

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

In the Matter of Alleged Violations of
Section 480-a of the Real Property
Tax Law ("RPTL") and Part 199 of Title 6
of the Official Compilation of Codes,
Rules and Regulations of the State of
New York ("6 NYCRR"),

ORDER

NYSDEC Case No.
R7-20071214-76

- by -

WILLIAMS AND MARIANO, INC.,

Respondent.

On October 30, 2007, staff of the New York State Department of Environmental Conservation ("Department") served a notice of intent to file a notice of violation on respondent Williams and Mariano, Inc. as a result of timber-cutting activities on a 242 acre tract of land that respondent owns in the Town of Redfield, Oswego County. By letter dated November 26, 2007, respondent requested a hearing pursuant to 6 NYCRR 199.10 before an administrative law judge. On February 20, 2008, Department staff served a Notice of Hearing and Complaint that detailed Department staff's specific allegations.

Pursuant to respondent's request, Department staff agreed to extend the time for respondent to serve its answer. Respondent filed an answer with counterclaim dated April 22, 2008. With permission, respondent filed an amended answer dated May 19, 2008, which did not include the counterclaim.

In November 1992 respondent, pursuant to RPTL § 480-a, filed an application with the Department for a certificate of approval for a forest land tax exemption for the tract of land (Tax Map Number 78-2-45). Respondent also submitted a forest management plan. In January 1993, the Department issued certificate of approval #35-4 to respondent for this tract (the "certified eligible tract"), and accepted the respondent's forest management plan. The certificate of approval established a work schedule for the period from 1993 to February 28, 2008. The certified eligible tract is identified and recorded in the office of the Oswego County Clerk in Liber 1035 of Deeds at page 344.

Department staff in its complaint alleges that respondent violated:

1) 6 NYCRR 199.10(c)(2), by failing to provide the Department with notice of a proposed cutting on the certified eligible tract and failing to pay the appropriate tax on the stumpage value of the merchantable forest crop; and

2) 6 NYCRR 199.10(c)(3), by failing to comply with the forest management plan for the certified eligible tract.

Accordingly, Department staff requested that a notice of violation be issued to respondent (see Complaint, at 7).

This matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Kevin J. Casutto. After conducting an adjudicatory hearing in accordance with the procedures of the State Administrative Procedure Act and 6 NYCRR Part 622 (see 6 NYCRR 199.10[b]), ALJ Casutto prepared the attached hearing report. The ALJ recommended that respondent be found to have violated 6 NYCRR 199.10(c)(2) and (3),¹ and that a notice of violation be issued.

I adopt the ALJ's hearing report as my decision in this matter, subject to the following comments. Department staff bears the burden of proof on the charges that it affirmatively asserts in its complaint (see 6 NYCRR 622.11[b][1]). Based on the hearing record, Department staff carried its burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).

I hereby direct Department staff to issue a notice of violation to respondent in accordance with RPTL § 480-a(7) and 6 NYCRR 199.10. New York Real Property Tax Law provides that, in addition to the owner, the Department shall give notice of violation to the county treasurer of the county or counties in which such tract is located (see RPTL § 480-a[7][f]). The applicable regulations further provide that notice be given to the local assessor (see 6 NYCRR 199.10[e]). Accordingly, Department staff is directed to send a copy of the notice of violation, together with a copy of this order, to the County Treasurer of the County of Oswego and the Assessor of the Town of Redfield.

¹ I note that the language of these regulatory sections is taken directly from the authorizing statute (see RPTL § 480-a[7][a][ii] and [iii]).

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

I. Respondent Williams and Mariano, Inc. is adjudged to have violated:

A. 6 NYCRR 199.10(c)(2), for failing to provide the Department with notice of a proposed cutting on a certified eligible tract and failing to pay the appropriate tax on the stumpage value of the merchantable forest crop; and

B. 6 NYCRR 199.10(c)(3), for failing to comply with the management plan for the certified eligible tract.

II. Department staff shall issue a notice of violation to respondent and shall transmit copies of such notice, together with a copy of this order, to the County Treasurer of the County of Oswego and to the Assessor of the Town of Redfield.

III. All communications from respondent to the Department concerning this order shall be made to Margaret A. Sheen, Esq., Assistant Regional Attorney, NYSDEC Region 7, 615 Erie Boulevard West, Syracuse, New York, 13204-2400.

