

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION**

**RE: GEORGE E. BINNS LIVING TRUST
DAM 565**

AAD NO. 13-011/DE

DECISION

This matter came before Hearing Officer David Kerins for Administrative Hearing on October 23, 2018. This matter began by the Respondent filing a Notice of Appeal on November 21, 2013. The Appeal was taken from a Notice of Violation (“NOV”) dated November 5, 2013 identifying the dam, Ross Pond Dam, State Dam 565 as unsafe. The Office of Compliance and Inspection (“OC&I”) was represented by Christina Hoefsmit, Esquire, and the Respondent was represented by Timothy F. Kane, Esquire. OC&I filed its Post Hearing Memorandum on January 11, 2019 and the Respondent filed its Post Hearing Memorandum on January 16, 2019.

JURISDICTION

The Hearing was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters R.I. General Laws § 42-17.7-1 et seq. the Administrative Procedures Act R.I. General Laws § 42-35-1 et seq. and the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (“AAD Rules”).

STIPULATED FACTS

The following facts were stipulated to by the parties prior to the Hearing and entered into evidence as part of Joint Exhibit #1 Full.

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Respondent.
2. The Ross Pond Dam, identified as State Dam No. 565 (the "Dam") is located within the Town of Burrillville, Rhode Island.
3. A portion of the Dam is located on Plat 156, lot 43.
4. Portions of the Dam are located on property not owned by the Respondent, including but not limited to the Rhode Island Department of Transportation.
5. The Dam has been classified by DEM as Significant Hazard.
6. On or about February 23, 2009, DEM issued a Dam Registration/Notification of Hazard Classification to Trustees of the George E. Binns Living Trust.
7. On or about March 16, 2009 DEM received a signed Dam Registration for the Dam identifying the Respondent, George E. Binns Living Trust, as owner of the Dam. The Registration form does not distinguish between full or partial ownership of the Dam.
8. The Dam Registration notice was signed by Nancy F. Binns, Trustee for the George E. Binns Living Trust.
9. On or about November 18, 2011, PARE, an agent for DEM, conducted an inspection of the Dam and reported on the condition of the Dam.
10. On or about November 5, 2013, DEM issued a Notice of Violation ("NOV") to the Respondent in regards to several maintenance issues and safety concerns associated with the Dam.
11. On or about September 6, 2017, DEM rescinded Sections D(1) and D(2) of the NOV. However, DEM is still requiring compliance with Sections D(3) through D(5) inclusive regarding the low level outlet.

STIPULATED EXHIBITS

The Parties stipulated to the admission of the following Exhibits as part of Joint Exhibit #1 Full.

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DEM Exhibits:

1. Copy of the Dam Registration/Notice of Hazard Classification letter dated February 23, 2009, to Trustees of the George E. Binns Living Trust Agreement, four (4) pages.
2. Copy of Dam Registration Form for Ross Pond Dam, No. 565, dated March 9, 2009, one (1) page.
4. Copy of the Ross Pond Dam Visual Inspection/Evaluation Report, by Pare Corporation, twenty-four (24) pages.
5. Copy of the November 5, 2013, Notice of Violation re Dam State I.D. 565, eight (8) pages.
6. Copy of the Dam Regulations, December 2007, eighteen (18) pages.

Respondent's Exhibits:

- A. RI DOT Map recorded in Burrillville Land Evidence Records Plat 173 Section 2 showing the April 1921 relocation of Old Wallum Lake Road (2 pages).
- B. Boundary Survey for Nancy Binns Assessor's Plat 156 Lots 24 & 43 by Norbert Therin, PLS dated August 16, 2018.
- C. Correspondence from Ann Hollands, RI DOT administrator for Real Estate dated February 14, 2017 to David Chopy at RIDEM with map attached thereto.
- E. 2017 Annual Report to the Governor on the Activities of the Dam Safety Program, dated April 6, 2018.
- F. September 6, 2017 letter to Attorney Timothy Kane, rescinding portions of the NOV.
- G. July 27, 2014 letter from the Rhode Island Department of Transportation ("RIDOT") to Richard Bianculli, then attorney for DEM regarding records request.
- H. July 7, 2016 email from Christina Hoefsmit, Esq. to Tim Kane, Esq. with attachment, regarding information provided by RIDOT.

