

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

IN RE: Richard Conti  
Application No. 89-0257F

DECISION AND ORDER

Applicant Richard Conti petitioned the Administrative Adjudication Division to review the Department of Environmental Management's (DEM) denial of his request to alter a freshwater wetland.

Mr. Conti has sought approval to build a 5,000 square feet concrete block commercial building associated impervious parking lot with driveway, stormwater detention basin and utility connections within a wetland swamp and its 50 feet perimeter buffer. Actual construction affects 42,000 square feet (.96 acres) of swamp and 6,124 square feet (.14 acres) of perimeter buffer for a total alteration of 48,125 square feet (1.1 acres). Modifications to this wetland include vegetation clearing, filling, grading, landscaping and drainage discharge within the wetland complex.

This wetland is located in the Town of Smithfield, Rhode Island on the northside of the intersection of Lydia Ann Road and Washington Highway, Assessor's Plat 49, Lot 159. The site is densely forested with various tree and shrub species. This area is seasonally flooded and perpetually holds 12 to 18 inches of standing water. Surrounding the parcel are multi-use commercial buildings and scattered homes. Approximately 300 feet to the left of the site is a Mutual Isuzu Auto dealership and directly across the street is an industrial park.

Prior to the appeal hearing the parties attended a pre-hearing conference on October 11, 1990 and agreed to enter joint exhibits 1-16 which were marked and entered as full exhibits. Joint exhibits 17-19 were entered as full exhibits during the hearing. The complete list of joint exhibits is as follows:

- JT1. Formal Application to Alter a Freshwater Wetland received by the Department on April 6, 1989. (1 page).
- JT2. Site plan submitted by applicant entitled: "Proposed Commercial Building, Route 116, Washington Highway, Smithfield, Rhode Island, Assessor's Plat 49, Lot 156, Formal Wetland Application", two (2) sheets dated September, 1989, revised October, 1989, all sheets received by the Department on October 24, 1989.
- JT3. Evaluation of Application for Permission to Alter Freshwater Wetlands by Daniel M. Kowal dated May 7, 1990. (19 pages).
- JT4. Official Notice and Certification of Notice regarding public notice and comment dates signed by Brian C. Tefft and dated March 1, 1990. (3 pages).
- JT5. Letter with attachments dated April 9, 1990 and received by the Department April 10, 1990 to Brian C. Tefft from Edith C. Poirier, Smithfield Town Council. (6 pages).
- JT6. Letter dated July 20, 1990 to Richard Conti from Brian C. Tefft denying application No. 89-0257F. (4 pages).
- JT7. Letter dated July 24, 1990 to Administrative Adjudication Division from Patricia K. Rocha requesting an adjudicatory hearing. (3 pages).
- JT8. Notice of Administrative Hearing and Pre-hearing Conference, certification dated October 2, 1990. (5 pages).
- JT9 A-B Copies of aerial photographs of the subject wetlands complex dated 1970, and 1985.
- JT10. Wetland Wildlife Recreation evaluation of Application No. 4964 by Hank K. Ellis dated February 24, 1984. (11 pages).
- JT11. Review Panel Recommendations/Objections - Comments dated May 28, 1990.

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- JT12. Engineering Review Sheet dated January 18, 1990.
- JT13. Freshwater Wetlands Review Sheet dated October 25, 1989.  
(2 pages).
- JT14. Engineering Review Sheet dated June 20, 1989.
- JT15. Copy of Deed from J. Andreoni to Richard J. Conti executed  
August 17, 1990.
- JT16. Drainage Report dated March, 1989.
- JT17. Freshwater Wetlands Review Sheet dated July 12, 1990.
- JT18. Formal application decision summary.
- JT19. Supervisors Determination dated July 11, 1990.

Applicant submitted 4 exhibits for identification :

Applicant 1 Resume of John Caito.  
For Ident.

Applicant 2 Aerial photo.  
For Ident.

Applicant 3 DEM deficiency checklist dated June 23, 1990.  
For Ident.

Applicant 4 Letter to Dan Kowal from Jeffrey Hanson dated  
For Ident. September 19, 1990.

The Department offered 4 exhibits for identification. Exhibits 3 and  
4 were admitted as full exhibits during the hearing:

DEM # 1 Resume of Daniel Kowal. This exhibit was entered as full  
for Ident. during the hearing without objection.

