

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

IN RE: Tennessee Gas Pipeline Company AAD No. 92-044/FWE
Notice of Suspension of Permit and Order

DECISION AND ORDER

This matter is before the Hearing Officer pursuant to the Freshwater Wetlands Act R.I.G.L. Section 2-1-18 et seq., as amended (hereinafter "Act"), R.I.G.L. Chapters 42-17.1 and 42-17.6, as amended; the duly-promulgated Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act ("Rules and Regulations"); and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.

The Division of Groundwater and Freshwater Wetlands ("Division") of the Department of Environmental Management ("DEM") issued a Notice of Suspension of Permit and Order ("NSPO") to Tennessee Gas Pipeline Company ("TGP") dated July 15, 1992.

The NSPO alleged that on June 9, 1992 and June 23, 1992, the Division inspected certain property on which TGP maintains an easement for a gas pipeline. This property ("specific area of concern") is located opposite utility pole No. 78, and extends 450± feet westerly of Natick Road, along the existing TGP easement, Assessor's Plat 22, Lot 108, Cranston, Rhode Island. These inspections revealed that during construction of the pipeline, TGP had altered certain freshwater wetlands which areas were not shown or represented on the revised plans on

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which Division partly based its issuance plans.

Therefore, the Division pursuant to R.I.G.L. Sections 2-1-24, 42-17.1-2(s) and Section 10.01 of the Rules and Regulations ordered: (1) that TGP cease and desist from undertaking any additional alterations or work in furtherance of the permit granted by DEM on August 27, 1991; (2) that the permit be suspended; and (3) TGP submit within 30 days revised plans and supporting documentation for the specific area of concern showing all wetland areas, all existing construction activity, and all properties within 200 feet of the wetlands alterations (with the names and addresses of the respective owners) to meet the Division's interest to re-notice the project in this specific area. Upon meeting the requirements of the enclosed Freshwater Wetlands Formal Application package and after confirmation that all plans and supporting data are adequate, TGP shall provide the appropriate number of full size and reduced plans to the Division for re-notice purposes.

On July 24, 1992, TGP filed a timely request for a hearing to show cause why said NSPO should not stand and also for a full administrative hearing relating to the NSPO.

Judith Moreau, N. Robert Moreau, Walter Lawrence, and Clara Lawrence ("Intervenors") filed separate petitions to intervene in the adjudicatory hearing in August and September of 1992. On October 13, 1992, over TGP's objection, the AAD granted each petition to intervene.

Mary B. Shekarchi, Esq. and Catherine Robinson Hall, Esq. represented the Division; Peter V. Lacouture, Esq. and Susan C. deBattista, Esq. represented TGP; Morton L. Simons, Esq. and Barbara M. Simons, Esq. represented the Intervenors, Judith B. Moreau and N. Robert Moreau; and Intervenors, Walter Lawrence and Clara Lawrence, appeared pro se.

The prehearing conference was held on October 20, 1992, and the requisite Prehearing Conference Record was prepared by this Hearing Officer.

The Division's motion to consolidate the show-cause hearing and the full administrative hearing relating to the Department's NSPO was granted by the Hearing Officer on October 26, 1992. Pursuant to the Order of Consolidation, the Division presented its case first to demonstrate why it suspended TGP's permit, and then TGP followed with its case to show cause why the NSPO should not stand. Based upon said consolidation, the hearing was conducted as both a show-cause hearing and a full administrative hearing. Consequently, this Decision and Order addresses and is a full determination of both hearings. Division concedes that ultimately it has the burden of proving by a preponderance of the evidence that the NSPO should be upheld.

The adjudicatory hearing was held before this Hearing Officer on October 26, 27 and 28, 1992. The post-hearing briefs were filed on or about January 5, 1993.

The following stipulations of fact were agreed upon by the parties pursuant to the Prehearing Conference Record:

1. On March 20, 1990, Tennessee filed an application to alter freshwater wetlands with the Department.
2. In support of its application, Tennessee filed site plans with DEM demonstrating the proposed route for construction and installation of a natural gas pipeline; such site plans are entitled: "Rhode Island Extension of Providence Pipeline Project . . . , Tennessee Gas Pipeline Company . . . , 29 sheets, revised dated September, 1990, and received by DEM September 21, 1990, ("site plans").
3. The site plans were sent out to public notice in accordance with R. I. Gen. Laws Section 2-1-18 et seq. from September 27, 1990 to November 11, 1990.
4. DEM denied Tennessee's application to alter freshwater wetlands on December 28, 1990.
5. Tennessee filed a timely request for hearing on January 9, 1991.
6. As part of settlement negotiations, Tennessee submitted revised site plans and specifications to the Department which, inter alia, partially relocated the proposed natural gas pipeline; such site plans are entitled: "Rhode Island Extension of Providence Pipeline Project", Tennessee Gas Pipeline Company, sheets No. 1 through 29 of 29, sheets 3A, 4A, 9A and 16A; as revised in August, 1991 ("revised site plans") and are further described by the specifications and documentation set forth in the report entitled: "Supplemental Response to Comments on the Providence Pipeline Project - Freshwater Application No. 90-0184F" dated July 15, 1991 and "Addendum Number 1 to Supplemental Responses . . . on the Providence Pipeline Project" dated August 7, 1991, (collectively referred to as "specifications").
7. After negotiations, and in lieu of proceeding to an administrative hearing, Tennessee and DEM entered into a Consent Agreement on August 27, 1991 whereby DEM issued Tennessee a Freshwater Wetlands Permit approving those alterations as shown and described by

the revised site plans and specifications.

