

Department of Environmental Management

Administrative Adjudication Division

State of Rhode Island

RE: MANUEL SILVA MOURATO

AAD No. 99-003/FWE

Notice of Violation No. C99-0043

February 8, 2000

**DECISION AND ORDER**

This matter came before the Administrative Adjudication Division (“AAD”) of the Department of Environmental Management (“Department” or “DEM”) pursuant to the Respondent’s request for a hearing on the Notice of Violation and Order No. C 99–0043 (“NOV”) issued by the Office of Compliance and Inspection (“OCI”) dated June 3,1999.

This matter is properly before the Hearing Officer pursuant to the Freshwater Wetlands Act (R.I.G.L. Section 2–1–18 et seq.), the statutes governing the AAD (R.I.G.L. § 42–17.7–1 et seq.), the Administrative Procedures Act (R.I.G.L. § 42–35–1 et seq.), the duly promulgated Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act (“Wetlands Regulations”), the Administrative Rules of Practice and Procedure for the AAD, and the Rules and Regulations for Assessment of Administrative Penalties (“Penalty Regulations”). The hearing was conducted in accordance with the above noted statutes and regulations.

The NOV alleged that Respondent violated R.I.G.L. § 2–1–21 and Rule 7.01 of the Wetlands Regulations, in that an inspection of the property owned by Respondent and located immediately south of Birch Swamp Road, opposite utility pole number 5, approximately 200 feet southeast of the intersection of Birch Swamp Road and Market Street in the Town of Warren, R.I., otherwise identified as Assessor’s Plat 22 Lot 178 (the “Property”) on June 16, 1998 and December 15, 1998 revealed that the Respondent did accomplish or permit alterations of freshwater wetlands by undertaking the following unauthorized activities: clearing, grading, filling (in the form of at least processed gravel associated with the installation of a driveway), constructing rock walls, installing a new well and numerous property amenities, and maintaining a lawn and landscaped areas in a 50–foot Perimeter Wetland.

Said NOV ordered the Respondent (1) to cease and desist immediately from any further alteration of the said freshwater wetland(s); (2) to restore all freshwater wetlands in accordance with certain restoration requirements as specified in the NOV; (3) to contact the Department prior to the commencement of restoration in order to ensure proper supervision by the Department and to obtain required restoration details by representatives of DEM; and (4) to pay an administrative penalty of One Thousand Dollars (\$1,000.00).

The Respondent filed a request for hearing at the AAD on June 11, 1999 and an Addendum to Request for Hearing on July 2, 1999. The Prehearing Conference (“PHC”) was held on September 3,

1999 and the requisite PHC Record was entered on September 10, 1999. The adjudicatory hearing was conducted on September 27 and 28, 1999 and October 18 and 19, 1999. A Post - hearing Memorandum was filed by OCI on November 29, 1999. As of the date of this Recommended Decision, no Post - hearing Memorandum (or Brief) was filed by Respondent. Paula J. Younes, Esq. represented the OCI. John J. Aubin, Esq. and Kevin A. McKenna, Esq. represented Respondent.

The following stipulations of fact were agreed to at the Prehearing conference:

1. Manuel Silva Mourato ("the Respondent") has been the legal owner of a parcel of property identified in the Land Evidence Records for the Town of Warren, Rhode Island as Assessor's Plat 22, Lot No. 178 ("the Property") continually since August 12, 1997.
2. Respondent submitted a request to determine the presence of wetlands on the Property pursuant to Rule 9.02(B) of the Department's Rules and Regulations Governing the Enforcement of the Fresh Water Wetlands Act, Freshwater Wetlands Application No. 97-0361, to the Department on July 29, 1997.
3. OCI issued Notice of Violation and Order No. C99-0043 ("the NOV") to the Respondent on June 3, 1999.
4. The NOV was received by the Respondent on or about June 5, 1999.
5. The Respondent filed a request for an adjudicatory hearing on June 11, 1999.
6. Respondent, Manuel Silva Mourato, ("the Respondent") is the legal owner of property identified in the land evidence records of the town of Warren, Rhode Island as Lot No. 178, assessor's Plat 22 and commonly known as 23 Birch Swamp Road (the property) and consisting of 2.36 acres of land.
7. On September 10, 1997 Respondent applied for and received a building permit from the Town of Warren to erect a fence on the property.
8. A site meeting was held at the property on December 31, 1997 between Respondent, an environmental engineer retained by Respondent and a Dena Gonsalves of the Department.
9. Respondent made a timely request for a hearing to contest the determination and allegations made by the Department and the assessment of the administrative penalty on June 11, 1999.

