STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law, and Part 673 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

RULING ON JOINDER

- by -

DEC Case No. CO3-20070201-9

ROBERT BERGER, KAREN BERGER, DAVID COOK and JODY COOK,

Respondents.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this administrative enforcement proceeding against respondents Robert and Karen Berger ("Berger respondents"), and David and Jody Cook ("Cook respondents"), by service of a notice of hearing and complaint, both dated April 27, 2007. The complaint alleges that respondents are owners of the Honk Falls Dam (State Dam ID No. 177-0735) and that they failed to operate and maintain the dam in accordance with the provisions of section 15-0507 of the Environmental Conservation Law ("ECL").

This matter first came before the Office of Hearings and Mediation Services upon the filing of a Notice of Motion for Summary Judgment and Ancillary Relief, dated July 25, 2007, by the Berger respondents. By ruling ("ruling on summary judgment") dated September 19, 2007, I denied the Berger respondents' motion for summary judgment in its entirety. The Berger respondents filed a motion for leave to appeal the ruling on summary judgment with the Commissioner and, by letter dated November 21, 2007, the Commissioner denied that motion. The Berger respondents later filed a second motion for summary judgment and, by ruling dated February 17, 2009, I denied the motion.

By ruling ("ruling on protective order") dated June 25, 2009, I denied Department staff's motion for a protective order and directed the parties to conclude discovery expeditiously and further directed that "any motion under 6 NYCRR 622.7(c) [governing protective orders and motions to compel disclosure], and any motion for additional discovery, must be filed with this office within 30 days of the date of this ruling" (ruling on protective order at 5). Subsequently, because of agreements reached between the parties, I extended the deadline for motions to compel disclosure to September 30, 2009. Both the Berger and Cook respondents filed timely motions to compel disclosure. By

ruling dated February 10, 2010, after in camera review of the documents withheld from disclosure by staff, I granted in part and denied in part motions by the Berger and Cook respondents to compel disclosure and directed staff to disclose additional documents to respondents.

Currently before me is the Cook respondents' motion to compel joinder. The filings under consideration on this motion include:

- Cook respondents' motion to compel joinder, filed under cover letter dated September 30, 2009 (includes the affirmation of Alyse D. Terhune, Esq., ["Cook affirmation"], dated September 30, 2009; and the affidavit of Terence G. Carle ["Carle affidavit"], dated September 29, 2009);
- Cook respondents' supplemental filing in support of the motion to compel joinder, filed under cover letter dated October 14, 2009 (includes the supplemental affidavit of Terence G. Carle ["Carle supplemental affidavit"], dated October 14, 2009);
- Berger respondents' filing in partial opposition to the motion to compel joinder, filed under cover letter dated October 13, 2009 (includes the affirmation of Carl G. Dworkin, Esq., ["Berger affirmation"], dated October 13, 2009);
- Department staff's filing in opposition to joinder, received by this office on October 26, 2009 (includes the affirmation of Robyn M. Adair, Esq., ["staff reply affirmation"], dated October 26, 2009; staff memorandum of law ["staff memorandum"]; and the affidavit of Alon Dominitz ["staff affidavit"], dated October 26, 2009);
- Cook respondents' reply filing under cover letter dated November 20, 2009 (includes the affirmation of J. Benjamin Gailey, Esq., ["Cook reply affirmation"], dated November 20, 2009; and the affidavit of Terence G. Carle ["Carle reply affidavit"], dated November 20, 2009);
- Department staff's sur-reply filing under cover letter dated December 11, 2009 (includes the affirmation of Robyn M. Adair, Esq., ["staff sur-reply affirmation"], dated December 11, 2009); and
- Berger respondents' reply filing under cover letter dated December 11, 2009 (includes the reply affirmation of Carl G. Dworkin, Esq., ["Berger reply affirmation"], dated December 10, 2009).

SUMMARY OF THE PARTIES' POSITIONS

The Cook respondents argue that numerous persons and organizations are owners of the Honk Falls Dam. They further argue that, pursuant to CPLR 1001(a), all of these other owners are "necessary parties" to this proceeding and, therefore, must be joined as respondents (Cook affirmation[1] at 3 [¶¶ 12, 13, 16], 4 [¶¶ 12-16], 5 [¶ 17]).