The following documents were admitted into evidence as full exhibits of the Division:

- Div. 1. Resume of Dean H. Albro (3 pp.).
- Div. 2. Cover Sheet for the Formal Application for Permission to Alter a Freshwater Wetlands Application No. 90-0184F, submitted on January 24, 1990 by W. B. Arcese, Jr., dated received by the Department on March 22, 1990 (2 pp.).
- Div. 3. Site plan entitled, "RI Lateral Line No. 265 E-100, Providence County, Rhode Island," sheet 29 of 29, revised dated September, 1990, and received by the Department, September 21, 1990.
- Div. 4. Public Notice of Application No. 90-0184F, dated September 27, 1990 (3 pp.).
- Div. 5. Correspondence from Brian C. Tefft to Applicant Tennessee Gas Pipeline (denial of permit No. 90-0184F), dated December 28, 1990 (7 pp.).
- Div. 6. Correspondence from Attorney Peter V. Lacouture to DEM Administrative Adjudication Division (requesting an adjudicatory hearing), dated received January 9, 1991 (6 pp.).
- Div. 7. Site plan entitled, "RI Lateral Line No. 265 E-100, Providence County, Rhode Island," sheet 29 of 29, revised dated August, 1991 and received by the Department, August 8, 1991.
- Div. 8. Chapter 4, cover sheet and table of contents for Supplemental Responses to Comments on the Providence Pipeline - Freshwater Wetlands Application No. 90-0184F submitted on July 15, 1991 by Tennessee Gas Pipeline Company and approved with conditions as specified in the letter of approval, dated August 27, 1991 (49 pp.).
- Div. 9. Consent Agreement for Application No. 90-0184F signed by Dean H. Albro, Chief of Division of Freshwater Wetlands and by W. B. Arcese, Jr., for

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Tennessee, dated August 27, 1991 (with Appendix C only) (13 pp.).

- Div. 10. Freshwater Wetlands Progress Report, December 28, 1991 - January 11, 1992 for Tennessee Gas Pipeline Company Providence Pipeline Project (Application No. 90-0184F) dated January 16, 1992, dated received by the Department January 17, 1992 (10 pp.).
- Div. 11. Freshwater Wetlands Progress Report, February 29, 1992 - March 31, 1992 for Tennessee Gas Pipeline Company Providence Pipeline Project dated April 15, 1992 (12 pp.).
- Div. 12. Correspondence to Hank K. Ellis from Douglas E. Cotton (indicating restoration activities were completed), dated received by the Department May 18, 1992 (1 p.).
- Div. 13. Memorandum to Distribution from Doug Cotton (subject May 14 Site Walk with RIDEM), dated May 15, 1992 (3 pp.).
- Div. 14. Note to file by Dean H. Albro, dated June 9, 1992 (3 pp.).
- Div. 15. Memorandum to Distribution from Doug Cotton (subject June 11 Site Walk of R.I. Lateral Cleanup), dated June 16, 1992 (3 pp.).
- Div. 16. Memorandum to Distribution from Doug Cotton (subject site walks from week ending June 20, 1992) (5 pp.).
- Div. 17. Freshwater Wetlands Section Site Inspection Report by Dean H. Albro, dated June 23, 1992 (2 pp.).
- Div. 18. Memorandum to Distribution from Doug Cotton (subject Site Walks of June 27 and June 29, 1992), dated June 30, 1992 (6 pp.).
- Div. 19. Correspondence to Tennessee Gas Pipeline Company from Dean H. Albro (Notice of Suspension of Permit and Order), dated July 15, 1992 (3 pp.).
- Div. 20. Correspondence to Louise Durfee from Attorneys

Peter V. Lacouture and Amelia E. Edwards
(requesting an adjudication hearing), dated
received by the Department of July 24, 1992
(3 pp.).

The following documents were admitted into evidence as full
exhibits of TGP:

- TGP 2. Resume, Mr. Douglas Cotton, Massachusetts Turnpike Authority.
- TGP 3. Wetland Assessment Report (Excerpts) 12/31/91.
- TGP 4. Freshwater Wetlands Progress Reports:
 - a. 12/14/91 - 12/28/91.
 - b. 12/28/91 - 01/11/92.
 - c. 01/12/92 - 02/29/92.
 - d. 01/28/92 - 02/29/92.
 - e. 02/29/92 - 03/31/92.
 - f. 03/31/92 - 04/30/92.
 - g. 05/01/92 - 05/30/92.
 - h. 06/01/92 - 06/30/92.
 - i. 07/01/92 - 07/30/92.
- TGP 6. Construction and Restoration Progress Chart.
- TGP 14. Photographs of right-of-way--10/09/92:
 - a. View west from Natick Road.
 - b. View east to Natick Road.
 - c. Detail-wetland vegetation.
- TGP 15. Federal Energy Regulatory Commission Orders:
 - a. May 18, 1989.
 - b. September 19, 1990.
 - c. September 13, 1991.
 - d. December 13, 1991.
- TGP 17. Single page sketch of area (from DEM files; undated; author unknown - BCT?)
- TGP 18. Biological Inspection Report - Mr. Wencek (12/18/91) (2 pp.).
- TGP 19. Wencek Comments and sketch (12/18/91) (2 pp.).

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- TGP 20. Record of informal meeting (12/23/91) (2 pp.).
- TGP 21. Recommendations to supervisor (Enforcement), M. Wencek.
- TGP 22. Complaint Data Sheets:
- a. Complainant - unidentified (12/16/91).
 - b. Complainant - Mr. Moreau (01/06/92).
 - c. Complainant - Mr. Lawrence (01/07/92).
 - d. Complainant - Mr. Moreau (01/07/92).
 - e. Complainant - Mrs. Moreau (01/13/92).
 - f. Complainant - Mr. Lawrence (01/13/92).
 - g. Complainant - Mrs. Moreau (01/14/92).
 - h. Complainant - Mr. Lawrence (01/14/92).
 - i. Complainant - Mr. Lawrence (01/16/92).
 - j. Complainant - Mr. Lawrence (02/14/92).
 - k. Complainant - Mr. Lawrence (02/17/92).
 - l. Complainant - Mr. Lawrence (03/02/92).
 - m. Complainant - Mr. Lawrence (04/10/92).
- TGP 23. Result of complaint investigation (06/11/92).
- TGP 24. Undated memorandum to file from Hank Ellis.
- TGP 25. Intra-office memo Albro to Ellis (06/11/92 (4 pp.)).
- TGP 26. Responses to Comments on Formal Application for Permission to Alter a Freshwater Wetland--RIDEM Tennessee Gas Pipeline.

(TGP's exhibits marked for identification Nos. 1 for ID, 5 for ID, 7 for ID, 8 for ID, 9 for ID, 10 for ID, 11 for ID, 12 for ID, 13 for ID, and 16 for ID were not admitted as full exhibits.)

