State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON

MOTION FOR SUMMARY DECISION

OAL DKT. NO. ENH 2242-12

AGENCY DKT. NO. 31-236

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION – BUREAU OF DAM SAFETY AND FLOOD CONTROL,

Petitioner,

v.

MICHAEL AND ROBERTA COKENAKES

Respondents.

Bernadette Hayes, Deputy Attorney General, appearing for petitioner, (John J. Hoffman, Acting Attorney General of New Jersey)

Howard Butensky, Esq, for respondents, Michael and Roberta Cokenakes

Record Closed: July 31, 2015 Decided: August 31, 2015

BEFORE **BRUCE M. GORMAN, ALJ:**

STATEMENT OF THE CASE AND FACTUAL DISCUSSION

In this matter, respondents Michael and Roberta Cokenakes (Respondents) contest an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued against them by petitioner New Jersey Department of Environmental Protection (DEP) for violating the Safe Dam Act, N.J.S.A. 58:4-1 to -14 (Act or SDA), and the regulations promulgated thereunder, N.J.A.C. 7:20-1.1 to -2.9 (Dam Safety Procedures), with respect to Penny Pot Lake Dam (Dam).[1] The DEP filed a motion for summary decision asserting that Respondents, as "owner[s] or person[s] having control of a reservoir or dam," are liable under the Act and regulations for their failure to obtain from the DEP a permit for the construction of a concrete appurtenance to the Dam and for their failure to provide the DEP required information regarding the Dam. For these alleged violations, the DEP is seeking to assess a $3,500 civil administrative penalty against Respondents and to compel them to apply for a permit to breach the Dam and to complete the breach. In response, Respondents contend that they are not liable under the Act because they do not own or control the Dam or Penny Pot Lake, which is the reservoir created by the Dam.

The following facts are not in dispute. Since September 7, 2000, Respondents have owned property located at Block 3409, Lot 4 (Property) in Folsom Borough, Atlantic County. The Property includes the Dam, which is made of timber and has been in existence for over a century.[2] The Dam is approximately 100 feet downstream of County Route 322 (also known as Black Horse Pike) and approximately 500 feet upstream of the confluence of the Hospitality Branch and the Great Egg Harbor River. The Dam holds back the waters of the Hospitality Creek, which is a tributary of the Great Egg Harbor River, to form an impoundment known as Penny Pot Lake.

In September 2010, the DEP was notified by Fred Akers, the River Administrator of the Great Egg Harbor River Council and Watershed Association, that large concrete blocks had been placed within the waterway of the Dam. On October 4, 2010, two civil

[1] Reference to the "Dam" either means the original timber dam or both the original timber dam and the concrete appurtenance. The original timber portion and the concrete appurtenance are also referred to separately when necessary. Respondents do not dispute that the concrete structure is part of the Dam in accordance with the meaning of "dam" under the Dam Safety Procedures.
[2] The deed conveying the Property includes "all land and buildings and structures on the land[.]"

engineers in the DEP's Bureau of Dam Safety and Flood Control inspected the Dam and the concrete blocks that had been placed immediately upstream of the existing timber structure. According to one of the engineers, Richard Tamagno, the concrete block spillway appeared to have been built to stabilize the normal lake water level due to the failing spillway of the original timber portion of the Dam. He noticed that the abutments for the concrete block and timber spillways of the Dam tie in at the same place on the left side of the stream bank. He also found that each end of the concrete block spillway had eroded and that the original timber portion of the Dam was significantly bowed in the middle. Based on his inspection, Tamango concluded that the concrete block spillway was an appurtenance to the existing timber portion of the Dam. He also determined that the Dam was not in stable condition and that the concrete appurtenance was not properly designed or constructed to serve as a supplemental, permanent impounding structure. Finally, he determined that neither Respondents nor any other party had applied for a permit to build the concrete appurtenance.

