

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: OBF, LLC
AAD No. 07-006/FWE
Notice of Violation 2007/428FW
2009

DECISION AND ORDER

This matter came on before the Administrative Adjudication Division for Environmental Matters (AAD) on an Appeal filed by OBF, LLC (OBF) seeking review of a Notice of Violation dated September 18, 2007 (NOV) and Amended Notice of Violation dated March 25, 2008 (ANOV). This matter is properly before the Hearing Officer pursuant to the Freshwater Wetlands Act (R.I.G.L. § 2-1-18 et seq.), the statutes governing the AAD (R.I.G.L. § 42-17.7-1 et seq.), the Administrative Procedures Act (R.I.G.L. § 42-35-1 et seq.), the duly promulgated Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act (“Wetlands Regulations”), the Administrative Rules of Practice and Procedure for the AAD, and the Rules and Regulations for Assessment of Administrative Penalties (“Penalty Regulations”). The hearing was conducted in accordance with the above noted statutes and regulations.

The Respondent was represented by its President, Craig S. Hibbad, and the Rhode Island Department of Environmental Management, the Office of Compliance and Inspection (OCI), was represented by Marisa A. Desautel.

A Prehearing Conference was held on August 27, 2008. An Administrative Hearing was held on October 20, 21 and November 5, 2008. Respondent submitted a closing statement on November 13, 2008 and OCI filed a Post Hearing Memorandum on January 5, 2009.

A. ALLEGED VIOLATIONS

The NOV and ANOV both allege that the Respondent has committed violations of R.I.G.L. § 21-1-21 and Rule 7.01 of the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act.

1. The NOV dated September 18, 2007 alleges the Respondent committed the following unauthorized activities:
 - a. Filling (in the form of at least sand, gravel, and rocks), excavating, and installing a house foundation with associated building materials within a Swamp-Marsh Wetland Complex. These activities have resulted in the unauthorized alteration of approximately 11,500 square feet of Freshwater Wetlands.
 - b. Filling (in the form of at least sand, gravel, and rocks) within a 50-foot Perimeter Wetland. These activities have resulted in the unauthorized alteration of approximately 2,800 square feet of Freshwater Wetland.
 - c. Filling (in the form of eroded sediments) within an Area Subject to Storm Flowage. This activity has resulted in the unauthorized alteration of approximately 20 linear feet of Freshwater Wetland.
 - d. Filling in the form of a structure (the top of a house) within the Swamp-Marsh Wetland Complex and Perimeter Wetland. This activity had resulted in the unauthorized alteration of approximately 350 square feet of Freshwater Wetlands. In addition, fencing was installed to corral animals in the wetland.
2. The ANOV dated March 25, 2008 alleges the following additional unauthorized activities:
 - a. Installation of post and wire fencing within the Swamp-Marsh Wetland Complex and Perimeter Wetland. This activity resulted in the placement of approximately 1,300 linear feet of fencing in

Freshwater Wetlands and the creation of an approximately 60,000 square foot corral within Wetland areas.

b. Clearing vegetation and compacting soil throughout portions of the corralled Swamp-Marsh Wetland Complex and Perimeter Wetland with: construction equipment, farm animals and stockpiling of cut vegetation within the Wetland areas. This activity resulted in the alteration of various portions of the approximately 60,000 square-foot corralled area.

The alleged violations in the ANOV arise upon the determination by the Division of Agriculture (DOA) that the Respondent did not meet the definition of Farmer pursuant to R.I.G.L. § 2-1-22 (i) (1) and (j). Both the NOV and ANOV, DEM alleges that the Respondent carried out the activities without receiving prior approval from DEM to alter the Freshwater Wetlands.

B. STIPULATED FACTS

The following Stipulations of Facts were agreed to by the parties at the Prehearing Conference:

1. The subject property is located approximately 200 feet north of Simmons Road at utility pole no. 20, approximately 800 feet west of its intersection with East Main Road, Assessor's Plat 29, Lot 18, in the Town of Little Compton, Rhode Island (the "Property").
2. The Property is currently owned by OBF, LLC (Craig S. Hibbad, President). It was purchased by OBF, LLC on October 5, 2005.
3. On February 16, 2006, a Notice of Intent to Enforce (NOIE) was issued to the Respondent by OCI.
4. On May 2, 2006, a report was received by OCI from the Respondent's environmental consultant indicating that they made a preliminary assessment of the issues raised in the NOIE. A request was made to extend the deadline for restoration.
5. OCI Inspected the Property on November 9, 2006. During the inspection the OCI inspector spoke with the Respondent, Mr. Hibbad. Mr. Hibbad advised the OCI inspector that he had permission from the DEM Division of Agriculture (DOA) to install fencing on the Property.
6. A Cease and Desist Order (C&D) was left on the Respondent's doorstep on September 13, 2007. The Respondent contacted the OCI regarding the C&D.
7. A Notice of Violation (NOV) was issued by DEM to the Respondent on September 18, 2007.
8. The Respondent requested a timely administrative adjudicatory hearing on the NOV.
9. An Amended Notice of Violation (ANOV) was issued by DEM to the Respondent on March 25, 2008.

C. HEARING SUMMARY

Ten (10) witnesses testified at the Administrative Hearing; five (5) for OCI and five (5) for the Respondent. The witnesses were scheduled on the basis of their availability and the order of the testimony for each side was sometimes interrupted. The first witness for OCI was Jenna Testone. Jenna Testone has been employed by DEM for five (5) years as an environmental scientist, the last three (3) of which were with OCI. Ms. Testone testified that she is familiar with the subject premises at 25 Simmons Road, Little Compton, Rhode Island and inspected the property on six (6) occasions. She testified that the inspections occurred on the following dates: (1) February 2, 2006; (2) November 9, 2006, (3) March 1, 2007; (4) April 23, 2007; (5) September 13, 2007 and (6) November 9, 2007. She testified as a fact witness as to her observations upon each visit. She also testified regarding the report she prepared reflecting her inspections. These reports were added into evidence during her testimony and are listed as follows: OCI #8 Full, OCI #9 Full; OCI #11 Full, OCI #12 Full, and OCI #15 Full.

Ms. Testone testified that on her first inspection on February 2, 2006 (The actual date may have been February 1, 2006 as reflected in OCI Exhibit #1 Full.) she observed sediment and gravel fill

and a concrete foundation within 50 feet of the wetlands complex. She also observed no erosion controls in place.

Ms. Testone testified that she next inspected the premises on November 9, 2006 and the condition was unchanged from the previous inspection except for the addition of fencing and the top of a house, both within 50 feet of the wetlands complex. She referred to Exhibit OCI #9 Full which contained a narrative description and photographs.

Ms. Testone testified that on March 1, 2007 she returned to the premises where she observed the previous conditions as well as additional fencing, miscellaneous debris and construction materials within 50 feet of the wetlands complex.

