The Zoning Board administrative appeal filed by the plaintiffs [*145] is hereby dismissed.

BY THE COURT

Hon. Kevin Tierney

Judge Trial Referee

6 of 7 DOCUMENTS

Marc Briere v. Anthony Tusia et al.

WWMCV0940009046S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF WINDHAM AT WILLIMANTIC

2011 Conn. Super. LEXIS 2301

***May 16, 2011*, Decided**
***May 16, 2011*, Filed**

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CORE TERMS: beaver, pond, dam, nuisance, neighbor, beaver dam, special defenses, yard, flooding, cause of action, wetland, counterclaim, private nuisance, injunctive relief, surface water, trespass, natural resources, landowner, water level, artificial, breachway--, renders judgment, quotation marks omitted, natural condition, environmental, judicata, earthen, tubing, laches, berm

JUDGES: [*1] Robert F. Vacchelli, Judge, Superior Court.

OPINION BY: Robert F. Vacchelli

OPINION

MEMORANDUM OF DECISION

This case involves a dispute between neighbors over a beaver dam. The plaintiff, Marc Briere, complains that his neighbors, the defendants Anthony Tusia and Kathleen Mills, have a beaver dam on their property that causes water to back up onto his property, making parts of his back yard unusable. Moreover, it is damaging his property value, he claims. He further complains that the defendants are able, but refuse, to ameliorate the flooding caused by the dam. The defendants admittedly prefer to let nature take its course, and refuse to act. The defendants consider modification of the dam to be a deadly insult to the ecosystem that outweighs the relatively trivial concerns of their neighbor in this case. As the facts will show, this is not the first time that the defendants have been sued over this same beaver dam. In 2007, after trial, the defendants were found liable and ordered to pay $100.00 in damages to another neighbor. For similar reasons, the court rules likewise in this case. The court renders judgment for the plaintiff, Briere, on count two his amended complaint and awards $100.00 damages. On [*2] all other claims and requests in the amended complaint, the court renders judgment for the defendants, Tusia and Mills. On the counterclaim filed by Tusia and Mills, the court renders judgment for Briere. Each party shall be responsible for their own attorneys fees.

I

This [*3] matter was tried to the court. The court heard evidence on October 20 and November 18, 2010 and on January 25 and March 9, 2011. It also viewed the site on November 18, 2010 with the parties, counsel, and court per-

sonnel. It heard testimony from the following witnesses: Paul Archer, land surveyor; Charles Normandin, Jr., land surveyor; Charles Kroll, Ph.D., engineering professor; William Henry, real estate appraiser; Richard W. Chase, neighbor; Robert H. Louiselle, Sr., former Killingly elected official; Anthony Tusia, defendant; Leo Briere, plaintiff's father; Linda Walden, Killingly Director of Planning and Development; Paul Hennen, ***wetlands*** scientist; Kathleen Mills, defendant; Russell Bugbee, neighbor; Luba Bugbee, neighbor; and Marc Briere, plaintiff. The court also reviewed 29 maps, photographs and other exhibits. Briefs and reply briefs were filed by counsel for the parties in support of their respective positions.

The amended complaint is in three counts: the first count alleges trespass; the second count alleges private nuisance; and the third count alleges a violation of the Environmental Protection Act, General Statutes §22a-16. Plaintiff seeks injunctive relief, money damages [*4] and attorneys fees. The defendants' answer denies the allegations of harm and asserts four special defenses: the first special defense claims that plaintiff's requests are legally barred because they would require defendants to violate state and local ***wetlands*** laws; the second special defense claims that plaintiff's action is barred by res judicata and collateral estoppel; the third special defense claims that the plaintiff's action is barred by laches; and the revised fourth special defense alleges assumption of the risk. The defendants also filed a counterclaim seeking injunctive relief against the plaintiff alleging a cause of action for private nuisance, claiming that the plaintiff is causing water to flow onto the defendants' property. Plaintiff denies the allegations in the counterclaim and files special defenses of unclean hands and laches as to the counterclaim.

II

On the first day of trial, the defendants filed a motion to dismiss claiming that the court lacks subject matter jurisdiction over the third count of the amended complaint. That motion is denied.

The standards for deciding a motion to dismiss on subject matter jurisdiction grounds are well established. "A motion to [*5] dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Citation omitted; internal quotation marks omitted.) *Filippi v. Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005); see also *Dyous v. Psychiatric Security Review Board*, 264 Conn. 766, 773, 826 A.2d 138 (2003); *Blumenthal v. Barnes*, 261 Conn. 434, 442, 804 A.2d 152 (2002).

