

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

RE: RONALD RONCI

AAD NO. 92-002/FWA

DECISION AND ORDER

This matter was heard before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters on September 21 and 22, 1992 on an appeal from a decision by the Division of Freshwater Wetlands which approved the application for permission to alter a freshwater wetland but imposed twenty (20) permit conditions.

Said appeal is properly before the Hearing Officer pursuant to the Freshwater Wetlands Act (R.I.G.L. Section 2-1-18 et seq.), statutes governing the Administrative Adjudication Division (R.I.G.L. Section 42-17.7-1 et seq.), the Administrative Procedures Act (R.I.G.L. Section 42-35-1 et seq.), the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, March 1981 ("Wetlands Regulations") and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters. The hearing was conducted in accordance with the above-noted statutes and regulations.

BACKGROUND

On October 8, 1981 the Department of Environmental Management issued a Notice of Violation (JT6) to Ronald A. and Barbara Ronci alleging that they "did accomplish or permit sedimentation of and the filling and regrading in and within

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100 feet of a fresh water stream, filling of an area subject to storm flowage and the regrading within 50 feet of a fresh water swamp" on property located north of Snake Hill Road at pole #114 Tax Assessor's Plat #15, Lot #111.

In a Consent Agreement (JT7) dated March 10, 1982, the parties agreed that the order contained in the Notice of Violation (NOV) would remain in effect with the following modifications:

1. Respondent agrees to submit an application for permission to alter freshwater wetlands, along with all necessary requirements, to this Department on or before May 10, 1982.
2. Respondent agrees to install and maintain adequate sedimentation and erosion controls on site pending a decision on this application.
3. This Department agrees to postpone the restoration order contained in the above-mentioned Notice of Violation pending a decision on this application.

Nine years later, Applicant submitted the application which is at issue in this matter.

The wetlands affected by this proposal consist of a swamp, with an associated 50 foot perimeter wetland (that area within 50 feet of the edge of any swamp); a river (Mosquitohawk Brook), with an associated 100 foot riverbank wetland (that area within 100 feet of the edge of a flowing body of water less than 10 feet wide during normal flow; and an area subject to storm flowage (intermittent stream) with an associated 100 foot riverbank wetland.

The alterations as proposed consist of 1) Vegetative clearing, filling, creating soil disturbance, grading and related construction disturbance in and within 50 feet of a swamp; 2) Filling in, and diversion into a new channel, of approximately 700 linear feet of a river (Mosquitohawk Brook); 3) Filling in, and diversion into a new channel, of approximately 350 linear feet of an area subject to storm flowage; 4) Vegetative clearing, filling, grading, creating soil disturbance, and other construction disturbance within the 100 foot riverbank wetlands associated with the above-described watercourses. (JT4, p. 22)

On May 29, 1992, the Division of Freshwater Wetlands ("Division") issued a letter (JT2) to applicant stating that, with special conditions, the project did not represent an abridgement of the intent of the Rhode Island Fresh Water Wetlands Act. The application was approved, provided that applicants complied with twenty (20) permit conditions.

On June 5, 1992 the applicants filed a request for an adjudicatory hearing which contested the imposition of the conditions.

PRE-HEARING CONFERENCE

A Pre-Hearing Conference was held on July 30, 1992. James M. Sloan, III appeared on behalf of applicants and Michael K. Marran represented the Division of Freshwater

Wetlands: There were no requests to intervene.

The parties identified the following stipulated facts and agreed to the submission of joint exhibits as full exhibits.

STIPULATED STATEMENTS OF FACT

1. Applicant was the owner of the subject site at all times material hereto;
2. All necessary fees and appeals have been timely made.

JOINT EXHIBITS

JT1 Application
JT2 Permit Letter
JT2A DEM file copy of Site Plan
JT3 Claim of Appeal
JT4 Notice of Hearing
JT5 Cease and Desist Order
JT6 Notice of Violation
JT7 Consent Agreement
JT8 Official Public Notice of Pending Application

At hearing, applicant withdrew the exhibits which had been proffered at the prehearing conference as they duplicated certain of the joint exhibits. (T1-3). Other documents offered by applicant at the hearing were marked as follows:

Full A Marked-up Site Plan (see JT2A)
(App. 1 for Id)

Full B Central Nurseries Landscape Proposal
Full C Resume of Richard J. Cohen
Full D Withdrawn
Full E Resume of John J. Kupa

The Division's exhibits were marked as indicated below.

