

BEFORE THE RECLAMATION COMMISSION

CAROLINE JOHNSON,

Appellant,

-vs-

DIVISION OF MINERAL RESOURCES
MANAGEMENT,

Appellee,

and

CAPSTONE HOLDING COMPANY,

Intervenor.

Case No. RC-11-011

Review of Chief's Decision After Remand;
re: pond; Permit D-608 (Capstone Holding
Company)

**FINDINGS, CONCLUSIONS &
ORDER OF THE COMMISSION**

Appearances: Caroline Johnson, Appellant *pro se*; George Horvath, Megan DeLisi, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management; Geoffrey Mosser, Counsel for Intervenor Capstone Holding Company.

BACKGROUND

On November 15, 2011, Appellant Caroline Johnson filed with the Reclamation Commission a notice of appeal from a decision of the Division Chief, following a remand by this Commission in case number RC-10-012 (*Keith & Caroline Johnson vs. DMRM & Capstone Holding Company, Inc.*, RC-10-012 (February 3, 2011)). Mrs. Johnson owns an interest in land that was affected by a coal mining operation conducted under mining permit D-608. Mrs. Johnson has raised concerns relative to a pond created during the mining operations, which pond is to be left as a permanent structure on the Johnson property. The Commission's remand addressed this pond.

Permit D-608 is held by Capstone Holding Company ["Capstone"], and Capstone is responsible for the reclamation of lands affected under this permit. Pursuant to motion, the Commission granted Capstone intervenor status in this appeal.

On April 19, 2012, a site view was conducted by the Commission. All parties participated in the view. The Commission and the parties visited the Johnson property, observing the pond at issue, as well as other areas and features within the watershed of this pond.

This case came on for hearing before the Reclamation Commission on July 11, 2012. At hearing, the parties presented evidence and examined witnesses appearing for and against them.

PROCEDURAL HISTORY

In August 2010, the Johnsons filed a previous appeal with the Commission. This prior appeal, *Johnson I* (case RC-10-012), addressed the same pond that is at issue in the immediate case. The *Johnson I* appeal was taken from the Division's August 17, 2010 determination that the Johnson pond met all reclamation requirements, and that the reclamation performance bond associated with the Johnson pond would be released pursuant to O.R.C. §1513.16(F). The release of bond terminates Capstone's reclamation responsibilities for this pond. The Johnsons appealed the Division's determination, and, in November and December 2010, the Commission held a hearing in the *Johnson I* appeal.

On February 3, 2011, the Commission rendered a decision in the *Johnson I* appeal. The Commission's decision held in part:

10. The evidence in this case did not establish that the pond at issue, which has been designated as a permanent agricultural/wildlife habitat pond, meets the minimum depth requirements of law.
11. The Division's failure to articulate, or apply, a consistent depth requirement for pond # 6 was arbitrary and capricious.
12. The Division's approval of final security release on the Year 13 Segment of permit D-680, without reasonable evidence that pond #6 met the minimum depth requirement of NRCS Code 378, was inconsistent with law.

(Decision of Commission, *Johnson I*, *supra*, p. 24; Johnson's Hearing Exhibit 1).

In the Johnson I appeal, the Commission ordered the following:

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **REMANDS** this matter to the Division to make a determination that permanent impoundment #6 meets all of the requirements of law, consistent with the findings and conclusions of the Commission.

(Decision of Commission, Johnson I, *supra*, p. 25; Johnson's Hearing Exhibit 1.)

On October 13, 2011, following the Commission's remand, Division District Manager Michael Kosek sent a letter to the Johnsons, indicating that the Division had re-inspected the Johnson pond, and had determined the pond to be "spring-fed." Mr. Kosek again concluded that the pond met all requirements of law. Mr. Kosek's October 13, 2011 letter stated in part:

In conclusion, the Division has determined, consistent with the findings and conclusions of the Commission, that Pond #6 meets all requirements of law. Because the pond is "spring fed[,"] it must meet the requirement of a minimum depth of 6 feet over 25% of the pond. Pond #6 meets this requirement, The Division stands by the original decision to release performance ... [bond] based on the aforementioned information. The Division will require no further action from the operator.

