

PREHEARING CONFERENCE

The Prehearing Conference on AAD No. 92-014/FWE (NOV C91-0381(a) and (b)) was conducted on December 4, 1992. Consolidation of the two AAD matters was granted on September 27, 1993. A Prehearing Conference as to AAD No. 92-006/FWE (NOV C91-0382) was scheduled for October 4, 1993 but cancelled at the parties' request upon their representation that the prior Prehearing Conference essentially covered the matter. Additional documents offered by the Division were required to be filed with the AAD by October 4, 1993. The parties also filed eight stipulations of fact.

The stipulations as to both AAD matters which were filed prior to hearing, have been combined and are attached hereto as Appendix A, and incorporated into this Decision and Order.

The exhibits proffered by the parties, and marked as they were admitted at hearing, are indicated on Appendix B, attached hereto.

For purposes of clarification, it is noted that the occurrence which generated the NOV identified as AAD No. 92-014/FWE, had resulted in an earlier NOV which was released when lot 142 was subdivided, then reissued for the appropriate new-numbered lot 136 (with the same NOV C91-0381 identification). The reissued NOV is the subject of AAD No. 92-014/FWE. One of the lots identified in NOV C91-0382 was also renumbered, which resulted in a partial release of violation as to the relabelled lot. The occurrences on the

remaining lot identified in the NOV is the subject of AAD No. 92-006/FWE.

HEARING SUMMARY

The hearing on the two consolidated matters was held on October 14 and 18, 1993. Post-hearing memoranda were filed on November 19 and 22, 1993.

The Division called as its witnesses Gashy Dowlatshahi, President and sole owner of Gashy Construction ("Gashy"), the Respondent named on the two Notices of Violation and Order; Tracey Carlson, senior natural resource specialist at the Division of Freshwater Wetlands; and Harold K. Ellis, the enforcement supervisor of the Division. Both Ms. Carlson and Mr. Ellis were qualified as experts in wetlands ecology, interpretation of aerial photography and in natural resources.

Respondent's counsel called as witnesses Gashy Dowlatshahi and Karen (Dupont) Beck, a landscape architect and wetlands scientist at Commonwealth Engineers and Consultants, Inc.

I. BACKGROUND

In 1989 Gashy was issued an NOV for lot 107, an area comprised of approximately 47 to 50 acres which later became Assessor's Plat 26, as a result of a site inspection which revealed that there had been clearing, grading and soil disturbance into a swamp and in that area within fifty (50) feet of a swamp (Tr. 1-13, 138). In an attempt to resolve the NOV, Tracey Carlson met on site with Mr. Dowlatshahi and

his biologist Karen Dupont on August 21, 1990.

At that meeting, according to Ms. Carlson, the swamp was flagged and stakes were placed up on the road cut to indicate the area within fifty (50) feet of the swamp. (Tr. 1-141). This same swamp and perimeter wetland became the subject of the NOV's set forth below, which were issued in 1992.

As a result of the August 1990 meeting, Respondent willingly removed the fill, relocated the cul de sac, and placed haybales along the flagline. Though it is unclear whether a Consent Agreement was ever offered or executed, the parties agree that the area was restored and a penalty paid. (Tr. 1-98, 34).

As Mr. Dowlatshahi explains it, after he restored the area, he called Ms. Carlson to come and inspect "...it was fine, but she noticed the detention pond, and that's when this whole thing started again." (Tr. 2-122).

On February 13, 1992, the Division issued Notice of Violation and Order C91-0381(a) (JT 6) alleging that Gashy Construction did accomplish or permit alterations of freshwater wetlands through detention basin construction and associated filling, grading, clearing and creating soil disturbance into a perimeter wetland, resulting in an alteration of approximately 5525 square feet of wetland. The subject site is located approximately 80 feet north of the dead end of Nardolillo Street, approximately 2025 feet from the intersection of Nardolillo Street and Plainfield Pike,

Assessor's Plat 26, Lot 136, in the Town of Johnston, Rhode Island. In testimony, this site was referred to as "Site A".

At the time of the alleged alteration of Site A, Judith Gaudette was the owner of record and a Notice to Owner C91-0381(b) (JT 7) was issued accordingly. Subsequently, the property was transferred back to Gashy who is the present owner of the site. (TR 2-83).

