STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law

- by -

WILLIAM STASACK AND STEPHEN STASACK,

Respondents.

ORDER

DEC File No. R4-2003-1023-117

This matter involves the administrative enforcement of an alleged violation of the protection of waters provision of the New York Environmental Conservation Law (ECL) and accompanying regulation. The alleged violation is based on the placement of fill below the mean high water level of a navigable water of the State (South Long Pond in the Town of Grafton, Rensselaer County) without a permit from the New York State Department of Environmental Conservation (Department). The alleged violation occurred adjacent to property that at the time was owned by respondents William Stasack and Stephen Stasack at 45 Benker School Way, Grafton, New York. Department staff instituted this proceeding to enforce ECL 15-0505(1) and section 608.5 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

This matter was assigned to Chief Administrative Law Judge (CALJ) James T. McClymonds of the Department's Office of Hearings and Mediation Services. CALJ McClymonds had previously granted in part and denied in part Department staff's motion for clarification and to strike affirmative defenses in this proceeding (see Ruling, Dec. 30, 2010). CALJ McClymonds also denied respondents' motion for summary judgment dismissing the complaint or, in the alternative, for partial summary judgment dismissing or reducing the relief requested in the complaint (see Ruling, April 25, 2013).

An administrative enforcement hearing was held on October 2, 2013, at which respondents appeared. CALJ McClymonds prepared the attached hearing report which I adopt as my decision in this matter, subject to the following comments.

Standard of Proof

Where a hearing is held in a Department administrative enforcement proceeding, Department staff bears the burden of proof on all charges and matters affirmatively asserted in the complaint (see 6 NYCRR 622.11[b][1]). Respondents bear the burden of proof on all remaining affirmative defenses (see 6 NYCRR 622.11[b][2]). The standard of proof in Department enforcement proceedings is a preponderance of the evidence (see 6 NYCRR 622.11[b]; see also Matter of Steck, Order of the Commissioner, March 29, 1993, at 4).

Here, I agree with the CALJ that the direct record evidence combined with reasonable inferences taken from this evidence, make it far more probable than not that respondents placed fill below the mean high water level of South Long Pond, a navigable water of the State, without a permit. As discussed below, this is based on, among other things, the testimony of Lisa Dooley (a neighbor of respondents),[1] Daniel Zielinski (the Department's expert), and Vonnie Vannier (respondent Stephen Stasack's wife), and is further based on photographic (see exhibits 5C, 5D, 8A, and 8B) and documentary evidence (see ENCON Police Report Form, annexed as an exhibit to respondents' motion for summary judgment).[2]

I also agree with the CALJ that respondents failed to carry their burden of proof on their three remaining affirmative defenses. Accordingly, these defenses are dismissed.

[1] Ms. Dooley and other neighbors have an easement to use the beach adjacent to respondents' property on South Long Pond. Respondent Stephen Stasack attempted to revoke the easement, which both Supreme Court and the Appellate Division rejected and permanently enjoined respondents from interfering with or obstructing easements for use of the beach (see Stasack v Dooley, 292 AD2d 698 [3d Dept 2002]).

[2] Although the CALJ did not admit the ENCON Police Report into evidence at the hearing (see transcript [t.] at 35), respondents had included it as an exhibit to their motion for summary judgment dated January 13, 2012. By operation of State Administrative Procedure Act § 302(1), it is therefore a part of the record in this proceeding: "The record in an adjudicatory proceeding shall include: (a) all notices, pleadings, motions, intermediate rulings" (emphasis added) (see also 6 NYCRR 622.17[b]). Respondents can hardly claim any prejudice when they themselves submitted the document as part of their case in this proceeding.

Liability

CALJ McClymonds concluded that Department staff established that respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 by (1) placing fill, (2) below the mean high water level, (3) of a navigable water of the State (South Long Pond), (4) without a permit. I agree with the CALJ's analysis of these statutory and regulatory elements of the violation and determine that Department staff established the violation.

Element 1: Placement of Fill

Respondents acquired the property located at 45 Benker School Way, Grafton, New York, on or about August 19, 1998 (see exhibit A). The record reveals that a jetty was pre-existing on South Long Pond adjacent to respondents' property, and that after respondents acquired the property, respondents further improved or enlarged the jetty by placement of additional fill on it. The record also contains an admission from Ms. Vannier that she and respondents placed a bench and a flagpole on the jetty, which is in an area below the mean high water level of South Long Pond (t. 79) adjacent to the property that she co-owned with respondents.

The CALJ correctly noted that the bench and the flagpole constitute illegal fill (see Hearing Report at 9). Department staff also established that the jetty and the concomitant addition of fill by respondents have an adverse impact on navigation and habitat (see Hearing Report at 6).

The record also demonstrates that respondents did extensive work in and at the pond on April 20, 2003. Ms. Dooley testified that she took photographs on that morning, which depicted an excavator either in the pond or on the beach adjacent to the pond (see Exhibits 5C [depicting excavator in or at the edge of the pond] and 5D [depicting extensive fill on the beach of the site]).

In addition to the evidence relied on by the CALJ, which is sufficient to establish respondents' placement of fill, other record evidence further supports the CALJ's fact finding. A Department Environmental Conservation Officer went to the site on April 20, 2003. The ENCON Police Report Form states that "the property owners had an excavator in the pond." The Police Report further stated that

> "A significant amount of area was disturbed, fill placed in the pond, wetlands areas filled in, removed soil from pond bottom and built up parts of an area that was to be used as a beach. All done without obtaining a permit from the Department, nor using proper erosion and sedimentation control to avoid negative effects on existing life in South Long Pond, Class B."

The testimony and photographic and documentary evidence thus establish the first element of an ECL 15-0505(1) and 6 NYCRR 608.5 violation: placement of fill.

Element 2: Below the Mean High Water Level

As to establishing that the fill was placed below the mean high water level, the Department's expert witness, Mr. Zielinski, explained how he followed the regulatory requirement (6 NYCRR 608.1[r]) to determine the mean high water level of South Long Pond at respondents' property at 45 Benker School Way. At the time that Mr. Zielinski testified, he had over 20 years of experience as an aquatic biologist (see t. at 43-44).

Mr. Zielinski interpreted the regulation and used his training to determine the mean high water level of 45 Benker School Way, relying on hydrology and vegetative and physical characteristics to make this determination, as the regulation requires. He placed flags and spray painted the mean high water mark at the site (see exhibits 8-A and 8-B), and determined that respondents' fill activities occurred below the mean high water level at the site (see t. at 41-44; Hearing Report at 8-9).

Element 3: Navigable Water of the State

The CALJ also analyzed why South Long Pond is a navigable water of the State (see Hearing Report at 9-17). In summary, he concluded that South Long Pond is navigable in fact under the common law definition of navigable in fact. Alternatively, he concluded that South Long Pond is a navigable water under the broader definition of ECL article 15 and the Navigation Law. I accept this analysis and determine that South Long Pond is a navigable water of the State.

