

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

**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045**

AAD NO 08-006/FWE

DECISION AND ORDER

I. Background

This matter is an appeal from a Notice of Violation issued by the Rhode Island Department of Environmental Management (“DEM”), Office of Compliance and Inspection (“OC&I”) dated April 30, 2008 regarding Dam #397 known as “New Pond Dam” located in the Town of Glocester, Rhode Island.

The Notice of Violation (“NOV”) was issued to Stephen N. Tolias (“TOLIAS”), Martin Petry (“PETRY”), and John P. Wrenn (“WRENN”). In addition to the Notice of Violation, a “Notice to Owner” was also sent on April 30, 2008 to Mr. Donald Lapierre and The Chepachet Cemetery Association. Wrenn filed his Answer and Request for Hearing in writing dated May 6, 2008. Stephen Tolias also filed an Answer and requested a hearing on May 15, 2008. Martin Petry did not file an answer or otherwise participate in the hearings before the Administrative Adjudication Division of the Department of Environmental Management, which were held on January 17 and 18, 2012.

DEM alleged in its NOV that the Office of Compliance and Inspection inspected the site of the dam on April 3, 2006 after receiving a complaint from the Glocester Public Works Director that a failure of the New Pond Dam had occurred. DEM alleges that it found a breach had occurred, an empty pond, and extensive deposits of sand, gravel and soil deposited in downstream wetlands. On August 10, 2006, a Notice of Intent to Enforce was issued to Tolias, Petry and Wrenn requiring the filing of a detailed restoration plan to remove all fill and

**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045**

AAD NO. 08-006/FWE

Page 2

remediate all damage to downstream wetlands. None of the Respondents undertook the restoration work.

The NOV set forth, and the testimony at the hearing confirmed, that DEM was aware of prior breaches and repairs to the dam in 2001, 2002 and 2005.

In the NOV, DEM ordered Tolias, Petry and Wrenn to submit to DEM for review and approval a plan to restore the freshwater wetlands on the listed Affected Properties, to be completed by September 1, 2008. The NOV assessed a penalty of \$33,000 against Tolias, Petry and Wrenn without any specific allocation to either of them individually.

Specifically, the NOV alleges that the Respondents violated the following statutes, regulations, and/ or other requirements:

- (1) RI General Laws § 2-1-21 and Rule 7.01 of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
- (2) RI General Laws § 46-19-3 prohibiting the substantial alteration to a dam until plans and specifications of the proposed work are filed with and approved by the director.
- (3) RI General Laws § 46-12-5 and Rule 9(A) of the DEM Water Quality Regulations, prohibiting the discharge of pollutants into the waters of the State that will likely result in the violation of any State water quality criterion.
- (4) RI General Laws § 46-12-5 and Rule 11(B) of the DEM Water Quality Regulations, prohibiting the discharge of pollutants into the waters of the State except as in compliance with the provisions of Chapter 46-12 and pursuant to the terms and conditions of an approval from DEM.
- (5) RI General Laws § 46-12-5 and Rule 13(A) of the DEM Water Quality Regulations, prohibiting the discharge of pollutants into, or conducting any activity which will likely cause or contribute pollution to the waters of the State without an approval from DEM.

**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045
Page 3**

AAD NO. 08-006/FWE

These statutes are set out below:

RIGL §2-1-21 Approval of director. – (a) No person, firm, industry, company, corporation, city, town, municipal or state agency, fire district, club, nonprofit agency, or other individual or group may excavate; drain; fill; place trash, garbage, sewage, highway runoff, drainage ditch effluents, earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; dike; dam; divert; change; add to or take from or otherwise alter the character of any fresh water wetland as defined in § 2-1-20 without first obtaining the approval of the director of the department of environmental management.

RIGL §46-19-3 Approval of plans for construction or alteration. – No dam or reservoir shall be constructed or substantially altered until plans and specifications of the proposed work shall have been filed with and approved by the director.

RIGL §46-12-5 Prohibitions. – (a) It shall be unlawful for any person to place any pollutant in a location where it is likely to enter the waters or to place or cause to be placed any solid waste materials, junk, or debris of any kind whatsoever, organic or non organic, in any waters.

(b) It shall be unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit.

The Respondents were also cited under the DEM regulations promulgated in accordance with the above-referenced statutes; Rule 7.01 of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act and Rules 9(A), 11(B) and 13(A) of the DEM Water Quality Regulations.