The Dam and its concrete appurtenance are subject to the provisions of the Act because they were built to impound water on a permanent basis and they raise the water of the creek or stream more than five feet above its usual, mean, low water height when measured from the downstream toe-of-dam to the top-of-dam. Pursuant to N.J.A.C. 7:20-1.8(a)(3), the Dam is classified as "Class III – Low Hazard Potential," which classification "includes those dams, the failure of which would cause loss of the dam itself but little or no additional damage to other property."

By letter dated October 28, 2010, the DEP directed Respondents to retain a state-licensed engineer who could devise a plan either to make emergency repairs to maintain the lake at its current level or to lower the impoundment until permanent repairs could be made or until the Dam could be removed. The DEP requested the name of the engineer within ten days and a copy of the engineer's plan within twenty days. In the letter, the DEP also directed Respondents to submit within ninety days a permit application to remove the Dam or repair it.

On January 6, 2011, having not received any of the requested information from Respondents, the DEP issued an AONOCAPA finding that Respondents had violated

the Act by failing to obtain a permit before modifying the Dam and by failing to respond to the DEP's request for information regarding the Dam, and ordering Respondents to submit to the DEP a permit application to breach the Dam within ninety days and to complete the breach within 180 days. The DEP also assessed a $3,500 civil administrative penalty, which included $1,000 for Respondents' failure to provide information and $2,500 for Respondents' failure to submit a permit application and represented a penalty for only one day for both violations. Respondents appealed, and the DEP transmitted the matter to the Office of Administrative Law as a contested case.

On April 15, 2013, Respondents filed an action in Superior Court for a declaratory judgment finding that his neighbors were "responsible for the repair, maintenance and upkeep of the structures affecting water flow on the Hospitality Branch and/or Penny Pot Lake" and indemnifying Respondents from any penalties or costs associated with the AONOCAPA issued against them by DEP. Hayes Cert., Ex. E. According to the complaint, "[w]hile [Respondents] are the fee owners of the uplands on either side of the Hospitality Branch, the actual ownership of the fee to the riverbed is subject to further analysis." Ibid. Respondents certified that, in August or September 2010, Joseph Ingemi, on behalf of a neighborhood group called the Friends of Penny Pot Lake, "sought permission, verbally, from [Respondents] to rebuild the [Dam]." Ibid. Respondents "consented, having believed that the work would be done with all appropriate approvals," and "purely as a neighborly gesture." Ibid. On or about September 11, 2010, Starn Enterprises, Inc. "installed a number of concrete blocks slightly upstream of the existing structure" and "did so at the express request of Mr. Ingemi." Ibid. On April 28, 2014, the action was dismissed without prejudice pending the outcome of this matter.

The parties dispute whether Respondents gave Ingemi permission to build the concrete appurtenance. In support of their position, the DEP points to three documents. The first document is Respondents' Superior Court complaint, in which they certified that they consented when Ingemi sought their permission to rebuild the Dam. The second document is a transcript of a deposition Ingemi gave as part of the Superior Court action. Hayes Cert., Ex. F. In his deposition, Ingemi stated that he met with respondent Michael Cokenakes about fixing the Dam and when Ingemi asked

Cokenakes "what he was going to do, he did say [to Ingemi], "Nothing, and if you want to do something you're welcome to come on the property and do something." Ibid. The third document is a June 14, 2012, letter from Respondents' counsel, Howard Butensky, to Ingemi. Hayes Cert., Ex. G. Butensky stated,

> [a]s you may recall, I have been in prior contact with you relative to the [AONOCAPA]. Apparently, no good deed goes unpunished …
>
> [Starn Enterprises] confirmed that the [concrete appurtenance] work was done at your direction. While Mr. Cokenakes permitted you to do so, his largess is not without limits. There was never any assumption of liability …
>
> At this juncture, I am insisting that [you and other property owners who benefited from the [Dam], step up and deal with the issue]." Otherwise, I will have no option but to take affirmative action in relation thereto."
>
> [Ibid.]

