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
of the State of New York

-by-

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

Respondents.

DEC Case No. CO3-20070201-9

DECISION AND ORDER OF THE COMMISSIONER

June 17, 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 Robert Berger, Karen Berger (Berger respondents), David Cook and Jody Cook (Cook respondents) (the Berger and Cook respondents are referred to collectively herein as respondents) are owners of the Honk Falls Dam (dam), and have failed to operate and maintain the dam in a safe condition, in violation of Environmental Conservation Law (ECL) § 15-0507(1). Based on the record, I adopt the attached hearing report (Hearing Report) of Administrative Law Judge (ALJ) Richard A. Sherman 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 Honk Falls Dam, located on Rondout Creek, a tributary of the Hudson River in the Town of Wawarsing, Ulster County, is a concrete dam nearly 300 feet long and approximately 42 feet tall at its highest point, measured from the downstream toe to the top of the dam's abutment walls[1] (see Hearing Report, at 3; see also Exhibits [Exs.] 2, 8). Built in or around 1898 for hydroelectric power generation, the dam is no longer used for that purpose but continues to impound the water in Honk Lake, which is used for recreational purposes (see Hearing Report, at 3). Water from the lake flows over a spillway[2] located approximately in the center of the dam.

In 1981, the New York District Corps of Engineers completed a Phase I Inspection Report (Phase I Report) relating to the dam, as part of the National Dam Safety Program (see Ex. 2). The Phase I Report determined that the spillway capacity was "seriously inadequate," and classified the dam as "in the 'high' hazard category" and "unsafe, non-emergency," stating that "if a severe storm were to occur, overtopping and failure of the dam would take place, significantly increasing the hazard to loss of life downstream" (id. at fifth un-numbered page, and at 2). The Phase I Report identified additional "significant deficiencies," including deterioration of the entire concrete surface of the dam, cracks in the downstream face of the auxiliary spillway, erosion at the junction of the concrete and rock at the toe of the dam, and that brush and trees were growing at various locations on the dam and in the discharge channel below

[1] The "downstream toe" is the junction of the downstream face of a dam and the natural ground surface (see DEC Guidelines for Design of Dams [rev. 1989] [DEC Dam Guidelines], www.dec.ny.gov/docs/water_pdf/damguideli.pdf, at 4; see also FEMA Federal Guidelines for Dam Safety, Glossary of Terms [2004] [FEMA Glossary], www.ferc.gov/industries/hydropower/safety/guidelines/fema-148.pdf, at 23). The abutment walls of the Honk Falls Dam extend beyond both the eastern and western shorelines (see e.g. Exs. 2, 8, 14), and are also referred to as the "non-overflow" portions of the dam, defined as "[a] dam or section of dam that is not designed to be overtopped" (FEMA Glossary, at 18). As discussed in more detail below, the Berger respondents admit that they own the abutment wall to the extent that it extends eastward onto the parcel of land that they own, but claim erroneously that the abutment wall is not part of the dam.

[2] A spillway is "[a] structure over or through which flow is discharged from a reservoir" [FEMA Glossary, at 21; see also DEC Dam Guidelines, at 4], allowing 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 that may ultimately cause failure of the dam, resulting in the release of the impounded water (see DEC Dam Guidelines, at 10). Spillways must therefore be designed to have a capacity sufficient to handle sustained flows as well as extreme floods.

the auxiliary spillway (id. at 8-9, 15, 19). Finally, the Phase I Report noted that there were no operable outlet pipes to draw down the lake (id. at 14).

In 1998, the U.S. Army Corps of Engineers, New York District, issued a Dam-Break Flood Analysis of the dam, and determined that, "[o]n the basis of its potential to cause downstream damage, in terms of either loss of life or economic loss, Honk Falls Dam is rated as a Class C, High Hazard category" (Ex. 8, at i, 18; see also Hearing Report, at 3).[3]

The record reflects that Department staff inspected this dam at least 14 times between 1983 and 2010 and noted deficiencies throughout this period (see Exs. 4, 6, 34). Every inspection report during that period stated that the dam was classified as Hazard Class "C" (id.).

By letter dated September 6, 2006, the Department: (i) notified respondents that "records indicate that you are co-owners of the Honk Falls Dam" and were therefore responsible to operate and maintain the dam in a safe condition under ECL 15-0507; (ii) informed respondents that the dam was classified as "Class C – High Hazard" and that there was no emergency action plan (EAP) in place;[4] (iii) identified deficiencies in the dam found during a 2006 inspection; and (iv) requested that respondents retain a licensed professional engineer to evaluate the dam and report on its condition (see Ex. 6). The Department followed up with letters in November 2006 and February 2007 (id.), but the record does not reflect that respondents took any actions to retain an engineer to assess the condition of the dam or otherwise address the deficiencies found by the Department.

Department staff commenced this enforcement proceeding by serving on respondents a notice of hearing and complaint dated April 27, 2007. In its complaint, staff alleges that (i) since August 1994, the Berger respondents violated ECL 15-0507(1) by failing to operate and maintain the dam in a safe condition; and (ii) since July 1999, the Cook respondents violated ECL 15-0507(1) by failing to operate and maintain the dam in a safe condition.[5] The matter was assigned to ALJ Sherman upon the filing by the Berger respondents of a motion for summary

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[3] Dams are classified as "Class C or high hazard" in circumstances in which dam failure may result in widespread or serious damage to, among other things, homes, highways, industrial or commercial buildings, utilities, or other infrastructure "such that the loss of human life or widespread substantial economic loss is likely" (Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] 673.5[b][3]; see also Ex. 8, at 2 [referring to 6 NYCRR former 673.3, the prior version of 673.5 in effect in 1998, which stated that Class C dams are located in areas where failure may cause loss of human life and/or serious damage to structures and extensive economic loss]).

[4] 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 emergency management official in the county in which the dam is located and, upon request, any other municipality in the same or an adjoining county within the inundation area (see 6 NYCRR 673.7).

[5] At the commencement of the hearing, staff amended the complaint without objection by respondents so that the period of alleged violations by all respondents began on July 27, 1999 (see Hearing Transcript [Transcript] at 9:18-22). The change to a July 27, 1999 commencement date was based upon the Legislature's amendments to the dam safety statute in July 1999.

judgment dated July 25, 2007. Following extensive motion practice and discovery,[6] a notice of hearing was issued by letter dated August 26, 2011 (see Hearing Report, at 1). ALJ Sherman conducted nine days of hearing between November 2, 2011 and January 18, 2012, involving testimony by nine witnesses, and the admission of 80 exhibits into the record. Following the hearing, the parties filed post-hearing and reply briefs, the latter filed by all parties on or before May 4, 2012 (id.).

On January 29, 2013, Department staff sent to the ALJ and respondents a copy of Knapp v Hughes (19 NY3d 672 [2012]), a decision issued by the New York Court of Appeals several months after briefing in this proceeding had closed. Upon requests by respondents, Assistant Commissioner Louis A. Alexander granted the parties an opportunity to submit briefs addressing the Knapp decision.[7] Staff thereafter filed and served timely its brief on March 7, 2013. The Cook respondents filed and served timely their brief on March 20, 2013. The Berger respondents failed to file their brief by the March 20 deadline, but sent, shortly after the close of the filing deadline, an email request for an extension of time to file their brief. The Berger respondents thereafter filed and served their brief that evening.[8]

ALJ Sherman recommends that I (i) hold respondents jointly and severally liable for violating ECL 15-0507; (ii) order respondents to implement remedial measures; (iii) order respondents to provide financial assurance in the amount of $500,000; and (iv) assess a civil penalty jointly and severally against respondents in the amount of $116,500, representing the lower of two proposed penalties submitted by Department staff. Subject to the comments below, I adopt the ALJ's recommendations with respect to liability, remedial measures and financial assurance, and adopt in part the ALJ's recommendation relating to civil penalties.

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[6] The ALJ issued seven rulings on motions including two motions for summary judgment as well as motions to compel, for a protective order, to join additional parties, to exclude certain documentary evidence, and to dismiss affirmative defenses. As reflected in the ALJ's rulings, the hearing transcript, correspondence and post-hearing briefing, this proceeding has been litigated aggressively, and has included accusations by counsel for the Berger respondents of prosecutorial misconduct (see ALJ Ruling, Sept. 19, 2007, at 9; see also ALJ Ruling, Feb. 17, 2009, at 9), that the Department's counsel and witnesses are lying, being untruthful, and are not "forthcoming," that the proceeding is "[n]ot based on intellectually honest analysis," is a "travesty" and "shocking to the conscience" (see Transcript at 2398:20; Respondents Bergers' Post-Hearing Initial Brief dated April 6, 2012 [Berger Post-Hrg. Br.], at 3-4, 27, 28 n.7, 37 n.9), that Department staff had "hidden" or "misrepresented" evidence (Berger Post-Hrg. Br., at 3; see also id. at 52), that the proceeding is a violation of Bergers' constitutional rights to equal protection (see Matter of Berger, ALJ Ruling, Feb. 17, 2009, at 9) and due process (see Matter of Berger, ALJ Ruling, Feb. 10, 2010, at 4-5), and that the Berger respondents were entitled to dismissal, reimbursement and sanctions (see Matter of Berger, ALJ Rulings, Sept. 19, 2007, Feb. 17, 2009, June 25, 2009, Feb. 10, 2010). The ALJ – who did not find merit in any of the accusations made by counsel for the Berger respondents prior to and during the hearing – is to be commended for his management of this proceeding, and his consistent direction to the parties to maintain civility and to focus on the facts and the merits (see e.g. Matter of Berger, ALJ Ruling, June 25, 2009; see also Transcript at 306:10-11; 373:20-23; see generally Standards of Civility for the Legal Profession, 22 NYCRR 1200, Appendix A). My review of the record confirms that the ALJ was correct in finding these claims by the Bergers' counsel to be meritless.

[7] Assistant Commissioner Alexander addressed respondents' requests because ALJ Sherman had already forwarded the Hearing Report to me for final determination.

[8] Because the Bergers' late filing did not prejudice any of the parties, it was accepted and I have fully considered it in reaching this decision and order.

STANDARD OF REVIEW

In this enforcement proceeding, the recommendations contained in the ALJ's hearing report are advisory in nature, and my review is de novo (see e.g. Matter of Sil-Tone Collision, Inc. v Foschio, 63 NY2d 406, 411 [1984]; Matter of Owl Energy Resources, Inc., Interim Decision of the Commissioner, Feb. 26, 1993, at 1-2). Although an ALJ's report is entitled to weight, especially to the extent that determination of material facts may turn on resolving the credibility of witnesses appearing at hearing, a Commissioner is not bound by, and may overrule, the ALJ's findings of fact and make his own findings, provided they are supported by record evidence (see Simpson v Wolansky, 38 NY2d 391, 394 [1975]; Matter of Jackson's Marina, Inc. v Jorling, 193 AD2d 863, 866 [3d Dept 1993]; Matter of New York City Dept. of Sanitation, Decision of the Commissioner, July 2, 2012, at 9-10; see also 6 NYCRR 622.18[e] [Commissioner's final determination must contain findings of fact and conclusions of law or reasons for the final determination]). I adopt the ALJ's findings of fact and conclusions of law in this matter, subject to the comments below.

STANDARD OF PROOF

The Berger respondents incorrectly characterize the standard of proof applicable to the Department staff's presentation of its case, referring to it at various points as "the preponderance of the substantial evidence" (see Berger Post-Hrg. Br., at 1, 6, 39, 55), "substantial evidence to the record" (id. at 5; see also id. at 6, 26), and "absolute, iron-clad proof" (id. at 12), and erroneously citing State Administrative Procedure Act § 301(6) as setting the applicable standard (id. at 6).[9] As the ALJ correctly observed, a "preponderance of the substantial evidence" standard does not exist, and it appears that the Berger respondents have combined two different standards (see Hearing Report, at 4-5). Assuming the Berger respondents are arguing that the "substantial evidence" standard applies (and it does not), that would actually reduce the Department staff's burden of proof; substantial evidence "is less than a preponderance of the evidence" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011] [citing 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180-181 (1978)]).

In this enforcement proceeding, Department staff bears the burden of proof on the charges and matters asserted in the complaint, and must establish factual matters by a "preponderance of the evidence" (see 6 NYCRR 622.11[b], [c]). As stated by the ALJ, and as I hold herein, Department staff satisfied its burden of proof in this matter.[10]

[9] It is assumed that the Berger respondents intended to cite section 306(1), which discusses the substantial evidence standard, rather than section 301(6), which relates to the appointment of qualified interpreters whenever a deaf person is a party to an adjudicatory proceeding.

[10] Only one of the initial nine "affirmative defenses" raised by the Berger respondents remained at the time of the hearing (see Matter of Berger, ALJ Ruling, Aug. 22, 2011). That "defense" – "[n]o law or regulation creates any legal obligation upon Answering Respondents with respect to the Honk Falls Dam" (Revised Amended Verified Answer [June 24, 2011]) – is in the nature of a denial pleaded as an affirmative defense and, as such, has been rendered academic by Department staff's proof in this matter. The Cook respondents amended their answer to reflect that they asserted no affirmative defenses (see Hearing Report, at 5 n 5).

DISCUSSION

Respondents do not dispute that (i) the dam has many deficiencies, as identified in the Phase I Report in 1981 and by the Department during its inspections from 1983 forward; (ii) failure of the dam could result in loss of life and property damage downstream, as discussed in both the Phase I Report and the 1998 Dam Break Analysis; (iii) the spillway lacks sufficient capacity; or (iv) respondents have not prepared, submitted to the Department for approval, or circulated, an EAP, although one is required by 6 NYCRR 673.7. Indeed, counsel for the Berger respondents expressly concedes that respondents have not performed the actions required of owners of dams (see Berger Post-Hrg. Br., at 5 ["Neither Respondents Bergers nor Respondents Cooks have contested that there are obligations placed upon owners of hazard class C dams or that they have not taken actions that would be required of them if they were owners."] [emphasis added]).

Rather, respondents claim that they are not "owners" of the entire dam, and are therefore not responsible for inspecting or maintaining the dam or performing any of the other activities required by the relevant statute and regulations. In addition, the Berger respondents argue that the Department has never properly classified the dam as a "Class C – High Hazard" dam.

I. Respondents Are "Owners" of the Dam Under ECL 15-0507(1)

The ALJ carefully reviewed all of the evidence relating to the issue of ownership of the property surrounding, underneath and including the dam, including deeds, indentures, maps, surveys, tax records, photographs, other documents, and testimony, and correctly concluded that respondents are "owners" of the dam under ECL 15-0507(1) (see Hearing Report, at 6-26). I will not repeat his thorough analysis here, but will address a few salient points and discuss the Knapp decision that was the subject of briefing by the parties after the record was closed and the ALJ forwarded the Hearing Report for my consideration.

ECL 15-0507(1) 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."[11] Liability in this case turns on whether each respondent is an "owner" because he or she is a "person … who owns … a dam," and does not implicate the issue of whether each respondent is an "owner" under the statute because he or she is "person … who … uses a dam."[12]

[11] 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]).

[12] Prior to the hearing, the Cook respondents moved to compel joinder of dozens of persons and organizations as "necessary parties," arguing that owners of property adjoining Honk Lake are statutory "owners" of the dam because they "use" the dam by enjoying increased property value and enhanced quality of life due to owning lakefront property. In an earlier ruling, the ALJ held that under certain circumstances "use of the waters impounded by a dam may constitute ownership under ECL 15-0507(1)" (Matter of Berger, ALJ Ruling, Feb. 17, 2009, at 6), but had not made any finding or ruling with respect to whether respondents were considered "owners" in that context (see Matter of Berger, Ruling of the ALJ, May 28, 2010, at 4 n 2). In denying the Cook's motion to compel joinder, the ALJ held that, since Department staff represented that it would not argue that respondents are owners based on their

As a preliminary matter, I adopt the ALJ's conclusion that, because none of the relevant deeds contained an exclusion or reservation of the dam from conveyance of the property, the owner or owners of the land underneath the dam own the dam (see Hearing Report, at 8-9 [citing cases]). I also adopt the ALJ's rejection of respondents' arguments that the dam is owned by the City of New York, the County of Ulster or Longboat, Inc. (id. at 6-14).

A. The Berger Respondents Are Owners of the Dam

The Berger respondents admit that they own tax parcel 83.6-1-11 (see Hearing Report, at 2 [citing affidavit and testimony of respondent Robert Berger, and statements of the Berger respondents' counsel]), but claim that they own land only up to the top of the eastern bank of Honk Lake and Rondout Creek, and no further west into or under the water. With respect to the land up to the bank, the Berger respondents concede that, "to the extent that there is any portion of the dam's structure that's on there, they're not going to deny they own the dam structure that's on the land" (Transcript at 833:14-21; see also Berger Post-Hrg. Br., at 11 [if the abutment wall is part of the dam, the Bergers "could be considered to own it in some manner"]).[13] Indeed, Bergers' counsel represented at the hearing that the Bergers agree to repair the portion of the abutment that is on their land, if it needs to be repaired (Transcript at 837:9-13).

I adopt the ALJ's analysis and conclusions regarding the boundaries of the Berger respondents' parcel, including his holding, based upon case law predating the Knapp decision, that conveyance of land along a stream or lake is presumed to convey land under the water to the centerline of the stream or lake, unless the deed expressly excludes the underwater land (see Hearing Report, at 18-21 [citing cases including Stewart v Turney, 237 NY 117, 121-122 (1923)]).[14] In addition, as discussed below, I hold that the Knapp decision does not compel a different result.

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beneficial use of the dam, he would allow no testimony, evidence or argument at the hearing concerning "beneficial use" (id. at 10).

Because respondents' liability is established through their actual ownership of the property on which the dam sits, and thus ownership of the dam itself, it is not necessary to reach in this case the issue of the nature and scope of "use" of a dam that would suffice to satisfy the statutory definition of "owner." I note, however, that I have held that a municipality "uses" a dam, and is thus an "owner" under the statute, when it uses the waters impounded by a dam for its water supply (see Matter of Village of Florida, Commissioner's Decision and Order, May 23, 2013, at 5).

[13] Exhibit 22 includes a recorded mortgage in which the Bergers, to secure a mortgage, represented to lender Ulster Savings Bank that they "lawfully own the Property" described in Schedule A attached to the mortgage as "ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected… identified as Tax Map Designation 83.6-1-11" (Ex. 22, at 17th, 18th, and 35th unnumbered pages [emphasis added]).

