

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

Alleged Violations of Articles 15 and 24  
of the Environmental Conservation Law of the  
State of New York, and Title 6 of the  
Official Compilation of Codes, Rules and  
Regulations of the State of New York  
Parts 608 and 663,

- by -

**RICHARD STEINBERG AND BARBARA STEINBERG,**

Respondents.

DEC Case No. R3-20030718-97

DECISION AND ORDER OF THE COMMISSIONER

August 16, 2010

DECISION AND ORDER OF THE COMMISSIONER

This matter involves the administrative enforcement of alleged violations of navigable waters and freshwater wetlands provisions of the New York Environmental Conservation Law (ECL) by owners of lakefront residential property in Sullivan County.

Staff of the New York State Department of Environmental Conservation commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated February 2, 2006, upon respondents Richard and Barbara Steinberg, which staff later amended on August 16, 2006. In the amended complaint, Department staff alleges the following:

-- the Steinbergs own a parcel of real property identified as Lot No. 97 (Tax Map No. 52K/3/18) on a map entitled *Plan of Subdivision #11, Emerald Green*, filed on April 27, 1971, in the Town of Thompson, Sullivan County;

-- the Steinbergs' property abuts Treasure Lake, which staff contends is a navigable water of New York State, and the property also contains a regulated freshwater wetland;

-- the Steinbergs violated ECL 15-0505(1) and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) § 608.5 (Excavation or Placement of Fill in Navigable Waters) on or before April 3, 2003, by placing fill in Treasure Lake without first obtaining a permit from the Department; and

-- the Steinbergs violated ECL 24-0701(1) and 6 NYCRR part 663 on or before April 3, 2003, by placing about 60 truckloads of fill consisting of earth, clay, silt, sand, gravel, stone, and rock in a portion of Treasure Lake that is a regulated freshwater wetland, as well as in the adjacent area of the wetland without first obtaining a permit from the Department.

The Steinbergs appeared in the proceeding by Donald S. Tracy, Esq. (Tracy and Edwards from New City, New York), and filed an amended answer and affirmative defenses dated October 25, 2006.

An adjudicatory hearing was held before Administrative Law Judge (ALJ) Daniel P. O'Connell on May 8, 2007. ALJ O'Connell then prepared the attached hearing report.

At issue in this proceeding is whether the Department has subject matter jurisdiction over the Steinbergs' property pursuant to ECL articles 15 and 24. Upon review of the record and the attached hearing report, I adopt ALJ O'Connell's report

recommending that the Article 24 violation be dismissed on the grounds that the respondents' property is grandfathered under the Freshwater Wetlands Act because it is part of a subdivision that was approved prior to the effective date of the Act. Further, while I disagree with the ALJ's conclusion that the Department has no jurisdiction over the alleged Article 15 violation on the grounds that the lake at issue is an exempt water body under the Department's regulations, staff has nonetheless failed to prove all of the elements necessary to establish the violation under ECL 15-0505(1).

Accordingly, and as discussed in more detail below, I determine that the Department has no jurisdiction over the respondents' activities in filling in a regulated wetland because their activities on their property are grandfathered. I further determine that while the water body here is not exempt under the regulatory definition of a navigable water (6 NYCRR 608.1[u]), Department staff did not prove all of the elements necessary to establish a violation under ECL 15-0505(1).

#### **Article 24 Violation**

As stated above, the amended complaint alleges that the Steinbergs violated the Freshwater Wetlands Act (ECL 24-0701[1]) and implementing regulations (6 NYCRR part 663) by placing fill in a regulated freshwater wetland and adjacent areas without first obtaining a permit from the Department. The Steinbergs responded to this charge by claiming that their property was exempt (grandfathered) from the requirements of the Freshwater Wetlands Act because it was part of a subdivision that received final approval prior to the effective date of the Freshwater Wetlands Act.

Department staff does not dispute the respondents' facts as to whether the subdivision, of which respondents' property is a part, received final approval prior to the effective date of the Freshwater Wetlands Act. Rather, staff argues that a Declaration of Covenants and Restrictions (Declaration) added to the respondents' deed after the effective date of the Freshwater Wetlands Act changed the project that was given the final approval and, thus, works to "ungrandfather" the property, thereby conferring ECL article 24 jurisdiction.

As set forth below, I agree with the ALJ that the respondents' activities are grandfathered under the Freshwater Wetlands Act, ECL article 24.

The Freshwater Wetlands Act became effective on September 1, 1975. As initially enacted, after September 1, 1975, projects that had commenced prior to that date and which involved lands subject to the Act were required to stop work until the

developers satisfied applicable requirements. The Act was amended one year later, however, with the addition of a "grandfathering" provision. (L 1976, ch 771.) Thus, pursuant to ECL 24-1305, the Freshwater Wetlands Act does not apply to any land use, improvement, or development for which "final approval" had been obtained prior to September 1, 1975. The Act defines the term "final approval" for a number of different scenarios. For the subdivision of land, which is applicable here, final approval means the "conditional approval of a final plat as the term is defined in section two hundred seventy-six of the town law" (see ECL 24-1305[a]).

The Steinbergs' property is identified as Lot No. 97 on the Emerald Green Plan of Subdivision #11 (Exhibit [Exh] 6). The Town of Thompson Planning Board approved the Emerald Green Plan of Subdivision #11 on April 26, 1971, and the final approved plat was filed with the Sullivan County Clerk's Office the next day, April 27, 1971. These two events predated the enactment of the Freshwater Wetlands Act on September 1, 1975. Consequently, the grandfathering exemption in ECL 24-1305 has been met.

The Declaration of Covenants and Restrictions referenced above was filed and recorded in 1979, some four years after the effective date of the Act. According to staff, the Declaration changed the final subdivision approval issued in 1971 because it changed the use of part of the property conveyed. Staff illustrates this point by asserting that the Declaration changed the actual plan of development by fixing the lot line limits to areas above the mean high water mark (MHWM).<sup>1</sup> Staff claims, therefore, that activities for the land below the MHWM is subject to the Freshwater Wetlands Act because its use has changed from residential to recreational -- that is, the land has become part of the lake, which was approved specifically for recreational use. Affirmation of Steven Goverman in Support of Motion to Amend Complaint, dated August 16, 2006, ¶¶ 5-11.

