

STATE OF NEW YORK: ADIRONDACK PARK AGENCY

-----X
In the matter of the alleged violation of
9 NYCRR Part 578 by:

REPLY
AFFIDAVIT

LEROY DOUGLAS and
THE DOUGLAS CORPORATION OF SILVER LAKE

Agency File: E2007-047

Respondents.
-----X

DOUGLAS MILLER, being duly sworn, deposes and says:

1. I am an Enforcement Officer for the Adirondack Park Agency (the "Agency"), an executive agency of the State of New York created pursuant to Executive Law § 803, with offices located in the Town of North Elba, Essex County, New York, and have served in this position since 2005. In the course of my duties, I am responsible for investigating alleged violations of the Adirondack Park Agency Act, Adirondack Park Agency Rules and Regulations, the New York State Freshwater Wetlands Act, and the NYS Wild, Scenic and Recreational Rivers Act in an area that includes the Town of Black Brook, Clinton County.

2. I am familiar with the enforcement files concerning the subject property, but I have never conducted a site visit there. I have only observed the subject property on September 6, 2007 from Island Road. I submit this affidavit in reply to

Respondents' cross-motion and in support of Agency staff's Motion for an Order without Hearing.

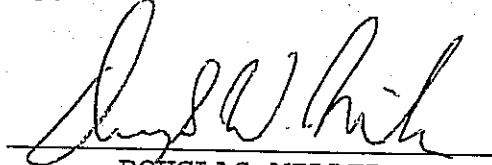
3. Respondent The Douglas Corporation of Silver Lake has owned, the subject property, including the island on Silver Lake described in Mr. Douglas's affidavit, since 1960, pursuant to the deed attached hereto as Exhibit A.

4. I was on Island Road on September 6, 2007 at the direction of my supervisor to investigate a report of possible road construction and wetland filling from a complainant. The allegation was that the filling activity was ongoing and could be seen from Island Road, according to my supervisor. Prior to leaving Agency headquarters for the subject property, I attempted to contact Mr. Douglas and his attorney by telephone to advise them of the complaint and to see if someone could meet us at the subject property.

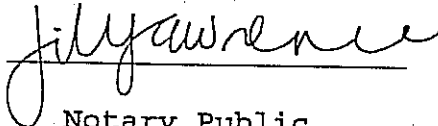
5. After arriving at the subject property, I had the encounter with Mr. Douglas described in my memorandum of September 10, 2007 which is attached hereto as Exhibit B. Exhibit B accurately describes the incident and is a formal memorandum of notes that I provided to my supervisor on September 6, 2007 after returning to the Agency from Island Road. I said nothing to Mr. Douglas prior to his outburst.

6. Subsequent to this incident, at the direction of Agency management, I reported the incident described in Exhibit B to

the New York State Troopers and made a sworn statement regarding the facts of the incident.


DOUGLAS MILLER

Sworn to before me this
27th day of March 2008


Notary Public

JILL LAWRENCE
Notary Public - State of New York
Qualified in Franklin County
No. 01LA6175330
Commission Expires Oct. 9, 2011

A

Philip's Indenture

Made the 11 day of March Nineteen Hundred and Sixty,

Between Roger O. Douglas and LeRoy M. Douglas both of Hawkeye Town of Black Brook, Clinton County, New York, hereinafter referred to as

parties of the first part, and
The Douglas Corporation of Silver Lake, a domestic corporation, with its principal place of business located at Silver Lake, Town of Black Brook, Clinton County, New York, hereinafter referred to as

party of the second part,
Witnesseth, that the parties of the first part, in consideration of
One and 00/100 Dollar
(\$ 1.00) lawful money of the United States,

paid by the party of the second part,
do hereby grant and release unto the party of the second part,

its successors and assigns forever, all the following pieces and parcel
of land together with the buildings and improvements located thereon,
viz:

PARCEL A

ALL THOSE PIECES AND PARCELS OF LAND described in a deed dated the 23rd day of August, 1954 executed by Elizabeth O. Douglass, Roger O. Douglas and LeRoy M. Douglas which said deed is about to be recorded in the Clinton County Clerk's Office, and is therein described as follows:

PARCEL I. ALL THAT PARCEL OF LAND in Town of Black Brook in Clinton County, N.Y., being a part of Lot number 26 in Township No. 3, Old Military Tract, bounded by beginning at a point in the East line of said lot marked by a cedar post and stones, it being the southeast corner of 100 acres of land belonging to the State of New York, and being South 5°22' West 221.8 feet six inches from the corner of Lots No. 17, 18, 26 & 27; running thence South 5° 22' West 181 feet six inches along east line of Lot 26 to a point marked by a long stone with stones piled around it; thence North 87° West 3155 feet to a cedar stake, the same being N.W. Cor. David Douglass lot; thence north 493' West 2509 feet to a cedar post and stones standing in North line of Lot 26; thence South 87° East 1345 feet along said N. line to a cedar post and stones standing on the west side of the road, said post being the N.W. corner of the 100 acres belonging to the State; thence South 5° 22' West 105 feet to center of road; thence along the same 221.8 feet six inches to a cedar post and stones, the same being S.W. Corner State 100 acres; thence South 84° 35' East 221.8 feet six inches along South bounds of the State land to place of beginning as surveyed by E. M. Merrill in 1900 and is the same parcel known as the Philip English place & occupied by him in Oct. 1900 and contains 76 & 8/10 ac

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more or less, and the same land conveyed by Patrick Hanlon to David Douglass by deed dated Nov. 8, 1902 and recorded in Clinton County Clerk's Office November 17, 1902 in Vol. 102 at page 947 to which deed and record reference may be had.

Also all that other piece and parcel of land in Lot No. 26 aforesaid being about 13 acres more or less bounded on East by Highway leading from Silver Lake to Clayburgh, N.Y. Westerly by lands of Henry Douglass, Southerly by the Highway leading from Silver Lake to Union Falls, N.Y. and Northerly by lands formerly owned by Phillip English.

This last parcel being the same heretofore occupied by David Douglass as a home with two houses and barns thereon.

The above parcel of land being the same premises which were heretofore conveyed on the 28th day of June, 1909 by deed executed by David Douglass to David Douglass, 2nd, deceased husband of the party of the first part herein, which said deed was recorded in the Clinton County Clerk's Office on the 29th day of June, 1909 in Volume 112 of Deeds at Page 736.

PARCEL IT. ALL THAT CERTAIN PIECE OR PARCEL OF LAND situate lying and being in the Town of Black Brook, County of Clinton and State of New York, and being a part of lot Number twenty-six (26) in Town of Three, Old Military Tract, Town and County aforesaid, bounded and described as follows: Beginning at the southeast corner of the said Ford lot and running thence west along the south line of said lot 8 chains and 15 links to a marked cedar stake at the middle point thereof, thence northerly through the middle of said Ford lot to a marked cedar stake at the middle point of the north line of said lot, said stake being 10 feet west of a small dead spruce tree; thence east along said north line 5 chains and 88 links or 23 1/2 rods to a stake and stones at the northeast corner of the said Ford lot and thence south along the east line of said lot, to the place of beginning, containing 25 acres, be the same more or less.

Being the same premises which were heretofore conveyed by U. Monroe Sheffield and Mabelle L. Sheffield to David Douglass by deed dated the 22nd day of December, 1919 which said deed was recorded in the Clinton County Clerk's Office on the 4th day of May, 1920 in Liber 131 of Deeds at Page 75.

The above described premises is conveyed subject to any easements which have been heretofore granted for electric light, power and telephone purposes.

Also excepting from the above described premises any portion thereof which may have been heretofore conveyed for highway purposes.

The party of the first part herein is the widow of David Douglass who died intestate on the 15th day of September, 1949.

The above described premises are the same premises which are mentioned and described in an agreement executed by David Douglass and Elizabeth Douglass whereby the ownership of the same was to be owned by the said David Douglass and Elizabeth Douglass, his wife, as tenants by the entirety and is mentioned and described in an agreement dated the 1st day of April, 1931 which said agreement is recorded in the Clinton County Clerk's Office on the 1st day of April, 1931 in Liber 164 of Deeds at Page 161.

The above described premises is conveyed subject to a mortgage given to Elizabeth O. Douglass, now deceased, which said mortgage The Douglass Corporation of Silver Lake hereby assumes and agrees to pay in accordance with the terms and conditions of said mortgage.

