

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF GROUNDWATER AND
FRESHWATER WETLANDS

IN RE: JAMES ROMANELLA AND SONS, INC. (FRESHWATER
WETLANDS APPLICATION NO. 4053, 86-696F); PETITION
FOR DECLARATORY RULING

THE PETITION

Applicant James Romanella and Sons, Inc. requests that the Director issue a declaratory ruling pursuant to Rule 18.00 of the Department's Administrative Rules of Practice and Procedure to the effect that a December 7, 1981 Decision and Order conditionally approving Application No. 4053 remains valid. Applicant alleges that pursuant to that Decision, the Director is obligated by Section 2-1-77 (d) of the General Laws to issue a permit forthwith. If granted, applicant argues that its Petition would render moot a subsequent 1986 application, No. 86-696 F, represented to be identical in substance to No. 4053.

TRAVEL

1. The (Designated) Director is acting under the authority of an Assignment of Function filed with the Secretary of State on November 28, 1990.
2. Applicant's Petition to Director for Declaratory Ruling was mailed to the Department on November 14, 1990.
3. The objection of the Division of Groundwater and Freshwater Wetlands was mailed to the (Designated) Director on November 26, 1990.
4. On November 28, 1990, the Designated Director mailed a request to the parties for certain information relative to Applicant's compliance with various conditions, numbered 1, 2, 3, and 5 attached to the aforementioned "December 7, 1981 Decision and Order, particularly as those conditions affected issuance of the wetlands alterations permit authorized by that Decision and Order.
5. By letter of February 5, 1991, the Division of Groundwater and Freshwater Wetlands responded to the Designated Director's request for information and attached various letters, memoranda and reports in support of that response.
6. By letter of February 4, 1991 applicant's counsel similarly responded.

7. The Designated Director on February 8, 1991 mailed a request to Sandra J. Calvert, Esquire for certain additional information in the Division's files relative to February 4, February 23, and April 2, 1982 correspondence to it from applicant's attorney.
8. By letter of February 19, 1991, Ms. Calvert responded to this request.
9. By letter of March 18, 1991, applicant's counsel responded to the Designated Director's telephone request for a records search regarding the results of water quality testing which was to be performed for the applicant by Eco Science in 1982.
10. By letter of April 3, 1991, Division's counsel responded to a similar request.
11. The petitions, objections and correspondence as above identified together with attached exhibits represent the entire record upon which the within ORDER is based.

SUMMARY OF THE RECORD

1. The Hearing Officer's Decision and Order of December 7, 1981 attached three conditions precedent to the issuance of the wetland alteration permit ordered by his Decision. Each of these were specifically required to have been met or accomplished by the applicant, one within a prescribed time frame and all subject to varying types and degrees of Departmental oversight and approval, prior to and as a precondition for the issuance of the aforementioned wetlands alteration permit (see in particular Condition 5(a) on Page 8 of the December 7, 1981 Order).

2. The 1981 Hearing Officer's first precondition required that:

"...within ninety (90) days from receipt of this Order, Romanella remove debris floating on the surface water, and nearby areas, from the three (3) quarries referenced in the decision, in accordance with solid waste management criteria. Supervision shall be made by the DEM divisions of Land Resources and Air and Hazardous Materials." (Decision at Page 7).

Applicant's counsel has submitted a copy of a February 4, 1982 letter from himself to the Freshwater Wetlands Section, which it acknowledges receiving, that references a mutual agreement reached at a joint meeting on February 2, 1982 as to the extent and schedule of the required debris removal.

There is no evidence in the record to suggest that this agreement was other than as described by applicant's counsel in the referenced February 4, 1982 letter. I must, therefore, conclude that the parties mutually agreed at that time that the Hearing Officer's first precondition would be satisfied by a cleanup of the "entire" Bradford Quarry and the "area westward of the natural barrier" within the Cross Street Quarry, with this clean-up to commence in early April and conclude by May 15 of 1982.

With regards to the Bradford Quarry, Peter Janaros, the then Chief of the Wetlands Section subsequently concluded per memorandum dated May 24, 1982 that "the clean up [was] substantially complete;" this based on Martin Wenceck's site inspection report of May 14, 1982 (Division's Exhibits D and C, respectively).

The status of the Cross Street cleanup is less clear. The site was inspected by Dean Albro on March 1, 1982 while debris removal was still underway, but the only mention of the "area westward of the natural barrier" where the clean-up effort was by agreement to have been concentrated is that it "does not appear to be affected by [the] suspended particles." (Division's Exhibit B). No mention was made of floating debris, whether present or absent.

