

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

In the Matter of the Alleged Violation of Article 15 of the New York State Environmental Conservation Law (ECL) and Part 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

RAYMOND BOUDERAU,

Respondent.

ORDER

DEC Case No.
R3-20180503-80

This administrative enforcement proceeding concerns alleged violations of Article 15, Title 5 of the ECL (Protection of Water) and 6 NYCRR 608.5 (Excavation or placement of fill in navigable waters) by respondent Raymond Bouderau (respondent) at property he owns at 46 Edgemere Avenue, Greenwood Lake, Orange County, New York (site). The site is located on the shoreline of Greenwood Lake, a navigable water which is classified as a Class A surface water of the State of New York.

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this proceeding by serving respondent with a notice of hearing and complaint. Staff subsequently served an amended complaint, dated October 8, 2020 (Amended Complaint). Staff alleged that respondent violated ECL 15-0505 (1) and 6 NYCRR 608.5 by excavating and/or placing fill below the mean high-water level in navigable waters of the State that are inundated at mean high water level without a DEC-issued permit (see Amended Complaint, ¶ 12). Respondent served an answer to the amended complaint with affirmative defenses.

The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O’Connell. A hearing was held on December 15, 2020. Following the hearing, the ALJ prepared the attached hearing report, dated January 27, 2022, in which he recommended that I issue an order: (i) finding respondent liable for violating ECL 15-0505 (1) and 6 NYCRR 608.5; (ii) imposing upon respondent a civil penalty of ten thousand dollars (\$10,000); and (iii) directing respondent to remediate the site (see Hearing Report at 18). I adopt the ALJ’s conclusions and recommendations, subject to my comments below.

Factual Background

In October 2016, respondent submitted a permit application to the Department seeking authorization to construct a concrete parking pad with a cantilevered deck on the site (see Hearing Report at 3-4 [Findings of Fact No. 4]; Department Exhibit [Exh] 1). Respondent’s application included a plan dated October 20, 2016 (id.). By letter dated November 10, 2016, Department staff issued a Notice of Incomplete Application (NOIA) to respondent (see

Department Exh 2). Among other things, Department staff advised that the project was unlikely to meet permit issuance standards and noted that respondent was proposing an over-water structure with the placement of fill into the lake which would cause the loss of aquatic habitat (see id.; Hearing Transcript [Tr] at 10-11).

DEC staff and respondent thereafter engaged in discussions with respect to the project, and respondent submitted a revised plan, dated November 28, 2016 (see Department Exh 3). Upon review, Department staff determined that no permit would be required for the revised plan because the structure would be placed above the mean high-water line (see Tr at 12). By letter dated December 8, 2016 (no-jurisdiction letter), Department staff advised: “The [revised] plans appear to show that an Article 15 Excavation and Fill permit is not required, however the normal high water level is not shown on the plans. . . . [N]o fill is authorized below normal high water. Therefore, as long as no fill is placed below the mean high water level, an Article 15 Excavation and Fill permit is not required” (Department Exh 4, at 1). Staff noted that its determination of no jurisdiction was based upon the plan dated November 28, 2016 (id.). Based upon the plans and DEC’s notice of no jurisdiction, the Village of Greenwood Lake (Village) issued respondent a building permit (see Department Exh 5). No DEC Article 15 permit was ever issued to respondent with respect to the proposal (see Tr at 13).

By letter dated April 20, 2018, the Village advised the Department that respondent had “greatly expanded the scope” of the project, and the “as built” plans, dated March 21, 2018, provided by respondent to the Village “are radically different” from the plans submitted to the Department and “appear to show that an Article 15 Excavation and Fill permit is required” (Department Exh 5). DEC staff visited respondent’s property in April 2018 and observed that the concrete structure built by respondent did not match the structure that was on the plans that formed the basis for the no-jurisdiction letter (see Tr 44-45). On June 14, 2018, the Department issued respondent a Notice of Violation (NOV) which asserted, among other things, that respondent’s structure constituted illegal fill in waters of the state below the mean high-water level and required a DEC permit (see Respondent Exh 9). The Department also provided respondent with a draft order on consent (see Department Exh 6). Respondent did not sign the consent order and Department staff thereafter commenced this proceeding.

Liability

ECL 15-0505 (1) prohibits any person from “excavat[ing] or plac[ing] fill below the mean high water level in any of the navigable waters of the state . . . without a permit issued” by the Department (see 6 NYCRR 608.5). The statute defines “fill” as including “earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material whether or not enclosed or contained” (ECL 15-0505 [1]). In addition, DEC’s regulations provide:

“ ‘Mean low water’ ” or ‘mean high water’ means, respectively, the approximate average low water level or high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat as determined, in order of use by the following:

- (1) available hydrologic data, calculations, and other relevant information concerning water levels (e.g., discharge, storage, tidal, and other recurrent water elevation data); (mean high water elevations are established, using this method, for certain waterbodies as presented in section 608.11 of this Part);¹
- (2) vegetative characteristics (e.g., location, presence, absence or destruction of terrestrial or aquatic vegetation);
- (3) physical characteristics (e.g., clear natural line impressed on a bank, scouring, shelving, or the presence of sediments, litter or debris); and
- (4) other appropriate means that consider the characteristics of the surrounding area” (6 NYCRR 608.1 [r]).

There is no dispute in this matter that Greenwood Lake is a navigable water to which ECL 15-0505 (1) applies, that the concrete structure placed in the water by respondent meets the definition of “fill” set forth in the statute or that respondent did not obtain a permit for the placement of the fill.

The hearing evidence also demonstrated that the fill -- here, the concrete structure -- was placed below the mean high water level as determined by the Department. On this point, Brian Drumm, a Biologist 2 with DEC’s Bureau of Ecosystem Health Management for Region 3, testified that he determined the mean high water level of Greenwood Lake by looking at the vegetative and physical characteristics of the lake as required by the regulations (see Tr at 25; see also 6 NYCRR 608.1 [r]). He observed the presence of terrestrial vegetation above the mean high water level and observed no vegetation growing below the mean high water level; he testified that he observed a “line of lichens” on the rocks which “grow where it’s wet sometimes” but do not survive when underwater all the time (Tr at 25). Michael Fraatz, a Biologist 1 with DEC’s Region 3 office, testified that, during a site visit, he noticed water “lapping up against the vertical side of the structure out on the lake side and also water staining on the structure” (Tr at 45).

DEC staff also submitted a set of aerial photographs depicting the site before, during and after construction; the mean high-water level as determined by DEC staff is depicted on the photographs as a blue line (see Tr at 45-46; Department Exhs 7-9). The photograph of the completed structure shows that it was built below the mean high water level (see Tr 47; Department Exh 9). Respondent did not submit any evidence refuting staff’s evidence as to this element of the charge.²

¹ Greenwood Lake is not listed in 6 NYCRR 608.11 (see Tr at 24-25; see generally 6 NYCRR 608.11).

² In his answer, respondent Boudreau raised several affirmative defenses, including that his property is exempt from DEC permitting requirements and that the proceeding violates his constitutional rights. Respondent raised additional arguments at the hearing and in his written closing brief and reply. In his hearing report, ALJ O’Connell addressed each argument made by respondent in detail and determined that several of the arguments were without merit, unsupported or not properly raised in this proceeding (see Hearing Report at 6 [respondent’s reliance on ECL 15-0503(1)(b) is misplaced], 6-8 [respondent failed to meet his burden regarding the applicability of the Federal Power Act to this matter], 9-11 [equal protection and selective enforcement], and 12 [takings claim]). Although the

Based upon the foregoing, I concur with the ALJ's finding that respondent violated ECL 15-0505 (1) and 6 NYCRR 608.5 and adopt it.