The following documents were admitted into evidence as full exhibits of the Lawrences:

- L1. Map of original route sent out for public comment.

(Lawrences' exhibits Nos. L2 for ID, L3 for ID, L4 for ID,

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L5 for ID, L6 for ID, L7 for ID were not admitted as full exhibits.)

The following documents were admitted into evidence as full exhibits of the Moreaus:

- M1. Original Tennessee Gas Pipeline Route Which Accompanied Notice for Comment from DEM on September 27, 1990.
- M2. Letter from Judith Moreau dated November 6, 1990 in Reply to DEM Notice For Comment.
- M3. Review Comments of Brian Tefft, Supervisor of Applications, Freshwater Wetland Section, dated May 3, 1991.
- M8. Twenty-Nine photographs of Tennessee Gas Pipeline's Construction of Wetland #70 on Ruby Associates' Property - Taken between January, 1992 and September 27, 1992.
- M10. Aerial photograph showing Moreau/Lawrence property (early 1970's).
- M11. Map of Lawrence, Ruby Associates and Moreau's properties from Cranston's Tax Assessor's Office.

(Moreaus' exhibits Nos. 4 for ID, 5 for ID, 6 for ID, 7 for ID, 9 for ID, 12 for ID and 13 for ID were not admitted as full exhibits.)

The parties agreed at the prehearing conference that the following are issues to be considered at the hearing:

1. Whether freshwater wetlands are present in the specific area of concern;
2. Whether Tennessee's revised site plans and specifications contained false or erroneous information;
3. Whether the Department's issuance of a Notice of Suspension of Permit and Order should be upheld and

affirmed;

4. Whether as a result of the appeal filed by Judith Moreau, DEM has no jurisdiction to address this issue.

TGP offered the following as additional issues:

1. This matter is moot because Tennessee's wetlands permit has expired.
2. Tennessee's actions were taken in good faith and in reliance on the advice of DEM's consultant, IEP.
3. Tennessee took all reasonable precautions to mitigate the impact on the area in question and to restore it after construction was completed.
4. Suspension of the Tennessee permit is beyond the authority of DEM.

Dean Hamilton Albro, Chief of the Division of Freshwater Wetlands for DEM, was the first witness called for the Division.

Mr. Albro was qualified as an expert in wetlands ecology, aerial photographic interpretation, and as a natural resources specialist. He testified that on March 22, 1990, TGP filed a formal application (No. 90-018F) with the DEM seeking permission to alter freshwater wetlands as part of its plan to install a pipeline extending approximately twenty-five (25) miles from the Rhode Island border in Burrillville into Cranston, Rhode Island. Site plans were submitted with said application depicting TGP's proposal in order for Division to evaluate the proposed alterations. The Division sent TGP's application out to public notice on September 27, 1990.

It was this witness's testimony that the Division hired a

consulting firm, IEP, Inc., to review this project for Division pursuant to an agreement between Division and TGP. IEP basically conducted the field investigations, undertook an evaluation of the value of the wetlands to be altered and provided the Division with impact assessment. Division made a determination that the project presented significant problems, and therefore, denied the application. TGP requested a hearing on the denial of its application; however in lieu of proceeding to a hearing, the Division and TGP entered into settlement negotiations to resolve this matter. Mr. Albro participated in a number of meetings and discussions that ensued to determine if TGP could properly address the Division's concerns so that the project could be permitted.

TGP submitted revised plans which were reviewed principally by Brian Tefft, Supervisor for Applications for the Permitting Section of the Division. Said revised plans presented a modified route for a portion of the pipeline.

Mr. Albro testified that the revised site plan did not depict any freshwater wetlands, nor any proposed wetland alterations, in the specific area of concern. He explained that the Division believed that there was no substantive deviation of the proposed route by the revised plan, and that all wetland alterations had been considered previously through the application process. Therefore, the Division did not send the revised site plan out to public notice. TGP submitted

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supplemental responses as part of the settlement negotiations that took place between the Division and TGP. Said responses provided additional information to explain why TGP had to adhere to the route approved by the Federal Energy Regulatory Commission("FERC"), and addressed certain technical and safety issues that the Division wanted clarified. The supplemental data submitted also detailed how TGP proposed to protect the wetlands that were listed, how TGP would minimize the disturbance to these wetlands during construction of the pipeline and the mitigative features to be provided by TGP in support of its application.

Mr. Albro testified that the specific area of concern was not reviewed by IEP because it was not within that portion of the property to be utilized for the pipeline crossing according to the plans as submitted originally with the application. He acknowledged that the Division did not conduct a field investigation to confirm the information contained on the revised site plan. He was not aware of this when he executed the consent agreement on behalf of the Division (which incorporated the Permit that was issued to TGP for the subject project).

It was explained by Mr. Albro that after TGP had conducted a substantial portion of the project, staff biologists filed a report dated December 18, 1991 concerning the subject area. This report was signed by Martin Wencek and included a sketch

wherein the narrative was provided in comments. The sketch denotes the approximate wetland limit and depicts the portion of the wetland within the specific area of concern that was cleared and grubbed. The sketch also contains the notation "less than three acres" on one side of the wetland's edge. Mr. Albro discovered Mr. Wencek's findings in May of 1992 during litigation that the Department was required to answer, and he became aware at that time that TGP had not shown the wetland in question on the revised site plan. After discussions with the enforcement supervisor, Division determined not to take enforcement action (such as a notice of intent to enforce) because the applicant had already progressed through this particular area, and they "did not believe that the enforcement actions that that side of this program undertake would actually resolve the issues that we were concerned about".

Mr. Albro visited the site on June 9, 1992 with Martin Wencek and Brian Tefft to resolve a number of questions that had come up regarding possible conflicts concerning the type and extent of wetlands on the site and the location of the activities in the wetlands. He noted at said site visit that wetland conditions were present in the area under consideration "which were characterized by dominant plant community; that saturation was present at the surface; that water had collected in low-lying areas, and that surface seepage could be observed". Based upon these findings, he determined that freshwater

wetlands were present in the specific area of concern. He reported his findings to Mr. Edward Szymanski, Associate Director of Water Quality Management.

