

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

IN RE: James Corrigan  
Notice of Violation No. 2621

DECISION AND ORDER

This matter was heard before the Administrative Adjudication Division for Environmental Matters ("AAD") of the Department of Environmental Management ("DEM"), on June 16, 1992 at the Department of Administration Building, One Capitol Hill, Providence, Rhode Island. Hearing Officer Patricia Byrnes presiding.

This action is a result of a timely administrative appeal taken by Respondent James Corrigan from a freshwater wetlands violation issued by DEM. The Department is seeking to enforce the provisions of the Rhode Island Freshwater Wetlands Act against the Respondent for allegedly altering a wetland on his property.

Authority

Said appeal is properly before the Hearing Officer pursuant to the Freshwater Wetlands Act R.I.G.L. § 2-1-18 et. seq. as amended; statutes governing the Department of Environmental Management R.I.G.L. § 42-17.1-1 et. seq., as amended; statutes governing The Administrative Adjudication Division R.I.G.L. § 42-17.7-1 et. seq.; 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

promulgated 1986; and the Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters promulgated July 1990.

Representation

Michael K. Marran represented the Department of Environmental Management and James Corrigan the Respondent appeared pro se. Representative Sandra J. Campell attended the hearing on Mr. Corrigan's behalf.

Burden

The burden of proof and persuasion as set forth in R.I.G.L. § 42-17.6-4 requires DEM to show by preponderance of the evidence, the occurrence of each act or omission alleged in the violation.

Stipulations

Prior to the hearing, the parties entered the following stipulations:

1. A Notice of Violation and Order ("NOVAO") was issued to James Corrigan ("Respondent") on September 9, 1988.
2. Respondent received this NOVAO sometime between September 9, 1988 and September 20, 1988.
3. The NOVAO was recorded in the Foster Land Evidence Records on September 14, 1988 at Book 45, Page 453.
4. At the time that the NOVAO was issued, the Respondent was the legal owner of the property located approximately +2300 feet south of the intersection of Plainwoods Road and Jenks Road, approximately +300 feet east at Jenks Road at Pole No. 9, Assessor's Plat 1, Lot 68A in the Town of Foster, Rhode Island.

5. Respondent filed a request for an adjudicatory hearing on September 22, 1988.
6. Freshwater wetlands as defined by the Freshwater Wetlands Act ("Act"); specifically, a wooded swamp, 100-year flood plain, 100 foot riverbank and the fifty-foot perimeter associated with a wooded swamp are located on the site.
7. The freshwater wetlands on the subject site were altered and remain in an altered state.
8. The Respondent altered or permitted alteration of the freshwater wetlands on the site.
9. Neither the Respondent nor any other person received a freshwater wetlands permit to alter the wetlands on the site.
10. The Respondent is the current owner of the subject property.

As a result of these stipulations, the Department requested partial summary judgment. After reviewing argument presented by the parties and the applicable case law, the Hearing Officer granted summary judgment on the stipulated facts. (T. 16)

#### Issues

The issues to be resolved at the hearing are as follows:

1. Did a violation occur?
2. Should the requirement set forth in the NOV that the Respondent restore the wetland to its original condition as of May 9, 1974 be affirmed?
3. Is the penalty assessment of \$1,850.00 set forth in the NOV excessive or should it be affirmed?

#### Exhibits

All documents listed below were admitted as full exhibits during the hearing:

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Division of Freshwater Wetlands:

- DEM 1. Site Inspection Report prepared on November 10, 1990 by Eileen M. Jutras (2 pp.).
- DEM 2. Three photographs taken on November 16, 1990 by Eileen M. Jutras (2 pp.).
- DEM 3. Complaint Data Sheet, dated March 18, 1988.
- DEM 4. Request for an Adjudicatory Hearing prepared by James F. Corrigan and received by the Division on September 22, 1988.
- DEM 5. Wetlands Inspection Report prepared on August 19, 1988 by Brian Lang (2 pp.).
- DEM 6. Notice of Violation and Order issued on September 9, 1988 (3 pp.).
- DEM 7. Diagram prepared on August 19, 1988 by Brian Lang.
- DEM 8. Complaint Data Sheet, dated August 11, 1988.
- DEM 9. Two photographs taken on August 19, 1988 by Brian Lang (2 pp.).