I do not accept staff's assertion that the Declaration changed in any way the final subdivision approval of the Emerald Acres Subdivision.<sup>2</sup> The subdivision that the Town of Thompson approved in 1971 did not include Treasure Lake. The Declaration simply clarified the boundary line between the lands of the subdivision and Treasure Lake, tying that boundary to the MHWM.

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<sup>1</sup> Staff claims that the Declaration was filed to account for restoration of a dam on the lake, which would change the level of the water in the lake. Hence, the mean high water mark was settled upon as the boundary of property rights. Affirmation of Steven Goverman in Support of Motion to Amend Complaint, dated August 16, 2006, ¶¶ 10-11.

<sup>2</sup> I note that the ALJ relied exclusively on the exemption afforded by the issuance and filing of the final plat approval and did not address staff's argument that the Declaration operated to "ungrandfather" the exempt wetlands.

Based on the record before me, this is not a change that would ungrandfather the final approval for an entire subdivision. Consequently, the respondents' activities to further the use of their property for residential use is grandfathered under the Freshwater Wetlands Act, which means that the regulatory requirements of the Act do not apply to the respondents' activities on their property.

Finally, staff has not established in this record that the respondents violated the Freshwater Wetlands Act by engaging in unlawful activities in areas of regulated wetlands beyond the boundaries of their property.

### **Article 15 Violation**

The amended complaint (¶¶ 14-16) also alleges that on or about April 3, 2003, respondents placed fill below the mean high water level of a navigable water without first obtaining a permit from the Department, in violation of ECL 15-0505(1) and 6 NYCRR 608.5. In their defense, respondents claim that they did not violate the ECL or its regulations because Treasure Lake, as a privately owned lake, falls within an exemption under the term "navigable water of the State." The ALJ agreed with the respondents and recommends that this cause of action be dismissed.

As further discussed below, I disagree with the ALJ's analysis and application of the exemption for privately owned lakes. However, moving beyond the exemption to the merits of the alleged violation, the outcome of this matter is the same: respondents cannot be deemed to have violated ECL 15-0505(1) because staff did not prove that Treasure Lake is a navigable water of the State, an indispensable element of the cause of action.

### ECL 15-0505(1) - Elements of the Cause of Action

To prevail on a cause of action based on the illegal placement of fill in a navigable water of the State under ECL 15-0505(1), staff must prove that a respondent

- (1) placed fill
- (2) below the mean high water level
- (3) in a navigable water of the State
- (4) without a permit from the Department.

Here, the record demonstrates that staff proved only three of the four elements of the cause of action. First, the fill consisted of rip rock brought onto the site. (See Exh 13 [aerial photographs taken in 1994 and 2001 depicting the lot as undisturbed, and subsequent aerial photograph taken in 2004

depicting the lot as having been cleared of vegetation and containing a house]; Testimony of Department's witness, Douglas Gaugler, Transcript [Tr] at 94, 99 [regarding his site visit on November 27, 2006, confirming placement of fill (non-native rock) at the lake edge]; Testimony of respondent, Richard Steinberg, Tr at 142 [testifying that he put crushed stone along the edge of Treasure Lake]; Testimony of respondents' witness, Edward Garland, Tr at 169 [stating that rock was delivered to the respondents' property and deposited on the edge of Treasure Lake]; Testimony of respondents' witness, surveyor Joseph Roberts, Tr at 205 [stating that the shoreline of Treasure Lake changed on the respondents' lot between 2002 and 2006 due to installation of "rip rock"].)<sup>3</sup>

Second, two photos show that the rip rock was placed in the water at the shoreline of respondents' property. (See Exh 3-C [taken on April 4, 2003]; Exh 10-E [taken in September 2005].) Although staff did not indicate the precise location of the rip rock relative to the mean high water level, these two photographs depict some of the rock in the water of Treasure Lake. (See Matter of Young, Decision of Commissioner, Feb. 29, 1988, at 1 and 4 [1988 NY Env Lexis 55, \*1 and \*9] [adopting the conclusions in the ALJ's Hearing Report that a violation of Article 15 existed even though the precise location of the rip rap (rip rock) relative to mean high water was not presented but some of the rock was obviously in contact with the water in a creek].)

Third, staff demonstrated that respondents did not have a permit to engage in this fill activity. (See Testimony of Department's witness, Douglas Gaugler, Tr at 104 [stating that the Department had no record of any Article 24 permit for the placement of fill at respondents' property].)

However, as discussed further below, staff did not prove that Treasure Lake is a navigable water of the State.

#### Navigable Water of the State - Single Private Ownership Exemption

The regulations implementing ECL article 15 define "navigable waters of the State" to include

"all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be

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<sup>3</sup> I discount earlier testimony of Mr. Roberts (Tr at 180-181), in which he states that he did not observe rip rock placed in Treasure Lake. This testimony is contradicted by his later testimony that the shoreline changed between two surveys that he had taken, and that change was due to the placement of rip rock (Tr at 205). Additionally, his testimony that he did not observe rip rock in the water is belied by the photos in the record. (See e.g., Exhs 3-C, 10-E.)

operated notwithstanding interruption to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation."

6 NYCRR 608.1(u).<sup>4</sup> The regulation expressly states that navigable waters do not include "waters that are surrounded by land held in single private ownership at every point in their total area." Id. The regulations further define "single private ownership" as "the ownership by a person, joint ownership by more than one person or a single nongovernmental entity such as an association, corporation, trust or estate." 6 NYCRR 608.1(ae).<sup>5</sup>

Here, respondents claim that Treasure Lake was and is owned by a property owners association, and thus is exempt under article 15 as "waters surrounded by land held in single, private ownership at every point in their total area." To support this claim, respondents point to the September 14, 1992, deed (Exh 7) relating to Treasure Lake. According to respondents, this deed demonstrates that for an undetermined period of time prior to September 1992, Treasure Lake was owned by the 1867 Williamsbridge Road Corp., and that after September 14, 1992, ownership of Treasure Lake was transferred to the Emerald Green Property Owners Association, Inc. (Association). The 1867 Williamsbridge Road Corp. and the Association are single nongovernmental entities within the meaning of the term "single private ownership" defined under 6 NYCRR 608.1(ae). Consequently, respondents argue that Treasure Lake is not a navigable water of the state, as defined at 6 NYCRR 608.1(u), and the Department lacks subject matter jurisdiction over Treasure Lake with respect to ECL article 15.