Ms. Testone testified that on April 14, 2007 she had taken a complaint from the Little Compton Building Inspector, Mike Mello. The complaint, which was admitted as OCI #10 Full, indicated that Respondent was bringing sheds and a chicken coop within the wetlands. It also noted that the foundation and fill material had not been removed. Ms. Testone inspected the premises on April 23, 2007 and noted that, in addition to the previous condition, the premises now contained a mobile house, small shed, dog pen and miscellaneous debris within 50 feet of the wetlands complex. Her report entered as OCI #11 Full also contained pictures of the premises.

On September 13, 2007 Ms. Testone, together with DEM environmental scientist Howard Cook, visited the subject premises. At that time she observed the same condition with the addition of a full stock pile and another shed within 50 feet of the wetlands complex. There was also new fencing for animals within the wetlands complex. Her report including photographs was admitted as OCI #12 Full. During that visit Ms. Testone left a Cease and Desist Order at the Respondent's premises a copy of which was admitted as OCI #13 Full.

On November 9, 2007 Ms. Testone and Howard Cook next visited the premises for the purpose of "flagging" the wetlands complex. The purpose of "flagging" is to delineate the wetlands complex and establish a point from which remediation can be performed. The wetlands complex is determined by soil hydrology, vegetation and aerial photography. Ms. Testone testified that at some points the fill was so deep that the border of wetlands could not be readily discernable and was established by review of historic aerial photography.

Ms. Testone's direct testimony indicated that the Respondent had not sought or received permission to alter the wetlands as required by law. A Notice of Intent to Enforce, OCI #3 Full was issued on February 16, 2006 but Respondent has not complied. OCI questioned Ms. Testone regarding her education and experience and requested that she be acknowledged as an expert. The request to admit Ms. Testone as an expert witness was denied and her testimony would be taken on the basis of her factual observations.

The Respondent conducted a brief cross-examination which did not substantially take away from or add to her testimony.

Michael Mello was the next witness to be called. Mr. Mello was a Respondent's witness who was called out of sequence as a courtesy to him upon the agreement of the parties. Mr. Mello is the Building Inspector for the Town of Little Compton, Rhode Island and has been such since 2005. Mr. Mello testified that on November 28, 2005 Respondent's President, Craig Hibbad, visited his office at the Town Hall. Mr. Hibbad was seeking permission to move a dwelling at 25 Simmons Drive from directly on the street to approximately fifty (50) feet back. During this visit Mr. Mello called DEM and spoke with an individual who he believed to be David Chopy. This call was placed because of a concern as to the status of wetlands on Respondent's premises. Mr. Mello testified that he identified the premises by Plat and Lot from the tax assessor's rolls. He testified that the response he received from "David Chopy" was that there were no wetlands on the premises. On the basis of this information he issued a permit to the Respondent.

Mr. Mello was cross-examined briefly by counsel for OCI. He indicted that at the time of the call to Mr. Chopy he had been on the job for only six (6) months. He testified that he had no familiarity with freshwater wetlands and alternatives. He testified that he never gave Mr. Hibbad a foundation permit but a moving permit. He conceded that this was a mistake on his part.

Alfred Bettencourt, Jr. was called next by the Respondent, out of order with the agreement of OCI. Mr. Bettencourt testified that he is the Executive Director of the Rhode Island Farm Bureau which is an advocacy group for farmers. He testified that Mr. Hibbad had been a member since 1992. He said that he is very familiar with farm practices and that very few are full time farmers. Upon cross-examination he stated that he considered Mr. Hibbad a farmer based on personal knowledge. There are no specific criteria for determining a farmer in the Farm Bureau. He testified that he is familiar with the Freshwater Wetlands Act and the income requirement. On redirect Mr. Bettencourt testified that he considered Mr. Hibbad to be engaged in "normal farming activities". He testified that it is not uncommon to have cattle on a wetland. Respondent's Exhibit #13, Mr. Bettencourt's Resume was admitted as a Full Exhibit.

Howard Cook was called by OCI. He testified that he has been employed by DEM for nine and a half (9 1/2) years as an environmental scientist. His primary duties involve taking complaints and evaluating wetlands.

He testified that he is familiar with the subject premises and was present for two site inspections. On November 11, 2007 he assisted in the placement of flags to delineate the wetlands complex and the fifty (50) foot buffer. He made two sketches which are part of OCI #15 Full. The sketches show land marks in relationship to the swamp edge and the buffer.

Mr. Cook testified about his Resume which was admitted as OCI #21 Full. He reviewed his education and experience including approximately more than one thousand (1000) inspections. He testified that he had previously been qualified as an expert witness. Mr. Cook was recognized as an expert in wetlands ecology without objection.

Mr. Cook testified that he is familiar with R.I.G.L. § 2-1-21. He testified that he believes that there was a violation of the Freshwater Wetlands Act as a result of the disturbance of wetlands and the presence of structures without a permit.

Mr. Cook reviewed the report of Natural Resources Services, Inc. dated April 30, 2006, which was later marked as OCI #4 Full. Mr. Cook disagreed with the report on the issue of a prior structure on the spot where the new foundation was installed. He stated that there were structures which predated the Act but they were not in that location.

On cross-examination Mr. Cook testified that he had been to the subject premises for two (2) inspections for a total of about two (2) hours. He acknowledged that he did not know where the septic system was located. He stated that the purpose of flagging the property was to delineate the wetlands complex and buffer.

Kenneth Ayars was OCI's next witness. Mr. Ayars stated that he has been the Chief of the DEM Division of Agriculture for more than ten (10) years. Mr. Ayars' Resume was admitted without objection as OCI #23 Full. He described his duties in part as overseeing agricultural wetlands and the agricultural farmer qualification process. Mr. Ayars was recognized without objection as an expert in the area of agriculture, definition of a farmer under the Rhode Island Freshwater Wetlands Act and farmer qualification process.

Mr. Ayars stated that he was familiar with the property and the Applicant. He visited the site several times over the last two and half years. He has known Mr. Hibbad since childhood. He was shown a copy of an email from himself to Steve Tyrrell dated February 20, 2007 which was marked OCI #7 Full without objection.

Mr. Ayars testified that he is familiar with R.I.G.L. § 2-1-22 and 23. He read from OCI #7 Full that "the concrete house foundation housetop serving as an animal housing facility are structures which are not within the definitions of Rhode Island General Laws 2-1-22 I 1 or 2 as normal or new farming activities". He said structures are not within categories which he could issue a permit. Fencing is considered to be normal farming activity, one that is exempted from permitting. Mr. Ayars testified that he initially considered Mr. Hibbad to be a farmer. He said this was based on his observations and conversations. He said that the qualifying process required the Applicant to meet the components in writing. Mr. Ayars reviewed Respondent's #10 which

became a Full Exhibit. The exhibits included Tax Form Schedule F Form 1040 for the years 2000, 2001, 2002, 2003, 2004 2005, 2006 and 2007.

Mr. Ayars testified that the definition of farmer required at least \$10,000 gross income from farm products for at least four (4) years in a row filing as a farmer with the IRS and having a farm tax exemption number with the state. He testified that the tax returns for 2003, 2004 and 2005 do not meet the income requirement. Tax returns for 2006 met the requirement.