Element 4: Without a Permit

Mr. Zielisnki also determined that respondents placed fill at the site without obtaining an ECL article 15 permit from the Department (see t. at 59). I therefore determine that Department staff established this element of the violation.

In conclusion, Department staff established the violation set forth in the complaint relating to respondents' placement of fill below the mean high water level of a navigable water of the State without a permit in violation of ECL 15-0505(1) and 6 NYCRR 608.5.

By letter dated December 12, 2016 from then Region 4 Assistant Regional Attorney Dusty Renee Tinsley, the Office of Hearings and Mediation Services was advised that respondents Stephen Stasack and William Stasack, together with Vonnie A. Vannier, had sold the property they owned at 45 Benker School Way, Grafton, New York on April 18, 2016. This change of circumstance does not affect respondents' liability for their illegal placement of fill into the navigable waters of the State at a location adjacent to the property that they formerly owned (see ECL 71-1127[1]; see also Matter of Scully, Order of the Commissioner, May 6, 1992, at 1-2 [holding respondent who disposed of illegal fill on property of another to be in violation of ECL 15-0505]; see also Matter of John Ames, Order of the Commissioner, December 29, 1994).

Civil Penalty

I further conclude that the civil penalty sought by Department staff – ten thousand dollars ($10,000) – to address the violation is authorized and appropriate. This amount is far below the total civil penalty that could have been assessed against respondents for this multi-year continuing violation of the legal requirements (see Hearing Report at 18-19).

Corrective Action/Restoration

Department staff has proposed various corrective actions to address this impediment to navigation and restore wildlife habitat. Department staff is seeking the following restoration activities at the site:

(a) restoration of the shoreline of South Long Pond to its pre-disturbance condition (this includes complete removal of the jetty);

(b) carrying out all restoration activities to ensure the protection of water quality and aquatic natural resources, including implementation of erosion and sediment control measures to reduce turbidity while the restoration is occurring;

(c) notification to Department staff at least seven (7) days in advance of initiation of restoration work and arranging a site visit to outline planned restoration activities; and

(d) a date certain by which to complete the restoration.

In considering the requested corrective action and restoration, the record reflects that not all the fill placed into navigable waters as to the jetty is due to respondents' activities (see Hearing Report at 19). Although respondents added to and undertook activities relative to the jetty that constituted the placement of fill below the high water level of a navigable water without a permit and violated applicable legal requirements, the initial placement of the jetty was by unknown and unidentified third parties (see id.).

Accordingly, and as the CALJ recommends in his hearing report, I decline to order respondents to undertake restoration activities that would involve removal of those portions of the jetty that did not result from respondents' activities. Certain of respondents' restoration activities will, however, necessitate shoreline restoration. Respondents shall incorporate such restoration into their restoration plan.

Consequently, I am directing respondents to submit a restoration plan to Department staff in approvable form,[3] which would include removal of respondents' additions and improvements to the jetty, including any rocks or boulders, the bench, and the flagpole, below the mean high water mark of South Long Pond, and appropriate shoreline restoration. Upon Department staff's approval of the restoration plan, respondents are required to implement the plan under the supervision of Department staff.

[3] "Approvable" means that which can be approved by Department staff with only minimal revision. To facilitate the preparation of the restoration plan, I encourage respondents to discuss the development of the restoration plan with Department staff prior to the plan's submission.

Respondent shall notify Department staff at least seven (7) days prior to respondents' undertaking restoration activities. This notification requirement shall be included in the restoration plan. In addition, milestone dates by which restoration activities will be completed, as well as the date by which the restoration activities are to be fully achieved, are also to be set forth in the plan. Department staff may, at its discretion, modify any of these dates upon good cause shown by respondents. Any request for modification of a date must be in writing with a detailed explanation in support.

The circumstance that respondents have sold the adjacent property does not relieve them of their remedial obligations. A person subject to an order directing remedial activity has the initial obligation to make reasonable good faith efforts to obtain the consent of any third-party property owners necessary to fulfill the remedial obligations (see e.g. Matter of Ramcharan, Order of the Commissioner, July 24, 2011, at 4). If respondents' access is denied or unduly restricted with respect to the restoration work, respondents are directed to immediately contact Department staff to review and address access-related issues.

Finally, the CALJ recommends that I direct staff to (a) remove any illegal fill that remains in the location of the subject jetty (following the respondents' removal of the illegal fill and improvements that they added to the jetty) and (b) restore the shoreline to its pre-disturbance condition (see Hearing Report at 19).[4] I decline to impose such obligations on staff in this matter. To the extent, however, that staff determines that (a) other parties may be responsible for all or a portion of the illegal fill that cannot be attributed to respondents' activities or (b) the current landholders of adjoining property have certain liabilities with respect to this illegal fill, nothing in this order precludes staff from pursuing other potentially responsible parties.

[4] As noted, respondents shall be responsible for restoring the shoreline that was impacted by their illegal activities.

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

I. Based upon a preponderance of the record evidence, respondents William Stasack and Stephen Stasack are adjudged to have violated ECL 15-0505(1) and 6 NYCRR 608.5, by placing fill below the mean high water level of a navigable water of the State without a permit.

II. Respondents William Stasack and Stephen Stasack are assessed, jointly and severally, a civil penalty in the amount of ten thousand dollars ($10,000) for the violations set forth in paragraph "I" of this order.

III. Within thirty (30) days of service of this order upon respondents William Stasack and Stephen Stasack, respondents shall pay the civil penalty referenced in paragraph "II" of this order in the amount of ten thousand dollars ($10,000) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

IV. The penalty payment shall be sent to the following address:

NYS Department of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attention: Mark D. Sanza, Esq.[5]

V. In addition to the payment of a civil penalty, no later than thirty (30) days after service of this order upon respondents William Stasack and Stephen Stasack, respondents are ordered to submit a restoration plan in approvable form to Department staff, which shall include the following:

A. the removal of all illegal fill placed by respondents or third parties under their control below the mean high water level of South Long Pond, adjacent to the premises that they owned at 45 Benker School Way, Grafton, New York, including but not limited to rocks, boulders, the bench, and the flag pole;

[5] By notice of appearance dated August 15, 2017, Assistant Counsel Mark D. Sanza has been substituted as attorney-of-record for the Department.

B. a description of the erosion and sediment control measures to reduce turbidity that respondents will employ during any and all restoration activities, as well as other measures necessary to protect water quality and aquatic natural resources;

C. milestone dates for the restoration activities, in addition to providing Department staff with at least seven (7) days notice in advance of initiation of restoration work and with a date certain for completion of the restoration work; and

D. arrangements for a site visit with Department staff prior to commencement of the restoration work to review respondents' planned restoration activities and for a site visit following completion of the restoration work for the purpose of determining compliance with the Department-approved restoration plan.