I reject this claim because it is not supported by the facts. By its very terms, the regulatory exemption applies only to "waters that are surrounded by land held in single private ownership at every point in their total area." The land that surrounds Treasure Lake (and based on the Declaration, the record demonstrates that the water ends at the mean high water mark) is owned by multiple, separate landowners -- respondents being just one set of many landowners along Treasure Lake. Stated another way, the exemption does not refer to waters surrounding land, but rather to the land surrounding waters -- the focus is on the ownership of the land around the water, not merely the water

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<sup>4</sup> This is the current citation for the definition of "navigable waters of the State." Between 1994 and 2009, the definition was codified at 6 NYCRR former 608.1(l). The definition itself was not changed in the recodification.

<sup>5</sup> This is the current citation for the definition of "single private ownership." Between 1994 and 2009, the definition was codified at 6 NYCRR former 608.1(s). The definition itself was not changed in the recodification.

itself.

Treasure Lake is described in the September 14, 1992, deed as follows:

"Treasure Lake. All that parcel, piece or tract of land lying and situate in the Town of Thompson, County of Sullivan, State of New York, being Treasure Lake, a lake of approximately 50 acres, the perimeter of which abuts, in a clock-wise direction, the southeast corner of the lands of Treasure Lake Associates, thence Emerald Green Section 11 to and along Open Space Parcel 2, Emerald Green Section 10, to and along Open Space Parcel I, Section 0, returning to the point of beginning, by passing the lands of Treasure Lake Associates, the same being identified for tax map purposes as Town of Thompson Section 52, Block 1, Lot 21."

(Exh 7.) This deed description of Treasure Lake demonstrates on its face that the land that surrounds Treasure Lake is not held in single private ownership by the Association or any other entity, but rather abuts other lands, including numerous subdivision parcels. Indeed, respondents' lot is part of Emerald Green Section 11. (Exh 4.)

The ALJ based his recommendation on a different interpretation of the term "surrounded." To the ALJ, the "land" referred to in the phrase "waters surrounded by land" means the land under the lake. (Hearing Report, at 7-8.) This interpretation is not correct. The "land" in "waters surrounded by land" is the land that forms the perimeter around the lake -- the land that rings the lake -- not the land beneath it. As demonstrated above, here the land that forms the perimeter around Treasure Lake is not held in single private ownership at every point around the lake. Rather, numerous lots dot Treasure Lake, with the respondents' lot constituting just one of many.

To further support their position that the Association owns the land surrounding Treasure Lake, respondents alternatively argue that (1) the Association owns the land below the MHWM, or (2) Treasure Lake has no MHWM. Neither one of these arguments supports the respondents' position that the Association owns land that completely surrounds the lake.

First, that the Association owns the land below the MHWM only means that the Association owns the lake, not the land surrounding the lake, which begins at the MHWM. Second, respondents' argument that Treasure Lake has no MHWM is belied by the record, particularly the Declaration filed in 1979. As discussed above, the Declaration expressly accounted for a

change, however slight, in the MHHM of Treasure Lake because of repairs to a dam that controls the level of the water on Treasure Lake.

I therefore reject the ALJ's finding of fact number 7 that the land surrounding Treasure Lake is held in single private ownership.

#### Navigable Water of the State - Record Evidence

Having determined that Treasure Lake does not fall within the single private ownership exemption of a navigable water of the State does not mean that staff has established this element of the Article 15 cause of action -- staff still needs to demonstrate that Treasure Lake is a navigable water of the State.

Under 6 NYCRR 608.1(u), Department staff can establish that a waterbody is a navigable water of the State in two ways: (1) if it is navigable in fact or (2) if it can have "vessels with a capacity of one or more persons [operated on it] notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation."

Here, staff has failed to make any showing whatsoever on this indispensable element of the cause of action. As noted above, staff could have satisfied the "navigable water" element of the cause of action by establishing that Treasure Lake was (1) navigable in fact or (2) that it was capable of having a vessel operated on it that could accommodate one or more persons notwithstanding the specified interruptions to navigation. Staff did not put on a case to establish navigability either way. Therefore, because staff failed to satisfy this one element, the entire cause of action - the claimed violation of ECL 15-0505(1) - fails.

In sum, while I determined that Treasure Lake does not fall within the single private ownership exemption under the term "navigable waters of the State," Department staff did not prove that Treasure Lake was a navigable water of the State, an indispensable element of the alleged violation of ECL 15-0505(1).

#### **Conclusion**

The amended complaint filed against respondents must be dismissed. As to the Freshwater Wetlands Act cause of action, respondents' activities on their property are not subject to the Act because they were grandfathered. As to the Article 15 cause of action, Department staff failed to establish an element of the cause of action. I decline to address respondents' affirmative defenses because they are moot in light of these determinations.

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

- I. The charge in the amended complaint alleging that respondents Richard Steinberg and Barbara Steinberg violated ECL 24-0701(1) and 6 NYCRR part 663 by placing fill in wetlands and adjacent areas without a permit from the Department is dismissed.
- II. The charge in the amended complaint alleging that respondents Richard Steinberg and Barbara Steinberg violated ECL 15-0505(1) by placing fill below the mean high water level in a navigable water of the State without a permit from the Department is dismissed.
- III. Any communications with Department staff concerning this order shall be made to

Carol Krebs, Esq.<sup>6</sup>  
Assistant Regional Attorney  
New York State Department of Environmental Conservation  
Region 3  
21 South Putt Corners Road  
New Paltz, New York 12561-1696

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Alexander B. Grannis  
Commissioner

Dated: August 16, 2010  
Albany, New York

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<sup>6</sup> Attorney Steven Goverman, who previously handled this matter on behalf of Department staff, is no longer with the Department.

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
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In the Matter

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the Alleged Violations of Articles 15 and 24 of the  
New York State Environmental Conservation Law (ECL),  
and Parts 608 and 663 of Title 6 of the Official  
Compilation of Codes, Rules and Regulations of  
the State of New York (6 NYCRR)

- by -

**RICHARD STEINBERG AND BARBARA STEINBERG,**

Respondents.

DEC Case No. R3-20030718-97

HEARING REPORT

- by -

\_\_\_\_\_/s/\_\_\_\_\_  
Daniel P. O'Connell  
Administrative Law Judge

May 15, 2008

## Proceedings

Staff from the Region 3 Office of the New York State Department of Environmental Conservation (Department staff) commenced the captioned enforcement proceeding with service of a notice of hearing, and complaint, both dated February 2, 2006, upon Richard and Barbara Steinberg (the Steinbergs) by certified mail, return receipt requested. The February 2, 2006 complaint asserts that the Steinbergs own a parcel of property identified as Lot No. 97 (Tax Map No. 52K/3/18) on a map entitled, *Plan of Subdivision #11, Emerald Green*, filed on April 27, 1971, in the Town of Thompson, Sullivan County.