HEARING SUMMARY

On October 23, 2018 OC&I presented Mr. Paul Guglielmino, P.E. to testify in support of

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its case in chief. Mr. Guglielmino has been with DEM for about thirty (30) years and has been the Principal Civil Engineer with the Dam Program for eighteen (18) years. Mr. Guglielmino was qualified as an expert in the Dam Safety Regulations without objection.

Mr. Guglielmino testified that the subject Dam State ID 565 (the "Dam") was classified as a significant hazard dam and the Respondent was notified of such by letter dated February 23, 2009. He testified that the dam had been inspected on November 18, 2011 by Pare Corporation. Pare Corporation was awarded the contract to inspect certain dams including Dam 565. Pare Corporation prepared a report of its visual inspection. DEM Exhibit 4 Full. (Tr. p. 17) Mr. Guglielmino said that he reviewed the report which concluded that the dam was unsafe. He said that the reason it was unsafe was because the low-level outlet ("LLO") was inoperable and a section of the embankment was overgrown with vegetation which prevented inspection. He said that the Dam Regulations provide that if there is a LLO present it needs to be operable.

Mr. Guglielmino testified that the Dam Safety Regulations ("Dam, Regulations") at Rule 6 definitions at subsection AD says an:

"Unsafe Dam" means the condition of a regulated dam, as determined by the Director, in such that an unreasonable risk of failure exists that will result in a probable loss of human life or major economic loss. Among the conditions that would result in this determination are: excessive vegetation that does not allow the Director to perform a complete visual inspection of a dam, excessive seepage or piping, significant erosion problems, inadequate spillway capacity, inadequate capacity and/or condition of control structures or serious structural deficiencies, including movement of the structure or major cracking." (Tr. p. 25)

Mr. Guglielmino testified that although he relied on the Pare report he did visit the subject dam sometime one year prior to the Hearing. He said that the area of the Dam with the overgrowth was determined to be owned by RIDOT. This left only the inoperable LLO as the

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reason for Respondent to be held responsible through the NOV. Mr. Guglielmino testified that the LLO served a purpose to lower the level of the water if there's a problem with the dam. He acknowledged that this was also feasible by use of a pump over the dam. He testified that there is nothing in the Regulations that says that you need to have a lower level outlet. Mr Guglielmino testified that there were no minimum flow requirements for the LLO in the Regulations.

Mr. Guglielmino testified that the LLO was originally intended to operate by the removal of boards which could be removed to release water (Tr. p.24). He said that the boards could no longer be removed entirely since the concrete had been added to the structure.

On cross examination Mr. Guglielmino testified that approximately three years after the issuance of the NOV it was determined that RIDOT owned a portion of Dam State ID 565 which included the portion of the dam which was overgrown with vegetation. Once they determined that RIDOT had an ownership interest in the dam DEM sent them a request to register as a dam owner. RIDOT never complied. He testified that RIDOT was never issued a NOV. He said that RIDOT was in violation of the Dam Regulations by not registering its ownership interest. The cross examination continued along the lines of enforcement and non-enforcement of RIDOT owned dams.

Mr. Guglielmino testified that the LLO was not fully operable. The Pare report stated that the LLO could draw twenty-seven (27) inches times four (4) feet. DEM Exhibit 4 Full. Mr. Guglielmino said that he considered a partially operating LLO as inoperable (Tr. p. 55). He testified that he could not say with certainty if the LLO would be able to handle something greater than a 100-year storm (Tr. p. 56-57). Mr. Guglielmino took the position that he considered Respondent's partially operating LLO as inoperable under the Regulations therefore rendering the

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dam unsafe. Mr. Guglielmino said that he had never been to Dam 565 during a significant rain event (Tr. p. 58). He said that he had been out to Dam 565 about a year ago and the downstream vegetation had not been cleared. (Tr. p. 60).

On redirect examination Mr. Guglielmino testified the way the LLO is configured today it does not operate in the same fashion as when it was originally designed. (Tr. p. 65). He testified that he could not say with a degree of certainty whether, during a major storm event, the primary spillway would prevent overtopping (Tr. p. 73). He said that even if the LLO operated sufficiently to take enough water he still wouldn't consider it safe. (Tr. p. 73).

OC&I called David Chopy as its next witness. Mr. Chopy testified that he has been employed as the Chief of OC&I since 2008. He oversees the Dam Safety Program. He was a primary author the Dam Safety Regulations. He drafted the NOV in this matter. He said that Dam 565 was considered as a significant risk because if it failed it would take out Old Wallum Lake Road which is a state road.