The OCI bore the burden of proving by a preponderance of the evidence that the Respondent violated R.I.G.L. § 2-1-21 and Rule 7.01 of the Wetlands Regulations as alleged in the NOV. Once a violation is established, Respondent bears the burden of proving by a preponderance of the evidence that OCI failed to assess the penalty in accordance with the Rules and Regulations for the Assessment of Administrative Penalties.

The exhibits proffered by the parties, marked as they were admitted into evidence, are indicated on Appendix A.

Sean R. Carney was the first witness called by OCI. He is employed by DEM in the Office of Compliance and Inspection. It was stipulated that Mr. Carney is qualified as an expert in the field

of wetlands ecology, aerial photograph interpretation, and as a natural resource specialist. He testified that he inspected the subject property in June and July of 1998 and determined that there was a fresh water wetland, viz. a wooded swamp, present on the site, as well as a 50-foot perimeter wetland. He observed a number of alterations of the 50-foot perimeter wetland on the subject property, viz.: the perimeter wetland had been partially cleared and landscaped; a wooden stockade fence had been built; a crushed stone driveway had been installed within the cleared area; and a metal link chain fence and a well had been installed. It was this witness's expert opinion, within a reasonable degree of scientific certainty, that the character of the freshwater wetland had been altered by the Respondent's actions. He also testified that a permit was not issued by the Department for said alterations.

Nancy L. Freeman was called as the next witness for OCI. She is presently employed by DEM in the Wetlands Permitting Section, Office of Water Resources. She was previously employed by OCI, Wetlands Enforcement, as a Natural Resource Specialist. It was stipulated that Ms. Freeman is qualified as an expert in wetlands ecology, aerial photograph interpretation, and as a Natural Resource Specialist. She conducted an inspection of the site in December of 1998, and determined that fresh water wetlands, viz. a swamp, its associated 50-foot perimeter wetland, and an area subject to storm flowage, were present on the Property. Ms. Freeman testified that her independent determination that a swamp was present was based on the hydrophytic vegetation and the hydrological indicators that she observed, her aerial photograph review, as well as discussions with other staff biologists and concurred with the Department's previous determination of a swamp on the Property. Also, because the swamp is greater than three acres in size, it is assessed a 50-foot perimeter wetland.

Ms. Freeman testified that after making her determinations as to the presence and location of the freshwater wetlands, she observed that the perimeter wetland had been altered. Specifically, that it was being maintained as a grass lawn, a gravel driveway and lighting fixtures had been installed along said driveway, and some stone walls, stockade fencing, chain link fencing, and other property amenities were present within the perimeter wetland. Based on aerial photo review, she determined that there was vegetation prior to said alteration. This witness opined that, based on her observations of the Property, and within a reasonable degree of scientific certainty, the character of the fresh water wetland located on the Property was altered. She also determined that no permit was issued for said alterations by the Department.

Howard F. Cook was the next witness called by OCI. It was stipulated that Mr. Cook is qualified as an expert in the area of wetland ecology, aerial photograph interpretation, and as a Natural Resource Specialist. He testified that in June of 1999, he conducted a site inspection of the Property to determine if further alterations had occurred after the NOV was issued. He observed alterations to the fresh water wetlands in the Property in addition to those cited in the NOV, viz.: a path had been cleared through a portion of swamp; some boards had been placed over the area subject to storm flowage; another portion of swamp had been freshly cleared; some fruit trees had been planted in the cleared area; and another portion of perimeter wetland cleared, and a truck and lumber was placed in this area. It was this witness's expert opinion, within a reasonable degree of scientific certainty, that the character of the freshwater wetlands had been altered in the areas just described. He also testified that a permit was not issued by the Department for said alterations to the freshwater wetlands.

Harold K. Ellis, Enforcement Supervisor, Wetlands Enforcement Section, OCI, DEM, was the next witness called by OCI. He was qualified by agreement as an expert in the field of wetlands ecology, aerial photograph interpretation and as a natural resource specialist. It was Mr. Ellis's expert opinion that restoration (as ordered in the NOV) was required to return the altered freshwater wetlands to its previous condition as best as possible. He also testified that the Department considered all of the factors articulated in Section 9 of the Penalty Regulations and determined that the Respondent's violation of the Freshwater Wetlands Act was "Type I Major" as outlined in the Penalty Matrix. It was this witness's opinion, based on his experience as Enforcement Supervisor for the last eleven years, that the One Thousand Dollar penalty is appropriate.