Penalty and Remedial Relief

Pursuant to ECL 71-1127, “[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by article 15 . . . or who violates or who fails to comply with any rule, regulation, determination or order of the department heretofore or hereafter promulgated pursuant to article 15 . . . shall be liable for a civil penalty of not more than two thousand five hundred dollars for such violation and an additional civil penalty of not more than five hundred dollars for each day during which such violation continues, and, in addition thereto, such person may be enjoined from continuing such violation as otherwise provided in article 15” (ECL 71-1127 [1]).

Here, Department staff sought in its amended complaint the imposition of a total civil penalty in the amount of \$10,000 and an order directing respondent to submit a work plan providing for the removal of the structure and restoration of the impacted area (see Amended Complaint, Wherefore Clause; see also Tr at 67). ALJ O’Connell found staff’s request to be supported and reasonable (see Hearing Report at 15-17).

I adopt the proposed civil penalty and remedial relief as follows. Although the civil penalty of \$10,000 is below the maximum amount for this continuing violation, it does reflect the aggravating circumstances presented here, which include the fact that respondent was fully aware that he would need a permit for the placement of the concrete structure in the lake but knowingly proceeded without one. In addition, respondent did not establish the existence of any mitigating circumstances; his assertion that the environmental impact was de minimus is contradicted by the evidence, which demonstrates that the placement of the concrete structure caused the loss of 212.5 square feet of aquatic habitat - including the loss of shoreline and the loss of lake bottom - in the littoral zone, which, among other things, serves as an aquatic habitat for various organisms and has vital importance to the health of the lake (see Tr at 47, 60-61, 65, Department Exh 10). Based upon this record, the amount of \$10,000 is appropriate and authorized. The civil penalty is to be paid within sixty (60) days of the service of this order upon respondent.

With respect to the remedial relief, respondent is directed to submit an approvable remediation plan to Department staff that addresses the removal of the illegal structure (that is, the concrete structure) and the restoration of the impacted area. An approvable plan is one that can be approved by the Department with only minimal revision. The remediation plan must be submitted to Department staff within sixty (60) days of the service of this order upon respondent.

ALJ indicated that respondent’s cantilevered docks met statutory exemption criteria, respondent’s concrete structure did not (see Hearing Report at 9, 14-15). I concur with the ALJ’s conclusions regarding affirmative defenses and adopt the same as part of this Order.

Based upon my review and to ensure appropriate completion of the remediation, the remediation plan must contain, among other things:

- a timetable for respondent's removal of the illegal structure, the restoration of the impacted area and the performance of any other activities proposed by the plan;
- a description of the method by which respondent shall remove the illegal structure (including the protections to be followed to minimize any further negative impacts to Greenwood Lake or its banks);
- the names of the facility(ies) where any removed material will be disposed and the requirement that respondent shall submit receipts for any such disposal; and
- the manner by which respondent shall furnish photographs that show the appearance of the area before and after removal/restoration.

I encourage respondent to discuss the preparation of the work plan with Department staff prior to its submission to ensure that the work plan incorporates all components that staff would require for this type of remedial relief.

Respondent may, upon good cause shown, request an extension of the date when the civil penalty is due, the date of the remediation plan submission and any milestone dates contained in the plan. Any such request must be in writing, setting forth the reasons for the request, and submitted to Department staff in DEC Region 3. The granting of any extension shall be within the discretion of Department staff.

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

- I. Based on the record of this proceeding, respondent Raymond Bouderau violated ECL 15-0505 (1) and 6 NYCRR 608.5 by placing fill (here, the concrete structure) below the mean high-water level of Greenwood Lake without a permit from the Department.
- II. A civil penalty in the amount of ten thousand dollars (\$10,000) is hereby assessed upon respondent Raymond Bouderau. Respondent shall pay the civil penalty by check, cashier's check or money order made payable to the New York State Department of Environmental Conservation within sixty (60) days of the service of this order upon him. Such payment shall be submitted to:

Elisa Chae, Esq.
NYS Department of Environmental Conservation
Region 3 (Office of General Counsel)
21 South Putt Corners Road
New Paltz, New York 12561.

III. Within sixty (60) days of the date of the service of this order upon respondent, respondent Raymond Bouderau is to submit an approvable remediation plan to Department staff that addresses the removal of the illegal structure and the restoration of the impacted area. An approvable plan is one that can be approved by the Department with only minimal revision.

The remediation plan, which is to be submitted to Department staff must contain, among other things:

- A. a timetable for respondent's removal of the illegal structure, the restoration of the impacted area and the performance of any other activities proposed by the plan;
- B. a description of the method by which respondent shall remove the illegal structure (including the protections to be followed to minimize any further negative impacts to Greenwood Lake or its banks);
- C. the name(s) of the facility(ies) where any removed material will be disposed and the requirement that respondent shall submit receipts for any such disposal; and
- D. the manner by which respondent shall furnish photographs that show the appearance of the area before and after removal/restoration.

IV. Respondent Raymond Bouderau shall submit the remediation plan referenced in Paragraph III of this order to:

Brian Drumm
Bureau of Ecosystem Health and Management
NYS Department of Environmental Conservation
Region 3
21 South Putt Corners Road
New Paltz, New York 12561.

V. Respondent Raymond Bouderau may, upon good cause shown, request an extension of (i) the date when the civil penalty is due, (ii) the date of the remediation plan submission and (iii) any milestone dates contained in the plan. Any such request must be in writing, setting forth the reasons for the request, and submitted to Department staff in DEC Region 3. The granting of any extension shall be within the discretion of Department staff.

VI. Any questions or other correspondence regarding this order shall be addressed to Elisa Chae, Esq., at the address referenced in Paragraph II of this order.

- VII. The provisions, terms and conditions of this order shall bind respondent Raymond Bouderau and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: November 28, 2022
Albany, New York

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

Alleged Violation of Article 15 of the Environmental Conservation Law
of the State of New York, and Title 6 of the Official Compilation of Codes,
Rules, and Regulations of the State of New York Part 608

by

Raymond Bouderau,
Respondent.

Case No: R3-20180503-80

Hearing Report

- by -

/s/

Daniel P. O'Connell
Administrative Law Judge

January 27, 2022

Proceedings

Staff of the New York State Department of Environmental Conservation (Department staff) commenced the captioned enforcement proceeding with service of a notice of hearing and complaint dated April 16, 2019 (complaint), upon Raymond Bouderau (respondent). Subsequently, staff filed a statement of readiness dated June 13, 2019. Staff served an amended complaint dated October 8, 2020 (October 2020 amended complaint), and alleged that Mr. Bouderau violated New York State Environmental Conservation Law (ECL) § 15-0505(1) and 6 NYCRR 608.5 when he placed fill below the mean high water level in a navigable water of the State without a permit from the Department.

The site of the alleged violation is on property owned by Mr. Bouderau located at 46 Edgemere Avenue in the Village of Greenwood Lake (Orange County). Respondent's property is adjacent to Greenwood Lake. According to the complaint, the alleged violation commenced on April 18, 2018, and has continued to date. For the alleged violation, staff seeks an Order from the Commissioner directing Mr. Bouderau to remove the unpermitted structure and fill from Greenwood Lake, and to pay a total civil penalty of \$10,000.

Mr. Bouderau answered the complaint and, later, filed an answer and affirmative defenses to the amended complaint dated October 28, 2020 (October 2020 answer). Mr. Bouderau denied the alleged violation asserted in the October 2020 amended complaint, and requested that the Commissioner conclude that he did not violate either ECL 15-0505(1), or 6 NYCRR 608.5. In addition, Mr. Bouderau asserted several affirmative defenses, which are addressed below.

