STATE OF NEW YORK
SUPREME COURT : HAMILTON COUNTY

FRIENDS OF THAYER LAKE LLC, et al.

Plaintiffs,

-against-

PHIL BROWN, et al.,

Defendants,

and

THE STATE OF NEW YORK and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Intervenors-Defendants.

Index No. 6803-10

RJI No. 17-1-11-0078

HON. RICHARD T. AULISI

STATE'S MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' OPPOSITION TO THE STATE'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Intervenors-Defendants

LISA M. BURIANEK
KEVIN P. DONOVAN
Assistant Attorneys General
New York State Department of Law
Environmental Protection Bureau

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SUMMARY

A waterway is navigable-in-fact if it has practical utility for trade *or* travel, and utility for recreational travel falls within that standard. *Adirondack League Club v. Sierra Club*, 92 N.Y.2d 591, 600, 603 (1998). Nonetheless, plaintiffs ask this court to find that a waterway used for travel for more than ninety years is not navigable, primarily based on arguments rejected in *Adirondack League Club*. Among plaintiffs' arguments are that there is a commercial standard for navigability that the Waterway does not meet, that a 500 foot carry around shallow rapids in the outlet of a navigable pond is an obstacle that prevents the waterway from being navigable-in-fact, that the public right of navigation constitutes a "taking" of private property, that various State actions bar a finding of navigability, and that use of the Waterway is not "necessary" for travelers or for commercial guides. Plaintiffs fail to establish their own basis for summary judgment, nor do they defeat the State's entitlement to summary judgment.

Adirondack League Club is the controlling case and dictates the result. Accordingly, the Court should grant the State's motion for summary judgment and should deny FOTL's counter-motion for summary judgment.

ARGUMENT

POINT I

THE WATERWAY IS NAVIGABLE UNDER CONTROLLING PRECEDENT

A. Introduction

The Mud Pond Waterway is subject to the right of navigation because it has *practical utility for trade or travel. Adirondack League Club v. Sierra Club*, 92 N.Y.2d at 600 (emphasis added). Since 1918, it has been in continuous use as a "major route" and "primary means of access" to lands for which plaintiffs did not create road access. August 8, 2012 Memorandum of Law In Support of the Motion for Summary Judgment of the State of New York and the New York State Department of Environmental Conservation ("State's Memorandum") at 4 (citing April 29, 2011 Affidavit of Donald Potter Relative to Intervention, ¶ 9 (filed with plaintiffs' May 3, 2011 Opposition to the State's Motion to Intervene); February 16, 2012 Examination Before Trial of Donald B. Potter ("Potter Dep.") at 102, 134-35, 137, 221-22; February 4, 2011 Amended Complaint ("Amended Complaint"), ¶ 21). Plaintiffs agree "it is possible to reach the Mud Pond Outlet and Shingle Shanty Brook on plaintiffs' Mud Pond Parcel by small boat from Lake Lila . . . ." and all that is necessary to continue water travel on the "interconnected Mud Pond-Lilypad Pond water complex" to State land is a 500 foot carry followed by water travel over Mud Pond. Plaintiffs' May 3, 2011 Memorandum of Law In Opposition to the State's Motion to Intervene at 3, 4 (also filed with plaintiffs' May 3, 2011 Opposition to the State's Motion to Intervene). A plaintiff-supplied video shows successful

canoe travel on the Mud Pond Outlet and Shingle Shanty Brook portion of the Waterway at below average water level. September 25, 2012 Affidavit of Justin Potter ("Justin Potter Aff."), ¶¶ 15-20, Exhibit A (CD).[1]

B. The Waterway is Navigable Because it Has Capacity for Trade or Travel, and Recreational Travel By Canoe Constitutes Sufficient Evidence of Navigability

Plaintiffs err in claiming that a waterway cannot be navigable-in-fact unless it had a history of substantial commercial transport, specifically log driving, and that travel by canoe and kayak cannot establish navigability. FOTL's Memorandum at 14-21; September 27, 2012 Affirmation of Dennis Phillips ("Phillips Aff."), ¶ 70. The Court of Appeals was presented with both arguments in *Adirondack League Club* and explicitly rejected them.

