

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

**OFFICE OF COMPLIANCE AND INSPECTION**

In Re: Town of Johnston

File Nos.: Dam State I.D. 168,169,  
170 and 171

AAD No.: 10-004/DE

**CONSENT AGREEMENT**

**A. INTENT & PURPOSE**

This Agreement is entered by and between the Rhode Island Department of Environmental Management's Office of Compliance & Inspection (the "RIDEM") and the Town of Johnston (the "Respondent"). This Agreement is entered in accordance with Section 42-17.1-2 *et seq.* of the Rhode Island General Laws ("R.I. Gen. Laws") for the purpose of resolving the administrative enforcement action set forth in a Notice of Violation (the "NOV") issued to the Respondent by the RIDEM on October 21, 2010 (the "NOV").

**B. STIPULATED FACTS**

(1) WHEREAS, the subject properties are as follows:

- (a) A dam identified as Oak Swamp Dam, State Identification Number 168, located west of Reservoir Avenue, south of Hartford Avenue and north of Shore Drive, in the town of Johnston, Rhode Island ("Dam 168");
- (b) A dam identified as Almy Dam, State Identification Number 169, located north of Central Avenue, west of route I-295 and east of Reservoir Avenue, in the town of Johnston, Rhode Island ("Dam 169");
- (c) A dam identified as Simmons Upper Dam, State Identification Number 170, located east of Taylor Road, north of Plainfield Pike, and west of route I-295, in the town of Johnston, Rhode Island ("Dam 170"); and
- (d) A dam identified as Simmons Lower Dam, State Identification Number 171, located north of Plainfield Pike, east of Taylor Road and west of route I-295, in the town of Johnston, Rhode Island ("Dam 171").

Collectively, the four dams are referred to as the "Dams".

(2) WHEREAS, the Respondent owns the Dams.

- (3) WHEREAS, on October 21, 2010, the RIDEM issued a NOV to the Respondent for the Dams, alleging certain violations of the RIDEM's *Rules and Regulations for Dam Safety* (the "Dam Safety Regulations").
- (4) WHEREAS, the Respondent requested an administrative hearing to contest the NOV.
- (5) WHEREAS, in lieu of proceeding to an administrative adjudicatory hearing on the NOV and to effect a timely and amicable resolution of the NOVs, the RIDEM and the Respondent hereby agree that it is in the best interest of the parties and in the public interest to resolve the issues raised in the NOV.
- (6) WHEREAS, the RIDEM finds that this Agreement is a reasonable and fair settlement and adequately protects the public interest in accordance with the RIDEM's Dam Safety Regulations.

### C. **AGREEMENT**

- (1) **JURISDICTION** – The RIDEM has jurisdiction over the subject matter of this Agreement and has personal jurisdiction over the Respondent.
- (2) **FORCE and EFFECT** – This Agreement shall have the full force and effect of a final compliance order issued after a full hearing on the merits pursuant to the Administrative Procedures Act, R.I. Gen. Laws Section 42-35-1 et seq. from which no timely appeal was taken, and which is enforceable in Superior Court in accordance with R.I. Gen. Laws Section 42-17.1-2(21)(v).
- (3) **APPLICATION** – The provisions of this Agreement shall apply to and be binding upon the RIDEM, the Respondent and its agents, servants, employees, successors, assigns and all persons, firms and corporations acting under, through and for the Respondent in the performance of work relating to or impacting the requirements of this Agreement.
- (4) **CONDITIONS** –
  - (a) **By May 1, 2013** the Respondent shall submit to the RIDEM an escrow agreement that will describe the disbursement of funds associated with compliance with this Consent Agreement (the "Escrow Agreement"). The Escrow Agreement must:
    - (i) Identify the escrow agent (the "Escrow Agent") and the account where the funds will be held (the "Escrow Account").
    - (ii) Identify that a total of One Million Four Hundred Thousand Dollars (\$1,400,000.00) shall be transferred to the Escrow Agent to be held in the Escrow Account in accordance with the following schedule:
      1. Two Hundred and Fifty Thousand Dollars (\$250,000.00) by October 1, 2013.

