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In the Matter of Alleged Violations of  
Article 15 of the Environmental Conser-  
vation Law of the State of New York by

**RULING ON  
MOTION FOR ORDER  
WITHOUT HEARING**

**GUY HUNNEYMAN,**

(9/10/2007)

NYSDEC Case No.  
R6-20041021-66

Respondent.

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**SUMMARY OF RULING**

This Ruling denies the New York State Department of Environmental Conservation ("the Department" or "NYSDEC") Region 6 Staff's ("Department Staff") Motion for Order Without Hearing regarding Respondent Guy Hunneyman's alleged repair or reconstruction of a dam located in the Town of Theresa, County of Jefferson, State of New York upon land allegedly owned by Respondent. The ALJ finds several important factual matters remain in dispute, such that this matter is not amenable to the relief sought by the motion. Instead, following completion of discovery and filing of a statement of readiness, the ALJ will set a hearing schedule in this matter.

**PROCEEDINGS**

Introduction

Department Staff contends that, at all times referred to herein, Respondent Guy Hunneyman owned and continues to own real property located in the Town of Theresa, County of Jefferson, State of New York (mailing address County Route 21, Redwood, Jefferson County, New York) on which property is situated an old mill dam at the outlet of Lake of the Woods. Department Staff asserts that Respondent has repaired or reconstructed the dam on two occasions without a permit.

Department Staff commenced this action on March 1, 2007 by serving a Notice of Motion for Order Without Hearing and supporting papers upon Judy Drabicki, Esq., representative of Guy Hunneyman ("Respondent"), by certified mail, return receipt requested.<sup>1</sup>

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<sup>1</sup> Ms. Drabicki, then engaged in the private practice of law and representing Respondent in this proceeding, has since

Motion for Order Without Hearing

Department Staff's filings include a notice of motion and motion of James T. King, Region 6 Regional Attorney (both dated February 28, 2007), and supporting affidavits of Mark Craig, NYSDEC Biologist I; Mark T. Effley, NYSDEC Land Surveyor; and Lawrence R. Ambeau, NYSDEC Region 6 Deputy Permit Administrator (all dated February 27, 2007). In addition, a brief (dated February 28, 2007) and an affidavit of service were filed. These submissions were served on Respondent on March 1, 2007.

Exhibits included with the motion and affidavits include several photographs depicting the dam, a letter from Respondent (dated March 28, 2004), a survey report and a drawing depicting the elevation of the dam. With daily penalties, Department Staff calculates a maximum monetary penalty in excess of \$400,000.

DEC Department Staff asserts that on two occasions, Respondent repaired or reconstructed the dam without a permit, raising the water level in Lake of the Woods. Department Staff further asserts that no hearing is required and that the Department is entitled to judgment as a matter of law.

The record on this Motion for Order Without Hearing closed on April 3, 2007, with receipt of Respondent's Affidavit Opposing Motion for Order Without Hearing.

Standard of Review

Pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") 622.12(d), a motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action (or defense) is established sufficiently to warrant granting summary judgment in favor of any party under the Civil Practice Law and Rules ("CPLR"). Pursuant to 6 NYCRR §622.12(e), the motion for summary order should be denied if Respondent shows any issues of fact sufficient to require a hearing. However, pursuant to 6 NYCRR 622.12(f), the existence of a triable issue of fact that is associated with relief, such as the amount of civil penalty, does not preclude granting the motion in part.

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accepted a position as the NYSDEC Region 6 Regional Director requiring her withdrawal as counsel in this matter. Attorney Gary S. Bowitch has assumed representation of Respondent.

In order to succeed on its motion, with respect to each allegation, Department Staff must show on its papers alone, without the aid of oral testimony, that there is no material issue of fact outstanding and that the facts mandate judgment in its favor. On a motion for summary judgment the court will accept as true, the opposing party's evidence and any evidence of the movant that favors the opposing party. *Weiss v Garfield*, 21 AD2d 156, 249 NYS2d 458 (3rd Dept., 1964). See, generally, CPLR §3212, and *McKinney's Consolidated Laws of New York*, CPLR §3212, Practice Commentary.

In the present matter, Respondent has personal knowledge of the facts and provided a reply affidavit on the motion. Several factual matters are in dispute and Department Staff's motion contains omissions requiring that this motion for order without hearing must be denied. Following is a discussion of the more prominent matters in dispute and omissions.

*Alleged Violations of Environmental Conservation Law ("ECL") §15-0503*

Pursuant to ECL §15-0503, "[n]o dam shall be erected, constructed, reconstructed or repaired by any person or local public corporation without a permit issued pursuant to [this section]."<sup>2</sup> Department Staff alleges that Respondent committed continuing violations of ECL §15-0503 by failing to obtain a permit before repairing (or reconstructing) the old mill dam on two occasions; first, prior to December 2003 and second, between June 24, 2004 and July 15, 2004.