After providing opportunities for settlement, and adjournments duly taken, I issued a notice of hearing dated November 16, 2020, which scheduled a virtual hearing for December 15 and 16, 2020. Using the Webex meeting audiovisual conference platform, the administrative enforcement hearing convened, as scheduled on December 15, 2020, at 12:00 p.m. (Eastern Standard Time), and concluded on that same day. Elisa E. Chae, Esq., Assistant Regional Attorney, represented Department staff. Brian Drumm and Michael Fraatz, from the Department's Region 3 Bureau of Ecosystem Health and Management, testified for the Department. Mr. Drumm is a Biologist II, and Mr. Fraatz is a Biologist I.

Raymond J. Markovich, Esq., (New York, New York), appeared for respondent, Raymond Bouderau. Respondent proffered no witnesses.

The Office of Hearings and Mediation Services (OHMS) transcribed the audio recording, and prepared a transcript. With an email dated September 1, 2021, I circulated the transcript to the parties' counsel. As discussed during the hearing (Tr. at 72-73), I provided the parties with the opportunity to file a written closing brief and reply. On October 29, 2021, I received electronic copies of Department staff's and respondent's respective closing briefs. Subsequently, on November 15, 2021, I received electronic copies of Department staff's and respondent's

respective replies. With a letter dated December 2, 2021, I advised the parties that the record of the proceeding closed (*see* 6 NYCRR 622.17[d]).

Prior to the hearing, the parties circulated electronic copies of their respective exhibits. Department staff provided 10 exhibits, and respondent provided 9 exhibits. During the hearing, the parties stipulated to the receipt of the exhibits into the evidentiary record (Tr. at 8). An exhibit chart is attached to this hearing report as Appendix A.

During the hearing (Tr. at 6), I granted Department staff's request to take official notice of ECL article 15 and 6 NYCRR part 608 (*see* 6 NYCRR 622.11[a][5]).

With an email dated October 21, 2021, I authorized the parties to propose errata to the hearing transcript when filing the closing briefs. In addition, the email instructed the parties to state any objections to the other party's proposed errata with the replies. With an email from Ms. Chae dated October 30, 2021, Department staff filed a proposed transcript errata sheet. Respondent did not propose any changes to the transcript, and did not object to staff's proposed changes. Accordingly, I adopt the proposed changes, and staff's errata shall be appended to the hearing transcript.

Findings of Fact

1. Raymond Bouderau owns property at 46 Edgemere Avenue in the Village of Greenwood Lake (Orange County), New York. Mr. Bouderau's property is adjacent to Greenwood Lake. (*See* Department Exhibit 1; Tr. at 7-9.)
2. Greenwood Lake is a navigable water of New York State located on the Orange County border with the State of New Jersey. It is a Class A surface water. With such a classification, these waters may be used as a potable water source, as well as for primary and secondary contact recreation. In addition, Class A surface waters must be suitable for fish propagation and survival. (*See* 6 NYCRR 701.6[a] and 865.6; Tr. at 9, 19.)
3. The water level of Greenwood Lake is controlled by a dam located on the southern end of the lake in the State of New Jersey. Periodically, the dam is opened from October to the end of January, and the water level of Greenwood Lake is lowered. During this period, the Village of Greenwood Lake will issue building permits for proposals located in the village along the shoreline of the lake. (Respondent Exhibits 5 and 7 [Bates Nos. 182-239]; Tr. at 20-23, 45-46.)
4. On October 31, 2016, staff at the Department's Region 3 office in New Paltz, New York, received a joint permit application signed by Mr. Bouderau on October 20, 2016. With the joint application (DEC Application No. 3-3354-00805/00001), Mr. Bouderau proposed to construct a 400 square foot concrete parking pad adjacent to Edgemere Avenue, with a cantilevered deck (dimensions not provided), to be built on the banks of Greenwood Lake, across Edgemere Avenue from Mr. Bouderau's residence. With the

joint application, Mr. Bouderau included a plan dated October 20, 2016. (*See* Department Exhibit 1; Tr. at 7-9.)

5. With respect to the October 31, 2016 joint permit application filed by Mr. Bouderau, Department staff issued a notice of incomplete application (NOIA) dated November 10, 2016. Among other things, the NOIA stated that permit issuance was not likely because the proposed structure would be placed in and over the lake of a stable shoreline. The NOIA stated further that constructing a structure that would extend over the water and placing fill behind it would result in a loss of aquatic habitat. (*See* Department Exhibit 2; Tr. at 10-11.)
6. After a telephone discussion with Department staff concerning the November 10, 2016 NOIA, Mr. Bouderau provided a revised plan dated November 28, 2016. According to the revised plan, Mr. Bouderau proposed all construction activities landward of the mean high water level of Greenwood Lake. (*See* Department Exhibit 3; Tr. at 11-12.)
7. After reviewing the revised plan, Department staff issued a notice of no jurisdiction dated December 8, 2016. The December 8, 2016 notice provided a description of the proposal based on Mr. Bouderau's revised plans dated November 28, 2016. The notice explained that all components of the concrete parking pad must be located landward of the mean high water level. The notice provided for the installation of a U-shaped cantilevered dock consisting of two outer docks connected with a walkway. The notice anticipated that the total surface area of the dock would be less than 4,000 square feet. The notice incorporated by reference Mr. Bouderau's November 28, 2016 revised plan. (*See* Respondent Exhibit 8 and Department Exhibit 4; Tr at 12-13.)
8. Department staff did not issue a permit to Mr. Bouderau for any construction activity on his property located adjacent to Greenwood Lake. (*See* Respondent Exhibit 8, and Department Exhibits 1 and 4; Tr. at 13).
9. In a letter dated April 20, 2018, to Department staff, the building inspector from the Village of Greenwood Lake explained that Mr. Bouderau filed an application for a building permit to construct a bulkhead, and dock on his property located adjacent to Greenwood Lake. The building permit application included a copy of the October 20, 2016 plan for the initially proposed cantilevered platform, as well as a copy of the December 8, 2016 notice of no jurisdiction. The village issued a building permit. (*See* Department Exhibit 5; Tr. at 13.)
10. The building inspector also explained that Mr. Bouderau expanded the scope of his project to include a third lot (SBL 319-1-37), and to extend the bulkhead and dock structure into Greenwood Lake. As a result of this expansion, the village issued a "stop work" order. Subsequently, Department staff provided the village with a copy of the November 28, 2016 revised plan, which had been incorporated by reference into the Department's December 8, 2016 notice of no jurisdiction. (*See* Department Exhibit 5[D]; Tr. at 13-15.)

11. The building inspector explained further that, pursuant to a court directive, Mr. Bouderau provided the village with a copy of “as built” plans dated March 21, 2018 (two sheets). With the April 20, 2018 letter, the building inspector provided Department staff with a copy of the March 21, 2018 “as built” plans. The building inspector inquired whether the March 21, 2018, “as built” plans would invalidate the Department’s December 8, 2016 notice of no jurisdiction, and require a permit pursuant to ECL article 15. (*See* Department Exhibit 5[E]; Tr. at 14-16.)
12. The March 21, 2018 “as built” plans show the following features: (1) a concrete pad at road level measuring 7’-0” by 50’-0” (350 square feet [sq. ft.]); (2) a concrete platform measuring 8’-6” by 50’-0” (425 sq. ft.); and (3) a set of cantilevered docks with a total area of about 400 sq. ft. (*see* Department Exhibit 5[E]). The concrete platform, which is a form of fill, extends out into the water, and portions of the platform are below the mean high water level (*see* Department Exhibit 5[E]; Tr. at 15-16, 44-45, 47-48).
13. After reviewing the April 20, 2018 letter from the village’s building inspector, staff visited Mr. Bouderau’s property during that month, and confirmed that the structures built by Mr. Bouderau were not consistent with the November 28, 2016 revised plan referenced in the Department’s December 8, 2016 notice of no jurisdiction (*see* Department Exhibit 4). Rather, the structures at the site were consistent with the “as built” plans dated March 21, 2018 (*see* Department Exhibit 5[E]). (Tr. at 13-16, 44-45.)
14. Department staff estimated that about half of the concrete platform measuring 8’-6” by 50’-0” (425 sq. ft.) extends beyond the shoreline, into the waters of Greenwood Lake and, therefore, is below the mean high water level. The approximate area of aquatic habitat lost, due to filling, is 212.5 sq. ft. (*See* Department Exhibits 7, 8, 9, and 10; Tr. at 45-48, 55.)
15. The area of Greenwood Lake that Mr. Bouderau filled below the mean high water level is referred to as the littoral zone. The littoral zone is the area around the shoreline where the high water level transitions to the upland area of the shoreline. This area serves as highly productive aquatic habitat for various organisms, and provides other functions such as erosion protection, and wave dissipation. The placement of fill in the littoral zone eliminates the aquatic habitat in the filled area. The eliminated aquatic habitat, and the associated benefits, cannot be replicated elsewhere in the lake. (Tr. at 60-61.)
16. With an email dated June 14, 2018, Department staff sent Mr. Bouderau a notice of violation dated June 14, 2018, and a draft order on consent (*see* Respondent Exhibit 9, and Department Exhibit 6; Tr. at 16-18).

