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

RE: CFD REALTY, LLC AND JS PALLET CO., INC. **AAD NO. 09-004/FWE**
NOTICE OF VIOLATION OC&I C03-0259

DECISION AND ORDER

This enforcement action came before Hearing Officer David M. Spinella on September 25, 2012 for Administrative Hearing. At the onset of the Hearing, the burden of proof was discussed and announced on the record. The Office of Compliance and Inspection ("OC&I") had the burden of proving, by a preponderance of the evidence, the allegations in the Notice of Violation. A Decision and Order was then rendered on October 31, 2012. In that Decision and Order, certain Findings of Fact and Conclusions of Law were made.

On November 5, 2012 the Office of Compliance and Inspection filed a Motion to Reconsider Decision and Order. No Objection was filed by Respondent. OC&I prays that Finding of Fact No. 16 and Conclusion of Law No. 3 be removed and amended from the Decision and Order.

Finding of Fact No. 16 reads "No evidence concerning the assessment of penalties was introduced." OC&I is technically correct that this fact was not Stipulated to by the parties. The caption in the Decision and Order incorrectly read "Findings of Fact – Stipulated by Parties". (F.N. 1). Despite the error in wording in the caption, the reality is that no evidence was introduced by OC&I regarding the assessment or calculation of penalties. OC&I argues that Rule 12 (c) of RIDEM's Rules and Regulations for Assessment of Administrative Penalties controls in this

F.N. 1 The parties, just prior to the Hearing, submitted a list of Stipulated Facts in an E-mail format on September 25, 2012 rather than placing them in their PreHearing Memoranda as required.

situation. Rule 12 (c) reads as follows:

> "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." (Emphasis added)

While Rule 12 (c) is relevant, the case of **Richard Fickett** AAD No. 93-014/ GWE (Decided October 27, 1995) is dispositive on the issue of the burden of proving penalties / assessment of penalties in an enforcement action. The relevant part of the **Fickett** case reads as follows:

> "At the commencement of the hearing the hearing officer informed counsel of their respective burdens of proof as delineated in Section 12 (c). Section 12 (c) however does not speak to the Division's burden of going forward with documentary or testimonial evidence of the penalty assessment and penalty calculation. The party asserting imposition of the penalty has the obligation to produce evidence of the penalty it seeks to impose and the calculation thereof. Specifically, once the Division discharges its initial duty to establish in evidence the penalty amount and its calculation, Section 12 (c) shifts the burden of proof to the Respondent 1) to produce evidence of record **and** 2) to bear the burden of persuasion that the Director failed to assess the penalty or economic benefit portion of the penalty in accordance with the Penalty Regulations.
>
> The Administrative Procedures Act ("APA"), R.I. General Laws §42-35-9 (g) mandates that findings of fact be based exclusively on the evidence and matters officially noticed. Although the pleadings are part of the administrative record, the APA distinguishes pleadings and other portions of the administrative record from **evidence** received or considered at the hearing and upon which the hearing officer may base his or her findings of fact. **See** §42-35-9 (e). In the present matter of the hearing record is bereft of evidence of an administrative penalty. Since the APA provides that findings of fact must be based exclusively on the evidence and matters officially noticed, the absence of evidence concerning the administrative penalty precludes the necessary factual findings to uphold the assessment of an administrative penalty." (**Fickett** pgs. 7 and 8).

The instant case falls squarely within the **Fickett** decision.

The **Fickett** case was reaffirmed as recently as December 20, 2010 in the case of **In Re: New England Paint Mfg. Co., Inc.** AAD No. 08-001/ GE. In this case, the Hearing Officer

reiterated the principal that a Notice of Violation is a part of the record but not evidence received or considered at the Hearing and upon which the Hearing Officer may base his or her Findings of Fact.

Lastly, OC&I argues that if the language in Conclusion of Law No. 3 stands ("No penalties are assessed or imposed in this matter against Respondents") it would relieve the Respondent's from the Restoration Requirements outlined on page 3 of the Notice of Violation. The Notice of Violation clearly delineates the "Restoration Requirements" Section (D). Order (2) "Restore all freshwater wetlands in accordance with the restoration requirements set forth below" from Section (E) Assessment of Penalty (1) "Pursuant to R. I. General Laws §42-17.6-2, the following administrative penalty, as more specifically described in the attached penalty summary and worksheets, is hereby ASSESSED, jointly and severally against each named Respondent: One Thousand Dollars and no cents ($1000.00)".

While I disagree with counsel's argument, I will revise Conclusion of Law No. 3 to make it clear that no monetary penalties are imposed but that the Restoration Requirements remain enforceable.

Wherefore, it is hereby **ORDERED** that:

1. The Motion to Reconsider Decision and Order is **DENIED** with respect to OC&I's prayer for relief to remove Finding of Fact No. 16 ("No evidence concerning the assessment of penalties was introduced") from the Decision and Order dated October 31, 2012.

2. The Motion to Reconsider Decision and Order is **GRANTED** with respect to OC&I's prayer for relief to amend Conclusion of Law No. 3 which is hereby amended to read: No monetary penalties pursuant to Section E (1), (2), and (3) of the Notice of Violation (One Thousand and 00/100 Dollars) are assessed or imposed in this matter against Respondents, but the Restoration Requirements in Section D (2) of the Notice of Violation remain in full force and effect in the Decision and Order dated October 31, 2012.

Entered as an Administrative Order this 26th day of November, 2012.

David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid to Christopher A. Murphy, Esquire, Armstrong, Gibbons & Gnys, LLP, Suite 301, 155 South Main Street, Providence, RI 02903 and via interoffice mail to Richard M. Bianculli, Jr., Esq., DEM Office of Legal Services and David Chopy, Chief, Office of Compliance and Inspection, One Capital Hill, Providence, RI 02908 on this 26th day of November, 2012.

Elizabeth K. Lamie