

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

ORDER

DEC Case No.
R5-20120618-2004

-by-

MICHAEL S. MASTIC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation ("DEC" or "Department") that respondent Michael S. Mastic violated provisions of article 9 of the Environmental Conservation Law ("ECL") and its implementing regulations by cutting trees and other vegetation along the sides of Mud Pond Road, which included a portion of State land, in the Town of Peru, Clinton County. The State land on which the cuttings occurred is known as the Terry Mountain State Forest.

Staff commenced this proceeding by service of a notice of hearing and complaint, both dated November 14, 2012. On June 25 and 26, 2014, an administrative hearing to consider Department staff's allegations was held before Administrative Law Judge ("ALJ") Richard A. Sherman of the DEC Office of Hearings and Mediation Services.

Liability

Department staff alleges that respondent violated ECL 9-0303(1) by cutting eleven (11) trees growing on State land along Mud Pond Road. With certain exceptions not relevant here, ECL 9-0303(1) provides that "[i]n order to protect the state lands described in this article . . . no person shall cut, remove, injure, destroy or cause to be cut, removed, injured or destroyed any trees or timber or other property thereon or enter upon such lands with intent to do so." For this violation, staff seeks a penalty of two thousand seven hundred fifty dollars (\$2,750) under the provisions of ECL 71-0703(6)(a).

Department staff further alleges that respondent violated 6 NYCRR 190.8(g) by cutting over 1,000 saplings and shrubs on State land along Mud Pond Road. Section 190.8(g) of 6 NYCRR provides that "[n]o person shall deface, remove, destroy or otherwise injure in any manner whatsoever any tree, flower, shrub, fern, fungi or other plant like organisms . . . found or growing on State land." For this violation, Department staff seeks a penalty of one hundred

dollars (\$100) under the provisions of ECL 71-0703(1). Accordingly, for the two violations, Department staff is seeking a civil penalty of two thousand eight hundred fifty dollars (\$2,850).

The ALJ prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the hearing report, the ALJ concluded that Department staff met its burden of proof and established that respondent is liable for the violations of ECL 9-0303(1) and 6 NYCRR 190.8(g) alleged in the complaint. Indeed, respondent admitted that he undertook brush cutting on State land to improve access to properties along Mud Pond Road, particularly his mother's residence, which is located near the west end of the road.

Affirmative Defenses

Respondent asserted four affirmative defenses in his answer: (1) the Department was engaging in selective enforcement against respondent; (2) the Department's claims were time-barred; (3) the Department had given respondent permission to undertake the cutting of trees and vegetation; and (4) respondent's brush cutting activity had occurred within the right-of-way for Mud Pond Road and the deed into the State for the land at issue "excepts the use of the right of way for . . . [those] owning property along said Mud Pond Road for ingress, egress and utilities" (respondent's answer at pages 3-5 [quote at ¶ 48 of the Answer]). The ALJ addressed each of the affirmative defenses and determined that none of the defenses relieves respondent of liability (see Hearing Report at 4-10). I concur with the ALJ's analysis in that regard.

Civil Penalty/Corrective Action Plan

The ALJ recommends that I impose a civil penalty in the amount of two thousand eight hundred fifty dollars (\$2,850), as requested by Department staff. The civil penalty that Department staff requests is authorized and warranted. Although Department staff did not seek to suspend any portion of the penalty, the ALJ recommends that I suspend the entire penalty provided that respondent implements a Department-approved corrective action plan to remediate respondent's unauthorized and illegal activities along Mud Pond Road as they relate to State land. In this proceeding, Department staff noted improper cutting of trees and vegetation and improper handling of debris left on State land arising from respondent's activities (see Hearing Transcript at 131-141; see also exhibits 2-11 [photographs depicting stumps, cuttings and debris along Mud Pond Road]). The record also indicates that respondent's manner of cutting was inconsistent with Department-approved practices that require stumps to be cut at ground level (see Hearing Report at 11).

ECL 71-0703[7] authorizes, where violations of ECL 9-0303(1) have occurred, that a respondent may be ordered to "reasonably restore the lands affected by the violation to their condition immediately before the violation." Implementing a corrective action plan to repair damage and address the impacts on the State lands adjoining Mud Pond Road would provide an environmental benefit.

Accordingly, I hereby direct that respondent implement a corrective action plan to ensure that appropriate restoration activities are undertaken along the State land portion of Mud Pond

Road. Respondent is directed to consult with Department staff upon his receipt of this order and submit a corrective plan to the Department for review and approval within forty-five (45) days of this receipt of this order. Respondent, in the corrective action plan, must evaluate the current condition of the impacted land in question, including but not limited to the stumps and debris that were left on or impacting State lands as a result of respondent's cutting activities, and set forth the remedial activities to be undertaken. The plan must also include a timetable for completion of the remedial activities being proposed.

The ALJ recommended that the plan be submitted within sixty (60) days. Based on this record, requiring that the plan be submitted to Department staff for its review and approval in forty-five (45) days is reasonable. Department staff, upon review of the corrective action plan, may direct respondent to make appropriate revisions, including but not limited to changes to the timetable, and establish the date by which respondent must submit a revised plan to Department staff. Following approval of the corrective action plan by Department staff, respondent shall implement the plan in accordance with its terms including, without limitation, any timeframes established under the plan. Upon completion of the work, respondent shall provide a report to Department staff of the remedial activities that respondent implemented. Respondent's report shall also include before-and-after photographs of the areas where respondent undertook remedial activities.