In support of their position that they did not give Ingemi permission to build the concrete appurtenance, Respondents cite the Answer to Interrogatory No. 40 they submitted as part of this matter. Hayes Cert., Ex. B. In that answer, Respondents denied consenting to Ingemi's request to build the concrete appurtenance. Ibid. According to Respondents,

> [t]o the extent that there are any inconsistencies in prior answers or correspondence, there may have been a prior miscommunication. The foregoing is the chronology of events to the best of the Respondent's knowledge. Michael Cokenakes was contacted by Mr. Starn at the request of Mr. Ingemi seeking permission to repair the dam. He was told by [Mr. Cokenakes] that he wanted nothing to do with the dam and no permission was given. The foregoing notwithstanding, the concrete blocks were installed on or about September 10, 2010 believed to be at night, without the consent of the Respondents.
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> [Ibid.]

Respondents also dispute the DEP's assertion that a portion of Penny Pot Lake lies on the Property. Tamagno Cert., Exs. A & B (Property deed, Folsom Borough tax map, and aerial photographs of the Property).

According to the DEP, Respondents are liable for violations of the Act as the owners or persons in control of the Dam. The DEP further submits that a $3,500 civil administrative penalty is appropriate because it was properly calculated in accordance with statutory and regulatory requirements, and that Respondents must submit a permit application to breach the Dam and then breach the Dam in accordance with the permit.

In response, Respondents maintain that they are not covered by the Act because they do not fit within the meaning of the term "owner" as interpreted by the Chancery Division in New Jersey Dep't of Envtl. Prot. v. Mercer Cnty. Soil Conservation Dist., 425 N.J. Super. 208 (Ch. Div. 2009). In Mercer County, the court held that the relevant factors "to determine whether a person is an 'owner' of a dam or impoundment pursuant to the Dam Safety Act" were "[t]he nature and extent of any legal title to the underlying real property;" "[w]hether the alleged owner constructed or participated in the structure's construction; "[w]hether the alleged owner controls, ever controlled, or participated in the control of the structure to more than a *de minimis* extent;" and, "[w]hether the alleged owner has legal authority to exercise control of the structure." Id. at 223. Thus, in the court's opinion, "the words 'owner or persons having control" [should be read] together as one phrase, such that either the owner who has control or another person having control would be responsible for the improvements upon real property," and "having control is a necessary element of being an 'owner' under the statute." Id. at 220.

In light of Mercer County, Respondents argue the following:

> [Respondents are] indeed the owner[s] of property on either side of the structure and the fee owner[s] of the stream. However, the stream is subject to profound and extensive regulatory supervision by both the Federal Government and the State of New Jersey rendering the fee ownership, in

> effect, nugatory.[3] [Respondents are] not, however, the owner[s] of the Penny Pot Lake or any property abutting it. Hence, while there is an ownership issue relative to the dam, there is none to the reservoir, an integral part of the definition. To the extent that Penny Pot Lake actually includes the 100 ft. between the dam and Route 322, it is *de minimus*.

Respondents further argue that they are not "owners" in accordance with Mercer County because they did not build the original structure; because they "never maintained the structure, being of the opinion that it was there for the benefit of … the property owners abutting Penny Pot Lake," they did not authorize the construction of the concrete appurtenance, and "[t]he persons having exhibited control were the Penny Pot residents as, for a practical matter, it is their dam located on the Respondents' property;" and, because they did not have legal authority to exercise control of the structure since the Penny Pot Lake property owners, "as the beneficiaries of the structure, [have] certain rights that very well may be enforceable against [Respondents] should he exercise dominion over the structure."

LEGAL ANALYSIS

Under the Act, the Legislature found and declared that a "chronic lack of maintenance" has contributed "to the collapse of dams, polluted lakes, stream flooding and property damage to homes, businesses, lake communities and public utilities[.]" N.J.S.A. 58:4-11. In light of these concerns, the Act provides that "[n]o municipality, corporation or person shall, without the consent of the Commissioner of Environmental Protection, … build any reservoir or construct any dam, or repair, alter or improve existing dams on any river or stream in this State … which will raise the waters of the river or stream more than five feet above its usual mean low-water height[.]" N.J.S.A. 58:4-1(a). The Act further requires that "[a]n owner or person having control of a reservoir or dam" must "[i]mplement all measures," "[p]rovide to the Department of Environmental Protection, upon request, any reports or information," and "[i]mplement