IV. The provisions, terms, and conditions of this order shall bind respondent Williams and Mariano, Inc., its successors and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: April 29, 2009
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

Alleged Violation of Section 480-a of the Real Property Tax Law
and Part 199 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York by:

WILLIAMS AND MARIANO, INC.,

RESPONDENT

DEC Case No. R7-20071214-76

HEARING REPORT

- by -

_____/s/_____
Kevin J. Casutto
Administrative Law Judge

PROCEEDINGS

Pursuant to Section 480-a of the Real Property Tax Law ("RPTL") and Parts 199 and 622 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), an administrative enforcement hearing was held before Administrative Law Judge ("ALJ") Kevin J. Casutto, New York State Department of Environmental Conservation (the "Department"), Office of Hearings and Mediation Services on August 7, 2008, in the Department's Region 7 Office, Syracuse, New York.

On October 30, 2007, Staff of the Department's Region 7 Office ("Department Staff") issued a Notice of Intent to Issue a Notice of Violation, served upon Respondent by certified return receipt mail (see, Notice of Hearing and Complaint, Appendix D). Pursuant to 6 NYCRR 199.10, by letter dated November 26, 2007, Respondent requested an administrative hearing in this matter, thereby commencing this proceeding. Subsequently, on February 20, 2008, Department Staff issued a Notice of Hearing and Complaint to Respondent's counsel to elaborate upon Department Staff's position in this matter.

Department Staff appeared at the hearing by Margaret A. Sheen, Esq., Region 7, Syracuse, New York. To support its case, Department Staff presented two witnesses: Richard Pancoe, Senior Supervising Forester, and Charles Porter, Senior Forester.

Respondent appeared at the hearing by William S. Helmer, Esq., Green and Seifter, PLLC, Albany, New York.¹ Respondent presented two witnesses, Vincent J. Mariano, a shareholder of Respondent, and Michael Endress, a forester employed by Forecon, Inc., Respondent's forestry management consultant.

The transcript was received by the Office of Hearings and Mediation Services on August 25, 2008. Closing briefs were postmarked by September 26, 2008. The hearing record closed on October 2, 2008, upon receipt of Department Staff's closing brief.

¹ Mr. Helmer has since accepted a position as General Counsel for Riverbank Power Corporation, but his former firm continues to represent Respondent in this matter.

Department Staff's Charges and Relief Sought

Jurisdiction and authority to initiate this administrative action is based upon RPTL § 480-a. RPTL § 480-a creates a program encouraging preservation of forest lands in New York State by providing an opportunity for private owners of forest lands to receive a real property tax exemption if the property is managed in a manner approved by the Department.

Forest lands eligible for this program are privately owned tracts of at least fifty contiguous acres devoted to production of forest crops. An owner of such an eligible tract must submit an application to the Department for certification of such lands, including a proposed management plan. In granting an application for certification, the Department must determine that the proposed tract is an eligible tract and must approve the management plan. The management plan must contain requirements and standards to ensure the continuing production of a merchantable forest crop selected by the owner. If the Department finds that a tract is an eligible tract and the plan is an approved management plan, it will forward to the owner a certificate of approval, the approved management plan, and a copy of a commitment certified by the Department for the eligible tract. *See generally*, RPTL § 480-a and 6 NYCRR 199.

Respondent owns a tract of forest land in the Town of Redfield, County of Oswego, New York, which has received a forest land tax exemption provided for by RPTL § 480-a and 6 NYCRR Part 199. Respondent submitted an application to the Department for a Certificate of Approval with the Respondent's management plan to the Department in November 1992, pledging to commit all 242 acres of Parcel No. #78-2-45, Town of Redfield, County of Oswego, New York (the "480-a parcel"), to continued forest crop production so as to qualify this acreage for the New York State forest land real property tax exemption provided for by RPTL § 480-a and 6 NYCRR Part 199. In January 1993, the Department issued Certificate of Approval #35-4 to Respondent, certifying that the 242 acres comprising the 480-a parcel were an "eligible tract" as that term is defined in RPTL § 480-a (1)(e) and 6 NYCRR Part 199.1(m) for purposes of the forest land tax exemption. The Department accepted the initial management plan and subsequent five year update management plans submitted by Respondent for the 480-a parcel.

In 2007, Department Staff learned from Respondent that logging (commercial cutting) of the 480-a parcel had occurred in 2003. Department Staff allege that Respondent committed two violations:

1. failing to provide the Department with notice of commercial cutting on the certified eligible tract and failing to pay any tax on the stumpage value. See, RPTL § 480-a(7)(a)(ii), and 6 NYCRR 199.10(c)(2); and
2. failing to comply with the management plan by conducting commercial harvest on the certified eligible tract. See, RPTL § 480-a(7)(a)(iii), and 6 NYCRR 199.10(c)(3).

