

COMMON PLEAS COURT
WARREN COUNTY, OHIO
FILED

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JAMES L. GREGG
CLERK OF COURT

**IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO**

STATE OF OHIO, ex rel.)
DAVE YOST,)
ATTORNEY GENERAL)
30 East Broad Street, 25th Floor)
Columbus, Ohio 43215)

Plaintiff,)

v.)

SETTLERS WALK HOME OWNERS)
ASSOCIATION)
c/o Statutory Agent)
Scott G. Oxley)
325 North Main St., Suite 204)
Springboro, OH 45066)

MCS LAND DEVELOPMENT)
c/o Statutory Agent)
Paul Zimmer)
PS&E Corporate Services, Inc.)
2700 Kettering TWR)
40 North Main St.)
Dayton, OH 45423)

Defendants.)

CASE NO. 19CV92490
JUDGE: Peeler

COMPLAINT FOR PERMANENT INJUNCTIVE RELIEF

Defendants, Settlers Walk Home Owners Association and MCS Land Development, LLC, have endangered the community that surrounds Remick Lake by failing to maintain or operate the Remick Lake Dam in compliance with Ohio's dam safety laws and rules. Defendants have not complied with both a Notice of Violation and a Chief's Order from the Ohio Department of Natural Resources' Division of Water Resources stating the required repairs. To this day, Remick Lake Dam remains in poor condition.

Plaintiff, the State of Ohio, by and through its Attorney General, Dave Yost, at the written request of the Chief of the Division of Water Resources, Ohio Department of Natural Resources, hereby institutes this action to enforce Ohio's dam safety laws, namely Ohio Revised Code Chapter 1521 and Ohio Administrative Code Chapter 1501:21, and to protect public health, safety, and welfare.

GENERAL ALLEGATIONS

The Dam

1. The Remick Lake Dam ("the Dam") is a Class I dam, per Ohio Adm.Code 1501:21-13-01(A)(1). Among other things, a Class I dam is one whose sudden failure would result in either the probable loss of human life or the structural collapse of at least one residence or one commercial or industrial business. Multiple properties are located downstream of the Dam including homes, a strip mall, a local road, and a day care center.

Defendants

2. Defendant Settlers Walk Home Owners Association ("Settlers Walk") is a person under R.C. 1.59(C).

3. Defendant Settlers Walk is an Ohio corporation in good standing, formed under the laws of the State of Ohio on December 1, 1993. Defendant Settlers Walk acquired the property where part of the Dam is located at Parcel No. 0409371019 on March 19, 1998. This is reflected in the Warren County Recorders records at Volume 1503, Page 868.

4. Defendant MCS Land Development, LLC (“MCS”) is a person under R.C. 1.59(C).

5. Defendant MCS is an Ohio limited liability company in good standing, formed under the laws of the State of Ohio on September 1, 2000. Defendant MCS acquired the property where part of the Dam is located at Parcel No. 0409371036 on May 29, 2001. This is reflected in the Warren County Recorders records at Volume 2179, Page 259.

6. At the time the violations alleged herein began and continuing thereafter, Settlers Walk and MCS (collectively, “Defendants”) owned the property where the Dam is located on an unnamed tributary in Warren County, Clear Creek Township, Ohio. The Division of Water Resources, Ohio Department of Natural Resources’ (“Division”) inspections of the Dam and its spillways confirm that the Dam falls on permanent parcel nos. 0409371019 and 0409371036. These parcels are owned by Defendants MCS and Settlers Walk, respectively.

7. Upon information and belief, it appears that both Defendants are “owners” of the Dam, as that term is defined in Ohio Adm.Code 1501:21-3-01(W). However, the determination and extent of property rights and interests are within the exclusive jurisdiction of Ohio’s courts.

Ohio’s Dam Safety Laws and Rules

8. The Chief of the Division of Water Resources, Ohio Department of Natural Resources (“Chief”) has statutory authority pursuant to R.C. Chapter 1521 to regulate certain dams in Ohio, including the Remick Lake Dam.

