

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

In Re: CARMINE OLIVIERI/MODERN BOATING, INC.

AAD NO. 95-020/FWE

NOTICE OF VIOLATION C95-0725

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to the Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the Division of Freshwater Wetlands ("Division") on November 21, 1995. On January 5, 1996, Boston Neck Realty Corp., the owner of real estate which abuts and is contiguous with the property which is the subject of the NOV, filed a petition to intervene; as no objection was filed with the AAD, intervention status was granted on January 17, 1996.

The hearing was conducted on April 9, 10, 16 and 23, 1996. Post-hearing memoranda were subsequently filed by the Division and Respondent. Upon the filing of the final memoranda on August 30, 1996, the hearing was considered closed.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN LAWS Section 42-17.7-1 et seq), the Administrative Procedures Act (R.I. GEN LAWS Section 42-35-1 et seq), the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 2

Environmental Matters ("AAD Rules") and the Rules and Regulations for Assessment of Administrative Penalties, May 1992 ("Penalty Regulations").

PREHEARING CONFERENCE

A prehearing conference was conducted on February 8 and 16, 1996 at which the parties agreed to the following stipulations of fact:

1. A Notice of Violation and Order No. C94-0130v (the "NOVAO") was issued by the Division to Carmine Olivieri on November 21, 1995.
2. The NOVAO was received by Mr. Olivieri on or about November 27, 1995.
3. The NOVAO was recorded in the Land Evidence Records for the Town of West Greenwich, Rhode Island on November 27, 1995.
4. At the time that the NOVAO was issued, Mr. Olivieri was the legal owner of a parcel of property identified in the Land Evidence Records for the Town of West Greenwich, Rhode Island as Assessor's Plat 29, Lot No. 1-1 ("subject site").
5. Freshwater wetlands exist upon the subject site.
6. Mr. Olivieri filed a request for an adjudicatory hearing on December 1, 1995.
7. That Boston Neck Realty, Inc. is an abutting and adjoining owner and the holder of a mortgage deed on the subject site.

The exhibits, marked as they were admitted at the hearing, are attached to this Decision as Appendix A.

HEARING SUMMARY

At the hearing, the Division called seven (7) witnesses: **Carmine Olivieri; Dena Gonsalves**, a senior natural resource specialist in the

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 3

Enforcement Section of the Division of Freshwater Wetlands who was qualified as an expert in wetlands ecology, as a natural resource specialist and as an expert in aerial photograph interpretation; **Sean Carney**, a natural resource specialist at DEM who was qualified as an expert in wetlands ecology, as a natural resource specialist and as an expert in aerial photograph interpretation; **Earle F. Prout, Jr.** who was qualified as an expert in dam safety and inspection; **Nicholas A. Pisani** who was qualified as a Professional Registered Engineer; **Dean Albro**, Chief of the Division of Freshwater Wetlands; and **Harold K. Ellis**, the enforcement supervisor for the Division, who was qualified as an expert in wetlands ecology, as a natural resource specialist and as an expert in aerial photograph interpretation. Respondent presented one (1) witness, **Carmine Olivieri**. Intervenor did not call any witnesses.

I. BACKGROUND

The subject site, located in the Town of West Greenwich, contains a swamp/pond complex, a stream which is less than ten (10') feet wide on average, a perimeter wetland, and two (2) riverbank wetlands. Tr. April 9, 1996 at 36-38. A cartpath runs through the site in a northerly direction; a large pond lies to the east of the cartpath and the swamp, which is greater than three acres in area, is located west of the cartpath. A concrete outlet structure carries flow from the pond beneath the cartpath to the swamp. The cartpath, an undeveloped roadway

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 4

approximately eight (8') feet wide on average, at a certain point becomes an earthen berm or dam. Tr. April 9, 1996 at 37, 41-42.

After a westerly bend in the cartpath lies a stream crossing where, according to Dena Gonsalves, a senior natural resource specialist in the Enforcement Section of the Division of Freshwater Wetlands, and based upon her review of aerial photographs, over a number of years water from the ponded section to the east had flowed through the cartpath (which term Ms. Gonsalves admits using interchangeably with "dam"; see Tr. April 9, 1996 at 81) to the swamp located on the other side of the cartpath. Tr. April 9, 1996 at 42-44.

On September 29, 1993, a Notice of Intent to Enforce ("NOI") was issued to Boston Neck Realty Corp., the then owner of the site. Div.11 Full; Tr. April 9, 1996 at 45. The NOI had been issued because, in an earlier site inspection, Ms. Gonsalves had determined that the stream channel had been excavated in order to remove a beaver dam and the debris had been placed along the sides of the stream channel. Tr. April 9, 1996 at 42-43.

During a site inspection conducted in April 1994, Ms. Gonsalves noted that the stream had again been recently excavated to remove a beaver dam; the soil piles had again been placed along the sides of the channel. The dimensions of the channel were approximately four (4') feet deep by three (3') feet wide. Tr. April 9, 1996 at 46.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 5

A site inspection conducted in July 1994 revealed another excavation of the stream crossing to remove a beaver dam; the debris was present along the sides of the channel, making it very steep and in need of stabilization, according to Ms. Gonsalves. Tr. April 9, 1996 at 46-47.

On August 3, 1994, the Division of Freshwater Wetlands received a letter of authorization from John R. Assalone, president of Boston Neck Realty, Corp., designating Carmine Olivieri to act on its behalf in the discussions with the Division. Div.14 Full; Tr. April 9, 1996 at 11, 48. On August 11, 1994, Ms. Gonsalves met on site with Carmine Olivieri to discuss restoration. She advised Mr. Olivieri that the slopes of the channel needed to be graded back, seeded and mulched with a mat of loose hay. Tr. April 9, 1996 at 48. According to the testimony of both Ms. Gonsalves and Mr. Olivieri, Mr. Olivieri insisted that he had to be able to cross the water course, and specifically, that he wanted to be able to drive a vehicle across the path. Tr. April 9, 1996 at 12, 49. He was advised that any work other than complying with the restoration requirements of the NOI would require a permit. Tr. April 9, 1996 at 49.

Subsequent to the August 11th meeting, Mr. Olivieri received permission from the Division to fill two (2') feet of the four (4') feet depth of the stream in order to gain access across the water course but still allow water from the pond to flow through the carpath to the swamp. Div.17 Full; Tr. April 9, 1996 at 50.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 6

From testimony and a records research conducted by the Division, on August 25, 1994 Boston Neck Realty Corp. conveyed the property to Modern Boating, Inc., of which company Carmine Olivieri is president. Div.41 Full; Tr. April 9, 1996 at 10; Tr. April 23, 1996 at 56-57.

On or about August 29, 1994, Ms. Gonsalves again visited the site and found that the restoration had not been done in conformance with the direction of DEM; to the contrary, the stream channel had been filled "well beyond two feet. Actually it had been filled to the top of the cartpath." Tr. April 9, 1996 at 50.

On November 21, 1994, Dena Gonsalves and Harold Ellis, the enforcement supervisor for the Division, met with Carmine Olivieri at the property. The Division employees observed that the fill within the stream channel was now one (1') foot below the top of the cartpath (Mr. Ellis speculated the decrease was probably due to erosion or water flowing across the surface; Tr. April 16, 1996 at 29) but still allowed water to flow across the partially filled ditch/stream. Tr. April 9, 1996 at 51, 53. Ms. Gonsalves and Mr. Ellis determined that, based upon the channel's relatively stable nature and that it still allowed water to escape the pond, thereby acting as an emergency overflow for the dam, what had been accomplished was sufficient to restore the wetlands in conformance with the NOI requirements. Tr. April 9, 1996 at 51; Tr. April 16, 1996 at 29.