With respect to the civil penalty, I decline, in light of respondent's unsanctioned activities, to suspend the entire portion as recommended by the ALJ. Requiring respondent to undertake the cost of restoring the affected area in a manner that would conform to the Department's practices supports the suspension of a significant portion of the civil penalty, but, in light of the illegal activities, a portion of the penalty will not be suspended. In this matter and on this record, I am suspending two thousand six hundred fifty dollars (\$2,650) of the requested civil penalty contingent upon respondent's complying with the terms and conditions of this order including but not limited to the satisfactory preparation and implementation of the corrective action plan. The remaining portion of the penalty (that is, two hundred dollars [\$200]) is not suspended and respondent shall submit payment within thirty (30) days of the service of this order upon him.

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

- I. Respondent Michael S. Mastic is hereby adjudged to have violated:
 - A. ECL 9-0303(1) and 6 NYCRR 190.8(g) by cutting saplings and shrubs on State land; and
 - B. ECL 9-0303(1) by cutting eleven (11) trees on State land.
- II. Respondent Michael S. Mastic is hereby assessed a total civil penalty in the amount of two thousand eight hundred and fifty dollars (\$2,850). Of this amount, two hundred dollars (\$200) shall be payable within thirty (30) days of service of this order upon

respondent. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

New York State Department of Environmental Conservation
Region 5, Office of General Counsel
1115 NYS Route 86
P.O. Box 296
Ray Brook, New York 12977
Attn: Betty Douglas

The remaining portion of the penalty assessed (that is, two thousand six hundred fifty dollars [\$2,650]) shall be suspended, contingent upon respondent complying with the terms and conditions of this order. Should respondent fail to satisfy the terms and conditions of this order, including but not limited to the preparation and implementation of a corrective action plan as described in this order, the suspended penalty shall become immediately due and payable upon notice by the Department and shall be mailed to the Department at the address referenced above.

- III. Within forty-five (45) days of the service of this order upon respondent Michael S. Mastic, respondent shall, after consultation with DEC Assistant Regional Attorney Scott Abrahamson or his designee, submit a corrective action plan to the Department for approval. Respondent, in the corrective action plan, must evaluate the current condition of the impacted land in question, including but not limited to the stumps and debris that were left as a result of respondent's cutting activities for which he has been found liable, and set forth the remedial activities to be undertaken. The plan must also include a timetable for completion of the remedial activities set forth in the corrective action plan. Following approval of the plan by Department staff, including any appropriate revisions directed by Department staff, respondent shall implement the plan in accordance with its terms including, but not limited to, any timeframes established under the plan. Within thirty (30) days of the completion of the remedial activities set forth in the corrective action plan, respondent is to provide a report to Department staff (at the address set forth in Paragraph IV of this order) of the remedial activities and before and after photographs of the areas where remedial activities were implemented.
- IV. Any questions or other correspondence regarding this order shall be addressed to Scott Abrahamson, Esq., Assistant Regional Attorney by telephone at the following address:

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

- V. The provisions, terms and conditions of this order shall bind respondent Michael S. Mastic, his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/
By: _____
Basil Seggos
Commissioner

Dated: Albany, New York
October 18, 2016

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

In the Matter

- of -

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

- by -

MICHAEL S. MASTIC,

Respondent.

DEC Case No. R5-20120618-2004

HEARING REPORT

- by -

/s/

Richard A. Sherman
Administrative Law Judge

October 3, 2014

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 November 14, 2012, on respondent's former counsel, James E. Martineau, Jr., by ordinary mail.¹ The complaint alleges that respondent violated provisions of article 9 of the Environmental Conservation Law (ECL) and its implementing regulations by cutting trees and other vegetation on State land. Respondent served an answer, dated February 4, 2013, wherein he generally admits the factual allegations set forth in the complaint, but asserts four affirmative defenses (see answer ¶¶ 11, 14-49). Among other things, respondent asserts that he "had permission" from a DEC forester to undertake the brush cutting (id. ¶ 41) and that an existing "right-of-way grants [respondent] the legal right to maintain and keep clear the right of way for its intended purposes" (id. ¶ 49).

On June 25 and 26, 2014, an administrative enforcement hearing was held at the DEC Region 5 Office in Ray Brook, New York, to consider Department staff's allegations. Pursuant to section 622.9(e) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), this office provided written notice of the hearing to respondent by letter dated May 29, 2014. The 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 four witnesses: Daniel Levy, Senior Forester, DEC Region 5; Doug Hazelden, Assistant Surveyor 3, DEC Region 5; Brian D. Huyck, Regional Enforcement Coordinator, DEC Region 5; and Glen Bronson, Forest Ranger, DEC Region 5. Respondent testified on his own behalf and called six other witnesses: Robert J. Sorrell, Plattsburgh, NY; Christopher M. Mastic, Peru, NY; William B. Ryan, Peru, NY; Leo M. Geppner, Peru, NY; Andrea C. Christensen, Peru, NY; and Henriette Mastic, Peru, NY.