[14] I agree with the ALJ's conclusion that the Berger respondents own tax parcel 83.6-1-11 by adverse possession (see Hearing Report, at 17). Moreover, the Berger respondents are estopped from claiming that they do not own the entirety of the tax parcel. Under well-settled principles of equitable estoppel, a party who has accepted the benefit of a deed conveying property is estopped from attacking the validity of that deed to avoid corresponding obligations (see e.g. Boulder Brook Acres, Inc. v Town of Scarsdale, 112 AD2d 336 [2d Dept], lv dismissed 66 NY2d 603, 916 [1985]; see also Bybee v Oregon and Calif. R.R. Co., 139 US 663, 682 [1891]). Thus, the Berger respondents may not claim the benefit of ownership of the parcel under the deed, but disavow ownership of the entire parcel,

The Knapp decision is a reaffirmation and clarification of existing law. Indeed, the Court begins its decision by explicitly so stating:

> "It has long been established New York law that a conveyance of land on a pond or stream includes the land under the pond or stream, to the center of the water, unless a contrary intention is made clear. We reaffirm that principle in this case, and hold that its application does not depend on minor variations in the language of the conveyance."

(19 NY3d at 674 [emphasis added]). The Court listed several of its prior cases that had applied that rule, including Stewart v Turney, one of the cases cited by the ALJ here to support his recommendation regarding the boundary line of the Berger respondents' parcel. The Court did not overrule Stewart or any of those prior cases; to the contrary, the Court intended to make the rule even clearer, and to correct any confusion that may have resulted from some decisions that interpreted certain words to be sufficient to rebut the presumption that underwater lands go with lands adjacent to water:

> "The effect of a grant should not turn on such fine distinctions as that between 'side' and 'edge.' To make a plain and express reservation of rights to underwater land, a grantor must do more than use the word "edge" or "shore" in a deed. He or she must say that land under water is not conveyed, in those words or in words equally clear in meaning. In the absence of an explicit reservation, a grant of land on the shore of a pond or stream will be held to include the adjoining underwater land, except in unusual cases where the nature of the grant itself shows a contrary intention."

(Id. at 677 [emphasis added]).

After first claiming that the Court of Appeals decision in Knapp "isn't even 'authority'" (Berger Memorandum of Law Regarding Knapp v Hughes, at 1), the Berger respondents argue that the precedential value of the decision is limited to cases involving "a certain class of deeds" which, according to the Berger respondents, does not include the deeds at issue in this case (id.). The Berger respondents have not offered any deed or other document relating to a conveyance of parcel 83.6-1-11 that contains any reservation of lands under Honk Lake or Rondout Creek, much less a deed or other document containing language that would satisfy the Court of Appeals' requirement of an "explicit reservation." Nor did the Berger respondents argue that this case falls within the "unusual" exceptions in which the nature of the grant itself shows an intention to reserve the underwater lands.

Although the Berger respondents seek to distinguish the facts in Knapp from those in the present case, they have not refuted the applicability of the longstanding legal principle pre-dating and reaffirmed in Knapp. The ALJ's finding that respondents own land to the centerline of Rondout Creek is fully consistent with the Knapp decision, and I adopt it herein.

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including the land between the "top of the bank" and the center of Rondout Creek, based upon any alleged title defect.

In addition to the legal principles discussed above, the historical deeds support the conclusion that the boundary line between the Berger respondents' property and the Cook respondents' property is the centerline of Rondout Creek (see Hearing Report, at 20). The Berger respondents did not offer into the record any deed or other document contradicting the historical deeds and supporting their claim that their property boundary ended at the top of the bank. Nor did they apparently ever have their parcel surveyed or offer a survey into evidence in this proceeding (see Hearing Report, at 19-20).

Based upon the foregoing, and the ALJ's Hearing Report at pages 5-21 to the extent it relates to parcel 83.6-1-11, I hold that the Berger respondents own tax parcel 83.6-1-11 and that the western boundary line of that parcel is the centerline of Rondout Creek. Because this land underlies the dam,[15] I also hold that the Berger respondents are owners of the dam for purposes of ECL 15-0507(1).[16]

B. The Cook Respondents Are Owners of the Dam

The Cook respondents admit that they own tax parcel 83.1-2-5, including land under the water of Honk Lake (see Hearing Report, at 2 [citing testimony of respondent Jody Cook and Cook Post-Hearing Brief]). The Cook respondents essentially advance two arguments that they do not own any portion of the dam. First, they argue that title to the dam rests in the City of New York, the County of Ulster or Longboat, Inc. As set forth above at 6, the ALJ properly rejected this argument (see Hearing Report, at 6-14), and I adopt his analysis and conclusions.[17]

[15] I note again that the Berger respondents have already conceded that they own the portion of the dam's abutment wall that is located on their parcel to the east of the bank of Rondout Creek. Although the Berger respondents argue that the portion of the wall on land is not part of the dam, the evidence – including the testimony of the Bergers' own witness Michael Naegeli – is clearly to the contrary (see e.g. Transcript at 2393:18 [Naegeli testimony: "Without the abutment you have no dam"]; id. at 83:13-85:9 [Canestrari testimony regarding design and purpose of Honk Falls Dam abutment walls]; id. at 833:8-13 [Burgher testimony that abutment is part of the dam]; id. at 1568:23-1569:5; 1570:24-1573:5; 1573:20-1575:17 [Dominitz testimony regarding relationship between spillway and abutment wall portions of the dam as they relate to EAP and spillway capacity]).

[16] I adopt the ALJ's analysis rejecting the Berger respondents' claim that I lack the authority to determine whether the Berger respondents are owners of the dam for purposes of ECL 15-0507(1) (see Hearing Report at 26-28). As the ALJ states, whether a respondent is an "owner" under the statute is an element of the claim that Department staff must establish by a preponderance of the evidence. Nothing in the case law or the legislative history of ECL 15-0507 supports the position that the statute is to be enforced against "owners" but that I lack the authority to determine who is an "owner" (see Matter of Estate of Ryan, Ruling of the Chief ALJ, Oct. 15, 2010, at 7-8 [where Legislature made ownership of property an element of a violation under the ECL, the Department has the authority to determine ownership through administrative adjudicatory proceedings]). Moreover, nothing in case law or other statutes supports the Berger respondents' claim that determining ownership rests exclusively within the jurisdiction of the Supreme or County Courts, or can only be accomplished under the Real Property Actions and Proceedings Law.

[17] As with the Berger respondents, an alternative basis exists for concluding that, notwithstanding any title defects, the Cook respondents own tax parcel 83.1-2-5. Having accepted the benefits of ownership through their quitclaim deed, the Cook respondents are estopped from challenging the validity of that deed to avoid the obligations of ownership (see Boulder Brook Acres, Inc., 112 AD2d at 336; see also Bybee, 139 US at 682).

Second, the Cook respondents claim that the centerline of Rondout Creek prior to the construction of the dam in 1898 cannot be determined, and that it is possible that the historical centerline was west of its current location. The Cook respondents theorize that, if the historical centerline of Rondout Creek was to the west of the dam, the dam is not on land owned by the Cook respondents. The ALJ properly analyzed the relevant documentary and testimonial evidence (see Hearing Report, at 21-26), and I adopt his conclusion that "[t]he record overwhelmingly supports Department staff's position that, prior to the construction of Honk Falls Dam, Rondout Creek flowed where the dam now sits" (id. at 24).

Based upon the foregoing, and the ALJ's Hearing Report at pages 5-26 to the extent it relates to parcel 83.1-2-5, I hold that the Cook respondents own tax parcel 83.1-2-5 and that the eastern boundary line of that parcel is the centerline of Rondout Creek. Because this land underlies the dam, I also hold that the Cook respondents are owners of the dam for purposes of ECL 15-0507(1).

II. The Dam is a Class C High Hazard Dam

The Berger respondents argue that the record lacks evidence that the Department staff ever assigned a Class C Hazard classification to the dam, or that the dam was properly so classified when this proceeding was commenced (see Berger Post-Hrg. Br., at 39-41). For the reasons set forth in the Hearing Report, I reject the Berger respondents' arguments and adopt the ALJ's conclusions on this issue (see Hearing Report, at 28-32).[18]

III. Respondents Are Jointly and Severally Liable Under ECL 15-0507(1)

Having determined that respondents are "owners" of the Honk Falls Dam under ECL 15-0507(1), I also hold, based on the weight of the credible record evidence, that respondents have violated ECL 15-0507(1) by failing to operate and maintain the Honk Falls Dam in a safe condition. Respondents have not submitted any evidence to demonstrate that they have complied with the statutory and regulatory requirements applicable to owners of the dam. Indeed, the Berger respondents have expressly conceded that they have not performed the actions required of dam owners (see Berger Post-Hrg. Br., at 5). As discussed immediately below, I also adopt the ALJ's recommendation to hold that respondents' liability for these violations of ECL 15-0507(1) is joint and several.

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

[18] The Berger respondents expressly conceded that "[t]he Honk Falls Dam was a hazard class C dam in 1997" (Berger Post-Hrg. Br., at 54), but offered no expert testimony to demonstrate that such classification was no longer appropriate as of the commencement of this proceeding. Counsel's extended discussion in the post-hearing brief of "breach invert," sedimentation, and computer modeling (id. at 42-49) was not supported by any expert testimony, report or engineering analysis in the record. In any event, the dam's classification is not an element of proof with respect to respondents' violation of ECL 15-0507(1) (see also 6 NYCRR 673.3[a], [b], [d]). The claim only requires that Department staff prove by a preponderance of the evidence that respondents have failed to operate and maintain the dam in a safe condition (see ECL 15-0507[1]).

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," 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.). 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 does not expressly state whether, in circumstances such as the present case in which more than one person satisfies the statutory definition of "owner," each "owner" may be held jointly and severally liable for violations of ECL 15-0507(1).[19] I conclude that imposing joint and several liability on each respondent for 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 all owners of dams 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

[19] Where it has been determined that a person satisfies the definition of "owner" of a dam, such person is responsible for satisfying all duties imposed by the statute and regulations; the statute does not establish a threshold extent of "ownership" 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]).[20] In this case, even if respondents' property boundaries meet at the centerline of Rondout Creek, and thus somewhere near the middle of the dam, the dam is itself indivisible (see e.g. Transcript at 1569:3-5 [Dominitz testimony that hazard classification is assigned to the entire dam because "the entire dam works as a system"]), 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.[21]

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.[22] 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]).[23]

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

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[20] 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").

[21] 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").

[22] Indeed, even if the dam failed, for example, at locations on its eastern and western ends, and the released waters combined 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"]).

[23] 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").

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 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 NY 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]).[24]

In Simmons, each owner owed a common duty to ensure the safety of the wall common to the three separate properties. Similarly, the Berger respondents and the Cook respondents in this case, as "owners" of the dam under ECL 15-0507(1), have 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. Respondents thus 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 Envtl. 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) (see also Matter of Village of Florida, Commissioner's Decision and Order, May 23, 2013, at 8 [holding three municipalities jointly and severally liable for violations of ECL 15-0507(1)]).

IV. Remedy and Civil Penalty

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

[24] 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"].

respondents jointly and severally to perform remedial activities and pay civil penalties as described below.

A. Remedial Activities

ALJ Sherman recommends that I direct respondents to perform the remedial activities requested by Department staff. According to Alon Dominitz, a licensed professional engineer with a master's degree in engineering who has served as section chief of the Department's dam safety section for approximately 20 years (see Transcript at 1291:15-22), the following activities are necessary in order to ensure that the dam is being operated and maintained in a safe condition: (i) conduct an engineering assessment and implement a chosen alternative resulting from such assessment, which may include removal of the dam, temporary lowering of the spillway, or reducing the level of water in the lake pending completion of repairs; (ii) prepare an emergency action plan; (iii) retain a licensed professional engineer, who must inspect the dam; (iv) prepare and follow a written inspection and maintenance plan; and (v) prepare and complete annual certifications by the owners (see Transcript at 1335:6-1339:11; 1604:1605:9; see also 6 NYCRR Part 673).

According to Mr. Dominitz, an engineering and safety inspection could be performed immediately, an inspection and maintenance plan and an interim emergency action plan could be completed within three months, and an engineering assessment could reasonably be completed within nine months to a year (see Transcript at 1339:20-1340:13). Department staff's post-hearing brief essentially tracks Mr. Dominitz's testimony, and requests that I issue an order directing respondents to complete certain activities required by Part 673 for owners of class C dams within three months and other activities within a year (see Staff Post-Hearing Br., at 42).

ALJ Sherman has recommended two modifications to Department staff's requested remedial measures: (i) that I modify staff's request with respect to lowering the level of Honk Lake "as soon as possible" by requiring respondents to first submit a plan to Department staff for approval setting forth both the proposed method to be employed to lower the water level, and a schedule for implementing the proposal; and (ii) that I order quarterly safety inspections but grant to Department staff the flexibility to extend the period between inspections (see Hearing Report, at 33). I adopt these recommendations. In addition, I have incorporated the standard requirements in the list of remedial activities ordered below that certain documents be signed and sealed by a licensed engineer.

Having held that respondents are jointly and severally liable for violations of ECL 15-0507(1), I hereby order respondents – jointly and severally – to perform the following remedial activities:

(1) Within thirty (30) days of the date of this decision and order, respondents shall retain a licensed professional engineer registered in New York and experienced in dam safety, and such engineer shall perform an engineering and safety inspection of the Honk Falls Dam. Respondents shall provide advance notice of such inspection to the Department so that Department staff may, if it so chooses, accompany respondents' engineer during the inspection;

(2) Within forty-five (45) days of the date of this decision and order, respondents shall submit to the Department a proposal for lowering the water level of Honk Lake and a schedule for implementing the proposal so that the lowering is accomplished as soon as possible;

(3) Within ninety (90) days of the date of this decision and order, respondents shall:

(a) prepare a basic or interim emergency action plan (EAP) (see 6 NYCRR 673.7);
(b) retain a licensed professional engineer registered in New York and experienced in dam safety, and such engineer shall perform the first of quarterly safety inspections; and
(c) prepare an inspection and maintenance plan (see 6 NYCRR 673.6);

(4) Within one (1) year of the date of this decision and order, respondents shall:

(a) complete and submit to the Department a full engineering assessment (see 6 NYCRR 673.13), including analysis of the material of which the dam and its foundation are made, an assessment of the dam's stability, identification of repair alternatives and corresponding costs estimates, and a schedule that would result in the dam meeting safety criteria; and
(b) complete and circulate a full EAP in accordance with 6 NYCRR 673.7;

(5) Within sixty (60) days of completing the required engineering assessment, 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. Such plans and specifications shall identify and describe the selected alternative and the remedial work required to complete such alternative, and be signed and sealed by a licensed professional engineer registered in New York;[25]

(6) Within thirty (30) days after the Department issues the permit, respondents shall commence the remedial work in accordance with engineering plans and specifications approved under a permit issued by the Department;

(7) Within one hundred fifty (150) days after the Department issues the permit, respondents shall complete such remedial work and shall notify the Department in writing by certified mail that such work has been completed, including 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; and

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

(8) Within one hundred eighty (180) days after the Department issues the permit, respondents shall provide to the Department one complete set of "as-built" records. The record drawings shall be signed by the construction engineer and shall include identification of all changes from the approved plans.

I also order that respondents conduct safety inspections on a quarterly basis; provided, however, that the Department may, on the basis of the engineering assessment or other information, determine that these safety inspections may be conducted less frequently.

B. Financial Assurance

I adopt the ALJ's recommendation to require respondents to provide financial assurance (see 6 NYCRR 673.16[i][2]) in the amount of $500,000, subject to reduction by Department staff based upon an approvable estimate by respondents relating to the cost of the breach or removal of the dam (see Hearing Report, at 33-34).

C. Civil Penalty

The maximum possible civil penalty for the period of violations alleged in the complaint (July 27, 1999 to April 27, 2007, as amended at the hearing) is $1,416,000 (see Hearing Report, at 34 [citing ECL 71-1109]). In its request for relief, however, Department staff has provided two alternative penalty calculations, using periods of violation that differ from those alleged in the complaint. Both alternative calculations use September 6, 2006, (the date that the Department sent letters to respondents first notifying them of their violations [see Hearing Report, at 34]) as the initial date of violation (id.). For the end date of the period of violation, one alternative calculation uses the date of the complaint, and the other alternative uses the date the hearing began (id. at 34-36).

Thus, based upon the differences in calculating the period of violation, staff proposes a penalty of either $116,500 or $941,000 (id. at 34 and n 32), both of which are less than the maximum possible penalty. According to Section Chief Dominitz, the Department is seeking less than the maximum possible penalty because "it's more important to get the dam fixed. So we wanted them to spend the money on getting the dam fixed" (Transcript at 1350:23-1351:8).

The ALJ properly determined that, in this case, the appropriate end date for calculating a civil penalty is the date of the complaint, and recommends that I assess a penalty against respondents jointly and severally in the amount of $116,500 rather than the alternative $941,000 (see Hearing Report, at 35-36). In making that recommendation, the ALJ cites testimony and argument relating to the gravity of the violations, compliance history and respondents' level of cooperation (id. at 34-35).

It is also important to acknowledge that respondents are individuals, not corporations or municipal entities, and that imposing a large penalty in addition to financial assurance and the costs of the remedial work required by this decision and order may present a financial challenge. Respondents' violations are nevertheless serious, however, and warrant the imposition of significant penalty. As discussed above, the Honk Falls 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]).

I agree with the ALJ that imposing the larger of the requested penalty would "divert substantial resources of the respondents away from the objective of correcting deficiencies in the operation and maintenance of Honk Falls Dam" (id. at 35). I also agree with Section Chief Dominitz that the most important tasks to accomplish are determining the condition of, and "fixing," the dam, whether "fixing" means repair, reconstruction, breach or removal of the dam. Ensuring the safety of persons and property at risk is the primary goal of the statute.

Based on the foregoing discussion, I adopt the ALJ's recommendation to impose a penalty, but modify as follows: I assess a total civil penalty in the amount of one hundred sixteen thousand five hundred dollars ($116,500), jointly and severally, of which thirty thousand dollars ($30,000) is immediately payable and eighty six thousand five hundred dollars ($86,500) is suspended contingent upon respondents' compliance with the terms and conditions of this decision and order.

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

I. Respondents Robert Berger, Karen Berger, David Cook, and Jody Cook are adjudged, jointly and severally, to have violated ECL 15-0507(1) by failing to operate and maintain the Honk Falls Dam in a safe condition during the period July 27, 1999 to April 27, 2007.

II. With respect to their violations of ECL 15-0507(1), respondents, Robert Berger, Karen Berger, David Cook, and Jody Cook are hereby directed, jointly and severally, to perform all remedial activities set forth at pages 13-15 of this decision and order, within the time frames set forth therein. Respondents shall submit necessary permit applications to repair, reconstruct, breach and/or remove the Honk Falls Dam, in accordance with the terms of and within the time frames set forth in this decision and order, 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 shall provide financial assurance in accordance with 6 NYCRR 673.16[i][2] in the amount of five hundred thousand dollars ($500,000), subject to reduction by Department staff based upon an approvable estimate by respondents relating to the cost of the breach or removal of the dam.