[3] According to Respondents, "[t]he dam is on a navigable waterway" and in Stevens v. Paterson & Newark Railroad Co., 34 N.J.L. 532 (E. & A. 1870), the Court held that "[t]he right of the owner of lands bounding on a navigable river extends only to the actual high water mark, and that all below that mark belongs to the State."

any action ordered by the Commissioner of Environmental Protection to correct conditions that render the reservoir or dam … unsafe or improperly maintained or to bring the reservoir or dam into compliance with standards" that are "required pursuant to [the Act] or any rule, regulation, code, permit or order issued pursuant thereto[.]" N.J.S.A. 58:4-5(a)(1) to -(3); N.J.S.A. 58:4-6(h).

The Act authorizes the Commissioner and his staff to "investigate and take appropriate action regarding any dam or reservoir about which the commissioner has a security or safety concern." Ibid; N.J.S.A. 58:4-2 to -5; N.J.S.A. 58:4-8. And, "[w]henever, on the basis of available information, the [C]ommissioner finds a person in violation of" the Act,

> the [C]ommissioner may issue an administrative order: (1) specifying the provision or provisions of the law, rule, regulation, permit or order, of which the person is in violation; (2) citing the action which constituted the violation; (3) requiring compliance with the provision or provisions violated; (4) requiring the restoration of the area which is the site of the violation; and (5) providing notice to the person of the right to a hearing on the matters contained in the order.
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> [N.J.S.A. 58:4-6(b).]

The Act also authorizes the Commissioner "to assess a civil administrative penalty of not more than $ 25,000 for each violation of any provision of" the Act or any implementing regulation and provides that "each day during which each violation continues shall constitute an additional, separate, and distinct offense." N.J.S.A. 58:4-6(d). However, "[a]ny amount assessed under this subsection shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, duration, and conduct[.]" Ibid. As with administrative orders, a person may request a hearing to contest a civil administrative penalty. Ibid.

The Dam Safety Procedures, N.J.A.C. 7:20-1.1 to -2.9, which implement the provisions of the Act, "set forth procedures for application to construct, repair or modify a dam, as defined in N.J.A.C. 7:20-1.2[,] set standards for design and maintenance of dams" and "establish a dam inspection procedure." N.J.A.C. 7:20-1.1(a)(1). In

accordance with the Act, the rules provide that the DEP "may require any owner or operator of an existing dam to obtain a permit for repair or modification of the dam and appurtenances" in cases in which "[r]epair or modification is necessary to insure protection of human health or safety" or "[m]odification is required to comply with the [Dam Safety Procedures.]" N.J.A.C. 7:20-1.5(c)(1) and (2); N.J.A.C. 7:20-1.4(a); but see N.J.A.C. 7:20-1.3 (setting forth "permit-by-rule" exception to general rule regarding permits).[4] The rules define an "owner and/or operator" as "any person who owns, controls, operates, maintains, manages or proposes to construct a dam." N.J.A.C. 7:20-1.2. A "dam" is defined in relevant part as "any … barrier, together with appurtenant works, which is constructed for the purpose of impounding water, on a permanent or temporary basis, that raises the water level five feet or more above the usual, mean, low water height when measured from the downstream toe-of-dam to … the top-of-dam." Ibid. A "reservoir" is "any impoundment or any potential impoundment that will be created by a dam, dike or levee." Ibid.

The Appellate Division's recent decision in New Jersey Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501 (App. Div. 2015), certif. denied, 2015 N.J. LEXIS 664 (June 30, 2015), supports the conclusion that Respondents are liable for violations of the Act as "dam owners," "reservoir owners," "those who control the dam," and/or "those who control the reservoir." In Alloway Township, the court held that,

> [t]he SDA 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 SDA against that person.
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> [Id. at 512 (quoting N.J.S.A. 58:4-5(a) with added emphasis).]