The Notice of Violation, Penalty Matrix Worksheet “Factors Considered” sections E, F and I state as follows:

“(E) The duration of the violation. The violation was first observed by DEM on April 5, 2006.

(F) The aerial extent of the violation. The Aerial extent of the violation is approximately 61,500 ft..

(I) 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. The Respondents attempted to repair earlier breaches of the earthen dam in 2001, 2002 and 2005, only to have the dam fail on subsequent occasions. The failure of the Respondents to obtain professional help in repairing the dam and obtaining the proper permits was clearly negligent. The violation was definitely foreseeable, given the prior failed attempts at repair.”

This case, based on the allegations in the NOV, involves a simple, straightforward question of whether Respondents violated the previously cited Statutes and Regulations regarding the April 3, 2006 breach at Dam #397. But, as section (F) of the Penalty Matrix indicates, the history of this case dates back many years due to prior breaches at the dam.

II. Hearing Summary

The following witnesses were presented by DEM:

1. Mr. Bruce Ahearn. Mr. Ahearn has been with the DEM/ OC&I for thirteen years. The OC&I takes and investigates complaints on a daily basis regarding potential wetlands violations all across the State. The OC&I investigates and prosecutes, when necessary, violations after the investigation is complete. He has reviewed or investigated over 100 site complaints. He has testified as an expert at administrative hearings and Superior Court. He was qualified as an expert in freshwater wetlands delineation, interpretation and assessment as well as in the area of aerial photography interpretation for this hearing.

Mr. Ahearn visited the site in question once on April 5, 2006. Mr. Ahearn talked about breaches of dam 397 prior to April 2006 based on discussions with other employees in the DEM. He admits to personal involvement with the April 2006 breach only. (TR. pg. 88 line 23) He also acknowledged on cross examination that a natural erosion and undermining of a dam can occur over time in the absence of maintenance and/ or repair. (TR. pg. 91 line 19)

Mr. Ahearn stated that aerial photos do not show the extent of damage caused by breaches of this dam prior to 2006 (TR. pg. 96) nor could he testify as to discussions that occurred between Mr. Gugliemino with Respondent Tolias (TR. pg. 105 line 17). He did not have any personal knowledge of Respondent Wrenn's involvement other than what he read in

**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045**

AAD NO. 08-006/FWE

Page 5

the Gloucester Police Department report. (TR. pg. 111 line 8) He did make it clear that Respondent Tolia, as the owner, was responsible for upkeep and safety of the dam. As a result of prior breaches and poor repair of those breaches Mr. Ahearn stated that some rain event or some occurrence occurred where the dam breached another time and resulted in detrimental impacts to wetlands downstream and upstream. (TR. pg. 104)

2. Mr. Paul Gugliemino. Mr. Gugliemino is a Senior Sanitary Engineer who has worked in the Office of Compliance and Inspection, Dam Safety Program for the past 12-13 years. (TR. pg. 114) He inspects dams, writes and reviews reports and determines if dams are unsafe. (TR. pg. 114) In 2000 Mr. Gugliemino conducted his first visual inspection of Dam #397. (TR. pg. 116 line 15) He looked at three components: 1) Embankment, 2) Spillway, and 3) Low level outlets. His 2000 inspection of Dam #397 was rated as follows: 1) Embankment – poor, 2) Spillway – poor, and 3) Low level outlets – N/A. (TR. pg. 116 line 15) In 2002 he inspected the dam again after receiving a complaint that the dam failed or partially failed. He observed a section of the embankment missing and water in the pond partially drained (TR. pg. 116 line 23). No enforcement action was taken at that time (TR. pg. 119 line 4).

Sometime in 2005, Mr. Gugliemino reviewed Dam #397 as a follow-up to his 2002 inspection as he was in the area. (TR. pg. 121 line 24) He noted that the portion that failed in 2002 had been repaired. (TR. pg. 119 lines 17-24) Later in 2005, another complaint was received that the dam failed or partially failed and partially drained the pond. No follow-up inspection was done. (TR. pg. 121 line 24)

On April 4, 2006 the Gloucester Police filed a report with DEM that Dam #397 failed (OC&I 4 Full). This document was admitted for the limited purpose of showing DEM received

notice of the failure of the dam from the Gloucester Police. (TR. pg 128 line 7)

On Cross examination Mr. Gugliemino was asked extensively about the causes of the breaches of the dam prior to April 2006. Much of the questioning focused on natural erosion over time caused by significant rain events (TR. pg. 135 line 15); vandalism (TR. pg. 79 line 9); other parties and residents that lived around the dam etc. as possible causes (TR. pg. 79 line 13).