[1] The Terhune affirmation repeats the paragraph numbering for paragraphs numbered 11 through 16. Where necessary to avoid confusion, I will provide both the page number and the paragraph number when citing to the affirmation.

The Cook respondents advance a variety of bases for asserting that various non-parties are owners of the dam. These bases include my earlier holding that "use of the waters impounded by a dam may constitute ownership under ECL 15-0507(1)" (Cook affirmation ¶ 6 [quoting Matter of Berger, Ruling of the ALJ, Feb. 17, 2009, at 6]). The Cook respondents argue that owners of properties that adjoin Honk Lake are the owners of the Honk Falls Dam because they "clearly benefit from the dam and waters of Honk Lake. Lakefront property enjoys increased property value and enhanced quality of life for its owners and residents" (id. at 3 [¶ 16]). The Cook respondents provide a list of dozens of individuals and organizations that the Cook respondents assert "receive a unique benefit from the lake" (Carle affidavit ¶ 29).

Additionally, the Cook respondents argue that certain real property transactions involving lands under or proximate to the dam create ownership liability on the part of several entities, including the County of Ulster, Central Hudson Gas & Electric Corporation, Longboat, Inc., and the City of New York (see Cook affirmation at 3 [¶¶ 12, 13]). The Cook respondents also argue that other non-parties should be joined because they have taken affirmative actions to benefit from the waters impounded by the dam. Several of these parties are redundant with the list of adjoining land owners, but the Cook respondents add the Wawarsing Rod & Gun Club ("which owns or uses a boat landing on Honk Lake"), the general public (which "has beneficial use of Honk Lake for recreational purposes") and the State of New York (which "promotes Honk Lake to the public as a premier ice fishing destination") (see id. at 4 [¶¶ 12-15], ¶ 39).

As to their own liability for the dam, the Cook respondents argue that they are neither titled owners nor beneficial users of the dam or of Honk Lake and, therefore, they have no liability (Cook affirmation at 3 [¶¶ 14, 15]; Cook reply affirmation ¶¶ 19, 25). The Cook respondents further argue that staff failed to rebut the evidence and analysis proffered by respondents in support of the motion to compel joinder and "request a Ruling dismissing [them] from this proceeding" (Cook reply affirmation ¶ 2).

The Berger respondents argue that the Department "has no power to enforce against anyone other than those who have a recordable or contractual right to enter upon the Dam premises to inspect or repair [the dam]" (Berger affirmation ¶ 5). Therefore, according to respondents, only those who have the legal authority to access the dam are appropriate respondents (id. ¶ 22). The Berger respondents further argue that the State of New York "has the inherent right to repair or remove [d]ams when indicated" (id. ¶ 25). Moreover, the "State has effectively adopted Honk Lake as being special to the State and the people of the State" (id. ¶ 27). Therefore, the State should be joined as the "exclusive ultimate responsible party" (id. ¶ 29).

The Berger respondents also argue that many of the persons who the Cook respondents seek to join have "no apparent connection to the Lake or the Dam" and the rationale for joining them "is suspect at best" (Berger affirmation ¶ 10). As to the waterfront land owners, the Berger respondents argue that the benefit these owners allegedly derive from the dam has not been established. According to the Berger respondents, if the dam and lake did not exist, boaters could then access Roundout Creek

unimpeded by the dam and property values along the shore "may actually be lower with the Lake than they would have been with Roundout Creek" (id. ¶ 11). Further, it is "intuitively obvious that land values will suffer devastatingly if the . . . financial liability for the Dam were to be factored in to a [potential new owner's] purchase decision" (id.).

By their reply affirmation, the Berger respondents reiterate many of their previous challenges to Department staff's allegation that they are owners of the Honk Falls Dam. The Berger respondents argue that staff's theory regarding their alleged ownership has shifted repeatedly, causing the Berger respondents to suffer undue financial burden and stress (Berger reply affirmation ¶¶ 3, 35, 37).

Among other things, the Berger respondents request to be dismissed from the proceeding and further request that all non-parties who have legal authority to enter upon and inspect or repair the dam be joined as respondents (Berger affirmation at 7-8).