The complaint asserts further that the Steinbergs' property abuts Treasure Lake, which Department staff contends is a navigable water of New York State. According to the February 2, 2006 complaint, the Steinbergs violated Environmental Conservation Law of the State of New York (ECL) § 15-0505(1) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) § 608.5 (Excavation or Placement of Fill in Navigable Waters) when they allegedly placed fill in Treasure Lake without first obtaining a permit from Department staff. In the February 2, 2006 complaint, Department staff requests a civil penalty of \$5,000, and an Order from the Commissioner directing the Respondents to remove the fill.

By their attorney, Donald S. Tracy, Esq. (New City, New York), the Steinbergs timely filed an answer dated February 21, 2006. Subsequently, with a cover letter dated March 24, 2006, the Steinbergs filed an amended answer of the same date. In the March 24, 2006 amended answer, the Steinbergs admitted that they own Lot No. 97, denied that they placed any fill in Treasure Lake, and argued, among other things, that they did not violate any provisions of the ECL or its implementing regulations.

The parties filed pre-hearing motions. With a cover letter dated March 27, 2006, the Steinbergs' filed a notice of motion and an affirmation, both dated March 27, 2006, and moved to dismiss the alleged charges. With a cover letter dated April 11, 2006, Department staff responded. The Steinbergs filed a reply affirmation and two attachments with a cover letter dated

April 14, 2006. At issue in this motion was whether Treasure Lake is a navigable water of the State. In a ruling dated May 31, 2006, I denied the Steinbergs' motion.

Subsequently, Department staff moved to amend the February 2, 2006 complaint by a notice of motion dated August 16, 2006 and an affirmation by Department staff's counsel dated August 15, 2006. In the proposed amended complaint dated August 15, 2006, Department staff alleges that Treasure Lake, in addition to being a navigable water of the state pursuant to 6 NYCRR 608.1(1), is also a regulated freshwater wetland identified as YL-1. For the alleged violation of the freshwater wetland statute (see ECL 24-0701), Department staff requests a total civil penalty of \$180,000 and an Order directing the Steinbergs to remove the fill and to restore the freshwater wetland to its original condition.

With a cover letter dated September 25, 2006, the Steinbergs' counsel filed an affirmation of the same date with various attachments in opposition to Department staff's August 16, 2006 motion to amend the complaint. The Steinbergs opposed the proposed amended complaint, and argued that their property is exempt from the permit requirements of the Freshwater Wetlands Act (ECL article 24). In addition, the Steinbergs cross-moved to dismiss the charges alleged in the original complaint as well as the charges alleged in the proposed amended complaint.

In a ruling dated October 11, 2006, I granted Department staff's motion to amend the February 2, 2006 complaint, and denied the Steinbergs' cross-motion to dismiss. I concluded that the Steinbergs' cross-motion identified additional factual disputes that needed to be resolved at an adjudicatory hearing. With a cover letter dated October 25, 2006, the Steinbergs filed an amended answer and affirmative defenses.

After adjournments duly taken to discuss settlement, an adjudicatory hearing convened on May 8, 2007 at 10:00 a.m. at the Department's Region 3 Office in New Paltz, New York. Department staff appeared by Steve Goverman, Esq., Assistant Regional Attorney. Environmental Conservation Officer (ECO) Scott R. Steingart; Robert "Andy" Burger, a Land Surveyor from the Department's Division of Real Property; and Douglas Gauglar, a Biologist I from the Department's Division of Fish, Wildlife

and Marine Resources, testified on behalf of Department staff. Department staff also called Richard Steinberg as a witness. Assistant Regional Attorney Carol Krebs, Esq. prepared Department staff's closing brief.

Donald S. Tracy, Esq. (New City, New York) appeared at the May 8, 2007 adjudicatory hearing on behalf of his clients, Richard and Barbara Steinberg. Mr. Steinberg testified on behalf of Respondents. In addition, the Steinbergs called Edward Garland and Joseph M. Roberts. Mr. Garland is an excavator, and Mr. Roberts is a licensed professional land surveyor.

On July 26, 2007, the Office of Hearings and Mediation Services received the stenographic record of the adjudicatory hearing held on May 8, 2007. The parties filed closing briefs. Subsequently, the record of the hearing closed on December 19, 2007 upon the timely receipt of Respondents' reply brief.

#### **Findings of Fact**

1. Richard and Barbara Steinberg own property at 61 Lake Shore Drive West in the Town of Thompson, Sullivan County. They purchased the property in 2002. The western boundary of the Steinbergs' property is Treasure Lake.
2. The Steinbergs' property at 61 Lake Shore Drive West is also identified as Lot No. 97 on the Emerald Green Plan of Subdivision #11. The plan identified as Emerald Green Subdivision #11 depicts, among other things, Lot Nos. 80 through 98, inclusive, located along the shoreline of Treasure Lake.
3. Treasure Lake is a tributary to McKee Brook, and is indexed as No. D-1-35-P39 pursuant to 6 NYCRR 815.6, Table 1, Item No. 94.<sup>1</sup> Treasure Lake is assigned a Class B rating. The best usages of Class B surface waters, like Treasure Lake, are primary and secondary contact recreation and fishing.

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<sup>1</sup> 6 NYCRR part 815 identifies the waters of the Delaware River Drainage Basin.

Class B surface waters are suitable for fish propagation and survival (see 6NYCRR 701.7).

