

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

RE: TOWN OF JAMESTOWN
NOTICE OF VIOLATION NO. 1193

AAD NO. 94-005/WRE

DECISION AND ORDER

This matter was heard before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") on November 27, 1995 pursuant to the Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the Department on August 26, 1994. Liability, that is that the Respondent violated R.I.G.L. Sections 46-12-4 and 46-12-4.1 and Rule 6(b)iii of the Rules and Regulations Pertaining to a User Fee System for Point Source Dischargers ("User Fee Regulations") as alleged in the NOV, was previously established in that Decision and Order ("Decision") entered on August 11, 1995. That Decision, which granted summary judgment on the liability issue, is incorporated in this Decision and Order and is attached hereto as Appendix A. It is also identified in the hearing record as Division's Exhibit #2 Full. According to the Decision, the remaining issue to be heard was that of the assessment of an administrative penalty.

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

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

BACKGROUND

On August 26, 1994 the Department of Environmental Management, Division of Water Resources ("Division") issued a Notice of Violation to the Town of Jamestown alleging that the Respondent violated R.I.G.L. §§46-12-4 and 46-12-4.1 and Rules 6(b)iii, 6(d) and 8.0 of the User Fee Regulations in that Respondent has failed to pay the user fee of \$1840.00 assessed on December 8, 1993 and which became due in full within 45 days of receipt of the assessment letter, i.e. January 23, 1994. The Administrative Penalty Worksheet, attached to the NOV, identifies the "Date of Initial Violation" as January 25, 1994 and indicates that Respondent had been in violation of R.I.G.L. §46-12-4 for seven (7) months. The NOV assessed an administrative penalty of \$700.00, one hundred (\$100.00) dollars for each month of the violation, and seeks an additional administrative penalty for each month that the Respondent remains in violation of its statutory and regulatory obligations. Respondent filed its request for hearing at the AAD on September 9, 1994.

In April 1995, the parties filed separate motions for summary judgment. Oral argument on the motions was heard on

May 22, 1995 and the Division's motion was subsequently granted as to liability. In the Decision which granted summary judgment on liability, the Hearing Officer reviewed the stipulations of counsel and summarized the matter as follows:

...Respondent is responsible for the operation of a wastewater treatment facility located at 44 Southwest Avenue in the Town of Jamestown, Rhode Island; that on December 8, 1993 the Respondent was properly assessed a user fee of \$1840.00 for the period commencing February 1, 1994 and concluding February 1, 1995; and that Respondent has refused to pay said user fee which has been due and owing to Division since January 23, 1994. There is no dispute that said user fee was properly assessed and remains due to Division in accordance with the provisions of §46-12-4 and 46-12-4.1 of the Water Pollution Act and Rule 6(b)iii of the User Fee Regulations.

It has also been stipulated by the parties that Respondent has previously paid assessed user fees to the Division for the years 1991, 1992 and 1993 totaling \$6031.50; that Respondent would appear to be entitled to reimbursement from the State of Rhode Island for \$6031.50 and that as of the date of filing of the Stipulated Facts, the State has failed and refused to provide Respondent with reimbursement of the \$6031.50. Decision and Order entered Aug. 11, 1995, pp. 5-6.

The Hearing Officer considered the arguments of counsel in the respective cross motions for summary judgment. Respondent's motion contended that the stipulations established that the Division is liable to the Town in the amount of \$6031.50 as reimbursement for fees paid to the Division for the years 1991, 1992 and 1993; that the \$1840.00 fee assessment claimed by the Division should be subtracted

from this sum; and that even this \$1840.00 should later be returned to the Town pursuant to the Division's rules. Decision, p.5. The Division's motion asserted that the stipulations established that the \$1840.00 remained unpaid; that the Division was entitled to the payment; and that although the Town's allegations as to its entitlement to reimbursement of the user fees was not contested by the Division, the request for reimbursement should be addressed to the Department of Administration, not the Department of Environmental Management. Decision, pp. 4, 6.

In the Decision, the pertinent statutes were reviewed by the Hearing Officer and he concluded that although the Department of Environmental Management clearly had the authority to impose user fees, it lacked the authority to consider reimbursements. The statute which provided for reimbursement established a system wherein the Department of Administration was required to submit an annual report to the Budget Office, the Budget Office was to include the statement of costs in the state budget, and the State Treasurer was to distribute the reimbursements in accordance with the original report submitted to the Budget Office by the Department of Administration. Decision, pp. 8-9. The statute does not authorize or empower the Department of Environmental Management to consider requests for reimbursement. at 9.

The Hearing Officer's Decision, in addition to

determining that the Division lacked authority to consider requests for reimbursement, also found that the AAD lacked jurisdiction to consider Respondent's reimbursement request. This conclusion was based upon the AAD's enabling statute which empowers the AAD to hear notices of violation, but provides no authority to hear and determine requests for reimbursement between municipalities and the Department of Administration/Office of the Treasurer. at 9-10.