Respondent:

- Resp. 1. Letter to Mr. & Mrs. Corrigan from Paul C. Dolan, dated April 28, 1987 (1 pp.).
- Resp. 2. Forest Management Plan, dated April 28, 1987 (3 pp.).
- Resp. 3. American Forest Council's County Tree Report, Page 1140 (1 p.).
- Resp. 4. Statement of James Corrigan.
- Resp. 5. Letter from Foster Land Trust to James Corrigan, dated March 31, 1992 (1 p.).
- Resp. 6. Letter from the Foster Land Trust to Patricia Byrnes, Hearing Officer, dated May 11, 1992.

Resp. 7. Map of the parcel drawn by James Corrigan.

Background

On August 19, 1988 DEM Field Biologist Brian Lang inspected a 30-acre tract of pristine woodland located in Foster, Rhode Island. After assessing the property, the biologist informed the owner James Corrigan that he was in violation of the Freshwater Wetlands Act for disturbing a jurisdictional wetland by vegetative clearing and deposition of fill material into approximately 2910 square feet of a wooded swamp and an unnamed perennial river. Mr. Corrigan was in the process of building a 13' X 6' oak timber bridge and a 200' X 15' wide pathway comprised of gravel and dry-laid stone walls. (T. 70) (DEM 5 and 6)

This project was begun by the Respondent in 1983 and was being built with the use of his hands, a wheelbarrow and a pickup truck. The purpose of this project is to provide Mr. Corrigan access to the bulk of his property which he uses as a registered tree farm. The owner has also maintained a forest management plan established by DEM's Division of Forestry which encompasses the entire 30-acre site. (Resp. 2)

The Respondent was issued a notice of violation and penalty (NOVAP) on September 9, 1988 which outlined the alleged wetland infractions and assessed the Respondent a \$1,850.00

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administrative penalty. (DEM 6) After receiving the notice, the property owner sought a meeting with DEM personnel and requested an administrative appeal. (DEM 4)

On September 22, 1988, Mr. Corrigan met with Dean Albro then Supervisor of the Wetlands Program and now Chief of Freshwater Wetlands. It is unclear what specific proposals were discussed at the meeting, but both parties agree the possibility of entering into a consent agreement was addressed. (T. 41)

Mr. Corrigan heard nothing further from DEM until he received a proposed consent agreement in the mail on April 9, 1990, 18 months after his meeting with Mr. Albro. This document required the Respondent to fully restore the wetland as was outlined in the violation. The Respondent rejected the proposal and waited for an administrative hearing.

No action was taken on this matter until the Freshwater Wetland's Division (the "Division") referred the matter to AAD in December, 1990. This violation received a status conference on January 11, 1991, and a prehearing conference was held on May 7, 1992. The hearing was conducted on June 15, 1992 and a view of the property by the parties and the Hearing Officer was taken on June 16, 1992.

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In the intervening 5 years between the violation and hearing, Mr. Corrigan has agreed to donate his land to the Foster Land Trust to be used as open space. (Resp. 5, 3) (T. 71-73) Negotiations to acquire the property have been stayed pending the outcome of this violation.

Decision and Order

I. Did a violation occur?

Stipulations entered by the parties, partial summary judgment granted to DEM prior to this hearing and the testimony of James Corrigan (T. 70) clearly establishes that the property owner James Corrigan altered a jurisdictional wetland without obtaining a permit from the Director of the Department of Environmental Management. The Rhode Island Supreme Court in the matter of Wood v. Davis, 488 A.2d 1221, 25 (1985) has held that as a matter of law, prior approval from the Director is always required before a person could lawfully alter a wetland. Therefore, James Corrigan is found in violation of the permit provisions of R.I.G.L. § 2-1-21(a) known as the Freshwater Wetlands Act as alleged in NOV C-2621 issued on September 9, 1988.

II. Should the requirement set forth in the NOV that Respondent restore the wetland to its original condition as of May 9, 1974 be affirmed?

The Director of DEM is charged in R.I.G.L. § 2-1-21 with protecting the integrity of freshwater wetlands. To pursue this mandate, the legislature has empowered the Director through R.I.G.L. § 21-1-24(a) to order restoration of a wetland.

(a) Whenever any person, firm, industry, company, corporation, city, town, municipal or state agency, fire district, club or individual or group shall commence any activity set forth in § 2-2-21 without first having obtained the approval of the director, or violated any rule or regulation of the director, the director shall have the power by written notice to order the violator to cease and desist immediately and/or restore the wetlands to their original state in so far as possible.