PARCEL B

ALL THAT PIECE OR PARCEL OF LAND described in a deed dated the 28th day of July, 1959 executed by Harry Kingsland Welsh to Roger O. Douglas and Roy M. Douglas which said deed is about to be recorded in the Clinton County Clerk's Office, and is therein described as follows:

"ALL THAT PIECE OR PARCEL OF LAND together with the camp and other structures located thereon located in Lot 34, Town of Black Brook, Clinton County, New York and being the same premises which were heretofore conveyed by Paul E. Kemp and Howard D. Kemp to Harry Kingsland Welsh by deed dated July 8, 1949 and recorded in the Clinton County Clerk's Office on the 26th day of July, 1949 and recorded in the Clinton County Clerk's Office on the 26th day of July, 1949 in Book 277 of Deeds at Page 483 and therein described as follows:

"ALL THAT TRACT OR PARCEL OF LAND situate in the Town of Black Brook, Clinton County, New York, being part of Lot 34 and more particularly bounded and described as follows:

BEGINNING at a point on the easterly shore line of Silver Lake where it is intersected by the southerly bounds of a parcel of land and water conveyed by J. J. Rogers Company to Frank L. Kemp by deed bearing date August 9, 1927; running south 67 degrees 16 minutes east along the southerly bounds of the above mentioned parcel three hundred eighty-four (384) feet to the southeast corner of the F. L. Kemp lot;

thence south 22 degrees 44 minutes west seven hundred six (706) feet to a point marked by a two inch pipe and stones; thence north 67 degrees 16 minutes west sixty-four (64) feet to a one and one-half inch iron pipe driven in the ground; thence in a general northeasterly direction eight hundred (800) feet; more or less, to a one and one-half inch iron pipe driven in the ground on the shore of Silver Lake; thence easterly a distance of one hundred eighty-one (181) feet; more or less, to a one and one-half inch iron pipe or the point or place of beginning.

Excepting from the above described premises a strip of land twenty (20) feet in width extending across the above described premises which is presently laid out and marked as a roadway and which is owned by Paul E. Kemp and Howard D. Kemp.

The party of the first part hereby grants to the party of the second part, his heirs, grantees and assigns, a right of way in common with others for ingress and egress from the county hard surface road known as the Ausable Forks to Hawkeye macadam road westerly to the northerly bounds of the property above described where the road now strikes the same.

The said Paul E. Kemp and Howard D. Kemp, who joins in the execution of this deed, do hereby further grant to the party of the second part a right of way for ingress and egress over the twenty (20) foot strip of land which is laid out for a roadway as it winds and turns over the property above described, and further grant to the party of the second part the right to install and maintain a pole line for electric light, power and telephone purposes along the twenty (20) foot roadway above mentioned where it crosses the property above described except that the poles are not to be installed within eight (8) feet from the center of said road, and further granting to the party of the second part the right to trim trees and brush along the route of said pole line.

The above described premises is conveyed subject to any right of way or easements which have been heretofore granted to others over said roadway.

The party of the first part further reserves a right of way for ingress and egress along a branch road, so-called, extending along the northerly portion of the property herein conveyed where it is now laid out and situated extending from the twenty (20) foot roadway above mentioned westerly to property which is this day to be conveyed to Carolyn Kemp.

The above described premises is part of the same premises which were conveyed on the 5th day of May, 1949 by Howard D. Kemp to Paul E. Kemp by deed which is about to be recorded in the Clinton County Clerk's Office.

The above described property is conveyed subject to the condition that the party of the second part keep the twenty foot roadway extending over the premises hereby purchased in good condition.

The party of the first part herein intends to convey to the parties of the second part all of his right, title and interest in and to the above described premises and further to grant any easements or rights which he has acquired in connection therewith, and further conveys it subject to any easements or rights of way as appears of record."

PARCEL C

ALL THAT PIECE OR PARCEL OF LAND described in a deed dated the 29th day of October, 1958 executed by Florence M. Douglas to Roger O. Douglas and Leroy Douglas which said deed was recorded in the Clinton County Clerk's Office on the 14th day of November, 1958 in Liber 409 of Deeds at Page 529, and therein described as follows:-

"ALL THAT PIECE OR PARCEL OF LAND situate, lying and being in the Town of Black Brook, Clinton County, New York, formerly owned by Henry Casey, and thereafter by the Grantor herein described as follows: Lot No. 16, consisting of One Hundred (100) acres in Township No. 5, bounded on the North and West (in 1941) by Township Realty Corporation on the East (in 1941) by Kennedy and South by Saranac River; which was sold to the County of Clinton on March 10, 1938 for unpaid taxes levied in the year 1936.

And being the same premises deeded by the County of Clinton to the Grantor herein by deed dated January 19, 1941, and recorded in the office of the Clinton County Clerk on February 3, 1941 in Vol. 197 of Deeds at Page 127.

Being the same premises which were heretofore conveyed.

on the 25th day of July, 1949 by Herwood Light to D'Avignon Douglas, Roger O. Douglas and Leroy Douglas by deed which was recorded in the Clinton County Clerk's Office on the 25th day of July, 1949 in Liber 277 of Deeds at Page 451.

Also being the same premises which were this day conveyed by D'Avignon Douglas et al, to Florence M. Douglas by deed which is about to be recorded in the Clinton County Clerk's Office.

PARCEL D

ALL THOSE PIECES AND PARCELS OF LAND described in a deed dated the 22nd day of August, 1953 executed by Howard D. Kemp and Maria C. Kemp and Minnie A. Kemp to Roger O. Douglas and Roy M. Douglas which said deed was recorded in the Clinton County Clerk's Office on the 2nd day of September, 1953 in Liber 326 of Deeds at Page 399, and therein described as follows:

"ALL the following described parcels of land situate in Lots Nos. 34 and 35, Old Military Tract, Town of Black Brook, County of Clinton, State of New York.

FIRST PARCEL - BEGINNING at a point in the Easterly shore line of Silver Lake marked by a stake and stones and running S. 67°16' E. four hundred three (403) feet to a corner; thence S. 22°44' W. 522.5 feet to the Westerly end of a right of way described below, and continuing on the same course 277.5 feet to a corner; thence N. 67°16' W. three hundred eighty-four (384) feet to the shore of Silver Lake and continuing on the same course sixteen hundred sixteen (1616) feet to a point in the Lake; thence N. 22°44' E. eight hundred (800) feet to a point in the Lake; thence S. 67°16' E. fifteen hundred ninety-seven (1597) feet to the place of beginning, containing 36.73 acres of land and water, the intent being to convey a rectangular parcel of land and water eight hundred (800) feet wide by two thousand (2000) feet long which will include wholly within its bounds the island located in the Easterly part of Silver Lake. Being the same premises designated "MINNIE A. KEMP 36.73 Acre Parcel" on a certain map prepared by K. C. Raybold, Surveyor, dated April 15, 1938, and entitled "MAP SHOWING LAND OWNED BY MINNIE A. KEMP IN THE TOWN OF BLACK BROOK, CLINTON COUNTY, NEW YORK," filed in the office of the Clinton County Clerk, at Plattsburgh, New York, on August 4, 1947, including, and intending to include, in this conveyance, "THE ISLAND" so-called and so labeled on the above mentioned map, prepared by said surveyor K.C. Raybold, and dated April 15, 1938, including all buildings and structures on said Island.

ALSO, a right-of-way three (3) rods in width extending from the above described parcel to the highway leading from Black Brook to Silver Lake, the center line of which right-of-way is described as follows: BEGINNING at a point in the easterly bounds of the parcel above described, and S. 22°44' W. 522.5 feet from the northeasterly corner thereof and running N. 74°15' E. 444.4 feet; thence N. 80°30' E. 299.5 feet; thence N. 75°43' E. 478.9 feet; thence N. 86°39' E. 333 feet to the center of the highway leading from Black Brook to Silver Lake, and in the right-of-way along the above mentioned strip of land from the highway leading from Black Brook to Silver Lake to the above described premises, for the purpose of constructing and maintaining a pole transmission line, for the purpose of transmitting power and telephone service from the said highway to the property of Howard D. Kemp.

ALSO, EXCEPTING AND RESERVING to Minnie A. Kemp, her heirs and assigns a right-of-way three (3) rods in width running in a generally southwesterly direction from the present westerly terminus of the above-described right-of-way across the southeasterly portion of the premises above described to premises now or formerly owned by Minnie A. Kemp lying southerly of the premises herein conveyed and designated on the above mentioned map "MINNIE A. KEMP 32.41 Acre Parcel".

SECOND PARCEL - Also conveying to the parties of the second part by this conveyance a small piece of land four rods square located in the above mentioned Lot No. 34 on the easterly shore of Silver Lake about 500 feet therefrom and containing "Zero Spring" so-called. Said Spring being in the exact center of this described parcel together with

a right of way from said spring and the parcel of land surrounding same over and across lands owned by the parties of the first part herein along the route where said water pipe line is now laid out and situated to the waters of Silver Lake and thence under the waters of Silver Lake along the course where said pipe line is now situated to the Island Property, so-called, locally known as Kemp's Island; further giving to the parties of the second part the right to maintain said water pipe line where it is now laid out and situated and to convey water by means of said water pipe line from said Spring to the Kemp Island, so-called. The parties of the first part do further give to the parties of the second part the right in the future to excavate along the route of the said water pipe line where it crosses property owned by the parties of the first part for the purpose of burying same beneath the ground, repairing said water pipe line and relaying same when necessary so to do; further giving to the parties of the second part the right to enter upon said property owned by the parties of the first part along the route where said water pipe line is now laid out and situated with men and equipment for the purpose of maintaining said water pipe line in operating condition, also giving to the parties of the second part the right to install a power line from the present power line located along the road over and across property owned by the parties of the first part to the Zero Spring with the right to install one power pole along the route so that electric power can be made accessible to the spring in the event the parties of the second part desire to install electric pumping facilities. Howard D. Kemp, one of the parties of the first part herein, however, reserves the right and privilege of tapping onto said water pipe line at a point on property owned by the said Howard D. Kemp with a pipe line not larger in diameter than the present line for the purpose of piping water from said pipe line now existing or any future pipe line which may replace the present pipe line for the purpose of piping water to non-business structures as the said Howard D. Kemp may erect on property owned by him at Silver Lake and over which said water pipe line now extends.