¹ This means of service is not authorized by the Department's hearing regulations (see title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] § 622.3[a][3] [stating that, unless an alternative method is authorized by the ALJ, a notice of hearing and complaint must be served "by personal service consistent with the CPLR or by certified mail"]; see also Broman v Stern, 172 AD2d 475 [2d Dept 1991][holding that, "an attorney who agrees to accept service on behalf of [a client] does not automatically become an agent for the acceptance of process" and "[e]ven assuming that the . . . attorney had been properly designated as [an] agent for the service of process, the fact remains that . . . [m]ailing a summons and complaint to a person to be served does not constitute valid service"[internal quotation marks and citations omitted]). In this case, however, respondent did not contest personal jurisdiction in his answer or at any time since and, therefore, respondent has waived his right to challenge these proceedings on the basis of the lack of personal service (see Goldenberg v Westchester County Health Care Corp., 16 NY3d 323, 327 [2011][holding that the affirmative defense of lack of personal jurisdiction "[is] properly raised in either an answer or a pre-answer motion to dismiss" (citation omitted)]; McGowan v Hoffmeister, 15 AD3d 297 [1st Dept 2005] [holding that "[h]owever meritorious the affirmative defense might have been, the law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion . . . is waived" (citations omitted)]).

At the close of the hearing, Department staff requested the opportunity to file, and I authorized, written closing briefs. By agreement of the parties, closing briefs were to be filed within 30 days of the receipt of the hearing transcript, and briefs were limited to five pages. This office received the full hearing transcript on July 23, 2014 and the transcript was made available to the parties via email on that same day. This office received respondent's closing brief (respondent brief) on August 20 and staff's closing brief (staff brief) (via email) on August 22, 2014. No party requested authorization to file a reply to the closing briefs. On September 11, 2014, staff filed a request to correct several minor errors that staff identified in the hearing transcript. Respondent did not object and the errata are accepted.

As detailed below, on the basis of the record established in this proceeding, this hearing report recommends that the Commissioner issue an order (i) adjudging respondent to have violated ECL 9-0303(1) and 6 NYCRR 190.8(g); (ii) directing respondent to implement a Department-approved corrective action plan; and (iii) assessing a civil penalty of \$2,850 upon respondent, with the entire amount suspended provided that respondent complies with all terms and conditions of the Commissioner's order.

FINDINGS OF FACT

1. Mud Pond Road is a dead-end dirt road located in the Town of Peru, Clinton County. The road is approximately three and one-half miles long, runs generally east-west, with access to Patent Road at its eastern end (see transcript [tr] at 30-31, 50, 104; exhibits 1, 2, 4, 19, 20, 36).²
2. Roughly the western half of Mud Pond Road is on State land known as the Terry Mountain State Forest (tr at 106-107, 244-248; exhibits 1, 18).
3. Local landowners erected a gate on private land near the eastern end of Mud Pond Road in or about 1992, purportedly because the Town of Peru discontinued road maintenance and the landowners wanted to limit access and reduce maintenance costs (see tr at 166, 197-199; exhibit 36).
4. Respondent resides at 199 Mud Pond Road, approximately one-half mile west of the eastern end of the road (answer ¶ 2; tr at 107, exhibit 1).
5. Henriette Mastic, respondent's mother, has owned a camp near the western terminus of Mud Pond Road for over 50 years and has resided at the camp for 23 years (tr at 164-165; exhibits 21, 36). Mud Pond Road crosses approximately one and one-half miles of State land prior to reaching Henriette Mastic's residence (see exhibits 1, 19).
6. Respondent undertook and oversaw brush cutting along the sides of Mud Pond Road, primarily as the road crosses private land (the eastern portion of the road), but also along

² Mud Pond Road is identified as Patent Road in certain exhibits (see e.g. exhibits 19, 20) and the precise point at which Patent Road ends and Mud Pond Road begins is not established in the record. For clarity, as used in this hearing report, Mud Pond Road refers to the section of road described above.

a section of the road that crosses State land (the western portion) (answer ¶ 11; tr at 16-17, 28, 48, 80; exhibit 1).

7. Respondent's clearing activity on State land was limited to less than one-half mile along Mud Pond Road beginning at the point where the road crosses the eastern boundary of the State land and continuing westerly along the road (tr at 55; exhibits 1, 13 at 2 [Department staff field note indicating that recently cut stumps were found "on 3 tenths of a mile of [road]").
8. Department staff inspected the site on or about April 17, 2009 and photographed areas depicting the clearing activity on State land (tr at 111-112; exhibits 2-12, 39 at 3).
9. Department staff issued a notice of violation to respondent in January 2010 (tr at 304, 312; exhibit 17).

DISCUSSION

Department staff bears the burden of proof on all its charges and must prove the factual allegations underlying those charges by a preponderance of the evidence (see 6 NYCRR 622.11[b][1], [c]). Where a respondent asserts an affirmative defense, the respondent bears the burden of proof and must prove facts in support of the defense by a preponderance of the evidence (see 6 NYCRR 622.11[b][2], [c]).

Department staff alleges that respondent violated ECL 9-0303(1) by cutting eleven trees growing on State land along Mud Pond Road. With certain exceptions not relevant here, ECL 9-0303(1) provides that "[i]n order to protect the state lands described in this article . . . no person shall cut, remove, injure, destroy or cause to be cut, removed, injured or destroyed any trees or timber or other property thereon or enter upon such lands with intent to do so." For this alleged violation, staff seeks a penalty of \$2,750 under the provisions of ECL 71-0703(6)(a).

