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

RE: FULL CHANNEL TV, INC. **AAD NO. 10-004/FWE**
NOTICE OF VIOLATION OC&I/FW C92-0393

DECISION AND ORDER

This matter came before Hearing Officer David M. Spinella for Hearing on April 3rd and 4th, 2013. The Department of Environmental Management, Office of Compliance and Inspection and Respondent thereafter filed their Post-Hearing Memoranda on April 24, 2013 and May 8, 2013 respectively.

I. FACTS AND TRAVEL

In 1982, Full Channel, Inc. ("Full Channel"), a Rhode Island corporation founded by John Donofrio, Jr., began to provide cable television services to the towns of Barrington, Warren, and Bristol, Rhode Island. (Transcript hereinafter "Tr." Vol. II pg. 218). In order to provide these services to its customers, Full Channel uses a Network Operations Center ("NOC"), consisting of antennas, a tower and a cinderblock building located on Assessor's Plat 21, Lot 283 in the Town of Warren, State of Rhode Island. (the "Property") (Joint Stipulations of Fact 1 and 2). The NOC, a Federal Communications Commission ("FCC") licensed Satellite Earth Station, is presently used to connect Full Channel's network to the public Internet and telephone networks and to receive television signals, which are then transferred into a form that can be disbursed through Full Channel's hybrid fiber-coax communications network. (Tr. pg. 221-222).

The Property originally had no means of egress or ingress from the street, but the NOC was accessible for daily use and maintenance through an easement granted by the neighboring property owner, Dzinta Krohn. (Tr. pg. 57-58 and Joint Exhibit 1A). This easement permitted Full Channel

unlimited ingress and egress as long as the dominant estate maintained the easement. (Tr. pg. 58 and Joint Exhibit 1A).

This easement provided Full Channel with sufficient access for nearly a decade, until Judge Patricia Hurst ("Hurst"), the new owner of the servient estate, filed suit to terminate the easement. (OC&I Exhibit 3). Hurst won her suit, effectively eliminating full Channel's ability to operate the NOC. (Tr. pg. 237-238). Sometime prior to 1993 a driveway was constructed or improved[1] on the property in order to provide access to the NOC and to keep Full Channel services working. (Tr. pg. 27-28, 31) and (Respondent's Exhibit 9). On October 27, 1992, Mr. Martin Wencek of the Department of Environmental Management ("DEM") conducted a Complaint Inspection report regarding the driveway and the Property. (Tr. pg. 28 and Joint Exhibit 10).

On February 25, 1993, the DEM issued a Notice of Intent to Enforce ('NOIE') against Full Channel for the creation of the driveway and ordering the restoration of numerous wetlands violations existing on the property. (Joint Stipulations of Fact 3 and Joint Exhibit 9). Specifically, this notice requested that Full Channel remove the driveway, take out the fill used to build the driveway, and replant the perimeter wetlands on either side it. (Tr. pg. 33 and Joint Exhibit 9). In a letter dated November 13, 1996 from Mr. Donofrio to Paula J. Younes, Esquire at DEM, Mr. Donofrio said that he had spoken with several DEM employees and was told that he did not need a permit for the driveway and that the matter was closed. (Respondent's Exhibit 9).

In between the February 25, 1993 NOIE and Mr. Donofrio's letter explaining to the DEM that he believed the matter was closed, the Supreme Court of Rhode Island reversed the case against

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[1] The driveway was apparently existing prior to 1993. The evidence presented at the Hearing did not make it clear who initially constructed it but it appears, at the very least, that it was improved by Respondent. The parties referred to it as a roadway and driveway throughout the Hearing. I will refer to it as a driveway.

Full Channel in Full Channel's favor (OC&I Exhibit 3). This meant that Full Channel had the ability to use the easement with the same restrictions as the original easement. However, for reasons unknown, Mr. Donofrio came to an agreement with Hurst which restricted use of the easement for emergency use only. Ms. Linda Jane Maaia, daughter of Mr. John Donofrio and the current operator of Full Channel, testified that she is not able to determine why Mr. Donofrio signed the amended easement, restricting the rights the Supreme Court of Rhode Island just granted him, as Mr. Donofrio passed away in August of 2004. (Tr. pg. 219). She was then thrust into the business after her father passed away. (Tr. pg. 220).