Mr. Albro returned to the site on June 23, 1992 to confirm his findings, and again observed saturation in many portions of the area, which was evidenced by dark stained areas and by root systems that indicated a high ground water table. He also utilized 1985 and 1992 aerial photographs to confirm the edge, size and nature of the freshwater wetland in the specific area of concern prior to the alterations.

It was Mr. Albro's opinion that a wetland plant community greater than three acres in extent existed in the particular area in question which has been altered by construction of the gas line; and that typically, there was a swamp existing in said area. He noted however that this disturbed area is "typically coming back as emergent vegetation typical of marsh or swamp species".

It was explained by this witness that a wooded wetland less than three acres in size, which is typically a swamp type wetland, is still considered a wetland pursuant to the Act and the Department has jurisdiction over same. However, the Department cannot extend a fifty-foot perimeter wetland around the boundary of a swamp type wetland of less than three acres in accordance with Section 2-1-20(d).

Mr. Albro opined that: (1) based on his review of 1985

aerial photographs in comparison with his observations at the site in June of 1992, there were no differences in the wetland characteristics on said dates, other than as disturbed by the gas pipeline alterations; (2) there is a wetland present in the specific area of concern, (3) wetlands were present in that particular area prior to the installation of the gas line; and (4) this wetland was altered by the construction of the pipeline.

Mr. Albro stated that Brian Tefft, formerly with the Division, inspected the site to determine whether wetlands were present (after Division had received reports of wetland alterations). Mr. Tefft prepared a report and sketch of the subject area on or about December 19, 1991 which detailed the wetlands present, a portion thereof being within the specific area of concern.

It was Mr. Albro's testimony that Mr. Tefft's sketch does not accurately portray characteristics at the site because the extent of the wetland is actually greater than the acreage indicated in the sketch.

It was brought out during cross-examination of Mr. Albro that he had not inspected the area under consideration prior to construction; and that when he first inspected the site with Mr. Wencek and Mr. Tefft on June 9, 1992, the restoration activities consisting of regrading and seeding had already been completed.

Wallace B. Arcese, Jr., the TGP Division Right-of-Way

Supervisor for the Northeast Region, was called as the next witness for Division. He testified that he submitted the subject application as well as the revised site plans and response comments that were considered during settlement negotiations. It was acknowledged by this witness that the revised site plan does not depict any freshwater wetlands, nor alterations to same, within the specific area of concern.

He admitted that TGP erred by failing to determine if wetlands were present in the specific area of concern; however, he explained that this was overlooked when the pipeline was relocated by FERC (from the path as submitted in the application to its present location in the area of concern).

Mr. Arcese testified that TGP did not become aware of the wetlands in the specific area of concern until December of 1991. TGP was denied access to this property until FERC granted the order to finish that portion of the pipeline. At that time, TGP's consultant or the environmental inspectors on the job had concerns concerning the vegetation present, so they conferred with IEP. TGP was told that wetland vegetation was present but it was non-jurisdictional. TGP utilized a silt fence or hay bales and took other mitigating measures similar to the measures followed in wetland areas. Construction of the pipeline was completed in January of 1992 and restoration of the specific area of concern has been completed by TGP. It filed a compliance report on restoration of the pipeline on October 20,

1992 and the pipeline is presently transporting gas. Delivery of gas commenced in August of 1992 when Providence Gas completed its facilities to accept the additional volume of gas from the pipeline.

It was elicited in cross examination of Mr. Arcese that TGP began deliveries of gas after the NOVAO was issued in order to comply with the FERC certificate. It was also brought out that in addition to proceedings before the FERC, construction of the subject pipeline involved a condemnation action before Judge Boyle of the United States District Court. Approvals from the State Historic Preservation Office, and the Office Supply Plan and Producer Regulation of the Federal Energy Regulatory Commission were also required.

Douglas Cotton, a Manager of Environmental Engineering, was the first witness called by TGP. He was employed with the BSC Group of Boston, Massachusetts, at the time of the subject project. He originally assisted the project manager in the preparation of the environmental analyses supporting the subject permit, and in July of 1991 he became the project manager for all environmental activities concerning the TGP project.

Mr. Cotton testified that he first became aware of the wetland in question in early September of 1991, approximately one week after the subject permit was issued. This was when it came to BSC's attention that an abutter had alleged (in a suit challenging the permit) that a wetland in the area in question

was not accounted for in the permit. A review was then conducted of the material that IEP had prepared which confirmed that there was no information therein regarding the subject area. BSC's former project manager discussed this situation with the IEP employee who actually performed the field work in the area in question. It was BSC's belief that although there might be some wetland vegetation present, TGP need not be concerned about this since it had been considered previously and not made part of the permit issued by Division.

It was explained by Mr. Cotton that the area under consideration has been referred to as "Wetland 70" for convenience purposes. Construction in this area first began approximately December 17, 1991. The initial crews in this area informed the BSC environmental inspector that they observed possible wetland vegetation in the area. The inspector instructed the crews to treat the area the same as any other wetland which they had a permit to alter despite their belief that it was not considered a regulated wetland.

Mr. Cotton testified that he did not visit the area in question until December 20, 1991, at which time the right of way had been cleared of vegetation. He visited this area and other areas in preparation for a meeting with Brian Tefft, who had requested that BSC prepare a report describing the status of construction activities at every single wetland for the entire twenty-five (25) miles. BSC submitted an extensive report

concerning the wetland in question (and several other wetlands) to Mr. Tefft on December 23, 1991.

It was Mr. Cotton's testimony that the wetland in question was discussed at the meeting held on December 23, 1991, and at that time Mr. Tefft and Mr. Wencek were informed of the method planned by TGP to deal with the subject wetland. Periodic reports describing the construction activities were submitted to DEM at Mr. Tefft's request. These reports contained a section (including color photographs) "illustrating the on-going construction with an eye toward focusing on the wetland that DEM had expressed concerns about."