Mr. Ayars identified OCI #18, which was later marked as a Full Exhibit, as an interoffice memo from him to David Chopy dated February 6, 2008. The memo advised that they did not consider Mr. Hibbad to meet the definition of farmer under the Freshwater Wetlands Act.

On cross-examination Mr. Ayars testified that he had first been to the subject premises in the spring of 2006. He testified that he had been there three or four times, once or twice alone and twice with Tom Sandhan. He testified that young calves and goats require shelter in the wintertime. He acknowledged that DEM had given him permission to put sand in the building in the fall of 2007 so the animals could survive the winter.

Mr. Ayars testified that when he met with Mr. Hibbad he told him where to put the fences on his property. He acknowledged that Mr. Hibbad followed his instructions on placement of fencing.

Mr. Ayars testified that he asked Mr. Hibbad if he met the components.

Mr. Hibbad questioned Mr. Ayars with regards to tax returns for 1999, 1998, 1997 and 1996. The witness responded to general questions about activities that could be performed under various circumstances. He testified that it was a common practice for owners of land to lease it out to others to conduct farming activities. Mr. Ayars identified Mr. Hibbad's certificate of exemption which was issued in 1993. This was later marked as Respondent's #5 Full.

Mr. Ayars was questioned regarding an aerial photography of the subject premises which was later marked as OCI #7 Full. The witness identified the exhibit as the plan the USDA prepared for Craig Hibbad. Mr. Ayars said that he did not prepare the plan but that he did talk to the person who prepared the plan before it was submitted to him.

On redirect, counsel for OCI reviewed with the witness the express terms of R.I.G.L. § 2-1-21.

The witness testified to the interpretation of the statute by DEM.

Thomas Sandhan, a witness for Respondent, was called out of order by agreement. Mr. Sandhan stated that he is the District Manager for the Eastern Rhode Island Conservation District. Mr. Sandhan briefly reviewed his resume. He went on to say that he was familiar with the subject premises and had visited it on five (5) occasions. He said he was involved with Ken Ayars in addressing where the fences should go. He testified that he worked with a farmer to develop best management practices for the property.

Mr. Sandhan testified that he had prepared OCI #7 Full. He designed the plan based on the farmers' intended uses. He testified that he had known Mr. Hibbad for approximately five (5) years. Mr. Sandhan testified that Mr. Hibbad's livestock appeared to be in good health and that shelter is required for wintertime protection.

Harold K. Ellis was called by OCI as its next witness. Mr. Ellis testified that he is the supervising environmental scientist for OCI, specifically the Wetlands Compliance Program. He oversees the staff, reviews reports and ensures that proper action is taken in the field. He stated that he has been supervisor environmental engineer for almost 20 years.

Mr. Ellis testified that he was familiar with the subject premises through review of the OC&I reports. He prepared both the NOV and ANOV. He has visited the property. Mr. Ellis's resume was admitted as OCI #22 Full without objection. Mr. Ellis was recognized as an expert witness in the area of wetlands without objection. The witness identified the documents and reports upon which he relied to prepare the Notice of Intent to Enforce (NOIE) and NOV. OCI Exhibits #1, 2 and 5 were marked Full without objection. Mr. Ellis reviewed the NOIE and upon motion and without objection it was marked as OCI #3 Full. Respondent acknowledged receipt of the NOIE. Mr. Ellis was shown a copy of a report from Scott Rabideau of Natural Resources Services dated June 16, 2006. Upon Motion and without objection the report was marked as OCI #6 Full. Mr.

Ellis testified that he had reviewed the report and disagreed with the conclusion contained therein that there was a structure where the unauthorized foundation is presently located.

Mr. Ellis was shown a document from Scott Rabideau of Natural Resources Services dated April 30, 2006. The report was marked as OCI #4 without objection. This report contained a series of historical aerial photographs which were interpreted by Natural Resources to stand for the proposition that there was a structure on the location of the new foundation. Upon questioning Mr. Ellis stated that OCI disagreed with that conclusion.

Mr. Ellis next testified that the NOV had been amended because originally Ken Ayars had given an opinion that Mr. Hibbad was a farmer. Mr. Ellis identified two memos to David Chopy dated January 24, 2008 and January 31, 2008. These memos were marked as OCI #16 and 17 Full without objection. OCI #16 Full advised David Chopy that as a result of an email from Ken Ayars, Mr. Hibbad was no longer considered a farmer. OCI #17 Full advised David Chopy that based on personal observation and aerial photographs the fencing was within the swamp-marsh wetland complex.

Mr. Ellis's attention was next directed to the NOV and ANOV issued September 18, 2007 and March 25, 2008 respectively. He testified that he had drafted the documents. Upon motion and without objection, the NOV and ANOV were marked as OCI #14 and #19 respectively as Full Exhibits. He testified that the Administrative Penalties were prepared in accordance with DEM's regulations. Mr. Ellis reviewed each violation listed in OCI #19 Full. Mr. Ellis testified that the violations which he referred to as B1 through B24 were in the NOV. B15 through B19 were added in the ANOV. B19 of the ANOV was specifically added based on the change of opinion that Mr. Ayars was not a farmer. In B19 of the ANOV, OCI cited the Respondent for installation of fencing, clearing of vegetation and compacting of soil in the corral area. He testified that OCI did not assess a penalty for violations B12, 14, 18 and 19. He stated that they did not assess a penalty because they were done when Mr. Hibbad thought he was a farmer "so it didn't seem fair to cite him for violations that occurred when he was thinking he was a farmer" (Tr. P. 122, 10/21).

Mr. Ellis next described the restoration requirements contained in the ANOV. He reviewed the specific factors alleged as they apply to the rules and regulations for the assessment of administrative penalties. The penalties assessed were reviewed and the point was made that in each instance the penalty assessed was much less than that which the rules allowed.

On cross-examination Mr. Ellis stated that he had been to the subject premises once for about one-half hour. He testified that he met Mr. Hibbad on that occasion. He testified that the subject premises are situated on a high wetland. Mr. Hibbad questioned Mr. Ellis by use of pictures. Mr. Ellis did not agree that there was an equivalent historic structure on the site of the new foundation. He said that in the 1972 pictures there appeared to be a shed or outhouse but no big building. OCI rested and reserved the right to call David Chopy as a rebuttal witness.

Mr. Hibbad made a brief opening statement. He called Joseph McCue. Mr. McCue's resume was admitted into evidence as Respondent's #13 Full. After brief review of his work experience and voir dire questioning by OCI, Mr. McCue was recognized as an expert witness in the area of wetlands delineation.

Mr. McCue testified that in March of 2006 he visited the subject premises and observed the new foundation. He reviewed historical aerial photographs. He said some of the pictures showed detail better than others. Mr. McCue testified that a 1951 photo shows the outline of a dwelling or a structure which he said was bigger than an outhouse. It was more along the level of the size of a garage. Mr. McCue reviewed a series of photographs: 1972, 1976, 1981, 1997 and 2003. He testified that in his opinion the ground where the foundation was placed was already disturbed. Although the photographs were fuzzy (1976), grainy (1981) and tough to tell (2003), Mr. McCue used GPS to put the existing foundation immediately north of the disturbance in the area. His opinion was that the dwelling is definitely bigger than an outhouse Respondent's #4 was entered as a Full Exhibit.