Mr. Chopy testified that after correspondence from Mr. Kane, the Respondent's attorney, it was determined that RIDOT owned part of Dam 565. He said that DEM sent correspondence to RIDOT that was not answered. He did authorize the removal of the allegations of overgrown vegetation from Respondent's NOV. He said that DEM does not pursue all violations against RIDOT but that they handle matters informally between the two state agencies. (Tr. p. 93). Upon the completion of Mr. Chopy's testimony OC&I rested.

The Respondent called as its only witness Nancy F. Binns. Ms. Binns testified that she lived near Dam 565 for many years. She said that she believed that the State of Rhode Island had built the Dam 565 because there was a brass plaque on the dam which said "State of Rhode

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Island” (Tr. p. 95).

Ms. Binns testified that she was present at Dam 565 in late March of 2010 during what has been referred to as the “100-year flood”. (Tr. p. 100-101). She said that the LLO was able to handle the volume of water. She said that she had been familiar with Dam 565 for approximately sixty-five (65) years. March of 2010 was the highest she had ever seen. She said that she had never seen Old Wallum Lake Road being overtopped or washed out from rain events. (Tr. p. 102). She said that Old Wallum Lake Road had been altered as depicted in Respondent’s Exhibit A Full. A review of Respondent’s Exhibit A Full show it to be a RIDOT plan dated 1921. She said that the changes in Old Wallum Lake Road has caused runoff to into the LLO. Upon the completion of cross examination of Ms. Binns by counsel for OC&I the Respondent rested. OC&I put David Chopy for a brief examination in rebuttal.

BURDEN OF PROOF/STANDARD OF REVIEW

OC&I bears the burden of proof in this matter and must prove the allegations in the NOV by a preponderance of the evidence. “The burden of showing something by a preponderance of the evidence... simply requires the trier to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the facts existence” Metropolitan Stevedore Co V. Rambo, 521 U.S. 121

ANALYSIS

OC&I has the burden of proof that State Dam 565, the Ross Pond Dam, is “unsafe” in violation of Rule 4(A) of the Dam Safety Regulations. It argues that the low level outlet (“LLO”) was not fully operable and therefore unsafe based on the language in Rule 4(A) that “All owners of High Hazard dams and Significant Hazard dams shall keep their dams and appurtenant works in a safe condition.” Rule 6 of the Dam Safety Regulations entitled “Definitions” at subsection AD states an “unsafe dam means the condition of the regulated dam, as determined by the Director, is such that an unreasonable risk of failure exists that will result in a probable loss of human life or major economic loss. Among the conditions that would result in this determination are: excessive vegetation that does not allow the Director to perform a complete visual inspection of a dam, excessive seepage or piping, significant erosion problems, inadequate spillway capacity and/or condition of control structures(s) or serious structural deficiencies, including movement of the structure or major cracking.”

The Ross Pond Dam is classified as a Significant Hazard dam because its failure would have impact on Old Wallum Lake Road which is a state road. It was testified that the fact that it is a state road there would be a “significant economic loss” (Tr. p. 82). It was also testified that if the Old Wallum Lake Road had been a town road the classification would not be classified as a “significant hazard” dam which would mean it was a ‘low hazard’ dam. The Respondent argued that the LLO was not inoperable but partially operable. OC&I presented Mr. Guglielmino and Mr. Chopy to testify. They were qualified as experts in the interpretation of the Dam Safety Regulations but they are not qualified as Dam Safety Engineers. Mr. Chopy had never been to

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State Dam 565 before and Mr. Guglielmino had only been there once approximately one (1) year ago or six (6) years after the issuance of the NOV. Neither witness can be considered as a fact witness.

The State of Rhode Island hired the Pare Corporation to conduct inspections of dams including State Dam 565 (Tr. p. 16-17). Pare Corporation conducted an inspection of State Dam 565 on November 18, 2011 which was submitted into evidence as OC&I Exhibit 4 Full. OC&I relied on the admission of the Pare report as an exception to the hearsay evidence rule. OC&I did not provide a representative of Pare Corporation to elaborate on its report or answer questions in support thereof. The Pare Report is the single piece of substantive evidence to determine if the lack of the LLO rendered State Dam 565 as "unsafe".

