

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

ORDER

-by-

DEC Case No.
R3-20180503-81

ERIC D. HASTINGS,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Eric D. Hastings:

- (a) violated ECL15-0503(1)(b) and 6 NYCRR 608.4(b)(1), when respondent constructed a concrete platform in regulated waters without a permit from the Department; and
- (b) violated ECL 15-0505(1) and 6 NYCRR 608.5, when respondent placed fill below the mean high water level in a navigable water (Greenwood Lake) of the State of New York.

The alleged violations occurred at property that is adjacent to Greenwood Lake and is across the street from respondent's residence located at 32 Edgemere Avenue, Village of Greenwood Lake, Orange County.

Department staff commenced this proceeding against respondent by service of a notice of hearing and complaint dated April 16, 2019 (complaint). According to the complaint, the alleged violations commenced on April 18, 2018, and had continued to the date of the complaint.

The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell of the DEC's Office of Hearings and Mediation Services. Following an enforcement hearing conducted on July 23, 2019, ALJ O'Connell prepared the attached hearing report. I adopt the hearing report as my decision in this matter, subject to my comments below.

Liability

Respondent Hastings submitted an application on September 12, 2016 to construct a new 75 linear foot bulkhead “with a 900 [square foot] deck and 390 [square foot] cantilevered deck” to be built along the banks of Greenwood Lake, “across the street from [respondent’s] residence” (Hearing Exhibit [Exh] 2, at 1; see also Exh 1 at 2 [“Project Description”]).¹ On October 20, 2016, Department staff issued a notice of incomplete application (NOIA) to respondent Hastings in which staff listed information needed for the Department to continue its review (see Exh 2 at 3-4). The NOIA noted several issues including the “excessive size of the proposed structure” and a need to clarify the purpose for the cantilevered structure, and recommended that respondent meet with Department staff to discuss alternatives (id.).

By cover letter dated November 16, 2016, respondent Hastings provided revised plans to the Department that modified his original proposal (see Exh 4). Following review of the revised plans, Department staff issued a notice of no jurisdiction dated December 6, 2016 (December DEC Letter) (see Exh 5). The December DEC Letter stated that the revised project consisted of a 75 foot long by eight foot wide retaining wall, which would be built above normal high water, that no fill would be placed below normal high water, and that a docking facility as specified in the December DEC Letter would be constructed (see Hearing Report at 2-3 [Finding of Fact No. 4]; Exh 5, at 1). Based on the revised project plans, Department staff determined that a DEC permit would not be required for the project (see Hearing Exh at 1).

During a site visit on April 18, 2018, Department staff observed that the concrete bulkhead and dock built at the site did not conform to the specifications in the December DEC Letter. Department staff inspected the site again on June 3, 2018, and subsequently prepared a notice of violation dated June 14, 2018 (NOV). The NOV stated that “[t]he new bulkhead, concrete pad, and cantilevered dock exceed the limits of disturbance shown on [respondent’s revised] plans and constitute illegal fill in waters of the state below the mean high water level” (Exh 8 [NOV at 1]). Department staff stated that respondent’s activities would have required a Department-issued permit and that the violations required “immediate corrective action” (id.). Department staff provided respondent with an order on consent to resolve this matter (see Exh 8; Hearing Transcript [Tr] at 5). Respondent did not sign the order and failed to undertake corrective action.

As set forth in the ALJ’s hearing report, respondent failed to demonstrate that the bulkhead and related structures (structures) were constructed above the mean high water level of Greenwood Lake (see Hearing Report at 3-8). Based on evidence presented at the hearing, this construction was below the mean high water level of Greenwood Lake for which a permit from the Department would be required. ECL 15-0503(1)(b) provides that “no dock, wharf, platform, breakwater, mooring or other structure in, on or above waters shall be . . . constructed . . . by any person . . . without a permit.” Section 608.4(b)(1) provides that no person may construct, a dock, pier, wharf, platform, breakwater or other structure in, on or above the navigable waters of the State without a permit. Accordingly, respondent violated ECL 15-0503(1)(b) and 6 NYCRR

¹ Greenwood Lake is a navigable water and a Class A surface water (see Hearing Report, at 2 [Finding of Fact No. 2]).

608.4(b)(1) when he constructed the structures below the mean high water level of Greenwood Lake, a navigable water (see Hearing Report at 2 [Finding of Fact No. 2]), without a permit from the Department.