OCI conducted a brief cross-examination. He confirmed that his review of the 1976 and 1981 photographs was that "it cannot be confirmed in these photographs whether or not the dwelling still existed although it does appear to be present" (TR. P. 168, 10/21). He testified that he could not confirm that the structure was in the spot of the current foundation. He stated that he was not really certain from his review of the aerial photos whether or not there was a structure on the property.

Craig Hibbad testified on behalf of the Respondent. He testified in narrative fashion in so far as he was also acting to represent the Respondent in his capacity as its President.

Mr. Hibbad testified that he purchased the property in October of 2005. He went down to the town hall and requested to move the house because it did not meet the setback requirements of the town. While at the town hall, the building inspector called DEM. As a result of the building inspector's call, which he perceived was with David Chopy, the building inspector issued a permit. Mr. Hibbad then went back to the site and dug out the old foundation and poured the footing. He said that he did not measure the old foundation but it was approximately 24 by 24. He said it was a two-car garage. Once the footing was in, the building inspector gave approval to put up the walls. He contracted to move the house but could not due to the weather.

He went on to testify that on approximately February 6th he came home and found a sticker on his door from DEM that he had committed a wetlands violation. This was the first he had ever heard of it. He said that he has spent approximately Six Hundred Thousand (\$600,000) Dollars on the property with the intention of farming it. He said he had been a farmer since he was a young boy. He was born and raised on a farm.

He testified that he had contacted Ken Ayars before he went into fencing or any buildings. Mr. Ayars came down several times. He showed him when to put fences and asked him to fence off around the pond and the piece of wetlands. Mr. Hibbad testified that Mr. Ayars told him where to put the dog pens, the shed and the buildings. He said he did everything according to what Ken Ayars told him to do.

Mr. Hibbad offered to read a letter from the son of a previous owner regarding the property. After objection the Respondent was instructed not to read the letter. Mr. Hibbad requested the opportunity to bring in the son as a witness. Mr. Hibbad's tax returns for the years 1995 through 2007 were admitted over OCI objection as Respondent #6 Full. The moving and demolition permit was admitted as Respondent #18 Full. The Certificate of Tax Exemption for farming was offered and marked as Respondent #5 Full which Mr. Hibbad testified that he had since 1993. Upon agreement photographs were admitted as Respondent #12 Full. The hearing was adjourned after Mr. Hibbad's testimony with the understanding that the parties would have the opportunity to present one witness each at a final hearing date.

On November 5, 2008 the Administrative Hearing reconvened. Respondent called Frank Rosa as its next witness. Mr. Rosa testified that the subject premises at 25 Simmons Road in Little Compton had been in his family for 80 years. It was owned by his grandparents and parents. He lived there for 21 years. His father requested that the fields be kept open for the taking of hay. Mr. Rosa testified that Mr. Hibbad took hay from the premises.

Mr. Rosa identified a picture which was Respondent's #4 for Identification. He said that it was a picture of him in front of his house on Simmons Road. He identified the structures in the rear of the photograph as a garage and shed, a workshop. He said that the garage was in the area of the new foundation. The garage was two stories. He went on to describe in detail that the building in the forefront of the photograph is his family home.

Mr. Rosa was presented a copy of a statement which was marked Respondent's #16 for Identification. Mr. Rosa read the letter into the record. Respondent's #4 and 12 were entered as Full Exhibits.

OCI cross-examined Mr. Rosa. He stated that he lives about 1 1/2 miles from subject premises which he passes by on a regular basis. He can see the new foundation from the road but does not know the exact distance. He said that the two-story garage with shed was demolished 20 or 30

years ago. It was at a point when it was falling down. It was burned on the site under the supervision of the fire department. He testified that there was a one story shed with dimensions of 12 by 18, which was not as far back as the garage.

David Chopy was called by OCI. Mr. Chopy had not been previously available during OCI's direct case. Mr. Chopy testified that he is the Acting Chief of OCI. He supervises 28 employees that are involved in various programs, including freshwater wetland, water pollution, septic systems, air pollution, solid waste, hazardous waste amongst others. He has worked for DEM since 1985.

Mr. Chopy said that he did not recall a telephone conversation with Michael Mello, who he understands to be the building inspector in Little Compton. At the time of the telephone call he was the Supervising Sanitary Engineer for the Water Compliance Division and supervised a staff of 13 employees. He testified that he is aware of the testimony of Mr. Mello. He said that he does not usually handle incoming calls. He usually handles calls regarding policy matters. He testified that there are no maps to which he could have referred to answer a question regarding a specific property. He did not have nor was he qualified to interpret aerial photographs. He said that the only way to determine the presence of freshwater wetlands is to send someone out to inspect the premises. He testified that he would not have given Mr. Mello an opinion over the phone but would have advised him of the proper procedure to follow.

Upon the completion of Mr. Chopy's testimony, both sides rested. The Respondent provided a written closing statement on November 13, 2008 and OCI submitted a Post Hearing Memorandum on January 5, 2009.

D. ANALYSIS

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

The authority of the Department of Environmental Management to regulate and enforce laws relating to freshwater wetlands came from R.I.G.L. § 2-1-21 which states:

2-1-21. Approval of director - (a) No person ... may excavate; drain; fill; place trash, garbage, sewage, highway runoff, drainage ditch effluents, earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; dike; dam; divert; change; add to or take from or otherwise alter the character of any freshwater wetland as defined in § 2-1-20 without first obtaining the approval of the director of the department of environmental management.

R.I.G.L. § 2-1-20 lists several definitions that are applicable in this matter including the following:

“Fresh water wetlands” includes but is not limited to, marshes, swamps, bogs, ponds, rivers, rive and stream flood plains and banks, areas subject to flooding or storm flowage, emergent and submergent plant communities in any body of fresh water including rivers and streams and that area of land within fifty feet (50') of the edge of any bog, marsh, swamp or pond.

The positions of the parties can be summarized as follows:

OCI's Position

1. There exists on the subject premises freshwater wetlands in the nature of a swamp-marsh complex.
2. Respondent has disrupted the swamp-marsh complex and/or its fifty (50) foot buffer by the placement of a foundation and other materials.

3. Respondent did not seek or obtain approval from the Director.

Respondent's Position

1. There was a structure in that location before.
2. A DEM representative (David Chopy) told the Little Compton Building Inspector that there were no wetlands on the subject premises.
3. He relied on Ken Ayars who told him where to put fencing and other material.