9. The rules in Ohio Adm.Code Chapter 1501:21 were enacted pursuant to R.C. Chapter 1521 and provide the rules with which dam owners must comply in order to safely operate their dams in the state of Ohio. Included among these rules are requirements that:

- a.) Dams have a spillway system which can safely operate during the design flood without endangering the safety of the dam. Ohio Adm.Code 1501:21-13-03(A);
- b.) Dam owners develop an Operation, Maintenance, and Inspection manual as well as an Emergency Action Plan in the event a dam has safety issues. Ohio Adm.Code 1501:21-21-04(B) & (C);
- c.) Dams include a means of dissipating the energy of flow without endangering the safety of the dam. Ohio Adm.Code 1501:21-13-03(B);
and
- d.) Dams include a device which drains the reservoir within a reasonable period of time for emergency repairs or maintenance activities. Ohio Adm.Code 1501:21-13-06(A).

10. If dam owners do not comply with these provisions, Revised Code 1521.062(D) provides that, “[t]he chief shall order the [dam] owner to perform such repairs, maintenance, investigations, or other remedial or operational measures as the chief considers necessary to safeguard life, health, or property.”

Defendants' Activity at the Dam

11. The Division has performed inspections of the Remick Lake Dam pursuant to R.C. 1521.062 and Ohio Adm.Code 1501:21-21 and has found the conditions such as to render the Dam unsafe.

12. On March 31, 2016, Division staff conducted a safety inspection at the Dam and issued a safety report citing the required repairs the Dam needed.

13. As a result of this report, on March 10, 2017, the Division sent a letter to Defendants requiring Defendants to submit a schedule for finalizing an Emergency Action Plan (EAP) and making the required dam repairs.

14. The Division received the required schedule on May 17, 2017. The schedule indicated that Defendants would submit the final EAP by March 31, 2018 and complete all dam repairs by September 1, 2018.

15. Defendants met none of the deadlines set forth in their submitted schedule.

16. On April 26, 2018, the Division issued a Notice of Violation to Defendants, which required Defendants to:

- a.) By June 1, 2018, submit an acceptable schedule with timeframes for finalizing an EAP and making the required dam repairs;
- b.) By October 1, 2018, finalize the EAP; and
- c.) By December 1, 2019, complete all repairs to bring the Dam into full compliance with Ohio's dam safety laws.

17. Defendants did not submit schedules with timeframes or finalize the EAP.

18. On August 22, 2018, the Division issued Chief's Order 2018-103 to Defendants pursuant to R.C. 1521.062.

19. The Chief's Order required Defendants to repair, breach, or modify the Dam.
20. The Chief's Order gave schedules of construction benchmarks and deadlines for Defendants to follow when repairing, breaching, or modifying the Dam. The schedules required Defendants to:
 - a.) Submit an acceptable schedule for full remediation or permanent breach or modification of the Dam by September 7, 2018;
 - b.) If breaching or modifying the Dam, submit engineered plans for the permanent breach or modification by November 1, 2018; and
 - c.) If repairing the Dam, submit the finalized EAP by November 16, 2018.
21. Defendants never submitted a schedule for the repairs, engineered plans, or a finalized EAP.
22. On October 19, 2018, Division staff conducted a site visit to the Dam to view its current condition. Defendants had taken no measures to bring the Dam into compliance, and the Dam remained in poor condition.
23. Defendants did not appeal the August 22, 2018 Chief's Order pursuant to R.C. Chapter 119 and R.C. 1521.062(D), making the Chief's Order a final non-appealable order ripe for judicial enforcement.

Enforcement of Ohio's Dam Safety Laws and Rules

24. This matter was referred by the Chief to the Attorney General for enforcement purposes under R.C. 1521.062(D), which provides that "[t]he attorney general, upon written request of the chief, may bring an action for an injunction ... to enforce an order of the chief made pursuant to [R.C. 1521.062]."

25. Defendants' conduct and omissions violate the August 22, 2018 Chief's Order for which the Chief is entitled to injunctive relief pursuant to R.C. 1521.062(D).

26. Venue is proper in this Court pursuant to Civ.R. 3(C).

27. The allegations set forth in paragraphs 1-25 are incorporated by reference into Count I as if fully rewritten therein.

