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

RE: TAMMIE & MITCHELL PARKHURST
NOTICE OF VIOLATION NO. C90-0165

DECISION AND ORDER

This matter was heard before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") on March 22, 1993 pursuant to the Respondent's request for hearing on the Notice of Violation and Order issued by the Division of Groundwater and Freshwater Wetlands on November 19, 1990. Liability, that is that Respondents altered freshwater wetlands without approval of the Division, was established in the Decision on Division's Motion for Partial Summary Judgment entered as a final agency order on July 20, 1992. Summary Judgment on the issue of restoration, which was also addressed in said Decision, was later vacated. The within hearing was conducted on the remaining issues of administrative penalty and restoration.

This matter is properly before the Hearing Officer pursuant to the Freshwater Wetlands Act (R.I.G.L. Section 2-1-18 et seq.), statutes governing the Administrative Adjudication Division (R.I.G.L. Section 42-17.7-1 et seq.), the Administrative Procedures Act (R.I.G.L. Section 42-35-1 et seq.), the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, March 1981 ("Wetlands Regulations") and the Administrative Rules of Practice and Procedure for the Department of Environmental Management

Administrative Adjudication Division for Environmental Matters ("AAD Rules"). The hearing was conducted in accordance with the above-noted statutes and regulations.

BACKGROUND

On November 19, 1990 the Department of Environmental Management issued a Notice of Violation and Order (DEM 7) to Mitchell J. and Tammie J. Parkhurst alleging that they did accomplish or permit alterations of freshwater wetlands through garage construction and associated filling, grading and soil disturbance into a swamp, resulting in the loss and disturbance of approximately 350 square feet of wetland, and into a perimeter wetland, resulting in the loss and disturbance of approximately 700 square feet of wetland. The subject site is located approximately 200 feet southeast of Staghead Drive, approximately 1025 feet south of the intersection of Staghead Drive and Buck Hill Road, Block 2, Lot 139, in the Town of Burrillville, Rhode Island.

The Division seeks restoration of the wetlands areas and the assessment of an administrative penalty in the amount of two thousand ($2000.00) dollars.

Respondents argue that the Division was advised of an alleged wetlands violation months before the garage/barn was constructed and that if they had known they were violating statutes and regulations protecting freshwater wetlands, they would not have built the garage. They assert a laches

defense and their financial condition as factors to be considered in determining whether restoration and penalty assessment should be ordered.

PRE-HEARING CONFERENCE

A Pre-Hearing Conference was held on June 4, 1992.

John Pellizzari, Esq., appeared on behalf of Respondents and Catherine Robinson Hall, Esq., represented the Division of Freshwater Wetlands. There were no requests to intervene.

The parties agreed to the following stipulations of fact:

1. A Notice of Violation and Order ("NOVAO") was issued to Mitchell J. and Tammie J. Parkhurst ("Respondents") on November 19, 1990.

2. Respondents received the NOVAO on November 26, 1990.

3. The NOVAO was recorded in the Burrillville Land Evidence Records on November 20, 1990 at Book 147, Page 218.

4. At the time that the NOVAO was issued, the Respondents were the legal owners of property located approximately 200 feet south of the intersection of Staghead Drive and Buck Hill Road, identified as Assessor's Block 2, Lot 139 in the Town of Burrillville, Rhode Island, the "site."

5. Respondents' filed a request for an adjudicatory hearing on December 5, 1990.

6. Freshwater wetlands as defined by the Freshwater Wetlands Act ("Act"), specifically a wooded swamp and its associated fifty (50') perimeter wetland, are located on the site.

7. The freshwater wetlands on the subject site were altered and remain in an altered state.

8. The Respondents or their agents constructed a garage in freshwater wetlands on the site.

9. The Respondents altered or permitted alteration of freshwater wetlands on the site.

10. Neither the Respondents nor any other person received a freshwater wetlands permit to alter the wetlands on the site.

11. The Respondents are the current owners of the subject property.

The Division submitted the following exhibits which, by agreement, were marked as Full:

DEM 1. FULL — Resume of Harold K. Ellis (3 pp.)

DEM 2. FULL — Resume of Tracey A. Carlson (3 pp.)

DEM 3. FULL — Complaint Inspection Report by Tracey A. Carlson, dated October 17, 1990 (2 pp.)