VI. No later than fifteen (15) days after respondents William Stasack and Stephen Stasack receive notification from the Department of the Department's approval of the restoration plan, respondents are required to begin the restoration work in the plan, and conclude the work in accordance with the timeframes contained in the restoration plan. Department staff may, at its discretion, modify the commencement date and dates in the restoration plan upon good cause shown by respondents.

VII. Respondents William Stasack and Stephen Stasack shall submit the restoration plan required in paragraph "V" of this order to:

New York State Department of
Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attention: Mark D. Sanza, Esq.

VIII. Respondents' affirmative defenses are dismissed.

IX. The provisions, terms, and conditions of this order shall bind respondents William Stasack and Stephen Stasack and their agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
October 26, 2017

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law (ECL)

- by -

WILLIAM STASACK and STEPHEN STASACK,

Respondents.

HEARING REPORT

DEC File No.
R4-2003-1023-117

April 25, 2014

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Jill T. Phillips of counsel), for staff of the Department of Environmental Conservation

-- Stephen A. Stasack, respondent pro se and for respondent William Stasack

HEARING REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges that respondents William Stasack and Stephen Stasack violated Environmental Conservation Law (ECL) article 15 by constructing a 66 foot long jetty in the navigable waters of South Long Pond located in the Town of Grafton, Rensselaer County, without a permit. An evidentiary hearing was conducted on October 2, 2013. Based upon the hearing record, and for the reasons that follow, I conclude that Department staff proved the violation by a preponderance of the record evidence.

I. PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated July 1, 2010 (see Exhibit [Exh] 2). In the complaint, staff alleged that respondents William Stasack and Stephen Stasack own property located at 45 Benker School Way,

Town of Grafton, Rensselaer County (Tax Map Parcel # 107.-2-23) (the site), adjacent to South Long and Dyken Ponds (the Pond).[1] Staff further alleged that the Pond is a navigable body of water as defined in section 608.1(u) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Based on inspections of the site conducted on May 8, 2003, and April 30, 2009, staff charged that respondents constructed an approximately 50 foot long jetty in the Pond, placed large rocks into the Pond, and disturbed the shoreline along the width of the site. Staff further alleged that respondents lacked a permit for the construction activities, and that the construction interferes with the recreational uses of the Pond, and fish, shellfish, and wildlife habitat. Accordingly, staff charged respondents with continuing violations of ECL 15-0505(1) and 6 NYCRR 608.5. Staff seeks a civil penalty in the amount of $10,000, and remediation of the site.

Respondents filed an answer and affirmative defenses dated July 15, 2010 (see Exh 3). In their answer, respondents denied the material elements of the complaint, including the allegations that respondents own the property at issue, or that the Pond is a navigable water. Respondents also pleaded nine affirmative defenses.

By motion dated July 23, 2010, staff moved to strike the affirmative defenses or, in the alternative, for clarification of those defenses. Respondents opposed. In a ruling dated December 30, 2010, I granted Department staff's motion to strike affirmative defenses in part, and dismissed the defenses of failure to join necessary parties (a portion of respondents' second affirmative defense), election of remedies (a portion of the third affirmative defense), selective enforcement (the sixth affirmative defense), laches (a portion of the eighth affirmative defense), statute of limitations (the ninth affirmative defense), res judicata, and collateral estoppel (the tenth affirmative defense) (see Matter of Stasack, Ruling of the Chief Administrative Law Judge [ALJ] on Motion for Clarification and To Strike Affirmative Defenses, Dec. 30, 2010). I otherwise denied Department staff's motion for clarification or to strike affirmative defenses.

[1] In this hearing report, when both ponds are referred to as a single body of water, they are referred to as the "Pond." Otherwise, they are referenced separately as "South Long Pond" or "Dyken Pond," respectively.

On September 16, 2011, Department staff filed a statement of readiness for adjudicatory hearing (see 6 NYCRR 622.9). The hearing was adjourned, however, while the parties attempted a mediated settlement with ALJ Richard R. Wissler.

When the mediation failed to produce a settlement, respondents filed a notice of motion for summary judgment dated January 13, 2012. In their motion, respondents sought dismissal of the complaint on multiple grounds. In the alternative, respondents sought partial dismissal of the relief sought by Department staff, including a reduction in any applicable penalty. Respondents also sought reargument and reconsideration of my prior ruling striking respondents' statute of limitations defense. Department staff opposed respondents' motion.

In a ruling dated April 25, 2013, I denied respondents' motion in its entirety (see Matter of Stasack, Ruling of the Chief ALJ on Motion for Summary Judgment, April 25, 2013). I subsequently issued a notice of enforcement hearing dated June 28, 2013, directing the parties to appear for an adjudicatory hearing on October 2, 2013 (see Exh 1).

The parties appeared as directed. Department staff was presented by Jill T. Phillips, Esq., Senior Attorney. Two witnesses testified for the Department: Lisa Dooley, and Daniel J. Zielinski, Aquatic Biologist 1, New York State Department of Environmental Conservation, Region 4, Bureau of Fisheries. Respondents were represented by Stephen A. Stasack, Esq. One witness, Vonnie J. Vannier, testified for respondents. The hearing was concluded on October 2.

After the hearing concluded, a briefing schedule was established. The transcript of the hearing was received by my office on October 22, 2013. On October 31, 2013, Department staff requested two corrections to the transcript, and respondents objected. By email ruling dated November 7, 2013, I granted staff's request. A ruling correcting the transcript is attached to this hearing report.

Respondent filed a closing brief on November 13, 2013. Department staff filed a closing brief dated November 14, 2013. Respondent filed a reply brief on December 4, 2013. Department staff filed a reply brief dated December 5, 2013.

II. FINDINGS OF FACT

Based upon the preponderance of the record evidence, I make the following findings of fact (see 6 NYCRR 622.11[c]).

1. South Long Pond is located in the Town of Grafton, Rensselaer County (see Freshwater Wetland Map J27NW, Exh 4;[2] see also 6 NYCRR 863.6, Table I, Item No. 777; 6 NYCRR 863.9, Ref. Map No. K-26NW). Dyken Pond is located south of South Long Pond (see id.). The two ponds are hydrologically connected; South Long Pond and Dyken Pond appear as a single water body on all relevant maps (see id.). South Long Pond and Dyken Pond together are the headwaters of the Poesten Kill, which, in turn, is a tributary of the Hudson River (see id.).

