

**OFFICE OF ADJUDICATIONS**

<b>IN THE MATTER OF</b>	:	<b>ORDERS DS-96-1001V &amp; DS-98-1001V</b>
	:	
<b>ROBERT GLUCK AND PROVIDENCE &amp; WORCESTER R.R. CO.</b>	:	<b>SEPTEMBER 6, 2000</b>

**FINAL DECISION**

**I**

**SUMMARY**

This decision concerns the appeal of two Orders issued by the Commissioner of the Department of Environmental Protection (DEP) pursuant to General Statutes §22a-402. The Orders were issued to Robert Gluck (Gluck) and the Providence and Worcester Railroad Company (P&W). The Orders require these respondents to repair certain deficiencies in an earthen embankment dam<sup>1</sup> located in Plainfield, Connecticut. The parties to this proceeding are the respondents, Gluck and P&W, and the DEP Water Management Bureau, Inland Water Resources Division.

Each respondent requested a hearing to appeal the Orders. General Statutes §22a-408. The appeals were combined and hearings were conducted by Hearing Officer Donald Levenson. Following the proceedings and the filing of post-hearing legal submissions, but prior to issuing a final decision, Hearing Officer Levenson left the Office of Adjudications and I was assigned to render a final decision. Regs., Conn. State Agencies §22a-3a-6(y)(1).

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<sup>1</sup>Unless otherwise specified herein, the terms “dam” and “Packer’s Pond Dam” shall refer to the embankments, spillway, retaining walls, sluiceway, intake and gate structure, channels and any appurtenances associated with the dam’s operations.

The scope of a final decision includes the findings of fact and necessary conclusions of law. The findings of fact are based exclusively on the evidence in the record. General Statutes §4-180(c). I have reviewed the entire record, which includes transcripts of the proceedings and oral argument, and notices, briefs, pleadings, intermediate rulings and other aspects of the evidentiary record.

The evidence amply demonstrates that the respondents are either owners or in control of the dam and that the dam is in an unsafe condition. The actions required by the Orders are necessary to restore the dam to a safe condition. Therefore, subject to certain modifications, I affirm the Orders.

## II

### PROCEDURAL HISTORY

On December 15, 1977, the Commissioner issued an order to Gluck as “the owner or otherwise [having] control of a dam known as Packer’s Pond Dam located on Mill Brook north of Lillibridge Road in the Community of Plainfield.” The Commissioner found, *inter alia*, that certain “deficiencies at the dam” had been discovered following an inspection.

On July 27, 1981, the Commissioner issued a second order to Gluck as the owner or otherwise having control of Packer’s Pond Dam. This order was issued based upon findings by the U.S. Army Corps of Engineers<sup>2</sup> that certain remedial work was required to assure the integrity of the dam. The order set forth, in detail, the scope of a required

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<sup>2</sup> In 1972, federal legislation (Public Law 92-367) was passed authorizing the Secretary of the Army, through the Corps of Engineers, to initiate a National Dam Inspection Program. The purpose of the Inspection Program was to identify dams that posed a threat of loss of human life and/or damage to property.

engineering investigation, and the specific repair and operation plans that were to be developed in order to comply with the order.

No actions were taken in response to either of these orders and, following a DEP investigation on April 10, 1995, the Commissioner issued a third Order to Gluck on January 19, 1996 (Attachment A). The Commissioner again found that Gluck was the owner and had control of Packer's Pond Dam and that the dam was "in an unsafe condition." This Order set forth in considerable detail the deficiencies identified during the inspection, and outlined compliance and procedural requirements. On February 8, 1996, Gluck filed a written request for a hearing to appeal the Order. General Statutes ' 22a-408.

The Commissioner subsequently issued an Order to P&W dated May 11, 1998 (Attachment B). The Commissioner found that P&W was an owner and/or had control of a portion of Packer's Pond Dam, that "the dam might, by breaking away, cause loss of life or property damage", and that the dam was "in an unsafe condition." P&W also filed a written request for a hearing.

Hearings were conducted on seventeen days between October 21, 1998 and July 20, 1999. Post-hearing briefs and reply briefs were submitted by the parties on September 17, 1999 and October 8, 1999 respectively.

**III**  
**DECISION**

**A**  
**FINDINGS OF FACT**

Based on the evidence in the record, I find the following relevant facts:

**1**

**The Dam**

1. Packer's Pond Dam is located on Mill Brook in Plainfield, Connecticut. The dam was constructed circa 1811 to impound water to provide power to downstream mills. The dam is no longer used for that purpose.
2. The dam is an earthen embankment, approximately 325 feet in length, and impounds 450 acre-feet of water. The top of the dam varies in width, averaging between twelve and fifteen feet.
3. The spillway is sixty-four feet wide and located at the east end of the dam. It is a stone masonry structure and provides four and four-tenths feet of freeboard<sup>3</sup> from its concrete crest to the top of the dam. The downstream face of the spillway is stepped, with each course about sixteen inches high. There are stone masonry training walls at each side of the spillway approximately four feet high. A stone wall extends along the west side of the spillway discharge channel.

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<sup>3</sup> Freeboard is the distance between the maximum surface elevation of impounded water and the crest of the dam.

4. The upstream slope of the dam is irregular with incline ratios of approximately 1.5:1 (horizontal to vertical) above the waterline and about 3:1 (horizontal to vertical) below the water. The downstream slope is inclined at a ratio of approximately 1.5:1 (horizontal to vertical). There is a dry-laid stone masonry wall along the downstream toe<sup>4</sup> of the embankment that extends approximately thirty-five feet from the west side of the spillway. At one time this wall was approximately seventy feet in length but portions of it have collapsed over time.
5. A concrete intake and gate structure is located at the upstream slope at the west end of the dam. The opening of the structure is approximately three feet wide by two-and-a-half feet high. A channel or sluiceway, approximately three feet wide, ten feet deep and twenty feet long extends between the gate structure and a brick arch culvert.
6. The brick arch culvert travels beneath an earthen railroad embankment. The railroad embankment, approximately twenty-four feet high, runs parallel to the dam on the northeast side of the spillway and intersects the downstream slope of the dam on the southwest side of the spillway. The brick arch culvert permits discharge from the gate structure and sluiceway.

## 2

### **Property Interests Related to the Dam**

7. John Gluck was successor in title to tracts of land which include approximately 265 acres where Packer's Pond and Packer's Pond Dam are located. John Gluck took title to this property by virtue of a warranty deed from William Bramwell

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<sup>4</sup> Toe means the base or bottom of the impounding structure at the upstream and downstream sides.

dated September 27, 1954. Certain rights and privileges appurtenant to the dam, which first arose in the early 1800s<sup>5</sup>, were included in that conveyance - specifically, flowage and discharge control rights as well as dam repair and maintenance obligations.

8. On July 10, 1967, John and Mary Gluck quitclaimed the 265 acres along with other additional interests in land to their son, Robert Gluck, a dairy farmer. Gluck does not use the water impounded by the dam or the water flowing from the dam for any purpose. In 1986, he registered the dam with the DEP as required by General Statutes §22a-409.
9. P&W is the successor in title to the interest in the railroad corridor that intersects and passes over the dam including the embankment that ties into the downstream portion of the dam. The succession of interests that conclude with those held by P&W arose due to enabling legislation enacted in the 1840s that provided for the establishment of several railroad companies to provide transportation services throughout the state.
10. These railroad companies were empowered to purchase and receive real estate, and, if necessary, to take property along a planned and approved route for their railway in accordance with certain assessment and condemnation procedures<sup>6</sup>.

