



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF)	<u>ADMINISTRATIVE ACTION</u>
ENVIRONMENTAL PROTECTION,)	FINAL DECISION
BUREAU OF DAM SAFETY)	
AND FLOOD CONTROL,)	OAL DKT. NO. ENH 2242-12
)	AGENCY DKT. NO. 31-236
Petitioner,)	
)	
v.)	
)	
MICHAEL AND ROBERTA COKENAKES,)	
)	
Respondents.)	

This Order addresses an appeal of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued on January 6, 2011, by the Department of Environmental Protection (the Department) assessing penalties in the amount of \$3500 against Michael and Roberta Cokenakes (Respondents) for violating the Safe Dam Act (the Act), N.J.S.A. 58:4-1, et seq., and the Dam Safety Standards (the rules), N.J.A.C. 7:20-1.1, et seq., with respect to Penny Pot Lake Dam, a Class III dam structure situated on Respondents' property, designated as Block 3409, Lot 4 in Folsom Borough, Atlantic County. The dam consists of a timber portion spanning the width of Hospitality Creek to form Penny Pot Lake as well as an unpermitted concrete block spillway constructed upstream of the timber portion. Specifically, the AONOCAPA charged Respondents with failure to obtain Department approval prior to reconstructing the dam in

violation of N.J.A.C. 7:20-1.4(a) and failure to provide information to the Department to determine compliance with the Act and the rules in violation of N.J.A.C. 7:20-1.12. The Department's penalty was calculated under N.J.A.C. 7:20-2.6(a), specifically, \$1000 for Respondents' failure to submit information, N.J.A.C. 7:20-2.6(a)2iii, and \$2500 for their failure to obtain approvals prior to reconstructing the dam, N.J.A.C. 7:20-2.6(a)4iii. The Department further directed Respondents to submit a permit application to breach the dam structure within 90 days of receipt of the AONOCAPA and to complete the breach of the dam within 180 days of receipt of the AONOCAPA.

Respondents requested a hearing and the matter was transferred to the Office of Administrative Law, where it was decided by Administrative Law Judge (ALJ) Bruce M. Gorman on motion by the Department for summary decision, supported by certification of engineering staff of the Department's Bureau of Dam Safety and Flood Control. Respondents opposed the Department's motion claiming that, because they did not construct the dam, never maintained it, derive no benefit from the dam or the lake which the dam impounds and did not themselves undertake the reconstruction of the structure by adding the concrete spillway, they are not owners or persons in control of the dam within the meaning of the Act and therefore not liable for the violations.

In an Initial Decision dated August 31, 2015, the ALJ found that Respondents both owned and controlled the dam structure, which is indisputably on their property, and owned and controlled a portion of Penny Pot Lake. Citing the controlling Appellate Division decision, New Jersey Dep't of Env'tl. Prot. v. Alloway Twp., 438 N.J. Super. 501, certif. denied, 222 N.J. 17 (2015), the ALJ concluded that Respondents were liable for violations of the Act as dam owners, reservoir owners, those who control the dam and/or those who

control the reservoir. The ALJ found that Respondents' certification in their related Superior Court action revealed that they gave permission to a neighboring property owner to build a concrete appurtenance behind the existing deteriorating dam, and that their subsequent attempt to repudiate this consent through conflicting responses to discovery in this matter did not raise a genuine issue of fact sufficient to defeat the Department's motion for summary decision. The ALJ found that Respondents were required to obtain a permit for work on their property and failed to do so, thus violating the Act. The ALJ further found that Respondents violated the Act by failing to provide a permit application and engineering plan for repair or removal of the unauthorized structure as directed by the Department. The ALJ concluded that Respondents were thus appropriately penalized in the amount of \$3500, which reflects a penalty for a single day of violation.

