

**STATE OF RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF COMPLIANCE & INSPECTION**

IN RE: SOSCIA HOLDINGS, LLC

FILE NO.: OCI-FW-21-7

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”) has violated certain statutes and/or administrative regulations under RIDEM’s jurisdiction.

B. ADMINISTRATIVE HISTORY

On 4 April 2021, RIDEM issued a letter (“April 4TH Letter”) to Respondent that explained its obligation to operate the dam that is the subject of this Notice of Violation (“NOV”) in a manner consistent with its historic use or apply for a permit to operate the dam differently. On 20 April 2021, RIDEM issued a follow up letter (“April 20TH Letter”) to Respondent, including information on how to operate the dam during dry periods. On 11 July 2022, RIDEM issued a letter (“July 11TH Letter”) to Respondent that was sent by electronic mail and by certified mail for the violation that is the subject of the NOV. The July 11TH Letter advised Respondent of the specific actions required to correct the violation. On 13 July 2022, RIDEM issued an Order to Cease and Desist (“C&D”) to Respondent that was sent by electronic mail and by certified mail requiring the same specific actions as the July 11TH Letter. On 14 July 2022 and 18 July 2022, the July 11TH Letter and C&D were delivered, respectively. Respondent failed to respond to or comply with the July 11TH Letter or C&D. On 9 August 2022, RIDEM issued an Immediate Compliance Order (“ICO”) to Respondent for the violation that is the subject of the NOV. The ICO was valid for 45 days and ordered Respondent to take specific actions to correct the violation. Respondent’s attorney responded to RIDEM by electronic mail that same day and stated that Respondent would comply with the ICO. On 23 September 2022, RIDEM extended the ICO for 45 days. On 6 June 2023, RIDEM issued a letter (“June 6TH Letter”) to Respondent by certified mail advising Respondent that the deadline to apply for a permit to operate the dam was 29 July 2023. On 12 June 2023, the June 6TH Letter was delivered to Respondent. On 29 July 2023, the Federal Court issued a stay on RIDEM’s enforcement of the requirements in the June 6TH Letter in *Soscia Holdings, LLC v. Terrence Gray, Director of the Rhode Island Department of Environmental Management, and David E. Chopy, Administrator for the Rhode Island Department of Environmental Management, Office of Compliance and Inspection* (Civil No. 22-cv-266-LM-AKJ). On 25 March 2024, the Federal Court dismissed the above referenced case.

C. FACTS

- (1) Flat River Reservoir Dam, State Identification Number 167 (“Flat River Dam”), located in Coventry, Rhode Island, is owned and operated by Respondent.
- (2) Flat River Dam has a control structure that allows the water behind the dam to be raised or lowered.
- (3) Flat River Dam is a jurisdictional dam as that term is defined in Rhode Island’s *Rules and Regulations for Dam Operation Permits* (250-RICR-130-10-1) (“DOP Rules”).
- (4) Respondent acquired ownership of Flat River Dam on 3 March 2020.
- (5) The water impounded behind Flat River Dam is known as Flat River Reservoir and/or Johnson’s Pond (“Pond”), which also includes fringe forested wetland and emergent freshwater wetland (“collectively, “Freshwater Wetlands”).
- (6) The Pond is used for recreation.
- (7) The Pond is not used for a public water supply system as defined in R.I. Gen. Laws §46-13-2.
- (8) The normal storage capacity of the Pond is 4,195-acre feet.
- (9) The stream below Flat River Dam is known as South Branch Pawtuxet River (“River”).
- (10) The Pond and River are important for the preservation of freshwater wetlands and plant and animal species dependent on freshwater wetlands.
- (11) Prior to Respondent acquiring ownership of Flat River Dam, the dam was historically operated in the following manner (“Historic Use”):

April 1- April 30

Maintain a minimum streamflow in the River of 215 cubic feet per second (“cfs”) and gradually raise the water level in the Pond to 12 inches below spillway level. If the streamflow in the River cannot be maintained at 215 cfs, lower the water level in the Pond until the River attains 215 cfs. If the water level in the Pond falls below 24 inches below spillway level (that is, 25 inches, 26 inches, etc.), reduce the streamflow in the River to 100 cfs until the water level in the Pond reaches 24 inches below spillway level. Once the water level in the Pond reaches 24 inches below spillway level, maintain the water level in the Pond at 24 inches below spillway level provided that a minimum streamflow in the River of 100 cfs is

maintained. Raise the water level in the Pond above 24 inches below spillway level (that is, 23 inches, 22 inches, etc.) provided that a minimum streamflow in the River of 215 cfs is maintained.

