

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

IN RE: Richard Alegria  
Freshwater Wetlands Application No. 88-0894F

DECISION AND ORDER

This matter came before Hearing Officer McMahon pursuant to the Freshwater Wetlands Act (R.I.G.L. § 2-1-18 et seq.) and the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, March 1981 ("Wetlands Regulations").

The Pre-Hearing Conference was held on June 26, 1990. At the Pre-Hearing Conference, John B. Webster, attorney for applicant, and Gary E. Powers, attorney for the Department of Environmental Management, Division of Groundwater and Freshwater Wetlands ("DEM"), agreed to the submission of the following:

JOINT EXHIBITS

- JT1 Application 88-0894F dated June 30, 1989.
- JT2 Wetlands Report by Garofalo & Associates, Inc., dated June 30, 1989.
- JT3 DEM Submission (Plans dated June 21, 1989).
- JT4 DEM Notice to Town of Warren and abutters, dated December 8, 1989.
- JT5 Letter to Mr. Tefft from the Audubon Society of Rhode Island, dated December 29, 1989.
- JT6 Letter to Mr. Tefft from DEM Division of Planning and Development, dated December 20, 1989.
- JT7 Letter to DEM from the Warren Land Conservation Trust, dated January 8, 1990.
- JT8 Letter to DEM from the Warren Town Council, dated January 9, 1990.

- JT9 Letter to Mr. Teft (sic) from the Conservation Commission, dated January 11, 1990.
- JT10 DEM Evaluation of Application, dated January 19, 1990.
- JT11 - No JT 11 -
- JT12 Letter to Mr. Alegria from Mr. Tefft, dated March 13, 1990 (Denial letter).
- JT13 Letter to Mr. Tefft from John B. Webster, dated March 16, 1990 (Request for Hearing).
- JT14 Notice of Hearing dated June 8, 1990 (Certification dated June 11, 1990).
- JT15 Memorandum of DEM Division of Water Resources, dated June 1, 1990.
- JT16 Notice of Denial of Water Quality Certificate by DEM Division of Water Resources.
- JT17 Letter to Pasquale T. Annarummo from John B. Webster, dated June 13, 1990.
- JT18 Rules and Regulations Governing the Enforcement of the Fresh Water Wetlands Act, March, 1981.
- JT19 Curriculum Vita of John Meyer.
- JT20 Curriculum Vita of John Travassos. 1
- JT21 Curriculum Vita of Brian C. Tefft.
- JT22 Curriculum Vita of Martin D. Wencek.
- JT23 Curriculum Vita of Rick Enser.
- JT24 Curriculum Vita of Susan C. Adamowicz.
- JT25 Drainage Computations by Garofalo & Associates, Inc., dated June, 1989.

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<sup>1</sup> Applicant did not call Mr. Travassos as a witness though he was listed as such.

Applicant identified eight (8) additional exhibits. At the hearing, applicant also submitted the EPA document "Questions & Answers on: Antidegradation", which was marked as Applicant's 3 for ID. Applicant's exhibits were marked as follows:

APPLICANT'S EXHIBITS

App 1 for ID	Warren Wetland Inventory.
App 2 for ID	DEM Freshwater Wetlands Review Sheet; Formal Application Decision Summary; Wetlands Review Committee Decision; Supervisor's Determination.
App 3 for ID	EPA Questions & Answers on: Antidegradation.
App 3 for ID	1988 Soil Conservation Study (public document). <sup>2</sup>
App 4 for ID	DEM Guidelines for Freshwater Wetlands Crossings (public document).
App 5 for ID	DEM Engineering Review Sheet.
App 6 for ID	USGS Surface and Groundwater Evaluations (public document).
App 7 for ID	USGS Water Supply Paper (public document).
App 8 for ID	RI Water Resource Board - Quadrangle Map (public document).

<sup>2</sup> No testimony was received regarding the Soil Conservation Study. A confusion in numbering documents resulted in two being identified as "Applicant's 3 for ID". All transcript references are to EPA Questions & Answers on: Antidegradation.

The Department offered two (2) exhibits for identification. Exhibit 2 was admitted as a full exhibit during the hearing.