Excepting from the above described four rod square parcel of land surrounding Zero Spring all that part thereof which was heretofore conveyed and is presently owned by James Snow and wife.

Also excepting and reserving to Howard D. Kemp and Minnie A. Kemp and their heirs a free right of ingress and egress over and across the present right of way extending from Silver Lake to the highway leading from Black Brook to Silver Lake.

THIRD PARCEL - All that piece or parcel of land situated in the Town of Black Brook, Clinton County, State of New York in Lots Nos. 34 and 35, Old Military Tract, Township No. 3, bounded and described as follows: BEGINNING at the northwest corner of the "FIRST PARCEL" herein conveyed which corner is in the waters of Silver Lake; thence S. 66° 04' E. 1613.4 feet to a 2" iron pipe; thence continuing in the same line 386.6 feet to a 2" iron pipe which is the northeast corner of said "FIRST PARCEL" herein conveyed; thence S. 23° 56' W. 522.5 feet to a point where the above described right-of-way's westerly terminus intersects the easterly boundary of the said "FIRST PARCEL" herein conveyed; thence Northeasterly along the said right-of-way until it intersects the road leading from Black Brook to Silver Lake; thence along said highway N. 56° 44' W. 429.8 feet to a triangular shaped concrete monument; thence along said highway N. 49° 39' W. 396.1 feet to a triangular shaped concrete monument; thence turning and running N. 79° 52' W. 614.8 feet to a 2" iron pipe; thence continuing N. 79° 52' W. 543.1 feet to a 1/2" iron rod set in boulder; thence continuing in the same line to the point or place of beginning; being the same premises designated "MINNIE A. KEMP 5.42 Acres (Water)" and "MINNIE A. KEMP 20.72 Acres (Land)" on the above mentioned map prepared by K. O. Raybold and dated April 15, 1938. EXCEPTING AND RESERVING from said premises, however, all that portion thereof heretofore conveyed by MINNIE A. KEMP to Paul B. Kemp and Marie E. Kemp, his wife, by deed dated June 5, 1947, and recorded in the Office of the Clinton County Clerk in Volume 244 of Deeds at Page 415.

And being part of the same premises conveyed by Minnie A.

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Kemp to Howard D. Kemp by deed dated August 4th, 1947, and which said deed was duly recorded in the Clinton County Clerk's Office on the 15th day of January, 1948, in Volume 252 of Deeds at Page 401.

EXCEPTING AND RESERVING to Howard D. Kemp, and his heirs free ingress and egress over the right-of-way, above referred to, which runs in a generally southwesterly direction across Parcel #1, herein conveyed, from the westerly terminus of the right-of-way, running from the Lake to the main highway. EXCEPTING AND RESERVING property heretofore conveyed by Minnie A. Kemp to Paul E. Kemp, and wife, by deed dated June 5, 1947, recorded in Clinton County Clerk's Office in Volume 244 of Deeds at Page 415, and this conveyance is made subject to any and all rights of way or easements heretofore granted to others over or across said property.

The parties of the first part herein hereby intend to convey all the remaining property owned by them at Silver Lake, Clinton County, New York including the Zero Spring Property described in Parcel Two above, but excepting from this conveyance the lot, exclusive of Zero Spring, presently owned by Howard D. Kemp, and whatever interest they may own in the branch road extending from the three rod right-of-way near Kemp's Dock and running in a southwesterly direction across property which has been heretofore laid out into lots for Howard and Paul Kemp by Joseph W. Hogan, November 7, 1947."

The above described property is conveyed subject to a mortgage presently owned by the National Commercial Bank and Trust Company of Plattsburgh, New York which said mortgage The Douglas Corporation of Silver Lake assumes and agrees to pay in accordance with the terms thereof.

Together with the appurtenances and all the estate and rights of the parties of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, its successors and assigns forever.

And said Roger O. Douglas and LeRoy N. Douglas

covenant as follows:

First, That the party of the second part shall quietly enjoy the said premises.

Second, That said Roger O. Douglas and LeRoy N. Douglas

will forever WARRANT the title to said premises.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

In Presence of



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State of New York
County of ESSEX

§§.

of
On this
Sixty

day of March
Nineteen Hundred and
before me, the subscriber, personally appeared

Roger C. Douglas and LeRoy M. Douglas

to me personally known and known to me to be the same persons described
in and who executed the within Instrument, and they each and severally duly
acknowledged to me that they executed the same.

Notary Public

WARRANTY

ROGER C. DOUGLAS
and
LEROY M. DOUGLAS

TO

THE DOUGLAS CORPORATION
OF SILVER LAKE

THE DOUGLAS CORP. OF SILVER LAKE
Haverly, Mitchell, Emily, New York

Dated, 10 MARCH, 1960

STATE OF NEW YORK

County of Essex § 55

RECORDED ON THE

day of 10 MARCH, 1960

at Oriskany

in LIBER 11 of DEEDS

on PAGE 1 and returned

DANIEL T. MANNING
ATTORNEY AT LAW
ALBANY, NEW YORK



NEW YORK STATE

Adirondack
parkagency

M E M O R A N D U M

TO: Paul Van Cott

FROM: Doug Miller *DWM*

DATE: September 10, 2007

RE: Island Road site visit of September 6, 2007

On September 6, 2007 I was directed to investigate an ongoing wetland disturbance on the property of the Douglas Corporation in the Town of Black Brook. The Agency has an open enforcement case on this property, and received reports of new activity in the wetland area here on September 6.

Mark Rooks agency wetland biologist and I arrived at the site at approximately 1:45 pm. There was a truck parked at the roadside adjacent to a new road entrance into the property. Mark and I were able to tell this was the source of the new complaint based on photos that were sent by the complainant. Mark was also able to determine that this new road did not encroach on the wetland area based on a survey map that showed the wetland location.

As we were preparing to leave a pickup truck pulled in and blocked the road preventing us from leaving the area. Mark was able to identify the driver as Mr. Leroy Douglas, the owner of the property in question. There was also a younger man with Mr. Douglas who may have been the owner of the second truck. This man may also have been Mr. Douglas's son. We got out of our vehicle and Mark addressed Mr. Douglas and introduced me. At this point Mr. Douglas had a violent outburst directed at me. He threatened to kill me, beat the crap out of me and he poked me in the throat. He indicated that I was not under any circumstances to go on his property, and then invited me on to his property for the purpose of instigating a fight. He was unclear as to the reason for his anger, but indicated it had to do with past contact I had had with him and the code enforcement officer for Black Brook, Mr. Paul Blaine.

At this point I was prepared to leave the area, but Mr. Douglas wanted Mr. Rooks to see what he had done. They took a brief walk onto the property and then returned to my truck, and Mark and I departed.

STATE OF NEW YORK: ADIRONDACK PARK AGENCY

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In the matter of the alleged violation of
9 NYCRR Part 578 by:

REPLY
AFFIRMATION

LEROY DOUGLAS and
THE DOUGLAS CORPORATION OF SILVER LAKE

Agency File: E2007-047

Respondents.
-----X

STATE OF NEW YORK)
) ss:
COUNTY OF ESSEX)

PAUL VAN COTT, an attorney licensed to practice law in the courts
of the State of New York, affirms under penalty of perjury:

1. I am an Associate Attorney for the Adirondack Park
Agency (the "Agency") and have served as the Agency's Enforcement
Attorney since 2001. In this role, I am responsible for
administrative enforcement of the Agency's laws and regulations,
including in the Town of Black Brook, Clinton County.

2. In early Spring, 2007, when Respondents' subdivision
proposal was before the Town of Black Brook Planning Board, I
received complaints from private citizens about Respondents'
activities, planned and undertaken, on the subject property.

3. Specifically, there were complaints about the shoreline
cutting that had occurred on the subject property in 2003. I
advised the complainants that Agency staff had investigated those
allegations, found a violation, and resolved it with Mr. Douglas.

4. There were also complaints about Respondents' proposed subdivision. I advised the complainants that Agency wetland biologists had delineated the wetlands on the subject property, and that no lots had been sold involving wetlands.

5. Finally, the complainants brought up the road that is the subject of this proceeding. I advised them that we understood from Mr. Douglas that it was an existing road that he had merely repaired and improved. These complainants insisted that the road had not existed at all prior to Mr. Douglas's road construction activities. I told them that we would look into their allegations, consistent with our standard practice when we receive a complaint of a violation.

6. These complaints did not come from the former Town of Black Brook Code Enforcement Officer Paul Blaine. Instead, they came from private citizens who claimed to be familiar with the subject property.