Department staff opposes the motion and argues that compelling staff to join persons not named as respondents undermines staff's prosecutorial discretion (staff affirmation ¶ 13). Although staff continues to maintain that beneficial users of a dam may be deemed dam owners under the relevant statute and regulations, staff asserts that it does not typically pursue enforcement against such owners[2] (staff affidavit ¶¶ 21, 22; staff memorandum ¶ 3). Staff asserts that, pursuant to "its inherent prosecutorial discretion, the Department's typical practice is to focus on titled owners or people with a real property interest in the dam. If these owners are identified, it is unnecessary to seek out beneficial users of the dam" (staff memorandum ¶ 4 [citing staff affidavit ¶ 22]).

DISCUSSION

The Cook respondents' motion to compel joinder is premised upon the argument that there are non-parties to these proceedings who are "necessary parties" under CPLR 1001(a) and who, therefore, must be made parties (Cook affirmation ¶¶ 17, 32). Pursuant to CPLR 1001(a), "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Because I conclude that the non-parties identified by the Cook respondents are not necessary parties, I deny the Cook respondents' motion to compel joinder.

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[2] As the parties note, I previously held that under certain circumstances "use of the waters impounded by a dam may constitute ownership under ECL 15-0507(1)" (Matter of Berger, Ruling of the ALJ, Feb. 17, 2009, at 6). That ruling did not, however, make any determination with regard to whether the specific facts and circumstances at issue in this proceeding would constitute such ownership (id. at 8 [stating that staff "has proffered evidence in proper form in support of its allegation that the Berger respondents are owners of the dam by action and the Berger respondents have not rebutted staff's proffer. However, the extent of the Berger respondents' use of and benefit from the dam, and whether that use is of sufficient nature to warrant imposing ownership liability on them under the statute, are questions appropriately addressed at hearing"]).

The Cook respondents advance a variety of arguments under CPLR 1001 for maintaining that numerous non-parties must be joined in this proceeding. As discussed below, however, I decline to hold that CPLR 1001 is controlling in DEC enforcement proceedings. Moreover, even if CPLR 1001 were controlling, it would not compel joinder of additional parties in this proceeding.

The complaint alleges a single cause of action, that "Respondents have failed to operate and maintain the Honk Falls Dam in a safe condition, in violation of ECL § 15-0507" (complaint ¶ 33). Pursuant to ECL 15-0507, all dam owners, as that term is defined by statute, have the same obligation to "operate and maintain said structure and all appurtenant structures in a safe condition." If the Honk Falls Dam has not been operated and maintained in a safe condition, all of its owners face the same joint and several liability for violating ECL 15-0507. Because the dam owners' liability is joint and several, CPLR 1001 does not require joinder of all owners, or possible owners, and staff is free to choose who it will name as a respondent (see Kirshtein v Balio, 199 AD2d 777, 778 [3d Dept 1993] [affirming Supreme Court's denial of defendant's motion to compel joinder because "the liability of defendant is joint and several, and, therefore, he can be separately sued" (citation omitted)]; State v Schenectady Chemicals, Inc., 103 AD2d 33, 38 [3d Dept 1984] [declining to dismiss a nuisance suit and stating "[w]e further reject defendant's contention that dismissal is warranted for nonjoinder of certain parties . . . since nuisance liability is joint and several" (citations omitted)]). Therefore, CPLR 1001 may not be relied upon in this proceeding to compel staff to join additional parties.

Moreover, absent joint and several liability, I would still deny the motion to compel joinder. In my view, Department staff may not be compelled to join additional parties in enforcement proceedings, regardless of the nature of the non-parties' liability.

The Cook respondents assert that "[n]o ALJ or Department Ruling forecloses compelled joinder of respondents" (Cook affirmation ¶ 30). In Matter of Gaul, however, the ALJ dismissed the affirmative defense of failure to join a necessary party and held that "it is solely up to the discretion of staff as to whom it decides to prosecute . . . Department staff has the burden of proof in this matter and if it fails to establish the respondents' liability, the Commissioner will find for the respondents. The staff may pursue these other landowners in a separate proceeding if it wishes" (Matter of Gaul, Ruling of the ALJ, Jan. 12, 2009, at 11 [citing a similar holding in Matter of ExxonMobil Corporation, Ruling of the ALJ, Sept. 23, 2002]). Conversely, no party to these proceedings has cited, nor have I identified, a ruling determined under the current provisions of part 622 that compelled staff to join an additional party.