I. Did the Respondent disrupt the swamp-marsh complex or its fifty (50) foot buffer without permit?

OCI has alleged in the NOV (OCI Exhibit #14 Full) that Respondent violated the terms of R.I.G.L. § 2-1-21 in that it altered the freshwater wetlands without the approval of the Director. The testimony of witness Jenna Testone reflects six (6) separate occasions upon which she visited the subject premises and observed prohibited activity within the swamp marsh complex or within the fifty foot buffer. Her observations were documented in her reports including detailed sketches.

Ms. Testone's testimony was supported by Howard Cook who was recognized as an expert in wetlands ecology. He testified that he had accompanied Ms. Testone during two of her site inspections. He assisted in the placement of flags. Mr. Cook referred to sketches which he prepared reflecting the location of the swamp marsh complex, the 50 foot buffer and the prohibited activities. He testified that, in his expert opinion, there were violations of the Freshwater Wetlands Act and Regulations. These violations included disturbance to the wetlands as well as the presence of structures without approval of the Director.

OCI's next witness was Harold K. Ellis, Supervising Environmental Scientist. Mr. Ellis was recognized as an expert in the area of wetlands analysis. He testified that he was familiar with the subject premises. He had reviewed all the reports prepared by his subordinates and visited the site on one occasion. Mr. Ellis had prepared both the NOV and ANOV. His expert opinion as reflected in the NOV and ANOV was that the Respondent was responsible for violation of the Freshwater Wetlands Act.

The Respondent presented six (6) witnesses including its president Mr. Hibbad. Its primary wetlands' witness was Mr. Joseph McCue who was recognized as an expert in the area of wetlands delineation. The Respondent also presented Alfred Bettencourt, Jr. and Thomas Sandham whose testimony was limited to their observations and opinions regarding the status of Mr. Hibbad as a farmer and normal farming activities. The Respondent also presented Mr. Michael Mello regarding the issuance of a permit relating to the new foundation. The Respondent's last witness was Mr. Frank Rosa whose testimony was limited to the history of structures located on his family's homestead.

A review of all the witness testimony presented by the Respondent reveals that there was no testimony contradicting the OCI witnesses as to the nature and location of the swamp-marsh complex. The only Respondent witness qualified to testify as to the nature and location of the wetlands was Mr. McCue. Mr. McCue's testimony was focused primarily in a review of historic aerial photographs to determine the presence of a previous structure where the new foundation was placed. He did not testify in contradiction of the OCI witnesses or the nature and location of the swamp-marsh complex. He in fact testified that the new foundation was a "violation" (Tr. P. 170 10/21) but that there had been a prior structure or at least prior disturbance at that location, where the OCI witnesses say it is. The gist of the Respondent's case is that there was a structure in the wetlands previously.

The existence of jurisdictional freshwater wetlands on the Property, viz. a swamp-marsh complex and its associated 50-foot perimeter wetland, was clearly established by OCI's three witnesses,

two of which were expert witnesses. All the experts were stipulated as experts in wetlands ecology, and in aerial photograph interpretation. Their testimony in this regard was positive and uncontroverted. Said evidence was unchallenged and not discredited by other positive testimony or by circumstantial evidence extrinsic or intrinsic and is therefore deemed conclusive upon this Hearing Officer as the trier of fact. State v A. Capuano Bros., Inc., 120 R.I. 58 (1978). As in A. Capuano there was no evidence to refute the credible testimony of OCI's expert witnesses that identified the subject property as freshwater wetlands, and same is deemed conclusive. It is also uncontradicted that the Respondent did not seek or receive permission from the Director to make alterations to the wetlands.

II. The new foundation was placed where there previously was a similar structure.

The Respondent argues that the place where he placed a new foundation had previously been disturbed and was the site where there was a building of similar size. He presents an argument that he should be allowed to place a structure on that site under a "grandfather" theory. The Respondent presented the testimony of its expert, Joseph McCue, who reviewed historic aerial photographs. He testified that there previously existed a structure of similar size on the approximate site of the new foundation. The OCI witnesses testified that their review of the aerial photographs revealed a structure but they contend that it was much smaller than the new foundation.

The best witness on these questions was Frank Rosa who testified at the request of the Respondent. He testified identifying historic photographs. He identified a structure which was a garage with an attached workshop. He testified that a two-story garage was in the same location as the new foundation. The garage had been let go until at some point the fire department came in and burned it down. Mr. Rosa also testified on direct examination about farming activities which had been conducted on the subject premises over the years. Respondent's Exhibit #12 for Identification, a series of historical pictures, were entered as Respondent's Exhibit #12 Full. Respondent's Exhibit #4 which included other pictures was also entered as a Full Exhibit. On cross examination Mr. Rosa testified that he observed where the new foundation was by observing from the road. He admitted that he had not taken any measurements and could not say exactly where the new foundation was.

Mr. Rosa testified that the two-story garage with shed was demolished. "I don't know whether it was 20--20 or 30 years ago ..." (Tr. P. 33, 11/5). He said that at some point it was almost down. You could get a burning permit and it was easier to burn it down rather than carry it away. He testified that there was also a shed, 12 by 18, which was not as far back as was the two-story garage. The shed was there when Mr. Hibbad bought the property.

The fact that the two-story garage with attached workshop was destroyed twenty to thirty years ago is very important to the determination of the Respondent's right to claim a continuing use. In order to avail itself of the benefit of replacing a prior disturbed area in wetlands, the Respondent must prove two things. First it must prove that the old structure existed in the same place as the new structure. And secondly that the old structure was not abandoned for any length of time prior to the placement of the new structure.

In the case of OBF the facts are that the old structure was destroyed twenty to thirty years ago. The Respondent is not entitled by law to place the new foundation in the approximate location of the abandoned two-story garage.

III. The issuance of a permit by the Little Compton Building Inspector

The Respondent presented testimony of Michael Mello, the Building Inspector for the Town of Little Compton, that he issued a permit to build the new foundation because David Chopy of RIDEM had told him that there was no wetlands on the subject property. The permit,

Respondent's #1 Full, was actually a "moving or demolition" permit. Respondent relied on the issuance of the permit and placed a new foundation within the wetlands. David Chopy testified that he did not recall any conversation with Mr. Mello. As supervising engineer for the water compliance division within OCI he did not normally take telephone calls. He testified that he did not consult aerial photographs and would never give an opinion over the telephone.

It is not necessary to make a decision on the credibility of the witnesses or the accuracy of the testimony. The Respondent cannot circumvent the Freshwater Wetlands Act or the regulations on the basis of a telephone conversation between the building inspector and an employee of RIDEM. Even if we accept the facts as presented by the Respondent, it is not legally acceptable to put a foundation in a wetland without applying for and receiving a permit from the Director.

IV. Respondent relied on approvals from Ken Ayars, Chief of the Division of Agriculture for RIDEM in placement of fencing and farming activities.

The last issue presented by the Respondent is that he placed fencing and engaged in farming activities on the basis of recommendations from Ken Ayars, the chief of the Agriculture Division of RIDEM. Mr. Ayars testified that he first visited the subject premises on in the Spring of 2006. He went on to say that he had visited the subject premises several times over the two and half years. He knew Mr. Hibbad since childhood and he knew him to be a farmer. Based on prior knowledge and conversations with Mr. Hibbad he assumed that Mr. Hibbad met the definition of a farmer. He gave Mr. Hibbad detailed directions on the placement of fencing and other normal farming activities. Mr. Hibbad relied on the advice of Mr. Ayars and placed fencing throughout the subject premises.