2. South Long Pond and Dyken Pond are classified in the State's water quality classification system as class B fresh surface water bodies (see 6 NYCRR 863.6, Table I, Item No. 777; see also 6 NYCRR 863.9, Ref. Map No. K-26NW). The best uses of class B fresh surface water bodies are for primary and secondary contact recreation and fishing, including swimming and boating, and the waters are suitable for fish, shellfish, and wildlife propagation and survival (see 6 NYCRR 701.7; 6 NYCRR 700.1[a][49] [primary contact recreation]; 6 NYCRR 700.1[a][56] [secondary contact recreation]; see also Tr at 52).

3. South Long Pond and Dyken Pond have been used by the public for boating, fishing, and swimming (see Tr at 15, 22, 54, 57-58; see also Exh 10). A person can navigate between South Long Pond and Dyken Pond on a boat (see Tr at 22, 57-58).

4. A publicly-accessible non-motorized boat launch is available at the Dyken Pond Environmental Center located at 475 Dyken Pond Road, Cropseyville, New York (see Exh 10). The Center's literature indicates that the pond is available for fishing, canoeing, and kayaking (see id.). The boat launch is located on the western shore of Dyken Pond (see Exh 4 [marked "BL"]).

5. Respondents Stephen Stasack and William Stasack, and non-respondent Vonnie Vannier jointly own a parcel of property

[2] Dyken Pond is identified as Dyking Pond on Freshwater Wetland Map J27NW (see Exh 4). Dyken Pond and Dyking Pond are the same water body (see Hearing Transcript [Tr] at 56).

located at 45 Benker School Way, Town of Grafton, Rensselaer County (Tax Map Parcel No. 107.-2-23) (see Deed [8-20-98], Exh A). Respondents' parcel lays adjacent to the eastern shore of South Long Pond. The westerly border of respondents' parcel is the "approximate high water mark of South Long Pond" (id.).

6. The approximate mean high water level of South Long Pond in the location of respondents' parcel is as indicated by the flags and white spray paint shown on Exhibits 8A and 8B (see Tr at 41-44).

7. Respondents' and Ms. Vannier's ownership of the parcel is "subject to the right of other owners of beach privileges to the private beach located on the premises hereby conveyed for swimming and bathing purposes" (Deed [8-20-98], Exh A). The Appellate Division, Third Department, has held that this deed provision grants easements to owners of neighboring parcels on Benker School Way to use the private beach located on respondents' property for swimming and bathing purposes (see Stasack v Dooley, 292 AD2d 698 [3d Dept 2002]).

8. Respondents and Ms. Vannier acquired the property in August 1998 (see Exh A; Tr at 73). At the time they acquired the property, an earthen jetty extended from the boundary of their property and into South Long Pond (see Exhs B, P-19). The person responsible for the initial placement of the jetty is unknown.

9. On April 20, 2003, respondents William and Stephen Stasack, with assistance of unknown third parties, placed significant amounts of fill below the mean high water mark of South Long Pond by adding fill to the jetty extending from their property line into the pond (see Tr at 17, 19-22, 36-46, 51; Exhs B, P-8, P-9, P-18, P-19 [before], 5C, 5D [during], 7A, 7B, 8A, 8B [after]).

10. Respondents did not have a permit from the Department for the fill activities conducted on April 20, 2003 (see Tr at 59).

11. Inspections conducted by Department staff on April 30, 2009, and December 1, 2011, revealed that the jetty remained in place. The jetty is approximately 66 feet long and 35 feet wide (see Tr at 51).

12. The jetty interferes with navigation in the South Long Pond. Neither boats nor swimmers can navigate across the jetty. In addition, construction of the jetty permanently destroyed habitat for fish, plants, and other organisms in the location of the jetty and degraded the underwater environment in the channel adjacent to the jetty (see Tr at 38-39).

III. DISCUSSION

A. Standard of Review

Where a hearing is held in a Departmental administrative enforcement proceeding, Department staff bears the burden of proof on all charges and matters affirmatively asserted in the complaint (see 6 NYCRR 622.11[b][1]). Respondents bear the burden of proof on all remaining affirmative defenses (see 6 NYCRR 622.11[b][2]). Whenever factual matters are involved, the party with the burden of proof must sustain that burden by a preponderance of the record evidence (see 6 NYCRR 622.11[c]).

Some elements of Department staff's case are supported by circumstantial evidence. Given this, respondents argue that in order to carry its burden of proof on factual matters, staff's evidence must point to a single conclusion. Respondents assert that if staff's evidence points to more than one possible fact, "it is inconclusive and inadmissible" (Respondents' Reply Brief, third unnumbered page). Respondents misstate the applicable standard.

As an initial matter, whether evidence is circumstantial goes to the sufficiency of evidence supporting staff's case, not the admissibility of that evidence (see Spett v President Monroe Bldg. & Mfg. Corp., 19 NY2d 203, 205 [1967]). In civil proceedings, such as administrative enforcement proceedings before the Department, if a plaintiff relies entirely on circumstantial evidence, it is enough that the plaintiff shows facts and circumstances from which the defendant's guilt "`may be reasonably inferred'" (Schneider v Kings Highway Hosp. Ctr., Inc., 67 NY2d 743, 744 [1986] [quoting Ingersoll v Liberty Bank, 278 NY 1, 7 (1938)]; see also Prince, Richardson on Evidence § 4-303 [Farrell 11th ed 1995]). A plaintiff is not required to negate all other possible

inferences (see Schneider, 67 NY2d at 744). Rather, the plaintiff's proof must render those other inferences sufficiently remote or technical to enable the fact finder to reach its conclusions based not on speculation, "but upon the logical inferences to be drawn from the evidence" (id.). Any stricter standard -- such as the standard applicable in criminal proceedings alluded to by respondents' argument (see Richardson on Evidence § 4-304) -- is not applicable in this civil proceeding.

B. ECL Article 15 Violation

In its July 1, 2010, complaint, Department staff charges respondents with continuing violations of ECL 15-0505(1) and its implementing regulation at 6 NYCRR 608.5. ECL 15-0505(1) provides that "[n]o person . . . shall excavate or place fill below the mean high water level in any of the navigable waters of the state . . . without a permit issued" by the Department (see also 6 NYCRR 608.5 [same]). For purposes of section 15-0505, "fill shall include, but shall not be limited to, 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" by a structure (ECL 15-0505[1]; see also 6 NYCRR 608.1[m]). To establish the violation charged in the complaint, Department staff had the burden of proving that respondents (1) excavated or placed fill below the mean high water level of (2) a navigable water of the State (3) without a permit from the Department. Based upon a preponderance of the direct record evidence, and the reasonable inferences drawn therefrom, Department staff carried its burden of proving the violation charged.