May 1 – May 31

Maintain a minimum streamflow in the River of 150 cfs and raise the water level in the Pond to spillway level. If the streamflow in the River cannot be maintained at 150 cfs, lower the water level in the Pond until the River attains 150 cfs. If the water level in the Pond falls below 12 inches below spillway level (that is, 13 inches, 14 inches, etc.), reduce the streamflow in the River to 60 cfs until the water level in the Pond reaches 12 inches below spillway level. Once the water level in the Pond reaches 12 inches below spillway level, maintain the water level in the Pond at 12 inches below spillway level provided that a minimum streamflow in the River of 60 cfs is maintained. Raise the water level in the Pond above 12 inches below spillway (that is, 11 inches, 10 inches, etc.) provided that a minimum streamflow of 150 cfs in the River is maintained.

June 1 – September 30

Maintain the water level in the Pond at spillway level. If the water level in the Pond is below spillway level, reduce the streamflow in the River to 40 cfs.

October 1 – October 31

Maintain a minimum streamflow in the River of 64 cfs and maintain the water level in the Pond between the spillway level and 12 inches below the spillway level. If the streamflow in the River cannot be maintained at 64 cfs, lower the water level in the Pond until 64 cfs in the River is attained. If the water level in the Pond falls below 36 inches below spillway level (that is, 37 inches, 38 inches, etc.), reduce the streamflow in the River to 40 cfs until the water level in the Pond reaches 36 inches below spillway level. Once the water level in the Pond reaches 36 inches below spillway level, maintain the water level in the Pond at 36 inches below spillway level provided that a minimum streamflow in the River of 40 cfs is maintained. Raise the water level in the Pond above 36 inches below spillway level (that is, 35 inches, 34 inches, etc.) provided that a minimum streamflow in the River of 64 cfs is maintained.

November 1 – November 31

Maintain the water level in the Pond between 30 inches to 36 inches below spillway level. If the water level in the Pond falls below 36 inches below spillway level (that is, 37 inches, 38 inches, etc.), reduce the streamflow in the River to 64 cfs until the water level in the Pond reaches 36 inches below spillway level.

December 1 – March 31

Maintain the water level in the Pond between spillway level and 42 inches below spillway level (except for a maximum period of 2 weeks when the water level in the Pond can be 50 inches below spillway level) provided that a minimum streamflow in the River of 32 cfs is maintained. If the water level in the Pond falls below 42 inches below spillway level (that is, 43 inches, 44 inches, etc.), limit the streamflow in the River to 32 cfs until the water level in the Pond reaches 42 inches below spillway level.

Due to varying weather conditions, the stream flows in the River may be higher than or less than the values shown above.

- (12) Rhode Island's *Water Quality Regulations* (250-RICR-150-05-1) ("WQ Rules"), Part 1.25(J)(2) and Part 1.25(J)(3) classify the Pond and the River as Class B waters.
- (13) Pursuant to the WQ Rules, Part 1.9(B)(3), Class B waters are designated for fish and wildlife habitat and primary and secondary contact recreational activities and shall have good aesthetic value.
- (14) The Pond is approximately 950 acres and is home to multiple species of fish (including largemouth bass, smallmouth bass, bluegill sunfish, pumpkinseed sunfish, yellow perch, white perch, chain pickerel, white sucker, brown trout, brown bullhead, golden shiner, black crappie, swamp darter, and white catfish), numerous species of birds, turtles, and several species of mussels (including some classified as rare and/or high conservation value) and other benthic species such as snails and worms. The Pond, which is home to RIDEM's boat ramp at *Zekes Bridge*, is further used for active recreation, including but not limited to, boating, kayaking, fishing, and swimming, and for passive recreation.
- (15) The WQ Rules, Part 1.4(A)(71), defines pollution as the human-made or human-induced alteration of the physical, chemical, biological, or radiological characteristics and/or integrity of water.
- (16) The April 20TH Letter explained what Respondent could do to manage the water level within the Pond and water releases from Flat River Dam during dry periods. One approach was to look at the current conditions for rivers in the region and adjust water releases to match these conditions ("Regional Streamflow Approach"). As identified by the United States Geologic Survey ("USGS"), these rivers are 01117000, 01115630, 01117800, 01118000, 01117500, 01117468, and 01117420 ("Regional Rivers").