Mr. Ayars initially advised representatives of OCI that Mr. Hibbad met the definition of a "farmer". OCI Exhibit #7 Full in an email dated February 20, 2007 from Mr. Ayars to Stephen Tyrrell of OCI. In that email he advised the following:

1. The concrete house foundation, and house top serving as an animal housing facility, are structures which are not within the definitions of RIGL 2-1-22(i)(1) or (2) as "normal" or "new" farming activities. The Office of Compliance and inspection/Office of Water Resources therefore has jurisdiction over the issue from the standpoint of enforcement and/or permitting.
2. Fencing of farms in general has previously been determined by the Division of Agriculture, in coordination with the DEM Agricultural Advisory Committee to be normal farming and ranching activity as defined by 2-1-22(i)(1), pursuant to the process in 2-1-22(i)(3). Mr. Hibbad meets the definition of a farmer pursuant to section (j) and the field in question has a history of agricultural usage viewing aerial photographs at least back to 1988. I do consider the fence Hibbad constructed therefore to be a normal farming activity and exempt from permitting - in accordance with the requirement that the use of the field and farm in general (in relation to wetlands) minimizes adverse effects to wetlands. That is therefore to be accomplished through a conservation or management plan being developed by USDA/NRCS with which Hibbad has agreed to abide. Such plan will recommend proper manure management, rotating any farm animals among different fields or paddocks, additional fencing recommendations etc., and will serve as a reference point when completed for Hibbad/NRCS and therefore the Division of Agriculture in terms of whether future or ongoing usage of the farm fields are consistent or not with the Act in relation to wetlands."

On September 12, 2007 the NOV (OCI Exhibit #14 Full) was issued citing OBF for numerous violations but not for fencing and farming activities. On February 6, 2008 Ken Ayars sent an inter-office memo to David Chopy (OCI Exhibit #19 Full). The inter-office memo advised that based on a review of Mr. Hibbad's tax returns he did not meet the definition of a "farmer". On March 25, 2008 OCI issued an ANOV to the Respondent (OCI Exhibit #19 Full) which added the fencing and farming activities to the previous violation.

It is troubling that the Department of Agriculture met with the Respondent in 2006 but did not raise the issue that Mr. Hibbad did not meet the definition of a “farmer” until February of 2008, almost two years later. During this time Ken Ayars was advising the Respondent where to put its fences and how to conduct its normal farming activity. The Respondent relied on the advice given by Ken Ayars to its detriment. There was no testimony that the Department of Agriculture had a written policy or any policy at all when dealing with the qualification of “farmers” in wetlands. It appears to be a mistake that the Department of Agriculture gave the Respondent advice and watched him install fencing without first determining its status.

OCI did not impose an additional Administrative Penalty on the Respondent because of the farming violations raised in the ANOV (OCI Exhibit #19 Full). Harold Ellis, a supervising environmental scientist, testified that OCI did not impose an administrative penalty because “it didn't seem fair to cite him for violations that occurred when he was thinking he was a farmer” (Tr. P. 128 10/21). The ANOV does, however, require the Respondent to remove all fencing and fence posts which can only be assumed to relate in significant expense to the Respondent.

It is the opinion of this Hearing Officer that the failure of the Department of Agriculture to determine the Respondent's status prior to authorizing certain activities of a farming nature was improper. The Department should take the steps necessary to determine if a party meets the definition of a “farmer” prior to authorizing activities in the nature of a “farmer's exception” to the Freshwater Wetlands Act. I find that Mr. Hibbad does not technically meet the definition of a “farmer” under R.I.G.L. § 2-1-21 and 22. I find as a fact that he has been engaged in farming activities for many years and relied on the authorizations of Mr. Ayars to his detriment. I will not require him to remove the fencing, fence posts or to remediate the area of his property which has been modified for “normal farming activities”. I find that this includes the modifications done to prepare the corralled area. I find that the placement of structures in the swamp-marsh wetlands complex or its fifty (50) foot buffer is not a “normal farming activity” and any such structure must be removed.

Administrative Penalty

R.I.G.L. § 42-17.1-2 provides that the Director shall have the power and duty to impose administrative penalties in accordance with the provisions of Chapter 17.6 of this title. § 42-17.6-2 grants the authority to the Director to assess an administrative penalty on a person who fails to comply with any provisions of any rule, regulation, order, permit, license or approval issued or adopted by the Director, or any law which the Director has the authority or responsibility to enforce.

The testimony of OCI's expert, Mr. Ellis, demonstrates that the penalty was assessed in accordance with the pertinent statutes and Penalty Regulations. The Department considered the factors articulated in Section 9 of the Penalty Regulations and determined that the violation in question is Type I Major as outlined in the penalty Matrix, and considered by the Department to be appropriate. The testimony of OCI's expert witness was credible and not refuted by Respondent. The Respondent failed to present any evidence on this issue. The evidence clearly established that the Five Thousand Five Hundred (5,500) Dollar penalty is appropriate and fully warranted under the circumstances.

Conclusion

I find that the Respondent has committed numerous violations of the Freshwater Wetlands Act. I find in favor of OCI regarding the violations contained in its NOV (OCI Exhibit # 14 Full). The Respondent caused alterations to the swamp-marsh wetlands complex without the permission of the Director. These alterations include but are not limited to unauthorized filling, clearing of the area and the installation of a concrete foundation in the swamp-marsh complex. I find that the

Respondent should not be held responsible for the additional alleged acts contained in the ANOV (OCI Exhibit # 19 Full) on the grounds that he received authorization to take such actions by the representative of the Department of Agriculture allowing the conditions relating to “normal farming activities” which does not represent a significant threat or impact on the swamp-marsh wetlands complex.

