

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

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

ORDER

DEC Case No.
CO 5-20120412-07

-by-

JASON ROBERTS DEVELOPMENT CORP.,

Respondent.

On May 17, 2013 an adjudicatory hearing was convened before Administrative Law Judge ("ALJ") Richard A. Sherman of the Office of Hearings and Mediation Services, New York State Department of Environmental Conservation ("Department"). The hearing addressed the allegations of Department staff that Jason Roberts Development Corp. ("respondent") violated 6 NYCRR 673.7 which establishes requirements governing emergency action plans for class B and class C dams. Specifically, staff alleges that respondent owns the Rainbow Lake Dam (DEC Id. No. 186-0849) in Hamilton County, New York that has been assigned a hazard classification of C, and that respondent has failed to submit an emergency action plan ("EAP") for the dam, on or before August 19, 2010.

The ALJ prepared the attached hearing report, which I adopt as my decision in this matter subject to my comments below. As set forth in the hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear at the adjudicatory hearing (see Hearing Report at 2 [Findings of Fact ¶¶ 5, 6]).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for default be granted (see Hearing Report at 3), and I concur that staff is entitled to a judgment on default. Furthermore, at the hearing Department staff presented a prima facie case on the merits and proved its case by a preponderance of the evidence (see id.). Accordingly, staff is entitled to a judgment based on record evidence.

ECL 15-0507(1) authorizes the promulgation of regulations governing emergency action planning, which are set forth in 6 NYCRR 673.7. Department staff requests that respondent be assessed a civil penalty of ten thousand dollars (\$10,000) for its failure to submit an EAP for the Rainbow Lake Dam. Staff cites ECL 71-1127 as the basis for its requested penalty. Prior to February 15, 2012, ECL 71-1127 provided for a penalty of not more than five hundred dollars for each violation of any provision of, or failure to perform any duty imposed by, article 15 (except for ECL 15-1713 [addressing certain water impoundments]) and an additional civil penalty of not more than one hundred dollars for each day during which the violation continued.

Effective February 15, 2012, ECL 71-1127 was amended to provide a penalty of not more than two thousand five hundred dollars for each violation and an additional civil penalty of not more than five hundred dollars for each day during which the violation continues. The violation in this matter commenced prior to February 15, 2012, and has continued past that date. Alternatively, pursuant to ECL 71-1109(1), any dam owner that violates ECL 15-0507(1), or any regulation promulgated pursuant thereto, is liable for a penalty of up to five hundred dollars (\$500) for each violation, and each day the violation continues is deemed a separate and distinct offense. Staff's ten thousand dollar (\$10,000) penalty request is within the authorized limits of either ECL 71-1127 or ECL 71-1109(1).

Respondent, as owner of the Rainbow Lake Dam, was required to submit an EAP to the Department by no later than August 19, 2010. Department staff testified that maintaining an up-to-date EAP is an industry standard and that it can save lives in the event of a dam breach or other emergency (see Hearing Report at 3). As of May 17, 2013, the date of the hearing, respondent had not submitted an EAP for the dam. Accordingly, respondent has been in violation for three years. Based on this period of violation and the importance of the EAP in protecting the public health and welfare, the requested penalty of ten thousand dollars (\$10,000) is appropriate. I also concur with staff's request that the civil penalty be paid within thirty (30) days of the service of this order upon respondent.

Respondent is also directed to submit its EAP to the Department within sixty (60) days of the service of this order upon it. The EAP must satisfy the requirements of 6 NYCRR 673.7, including but not limited to providing emergency notification procedures, inundation maps or other acceptable description of the potential inundation area, implementation procedures for all other aspects of the EAP, and EAP updating procedures. It also must circulate the EAP to the county emergency management official and other recipients as designated by the regulation. I strongly encourage respondent to contact Department staff to review the preparation of the plan for the Rainbow Lake Dam and its required contents.¹

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Jason Roberts Development Corp. waived its right to be heard.
- II. Based upon record evidence, respondent Jason Roberts Development Corp. is adjudged to have violated 6 NYCRR 673.7 for failing to submit an emergency action plan ("EAP") on or before August 19, 2010 for the Rainbow Lake Dam (DEC Id. No. 186-0849) located in Hamilton County, New York.

¹ Staff, in its complaint, also requested that respondent prepare and submit an inspection and maintenance plan for the dam (see 6 NYCRR 673.6 [setting forth requirements for the preparation of an inspection and maintenance plan and, where requested, its submission to Department staff]). Neither the complaint nor staff's proposed order alleged any violations of the requirements applicable to inspection and maintenance plans. Accordingly, this order makes no determinations in that regard.