Discussion

I. Mr. Bouderau’s Affirmative Defenses

As noted above, Mr. Bouderau asserted several affirmative defenses in the October 2020 answer (*see* Respondent Exhibit 2). He addressed some at the hearing orally in the closing

statement (Tr. at 68-70). He addressed others in his written closing brief and reply. Each affirmative defense is addressed below.

A. ECL 15-0503(1)(b)

Mr. Bouderau contended that the Department does not have jurisdiction over either Greenwood Lake, or his residential real property located at 46 Edgemere Avenue (Lots 38 and 39).¹ According to Mr. Bouderau, Exhibit 1 to the October 2020 answer depicts the concrete portion of the dock, which was constructed exclusively on his property, including the underwater lands that he owns. Also, because ECL 15-0503(1)(b) only applies to state-owned lands, respondent concluded that the Department lacks jurisdiction over his property because the site of the dock is on privately owned property.

ECL 15-0503(1)(b) requires a permit from the Department to place and construct features such as docks, wharfs, platforms, and moorings, among other things. The scope of the Department's jurisdiction pursuant to ECL 15-0503(1)(b) is limited to underwater lands owned by the State. However, before obtaining a permit from the Department, this provision expressly requires the person or local public corporation seeking to undertake the construction project to obtain a lease or other conveyance from the Commissioner of General Services pursuant to Public Lands Law § 75. Therefore, when a person proposes to undertake a project that impacts underwater lands owned by the State, the requirements at ECL 15-0503(2) require at least two different approvals. The first is a lease or other conveyance from the Office of General Services. The second is a permit from the Department.

Mr. Bouderau noted that ECL 15-0503(1)(b) applies to State-owned lands that are underwater, and correctly concludes that he cannot be held liable under ECL 15-0503(1)(b).² However, this enforcement proceeding is not based on the permit requirements outlined at ECL 15-0503(1)(b). Rather, Department staff alleged a violation of ECL 15-0505(1), and the implementing regulatory provision at 6 NYCRR 608.5. Therefore, Mr. Bouderau's reliance on ECL 15-0503(1)(b) is misplaced because staff did not allege a violation of ECL 15-0503(1)(b) (*see* ¶ 12 October 2020 Amended Complaint [Respondent Exhibit 1] at 3).

B. Federal Preemptions

According to respondent, the Department's jurisdiction over Greenwood Lake is at issue. Respondent asserts two different federal preemptions. The first concerns whether the federal government exercises control over Edgemere Avenue. The second concerns the applicability of the Federal Power Act to the dam that impounds Greenwood Lake. Each is addressed below.

Due to the interstate nature of Greenwood Lake, respondent inquired, during the cross-examination of the Department's witnesses, whether any federal authority preempted ECL article 15. Mr. Drumm responded that, with respect to the captioned matter, the basis for the

¹ *See* ¶ 1 October 2020 Answer (Respondent Exhibit 2) at 3.

² *See* ¶ 2 Respondent Exhibit 2, at 3; Tr. at 68.

jurisdiction over Mr. Bouderau's property is ECL article 15. Mr. Drumm also stated that he is not aware of any instance where a federal statute would preempt ECL article 15. (Tr. at 19-20.)

Mr. Bouderau inquired further about which level of government exercises authority over Edgemere Avenue. Mr. Fraatz said that he did not know whether Edgemere Avenue was a federal, State, or county roadway, and that he did not contact transportation officials at various levels of government in this regard. (Tr. at 48-50.)

At hearing (Tr. at 68), respondent observed that Greenwood Lake is an interstate waterway. He further observed that the structure at issue here is located between Edgemere Avenue and Greenwood Lake. Given these circumstances, Mr. Bouderau suggested that either the federal Department of Transportation, or the analogous State or county agency retained jurisdiction over his structure. Respondent asserted further that the proximate nature of his structure to Edgemere Avenue serves to stabilize the roadway which, in turn, eliminates or reduces the costs associated with maintaining the roadway. The resulting savings in maintenance costs are thereby passed on to the appropriate federal, State, or local highway agency. (*See also* Respondent Closing Brief at 7.)

Though provided the opportunity at hearing and in a written closing brief and reply, Mr. Bouderau neither demonstrated who exercises jurisdiction over Edgemere Avenue, nor explained the significance of determining which level of government maintained Edgemere Avenue. Moreover, respondent did not offer any authority that would preempt or otherwise limit the jurisdiction of ECL article 15 over the site and Greenwood Lake with respect to highway maintenance. Finally, Mr. Bouderau offered nothing to show that the shoreline in the vicinity of his property needed to be stabilized to prevent his shoreline property from eroding into Greenwood Lake. Staff's admission that the features of Mr. Bouderau's bulkhead and dock structure could protect portions of Edgemere Avenue from eroding into Greenwood Lake (Tr. at 53), does not exempt respondent from obtaining a permit from the Department before placing any fill in the lake, a navigable water of the State. Therefore, respondent's unsupported claims have no merit, and the Commissioner should not consider them further.

Respondent also claimed that the Federal Power Act ([FPA] 16 USC § 791a *et seq.*) preempts ECL article 15. According to respondent, Department staff produced no evidence that since 1765, the dam on Greenwood Lake "is not currently a source of Hydropower" (Respondent Closing Brief at 2). Based on the asserted federal preemption, respondent concludes that the Commissioner must dismiss the violation alleged in the October 2020 amended complaint with prejudice. To support this claim, respondent cites *Matter of Niagara Mohawk Power Corp. v New York State Dept. of Envtl. Conservation*, 187 AD2d 7, 11 (3d Dept 1993) (*citing Calvert Cliffs' Coordinating Commn. v United States Atomic Energy Commn.*, 449 F2d 1109, 1123), *affd*, 82 NY2d 191 (1993).³ (*See* Respondent Closing Brief at 4-5, *citing* Tr. at 20-21; *see also* Respondent Exhibit 7 [Bates No. 183]).

³ The case cited by respondent concerns a utility company with applications pending before the Federal Energy Regulatory Commission (FERC) for licenses to construct new hydroelectric facilities, and to perform dam repair or reconstruction on existing ones. Given the pending applications before FERC, the Court determined that the FPA preempted ECL article 15 (*see* 16 USC 797[e]), and limited the scope of the Department's jurisdiction to a

At the hearing, respondent offered his Exhibit 7, which is a printout from the web site for the Greenwood Lake Commission (<http://www.gwlc.org/history-of-gwl>). [last accessed January 27, 2022]]. During cross-examination, Mr. Drumm read from this document. In relevant part the document states:

During the Revolutionary War, the Greenwood Lake valley was considered an important industrial center with the Towns of Warwick and Pompton Plains serving as the major population centers. A dam was constructed as early as 1765 to support the sawmills, forges, and grist mills within the region, but in 1836 a more substantial dam was constructed near the Wanaque River on the southeastern portion of the lake.