DEPARTMENT'S EXHIBITS

DEM 1           Aerial photograph of site, April 1981.  
for ID

DEM 2           Photograph of Northern Leopard Frog (Rana Pipiens).  
for ID  
(Full A,  
11/8/90)

No requests to intervene were received at or prior to the Pre-Hearing Conference.

On June 30, 1989 Richard Alegria filed a revised application with the Department of Environmental Management Division of Groundwater and Freshwater Wetlands (DEM) to alter freshwater wetlands consisting of a freshwater swamp, fifty (50) foot perimeter wetland, an unnamed perennial stream, a hundred (100) foot riverbank wetland, and an area subject to storm flowage. The proposed site is located east of Market Street (Route 136), south and west of Birch Swamp Road, Assessor's Plat 22, Lots 22, 23 and 146, Warren, Rhode Island.

DEM sent the application to public notice on December 8, 1989 (JT4) and received five (5) objections which it determined to be substantive (JT5 - JT9). One such objection advised the Department that the Warren Town Council had voted to disapprove the application pursuant to R.I.G.L. § 2-1-21 (a) (JT8).

By letter dated March 13, 1990 (JT12) applicant was informed that his

application had been denied. Subsequently, he was notified of the Department's denial of the Water Quality Certificate (JT15, JT16). Both matters were appealed to the Adjudication Division.

Pursuant to Section 11.03 (b) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, applicant bears the burden of proving through a preponderance of the evidence that the application is consistent with the purposes of the Act and complies with the Wetlands Regulations.

Public hearings were held on November 5, 7, 8, 9 and 14, 1990 and were conducted in accordance with the Administrative Procedures Act and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters, July 1990.

Applicant presented six (6) witnesses: Steven B. Garofalo, President of Garofalo & Associates, an architectural, engineering, and surveying firm located in Warwick, who was qualified as an expert witness in the area of civil engineering during the hearing; Brian C. Tefft, Supervisor of Applications for the Division of Groundwater and Freshwater Wetlands; Martin Wencek, a principal natural resource specialist in DEM's Freshwater Wetlands Section; John L. Meyer, Director of Environmental Sciences at the Environmental Scientific Corporation in Lincoln, who, by agreement, was qualified as a biologist specializing in water quality; Peter Janaros, currently an employee at the Department of Transportation but formerly Chief of the then Land Resources Division, who was

subpoenaed to testify about abutting properties; and Richard Alegria as applicant and owner of the subject property.

Applicant testified that he purchased the 28 acre property with the intention of developing the site. When Mr. Webster attempted to elicit testimony that if applicant were not granted this permit, then all beneficial use of the property would be denied and a State "taking" would result, DEM objected. (transc.1 p. 15-16).

Until the final decision is rendered, there is no basis for determining whether or to what extent applicant may have been deprived of his property. Once a final determination has been made, § 2-1-21 of the Rhode Island General Laws provides a remedy for permit denial: the landowner can bring suit in Superior Court to obtain the fair market value of the wetland. Under Williamson County Regional Planning Commission v. Hamilton Bank, 473 US 172 (1985), if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until he has used the procedure and been denied just compensation. Q.C. Construction Company, Inc. v. Verrengia, 700 F. Supp. 86 (D.R.I. 1988).

Additionally, applicant can bring suit in Superior Court under the Administrative Procedures Act if dissatisfied with the administrative determination. Rhode Island General Laws § 42-35-15 provides for court reversal or modification of the administrative decision if substantial rights of the appellant have been prejudiced because the decision violates constitutional provisions. The Rhode Island Supreme Court has

ruled that constitutional issues need not be addressed at the administrative level to preserve those rights in Superior Court. Randall v Norberg, 121 RI 714, 403 A2d 240 (1979).

In consideration of the above, this Hearing Officer ruled that the issue of a State taking without just compensation was not ripe for determination and was found to be irrelevant to these proceedings.

Applicant and applicant's witnesses presented testimony regarding the proposed freshwater wetlands alteration. The site is bordered on the east side by Route 136 and is located in an area which is heavily industrial and manufacturing. Approximately 8½ acres of wetland would be filled, 2.1 acres of which would be paved with asphalt for four parking lots and an access road to Building 1. (Garofalo, transc. 1, p.44). Four (4) industrial buildings, roughly 100' x 200', would be constructed. Three of the buildings would be located at the edge of the wetland along Route 136 and the fourth building, Building 1, would be set back from Route 136 on an upland area which would be reached through the access road. The access road is designed to cross freshwater swamp and a perennial stream over a 4' x 6' box culvert.

