

# New York State Department of Environmental Conservation

## Office of General Counsel, Region 6

Dulles State Office Building, 317 Washington Street, Watertown, New York 13601-3787

Phone: (315) 785-2238 • FAX: (315) 785-2242

Website: [www.dec.ny.gov](http://www.dec.ny.gov)



Alexander B. Grannis  
Commissioner

June 5, 2009

Hon. Alexander B. Grannis  
Commissioner of Environmental Conservation  
NYSDEC  
625 Broadway  
Albany, NY 12233-1500

Subject: The Matter of James W. McCulley  
DEC VISTA Index Number R520050613-505  
Motion for Clarification and Reconsideration

Dear Commissioner Grannis:

On behalf of the staff of the Department of Environmental Conservation, I respectfully request clarification of certain aspects of the decision in this matter dated May 19, 2009. Staff does not seek reversal of the dismissal of the action against respondent. However, we believe that specific aspects of the decision should be clarified to ensure proper care, custody, and control of the lands under the administration of the Department.

The Commissioner of Environmental Conservation has inherent authority to reopen or otherwise reconsider a final decision. See, *Matter of Mohawk Valley Organics, LLC*, Commissioner's Ruling on Motion to Suspend Order and Reopen the Hearing Records, September 18, 2003; citing *Matter of Charles Pierce, Sr.*, Commissioner's Ruling on Motion for Reconsideration, June 9, 1995. See also *Matter of Erie Boulevard Hydropower, L.P.*, Ruling of the Deputy Commissioner, June 17, 2005.

Clarification is appropriate upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision. *Mayer v. National Arts Club*, 192 A.D.2d 863 (3d Dept. 1993). Clarification is a matter within the sound discretion of the decision maker. *William Phal Equipment Corp. v. Kassis*, 182 A.D. 2d. 22, 27 (1<sup>st</sup> Dept. 1992). As more fully stated below and in the enclosed motion, staff believes the May 19, 2009, decision misapprehended or misapplied the applicable law.

With regard to §205 of the Highway Law, the decision states “ . . . *the road is deemed abandoned when the town superintendent, based on written consent of the town board majority, files a description of the highway abandoned with the town clerk . . .*” Case law uniformly holds that abandonment occurs (or fails to occur) independently from the filing of a certificate of abandonment. See, e.g., *Willis v. Town of Orleans*, 263 A.D. 2d 889 (4<sup>th</sup> Dept. 1997).

Ambiguity exists regarding the basis for dismissal of staff's case. The decision states that staff failed to meet its burden of proof. However, the decision also adopts the Chief ALJ's report, which dismissed staff's case as a matter of law, and only finds in the alternative that staff did not meet its burden of proof. This creates an ambiguity that could effect decisions regarding future enforcement and management of the Department's trails. Further, staff believes that the Chief ALJ incorrectly dismissed staff's case as a matter of law. Judgment as a matter of law is only appropriate when, drawing all inferences favorable to the non-moving party, that party has not made a prima facie case. *Szczerbiak v. Pilat*, 90 N.Y. 2d 553, 556 (1997). Even when some public use of a highway exists, particularly recreational use, abandonment can occur. See, *inter alia Pless v. Town of Royalton*, 185 A.D. 2d 659 (1992), *aff'd* 81 N.Y. 2d 1047. Accordingly, the determination that Old Mountain Road through the Sentinel Range was not abandoned rested upon a weighing of the facts to determine whether the nature and level of use demonstrated abandonment.

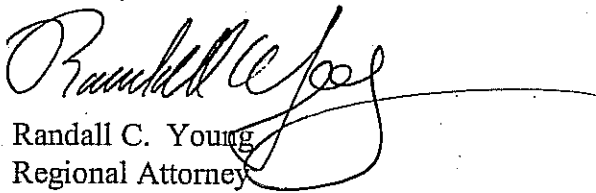
Staff requests that you set a briefing schedule to allow a full statement of the issues identified in its motion.

Finally, please consider this to be a request for a change in lead counsel for the purposes of this motion. Charles Sullivan, who represented staff during the adjudicatory proceeding, is currently engaged with other matters.

Copies of the notice of motion, motion, and supporting papers have been served on Respondent's attorney, Matthew Norfolk, Esq., Assistant Commissioner Louis Alexander, and Chief ALJ James McClymonds, under separate covers. I will forward proof of service as soon as possible.

Thank you for your time and consideration.

Sincerely,

  
Randall C. Young  
Regional Attorney  
NYSDEC Region 6

RCY:als

Enc.(s)

cc: Matthew Norfolk, Esq. (Certified Mail, Return Receipt Requested) ✓  
Louis A. Alexander, Esq.  
Hon. James McClymonds

STATE OF NEW YORK:  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 9 of the  
Environmental Conservation Law and Title 6, Part 196.1 of  
the Official Compilation of Codes, Rules and Regulations of  
the State of New York by:

NOTICE  
OF  
MOTION

JAMES W. McCULLEY

VISTA  
Index Number  
R520050613-505

Respondent.