"When a . . . Court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light . . . [A] court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Citations omitted; internal quotation marks omitted.) *Filippi v. Sullivan, Id.; see also Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 432-33, 829 A.2d 801 (2003); *Dyous v. Psychiatric Security Review Board, Id.* "Where a decision as [*6] to whether a court has subject matter jurisdiction is required, every presumption favoring jurisdiction should be indulged." (Citations omitted.) *Demar v. Open Space & Conservation Commission*, 211 Conn. 416, 425, 599 A2d 1103 (1989).

The third count alleges a violation of the Environmental Protection Act, General Statutes §22a-16. Defendants argue that the plaintiff does not come within the scope of persons protected by this statute because the statute protects only natural resources "of the state" not private property. The statute provides, in pertinent part, as follows:

> . . . [A]ny person . . . may maintain an action in the superior court for the judicial district wherein the defendant is located . . . except where the state is a defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against . . . any person . . . for the protection of the public trust in the air, water and other natural resources *of the state* from unreasonable pollution, impairment or destruction . . .

General Statutes §22a-16 (emphasis added).

Defendants argue that, where this statute calls for protection of the natural resources "of the state" in the emphasized [*7] portion above, a reading of the plain language of this statute requires the court to conclude that this statute only protects state owned property, not private property. Only private property is involved in this case; so, the statute does not apply, defendants argue.

Whether this remedy applies only to state owned property calls for the court to construe this statute. "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply . . . In seeking to determine that meaning, General Statutes §1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If after examining such test and considering such relationship, the meaning of such test is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered . . . When a [*8] statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . ." (Citations omitted; internal quotation marks omitted.) *Grady v. Somers*, 294 Conn. 324, 333, 984 A.2d 684 (2009).

Under these rules, the court must read the statute in context. In context, it is clear that the remedy applies to both private and public property. That is because the natural resources of the state being discussed in this statute means, inter alia, the "natural environment" located in Connecticut, not government property. This is explained earlier in the same chapter of the general statutes, particularly in General Statute §22a-1, as follows:

> The General Assembly finds that the growing population and expanding economy of the state have had a profound impact on the life-sustaining *natural environment*. The air, water, land and other natural resources, taken for granted since the settlement of the state, are now recognized as finite and precious. It is [*9] now understood that human activity must be guided by and in harmony with the system of relationships among the elements of nature. Therefore the General Assembly hereby declares that the policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state. It shall further be the policy of the state to improve and coordinate the environmental plans, function, powers and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations and concerned individuals, and to manage the basic resources of air, land and water to the end that the state may fulfill its responsibilities as trustee of the environment for the present and future generations.

General Statute §22a-1 (emphasis added).

The court finds that the statute, when read in context, is unambiguous. It applies to the natural resources located on both public and private property in Connecticut. All other arguments advanced by defendants concern the merits of the case or sufficiency of the pleading, not [*10] the subject matter jurisdiction of the court to hear the matter. Therefore, and for all of the above reasons, the motion to dismiss is denied.

III

As to the merits, the court finds the facts as follows: Marc Briere lives at 1192 Hartford Pike, Dayville, CT. His lot is shaped like a parallelogram. It is .87 acres in size, with a single-family home. It has about 100 feet of frontage on Hartford Pike and runs north for about 500 feet. As it runs north, the topography drops gently so that his back yard is generally lower in elevation than the front yard. He acquired his property in September 1988. The Tusias live at 1206 Hartford Pike, Dayville, CT. It is a back lot, located behind Briere, further to the north. They own over 22 acres. A large part of their property is covered by a large, natural spring fed pond that sometimes overlaps onto a portion of Briere's back yard. It is that overlap that is in issue in the instant case. Under various conveyances, the Tusias acquired part of their property in February 1980 and they acquired the portion containing the pond in August 1985.

Before the area was subdivided and developed, and before the existing lots were acquired by the present parties, [*11] aerial photographs and anecdotal evidence from long-time property owners showed that the pond existed for many years, and that it changed in shape over time. Sometimes, it covered a large part of what is now Briere's lot, and at other times it did not reach his lot. Water level in the pond rose and fell depending on rainfall. Sometimes, neighbors would take a boat down to the water and fish in an area that is now Briere's back yard. Water from the pond flowed north down a short breachway into Chase Reservoir.