7. I then asked Agency biologist Mark Rooks to check the aerial photographs of the subject property to determine whether or not the road existed in 2003 or before. When Mr. Rooks informed me that the aerial photographs showed that no road had existed, Agency staff proceeded with enforcement action to address this new, more serious wetland violation.

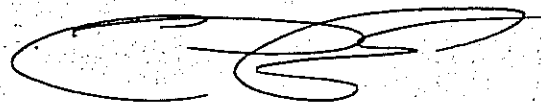
8. Subsequently, I received another complaint from a private citizen in early September of 2007. The substance of

the complaint was that Respondents were in the process of constructing a new road in wetlands on the subject property. I directed Douglas Miller to promptly investigate the allegation of an ongoing wetland disturbance on the subject property. This is our consistent practice when we receive a complaint of an ongoing violation. As it turned out, there was no wetland violation.

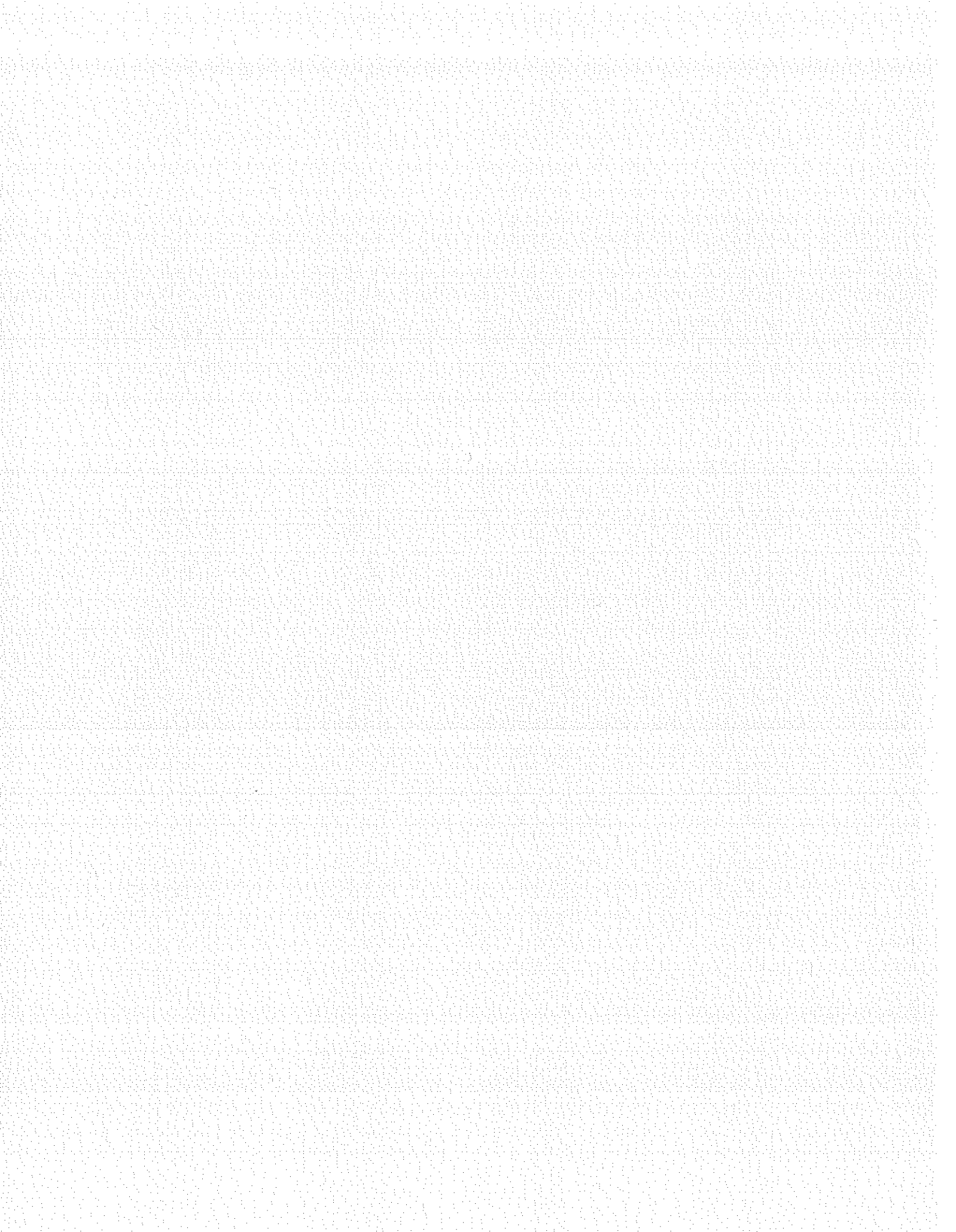
9. Despite the local controversy surrounding Respondents' subdivision proposal for the subject property, Agency staff have at all times proceeded as they would normally in responding to citizen complaints of violations on the subject property. We have not taken any side in that controversy. Our responsibility is simply to follow the facts and law, and to enforce in a firm, but fair manner.

10. I have reviewed the Agency's files in response to Respondents' FOIL request and their demand for documents and am unaware of any documents (except for Respondents' own papers) that provide support for Respondents' claim that there was an existing road in the location of the road that is the subject of this proceeding.

Dated: Ray Brook, New York
March 28, 2008



PAUL VAN COTT, ESQ.



STATE OF NEW YORK: ADIRONDACK PARK AGENCY

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In the matter of the alleged violation of
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Respondents.
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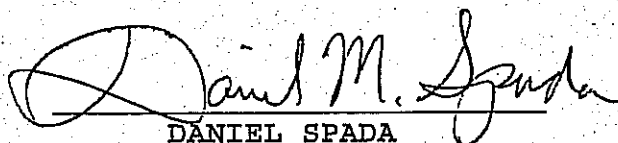
Daniel Spada, having been duly sworn, deposes and says:

1. I am the Supervisor of the Resource Analysis and Scientific Services (RASS) division of the Adirondack Park Agency. In that position I supervise two wetlands biologists, two engineers, a limnologist and a soil scientist/forester. The RASS division provides technical review and advice to all other divisions within the Agency regarding natural resource protection. I have served in this position since January 2005. Prior to this I was the AP Associate Project Analyst, Biological Resources; a position I had held since August 27, 1984. During that period I was the main wetland delineator for the Agency, and, among other wetlands related tasks, authored the Agency's Wetlands Compensatory Mitigation Guidelines and co-authored the NYS Freshwater Wetlands Delineation Manual, as well as other numerous wetlands policy and guidance documents.

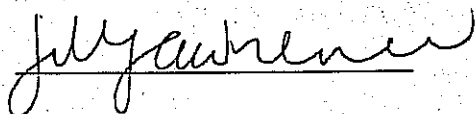
2. I am familiar with the subject property, having conducted a site visit there on July 27, 1994 to investigate an

alleged wetlands violation. I have also consulted with Agency biologist Mark Rooks prior to preparing this affidavit in order to familiarize myself with the road that is the subject of this proceeding.

3. During my July 27, 1994 site visit, I discovered a minor wetland fill where Respondent Leroy Douglas had placed stumps in a wetland. The location of this violation was near but not in the same location as the road that is the subject of this proceeding. I saw no evidence of the road that is the subject of this proceeding or any culvert during that site visit. I am certain that I never provided any advice to Mr. Douglas about a road or culvert, and there is no mention of either in my field notes from that date. A copy of my field notes is attached as Exhibit A.


DANIEL SPADA

Sworn to before me this
26th day of March 2008


Notary Public

JILL LAWRENCE
Notary Public - State of New York
Qualified in Franklin County
No. 01LA6175330
Commission Expires Oct. 9, 2011

A

3/23/94 LeRoy Dough Field on

Silver Lake.

Fill and shield in wetland.

riparian stream w/ Ball, F. nigra,
A. rubrum scattered sycam, O. cin, Q. sen
lingualis, Thuja occ. Abies balsamea

Soil, w/ 8-12" muck over 6-10" grey sandy
silt N7 soil. some hard sandy (100% in

spots) dash brown w/ red wetlands. pebbles.

Hydro. Red Pine on adjacent upland.

Low beam ground level breasted at stream.

No muck adjacent stream channels.

East side of wetland B-B-13 100% silt.

Wetland soil w/ A1 - A2E 10% muck

None of wetland has strips pulled in.

Copy by Dana Speidel

Fill waste page.

DDX

3.25.08



NEW YORK STATE
Adirondack
parkagency

March 28, 2008

J. Michael Naughton, Esq.
Young, Sommer, Ward, Ritzenberg,
Baker & Moore, LLC
Executive Woods
Five Palisades Drive
Albany, New York 12205

Dear Mr. Naughton:

Re: Matter of Douglas (E2007-047)

Please find attached the log of documents which we assert as privileged: Deliberative Privilege (DP); Attorney/Client Privilege (A/C); Attorney Work Product Privilege (WP). Please let me know if you want to discuss access to any of these documents further.