2. Two Hundred and Fifty Thousand Dollars (\$250,000.00) by July 1, 2014.
  3. Two Hundred and Fifty Thousand Dollars (\$250,000.00) by July 1, 2015.
  4. Two Hundred and Fifty Thousand Dollars (\$250,000.00) by July 1, 2016.
  5. Two Hundred and Fifty Thousand Dollars (\$250,000.00) by July 1, 2017.
  6. One Hundred and Fifty Thousand Dollars (\$150,000.00) by July 1, 2018.
- (iii) State clearly that the funds in the Escrow Account are to be used exclusively to complete the work described in Sections (C)(4)(b) through (C)(4)(h) of the within Consent Agreement;
  - (iv) Require approval by the RIDEM prior to disbursement of any funds from the Escrow Account and specifying documentation, including contractor's bills signed by the Respondent, indicating completion of the work set forth in the bills;
  - (v) State clearly that any funds that remain after completing the work for each dam shall be used for the remaining dams; and
  - (vi) State clearly that any funds that remain after completing all the work associated with the Consent Agreement shall be transferred to the Respondent upon the Escrow Agent's receipt of written authorization by the RIDEM.
- (b) **By January 1, 2014** the Respondent shall retain a professional engineer fully registered in the State of Rhode Island, who is experienced with dam inspection, design, construction and repair, to oversee the work associated with this Consent Agreement. The engineer retained must be deemed qualified by the RIDEM (the "Dam Project Engineer").
- (c) **By June 30, 2014** the Respondent shall complete the following actions on Dam 169:
- (i) Cut or remove improper vegetation in accordance with the RIDEM's Dam Safety Regulations, Rule 10A in sufficient amounts to allow a thorough visual inspection to be performed. RIDEM shall be notified upon commencement and completion of this work.

- (ii) A visual inspection of the dam by the Dam Project Engineer in accordance with the RIDEM's Dam Safety Regulations, Rule 11C and submission of a report of the inspection findings to the RIDEM. The report must specify the actions necessary to return the dam to a safe condition and include a reasonable schedule to complete the work. For any proposed repairs to the dam, the report must include an application prepared in accordance with the RIDEM's Dam Safety Regulations, Rule 10B.
  - (iii) Submit an application to the RIDEM in accordance with the RIDEM's Dam Safety Regulations, Rule 10B that is prepared by the Dam Project Engineer to either repair the low level gate and erosion areas on the embankment (upstream slope and crest) near the low level gate and the spillway **OR** permanently lower the water level behind the dam such that the dam can be classified as a low hazard dam. The application must include a reasonable schedule to complete the work.
- (d) **By June 30, 2015** the Respondent shall submit an application to the RIDEM in accordance with the RIDEM's Dam Safety Regulations, Rule 10B that is prepared by the Dam Project Engineer to either repair the low level gate and erosion areas on the embankment (upstream slope and crest) on Dam 168 **OR** permanently lower the water level behind the dam such that the dam can be classified as a low hazard dam. The application must include a reasonable schedule to complete the work.
- (e) **By June 30, 2016** the Respondent shall complete the following actions on Dam 170:
- (i) Cut or remove improper vegetation in accordance with the RIDEM's Dam Safety Regulations, Rule 10A in sufficient amounts to allow a thorough visual inspection to be performed. RIDEM shall be notified upon commencement and completion of this work.
  - (ii) A visual inspection of the dam by the Dam Project Engineer in accordance with the RIDEM's Dam Safety Regulations, Rule 11C and submission of a report of the inspection findings to the RIDEM. The report must specify the actions necessary to return the dam to a safe condition and include a reasonable schedule to complete the work. For any proposed repairs to the dam, the report must include an application prepared in accordance with the RIDEM's Dam Safety Regulations, Rule 10B.
  - (iii) Submit an application to the RIDEM in accordance with the RIDEM's Dam Safety Regulations, Rule 10B that is prepared by the Dam Project Engineer to either repair the low level gate **OR** permanently lower the water level behind the dam such that the dam can be classified as a low hazard dam. The application must include a reasonable schedule to complete the work.