In addition, ECL 15-0505(1) prohibits any person from either excavating or filling below the mean high water level of any navigable water of the State without a permit. Section 608.5 also requires a permit for any such excavation or filling. Respondent Hastings violated ECL 15-0505(1) and 6 NYCRR 608.5 when he placed fill in Greenwood Lake without a permit from the Department (see Hearing Report at 8-9).

Penalty and Remedial Relief

Pursuant to ECL 71-1127, any person who violates any of the provisions of, or who fails to perform any duty imposed by the provisions of ECL article 15 at issue here or their implementing regulations shall be liable for a civil penalty of not more than \$2,500 for such violation and an additional civil penalty of not more than \$500 for each day that the violation continues, and such person may be enjoined from continuing such violation.

Department staff in its complaint requested that a civil penalty in the amount of twenty thousand (\$20,000) be imposed and that respondent be directed to submit a work plan providing for removal of the illegal structures and restoration of the impacted area within 30 days (see Complaint, Wherefore Clause [3]; see also Hearing Tr at 54). The ALJ supports Department staff's request (see Hearing Report at 11).

I adopt the proposed civil penalty and remedial relief as follows. The requested civil penalty, although below the maximum amount that could be imposed, does reflect aggravating factors present here (see Hearing Tr at 56-57). Based on this record, the amount of twenty thousand dollars (\$20,000) 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 all illegal structures and the restoration of the area that was impacted by this illegal activity. 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 within sixty (60) days of the date that this order is served upon respondent, must contain, among other things:

- a timetable for respondent's removal of all illegal structures, of the restoration of the impacted area, and of any other activities proposed by the plan;
- a description of the method by which respondent shall remove illegal structures (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 remediation plan submission date, milestone dates contained in the plan or the civil penalty payment date. 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 Eric D. Hastings violated:
 - A. ECL 15-0503(1)(b) and 6 NYCRR 608.4(b)(1) when respondent Hastings constructed a bulkhead and related structures on his property below the mean high water level of Greenwood Lake, without a permit from the Department; and
 - B. ECL 15-0505(1) and 6 NYCRR 608.5 when respondent Hastings placed fill in Greenwood Lake, a navigable water of the State, without a permit from the Department.
- II. A civil penalty in the amount of twenty thousand dollars (\$20,000) is hereby assessed upon respondent Eric D. Hastings. 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 Eric D. Hastings is to submit an approvable remediation plan to Department staff that addresses the removal of all illegal structures and the restoration of the area that has been impacted by this illegal activity. 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 all illegal structures, of the restoration of the impacted area, and of any other activities proposed by the plan;
- B. a description of the method by which respondent shall remove illegal structures (including the protections to be followed to minimize any further negative impacts to Greenwood Lake or its banks);
- C. 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
- D. the manner by which respondent shall furnish photographs that show the appearance of the area before and after removal/restoration.

IV. Respondent Hastings 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 may, upon good cause shown, request an extension of the remediation plan submission date, milestone dates contained in the plan or the civil penalty payment date. 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 Eric D. Hastings 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: May 11, 2020
Albany, New York

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

In the Matter

- of -

Alleged Violations 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

Eric D. Hastings,
Respondent

Case No: R3-20180503-81

Hearing Report

- by -

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

November 1, 2019

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 both dated April 16, 2019 upon Eric D. Hastings (Respondent). In the first cause of action, staff alleged that Mr. Hastings violated Environmental Conservation Law of the State of New York (ECL) § 15-0503(1)(b), and implementing regulations at Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR) 608.4(b)(1) when he constructed a concrete platform in regulated waters without a permit from the Department. In the second cause of action, staff alleged that Mr. Hastings violated ECL 15-0505(1) and 6 NYCRR 608.5 when he placed fill below the mean high water level in navigable waters of the State.

The site of the alleged violations is on property owned by Mr. Hastings located at 32 Edgemere Avenue in the Village of Greenwood Lake (Orange County). Respondent's property is adjacent to Greenwood Lake. According to the complaint, the alleged violations commenced on April 18, 2018, and have continued to date. For the alleged violations staff seeks an Order from the Commissioner directing Mr. Hastings to remove the unpermitted structures and fill from Greenwood Lake, and to pay a total civil penalty of \$20,000.

Mr. Hastings filed an answer dated May 2, 2019. He denied the alleged violations asserted in the April 16, 2019 complaint, and requested that the Commissioner dismiss the charges.

Subsequently, Department staff filed a statement of readiness dated May 16, 2019 with the Office of Hearings and Mediation Services (OHMS). I was assigned to the case on May 20, 2019. On May 30, 2019, I issued a notice of hearing scheduling the adjudicatory hearing for 10:00 a.m. on Tuesday, July 23, 2019 at the Department's Region 3 office located at 21 South Putt Corners Road, New Paltz, New York.