Div 1 Full Evaluation of Application by Charles
(Div 1 for ID) Horbert
Div 2 for ID Marked as JT2A
Div 3 for ID Marked as JT8
Div 4 Full Curriculum Vita, Dean Albro
(Div 4 for ID)
Div 5 Full Curriculum Vita, Charles Horbert

(Div'5 for ID)

Div 6 Full Curriculum Vita, Harold Ellis
(Div 6 for ID)
Div 7 for ID Withdrawn

BURDEN OF PROOF

Pursuant to Section 11.03(b) of the Wetlands Regulations as amended in April 1990, applicants bear the burden of proving through a preponderance of the evidence that the application is consistent with the purposes of the Freshwater Wetlands Act, complies with the Wetlands Regulations, and is protective of the environment and the health, welfare and general well being of the populace.

HEARING SUMMARY

The hearing of this matter was conducted on September 21 and 22, 1992 followed by a site visit on October 14, 1992. Final post-hearing briefs were filed on December 31, 1992. A settlement conference was held by this Hearing Officer on January 29, 1993 but failed to produce any results.

Applicants presented three (3) witnesses: Richard J. Cohen, a professional engineer and president of R. J. Cohen Engineering Associates; John J. Kupa, president of Ecological Associates and holds a doctorate in wildlife management; and Ronald A. Ronci, who with his wife Barbara A. Ronci, has owned the property since about 1975. The Department offered as witnesses Harold K. Ellis, the enforcement supervisor of the DEM Freshwater Wetlands program; Charles A. Horbert, a senior

natural resource specialist at the Division of Freshwater Wetlands; and Dean Albro, Chief of the Division of Freshwater Wetlands.

Because this matter involves an "after-the-fact" application, that is, alterations were made without a permit and such permission is now being sought, the plan (JT2A) identifies the site prior to the alterations as "existing" and the present state of the property as "proposed".

I. THE SITE

The property which is the subject of the application for permission to alter a freshwater wetland is identified as Assessor's Plat 15, Lot 110, located in the Town of Gloucester and consists of 11.84 acres. It lies north of Snake Hill Road and approximately 800 feet west of Tourtelotte Hill Road.

Applicant's site plan indicates that, based on aerial photographs, the area appears to have been completely wooded from 1951-1975, cleared approximately 65% in 1981 and cleared approximately 90% in 1988. (JT2A, paragraph 7).

In addition to the alterations which were the subject of the 1981 NOV (JT6), it appears from the testimony of Harold K. Ellis that Mr. Ronci conducted a further alteration whereby he changed the path of the stream identified on the Plan (JT2A) as the "existing waterway", sometime after October 1983 (T1-115); by early 1985

"the stream course was pushed to the northwest and channelized in a straight line thus creating that

northwest triangle...and it ran in a southerly direction directly towards Snake Hill Road. The old channel was pushed to the northwest and, to the west." (T1-116).

This shift in the channel has created a larger open area which Mr. Ronci uses for grazing his cattle.

But in 1985, at the time of this latter alteration (which is listed in the site plan as a "proposed waterway"), the applicant was not raising cattle. Mr. Ronci began raising his first group of cattle in 1987 and, at present, the site contains his residence and "a farm" where he calculates he can graze up to twelve (12) head of cattle (T1-82-83). The size of the herd is governed by the amount of acreage available for the cattle and the manner in which he pays for the cattle's winter boarding expenses (T1-84-85).

It was clear from Mr. Ronci's testimony that every piece of pasture area was of consequence and that even the grass clippings from the residence lawn was fed to the cows; "I need my grass, I need all my grass that I can get." (T1-87-88).

According to the analysis which was conducted by applicant's engineer Richard J. Cohen, 7.48 acres of the 11.84 acres owned by Ronald Ronci are presently being used as a cow pasture. The DEM Permit letter (JT 2), by imposition of its conditions, would reduce the grazing area to 5.72 acres. Mr. Cohen explained in his cross-examination testimony that this loss of 1.76 acres includes the .75 acre northwest triangle. (T1-35).