Department Staff cites the general civil penalty provisions of ECL §71-4003 as applicable to violations of ECL §15-0503. ECL §71-4003 provides for civil penalties of not more than \$500.00 per violation and additional civil penalties of not more than \$500.00 for each day of each continuing violation. However, a more specific provision, ECL §71-1127, is applicable to these alleged violations of ECL §15-0503. ECL §71-1127 provides for civil penalties of not more than \$500.00 per violation and additional civil penalties of not more than \$100.00 for each day of each continuing violation. Department Staff has not provided any explanation why ECL §71-4003 would be applicable in this instance, rather than ECL §71-1127.

It is undisputed that the structure at the outlet of Lake of the Woods is a "dam" within the meaning of ECL §15-0503. It is

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<sup>2</sup>Exceptions to permitting identified in ECL §15-0503(3) are not relevant to this case.

also undisputed that Respondent has not applied for an ECL Article 15 permit, nor was any such permit issued by the Department for the site. Further, as explained below, it is undisputed that Respondent repaired or reconstructed the old mill dam on two occasions, prior to December 2003 and between June 24, 2004 and July 15, 2004. However, factual disputes exist as to the extent or nature of the repairs or reconstruction.

#### Department Staff's Position

Department Staff alleges that on two occasions, (1) prior to December 2003 and later, (2) between June 24, 2004 and July 15, 2004, Respondent repaired or reconstructed the old mill dam without a permit, raising the water level in Lake of the Woods by 12 inches.

Department Staff seeks an order requiring Respondent to (1) submit an engineering study and work proposal; and (2) reduce the elevation of the dam to 317.86 feet. Department Staff also asks that the Commissioner's Order authorize Department Staff to enter upon the site to lower the dam if Respondent fails to do so within 180 days of the date of such order, and require that in the event of Respondent's non-compliance with the order, costs and expenses incurred by the Department will become a charge against Respondent's real property (the site).

In addition, Department Staff seeks penalties of \$125,000.00 for Respondent's violations of ECL Article 15: a \$10,000.00 payable penalty and a \$115,000.00 suspended penalty. Lastly, Department Staff seeks an order that reserves the Department's right to take further action for matters not specifically alleged in its motion, and ordering such other and further relief as may be justified under the circumstances.

#### Respondent's Position

Respondent, by counsel, acknowledged service of Department Staff's motion by submitting an Affidavit Opposing Motion for Order Without Hearing, dated March 29, 2007, including six exhibits. The exhibits include a real property deed dated March 29, 1916; several photographs of the dam, including purportedly historical photographs; a newsletter of the Lake of the Woods Association (dated June 23, 2005); and a Lake Management Plan for Lake of the Woods (prepared by Dr. Richard Lamb, Center for Earth and Environmental Science, SUNY Plattsburgh, dated July 1999).

In his opposing affidavit, Respondent contends that Department Staff's motion contains several inaccuracies and

omissions. Additionally, Respondent asserts that the relief sought by Department Staff is inappropriate in light of existing circumstances.

Respondent states that he has always offered to work with the Lake of the Woods Association and with the NYSDEC to ensure water level was maintained to best serve all users of the lake. Respondent's letter (Department Staff, Exhibit 1) concludes with a statement that "[t]here is currently two feet of water under the bridge. If the spillway is cut too low and a boat cannot navigate under the bridge the property does not offer any value to our family. Our family would be open to selling the property and the deeded water rights to the Lake of the Woods Homeowners Association or New York State."

Respondent opposes Department Staff's motion and requests dismissal of this matter in its entirety.

## DISCUSSION

On December 15, 2003, Department Staff received a complaint of illegal dam construction on the outlet of Lake of the Woods, located in the Town of Theresa, Jefferson County.

In March 2004, with reference to Department Staff's first alleged violation, Department Staff Biologist Mark Craig visited the site and spoke with Respondent, Guy Hunneyman. With respect to the first alleged violation, Biologist Craig noted that a new cap had been installed across the crest of the dam, including a concrete lined spillway, and that a wooden gate<sup>3</sup> that leaked had been replaced with a solid metal gate which no longer leaked. These repairs or reconstruction form the basis of Department Staff's first alleged violation. The Craig affidavit states that Respondent "readily admitted" that he had made improvements to the dam. Craig Affidavit, ¶¶8 and 9.

