STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law (ECL)	**RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY JUDGMENT**
- by -	
WILLIAM STASACK and STEPHEN STASACK,	DEC File No. R4-2003-1023-117
Respondents.	April 25, 2013

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Jill T. Phillips of counsel), for staff of the Department of Environmental Conservation

-- Stephen A. Stasack, respondent pro se and for respondent William Stasack

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges that respondents William Stasack and Stephen Stasack violated Environmental Conservation Law (ECL) article 15 by placing fill into navigable waters on property located in the Town of Grafton, Rensselaer County, adjacent to South Long Pond and Dyken Pond. Respondents move for summary judgment dismissing the complaint or, in the alternative, for partial summary judgment dismissing or reducing the relief requested in the complaint. Respondents also move for reargument and reconsideration of a prior ruling. For the reasons that follow, respondents' motions are denied.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated July 1, 2010. In the complaint, staff alleges

that respondents William Stasack and Stephen Stasack own property located at 45 Benker School Way, Town of Grafton, Rensselaer County (Tax Map Parcel # 107.-2-23) (the site), adjacent to South Long and Dyken Ponds (the Pond).[1] Staff further alleges that the Pond is a navigable body of water as defined in section 608.1(u) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Based on inspections of the site conducted on May 8, 2003, and April 30, 2009, staff charges that respondents constructed an approximately 50 foot long jetty into the Pond, placed large rocks into the Pond, and disturbed the shoreline along the width of the site. Staff further alleges that respondents lacked a permit for the construction activities, and that the construction interferes with the recreational uses of the Pond, and fish, shellfish, and wildlife habitat. Accordingly, staff charges respondents with continuing violations of ECL 15-0505(1) and 6 NYCRR 608.5. Staff seeks a civil penalty in the amount of $10,000, and remediation of the site.

Respondents filed an answer and affirmative defenses dated July 15, 2010. In their answer, respondents denied the material elements of the complaint, including the allegations that respondents own the property at issue, or that the Pond is a navigable water. Respondents also pleaded nine affirmative defenses.

By motion dated July 23, 2010, staff moved to strike the affirmative defenses or, in the alternative, for clarification of those defenses. Respondents opposed. In a ruling dated December 30, 2010, I granted Department staff's motion to strike affirmative defenses in part, and dismissed the defenses of failure to join necessary parties (a portion of respondents' second affirmative defense), election of remedies (a portion of the third affirmative defense), selective enforcement (the sixth affirmative defense), laches (a portion of the eighth affirmative defense), statute of limitations (the ninth affirmative defense), res judicata, and collateral estoppel (the tenth affirmative defense) (see Matter of Stasack, Ruling of the Chief Administrative Law Judge [ALJ] on Motion for

[1] As discussed further below, the parties dispute whether South Long Pond and Dyken Pond are a single body of water. In this ruling, when both ponds are referred to as a single body of water, they are referred to as the "Pond." Otherwise, they are referenced separately as "South Long Pond" or "Dyken Pond," respectively.

Clarification and To Strike Affirmative Defenses, Dec. 30, 2010). I otherwise denied Department staff's motion for clarification or to strike affirmative defenses.

On September 16, 2011, Department staff filed a statement of readiness for adjudicatory hearing (see 6 NYCRR 622.9). The hearing was adjourned, however, while the parties attempted a mediated settlement with ALJ Richard R. Wissler.

When the mediation failed to produce a settlement, respondents filed a notice of motion for summary judgment dated January 13, 2012. Attached to the notice of motion are an affidavit of Stephen A. Stasack with attachments and a memorandum of law. In their motion, respondents seek dismissal of the complaint on multiple grounds. In the alternative, respondents seek partial dismissal of the relief sought by Department staff, including a reduction in any applicable penalty. Respondents also seek reargument and reconsideration of my prior ruling striking respondents' statute of limitations defense.

In opposition to respondents' motion, Department staff filed a memorandum of law dated February 2, 2012, with attachments. Respondents filed a reply affidavit of Stephen A. Stasack dated February 10, 2012.

DISCUSSION

Motions for summary judgment -- or motions for order without hearing under the Department's uniform enforcement hearing procedures (see 6 NYCRR 622.12) -- are governed by the standards applicable to summary judgment motions under Civil Practice Law and Rules (CPLR) § 3212. A contested motion for summary judgment will be granted if, upon all the papers and proof filed, a cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party (see 6 NYCRR 622.12[d]). The motion must be denied with respect to particular causes of action or defenses if any party shows the existence of one or more substantive disputes of fact sufficient to require a hearing (see 6 NYCRR 622.12[e]).

As the party making the motion, respondents carry the initial burden of establishing their entitlement to judgment as a matter of law on any of the causes of action or defenses

raised (see 6 NYCRR 622.11[b][3]; see also Matter of Berger, ALJ Ruling, Sept. 19, 2007, at 4-5; Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [and cases cited therein]). Respondents carry their burden by producing evidence sufficient to demonstrate the absence of any material issues of fact (see Matter of Locaparra, at 4). Because hearsay is admissible in administrative hearings, respondent may support its motion with hearsay evidence, provided that the evidence is sufficiently relevant, reliable, and probative (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 2-3).

Once respondents carry their initial burden of establishing a prima facie case justifying summary judgment, the burden shifts to Department staff to produce evidence sufficient to raise a triable issue of fact warranting a hearing (see Matter of Locaparra, at 4). As with the proponent of summary judgment, a party opposing summary judgment may not merely rely on conclusory statements or denials, but must lay bear its proof (see id. [and cases cited therein]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (see Zuckerman v New York City Tr. Auth., 49 NY2d 557, 562-563 [1980]; Drug Guild Distribs. v 3-9 Drugs, Inc., 277 AD2d 197, 198 [2d Dept 2000], lv denied 96 NY2d 710 [2001] [conclusory denial of transactions by company president insufficient to counter facts established by plaintiff's documentary evidence]). As noted above, hearsay evidence may be used to raise a triable issue of fact, provided that the evidence is sufficiently relevant, reliable, and probative (see Matter of Tractor Supply Co., at 2-3).