The hearing commenced as scheduled. Elisa E. Chae, Esq., Assistant Regional Attorney, represented Department staff. Brian Drumm, from the Bureau of Ecosystem Health and Management, testified for staff. Eric Hastings appeared pro se, and testified. In addition, George Vurno, Esq., served as Mr. Hastings' "advisor" during the hearing (Transcript [Tr.] at 1), and testified. During the hearing (Tr. at 11-13), 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]).

The hearing concluded on July 23, 2019. Upon receipt of the hearing transcript on August 13, 2019, the record of the proceeding closed.

Findings of Fact

1. Eric Hastings owns property at 32 Edgemere Avenue in the Village of Greenwood Lake (Orange County), New York. Mr. Hastings' property is adjacent to Greenwood Lake. (*See* Exhibit 1; Tr. at 85-87, 119.)

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 and 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 17-18.)
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. (Tr. at 59-60, 75, 90.)
4. On September 12, 2016, staff at the Department's Region 3 office in New Paltz, New York, received a joint permit application signed by Mr. Hastings on September 6, 2016. With the joint application (Application No. 3-3354-00581/00003), Mr. Hastings sought approval from the Department to construct a new 75 linear foot bulkhead along the shore of Greenwood Lake. The proposed project also included a platform (75 feet x 12 feet [900 square feet]) cantilevered over the length of the bulkhead, and a dock (75 feet x 6 feet [450 square feet]) extending from the proposed bulkhead into the water. The joint application included three drawings of the proposal. Mr. Hastings provided copies of the joint application to the US Army Corps of Engineers, the New York State Office of General Services, the New York State Department of State, and the Village of Greenwood Lake. (*See* Exhibits 1 and 11; Tr. at 10-11, 15-18, 85-86.)
5. With respect to the September 6, 2016, joint permit application filed by Mr. Hastings, Department staff issued a notice of incomplete application (NOIA) dated October 20, 2016. Among other things, the NOIA stated that permit issuance was not likely due to the excessive size of the proposal, and the volume of fill that would be placed in Greenwood Lake, below mean high water. (*See* Exhibit 2; Tr. at 18-21.)
6. With a cover letter dated November 16, 2016, Mr. Hastings provided revised plans after staff met with Mr. Hastings at the site. In the revised plans, the width of the platform was reduced from 12 feet to 8 feet, and it would not be cantilevered over the bulkhead. The toe of the 75 linear foot bulkhead supporting the platform would be placed at the high water mark, and three floating docks would extend from the bulkhead into the lake. The floating docks would be removed during the winter. (*See* Exhibit 4; Tr. at 28-30.)
7. After reviewing the revised plans, Department staff issued a notice of no jurisdiction dated December 6, 2016. The December 6, 2016 notice provided a description of the proposal based on Mr. Hastings' revised plans filed under cover of letter dated November 16, 2016. The notice limited the width of the platform to 8 feet, and noted that the 75 linear foot bulkhead would be installed landward of the high water mark level thereby ensuring that no fill would be placed in Greenwood Lake. The notice also authorized the installation of three floating docks (two at 4 feet x 15 feet, and one at 4 feet x 7 feet) extending from the bulkhead into the lake. According to the December 6, 2016 notice,

the total area of these docks could not exceed 4,000 square feet. (*See* Exhibit 5; Tr at 30-34.)

8. Department staff did not issue a permit for the proposal described in the September 6, 2016 joint permit application (*see* Exhibits 1 and 2; Tr. at 21, 34).
9. On April 18, 2018, Department staff visited Mr. Hastings' property. Staff subsequently returned to the site on June 3, 2018, and photographed the structures installed at the site by either Mr. Hastings or his contractor. The photographs show a bulkhead extending into Greenwood Lake, below the high water mark level by approximately one foot. The width of the platform extending from the shoreline to the top of the bulkhead was 12 feet; it did not cantilever over the bulkhead. (*See* Exhibits 6 and 9; Tr at 35, 42-46, 50-52, 77-79.)
10. After staff's June 3, 2018 site visit, Department staff prepared a notice of violation (NOV) dated June 14, 2018. With an email dated June 14, 2018, staff sent the NOV and a draft order on consent to Mr. Hastings. According to the June 14, 2018 NOV, the structure installed at the site does not conform with the revised plans submitted with Mr. Hastings' November 16, 2016 cover letter, which Department staff had incorporated by reference into the December 6, 2016 notice of no jurisdiction. (*See* Exhibit 8; Tr. at 46-47.)
11. The elevation of the toe of the bulkhead constructed in Greenwood Lake on Mr. Hastings' property is not part of this hearing record.