1. Excavation and Fill Below the Mean High Water Level

For purposes of ECL 15-0505(1), the mean high water level is defined as "the approximate average . . . high water level for a given body of water at a given location, that distinguishes between predominately aquatic and predominately terrestrial habitat as determined, in order of use by the following:

"(1) available hydrologic data, calculations, and other relevant information concerning water levels . . . ;

"(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]).[3]

In this case, direct record evidence establishes the location of the mean high water level at the site, which corresponds with respondents' western property line. Department staff's witness, who is an expert in locating mean high water levels, testified that he used the vegetative and physical characteristics of the site to demarcate the mean high water level at the site (see Tr at 41-44). Thus, the mean high water level of South Long Pond in the vicinity of respondents' property is as it is depicted in Exhibit 8A and 8B. The subject jetty is located west of and, consequently below, the mean high water level.

Moreover, respondents repeatedly denied ownership of the property on which the jetty is located, and admitted that their property adjoins that property (see, e.g., Answer ¶¶ 20-21). Inasmuch as respondents' western property line is the "approximate high water mark of South Long Pond" (Deed, Exh A), and the jetty is located to the west of respondents' parcel, the jetty is located below the high water mark of the Pond.

The preponderance of direct evidence together with the reasonable inferences drawn from that evidence supports the conclusion that respondents conducted fill activities to the west of, and therefore below, the mean high water level of South Long Pond. The Department's witness and respondents' neighbor, Lisa Dooley, testified that on April 20, 2003 (Easter Sunday),

[3] Respondents persist in arguing that the mean high water level is determined by averaging the mean high and mean low water level at a given location. I have previously rejected respondents' misinterpretation of the applicable regulatory standard (see Ruling, April 25, 2013, at 13-15).

another neighbor notified her that respondents were working with equipment down on the beach adjacent to respondents' property and asked Ms. Dooley to come take photographs. The photographs taken by Ms. Dooley on April 20, 2003, reveal respondents and unknown third persons working with shovels and heavy equipment on the beach adjacent to respondents' property, which is below the mean high water level of South Long Pond at that location (see Exhs 5C, 5D, 8A, and 8B). The photographs also show a large pile of fill on the beach (see Exh 5D). Photographs taken before and after April 20, 2003, reveal that the jetty was improved by being widened and leveled out, and planted with grasses (compare Exhs B [aerial photograph taken in 1994], P-8, P-9, P-18, and P-19 [photographs taken in 1998 and 1999] with Exhs 7A, 7B [photographs taken in 2009], 8A, and 8B [taken in 2011]). In addition, Ms. Vannier, a co-owner of respondents' property, testified that she and respondents placed a flag pole and bench at the end of the jetty, both of which are fill under the regulations. Accordingly, the direct evidence and the reasonable inferences drawn therefrom lead to the conclusion that on or about April 20, 2003, respondents and persons under their direction and control placed fill below the mean high water level of South Long Pond in the location of the jetty.

In closing briefing, respondents argue that the heavy equipment observed by Ms. Dooley "could have been there simply to move large rocks interfering with the driveway, removing tree stumps, or correcting drainage problems near the camp" (Respondent's Closing Brief at second unnumbered page). Respondents' argument is uncorroborated speculation. Respondents proffered the testimony of Ms. Vannier, who, as a co-owner of the property adjacent to the jetty, could have easily provided direct evidence of any of these other explanations for the equipment and work observed on April 20, 2003. However, she did not so testify. Respondents offered no other evidence supporting the suggested alternatives. Accordingly, I conclude that it is more likely than not that the activities observed on April 20, 2003, involved the improvement and filling of the jetty, and not the other activities suggested by respondents.

2. Navigable Water of the State

I also conclude that Department staff established that South Long Pond is a navigable water of the State. Under the

Department's regulations, "navigable waters of the State" for purposes of ECL 15-0505 include "all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation" (6 NYCRR 608.1[u]). As the Commissioner has recently explained, although the definition of navigable waters under ECL 15-0505 includes the common law definition of waters "navigable in fact," navigability under ECL 15-0505 is broader than the common law definition (see Matter of Serth, Decision of the Commissioner, Dec. 19, 2012, at 5-6; see also Matter of Stasack, Ruling of the Chief ALJ on Motion for Summary Judgment, April 25, 2013, at 4-9). Consistent with ECL article 15's broad environmental protection purposes and goals, navigability under ECL article 15 includes not only uses of the State's waters for travel or transportation, but for a variety of other uses including boating, fishing, swimming, water sports, and other recreational purposes (see Serth, at 5-8). Article 15 also protects the State's waters for purposes of fish and wildlife habitat protection, and water quality and purity (see id. at 6).

In this case, record evidence supports the conclusion that South Long Pond is navigable under the common law definition of navigable in fact. Under the common law, a water is navigable in fact if it has the capacity, in its natural state and ordinary volume of water, to be used by the public as a highway for transportation, whether for trade or travel (see Adirondack League Club, Inc. v Sierra Club, 92 NY2d 591, 601-604 [1998]). Recreational, as well as commercial, uses support a finding of navigability in fact, provided the water has practical utility for travel or transportation (see id. at 603-604).

Respondents assert that South Long Pond lacks multiple public access points and, thus, is not navigable in fact. While the lack of multiple access points is a relevant factor (see Hanigan v State of New York, 213 AD2d 80, 84-85 [3d Dept 1995]), the availability of access points is only one factor to be considered in determining a water body's suitability for public travel or transportation (see Mohawk Valley Ski Club, Inc. v Town of Duanesburg, 304 AD2d 881, 883 [3d Dept 2003]).

Here, the record supports the conclusion that South Long Pond has practical utility for travel or transportation by the public. The public boat launch on Dyken Pond, which is hydrologically connected to South Long Pond, provides the public with a practical means of accessing South Long Pond. Moreover, the record reveals that the public may and does engage in recreational travel between Dyken Pond and South Long Pond. Further, both Dyken Pond and South Long Pond are relatively large,[4] and the lands surrounding the ponds are not held in single ownership (compare Hanigan at 84-85). Thus, South Long Pond is navigable in fact under the common law definition of the term.

In the alternative, South Long Pond is a navigable water of the State as that term is more broadly defined under ECL article 15. South Long Pond is classified in the State's water quality classification system as class B fresh surface water bodies (see 6 NYCRR 863.6, Table I, Item No. 777; see also 6 NYCRR 863.9, Ref. Map No. K-26NW). The best uses of class B fresh surface water bodies are for primary and secondary contact recreation and fishing, including swimming and boating, and the waters are suitable for fish, shellfish, and wildlife propagation and survival (see 6 NYCRR 701.7; 6 NYCRR 700.1[a][49] [primary contact recreation]; 6 NYCRR 700.1[a][56] [secondary contact recreation]). Record evidence establishes that South Long Pond is used for boating, fishing, and swimming, which are among the uses for which the Pond is classified. Thus, Department staff has established that South Long Pond is a navigable water of the State as that term is defined under ECL 15-0505, its implementing regulations, and Commissioner decisions.