The plan includes channeling runoff from Route 136, which presently drains, untreated, directly onto the property, by extending the existing pipe to disperse the water. Its velocity of flow and erosion ability would be further reduced through the use of riprap. The water would then be collected and directed into the grass swale which is part of the depression between Building 2 and Building 3. An outfall pipe within the

depression would allow the water to exit without overtopping.

Three of the detention basins are designed to hold the volume of runoff from a one-inch storm and the remaining basin would have the capacity to hold the volume from a third of an inch of runoff from the site. (Meyer, transc. 2, p.37). In smaller storms the water would be self-contained within the depressions and would seep into the ground; in larger storms, these depressions would overtop and flow into the wetland.

The access road is designed with a low point that would intercept the drainage in the area and would outfall that drainage directly into the wetland.

#### VALUABLE WILDLIFE HABITAT

#### VALUABLE RECREATIONAL ENVIRONMENT

Martin D. Wencek, a DEM principal natural resource specialist, testified that he had been to the 48 acre wetland complex approximately 50 times and had visited the proposed site an estimated ten times, 3-4 of which were to evaluate the Alegria proposal. The Golet Analysis, prepared by Mr. Wencek on the wetland complex, achieved a score of 66.0. Wencek further indicated in both his Evaluation (JT10) and through testimony, the presence of a high diversity of wildlife and the potential of the area to sustain such recreational activities as hiking, photography, education, research, birdwatching, nature study, hunting, and trapping. (transc. 2, p.17-19; transc. 3, p.5-6).

Mr. Webster stipulated that under the Wetlands Regulations, it was a

valuable wetland complex. (transc. 3, pp.49, 52).

The Hearing Officer finds that, based on Mr. Wencek's documentary and testimonial evidence, the proposed site is a valuable wetland as a valuable wildlife habitat and as a valuable recreational environment.

UNIQUE WETLAND: THE NORTHERN LEOPARD FROG

Brian C. Tefft, DEM Supervisor for Applications within the Division of Groundwater and Freshwater Wetlands, testified that the wetland was unique because of the presence of rare or endangered plants or animals and the presence of plants or animals at or near the limits of their geographical range: the northern leopard frog. (transc. 1, p.73).

Rick Enser, a DEM natural resource specialist and coordinator of the Natural Heritage Program, Martin Wencek, and Brian Tefft all testified that the northern leopard frog is classified as a species of state interest under the Natural Heritage Program. For a species to receive a "state interest" rating, a determination is made that there are likely to be 6 - 10 populations of the animal within the state (transc. 3, p.142). Though not specifically labelled "rare" or "endangered", Mr. Enser testified that all species in the "State interest" category are considered by the Program as being rare but not in imminent danger of becoming extinct (transc. 3, p.142).

Enser testified that a zoologist had "collected" a northern leopard frog in April of 1987 approximately 300 feet south of the site. (transc. 3, p.149). It was Enser's expert opinion that if the animal was found

there in 1987, it should still be present on the site. (transc. 3, p.151).

Further testimony was that the habitat is "hospitable" to the northern leopard frog (Enser. Transc. 3, p.152); that the frog is a "mobile" species (Enser. Transc. 4, p.27); that the amphibian population would be a minimum of fifty animals, and from there to a hundred plus would not be unreasonable (Enser. Transc. 4, p.33); "without question ... the northern leopard frog could be on this site..." (Wencek. Transc. 3, p.71).

On cross examination Mr. Enser indicated that there was no documentation other than the 1987 sighting to suggest an existing population of northern leopard frogs was on the subject wetland (transc. 4, p.26); Mr. Tefft had seen no evidence at the site of the infamous amphibian, and Mr. Wencek, in his 50 visits to the wetland complex, had not espied the elusive frog.

While Mr. Enser testified that "it would probably be more likely that the population is there than it is not" (transc. 4, p.26), this Hearing Officer cannot conclude that a sighting three-and-half years ago, without anything more, amounts to the "presence" required to qualify as a unique wetland under Section 7.06 (a) of the Wetlands Regulations.