I. Navigability under ECL 15-0505

ECL 15-0505(1) provides that "[n]o person . . . shall excavate or place fill below the mean high water level in any of the navigable waters of the state . . . without a permit issued pursuant to subdivision 3 of this section" (see also 6 NYCRR 608.5). Fill includes, "but is not limited to, earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material" whether or not enclosed or contained by a structure such as a crib, bulkhead, cofferdam, or piling (see ECL 15-0505[1]; 6 NYCRR 608.1[m]).

Respondents argue that South Long Pond is not a navigable water of the State as a matter of law and, thus, the complaint must be dismissed in its entirety. Respondent Stephen Stasack states in his affidavit that South Long Pond is entirely surrounded by privately owned lots. He also states that although boats may be launched from respondents' lot, and that he, the police, fire rescue, and emergency responders have operated vessels on the pond, the public does not have access to the pond. Relying on the common law and Navigation Law definitions of navigability, respondents argue that because South Long Pond is not used as a public highway for transportation and lacks multiple public access points, it is not a navigable water of the State.

In opposition to respondents' motion, Department staff asserts that South Long Pond and Dyken Pond is a navigable water of the State under ECL article 15. In support of its position, staff cites the regulatory definition at 6 NYCRR 608.1(u), which provides that the "navigable waters of the State" include:

> "all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation. It does not include waters that are surrounded by land held in single private ownership at every point in their total area."

Department staff alleges that South Long Pond and Dyken Pond is a single water body, and that respondents' own proof establishes that vessels with a capacity of one or more persons can be operated on the Pond. Staff also asserts that although privately-owned lots surround the Pond, those lots are not all owned by a single owner and, thus, the exemption for waters held in single private ownership does not apply. Accordingly, because vessels can be operated on the Pond, staff asserts that the Pond satisfies the definition of navigability under section 608.1(u).

As to public access, staff asserts that whether public access exists is not relevant to the definition of navigability under section 608.1(u). Nevertheless, in its brief, staff "notes for the record" that the Department maintains a public

access point to the Pond located at the Dyken Pond Environmental Center on the south end of the Pond.

Department staff also argues that respondents' reliance on case law interpreting the definition of navigability under the common law and the Navigation Law is misplaced. Staff contends that the common law and Navigation Law definitions of navigability do not apply to ECL article 15.

Respondents fail to establish they are entitled to summary judgment on the issue whether South Long Pond is a navigable water of the State under ECL 15-0505. In Matter of Serth (Decision of the Commissioner, Dec. 19, 2012), the Commissioner recently explained the use of the term "navigable waters of the State" under ECL 15-0505, and distinguished navigability under the ECL from navigability under the Navigation Law and the common law. While waters that are navigable under the Navigation Law and the common law are subject to ECL 15-0505, the scope of navigability protected by ECL 15-0505 is broader than under the Navigation Law and the common law, and the definition of navigability under ECL 15-0505 is not limited by the common law or Navigation Law definitions (see id. at 5-10).

Although ECL 15-0505 applies to waters that are used for public transportation -- the common law and Navigation Law notion of navigability "in fact" -- ECL 15-0505 is a broad environmental protection statute that applies to waters used for a variety of purposes beyond public transportation (see Matter of Serth, at 5-6). Navigable waters under ECL 15-0505 include not only waters used as public highways, but also waters used, both publicly and privately, for boating, fishing, swimming, water sports, and other forms of recreation (see id. at 6). They also include waters used for water supply for domestic, municipal, agricultural, industrial, and other uses; for maintenance of fish and wildlife populations and the habitat upon which they rely; for water quality and purity; for flood control; and for a host of other ecological purposes (see id.). Navigable waters under ECL 15-0505 also include natural and artificially created waters, waters over public or privately-owned property, and tributaries and other surface waters that are hydrologically connected to waters that are navigable as public highways (see id.). Finally, navigable waters include not only waters used by the general public, but also waters used

by private property owners that have access to a particular water body (see id. at 7-8).

In determining whether a particular water body is navigable under ECL 15-0505, that water body's classification is considered, among other things (see id. at 8). Here, South Long Pond and Dyken Pond are classified in the State's water quality classification system as class B fresh surface water bodies (see 6 NYCRR 863.6, Table I, Item No. 777; see also 6 NYCRR 863.9, Ref. Map No. K-26NW [attached]). The best uses of class B fresh surface water bodies are for primary and secondary contact recreation and fishing, including swimming and boating, and the waters are suitable for fish, shellfish, and wildlife propagation and survival (see 6 NYCRR 701.7; 6 NYCRR 700.1[a][49] [primary contact recreation]; 6 NYCRR 700.1[a][56] [secondary contact recreation]).

In addition, South Long Pond and Dyken Pond are the headwaters of the Poesten Kill, which, in turn, is a tributary of the Hudson River, a navigable water at the mouth of the Poesten Kill (see, e.g., Waterford Elec. Light, Heat and Power Co. v State of New York, 239 NY 147 [1925], affg without opinion 208 AD 273, 281 [3d Dept 1924]). The Poesten Kill is designated as either class C(T) or class C(TS) fresh surface water along its course from South Long Pond and Dyken Pond to the Hudson River (see 6 NYCRR 863.6, Table I, Item Nos. 774, 775, and 775.1). The best usage of class C fresh surface waters is for fishing, and the waters are suitable for fish, shellfish, and wildlife propagation and survival (see 6 NYCRR 701.8). Depending on the circumstances, class C fresh surface waters may also be suitable for primary and secondary contact recreation, such as for swimming and boating (see id.). C(T) and C(TS) waters are suitable for trout habitat or trout spawning habitat, respectively (see 6 NYCRR 701.25).

On this motion, the record reveals triable issues of fact concerning the use of South Long Pond for boating, fishing, swimming, and other recreational uses within the protection of ECL 15-0505. Respondents' own proof indicates that South Long Pond is used for boating (see Stephen Stasack [S. Stasack] Affid [1-13-12], ¶ 9). Indeed, in their submissions, respondents indicate that they do not dispute that boats are operated on South Long Pond (see S. Stasack Reply Affid [2-10-12], ¶ 5). In addition, Department staff submitted documents, including a decision from the Appellate Division, Third Department,

indicating that local property owners have easements for the use of the private beach located on respondents' property for swimming and bathing purposes (see Stasack v Dooley, 292 AD2d 698 [2002]). Thus, triable issues are presented concerning South Long Pond's use for boating and swimming, uses consistent with the pond's designation as a class B water body, and uses that would support the pond's navigability under ECL 15-0505.