4. A deed (Liber 1618 page 150), dated September 14, 1992 (Exhibit 7) documents the transfer of the lakes and the underlying property located within the Emerald Green Subdivision from the 1867 Williamsbridge Road, Corp. to the Emerald Green Property Owners Association, Inc. The lakes described in the September 14, 1992 deed are Treasure Lake, Davies Lake, and Lake Louise Marie.
5. A deed (Liber 778, page 828), dated February 23, 1973 (Exhibit 5) is the originating document from Leisure Time Developers (the Grantor). The deed pertains specifically to Lot No. 97 from the Emerald Green Plan of Subdivision #11, Town of Thompson, Sullivan County, which is the Steinbergs' property.
6. The deed for Lot No. 97 (Exhibit 5) includes a number of covenants, conditions and restrictions, which were placed upon the property by the original subdivider that may provide for, or limit, certain rights. Condition No. 25 of the deed states that any land located adjacent to water bodies, such as Treasure Lake, does not include any riparian rights below the high water mark. Based on Condition No. 25, there is no conveyance into Treasure Lake, which abuts the Steinbergs' property.
7. Based on the September 14, 1992 deed (Exhibit 7), and the February 23, 1973 deed (Exhibit 5), Treasure Lake is held in single private ownership, as defined at 6 NYCRR 608.1(s), at every point in its total area. Therefore, Treasure Lake is not a navigable water of the State, as defined at 6 NYCRR 608.1(1).
8. The area of Treasure Lake along its western and southern shorelines is a regulated freshwater wetland identified as YL-1.<sup>2</sup> The Steinbergs' property is located within or adjacent to the wetland boundary of YL-1.

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<sup>2</sup> "YL" refers to the Yankee Lake US Geological Survey Quadrangle.

9. The Emerald Green Plan of Subdivision #11 is identified in the hearing record as Exhibit 6. The Town of Thompson Planning Board approved the Emerald Green Plan of Subdivision #11 on April 26, 1971. Subsequently, the final plat approval was filed with the Sullivan County Clerk's Office the next day, on April 27, 1971. These two events predate the enactment of the Freshwater Wetlands Act on September 1, 1975.

### **Discussion**

The August 15, 2006 amended complaint alleges two causes of action. In the first cause of action, Department staff asserts that Treasure Lake is a navigable water of the State. Department staff alleges that on or about April 3, 2003, the Steinbergs placed fill consisting of earth, clay, silt, sand, gravel, stone and rock below the mean high water level of Treasure Lake without a permit from the Department in violation of ECL article 15-0505(1) and 6 NYCRR 608.5.

In the second cause of action, Department staff asserts that a portion of Treasure Lake, proximate to the Steinbergs' property, is a regulated freshwater wetland identified as YL-1. Department staff alleges that the Steinbergs violated ECL 24-0701(1) and 6 NYCRR part 663 on or about April 3, 2003, by placing about 60 truck loads of fill consisting of earth, clay, silt, sand, gravel, stone and rock in a portion of Treasure Lake that is a regulated freshwater wetland, and in the adjacent area of the wetland without a permit from the Department.

#### I. Navigable Waters of the State

In the amended complaint dated August 15, 2006, Department staff asserts, among other things, that Treasure Lake is a navigable water of the State, as that term is defined in 6 NYCRR 608.1(1). As noted above, the Steinbergs, in a pre-hearing motion, challenged Department staff's assertion that Treasure Lake is a navigable water of the State. In a ruling dated May 31, 2006, I denied the Steinbergs' motion without prejudice because their submissions raised a triable issue of fact

concerning the ownership of the property surrounding Treasure Lake.

The term, "navigable waters of the state" is defined at 6 NYCRR 608.1(1), and means:

all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation. *It does not include waters that are surrounded by land held in single private ownership at every point in their total area.*  
(Emphasis added.)

At issue here is whether Treasure Lake is surrounded by land held in single private ownership at every point in its total area. The term, "single private ownership" is defined in the regulations at 6 NYCRR 608.1(s), and means the ownership by a person, joint ownership by more than one person or a single non-governmental entity such as an association, corporation, trust or estate.

Exhibit 7 is a copy of a deed (Liber 1618 page 150) dated September 14, 1992.<sup>3</sup> On the one hand, the Steinbergs rely on Exhibit 7 to support their claim that Treasure Lake is not a navigable water of the State because they argue that the lake is held in single private ownership. On the other hand, Department staff relies on Exhibit 7 to show that the lands around Treasure Lake are owned by many individuals. In addition, Department staff argued that the plan identified as Emerald Green Subdivision #11 (Exhibit 6) created many building lots that are now owned by different individuals. As a result, Department staff maintains that the land surrounding Treasure Lake is not held in single private ownership at every point.

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<sup>3</sup> The Steinbergs offered a copy of this document as Attachment C to Mr. Tracy's affirmation dated March 27, 2006.

The September 14, 1992 deed (Exhibit 7) documents a transfer of the lakes and the underlying property located within the Emerald Green Subdivision from the 1867 Williamsbridge Road, Corp. to the Emerald Green Property Owners Association, Inc. The lakes described in the September 14, 1992 deed are Treasure Lake, Davies Lake, and Lake Louise Marie. According to the deed, the perimeter of Treasure Lake abuts the lands of the following: (1) the Treasure Lake Association; (2) Emerald Green Section 11;<sup>4</sup> (3) Open Space Parcel 2; (4) Emerald Green Section 10; and (4) Open Space Parcel I, Section 10. Emerald Green Section #11 (Exhibit 6) depicts lots 80 through 98, inclusive, along the shoreline of Treasure Lake, which have been offered for sale as individual building lots.

Exhibit 7 demonstrates that for an undetermined period of time prior to September 1992, Treasure Lake was owned by the 1867 Williamsbridge Road, Corp., and that after September 14, 1992, ownership of Treasure Lake was transferred to the Emerald Green Property Owners Association, Inc. The 1867 Williamsbridge Road, Corp. and the Emerald Green Property Owners Association, Inc. are single non-governmental entities within the meaning of the term "single private ownership" defined at 6 NYCRR 608.1(s).

Although the description in the September 14, 1992 deed (Exhibit 7) states that the perimeter of Treasure Lake abuts lands owned by more than one person, Condition No. 25 of the deed (Liber 778, page 828) dated February 23, 1973 (see Exhibit 5), concerning the Steinbergs' property (Lot No. 97), states that any land located adjacent to water bodies, such as Treasure Lake, does not include any riparian rights below the high water mark. It is not known whether the deeds for Lot Nos. 80 through 96, inclusive, and Lot No. 98 on the plan identified as Emerald Green Subdivision #11 (Exhibit 6) are similarly conditioned because these lots, like the Steinbergs' property, are also located adjacent to Treasure Lake. Nevertheless, based on Condition No. 25 of Exhibit 5 and Mr. Burger's testimony, the Steinbergs do not own any part of Treasure Lake (Tr. 38-39).

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<sup>4</sup> Emerald Green Section #11 includes the Steinbergs' property, which is identified as Lot No. 97 (see Exhibit 6).

