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OSAH

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BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

*K. Westray*

Kevin Westray, Legal Assistant

LAKESIDE AT ANSLEY COMMUNITY :  
ASSOCIATION, INC., :

Petitioner, :

v. :

JUDSON H. TURNER, Director of the :  
Environmental Protection Division of the :  
Georgia Department of Natural Resources, :

Respondent. :

Docket No.:  
OSAH-BNR-DS-1548520-60-Baxter

**FINAL DECISION**

**ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DETERMINATION**

Lakeside at Ansley Community Association, Inc. (“Petitioner”) appeals the reclassification of the Lakes at Ansley Dam as a Category I dam issued on April 26, 2013, by Judson H. Turner, the Director, (“Director”), of the Environmental Protection Division (“EPD”) of the Georgia Department of Natural Resources, (“Department” or “Respondent”). On April 20, 2015, the Director moved for summary determination.<sup>1</sup> The Petitioner submitted its response on May 6, 2015. The Director filed his reply brief in support of his Motion on May 26, 2015. For the reasons set forth below, the Director’s Motion for Summary Determination is **GRANTED**.

**I. STATUTORY AND REGULATORY FRAMEWORK**

1.

In 1978, the General Assembly passed the Georgia Safe Dams Act of 1978, O.C.G.A. §§ 12-5-370 to 12-5-385 (“the Act”), in response to a dam failure near Toccoa Falls, Georgia. Forsyth Cnty. v. Reheis, OSAH-DNR-DS-02-27751-58-JBG, 2002 Ga. Env. LEXIS 4, at \*12 (OSAH Aug. 23, 2002). The Act’s stated purpose is to “provide for the inspection and permitting of certain dams in order to protect the health, safety, and welfare of all the citizens of the state by reducing the risk of failure of

<sup>1</sup> Individual homeowners Rajive Beri, Lori Beri, Aaron Goodkin, and Stacie Goodkin simultaneously filed a nearly identical petition with this Court. OSAH-BNR-DS-1548529-60-Baxter. The Director filed separate summary determination motions in the both cases.

such dams.” O.C.G.A. § 12-5-371. The inspection and permitting of dams is properly a matter for regulation under the police powers of the state. Id. Because the Act is “remedial in nature and enacted for the purpose of protecting the public, its provisions must be given broad construction and application.” Forsyth Cnty., 2002 Ga. Env. Lexis 4, at \*12.

2.

Under the Act, a dam is defined as any artificial barrier, including its appurtenant works, which impounds or diverts water and is: (1) at least 25 feet in height with a minimum storage capacity of 15 acre-feet; or (2) has an impounding storage capacity of 100 acre-feet or more and is at least 6 feet in height. O.C.G.A. §§ 12-5-372(4)(A), (4)(B)(v).

3.

The Act requires the Director to inventory all dams in the state and determine whether a dam should be classified as either a Category I or Category II dam. A Category I dam is one where “improper operation or dam failure would result in probable loss of human life,” and a Category II dam is a dam where “improper operation or dam failure would not be expected to result in probable loss of human life.” O.C.G.A. § 12-5-375(a)(1), (2). Situations constituting probable loss of human life involve “frequently occupied structures or facilities, including, but not limited to, residences, commercial and manufacturing facilities, schools, and churches.” O.C.G.A. § 12-5-375(a)(1). If a dam is determined to be a Category I dam, the owner or operator is required to obtain a permit from EPD. O.C.G.A. § 12-5-376.

4.

The Director is required to reinventory dams at least once every five years after the completion of the first inventory. O.C.G.A. § 12-5-375(b). The Director is authorized to contract with private entities to accomplish the purposes of the Act. O.C.G.A. § 12-5-375(c). If a dam is classified or reclassified as a Category I dam, the Director is required to serve a written notice on the owner or operator of the dam and the owner/operator must submit an application for a permit within 180 days after service of the reclassification notice. O.C.G.A. § 12-5-376(a), (b). The Director’s classification of a dam as a Category I dam is a final agency action that can be challenged pursuant to the procedures for contested cases set forth in the Administrative Procedures Act and EPD’s rules. See Ga. Comp. R. & Regs. 391-1-2-.01 to 391-1-2-.09.