Judith B. Moreau, an intervenor, was the next witness to testify. She described the 55-acre parcel property located in the immediate vicinity of the area in question (on which her home is situated). The Moreaus received the notice that was sent out for comment by DEM in late September of 1990 concerning the original route for the gas line. The Moreaus filed comments responsive to said notice which contained a brief reference to what has been referred to as "Wetland 70".

This witness presented a detailed review of the progress of pipeline construction and the standing water that accumulated in the area under consideration. She also described the various procedures undertaken by these intervenors, and their previous allegations of the presence of wetlands on the property in question.

Division maintains that TGP has failed to meet its burden of proof, and that Division has proved its case by a preponderance of the evidence. It is essentially Division's contention that TGP's failure to depict the fresh water wetlands and alterations in the area of concern automatically mandates that the NSPO be upheld.

Division argues that TGP's error in failing to inspect the specific area of concern prior to submitting revised site plans fully supports the issuance of the NSPO; and that once TGP learned of the presence of fresh water wetlands in said area, it was TGP's obligation to advise Division of the presence of fresh water wetlands on the site and to seek a determination or confirmation as to whether the fresh water wetlands in this area were "jurisdictional".

The Division further contends that all of TGP's arguments that it be excused for failing to identify the wetlands and alterations are without merit; and that the remedy set forth in the NSPO is appropriate and in full accordance with the pertinent statutes and Regulations.

It is further argued by Division that TGP's permit was properly suspended (based upon the Division's belief that TGP erroneously or falsely submitted information in support of the permit) , and that the expiration of the permit during the pendency of the administrative proceedings, as well as the completion of the project, should have no bearing on the

determination of this matter.

Division contends that AAD lacks jurisdiction to consider TGP's argument that DEM's authority to issue the subject NSPO is federally exempted (by the FERC permit); and Division submits (in the alternative) that if this forum considers said issue, it should find that TGP must comply with all requisite state fresh water wetlands laws, rules and regulations.

It is also maintained by Division that intervenor Judith Moreau's pending administrative appeal (to the Superior Court) of DEM's approval of TGP's revised proposal has no bearing on the Division's authority to enforce the Act and its regulations, and that the Division retains jurisdiction to suspend TGP's permit regardless of the separate pending civil action.

TGP argues that its revised site plans and specifications did not contain "false or erroneous information" despite the fact that the wetlands in the specific area of concern meets the biological definition of a swamp since said wetlands is less than three acres and therefore it is not a jurisdictional wetland regulated by DEM.

It is TGP's contention that the instant matter is moot since construction has been completed under the wetlands permit and said permit has expired by its own terms. TGP urges that the doctrine of estoppel mandates that the NSPO be rejected.

TGP maintains that the construction of the gas pipeline in the specific area of concern was the result of a series of

miscommunications and errors among the various parties that did not become apparent until after the construction was completed; that the installation of the pipeline had only a temporary impact; and that the mitigation efforts and restoration were successfully undertaken in accordance with the directions of the authorized agents of the Division.

It is argued by TGP that DEM no longer has any jurisdiction in this matter because of Judith Moreau's appeal of the permit to the Superior Court, and that although DEM has authority to suspend a wetlands permit, it does not have authority to order TGP to file additional materials independent of the suspension.

TGP urges that Mr. Albro's testimony regarding the condition of the site and his determination of the size and extent of the wetlands following completion of construction should be disregarded because of the Hearing Officer's ruling on the Division's Motion in Limine.

It was argued by TGP in its Post Hearing Brief that the Fresh Water Wetlands Act as interpreted and applied by DEM denies TGP due process of law, and should be declared void for vagueness.

Intervenors, Judith B. and N. Robert Moreau, argue that TGP's defense of "good faith" is inconsistent with the facts and that TGP's failure to depict the fresh water wetlands in the specific area of concern is part of a consistent pattern of unprofessional and incompetent work that can only result from a

deliberate indifference to truth and accuracy. Said intervenors hint that TGP deliberately ignored the rules and regulations in order to accomplish certain goals.

The intervenors maintain that TGP's "non-jurisdictional wetlands" defense must be discredited because TGP failed to avail itself of Division's preliminary determination procedure; and also that the alleged statements of the Messrs. Tefft and Wencek provide no basis for stopping the Division from proceeding with the NSPO.

It is the contention of the Intervenors that TGP knowingly and deliberately violated the Act, and that TGP should be ordered to remove (or render inoperative) that portion of the pipeline from the specific area of concern, and to restore the area to its pre-construction status.

The pertinent provisions of the Rules and Regulations Governing the Enforcement of the Fresh Water Wetlands Act are Sections 10.01 and 11.01(b). Section 10.01 provides:

"Where the Director has cause to believe that (a) the information or data submitted by the applicant in support of an application for...a permit to alter fresh water wetlands is false or erroneous,...the Director shall issue a cease and desist order, and/or an order requiring the applicant to show cause why such permit...should not be revoked or suspended and/or to require the applicant to restore the subject wetlands."

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Section 11.01(b) provides that within ten (10) days after service of such a written order, the applicant or permittee may request that "the Director allow him/her to appear at the Department to show cause why such order should not stand".

The evidence introduced by Division clearly establishes that there are fresh water wetlands present in the specific area of concern which are regulated pursuant to the ACT which are therefore "jurisdictional". Mr. Albro's testimony was the only direct and positive evidence offered on this issue. Although there was no satisfactory explanation offered concerning the notes and memoranda of other Division employees (that indicated the wetland was less than three acres), Mr. Albro's testimony that said wetland consisted of a swamp more than three acres in size was basically uncontroverted. Evidence not discredited either by other positive testimony or by circumstantial evidence, is deemed conclusive. State v. A. Capuano Bros., Inc. 120 R.I.58 (1978).

A close scrutiny of the Act reveals the the swamp in the specific area of concern would still be a state-regulated fresh water wetland even if it was less than three acres in size. Pursuant to the definition of "Freshwater Wetlands" contained in Section 2-1-20(d) of the Act, a wooded swamp such as the one in question is regulated as a freshwater wetland, despite its failure to meet the size criteria necessary to be classified as a "wooded swamp". The Act broadly defines "freshwater wetlands"

as including, but not being limited to, certain wetland types enumerated therein.

