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In the matter of the apparent
violations of 9 NYCRR Part 577
by:

Agency File E2004-043

JOHN AND DAWN MAYE,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF AGENCY STAFF'S
REQUEST FOR A DETERMINATION BY
THE ENFORCEMENT COMMITTEE
PURSUANT TO 9 NYCRR § 581-2.6(d)

Respectfully submitted by:

Paul Van Cott, Associate Attorney
Adirondack Park Agency Staff

March 25, 2008

PRELIMINARY STATEMENT

This administrative enforcement proceeding is brought by Adirondack Park Agency ("Agency") staff to enforce 9 NYCRR Part 577 against Respondents. Based on Agency staff's Notice of Apparent Violation ("NAV"), and the affidavits and exhibits attached to Agency staff's Request for an Enforcement Committee Determination, there are no material facts in dispute in this matter. Accordingly, Agency staff request a determination by the Enforcement Committee pursuant to 9 NYCRR § 581-2.6(d) that the apparent violations alleged in the NAV occurred, and are occurring. Agency staff further request that the Enforcement Committee determine appropriate injunctive relief and penalties against Respondent as provided by 9 NYCRR § 581-2.6(d).

FACTS

Respondents own the subject property located in the Town of Black Brook, Clinton County. Affidavit of Trevor Fravor, dated March 18, 2008 ("Fravor"), ¶ 3, Exhibit A. The subject property is designated as tax map parcel 285-1-1 on the local tax map. Fravor, ¶ 4, Exhibit B. Respondent's property is classified as Rural Use on Adirondack Park Land Use and Development Plan Map and is partially located within the Saranac River designated recreational river area. Fravor, ¶ 5, Exhibit C.

Based on Agency staff review of Town of Black Brook tax assessment records (including a photograph), in 1999 Respondents constructed a 784 square foot single family dwelling on the subject property. Fravor, ¶ 6, Exhibit D. Respondents did not seek or obtain a permit or variance from the Agency prior to such construction. Fravor, ¶ 7.

Agency staff have sought permission from Respondents to conduct a site visit on the subject property for the purpose of investigating the violations alleged in this matter, and Respondents have repeatedly denied staff access to their property. Fravor, ¶ 8, Exhibit E. A photograph taken by a former government employee paddling on the Saranac River purports to show Respondents' single family dwelling as it appears from the Saranac River. Fravor, ¶ 9, Exhibit F; Parker, ¶ 5.

Agency staff review of 2003 aerial photographs of the subject property confirm the presence of Respondents' single family dwelling on the subject property and within the Saranac River recreational river area. Affidavit of Susan Parker, dated March 14, 2008 ("Parker"), ¶ 6, Exhibits A, B. The 2003 aerial photograph also establishes that Respondents' single family dwelling is at least 800 square feet in size and that it is located within 80 feet of the Saranac River. Parker, ¶ 7, Exhibits A, B.

Staff also reviewed aerial photographs of the subject property from 1995, 1978 and 1968. Parker, ¶ 8. There is no evidence of any structure on the subject property in the vicinity of the current single family dwelling in any of those aerial photographs. Id. This finding by staff is corroborated by Agency staff's site visit to the property in 1991. Id., ¶ 3.

Before the Board

ARGUMENT

Procedural Basis for Motion

This enforcement proceeding is brought pursuant to 9 NYCRR Subpart 581-2. As provided by 9 NYCRR § 581-2.6(b), Agency staff initiated this proceeding by serving a NAV on Respondents. Based on the NAV, supplemented by Agency staff's affidavit and exhibits, there are no material facts in dispute requiring a hearing. Accordingly, Agency staff request a determination by the Enforcement Committee in this matter pursuant to 9 NYCRR § 581-2.6(d).

Respondents' Shoreline Setback Violations

9 NYCRR Part 577 prohibits the construction of single family dwellings within the shoreline setback of a designated recreational river without an Agency variance. On Rural Use lands in the Saranac River recreational river area, absent a variance, new single family dwellings must be set back at least 150 feet from the mean high water mark of the river.

Respondents are violating the shoreline setback restrictions of 9 NYCRR Part 577 by constructing their single family dwelling no more than 80 feet from the Saranac River without first obtaining a variance from the Agency.

Respondents' Illegal Rivers Project

9 NYCRR Part 577 requires an Agency permit prior to the construction of any single family dwelling on Rural Use lands within a recreational river area (approximately ¼ of a mile from the edge of the river). Respondents are violating 9 NYCRR Part 577 by constructing their single family dwelling on Rural Use lands within the Saranac River recreational river area without an Agency permit.

RELIEF SOUGHT

Remediation

In the NAV, Agency staff seek remediation measures that will bring the property into compliance with 9 NYCRR Part 577. This would necessarily require Respondents, by a date certain, to remove their single family dwelling from within the setback of the river area since there are alternative locations on the subject property for their single family dwelling. Parker, ¶ 4. Agency staff recommend, however, that Respondents be given the opportunity to relocate their single family dwelling to a new location on the subject property that is more than 150 feet from the mean high water mark of the Saranac River, subject to prior Agency review and approval.