As there was no genuine issue of material fact regarding Respondent's violation of §§46-12-4, 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations, the Division's Motion for Summary Judgment was granted as to the Respondent's liability for the violation alleged in the NOV. The Decision ordered that the remaining issue of the proposed administrative penalty be set down for prehearing conference and hearing.

PREHEARING CONFERENCE

The prehearing conference was conducted on November 3, 1995 at which the parties identified those stipulations of fact which had been previously submitted to the AAD on March 24, 1995 as "Stipulated Facts". Those eleven (11) stipulations (as they are set forth in the Prehearing Conference Record and Order entered on November 8, 1995) are attached hereto as Appendix B. Of the eleven stipulations, stipulations 1 through 8 are also set forth as findings of fact in the Decision which determined liability. The exhibits

proffered by the parties, marked as they were admitted into evidence, are indicated on Appendix C.

HEARING SUMMARY

At the hearing conducted before the AAD on November 27, 1995, the Division chose to rest upon the documents which had been admitted as exhibits, and upon the Decision in the record. Respondent also chose to rest upon the exhibits and Decision in the record. No witnesses were called to testify by either party.

In closing argument, the Division requested that Respondent be ordered to pay the original user fee assessment of \$1840.00; pay an administrative penalty of \$700.00 as set forth in paragraph two (2) of the order portion of the NOV (Div. 1 Full); and pay an additional administrative penalty, as set forth in paragraph three (3) of the order portion of the NOV, for the period following the issuance of the NOV that the Respondent remained in violation of its statutory and regulatory requirements. Paragraph three (3) provides that this latter penalty be calculated in the same manner set forth in the Administrative Penalty Worksheet (attached to the NOV) as was used to calculate the \$700.00 penalty. That is, at a rate of one hundred (\$100.00) dollars per month for the continuing violation.

Division's counsel asserted in closing argument that the user fee assessment had still not been paid and that fourteen

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(14) months had elapsed since issuance of the NOV. Citing In Re: Warren Sewer Commission/Wastewater Treatment Facility, AAD No. 93-005/WRE, Final Agency Decision and Order dated April 26, 1994 which assessed an initial penalty and an accrued penalty due to Respondent's continued noncompliance, the Division attorney requested and computed an additional penalty of \$1400.00, for a total administrative penalty of \$2100.00. The total amount due from the Town, according to counsel, would be \$3940.00 (the \$1840.00 user fee + \$2100.00 in administrative penalties).

Respondent's closing argument reiterated the position set forth in its Motion for Summary Judgment and urged the user fee assessment be paid from the sums due the Town as reimbursement for the years 1991-1993. Respondent's counsel further stated that, since the assessment was due under regulations promulgated by the Department of Environmental Management, the DEM should seek the money from the Department of Administration. He also pointed to the ludicrousness of the circumstance that would require the Town to pay this user fee assessment of \$1840.00, only to later have the sum returned to the Town.

At the conclusion of the hearing, the parties were asked if they had considered referring this matter for either mediation or to the Department's ombudsman for assistance in achieving resolution of the dispute. The Town indicated that

it had been willing to seek mediation but that the Division had objected. Division's counsel stated that they did not agree to mediation, but offered to assist the Town in regaining the sums from the Department of Administration.

The Original Violation

As noted by the Hearing Officer in the Decision determining liability, if Respondent is entitled to reimbursement and has not been reimbursed as alleged, it is difficult not to be sympathetic to the Town's plight. Decision, p. 9. But as that Hearing Officer concluded, even viewing the Stipulated Facts and the pleadings in the light most favorable to the Town, there was no dispute as to the Division's entitlement to the user fee as alleged in the NOV. Decision, p. 6. Liability has been clearly established and evidence identifying the assessment and calculation of the administrative penalty is in the hearing record. The only issue remaining as to the original violation is whether the amount of the proposed penalty is excessive.

Pursuant to Section 12(c) of the Penalty Regulations:

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.

Both R.I.G.L. §42-17.6-6 and Section 10 of the Penalty

Regulations specify the factors to be considered in determining the amount of the administrative penalty. According to Section 12(c) of the Penalty Regulations, it is Respondent's burden to prove that those factors were not properly considered in determining the money amount of the proposed administrative penalty.

Respondent's closing argument cannot be considered as evidence in determining whether the Town has met its burden of proof. The nonevidentiary nature of counsel argument was previously addressed in In Re: Gerard L. & Antoinette Bucci, AAD No. 92-022/IE, Final Agency Order dated March 31, 1995. In that case Respondent's counsel, by way of a Memorandum of Law, identified certain factors to be considered in determining the penalty but failed to present any documentary or testimonial evidence on the issue.

