

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

**RE: FONTAINE LIVING TRUST  
DAM 313**

**AAD NO. 13-012/DE**

**DECISION**

This matter came before Hearing Officer David Kerins pursuant to Administrative Adjudication Division Rule 1.17c, ("AAD Rules") which authorizes the issuance of a decision by a substitute Hearing Officer upon the retirement or disability of a Hearing Officer. This matter was heard by Hearing Officer David M. Spinella on October 19, 2017 and January 18, 2018. Hearing Officer David M. Spinella left the Administrative Adjudication Division ("AAD") on March 30, 2018. The Office of Compliance and Inspection ("OC&I") was represented by Christina Hoefsmit and the Respondent was represented by Nicholas Gorham. OC&I filed its Post Hearing Memorandum on March 30, 2018 and the Respondent filed its Post Hearing Memorandum after numerous requests for extensions of time, on July 2, 2018. This decision will be made based on stipulated facts, exhibits and careful reading of the transcript.

**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").

**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

**TRAVEL**

This matter began by the Respondent filing a Notice of Appeal on December 13, 2013. The Appeal was taken from a Notice of Violation ("NOV") dated March 8, 2013 identifying the dam, Hughesdale Upper Pond Dam, State Dam 313 as unsafe. OC&I filed its Prehearing Memorandum on August 25, 2016 and the Respondent filed its Prehearing Memorandum on August 24, 2016 and amended Prehearing Memorandum on October 12, 2016. The Administrative Hearing was heard by Hearing Officer David M. Spinella on October 19, 2017 and January 18, 2018.

**STIPULATED FACTS**

The following facts were stipulated to by the parties prior to the Hearing:

1. Respondent, the Fontaine Living Trust, is the owner of what is commonly referred to as the Hughesdale Upper Pond Dam ("the Dam").

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2. The Dam is identified as State Dam ID No. 313 and is located within the Town of Johnston, Rhode Island.
3. On or about December 9, 2011, a dam safety inspector conducted an inspection of the Dam and reported on the condition and hazard classification of said Dam.
4. On March 8, 2013, DEM issued a Notice of Violation ("NOV") to the Respondent in regard to several maintenance issues and safety concerns associated with the Dam.
5. The Department has jurisdiction over the Respondent pursuant to Rhode Island General Laws § 42-17.1-1 et seq. and § 46-19-1 et seq.

**AGREED UPON EXHIBITS**

The following were agreed to as full exhibits by the Parties:

<u>Department's Exhibit 3:</u>	Notice of Violation, dated March 8, 2013
<u>Department's Exhibit 6:</u>	DEM Dam Regulations, December 2017.
<u>Respondent's Exhibit 1:</u>	Notification of Hazard Classification letter to Jeannette Fontaine, dated January 20, 2009.
<u>Respondent's Exhibit 3:</u>	Dam Registration Form for Hughesdale Pond Upper Dam State Id. No. 313, dated February 6, 2009.
<u>Respondent's Exhibit 5:</u>	RI Department of Public Works, Division of Harbors and Rivers, Special Inspection Report, dated May 1, 1946
<u>Respondent's Exhibit 6:</u>	RI Department of Public Works, Division of Harbors and Rivers, Official Inspection Report, dated May 1, 1946.
<u>Respondent's Exhibit 9:</u>	RI Department of Natural Resources, Dam Inspection Report, dated May 31, 1973.
<u>Respondent's Exhibit 11:</u>	DEM Wetlands file for Wetland Application No. 6002.

HEARING SUMMARY

On October 19, 2017 OC&I presented Mr. Paul Guglielmino, P.E. to testify in support of 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 313 was classified as a high hazard dam and the Respondent was notified of such by letter dated January 20, 2009. He testified that the dam had been inspected on December 9, 2011 by Pare Corporation. Pare Corporation was awarded the contract to inspect certain dams including Dam 313. Pare Corporation prepared a report of its visual inspection. DEM Exhibit 1 Full. 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 lower than the rest of the embankment. 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."

Mr. Guglielmino testified that although he relied on the Pari report he did visit the subject dam sometime in October 2016. He said that the Respondent had complied completely with the

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NOV except the LLO. (Tr. P 28). Mr. Guglielmino testified that the LLO served a purpose to lower the level of the water if there's a problem with the dam (Tr. P 45). 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 Lever outlet (Tr. P. 47-48). Mr Guglielmino testified that there were no minimum flow requirements for the LLO in the Regulations (Tr. p. 53).