#### WATER QUALITY

In June 1989, the proposed project's impact on water quality was identified as a concern and the Division of Water Resources was requested to review the matter. (Tefft, transc. 1 p.86). Though the water quality analysis was conducted by Water Resources subsequent to denial of the

application, the Wetlands Section included its concern as a basis for denial. (JT12, #7).

By Memo dated June 1, 1990, Edward S. Szymanski, Chief of the Division of Water Resources, advised Stephen G. Morin, Chief of the Division of Groundwater and Freshwater Wetlands, of the project's potential impacts and the pertinent regulations and standards on water quality (JT15). Though the communication is labelled "Inter-Office Memo", on page four after it states that, based on the potential impacts, the Department "cannot issue water quality certification", the document provides information regarding applicant's right to request a hearing. An undated letter from Edward Szymanski to Mr. Alegria (JT16) adds to the confusion by referring to the Memo as "denial of the Water Quality Certificate".

Though Mr. Webster and Mr. Powers had stipulated that hearing on the Water Quality Certificate's denial be consolidated with the hearing on the denial of the application to alter freshwater wetlands, this Hearing Officer, on July 6, 1990, raised the question of whether the matter was properly before the Adjudication Division and requested Memoranda of Law from the parties.

Applicant's attorney, while agreeing water quality was an issue properly before the Hearing Officer, questioned DEM's jurisdiction to issue or deny water quality certificates. Mr. Webster quoted the Rhode Island Policy on the Application of Water Quality Standards adopted by the Division of Water Resources, October, 1990 (hereinafter "Policy") wherein it states: "it appears that DEM should not be independently

denying water quality certificates..."(Policy, p.1).

Since the Policy is the only "Memorandum" provided by DEM on this issue, its interpretation is crucial as to whether the water quality certificate is properly before the Adjudication Division.

The Policy states that the Division of Water Resources should not issue or deny permits, but merely advise the Coastal Resources Management Council, the Wetlands Section, or any other agency as to whether a proposal would violate water quality standards. Page two of the Policy clearly indicates that issuance of a water quality certificate means that an application to alter freshwater wetlands met water quality standards but that an application may be denied if a certificate is not approved.<sup>3</sup> The appeal would be on the application's denial, not on the certificate.

On the basis of her review of exhibits JT15 and JT16, the Water Pollution Act and Water Pollution Regulations, as well as the Wetlands Regulations, the Policy, and applicant's Memorandum of Law, the Hearing Officer concluded, and so ruled, that the water quality certificate was properly before her, though not a matter giving rise to a separate right to an adjudicatory hearing.

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<sup>3</sup> This issue was further complicated by the fact that the Memo to Stephen Morin on the water quality impacts was dated 2½ months after applicant's denial letter was sent. The Hearing Officer assumes that if the application had been approved and a similar Memo was sent 2½ months later, then it would have necessitated revocation of the permit for failure to comply with water quality standards (Policy, p.2). This would present a dilemma thankfully not before the Hearing Officer.

Applicant presented a biologist specializing in water quality, John Meyer, as his expert witness. Susan C. Adamowicz, a principal natural resource specialist at the Division of Water Resources who coordinates and administers the water quality review of proposed projects, testified as DEM's witness on the issue.

Meyer testified that he had conducted a pre- and post-project pollutant loading analysis and also looked at the efficiency of the proposed detention ponds for removing stormwater pollutants. His conclusion was that the basins would reduce stormwater loads so that the concentration of metals would meet EPA criteria for stormwater discharge (transc. 2, p. 38). If the proposal complied with Mr. Meyer's design criteria, then it would be considered to be protective of aquatic life and would have no adverse impact on that aquatic life (transc. 2, p. 38-39).

On cross examination, Mr. Meyer stated that he was called to assist on the project approximately two weeks prior to the hearing<sup>4</sup> and did not participate in the preparation of the plan (transc. 2, p. 40). He recommended that the detention basins be planted with wetland species since they may be used by wildlife (transc. 2, p. 50).