Upon being advised of their conclusion, Mr. Olivieri stated that he

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 7

wanted to do additional work because rain had damaged the road; he wanted to stop all water from flowing across the cartpath in the area of the stream crossing. Tr. April 9, 1996 at 51-52, 55; Tr. April 16, 1996 at 30. At the meeting, Mr. Ellis informed Mr. Olivieri numerous times that, in order to do the work intended, a permit from the Wetlands Division would be required. Tr. April 16, 1996 at 30. Mr. Ellis reiterated this position by letter dated December 2, 1994, and specifically addressed Mr. Olivieri's contention that the work he wanted to do was "maintenance" of the dam and exempt from permit requirements:

Contrary to what you expressed in the field, the proposed activity of raising the grade of the cartpath to stop the overflow of water is not maintenance activity in our Rules and Regulations. As such, any further work proposed in and/or adjacent to the restoration area shall require a Permit from this Division....Please also note that approval is required from this Division to manipulate the water level in the Pond... Div. 29 Full, p. 1.

A site visit conducted on December 14, 1994 indicated that the premises were in essentially the same condition as that approved in the November on-site meeting, and therefore the property was in compliance with the NOI. Tr. April 9, 1996 at 57-60.

A different picture was presented on September 29, 1995 when Sean Carney, a natural resource specialist at DEM, visited the site in response to a telephone complaint received by the Department. Div. 19 Full; Tr. April 9, 1996 at 104-106. Mr. Carney observed a large backhoe excavating in a portion of the ponded area near the concrete culvert

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 8

outlet structure and noted several areas of recent activity: clearing and filling in both the ponded portion and swamp area had been done and material had been placed into the area of the stream channel. Further along the cartpath Mr. Carney noticed filling and clearing and grading within a swamp and perimeter wetland area. Tr. April 9, 1996 at 111, 113-114.

Mr. Carney then contacted his field supervisor and after discussing the activity on site, the fill material being placed into the wetland and the lack of necessary erosion controls, Mr. Carney was told to issue a Cease and Desist Order. A Cease and Desist Order was then issued to Carmine Olivieri on the same day. Div. 38 Full; Tr. April 9, 1996 at 115-117.

On October 4, 1995, Dena Gonsalves, accompanied by Sean Carney, conducted another inspection of the property. Tr. April 9, 1996 at 60. Compared to her last visit (December 14, 1994), Ms. Gonsalves noted that the stream crossing area had been filled to the top of the cartpath and there was additional work along the sides of the cartpath as well as to the north, northwest of the stream crossing. Fill in the form of soil material had been placed in the stream channel and into the pond, thereby raising and widening the cartpath/dam. Filling and grading had been done. Large fill piles were stored at the end of the cartpath in the swamp and perimeter wetland. Div. 43 A-F Full; Tr. April 9, 1996 at 60-68.

A month later (November 6, 1995), Sean Carney returned to the site.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 9

He found that, despite the issuance of the Cease and Desist Order, further alterations had been accomplished in that additional fill had been placed in the perimeter wetland at the end of the cartpath. Tr. April 9, 1996 at 129-130. Mr. Olivieri disputes that any further activity occurred following receipt of the Cease and Desist Order.

As a result of his investigations, Mr. Carney drafted a report recommending that a Notice of Violation and Order be issued and later drafted the original NOV and prepared a portion of the penalty assessment sheet. Tr. April 9, 1996 at 137-138. Harold Ellis completed the penalty assessment sheet by identifying the deviation from standard and penalty assessment for each violation. Tr. April 16, 1996 at 37.

Mr. Ellis testified that he reviewed provisions in the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act ("Wetlands Regulations") regarding exempt activities and determined that the alterations at the site exceeded the limitations set forth in the regulations; he also determined that no application had been submitted for the alterations. Tr. April 16, 1996 at 35.

In issuing the Notice of Violation, which he signed, he relied on the reports prepared by Mr. Carney, his review of the aerial photographs, his own knowledge of the site, the reports prepared by Ms. Gonsalves, and all the Division's files on the matter. Tr. April 16, 1996 at 33-34.

The NOV, issued to Respondent on November 21, 1995, alleges that

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 10

Respondent altered or permitted alterations of freshwater wetlands in five (5) instances without having first obtained the approval of the Director of the Department of Environmental Management ("DEM"), orders the restoration of the wetlands and imposes a Five Thousand (\$5,000.00) Dollar administrative penalty.

"Instance 1" cites Respondent for filling into a 100-foot Riverbank Wetland and into a Swamp/Pond Complex, resulting in the unauthorized alteration of approximately 160 square feet of wetland.

"Instance 2" cites Respondent for filling into a Stream, resulting in the unauthorized alteration of wetland by restricting flow in the Stream and causing impoundment of water in the adjacent Pond.

"Instance 3" cites Respondent for filling into a 100-foot Riverbank Wetland and into a Swamp/Pond Complex, resulting in the unauthorized alteration of approximately 400 square feet of wetland.

"Instance 4" cites Respondent for filling and clearing within a Swamp/Pond Complex, resulting in the unauthorized alteration of approximately 5,800 square feet of wetland.

"Instance 5" cites Respondent for filling into a Perimeter Wetland, resulting in the unauthorized alteration of approximately 3,900 square feet of wetland.

II. LIABILITY
Alteration vs. Maintenance

The Notice of Violation cited Carmine Olivieri/Modern Boating, Inc.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 11

for violation of R.I. GEN LAWS §2-1-21 and of the Wetlands Regulations.

Pursuant to the statute,

(a) No person, firm, industry, company, corporation...may excavate; drain; fill; place trash...earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; dike; dam; divert; change; add to or take from or otherwise alter the character of any fresh water wetland...without first obtaining the approval of the director of the department of environmental management.

Section 7.01 A of Rule 7.00 of the Wetlands Regulations provides that a proposed project or activity which may alter freshwater wetlands requires a permit from the Director:

Pursuant to Section 2-1-21(a) of the Act, except as exempt herein...no person, firm, industry, company, corporation ... may excavate; drain; fill; place trash...earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; dike; dam; divert; clear; grade; construct in; add to or take from or otherwise change the character of any freshwater wetland ...in any way, without first obtaining a permit from the Director.

The Wetlands Regulations identify specific limited activities which are exempt from the permit requirements provided they are conducted subject to certain restrictions. Set forth below are those conditions and restrictions which are particularly pertinent to the circumstances in this case:

RULE 6.00 - EXEMPT ACTIVITIES

6.01 General Conditions for Exempt Activities

A. Certain limited activities in freshwater wetlands may proceed without a specific written permit from the Department under the restrictions set forth below. Such restricted activities shall be considered exempt from the requirement to obtain a permit.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 12

B. Nothing in this Rule shall be deemed to supersede any existing terms or conditions or to interfere with the Director's authority to make a determination or decision on an application, or to impose terms and conditions on any permit, enforcement action or Consent Agreement. In addition, any activities not described within this Rule which could alter the character of any freshwater wetlands require a specific written permit.

C. Nothing in this Rule shall preclude the Director from initiating an enforcement action in the event of any failure to undertake exempt activities in accordance with the requirements and conditions set forth herein.