- (17) On 1 June 2022 and 8 June 2022, RIDEM received complaints regarding low water levels in the Pond and concerns regarding the impacts the low water level is having on fish in the Pond.
- (18) On 30 June 2022, RIDEM inspected the Pond. The inspection revealed that the water level in the Pond was approximately 4 inches below spillway level. RIDEM reviewed the USGS streamflow gauge data¹ for the River, which revealed that the streamflow was approximately 57 cfs.
- (19) On 8 July 2022 and 11 July 2022, RIDEM received complaints regarding low water levels in the Pond.
- (20) On 11 July 2022, RIDEM inspected the Pond. The inspection revealed that the water level in the Pond was approximately 13 inches below spillway level. RIDEM reviewed USGS streamflow gauge data for the River, which revealed that the streamflow was approximately 53 cfs.
- (21) On 11 July 2022, RIDEM reviewed USGS stream gauge data for the Regional Rivers. The average median streamflow for these rivers based on up to 81 years of data was 31.4 cfs, and the average current streamflow was 19.1 cfs, which is 60% of the average median streamflow.
- (22) The July 11TH Letter advised Respondent that RIDEM used the Regional Streamflow Approach and determined that under the current dry conditions, Respondent must reduce the downstream release from Flat River Dam to maintain a streamflow in the River of 24 cfs.
- (23) From approximately 12 July 2022 through 25 July 2022, RIDEM received 6 complaints regarding low water levels in the Pond and concerns related to the impacts the low water level is having on wildlife, wildlife habitat, and recreational use.
- (24) On 25 July 2022, RIDEM inspected the Pond. The inspection revealed that the water level in the Pond was approximately 24 inches to 25 inches below spillway level. The inspection further found at multiple locations surrounding the Pond, portions of the Pond bed exposed or completely dry and several watercrafts unable to move due to the low water level in the Pond. RIDEM reviewed USGS streamflow gauge data for the River, which revealed that the streamflow was between approximately 46 cfs to 48 cfs.

¹ Streamflow data referenced herein was obtained from the real-time stream flow for the River which is maintained by the USGS and publicly available at https://waterdata.usgs.gov/nwis/uv?site_no=01116000&legacy=1. Respondent was advised of the availability of the same.

- (25) From approximately 26 July 2022 through 9 August 2022, RIDEM received 10 complaints regarding low water levels in the Pond and concerns regarding the effect the low water level in the Pond is having on fish, wildlife, vegetation, and recreation.
- (26) On 1 August 2022 and 2 August 2022, RIDEM inspected the Pond to determine the presence of freshwater mussels. The inspections identified three live freshwater mussel species. Specifically, Eastern elliptio, *Elliptio complanata* (“Eastern elliptio”); Eastern floater, *Pyganodon cataracta* (“Eastern floater”); and Eastern lampmussel, *Lampsilis radiata* (“Eastern lampmussel”). Earlier, in calendar year 2000, RIDEM observed the presence of five species of freshwater mussels in the Pond. Specifically, Eastern floater; Eastern elliptio; Triangle floater, *Alasmidonta undulata* (“Triangle floater”); Eastern lampmussel; and Creeper, *Strophitus undulatas* (“Creeper”).
- (27) RIDEM considers Eastern lampmussel to be rare, of high conservation priority, and of greatest conservation need.
- (28) RIDEM considers Creeper to be rare and of high conservation priority.
- (29) RIDEM considers Triangle floater to be of greatest conservation need.
- (30) RIDEM determined that the water level in the Pond on August 1, 2022 and August 2, 2022 adversely affected the physical, chemical, and biological integrity of the habitat and adversely altered the uses, processes and activities of fish and wildlife and more likely than not harmed the freshwater mussels.
- (31) On 10 August 2022, RIDEM reviewed USGS streamflow gauge data for the River, which revealed that the streamflow was between approximately 36 cfs to 53 cfs.
- (32) On 10 August 2022, Respondent reduced the streamflow in the River.
- (33) On 11 August 2022, RIDEM received 4 complaints regarding low water levels in the Pond and concerns regarding dead fish and effects to the ecosystem of the Pond.
- (34) From approximately 11 August 2022 to on or about 1 November 2022, Respondent maintained the streamflow in the River at approximately 20 cfs.