A March 12, note on the inspection report over Peter Janaros' initials directs "continued follow up", although there is no evidence that this in fact occurred. In fact, the Division's file shows no record of any response to applicant's counsel's April 2, 1982 invitation to inspect the "completed" clean-up of the Cross Street site and it is, therefore, impossible to determine after the passage of nearly ten years whether that clean-up would have been determined to be satisfactory by the Department were it to have been inspected at the time as requested by the applicant.

Subsequent Department inspections conducted in September of 1985 and March of 1990 (Division's Exhibit F) are so late in time relative to the agreed upon May, 1982 clean-up deadline as to shed virtually no light on applicant's compliance with the Hearing Officer's 1981 Order and its deadlines. The debris cited in the 1985 and 1990 inspection reports might have accumulated in the years that have passed since the ordered clean-up was to have been completed; it might in all or part never have been removed by Romanella in the first place. The Department's failure to inspect these sites when requested to do so in 1982 and the subsequent passage of time make it impossible to tell with any reasonable degree of confidence. All I can know for sure is that as of today there are alleged to exist violations of the Department's solid waste regulations at all three quarries subject to the 1981 Decision and Order.

3. The Hearing officer in 1981 secondly required prior to the Division issuing a wetlands alteration permit that:

"...Romanella close out the solid waste area at the southern side of the Cross Street Quarry in accordance with solid waste management facility closure regulations enforced by DEM and under supervision of the DEM division of Land Resources and Air and Hazardous Materials." (Decision at Page 7)

Again, applicant's counsel in his letter to Peter Janaros of February 2, 1982 references a February 2 meeting with DEM at which it was agreed that compliance with this condition would be in the form of a "clean-up of litter and surface rubbish." Dean Albro's inspection report of March 1, 1982 (Division's Exhibit B) confirms that "a clean-up operation [was] taking place" and reports that three "very large" piles of debris have been bulldozed into an "upland area" near the quarry. It is however, impossible to determine at this time whether the clean-up was subsequently completed and the debris removed off-site since there is again no evidence that the Division responded to applicant's counsel's previously referenced April 2, 1982 invitation to inspect the site for compliance with the Hearing Officer's Order prior to the removal of clean-up equipment by the applicant.

4. The third and final precondition attached by the Hearing Officer in 1981 to the issuance of a wetlands permit was that:

"...Romanella undertake tests, at its expense, at the application site, for surface water and bottom depth water, by an independent firm, in accordance with specifications by and under the supervision of the DEM divisions of Air and Hazardous Materials and Land Resources." (Decision at Pages 7 and 8).

Tests results were then to be analyzed by DEM to determine whether levels of "toxicity" were "unacceptable," in which case a wetlands alteration permit would not be issued.

It is clear from a reading of the 1981 Order that the Hearing Officer ordered water quality testing because he was concerned with the possibility that debris at the bottom of the quarries might discharge toxic materials into and thereby contaminate groundwater flowing through the sites after they were filled (see Page 6 of the 1981 Order). It is for this reason that he insisted that water samples be taken from the quarries at depth as well as from the surface and then that these samples be separately analysed.

It is also clear from a reading of the 1981 Order that in determining whether the results of these water quality tests were "acceptable" pursuant to Condition No. 5 the Division of Air and Hazardous Materials was to make an

informed judgement of whether test results indicated the presence of "significant levels of toxic waste which must be addressed in accordance with the Rhode Island Hazardous Waste Management Act, G.L. 1956 (1979 Reenactement) Section 23-19.1 et seq., as a condition precedent to any wetlands consideration" (Page 7 of 1981 Order).

Applicant's counsel has suggested in his letter of March 19, 1991 that I can "reasonably infer" that the applicant in the Spring of 1982 submitted the water quality test results ordered by the Hearing Officer despite the fact that neither applicant's counsel, the applicant himself, his testing lab, nor anyone at RIDEM who might conceivably have been the legitimate recipient of such test results has any record whatsoever that the required testing ever took place or that results were in fact produced and sent anywhere. It would, therefore, take a leap of faith of almost Biblical proportions on my part to conclude that the required tests were completed and submitted, and even were I to take this leap I would still have no idea what those "assumed-to-be-missing" tests results showed.

I must rely, then, on the only water quality test results known to have been submitted by this applicant, which were received by the Freshwater Wetlands Section in late February of 1986, some five years after issuance of the

Order to which they presumably respond (see Division's Exhibit L). These appear to have been drawn from the Cross Street Extension quarry in Westerly only and there is no indication on the reporting form whether they represent a bottom, surface or composite sample. I, moreover, see no evidence that any water quality sampling results were submitted for the other quarry addressed in the 1981 Order, located off Quarry Road in Bradford.