I have not heard from you regarding whether you want to review the rest of our files at your offices per my earlier letters.

Sincerely,

Paul Van Cott
Associate Attorney

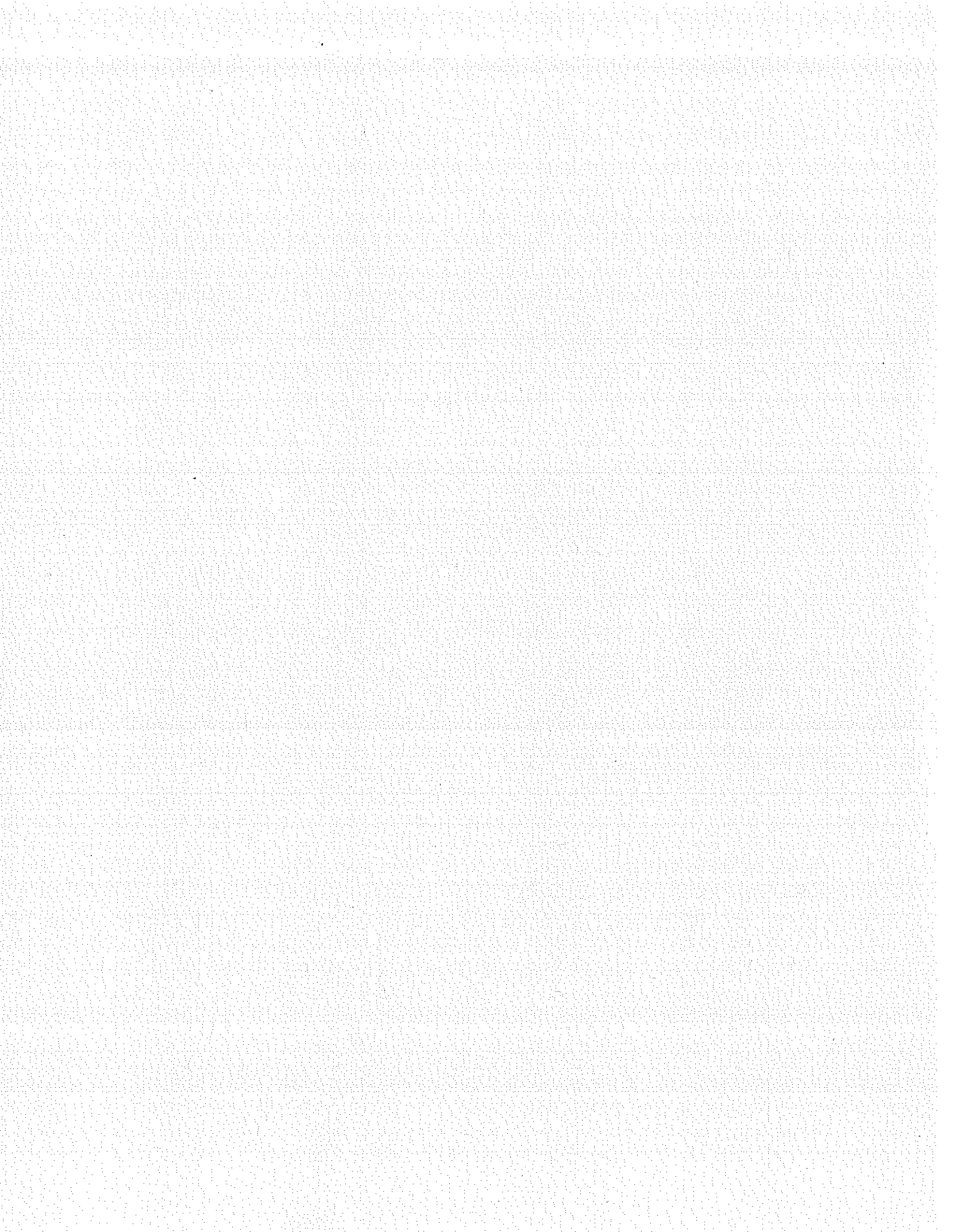
Attachment

PRIVILEGE LOG

2/11/08	Van Cott	Cecil Wray John Banta	Enforcement Procedure	A/C; DP
2/14/08	""	Cecil Wray	""	""
2/14/08	""	""	""	""
2/11/08	""	""	""	""
5/23/07	""	Brian Grisi Douglas Miller Susan Parker Mark Rooks	Douglas Investigation	DP
8/8/05	""	John Banta Mark Sengenberger	Enforcement Strategy	DP
1/22/08	""	Mark Rooks	Rooks Affidavit	DP
2/1/08	""	John Banta Mark Sengenberger Curt Stiles Cecil Wray	Enforcement Procedure	A/C; DP
2/1/08	Wray	Van Cott Stiles	""	""
2/21/08	Complainant	Van Cott	Douglas Case	DP
2/21/08	Van Cott	Complainant	Douglas Case	DP; WP
2/21/08	Van Cott	Miller	Douglas Case	DP; WP
3/4/08	Van Cott	Banta Sengenberger Stiles Wray	Douglas Case Adjournment	DP; WP

2/29/08	Van Cott	Wray	Transmittal of Douglas Memorandum of Law	DP
1/18/08	Van Cott	Rooks Miller	Rooks Affidavit	DP; WP
1/18/08	Rooks	Van Cott Miller Lawrence	""	DP
1/22/08	""	"" Spada	""	DP
8/8/05	Van Cott	Banta Sengenberger	Douglas Subdivision Plan	DP; WP
7/16/99	Terry (staff atty)	Hannon (former Enf officer)	Douglas Campground	DP; WP
10/26/98	""	""	""	""
2/22/08	Complainant	""	Affidavit (signed)	DP
3/26/08	Miller	Van Cott	Affidavit	DP
3/26/08	Miller	Van Cott	Transmittal of 9/07 memo	DP
3/24/08	O'Dell	Van Cott	Douglas Affidavit	DP
3/24/08	Parker	Van Cott	Douglas Affidavit	DP
""	""	""	""	""
3/24/08	Van Cott	Parker Miller Rooks Grisi	""	WP; DP
3/24/08	Van Cott	Parker	""	""

3/24/08	Van Cott	Miller	September Miller Memo	“(”
3/26/08	“(”	“(”	Affidavit	“(”
2/26/08	“(”	Banta	Enforcement Process	“(”
2/26/08	“(”	Miller	Complainant's Affidavit	“(”
3/4/08	“(”	Lawrence Lester	Adjournment	“(”
3/24/08	“(”	Spada; Rooks	Douglas Affidavit	“(”
3/26/08	“(”	Parker	Affidavit	“(”
3/26/08	“(”	Lawrence	Staff Reply Papers	“(”
3/25/08	“(”	Grisi O'Dell Spada	Site visit notes	“(”
3/24/08	Van Cott	O'Dell	Discovery	“(”
3/25/08	Van Cott	Van Cott	Affidavits	“(”
“(”	“(”	“(”	“(”	“(”
3/27/08	“(”	Lawrence	“(”	“(”
3/27/08	Van Cott	Grisi	“(”	“(”
3/25/08	Van Cott	Van Cott	“(”	“(”
3/27/08	Van Cott	Lawrence	Douglas Reply Papers	“(”
“(”	“(”	“(”	“(”	“(”
“(”	“(”	“(”	“(”	“(”



STATE OF NEW YORK: ADIRONDACK PARK AGENCY

-----X
In the matter of the alleged violation of
9 NYCRR Part 578 by:

REPLY
AFFIDAVIT

LERROY DOUGLAS and
THE DOUGLAS CORPORATION OF SILVER LAKE

Agency File: E2007-047

Respondents.
-----X

BRIAN GRISI, being duly sworn, deposes and says:

1. I am the Local Planning Assistance Specialist for the Adirondack Park Agency (the "Agency"). Prior to my recent promotion, I was the Agency's Associate Adirondack Park Project Analyst, Forestry, and served in that position since 1988.

2. I am familiar with the subject property, having conducted site visits there on August 24, 2004 and on July 20, 2005 to investigate and resolve a shoreline cutting violation undertaken by Respondent Leroy Douglas. I have also consulted with Agency biologist Mark Rooks prior to preparing this affidavit in order to familiarize myself with the road that is the subject of this proceeding. I submit this affidavit in reply to Respondents' cross-motion and in support of Agency staff's Motion for an Order without Hearing.

3. During my August 24, 2004 and July 20, 2005 site visits, Mr. Douglas and I accessed the shoreline of the subject property by foot from Island Road to the south of the road that

is the subject of this proceeding. On Exhibit A hereto, I have identified as point "A" the approximate location along Island Road from which Mr. Douglas and I walked to the shoreline. As I drove to and from point "A" along Island Road, there was no evidence of any road or clearing in the location of the road that is the subject of this proceeding. This is evidenced by the solid row of trees along the northerly side of Island Road depicted in Exhibit A in the vicinity of the road that is the subject of this proceeding.

