

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

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

-by-

VILLAGE OF FLORIDA,
TOWN OF CHESTER, and
COUNTY OF ORANGE,

Respondents.

DEC Case No. CO3-20070201-2

DECISION AND ORDER OF THE COMMISSIONER

May 23, 2013

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (DEC or Department) that respondents Village of Florida (Village), Town of Chester (Town) and County of Orange, New York (County) (the Village, Town, and County are referred to collectively herein as respondents): (i) failed to operate and maintain the Glenmere Lake Dam in a safe condition, in violation of Environmental Conservation Law (ECL) § 15-0507(1); and (ii) performed repairs on the dam without obtaining the required permits, in violation of ECL 15-0503(1) and section 608.3 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Based on the record, I adopt the attached hearing report of Administrative Law Judge (ALJ) Helene G. Goldberger (Hearing Report) as my decision in this matter, including the Findings of Fact set forth in the Hearing Report, subject to the comments set forth below.

BACKGROUND

The Glenmere Lake Dam (dam), an earthen embankment approximately 600 feet long and 24 feet high at its highest point, is located at the north end of Glenmere Lake in the Town of Chester, Orange County, New York. The lake currently serves as a water supply for the Village of Florida. A dam has existed at the lake since the mid-1800s, initially constructed to power a mill.¹ The dam currently impounds more than 600 million gallons of water, and has been classified by the Department as a “Class C – High Hazard” dam, based upon a determination that its failure could “cause loss of life, serious damage to homes, industrial or commercial buildings, important public utilities, main highways, and railroads” (Guidelines for Design of Dams - DEC, Rev. Jan. 1989 [Dam Guidelines], at 5; see also Ex. 12a [1973 DEC Dam Inspection Report reflecting re-classification of dam as Hazard Class C]). Water from the lake flows over a “spillway”² located at one end of the dam, through two culverts, and ultimately reaches Brown’s Creek, a tributary of the Wallkill and Hudson Rivers.

¹ The parties disagree regarding how long the current dam has been in place, and whether it was wholly replaced, or its height was merely increased, near the end of the 19th century. Documents dated 1926 describe the history of the dam dating back to approximately 1826, and indicate that the dam was completed in 1900 (see Exhibits [Exs.] 47, 48; see also Ex. 15 [Opinion of Orange County Attorney No. 95-5]). Given respondents’ actions and ownership interests during the period at issue here (July 1999 through October 18, 2007, the date of the amended complaint), it is not necessary to resolve the factual question regarding the origin of the dam for a proper determination of staff’s claims.

The key 19th century issue of relevance here is the nature of the interest conveyed in 1892 to the Florida Water Works Company (FWWC) as reflected in the “Cable Indenture” document (see Exs. 14A, 14B; see also Hearing Report, at 2, 4-7, 14-18). I agree with the ALJ that the Cable Indenture conveyed an easement to the FWWC entitling FWWC to raise the dam and take water from the lake. The Indenture did not convey a fee interest in the entire dam (see also Ex. 15 [Opinion of Orange County Attorney No. 95-5, at 9-12 (Cable Indenture granted FWWC an easement, and County possesses full rights to water in lake “subject to the limited easement now owned by the Village of Florida”)]).

² A spillway is a structure that allows water to flow from the lake at a level below the top of the dam. Spillways are intended to protect the dams from “overtopping,” a circumstance in which water would flow over the top of the dam. Overtopping may cause erosion and failure of the embankment, which failure would result in the release of the impounded water (see Hearing Report, at 9). Spillways must therefore be designed to have a capacity sufficient to handle sustained flows as well as extreme floods (see Dam Guidelines, at 10).

The record reflects that Department staff inspected this dam at least 21 times between 1973 and 2011 and noted deficiencies throughout this period (see Exs. 12a-12v). At least twelve of the inspection reports generated as a result of these inspections, as well as letters discussing the reports and photographs, were provided contemporaneously to the County, the Village, or both, beginning no later than 1980 (see, e.g., Exs. 12e, 12h, 12i, 12m-12t, 12v).

In 1981, the DEC Dam Safety Section, in cooperation with the New York District Engineer of the Army Corps of Engineers (ACOE), completed a Phase I Inspection Report (Phase I Report) relating to the dam, as part of the National Dam Safety Program (see Ex. 10). The Phase I Report classified the dam as “high hazard due to its location above several low lying homes” (see id. at 1). The Phase I Report found that the dam spillway was “seriously inadequate,” and that “if a severe storm were to occur, overtopping and failure of the dam could take place significantly increasing the hazard to loss of life downstream of the dam” (see id. at fifth un-numbered page). The Phase I Report identified additional problems, including collapsing portions of the retaining wall on the downstream slope of the embankment, seepage at the downstream “toe” of the dam³ and a deteriorated spillway structure which, “if left uncorrected have the potential for the development of hazardous conditions and must be corrected within 1 year” (see id. at sixth un-numbered page).

A 1993 study prepared for the Orange County Department of Public Works by Tectonic Engineering Consultants P.C. (Tectonic Study) confirmed the ACOE’s 1981 conclusions (see Ex. 11). The Tectonic Study found the dam had insufficient spillway capacity (see id. at 18-19), that municipalities had “randomly” placed fill along a 300 foot length of the downstream side of the stone and concrete walls, apparently burying the sections of collapsing walls and slopes identified in earlier reports (see id. at 11), that seepage continued (see id. at 12-13), and that the spillway structure was in “fair to poor condition” (see id. at 14). The Tectonic Study recommended replacing the spillway, raising and widening the dam crest (the roadway), providing a low-level outlet for draining the lake, and modifying the downstream embankment (see id. at 22-28).

The periodic Department inspections conducted between 1993 and 2007 reflect continuing seepage, dumping of fill, additional deterioration of the dam, and that respondents took no steps to address the inadequate spillway capacity. By letter dated January 2, 2007, the Department: (i) notified all three respondents that they are co-owners of the dam “for dam safety purposes” under ECL 15-0507; (ii) informed respondents that the condition of the dam remained out of conformance with applicable safety criteria; and (iii) requested that respondents, as co-owners of the dam, provide within 15 days of receipt of the Department’s letter a proposed plan and schedule for bringing the dam into compliance (see Ex. 12q). None of respondents provided such plan or schedule.⁴

³ The “downstream toe” is the junction of the downstream face of a dam and the natural ground surface (see Dam Guidelines, at 4).

⁴ Although the Town responded by letter to the Department’s January 2, 2007 letter, its five-sentence letter stated, among other things, that the Town “does not believe it is responsible for the maintenance or repair of the dam, but

Following respondents' failure to comply with the Department's January 2, 2007 letter, Department staff commenced this enforcement proceeding by serving on respondents a notice of hearing and complaint dated April 27, 2007, and an amended notice of hearing and complaint dated October 18, 2007 (see Ex. 1). In its complaint, staff alleges that (i) from August 1981 to the date of the complaint,⁵ respondents violated ECL 15-0507(1) by failing to maintain the dam in a safe condition; and (ii) from on or before December 13, 1988 until at least July 12, 2006, respondents violated ECL 15-0503(1) by conducting repairs on the dam without obtaining the required permit (see id.). Each respondent filed an answer (see Exs. 2, 3, 4), and the matter was referred for hearing on April 27, 2012 (see Ex. 6) and assigned to ALJ Goldberger (see Ex. 5). The hearing was conducted on October 15-18, 2012 and, following full briefing and replies, the record closed on January 4, 2013 (see Hearing Report, at 1-2).

ALJ Goldberger recommends that I hold all respondents liable for violating ECL 15-0507 (failing to operate and maintain the dam in a safe manner), and for violating ECL 15-0503(1) and 6 NYCRR 608.3 (construction or repairs on the dam without a permit). ALJ Goldberger also recommends that I assess separate civil penalties, a portion of which is suspended, against each respondent. As discussed in detail below, I (i) adopt ALJ Goldberger's recommendation to hold respondents jointly and severally liable for violating ECL 15-0507; (ii) adopt the ALJ's recommendation to hold respondents individually liable for their respective violations of ECL 15-0503(1) and 6 NYCRR 608.3, and hold that, on the facts of this case, such liability is not joint and several; and (iii) adopt in part the ALJ's recommendations relating to civil penalties.

DISCUSSION

The record reflects that, in 1978, the County purchased the land surrounding the dam and the lake, including the lake itself and the lake bottom (see Hearing Report, at 7; see also Exs. 15, 22 and 23b). In 1992 and 2002, the County conveyed to the Village a portion of the land upon which the dam sits (see Hearing Report, at 7; see also Exs. 22, 23c). The Village has for many years operated a pump house and water treatment building at the site, which includes pumping water from the lake to use for the Village water supply (see Hearing Report, at 6, 7; see also Exs. 11, 21a, 50a-50k). The Village also installed new water mains in 2006-2007, which included work on the downstream embankment of the dam (see Hearing Report, at 11-12). The Town maintains a road known as Florida Road and Glenmere Avenue, located on the top of the dam, and has performed work at the dam including adding pavement on top of the road, placing "fill"⁶

would cooperate in closing any road or roadway necessary to accommodate the repairs by the other municipalities" (Ex. 49).

⁵ At the commencement of the hearing, staff moved for and was granted leave to amend the complaint so that the period of alleged violation began in July 1999 rather than August 1981. The change to a July 1999 commencement date was based upon the Legislature's extensive amendments to the dam safety statute in July 1999 (see Hearing Transcript [Transcript] at 13:20-14:20).

⁶ The fill was comprised of sand, silt, gravel, asphalt pieces and trace amounts of plastic, metal, glass and "other deleterious material and roots up to 2 inches in diameter," and was placed "with little or no compaction efforts" (see Hearing Report, at 11-12).

on the downstream face of the dam, and installing a new culvert beneath the road in 2000 or 2001 relating to the spillway (see id. at 7, 10, 16, 17; see also Ex. 13).

Respondents do not dispute that (i) the dam has many deficiencies, as identified by the ACOE in 1981, the County’s engineering consultant Tectonic in 1993, and the Department during its inspections from 1973 forward; (ii) the spillway lacks sufficient capacity; (iii) the ACOE concluded more than 30 years ago that the dam was “unsafe, non-emergency;”⁷ (iv) no respondent has prepared, submitted to the Department for approval, or circulated, an emergency action plan (EAP), although one is required by 6 NYCRR 673.7;⁸ or (v) respondents performed work on the dam without first having obtained permits, although permits are required by ECL 15-0503(1) and 6 NYCRR 608.3.

Each respondent simply claims that it is not an “owner” of the dam, and is therefore not responsible for inspecting or maintaining the dam or performing any of the other activities required by the relevant statute and regulations. ECL 15-0507(1), however, broadly defines an “owner” of a dam as “any person or local public corporation who owns, erects, reconstructs, repairs, maintains or uses a dam or other structure which impounds waters.” As discussed below, I agree with the ALJ that all respondents fall within the scope of this statutory definition, and are therefore “owners” of the dam under and subject to the requirements of ECL 15-0507(1).⁹

I. Liability Under ECL 15-0507(1)

A. Each Respondent is an “Owner” of the Dam Under ECL 15-0507(1)

1. The County

The County is an “owner” of the dam under ECL 15-0507(1) (see Hearing Report, at 14-15). As the ALJ discussed, court decisions make clear that the owner of land on which a dam sits owns the dam (id. at 15); a deed conveys all “incidents to the land” as well as the land itself, unless the deed contains a written reservation or exclusion of a particular thing that sits upon the land (see Hearing Report, at 14-15 [citing and discussing cases]). The parties do not dispute that the County owns the lake and the land surrounding and under the lake and the dam, and made the purchase in 1978 “so as to provide for its future water needs” (Ex. 15, at 1-4; see also Ex. 22 [March 9, 2011 Memorandum from J.G. Martin describing and attaching relevant deeds and other documents]). The relevant deeds do not reflect that the dam was expressly excluded from

⁷ The Village and Town essentially claim that the dam must be “safe” because it has existed for more than 100 years without failure (see Village Brief, at 3; Town Reply Brief, at 3).

⁸ An EAP for a Class C dam must include, among other things, notification procedures, inundation maps or another acceptable description of the potential inundation area, and procedures for updating the plan (see 6 NYCRR 673.7[f]). The dam owner(s) must circulate the EAP and its annual updates to the County’s emergency management official, any other municipality in the same or an adjoining county within the inundation area which must be prepared and updated annually for Class C dams such as the dam at issue (see 6 NYCRR 673.7).

⁹ In addition to the activities covered by the statutory definition, the regulation adds any person or local public corporation who constructs, breaches or removes a dam (see 6 NYCRR 673.2[t]).

the conveyance. As discussed below, the County conveyed to the Village a portion of the property underlying the dam, but retained the remaining property on which the dam sits. Thus, because the County owns a portion of the property on which the dam sits, and the dam was not expressly excluded from the conveyance of this property to the County, the County is an “owner” of the dam under ECL 15-0507(1).

2. The Village

The Village is also an “owner” of the dam under the statute, in at least two ways. First, the record reflects that, in 1992 and 2002, the Village purchased from the County a portion of the property on which the dam sits (see Hearing Report, at 7; see also Exs. 22, 23c). The deeds conveying this property did not exclude from the conveyance the portion of the dam that sits on the property conveyed. Thus, the Village is a fee owner of land on which the dam sits, and therefore is an “owner” of the dam under ECL 15-0507(1).¹⁰

Second, the Village “uses” the dam for purposes of securing and pumping some of the impounded waters in the lake for its water supply (see, e.g., Exs. 50a-50k [Village Annual Drinking Water Quality Reports for 2001-2011 (“Our water source is Glenmere Lake”)]). As noted, ECL 15-0507(1) defines “owners” to include “users” of the dam. In that the Village “uses” the dam to impound waters for its water supply, the Village is also an “owner” under the statutory definition.¹¹

3. The Town

The Town is an “owner” of the dam under ECL 15-0507(1). The Town does not dispute that it has maintained and used the road that literally sits on the top of the dam. I agree with the ALJ’s conclusion that, as a “user” of the dam for these purposes, the Town is therefore an “owner” of the dam under ECL 15-0507(1).

B. Each Respondent is Jointly and Severally Liable Under ECL 15-0507(1)

Having determined that each respondent is an “owner” under ECL 15-0507(1), I also adopt the ALJ’s recommendation to hold respondents jointly and severally liable for their violations of that provision, as discussed immediately below.