On January 9, 1992 the Division issued Notice of Violation and Order C91-0382 (DEM 19 Full) alleging that Gashy Construction did accomplish or permit alterations of freshwater wetlands in two instances: through road construction and associated filling, grading, clearing and creating soil disturbance into a perimeter wetland and into a riverbank wetland, resulting in an alteration of approximately 7750 square feet of wetland; and by filling, grading, and creating soil disturbance into a swamp and into a riverbank wetland, resulting in an alteration of approximately 200 square feet of wetland. The site of these alleged alterations, as set forth in the NOV, is located at the north end of Nardolillo Street, approximately 2025 feet from the intersection of Nardolillo Street and Plainfield Pike, Assessor's Plat 26, Lots 141 and 134 in the Town of Johnston. Due to the renumbering of the lots, the Division on January

30, 1992,¹ issued a Release of Violation (DEM 21 Full) as to lot 134.

The hearing therefore proceeded only as to lot 141, which was referred to in testimony as "Site B".

For both NOVs, the Division seeks restoration of the Wetlands areas and the assessment of a \$1,000.00 administrative penalty as to the Site A Violation and a \$2,000.00 administrative penalty for the Site B violations, for a total penalty on the two matters of \$3,000.00. The release as to lot 134 did not affect the relief sought by the Division (Tr. 2.-43-45).

II. THE VIOLATIONS

Tracey Carlson testified that on October 25, 1991 she conducted a field inspection wherein she determined, through the presence of hydrophytic vegetation, the existence of a swamp, the size of the wetland, and then measured that area of land within fifty (50) feet of the edge of the swamp. (Tr. 1-73). She observed a detention basin on Site A, "built right up to the edge of the swamp" in the perimeter wetland, and saw "cul de sac construction and also some filling, clearing, grading and soil disturbance within a swamp and a 50-foot perimeter wetland that were present on Site B." (Tr. 1-121). To verify what she determined in the field, Ms. Carlson

¹Parenthetically, in my review of this document, it came to my attention that it is incorrectly dated, "this 30th day of January, A.D. 1991". As it is releasing a January 1992 NOV, clearly the wrong year-1991-was written.

reviewed aerial photographs and affirmed the presence of a wetland on the sites, its size and location. (Tr. 1-71).

Harold K. Ellis, as supervisor, reviewed Ms. Carlson's work, those documents now marked Resp. 3 Full, JT. 1, JT. 2, and JT. 3, and concluded to a reasonable degree of scientific certainty that freshwater wetlands existed on Site A, as well as an area within fifty (50) feet of the edge of a swamp, and that the freshwater wetlands had been altered (Tr. 2-19, 20); he drew a similar conclusion as to Site B: that a swamp, a fifty (50) foot perimeter wetland, and a two hundred (200) foot riverbank wetland existed on the site and had been altered as described in the NOV (Tr. 2-36). No permits for the alterations had been issued. (Tr. 2-24, 38).

In testimony, Mr. Dowlatshahi admitted that Gashy Construction Company had done the work through its employees or subcontractors. (Tr. 2-83). He also testified that he had not applied for a permit to alter wetlands on the property (Tr. 2-88); that the detention basin was still in place, as were the roadway and cul de sac (Tr. 1-38-39); and that he is the present owner of that property identified as Assessor's Plat 26, lot 136, (Site A) and Assessor's Plat 26, lot 141 (Site B). (Tr. 2-82-83).

III. ESTOPPEL/EQUITY ISSUE

What occurred at the August 21, 1990 on-site meeting, held to resolve the 1989 NOV, and Respondent's actions thereafter serve as the impetus for his counsel's argument

that the Department should be estopped from taking any action regarding the pending NOV's; that it misled Respondent regarding the location of jurisdictional wetlands; and that equity requires that the Department rescind its NOV's and allow the improvements to remain. Gashy Construction Company's Post-Hearing Memorandum of Law.

For the reasons set forth in Re: Tammie & Mitchell Parkhurst, NOV No. C90-0165, Final Agency Decision dated December 24, 1993, estoppel and equity issues should be considered by this tribunal, but weighed with a reluctance to apply the doctrine of equitable estoppel against the government. Lerner v. Gill, 463 A2d 1352 (RI 1983). Only in "unusual or extraordinary circumstances" can the doctrine of equitable estoppel be applied against government. The party seeking the estoppel must show, inter alia, affirmative misconduct on the part of the government. Newport Nat. Bank v. U.S., 556 F. Supp. 94, 98 (D. RI 1983). The facts and circumstances of each case must be closely scrutinized to determine whether justice requires the imposition of estoppel. Lerner at 1362.