- (35) On 11 August 2022, 15 August 2022, 24 August 2022, 31 August 2022, 6 September 2022, 8 September 2022, 14 September 2022, 22 September 2022, 13 October 2022, and 21 October 2022, RIDEM inspected the Pond. The inspections revealed that the water level in the Pond was approximately as follows:
- (a) 11 August 2022 – 43 inches below spillway
 - (b) 15 August 2022 – 46.5 inches below spillway
 - (c) 24 August 2022 – 42.5 inches below spillway
 - (d) 31 August 2022 – 41.5 inches below spillway
 - (e) 6 September 2022 – 36 inches below spillway
 - (f) 8 September 2022 – 32 inches below spillway
 - (g) 14 September 2022 – 30 inches below spillway
 - (h) 22 September 2022 – 29.5 inches below spillway
 - (i) 13 October 2022 – 21 inches below spillway
 - (j) 21 October 2022 – 9 inches below spillway
- (36) From approximately 12 August 2022 through 15 August 2022, RIDEM received 2 complaints regarding low water levels in the Pond.
- (37) From at least 30 June 2022 through 13 October 2022, Respondent failed to operate Flat River Dam in a manner consistent with the Historic Use.
- (38) Respondent’s operation of Flat River Dam in a manner inconsistent with the Historic Use was not exempt in accordance with Part 3.6 (formerly Part 1.6) of Rhode Island’s *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act* (250-RICR-150-15-3) (formerly 250-RICR-150-15-1) (“FWW Rules”).
- (39) RIDEM has not issued Respondent any permits to operate Flat River Dam in a manner inconsistent with Historic Use.
- (40) RIDEM has not issued Respondent a water quality certificate (“WQC”) to operate Flat River Dam in a manner inconsistent with Historic Use.
- (41) Respondent’s operation of Flat River Dam in a manner that was inconsistent with the Historic Use caused or contributed to pollution of the Pond.
- (42) Respondent’s operation of Flat River Dam interfered with one or more of the existing and designated uses of the Pond.
- (43) As of the date of the NOV, Respondent has not applied to RIDEM for a permit to operate Flat River Dam (“Dam Operation Permit”).

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) **R.I. Gen. Laws Section 46-19.1-1 (“Dam Operation Permit Act”)** – requiring the owner or operator of a dam that has the capacity to store greater than 1,400 normal storage acre feet of water to operate the dam in a manner that is consistent with historic use as determined by RIDEM until such time as a permit is issued by RIDEM and apply to RIDEM for a permit to raise or lower the water level behind the dam, unless the dam impounds water for a public water supply system as defined in §46-13-2.
- (2) **R.I. Gen. Laws Section 2-1-21 (“FWW Act”)** – prohibiting activities which may alter freshwater wetlands without a permit from RIDEM.
- (3) **FWW Rules, Part 3.5.5(A) (formerly Part 1.5(A)(1))** – prohibiting activities which may alter freshwater wetlands without a permit from RIDEM.
- (4) **WQ Rules**
 - (a) **Part 1.10(B)(1)** – requiring that all waters be free from anthropogenic activities subject to these regulations that adversely affect the physical, chemical, or biological integrity of the habitat.
 - (b) **Part 1.11(A)** – prohibiting the performance of any activity alone or in combination which will likely result in the violation of any State water quality criterion or interfere with one or more of the existing or designated uses assigned to the receiving waters or to downstream water.
 - (c) **Part 1.15(A)** – prohibiting activities which will likely cause or contribute to pollution to the waters of the State without having obtained all required approvals from RIDEM, including a WQC.
 - (d) **Part 1.15(A)(3)(d)(1)** – requiring a WQC where a project or activity also requires a wetlands permit or determination in accordance with the FWW Rules.
- (5) **DOP Rules, Part 1.8(A)** – requiring each owner and operator of a jurisdictional dam to apply to RIDEM to obtain a permit to raise or lower the water level behind the dam within 60 days of the effective date of the rules.