Department staff further alleges that respondent violated 6 NYCRR 190.8(g) by cutting over 1,000 saplings and shrubs on State land along Mud Pond Road. With certain exceptions not relevant here, 6 NYCRR 190.8(g) provides that "[n]o person shall deface, remove, destroy or otherwise injure in any manner whatsoever any tree, flower, shrub, fern, fungi or other plant like organisms . . . found or growing on State land." Staff deems this allegation to entail a single violation and seeks a penalty of \$100 under the provisions of ECL 71-0703(1).

Most of Department staff's factual allegations are not in dispute. Respondent admits that he undertook brush cutting on State land to improve access to properties along Mud Pond Road, particularly his mother's residence, which is located near the west end of the road (see answer at ¶ 11; tr at 18-19, 253-254; exhibit 1). In addition to his own brush cutting activities, it is clear that other individuals engaged in these activities at respondent's request (see tr at 28, 48, 80). Accordingly, the discussion below will generally focus upon the defenses raised by respondent.

Before turning to respondent's affirmative defenses, however, I will briefly address Department staff's allegation that respondent cut down eleven trees on State land. As to this allegation, respondent does not rely upon his affirmative defenses alone, but rather argues that the eleven trees at issue were the result of "blow down" (see respondent brief at 3 [citing several photographic exhibits]). Some photographs in evidence depict trees that appear to have been blown down, but there is no indication in the record that the trees depicted were those that form the basis of staff's allegation. Moreover, respondent's argument is directly refuted by forester Levy's testimony that he personally viewed the stumps of the eleven trees cut on State land, measured their diameter, and determined their stumpage value (see tr at 146-147; see also exhibit 13). The fact that there are blown down trees in the woods along Mud Pond Road does not overcome the testimony of the Department's forester regarding the eleven trees at issue. Accordingly, I hold that staff has met its burden to establish that respondent cut down eleven trees on State land.

RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent asserts four affirmative defenses in his answer: (1) the Department is engaging in selective enforcement against respondent; (2) the Department's claims are time-barred; (3) the Department gave respondent permission; and (4) respondent's brush cutting activity occurred within the right-of-way for Mud Pond Road and the deed into the State for the land at issue "excepts the use of the right of way for . . . [those] owning property along said Mud Pond Road for ingress, egress and utilities" (answer at 3-5 [quote at ¶ 48]).

First and Second Affirmative Defenses

At hearing, respondent did not pursue the first or second defenses and I will address them only briefly here. The first defense, selective enforcement, is not available to respondent in this forum, but rather must be pursued in civil court (see Matter of 303 West 42nd Street Corp. v Klein, 46 NY2d 686, 693 [1979])[noting that a claim of selective enforcement "is treated not as an affirmative defense to . . . the imposition of a regulatory sanction but rather as a motion to dismiss or quash the official action [and a reviewing] court must conduct a hearing if, on the papers before it, a strong showing of selective enforcement, invidiously motivated, appears"] [citations omitted]). Accordingly, the first affirmative defense will not be considered further here.

As for the second affirmative defense, respondent did not state the legal basis for his assertion that the Department's enforcement action is time barred. Nevertheless, I note that State Administrative Procedure Act (SAPA) § 301(1) provides that "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time." In Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169, 178 [1985]), the Court of Appeals elaborated on this standard, holding that "an administrative body in the first instance, and the judiciary sitting in review, must weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation."

Although there was some discussion at hearing regarding the length of time between when the alleged violations were first identified by Department staff (in April 2009) and the date respondent was issued a ticket (in January 2010) (see tr at 230-232), there was no showing that the timing of the ticket or the hearing resulted in actual prejudice to respondent. The passage of time, standing alone, does not constitute prejudice (see e.g. Matter of Corning Glass Works v Ovsanik, 84 NY2d 619, 623-624 [1994][rejecting "petitioner's claim that the 8 1/2-year delay in this case was substantially prejudicial as a matter of law" and holding that the court "must decide whether petitioner was actually prejudiced by the administrative agency's delay"]. In addition, at least some of the delay here was caused by the parties' efforts to resolve this matter without resort to hearing (see tr at 235 [respondent noting that he and staff met "several times in regards to resolving this issue"])).

With regard to the underlying public policy at issue in this proceeding, I note that the protection of the forest preserve is mandated by the New York State Constitution (see NY Const, art XIV, § 1 [stating that "the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be . . . taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed"]). This policy is further codified at ECL 1-0101(3)(d), which declares it is the policy of this State to "[p]reserve[e] the unique qualities of special resources such as the Adirondack and Catskill forest preserves." That is the very purpose behind the statute under which respondent is charged (see ECL 9-0303 [stating that "[i]n order to protect the state lands described in this article [which include the Adirondack forest preserve] the following restrictions shall apply"])).

The record does not support a holding that respondent was denied a hearing within reasonable time as contemplated by SAPA § 301(1). Accordingly, respondent has not met his burden to prove the second affirmative defense.