Caroline Johnson appealed Mr. Kosek's October 13, 2011 letter to the Commission. This currently-pending appeal is designated as case number RC-11-011, the Johnson II appeal.

Prior to the hearing in the Johnson II appeal, a question was raised regarding the Reclamation Commission's subject matter jurisdiction over appeals relating to the Johnson pond. In this regard, on June 7, 2012, the Commission held:

Therefore, the Commission **FINDS** that, under the unique circumstances presented in this case, the Commission's jurisdiction was properly invoked in both the Johnson I appeal and the Johnson II appeal, and that the Commission's jurisdiction is appropriate despite the fact that final bond had been released prior to the filing of either of these appeals.

(Order of Commission Confirming Jurisdiction & Granting Motion in *Limine*, Johnson II, p. 9.)

In response to a Motion in *Limine*, filed by the Division, the Commission also addressed the scope of the *Johnson II* proceedings in its June 7, 2012 order. The Commission identified the issues presented by the *Johnson II* appeal as:

1. Is the Johnson pond a "spring-fed" pond?
2. Does the Johnson pond meet the depth requirements for an agricultural pond, as set forth in Natural Resources Conservation Service ["NRCS"] Code 378?

(Order of Commission Confirming Jurisdiction & Granting Motion in *Limine, Johnson II*, p. 11.)

FINDINGS OF FACT

1. Coal mining and reclamation permit D-608 was issued to R & F Coal Company ["R&F"] on August 25, 1986. This permit allowed the surface mining of coal on 261.6 acres of land, located in Guernsey County, Ohio. Township Road 187 runs through the permitted area. Property on both sides of the township road was permitted. Actual mining of coal only occurred on the east side of the township road. Permitted property on the west side of the township road was utilized to control drainage from the mining operation. The pond at issue ["the pond," "pond #6" or the "Johnson pond"] is situated on an 8.1-acre segment of permit D-608, located on the west side of Township Road 187, and associated with drainage control for the permitted area. In August 1999, Capstone purchased R&F, thus acquiring permit D-608, and assuming reclamation responsibility for this area.¹

2. The original mining and reclamation plan for permit D-608 included design criteria for a temporary siltation structure, to be known as pond #6. Pond #6 was built in March 1987. Pond # 6 functioned as part of the drainage control system for permit D-608 until about October 2002.

¹ The immediate appeal, *Johnson II*, is a continuation of the previously-decided *Johnson I* case, and arises from the remand of the *Johnson I* appeal. Some of the facts presented are taken from the Commission's decision in the *Johnson I* case, and are provided as background to the issues that are before the Commission in the current appeal.

3. On June 11, 1997, R&F submitted to the Division an application to revise ["ARP"] permit D-608, proposing to leave pond #6 as a permanent structure following mining and reclamation. This request was prompted by previous landowners Frank and Rosalie Salerno, who desired to use the pond for agricultural and wildlife habitat purposes.

4. Keith and Caroline Johnson have lived in the area of permit D-608 since approximately 1987. In 1991, the Johnsons purchased their current home, which is situated on a 5-acre parcel of land, north of the pond at issue. Initially, the Johnsons leased the land surrounding the pond from Frank and Rosalie Salerno. In December 2002, the Johnsons entered into an agreement to purchase the Salerno property, including the pond. The land surrounding the pond is in pasture, which the Johnsons utilize to graze their horses.

5. Beginning in approximately 2002, Mrs. Johnson expressed concerns to the Division, relative to the depth of this pond, as she believed the pond was too shallow for its intended use. The Johnsons have filed three formal citizen's complaints with the Division regarding the condition of their pond.

6. During the spring or early summer of 2009, Mr. John Dutton (of Capstone) met with Mr. Johnson in regards to the Johnsons' complaints relative to pond depth. During this meeting, Mr. Dutton indicated that Capstone would remove a portion of the collected sediment from the pond² and would construct a permanent ditch to pond #6, to increase flow into the pond.

