

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

**RE: GARDINER C. McLINTOCK**

**AAD NO. 97-007/FWE**

**NOTICE OF VIOLATION NO. C95-0220**

**ORDER GRANTING MOTION TO DISMISS**

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") after oral argument on the Motion to Dismiss ("Motion") filed by the Office of Compliance and Inspection ("OCI") in the above-entitled matter. The Motion was filed on November 17, 1997 and a status conference was held on December 5, 1997. No objection to the Motion was filed. Because the Motion is dispositive it was set down for oral argument. Oral argument was scheduled for January 5, 1998 to afford the parties an opportunity for settlement. Counsel appeared on January 5, 1998 and indicated that no settlement had been reached and counsel proceeded with oral argument.

As the basis for its Motion, OCI contends that the request for hearing was untimely thereby rendering AAD devoid of jurisdiction. OCI cites numerous AAD decisions to support its position. At the hearing on the Motion OCI relied on its written submission and made no further argument.

Respondent did not file a written objection or memorandum. At oral argument Respondent's counsel argued that the request for hearing was filed a day earlier than asserted by OCI and that the ten day period in which to request a hearing was not sufficiently long and should be

extended. Respondent's counsel acknowledged that the Notice of Violation was received by his client on October 25, 1997 and that the request for hearing was filed with AAD on November 5, 1997.

R.I. Gen. Laws §42-17.1-2(u)(1) provides in pertinent part,

...The notice will be deemed properly served upon a person if a copy thereof is served him or her personally, or sent by registered or certified mail to his or her last known address, or if he or she is served with notice by any other method of service now or hereafter authorized in a civil action under the laws of this state. ***If no written request for hearing is made to the director within ten (10) days of the service of the notice, the notice shall automatically become a compliance order.*** (emphasis added)

In the present matter, the request for hearing was not filed within ten days of the service of the notice. The notice, by operation of law, automatically became a compliance order thereby divesting AAD of jurisdiction to entertain Respondent's appeal. Similarly, R.I. Gen. Laws §42-17.6-4 relating to the assessment of the administrative penalty provides as follows,

- (a) A person shall be deemed to have waived his or her right to an adjudicatory hearing unless, within ten (10) days of the date of the director's notice that the or she seeks to assess an administrative penalty, the person files with the director or the clerk of the administrative adjudication division a written statement denying the occurrence of any act or omissions alleged by the director in the notice, or asserting that the money amount of the proposed administrative penalty is excessive. ...
- (b) If a person waives his or her right to an adjudicatory hearing, ***the proposed***

*administrative penalty shall be final immediately upon the waiver.* (emphasis added)

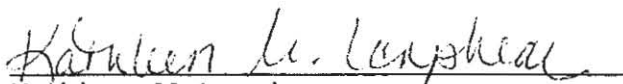
The ten (10) day appeal period afforded by R.I. Gen. Laws §42-17.1-2(u) and §42-17.6-4 is mandatory and jurisdictional in nature. *Haroutioun G. Jerejian v. Rhode Island Department of Environmental Management, C.A. No. 94-2910*, Rescript Opinion issued 9/26/95, Ragosta, J., AAD No. 93-076/GWE, Decision issued May 4, 1994; *Cumberland Park Homes*, AAD No. 91-017/FWA, Decision issued November 14, 1991. In the present matter, Respondent failed to file a request for hearing within the ten (10) day appeal period. Accordingly, AAD lacks subject matter jurisdiction and the Motion to Dismiss filed by OCI is meritorious.

Based on the foregoing, it is hereby

**ORDERED**

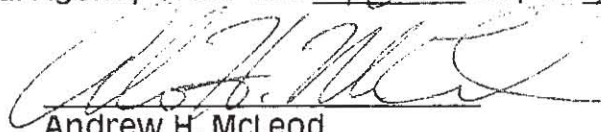
that the Motion to Dismiss is **GRANTED**.

Entered as a Recommended Decision this 6<sup>th</sup> day of January, 1998.



Kathleen M. Lanphear  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
235 Promenade St., Room 310  
Providence, Rhode Island 02809  
(401)-222-1357

Entered as a Final Agency Order this 16<sup>th</sup> day of April  
1998.



Andrew H. McLeod  
Director  
Department of Environmental Management  
235 Promenade Street, 4th Floor  
Providence, Rhode Island 02908

**CERTIFICATION**

I hereby certify that I caused a true copy of the within Order Granting Motion to Dismiss to be forwarded via regular mail, postage prepaid to William G. Coningford, Esq., 1564 Cranston Street, Cranston, RI 02920-5264 and via interoffice mail to Paula J. Younes, Esq., Office of Legal Services, 235 Promenade Street, Providence, Rhode Island 02908 on this 16<sup>th</sup> day of April 1998.