1. Recreational Use Can Prove Utility for Travel

The *Adirondack League Club* Court unequivocally held that recreational use of a waterway can establish its navigability. "We hold . . . that evidence of the river's *capacity for recreational use* is in line with the traditional test of navigability, that is, whether a river has a *practical utility for trade or travel.*" *Adirondack League Club,* 92 N.Y.2d at 600 (emphasis added). The Court explained, "We only hold that such transport *need not be limited to moving goods in commerce, but can include some recreational uses. Practical utility for travel or transport nevertheless remains the standard.*" *Adirondack League Club*, 92 N.Y.2d at 604 (emphases added).

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[1] Plaintiffs' counsel confirmed that the video may be viewed at the following location should the Court experience any difficulty with the CD. http://www.youtube.com/watch?v=Ny6tQflFGTw&feature=related

"Travel" means "to move from one place to another." Webster's II New College Dictionary (2001). There is no dispute that the Waterway can be used and has been used to move from one place to another as it is the primary access for plaintiffs to and from Mud Pond Camp ("Camp"). If the Waterway were not useful for travel as plaintiffs now assert (FOTL's Memorandum at 22-23), they and Frederick Potter, who constructed the Camp, would have traveled there by trail rather than perform the one and one-half to two hour paddle. April 25, 2012 Affidavit in Support of Plaintiffs' Cross Motion, etc., of Donald Potter ("Donald Potter SJ Aff."), ¶¶ 42, 52, 57 (Exhibit R) (map of trail system). But Plaintiffs' actions for a century demonstrate that the waterway is navigable.

Tellingly, plaintiffs neither quote nor address the standard of "practical utility for trade *or travel*" as stated in *Adirondack League Club*. 92 N.Y.2d at 600 (emphasis added). Instead, they offer incomplete and selective citations from the decision. For example, to bolster their claim that navigability requires transport of commercial items, plaintiffs quote the decision as stating "[O]f paramount concern is the capacity of the river for transport." They thereafter refer to the capacity for transport or utility for transport. Plaintiffs' September 28, 2012 Memorandum of Law In Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motions for Summary Judgment ("FOTL's Memorandum") at 8-9, 10, 15, 16, 17, 22, 27, 32. The Court's actual language reads "[O]f paramount concern is the capacity of the river for transport, *whether for trade or travel*." *Adirondack League Club*, 92 N.Y.2d at 603 (emphasis added).

Nor does plaintiffs' argument that navigability cannot be established by recreational use absent commercial use withstand scrutiny. Specifically, plaintiffs seek a ruling that would ignore the holdings in *Adirondack League* Club, including that "such transport *need not be limited to moving goods in commerce.*" *Adirondack League Club*, 92 N.Y.2d at 604 (emphasis added). Similarly, plaintiffs seek to ignore the Court of Appeals' use of the word "travel" in the phrases "utility for trade or travel" and "travel or transport." *Adirondack League Club*, 92 N.Y.2d at 600, 603, 604. And plaintiffs would ignore the Court's discussion of the uses of rivers, viewed "no longer primarily as subjects of commercial exploitation and gain but are valued in their own right as a means of travel." *Adirondack League Club,* 92 N.Y.2d at 603. Wishing that the Court's reference to recreational travel was meaningless surplusage does not make it so.

Finally, while plaintiffs rely on a pre-*Adirondack League Club* case from the Appellate Division, Third Department, *Hanigan v. State*, 213 A.D.2d 80, 84 (3d Dep't 1995) for wording, they ignore that the Third Department has interpreted *Adirondack League Club* as recognizing that recreational use can establish navigability. *Mohawk Valley Ski Club, Inc. v. Town of Duanesburg,* 304 A.D.2d 881, 883 (3d Dep't 2003) ("in light of more modern attitudes about use of natural resources, recreational use should be considered in addition to commercial use in determining navigability").