## II. FINDINGS OF UNDISPUTED MATERIAL FACT

Pursuant to OSAH Rule 15(1), a motion for summary determination shall include “a short and concise statement of each of the material facts as to which the moving party contends there is no genuine issue for determination.” Ga. Comp. R. & Regs. 616-1-2-.15(1). Similarly, a response to a statement of material facts must contain “a short and concise statement of each of the material facts as to which the party opposing summary determination contends there exists a genuine issue for determination.” Ga. Comp. R. & Regs. 616-1-2-.15(2). The Court has endeavored to streamline the facts presented and has endeavored to integrate both parties’ submissions into a coherent narrative.

1.

The Lakes at Ansley Dam (“the Dam”) is an earthen embankment dam located in the Lakeside at Ansley residential development in Roswell, Georgia. The Dam fits the definition of the term “dam” based on its height and storage capacity and is therefore subject to regulation under the Act. (Affidavit of Dallan Thomas Woosley [“Woosley Aff.”], ¶¶ 5, 9.)

2.

In September 2000, the Dam was originally classified as a Category II dam as a proposed structure. As part of the reinventory process, the Safe Dams Program team made a site visit to the Dam in August 2012, and after observing the Dam and identifying potential flood hazards in the vicinity of the Dam, determined it would be appropriate to conduct a dam break analysis to determine whether the Dam should remain a Category II dam or be reclassified as a Category I dam. (Woosley Aff., ¶¶ 4, 6, 7.)

3.

A dam break analysis is designed to evaluate the impact of a hypothetical “sunny day,” or non-storm, catastrophic dam failure event on the land downstream of the dam. The analysis is based on a hypothetical “worst case scenario,” in which the dam failure or improper operation occur when the water surface or pool is elevated to the top of the dam. The analysis does not consider the likelihood that a dam will fail based on the actual condition or operation of the dam and instead assumes that the dam has failed for any reason and determines the extent of flooding that is predicted to occur as a result of the catastrophic dam failure. (Woosley Aff., ¶¶ 8, 9.)

4.

EPD contracted with Schnabel Engineering (“Schnabel”) to perform a dam break analysis of the Dam. On February 22, 2013, EPD approved the finalized version of Schnabel’s Dam Breach Study

("Schnabel's Breach Study") after having conducted a lengthy review of Schnabel's analysis. (Woosley Aff., ¶¶ 8, 10.)

5.

Schnabel's Breach Study used a type of hydrological computer modeling, known as the Hydrologic Engineering Centers River Analysis System ("HEC-RAS"), which was developed by the United States Army Corps of Engineers and is a highly regarded peer-reviewed methodology that incorporates state-of-the-art techniques and procedures in a comprehensive computer software program. The Schnabel engineers relied upon field observations and aerial photographs to document the conditions of the channel and to characterize channel roughness. (Woosley Aff., ¶ 12; Woosley Aff., Ex. A.)

6.

Schnabel's Breach Study revealed that several residential dwellings are located within the dam break zone below the Dam. The modeling showed that in the event of a catastrophic dam failure, the basement of a home located at 220 Lakeshore Drive would be flooded 1.5 feet above finished floor elevation. Additionally, the breach study showed a residence located at 102 Russell Road and the community swimming pool would experience some flooding in the event of a catastrophic failure of the Dam. (Woosley Aff., ¶¶ 13-14; Woosley Aff., Ex. A.)

7.

EPD considers flooding at 1.5 feet above finished floor level to constitute a probable loss of life situation for elderly persons, handicapped persons or infants. Based on the results of Schnabel's Breach Study, the Safe Dams Program recommended that the Director issue a classification letter reclassifying the Dam as a Category I dam. (Woosley Aff., ¶¶ 13-16.)

8.

On April 26, 2013, the Director sent by certified mail classification letters to all persons and entities identified as owners of the Dam based on records from the Fulton County Tax Assessor's Office. The classification letters advised the Dam owners of their rights to appeal the dam classification by filing a petition within 30 days of the April 26, 2013 letter. (Woosley Aff., ¶¶ 16-17.)

9.

The Association filed a timely petition challenging the reclassification of the Dam.

10.

The Association hired engineers from Walden, Ashworth & Associates, Inc. to review some of the data relied upon in Schnabel's Breach Study. The consulting engineer, Martin Walden, noted that certain measurements and assumptions used in Schnabel's Breach Study could potentially alter the analysis if that data was incorrect. (Affidavit of Martin L. Walden ["Walden Aff."], ¶¶ 3-10.)