The former provisions of part 622 contained a subdivision entitled "Consolidation, nonjoinder, misjoinder and severance" (former 6 NYCRR 622.12[c]). The subdivision included an express provision allowing for motion practice relating to joinder of parties (see former 6 NYCRR 622.12[c][3] ["Parties may be added or dropped by the hearing officer, on motion of any party or on his own initiative"]) and provided

discretion to the ALJ to continue a proceeding in the absence of a necessary party "in the interest of justice" (former 6 NYCRR 622.12[c][2]). When the Department revised its enforcement hearing regulations in 1994 (the "1994 revision"), the subdivision was retitled "Consolidation and severance," and the provisions pertaining to nonjoinder and misjoinder (the "former joinder provisions") were struck in their entirety (see 6 NYCRR 622.10[e]). Accordingly, the former joinder provisions are deemed repealed by the 1994 revision of part 622 (see Bates v Lang, 26 AD2d 462, 466 [1st Dept 1966] [holding that "upon 'the repeal of a statute and its re-enactment in another form, such clauses in the earlier acts as are not retained' in the newly enacted statute are deemed repealed by necessary implication. And where a later statute covers the whole subject, the Legislature evidently intended the new law to be the only law on the subject" (quoting McKinney's Cons Laws of NY, Book 1, Statutes § 373) (other citations omitted)]).

The repeal of the former joinder provisions does not necessarily foreclose this office from considering the Cook respondents' motion to compel joinder. The effect of the repeal is to render part 622 silent with regard to such motions and "[w]here the Department's hearings regulations are silent on a particular issue presented, the CPLR may be consulted" (Matter of Gramercy, Ruling of the ALJ, Jan. 14, 2008, at 7-8). Accordingly, the repeal of the former joinder provisions may either be read to prohibit consideration of motions to compel joinder in DEC enforcement proceedings or, alternatively, to allow for consideration of such motions under the provisions of the CPLR and relevant case law.

Under the CPLR, persons who ought to be parties and who are subject to the court's jurisdiction must be made parties. There is no discretion (see CPLR 1001[b] ["When a person who should be joined under [CPLR 1001(a)] has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned"]; Matter of Alexy v Otte, 58 AD3d 967 [3d Dept 2009] ["if an absent necessary party is subject to the jurisdiction of the court it must be joined and, if the absent party is not subject to jurisdiction, the court must consider the enumerated statutory factors . . . Thus, inasmuch as the [absent parties] were subject to the court's jurisdiction, Supreme Court here was required to order petitioners to summon them" (citations omitted)]; Matter of Romeo v New York State Dept. of Educ., 41 AD3d 1102, 1105 [3d Dept 2007] ["Because the district was a necessary party subject to Supreme Court's jurisdiction, the court was required to order petitioners to summon the district. We now correct the error by joining the district as a respondent"]; see also Siegel, NY Prac § 132, at 218 [3d ed] ["If X ought to be joined and is subject to the court's jurisdiction, CPLR 1001(a) directs that she be named and joined now"]; id. § 138, at 226-27 ["The court may thus act on its own without waiting for a motion, and will do so whenever a hint of need appears . . . If the needed person is subject to jurisdiction, the court merely orders her joined"]). The mandatory joinder provisions of the CPLR are not, however, controlling in this administrative enforcement proceeding (see CPLR 101 [stating that the CPLR "shall govern the procedure in civil judicial proceedings"]; Matter of Hicks v New York State Div. of Hous. & Community Renewal, __ AD3d __, __, 2010 NY Slip Op 4062, 5 [1st Dept 2010] [holding that "the CPLR does not purport to dictate the procedure to be applied in administrative matters; and even if [it is] construed as providing general

guidance in the conduct of administrative proceedings, it clearly does not supplant the procedures specified by any statute specifically governing the agency's operation or by regulations promulgated in the exercise of an agency's administrative prerogative"]).