Much of the questioning regarding repairs and maintenance of the Dam was varied and scattered. Discussions were held throughout the years by DEM officials with Respondents and others regarding repairs, funding for repairs, persons who allegedly made repairs, ownership of the Dam and agreements with the Town of Gloucester to maintain and repair the Dam. (See E.G. Tr. pg. 111; TR. pg. 116; TR. pg. 190; TR. pg. 194; TR. pg. 214; TR. pg. 222; TR. pg. 224; TR. pg. 228)

The facts demonstrated on cross of Mr. Gugliemino that a file regarding Dam #397 has existed at DEM since 1947 and that the first inspection of the dam occurred on July 1st of that year. (TR. pg. 166)

On cross and re-direct examination of Mr. Gugliemino references to RIGL §46-19-4 were made repeatedly and whether this Statute should have been included in the subject NOV.

RIGL §46-19-4 reads as follows:

§46-19-4 Investigations and orders as to unsafe dams and reservoirs. – (a) The director of the department of environmental management, on application made to him or her in writing by any person owning or representing property liable to injury or destruction by the breaking of any dam or reservoir, or on an application made by any mayor or city council of any city, or by the town council of any town, on account of danger of loss of life or of injury to any highway or bridge therein, from the breaking of any dam or reservoir, or without the complaint, whenever he or she shall have cause to apprehend that any dam or reservoir is unsafe, shall forthwith view and thoroughly

**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045**

AAD NO. 08-006/FWE

Page 7

examine the dam or reservoir, or cause the dam or reservoir to be viewed and examined. And if in the judgment of the director the dam or reservoir be not sufficiently strong to resist the pressure of water upon it, or if from any other cause the director shall determine the dam or reservoir to be unsafe, or if in his or her judgment there is reasonable cause to believe that danger to life or property may be apprehended from the unsafe dam or reservoir, the director shall determine whether the water in the reservoir shall be drawn off in whole or in part, and what alterations, additions, and repairs are necessary to be made to the dam or reservoir to make the dam or reservoir safe, and shall forthwith in writing under his or her hand notify the owner or person having control of the dam or reservoir to cause the additions, alterations, and repairs in the dam or reservoir to be made within a time to be limited in the notice; and may order the water in the reservoir to be drawn off, in whole or in part, as the director may determine.

(b) If such order is not carried out within the time specified, or if the owner of the dam cannot be determined, the director of the department of environmental management or the director's duly authorized agents may carry out the actions to mitigate the unsafe condition as required by the order, provided the director has determined that an emergency exists and the safety of life and/ or property is endangered. The director is hereby authorized to assess the costs of such action, including the use of deed restrictions, against the person owning or having care and control of the dam.

Issues were then raised by Respondents Counsel regarding the DEM's obligations per the various statutes concerning dams and whether they were satisfied throughout the years regarding Dam #397. (See E.g. TR. pg. 182; TR. pg. 210; TR. pg. 214; TR. pg. 218; TR. pg. 222; TR. pg. 223; TR. pg. 224)

OC&I countered through re-direct examination of Mr. Gugliemino that Dam #397 was never determined to be unsafe therefore, a letter was never sent per RIGL §46-19-4. (TR. pg. 246) Furthermore, Mr. Gugliemino asserted that the DEM is not required to tell an owner to maintain a dam, but rather to tell an owner to return it to a safe condition. (TR. pg. 247 line 23)

On re-cross of Mr. Gugliemino, a letter from 1987 authored by Mr. Peter Janaros from DEM was introduced. (Respondents Exhibit 3 Full) The letter was sent to the owner of Dam #397 at that time citing RIGL §46-19-4 and pointed out the deficiencies and enclosed the inspection report. (TR. pg. 253) Mr. Gugliemino agreed the dam was unsafe in 1987 after he

**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045**

AAD NO. 08-006/FWE

Page 8

reviewed the report. (TR. pg. 256 lines 10-11) Respondents, through re-cross of Mr. Gugliemino assert that if he contends the dam was not unsafe in 2006, why did a Notice of Violation issue? (TR. pg. 257)