In sum, OC&I inspectors conducted inspections of the property on August 1, 1996; December 19, 1996; April 14, 2005; January 4, 2008; and April 23, 2008. In 2008, DEM Supervisor Mr. Harold Ellis requested that Howard Cook, a DEM employee, "reactivate" the violation at the Full Channel Property, and conduct a follow-up inspection (Joint Exhibit 3). Mr. Cook was qualified to testify as an expert in the administration of *The Freshwater Wetlands Act* and DEM's *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act*. (Tr. pg. 170). He stated that he has a Bachelor of Science from the University of Rhode Island in Environmental Management. His experience with Wetlands Biology was that he focused on water and soil in his degree and took a couple of the core classes which almost all of the wetlands inspectors in public and private service have taken. (Tr. pg. 171). In a Site Inspection Report dated January 4, 2008, Mr. Cook wrote the "the subject site is essentially in the same condition as when last inspected on August 1, 1996. [T]he only significant change is that some of the unauthorized cleared areas have revegetated." (Joint Exhibit 5). Mr. Cook testified that he did not know the square footage of the entire swamp or the limits of the property boundary (Tr. pg. 193).

Eighteen days later, in a hand-written note, Mr. Ellis told Mr. Cook, "I need you to prepare an accurate sketch of violations that exist today. Please take the time to do a thorough job." (Joint Exhibit 3). Mr. Cook followed this order and completed a Site Inspection Report dated April 23, 2008. (Joint Exhibit 5). In this report he cited substantially the same alleged violations that were made in the February 25, 1993 NOIE. One difference that Mr. Cook indicated in his report was that some of the driveway area had revegetated since 1996. Two alleged violations were also reported to the DEM in 1996 involving an adjacent property and the driveway at issue in this case but were not investigated. (Tr. pg. 85-88, 144 and Joint Exhibit 7). Property owned by the Hennessey family is in near proximity and contiguous to the Full Channel property. According to Mr. Ellis's testimony regarding his Memorandum dated December 19, 1996 (Tr. pg. 85 and Joint Exhibit 7), he and Emilie Holland from DEM met at the site with Judge Hurst and Mr. Donofrio. Judge Hurst alleged that the Hennessey's (adjacent neighbors to the North) removed a berm which effectively speeds up the time it takes storm runoff to reach the low area by her property. (Tr. pg. 85-86 and Joint Exhibit 7). He also read from his notes that Judge Hurst complained that the Town (Town of Warren) "ditched the side of the road and created the culverts, (PVC 4) under Mr. Donofrio's unauthorized driveway and routed water off the paved road into the wetlands adjacent to her property". (Tr. pg. 85, 144 and Joint Exhibit 7). Mr. Ellis was to discuss the case with his division Chief and chief legal counsel, and get back to them after following up on the complaints regarding the Hennessey's and the Town. (Tr. pg. 86 and OC&I Exhibit 7).

Mr. Ellis did not know if his office ever did any follow up, as promised, regarding the other alleged violations involving the Hennessey property or the culverts under the driveway (Tr. pg. 87 and 88).

On August 25, 2008, a Second NOIE was issued to Full Channel by DEM. (OC&I Exhibit 2). On May 11, 2010, a Notice of Violation alleging the same violations as the second NOIE was filed by OC&I. (OC&I Exhibit 1). The Notice of Violation also included a penalty of $2100 and Penalty Summary. The Penalty Summary indicated that there was only one event which resulted in the assessment of the penalty. (OC&I Exhibit 1). Mr. Ellis concurred that there was only one event/ violation at the site. (Tr. pg. 82).

