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FAYETTE COUNTY SOIL CONSERVATION DISTRICT, Respondent

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BEFORE THE COMMISSIONER OF THE TENNESSEE 
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

IN THE MATTER OF:

FAYETTE COUNTY SOIL
CONSERVATION DISTRICT

Respondent

) ) DOCKET NO. 04.02-073036J
) ) CASE NO. 04003

ORDER

This contested administrative matter was heard on July 15, 2005, before James A. Hornsby, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Environment and Conservation in Nashville, Tennessee. Robert N. Cox, Assistant General Counsel for the Department, was present and represented the State. Harris Armour, III was present for the Respondent Conservation District, which was represented by attorney Matthew R. Armour.

The matter became ready for consideration on August 11, 2005, after the parties filed proposed findings and orders.

The subject of this proceeding is the determination by the Department of Environment and Conservation that the Respondent is responsible for the operation and maintenance of two dams located on Sand Creek in Fayette County, Tennessee. After consideration of the arguments of the parties and the entire record, it is DETERMINED that the Respondent is responsible for the two dams, and it is ORDERED that the Respondent comply with required repairs and maintenance on the subject dams. This determination is based upon the following Findings of Fact and Conclusions of Law:
**FINDINGS OF FACT**

1. This matter concerns two earthen dams constructed on Sand Creek in Fayette County, Tennessee. The dams were built in the late 1950’s by the federal government as demonstration projects for soil conservation. In 1957, the Fayette County Soil Conservation District (hereafter “District”) entered into a contract with the federal Soil Conservation Service (now called the National Resources Conservation Service) (hereafter “Service”) to build the dams. In consideration for construction of the dams by the federal government, the county District agreed in the contract to “be responsible for operation and maintenance.” The agreement is specifically entitled “Operation and Maintenance Agreement.”

2. The two dams have been beneficial for the area by opening new acreage to farming that was previously unused, or underused, due to the flooding, erosion and silting of Sand Creek. As demonstration projects, the dams were visited by people from throughout the country who were interested in similar soil control measures.

3. Approximately 47 years have passed since the dams were built. The dams were being well maintained while they were of interest as demonstration projects, but as the years passed and interest waned, maintenance was deferred to the owners of the land on which the dams were built, and the dams gradually fell into disrepair. The dams are currently used by the private landowners for personal farming and recreational purposes.

4. In 1973, Tennessee passed the Safe Dams Act (TCA §68-11-101 et seq.) and gave authority to the Tennessee Department of Environment and Conservation (hereafter “Department”) to establish standards for the safe construction, maintenance and operation of dams within the state. The Act requires dam operators to obtain a certificate of approval from
the Department and authorizes the Department to inspect and issue penalties for violation of the Act.

5. The subject Sand Creek dams, being over 20 feet in height and having an impounding capacity of 30 acre-feet of water, meet the definition of dams included under the Act.

6. The Department began inspecting dams throughout the State soon after the Act was passed, but because the Sand Creek dams were classified as “low hazard,” the Department did not begin to inspect them until after the higher priority dams had been secured. In 1989, The Department notified the county District that the two Sand Creek dams were in the Department’s inventory and subject to inspection. There was some written and verbal discussion between the two entities with the Department taking the position that the District was obligated to apply for and obtain a certificate of approval to operate the two dams, and the District taking the position that the private landowners were now operating and maintaining the two dam sites.

7. The Department’s first official inspection of the two Sand Creek dams was in 1997. Both dams were found to be basically sound, but in need of routine maintenance. Dam number 1 was in “fair condition”, and dam number 2 was in “marginal condition.” To bring the dams into compliance, the inspector recommended removal of debris, especially that created by beaver activity, removal of small trees, briars and brush from the slopes of the dam and the principal spillway, control of cattle grazing, repair of erosion, reseeding of bare areas and generally improvement of the vegetative cover.

8. The governing body of the county District has, of course, changed several times since the dams were built. In a letter dated February 13, 1997, the county District advised the Department that it had no record of the District having ownership of the two dams and that
without such documentation, it would not submit an application for an operation certificate. The Department replied on July 3, 1997, enclosing copies of the 1957 agreement between the county District and the federal Service wherein the District assumed responsibility for the operation and maintenance of the dams. In that letter, the Department again advised the District that it was responsible for applying for and obtaining a certificate of approval for operation of the two dams.

9. The dispute over responsibility for the two dams went on for some time, but in 2001, the county District, while not changing its opinion that it did not have responsibility, did apply for and obtain certificates of approval for the two dams. The Department issued the certificates on condition that the recommended repairs and maintenance be made.

10. The two certificates of approval expired on January 12, 2004, and the repairs had still not been made. Inspections made in 2001 and 2004 disclosed that the dams were, with some additional deterioration, in essentially the same condition as when first inspected in 1997. In 2004, the county District made arrangements with a local contractor to do the repairs, and tried to get funds from the federal government to cover the expense, but was not successful. A Department inspector issued notices of violation to the District on February 23, 2004.

11. The contract between the county District and the federal Service, wherein the District agreed to be responsible for operation and maintenance of the two dams, does not have an expiration date. A representative of the federal Service testified at the hearing that the Service usually considers 50 years to be a reasonable period of useful service for a dam, and that a maintenance contract can usually be ended after that time period. He said that since 47 years have passed since the Sand Creek dams were built, the Service would probably agree to terminate the contract if the county District requested it, but that no such request has been made, and the contract is currently a working agreement. The District has written to the federal Service
requesting decommissioning of the two dams, and that request is now under review by the federal agency.