11.

Walden calculated the storage volume as 108.9 acre-feet at elevation 960.0 and 114.4 acre-feet at elevation 960.71 based on the contour lines scan from a print of the original topographic survey used in the design of the Dam. These measurements differ from Schnabel's Breach Study, which listed the storage volume as 109.6 acre-feet at elevation 960 and 114.6 acre-feet at elevation 960.71, the top elevation of the Dam. Walden did not determine whether these different calculations impacted the results of the modeling. (Walden Aff., ¶ 7; Woosley Aff., Ex. A, Table 1 at 4.)

12.

Walden noted that Schnabel's calculation of the Dam's height used a top-of-dam elevation of 960.71, but the original design was to be at elevation 960.0. Walden did not provide any opinion as to which elevation was correct. Walden opined that depending on the correct elevation for the top of the Dam, the height of the Dam may be different from the height used in Schnabel's Breach Study. (Walden Aff., ¶ 8; Walden Aff., Ex. A, p. 2.)

13.

Schnabel Engineering did not model the possible impact of the breach flow spreading upstream before reaching the hazard. In response to a Safe Dams Program comment, Schnabel engineers stated they did not believe the modeling was necessary based on the topography, alignment of the dam, and associated high velocity breach flow. EPD approved Schnabel's Breach Study after Schnabel responded satisfactorily to the questions and comments. (November 12, 2012, Response to Comment #13 of the Safe Dams Program Comments; Woosley Aff., ¶ 10.)

14.

Walden stated that if the Schnabel engineers considered the possibility of the breach flow spreading upstream, the outcome could result in the Dam being classified as a Category II structure. Walden added, however, that the only way to know if this possible upstream spreading would have any impact on the depth of the flood wave would be to perform an analysis. Walden did not perform that analysis. (Walden Aff., ¶ 9.)

### III. STANDARD ON SUMMARY DETERMINATION

On a motion for summary determination, the Director, as the moving party, must demonstrate that there is no genuine issue of material fact for determination. Ga. Comp. R. & Regs. 616-1-2-.15(1). A fact is material when it is identified as such by the controlling substantive law. Johnson v. Georgia Dep't of Human Res., 983 F. Supp. 1464, 1467 (N.D. Ga. 1996). "Genuine disputes [of material fact] are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant. For factual issues to be considered genuine, they must have a real basis in the record." Mize v. Jefferson City Bd. of Educ., 983 F. Supp. 1464, 1467 (N.D. Ga. 1996).

When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit or other probative evidence that there is a genuine issue of material fact that requires a trial and that a reasonable jury could find in its favor. OSAH Rule 616-1-2-.15(3); Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991). Although the Court considers all evidence and reasonable factual inferences in a light most favorable to the nonmoving party, "mere conclusions and unsupported factual allegations are legally insufficient" to defeat a summary determination motion. Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560, 1562-63 (11th Cir. 1989). Moreover, "inferences based upon speculation are not reasonable." Marshall v. City of Cape Coral, Fla., 797 F.2d 1555, 1559 (11th Cir. 1986). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Johnson, 983 F. Supp. at 1467 (finding nonmovant must do more than simply show "some metaphysical doubt" as to material facts).

### IV. CONCLUSIONS OF LAW

The parties do not dispute that the Dam fits into the statutory definition of a dam and that the Director exercised appropriate authority in reclassifying the Dam. See O.C.G.A. §§ 12-5-372(4)(A), (4)(B)(v); 12-5-375(b), (c). The sole remaining inquiry is whether the Dam was appropriately reclassified as a Category I dam.

#### **A. The Director met his burden of production.**

In support of his reclassification, the Director relied on Schnabel's Breach Study and Georgia Safe Dams Program's recommendation. The hydrological modeling used in Schnabel's Breach Study was based on HEC-RAS modeling, which is a highly regarded, peer-reviewed methodology developed by the United States Army Corps of Engineers. The modeling showed that in the event of a

catastrophic failure of the Dam, the residence at 220 Lakeshore Drive would experience flooding 1.5 feet (or 18 inches) above the finished floor level. Additionally, the breach study showed a residence located at 102 Russell Road and the community swimming pool would experience some flooding. The Safe Dams Program considers 1.5 feet above finished floor level to constitute a probable loss of life situation for elderly persons, handicapped persons, or infants.<sup>2</sup> Based upon the affidavit and accompanying evidence, the Director has met his burden in demonstrating there is no genuine issue for determination regarding whether a catastrophic event would result in 1.5 feet of flooding in the residential area.