In so holding, the court overruled the Chancery Division's decision in Mercer County, supra, because the court's "construction of the statute in *Mercer County* implied that, to be brought under the enforcement umbrella of the SDA, a person must have

[4] Neither party claims the "permit-by-rule" provision applies in this matter.

more than legal ownership of a dam or reservoir" and "also must have constructed or exercised some degree of control over the dam or reservoir, or have had the legal authority to exercise control." Id. at 512-13 (citing Mercer County, supra, 425 N.J. Super. at 223). According to the Appellate Division, "by interpreting the SDA's use of the term 'owner' to necessarily include qualities similar to that of a 'person in control,' the court in *Mercer County* conflated two separate statutory terms, thereby rendering the phrase 'owner' surplusage." Id. at 513. Thus, under the facts in Alloway Township, the court rejected a private party's argument that "the SDA does not apply to him, the 'mere owner' of the lake bed without any authority '"to control, operate or maintain"' the dam in question" because "[h]e admitted being the owner of the dam, as well as the reservoir created by the dam." Id. at 506, 515 (citing N.J.A.C. 7:20-1.2)).

Here, the Act applies to Respondents as "dam owners," "reservoir owners," "those who control the dam," and/or "those who control the reservoir." First, Respondents are "dam owners." Like the private party in Alloway Township, Respondents admit that the Dam is on the Property. Indeed, the deed conveying the Property to Respondents includes "all land and buildings and structures on the land," and according to N.J.S.A. 46:3-16, "[e]very deed conveying land shall, unless an exception shall be made therein, be construed to include all and singular the buildings, improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining[.]"

Nonetheless, Respondents attempt to argue that "ownership of the dam is a disputed fact" because the "dam is on a navigable waterway," and that the State of New Jersey owns the land under Penny Pot Lake and the stream. To the extent that Respondents base their argument on the "public trust doctrine," they frame the issue incorrectly because the Supreme Court has noted that "[i]n probably most states the doctrine covers all navigable waters, non-tidal as well as tidal," but that "New Jersey early limited it to tidal waters and does not apply the navigability test.[5] Neptune City v. Avon-By-The Sea, 61 N.J. 296, 305, n.2 (1972), (citing Cobb v. Davenport, 32 N.J.L. 369 (Sup. Ct. 1867)). In New Jersey, "[g]enerally, the State owns in fee

simple all lands that are flowed by the tide up to the high-water line or mark, and the owner of [littoral or riparian] property holds title to the property upland of the high water mark[.]"[6] City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 474-76 (2010) (citing O'Neill v. State Highway Dep't, 50 N.J. 307, 323 (1967); Bor. of Wildwood Crest v. Masciarella, 51 N.J. 352, 357 (1968)).

Here, however, the DEP has certified that there are no tidelands near the Property and that the waters on the Property are not tidally flowed, and Respondents have failed to set forth any specific facts showing otherwise. Castagna Cert. Therefore, there is no genuine dispute with respect to whether the State has any ownership interest affecting Respondents' ownership of the dam. In addition, Respondents did not offer any facts or law showing that the federal government has an ownership interest in the waters that lie on the Property. Likewise, Respondents have failed to show that any of their neighbors have property rights affecting Respondents' ownership of the Dam.

Under these facts and in accordance with Alloway Township, it is clear that Respondents can no longer rely on the ownership factors in Mercer County and that they are covered by the Act as "dam owners." This status is sufficient, by itself, to hold Respondents liable for violations of the Act.

Still, it is equally clear that Respondents are also liable under the Act as "reservoir owners," "those who control the dam," and "those who control the reservoir." Respondents are "reservoir owners" because they own a portion of Penny Pot Lake, which is the impoundment created by the Dam. In Alloway Township, the court noted that "the Legislature intended the SDA to have the broadest possible remedial application and envisioned enforcement actions against multiple responsible parties" and that "[o]ne of the sections enacted, *N.J.S.A. 58:4-5(c)*, explicitly authorizes 'allocation of the cost of removal among the liable owners or persons having control of the dam or reservoir *whenever two or more owners or such persons are liable*." Alloway

[5] The "public trust doctrine" is "[t]he legal principle that the State holds 'ownership, dominion and sovereignty' over tidally flowed lands 'in trust for the people.'" City of Long Branch, infra, 203 N.J. at 474 (citing Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 316-17 (1984)).