Respondents filed exceptions to the Initial Decision, restating their argument that they are not liable under the Act because they did not construct the concrete appurtenance, did not give permission to their neighbor to do so, and corrected prior miscommunication about such consent in their responses to the Department's discovery in this matter. Respondents claim that the facts surrounding their consent are disputed and render the grant of summary decision in this matter inappropriate. The Department filed exceptions on September 9, 2015 which it withdrew by a supplemental letter dated September 10, 2015.¹ The Department replied to Respondents' exceptions on September 15, 2015, arguing that Respondents' claim that they did not give consent to other parties to construct the concrete appurtenance is unsupported and does not defeat the standard for summary decision;

¹ The remaining minor exception was to correct the nomenclature used by the ALJ in referring to the Department's regulations, N.J.A.C. 7:20-1.1, et seq.

moreover, Respondents are persons responsible for the violation within the meaning of the Act. Respondents filed a sur-reply², restating their position that they did not consent to the construction on their property and that this disputed fact defeats a motion for summary decision.

Having reviewed the ALJ's Initial Decision, the record below, and the exceptions and replies, I ADOPT the Initial Decision for the reasons stated therein. Respondents' claim that they did not provide consent to a neighboring property owner who then undertook the construction of the concrete appurtenance upstream of the deteriorating timber dam structure does not raise a material fact that defeats the Department's motion for summary decision. Respondents' claim is contradicted by the certified complaint they filed in the Superior Court in April 2013 as well as deposition testimony provided by the neighboring property owner who undertook the construction. More importantly, Respondents, as owners of the property on which the appurtenance was constructed and as owners of the portion of Penny Pot Lake surrounding that dam, cannot relinquish their legal responsibility merely by allowing other parties to enter onto their property and commence work. Respondents were responsible for obtaining permits and for ensuring that any measures taken to alter or improve the existing structures were executed in accordance with the Department's rules.

The reasoning of New Jersey Dep't of Env'tl. Prot. v. Alloway Twp., 438 N.J. Super. 501, certif. denied, 222 N.J. 17 (2015) is controlling. In Alloway Township, the court held that:

² Respondents' letter is dated September 10, 2015; however, the body of the letter acknowledges receipt of the Department's September 15th letter.

[t]he [Act] compels compliance from '[a]n owner or person having control of a reservoir or dam.' A common sense reading of this language indicates there are four classes of people who are subject to the statute: (1) dam owners; (2) reservoir owners; (3) those who control the dam; and (4) those who control the reservoir. It follows that if a party fits into any one of those categories, the Commissioner may seek enforcement of the [Act] against that person.

[Id., at 512.]

There is no dispute that Respondents' fee ownership includes the entirety of the dam structure as well as a portion of Penny Pot Lake, i.e., the reservoir. As such, Respondents are owners of the dam and reservoir and persons in control of the dam and reservoir. Regardless of their consent or lack thereof concerning the construction that was undertaken, they are responsible under the Act. The penalty for a single day of violation, moreover, was the minimum penalty that the Department in its discretion could have assessed under N.J.A.C. 7:20-2.6(a)2 and -(a)4 for a Class III dam.

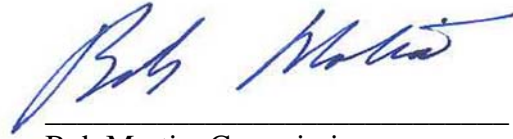
CONCLUSION

For the reasons set forth therein and above, I ADOPT the ALJ's Initial Decision granting summary decision to the Department and affirming the Department's AONOCAPA finding Respondents in violation of the Safe Dam Act, N.J.S.A. 58:4-1 et seq., and the Dam Safety Standards, N.J.A.C. 7:20-1.1, et seq. Respondents are directed to, in accordance with paragraph 12 of the AONOCAPA, submit payment of the penalties by check payable to the Treasurer, State of New Jersey, along with a copy of this Final Decision, within 20 days of the date of this decision. Respondents are further directed to comply with paragraph 6 of the AONOCAPA and submit, within 90 days of the date of this

Final Decision, a permit application to breach the structure and to complete the breach of the dam within 180 days of receiving this Final Decision.

IT IS SO ORDERED.

October 16, 2015
DATE



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, BUREAU OF
DAM SAFETY AND FLOOD CONTROL, v.
MICHAEL AND ROBERTA COKENAKES

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