DEM # 2 Resume of Brian C. Tefft.  
for Ident.

DEM # 3 Resume of Harold Ellis.

DEM # 4 1988 aerial photo map.

An adjudicatory hearing on this application was conducted by the  
Hearing Officer on Monday October 22, 1990 at the North Smithfield

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Council Chambers Municipal Annex, North Smithfield, Rhode Island and Tuesday October 23, 1990 at the State House, Room 135, Providence, Rhode Island. The hearing was conducted pursuant to the Administrative Procedures Act (R.I.G.L. 42-35 et. seq.) and the Administrative Rules of Practice and Procedures for the Administrative Adjudication Division for Environmental matters of the Department of Environmental Management adopted July 1990.

Attorney John Webster represented the applicant and Catherine Robinson Hall appeared as counsel for the Division of Groundwater and Freshwater Wetlands.

Ernest Begin, Deputy Solicitor for the Town of Smithfield attended the hearing but made no motion to intervene and did not comment. The Town of Smithfield had previously denied this application and had already provided the Hearing Officer with a comment letter (JT.5). An abuttor, James Donovan and his son James Arthur Donovan attended the hearing and provided public comment.

To enable the Hearing Officer to better understand the testimony adduced during the hearing, the Hearing Officer and the parties viewed the site on October 25, 1990.

Applicant bears the burden of proof by preponderance of the evidence pursuant to § 11.02 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

As his case-in-chief applicant's attorney presented two witnesses. Richard Conti and John Caito. Prior to Mr. Caito's testimony the state stipulated that he is an expert civil and environmental engineer.

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(transc.1 p.4). The department initially called three witnesses. Brian Tefft, Supervisor in the Wetlands Division, Daniel Kowal, primary biologist on the site and Harold Ellis, current Wetlands Enforcement Supervisor who reviewed the wetland complex in 1984. Applicant' counsel stipulated that Messrs. Tefft and Ellis were experts in wetlands biology (transc.1 p.4). After initial direct examination by the State and voir dire by the applicant, Mr. Kowal was qualified by the Hearing Officer as an expert in wetlands biology. (transc.2 p.25).

During the direct examination of Mr. Ellis, two legal issues were raised by the applicant: the lack of foundation established for Mr. Ellis to testify to aerial photographs shown to him by Ms. Hall and the relevancy of Mr. Ellis' testimony concerning the 1984 biological evaluation of this wetland complex (JT.10). Based on Mr. Webster's objections, the state's attorney asked that Mr. Ellis be temporarily excused so the department could provide the documents necessary to set a proper foundation for his testimony (transc.2 p.113). This request was granted. The Hearing Officer then reserved ruling on the issue of relevancy until other DEM witnesses had testified. Subsequently counsel for DEM withdrew Mr. Ellis as a witness. Since applicant had no opportunity to cross examine Mr. Webster's motion to strike Mr. Ellis' direct testimony was granted. Pointer v Texas 380 US 400, 85 S. Ct. 1065, 13L.ed2d 923, Davis v Alaka 415 US 308 94 S. Ct 11050 39 Led2 347.

As Ms. Hall began her examination of Brian Tefft, applicant's attorney moved to sequester Daniel Kowal, the states next witness who had entered and was sitting in the back of the room. The State's attorney

vehemently objected at this request. Excluding a witness from a room during the taking of testimony is within the sound discretion of the trier of fact St v Cyralik 100 RI 256 214 A2d 382 (1966), St v Raposa 100 RI 516 217 A2d 469 (1966). Mr. Webster is not required by case law to give specific reasons for requesting exclusion of a witness St v Raposa supra but he did give viable and reasonable reasons for his motion including the fact the biologist's recommendations were contrary to his supervisor (transc.1 p.125). Sequestration motions are available to both parties but at no time did the State's counsel choose to exercise that option.

At the conclusion of applicant's case, the Department's attorney moved for a directed verdict (transc.2 p.3). A directed verdict motion is applicable only in jury cases. (Rodrigues v Santos 366 A2d 306 (1983)). The appropriate motion to be made at the close of a non-jury case is a motion for an involuntary dismissal under Superior Court rule 41 (b) (2) Abbey Medical v Mignacca 471 A2d 189 (1984)).