In 1999, following severe flooding over several years that resulted in numerous dam failures throughout New York, the Legislature enacted significant amendments to ECL 15-0507 and ECL 15-0503. The primary purposes of the legislation were to ease permitting requirements relating to small dams “while clarifying and strengthening New York State laws which regulate

¹⁰ In its post-hearing brief, the Village argues that the record contains no proof that it succeeded to the rights of the FWWC under the Cable Indenture; that is, that the Village is not the “owner” of the easement granted to the FWWC. Given the Village’s direct ownership of land on which the dam sits, and its undisputed use of the dam to facilitate bringing water to its residents, it is not necessary, for purposes of determining liability here, to resolve the issue of whether the Village is a successor in interest to the rights of FWWC.

¹¹ While the use of the lake as a water supply does not change the legal classification for purposes of dam safety regulation, the importance of securing the Village’s water supply cannot be underscored enough.

dams and structures which impound waters,” and to shift the Department’s focus and resources from the permitting of small dams to the proper maintenance and repair of larger dams, “which may pose grave risks to public safety” (Sponsor’s Mem, Bill Jacket, L 1999, ch 364, at 4).

The bill sponsor’s memorandum declared that, because dams “and the volume of water they impound are potentially life threatening [and] far too often the structures are not properly maintained ... [i]t is imperative that all owners of dams and other structures which impound waters ... maintain these structures in a safe condition” (*id.* at 7). The memorandum also noted that (i) “roughly 25% [of the then-existing 300 high-hazard dams] are very-well maintained [while] 75% have some documented maintenance deficiency” (*id.*) and (ii) fewer than one-third of the high hazard dam owners had developed and submitted emergency action plans to the Department, despite the fact that such plans are standard engineering practice and the Department had specifically requested that owners prepare such plans (*id.*).

Because dam owners had failed to address sufficiently the risk to public safety posed by deficient dams, the Legislature intended through its 1999 legislation to provide the Department “with the legal tools to ensure that dams are safe,” and declared that “it is imperative that the State be able to cause the owner to remedy the negligence before a catastrophe occurs” (*id.* at 7). The legislation therefore “requires all owners to properly maintain and operate their dams and structures and allows DEC to require through regulation owners to prepare a safety program which can include planning and maintenance measures and an emergency action plan” (*id.* at 8). In addition, in circumstances in which the Department necessarily incurs expenses “to protect public safety,” the legislation “allows recovery in any lawful manner for such necessary costs and expenses” (*id.*).

The 1999 amendments thus reflect the Legislature’s express recognition of the grave risks posed by unsafe dams, and its intention to impose on dam owners and users the primary responsibility for ensuring the safety of their dams, while also significantly strengthening the Department’s power to regulate and enforce dam safety.

The statute is silent, however, on the issue whether, in circumstances such as the present case in which more than one person or entity satisfies the statutory definition of “owner,” each “owner” may be found jointly and severally liable for violations of ECL 15-0507(1).¹² I conclude that imposing joint and several liability on each respondent for its ongoing violations of ECL 15-0507 is fully consistent with the broad remedial purposes of the statute, particularly given the clear intent in the 1999 legislation to strengthen the powers of the Department and shift to dam owners the primary responsibility for ensuring that their dams are safe.

The present case implicates long-settled principles of law relating to circumstances in which joint and several liability is appropriate. First, joint and several liability is appropriate where, as here, the harm resulting from a failure to act would be “incapable of any reasonable or practicable division or allocation among multiple tort-feasors,” irrespective of whether the

¹² Where it has been determined that a person or entity satisfies the definition of “owner” of a dam, such person or entity is responsible for satisfying all duties imposed by the statute and regulations; the statute does not establish a threshold extent of “ownership” or quantity of “use” below which one would not be considered an “owner” under the statute.

defendants acted in concert or concurrently (Ravo v Rogatnick, 70 NY2d 305, 310 [1987]).¹³ In this case, the dam itself – a continuous 600 foot long earthen structure – is “indivisible,” and the harm likely resulting from dam failure, which could include death and destruction of homes and other property, is precisely the type of harm that would not be subject to allocation or apportionment among respondents.¹⁴

Although the dam may fail at a particular location in the structure, no reasonable basis exists for allocating responsibility among respondents for the downstream damage that would be caused by the failure and resulting release of the impounded waters.¹⁵ In such case, it would clearly be appropriate to hold each respondent jointly and severally liable for the failure and damage (see also Burlington Northern and Santa Fe Railway Co. v United States, 556 US 599, 614 [2009] [discussing joint and several liability under the federal Superfund law, and quoting United States v Chem-Dyne Corp., 572 F Supp 802, 810 (SD Ohio 1983)] [“[w]here two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm”]).

Second, it has been the law in New York and elsewhere for more than a century that joint and several liability is appropriate where, as here, multiple parties owe a common duty and jointly control the risk (see e.g. Simmons v Everson, 124 NY 319 [1891]; see also Butler v Rafferty, 100 NY2d 265 [2003] [discussing principle that co-owners/cotenants can be jointly and severally liable for injuries caused by defective condition in property subject of cotenancy]).¹⁶

The facts of Simmons are instructive. In Simmons, a continuous brick wall formed the front of, and was attached to, three buildings owned by three different individuals. After a fire damaged the three buildings and the common wall, the common wall stood for awhile, but later fell and killed a passerby. The Court held that the defendant property owners were jointly and

¹³ See Restatement (Second) of Torts § 875 (“Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm”); see also id. § 433A(2), Comment on Subsection (2) (where the harm resulting from two or more causes is “incapable of any logical, reasonable, or practical division ... the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm”).

¹⁴ See Restatement (Second) of Torts § 433A, Comment on Subsection (2) (identifying death and destruction of a house as examples of the type of harm that “by their very nature, are normally incapable of any logical, reasonable, or practical division”).

¹⁵ Indeed, even if the dam failed at two locations, and the released waters combined again immediately below the dam, the harm would remain indivisible (see e.g. Slater v Mersereau, 64 NY 138, 146-147 [1876] [joint and several liability applied where water from two sources “commingled together and became one body” causing injury to plaintiffs’ property. The court stated: “The water with which each of the parties were instrumental in injuring the plaintiffs was one mass and inseparable, and no distinction can be made between the different sources from whence it flowed, so that it can be claimed that each caused a separate and distinct injury for which each one is separately responsible”]).

¹⁶ See generally Prosser, Joint Torts and Several Liability, 25 Calif L Rev 413, 431, and n 119 (1937) (“Two defendants may be under a precisely similar duty to use care to prevent a particular occurrence, the most obvious illustration is the case of the fall of a party wall, through the negligence of adjoining landowners. In such a case each is, of course, liable for the entire damage”); see also Restatement (Second) of Torts § 878 (“If two or more persons are under a common duty and failure to perform it amounts to tortious conduct, each is subject to liability for the entire harm resulting from failure to perform the duty”).

severally liable because none of them did anything to support the common wall even after it was clear that the wall was leaning following the fire (124 N.Y. at 323-324; see also Hall v E.I. du Pont de Nemours & Co., Inc., 345 F Supp 353, 371-372 [EDNY 1972] [citing cases]; Ferdinando v Rosenthal, 169 Misc 953, 955 [Municipal Ct, New York County 1938] [common courtyard between two properties]).¹⁷

In Simmons, each owner owed a common duty to ensure the safety of the wall common to the three separate properties. Similarly, each respondent in this case, as an “owner” of the dam under ECL 15-0507(1), has a statutorily imposed independent, and common, duty to inspect, maintain and ensure the safety of the dam so as to prevent its failure and any resulting injury or damage to persons or property downstream. The County and Village jointly own all the land under the dam, and the Town maintains and uses the road that comprises the top of the dam. Respondents thus collectively have common duties and joint control of the risk of dam failure. Each is jointly and severally liable for failing to comply with the duties imposed upon them by the statute.

The result here is fully supported by prior court decisions holding joint and several liability to be appropriate under other New York statutes that, although silent on that issue, evince clear legislative intent to protect the public and the environment (see, e.g., State of New York v Passalacqua, 19 AD3d 786, 791 [3d Dept. 2005] [strict, joint and several liability “broadly and liberally applied to owners of property where a petroleum discharge is discovered” under Navigation Law § 181]; Matter of Carney’s Restaurant, Inc. v New York, 89 AD3d 1250 [3d Dept 2011] [upholding Commissioner’s determination holding petitioners jointly and severally liable for violations of ECL article 17 (water pollution)]; Matter of Colella v New York State Dept. of Env’tl. Conservation, 196 AD2d 162 [3d Dept 1994] [upholding Commissioner’s order in Matter of Ten Mile River Holding, Ltd., Sept. 28, 1992, holding petitioners jointly and severally liable for violations of ECL articles 15 (water resources), 17 (water pollution) and 23 (mining operations)]).

In the current context, then, joint and several liability for failure to comply with ECL 15-0507(1) is the most appropriate means of implementing the Legislature’s emphatic declaration that “it is imperative that the State be able to cause the owner to remedy the negligence before a catastrophe occurs” (Bill Jacket, at 7-8). I therefore hold respondents jointly and severally liable for violating ECL 15-0507(1).

II. Liability Under ECL 15-0503(1)

ECL 15-0503(1) states in relevant part that “[n]o dam shall be erected, constructed, reconstructed or repaired by any person or local public corporation without a permit.” The record in this case reflects that each respondent performed some work at the dam without obtaining a permit. The record also reflects that other unpermitted work has been performed at the dam, but the entity performing such work has not been identified.

¹⁷ Accord Johnson v Chapman, 43 W Va 639 [Sup Ct App W Va 1897] [“Two separate persons are obligated to make each pillar strong. If either does his duty the wall may stand; but if each neglects his duty, and the wall falls, they are jointly and severally liable for the injury that follows to any one”].

A. Each Respondent Performed Unpermitted Work

The record reflects that the Town put a new culvert beneath Florida Road in 2000 or 2001, without first obtaining a permit (see Exs. 13, 12o, 12p; see also Transcript at 100:18-101:12; 759:22-760:13; 785:5-18). The Town also patched, filled, maintained and repaved the road on top of the dam, and dumped fill in the ravine alongside the dam, without obtaining a permit (see Transcript at 99:17-101:12; 762:11-763:17). Given this evidence, I adopt the ALJ's holding that the Town violated ECL 15-0503(1) and 6 NYCRR 608.3 (see Hearing Report, at 17).

Similarly, the Village has performed maintenance and repairs on its water supply system, including replacing the water mains, and digging, removing, replacing and re-grading earth on the downstream embankment of the dam, all without a permit (see Transcript, at 764:6-768:16; 771:18-785:2). I therefore adopt the ALJ's holding that the Village violated ECL 15-0503(1) and 6 NYCRR 608.3 (see Hearing Report, at 11-12, 18).¹⁸

Finally, the County installed a fence along the upstream face of the dam, without a permit (see Ex. 12g). Thus, I adopt the ALJ's holding that the County violated ECL 15-0503(1) and 6 NYCRR 608.3 (see Hearing Report, at 16).

Thus, each respondent is liable for its violations of ECL 15-0503(1) and 6 NYCRR 608.3. Unlike their violations of ECL 15-0507(1), however, respondents' violations of ECL 15-0503(1) are distinct and capable of apportionment. In such case, joint and several liability is not appropriate.

III. Remedy and Penalties

Having concluded after hearing that each respondent is an "owner" under the statute, and that each such "owner" has violated the requirements of ECL 15-0507(1), I hereby direct respondents jointly and severally to perform remedial activities and pay civil penalties as described below.

A. Remedial Activities

With respect to violations of ECL 15-0507(1), ALJ Goldberger recommends that I direct respondents – jointly and severally – to bring the dam into compliance and implement all required remedial activities pursuant to a "Schedule of Compliance" submitted by staff at the hearing (see Hearing Report, at 22-23; see also Ex. 26). I adopt the ALJ's recommendation and hold that respondents are jointly and severally responsible for bringing the dam into compliance and performing all of the remedial activities described in the Schedule of Compliance attached hereto as Exhibit A, which Schedule is incorporated herein and made a part of this decision and

¹⁸ I also affirm the ALJ's determination, based upon testimony of the Village's own witness, to grant staff's motion to conform the pleadings to the proof and add the allegation concerning the Village's unpermitted construction work during 2006-2007 (see Hearing Report, at 18).

order.¹⁹ I have amended the time frames set forth in the Schedule of Compliance with respect to Remedial Activities VIII through XI, tying them to issuance of the required permit, in order to ensure compliance with any applicable notice requirements, and recognizing that the actual length of the permitting process may vary. Department staff may extend due dates only upon the occurrence of a force majeure event.

B. Penalties

The following brief summary of the facts relating to each respondent is helpful in determining the amount of penalties to be assessed for the violations in this case:

As discussed above, the Glenmere Lake Dam is a Class C High Hazard dam, which classification signifies that failure of the dam poses the greatest risk to downstream residents and property. As stated in the regulations, failure of a Class C High Hazard dam

“may result in widespread or serious damage to home(s); damage to main highways, industrial or commercial buildings, railroads, and/or important utilities, including water supply, sewage treatment, fuel, power, cable or telephone infrastructure; or substantial environmental damage; such that the loss of human life or widespread substantial economic loss is likely.”

(6 NYCRR 673.5[b][3] [emphasis added]). Respondents have long been aware of the serious potential consequences of failure of this dam.

The County has for the relevant period owned all of the land surrounding the lake and under the lake, owned a portion of the land under the dam, and installed a fence along Glenmere Avenue without obtaining a permit. The Department sent to the County many of its inspection reports over the years, and the County has been aware for decades of the Department’s concerns regarding the dam. As a mitigating factor, however, the County did commission the 1993 Tectonic Study of the dam and prepared a draft EAP (see Transcript at 647), and has therefore demonstrated some effort with respect to learning the condition of the dam.

The Town has maintained the road on top of the dam during the relevant period, including adding pavement to the road (and thereby increasing the height of the dam). The Town has also placed fill along the dam and replaced the culvert – all without obtaining the required permits. As a mitigating factor, however, the Town did respond to the Department’s January 2007 letter and has a moderately credible claim that, until that time, it was unaware that the Department considered it an “owner” under ECL 15-0507(1).

