

**STATE OF RHODE ISLAND  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

**OFFICE OF COMPLIANCE & INSPECTION**

**IN RE: Town of Johnston**

**FILE NOS.: Dam State I.D. No. 168  
and OCI-DAMS-23-12**

**NOTICE OF VIOLATION**

**A. INTRODUCTION**

Pursuant to Sections 42-17.1-2(21) and 42-17.6-3 of the Rhode Island General Laws, as amended, (“R.I. Gen. Laws”) you are hereby notified that the Director of the Rhode Island Department of Environmental Management (“Director” of “RIDEM”) has reasonable grounds to believe that the above-named party (“Respondent” or “Town”) has violated certain statutes and/or administrative regulations under RIDEM's jurisdiction.

**B. ADMINISTRATIVE HISTORY**

On 28 December 2022, RIDEM issued a Notice of Intent to Enforce (“Notice”) by certified mail to the Town for the dam and the violations that are the subject of this Notice of Violation (“NOV”). The Notice required specific actions to correct the violations. On 3 January 2023, the Notice was delivered. As of the date of the NOV, the Town has failed to respond to or comply with the Notice.

**C. FACTS**

- (1) The property includes a dam identified as Oak Swamp Reservoir Dam, State Identification Number 168 (“Oak Swamp Dam”), located approximately 1.9 miles west of the Johnston Senior High School and 1.4 miles north of Central Landfill in Johnston, Rhode Island.
- (2) Respondent owns Oak Swamp Dam.
- (3) Oak Swamp Dam is classified by RIDEM as High Hazard.
- (4) On 18 May 2022, Oak Swamp Dam was visually inspected. The inspection revealed the following:
  - (a) Significant erosion/sinkhole issues in numerous locations on the upstream embankment, crest, and downstream embankment, including:
    - 10 inch diameter sinkhole approximately 40 inches deep located behind the upstream slope.

- 6 inch diameter by 24-inch deep sinkhole located at STA 0+85.
  - 10 inch diameter by 4 foot deep hole at STA 9+75.
  - Pockets/voids in the Downstream Wall as large as 3 feet in diameter that extended 4 to 6 feet into the embankment.
- (b) A low area immediately beyond the right abutment that may be subject to overtopping before the dam.
- (5) RIDEM considers that Oak Swamp Dam may be unsafe because of the findings described in section C (4) above.
- (6) As of the date of the NOV, Respondent has failed to correct the issues set forth in section C (4) above.

D. VIOLATION

Based on the foregoing facts, the Director has reasonable grounds to believe that you have violated the following statutes and/or regulations:

- (1) **Rhode Island's Rules and Regulations for Dam Safety (250-RICR-130-05-1) ("DS Rules"), Part 1.11(A)(4)** – requiring the owner of a high hazard dam, to retain a qualified engineer to perform a detailed investigation of the dam, provide a schedule by which any work needed shall be accomplished, and complete all work required by RIDEM in a reasonable time frame required by RIDEM, whenever the findings of a visual inspection reveal, in the opinion of RIDEM, that the dam may be unsafe.
- (2) **DS Rules, Part 1.11(D)** – requiring that a report be prepared for a detailed investigation. If deficiencies are found, the report must identify the specific deficiencies and, when warranted, specify further investigation or corrective measures. The report, completed by a qualified engineer retained by a dam owner, must provide a recommended schedule to complete any work identified as necessary to correct the deficiencies noted in the report. Such reports must be provided to the dam owner and RIDEM within 60 days of the date of the detailed investigation.

E. ORDER

Based upon the violations alleged above and pursuant to R.I. Gen. Laws Section 42-17.1-2(21), you are hereby ORDERED to:

- (1) **Within 90 days of receipt of the NOV**, retain a professional engineer fully registered in the State of Rhode Island, who is experienced with dam inspections, design, construction, and repair ("Dam Engineer").

