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November 1, 2021

***VIA ELECTRONIC &
FIRST CLASS MAIL***

Mr. Carl J. Kempf III
Rensselaer County Attorney
Rensselaer County Government Center
1600 Seventh Avenue
Troy, New York 12180
cjkempf@rensco.com

**Re: Burden Lake Dam
DEC ID # 226-1335**

Dear Mr. Kempf:

On behalf of our client, the Burden Lake Preservation Corp. ("BLPC"), which is owned in part by the Burden Lake Conservation Association ("BLCA") and the Burden Lake Association ("BLA") (collectively, the "Burden Lake Entities"), we write in response to your correspondence, dated October 15, 2021 (the "Letter"), regarding dam safety issues relative to the Burden Lake Dam (the "Dam"), located in the Town of Sand Lake ("Town"), County of Rensselaer ("County"). Your Letter sets forth the position that notwithstanding the County's decades of physical occupation of the Dam with a major County roadway and attendant structures and decades of use of this County roadway until just recently, the County bears no responsibility relative to Dam safety issues. With all due respect, the Burden Lake Entities disagree with your position. Notwithstanding this disagreement, we continue to believe that the best course of action going forward is for the parties to work cooperatively towards a resolution of all outstanding issues.

As we have already discussed with the Department of Environmental Conservation (the "Department"), all safety issues associated with the Dam (as opposed to the weir) implicate the County and Town due to the significant construction and modifications/repairs that both municipal entities have made over the long-term to the Dam and appurtenant structures. Specifically of note are: (1) the County's construction of a major County roadway over the Dam, the repaving of this major roadway with multiple layers of pavement, the insertion of guard rails which were pounded into the Dam structure, and the rebuilding of the inlet/outlet culvert/spillway on the Dam, and (2) the Town's installation of a sewer pipe and related structures through the entire length the Dam. As further explained below, these actions by the County and Town render the County and Town "owners" under the governing statutes and regulations, as well as pursuant to inverse condemnation principles.

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Importantly as well, the fact that the County just recently initiated a stopgap measure by exercising its prerogative to cease public use of the roadway does not change the analysis or result. The physical occupation by the County and Town is long-term and permanent, as are the physical alterations to the Dam structure and the subsidence that has occurred due to decades of heavy traffic. The existing structures and the construction activities that have already taken place at the hands of the County and Town – which plainly affect Dam safety/integrity – render the County and Town statutory “owners” and responsible, in any event, by virtue of common law considerations. Accordingly, any consent order with the Department addressing Dam safety issues must involve both the County and the Town.

- **Environmental Conservation Law (“ECL”) 15-0507 and 6 NYCRR Part 673**

ECL 15-0507(1) directs: “Any owner of a dam or other structure which impounds water shall at all times operate and maintain said structure and all appurtenant structures in a safe condition.” The statute broadly defines “owner” to mean “any person or local public corporation who owns, erects, reconstructs, repairs, maintains or uses a dam or other structure which impounds water.” 6 NYCRR 673.2(t) similarly defines “owner” to mean “any person or local public corporation who owns, erects, constructs, reconstructs, repairs, breaches, removes, maintains, operates or uses a dam.” Thus, contrary to the intimation in your Letter, “owner” is not limited to title owner; nor is “owner” limited to a current user. Moreover, municipal entities are “persons” for purposes of the statute. ECL 1-0303(18); 6 NYCRR 673.2(u).

Here, the County has been a long-term user of the Dam by virtue of the County roadway that it constructed across the Dam, including installing multiple layers of pavement and the pounding of guard rails directly into the Dam structure. The County has also performed repairs and reconstruction activities on the Dam and appurtenant structures (e.g., the highway and the culvert/spillway). The County thus also qualifies as an “owner” by virtue of the statute’s erect, reconstruct, repair or maintain language.