In 1992 and 2002, the Village purchased from the County some of the land under the dam. The Village has also used the dam for many years to impound waters for its water supply. The Village has performed work on the dam, including replacing the water mains, and digging, removing, replacing and re-grading earth on the downstream embankment of the dam – all without obtaining the required permits. The Village sells water to the Orange County Jail and

¹⁹ Respondents shall perform all remedial activities described in the Schedule of Compliance irrespective of the nature of the selected alternative, which may include repair, reconstruction, breach and/or removal of the dam.

the Valley View Residential Center (see Transcript at 796:6-25), thereby obtaining an economic benefit from its use of the dam. Beginning no later than 1986, the Department sent many letters and inspection reports directly addressed to the Village concerning the dam, including identifying it as a Class C high hazard dam, describing its deterioration and noting that the Village had taken no actions to correct the deficiencies and reduce the risks (see e.g. Ex. 12e [Aug. 5, 1986 letter to mayor of Village of Florida enclosing inspection report]). Inspection reports have identified the Village as the owner of the dam for almost nineteen years (see Exs. 12k-12t). The record reflects no mitigating factors with respect to the Village.

Department staff has submitted three different enforcement calculation sheets (see Exs. 27a-27c), all of which apply versions of ECL 71-1127 in effect at some point during the relevant period.²⁰ Notwithstanding the various formulations of possible maximum penalties, which ranged from \$454,000 to \$4.27 million, Department staff's recommended penalty among the three calculations ranged from \$200,000 to \$250,000, with a final recommended penalty of \$225,000, to be assessed jointly and severally.²¹

The ALJ recommends a total penalty of \$350,000, divided among respondents based on degree of culpability, of which \$110,000 would be immediately payable and \$240,000 would be suspended pending compliance with the remainder of the decision and order. The ALJ did not address whether any portion of the penalty should be assessed jointly and severally.

I agree with Department staff's position that respondents have a high degree of culpability because they have been aware for many years of the concerns about this high hazard dam and the Department's many requests for evaluation and remediation, but have failed to act.²² As discussed earlier in this decision and order, I hold respondents jointly and severally liable for their violations of ECL 15-0507(1). Accordingly, I also hold respondents jointly and severally liable for that portion of the assessed penalties related to their violations of ECL 15-0507(1), as specified below.

The ALJ correctly noted, however, that respondents' actions reflect different levels of culpability, and that each respondent's violations of ECL 15-0503(1) and 6 NYCRR 608.3 are clearly identifiable and distinct from each other (see Hearing Report, at 21-22). I therefore also adopt the ALJ's recommendation to allocate penalties among respondents based upon their

²⁰ On cross-examination at the hearing by counsel for the Village, Department staff conceded that the initial calculations were based on the version of ECL 71-1127 that became effective on February 15, 2012. I agree with the ALJ that it was not appropriate to retroactively apply the amended version of ECL 71-1127 to violations occurring before its effective date (see Hearing Report, at 21).

²¹ Department staff mentioned in its post-hearing brief but, without explanation, did not apply, the penalty provisions in ECL 71-1109, which provide that each violation of ECL 15-0507(1) or any related regulations is subject to a five hundred dollar (\$500) penalty, and every day's continuance is a separate and distinct offense. The assessed penalties are significantly below the maximum possible penalty under either ECL 71-1109 or ECL 71-1127.

²² Respondents have apparently not availed themselves of opportunities to obtain external funding available to municipal entities in order to ensure the safety of the dam (see Hearing Report, at 21; Transcript at 647:16-648:3; 672:16-673:2).

individual violations of ECL 15-0503(1) and 6 NYCRR 608.3, rather than assess a total penalty against all respondents jointly and severally.

I agree with the ALJ that, although deterrence is important and respondents' violations are serious, "the emphasis at this point must be on repair to the dam and in creation of an EAP expeditiously" (Hearing Report, at 22). I therefore agree in principle with the ALJ's recommendation that the penalties be comprised of both immediately payable and suspended components, and that the suspended penalty – which should provide some incentive to perform the remedial activities – be significantly higher than the immediately payable portion of the penalty (see Hearing Report, at 21-22). As set forth in detail below, I have retained the total penalty amount recommended by the ALJ, have reduced the immediately payable portion and increased the suspended penalty accordingly.

In light of the foregoing, I assess a total civil penalty of three hundred fifty thousand dollars (\$350,000) against the respondents, of which three hundred thirty thousand dollars (\$330,000) is assessed jointly and severally against respondents for their violations of ECL 15-0507(1). Of the \$330,000 assessed jointly and severally against respondents, thirty thousand dollars (\$30,000) shall be due and payable by respondents within sixty (60) days of service of this decision and order upon them, and three hundred thousand dollars (\$300,000) is suspended contingent upon respondents' compliance with the terms and conditions of this decision and order, including the attached Schedule of Compliance.

I assess a civil penalty of twenty thousand dollars (\$20,000) against the respondents for their violations of ECL 15-0503(1) and 6 NYCRR 608.3, allocated as follows: The County is assessed a penalty of two thousand five hundred dollars (\$2,500), of which one thousand two hundred fifty dollars (\$1,250) is suspended contingent upon the County's compliance with the terms and conditions of this decision and order, including the attached Schedule of Compliance. The Village is assessed a penalty of ten thousand dollars (\$10,000), of which five thousand dollars (\$5,000) is suspended contingent upon the Village's compliance with the terms and conditions of this decision and order, including the attached Schedule of Compliance. The Town is assessed a penalty of seven thousand five hundred dollars (\$7,500), of which three thousand seven hundred fifty dollars (\$3,750) is suspended contingent upon the Town's compliance with the terms and conditions of this decision and order, including the attached Schedule of Compliance. The non-suspended portions of each penalty for the violations of ECL 15-0503(1) and 6 NYCRR 608.3 shall be due and payable within sixty (60) days of service of this decision and order upon that respondent

NOW, THEREFORE, having considered this matter and been duly advised, it is **ORDERED** that:

- I. Respondents Village of Florida, Town of Chester, and County of Orange, New York, are adjudged, jointly and severally, to have violated ECL 15-0507(1) by failing to operate and maintain the Glenmere Lake Dam in a safe condition during the period July 1999 to April 27, 2007.

- II. With respect to their violation of ECL 15-0507(1), respondents Village of Florida, Town of Chester, and County of Orange, New York, are hereby directed, jointly and severally, to perform the activities described in, and within the time frames set forth in, the “Schedule of Compliance” attached as Exhibit A and incorporated by reference herein and made a part of this decision and order. Based upon such activities, respondents shall repair, reconstruct, breach and/or remove, the Glenmere Lake Dam, in accordance with the terms of and within the time frames set forth in the attached Schedule of Compliance, and in compliance with all applicable statutes and regulations including 6 NYCRR 608.3. Department staff may extend due dates only upon the occurrence of a force majeure event.
- III. Respondents Village of Florida, Town of Chester, and County of Orange, New York, are each adjudged to have violated ECL 15-0503(1) and 6 NYCRR 608.3 by performing work on the Glenmere Lake Dam without a permit.
- IV. Based upon the foregoing violations, respondents are hereby assessed civil penalties as follows:
 - A. Respondents Village of Florida, Town of Chester, and County of Orange, New York, are hereby assessed a civil penalty in the amount of three hundred thirty thousand dollars (\$330,000), joint and severally, for their violations of ECL 15-0507(1), of which three hundred thousand dollars (\$300,000) is suspended contingent upon respondents’ compliance with the terms and conditions of this decision and order, including the attached Schedule of Compliance;
 - B. Respondent Village of Florida, New York is hereby assessed a civil penalty in the amount of ten thousand dollars (\$10,000) for its violations of ECL 15-0503(1) and 6 NYCRR 608.3, of which five thousand dollars (\$5,000) is suspended contingent upon the Village’s compliance with the terms and conditions of this decision and order, including the attached Schedule of Compliance;
 - C. Respondent Town of Chester, New York is hereby assessed a civil penalty in the amount of seven thousand five hundred dollars (\$7,500), for its violations of ECL 15-0503(1) and 6 NYCRR 608.3, of which three thousand seven hundred fifty dollars (\$3,750) is suspended contingent upon the Town’s compliance with the terms and conditions of this decision and order, including the attached Schedule of Compliance; and
 - D. Respondent County of Orange, New York is hereby assessed a civil penalty in the amount of two thousand five hundred dollars (\$2,500), for its violations of ECL 15-0503(1) and 6 NYCRR 608.3, of which one thousand two hundred fifty dollars (\$1,250) is suspended contingent upon the County’s compliance with the terms and conditions of this decision and order, including the attached Schedule of Compliance.

The non-suspended portion of the civil penalties set forth in paragraphs IV.A through D of this decision and order shall be due and payable within sixty (60) days of service

of this decision and order upon that respondent. Should any respondent fail to comply with the terms and conditions of this decision and order, including the Schedule of Compliance, the suspended portion of the assessed civil penalty set forth in paragraph IV.A shall, upon notice by Department staff, become immediately due and payable by all respondents. In addition, with respect to the respondent that fails to comply with the terms and conditions of this decision and order, the suspended portion of the assessed penalty in whichever paragraph (IV.B, IV.C or IV.D) applies to that respondent shall also become immediately due and payable. All payments required by this order shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed or otherwise delivered to the Department at the following address:

New York State Department of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, NY 12233-1500
Attention: Scott Crisafulli, Esq.

- V. All communications from any of respondents concerning this decision and order shall be directed to Scott Crisafulli, Esq., at the address referenced in paragraph IV of this decision and order.
- VI. The provisions, terms and conditions of this decision and order shall bind Respondents Village of Florida, Town of Chester, and County of Orange, New York, their agents, successors and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

/s/

By: _____

Joseph J. Martens
Commissioner

Dated: May 23, 2013
Albany, New York

**EXHIBIT A
GLENMERE LAKE DAM
SCHEDULE OF COMPLIANCE**

COUNTY OF ORANGE, VILLAGE OF FLORIDA AND TOWN OF CHESTER

REMEDIAL ACTIVITIES	DUE DATE OF COMPLETION²³
I. Respondents shall submit to the Department a report of progress, including funds allocated and expended, proposals or contracts released or let, percent design or construction completed, and other significant items.	Monthly, with the first such report to be received by the Dam Safety Section no later than 30 days after the date of this decision and order
II. Respondents shall notify the Department of the name, address, telephone number, and PE license number of the professional engineer, registered in NYS and experienced in dam safety, who will act as Project Manager.	75 days after the date of this decision and order
III. Respondents shall submit to the Department an acceptable Emergency Action Plan (EAP), and an acceptable Inspection and Maintenance (I&M) Plan. The EAP shall be fully coordinated with, and accepted by, local emergency responders and shall include a complete Promulgation and Concurrence Form.	105 days after the date of this decision and order
IV. Respondents shall submit to the Department a completed Annual Certification form or forms.	105 days after the date of this decision and order
V. Respondents shall notify the Department of the name, address and telephone number, and PE license number of the professional engineer, registered in NYS and experienced in dam safety, who has been retained to develop plans for remedial work to correct the dam's deficiencies (design engineer).	135 days after the date of this decision and order
VI. Respondents shall submit to the Department a complete permit application including, but not limited to, a Final Basis of Design Report, engineering plans, and specifications. The engineering plans and specifications shall represent the remedial work required to complete the selected alternative, ²⁴ including the control of water during construction, and shall be signed and sealed by the design	195 days after the date of this decision and order

²³ "Due Date of Completion" on this Schedule means on or before 5:00pm on the day identified. For those Remedial Activities requiring submission, notification or provision to the Department, the Due Date of Completion refers to the date that the Department must receive such submission, notification, or provision. Department staff may extend due dates only upon the occurrence of a force majeure event.

²⁴ The selected alternative may include repair, reconstruction, breach and/or removal of the dam.

engineer.	
VII. Respondents shall notify the Department of the name, address, and telephone number, and PE license number of the professional engineer, registered in NYS and experienced in dam safety, who has been retained to oversee and direct the remedial work (construction engineer).	195 days after the date of this decision and order
VIII. Respondents shall commence the remedial work in accordance with the engineering plans and specifications that have been approved by the Department.	30 days after the Department issues the permit
IX. Respondents shall substantially complete the remedial work, and shall submit to the Department an updated Inspection and Maintenance (I&M) Plan reflecting the revised configuration of the dam.	150 days after the Department issues the permit
X. Respondents shall notify the Department in writing by certified mail (return receipt requested) of the completion of the remedial work, which shall include a signed and sealed statement from the construction engineer that the project has been completely constructed under his/her care and supervision, and was completed in accordance with the engineering plans and specifications approved by the Department.	150 days after the Department issues the permit
XI. Respondents shall provide to the Department one complete set of “as-built” records. The record drawings shall be signed and sealed by the construction engineer and shall include identification of all changes from the approved plans.	180 days after the Department issues the permit
XII. Respondents shall submit to the Department a completed Annual Certification form, and shall review the EAP and submit any required revisions.	470 days after the date of this decision and order (1 year after submission of the prior Annual Certification and EAP)

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter

- of -

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

by:

VILLAGE OF FLORIDA, TOWN OF CHESTER, and COUNTY OF ORANGE,

Respondents.

DEC Case No. CO3-20070201-2

HEARING REPORT

/s/

Helene G. Goldberger
Administrative Law Judge

January 23, 2013

Proceedings

Pursuant to a notice of hearing and complaint dated April 27, 2007, the staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against the respondents Village of Florida, Town of Chester, and County of Orange for alleged violations of Article 15 of the Environmental Conservation Law (ECL) and Parts 608 and 673 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). Based upon Chief Administrative Law Judge (CALJ) McClymonds' ruling on its motion to amend its pleading (September 26, 2007), the DEC staff amended its complaint to add the Town of Warwick. Hearing Exhibit (Ex.) 1. However, upon further review, staff determined that the Town of Warwick was not a proper party to this enforcement proceeding and moved to discontinue the matter against the Town by motion dated August 15, 2011. Such relief was granted by CALJ McClymonds on September 22, 2011.

Pursuant to ECL § 15-0507, the Department staff alleges that respondents Village of Florida (Village), Town of Chester (Town), and County of Orange (County) are owners of a structure known as the Glenmere Lake Dam (State Dam ID No. 179-0460) located at the north end of Glenmere Lake in the Town of Chester. The complaint further alleges that respondents failed to operate and maintain the dam in a safe condition in violation of ECL § 15-0507, and that respondents conducted repairs on the dam without a permit in violation of ECL § 15-0503(1) and 6 NYCRR § 608.3. Respondents have each filed answers. The Village's answer is dated May 10, 2007 (Ex. 2), the Town's answer is dated May 7, 2007 (Ex. 3), and the County's answer is dated May 25, 2007 (Ex.4).