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<sup>5</sup> Evidence regarding the chain of title reflects that Stephen and Joseph Farnum conveyed to Able Androse together with the “exclusive privilege of using the whole of the water if necessary in the . . . brook for a cotton factory and for carrying the turning lathes in the machine shop and the privilege of using the water for carrying the trip hammers in a blacksmith’s shop when not wanted for the aforesaid gristmill.” In 1809, Joseph and Stephen Farnum conveyed to Daniel Packer and David F. Lester a quarter of an acre of land “together with the privilege of crossing the grantors’ other land for the purpose of repairing and maintaining dams and flume gates at any and all times.”

<sup>6</sup> *1849 Charter of The Hartford, Providence and Fishkill Railroad Company*, Section 8 provides: “Whenever the location of said railroad or any part thereof shall have been designated and finally located, the said company shall be holden to pay all damages that may accrue to any person or persons, corporation or corporations, by taking their lands or real estate for said railroad; when the same shall not have been

11. The charters for the predecessors in interest to P&W authorized the railroad companies to take as much land as was necessary for the purposes of cutting and embankments, necessary turnouts, obtaining stone and gravel, and constructing their railroads. The charters also empowered the companies “to purchase, receive and hold such real estate as may be necessary and convenient in accomplishing the object for which [the] incorporation [was] granted . . . .” and “to enter upon and use all such lands and real estate as may be necessary . . . .”<sup>7</sup>
12. The enabling statutes required railroad companies to “erect and maintain good and sufficient fences on both sides of their railroads, throughout their whole extent . . . .”<sup>8</sup> and, where necessary, to “erect and maintain a gate across the railroad” at turnpike, highway or street crossings.<sup>9</sup>

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obtained by voluntary agreement; and whenever the person or persons to whom damage may so arise, shall not have previously relinquished in writing all claims for damages, the said company may apply to the superior court of the county in which the real estate damaged may be situated, or to any judge of the superior court, . . . and thereupon said superior court, or such judge, shall appoint three disinterested and judicious persons to assess the amount of such damages . . . which assessment shall be in writing under the hands of said persons-and the same shall be returned (with the application) to the clerk of said superior court, who shall record it; and when so returned and recorded, such assessment shall have the effect of a judgment . . . .”

<sup>7</sup> *Incorporation of The New York and Hartford Railroad Company* (Passed 1845). Specifically, this charter provided for the company to “locate, construct and finally complete a single, double or treble railroad or way from some suitable point in the city of Hartford, in a westerly direction, through or near the towns of Wethersfield, Farmington, Berlin to Plainville, Bristol, Plymouth, Watertown, Waterbury, Woodbury, Southbury, Middlebury, Roxbury, New Milford, Newtown, Brookfield to Danbury and Ridgefield . . . and to transport, take and carry property and persons upon said railroad or way . . . .” p. 1014.

In 1849, The New York and Hartford Railroad Company was merged with The Hartford and Providence Railroad and renamed The Hartford, Providence and Fishkill Railroad Company. The route or railway was expanded to run east and west from Providence to Fishkill through the towns of Plainfield and Sterling.

<sup>8</sup> Title XLIV of the Statutes of the State of Connecticut, *An Act Relating to Railroad Companies*, [Amended 1850] §2, p. 753.

<sup>9</sup> Title XLIV of the Statutes of the State of Connecticut, *An Act Relating to Railroad Companies*, (An Act to Prevent Injuries and the Destruction of Life upon Railroads, and by Railroad Trains, 1853) §9, p. 748.

13. The statutes provided that “commissioners of railroads”<sup>10</sup> were to “advise and recommend the making of such repairs upon any railroad, railroad bridge, or other property belonging to the same as they shall deem necessary to the public safety....”<sup>11</sup>
14. In 1853, land held by Daniel Packer (a predecessor in title to Gluck) was the subject of an assessment proceeding initiated by the Hartford, Providence and Fishkill Railroad Company (predecessor in interest to P&W), which assessment was duly recorded in the records of the Connecticut Superior Court. That portion of the railway corridor that intersects and passes over the dam, including the aforementioned embankment, was the subject of those assessment proceedings and taken by condemnation from Daniel Packer by this predecessor in interest to P&W.
15. From time to time, P&W’s predecessors in interest prepared evaluation maps that defined the boundaries of railroad corridors from one point to another. These maps identified a “center line” of the corridor which was physically marked by monuments along the railway. The width of a corridor was shown as so many feet on either side of the center line as determined from the language used in the condemnation assessment documentation or in deeds of conveyance.
16. Through the use of the historical evaluation maps and the assessment documentation, a survey (Conklin survey, Attachment C) dated March 27, 1998 was prepared “to depict or note the position of the existing features and

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<sup>10</sup> Commissioners were to be appointed by the General Assembly to inspect the condition and management of each railroad within the state. *Id.* at §10, p. 759.

<sup>11</sup> *Id.* at §11, p. 759-760.

topography with respect to the existing dam structure and existing railroad tracks....”<sup>12</sup>

17. Another survey, dated October 16, 1998, (Meehan survey, Attachment D) was “prepared to depict the relation of the dam structures to the railroad layout.”<sup>13</sup>

All parties agreed that the boundaries depicted on the Conklin and Meehan surveys are “substantially correct.”

18. The following portions of the dam are within those boundaries shown on the surveys: 1) the east downstream spillway training wall; 2) the west downstream spillway training wall; 3) a portion of the spillway including the base or toe and spillway outlet channel; 4) the east and west dam embankments; 5) a west embankment lateral training wall; and 6) a portion of the sluiceway or sluice structure.

19. On July 30, 1991, P&W executed a document entitled “Deed” conveying “a certain piece or parcel of land” representing a portion of the tract of land taken from Daniel Packer (predecessor in title to Gluck) to Yaworski Realty, Inc. a Connecticut Corporation. The Deed sets forth, *inter alia*, an agreement on the part of Yaworski to construct a six-foot chain link fence on the portion of the property that abuts the remaining “land” of the railroad. The Deed is silent as to the nature of the interest conveyed and any reversionary rights of Packer or his successors in interest.

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<sup>12</sup> Notes: Conklin & Soroka, Inc., General Location Survey, Packers Pond Dam Area, Prepared for Donald T. Ballou, March 27, 1998.

<sup>13</sup> General Notes, Improvement Location Survey, Prepared for DEP, Meehan & Goodin, October 16, 1998.

### Condition of the Dam

20. In its Phase I Inspection Report issued December, 1980, the Army Corps of Engineers, in accordance with recommended guidelines for safety inspection of dams, and taking into account its height and impound capacity, characterized the dam as “Small”. The Corps further classified the dam as a “Significant Hazard” due to the “potential for the loss of a few lives and some damage to property in the event the dam failed”.<sup>14</sup>
21. The Commissioner has promulgated regulations in accordance with the provisions of Chapters 54 and 446j of the General Statutes pertaining to the classification of dams based upon their hazard potential. Pursuant to those regulations, the DEP has classified Packer’s Pond Dam as a Class B dam.<sup>15</sup> Regs., Conn. State Agencies §22a-409-2.
22. The dam has been the subject of inspections and assessments by the DEP and its predecessor (the Water Resources Commission) for more than thirty-four years. During this time, certain deficiencies observed in the dam have worsened to such an extent that these assessments of the overall condition of the dam have gone from good to fair to poor.