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 **within 7 days of receipt of the NOV**, apply to RIDEM for a permit to raise or lower the water level behind Flat River Dam that fully complies with the DOP Rules as described in the June 6TH Letter.

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:

\$217,000

- (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.

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, Suite 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:

Tricia Quest, Esquire
RIDEM - Office of Legal Services
235 Promenade Street, 4TH 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 the 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, you may contact (or if you are represented by an attorney, please have your attorney contact) Tricia Quest of RIDEM's Office of Legal Services at (401) 537-4413 or at tricia.quest@dem.ri.gov. All other inquiries should be directed to David E. Chopy of RIDEM's Office of Compliance and Inspection at (401) 537-4442 or at david.chopy@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: _____
David E. Chopy, 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:

SOSCIA HOLDINGS, LLC
c/o Richard E. Fleury, Resident Agent
33 College Hill Road
Building 20
Warwick, RI 02886

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Programs: Dams, Freshwater Wetlands, and Water Pollution
 File No.: OCI-FW-21-7
 Respondent: SOSCIA HOLDINGS LLC

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) – Failure to Operate Flat River Dam in Compliance with the Dam Operation Permit Act	Type I <i>(\$1,000 Max. Penalty)¹</i>	Major	\$1,000	106 days	\$106,000
D (2) and D (3) – Failure to Comply with the FWW Act and FWW Rules	Type I <i>(\$10,000 Max. Penalty)²</i>	Major	\$10,000	1 violation	\$10,000
D (4) – Failure to Comply with the WQ Rules	Type I <i>(\$25,000 Max. Penalty)¹</i>	Major	\$25,000	4 months	\$100,000
D (5) – Failure to Apply for a Dam Operation Permit	Type I <i>(\$1,000 Max. Penalty)¹</i>	Major	\$1,000	1 violation	\$1,000
SUB-TOTAL					\$217,000

¹ Maximum Penalties represent the maximum penalty amounts per day per violation.

² Maximum Penalties represent the maximum penalty amounts 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.

A review of the record in this matter has revealed that Respondent has either enjoyed no identifiable benefit from the noncompliance alleged in this enforcement action or that the amount of economic benefit that may have resulted cannot be quantified.

ADMINISTRATIVE PENALTY SUMMARY (continued)

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 = \$217,000

PENALTY MATRIX WORKSHEET

CITATION: Failure to Operate Flat River Dam in Compliance with the Dam Operation Permit Act
 VIOLATION NO.: D (1)

TYPE		
<p style="text-align: center;"><u> X </u> TYPE I</p> <p><u>DIRECTLY</u> related to protecting health, safety, welfare, or environment.</p>	<p style="text-align: center;"><u> </u> TYPE II</p> <p><u>INDIRECTLY</u> related to protecting health, safety, welfare, or environment.</p>	<p style="text-align: center;"><u> </u> TYPE III</p> <p><u>INCIDENTAL</u> to protecting health, safety, welfare, or environment.</p>
DEVIATION FROM THE STANDARD		
THE DEGREE TO WHICH A VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.		
<p><u>FACTORS CONSIDERED:</u></p> <p>Taken from Part 1.10(A)(1)(b) of the Penalty Rules.</p> <ol style="list-style-type: none"> (1) The extent to which the act or failure to act was out of compliance: Respondent failed to operate Flat River Dam in compliance with the Dam Operation Permit Act – specifically, operating the dam in a manner consistent with the Historic Use until a permit is obtained from RIDEM to operate the dam in a different manner. Compliance with State law is of major importance to the regulatory program. (2) Environmental conditions: Considered, but not utilized for this calculation. (3) Amount of the pollutant: Considered, but not utilized for this calculation. (4) Toxicity or nature of the pollutant: Considered, but not utilized for this calculation. (5) Duration of the violation: Full duration unknown – at least 106 days (30 June 2022 – 13 October 2022). Prior to Respondent’s acquisition of Flat River Dam, the Pond was maintained at spillway level from June 1 – September 30 and between spillway level and 12 inches below spillway level from October 1 – October 30. RIDEM’s inspections revealed that the water level in the Pond was between approximately 4 inches to 46.5 inches below spillway level from June 30 – September 30 and approximately 21 inches below spillway in October. RIDEM’s review of USGS records revealed that prior to issuance of the ICO, the streamflow in the River from June 30 – August 9 was approximately between 46 cfs and 57 cfs, which is above the minimum Historic Use streamflow in the River of 40 cfs between June 1 – September 30 and well above the Historic Use streamflow in the River during dry periods. 		
(continued)		

