

# Memo

To: Estling Lake Corporation

From: Eileen McCarthy Born, Esq.

Date: September 6, 2019

Re: Dam Rehabilitation

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As per our discussion, the following information is provided as an update to ELC and your members regarding the dam rehabilitation.

The New Jersey Safe Dam Act, N.J.S.A. 58:4-1, et seq. (“SDA”) imposes maintenance and repair obligations for a dam on parties who are owners or have control of that dam, and secondarily, on those controlling or owning the reservoir created by the dam. As defined by the Act, an owner or person having control of a reservoir or dam must implement any action ordered by the New Jersey Department of Environmental Protection (“NJDEP”) pursuant to N.J.S.A. 58:4-5 (a).

In the past several years, case law has addressed the issue of dam responsibility when there are two or more potential parties who have either ownership (including an easement or right of way) or control of the dam or reservoir. Generally, the court will look at the

factual situation of each case in determining the percentage responsibility for the rehabilitation of the dam, in accordance with NJDEP dam safety standards.

In applying these standards to the situation that exists between Estling Lake and N.J. Transit, the question of legal title appears to indicate that both Estling Lake and N.J. Transit have a portion of legal title to the underlying real property. NJDEP acknowledges both parties as owners of the dam and sends enforcement and compliance letters to both parties. The “dam”, as such term is used here, includes the spillway and the railroad embankment. It is my further understanding that N.J. Transit has taken responsibility for the periodic engineering reports required by NJDEP/ Dam Safety, but that Estling Lake has previously taken the lead in the spillway rehabilitation project, including replacing the low-level intake pipe under the spillway.

As the rehabilitation project is currently in the development stage, the allocation of each party’s responsibility has not been determined at this time. It is anticipated that the terms of the rehabilitation will be negotiated between the parties, as the NJDEP does not typically get involved in the determination of each owner’s responsibility.