D. The following general restrictions apply to all activities performed under this Rule:

- 1) Exempted activities do not obviate the need to obtain other applicable federal, state, or local permits, approvals, or authorizations required by law;
- 2) Any structure or fill exempt under this Rule shall be properly maintained to ensure public safety, and to protect wetland functions and values;
- 3) Appropriate erosion and sediment controls must be used and maintained in effective operating condition during the activity, and all exposed soil and other fills must be permanently stabilized at the earliest possible date...
- 4) ***
- 5) ***
- 6) Any access to undertake an exempt activity must be limited to only that necessary to complete the activity, and must be temporary in nature; and
- 7) For all exempt activities, care must be taken to the maximum extent possible to protect all wetland functions and values, and to prevent pollutants, sediment, or any material foreign to any wetland, or any material hazardous to life, from entering any wetland.

Section 6.03 of the Wetlands Regulations identifies the limited maintenance activities that are exempt from the statutory and regulatory requirements to obtain a permit before altering wetlands. It provides in pertinent part:

6.03 Limited Maintenance Activities

The following limited repairs to, and maintenance of approved or pre-existing structures in current use located in wetlands are allowed in accordance with Rule 6.01 without written authorization from the Department provided that the maintenance activity does not increase either vertically or horizontally the physical size of any pre-existing structure....

A.***

B.***

C.***

D.***

E.***

F. Repair to or maintenance of a stream crossing, such as a stone ford and its approach, or any unpaved road which is used at least on an annual basis, provided that any increase in road surface cover does not require the expansion of any slopes further into the wetland beyond the existing toe of slope, and any increase in height does not exceed two inches (2")...

Sean Carney, who was qualified as an expert in wetlands ecology, as a natural resource specialist and as an expert in aerial photograph interpretation, described the instances cited in the NOV. Instance #2, the filling in of the stream, was based upon the increase in the height of the cartpath at the area of the stream channel; that is, that between November 21, 1994 (when the Division determined that although they had previously sought restoration of a two (2') deep stream channel, the one (1') foot difference in elevation between the top of the cartpath and the stream crossing sufficiently met the requirements of the NOI) and October 4, 1995, the 1' channel had been filled to become even with the cartpath. Tr. April 9, 1996 at 132-135. In addition, according to Mr. Carney, there were no erosion controls in place when the activity was

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 14

undertaken. Tr. April 9, 1996 at 131. He testified that the activity could not be considered the limited maintenance activity exempt from a permit requirement under the Wetlands Regulations. Tr. April 9, 1996 at 130.

Mr. Carney stated that the other four instances cited in the NOV, #1, #3, #4 and #5, extended beyond the original area of the dam. Tr. April 9, 1996 at 137. According to Mr. Carney, the filling and clearing in the swamp at the end of the cartpath and the work in the riverbank wetland were outside the scope of the limited maintenance activities which can be exempt from the permit requirements under the regulations. Tr. April 9, 1996 at 131. In areas where there was vegetation present prior to the activities, the vegetation had been removed; fill had been placed into areas of the wetland where fill had not been present, effectively eliminating that portion of the wetland; and sediment material extended further into the wetlands than before the activities due to the lack of erosion controls. He concluded that the character of the freshwater wetland areas on the site were altered as the result of Mr. Olivieri's activities. Tr. April 9, 1996 at 135-136.

Carmine Olivieri was called as a Division's witness and later also testified on behalf of Respondent. He admitted that he was responsible for all of the activity that occurred at the site: that he worked on the banks, cut down trees, stockpiled debris, performed grading, cleared vegetation, and removed fill that he alleged someone had dumped into

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 15

the pond. Tr. April 9, 1996 at 18-20; Tr. April 23, 1996 at 73.

According to his testimony, as well as from the testimony of many of the other witnesses, Mr. Olivieri has insisted that the work he intended to do on site and later accomplished was only maintenance of the dam and did not require a permit. He asserted at the hearing that "DEM refused to talk about maintenance, refused to give any guidance or suggestions." Tr. April 9, 1996 at 20. He also stated that he was not given any set of standards, guidelines, rules or regulations as to what constituted maintenance or alteration of a dam. Tr. April 9, 1996 at 23. During gentle cross examination from Intervenor's counsel, Mr. Olivieri agreed that he had been "trying to determine what was maintenance of a dam as opposed to what was altering the dam" and that he had been unable to find a definition. Tr. April 23, 1996 at 77.

While there is no set of standards, guidelines, rules or regulations marked "Dam Regulations" or "Dam Regulations Approved Maintenance Activities", or similarly entitled under the dam safety law, there are rules issued pursuant to the Freshwater Wetlands Act which provide guidelines to distinguish "maintenance" from "alteration" of a dam. Tr. April 10, 1996 at 177-178. Dean Albro explained the rationale for the inclusion of the regulation of dam maintenance and alteration activities under the Wetlands Regulations:

Dams, by their general nature, exist within freshwater wetlands, either there is a pond or impoundment upstream of the dam, there

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 16

is a river or stream that flows through a portion of the dam and then there are either perimeter wetlands, riverbanks or floodplains associated with the dam and the wetlands that surround it. There is virtually no ability to extract the alterations of dams and the alteration of wetlands. They go hand in hand. Tr. April 10, 1996 at 201-202.

Notwithstanding Mr. Olivieri's testimony that he was not provided any guidance from DEM regarding what was considered maintenance of a dam, Mr. Olivieri acknowledged at the hearing that he had looked at the DEM regulations before conducting the work on the dam and had noted a list of exempt activities. Tr. April 23, 1996 at 61. Additionally, on the numerous occasions when Mr. Olivieri had described what he considered maintenance, he had been told in person and/or by letter by Ms. Gonsalves, Mr. Ellis, Mr. Prout and Mr. Albro that the work described was not the limited maintenance activities exempt from the permit requirements and that a permit would be required.

When pressed at the hearing about whose definition of maintenance was being used when Mr. Olivieri stated he was only performing maintenance of the dam, Mr. Olivieri stated his belief that "it's the land owner's right of maintenance activity, determined by the landowner, according to DEM regulations." Tr. April 23, 1996 at 61. According to Mr. Olivieri's definition of maintenance, he could achieve the two goals that "the height of the dam had to be able to be controlled to maintain adequate height due to change in seasons" and that the cartpath be at a level whereby a vehicle could easily drive over the dam

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 17

(Tr. April 23, 1996 at 60, 70-72) without being required to obtain a wetlands permit.

In contrast to the above subjective interpretation of what activity constitutes maintenance, Section 6.03 of Rule 6.00 of the Wetlands Regulations identifies the limited maintenance activities that are exempt from the statutory and regulatory requirements to obtain a permit before altering wetlands. The exhibit marked "Div 31 Full", which is a letter dated December 13, 1994 addressed to Carmine Olivieri from Dean Albro, supports the conclusion that prior to conducting his work on the dam, Mr. Olivieri not only was aware of the Wetlands Regulations' provision exempting certain activities from the permit requirements, he had asserted that his intended filling and grading of the stream channel constituted an allowed Exempt Activity under Rule 6.00.