With respect to landowners identified in the September 14, 1992 deed (Exhibit 7) whose property abuts Treasure Lake, Department staff offered nothing to support its argument that these landowners own any portion of the lands underneath Treasure Lake. In the absence of any additional evidence, I find that the September 14, 1992 deed (Exhibit 7), and the February 23, 1973 deed (Exhibit 5) support the Steinbergs' position that Treasure Lake is held in single private ownership. The burden to show that Treasure Lake is a navigable water of the State rests with Department staff (see 6 NYCRR 622.11[b][1]), and Department staff did not carry this burden.

Based on the foregoing, I find that Treasure Lake is surrounded by land held in single private ownership, as defined at 6 NYCRR 608.1(s), at every point in its total area. Therefore, I conclude that Treasure Lake is not a navigable water of the State, as defined at 6 NYCRR 608.1(l). Accordingly, the Department lacks subject matter jurisdiction over Treasure Lake with respect to ECL article 15.

## II. The Exemption from ECL Article 24 provided by ECL 24-1305

Generally, the area of Treasure Lake along the western and southern shorelines is mapped as a regulated freshwater wetland (Exhibit 2). According to the portion of the freshwater wetland map in the hearing record, the Steinbergs' property is located within or adjacent to the wetland boundary for YL-1.

Pursuant to ECL 24-0701(1), a permit from the Department is required before any person undertakes a regulated activity in or adjacent to freshwater wetlands. Regulated activities are identified in ECL 24-0701(2), and include, among other things, dumping, filling and depositing such things as soil, stones, sand, and gravel. The implementing regulations are outlined at 6 NYCRR part 663, and the term "regulated activity" is defined at 6 NYCRR 663.2(z). The regulatory requirement to obtain a permit before undertaking regulated activities is found at 6 NYCRR 663.4.

However, ECL 24-1305 states that:

[t]he provisions of this article shall not apply to any land use, improvement or development for which

final approval shall have been obtained prior to the effective date of this article from a local governmental authority or authorities having jurisdiction over such land use.

The term "final approval" is defined in the statute. In the case of the subdivision of land, final approval means the "conditional approval of a final plat as the term is defined in section two hundred seventy-six of the town law, and approval as used in section 7-728 of the village law and section thirty-two of the general cities law" (ECL 24-1305[a]).

The term "final plat" is defined at Town Law § 274(4)(d), and means a drawing prepared in a manner prescribed by local regulation, that shows a proposed subdivision with the details required by local regulation. The term "conditional approval of a final plat" is defined at Town Law § 274(4)(e), and means an approval made by a planning board subject to conditions set forth in a resolution which conditionally approves the plat. The definition states further that a conditional approval does not qualify as a final plat for recording in the county clerk's office.

The term "final plat approval" is defined at Town Law § 274(4)(f), and means a signed approval made pursuant to a resolution which grants final approval to the plat. The definition states further that a final plat approval qualifies the plat for recording in the county clerk's office where the plat is located.

Citing ECL 24-1305, the Steinbergs contend, as an affirmative defense in their October 24, 2006 amended answer, as well as in their closing brief (at 2-3), that they are exempt from the permit requirement at ECL 24-0701(1). To support this contention, the Steinbergs refer to Exhibits 6, 16 and 17. Exhibit 6 is a certified copy the "Plan of Subdivision #11, Emerald Green, Town of Thompson, Sullivan County, dated January 19, 1971, sheet 1 of 2" from the Sullivan County Clerk's Office.

There are six notes in the upper left hand corner of the subdivision plan (Exhibit 6). The following appears under these notes: "Subdivision approved by: The Town of Thompson Planning Board; Date: April 26, 1971; Chairman: Robert Mastropiero." According to the Sullivan County Clerk's certification dated May

4, 2007, which is attached to Exhibit 6, the approved subdivision plan, identified as Exhibit 6 in the hearing record, was filed in the clerk's office on April 27, 1971.

Exhibits 16 and 17 are letters from William G. Little, Esq., who in 1991 was the Wetlands Program Attorney for the Department. Exhibits 16 and 17 refer to the plan for the Emerald Green Subdivision #10.<sup>5</sup> Exhibit 16, which is dated January 24, 1991, is addressed to Leslie Dotson from Garling Associates, and refers to Emerald Green, Section 10.

In the January 24, 1991 letter, Mr. Little states that he reviewed the minutes from the August 31, 1971 meeting of the Town of Thompson Planning Board, which show that the Planning Board issued a resolution to approve Sections 10 and 11 of the Emerald Green Subdivision. Mr. Little also states that he reviewed an affidavit by Robert Mastropiero, who was the chair of the planning board at the time of the resolution, in which Mr. Mastropiero attested that he signed the subdivision approval map on September 13, 1971 for the Emerald Green Subdivision #10. Based upon the review of this information, Mr. Little concludes that "Emerald Green [S]ubdivision #10 depicted on maps 277-1 and 277-2 ... is exempt from obtaining a freshwater wetlands permit."

Exhibit 17, which is a letter from Mr. Little dated February 6, 1991, is addressed to Burton Lendina, Esq. from Kesten, Gerstman and Lendina, Counsellors at Law, and expressly refers to Emerald Green Subdivision, Lots 74-81; Town of Thompson, Sullivan County. The February 6, 1991 letter clarifies the statements previously made by Mr. Little in his January 24, 1991 letter. In the February 6, 1991 letter, Mr. Little states, in pertinent part, that:

[t]he grandfathering determination applies to the property within the lot lines of lots 74-81 of subdivision section 10 of the Emerald Green subdivision and only as to those land uses permitted by the subdivision approval granted by the

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<sup>5</sup> The subdivision plan for the Emerald Green Subdivision #10 is not part of this hearing record.

municipality in the planning board's resolution of August 31, 1971.

Upon careful review of these exhibits, I concluded that Exhibits 16 and 17 have no probative value with respect to the exemption that the Steinbergs assert should apply to their property. As noted above, the January 24, 1991 and February 6, 1991 letters (Exhibits 16 and 17, respectively) relate to Emerald Green Subdivision #10, Lots 74-81. The Steinbergs' property, however, is identified as Lot No. 97 on the plan identified as Emerald Green Subdivision #11 (Exhibit 6). The Town of Thompson Planning Board approved the two plats on two different occasions. The planning board approved the Emerald Green Subdivision #11, which includes the Steinbergs' property, on April 26, 1971, and the Emerald Green Subdivision #10 on September 13, 1971. Accordingly, I assign no evidentiary weight to Exhibits 16 and 17.