- (2) **Within 180 days of receipt of the NOV**, the Dam Engineer must complete the following in accordance with the DS Rules, Part 1.11 (C):
  - (a) A detailed investigation of embankment (upstream and downstream) and crest of Oak Swamp Dam to evaluate the findings described in Section C (4) above.
  - (b) Submit a report of the findings to RIDEM. If deficiencies are found, the report must identify the specific deficiencies and, when warranted, specify further investigation or corrective measures. The report must provide a recommended schedule to complete any work identified as necessary to correct the deficiencies noted in the report. If it is determined that the dam is unsafe, the report must specify the actions necessary to return the dam to a safe condition and include a schedule to complete the work. For any proposed repairs, the report must include an application prepared in accordance with the DS Rules, Part 1.10(B).
- (3) The report, application, and/or schedule required above shall be subject to RIDEM's review and approval. Upon review, RIDEM shall provide written notification either granting formal approval or stating the deficiencies therein. **Within 14 days (unless a longer time is specified) of receiving a notification of deficiencies**, submit to RIDEM a modified report, application, and/or schedule or additional information necessary to correct the deficiencies.
- (4) Commence work specified in the schedule approved by RIDEM **within 20 days of approval (unless otherwise expressly authorized by RIDEM in writing to commence work later)** and complete such work in accordance with the approved schedule.

F. PENALTY

- (1) Pursuant to R.I. Gen. Laws Section 42-17.6-2, the following administrative penalty, as more specifically described in the attached penalty summary and worksheets, is hereby ASSESSED, jointly and severally, against each named respondent:

**\$1,106**

- (2) The proposed administrative penalty is calculated pursuant to Rhode Island's *Rules and Regulations for Assessment of Administrative Penalties* (250-RICR-130-00-1) ("Penalty Rules") and must be paid to RIDEM within 30 days of your receipt of the NOV.
- (3) Penalty payments shall be by one of two methods:
  - (a) By certified check, cashier's check, or money order made payable to the **General Treasury – Water and Air Protection Program** and forwarded to:

Administrator, RIDEM Office of Compliance and Inspection  
235 Promenade Street, Suite 220  
Providence, RI 02908-5767.

- (b) By wire transfer in accordance with instructions provided by RIDEM.
- (4) Penalties assessed against respondent in the NOV are penalties payable to and for the benefit of the State of Rhode Island and are not compensation for actual pecuniary loss.
- (5) If any violation alleged herein shall continue, then each day during which the violation occurs or continues shall constitute a separate offense and the penalties and/or costs for that violation shall continue to accrue in the manner set forth in the attached penalty summary and worksheets. The accrual of additional penalties and costs shall be suspended if RIDEM determines that reasonable efforts have been made to comply promptly with the NOV.

G. RIGHT TO ADMINISTRATIVE HEARING

- (1) Pursuant to R.I. Gen. Laws Chapters 42-17.1, 42-17.6, 42-17.7 and 42-35, each named respondent is entitled to request a hearing before RIDEM's Administrative Adjudication Division regarding the allegations, orders and/or penalties set forth in Sections B through F above. All requests for hearing MUST:
  - (a) Be in writing. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.6-4(b).
  - (b) Be **RECEIVED** by RIDEM's Administrative Adjudication Division, at the following address, within 20 days of your receipt of the NOV. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.7-9:

Administrative Clerk  
RIDEM - Administrative Adjudication Division  
235 Promenade Street, Room 350  
Providence, RI 02908-5767

- (c) Indicate whether you deny the alleged violations and/or whether you believe that the administrative penalty is excessive. See R.I. Gen. Laws Section 42-17.6-4(b).
- (d) State clearly and concisely the specific issues which are in dispute, the facts in support thereof and the relief sought or involved, if any. See Part 1.7(B) of Rhode Island's *Rules and Regulations for the Administrative Adjudication Division* (250-RICR-10-00-1).