DEM 4. FULL — Biological Inspection Report by Tracey A. Carlson, dated October 17, 1990 (3 pp.)

DEM 5. FULL — Recommendations to Supervisor by Tracey A. Carlson, dated October 18, 1990 (1 p.)

DEM 6. FULL — Photocopy of one (1) photograph of the subject site by Tracey A. Carlson, dated October 24, 1990.

DEM 7. FULL — Notice of Violation and Order, dated November 19, 1990; and certificate of authenticity and copy of receipt for certified mail (6 pp.)

DEM 8. FULL — Correspondence to Division of Freshwater Wetlands from Attorney Joseph E. Marran, III (request for adjudication hearing) dated received December 5, 1990 (1 p.)

DEM 9. FULL — Site Inspection Report by Tracey A. Carlson, dated September 4, 1991 (1 p.)

DEM 10. FULL — Certified copy of Building Permit Application from Burrillville Town Hall.

DEM 11 FULL — Department's Request for Production.

Respondents submitted the following exhibits which were marked as indicated:

Resp. 1 for Id — Map depicting Proposed Restoration Planting.

Resp. A. Full — Report from Natural Resources Services, Inc.

Resp. B. Full — Burrillville Conservation Commission.

Resp. C. Full — Complaint Data Sheet.

HEARING SUMMARY

The hearing of this matter was conducted on March 22, 1993. Rather than presenting a closing argument, the Division opted to file a post-hearing brief. Said memorandum was filed with the AAD on May 20, 1993.

The Division called as its witnesses Respondent Mitchell J. Parkhurst and Harold K. Ellis, the enforcement supervisor of the DEM Freshwater Wetlands program. By agreement, Mr. Ellis was qualified as an expert in wetlands ecology, interpretation of aerial photography and in natural resources.

Respondent's counsel called as witnesses Mitchell J. Parkhurst, Tammie J. Parkhurst, and David M. Tyler, a conservation officer with the rank of Captain, employed at the Rhode Island Department of Environmental Management.

As Respondents were found to have violated the Wetlands Act and Wetlands Regulations in the Decision on Division's Motion for Partial Summary Judgment, which was adopted as a final agency order by the Director on July 20, 1992 (and later vacated in part as to restoration only), the hearing was for

the purpose of considering and determining the issues of restoration and assessment of the administrative penalty.

The Division bore the burden of proving by a preponderance of the evidence that the Department is entitled to the relief requested in the Restoration Order and Penalty Assessment as set forth in the NOVAO.

I. LACHES DEFENSE

Respondents argue that the Department should be estopped from requiring that the garage be removed and the area restored to its natural state because DEM had received notification on June 4, 1990 of wetlands violations, specifically of fill being brought onto the site, and took no action until November 19, 1990 when the NOVAO was issued to the Parkhursts, long after the garage had been constructed. Respondents' Prehearing Memorandum, p. 1.

As put forth by Respondents' counsel,

> Laches in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief. Chase v. Chase, 37A804, 805, 20 RI 202 (1897). See Respondent's Prehearing Memorandum,

p. 3.

Though counsel for the Division argued at the hearing that "this tribunal has no authority to make a ruling on equitable defense" (Tr. p.29), I allowed Respondent to present and elicit testimony regarding a possible laches defense.

In considering such a defense, I have re-examined my ruling in Michael Parrilla, AAD No. 91-007/ISA, Decision on Applicant's Motion for Summary Judgment, entered November 30, 1992, wherein I had concluded that "the DEM Administrative Hearing Officers have no statutory authority to provide or consider equitable or injunctive relief." at 8-9. This determination, at least as it concerns equitable defenses, would seem to be over-broad and would frustrate the Administrative Hearing Officer's obligation pursuant to R.I.G.L. § 42-17.7-6 to provide a recommended Decision and Order to the Director; that is, unless the defenses are explicitly limited by statute or regulation whereby equitable defenses are not available, they should be brought to the Director's consideration since, if the matter were to be appealed to the Superior Court under the Administrative Procedures Act, and specifically § 42-35-15, equity matters would be considered in that forum. (Tr. 64-65).