The Wetlands Regulations, including Sections 6.01 through 6.11 of Rule 6.00 which governs activities exempt from the requirement to obtain written authorization for wetlands alteration, were adopted pursuant to the authority granted to the Department under R.I. GEN LAWS §2-1-20.1. The regulations regarding exempt activities are quite specific as to what is allowed without written authorization from the Department and that those activities may only be performed in accordance with the provisions of Section 6.01 of Rule 6.00 that require, *inter alia*, the use of appropriate erosion and sediment controls during the activity.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 18

Mr. Olivieri's conclusion, therefore (especially in light of his admitted review of the DEM regulations governing exempt activities), that "it's the land owner's right of maintenance activity, determined by the landowner, according to DEM regulations" is baseless and inconsistent with the clear language of the regulations. Mr. Olivieri's conduct at the site must be reviewed and considered in accordance with the Wetlands Regulations, not his subjective opinion and assertion that the activities constituted "maintenance".

Section 6.03 of the Wetlands Regulations allows limited repairs to, and maintenance of approved or pre-existing structures without a permit provided that the maintenance activity does not increase either vertically or horizontally the physical size of any pre-existing structure and provided that the activity is performed in accordance with Section 6.01.

Apparently it is Mr. Olivieri's contention that the provision of Section 6.03 dealing with limited repairs to and maintenance of approved structures justify his activity at the dam. Mr. Olivieri testified that for his maintenance of the dam, he referred to a drawing of the dam, marked "As Built", which he had obtained from DEM. The plan contained the elevations, grades and length of the dam. Tr. April 9, 1996 at 22-23. In his post-hearing memorandum, Mr. Olivieri asserts that the dam in question, identified as Rhode Island Dam #468,

is a legitimate, recognized, approved dam of the State of Rhode Island which must be maintained in accordance with the detailed

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 19

elevations and benchmarks in order to protect its integrity... Therefore the plans detailed elevations, grades, and length are the controlling benchmarks for the dam's maintenance. Post-Hearing Memorandum of Carmine Olivieri & Modern Boating, Inc., p. 7.

He stated at the hearing that he was not an engineer (Tr. April 23, 1996 at 73) and that he had contacted "various engineering firms" (Tr. April 9, 1996 at 21) which were unidentified, about his proposed activity. Notwithstanding his lack of engineering expertise and without any indication of the conclusions drawn by the engineers to whom he had presented the plans (Tr. April 23, 1996 at 79), Mr. Olivieri concluded at the hearing that he did not exceed any of the drawings. Tr. April 9, 1996 at 22-23.

The Division considered that the plans of Rhode Island Dam #468 had no relevance to the condition of the site in 1971 or to the alleged violation of Mr. Olivieri, according to Harold Ellis. Tr. April 23, 1996 at 47-48. The Division presented evidence at the hearing that the plans had not been approved by the Department and were incomplete.

According to the testimony of Earle F. Prout, Jr., an employee in the Division of Freshwater Wetlands, Dam Safety Program, who by agreement was qualified by the parties as an expert in dam safety and inspection, the plan was prepared by the Soil Conservation Service and originally submitted to the Division of Harbors and Rivers (the predecessor to the Department of Environmental Management; Tr. April 10, 1996 at 53) on August 17, 1954 and then resubmitted again on November 29, 1961. It

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 20

was Mr. Prout's opinion that the dam plans had never been approved by the Department. Mr. Prout based this conclusion on the lack of the document being stamped "approved", thus indicating to him that it was an incomplete set of plans. Tr. April 10, 1996 at 58-59.

Further evidence that it was an incomplete set of plans, according to Mr. Prout, was that the title box on the plan was not signed by either the person who designed it or checked it, the plan was undated, and the plan identifies it as sheet 1 of 2 sheets but there is no record of sheet number two. He also concluded that the drawing was incomplete due to a notation on the plan referring to a pipe spillway capacity of 41 CFS--cubic feet per second--with no indication of a pipe spillway on the drawing. The location of the concrete outlet had been omitted from the plan; Mr. Prout testified that the symbol identifying its location which is presently on the plan, had been inserted for his own reference purposes. Also missing from the original plan was any indication of a depressed area which had been historically overtopped and used as an emergency spillway. Again, the notation on the plan of its location had been inserted by Mr. Prout for his own reference purposes. Tr. April 10, 1996 at 59-63, 77.

Nicholas A. Pisani who, by agreement of the parties, was qualified as a Professional Registered Engineer, also provided insight as to the questionable reliability of the site plan. Under cross examination by Mr.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 21

Olivieri, Mr. Pisani stated that he could not determine what the elevation of the emergency spillway should be under the plan because he cannot determine what they used as a benchmark; that is, "the benchmark could be a nail in the tree at one foot above the ground or it could be a nail in the tree at six feet above the ground." Tr. April 10, 1996 at 137-138.

Additionally, according to Mr. Pisani, the drawing contains circled numbers at various points along the dam which typically are used to refer to "either a cross section or a reference point somewhere else on the drawing or on another drawing...", yet the plan provides no indication of what the circled numbers represent. The witness speculated that the circled numbers could have been used to indicate variations in the height along the dam. "Typically, this type of structure should have...cross sections with it and, ideally, spot elevations on the top of the embankment. If I was a contractor trying to build that structure, I'd go back to the design engineer and start asking questions." Tr. April 10, 1996 at 139-141.

Mr. Olivieri's professed reliance on the site plan notwithstanding, he had been informed of the existence of problems with the plan before he performed the work on the dam. The Division's witnesses established that the activity cited in the NOV occurred on September 29, 1995 or recently prior to that date. Yet Mr. Olivieri had been advised many months earlier by letter dated January 19, 1995 from Dean Albro, Chief of

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 22

the Division of Freshwater Wetlands, that the site plan was unreliable. Mr. Albro stated the following in his letter, which is marked "Div 34 Full":

Regarding your referral to the plan and elevations contained therein on file with the Dam Safety Program in this Division, please be aware that the plan in question is of no official consequence because it was never approved by this Department. To our knowledge, the dam in question was constructed sometime in the mid-1950's without the benefit of an approved construction plan. In fact, we are aware of significant inconsistencies between what has existed on site since construction and what this plan actually indicates. Thus, the plan to which you refer is maintained for general reference only. at 1.

Based upon the testimony of Earle F. Prout, Jr. and of Nicholas A. Pisani and my review of the document marked "Div 9 Full", I conclude that the plan had not been approved by the Department and that Rhode Island Dam #468 is not an "approved" structure as contemplated in Section 6.03 of the Wetlands Regulations. Therefore, if Mr. Olivieri did indeed rely upon the plan for the work he performed on the dam, that reliance was misplaced.

Since the dam was not an approved structure, Mr. Olivieri's activity must be viewed in light of the provisions in Section 6.03 dealing with limited repairs to, and maintenance of pre-existing structures. Section 5.62 of the Wetlands Regulations defines "Pre-existing" as "existing or present as of the enactment of the Freshwater Wetlands Act (i.e., July 16, 1971)". The Division has agreed that the condition of the dam on November 21, 1994, when they determined the NOI to have been resolved, shall be deemed the "pre-existing" structure and serve as the

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 23

baseline to compare Mr. Olivieri's later activities at the site. Testimony from Harold K. Ellis established that using the November 21, 1994 baseline was less severe than measuring Mr. Olivieri's activities against the condition of the site on July 16, 1971.