During development in 1979, the area in Briere's back yard was excavated and made even lower, making it susceptible to water collection from the pond. Moreover, it brought the ground closer to the subsurface water table. A small spring breaks through the surface at one spot in the northeast corner of Briere's back yard, near the same area that he complains is wet due to the Tusias' pond.

In 1981, the then-owner, the Crystal Water Utilities ***Corporation,*** built an earthen berm around the pond to trap the water. This caused the pond to expand onto the neighbors' property. Neighbors complained. The owner cut a breach into the berm. This permitted the water to run down the breachway again [*12] and drain into the Chase Reservoir, lowering the water level.

When Briere purchased his lot in 1988, his back yard was relatively dry. The grass could be mowed, and he kept a dog house in the lower area.

In 1990, the pond water level rose again and water from the pond began to intrude onto neighbor's property again. This time, the problem was beavers. A beaver colony had constructed a beaver lodge in the middle of the pond and had taken up residence. They also built a dam across the breach in the berm, blocking the breachway. Neighbors complained about the flooding to the Tusias. Shortly thereafter, the Tusias discovered that the beaver dam had been knocked down by trespassers. This caused the water level to drop. This upset the Tusias because they believed that the loss of water caused the beavers to freeze to death or relocate.

The beavers, or a new family, eventually rebuilt the dam about a year or two later. The complaining neighbors also returned.

One neighbor, Richard Chase, whose family had been farming in the area for 200 years, confronted the Tusias and demanded action. The Tusias liked the wildlife and natural surroundings as is, but they tried to placate Mr. Chase. Mr. Tusia [*13] consulted with someone who worked at the state Department of Environmental Protection and studied literature to determine how to reduce the pond water level without disturbing the beavers or ecosystem. He installed tubing beneath the dam to permit a runoff. The beavers responded by blocking the tubing. His repeated efforts to keep the tubes clear were unsuccessful.

In 2002, the pond began to expand into Briere's back yard. The neighbors continued to complain. The dispute became heated. Mr. Chase and others demanded that Tusia remove the beavers and the dam. They complained, without satisfaction, to the town government. They asked whether the Tusias cared more for the beavers or the neighbors. Witnesses testified that Mr. Tusia responded, at that time, "F the neighbors . . . I care about nature." Mr. Chase filed suit in 2004. At this point, the Tusias stopped trying to keep the tubing clear. Mr. Tusia testified that, by then, he had been trying to keep Mr. Chase happy for ten years, without success. He quit trying after Chase filed suit.

The *Chase* lawsuit was filed in Windham Superior Court and was tried to the court. That case concerned many of the same background facts as in the [*14] instant case. Chase's property is adjacent to the pond on one side and Briere's property is adjacent to the pond on another side. However, the issues in the *Chase* case focused on the effect of the pond on Mr. Chase's property, not Mr. Briere's property. Mr. Briere testified as a witness at that trial and said, in effect, that he was not very concerned about water on his property; but, rather, was concerned that the flooding was causing a problem with rats. Briere did not sue the Tusias at that time, nor did he join in the *Chase* lawsuit.

The *Chase* lawsuit was similar to the instant case in that it alleged causes of action for trespass and private nuisance. Mr. Chase, like Mr. Briere in the instant case, sought injunctive relief and damages. The trial court in the *Chase* case ruled against the Tusias only on the private nuisance count. It ruled that, although the Tusias ordinarily could not be liable for a nuisance resulting from a natural condition on their land, this dam was not natural because the beavers were attracted to and using the artificial conditions on the land: the earthen berm and breachway originally created by the Crystal Water Utilities ***Corporation.*** The court ruled, "Consequently, [*15] the defendants are liable for damages caused by the surface water that was diverted onto the plaintiffs' land as a result of their failure to remove the beaver dam, a non-natural abatable condition existing on their land." *Chase v. Tusia*, Superior Court, judicial district of Windham, Doc. No. CV 04-4000354-S (May 1, 2007, Booth, J.) [43 Conn. L. Rptr. 688]. The trial court denied injunctive relief apparently due to the fact that, inexorably, the beavers will come and go, and due to the evident futility in keeping the beavers from maintaining the dam. However, it did award money damages. Apparently persuaded that the pond affected only small parts of empty land, the court awarded damages of only $100.00.