Township, supra, 438 N.J. Super. at 513, 514 (citing Gallenthin Realty Dev., Inc. v. Bor. of Paulsboro, 191 N.J. 344, 368 (2007)).

Here, there is no genuine issue of material fact that Respondents own a portion of Penny Pot Lake, and they are liable under the Act even if they do not own the entire lake. While Respondents take issue with the DEP's assertion that "[a] portion of the Penny Pot Lake lies within Block 3409, Lot 4," because "[t]here is a survey or other certified document delineating or otherwise designating Penny Pot Lake," Respondents have failed to produce such a document, while the DEP has produced a deed, tax map, and aerial photographs in support of its assertion. Moreover, Respondents seem to contradict their stance by citing the DEP's certification that a portion of the lake lies within Block 3409, Lot 4 and allowing in their opposition brief that "[t]o the extent that Penny Pot Lake actually includes the 100 ft. between the dam and Route 322, it is *de minimis*."[7] Even if other property owners around the lake own other portions of the lake, this fact would not affect Respondents' liability as "reservoir owners."

Finally, Respondents are also subject to liability for violations of the Act as "those who control the dam" and "those who control the reservoir." In their Superior Court action, Respondents certified that they gave Ingemi permission to build the concrete appurtenance. And in Butensky's letter to Ingemi, Butensky stated that Respondents gave Ingemi permission to build the structure. Respondents cannot now assert, as they do in their Answer to Interrogatory No. 40, that they did not give Ingemi permission to enter the Property to construct the concrete appurtenance. As the DEP rightly argues, Respondents "cannot create an issue of fact simply by raising arguments contradicting [their] own prior statements and representations." Mosior v. Ins. Co. of No. America, 193 N.J. Super. 190, 195 (App. Div. 1984). Moreover, the fact that Respondents gave permission to Ingemi is supported by Ingemi's deposition testimony that he met with Mr. Cokenakes to discuss fixing the Dam and that Mr. Cokenakes replied, "if you want to do something you're welcome to come on the property and do something." The fact that Respondents gave Ingemi permission to build the concrete appurtenance - because the

[6] As the Court explained in City of Long Branch, "'[l]ittoral' means '[o]f or relating to the coast or shore of an ocean, sea, or lake.' By contrast, 'riparian' means '[o]f, relating to, or located on the bank of a river or stream.' Id. at 476, n.7 (quoting Black's Law Dictionary 1018, 1441 (9th ed. 2009)).

site of the original dam and the concrete appurtenance, and a portion of the impoundment created by the Dam are on the Property – shows that Respondents are also properly classified as "those who control the dam" and "those who control the reservoir."

In sum, Respondents are liable for violations of the Act as members of all four classes of people subject to the provisions of the Act and the Commissioner may seek enforcement of the Act against them on the basis of any or all of the liable classes of which they are members.

Respondents violated N.J.S.A. 58:4-2 by failing to obtain a permit for the construction of the concrete appurtenance and they violated N.J.S.A. 58:4-5(a)(2) by failing to provide the information requested by the DEP by letter on October 28, 2010.[8] First, Respondents do not dispute that neither they nor anyone else obtained a permit prior to the construction of the concrete appurtenance. As persons subject to the provisions of the Act, Respondents violated N.J.S.A. 58:4-2 by failing to obtain a permit prior to the construction of the concrete appurtenance.

Second, Respondents do not dispute that they did not timely provide the name of an engineer and a copy of the engineer's plan, and did not submit a permit application to remove or repair the Dam in accordance with the DEP's October 28, 2010, letter order. Instead, Respondents argue that "[t]he Department's requirements, considering the history of its regulation (none), the category of the dam, the third party participants and the economic reality of the situation give rise to an arbitrary unreasonable and mean-spirited application of the regulation[.]" Nonetheless, as persons covered by the Act, Respondents were required to provide any information the DEP required in order to determine compliance with the Act. By failing to do so, Respondents violated N.J.S.A. 58:4-5(a)(2).