Penalty

Agency staff recommend that the Enforcement Committee determine an appropriate penalty in this matter based on consideration of the following relevant factors from the Enforcement Committee's General Penalty Guidelines:

1. Statutory Maximum:

The starting point for determining an appropriate penalty requires an understanding of the potential penalty allowed by law. Taking into account the fact that Environmental Conservation Law § 15-2723 allows the Agency to determine a penalty of up to \$1,000 for each day that a violation of 9 NYCRR Part 577 continues, the following table summarizes Respondents' potential penalty liability for the apparent violations set forth in the NAV:

Violation	Beginning Date	Ending Date	Total Days	Maximum Per Day Penalty	Total Maximum Penalty
Rivers Setback	4/18/04*	5/8/08	1481	\$1,000	\$1,481,000
Rivers Project	4/18/04	5/8/08	1481	\$1,000	\$1,481,000

2. Potential Harm and Actual Damage

This factor focuses on the extent to which the violator's conduct resulted in or could potentially result in harm to the

* This is the date of the photograph of Respondents' single family dwelling taken from the Saranac River by David Nettles. Parker, ¶ 5.

environment or human health. The penalty should be proportional to potential or actual harm. Here, the known environmental harm resulting from Respondents' illegal single family dwelling is the continuing visual impact of use on the Saranac River recreational river area. Since staff have been denied access to the subject property, it is unclear whether there are other environmental impacts including, but not limited to potential septic system impacts and/or violations.

3. Culpability

The violator's culpability is relevant in assessing the amount of a penalty, and a higher penalty is appropriate proportionate to the culpability of the violator. In assessing the degree of Respondents' culpability, staff recommend consideration of the following: (i) how much control Respondents had over the events constituting the violation; and (ii) the foreseeability of the violations.

Respondents own the subject property and constructed the single family dwelling there. Fravor, ¶¶ 3,6. It is unclear from the facts in the record to what extent Respondents should have foreseen their violations, given their lack of cooperation in the Agency's investigation.

4. Violator Cooperation

The cooperation of the violator in remedying the violation and the self-reporting of a violation may be mitigating factors

in determining an appropriate penalty. These factors do not apply in this case.

Agency staff discovered Respondents' potential violations as a result of a complaint received from an individual paddling by Respondents' property on the Saranac River. Parker, ¶ 5.

Respondents have repeatedly denied staff requests for access to the subject property to investigate the alleged violations in this matter. Fravor, ¶ 8.

5. Extent of Compliance Required

In this case, Agency staff seek remediation measures that will bring the subject property into compliance with 9 NYCRR Part 577. It will be costly for Respondents to relocate their single family dwelling outside of the shoreline setback. There will likely also be some costs associated with obtaining Agency approval of a location on the subject property to which the single family dwelling may be relocated. It is appropriate for the Committee to take these costs into consideration in determining an appropriate penalty.

6. Economic Benefit

Since 1999, Respondents have avoided the costs of obtaining Agency approval for their single family dwellings and have enjoyed the illegal economic benefit of having a single family dwelling within the shoreline setback of the Saranac River.

7. Importance to the Regulatory Scheme

This factor focuses on the importance of the violated

requirements in achieving the goal of the underlying statute. 9 NYCRR Part 577 implements the Wild, Scenic and Recreational Rivers Act and applies to "land use and development on privately owned lands within wild, scenic and recreational river areas located in the Adirondack Park." 9 NYCRR § 577.1. River areas are defined to include "the wild, scenic and recreational rivers and the private lands in their immediate environs" as set forth in Appendix Q-6 of 9 NYCRR. 9 NYCRR § 577.2(o). Pursuant to Environmental Conservation Law § 15-2714(3)(y), the Saranac River is a designated recreational river. By statute, the management of recreational rivers "shall be directed at preserving and restoring the natural scenic and recreational qualities of such river areas". Environmental Conservation Law § 15-2707(2)(c). Clearly, firm enforcement of the shoreline restrictions and permitting requirements of the Rivers Act is fundamental to achieving this statutory direction. From the photograph of Respondents' single family dwelling taken from the Saranac River, it appears that Respondents' have little regard for the objectives of the Rivers Act to preserve and restore the "natural scenic and recreational qualities" of the Saranac River. Id.; Fravor, Exhibit F.

CONCLUSION

Based on Agency staff's NAV and the affidavit and exhibits in support of Agency staff's Request for an Enforcement Committee Determination, there are no material facts in dispute

in this matter. Accordingly, Agency staff request a determination by the Enforcement Committee pursuant to 9 NYCRR § 581-2.6(d) that the apparent violations of 9 NYCRR Part 577 alleged in the NAV occurred and are continuing to occur. Agency staff further request that the Committee determine appropriate injunctive relief and penalties against Respondents as authorized by 9 NYCRR § 581-2.6(d) and consistent with the NAV, the Notice of Request for an Enforcement Committee Determination and Agency staff's recommendations herein.