Wetlands biologist George H. Gifford, III, representing Full Channel, was then qualified as an expert witness in the area of Wetlands Biology and his testimony was accepted as such. He stated that a Wetlands Biologist analyzes wetlands and the potential impact to those wetlands created by development or use of land. (Tr. pgs. 119 and 121). He testified that in the Spring of 2010 he inspected the driveway and its surrounding property and prepared a document which compiled the work he did and his conclusions. (Tr. pg. 122 and Respondent's Exhibit 6). Mr. Gifford took detailed measurements of the driveway at very specific regular intervals to quantify the actual areas of potential disturbance. He also reviewed aerial photographs from 1992 and 2009 obtained from DEM. He then made calculations of the driveway width, restored perimeter wetland or revegetated area and determined that an additional wetland area of approximately 10,000 square feet was now present. (Tr. pg. 123-128, 131). Based on his expertise and knowledge, he concluded that removing the driveway would cause much more harm than good (Tr. pg. 137). He also was unable to determine what impact the alleged alterations to the wetlands on the Hennessey property or the driveway culverts might have made since they were not investigated at all by the DEM. (Tr. pg. 144). The following is a relevant and more complete excerpt of Mr. Gifford's testimony on direct examination concerning the removal of the Driveway:

Q. Now, do you have an opinion as to what effect it would have on the wetlands if the Notice of Violation and the suggested work to be performed by DEM was actually carried out, meaning the removal of the driveway?

A. Yes.

Q. And what is that opinion, number one; and number two, what is the basis of that opinion?

A. Number one, the opinion is that it would cause more disturbance than good. The basis of that opinion is simply that we don't know. The situation has stabilized and revegetated over the past 20 years and the act of disturbing the site again opens it up for potential problems, including such issues as the colonization of invasive species.

Q. All right. What type of species would that be?

A. Some of the species I would be immediately concerned about is tall reed phragmites. There are others. Knotweed, Japanese knotweed would be another plant that I would be concerned about.

Q. Has that been a problem as far as in the State of Rhode Island with these types of aggressive invasive species?

A. Yes.

Q. And you've seen that in your years as a landscape biologist?

A. As a wetlands biologist, I have seen these species and they are well documented as damaging invasive species.

Q. Now, what about the tree cover along that driveway? Can you discuss for the court the negative impact that might have on the wetland if Full Channel were forced to follow the recommendations of DEM?

A. Yes. When we review these forested environments, upland and wetland areas, for their wildlife habitat time benefit, an oversimplification would be to review these areas in a layered effect, the ground surface and then the herb layer and then the tree canopy. One of the observations I had when reviewing the site back in the summer of 2010 was that the vegetation had grown to a certain point that the tree canopy was knit together, thereby – by that, I mean the trees had grown to an extent that the branches form these trees on both sides of the path were intermingled, thereby allowing habitat area for avian species and insects to traverse the pathway.

Q. Would you agree that the wetlands located at the Full Channel site are more mature now and have, in fact, reverted back to being normal wetlands?

A. No.

Q. All right. Why do you say that?

A. There is clear demonstration on this site that some activity occurred that involved the creation or improvement of an existing pathway. Because I wasn't present back in 1992 to actually see the conditions at that time, it is very difficult for me to give any indication of the extent of any damage to the environment. So for that reason, I can't answer your question clearly.
What I would say, however, it that the existing situation has stabilized the wetland, does have a value the way it is, and there would be a question as to the value of removing this existing path.
(Tr. pg. 137-139).

Furthermore, in the letter of July 28, 2010 from Mr. Caito and Mr. Gifford to Mr. Chopy, Chief of OC&I it states "It is our professional opinion that the natural re-vegetation that has been allowed to take place is adequate to compensate for the disturbance caused by the construction of the gravel driveway, and that no further remediation is necessary as long as the gravel driveway is maintained in its current condition". (Respondent's Exhibit 6).

On January 4, 2008, Mr. Cook inspected the driveway and said it was in the same condition as when last inspected in 1996. (Joint Exhibit 5).

Mr. Cook, on re-direct examination, criticized Mr. Gifford's testimony and generically spoke about the fact that he has heard often times the statement that restoration would do more harm than good. (Tr. pg. 179). He was asked about what sort of restoration should occur at this site in his expert opinion. He stated "Removal of the roadway. Just typical install erosion controls, remove all the material down to original grade, seed with conservation mix in the upland areas, trees and shrubs, wet mix in the swamp and allow it to recover". (Tr. pg. 180).