Mr. Guglielmino testified that he didn't have any information that the dam had ever failed as a result of any condition. (Tr. P. 57). It did not fail during the floods in 2010. After a brief redirect and re-cross examination Mr. Guglielmino's testimony was completed and the hearing was adjourned for the day.

The Administrative Hearing was reconvened on January 18, 2018. The Department rested. (Tr. P. 94). Mr. Gorham reviewed for the record the status of Exhibits. The Department initially agreed to Respondent's Exhibits 1, 3, 9 and 11. They subsequently agreed to the admission of 5 and 6.

The Respondent called as its first witness Robert W. Fairbanks, Jr., P.E. He testified about his education and professional experience, He said that he had been inspecting dams since 1986 and had inspected more than 500 dams. He has been hired by DEM several times to conduct visual dam inspections and provide reports. Mr. Fairbanks was qualified as an expert in the area of dam inspections (Tr. p. 104).

Mr. Fairbanks testified that he inspected the Hughesdale Pond Upper Dam, State Dam Number 313. He visited the site at least three times and reviewed the reports prepared by Pari Engineering. He said that he had reviewed the NOV and was familiar with the alleged violations. He supervised the correction of the violation involving the elevation of the spillway. The only

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issue remaining was the LLO.

Mr. Fairbanks agreed that the LLO is inoperable (Tr. p. 121). He said that the LLO has been inoperable since at least 1946. He reviewed Respondent's Exhibit 11 which reflected an inspection of the dam on May 31, 1973 (Tr. p. 123). This report indicated that there is "No lift mechanism".

Mr. Fairbanks testified that he prepared a cost estimate of the LLO associated with the subject dam. He described each component and the process of repair. He set the cost of repair of the LLO at \$283,000. (Tr. p. 146). He testified that as an alternative the function of the LLO could be performed effectively by portable pumps.

Mr. Fairbanks testified that the "Dam Safety Regs. do not have a requirement for what would be called a spillway design flood, so there is nothing within the regulations that requires a dam to pass a certain amount of water" (Tr. p. 150). He went on to say that "there's nothing within the regulations that requires a low-level outlet" (Tr. p. 151). Respondent concluded its direct examination.

In cross examination Mr. Fairbanks was questioned about the definition for "Unsafe Dam". He testified that the lower level outlet is a control structure and that it was not functional.

Respondent next called Patricia L. Brady who testified that she is the daughter of Respondent Jeannette Fontaine. She testified that she is power of attorney for her mother and has personal knowledge of facts regarding the subject dam. She said that her mother will be 90 shortly and has difficulty getting around. Upon the completion of Ms. Brady's testimony, the Respondent rested.

ANALYSIS

The burden of proof is on the Department to prove by a preponderance of the evidence that the subject dam is “unsafe” and therefore must be made safe by the owners. The Department argues that the subject dam fits the definition of an “unsafe dam” pursuant to Dam Safety Regulation, Rule 6 (AD). Rule 6 (AD) states that an “unsafe dam means the condition of a regulated dam, as determined by the Director is such that an unreasonable risk of failure exist that will result in a probable loss of human life or major economic loss.” One of the conditions that would result in this determination is “inadequate capacity and/or condition of control structures.”

The Department’s case is based entirely on the fact that the Low-Level Outlet (“LLO”) is inoperable. The Department does not present any additional facts regarding the LLO. The experts presented by both sides agree that the LLO provides two functions. One is to lower the level of the pond to allow maintenance such as vegetation removal around the edge of the pond. The second function is to allow for the release of water in the event of a flooding event. There was no testimony to establish the volume of water that would flow through a properly operating LLO or its effectiveness. There was testimony that there was at least one other method to accomplish those two tasks and that was by portable pump.

The evidence shows that the LLO for the subject dam has been inoperable since 1946. This dam has existed without a functioning LLO for at least seventy-two (72) years. The subject dam has functioned under the most extreme of circumstances including the 300-year storm in March 2010. Although there has been some damage to the spillway the integrity of the dam has not presented an “unreasonable risk of failure.”

Hearing Officer David Spinella considered a similar factual situation in the matter of

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*Dudley Development Corporation*, AAD No. 11-002/DE. In the *Dudley* matter the LLO had been inoperable since 1936. He issued a decision which accepted the Respondent's expert's opinions that the dam was not unsafe in spite of the inoperable condition of the LLO.

In this matter we had the assistance of two dam safety experts, Paul Guglielmino, P.E. for the Department and Robert Fairbanks, P.E. Both experts' testimony was credible and helpful. Mr. Guglielmino testified that his knowledge of the subject dam was received through review of the report prepared by Pari Engineering (DEM Exhibit 1 - Full). He said that he had visited the site in October 2016.