Manuel Silva Mourato, Respondent, was the next witness called by OCI. He testified that he purchased the Property in August, 1997. Although he initially denied installing a driveway after that date, he did acknowledge that: "he put one inch stone atop the land—for me to drive" sometime in 1997; he put a fence on the Property in 1997; and he had a well installed in 1998. Despite the conversations and dealings with DEM prior to the issuance of the instant NOV (including those when he, his wife, and his environmental engineer were present), he maintained that he was unaware of the existence of the wetlands on his Property.

Respondent called Harold K. Ellis as his first witness. Mr. Ellis acknowledged that no map surveys of the state indicating the wetland areas had been provided by DEM to the building inspector of the town in which the Property is located.

Robert Modem, an adjoining property owner, was the next witness called by respondent. Mr. Modem testified that he has lived next to the subject Property for approximately twelve years, and has observed same almost daily. He occasionally mows the Respondent's property. He stated that there have been no major changes to Respondent's property, other than a clean up of the trash and debris that had been dumped there by others. It was elicited in cross-examination of this witness that there have been some changes in the Property since it was acquired by Respondent. Mr. Modem acknowledged that the driveway and stockade fence depicted in OCI Exhibit 24 full were not present when the Respondent purchased the Property; the stone walls were not in their present condition; and that it was possible that wetlands species had been cut down in the area that was cleared.

Dena Gonsalves, currently employed as an Air Quality Specialist with DEM, testified next for OCI.1 Ms. Gonsalves previously held the position of Senior Natural Resource Specialist in the Wetland Section of OCI. She was qualified by agreement as an expert in the field of wetlands ecology, and as a Natural Resource Specialist. She became familiar with the subject Property while conducting an inspection of same in May, 1997. She returned in June or July of 1997 and determined that the site was then in compliance. She inspected the site again on September 17, 1997 to investigate a complaint received by the Department. This inspection revealed that a shed was located approximately twenty feet from the edge of that portion of the swamp which had been restored previously. While on the site, the Respondent appeared. With the help of Respondent and his son, she used a tape measure and measured the distances for the fifty foot Perimeter Wetland. She informed Respondent that a DEM permit was required for the shed; and explained the process to Respondent. Respondent stated that he understood and would remove the shed. Ms. Gonsalves returned to the Property on October 1, 1997, and observed that the shed had been removed outside the fifty foot Perimeter Wetland as required.

Ms. Gonsalves conducted another inspection on November 6, 1997, and identified clearing within Swamp and Perimeter Wetland on the Property. A trench was being hand dug within the immediate vicinity of an Area Subject to Storm Flowage ("ASSF") present onsite and within the Swamp. She instructed the person performing the work that it was a violation of the R.I. Freshwater Wetlands Act and gave him a verbal Cease and Desist Order. The Respondent then appeared at the subject site. Ms. Gonsalves explained to Respondent that the work being conducted represented violations and that he must stop clearing. Respondent agreed not to do any more clearing without a permit. The Respondent thereupon directed the workers to backfill the trench immediately. A gravel driveway had also been constructed within the Perimeter Wetland. Ms. Gonsalves inspected the site again in December, 1997. The purpose being to meet with Mr. and Mrs. Mourato and their wetlands consultant, Linda Steere, to explain the Department's jurisdiction to the Mouratos, to review the related application file, and to discuss the required restoration. The parties were shown the Wetlands location on the site, and a copy of a portion of the related application was given to them so that they would know the location of the Swamp and Perimeter Wetland on the Property. At that time, another driveway, a stonewall, and fence were not present on the Property. It was this witness's expert opinion based on a reasonable degree of scientific certainty that a swamp, its associated perimeter wetland, and an ASSP were located on the Property.

It is OCI's contention that freshwater wetlands exist on the subject Property; that the alterations on the Property by the Respondent occurred in and affected the character of the freshwater wetlands located on the Property; that the wetland alterations on the Property occurred in violation of the Freshwater Wetlands Act; and that the Respondent is responsible for the violation of the Freshwater Wetlands Act. OCI maintains that it has satisfied fully its burden of proof in this matter and has shown, by a preponderance of the evidence, that freshwater wetlands exist upon the subject site; that the Respondent is responsible for the unauthorized alterations to the freshwater wetlands on the subject property as outlined in the NOV; and therefore, the Respondent must restore completely the freshwater wetlands as outlined in the NOV and pay an administrative penalty of One Thousand Dollars.