This dam was initially developed in order to provide water to the Morris and Essex Canal. (Respondent Exhibit 7 [Bates No. 183]; *see also* Tr. at 20-21).

In his closing brief (at 2), respondent referenced Mr. Drumm's testimony (Tr. at 20-21), and states in Paragraph 6 of his written closing brief that:

A dam was constructed on the Lake as early as 1765 to provide hydropower to sawmills, forges and gristmills ("Hydropower") and a more substantial dam was constructed in 1836 to additionally provide water to the Morris and Essex Canal [New Jersey].

Although not expressly stated, respondent's use of the word "Hydropower" in his written closing brief appears to be the basis for his argument that FPA preempts ECL article 15. There is a distinction, however, between using impounded water to operate sawmills, forges, and gristmills in the mid-eighteenth century, and operating a hydroelectric generating facility. The operation of a hydroelectric generation facility on Greenwood Lake is a prerequisite condition to the applicability of FPA. The evidentiary record of this proceeding, however, does not include any proof that either Mr. Bouderau, or some other entity, has applied for, or obtained, a license from the Federal Energy Regulatory Commission to operate a hydroelectric generating facility on Greenwood Lake pursuant to the FPA. (*See also* Department staff Reply at 2-3.)

Contrary to respondent's contention, Department staff is not obliged to show whether the dam on Greenwood Lake continues to be used to provide hydropower. No component of Mr. Bouderau's shoreline structure is dependent upon hydropower. As an affirmative defense, respondent has the burden to show the applicability of other regulatory schemes that may preempt ECL article 15 (*see* 6 NYCRR 622.11[b][2]). With respect to the applicability of the FPA to the captioned matter, respondent did not meet this burden.

consideration of the Water Quality Certification authorized by Section 401 of the federal Clean Water Act (*see* 33 USC § 1341). (*See Matter of Niagara Mohawk Power Corp. v New York State Dept. of Env'tl. Conservation*, 82 NY2d 191, 201-202 [1993]). None of the circumstances described in the case law referenced by respondent apply to the captioned administrative enforcement proceeding.

C. Permit Exemption⁴

Referring to ECL 15-0503(3)(a) and 6 NYCRR 608.4(c)(2), Mr. Bouderau argued that his dock is exempt from permit requirements because the area of the dock is less than 4,000 square feet, and it is used solely as a landing place on water providing dockage for five or fewer boats.⁵ The March 21, 2018 “as built” plans depict two cantilevered docks. Based on these plans, the total approximate area of the docks is 400 sq. ft. (*see* Department Exhibits 5[E] and 10; Tr. at 47-48). Similarly configured docks are depicted on the November 28, 2016 plans that staff incorporated by reference into the Department’s December 8, 2016 notice of no jurisdiction. Based on this information, Mr. Bouderau’s cantilevered docks, as depicted on the March 21, 2018 plans, meet the exemption criteria outlined in ECL 15-0503(3)(a), and implementing regulations at 6 NYCRR 608.4(c)(2).

However, the shoreline structure that Mr. Bouderau constructed on his property adjacent to Greenwood Lake also includes a concrete platform measuring 8’-6” by 50’-0” (425 sq. ft.). The exempt docks are attached to the concrete platform, which was not part of the November 28, 2016 plans. The concrete platform, as shown on the March 21, 2018 plans (*see* Department Exhibit 5[E]), is addressed below.

D. Equal Protection and Selective Enforcement

In his October 2020 answer, Mr. Bouderau stated that countless docks and related structures on Greenwood Lake are similar or nearly identical to his. Based on these circumstances, he asserted that any enforcement action against him would be discriminatory, and violate his constitutional rights including, but not limited to, his right to equal protection under the law (*see* ¶ 5 Respondent Exhibit 2, at 3).

Mr. Bouderau further claimed, in his written closing brief and reply, that the reason for the Department’s disparate treatment of him, pursuant to ECL article 15 and its implementing regulations, is due to his Irish Catholic heritage. Respondent questioned why properties on Greenwood Lake owned for a hundred years or more by White Anglo-Saxon Protestant families do not have to comply with the Department’s regulations, when his property does. Respondent stated that he should be treated equally to those property owners of White Anglo-Saxon Protestant heritage. (*See* Respondent Closing Brief at 8-9, and Respondent Reply at 4-5; *compare* Department staff Reply at 4-5.)

Respondent Exhibit 4 (Bates Nos. 075-124)⁶ consists of a set of over 100 photographs of various docks, retaining walls, boat houses, and other manmade structures constructed along the

⁴ Respondent did not provide any additional argument in his written closing brief and reply with respect to the permit exemption provided by ECL 15-0503(3)(a) and 6 NYCRR 608.4(c)(2).

⁵ *See* ¶¶ 3 and 4 Respondent Exhibit 2, at 3.

⁶ The set of photographs appended to respondent’s October 2020 Answer as Exhibit 2 is the same set of photographs identified as Respondent Exhibit 4 in the evidentiary record of the hearing.

shoreline of Greenwood Lake. Mr. Bouderau cross-examined Mr. Drumm about the structures depicted in this exhibit.

Mr. Drumm acknowledged that many of the structures, or components of them, in these photographs are below mean high water level (*see* Respondent Exhibit 4 [Bates Nos. 075-124]; Tr. at 25-39). However, Mr. Drumm expressed concern about when these particular structures were built, and opined that some may have been constructed before the effective date of the statute and implementing regulations. Mr. Drumm also said that he does not know the precise location of the structures depicted in Respondent Exhibit 4. (Tr. at 27, 40-41.)

Respondent's cross-examination of Mr. Drumm failed to show how the captioned enforcement action is discriminatory. Although provided the opportunity during the hearing, respondent offered no other information about the precise location of the structures depicted in Respondent Exhibit 4, or when any of the structures were constructed. (Tr. at 26.) Consequently, Mr. Bouderau's comparison of the existing structures on Greenwood Lake to his structures at issue in this proceeding is factually incomplete. For example, some structures depicted in Respondent Exhibit 4 may be located along the lakeshore in New Jersey, which would be beyond the scope of ECL article 15. Other structures, located in the State of New York, may predate the permitting requirements as provided by 6 NYCRR 608.4(c), or would otherwise be exempt. Finally, it is not known whether Department staff issued any permits, pursuant to ECL article 15, to construct any of the structures depicted in Respondent Exhibit 4.

Moreover, the Commissioner should not consider Mr. Bouderau's equal protection claim as it relates to his ethnic and religious heritage, or those of other Greenwood Lake property owners. Mr. Bouderau asserted this claim for the first time when he filed his written closing brief and reply. Pursuant to 6 NYCRR 622.4[c], a respondent must explicitly assert any affirmative defense in the answer, together with a statement of facts so as to provide notice of the affirmative defense. Accordingly, the Commissioner should conclude that this claim is untimely raised.

In the event that the Commissioner wishes to consider the merits of Mr. Bouderau's claim, the record of this proceeding does not include any evidence to support it. First, respondent did not offer any proof about his ethnic and religious heritage. In addition, no reasonable inference can be made about what Mr. Bouderau's ethnic and religious heritage would be. Among other things, Raymond Bouderau did not attend or otherwise participate in the December 15, 2020, Webex audiovisual conference. His appearance was by his counsel, Mr. Markovich.