In addition, triable fact issues are presented concerning public access to South Long Pond. As noted above, and contrary to respondents' assertions to the contrary, navigable waters under ECL 15-0505 are not limited to waters to which the general public has access. Navigability under ECL 15-0505 may be based upon access to privately-owned waters by private individuals for boating, swimming, and other recreational, non-transportation related purposes (see Matter of Serth, at 7-8).[2] Here, the record contains evidence indicating that some local property owners have access to South Long Pond and, thus, that the pond is accessible to the "public" as that term is applied in the context of navigability under ECL 15-0505. Moreover, respondents have not offered any evidence that would support the conclusion that the other private property owners surrounding the pond lack access.

In addition, triable fact issues are presented concerning the general public's access to South Long Pond for boating and fishing. Department staff alleges that South Long Pond and Dyken Pond are connected, and that the public can obtain access to South Long Pond from a public boat launch on Dyken Pond. Publicly available Departmental fishing maps indicate the existence of a public boat launch at the Dyken Pond Environmental Center (see New York State Department of Environmental Conservation, Lake Map Series, Region 4, Dyken Pond, accessed at http://www.dec.ny.gov/docs/fish_marine_pdf/dykpdmap.pdf; see also http://dykenpond.org/news/trail-map-3/).[3] The map also shows that it is possible to navigate by boat from Dyken Pond

[2] Respondents' citations to case law concerning public access under the Navigation Law and the common law are inapposite.

[3] Respondents are correct that on this motion, Department staff did not submit evidence in admissible form to dispute whether the public has access to South Long Pond from the boat launch on Dyken Pond (see S. Stasack Reply Affid, ¶ 5). The publicly-available documents cited here, however, may be subject to either judicial notice, or official notice as documents containing facts within the specialized knowledge of the Department (see 6 NYCRR

and South Long Pond. Indeed, respondents confirm that small boats can navigate between the two ponds at certain times of the year (see S. Stasack Affid, ¶ 12). Thus, a triable issue of fact is raised concerning the public's access to South Long Pond for boating and fishing.[4]

In sum, respondents have failed to establish their entitlement to summary judgment on the issue of South Long Pond's navigability under ECL 15-0505. Triable issues of fact are presented concerning whether South Long Pond is used for boating, fishing, swimming, and other recreational, non-transportation related uses for which its waters are designated, and the extent to which individual private property owners surrounding the pond, or the public in general, have access to the pond. These issues are all relevant to whether South Long Pond is a navigable water of the State under ECL 15-0505. Accordingly, respondents' motion for summary judgment dismissing the complaint on the ground that South Long Pond is not navigable water should be denied.

II. Compromise and Settlement

Respondents also move for summary judgment based on their claim that the charges and remedial relief sought by Department staff in this proceeding were resolved by the compromise and settlement of a criminal proceeding brought against respondent William Stasack in 2003. In that proceeding, respondent William Stasack was charged with one misdemeanor count of placing fill in navigable waters in violation of ECL 15-0505 on April 20, 2003 (see Environmental Conservation Appearance Ticket [ECAT] No. EC 022062, S. Stasack Affid,

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622.11[a][5]; see also State Administrative Procedure Act § 306[4]). Because I am not searching the record and granting summary judgment to Department staff on the navigability issue, however, I need not decide whether the maps may be officially noticed. Department staff will have the burden of proving South Long Pond's navigability at hearing, and to the extent staff relies on these or other maps, respondents will have the opportunity to test their probity and reliability before a final determination is made on the issue (see id.).

[4] If it is proven that South Long Pond is accessible by a public boat launch on Dyken Pond, the Navigation Law would also require an ECL 15-0505 permit for excavation and fill in the pond (see Matter of Serth, at 10-11, citing Navigation Law §§ 31, 37, and Town of N. Elba v Grimditch, 98 AD3d 183, 193 n 7 [3d Dept 2012]).

unnumbered attachment). The ECAT was issued by Environmental Conservation Officer Linda Acierno who, responding to complaints by the neighbors, inspected the site on April 20, 2003, and observed, among other things, a significant amount of disturbed area, fill in the pond and wetland areas, removal of soil from the pond bottom, and use of an excavator in the pond, all without a permit (see ENCON Police Report Form, Complaint No. 403-01438, id.). Respondent William Stasack later pleaded guilty in Town Court to a violation of ECL 71-4001, and agreed to payment of a $100 fine and waiver of his right to appeal (see People v Stasack, Grafton Town Ct, Rensselaer County, Dec. 14, 2003, Memorandum of Plea Bargain, id.).

Respondents assert that remediation was originally sought in the prior criminal proceeding but, as part of the plea agreement, the Department agreed to withdraw its request. Accordingly, respondents claim that staff's request for remediation in this proceeding was compromised in the 2003 criminal proceeding.

Respondents have failed to make a prima facie showing of entitlement to summary judgment on their defense of compromise and settlement. As I have previously ruled in this proceeding, the ECL provides for both criminal and civil penalties and remedies for violations of ECL article 15 that are enforceable in criminal, civil, and administrative proceedings (see Matter of Stasack, Ruling of the Chief ALJ, at 6, citing ECL 71-1103; 71-1107; 71-1127; and 71-4003; see also ECL 71-4001). Specifically here, ECL 71-1127 authorizes the imposition of civil penalties for civil violations of ECL article 15, and the issuance of an order enjoining a person held civilly liable from continuing those violations. The civil penalties and remedies contained in ECL 71-1127, among other statutory provisions, are in addition to the criminal sanctions authorized for criminal violations of ECL article 15 (see ECL 71-0505; 71-0507; 71-1107; 71-1131).