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<sup>4</sup> Attorney Webster stated in his argument opposing DEM's Motion to Dismiss that Mr. Meyer had been retained for this application in June 1990 but on a more limited basis than when he was again contacted prior this hearing.

This Hearing Officer was not presented with Mr. Meyer's design criteria, nor was the Hearing Officer or the Division of Groundwater and Freshwater Wetlands supplied the pollutant loading analysis report which was the basis of his conclusion that water quality standards had been met. While pollutant loading analyses are not required by the Department, the absent analysis was used by applicant's witness in an attempt to refute #7 of the denial letter (JT12) (transc. 2, p. 38).

Testifying on behalf of DEM, Susan Adamowicz first had to be qualified as an expert witness. Testimony was presented on her academic qualifications, publications on ecology, and experience in evaluating approximately 300 projects for their impacts to water quality since her employment at DEM.

In his voir dire, Mr. Webster elicited that Ms. Adamowicz had previously worked at Environmental Scientific Corporation where one of her supervisors had been John Meyer. When voir dire seemed to stray into matters more appropriate under cross examination and the weight to be given her testimony, the Hearing Officer suspended voir dire and qualified Ms. Adamowicz as an expert on water quality determinations.

As a primary reviewer of the project, Ms. Adamowicz testified regarding the pollutant loading which would occur under applicant's proposal, through no computer modelling analysis was conducted by DEM (transc. 4, p.90). According to her testimony, stormwater runoff would introduce additional heavy metals and organics, such as oil, grease, anti-freeze and hydraulic fluids that would drip from cars in the parking

lot and then be washed into the detention basins. The detention basins, as designed, would meter out flood flows and would not treat or allow to settle pollutants that flow on the surface, such as oils, or those that dissolve in water, such as salts, bacteria or viruses (transc. 4, pp.47, 49).

The introduction of these pollutants would result in changes in water chemistry which would alter the variety of plant life and thus change the wildlife habitat (transc. 4, p.48). She further testified that most of these pollutants would be carried through the detention basins into the perennial stream and the remainder of the wetland. This could include petroleum hydrocarbons which are "known to be mutagens and can affect the cell development and egg development in amphibians". (transc. 4, p.61).

Based on the above, Ms. Adamowicz concluded that the proposed development would result in a "significant degradation" of water quality (transc. 4, p.64).

Having weighed the testimony, experience, and credibility of the two experts on water quality, the Hearing Officer cannot find Mr. Meyer's opinion persuasive when she has not been provided with sufficient facts or assumptions upon which he based his conclusion that water quality standards had been met. Applicant has not sustained his burden of proof regarding # 7 of the denial letter: "The proposed project is expected to cause degradation of water quality within the subject wetlands complex, said degradation expected to negatively impact the aquatic resources of the subject wetlands area". (JT12).

Since a Water Quality Certificate would serve solely as supporting documentation to the denial letter, it is unnecessary to further address the merits of its denial.

Ms. Adamowicz also testified about the hydraulic loading which would occur under the proposal, and the consequential loss of habitat for a variety of fish and wildlife species even beyond the area of fill (transc. 4, p.46). Under applicant's plan, water would be impounded within a portion of the wetland, caused by the shallow detention basins overflowing and the restricting effect of the culvert and berm (transc. 4, p.51). The result would be "a flood water retention area right in the stream itself which would end up impounding nearly 2 acres of the stream during the ten year storm..." (transc. 4, p.47).

The stream area was also a concern of Martin Wencek, who, in his site evaluation (JT10) and testimony, questioned the wetlands' ability to moderate the damaging effects of flood flows: displaced water could cause flooding in the perennial stream onto the remaining portion of the parcel and possibly downstream. (transc. 2, p.24).

This position was adopted by Brian Tefft (transc. 1, p.84) and incorporated as one of the grounds for the application's denial: "The proposed project will reduce the ability of the wetland to moderate the damaging effects of flood flows". (JT12, #6).

Steven Garofalo, a civil engineer, countered this conclusion and stated that the wetland would have adequate storage capacity to contain water on a temporary basis and prevent flood flows (transc. 1, pp.49-50).

The 4' x 6' box culvert would act as a flow restricter for ten-year and 25-year frequency storms and would reduce the volume of water passing through the culvert (transc. 1, p.50).