The Bucci decision reviewed Section 42-35-10 of the Administrative Procedures Act ("APA") which provides in pertinent part:

...The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs...

As discussed in Bucci, at pp. 7-8, although the APA may arguably allow consideration of some types of reliable hearsay

in contested cases, the Rhode Island Supreme Court has determined that:

...statements of counsel made in the course of argument, whether written or oral, do not constitute evidence, regardless of the form in which they are presented. Wood v. Ford, 525 A.2d 901, 903 (R.I. 1987).

The Supreme Court ruled that an administrative agency may not base a finding or determination on information that is not legally probative. at 903. See Rhode Island Consumer's Counsel v. Smith, 111 R.I. 271, 302 A.2d 757 (1973).

Having concluded that the Town's closing argument cannot be considered as evidence, I find that the only evidence in the record on Respondent's behalf is contained in the Stipulated Facts. While the stipulations may directly or indirectly address some of the factors the Department is required to consider in determining an administrative penalty, Respondent did not elicit or provide any testimonial or documentary evidence to indicate that those factors were not indeed considered in the assessment of the administrative penalty in this matter. For instance, that the Town had complied with the User Fee Regulations in the past and that there appears to be no actual or potential impact on public health, safety and welfare and the environment for its present failure to comply may well have been factors which the Division considered in determining the proposed penalty. There is certainly nothing in the record to indicate

otherwise.

As the record is devoid of any evidence that the Division failed to consider these or other issues in arriving at the proposed assessment of the \$700.00 administrative penalty, clearly the Respondent has failed to meet its burden of proving by a preponderance of the evidence that the Director failed to assess the \$700.00 penalty and/or the economic benefit portion of the penalty in accordance with the Penalty Regulations.

The assessment of the \$700.00 administrative penalty for the period from the date of the initial violation (January 25, 1994) until the issuance of the NOV is therefore upheld.

The Continuing Violation

The proposed penalty for the period following the issuance of the NOV that the Respondent remained in violation of its statutory and regulatory requirements presents some additional issues. The Division, in closing argument on November 27, 1995, asserted that the Respondent remained in non-compliance with the User Fee Regulations for the fourteen (14) month period from the date of the NOV (August 26, 1994) until the date of the hearing. The Division therefore sought the imposition of an additional penalty for the fourteen (14) months further noncompliance, as was set forth in paragraph three (3) of the order portion of the NOV.

For this fourteen (14) month period, as with the original

violation, the Division must, "by a preponderance of the evidence, prove the occurrence of each act or omission alleged." R.I.G.L. §42-17.6-4.

As discussed above with reference to Respondent's closing argument, the Bucci decision is clear that arguments of counsel are not evidence and cannot form the basis for administrative findings of fact. Thus the Division's closing argument is legally insufficient to support a finding of fact that the user fee remained unpaid as of the date of the hearing.

The record, however, does support a finding that the user fee assessment had not been paid as of March 24, 1995, the date of the Stipulated Facts relied upon by the Hearing Officer in the Decision granting summary judgment on liability. Stipulation 2(h), which is set forth in the Decision as finding of fact number 8, provides: "The Respondent has refused to pay DEM the user assessment in the amount of one thousand eight hundred and forty (\$1840.00) dollars which has been due and owing since January 23, 1994." As a result, the Division met its burden on the original violation for nonpayment, but only established that, following the NOV's issuance, the user fee assessment remained unpaid in violation of the statutory and regulatory requirements as of the date the Stipulated Facts were signed by Respondent's counsel.

It is noted that the Decision and Order in the Warren Sewer Commission matter which was cited by Division's counsel in support of imposition of a further penalty for the continuing violation, considered testimony from a Division witness that the Respondent remained in noncompliance for over seven (7) months after being cited, from the date of issuance of the NOV to the date of hearing. In Re: Warren Sewer Commission/Wastewater Treatment Facility, Decision and Order, p. 9.. Testimonial evidence supported the conclusion that even on the date of the hearing, the Facility remained in violation of regulatory requirements and that the Division had met its burden of proof on the issue.

Here the Hearing Officer's Decision entered August 11, 1995 has established that the Town of Jamestown failed to pay the required user fee for the period following the issuance of the NOV until March 24, 1995. As the NOV (Division's Exhibit 1 Full) provided the manner of calculation of the penalty for the continuing violation at the rate of \$100.00 per month, and a continuing violation of six (6) months has been proved by the Division, the additional administrative penalty should be the amount of six hundred (\$600.00) dollars.

Pursuant to the provisions of Section 12(c) of the Penalty Regulations, it then became Respondent's burden to prove by a preponderance of the evidence that the penalty for this period was not properly assessed. Respondent, for the

same reasons as with the original violation, has failed to meet its burden of proof on the penalty issue.

