stop store is a much more significant undertaking, I recommend respondent be given five years from the date of the Commissioner's order to remove the portion of the store that encroaches on State land and return the State land to its natural, undisturbed condition. Although

respondent testified that it would take "ten years to allow the store operation to pay for any of the remodel or the removal" options discussed at the remand hearing, the options discussed included remodeling the existing store's structure after the encroachment on State land was removed. It is possible that respondent could reduce these costs by, for example, razing the structure rather than remodeling it.

Moreover, the violations caused by the store encroaching on State land are longstanding and respondent benefited from his use of the State land during that time. My recommendation of five years to remove the encroachment caused by the store is intended to strike a balance between the need to address these violations promptly and to provide respondent with sufficient time to implement corrective action while continuing to operate the Campers Last Stop store. Respondent may eliminate the encroachment either by removing only that portion of the existing store's structure that encroaches on State land and remodeling the remaining structure for use as respondent sees fit, or by razing the entire structure.

Lastly, if respondent (i) fails to timely submit a removal plan to the Department for approval; (ii) fails to receive approval of the removal plan from Department staff; or (iii) fails to implement the approved plan in accordance with the timeframes and other terms established by the plan, then Department staff may exercise the Department's authority under ECL 9-0303(6) to dispose of the encroachments under such conditions as it deems to be in the public interest.

In the event that the Department must remove the encroachments, the Department should seek reimbursement from Mr. DeMeo for all costs involved.

EXHIBIT LIST

**Matter of Mark A. DeMeo
DEC Case No. R5-20121206-2042**

Exhibit No.	Rec'd (Y/N)	Description
45	Y	2016 Survey Map of DeMeo property and adjacent properties
46	Y	Photograph of southeast side of store
47	Y	Photograph of back of store
48	Y	Photograph of back of store
49	Y	Photograph of northwest side of store and covered patio
50	Y	Photograph of 5/8" rebar marking DeMeo property and State land boundary line
51	Y	Photograph of concrete block fireplace, debris, and corner of 28' by 42' building
52	Y	Photograph of shed showing both open and enclosed portions
53	Y	Photograph of shed showing open portion
54	Y	Photograph of exposed portion of 3" PVC cleanout
55	Y	Photograph of northernmost electrical outlet on post and portion of fence along DeMeo property and private property to the north
56	Y	NYS Constitution, article XIV, §1
57	Y	ECL 9-0105
58	Y	DEC Program Policy, ONR-3 (Temporary Revocable Permits)
59	Y	Affirmation of Scott Abrahamson re: contacts with DeMeo
60	Y	Affidavit of Peter Frank re: DEC records search
61	Y	Construction contract/proposal re: renovation of camp store
62	Y	Construction contract/proposal re: convert the 28' by 42' storage building into camp store
63	Y	DeMeo tax returns (2015)
64	Y	DeMeo tax returns (2014)
65	Y	DeMeo tax returns (2013)
66	Y	Northampton Fire Inspection Report (2014)
67	Y	Northampton Fire Inspection Report (2016)