The parties engaged in a period of settlement discussions and discovery and by statement of readiness dated April 27, 2012 (Ex. 6), Department staff asked the Department's Office of Hearings and Mediation Services (OHMS) to schedule a hearing. On May 8, 2012, the matter was assigned to me and hearing dates of October 15-19 were set. The hearing proceeded on October 15, 2012 at 10:00 a.m. and concluded on the afternoon of October 18, 2012, in the Department's Region 3 offices in New Paltz, New York. On the morning of October 18, 2012, the parties joined me at the dam for a site visit where we viewed the features of the dam including the lake, the chain link fence along the upstream face of the dam, the signage on the fence noting "Property of Orange County – no trespassing" as well as other warnings indicated by order of the Board of the Village of Florida, the spillway, stop logs, and concrete box culvert which the water flows into, the road atop the dam, the culvert under the road, the brick culvert further downstream and the entrance to Brown's Creek. We also observed the location of the Village's water treatment facility.

The hearing transcript volumes were received by the OHMS between October 24 and November 5, 2012; I sent the parties my corrections to the transcript on December 12, 2012 and invited same from the parties by January 4, 2013. However, I did not receive additional transcript corrections. Closing memoranda were submitted to me on the due date of December 7, 2012 by the Department staff, Orange County and the Town of Chester. The Village of Florida

submitted its brief on December 14, 2012. Based upon the objections of the parties including the fact that the Village addressed aspects of the other parties' closing memoranda in its brief, I accepted the brief but denied the Village an opportunity to submit a reply. The Town of Chester submitted its reply on January 2, 2013 and the replies of the staff and County were received on January 4, 2013 (the due date), closing the record.

The Department staff was represented by Robyn M. Adair, Esq. and Mary E. Wojcik, Esq. The Village was represented by Bernard Kunert, Esq. of Florida, New York. The Town was represented by Scott Bonacic, Esq. and James V. Galvin, Esq. of Bonacic, Krahulik, Cuddeback, McMahon & Brady, LLP of Middletown, New York. The County was represented by Joseph Mahoney, Esq. of the Office of the County Attorney, Goshen, New York.

Department staff presented the following witnesses: Scott Braymer, P.E.; Jeffrey Martin, PLS; and Alon Dominitz, P.E. The Village presented James Kennedy, the Village of Florida's Water Superintendent. The other respondents elected not to present any witnesses.

The Charges and Relief Sought

In its complaint, the Department staff alleged that from August 1981 to the date of the amended complaint – October 18, 2007 – the respondents failed to operate and maintain Glenmere Lake Dam (hereinafter the dam or GLD) in a safe condition in violation of ECL § 15-0507. At the commencement of the hearing, staff moved to amend the complaint to alter the start of alleged lack of maintenance to July 1999. Ms. Adair explained that in July 1999, the Legislature amended ECL § 15-0507(1) to clarify that the responsibility for dam maintenance and safety rests on dam owners. Hearing Transcript (TR) 14. There was no opposition to staff's proposed amendment and I allowed it.

The staff has determined that the three respondents are statutory owners of the dam. TR 16. With respect to Orange County, the staff maintains that Orange County is the principal fee owner of the dam. Staff relies in part upon the 2009 Tectonic survey of the area depicting the County's (and Village's) ownership of the land adjacent to and beneath the dam. Exs. 21a, b (reduced copies annexed hereto). In addition, the staff relies upon the title review performed by Jeffrey G. Martin, PLS including the document identified as the "1892 Cable indenture" throughout these proceedings to establish Orange County as the principal fee owner of the land at the dam site. Exs. 14a, 22. The Cable indenture granted to the Florida Water Works Company (FWWC) (alleged to be the Village's predecessor in interest) and its successors the right to "raise" the dam and to take water, reserving to the landowners and their successors, rights to the use of the Lake. *Id.* As for the Village, the staff found that it owns a smaller portion of the land at the westerly end of the dam site near the Village's water filtration plant and uses the lake as a water supply. Staff Br., 10-11; Exs. 21a,b and 22. Based on the Town's use and maintenance of the road that is sited on the top of the dam's embankment, the staff has determined it too has owner responsibility as a user of the dam. Staff Br., 11-12.

In support of its claim that the respondents have failed to operate and maintain the dam in a safe condition, the staff alleged: the respondents have allowed a seriously inadequate spillway to exist at the dam; the respondents have failed to clear undesirable and excessive vegetative

growth along the upstream face of the dam; and the respondents have failed to prepare and maintain an emergency action plan (EAP). TR 15. Staff also alleges that from on or before December 13, 1998 until at least July 12, 2006, the respondents conducted unauthorized repairs on the dam without a dam repair permit issued by the Department in violation of ECL § 15-0503.1. At the conclusion of the enforcement hearing on October 18, 2012, DEC staff moved to conform the pleadings to the proof by adding that the respondent Village had performed additional unpermitted work at the dam in violation of ECL § 15-0505 in 2006 and 2007 when it excavated, installed water pipes, and backfilled. TR 803. I reserved on my decision with respect to this motion. See, ruling on p. 18, *infra*.

Staff has concluded that the dam – classified as C – a high hazard dam – has been seriously deficient in its structure and maintenance since 1981. Staff described the dam as “very dangerous” because in the event of a dam failure there was no system in place to alert downstream owners. TR 15.

Staff seeks a penalty of \$250,000 from the respondents in addition to an order directing the respondents to conduct the necessary studies and obtain the necessary permits to repair the dam in conformance with dam safety criteria. TR 16; Exs. 26, 27A; Staff’s Brief (Br.), 18-23. Staff also stresses the importance of the preparation of an EAP and an acceptable inspection and maintenance plan. *Id.* At the hearing, Mr. Dominitz was cross-examined by the Village attorney regarding the penalty calculation and it came to light that the penalties for the Article 15 violations were increased in February 2012 and staff applied the higher penalty schedule in their calculations. TR 653-654. I asked the staff to recalculate its penalty request using the older statutory scheme as appropriate pursuant to ECL § 71-1127. TR 659. Staff disagreed with me and the other parties that the newer penalty scheme did not apply and this was addressed in its closing brief. TR 660-662; Staff Br., 20-22. In its brief, staff also offers as an alternative a penalty of \$225,000 based upon a bifurcated scheme with the lower penalty applying to the alleged violations that occurred prior to February 2012, and the alleged violations that occurred after that date subject to the higher penalty. Staff Br., 21-22.

The Village’s Position

In its answer, the Village denied the allegations or denied knowledge or information sufficient to form a belief as to the allegations. Ex. 2. It requested that the complaint be dismissed. *Id.* In its closing memorandum and reply, the Village opposes the staff’s third calculation of its penalty proposal stating that it was denied the right of cross examination with respect to this document. Village Br., 1. As to staff’s motion to amend the complaint regarding alleged violations by the Village in performing unpermitted repairs to its water supply system that traversed the dam, the Village maintains that the boundary of the dam was not established at the hearing, there is no proof that there was a permit required, and given the time that has elapsed, the statute of limitations or laches bar prosecution. Village Br., 1-2.

With respect to any other unpermitted work alleged by DEC, the Village maintains that it was performed by the Town of Chester or alternatively, the staff did not provide proof as to who did the work. Village Br., 2-4. Concerning the alleged dumping of fill, the Village states that it is the Town and County who are responsible. Village Br., 4. The Village argues that there was

no evidence of excessive vegetative growth on December 18, 2012, when the site visit was made during the hearing. Village Br., 3. As for the alleged inadequacy of the dam, the Village argues that the dam has withstood the test of time and this is more persuasive than “studies by engineers who are loathe to admit that anything is working properly.” Br., 3.

The Village agrees with staff that the County is the record owner of the dam, its spillway, and the ravine, and that the Town is responsible for the road over the dam. Village Br., 4.

With respect to the Cable indenture (Exs. 14a, b), the Village argues that it is the intent of the parties that created the document that is key, and that it must be interpreted based on the culture of the time. Village Br., 7-8. Accordingly, the Village finds that “[i]t would be incomprehensible to infer that the intent of the FWWC, by virtue of accepting the Cable deed, was to hold the Cable and their heirs, harmless from DEC prosecution.” Village Br., 8. Moreover, the Village asserts that in any case there is no proof that the Village succeeded to the rights of the FWWC. *Id.*

The Village disputes Mr. Dominitz’s expertise to present a penalty calculation. Village Br., 4-5. The Village also argues that while Mr. Dominitz maintains that the violations existed for decades, it was only in 1999 that the statutory owners were made responsible by the Legislature. Br., 5. The Village characterizes the staff’s economic benefit calculation as “complete fantasy,” finding that the rate of interest staff proposed would have multiplied the Village’s savings on the dam repairs as unrealistic. Village Br., 6. The Village argues that there is no economic benefit to a municipality that can only spend money on specific designated projects and not invest purely to profit. *Id.*

The Town’s Position

In its answer and its opening statement at the hearing, the Town asserted that it does not own the dam. Ex. 3; TR 17-18. On behalf of the Town, Mr. Galvin stated that the road over Glenmere Dam is a user road and Chester only acts to maintain the road and is not considered an owner. TR 17-18. Mr. Galvin maintained that the Town derives no benefit from the dam and has no ownership interest in the lake. TR 18. In its closing memorandum, the Town reiterates these positions. Particularly, the Town argues that its involvement with the road is limited to maintaining only a section of it within its boundaries and that the Town remains willing to work with DEC “to accommodate any work to be done on the Glenmere Dam by the other municipalities or entities who own or operate the Dam itself.” Town Br., 2, 7-8. Citing the County Attorney’s 1985 opinion (Ex. 15), the Town explains that it is Orange County and the Village of Florida (via the Florida Water Works Company) that have the ownership interests in the property surrounding the lake and the water rights respectively. Town Br., 2-3. The Town notes that the dam benefits both the Village, which obtains its water from the dam, and the County, which purchases the water for use at County facilities, while the Town gets no benefits from the dam. Town Br., 3.

The Town notes that it was not identified by DEC as a responsible party until January 2, 2007 and therefore, the Town was not aware until such time that it was being identified as an “owner” of the dam. Town Br., 3-7. In its reply brief, the Town strenuously denies any

culpability for either maintenance of the dam or for performing any of the alleged illegal work on it, due to its failure to receive any notice of ownership prior to 2007. The Town emphasizes that the staff's witness "could not point to anything the Town of Chester had done specifically nor to anything the Town of Chester had refused to do after January 24, 2007." Town Br., 9. The Town cites to its letter of January 24, 2007, in which it offered to cooperate with DEC "in closing any road or roadway necessary to accommodate the repairs by the other municipalities" as demonstrative of its willingness to assist. Ex. 49. The Town disputes DEC's claim that it shared culpability for any refusal to participate in remediation of the dam based upon its lack of ownership and notification. Town Br., 11-12. In its reply, the Town agrees with the Village that the dam has withstood "everything nature has thrown at it for over 150 years and disaster projections of the DEC engineers are unrealistic." Town Reply, 3. The Town concludes that in the event that the Department deems it a statutory owner, the repairs should be consistent with DEC's preferred alternative stated in its January 2, 2007 letter (Ex. 12q) - breaching the dam - and that the Town should not be penalized for lack of repairs it could not undertake on its own. Town Br., 13.

The County's Position

In its answer, the County asserts that it does not own, operate, or maintain the dam and is therefore not a proper respondent. Ex. 4. In addition, the County responds to the complaint by stating that the penalties are excessive and the failure to maintain an EAP is not a violation of any law, regulation or rule. Ex. 4, ¶¶ 19, 20, 28. At the hearing, Mr. Mahoney stated that the County does not own the dam but rather the lake bottom. TR 18. While the County has acted to help the involved municipalities address the dam's issues, it asserts that its involvement is not required. TR 18-19. Mr. Mahoney noted that it does purchase water from an entity that uses the dam. TR 19.

In its closing and reply memoranda, the County reiterates that because it does not meet the statutory definition contained in ECL § 15-0507(1), the only manner it could be deemed an owner is through a real property interest which it does not have. County Br., 2-21; Reply Br, 2-13. The County maintains that while it owns the underlying property, the dam was the responsibility of the Florida Water Works Company via the Cable indenture. County Br., 2-3. Moreover, the County points to several documents in which the Army Corps of Engineers, Tectonic Engineering and the Department deemed the FWWC, and then the Village, the dam owners. County Br., 5. The County argues that the Department staff's expert witness - a surveyor - did not provide an answer to the question of whether the property owner was also the owner of the dam. County Br., 7-12. Essentially, the County explains that even if there was no reservation regarding the dam in the 1978 deed that transferred the property to Orange County, the property was transferred subject to the rights of FWWC which includes the ownership interest in the easement and any property placed within it. County Br., 12; Ex. 23a. The County finds that under New York's real property law, it is a servient estate owner and therefore, not entitled to interfere with the rights of the dominant estate. County Br., 3-4.

With respect to the Department's allegations of unpermitted work on the dam, the County states that the Department staff provided no evidence of the County having done any of the

subject work and therefore, this cause of action vis a vis the County should be dismissed in its entirety. County Br., 22-23, County Reply, 13.

The County points to the Village as the appropriate responsible party pursuant to the ECL because it “uses” the dam as a water supply and reaps a financial benefit from this activity. County Br, 23-24; Exs. 50a-50k; TR 791-794. In addition, the County notes that it was the Village that performed repair and maintenance work on the dam. County Br., 24; Ex. 41. Lastly, the County notes that the 1892 Cable indenture permitted the FWWC to build a dam and take water from the lake and obligated the FWWC, along with its successors, to maintain the dam. County Br., 24; Ex. 14b. As successor to the FWWC, the Village steps into its shoes, the County argues. County Br., 24.

FINDINGS OF FACT

History of Dam and Physical Description

1. The Glenmere Lake Dam is a 600 feet long earth embankment located at the north end of Glenmere Lake, much of it underneath Florida Road, in the Town of Chester at the boundary of the Town of Warwick, Orange County, New York. TR 44; Ex. 10, p. 1; Ex. 11, Figure 1. The dam impounds approximately 616 million gallons of water. TR 243. DEC has assigned to it an identifying number of 179-0460 and a classification of C – high hazard dam. TR 45; Ex. 11, p. 4. The lake is 328 acres and is a water supply for the Village of Florida. TR 797; Ex. 11, p.3; Exs. 50a-k.

