

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Natco Products Corporation
AAD No. 10-003/DE
DAM State I.D. 148
January 2011

DECISION AND ORDER

TRAVEL

On August 12, 2010 the Rhode Island Department of Environmental Management (DEM), Office of Compliance and Inspection (OC&I) issued a Notice of Violation to Respondent, Natco Products Corporation (Natco) alleging, among other things, that Natco violated Rule 4 A of the Dam Safety Regulations, requiring the owner of a high hazard dam to maintain the dam in a safe condition.

Natco denied and disputed the charges and filed an appeal with the Administrative Adjudication Division on August 23, 2010.

A Status Conference was held on October 6, 2010.

A Prehearing Order was issued on October 6, 2010.

On January 11, 2011, Natco filed a Motion to Dismiss. OC&I did not file an objection to Natco's Motion to Dismiss.

NATCO argues that the DEM, a state agency, does not have jurisdiction over inspections and safety issues of a dam that is used in the generation of hydroelectricity such as theirs. Natco maintains that DEM's action in issuing a Notice of Violation in this case is preempted by the Federal Energy Regulatory Commission (FERC).

FINDINGS OF FACT

1. DEM ISSUED a Notice of Violation on August 12, 2010 to NATCO Products Corporation alleging that the Director of DEM has reasonable grounds to believe that Natco Products Corporation violated certain statutes and/or administrative regulations.
2. The subject property is located at 33 Factory Street in the town of West Warwick, Rhode Island (the "Property"). The Property includes a dam and associated spillway identified as Arctic Dam, State Identification Number 148 (the "Dam").
3. The Dam is owned by the Respondent, Natco Products Corporation.
4. The Dam is used to generate hydroelectricity.
5. The DEM acknowledged in paragraph (4) of the Notice of Violation that the dam is used to generate hydroelectricity.
6. The Dam is licensed by FERC and Natco is the licensee.
7. The Dam is classified by DEM as High Hazard.
8. The Dam includes a flashboard structure on the spillway for the hydroelectric operation at the Property. The flashboard structure consists of wooden boards that are fastened to the Dam by metal brackets. The flashboard structure was designed so that the wooden boards break away during high flows.
9. DEM inspected the Dam on November 17, 2004, September 21, 2007, and March 15, 2010. The inspections revealed the following:
 - (A) an inoperable low level gate; and
 - (B) the wooden boards still in place.

10. On March 15, 2010 the DEM inspector spoke with the Respondent's engineering Consultant, Mr. James Russell, of the RT Group, Inc. Mr. Russell informed the DEM inspector that the wooden boards failed to break away as designed and that Immediate action should be taken to manually break the wooden boards with a backhoe.

11. DEM inspected the Dam on March 30, 2010 and March 31, 2010. The DEM inspector observed that the Respondent was working to manually break the wooden boards with a backhoe. At the time of the March 31, 2010 inspection, the Respondent had removed sixty (60) feet in length of wooden boards and fifty (50) feet in length of wooden boards remained in place.

12. All remaining wooden boards were removed prior to the issuance of the NOV, as soon as the unusually high water levels were subsided (after the severe flooding in March, 2010).

13. The low level gate and accompanying pipe were given a category IV ranking by The Federal Energy Regulatory Commission FERC, after performing a potential failure mode analysis.

14. Category IV by FERC is the lowest level of concern.

15. Natco has spent several hundreds of thousands of dollars enhancing the safety of the Arctic Dam and has been working with FERC to develop a plan and schedule to implement improvements to the dam.

16. The plan and schedule submitted to FERC was based on the part 12d safety inspection that was completed for this facility.

17. The part 12d safety inspection included a potential failure mode analysis study report, a copy of which was provided to DEM.

CONCLUSIONS OF LAW

1. The three decisions which establish the supremacy of the Federal Power Act over state law with respect to hydropower are First Iowa-Electric Cooperative v. Federal Power Commission (State of Iowa), 328 U.S. 152, 66 s. ct. 906 (1946); California v. FERC, 495 U.S. 490, 110 s. ct. 2024 (1990) and Sayles Hydro Assocs. V Maughhan, 985 f. 2d 451, 456 (9th cir. 1993).

2. The Arctic Dam is registered with DEM (state identification number 148).

3. Jurisdiction with respect to dam safety rests with the Federal Energy Regulatory Commission pursuant to the Federal Power Act.

Wherefore, the Motion to Dismiss of Respondent Natco Products Corporation is hereby GRANTED.

Entered as a Final Agency Order this ____ day of _____, 2011.

David M. Spinella
Hearing Officer