In addition, a separate and independent basis exists for concluding that the requirements of ECL 15-0505 apply to South Long Pond. Under section 31 of the Navigation Law, a permit pursuant to ECL 15-0505 is required for excavation and fill in waters navigable under that statute (see also Navigation Law § 2[4]). Under Navigation Law § 37, the provisions of the Navigation Law, including section 31, "apply to privately owned

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[4] The Department's Lake Map for Dyken Pond shows that the combined surface area of Dyken Pond and South Long Pond is approximately 134 acres. The Lake Map is publicly accessible on the Department's website at http://www.dec.ny.gov/docs/fish_marine_pdf/dykpdmap.pdf. To the extent necessary, I take judicial notice of this publicly available map (see 6 NYCRR 622.11[a][5]).

navigable waters to which the public has or is granted access, for compensation or otherwise, for boating, bathing, swimming or other recreational uses or purposes." As noted above, the record establishes that the public has access to South Long Pond for boating and fishing via a public boat launch on Dyken Pond, which is hydrologically and navigationally connected with South Long Pond (see Exh 10 at 3). Thus, ECL 15-0505 applies to South Long Pond under Navigation Law § 37 as well (see Town of N. Elba v Grimditch, 98 AD3d 183, 193 n 7 [3d Dept 2012]).

Respondents assert that the regulation at 6 NYCRR 608.1(u), which defines navigable waters of the State to include waters upon which vessels with a capacity of one or more persons may be operated, impermissibly expands navigable waters under ECL 15-0505 beyond waters that are navigable in fact and, thus, is an invalid enactment under the separation of powers doctrine (citing Boreali v Axelrod, 71 NY2d 1 [1987]). As an initial matter, although respondents cite Boreali, they make no effort to establish how the four factors examined in that case compel the conclusion that section 608.1(u) is invalid. To the contrary, application of the Boreali analysis to ECL 15-0505 and its implementing regulations support the validity of the regulatory definition of navigability.[5]

At its essence, a Boreali analysis examines whether an agency's rulemaking involved impermissible "regulation on a clean slate without any legislative guidance" or the balancing of competing goals and costs that is unique to legislative policy-making, or whether the agency merely "fill[ed] in the interstices" of legislatively established standards by

[5] Department staff declined to address this argument on the merits based upon its view that challenges to regulations should not be raised before the agency. I disagree. Respondents are required to raise challenges to regulations at the agency level under principles governing exhaustion of administrative remedies to allow the agency to consider the challenge in the first instance (see Matter of Zelinsky v Tax Appeals Trib., 1 NY3d 85, 89 (2003), cert denied 541 US 1009 [2004] [confirming agency rejection of as-applied constitutional challenge to agency regulation]; Matter of Murtaugh v New York State Dept. of Envtl. Conservation, 42 AD3d 986, 988 [4th Dept 2007] [petitioners failed to exhaust administrative remedies with respect to their challenge to the constitutionality of agency regulation where the alleged constitutional error could have been remedied in the administrative appeal process]; Matter of Alston v New York City Tr. Auth., 186 AD2d 649 [2d Dept 1992] [challenge to agency regulations not preserved for judicial review when petitioner failed to raise issue before agency]). Thus, it is appropriate to address respondents' challenge to the Department's regulation in this venue.

prescribing rules and regulations consistent with the enabling legislation (Matter of Medical Soc'y of N.Y. v Serio, 100 NY2d 854, 865 [2003] [quoting Matter of Nicholas v Kahn, 47 NY2d 24, 31 (1979)]). Review of the legislative history of ECL 15-0505 and its implementing regulations reveals the later circumstance.

The expansion of navigable waters beyond waters "navigable in fact" is based not upon agency policy-making, but upon decades of clear legislative enactments and guidance. ECL 15-0505 traces its history back to the Laws of 1941, when the Legislature comprehensively recodified the Navigation Law (see L 1941, ch 941). The first State-wide prescription against excavation and fill in navigable waters was enacted as Navigation Law § 31. That provision provided that "[n]o channel shall be excavated nor shall any fill be placed in the navigable waters of the state without approval of the superintendent of public works" (Navigation Law § 31, as enacted by L 1941, ch 941). "Navigable waters of the state" was defined to mean "all inland lakes and streams wholly included within the state and not privately owned which are navigable in fact and are not connected by navigable channels with tidewater" (Navigation Law § 2[4], as enacted by L 1941, ch 941). "Navigable in fact" was further defined to mean "navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation" (Navigation Law § 2[5], as enacted by L 1941, ch 941). Thus, as originally enacted, the statutory definition of navigable waters of the State was limited to the common law definition of waters "navigable in fact" (compare Morgan v King, 35 NY 454, 459 [1866]), and further limited to exclude waters navigable in fact that connected with tide waters. Moreover, the Navigation Law's provisions were expressly applicable to "public use of privately owned navigable waters" (Navigation Law § 37, as enacted by L 1941, ch 941).

The ensuing decades witnessed a gradual legislative expansion of the statutory definition of navigable waters as the Legislature sought to address first the protection of navigation and boat safety and, later, broader environmental concerns. In 1956, to expand the Navigation Law's boat safety provisions to all boating in the State, the Legislature amended the definition

of "navigable waters of the state" to include all waters "navigable in fact or upon which vessels are operated" (Navigation Law § 2[4], as amended by L 1956, ch 596, § 1 [emphasis in original]; see also Mem of Joint Legis Comm on Motor Boats, Bill Jacket, L 1956, ch 596 at 7-8). The Legislature also removed the exception for waters connected to tidal waters, although it did retain the exception for tide waters of the lower Hudson River and Long Island Sound (see id.).[6]

In 1961, the Legislature further amended the Navigation Law to make clear that its provisions applied not only to publicly owned navigable waters, but also privately owned waters to which the public had access. It also expanded the law's coverage to waters used not only for boating, but for other recreational uses. Navigation Law § 37 was amended to provide, "The provisions of this chapter shall apply to privately owned navigable waters to which the public has or is granted access, for compensation or otherwise, for boating, bathing, swimming or other recreational uses or purposes" (as amended by L 1961, ch 864 [emphasis added]). The purposes of the expansion was to extend the protections of the Navigation Law to recreational uses of waters "whenever a privately owned lake is utilized, in effect, as a public waterway" (Legislative Mem, Bill Jacket, L 1961, ch 864 at 9). Thus, by 1961, the provisions of the Navigation Law, including the prescription against excavating and filling in the navigable waters of the State without approval from the Superintendent of Public Works, applied not only to waters "navigable in fact" under the common law, but also to lakes such as South Long Pond to which the public had access for recreational boating or swimming, among other uses.