The general rule "that words of a general import are limited by words of restricted import immediately following and relating to the same subject" is not a positive rule of law but merely a rule of construction to be employed only in determining the meaning of an ambiguous statute. Powers ex. rd. 2 Dayon v. Charron, 86 R.I. 411 (1957). When the language of a statute is clear and unambiguous, (as in the instant matter), the statute may not be construed or extended but must be applied literally. Citizens for Pres. of Waterman Lake v. Davis 420 A.2d53 (R.I. 1980).

TGP's reliance on the ejusdem generis doctrine to support its position (that swamps less than three acres are not regulated under the Act) is misplaced. Said rule of construction provides that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. However, it is generally held that the rule of ejusdem generis is merely a rule of construction and is only applicable where legislative intent or language expressing that intent is unclear. This rule can be overcome by a strong indication of contrary legislative intent or policy. When

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"include" is utilized (in legislation); it is generally improper to conclude that entities not specifically enumerated are excluded. 2A Sutherland, Statutory Construction, Section 47.23 (5th ed).

In construing a statute, the words used therein must be given their plain and customary meaning. The meaning expressed is conclusively presumed to be the meaning intended. Murphy v. Murphy, 471 A.2d 619 (R.I. 1984).

Assuming, without deciding, that the Act appears somewhat confusing at first sight, a clear reading of the Act shows that the term "fresh water wetlands" as defined by the Act includes, but is not limited to swamps in excess of three acres. The purpose and intent of the Act is to preserve the purity and integrity of the swamps, marshes and other fresh water wetlands of this State and it is apparent that all fresh water wetlands are regulated thereunder.

Although the fresh water wetlands in the area of concern were not depicted in the plans, this does not mandate that the NSPO should be upheld automatically without due and proper consideration of the facts. A careful review of the evidence demonstrates that the information or data submitted by the applicant in support of its application for a permit is not false or erroneous within the purview of the Act and the Rules and Regulations. Although the site plans and specifications did not accurately portray the location of the fresh water wetlands

in question, the proposed pipeline did not traverse the specific area of concern at the time the original plans were submitted by TGP. The route of said pipeline was modified by mutual consent of TGP and Division. Said modification was detailed on sheet 29 of 29 sheets of the site plans. The site plans identified 69 wetlands located on a vast stretch of property extending approximately twenty-six miles, and the revised site plan entailed a straightening of the route of said pipeline in the vicinity of Natick Road (which involved only approximately four hundred feet of pipeline).

The comprehensive Consent Agreement (executed on behalf of Division by Mr. Albro) and the Permit incorporated therein (signed by Mr. Tefft) contained elaborate conditions and specifications for the protection of the numerous wetlands along the project route.

The NSPO recites that DEM issued the Permit following execution of a Consent Agreement and "based in part on the plans submitted by Tennessee"; however there is no indication that the Division relied on any information or data supplied by TGP (as to the specific area of concern) as part of the settlement process. The evidence demonstrates that neither TGP nor Division were aware of the presence of fresh water wetlands in the specific area of concern prior to or at the time of execution of the Consent Agreement (which incorporated the Permit). DEM's consultant, IEP, Inc., was not produced as a

witness, nor were DEM's supervisory employees who conducted the site inspections contemporaneous with construction of the pipeline and those who had numerous meetings with TGP after they investigated numerous complaints by the Moreaus and Lawrences.

Intervenors' contention that TGP's failure to depict the fresh water wetland in the specific area of concern was deliberate and that TGP intentionally violated the Act, is not supported by the evidence. There was no proof whatsoever that fraudulent or deceptive information or details were supplied by TGP or that TGP engaged in any misleading tactics. The misidentification of the wetland resulted from a misunderstanding or lack of communication between TGP and the agent and/or employees of DEM. The property encompassing the specific area of concern was not reviewed by IEP and the Division failed to conduct a field investigation prior to the execution of the Consent Agreement.

DEM retains jurisdiction to address the issues presented in the instant matter despite the administrative appeal filed by Judith Moreau (concerning the Division's issuance of the Permit to TGP). Such appeal does not bar or prevent the Division from taking suspension action when same is appropriate. A similar objection to maintaining a separate action was summarily disposed of by the Rhode Island Supreme Court, where it held that Administrative review authorized by statute does not exclude other legal remedies. Demers v. Shehab

101 R.I. 417 (1966).

Although DEM retains jurisdiction in this matter, the evidence does not reach the level necessary to prove that the NSPO should be upheld and affirmed. The initial review of the project was conducted by the firm that Division hired to review the project, and subsequent reviews were conducted by DEM's supervisory employees. Division acknowledged that there was no substantive deviation of the pipeline route by the revised plan and Division mistakenly assumed that all wetland alterations had been considered previously. There was no proof to support Division's allegations that the issuance of the permit was based in part on plans submitted by TGP nor that the plans submitted in support of the subject application were false and erroneous. The instant matter therefore differs substantially from the usual situation where an applicant fails to inspect a site prior to submitting site plans, or fails to request a preliminary determination. Consequently, suspension of TGP's permit would not be an appropriate remedy.

Assuming arguendo that Division had established reliance on the plans submitted by TGP, the evidence demonstrates that Division failed to issue the show cause order in a timely fashion. Since construction of the pipeline has been completed under the wetlands permit and the permit has expired by its own terms, this matter is now moot.

Academic matters should not be considered at

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adjudicatory hearings, consequently the NSPO should be rejected in this matter. In a similar situation the Rhode Island Supreme Court refused to review the denial of a motor vehicle operator's license when said license was subsequently issued without a court order prior to the court's determination. It was ruled by the Court that "it will not ordinarily spend its time either proceeding to adjudicate when there is no subject matter on which its judgment can operate or in deciding a moot case". Perry v Petit, 116 R.I.89 (1976).

The rule requiring a justiciable issue was affirmed in Town of Scituate v. Scituate Teachers Association, 296 A.2d 466 (1972). The court declined to consider a question about the effect of a teacher's contract where the contract had terminated, since "The issue presented is, therefore, moot, academic or hypothetical, and will not be passed upon under our system".