It is Respondent's contention that the Property does not contain a swamp as defined by R.I.G.L. § 2-1-20(h) and the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act; and that in the alternative, if a swamp is found to be in existence on the property, that any actions taken by the Respondent were within specific exemptions allowed under said regulations.

Respondent maintains that the Department acted illegally with regard to this enforcement action. Respondent asserts that the Department caused Respondent's property to be taken for public use without compensation; and that the Department's action has rendered the property without economic value. Respondent argues that the Department, through its issuance of the May 22, 1998 "Notice of Compliance" led the Respondent to believe that his property was in compliance; and that the Department should not have issued the "Notice of Compliance" if violations of the Freshwater Wetlands Act were in existence at that time. Respondent also argues that the Department's requirement that the Respondent remove certain alleged amenities (viz. an American flag and religious statuary) illegally infringes on Respondent's constitutional rights of freedom of religion and free speech.

The parties are in agreement that the Respondent has been the owner of the Property since August, 1997. The existence of jurisdictional freshwater wetlands on the Property, viz. a swamp, its associated 50-foot perimeter wetland, and an area subject to storm flowage, was clearly established by OCI's four expert witnesses. All were stipulated as experts in wetlands ecology, nearly all in aerial photograph interpretation, and as senior and natural resource specialists. Their testimony in this regard was positive and uncontroverted. Said evidence was unchallenged and not discredited by other positive testimony or by circumstantial evidence extrinsic or intrinsic and is therefore deemed conclusive upon this hearing Officer as the trier of fact. State v. A. Capuano Bros., Inc., 120 R.I. 58 (1978). As in A. Capuano there was no evidence to refute the credible testimony of OCI's expert witnesses that identified the subject property as freshwater wetlands, and same is deemed conclusive.

Respondent's counsel cross-examined OCI's witnesses at length concerning the size of the swamp. Counsel suggested repeatedly that since the Property consisted of only 2.36 acres, there could not be a swamp on the Property because Wetlands Regulations 5.87 includes a three acre requirement in the definition of a swamp. OCI's expert witnesses were steadfast in their determination that metes and boundaries are not needed to determine the edge of a swamp, as the edge of a swamp is not a property boundary, it's the edge of a natural feature. The interpretation argued by Respondent would limit the Department's jurisdiction to property lines rather than an ecological feature, and such could not be the intent of either the Freshwater Wetlands Act or the Wetlands Regulations.

The argument advanced by Respondent concerning his supposed lack of notice as to the wetlands on his property lacks merit. The Department is not required to notify the Respondent of the existence of freshwater wetlands on his property before the issuance of the NOV. Furthermore, the evidence clearly demonstrates that the Respondent knew that wetlands existed on the Property. The Respondent submitted an application to the Department to determine the presence of Wetlands prior to purchasing the Property. Respondent had numerous dealings with representatives of the Department and others after he acquired the Property; and OCI's expert, Ms. Gonsalves, showed Respondent the swamp edge and the perimeter wetland at the Property prior to the alterations for which Respondent was cited in the NOV.

Respondent's counsel attempted to portray the alterations as having been present prior to the NOV; however neither the cross-examination of OCI's witnesses or the testimony of Respondent's witnesses supports this contention. Respondent's extensive cross-examination of OCI's expert witnesses did not elicit any contradictions or inconsistencies in the testimony of said experts. Also, Respondent himself acknowledged that the alterations (with the possible exception of the driveway) occurred as specified in the NOV. The testimony of OCI's expert witnesses was most credible and clearly establishes that the Respondent, his agent(s) or servant(s) altered the wetlands on the Property as detailed in the NOV; that said alterations occurred in and affected the character of said wetlands. Also that the alterations were performed absent a permit from the Director of the Department, and are therefore violations as alleged in the NOV.