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PLEASE TAKE NOTICE THAT the staff of the Department of Environmental Conservation moves for clarification of certain points of law stated in the Commissioner's decision in this matter as more specifically stated in the enclosed motion. Staff seeks clarification of statements within the decision that pertain to implementation and enforcement of Article 14 of the New York State Constitution, the Adirondack Park State Land Master Plan, the Highway Law, and Vehicle and Traffic Law.

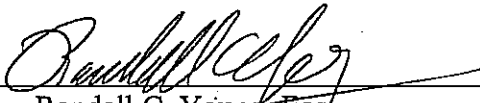
PLEASE BE ADVISED THAT staff does not seek reversal of the dismissal of the action against Respondent.

PLEASE BE ADVISED THAT a response to this motion must be filed with the Chief Administrative Law Judge within twenty days of the receipt of the motion and the failure to provide a response to this motion constitutes a default and may waive your right to be heard.

Dated at Watertown, New York:  
June 5, 2009

Staff of the New York State Department  
of Environmental Conservation

By:



Randall C. Young, Esq.  
Senior Attorney, NYSDEC  
317 Washington Street  
Watertown, NY 13601  
315-785-2238

STATE OF NEW YORK:  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 9 of the  
Environmental Conservation Law and Title 6, Part 196.1 of  
the Official Compilation of Codes, Rules and Regulations of  
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Respondent.

MOTION FOR  
CLARIFICATION

VISTA  
Index Number  
R520050613-505

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The staff of the New York State Department of Environmental Conservation ("Staff") through its attorney, Randall C. Young, moves for the Commissioner of Environmental Conservation to clarify the Commissioner's decision in this matter dated May 19, 2009, consistent with 6 NYCRR Part 622.18(e), CPLR §2221, ECL §§1-0101(3)(d), 3-0301(1)(d), and 9-0105(1)&(9), to ensure the proper care, custody, and control of the state lands under the jurisdiction of the Department.

Staff seeks clarification of the following portions of the Commissioner's decision:

1) The obligation of towns of Keene and North Elba to improve the route

Staff requests clarification of that portion of the decision starting at page 5 discussing the obligations of the towns of Keene and North Elba to improve and maintain the route. A user highway is limited to the extent of the currently maintained way. See, *inter alia*, *Flacke v. Town of Fine*, 113 Misc. 2d 56 (Sup. Ct. St. Lawrence Co. 1982). Additionally, increasing the extent of the road to make it passable to motor vehicles would violate Article 14 of the New York State Constitution, Executive Law section 816, the Adirondack Park State Land Master Plan, and the Environmental Conservation Law.

This portion of the decision also appears to exceed the scope of the administrative proceedings in a manner inconsistent with the ECL Article 3 and 9 and 6 NYCRR Part 622.18(e).

indications of “. . . travel or use as a highway. . .” under Highway Law §205(1).

The Chief ALJ relied upon cases dealing with hostile use of private lands when he determined that "travel over this road by such disparate groups as snowmobilers, bicyclists, cross-country skiers, and pedestrians" precluded a finding of abandonment – e.g. *Smigel v. Town of Rensselaerville*, 238 A.D. 2d 863 (3d Dept. 2001). Unlike the situation in those cases, the state promotes hiking, skiing, and snowshoeing pursuant to the APSLMP in keeping with the state's interests and the purposes of the Forest Preserve. For recreational uses, this route is a destination, not a highway used for travel to a destination.

5) Dismissal of staff's case as a matter of law

The decision states as a basis for dismissal that “Department staff did not meet its burden of proof.” However, the decision also adopts the ALJ’s report that dismissed the case as a matter of law. Staff believes that this creates an ambiguity and requires clarification. Further, based on the considerations set forth in items 1 through 4 above, Staff believes the Chief ALJ erred in holding Staff did not present a prima facie case as a matter of law.

The Commissioner of Environmental Conservation has inherent authority to reopen or otherwise reconsider a final decision. See, *Matter of Mohawk Valley Organics, LLC*, Commissioner’s Ruling on Motion to Suspend Order and Reopen the Hearing Records, September 18, 2003; citing *Matter of Charles Pierce, Sr.*, Commissioner’s Ruling on Motion for Reconsideration, June 9, 1995.

Further, ECL §§1-0101(3)(d), 3-0301(1)(d), and 9-0105(1)&(9), grant the Commissioner care, custody, and control of the Forest Preserve and lands administered by the Department. Staff respectfully requests clarification of Commissioner’s May 19, 2009, decision pursuant to that authority to ensure proper implementation of Article 14 of the