Mr. Ellis, who was qualified as an expert in wetlands ecology, as a natural resource specialist and as an expert in aerial photograph interpretation, testified regarding his review of the aerial photographs of the area for the years 1970, 1985 and 1992. He stated that in 1970 there was a cut through the dam, perpendicular across the dam, with water passing through it. Tr. April 23, 1996 at 10. There was a small amount of water behind the dam. Tr. April 23, 1996 at 11. Although he was unable to estimate the depth of the water, he determined from the 1970 aerial photograph that "water flowed across the dam at a relatively deep cut in such a way not to allow passage of a vehicle." Tr. April 23, 1996 at 10, 12-13.

His review of the 1985 aerial photograph revealed water flowing over the dam in a surface area of 15 to 20 feet wide. Tr. April 23, 1996 at 13-14. Again there was relatively little water behind the dam. Tr. April 23, 1996 at 11. In 1992, however, there was "a huge water body behind the dam... apparently water was blocked at that particular point, much more so" than before. Tr. April 23, 1996 at 12. It appeared that the pond area was possibly ten times the size it had been in 1970. Tr. April 23, 1996 at

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 24

13.

Based upon his review of the aerial photographs through the years and his knowledge of the present conditions, Mr. Ellis estimated that the cut in the dam in 1970 was four to five feet deep. Tr. April 23, 1996 at 11. Since the condition of the site in 1985 was comparable to its condition in 1970, it is likely that the 4-5' depth of the cut remained substantially unchanged from 1970, including July 16, 1971, through 1985.

The Division, however, is not measuring Mr. Olivieri's alterations at the dam against the cut in the dam as it existed on July 16, 1971. It determined that a one foot deep channel, as it existed on November 21, 1994, would allow water to flow over the dam and could still accommodate Mr. Olivieri's intent to be able to drive over the cartpath. Additionally, Mr. Olivieri was aware, because he was present at the meeting on the property on November 21, 1994, that on that date the Division considered the dam's condition to be in compliance with the NOI restoration requirements.

Having concluded that it was not inappropriate to measure Mr. Olivieri's alterations against the pre-existing structure as it appeared on November 21, 1994, I will now consider the evidence to determine whether the alterations exceeded the limited activities which are exempt under the Wetlands Regulations.

Limited repairs to and maintenance of pre-existing structures are

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 25

exempt from the permit requirement only if it does not increase either vertically or horizontally the physical size of the pre-existing structure. The parameters of this limitation are even more specific when the repairs or maintenance concern a stream crossing. Section 6.03 F provides that repair to or maintenance of a stream crossing is exempt only if "any increase in road surface cover does not require the expansion of any slopes further into the wetland beyond the existing toe of slope, and any increase in height does not exceed two inches (2")..."

The Wetlands Regulations define "Stream/Intermittent Stream" to mean

any flowing body of water or watercourse other than a river which flows during sufficient periods of the year to develop and maintain defined channels. Such watercourses carry groundwater discharge and/or surface runoff. Such watercourses may not have flowing water during extended dry periods but may contain isolated pools or standing water. Section 5.83.

Ms. Gonsalves, Sean Carney and Harold Ellis, all qualified as experts in wetlands ecology, as natural resource specialists and as experts in aerial photograph interpretation, testified that the cut in the dam met the definition of a stream under the 1994 Wetlands Regulations. Therefore, in order for Mr. Olivieri's activities at the dam to be considered exempt activities, any increase in the height of the one foot deep channel cannot exceed two inches (2") and the slopes cannot be expanded further into the wetland beyond the existing toe of slope.

Evidence at the hearing established that the channel was filled to

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 26

be even with the top of the cartpath, thus increasing the height of the channel (and eliminating it) by approximately twelve inches. Clearly this in excess of the exempt activity allowed in Section 6.03 F.

Sean Carney also testified that the alterations widened the structure:

In terms of the widening, it was clearly obvious from the fill material placed along the side of the cartpath or dam structure...It was very fresh fill material, it was very unstable, it was proceeding to erode down the slope into the ponded section... Tr. April 9, 1996 at 121.

Again, the alterations at the dam were in excess of the exempt activity allowed in Section 6.03 F.

Even if Mr. Olivieri had complied with the requirements of Section 6.03 F however, repairs to or maintenance of the dam is not considered exempt if the activity is not performed in accordance with Section 6.01.

Section 6.01, particularly subsections D (3) and D (7), require that appropriate erosion and sediment controls be used and maintained in operating condition during the activity and that "care must be taken to the maximum extent possible" to prevent sediment from entering the wetland. Under cross examination from the Division, Mr. Olivieri agreed that on September 29, 1995 when Mr. Carney arrived at the site, Respondent had been cleaning out the culvert and "stabilizing" the banks with a backhoe. Hay bales remained in his vehicle. Tr. April 23, 1996 at 62-63. When queried about silt fences, sediment controls or other steps to

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 27

protect against any impact on the wetlands, Mr. Olivieri stated that they had been in the middle of working and that, in his opinion, sediment controls on the banks and silt fences in the water were not feasible. Tr. April 23, 1996 at 66-67.

Notwithstanding Mr. Olivieri's opinion, erosion and sediment controls are required in order for the limited activities listed in Section 6.03 to be exempt from the permit requirement. The above testimony from Mr. Olivieri, as well as testimonial evidence from Division witnesses, establish that the activity was not performed in accordance with the requirements of Section 6.01 D (3) and (7).

I have reviewed the documentary and testimonial evidence of record and considered the legal arguments of the parties and conclude as a matter of law that Respondent's activities do not meet the requirements of Sections 6.01 and 6.03 and therefore were not the exempt "limited maintenance activities" set forth in the Wetlands Regulations. Based on the above conclusion of law and in consideration of the evidence of record, I find that the Division has met its burden to prove that Respondent violated R.I. GEN LAWS §2-1-21 and the Wetlands Regulations in the five (5) instances alleged in the NOV.

III. RESTORATION

Section 2-1-23 of the Rhode Island General Laws provides that "In the event of a violation of §2-1-21, the director of environmental

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 28

management shall have the power to order complete restoration of the freshwater wetland area involved by the person or agent responsible for the violation." The proposed order for restoration is set forth in the NOV.

Harold K. Ellis testified as to the Division's restoration requirements for the site. It was his professional opinion that

Restoration would include the removal of the fill that was placed on site, fill material placed into the stream, placed into the swamp pond complex, placed into the perimeter wetland and into the 100 foot riverbank wetlands... and returning the grade of the stream back to its grade... on November 21, 1994. Tr. April 16, 1996 at 35-36.

Except for Mr. Olivieri's contention that he had not violated the wetlands statute or regulations because his work at the site constituted "maintenance", no testimony was presented or elicited suggesting less than the full restoration to the site's condition as it existed on November 21, 1994. Restoration as set forth in the NOV, including the removal of fill to restore the area to its condition as it existed on November 21, 1994, is therefore required.

IV. ADMINISTRATIVE PENALTY

As indicated in the NOV, the Division seeks an administrative penalty of One Thousand (\$1,000.00) Dollars for each of the five instances wherein Respondent violated the Freshwater Wetlands Act, for a total penalty of Five Thousand (\$5,000.00) Dollars. The NOV states that the penalty associated with each instance was calculated in accordance with Sections 9 and 10 and with the Freshwater Wetlands penalty matrix of the Rules

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 29

and Regulations for the Assessment of Administrative Penalties ("Penalty Regulations"). As stated previously, the AAD proceeding in this matter was conducted in accordance with the Penalty Regulations.

Section 12(c) of the Penalty Regulations provides the following:

In 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 Department's interpretation of this provision requires the Division to prove the alleged violation by a preponderance of the evidence and "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, 1995.