Second, respondent offered no information about the ethnic and religious heritage of the owners whose waterfront structures are depicted in Respondent Exhibit 4 (Bates Nos. 075-124) to support the assertion that they are of White Anglo-Saxon Protestant heritage. Consequently, there is no factual evidence in the record of this proceeding to prove, as Mr. Bouderau claims, that he is a member of either an ethnic or religious group who has been subjected to systematic racism and xenophobia in Europe and the United States (*see* Respondent Closing Brief at 8). As a result, respondent failed to meet his burden of proof with respect to this untimely asserted affirmative defense (*see* 6 NYCRR 622.11[b][2]).

Finally, to the extent that respondent has argued that Department staff is engaged in selective enforcement or discriminatory prosecution, the Department's administrative decisions have consistently held that such a defense is not a defense to an administrative proceeding, but must be raised in a judicial forum (*see Matter of James W. McCulley*, ALJ Ruling on Motion for Order without Hearing dated September 7, 2007, at 7-8).

E. Takings Claim⁷

Mr. Bouderau asserted that "his Dock" is neither in violation of the ECL, nor an environmental hazard due to the presence of all the other docks and structures on Greenwood Lake, and the absence of notices of violation related to them from the Department. Mr. Bouderau claimed that any attempt by the Department to assess a civil penalty, or order the removal of the dock would result in an unconstitutional taking of his property (*see* ¶¶ 6 and 7 October 2020 Answer [Respondent Exhibit 2] at 3-4).

Respondent's reference to "his Dock" is ambiguous. It is not clear whether he is referring to the structure that collectively consists of the parking pad adjacent to Edgemere Avenue, the concrete platform, and the two cantilevered docks, or only the cantilevered docks.

Mr. Bouderau's cantilevered docks are not at issue in this proceeding. As noted above, the docks associated with Mr. Bouderau's lakeshore structure are duly exempt from the permitting requirements of ECL 15-0505(1) (*see* ECL 15-0503[3][a]). As noted above, the concrete platform is at issue and is addressed below.

The hearing record is seriously deficient with respect to Mr. Bouderau's comparison of his dock to other docks and existing structures on Greenwood Lake. As noted above, Department staff acknowledged that many of the structures depicted in Respondent Exhibit 4, or components of them, are below mean high water level. (Tr. at 25-39.) However, respondent offered no proof about when these structures were built, and whether any of these structures were constructed prior to the effective date of the statute and implementing regulations. In addition, some of the structures depicted in Respondent Exhibit 4 may be exempt from permitting requirements pursuant to 6 NYCRR 608.4(c). For other structures, the Department may have issued permits.

Respondent contends further that the remediation sought by Department staff is not necessary, in the first instance, because no environmental harm has occurred. In the alternative, respondent appears to assert that a determination from the Commissioner which assesses a civil penalty and orders the remediation requested by staff would result in an unconstitutional taking of his property without just compensation.

Generally, the doctrine of exhaustion of administrative remedies requires a respondent to raise most constitutional issues at the administrative level (*see Original Italian Pizza, Inc.*,

⁷ With respect to a takings claim, respondent did not provide any additional argument in his written closing brief and reply.

Ruling of the Chief Administrative Law Judge, dated December 15, 2010, at 3-4 [and cases cited therein]). However, the courts have recognized an exception from this general rule for takings claims (*see Matter of Haines v Flacke*, 104 AD2d 26, 32-33 [2d Dept 1984]). The courts require that takings claims be presented directly to the courts and not to the agency (*see id.*). Therefore, to the extent that respondent pleaded a takings defense, a consideration of it, at this time, is beyond the scope of this administrative enforcement proceeding.

II. Liability

In the October 2020 amended complaint, staff alleged that Mr. Bouderau violated ECL 15-0505(1), and implementing regulations at 6 NYCRR 608.5, when he placed fill below the mean high water level in navigable waters of the State without a permit from the Department. According to the October 2020 amended complaint, on April 18, 2018, Department staff observed a concrete bulkhead and dock built along Mr. Bouderau's shoreline property on Greenwood Lake in nonconformance with plans previously submitted to the Department.

ECL 15-0505(1) prohibits any person from either excavating or placing fill below the mean high water level of any navigable water of the State. Before undertaking these activities, ECL 15-0505(3) requires a permit from the Department. (*See also* 6 NYCRR 608.5.) Pursuant to 6 NYCRR 608.1(m), *fill* may be "any solid or semi-solid, organic or inorganic material including, but not limited to, earth, clay, silt, sand, gravel, stone, ..., concrete, ..., [and] metal...."

The *navigable waters of New York State* are those lakes and other bodies of water that are navigable in fact notwithstanding interruptions to navigation by seasonal variations in capacity. This definition does not apply to waters that are surrounded by land held in single private ownership at every point in their total area. (*See* 6 NYCRR 608.1[u].)

Whether the waters of Greenwood Lake are navigable in fact is not at issue in this proceeding. The purpose of Mr. Bouderau's initial permit application was to provide access to Greenwood Lake for boating by installing docks for watercraft (*see* Department Exhibit 4; Tr. at 9-10). In addition, Mr. Bouderau made no claim that the waters of Greenwood Lake are surrounded by land held in single private ownership at every point in their total area. Therefore, this exception is not relevant here.

The terms *mean low water*, and *mean high water* are defined in the regulations at 6 NYCRR 608.1(r). These terms mean, respectively,

the approximate average low water level or high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat....

The definition further identifies four methods for distinguishing between predominantly aquatic and predominantly terrestrial habitat. They are as follows:

1. available hydrologic data, calculations, and other relevant information concerning water levels (*e.g.*, discharge, storage, tidal, and other recurrent water elevation data); (mean high water elevations are established, using this method, for certain waterbodies as presented in section 608.11 of this Part);
2. vegetative characteristics (*e.g.*, location, presence, absence or destruction of terrestrial or aquatic vegetation);
3. physical characteristics (*e.g.*, clear natural line impressed on a bank, scouring, shelving, or the presence of sediments, litter or debris); and
4. other appropriate means that consider the characteristics of the surrounding area (6 NYCRR 608.1[r][1] - [4]).

A table of mean high water elevations is presented at 6 NYCRR 608.11(a) for various waterbodies in New York State (*see* 6 NYCRR 608.1[r][1]). The waterbodies are grouped by their respective drainage basins in the State, and their respective index numbers are identified. For each body of water, the relevant US Geological Service (USGS) gaging station number is provided, and the mean high water elevation at the gaging station is expressed in feet above mean sea level based on various elevation data sets. (*See* 6 NYCRR 608.11[a], *see* notes a, b, and c.)

Department staff witness, Brian Drumm, said that Greenwood Lake is not listed in the table provided at 6 NYCRR 608.11(a). As a result, Mr. Drumm appropriately concluded that the first methodology identified in 6 NYCRR 608.1(r)(1) does not apply to determining the mean high water level of Greenwood Lake. Mr. Drumm explained that he relied on the second and third methods, as prescribed in the regulations, for determining the mean high water level of Greenwood Lake in the vicinity of the project site. (Tr. at 5, 24-25.)

In his written closing brief (at 5-6) and reply (at 2), respondent argued that the Department's failure to identify the mean high water elevation of Greenwood Lake in the table at 6 NYCRR 608.11 is fatal to the first cause of action identified in the Department's October 2020 amended complaint. Respondent concluded that the Commissioner must dismiss the violation alleged in the October 2020 amended complaint with prejudice. To support this argument, respondent cited *Matter of Tyler v Board of Members of Adirondack Park Agency*, 92 Misc 2d 754, 758 (1978).