Prior to determining whether Respondent has met the extra burden to bypass the general rule against governmental estoppel, Respondent must show that the testimony and evidence of record supports an argument of estoppel or other equity protection. That is, he must "...at least demonstrat[e] that the traditional elements of estoppel are present." Heckler v.

Community Health Services, 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed. 2d 42, 53 (1984), as cited in Respondent's Brief, p.6. "Thus, a party claiming the estoppel must have relied on its adversary's conduct in such a manner as to change his position for the worse, and the reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." Heckler at 51-52, as cited in Respondent's Brief, p. 3.

In Respondent's closing argument, his counsel stated that "this is a case that I don't believe there's going to be a problem of credibility assessment in terms of somebody's lying and somebody's telling the truth, but in terms of somebody recalling better what had occurred out there." (Tr. 2-150). To support the estoppel and equity argument, it is his contention that Ms. Carlson flagged the jurisdictional wetland; that is, one set of flags marked not only the biological wetland, but also the perimeter wetland. Along this flag line, Gashy, as he had been directed to, placed haybales. He was told that the flags meant "on this side is wetland." (Tr. 1-42). He testified that he then stayed "about ten feet away from the flagged area, five to ten feet." (Tr. 1-27). Gashy proceeded to build the road and retention basin in an area "identified by Ms. Carlson as being outside the jurisdictional wetland, and therefore beyond the control of the DEM." Respondent's Brief, p.1. According to counsel, Ms. Carlson later issued the 1992 NOVs, "denying that she had

flagged the jurisdictional wetland and indicated where on the Property Gashy could place the road and retention basin without violating the Freshwater Wetlands Act." at 1.

Ms. Carlson, on the other hand, testified that she had flagged the biological wetland, then measured fifty (50) feet for the perimeter wetland and placed stakes up on the road cut to mark the protected area. "I told" him that that area between the stakes that I had placed up on the top of the fill and the blue flags that I had placed at the edge of the swamp would have to be removed." (Tr. 1-94). Haybales were to be placed along the flagline.

Gashy testified that while he remembered the blue flags, he did not remember any stakes. (Tr. 2-100). Later, under Division cross-examination, he was less certain there were no stakes:

"Q. But now you don't remember the stakes at the end on the roadway, do you?

A. Okay, she's saying that she put one stake in. I don't recall if she put one or two stakes. She said she did, okay. I definitely remember every blue flag..." (Tr. 2-111-112).

He also had not recalled that his biologist Karen Dupont had been present for the flagging, until she reminded him later in the hearing. (Tr. 1-41; 2-90). He then testified that Karen Dupont had accompanied Tracey Carlson as she flagged the area. (Tr. 2-95).

Karen (Dupont) Beck, testifying on Respondent's behalf,

provided the sockdolager to counsel's argument for estoppel. Her recitation of events and notes of the August 21st meeting serve to confirm Ms. Carlson's version of what had occurred on-site and that Respondent had not been misled regarding jurisdictional wetlands in the area. She testified that typically the Department or any consultant would flag the biological wetland but not the perimeter wetland. It would be standard practice in the industry to just flag the wetland proper. (Tr 2-137-138). But according to Mrs. Beck, Tracey Carlson flagged both the edge of the wetland and its 50 foot perimeter, which was unusual enough that she wrote it down in her Notes of Meeting (Resp. 10 Full) (Tr. 2-138).

Testimony elicited from Mrs. Beck under cross-examination by the Division removes any doubt that both areas were separately marked:

Q. So then what you're saying is that Ms. Carlson flagged both the edge of the swamp and the edge of the 50-foot perimeter?

A. Uh-hum, correct.

Q. Okay. So there were two lines of flags?

A. Yes

Q. And what did you understand, did you understand that in between those two lines of flags is the 50-foot perimeter that goes with the swamp area?

A. Yes

Q. And on August 21, 1990, Ms. Carlson walked the edge of the swamp with you, did she not, as she placed the blue flags?

A. I don't remember specifically walking it with her as

she placed the flags, but I do remember that she placed flags for both areas, that's correct.