In accordance with the above, the additional penalty for the period following the issuance of the NOV which the Division has proven the Respondent remained in violation of the statutory and regulatory requirements, that is until March 24, 1995, is therefore upheld.

Conclusion

It is unfortunate that this matter has consumed so many resources of the Division and the Town and gives every indication of continuing its litigious path.

The Town's situation suggests issues and concerns not properly before the AAD but which may shed some light on resolving the reimbursement question and provide finality to the issue of the Division's entitlement to the payment of the user fee assessment. Answers obtained from the Department of Administration may advance the Town's future compliance with the User Fee Regulations.

The Division is entitled to the payment of the user fee assessment of \$1840.00; administrative penalties in the amount of \$700.00 for the original violation and \$600.00 for the continuing violation are reasonable and warranted.

As liability was established in the Decision and Order dated August 11, 1995, findings of fact numbered 1 through 8 which were based upon the Stipulated Facts dated March 24,

1995, and conclusion of law number 1 are incorporated in this Decision and Order and are set forth below.

FINDINGS OF FACT

1. The AAD has personal and subject matter jurisdiction over the Respondent to consider the instant matter.
2. The Respondent is responsible for the operation of a wastewater treatment facility located at 44 Southwest Avenue in the Town of Jamestown, Rhode Island (the "facility").
3. On November 12, 1993, the Respondent received a copy of DEM's draft Fee Assessment dated November 8, 1993 which identified the monitoring which DEM proposed to accomplish at the facility during the period commencing February 1, 1994, and concluding February 1, 1995.
4. The Respondent failed to comment on the DEM's draft Fee Assessment within twenty (20) days of receipt.
5. Upon failure to receive any comments from the Respondent within twenty (20) days of its receipt of the draft Fee Assessment, the Division issued a final assessment on December 8, 1993.
6. On December 8, 1993, the Respondent was assessed a user fee in the amount of one thousand eight hundred and forty (\$1840.00) dollars and was so advised by the DEM in a letter sent to Respondent and dated December 8, 1993.
7. The Respondent was required to pay the assessed user fee in full within forty-five (45) days of the receipt of the December 8, 1993 letter. The Respondent received the December 8, 1993 letter on December 10, 1993.
8. The Respondent has refused to pay DEM the user assessment in the amount of one thousand eight hundred and forty (\$1840.00) dollars which has been due and owing since January 23, 1994.

After considering the stipulations of the parties and the documentary evidence of record, I find as fact the following:

9. The above finding of fact number 8 is identical to Stipulation 2(h) of the Stipulated Facts filed by the parties on March 24, 1995.

10. As of March 24, 1995, Respondent had refused to pay DEM the user assessment in the amount of one thousand eight hundred and forty (\$1840.00) dollars which had been due and owing since January 23, 1994.
11. No evidence was presented that after March 24, 1995 Respondent failed to pay DEM the user assessment in the amount of one thousand eight hundred and forty (\$1840.00) dollars which had been due and owing since January 23, 1994.
12. The NOV Administrative Penalty Worksheet calculated an administrative penalty from the date of the initial violation (January 25, 1994) until the issuance of the NOV (August 26, 1994) in the amount of one hundred dollars per month.
13. An administrative penalty in the amount of Seven Hundred (\$700.00) Dollars for the violation for the period until the issuance of the NOV (August 26, 1994) is not excessive.
14. For over six (6) months following the issuance of the NOV Respondent refused to pay DEM the User Assessment in the amount of one thousand eight hundred and forty (\$1840.00) dollars which had been due and owing since January 23, 1994.
15. The NOV assessed an additional administrative penalty for the period following the issuance of the NOV that the Respondent remained in violation of its statutory and regulatory requirements, calculated in the same manner set forth in the Administrative Penalty Worksheet for the original violation.
16. Ad administrative penalty in the amount of Six Hundred (\$600.00) Dollars for the violation for the period from the date of issuance of the NOV (August 26, 1994) until March 24, 1995 is not excessive.

CONCLUSIONS OF LAW

1. There is no dispute as to any material fact concerning the liability portion of the NOV and the Division is entitled to judgment as a matter of law concerning liability for violations of R.I.G.L. Sections 46-12-4 and 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations.

Based upon the above conclusion of law, the foregoing facts, the stipulations of the parties and the documentary

evidence of record, I make the following conclusions of law:

2. The Decision and Order dated August 11, 1995 established Respondent's liability for violations of R.I.G.L. Sections 46-12-4 and 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations for the period of the initial violation until March 24, 1995.
3. Respondent has failed to prove by a preponderance of the evidence that the administrative penalties were not assessed in accordance with the Penalty Regulations.
4. The Department is entitled to payment of the user fee assessment in the amount of One Thousand Eight Hundred and Forty (\$1840.00) Dollars.
5. The Department is entitled to administrative penalties in the amount of Thirteen Hundred (\$1300.00) Dollars.