The purpose of the basins and effect of the culvert was confirmed by Ms. Adamowicz's testimony (transc. 4, p.50). Though the Hearing Officer is not convinced that flooding will not occur under this plan, such is not applicant's burden: the Hearing Officer concludes that applicant has met his burden on this issue.

One of the other factors cited for denial was that the proposal would cause an undesirable reduction of wildlife habitat values provided by the subject wetland (JT12, #2). According to Wencek, applicant's plan will cause the loss and disturbance of 8.19 acres of swamp, perimeter wetland, riverbank wetland, and the elimination of approximately 300 feet of intermittent stream or area subject to storm flowage; thirty-two feet of the perennial stream would be culverted to allow construction of the access road (transc. 3, pp.66-67). The culvert would have a funneling effect for wildlife migrating up and down the stream corridor and the road would, in effect, segment the wetland into two separate units (transc. 3, p.68). None of this was refuted by applicant's witnesses.

Under both direct and cross examination, Wencek considered the proposal's impact on the wildlife habitat. One concern was that this flood water retention area in the stream would change the vegetative composition of that portion of the wetland and cause a concomitant change in the wildlife habitat (transc. 3, p. 74). He testified that if the

perennial stream was not protected, then the anadromous run of fish known as the four-spined stickelback, a food source for other animals, could be affected (transc. 3, pp.6, 75). He also testified that a reduction in wetland area would curtail an animal's living quarters and could particularly impact those not tolerant of urbanization (transc. 3, p. 76).

This proved to be a fruitful area for questioning by applicant's attorney. Under cross examination, Mr. Wencek conceded that animals intolerant of urbanization would most likely not be found at this site (transc. 3, p. 90-91). He also testified that even animals which would "shy away" from urbanization might follow those more tolerant if they were their food source (transc. 3, pp.96-97).

Based on the testimony of Martin Wencek, which largely stood unrefuted by applicant, and in consideration of Ms. Adamowicz's testimony, the Hearing Officer finds that wetland wildlife habitat would not only be lost to fill, asphalt and buildings, but would be altered by the effect of the flood water retention area, introduction of additional pollutants, and "magnitude of loss" of wetland. (Wencek. transc. 3, p.68). Though the animal population may be able to adjust to the increased urbanization, applicant presented no evidence that the segmentation of the wetland or water impoundment would not cause an undesirable reduction of wildlife habitat values provided by this wetland. The Hearing Officer concludes that applicant has not met his burden on this issue. (JT12, #1(5.03 (c) (7)), #2).

Further, Mr. Wencek testified that if the wildlife habitat is reduced, then the wetlands ability to provided a full scope of recreational activities is also reduced. It would have a particular impact on this wetland because the surrounding habitat is dominated by wooded open space or agricultural fields (transc. 3, p.74). The Hearing Officer concludes that applicant has not met his burden on #5 of the denial letter: "The proposed project will reduce the value of a "Valuable" Wetland recreational environment...and will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and adjacent areas which serve as a buffer zone".

At the conclusion of applicant's case, Mr. Powers moved to dismiss the within matter. His grounds were twofold: he suggested that the July 6, 1990 Order granting applicant's continuance was based on Mr. Meyer's lack of availability as a witness when Mr. Meyer had not yet been retained; and secondly, that applicant had failed to present evidence on several issues. Attorney Webster responded that Meyer had been retained in June 1990 (as noted earlier in fn.4) and that evidence had been presented to show compliance with the Wetlands Regulations and Wetlands Act.

The Hearing Officer ruled that it was clear on the record that a continuance had been granted for several reasons, Mr. Meyer's unavailability only being one of them. She ruled that applicant had presented evidence on the issues and denied the Motion to Dismiss.

Having determined that this area is a valuable wildlife habitat and

valuable recreational environment and having reviewed the extent of encroachment <sup>5</sup> and paucity of proposed mitigation measures <sup>6</sup>, the Hearing Officer finds that this project is not in the best interest of the public and is contrary to the legislative intent of preserving freshwater wetlands.

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<sup>5</sup> Mr. Wencek's testimony seems to indicate that a scaled-down development along the perimeter of applicant's property may be possible with fewer adverse consequences to wildlife habitat values.