Q. And when she placed the flags on the edge of the swamp, she told you that was the edge of the swamp?

A. Yes

Q. And when she placed the flags at the end of the 50-foot perimeter, she told you that was the 50-foot perimeter?

A. Yes

Q. And she also told you on that day the fill in between the 50-foot perimeter line and the swamp line had to be moved, did she not?

A. Yes

Q. And did you advise Mr. Gashy of that fact as well, that Ms. Carlson told you that?

A. I didn't personally need to inform Gashy, because everything that happened that day happened right then and there, it was Tracy there, Gashy there and myself..." (Tr. 2-144-145).

After the August 21st meeting, Mrs. Beck, despite the fact that she is responsible for all the environmental work at Commonwealth Engineers, had no further involvement in this case. (Tr. 2-142, 145-146). Gashy removed the fill in accordance with the instructions and directives given by Ms. Carlson (Tr. 2-95) and had his engineers redesign the road. His crew then did the work according to the new plan. (Tr. 2-102). As a result, the pending NOV's were issued.

IV. RESTORATION

The Division has provided clear evidence that violations of R.I.G.L. §2-1-21 occurred, resulting in the pending NOV's. §2-1-23 provides that "[i]n the event of a violation of §2-1-

21, the director of environmental management shall have the power to order complete restoration of the fresh water wetland area involved by the person or agent responsible for the violation."

Harold K. Ellis testified as to the Division's restoration requirements for both Site A and Site B.

For Site A:

That would mean the removal of the detention basin, all berms, all pipes, any riprap that exists there, down to its original grade which existed prior to the alteration, pulling the pipe out of that area of land within 50 feet of the swamp, stabilizing all the soils with loam, seed and a mat of loose hay, placing haybales where necessary to prevent erosion and sedimentation, replanting all disturbed, restored areas with trees and shrubs, specifically trees would include red maple and white pine four feet high, ten feet on center, interspersed throughout those areas, shrubs would include blueberry, highbush blueberry and sweet pepper bush, three feet tall, five feet on center throughout all areas. Any remaining slopes which existed after the removal of the detention basin would be graded back at a three-to-one slope or shallower and those areas would be stabilized as well. (Tr. 2-33).

For Site B:

Site B would require the removal of that portion of the culdesac which exists within the 50-foot perimeter wetland. That culdesac would include the asphalt surface and the underlying fill. Any pipes that were exiting, whether they were water lines or gas lines, electric, the utility poles exist, would have to be removed, a slope would have to be established, gradual slope which would be stabilized with loam and seed, and if the slope is not too severe, just sufficient plant materials, such as grass, may be necessary, it may need hay mulch placed over the area, but if the slope is severe, it may need itself matting as well. The pipe exiting from the remainder of the culdesac would have to be engineered, a plan would be necessary, possibly riprap or whatever engineering requirements are necessary outside of the wetland area would be required, all disturbed areas would be loomed and seeded and all areas would be planted with

shrubs and trees, specific trees, red maple, white pine, four feet tall, ten feet on center, interspersed throughout the area; shrubs, highbush blueberry, sweet pepper bush, three feet tall, five feet on center, established throughout the area. (Tr. 2-44-45).

The plan required by the Division should reflect any discharge that would be exiting out from the remainder of the culdesac on Site B. (Tr. 2-45).

Restoration, as set forth above, is warranted in this matter.

V. ADMINISTRATIVE PENALTY

As indicated in the Notice of Violation pertaining to Site A (JT 6), the Division seeks an administrative penalty of one thousand (\$1,000.00) dollars for Respondent's violation of the Freshwater Wetlands Act through detention basin construction and associated filling, grading, clearing and creating soil disturbance into a perimeter wetland. Mr. Ellis, who ultimately determined the penalty, testified that the Division examined the area of alteration; the extent of area altered; the location of the alteration; the types of vegetation affected, "...in this case the entire 50-foot perimeter were eliminated" (Tr. 2-28-29); and the nature of the alteration, "...in this case there was a structure, a detention basin" (Tr. 2-29). He also considered the amount of penalty necessary to ensure immediate compliance; the amount necessary to ensure or eliminate future noncompliance; whether the individual undertook measures to mitigate or prevent harm, "in this case we felt that he had not"; whether the person had

previously failed to comply with any statute, rule or regulation, in this case, the NOV C89-185; prior knowledge; and the public interest. (Tr. 2-29).