IV. Based upon the foregoing violations, respondents are hereby assessed a civil penalty in the amount of one hundred sixteen thousand five hundred dollars ($116,500), jointly and severally, of which thirty thousand dollars ($30,000) is immediately payable, and eighty six thousand five hundred dollars ($86,500) is suspended contingent upon respondents' compliance with the terms and conditions of this decision and order.

The non-suspended portion of the civil penalty set forth herein shall be due and payable within thirty (30) days of service of this decision and order upon respondents. Should respondents fail to comply with the terms and conditions of this decision and order, the suspended portion of the assessed civil penalty shall, upon notice by Department staff, become immediately due and payable. All payments required by this decision and 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: Carol Conyers, Esq.

V. All communications from any of the respondents concerning this decision and order shall be directed to Carol Conyers, 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 Robert Berger, Karen Berger, David Cook, and Jody Cook, and 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: June 17, 2013
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

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

- by -

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

Respondents.

DEC Case No. CO3-20070201-9

HEARING REPORT

- by -

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

December 10, 2012

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this administrative enforcement proceeding against respondents Robert Berger, Karen Berger (Berger respondents), David Cook and Jody Cook (Cook respondents), by service of a notice of hearing and complaint, both dated April 27, 2007. By its complaint, staff alleges that respondents are owners of Honk Falls Dam (State Dam ID No. 177-0735) and that, since July 27, 1999, the respondents have continually failed to operate and maintain the dam in accordance with the provisions of section 15-0507 of the Environmental Conservation Law (ECL). The matter first came before the Office of Hearings and Mediation Services (OHMS) upon the Berger respondents' filing of a Notice of Motion for Summary Judgment and Ancillary Relief, dated July 25, 2007.[1]

Pursuant to section 622.9(e) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), this office provided written notice of the hearing to respondents by letter dated August 26, 2011. The hearing commenced on November 1, 2011 at the Department's Region 3 Office in New Paltz, New York, and was reconvened at the same location on the following eight days: November 2, 2011, November 3, 2011, December 1, 2011, December 2, 2011, January 9, 2012, January 12, 2012, January 13, 2012, and January 18, 2012. Additionally, on January 18, 2012, the parties and I visited the site of the dam, accessing the area from a dirt road on the west side of Rondout Creek. The hearing was held in accordance with the provisions of the Department's uniform enforcement hearing procedures, 6 NYCRR part 622.

At hearing, the Berger respondents were represented by Nolan and Heller, LLP, Carl G. Dworkin, Esq., of counsel. The Berger respondents called Michael Naegeli and respondent Robert A. Berger as witnesses. The Cook respondents were represented by Jacobowitz and Gubits, LLP, J. Benjamin Gailey, Esq., and Alyse D. Terhune, Esq., of counsel. The Cook respondents called John Tarolli, Professional Engineer (P.E.) and Professional Land Surveyor (L.S.), Alphonse Mercurio, L.S., Terence G. Carle, and respondent Jody Cook as witnesses. Department staff was represented by Scott Crisafulli, Esq., Chief, General Enforcement Bureau, and Carol Conyers, Esq., Senior Attorney. Staff called Ronald E. Canestrari, P.E., Robert A. Burgher, L.S., and Alon Dominitz, P.E., as witnesses.

Pursuant to the post-hearing scheduling notice and the subsequent agreements of the parties, closing briefs were filed by all parties on or before April 6, 2012 and reply briefs were filed by all parties on or before May 4, 2012.

As detailed below, on the basis of the record established in this proceeding, I recommend that the Commissioner issue an order (i) adjudging respondents to be in violation of ECL 15-0507(1); (ii) directing respondents to undertake corrective measures, as specified below; (iii) directing respondents to secure financial assurance in the amount of $500,000, in a form

[1] This matter has been the subject of substantial motion practice by the parties, the substance of which will not be detailed here. Published rulings on pre-hearing motions may be viewed on the Department's website at: http://www.dec.ny.gov/hearings/2479.html.

acceptable to Department staff; and (iv) assessing a civil penalty in the amount of $116,500 jointly and severally upon the respondents.

FINDINGS OF FACT

1. The Berger respondents admit that they own property (parcel 83.6-1-11) near Honk Falls Dam on the east side of Rondout Creek that is designated on Ulster County tax maps as parcel 83.6-1-11 (see amended affidavit of Robert Berger in support of Berger respondents' first motion for summary judgment, Aug. 7, 2007, ¶¶ 1 [admitting ownership of "the parcel of land best described as tax map number 83.6-1-11"], 5 [stating they acquired title to the parcel in 1992 by deed from the estate of Ethel Kooperman]; transcript at 833 [counsel for Berger respondents stating that "[j]ust so it's clear for the record and no dispute about it, the Bergers do not deny ownership of the land up to the bank [of Rondout Creek] and to the extent that there is any portion of the dam's structure that's on there, they're not going to deny they own the dam structure that's on the land"], 839 [counsel for Berger respondents stating that "[t]he Bergers own the land up to the bank. Whatever happens to be on the land, whether it's a shed or a fire pit or a path, they own it"], 2416 [respondent Robert Berger testimony asserting ownership of the parcel]; Berger closing brief at 9-10).

2. The Berger respondents are the grantees of record to parcel 83.6-1-11 according to the duly recorded deed to that parcel dated October 1, 1992 (exhibit 15 [Ulster County Liber 2215 of Deeds (Liber), page 52[2]]; transcript at 603 [Burgher testimony noting the deed "to Robert A. Berger and Karen Jill Berger . . . dated October 1st, 1992, recorded on October 23rd, 1992, in Liber 2215 of deed, page 52"]).

3. Parcel 83.6-1-11 is an undeveloped, forested parcel with no street frontage (see exhibits 11 [Ulster County tax map 083.006, parcel 83.6-1-11 is immediately to the south of Honk Lake and east of Rondout Creek]; 14 [panel 5, title sketch, lands of Bergers and Cooks, parcel 83.6-1-11 is denoted by a green, circled number "8"; panel 6, DEC survey]; 28 [aerial photographs of Honk Falls Dam and surrounding area]).

4. The Cook respondents admit that they own property (parcel 83.1-2-5) which includes Honk Lake and land near the dam on the west side of Rondout Creek that is designated on Ulster County tax maps as parcel 83.1-2-5 (transcript at 1762-1769, 1787-1788 [respondent Jody Cook testimony admitting that the Cook respondents own parcel 83.1-2-5 and that it includes certain upland areas]; Cook closing brief at 24 [denying ownership of the dam but stating that "Mrs. Cook consistently maintained that she owns the land under the water [of Honk Lake]"]).

5. The Cook respondents are the grantees of record to parcel 83.1-2-5 according to the duly recorded deed to that parcel dated July 26, 1999 (exhibit 67 [Liber 2950, page 214]; see also transcript at 2247-2248 [Carle testimony that "a deed dated July 26, 1999, from the

[2] A "correction deed" was recorded in August 1994 to clarify that the 1992 conveyance was from the estate of Ethel Kooperman and not from the executor personally (id. [Liber 2424, page 106]).

County of Ulster to David Cook and Jody Cook . . . is recorded in Liber 2950 of page 214").

6. The predominant feature of Parcel 83.1-2-5 is that a large portion of it lies beneath the waters of Honk Lake, but it also includes a narrow band of upland surrounding much of the lake and several acres of upland along the lake's southwest shore (see exhibits 11 [Ulster County tax map 083.001, parcel 83.1-2-5]; 14 [panel 5, title sketch, lands of Bergers and Cooks, parcel 83.1-2-5 is denoted by a red, circled number "6"; panel 6, DEC survey]; 28 [aerial photographs of Honk Falls Dam and surrounding area]).

7. A Department surveyor, licensed by the State of New York, undertook a survey to determine the property boundary between parcel 83.6-1-11 and 83.1-2-5 at the location of Honk Falls Dam and concluded that the boundary is the thread of Rondout Creek near the midpoint of the dam's spillway (exhibit 14; transcript at 739 [Burgher testimony describing markings he placed on exhibit 7 to indicate the lowest point of Rondout Creek at the dam site], 1074-1075).

8. A private surveyor, licensed by the State of New York, was engaged by the Cook respondents in 2001 to undertake a survey of their land holdings in the vicinity of Honk Lake and concluded that the Cook respondents' property line runs across Honk Falls Dam, near the midpoint of the dam's spillway (exhibit 16; transcript at 627-628, 1803-1804).

9. Honk Falls Dam (State Dam ID No. 177-0735), is located in the Town of Wawarsing, Ulster County. The dam is nearly 300 feet long and approximately 42 feet tall, measured from the downstream toe of the dam to the top of the dam's abutment walls. The dam was built in or about 1898 for hydroelectric power generation. At that time, two six-foot diameter penstocks (or feeder pipes) conveyed water from the headwall (or upstream face of the dam) to the power plant. The dam is no longer used for power generation, but continues to impound Honk Lake which is used for recreational purposes (exhibits 8 at 3, 50 at 3; see also transcript at 63 [Canestrari testimony describing the purpose of the penstocks).

10. In 1981, the New York District Corps of Engineers issued a Phase 1 inspection report (Phase 1 report) for Honk Falls Dam. The Phase 1 report states that the dam's spillway capacity is "seriously inadequate" and assesses the dam as "unsafe, non-emergency" (exhibit 2 at 19).

11. In 1998, the U.S. Army Corps of Engineers, New York District, issued a final report (final report) on a dam-break analysis of Honk Falls Dam. The final report states that "[o]n the basis of its potential to cause downstream damage, the Honk Falls Dam is given a Class C, High Hazard classification" (exhibit 8 at 18).

12. Numerous Department visual inspection reports for Honk Falls Dam document staff's concerns over the adequacy of the dam's spillway capacity and stability, and the existence of cracks, voids, seepage and lack of general maintenance over many years (see exhibits

4 [DEC inspection reports for 1983, 1993, 1998, and 2002], 6 [DEC inspection reports for 2006, 2008 and 2010]; see also transcript at 95-146 [Canestrari testimony regarding DEC dam inspections and the inspection reports for Honk Falls Dam], 103 [Canestrari testimony defining the meaning of certain codes used in the 1983 and 1993 inspection reports], 1347-1348 [Dominitz testimony that "[t]here doesn't appear to be any sign of maintenance at the dam"]). Department staff mailed copies of the inspection reports for 2006, 2008, and 2010 to respondents, and advised respondents of their responsibility to correct deficiencies at the dam (see exhibit 4 [letter dated Sept. 6, 2006, certified letter dated Apr. 8, 2008, and certified letter dated Mar. 5, 2010]).

DISCUSSION

By its complaint, Department staff alleges that, since July 27, 1999,[3] respondents have failed to operate and maintain Honk Falls Dam in a safe condition in violation of ECL 15-0507 (complaint ¶¶ 27-34). 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."

Department staff bears the burden of proof on all charges and matters that it affirmatively asserts in the complaint (see 6 NYCRR 622.11[b][1]) and must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]). I note that the Berger respondents, citing State Administrative Procedures Act (SAPA) § 306(1), attempt to alter this standard by stating that staff's burden of proof may be "sustained if, and only if, what is presented in support of the charges is a preponderance of the substantial evidence" (Berger closing brief at 6 [emphasis supplied]). No such standard exists.

[3] On the first day of hearing, Department staff moved to amend its complaint to correct typographical errors and to indicate that the alleged violation began on July 27, 1999 (this date corresponds to the effective date of the current version of ECL 15-0507). Staff's motion was granted without objection from the respondents (see transcript at 9).

The Berger respondents have conflated two evidentiary standards: the substantial evidence standard imposed under SAPA 306(1) and the preponderance of evidence standard imposed under 6 NYCRR 622.11(c). The Court of Appeals has defined substantial evidence to mean "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact, and is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt. The standard demands only that a given inference is reasonable and plausible, not necessarily the most probable" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]). Where a higher standard is applicable, as is the case under 6 NYCRR 622.11(c), the substantial evidence test is of no moment.

Summary of Berger Respondents' Position

By their answer (Berger answer[4]), the Berger respondents deny the gravamen of the complaint. They deny that they own Honk Falls Dam (answer ¶ 5 [denying allegations set forth in the complaint ¶ 7]) and deny that they "have or had any obligation under law to do anything with respect to the Honk Falls Dam" (id. ¶ 18). The Berger respondents also raise nine affirmative defenses in their answer, all but one of which were dismissed or determined to be denials rather than affirmative defenses (see Matter of Berger, ALJ Ruling, Aug. 22, 2011).

The Berger respondents argue that Department staff failed to meet its burden of proof to demonstrate that the Berger respondents "own the Honk Falls Dam and that the Honk Falls Dam is a hazard class C Dam" (Berger closing brief at 1). The Berger respondents state that the dam's ownership and hazard classification "were the only allegations that were contested by Robert and Karen Berger" (id. n 1).

Summary of Cook Respondents' Position

The Cook respondents deny that they own Honk Falls Dam (Cook respondents' amended answer [Cook answer], dated July 15, 2011, ¶ 3 [denying allegations set forth in complaint ¶ 7]). The Cook respondents further argue that their expert's title search "demonstrates that Cook does not own title or any property interest in any portion of the dam, and that title is actually vested in the City of New York, County of Ulster or Longboat, Inc." (Cook closing brief at 10).

The Cook respondents also deny the specific allegations against them in the complaint concerning the operation and maintenance of the dam (Cook answer ¶ 3 [denying allegations set forth in complaint ¶¶ 29-34]). The Cook respondents raise seven defenses in their answer, none of which are denominated as affirmative defenses.[5]

[4] As used in this hearing report, the "Berger answer," refers to the Berger respondents' "Revised Amended Verified Answer," dated June 24, 2011.

[5] In June 2011, the Cook respondents sought and were granted permission to amend their answer to strike the word "affirmative" from defenses pled in their answer (see ALJ letter to the parties, dated June 16, 2011, at 2 [authorizing the amended answer]).

Ownership of the Dam

Under the single cause of action set forth in the complaint, respondents are alleged to have failed to operate and maintain Honk Falls Dam in a safe condition since July 27, 1999, in violation of ECL 15-0507 (complaint ¶ 33). Pursuant to ECL 15-0507(1), the obligation to operate and maintain the dam in a safe condition falls upon "[a]ny owner" of a dam. Therefore, respondents must be determined to be owners of Honk Falls Dam for liability to attach under the charge in the complaint. As stated by the Berger respondents, the "threshold question" is whether the named respondents are owners of Honk Falls Dam (Berger closing brief at 1).

From early in these proceedings, the Berger respondents have admitted that they own parcel 83.6-1-11 (see findings of fact ¶ 1). Similarly, the Cook respondents admit that they own parcel 83.1-2-5 (see findings of fact ¶ 4). As will be discussed later in this hearing report, title experts for the Berger respondents and the Cook respondents opine that there are defects in the respondents' respective record chains of title.

It is undisputed that during the period of the alleged violation, the Berger respondents were named as the owners of parcel 83.6-1-11 in the duly recorded deed to that parcel (exhibit 15 [Liber 2215, page 52]), and that the Cook respondents were named as the owners of parcel 83.1-2-5 in the duly recorded deed to that parcel (id. [Liber 2950, page 214[6]]). A survey map (DEC survey), prepared and certified by a New York State licensed land surveyor in the employ of the Department, depicts the property boundary between parcel 83.6-1-11 and parcel 83.1-2-5 as being near the midpoint of the Honk Falls Dam spillway (exhibit 14).

Staff notes that the term "owner" is defined broadly under the statute to include anyone "who owns, erects, reconstructs, repairs, maintains or uses a dam" (ECL 15-0507[1]). Staff alleges that respondents are each real property owners of Honk Falls Dam and argues that "each category [of ownership] must itself be construed broadly, in line with the express intention of the Legislature . . . to cast a wide net in identifying 'owners' in order to safeguard the public from the perils of dam failures" (staff closing brief at 9).

Left unchallenged, the deeds of record and the DEC survey are sufficient to establish that the Berger and Cook respondents are owners of Honk Falls Dam. Both the Berger and Cook respondents, however, raise certain challenges to their purported ownership including whether any interest in Honk Falls Dam was conveyed under the deeds for their respective parcels, whether the deeds themselves are valid, and whether the location of the property boundary line at the dam site, as depicted on the DEC survey, is accurate. The bases for these challenges are discussed below.

-- New York City Indenture and Release

In 1948 the City of New York (City), Central Hudson Gas & Electric Corporation (Central Hudson), and Irving Trust Company (Irving Trust) entered into an agreement "in full

[6] Liber 2950, page 216, as shown in exhibit 15, is nearly illegible. A more legible copy is found at the end of exhibit 67.

settlement" (exhibit 41 [Liber 697, page 428]) of claims for damages by Central Hudson and Irving Trust arising from "the acquisition of the right to divert and the actual diversion by the City of the waters of Rondout Creek" (id. [Liber 697, page 427]). The agreement is memorialized by two documents filed with the Ulster County Clerk on April 26, 1948: an indenture (indenture) (exhibit 41 [Liber 697, page 417]) and an agreement (agreement) (id. [Liber 697, page 425]).

Both the Berger and Cook respondents assert that the indenture and agreement may be dispositive of this matter (Berger closing brief at 27; Cook closing brief at 10). I disagree.

The Cook respondents argue that the City "owns Honk Falls Dam by virtue of the 1948 deed[7] and agreement" (Cook closing brief at 10). They argue that the indenture and agreement "must be read together as a single document" and that "[a]lthough the deed is a quitclaim deed, the warranty in the agreement usurps the nature of a quitclaim and effectively creates a warranty deed" (id. [citing transcript at 2172, 2175 (Carle testimony)]). They further argue that, under the agreement, Central Hudson "warranted that it owned fee simple title" to the land under Honk Lake and Honk Falls Dam and that the indenture conveyed ownership of those lands to the City (id. at 11).

The Berger respondents argue that by the indenture and agreement "[Central Hudson] conveyed to [the City] every right that it had over flowage and pondage and the right to either construct a dam . . . or have ownership rights in the dam already there" (Berger closing brief at 28). The Berger respondents argue that the indenture and agreement "effectively conveyed the Honk Falls Dam because it conveyed the right to impound" (id. at 29).

The respondents misread the indenture and agreement. The agreement states that the City acquired, by condemnation, "the right to divert the waters of Rondout Creek at Merriman Dam . . . and is and has been since April 1, 1944, diverting water therefrom" (exhibit 41 [Liber 697, page 427]). Merriman Dam is upstream from Honk Falls Dam and the City's diversion of the waters of Rondout Creek deprived Central Hudson of the use of those waters and of the free flow of Rondout Creek. The agreement acknowledges that Central Hudson and Irving Trust "have been substantially damaged" by the City's "acquisition of the right to divert and actual diversion" of the waters of Rondout Creek and that, as a result of those substantial damages, Central Hudson and Irving Trust filed verified claims against the City (id.).

