

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

RE: TENNESSEE GAS PIPELINE COMPANY
AAD NO. 92-044/FWE
(REMAND FROM PROVIDENCE COUNTY SUPERIOR COURT IN
C.A. NO. 93-4996)

ADDENDUM TO AMENDED FINAL DECISION AND ORDER

The recommended Amended Final Decision and Order in the above entitled matter dated October 25, 1995 was forwarded to the Director of the Rhode Island Department of Environmental Management ("DEM") by Hearing Officer Joseph F. Baffoni pursuant to the instructions of the Director in accordance with the Order of Remand of the Providence County Superior Court dated February 27, 1995 in C.A. No. 93-4996.

On November 10, 1995, by document entitled "Director's Decision", this matter was remanded to the Hearing Officer to make Findings of Fact and Conclusions of Law for the Proposed Amended Order and Decision consistent with provisions of R.I. General Laws §42-35-12.

The Final Agency Decision and Order in this matter dated August 11, 1993 (which was the subject of the appeal in C.A. No.93-4996) was affirmed by the Superior Court, but this matter was remanded to the Director of DEM to issue an Amended Final Decision and Order where the Director (a) may consider whether restoration of the wetlands is appropriate, and (b) must consider imposition of an administrative fine.

The travel of this matter and the actions of the various parties and authorities were detailed by the Hearing Officer in the recommended Amended Final Decision and Order to

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demonstrate compliance with the mandates of the Superior Court and the instructions of the Director. The entire recommended Amended Final Decision and Order is incorporated herein by reference thereto.

A review of the Superior Court Order dated February 27, 1995, the Decision of the Superior Court filed November 3, 1994, and the Decision on the Motion for Reconsideration filed January 30, 1995 demonstrates that the Superior Court upheld the denial and dismissal of the Notice of Suspension of Permit and Order ("NSPO") issued by the Division of Freshwater Wetlands ("Division") and affirmed the Final Agency Decision. However, the Final Agency Order was remanded to the Director to issue an Amended Final Decision and Order concerning restoration and penalty. Although the Superior Court in passing on the evidence was troubled by the information gap in the original record, no additional evidentiary hearing was mandated.

The Superior Court in its Decision on the Motion for Reconsideration (treated by the Court as a motion for clarification) stated that "because the Court affirmed the Director's finding that the NSPO was moot, the DEM might now decide to view the situation differently and choose to pursue other remedies." The Court reiterated that its Decision merely suggested alternative routes available to DEM, but that no requirement of a reconsideration of restoration was

intended, explicitly or implicitly by the Court.

Conversely, the Court decided that since the Director found in his Final Decision that a violation had occurred, a mandate to consider a fine is required by §2-1-23 of the R.I.G.L. (although the Court felt that the fine may be either nominal or nonexistent (e.g. \$0)). The Court stated that for it "to make a thorough and accurate review of the record, there must be some indication that the Director considered a fine, as required by the statute". (Emphasis added.)

The Hearing Officer, after hearing the parties in conference, remanded this matter to Division of Freshwater Wetlands to make a written determination concerning restoration and penalty. Division submitted a letter to the Hearing Officer on June 20, 1995 stating that it determined that restoration was not appropriate, and that it did not believe an administrative penalty was warranted in this matter. The Division specified its reasons in said letter (a copy of which is attached hereto as "Appendix A".)

Oral arguments on the Objections/Responses to the Division's Determination were heard on September 7, 1995, and after consideration of the arguments of the parties and review of this matter, the Hearing Officer issued an Amended Final Decision and Order which recommended essentially that the Director adopt the Division's Determination that restoration is not appropriate and that no administrative penalty be

imposed.

A review of the pertinent statutes and regulations appears appropriate in this matter.

The Administrative Procedures Act ("APA") provides:

§42-35-12. Orders - that "Any final order adverse to a party in a contested case shall be in writing or stated in the record. Any final order shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings...". (Emphasis added.)

§42-35-1, Definitions - As used in this chapter:...

(c) "Contested case" means a proceeding, including not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a specific party are required by law to be determined by an agency after an opportunity for a hearing;

§42-35-9. Contested cases - Notice-Hearing-Records.-

(a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include:...

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(g) Finding of Fact shall be based exclusively on the evidence and matters officially noticed.

Chapter 17.7 of Title 42 of the R.I.G.L. entitled "Administrative Adjudication for Environmental Matters" provides:

§42-17.7-6 Hearings-Orders-Concurrent Jurisdiction. - Subject to the provisions of §42-17.7-2 every hearing for the adjudication of a violation or for a license shall be held before a hearing officer....After due consideration of the evidence and arguments, the hearing officer shall make written proposed findings of facts and proposed conclusions of law...

The Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters provides:

Section 16.00 Decisions

(a) Recommended Decisions. All decisions rendered by an AHO at the conclusion of a hearing shall be in writing and shall comply with the requirements of R.I.G.L. §42-17.7-6 and §42-35-12....

The hearing officer, after careful review of the decisions, order, instructions, documents and arguments of the parties, the Administrative Procedures Act, the controlling statutes, and the pertinent Rules and Regulations, reasoned that the Division's Determination should be adopted by the Director.