Moreover, plaintiffs incorrectly assert that *Adirondack League Club* was remanded for fact-finding on whether commercial log driving had been

accomplished only through artificial augmentation. FOTL's Memorandum at 20. While the issue on remand was evidence of seasonal or periodic capacity, not only did the Court discuss alternative uses that could establish navigability -- recreational or commercial -- it specifically acknowledged that individual canoe excursions or commercial canoeing operations were potential factual grounds for a navigability finding. *Adirondack League Club,* 92 N.Y.2d at 604-07.

2. Travel by Canoes and Kayaks Constitutes Sufficient Proof of Navigability

Although plaintiffs claim that the floatability of canoes cannot be used to determine navigability, FOTL's Memorandum at 20-22, the Court of Appeals repeatedly pointed to both floatability and canoes as evidence of navigability. *Adirondack League Club*, 92 N.Y.2d 601 ("If it is so far *navigable or floatable*, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported") (citing *Morgan*, 35 N.Y. at 454, 458-459 (1866); *Adirondack League Club,* 92 N.Y.2d at 600, 606 ("trip . . . [in two canoes and a kayak] is evidence of navigability"); and *Adirondack League Club,* 92 N.Y.2d at 607 (navigability referenced as a "capacity to float individual *canoeing* excursions."). *See also* State's Memorandum at 18.

Plaintiffs admit that the Waterway is "barely suitable for recreational canoeing and kayaking," is "only capable of floating canoes and kayaks," that "canoes can be floated (historically, with some difficulty), up the Shingle Shanty Brook and Mud Pond Outlet to the bottom of the rapids" and that it "support[s] only recreational canoeing and kayaking." FOTL's Memorandum at 5, 6, 23, 26. This

settles the question of its utility for travel. *Burnside v. Foglia*, 208 A.D.2d 1085, 1086 (3d Dep't 1994) (writing by counsel admissible as statement of party); *DiCamillo v. City of New York*, 245 A.D.2d 332, 333 (2d Dep't 1997) (statement of fact in letter by counsel admissible against party).

Plaintiffs attempt to raise irrelevant confounding factors, such as the winding nature of the waterway or fallen trees or other obstructions that have no support in case holdings. Not all public highways on land are paved and easily driven, and can be unpaved, rocky, seasonal, twisty, or even require four wheel drive. Similarly, navigable waterways are common highways for travel on water. See State's Memorandum at 13-14; *Smith v. City of Rochester*, 92 N.Y. 463, 485 (1883). They also differ in character and may not be broad or straight. Moreover, plaintiffs' litany of potential navigation impediments would render the law of navigability a nullity, even where, as here, a waterway has been used as a regular route of travel for close to a century.

Needing to sidestep the holdings in *Adirondack League Club* and *Mohawk Valley Ski Club,* plaintiffs seek to rely upon 19th century cases. See FOTL's Memorandum at 7, 8, 13, 17, 20, 21, citing *Smith, supra,* as well as FOTL's Memorandum at 16-17, 22 n, 26, citing *DeCamp v. Thomson*, 16 A.D. 528 (4th Dep't 1897). However, neither of these cases provide support for their arguments. *Smith* does not mention commercial use or log drives in stating that Hemlock Lake was navigable, and further noted non-commercial uses, such as "fishing, ferrying and transportation." *Smith,* 92 N.Y. at 480. Notably, *DeCamp* determined only that

because artificial means were necessary to float logs, the waterway in question was not "a public highway to the extent and *for the purposes* for which the defendants have attempted to use them . . . . " and "in its natural state, is not a public highway at common law *for the purpose of floating logs and timber.*" *DeCamp,* 16 A.D. at 533, 535 (emphases added). Moreover, *DeCamp's* holding that the lack of navigability was only for the purposes of floating logs recognizes that the waterway may be navigable for other purposes, contrary to plaintiffs' contention that a ruling on navigability is determinative for all purposes. FOTL's Memorandum at 21.[2]

Plaintiffs' listing of cases in which waterbodies were determined not to be navigable shed no light here. See FOTL's Memorandum at 17. None involved consistent use for travel for almost a century.[3] Nor can plaintiffs find support for

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[2] Plaintiff's cite *Dale v. Chisholm,* 67 A.D.3d 626 (2d Dep't 2009) for the proposition that recreational canoeing and kayaking cannot prove utility for travel. But that case referred only to the specific canoe and kayak use on that lake and that there was no proof that travel could continue beyond the lake. *Dale,* 67 A.D.3d at 627. Thus that case properly cites *Mohawk Valley Ski Club, Inc.,* 304 A.D.2d 881, 882-84 (3d Dep't 2003) and *Hanigan v. State*, 213 A.D.2d 80, 84 (3d Dep't 1995), which state that travel requires more than one access point to a body of water. It is not relevant here where there is more than one point of access.