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<sup>14</sup> For purposes of this Decision the terms “fail” or “failure” means that the impound structure of the dam or a portion of it has given way and can no longer retain water or when water flows over portions of the structure other than the spillway (i.e., overtopping).

<sup>15</sup> Regs., Conn. State Agencies §22a-409-2(d)(1)(D) defines a Class B dam as a “significant hazard potential dam which, if it were to fail, would result in any of the following: (i) possible loss of life; (ii) minor damage to habitable structures, residences, hospitals, convalescent homes, schools, etc.; (iii) damage to or interruption of the use of service of utilities; (iv) damage to primary roadways (less than 1500 ADT) and railroads; (v) significant economic loss.” Regs., Conn. State Agencies §22a-409-2(d)(4) also provides that “[p]otential future development of the area downstream from the dam that would be affected by its failure shall be considered in determining the classification.”

23. The interests of P&W's predecessors in title, The New York, New Haven and Hartford Railroad Company, were also the subject of inspections and assessments by the Water Resources Commission and the railroad was asked to make certain repairs to the brick arch culvert and the stone walls in the channel. The railroad company, in response to requests from the Water Resources Commission, made repairs to the culvert headwall and shored up the stone walls.
24. In the most recent administrative Orders, the Commissioner found the following deficiencies: (1) the spillway crest and toe, and the toe of the training walls to the east and west of the spillway are undermined; (2) the dam embankment located on the southwest side of the spillway has an irregular cross section and an uneven crest elevation; (3) there is severe erosion at several locations; (4) the vertical walls of the sluiceway are in poor condition and are in imminent danger of failing; (5) trees and brush on the embankment need to be removed and the root systems grubbed; (6) a trash rack needs to be installed on the vertical lift gate; and (7) various maintenance deficiencies require attention such as re-pointing and re-chinking the masonry structures.
25. The structural integrity of the dam is in jeopardy because the dam cannot safely support the flows that will pass over the spillway during the 100-year frequency recurrence flood flow ("100-year storm event").<sup>16</sup> The DEP and the Army Corps

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<sup>16</sup> The 100-year frequency storm is defined as rainfall of 7.1 inches in a 24-hour period over the watershed that supplies Packer's Pond. The record reflects three different opinions regarding the volume of water that would flow over the spillway in the event of such a storm. At the lowest volume, it was determined that this dam could safely support only fifty-nine percent of the flow that would occur during the 100-year storm event.

of Engineers guidelines use a spillway design storm of this magnitude for dams that are classified as significant hazard dams.

26. The occurrence of a 100-year storm event will cause the dam to overtop because, due to the height of its spillway, the level of the water within the impound area will rise at a rate greater than the dam's capacity to pass that water over the spillway.
27. In the event the dam overtopped, damage could occur to: (1) the masonry conduit and training walls of the sluiceway; (2) the railroad embankment; (3) the brick arch culvert underneath the railroad embankment; (4) Packerville Road, including the bridge that spans Mill Brook, which is located a short distance downstream of the dam; and (5) any downstream structures that might incur flooding.

#### 4

#### **Repairs to the Dam**

28. In order to safely support the flows that would occur during a 100-year storm event, the spillway of the dam would need to be at such a height that there would be one foot of freeboard between the crest of the dam and the maximum water elevation during the storm. At present, the spillway is too high and it cannot support the anticipated flow of water during a 100-year storm event and retain the required one foot of freeboard.

29. All parties agreed that the repairs as set forth below would restore the dam to a safe condition and would satisfy the compliance requirements of the DEP.<sup>17</sup>

- Lower spillway by four feet
- Excavate soil on upstream side of spillway
- Rebuild spillway by pouring a one foot high concrete lip
- Clear and grub embankments
- Regrade embankments
- Seed and mulch embankments
- Adjust the vertical slopes to attain a ratio of 1:1
- Bed and lay 48" reinforced concrete pipe
- Seal both ends of pipe
- Backfill and compact granular fill around pipe
- Install fenced enclosure around Intake/Grate structure
- Chink and group openings in spillway and training walls

30. The majority of the areas that are in need of repair lie on portions of the dam that are owned by, or in control of, either of the respondents. The extent of either respondent's responsibility for any particular repair can be clearly determined based on the relative interests of each respondent in the effected portion of the dam as depicted on the Conklin and Meehan surveys (Attachments C & D).

## **B**

### **Conclusions of Law**

#### **1**

##### **Jurisdiction**

The Commissioner has jurisdiction over any dam located within the state that might endanger life or property if it were to fail. General Statutes ' 22a-401. The Commissioner is empowered to require investigations or inspections of any dam that, in his judgment, meets this statutory criteria. General Statutes §22a-402. (Emphasis added.)

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<sup>17</sup> This list was taken from the proposed repair plan submitted by Gluck's expert, Mr. Ballou.

Furthermore, §22a-409(b) provides that dam owners shall register with the Commissioner the location and dimensions of any dam or similar structure and any other information the Commissioner may require. Pursuant to §22a-409(c), the Commissioner is required to inspect any registered dam.

I have reviewed the evidence pertaining to the registration, location, dimensions, and hazard classifications of the dam. I have considered the expert testimony regarding the likelihood of damage to structures downstream, Packerville Road bridge, and railroad property should the dam fail. On this basis, I conclude that the dam falls clearly within the jurisdiction of the Commissioner and that he was acting within the scope of his statutory authority by initiating one or more investigations of the dam.

## 2

### **Condition of Packer's Pond Dam**

Sections 22a-1 through 22a-13 of the General Statutes set forth the policy of the state regarding the conservation and protection of its natural resources and its interest in the health, safety and welfare of its constituents. Title 22a of the General Statutes contains various provisions all related to this purpose, including the role of the DEP and the duties and powers of the Commissioner. *Keeney v. Town of Old Saybrook*, 237 Conn.135 (1996). Management of the state's water resources, including dams and other structures, falls within the scope of responsibilities of the DEP. General Statutes §22a-1.

General Statutes §22a-401 provides that “[a]ll dams ... with their appurtenances, ... which by breaking away or otherwise, might endanger life or property, shall be subject to the jurisdiction conferred by this chapter.” Pursuant to §22a-402, upon inspection and a finding that any dam within his jurisdiction is in an unsafe condition, the Commissioner

is authorized to issue orders to owners or those having control of that dam to restore it to a safe condition or to remove it. It is unclear, however, whether these jurisdictional requirements of §§22a-401 and 22a-402 set forth the only factors that must be established in order to arrive at conclusions regarding a dam's safety. Furthermore, no statute, regulation or precedent establishes the rule that the Commissioner must delay his determination until such time as the question of whether a dam is unsafe becomes a certainty.

The DEP's regulations are void of any clear and specific guidelines for the determination that a dam is unsafe. The burden is therefore on the Commissioner to consider the unique structure of each dam and to assess whether it is in a safe condition within the context of that structure. In so doing, the Commissioner has routinely and consistently assessed the capability of a dam to convey flows without overtopping under the conditions of the 100-year storm event. When it has been determined that a dam cannot safely withstand the 100-year storm event, that dam has been declared unsafe. See, e.g., *Kish v. Cohn*, 1998 Ct. Sup. 4786 (1998); *Lake Williams Beach Association v. Gilman Brothers Company*, 197 Conn. 134 (1985); *Errichetti Associates v. Boutin*, 183 Conn. 481 (1981).