7. Mr. Michael Kearns, a professional engineer, was hired by Capstone to conduct a survey of the Johnson pond. On May 1, 2009, a survey team, under the supervision of Mr. Kearns, recorded elevations of various points within and surrounding the Johnson pond. Mr. Kearns generated a contour map, plotting several hundred field elevations, including approximately 200 elevations of the pond's bottom. (See Capstone's Hearing Exhibit 1.) Comparison of the pond bottom elevations, to the top of the riser pipe, would provide the normal pond depth at various points within the pond. (See Footnote 13.)

² At some point, Capstone's plan to remove the collected sediment from the pond was changed. Ultimately, Capstone decided to increase the depth of the pond by adding to the height of the principal spillway riser pipe, as opposed to removing sediment from the pond's bottom. Some sediment was removed from the pond in July 2009. (See Finding of Fact #8). It does not appear that Capstone's change in plans was ever directly communicated to the Johnsons.

8. In July 2009, Capstone submitted another ARP to the Division, proposing to increase the depth of the pond by welding 3 feet of additional pipe on to the existing principal spillway riser pipe. This ARP was approved by the Division in September 2009. In July 2009, Capstone dredged some sediment from the east side of the pond, using a track hoe operating from the shoreline. Capstone constructed a permanent ditch from the culvert under Township Road 187 into the pond. The permanent ditch was expected to increase the flow of water into the pond, thus helping to stabilize the pond's water level. Capstone also welded additional pipe to the pond's riser, raising the principal spillway elevation from 798 feet msl³ to 801 feet msl. By raising the principal spillway outlet for the pond, the pond's potential maximum depth was increased by 3 feet, and the surface area of the pond was increased to 1.9 acres at normal water level.

9. In the Johnson I appeal, Keith and Caroline Johnson testified that since the additional 3 feet of pipe has been added to the pond's riser, pond #6 rarely discharges through the riser pipe (*i.e.*, rarely reaches normal pool depth). Mrs. Johnson testified that in October 2009 (3 months after the riser pipe was lengthened), the pond discharged for the first time from the lengthened riser pipe. In the Johnson I appeal, Mrs. Johnson also testified that the ditch from the culvert under the township road does not always carry water. In the Johnson II appeal, Mrs. Johnson again testified that the ditch leading to the Johnson pond from the township road is frequently dry, and she provided photographs to this effect. (See Johnson's Hearing Exhibits 4A through 4E.) However, in the Johnson I hearing, the Commission did hear testimony, indicating that the pond level sometimes reaches the top of the riser pipe, and that the pond does discharge. In the Johnson I hearing, Division Manager Michael Kosek testified that he observed the pond discharging on May 17, 2010. However, during the Johnson I hearing, engineer Michael Kearns testified that on August 2, 2010, he observed that the pond level was below the inlet to the riser pipe.⁴

³ Mean sea level.

⁴ The Commission conducted two site views of the Johnson pond. One view was conducted on October 7, 2010 (Johnson I) and one one was conducted on April 19, 2012 (Johnson II). The Commission's procedural rules state that "a site view shall not be considered as evidence." (See O.A.C. 1513-3-15(A)(6).) However, the Commission would note that on October 7, 2010 the channel was dry, and on April 19, 2012 water was flowing in the channel and the pond's water level was at the top of the riser pipe. This information indicates that input to the Johnson pond is variable.

10. On November 3, 2009, Capstone submitted a request for a Phase III bond release, asking for final approval by the Division on the Year 13 Segment of permit D-608. The Year 13 Segment of permit D-608 covers 8.1 acres, including and surrounding the Johnson pond. This request was ultimately approved, and bond was released on August 17, 2010. (See Finding of Fact #14.)

11. On December 3, 2009, Division District Manager Michael Kosek and Division Inspector Gerald Young visited the Johnson pond. Mr. Kosek testified that, at this time, the pond embankment needed repair and that he did not believe the pond's water level to be stable.