After the *Chase* case was decided, Briere asked the Tusias to abate the flooding that affected his property. The Tusias have responded by doing nothing to abate the problem. Mr. Tusia, a former member of the Killingly ***Wetlands*** Commission, believes that it would be unlawful for him to remove the dam. There is no law prohibiting the removal or

alteration of a beaver dam in order to lower water levels, although a permit might be required to work in a ***wetland***, depending upon the particular [*16] facts. General Statutes §22a-28 et seq.; Inland ***Wetlands*** and Watercourses Regulations of the Town of Killingly, Connecticut (1999 Rev.). Mr. Tusia has never applied for a permit. There is no law prohibiting the trapping and removal of beavers either, provided it is done in a lawful manner. There are very strict trapping laws and regulations in Connecticut. See General Statutes §26-65 et seq.; Reg. Conn. State Agencies §26-66-1 et seq. There was no evidence in this case that the Tusias ever considered trapping or relocating the beavers, or hiring an expert service to do so. To the contrary, they appreciate nature and enjoyed co-existing with the wildlife on their property.

The instant case was commenced in May 2009. In the meantime, the beavers have not been seen since 2008-09. They have apparently migrated elsewhere, but all expect them to return someday. Their lodge is still standing in the middle of the pond. It is currently vacant. The dam has deteriorated with time, permitting some water to resume its flow into the Chase Reservoir. Mr. Tusia has detected a cut in the dam that he suspects was not caused naturally. Nevertheless, by the end of the trial in the instant case, the pond [*17] water level has lowered and the standing water has receded from Briere's property. At peak, it intruded onto almost 160 feet of the northeast corner of his back yard. In January 2011, it intruded onto only about 10 to 12 feet of the northeast corner of Briere's back yard.

IV

The first issues that should be addressed concern defendants' special defenses of res judicata (claim preclusion) and collateral estoppel (issue preclusion). These issues were raised in defendants' second special defense. These defenses are the civil law's analogue to the criminal law's defense of double jeopardy. They bar a party from relitigating a matter that was already litigated. *Singhaviroi v. Board of Education*, 124 Conn.App. 228, 232, 4 A.3d 851 (2010). Essentially, defendants argue that the same problems were litigated in the case of *Chase v. Tusia, supra*, and cannot be tried again. The court concludes that the doctrines do not apply in this case.

Res judicata precludes the parties to a judgment from relitigating that cause of action. The judgment is conclusive with respect to any claims relating to the cause of action which were actually made or which might have been made. *Local 1219, International Assn. of Fire Fighters v. Conn. Labor Relations Board*, 171 Conn. 342, 355, 370 A.2d 952 (1976); [*18] *Corey v. Avco-Lycoming Div., Avco* ***Corp.***, 163 Conn. 309, 316-17, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116 (1973). A final judgment on the merits is conclusive on the parties to the action. *Corey v. Avco-Lycoming Div., Avco* ***Corp.***, *supra*, 163 Conn. 316-17. The term "parties" includes not only the nominal or record parties, but also real parties in interest and those in privity, but not mere witnesses. *Ladany v. Assad*, 91 Conn. 316, 322, 99 A. 762 (1917). In the *Chase* case, Marc Briere was a witness, but not a party in fact or vicariously. The doctrine of res judicata does not bar him from litigating the instant case.

Collateral estoppel is that aspect of res judicata which is concerned with the effect of a final judgment on the subsequent litigation of a different cause of action involving some of the issues determined in a former action between the parties. *Brockett v. Jensen*, 154 Conn. 328, 337, 225 A.2d 190 (1966). "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . . A judgment on one cause of action [*19] is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."(Citation omitted.) *Brockett v. Jensen, supra.* This doctrine is not applicable here, either. First, it does not apply because Marc Briere was not a party who had his day in court in the *Chase* case. Second, it does not apply because the *Chase* case involved the flooding of Chase's property and the responsibility of the Tusias for infringing on Chase's rights; the *Chase* case did not resolve issues concerning the Briere property or the responsibility of the Tusias for infringing on Briere's rights. Because both properties border the same pond, the instant case involves some of the same historical, background facts as in the *Chase* case, but it involves a different location and different dispositive facts. Whether those different facts will require a different result is a factual question to be resolved by the trier of fact, not a legal issue of claim or issue preclusion resolved by legal doctrine. All other arguments by the defendants under this category were unpersuasive.