I have reviewed the record regarding the issue of whether the DEP sustained its burden of demonstrating that the dam is in an unsafe condition. The expert testimony on this issue is not clearly uncontroverted. The experts for P&W and Gluck attempted to cast doubt on the probability that the dam would overtop during a 100-year storm event. However, neither offered any substantial and credible rebuttal evidence to prove that the dam could safely support the flows anticipated under the conditions of that well-established criteria which both experts endorsed. Furthermore, the record shows that

these two experts agreed to the necessity of the repairs enumerated in the Commissioner's Orders and in the proposed repair plan proffered by Gluck's expert in order to make the dam safe.

I have also reviewed the record with respect to P&W's claim that the DEP's conduct over the past thirty years is inconsistent with a finding that this dam is unsafe. The record does show that the DEP and its predecessor investigated the dam in the past and that deficiencies in its structural integrity were identified on a number of occasions. The record is void of any evidence that the Commissioner has exercised his authority to enforce earlier administrative orders issued for the repair of this dam, or taken any action authorized by General Statutes §22a-402 to have the dam restored to a safe condition. However, the authority granted to the Commissioner pursuant to §22a-402, specifically that the Commissioner "may carry out the actions required by the order provided the [C]ommissioner has determined that an emergency exists which presents a clear and present danger to the public safety...", is permissive and not mandatory. (Emphasis added)

Furthermore, the language of §22a-402 does not specifically require that a dam actually be in imminent danger of failing so as to present a "clear and present danger to the public safety" before a determination can be made that it is in an unsafe condition. The provision merely empowers the Commissioner to act in those extreme circumstances.

The record contains substantial facts from which it could reasonably be inferred that the dam is in an unsafe condition. See, *Samperi v. Inland Wetlands Agency*, 226 Conn. 579 (1993). The engineers for all three parties agree that the repairs, as proposed to comply with the Orders, are necessary. The deficiencies in the structural integrity of the dam have worsened over time. There is substantial, albeit, contradicted evidence, that

the dam will not be able to withstand the 100-year storm event. However, even if it were possible to arrive at two inconsistent conclusions based upon any contradictory evidence in the record concerning the condition of the dam, there is sufficient evidence to support a finding that the dam is unsafe and that the issuance of the repair order was proper under the circumstances. See, *Samperi*, supra, citing *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525 (1987).

On the basis of the foregoing, I conclude that the Commissioner's determination that the dam is in an unsafe condition and his issuance of administrative Orders to repair the dam was a proper exercise of his discretion and his responsibilities.

3

**Gluck's Ownership Pursuant to ' 22a-402**

The record contains ample evidence to prove that Gluck is a person "owning or having the care and control" of at least a portion of the dam. General Statutes §22a-402. Gluck's interest in a portion of the real estate that is the subject of the repair Order is a sufficient basis for the Commissioner's jurisdiction and the exercise of his authority to issue an administrative order under §22a-402.

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**P&W's Ownership and Control Pursuant to §22a-402**

There is extensive evidence in the record concerning the question of whether P&W is a proper respondent to the Commissioner's Order to repair the dam. It is uncontroverted, however, that portions of the dam are located within P&W's easement boundary. The issue is, therefore, whether given this property interest of P&W, the Commissioner properly found that the railroad company is either an "owner" or "in

control” of that portion of the dam that lies within its easement boundaries. General Statutes §22a-402.

A preliminary question is whether the railroad’s rights of exclusive occupancy and of permanent possession create an interest in the nature of a fee or whether P&W holds a mere right-of-way for railroad purposes with rights and privileges that are limited in time and scope. The determination of what estate in property was created at the time of the condemnation requires a close examination the relevant statutes and documents that memorialize the event. *Presault v. The United States*, 100 F.3d 1525 (Fed. Cir. 1996); see also, *Driscoll v. New Haven*, 75 Conn. 92 (1902); E. L. Pierce, *A Treatise on the Law of Railroads*, (1881) p.157.

The recorded application of The Hartford, Providence and Fishkill Railroad (P&W’s predecessor in interest) and the appraisers’ assessment are the only documents that memorialize the condemnation event which ties the subject property to P&W. Unlike a deed, those documents contain no habendum clause that would define the extent of P&W’s interest and any conditions affecting it. The references to the Charter contained in the application and assessment documents are to the 1849 Act,<sup>18</sup> which also does not address the nature of the interest taken.

Typically, where there are no express provisions in a charter, or in statutes authorizing the takings, railroad companies that take land for use in the construction of their railways take an easement. 2 H. G. Wood, *A Treatise on the Law of Railroads*, (1885) §242 p.767-768. See also 2 Thompson, *Real Property*, (1980 Replacement) §381, p.503; *Preseault v. The United States*, *supra*, 1534. Moreover, the railroad is obligated to

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<sup>18</sup> See footnote 6 *supra*.

devote the property taken for the specific public use authorized by the legislature. *Hall v. Weston*, 167 Conn. 49 (1974). “By exercising the power of eminent domain granted by the act, the [railroad] becomes bound to devote the property acquired to the purpose for which the legislature authorized the taking. . . .” *Id.* at 63, citing *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 588-89 (1952). Therefore, at a minimum, P&W’s interest in the property which is the subject of the Commissioner’s order is in the nature of an easement that is subject to the limitation that it must be used for railroad purposes. 2 Thompson, *supra*, §381, p.503.

I have reviewed and considered P&W’s contention that the limitation on the railroad’s use of the easement also limits its obligation to maintain it. However, the term “railroad purposes” encompasses a broad array of activities including, but not limited to, laying track, constructing depots and other buildings, maintaining telegraph lines, and excavating stone and gravel. See, E. L. Pierce, *A Treatise on the Law Of Railroads*, (1881) p.159. “Railroad purposes,” as the term was used in the Charter and taking instruments, did not mean merely the running of train over track. It is also clear from the documents and relevant statutes that it was intended that the railroad’s possession and use of the property taken was to be perpetual and exclusive, and subject to other future uses which fall within the scope of the company’s original purpose but which may not even have been contemplated at the time. *Presault v. The United States*, *supra*, 1542, citing Richard R. Powell, 3 Powell on Real Property Section(s) 34.12[2] (Patrick J. Rohan ed., 1996). See also Pierce, *supra*, p. 159; 2 K. & W. Elliott, *A Treatise on the Law of Railroads* (3<sup>rd</sup> ed. 1921) §1158, p.627; *New York & New England Railroad Co. v. Comstock*, (1891). It is therefore reasonable to conclude that the enabling legislation that provided this broad grant of authority for taking land in order to construct railways was

not intended to place strict limitations on the activities of railroad companies or to narrowly define the railroad's responsibilities. Furthermore, these legislative grants were not intended merely to bestow privileges on private railroad corporations but also to provide an important service to the public (i.e., an improved method of transportation).

Property taken by railroads was taken for the public use. In fact, railways have been characterized as public highways "burdened with a public trust." *Presault v. The United States*, supra, 1568, (Clevenger, J., dissenting on other grounds). See also *Lacy v. East Broad Top Railroad and Coal Co.*, 168 PS. Super 351, 77 A.2d 706 (1951).

(Railroad cannot discontinue service without consent of Commonwealth to abandon its interests.) "Although railroads are public highways, their tenure of such ways is in the nature of a public trust and subject to state supervision." *State of Missouri v. Conrad*, 310 S.W. 2d 871, 874 (Mo. 1958). (State can condemn tract owned by railroad under its police power to construct highway crossing.) "...Rail-roads [sic]... are to be regarded as *public works*, and the public benefit is the ultimate end and object of all the powers conferred for their construction, preservation and use." *Bradley v. The New York and New Haven Railroad Company*, 21 Conn. 293, 301 (1851).