There is no mention of Honk Falls Dam in the indenture or the agreement and conveyance of the dam is not necessary to effect the purposes of the settlement. The indenture and agreement memorialize the City's agreement to compensate Central Hudson and Irving Trust for the substantial damages caused by the diversion of Rondout Creek. In the absence of clear language demonstrating that the parties intended to convey Honk Falls Dam to the City, there is no basis to read such a conveyance into these documents. This distinction is addressed in a 1939 opinion by the Court of Appeals wherein the Court held that the plaintiff dam owner "had not reduced the waters to possession so as to acquire a property right therein, but possessed only a

[7] The parties sometimes refer to the indenture as a "deed." On its face, the document states that it is an indenture (see exhibit 41 [Liber 697, page 427]) and that term is used in this hearing report, except where quoted material dictates otherwise.

right to damages if the natural flow of the water was diminished so as to affect his usufructuary right" (Lyon v City of Binghamton, 281 NY 238, 245 [1939]). The Court further held, however, that when "the city, through its mayor and police, forcibly took possession of the dam . . . and ousted plaintiff from his possession, a very different situation was created. From that time on plaintiff was entitled to the rental value of the real property taken. Prior to that time, however, the acts of the city amounted to no more than, at the most, an unreasonable diversion of the water . . . which preserve the legal title of plaintiff" (id. at 245-246).

The indenture states that Central Hudson "in consideration of the premises, does hereby remise, release and quitclaim onto the City of New York . . . the following property" (exhibit 41 [Liber 697, page 417]). The property is then described, in part, as "[a]ll real estate of Central Hudson Gas & Electric Corporation in the Town of Wawarsing" (id.). This broad description is, however, immediately narrowed by the phrase "acquired for and on behalf of the City of New York under Chapter 41, Title K of the Administrative Code of The City of New York . . . in a proceeding in the New York Supreme Court, Third Judicial District" (id. [Liber 697, page 418]). The State Supreme Court proceeding referred to in the indenture and agreement resulted in the City acquiring, by condemnation, the right to divert the waters of Rondout Creek at Merriman Dam (id. [Liber 697, page 427]). The Merriman Dam is several river miles upstream from Honk Falls Dam and, therefore, the condemnation eliminated the right of Central Hudson to use the diverted waters and to the natural flow of Rondout Creek.

The indenture, then, is not a conveyance. Rather, it simply acknowledges what the City had previously acquired from Central Hudson as a result of the condemnation proceeding before the State Supreme Court. The purpose of the indenture and agreement is to memorialize the agreement reached between Central Hudson and the City regarding compensation for Central Hudson for the loss of its right to the natural flow of Rondout Creek and its right to use the diverted waters.

The fact that Central Hudson warranted to the City that it held title to the lands under Honk Lake and Honk Falls Dam does not in any way alter this analysis. The warranty of title simply provides a measure of protection to the City to ensure that the City will not be harmed if it is negotiating with the wrong party. If some other entity were to come forward claiming ownership of the subject lands and, premised on that claim of ownership, file an action for damages resulting from the diversion of Rondout Creek by the City, Central Hudson agreed to defend against the claim. This too is a logical aspect of the indenture and agreement that neither necessitates nor entails a transfer of ownership of Honk Falls Dam.

I conclude that the indenture and agreement do not convey to New York City either Honk Falls Dam or the right to impound Honk Lake.

-- Dam Ownership as Separate from Parcel Ownership

As an improvement to real property, Honk Falls Dam is conveyed with the property upon which it rests unless it is expressly excepted from the conveyance (see Mott v Palmer, 1 NY 564, 569-570 [1848] [holding that "[f]ixtures belonging to the owner of the land, being part of the land, cannot be reserved by parol when the land is conveyed; the deed conveys them to the

grantee unless the reservation be in writing"]; Matter of Veltri v New York State Office of the State Comptroller, 81 AD3d 1050, 1053 [3d Dept 2011] [holding that "petitioner purchased the property in 'as is' condition and failed to submit any proof that the transfer of the land did not include fixtures, and the record is otherwise devoid of any evidence that, as the title owner of the real estate, petitioner is not the owner of the [fixture]" (citations omitted)]). Accordingly, in the absence of evidence to the contrary in the relevant deeds, Honk Falls Dam belongs to the owners of the land upon which the dam rests.

No party to these proceedings presented a deed that expressly excludes Honk Falls Dam from the property being conveyed (transcript at 1165 [Burgher testimony that there are "no deeds that identify the dam, period"], 2404 [Naegeli testimony that it is "correct" that none of the deeds he examined for this matter contained an exclusion for Honk Falls Dam). Additionally, although there was much discussion at hearing relative to whether the tax assessments for parcel 83.6-1-11 or parcel 83.1-2-5 included an assessment for the dam, no party presented a tax assessment from any year, for any property, that indicated Honk Falls Dam was separately assessed by Ulster County at any time (see e.g. transcript at 1122 [Burgher testimony that he did not find a separate assessment for Honk Falls Dam], 2326-2327 [Carle testimony confirming that he found no separate assessment for Honk Falls Dam]).

I conclude that Honk Falls Dam is owned by the owner or owners of the land upon which the dam rests.

-- Recycled National Paper Corporation

As will be discussed below, the history of the ownership of parcel 83.6-1-11 and parcel 83.1-2-5 is complex. It is, however, undisputed that Recycled National Paper Corporation (Recycled) was the record owner of a large tract of land (Recycled parcel[8]) that included parcel 83.6-1-11 and parcel 83.1-2-5 beginning in 1976 (exhibit 67 [Liber 1352, page 672]; transcript at 602, 796-797, 2209-2210, 2381). Therefore, the focus of the discussion below is on the various arguments advanced by the parties regarding ownership of parcel 83.6-1-11 and parcel 83.1-2-5 subsequent to Recycled.

-- Longboat or Ulster County

Although the Cook respondents admit that they own parcel 83.1-2-5, their title expert testified that they do not (transcript at 2244 [Carle testimony that, because of a defective tax assessment by Ulster County, the deed into the Cook respondents "[c]onveys nothing, no title"]; see also transcript at 2246 [counsel for Cooks stating that "Mrs. Cook believes that she owns the land under the water. Mr. Carle is testifying that, in fact, the Cooks do not"]). Premised upon the opinion of their expert, the Cook respondents argue that if New York City "did not acquire

[8] The lands comprising the Recycled parcel are the same as those conveyed to Rondout Paper Mills, Inc. by Central Hudson Gas & Electric Corporation in 1949 (exhibit 67 [Liber 738, page 439; Liber 1352, page 672]; transcript at 599-602, 2189-2190, 2209-2210, 2381). For ease of reference, the term "Recycled parcel" is used herein to refer to those lands both before and after they were acquired by Recycled.

title to the dam or the land under the dam, then the dam and the land under the dam is owned by either Longboat, Inc. [Longboat],[9] or the County of Ulster" (Cook closing brief at 14).

The Cook respondents' title expert asserts that Ulster County acquired title to parcel 83.1-2-5 under a 1979 tax deed (exhibit 67 [Liber 4, page 199]), as part of the County's acquisition of the Recycled parcel through a tax foreclosure (transcript at 2213). He opines that Ulster County either retained ownership of the Recycled parcel or sold it to Longboat in 1985 (id. at 2231-2233). In either case, he opines, the County's subsequent tax foreclosure against Recycled in 1995 would be a nullity because Recycled would not have been the owner of parcel 83.1-2-5 in 1995. The Cook respondents' expert concludes that, because the 1995 foreclosure is a nullity, the 1999 deed into the Cook respondents for parcel 83.1-2-5 conveyed no title (transcript at 2243-2244).

Department staff's title expert asserts that the 1979 tax deed conveyed parcels to the County that are unrelated to ownership of Honk Falls Dam (transcript at 1041-1044). He opines that the 1985 deed into Longboat involved only lands downstream from the dam that comprised the Rondout Paper Mill site (id. at 843, 1042). Staff's title expert further opines that Ulster County did not acquire title to parcel 83.1-2-5 until 1995 and that the Cook respondents' 1999 deed from the County is valid (see exhibits 14 [panel 5], 67 [Liber 14, page 218]; transcript at 677-678).

The relevant tax assessment rolls provide support for the conclusion reached by the Cook respondents' title expert regarding Ulster County's acquisition of the Recycled parcel in 1979. The 1976 deed into Recycled includes a metes and bounds description of the parcels being conveyed, but the 1979 tax deed into Ulster County does not (see exhibit 67 [Liber 1352, page 672; Liber 4, page 199]). Rather, the 1979 tax deed describes the location of the parcel by identifying the bounding property owners to the north, east, south and west. The description in the 1979 tax deed is derived from the 1975 tax assessment roll for the Recycled parcel[10] and the same description is retained in the assessment rolls through a series of conveyances dating back to 1949 when Central Hudson conveyed land that included both parcel 83.6-1-11 and parcel 83.1-2-5 to Rondout Paper Mills, Inc.[11] Therefore, as the Cook respondents' title expert testified,

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[9]A search of the New York State Department of State corporation and business entity database indicates that Longboat was dissolved by proclamation or annulment of authority in 1993 (see http://www.dos.ny.gov/corps/bus_entity_search.html [accessed Dec. 7, 2012]).

[10] The 1979 tax deed states that the parcel being conveyed was assessed to "WYANDOTTE [*sic*] ENTERPRISES LTD INC" on the 1975 tax assessment roll. Wyandott Enterprises Ltd., Inc. (Wyandott), is the grantee under a 1973 deed which conveyed the Recycled parcel (see exhibit 67 [Liber 1301, page 1126]). Through a series of intervening conveyances, the same lands conveyed to Wyandott in 1973 were conveyed to Recycled in 1976.

[11] There are numerous parcels described in both the deed into Rondout and the deed into Recycled. Although the deeds use different number designations for the relevant parcels, the parcel descriptions for the lands that now include parcel 83.6-1-11 and parcel 83.1-2-5 are the same in both deeds (see exhibit 67 [Liber 738, page 439 (Rondout deed parcel descriptions for parcels numbered VIII, X, XI and XII); Liber 1352, page 627 (Recycled deed parcel descriptions for first plot, parcels 1, 3, 4 and 5]; see also exhibit 14 [panel 3 and panel 4 (depicting a portion of the lands described in the Rondout deed and the Recycled

the tax assessment rolls indicate that the same lands conveyed to Rondout in 1949 were conveyed to Recycled in 1976 (transcript at 2161-2162; see also exhibit 66). If the 1979 tax deed conveyed to Ulster County all the lands that comprised the Recycled parcel, then the 1979 tax deed conveyed parcel 83.6-1-11 and parcel 83.1-2-5 to the County (id. at 2213).

The consistency of the bounding property owners identified on the assessment rolls over the course of many years supports the conclusion that the parcel acquired by Ulster County in 1979 included the entire Recycled parcel. However, the 1979 tax deed also contains information that is inconsistent with that conclusion. Specifically, the tax deed states that the parcel being conveyed contains only two acres, more or less (see exhibit 67 [Liber 4, page 199]). The Recycled parcel, however, is in excess of 100 acres (see exhibits 14 [panel 4, depicting part of the Recycled parcel], 18 [1949 Central Hudson map depicting "Honk Falls Lands & Flooding Rights to be Sold"]). Therefore, either Ulster County foreclosed on something substantially less than the entire Recycled parcel or, as the Cook respondents' title expert asserts, the acreage listed on the tax deed is "grossly erroneous" (transcript 2215).[12]

There are also records in evidence of telephone conversations between the Department and Ulster County officials in 1984 that undermine the Cook respondents' assertion that Ulster County acquired title to the Recycled parcel in 1979. A Department "record of telephone conversation," dated December 14, 1984, memorializes a conversation between the Department and Frank Carle, who is listed on the document as the "Director" of "Ulster County – ODP [possibly, the 'Office of Disaster Preparedness'[13]]" (see exhibit 36 at 3). According to that record, Frank Carle stated that the County did not own the property where Honk Falls Dam is located and, therefore, had not offered it for sale in 1984 (id.). Another Department "record of telephone conversation," dated December 14, 1984, between the Department and Jack Reynolds, listed as the "Director" of "Ulster County – Real Property Tax Service Agency," states that Mr. Reynolds also denied that the County owned the parcel and stated that "the property on which the dam is located was never on the County tax rolls and, therefore, could not have been offered at a tax sale" (id. at 4).

Even assuming that Ulster County acquired parcel 83.6-1-11 and parcel 83.1-2-5 under the 1979 tax deed, as the Cook respondents' title expert opines, there is no deed out from the

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deed, respectively)]; transcript 2177 [Carle testimony that the deed into Rondout included "the land under the dam[,] under Honk Lake and surrounding lands, adjacent lands"]).

[12] I also note that there is an unexplained change in the account number assigned to the Recycled parcel. On the 1974 assessment roll the parcel is assigned account number 146491. This is the same account number that appears on the 1979 tax deed (see exhibit 67 [Liber 4, pages 199, 202]). On the 1975 assessment roll the parcel is assigned account number 149493. In contrast, the discrete account numbers assigned to five other parcels that were acquired by the County in 1979 from properties that were assessed to Wyandott retain their respective account numbers on the 1974 and 1975 assessment rolls (see exhibits 66, 71, 72).

[13] The Cook respondents' title expert testified that Frank Carle is his father and that, in or about 1984, Frank Carle was Ulster County's "civil defense coordinator. It became disaster preparedness coordinator while he held the job" (see transcript at 2219]).

County to Longboat for either of these parcels. The 1985 deed from Ulster County to Longboat that is cited by the Cook respondents' expert expressly states that it is for only two parcels: a five acre parcel that is described as "Manufacturing and loading dock on Rail Road Property," and a two acre parcel that is described as including "Land and Building Water Rights" (exhibit 67 [Liber 1541, page 55]). These parcel descriptions do not correspond in any way to those of the Recycled parcel, but do correspond to two discrete parcels acquired by Ulster County under separate tax deeds in 1979 (id. [Liber 4, page 207[14]; Liber 4, page 211]). There is nothing in the deed into Longboat that suggests it is intended to convey any portion of parcel 83.6-1-11 or parcel 83.1-2-5.[15]

On this record, although the issue is a close one, I credit the testimony of the Cook respondents' title expert and conclude that Ulster County acquired parcel 83.6-1-11 and parcel 83.1-2-5 by conveyance under the 1979 tax deed. I further conclude, however, that there is no deed out from Ulster County to Longboat for either of these parcels. Accordingly, pursuant to the 1979 tax deed, in the absence of a subsequent conveyance or loss of title by adverse possession or other means, Ulster County would remain the owner of parcel 83.6-1-11 and parcel 83.1-2-5.

-- Tax Sale of Parcel 83.1-2-5

The Cook respondents acquired parcel 83.1-2-5 from Ulster County by quitclaim deed in 1999 and the Cook respondents' title expert acknowledges that he is unaware of any challenge to the validity of that deed (transcript at 2353). Nevertheless, the expert opines that the deed into the Cook respondents conveyed no title because it results from a defective tax assessment (id. at 2244, 2248). The Cook respondents' expert states that the County's assessment of parcel 83.1-2-5 to Recycled in 1990 was in error because Recycled had not owned the parcel since 1979 (id. at 2242-2244). The Cook respondents argue that "[s]ince the 1995 tax deed derived its claim of title from the wholly erroneous and fatally defective assessment to Recycled, the County acquired no right, title or interest in the property by the tax deed, and the County conveyed nothing to Cook" (Cook closing brief at 19).

The Cook respondents' title expert opines that either Ulster County or Longboat was the owner of parcel 83.1-2-5 at the time of the conveyance of the parcel to the Cook respondents. As discussed in the previous section of this hearing report, I have concluded that Ulster County was

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[14] The copy of this deed in evidence is missing two pages, including the parcel descriptions. However, an exhibit prepared by the Cook respondents' title expert provides parcel descriptions (see exhibit 66 at 1 [describing two parcels sold to the County under the deed recorded in Liber 4, page 207, and noting that the parcels are located well away from the dam site]). The title expert's exhibit also sets forth the parcels' tax assessment account numbers, and those account numbers match those set forth on the last page of the deed in evidence (see id.; exhibit 67 [Liber 4, page 210]).

[15] In 1986, Longboat recorded a deed from itself to itself that includes descriptions of numerous parcels. This deed states that it is "intended to more accurately describe the property conveyed by the County of Ulster to Longboat" by the 1985 deed, and also states that the 1985 deed conveyed "all or a portion of the property" conveyed to Recycled by Pearl Tissue (exhibit 67 [Liber 1583, pages 155, 168]). Of course, the 1986 deed from Longboat could only convey to Longboat what Longboat already owned, and that is expressly set forth in the 1985 deed.

the owner of parcel 83.1-2-5 at that time. The only deed out of Ulster County for parcel 83.1-2-5 is the 1999 quitclaim deed into the Cook respondents. Therefore, absent some infirmity in the conveyance from the County to the Cook respondents, they are the owners of parcel 83.1-2-5.

The Cook respondents provided no case law, and I am aware of none, that would nullify an otherwise valid conveyance based upon the grantor's misapprehension of how it acquired title. It is uncontested that Ulster County intended to convey parcel 83.1-2-5 to the Cook respondents in 1999 and that the Cook respondents intended to purchase that same parcel. Because Ulster County held title to parcel 83.1-2-5 at the time of the conveyance, albeit by means other than the tax deed referenced in the Cook deed, I conclude that the conveyance of the parcel from the County to the Cook respondents conveyed valid title to parcel 83.1-2-5 (see Lipton v Bruce, 1 NY2d 631, 636 [1956][holding that "the intent of the parties as evidenced by the deed and the circumstances surrounding the making thereof must be given expression wherever it is possible to do so without violating law and reason"]).

The Cook respondents' deed identifies parcel 83.1-2-5 as the property being conveyed and Ulster County held title to that parcel at the time of the conveyance. Accordingly, I conclude that the 1999 deed into the Cook respondents conveyed good title.

I note that the Cook respondents raise the issue of whether Ulster County gave proper notice to the owner of parcel 83.1-2-5 at the time of the 1995 tax foreclosure. This question is only germane under the assumption that, as Department staff's title expert opined, Recycled continued to own parcel 83.1-2-5 until the 1995 foreclosure. As noted in the previous section, I credited the opinion of the Cook respondents' title expert and concluded that Ulster County acquired title to the parcel in 1979. Nevertheless, I will briefly address the Cook respondents' argument regarding the County's notice.

The Cook respondents expressly state that they are "not challenging the [1999] tax sale" (Cook reply brief at 10). Nevertheless, they argue that Ulster County "did not provide notice of the [1999] tax sale to . . . the known mortgagees, and did not reasonably attempt to notice the owner shown on the assessment role [i.e., Recycled]" (id.). Assuming that Recycled was the actual owner of parcel 83.1-2-5, the County was required to provide notice to Recycled and any other party, such as a mortgagee, that had an interest in the property (see Real Property Tax Law § 1125). The Court of Appeals has held that "[i]t is well settled that the requirements of due process are satisfied where notice [of a foreclosure action] is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and that "the courts may take into account the status and conduct of the owner in determining whether notice was reasonable" (Matter of Harner v County of Tioga, 5 NY3d 136, 140 [2005] [internal quotation marks and citations omitted]).