The Respondent's attempts to portray the alterations in question as activities allowed as exemptions under Wetlands Regulations Rule 6.00 met with no success. Respondent's counsel sought to do this by cross-examination of OCI's experts, and by the testimony of Respondent's

neighbor, Robert Modem. OCI's expert witnesses remained steadfast in their testimony that the activities are not exemptions; and the evidence demonstrates that none of the exemptions in the Wetlands Regulations applied to the facts of this case. Mr. Modem's testimony as to the conditions of the Property at various times was not persuasive. It was elicited in cross-examination of this witness that he could not accurately recall the condition of the Property at various times. He did not know if the shed had been moved, or a tree removed from the Property. He also admitted that he did not look close enough when he cleared the area (that he had described as "lawn type growth") with a sickle. A careful review of the evidence and the Wetlands Regulations demonstrates that there are no exemptions in the Wetland Regulations for the alterations of the freshwater wetlands made by Respondent.

Wetland Regulation 6.02 A provides that "Limited cutting or clearing of vegetation in freshwater wetlands is allowed ... when: A. The cutting is to remove tree limbs or dead or diseased trees or shrubs which, if left unattended, pose a threat to ... driveways;". This exemption does not apply to the instant matter because it was not a driveway originally. The installation of the driveway occurred after the effective date of the Wetland Regulations in April, 1998, and the Respondent should not be allowed to create a violation and then argue that an exemption applies.

Wetland Regulation 6.05 provides that certain "limited changes to existing or approved single family residences and property accessories are exempt" under certain circumstances; however, pertinent circumstances are not present in this matter. The Property is not a single-family residence, and also the Respondent fails to meet any of the criteria of Wetland Regulation 6.05. The perimeter wetland on the Property was neither an existing or approved cleared area as required by the regulations. Wetland Regulation 5.31 defines the term "existing" as: "(1) a condition that was present as of the enactment of the Freshwater Wetlands Act or its applicable amendment and has continually remained in the same condition, or (2) a condition that is present and was approved under the Freshwater Wetlands Act or its applicable amendments; or a condition that has naturally occurred and is currently present." The evidence presented by OCI clearly establishes that the perimeter wetland was vegetated and had been restored by the previous owner of the Property and that the condition of the Property did not naturally occur. Also all construction activity was not located at least 25 feet from the swamp as required by Wetland Regulation 6.05 since at least the driveway and stone walls were installed at the swamp edge.

Wetland Regulation 6.03 provides that "certain limited repairs to, and maintenance of approved or existing structures in current use located in wetlands are allowed in accordance with Rule 6.01 and provided that the maintenance activity does not increase either vertically or horizontally the physical size of any existing structure". Certainly the alterations for which Respondent was cited in the NOV are not allowed pursuant to those limited structural changes that may be exempt as specifically provided in Rule 6.03. The alterations cannot be allowed as normal maintenance of existing or approved property accessories and lawns since one cannot create a violation and then ask that said violation be maintained. Also the construction of the stone wall cannot be allowed under Rule 6.03 since the stone walls cannot be considered as a "Repair to or in-kind, in place replacement of shoreline stabilization structures ..." since there is no water body present adjacent to said stone walls.

Wetland Regulation Rule 7.00 is entitled "Regulated Activities and General Procedures for Obtaining Permits". This rule generally deals with activities located outside a jurisdictional

wetland for which a permit is required due to the close proximity to the wetland or the size or nature of a project that will result in an alteration of the wetland. The installation of the well in question is not considered an exemption under Wetland Regulation 7.01 (B)(2)(c) since the well was installed in the perimeter wetland.

Respondent's argument that the Department's alleged requirement that the Respondent remove an American flag and religious statuary infringes on Respondent's constitutional rights of freedom and free speech has no support either logically or in the record. The evidence demonstrates that these items were not present at the time of OCI's inspections culminating in the issuance of the NOV. These items were not present in the photographs of Respondent's Property taken by OCI just prior to the issuance of the NOV, and OCI's witnesses steadfastly maintained that said items were not involved in the instant enforcement action. Assuming *arguendo* that the NOV required the removal of an American flag or religious statuary, the constitutional issues raised by Respondent are not properly before this administrative tribunal and will not be addressed further by this Hearing Officer.

It has been determined by the Rhode Island Supreme Court that "prior approval of the Director always is required before a person can lawfully alter a wetland." Wood v. Davis, 488 A.2d 1221, 1225 (R.I.1983). It is uncontroverted that the freshwater wetlands on the Property were altered without the Director's approval, and consequently in violation of the Freshwater Wetlands Act. The Respondent's attempt to seek cover under the Department's issuance of the "Notice of Compliance" of May 22, 1998 fails. OCI's issuance of the "Notice of Compliance" was obviously proper; and the receipt of same by Respondent (before the instant NOV) only serves to refute Respondent's supposed lack of knowledge of the presence of the wetlands on his Property.

