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

RE: HONE, FREDERICK T., JR. **AAD NO. 08-001/MM**
NOTICE OF VIOLATION C93-0208 AND CI 05-184

DECISION AND ORDER

This matter came before the Department of Environmental Management ("DEM"), Administrative Adjudication Division for Environmental Matters ("AAD") for hearing pursuant to Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the DEM Office of Compliance and Inspection ("OC&I" or "Department") on January 15, 2008 to the Respondent Frederick T. Hone Jr. Living Trust and Frederick T. Hone, Jr. ("Mr. Hone" or "Respondent"), for properties located at 339 and 331 A & B South County Trail, also identified as Assessor's Plat 67-1, Lot 2, and Plat 67-1, Lot 3 in the Town of Exeter, Rhode Island, (the "Property").

The NOV cited Respondent with ten violations of the Rhode Island Freshwater Wetlands Act (R.I.G.L. 2-1-21 et seq.) and the Rules and Regulations promulgated in accordance therewith, and with six violations of the DEM Rules and Regulations Establishing Minimum Standards Relating to the Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems (the "ISDS Regulations"). *See Exhibit OC&I 1, NOV dated January 5, 2008, p. 15, Administrative Penalty Summary.* The NOV ordered the Respondent to immediately cease and desist from further alteration of the subject wetlands, and to restore the wetlands that had been altered in accordance with certain standards laid out in the NOV, and to immediately take steps to reduce the discharge of wastewater to the ISDS, to submit and ISDS repair application within 30 days, and to complete the repair or other appropriate project in accordance with a method and within a timeframe to be approved by DEM. The NOV further assessed an administrative penalty in the amount of eleven thousand

seven hundred dollars ($11,700.00) for the sixteen violations.

An administrative hearing was held on June 16, 2015 before Chief Hearing Officer David Kerins. At the outset of the hearing it was established that the parties had reached an agreement with regard to all issues in this matter with the exception of the penalty. To that end a copy of the Consent Agreement was entered into the record as Joint Exhibit 1. Therefore, the sole issue for determination during the hearing was whether the penalties assessed in the NOV were appropriately calculated in accordance with the relevant statute and the Rules and Regulations for Assessment of Administrative Penalties, and should be upheld as assessed.

At the close of the hearing, Chief Hearing Officer Kerins ordered that the Post-Hearing Memorandum of the Respondent should be filed by July 20, 2015, with OC&I's to be submitted within thirty (30) days after the filing of Respondent's memorandum. The parties filed their respective Post-Hearing Memoranda in a timely manner.

Hearing Summary

The sole issue for determination during the hearing was whether the penalties assessed in the NOV were appropriately calculated in accordance with the Penalty Regulations, and should be upheld as assessed. At the hearing, OC&I called one witness during its case in chief, David Chopy, Chief of the Office of Compliance and Inspection. Mr. Chopy testified generally regarding the requirements of his day-to-day job as Chief of OC&I with regard to the development of the penalty in this particular instance. Mr. Chopy testified in detail about the developments of the penalty section of the NOV, the Penalty Regulations, and how those

regulations were applied in developing and assessing the penalty in this NOV.

Mr. Chopy also testified that two informal letters were sent to the Respondent prior to the issuance of this NOV, informing him of the presence of violations and outlining what was required to bring the property back into compliance in order to avoid the issuance of an NOV and penalty. These Notices of Intent to Inforce, Exhibits OC&I 2 and 3, were issued to the Respondent on October 7, 2005 and May 25, 2006, and were delivered by certified mail to the Respondent, as evidenced by his signature on the return receipts attached to the letters in Exhibits OC&I 2 and 3.

The Respondent then cross-examined Mr. Chopy about the relevant statutes relating to the assessment of administrative penalties for environmental violations (R.I.G.L. Chapter 42-17.6), and about Mr. Hone's tax returns from the years 2009-2014, most of which were submitted to the department as part of the extensive settlement discussions that were undertaken between the parties in this matter. OC&I objected to the admission of those tax returns into evidence, as they are not relevant to the determination whether the penalties in the NOV were calculated appropriately, and the Department did not have those records at the time the NOV was prepared and the penalties were calculated. The Respondent's cross examination of Mr. Chopy included discussion of the settlement negotiations undertaken by the parties, including Mr. Hone's position that he is without the financial ability to pay the penalty as assessed. During his cross examination, Mr. Chopy explained that the tax returns submitted by Mr. Hone during settlement negotiations were found to be incomplete, and overall were not accurate such that the Department found that, based on the information presented by the Respondent in support of his inability to pay in this instance, the Department was unable to conclude that Mr. Hone was without the ability to pay any portion of

the penalty at all. Upon the conclusion of Mr. Chopy's testimony the Department rested. The Respondent did not present any witnesses and indicated that he intended to rely on legal arguments and his interpretation of the Penalty Statute and Regulations.