It was the opinion of the Hearing Officer that the adoption of the Division's Determination by the Director should satisfy the mandates of the Court. The Division's determination addressed in detail those issues raised by the Superior Court, and it was the Hearing Officer's recommendation that same be adopted by the Director. Since no restoration was ordered, and no administrative penalty was imposed, no evidentiary hearing on these issues is mandated or warranted under the APA.

In accordance with the provisions of the remand to the hearing officer contained in the Director's Decision, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

(1) The Department of Environmental Management ("DEM") issued a Final Agency Decision dated August 11, 1993 that denied and dismissed the Notice of Suspension of Permit and Order ("NSPO") dated July 15, 1992 issued by the Division of Freshwater Wetlands ("Division") to Tennessee Gas Pipeline Company, (AAD No. 92-044/FWE).

(2) The Providence County Superior Court in appeal numbered C.A. 93-4996, by Order dated February 27, 1995, affirmed the Final Agency Decision.

(3) The Superior Court Order dated February 27, 1995 remanded the Final Agency Order to the Director of DEM to issue an Amended Final Decision and Order where the Director:

(a) may consider whether restoration of the wetlands is appropriate, and

(b) must consider imposition of an administrative fine.

(4) The Director remanded this matter to the hearing officer with instructions to issue a Recommended Decision and Order in accordance with the Order of the Superior Court.

(5) The hearing officer held a conference with the parties to determine the procedures to be employed in implementing the mandates of the Superior Court and the Director.

(6) The hearing officer, after hearing the parties in conference and upon review of this matter remanded this matter to the Division to make a written determination as to the following:

(a) The Division may consider whether restoration of the wetland (wetland 70) is appropriate, and

(b) The Division must consider imposition of an administrative penalty.

(7) The parties were given ten days from receipt of the determination to file an objection/answer with the AAD; and the AAD retained jurisdiction of this matter to issue its Recommended Decision and Order to the Director.

(8) The Division, by letter dated June 20, 1995, rendered its written determination stating that it had fully considered restoration and imposition of a penalty prior to issuance of the NSPO; and that it did not consider restoration of the wetlands to be appropriate nor an administrative penalty warranted, (for the same reasons that it issued the NSPO rather than a Notice of Violation and Order).

(9) Judith B. and N. Robert Moreau and Walter and Clara Lawrence (Intervenors in AAD No. 92-044/FWE) filed Objections/Responses to Division's determination.

(10) Oral arguments on the Objections/Responses were heard by the hearing officer on September 7, 1995.

(11) Division considered whether restoration of the wetlands (wetland 70) is appropriate, and issued a written determination that restoration had already been extensively considered by Division and restoration is not deemed appropriate.

(12) Division considered the imposition of an administrative penalty against Tennessee Gas Pipeline Company and issued a written determination wherein it specifically stated that it does not believe an administrative penalty is warranted in this matter.

(13) The Division's determination as to restoration and penalty are not adverse to Tennessee Gas Pipeline Company.

(14) The determination not to institute proceedings adverse to Tennessee Gas Pipeline Company renders further evidentiary hearing unnecessary.

(15) No further action against Tennessee Gas Pipeline Company is warranted in this matter.

CONCLUSIONS OF LAW:

(1) The Division's determination not to order restoration or impose a penalty conforms with all statutory and regulatory requirements.

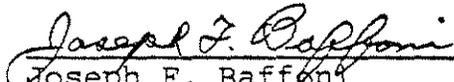
(2) The APA does not mandate an evidentiary hearing in this instance since restoration was not ordered nor was an administrative penalty imposed by the Division.

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

ORDERED

1. That the Final Agency Decision and Order dated August 11, 1993 (which is the subject of C.A. 93-4996 at the Providence County Superior Court) is incorporated herein by reference thereto and is hereby amended by adding the following to the Order portion of said Final Agency Decision and Order.
2. That the Determination of the Division of Freshwater Wetlands that restoration of wetland 70 is not appropriate is hereby AFFIRMED.
3. That the Determination of the Division of Freshwater Wetlands that no administrative penalty be imposed is hereby AFFIRMED.

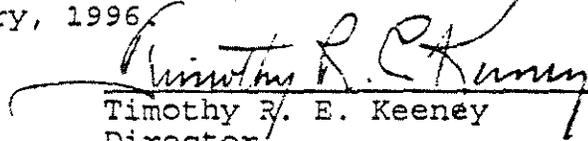
Entered as an Administrative Order this 1st day of February, 1996 and hereby recommended to the Director for adoption as an Amended Final Decision and Order.



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

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Entered as an Amended Final Decision and Order this _____
day of February, 1996.



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 Peter V. Lacouture, Esq., Kathryn Holly, Esq.; Peabody and Brown, One Citizens Plaza, Providence, RI 02903; Barbara Simons, Esq., Simons & Simons, 5025 Linnean Avenue, N.W, Washington, DC 20008; Robert S. Bruzzi, Esq., 18 Imperial Place, Providence, RI 02903; Clara and Walter Lawrence, 745 Natick Ave., Cranston, RI 02921 and via interoffice mail to Catherine Robinson Hall, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 23rd day of February, 1996.