[3] *Munson v. Hungerford*, 6 Barb. 265 (1849) (severe drop over 30 miles in which "a boat or raft would be broken to pieces"); *Curtis v. Keesler*, 14 Barb. 511, 518 (1852) (so shallow as to not float a single stick of timber); *Smith v. Rochester*, 92 N.Y. 463, 473 (1883) (issue of riparian rights on Creek, not its navigability); *Fulton Light Heat & Power Co. v. New York*, 200 N.Y. 400, 412, 416-17 (1911) (whether landowners owned to the middle of the Oswego River as it was not a tidal arm of the sea); *People ex reI. New York Cent. R.R. v. State Tax Comm'n*, 239 N.Y. 183, 185 (1924) (not navigable because barges did not use it); *People v. Platt,* 17 Jolms. 195 (1819) (conceded to be "unnavigable for boats of any kind"); *State of New York ex rel. Western New York and Pennsylvania R.R. Co. v. State Tax Comm'*n, 244 N.Y. 596, 597 (1927) (stated, without rationale, to be not navigable).

their commercial use argument from a statutory definition of "navigable in fact," Navigation Law § 2 (5), as that statute does not limit common law rights in navigable waters. *Town of North Elba v. Grimditch*, 98 A.D.3d 183, 190 (3d Dep't 2012).

3. The Waterway Has Capacity for Commercial Use

And although not necessary for a finding of navigability, capacity for commercial use has been proved, as it can be shown by recreational use. *Adirondack League Club,* 92 N.Y.2d at 603 ("recreational boating has commercial aspects.") And because guided travel is a commercial activity, *Adirondack League Club*, 92 N.Y.2d at 603-604, its utility for commercial guided travel also establishes commercial capacity. July 26, 2012 Affidavit of David Cilley ("Cilley Aff."), ¶¶ 8-12, 34-40. Plaintiffs complain that the guide, Mr. Cilley, did not point to a direct increase in his business due to use of the waterway, and that he failed to assert that its use was "critical" to his business. FOTL's Memorandum at 25; September 25, 2012 Affidavit of Colin Bradford, ¶¶ 15-17. But plaintiffs cite no cases for such a proof requirement, nor are there any. Plaintiffs next intimate that DEC regulations, mirrored in the Whitney Management Plan, bar the use of commercial Adirondack guides in the Forest Preserve.[4] FOTL's Memorandum at 24. Not only is plaintiffs' reading of the DEC regulations fundamentally incorrect, such a reading would end the long-standing tradition of Adirondack guides. The DEC regulations

[4] "The use of State lands or any structures or improvements thereon for private revenue or commercial purposes is prohibited . . . ." 6 N.Y.C.R.R. § 190.8. The other regulation cited by plaintiffs, 6 N.Y.C.R.R. § 190.33, contains no such language.

prohibit the location of a business on State-owned Forest Preserve lands, not privately guided travel in the Forest Preserve.

That said, and although not necessary for a finding of navigability, history demonstrates the Waterway's capacity for commercial use. *Adirondack League Club*, 92 N.Y.2d at 605 ("Navigability turns on evidence of actual practical use or evidence of capacity for practical use."); State's Memorandum at 3-5; Potter Dep. at 101, 102, 134-35, 1137, 38-39, 140, 145-147, 221-22. And plaintiffs' after-the-fact attempt to re-cast Frederick Potter's use of the Waterway for trapping and sale of furs as "recreational" or "rare" does not divest it of its commercial nature. See FOTL Memo of Law at 24; Donald Potter SJ Aff., ¶ 61. But that Frederick Potter (and likely Donald Potter, who described certain of his actions as those of a "frustrated trapper," Potter Dep. at 269-70) engaged in trapping on and around the Waterway and transported the pelts on it demonstrates its "capacity for trade." And that is all that is required to establish navigability even under plaintiffs' commercial argument. And trapping for sale of pelts can still be performed on the surrounding State waters and the pelts brought out over the Waterway. Potter Dep. at 240-42; February 15, 2011 Verified Counterclaim ("Verified Counterclaim"), Exhibit 2 at 2 (trapping, hunting, fishing among activities the public can pursue in Whitney Wilderness Area.)