Department staff offered Exhibit 5 to refute the Steinbergs' claim that activities undertaken on their property are exempt from regulation pursuant to ECL 24-1305. As noted above, Exhibit 5 is a copy of a deed dated February 23, 1973. Mr. Burgher testified (Tr. 37) that this deed is the originating document from Leisure Time Developers (the Grantor), and that Leisure Time Developers proposed the subdivision plan. The deed pertains to Lot No. 97 from the Emerald Green Plan of Subdivision #11, Town of Thompson, Sullivan County, which is the Steinbergs' property and the subject of this administrative enforcement proceeding. Among other things, the deed outlines various setback requirements for locating a single family home on the site. Among them, no building may be located closer than 35 feet from the high water mark (Exhibit 5, Condition No. 5) of Treasure Lake.

Mr. Burgher testified (Tr. 37-38) that the deed for Lot No. 97 (Exhibit 5) includes a number of covenants, conditions and restrictions, which are placed upon the property by the original subdivider that may provide for, or limit, certain rights. Condition No. 16 requires future landowners to comply with the rules and regulations promulgated by the Emerald Green Home Owners Associations, Inc. and any successors.

In addition, Condition No. 25 of the deed (Exhibit 5) states that any land located adjacent to water bodies, such as

Treasure Lake, does not include any riparian rights below the high water mark. Based on his review of Condition No. 25, Mr. Burgher testified (Tr. 39) there is no conveyance into Treasure Lake, which abuts the Steinbergs' property.

ECL article 24 (Freshwater Wetlands Act) became effective on September 1, 1975 (see Laws of 1975, chapter 614). After September 1, 1975, projects that had commenced prior to that date and, which involved lands subject to the act, were required to stop work until the developers satisfied applicable requirements. Given these circumstances, legislation was proposed that subsequently amended the Freshwater Wetlands Act by adding language to exempt activities from the requirements of the act as a way to remedy the unfairness associated with the application of the Freshwater Wetlands Act to the owners and developers who had otherwise obtained all previously required authorizations.

The concern about the impact of the Freshwater Wetlands Act to projects approved prior to September 1, 1975 is reflected in the Bill Jacket concerning the proposed exemption legislation (see e.g., Memorandum on New York Assembly Bill 11369, Bill Jacket, Laws of 1976, chapter 771; Budget Report on Bills [New York Assembly Bill 11369-A], July 14, 1976, Bill Jacket, *id.* ["grossly unfair to prohibit the development of projects because owners and developers had not secured a (freshwater wetlands) permit which became necessary after they had secured all previously required legal authorization"]; Department of Environmental Conservation Memorandum, July 12, 1976, *id.* [legislation to address projects where final approval received but on which work "has not yet been completed"]; Letter from the New York Conference of Mayors and Municipal Officials, July 7, 1976, *id.* [the bill would allow "planned construction which had received final authorization by local entities prior to this date to proceed without the expense and delay implicit in meeting the new (wetland) requirements"]; see also N.Y.S. Legislative Annual 1976, Memorandum of Assemblyman Gary A. Lee, at 212-3). The exemption legislation was codified as section 24-1305 to article 24 of the ECL (see Laws of 1976, chapter 771, § 1).

Declaratory rulings<sup>6</sup> issued by the Department have reiterated the limited application of ECL 24-1305 (see e.g., *Matter of 628 Land Associates*, Declaratory Ruling, DEC 24-11, September 14, 1987, at 5 ["It is manifest from the terms of the statute and from its legislative history that its purpose is to alleviate the hardship that would otherwise result where a development proposal, having obtained all necessary local approvals prior to enactment of [the Freshwater Wetlands Act], is subjected to further review and approval under the Act"]).

Furthermore, the courts have determined that the exemption language is to be interpreted narrowly (see *Matter of Biggica v. State*, 70 AD2d 591, 591 [2d Dept 1979][contention that the exemption provisions of ECL 24-1305 "should be interpreted liberally is without any basis in either the language of the statute or in case law"]). The burden of showing an exemption from the permit requirements of the Freshwater Wetlands Act rests on the persons who seek to benefit from it (see 6 NYCRR 663.3[o]), which in this case are the Steinbergs.

On prior occasions, the Commissioner and the Department's General Counsel have considered the applicability of ECL 24-1305. Most recently, the Assistant Commissioner revisited the issue of whether ECL 24-1305 applied to properties located in the Village of Saltaire, Suffolk County in the *Matter of David Watts*, Decision dated April 4, 2005. The properties considered in *Watts* had been the subject of the *Matter of Village of Saltaire*, Declaratory Ruling, DEC 24-16, dated July 27, 1995.<sup>7</sup>

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<sup>6</sup> The Department's General Counsel is authorized to provide a declaratory ruling concerning the applicability of the ECL and its implementing regulations to persons or the actions they intend to undertake (see State Administrative Procedure Act [SAPA] § 204 and 6 NYCRR part 619).

<sup>7</sup> The Village of Saltaire unsuccessfully challenged Declaratory Ruling 24-16. Supreme Court, Suffolk County dismissed the Village's petition, filed pursuant to article 78 of the Civil Practice Law and Rules, as untimely. The Appellate Division subsequently affirmed Supreme Court's determination (see *Matter of Incorporated Village of Saltaire v. Zagata*, Sup Ct, Suffolk County, Cannavo, J.,

In *Watts* (at 12-13), the Assistant Commissioner determined that the Village of Saltaire had not issued a "final approval" for a subdivision consistent with the meaning of that term, as defined at Village Law § 7-728 (see ECL 24-1305[a]).

In the *Matter of Shumway Group, Inc.*, Declaratory Ruling, DEC 24-15, dated January 27, 1993, the General Counsel rejected arguments that a subdivision in the Village of Saugerties, Ulster County, was exempt pursuant to ECL 24-1305(a) because neither the County Health Department approval, nor an "agreement" by the Village Trustees to provide road improvements for a subdivision, could be considered the "functional equivalent" of the approval required by Village Law § 7-728. According to the General Counsel, the County Health Department approval is required by the Public Health Law, and cannot substitute for a local government's authorization to construct residential dwellings. The General Counsel concluded further that the agreement by the Village Board of Trustees does not comply with the requirements outlined in Village Law § 7-728.