OCI acted in accordance with its statutory and regulative mandate, and certainly the Department did not act illegally with regard to the instant enforcement action, as alleged by Respondent. R.I.G.L. 42-17.1-2(u) provides that the Department has the power and duty to issue a notice of an alleged violation to the person responsible therefore whenever the Director determines that there are reasonable grounds to believe that there is a violation of any law or regulation. Certainly OCI had reasonable grounds to believe that the Respondent was responsible for the violations for which it was cited. Consequently, OCI's issuance of the NOV was proper and should be affirmed.

R.I.G.L. 2-1-23 provides that in the event of a violation of § 2-1-21, the Director has the power to order complete restoration of the fresh water wetland area involved by the person or agent responsible for the violation. R.I.G.L. 2-1-24(a) provides that whenever anyone shall commence any activity set forth in 2-1-21 without first having obtained the approval of the Director, or violates any rule or regulation of the Director, the Director has the power to order the violator to cease and desist immediately and/or restore the wetlands to their original state insofar as possible. OCI has proven by a preponderance of the evidence that the Respondent is responsible for alterations of the freshwater wetlands located upon the subject property and that Respondent failed to obtain a permit to perform these alterations prior to effectuating the same. Consequently OCI is entitled to the restoration order it seeks in the NOV. State v. Distante, 455 A.2d 305 (R.I.1983), Williams v. Durfee, C.A. No. PC 1216, July 6, 1993, Parrillo v. Durfee, C.A. No. 92-5722, May 24, 1993.

R.I.G.L. 42-17.1-2 provides that the Director shall have the power and duty to impose



administrative penalties in accordance with the provisions of Chapter 17.6 of this title. § 42-17.6-2 grants the authority to the Director to assess an administrative penalty on a person who fails to comply with any provisions of any rule, regulation, order, permit, license or approval issued or adopted by the Director, or of any law which the Director has the authority or responsibility to enforce.

The testimony of OCI's expert, Mr. Ellis, demonstrates that the penalty was assessed in accordance with the pertinent statutes and Penalty Regulations. The Department considered the factors articulated in Section 9 of the Penalty Regulations and determined that the violation in question is Type I Major as outlined in the Penalty Matrix, and considered by the Department to be appropriate. The testimony of OCI's expert witness was credible and not refuted by Respondent. The Respondent failed to present any evidence on this issue. The evidence clearly establishes that the One Thousand (\$1,000.00) Dollar penalty is appropriate and fully warranted under the circumstances.

The Respondent did not introduce any evidence, nor were any valid reasons advanced, to support the Respondent's assertion that the enforcement action caused the Respondent's property to be taken for public use without just compensation; or that it rendered the property without economic value, or that it entitled the Respondent to compensation. Consequently, same will not be addressed further by this Hearing Officer.

### **FINDINGS OF FACT**

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

1. Manuel Silva Mourato ("the Respondent") has been the legal owner of a parcel of property identified in the Land Evidence Records for the Town of Warren, Rhode Island as Assessor's Plat 22, Lot No. 178 ("the Property") continually since August 12, 1997.
2. Respondent submitted a request to determine the presence of wetlands on the Property pursuant to Rule 9.02(B) of the Department's Rules and Regulations Governing the Administration and Enforcement of the Fresh Water Wetlands Act, Freshwater Wetlands Application No. 97-0361, to the Department on July 29, 1997.
3. A site meeting was held at the Property on December 31, 1997 between Respondent, an environmental engineer retained by Respondent and a Dena Gonsalves of the Department.
4. State jurisdictional freshwater wetlands, specifically, a swamp and its associated fifty-foot (50') perimeter wetland exist upon the Property.
5. Department inspections of June 16, 1998, July 3, 1998 and December 15, 1998 revealed that Respondent did accomplish or permit clearing, grading, filling (in the form of at least processed gravel associated with the installation of a driveway), constructing rock walls, installing a new well and numerous property amenities, and maintaining a lawn and landscaped areas in a fifty-foot (50') perimeter wetland.
6. The fifty-foot perimeter wetland located on the Property was vegetated prior to the clearing, grading, filling (in the form of at least processed gravel associated with the installation of a

driveway), construction rock walls, installation of a new well and numerous property amenities, and the installation of a lawn and landscaped areas by the Respondent.