Biologist Craig advised Respondent that "as a first step toward resolving the problem that three to four inches of concrete that were added to the dam had to be removed." Craig Affidavit, ¶9. Staff asserts that the higher elevation of the dam was flooding a small island in the lake that is used by Common Loons for nesting.

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<sup>3</sup>This gate affords access to the lower level of the dam for cleaning accumulated debris.

In his affidavit, Respondent states that in 2003, the Jefferson County Department of Public Works installed a cofferdam in order to make improvements to the nearby bridge and roadway. With the dam dewatered, Respondent admits that he repaired or reconstructed the dam; he "reinforced the flume and spillway front and back with concrete, but did not remove any material or alter the dam height. [He] painted the surfaces with white waterproof paint to protect the concrete. [He] also replaced the gate because it had deteriorated." Hunneyman Affidavit, ¶11. Therefore, it is undisputed that prior to December 2003, Respondent repaired or reconstructed the old mill dam, without a permit.

Respondent concedes that in the spring of 2004 Department Staff Biologist Craig visited the site and advised Respondent that he should not have altered (repaired or reconstructed) the dam without a permit. In response, Respondent contends that prior to May 24, 2004, he removed some material from the base of the spillway "since that seemed to be of concern to [Department Staff] even though I had not raised it." He also admits that he applied Block Bond surface bonding material over the area at the base of the spillway to smooth the area from which he had removed material. Hunneyman Affidavit, ¶¶13 and 15.

Respondent states his understanding that these additional alterations (repairs or reconstruction), at DEC Staff's request, resolved any claim that he had violated the law by altering (repairing or reconstructing) the dam without a permit. Hunneyman Affidavit, ¶¶12-15. In fact, DEC Biologist Craig states that by July 15, 2004, Respondent had repaired the dam, reversing the pre-December 2003 repairs (or reconstruction) observed previously. Craig Affidavit, ¶12. However, Respondent contends that these repairs occurred prior to the time of the second alleged violation, "between June 24, 2004 and July 15, 2004."

Nonetheless, these repairs or reconstruction apparently form the basis of Department Staff's second alleged violation. In other words, DEC Staff apparently asserts that Respondent's removal of the three to four inches of concrete from the dam, without a permit and at Department Staff's direction, form the basis of Department Staff's second alleged violation. Consequently, a factual dispute exists as to when these repairs or reconstruction occurred.

Moreover, Biologist Craig concludes that based upon subsequent visits to the site, the elevation of the dam must be reduced by an additional 12 inches to restore the water level to historic levels. Craig Affidavit, ¶12. However, Biologist Craig

provides no evidence or explanation of how the dam was repaired or reconstructed "between June 24, 2004 and July 15, 2004" or later to account for the alleged increased water elevation or impoundment of waters of Lake of the Woods.

Instead, on March 8, 2006 (well after the period of "between June 24, 2004 and July 15, 2004"), DEC Land Surveyor Effley determined that the dam spillway has an elevation of 329.86 feet at its lowest point. Effly Affidavit, ¶6. The elevation at the top of the dam was 332.82 feet at its highest point; and the water elevation was approximately 330.02 feet. Effly Affidavit, ¶6. In addition, Biologist Craig states that Lake of the Woods is a Class C water body. 6 NYCRR 910.6, Item No. 1117; and pursuant to Department publication, "New York State Lakes, A Morphometric Atlas of Selected Lakes, Volume 3, Region 6," Lake of the Woods has an elevation of 328 feet. Craig Affidavit, ¶6. These facts appear to form the basis of Staff's request for reducing the elevation of the dam by 12 inches (329.86 measured by Surveyor Effly, less 328 elevation reported in the Departmental atlas, would be 12.86 inches difference in elevation).

In view of Biologist Craig's statement that the pre-December 2003 repairs (or reconstruction) had been reversed by July 15, 2004, Department Staff has provided no explanation or evidence other than Effly's determination in March 2006 (almost two years later than the time of "between June 24, 2004 and July 15, 2004," identified for the second alleged violation, to support Department Staff's request that the elevation of the dam must be reduced by 12 inches. Therefore, Department Staff implicitly contends either that between June 24, 2004 and July 15, 2004, Respondent repaired or reconstructed the dam in some additional manner to increase its elevation by 12 inches or at some time between July 15, 2004 and March 2006, Respondent repaired or reconstructed the dam in some additional manner to increase its elevation by 12 inches (an unasserted third alleged violation) or in the alternative, that Respondent, as owner of the dam, is responsible at law (strictly liable) to maintain the dam, and therefore must lower the elevation of the dam by 12 inches, as Department Staff seeks, or some other theory of liability.