III. Within thirty (30) days of the service of this order upon respondent, respondent Jason Roberts Development Corp. shall pay a civil penalty in the amount of ten thousand dollars (\$10,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The penalty payment shall be sent to the following address:

New York State Department of Environmental Conservation
Region 5
Office of General Counsel
1115 NYS Route 86
P.O. Box 296
Ray Brook, New York 12977
Attn: Betty Vann

IV. Within sixty (60) days of the service of this order upon respondent, respondent Jason Roberts Development Corp. shall submit an EAP for the Rainbow Lake Dam in accordance with the requirements of 6 NYCRR 673.7. The EAP shall be submitted to the Department at the following address:

New York State Department of Environmental Conservation
Dam Safety Section
EAP Coordinator
625 Broadway, 4th Floor
Albany, New York 12233-3504

V. Any questions or other correspondence regarding this order, including questions relating to the EAP, shall be addressed to Scott Abrahamson, Esq., Assistant Regional Attorney, at the address referenced in paragraph III of this order.

VI. The provisions, terms and conditions of this order shall bind respondent Jason Roberts Development Corp., and its 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: Albany, New York
September 14, 2013

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

HEARING REPORT

DEC Case No:
CO 5-20120412-07

-by-

JASON ROBERTS DEVELOPMENT CORP.,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondent Jason Roberts Development Corp. with a notice of hearing and complaint dated April 2, 2013, alleging that respondent violated ECL article 15 and 6 NYCRR 673.7 by its failure to submit an emergency action plan (EAP) for Rainbow Lake Dam (DEC dam ID# 186-0849). The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL article 15 and 6 NYCRR 673.7; (2) directing respondent to prepare and submit an EAP and an inspection and maintenance plan;¹ (3) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); and (4) granting such other relief as the Commissioner may deem appropriate.

In accordance with 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint was made by certified mail, delivered to respondent on April 4, 2013 (DEC exhibit 1). Respondent failed to file an answer to the complaint.

An adjudicatory hearing was convened on May 17, 2013 before DEC Administrative Law Judge (ALJ) Richard A. Sherman of the Office of Hearings and Mediation Services (OHMS), at the Department's Region 5 sub-office, 232 Golf Course Road, Warrensburg, New York. Department staff was represented by Scott Abrahamson, Assistant Regional Attorney, DEC Region 5. As noted on the hearing record, no one appeared on behalf of respondent. Staff indicated that it was prepared to proceed with the hearing and the hearing proceeded in the absence of respondent.

¹ The complaint alleges a single cause of action: that respondent failed to submit an EAP. The complaint does not charge respondent with failure to submit an inspection and maintenance (I&M) plan, nor was proof adduced at hearing regarding whether respondent has submitted an I&M plan. Therefore, while I note that respondent is required to file an I&M plan pursuant to the provisions of 6 NYCRR 673.6, this hearing report makes no determinations or recommendations concerning whether respondent has filed an I&M plan.

Department staff called one witness, Alon Dominitz, Chief of the Department's Dam Safety Section. Five exhibits were received in evidence at the hearing.

Applicable Regulatory Provisions

Pursuant to 6 NYCRR 673.7(a), "[t]he owner of a dam that been assigned a hazard classification of class B or C shall prepare an emergency action plan and annual updates thereof, submit each to the department . . . in accordance with this section." Additionally, pursuant to 6 NYCRR 673.7(c)(1), "[f]or dams that have been assigned a hazard classification of class C as of the effective date of this Part, the emergency action plan shall be submitted and provided in accordance with subdivision (b) of this section within 12 months of the effective date of this Part." Part 673 became effective on August 19, 2009 and, therefore, EAPs for class C dams were required to be submitted on or before August 19, 2010.