Additionally, as Judge Israel most recently noted in Corrigan v. Dept. of Environmental Management, C.A. No. 93-1529 (R.I. Super Ct. October 15, 1993), there is "reputable

authority for the proposition that administrative orders may be tempered by equitable considerations." at 8. He quoted Niagara Mohawk Power Corporation v. Federal Power Commission, 379 F2d 153, 160 (D.C. Cir. 1967):

> The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice. Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice. (Emphasis supplied by Judge Israel).

Having allowed that equitable principles can and should be considered in this forum, I am aware that, as a general rule, courts are reluctant to invoke estoppel against the government. Lerner v. Gill, 463 A2d 1352, 1362 (RI 1983). Only in "unusual or extraordinary circumstances" can the doctrine of equitable estoppel be applied against government. The party seeking the estoppel must show, inter alia, affirmative misconduct on the part of the government; "sluggishness and torpor on the part of a governmental agency, standing alone" is insufficient to portray affirmative misconduct. Newport Nat. Bank v. U.S., 556 F. Supp. 94, 98 (D. RI 1983). The facts and circumstances of each case must be closely scrutinized to determine whether justice requires the imposition of estoppel. Lerner at 1362.

Though the Lerner court espoused the general rule against governmental estoppel, it reiterated its decision in Ferrelli v. Department of Employment Security, 106 RI 588, 261 A2d 906 (1970) wherein it held that in proper circumstances a public agency may be estopped. In Lerner, the Rhode Island Supreme Court proceeded to weigh whether the petitioner Maurice Lerner, an inmate at the ACI, was entitled to the imposition of estoppel against the government in order to obtain an earlier parole. The Court employed the standard that, to determine whether estoppel should be exercised against the government, it must not only consider the problems encountered by the petitioner, but must also be mindful of the public interest. at 1363. See United States v. Wharton, 514 F2d 406, 412-13 (9th Cir. 1975); Beacom v. Equal Employment Opportunity Commission, 500 F. Supp. 428, 435 (D. Ariz. 1980).

The Lerner court considered that the public has a strong interest in whether and when an inmate is deemed eligible for parole and concluded that it was important for the public safety and welfare that parole statutes be strictly applied. There, the public interest greatly outweighed the arguments for estoppel.

I have considered the Parkhurst's assertion of laches against the Department of Environmental Management on several levels: whether Respondents have presented sufficient

evidence to support such a claim; assuming that they have done so, whether it should be applied as an estoppel against the government; and if estoppel should not apply, whether restoration in its entirety should be "tempered by equitable considerations."

Among the elements which must be proved to support the laches defense is that the Wetlands Section "knowing his rights" took no steps to enforce them until the Parkhursts' condition in good faith became so changed that they cannot be restored to their former state. Chase at 805. Respondents' witness David M. Tyler, a DEM conservation officer who was also chairman of the Burrillville Conservation Commission ("BCC"), testified that he was in the area on routine patrol in December 1989 when he requested his dispatcher to advise the Wetlands Section of suspected multiple freshwater wetlands violations on Staghead Drive. (Tr. 128-129). The May 25, 1990 letter from the BCC, received by the Department of Environmental Management Division of Groundwater and Freshwater Wetlands on June 4, 1990 (Resp. B. Full), was sent as a follow-up when the BCC failed to receive comment from the Division as a result of the December verbal complaint. (Tr. 132). Harold K. Ellis testified that he received the letter and that the Division eventually took action in October 1990 when Tracey Carlson, a DEM senior natural resource specialist, conducted a site inspection. (Tr. 32-33). A NOVAO (DEM 7

Full) was issued to Respondents on November 19, 1990.

Under cross examination, Mr. Tyler explained that the BCC letter refers to "at least seven different parcels of property" (Tr. 146) on two different streets; that he did not know who owned the properties; and that his complaint was regarding fill and construction in swamp of "that row of houses, that whole section of houses at that location." (Tr. 147). He was not offered as an expert in wetlands biology; his was a lay witness opinion, though perhaps more knowledgeable than most.