7. The clearing, grading, filling (in the form of at least processed gravel associated with the installation of a driveway), constructing rock walls, installing a new well and numerous property amenities, and maintaining a lawn and landscaped areas within the fifty foot (50') perimeter wetland on the Property altered the character of freshwater wetlands on the Property.

8. At the time when the Respondent did accomplish or permit clearing, grading, filling (in the form of at least processed gravel associated with the installation of a driveway), constructing rock walls, installing a new well and numerous property amenities, and maintaining a lawn and landscaped areas within the fifty foot (50') perimeter wetland on the Property, the Respondent did not have a permit issued by the Director of the Rhode Island Department of Environmental Management to do so.

9. The Department issued Notice of Violation and Order no. C99-0043 (the "NOV") to the Respondent on June 3, 1999.

10. The NOV was received by the Respondent on or about June 5, 1999.

11. The NOV was recorded in the Land Evidence Records for the Town of Coventry, Rhode Island on June 4, 1999 at Book 317, Page 280 - 284.

12. The Respondent filed a request for an adjudicatory hearing on June 11, 1999.

13. Restoration of the freshwater wetlands on the Property is necessary in order to restore the wetlands to their natural unaltered condition.

14. The administrative penalty was assessed properly by the Department; and is not excessive and is appropriate.

### **CONCLUSIONS OF LAW**

Based upon all of the documentary and testimonial evidence of record, I conclude as a matter of law that:

1. The Department of Environmental Management has jurisdiction over the freshwater wetlands located on the Respondent's Property.

2. Respondent made a timely request for hearing in accordance with R.I.Gen.Laws § 42-17.1-2.

3. The Department acted within its legislative mandate in issuing the NOV because there were reasonable grounds to believe that there were violations at the Property.

4. The Department proved by a preponderance of the evidence that freshwater wetlands on the Property were altered in violation of R.I.Gen.Laws § 2-1-21 and Rule 7.0 of the Wetland Regulations in the instance as alleged in the Notice of Violation dated June 3, 1999.

5. The Department proved by a preponderance of the evidence that Respondent is responsible for the wetland alterations on the Property.
6. The freshwater wetlands located on Respondent's property were altered without a wetlands alteration permit from DEM.
7. The Department is entitled to restoration of the altered freshwater wetlands on the Property as set forth in the NOV.
8. The Department is entitled to an administrative penalty of One Thousand (\$1,000.00) Dollars.
9. The Department was warranted in issuing the NOV to the Respondent and said NOV should be affirmed in its entirety.

Wherefore, it is hereby

**ORDERED**

1. That the Notice of Violation and Order and Penalty issued to the Respondent dated June 3, 1999 be and is hereby SUSTAINED.
2. That the Respondent must comply with the Restoration Order as set forth in the NOV and completely restore the subject freshwater wetlands in accordance with the requirements of the Department's office of Compliance and Inspection no later than June 15, 2000.
3. That the Respondent pay an administrative penalty in the sum of One Thousand Dollars (\$1,000.00) for said violation no later than twenty (20) days after the date the Final Decision and Order is signed by the Director. Said payment shall be in the form of a certified check or money order payable to the "General Treasury—Water & Air Protection Program Account" and shall be forwarded to:

Rhode Island Department of Environmental Management

Office of Management Services

235 Promenade Street

Providence, Rhode Island 02908

Entered as an Administrative Order this 27th day of JANUARY, 2000 and herewith recommended to the Director for issuance as a Final Agency Order.

Joseph F. Baffoni  
Hearing Officer

Entered as a Final Agency Order this 8th day of February 2000.

Jan H. Reitsma  
Director

## APPENDIX A

### RESPONDENT'S EXHIBITS

**Resp. 1 (Full)** A copy of a receipt dated August 14, 1997 from C.L. Rodrigues for removal of dead elm tree

**Resp. 2 (Full)** A copy of a building permit issued to Manuel Silva Mourato to "erect a six foot fence in rear yard area" at 123 Birch Swamp Road dated September 10, 1997

**Resp. 3 (Full)** A copy of certified mail return card (article no. z 231029403) dated January 20, 1998 and addressed to Harold K. Ellis and Dena Gonsalves.