COUNT I
Failure to Comply with Chief's Order 2018-103

28. On August 22, 2018, the Chief issued Order Number 2018-103 ("Chief's Order") to Defendants for failing to safely monitor, maintain, and operate the Dam in violation of Ohio's dam safety laws. A true and accurate copy of that Order is attached hereto as Exhibit A.

29. This Chief's Order required Defendants to either repair, breach, or modify the dam by performing the following measures:

- a.) Submit an acceptable schedule for repair, breach, or modification of the Dam;
- b.) If repairing the Dam, submit the finalized Emergency Action Plan;
- c.) Submit final engineered plans for repair, breach, or modification of the Dam; and
- d.) Complete construction to fully repair, breach, or modify the Dam.

30. If Defendants chose to repair the Dam, these dates were, respectively, September 7, 2018, November 16, 2018, March 1, 2019, and November 15, 2019.

31. If Defendants chose to breach or modify the Dam, these dates were, respectively, September 7, 2018, November 1, 2018, and May 31, 2019.

32. The outstanding repairs at the Dam include: 1) repairing the principal spillway of the dam; 2) realigning the emergency spillway, which currently directs emergency spillway flows straight towards a daycare; 3) submitting a finalized Emergency Action Plan; and 4) installing a lake drain that can drain the reservoir within a reasonable period of time.

33. Defendants did not comply with the Chief's Order. Defendants did not submit a schedule for repair, breach, or modification by September 7, 2017, as ordered by the Chief. Nor did Defendants submit either engineered plans for permanent breach or modification by November 1, 2018 or the finalized EAP by November 16, 2018, as ordered by the Chief.

34. The acts and omissions alleged in this Count constitute violations of R.C. 1521.062(D) for which Defendants are liable and subject to injunctive relief under R.C. 1521.062(D).

PRAYER FOR RELIEF

Wherefore, the State of Ohio respectfully requests that this Court enforce Chief's Order 2018-103 and order the following relief:

- A. Permanently enjoin Defendants from continuing to violate Ohio's dam safety laws found in R.C. Chapter 1521 and Ohio Adm. Code 1501:21;
- B. Permanently enjoin Defendants to remedy the dam safety violations at the Remick Lake Dam as follows:
 - 1. If Defendants choose to repair the Dam:
 - a.) Within 30 days from the entry of this Order, submit an acceptable schedule for full remediation of the Dam, including finalizing the Emergency Action Plan;

- b.) Within 90 days from the entry of this Order, submit the finalized Emergency Action Plan;
 - c.) Within 90 days from the entry of this Order, submit engineered plans for full remediation of the Dam; and
 - d.) Within 180 days from the entry of this Order, complete construction to fully remediate the Dam.
2. If Defendants choose to breach or modify the Dam:
- a.) Within 30 days from the entry of this Order, submit an acceptable schedule for breach or modification of the Dam;
 - b.) Within 90 days from the entry of this Order, submit engineered plans for the permanent breach or modification of the Dam; and
 - c.) Within 180 days from the entry of this Order, complete construction to permanently breach or modify the Dam.
- C. Order Defendants to pay all costs and fees for this action, including reasonable attorney fees incurred by the Ohio Attorney General's Office;
- D. Retain jurisdiction of this case until all Orders issued by this Court are complied with in all respects; and
- E. Grant such other relief as may be deemed necessary and appropriate.

Respectfully submitted,

DAVE YOST
OHIO ATTORNEY GENERAL



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Counsel for Plaintiff, the State of Ohio

ORDER
BY THE CHIEF



OHIO DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RESOURCES

Order Number 2018-103

TO: Settlers Walk Home Owners Association
6540 Centerville Business Park
Centerville, OH 45459

MCS Land Development
6135 Far Hills Avenue
Dayton, OH 45459

RE: Remick Lake Dam
File Number: 9441-011
Warren County

August 22, 2018

Pursuant to Ohio Revised Code (O.R.C.) Section 1521.062, the Chief of the Division of Water Resources (“the Division”) makes the following findings and issues the following Order to Settlers Walk Home Owners Association and MCS Land Development.