Further, plaintiffs do not dispute that they used the Waterway to transport goods to and from the Camp, showing that it is useful for transport, and they acknowledged that Frederick Potter hired a guide to assist him and guests while

fishing the waters of the Mud Pond Parcel and at least one sporting trip for deer hunting. FOTL's Memorandum at 24. Saying that the guide was not used for "the public" *(Id.)* is a distinction without a difference -- guests are by definition members of the public invited to the Waterway. But even were the guides solely used by members, that would not make the hiring of the guide any less commercial. To the extent that the Court considers the affidavit of Judson Potter, his opinion that canoes and kayaks have only recreational use (August 8, 2012 Affidavit of Judson Potter ("Judson Potter Aff."), ¶ 27), is immaterial, is contrary to history in America as well as that of the Waterway, and is contrary to the Court of Appeals' statement that guided travel is commercial. *Adirondack League Club*, 92 N.Y.2d at 603, 607-08 (recognizes that guided tours have commercial aspects, and refers to commercial canoeing ventures.)[5]

4. A 500 Foot Long Rapids and Carry Does Not Render the Waterway Unnavigable

Plaintiffs assert that Mud Pond has only one access point, asserting that travel on the Waterway down the Outlet of Mud Pond into Shingle Shanty Brook on it is course to Lake Lila is "blocked by an impassable bedrock ledge which is immediately followed by the 500-foot long Mud Pond Outlet Rapids." FOTL's

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[5] In addition to the use of canoes by plaintiffs in their commercial endeavors, the State asks the Court to take judicial notice of the commonly known historical fact that canoes were a common mode of water travel by Native Americans and others who used them in their trade, including transport of beaver pelts to market. *Swinnerton v Columbian Ins. Co*, 37 N.Y. 174, 188 (1867) (judicial notice of historical facts); *In Re Clement*, 132 A.D. 598, 600 (3d Dep't 1909).

Memorandum at 11. Plaintiffs then rely on cases declaring ponds not navigable when they had no connection to other waters, because the traveler "traveled nowhere." *Mohawk Valley Ski Club, Inc.,* 304 A.D.2d 881, 883-84 (3d Dep't 2003); *Hanigan v. State*, 213 A.D.2d 80, 84 (3d Dep't 1995). Plaintiffs' recharacterization of the Waterway ignores the undisputed fact that Mud Pond is not an isolated water body but rather is part of an integrated waterway allowing travel upstream to Lilypad Pond; the Waterway also serves as a downstream route to Mud Pond Outlet and Shingle Shanty Stream which flows to Lake Lila - as regularly demonstrated by plaintiffs' own use of the Waterway. Plaintiffs' own witness, Donald Potter, who knows the area better than anyone else, testified that the waters in the Waterway, and those on State land upstream and downstream, "are all one integrated stream system" even though they have various names. Potter Dep. at 209-10, 274; Verified Counterclaim, ¶¶ 37-41; August 1, 2012 Affidavit of Josh Houghton ("Houghton Aff."), ¶ 16, Exhibits A and B. Even plaintiffs' denomination of the stream in question as the "Mud Pond Waterway" confirms this. Amended Complaint, ¶¶ 22, 23.