STANDARD OF REVIEW AND BURDEN OF PROOF

The Rules and Regulations for the Assessment of Administrative Penalties (the "Penalty Regulations") set out the proper standard of review and burden of proof to be applied in administrative hearings on enforcement matters. Rule 12 (c) of the Penalty Regulations specifies that:

> At an enforcement hearing, the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

The AAD's interpretation of this provision requires the Department to prove the alleged violation by a preponderance of the evidence which "includes establishing, in evidence, the penalty amount and its calculation." The violator then bears the burden of proving that the penalty and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations. *In Re: Richard Fickett, AAD No. 93-014/GWE,* Final Decision and Order issued by the Director on December 9, 1996.

Analysis

While the existence of the violations was not contested here, OC&I met its burden of demonstrating that the penalty was calculated fairly and accurately in accordance with the Penalty Regulations. The burden then shifts to the Respondent to demonstrate by a preponderance of the evidence that the administrative penalty was not properly assessed in accordance with the Penalty Regulations.

The authorizing statute in this matter is R.I.G.L. § 42-17.6-6 "Determination of Administrative Penalty". ("Penalty Statute") The Respondent points to the following language "In determining the amount of each administrative penalty the director shall include, but not be limited to, the following to the extent practicable in his or her consideration". The statute then lists eleven (11) factors. Factor (7) states "The financial condition of the person being assessed the administrative penalty". The Respondent argues that the Director through her representatives, did not take the financial condition of the Respondent into consideration, at the time of the issuance of the NOV. The Department argues that it is not practical or possible for the Department to take the financial condition of the Respondent into consideration prior to issuing of the NOV.

The Department adopted Regulations pursuant to R.I.G.L. § 42-17.6-6 entitled "Rules and Regulations for the Assessment of Administrative Penalties" ("Penalty Rules") in May of 2000. Section 10 of the Penalty Rules reflects the factors to be considered in determining the Administrative Penalty. Section 10 lists all of the factors listed in the statute except the "financial condition of the person being assessed the Administrative Penalty."

Section 11 of the Penalty Rules is entitled "Assessment of Administrative Penalty – Resolution Prior to Hearing". This rule contemplates a process whereby the Director can

reconsider the NOV based on additional information provided by the Respondent. In section11 subsection (e) the Penalty Rules provide "The Director may consider the following factors in negotiating a final resolution of the penalty, prior to hearing... (6) the financial condition of the person being assessed the administrative penalty".

The enabling legislation required the Director to take the Respondent's financial condition into consideration "to the extent practicable" R.I.G.L. 42-17.6-6. Is it practicable for the Director to take the financial condition of each alleged violator into consideration prior to the issuance of an NOV containing an administrative penalty? It is not. The Director does not have the authority to request or obtain the information relating to an alleged violator's financial condition prior to or even after the issuance of an NOV. The obtaining of information relating to an alleged violator's financial consideration is dependent on the cooperation of the alleged violator. In order for the Director to consider an alleged violator's financial condition the alleged violator must bring the information forward. If the Director had to wait for an alleged violator to come forward with his or her financial information before an NOV, with administrative penalty, could be issued then very few NOV's would be issued. It is not "practicable" for the Director to be precluded from issuing an NOV with an administrative penalty until after the alleged violator has voluntarily provided his or her financial information.

The drafters of the Penalty Rules provided for a way that the Director could consider the financial condition of the Respondent is Section 11 (e) (6). After the issuance of the NOV and before the Administrative Hearing, Section 11 of the Penalty Rules provides a list of factors to guide the Director in reaching a resolution. The factors listed in Section 11 of the Penalty Rules requires voluntary cooperation of the parties. In the case of consideration of the Respondent's financial condition it requires the full and honest cooperation of the Respondent. The Director is required to consider the Respondent's financial condition in attempting to

reach a resolution after the issuance of an NOV. The Respondent, inferentially, is required to provide a complete and honest representation of his financial affairs. The Director is not required to consider financial information provided by the Respondent which is not complete and honest.

The Respondent provided financial information at the Administrative Hearing. He presented tax returns. The returns of Mr. Hone for the years 2009 through 2014 were admitted as Respondent's Exhibit A Full over the objection of OC&I. (Tr. p 75) Mr. Chopy testified that he had not seen the tax returns prior to the issuance of the NOV (Tr. p 91). He testified that he received them after the issuance of the NOV as part of settlement discussions. He said that they have the ability to consider "three years of tax returns and whatever other financial documents we think are needed to try to support their argument that they don't have the ability to pay" (Tr. p 92, 17-20). Mr. Chopy testified that he considered the tax returns to be "improperly calculated" (Tr. p 87, 17) and therefore were not of use in determining the Respondent's ability to pay.