As also previously held, where criminal and civil sanctions are available to an agency, choice of one is not an election barring the other (see Matter of Stasack, Ruling of the Chief ALJ, at 6, citing Town of Southampton v Sendlewski, 156 AD2d 669, 670 [2d Dept 1989]). Nor does a guilty plea in a criminal proceeding generally bar a subsequent civil proceeding arising from the same transaction (see Matter of McCulley, ALJ Ruling on Motion for Order Without Hearing, Sept. 7, 2007, at 4

[and cases cited therein]). Thus, the circumstance that Department staff accepted respondent William Stasack's guilty plea in the 2003 criminal proceeding does not, without more, constitute a settlement of the Department's civil claims, including staff's claims for remedial relief arising from respondents' alleged civil liabilities.

To determine whether Department staff compromised its civil claims and remedies against respondents in the criminal proceeding, the specific terms of the plea agreement entered on the record of the criminal proceeding are examined (see People v Curdgel, 83 NY2d 862, 864 [1994]; People v Danny G., 61 NY2d 169, 173-174 [1984]; Matter of Benjamin S., 55 NY2d 116, 120 [1982]). Off-the-record promises made in the plea bargaining process are not recognized where they are flatly contradicted by the record, either by the existence of inconsistent on-the-record promises, or by a statement on the record that no other promises have been made (see Matter of Benjamin S., 55 NY2d at 120).

The only evidence of the plea agreement respondents have proffered is the Grafton Town Court's memorandum of plea bargain (see S. Stasack Affid, unnumbered attachment). That memorandum only recites the $100 fine and the waiver of appeal rights as the conditions of the agreement (see id.). The memorandum also states that it "constitutes the agreement among the People, the defendant, and the Court as to the disposition of the above original charge(s)" (id.). Nothing in the memorandum states that as a condition of respondent William Stasack's agreement to plead guilty to a violation of ECL 71-4001, Department staff withdrew any civil claims or remedies arising from the transaction. Nor have respondents offered any other on-the-record evidence, such as a transcript, documenting any other conditions of the agreement beyond those recited in the memorandum of plea bargain. Thus, respondents fail to make a prima facie showing that Department staff compromised its civil claims and remedial relief associated with those civil claims as a condition of respondent William Stasack's plea agreement.

Respondents offer several emails among Department staff indicating that remediation was being sought in the criminal proceeding (see S. Stasack Affid, unnumbered attachments). Respondents argue that these emails indicate that staff settled its request for remediation in this proceeding in

the criminal proceeding. However, the emails do not clearly establish that staff was seeking civil, as opposed to criminal, remedies in the criminal proceeding. In any event, the emails are not on the record of the criminal proceeding and, thus, are not evidence of any agreement to settle civil claims and remedies in the criminal proceeding.

Respondents also furnish an unexecuted order on consent Department staff offered to respondents in November 2003, which respondents contend details the remediation staff was seeking at the time of the criminal proceeding (see Order on Consent [undated], DEC File No. R4-2003-1023-117, S. Stasack Affid, unnumbered attachment). The order on consent, which respondents did not sign, states that it only addresses civil and administrative penalties arising from activities conducted at the site from January 1, 2001, through the date of the order (see Order on Consent ¶ II.A, id.). Moreover, the consent order is based on factual allegations, among others, arising from an inspection of the site conducted on May 8, 2003. No mention is made of the April 20, 2003, inspection or the ECAT issued that day. The consent order, therefore, supports a conclusion that Department staff did not seek or otherwise compromise any civil claims or remedies in the criminal proceeding but, rather, pursued them separately in civil administrative proceedings.

Respondents' compromise and settlement defense fails for two additional reasons. First, the complaint in this proceeding seeks civil penalties and remedies for violations occurring not only in 2003, but continuing at least through an inspection of the site allegedly conducted in April 2009. Nothing in the 2003 plea agreement indicates that any future claims, whether civil or criminal, were compromised by the plea agreement. Second, the criminal proceeding only addressed violations charged against respondent William Stasack. Again, nothing in the 2003 plea agreement indicates that any claims, whether civil or criminal, were compromised as to respondent Stephen Stasack. Thus, respondents' request for summary judgment on this defense should be denied.

III. Respondents' Personal Activities

Respondents assert that Department staff has charged them with personally violating ECL 15-0505. Respondents submit affidavits in which they deny personally excavating or placing

fill in South Long Pond (see S. Stasack Affid, ¶ 11; William Stasack Affid [1-13-12], ¶ 4).

As an initial matter, I disagree with respondents' assertion that Department staff only charged respondents for personally excavating or placing fill in South Long Pond in violation of ECL 15-0505. Persons liable for violations of ECL 15-0505 include persons who directly or indirectly control a site and who are responsible for site alteration (see Matter of Kinneary, Order of the Acting Commissioner, May 9, 1994, at 2-3; see also Matter of Taylor, Order of the Commissioner, Oct. 18, 2000, at 1 [placement of concrete into lake with knowledge and consent of site owner]; Matter of Romer, Order of the Commissioner, July 2, 2003, at 1 [site owner acting through son as agent]). Here, staff alleges that respondents are the owners of the site adjacent to South Long Pond where the alleged excavation and fill activities occurred. Moreover, staff does not limit its allegations to respondents' personal activities. Thus, the allegations of the complaint are sufficiently pleaded so as to include respondents' potential liability as persons exercising control over site alterations.

In any event, in response to respondents' motion, Department staff submits an affidavit of a witness, Lisa Dooley, along with accompanying photographs, who states that on April 20, 2003, she witnessed respondents personally conducting work in South Long Pond with an excavator and an unknown third person (see Dooley Affid [2-2-12], Petitioner's Mem of Law, Exh 2). Thus, Department staff has raised triable issues of fact concerning respondents' liability for the alleged violations in South Long Pond.

IV. Fill Above Mean High Water Mark

Respondents argue that the location of the site where fill is alleged to have been placed, including the jetty, is above the mean high water mark of South Long Pond. Respondents assert that the mean high water mark is defined as the average of the high and low water marks at a given location. Accordingly, respondents seek dismissal of the complaint (see S. Stasack Affid ¶ 12). In the alternative, respondents seek partial summary judgment dismissing the remedial relief sought by Department staff because the remediation requested at the site is above the mean high water mark (see id. ¶ 16).