Here, the record reflects that Ulster County attempted to provide notice to Recycled using the address on the County's tax assessment rolls, and that address is consistent with the address shown on the deed into Recycled (see exhibits 23, 67 [Liber 1352, page 627], 75). That mailing was returned by the postal service marked "Attempted-Not Known" (exhibit 75 at 3). According to the New York State Department of State corporation and business entity database, Recycled is an inactive Florida corporation (see http://www.dos.ny.gov/corps/bus_entity_search.html

[accessed Dec. 7, 2012]). The Florida Department of State corporations database indicates that Recycled became World Trade Enterprises, Inc. of Delaware (WTE) in 1982 and that WTE is an inactive corporation with no listed filing activity since 1982 (see http://sunbiz.org/corinam.html [accessed Dec. 7, 2012]). On the record before me, there is no indication that Recycled ever challenged the sufficiency of the foreclosure notice that was provided by the County, nor is there a basis to conclude that such a challenge would be successful.[16]

-- Berger Respondents' Record Chain of Title

The Berger respondents' record chain of title to parcel 83.6-1-11 consists of only the deeds into them from the estate of Ethel Kooperman. As will be discussed below, there was evidence adduced at hearing indicating that Ethel and Joseph Kooperman held themselves out as owners of parcel 83.6-1-11 as early as 1962 and that they paid taxes on the parcel beginning sometime in the 1960s. There is, however, no record deed into the Koopermans for parcel 83.6-1-11 and no party proffered evidence to establish that a prior owner had conveyed the parcel to the Koopermans through an unrecorded deed or other means. Moreover, as discussed above, the record deeds indicate that parcel 83.6-1-11 was owned by Recycled until at least 1979 (see page 9, supra). On this record, I conclude that there was no conveyance of parcel 83.6-1-11 to the Koopermans.

Despite the absence of a conveyance to the Koopermans, it is possible that the Koopermans obtained title to parcel 83.6-1-11 by adverse possession. If so, the deed from the estate of Ethel Kooperman into the Berger respondents would convey good title, irrespective of whether the Koopermans instituted an action to quiet title (see Connell v Ellison, 86 AD2d 943, 944 [1982], affd 58 NY2d 869 [1983] [holding that "it is well settled that adverse possession for the requisite period of time not only cuts off the true owner's remedies but also divests him of his estate" and that "title to property actually acquired by adverse possession may be transferred by . . . deed"][citations omitted]).

There is evidence to support the conclusion that the Koopermans owned parcel 83.6-1-11 by adverse possession. Respondent Robert Berger testified that he knew that Ethel and Joseph Kooperman owned the upland portion of parcel 83.6-1-11 because his parents "were very good friends with the Koopermans, and we spent numerous summers, falls, winter[s] up on that property" (transcript at 2416). Respondent Berger further testified that he and his family, as friends of the Koopermans, engaged in a variety of activities on the Koopermans' property beginning sometime in 1962 or 1963 (id. at 2417). He described the upland area owned by the Koopermans as extending to the "top of the bank [along Honk Lake and the east side of Rondout Creek] . . . Until where it would drop down" (id. at 2425).

[16] The same is true for the mortgagees. Nothing before me indicates that the mortgagees ever challenged the tax sale and it appears that Ulster County mailed notice to the known mortgagees (see exhibit 75 at 2 [listing Recycled and three mortgagees as "parties defendant," together with their respective mailing addresses]). The Cook respondents assert that "the County made no effort to mail notice to those parties [i.e., the mortgagees]," but they cite nothing in support of that assertion (Cook closing brief at 19). Unlike Recycled, there is no record indicating the mailings to the mortgagees were returned by the postal service, but this is not evidence that the mailings were not made.

Additionally, by letter dated October 21, 1986, Ethel Kooperman contacted the Department with regard to Honk Falls Dam (see exhibit 37 at 4). The letter is written on the letterhead of Kooperman, Kooperman & Tso, P.C., Counsellors at Law, and lists Ethel Kooperman as an attorney. In the letter, Ms. Kooperman states that "[i]t is rumored that you are spreading information to the public by radio, that there are several dams in the area which are unsafe, among which is Honk Lake. Kindly advise in what respect you find it to be unsafe and what would be your minimum requirements to bring it up to safety levels" (id.). In response, by letter dated November 6, 1986, the Department sent Ms. Kooperman a copy of the Phase I report and directed her attention to the assessment section for a summary of "the condition of the structure and the required remedial measures" (id. at 2). According to a Department record of telephone conversation, Ms. Kooperman spoke with the Department on January 29, 1987, but did not claim ownership of the dam at that time. Rather, she indicated that her interest in the dam was "personal, in that she owns lakefront property" (id. at 1).

The property assessment rolls for Ulster County also provide some evidence that the Koopermans were owners of parcel 83.6-1-11. The 1990 assessment roll, which is the first assessment roll to include tax map number 83.6-1-11 in the parcel description, lists the Koopermans as the owners of parcel 83.6-1-11 (see exhibit 23). The account number assigned to parcel 83.6-1-11 on the assessment roll is 122960. Account number 122960 first appears on the assessment rolls in 1968,[17] and the Koopermans were assessed for, and paid taxes on, the parcel assigned that account number from 1968 until the Berger respondents purchased parcel 83.6-1-11 from the Kooperman estate in 1992.[18]

However, as Department staff's title expert testified, the assessment roll records are "muddled" relative to whether account number 122960 was consistently assigned to parcel 83.6-1-11 (transcript at 803). From 1968 through 1989 the assessment rolls describe the location of the parcel assigned account number 122960 by identifying the same four bounding property

[17] Prior to the 1968 assessment roll there is no account number 122960. However, the assessment rolls for 1966 and 1967 include a tax assessment for a 26 acre vacant parcel, assessed to Robert Sawyer under account number 139700, and both assessments have hand-written notes indicating that the parcel was actually owned by K K E Realty Corp. as of 1966. From 1968 through 1976 the assessment rolls list K K E Realty Corp. as the owner of the parcel assigned to account number 122960. Counsel for the Berger respondents refers to K K E Realty Corp. as a "persona" of the Koopermans (Berger closing brief at 10) and a search of the New York State Department of State corporation and business entity database indicates that K K E Realty Corp. was originally named Kooperman, Kooperman & Ewig Realty Corp. (see http://www.dos.ny.gov/corps/bus_entity_search.html [accessed Dec. 7, 2012]). The record before me is insufficient to establish that the parcel assigned account number 139700 is the same as the parcel assigned account number 122960 (see exhibit 23 [the 1967 assessment roll for account number 139700 and the 1968 assessment roll for account number 122960 state that the respective assessments relate to parcels that have only one of four neighboring property owners in common]; see also transcript at 799-802 [Department staff expert stating that he researched the Sawyer parcel and "can't actually verify" the account numbers 139700 and 122960 relate to the same parcel]).

[18] The assessment rolls for 1990-1992 are marked "redeemed," indicating the Berger respondents paid back taxes on parcel 83.6-1-11 for the years immediately prior to their purchase of the parcel from the Kooperman estate (exhibit 23; see also transcript 2448-2449).

owners to the north, east, south and west. Staff's title expert testified, and that testimony was uncontroverted, that the four bounding property owners named on the assessment rolls do not correspond to the bounding property owners of parcel 83.6-1-11 (transcript at 792-794). Beginning with the 1990 assessment roll, the bounding owners are no longer denominated and instead the parcel location is identified by its street location and tax map number, both of which are consistent with the general location of parcel 83.6-1-11. Other aspects of the parcel description remain the same on the 1989 and 1990 assessment rolls (e.g., the acreage is listed as 26 acres and the assessed value is listed as $500).

While there is evidence that the Koopermans held themselves out as owners of parcel 83.6-1-11 for nearly thirty years and that they may have paid taxes on that parcel, the evidence before me is insufficient to establish that the Koopermans owned parcel 83.6-1-11 by adverse possession. On this record, I conclude that the estate of Ethel Kooperman did not own parcel 83.6-1-11 and, therefore, the deed for that parcel from the Kooperman estate to the Berger respondents did not convey title.

-- Berger Respondents' Ownership by Adverse Possession

The Berger respondents admit that they own parcel 83.6-1-11 (see findings of fact ¶1). The Berger respondents' title expert asserts that they own the parcel by adverse possession (transcript at 2389 [Naegeli testimony regarding whether the Koopermans could claim ownership of the parcel by adverse possession, "No, because they didn't have anything of record showing [they owned] it," but with regard to whether the Berger respondents have a claim, "Yes, because of . . . the quitclaim deed from the Koopermans"], 2392-2396 [Naegeli testimony that the dam could be viewed "just as an encroachment of the neighboring improvement coming onto the lands that have now been adversely possessed by the Bergers. That would probably be the most common way of looking at it"]; see also Berger closing brief at 30 [arguing that "it is not certain" that the Berger respondents own any portion of parcel 83.6-1-11 but that they "have established prima facie their ownership of the parcel as they define it"]). Department staff's title expert states that the Berger respondents' ownership interest is established by their deed, their assertion of "unwritten rights"[19] in relation to the parcel, and other factors such as their mortgage and payment of property taxes on the parcel (transcript 760-765). Accordingly, the Berger respondents' ownership of parcel 83.6-1-11 is not in dispute.

Although the Berger respondents' ownership of parcel 83.6-1-11 is not contested, I note for the record that the evidence adduced at hearing provides ample support for the conclusion that the Berger respondents are owners of the parcel by adverse possession. For an adverse possessor to obtain title, it must be "demonstrate[d] by clear and convincing evidence that for a period of 10 years [they] actually possessed the property in dispute and that such possession was open and notorious, exclusive, continuous, hostile and under a claim of right" (Village of Castleton-On-Hudson v Keller, 208 AD2d 1006, 1008 [1994]; see also Guenther v Allen, 268 AD2d 934, 934-935 [3d Dept 2000], lv dismissed and denied, 94 NY2d 939 [2000]).

[19] Staff's title expert testified that "unwritten rights" are actions demonstrating "occupation by the owners" (transcript at 521).

The Berger respondents have held a duly recorded deed to parcel 83.6-1-11 for approximately 20 years, and that deed has never been challenged (transcript at 2469; see also id. at 760-761 [staff title expert stating that the Berger respondents' ownership is evinced by their "claim of ownership through their deeds . . . their occupation of the property"]). They have posted the property for approximately twenty years (see exhibit 4 [June 30, 1993, DEC visual inspection report (stating that the property to the left [i.e., east side] of the dam is "posted by KR Berger Napanoch"]; Berger closing brief at 10 [stating that "[i]mmediately after purchasing, they posted 'No Trespassing' signs along all of what they believed their boundaries to be"]; transcript at 805 [Burgher testimony that the parcel is "posted along the south and a little bit along the . . . east boundary"]). They have paid taxes on parcel 83.6-1-11 since purchasing the parcel in 1992 and redeemed the back taxes on the parcel for the years immediately prior to their purchase (transcript at 2448-2449; see also exhibit 23 [1990-1992 assessment rolls for parcel 83.6-1-11 indicating that taxes were redeemed, and subsequent years indicating that taxes were paid]). They have sought, obtained and currently hold a mortgage on property that includes parcel 83.6-1-11 (transcript at 2461; exhibits 22 [current mortgage], 42 [documentation of 2001 mortgage (Liber 4871, page 54)]; see also transcript at 765-772 [Burgher testimony regarding current and past mortgages on the property]). They have a shed on the parcel (transcript 782, 2424-2426 [respondent Robert Berger testimony identifying the Berger respondents' shed on parcel 83.6-1-11, as shown on exhibit 28 aerial photographs]). They have a residence on a parcel adjacent to parcel 83.6-1-11 and maintain a pathway from their residence across parcel 83.6-1-11 to the vicinity of the dam (transcript 784). They also have a walking trail on parcel 83.6-1-11 that runs to the south of the dam along the top of the bank of Rondout Creek (transcript at 2428 [respondent Robert Berger testimony describing the boundary line on the west side of parcel 83.6-1-11 along Rondout Creek as "pretty much" following the walking trail]).

Taken together, the foregoing factors are more than sufficient to conclude that the Berger respondents own parcel 83.6-1-11 by adverse possession, particularly given the undeveloped and forested character of the parcel (see findings of fact ¶ 3; Guenther v Allen, 268 AD2d 934, 935 [3d Dept 2000], lv dismissed and denied, 94 NY2d 939 [holding that "the nature of the property is critical to the determination of the degree of possession required to establish adverse possession and wild and undeveloped land that is not readily susceptible to habitation, cultivation or improvement does not require the same quality of possession as residential or arable land" (internal quotation marks and citations omitted)]; Goff v Shultis, 26 NY2d 240, 248 [1970] [noting that "[t]he claim that one has an instrument to justify his possession differs from a claim for possession without assertion of interest shown by an instrument, in the kind of physical act which accompanies possession"]).[20]

[20] The 2008 amendments to the real property actions and proceedings law regarding adverse possession are not applicable here because the Berger respondents' title ripened before the amendments were enacted (see Hogan v Kelly, 86 AD3d 590, 592 [2d Dept 2011] [holding that "[a]lthough this action was commenced after the effective date of the 2008 amendments [to the RPAPL], we agree with our colleagues in the Third and Fourth Departments that the amendments cannot be retroactively applied to deprive a claimant of a property right which vested prior to their enactment" (citations omitted)]). Additionally, RPAPL 543, which was enacted under the 2008 amendments and which limits the activities that are deemed to be adverse, is directed at encroachments across a boundary line. Here, the Berger respondents assert ownership of the entirety of parcel 83.6-1-11.

I note that the Berger respondents' title expert does not specify whose title the Berger respondents hold parcel 83.6-1-11 adverse to. Their expert testified that he agrees with both Department staff's title expert and the Cook respondents' title experts regarding the chain of title for parcel 83.6-1-11 (transcript at 2384). However, Department staff's expert maintains that Recycled is the last record owner of parcel 83.6-1-11 (transcript at 797, 845-846), while the Cook respondents' expert maintains that either Ulster County or Longboat is the last record owner of the parcel (transcript at 2237-2238). Under the circumstances here, it is not necessary to determine which of these entities is the record owner of the parcel because each is equally susceptible to loss of its title through adverse possession.[21] Because adverse possession cuts off the rights of the former owner and vests title in the adverse possessor, the Berger respondents own parcel 83.6-1-11 regardless of who formerly held title to the parcel.

As stated at the outset of this section, the Berger respondents' ownership of parcel 83.6-1-11 is not in dispute. However, because the deed into them did not convey title, I conclude that the earliest the Berger respondents may be held to be owners of parcel 83.6-1-11 is October 1, 2002, ten years after the date of the deed into them from the estate of Ethel Kooperman (see Franza v Olin, 73 AD3d 44, 46-47 [4th Dept 2010] [stating that "[i]t is well-settled law that the adverse possession of property for the statutory period vests title to the property in the adverse possessor . . . Thus, at the expiration of the statutory period, legal title to the land is transferred from the owner to the adverse possessor"]).

-- Boundary of Parcel 83.6-1-11

Although the Berger respondents admit that they own parcel 83.6-1-11, they assert that the western boundary of their parcel is the top of the bank of Rondout Creek and not, as Department staff asserts, the centerline or thread of the creek. The Berger respondents' title expert referred to the boundary line claimed by the Berger respondents as the "possession line" (transcript at 2397). The possession line, according to the Berger respondents' expert, corresponds to what the owners of a parcel assert or believe to be the boundary of their parcel (id. at 2399). At hearing, respondent Robert Berger marked several photographs in evidence to depict what he maintains is the boundary line of parcel 83.6-1-11 in the vicinity of the dam (transcript at 2421-2428 [referring to markings the witness made on exhibit 28]; 2438-2440 [referring to markings the witness made on exhibit 44]). He testified that the boundary line near the dam coincides with the top of the bank where the land "drops off" down to the creek (transcript at 2425, 2440-2441).

Department staff maintains that the boundary line of parcel 83.6-1-11 runs along the centerline or thread of Rondout Creek, approximately through the middle of the dam.

[21]Although the State and its municipalities are generally immune from claims of adverse possession, where a municipality acquires title to property in its proprietary capacity, as when it acquires land through a tax foreclosure, those lands remain subject to adverse possession (see Casini v Sea Gate Ass'n, 262 AD2d 593, 594-595 [2d Dept 1999] [holding that "we find no merit to the plaintiffs' claim that the Association could not acquire adverse possession to the property because the City foreclosed on the land in 1977 to satisfy tax liens . . . land which is held by a municipality in its proprietary capacity is not immune from adverse possession"]).

Department staff's title expert concedes that the deed into the Berger respondents for parcel 83.6-1-11 does not include a metes and bounds description (transcript at 798). He asserts, however, that the prior deeds to parcel 83.6-1-11, as well as other deeds and historical documents establish that the western boundary of parcel 83.6-1-11 is the former centerline of Rondout Creek (see generally exhibit 14 [panels 1-5 (title sketches, with relevant deed references, depicting ownership of parcels in the vicinity of the dam dating back to 1897); panels 6, 7 (DEC survey, with relevant map and drawing references, depicting the boundary line at the dam, as determined by the DEC surveyor, to be the point at which the approximate centerline of Rondout Creek intersects the face of the dam)]; see also transcript at 597-609).

Contrary to the opinion advanced by Berger respondents' title expert, where ownership by adverse possession is founded upon a written instrument, the entire parcel described in the instrument is deemed to be held adversely (see RPAPL 511 [providing that where "there has been a continued occupation and possession of the premises included in the instrument . . . or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely" (emphasis supplied)]; Hutton v Townsend, 150 AD2d 972, 973 [3d Dept 1989] [citing RPAPL 511 and 521 and noting that "when adverse possession of property is not founded on a written instrument, only that portion of the property actually occupied and possessed may be acquired by the adverse possessor. On the other hand, when adverse possession is based on a written instrument, the adverse possessor's occupation and possession of a portion of the property gives rise to constructive possession of the entire property laid claim to under the instrument" (additional citations omitted)]).

Here, it is clear that the Berger respondents' claim is founded upon the 1992 deed into them from the estate of Ethel Kooperman. Therefore, the assertion by the Berger respondents' title expert that the "possession line" is determinative is in error. The issue remaining to be determined is where the boundary of parcel 83.6-1-11 is in relation to the dam.