Department Staff seek an order issuing a Notice of Violation to Respondent, the Town of Redfield Assessor's Office, and the Oswego County Treasurer, finding that the 242-acre parcel owned by Respondent that was previously certified by the Department as eligible for the forest land tax exemption is no longer eligible for the forest land tax exemption, and for such other and further relief as may be just and proper.

In the event the Department issues a Notice of Violation, pursuant to RPTL § 480-a(7)(c), (d), and (e), a penalty may be imposed upon Respondent by the county treasurer of the county or counties in which the 480-a tract is located, computed for each of the municipal corporations in which the tract is located. RPTL § 480-a(7).

Respondent's Answer

Respondent filed an Answer With Counterclaim² dated April 22, 2008, and, with permission, an Amended Answer, dated May 19, 2008.³ Regarding the substantive allegations of the Complaint, Respondent denies the allegations, or denies knowledge and information sufficient to form a belief regarding the allegations.

Respondent asserts two defenses, "accident" and "trespass:" first, that activities described in the Complaint occurred through no fault of the Respondent and constituted an accident within the meaning of 6 NYCRR 199.11(c); and second, that the activities described in the Complaint occurred through no fault of the Respondent and constituted a trespass within the meaning of 6 NYCRR 199.11(c).

² The Department's administrative enforcement regulations do not provide for counterclaims.

³ The Amended Answer omits the counterclaim and instead pleads an affirmative defense (later withdrawn at the beginning of the adjudicatory hearing. Transcript, pages 6-7 ["T. 6-7"]).

FINDINGS OF FACT

Introduction

1. Williams and Mariano, Inc., is a closely held family corporation comprised of Vincent Mariano (who testified for Respondent), his parents, and his younger brother. Since his parents relocated from New York to Florida (in 1993), Vincent Mariano has assumed greater responsibility for the affairs of Respondent corporation.

2. Vincent J. Mariano is a stockholder in Respondent corporation. (He did not identify himself as an officer or director of the corporation.)

3. In 1973, Respondent purchased Stony Brook Farm, also known as Stony Brook Club, a parcel of land approximately 500 acres, located in Oswego County. Stony Brook Farm is mostly forested, however, a house and a cabin are located on the southern portion of the Stony Brook Farm property. Respondent's Stony Brook Farm property does not participate in the RPTL 480-a program.

4. In or about 1989, Respondent purchased and has owned a parcel of land adjacent to Stony Brook Farm in the Town of Redfield, Oswego County (Parcel No. 78-2-42), approximately 242-acres. Parcel No. 78-2-42 is identified and recorded by deed in the office of the Oswego County Clerk in Liber of Deeds 1035 at Page 344. Parcel No. 78-2-42 is landlocked, but is accessible to Respondent via the Stony Brook Farm property. Parcel No. 78-2-42 is located east and north of Stony Brook Farm.⁴

5. In November 1992, Respondent submitted an application with a proposed management plan to the Department for a Certificate of Approval, pledging to commit all 242 acres of Parcel No. 78-2-45, Town of Redfield, County of Oswego, New York (480-a parcel), to continued forest crop production so as to qualify this acreage for the New York State forest land real property tax exemption provided for by RPTL § 480-a and 6 NYCRR Part 199.

6. In purchasing the 480-a parcel and preparing the application for Certificate of Approval, Respondent utilized the services of Forecon, Inc. ("Forecon"), a company that provides forestry consulting services, primarily for private forest lands. Respondent had been utilizing the services of Forecon since approximately 1980 regarding management of the Stony Brook Farm property.

⁴ A blue line on Exhibit 7 depicts the interior boundary line between Stony Brook Farm and the 480-a parcel.

7. Forecon acted as Respondent's consultant in 1989, purchasing the 480-a parcel and applying for RPTL § 480-a status, including preparation of the initial management plan (and successive plans). Forecon also was retained by Respondent to re-paint boundary lines for the 480-a parcel in 2002 or 2003 (and again in 2006), and did so.

8. In January 1993, the Department issued Certificate of Approval No. 35-4 to Respondent, certifying that the 242 acres comprising the 480-a parcel were an "eligible tract" as that term is defined in RPTL § 480-a(1)(e) and 6 NYCRR Part 199.1(m) for purposes of the forest land tax exemption. The Department accepted the management plan and subsequent five year update management plans submitted by Respondent for the certified eligible tract (the 480-a parcel), through 2007. See, Exhibit 5, Management Plans and Annual Commitments; see also, Complaint Appendix C.

9. Respondent has submitted to the Redfield Town Assessor and to the Department, a notarized Annual Commitment to Forest Crop Production form each year prior to (or about), the taxable status date of March 1st, annually from 1993 through 2007.