Respondent's reliance on *Tyler* (92 Misc 2d 758), is misplaced. *Tyler* concerns a determination of the mean high water level of Lake George by the Adirondack Park Agency. Executive Law article 27 is the Adirondack Park Agency Act (APA), and Section 802 provides a definition of the term, *mean high water mark*, as it applies to water bodies regulated by the Adirondack Park Agency. Pursuant to Executive Law § 802(37-a), the mean high water mark is "the average annual high water level." In *Tyler*, the court noted that the low mean water level of Lake George is codified at Public Lands Law § 15-a(4), which references the USGS station at Rogers Rock. In contrast, however, the court observes that nothing as precise exists as a method for determining the mean high water mark on Lake George. (*Tyler*, 92 Misc 2d at 757.)

Unlike Lake George, Greenwood Lake is not regulated pursuant to the Adirondack Park Act (*see* Executive Law article 27). Consequently, the definition of the term *mean high water mark*, as provided in Executive Law § 802(37-a), does not apply to Greenwood Lake. Rather, Mr. Drumm credibly explained during his testimony how he determined the mean high water level of Greenwood Lake by applying the criteria outlined at 6 NYCRR 608.1(r), which is a duly promulgated regulation, not disturbed by *Tyler* (92 Misc 2d 754). I conclude that Mr. Drumm's reliance on 6 NYCRR 608.1(r) was appropriate for determining the location of the mean high water mark on Greenwood Lake in the vicinity of respondent's property, and recommend that the Commissioner conclude the same.

Respondent argued further that the mean high water level of Greenwood Lake would have been at least 12 feet below the current elevation prior to the re-construction of the dam in 1836. Respondent observed that the re-constructed dam altered the habitat in the area surrounding the lake. The increase in the elevation of Greenwood Lake had the effect of expanding the lake's aquatic habitat by inundating terrestrial habitat areas. According to respondent, his construction activities restored portions of the terrestrial habitat in the vicinity of the waterfront property that he owns. (*See* Respondent Exhibit 7; *see also* Respondent Closing Brief at 7-8, and Respondent Reply at 4.)

The historical conditions that may have existed on Greenwood Lake in 1836 are not relevant to this proceeding. Rather, the facts adduced at hearing, through Mr. Drumm's unrefuted testimony, establish the location of the mean high water level on Greenwood Lake in the vicinity of respondent's property. Department Exhibit 5 includes a set of photographs taken by the village's building inspector that depict the structures at issue in this proceeding. They are: (1) a concrete pad at road level measuring 7'-0" by 50'-0" (350 square feet [sq. ft.]); (2) a concrete platform measuring 8'-6" by 50'-0" (425 sq. ft.); and (3) two cantilevered docks with a total area of about 400 sq. ft. The concrete platform (8'-6" x 50'-0" [425 sq. ft.]) was constructed in the waterbody, and portions of the concrete platform are below the mean high water level (*see* Department Exhibit 5[E] [Bates No. 038]; Tr. at 15-16, 47-48). With reference to these photographs, Mr. Drumm identified the scour-line along the concrete blocks of the concrete platform. The scour-line along the concrete blocks is located above the toe of the concrete platform by about one foot. These circumstances establish that the toe of the concrete platform is located below the mean high water level of Greenwood Lake. (Tr. at 15-16, 44-45.)

On April 18, 2018, staff visited Mr. Bouderau's property, and confirmed that the structures built by Mr. Bouderau were not consistent with the November 28, 2016 revised plan referenced in the Department's December 8, 2016 notice of no jurisdiction (*see* Respondent Exhibit 8 and Department Exhibit 4). Rather, the structures at the site were consistent with the "as built" plans dated March 21, 2018 (*see* Department Exhibit 5[E]). (Tr. at 13-16, 44-45.)

With his testimony, Mr. Fraatz offered Department Exhibits 7, 8 and 9, which are a set of three aerial photographs of Mr. Bouderau's property (Tr. at 43-45). Department Exhibit 7, dated October 14, 2016, depicts the site before construction. Department Exhibit 8, dated April 2, 2017, shows the site during construction of Mr. Bouderau's shoreline structures, and Department Exhibit 9, dated October 18, 2017, is a photo following construction. The photographs show

Greenwood Lake at various levels. Department Exhibit 7 was taken at the start of the drawdown.⁸ Referring to Department Exhibit 7, Mr. Fraatz identified the mean high water level of Greenwood Lake based on vegetation. He explained that he marked the photo with a blue line to show the location of the mean high water level. (*See* Department Exhibit 7, Tr. at 45-46.)

Department Exhibit 8 is a photograph taken during the construction of Mr. Bouderau's shoreline structures. At the time the photograph identified as Department Exhibit 8 was taken, Mr. Fraatz noted that the water level of Greenwood Lake is rising, but not yet at full capacity. On this exhibit, Mr. Fraatz placed a red line to show the approximate location of the mean high water level from the previous photograph, Department Exhibit 7. Department Exhibit 8 shows that the concrete platform (8'-6" x 50'-0") will extend lakeward below the mean high water level after Greenwood Lake reaches full capacity following the drawdown. (*See* Department Exhibit 8, Tr. at 46-47.)

Mr. Fraatz noted that the date of Department Exhibit 9 is about one year after the date of Department Exhibit 7. Department Exhibit 9 shows the lake at its normal level, as well as Mr. Bouderau's completed shoreline structure. On Department Exhibit 9, Mr. Fraatz placed a blue line to show the approximate location of the mean high water level as it had been depicted on Department Exhibit 7. Department Exhibit 9 shows that the concrete platform (8'-6" x 50'-0") extends lakeward below the mean high water level of Greenwood Lake. (*See* Department Exhibit 9, Tr. at 46-47.)

As discussed above, Department staff's testimony and photographs introduced at the hearing show that Mr. Bouderau installed the concrete platform (8'-6" x 50'-0") below the mean high water level of Greenwood Lake. As a result, fill, in the form of the materials used to construct the platform, was placed in Greenwood Lake, a navigable water of the State. Pursuant to ECL 15-0505(1) and 6 NYCRR 608.5, a permit from the Department is required before placing fill in any navigable waters of the State. The Department did not issue a permit to Mr. Bouderau pursuant to ECL 15-0505(3). Therefore, Mr. Bouderau violated ECL 15-0505(1) and 6 NYCRR 608.5. This violation commenced when staff initially observed it on April 18, 2018, and has continued as of the date of the hearing (*i.e.*, December 15, 2020).

III. Relief

As relief for the alleged violation, Department staff seeks an Order from the Commissioner that would direct Mr. Bouderau to submit a work plan for the removal of the illegal structure, and the restoration of the adversely impacted area. In addition, staff seeks a total civil penalty of \$10,000 pursuant to ECL 71-1127. (*See* Department staff Closing Brief at 9-11, and Department staff Reply at 5.) For violations of ECL article 15, its implementing regulations, as well as permits and orders issued pursuant thereto, ECL 71-1127 authorizes a civil penalty of not more than \$2,500 per violation and an additional civil penalty of not more than \$500 for each day that the violation continues.

⁸ Mr. Fraatz explained that every four years or so, Greenwood Lake has a drawdown (*see* Respondent Exhibits 5 and 7 [Bates Nos. 181-23]); Tr. at 46).

Mr. Drumm testified about the need to remediate the site and how Department staff calculated the requested civil penalty. With respect to remediation, Department staff seeks removal of the concrete platform located below the mean high water mark. Mr. Drumm explained that the structure could be removed using standard construction techniques, such as isolating the work area with a cofferdam or turbidity curtain. In the alternative, remedial activities could be undertaken during the drawdown period. According to Mr. Drumm, leaving the concrete platform in place will cause adverse environmental impacts. Among them would be the permanent loss of habitat in the littoral zone, and an alteration of the wave patterns in the vicinity of the site. Changes in wave patterns would contribute to erosion along the shoreline. (Tr. at 17.) According to Mr. Fraatz, the area of the littoral zone filled by the concrete platform is about 212.5 sq. ft., which is about half the area of the concrete platform (8'-6" x 50'-0") (*see* Department Exhibit 10; Tr. at 47-48).