Findings of Fact

1. Respondent Jason Roberts Development Corp., is the owner of Rainbow Lake Dam (DEC dam ID# 186-0849), located in the Town of Indian Lake, Hamilton County, New York (DEC exhibits 2, 3, 4; testimony of Alon Dominitz [stating that Town of Indian Lake officials had advised Department staff that respondent was the owner of the dam and that staff had subsequently met with representatives of the owner]; see also Hamilton County Online Mapping System, <http://www.hamcomaps.net/#> [accessed May 30, 2013] [listing "Jason Roberts Dev Corp" as the owner of a 140 acre parcel, and numerous adjacent parcels, surrounding the site of the dam]).
2. Rainbow Lake Dam is assigned a hazard classification of class C (testimony of Alon Dominitz; exhibits 3, 4).
3. Alon Dominitz is the Chief of the Dam Safety Section and is familiar with records filed with and maintained by the Department relating to dams, including EAPs submitted pursuant to 6 NYCRR 673.7 (testimony of Alon Dominitz).
4. Alon Dominitz reviewed the Dam Safety Section file for Rainbow Lake Dam prior to the hearing and confirmed that respondent had not submitted an EAP for the dam on or before August 19, 2010, or at any time since that date (testimony of Alon Dominitz).
5. Department staff filed an affidavit of service stating that the notice of hearing and complaint was mailed to respondent on April 2, 2013 and, attached to the affidavit of service, is a United States Postal Service confirmation that these items were delivered to respondent's address on April 4, 2013 (DEC exhibit 1).
6. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing held on May 17, 2013 (DEC exhibit 1, hearing record).

Discussion and Conclusions

At hearing, Department staff moved for both a default judgment against respondent and for a determination on the merits regarding respondent's liability for the violation alleged by staff.

The record shows that respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing held on May 17, 2013 (see findings of fact ¶¶ 5, 6). On May 20, 2013, Department staff provided OHMS with a proposed default order. Department staff has satisfied the requirements governing default procedures set forth at 6 NYCRR 622.15. Accordingly, I conclude that staff's motion for a default judgment should be granted and respondent should be held liable for violating 6 NYCRR 673.7.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent violated 6 NYCRR 673.7. Department staff's proof presents a prima facie case demonstrating that respondent failed to submit an EAP for Rainbow Lake Dam on or before August 19, 2010, or at any time since, in violation of 6 NYCRR 673.7 (see finding of fact ¶ 4). Respondent made no proffer and did not appear at hearing. Accordingly, I conclude that staff's motion for a determination on the merits should be granted and respondent should be held liable for violating 6 NYCRR 673.7.

By its complaint, and again at hearing, Department staff requested a \$10,000 penalty. At hearing, staff stated that a properly written and updated EAP is an important component of dam safety and is an "industry standard" (testimony of Alon Dornitz). Staff further stated that EAPs can and do save lives by ensuring that, in the event of a dam breach or other emergency, appropriate first responders are quickly identified and contacted and that responders know the likely path of any flood waters (id.). Given that respondent has been in violation of 6 NYCRR 673.7 for well over two years, staff's proposed penalty is a small fraction of the maximum penalty available under ECL 71-1109.² I conclude that the penalty proposed by staff is authorized and appropriate.

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default and holding respondent in default pursuant to the provisions of 6 NYCRR 622.15;

² Department staff cites ECL 71-1127 as authority for its proposed penalty. ECL 71-1109, however, provides a specific penalty for "violating subdivision 1 of section 15-0507 or any regulations promulgated pursuant thereto" and the charge here relates to a violation of a regulation promulgated pursuant to ECL 15-0507(1). I note that both ECL 71-1109 and 71-1127 provide for a \$500 penalty for each day that a violation continues and the violation here is of long duration. Therefore, the maximum penalty available under either ECL provision is in the hundreds of thousands of dollars.

2. Holding respondent liable for violating 6 NYCRR 673.7 for its failure to submit an EAP for Rainbow Lake Dam (DEC dam ID# 186-0849) based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to pay a civil penalty in the amount of \$10,000; and
4. Directing respondent to file an EAP for Rainbow Lake Dam.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
June 4, 2013

EXHIBIT CHART

Matter of Jason Roberts Development Corp.
DEC Case No. CO5-20120412-07

Exhibit No.	Description	Offered By	Rec'd (Y/N)
DEC-1	Affidavit of Service of Notice of Hearing and Complaint (with attachments, including copies of the notice of hearing and complaint)	Department Staff	Y
DEC-2	Map of Region Surrounding Rainbow Lake Dam	Department Staff	Y
DEC-3	DEC Report of Inspection (inspection date: Oct. 17, 2011) and Cover Letter (dated Nov. 28, 2011) (with attachments)	Department Staff	Y
DEC-4	DEC Notice of Violation (dated Apr. 13, 2012) and Proposed Order on Consent (with attachments)	Department Staff	Y
DEC-5	Department Staff Civil Penalty Table	Department Staff	Y