**Resp. 4 (ID)** Copies of an invoice from Applied Bio-Systems dated January 16, 1998 for site inspection and copy of money order made out to Applied Bio-systems for \$90.00.

**Resp. 5 (Full)** A copy of the portion of Warren Tax Assessor's plat no. 22 showing subject property and surrounding properties.

**Resp. 6 (ID)** Copies of an invoice from Applied Bio-Systems dated April 22, 1999 for wetland delineation and copy of money order in the amount of \$150.00.

**Resp. 7 a-h (Full)** Copies of photographs (two pages) taken by Respondent of subject property.

**Resp. 8 (Full)** Photocopy of Aerial Photo

**Resp. 9 (Full)** Photocopy of Aerial Photo

**Resp. 10 (Full)** Letter from Robert D. Moden dated 9-19-99

**Resp. 11 (ID)** Photograph referred to in letter from Robert D. Moden dated 9-19-99

**Resp. 12 (Full)** Photograph

### OCI'S EXHIBITS

**OCI 1 (Full)** Copy of Resume of Harold K. Ellis (3 pp.)

**OCI 2 (Full)** Copy of Resume of Dena Gonsalves (1 p.)

**OCI 3 (Full)** Copy of Resume of Sean Carney (1 p.)

**OCI 4 (Full)** Copy of Resume of Nancy Freeman (1 p.)

- OCI 5 (Full)** Copy of Resume of Howard Cook (1 p.)
- OCI 6 (Full)** Copy of Triage Complaint Report dated May 21, 1997 (2 pp.)
- OCI 7 (Full)** Copy of Site Inspection Report dated July 29, 1997 (1 p.)
- OCI 8 (Full)** Copy of Rhode Island Department of Environmental Management Office of Water Resources/Permitting Program Freshwater Wetlands Application NO. 97-0361 received on July 30, 1997 with Check No. 101 (3 pp.)
- OCI 9 (Full)** Copy of correspondence to Manuel Silva Mourato dated August 1, 1997 (1 p.)
- OCI 10 (Full)** Copy of Correspondence to Robert Souza dated August 26, 1997 with certified mail receipts (2 pp.)
- OCI 11 (Full)** Copy of Triage Complaint Report dated September 17, 1997 (3 pp.)
- OCI 12 (Full)** Copy of Application Inspection Report Freshwater Wetland Application No. 97-0361 (1 p.)
- OCI 13 (Full)** Copy of Correspondence to Manuel Silva Mourato dated September 30, 1997 (1 p.)
- OCI 14 (Full)** Copy of site inspection Report dated October 1, 1997 (2 pp.)
- OCI 15 (Full)** Copy of Triage Complaint Report dated November 6, 1997 with sketch and two photographs (6 pp.)
- OCI 16 (Full)** Copy of Records Research dated November 18, 1997 (1 p.)
- \*13 OCI 17 (Full)** Copy of Site Inspection Report dated December 31, 1997 (2 pp.)
- OCI 18 (Full)** Copy of correspondence to Manuel Silva Mourato dated January 14, 1998 with certified mail receipt (3 pp.)
- OCI 19 (Full)** Copy of Correspondence from Manuel Silva Mourato dated January 16, 1998 (1 p.)
- OCI 20 (Full)** Copy of Site Inspection Report dated May 7, 1998 (2 pp.)
- OCI 21 (Full)** Copy of Correspondence to Manuel Silva Mourato dated May 22, 1998 with certified mail receipt (2 pp.)
- OCI 22 (Full)** Copy of Triage Complaint Report dated June 16, 1998 (3 pp.)
- OCI 23 (Full)** Copy of Site Inspection Report dated July 3, 1998 with 3 photographs (3 pp.)
- OCI 24 (Full)** Copy of Site Inspection Report dated December 15, 1998 with sketch and 3

photographs (7 pp.)

**OCI 25 (Full)** Copy of records Research dated March 4, 1999 (1 p.)

**OCI 26 (Full)** Copy of Penalty Methodology dated May 4, 1999 (1 p.)

**OCI 27 (Full)** Copy of recorded Notice of Violation and Order C99-0043 dated June 3, 1999 and receipts for certified mail (9 pp.)

**OCI 28 (Full)** Copy of Site Inspection Report dated June 24, 1999 (2 pp.)

#### Footnotes

1 By agreement of the parties, this witness was allowed to testify out of order.