V

Concerning the merits, with respect to plaintiff's causes of action [*20] for trespass (first count) and nuisance (second count), the pertinent Connecticut precedent was succinctly stated by the court in the *Chase* case as follows:

> The plaintiffs have brought a count in trespass and a count in private nuisance. The elements of a Connecticut action for trespass are: "(1) ownership or possessory interest in land by the plaintiff; (2) in-

vasion, intrusion or entry by the defendant affecting the plaintiffs' exclusive possessory interest; (3) done intentionally; and (4) causing direct injury." *Abington Ltd. Partnership v. Talcott Mountain Science Center*, 43 Conn.Sup. 424, 427 (1994) [11 Conn. L. Rptr. 349]. The court finds, however, that the defendants' actions were not sufficiently intentional to support an action for trespass. In addition, the plaintiff's claims of trespass and of private nuisance are based on the same conduct of the defendants. The court therefore holds that if the plaintiffs have a cause of action against the defendants, it is more properly analyzed as a private nuisance.

In *Pestey v. Cushman*, 259 Conn. 345, 361 (2002), the court held "in order to recover damages in a common-law private nuisance cause of action, a plaintiff must show that the [*21] defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . or the result of the defendant's negligence." (Citation omitted.) While the plaintiffs claim that the defendants have maintained the beaver dam causing the flooding, the defendants claim that it is the beavers that maintain the dam, not the defendants. Neither of these assertions address the central issue of the case. The court agrees that the defendants do not maintain the beaver dam, and the court finds as a fact that the defendants did nothing to attract beavers onto the property. However, because the dam is located on the defendants' property the question is whether the defendants have a duty to alleviate the flooding caused by the beaver dam.

"Surface water cases first abandoned the law of property in favor of the law of torts in *Basset v. Salisbury Mfg. Company*, 43 N.H. 569 (1862) . . . While under the law of property, water dripping from an overhanging eve was actionable, the law of torts, which governs surface water, requires the water to do damage before a right of action accrues." *Street* [*22] *v. Woodgate Condominium Assoc.*, Superior Court, judicial district of Middlesex at Middletown, Docket No. CV 01 096955 (January 13, 2004, Gordon, J.) [36 Conn. L. Rprt. 381].

In 1980, the Connecticut Supreme Court in *Page Motor Co. v. Baker*, 182 Conn. 484, 487-88 (1980), analyzed the common-law principle of the "common-enemy doctrine" for surface waters. In *Page Motor*, the Supreme Court modified the first part of this doctrine and determined that in Connecticut a landowner repelling water from his land had a duty to do so in a reasonable manner and was "entitled to take only such steps as are reasonable, in light of all of the circumstances of relative advantages to the actor and disadvantages to the adjoining landowners . . ." *Id.*, 488-89.

In *Ferri v. Pyramid Construction Co.*, 186 Conn. 682, 686 (1982), the Supreme Court reiterated its holding in *Page Motor*, but further explained that the reasonable use doctrine set forth in *Page Motor* did not apply to incidents where surface water flowed off the defendants' property onto the land of the adjoining landowner. In a trial court opinion the court held "[t]hus, landowners who divert surface water from its natural flow in such a way as to [*23] substantially damage the property of their neighbors are liable regardless of whether or not their conduct is reasonable." *Crowell v. Kogut*, Superior Court, judicial district of New Haven at Meriden, Docket No. CV 04 4000404 (October 19, 2005, Wiese, J.) [40 Conn. L. Rptr. 133].

"An invasion of one's interest in the use and enjoyment of land resulting from another's interference with the flow of surface water may constitute a nuisance . . ." Restatement 2d of Torts, §833. "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." (Internal quotation marks omitted.) *Pestey v. Cushman, supra*, 259 Conn. 352.

"The term nuisance refers to the condition that exists and not to the act or failure to act that creates it. If the creator of the condition intends the acts that bring about the condition found to be a nuisance, the nuisance thereby created is said to be absolute and its creator is strictly liable . . . If the condition claimed to be a nuisance arises out of the creator's unintentional but negligent act, i.e., a failure to exercise due care, the resulting condition is characterized as negligent nuisance . . . [T]he only practical [*24] distinction between an absolute nuisance and one grounded in negligence is that contributory negligence is not a defense to the former but may be as to the latter." (Citations omitted; internal quotation marks omitted.) *Quinnett v. Newman*, 213, Conn. 343, 348-49, overruled on other grounds, *Craig v. Driscoll*, 262 Conn. 312, 329 (2003).