10. Respondent's intention was that all logging activities were to be limited solely to the Stony Brook Farm property. Respondent contemplated no logging to occur on the 480-a parcel. Nonetheless, it is uncontroverted that the logging contractor conducted substantial logging on the 480-a parcel in 2004.

11. Prior to any logging activity, Vincent Mariano instructed the logging contractor that logging activities were to be limited to the Stony Brook Farm property. He explained the status of the 480-a parcel to the logging contractor and provided the logging contractor with maps of the two properties, copies of which are in evidence as Exhibits 10B and 11.

12. Although Respondent has had a lengthy and continuing relationship with forestry consultant Forecon, Respondent did not retain Forecon (or another forestry consultant) to review the 2002 Stony Brook Farm logging plans or to inspect the property boundary shared with the 480-a parcel as logging progressed in 2003 and 2004. In sum, Forecon played no role in Respondent's retaining a logging contractor for the logging that occurred in 2003 and 2004, or inspecting the contractor's work in progress. Forecon was not involved in this logging transaction at all, until 2007, when Respondent discovered that overcutting had occurred on the 480-a parcel.

13. During the logging activities, Vincent Mariano met with the logging contractor at the Stony Brook Farm property approximately every four to six weeks. However, Mr. Mariano

never went on the 480-a parcel or inspected the boundary lines between Respondent's two properties to assure that no logging occurred on the 480-a parcel. Respondent remained unaware of any logging activities on the 480-a parcel until Autumn 2007.

14. Logging on the Stony Brook Farm property improved access to the landlocked 480-a parcel, from Stony Brook Farm. Trails on Stony Brook Farm were bulldozed and made accessible for recreational use.

15. On October 9, 2007, Respondent's representative, Vincent Mariano, telephoned Department Staff Forester, Charles Porter to advise him that Mr. Mariano had recently discovered that approximately three years previous, logging had occurred on the 480-a parcel. Mr. Mariano explained that a logging contractor hired by Respondent to log trees on Respondent's Stony Brook Farm property had gone over the boundary line into the 480-a parcel and had overcut trees, logging on the 480-a parcel.

16. Following Vincent Mariano's October 2007 telephone call, Department Staff Forester Porter, inspected the 480-a parcel on October 10, 2007 and again on October 15, 2007. During the October 10, 2007 inspection, Forester Porter walked the interior boundary lines between Stony Brook Farm and the 480-a parcel. During the October 15, 2007 inspection, he walked the exterior boundary lines of the 480-a parcel.

17. It is undisputed that the logging that occurred on the 480-a parcel in 2004 was substantial, and is inconsistent with the management plans and goals of participation in the RPTL § 480-a program. The logging contractor's overcutting extended well beyond the Stony Brook Farm property line into Respondent's 480-a parcel.

18. A logging road bisects the 480-a parcel from the northwest to the southeast. See Exhibit 7 (logging road depicted by dotted line.) The area of the 480-a parcel southwest of the logging road was most intensively logged; the area to the northeast of the logging road was less intensively logged; some desirable trees remain on the northeast portion of the 480-a parcel.

19. Department Staff Forester Porter described the logging on the western portion of the 480-a parcel as a "liquidation harvest". On the eastern portion of the 480-a parcel, where there were fewer valuable trees, Forester Porter stated the best trees had been taken. The 12 photographs comprising Exhibit 8 were taken by Forester Porter on his October 10, 2007 field inspection of the 480-a parcel and support his testimony regarding the extent of logging on the 480-a parcel.

20. In July 2008, the Town of Redfield Sole Assessor (Oswego County, New York) notified Respondent that the 480-a parcel would be fully assessed and fully taxed for the next tax year.

21. The logging contractor provided Respondent with tally sheets from buyers of the logged trees. The logging contractor sent the tally sheets and monetary payment for Respondent to Vincent Mariano's father, in Florida.

22. Therefore, Respondent received monetary payment from the logging contractor for logging that occurred on Respondent's property, based upon the tally sheets of timber sales to buyers of the harvest. It is unclear whether the monetary compensation that Respondent received from the logging contractor was for all logging that occurred on Respondent's two properties, or only for the logging that occurred on Stony Brook Farm.

23. No stumpage value has been determined for the logging that occurred on the 480-a parcel.

24. Respondent intends to bring a lawsuit against the logging contractor for logging that occurred on the 480-a parcel, but has not yet commenced litigation.

The Defenses of Trespass and Accident

25. Respondent asserts two defenses, trespass and accident, relying upon the provisions of RPTL § 480-a(8)(d) and 6 NYCRR 199.11(c). Respondent asserts that the contractor's conduct in conducting commercial cutting on the 480-a parcel amounts to trespass or accident.