It is settled case law that when deciding a directed verdict motion, the trier of fact looks at the evidence in the light most favorable to the party with the burden of proof without assessing the credibility of witnesses or weighing the evidence.

The trier of fact need not review the evidence in the light most favorable to the moving party for a motion to dismiss and can review the evidence and credibility of witnesses. If the evidence preponderates against the plaintiff the motion to dismiss may be granted JK Social Club v JK Realty Corp 444 As 130 (1982).

The Hearing Officer did review the applicant's case by the standard requested by the State and found the applicant had offered countervailing testimony on at least two factors set out in the Department's denial letter. (transc.2 p.9).

Assessing the evidence in its totality in light of 41 (b) (2) the applicant's case succeeds in showing to accomplish a fair and impartial hearing it is necessary to have a presentation of all the evidence.

Mr. Webster attempted to elicit information concerning fair market values, rate of return, and purposes for purchasing the property to establish a "taking" by the State (transc.2 p.23). It is axiomatic that State Government can prohibit uses of private property, even the most economically beneficial use of that land to ensure the health, safety and general welfare of the public. The issue if this permissible exercise of police power results in a constructive taking which creates for the property owner a right to secure compensation under the U.S. Constitution 5th Amendment, Sect. 1, 14th Amendment Sect. 1, Rhode Island Constitution Art. 1, § 2 and 16 is not a matter which can be resolved by this tribunal. The Hearing Officer is constrained to review this appeal according to the issues raised within the denial letter and testimony adduced on those issues. Since no final determination can be made at the hearing level, the issue of a taking without just compensation is not ripe for determination and will not be addressed any further in this opinion.

An ecological field study and evaluation of the parcel was conducted by biologist Daniel Kowal on May 7, 1990 (JT.3). Based upon that

analysis the DEM biologist determined this area to be a valuable recreational wetland and that the project will reduce the ability of the wetland to moderate the damaging effects of flood flows. Brian Tefft, Mr. Kowal's supervisor, after reviewing the biologist's report, the previous biological report done on this wetland, topographic and aerial maps, and visiting the site agreed with Mr. Kowal's view. He further concluded that the area is a valuable wetland wildlife habitat, that the project is expected to cause degradation of water quality and negatively impact the aquatic resources within the subject wetland. These factors were used as the primary basis for the project denial (JT.16). The applicant attempted to counter each of these assertions.

#### RECREATIONAL VALUE OF THE WETLAND

DEM asserts in the denial letter that "this 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 that serve as a buffer zone" (JT.6).

The developer argues that due to the fact Messrs. Conti, Caito, Kowal and Tefft did not observe anyone recreating on their various sojourns to the parcel, the area has dense terrain and the local restrictions on hunting and trapping prove that this site has negligible recreational value.

Section 7.06 of the Freshwater Wetlands Rules and Regulations define a valuable recreational environment as one which is "capable in its

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natural state of supporting recreation by the general public". Mr. Kowal stated in his evaluation and reiterated on the stand that in his professional opinion, this area has the potential to be used for a variety of recreational activities besides hunting and trapping such as hiking, photography, education and nature study (transc.2 p.54).

Although the regulation does not explain the meaning of the terminology, it clearly takes into account potential uses of the wetland. The Hearing Officer believes that the Department's interpretation of potential uses for that wetland must be reasonable and practical. Considering the proximity of homes and businesses and roadways to this site and the topography of the area, it is not unreasonable for the DEM biologist to assess that this area has the potential to be used for the activities he delineated in the biological inspection report (JT.3).

Mr. Conti did not offer any documentary evidence, produce any witnesses or elicit any testimony to dissuade the Hearing Officer that this site has no realistic prospect of public recreational enjoyment. Accordingly, I find as a fact this area is a valuable recreational wetland.

#### WILDLIFE HABITAT VALUE OF THE WETLAND

The denial letter issued to Mr. Conti contains the statement that "the subject proposal will cause undesirable reduction of the wetland habitat values and the this freshwater wetland area is considered a valuable wetland-wildlife habitat" (JT.6).

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To determine if this site is a valuable wildlife habitat Mr. Kowal employed the use of the revised wetland-wildlife evaluation model known as the modified Golet Analysis. (JT.3). This analysis is a numerical system which establishes if the site has high wildlife diversity and productivity. In this particular case the Golet system classified the wetland as a wooded swamp and assessed to it a numerical value of 59.5. This score is within the high moderate range of values but does not raise the wetland to the level of a valuable class which begins with a value of 60. (transc. p.115). Applicant relied on this analysis to prove the wetland is not a valuable wildlife wetland.