On cross examination it was pointed out to Mr. Cook that Mr. Gifford visited the site in 2010 and observed that over the last 17 years revegetation has occurred in that swamp or

wetland and in fact had increased. (Tr. pg. 191 and pg. 193). Mr. Cook was asked if it might have been wise for him to go to the site before testifying at the Hearing and his answer was "no". (Tr. pg. 191). Mr. Cook stated that he last inspected the site in 2010. (Tr. pg. 201 and Joint Exhibit 2). Additionally, Mr. Cook did not doubt that Mr. Gifford observed facultative species at the site. Mr. Cook stated he never reported an increase in vegetation at this site as there was nothing to indicate that. (Tr. pgs. 192-193). He ultimately disagreed with Mr. Gifford that restoration would do more harm than good. (Tr. pg. 180).

Full Channel's NOC facility presently provides telephone, Internet access, and cable television services to between 6,500 and 7,000 households in the East Bay communities of Barrington, Warren, and Bristol, Rhode Island. (Tr. pg. 229-230). In addition to these households, Full Channel provides services to three town halls, police and fire departments, schools, libraries, nursing homes, the Warren harbormaster, and nearly all community facilities in the three towns. (Tr. pg. 222-223). Full Channel provides a specific platform to provide Enhanced 911 services to Rhode Island's Uniform Emergency Telephone System call center, the state's primary public safety and emergency health care dispatching agency. (Tr. pg. 224-225). Full Channel communicated and works with the government Homeland Security as well as the Rhode Island divisions of the Army, the National Guard, the Coast Guard, and the FBI, providing them with resources to prevent cyber-attacks on our country. (Tr. pg. 224). In order to provide all of these services, twenty-four hours a day, three hundred sixty-five days a year to the communities, Full Channel spends hundreds of thousands of dollars updating and maintaining the equipment found in the NOC (Tr. pg. 229). In order to maintain the equipment and continue providing all of its services, Full Channel must be able to access the NOC using the driveway on a daily basis. (Tr. pgs. 229, 237-238).

DISCUSSION

I. STATUE OF LIMITATIONS

The Respondent argues that this matter should be dismissed based on, among other legal theories, the statue of limitations. Respondent contends that the Ten Year Statute of Limitations, as outlined in Rhode Island General Laws §9-1-13(a) is applicable in this case. In a previous case before the Department of Environmental Management Administrative Adjudication Division, the Hearing Officer declared that although "there is no statute of limitations which specifically applies to DEM enforcement actions... [Rhode Island General Laws §9-1-13(a)] should apply to DEM enforcement actions and administrative penalties. **RE: Francis P. Paine, AAD No. 93-048/GWE, (pg. 7).** The Respondent argues that this cause of action accrued from no later than February 25, 1993 which was the date the first NOIE was sent by OC&I to Respondent for alleged wetlands violations. Respondent concludes that since the Notice of Violation was recorded on May 1, 2010, more than seventeen years has passed since the first violation, the statute of limitations elapsed and this action is barred. The OC&I argues that the construction and maintenance of the driveway represents a continuous violation of the Act and the Rules for the past twenty-one years.

Respondent's argument is tempting at first blush, but as Respondent has pointed out in its Memorandum, the Rhode Island Supreme Court has stated that "the underlying principle for specific applications for when a cause of action 'accrues' is that an interested party have a reasonable opportunity to become

cognizant of an [alleged] injury" **Lee v. Morin, 469 A.2d 358, 360 (R.I. 1983).** Sadly, Mr. Donofrio passed away in 2004 and it certainly hurts the Respondent's ability to defend the case, but there were five inspections of the Property between 1996 and 2008, lawsuits, appeals, plenty of notices, meetings and correspondence between the parties prior to and after his death, and wetlands experts were hired by Respondent, all of which demonstrates that Respondent was and is "cognizant" of DEM's claim of alleged wetlands violations. On the other hand, the DEM never set forth a plausible explanation why this case lingered for so long and why the surrounding properties were never investigated as promised. (Tr. pg. 91). DEM apparently never replied to Mr. Donofrio's November 13, 1996 correspondence to DEM indicating that he considered the matter closed. (Respondent's Exhibit 9).