Wherefore, it is hereby

ORDERED

1. Respondent shall, within ten (10) days after the Final Agency Order is signed by the Director, pay the One Thousand Eight Hundred and Forty (\$1840.00) Dollar user fee. The payment should be in the form of a certified check or money order made payable to the General Treasurer, State of Rhode Island, Account No. 1751-801 with a memo to "User Fee" on the check and delivered to the Department of Environmental Management, Office of Business Affairs, 22 Hayes Street, Providence, Rhode Island 02908-5767 (Attention: Janice Breault).
2. Respondent shall, within ten (10) days after the Final Agency Order is signed by the Director, pay administrative penalties in the amount of Thirteen Hundred (\$1300.00) Dollars by certified check, made payable to the "General Treasurer, State of Rhode Island" and send it to:

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

Entered as an Administrative Order this 12th day of January, 1996 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon
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 23 day of JAN., 1996.

Timothy R. E. Keeney
Timothy R. E. Keeney
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 James A. Donnelly, Esq., 180 America Way, Jamestown, RI 02835 and via interoffice mail to Gary Powers, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 24th day of January, 1996.

Daniel L. Stewart

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

RE: TOWN OF JAMESTOWN

AAD NO. 94-005/WRE

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on (1) Motion for Summary Judgment filed by the Division of Water Resources ("Division") on April 18, 1995; and (2) Motion for Summary Judgment filed by the Town of Jamestown ("Town" or "Respondent") on April 24, 1995. Each of these cross-motions asserts that on the basis of the Stipulated Facts and pleadings filed in the instant matter that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Oral argument on the motions was heard on May 22, 1995.

Division issued the Notice of Violation and Order No. 1193 ("NOV") in the instant matter to the Respondent on or about August 26, 1994. The NOV cited Respondent for violations of R.I.G.L. 46-12-4, R.I.G.L. 46-12-4.1 and Rules 6(b) iii, 6(d) and 8.0 of the Rules and Regulations Pertaining to a User Fee System for Point Source Dischargers that Discharge Pollutants into the Waters of the State ("User Fee Regulations") in that Respondent has failed to pay the user fee of \$1840.00 assessed on December 8, 1993 and which became due in full within 45 days of receipt of the assessment letter, i.e. January 23, 1994. The NOV also assessed an administrative penalty of \$700.00. Respondent filed its

request for a hearing at the AAD on September 9, 1994.

The parties appeared before the AAD for a Status Conference on November 4, 1994 at which the parties represented that this matter involves a question of law for which their positions can be argued through presentation of briefs, and that no Prehearing Conference would be necessary as the facts are not in dispute. Pursuant to their request at the status conference, an Order of the AAD was issued on November 21, 1994 whereby (1) the parties were required to file stipulations, including a waiver of hearing and submission on the record (pursuant to AAD Rule 15.00(b) by November 30, 1994, (2) the parties were required to file briefs by December 30, 1994 and any reply briefs by January 13, 1995, and (3) this matter would be assigned to a hearing officer for consideration and decision pursuant to AAD procedure.

The parties failed to file their respective briefs by the dates appointed, consequently, a Prehearing Order was issued by the AAD on January 27, 1995 whereby a Prehearing Conference was scheduled for March 3, 1995. Pursuant to motion of the parties, an Order of the AAD was issued on March 9, 1995 whereby (1) the prehearing conference was passed, (2) the parties were required to file stipulations of fact, including the waiver of hearing and submission on the record (pursuant to AAD Rule 15.00(b) by March 24, 1995, (3) each party was

required to file a memorandum in support of its motion for summary judgment by April 14, 1995, (4) each party was required to submit its response to opposing memorandum by April 28, 1995, and (5) this matter was to be assigned to a hearing officer for consideration and decision pursuant to AAD procedure.

The Stipulated Facts were filed on March 24, 1995. Division filed its Motion for Summary Judgment and Memorandum in support thereof on April 18, 1994. Respondent filed its Motion for Summary Judgment and its Memorandum in Support thereof (in which it submitted arguments in opposition to Division's Motion) on March 24, 1995. Division filed its Memorandum in Response to Respondent's Motion for Summary Judgment on April 28, 1995.

The cross-motions were filed pursuant to Rule 56 of the Superior Court Rules of Civil Procedure ("Court Rules") and Section 8.00 of the Administrative Rules of Practice and Procedure for the AAD ("AAD Rules"). Section 8.00 of the AAD Rules permits the parties to make such motions as are permissible under the AAD Rules and the Court Rules. Court Rule 56, which governs motions for summary judgment, provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

AAD Rule 15(b) provides as follows:

Submission Without a Hearing. Any party may elect to waive a hearing and to submit its case upon the record. Submission of a case without a hearing does not relieve the parties from the necessity of providing the facts supporting their burdens, allegations or defenses.