12. In December 2009, Division issued a written response to the Johnsons' complaints regarding pond depth. The Division's response noted the following:

... Inspector Young has directed the operator to repair and stabilize the embankment. We have suggested using a clay material. We believe this repair may raise the water level as water is currently seeping through the embankment as a result of these [muskrat] burrows. We also found that water from the road culvert was reaching the pond. The pond is a reclamation pond and does not have a sediment requirement. The pond does, however, have quite a bit of storage volume remaining before reaching discharge.

Once these repairs are made, the pond will meet the criteria needed for final release. ...

(See Division's Exhibit 6 in the Johnson I appeal.) In mid-December 2009, upon direction from the Division, Capstone filled the muskrat and groundhog holes on the pond #6 embankment.

13. On July 7, 2010, the Division conducted the Phase III bond release inspection, to determine if all reclamation had been successfully accomplished on the 8.1-acre segment of permit D-608 where the Johnson pond is located. Mr. Johnson attended this inspection. During the inspection, Mr. Johnson expressed his continued concern with the pond's depth. Thereafter, the Division required Capstone to certify the stability of the pond's embankment, which Capstone did on August 3, 2010.

14. On August 17, 2010, Division District Manager Michael Kosek issued a letter to Mr. and Mrs. Johnson, informing the Johnsons that the Division had determined that the Johnson pond met the requirements for final bond release, and that the Division had approved the final bond release for the 8.1-acre Year 13 Segment of permit D-608.

15. On August 30, 2010, Mr. and Mrs. Johnson filed an appeal with the Reclamation Commission from the Division's August 17, 2010 determination that the pond met all legal requirements (the Johnson I appeal).

16. On February 3, 2011, the Commission issued a decision in the Johnson I appeal. The Commission found that the evidence presented did not establish that the Johnson pond met the minimum legal depth requirement for this pond. The Commission remanded the matter to the Division to make a determination that the Johnson pond met such requirements.

17. Between February 3, 2011 and June 3, 2011, the Division was informed by Capstone's consulting engineer Michael Kearns that springs existed in the watershed of the Johnson pond. On June 3, 2011, the Division observed two springs at the toe of the backfill used to reclaim the permit D-608 highwall. These springs were located on the east side of Township Road 187 and were up-gradient from the Johnson pond. One of these springs was piped. The Division measured the flow from the piped spring at 10 gallons per minute.

18. In August 2011, the Division received a map from Capstone, reflecting pond depths, based upon a water level of 801 feet msl (*i.e.*, at the top of the riser pipe), and utilizing the elevations taken of the pond bottom in May 2009. (See Division's Hearing Exhibit 2.) This map shows that approximately 53.5% of this 1.9-acre pond (or about 1.016 acres) has a depth of 6 feet or greater when the water level reaches the inlet to the riser pipe.

19. On October 13, 2011, Division District Manager Michael Kosek sent a letter to the Johnsons, indicating that the Division had re-inspected the Johnson pond, and had determined the pond to be "spring-fed." Mr. Kosek again concluded that the pond met all requirements of law. Mr. Kosek's October 13, 2011 letter stated in part:

In conclusion, the Division has determined, consistent with the findings and conclusions of the Commission, that Pond #6 meets all requirements of law. Because the pond is "spring fed[,] it must meet the requirement of a minimum depth of 6 feet over 25% of the pond. Pond #6 meets this requirement, The Division stands by the original decision to release performance security based on the aforementioned information. The Division will require no further action from the operator.

20. On November 15, 2011, Caroline Johnson filed an appeal with the Reclamation Commission from the Division's October 13, 2011 determination that the Johnson pond is "spring-fed" and meets all legal requirements (the *Johnson II* appeal).

21. On February 2012, the Division conducted a dye test on the water generated from the piped spring located east of Township Road 187 and up-gradient from the Johnson pond. The dye test established that water from the spring reaches the Johnson pond.