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- (6) **Areal extent of the violation:** Considered, but not utilized for this calculation.
- (7) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondent failed to take reasonable and appropriate steps to prevent the noncompliance. RIDEM advised Respondent in the April 4TH Letter and the April 20TH Letter of its obligations to operate Flat River Dam in a manner consistent with the Historic Use. The July 11TH Letter and C&D required Respondent to take actions to comply with the Dam Operation Permit Act – specifically, to operate Flat River Dam in a manner consistent with the Historic Use until Respondent obtained a permit from RIDEM to operate the dam in a different manner. Respondent failed to respond to or comply with the July 11TH Letter or C&D. Because of Respondent’s failure to prevent the noncompliance, RIDEM issued the ICO to Respondent. While Respondent reduced the streamflow in the River in accordance with the ICO, its failure to act prior to its receipt of the ICO resulted in the water level in the Pond never reaching spillway level consistent with the Historic Use.
- (8) **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:** Considered, but not utilized for this calculation.
- (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 complete control over the violation and the violation was foreseeable. RIDEM advised Respondent in numerous letters of its obligation to operate Flat River Dam in a manner consistent with the Historic Use and in compliance with the Dam Operation Permit Act. Respondent’s failure to comply was willful.
- (10) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but not utilized for this calculation.

<u>X</u> MAJOR	MODERATE	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	MAJOR	\$800 to \$1,000 \$1,000	\$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

PENALTY MATRIX WORKSHEET

CITATION: Failure to Comply with the FWW Act and FWW Rules
 VIOLATION NOs.: D (2) and D (3)

TYPE		
<u> X </u> TYPE I DIRECTLY related to protecting health, safety, welfare, or environment.	<u> </u> TYPE II INDIRECTLY related to protecting health, safety, welfare, or environment.	<u> </u> TYPE III INCIDENTAL 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>FACTORS CONSIDERED:</p> <p>Taken from Part 1.10(A)(1)(b) of the Penalty Rules.</p> <p>(1) The extent to which the act or failure to act was out of compliance: Respondent failed to comply with the FWW Act and FWW Rules. Compliance with State law and regulations is of major importance to the regulatory program.</p> <p>(2) Environmental conditions: The Pond is approximately 950 acres and is comprised predominately of open water, with fringe forested wetland and emergent freshwater wetland. It is home to multiple species of fish (including largemouth bass, smallmouth bass, bluegill sunfish, pumpkinseed sunfish, yellow perch, white perch, chain pickerel, white sucker, brown trout, brown bullhead, golden shiner, black crappie, swamp darter, and white catfish), numerous species of birds, turtles, and several species of mussels (including some classified as rare and/or high conservation value) and other benthic species such as snails and worms. The Pond, which is home to RIDEM's boat ramp at <i>Zekes Bridge</i>, is further used for active recreation, including but not limited to, boating, kayaking, fishing, and swimming, and for passive recreation. The lowered water level led to hundreds of acres of the Pond bottom above the water and dry.</p> <p>(3) Amount of the pollutant: Considered, but not utilized for this calculation.</p> <p>(4) Toxicity or nature of the pollutant: Considered, but not utilized for this calculation.</p>		
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- (5) **Duration of the violation:** Full duration unknown – at least 106 days (30 June 2022 – 13 October 2022). Prior to Respondent’s acquisition of Flat River Dam, the Pond was maintained at spillway level from June 1 – September 30 and between spillway level and 12 inches below spillway level from October 1 – October 30. RIDEM’s inspections revealed that the water level in the Pond was between approximately 4 inches to 46.5 inches below spillway level from June 30 – September 30 and approximately 21 inches below spillway in October. RIDEM’s review of USGS records revealed that prior to issuance of the ICO, the streamflow in the River from June 30 – August 9 was approximately between 46 cfs and 57 cfs, which is above the minimum Historic Use streamflow in the River of 40 cfs between June 1 – September 30 and well above the Historic Use streamflow in the River during dry periods.
- (6) **Areal extent of the violation:** Considered, but not utilized for this calculation.
- (7) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondent failed to take reasonable and appropriate steps to prevent the noncompliance. RIDEM advised Respondent in the April 4TH Letter and the April 20TH Letter of its obligations to operate Flat River Dam in a manner consistent with the Historic Use to comply with the FWW Act and FWW Rules. While Respondent reduced the streamflow in the River in accordance with the ICO, its failure to act prior to its receipt of the ICO resulted in the water level in the Pond never reaching spillway level consistent with the Historic Use.
- (8) **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:** Considered, but not utilized for this calculation.
- (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 complete control over the violation and the violation was foreseeable. RIDEM advised Respondent in the April 4TH Letter and the April 20TH Letter of its obligation to operate Flat River Dam in a manner consistent with the Historic Use and in compliance with the FWW Act and FWW Rules. Respondent’s failure to comply was willful.
- (10) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but not utilized for this calculation.