Third Affirmative Defense: Department Authorization

By his third affirmative defense, respondent asserts that he had permission from Department staff to undertake brush cutting activity on State land and, therefore, the Department may not hold respondent liable for that activity. It is well settled, however, that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (Matter of Schorr v New York City Dept. of Housing Preserv. and Dev., 10 NY3d 776, 779, [2008][citations omitted]; see also Matter of Parkview Assoc. v City of New York, 71 NY2d 274, 282 [1988][holding that "estoppel is not available to preclude a municipality from enforcing [its] laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results"])[citations omitted]). Here, the Department has a clear statutory duty to protect the forest preserve and, even if a Department employee had verbally authorized respondent to cut trees and brush on State land along Mud Pond Road, the Department would not be foreclosed from fulfilling that duty.

Although estoppel does not provide a defense to liability, the factors giving rise to a claim of estoppel may be relevant to the penalty determination. Specifically, if a respondent establishes that he or she was given authorization by a member of the Department for an activity

that was later determined to be in violation of law, the Commissioner may choose to consider this as a mitigating factor. Accordingly, respondent's estoppel defense is discussed below.

At hearing, respondent questioned DEC forester Levy at length with regard to whether Mr. Levy authorized respondent's brush cutting activity along the State land portion of Mud Pond Road (see tr at 213-221). It is clear that, at various times and at various locations along Mud Pond Road, respondent and Mr. Levy spoke about respondent's brush cutting activities (id. at 219 [Levy testimony that he and respondent "had numerous conversations . . . about work that was going on"]). Mr. Levy testified that he told respondent that the brush cutting done along the private land portion of Mud Pond Road "looked good or . . . was okay," but that he also advised respondent that the Department "had no oversight over any of the work that happened on private property" (id.). Respondent maintains that Mr. Levy stated his approval of respondent's brush cutting while respondent was actively working on State land, but Mr. Levy flatly denies same (id. 215 [Levy testimony that he "never was present during any work that took place on the State portion" of Mud Pond Road]).

Respondent proffered the testimony of three eyewitnesses to corroborate his position with regard to whether Mr. Levy gave approval of respondent's brush cutting activity while respondent was actively working on State land. Generally, the testimony of these witnesses supported respondent's assertion that Mr. Levy had stated his approval of respondent's brush cutting activity (see tr at 34 [Sorrell testimony that Mr. Levy stated the brush cutting was "perfectly fine"], 38 [C. Mastic testimony that Mr. Levy "seemed quite happy with what we were doing"], 81 [Geppner testimony confirming that Mr. Levy had indicated that the work looked good]). Their testimony was, however, inconsistent with regard to whether Mr. Levy's approbatory statements were made on the State land portion of Mud Pond Road. Two of the witnesses recalled the statements as having occurred on private land and one recalled the statements as having been made on the State land portion of the road (see id. at 30-31 [Sorrell testimony that the statements were made on the private land portion of the road "between Mr. Mastic's and the gate, roughly"], 79 [Geppner testimony that, while on private property near the gate at the east end of Mud Pond Road, Mr. Levy stated that they could cut brush "not any bigger than two inches in diameter"], 37 [C. Mastic testimony that the statements were made on the State land portion of the road "at the Mud Pond Trail entrance"]).

While it is clear from the record evidence that Mr. Levy noted his approval, in some form, of respondent's brush cutting activity along the private land portion of Mud Pond Road, the evidence does not support a holding that he did so on the State land portion of the road. As discussed above, of the four firsthand witness accounts proffered at hearing, only one placed the relevant conversation on State land.³ Notably, even that witness placed the location of the conversation "at the Mud Pond Trail entrance" which is on State land, but just west of the State land boundary (tr at 37; see also exhibit 1 [the Mud Pond Trail entrance is located approximately at the point marked as "287" on Mud Pond Road]). Moreover, the witness signed a statement in January 2010 wherein he states that he and others "had just gotten out of [their] truck" as they were moving west along the road "when Dan Levy pulled up . . . rolled down his window . . .

³ Messrs. Levy, Sorrell, C. Mastic, and Geppner each testified that they were present on Mud Pond Road when Mr. Levy indicated his approval of respondent's brush cutting activity. Although respondent testified at hearing, his testimony did not address this specific issue (see tr at 339-343).

[and] said "Look[]s good guys" (exhibit 35). It is not clear from that statement whether any brush cutting had been done on State land at that location.

Although I conclude that Mr. Levy did not state that he approved of respondent's brush cutting activity while on State land, it remains possible that discussions between respondent and Mr. Levy were misconstrued or confusing. Mr. Levy's comments on work done on private land may have been interpreted as granting approval for similar work along the entire length of Mud Pond Road (see tr at 218-221 [respondent's questioning of Mr. Levy on this point]; see also id. at 83 [Geppner testimony that he did not understand Mr. Levy's approbatory statements to be limited to work done on private land "so I thought it was okay to" cut brush on State land]). Respondent concedes that he was advised that he would need formal authorization to cut larger trees on State land (see id. at 17 [respondent's opening statement in which he represents that staff advised him "you can cut all the brush you want, just don't cut any large trees, I'll give you a permit for large trees later on"]). The fact that respondent understood that authorization was necessary for some aspects of his road clearing work on State land, may have led respondent to misapprehend Mr. Levy's statements concerning the need for a permit to do any road clearing work (see id. at 213-214 [respondent's questioning of Mr. Levy with regard to Mr. Levy's purported authorization to cut brush, but not to cut large trees]).

As noted at the outset of this discussion, the issue of whether a member of Department staff advised respondent that he could undertake brush cutting activity on State land is not relevant to respondent's liability. Under the circumstances presented here, there is no estoppel against the State. Nevertheless, on the record before me, I deem it credible that respondent believed he had Department approval to undertake brush cutting on State land along Mud Pond Road and recommend that this be taken into consideration in assessing a penalty.