DISCUSSION

What standards apply to the Johnson pond?

In 1997, the Johnson pond was reclassified, for purposes of permit D-608, from a temporary siltation structure to a permanent impoundment. In approximately 2002, the Johnson pond ceased to function as part of the permit D-608 sediment control system.

In requesting that this pond remain as permanent, the landowners stated that the pond would be used in the future for agricultural and wildlife habitat purposes. This request was incorporated into permit D-608 through an application to revise the permit ["ARP"].

A permanent impoundment left on a reclaimed area for agricultural and wildlife habitat purposes must meet certain design and performance requirements established by law, as well as the requirements set forth within the mining permit.⁵

As held in the Johnson I decision, the controlling legal standard for the depth of an agricultural pond in the State of Ohio is Natural Resources Conservation Service ["NRCS"] Code 378.⁶ NRCS Code 378 specifically addresses the minimum depth requirement for agricultural ponds, and requires that:

At least 25 percent of the pond area at normal water level shall have a minimum depth of 8 [feet], or a minimum depth of 6 [feet] for spring fed ponds, or at least 50 percent of the pond area shall have a minimum depth of 6 [feet] when excavating is restricted by underlying material.

No evidence was presented that excavation was restricted by underlying material in the area of the Johnson pond. Therefore, the Johnson pond must have a depth of either:

1. 8 feet over at least 25% of the pond's surface area, or
2. if the pond is determined to be "spring-fed," 6 feet over at least 25% of the pond's surface area.

The evidence presented does not establish that 25% of the Johnson pond area reaches a depth of 8 feet or greater.⁷ Thus, a determination of whether the Johnson pond is "spring-fed" is critical to an evaluation of whether this pond meets the legal depth requirements.

⁵ During the Johnson I hearing, the Division identified the appropriate depth requirement for the Johnson pond as the NRCS 378 standard. Having received no persuasive evidence that the pond was "spring-fed," the Commission attempted to determine whether the pond met the agricultural pond depth standard of 8 feet over 25% of the pond's area. The evidence adduced at the Johnson I hearing did not establish, to the Commission's satisfaction, that this depth standard had been met, and hence the matter was remanded to the Division.

⁶ Ohio's mining and reclamation law, at O.R.C. §1513.16(A)(8), sets forth certain performance standards that apply to permanent ponds situated on reclaimed ground. This section of Ohio law does not specify a minimum depth for agricultural ponds. Rather O.R.C. §1513.16(A)(8)(b) requires that permanent impoundments be designed in compliance with the "Watershed Protection and Flood Prevention Act," 16 U.S.C. §1001. Regulations promulgated under the "Watershed Protection and Flood Prevention Act" authorize the Department of Agriculture, Natural Resources Conservation Service to develop technical standards and criteria for the design and construction of various types of ponds, including agricultural ponds and wildlife habitat ponds. These technical standards include criteria for minimum pond depths. The NRCS Engineering Field Manual provides national standards relating to ponds, but directs state agencies to apply state-specific NRCS standards, where they exist. NRCS Code 378 sets forth the criteria for agricultural ponds located in the State of Ohio.

⁷ In fact, the evidence established that only approximately 15.4% of the Johnson pond has a depth of 8 feet or greater. (See Division' Hearing Exhibit 2.)

Is the Johnson pond "spring-fed"?

Following the Commission's remand, the Division determined that the Johnson pond is a "spring-fed" pond. Neither the term "spring⁸," nor the term "spring-fed,⁹" is specifically defined in NRCS 378.

The watershed for the Johnson pond is approximately 25 acres in size and includes a reclaimed highwall created during mining operations under permit D-608. A spring has been identified near the toe of this reclaimed backfill.¹⁰ Testimony regarding this spring was not presented in the *Johnson I* appeal.