**POSITIONS OF THE PARTIES**

12. The Department contends that the county District, by definition in the Safe Dams Act of 1973, is a state government entity that, because of its agreement with the federal government, owns and operates the subject Sand Creek dams, and is therefore responsible for complying with state law regulating the operation of those dams.

13. The county District contends that it has no ownership in the subject dams and is no longer responsible for them. It reasons that the dams were built as soil conservation demonstration projects and that they no longer serve that purpose. As they are now used for the private purposes of the landowner, they are farm ponds and exempt from requirements of the Safe Dams Act of 1973.

**CONCLUSIONS OF LAW**

1. Tennessee Code Annotated, Section 69-11-105 of the “Safe Dams Act of 1973” provides that on or after July 1, 1973, no person shall construct, enlarge, repair, alter, remove, maintain, or operate a dam in the State of Tennessee without first obtaining from the commissioner a certificate of approval and safety.

2. TCA §69-11-102 (3) defines “dam” as any artificial structure that is either twenty feet or more in height or has an impounding capacity of thirty acre-feet. It is uncontested that both of the Sand Creek dams meet this definition and are subject to the law unless they are otherwise exempt.

3. There is an exemption to the law for any structure that is a “farm pond.” A farm pond is defined at TCA §69-11-102 (8) as “Any impoundment used only for providing water for
agricultural and domestic purposes for the owner or occupant of the farm, the owner’s or occupant’s family, and invited guests, such as livestock and poultry watering, irrigation of crops, recreation and conservation, but does not include any impoundment for which the water, or privileges or products of the water, are available to the public.”

4. The definition of “farm pond” is also found in Rule 1200-5-7-.02 (22) of the Tennessee Department of Environment and Conservation, Division of Water Supply. The definition there is the same as in the statute, but the rule goes on to provide examples of what are and what are not farm ponds. Specifically listed as impoundments which are not farm ponds are “lakes owned or operated by a city, county, or the state, …and watershed district impoundments.”

5. The proof is sketchy as to whether the Sand Creek dams are “watershed district impoundments.” It seems logical that they are, but the term is not defined in the Department’s Rule and Watershed District Boards are governed under a separate statute (TCA §69-6-1-1 et seq.). However, it is not necessary to resolve that question because TCA §43-14-202 (3) of the Soil Conservation Districts Law defines “soil conservation district” as “a subdivision of this state and a public body corporate and politic,” and it is therefore DETERMINED that the Fayette County Soil Conservation District is a state government entity.

6. It is further DETERMINED that, by definition, the Fayette County Soil Conservation District is the “owner” of the subject dams. TCA §69-11-102(9) and Rule1200-5-7-.01(30) both define “owner” as any person who owns an interest in, controls, or operates a dam. “Person” is defined broadly in both the Statute and the Rule to include county corporations and entities of the state. The District is “operating” the subject dams because it has contracted with the federal government to do so.
7. Under TCA §43-14-218, the county District is authorized to 1) conduct surveys, investigations and research relating to soil erosion and the preventive and control measures needed, 2) carry out preventive and control measures, 3) construct, improve and maintain such structures as may be necessary, 4) conduct demonstration projects, and 5) take over and administer any soil conservation, erosion control or erosion prevention project…undertaken by the United States or any of its agencies. The county District was clearly acting within its authority and purpose when it entered into the agreement with the federal government to operate and maintain the Sand Creek dams as “floodwater retarding structures.”

8. Fayette County has profited from the federal government’s construction of the two dams through the reduction of flooding, silting and soil erosion along Sand Creek, the addition of many acres of underused farm land, and the distinction of having the demonstration projects in that county. In consideration for the construction of the dams, the District agreed to operate and maintain the dams. If the dams have outlived their usefulness, the District should take the proper steps with the federal government to terminate the contract, but until that is done, the District is still responsible for their operation and maintenance.

9. It is DETERMINED that the Respondent, Fayette County Soil Conservation District, is responsible for the operation and maintenance of the subject Sand Creek dams, and that said Respondent is in violation of The Department’s Rule 1200-5-7-.04(2), which requires an operator to have a current operating certificate, and Rule 1200-5-7-.06 (1) and (2) (a) and (b), which require that operators keep dams stable and with properly protected slopes.

10. The Commissioner of Environment and Conservation is authorized to administer and enforce the Safe Dams Act, and “assess civil penalties for violation of any provision of this chapter or any rule, regulation, standard adopted or order issued by the commissioner pursuant to
this chapter. TCA §69-11-104(a)(1) and (4). It is DETERMINED that the repair and maintenance requirements and the alternative civil penalties ordered by the Department in its Order of March 14, 2005, (attached to this order as Attachment ‘A’) are reasonable and are hereby UPHELD.

11. It is ORDERED that paragraphs 12, 13, 14, and 15 of the Department’s Order of March 14, 2005, be, and are hereby, incorporated into this Initial Order by reference, except that the time limitations for accomplishing the required repairs and maintenance are changed to begin running as of the date this Initial Order is filed. Therefore, the Respondent will have an additional opportunity to perform the required maintenance and avoid civil penalties.

12. It is ORDERED that the Respondent comply with the repair and maintenance procedures required by the Department’s March 14, 2005 Order.

This 21st day of September, 2005.

__________________________________________
James A. Hornsby
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 21st day of September, 2005

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Charles C. Sullivan II, Director
Administrative Procedures Division