3. Harold Ellis. Mr. Ellis works in the Office of Compliance and Inspection and is a supervising environmental scientist for the wetlands program. By stipulation, he was qualified as an expert in wetlands ecology, aerial photography interpretation and as a natural resource specialist. (TR. pg. 259 lines 9-12) He became personally involved with the 2006 investigation of the dam breach by directing people to investigate or oversee it. (TR. pg. 260 lines 19-24) He did assist with the preparation of the Notice of Intent to Enforce of August 10, 2006. Pursuant to the Notice of Intent to Enforce, he conducted meetings to determine more of the issues and find out who was involved. (TR. pg. 264 lines 21-23) His primary function was to calculate the penalty contained in the Notice of Violation. Mr. Ellis testified that he determined the 2006 breach a major violation because of the extent of the violation as determined from aerial extent of the violation (TR. pg. 304 lines 3-4), the depth of the sediment that had been washed down into the swamp (TR. pg. 304), and the discharging of sediment into State water, affecting water quality. (TR. pg. 305)

After the DEM rested, the Respondents moved, pursuant to Rule 50 of the Superior Court Rules of Civil Procedure for Judgment as a matter of Law. The motions were made by Respondents Tolias and Wrenn. A ruling on the motions was reserved.

Mr. Tolias was then called to testify by his counsel. Mr. Tolias stated that he owns approximately forty (40) acres of land in Gloucester on which sits New Pond and New Pond Dam. He has owned this land since April 2001. (TR. pg. 336) He never authorized anybody to make repairs or do maintenance to the dam between 2001-2006. (TR. pg. 336) He recalls that

he was building his house sometime in 2002 and met with Mr. Gugliemino in response to complaints that the dam broke and the water was down. (TR. pg. 337) He stated that Mr. Gugliemino told him to "go ahead and fill it in" (TR. pg. 339 line 9) and that he did not need a permit or to apply for one. (TR. pg. 339 lines 8-13) Mr. Tolias admitted on cross examination that on one occasion he undertook repair or maintenance work to Dam #397, but there was no elaboration. (TR. pg. 340)

III. Burden of Proof

The Department of Environmental Management, Office of Compliance and Inspection ("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.

IV. Analysis

The DEM argues that Respondent Tolias was cited under RIGL §46-19-3 because, as the owner of the dam, he is the only party who can apply and should have applied for and received approval from DEM for the subject dam alterations in accordance with RIGL §46-19-3. The argument against Respondent Wrenn was DEM's understanding that Wrenn had provided access to the dam across his property and provided money for materials for repairing the dam. No specifics were given regarding the repairs or amount of money given. Respondent Petry supposedly admitted to Mr. Ahearn that he backfilled the area of a breach prior to 2006. (TR. pg. 76 line 17) No other details were provided.

**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045
Page 10**

AAD NO. 08-006/FWE

Much of the testimony and evidence presented at the Hearing was confusing, conflicting, perplexing, and vague. Both Respondents argue that much of the evidence presented against both Wrenn and Tolia is fraught with hearsay and does not prove the truth of the matter. For example, Respondent Wrenn, in his Post Hearing Memorandum states:

“The Complaint Investigation Sheet, prepared by Adam Hill, who is employed by DEM, but was not called to testify, sets forth that he and Paul Guglielmino were informed by Alan Whitford, the Gloucester Public Works Director, and Captain David Laplante of the Gloucester Police Department, that Wrenn had been recently working on the subject dam just before it breached. (OCI Exhibit 3 Full) However, neither Mr. Whitford nor Mr. Laplante testified at the hearing regarding their personal knowledge of this purported fact. Consequently, since Adam Hill did not have personal knowledge of the matters recited in his report, his report is not competent to support the conclusion that Wrenn had been working on the dam prior to its breach. R.I. Rules of Evidence Rule 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”)” (Respondent Wrenn, Posthearing Memorandum pg. 5) I agree with this reasoning.

The NOV is limited to the 2006 breach of Dam #397, therefore this decision is limited to that incident even though the penalty matrix takes into account the prior breaches in 2001, 2002 and 2005. The uncontrovertible fact is that Dam #397 breached in April, 2006. Therefore, the central issue for this Hearing Officer to decide is whether DEM proved, by a preponderance of the evidence, that the Respondents failed to comply with RIGL §46-19-3 which prohibits the **substantial alteration** to a dam until plans and specifications of the

**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045
Page 11**

AAD NO. 08-006/FWE

proposed work are filed with and approved by the director. I am also compelled to consider the proof concerning RIGL §2-1-21 and RIGL §46-12-5.

Based on the evidence, I find that the Respondents did not need to comply with RIGL §46-19-3 as the Respondents did not undertake **substantial alterations** to the dam without approval of the Director.

Rhode Island General Law §46-19-3 provides:

“No dam or reservoir shall be constructed or **substantially altered** until plans and specifications of the proposed work shall have been filed with and approved by the director.”