The Pare Report made seven (7) points of concern in its "Assessments" section 3.1. Six (6) of these Assessments were directed at deficiencies under the control of RIDOT, including issues of erosion and overgrowth. Number five (5) in the "Assessments" section addresses the sluiceway which is partially the responsibility of RIDOT and partly the responsibility of the Respondent.

The Pare Report identified thirteen (13) "Recommendations" in section 3.2. Twelve (12) of the Pare Recommendations are directed to general dam management and/or the issues relating solely to the RIDOT controlled deficiencies. Number ten (10) of the Pare Report addresses the LLO. Number 10 states:

"Evaluate means to provide low level outlet discharge capacity. Given the current configuration of the sluiceway, provision of low level outlet capacity may be possible by modifying the existing structure...Alternatively, a system of siphons or pumps could be used." (emphasis added)

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The Hearing Officer is at a disadvantage in evaluating the weight and substance of the Pare Report in the absence of testimony by a representative of Pare or a qualified dam engineer. Does the presence of a partially functioning LLO present an “unreasonable risk of failure” under the definition of “unsafe dam”? In its report Pare addresses “condition rating” after the definition of “unsafe” it gives a description of condition rating as “poor” as “a component that has deteriorated beyond a maintenance issue and requires repair; the component no longer functions as it was originally intended”. Without the testimony of a representative of the Pare Corporation or a qualified dam engineer it is impossible to determine if a partially functioning LLO presents an “unsafe” condition or a “poor” condition. It should be noted that the lack of a qualified dam engineer or a representative from Pare Corporation deprived the Respondent its opportunity to cross examine regarding the report. There are many questions raised by the report that this Hearing Officer would like to have qualified by a qualified witness.

The only eye witness testimony was presented in the testimony of Nancy F. Binns. Ms. Binns testified generally about the history and condition of State Dam 565. She testified that she was present at the area of the LLO during the rain event in late March 2010 during what has been referred to as the “100 year flood” (Tr. p. 100-101). She said that the LLO had handled the volume of water effectively. Ms. Binn’s testimony compels one to conclude that the partially operable LLO at State Dam 565 was capable of handling the volume during a “100 year” event and therefore no “unreasonable risk of failure” existed under the most extreme of circumstances.

The AAD has previously ruled in Fontaine Living Trust State Dam 313, AAD 13-012/DE and Dudley Development Corporation State Dam 46, AAD 11-002/DE that a non-operational LLO in and of itself is sufficient reason to declare a dam as “unsafe”. In the matter presently

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under consideration the LLO is partially operable and therefore better able to address the task of handling excessive volume than an inoperable LLO. The testimony of Mr. Chopy and Mr. Guglielmino does not provide any additional factual support for the proposition that the dam is “unsafe”. There is no specific requirement in the Pare Report that the LLO at Sate Dam 565 needs to be replaced. The Report indicated in “Recommendations” section 3.2, number 10 that “Alternately, a system of siphons or pumps could be used”. OC&I Exhibit 4 Full.

The Respondent, in its Post Hearing Memorandum, raised the issue of estoppel in its defense. The Respondent pointed out the continued failure of OC&I to join RIDOT in the NOV and require RIDOT to carry out the corrective steps which they had previously required the Respondent to accomplish. Although the lack of enforcement against RIDOT when a determination of “significant hazard” has been determined shocks the conscience of this Hearing Officer. The AAD is not a court of equity and there the legal principal of estoppel is not available. From a fairness point of view, DEM should enforce violations of laws, which are serious public safety concerns, against RIDOT as aggressively as it pursues such violations against private citizens. There should not be separate treatment or delayed enforcement where public safety is involved.

CONCLUSION

In conclusion I find that OC&I has not met its burden of proof that State Dam 565 is “unsafe” and that an “unreasonable risk of failure exists”. I base my decision on the Pare Report and the testimony of Nancy F. Binns. The Respondent’s Appeal should be granted and the NOV issued on November 5, 2013 should be dismissed.