FINDINGS

1. Settlers Walk Home Owners Association and MCS Land Development (“the Owners”) are the owners of Remick Lake Dam (“the Dam”) located on a tributary to Clear Creek in Warren County, Clear Creek Township, Ohio.
2. The Dam is a Class I structure pursuant to Ohio Administrative Code (O.A.C.) Rule 1501:21-13-01 based on the potential downstream hazard. Sudden failure of the Dam would result in probable loss of life and flooding of high valued property downstream of the Dam.
3. On March 10, 2017, the Division of Water Resources (“the Division”) sent a letter to the Owners requiring submittal of a schedule within 60 days from the date of the letter for finalizing an Emergency Action Plan (EAP) and making the required dam repairs as identified in the 2016 Dam Safety Inspection Report. The schedule was required to show the necessary steps to be implemented in order to have an approved EAP on file with the Division of Water Resources within 1 year from the date of the letter, and also to outline the steps necessary for completing repairs to the dam within 2 years from the date of the letter.
4. Scott G. Oxley, Statutory Agent for Settlers Walk Home Owners Association, submitted a schedule on May 17, 2017. The schedule indicated that the final EAP would be submitted by March 31, 2018 and that dam repairs would be completed by September 1, 2018. This outlined an acceptable time frame for completing the EAP and dam repairs, and the schedule was approved on May 25, 2017. No deadlines on the schedule were met.

Remick Lake Dam
August 22, 2018

5. On April 26, 2018, Notice of Violation (NOV) Number 2018-1001 was sent to the Owners requiring submittal of a revised schedule by June 1, 2018 for the EAP and other items listed in the 2016 Dam Safety Inspection Report. The NOV required the EAP to be completed by October 1, 2018, and the dam to be brought into full compliance by December 1, 2019. A revised schedule was not received.

ORDER

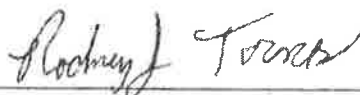
The Owners shall perform the following remedial measures judged by the Chief as necessary to safeguard life, health, and property:

1. The Owners shall either repair, breach, or modify the Dam by performing the following measures:
 - a. If the Owners choose to repair the Dam:
 - i. By September 7, 2018, the Owners must submit an acceptable schedule for full remediation of the Dam including finalizing the Emergency Action Plan.
 - ii. By November 16, 2018, the Owners shall submit the finalized Emergency Action Plan.
 - iii. By March 1, 2019, the Owners shall submit final engineered plans for full remediation of the Dam.
 - iv. By November 15, 2019, the Owners shall complete construction to fully remediate the Dam.
 - b. If the Owners choose to breach or modify the Dam:
 - i. By September 7, 2018, the Owners must submit an acceptable schedule for the permanent breach or modification of the Dam.
 - ii. By November 1, 2018, the Owners shall submit engineered plans for the permanent breach or modification of the Dam.
 - iii. By May 31, 2019, the Owners shall complete construction to permanently breach or modify the Dam.

It is so Ordered.

This Order is issued under the authority granted to me by O.R.C. Section 1521.062.

8-22-18
Issue Date



Rodney J. Tornes, P.E.
Acting Chief
Division of Water Resources

Remick Lake Dam
August 22, 2018

NOTICE OF APPEAL RIGHTS

Pursuant to Chapter 119 of the Ohio Revised Code, you are hereby notified that you may request an administrative hearing regarding this Order. Any such request must be submitted in writing within thirty (30) days of the mailing date of this Order. Please note that this Order is being mailed to you on August 22, 2018. Requests for a hearing must be addressed to:

Chief, Division of Water Resources
Ohio Department of Natural Resources
2045 Morse Road, Building B-3
Columbus, Ohio 43229-6693

In the event that a request is made, at the hearing you may appear in person, be represented by your attorney, or be represented by such other representatives as are permitted to practice before the agency, or you may present your position, arguments or contentions in writing. At the hearing, you may present evidence and examine witnesses appearing for and against you.