If a railroad was acting solely in the interests of the public it might, more appropriately, be shielded by the type of immunities afforded a governmental entity. However, where a grant by the Legislature has been given to a private corporation, and accepted by it, "for its profit, a different situation is presented." *DeCapua v. City of New Haven, et al.*, 126 Conn. 558, 561 (1940). In those circumstances, it is a "... well established principal that railroads are held to a higher standard of responsibility than most private enterprises. *General Foods Corp. v. Baker*, 451 F. Supp. 873, 875 (D. Md. 1978). See also, *Ethan Allen, Inc. v. Maine Central Railroad Co.*, 431 F. Supp. 740, 742-43

(D. Vt. 1977) (noting that “the quasi-public nature of railroads entails a higher degree of public responsibility than is required of most public corporations.”);” *G. S. Roofing Products Company v. Surface Transportation Board*, 143 F. 3d. 387 (8<sup>th</sup> Cir. 1998). (Railroad, under its common carrier obligation cannot unilaterally cease operations absent exigent circumstances without permission from the proper administrative agency.)

The burden of public responsibility that vested in P&W’s predecessors in title continues with P&W’s interests, particularly in light of the exclusive and perpetual nature of those interests. See, E.L. Pierce, *A Treatise on the Law of Railroads* (1881) p.158. The duty to protect the public from harm is clearly one of its responsibilities. Furthermore, regardless of the actual interest created at the time of the taking, P&W uncontrovertedly has, at least, an easement interest in land. See, *Hartford Electric Light Co. v. Wethersfield*, 165 Conn. 211 n. 4 (1973) citing General Statutes §47-42. P&W, having transferred a portion of the property taken by its predecessors in title knowing it would be used for other than railroad purposes, must certainly believe that its interests are greater than those of a holder of a lesser estate.

P&W, as an owner of an easement in land, has certain duties and obligations “to maintain the property embraced by the easement [at least] to the extent necessary to permit its use for the purpose of the easement.” 2 Thompson, *supra*, §428, p. 667. Although P&W may allow its easement to become useless if it chooses to, it cannot, by neglect, violate its duty to the public to keep the property in a safe condition. *Id.* “As a general rule, it is the duty of one who is the owner of a right of way over lands of another to keep it in repair, to protect and maintain it.” *Early v. Hall*, 89 Conn. 606, 611 (1951) citing *Nichols v. Peck*, 70 Conn. 439, 441, 39 Atl. 803; *McCusker v. Spier*, 72 Conn. 628, 629, 45 Atl. 1011; *Jones v. Percival*, 22 Mass. (5 Pick.) 485, 486.

P&W also has a duty to the servient estate. “Generally, the owner of an easement or right-of-way over the lands of another must maintain it in a state of good repair and efficiency so that no unnecessary damage will result from its use to the servient estate.” 2 Thompson, *supra*, §428, p. 666. “The owner of an easement may be held to have a duty to maintain it where failure to do so would injure the servient estate.” *Center Drive-In Theatre, Inc. v. Derby*, 166 Conn. 460, 465 (1974), citing 2 Thompson, *Real Property (1961 Replacement)* 428, pp. 710-11; *Lakeview Associates v. Woodlake Master Condo. Assn.*, 239 Conn. 769, 776-77 (1997). See also, *Kesslering v. Chesapeake & Ohio Railway Company*, 437 F. Supp. 267 (1977) (Control over an easement and not ownership of the servient estate determines who is liable for injuries due to a failure to maintain and repair the easement.)

P&W, as a railroad company, has a duty to the public. As a holder of an interest in property, it has a duty to maintain the property in a manner that safeguards the public and the servient estate. P&W is free to alter its use of its easement, to lease portions of it, even to convey away some of its interest. It is not unreasonable, then, for the Commissioner to look to P&W, as a property owner within his jurisdiction, to take responsibility for property which is exclusively within its control.

It is also not unreasonable for the Commissioner to conclude that P&W “owns” or has “control” of the property that lies within the boundaries of its easement. The term “owner” appears frequently in our statutes and its meaning is determined based upon the contextual circumstances in which it is used. *Smith v. Planning & Zoning Board of the City of Milford*, 3 Conn. App. 550, 553 (1985). “The term “owner” is one of general application and includes one having an interest other than the full legal and beneficial title. *Coyle v. Swanson*, 354 Mass. 126, 128 (1962).” *Id.* Furthermore, “control” does

not even require ownership. ““In general, to have “control” of a place is to have the authority to manage, direct, superintend, restrict or regulate.”” *Bates v. Connecticut Power Co.*, 130 Conn. 256, 261 (1943), quoting *State v. Ehr*, 52 N.D. 946, 953 (1925).

The record clearly indicates that P&W holds an interest in land in the nature of an easement. The holder of an easement is considered to be the “owner” of the easement. See *Lakeview v. Woodlake*, supra, 776; *Center Drive-In Theatre, Inc., v. Derby*, supra, 464. Also, under the broad authority of P&W’s Charter and the enabling legislation from which it was derived, as well as the exclusive and perpetual nature of its interest, P&W is clearly in “control” of its easement.

I have also considered P&W’s contention that Gluck alone carries the burden of maintaining the dam property. P&W relies on the following evidence: (1) Gluck is entitled to the flowage benefits of the dam, (2) covenants running with the land obligate him to maintain the dam, and (3) the deficiencies noted by the Commissioner are design features of the dam and therefore originate on Gluck’s property.<sup>19</sup>

The Commissioner is guided less by the narrow constructs of the law of estates in property and more by the broad uses of statutory terms necessary to accomplish the agency’s goals. It is well established that “[e]nvironmental statutes, considered remedial in nature, are to be construed liberally to reach the desired result. *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 57 (1981)” *Keeney v. Town of Old Saybrook*, 237 Conn. 135, 157 (1996), citing *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358, 382 (1993).

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<sup>19</sup> The record does not fully support this last contention. In fact P&W’s expert agreed that the maintenance items proposed were necessary repairs to ensure the safe condition of the dam.

Furthermore, the Commissioner has been given broad discretion to exercise his regulatory authority. *Cadlerock Properties v. Commissioner DEP*, 253 Conn. 661 (2000). It is therefore reasonable to interpret the words “owner” and “control” in General Statutes §22a-402 liberally and in a manner sufficient to allow the Commissioner to cast as wide a net as possible in order to enforce the statute. See *Starr*, supra, 372.

P&W is an owner of an easement which is exclusively under its control. As such, P&W has a legal responsibility for the maintenance and repair of that property. P&W is therefore an appropriate respondent to the Order issued by the Commissioner.

## 5

### **Preemption Pursuant to 49 U.S.C. §10501**

I have considered P&W’s argument that should I find that P&W is a proper respondent to the Commissioner’s Order, enforcement would be precluded because such enforcement would fall within the scope of activities that are regulated exclusively by the Surface Transportation Board under the preemption language of the Interstate Commerce Commission Termination Act (ICCTA). 49 U.S.C. §10501(b).<sup>20</sup> Section 10501(b) of the ICCTA provides in pertinent part:

“The jurisdiction of the Board over – (1) transportation by rail carriers . . . and (2) the construction, acquisition, operation, abandonment, or discontinuance of . . . tracks, or facilities . . . is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law.”

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<sup>20</sup> At the close of the hearings, the Hearing Officer asked counsel for each party to address, in closing comments, the question of whether the Commissioner was precluded from issuing an Order to the railroad because it was preempted by Federal law. Counsel for the DEP and for P&W stated that they saw nothing in the Federal statutes or regulations that would indicate that the Commissioner’s Order was preempted. Despite those representations, P&W raised this argument in its post-hearing brief and the DEP replied.