Notably as well, the County’s recent closure of the road to the public is a non-issue. In this regard, two points bear mention. First, to clarify the record, contrary to your contention, BLPC most certainly did not “demand” that the County close the roadway. The County indicated that it might close the road, and BLPC responded that such was the County’s prerogative. Second, closure of the road by the County does not alter the County’s liability relative to Dam Safety. The lack of continued traffic on the roadway does not change the fact of the County’s extensive constructive activities and physical occupation of the Dam with significant structures and decades of use, all of which plainly implicate Dam safety. The County, therefore, remains an “owner” under ECL 15-0507(1) and 6 NYCRR 673.2(t) regardless of whether the roadway is, or is not, currently open to the public.

The Town, likewise, is an “owner.” The Town is a user of the Dam by virtue of its installation of the sewer pipe/system through the entire length of the Dam, which pipe is in use to serve the Town’s sewage disposal system. Due to installation of the sewer pipe and ancillary facilities, including manholes across and in the Dam, the Town also qualifies as an “owner” under the statute’s erect/repair/maintain language. As an aside, it is common knowledge that sewer lines and similar structures should not be constructed through or across a dam because leakage from those facilities can lead to a dam failure.

Under the plain statutory/regulatory language and well-settled common law principles, the County’s and Town’s affirmative acts of construction and use render both municipal entities “owners” and/or responsible parties and thus, necessary parties to any consent order with the Department respecting Dam safety. *See, e.g., Malcuria v. Town of Seneca*, 93 Misc.2d 799 (Sup. Ct., Ontario Cnty., 1978) (if municipality was found to have affirmatively undertaken acts that caused the flooding, i.e., installation of culverts, municipality could be found responsible and Plaintiff entitled to relief), *modified on other grounds*, 66 A.D.2d 421 (4th 1979), *appeal dismissed*, 55 N.Y.2d 1037 (1982); *cf., Village of Chestnut Ridge v. Howard*, 92 N.Y.2d 718 (1999) (determining which municipal entity bore responsibility for maintaining road structure; basing determination on whether structure was classified as a bridge or a culvert).

- **Inverse Condemnation**

The County and Town are also “owners” of the Dam under inverse condemnation principles. In short, the County’s and Town’s construction over and into the Dam and use of the Dam are physical intrusions that constitute an inverse condemnation of the Dam. *See, e.g., Lyon v. City of Binghamton*, 281 N.Y. 238, 245-246 (1939) (physical occupation of dam and appurtenant land by the city was an inverse condemnation); *Buholz v. Rochester Tel. Corp.*, 40 A.D.2d 283, 286-287 (4th Dep’t 1973), *appeal dismissed*, 33 N.Y.2d 939 (1974) (discussing inverse condemnation by physical occupation); *cf., Berger v. New York State Dept. of Env’tl Conservation*, 125 A.D.3d 1128 (3d Dep’t 2015), *lv. denied*, 26 N.Y.3d 908 (2015) (evidence did not support department’s finding that landowners abutting dam had duty to maintain dam in safe condition where ALJ did not consider what property the city had acquired through condemnation). Consequently, on this basis as well, the County and Town are owners of the Dam and, as such, are necessary parties to any consent order addressing Dam safety. *See, e.g., Dillenback v. State*, 193 Misc. 542, *aff’d*, 275 A.D.2d 871 (3d Dep’t 1949) (involving perpetual easement by the State; finding that fair compensation must still be paid even if the fee remains in the claimant); *Syracuse Solar Salt Co. v. Rome, W.&O.R. Co.*, 67 Hun 153, 22 N.Y.S. 321, 325-326 (4th Dep’t 1893) (physical occupation of laying track on plaintiff’s property was a condemnation requiring compensation).

For these reasons, the Burden Lake Entities respectfully request that the County reevaluate its position and continue discussions with us, the Department, and the Town to address the Dam safety issues identified in your Letter. Because of your Letter, the Burden Lake Entities were

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forced to respond to outline our position on the liability issues. Nevertheless, the Burden Lake Entities remain ready to work amicably with all parties to resolve extant concerns.

Very truly yours,

Thomas S. West

TSW/cmm
cc: Burden Lake Preservation Corp.

Burden Lake Conservation Association

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