Fourth Affirmative Defense: Mud Pond Road Right-of-Way

The legal status of Mud Pond Road was not established on this record. Respondent argues that Mud Pond Road is a right-of-way, either public or private, providing the only means of vehicular access to several camps and his mother's year-round residence located on a tract of private land within the Terry Mountain State Forest (tr at 18; respondent brief at 1; see also exhibit 1 [depicting the road, State land, and private inholdings]).

As respondent notes, the 1960 deed into his parents, James and Henriette Mastic, for a parcel near the western terminus of Mud Pond Road describes the parcel by reference to "the Town Road" (tr at 202-203, 205-206; exhibit 21 at 1 [deed describing the parcel's northern boundary as "running . . . along the Southerly boundary line of the Town Road"]). The record includes other evidence which suggests that Mud Pond Road is a town road (see e.g. exhibits 19 [DEC map, revised in 1962, denominating Mud Pond Road as a town road], 36 [news articles from the 1990s describing the road's long history and noting the town's former maintenance of the road]; tr at 53 [Christopher Mastic testimony that, in the early 1990s, "the town decided that they had just had enough maintaining it (i.e., Mud Pond Road)"], 202-203, 206 [Henriette Mastic testimony relating the efforts of local residents to maintain the road after the town ceased maintenance], 259 [DEC surveyor's testimony that Mud Pond Road "was an old town road"]).

Although Department staff acknowledges that Mud Pond Road is a right-of-way, allowing passage to the private inholdings, staff declines to take a position with regard to whether the road is a town road (see e.g. tr at 10 [DEC counsel, without rejecting the possibility, stating that "the proof for that contention (i.e., that Mud Pond Road is a town road) I don't think is that strong"], 107 [DEC forester's testimony that the Department is "unsure if it's a . . . road"], 122 [DEC forester's testimony that he went into "great detail" with respondent relative to allowable work along the "existing road right-of-way"], 259 [DEC surveyor's testimony that Mud Pond Road "was an old town road" and "the private owners have a right-of-way to get to their land"])).

Department staff argues that "for the purposes of this proceeding against Mr. Mastic, the status of the Mud Pond Road, as a town highway or private road, is not relevant" (tr at 13-14). Staff posits that, regardless of whether Mud Pond Road is a town road or private right-of-way, respondent's brush cutting activity outside of the traveled roadway was unauthorized and in violation of the environmental conservation law and regulations. DEC's surveyor testified that the Mud Pond Road right-of-way is limited to "just the existing path that is available for travel" (*id.* at 265). DEC forester Levy testified that much of Mr. Mastic's brush cutting occurred "outside of the existing ditch line, which in a prescriptive road, which is one that doesn't have a deeded width, the Department uses those ditches to show existing width" (*id.* at 137-138). In addition, Forest Ranger Bronson testified that, to determine the width of an existing right-of-way, "we find a section of road where both ditches are identifiable . . . [and] measure that distance" (*id.* at 329).

Department staff's representations concerning the extent of the Mud Pond Road right-of-way are consistent with the approach set forth in the Department Policy and Procedure for Temporary Revocable Permits for the Use of State Land (TRP policy [exhibit 28]), dated July 31, 1986, which was in effect at the time of respondent's brush cutting activity (tr at 286). The TRP policy states that, "[t]he discernible right-of-way of the road cannot be increased . . . unless . . . a width is specified in the document or deed that created the easement" (exhibit 29 [TRP policy § 8426.05 n 2]). As discussed below, this "discernable right-of-way" approach is in harmony with relevant case law.

Neither party has asserted that the right-of-way for Mud Pond Road was established by a written instrument. There is no evidence in the record that would support the conclusion that the town dedicated land to create a right-of-way for the road (see generally Highway Law § 171 [describing the process for establishing a town highway by dedication]). There has also been no assertion, nor is there any evidence in the record, that Mud Pond Road was established under a written easement, by deed or other means. Accordingly, as noted in the TRP policy, because the width of the right-of-way is not "specified in [a] document or deed," the bounds of the right-of-way must be established by other means.

Absent formal dedication proceedings by the Town of Peru, Mud Pond Road may still be deemed to be a town road. Pursuant to Highway Law § 189 (governing "[h]ighways by use"), lands that are "used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to the width of at least three

rods." A rod equals 16.5 feet. Accordingly, assuming without deciding that Mud Pond Road is a town road "by use," this provision of the highway law would appear to establish a right-of-way 49.5 feet wide; sufficiently wide to encompass the area where respondent engaged in brush cutting. This provision of the highway law does not, however, provide a defense for respondent.

New York courts have long held "that the width of a public highway acquired by use pursuant to Highway Law § 189 is limited to its present width, even though that width may be less than the statutorily prescribed three rods" Matter of Danial v Town of Delhi, 185 AD2d 500, 503 [3d Dept 1992][citation omitted], lv denied 81 NY2d 706 [1993]). The violations alleged by staff clearly relate to brush cutting activities outside the "present width" of Mud Pond Road. I also note that Highway Law § 189 concerns a town's right to maintain a road; it does not authorize private citizens to maintain roads (see e.g. Petti v Town of Lexington, 92 AD3d 1111, 1112 [3d Dept 2012][noting that municipal "dominion and control over the road" is a pre-condition to the creation of a town road under Highway Law § 189][internal quotation marks and citations omitted]). Accordingly, Highway Law § 189 provides no defense to respondent.