4. After reviewing the shoreline cutting issues with Mr. Douglas, he proceeded to discuss his plans for cleaning up the subject property and to sell several lots. In particular, he asked me whether he could replace a culvert in the stream at an approximate location that I have identified as point "B" on Exhibit A. At this point, we were on an unimproved, logging skid-road running in a northerly direction across the stream. The stream came out of a wetland that lay to the east of where we stood. I told him that he could replace the culvert in the same location so long as there was no expansion of the road and he avoided placing any fill in the wetland along the stream.

5. As we stood at point "B", I took a photograph of the wetland that extended to the east. This photograph is attached to this affidavit as Exhibit B. Looking to the east, I saw no

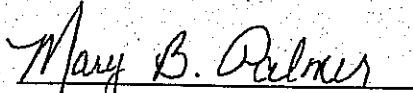
evidence of the road that is the subject of this proceeding. Instead, I observed only wetland in that direction surrounded by undisturbed and vegetated upland area. If the road had existed, it would have been observable in the photograph that is attached as Exhibit B. Also, it would have intersected with the north-south skid-road that Mr. Douglas and I stood upon when we were discussing the culvert.



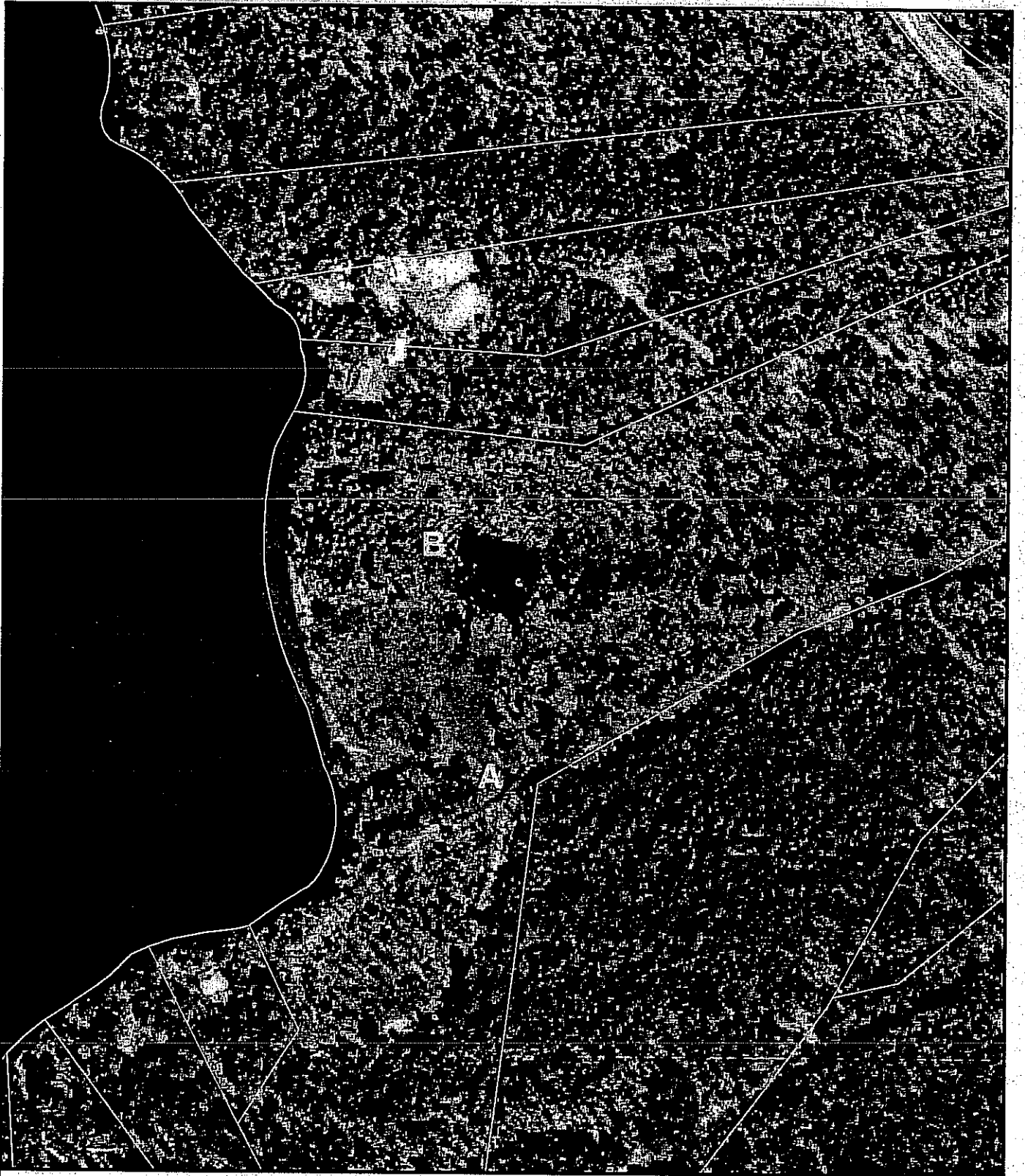
BRIAN GRISI

Sworn to before me this
28th day of March 2008

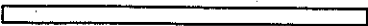
MARY B. PALMER
Notary Public, State of New York
01PA6128439
Commission Expires June 13, 2009


Notary Public

A

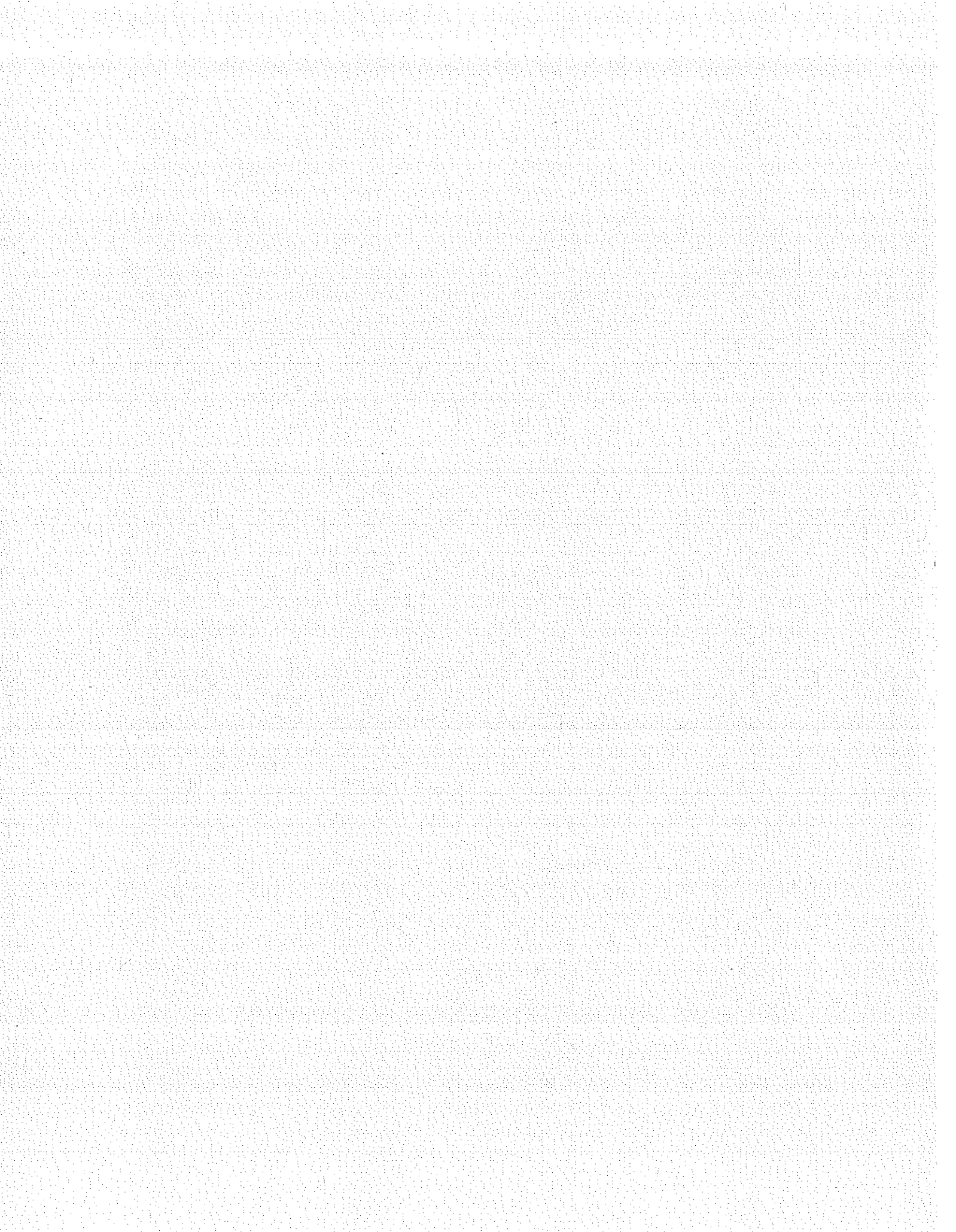


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NEW YORK STATE
Adirondack
parkagency





STATE OF NEW YORK: ADIRONDACK PARK AGENCY

-----X
In the matter of the alleged violation of
9 NYCRR Part 578 by:

REPLY
AFFIDAVIT

LEROY DOUGLAS and
THE DOUGLAS CORPORATION OF SILVER LAKE

Agency File: E2007-047

Respondents.
-----X

SUSAN PARKER, being duly sworn, deposes and says:

1. I am an Environmental Program Specialist 1 for the Adirondack Park Agency (the "Agency"), an executive agency of the State of New York created pursuant to Executive Law § 803, with offices located in the Town of North Elba, Essex County, New York, and have served in this position since 2002. Prior to this position I have been employed by the Agency since 1984 in the titles of Cartographic Technician 1, Natural Resource Planning Assistant, and Cartographic Technician 3. In the course of my duties, I am responsible for reviewing projects and writing permits for projects under the Adirondack Park Agency Act, Adirondack Park Agency Rules and Regulations, the New York State Freshwater Wetlands Act, and the NYS Wild, Scenic and Recreational Rivers Act.