Plaintiffs' contention that a 500 foot carry destroys navigability is another instance of sidestepping *Adirondack League Club*, namely its holding that "the existence of occasional natural obstructions do not destroy navigability." *Adirondack League Club,* 92 N.Y.2d at 607. There, the Court observed that the travelers were required to leave their boats for "several portages" to bypass obstacles. *Adirondack League Club,* 92 N.Y.2d at 600. Nonetheless, the Court cited

that canoe/kayak trip with its several portages as evidence of navigability. *Adirondack League Club,* 92 N.Y.2d at 607. The case here is clear-cut, as this Waterway requires not several carries as in *Adirondack League Club,* but only one very short 500 foot carry around shallow rapids - - one of the shortest in the Adirondacks. Cilley Aff., ¶ 24; February 8, 2012 Examination Before Trial of Philip H. Brown ("Brown Dep.") at 83, 123; Verified Counterclaim, ¶¶ 57-58, Exhibit 5, *Testing the Legal Waters*, at 49; February 15, 2011 Affidavit of Christopher Amato ("Amato Aff.") (affidavit filed with February 23, 2011 State's Motion to Intervene), ¶ 20 ("an easy carry"); Potter Dep. at 66 (the 0.8 mile carry on State land - 8 times the length of the 0.1 mile carry around Mud Pond Rapids - was short.)[6]

5. The Public Right of Navigation Is Not a Taking of Property

Plaintiffs' assert that the standard of navigability requires proof of commercial use, and that considering recreational use for navigability would be a change in the law and thus a "taking" of private property that would upset well-settled notions of private property rights. FOTL's Memorandum at 1, 36, 39. For support, Plaintiffs twice quote *Adirondack League Club* as stating "We do not broaden the standard for navigability-in-fact . . ." FOTL's Memorandum at 15, 21. But the full quotation in context shows that the Court was squarely presented with,

[6] Nor do beaver dams, which come and go, constitute a barrier to navigation, as they are easily bypassed. Cilley Aff., ¶ 41. Were beaver dams determinative, navigability status would regularly change, and a landowner could bar navigability by introducing beaver to the area.

and rejected, the precise claim that plaintiffs make here. Initially, the Court set forth the argument made by the landowners:

> ALC [the landowner] contends that navigability references only commercial utility and that the focus thus should be on the . . . use as a logging river. . . . Reliance on recreational uses, ALC asserts, would disrupt settled expectations regarding private property and would expand the common-law rule beyond its traditional foundation.

Adirondack League Club, 92 N.Y.2d at 601. The Court then wrote:

> [F]ear that consideration of recreational use broadens the common-law standard and threatens private property rights is unfounded. *We do not broaden the standard for navigability-in-fact, but merely recognize that recreational use fits within it. . . .*
>
> Furthermore, property rights are not materially altered by this holding. Riparian owners retain their full panoply of rights, subject only to the long recognized navigational servitude. . . .
>
> Having never owned the easement, riparian owners cannot complain that this rule works a taking for public use without compensation.

Adirondack League Club, 92 N.Y.2d at 603-05 (emphasis added). And see State's Memorandum at 14. Simply put, recreational use has always been within the standard and recognizing recreational use as proof of utility of travel, thus navigability, does not affect private property rights.[7]

This Court should decline plaintiffs' invitation to re-visit the issues resolved in *Adirondack League Club*.

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[7] *Douglaston Manor, Inc. v. Bahrakis*, 89 N.Y.2d 472 (1997) is not pertinent. That case involved the claim that navigation rights should be expanded to include anchored fishing in a privately owned stream.

POINT II

PLAINTIFFS' REMAINING ARGUMENTS ARE BASELESS

Plaintiffs' remaining arguments are irrelevant and without merit. They assert that State actions or inactions are evidence that the State did not deem the route navigable or bar a finding of navigability, but point to no controlling legal principle. However, it is axiomatic that the State as trustee cannot alienate the public right of navigation. See State's Memorandum at 14; *Smith,* 92 N.Y. at 477-78, 480 ("the rights and interests of the public such as fishing, ferrying and transportation, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign"). Thus, navigability cannot be affected by the State's creation of, or the existence of, an alternate route, by a claimed failure to assert navigability in the past,[8] by the State's purchase of rights to lands and waters in other areas, by lack of public use prior to the 1998 Whitney acquisition, or by a conservation easement. *See, e.g.* FOTL's Memorandum at 27, 38-39; Judson Potter Aff., ¶¶ 23-28; September 25, 2012 Affidavit Colin Bradford, ¶ 25; September 25, 2012 Affidavit of Steven Potter, ¶ 37.