It is important to point out that this appeal is being taken on basis that the Director did not properly assess the administrative penalty at the time of the issuance of the NOV. This appeal is not to review the propriety of the post NOV settlement discussions. The Director did not have the tax returns submitted by Respondent during the Administrative Hearing and therefore those tax returns are irrelevant. The Respondent was allowed to submit those returns as a courtesy so he could make his legal argument. The tax returns are not being considered in this decision.

The Respondent has not sustained his burden of proving by a preponderance of the evidence that the Director failed to assess the penalty in accordance with the Penalty Regulations.

Conclusion

The violations in this matter were admitted by Consent Agreement. The only thing to be determined by the Administrative Hearing was the propriety of the Administrative Penalty at the time of the issuance of the NOV. OC&I has presented a prima facie case that the Administrative Penalty was properly calculated in accordance with the Penalty Rules. The Respondent has failed to bear the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty in accordance with the Penalty Rules. Respondent's appeal should be denied and dismissed.

Findings of fact

1. The Administrative Adjudication Division of the Department of Environmental Management ("AAD") has jurisdiction over the person and subject matter of the pending matter;

2. The Respondent is the owner of certain property located at 339 South County Trail, Assessor's Plat 67-1, lot 2 and 331 A&B South County Trail Assessor's Plat 67-1, Lot 3 in the Town of Exeter, Rhode Island ("subject premises");

3. On January 15, 2008 the Respondent was issued a Notice of Violation ("NOV") which alleged sixteen (16) violations of certain statutes and/or administrative regulations under the jurisdiction of the RIDEM; (OC&I Exhibit 1 except for administrative penalty);

4. The NOV contained an administrative penalty assessed against the Respondent of Eleven Thousand Seven Hundred ($11,700.00) Dollars;

5. The Respondent filed a timely appeal to the AAD on January 30, 2008;

6. The parties entered into a Consent Agreement on June 8, 2015 (Joint Exhibit 1 Full) in which the Respondent admitted the sixteen (16) violations alleged in

the NOV but did not admit that the administrative penalty was calculated in accordance with the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Rules');

7. On June 16, 2015 and Administrative Hearing was held on the sole issue of the propriety of the administrative penalties as presented in the NOV;

8. Witness David Chopy testified that the administrative penalty was assessed in accordance with the Penalty Rules;

9. Respondent presented at the Administrative Hearing copies of Tax Returns for 2009 through 2014 (Respondent's Exhibit A Full);

10. The tax returns had not been submitted to RIDEM prior to the issuance of the NOV;

11. The tax returns were submitted to RIDEM as a part of settlement negotiations prior to the Administrative Hearing;

12. Respondent's tax returns (Respondent's Exhibit A Full) are irrelevant.

13. The Respondent has not proven that the Director failed to assess the penalty in accordance with the Penalty Rules;

14. The administrative penalty was assessed in accordance with the penalty rules.

Conclusions of Law

1. The AAD has jurisdiction over the person and subject property of the pending Matter.

2. The imposition of administrative penalties in environmental matters is governed by R.I.G.L. § 42-17.6 et seq. ("Administrative Penalties for Environmental Violations" and the Rules and Regulations for the Assessment of Administrative Penalties".

3. R.I.G.L. § 42-17.6-6 "Determination of Administrative Penalty directs the Director to consider the financial condition of the person being assessed the the administrative penalty" to the extent practicable.

4. It is not practicable for the Director to consider the financial condition of the alleged violators prior to the issuance of a Notice of Violation

5. Section 12 of the Penalty Rules entitled "Assessment of Administrative Penalty". Resolution prior to Hearing at subsection (e) (6) provides a method for the Director to adjust an administrative penalty based on the financial condition of the person being assessed the administrative penalty.

6. Tax returns submitted after the issuance of the NOV are not relevant to the question of propriety of administrative penalty contained in the NOV.

Based on the forgoing Findings of Fact and Conclusions of Law it is hereby

Ordered

1. The Respondent's Appeal is **Denied and Dismissed**.

2. The NOV dated January 15, 2008 is **affirmed.**

Entered as an Administrative Order this 27th day of October, 2015.

David Kerns
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill 2nd FL
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid to: Robert E. Craven, Esquire, 7405 Post Road, North Kingstown, RI 02852, and via interoffice mail to Susan Forcier, Esq., DEM Office of Legal Services and David Chopy, Chief, DEM Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this 27th day of ~~May~~ October, 2015.