II. EQUITABLE ESTOPPEL

Respondent also argues that it has lost its ability to adequately defend itself due to the death of Mr. Donofrio. Seventeen years has passed since the first NOIE was sent by DEM and the time that the NOV was issued. While this is true, as the OC&I points out, the Respondent created its own hardship when, by its own admission, it created or improved this driveway and for reasons unknown, Mr. Donofrio executed an amended easement with Hurst that prohibits the use of the easement *except for* emergency access, after the Rhode Island Supreme Court reversed the Superior Court and ruled in Respondent's favor.

III. ABUSE OF DISCRETION

Respondent argues that the DEM has arbitrarily targeted Full Channel TV by engaging in "selective enforcement" and failing to investigate the alleged violations on the neighboring properties. It also argues that forcing Full Channel to remove the driveway will cause harm to the Communities Full Channel services and the ecosystem will be harmed by removing the driveway.

OC&I points out again that the Respondent caused its own hardship by creating this driveway and failing to negotiate favorable easement terms after the Rhode Island Supreme Court ruling. It is troubling to recall Mr. Ellis' testimony who could not give a reason why this case fell through the cracks for twelve years (Tr. pg. 91) other than manpower shortages or that other cases take priority (Tr. pg. 44). It was equally troubling that there was no explanation of why the adjacent Hennessey property and culvert installation were not investigated as these issues may have environmentally impacted Respondent's property.

ANALYSIS

The simple facts of this case have been complicated with the passage of time and by certain factors that have intervened. This is an enforcement action. The burden of proof rests with the OC&I to prove all elements of the NOV by a preponderance of the evidence which requires "the Trier to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the Party who has the burden to persuade the Judge of the fact's existence" **Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121.** The fact that the driveway was constructed

or improved prior to 1993 is not disputed. (Respondent's Exhibit 9). It was done without permission or a permit from DEM to alter freshwater wetlands. The NOV orders the Respondent to remove the driveway and complete certain restoration requirements including the removal of the drainage culverts. I agree with Mr. Gifford's testimony and find that the existing situation has stabilized the wetland and does have a value the way it is and should be left alone. (Tr. pg. 137-139). Mr. Cook was qualified to testify as an expert in the administration of *The Freshwater Wetlands Act* and DEM's *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetland Act* (Tr. pg. 170). His testimony and analysis was not as detailed and comprehensive as Mr. Gifford's, especially concerning the potential impact to these wetlands created by improvements to the driveway.

Therefore, I am assigning greater weight and credibility to Mr. Gifford's expert testimony versus Mr. Cook's expert testimony, especially since Mr. Gifford is qualified to analyze wetlands and the potential impact to those wetlands created by the driveway and the improvements made to it, which is a major issue in this case. (Tr. pgs. 119 and 121). I also found Mr. Giffords's written report and testimony to be more detailed and consistent than Mr. Cook's and the other DEM employees who worked on this matter. There were many inconsistencies between the various reports and documents prepared by DEM staff throughout the years. For example, in 1992 Mr. Wencek indicated that the area of swamp that was affected was 7350 square feet and reported 3250 square feet for the perimeter or buffer zone (Tr. pg. 92). Ms. Emilie Holland from DEM then reported in 1996 that the wetlands consisted of 18,350 square feet. (Tr. pg. 92). Mr. Wencek said the roadway was 30 feet wide and Ms. Holland said it was 15-20 feet wide. (Tr. pg. 92).