A search of the record at AAD reveals that the parties filed their agreed Stipulated Facts; however, no waiver of hearing and submission on the records has been filed. Consequently the within Decision and Order shall be rendered as a decision on the cross-motions for summary judgment, based on the stipulated facts, the memoranda and arguments of counsel and a review of the record in this matter at the AAD.

Division asserts that a review of the Parties' Stipulation and the pleadings in this matter establishes that the \$1840.00 assessed by Division against the Respondent on December 8, 1993 pursuant to R.I.G.L. §46-12-4 and Rule 6(b)iii of the User Fee Regulations as set forth in the NOV, remains unsatisfied; and therefore, Division is entitled to entry of judgment in its favor and against Respondent in the amount of \$1840.00.

It is Respondent's contention that the Stipulated Facts establish that the Division is liable to the Town in the amount of \$6,031.50 as reimbursement for fees paid to Division for the years 1991, 1992 and 1993 pursuant to the Division's rules and regulations; and therefore, the Town is entitled to judgment in its favor for the sum of \$6031.50 minus the \$1840.00 claimed by Division, and that the \$1840.00 so deducted should then be returned to the Town pursuant to the Division's rules and regulations.

In deciding on motions for summary judgment, the trier of facts must conduct an examination of the pleadings, admissions, and other appropriate evidence in a light most favorable to the party opposing the motion. If after the submission of the appropriate evidence there is an actual dispute about the facts, then a genuine issue of material fact exists that cannot be resolved by a motion for summary judgment. However, where there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law, summary judgment properly issues. Commercial Union Companies v. Graham 495 A.2d 243 (R.I. 1985).

The parties have stipulated that Respondent is responsible for the operation of a wastewater treatment facility located at 44 Southwest Avenue in the Town of Jamestown, Rhode Island; that on December 8, 1993 the Respondent was properly assessed a user fee of \$1840.00 for

the period commencing February 1, 1994 and concluding February 1, 1995; and that Respondent has refused to pay said user fee which has been due and owing to Division since January 23, 1994. There is no dispute that said user fee was properly assessed and remains due to Division in accordance with the provisions of Section 46-12-4 and 46-12-4.1 of the Water Pollution Act and Rule 6(b)iii of the User Fee Regulations.

It has also been stipulated by the parties that Respondent has previously paid assessed user fees to the Division for the years 1991, 1992 and 1993 totaling \$6031.50; that Respondent would appear to be entitled to reimbursement from the State of Rhode Island for \$6031.50 and that as of the date of filing of the Stipulated Facts, the State has failed and refused to provide Respondent with reimbursement of the \$6031.50.

A review of the Stipulated Facts and the pleadings in this matter in a light most favorable to the opposing party, (in each of the motions) demonstrates that there is no dispute as to the Division's entitlement to the user fee as alleged in the NOV. The Town's allegations as to its entitlement to reimbursement of users fees is not contested by Division; however Division maintains that contrary to Respondent's contentions, the Town's request for reimbursement must be addressed by the Department of Administration and not the Department of Environmental Management.

The function, powers, duties and responsibilities of the DEM concerning pollution monitoring systems are contained in R.I.G.L. Chapter 46-12, entitled Water Pollution ("Act"). Section 46-12-4 of the Act, which provides

Pollution monitoring system - The director shall establish a pollution monitoring system, and a fee system for point source discharges who discharge sewage into the surface waters of the state. Monies derived from the fee system shall be used by the director to develop and operate a pollution monitoring program. The director shall monitor the levels of conventional and hazardous pollutants especially toxic pollutants discharged into the surface waters and shall assess the impact thereof.

Section 46-12-4.1 of the Act provides:

Fees-Limits-Recovery of costs - The fee established by the director pursuant to §46-12-4 shall be based on the individual discharger's need for monitoring and the effluent's potential for environmental degradation as determined by the director; provided, however, that any fees charged discharges shall be in addition to and not substituted for funds appropriated by or monitoring required by the state or federal government for similar purposes; and further provided:

(a) The director shall annually adopt by regulation, in accordance with the provisions of chapter 35 of title 42, the maximum cost of the monitoring program for the next fiscal year. The fee charged any discharger shall not exceed the actual cost of the pollution monitoring program of that discharger.

(b) The operating authority for any publicly owned treatment facility is hereby empowered to recover any costs incurred under the provisions of this chapter, including administrative costs, by levying an assessment on their customers. Monies derived from the fees shall be deposited into a restricted receipt account for use by the director to carry out the requirements of §46-12-4 and shall be unable to match any federal funds appropriated for these purposes.

Section 46-12-9(a) of the Act provides in part:

Notices of violation and compliance orders - (a) The director shall follow the procedures provided in §42-17.1-10(g) in issuing any notice of violation or compliance order authorized pursuant to this chapter of any rules, regulations, or permits promulgated thereunder.

