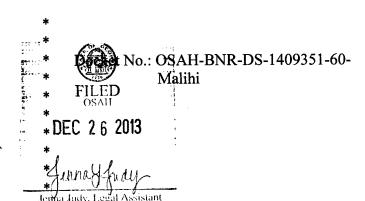
BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS STATE OF GEORGIA

KINGSCLIFF LAKE CORP., Petitioner,

v.

JUDSON H. TURNER, DIRECTOR ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES, Respondent.



ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DETERMINATION

I. Introduction

This matter came before the Court pursuant to an appeal filed by Kingscliff Lake Corporation (hereinafter "Petitioner") from the decision of Respondent to reclassify King's Cliff Lake Dam as a Category I dam pursuant to its authority under Chapter 5 of Title 12 of the Official Code of Georgia. Respondent has moved for Summary Determination, arguing that no genuine issue of material fact for determination exists and that it is entitled to judgment as a matter of law. Petitioner filed a response to Respondent's Motion on December 20, 2013. For the reasons indicated below, Respondent's Motion is **GRANTED**.

II. Findings of Fact

- 1. On July 21, 2003, Respondent notified Petitioner, Kingscliff Lake Corporation, that it would reclassify King's Cliff Lake Dam from a Category II dam to a Category I dam based upon a finding that probable loss of life would occur in the event of dam failure. This letter (hereinafter the "Kingscliff Notification Letter) informed Petitioner that it could appeal within 30 days if it disagreed with Respondent's reclassification. Notification to Kingscliff Lake Corporation dated July 21, 2013
- 2. Petitioner appealed the reclassification on August 14, 2003. Petitioner contended that it was not the owner of the dam, but appealed the reclassification as "an interested party whose property rights may be adversely affected by decisions rendered by the Environmental Protection Division." Petitioner argued that the reclassification was invalid due to EPD's failure to adhere to the procedural requirements for reclassification; EPD sent notification to Kingscliff instead of notifying DeKalb County Board of Commissioners, the owner of the dam. Petitioner attached to its appeal evidence that DeKalb County owned the dam, including a deed, and DeKalb County Real Estate Tax Statement. At the conclusion of its appeal, Petitioner requested "[t]hat the decision reclassifying King's Cliff Lake Dam as a Category I dam be vacated, based upon the failure of the Environmental Protection Division to name the true owner of said dam as provided by Georgia law." Petitioner's Appeal Letter dated August 14, 2003.

- 3. On June 11, 2004 Respondent notified DeKalb County of the reclassification of the dam from a Category II to a Category I dam via certified mail. Respondent's Motion for Summary Determination, Exhibit 1.
- 4. This matter was referred to the Office of State Administrative Hearings for adjudication on or about September 12, 2013.
- 5. On November 22, 2013, Respondent filed a Motion for Summary Determination with the undersigned. In its motion, Respondent introduced evidence that it had identified DeKalb County as the true owner of the dam and that, by providing notice to DeKalb County on June 11, 2004, it had given notice to the owner of the dam, fulfilling the statutorily-imposed prerequisite to reclassifying the dam. Respondent argued that since it was undisputed that DeKalb County was the owner of the dam and that it demonstrated that it had adhered to the notice requirements of the statute, there was no longer "a genuine issue of material fact for determination." Therefore, Respondent contended that its Motion for Summary Determination should be granted. Respondent's Motion for Summary Determination.
- 6. On December 12, 2013, the parties entered into a stipulation giving Petitioner until December 20, 2013 to respond to Respondent's Motion for Summary Determination. Notice of Appearance, Stipulation, Joint Motion for Extension of Time and Order Thereon.
- 7. On December 20, 2013, Petitioner filed a document entitled "Petitioner's Response to Motion for Summary Determination and Motion to Vacate and declare that Respondent's 2003 Notice Letter is Inapplicable to Petitioner" (hereinafter "Petitioner's Motion to Vacate"). In Petitioner's Motion to Vacate, Petitioner submitted that Respondent's Motion for Summary Determination should be denied and proceeded to argue that the July 2003 notification letter did not apply to Petitioner and should be "vacated and declared null and void." Petitioner attached an Affidavit from Jack Woodall, President of Kingscliff Lake Corporation, to the Motion to Vacate. Petitioner included exhibits along with Mr. Woodall's affidavit, including plats of the King's Cliff Lake properties and correspondence with the Safe Dams Program. These correspondences directed Petitioner to take action to maintain the dam. Petitioner's Motion to Vacate, Exhibits A, B, C, E-1, E-2; Affidavit of Jack Woodall.
- 8. Petitioner submitted that this evidence demonstrated that Kingscliff Lake Corporation was not the owner of the dam and, therefore, that Respondent could not "require Petitioner to operate the dam and comply with regulatory procedures with respect to such operation." Petitioner submitted that, because it did not own the dam, it could not possibly "operate, maintain, repair, or remediate the Dam or carry out any of the regulatory procedures referenced in the 2003 Notice Letter," and that, therefore, the 2003 Notice Letter should be "vacated and declared null and void." *Petitioner's Motion to Vacate*.
- 9. Respondent immediately replied to the December 20 Motion with a "Motion to Strike Petitioner's Motion . . . and Affidavit of Jack Woodall and Exhibits Attached Thereto . . ." on December 23, 2013 (hereinafter "Respondent's Motion to Strike"). Respondent contended that Petitioner's Motion to Vacate, the Jack Woodall Affidavit, and all exhibits attached thereto

should be stricken from the record because: (1) Petitioner's Motion was an untimely Motion for Summary Determination; (2) Petitioner's Motion fails to include a statement of material facts as to which there is no genuine issue for determination and (3) Petitioner's motion is premised upon contentions that are outside the scope of the sole issue before the Court as framed by the allegations of the Petition for Hearing. *Respondent's Motion to Strike*.

III. Conclusions of Law

- 1. OSAH Rule 15 provides that a party "may move, based on supporting affidavits or other probative evidence, for summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination." GA. COMP. R. & REGS. 616-1-2-.15 (1). "When a motion for summary determination is supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination." *Id. at (2)*.
- 2. Petitioner originally appealed Respondent's action on the basis that it would be aggrieved by Respondent's reclassification of King's Cliff Lake Dam as a Category I dam. Petitioner requested that Respondent's action be "vacated" only on the basis that Respondent failed to provide the true owner with notice. Petitioner's Appeal dated August 14, 2003.
- 3. Respondent submitted evidence in its Motion for Summary Determination that it provided the owner of the dam with notice that it intended to classify King's Cliff Lake Dam as a Category I dam in the manner prescribed by the Georgia Code. Respondent's Motion for Summary Determination; See O.C.G.A. § 12-5-376(a) and (b).
- 4. Petitioner failed to refute Respondent's evidence in its Motion to Vacate and thereby failed to show that there is a genuine issue of material fact for determination. Rather, Petitioner reiterated that it did not own the King's Cliff Lake Dam property and moved that the undersigned vacate the July 21 notification letter.

IV. Decision

IT IS HEREBY ORDERED that Respondent's Motion for Summary Determination is GRANTED.

SO ORDERED this 26rd day of December, 2013.

MICHAEL MALIHI, Judge