I also find that DEM failed to prove, by a preponderance of the evidence, that Respondent installed the drainage culverts under the road. It is possible that it was the Town of Warren that

installed them according to Mr. Ellis' own notes, but the DEM never investigated it any further after his meeting with Judge Hurst and Mr. Donofrio. (Tr. pg. 86 and OC&I Exhibit 7). There is simply no direct evidence regarding this issue, but rather circumstantial evidence which can support a fair preponderance of the evidence. **Narragansett Electric Co. v. Carbone, 898 A.2d 87 (R.I. 2006).**

Based on the foregoing, it is evident that while Respondent continues to provide privately paid cable, phone and internet services to the public, it has also evolved into an invaluable resource to Town Halls, Fire, Police, Rhode Island 911 services as well as Federal agencies such as Homeland Security, Military, etc., all in an effort to combat cyber attacks on our country and enhance our security twenty-four hours a day, three hundred and sixty-five days a year. The driveway is used constantly to access the NOC to provide these services. The fact that Respondent committed a violation in the early 1990's is mitigated at this point in time based on the testimony of Respondent's expert about the revegetation of the wetland area and increase in vegetation square footage. The violation is not totally excused though. The OC&I assessed a penalty of Two Thousand One Hundred ($2100.00) Dollars, which included a penalty of Four Hundred ($400) Dollars for the "minor" violation of the installation of culverts under the driveway. Since I find that the OC&I did not prove that the Respondent was responsible for the installation of those culverts, that portion of the penalty or Four Hundred ($400) Dollars shall not be imposed against Respondent. Therefore, the total penalty imposed shall be One Thousand Seven Hundred and 00/100 ($1,700.00) Dollars.

FINDINGS OF FACT

I make the following Findings of Fact based on the testimony, documentary evidence and stipulations of the Parties:

A. Full Channel TV, Inc. ("Full Channel" or the "Respondent") is the owner of real property located at Assessor's Plat 21, Lot 283 in the Town of Warren, State of Rhode Island (the "Property").

B. Respondent is the operator of the facility existing on the Property.

C. The Respondent maintains a communications facility called a "Network Operations Center" on the Property and provides cable television, internet and phone services to its paying customers in the East Bay area of Rhode Island as well as services to Municipal, State, and Federal agencies involved in maintaining Homeland Security and Emergency Services.

D. In 1984, the Respondent entered into an easement (the "Krohn Easement") with Dzinta Krohn in order to provide access to the NOC.

E. In or about 1990, the Respondent was sued by Judge Patricia Hurst for failing to maintain the Krohn Easement.

F. In 1992, the Rhode Island Superior Court entered a judgment in favor of Hurst, thereby extinguishing the Krohn Easement.

G. On or about October 27, 1992, an inspector from DEM conducted an inspection of the Property and discovered numerous violations thereon, including filling and grading associated with the construction of a driveway from Serpentine Road to the NOC.

H. On February 25, 1993, the DEM Office of Compliance and Inspection ("OC&I") issued a Notice of Intent to Enforce ("NOIE") to Full Channel ordering the restoration of numerous wetlands violations existing on the Property.

I. John Donofrio Jr., was the President and founder of a Full Channel at the time the first NOIE was sent. Mr. Donofrio Jr. oversaw the operations at Full Channel.

J. On November 13, 1996, Mr. Donofrio sent a letter to the DEM indicating that he was told by people at DEM that this matter was closed.

K. On November 18, 1993, the Rhode Island Supreme Court issued a decision in favor

of the Respondent, reversing and vacating the 1992 Superior Court decision, and remanding the matter back to the Superior Court to "adopt appropriate regulations for better use of [the Krohn][E]asement [and] setting forth necessary restrictions that would be enforceable by the Court."

L. Seventeen years passed without any action taken on the Notice of Intent by the OC&I.

M. John Donofrio Jr. passed away in August of 2004.

N. On or about August 1, 1996, an inspector from DEM conducted an inspection of the Property. The 1996 inspection discovered additional alterations including the installation of culverts in the driveway.

O. On December 12, 2007, Harold Ellis, Supervising Environmental Scientist at DEM, ordered the reactivation of the case against Full Channel.

P. On or about January 4, 2008, an inspector from DEM conducted an inspection of the Property and confirmed the existence of the previously identified violations.

Q. On or about April 23, 2008, an inspector from DEM conducted an inspection of the Property and confirmed the existence of the previously identified violations.