The recovery of the user fees by the Town is governed by R.I.G.L. §§45-16-6 thru 45-13-10, which requires a system to be established for the reimbursement to cities and towns for the costs of state mandates.

Section 45-13-9 provides:

Reimbursement to cities and town for the costs of state mandates.

(a)(1) The department of administration shall submit to the budget office by September 1 of each year, a report by each city and town, of the cost of state mandates established after January 1, 1979 to be reimbursed for the next preceding July 1 - June 30 period.

(2) The budget office shall annually include the statewide total of the statement of costs of state mandates to be reimbursed in the state budget for the next fiscal year provided, however, that any costs resulting from the rules and regulations of state departments or agencies shall be allocated to the budgets of those departments or agencies.

(b) The state treasurer shall in July of each year distribute to cities and towns the reimbursements for state mandated costs in accordance with the report submitted by the department of administration to the state budget office.

The Statutes involved lend no support for Respondent's arguments. Clearly the DEM has been authorized by statute to impose users fees, but DEM lacks the authority to consider reimbursements. Section 45-13-9 clearly provides that the department of administration shall submit an annual report (concerning the cost of state mandates) to the budget office,

and the state treasurer shall distribute to municipalities the reimbursement for state mandated costs in accordance and reports.

Assuming that Respondent is entitled to reimbursement as alleged, it would be difficult not to be sympathetic to their plight; however, DEM can only operate within its statutory boundaries. It has been stipulated by the parties that Division has pursuant to statutory authority properly imposed the subject users fee, and Division is therefore entitled to the \$1840.00 assessed by Division.

The Respondent's argument that it is entitled to reimbursement from Division lacks merit. The statute governing reimbursement to municipalities for the costs of state mandates does not authorize or empower DEM to consider requests for reimbursement. Agencies must operate within the scope of their authority, and attempts to set-off in the instant matter any amounts due Respondent from the department of administration/state treasurer cannot be considered by the AAD.

In addition to Division's lack of authority to consider requests for reimbursement, AAD lacks jurisdiction to consider Respondent's reimbursement request. AAD's jurisdiction is set forth in R.I.G.L. §42-17.7-2, which provides in part:

Adjudication of environmental licenses and violations - Informal Resolution. All contested enforcement proceedings, all contested licensing proceedings, and all adjudicatory proceedings under

chapter 17.6 of title 42 shall be heard by the division of administrative adjudication pursuant to the regulations promulgated by the director of environmental management;...

It is a well-established principle that agencies are a product of the enabling legislation that creates them, and agency action is only valid, therefore, when the agency acts within the parameters of the statutes that define their powers. The statute is the source of agency authority as well as of its limits. in re Advisory Opinion to Governor, 627 A.2d 1246 (R.I. 1993). The statute creating AAD empowers it to hear notices of violation, but the AAD is not clothed with the authority to hear and determine requests for reimbursement between municipalities and the department of administration/treasury. Consequently, Respondent's Motion for Summary Judgment must be denied.

A review of the Stipulated Facts and the pleadings in this matter establishes that there is no genuine issue of material fact regarding Respondent's violation of §46-12-4, 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations. Division is therefore entitled to summary judgment against Respondent for \$1840.00. The Division did not appear to request summary judgment for the \$700.00 administrative penalty that was assessed against Respondent in the NOV; however, to avoid any confusion, Division's Motion for Summary Judgment is granted in part as to the Respondent's liability for the violation alleged in the NOV but denied as

to the penalty assessment.

Although this Decision and Order operates as what is sometimes termed a "partial summary judgment", it is actually an order under Court Rule 56(d) establishing certain facts and leaving others for determination at the hearing. Russo v. Cedrone, 118 R.I. 549, 375 A.2d 906 (1977).

Based upon the Stipulated Facts, I find as a fact the following:

1. The AAD has personal and subject matter jurisdiction over the Respondent to consider the instant matter.
2. The Respondent is responsible for the operation of a wastewater treatment facility located at 44 Southwest Avenue in the Town of Jamestown, Rhode Island (the "facility").
3. On November 12, 1993, the Respondent received a copy of DEM's draft Fee Assessment dated November 8, 1993 which identified the monitoring which DEM proposed to accomplish at the facility during the period commencing February 1, 1994, and concluding February 1, 1995.
4. The Respondent failed to comment on the DEM's draft Fee Assessment within twenty (20) days of receipt.
5. Upon failure to receive any comments from the Respondent within twenty (20) days of its receipt of the draft Fee Assessment, the Division issued a final assessment on December 8, 1993.
6. On December 8, 1993, the Respondent was assessed a user fee in the amount of one thousand eight hundred and forty (\$1840.00) dollars and was so advised by the DEM in a letter sent to Respondent and dated December 8, 1993.
7. The Respondent was required to pay the assessed user fee in full within forty five (45) days of the receipt of the December 8, 1993 letter. The Respondent received the December 8, 1993 letter on December 10, 1993.
8. The Respondent has refused to pay DEM the user assessment in the amount of one thousand eight hundred and forty

(\$1840.00) dollars which has been due and owing since January 23, 1994.