26. The purported contract, Exhibit 9 was not fully executed; it is unsigned by Respondent. It is a one-page printed document (with attachments consisting of two-page certificate of liability insurance and a one-page pricing chart). Exhibit 9 also contains, below the signature lines, additional handwritten information that may or may not be part of the purported contract.

27. The purported contract, Exhibit 9, does not distinguish between Respondent's Stony Brook Farm property and Respondent's 480-a parcel, but simply authorizes the logging contractor to "cut logs on landowner's property . . ." Exhibit 9, First Paragraph. (This, in fact, is what occurred, as both Stony Brook Farm and the 480-a parcel are Respondent's property.)

28. Respondent failed to make any inspection of the 480-a

parcel to assure that the logging contractor's activities were limited solely to the Stony Brook Farm property.

29. Both Department Staff Supervising Forester Richard Pancoe and Respondent's forestry expert witness, Michael Endress, provided expert opinion testimony that overcutting occurs often, either due to negligence or theft of the logging contractor, and that inspecting one's property during neighboring logging operations is strongly recommended in order to avoid any unwanted cutting.

RPTL §480-a(7)(b)

30. Respondent does not dispute that logging on the 480-a parcel was significant, and that as a result it is no longer possible to meet the goals and objectives in the management plan.

DISCUSSION

The Allegations

The statutory and regulatory provisions provide that, after notice and hearing, the Department may issue a Notice of Violation for any certified tract whenever it finds that, *inter alia*, the owner of a certified tract 1) failed to provide the Department with notice of commercial cutting on the certified eligible tract and failed to pay any tax on the stumpage value (See, RPTL § 480-a[7][a][ii], and 6 NYCRR 199.10[c][2]); or 2) failed to comply with the management plan by conducting commercial harvest on the certified eligible tract. (See, RPTL § 480-a[7][a][iii], and 6 NYCRR 199.10[c][3]).

Department Staff asserts that Respondent failed to comply with the approved management plan for the eligible tract, failed to give notice of proposed commercial cutting on the 480-a parcel, and failed to timely pay any tax on the stumpage value of the commercial cutting that occurred on the 480-a parcel.

Background

Williams and Mariano, Inc., is closely held family corporation comprised of Vincent Mariano (who testified for Respondent), his parents, and his younger brother.⁵ As his father has gotten older and has relocated from New York to Florida, Vincent Mariano, a shareholder in the corporation, has assumed greater responsibility for the affairs of Respondent corporation.

⁵ Vincent Mariano is a stockholder in Respondent corporation, but not an officer or director of the corporation.

In 1973, Respondent purchased Stony Brook Farm, a parcel of land approximately 500 acres, located in Oswego County. In or about 1989, Respondent purchased a parcel of land in the Town of Redfield, Oswego County (Parcel No. 78-2-42), approximately 242-acres, adjacent to Stony Brook Farm, which serves as a recreational retreat site for the Mariano family. T. 54; see also, Exhibits 5, 6, 7, and 11. Respondent's Stony Brook Farm property does not participate in the RPTL 480-a program.

In November 1992, Respondent submitted to the Department an application and management plan for an RPTL § 480-a Certificate of Approval for Parcel No. 78-2-42, the 242-acre parcel.⁶ This 242-acre parcel has been enrolled as a certified eligible tract in the RPTL § 480-a program since on or about January 14, 1993.

On that date, the Department issued Certificate No. 35-4 to Respondent, certifying that the 242 acres of parcel No. 78-2-45, were an eligible tract as defined in RPTL § 480-a for purposes of the forest land tax exemption (the "480-a parcel"). The Department accepted Respondent's initial management plan and has accepted subsequent five-year update management plans for the 480-a parcel. Further, Respondent has submitted to the Redfield Town Assessor and to the Department, a notarized Annual Commitment to Forest Crop Production form each year prior to (or about) the taxable status date of March 1st, annually from 1993 through 2007.

In October 2007, Respondent's representative, Vincent Mariano, telephoned Department Staff Forester, Charles Porter to advise him that Mr. Mariano had recently discovered that approximately three years previous, logging had occurred on the 480-a parcel. Vincent Mariano explained that in or about 2002, he and his father, on behalf of Respondent, had arranged to have a logging contractor conduct a commercial harvest of timber from Respondent's Stony Brook Farm property. Mr. Mariano stated that it was Respondent's intention that the commercial timber cutting that occurred in the years 2003 to 2004 was to be limited to the Stony Brook Farm property; Respondent contemplated no logging to occur on the 480-a parcel. However, the logging contractor harvested trees beyond those on the Stony Brook Farm property, extending the commercial cutting well into Respondent's 480-a parcel.

