

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

IN RE: Frederick W. and Louisa G. Williams  
Notice of Violation No. C-2771

SUPPLEMENTAL RECOMMENDED DECISION AND ORDER

This matter is before this Hearing Officer on remand by the Director dated January 31, 1992 for review and recommendations concerning two (2) additional issues not addressed in the Recommended Decision and Order dated January 17, 1992, viz., (1) whether the administrative penalty was properly assessed in accordance with the Rules and Regulations for Administrative Penalties and (2) the terms of the Order to restore the altered wetlands.

The testimony concerning these issues was previously reviewed and reported in this Hearing Officer's Recommended Decision; however, the Hearing Officer made no findings concerning these issues therein in view of the Hearing Officer's proposed conclusion recommending dismissal of the Notice of Violation and Penalty ("NOVAP") on the grounds that the Division had failed to sustain its burden of proving by a preponderance of the evidence that it was the Respondents' or their agents or servants who altered the subject wetlands. The contrary conclusion and remand by the Director now necessitates consideration of this matter by the Hearing Officer in order for him to make the requisite recommendations on these issues. The parties have previously addressed the issues concerning the validity of the Division's Order as to restoration and penalties

and have already presented their arguments in support of their respective positions concerning these issues orally and by brief. Therefore, in accordance with the remand by the Director, I will now review these additional issues based on the record evidence introduced during the hearings.

R.I.G.L. § 42-17.1-2 (v) and § 42-17.6-2 empower the Director to assess administrative penalties on any person who fails to comply with the rules, regulations or any law which the Director has the authority or responsibility to enforce.

R.I.G.L. § 42-17.6-6 outlines the considerations for determining the amount of the administrative penalty to be imposed for environmental violations.

The Rules and Regulations for the Assessment of Administrative Penalties specifies the various administrative enforcement options available to the Department.

Section 9 lists the factors relevant to the determination of the amount of the administrative penalty to be assessed to compel and ensure compliance.

Section 11 provides that the assessment of administrative penalties is to be calculated according to the "Penalty Matrix" and that the penalty range is to be determined according to the "Type of Violation" and the "Potential for Harm" caused or threatened by the alleged violations.

Dean Albro (Supervisor of the Freshwater Wetlands Division) testified at length as to the factors relied on by the Division regarding the restoration order and the imposition of the administrative penalties.

This witness convincingly established that the Division appropriately considered the following in determining the amount of the administrative penalty to be imposed as to the violations cited in the NOVAP:

(1) The actual and potential impact on the public health, safety, welfare and the environment of the failure to comply.

(2) The extent and scope of the unpermitted activities conducted and the actual and potential damages to a swamp caused by alterations which resulted in the loss and disturbance of approximately 7200 square feet of wetland (as to the first citation).

(3) The extent and scope of the unpermitted activities conducted and the actual and potential damages to that area within 50 feet of the edge of a swamp caused by alterations which resulted in the loss and disturbance of approximately 5500 square feet of wetland (as to the second citation).

(4) The amount of the penalty necessary to assure compliance and to make compliance less costly than noncompliance.

(5) The amount of the penalty necessary to deter future noncompliance and to assure that expansion of the unpermitted activities did not take place.

(6) The potential impact that would result from the unpermitted alterations due to erosion and subsequent sedimentation of eroded material down to the wetland area.

(7) The permanent loss of wildlife habitat and recreational environmental values that would result from the impact of the unpermitted alterations and the failure to remedy and mitigate whatever harm might have been done as a result of such noncompliance.

(8) The persons being assessed the administrative penalties had not taken appropriate steps to prevent the harm that was occasioned by their noncompliance.

(9) The administrative penalty for each of the violations was calculated according to the "Penalty Matrix" developed for Fresh Water Wetlands pursuant to the Rules and Regulations for Assessment of Administrative Penalties and based upon the technical evaluation of the circumstances involved, the actual or potential risk of harm to the public health, safety, welfare or the environment caused or threatened by the violations, the Division placed both violations in the major category and assessed the maximum penalty allowed for each violation viz., One Thousand Dollars, making the total administrative penalty imposed Two Thousand Dollars.