Respondents fail to make a prima facie showing that the location of the alleged fill is above the mean high water mark. As an initial matter, respondents use an incorrect method for determining the mean high water mark. Section 608.1(r) of 6 NYCRR, which defines both the mean high water mark and the mean low water mark for purposes of ECL 15-0505, provides:

> "Mean low water or mean high water means, respectively, the approximate average low water level or high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominately terrestrial habitat as determined, in order of use by the following:
>
> (1) available hydrologic data, calculations, and other relevant information concerning water levels (e.g., discharge, storage, tidal, and other recurrent water elevation data); . . .
>
> (2) vegetative characteristics (e.g., location, presence, absence or destruction of terrestrial or aquatic vegetation);
>
> (3) physical characteristics (e.g., clear natural line impressed on a bank, scouring, shelving, or the presence of sediments, litter or debris); and
>
> (4) other appropriate means that consider the characteristics of the surrounding area"

(6 NYCRR 608.1[r] [emphasis added]). Thus, the mean high water mark is determined using the approximate average high water level at a given location, not by taking the average of the high water and lower water levels at a given location as argued by respondents. In addition, several physical and ecological factors are considered in establishing the mean high water mark at a given location.

In this case, Department staff demarked the mean high water mark at the site (see Petitioner's Mem of Law, Exh 3). Respondents offer no evidence disputing staff's demarcation applying the correct standard for determining the mean high water mark at the site. Nor do respondents offer evidence establishing that all activities alleged in the complaint

occurred above the mean high water mark demarked by staff. Accordingly, respondents have failed to make a prima facie showing entitling them to summary judgment dismissing the complaint, or partial summary judgment dismissing the remedial relief sought by Department staff.

V. Administrative Delay

Respondents note that in November 2003, Department staff advised respondents that an administrative enforcement proceeding would be commenced, but that staff did not serve the complaint until July 2010. Respondents argue that by delaying commencement of this administrative enforcement proceeding for seven years, Department staff has prejudiced respondents in the defense of this matter due to an alleged inability to call relevant witnesses, thereby justifying dismissal of the complaint under Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169 [1980], cert denied 476 US 1115 [1986]). Respondents allege that the prior owner of the site, Donald E. Derth, constructed the subject jetty. However, they assert that Mr. Derth died "several years after" respondents purchased the property in 1998 (S. Stasack Affid, ¶ 13). Respondents also allege that an unidentified neighbor with knowledge about the jetty's construction, who owned the adjoining property on one side, is also dead. Respondents further allege that the adjoining owner on the side of respondents' property where the jetty is located "sold the property a few years ago and I am informed that the new owner may have sold this past fall" (id.). Respondents claim these witnesses are no longer available to testify about how the jetty was created or how and when it grew in size over the years. Respondents also allege that the Assistant District Attorney and the Deputy District Attorney involved in the prior criminal proceeding are no longer employed by the Rensselaer County District Attorney's Office and, thus, are unavailable to testify concerning the compromise and settlement negotiated in that proceeding. Accordingly, respondents assert they have been substantially prejudiced in the defense of this proceeding by the Department's delay.

Respondents have failed to establish substantial actual prejudice in the defense of this matter resulting from Department staff's delay in filing the complaint. Under State Administrative Procedure Act (SAPA) § 301, all parties to an administrative adjudicatory hearing are to be afforded an

opportunity for hearing within a reasonable time (SAPA § 301[1]). To establish that a period of delay is unreasonable, respondents must show substantial actual prejudice in the defense of a matter resulting from the delay (see Cortlandt, 66 NY2d at 177-178, 180-181; Matter of Diaz Chemical Corp. v New York State Div. of Human Rights, 91 NY2d 932, 933 [1998]; see also Matter of Giambrone, Decision and Order of the Commissioner, March 17, 2010, at 11, confirmed in relevant part sub nom Matter of Giambrone v Grannis, 88 AD3d 1272, 1273 [4th Dept 2011]). The mere lapse of time in rendering an administrative determination does not, standing alone, constitute prejudice (see Matter of Louis Harris & Assocs., Inc. v deLeon, 84 NY2d 698, 702 [1994]). Thus, no fixed period exists after which delay becomes unreasonable as a matter of law (see id. [6 year delay before probable cause hearing and over 7 years before final determination not unreasonable as a matter of law]; Diaz, 91 NY2d at 933 [11 year delay before holding hearing and 3 year delay in issuing order not unreasonable]; Matter of Hansen v New York State Dept. of Envtl. Conservation, 288 AD2d 473 [2d Dept 2001] [9 year delay in bringing complaint not unreasonable]; St. Joseph's Hosp. Health Ctr. v Department of Health, 247 AD2d 136, 151-152 [4th Dept 1998], lv denied 93 NY2d 803 [1999] [10 year delay in implementing regulations not unreasonable]).

To determine whether a period of delay is reasonable within the meaning of SAPA § 301(1), agencies and reviewing courts 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 (see Cortlandt, 66 NY2d at 177-178; see also Matter of Giambrone, Commissioner Decision and Order, at 11; Matter of Hansen, ALJ Hearing Report, at 4-5, adopted by Commissioner Order, Jan. 3, 2000, confirmed on judicial review 288 AD2d 473 [2d Dept 2001]).

Here, the prejudice respondents claim is their inability to call relevant witnesses. However, although some witnesses have allegedly changed employment or moved, respondents offer no proof that those witnesses are actually unavailable (see St. Joseph's Hosp. Health Ctr., 247 AD2d at 152). Nor have respondents offered proof that the testimony of the allegedly deceased witnesses is critical to mounting their

defense (see id.). To the contrary, respondent Stephen Stasack himself has offered testimony and documentation concerning the alleged condition of the jetty at the time respondents purchased the site. Respondents have not established that other witnesses are unavailable to provide evidence concerning site conditions at all relevant times. Moreover, with respect to the prior site owner, Mr. Derth, the record is not clear whether Mr. Derth died prior to staff's November 2003 communication. If he did, the alleged loss of Mr. Derth as a witness could not in any event be attributed to the alleged delay between the November 2003 letter and the filing of the complaint in this matter. Thus, because respondents have not shown that they are actually prejudiced by the alleged loss of witnesses, they have failed to establish that they are significantly and irreparably handicapped in mounting a defense in this matter as a result of the claimed delay (see Cortlandt, 66 NY2d at 180-181; Matter of Corning Glass Works v Ovansik, 84 NY2d 619, 624-625 [1994]).