Mr. Ellis testified that he concluded the violation fell within the "Major" classification in the penalty assessment Matrix (Tr. 2-31) and that the maximum penalty should be assessed.

For the Notice of Violation pertaining to Site B (DEM 19 Full), the Division seeks an administrative penalty of one thousand (\$1,000.00) dollars for each of the two instances set forth therein whereby Respondent violated the Freshwater Wetlands Act, bringing the total administrative penalty sought for the violations on Site A and Site B to three thousand (\$3,000.00) dollars. Mr. Ellis testified that he considered the identical factors in arriving at the Site B penalty as he had in determining the appropriate penalty for Site A. (Tr. 2-39). The partial release of the NOV as to lot 134 (Div 21 Full) did not alter the amount of the penalty sought by the Division. (Tr 2-43).

Respondent's counsel conducted a thorough cross-examination of Harold Ellis and argued that the penalty was punitive and did not achieve the goals which determined the amount of the penalty. That is, the maximum penalty, according to counsel, would not affect the condition of the wetland, and would not ensure immediate compliance or deter future noncompliance. The witness responded that a higher

penalty can be used to ensure immediate compliance and to deter future noncompliance by providing a disincentive to further violation. Compliance would relieve the Division from having to issue additional notices of violation. (Tr 2-54, 56).

Respondent's counsel also focused on prior knowledge as a factor considered in determining the penalty. According to Mr. Dowlatshahi's testimony throughout the hearing, it was his intent to correct the 1989 violation and achieve a re-designed development that complied with the Freshwater Wetlands Act. He had Karen Dupont attend the August 21st on-site meeting because she was knowledgeable about wetlands and could help him understand what needed to be done. (Tr. 2-94). His understanding was that he could not go beyond the flags and haybales; he did not understand about the buffer. (Tr. 2-99). He thought he could do any work he wanted to on the south-southwest side of the hayline and instructed his employees "to stay on the other side and...make sure nothing will fall into the wetland area." (Tr 2-100, 101).

While the facts as a whole suggest a lack of intent to alter a wetland, it is also evident from the record that the wetland and perimeter wetland were clearly delineated by the Division's Ms. Carlson. What is not explained is the lack of involvement of the Respondent's wetlands scientist once Commonwealth Engineers and Consultants, Inc. undertook the redesign of the road.

Based on the testimony, there is at least a finding of "constructive" prior knowledge. Any reasonable person would have either understood the directives to avoid the buffer area, or would have consulted the expert retained for the specific purpose of aiding in achieving compliance with the Freshwater Wetlands Act. Mrs. Beck had considered the flagging (and staking) done by Ms. Carlson to be so clear, that she had deemed her follow-up on the project to be unnecessary. (Tr. 2-145).

Considerations of prior knowledge, or lack thereof, aside, the Division had sufficient other grounds for assessing the maximum penalty.

VI. CONCLUSION

The Division has proven the violations set forth in the matters identified as AAD No. 92-006/FWE and AAD No. 92-014/FWE by a preponderance of the evidence and is entitled to the restoration set forth above.

While it is unfortunate that Mr. Dowlatshahi's well-meaning intent and efforts to comply with the Freshwater Wetlands Act resulted in these additional enforcement actions, the administrative penalties sought by the Division are appropriate.

Wherefore, after considering the testimony and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. On February 13, 1992 Judith Gaudette was the owner of record of property located approximately 80 feet north of the dead end of Nardolillo Street, approximately 2025 feet from the intersection of Nardolillo Street and Plainfield Pike, Assessor's Plat 26, Lot 136 in the Town of Johnston, Rhode Island ("Site A").
2. Gashy Construction Company is the present owner of Site A.
3. A Notice of Violation and Order ("NOVAO") No. C91-0381(a) was issued to Gashy Construction on February 13, 1992 regarding the above site.
4. The Department issued Notice of Violation No. C91-0381(b) to Judith Gaudette on February 13, 1992 advising her of an alleged violation on the above property.
5. Gashy Construction Company received the NOVAO on February 13, 1992.
6. This NOVAO was recorded in the Johnston Land Evidence Records on February 14, 1992 at Book 366, Page 280.
7. Gashy Construction Company filed a request for an adjudicatory hearing on February 19, 1992.
8. Freshwater Wetlands are present on Site A; namely a swamp and the swamp's associated fifty-foot perimeter wetland.
9. Between October 1989 and October 25, 1991 construction of a detention basin and associated clearing, grading and filling altered the freshwater wetlands on the subject site and they remain in an altered state.
10. Gashy Construction Company altered or permitted the alteration of the freshwater wetlands on Site A.
11. Neither Gashy Construction Company nor any other person received a freshwater wetlands permit to alter the wetlands on the site.
12. Restoration of Site A is necessary in order to restore the wetlands to their natural, unaltered condition.
13. The \$1000.00 administrative penalty assessed against Gashy Construction Company in connection with the alterations performed upon Site A is not excessive.