Robert Fairbanks testified that he had conducted an inspection of the dam and visited the site three times. He testified that since 1986 he had been associated with nearly 500 dam inspections, some of them for DEM (Tr. p. 101). His testimony was that the LLO was not a safety feature but a maintenance feature for the annual lowering of ponds for repairs when necessary (Tr. p. 115-116). He said that in the event of a flood event that a portable pumping system would provide more effective alternative to an operating LLO. He testified that repair of the LLO would not increase the safety of the dam. The Department did not present rebuttal testimony to that of Mr. Fairbanks.

I have carefully reviewed the testimony contained in the transcripts as well as the stipulated facts and exhibits of the parties. My conclusion is the same as Hearing Officer Spinella in the *Dudley Development* matter. I find that the inoperability of the LLO in this matter does not render Dam 313 "unsafe". The fact that the LLO has been inoperable since 1946 without incident is very compelling. The uncontradicted testimony of Robert Fairbanks that the LLO is not a safety component of the dam. Furthermore, that the repair of the LLO would not render the dam safer.

I find that requiring the Respondent to repair the LLO at great expense without increasing



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the safety of the dam is unreasonable and not within the intent of the Dam Safety Regulations and enabling statutes.

I therefore find that the Department has failed to carry its burden of proof, by a preponderance of the evidence, the fact, as alleged in the Notice of Violation dated March 8, 2013 that Respondent Fontaine Living Trust, violated Rule 4A of the Rules and Regulations for Dam Safety requiring the owner of a high hazard dam to repair or replace the LLO.

**STIPULATED FINDINGS OF FACT**

The following facts were stipulated to by the parties prior to the Hearing:

1. Respondent, the Fontaine Living Trust is the owner of what is commonly referred to as the Hughesdale Upper Pond Dam (the "Dam").
2. The Dam is identified as State Dam ID No. 313 and is located within the town of Johnston, Rhode Island.
3. On or about December 9, 2011, a dam safety inspector conducted an inspection of the Dam and reported on the condition and hazard classification of said Dam.
4. On March 8, 2013, DEM issued a Notice of Violation ("NOV") to the Respondent regarding several maintenance issues and safety concerns associated with the Dam.
5. The Department has jurisdiction over the Respondent pursuant to Rhode Island General Laws § 42-17.1-1, et seq. and § 46-19-1, et seq.

**ADDITIONAL FINDINGS OF FACT AT HEARING**

6. The NOV identified two areas of concern (Department's Exhibit 3 Full).
7. The first area of concern in the NOV was an inoperable low-level outlet ("LLO").
8. The second area of concern in the NOV was an uneven spillway.
9. The uneven spillway was rectified to DEM's satisfaction prior to hearing.

10. The only remaining issue of concern is the inoperable LLO.
11. Mr. Paul Guglielmino, Senior Sanitary Engineer for the Department of Environmental Management Office of Compliance and Inspection classified Dam 313 as "unsafe" because of the inoperable LLO.
12. Mr. Guglielmino classified Dam 313 unsafe based on the Pari Corporation Report. (Department's Exhibit 1 Full).
13. The LLO for Dam 313 has been inoperable since before 1946.
14. The LLO is customarily used for maintenance of the dam and pond.
15. Many older dams have inoperable LLO.
16. Mr. Robert Fairbanks, P.E. was qualified as an expert in dam inspection and safety.
17. Mr. Fairbanks testified that the LLO at Dam 313 is not an integral part of the safety of the dam but primarily for maintenance.
18. The function of the LLO can be accomplished using portable pumps if necessary.
19. The lack of functionality of the LLO at Dam 313 does not render the dam unsafe.

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, Fontaine Living Trust in the Notice of Violation dated March 8, 2013.
3. Respondent, Fontaine Living Trust, did not violate Rule 4A of the Rules and Regulations for Dam Safety.
4. Respondent's Appeal is Sustained.

Wherefore it is hereby:

**ORDERED**


1. Respondent's Appeal is **GRANTED**.

Entered as an Administrative Order this 7<sup>th</sup> day of August 2018.

  
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David Kerins  
Chief Hearing Officer  
Administrative Adjudication Division  
235 Promenade Street, 3<sup>rd</sup> 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: Nicholas Gorham, Esquire, Gorham & Gorham, PO Box 46 (25 Danielson Pike), N. Scituate, RI 02857; 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 7<sup>th</sup> day of August 2018.

  
\_\_\_\_\_  
Michelle Janvrin

**RE: FONTAINE LIVING TRUST  
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**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.