2. The dam was built originally to power a mill but since 1892 has been used for a water supply. Exs. 10, p. 2; 11, p. 3; TR 65.

3. Water flows from the lake over the spillway into a box culvert through the embankment underneath Florida Road. Ex. 10, Section 1 – Project Information, p. 1; TR 34. On the downstream side of the dam (across Florida Road), there is a culvert that leads to another older brick culvert and then the water flows into Brown’s Creek, a tributary of the Walkill River and Hudson River, approximately one mile east of the Village of Florida. Ex. 10, p. 1; TR 34-35.

4. The Department’s dam safety hazard classification is based upon an estimate of the downstream consequences if the dam were to fail. TR 97; *Guidelines for Designs of Dams* (NYSDEC – Revised January 1989).¹ This classification is used to determine the spillway design for a dam. *Id.* The classification for the Glenmere Lake Dam is C – high hazard – because of the number of homes and other properties that could be damaged as a result of dam failure. Ex. 11, p. 4.

5. In the early to mid-1800’s, in the vicinity of the Glenmere Lake Dam there was a dam built to power a mill. Ex. 11, p. 3; Ex. 15, p. 8. The remains of the mill structure are located downstream and approximately 100 feet east of the dam. Ex. 11, p. 3. In 1993, staff for

¹ In response to staff’s request, I took official notice of this document which provides essential information on the Department’s dam safety program including definitions of terminology. TR 357.

Tectonic Engineering Consultants, P.C. found the remains of two steel plate pipes which they determined had served the mill and passed through the dam embankment approximately 225 feet west of the mill remnants. *Id.*

Ownership of Dam and Surrounding Lands

6. On September 22, 1892, Hanford R. Cable and Hulda, his wife, entered into an agreement with the Florida Water Works Company in which FWWC was allowed to enter the Cable property and to “raise” a dam “so as to raise the water” in Glenmere Lake. Exs. 14a, b. The Cables included in this indenture the right to “dig, excavate and lay mains or pipe to tap said Lake and to take and to carry away such additional accumulated surplus waters as shall be stored or accumulated by reason of the raising of the dam and roadway.” *Id.* This indenture requires the FWWC and its successors to “maintain a good and sufficient dike, dam or breakwater” “so as to fully protect the lands and premises” of the Cables. *Id.* The FWWC was also required to clean up and remove from the premises any refuse and debris. *Id.* The Cables maintained the rights for themselves and their heirs and successors to use the lake and occupy the land. *Id.* Similarly, the agreement provides that FWWC and its successors would “quietly enjoy the said privileges granted.” *Id.* At the same time that Cable and FWWC entered into this agreement, FWWC also obtained rights from adjoining landowners to raise the height of the waters of the lake for its use. Ex. 15, p. 13.

7. On March 6, 1978, successor owners of the land - Glenmere Lake Estates and A.M. Gootnick - sold to the County of Orange the lands surrounding and including the lake and lake bottom – approximately 1330 acres.² Exs. 15, p. 7; 22; 23b. The land was conveyed subject to certain rights including highway rights and the rights of the FWWC. Exs. 15, 22, 23b, pp. 6-7. The County retained rights to Glenmere Lake subject to the easement of the Village. Ex. 15, p. 12.

8. On May 12, 1992 and August 14, 2002, the County conveyed to the Village of Florida portions of this property. Exs. 22, 23c. The Village operates a pump house and water treatment building with appurtenant equipment sheds on site. Ex. 11, p. 3; Ex. 21a; TR 773. In addition, the Village, as the successor in interest to the FWWC, has rights to use water from the Lake. Ex. 15.

9. The respective ownerships by the County and Village of the lands surrounding and including the Lake and dam are depicted on Exs. 21a, b.

10. The Town of Chester maintains a section of the road known as Florida Road that is located on the embankment of the dam. Ex. 25.

Regulatory Investigation and Efforts to Address Dam Maintenance

11. The Department staff inspected this dam on July 19, 1973, when it was reclassified from

² A more detailed chain of title to these lands is described in the County Attorney’s Opinion of June 29, 1995, p. 7. Ex. 15.

a Class B to Class C - high hazard - dam. Ex. 12a. At this inspection, staff determined that the joints, upstream slope, cracks, spillway, spilling basin, surface of concrete, and toe of slope were inadequate and in need of major repair. *Id.*

12. By letter dated January 18, 1980, Kenneth D. Harmer, DEC's Dam Safety Coordinator, wrote to Mayor John B. Harter of Florida, New York, noting that an inspection was performed on December 18, 1979, that showed the downstream face of the dam was deteriorating. Ex. 12v. Mr. Harmer suggested that "normal maintenance" be done "so that no further deterioration occurs." *Id.* He stated that a complete engineering analysis of the dam would be done by DEC's office within two years; however, there is no indication that this was done. *Id.*

13. In 1981, the DEC Dam Safety Section in cooperation with the New York District Engineer of the Army Corps of Engineers (ACOE) completed a Phase I inspection of the GLD. Ex. 10. As stated in the report of this inspection entitled *Phase I Inspection Report – National Dam Safety Program – Glenmere Lake Dam*, the dam is classified as a high hazard dam due to its location above several low-lying homes. TR 54; Ex. 10, p. 1. See also, Ex. 11, p. 4. The report notes that the purpose of the inspection was to identify "expeditiously" any hazards to human life or property. *Id.*, preface. The report concluded that the dam's spillway was seriously inadequate and therefore the dam was assessed as unsafe - non-emergency. *Id.*, Assessment. In order to address this condition, the authors recommended that a study be undertaken to determine the "site specific characteristics of the watershed." *Id.* This information would provide the basis for identification of appropriate remedial measures to provide a spillway that would be "adequate to discharge the outflow from at least the ½ PMF [probable maximum flood] event."³

14. This report also noted additional deficiencies: 1) collapsing portions of the retaining wall on the downstream slope of the embankment; 2) seepage at several points on the downstream toe of the embankment; 3) deteriorated concrete elements and joints of the spillway structure; 4) need to repair and backfill wingwalls; 5) heavy vegetation and debris in and around the spillway channel; 6) need to remove the stoplog in the spillway to reduce normal pool elevation and to riprap the upstream slope; 7) need to develop a program of periodic inspection and maintenance of the dam and appurtenance and to document this information for future reference; 8) need to develop an EAP. *Id.* The report also concluded that during the ½ PMF event, there would be overtopping along the entire length of the dam by up to 0.65 feet. TR 59.

15. On August 12, 1982, Department staff performed a visual inspection of the dam. Ex. 12u. At that time, the inspector indicated that FWWC was the owner of the dam. *Id.*; TR 79. The inspector deemed the condition of the dam "unsafe-nonemergency" and noted that none of the previously noted deficiencies had been corrected. The inspector found the conditions the same as depicted in the 1981 ACOE Phase I report. *Id.*; TR 80. Based on New York State's dam safety criteria contained in Part 673, this dam's status was deemed unsound. TR 80. The particular deficiencies noted were – a stoplog placed along the crest of the spillway; a collapsing

³ PMF is the worst combination of meteorological and hydrological conditions that could be expected to occur. TR 37. It would occur as a result of the probable maximum storm – the worst storm that is expected to occur over a watershed. *Id.* A spillway is required to pass the spillway design flood or SDF which in the case of a class C high hazard dam is ½ the PMF. See, *Guidelines for Designs of Dams*, pp. 4,8 (NYSDEC – Revised January 1989).

shoulder that had been rebuilt with timbers and stakes on the downstream side of the road culvert; cattails in abundance on the dam; and seepage at the toe. TR 81; Ex. 12u.

16. On December 13, 1988, DEC staff inspected the dam and observed that there had been no remedial work initiated; drainage and regrading work had been performed near or around the water treatment building; there was a new road shoulder with riprap into the lake; a fence was installed (by Orange County, according to the inspector) along the entire upstream face of the dam, with no DEC permit; and two bubblers were put in the water to keep intake free of ice. Ex. 12g. In photo 11 annexed to this inspection report, the inspector noted that the spillway had a flashboard in place. Mr. Brayer corrected this characterization, indicating that it was rather a stoplog; noting that both perform the function of raising the crest of the spillway. TR 81-82. The difference is that a stoplog is not intended to fail during high water. TR 82. Other photographs annexed to this inspection report show vegetation on the dam; collapsed face of the downstream masonry wall; and fill placed on the left downstream side of the dam. Photos 15, 16, 17, 18, and 19 annexed to Ex. 12g.

17. Trees that are allowed to grow on an embankment permit roots to penetrate into the structure, creating seepage paths and erosion. TR 82. If the trees come down in a storm, they can cause big holes in the embankment with their root balls, endangering the embankment. This vegetative growth also obscures sections of the dam, potentially covering up problems as well as creating pathways for animals to burrow. TR 82-83.

18. There was no evidence in the DEC's records that the work observed during the December 13, 1988 inspection was permitted. TR 84. By letter dated June 6, 1989, Department staff alerted Mayor John Harter of the Village of Florida that the "significant deficiencies concerning spillway capacity and structural deterioration remain uncorrected." Ex. 12h; TR 85-86.

19. An inadequate spillway capacity can result in overtopping of a dam when a storm larger than the spillway capacity occurs. TR 86. This overtopping can cause erosion and failure of the embankment – releasing the impounded water of the lake. *Id.*

20. On May 21, 1990, Mr. Walter Lynick, P.E., Senior Engineer of DEC's Dam Safety Section in that era, wrote to Mayor Harter asking again for a status update on the Village's engineering and remedial work vis a vis the dam. Ex. 12i. In addition, he provided the results of a dam safety inspection on April 17, 1990, which revealed that a portion of the upstream paved slope protection adjacent to the spillway had failed and that fill material of poor quality had been improperly placed on the downstream left end of the embankment. Mr. Lynick reminded the Mayor that any work on the dam had to be authorized through DEC by an Article 15 permit. *Id.*

21. On November 17, 1992, Walter Lynick, P.E. visited the dam again and observed that no remedial measures had taken place at the dam. Ex. 12j. He observed seepage, surficial deterioration, voids in the structure, undesirable growth on the dam, cracking and need for maintenance. *Id.* He also observed that the downstream slope had filling consisting of random fill – earth, shale, clay, broken asphalt pavement pieces, etc. *Id.*

22. In 1993, Tectonic Engineering Consultants, P.C. prepared a report for the Orange County

Department of Public Works (Tectonic 1993 report) to evaluate all the available information on the dam as well as do an inspection to “determine the appropriate remedial measures required to achieve a spillway capacity to discharge the outflow, [as required by DEC regulations]”. TR 64; Ex. 11, pp. 1-2. Among the findings of this report was the observation that “[s]ince the Corps of Engineers . . . report, a substantial amount of fill material has been placed along a 300 plus or minus foot length of the downstream side of the masonry stone and concrete walls along the section of dam beginning approximately 125 feet from the spillway heading westward.” Ex. 11, p. 10. Tectonic Engineering concurred with the previous findings of the 1981 Army Corps report with respect to the inadequacy of the spillway, placement of unauthorized fill, and lack of a low level outlet. Ex. 11, p. 18; TR 68. Tectonic Engineering found that the overtopping would be double what was predicted in the 1981 report. TR 68.

23. A June 1994 inspection by two DEC inspectors revealed that there was seepage along most of the toe to the left of the spillway; embankment material on the right side of the spillway was sliding; the right side of the spillway outlet channel was caving in; the left side of the spillway outlet channel had stones displaced and missing; and there was surface deterioration on the upstream face of the spillway walls. Ex. 12k. In addition, the inspectors noted that a drainage pipe below the dam was being removed and a new ditch parallel to the pipe was being dug. *Id.*

24. On April 4, 1996, two DEC inspectors observed that fill had been dumped behind the dam and that overall, the conditions at the dam were similar to the last inspection. Ex. 12l.

25. On October 22, 1998, Stephen Len, DEC Senior Engineer, Bureau of Flood Protection, wrote to Deputy Commissioner Vincent L. Soukoup, P.E. of the Orange County Department of Public Works requesting an update on the status of Orange County’s plans to repair the dam. Ex. 12m. He also noted that at his April 20, 1998 inspection of the dam he viewed a six-inch stoplog in place in the spillway and recommended that it be removed. *Id.*

26. On June 15, 2000, Edward Blackmer, P.E. of DEC’s Division of Dam Safety and Flood Control Projects wrote to Deputy Commissioner Soukoup advising him of a May 17, 2000 inspection of the dam that revealed undesirable growth, lack of adequate spillway, structural damage, and inadequate maintenance. Ex. 12n. He reiterated the request to remove the stoplog and recommended that the dam be evaluated by a licensed engineer and that action be taken so that the dam was safely operated and maintained. *Id.* Mr. Blackmer requested that the County respond by August 1, 2000. *Id.*; TR 86.