<sup>6</sup> Ms. Adamowicz proposed mitigation measures to renovate stormwater runoff through the use of retention basins. Mr. Meyer suggested the basins be planted with wetland species.

As a result of the testimony and documentary evidence presented, and, in addition to those facts stipulated to by the parties as set forth above, I make the following:

FINDINGS OF FACT

1. Applicant has filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above-referenced matter.
2. The subject site is owned by Applicant and is located east of Market Street, south and west of Birch Swamp Road, Assessor's Plat 22, Lots 22, 23 and 146, Warren, Rhode Island.
3. The state jurisdictional wetlands affected by Applicant's proposal include a freshwater swamp, a fifty (50) foot perimeter wetland, an unnamed perennial stream, a hundred (100) foot riverbank wetland and an area subject to storm flowage.
4. The formal application No. 88-0894F was filed on June 30, 1989.
5. The application was sent to public notice on December 8, 1989, commencing a forty-five (45) day public notice period which expired January 28, 1990.
6. The Department received five (5) objections (JT5, JT6, JT7, JT8, JT9) during the public notice period which were determined to be substantive, including one from the Warren Town Council advising the Department that it had voted to disapprove the application pursuant to R.I.G.L. § 2-1-21 (a) (JT8).

7. The Department denied the application on March 13, 1990 and also denied a Water Quality Certificate.

8. Applicant filed timely requests for hearing by letters dated March 16, 1990 and June 6, 1990.

9. The Notice of Administrative Hearing and Prehearing Conference dated June 8, 1990 (Certification dated June 11, 1990) was published in the Providence Journal-Bulletin.

10. The Prehearing Conference was held on June 26, 1990 at 291 Promenade Street, Providence, Rhode Island.

11. No requests to intervene were received at or prior to the Prehearing Conference.

12. On or about July 6, 1990 applicant's attorney made an ex parte request for continuance which was granted by Order dated July 6, 1990.

13. Pursuant to said Order, the within matter was placed at the bottom of the hearing request list.

14. The Notice of Administrative Hearing dated October 18, 1990 was published in the Providence Journal-Bulletin.

15. A public hearing was held on November 5, 1990 at the East Bay Government Center, 1 Joyce Street, Warren, Rhode Island and on November 7, 8, 9 and 14, 1990 in the Administration Building, One Capitol Hill, Providence, Rhode Island.

16. The alterations proposed consist of clearing, filling, re-grading and construction in the aforementioned swamp, perimeter wetland, riverbank wetland, and area subject to storm flowage, as well as culverting the

aforementioned perennial stream through the use of a box culvert.

17. Applicant proposes constructing four (4) approximately 100' x 200' manufacturing buildings with paved lots, a paved access road over a boxed culvert to reach Building 1, and four detention basins.

18. Construction of the proposed buildings, paved lots and access road will result in over 2 acres of asphalt.

19. Runoff from Route 136 presently drains untreated directly onto the property.

20. Applicant's proposal would reduce the present runoff's velocity of flow and erosion ability.

21. Stormwater runoff would wash additional heavy metals and organics into the detention basins.

22. Three of the detention basins are designed to hold the volume of rain associated with a one-year storm; the fourth basin has the capacity to hold the runoff from a third of an inch of rain.

23. Smaller quantities of water will be detained, allowing some suspended solids to settle out.

24. During heavy rainstorms, the detention basins will overtop and flow into the wetland.

25. The access road is designed to allow drainage directly into the wetland.

26. The detention basins would not treat or allow to settle pollutants that flow on the surface or those that dissolve in water.

27. The introduction of these pollutants would result in changes in

water chemistry which could alter the variety of plant life and change the wildlife habitat.

28. As a result of overtopping detention basins and the effect of the box culvert and berm, a flood water retention area will be created in the perennial stream.

29. The box culvert acts as a flow restricter.

30. The wetland has adequate storage capacity to contain water on a temporary basis.

31. The resulting flood water is likely to impound nearly two acres of the stream during a ten-year storm.

32. Impounding water within a portion of the wetland will change the vegetative composition and wildlife habitat of that portion of the wetland.

