

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

RE: DURASTONE COMPANIES AAD NO. 92-045/FWE
NOTICE OF VIOLATION NO. C92-0098V

ORDER GRANTING DISMISSAL OF THIRD PARTY COMPLAINT

This matter came before Hearing Officer Mary F. McMahon for oral argument on January 31, 1994 on the Rhode Island Department of Transportation's (RIDOT'S) Motion to Dismiss Respondent Durastone's Amended Third Party Complaint. RIDOT seeks dismissal of Count I of Respondent's Amended Third Party Complaint on three grounds: lack of subject matter jurisdiction, lack of jurisdiction over the person, and failure to state a claim for which relief can be granted. It also seeks dismissal of the remaining count of the Third Party Complaint for failure to state a claim for which relief can be granted. Respondent has objected.

DECISION AND ORDER

Pursuant to R.I.G.L. §42-17.7-2, the Administrative Adjudication Division ("AAD") has jurisdiction over "[a]ll contested enforcement proceedings, all contested licensing proceedings, and all adjudicatory proceedings under chapter 17.6 of title 42" (administrative penalties for environmental violations). It is axiomatic that a statutorily-created tribunal such as the AAD cannot expand its jurisdiction beyond that provided by the legislature.

The pending Notice of Violation and Order was issued to Durastone Companies ("Durastone") on July 15, 1992 pursuant to the powers granted to the Director of the Department of

DURASTONE COMPANIES
AAD NO. 92-045/FWE
PAGE 2

Environmental Management ("DEM") under R.I.G.L. §42-17.1-2. That section specifically provides that the Director "give notice of an alleged violation of law to the person responsible therefor" and sets forth the requirements for obtaining a hearing on the alleged violation when the matter is contested.

When the AAD's jurisdiction statute is read in conjunction with §42-17.1-2, it is clear that the four corners of the notice of violation control the limits of the AAD's jurisdiction over the proceeding. Jurisdiction over a third party respondent must be derivative from the action pending between the DEM and the Respondent. Using the Superior Court Rules of Civil Procedure by filing a third party complaint cannot extend the jurisdiction of the AAD. Theodore Shulterbrandt/Buttunwoods Cleaners & Tailors, Inc., AAD No. 92-035 (order granting dismissal of third party complaint, dated December 9, 1993).

The AAD has previously determined that Hearing Officers, and ultimately the Director, are without jurisdiction to decide civil issues involving contract and indemnification claims, Barbara D'Allesandro, AAD No. 91-006/GWE (order denying leave to assert a third party complaint, dated June 8, 1992); Theodore Shulterbrandt, supra; loss of property value and loss of use and enjoyment of property, Quidnick Reservoir Company, AAD No. 93-017/WRE (Order Denying Intervention/Tiogou

Lake Association, dated February 1, 1994). Determination as to proper jurisdiction on the within matter can only be made upon examination of the Notice of Violation and Order and the Amended Third Party Complaint filed by Respondent Durastone against RIDOT.

The Notice of Violation and Order ("NOV") identifies six instances of alleged violation of the Freshwater Wetlands Act:

- Instance (1) Filling (in the form of pre-cast concrete and eroded concrete fines) into an area subject to storm flowage;
- Instance (2) Filling (in the form of pre-cast concrete) into a swamp and riverbank wetland;
- Instance (3) Filling (in the form of pre-cast concrete) into a perimeter wetland and into a riverbank wetland;
- Instance (4) Filling (in the form of pre-cast concrete and eroded concrete fines) into a swamp and riverbank wetland;
- Instance (5) Filling (in the form of pre-cast concrete) in a perimeter wetland and into a riverbank wetland;
- Instance (6) Filling (in the form of pre-cast concrete) in a riverbank wetland.

In order for the Division of Freshwater Wetlands ("Division") to obtain restoration, it must prove the above violations by a preponderance of the evidence.

Count I of Respondent's Amended Third Party Complaint against RIDOT asserts that RIDOT's actions created a wetland on Respondent's property and that if Respondent is required to restore any portion of the alleged wetland, then the cost

should be borne by RIDOT. Count II additionally asserts that the drainage pattern from Interstate Route 295 deposits sediment on the Respondent's land "on an area allegedly designated as a wetland." (Count II, para. 6). Respondent seeks the same relief against RIDOT as it sought in Count I.

Not only does the Third Party Complaint seek relief in the nature of indemnification which the AAD has previously ruled beyond its jurisdiction, the claim of sediment deposit is beyond the instances set forth in the NOV. Even assuming arguendo that a Hearing Officer found the RIDOT's actions created or enlarged a wetland and that it had caused sediment deposits, neither activity is set forth in the NOV for which relief could be granted against RIDOT.

This is not to say, however, that the elements of Respondent's Counts cannot be presented as a defense to wetland alteration or used in limiting the removal of fill to that specified in the NOV: pre-cast concrete and eroded concrete fines. If the Division seeks any further removal, it would have to issue a further NOV and prove that Respondent was responsible for the additional fill.

In light of the above conclusion that the AAD is without jurisdiction, the Third Party Complaint against RIDOT is dismissed.

As a prehearing conference was conducted on this matter while RIDOT remained a party, and in consideration of the

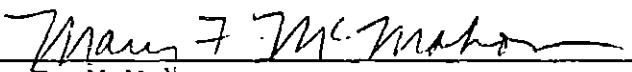
elapse of time since that conference which may warrant an update of the parties' positions, witnesses or exhibits, a new prehearing conference will be scheduled.

Wherefore, it is hereby

ORDERED

1. RIDOT's Motion to Dismiss Respondent Durastone's Amended Third Party Complaint is GRANTED, and the Third Party Complaint is hereby DISMISSED.
2. A Prehearing Conference is scheduled for June 3, 1994 at 10:00 a.m. in the offices of the Department of Environmental Management, Administrative Adjudication Division, One Capitol Hill, Third Floor, Providence, Rhode Island 02908. Any supplements or amendments to the matters presented at the prehearing conference conducted on September 10, 1993 should be exchanged between the parties prior to June 1, 1994.

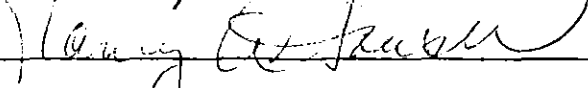
Entered as an Administrative Order this 12th day of May, 1994.



Mary F. McMahon
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 Thomas S. Hogan, Esq., 201 Waterman Avenue, East Providence, RI 02914; Veronica Ridolfi, Esq., RIDOT, Two Capitol Hill, Room 251, Providence, RI 02903 and via interoffice mail to Genevieve Martin, Esq., Office Legal Services, 9 Hayes Street, Providence, RI 02908 on this 12th day of May, 1994.



[Signature]