27. In 2002, the Town of Chester performed work on the road that is on the top of the dam. Ex. 13; TR 95. The fill that was placed on the downstream face of the dam was not an engineered material that was properly benched and compacted and thus could not be used as a stable base for reconstruction of the dam. TR 99. This fill also obscures the view of the original face. TR 101. The placement of pavement on the road on the top of the dam raised the top of the dam, allowing for more water storage that could increase the flooding risk downstream. *Id.*

28. On February 19, 2003, Mr. Blackmer wrote to Commissioner Edmund Fares of the

Orange County DPW to advise that a March 19, 2002 dam safety inspection revealed the same deficiencies of undesirable growth, lack of adequate spillway capacity, structural damage and inadequate maintenance. Ex. 12o. The DEC inspector also noted that a new road culvert was installed below the spillway and a head wall had been added to the outlet end of the service spillway outlet barrel. Mr. Blackmer advised Commissioner Fares that this work as well as the concrete work on either side of the new pipe barrel was illegal. *Id.* In this letter, Mr. Blackmer also advised the County that it was “potentially liable for damages done by discharge waters from the dam in the event of a failure.” *Id.* He also advised the County that Bond Act monies might be available to help share the cost of repairs and advised where to find information on applying for such assistance. *Id.* Mr. Blackmer requested a response by April 1, 2003. *Id.*

29. On May 13, 2005, Alon Dominitz, P.E. of DEC’s Dam Safety Unit, wrote to the Mayor of the Village of Florida and Commissioner Fares regarding an inspection he performed of the dam on September 28, 2004. Ex. 12p. He explained that he had observed a new low-profile corrugated metal pipe that had been installed at the dam’s outlet, a new road surface and new fill on the downstream slope of the dam. *Id.*; TR 87. The new culvert reduced the flow area of the culvert from the box culvert in the spillway. TR 88. As a result, there is a reduction in flow area that could reduce spillway capacity. TR 89. Mr. Dominitz stated that the work he had observed required a permit but no permit had been applied for or obtained. *Id.* He also noted that there had been no response to the February 19, 2003 letter and there was a continuing need for an emergency action plan (EAP), and the retention of an engineer to evaluate the dam and devise a plan for addressing the deficiencies. *Id.* Mr. Dominitz also revealed that a new road surface, approximately 2 inches higher than the existing road surface, was being installed at the dam’s crest and there was new fill on the downstream slope of the dam. Ex. 12p. Mr. Dominitz requested that a written response be sent by July 29, 2005, containing a schedule for addressing the dam’s deficiencies. *Id.*

30. By letter dated January 2, 2007, Scott Braymer, P.E. of DEC’s Dam Safety Unit wrote to Orange County Executive Edward A. Diana, Commissioner Fares, Town of Chester Supervisor William Tully, and Village of Florida Mayor James R. Pawiliczek, Sr. regarding the results of a July 12, 2006 inspection that revealed the same inadequate conditions at the dam as had been previously observed and documented. Ex. 12q; TR 90-91. The inspection report that accompanied the letter indicated that no drain was observed, the upstream face was overgrown with weeds, the spillway had debris on the crest, the downstream face of the dam was armored with riprap and dumped cement, and the left side of the downstream face was filled in with road debris. Ex. 12q. There was also a stoplog still in place across the crest of the spillway. *Id.*; TR 91. In his letter, Mr. Braymer noted that the Department staff had determined that the County, Village and Town were all owners of the dam and responsible for its maintenance. *Id.* He requested a coordinated response to address the needed remediation of the dam within 15 days of the receipt of his letter. *Id.* Prior to the hearing, neither the County, the Town, nor the Village addressed the conditions described in the letter. TR 115-116.

31. Between 2006 and 2007, the Village of Florida hired subcontractors to replace some water main pipes on property owned by the Village adjacent to the dam. TR 766. These workers

excavated the ground, installed replacement pipes, replaced earth, and regraded the landscape. TR 767-768. The work took place on the downstream embankment of the dam. TR 765-767; Ex. 21a, b. The Village did not have an Article 15 permit to perform this work.

32. By letter dated November 26, 2008, Mr. Braymer wrote to Town of Chester, Orange County, the Village of Florida, and also the supervisor of the Town of Warwick regarding his inspection on October 22, 2008 in which he observed weeds and brush on the dam faces and the outstanding need for an EAP. Ex. 12r. The stoplog across the crest of the dam was still in place and on the downstream face there was spoil material along the left side and waist-high weeds. *Id.* He noted a pipe perpendicular to the road at the right end of the spoil fill and a pipe buried in the downstream toe of the spoil fill flowing about 50 gallons a minute into the stream. *Id.* The water coming out of the pipe was discolored. *Id.* The pipe arch under the road was starting to corrode and there were stones displaced from the walls of the outlet channel. *Id.* Woody debris was seen clogging the outlet channel before the drop into the stream bed. *Id.* Based upon a review of 2007 photographs and a USGS topographical map, in this inspection report, Mr. Braymer also noted the development downstream of the dam that could be affected if the dam failed. *Id.* In his cover letter, Mr. Braymer explained that the growth on the dam could cause erosion and also obscured a visual observation of the dam. *Id.* He recommended that the brush and spoil material be removed and explained that grass is preferable for an earthen embankment. *Id.* He advised the municipalities of DEC's efforts to revise the dam safety regulations and invited their input. *Id.* Mr. Braymer reminded the municipalities that any work on the dam may require a DEC permit. *Id.*

33. By letter November 16, 2010, Mr. Braymer reported his findings on his November 2, 2012 inspection of the dam to the County, Village of Florida, Town of Chester and Town of Warwick. Ex. 12s. The letter is largely a reiteration of the findings and directives contained in previous correspondence from DEC staff to the municipalities. *Id.*

34. By letter dated September 12, 2011, Mr. Braymer wrote to Orange County, the Village of Florida, the Town of Chester, and the Town of Warwick reporting the results of a post-Hurricane Irene inspection of the GLD. Ex. 12t. While reporting that the dam did not appear to sustain damage as a result of the storm, Mr. Braymer provided a summary of the new dam safety requirements. *Id.*

35. The Glenmere Lake Dam is unsafe based on its unsound structure, its inadequate spillway, and the lack of an emergency action plan in the event of a dam failure. TR 100; Ex. 12r.

DISCUSSION

By its complaint dated October 18, 2007 (Ex.1), the staff alleges that since July 25, 1999, the respondents have committed violations of Article 15 of the ECL and Parts 608 and 673 of 6 NYCRR. Specifically, staff alleges that the respondents have failed to operate and maintain the dam in a safe condition in violation of ECL § 15-0507, and that respondents conducted repairs on the dam without a permit in violation of ECL § 15-0503(1) and 6 NYCRR § 608.3.

ECL § 15-0507(1) provides:

“Any owner of a dam or other structure which impounds waters shall at all times operate and maintain said structure and all appurtenant structures in a safe condition. As used in this section and section 71-1109 of this chapter, ‘owner’ means any person or local public corporation who owns, erects, reconstructs, repairs, maintains or uses a dam or other structure which impounds waters. The commissioner may promulgate regulations requiring any owner to prepare and implement a safety program for such dam or structure as necessary to safeguard life, property or natural resources. Regulations governing the safety program may include requirements for inspections, monitoring, maintenance and operation, emergency action planning, financial security, recordkeeping and reporting or any other requirement the commissioner deems necessary to safeguard life, property or natural resources. Such requirement shall only apply to those dams or other structures that impound waters which pose, in the event of failure, a threat of personal injury, substantial property damage or substantial natural resource damage.”

ECL § 15-0503(1) provides:

“Except as provided in subdivision 3 of this section a. No dam shall be erected constructed, reconstructed or repaired by any person or local public corporation without a permit issued pursuant to subdivision 2 of this section. As used in this section and section 15-0511 of this title, “dam” means any artificial barrier including any earthen barrier, together with its appurtenant works, which impounds or will impound waters, provided it has (1) a height equal to or greater than fifteen feet or (2) a maximum impoundment capacity equal to or greater than three million gallons; except that for purposes of this section a dam shall not include any structure which has (i) a height equal to or less than six feet regardless of the structure’s impoundment capacity, or (ii) an impoundment capacity not exceeding one million gallons regardless of the structure’s height.”

Section 608.3 of 6 NYCRR provides: “Dams.

(a) *Permit Required.* Except as provided in subdivision (a)(3) of this section, no person or local public corporation may construct, reconstruct, repair, breach, or remove without a permit issued pursuant to this Part.”

Department staff bears the burden of proof on the charges it asserts in the complaint and must sustain that burden with a preponderance of the evidence. 6 NYCRR §§ 622.11(b), (c).

While the dam at issue in this matter has been a proverbial “hot potato” in that none of the respondent-municipalities wish to acknowledge ownership, there is not much that was controverted at the hearing with respect to the staff’s assertions of the dam’s condition, the lack of an emergency action plan, the lack of a plan to remediate the dam, or the fact that there has been unpermitted work done on the road on the embankment and other areas in and around the

dam.⁴ Therefore, the main focus of this report will be an explanation of each of the respondents' roles as owner pursuant to ECL § 15-0507(1) and the appropriate relief.

Liability of the Respondents

County of Orange

As noted above, without dispute, the County owns much of the land underlying the lake and surrounding the dam. Exs. 16, 17, 21a, b, 22. The dispute is whether this ownership connotes ownership of the dam as well. The County argues that there is no evidence that the County erected, reconstructed, repaired, maintained or used the dam and hence, the only means of demonstrating ownership is through real property interests. The County maintains that because the FWWC was given interests in the dam through the Cable indenture and the Gootnick deed left those interests intact when the County took title, the County is not the dam owner. I disagree with this conclusion.

As all the parties appeared to agree at the hearing, the Cable indenture was not a deed but rather a document that conveyed interests – an easement – that entitled FWWC to raise the dam and to take water from the lake. It did not give title to the land and in fact, the indenture reserved rights to the Cables and their successors to use the lake “and to occupy and use the said premises and the said Lake for any and all purposes forever, the same as if this grant or conveyance had not been made . . .” Exs. 14a, b. As an improvement to real property, GLD is conveyed with the property upon which it rests unless it is expressly excepted from the conveyance. Mott v. Palmer, 1 NY 564, 579-570 (1848). See also, Buckley v. Buckley, 11 Barb. 43 (NY Sup Ct 1850) (“all erections connected with a cotton factory and other mills propelled by water power, including the dams, water wheels, gearing, and machinery fastened to the ground or buildings, are prima facie a part of the realty and descend to the heir at law of the owner upon his death, and do not pass to his executors or administrators as part of his personal estate.”) In addition, as the County Attorney expressed in his opinion of June 29, 1995, “[a]n easement is an interest in property that does not rise to the level of ownership.” Ex. 15, p. 11. As further expressed in this same opinion, “the County succeeded to the rights of Judge Thompson [the earliest known owner in the chain of title to the lands the County now owns] when it acquired Glenmere Lake and its surrounding properties. These rights are described in the deeds as follows:

“All that certain tract of land and water and land under water
and the mills, mill seat, mill pond, dwelling houses . . . and all
the incidents, rights, easements, ways, privileges and
appurtenances belonging to or connected with the same. . . as the

⁴ The Village and the Town both adhere to a theory of longevity with respect to the necessity for dam maintenance and repair by stating in their respective briefs that the dam has withstood the test of time. However, the regulatory scheme requires that owners provide maintenance and repairs based upon engineering verification – not speculation. ECL § 15-0507(1); 6 NYCRR Part 673. While the Town in its reply (p. 3) underscores the 1981 Army Corps of Engineers' conclusion that its “examination of documents and the visual inspection of the dam did not reveal conditions which constitute an immediate hazard to human life or property”, the Army Corps did find deficiencies that have gone unresolved. Ex. 10. And that was over thirty years ago! As concluded by the Army Corps in 1981, the Tectonic report of 1993, and DEC staff today, a detailed hydrologic and hydraulic investigation of the dam would determine the specific remedial measures that are required. Exs. 10, 11, pp. 18-19, TR 58-59, 68.

same were originally used, held and enjoyed by said Judge Thompson including any and all rights of flowing the waters of and in said pond to any height and extent over the adjacent lands and premises which the said Judge Thompson had used and enjoyed during his lifetime and in the same full, complete and amply manner in which the said lands, tenements, hereditaments, rights, easements, incidents and appurtenants have been held, used, exercised and enjoyed at any and all times since the 20th day of June, 1820.” *Id.*, p. 12.

The County Attorney made this analysis of the County’s interests and rights to the lands and waters when it was considering the use of the Lake as a water supply. *Id.*, p. 1. While it would now like to divest itself of this interest vis a vis the dam, I find that it cannot.

Mr. Mahoney stressed that the Cable indenture’s grant to “raise” a dam does not necessarily mean to raise in height but could also mean “to build.” Exs. 31-37. With this argument, the County seeks to distance itself from ownership by making the dam the sole responsibility of FWWC and its successor, the Village. See also, County Reply Br., 10-12. Since the word “raise” is used in other documents related to this property, and even in the Cable indenture itself, to clearly mean to raise the height, this is strained interpretation. *See*, Ex. 15, references to 1860 Coleman grant at p. 8 and Goble conveyance at p. 10; also Cable indenture, Ex. 14a at p. 1. However, I do not find it key to a determination of the County’s ownership. While the Army Corps of Engineers study (Ex. 11) determined there was evidence of an old dam in the vicinity of GLD, we cannot know for certain whether the dam was constructed anew or on top of the old structure. In any case, the dam exists on the property of the County, it has not been excepted from any deeds from the properties that the County owns, the Cable easement/indenture reserves rights to the successor owners of the property upon which the dam sits, including the use of the lake, and therefore, the County is among those responsible for it pursuant to ECL § 15-0507(1) and has failed to operate and maintain the dam in a safe condition.

In Knowlton Bros. v. New York Air Brake Co., 169 AD 324, 333 (4th Dep’t 1915), the court found that the owner of the land on which a dam rested was the owner of the dam. The court also found that as owner of the land against which the dam abutted, he had the right to remove the dam, notwithstanding a reservation contained in the deed to him permitting another party to maintain and repair the dam. In the Cable indenture (Ex. 14a), the FWWC was made responsible for maintaining the dam (“maintain and keep the same without cost or expense to the said first party, or their heirs or assigns . . .”) as was apparently the case in Knowlton. But such responsibility did not change the ownership rights of the landowner and accordingly it does not change that of Orange County’s. In Boxer v. Commonwealth Land Title Ins. Co., 185 AD2d 515 (3d Dep’t 1992), the court permitted the owner of the real property upon which the dam was located to lower the pond’s level to repair the dam based upon the location of the dam upon the real property that the plaintiff owned.

In its reply brief, the Town of Chester remarks that it agrees with the County’s position in its closing memorandum that it (like the Town) cannot make repairs to the dam because it is a

“servient owner” of the dam. Town Reply Br., 2. This language refers to a real property law concept of an appurtenant easement where there is a dominant estate (benefited by the easement) and a servient one. *See, e.g., Selvaggi v. Skvorecz*, 256 AD2d 324 (2d Dep’t 1998). An easement appurtenant runs with the land, so that when the dominant estate is transferred the subsequent owner benefits even if no mention of the easement is made in the deed. *Green v. Mann*, 237 AD2d 566 (2d Dep’t 1997). However, there has been no evidence that the FWWC owned property that related to the Cables. Rather, it appears that the indenture is an easement in gross – a right created in a person to use the land of another. *U.S. v. Turoff*, 701 F. Supp. 981 (EDNY 1988). Usually, easements in gross are not assignable or inheritable but there is an exception for commercial easements like the Cable indenture. *Benach v. Home Gas Company*, 23 Misc. 2d 556 (Sup. Ct. Schuyler Co. 1960) (defendant gas company’s right to lay pipeline on land of plaintiff upheld based on the stated reservation of rights by its predecessor when title to the land was conveyed). And as noted in the cases cited above, the courts have liberally allowed land owners to perform repairs or even remove a dam.