Although the legislature has provided the Director with the authority to order restoration, this empowerment cannot be viewed as the sine qua non of a violation. The Rhode Island Courts and a recent administrative decision have clearly stated that each case must be reviewed in accordance with its particular circumstances. The Rhode Island Supreme Court in the matter of J. M. Mills, Inc. v. Murphy, 116 RI 54, 63 352 A.2d 661 (1976) concluded a wetland alteration must be reviewed within the legislative mandate to preserve wetlands but that each determination must be made on a case-by-case basis. Recently in the Superior Court case Profile Construction Co. v. DEM, Case No. 91-3154 (decision 10/26/92), the Court found the Department could not engage in general rule making but must

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review each case on a case-by-case basis. Similarly, in the administrative decision Environmental Scientific Corp./John Travassos, (AAD No. 91-020/FWA, Application No. 90-0746F) (p. 21-22) (decision September 14, 1992), the Director accepted the Hearing Officer's conclusion that "there can be no bright line generic pronouncement . . . each case must be considered in light of its particular circumstances."

Reviewing the specifics of this violation, evidence establishes that the site of the violation is a 30-acre parcel of pristine woodland located 4 - 5 miles off a main road and accessible by a dirt path. (T. 67-68) The land is currently utilized as a tree farm and as a nature refuge for the owner.

The property has been owned by James Corrigan since 1983. There is uncontroverted testimony that the owner has planted hundreds of shrubs and trees under the guidance of DEM's Department of Forestry, built one hundred nesting boxes, provided a refuge for various wildlife, including beaver, deer and wild turkeys and has reclaimed a former gravel bank and dump. (T. 69, Resp. A, 2 and 4.)

Biologist Brian Lang inspected the property on August 19, 1988. Mr. Lang left the Department sometime in 1989 and was not called to testify at the hearing. In his biological inspection report (DEM 5), the biologist specifically commented that the work disturbance was limited to a "narrow 15-foot wide construction easement" and further noticed "the property owner

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had established a great number of woody shrubs/tree (sic) plantings along the existing roadway and had taken noticeable efforts to control vegetative clearing." (DEM 5, p. 1.) He also noticed that the work done by Mr. Corrigan was completed using only a wheelbarrow and a pickup truck. (DEM 5) The actual work observed by Mr. Lang consisted of an oak timber bridge made of 10 oak beams (13' X 6'), a gravel driveway (200' X 15'), and a flat stone dry wall (2' X 3') on each side of the bridge. (DEM 5.) According to his report, there were ornamental shrubs, mainly rhododendrons, planted along the side of the bridge. (DEM 5.)

In its case-in-chief, the State presented Dean Albro, Chief of the Wetlands Division, as its only witness. Prior to the hearing, Mr. Albro was stipulated to as an expert in wetland ecology, aerial photographic interpretation and as a natural resources specialist. During his testimony, Mr. Albro articulated the Freshwater Wetlands Division's reasons for ordering restoration (T. 28-61).

The witness explained that restoration means removing any work done in the jurisdictional wetland (T. 52). He testified that DEM's goal in ordering restoration is to "get back the natural values the wetland will provide." (T. 28, 50) The Division measures the wetlands "natural values" from the date that jurisdictional wetland become subject to regulation. In this case, that date is May 9, 1974. The Division compares

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aerial photos of the area taken on May 9, 1974 with other more current photos of the wetland complex to determine if the wetland is in its natural state. (T. 28-29) Mr. Albro further testified if the wetland disturbance happened before that date, restoration would not be sought. (p. 29)

To better understand the Division's position, the Hearing Officer questioned Mr. Albro about the damage which might be done by removing the modifications. Mr. Albro replied that any damage done to the wetland by the removal of the alteration would be temporary because "it would return the wetland back to the values we are charged to protect." (T. 52-53)

The witness acknowledged that not all alternations to the wetland are prohibited (T. 38-39) and did not deny that the alterations caused by Mr. Corrigan may be permitted. Mr. Albro maintained, however, that the affect this alteration has on the wetland cannot be assessed until the wetland is returned to its natural state and an application to alter the wetland is filed. Once an application is filed, the Division conducts a freshwater wetland application review to determine if the alteration is permitted. If the alteration is approved, Mr. Corrigan could rebuild the bridge and driveway. (T. 52-54) Mr. Albro also noted that after-the-fact permits have been issued in the past, but it was no longer the policy of the Department.

Mr. Albro's testimony shows that once a violation is cited, the Division has one goal--to remove the modification. Generally, restoration of a wetland to its natural state achieves the State's mandate set forth in the Freshwater Wetlands Act to protect the integrity of the wetland, but each case must be viewed individually. The testimony of Mr. Albro clearly shows that the Division did not review the particular circumstances of this case but relied on a general policy of requiring restoration. The Hearing Officer finds the State has not met its burden to show the restoration order as set forth in NOV No. C-2621 should be affirmed.