The DEM biologist testified in addition to passerine birds he made a direct observation of an american woodcock and its nest with four eggs. The record establishes that this bird is a species of concern to the United States Fish and Wildlife Service, which is a species that is not yet endangered but has a dwindling population. This species is also indigenous to the wetland (transc.2 p.87).

The biologist further testified that this area is a suitable habitat for herps and mammals. Mr. Kowal explained that many animals may use this area but were not directly observed on his brief site visits, therefore he assessed the habitat to determine what kinds of animals would most likely find this type of terrain to be a suitable home (transc.2 p.51).

In his expert opinion this vegetative area is capable of supplying food and cover for a variety of wildlife (transc.2 p.45). Despite these opinions Mr. Kowal did not find this area to be a valuable wildlife

habitat. When questioned on this point by the Hearing Officer, Mr. Kowal revealed he based his decision solely on the empirical data resulting from the Golet Analysis. (transc.2 p.115).

Mr. Tefft, Supervisor of the Wetland Division and Mr. Kowal's immediate superior testified that the Golet analysis is only one factor in an assessment of a wetland complex (transc.2 p.156). He further testified that the final determination if an area is a valuable wildlife habitat is done by the senior staff administrators after Mr. Tefft sees the site, reviews the biological report, topographic maps and technical reports concerning the area. (transc.1 pp.155 and 156).

Freshwater Wetland Rules and Regulations § 7.06 indicates the evaluation of a wildlife habitat must include an assessment of soil, ground and surface water association, existing plant and animal communities and surrounding land use patterns. In a recent Supreme Court case Downing Corp. v Robert L. Bendick, Jr. (Supreme Ct No 89-607 mp), the Court found § 7.06 of the Freshwater Wetlands Regulations does not restrict the evaluation of a wetland to a numerically based rating system.

The applicant was unable to offer any witnesses or arguments to challenge the Department's exhaustive ecological survey of this parcel. After assessing the testimony presented on this issue and reviewing the substantial comments submitted by the Town of Smithfield (JT.5), the Hearing Officer finds the area is a valuable wildlife habitat.

In light of the above determination, the Hearing Officer also finds this project will reduce and negatively impact the aesthetic and natural character of the subject wetland. This project will cause a loss to the

natural wetland characteristics of the area and reduce wildlife population and abundance. Additionally, this proposal will negatively affect the public's ability to recreate on the site. A direct relationship exists between wildlife and recreation. If the wetland is destroyed or disturbed many recreational purposes for using the area are eliminated.

ABILITY OF THE WETLAND TO MODERATE STORM FLOW

A significant amount of testimony was devoted to the issue of stormwater flowage and its effects on the wetland. The Department has made a determination that this project "will reduce the ability of a wetland to moderate the damaging effects of flood flows" (JT.6). The State's assertion is based upon the developer's proposal to place 5 to 7 feet of fill material into the subject wetland. Biologists Tefft and Kowal believe this disruption will cause displacement of water on the site and adjacent property, (transc.2 pp. 58, 61 & transc.1 p. 84) that the proposed detention basin is not sufficient to mitigate the damaging effects of the fill (transc. p.89) and that the fill will degrade water quality and aquatic life (transc. p.165).

In an effort to compensate for any disruption to the wetland, applicant proposes to funnel all stormwater flow from the proposed project including runoff from the roadway, driveway and roof top into a detention basin. To protect water quality in the swamp an oil/water separator is proposed for the catch basin, riprap and mitigating planting

at and around the area (transc.1 p.54).

To refute the department's contentions and establish his position, the applicant called John Caito, an expert qualified civil and environmental engineer.

Mr. Caito prepared drainage calculations for this property (transc.1 p.47) and concluded from these calculations that the ability of the wetland to moderate the effect of storm flow would not be affected by this development because the rate of peak run-off would not exceed predevelopment conditions (transc.1 p.48). He also pointed out that this area is not in a flood zone (transc.2 p.119).