GASHY CONSTRUCTION
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14. On January 9, 1992 Gashy Construction Company was the owner of property located at the north end of Nardolillo Street, approximately 2025 feet from the intersection of Nardolillo Street and Plainfield Pike, Assessor's Plat 26, Lots 141 and 134 in the Town of Johnston, Rhode Island.
15. The Department issued Notice of Violation and Order ("NOVAO") No. C91-382 to Gashy Construction on January 9, 1992 regarding the above property.
16. Gashy Construction received the NOVAO No. C91-382 on January 28, 1992.
17. This NOVAO was recorded in the Johnston Land Evidence Records on January 15, 1992 at Book 363, Page 68.
18. Gashy Construction Company filed a request for an adjudicatory hearing on January 30, 1992.
19. On January 30, 1992, the Department released NOVAO C91-382 only to the extent that it applied to Assessor's Plat 26, Lot 134, in the Town of Johnston, Rhode Island.
20. Gashy Construction Company is the current owner of the property described as Assessor's Plat 26, Lot 141, in the Town of Johnston, Rhode Island ("Site B").
21. Freshwater Wetlands are present on Site B; namely a swamp, the swamp's associated fifty-foot perimeter wetland, and a two-hundred foot riverbank wetland.
22. Between October 1989 and October 25, 1991 construction of a culdesac and associated clearing, grading and filling altered the freshwater wetlands on the subject site and they remain in an altered state.
23. Gashy Construction Company altered or permitted the alterations of the freshwater wetlands on Site B.
24. Neither Gashy Construction Company nor any other person received a freshwater wetlands permit to alter the wetlands on the site.
25. Restoration of Site B is necessary in order to restore the wetlands to their natural, unaltered condition.
26. The \$2000.00 administrative penalty assessed against Gashy Construction Company in connection with the alterations performed upon Site B is not excessive.

Based upon the foregoing facts and the documentary and testimonial evidence of record, I make the following:

CONCLUSIONS OF LAW

1. That Respondent made a timely request for hearing in both matters in accordance with R.I.G.L. §42-17.1-2(u)(1).
2. That pursuant to the provisions of R.I.G.L. §42-17.6-4, the Department of Environmental Management ("DEM") has the burden of proving each and every act or omission alleged by a preponderance of the evidence.
3. That the DEM has met its burden to prove jurisdictional wetlands were altered in violation of R.I.G.L. §2-1-21(a) and the Wetlands Regulations as alleged in the Notice of Violation and Order C91-381(a), issued February 13, 1992 and in the Notice of Violation and Order C91-382, issued on January 9, 1992.
4. The DEM has met its burden to prove Respondent was responsible for the wetlands alterations on Site A and Site B.
5. The Department is entitled to the relief requested in the Restoration Order set forth in NOVAO No. C91-0381(a).
6. The Department is entitled to the relief requested in the Restoration Order set forth in NOVAO No. C91-0382.
7. The Department is entitled to the assessment of an administrative penalty in the sum of one thousand (\$1000.00) dollars in connection with the violations which occurred on Site A.
8. The Department is entitled to the assessment of an administrative penalty in the sum of two thousand (\$2000.00) dollars in connection with the violations which occurred on Site B.


Wherefore, it is hereby

ORDERED


1. That Respondent must comply with the Restoration Orders set forth in NOVAO C91-0381(a) and NOVAO No. C91-0382 and completely restore the subject wetlands in accordance with the requirements of the Department's Division of Freshwater Wetlands no later than June 1, 1994.
2. That the Respondent must contact the Division of Freshwater Wetlands prior to the commencement of restoration to ensure proper supervision and to obtain the required restoration details from the representatives of said Division.
3. That the Respondent shall, within twenty (20) days after the Final Agency Order is signed by the Director, pay a total administrative penalty of three thousand (\$3000.00) dollars. Payment of this penalty shall be made by certified check, made payable to the "General Treasurer, State of Rhode Island" and sent to:

Rhode Island Department of Environmental Management
Attention: Robert Silvia
Office of Business Affairs
22 Hayes Street
Providence, Rhode Island 02908

Entered as an Administrative Order this 16th day of March, 1994 and herewith recommended to the Director for issuance as a Final Agency Order.


Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

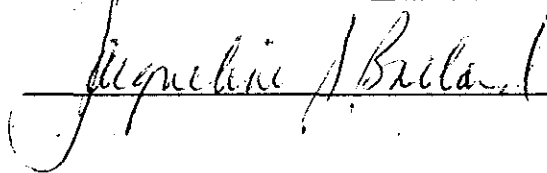
Entered as a Final Agency Order this 18th day of March,
1994.



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

CERTIFICATION

I hereby certify that I caused a true copy of the within
order to be forwarded, via regular mail, postage prepaid to
John B. Webster, Esq., Adler Pollock & Sheehan, 2300 Hospital
Trust Tower, Providence, RI 02903 and via interoffice mail to
Genevieve Martin, Esq., Office of Legal Services, 9 Hayes
Street, Providence, RI 02908 on this 18th day of March,
1994.



APPENDIX A

STIPULATIONS OF THE PARTIES

I. SITE A

Pursuant to the Prehearing Conference conducted on AAD No. 92-014/FWE, which is identified as Notice of Violation and Order No. C91-0381(a), the parties agreed to the following stipulations of fact (as they are set forth in the Prehearing Conference Record entered on March 9, 1993):

1. A Notice of Violation and Order ("NOVAO") No. C91-0381(a) was issued to Gashy Construction ("Respondent") on January 8, 1992.
2. Respondent received this NOVAO on January 28, 1992.
3. The NOVAO was recorded in the Johnston Land Evidence Records on January 15, 1992 at Book 363, Page 72.
4. The Respondent changed the lot number of the subject site from Lot 142 on Plat 26 to Lot 136 on Plat 26.
5. On February 13, 1992, the Department released NOVAO No. C91-0381(a).
6. Another NOVAO No. C91-0381(a) was issued to the Respondent on February 13, 1992.
7. Respondent received this NOVAO on February 13,

1992.

8. This NOVAO was recorded in the Johnston Land Evidence Records on February 14, 1992, at Book 366, Page 280.
9. At the time this NOVAO was issued, Gaudette was the legal owner of the subject site, newly identified as Assessor's Plat 26, Lot 136 in Johnston, RI.
10. Respondent filed a request for an adjudicatory hearing on February 19, 1992.
11. The Department issued a Notice of Violation ("NOV") No. C91-0381(b) to Gaudette on February 13, 1992 advising her of the alleged violation on her property, the subject site.

II. SITE B

Following consolidation of AAD No. 92-014/FWE with AAD No. 92-006/FWE, which is identified as Notice of Violation and Order No. C91-0382, the parties submitted the attached "Stipulation" to the AAD on October 5, 1993.

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

IN RE: Gashy Construction Co.
Freshwater Wetlands Enforcement Nos.
C91-381 and C91-382
AAD Nos. 92-006 and 92-014/FWE

STIPULATION

The parties in the above-referenced matter hereby agree and stipulate to the following facts:

1. The Department issued Notice of Violation and Order ("NOVAO") No. C91-382 to Gashy Construction Co. ("Respondent") on January 9, 1992.
2. Respondent received NOVAO No. C91-382 on January 28, 1992.
3. NOVAO No. C91-382 was recorded in the Johnston Land Evidence Records on January 15, 1992 at Book 363, Page 68.
4. At the time that NOVAO No. C91-382 was issued, Respondent was the legal owner of property approximately at the north of Nardolillo Street approximately 2025 feet from the intersection of Nardolillo Street and Plainfield Pike, and identified as Assessor's Plat 26, Lot(s) 141 and 134 in the Town of Johnston, Rhode Island.
5. Respondent filed a request for an adjudicatory hearing on January 30, 1992.
6. On January 30, 1992, the Department released NOVAO No. C91-382 only to the extent that

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APPENDIX B

LIST OF EXHIBITS

The below-listed documents are marked as they were admitted at hearing.