The testimony of Mr. Albro was uncontroverted, and I find his testimony is credible and most persuasive. The Respondents offered no evidence to show that the penalties imposed were excessive, and the Division's testimony that said penalties were reasonable under the circumstances and that they were assessed in accordance with the proper relevant factors was not refuted by the Respondents.

With respect to the first issue involving penalties, the evidence clearly established that the penalty assessed in the amount of \$1,000.00 for each of the two violations was

determined correctly, after due and proper consideration within the guidelines established, and was calculated properly according to appropriate relevant factors.

Respondents argued that an order mandating that the Respondents restore the freshwater wetlands to their state as of July 16, 1971 is in the nature of an injunction, and as such fails to inform Respondents of what is expected of them in clear, certain and specific terms so that they can ascertain their duties or obligations. Respondents maintain that an order requiring them to contact the Division prior to the commencement of restoration to ensure proper supervision and to obtain the required restoration details from the Division is vague and unreasonable. It is Respondents' position that the Order of Restoration is similar to a mandatory injunction, and as such requires that all of the specific terms of compliance should be included in the order. Also, Respondents urge that such an order requiring them to restore the wetlands to the satisfaction of the Division is impermissible and should therefore be dismissed.

R.I.G.L. § 2-1-23 and § 2-1-24 empower the Director by written notice to order the person responsible for the violation to restore the freshwater wetlands involved to their original state insofar as possible.

R.I.G.L. § 42-17.1-2 (v)(ii) provides that the notice (of violation) shall provide for a time within which the alleged violation shall be remedied.

The Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act contain the requisite provisions for the Division to administer said Act. Section 3.04 provides that the Division shall investigate all complaints of possible wetlands violations and that notice of the applicability of the Act be given to the owner of the land upon which the violation occurred. Section 8.00 deals with the issuance of permits to alter freshwater wetlands pursuant to the Act and details the procedures to be followed for compliance of projects involving wetland alterations. Section 9.01 authorizes the issuance of Cease and Desist Orders and Restoration Orders by the Division and 9.02 establishes the meaning of the words "within a reasonable time" as used in the Act concerning restoration.

Section 7 (b)(4) of the Rules and Regulations for the Assessment of Administrative Penalties provides that the Division may issue a formal notice of a suspected violation ("NOV") which "specifies a reasonable deadline or deadlines by which the person(s) shall come into compliance with the

requirements described in the NOV, or (ii) shall submit a written proposal setting forth how and when that person proposes to achieve compliance."

The Respondents' arguments as to the invalidity of the restoration order are not persuasive. The evidence clearly established that the wetlands on Respondent's property were altered (without a permit) by clearing, grading, filling, stockpiling of debris, construction of a shed and portions of an individual sewage disposal system and house. These alterations had taken place recently prior to the Division's inspection on December 6, 1988 (in response to a complaint received by the Division on November 7, 1988) and in any event were not in existence as of January 29, 1988, the date on which the Division inspected Respondents' property for the purpose of making a preliminary determination at the request of the Respondents.

The Division's order that Respondents restore said wetlands to their state as of July 16, 1971 within a reasonable deadline is one of the enforcement options available to the Division pursuant to the Statutes and the Rules and Regulations for the Assessment of Administrative Penalties. Said order obviously requires the removal of the debris, shed and those portions of

the ISDS and house which had already been accomplished in violation of the Freshwater Wetlands Act, in addition to restoring the premises to its previously unaltered condition.

The order that the Respondents contact the Division prior to the commencement of restoration to ensure proper supervision and to obtain required restoration details from the Division is certainly reasonable and proper. The provisions of the Wetlands Act that prohibit anyone from altering the character of any freshwater wetland without first obtaining the approval of the Division should necessarily apply with equal force to one who must undo the unpermitted alterations, which by necessity involves further activities within the protected wetlands. It is virtually impossible to return said wetlands exactly to their previously unaltered state, and any activities required to restore said wetlands should be accomplished under the supervision and control of the Division. The Regulations authorize the Division to require a violator to submit a written proposal setting forth how and when that person proposes to achieve compliance, and it would appear that the requisite restoration could not be effectuated without contacting the Division to promulgate the restorative procedures.