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

FINDINGS OF FACT

1. The subject property is located approximately 200 feet north of Simmons Road, at utility pole no. 20, approximately 800 feet west of its intersection with East Main Road, Assessor's Plat 29, Lot 18, in the Town of Little Compton, Rhode Island (the “Property”).
2. The Property is currently owned by OBF, LLC (Craig S. Hibbad, President; “Respondent”). It was purchased by OBF, LLC on October 5, 2005.
3. Inspection of the Property by the Office of Compliance and Inspection (OCI) on February 1, 2006 revealed the following unauthorized activities:
 - a. Clearing, filling (in the form of at least sand, gravel, and rocks), excavating, installing a house foundation with associated building materials, and creating soil disturbing activities within a Swamp-Marsh Wetland Complex. These activities resulted in the unauthorized alteration of approximately 11,500 square feet of Freshwater Wetlands.
 - b. Clearing, filling (in the form of at least sand, gravel, and rocks), and creating soil disturbing activities within a 50-foot Perimeter Wetland. These activities resulted in the unauthorized alteration of approximately 2,800 square feet of Freshwater Wetland.
 - c. Filling (in the form of eroded sediments) within an Area Subject to Storm Flowage. This activity resulted in the unauthorized alteration of 20 linear feet of Freshwater Wetland.
4. On February 16, 2006, a Notice of Intent to Enforce (NOIE) was issued to the Respondent by OCI for unauthorized alterations within Freshwater Wetlands. The Respondent was required to restore the wetlands by May 31, 2006.
5. On March 20, 2006, correspondence was received from the Respondent's attorney indicating that the Respondent had contracted with an environmental consultant to review the requirements in the NOIE.
6. On May 2, 2006, a report was received from the environmental consultant indicating that they made a preliminary assessment of the issues raised in the NOIE. A request was made to extend the deadline for restoration.
7. Review of the Property by OCI on June 6, 2006, revealed that the Respondent did not complete the restoration as outlined in the NOIE.
8. On June 16, 2006, OCI issued a letter to the environmental consultant advising the consultant that OCI had reviewed their preliminary report and agreed that one or more structures existed on the Property in the “vicinity” of the foundation over the years, but disagreed that a structure existed in the area of the unauthorized foundation. OCI maintained that restoration as outlined in the NOIE was still required. The restoration deadline was extended to July 31, 2006.
9. On September 1, 2006 correspondence was received from Respondent's new attorney requesting additional time to evaluate the issues raised in the NOIE.
10. Inspection of the Property by OCI on November 9, 2006 revealed that the Respondent did not complete the restoration as outlined in the NOIE and that additional filling (in the form of a structure (the top of a house) occurred within the Swamp-Marsh Wetland Complex and Perimeter Wetland. This activity resulted in the unauthorized alteration of approximately 350 square feet of Freshwater Wetlands. In addition, fencing was installed to corral animals in the wetland.
11. During the inspection on November 9, 2006 the OCI inspector spoke with Respondent. Mr. Hibbad advised the OCI inspector that he had permission from the DEM Division of Agriculture

(DOA) to install the fencing and that his legal counsel sent a letter to OC&I to try to resolve the remaining issues.

12. On February 20, 2007 the DOA notified the OCI that the concrete house foundation and the house top serving as an animal housing facility are structures which are not considered normal or new farming activities. DOA further indicated that Respondent met the definition of farmer and that his use of fencing was considered to be a normal farming activity and therefore exempt from permitting requirements.

13. Inspection of the Property by OCI on March 1, 2007 revealed that the Respondent did not complete the restoration as outlined in the NOIE and that additional materials (in the form of crates and assorted debris) were placed in the Swamp-Marsh Wetland Complex and Perimeter Wetland.

14. In response to a complaint by the Little Compton Building Official, OCI inspected the Property on April 23, 2007. Inspection revealed that the Respondent had placed new structures (in the form of a dog pen) within the 50-foot Perimeter Wetland.

15. Inspection of the Property by the OCI on September 13, 2007 revealed the following unauthorized activities:

a. Fill (in the form of at least soil material) has been stockpiled and spread within portions of the 50-foot Perimeter Wetland. This activity resulted in the unauthorized alteration of various portions of wetland areas that were previously altered.

b. Construction/placement of a small shed in the Swamp. This activity resulted in the unauthorized alteration of various portions of wetland areas that were previously altered.

16. A Cease and Desist Order (C&D) was left on Respondent's doorstep on September 13, 2007 requiring that he immediately stop all unauthorized activities (filling, clearing, grading, and creating soil disturbance) within Marsh and associated 50-foot Perimeter Wetland. On September 14, 2007 Respondent contacted the OCI regarding the C&D.

17. A Notice of Violation ("NOV") was issued by DEM to the Respondent on September 18, 2007 for all unauthorized activities referenced in Facts 3, 10, 12, and 13 not considered normal farming or ranching activities.

18. The Respondent requested a timely administrative adjudicatory hearing on the NOV.

19. On November 9, 2007 representatives of OCI inspected the Property to locate (flag) the edge of the Marsh-Swamp Wetland Complex and the 50-foot Perimeter Wetland. During this inspection it was revealed that the Respondent did additional filling (in the form of construction debris and other solid waste materials) in the 50-foot Perimeter Wetland. This activity has resulted in the unauthorized alteration of approximately 100 square feet of Freshwater Wetland.

20. On February 06, 2008 the DOA provided a memo to OCI advising OCI that the Respondent did not meet the definition of farmer pursuant to RIGL § 2-1-22(i)(1) and (j).

21. Respondent did accomplish or permit alterations of freshwater wetlands and did not receive the required permit or approval from the DEM to alter these Freshwater Wetlands.

22. The OCI established in evidence that Respondent's violation of RIGL § 2-1-22, and the DEM's *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act* was determined to be Type I, Major, Moderate and 2 Minor Deviations from the Standard.

23. The OCI established in evidence the amount of the gravity of the violations in the ANOV was \$5,500.

24. The ANOV served notice of the intent to assess an administrative penalty in the amount of \$5,500.

25. An administrative penalty in the amount of \$5,500 for accomplishing alterations of freshwater wetlands without the required permit or approval from the DEM to alter these freshwater wetlands is not excessive.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the findings of fact as set forth herein, I conclude the following as a matter of law:

1. The Department of Environmental Management has jurisdiction over the freshwater wetlands located on the Respondent's Property.
2. Respondent made a timely request for hearing in accordance with R.I.G.L. § 42-17.1-2.
3. The Department acted within its legislative mandate in issuing the NOV because there were reasonable grounds to believe that there were violations at the Property.
4. The Department proved by a preponderance of the evidence that freshwater wetlands on the Property were altered in violation of R.I.G.L. § 2-1-21 and Rule 7.0 of the Wetland Regulations in the instance as alleged in the Notice of Violation dated September 18, 2007 (OCI Exhibit # 14 Full).
5. The Department proved by a preponderance of the evidence that Respondent is responsible for the wetland alterations on the Property as alleged in the NOV.
6. The freshwater wetlands located on Respondent's property were altered without a wetlands alteration permit from DEM.
7. The Department is entitled to restoration of the altered freshwater wetlands on the Property as set forth in the NOV.
8. The Department has not proved by a preponderance of the evidence that the Respondent is responsible for all the additional alterations contained in the ANOV dated March 25, 2008 (OCI Exhibit #19 Full).
9. The Respondent is not responsible for the erection of fencing and farm related activities because they were done at the direction and under the authorization of the Department of Agriculture.
10. The Respondent is responsible for additional alterations in the ANOV which are not normal farming activities, i.e. structures.
11. The OCI established in evidence the penalty amount and its calculation.
12. Respondent failed to prove by a preponderance of the evidence that OCI's determination of the violations as Type I Major, Moderated and Minor Deviations from the Standard were not in accordance with the Penalty Regulations.
13. Pursuant to the requirements of R.I.G.L. § 42-17.6-3, the ANOV served notice of the intent to assess an administrative penalty in the amount of \$5,500.
14. The assessment of an administrative penalty in the ANOV against the Respondent in the amount of \$5,500 is in accordance with the Penalty Regulations.