The Rhode Island Supreme Court has held that the mere removal of three planks from the crest of a dam, thereby lowering the level of a pond, was not a substantial alteration of a dam requiring prior director approval. **Powers v. Lawson**, 86 R.I. 441, 136 A. 2d 613 (1957) In **Powers**, the statute addressing the inspection of mill dams and reservoirs, R.I. General Laws ch. 63 RIGL §4 provided: “No dam or reservoir shall be constructed or substantially altered until plans and specifications of the proposed work shall have been filed with and approved by the said chief.” The Court went on to find that the Director exceeded his authority by requiring the respondent to submit plans to repair the dam based on the removal of the planks. ID at 445-446 I find that the evidence presented during the Hearing failed to prove by a preponderance of the evidence that the Respondents **substantially altered** Dam #397.

The fact that Tolias may have been told by Mr. Gugliemino to “go ahead and fill it in” did not excuse Tolias from the requirements of RIGL §46-19-3. But to make it clear, I find that the type of alleged modification(s) or repair(s) made prior to the 2006 breach do not constitute “**substantial alterations**” which consequently invoke the requirements of RIGL §46-19-3.

The NOV alleges in paragraph 4 that on April 5, 2006 an inspection by OC&I in the dam breach location revealed evidence of material used to carry out dam repair and backfilling operations including plywood, broken wood planks partially buried in the breach area, sand bags, deposited sand and gravel material. OC&I's inspector determined that the breached area of the dam had been subjected to backfilling and repair activity prior to the breach. The evidence at the Hearing failed to prove these allegations by a preponderance of the evidence. Respondent Wrenn succinctly addressed this issue in his Post Hearing Memorandum as follows:

There is no evidence in the record that Wrenn constructed or substantially altered the subject dam or engaged in any action that would require prior approval by the DEM. It must be emphasized that there was no evidence regarding the amount of funds provided by Wrenn, the amount or type of supplies purchased with said funds, how the materials were used to alter the dam, or how Wrenn's contribution compared to the monies and labor expended by Petry and others." Similarly, DEM did not demonstrate that Mr. Tolias should have filed for permission from the Director or that any repairs he may have undertaken constituted a "substantial alteration". The record contains speculative reports and information based on interviews, meetings, phone calls, etc. that at various times, prior to the breach in April 2006, certain work was done to the dam. For example, in August 2002 Mr. Gugliemino spoke with Mr. Tolias after the breach and prior to the site inspection and was told by Mr. Tolias that the breach could have been caused by vandals. (TR. pg. 228) In June 2005, after the breach, Mr. Gugliemino observed that "The repair is in good condition and holding water better than many other areas of the dam." (TR. pg. 235 lines 7-9) He then stated in his report (Respondents 13 Full) that "No further action recommended." (TR. pg. 235 line 21) (Wrenn Post Hearing Memorandum pg. 12))

No NOV was sent to Mr. Tolias resulting from those dam repairs according to Mr. Gugliemino (TR. pg. 236 line 2)

A file has existed at DEM concerning the history of this dam since 1947 at which time an inspection was done by a Mr. Kiely from DEM. He noted in the file "small areas of erosion on embankment should be filled in and trees and brush on embankment should be cut". (TR. pg.

166) Then in 1987, Mr. Janaros, from DEM, sent a letter pursuant to RIGL §46-19-4 pointing out deficiencies in the dam and the need to correct them. Mr. Gugliemino testified that he agreed with the 1987 letter and that the dam was unsafe but not unsafe in 2006. (TR. pg. 253 and 256) It is troubling that the dam failed again in 2006 despite the existence of knowledge by all concerned about the history of this dam. Regardless of this fact, I must analyze the charges contained in the NOV regarding the breach in 2006.

Since I find that the Respondents did not need to comply with Rhode Island General Laws §46-19-3, I will next address the issue of whether Respondents violated the provisions of RIGL §2-1-21 regarding alteration of freshwater wetland without a permit. There was evidence that in 2002 Mr. Gugliemino told Mr. Tolia to “go ahead and fill it in” (the dam) (TR. pg. 339 line 9) and Mr. Tolia admitted on Cross that he undertook repairs or maintenance to the dam on one occasion. (TR. pg. 340 line 13) Respondents objected to this line of questioning as being beyond the scope of direct examination. Respondents also argued that Mr. Tolia was not called by DEM as a witness as part of their case in chief so DEM then withdrew the question. (TR. pg. 341 line 9) Additionally, there were other references to vandalism of the dam and others who may have done work or paid money to have work done, but there was no specific evidence presented that the Respondents did any activities which may alter freshwater wetland without a permit regarding the breach in April 2006. I find that Respondents did not violate RIGL §2-1-21.