Where lands are conveyed along a creek or stream, it is generally presumed that the boundary line follows the centerline or thread of the watercourse unless the conveyance clearly demonstrates another boundary line is intended (see Stewart v Turney, 237 NY 117, 121-122 [1923] [stating that "[i]n deeds from an individual owning to the center of . . . a non-tidal stream . . . of land said to be bounded by such . . . or simply of a tract with reference to a map showing the tract to be so bounded, the grantee takes title to . . . the thread of the stream" and that "[i]f the grantor desires to retain his title to the land . . . underneath the water the presumption must be negatived by express words or by such a description as clearly excludes it from the land conveyed"]; Henry v Malen, 263 AD2d 698, 701 [3d Dept 1999] [stating that "when lands are conveyed with a brook or watercourse described as a boundary, it is presumed that the grantor intended that the boundary be located in the middle of such brook or watercourse unless there is an express intent to restrict the property to the edge or shore of the watercourse"]). The deed into the Berger respondents does not contain a metes and bounds description of parcel 83.6-1-11 and respondent Robert Berger testified that the executor of Ethel Kooperman's estate did not describe the parcel's boundaries to the Berger respondents at the time of purchase (transcript at 2441-2442, 2452-2453). Nor did the Berger respondents have the parcel surveyed, either prior to or after their purchase of the parcel, to determine its boundaries (id. at 2442, 2456).

Aside from Respondent Robert Berger's testimony regarding his belief of where the western boundary of parcel 83.6-1-11 is located, there is no evidence in the hearing record to support a determination that the boundary of the parcel is the top of the bank of Rondout Creek. In particular, I note that no deed to any parcel in the vicinity of the dam was produced at hearing that indicated the top of the bank of Rondout Creek has been used to demarcate property boundaries in the area.

The deed into the Berger respondents for parcel 83.6-1-11 describes the parcel primarily by its tax map number (i.e., 83.6-1-11). The relevant tax map at the time of the Berger respondents' purchase of parcel 83.6-1-11, as well as the tax maps from other years that are in evidence, show the boundary line to run generally along the center of Rondout creek (see exhibits 9, 11, 32).[22] Although boundary lines shown on a tax map are not dispositive of the true boundaries of a given parcel, tax maps do provide an indication of the location of each tax parcel (see e.g. Boons v Martocci, 268 AD2d 616, 620 [3d Dept 2000], lv denied 94 NY2d 765 [2000] [holding that tax maps provide "some evidence of the location of the property conveyed" but that a purchaser is not "bound by the location of the property as . . . set forth on the most recent tax map as of the date of the sale"]). Accordingly, a prudent purchaser of land that is identified only by its tax map number would be expected to consult the relevant tax map to ensure that it comports to the purchaser's understanding of what is being conveyed.

Historical deeds in the vicinity of the dam also support the conclusion that the boundary line between parcel 83.6-1-11 and parcel 83.1-2-5 is the centerline or thread of Rondout Creek. Staff's title expert testified that the 1897 deeds into Charles Dickenson, the individual who originally acquired the lands to construct the dam, state that the boundary line between the parcels where the dam was built is the centerline of Rondout Creek (transcript at 606). This testimony is uncontroverted and consistent with the deeds (see exhibit 15 [Liber 339, page 120; Liber 339, page 129]). The express references to the centerline of Rondout Creek are retained in the record deeds through and including the 1976 deed into Recycled (see exhibit 15 [Liber 1352, page 672 (first plot, parcels 4 and 5)]; see also exhibit 14 [panels 1, 4]).

Department staff's title expert is also a New York State licensed land surveyor. His extensive research and fieldwork are well documented on the record (see transcript at 568-579; exhibit 14). Staff's expert generated a survey, duly certified, that depicts the thread of the creek at the dam as the boundary line between parcel 83.6-1-11 and parcel 83.1-2-5. Staff's expert determined the location of the centerline of the creek immediately below the dam to be where the creek is at its deepest and determined the centerline above the dam to be that shown on historical maps of the area (transcript at 1073-1075). The Berger respondents did not have a survey done and, aside from Respondent Robert Berger's testimony regarding his belief of where the boundary line is located, proffered no evidence that would establish that the top of the bank of Rondout Creek is the true boundary.

[22] Much was made at hearing with regard to the fact that the dam is not depicted on most of the Ulster County tax maps for section 83.6 (see transcript 968-969, 1103-1105, 1370-1380). The tax maps, however, do not generally show improvements. Residential structures, for example, are not typically shown on the tax maps (see exhibit 32). Moreover, there is no dispute that Honk Falls Dam exists, that it spans Rondout Creek between parcel 83.1-2-5 and parcel 83.6-1-11, and that the tax maps show the boundary line between those two parcels as being generally along the center of the creek.

On this record, I conclude that the western boundary of parcel 83.6-1-11 is the centerline of Rondout Creek.

-- Historical Centerline of Rondout Creek

As discussed above, where land bounded by a watercourse is conveyed, there is a presumption that the centerline or thread of the watercourse forms the boundary line. While the Cook respondents do not challenge this presumption, they do challenge Department staff's determination regarding the location of the centerline of Rondout Creek prior to the construction of Honk Falls Dam. Essentially, the Cook respondents argue that the historical centerline of the creek cannot be determined on the evidence adduced at hearing and that it is possible that the centerline referred to in recorded deeds was to the west of its present-day location (see Cook closing brief at 26-27). If so, they argue, the eastern boundary of the Cook respondents' parcel (parcel 83.1-2-5) would be west of the dam and the entire dam would be outside the boundary of their parcel (id. at 32-33). For the reasons discussed below, I conclude that the assertion that the thread of Rondout Creek ran to the west of its present-day location at the time the dam was built is not credible.

The Cook respondents called two expert witnesses in support of their argument. These experts raised issues concerning stormwater flows during dam construction and possible errors on historical maps of the Honk Lake area. Neither of the Cook respondents' experts, however, proffered a historical map, or other historical documentation, that places the creek to the west of its current location as it runs through the dam site.

The first expert called by the Cook respondents is a professional engineer. This expert's testimony on direct examination focused on the dam's sluice pipes, which are two four-foot diameter pipes located at the base of the dam that allowed water to flow through the dam site during construction (see transcript at 2542 [Canestrari testimony that the purpose of the sluice pipes "was to pass, basically, base flow, and possibly light, modest rainfall flow, runoff flow"]; exhibit 50 at 3 [article on the development of the Honk Falls Power Company stating that "[a]t the beginning of the laying of concrete in the base of the dam two sluice pipes, each 4ft. in diameter were laid in the bottom one in each of the two gorges, to pass water through during the construction period"]).

According to the Cook respondents' expert engineer, the sluice pipes were not of sufficient size to handle the flow rate that would result from a significant rainstorm[23] and,

[23] The expert calculated that a one-year storm event (i.e., the average heaviest rainfall expected annually over any 24 hour period) would generate a peak flow rate at the dam of between 3,000 and 4,000 cubic feet per second (see transcript at 1239-1240, 2648). The expert testified that the sluice pipes could handle only about one tenth of that flow rate (transcript at 1240-1241 [Tarolli testimony that "the two four-foot pipes could take about a tenth of that 4,000 cubic feet a second, and they would be at the -- they would be overtopped"]). I note that this expert also testified that the combination of the two sluice pipes and the two six-foot penstocks (i.e., the pipes that, after construction, direct water to the power plant) could handle only about one-tenth of the flow rate expected from a one-year storm event (see id. at 1265 [Tarolli testimony that "[w]hen the water was above the four-foot pipes in the analysis, when it was above

therefore, the dam could have been overtopped while under construction. This expert opined that, because the sluice pipes were not large enough to handle the expected storm flow rates at the dam, "there is a possibility that the main channel or other channels were . . . actually carrying the water to the west side of the dam" (transcript at 1243-1244). The Cook respondents' expert noted that he had observed worn rock and an area of fill just below the dam, to the west of the present-day channel of Rondout Creek (id. at 1243). He opined that the worn rock and fill indicated that there had once been another channel to Rondout Creek. He equivocated, however, on the location of the hypothesized channel, stating only that it may have been somewhere in the area of the dam's west abutment wall (transcript at 1261-1262).

The second expert called by the Cook respondents is a New York State licensed land surveyor. Although a licensed surveyor, this expert was not engaged by the Cook respondents to undertake a survey to locate the property boundary at the dam site (see transcript at 2079 [Mercurio testimony that he did not do a survey of the property line because he "was not afforded that right"]). Rather, he investigated the possibility that the main channel of Rondout Creek had been elsewhere at the time of dam construction. The expert surveyor visited the dam site "[n]ot more than three times," took photographs, researched historical records relating to the construction of Honk Falls Dam and opined that the centerline of the creek depicted on several historical maps was in error (transcript at 2040).

Similar to the testimony provided by their expert engineer, the Cook respondents' expert surveyor testified that he too had observed worn rock and an area of fill on the west side of Rondout Creek just below the dam. The expert surveyor opined that the worn rock and fill "indicat[ed] the location of the creek" prior to dam construction (transcript at 2040-2041). This expert also testified that the area in the immediate vicinity of the dam appeared to have been excavated at the time the dam was constructed and, therefore, the native channel of Rondout Creek must have been elsewhere (id. at 2040-2041 [Mercurio testimony that photograph 2 of exhibit 63 depicts a "sheer rock ledge, sharp and jagged, indicating that the area was excavated and a creek could not [at the time of construction] be in this location"]). He equivocated, however, with regard to the extent and location of the excavated area (id. at 2097-2100 [Mercurio testimony that "there's no way I can tell" whether the rock outcropping below the dam was excavated and that "[t]here's no way for me to know" the extent of the excavation done when the dam was built]).

In addition to his field observations, the Cook respondents' expert surveyor identified an apparent error on some of the historical maps in evidence. A 1923 map (Clark map) created by P. Edwin Clark, a civil engineer of some renown,[24] depicts the boundary lines of several

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the nine-foot [*sic*] pipes . . . all four pipes were only taking 3- or 400 cubic feet a second, again, much less than what the analysis showed was coming downstream, which was in the proximity of 4,000 cubic feet a second"]). This testimony, however, is not consistent with the analysis presented by the expert (id. at 2643-2646 [Tarolli testimony that the calculated flow rates for the two sluice pipes alone would be in the 320 to 400 cubic foot per second rage, depending on the depth of water]).

[24] The Cook respondents' expert surveyor stated that "[t]he accuracy that I found in [Clark's] measurements and the detail and his research . . . was a hundred years ahead of his time" (transcript at 1987).

properties in the vicinity of Honk Lake (see exhibit 19). The error identified by the expert surveyor concerns the boundary lines of the parcel (east parcel) on the east side of Rondout Creek where the dam is located. The Clark map depicts the northern boundary of east parcel as a straight line, the western terminus of which is the centerline of Rondout Creek. This depiction of the east parcel's northern boundary line as a straight line is repeated on some of the other historical maps in evidence (see e.g. exhibits 18 [1949 map] 19; but see exhibit 33 [1926 map that omits the western portion of the northern boundary line]).

The Cook respondents' expert surveyor credibly demonstrated that the northern boundary line of the east parcel should not have been depicted as a straight line. Rather, moving from east to west along the boundary line, the line should be depicted as pivoting near its midpoint, turning to the northwest, and then continuing in a straight line from there to the centerline of Rondout Creek (transcript at 2005-2010, 2025-2029; see also exhibits 19 [showing corrected northern boundary line, as drawn by Mercurio], 60 [1894 deed], 61 [partial deed plot by Mercurio]). The Cook respondents' surveyor attributed the error on the Clark map to an 1897 "resurvey" of properties in the Honk Lake area that did not provide the course and distance for the western portion of the east parcel's northern boundary line (id. at 2007, 2018).

The error identified by the Cook respondents' surveyor regarding the depiction of the east parcel's northern boundary line on certain maps does not, however, equate to an error in those maps with regard to the depiction of the course of Rondout Creek. As the expert himself testified, the corrected location of the western terminus of the northern boundary line remains within the course of Rondout Creek as shown on the Clark map, it is just further upstream than shown on the map (see transcript at 2025-2028 [Mercurio testimony describing the error and marking the corrected boundary on exhibits 19 and 26]). Accordingly, the location of the western terminus of the east parcel's northern boundary line, as corrected by the Cook respondents' surveyor, remains consistent with the pre-construction course of Rondout Creek as depicted on the Clark map and other historical maps of the Honk Lake area. The expert surveyor testified that he could not establish the course of the creek between the location of the northern boundary's western terminus and the dam because no deed describes any point along that stretch of the creek (transcript at 2075-2076). That, however, does not demonstrate that the centerline of Rondout Creek as shown on the Clark map and others is incorrect.

For a gorge to the west of Honk Falls Dam to be deemed to have been the centerline of Rondout Creek at the time the dam was constructed, as the Cook respondents suggest, that gorge would have to have been the main channel or thread of Rondout Creek (see Stewart v Turney, 237 NY 117, 121 [1923] [stating that "the thread of the stream" is presumed to be the boundary line of parcels bounded by a stream or watercourse]). The Section Chief of the Department's Dam Safety Section, an expert in dam safety and dam engineering (see transcript at 1298), testified that the hypothesized west channel "would have to be able to accommodate [storm flows], so it should have been pretty wide as [the existing gorge] is" (transcript at 1306 [Dominitz testimony regarding whether the channel of Rondout Creek may have originally been to the west of its present-day location]). The Section Chief further testified that "any channel that may have been present [to the west] would have had to be at least as deep as the gorge where we see water flowing today" (id. at 1621).

The record overwhelmingly supports Department staff's position that, prior to the construction of Honk Falls Dam, Rondout Creek flowed where the dam now sits. First and foremost, the physical characteristics of the dam site do not support the argument that the pre-construction thread of Rondout Creek was to the west of the dam. As acknowledged by the Cook respondents' expert surveyor, the gorge at the dam site is dramatic (transcript at 2096). The gorge extends more than one thousand feet downstream from the dam (see exhibit 8 [attached map entitled "Dam-break Flood Analysis Inundation Plan" (depicting topography below the dam)]). The dam itself, which is nearly 300 feet wide and more than 40 feet tall (see exhibits 2 at 3; 7), provides a reasonable proxy for the dimensions of the cross-section of the gorge at the dam site. Additionally, aerial photographs of the dam site depict Honk Falls Dam spanning an impressive gorge carved in rock with no indication of a more prominent gorge to the west of the dam (see exhibit 28).

Had there been a substantial channel to the immediate west of the dam, that channel would have had to converge with the existing gorge as it runs south from the dam site. The west wall of the gorge in the vicinity of the dam, however, shows no sign of a significant former channel entering the gorge. Rather, in the area where the Cook respondents' experts indicated another gorge may have been, there is a substantial rock ledge at an elevation well above the existing creek bottom that extends south from the dam (see exhibit 28 [generally, and especially the second and third photographs depicting water flowing from the area of the penstocks and cascading down to the creek level from the rock ledge on the west bank of the gorge], transcript at 2579-2580 [Canestrari testimony that there is "a rock ledge on the west side. If that was a low area, you would expect to see some gorge tying into the main channel which leads down to Honk Falls and down to the substation. There's natural rock there; there's not fill there. There's nothing to indicate that this [i.e., the area on the west side of the dam] was a low area"]; 2629-2630 [Canestrari testimony that there is a "ledge on the east side of the penstocks[25] 10, 13 feet higher than the bottom of the gorge . . . that the penstock flow -- leakage flows over and down. That's just higher than that area. There's no gorge there, there's no low area"]).

Although Department staff's dam safety expert agrees that there is an area of fill along the west abutment wall of the dam, he testified that the fill area is at an elevation well above the bottom of the gorge (transcript at 2597 [Canestrari testimony that the fill area identified by the Cook Respondents' expert is at a higher elevation than the bottom of the penstocks], 2629-2630 [Canestrari testimony that "there's no reference in [the exhibit 7 drawings for the 1926 spillway repairs] or anywhere else that I've seen to identify that there's a deeper channel [that was filled] here"]). This assessment is supported by the record evidence (see exhibit 63, photograph 4 [photograph proffered by Cook respondents depicting the "fill area" with the end of the dam's west abutment wall visible in background]; exhibit 7 [top left diagram depicting "top of dyke" near the end of the west abutment wall in the same area depicted in exhibit 63, photograph 4]; exhibit 28, third photograph [aerial photograph depicting area near the end of the west abutment wall]). The credibility of the Cook respondents' expert surveyor is undermined by the fact that he did not physically view the west wall of the gorge at the dam site to ascertain whether there was evidence of a former substantial channel (transcript at 2095-2096 [Mercurio testimony that

[25] The penstocks are on the west side of the dam, to the west of the deepest part of the gorge. Canestrari's testimony regarding the "ledge on the east side of the penstocks" relates to a rock ledge that is on the lower portion of the west wall of the gorge.

"[i]t's impossible to look downstream [at the west wall of the gorge] . . . because you would have to walk out on the dam itself or go to the east side and look down" and that he only looked downstream "[f]rom the west side"]).

With regard to the extent of excavation at the dam site, Department staff's dam safety expert stated that there may have been some minor excavation or "scarifying" along the rock interface to ensure that the dam was built on a "sound subsurface" (transcript at 447-448). Department staff, however, rejects the assertion that extensive excavation was done to reroute Rondout Creek through the dam site (id. at 2578 [Canestrari testimony that construction drawings indicate "that some excavation of bedrock was done to place the penstocks [and that] seems to be representative of what I see in the field"]; 1304-1305 [Dominitz testimony that the gorge below the dam "appears to be made of solid rock, pretty much . . . it appears like a natural ground. I see no signs of any excavations or any blasting or anything like that"]).

Construction diagrams that depict repairs made to the dam's spillway in 1926 are consistent with Department staff's position that no significant excavation of the gorge occurred at the dam site during construction (see exhibit 7).[26] In the top left quadrant of the construction diagrams are two scale drawings of the upstream elevation of the dam that depict the interface between the dam structure and the surrounding rock. The surrounding rock is depicted as a crosshatched area[27] that rises and falls along what appears to be the natural contours of the gorge. The only portion of the surrounding rock interface that does not follow the apparent natural contours of the gorge is in the area below and to the west of the penstocks. In pronounced contrast to the rest of the surrounding rock interface, the contours of this area are depicted as straight horizontal and vertical lines, indicating that the area had been excavated. This excavated area is more than 10 feet above the base of the dam (id.). Also in evidence is an article published in 1925[28] that provides a first person account of the construction of Honk Falls Dam (see exhibit 50). The article does not mention extensive excavation of the gorge, but does discuss excavation in the area of the penstocks, also called feeder pipes (id. at 1 [noting preparations made for excavation "along the line of the proposed feeder pipe line"]; see transcript at 63 [Canestrari

[26] The Cook respondents, cite exhibit 7 and state that "[r]epairs to the spillway were made in or about 1941. There is no evidence of other repair or maintenance of the dam before 1941 or any time thereafter" (Cook closing brief at 1). As exhibit 7 plainly shows, however, the repairs were made in 1926 and the construction diagrams were made that same year (exhibit 7 [title box]). The construction diagrams were revised in 1941, with the only change noted on the diagrams described as "Intake shown to scale" (id.).