Following Vincent Mariano's October 2007 telephone call, Department Staff Forester, Charles Porter, inspected the 480-a parcel on October 10, 2007 and on October 15, 2007. These events resulted in Department Staff's initiation of this

⁶ Parcel No. 78-2-42 is identified and recorded by deed in the office of the Oswego County Clerk in Liber of Deeds 1035 at Page 344.

administrative enforcement proceeding. It is undisputed that the logging that occurred on the 480-a parcel was substantial, such that the management plan goals are no longer capable of being met. Department Staff Forester Porter described the logging on the western portion of the 480-a parcel as a liquidation harvest, and testified that on the eastern portion where there were fewer valuable trees, the best trees had been taken.

Vincent Mariano testified that Respondent intends to bring a lawsuit against the logging contractor for logging that occurred on the 480-a parcel, but Respondent has not yet commenced litigation. He further testified that Respondent did receive compensation from the contractor for the logging that occurred on "Respondent's property," not distinguishing between the Stony Brook Farm property and the 480-a parcel. Reasonably, the compensation received was for all logging that occurred on Respondent's two properties. Lastly, no stumpage value has been determined for the logging that occurred on the 480-a parcel.

I credit the testimony of Vincent Mariano that Respondent did not intend logging to occur on the 480-a parcel. Nonetheless, I find that this alone is not a sufficient defense against Department Staff's allegations, as explained below. An RPTL § 480-a Notice of Violation is appropriately issued in these circumstances because Respondent omitted to monitor the contractor's activities to assure that logging was limited to the Stony Brook Farm property. Additionally, the proposed contract, Exhibit 9, was poorly drafted, and did not differentiate between Respondent's two adjacent properties, and Respondent chose not to use a forestry consultant such as Forecon in planning the commercial cutting and monitoring the activities of the logging contractor.

The Defenses of Trespass and Accident

Respondent asserts two defenses; trespass and accident. Respondent relies upon the provisions of RPTL § 480-a(8)(d), which provide that "[t]he owner of a certified tract shall not be subject to penalty under this section that would otherwise apply because the forest crop on the certified tract or portion is, through no fault of the owner, damaged or destroyed by fire, infestation, disease, storm, flood, or other natural disaster, act of God, accident, trespass or war. . ." See, also, 6 NYCRR 199.11(c). Respondent relies upon the phrases 'through no fault of the owner' and specific identification of the circumstances 'accident' and 'trespass' in support of its contention that no Notice of Violation should be issued in these circumstances. Respondent contends that Respondent did not authorize the logging contractor to conduct commercial cutting on the 480-a parcel, and consequently, the cutting that did take place on the

480-a parcel occurred through no fault of the owner. In sum, Respondent asserts that the contractor's activities in conducting commercial cutting on the 480-a parcel amounts to trespass or accident.

In addition to the testimony of Vincent Mariano, Respondent relies upon Exhibit 9, the purported contract, as evidence of Respondent's intention that logging was to be limited to the Stony Brook Farm property. Respondent asserts that Department Staff provided no evidence rebutting Respondent's proof (*i.e.*, the testimony of Vincent Mariano and Exhibit 9, the purported contract). However, the purported contract, Exhibit 9 (in evidence) was not fully executed by the parties; Respondent did not sign the proposed contract. Exhibit 9 is a one-page printed document (with attachments consisting of two-page certificate of liability insurance and a one-page pricing chart). Exhibit 9 also contains, below the signature lines, additional handwritten information. For purposes of this administrative proceeding, it is not clear that Exhibit 9 is a valid contract. Further, even if Exhibit 9 was, *arguendo*, deemed a valid contract, it is not clear whether the handwritten information would be considered terms and conditions of the contract or extrinsic material. It is undisputed that the logging contractor conducted logging on Respondent's 480-a parcel as well as on Respondent's Stony Brook Farm parcel, and the contractor paid Respondent for the trees that were logged. Consequently, for purposes of this proceeding, I find that, at a minimum, a verbal agreement for commercial timber cutting (logging) was made between Respondent and the logging contractor.

In seeking issuance of a Notice of Violation, Department Staff asserts that Respondent's defenses are not legally applicable defenses in regard to issuance of a notice - - *i.e.*, a Notice of Violation - - but could only be applicable to penalty determination. Department Staff notes after a Notice of Violation has been issued, Respondent may pursue its right to a hearing on any penalty imposed by local taxing authorities under appeal rights that exist for such taxes, penalties, and interest.