The Commissioner's Order is not an attempt to regulate the railroad in that it does not involve the "construction", "acquisition" or "operation" of P&W's tracks or facilities. See, *Village of Ridgefield Park v. New York, Susquehanna and Western Railway Corporation*, 724 A.2d 267 (1999). Although the ICCTA may have preempted any state action that has an economic impact on the railroads, certain of the state's police powers have been retained. *Id.* at 274. (Emphasis added.) The police power exercised by the issuance of the Commissioner's Order is unrelated to the "regulation of rail transportation." 49 U.S.C. §10501(b)(2).

Furthermore, if a member of the public to which P&W owes a duty of safety were to be injured on railroad property, it would not be inconsistent with the preemption provisions of Section 10501 to permit a common-law personal injury claim. "Allowing money judgments against the railroad for carelessly injuring people does not affect the operation or interrupt the service of the railroad, although it may incidentally raise insurance rates or overall business expenses." *Village of Ridgefield v. New York*, *supra*, 276. The Commissioner's Order merely addresses the railroad's duty to prevent injury to the public and will not cause the type of economic impact contemplated by the ICCTA in that it will not affect the operation or interrupt the service of the railroad.

Enforcement of the Commissioner's Order is therefore outside the scope of 49 U.S.C. §10501. To require P&W to repair deficiencies in the dam that are within the boundaries of its easement does not interfere with the construction or operation of the railroad nor does it in any way conflict with the Congressional purpose of regulating railroad operations at the Federal level. *Id.*

### **Reasonable Apportionment**

General Statutes §22a-6a(b) provides for a finding of joint and several liability among multiple respondents when a reasonable apportionment of responsibility is not possible. Where, however, there is a reasonable basis for apportionment of responsibility among multiple respondents, a finding of joint and several liability should not be made. *Connecticut Building Wrecking Co. v. Carothers*, 218 Conn. 580 (1991).

The respondents presented evidence which was intended to provide a reasonable basis for apportionment of responsibility for repairs to the dam. Both respondents based their apportioned responsibilities on the percentage of work required on either side of the P&W easement boundary line as indicated on the Conklin and Meehan Surveys (Attachments C&D). Gluck also presented evidence based upon the benefits derived by each respondent from the various repairs to the dam.

I have reviewed the record and the apportionment theories proffered by each respondent and find that there is sufficient evidence to arrive at a reasonable allocation of responsibility for the repairs to each respondent based upon the location of P&W's easement boundaries relative to the work required. This allocation is set forth in Attachment E and incorporated herein.

## **IV**

### **CONCLUSION**

The Commissioner has properly exercised jurisdiction over Packer's Pond dam. The issuance of Orders to Gluck and to P&W is appropriate since these respondents either own or are in control of the dam. The record amply supports the Commissioner's

finding that the dam is in an unsafe condition and the ordered repairs are necessary to prevent the hazards of dam failure.

The record also demonstrates that the responsibility for the ordered repairs can be reasonably apportioned between the respondents. Therefore, the Orders DS-96-1001V and DS-98-1001V , as modified below, are *affirmed* and a Schedule of Apportionment is incorporated therein.

## V

### MODIFICATIONS

## A

### Order DS-98-1001V

#### Respondent Providence & Worcester Railroad Company

1. All of the compliance dates in this order, which originally ran from the date of issuance of this order, shall instead run from the date of this final decision.
2. In Section B.1.a. add “days” following “thirty (30)”, delete “and acceptable to the Commissioner”, add “and qualifications” between “of the identity” and “of the Engineer, add “Upon receipt of the Commissioner’s written approval,” before “Respondent shall retain”.
3. Section B.1.b. is deleted and replaced with the following:
  1. b. “Submit and Implement Operation and Maintenance Manual and Emergency Operation Plan. Within ninety (90) days following the issuance of this Order, Respondent shall submit for the Commissioner's review and written approval an Operation and Maintenance Manual and an Emergency Operation Plan. The Operation and Maintenance Manual shall provide for routine maintenance, identify those dam features to be monitored and a schedule for such monitoring. The Emergency Operation Plan shall be prepared in accordance with the  Guidelines for the Preparation of Dam Emergency Operations Plans  by the Department of

Environmental Protection, dated 9/94 attached hereto and made part of this order as Attachment A. Upon the Commissioner's written approval of the Emergency Operation Plan, Respondent shall implement said plan until such time as a revised Emergency Operation Plan is approved by the Commissioner.”

4. In Section B.1.h. delete “for” between “approval” and “the report” and replace with “of”.
5. In Section B.2. delete “Within” and replace with “On or before”.
6. In Section B.4. delete “if not time is” before “specified” and replace with “if time is not”.
7. In Section B.5. add the following:

“Respondent” means the Providence & Worcester Railroad Company and its agents or representatives. “Co-respondent” means Robert Gluck and his agents or representatives. “Respondents” means Respondent and Co-respondent collectively.”

8. In Section B.7. delete “they” between “aware that” and “did not” and replace with “Respondent”.
- 9 After Section B.15. add a new Section B.16. as follows, and renumber the sections that follow accordingly:

“16. Respondents to work in concert. Notwithstanding any other provision in this order, in any circumstance where the obligation to perform repairs, maintenance or any action item of this order is not clearly severable between the Respondent and the Co-respondent, the Respondents and/or their engineers shall work in concert to assure full compliance with this requirement. In the event the Respondent and the Co-respondent cannot design and implement a mutually acceptable plan for performing repairs, maintenance or any action item, each of the Respondents shall notify the Commissioner in writing, to that effect, on or before the ordered compliance date for that item. Upon receipt of this notice, the Commissioner will take whatever action is necessary to ensure that the dam is restored to a safe condition, including but not limited to, action authorized under General Statutes §22a-402 or Sections B.9. and B.17. herein.”

10. A new Section B.17. shall read as follows:

“17. Posting of Performance Bond. Notwithstanding Sections B.9. and B.16. herein, in the event of any failure to comply with any provision of this order or upon receipt of notice pursuant to Section 16, the Commissioner may require the posting of a sufficient bond or other security to assure compliance. General Statutes §22a-6 (7).”

10. In Section B.18. (as renumbered) delete “Marla Butts” and replace with “Wesley Marsh.”

11. Add a new Section “C” as follows:

“C. The action items required for compliance with this order are set forth in the attached Schedule of Apportionment (Attachment E) and the responsibility for compliance with the order and for the costs associated with those items is to be apportioned between the Respondents in accordance with this Schedule. Any agreement between the Respondents that modifies the Schedule shall be in writing and shall be submitted to the Commissioner for his written approval and incorporation into this Order. Notwithstanding any such agreement, the Respondent’s liability under the present terms of this order shall continue until a determination of full compliance has been made.”