- (2) A copy of each request for hearing must also be forwarded to:

Johann G. Donall , Esquire  
RIDEM - Office of Legal Services  
235 Promenade Street, 4<sup>TH</sup> Floor  
Providence, RI 02908-5767

- (3) Each named respondent has the right to be represented by legal counsel at all administrative proceedings relating to this matter.
- (4) Each respondent must file a separate and timely request for an administrative hearing before RIDEM's Administrative Adjudication Division as to each violation alleged in the written NOV. If any respondent fails to request a hearing in the above-described time or manner regarding any violation set forth herein, then this NOV shall automatically become a Final Compliance Order enforceable in Superior Court as to that respondent and/or violation and any associated administrative penalty proposed in the NOV shall be final as to that respondent. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and (vi) and 42-17.6-4(b) and (c).
- (5) Failure to comply with the NOV may subject each respondent to additional civil and/or criminal penalties.
- (6) The NOV does not preclude the Director from taking any additional enforcement action nor does it preclude any other local, state, or federal governmental entities from initiating enforcement actions based on the acts or omissions described herein.

If you have any legal questions, please have your attorney contact Johann Donall of RIDEM's Office of Legal Services at (401) 537-4081 or [Johann.Donall@dem.ri.gov](mailto:Johann.Donall@dem.ri.gov). All other inquiries should be directed to Patrick Hogan of RIDEM's Office of Compliance and Inspection at (401) 537-4449 or [patrick.hogan@dem.ri.gov](mailto:patrick.hogan@dem.ri.gov).

Please be advised that any such inquiries do not postpone, eliminate, or otherwise extend the need for a timely submittal of a written request for a hearing, as described in Section G above.

FOR THE DIRECTOR

By: \_\_\_\_\_  
Christina Hoefsmit, Deputy Administrator  
RIDEM Office of Compliance and Inspection

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

CERTIFICATION

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_  
the within Notice of Violation was forwarded to:

Honorable Joseph M. Polisena, Mayor  
Town of Johnston  
1385 Hartford Avenue  
Johnston, RI 02919

by Certified Mail.

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# ADMINISTRATIVE PENALTY SUMMARY

Program: Dam Safety  
 File Nos.: Dam State I.D. 168 and OCI-DAMS-23-12  
 Respondent: Town of Johnston

GRAVITY OF VIOLATION					
SEE ATTACHED "PENALTY MATRIX WORKSHEETS."					
VIOLATION No. & CITATION	APPLICATION OF MATRIX		PENALTY CALCULATION		AMOUNT
	Type	Deviation	Penalty from Matrix	Number or Duration of Violations	
D (1) and D (2) – Failure to address may be unsafe conditions	Type I (\$1,000 Max. Penalty) *	Major	\$1,000	1 year	\$1,000
<b>SUB-TOTAL</b>					<b>\$1,000</b>

\*Maximum Penalties represent the maximum penalty amounts per day, per violation.

ECONOMIC BENEFIT FROM NONCOMPLIANCE		
COSTS OF COMPLIANCE, EQUIPMENT, O&M, STUDIES OR OTHER DELAYED OR AVOIDED COSTS, INCLUDING INTEREST AND/OR ANY COMPETITIVE ADVANTAGE DERIVED OVER ENTITIES THAT COMPLY. NOTE: ECONOMIC BENEFIT MUST BE INCLUDED IN THE PENALTY UNLESS:		
- THERE IS NO IDENTIFIABLE BENEFIT FROM NONCOMPLIANCE, OR - THE AMOUNT OF ECONOMIC BENEFIT CAN NOT BE QUANTIFIED.		
DESCRIPTION OF BENEFIT	CALCULATION	AMOUNT
Failing to retain engineer to perform a detailed investigation of the dam. The economic benefit of noncompliance was determined by using an EPA computer model titled <i>BEN</i> that performs a detailed economic analysis. The dates, dollar amounts, and values used in this analysis are listed in this table.	<ul style="list-style-type: none"> <li>▪ Profit Status – Municipality</li> <li>▪ Filing Status</li> <li>▪ Initial Capital Investment</li> <li>▪ One-time Non-depreciable – \$3,500 Expense</li> <li>▪ First Month of Non-compliance – April 2023</li> <li>▪ Compliance Date – 31 December 2024</li> <li>▪ Penalty Due Date – 1 October 2024</li> <li>▪ Useful Life of Pollution Control</li> <li>▪ Equipment Annual Inflation Rate</li> <li>▪ Discount Compound Rate – 4.0%</li> </ul>	
<b>SUB-TOTAL</b>		<b>\$ 106</b>