In response to questioning by Respondent's counsel, Mr. Ellis explained the delay in investigating the BCC Communication and spoke of numerous groundless complaints received by the Department:

> Q. Why did the Department wait until October in taking action on that complaint?
> *
> *
> A. We didn't wait, we took action as soon as we could get there.
>
> Q. Is your Department handling numerous complaints of this nature?
> A. Yes.
>
> Q. Approximately how many?
> A. At the time of this complaint, we had over a thousand complaints yet to investigate and we only had three people investigating. We also were receiving an additional seventy complaints per month and we simply cannot get to them all.....
>
> Q. Is it your testimony that at the time you received this complaint it was utterly impossible for your Department to take action within a

relatively few weeks?
A. If taken in order of complaint, yes.

Q. Is that how our Department responds to complaints, in chronological order?
A. As best as we can, yes. We have no idea of what the severity of the problem is, over fifty percent of our complaints are unfounded. There really isn't a wetland out there and we shouldn't be there, but we have to spend the time to go to the site. (emphasis added) Tr. 33-34.

Even without Mr. Tyler's testimony that the BCC letter did not place the Division on notice as to the Parkhursts' property interest and may not even have dealt with the fill used for the garage but rather for the completed house, Mr. Ellis' above testimony establishes that the Division did not knowingly rest on its rights. Over fifty percent of the complaints received by the Division, once investigated, are determined to be unfounded; therefore it was more likely than not that the Division would find in its site visit that it had no rights to enforce.

Further, as the Court expressed in Hyszko v. Barbour, 448 A.2d 723, 727 (RI 1982), the laches defense may be successfully invoked "when unexplained and inexcusable delay have the effect of visiting prejudice on the other party." While it is unfortunate that the Parkhursts continued building the barn/garage when, if earlier advised of the violation their actions would have ceased and the expense of tearing down the barn been avoided, Mr. Ellis provided sufficient explanation for the delay in investigating the complaint.

On the basis of the evidence presented by the parties, the laches claim is not supported by the facts; further, had laches been proven, Respondent has not shown the unusual or extraordinary circumstances, nor the affirmative misconduct necessary to obtain equitable estoppel against a government agency.

I do not reach whether Respondents have proven the other elements necessary to support a laches defense.

II. RESTORATION

As a violation of R.I.G.L. § 2-1-21 has already been established, both by stipulation of the parties and through the Decision on Division's Motion for Partial Summary Judgment, I have reviewed the documentary and testimonial evidence of record to determine whether the Parkhurst situation presents such equitable considerations, short of laches and government estoppel, so as to merit less than the complete restoration sought by the Division.

§ 2-1-23 provides that "[i]n the event of a violation of § 2-1-21, the director of environmental management shall have the power to order complete restoration of the fresh water wetland area involved by the person or agent responsible for the violation." The NOVAO cited two instances whereby Respondents violated the Wetlands Act:

Instance (1)

> Garage construction and associated filling, grading and soil disturbance into a swamp.

The above alteration has resulted in a loss and disturbance of approximately 350 square feet of wetland.

Instance (2)

Garage construction and associated filling, grading and soil disturbance into a perimeter wetland (that area of land within 50 feet of a swamp). The above alteration has resulted in a loss and disturbance of approximately 700 square feet of wetland.

If the NOVAO had become a compliance order due to lack of a timely request for a hearing, the following relief would have been ordered:

1. ***

2a. Restore the freshwater wetland cited in instance number one above to its state as of July 16, 1971 insofar as possible before December 15, 1990.

2b. Restore the freshwater wetland cited in instance number two above to its state as of May 9, 1974 insofar as possible before December 15, 1990.

3. Contact this Department (277-6820) prior to the commencement of restoration to ensure proper supervision and to obtain required restoration details by representatives of this Department.

4. Within ten (10) days of receipt of this Order, pay an administrative penalty in the sum of two thousand dollars ($2,000.00)....

As explained by Mr. Ellis, the dates "July 16, 1971" and May 9, 1974" set forth in paragraphs 2a) and 2b) above, refer to the enactment of the Freshwater Wetlands Act protecting the swamp identified in "Instance (1)" and the later legislative

amendment to include protection of the perimeter wetland identified in "Instance (2)." (Tr. 12).

The Division seeks adoption of the above provisions with an adjustment of the restoration completion dates, in this Decision and Order.