There are statutes that, by their terms, are controlling in DEC enforcement proceedings (see e.g. State Administrative Procedures Act article 3 [governing administrative adjudicatory proceedings]). Generally, however, provisions of the CPLR and other statues control only where expressly provided for under the Department's enforcement hearing regulations (see e.g. 6 NYCRR 622.6[a][1] ["Rule 2103 of the CPLR will govern service of papers"]; 6 NYCRR 622.6[b][1] ["Computation of time will be according to the rules of the New York State General Construction Law"]; 6 NYCRR 622.7[a] ["The scope of discovery must be as broad as that provided under article 31 of the CPLR"]; see also Part 622/624 Comments/Response Document ["response to comments"], Dec. 1993, at 4 [response by Department stating that the "reference to CPLR Section 308.5 [in 6 NYCRR 622.3(a)(3)] has been retained since the section and the cases thereunder contain invaluable guidance regarding appropriate alternative methods [of service] and the applicable due process considerations"], 5-6 [response by Department stating that specific "references to the CPLR and other statutes are being retained for the facility of understanding and interpretation gained through the body of cases defining methodology and rights attendant on these procedures"]). Clearly, had the drafters of the 1994 revision of part 622 intended to impose the mandatory joinder provisions of CPLR 1001 on enforcement proceedings, they had the means to do so. At most, therefore, CPLR 1001 and its associated case law may be consulted in determining a motion to compel joinder.

To require Department staff to join a non-party in an enforcement proceeding after staff has made the determination that the person should not be made a party is, plainly, an infringement upon staff's prosecutorial discretion.[3] As the drafters of the 1994 revision recognized, staff "has the primary legal obligation to prosecute violators of the ECL . . . To efficiently fulfill DEC['s] statutory obligations prosecutors must be free to allocate department resources on a case-by-case basis" (response to comments at 8-9). To compel staff to join necessary parties in enforcement proceedings is the antithesis of staff being "free to allocate department resources on a case-by-case basis."

Moreover, to hold that the repeal of the former joinder provisions was intended to make compelled joinder of non-parties possible under some unstated standard, such as consulting provisions of the CPLR, would be difficult to reconcile with the Department's articulation of a more restrictive approach to intervention under the 1994 revision. Unlike the provisions for joinder, the intervention provisions were both retained and refined. The revised language largely tracked the earlier version, but added a new standard under which the party seeking intervention is required to demonstrate "that there

[3] Generally stated, in determining who to name as a respondent, Department staff "has prosecutorial discretion to pursue violations as it deems appropriate so long as it does not act with an 'evil eye' against a class that has been selected for some reason other than effective regulation" (Matter of Risi, Hearing Report, June 3, 2004, at 18 [citation omitted], adopted by Order of the Commissioner, Oct. 29, 2004, at 1).

is a reasonable likelihood that [their] private rights will be substantially adversely affected by the relief requested and that those rights cannot be adequately represented by the parties to the hearing" (6 NYCRR 622.10[f][3]).[4]

One comment received by the Department on the proposed new standard for intervention stated that the new standard "is too high" and "severely restrictive," making it more difficult for non-parties to join enforcement proceedings. In response, the Department stated that the rationale for limiting participation in administrative enforcement proceedings is similar to the rationale for limiting participation in criminal proceedings (see response to comments at 8). The Department further stated that persons who do not meet the standards for intervention may provide input to enforcement proceedings in a manner similar to that in criminal cases (id. at 9).

As previously noted, no party to this proceeding has identified a ruling under which staff was compelled to join a party to an enforcement proceeding, and I have identified no such ruling in my consideration of this matter. Other ALJs that have considered the issue of compelled joinder and have held either that it is not available in Department enforcement proceedings or that the question remains open. For the reasons stated above, I conclude that Department staff should not be compelled to join additional parties in this enforcement proceeding and, therefore, the Cook respondents' motion to compel joinder is denied.

I have also considered the respondents' respective requests to be dismissed from this proceeding and find the requests to be without merit. Part 622 makes no provision for dismissing a respondent from an enforcement proceeding and neither the Berger nor the Cook respondents cite to any of the grounds specified under the CPLR for dismissal (see CPLR 3211[a][1-11]). Assuming respondents base their respective requests for dismissal on the failure to join a necessary party (CPLR 3211[a][10]), that ground is rejected, as discussed above.