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[8] *People ex rel. Erie R.R. v. State Tax Comm'n*, 266 A.D. 452, 454 (3d Dept. 1943), *aff'd*, 293 N.Y. 900 (1944) (A stream "does not lose this characteristic [of navigability] even if it has fallen into disuse for a hundred years." In any event, prior to the Whitney acquisition, it would have been impractical to travel from State land near Tupper Lake to State land at Lake Lila due to the distances involved and time required to traverse, or on to Stillwater Reservoir before Lake Lila was acquired. See August 1, 2012 Affidavit of Alan Belensz (from 7:11 a.m. to 3:13 p.m., 8 hours 36 minutes, to travel only between Little Tupper put-in to Lake Lila take-out).

Similarly, plaintiffs' assertion that there were legislative proposals regarding navigability and that DEC considered actions concerning navigability are irrelevant. In any event, there is nothing improper with the public asking DEC -- as the State is trustee for the public right of navigability -- to enforce the law of public navigability. Indeed, plaintiffs asked DEC to determine that the Waterway was not navigable and to bring "trespass" charges against travelers, and did so in many letters, and in at least two meetings with DEC officials, and the DEC officials visited the Waterway at plaintiffs' request. February 15, 2011 Affidavit of Christopher Amato ("Amato Aff.") (filed with February 23, 2011 State's Motion to Intervene), ¶¶ 15, 17, 19, 22, 24, Exh. 5, 7; Judson Potter Aff., ¶¶ 8, 33, 37.[9]

Finally, plaintiffs' articulated concern regarding possible public harm to the environment is unsupported by either proof or the law. *See, e.g.*, Bradford Aff., ¶¶ 28-29. And plaintiffs have actually harmed the environment, such as when several family members drove gasoline-soaked stakes and poured gasoline into a

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[9] Plaintiffs refer to a Paper by Charles Morrison, a former DEC employee, entitled *The Struggle for Public Navigation Rights*, 1970-2000. Judson Potter Aff., Exhibit O. A fair reading of the Paper shows concern with navigable-in-fact waters illegally blocked by landowners and making the common law clear for landowners and water travelers. Ironically, the Paper shows that DEC staff had long been unaware of the common law and supported prosecution of travelers. Judson Potter Aff., ¶ 65, Exh. O at 14, 15. But Mr. Potter's interpretation of the Paper deserves no weight, as his litigation goal is clear - - since to convince DEC that the Waterway was not navigable he wrote that the Waterway never had "any commercial purposes whatsoever," that Mud Pond "dramatically recedes in the summer," and that Mud Pond Outlet Brook has "limited seasonal flow of water . . . ," Judson Potter Aff., Exhibit J, ¶¶ 6,7, 8, all proven false by the family's records and testimony of Donald Potter.

beaver lodge to remove beavers in the Waterway. Potter Dep. at 269-70. See Navigation Law §§ 173, 192 (bars discharges of petroleum; $25,000 civil penalty). Nor do concerns regarding invasive species provide a legal bar to public navigation; moreover, plaintiffs' travel could or may have already transported invasive species.

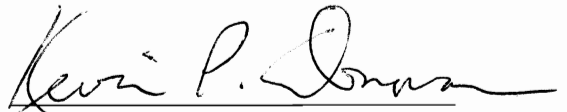
CONCLUSION

For the reasons stated above, and in the State defendants' prior submissions in support of their motion for summary judgment, and for any others that the Court deems appropriate, the State requests that the Court grant summary judgment in its favor and against plaintiffs and grant the State's Counterclaims in their entirety, deny plaintiffs' motion for summary judgment and dismiss the Second and Third Causes of Action in plaintiffs' Amended Complaint.

Respectfully submitted,

Dated: Albany, New York
October 19, 2012

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Intervenors-Defendants

By: 
LISA M. BURIANEK
KEVIN P. DONOVAN
Assistant Attorneys General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, New York 12224
(518) 474-4843