<u>X</u> MAJOR	MODERATE	MINOR
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Penalty Matrix where the applicable statute provides for a civil penalty up to \$10,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$5,000 to \$10,000 \$10,000	\$2,500 to \$5,000	\$1,000 to \$2,500
	MODERATE	\$2,500 to \$5,000	\$1,000 to \$2,500	\$500 to \$1,000
	MINOR	\$1,000 to \$2,500	\$500 to \$1,000	\$100 to \$500

PENALTY MATRIX WORKSHEET

CITATION: Failure to Comply with the WQ Rules
 VIOLATION No.: D (4)

TYPE		
<u> X </u> TYPE I DIRECTLY related to protecting health, safety, welfare, or environment.	_____ TYPE II INDIRECTLY related to protecting health, safety, welfare, or environment.	_____ TYPE III INCIDENTAL to protecting health, safety, welfare, or environment.

DEVIATION FROM THE STANDARD
 THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.

FACTORS CONSIDERED:

Taken from Part 1.10(A)(1)(b) of the Penalty Rules.

- (1) **The extent to which the act or failure to act was out of compliance:** Respondent failed to comply with the WQ Rules. Compliance with State regulations is of major importance to the regulatory program.
- (2) **Environmental conditions:** The Pond is approximately 950 acres and is comprised predominately of open water, with fringe forested wetland and emergent freshwater wetland. RIDEM inspections of the Pond on 1 August 2022 and 2 August 2022 revealed 3 species of live freshwater mussels: Eastern elliptio, Eastern floater, and Eastern lampmussel. Earlier, in calendar year 2000, RIDEM observed 5 species of freshwater mussels in the Pond. Specifically, Eastern floater, Eastern elliptio, Triangle floater, Eastern lampmussel, and Creeper. RIDEM considers Eastern lampmussel to be rare, of high conservation priority, and of greatest conservation need. RIDEM considers Creeper to be rare and of high conservation priority. RIDEM considers Triangle floater to be of greatest conservation need. RIDEM determined that the water level in the Pond on August 1, 2022 and August 2, 2022 adversely affected the physical, chemical, and biological integrity of the habitat and adversely altered the uses, processes and activities of fish and wildlife and more likely than not harmed the freshwater mussels. The lowered water level led to hundreds of acres of the Pond bottom above the water and dry.
- (3) **Amount of the pollutant:** Considered, but not utilized for this calculation.
- (4) **Toxicity or nature of the pollutant:** Considered, but not utilized for this calculation.