III. Should the penalty assessment of \$1,850.00 as set forth in the violation be affirmed or modified?

The Director of DEM is authorized by R.I.G.L. § 42-17-6.2 to assess an administrative penalty to any person who fails to comply with any rule, regulation, order, permit license or approval issued by the Division or any law which the Division has the authority to enforce. This administrative penalty cannot be more than \$1,000.00 for each violation (R.I.G.L. § 42-17.6-7).

In this case, the Department has assessed the landowner a total penalty of \$1,850.00 for altering the jurisdictional wetlands. Mr. Albro testified that the Department calculates the amount to be assessed after reviewing the specifics for

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levying a penalty located in the "penalty matrix" section of the rules and regulations for penalty assessment (T. 18-20). Mr. Albro further testified that he developed an "interim matrix" for the staff to use as a guideline for assessing a penalty. (T. 17) Neither the penalty matrix nor interim matrix were produced at the hearing or included as exhibits. The ability of the Division of Freshwater Wetlands to issue administrative penalties is codified in the Department of Environmental Management Rules and Regulations for the Assessment of Administrative Penalties promulgated in August, 1987 (see Section 13) (hereinafter Penalty Rules). As such, the Hearing Officer takes administrative notice of that penalty matrix. The interim matrix developed by Mr. Albro will not be considered.

In addition to discussing the purpose and use of the penalty matrix, Mr. Albro detailed the specific basis for each assessment levied against the Respondent (T. 17-20). A review of the penalty matrix and Mr. Albro's testimony shows that the administrative penalty assessed to Mr. Corrigan was well within parameters outlined in the penalty rules and was not excessive. During this proceeding, the Respondent did not challenge the penalty. The Hearing Officer finds the State has met its burden on this issue, and accordingly, the administrative penalty as set forth in NOV C-2621 should be affirmed.

FACTS

After careful review of all testimonial and documentary evidence, the Hearing Officer makes the following recommended findings of fact and conclusions of law on which this Decision and Order is based:

1. A Notice of Violation and Order ("NOVAO") was issued to James Corrigan ("Respondent") on September 9, 1988.
2. Respondent received this NOVAO sometime between September 9, 1988 and September 20, 1988.
3. The NOVAO was recorded in the Foster Land Evidence Records on September 14, 1988 at Book 45, Page 453.
4. At the time that the NOVAO was issued, the Respondent was the legal owner of the property located approximately +2300 feet south of the intersection of Plainwoods Road and Jenks Road, approximately +300 feet east at Jenks Road at Pole No. 9, Assessor's Plat 1, Lot 68A in the Town of Foster, Rhode Island.
5. Respondent filed a request for an adjudicatory hearing on September 22, 1988.
6. Freshwater wetlands as defined by the Freshwater Wetlands Act ("Act"); specifically, a wooded swamp, 100-year flood plain, 100 foot riverbank and the fifty-foot perimeter associated with a wooded swamp are located on the site.
7. The freshwater wetlands on the subject site were altered and remain in an altered state.
8. The Respondent altered or permitted alteration of the freshwater wetlands on the site.
9. Neither the Respondent nor any other person received a freshwater wetlands permit to alter the wetlands on the site.
10. The Respondent is the current owner of the subject property.

11. That a proposed consent agreement was sent to Respondent in April 1991.
12. That a status conference was conducted on January 11, 1991 at the Offices of the Administrative Adjudication Division, One Capitol Hill, Providence, Rhode Island.
13. That a prehearing conference was conducted on May 7, 1992 at the Offices of the Administrative Adjudication Division, One Capitol Hill, Providence, Rhode Island.
14. That a hearing was held on June 15, 1992 at the Offices of the Administrative Adjudication Division, One Capitol Hill, Providence, Rhode Island.
15. That a view of the site was taken on June 16, 1992 by the Hearing Officer and the parties.
16. That Respondent altered the freshwater wetland on the subject site by vegetative clearing and deposition of fill material directly into approximately 2910 square feet of wooded swamp.
17. That Respondent altered the freshwater wetland on the subject site by placement of fill material into the zone A 100-year flood plain of an unnamed perennial river.
18. That Respondent altered the freshwater wetland on the subject site by vegetative clearing and filling within a 50 feet of a wooded swamp.
19. That Respondent altered the freshwater wetland on the subject site by vegetative clearing and filling on a 100-foot riverbank wetland, which is that area of land within 100 feet of the edge of a flowing body of water, less than 10 feet wide.
20. That the Respondent constructed a wooden timber bridge (13' X 6') made from 10' X 10' oak beams within the jurisdictional wetland.
21. That the Respondent constructed a 200' X 15' long driveway within the jurisdictional wetland.
22. That the Respondent dry-laid a stone wall 2' X 3' high on each side of the wooden timber bridge.