In 1965, the Legislature began expanding the scope of the protection of navigable waters to address not only boat safety and navigation, but also broader environmental concerns. In that year, as part of the consolidation of various water pollution prevention statutes within a single agency, the Legislature transferred jurisdiction over the protection of navigable waters from the Superintendent of Public Works to the

[6] The exception for tide waters of the lower Hudson River and Long Island Sound was based upon the understanding that the United States Coast Guard actively controlled those areas (see Mem of Joint Legis Comm on Motor Boats at 8).

recently created Water Resources Commission (WRC)[7] within the former Conservation Department (see Conservation Law § 429-b, as enacted by L 1965, ch 955, § 7). As enacted, former Conservation Law § 429-b provided that "[n]o person . . . shall excavate or place fill in the navigable waters of the state as defined by Subdivision 4 of Section 2 of the Navigation Law, unless a permit therefor shall have first been obtained" from the WRC. Navigation Law § 31 was also amended to provide that "[n]o person . . . shall excavate or place fill in the navigable waters of the state without first obtaining a permit therefor in conformity with the provisions of [Conservation Law § 429-b]" (as amended by L 1965, ch 955, § 8). Among the reasons for the consolidation of water pollution prevention laws under the jurisdiction of the WRC was not only to protect the recreational uses of waters for boating, fishing, bathing, and other water sports, but to address the erosion, turbidity, siltation, water quality degradation, habitat destruction, and other adverse environmental impacts associated with the interference with, defilement of, and disturbances of water courses within the State (see former Conservation Law § 400-a, as enacted by L 1965, ch 955, § 5 [now codified at ECL 15-0103]).

In 1970, the powers of the former Conservation Department and Water Resource Commission were transferred to the newly-formed Department of Environmental Conservation (see Environmental Conservation Law § 75, as enacted by L 1970, ch 140, § 2). In 1972, former Conservation Law § 429-b was repealed and ECL 15-0505 was enacted (see L 1972, ch 664, § 2). As enacted, ECL former 15-0505 provided "[n]o person or local public corporation shall excavate or place fill in the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to navigable waters as defined by [Navigation Law § 2(4)] and that are inundated at mean high water level or tide, unless a permit therefor shall have first been obtained" from the Department (ECL former 15-0505[1]).

In 1975, the Legislature finally decoupled ECL 15-0505 from the Navigation Law definition of navigable waters. As

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[7] The Water Resources Commission was created in 1960 within the former Conservation Department and was comprised of several agency heads, including the Commissioners of Conservation, Agriculture and Markets, Health and Commerce, the New York Attorney General, and the Superintendent of Public Works (see Conservation Law § 410, as enacted by L 1960, ch 7, § 4, as amended by L 1961, ch 490, § 7).

amended in 1975, ECL 15-0505 provided "No person, local public corporation or interstate authority shall excavate or place fill in any of the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, unless a permit therefor shall have first been obtained" (L 1975, ch 349, § 1 [emphasis added]).[8] The legislative purpose of removing the express reference to Navigation Law § 2(4) was to remove the exceptions for Nassau and Suffolk County included in that section, and to extend ECL 15-0505's protections Statewide (see Assembly Introducer Mem in Support, Bill Jacket, L 1975, ch 349). The Legislature also sought to address the adverse impacts dredging and filling in waterways, marshes, and wetlands had on fish and shellfish habitat, recreational uses, and other ecological resources (see id.).

Thus, by 1975, the Legislature had expanded the scope of ECL 15-0505 from a statute concerned primarily with use of the State's waters for transportation and travel as public highways, to a statute concerned with public boating, swimming and bathing for commerce and recreation, and, ultimately, to a broad environmental protection statute intended to address a wide range of environmental concerns unrelated to travel and transportation, including fish and wildlife habitat protection, water supply and water purity protection, flood control, and other public health, safety and welfare issues (see Matter of Serth, Commissioner Decision at 6-7). Although the ECL does not contain a statutory definition of navigable waters of the State, the history of ECL 15-0505 demonstrates a clear legislative intent to extend the protections of the statute beyond waters navigable in fact to include waters, like South Long Pond, that are used by the public for recreational boating, fishing, and swimming, whether or not those waters are suitable for use as a highway in the strictest sense (see id.).

With respect to the regulation challenged by respondents -- the inclusion of waters "upon which vessels with a capacity of one or more persons can be operated" in the definition of "navigable waters of the State" (6 NYCRR 608.1[u]) -- review of the regulatory history reveals that the Department and its predecessor agencies merely tracked the Legislature's gradual expansion of ECL article 15's scope. As originally

[8] The prohibition against excavating or filling "below the mean high water level" of a navigable water was added in 1979 (see L 1979, ch 233, § 3).

adopted by the Water Resources Commission in 1965, the predecessor regulation to section 608.1(u) was virtually identical to the Navigation Law § 2(4) definition of navigable waters of the State, which former Conservation Law § 429-b expressly incorporated by reference. Both the statute and the regulation applied to waters "navigable in fact or upon which vessels are operated" (compare 6 NYCRR former 322.1[e], as filed Dec. 16, 1965 with Navigation Law § 2[4], as amended L 1965, ch 168, § 1). In 1979, the Department changed the regulatory definition to include waters "navigable in fact or upon which vessels with a capacity of one or more persons can be operated" (6 NYCRR former 608.1[h], as amended June 26, 1979). Given the clear legislative intent to apply ECL 15-0505 to waters used for boating, whether for commerce and travel, or for recreation, the 1979 regulatory amendments fall well within the Department's rulemaking authority to "fill in the interstices" of the standards established by the Legislature (Matter of Medical Soc'y of N.Y. v Serio, 100 NY2d at 865). Accordingly, the section 608.1(u) definition of navigable waters of the State constitutes a valid exercise of the Department rulemaking authority that is entirely consistent with the underlying statutory enactment[9] and respondents' challenge to section 608.1(u) on separation of powers grounds is rejected.

3. Lack of Departmental Article 15 Permit

Finally, Department staff made a prima facie showing that no article 15 permit was issued for respondents' fill activities below the mean high water level of South Long Pond, and respondents failed to produce an Article 15 permit in rebuttal. Accordingly, Department staff established by a preponderance of the credible record evidence that respondents conducted fill activities below the mean high water level of South Long Pond without a Department-issued permit.

[9] Indeed, if anything, the current regulatory definition of navigable waters of the State is under-inclusive, given the broad statutory definition of the term (see Matter of Serth, Commissioner's Decision at 6-8).

4. Conclusion

In sum, Department staff has established, by a preponderance of credible record evidence, that respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 by placing fill below the mean high water level of South Long Pond -- a navigable water of the State -- without a Department-issued permit. Respondents are liable for the illegal placement of fill below the mean high water level of South Long Pond, whether they placed the fill themselves, or the fill was placed by others under their direction and control (see Matter of Romer, Order of the Commissioner, July 2, 2003, at 1). Moreover, they are liable for the illegal placement of fill even if the fill was placed on property not owned by respondents (see Matter of Scully, Order of the Commissioner, May 6, 1992, at 1-2). Nothing in ECL 15-0505 requires a person to own the lands underlying navigable waters illegally filled as an element of liability under that section.