This spring is located on the east side of Township Road 187, up-gradient from the Johnson pond, and within the Johnson pond's watershed. On June 2, 2011, the Division measured the flow of this spring at 10 gallons per minute.¹¹ In February 2012, the Division conducted a dye test of the water generated at the spring, to better understand the water's path and to confirm that water from the spring actually reaches the Johnson pond. The dye test revealed that water from the spring flows down a hillside and into a ditch along the township road. From there, the water enters a culvert situated beneath the road, and is then directed via a rock-lined channel into the Johnson pond. Therefore, the spring is a source of water to the Johnson pond.

⁸ The U.S. Geological Survey defines a "spring" as "a water resource formed when the side of a hill, valley bottom or other excavation intersects a flowing body of ground water at or below the local water table, below which the subsurface material is saturated with water." (See www.usgs.gov/edu/watercyclesprings.) At hearing, Capstone's consulting engineer, Michael Kearns (who was qualified as an expert in the area of impoundments and pond development) confirmed the applicability of this definition to the Johnson pond.

⁹ Capstone's consulting engineer Michael Kearns testified that a pond is "spring-fed" if a spring exists within the pond's watershed.

¹⁰ The Division actually identified two springs, in close proximity to each other, near the toe of the reclaimed backfill. One spring, the spring discussed at hearing, was piped and the flow rate from this spring was readily measurable. The other spring consisted of a wet area, from which no flow rate was determined.

¹¹ While the spring's flow was measured at 10 gallons per minute in June 2011, it appears that the volume of the spring's flow is impacted by weather conditions. Mrs. Johnson submitted into evidence at the *Johnson II* hearing, photographs showing that the ditch along the township road is sometimes dry. (See Appellant's Exhibit 4A through 4E.) However, it is common for springs to be impacted by weather conditions.

Mrs. Johnson has expressed a concern with the fact that the spring feeding her pond is located on neighboring property, over which she has no control. She asserts that the spring could be diverted, and thus cease to feed her pond. Neither NRCS 378, nor any Ohio mining and reclamation laws, addresses the ownership of a spring that feeds a reclaimed pond. Therefore, Mrs. Johnson's concern, while genuine, cannot change the fact that her pond is "spring-fed."

Mr. John Dutton (of Capstone) testified at the Johnson II hearing that another spring, located in closer proximity to the pond, was previously piped into the pond. Mention of this piped spring was also made at the Johnson I hearing. Mr. Dutton testified that this piped spring enters the pond below the water's surface and is not visible from the pond's banks. Because this spring enters the pond below the water's surface, the Division was unable to confirm its existence or to measure its flow. However, Mrs. Johnson confirmed at the Johnson II hearing, that this water source exists.

Mrs. Johnson did not produce evidence at hearing to refute the evidence supporting the "spring-fed" nature of her pond. Therefore, based upon the evidence presented, the Commission **FINDS** that the Johnson pond is "spring-fed."

Does the Johnson pond meet the depth requirements for a "spring-fed" pond?

The Johnson pond was identified in permit D-608 as an "agricultural/wildlife habitat pond." Testimony from Mrs. Johnson establishes that the pond is used for these purposes. No depth requirement is specifically established for wildlife habitat ponds¹². However, regarding "spring-fed" agricultural ponds, NRCS 378 requires:

At least 25 percent of the pond area at normal water level shall have a minimum depth of ... 6 [feet] for spring fed ponds

¹² NRCS Code 644 addresses Wetland Wildlife Habitat Management, and does not set forth a minimum depth requirement for ponds associated with wetland habitat for wildlife.

NRCS 378 does not define "at normal water level." However, the testimony of Capstone's consulting engineer Michael Kearns was that "normal water level" is considered to be established at the pond's riser pipe inlet. In this case, the Johnson's pond riser pipe inlet is located at an elevation of 801 feet msl.

In May 2009, a survey team, under the direction of Capstone's consulting engineer Michael Kearns, recorded elevations (in mean sea level) for various points within and surrounding the Johnson pond. Mr. Kearns generated a contour map, plotting several hundred field elevations, including approximately 200 elevations of the pond's bottom. (See Capstone's Hearing Exhibit 1.) In May 2011, these plotted elevations were transferred to a map, which reflected pond depths, calculated using the riser pipe elevation of 801 feet msl.¹³ (See Division's Hearing Exhibit 2.)