The 1986 water quality test results submitted on behalf of this applicant are not responsive to the Hearing Officer's 1981 Order or his previously described water quality concerns as expressed in that Order. The Hearing Officer had ordered tests of surface and bottom water, had ordered that these tests be performed on both quarries which were subject to his Order, and had directed that tests be supervised by RIDEM staff. The applicant failed to comply with any of these conditions and as a consequence the Department is unable to determine as ordered by the Hearing Officer in 1981 whether or not "significant levels" of toxic waste have been disposed of in these quarries; a determination that the Hearing Officer required be made before a freshwater wetlands alteration permit was issued.

FINDINGS OF FACT

1. The December 7, 1981 Decision and Order required that three conditions, numbered 1, 2, and 3 and set forth on pages 7 and 8 of the Order, be met prior to issuance of a freshwater wetlands permit. These dealt respectively with removal of floating debris and solid waste and testing of water quality.
2. At a meeting on February 2, 1982, the applicant and the Department agreed to the scope and schedule of debris, litter and rubbish removal ordered by conditions No. 1 and 2. That scope and extent are described in a letter dated February 4, 1982 from Dennis Esposito to Peter Janaros.
3. Peter Janaros, for the Department, found the ordered debris removal from the Bradford Quarry to be substantially complete on May 24, 1982.
4. The Department did not respond to a written April 2, 1982 invitation by Dennis Esposito to inspect the Cross Street Extension quarry which Mr. Esposito represented to have been cleaned up in compliance with conditions No. 1 and 2 of the December, 1981 Order.

5. In 1985 and 1990 Department inspectors found what they characterized as solid waste violations at the three sites addressed in the December, 1981 Order.
6. While pursuant to condition No. 3 of the December, 1981 Order discussion took place between applicant's representatives and the Department relative to water quality testing in early 1982, there is no evidence that any testing actually took place at that time or that any results were reported to the Department prior to 1986. The 1986 results were for the Cross Street Extension quarry only and did not indicate whether samples were drawn from bottom or surface waters.

CONCLUSIONS OF LAW

1. The Final Agency Decision and Order of December 7, 1981 which conditionally approved Application No. 4053 remains valid. Application No. 86-696F is, therefore, moot.
2. The language employed in the above referenced Order is unambiguous in conditioning the actual issuance of the requested permit on the applicant's prior compliance with three requirements (or conditions) which are set forth in paragraphs numbered 1, 2, and 3 on pages 7 and 8 of that Order.

3. Condition No. 1 of the December, 1981 Order required the prior removal of floating debris from the Bradford and Cross Street Extension quarries. This requirement was met with regard to the Bradford Quarry. Compliance cannot be determined for the Cross Street Quarry because the Department failed to inspect the ordered clean-up when invited to do so by applicant's attorney.
4. Condition No. 2 of the December, 1981 Order required the prior removal of solid waste from the vicinity of the above two quarries together with a third site. Again, the Department failed to inspect the ordered clean-up when requested to do so by applicant's counsel with the consequence that compliance with the Order cannot be determined.
5. Condition No. 3 of the December, 1981 Order required that separate surface and water quality tests be first performed at both the Bradford and Cross Street Extension quarries. The only test results submitted by the applicant were for the Cross Street quarry and did not indicate whether they were drawn from surface or bottom waters. For this reason, compliance with Condition No. 3 cannot be determined.

6. Because of the various reasons noted above none of the three preconditions ordered in 1981 to be met before a freshwater wetlands permit could be issued can be shown to have been complied with. Release of a wetlands permit would, therefore, be violative of the 1981 Order. Contrary to the applicant's Petition, therefore, the Director is not obligated by Section 2-1-22(d) of the General Laws to issue a permit and is in fact prohibited from doing so by the terms of the 1981 Order.

Therefore, it is

ORDERED

1. Applicant Romanella shall be afforded ninety days from receipt of this Order to complete the removal of floating debris pursuant to precondition number 1 of the Final Agency Decision and Order of December 7, 1981.

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded, regular mail, postage prepaid to Dennis H. Esposito, Esq., 200 Shakespeare Hall, 128 Dorrance Street, Providence, Rhode Island 02903; and via inter-office mail to Sandra Calvert, Esq., 9 Hayes Street, Providence, Rhode Island 02908 on this 18th day of April, 1991.

Gene Calo