Section 10 of the Penalty Regulations provides for the calculation of the penalty through the determination of whether a violation is a Type I, Type II or Type III violation and whether the Deviation from the Standard is Minor, Moderate or Major. Once the Type and Deviation from Standard are known, a penalty range for the violation can be determined by reference to the Freshwater Wetlands penalty matrix.

The penalty amount and its calculation were established in evidence

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 30

through the testimony of Mr. Carney, that of Mr. Ellis, and through the document marked "Div 48 Full". According to the testimony, Div. 48 Full, the Penalty Assessment Sheet, was prepared in part by Mr. Carney and then completed by Mr. Ellis. Mr. Carney testified that for each instance of violation, he had prepared the Violation Type and the Extent of Noncompliance. Tr. April 9, 1996 at 139. The document shows that all five violations were identified as Type I violations.

Mr. Ellis explained that the biologist considers the extent of the violation and fills in the Violation Type and the Extent of Noncompliance based upon "the conditions on the site, the physical alterations that occurred, how much area was altered, what was the nature of the violation of the alteration", while he, as enforcement supervisor, reviews "whether the person took reasonable or appropriate steps to mitigate or prevent a violation occurring;...whether the person violated and previously failed to comply with a [law] or rule and regulations, and... how much control the violator had over the violation". Tr. April 16, 1996 at 37-39. Mr. Ellis testified that he then would fill out the Deviation from Standard and the Penalty Assessed and make any comments on the form. Tr. April 16, 1996 at 37.

On the Penalty Assessment Sheet, Mr. Ellis identified all five violations as a Major Deviation from Standard. He calculated the penalty for each violation at One Thousand (\$1,000.00) Dollars. The total penalty,

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 31

as set forth both in the Penalty Assessment Sheet and in the NOV (Div 49 Full), was assessed at Five Thousand (\$5,000.00) Dollars.

Based upon the testimony and evidence in the record, I find that the Division has established in evidence the penalty amount and its calculation for each of the violations. Pursuant to Section 12(c) of the Penalty Regulations, once the violations have been proven and the penalty amount and its calculation have been established in evidence, the Respondent then bears the burden of proving that the penalty and/or the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations.

Respondent conducted cross examination of Mr. Carney but did not question him regarding his determination that the violations were Type I. Intervenor briefly questioned Mr. Carney as to whether his supervisor had ever disagreed or changed his identification of Type of Violation or Extent of Noncompliance. Mr. Carney stated that it had never happened. Tr. April 9, 1996 at 194.

Harold Ellis underwent more extensive questioning from Respondent and Intervenor. Under cross examination from Respondent, Mr. Ellis confirmed that among the factors he considered in determining the Deviation from Standard was Mr. Olivieri's prior violation (although not the subject of an NOI or NOV) for his failure to leave the two-foot deep channel which had been approved by the Division as the restoration

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 32

required to satisfy the NOI. Instead, Mr. Olivieri had filled the channel to be even with the carpath. Tr. April 16, 1996 at 46-47. (The NOI was only considered satisfied after a foot of the fill had eroded or washed away.)

In Intervenor's cross examination of Mr. Ellis, he questioned whether any personal bias against Mr. Olivieri and his employer, Mr. Assalone, may have influenced the subjective judgments that sometimes come into play in determining the Type of Violation and Deviation from Standard. Mr. Ellis emphatically denied that his judgment had been influenced. Tr. April 23, 1996 at 41-42. He was also questioned about any discussions he may have had in arriving at the amount of the penalty. Mr. Ellis explained the process for determining the penalty amount:

[N]ormally you calculate the amount based upon the methodology matrix in the back part of Division 48 full and then you determine whether the person previously had knowledge, whether he took the appropriate steps. We felt that he hadn't because he did not apply and he was warned ten times, and really it boils down to the policy of the enforcement group, that when that occurs, the penalty is maximized, we can only assess a thousand dollars per instance. Tr. April 23, 1996 at 45.

Intervenor questioned Mr. Ellis about some of the other factors considered in determining the penalty but did not elicit any testimony to refute that the penalty was properly calculated.

I have reviewed the testimonial and documentary evidence of record to determine whether the Division properly classified the five instances of violation as Type I Major. I conclude that the Type I Major designation is consistent with the pertinent provisions of the Penalty

Regulations and with the evidence presented in this case. I also find that under the circumstances in this case, where Respondent was advised numerous times that to do what he intended to do on site and later accomplished required a permit, the Division's determination to impose the maximum penalty for each instance is in accordance with Sections 9, 10 and with the Freshwater Wetlands penalty matrix of the Penalty Regulations. I therefore find that Respondent has not met his burden to prove that the Five Thousand (\$5,000.00) Dollar administrative penalty was not assessed in accordance with the Penalty Regulations.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. Carmine Olivieri, President of Modern Boating, Inc., is the legal owner of a parcel of property identified in the Land Evidence Records for the Town of West Greenwich, Rhode Island as Assessor's Plat 29, Lot No. 1-1 (the "subject site").
2. A Notice of Violation and Order No. C94-0130v (the "NOVAO") was issued by the Division to Carmine Olivieri on November 21, 1995.
3. The NOVAO was received by Mr. Olivieri on or about November 27, 1995.
4. The NOVAO was recorded in the Land Evidence Records for the Town of West Greenwich, Rhode Island on November 27, 1995.
5. Mr. Olivieri filed a request for an adjudicatory hearing on December 1, 1995.
6. Boston Neck Realty, Inc.(sic) is an abutting and adjoining owner and the holder of a mortgage deed on the subject site.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 34

7. Boston Neck Realty, Corp. was granted intervention in the AAD proceeding on January 17, 1996.
8. Freshwater wetlands, specifically a swamp/pond complex, its associated perimeter wetland, a stream and its associated riverbank wetlands exist upon the subject site.
9. A cartpath, also known as Rhode Island Dam #468 ("dam"), is present on the subject site. The stream flows through a cut in the cartpath from the pond area east of the cartpath to the swamp west of the cartpath.
10. Boston Neck Realty, Corp., the previous owner of the subject site, had been issued a Notice of Intent to Enforce ("NOI") on September 29, 1993 when it was the owner of the property.
11. Investigations of the subject site by representatives of the Department on July 14, 1993, in April 1994 and July 1994 had revealed recent excavations of the stream flowing through the dam and the debris placed along the sides of the stream channel. The dimensions of the channel were approximately four feet (4') deep by three feet (3') wide.
12. By letter dated August 2, 1994, Boston Neck Realty, Corp., designated Carmine Olivieri to act on its behalf in the discussions with the Department regarding the site.
13. On or about August 24, 1994, Mr. Olivieri received permission from the Department to fill up to two feet (2') of the four foot (4') depth of the excavated area of the stream.
14. On or about August 25, 1994, Boston Neck Realty, Corp. conveyed the subject site to Modern Boating, Inc., of which company Carmine Olivieri is president.
15. On or about August 29, 1994, a representative of the Department again inspected the subject site and found that the stream channel had been completely filled to the top of the cartpath.
16. On November 21, 1994, two representatives of the Department met with Mr. Olivieri at the site and observed that the filled area within the stream channel had eroded and was one foot (1') below the top of the cartpath. The stream area had stabilized and allowed a flow of water over the dam.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 35