Based upon the elevations recorded for the Johnson pond it was determined that approximately 53.5% of the pond has a depth of 6 feet or greater.¹⁴ Based upon these calculations, the pond meets the depth requirements of NRCS 378 for a "spring-fed" agricultural pond. Therefore, based upon the evidence presented at hearing, the Commission **FINDS** that the Johnson pond meets the depth requirements of NRCS 378.

¹³ There was confusion at hearing, regarding whether the information collected by Mr. Kearns' team was obtained before, or after, the pond level was increased through the addition of 3 feet of pipe to the pond's riser. In fact, the date of the recording these elevations is not critical, as the elevations recorded were from the pond's bottom. With these elevations, Capstone was able to apply the current riser inlet elevation of 801 feet msl, in order to calculate the depth of the pond at the various recorded pond bottom elevation points.

¹⁴ Division's Hearing Exhibit 2 assumes that the water level in the pond is located at a surface elevation of 801 feet msl (which is at the top of the riser pipe), and establishes that approximately 53.5% of the pond has a depth of 6 feet or greater. This translates to approximately 1.016 acres of the 1.90-acre pond having a depth of 6 feet or greater. Conversely, approximately 46.5% of the pond (or 0.884 acre) has a depth of less than 6 feet. Of the 53.5% (or 1.016 acres) of the pond that has a depth of 6 feet or greater, approximately 41.5% (or 0.789 acre) has a depth of at least 7 feet and approximately 15.4% (or 0.293 acre) has a depth of at least 8 feet. Mrs. Johnson has testified that the water level in the pond does not always reach the top of the riser pipe, and the evidence presented confirms this. However, applying these figures, even if the water level were routinely one foot below the top of the riser pipe, 41.5% of the pond would still show a 6-foot depth, well over the required minimum of 25%.

CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in this matter is placed upon the Appellant Caroline Johnson to prove by a preponderance of the evidence that the Division's decision **after remand** was arbitrary, capricious or otherwise inconsistent with law. (See O.R.C. §1513.13(B).)

2. O.R.C. §1513.16(A)(8) sets forth the performance standards for permanent impoundments, created as part of a mining operation. This section of law provides:

(A) Any permit issued under this chapter to conduct coal mining operations shall require that the operations meet all applicable performance standards of this chapter and such other requirements as the chief of the division of mineral resources management shall adopt by rule. General performance standards shall apply to all coal mining and reclamation operations and shall require the operator at a minimum to do all of the following:

* * *

(8) Create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities only when it is adequately demonstrated by the operator that all of the following conditions will be met:

* * *

(a) The size of the impoundment is adequate for its intended purposes.

(b) The impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under the "Watershed Protection and Flood Prevention Act," 68 Stat. 666 (1954), 16 U.S.C. 1001, as amended.

* * *

(d) The level of water will be reasonably stable.

(Emphasis added; see also O.A.C. §1501:13-9-04(H) - performance requirements for permanent impoundments located on reclaimed ground.)

3. 16 U.S.C. §1001 of the "Watershed Protection and Flood Prevention Act" (referenced in O.R.C. §1513.16(A)(8)) sets forth the federal government's general policy of cooperation between federal, state and local government agencies, in the protection of water resources. While 16 U.S.C. §1001 does not set forth specific standards relative to pond design and construction, federal regulations promulgated under this statute make reference to technical standards published by the Natural Resources Conservation Service. The federal regulations give the NRCS responsibility for administering watershed protection and flood prevention programs. (See 7 C.F.R. §600.1.) The NRCS also has the authority to develop technical standards and criteria to insure the technical adequacy of conservation practices. (See 7 C.F.R. §653.1.)