Discussion

I. Liability

In two causes of action, the April 16, 2019 complaint alleged that Mr. Hastings violated provisions of ECL article 15, title 5 (Protection of Water), and implementing regulations at 6 NYCRR part 608 (Use and Protection of Waters) when he constructed various structures in Greenwood Lake without a permit from the Department. Each cause of action is discussed below.

A. First Cause of Action

In the first cause of action, staff alleged that Mr. Hastings violated ECL 15-0503(1)(b) and implementing regulations at 6 NYCRR 608.4(b)(1) when he constructed a concrete platform in Greenwood Lake, a regulated waterbody, without a permit from the Department. According to the complaint, the violation began on April 18, 2018, and continued for about a year.

Pursuant to ECL 15-0503(1)(b), a permit from the Department is required to construct any dock, platform, or other structure in, on, or above protected waters of the State (*see also* 6

NYCRR 608.4[a] and [b]). The Commissioner may delegate permitting authority to a local government to administer a local law or ordinance that provides environmental protection comparable to, or greater than, the requirements outlined in ECL 15-0503(1)(b) and the implementing regulations (*see* ECL 15-0503[1][c]). Pursuant to ECL 15-0503(3)(a), a permit is not required when a structure provides dockage for five or fewer boats, and the total docking area is less than 4,000 square feet (*see also* 6 NYCRR 608.4[c][2]).

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 making the distinction 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. The waterbodies are grouped by their respective drainage basins in the State, and their respective index numbers are provided.¹ 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, is a Biologist II from the Region 3 Bureau of Ecosystem Health Management. Mr. Drumm explained that Greenwood Lake is not listed in the table provided at 6 NYCRR 608.11(a). As a result, Mr. Drumm 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 further that he relied on the second and

¹ For the meaning of “index numbers” *see* 6 NYCRR part 865 et seq.

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 7, 26-27, 60, 72-73, 76.)

Exhibits 6 and 7 are two sets of photographs taken by Department staff that depict the structures at issue in this proceeding. In the June 3, 2018 photographs (*see* Exhibit 6), Mr. Drumm identified the vegetative characteristics that distinguish between the predominately aquatic and terrestrial habitats along the shoreline. In addition, Mr. Drumm observed the scour-line along the concrete blocks of the bulkhead, which is located above the toe of the bulkhead by about one foot. These circumstances establish that the toe of the bulkhead is located below the mean high water level of Greenwood Lake. (Tr. at 35, 42-46, 50-52, 77-79.)

During the hearing, Mr. Hastings made two claims about the Department's jurisdiction over the structures at issue in this proceeding. The first is that all construction took place above the mean high water level of Greenwood Lake (Tr. at 85). The second is that the Village of Greenwood Lake issued a building permit, as the Department's agent, that authorized the construction of the platform and the bulkhead (Tr. at 88-90, 97, 117-119, 123, 138-142).

Mr. Hastings testified that the water level of Greenwood Lake has been at, or above, flood stage. The basis for his statement is that water continues to flow over the dam at the southern end of the lake. (Tr. at 114.)² As a result, Mr. Hastings argued that the water level of Greenwood Lake was uncharacteristically high when Department staff visited his property in April 2018 and June 2018 (*see* Exhibit 6; Tr. at 36-37, 70, 73).

Mr. Vurno objected to staff's reliance on vegetative and physical characteristics to determine the mean high water level of Greenwood Lake (*see* 6 NYCRR 608.1[r][2] and [3]). He characterized staff's reliance on these methods as "a rule of thumb," and argued that these methods should not be applied here. In the alternative, Mr. Vurno recommended that the elevation of the dam should serve as the mean high water level of Greenwood Lake. (Tr. at 71, 147-149.)

Consistent with Mr. Drumm's testimony (Tr. at 26-27, 72), Greenwood Lake is not listed in the table provided at 6 NYCRR 608.11(a). Staff, however, offered Exhibit 10, which depicts two graphs based on data collected at USGS Gaging Station 01383000, which is located near the dam in Awosting, New Jersey. The upper graph on Exhibit 10 shows water surface elevations above NAVD 1988³ from May 27, 2019 to June 10, 2019. From the upper graph of Exhibit 10, elevation values include: 618.65 ft. on May 27, 2017; 618.85 feet on May 31, 2019; and 618.50 feet on June 10, 2019. The lower graph depicted on Exhibit 10 shows water surface elevations above NAVD 1988 at six month intervals from July 2016 to July 2019. (Tr. at 68-70.)