"The conduct necessary to make [an] actor liable for . . . a private nuisance may consist of (a) an act; or (b) a failure to act under circumstances in which the actor is under a duty to take positive action to

prevent or abate the interference with the . . . invasion of the private interest." Restatement 2d of Torts, §824. "A possessor of land is subject to liability for a nuisance caused while he is in possession of an abatable artificial condition on the land, if the nuisance is otherwise actionable, and (a) the possessor knows or should have known of the condition and the nuisance . . . and (b) he knows or should have known that it exists without the consent of those affected by it, and (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it." Restatement 2d of Torts, §839.

The [*25] Restatement 2d of Torts, §840, gets to the core of the present issue and states that "[a] possessor of land is not liable to persons outside the land for a nuisance resulting solely from a natural condition of the land." However, the Restatement expresses a narrow definition of "natural condition" and provides that "[t]he term 'natural condition' of land means a condition that is not in any way the result of human activity. The term comprehends . . . water that is on the land wholly through natural causes . . . and birds, animals or insects that have not been brought upon it or attracted by act of man. The term does not comprehend conditions that would not have arisen but for the effect of human activity even though the conditions immediately resulting from the activity were harmless in themselves and a harmful condition has arisen through the subsequent operation of natural forces. Thus, an artificial structure that was harmless when created but which has become dangerous through natural decay is not a natural condition." Here the artificial structures which were harmless when created by the defendants' predecessor in title, Crystal Water Company, are the earthen dam and breachway, [*26] which have become harmful through subsequent actions by the beavers.

The court finds that the defendants did not attract the beavers to the property. However, the facts reveal that the beavers used the earthen dam and breachway, created by the previous landowner, to build their beaver dam. Thus, pursuant to Restatement 2d of Torts, because the beavers were attracted to artificial conditions on the land--the earthen dam and breachway--the beaver dam is not considered a natural condition, but rather an artificial condition. Consequently, the defendants are liable for damages caused by the surface water that was diverted onto the plaintiffs' land as a result of their failure to remove the beaver dam, a non-natural abatable condition existing on their land.

Chase v. Tusia, supra.

Under the facts in the *Chase* case, which involved many of the same background facts as in the instant case, the court in the *Chase* case found that injunctive relief would not be appropriate, but it awarded damages: $100.00. While the above is not binding on this court, the court finds the legal analysis accurate and applicable. Also, it is consistent with decisions in other states that generally find no liability in [*27] the landowner for damage caused by nature and wildlife, including dams built by beavers, absent a statute to the contrary, or unless the landowner somehow shared in causing the problem in a way in which the law attaches responsibility. See, e.g., *Huff v. Smith*, 679 So.2d 259 (Ala.Civ.App. 1996); *Roberts v. Brewer*, 290 Ala. 329, 276 So.2d 574 (1973); *Bracey v. King*, 199 Ga.App. 831, 406 S.E.2d 265 (1991); *State v. Sensenbrenner*, 262 Wis. 118, 53 N.W.2d 773 (1952); *Villeneuve v. Powers*, 158 Vt. 330, 609 A.2d 994 (1992); *Frank v. Garrison*, 184 App.Div.2d 852, 584 N.Y.S. 2d 217 (1992).

The same result of the *Chase* case is merited in the instant case. The court agrees that the plaintiff in the instant case has failed to prove an intentional invasion of his property by the defendants, necessary for liability in trespass, as in *Chase*. Therefore, the court will render judgment for the defendants as to count one of the amended complaint. Also, as in the *Chase* case, the court does find the defendants liable for negligent nuisance. The defendants maintained the artificial berm utilized by the beavers. This renders the defendants partly responsible and, therefore, liable to the plaintiff for the [*28] damage caused by the beaver dam. In sum, the defendants are liable to Briere for nuisance for the same reasons they were liable to their other neighbor, Chase, for nuisance as decided by the Superior Court in the earlier *Chase* case.

Also, as in the *Chase* case, this court will not impose an injunction. Mandatory injunctive relief should not be granted if it would be impracticable to draft and enforce such an order. *Franc v. Bethel Holding Co.*, 73 Conn.App. 114, 144, 807 A.2d 519, cert. granted on other grounds, 262 Conn. 923, 812 A.2d 864 (2002), appeal withdrawn (2003). In the instant case, considering the futility of keeping up with the beavers and lack of certainty over a permanent solution, it is impracticable to fashion and enforce a mandatory injunction order.