JOINT EXHIBITS

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| JT. 1
Full | Site Inspection Report by Tracey Carlson, dated August 21, 1990 (2 pp.). |
| JT. 2
Full | Biological Inspection Report by Tracey Carlson, dated October 25, 1991 (3 pp.). |
| JT. 3
Full | Records Research (Land Evidence Records) by Tracey Carlson, dated October 29, 1991 (2 pp.). |
| JT. 3A
for Id | Marked-up copy of hand drawn assessor's map by Tracey Carlson. |
| JT. 4
Full | Recommendations to supervisor by Tracey Carlson dated October 29, 1991 (1 p.). |
| JT. 5
Full | Notice of Violation and Order, dated January 8, 1992 for File No. C91-0381(a); and Certificate of Service and Authenticity (4 pp.). |
| JT. 6
Full | Notice of Violation, dated February 13, 1992, for File No. C91-0381(a); and Certificate of Service and Authenticity (5 pp.). |
| JT. 7
Full | Notice of Violation, dated February 13, 1992, for File No. C91-0381(b) (3 pp.). |
| JT. 8 | Release of Violation, dated February 13, 1992, |

- Full for Complaint No. C91-0381(a) (1 pp.).
- JT. 9 Correspondence to Rhode Island Department of
Full Environmental Management from Attorney John B.
Webster (Request for Adjudicatory Hearing),
dated February 17, 1992 (1 p.).

DIVISION'S EXHIBITS

- Div. 1 Resume of Harold K. Ellis (3 pp.).
Full
- Div. 2 Resume of Tracey A. Carlson (3 pp.).
Full
- Div. 3 Complaint Inspection Report by Tracey Carlson,
for Id dated October 25, 1991 (2 pp.).
- Div. 4 Identified in the Prehearing Conference Record
for Id but not submitted for hearing.
- Div. 5-
Div. 13 No documents identified or submitted.
- Div. 14 Resume of Dean H. Albro (4 pp.).
for Id
- Div. 15 Complaint Inspection Report by Tracey Carlson,
Full dated October 25, 1991 (2 pp.).
- Div. 16 Biological Inspection Report by Tracey Carlson,
Full dated October 25, 1991 (3 pp.).
- Div. 17 Recommendations to Supervisor by Tracey
Full Carlson, dated October 29, 1991 (1 p.).
- Div. 18 Records Research by Tracey Carlson, dated
for Id October 29, 1991 (2 pp.).
- Div. 19 Notice of Violation and Order No. C91-0382,
Full dated January 9, 1992; and certificate of
authenticity and copy of receipt for certified
mail (6 pp.).
- Div. 20 Correspondence to RIDEM Administrative
for Id Adjudication Division from Attorney John B.
Webster (request for adjudicatory hearing)
dated received January 30, 1992 (1 p.).
- Div. 21 Release of Notice of Violation and Order,
Full No. C91-0382, January 30, 1991, as to Lot

134 (3 pp.).

Div. 22 Site Plan entitled "Gashy's Plat Subdivision
for Id Lot 10, Johnston, Rhode Island", dated received
October 9, 1991 (2 pp.).

RESPONDENT'S EXHIBITS

- Resp. 1 Site Inspection Report by Tracey Carlson,
Full dated March 26, 1990 (2 pp.).
- Resp. 2 Site Inspection Report by Tracey Carlson, dated
Full September 25, 1990 (2 pp.).
- Resp. 3 Complaint Inspection Report by Tracey Carlson,
Full dated October 25, 1992 (2 pp.).
- Resp. 4 Copies of Quit-Claim Deeds from the Johnston
Full Town Hall.
- Resp. 5 Notice of Violation and Order, dated January 9,
Full 1992, for File No. C91-0382 (4 pp.).
- Resp. 6 Correspondence to John B. Webster from Rhode
for Id Island Department of Environmental Management,
dated October 1, 1992 (1 p.).
- Resp. 7 Correspondence to Terrence Donilon, Governor's
for Id Office, from Judith A. Gaudette, dated June 24,
1992 (1 pp.)
- Resp. 8 Correspondence to The Honorable John H. Chafee
for Id from Rhode Island Department of Environmental
Management, dated June 25, 1992 (2 pp.).
- Resp. 9 Commonwealth Engineers & Consultants, Inc.
Full Notes of Meeting 8-8-90.
- Resp. 10 Commonwealth Engineers & Consultants, Inc.
Full Notes of Meeting 8-21-90.