² *See also* Mr. Vurno's testimony at 148-150.

³ North America Vertical Datum (NAVD) 1988.

Neither Mr. Hastings nor Mr. Vurno offered any information about the USGS gaging station at Awosting, New Jersey, or the elevation of the top of the dam.⁴ In addition, and more significant, these witnesses did not provide any information about the elevation of the toe of the bulkhead. Absent this information, the elevation of toe of the bulkhead cannot be compared to the elevation of either the top of the dam or the data reported in Exhibit 10. Such a comparison could show whether the elevation of the toe of the bulkhead is above or below the mean high water level of Greenwood Lake by “other appropriate means” (6 NYCRR 608.1[r][4]). Although provided the opportunity at the hearing, Mr. Hastings did not present sufficient information to apply an alternative method for determining the mean high water level of Greenwood Lake as authorized by 6 NYCRR 608.1(r)(4) (*see* 6 NYCRR 622.4[c] and 622.11[b][2]).

Mr. Hastings explained that after staff issued the October 20, 2016 NOIA, members of staff, including Mr. Drumm, Mike Frats, and Tracy O’Malley, came to his property in November 2016, and discussed his proposal. During the site visit, Mr. Hastings said that Mr. Drumm located the mean high water level on the shoreline, and Mr. Hastings noted the level. Subsequently, when Mr. Hastings revised the proposal, he attempted to locate the toe of the bulkhead above the mean high water level based on staff’s site visit. (Tr. at 21-22, 67, 84-85.)

As part of his direct case, Mr. Hastings offered Exhibits 12 and 14 to demonstrate that he did not violate ECL 15-0503(1)(b) and 6 NYCRR 608.4(b)(1). Exhibit 12 is a copy of the building permit (#16-07815) issued by the Village of Greenwood Lake to Mr. Hastings. The building permit is dated December 20, 2016, and was effective for one year. The permit authorized the construction of a bulkhead during the seasonal drawdown. The permit noted that the Department had approved the proposal. Mr. Hastings requested and obtained a six month renewal, and the Village extended the expiration date of the building permit to June 20, 2017. (Tr. at 88-91, 97-99.)

Exhibit 14 is a copy of a certificate of compliance from the Village of Greenwood Lake dated December 12, 2017. The certificate references the building permit (#16-07815), which the Village initially issued on December 20, 2016. The certificate states as follows:

WORK DESCRIPTION: BULKHEAD DURING DRAWDOWN
DEC APPROVED
PASSED – Final Inspection

According to Mr. Hastings, the Village of Greenwood Lake serves as the Department’s agent, and the Village’s building inspector supervises construction activities along the shore of Greenwood Lake during the drawdown. Mr. Hastings maintained that the Village’s building permit (Exhibit 12) and the certificate of compliance (Exhibit 14) demonstrate that he did not violate the ECL or the regulations when he constructed the bulkhead on his property. (Tr. at 89-90, 118, 138-142.)

⁴ Both witnesses are members of the Greenwood Lake Commission. After the creation of the Greenwood Lake Commission, then Governor George Pataki appointed Mr. Vurno to the Greenwood Lake Commission as the representative from New York State (*see* L 2002, ch 47 [Greenwood Lake Protection Act] § 3.A). (Tr. at 141, 143-144, 146.)

As noted above, ECL 15-0503(1)(c) allows the Commissioner to delegate permitting authority to a local government to administer a local law or ordinance that provides environmental protection comparable to, or greater than, the requirements outlined in ECL 15-0505(1)(b) and the implementing regulations. Demonstrating that such a delegation exists is a necessary element to prove a claim that the Village of Greenwood Lake serves as the Department's permitting agent.⁵ Mr. Hastings, however, offered nothing at the hearing to establish the requisite condition, though given the opportunity to do so (*see* 6 NYCRR 622.4[c] and 622.11[b][2]). Absent a showing that the Commissioner issued a delegation to the Village of Greenwood Lake pursuant to ECL 15-0503(1)(c), I do not accept Mr. Hastings' contention that the Village of Greenwood Lake served as the Department's permitting agent with respect to the structures at issue in this proceeding.