17. At the November 21, 1994 site meeting and/or by letter dated December 2, 1994 (Div 29 Full), Mr. Olivieri was informed that the area was in conformance with the NOI restoration requirements and that no further work, with the exception of additional erosion controls, was required to restore the altered freshwater wetlands.
18. On September 29, 1995, a representative of the Department inspected the subject site and issued a Cease and Desist Order to Carmine Olivieri.
19. Between November 21, 1994 and November 6, 1995 filling into a one hundred (100') foot riverbank wetland and swamp/pond complex; filling into a stream; filling into a one hundred (100') foot riverbank wetland and a swamp/pond complex; filling and clearing within a swamp/pond complex; and filling into a perimeter wetland altered the freshwater wetlands on the subject site and they remain in an altered state.
20. The filling into a one hundred (100') foot riverbank wetland and swamp/pond complex; filling into a stream; filling into a one hundred (100') foot riverbank wetland and a swamp/pond complex; filling and clearing within a swamp/pond complex; and filling into a perimeter wetland altered the character of the freshwater wetlands on the subject site.
21. Carmine Olivieri altered or permitted the alterations of the freshwater wetlands on the subject site.
22. Carmine Olivieri did not receive permission from the Director of the Department of Environmental Management to alter the freshwater wetlands on the site.
23. Carmine Olivieri had been informed by representatives of the Department on many occasions that the alterations of the freshwater wetlands which he intended to perform on the subject site and later accomplished required a permit from the Department.
24. Carmine Olivieri failed to use appropriate erosion and sediment controls during the alterations of the freshwater wetlands on the subject site.
25. The plan of Rhode Island Dam #468 had not been approved by the Department of Environmental Management or its predecessor

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 36

department or agency.

26. Carmine Olivieri increased the height of the carpath at the location of the stream channel by approximately twelve (12") inches.
27. Carmine Olivieri widened the carpath and the slopes extended further into the wetlands beyond the existing toe of slope.
28. Restoration of the freshwater wetlands on the subject site is necessary in order to restore the wetlands to their natural, unaltered condition.
29. Testimonial and documentary evidence from the Division established that each of the five (5) instances of violation constituted a Type I Major violation for which the Respondent was assessed a \$1,000.00 administrative penalty for each violation, for a total administrative penalty of Five Thousand (\$5,000.00) Dollars.
30. The Five Thousand (\$5,000.00) Dollar administrative penalty assessed against Carmine Olivieri in the NOV is not excessive.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. Respondent made a timely request for hearing in accordance with R.I. GEN LAWS §42-17.1-2 (w)(1).
2. Rhode Island Dam #468 is not an approved structure as contemplated in Section 6.03 of the Wetlands Regulations.
3. The condition of the dam on November 21, 1994 is consistent with the pre-existing structure as contemplated in Section 6.03 of the Wetlands Regulations.
4. The water flowing through the ditch or cut in the dam is a stream as defined in Section 5.83 of the Wetlands Regulations.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 37

5. The alterations to the freshwater wetlands on the subject site are not exempt activities and do not comply with Rule 6.00, and its subsections, of the Wetlands Regulations.
6. The Department has proved by a preponderance of the evidence that freshwater wetlands were altered in violation of the Freshwater Wetlands Act §2-1-21 and the Wetlands Regulations in the five (5) instances as alleged in the Notice of Violation dated November 21, 1995.
7. The Department has proved by a preponderance of the evidence that Carmine Olivieri was responsible for the wetlands alterations on the subject site.
8. The Department is entitled to removal of the alterations and restoration of the subject site as set forth in the NOV, to its condition as it existed on November 21, 1994.
9. The Division established in evidence the penalty amount and its calculation for each of the five instances of violation as set forth in the NOV.
10. Respondent has failed to prove by a preponderance of the evidence that the administrative penalty for each of the five instances of violation was not assessed in accordance with the Penalty Regulations.
11. The Division is entitled to the assessment of an administrative penalty against Carmine Olivieri in the sum of Five Thousand (\$5,000.00) Dollars as set forth in the NOV.

Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. Respondent must restore all freshwater wetlands cited in instance numbers 1, 2, 3, 4 and 5 of the NOV in accordance with the following restoration requirements:
 - a. Immediately install a continuous uninterrupted line of silt fence

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 38

between the undisturbed wetland and all areas from which fill material is to be removed.

b. Remove all fill material that has been deposited in the Swamp/Pond Complex, Riverbank Wetlands and Perimeter Wetland. All fill material removed must be deposited outside any and all wetlands.

c. Remove all material that has been deposited within the Stream. Re-establish the embankments of the watercourse following fill removal.

d. Plant all cleared areas in the newly created roadway with trees and shrubs.

Balled and burlapped or transplanted tree species must be planted in an interspersed fashion, 8 feet on center, 4 feet tall after planting throughout the area defined above. Tree species must include an equal distribution of 2 of the following:

- a. Hemlock, Tsuga canadensis;
- b. White pine, Pinus strobus;
- c. Red maple, Acer Rubrum;
- d. Tupelo, Nyssa sylvatica;
- e. White Ash, Fraxinus americana;
- f. Gray Birch, Betula Populifolia.

Balled and burlapped or transplanted shrub species must be planted in an interspersed fashion 6 feet on center, 3 feet tall after planting throughout the area defined above. Shrub species must include an equal distribution of 3 of the following:

- a. Highbush blueberry, Vaccinium corymbosum;
- b. Amur honeysuckle, Lonicera macckii;
- c. Arrowwood, Viburnum dentatum;
- d. Swamp azalea, Rhododendron viscosum;
- e. Elderberry, Sambucus canadensis;
- f. Winterberry, Ilex verticillata.

e. If any or all of the required plantings fail to survive at least one full growing season from the time they have been planted, you shall be responsible for replanting and maintaining the same plant

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 39

species until such time that survival is maintained over one full growing season.

f. All restored areas must be allowed to revegetate to a natural wild state.

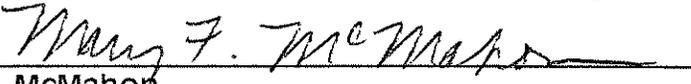
g. Upon stabilization of all disturbed areas all erosion and sedimentation controls must be removed from the freshwater wetland. Prior to the removal of the controls all accumulated sediment must be removed to a suitable upland area.

h. All work required above must be completed prior to **June 30, 1997.**

2. Respondent must contact the Division of Freshwater Wetlands/Office of Compliance and Inspection prior to the commencement of restoration to ensure proper supervision and to obtain the required restoration details from the representatives of the Division/Office.
3. Respondent must, within twenty (20) days after the Final Agency Order is signed by the Director, pay a total administrative penalty of Five Thousand (\$5,000.00) Dollars. Payment shall be in the form of a certified check made payable to the "General Treasurer - Water and Air Protection Program Account", and shall be forwarded to:

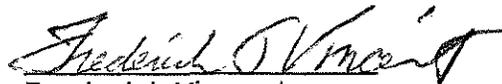
R. I. Department of Environmental Management
Office of Business Affairs
235 Promenade Street, Rm. 340
Providence, RI 02908
Attn: Glenn Miller

Entered as an Administrative Order this 1ST day of May, 1997 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
235 Promenade Street
Providence, RI 02908

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 40

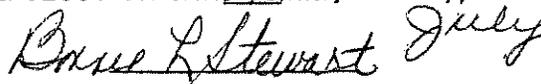
Entered as a Final Agency Order this 29 day of ^{July -88}~~May~~, 1997.