Mr. Tefft and Mr. Kowal were called by the Department to respond to applicant's claims. Both witnesses testified this project will adversely affect storm water flow by raising the water level in the wetland (transc.2 pp. 57 to 61, transc. 2 p.84). Mr. Kowal proffered that this detention basin would not mitigate any effect on the wetland (transc.2 p.89). Cross-examination established that this biologist had no knowledge of how much, if any, the stormwater runoff would increase, the extent, if any, of the rise in the water table or if such a rise would be detrimental to the wetland (transc.2 p.91). Mr. Kowal based his opinion on field references and literature (transc.2 pp.58 and 61). Applicant's attorney also questioned Mr. Tefft concerning this pronouncement. Mr. Tefft stated that he based his opinion on the principles of physics (transc.1 p.88).

Mr. Caito testified he had not evaluated the effect of runoff on adjacent properties but he did calculate the flow at the point of

discharge and in his expert opinion there would be no rise of the water level on adjacent properties (transc.1 p.53 and 54). In rebuttal testimony, Mr. Caito revealed that he had analyzed the flood flow over the 23 acre wetland complex. From this assessment he determined that without any mitigation, in the worst case scenario, the water level could rise 1/4 of an inch over 23 acres in a 100 year frequency storm (transc.2 p.118). DEM biologist Dan Kowal was questioned by Ms. Hall on this issue. Mr. Kowal acknowledged that such a rise in the water level use would not be detrimental to wildlife (transc.2 p.112).

An examination of the joint exhibits presented does not substantiate either biologist's contentions. DEM engineering forms reveal on January 18, 1990, the Department granted an engineering clearance for applicant's detention basin. The clearance was allowed once the basin was designed to hold stormwater from 10 to 100 years frequency storms and contained a catch basin with an oil/water separator to filter pollutants.

Messrs. Tefft and Kowal are accomplished and well respected biologists but their opinions did not take into account any mitigation proposed by the applicant, the acceptability of applicant's detention basin by DEM engineers or contradict any factual evidence presented by applicant's expert engineer. Therefore, on this issue the Hearing Officer was unable to give great weight to their testimony and find the weight of evidence falls in applicant's favor.

DEGRADATION OF WATER QUALITY WITHIN THE WETLAND

The DEM denial letter states "this proposed project is expected to cause degradation of water quality within the subject wetland..."(JT.6) Agency decisions are accorded great deference by judicial bodies Gryduc v. Bendick 510 A2d 937 (1986) but these determinations and the methodology used to arrive at those decisions must be based on more than notions, hunches or suppositions.

Testimony elicited from Mr. Tefft and Mr. Kowal revealed that the Department's assessment was based solely upon anticipated impacts. Both biologists were quite emphatic that the amount of fill proposed coupled with the level of paved surfaces would add pollutants such as heavy metals, hydrocarbons, sediment and nutrients to the water (transc.2 p.62 and transc.1 p.97). However, neither expert could delineate the extent of the pollution expected to be discharged or what effect the pollution might have on the area.

The Division did request a Water Quality Certificate from the Water Resource Division but had not received an answer to their request prior to this hearing (transc.1 p.96). Clearly the Water Resources Division has the experts on water quality who could have provided the biologists with a basis for adding the water quality factor to the denial letter.

Applicant assigned great significance to the absence of any empirical data such as a pollution loading analysis or EPA test results supplied by the Department. Empirical data is not imperative in making an evaluation but in order to raise the department's assessment above the level of speculation it is necessary that these determinations are based upon

discernible criteria. On this issue there are no facts to back up the biologists contentions. The only information available to the Hearing Officer is that a water quality certificate was requested and the testimony on mitigation elicited from Mr. Kowal. This biologist on cross-examination conceded that the proposed loam seeding and rip-rap could somewhat mitigate the influx of pollution into the wetland (transc.2 p.98). He further stated that the purpose of oil/water separators, such as the one proposed by the applicant, is to filter hydrocarbon pollutants from the water (transc.2 p.99). Therefore, the Hearing Officer can not find there is articulable basis for the DEM denial on this issue and finds the applicant has met his burden.

As a result of the expected water degradation the Department further concluded that "said degradation is expected to negatively impact the aquatic resources of the subject wetland area" (JT.16). This issue was not directly addressed by either party. As a result of my above conclusion, and a review of the 1989 and 1984 biological inspection reports (JT.3 and JT.10), I find applicant has also sustained his burden on this issue.