- (f) **By June 30, 2017** the Respondent shall complete the following actions on Dam 171:
- (i) Cut or remove improper vegetation in accordance with the RIDEM's Dam Safety Regulations, Rule 10A in sufficient amounts to allow a thorough visual inspection to be performed. RIDEM shall be notified upon commencement and completion of this work.
  - (ii) A visual inspection of the dam by the Dam Project Engineer in accordance with the RIDEM's Dam Safety Regulations, Rule 11C and submission of a report of the inspection findings to the RIDEM. The report must specify the actions necessary to return the dam to a safe condition and include a reasonable schedule to complete the work. For any proposed repairs to the dam, the report must include an application prepared in accordance with the RIDEM's Dam Safety Regulations, Rule 10B.
  - (iii) Submit an application to the RIDEM in accordance with the RIDEM's Dam Safety Regulations, Rule 10B that is prepared by the Project Engineer to either repair the low level gate and spillway and adjacent erosion areas on the embankment **OR** permanently lower the water level behind the dam such that the dam can be classified as a low hazard dam. The application must include a reasonable schedule to complete the work.
- (g) The reports and applications required in Section C(4) above shall be subject to the RIDEM's review and approval. Upon review, the RIDEM shall provide written notification to the Respondent either granting formal approval or stating the deficiencies therein. Within fourteen (14) days (unless a longer time is specified) of receiving a notification of deficiencies, the Respondent shall submit to the RIDEM a modified report, applications, and/or schedules or additional information necessary to correct the deficiencies.
- (h) The Respondent shall complete all work approved by the RIDEM in accordance with the approved schedules. All work for all four dams shall be completed no later than June 30, 2018.

#### ***D. COMPLIANCE***

- (1) EFFECT OF COMPLIANCE – Compliance with and fulfillment of this Agreement shall be deemed to resolve all issues raised in the NOV.
- (2) FAILURE TO COMPLY – In the event that the Respondent fails to comply with any of the items specified in Section C(4) of the Agreement, the Respondent shall pay a stipulated penalty of Five Hundred Dollars (\$ 500.00) per month for each and every month during which the noncompliance continues, except that the RIDEM may, for good cause shown, defer or reduce such penalty. The payment of a penalty in accordance with this section shall not preclude the RIDEM from seeking any other appropriate remedy (e.g., injunctive relief in Superior Court).

- (3) COMPLIANCE WITH OTHER APPLICABLE LAWS – Compliance with the terms of this Agreement does not relieve the Respondent of any obligation to comply with any other applicable laws or regulations administered by, through or for the RIDEM or any other governmental entity.
- (4) ADDITIONAL ENFORCEMENT ACTIONS – Upon a determination by the Director that there is a threat to the public health or the environment, or upon discovery of any new information, the RIDEM reserves the right to take additional enforcement actions as provided by law or regulation, including, but not limited to, the issuance of “Immediate Compliance Orders” as authorized by R.I. Gen. Laws Section 42-17.1-2(21). This Agreement shall not restrict any right to hearing or other right available by statute or regulation that the Respondent may have regarding any new enforcement action commenced by the RIDEM after the execution of this Agreement.
- (5) FUTURE ACTIVITIES AND UNKNOWN CONDITIONS – This Agreement shall not operate to shield the Respondent from liability arising from future activities, as of the date of execution of this Agreement.
- (6) SCOPE OF THE AGREEMENT – The scope of the Agreement is only violations alleged in the NOV.
- (7) NOTICE AND COMMUNICATION – Communications regarding this Agreement shall be directed to:

**David E. Chopy, Chief**  
RIDEM Office of Compliance and Inspection  
235 Promenade Street  
Providence, RI 02908-5767  
(401) 222-1360 ext. 7400

**Richard M. Bianculli, Jr., Esquire**  
RIDEM Office of Legal Services  
235 Promenade Street, 4<sup>TH</sup> Floor  
Providence, RI 02908-5767  
(401) 222-4700 ext. 2023

**William J. Conley, Jr., Esquire**  
670 Willett Avenue  
East Providence, RI 02915  
(401) 437-0905

All communications regarding compliance with this Agreement shall be forwarded to the above-referenced addressees by certified mail.

- (8) DEFERRAL – The RIDEM may, for good cause shown, defer any of the compliance dates prescribed herein. Good cause for deferral of any compliance date shall be

forwarded to the RIDEM in writing at least fifteen (15) days prior to the prescribed deadline.

- (9) AMENDMENT – The Agreement may be amended by mutual agreement of the parties in writing.
- (10) EFFECTIVE DATE – This Agreement shall be deemed entered as of the date of execution by all parties.

**IN WITNESS WHEREOF, the undersigned consent to this Agreement in substance and in form.**

*For the Town of Johnston*

\_\_\_\_\_  
Joseph Polisena, Mayor

Dated: \_\_\_\_\_

*For the State of Rhode Island Department of  
Environmental Management*

\_\_\_\_\_  
David E. Chopy, Chief  
Office of Compliance and Inspection

Dated: \_\_\_\_\_