Frederick Vincent
Acting Director
Department of Environmental Management
235 Promenade 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 Carmine Olivieri, Modern Boating, Inc. 45 Nooseneck Hill Road, West Greenwich, RI 02817; Arnold N. Montaquila, Esq., Calart Tower, Suite 3A, 400 Reservoir Ave., Providence, RI 02907 and via interoffice mail to Paula J. Younes, Esq., and Catherine Robinson Hall, Esq., Office of Legal Services, 235 Promenade Street, Providence, Rhode Island 02908 on this ~~29th~~ day of ~~May~~, 1997.



APPENDIX A

LIST OF EXHIBITS

The below-listed documents are marked as they were admitted into evidence:

Division's Exhibits:

- Div. 1 Full Copy of Resume of Harold K. Ellis (3 pp.)
- Div. 2 Full Copy of Resume of Sean R. Carney (2 pp.)
- Div. 3 Full Copy of Resume of Dena M. Gonsalves (2 pp.)
- Div. 4 Full Copy of Resume of Earl F. Prout, Jr. (2 pp.)
- Div. 5 Full Copy of Resume of Nicholas A. Pisani (2 pp.)
- Div. 6 Full Copy of Resume of Stephen J. Tyrell (2 pp.)
- Div. 7 Full Copy of interdepartmental memo to Henry Ise, Chief, Public Works, Division of Harbors & Rivers from Harry O.V. Nordquist, Public Works, Div. of Harbors & Rivers dated August 9, 1957 (2 pp.)
- Div. 8 Full Copy of Application for Approval of Plans by Thomas Wright, Chief, RI Div. of Fish & Game dated November 1, 1961 (1 p.).
- Div. 9 Full Copy of Site Plan: Kasella Farm Pond, W. Greenwich, RI, U.S. Dept. of Agriculture/Soil Conservation Service received on August 17, 1954/November 29, 1961.
- Div. 10 Full Photographs of Koszella Farm Pond Dam, RI Dam #468 (a, b & c) dated April 6, 1984 (3 photos, 1 p.).
- Div. 11 Full Copy of Notice of Intent to Enforce to Boston Neck Realty Corp. c/o John Assalone, President from Harold K. Ellis dated September 29, 1993 and Certified Mail Receipts (4 pp.).

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 42

- Div. 12 Full Copy of Site Inspection Reports by Dena Gonsalves dated April 15, 1994. (1 p.).
- Div. 13 Full Copy of Site Inspection Report by Dena Gonsalves dated July 28, 1994 (1 p.)
- Div. 14 Full Copy of letter to Harold K. Ellis from John R. Assalone, President, Boston Neck Realty Corp., dated received August 3, 1994 (1 p.).
- Div. 15 Full Copy of Site Inspection Report by Dena Gonsalves dated August 11, 1994 (1 p.).
- Div. 16 Full Copy of letter to Carmine D. Olivieri from Harold K. Ellis dated August 18, 1994 and certified mail receipt (2 pp.).
- Div. 17 Full Copy of telephone discussion notes by Harold K. Ellis dated August 24, 1994 (1 p.).
- Div. 18 for Id Copy of Complaint Data Sheet by R. Larson dated August 25, 1994 (1 p.).
- Div. 19 Full Copy of Complaint Data Sheet by Sean Carney dated August 26, 1994 (1 p.).
- Div. 20 Full Copy of Complaint Data Sheet by Harold K. Ellis dated August 26, 1994 (1 p.).
- Div. 21 Full Copy of Site Inspection Report by Dena Gonsalves dated August 29, 1994 (1 p.).
- Div. 22 Full Copy of telephone discussion notes by Harold K. Ellis dated August 31, 1994 (1 p.).
- Div. 23 for Id Copy of Complaint Data Sheet dated September 1, 1994 (1 p.).
- Div. 24 for Id Copy of Complaint Data Sheet dated September 1, 1994 (1 p.).
- Div. 25 for Id Copy of Complaint Data Sheet dated September 1, 1994 (1 p.).
- Div. 26 Full Copy of Site Inspection Report by Dena Gonsalves dated

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 43

- November 21, 1994 (3 pp.).
- Div. 27 Full Copy of Dam Inspection Report by E. F. Prout, Jr. dated November 22, 1994 (2 pp.).
- Div. 28 Full Copy of Memo for File, Dams Safety Section dated November 22, 1994 (1 p.).
- Div. 29 Full Copy of letter to Carmine Olivieri from Harold K. Ellis dated December 2, 1994 (2 pp.).
- Div. 30 Full Copy of telephone discussion noted by Dean Albro dated December 6, 1994 (1 p.).
- Div. 31 Full Copy of letter to Carmine Olivieri from Dean H. Albro dated December 13, 1994 (2 pp.).
- Div. 32 Full Photographs of Plat 29, Lot 1-1, W. Greenwich, RI dated a thru f December 14, 1994 (6 photos, 4 pp.).
- Div. 33 Full Copy of letter by Genevieve M. Martin dated December 22, 1994 (1 p.).
- Div. 34 Full Copy of letter to Carmine Olivieri from Dean H. Albro dated January 19, 1995 (2 pp.).
- Div. 35 Full Copy of letter to Carmine Olivieri from Dean H. Albro dated March 24, 1995 (2 pp.).
- Div. 36 for Id Copy of Complaint Data Sheet of September 29, 1995 (1 p.).
- Div. 37 Full Copy of Complaint Inspection Report of Sean Carney dated September 29, 1995, October 4, 1995 and November 6, 1995 (5 pp.).
- Div. 38 Full Copy of Cease and Desist Order dated September 29, 1995 (1 p.).
- Div. 39 Full Copy of Biological Inspection Report by Sean Carney dated September 29, 1995 (7 pp.).
- Div. 40 Full Copy of sketch by Sean Carney dated September 29, 1995.

OLIVIERI/MODERN BOATING, INC.
AAD NO. 95-020/FWE
RECOMMENDED DECISION AND ORDER
PAGE 44

- Div. 41 Full Copy of Records Research Report by Sean Carney dated October 11, 1995 (1 p.).
- Div. 42 Full Copy of telephone discussion notes by Sean Carney dated October 25, 1995. (1 p.).
- Div. 43 Full Photographs of Koszella Farm Pond Dam, RI Dam #468
a thru e dated October 4, 1995 (6 photos, 3 pp.).
- Div. 44 Full Copy of Special Dam Inspection Report dated November 6, 1995 (1 p.).
- Div. 45 Full Photographs of Koszella Farm Pond Dam, RI Dam #468
a thru f dated November 6, 1995 (5 photos, 3 pp.).
- Div. 46 Full Photographs of Koszella Farm Pond Dam, RI Dam #468
A thru F dated November 6, 1995 (6 photos, 2 pp.).
- Div. 47 Full Copy of Enforcement Summary Sheet by Sean Carney dated November 7, 1995 (2 pp.).
- Div. 48 Full Copy of Penalty Assessment Sheet by Harold K. Ellis dated November 15, 1995 (6 pp.).
- Div. 49 Full Copy of Notice of Violation and Order No. C95-0725 dated November 21, 1995 and receipts for certified mail (6 pp.).
- Div. 50 Full Copy of Request for Adjudicatory Hearing dated received December 1, 1995 (1 p.).

Respondent's Exhibits:

- Resp. 1 Full State of Rhode Island, Department of Environmental Management, 1995 Annual Report to the Governor, Dams Safety Program, Division of Freshwater Wetlands.