Respondent counters that RPTL § 480-a is not a strict liability statute. Instead, Respondent contends, defenses must be considered with respect to issuance of a Notice of Violation because once a notice is issued, imposition of penalty by local taxing authorities is a ministerial act. Lastly, Respondent argues for equitable relief, stating that Respondent already has paid a steep price in that the considerable investment they made as the stewards of the 480-a parcel has been destroyed, and further, the 480-a parcel is now fully taxable.

At the conclusion of the hearing, Respondent made a motion to hold this administrative proceeding in abeyance until such time as Respondent may initiate and obtain a resolution in a judicial proceeding against the logging contractor. Department Staff objected to the motion and moved to dismiss Respondent's defenses of accident and trespass as inapplicable to this proceeding addressing issuance of an RPTL § 480-a Notice of Violation. I denied Respondent's motion and reserved on Department Staff's motion, indicating that Respondent's defenses and Staff's motion would be addressed in this Hearing Report.

Department Staff contends that, as a general rule, statutes whose purpose is the protection of public health and welfare, as well as those that are remedial in nature, are generally interpreted broadly (*citing, U.S. v Conservation Chemical Co., 619 F.Supp. 162 [W.D. Mo. 1985]*). A logical corollary to this rule, Department Staff continues, is that exclusions to such statutes should be narrowly interpreted, in order to better effect their purposes (*citing In the Matter of a Significant Threat to the Environment at an Inactive Hazardous Waste Disposal Site, Under Article 27, Title 13, of the Environmental Conservation Law of the State of New York by Estate of William S. Lasdon, Commissioner's Order, September 19, 1994*). Department Staff concludes that the provisions of RPTL § 480-a pertaining to issuance of a Notice of Violation are remedial, in that the purpose of RPTL § 480-a is to encourage the growth of succession forest crop production. Therefore, Department Staff concludes that the terms "accident" and "trespass" as applied in RPTL § 480-a, should be interpreted narrowly, so that the remedial purpose of the statute is most broadly applied.

In considering the RPTL § 480-a program and the circumstances of this case, I agree with Department Staff's analysis and Staff's contention that Respondent's defenses of accident and trespass are not legally applicable defenses in this matter. Respondent must be held accountable for the acts or omissions of its agent or independent contractor in this administrative proceeding. Then, Respondent may pursue remedies or damages against the logging contractor in a judicial subrogation proceeding or pursue other legal recourse as Respondent may deem appropriate.

Even assuming, *arguendo*, that the defenses were legally applicable, I find these defenses unavailing. I am unpersuaded that the commercial cutting that occurred on the 480-a parcel occurred 'through no fault of the owner.' Respondent entered into a verbal agreement (or possibly a poorly drafted written contract, Exhibit 9) for commercial timber cutting services. The purported contract, Exhibit 9, does not distinguish between Respondent's Stony Brook Farm property and Respondent's 480-a parcel, but simply authorizes the contractor to "cut logs on

landowner's property . . ." Exhibit 9, First Paragraph. This, in fact, is what occurred, as both Stony Brook Farm and the 480-a parcel are Respondent's property. Additionally, Respondent failed to inspect the shared 480-a property boundary during the logging contractor's work in progress, to assure that the contractor's activities were limited solely to the Stony Brook Farm property.

Whether the logging contractor was acting as Respondent's agent or as an independent contractor, Respondent had a responsibility to inspect and assure that the logging was limited to that agreed upon between the parties; in this instance, logging on the Stony Brook Farm property. As a practical proposition, every contract for work to be done reserves some measure of control in the "employer," at least to the extent of enabling the "employer" to see that the contract is performed according to its terms and specifications. 2A NY Jur 2d, Agency § 380. A general right of supervision resting with the "employer" does not, for example, destroy the status of another party as an independent contractor. 2A NY Jur 2d, Agency § 380.^{7,8}

Respondent's witness, Michael Endress, has been employed by Forecon, Inc. ("Forecon"), for more than thirty years. Forecon has been Respondent's forestry management consultant on the 480-a parcel. Michael Endress stated he has worked on development and implementation of more than 300 forest management plans, and has been a consultant to Respondent since 1981. However, Respondent did not employ Forecon's services in arranging the logging contract. Both Department Staff Supervising Forester Richard Pancoe and Respondent's forestry expert witness, Michael Endress, stated that inspecting one's property during neighboring logging operations is strongly encouraged in order to avoid any unwanted cutting.

Mr. Endress stated he conducts approximately six "trespass appraisals" per year, due to overcutting occurrences. He

⁷ The mere retention by the owner of the right to supervise or inspect work of an independent contractor as it progresses, for the purpose of determining whether it is completed according to plans and specifications, does not operate to create the relation of master and servant between the owner and those engaged in the work. 2A NY Jur 2d, Agency § 380.