Having determined this area to be a valuable recreational wildlife wetland habitat, reviewing the public policies set forth in R.I.G.L. 2-1-18 and 2-1-19 and embodied in J.M. Mills v Director of Natural Resources 116 RI 54, 352 A2d 661 (1976), I find this project is not in the best interest of the public and is contrary to the legislative intent of preserving freshwater wetlands.

After carefully reviewing all the testimony, exhibits presented, and assessing the credibility of each witness, the hearing officer makes the following specific findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Applicants filed all necessary documents and paid all necessary fees on July 24, 1990 to be properly before the Hearing Officer in the above-referenced matter.
2. Publication of the Notice of Hearing was placed in the "Providence Journal" on October 4 and 10, 1990 and the "Observer Publications, Inc." on October 4 and 19, 1990.
3. The subject site is owned by Richard Conti and is located on the north side of Washington Highway (Route 116), pole 21½, approximately 200 feet northeast of the intersection of Lydia Ann Road and Washington Highway, Assessor's Plat 49, Lot 156 in the Town of Smithfield, Rhode Island.
4. The Town of Smithfield denied applicant's request to alter the wetland.
5. The formal application, No. 89-0257F was filed April 6, 1989.
6. The site plan subject to this hearing was received by the Department on October 24, 1989.
7. The site plan was sent out to public notice on March 1, 1990, commencing a forty-five (45) day notice period which ended April 15, 1990.
8. The Department received two (2) public comments during the public comment period. Pursuant to the standard set forth in § 5.05 (b) of the Rules and Regulations, the Department deemed one of the comments to be of a substantive nature.
9. The substantive comment was received from the Town Council, Town of Smithfield, which objected to the alterations as proposed.
10. The Department denied this application on July 20, 1990.

11. The state jurisdictional wetlands affected by the Applicant's proposal includes a wooded swamp and that area of land within fifty (50) feet of the edge of the swamp.
12. Pre-hearing conference was held on October 11, 1990 at 291 Promenade Street, Providence, Rhode Island.
13. A pre-hearing conference record was issued on October 13, 1990 and made part of the record.
14. A public hearing was held on the application on October 22, 1990 at No. Smithfield Council Chambers, Municipal Annex, Smithfield, Rhode Island and October 23, 1990 at the State House, Room 135, Smith Street, Providence, Rhode Island.
15. A view of the site was taken by the Hearing Officer and the parties on October 24, 1990.
16. Two abutters, James Donovan and James Arthur Donovan commented at the hearing and objected to the proposal.
17. This hearing formally closed the day all stenographer notes were received by the hearing officer on November 7, 1990.
18. No brief or memoranda were requested by the hearing officer or submitted by the parties.
19. Pursuant to Rule 11.02 of the regulations, the burden of proof and persuasion is upon the applicant to show by preponderance of the evidence that these proposals are not inconsistent with the provisions of the Freshwater Wetlands Act and the accompanying regulations.
20. This project will cause an alteration to a freshwater wetland.
21. That the total wetland area is 48,125 square feet (1.1 acres).
22. This area is privately owned by Richard Conti.
23. That the alterations requested consist of industrial building construction, impervious driveway and basin and utility connections.
24. DEM conducted an ecological field study and evaluation of the area on May 7, 1990.
25. This wetland area is capable of supporting recreational activity.
26. The site is a valuable recreational habitat as defined in Freshwater Wetlands Rules and Regulations Section 7.06.

27. That a Golet Analysis was completed.
28. That this analysis did not find the area to be one of high wildlife diversity and production.
29. That the Golet Analysis is not the sole criteria for determining the value of a wildlife habitat.
30. American woodcock resides in wetland and is a designated species of concern by U.S. Fish and Wildlife Service.
31. The American woodcock is indigenous to the swamp.
32. Passerine birds were sighted in the wetland.
33. Mammals and birds use this area for nesting and as a food source.
34. The area is a valuable wildlife habitat as defined in the rules and regulations governing Freshwater Wetlands Section 7.06.
35. This proposal will cause an undesirable reduction of the wildlife habitat provided by this wetland.
36. Construction of this project will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland.
37. That the detention basin proposed by the applicant is sufficient to moderate the effect of storm water flow for a 10 to 100 year frequency storm.
38. That the detention basin has an oil/water separator to filter hydrocarbons.
39. That this basin received engineering clearance for DEM.
40. A Water Quality Certificate was not made a part of the hearing.
41. Evidence does not support the contention that th is project may degrade water quality.
42. Evidence does not support the contention that this project may degrade aquatic life in the wetland.
43. This project is not consistent with the legislative intent outlined in R.I.G.L. 2-1-18 and 2-1-19.
44. These modifications will not preserve the integrity of the wetland.
45. This development is not in the best interest of the public.