With respect to the remaining Cortlandt factors, respondents have not identified any private interest compromised by the delay. As to the causal connection between the conduct of the parties and the delay, at a least a portion of that delay resulted from the parties' attempts to negotiate a settlement of the matter. The circumstance that those attempts proved unfruitful does not necessitate the conclusion that the delay resulting from those attempts was unreasonable. Respondents offer no evidence of any "repetitive, purposeless and oppressive" conduct on the part of Department staff during the period between the 2003 communication and the filing of the complaint (see Cortlandt, 66 NY2d at 181). Finally, the State's interest in protecting the quality of its waters is significant and longstanding (see ECL 15-0103; ECL 15-0105; Matter of Serth, at 5-8) and outweighs any prejudice respondents claim on this motion. Accordingly, a fair balancing of relevant factors compels the conclusion that respondents' motion for summary judgment on its administrative delay defense should be denied.

VI. Sufficiency of Complaint

Respondents argue the complaint in this matter is defective on its face and must be dismissed. Specifically, respondents claim that the complaint fails to provide notice of the date of the alleged violations. Respondents' assertions are unpersuasive.

By statutes and regulation, the Department is required to provide "reasonable" notice of the charges involved in the proceeding, including, among other things, a statement of the legal authority and jurisdiction under which the proceeding is to be held, a reference to the particular sections of the statutes, rules, and regulations involved, and a concise statement of the matters asserted (see SAPA § 301[2]; 6 NYCRR 622.3[a]). In the context of an administrative adjudication, the administrative complaint "need only be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him . . . and to allow for the preparation of an adequate defense" (Matter of Block v Ambach, 73 NY2d 323, 333 [1989] [citation omitted]; see also Matter of Board of Educ. v Commissioner of Educ., 91 NY2d 133, 139-140 [1997]).

Here, the July 1, 2010, complaint is reasonably specific to apprise respondents of the charges against them. The complaint states the legal authority for the Department's jurisdiction over the matter, and cites the specific statutes and regulations alleged to have been violated -- ECL 15-0505(1) and 6 NYCRR 608.5 (see Complaint ¶¶ 1, 8, 9). The complaint further states that the alleged violations were observed on May 8, 2003, and April 30, 2009, and that the violations are continuing (see id. ¶¶ 12, 13, 14, 18). Thus, the complaint provides reasonable notice that the charges are based on activities allegedly occurring on or before May 8, 2003, and continuing through the date of the complaint, with additional activities allegedly occurring on or before April 30, 2009.

The complaint provides reasonable notice of the time frames involved and is sufficient to satisfy due process requirements (see Block, 73 NY2d at 333). Accordingly, respondents' motion to dismiss on the ground of inadequate notice should be denied.

VII. Ownership of Property on which Remediation is Sought

Respondents assert that Department staff has alleged that they own the property on which the alleged fill activities occurred and that site ownership is a necessary element for an ECL 15-0505 violation (see Resps' Mem of Law ¶ VI). Respondents argue, however, that they do not own the property where the

alleged fill activities occurred. In support of their motion, respondents submit documentary evidence indicating that their property line extends only to the approximate high water mark of South Long Pond (see Deed [8-20-98], S. Stasack Affid, unnumbered attachment). Accordingly, respondents argue the complaint is defective and should be dismissed.

Respondents have failed to establish a basis for dismissal of the complaint. Contrary to respondents' assertions, nothing in ECL 15-0505 or 6 NYCCR 608.5 requires a showing that the alleged violator conducted excavation or fill activities on property owned by the violator. Rather, the statute and regulation only require a showing that a person conducted excavation or fill activities in the navigable waters of the State without a permit.

Moreover, Department staff did not plead that respondents own the property on which the alleged excavation and fill activities occurred. Rather, in the complaint, staff alleges that respondents own the property adjacent to South Long Pond where the alleged unpermitted activities occurred (see Complaint ¶ 3). Staff also alleges that respondents constructed the 50-foot jetty into South Long Pond, conducted fill activities that disturbed the shoreline and shallow near shore area of the pond along the width of the site owned by respondents, and placed large rocks in the pond (see id. ¶¶ 12, 13, 14). Staff further alleges that South Long Pond is a navigable water of the State, and that respondents did not have an ECL article 15 permit for the charged activities (see id. ¶ 15). These allegations are sufficient to state a claim for violations of the statute and regulation. Any failure to plead that respondents own the property on which the fill occurred does not provide a basis for dismissing the complaint.

In the alternative, respondents argue that Department staff lacks the authority to require respondents to undertake remedial activities on property not owned by either the State or respondents. Respondents assert that the lands under South Long Pond may be owned by the County of Rensselaer, and that "it is unlikely the County would consent to the restoration of the land recreating hazardous underwater conditions subjecting it to possible liability for negligence" (S. Stasack Affid ¶ 15). Respondents also proffer a cease and desist order from the United States Army Corps of Engineers prohibiting any further work in the location of the alleged violations (see Cease and

Desist Order [10-31-03], S. Stasack Affid, unnumbered attachment). Thus, respondents contend they would be prohibited from conducting remedial activities even assuming the Department has the authority to order them. Accordingly, respondents seek partial summary judgment striking Department staff's demand for remediation.