In its reply brief, the County continues to argue that the term “owner” as defined in ECL § 15-0507(1) does not include the County because it is not an owner of the dam. County Reply Br., 2-12. However, as the County’s own attorney noted in 1995 (Ex. 15) and as discussed above, the County retained rights to use the waters of Glenmere Lake through its title and therefore, even if the Commissioner determined it was not a dam owner under New York’s real property laws, its right to use the impounded waters makes it an owner under Article 15. In addition, I believe it is an owner based upon its ownership of the land under the dam. Ex. 22.

With respect to the staff’s second cause of action – repairs made to the dam without a permit in violation of ECL § 15-0503(1) and 6 NYCRR § 608.3, I agree with the County that the staff did not provide evidence that the County performed significant work on the dam. The Village’s witness did allude to work done with “orange-colored trucks” “but I did not identify markings on the truck . . .” TR761-762. This is not a sufficient basis to find the County liable for dumping fill in the ravine on the downstream side of the dam. However, the staff did produce a report from December 1988 indicating that the County had placed a fence along the upstream face of the dam (and the present day signage would confirm the County’s involvement). Ex. 12g. There is no evidence that the County had an Article 15 permit to erect this fence.

Town of Chester

The Town’s ownership pursuant to ECL § 15-0507 is derived from its undisputed use and maintenance of the road known as Florida Road that is on top of the dam’s embankment. Ex. 25. The Town disputes ownership by stating that its role is simply to maintain the road and it derives no benefit from the dam or lake.

Highway Law § 189 provides that “All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to the width of at least three rods.” Courts have held that “used by the public as a highway” means that there must be an assumption of control, of maintenance, of repair in a continuing way like other town highways generally so that the town becomes responsible for its

condition.” Goldrich v. Franklin Gardens Corp., 138 NYS2d 731, 734 (NY Sup Ct 1995); Egan v. Halverson, 271 AD2d 844, 846 (3d Dep’t 2000). In Katz v. Brookhaven, 15 AD2d 534 (2d Dep’t 1961), the court held that a public use of a strip of land as a highway was insufficient to establish a public highway. In Town of Addison v. Meeks, 233 AD2d 843 (4th Dep’t 1996), the Fourth Department held that the road in question had become a public highway by consistent and unrestricted use of road for more than 10 years and by the town’s longstanding and unchallenged efforts to improve, repair and maintain it on at least a yearly basis. The Third Department has required that the road must be kept in repair or taken in charge and adopted by the public authorities. Nogard v. Strand, 38 AD2d 871 (3d Dep’t 1972).

With respect to Florida Road, I did not find any dispute that the Town has regularly maintained the road and that it has been accessed by the public without restriction for well over 10 years. Ex. 13; TR 95, 788-790.

The Town has used the dam by continuing to maintain and use a road that is on top of the dam’s embankment. It derives a benefit from this use and it has also conducted unpermitted repairs of the road which have affected the dam. Exs. 12p, 13; TR 95, 99-101, 760-763.

Based upon the Town’s use and maintenance of the road which sits on the embankment of the dam, I find that the Town is a user of the dam pursuant to ECL § 15-0507 and is responsible, along with the other respondents, for its maintenance and repair and has failed to operate and maintain the dam in a safe condition.

With respect to the staff’s second cause of action regarding unpermitted work on the dam, the staff did establish that the Town, through its work on the road, has performed unpermitted work on the dam in violation of ECL § 15-0503(1) and 6 NYCRR § 608.3. Ex. 12p; TR 85, 99-101. Specifically, Mr. Kennedy confirmed that the Town of Chester put a new culvert beneath the road in 2000 or 2001. TR 760; 12q; Ex. 13. He also testified he saw the Town place fill in the ravine. TR 760-761. In the Town’s reply brief (pp. 5-9), it argues strenuously that it should not be held responsible for any illegality associated with these repairs because: the staff did not determine the Town to be an owner prior to 2007; there has been no proof that the repairs caused any harm to the dam; and the Department staff failed to timely notify the Town of any illegality. Regardless of the Department staff’s notification, since 1999, the Town and all persons and organizations were required to apply for a permit prior to undertaking any work on a dam exceeding the jurisdictional size. ECL § 15-0503(1). Prior to 1999, all dams were subject to this requirement. As for the Town’s effect on the dam through the road/culvert work, it is precisely the permit application that would provide a basis for determining how necessary work should be carried out so as not to damage the dam. Accordingly, I find that the Town is in violation of ECL § 15-0503(1) and 6 NYCRR § 608.3.

Village of Florida

The Village of Florida is both a titled owner of the dam as well as a statutory owner. The survey maps depict the Village as owning a portion of the land that the dam sits on and hence an owner of the dam (see discussion above, pp. 14-16). Exs. 20, 21a. In addition, the Village has used the lake as a source of water through its succession to the rights of the FWWC. Ex. 15, p.

13, Exs. 50a-k, Ex. 41; TR 758-759, 793-797. The Village benefits from the dam by its use of the lake as a water supply – one from which it sells water to several entities. TR 795-796; Exs. 50a-k. In 1988, the Village’s own representative, Stanley J. Urbanski, Trustee and Commissioner of Water and Sewer, telegraphed Commissioner Jorling of the Department regarding the Department staff’s interference with efforts to perform repairs on the dam by “the Village of Florida (people responsible for maintenance of the dam) . . .” Ex. 41.

In its reply brief, the Department staff raised an objection to the Village’s reference on the last page of its closing memorandum to a “restrictive covenant.” The Village actually uses the words “restriction in a covenant” in its argument that the Cable agreement must be viewed based upon the circumstances existing when it was created. A restrictive covenant is defined as a “private agreement in a deed or lease that restricts use in occupancy of real property.” Black’s Law Dictionary, 7th Edition (1999). An indenture is defined in Black’s as a formal instrument by two or more parties with different interests. During the course of these proceedings, the parties referred to the Cable document as an indenture and as an easement. Exs. 14a, b. The document gives the FWWC the right to raise a dam and extract water subject to the rights of the owners. The Village has stressed that it is the intention of the parties at the time that is key. The intentions of the Cable-FWWC parties is certainly an element to discerning the rights of the parties under New York’s real property laws (*see, e.g., Iovine v. Caldwell*, 256 AD2d 974 (3d Dep’t 1998) and the instrument does reveal an intention for those parties and their successors to both retain rights and responsibilities. Regardless of how the Cable agreement is titled, as discussed above at pp.14-15, it provided both parties to the agreement with rights and responsibilities with respect to the impounded waters. More importantly, ECL § 15-0507(1) also adds dam stewardship responsibilities to in fee owners and owners as defined within the statute.

In Matter of Berger, Ruling, February 17, 2009, at 6-7, ALJ Sherman found that ECL § 15-0507(1) defines the term “owner” broadly to include those who “erect, reconstruct, repair, maintain, or use a dam” and therefore, “the Legislature has clearly indicated its intention to impose ownership liability on a broad range of persons.” Those entities, like the Village of Florida, who benefit from the use of the impounded waters of Glenmere Lake, are deemed owners under the statute and therefore, as Mr. Urbanski opined, the Village is responsible for the maintenance and repair of the dam along with the two other respondents and has failed to operate and maintain the dam in a safe condition.

As confirmed by the testimony of the Village’s witness, Mr. Kennedy, the Village’s water superintendent, the Village has performed maintenance and repairs on this system that interfaces with the dam, which constituted construction on the dam. TR 765-768, 772-785. This unpermitted work is in violation of ECL § 15-0503(1) and 6 NYCRR 608.3. Based upon the testimony of Mr. Kennedy, I grant staff’s motion to conform the pleadings to the proof and add the allegation concerning the Village’s unpermitted construction work on the dam between 2006 and 2007.

As for the Village’s contention that the Department staff’s complaint is barred by the statute of limitations or laches, as staff noted in its reply, there is no statute of limitations applicable to administrative proceedings. Staff Reply, 2-3. As for laches, as staff correctly cites, the Court of Appeals has precluded this defense against the state when it is carrying out its

governmental functions on behalf of the public. Matter of Daleview Nursing Home v. Axelrod, 62 NY2d 30, 34 (1984). The State Administrative Procedures Act § 301(1) requires that all parties should be afforded a hearing within a reasonable time. The reasonableness determined by "an administrative body in the first instance, and the judiciary in review, must weigh . . . (1) the nature of the private interest allegedly compromised by delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation" Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 178 (1985).

For the first time in its closing papers, the Village raises this issue and provides absolutely no information regarding how it has been prejudiced. As staff correctly argues, the Village's failure to raise this defense in its answer is a bar to raising it now pursuant to the New York Civil Practice Law and Rules (CPLR) § 3018(b) and 6 NYCRR §§ 622.4(c), (d). But even based on the merits, since the staff served its complaint in 2007, this matter has proceeded fairly expeditiously. The delay has been not in going forward in this proceeding but rather in the response of the parties to the Department staff's repeated requests for action in response to the dam's deficiencies. There can be no question that there is a very strong public policy advanced by this proceeding in seeing that a high hazard dam is repaired to minimize potential hardship to people and property. Accordingly, I find no merit to the Village's argument.

Remedy and Penalty

In its complaint dated October 18, 2007, the staff requested that the Commissioner find the respondents liable for violating ECL § 15-0507 for failure to operate and maintain the dam in a safe condition (based on inadequate spillway capacity, visually observed deficiencies and lack of an emergency action plan) and for violating ECL § 15-0503(1) and 6 NYCRR § 608.3 for performing repairs to the dam without a permit. Ex. 1. In this pleading, the staff requested a civil penalty "in an amount equal to the maximum allowed by law." *Id.* The staff also requested an order directing respondents to conduct the necessary studies and obtain the necessary permits to repair the Glenmere Lake Dam in conformance with dam safety criteria in the discretion of the Department. *Id.*

At the hearing, staff produced an enforcement calculation sheet (Ex. 27a) which presented the maximum penalties to the date of the amended complaint as \$2,272,500, and penalties up to the date of the hearing as \$4,270,500. Using these figures as a starting point and with the application of the Civil Penalty Policy, the staff proposed a penalty of \$250,000. The staff applied ECL § 71-1127 which allows for a maximum penalty of \$2,500 for the first day of a violation and \$500 for each day thereafter that the violation continues. For the failure to operate and maintain a dam in a safe condition, the staff started the penalty from January 1, 2000 and for the unauthorized work on the dam (modification to the spillway culvert), staff began the penalty calculation from March 20, 2002. TR 639-640.

On cross-examination by the Village counsel, staff clarified that the penalty provision that staff applied went into effect on February 15, 2012. ECL § 71-1127; TR 653. The prior version of the statute provided for a penalty of \$500 for the first violation and \$100 for each day during which the violation continued. TR 654. Based on the view that the respondents and I shared that the prior penalty provision should apply to alleged violations that occurred prior to

February 15, 2012, I requested that staff provide a calculation of the maximum penalties using that formulation. TR 658-662. Staff agreed to provide this information while maintaining its position that the new penalties applied retroactively. TR 662. Accordingly, at the hearing, the staff presented a revised enforcement calculation sheet (Ex. 27b). Using the older version of the statute, the staff calculated a penalty of \$454,500 for the violations up to the date of the amended complaint and a penalty of \$854,100 for violations up until the date of the hearing. Ex. 27b.

At the hearing, staff also presented “Schedule A” (Ex. 26) in which, *inter alia*, it sets forth a compliance schedule for the identification of funds, engineering expertise, submission of an EAP and inspection and maintenance (I & M) plan, and submission of plans for remedial work and construction.

As part of staff’s closing memorandum, a second revised enforcement calculation sheet was provided that bifurcates the penalty calculation so that the older version of ECL § 71-1127 is applied to the violations prior to February 15, 2012 (the effective date of the new statute) and the newer version is applied to the violations after that date. I have marked this document as 27c.⁵ This calculation sheet provides for a maximum penalty of \$454,000 for violations up to the date of the complaint and \$1,048,300 as a maximum for violations up to the date of the hearing. Ex. 27c. Based upon these calculations and the Civil Penalty Policy, staff provides a request for a penalty of \$225,000. *Id.* However, staff does not agree that the prior penalty provision is appropriate in this matter and in its closing memorandum maintains its request for a \$250,000 penalty against all the respondents, jointly and severally. Staff’s Br., 22-23.

Both at the hearing and in its closing brief, staff explained its use of the Civil Penalty Policy in arriving at the penalty request.⁶ TR 642-648, 668-673; Staff Br., 20. The 1990 Civil Penalty Policy sets forth a number of factors upon which to base the development of a penalty. The starting point is the maximum penalty and based upon a number of considerations, the appropriate penalty is calculated. Economic benefit, environmental harm, violator cooperation and deterrence are all relevant in this determination. In addition, the policy directs consideration of any mitigating factors.

Staff calculated the economic benefit gained by the respondents by not fixing the dam by using the Bureau of Reclamation construction cost index for earth dams with a 5 percent or 8 percent compounded interest on the approximately \$435,000 cost saving. TR 670; Exs. 27a, b, c. Using the stated interest rates, the respondents saved over \$1 million or almost \$2 million dollars depending on which interest rate is applied.⁷ Exs. 27a, b, c. Staff found the gravity of the violations to be high because GLD is a high hazard dam with the potential for loss of life and property if it failed. TR 671. The importance to the regulatory scheme is high because the failure to obtain permits subject to agency review and direction prior to the dam work potentially

⁵ Counsel for the Village objected to the staff’s presentation of these calculations after the hearing stating that there was no opportunity for effective cross-examination by the respondents. Village Br., 1. Because this document is an arithmetical exercise based on the discussion had at the hearing and all the parties have had an opportunity to respond to it, I see no basis to exclude it.

⁶ During cross-examination, Mr. Dominitz also testified that the penalty was the same that was applied in a prior adjudicated matter. TR 649.