Based on the foregoing admissions and arguments of the parties, I conclude the following as a matter of law:

1. There is no dispute as to any material fact concerning the liability portion of the NOV and the Division is entitled to judgment as a matter of law concerning liability for violations of R.I.G.L. Sections 46-12-4 and 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations.

The Rules and Regulations for the Assessment of Administrative Penalties provides in Section 12 that once the Division establishes a violation, as it has done here, the burden shifts to the Respondent to prove by a preponderance of the evidence that the penalty assessment and/or economic benefit portion of the penalty was not in accordance with the Penalty Regulations. Respondent should be afforded an opportunity to come forward with evidence supporting its assertions. Accordingly, it is hereby

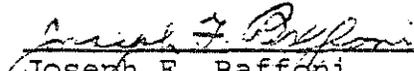
ORDERED

1. The Division's Motion for Summary Judgment is GRANTED in part as to the liability of the Town of Jamestown for violations of R.I.G.L. Section 46-12-4 and 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations as alleged in the NOV.
2. The Division's Motion for Summary Judgment is DENIED as to the penalty assessment.
3. The Town of Jamestown's Motion for Summary Judgment is DENIED.
4. The remaining issue of the proposed administrative penalty will be set down for Prehearing Conference and Hearing. The Clerk will notify the parties of the dates and times for same. As required by Section 12 of the Penalty Regulations, the Respondent bears the burden of

proving by a preponderance of the evidence that the penalty assessment and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations.

5. The above Findings of Fact and Conclusions of Law which establish Respondent's liability for the violations (as set forth in No. 1 of this Order) will be incorporated in the Decision and Order which will be issued following hearing on the remainder of the NOV and recommended to the Director for issuance as a Final Agency Decision and Order.

Entered as an Administrative Order this 11th day of August, 1995.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
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 James A. Donnelly, Esq., 24 Salt Pond Road (C-3), Wakefield, RI 02879-4324 and via interoffice mail to Gary Powers, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 11th day of August, 1995.



APPENDIX B

STIPULATIONS OF THE PARTIES

At the prehearing conference conducted on November 3, 1995, the parties identified those stipulations of fact which were filed with the AAD on March 24, 1995:

1. The Administrative Adjudication Division has personal and subject matter jurisdiction over the Respondent to consider the instant matter.
2. The Respondent is responsible for the operation of a wastewater treatment facility located at 44 Southwest Avenue in the Town of Jamestown, Rhode Island (the "facility").
3. On November 12, 1993, the Respondent received a copy of DEM's draft Fee Assessment dated November 8, 1993 which identified the monitoring which DEM proposed to accomplish at the facility during the period commencing February 1, 1994, and concluding February 1, 1995.
4. The Respondent failed to comment on the DEM's draft Fee Assessment within twenty (20) days of receipt.
5. Upon failure to receive any comments from the Respondent within twenty (20) days of its receipt of the draft Fee Assessment, the Division issued a final assessment on December 8, 1993.
6. On December 8, 1993, the Respondent was assessed a user fee in the amount of One Thousand Eight Hundred and Forty (\$1840.00) Dollars and was so advised by the DEM in letter sent to Respondent and dated December 8, 1993.
7. The Respondent was required to pay the assessed user fee in full with forty-five (45) days of the receipt of the December 8, 1993 letter. The Respondent received the December 8, 1993 letter on December 10, 1993.
8. The Respondent has refused to pay DEM the user assessment in the amount of One Thousand Eight Hundred and Forty (\$1840.00) Dollars which has been due and owing since January 23, 1994.
9. The Respondent has previously paid the assessed user fee to the Division for the years 1991, 1992 and 1993

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totaling Six Thousand Thirty-One and 50/100 (\$6031.50)
Dollars.

10. The Respondent would appear to be entitled to reimbursement from the State of Rhode Island in the amount of Six Thousand Thirty-One and 50/100 (\$6031.50) Dollars.
11. As of the date of filing of this stipulation, the State has failed and refused to provide the Respondent with reimbursement of the Six Thousand Thirty-One and 50/100 (\$6031.50) Dollars.

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APPENDIX C

LIST OF EXHIBITS

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

- Div. 1 Full Notice of Violation No. 1193 dated August 26, 1994 (9 pp). (copy)
- Div. 2 Full Decision and Order entered in the instant matter on August 11, 1995 (13 pp.) (copy).