[27] The Cook respondents' expert engineer declined to opine on what the crosshatched areas shown on exhibit 7 represent (see transcript at 1261 [Tarolli testimony that the "hatched area is not identified. I don't know if that's bedrock. I don't know what it is. It's a hatched area. It's not identified that I can see"]). Both Department staff dam safety experts opined, however, that the crosshatched areas represent bedrock (transcript 447-448 [Canestrari testimony in response to whether the crosshatched areas represent bedrock, "Yes, I read that being bedrock, yes"], 1303 [Dominitz testimony that the dam was constructed on bedrock based on his field observations "and based on this picture [exhibit 7], this crosshatching symbol is typical of a rock symbol"], 1627-1628 [Dominitz testimony that the crosshatched area "is ground that was not disturbed as part of the construction of the dam. It's the foundation of the dam"]).

[28] See transcript at 2102 [Mercurio testimony that the undated article was from "January of 1925"].

testimony that "the penstocks are the pipes in the dam that basically carry the water from the dam to the turbine downstream"]).

Lastly, I do not consider the flow rate analysis of the Cook respondents' expert engineer to be probative of the existence of a western channel. Although Department staff contested elements of the expert's flow rate analysis, staff did not dispute that significant storm events would generate flow rates well in excess of the capacity of the two sluice pipes. Regardless, both of Department staff's dam safety engineers testified that the sluice pipes were of sufficient size for construction purposes and did not need to be designed to handle flow rates generated from large storm events (see transcript at 1664 [Dominitz testimony that it is not unusual for sluice pipes to "be designed to handle a limited amount of flow. And there's some risk that is acknowledged to be taken on . . . that the work area may get flooded"], 2586-2587 [Canestrari testimony that, during construction, "you would want to pass base flow and oversize the pipes and be able to pass some light rainfall"]; see also transcript at 2544-2551 [Canestrari testimony discussing methods for the diversion of water during dam construction]).

The Cook respondents did not offer a dam safety or dam construction expert to controvert Department staff's experts' testimony regarding the sizing and purpose of the sluice pipes (see transcript at 2658 [Tarolli testimony, "I don't have any experience in dam construction . . . I am not an expert. I did testify [that] I worked on a dam 35 years ago, but I'm certainly not a dam expert"]). Moreover, the testimony provided by staff experts is consistent with other evidence received at hearing.

A United States Department of the Interior (DOI) publication, Design of Small Dams, includes a chapter on diversion of water during dam construction (see exhibit 78A). The DOI publication discusses several methods available to divert water from an active dam construction site and also states that overtopping a concrete dam during construction may have "little or no adverse effect" (id. at 491). In addition, the 1925 article on Honk Falls Dam recounts both the laying of the sluice pipes "to pass the water through during the construction period" and a storm event that overtopped the dam "notwithstanding that both gates [to the six-foot penstocks], and both sluices were wide open" (exhibit 50 at 3; see also exhibit 64 [an enlargement of a photograph from the 1925 article that depicts the dam under construction], transcript at 2101-2106 [Mercurio testimony acknowledging that the exhibit 64 photograph is taken from a point to the west of, and at a higher elevation than, the penstocks]).

On this record, particularly the absence of physical evidence or historic records indicating that a substantial channel or gorge existed to the west of where the dam was built, I conclude that Honk Falls Dam was erected in the main channel of Rondout Creek.

-- Commissioner's Authority to Determine Ownership

The Berger respondents argue that because they deny ownership of "any structure that impounds water and any land upon which such a structure sits . . . [t]he Commissioner has no authority to make the determination that [the Berger respondents] own the dam" (Berger closing brief at 12). They premise this argument on the Real Property Actions and Proceedings Law (RPAPL) article 15, which, they argue, mandates that the "determination of title to real property

when contested be within the jurisdiction of Supreme Court," with certain exceptions not relevant here (id. at 13).

The Berger respondents' argument must be rejected. First, the Berger respondents' reliance on Matter of Winter 1-A, Ruling and Interim Decision (interim decision) of the Commissioner, October 20, 2008, is misplaced, both factually and legally. The interim decision addresses a motion by one of the parties for a stay in the administrative proceeding "pending the resolution of a title dispute between [two parties to the proceeding] that is the subject of an action in State Supreme Court" (id. at 1). Unlike the instant matter, in Winter 1-A two parties claimed an interest in the same property and one of the parties brought an action to quiet title in State Supreme Court. Here, the Berger respondents admit that they own parcel 83.6-1-11 and no party has challenged the respondents' interest in that parcel.

Moreover, the Commissioner expressly held in Winter 1-A that the determination not to adjudicate the disputed ownership issue in that matter was limited to the facts and circumstances then before the Commissioner (see id. at 2-3). The Commissioner noted that the matter concerned compulsory integration under ECL article 23 and held that both Department policy and the ECL provide for resolution of title disputes in such proceedings to be determined by the courts. Specifically, the Commissioner noted that:

> "Section V.B of Department Program Policy DMN-1 entitled, Public Hearing Processes for Oil and Gas Well Spacing and Compulsory Integration, in delineating the procedures for compulsory integration hearings, states: 'Title disputes or tax map errors will not be referred to [the Office of Hearings and Mediation Services]' . . . Moreover, ECL 23-0901(3)(c)(1)(ii)(I), articulating one of the statutorily mandated provisions of all compulsory integration orders, empowers the well operator on behalf of the owners in a spacing unit 'to conduct all acts associated with the well and necessary facilities related thereto, including without limitation: conducting title examination and curative work on the tracts included in the spacing unit'" (id.).

The Commissioner concludes that "[b]ecause the Department would not be available as a forum for such 'title examination and curative work,' such claims, in this instance, are more properly adjudicated in State Supreme Court" (id. at 3 [emphasis supplied]).

Unlike Winter 1-A, the matter currently before me is an enforcement action brought under article 15 of the ECL. Department staff alleges that respondents are in violation of ECL 15-0507(1), which states that "[a]ny 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 [emphasis supplied]." Plainly, ownership of a dam is a necessary element of the charge and, therefore, must be proven by Department staff.

The ECL expressly provides the Department with the authority to "[c]onduct investigations and hold hearings and compel the attendance of witnesses and the production of accounts, books, documents, and nondocumentary evidence by the issuance of a subpoena" (ECL 03-0301[2][h]). The Berger respondents point to nothing in article 15 that would preclude this

office from conducting a hearing to determine whether Department staff has met its burden of proof to demonstrate, by a preponderance of the evidence, that respondents are owners of the Honk Falls Dam (see also RPAPL 1551 [stating that "[n]othing contained in this article shall be construed to limit any other remedy in law or equity"]; Matter of Shau Chung Hu v Lowbet Realty Corp., 2012 NY Misc LEXIS 5129, *11 [Sup Ct, Kings County 2012] [holding that "pursuant to RPAPL 1551, this remedy [an action under RPAPL 1501] is not exclusive and thus does not preclude relief pursuant to Business Corporation Law § 1114"]; Velez v Huff, 48 Misc 2d 10, 11 [Sup Ct, Chautauqua County 1965] [quoting RPAPL 1551 and stating that "[t]his court in reading the remaining sections in the article does not gather therefrom in any of them that there is vested in the Supreme Court, or in the County Court for that matter, exclusive jurisdiction over any title matter where an adverse claim between Indians on a Seneca Reservation is to be disputed"]).

The Berger respondents' reliance on Matter of Barnes, Decision and Order of the Commissioner, April 24, 2000, is also unavailing. In Barnes, the Commissioner upheld the determination of the ALJ that certain respondents had "continuously owned the property since 1982" (id. at 1; see also id., Hearing Report at 6 [ALJ determination that the same respondents "are the current property owners, and have been the only property owners since December 1982"]). Although, as the Berger respondents note, the Commissioner held that "[a]lternatively, [the respondents] are in constructive control of or maintained the unsafe condition of the subject dam," this does not alter the fact that the Commissioner concurred with the ALJ's determination and held that the respondents were owners of the subject property (id. at 1).

Hazard Classification of Honk Falls Dam

The Berger respondents argue that Department staff failed to meet its burden of proof to demonstrate that "the Honk Falls Dam is a hazard class C Dam" (Berger closing brief at 1). The Cook respondents argue that the Department "has never conducted an analysis of Honk Falls Dam that finds that the dam is unsafe or a potential threat to the public" (Cook closing brief at 1). The Cook respondents further argue that, in the absence of evidence that the dam is a hazard, "[t]here is no basis or reason for DEC to commence this proceeding" (id. at 5).

As set forth under 6 NYCRR part 673,[29] the Department assigns hazard classifications to dams according to the potential adverse downstream impacts in the event that the dam fails (see 6 NYCRR 673.5[a]). The hazard classification assigned to a particular dam is unrelated to the dam's physical condition or to the likelihood that the dam will fail (id.; transcript 147-148 [Canestrari testimony that the hazard class is determined by "the downstream impacts should the structure fail . . . it doesn't identify the -- the probability that it's going to fail or the condition of a structure"]; see also exhibit 8 at 19 [noting that the hazard classification of a dam "refers to the potential for damage or loss of life and does not refer to the condition of the dam"]). The factors considered by the Department in assessing a dam's hazard classification are established by regulation and include the height of the dam, its impoundment capacity, and the potential

[29] The current version of 6 NYCRR part 673 became effective on August 19, 2009. Citations in this report to sections of "former" part 673, refer to the dam safety regulations that were in effect from January 9, 1986 through August 18, 2009.

downstream consequences if the dam were to fail (see 6 NYCRR 673.5[a]; former 6 NYCRR 673.3[b]).[30]

Honk Falls Dam has been designated as a hazard "class C" dam on Department records since at least 1983 (see Matter of Berger, Ruling, Aug. 22, 2011, at 5; exhibit 4 at 1). In 1998, at the request of the Department, the U.S. Army Corps of Engineers, New York District (NY Corps), issued a final report on a dam-break analysis of Honk Falls Dam (see exhibit 8 at 1 [section I.B, authority and acknowledgments]). The final report states that "[t]he primary purpose of this study is to determine the downstream hazard classification for the [DEC] Dam Safety Section" (id. at *i*), and the report concludes that "[o]n the basis of its potential to cause downstream damage, the Honk Falls Dam is given a Class C, High Hazard classification" (id. at 18). The final report expressly cites to the Department's dam safety regulations, and sets forth the entire text of the Department's regulations for assessing a dam's hazard classification (id. at 2 [citing former 6 NYCRR 673.3(a) and (b)]; see also transcript at 154-155 [Canestrari testimony that "the dam safety section provided our definitions to the Corps and/or the engineer, so they used our definitions for hazard class out of 673.3, the regulations that were active at the time for hazard class"]).

Mr. Canestrari, the Department's dam safety engineer responsible for oversight of Honk Falls Dam, testified that he reviewed the NY Corps final report, including the methodologies used, the assumptions made, and the analysis undertaken (transcript at 163). Based upon his review, he concluded that the final report was "an acceptable dam break analysis" and that the analysis adhered to the Department's criteria for determining hazard classifications (id.).

Respondents proffered no expert testimony, report, or engineering analysis to refute the conclusions set forth in the NY Corps final report. They do, however, raise certain challenges to the Department's reliance on and use of the report.

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[30] The 2009 revisions to part 673 include changes to the text describing the factors used by the Department to assess a dam's hazard classification. Substantively, however, the factors remained largely unchanged. Former 6 NYCRR 673.3(b), which was in effect during most of the period of the alleged violations, reads: "The factors used to assess a hazard classification are: (1) the height of the dam and the maximum impoundment capacity; (2) the potential for loss of human life; (3) the physical characteristics of the dam site and the location of developed areas, occupied buildings or other land improvement in the area which would be affected by a failure of the dam; (4) the economic loss which could result from failure of the dam; (5) the environmental damage which could result from a failure of the dam; and (6) other site-specific characteristics which the department determines are necessary to consider." Current 6 NYCRR 673.5(a) reads "The factors used to evaluate and assign a Hazard Classification are: (1) the height, impoundment capacity and physical characteristics of the dam; (2) the physical characteristics of the location of the dam, including the areas which would be affected by a failure of the dam; and (3) the potential consequences and other circumstances relevant to the failure of the dam, including, without limitation: (i) personal injury and loss of human life; (ii) damage to developed areas, occupied buildings, or other land improvements; (iii) economic loss; (iv) damage to natural resources; (v) proximity to and possible impairment of access to emergency services; and (vi) other site-specific characteristics or factors which the department determines are necessary to consider."

The Berger respondents argue that it was an improper delegation of the Department's authority to allow the NY Corps to assess the hazard classification of Honk Falls Dam (Berger closing brief at 39-41). There is nothing in the record that indicates the Department ceded its authority to determine the appropriate hazard classification of Honk Falls Dam. Engaging the services of the NY Corps to undertake a dam-break flood analysis does not equate to a delegation of authority. The Department remained free to accept or reject the analysis and conclusions in the final report. As I ruled earlier in these proceedings:

> "The Berger respondents cite to no authority, and I am aware of none, that precludes Department staff from relying on information contained in reports and studies prepared by non-Department personnel in making determinations such as that at issue here. To the extent that staff has relied on information contained in Army Corps flood analysis, the Berger respondents are free to challenge the accuracy of that information. However, irrespective of whether the Army Corps flood analysis is accurate, the fact remains that there is no legal bar to staff using the analysis in making a dam hazard classification" (Matter of Berger, Ruling of the ALJ, Aug. 22, 2011, at 8).

With regard to the Department's reliance on the NY Corps final report, both the Berger respondents and the Cook respondents raise the issue of ongoing sedimentation in Honk Lake. The Cook respondents argue that Department staff has failed to update the 1998 dam-break analysis to determine whether Honk Falls Dam remains a class C dam. They argue that "even though volume of impounded water was a crucial factor in the 1998 analysis, Staff does not know how much water has been displaced by sediment since 1998" (Cook reply brief at 33-34). The Berger respondents argue that "[d]epending on the magnitude of sedimentation [of Honk Lake] that has occurred since 1997 - and historical documents and common sense demonstrate conclusively that there has been sedimentation - there is no reliable way based upon this record to determine whether the Honk Falls Dam was properly characterized as hazard class C when this action was commenced or is today" (Berger closing brief at 48).

The Berger respondents argue that "[t]here is one word that is key to understanding the ultimately fatal flaw in the prosecuting staff's case regarding the hazard classification issue: invert" (Berger closing brief at 43). The "invert" that the Berger respondents refer to is the "breach invert" used in the NY Corps final report. Although the Berger respondents state that the term is not defined in the record, the final report plainly uses the term to mean the bottom elevation of the assumed dam breach that was used in the dam-break flood analysis (see exhibit 8 at 12 [listing the breach invert as one of the "Assumed Dam-Breach Parameters"], 13 [diagram depicting "Typical Concrete Dam Breach Parameters"]).

The Berger respondents argue that the breach invert used in the final report took into account sedimentation of the lake because it was calculated by using the "actual, measured depth of water in Honk Lake" (Berger closing brief at 45). They assert that a contour map of Honk Lake included within the attachments to the final report "shows the deepest spot as something more than 15 feet, which [the final report] reports as elevation

553.6 [*sic*[31]] feet" and that "[i]n all of the computer runs in the second portion of [the final report], that is the invert" (id.; see also exhibit 8, attached supporting computations [the contour map is included in the hydrology section]).

The Berger respondents' calculation of the breach invert is in error. Subtracting the maximum depth of Honk Lake, as shown on the contour map, from the elevation of the spillway crest, as listed in the final report, results in a breach invert elevation of 555.9 feet (i.e., 571.0 - 15.1 = 555.9). The elevation of the breach invert used in the final report, however, is 553.8 feet, which is 17.2 feet below the spillway crest (i.e., 571.0 - 17.2 = 553.8). Accordingly, the breach invert does not equate to a simple subtraction of the maximum depth of Honk Lake from the elevation of the spillway crest.

Department staff's dam safety expert testified that the contour map in the final report was not created for the dam-break flood analysis but was a Department record developed by the Department's fisheries staff in the normal course of business (transcript at 357-358; see also http://www.dec.ny.gov/outdoor/24316.html [accessed Dec. 7, 2012] [listing the Honk Lake contour map in the Department's contour map series which "provides information on depth contours, water surface area, mean depth and available fish species for selected state waters"]). Staff's dam safety expert testified that the map provides background information "but it really had nothing to do with [the dam-break analysis] computations" (transcript at 365-366).

Additionally, there is no mention in the NY Corps final report that the breach invert was derived in the manner suggested by the Berger respondents. Rather, the final report notes that there is a "large bedrock outcropping" near the midsection of the dam along its downstream toe and states the elevation at the top of the outcropping is approximately 554 feet (exhibit 8 at 15). The report states that "it is assumed that the [dam] will fail at the maximum sections to left and right of the ledge outcrop" (id.). The report does not set forth the factors used to set the elevation of the breach invert just inches below the top elevation of the rock outcropping. The report's authors may have considered it unlikely that the concrete would fail in the gaps below and to the left and right of the rock outcropping, but that is not expressly stated.

The Department's dam safety expert testified that the assumption made in the final report with regard to the location of the breach invert could have been "a little more conservative" (transcript at 438-439). In the context of assessing potential impacts from a dam failure, "more conservative" equates to using a larger assumed breach, thereby resulting in greater flows through the breach (id.). The breach assumed in the final report is confined to approximately the top 17 feet of the dam, measured from the spillway crest, and to two-thirds of the width of the spillway (see id. at 438-439, 441; exhibit 8 at 12-13 [listing the breach invert at an elevation of 553.8 feet, or approximately 17 feet below the spillway crest elevation of 571.0 feet]). Because the maximum height of the dam at the spillway is approximately 32 feet, the dam safety expert opined that the dam break analysis could have run the analysis using a larger assumed breach (see transcript at 438-439, 441; see also exhibit 8 at 5 [listing the dam height at its maximum section as 32 feet]).

[31] The elevation of the breach invert used in the final report is 553.8 (see exhibit 8 at 12).

The fact that the NY Corps final report does not specify the rationale for setting the breach invert parameter at 553.8 feet does not alter the fact that the dam-break analysis and the NY Corps final report were deemed to be acceptable by Department staff. Moreover, staff's dam safety expert testified that there is some discretion in setting the breach parameters for a dam-break analysis of a concrete dam, and that the criteria used for the analysis in the final report is both acceptable to the Department and consistent with Federal Energy Regulatory Commission criteria (transcript at 438-439, 441). Staff's expert also testified that sedimentation was not "even mention[ed]" in the final report and that water volume of Honk Lake was not an input for the dam-break analysis (id. at 439).

I conclude that Department staff has met its burden of proof to demonstrate that Honk Falls Dam was a class C hazard dam during the period alleged in the complaint.

Relief

By its complaint, Department staff requests that the Commissioner issue an order "assessing a civil penalty in an amount equal to the maximum allowed by law" and "directing Respondents to conduct the necessary studies and obtain the necessary permits to repair the Honk Falls Dam in conformance with dam safety criteria in the discretion of the Department" (complaint at 7). Staff cites the provisions set forth in ECL 71-1109 and 71-1127 as authority for the relief requested (id. at 6).