Moreover, Exhibit 12, which is a copy of the building permit issued by Village of Greenwood Lake, is incomplete for the following reasons. The project description provided on the Village's building permit application form is "bulkhead on lake front, no existing." The Village's building permit states, in pertinent part:

This is to certify that permission is hereby granted for:
BULKHEAD DURING DRAWDOWN
DEC APPROVED

However, Exhibit 12 does not include a copy of the Department's permit or approval, or copies of the approved plans and drawings. In the alternative, Exhibit 12 does not incorporate by reference any documents reviewed and approved by the Department related to the construction of the bulkhead and related structures on Mr. Hastings' property. In this case, the project acceptable to Department staff was outlined in the December 6, 2016 notice of no jurisdiction (*see* Exhibit 5) plus the revised drawings submitted with Mr. Hastings' November 16, 2016 cover letter (*see* Exhibit 4). Department staff's December 6, 2016 notice of no jurisdiction incorporates, by reference, the revised drawings submitted under cover of letter dated November 16, 2016.

Upon review of Exhibit 12, I cannot determine what proposal the Village reviewed, and ultimately determined to be in compliance with the Department's approval (*see* Exhibit 14). Based on the October 20, 2016 NOIA (*see* Exhibit 2), the Department would have denied the original proposal submitted with the September 6, 2016 permit application (*see* Exhibit 1). Department staff did not issue any permit to Mr. Hastings (Tr. at 21, 34). The Department's December 6, 2016 notice of no jurisdiction (*see* Exhibit 5) incorporated by reference the revised plans that Mr. Hastings submitted to the Department with his cover letter dated November 18, 2016 (*see* Exhibit 4). Nevertheless, the bulkhead and related structures constructed at the site are consistent with the initial proposal and related drawings, rather than the revised drawings (*see* Exhibit 6; *compare* Exhibits 1 and 4). Given the incomplete nature of Exhibit 12, I find it to be unreliable and, therefore, assign it no weight.

⁵ Department staff denied that the Commissioner had authorized any delegation to the Village of Greenwood Lake. Rather the Village and DEC work together under a general permit with respect to drawdown activities. (Tr. at 153.)

Based on the foregoing, I conclude that Mr. Hastings failed to demonstrate that the bulkhead constructed at the site is located above the mean high water level of Greenwood Lake. In addition, Mr. Hastings did not show the Village of Greenwood Lake issued a building permit, as the Department's agent pursuant to ECL 15-0503(1)(c), which authorized the construction of the structures at issue in this proceeding.

Rather, the evidence presented at the hearing shows that the bulkhead at the site was built below the mean high water level of Greenwood Lake, which would require a permit from the Department pursuant to ECL 15-0503(1)(b) and 6 NYCRR 608.4(b)(1). The Department did not issue Mr. Hastings a permit to construct the bulkhead and related structures, as they currently exist at the site. Therefore, Mr. Hastings violated ECL 15-0503(1)(b) and 6 NYCRR 608.4(b)(1). This violation commenced when staff initially observed it on April 18, 2018 and has continued as of the date of the complaint (*i.e.*, April 16, 2019).

B. Second Cause of Action

In the second cause of action, staff alleged that Mr. Hastings 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 that are inundated at mean high water level without a permit from the Department. According to the complaint, the violation began on April 18, 2018, and has continued for about a year.

ECL 15-0505(1) prohibits any person from either excavating or filling 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.)

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. Hastings' proposal was to provide access to Greenwood Lake for boating by installing three floating docks for watercraft (*see* Exhibit 4). In addition, Mr. Hastings 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 circumstance is not relevant here.

As discussed above, Department staff's testimony and photographs introduced at the hearing show that Mr. Hastings installed the bulkhead below the mean high water level of Greenwood Lake. As a result, fill, in the form of the materials used to construct the bulkhead, 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. Hastings pursuant to ECL 15-

0505(3).⁶ Therefore, Mr. Hastings 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 complaint (*i.e.*, April 16, 2019).

II. Relief

As relief for the alleged violations, Department staff seeks an Order from the Commissioner that would direct Mr. Hastings to remove all illegal structures, and to restore the adversely impacted areas. In addition, staff seeks a total civil penalty of \$20,000 pursuant to ECL 71-1127. 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.

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 portion of the bulkhead 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, so that concrete dust and other debris would not extend into the lake. (Tr. at 54.) In addition, remedial activities could be undertaken during the drawdown period.

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). Due to the continuing nature of the violations, Mr. Drumm explained that the civil penalty can include a component related to the continuous nature of the violations. As of the hearing date (*i.e.*, July 23, 2019), Mr. Drumm said that the potential maximum civil penalty for both violations would be \$232,500. (Tr. at 56.)