The Respondents' argument that the Restoration Order is invalid lacks merit. The order issued by the Division informs the Respondents of their obligations in clear, certain and specific terms and leaves no doubt whatsoever as to what Respondents are required to do. The many cases cited by Respondents concerning the specificity required in injunctions are clearly distinguished from the instant matter, because the restoration ordered by the Division is clear and unambiguous and can in no way be characterized as vague. The status and condition of the wetlands prior to alteration should most likely be better known by the Respondents; however, the specifics or the details necessary for restoration should properly be submitted by Respondents to the Division and worked out with the Division pursuant to the Statutes and Regulations.

With respect to the second issue involving restoration, the order mandating restoration of the freshwater wetlands to their state as of July 16, 1971 certainly informs Respondents of their obligations in clear, certain and specific terms. The requirement that the Respondents contact the Division prior to the commencement of restoration to ensure proper supervision and to obtain the required restoration details complies with the Statute and Rules and Regulations and is certainly warranted

under the circumstances. The evidence clearly establishes that the terms of the Order are reasonable and not oppressive, and therefore, that the Restoration Order should be upheld.

Supplemental Findings of Fact

I have reviewed the entire record in this matter, and in accordance with the conclusion by the Director that the Respondents were responsible for the violations, I find the following supplemental findings of fact:

1. That the administrative penalty assessed against the Respondents in the total amount of Two Thousand Dollars (\$2,000.00) is not excessive and certainly reasonable and warranted under the circumstances.
2. That complete restoration of the wetlands on the site is necessary in order to restore the wetlands to their natural, unaltered condition.

Supplemental Conclusions of Law

Based upon the foregoing and the entire record, and in accordance with the conclusions by the Director, I make the following supplemental conclusions of law:

1. That the Department is entitled to the relief requested in Restoration Order and Penalty as set forth in the NOVAP.
2. That the NOVAP should be affirmed in its entirety (except as modified herein as to dates and times).
3. That the Respondents must comply with the Restoration Order as set forth in the NOVAP and completely restore the subject wetlands in accordance with the requirements of the Department's Division of Freshwater Wetlands no later than forty-five (45) days after the date of the Final Order herein.

4. That the Respondents must pay a total administrative penalty of Two Thousand Dollars (\$2,000.00) to the Department no later than ten (10) days after the date of the Final Order herein.

Based upon the foregoing determination of the two additional issues and the entire facts and testimonial and documentary evidence of record and the Conclusions of Law as determined by the Director in her remand dated January 31, 1992, and as additionally set forth herein, I now recommend that the Order as hereinafter set forth be adopted as a Final Order.

Wherefore, it is hereby

**ORDERED**

(1) That the Notice of Violation and Order and Penalty issued to the Respondents dated December 30, 1988 be and is hereby sustained.


(2) That the Respondents restore said freshwater wetlands to their state as of July 16, 1971 insofar as possible within forty-five (45) days of the date of the Final Order herein.

(3) That the Respondents contact the Division of Freshwater Wetlands of the Department of Environmental Management prior to the commencement of restoration to ensure proper supervision and to obtain the required restoration details from the representatives of said Division.

(4) That the Respondents pay an administrative penalty in the sum of One Thousand Dollars (\$1,000.00) for each of the two violations, making the total of the penalty assessments for said violations in the amount of Two Thousand Dollars (\$2,000.00). Such payment shall be in the form of a certified check made payable to the Treasurer, State of Rhode Island, and shall be delivered to the Director within ten (10) days of the date of the Final Order herein.

I hereby recommend the foregoing Supplemental Recommended Decision and Order to the Director for issuance as a Final Order.

February 13, 1992

  
\_\_\_\_\_  
Joseph F. Baffoni  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
One Capitol Hill, 4th floor  
Providence, RI 02908

Entered as a Final Order this 17 day of February, 1992.

February 17, 1992

Louise Durfee  
Louise Durfee  
Director  
Department of Environmental Management  
9 Hayes Street  
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Final Order to be forwarded via regular mail to John B. Webster, Esq., Adler, Pollock & Sheehan Inc., 2300 Hospital Trust Tower, Providence, RI 02903; and via interoffice mail to Catherine Robinson Hall, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 17<sup>th</sup> day of February, 1992.

Neil Greene