In its closing brief, Department staff requests that the Commissioner impose a $941,000 penalty, jointly and severally, on respondents and also requests that respondents be directed to undertake certain remedial measures (staff closing brief at 42-43). With regard to remedial measures, staff requests the Commissioner direct:

> "the following work to be done, without limitation, in the near term – a period of up to three months:
>
> 1. the lowering of the Honk Lake surface water elevation as soon as possible;
> 2. a basic or interim Emergency Action Plan (6 NYCRR 673.7);
> 3. the first of quarterly Safety Inspections (673.12) by a P.E.; and
> 4. an Inspection and Maintenance Plan (673.6).
>
> In the longer term – a period of up to a year – the Honk Fall[s] Dam requires:
>
> 1. an Engineering Assessment (673.13), with some exploration of the material the dam is made of and its foundation to better assess its stability, and with repair alternatives and corresponding cost estimates, including a schedule, that would allow the dam to meet safety criteria; and
> 2. a full Emergency Action Plan (673.7)" (staff closing brief at 42).

In addition, Department staff requests that the Commissioner impose a financial assurance requirement upon respondents. Staff requests financial assurance in the amount of

$500,000 "for the purpose of planning, designing and carrying out the breach and removal of the Honk Falls Dam in the event the Respondents should fail to comply with a Commissioner's Order" (staff closing brief at 45). This amount, staff states, "may be reduced based on an approvable cost estimate by the Respondents for the proper design, breach and removal of the dam" (id.).

For the reasons discussed below, I recommend that the Commissioner issue an order assessing a penalty of $116,500, and requiring respondents to implement the remedial actions and secure the financial assurance demanded by staff.

-- Remedial Measures

The remedial measures requested by Department staff are authorized and appropriate. As the record reflects, Honk Falls Dam is a hazard class C dam and has been neglected for decades. Much of what staff demands with regard to remedial measures is required for class C dams and the timelines set forth in staff's demand for relief are reasonable (see 6 NYCRR 673.6 [requiring an inspection and maintenance plan]; 6 NYCRR 673.7 [requiring an emergency action plan]; 6 NYCRR 673.12 [requiring safety inspections by an engineer]; 6 NYCRR 673.13 [requiring an engineering assessment]). Accordingly, implementation of these measures will, in large part, bring the operation and maintenance of Honk Falls Dam into conformance with regulatory requirements.

There are two aspects of Department staff's demand for remedial measures that warrant further comment. First, staff's request for the surface level of Honk Lake to be lowered "as soon as possible" should be modified to provide for staff approval of the method proposed by respondents to achieve the objective of lowering the lake level. Staff's request for relief does not describe the manner to be used to lower the lake level, and the issue is not addressed in the hearing record. Therefore, I recommend that the relief request be modified to require that respondents submit a plan to Department staff for approval setting forth the proposed method to be employed to lower the lake level and a schedule for implementing the proposal as swiftly as practicable.

Second, Department staff's request for quarterly safety inspections should provide for a less frequent inspection interval upon approval by the Department. Quarterly inspections are warranted given the long neglect and uncertain condition of the dam. However, staff may determine on the basis of the engineering assessment or other information that less frequent inspections are sufficient to address the Department's concerns. Accordingly, I recommend that staff's request for quarterly inspections be modified to provide flexibility with regard to the frequency of inspections.

-- Financial Assurance

Department staff's request for financial assurance in the amount of $500,000 is authorized and appropriate. Pursuant to 6 NYCRR 673.16(i), financial assurance may be required from a dam owner in relation to "the cost of breach or removal of the dam," at staff's discretion "upon consideration of public safety and the specific characteristics of the dam and its location." Staff

states that "Honk Falls Dam is a high hazard Class C dam that is either 'unsafe' or 'unsound' as evidence[d] by . . . the Phase I report of inadequate spillway capacity and stability as well as its visually observed deficiencies" (staff closing brief at 45; see also findings of fact ¶¶ 10, 11, 12). As staff requests, I recommend that the Commissioner's order provide flexibility to allow for the amount of the financial assurance to be reduced based upon an approvable estimate by respondents for the cost of the breach and removal of the dam (id.).

-- Penalty Calculation

Pursuant to ECL 71-1109, the maximum civil penalty to be imposed for violations of ECL 15-0507(1) is $500 per offense, and each day that an offense continues is deemed to be a separate and discrete offense. As set forth in the complaint, Department staff alleges that respondents have operated and maintained Honk Falls Dam in continuing violation of ECL 15-0507(1) since July 27, 1999. The maximum statutory penalty available for violating ECL 15-0507(1) from July 27, 1999 through the date of the complaint, April 27, 2007, is $1,416,000 (i.e., 2832 days multiplied by $500).

At hearing, Department staff provided two penalty calculations. For the purposes of its penalty calculation, staff used September 6, 2006 as the first date of violation, rather than the July 27, 1999 date that is set forth in the complaint. Staff determined that the September 6, 2006 date was appropriate because that is the date that staff sent letters to the respondents advising them that there were deficiencies in the dam and that respondents were responsible for implementing corrective measures (see transcript at 1348; exhibits 6, 30). Staff used two different dates as the end date of the violation. For one calculation, staff used the date of the complaint, April 27, 2007, as the last date of violation. For the other calculation, staff used the first date of the hearing, November 1, 2011, as the last date of violation. Using the date of the complaint as the last date of violation, staff calculated the maximum penalty to be $116,500. Using the date of the hearing as the end date, staff calculated the maximum penalty to be $941,000.[32]

In its closing brief, Department staff requests the larger of the two proposed penalty amounts. Staff argues that the $941,000 penalty is appropriate given "the seriousness or gravity of the violations, their repetitive and continuing nature, and Respondents' neglect of the Honk Falls Dam" (Staff closing brief at 43). For the reasons discussed below, I conclude that the date of the complaint is the more appropriate end date for the violation under the circumstances of this matter and, therefore, recommend the Commissioner assess a $116,500 penalty.

The two penalty amounts proposed by Department staff at hearing are nearly an order of magnitude apart. Yet the two proposed amounts were presented as viable alternatives with no explicit discussion regarding why the Commissioner should impose one amount over the other. The DEC Section Chief testified that a large penalty is warranted in this case because of the

[32] Department staff's penalty calculations appear to be slightly in error. The number of days of violation from September 6, 2006 to November 1, 2011, inclusive, is 1883; multiplied by $500 per day, equals $941,500. A similar error appears to have been made for the lower penalty calculation, which should equal $117,000. Because of the nominal amount involved and given that staff presented the slightly lower penalty calculations at hearing, I will use the penalty amounts as calculated by staff.

gravity of the violation, the history of noncompliance, and the lack of cooperation by the respondents (transcript at 1344-1348). With regard to gravity, the Section Chief testified that Honk Falls Dam is a high hazard dam "with very significant inadequate stability and spillway capacity" which, if it were to fail, could result in the loss of life (id. at 1344). Regarding the history of noncompliance and lack of cooperation, the Section Chief testified that respondents have made "no effort to even better understand the deficiencies of the dam much less to correct them" and that "there doesn't appear to be any sign of maintenance at the dam since any year you care to mention but certainly [not] since 1999 [the first year of violation alleged in the complaint]" (id. at 1346-1348).

The factors cited by the Section Chief for imposing a substantial penalty are reiterated in staff's closing brief. The import of these factors (i.e., the gravity of the violation, compliance history, and respondents' level of cooperation) is the same under both penalty calculations presented by staff. Accordingly, other than the use of different end dates for the violations, there is no apparent reason for the substantial difference between the two penalty amounts staff proposed.

As Department staff made clear, their primary objective in pursuing this enforcement proceeding is the repair, or removal, of Honk Falls Dam. When asked why Department staff was not seeking penalties for violations occurring prior to September 6, 2006, the Section Chief testified that "it's more important to get the dam fixed. So we wanted them to spend the money on getting the dam fixed and also to [provide] financial assurance to the department to assure that the dam would be fixed" (transcript at 1351; see also staff closing brief at 45 [stating that ECL 15-0507 is "remedial in nature. Its primary focus is that of averting the disasters and loss of life that can attend the failure of high hazard dams"]). As is reflected in the amount of the financial assurance requested by staff, the cost of repairing or breaching the dam is likely to be in the hundreds of thousands of dollars, and obtaining the requested financial assurance will impose additional costs upon respondents. Clearly, imposing the $941,000 penalty requested by staff in its closing brief will divert substantial resources of the respondents away from the objective of correcting deficiencies in the operation and maintenance of Honk Falls Dam.

In addition to the concerns discussed above, I consider Department staff's use of the date that the hearing commenced as the end date of the violation to be inappropriate under the circumstances presented here. First, there was substantial pre-hearing motion practice in this matter, some of which was initiated by staff (see http://www.dec.ny.gov/hearings/2479.html [accessed Dec. 7, 2012] [listing published rulings in this matter]). The resolution of pre-hearing motions can be time consuming and, as was the case here, sometimes results in delays to the commencement of a hearing. Second, and more importantly, the commencement date of the hearing in this matter was twice adjourned at the request of Department staff (see Notice of Hearing, dated August 5, 2010 [scheduling the hearing to commence on September 29, 2010]; letter from staff counsel to this office, dated August 31, 2010 [requesting an indefinite adjournment to provide time for staff to conduct a survey of the relevant property lines]; Notice of Hearing, dated July 12, 2011 [scheduling the hearing to commence on August 9, 2011]; letter from staff counsel to this office, dated August 1, 2011 [requesting an adjournment due to the unanticipated absence of staff counsel]). Given the extent of the pre-hearing motion practice in

this matter and the repeated requests by staff for adjournments, I conclude it is inappropriate to use the date of the hearing as the end date of the violation in this matter.

I note that the Berger respondents argue that joint and several liability is not available here because their "[o]wnership of a small section of [the dam's] wall without some other action in concert with the owner of the remainder of the structure cannot be the basis for imposition of joint and several liability" (Berger closing brief at 38). The Commissioner, however, recently reconfirmed the Department's practice of imposing joint and several liability under appropriate circumstances (see Matter of Geo Auto Repairs, Inc., Order of the Commissioner, Mar. 14, 2012, at 5 n 4 [concurring with the ALJ that joint and several liability was not appropriate under the particular circumstances of that matter, but noting that generally "joint and several liability may be imposed in administrative enforcement proceedings"]). Moreover, as I ruled earlier in this matter, "[p]ursuant to ECL 15-0507, all dam owners, as that term is defined by statute, have the same obligation to 'operate and maintain said structure and all appurtenant structures in a safe condition.' If the Honk Falls Dam has not been operated and maintained in a safe condition, all of its owners face the same joint and several liability for violating ECL 15-0507" (Matter of Berger, ALJ Ruling, May 28, 2010, at 5; see also Simmons v Everson, 124 NY 319, 324 [1891] [imposing joint and several liability on the owners of adjacent parcels of land where portions of a four-story brick wall along the front of the parcels "remain[ed] unsupported after they had visibly begun to incline towards the street, and it was as obvious before as it was after the accident that if any part of the front wall fell, a large part of it must"]).

As set forth in this hearing report, I have concluded that the Berger respondents own more than "a small section" of the dam. Both the Berger respondents and the Cook respondents are owners of the Honk Falls Dam. Their respective parcels extend to the thread of Rondout Creek, near the midpoint of the Honk Falls Dam spillway, and they own that portion of the dam that rests on their parcels. Additionally, I note that there is little distinction between the respondents with regard to their actions or, more accurately, their inaction, relative to the maintenance and operation of the dam. Under the circumstances presented here, I conclude that joint and several liability is appropriate.

In consideration of the foregoing, I recommend that the Commissioner assess the lower penalty amount proposed by Department staff, $116,500, jointly and severally upon respondents.

CONCLUSIONS AND RECOMMENDATIONS

As detailed above, I conclude that Department staff has established respondents' liability for violations alleged in the complaint. Specifically, respondents violated ECL 15-0507(1) by failing to operate and maintain Honk Falls Dam in a safe condition. For the Cook respondents, I conclude that the violations commenced on the date alleged in the complaint, July 27, 1999 and were ongoing as of the date of the complaint, April 27, 2007. For the Berger respondents, I conclude that the violations commenced on the date that their title to parcel 83.6-1-11 vested, October 1, 2002, and were ongoing as of the date of the complaint.

For the foregoing violations, I recommend that the Commissioner issue an order directing respondents to implement the remedial measures described above and to secure financial assurance in the amount of $500,000. I further recommend that the Commissioner assess a civil penalty of $116,500 jointly and severally upon the respondents.

EXHIBIT LIST

Matter of Robert Berger, Karen Berger, David Cook and Jody Cook
DEC Case No. CO3-20070201-9

Exhibit No.	Rec'd (Y/N)	Description
1	Y	Curriculum Vitae of Donald E. Canestrari
2	Y	Phase I Dam Inspection Report, Honk Falls Dam, New York District Corps of Engineers (1981)
3	Y	Photograph of Dam from Phase I Report
4	Y	DEC Visual Inspection Reports (1983, 1993, 1998 & 2002)
5	Y	Letter from DEC to Respondent Jody Cook (2000)
6	Y	Letters Re: Visual Inspection Reports from DEC to Respondents (2006, 2007, 2008 & 2010 [includes reports for 2006, 2008, 2010])
7	Y	Honk Falls Dam, Repairs to Spillway (1926) (with cross sections of dam), United Hudson Electric Corp. (revised, 1941)
8	Y	Dam Break Flood Analysis (U.S. Army Corps, 1998) (exhibit is in two parts, oversized attachments are maintained separately)
9	Y	Tax Maps, Wawarsing, Plats 83.001 and 83.006 (undated)
10	Y	NYS Real Property Services, Assessment Inquiry Printouts (2004)
11	Y	Tax Maps, Wawarsing, Plats 83.001 and 83.006 (2011)
12	Y	Current Record Deeds for Cook and Berger Parcels
13	Y	Curriculum Vitae of Robert A. Burgher
14	Y	Survey Map and Title Sketches by Burgher (2011)
15	Y	Deeds of Record for Cook and Berger Parcels (11 deeds)
16	Y	Survey Map by Sorace (2001)
17	Y	New York City Takings Map (1941)
18	Y	Central Hudson Map, Lands Sold to Rondout Paper (1949)
19	Y	Honk Falls Power Company Map (1923)
20	Y	Photographs of Honk Falls Dam Under Construction
21	Y	Photographs of Posted Signs, Berger Parcels
22	Y	Ulster County Mortgage Documents (2004), Berger Parcels
23	Y	Assessment Rolls (Cook 1999-2010; Berger 1965-2010)
24	--	No Exhibit (documents are included in exhibit 23)
25	Y	Survey Equipment Calibration
26	Y	Supplemental Survey Map by Burgher (2011)
27	Y	P.E. Clark Drawing
28	Y	Enlarged Aerial Photographs of Honk Falls Dam Area
29	Y	Curriculum Vitae of Alon Dominitz
30	Y	DEC Penalty Calculation
31	N	Aerial Photograph of Honk Falls Dam Area (not moved into evidence)
32	Y	Tax Maps, Wawarsing, Plats 83.001 & 83.006 (1992, et seq.)

Exhibit No.	Rec'd (Y/N)	Description
33	Y	United Hudson Map (1926)
34	Y	DEC Dam Inspections Reports (multiple years, 1984-2004)
35	Y	Documents from DEC Dam Safety Unit File re: Dam Ownership (1981-2001)
36	Y	DEC Record of Telephone Contact (1984)
37	Y	DEC Record of Telephone Contact (1987)
38	Y	DEC Documents Re: Glenmere Lake Dam Ownership
39	Y	DEC Memorandum Re: Rondout Reservoir Releases (1969)
40	Y	Printout from DEC Water Inventory
41	Y	Central Hudson/New York City Indenture & Agreement (1948)
42	Y	Ulster County Savings Bank Mortgage Documents (2004), Berger Parcel
43	Y	Southern Tier Abstract Corp. Title Insurance, Berger Parcel
44	Y	Photographs, East End of Honk Falls Dam by Robert Berger
45	Y	Real Property Codes, NYS Tax Department
46	Y	Curriculum Vitae of John Tarolli
47	Y	Drainage Area Map, Honk Lake, Mercurio-Norton-Tarolli (2011)
48	Y	Historic Evaluation of Runoff, Honk Lake, Mercurio-Norton-Tarolli (2011)
49	Y	Drainage Runoff Handbook Excerpt
50	Y	Article from 1925 Central Hudson Bulletin, "Further Developments and Growth of Honk Falls Power Company"
51	Y	Ulster County Letter to Property Owners Near Honk Lake (1998)
52	Y	Jody Cook Letter to Alex Diachishin & Associates Re: Dam Engineering Report (2001)
53	Y	Freer Abstract, Cook Parcel (1999)
54	Y	Curriculum Vitae of Alphonse Mercurio
55	Y	Mylar Photograph of Portion of 1917 Survey
56	Y	Photograph of Portion of 1917 Survey
57	Y	P.E. Clark Document Index
58	Y	P.E. Clark Field Notes
59	Y	Mylar Photograph of Portion of NYC Takings Map (Exhibit 17)
60	Y	Deed (1894)
61	Y	Partial Deed Plot by Mercurio
62	Y	Central Hudson Map (1945)
63	Y	Photographs by Mercurio
64	Y	Enlargement of Photograph from Exhibit 50
65	Y	Curriculum Vitae of Terence G. Carle
66	Y	Carle Chart of Chain of Title, Cook Parcel
67	Y	Deeds, Cook Parcel
68	Y	Assessment Rolls (68A [1948]; 68B [1949]; 68C [1950]; 68D [1951])

Exhibit No.	Rec'd (Y/N)	Description
69	Y	Assessment Roll 1961
70	Y	Assessment Roll 1973
71	Y	Assessment Roll 1974
72	Y	Assessment Roll 1975
73	Y	Ulster County Notice of Sale (1983-85)
74	Y	Assessment Roll 1990
75	Y	In Rem Party Defendant Sheet Ulster County (Recycled Property)
76	N	Tax Map, Wawarsing, Plat 83.001 (1999) (not moved into evidence)
77	Y	Ulster County Multi-Jurisdictional Natural Hazard Mitigation Plan (Excerpts) (2009)
78	Y	78A –Design of Small Dams (excerpts), U.S. Department of the Interior; 78B – USGS National Water Information System (Rondout Creek River Gage Location); 78C – USGS National Water Information System (Rondout Creek Flow Data 1931-67); 78D – USGS National Water Information System (Data Description); 78E – USGS National Water Information System (Daily Flow Data 1941-56); 78F – Calculations by Canestrari & Web-based Calculators; and 78G – Summary of Calculation Method by Canestrari
79	Y	Highlighted Copy of Exhibit 78E
80	Y	Hydraulic Design of Highway Culverts, U.S. Department of Transportation