In terms of the gravity of the violations, Mr. Drumm said that the purposes of ECL article 15 are to protect water bodies for fish and wildlife, and to provide recreational resources for members of the public. With respect to the captioned matter, Mr. Hastings has built out into the lake in order to gain a usable area for himself to the detriment of others. Mr. Drumm's unrefuted testimony also demonstrates that the violations adversely impacted aquatic life. (Tr. at 57.)

Department staff considered the following circumstance to be an aggravating factor that would justify the requested civil penalty. Staff explained that Mr. Drumm and others went to the site, and met with Mr. Hastings in November 2016, to develop an alternative proposal that avoided the Department's jurisdiction (*see* Exhibits 4 and 5). However, Mr. Hastings constructed his original proposal, initially described in the September 6, 2016, joint application, which staff considered not permissible (*see* Exhibits 1 and 2). Staff argued that such a blatant disregard of the project described in staff's December 6, 2016 notice of no jurisdiction justifies

⁶ ECL 15-0505 does not include a delegation provision comparable to that provided by ECL 15-0503(1)(c). Accordingly, Mr. Hastings' argument that the Village of Greenwood Lake authorized the construction of the structures at issue in this proceeding, as the Department's agent, is not relevant to the allegations in the second cause of action.

the requested civil penalty. In addition, staff considers Mr. Hastings' refusal to settle the enforcement action with an order on consent (*see* Exhibit 8) shows a lack of cooperation given the meeting that took place between staff and Mr. Hastings in November 2016. (Tr. at 56-57.)

Nevertheless, Mr. Hastings maintained that he did not violate any provisions of ECL article 15, title 5, and asserted that Department staff is confusing his compliant bulkhead with that of his neighbor, Raymond Bouderau. Mr. Hastings' property is located at 32 Edgemere Avenue in the Village of Greenwood Lake, and Mr. Bouderau's property is located next door at 46 Edgemere Avenue. To demonstrate that the Department intended to commence an enforcement proceeding against Mr. Bouderau rather than against Mr. Hastings, Mr. Hastings offered a copy of the draft order on consent that Department staff sent to Mr. Bouderau (*see* Exhibit 16). Mr. Hastings compared the draft order on consent that staff sent him (*see* Exhibit 8) with the draft sent to his neighbor (*see* Exhibit 16). According to Mr. Hastings, the content of the two draft documents is essentially the same. (Tr. at 98, 102-106, 110, 119-120, 128-130.)

Mr. Hastings explained further that his concern that staff mistakenly commenced the captioned enforcement proceeding against him rather than against Mr. Bouderau was confirmed when Mr. Hastings received an email from Ms. Chae. Ms. Chae's email referred to alleged violations at 46 Edgemere Avenue, which is Mr. Bouderau's address. (*See* Exhibit 17; Tr. at 106-109.) Although clerical errors may have occurred with respect to the draft order on consent, Department staff noted, however, that the address stated in the complaint, 32 Edgemere Avenue, is the address for Mr. Hastings' property, and the site of the violations (Tr. at 152).

Mr. Hastings also offered a set of photographs that he took in July 2019 depicting his neighbor's bulkhead and docks (*see* Exhibits 15A and 15B) in contrast to his (*see* 15C). Mr. Bouderau's bulkhead and docks are cantilevered over Greenwood Lake. Because his neighbor's docks are permanently installed to the bulkhead, Mr. Hastings said that Mr. Bouderau's docks cannot be removed at the end of the boating season like his. (Tr. at 99-102.)

In addition, Mr. Hastings contended that the Department has unfairly targeted him for enforcement. According to Mr. Hastings, his neighbors have undertaken regulated activities and Department staff has not initiated any enforcement against them. To support this contention, Mr. Hastings offered a photograph of a recently constructed boathouse in Greenwood Lake located north of his property. It is depicted in the middle- to back-ground of Exhibit 20. (Tr. at 122-124, 132-134; *see also* Exhibit 26.)

Finally, Mr. Hastings provided a copy of his May 16, 2019 request for information made pursuant to the Freedom of Information Law (FOIL). In pertinent part, Mr. Hastings requested:

public records that describe enforcement actions by the NYSDEC against Greenwood Lake front property owners in Greenwood Lake N.Y. 10925 and Greenwood Lake in Warwick, NY 10990. The time frame will include the two most recent drawdowns of 2012 and 2016. Please include open and closed cases.