I similarly find that the Respondents did not violate RIGL §46-12-5 which prohibits the discharge of pollutants into, or conducting any activity which will likely cause or contribute pollution to the waters of the State without an approval from DEM.

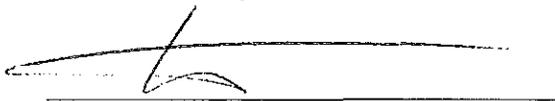
Finding of Fact

- (1) Respondent Stephen N. Tolias was the owner of the parcel of land in Gloucester, Rhode Island in April 2006, on which sits Dam #397 also known as "New Pond Dam".
- (2) The parcel owned by Mr. Tolias is also known as Plat 13 lot 21.
- (3) On April 6, 2006, the Office of Compliance and Inspection (OC&I) at the Department of Environmental Management received a Complaint from the Gloucester Public Works Director that a failure of the New Pond Dam occurred.
- (4) Respondents did not apply for nor did they receive approval of the DEM pursuant to RIGL §46-19-3 prior to engaging in any activities to repair or modify Dam #397 in 2006.
- (5) Repairs were made to the dam between 2001–2006 but were not substantial alterations pursuant to RIGL §46-19-3.
- (6) Dam #397 breached on or about April 3, 2006.
- (7) Areas downstream from the dam flooded.
- (8) On August 10, 2006, a Notice of Intent to Enforce was issued to Respondents requiring a detailed restoration plan to remove all fill and remediate all damage in downstream wetlands.
- (9) Respondents failed to perform the work pursuant to the Notice of Intent to Enforce.
- (10) Respondents did not receive approval from DEM to alter freshwater wetlands on the affected properties.
- (11) Respondents did not receive approval from DEM to discharge water containing sediment to the waters of the State.
- (12) Respondents did not receive approval from DEM to alter or repair New Pond Dam (#397).
- (13) Respondents did not engage in substantial alterations of the Dam so as to require approval of the Director.

Conclusions of Law

- (1) OC&I did not cite RIGL §46-19-4 "Investigations and Orders as to Unsafe Dams and Reservoirs" in the NOV against Respondents.
- (2) OC&I has not proven by a preponderance of the evidence that the repairs or alterations made by Respondents to Dam #397 were **substantial alterations** per RIGL §46-19-3.
- (3) Respondents did not apply for nor did they receive approval from the DEM pursuant to RIGL §46-19-3 prior to engaging in any activities to repair or modify Dam #397.
- (4) OC&I has not proven by a preponderance of the evidence that Respondents altered freshwater wetlands per RIGL §2-1-21 or Rule 7.01 of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act or violated the provisions therein.
- (5) OC&I has not proven by a preponderance of the evidence that Respondents placed or discharged pollutants where it was likely to enter the waters nor discharged any pollutants into waters in violation of RIGL §46-12-5 or Rule 9 (A); 11 (B); or 13 (A) of the DEM Water Quality Regulations or violated the provisions therein.
- (6) OC&I has not proved by a preponderance of the evidence that the Respondents are responsible for payment of the penalties imposed in the NOV.

Entered as an Administrative Order this 26th day of September, 2012.

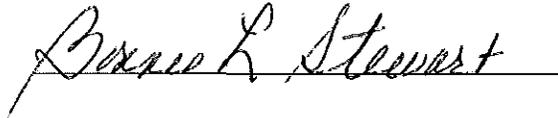

David M. Spinella
Hearing Officer
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RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045
Page 16

AAD NO. 08-006/FWE

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid to Gregory L. Benik, Esquire, 128 Dorrance Street, Suite 450, Providence, RI 02903; Timothy J. Robenhymmer, Esquire, 303 Jefferson Boulevard, Warwick, RI, 02888; Donald F. Lapiere, 30 Birch Street, Glocester, RI 02814; Chepachet Cemetery Association, 1049 Putnam Pike, Glocester, RI 02814 and via interoffice mail to Marisa Desautel, Esq., DEM Office of Legal Services and David Chopy, Acting Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this 26TH day of September, 2012.



**RE: WRENN, JOHN AND TOLIAS, STEPHEN
AND PETRY, MARTIN
NOTICE OF VIOLATION C06-0045**

AAD NO. 08-006/FWE

Page 17

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.