Mr. Ellis determined the condition of the site prior to alteration through examination of 1985 aerial photographs which indicated that the swamp and the fifty-foot perimeter had been forested. (Tr. 13). He testified that restoration of the wetlands to its state as it existed as of July 16, 1971 and May 9, 1974 would be accomplished by the following:

> In both areas, Instance 1 and 2, in the swamp and the fifty-foot perimeter, we would ask that the foundation, the garage in its entirety, that portion which falls within that area of land of fifty feet of the swamp and within the swamp be removed. That all original grades be returned and that any foreign soil that's been placed in there, if there is any underneath the foundation, be replaced with a soil suitable for growth for vegetation. That sedimentation controls, hay bales or silt fence be placed along the edge of the required restoration and that the area be stabilized with grasses so that erosion won't occur, and that the area be planted with trees throughout all the restored areas.
>
> Trees would be ten feet on center, that's the standard we use, four feet in height, species that's indigenous to the area and shrubs would be planted five feet on center throughout the entire restored area, and three feet in height and they would also be a species that were indigenous to the area. (Tr. 14-15).

Although the Division asserts in its Post-Hearing Memorandum, at 11, that "the Court has held that the General

Assembly intended that "complete restoration" be required", I find no case law supporting this position. (emphasis added). Though § 2-1-23 grants the director the power to order complete restoration, both the Director and the Court, to varying degrees,have recognized that complete restoration is not an absolute. In James Corrigan, AAD No. N/A, Final Decision and Order, dated February 25, 1993, the Director wrote: "the Division is entitled to have the site restored to its original state insofar as possible, absent evidence to the contrary." At 1 (emphasis added). Upon Corrigan's appeal to the Superior Court, Judge Israel stated:

> The question in this case is not whether or not the Director has the power to order restoration. Of that there is no question. Of course, she has. The question is rather, whether she should exercise that power in this case. Corrigan v. Dept. of Environmental Management, Supra at 5. (emphasis supplied).

He went further:

> Discretion is always exercised on a case-by-case basis. The Hearing Officer was correct when she held that the Department was required to consider the particular facts of each case in deciding whether the case is an appropriate one for the imposition of an order of complete restoration. The Department plainly has the power to order total restoration, partial restoration, or no restoration at all, as the particular facts of each case warrant. at 5-6.

Accordingly, I have reviewed the testimony of Harold K. Ellis and of Respondents' witnesses, as well as the exhibits, to determine what degree of restoration is warranted in this

matter. The Division's position is set forth above: they require complete restoration. Respondent's case relied upon the cross examination of Mr. Ellis, the submission of the document marked "Resp. A Full," and the argument that removal of the barn/garage would cause a "hardship" to Respondents.

Judge Israel's analysis of the law and facts in Corrigan provides guidance in weighing the equities presented herein. There, the Court considered the Director's argument that a wrongdoer should never be allowed to benefit from his wrongdoing, stating that it was a principle "long-established and well-recognized both in the common law and in equity." at 5-6. The Judge concluded, however, that Mr. Corrigan had provided clear and convincing evidence in mitigation and extenuation of his violation and noted in particular the Department's testimony regarding the environmental sensitivity displayed by the plaintiff as well as the testimony that no economic development of the land was intended.

Based on the singular circumstances of the Corrigan matter, the Court determined that it would be inequitable to force the Respondent to restore the wetlands. As the court found, "it does not appear likely that a violator will ever stand to benefit personally so little from his violation as this plaintiff, while the public might have so much to gain." at 7.

Corrigan bears little similarity to the instant matter.

No evidence was presented of any Parkhurst effort to prevent adverse environmental impact and the barn/garage was built for their own use. As Judge Needham expressed in Parillo v. Durfee, C.A. No. 92-5722 (R.I. Super Ct., May 24, 1993):

> "Were an individual such as the plaintiff allowed to circumvent the Wetlands Act by ignoring and/or forgetting to obtain approval prior to alteration of the wetland, then the Wetlands Act would be unfairly applied discriminately with respect to applicants thus endangering the State's program for preserving its wetlands.." at 12.

It is not in the public interest nor would equity be served if the Parkhursts were allowed to "reap the benefits" of wetlands alterations without a permit in violation of the law.

Having considered the evidence presented by both parties, I find that the barn/garage must be sacrificed in this instance and the restoration requested by the Division be imposed.