⁷ Per the Civil Penalty Policy, all economic benefit must be recouped. Civil Penalty Policy, Penalty Calculations, IV. C. 1,2.

made the dam's deficiencies worse. TR 671. Staff has found that the respondents have a high culpability because they have been aware of the issues and DEC's requests for remediation for many years. *Id.* In addition, because the three respondents are all municipalities, they had access to funding sources to support the dam's rehabilitation through taxing, bonding, loans and grant applications, however they chose not to avail themselves of these mechanisms. TR 672.

I disagree with the staff that the version of ECL § 71-1127 that went into effect in February 2012 is retroactive. Staff cites to several DEC administrative rulings to support this argument; however, none of the rulings support such application. In Matter of 151st Street, Hearing Report, October 26, 2011, ALJ O'Connell does not indicate that the higher penalty was to be applied retroactively. Rather, because the penalty requested by staff easily fell within the new statutory maximum for even one day of violation from the date it became effective, there was no issue regarding retroactivity. Again, in Matter of NYPD, Building Maintenance Section, Commissioner's Decision and Order, February 22, 2005 and in Matter of William W. Wakefield, Commissioner's Order, July 7, 2004, there is no mention of retroactive application of a higher penalty. Because even one day's penalty would be more than the ultimate penalty assessed in each of these cases, the newer statute could be utilized for the period that fell after its effective date. Where there is no clear expression that the Legislature intended retroactivity, no such application is appropriate. See, Majewski v. Broadalbin-Perth Cent.Sch.Dist., 231 AD2d 102 (3d Dep't 1997). As was the case in the Department decisions cited by staff, in this matter due to the lengthy period that staff has identified as constituting the period of violations (and as demonstrated in its most recent penalty calculation – Ex. 27c), the requested penalty of \$250,000 can be assessed using either statutory scheme.

I agree with staff's application of the Civil Penalty Policy to this matter. However, while these municipalities have certainly delayed acting on the necessary repairs to the dam and creation of an EAP, as well as recognizing the need for permits to undertake any work on the dam, assessment of such a large fine against municipal entities is not productive. See, County Reply, 14. The monies that were "saved" in not performing the necessary work were not used to profit an individual or private company but presumably were used for other public purposes or to keep taxes down. In any case, as noted in the references to the Bureau of Reclamation construction cost index for earth dams, the costs for such repairs have increased considerably. Exs. 27a-c. These municipalities will now have to pay more for this work to be accomplished and the public will bear this burden.

With respect to joint and several liability, there have been different degrees of culpability amongst the respondents for the unpermitted work and for the lack of response to the dam safety requirements and thus the penalties should reflect those circumstances. The staff did not show that the County did work at the site beyond the erection of the fence. And, the County has shown a level of cooperation in conducting the Tectonic report in 1993. Ex. 11. The Town of Chester has performed work on the road that involved the dam but was not a focus of DEC's dam safety program as an owner until 2007. Ex. 12q. And, in response to the Department's letter of January 2, 2007, by letter dated January 24, 2007, the Town responded by stating it did not believe it was responsible for the dam's maintenance or repair but it would cooperate in closing the road so that necessary repairs could be made. Ex. 49. The Village appears to derive the most benefit from the dam by its use of the impoundment for a water supply. Exs. 50a-k.

And, it has been the subject of DEC's dam safety program since at least 1980. Ex. 12v. Thus, I think it is appropriate to assess any penalties based upon this information.

It is certainly important to exact a penalty for these serious violations in order to encourage other dam owners to appreciate the need to maintain their dams and to obtain permits for any work that is performed. But, the remedial work requested will be costly. Therefore, I recommend to the Commissioner that the staff's recommended penalty of \$250,000 be modified as follows:

The County should be assessed a payable penalty of \$25,000 and a suspended penalty of \$75,000 in the event that it does not comply with the schedule of compliance.

The Town should be assessed a payable penalty of \$35,000 and a suspended penalty of \$65,000 in the event that it does not comply with the schedule of compliance.

The Village should be assessed a penalty of \$50,000 and a suspended penalty of \$100,000 in the event that it does not comply with the schedule of compliance.

As indicated by staff at the hearing, the Dam Safety Program is not in the business of exacting penalties but is rather interested in ensuring that every dam is safely constructed and maintained, that there are EAPs in place in the event of a flood, and that any work is permitted so that the Department staff can ensure that it will be in keeping with the structural requirements of the individual dam. TR 641. It is unfortunate that these three municipalities could not come to an agreement among themselves with the assistance of the Department to properly meet the regulatory requirements that would ensure the safety of their communities. I am hopeful that through this adjudicatory process, progress will be made toward repair and maintenance of the dam. Therefore, although I find all three respondents liable for failure to maintain and operate the dam in a safe manner and for performing unpermitted work, the emphasis at this point must be on repair to the dam and in creation of an EAP expeditiously. With respect to these requirements, I recommend that the Commissioner find the three respondents liable jointly and severally for the remedial work, so that any impetus to shift the burden of this work be eliminated.

CONCLUSION

The respondents Village of Florida, Town of Chester and County of Orange are liable for violating ECL § 15-0507 for failing to operate and maintain the dam in a safe manner and are liable for violating ECL § 15-0503(1) and 6 NYCRR § 608.3 for construction on the dam without a permit. I recommend that the Commissioner order: the respondent Village to pay a payable penalty of \$50,000 with a suspended penalty of \$100,000; the respondent Town to pay a penalty of \$35,000 with a suspended penalty of \$65,000; and the respondent County to pay a penalty of \$25,000 with a suspended penalty of \$75,000. Suspended penalties should be due and payable within thirty days of non-compliance with any milestone that is missed on the schedule of compliance that is made a part of the Commissioner's order.

I recommend that the Commissioner adopt the schedule of compliance that staff submitted as Ex. 26 in the hearing record as Schedule A and require that all the respondents, jointly and severally, be liable for its execution. The dates will have to be revised according to the release date of the Commissioner's order.

EXHIBIT CHART
Matter of Glenmere Dam
October 15-18, 2012

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
1	October 18, 2007 Notice of Hearing & Complaint	√	√	N/A	
2	October 30, 2007 Village of Florida Answer	√	√	N/A	
3	January 17, 2008 Town of Chester Answer	√	√	N/A	
4	November 13, 2007 County of Orange Answer	√	√	N/A	
5	May 8, 2012 Assignment Letter	√	√	N/A	
6	April 27, 2012 Statement of Readiness	√	√	N/A	
7	Resume – Alon Dominitz, P.E.	√	√	Staff	
8	Resume – Jeffrey G. Martin, PLS	√	√	Staff	
9	Resume – Scott M. Braymer, P.E.	√	√	Staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
10	NY District Corps of Engineers – August 1981 Phase I Inspection Report National Dam Safety Program Glenmere Lake Dam	√	√	Staff	
11	Tectonic Engineering Consultants P.C. – Phase 1 Study Rehabilitation of Glenmere Lake Dam – Prepared for Orange County Department of Public Works	√	√	Staff	
12a	DEC Dam Inspection Report – July 19, 1973	√	√	Staff	
12b	Dam Report – June 12, 1980	√	√	Staff	
12c	Dam Inspection Report – April 16, 1984	√	√	Staff	
12d	Dam Inspection Report – November 15, 1984	√	√	Staff	
12e	Letter to Mayor Harter dated August 5, 1986 w/certified mail receipt & DEC Inspection Report of July 15, 1986	√	√	Staff	
12f	DEC Inspection Report – March 23, 1987	√	√	Staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
12g	DEC Inspection Report – December 13, 1988	√	√	Staff	
12h	Letter dated June 6, 1987 to Mayor Harter w/inspection report dated May 25, 1989	√	√	Staff	
12i	Letter dated May 21, 1990 to Mayor Harter w/certified mail receipt & inspection report dated April 17, 1990	√	√	Staff	
12j	Inspection Report dated November 17, 1992	√	√	Staff	
12k	Inspection Report dated August 12, 1982	√	√	Staff	
12l	Inspection Report dated April 4, 1996	√	√	Staff	
12m	Letter dated October 22, 1998 to Vincent L. Soukup, P.E., Deputy Commissioner, Orange County DPW w/inspection report dated April 20, 1998	√	√	Staff	
12n	Letter dated June 15, 2000 to Vincent L. Soukup, P.E. w/report dated May 2000	√	√	Staff	
12o	Letter dated February 19, 2003 to Commissioner Fares, OCDPW w/inspection report dated March 20, 2002	√	√	Staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
12p	Letter dated Mary 13, 2005 to Mayor, Village of Florida and Commissioner Fares, OCDPW w/inspection report dated September 28, 2004	√	√	Staff	
12q	Letter dated January 2, 2007 to County Executive Diana, Commissioner Fares, Supervisor Tully, Town of Chester, and Village of Florida Mayor Pawiliczek, Sr. w/inspection report dated July 12, 2006	√	√	Staff	
12r	Letter dated November 26, 2008 to Commissioner Fares, Supervisor Tully, Supervisor Sweeton, Town of Warwick and Mayor Pawiliczek, Sr. w/inspection report dated October 22, 2008	√	√	Staff	
12s	Letter dated November 16, 2010 to Commissioner Charles Lee, P.E., OCDPW, Mayor Pawiliczek, Sr., Supervisor Neuhaus, Town of Chester, and Supervisor Sweeton w/inspection report dated November 2, 2012	√	√	Staff	
12t	Letter dated September 12, 2011 to Commissioner Lee, Mayor Pawiliczek, Sr., Supervisor Neuhaus and Supervisor Sweeton w/inspection report dated September 2, 2011	√	√	Staff	
12u	Inspection report dated August 12, 1982	√	√	Staff	
12v	Letter dated January 18, 1980 to Mayor Harter	√	√	Staff	
13	Town of Chester work log	√	√	Staff	
14a	Cable Indenture – typed – September 28, 1892	√	√	Staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
14b	Cable Indenture – handwritten version – September 28, 1892	√	√	Staff	
15	Opinion of the County Attorney – County of Orange – Opinion 95-5	√	√	Staff	
16	GIS Screen Shots	√	√	Staff	
17	Orange County Screen Shots	√	√	Staff	
18	New York State Department of Transportation Screen Shots	√	√	Staff	
19	Chapter A101 – Road Specifications	√	√	Staff	
21a & b	2009 Tectonic Survey	√	√	Staff	
22	Jeffrey G. Martin Memorandum dated March 9, 2011	√	√	Staff	
23a, b, c	Supporting Deeds – 2007 deed – County of Orange; Gootnick – 1998; Orange County – Village of Florida - 2002	√	√	Staff	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
24a & b	Tax Maps	√	√	Staff	
25	Photograph – Chester road signs	√	√	Staff	
26	Glenmere Lake Dam Schedule A	√	√	Staff	
27a	Enforcement calculation sheet	√	√	Staff	
27b	Revised enforcement calculation sheet	√	√	Staff	
28	Tectonic Engineering Consultants, P.C. – Glenmere Lake Bottom Survey – March 5, 1993	√	√	Staff	
29	Cross Section Drawing	√	√	Staff	
30	NOT USED				
31	Black's Law Dictionary, p. 1259	√	√	Orange Co.	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
32	Webster's Large Print Dictionary, p. 616	√	√	Orange Co.	
33	Webster's Third New International Dictionary, p. 1877	√	√	Orange Co.	
34	New Oxford American Dictionary, Third Edition, p. 1442	√	√	Orange Co.	
35	American Heritage Dictionary, pp. 692-693	√	√	Orange Co.	
36	Merriam Webster's Collegiate Dictionary, p. 965	√	√	Orange Co.	
37	Roget's II The New Thesaurus, p. 798	√	√	Orange Co.	
38	Letter dated May 4, 1982 to Peter Garrison, Commissioner, Orange County Dep't of Planning and Economic Development from Jamie Veitch, Ass't Sanitary Engineer	√	√	Orange Co.	
39	Letter dated August 27, 1986 from Mayor Harter to Walter Lynick, DEC	√	√	Orange Co.	
40	Memo dated April 15, 1987 from W. Lynick to File	√	√	Orange Co.	
41	Mailgram from Stanley J. Urbanski, Trustee and Commissioner, Water and Sewer to Commissioner Jorling dated May 6, 1988	√	√	Orange Co.	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
42	Letter dated June 27, 1988 from Gerald Crotty, Executive Chamber to Mr. Urbanski, Village of Florida	√	√	Orange Co.	
43	Memo dated February 7, 1989 from W. Lynick to File	√	√	Orange Co.	
44	Letter dated February 13, 1989 from Walter Lynick to Louis Heimbach, County Executive, Orange Co.	√	√	Orange Co.	
45	Letter dated November 24, 1926 from Division Engineer, State of New York, Department of State Engineer and Surveyor to Hon. Roy G. Finch, State Engineer, Albany	√	√	Orange Co.	
46	Letter dated January 6, 2011 from Rebecca Crist, Environmental Analyst, DEC to Mayor Pawiliczek Sr., Mayor	√	√	Staff	
47	Letter dated October 23, 1926 from Town of Chester to Hon. Roy Finch	√	√	Staff	
48	Letter dated November 2, 1926 from Joseph W. & Percy V.D. Gott to State Engineer	√	√	Staff	
49	Letter dated January 24, 2007 from Benjamin Ostrer, Town Attorney, Town of Chester to Scott Braymer, P.E., DEC	√	√	Town of Chester	
50a	Annual drinking water quality report – 2001 – Village of Florida water supply	√	√	Orange Co.	
50 b	Annual drinking water quality report – 2002 – Village of Florida water supply	√	√	Orange Co.	

Exhibit No.	Description	ID'd?	Rec'd?	Offered By	Notes
50c	Annual drinking water quality report – 2003 – Village of Florida water supply	√	√	Orange Co.	
50d	Annual drinking water quality report – 2004 – Village of Florida water supply	√	√	Orange Co.	
50e	Annual drinking water quality report – 2005 – Village of Florida water supply	√	√	Orange Co.	
50f	Annual drinking water quality report – 2006 – Village of Florida water supply	√	√	Orange Co.	
50g	Annual drinking water quality report – 2007 – Village of Florida water supply	√	√	Orange Co.	
50h	Annual drinking water quality report – 2008 – Village of Florida water supply	√	√	Orange Co.	
50i	Annual drinking water quality report – 2009 – Village of Florida water supply	√	√	Orange Co.	
50j	Annual drinking water quality report – 2010 – Village of Florida water supply	√	√	Orange Co.	
50k	Annual drinking water quality report – 2011 – Village of Florida water supply	√	√	Orange Co.	