4. The technical standards promulgated by the U.S. Department of Agriculture, Natural Resources Conservation Service apply to the present case because these standards are incorporated into Ohio law by reference. These technical standards are binding on Ohio coal mine operators. (See: *In the Matter of Horizon Coal Company*, case nos. SHA-131-82 & SHA-132-82 (Section of Hearings and Appeals, February 18, 1983); *Johnson I, supra.*)

5. NRCS Code 378 sets forth the minimum depth requirement for agricultural ponds located in the State of Ohio. This code addresses the acceptable depth of such agricultural ponds, and states:

At least 25 percent of the pond area at normal water level shall have a minimum depth of 8 [feet], or a minimum depth of 6 [feet] for spring fed ponds, or at least 50 percent of the pond area shall have a minimum depth of 6 [feet], when excavation is restricted by underlying material.

There is no minimum depth requirement set forth for wildlife habitat ponds.

6. The evidence in this case establishes that the pond at issue is "spring-fed."

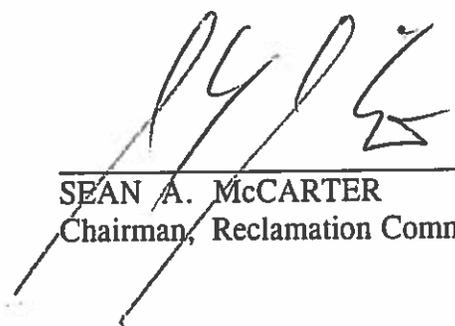
7. The evidence in this case establishes that the pond at issue meets the minimum depth requirements for a "spring-fed" agricultural pond, as greater than 25% of the pond achieves a depth of 6 feet or greater.

8. Based upon the evidence presented, the Commission **CONCLUDES** that the Division's decision after remand of the *Johnson I* appeal, finding that the Johnson pond meets the minimum depth requirements of law, was not arbitrary, capricious or inconsistent with law.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **AFFIRMS** the Division's October 13, 2011 decision, finding that the Johnson pond meets the depth requirements of law.

8/23/12
DATE ISSUED


SEAN A. McCARTER
Chairman, Reclamation Commission

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Appeals, within thirty days of its issuance, in accordance with Ohio Revised Code §1513.14 and Ohio Administrative Code §1513-3-22.

DISTRIBUTION:

Caroline Johnson, Via E-Mail [cj@tusco.net] & Certified Mail #: 91 7108 2133 3936 6716 8040
George Horvath, Megan DeLisi, Via E-Mail [george.horvath@ohioattorneygeneral.gov & megan.delisi@ohioattorneygeneral.gov] & Inter-Office Certified Mail #: 6682
Geoffrey Mosser, Via E-Mail [gbmosser@gbmosserlaw.com] & Certified Mail #: 91 7108 2133 3936 6716 8033

Intervenor's Witnesses:

John Dutton

Direct Examination; Cross Examination

Appellant's Witnesses:

Caroline Johnson

Statement on the Record; Cross Examination

EXHIBIT INDEX

Appellee's Exhibits:

Appellee's Exhibit 1

Professional Profile; Michael S. Kearns,
P.E.,M.S. (1 page)

Appellee's Exhibit 2

Map; As-Built Pond 6 Depths, based upon field
survey performed on May 1, 2009; map dated
May 19, 2011 (1 page)

Appellee's Exhibit 3

Topographic Map, vicinity of Johnson pond;
showing location of two springs; created in June
2011 (1 page)

Appellee's Exhibit 4

Natural Resources Conservation service,
Conservation Practice Standard 378; January
2003 (21 pages)

Appellee's Exhibit 5

Photograph; weir at spring D0608SP (taken by
Steven Maxwell in June 2011); (1 page)

Appellee's Exhibit 6

Photograph; culvert beneath the township road
(taken Steven Maxwell in June 2011); (1 page)

Appellee's Exhibit 7

Photograph; tracer dye in flow from spring, east
of township road (taken Steven Maxwell in February
2012); (1 page)

Appellee's Exhibit 8

Photograph; tracer dye in flow from spring, west
of township road (taken Steven Maxwell in February
2012); (1 page)