C. Penalty and Remedial Relief

ECL 71-1127 authorizes a civil penalty of five hundred dollars per day for violations of ECL article 15, and one hundred dollars per day for each day the violation continues (see ECL 71-1127[1]).[10] Under ECL 15-0505, the initial placement of fill is subject to the $500 penalty. For each additional day the illegal fill remains in place, the violator is subject to the additional $100 per day (see Matter of Valiotis, Order of the Commissioner, March 25, 2010, at 5-6). In addition, persons committing such violations may be enjoined from continuing those violations (see ECL 71-1127[1]). Any civil penalty provided for in the ECL may be imposed following an administrative adjudicatory hearing (see ECL 71-4003).

Here, Department staff seeks a civil penalty of $10,000. The record reflects that respondents or persons under their direction and control placed fill in the navigable waters of the State on or about April 20, 2003. The record further reflects that the illegal fill remained in place at least until December 1, 2011, over eight years later. Accordingly, the

[10] Effective February 15, 2012, civil penalties for violations of ECL article 15 were increased to two thousand five hundred dollars per day and an additional five hundred dollars per day for each day the violation continues (see L 2011, ch 401, § 10).

penalty sought by Department staff is well below the maximum allowable for an over eight-year continuing violation of ECL 15-0505.

With respect to remedial relief, an order directing respondents to remove the illegal fill placed by them or their agents is authorized and appropriate in this matter, even though the fill was placed in waters overlying lands not owned by respondents (see ECL 71-1127[1]; Matter of Scully, Order at 1-2). Department staff established the harm to navigation and the environment caused by the illegal jetty, thereby necessitating its removal in its entirety (see Finding of Fact No. 12).

The record establishes, however, that not all the fill placed into navigable waters in the location of the jetty was respondents' responsibility. Although respondents clearly added to and improved the jetty, the initial placement of the jetty was the responsibility of unknown and unidentified third parties. Department staff fails to cite, and research fails to reveal, authority for the proposition that respondents' liability for their own illegal fill activities in navigable waters over lands not owned by them includes liability for the illegal placement of fill by third parties not under their control. Thus, although respondents are responsible for the removal of all fill placed by them on the jetty, they are not responsible for the removal of the entire jetty.

Accordingly, I recommend that the Commissioner issue an order directing respondents to remove the fill placed by them on the jetty below the mean high water mark of South Long Pond. Respondents should be given a 60-day period to remove the fill, pursuant to a removal plan approved by Department staff. Thereafter, I recommend that the Commissioner direct Department staff to remove any illegal fill that remains in the location of the subject jetty and restore the shoreline to its pre-disturbance condition.

Respondents assert that they lack permission from the owner of the lands underlying the jetty to conduct any remedial activities. Respondents' argument in this regard is disingenuous at best. Respondents engaged in illegal fill activities on lands they admit are not owned by them, and they produced no evidence that they had permission from the landowner to do so. In any event, to the extent the landowner's permission is required, respondents may seek such permission or

obtain assistance from the Department in gaining the necessary access (see Matter of Ramcharan, Order of the Commissioner, July 24, 2011, at 4).

D. Respondents' Affirmative Defenses

As a result of my ruling dated December 30, 2010, three of respondents' affirmative defenses remain: the affirmative defense of compromise and settlement (a portion of the third defense); the defense under 6 NYCRR 622.4(c) (the seventh affirmative defense – inapplicability of the permit requirement to respondents' activities); and the defense of administrative delay (a portion of the eighth defense). At the hearing, however, respondents offered no evidence in support of any remaining affirmative defense. Nor did respondents offer any arguments in support of their remaining defenses in closing briefing. Accordingly, respondents failed to carry their burden of proof on their defenses and the remaining defenses should be dismissed.

IV. CONCLUSIONS OF LAW

Applying the applicable law to the facts established by a preponderance of the record evidence, I reach the following conclusions of law.

1. South Long Pond is a navigable water of the State as defined under ECL article 15, its implementing regulations, and Commissioner decisions. Thus, pursuant to ECL 15-0505, a permit from the Department is required for excavation and fill activities below the mean high water level of South Long Pond.

2. In the alternative, under the Navigation Law, because the public has access to South Long Pond for boating, bathing, swimming or other recreational uses, an ECL 15-0505 permit is required from the Department for excavation and fill activities below the mean high water level of South Long Pond (see Navigation Law §§ 31, 37).

3. On or about April 20, 2003, respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 by placing fill below the mean high water level of South Long Pond -- a navigable water of the State

-- without a Department-issued permit. The violation continued at least until December 1, 2011.

4. Respondents failed to carry their burden of proof on their remaining affirmative defenses and, accordingly, those defenses should be dismissed.

V. RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, I recommend that the Commissioner issue an order:

1. imposing a civil penalty as against respondents William Stasack and Stephen Stasack in the amount of ten thousand dollars ($10,000);

2. directing respondents William Stasack and Stephen Stasack to remove any and all illegal fill placed by them or third parties under their control below the mean high water level of South Long Pond. Such removal should take place within 60 days after service of the Commissioner order upon respondents, and pursuant to a Department approved remedial plan;

3. directing Department staff to remove any and all remaining illegal fill placed below the mean high water level of South Long Pond and restore the shoreline in the vicinity of the illegal jetty to its pre-disturbance condition; and

4. dismissing respondents' affirmative defenses.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: April 25, 2014
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law (ECL),

- by -

WILLIAM STASACK and STEPHEN STASACK,

Respondents.

RULING OF THE ADMINISTRATIVE LAW JUDGE CORRECTING TRANSCRIPT

DEC File No. R4-2003-1023-117

On request of staff of the Department of Environmental Conservation, and on the Administrative Law Judge's own motion, it is ORDERED that the transcript of the adjudicatory hearing conducted on October 2, 2013, in the above referenced matter is corrected as follows:

1. On page 4, line 20, change "ARBITRATOR TRELA" to "ALJ McCLYMONDS."

2. On page 5, line 13, change "ARBITRATOR TRELA" to "ALJ McCLYMONDS."

3. On page 6, line 9, change "ARBITRATOR TRELA" to "ALJ McCLYMONDS."

4. On page 19, line 6, change "30" to "20."

5. On page 44, line 10, change "representatives" to "represents."

6. On page 59, line 9, change "state" to "Stasacks."

7. On page 61, line 14, change "$3,500" to "$500."

8. On page 68, line 10, change “me” to “her.”

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: November 11, 2013
Albany, New York

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