On the other hand, an assessment of damages is appropriate. With respect to damages, Briere presented evidence that the flooding caused tree damage on his property and that it caused him to move his dog house to a different spot on the lawn to avoid the water. He also presented testimony from an appraiser that the flooding has diminished the value of his property by 20 per cent, amounting to a $35,000.00 loss. The court is [*29] not persuaded that the defendants should be liable to that extent. The pond has expanded and contracted naturally over the years without human or wild-life causes, and will do so in the future. Also, plaintiff's back yard is wet partly due to the existence of the subsurface spring on his property. Plaintiff also complained about water runoff aimed at his land by a different neighbor. Thus, the tree damage and need to move the dog house can be attributed to causes other than the defendants and the beavers. Moreover, the additional water affects only a small, unused portion of plaintiff's back yard, and that water is currently receding. Considering all of those factors, the court will assess plaintiff's damages at $100.00. Judgment shall enter in favor of the plaintiff on count two of the amended complaint accordingly. No attorneys fees will be awarded.

With regard to plaintiff's claim under the Connecticut Environmental Protection Act (CEPA) in count three, as noted earlier, that act allows "for declaratory and equitable relief against . . . any person . . . for the protection of the public trust in the air, water and other natural resources of the state from *unreasonable* pollution, impairment [*30] or destruction . . ." General Statutes §22a-16 (emphasis added). Plaintiff argues that the dam is causing an illegal impairment in this case.

While a dammed watercourse can be considered impaired for purposes of the CEPA, our Supreme Court has held that, in such a case, the CEPA is enforceable only when the impairment is unreasonable, i.e., shown to "rise to such a level as to require judicial intervention." *City of Waterbury v. Town of Washington*, 260 Conn. 506, 556, 800 A.2d 1102 (2002). In such cases, a review of the level of compliance or lack of compliance with the pertinent regulatory scheme can be used to measure whether the impairment is unreasonable. *Id.* at 557.

In the instant case, the plaintiff has failed to persuade the court that the defendants are in non-compliance with any environmental regulations. Moreover, there is no persuasive evidence of any negative impact on the environment requiring judicial intervention whatsoever. The burden is on the plaintiff to prove his case. General Statutes §22a-17. His claim under General Statutes §22a-16 fails because he has failed to successfully carry his burden of proof. Thus, judgment shall enter for the defendants on the third count [*31] of the amended complaint.

VI

With regard to defendants' special defenses, the court earlier disposed of the second special defense concerning res judicata and collateral estoppel. The remaining special defenses are discussed seriatim:

In their first special defense, defendants argue that plaintiff's case should fail because removal of the dam would constitute a violation of state and local ***wetlands*** laws. This defense fails. First, the plaintiff did not ask for removal of the dam. He asked for an order requiring the defendants to reduce the level of the dam to an elevation that will prevent the impounded waters from flooding the lands of the plaintiff, and to prohibit the defendants from maintaining the dam at a level wherein the impounded water will flow onto plaintiff's property. Moreover, the court finds that it is completely unnecessary to address this defense because the court did not order defendants to remove the dam. Having ruled against the plaintiff in his prima facie case for injunctive relief, it is unnecessary to address the corresponding special defense. See *Connecticut Light and Power Co. v. Huschke*, 35 Conn.Sup. 303, 305 n. 1, 409 A.2d 153 (1979).

To whatever extent the [*32] defense retains viability with regard to the issue of damages for nuisance for surface water diversion on which the court ruled in favor of the plaintiff, the court earlier observed that there is no state or local law that absolutely prohibits a landowner from abating a beaver dam flooding problem. As the testimony and exhibits in the case showed, the pond is in a ***wetland***, and a permit might be required for work in a ***wetland*** depending on the facts. The fact that a permit might be required does not bar the court from entering orders. The court can require a party to apply for a permit if one is necessary or appropriate. See, e.g., *City of Waterbury v. Town of Washington, supra*, 260 Conn. 532; *Town of Chaplin v. Balkus*, 189 Conn. 445, 456 A.2d 286 (1983); *Vance v. Tassmer*, 128 Conn.App. 101 (2011). Moreover, there was no evidence in the case that any law or government board would deny a permit if it was required. To the contrary, the evidence in this case showed that Mr. Tusia was a local ***wetlands*** official. He put in tubing under the dam to lower the water level voluntarily after consulting with experts, and he did the work without a permit. He maintained the tubing for 10 years without [*33] a permit. No ***wetlands*** authority objected. He did not stop because of any legal bar. He stopped because his efforts to appease his neighbors failed. They continued to complain. After Chase filed suit, Mr. Tusia stopped maintaining the tubing and stopped trying to appease his neighbors. Thus, defen-

dants' claim that ***wetlands*** laws prohibit them from taking action fails. All other arguments by the defendants under this category were unpersuasive. Accordingly, this special defense is of no avail.