## **B**

### **Order DS-96-1001V**

#### **Respondent Robert Gluck**

1. All of the compliance dates in this order, which originally ran from the date of issuance of this order, shall instead run from the date of this final decision.
2. Delete the provisions of DS-96-1001V entirely and replace with the following:

## ORDER

- A. The Commissioner of Environmental Protection ("the Commissioner") finds:
1. Robert Gluck ("Respondent") is an owner and/or has control of a portion of Packers Pond Dam ("the dam") located east of Lillibridge Road on the Mill Brook in Plainfield, Connecticut. The property the dam is located on is referenced in a deed as recorded in Volume 92, Pages 15 through 19 of the Plainfield Land Records and identified as lot 1 on map 10, block 17 in the Plainfield Assessor's Office and abuts land containing the rest of the dam owned by The Providence and Worcester Railroad whose property is more fully described in a deed recorded in Volume 124, Pages 370 through 376 of the Plainfield Land Records. The dam is identified by Connecticut Department of Environmental Protection dam inventory number 10901.
  2. The dam might, by breaking away, cause loss of life or property damage.
  3. The dam is in an unsafe condition.
- B. The Commissioner, acting under Sections 22a-6 and 22a-402 of the Connecticut General Statutes, orders Respondent as follows:
1. a. Retain Professional Engineer Licensed to Practice in Connecticut. Within thirty (30) days following the issuance of this order, Respondent shall retain a professional engineer licensed to practice in Connecticut to prepare the studies and documents required by this order and to oversee the actions required by this order (□the Engineer□) and by that date, notify the Commissioner in writing of the identity and qualifications of the Engineer. Upon receipt of the Commissioner's written approval, Respondent shall retain the Engineer until this order is fully complied with. Within ten (10) days after retaining any engineer other than one originally identified under this paragraph, Respondent shall notify the Commissioner in writing of the identity of such other engineer. Nothing in this paragraph shall preclude the Commissioner from finding a previously acceptable engineer unacceptable.
  - b. Submit and Implement Operation and Maintenance Manual and Emergency Operation Plan. Within ninety (90) days following the issuance of this Order, Respondent shall submit for the Commissioner's review and written approval an Operation and Maintenance Manual and an Emergency Operation Plan. The Operation and Maintenance Manual shall provide for routine maintenance, identify those dam features to be monitored and a schedule for such monitoring. The Emergency Operation Plan shall be prepared in accordance with the □Guidelines for the Preparation of Dam Emergency Operations Plans□ by the Department of Environmental Protection, dated 9/94 attached hereto and made part of this order as Attachment A. Upon the Commissioner's written approval of the Emergency Operation Plan, Respondent shall

implement said plan until such time as a revised Emergency Operation Plan is approved by the Commissioner.

- c. Perform Dam Maintenance Work. Within ninety (90) days following the issuance of this Order, Respondent shall perform the following actions :
- i. Remove all trees and woody vegetation from the dam and within the area to the upstream toe of the railroad embankment. Establish and maintain a suitable grass cover.
  - ii. Maintain the dam free of animal burrows.
  - iii. Repoint the upstream spillway training walls and rechalk all other masonry structures.
  - iv. Rehabilitate the concrete spillway crest.
  - v. Provide preventative general maintenance to the sluiceway structure and construct a protective gatehouse.
  - vi. Repair the concrete along the left training wall of the intake structure.
  - vii. Install an adequate trashrack for the intake structure.
- d. Submit Scope of Study for Investigation. Within sixty (60) days following the issuance of this Order, Respondent shall submit for the Commissioner's review and written approval a scope of study for investigation of the condition of the dam (□scope of study□) including but not limited to the following:
- i. The uneven embankment crest elevation and the irregular embankment cross section.
  - ii. The collapsed downstream masonry wall left of the left downstream spillway training wall.
  - iii. The erosion problem along the upstream slope of the embankments.
  - iv. The undermined downstream spillway training walls.
  - v. The scour protection at the downstream toe of the spillway.
  - vi. The undermining of the concrete spillway crest.
  - vii. The stone channel downstream of the sluiceway.

- viii. The ability of the spillway to safely convey the appropriate design storm with one foot of embankment freeboard.

The scope of study shall also include a description of the proposed methods to be used by the Engineer in evaluating said conditions and a proposed schedule for completing both the investigation and a report of investigation. In no event shall the investigation be completed later than sixty (60) days after the Commissioner's approval of the scope of study and the report of investigation completed later than sixty (60) days after the date of approval by the Commissioner of said report of investigation.

- e. Perform the Investigation. Respondent shall perform the investigation and other actions specified in the approved scope of study in accordance with the approved schedule(s).
- f. Submit Report of Investigation. Unless otherwise specified by the Commissioner in writing, Respondent shall submit for the Commissioner's review and written approval a comprehensive and thorough report signed and sealed by the Engineer in accordance with section 20-300-10 of the Regulations of Connecticut State Agencies, which report describes in detail (i) the investigation performed, (ii) results of the investigation, (iii) conclusion(s) about the condition of the dam and (iv) recommendations to place the dam in a safe condition including but not limited to dam repair alternatives (□report of investigation□).
- g. Supplemental Investigation and Revised Report. If the investigation carried out under an approved scope of study does not fully characterize the condition of the dam to the satisfaction of the Commissioner, the Commissioner may give written notice to Respondent that a supplemental investigation (□supplemental investigation□) is required and provide a schedule for performing the supplemental investigation and submitting a revised report of investigation. If no schedule for performing the supplemental investigation and submitting a revised report of investigation is provided by the Commissioner, the supplemental investigation shall be completed Within thirty (30) days after notice from the Commissioner that such supplemental investigation was required.

Except as may be provided in the supplemental investigation schedule approved by the Commissioner, within 30 days after the approved date for the completion of any supplemental investigation, Respondent shall submit for the Commissioner's review and written approval a comprehensive and thorough revised report signed and sealed by the Engineer in accordance with section 20-300-10 of the Regulations of Connecticut State Agencies. The revised report of investigation shall describe in detail (i) all investigations performed, (ii) results of all investigations, (iii) conclusion(s) about the condition of the dam and (iv)

recommendations to place the dam in a safe condition including but not limited to dam repair alternatives (□revised report of investigation□).

- h. Submit Plan to Place the Dam in a Safe Condition. Within sixty (60) days after the date of the Commissioner's approval of the report of investigation or any revised report of investigation Respondent shall submit for the Commissioner's review and written approval a plan which describes in detail the proposed actions to place the dam in a safe condition signed and sealed by the Engineer in accordance with section 20-300-10 of the Regulations of Connecticut State Agencies. Such plan shall be consistent with the recommendations found in the report of investigation, or any revised report of investigation approved by the Commissioner.
- i. Submit Contract Plans and Specifications. Unless another deadline is specified in writing by the Commissioner, within sixty (60) days after the date of the Commissioner's approval of the plan specified in paragraph B.1.h, Respondent shall submit for the Commissioner's review and written approval contract drawings and specifications for the actions approved in said plan to place the dam in a safe condition, including a schedule to perform such actions, with said drawings and specifications signed and sealed by the Engineer in accordance with section 20-300-10 of the Regulations of Connecticut State Agencies (□the contract plan□).
- j. Perform Actions to Place the Dam in a Safe Condition. Respondent shall perform the actions specified in the approved contract plan in accordance with the approved schedule(s), and within fifteen (15) days of completing such actions, shall notify the Commissioner in writing that the actions have been completed as approved. Respondent shall not modify the approved actions without the prior written approval of the Commissioner.
- k. Submit As-Built Construction Drawings, Certification, Operations and Maintenance Manual and Revised Emergency Operations Plan. Within thirty (30) days after completing the actions specified in paragraph B.1.j, Respondent shall submit to the Commissioner for his review and written approval:
  - (i) two (2) copies of as-built construction drawings of the dam, each signed and sealed by the Engineer in accordance with section 20-300-10 of the Regulations of Connecticut State Agencies;
  - (ii) a certification statement signed and sealed by the Engineer in accordance with section 20-300-10 of the Regulations of Connecticut State Agencies that the actions to place the dam in a safe condition have been completed as approved;

- (iii) an Operation and Maintenance Manual that specifies all routine maintenance activities which will be undertaken at the dam, identifies measures for monitoring those dam features which are essential to ensure the dam's integrity and prescribes a schedule for undertaking such activities and monitoring; and
- (iv) a revised Emergency Operation Plan prepared in accordance with Attachment A of this Order which plan takes into account the conditions and features of the dam following completion of the actions specified in paragraph B.1.j.