2. I am familiar with the enforcement files concerning the subject property, having had responsibility for investigating alleged violations there from 2003 to 2005. I have never

conducted a site visit on the subject property, however, having been denied access by Respondent Leroy Douglas. I have only observed the subject property from Island Road and from the ice on Silver Lake. I have also consulted with Agency biologist Mark Rooks prior to preparing this affidavit in order to familiarize myself with the road that is the subject of this proceeding. I submit this affidavit in reply to Respondents' cross-motion and in support of Agency staff's Motion for an Order without Hearing.

3. I was on Island Road in 2003 as part of the Agency's investigation into alleged shoreline cutting violations on the subject property. I do not recall observing any evidence of the road that is the subject of this proceeding.

4. In the winter of 2003-2004, I accompanied Brian Grisi on the ice of Silver Lake to observe the alleged shoreline cutting violations on the subject property. I saw no evidence of the road that is the subject of this proceeding.

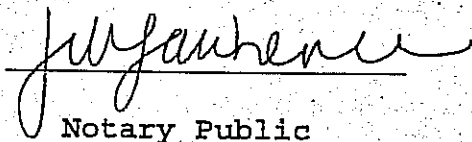
5. I learned of Respondents' plans to subdivide the property in 2004 and 2005 from Brian Grisi and from a prospective purchaser of one of the lots that Respondents were trying to sell. Because of the wetlands on the subject property, I encouraged Respondents to seek a permit or jurisdictional determination prior to subdividing.

6. In all of the communications that I have had or received from Douglas, he has been uncooperative, hostile and

threatening. In a 2003 telephone conversation, he threatened to shoot anyone that came on his land, crudely cursing Agency staff, and in a 2005 telephone message he denied subdividing his property, and threatened to sue for harassment.


SUSAN PARKER

Sworn to before me this
26th day of March 2008


Notary Public

JILL LAWRENCE
Notary Public - State of New York
Qualified in Franklin County
No. 01LA6175330
Commission Expires Oct. 9, 2011

STATE OF NEW YORK: ADIRONDACK PARK AGENCY

-----X
In the matter of the alleged violation of
9 NYCRR Part 578 by:

REPLY
AFFIDAVIT

LEROY DOUGLAS and
THE DOUGLAS CORPORATION OF SILVER LAKE

Agency File: E2007-047

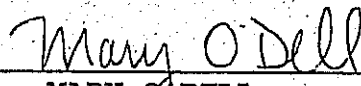
Respondents.
-----X

Mary O'Dell, having been duly sworn, deposes and says:

1. I am a wetlands biologist for the Adirondack Park Agency and submit this affidavit in reply to Respondents' cross-motion and in support of Agency staff's Motion for an Order without Hearing.

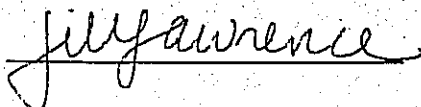
2. I understand from the affidavit of Leroy Douglas in this proceeding that alleges that I did a site visit at the subject property in August of 2006.

3. I have no written record of ever visiting the subject property nor any recollection of conducting a site visit there. My 2006 site visit was to two different parcels on the north side of Silver Lake.



MARY O'DELL

Sworn to before me this
25TH day of March 2008



Notary Public

JILL LAWRENCE
Notary Public - State of New York
Qualified in Franklin County
No. 01LA6175330
Commission Expires Oct. 9, 2011



NEW YORK STATE
Adirondack
parkagency

-----X
In the matter of the alleged violation of
9 NYCRR Part 578 by:

Agency File: E2007-047

LEROY DOUGLAS and
THE DOUGLAS CORPORATION OF SILVER LAKE

Respondents.
-----X

REPLY MEMORANDUM OF LAW IN SUPPORT OF AGENCY STAFF'S
MOTION FOR AN AGENCY ORDER WITHOUT HEARING
PURSUANT TO 9 NYCRR 581-4.16

Respectfully submitted by:

Paul Van Cott, Associate Attorney
Adirondack Park Agency Staff

March 28, 2008

PRELIMINARY STATEMENT

Agency Staff submit this Reply Memorandum of Law in opposition to Respondent's Cross-motion for Dismissal of Agency staff's Complaint and in further support of staff's Motion for an Order without Hearing in this proceeding.¹ Respondents have illegally filled over 8,000 square feet of wetlands on their property in the Town of Black Brook, Clinton County. Agency staff ask the Agency to order Respondents to restore these wetlands and to pay an appropriate penalty for their violation.

POINT I - RESPONDENTS' CROSS-MOTION SHOULD BE DENIED

Respondents argue that the Agency should be held to the November 9, 2006 Settlement Agreement (the "Settlement Agreement") between Respondent The Douglas Corporation of Silver Lake ("Douglas Corporation") and Agency staff. That settlement only required Respondent Douglas Corporation to remove a small portion of the illegal fill that Respondents have placed in wetlands on the subject property. For the reasons set forth below, Respondents' cross-motion should be denied.

¹ The facts and law establishing Respondents' violations are set forth in Agency staff's January 25, 2008 Memorandum of Law. Supplemental facts relevant to Agency staff's reply to Respondents' Cross-motion and in support of staff's Motion for an Order without Hearing are included in staff's arguments in this memorandum.

The Settlement Agreement should be Set Aside by the Agency

Stipulations are "generally binding on parties that have legal capacity to negotiate, do in fact freely negotiate their agreement and either reduce their stipulation to a properly subscribed writing or enter the stipulation orally on the record in open court. When a stipulation meets these requirements...courts should construe it as an independent contract subject to settled principles of contractual interpretation...As with a contract, courts should not disturb a valid stipulation absent a showing of good cause such as fraud, collusion, mistake or duress or unless the agreement is unconscionable or contrary to public policy..."²

Agency staff agree that the Settlement Agreement is a form of stipulation subject to these well-settled contract principles in New York law. In this case, it is necessary for the Agency to set aside the Settlement Agreement because it is based on mistaken, material facts and because limiting the wetland restoration to the relief provided by the Settlement Agreement would violate public policy.

(i) Mistake of Material Fact

Agency staff mistakenly relied on Respondent Leroy Douglas's statement that the road he was working on already

² McCoy v. Feinman, 99 N.Y.2d 295, 303 (2002).

existed, and assumed that Douglas was simply upgrading and expanding a road that was already in use. Reply Affidavit of Mark Rooks, dated March 26, 2008 ("Rooks Reply"), ¶ 2. Mr. Douglas, for his part, now alleges that there was an abandoned and overgrown, existing road through the wetlands in this same location that had not been used for many years. Affidavit of Leroy Douglas, dated March 10, 2008 ("Douglas"), ¶¶ 14, 15. Assuming his allegations to be true, this is a mutual mistake of a material fact.³ The Settlement Agreement recites this mistaken, material fact, and it is based entirely on this fact that the Settlement Agreement only requires removal of a very small portion of the illegal fill comprising the road from the wetlands on the subject property.

Even if at one time in history there was a road in this location, by Respondents' own admission it had long since been abandoned in favor of access from a different parcel owned by Respondents. Douglas, ¶¶ 14, 15. Since Respondent Douglas Corporation acquired the subject property in 1960 (Reply Affidavit of Douglas Miller, March 27, 2008 ("Miller Reply", Exhibit A.), it is quite possible that any road through wetlands that existed prior to

³ A contract entered into under mutual mistake of a material fact is voidable and subject to reformation or rescission. City of Binghamton v. Serafini, 8 A.D.3rd 835 (3rd Dep't 2004); Gould v. Board of Educ. Of Sewanhaka Cent. High School Dist., 81 N.Y.2d 446 (1993).

Respondent's ownership had reverted to a wetland after not being maintained over a period of years. Rooks Reply, ¶ 5. In any case, under the Agency's regulations the alleged road must have existed as of May 1, 1983 and its use must not have been discontinued for more than five years in order to be lawfully existing. There is no proof in the record that this is the case.