⁸ It has been observed that the general rule of non-liability of an employer for the torts or negligent acts of an independent contractor or its employees has been eroded by many well-recognized exceptions that the rule is now primarily important as a preamble to the catalog of its exceptions. 2A NY Jur 2d, Agency § 395.

provided expert opinion testimony that overcutting occurs often, either due to negligence or theft of the logging contractor. However, if overcutting is a common problem, then even more emphatically Respondent reasonably should have made some efforts to inspect and assure that overcutting did not occur on the 480-a parcel. Instead, it was years later before Respondent discovered that logging had occurred on the 480-a parcel. Under these circumstances, the commercial cutting that occurred on the 480-a parcel cannot be said to have occurred 'through no fault of the owner.'

In sum, Respondent's position that the 480-a logging occurred through no fault of Respondent must be rejected. Respondent's defenses of accident and trespass are not legally applicable defenses. Further, assuming *arguendo*, that the defenses were legally applicable, these defenses must be rejected.

RPTL § 480-a(7)(b)

In its closing brief, Respondent, for the first time, argues that pursuant to RPTL § 480-a(7)(b), under the circumstances present in this case, the Department need not issue a Notice of Violation, but instead may determine that no violation has occurred. RPTL § 480-a(7)(b). However, RPTL § 480-a(7)(b) provides that the Department may make such a determination only "if the failure to comply was due to reasons beyond the control of the owner" and if "such failure can be corrected forthwith without significant effect on the overall purpose of the management plan." RPTL § 480-a(7)(b). Respondent does not dispute that logging on the 480-a parcel was significant, and that as a result it is no longer possible to meet the goals and objectives in the management plan. Furthermore, as discussed above, I find that the logging did not occur through no fault of the owner. Consequently, Respondent's reliance upon RPTL § 480-a(7)(b) is untimely and misplaced, and must be rejected.

CONCLUSIONS OF LAW

1. Respondent's 480-a parcel (Parcel No. #78-2-45, Town of Redfield, County of Oswego, New York) is a certified eligible tract within the meaning of RPTL § 480-a.

2. At a minimum, Respondent entered into a verbal agreement with the logging contractor in 2002 or 2003 (or possibly a poorly drafted written contract, Exhibit 9) for logging on Respondent's Stony Brook Farm property. The logging that occurred on Respondent's Stony Brook Farm and 480-a properties is commercial cutting.

3. Boundary lines between Stony Brook Farm and the 480-a parcel had been re-painted in 2002 or 2003, prior to any logging activities, and, consequently, were identifiable in 2004, when logging of the 480-a parcel occurred.

4. As a result of the logging that occurred on the 480-a parcel, it is no longer possible to achieve the 480-a management plan goals for long term forest management of that property.

5. Penalty is not part of a Departmental administrative proceeding pursuant to RPTL § 480-a on Notice of Intent to Issue a Notice of Violation.

6. The terms "accident" and "trespass" as applied in RPTL § 480-a, should be interpreted narrowly, so that the remedial purpose of the statute is most broadly applied.

7. Whether the logging contractor was acting as Respondent's agent or as an independent contractor, Respondent had a duty to inspect its neighboring 480-a parcel, to assure that logging was limited to what was agreed upon between the parties; *i.e.*, logging on the Stony Brook Farm property. Respondent must be held accountable for the acts or omissions of its agent or independent contractor in this administrative proceeding.

8. Respondent's defenses are not legally applicable defenses regarding this proceeding on issuance of a Notice of Violation. Respondent's defenses could only be applicable to penalty determination.

9. Even assuming, *arguendo*, that the defenses were legally applicable, these defenses are unavailing. The overcutting logging that occurred on the 480-a parcel did not occur 'through no fault of the owner.'

10. RPTL § 480-a(7)(b) provides that the Department may make such a determination only "if the failure to comply was due to reasons beyond the control of the owner" and if "such failure can be corrected forthwith without significant effect on the overall purpose of the management plan." RPTL § 480-a(7)(b). Respondent's reliance upon RPTL § 480-a(7)(b) is untimely and misplaced, and must be rejected.

RECOMMENDATIONS

Upon consideration of the foregoing, and upon a review of the entire record of this hearing, my recommendation is that the Commissioner should find that Respondent failed to provide the Department with notice of commercial cutting on the certified

eligible tract and failing to pay any tax on the stumpage value, in violation of RPTL § 480-a (7)(a)(ii), and 6 NYCRR 199.10(c)(2); and that Respondent failed to comply with the management plan by conducting commercial harvest on the certified eligible tract, in violation of RPTL § 480-a (7)(a)(iii), and 6 NYCRR 199.10(c)(3). Accordingly, a Notice of Violation should be issued in this matter.