III. ADMINISTRATIVE PENALTY

As indicated in the NOVAO, the Division seeks an administrative penalty of one thousand ($1.000.00) dollars for each of the two instances whereby the Respondents violated the Freshwater Wetlands Act. Mr. Ellis, who ultimately determined the penalty, testified that the Division examined the nature of the violations themselves: the extent of area which was altered, the type of vegetation affected, the nature of the alteration (whether it was clearing understory "or going as

far as constructing a structure." Tr. 24), and the water quality classification of the nearby pond and its watershed. He also had considered that at the time of construction, there were no sedimentation controls or other efforts to mitigate any harm from the alterations. In evaluating the public interest and in light of the above considerations, Mr. Ellis had concluded that this matter merited the maximum penalty of two thousand ($2,000.00) dollars.

He testified that he had not considered Respondents' financial condition in determining the penalty. (Tr. 66).

Pursuant to the provisions of R.I. Gen. Laws §42-17.6-6, and particularly subparagraph (g), as well as Section 9 of the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Regulations") then in effect, I allowed Respondents to present testimony as to financial condition.

Mitchell Parkhurst testified about the limited family income, the lack of any savings, the existence of costly medical problems within the family, outstanding loan obligations, and the cost of the building materials used for construction of the garage which would now be lost. Mr. Parkhurst indicated that he personally built the garage with only the help from his father and that he would be unable to afford paying someone to remove the structure and its concrete foundation. He would have to do it himself. (Tr. 87-91, 97, 106).

Of particular concern was the testimony that a leaching field and reserve area would have to be crossed in order to remove the garage. The garage, according to Mr. Parkhurst, was not intended for vehicles and he is convinced that driving over the leaching field will destroy it. Mr. Parkhurst had been able to deliver the building materials to the garage site without damaging the ISDS because his neighbor had allowed him access to the area by crossing onto the abutting property. The neighbor has since installed a stone wall on the border. (Tr. 82, 97, 109, 110-112).

It was Mr. Parkhurst's belief that, in order to avoid damage to the ISDS, the concrete foundation would have to be broken-up and removed in small pieces so that heavy machinery would not be needed. He opined that such a removal would take two years. (Tr. 112). Replacement of the ISDS, if the leaching field was destroyed, was estimated at $6,000.00. (Tr. 110).

Another factor raised by Respondent's counsel through testimony was that if Mr. Parkhurst had known the location where he intended to build the garage was in wetlands, he would not have built it. (Tr. 85, 92, 101). Intent can be a consideration in the determination of the administrative penalty. §42-17.6-6(i).

In light of the above testimony dealing with the potential costs to be incurred by the Respondents, their

financial condition, and avowed lack of intent to violate the Freshwater Wetlands Act, I have reviewed the Penalty Regulations to determine an appropriate reduction in the assessment of an administrative penalty. Accordingly, it is my recommendation that the wetland and perimeter wetland violations, both found to be "Major" as set forth in the Penalty Matrix, should receive the minimum penalty for that category; that is, instance number one, dealing with the wetland proper, should be reduced to $750.00 and instance number two, involving the wetland perimeter, should be assessed at $500.00.

IV. CONCLUSION

As ordered below, Respondent is presented with a narrow time frame to remove the structure, complete the restoration, and pay the penalty. While I recognize that, according to Respondent's testimony, his circumstances are such that an expanded period would cause less hardship, the dates set forth below are for the purpose of obtaining some finality in the final agency order. That is, if Respondent determines to make no effort at compliance, the Department must have the avenue of promptly being able to seek relief in Superior Court.

It is suggested, however, that the parties agree to a more expanded time frame for both restoration and payment of the penalty.

Wherefore, after considering the testimony and

documentary evidence of record, I make the following:

FINDINGS OF FACT

1. Mitchell J. and Tammie J. Parkhurst (the "Parkhursts") own property located approximately 200 feet south of the intersection of Staghead Drive and Buck Hill Road, identified as Assessor's Block 2, Lot 139 in the Town of Burrillville, Rhode Island (the "site").
2. Freshwater wetlands as defined by the Freshwater Wetlands Act ("Act"), R.I. Gen. Laws § 2-1-18 et seq., specifically a wood swamp and its associated fifty (50') foot perimeter wetland are located on the site.
3. On October 18, 1990, the Department inspected the site and discovered wetlands alterations on the site; specifically garage construction and associated filling, grading and soil disturbance into a swamp and its associated fifty (50') foot perimeter wetland.
4. A Notice of Violation and Order ("NOVAO") was issued to Mitchell J. and Tammie J. Parkhurst on November 19, 1990 for altering freshwater wetlands on their property.
5. The Parkhursts filed a request for an adjudicatory hearing on December 5, 1990.
6. The freshwater wetlands on the site were altered and remain in an altered state.
7. The alterations to the freshwater wetlands cited by the

Department in the NOVAO occurred during 1989 and 1990.