Moreover, it appears the respondents' respective requests for dismissal are more accurately characterized as motions for summary judgment (see e.g. Cook reply affirmation ¶ 25 [stating that the Cook respondents are "entitle[d] to judgment as a matter of law" because they have proffered uncontroverted evidence and expert opinion that "demonstrate[s] the absence of any material issue or (sic) fact"]; Berger reply affirmation ¶¶ 57-58 [stating that the Berger respondents are not owners of the dam and cannot be held liable "under any rational reading of the ECL, 6 NYCRR Part 673 or applicable

[4] Notably, at the time that the current part 622 was promulgated, the then DEC Assistant Commissioner for Hearings noted that several "strategies" were employed to guide the revisions. First among these strategies was to achieve "[b]etter definition of standards" by incorporating standards into the new rules rather than leaving "participants in the process to rely on interpretation of prior decisions" (Feller, DEC's New Hearing Rules, 5 Environmental Law in New York [Matthew Bender & Co., Inc.], April 1994, at 49, 59). Of course, if the intent of the repeal of the former joinder provisions was to eliminate compelled joinder of non-parties, no standard for joinder is needed. If, however, the intent of the repeal was to allow for compelled joinder under an unarticulated standard, the repeal contravenes the Department's stated strategy.

decisional law"]). As the Commissioner has held, summary judgment may only be granted were a cause of action or defense is established "sufficiently to warrant the court as a matter of law in directing judgment. . . . The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact" (Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 4 [internal quotation marks and citations omitted]).

It is well established under New York law that summary judgment is a drastic remedy that should be granted only sparingly (see generally Siegel, NY Prac § 278, at 438 [3d ed]). To prevail, a movant must clearly established that there are no material issues of fact to be tried (see Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968] ["To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable'" (citations omitted)]). In considering a motion for summary judgment, the court does not weigh the credibility of affiants, but rather searches the record to ascertain whether there are material issues of fact to be tried (id. ["The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned"]).[5]

On review of this record, I conclude that no party has established that they are entitled to judgment as a matter of law on the basis of their ownership, or their lack of ownership, of the Honk Falls Dam. At hearing, Department staff will have the burden of proof to demonstrate that each of the named respondents is an owner of the dam and all the parties will have a full and fair opportunity to present evidence and to argue their respective positions. In that regard, I note that staff asserts that, under ECL 15-0507(1), the Berger and Cook respondents are owners of the Honk Falls Dam "both by virtue of

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[5] Note that the standards for dismissal under certain paragraphs of CPLR 3211 are similarly stringent (see e.g. 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 [2002] [holding that:

> "[i]n the posture of defendants' CPLR 3211 motion to dismiss, our task is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference. Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (citations omitted)]).

Moreover, in the context of a CPLR 3211(a)(1) motion to dismiss, supporting affidavits may not be considered "because they do not constitute documentary evidence" and any documentary evidence relied upon by the movant must, on its face, "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff's claim" (Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 [2d Dept 2003] [internal quotation marks and citations omitted]).

being property owners of the dam and by virtue of their beneficial use of the dam" (staff affidavit ¶ 21). In its sur-reply affirmation, however, staff argues that it has "not alleged that Cooks are 'owners' as beneficial users of the Honk Falls Dam as per the cause of action charged. Accordingly, the issue [of beneficial use ownership] is moot since it is not before the Court for consideration" (staff sur-reply affirmation ¶ 16). Staff further argues that joining persons who have "no title or ownership interest in the dam[,] or a tenuous 'user' of the lake[,] is a bad faith practice which will only delay proceedings and expend extra resources of both Department staff and the Respondents" (staff memorandum ¶ 9[d]).

The allegation set forth in the complaint concerning ownership of the dam is identical for each respondent (see complaint ¶ 7). Although the complaint recites the broad definition of owner contained in ECL 15-0507, Department staff has now unequivocally stated that it will not argue that respondents are owners because of their beneficial use of the dam. Accordingly, I will allow no testimony, evidence or argument concerning beneficial use at hearing.

CONCLUSION

For the reasons set forth herein, the Cook respondents' motion to compel joinder is denied. The Cook respondents' and the Berger respondents' motions to dismiss are also denied.

Recent correspondence among the parties indicates that Department staff has fulfilled its obligations under my ruling on disclosure dated February 10, 2010, and that discovery is largely complete. I will arrange a conference call with the parties, shortly after the issuance of this ruling. The parties should be prepared to discuss the status of any outstanding discovery issues and possible hearing dates.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: May 28, 2010
Albany, New York