CONCLUSIONS OF LAW

1. A public hearing was held at No. Smithfield Council Chambers, Municipal Annex, Smithfield Rd, Rte 146A, No. Smithfield, Rhode Island, a location reasonably convenient to the site of the proposed alteration and was in compliance with the statutory requirements regarding the locus of the hearing stated on R.I.G.L. 2-1-22.

2. Publication of the Notice of Hearing was in substantial compliance with R.I.G.L. 2-1-22(b). This statute requires that publication of the Notice of Hearing be in a newspaper of statewide circulation and in a local newspaper.

3. That this matter is properly before the Administrative Adjudication hearing officer as required by R.I.G.L. 42-17-1, 42-17-7.2.

4. That DEM filed a timely denial letter of applicant's request to alter a Freshwater Wetland. (July 20, 1990).

5. That applicant filed an appropriate and timely request for hearing and paid all necessary fees on July 20, 1990.

6. That the area in question is a wetland pursuant to R.I.G.L. 2-1-20.

7. Pursuant to Rule 11.02 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, the burden of proof and persuasion is upon the applicant to show by preponderance of the evidence, that these proposals are not inconsistent with the Act and accompanying Regulations.

8. The applicant has not sustained his burden of proof by preponderance of the evidence that this wetland is not a valuable

recreational environment pursuant to section 7.06 (b) of the Rules and Regulations governing Rhode Island Freshwater Wetlands Act.

8. The applicant has failed to sustain his burden of proof by preponderance of the evidence that this wetland is not a valuable wildlife habitat pursuant to section 7.06 (b)(1) of the Rules and Regulations governing the enforcement of the Rhode Island Freshwater Wetlands Act.

9. The applicant has not sustained his burden of proof to show his proposal will not cause an undesirable reduction of the wildlife habitat provided by this wetland.

10. The applicant has failed to demonstrate by the preponderance of the evidence, that his project will not reduce and negatively impact the aesthetic and natural character of the undeveloped wetland.

11. The applicant has not shown by the preponderance of the evidence, that this project will not result in the loss, encroachment and permanent alteration of the wetland wildlife habitat (48,125 square feet).

12. The applicant was able to sustain his burden that the proposed project would moderate the damaging effects of flood flows in the wetland as defined in § 5.03 (c)(2) of the Rules and Regulations governing the enforcement of the Rhode Island Freshwater Wetlands Act.

13. The Applicant has sustained his burden that the proposed project would not cause degradation of water quality within the subject wetland complex.

14. The Applicant did sustain his burden of showing the degradation would not negatively impact the aquatic resources in the subject wetland.

15. The applicant did not sustain his burden of proof that the proposed alteration would not result in random, unnecessary, or undesirable destruction of a Freshwater Wetland as defined in R.I.G.L. 2-1-20 and Section 5.03 (c) of the Rules and Regulations governing the enforcement of the Rhode Island Freshwater Wetlands Act.

16. The proposal is not consistent with the best public interest and public policy stated in R.I.G.L. 2-1-18 and 2-1-19 and Section 1.00 of the Rules and Regulations governing the Rhode Island Freshwater Wetlands Act.

ORDER

1. Approval of application No. 89-0257F by Richard Conti for a permit to alter a freshwater wetland is DENIED.

I hereby recommend the foregoing Decision and Order to the Director for issuance as a final Order.

12/21/90  
Date

Patricia Byrnes  
Patricia Byrnes  
Administrative Adjudication  
Hearing Officer

24 Dec 90  
Date

Michael Annarummo  
Michael Annarummo  
Director  
Department of Environmental  
Management

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to John B. Webster, Esq., Adler, Pollock & Sheehan Incorporated, 2300 Hospital Trust Tower, Providence, Rhode Island 02903 and via inter office mail to Catherine Robinson Hall, Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 24 th day of December, 1990.

Cheryl M. Dawberis