Respondents fail to make a prima facie showing entitling them to dismissal of the remedial relief sought by staff. The Department's authority under ECL article 15 is an exercise of the State's police powers to regulate and control the water resources and the navigable waters of the State (see New York State Water Resources Commn. v Liberman, 37 AD2d 484, 488 [3d Dept 1971], appeal dismissed 30 NY2d 516 [1972] [citing former Conservation Law §§ 429-b (now ECL 15-0505) and 630 (now ECL 71-1127)]). The State's powers extend not only to waters over publicly owned lands, but to waters over privately owned lands as well (see id. at 488-489). Thus, the issue of title is irrelevant to the remedial obligations the Department is authorized to impose under ECL 71-1127 for any violations of ECL 15-0505 committed by respondents or persons operating under their control.[5]

Accordingly, the Department has the authority to order a person found to have violated ECL article 15 or its implementing regulations to remediate those violations, whether the person owns the property on which the violations occurred or not. A person subject to an order directing remediation has the initial obligation to make reasonable good faith efforts to obtain the consent of any third-party property owners necessary to fulfill the remedial obligations (see Matter of Ramcharan, Order of the Commissioner, July 24, 2011, at 4). In the event a responsible person is unreasonably denied access, the Department has a variety of legal tools available to assist the person in gaining access (see id.; see, e.g., ECL 15-0305).

Moreover, respondents' assertion that access to the location of the alleged violations would be denied by the

[5] Ownership of the site where the alleged violations occurred would be relevant, however, in the event it is established at hearing that some or part of the charged excavation and fill activities were conducted by third persons, such as Mr. Derth, not subject to respondents' control and on property not presently owned by respondents. This circumstance would raise issues concerning respondents' liability for activities by persons outside their control, and on property not owned by respondents or not otherwise under their control.

County, the Army Corps of Engineers, or any other relevant property owner is speculative, and unsupported by any evidentiary showing. Accordingly, respondents have failed on this motion to demonstrate any basis for limiting the remedial relief Department staff seeks in this proceeding.

VIII. Civil Penalty Sought

Respondents argue that the complaint only alleges a violation occurring on April 20, 2003, and that the violations alleged constitute a single, one time occurrence, and not a continuing event. Accordingly, respondents request that the penalty sought by Department staff be reduced to $500, the maximum penalty authorized for a single violation. Respondents' request should be denied.

For violations of ECL 15-0505 and its implementing regulations, ECL 71-1127 provides for "a civil penalty of not more than five hundred dollars per day for such violation and an additional civil penalty of not more than one hundred dollars for each day during which such violation continues" (ECL 71-1127[1]). Unpermitted fill placed in the navigable waters of the State interferes with the navigability of, and aquatic habitats in, those waters every day until removed. Unpermitted fill also poses a continuing threat to water quality, through erosion and other mechanisms, whether active filling is occurring or not. Similarly, unpermitted dredging and excavation can also have continuing impacts on navigability and water quality that occur after the initial unpermitted activities are concluded. Thus, each day unpermitted fill remains in the navigable waters and each day unpermitted excavations are left unremediated constitutes a continuation of the original violation. Accordingly, a penalty of $500 is authorized for the initial unpermitted placement of fill or excavation at a site, and $100 per day for each additional day the unpermitted fill and excavation remains unremediated (see Matter of Taylor, Order of the Commissioner, Oct. 18, 2000, at 1-2; see also Matter of Valiotis, Order of the Commissioner, March 25, 2010, at 5-6).

In the complaint in this proceeding, Department staff charges that respondents engaged in unpermitted excavation and fill activities in South Long Pond, and that the unpermitted excavation and fill remained at least until the date of the

complaint. These allegations are sufficient to state a claim for continuing violations of ECL 15-0505. Respondents have offered no evidence indicating that any unpermitted fill has been removed, or unpermitted excavation remediated. Accordingly, respondents have failed to make a prima facie showing on this motion warranting reduction of the penalty sought by staff.

Authority cited by respondents in support of their argument that the violations charged constitute single, non-continuing violations actually supports the conclusion that the violations charged here are continuing. In Matter of Sherwood Med. Co. v New York State Dept. of Envtl. Conservation (206 AD2d 819 [3d Dept 1994]), the court held that continued operation of an air pollution source without an air pollution control device in place and without any intervening periods of compliance constituted a continuing violation of the air pollution control laws (see id. at 820). The court held that the violation involved one cause -- operation of the source without the pollution control device -- and one remedy -- return of the pollution control device to service -- without any intervening compliance (see id.). Similarly, here, the alleged act of leaving unpermitted fill and excavation in the navigable waters of the State without any intervening periods of compliance would constitute, if proven, a continuation of the initial unpermitted excavation and fill activities. The violation alleged here involves one cause -- the excavation and placement of fill in the navigable waters of the State -- and one remedy -- the return of the disturbed areas to pre-excavation and pre-fill conditions. Thus, Matter of Sherwood Med. Co. actually supports the conclusion that the violations alleged here, if proven, constitute continuing violations.

The remaining authority cited by respondents is similarly unpersuasive. In Ward v Caulk (650 F2d 1144 [9th Cir 1981]), the court held that a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation (see id. at 1147). That holding, however, was in the context of a civil rights claim in which the plaintiff argued that the defendant’s stated desire to prevent plaintiff from obtaining another county job was the continuation of the original allegedly discriminatory act of failing to promote him. The court concluded that a “misanthropic desire” does not constitute a discriminatory action.

Here, in contrast, the unpermitted interference with, or defilement and disturbance of water courses, and the unpermitted interference with the channels and beds of lakes through the unpermitted construction of structures are precisely the wrongs the Legislature sought to address through ECL article 15 (see ECL 15-0103[9], [10]). The continued unpermitted placement of fill and unremediated excavations are the continual unlawful acts ECL 15-0505 prohibits -- they are not simply the continued ill-effects of the original construction activity. Thus, Ward v Caulk is inapposite.

State of New York v Niagara Mohawk Power Corp. (263 F Supp 2d 650 [WD NY 2003]) is also inapposite. Niagara Mohawk involved the defendant's alleged failure to obtain a pre-construction air pollution control permit. The court held that the obligation to obtain a pre-construction permit ceased once the construction or modification was complete, and that operating the facility without the pre-construction permit was not a continuation of the defendant's failure to obtain the construction permit (see id. at 661-663). ECL 15-0505, however, does not provide for pre-construction and operating permits for excavating and filling in navigable waters. Again, it is the continued presence of unpermitted fill and unremediated excavations that the statute prohibits (see Matter of Valiotis, at 5-6).