If Mud Pond Road is not a town road under Highway Law § 189, it may nevertheless provide a legal right-of-way as a private road. As noted earlier, there is no evidence of a deed or other writing creating the right-of-way for Mud Pond Road. Therefore, if Mud Pond Road is a private road it is so by prescription (see generally Bouton v Williams, 42 AD3d 795, 795-796 [3d Dept 2007][discussing the standard to establish a prescriptive easement for a roadway]). Assuming without deciding that Mud Pond Road is a private right-of-way by prescription, respondent's brush cutting activity would not be excused. Similar to holdings concerning Highway Law § 189, New York courts have held that a private road right-of-way is limited to the extent of its use (see Dermody v Tilton, 85 AD3d 1682, 1683 [4th Dept 2011][holding "[i]t is well settled that, in the case of a prescriptive easement, the right acquired is measured by the extent of the use" (internal quotation marks and citations omitted)]). Accordingly, a holding that Mud Pond Road is a private road by prescription, would provide no defense to respondent.

I note that respondent did seek to demonstrate that the right-of-way for Mud Pond Road was sufficiently wide to encompass the area of his brush cutting. Respondent presented a photograph (exhibit 43⁴) to staff's surveyor which depicted a survey pin. The survey pin is located near the roadway and respondent inquired whether the pin represented the outer edge of the right-of-way (tr at 261-263). Staff's surveyor testified, however, that "[o]ur surveying standards require us to set a [boundary] line marker on either side of the road" and the pin has "nothing to do with [marking the boundary of] a road right-of-way" (id. at 263).

In summary, respondent argues, and staff does not dispute, that Mud Pond Road provides a right-of-way for property owners to access lands along the road. While the legal status of that right-of-way is not established on this record, respondent's tree and brush cutting activities

⁴ The photograph was initially used only to refresh the witness's recollection regarding the location and purpose of the survey pin (see Orszulak v A.O. Smith Water Prods., 2010 NY Misc LEXIS 5900, *7 [Sup Ct, NY County 2010][noting that the "use of photographs is a well accepted form of refreshing the recollection of a witness"]), but it was later moved into evidence as exhibit 43.

occurred outside of the right-of-way and were not authorized by the Department.⁵ Accordingly, the existence of the Mud Pond Road right-of-way does not relieve respondent of liability.

RELIEF

By its complaint, Department staff requests that the Commissioner issue an order assessing a penalty of \$2,850. Staff does not specify any corrective actions, but does request "[s]uch other and further relief as the Commissioner may deem appropriate" (complaint at 4). For the reasons discussed below, I recommend that the Commissioner issue an order assessing a penalty of \$2,850, with the entire amount suspended provided that respondent undertakes certain corrective actions at the site.

Penalty

By its first cause of action, staff alleges respondent violated ECL 9-0303(1) by cutting eleven trees on State land. The penalty provision for this violation is found at ECL 71-0703(6)(a), which states, in part:

"any person who violates subdivision 1 of section 9-0303 of this chapter shall be liable to a civil penalty of two hundred fifty dollars per tree or treble damages, based on the stumpage value of such tree or both."

Staff requests a penalty of \$2,750, which equates to the full \$250 penalty for each of the eleven trees cut by respondent.

By its second cause of action, staff alleges respondent violated 6 NYCRR 190.8(g) by cutting trees and over 1,000 saplings and shrubs on State land. The relevant penalty provision for this violation is found at ECL 71-0703(1), which provides, in part:

"any person who violates any provision of article 9 or the rules, regulations or orders promulgated pursuant thereto or the terms of any permit issued thereunder, or who fails to perform any duty imposed by any provision thereof . . . shall be liable to a civil penalty of not less than ten nor more than one hundred dollars."

Staff seeks \$100 for this alleged violation, apparently deeming the alleged brush cutting to be a single incident and seeking the maximum amount.

Department staff has met its burden of proof and has established that respondent is liable for the violations of ECL 9-0303(1) and 6 NYCRR 190.8(g) cited in the complaint. It is clear, however, that respondent's actions were motivated by his desire to improve access to his mother's residence which is currently limited by the condition of the road and the encroachment of vegetation (see tr at 18-19 [respondent asserting that he is "very concerned" over emergency vehicle access and plowing], 186 [H. Mastic testimony that she has been advised that emergency

⁵ The question of whether road maintenance activities within a public or private right-of-way require Department authorization is not before me and I make no determination in that regard.

vehicles can no longer access her property], 322 [DEC forest ranger testimony that "[i]f you're asking me if an ambulance can travel the length of that road, the answer is no"]. Respondent also has no prior violations (see id. at 322) and has stated that he will apply for a TRP before undertaking further work on State land (respondent brief at 3). Further, as discussed above, respondent may have misapprehended statements made by DEC staff as providing him with authorization to undertake brush cutting along the State land portion of Mud Pond Road.

On this record I recommend that the Commissioner assess a penalty in the amount requested by staff and suspend the entire amount.