With respect to the civil penalty calculation, Department staff referred to DEE-1, which is the Commissioner's *Civil Penalty Policy* (issued June 20, 1990). Mr. Drumm explained that the civil penalty can include a component related to the continuous nature of the violation. As of the hearing date (*i.e.*, December 15, 2020), Mr. Drumm said that the potential maximum civil penalty would far exceed \$100,000. (Tr. at 17-18.) According to staff, the statutory maximum civil penalty for the violation alleged in the October 2020 amended complaint is \$647,000 based, in part, on the continuous nature of the violation (*see* Department staff Closing Brief at 3-4).

In terms of the gravity of the violation, Mr. Drumm said that the purposes of ECL article 15 are to protect water bodies for fish and wildlife propagation and survival, and to provide recreational resources for the public. With respect to the captioned matter, Mr. Bouderau placed fill below the mean high water level. Mr. Drumm cautioned about potential adverse effects associated with filling Greenwood Lake with respect to wave action and potential erosion. (Tr. at 18-19.) (*See* Department staff Closing Brief at 4.)

Department staff considered the following circumstance to be aggravating factors that justify the requested civil penalty. According to Mr. Drumm, the November 10, 2016 notice of incomplete application explained why Mr. Bouderau could not obtain a permit from the Department with respect to his initial plan dated October 20, 2016. After conferring with Department staff, Mr. Bouderau filed a revised plan dated November 28, 2016, which staff incorporated by reference into the December 8, 2016 notice of no jurisdiction. However, Mr. Bouderau did not construct the approved structure depicted in the November 28, 2016 plan. Rather, he over built the structure, which is depicted in plans dated March 21, 2018. Staff argued that such a blatant disregard of the project described in staff's December 8, 2016 notice of no jurisdiction justifies the requested civil penalty. Given the consultations that took place between staff and Mr. Bouderau with respect to the development of the November 28, 2016 plan, staff argued that Mr. Bouderau has been uncooperative with his refusal to settle the enforcement action with an order on consent. (Tr. at 18.) (*See also* Department staff Closing Brief at 7-8.) I agree, and the Commissioner should conclude the same.

Mr. Bouderau argued that his structure would have a de minimus adverse environmental impact based on the following. First, the volume of the impacted area could not be determined. (Tr. at 53-54.) Second, the filled area is 2.54×10^{-6} % of the total area of Greenwood Lake. (Tr.

at 54-55.) In addition, Mr. Bouderau asserted that any habitat occupying the area filled by the concrete platform would be displaced to another part of the lake. (Tr. at 56-58.) Respondent also argued that plants and animals must exist in a three-dimensional volume rather than a two dimensional plane. (See Respondent Closing Brief at 6 and 7, and Respondent Reply at 3.)

Respondent's attempt to quantify the adverse environmental impact of the fill associated with the concrete platform as a percentage of the total area of Greenwood Lake is misplaced. Mr. Fraatz testified about the significance of the littoral zone, and the habitat values associated with that area of the lake compared to the areas of open water.⁹ The littoral zone is limited to areas around the lakeshore, and the littoral zone has a higher level of biological activity compared to the areas of open water toward the middle of the lake. (Tr. at 60-61.) Based on Mr. Fraatz's unrefuted testimony, Mr. Bouderau failed to demonstrate that his structure would have a de minimus adverse environmental impact on Greenwood Lake.

In addition, the conditions depicted in Respondent Exhibit 4 show how heavily developed the shoreline of Greenwood Lake is. These conditions demonstrate the need to review the potential impacts of projects and the need for permits pursuant to ECL article 15, before projects are constructed. Mr. Drumm testified that the cumulative impact associated with this violation would have a significant negative long-term environmental impact on the natural resources of Greenwood Lake, as well as its recreational benefits. (Tr. at 18-19.)

Mr. Bouderau's claim that the concrete platform does not contribute to a loss of aquatic habitat because it displaces a volume of water to a different location in Greenwood Lake is spurious. As noted above, Mr. Fraatz testified about the significance of the littoral zone, which is directly impacted by Mr. Bouderau's placement of fill, and the habitat values associated with that area of the lake compared to the areas of open water. Staff did not allege and, therefore, did not attempt to demonstrate that respondent's unpermitted activities adversely impacted the areas of Greenwood Lake located outside the littoral zone.

With respect to relief, Department staff's requests are reasonable and supported by the evidence presented during the administrative hearing. As discussed in detail above, Department staff demonstrated that the violation resulted in actual damage to Greenwood Lake, a navigable water of the State, and that Mr. Bouderau was culpable for the violation (see Department staff Closing Brief at 5-8). Such aggravating factors, further justify the requested relief. Accordingly, the Commissioner should require the remediation recommended by Department staff, and assess a total civil penalty of \$10,000.

Conclusion

Raymond Bouderau violated ECL 15-0505(1) and 6 NYCRR 608.5 when he placed fill, in the form of a concrete platform measuring 8'-6" x 50'-0", below the mean high water level of Greenwood Lake, a navigable water of the State, without a permit from the Department. This violation commenced on April 18, 2018, and has continued.

⁹ Mr. Bouderau's calculation is based on the entire surface area of Greenwood Lake rather than on the area of the littoral zone (see Respondent Closing Brief at 6), which would be considerably smaller.

Recommendations

1. For the demonstrated violation of ECL article 15, title 5, and the implementing regulations at 6 NYCRR 608.5, the Commissioner should assess a total civil penalty of \$10,000.
2. With respect to remediation, the Commissioner should direct respondent to submit a remediation plan for staff's review and approval. The remediation plan should include the removal of, or modification to, the concrete platform in a manner that removes all fill placed below the mean high water level of Greenwood Lake.

Attached: Exhibit Chart – Appendix A

Appendix A

Exhibit Chart

Matter of Raymond Bouderau

DEC Case No. R3-20180503-80

Hearing Date: December 15, 2020

Department Exhibits	Bates Nos.	Description
1	002-020	Mr. Bouderau's October 31, 2016, Application and Design Plan dated October 20, 2016 - Includes 2 copies of Design Plan and 1 Tax Map.
2	012-023	Notice of Incomplete Application dated November 10, 2016.
3	025	Mr. Bouderau's November 28, 2016, Revised Design Plan.
4	026-027	Notice of No Jurisdiction dated December 8, 2016.
5	028-039	April 20, 2018, Letter from the Village of Greenwood Lake to Department staff with enclosures.
6	040-052	Department staff's email dated June 14, 2018, with attached draft Order on Consent.
7	053	October 14, 2016, aerial photo.
8	054	April 2, 2017, aerial photo.
9	055	October 18, 2017, aerial photo.
10	056	Estimated Loss of Aquatic Habitat
Respondent Exhibits		
1	003-007	Amended Complaint dated October 8, 2020.
2	008-068	Answer and Affirmative Defenses dated October 28, 2020 (Bates Nos. 009-012); Exhibit 1 (Bates Nos. 013-018); Exhibit 2 (Bates Nos. 019-068).

3	069-074	Photographs; Tax maps; Survey.
4	075-124	Photographs.
5	125-177	Greenwood Lake Water Level Management Plan 2011-2031.
6	178-180	Greenwood Lake – Wikipedia.
7	181-245	Greenwood Lake Commission (Bates Nos. 182-187); Greenwood Lake Water Level Management Plan 2011-2013 (Bates Nos. 188-239); Notice of Hearing dated April 16, 2019 (Bates Nos. 240-241); Complaint dated April 16, 2019 (Bates Nos. 242-245).
8	246-248	Notice of No Jurisdiction dated December 8, 2016.
9	249-263	Notice of Violation dated June 14, 2018.

By stipulation of the parties, the ALJ received all exhibits into evidence (Tr. at 8).