IX. Request for Reargument and Reconsideration

Finally, respondents request reargument and reconsideration of my prior ruling striking their statute of limitations defense (see Ruling, at 9). In support of their request, respondents cite Matter of DMN Mgt. Servs., LLC v Daines (79 AD3d 37 [3rd Dept 2010]) for the proposition that an agency's interpretation of a regulation so as to excuse it from complying with regulatory time limits is irrational. Accordingly, respondents request that the statute of limitations defense be reinstated and the complaint dismissed.

In Departmental proceedings, motions for reconsideration and reargument are governed by the standards that apply to motions pursuant to CPLR 2221(d) (see Matter of 2526 Valentine Inc., Ruling of the ALJ on Motion for Reconsideration, March 10, 2010, at 3 [and cases cited therein]). The issue is whether issues of law or fact were

overlooked or misapprehended by the decision maker in determining the prior motion (see id.).

Respondents fail to identify any basis for reconsidering the prior ruling. As previously ruled, the CPLR limitations periods respondents relied upon on the prior motion do not apply to administrative enforcement proceedings under Part 622 (see Matter of Stasack, Ruling of the Chief ALJ, at 9). Other than SAPA's "reasonable time" standard addressed above, respondents identified no other applicable limitations period (see id.).

Nothing in the case cited by respondents compels a contrary conclusion. Matter of DMN Mgt. Servs. involved an agency's failure to follow a specific 6-year time limitation contained in its regulations. Here, respondents have not identified any applicable limitations period in Part 622, or any other regulation applicable to the Department, that would bar Department staff's complaint. Thus, respondents have failed to establish that issues of law or fact were overlooked or misapprehended on the prior ruling. Accordingly, respondents' motion for reargument and reconsideration should be denied.

RULING

For the foregoing reasons, respondents' motion for summary judgment dismissing the complaint is denied.

Respondents' motion, in the alternative, for partial summary judgment dismissing or reducing the relief requested in the complaint is denied.

Respondents' motion for reargument and reconsideration of that portion of the December 30, 2010, ruling in this matter that dismissed respondents' statute of limitations defense is denied.

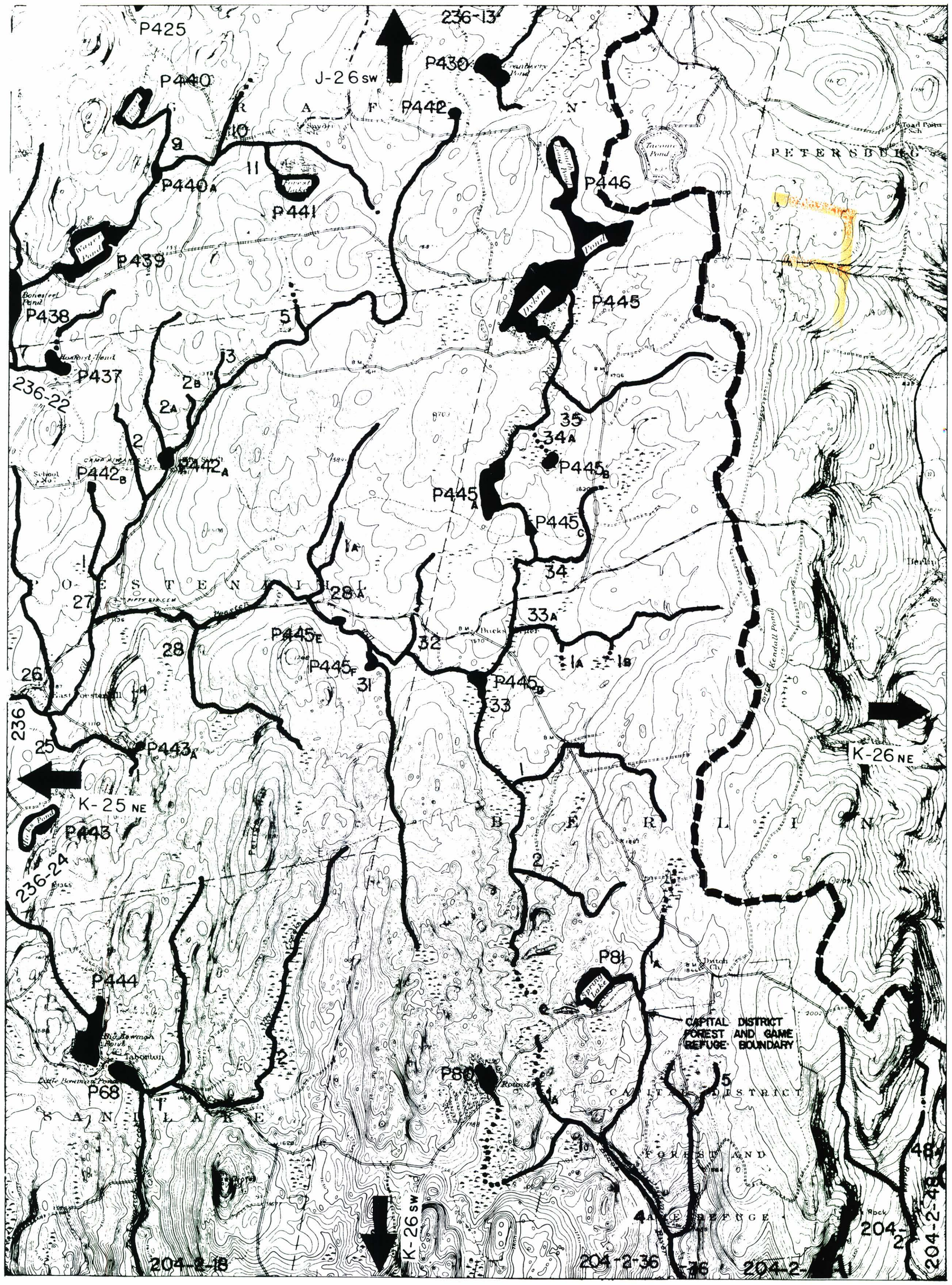
A statement of readiness for adjudicatory hearing has already been filed in this proceeding (see 6 NYCRR 622.9). Accordingly, my office will contact the parties for purposes of scheduling the adjudicatory hearing in this proceeding.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: April 25, 2013
Albany, New York

Attachment



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