33. Applicant's proposal will cause the loss and disturbance of 8.19 acres of swamp, perimeter wetland, riverbank wetland and the elimination of approximately 300 feet of intermittent stream or area subject to storm flowage.

34. Thirty-two feet of the perennial stream would be culverted.

35. The perennial stream supports an anadromous run of fish, the four-spined stickelback.

36. The perennial stream serves as a wildlife corridor.

37. DEM conducted an ecological field survey and evaluation of the area.

38. The modified Golet Analysis obtained a score of 66.0.

39. A score of 66.0 indicates the subject wetlands contains high diversity and production of wildlife.

40. The subject wetlands is a valuable wildlife habitat.

41. The subject wetlands is capable of supporting recreational activity by the general public.

42. The subject wetlands is a valuable recreational environment.

43. Wetland wildlife habitat would be altered by the effect of the flood water retention area, introduction of additional pollutants, and magnitude of loss of wetland.

44. This project is not consistent with the legislative intent set forth in R.I.G.L. §2-1-18 and §2-1-19.

45. This project does not comply with Wetlands Regulations.

46. This development is not in the best interest of the public.

Based on the foregoing and the documentary and testimonial evidence of record, I make the following:

CONCLUSIONS OF LAW

1. Notice of the hearing and pre-hearing Conference was duly provided in accordance with R.I.G.L. § 2-1-22, the Administrative Procedures Act, and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters.

2. In compliance with R.I.G.L. § 2-1-22, a public hearing was held at the East Bay Government Center, One Joyce Street, Warren, Rhode Island.

3. This matter is properly before the Administrative Adjudication

Division pursuant to R.I.G.L. § 2-1-22 and § 42-17.7-2.

4. The subject site contains state jurisdictional wetlands as defined in R.I.G.L. § 2-1-20.

5. The subject freshwater wetlands is a Valuable Wildlife Habitat as defined in Section 7.06 (b) of the Rules and Regulations Governing the Enforcement of the Rhode Island Freshwater Wetlands Act.

6. The subject freshwater wetlands is a Valuable Recreational Environment as defined in Section 7.06 (b) of the Rules and Regulations Governing the Enforcement of the Rhode Island Freshwater Wetlands Act.

7. The subject wetland is not a unique wetland as defined in Section 7.06 (a) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

8. Applicant has failed to sustain his burden of proof that the proposed alteration will not cause an undesirable reduction of wildlife habitat values provided by the wetland.

9. Applicant has failed to sustain his burden of proof that the proposed alteration will not cause an undesirable reduction of the value of a valuable wetland recreational environment.

10. Applicant has failed to sustain his burden of proof that the proposed alteration will not reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and adjacent areas which serve as a buffer zone.

11. Applicant has sustained his burden of proof that the proposed alteration will not reduce the ability of the wetland to moderate the

damaging effects of flood flows as provided in Section 5.03 (c)(2) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

12. Applicant has failed to sustain his burden of proof that the proposed alteration will not cause degradation of water quality and negatively impact the aquatic resources of the subject wetlands area.

13. The proposed alteration is inconsistent with the public interest and public policy as stated in R.I.G.L. § 2-1-18, § 2-1-19 and Section 1.00 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act .

ORDER

Approval of Freshwater Wetlands Application No. 88-0894F is hereby  
DENIED.

Feb 27 , 1991  
Date

Mary F. McMahon  
Mary F. McMahon  
Hearing Officer  
Administrative Adjudication Division

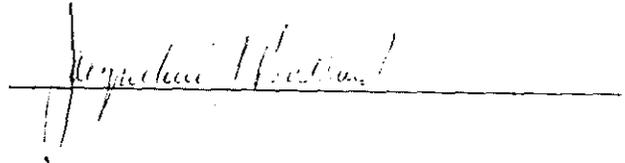
*Approved.*

March 7 , 1991  
Date

Louise Durfee  
Louise Durfee  
Director  
Department of Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded, regular mail, postage prepaid to Gary E. Powers, Esq., 371 Broadway, Providence, Rhode Island 02909; John B. Webster, Esq., Adler, Pollock & Sheehan Incorporated, 2300 Hospital Trust Tower, Providence, Rhode Island 02903; Kendra Beaver, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 4<sup>th</sup> day of February, 1991.

  
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