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- (5) **Duration of the violation:** Full duration unknown – at least 106 days (30 June 2022 – 13 October 2022). Prior to Respondent’s acquisition of Flat River Dam, the Pond was maintained at spillway level from June 1 – September 30 and between spillway level and 12 inches below spillway level from October 1 – October 30. RIDEM’s inspections revealed that the water level in the Pond was between approximately 4 inches to 46.5 inches below spillway level from June 30 – September 30 and approximately 21 inches below spillway in October. RIDEM’s review of USGS records revealed that prior to issuance of the ICO, the streamflow in the River from June 30 – August 9 was approximately between 46 cfs and 57 cfs, which is above the minimum Historic Use streamflow in the River of 40 cfs between June 1 – September 30 and well above the Historic Use streamflow in the River during dry periods.
- (6) **Areal extent of the violation:** Considered, but not utilized for this calculation.
- (7) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondent failed to take reasonable and appropriate steps to prevent the noncompliance. RIDEM advised Respondent in the April 4TH Letter and the April 20TH Letter of its obligations to operate Flat River Dam in a manner consistent with the Historic Use to comply with the FWW Act and FWW Rules, which includes a WQC. While Respondent reduced the streamflow in the River in accordance with the ICO, its failure to act prior to its receipt of the ICO resulted in the water level in the Pond never reaching spillway level consistent with the Historic Use.
- (8) **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:** Considered, but not utilized for this calculation.
- (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 complete control over the violation and the violation was foreseeable. RIDEM advised Respondent in the April 4TH Letter and the April 20TH Letter of its obligation to operate Flat River Dam in a manner consistent with the Historic Use and in compliance with the FWW Act and FWW Rules, which includes a WQC. Respondent’s failure to comply was willful.
- (10) **Any other factor(s) that may be relevant in determining the amount of a penalty:** The maximum penalty RIDEM could have assessed for this violation is \$2,650,000 (\$25,000 per day x 106 days).

<input checked="" type="checkbox"/> MAJOR	MODERATE	MINOR
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Penalty Matrix where the applicable statute provides for a civil penalty up to \$25,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$12,500 to \$25,000 \$25,000	\$6,250 to \$12,500	\$2,500 to \$6,250
	MODERATE	\$6,250 to \$12,500	\$2,500 to \$6,250	\$1,250 to \$2,500
	MINOR	\$2,500 to \$6,250	\$1,250 to \$2,500	\$250 to \$1,250

PENALTY MATRIX WORKSHEET

CITATION: Failure to Apply for Dam Operation Permit
 VIOLATION No.: D (5)

TYPE		
<u> X </u> TYPE I DIRECTLY related to protecting health, safety, welfare, or environment.	_____ TYPE II INDIRECTLY related to protecting health, safety, welfare, or environment.	_____ TYPE III INCIDENTAL to protecting health, safety, welfare, or environment.

DEVIATION FROM THE STANDARD
 THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.

FACTORS CONSIDERED:

Taken from Part 1.10(A)(1)(b) of the Penalty Rules.

- (1) **The extent to which the act or failure to act was out of compliance:** Respondent failed to apply for a Dam Operation Permit. Compliance with State regulations is of major importance to the regulatory program.
- (2) **Environmental conditions:** Considered, but not utilized for this calculation.
- (3) **Amount of the pollutant:** Considered, but not utilized for this calculation.
- (4) **Toxicity or nature of the pollutant:** Considered, but not utilized for this calculation.
- (5) **Duration of the violation:** Approximately 2½ months. The deadline in the DOP Rules is 29 July 2023 to apply to RIDEM for a permit. On 29 July 2023, the Federal Court issued a stay on RIDEM’s enforcement of the DOP Rules in *Soscia Holdings, LLC v. Terrence Gray, Director of the Rhode Island Department of Environmental Management, and David E. Chopy, Administrator for the Rhode Island Department of Environmental Management, Office of Compliance and Inspection* (Civil No. 22-cv-266-LM-AKJ). On 25 March 2024, the Federal Court dismissed the above referenced case. RIDEM is only considering the duration of the violation from 25 March 2024 to present.
- (6) **Areal extent of the violation:** Considered, but not utilized for this calculation.

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- (7) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondent failed to take reasonable and appropriate steps to prevent the noncompliance. RIDEM advised Respondent in the June 6TH Letter of its obligations to apply for the Dam Operation Permit. As of the date of the NOV, Respondent has taken no action to mitigate the noncompliance.
- (8) **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:** Considered, but not utilized for this calculation.
- (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 complete control over the violation and the violation was foreseeable. RIDEM advised Respondent in the June 6TH Letter of its obligation to apply for the Dam Operation Permit. Respondent's failure to comply was willful.
- (10) **Any other factor(s) that may be relevant in determining the amount of a penalty:** The maximum penalty RIDEM could have assessed for this violation is approximately \$75,000 (\$1,000 per day x 75 days (or 2 ½ months)).

<u> X </u> MAJOR	MODERATE	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	MAJOR	\$800 to \$1,000 \$1,000	\$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