With an email dated May 16, 2019, the Department acknowledged receipt of Mr. Hastings' FOIL request. The acknowledgement stated that Mr. Hastings should expect a response by June 14,

2019. As of the date of the hearing, Mr. Hastings stated that he has not received a response from the Department. Because the Department has not responded, Mr. Hastings argued that he could not present a complete defense at the hearing. (*See* Exhibit 21; Tr. at 124-126.)

Contrary to Mr. Hastings' claims, Department staff did not mistakenly commence the captioned matter against him rather than against his neighbor Mr. Bouderau. Moreover, Department staff is not targeting Mr. Hastings. Rather, OHMS received a statement of readiness from DEC Region 3 concerning Mr. Bouderau's property dated June 14, 2019 (DEC Case No. R3-20180503-80).

With respect to relief, Department staff's requests are reasonable and demonstrated by the evidence presented during the administrative hearing. Accordingly, the Commissioner should require the remediation recommended by Department staff, and assess a total civil penalty of \$20,000.

Conclusions

1. Eric Hastings violated ECL 15-0503(1)(b) and 6 NYCRR 608.4(b)(1) when he constructed a bulkhead and related structures on his property below the mean high water level of Greenwood Lake, a protected water, without a permit from the Department. This violation commenced on April 18, 2018 and continued for one year.
2. Eric Hastings violated ECL 15-0505(1) and 6 NYCRR 608.5 when he placed fill in Greenwood Lake, a navigable water of the State, without a permit from the Department. This violation commenced on April 18, 2018 and continued for one year.

Recommendations

For the two demonstrated violations of ECL article 15, title 5, and the implementing regulations at 6 NYCRR part 608, the Commissioner should assess a total civil penalty of \$20,000 and require the remediation recommended by Department staff.

Attached: Exhibit Chart

Exhibit Chart
Matter of Eric D. Hastings
DEC Case File No. R3-20180503-81

Hearing Date: July 23, 2019

Exhibit No.	Description
1	Joint Application Form (4 pages) filed by Eric D. Hastings, signed September 6, 2016. DEC Application No. 3-3354-00581/00003 DEC Application for Permit for the Construction, Reconstruction or Expansion of Docking and Mooring Facilities. Short Environmental Assessment Form, Part 1 – Project Information. Drawings (3 sheets).
2	Notice of Incomplete Application dated October 20, 2016.
3	Set of two photographs, dated June 3, 2019. (Marked for ID only; not received)
4	Cover letter dated November 16, 2016 from Eric D. Hastings to Tracey O’Malley with Drawings (3 sheets).
5	Notice of No Jurisdiction dated December 6, 2016.
6	Set of 5 Photographs. Two dated April 2018; two dated June 3, 2018; one image dated May 23, 2018.
7	Set of 3 Photographs. Two dated November 2016; one image dated April 19, 2016.
8	Email dated June 14, 2018 from Michael Fraatz to Mr. Hastings with attachments. Notice of Violation dated June 14, 2018. Draft Order on Consent (DEC Case No. R3-20180503-81).
9	Set of Drawings (3 sheets). Received NYS DEC Region 3, Natural Resources, August 2, 2018.
10	US Geological Service Gaging Station 01383000 Greenwood Lake at Awosting, New Jersey. Two Graphs.
11	List of Government Jurisdictions.

12	Village of Greenwood Lake, Inc. Building Permit. Building Permit No. 16-07815 Date: December 20, 2016 Expiration Date: December 20, 2017. Expiration Date: June 20, 2017 Permit Renewal Letter dated June 6, 2017 (7 pages)
13	Short Form Assessment Form Part 1 – Project Information Signed September 6, 2016 (See Exhibit 1)
14	Village of Greenwood Lake, Inc. Certificate of Compliance RE: Building Permit No. 16-07815 Date of Issue: December 12, 2017.
15	Set of 3 Photographs (15A, 15B, and 15 C)
16	Matter of Raymond Bouderau Draft Order on Consent DEC Case No. R3-20180503-80.
17	Email from Elisa E. Chae to Mr. Hastings. Subject: Notice of Hearing and Complaint R3-20180503-81.
18	Set of Four Photographs
19	Photograph (Parking)
20	Photograph
21	Letter dated May 16, 2019 from Mr. Hastings Request for Information to DEC made pursuant to New York State Freedom of Information Law (FOIL). Acknowledgement dated May 16, 2019 (Reference No. W052547-051619).
22	Photograph
23	Photograph

24	Photograph
25	Photograph
26	Photograph

Except for Exhibit 3, all exhibits received into evidence. See references throughout transcript.