23. That the alterations to the wetland were done by Respondent using his hand, a wheelbarrow and a pickup truck.
24. That Respondent obtained and maintains a forest management plan for the 30-acre parcel designed by the DEM Department of Forestry.
25. That the property is a registered tree farm.
26. That Respondent has planted trees, shrubs, reclaimed dump, created a wildlife refuge on the property.
27. That the property is used as a nature refuge for the owner.
28. That Respondent intends to donate the 30-acre parcel to the Foster Land Trust.
29. That DEM Biologist Brian Lang inspected the property on August 19, 1988.
30. That the disturbance to the wetland was limited to a 15-foot construction easement.
31. That the property owner took efforts to control vegetative clearing.
32. That Rhododendron were planted along side of the bridge.
33. That DEM measures wetland values from the date the wetland becomes subject to regulation.
34. That this property became subject to wetland regulation on May 9, 1974.
35. That DEM has ordered restoration.
36. That restoration requires removal of all modifications to the jurisdictional wetland.
37. That DEM does not order restoration if the modification occurred before the wetland was regulated.
38. That each case must be viewed according a case-by-case basis.

39. That DEM ordered restoration without reviewing the particular circumstances of this violation.
40. That not all alterations to a wetland are prohibited.
41. That after the fact permits have been issued by the Division of Freshwater Wetlands in the past.
42. That the Department used the penalty matrix contained within the Assessment of Administrative Penalties promulgated in August, 1987 to assess the penalty.
43. That the assessment of a \$1,850.00 fine is well within the matrix guidelines and is not excessive.

#### CONCLUSIONS OF LAW

1. That a lawful notice of violations was issued in accordance with R.I.G.L. § 42-17.1-2(v).

2. That Respondent made a timely request for a hearing in accordance with R.I.G.L. § 42-17.1-2(u)(1).

3. That the Hearing Officer has the jurisdiction to render a recommended decision pursuant to R.I.G.L. § 42-17.7.1 et seq.

4. That the hearing was conducted pursuant to Freshwater Wetlands Act R.I.G.L. § 2-1-18 et seq. The Administrative Procedures Act 42-35 et seq. The statutes governing the Department of Environmental Management § 42-17.1-1 et seq. The duly-promulgated Rules and Regulations Governing the Enforcement of Freshwater Wetlands Act promulgated 1986 and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters promulgated July 1990.

5. That the State has the burden of proving each and every act or omission alleged by a preponderance of the evidence R.I.G.L. § 42-17.6-4.

6. That the State has met its burden to show a jurisdictional wetland was altered in violation of R.I.G.L. § 2-1-21(a) as alleged in NOV C-2621 issued September 9, 1988.

7. That the State has met its burden of showing by a preponderance of the evidence that the penalty issued conforms with R.I.G.L. § 42-17.1, 42-17.6 and the Rules and Regulations for the Assessment of Administrative Penalties promulgated August, 1987 and is not excessive.

8. That the State has failed to meet its burden of showing by a preponderance of the evidence that the restoration order in NOV C-2621 issued on September 9, 1988 should be affirmed.

Therefore, it is hereby

ORDERED

1. That the property owner cease and desist any work in the wetland without a permit.
2. That the property owner file a wetland permit application with the Division of Freshwater Wetlands forthwith.
3. That once the wetland permit application is filed the Department of Freshwater Wetlands is to conduct a freshwater wetland application review forthwith.
4. That the Hearing Officer will retain jurisdiction of this matter pending the outcome of the application process in the event Respondent wishes to pursue a further appeal from the freshwater wetland application review.
5. That Respondent is required to pay the \$1,850.00 administrative penalty set forth in the violation.
6. That payment is to be made within ten (10) days of the Agency's Final Decision and Order.
7. That payment of the administrative penalty is to be paid to Rhode Island Department Environmental Management, Office of Business Affairs, 22 Hayes Street, Providence, RI 02908.

Entered as an Administrative Order this 8<sup>th</sup> day of  
February, 1993.

*Patricia Byrnes*

Patricia Byrnes  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
One Capitol Hill, Third Floor  
Providence, RI 02908