**B. The Petitioner failed to present evidence of a genuine issue of material fact.**

To contradict the Director's expert and Schnabel's Breach Study, Petitioner hired an engineer to review the Study. The Petitioner's expert determined that the study may have been affected by certain measurements and assumptions. First, the Petitioner's expert asserted that the *possibility* of the breach flow spreading upstream *could* result in the Dam being classified as a Category II structure. The Petitioner's expert admits that the only way of knowing whether the breach flow would have any impact on the depth of the flood wave would be to perform additional analysis. Second, the Petitioner's expert asserted that the height of the Dam *may* be different from the height used in Schnabel's Breach Study based on the Dam elevation provided in the original design. These speculative opinions, even when viewed in a light most favorable to the Petitioner, do not support a reasonable inference that a probable loss of life would not occur in the event of a Dam failure.

The Petitioner's expert also opined that storage volume measurements used in Schnabel's Breach Study differ from his calculations based on the contour lines scan from a print of the original topographic survey used in the design of the Dam. Although storage volume, along with other variables, have a bearing on the outcome of the breach study, the Court has no knowledge as to whether the alleged discrepancy in storage volume calculations affect the level of flooding that would occur in the event of a catastrophic failure of the Dam, which is the material fact at issue. Establishing a discrepancy in calculations, without describing its effect on Schnabel's Breach Study, does not rebut the Director's evidence that a catastrophic event would result in 1.5 feet of flooding in a residential area. See In re: Lake Carlton Dam, DNR-EPD-DS-AH 1-91, 1992 Ga. Env. LEXIS 14, at \*2 (May 6,

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<sup>2</sup> This Court previously affirmed the reasonableness of EPD's determination that flooding at a level of 18 inches or more creates a probable loss of life situation for vulnerable populations. McClendon v. Couch, OSAH-BNR-DS-0819095-71, 2008 Ga. Env. LEXIS 5, at \*8 (OSAH Apr. 17, 2008) ("[EPD] makes this determination because it does not know if the occupants of the structure are disabled, elderly, or infants, as the inhabitants of the structure could change at any moment."). The Petitioner did not dispute this assumption.

1992) (“While the [p]etitioners were able to establish that such modeling is not an exact science and involves the use of assumptions that may not reflect the specific dam modeled, no real challenge to the ultimate opinion offered by the Director’s dam safety expert[ ] was made.”). Although it is possible that the Petitioner’s expert could determine the effect before the trial, the Court is not permitted to assume that the Petitioner could or would prove the necessary facts at the hearing. See Lujan v. Nat’l Wildlife Federation, 497 U.S. 871, 889 (1990) (“It will not do to ‘presume’ the missing facts because without them the affidavits would not establish [the fact at issue].”).

Finally, the Petitioner’s assertion that conflicting expert opinion requires a denial of summary determination is incorrect. Although courts are wary of granting summary determination where there are conflicting expert opinions, summary determination “is not *per se* precluded . . . .” New Orleans Emps. Ret. Sys. v. Omnicom Grp., Inc., 597 F.3d 501, 512 (2d Cir. 2010). While expert opinion must be construed in the nonmoving party’s favor, the court may grant summary determination if the admissible evidence is insufficient to permit a rational juror to find in the nonmoving party’s favor. Id.

### C. Conclusion.

Once the Director produced evidence establishing that no genuine issues of material fact remain for determination, the Petitioner was required to come forward with evidence showing that a reasonable jury could rule in its favor. The Petitioner’s expert provided only speculative conclusions about possible outcomes, which did not create a triable issue of material fact as to the correctness of Schnabel’s Breach Study. The Petitioner’s evidence was therefore legally insufficient to defeat a summary determination motion.

### V. DECISION

For the above and foregoing reasons, the Director’s Motion for Summary Determination is **GRANTED** and the Director’s reclassification of the Dam as a Category I dam is **AFFIRMED**.

SO ORDERED, this <sup>15<sup>th</sup></sup> day of June, 2015.

  
AMANDA C. BAXTER  
Administrative Law Judge