Corrective Action

Although the complaint includes a request for "[s]uch other and further relief as the Commissioner may deem appropriate," Department staff did not request any specific corrective action. Nevertheless, Senior Forester Levy testified that respondent's brush cutting activity left numerous small stumps, between 12" and 18" tall, along the road and that these stumps created safety and access concerns (tr at 134; see also exhibit 5 [photograph depicting stumps along the road]). He further testified that this manner of brush cutting was not consistent with Department-approved practices which "require all stumps to be cut at ground level" (id.). Accordingly, I recommend that the Commissioner direct respondent implement a corrective action plan to ensure that the work he has done along the State land portion of Mud Pond Road conforms with Department-approved practices. To that end, respondent should be directed to consult with staff and submit a corrective action plan to the Department for approval within 60 days of his receipt of the Commissioner's order.

CONCLUSIONS AND RECOMMENDATIONS

As detailed above, I conclude that Department staff has met its burden to establish respondent's liability for the violations alleged in the complaint. I recommend that the Commissioner issue an order assessing a civil penalty of \$2,850. I further recommend that the penalty be suspended in its entirety provided that respondent implements an approved corrective action plan and complies with all other terms of the Commissioner's order.

EXHIBIT LIST

Matter of Michael S. Mastic
DEC Case No. R5-20120618-2004

Exhibit No.	Rec'd (Y/N)	Description
1	Y	DEC generated Geographic Information System (GIS) map of Mud Pond Road and surrounding area (dated 6/20/14) (oversized exhibit)
2	Y	Photograph (#283) – Mud Pond Road
3	Y	Photograph (#287) – Brush cuttings along Mud Pond Road
4	Y	Photograph (#298) – Mud Pond Road
5	Y	Photograph (#300) – Sapling stumps along Mud Pond Road
6	Y	Photograph (#301) – Stacked sapling trunks along Mud Pond Road
7	Y	Photograph (#302) – Brush cuttings along Mud Pond Road
8	Y	Photograph (#304) – Brush/sapling cuttings along Mud Pond Road
9	Y	Photograph (#310) – Brush cuttings along Mud Pond Road
10	Y	Photograph (#311) – Tree/sapling cuttings along Mud Pond Road
11	Y	Photograph (#315) – Tree/sapling cuttings along Mud Pond Road
12	Y	Photograph (#318) – Brush/sapling cuttings along Mud Pond Road
13	Y	Memorandum dated 4/23/09: timber trespass tree tally results
14	Y	Stumpage Price Report, winter 2009
14A	Y	Email dated 6/16/14: stumpage valuation for 11 trees
15	Y	Complaint Form, NYSDEC Office of Public Protection (Call for Service #10-000143)
16	Y	Ticket (UT-50), affirmed on 1/4/10
17	Y	Notice of Violation issued to respondent on 1/27/10
18	Y	Certificate of Appropriation (deed into NYS), dated 7/26/63
19	Y	NYS Conservation Dept Property Map No. 6442, Clinton County Reforestation Area No. 4 (revised Aug. 1962) (oversized exhibit)
20	Y	DEC Real Property Bureau Map No. 11,913 (portion of Clinton Reforestation Area 4) (certified 6/30/05)
21	Y	Deed into James and Henrietta (sic) Mastic, dated 6/30/60
22-26	N	Department staff originally planned to offer these exhibits at hearing, but decided they were not necessary to staff's case.
27	Y	Affidavit of Peter Frank, sworn 3/10/14
28	Y	DEC Memorandum, dated 8/29/86 and attached Commissioner's Directive, dated 7/31/86, Temporary Revocable Permits (TRP) Policy and Procedure
29	Y	Excerpt from exhibit 28
30	Y	Affidavit of Lt. John O. Ellithorpe, sworn 6/19/14, and attached Order on Consent (Town of Schroon)

Exhibit No.	Rec'd (Y/N)	Description
31	N	Order on Consent (Town of Jackson)
32	Y	Affirmation of Scott Crisafulli, Esq., dated 6/16/14, and attached Order on Consent (NYS Department of Transportation)
33	Y	Affirmation of Anthony London, Esq., dated 6/23/14, and attached Order on Consent (Town of Brighton)
34	Y	Sworn statement of Robert J. Sorrell, sworn 1/31/10
35	Y	Statement of Christopher M. Mastic, dated 1/31/10
36	Y	News articles from 1992 and 1997, re: Mud Pond Road closure
37	Y	Statement of Leo Geppner, dated 1/31/10
38	Y	Statement of Andrea C. Christensen, dated 1/31/10
39	Y	Field notes/phone contacts, from DEC file, 2/17/09-6/13/14
40	Y	Eleven photographs (marked 40A-40K) of downed trees and brush/sapling cuttings along Mud Pond Road
41	Y	Nine photographs (marked 41A-41I) of tree/sapling cuttings along Mud Pond Road and of road condition in winter
42	Y	Statement of Henriette Mastic, dated 1/31/10
43	Y	Photograph of capped surveyor's pin near Mud Pond Road
44	Y	Photograph of condition of Mud Pond Road on State land section
45	Y	Photograph of condition of Mud Pond Road on State land section
46	Y	Photograph of condition of Mud Pond Road on State land section
47	Y	Photograph of condition of Mud Pond Road on State land section
48	Y	Photograph of condition of Mud Pond Road on State land section
49	Y	Photograph (duplicate of exhibit 44)
50	Y	Photograph of condition of Mud Pond Road on State land section