Upon the Commissioner's written approval of the Operation and Maintenance Manual and revised Emergency Operation Plan described herein, Respondent shall implement said manual and plan and maintain them in effect thereafter.

2. Progress reports. On or before the last day of each month following issuance of this order, and continuing until all actions required by this order have been completed as approved and to the satisfaction of the Commissioner, Respondent shall submit a progress report to the Commissioner describing the actions which Respondent has taken to comply with this order to date.
3. Full compliance. Respondent shall not be considered in full compliance with this order until all actions required by this order have been completed as approved and to the satisfaction of the Commissioner.
4. Approvals. Respondent shall use best efforts to submit to the Commissioner all documents required by this order in a complete and approvable form. If the Commissioner notifies the Respondent that any document or other action is deficient, and does not approve it with conditions or modifications, it is deemed disapproved, and Respondent shall correct the deficiencies and resubmit it within the time specified by the Commissioner or, if time is not specified by the Commissioner, within thirty (30) days after the Commissioner's notice of deficiencies. In approving any document or other action under this order, the Commissioner may approve the document or other action as submitted or performed or with such conditions or modifications as the Commissioner deems necessary to carry out the purposes of this order. Nothing in this paragraph shall excuse noncompliance or delay.
5. Definitions. As used in this order, "Commissioner" means the Commissioner or his agent. "Respondent" means Robert Gluck and his agents or representatives. "Co-respondent" means the Providence & Worcester Railroad Company and its agents or representatives. "Respondents" means Respondent and Co-respondent collectively."
6. Dates. The date of submission to the Commissioner of any document required by this Order shall be the date such document is received by the Commissioner. The date of any notice by the Commissioner under this

Order, including but not limited to notice of approval or disapproval of any document or other action, shall be the date such notice is personally delivered or the date three days after it is mailed by the Commissioner, whichever is earlier. Except as otherwise specified in this Order, the word "day" as used in this Order means one calendar day. Any document or action which is required by this Order to be submitted or performed by a date which falls on a Saturday, Sunday or a Connecticut or federal holiday shall be submitted or performed by the next day which is not a Saturday, Sunday or Connecticut or federal holiday.

7. Notification of noncompliance. In the event that the Respondent becomes aware that Respondent did not or may not comply, or did not or may not comply on time with any requirement of this order or any document required hereunder, Respondent shall immediately notify the Commissioner and shall take all reasonable steps to ensure that any noncompliance or delay is avoided or, if unavoidable, is minimized to the greatest extent possible. In so notifying the Commissioner, Respondent shall state in writing the reasons for the noncompliance or delay and propose, for the review and written approval of the Commissioner, dates by which compliance will be achieved, and Respondent shall comply with any dates which may be approved in writing by the Commissioner. Notification by the Respondent shall not excuse noncompliance or delay, and the Commissioner's approval of any compliance dates proposed shall not excuse noncompliance or delay unless specifically stated by the Commissioner in writing.
8. Certification of documents. Any document, including but not limited to any notice, which is required to be submitted to the Commissioner under this order shall be signed by the Respondent, and by the individual or individuals responsible for actually preparing such document, each of whom shall certify in writing as follows:

"I personally examined and am familiar with the information submitted in this document and all attachments and certify that based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief, and I understand that any false statement made in this document or its attachments may be punishable as a criminal offense."
9. Noncompliance. Failure to comply with this order may subject Respondent to an injunction and penalties under chapters 439 and 446j of the Connecticut General Statutes.
10. False statements. Any false statement in any information submitted pursuant to this order may be punishable as a criminal offense in accordance with Section 22a-6, under Section 53a-157 of the Connecticut General Statutes.

11. Notice of transfer; liability of Respondent and others. Until Respondent has fully complied with this order, Respondent shall notify the Commissioner, in writing no later than ten (10) days after transferring ownership of the dam, or obtaining a new mailing or location address. Respondent's obligations under this order shall not be affected by the passage of title to any property, to any other person or municipality. Any future owner of the dam may be subject to an order of the Commissioner
12. Commissioner's powers. Nothing in this order shall affect the Commissioner's authority to institute any proceeding to prevent or abate violations of law, or to recover penalties for violations of law, including but not limited to violations of any permit issued by the Commissioner, or to place a dam in a safe condition and recover costs thereof. If at any time the Commissioner determines that actions taken by the Respondent pursuant to this order have not successfully placed the dam in a safe condition, the Commissioner may institute any proceeding to require Respondent to place the dam in a safe condition.
13. Respondent's obligation under law. Nothing in this order shall relieve Respondent of other obligations under applicable federal, state and local law.
14. No assurance by Commissioner. No provision of this order and no action or inaction by the Commissioner shall be construed to constitute an assurance by the Commissioner that the actions taken by the Respondent pursuant to this order will result in compliance or will restore the dam which is the subject of this order to a safe condition.
15. Notice to Commissioner of changes. Within fifteen (15) days of the date Respondent becomes aware of a change in any information submitted to the Commissioner under this order, or that any such information was inaccurate or misleading or that any relevant information was omitted, Respondent shall submit the correct or omitted information to the Commissioner.
16. Respondents to work in concert. Notwithstanding any other provision in this order, in any circumstance where the obligation to perform repairs, maintenance or any action item of this order is not clearly severable between the Respondent and the Co-respondent, the Respondents and/or their engineers shall work in concert to assure full compliance with this requirement. In the event the Respondent and the Co-respondent cannot design and implement a mutually acceptable plan for performing repairs, maintenance or any action item, each of the Respondents shall notify the Commissioner in writing, to that effect, on or before the ordered compliance date for that item. Upon receipt of this notice, the Commissioner will take whatever action is necessary to ensure that the dam is restored to a safe condition, including but not limited to, action authorized under General Statutes §22a-402 or Sections B.9. and B.17 herein.

17. Posting of Performance Bond. Notwithstanding Sections B.9. and B.16. herein, in the event of any failure to comply with any provision of this order or upon receipt of notice pursuant to Section 16, the Commissioner may require the posting of a sufficient bond or other security to assure compliance. General Statutes §22a-6 (7).
18. Submission of documents. Any document required to be submitted to the Commissioner under this order shall, unless otherwise specified in writing by the Commissioner, be directed to:

Mr. Wesley Marsh, Supervising E.A.  
DEP - Inland Water Resources Division  
79 Elm Street  
Hartford, Connecticut 06106-5127

- C. The action items required for compliance with this order are set forth in the attached Schedule of Apportionment (Attachment E) and the responsibility for compliance with the order and for the costs associated with those items is to be apportioned between the Respondents in accordance with this Schedule. Any agreement between the Respondents that modifies the Schedule shall be in writing and shall be submitted to the Commissioner for his written approval and incorporation into this Order. Notwithstanding any such agreement, the Respondent's liability under the present terms of this order shall continue until a determination of full compliance has been made."

## VI

### FINAL DECISION

The foregoing is issued as a Final Decision in the combined appeals of Orders DS-96-1001V and DS-98-1001V.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Jean F. Dellamarggio, Hearing Officer