The factual situation in the instant matter is similar to that in Phelps v. Bay Street Realty Corp., 425 A.2d 1236 (1981). The court in Phelps ruled that it need not consider the issue of whether the trial court erred in refusing to rule on the legal validity of a parking lot license in light of the fact that the defendant has already constructed and operated the parking lot and the license had expired. In the instant matter, the permit expired in August, 1992 by its own terms and the construction of the pipeline has been completed pursuant to the Permit.

It would appear to serve no useful purpose to order TGP to resubmit revised plans and supporting documents in order to meet the Department's interest to renotice the project in the specific area of concern.

It is interesting to note that the Intervenors, who have strenuously opposed this project, have argued that this purported "remedy" is unwarranted. Their request that TGP be ordered to remove (or render inoperative) that portion of the pipeline from the specific area of concern and to restore said area to its pre-construction status was not included in the relief requested, and such "a remedy" should not be considered without proper notice to TGP. Even if said request for relief had been properly presented, it would be unwarranted and inappropriate under the circumstances in the instant matter. The pipeline was installed below ground and no above-ground structures, appurtenances, pavement, or parking lots were constructed in the specific area of concern; also construction of the pipeline and the restoration activities were completed when Mr. Albro first visited the site. At this juncture, the remedies requested would serve no useful purpose, and the NSPO should be denied.

TGP has shown good cause why the NSPO should be dismissed, and has proven that it has complied with the Act and the Rules and Regulations.

The Division has failed to prove by a preponderance of

the evidence that the Notice of Suspension of Permit and Order should be upheld and affirmed.

In light of the foregoing, it is unnecessary to consider the additional issues or other arguments, or whether administrative notice should be taken of a United States District Court decision.

FINDING OF FACT

After reviewing the documentary and testimonial evidence of record, I find as a fact the following:

1. Tennessee Gas Pipeline Co., Inc. ("TGP") filed a formal application (No. 90-0184F) to alter fresh water wetlands ("Application") with the Division of Fresh Water Wetlands ("Division") of the Department of the Environmental Management ("DEM") on March 22, 1990.
2. The Applicant requested permission to alter fresh water wetlands in connection with a project to install approximately twenty-five (25) miles of 16" natural gas pipeline between Burrillville and Cranston, Rhode Island.
3. In support of its Application TGP filed site plans with DEM demonstrating the proposed route for construction and installation of a said natural gas pipeline entitled: "Rhode Island Lateral Line No. 265E-100 Providence County, RI, Tennessee Gas Pipeline Co., 29 sheets, revised dated September 1990 and dated received stamped by Division

September 21, 1990 ("site plans").

4. The site plans were sent out to public notice by the Division from September 27, 1990 to November 11, 1990 in accordance with RI General Laws Section 2-1-18 et seq.
5. Division hired a consulting firm, IEP, Inc., to review this project for Division pursuant to an agreement between Division and TGP.
6. The City of Cranston and the Towns of North Smithfield and Smithfield (municipalities within whose borders the project lies) disapproved or "vetoed" the Application within the forty-five day period provided for objections set forth in R.I.G.L. Section 2-1-22.
7. DEM denied TGP's Application by letter dated December 28, 1990.
8. TGP filed a timely request for an adjudicatory hearing on January 9, 1991 (appealing the Division's denial of TGP's Application).
9. As part of settlement negotiations, TGP submitted revised site plans and specifications to the Department which, inter alia, partially relocated the proposed natural gas pipeline; such site plans are entitled: "Rhode Island Lateral Line No. 265E-100, Providence County, RI" Tennessee Gas Pipeline..., sheets No. 1 through 29 of 29, sheets 3A, 4A, 9A and 16A; as revised on August, 1991 ("revised site plans") and are further described by the specifications and

documentation set forth in the report entitled: "Supplemental Response to Comments on the Providence Pipeline Project - Fresh Water Wetlands Application No. 90-0184F" dated July 15, 1991 and "Addendum Number 1 to Supplemental Responses...on the Providence Pipeline Project..." date stamped by Division August 8, 1991, (collectively referred to as "specifications").

10. The municipalities involved subsequently withdrew their disapprovals (vetoes).
11. The site plans originally submitted with the Application had charted the path of said pipeline to veer to the right from a point approximately four-hundred feet easterly of Natick Road in Cranston, RI.
12. The revised site plans modified the route of approximately four-hundred feet of the most westerly portion of said pipeline so that the pipeline continued straight ahead to its terminus at Natick Road, Cranston, Rhode Island pursuant to an Order issued by the Federal Energy Regulatory Commission on September 19, 1990.
13. The supplemental data submitted by TGP also detailed how TGP proposed to protect the wetlands listed, how TGP would minimize the disturbance to these wetlands during construction of the pipeline, and the mitigative features to be provided by TGP in support of its application.
14. After negotiations, and in lieu of proceeding to an

administrative hearing, TGP and DEM entered into a Consent Agreement on August 27, 1991, whereby DEM issued TGP a permit to alter fresh water wetlands ("Permit").

15. The Application, as modified by the revised site plans submitted by TGP, and as further described by the specifications and documentation presented in the Supplemental Responses to Comments dated July 15, 1991 and Addendum No. 1 to Supplemental Responses dated August 7, 1991 were approved and the Permit issued by letter dated August 27, 1991, which was signed by Brian C. Tefft, Supervisor for Application for Division.
16. The Permit specified the terms and "Permit Conditions" for the approval, and said Permit (as well as its conditions of approval) was attached to and incorporated by reference in the Consent Agreement dated August 27, 1991.
17. TGP commenced construction of the pipeline in September, 1991 pursuant to the Permit issued by the Division and the Consent Agreement.
18. On June 9, 1992 and June 23, 1992, the Division conducted site inspections of a portion of TGP's pipeline easement located opposite utility Pole No. 78, extending \pm 450 feet westerly of Natick Road, adjacent to Plat 22, Lot 108 in Cranston, Rhode Island ("specific area of concern") which revealed that TGP had altered a wetland in the specific area of concern by its installation of its natural gas

pipeline.