Wherefore, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. That the Notice of Violation, Order and Penalty issued to Respondent dated September 18, 2007 be and is hereby SUSTAINED.
2. That the Notice of Violation, Orders and Penalty issued to Respondent dated March 25, 2008 be and is hereby SUSTAINED in part and REVERSED in part.
3. That the Respondent shall restore the freshwater wetlands as follows:
 - (a) Prior to the commencement of restoration, install a continuous uninterrupted line of staked haybales or silt fence between those portions of the wetlands that have been altered without authorization and the undisturbed Swamp-Marsh Wetland Complex. The Perimeter Wetland and the Area Subject to Storm Flowage. These soil erosion and sediment controls must be regularly inspected and properly and continually maintained (and replaced, if necessary) during and following the completion of the required wetland restoration, and until such time that all of the surrounding areas are properly stabilized. At the discretion and direction of representatives of this

Office, additional soil erosion and sediment controls must be installed on-site, as deemed necessary, to protect any and all Freshwater Wetlands.

(b) Remove all unauthorized fill material (including, but not limited to, the concrete foundation, the soil, sand, and rock mound surrounding the foundation, the house top, all crates, associated construction materials and other solid waste debris, fencing, fence posts, construction equipment, and stockpiled cut vegetation) from the Swamp-Marsh Wetland Complex, Perimeter Wetland, and Area Subject to Storm Flowage. All fill material that is removed must be deposited in an appropriate upland location, outside of any and all wetlands. All solid waste that is removed from the Property must be disposed of at a licensed solid waste management facility. Documentation of disposal must be submitted to DEM within ten days of project completion.

(c) All unauthorized fill material supporting and surrounding the concrete foundation, shall be removed down to the original surface grade of the Swamp-Marsh Wetland Complex, matching the grade of the surrounding undisturbed wetland. If an adequate organic soil substrate is not present (i.e., if it has been removed in the area of the foundation), Respondents shall remove an additional eight inches (8") of high-organic plantable soil in order to re-establish the correct Swamp-Marsh elevations and hydrologic regime in the areas of concern. A wetland seed mix shall be applied to the surface areas of the restored Swamp-Marsh Wetland Complex and a wildlife conservation seed mix shall be applied to any re-established side slopes in the areas of concern. A mat of spread hay mulch shall be applied over all disturbed surface areas.

(d) Respondent is not required to remove fencing, fence post or remediate changes made to accommodate normal farming activities. Respondent shall remove any structures in so far as they are not considered normal farming activity.

4. That the Respondent contact the Office of Compliance and Inspection of the Department of Environmental Management prior to the commencement of restoration to ensure proper supervision and to obtain the required restoration details from the representatives of said Division. No work shall commence until such time that you have met in the field with a representative of OCI.

5. That the Respondent pay an administrative penalty in the sum of Five Thousand Five Hundred Dollars (5,500.00) for said violation no later than thirty (30) days after the date the Final Decision and Order is signed by the Director. Said payment shall be in the form of a certified check or money order payable to the "General Treasury - Water & Air Protection Program Account" and shall be forwarded to:

Rhode Island Department of Environmental Management
Office of Management Services
235 Promenade Street
Providence, Rhode Island 02908-5767

Entered as an Administrative Order this ___ day of April, 2009 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins

Acting Chief Hearing Officer

Entered as a Final Agency Order this ___ day of _____, 2009.

W. Michael Sullivan, Ph.D.

Director

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI general Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement

of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

APPENDIX A

EXHIBITS

OCI EXHIBITS

- OCI #1
Full Copy of OCI's Complaint Inspection Report, dated February 1, 2006, nine (9) pages;
- OCI #2
Full Copy of OCI's Biological Inspection Report dated February 1, 2006, five (5) pages;
- OCI #3
Full Copy of OCI's Notice of Intent to Enforce dated February 16, 2006, two (2) pages;
- OCI #4
Full Copy of Natural Resource Services, Inc. report to DEM, dated April 30, 2006, twelve (12) pages;
- OCI #5
Full Copy of OCI's Site Inspection Report, dated June 6, 2006, two (2) pages;
- OCI #6
Full Copy of the OCI's letter to Natural Resource Services, Inc., dated June 16, 2006, one (1) page;
- OCI #7
Full Copy of the Division of Agriculture's email to OCI, dated February 20, 2007, one (1) page;
- OCI #8
Full Copy of OCI's Site Inspection Report, dated March 1, 2007, seven (7) pages;
- OCI #9
Full Copy of OCI's Site Inspection Report, dated November 9, 2006, four (4) pages;
- OCI #10
Full Copy of OCI's Complaint Form, dated April 12, 2007, one (1) page;
- OCI #11
Full Copy of CCI's Site Inspection Report, dated April 23, 2007, five (5) pages;
- OCI #12
Full Copy of OCI's site Inspection Report, dated September 13, 2007, six (6) pages;
- OCI #13
Full Copy of OCI's Cease and Desist Order, dated September 13, 2007, one (1) page;
- OCI #14
Full Copy of the OCI's Notice of Violation, dated September 18, 2007, nine (9) pages;
- OCI #15
Full Copy of OCI's Site Inspection Report, dated November 9, 2007, eight (8) pages;
- OCI #16
Full Copy of OCI's Intra-Office Memorandum, dated January 24, 2008, three (3) pages;
- OCI #17
Full Copy of OCI's Intra-Office Memorandum, dated January 31, 2008, one (1) page;
- OCI #18
Full Copy of OCI's Inter-Office Memorandum, dated February 6, 2008, one (1) page;
- OCI #19 Copy of OCI's Amended Notice of Violation ("ANOV") dated March 25, 2008,

Full sixteen (16) pages;
OCI #20 Full Resume of Jenna Testone, two (2) pages;
OCI #21 Full Resume of Howard Cook, two (2) pages;
OCI #22 Full Resume of Harold Ellis, three (3) pages;
OCI #23 Full Resume of Kenneth Ayars, two (2) pages. (To be submitted.)

RESPONDENT EXHIBITS

RES #1 Full Moving Permit Application - New Foundation and Moving House dated 11/25/05;
RES #2 Full Building Permit - Chicken Coop;
RES #4 Full Pictures showing structures: Larger one is in the area where new foundation;
RES #5 Full Farm Certificate of Exemption issued August 23, 1993;
RES #6 Full Federal Schedule F Profit or Loss From Farming - 1995 thru 1999;
RES #7 Full Proposed Plan of How The Farm Will Be Laid Out - In October 2006 Ken Ayars (RI Dept. of Agriculture) and Tom Sandhan (US Gov. Agriculture Department - Eastern RI Conservation District) walked the property to lay the farm out and sent me this plan;
RES #10 Full IRS Form Schedule F Profit and Loss from Farming 2000 - 20007;
RES #12 Full Pictures of House at 25 Simmons Rd., Little Compton, RI;
RES #13 Full Resume of Alfred R. Bettencourt, Jr.