In the *Matter of Bernard Muschel*, Declaratory Ruling, DEC 24-13, dated June 11, 1990, the General Counsel found that the Village of Walden (Orange County) Planning Board issued an approval on October 6, 1971 to construct garden apartments (66 units) on property owned by Cedar Cliff Realty. Additional documentation reviewed by the General Counsel included two letters dated December 4, 1973 and May 16, 1974 by the Village Manager, which state that the Planning Board had exercised site plan approval with respect to this proposal. Based on this information, the General Counsel concluded that the Planning Board's action was a final site plan approval within the meaning of ECL § 24-1305(b), and that the proposal, therefore, was exempt from the Freshwater Wetlands Act.

In the *Matter of Dwight Enterprises, Inc.*, Declaratory Ruling, DEC 24-03, dated September 18, 1979, the General Counsel concluded that the construction of a commercial park in the Town of Geddes, Onondaga County, is exempt from the regulatory requirements of the Freshwater Wetland Act, as provided by ECL §

24-1305(a), even though the developer failed to file a plat in the county clerk's office. The General Counsel noted, however, that by November 19, 1971, the construction of the Town-approved sewers, laterals, pump stations and fire mains had been completed. The General Counsel found that the Town had been aware of, and supported, the development. Under these circumstances, the General Counsel concluded that the legislative intent of the exemption would be frustrated if the regulatory requirements of the Freshwater Wetland Act were applied to the partially constructed commercial park.

To qualify for an exemption from the requirements of the Freshwater Wetlands Act, ECL 24-1305(a) requires a person to demonstrate, in the case of the subdivision of land, that a planning board has issued a "conditional approval of a final plat," as defined at Town Law § 276(4)(e), before the effective date of the Freshwater Wetlands Act. I find that Exhibit 6 demonstrates that the Town of Thompson Planning Board approved the Emerald Green Plan of Subdivision #11 when Mr. Mastropiero, as the Chair of the Town of Thompson Planning Board, signed the plan on April 26, 1971. Based on the Clerk's certification, which is affixed to Exhibit 6, I find further that the final approved plat was filed with the Sullivan County Clerk's Office the next day, on April 27, 1971. These two events predate the enactment of the Freshwater Wetlands Act on September 1, 1975.

Because Exhibit 6 represents the planning board's final plat approval for the Emerald Green Plan of Subdivision #11, I conclude that the exemption standard at ECL 24-1305 has been met.<sup>8</sup> Therefore, as provided by ECL 24-1305, the regulatory requirements of the Freshwater Wetlands Act do not apply to the Steinbergs' property.

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<sup>8</sup> In this case, the condition of ECL 24-1305 has been exceeded. ECL 24-1305 requires *conditional* approval of a final plat. Here, however, the planning board issued *final* plat approval, which had been filed with the County Clerk (see Town Law § 274[4][f]).

### III. Liability

#### A. Protection of Water

Department staff asserts in the first cause of action in the amended complaint dated August 15, 2006 that the Steinbergs undertook regulated activities in navigable waters of the State in violation of ECL article 15 and its implementing regulations. Based on the discussion provided in Section I above, the activities related to the construction of the Steinbergs' house on their property are not regulated pursuant ECL article 15. Given these circumstances, the Commissioner should dismiss the violation alleged in the first cause of action in the Department's amended complaint dated August 15, 2006.

#### B. Freshwater Wetlands

Department staff asserts in the second cause of action in the amended complaint dated August 15, 2006 that the Steinbergs undertook regulated activities in and adjacent to a regulated freshwater wetland in violation of ECL article 24 and its implementing regulations. Based on the extensive discussion provided in Section II above, the activities related to the construction of the Steinbergs' house on their property are not regulated pursuant ECL article 24. Given these circumstances, the Commissioner should dismiss the violation alleged in the second cause of action in the Department's amended complaint dated August 15, 2006.

### IV. Relief

Department staff failed to meet its burden of proof with respect to liability. Therefore, the Commissioner should deny the relief requested in the August 15, 2006 amended complaint.

V. Respondents' Affirmative Defenses

In their October 24, 2006 amended answer and in their closing brief, the Steinbergs assert that the hearing was unreasonably delayed because Department staff did not initiate the captioned enforcement proceeding until February 2006 with service of the notice of hearing and complaint even though the violations allegedly occurred in April 2003. The Steinbergs also assert that the Department has engaged in the selective enforcement of ECL articles 15 and 24 by commencing the subject administrative enforcement proceedings against them but not against any their neighbors, who are similarly situated. These issues are now moot because Department staff failed to meet its burden of proof with respect to the charges alleged in the August 15, 2006 amended complaint.

**Conclusions**

1. The September 14, 1992 deed (Exhibit 7) demonstrates that for an undetermined period of time prior to September 1992, Treasure Lake was owned by the 1867 Williamsbridge Road, Corp., and that after September 14, 1992, ownership of Treasure Lake was transferred to the Emerald Green Property Owners Association, Inc. The 1867 Williamsbridge Road, Corp. and the Emerald Green Property Owners Association, Inc. are single non-governmental entities within the meaning of the term "single private ownership" defined at 6 NYCRR 608.1(s).
2. Treasure Lake is not a navigable water of the state, as defined at 6 NYCRR 608.1(1). Accordingly, the Department lacks subject matter jurisdiction over Treasure Lake with respect to ECL article 15.
3. ECL article 24 (Freshwater Wetlands Act) became effective on September 1, 1975. After September 1, 1975, projects that had commenced prior to that date and, which involved lands subject to the act, were required to stop work until the developers satisfied applicable requirements. Pursuant to ECL 24-1305, the provisions of ECL article 24 do not apply to any land use, improvement or development for which

final approval had been obtained prior to September 1, 1975. The term "final approval" is defined in the statute. In the case of the subdivision of land, final approval means the conditional approval of a final plat as the term is defined in Town Law § 276.

4. The Town of Thompson Planning Board approved the Emerald Green Plan of Subdivision #11 on April 26, 1971 (Exhibit 6), and the final approved plat was filed with the Sullivan County Clerk's Office the next day, on April 27, 1971. These two events predate the enactment of the Freshwater Wetlands Act on September 1, 1975. Consequently, the exemption standard at ECL 24-1305 has been met, and the regulatory requirements of ECL article 24 (Freshwater Wetlands Act) do not apply to the Steinbergs' property. The Department lacks subject matter jurisdiction over the Steinbergs' property with respect to ECL article 24.

#### **Recommendation**

The Commissioner should dismiss, with prejudice, the charges alleged in the August 15, 2006 amended complaint.

Attachment: Exhibit List