The third special defense raises the issue of laches. "The defense of laches, if proven, bars a plaintiff from seeking equitable relief in a case in which there has been an inexcusable delay that has prejudiced the defendant . . . First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant." (Citation omitted; internal quotation marks omitted.) *Ferrigno v. Cromwell Development Assoc.*, 93 Conn.App. 799, 804 n.10, 892 A.2d 291, cert. denied, 278 Conn. 903, 896 A.2d 104 (2006). Defendants' point here is that the pond water has been affecting plaintiff since 2002. He testified as a witness in Chase's case in 2007, but did not feel aggrieved enough [*34] to join the suit then, and he has taken no steps to address the problem from his side of the boundary. The court is not persuaded. That plaintiff has delayed suit cannot be doubted. The delay certainly informs the court about the seriousness of his concerns and extent of damage. However, there is no proof of prejudice to the defendants caused by any delay. Moreover, the court did not order injunctive relief, so it is not necessary to even consider the laches defense to such relief. Thus, the laches defense fails. All other arguments by the defendants under this category were unpersuasive.

The revised fourth special defense raises the issue of assumption of the risk. Assumption of the risk is a defense to an absolute nuisance. *Starkel v. Edward Balf Co.*, 142 Conn. 336, 342, 141 A.2d 199 (1955). An absolute nuisance has been defined as one not originating in negligence, but created by intention (the intention not being to commit a wrong, but to create the condition out of which the nuisance arose). See *DeLahunta v. Waterbury*, 134 Conn. 630, 634, 59 A.2d 800 (1948); D. Wright, J. FitzGerald, W. Ankerman, Connecticut Law of Torts (Third Edition, 1991) §128. "To charge a plaintiff with assumption [*35] of the risk, it must appear that he knew or ought reasonably to have known and comprehended the peril to which he was exposed and, having such knowledge and comprehension, continued of his own violation to subject himself to that peril." (Citations omitted.) *Starkel v. Edward Balf Co., supra*, 142 Conn. 342 This court is not persuaded of the applicability of the defense in this case. The nuisance in this case was not intentional, but had its origin in negligence, that is, the failure of the defendants to exercise due care. See *Beckwith v. Stratford*, 129 Conn. 506, 510, 29 A.2d 775 (1942). Moreover, the plaintiff did nothing risky to put himself in harm's way in this case with respect to the flooding. Therefore, this defense is of no avail. All other arguments by the defendants under this category were unpersuasive.

VII

The defendants have filed a counterclaim against the plaintiff. The counterclaim accuses the plaintiff of trespass or nuisance, alleging, inter alia, that during development of plaintiff's lot, the builder excavated the back yard, causing springs to break through to the surface. They also allege that the developer removed an earthen berm from Briere's lot that acted as [*36] a barrier that stopped water from flowing from Briere's lot onto the Tusias' lot. They claim these acts cause surface water to run off the plaintiff's back yard into the defendants' pond. They seek injunctive relief requiring the plaintiff to bring his lot back up to pre-development grade with fill. The court rules in favor of Briere on this counterclaim. There was no persuasive evidence that water is running off his lot onto the Tusias' lot. There was evidence of the opposite--due to the beaver dam. All other arguments by the defendants under this category were unpersuasive. Having ruled against the Tusias on the counterclaim, it is unnecessary to decide the special defenses to that counterclaim. No attorneys fees are awarded.

VIII

For all of the foregoing reasons, the court renders judgment for the plaintiff, Briere, on count two of his amended complaint and awards $100.00 damages. On all other claims and requests in the amended complaint, the court renders judgment for the defendants, Tusia and Mills. On the counterclaim filed by Tusia and Mills, the court renders judgment for Briere. Each party shall be responsible for their own attorneys fees.

THE COURT

Robert F. Vacchelli

Judge, Superior [*37] Court