FINDINGS OF FACT

Based on the testimony, documentary evidence and stipulations of the parties I make the following findings of fact:

1. The Ross Pond Dam, identified as State Dam No. 565 (the "Dam") is located within the town of Burrillville, Rhode Island.
2. A portion of the Dam is located on Plat 156, lot 43.
3. Portions of the Dam including the primary spillway, a portion of the secondary spillway (Sluiceway), the crest, the downstream embankment and related infrastructure are located on property not owned by the Respondent, but rather owned by the Rhode Island Department of Transportation (RIDOT).
4. The Dam has been classified by DEM as Significant Hazard.
5. On or about March 16, 2009 DEM received a signed Dam Registration for the Dam identifying the Respondent, George E. Binns Living Trust as owner of the Dam. The Registration form does not distinguish between full or partial ownership of the Dam.
6. On or about November 18, 2011 PARE, an agent for DEM, conducted an inspection of the Dam and reported on the condition of the Dam.
7. On or about November 5, 2013 DEM issued a Notice of Violation ("NOV") to the Respondent in regard to several maintenance issues and safety concerns associated with the Dam, including portions of the Dam owned by RIDOT.
8. On or about September 6, 2017 DEM rescinded Sections D(1) and D(2) of the NOV. However, DEM is still requiring compliance with sections D(3) through D(5) inclusive regarding the low level outlet.
9. OC&I did not present any witness from PARE Engineering to provide expert testimony with respect to the Pare report and the Dam.
10. Neither Paul Guglielmino or David Chopy, who testified on behalf of OC&I, are qualified to testify as dam safety engineers, or could offer an opinion as to whether the LLO as presently constituted would handle a flooding event greater than a 100 year storm.
11. The PARE report states that an alternative to modification of the LLO for purpose of water draw down is to use a system of pumps or siphons.

12. The Dam serves as state drainage infrastructure as water runoff from Old Wallum Lake Road is diverted through the secondary spillway.
13. The Dam supports the integrity of Old Wallum Lake Road which is a state road.
14. The RIDOT has failed to maintain several portions of the Dam which it owns including the primary spillway, head wall, the lower secondary spillway, side walls and the downstream embankment as noted in the PARE report.
15. The RIDOT has not acknowledged ownership of the Dam.
16. OC&I has not issued a NOV to RIDOT.
17. DEM did not enforce the Dam Safety Regulations against RIDOT to the same extent it did against the Respondent.
18. Respondent has kept the upstream dam embankment relatively free of tress, brush and other vegetation.
19. RIDOT has failed to remove vegetation from the downstream embankment to such an extent that further inspection is impeded.
20. The DEM Dam safety regulations do not require that a Dam have a functioning LLO.
21. The Department has jurisdiction over the Respondent and subject matter of this appeal pursuant to RIGL § 42-17.1-1 et seq. and § 46-19-1 et seq.

CONCLUSIONS OF LAW

1. The RIDEM has jurisdiction over the Respondent pursuant to RIGL § 42-17.1-1 et seq. and § 46-19-1 et seq.
2. The RIDEM has failed to prove by a preponderance of the evidence, the allegations against Respondent, George E. Binns Living Trust in the Notice of Violation dated November 5, 2013.
3. Respondent, George E. Binns Living Trust, did not violate Rule 4A of the Rules and Regulations for Dam Safety.

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4. Respondent's Appeal is GRANTED and SUSTAINED.

Wherefore it is hereby:

ORDERED

1. Respondent's Appeal is GRANTED.
2. That certain NOV filed against George E. Binns Living Trust on November 5, 2013 is DISMISSED.

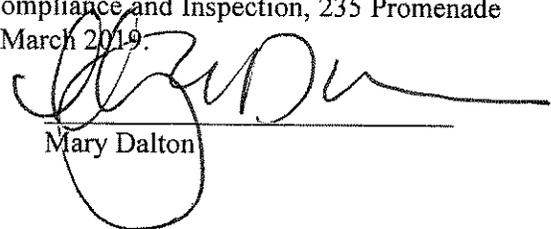
Entered as an Administrative Order this 11th day of March 2019.



David Kerins
Chief Hearing Officer
Administrative Adjudication Division
235 Promenade Street, 3rd Floor, Rm 350
Providence, RI 02908
(401) 222-4700 Ext. 4600

CERTIFICATION OF SERVICE

I hereby certify that I caused a true copy of the within ORDER to be sent via first class mail, Postage prepaid to: Timothy F. Kane, Esquire, P.O. Box 565, 627 Putnam Pike, Greenville, RI 02828; via interoffice mail to Christina Hoefsmit, Esquire, DEM Office of Legal Services and David Chopy, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this 11 day of March 2019.



Mary Dalton

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.