8. The alterations occurred on the Parkhursts' property.

9. The alterations that occurred within the freshwater wetlands on the Parkhursts' property include garage construction and associated filling, grading and soil disturbance.

10. The Parkhursts altered and permitted the alteration of the freshwater wetlands on the site.

11. Neither the Parkhursts nor any other person received a freshwater wetlands permit to alter freshwater wetlands on the site.

12. The freshwater wetlands on the site were altered without a freshwater wetlands permit, and therefore in violation of the Act.

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

14. Respondents have limited financial resources.

15. An administrative penalty in the total amount of one thousand two hundred fifty ($1,250.00) dollars is not excessive and is reasonable and warranted.

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

CONCLUSIONS OF LAW

1. The Department of Environmental Management ("DEM") has jurisdiction over the freshwater wetlands located on Respondents' property.
2. The freshwater wetlands located on Respondents' property were altered without a wetlands alteration permit from DEM.
3. The Division had reasonable grounds to believe that Respondents and/or their agents violated the Freshwater Wetlands Act which warranted the issuance of the NOVAO to the Respondents.
4. The Parkhursts are responsible for the wetlands alterations on their property.
5. The freshwater wetlands on Respondent's property were altered by Respondent in violation of §2-1-21 of the R.I. Gen. Laws and the regulations promulgated pursuant thereto, as alleged in the NOVAO dated November 19, 1990.
6. The Department is entitled to the relief requested in the Restoration Order as set forth in the NOVAO.
7. The Department is entitled to an administrative penalty in the total amount of one thousand two hundred fifty ($1,250.00) dollars.

Wherefore, it is hereby

ORDERED

1. That the Respondents must comply with the Restoration Order as set forth in the NOVAO and completely restore the subject wetlands in accordance with the requirements of the Department's Division of Freshwater Wetlands no later than March 1, 1994;

2. That the Respondent contact the Division of Freshwater Wetlands prior to the commencement of restoration to ensure proper supervision and to obtain the required restoration details from the representatives of said Division.

3. That the Respondents must pay a total administrative penalty of One Thousand Two Hundred Fifty ($1,250.00) dollars to the Department no later than January 10, 1994. Said payment shall be made directly to:

Rhode Island Department of Environmental Management
ATTENTION: Robert Silvia
Office of Business Affairs
22 Hayes Street
Providence, RI 02908

Entered as an Administrative Order this 13th day of December, 1993 and hereby recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

FINAL AGENCY DECISION

RE: TAMMIE & MITCHELL PARKHURST
NOTICE OF VIOLATION NO. C90-0165

I concur with the recommended decision of Hearing Officer in that the Corrigan v. Department of Environmental Management, C. A. No. 93-1529 (R. I. Super. Ct. October 15, 1993) may not be controlling. The Corrigan decision, although recent, must be read in light of Conklin Limestone v. State, 489 A.2d 327 (R.I. 1985), Wood v. Davis, 488 A.2d 1221 (R.I. 1985), and other Superior Court cases. See, Williams v. Durfee, C.A. No. 92-1216 (R.I. Super. Ct., July 6, 1993, and Parrillo v. Durfee, C.A. No. 92-5722, R.I. Super. Ct., May 24, 1993. In this case, however, I hereby adopt the recommended findings of fact and conclusions of law submitted by the hearing officer. Therefore, the recommended decision and order is adopted as a final agency decision.

Entered as a Final Agency Decision this 24th day of December, 1993.

LOUISE DURFEE, DIRECTOR
Rhode Island Department of
Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within Final Agency Decision to be forwarded by regular mail, postage prepaid to John Pellizzari, Esq., Oster & Groff, 936 Smithfield Avenue, P.O. Box B, Lincoln, RI 02865-0087 and via interoffice mail to Patricia C. Solomon, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 20th day of December, 1993.

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