19. The Division issued the instant Notice of Suspension of Permit and Order ("NSPO") to TGP on July 15, 1992.
20. The NSPO alleged that "this Department has reason to believe that the plans submitted in support of the subject application to be false or erroneous in that they fail to adequately represent the wetlands and limits of alterations taking place in these wetlands".
21. The NSPO ordered (1) that TGP cease and desist from undertaking any additional alteration or work in furtherance of the Permit granted by the Division on August 27, 1991; (2) that the Permit granted to TGP in the specific area of concern be suspended; and (3) that TGP submit to the Division within thirty days revised plans and supporting documentation for the specific area of concern showing all wetland areas, all existing construction activity, and all properties within two hundred feet of the wetlands alterations, in order for Division to re-notice the project in this specific area.
22. TGP filed a timely request for an adjudicatory hearing to show cause why the NSPO should be dismissed, and requested (1) that it be granted a hearing, (2) that the NSPO be dismissed, and (3) that it be afforded such other relief as it may be entitled to.
23. On October 13, 1992, over TGP's objection, Judith Moreau's,

N. Robert Moreau's, Walter Lawrence's and Clara Lawrence's petitions to intervene in the adjudicatory hearing were granted.

24. On October 21, 1992, the Division filed a Motion to Consolidate the show cause hearing and full administrative hearing on the merits relating to the Department's NSPO which was granted by the Hearing Officer prior to the commencement of the subject hearing.
25. The hearing was held on October 26, 27 and 28, 1993. All parties were afforded the opportunity to present witnesses and the opportunity for full cross-examination of opposing witnesses.
26. The property in the vicinity of the specific area of concern contained a fresh water wetland, consisting of a swamp greater than three acres in extent, that was not depicted in the revised site plan.
27. The Division failed to conduct a field investigation to confirm the information contained on the revised site plan.
28. Brian C. Tefft, formerly the Supervisor of Applications for the Division, had inspected the site after the Division had received reports of wetlands alterations, and he subsequently prepared a report and sketch of the subject area for the Division on or about December 19, 1991.
29. Mr. Tefft's aforesaid documents demonstrated that wetlands were present in the specific area of concern, but the

extent of the wetlands was inaccurately depicted as less than what actually existed in the specific area of concern.

30. Martin Wencek prepared a report and sketch dated December 18, 1991 concerning the subject area which contained the notation "less than three acres" on one side of the wetland's edge.
31. Harold K. Ellis, Enforcement Supervisor for Division, submitted a report concerning the subject area which stated that inspections on December 18, 1991 and March 2, 1992 (as a result of complaints), revealed no alterations of fresh water wetlands that required enforcement action.
32. Dean H. Albro, Chief of Division, became aware in May of 1992 (during court litigation that Division was required to answer) that TGP had not depicted the wetlands in question on the revised site plan.
33. Mr. Albro inspected the site on June 9, 1992 with Mr. Tefft and Mr. Wencek to resolve possible conflicts concerning the type and extent of wetlands on the site and the location of activities within wetland areas.
34. Mr. Albro reported the findings of his June 9, 1992 site visit to Edward Szymanski, Associate Director of Water Quality Management for DEM.
35. Mr. Albro reinspected the site on June 23, 1992 and confirmed the size and type of the wetland that had existed

in the specific area of concern, and that said wetland was altered by construction of the pipeline.

36. The existence of the wetland in the specific area of concern was discovered after TGP had progressed with a substantial portion of the project.
37. TGP did not knowingly, or intentionally, submit false or erroneous information and data to the Division in support of the Application.
38. The former Supervisor of Applications who authored the terms, conditions and specifications for the project (and who signed the Permit on behalf of Division), became aware of the alterations of the wetland in the specific area of concern during the course of construction of the pipeline.
39. The NSPO was not issued until after TGP had essentially completed the project.
40. The alterations of the fresh water wetlands in the area in question were conducted in accordance with the plans, specifications and instructions approved by duly authorized agents of Division.
41. The alterations to the fresh water wetlands did not result in any buildings, appurtenances, or permanent above-ground improvements that would permanently affect the wetlands in question.
42. The entire project is now completed, typical marsh or swamp vegetation is now emerging, and the submission of new plans

(or other documentation) at this time for the specific area of concern, would serve no useful purpose.

43. The instant matter is moot since the Permit has expired by its own terms and construction of the pipeline was completed in accordance with said Permit.
44. The pipeline was installed in accordance with the Permit and the mandates of duly authorized employees of the Division.

CONCLUSIONS OF LAW

1. DEM has jurisdiction over the freshwater wetlands located in the specific area of concern.
2. TGP has demonstrated good cause why the Notice of Suspension of Permit and Order dated July 15, 1992 ("NSPO") should not stand.
3. The evidence presented was insufficient to prove the allegations set forth in the NSPO by a preponderance of the evidence.
4. Since the allegations contained in the NSPO were not proven by a preponderance of the evidence, the Division is not entitled to the relief requested in the NSPO.

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Wherefore, it is hereby

ORDERED

1. That the Notice of Suspension of Permit and Order (of Application No. 90-0184F) issued by the Division to the Respondent on July 15, 1992 is denied and dismissed.

I hereby recommend the foregoing Decision and Order to Frederick J. Vincent, delegated Director in this matter for issuance as a Final Order.

6-29-93

Date

Joseph F. Baffoni

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

Entered as a Final Order on this _____ day of July,
1993.

Frederick J. Vincent
Delegated Director
Dept. of Environmental Management
83 Park Street
Providence, Rhode Island 02908

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CERTIFICATION

I hereby certify that a true copy of the within Decision and Order was forwarded to Attorney Peter V. Lacouture, Tillinghast, Collins & Graham, One Old Stone Square, Providence, RI 02903; Morton Simons, Esq., and Barbara Simons, Esq., Simons & Simons, 5025 Linnean Avenue N.W. Washington, D.C. 20008; Robert S. Bruzzi, Esq., 18 Imperial Place, Providence, RI 02903; Clara J. Lawrence and Walter Lawrence, 745 Natick Avenue, Cranston, RI 02921 by regular mail, postage prepaid and by interoffice mail to Mary B. Shekarchi, Esq., and Catherine Robinson Hall, Esq., Office of Legal Services, Department of Environmental Management, 9 Hayes Street, Rhode Island 02908 on the _____ day of July 1993.

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