R. On August 25, 2008 a second Notice of Intent to Enforce was issued by DEM to the Respondent.

S. On or about April 14, 2010, an inspector from DEM conducted an inspection of the Property and confirmed the existence of the previously identified violations.

T. On May 11, 2010 DEM issued a Notice of Violation ("NOV") against the Respondent.

U. The NOV identified filling activities and construction of the driveway that resulted in the alteration of 4,100 square feet of swamp wetland and 5,900 square feet of jurisdictional perimeter wetland and assessed an administrative penalty of $2,100.00.

V. The evidence presented at Hearing establishes that at some time before 1993, the Respondent completed the unauthorized wetland alterations identified in the NOV.

W. The evidence presented at Hearing establishes that the Respondent has used the driveway since at least 1992.

X. The DEM failed to prove, by a preponderance of the evidence, that the culverts were installed by Respondent.

Y. The evidence presented at Hearing establishes that the administrative penalty assessed in the NOV was accurate and calculated in accordance with DEM's *Rules and Regulations for the Assessment of Administrative Penalties*, except that the section of the Penalty matrix entitled *"Citation: Alteration of 3 areas subject to Storm Flowage"*, which alleges that the Respondent installed culvert pipes, was not proved by a preponderance of the evidence by OC&I and is therefore not accurate. Full Channel did not rebut the evidence concerning the penalty in the NOV.

Z. To date, the Respondent has failed to comply with the NOV.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based on the Findings of Fact as set forth herein, I conclude the following as a Matter of Law:

A. The Administrative Adjudication Division for the Department of Environmental Management has subject matter jurisdiction over the Respondent pursuant to Rhode Island General Laws §42-17.1-2 *et seq.*;

B. The Administrative Adjudication Division has personal jurisdiction over the Parties to this Appeal;

C. The DEM's NOV is sustained in part and reversed in part;

D. The DEM has proved, by a preponderance of the evidence, that Respondent violated Rhode Island General Laws §2-1-21, and Rule 7.01 of the DEM *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act*, prohibiting activities which may alter freshwater wetlands without a permit for the DEM;

E. The DEM did not prove, by a preponderance of the evidence, that Respondent installed the culvert pipes under the driveway at the subject site;

F. The administrative penalty of Two Thousand and One Hundred ($2,100.000 Dollars, as assessed in the NOV, is found to be incorrect based on the evidence produced at the Hearing and is hereby reduced by Four Hundred ($400.00) Dollars to One Thousand and Seven Hundred ($1700.00) Dollars.

Wherefore, it is hereby ORDERED that:

1. The Respondent's Appeal is granted in part and denied in part.

2. The Respondent's Appeal is **DENIED** as it relates to the complete dismissal of the Notice of Violation as the Respondent violated the provisions of RIGL §2-1-21 regarding the Freshwater Wetlands Act and Rule 7.01 of the DEM *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act*, prohibiting activities which may alter freshwater wetlands without a permit.

3. The Respondent's Appeal is **GRANTED** as it shall not be required to comply with any of the Restoration Requirements as outlined in the Notice of Violation.

4. The Respondent's Appeal is **GRANTED** as it shall not be required to pay Four Hundred ($400.00) Dollars of the Administrative Penalty as outlined in the penalty matrix section of the Notice of Violation regarding the removal of the culvert pipes. Respondent is therefore required to pay the sum of One Thousand and Seven Hundred ($1700.00) Dollars in the form of a certified check or money order made payable to The General Treasury – Water and Air Protection Program Account and forwarded to The DEM Office of Compliance and Inspection, 235 Promenade Street, Providence, Rhode Island 02908.

Entered as an Administrative Order this 15th day of August, 2013.

David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid to William C. Maaia, Esquire, 349 Warren Avenue, East Providence, RI 02914; Dennis S. Baluch, Esquire, 155 South Main Street, Providence, RI 02903 and via interoffice mail to Richard Bianculli, Esquire, DEM Office of Legal Services and David Chopy, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this 15th day of August, 2013.

Bruce L Stewart

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.