### **COST RECOVERY**

**ADDITIONAL OR EXTRAORDINARY COSTS INCURRED BY THE DIRECTOR DURING THE INVESTIGATION, ENFORCEMENT AND RESOLUTION OF AN ENFORCEMENT ACTION (EXCLUDING NON-OVERTIME PERSONNEL COSTS), FOR WHICH THE STATE IS NOT OTHERWISE REIMBURSED.**

A review of the record in this matter has revealed that RIDEM has not incurred any additional or extraordinary costs during the investigation, enforcement, and resolution of this enforcement action (excluding non-overtime personnel costs), for which the State is not otherwise reimbursed.

**TOTAL PENALTY PROPOSED UNDER PENALTY RULES = \$1,106**

# PENALTY MATRIX WORKSHEET

CITATION: Failure to address may be unsafe conditions

VIOLATION NOs.: D (1) and D (2)

TYPE		
<u>  X  </u> <b>TYPE I</b> <u>DIRECTLY</u> related to protecting health, safety, welfare, or environment.	<u>      </u> <b>TYPE II</b> <u>INDIRECTLY</u> related to protecting health, safety, welfare, or environment.	<u>      </u> <b>TYPE III</b> <u>INCIDENTAL</u> to protecting health, safety, welfare, or environment.
DEVIATION FROM THE STANDARD		
THE DEGREE TO WHICH A VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.		
<p><b><u>FACTORS CONSIDERED:</u></b></p> <p>Taken from Part 1.10(A)(1)(b) of the Penalty Rules.</p> <ol style="list-style-type: none"> <li>(1) <b>The extent to which the act or failure to act was out of compliance:</b> Respondent failed to address may be unsafe conditions at Oak Swamp Dam. Oak Swamp Dam is classified by RIDEM as High Hazard. Maintaining a High Hazard dam in a safe condition is the primary objective of the DS Rules and the regulatory program.</li> <li>(2) <b>Environmental conditions:</b> A High Hazard dam is one where failure or misoperation will result in a probable loss of human life. The inspection on 22 May 2022 revealed 2 may be unsafe conditions at Oak Swamp Dam.</li> <li>(3) <b>Amount of the pollutant:</b> Considered, but not utilized for this calculation.</li> <li>(4) <b>Toxicity or nature of the pollutant:</b> Considered, but not utilized for this calculation.</li> <li>(5) <b>Duration of the violation:</b> Full duration unknown – at least approximately 14 months. RIDEM’s Notice required Respondent to have an engineer assess may be unsafe conditions at Oak Swamp Dam and submit a report to RIDEM of the engineer’s findings by or around 3 April 2023.</li> <li>(6) <b>Areal extent of the violation:</b> Considered, but not utilized for this calculation.</li> <li>(7) <b>Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:</b> Respondent failed to take reasonable and appropriate steps to prevent the noncompliance by properly maintaining Oak Swamp Dam. Respondent failed to take reasonable and appropriate steps to mitigate the noncompliance by retaining an engineer to assess may be unsafe conditions at the dam and submitting a report to RIDEM of the findings, despite receiving the Notice requiring Respondent to do so.</li> <li>(8) <b>Whether the person has previously failed to comply with any regulations, order, statute, license, permit, or approval issued or adopted by RIDEM, or any law which RIDEM has the authority or responsibility to enforce:</b> Considered, but not utilized for this calculation.</li> </ol>		

(continued from the previous page)

- (9) **The degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable:** Respondent had full control over the violation. The violation was foreseeable.
- (10) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but not utilized for this calculation.

<input checked="" type="checkbox"/> MAJOR	<input type="checkbox"/> MODERATE	<input type="checkbox"/> MINOR
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Penalty Matrix where the applicable statute provides for a civil penalty up to \$1,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	<b>MAJOR</b>	\$800 to \$1,000 <b>\$1,000</b>	\$600 to \$800	\$400 to \$600
	MODERATE	\$600 to \$800	\$400 to \$600	\$200 to \$400
	MINOR	\$400 to \$600	\$200 to \$400	\$100 to \$200