Department Staff apparently relies upon the statement cited above, that Lake of the Woods has an elevation of 328 feet. Yet, if elevation 328 is taken as correct, then Department Staff's request for relief seeking to reduce the elevation of the dam to 317.86 feet is misplaced, as an elevation of 317.86 would be 12 feet lower than the elevation determined in March 2006 by

Surveyor Effly and 10.14 feet lower than the elevation reported in the Departmental atlas.

Respondent objects to Staff's request to lower the elevation of the spillway by 12 inches to as much as 12 feet. Respondent contends that the spillway height has not changed by more than a couple of inches. (Hunneyman Affidavit, ¶¶17-19). In support of his position, Respondent provided photographs of a dock on the lake to show that the lake level has not changed (Hunneyman Affidavit, ¶19 and Exhibits 3 and 4). Therefore, factual disputes exist concerning the current and historical elevations of the dam (and Lake of the Woods), and as to the extent of relief sought by Department Staff regarding final elevation sought for the old mill dam (and Lake of the Woods).

#### Ownership of the Property

Although Guy Hunneyman is the named Respondent in this matter, the Department Staff brief, in arguing that no ECL Article 15 permit has been issued for this site, refers to the site as the property of Mary Hunneyman. DEC Brief at 1. Department Staff provides no explanation or evidence of the relationship between Mary Hunneyman and the named Respondent, Guy Hunneyman. Although ownership is not a requirement of ECL §15-0503, Department Staff provides no evidence to show that Respondent is the owner of the property on which the dam is located. Instead, elsewhere in its brief, Department Staff states that "Respondent, Guy Hunneyman, owns property with a mailing address of County Route 21, Redwood, Jefferson County, New York." (The brief, however, is not a sworn document and is considered legal argument, not evidence). Respondent's purported ownership of the site becomes relevant when considering theories of liability supporting the relief sought by Department Staff - - lowering the elevation of the dam by 12 inches - - as discussed above.

#### Respondent as the Actor

Department Staff's Exhibit 1 is a letter dated March 28, 2004 from Respondent, captioned "Lake of the Woods Dam Proposal." Department Staff argues that this exhibit is Respondent's admission that he made repairs to the dam prior to the date of the letter. However, the letter is carefully worded and does not state that Respondent made repairs. For example, following is a portion of the first paragraph:

"The concrete dam leaked and was in need of a new gate. The gate had been installed numerous times in the past and the last time had rocks placed in front of it to prevent vandalism. Cottage owners

also began to through [sic] rocks and debris on the lake side of the bridge in an attempt to maintain the lake level. Lake owners have been adding to and tearing out depending on the water height desired since. The county made a coffer dam and the dam was coated with concrete for maintenance. The structure of the concrete dam was not modified. The county removed the coffer dam. Most of pre-existing debris had been pushed into the mud bottom by the sand bags which were removed..."

Exhibit 1 does not identify who coated the dam with concrete, who replaced the gate, etc. Department Staff's contention that Exhibit 1 is Respondent's admission that he made repairs to the dam must be rejected.

At best, on this point, the Craig affidavit provides a conclusory statement that in visiting the site, DEC Biologist Craig "was informed that I should speak with [Respondent] Guy Hunneyman about the situation. I finally made contact with Mr. Hunneyman in March 2004. He readily admitted that he had made improvements to the dam that I had observed." Craig Affidavit, ¶9. Nonetheless, Respondent acknowledges in his affidavit that, in sum and substance, he did make some repairs (or reconstruct) the dam, as described above.

**RULING:** This motion for order without hearing is denied. Factual issues remain in dispute: first, establishing ownership of the property upon which the dam is located; second, the extent of repairs made by Respondent; third, whether during the period of June 24, 2004 through July 15, 2004 (or at a later date prior to March 8, 2006), Respondent repaired or reconstructed the dam resulting in an increased elevation from 328 feet to 329.86 feet, as Department Staff asserts; and fourth, whether Respondent, as owner of the dam, is strictly liable for maintenance and repair of the dam, and therefore must lower the elevation of the dam by 12 inches.

Some matters regarding the first alleged violation (prior to December 2003) are proven by Respondent's affidavit containing his admission that he effected some repairs to the dam, and as to the second alleged violation, Department Staff's Craig affidavit that those repairs had been fully performed. However, disputed facts exist as to the extent of repairs or reconstruction effected. Other matters remain allegations to be proven. In addition, the matter of penalties to be assessed for each violation must be

developed more fully, including explanation of the appropriate penalty provision applicable in this matter.

Following completion of discovery, Department Staff shall file a statement of readiness, after which I will schedule a hearing in this matter.

September 10, 2007  
Albany, New York

\_\_\_\_\_/s/\_\_\_\_\_  
Kevin J. Casutto  
Administrative Law Judge

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