[7] Documents submitted by the DEP show that this 100-foot stretch is on the Property.
[8] In the AONOCAPA, the DEP cites violations of N.J.A.C. 7:20-1.4 and N.J.A.C. 7:20-1.12, which are the regulations implementing these statutory provisions.

Because of respondents' violations of N.J.S.A. 58:4-2 and N.J.S.A. 58:4-5(a)(2), the DEP appropriately assessed a $3,500 civil administrative penalty against Respondents. The Act authorizes the DEP "to assess a civil administrative penalty of not more than $25,000 for each violation of any provision of" the Act or any implementing regulation and provides that "each day during which each violation continues shall constitute an additional, separate, and distinct offense." N.J.S.A. 58:4-6(d). In implementing the Act, the DEP has determined that a person who fails to respond to a request for information regarding a Class III Dam is subject to a penalty of $1,000 for each day such violation continues. N.J.A.C. 7:20-2.6(a)(2). And, the DEP has determined that a person who fails to obtain the DEP's approval prior to the construction or modification of a dam or appurtenant structure is subject to a penalty in the range of $1,000 to $5,000 for each day such violation continues. N.J.A.C. 7:20-2.6(a)(4). The Dam Safety Procedures further provide that a penalty "shall be established at the mid-point of the ranges set forth [under N.J.A.C. 7:20-2.6(a)] unless adjusted by the Department in its discretion within the range" based on the circumstances of a particular violation. N.J.A.C. 7:20-2.6(b).

Here, the DEP assessed a penalty of $1,000 for Respondents' violation of N.J.S.A. 58:4-5(a)(2) and a penalty of $2,500 for Respondents' violation of N.J.S.A. 58:4-2. The DEP could have assessed a penalty for each day of Respondents' violations, but exercised its discretion in only penalizing Respondents for one day for each violation, and in assessing a penalty below the mid-point of the range of N.J.A.C. 7:20-2.6(a)(4).

Finally, the DEP appropriately ordered Respondents to submit a permit application to breach the Dam and to complete the breach of the Dam in order to correct conditions that render the Dam unsafe, improperly maintained, and otherwise non-compliant with the Act. The Act and regulations are designed to remedy the Legislature's finding that "the condition of many dams, lakes, and streams throughout the State has been deteriorating at an alarming rate due to a chronic lack of maintenance" and to ensure that the DEP "take[s] appropriate action regarding any dam or reservoir about which [there is] a security or safety concern." And, under the Act, Respondents are required to "[i]mplement any action ordered by the Commissioner of

Environmental Protection to correct conditions that render the reservoir or dam to be considered, as determined by the commissioner, unsafe or improperly maintained or to bring the reservoir or dam into compliance with" the Act and the Dam Safety Provisions.

By ordering Respondents to apply for a permit to breach the Dam and to complete the breach in accordance with the permit, the DEP has taken appropriate action under the Act to correct conditions that render the Dam unsafe, improperly maintained, and non-compliant with the Act. Respondents' permit application should conform with the requirements of N.J.A.C. 7:20-1.7, including the requirement that affected property owners receive notice of the application. The Commissioner may determine the time in which Respondents shall submit a permit application and complete the breach in relation to the date on which a final decision is issued.

ORDER

I **ORDER** that petitioner, New Jersey Department of Enviornmental Protection-Bureau of Dam Safety and Flood Control's Motion for Summary Decision seeking to enforce the AONOCAPA dated January 6, 2011 be **GRANTED**.

I hereby **FILE** my **ORDER** with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 31,2015
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: August 31, 2015

Date Mailed to Parties:

/jb

DOCUMENTS RELIED UPON

Notice of Motion for Summary Decision, dated October 10, 2014
Certification of Richard Tamagno
Certification of Bernadette Hayes, DAG
Brief in Support of Department's Motion