On the contrary, after entering into the Settlement Agreement, Agency staff received a complaint from a person alleging that the entire road was newly constructed. Reply Affirmation of Paul Van Cott, dated March 27, 2008 ("Van Cott Reply"), ¶¶ 2, 5. As the facts now show, Respondents' road has been constructed (or re-constructed, if Respondent's new allegations are true) since 2003. No road existed in this location in any of the historical aerial photos (1968, 1978, 1995 or 2003) reviewed by Agency staff. Rooks Reply, ¶ 4. Due to this mistake of a material fact underlying the Settlement Agreement, a fact represented by Leroy Douglas and relied upon by Agency staff, the Agency must set aside the Settlement Agreement.

This is consistent with the grounds provided by the Agency's law and regulations for suspension, modification or revocation of permits. In 9 NYCRR Subpart 581-3, the Agency is authorized to suspend, modify or revoke permits

based on inaccurate information provided by the permit holder.

(ii) The Settlement Agreement Violates Public Policy

Furthermore, limiting the wetland restoration to that required by the Settlement Agreement based on this mistaken, material fact would be contrary to public policy.⁴ Under the Freshwater Wetlands Act and the Adirondack Park Agency Act, the Agency is mandated to protect wetlands and their functions and values. In this case, the Settlement Agreement only provides for restoration of a very small portion of the 8,000 square feet of wetlands that Respondents have illegally filled. By granting Respondents' cross-motion for dismissal of this proceeding, the Agency would drastically reduce the amount of illegally filled wetlands to be restored and thereby violate the public policy for protection of wetlands that it is mandated to fulfill.

For these reasons, the Agency should set aside the Settlement Agreement and require restoration of all of the wetlands that Respondent has unlawfully filled.

⁴ "Courts will not be astute to sustain contracts when the effect will be to weaken the efficacy of laws and regulations designed for the protection of human life. Where a contract on its face, whether so intended by the parties or not, offends against statutes intended to promote public safety, the courts will not enforce it." Hart v. City Theatre Co., 215 N.Y. 322, 330 (1915). See also, Flegenheimer v. Brogan, 284 N.Y. 268 (1940).

Leroy Douglas is not a Party to the Settlement Agreement

If the Agency grants Respondents' cross-motion to dismiss this proceeding, it should only do so with respect to Respondent Douglas Corporation since Respondent Leroy Douglas is not a party to the Settlement Agreement. Leroy Douglas has admitted that he personally undertook the work on the road, and he should be held responsible individually for his violation.

Respondents collectively argue that the Agency should be bound by the Settlement Agreement entered into by Douglas Corporation and Agency staff as a matter of contract law. However, Respondent Leroy Douglas is not a party to the Settlement Agreement and, as such, has no standing to enforce it against the Agency.⁵ Accordingly, even if this proceeding is dismissed as to Respondent Douglas Corporation, it cannot be dismissed with respect to Leroy Douglas's personal responsibility for the alleged violation.

The Road is Only Part of the Wetland Violation

The Settlement Agreement only pertains to the portion of the illegally filled wetland area comprising the road. Agency staff's investigation reveals that, in addition to

⁵ Since the obligations arising out of a contract are due only to those with whom it is made, a contract ordinarily cannot be enforced by a person who is not a contracting party. DeRaffele v. 210-220-230 Owners Corp., 33 A.D.3rd 752 (2d. Dep't 2006).

the approximately 3,049 square feet of wetlands filled for the road, Respondents have filled an additional 5,227 square feet of wetland adjacent to the road. Thus, even if the Agency grants Respondents' cross-motion with respect to the road, Respondents should still be held responsible for their violation with respect to the additional area of illegally filled wetland.

POINT II - THE ALLEGED ROAD WAS NOT LAWFULLY EXISTING

Respondents allege that their road through the wetlands on the subject property was lawfully existing and that its maintenance did not require an Agency permit. In order for Respondents' alleged road to be lawfully existing under the Agency's wetland regulations: (1) It must have lawfully existed as of May 1, 1983 (9 NYCRR § 578.1(c)); and (2) Its use must not have been discontinued for a period exceeding five years, or under circumstances which indicate that its use has been abandoned (9 NYCRR § 573.6(f)).

Agency staff's review of aerial photographs conclusively shows that no road has been used in this location on the subject property since at least 1968. Rooks Reply, ¶ 4. Aerial photographs from 1968, 1978, 1995 and 2003 show no evidence of a road being used in this location. Id. The reply affidavit and photograph of Brian

Grisi, who observed the location of the alleged road in 2004, corroborates staff's position that no road existed in the wetlands on the subject property prior to Respondents' recent construction activity. Grisi Reply, ¶¶ 4, 5, Exhibits A, B.

This finding by staff is not inconsistent with the allegations made by Leroy Douglas in his affidavit. He claims that a road once existed in this location that provided driveway access from Island Road to a beach that was used to transport supplies and people to an island with a camp on Silver Lake. He acknowledges that the driveway fell into disuse after acquisition of the island by Respondent Douglas Corporation, stating that it was more convenient to launch a boat from other property owned by Respondents on Silver Lake. Douglas, ¶ 14. Since Respondent Douglas Corporation acquired the subject property including the island in 1960 (Miller Reply, Exhibit A) it is possible that the purported road does not appear in the 1968 aerial photograph due to its lack of maintenance since 1960. It was not until after 2003, when the road had by Mr. Douglas's own admission become overgrown and in need of repair, that Respondent Leroy Douglas personally undertook the repairs on the alleged road. Douglas, ¶ 15.

There is no proof in the record that the alleged road lawfully existed as of May 1, 1983 and that its use has not been discontinued for more than five years. To the contrary, the proof in the record strongly demonstrates that the road was not being used in 1983 and that it has been used little, or not at all, since at least 1968. Accordingly, Respondents' alleged road is not lawfully existing and Respondent Mr. Douglas's road construction activities in a wetland required an Agency permit.

POINT III - NO HEARING IS REQUIRED

The Material Facts are Undisputed

At a minimum, the undisputed facts in the record demonstrate conclusively that, between 1968 and sometime after 2003, the use of any road through the wetlands on the subject property had been discontinued and the road had become overgrown. Since no road appears in any of the aerial photographs of the subject property since 1968, and since in 2004 Brian Grisi observed wetlands where the road now lies, the alleged "existing" road either never existed or had reverted to wetland after so many years of disuse. Rooks Reply, ¶ 4; Grisi Reply, ¶¶ 4, 5, Exhibits A, B.

Because the undisputed facts show that no road lawfully existed in the wetlands on the subject property, an Agency permit was required for any wetland filling or

other wetland disturbance. It is undisputed that Respondents failed to obtain a permit for their wetland activities and Respondent Leroy Douglas has admitted to doing the road construction work in the wetland on the subject property.

Based on these undisputed, material facts, there is no basis for a hearing in this matter, the Agency should grant staff's motion, and Respondents should be held liable for their violation of 9 NYCRR Part 578.

The Record would not Benefit from a Hearing

Respondents speculate that the Agency's files and the testimony of additional Agency staff would confirm their position that the alleged road existed prior to Respondents' recent road construction activities.

Agency staff have opened their files to Respondents in response a FOIL request and Respondents' more recent discovery request. In reviewing the files preparatory to sharing them with Respondents, Agency staff have not found any information that would support Respondents' position. Van Cott Reply, ¶ 10.

Regarding potential testimony, affidavits have now been provided from all of the Agency staff named in Respondent Leroy Douglas's Affidavit. All of them have consulted with Agency biologist Mark Rooks and either have

no information relevant to his findings or have information that provides further support for those findings.

In the affidavit of Susan Parker, she states that she does not recall any evidence of a road in this location when she drove along Island Road in 2003. Reply Affidavit of Susan Parker, dated March 26, 2008, ¶ 3. Brian Grisi does recall a different logging skid-road on the subject property. Grisi Reply, ¶ 4. He also recalls a culvert in a stream that Respondent wanted to replace along that skid-road, but he did not observe evidence of any road in the location alleged by Respondents, and took a photograph of the wetlands located where the road that is the subject of this proceeding now lies. Grisi Reply, ¶¶ 4, 5, Exhibits A, B. Mary O'Dell has never been to the subject property. Affidavit of Mary O'Dell, dated March 25, 2008, ¶ 3. Dan Spada visited the subject property in 1994, and recalls a minimal wetland disturbance but no evidence of any road in the area of the subject property that he visited. Affidavit of Daniel Spada, dated March 26, 2008, ¶ 3.

Based on this written testimony by Agency staff, it is clear that the record would not benefit from a hearing that focuses on their recollections of Respondents' alleged, existing road.

CONCLUSION

Based on Agency staff's Complaint and the affidavits and exhibits in support of Agency staff's Motion for an Order without Hearing, there are no material facts in dispute in this matter. Accordingly, Agency staff request that the Agency deny Respondents' cross-motion and issue an order granting staff's motion pursuant to 9 NYCRR § 581-4.16. Agency staff request that the Agency find that the apparent violation alleged in the Complaint has occurred and is continuing to occur. Agency staff further request that the Agency order appropriate injunctive relief and penalties against Respondents as authorized by 9 NYCRR § 581-4.16 and consistent with Agency staff's recommendations in this proceeding.