It is to be noted that paragraph 7 of the printed "Notes" contained in applicant's own Site Plan (JT 2A), which had been submitted in furtherance of his application for permission to alter a freshwater wetland, disallowed the use of the northwest triangle for grazing purposes: "The triangle to the northwest of Mosquitohawk Brook is to be allowed to revert to its natural conditions." The DEM Permit letter merely incorporated this provision, using only slightly different language, as one of the permit conditions (see JT2, paragraph 17).

II. THE FARM EXEMPTION

Although applicant's request for an adjudicatory hearing (JT3) did not assert a claim to a farm exemption, the matter was raised during redirect examination of applicant by his attorney.

R.I.G.L. Section 2-1-22, which allows the exemption, governs the process of review of proposed projects which will impact a wetland, for both preliminary determinations and for formal applications when a determination has been made that a project appears to contemplate a significant alteration. It provides in pertinent part:

2-1-22. Procedure for approval by director -- Notice of change of ownership -- Recordation of permit--

- a)...
- b)...
- c)...
- d) In the event of a decision in favor of granting an application, the director shall issue a permit for

the applicant to proceed with the project. The permit may be issued upon such terms and conditions, including time for completion, as the director may require....

- e)...
- f)...
- g)...
- h)...

i) Normal farming activities shall be considered insignificant alterations and as such, shall be exempted from the provisions of this chapter in accordance with the following procedures:

(1) Normal farming and ranching activities are those carried out by farmers as herein defined, including plowing, seeding, cultivating, land clearing for routine agriculture purposes, harvesting of agricultural products, pumping of existing farm ponds for agricultural purposes, upland soil and water conservation practices, and maintenance of existing farm drainage structures, existing farm ponds and existing farm roads shall be permissible at the discretion of farmers in accordance with best farm management practices...

(2)...

(3)...

(4) Except as otherwise provided for farm road construction, filling of wetlands shall conform to the provisions of this chapter.

j) For purposes of this section, a farmer is an individual, partnership or corporation who operates a farm and has filed a 1040F U.S. Internal Revenue Form with the Internal Revenue Service, has a state of Rhode Island farm tax number and has earned ten thousand dollars (\$10,000) gross income on farm products in each of the preceding four (4) years.
(emphasis added)

It is a basic tenet of statutory construction that if the language of a statute is "clear on its face, then the plain meaning of the statute must be given effect." Gilbane Co. v. Poulas, 576 A2d 1195, 1196 (RI 1990). In the absence of equivocal or ambiguous language, the wording of the statute

must be applied literally and cannot be interpreted or extended. State v. LaPlume, 118 RI 670, 683, 375 A2d 938, 944 (1977).

In applying this standard of statutory construction, I find the requirements for qualifying for the farm exemption to be plain and unambiguous. In Section 2-1-22 (j), the requirements are compulsory in their entirety, as indicated by the legislature's use of the word "and". Applicant must meet each provision to properly assert that he is entitled to a farm exemption which could exempt him from the requirements of the Freshwater Wetlands Act; failure to meet even one provision would deny him the exemption.

While Mr. Ronci may be an individual who operates a farm, he had not qualified for the 1040F status in the eyes of the Internal Revenue Service (T1-104) and his gross income on farm products has not exceeded \$10,000 in even one (1) year (T1-104), though he does have a Rhode Island farm tax number (T1-105-106). Mr. Ronci, therefore, is not entitled to the farm exemption set forth in Section 2-1-22.

III. THE CONDITIONS

On May 29, 1992 the Division of Freshwater Wetlands issued a letter to applicant (JT 2) indicating that, with special conditions, the project did not represent an abridgement of the intent of the Rhode Island Fresh Water Wetlands Act. The letter proceeded to list 20 permit

conditions to which applicant has objected and requested a hearing.

Testimony presented at the hearing focused on the requirements of paragraphs/conditions 11, 13 and 17. Richard J. Cohen, the engineer who prepared the application in May 1991, identified the sections of the property which were addressed in these conditions:

Area to be Replanted: A corridor forty (40) feet wide located east of Mosquito Hawk Brook and which extends from the northern boundary of the property running in a southerly direction to approximately fifty (50) feet from Snake Hill Road, referred to in paragraph/condition 11 of the permit letter. Also, an area along the eastern-most watercourse referred to in paragraph/condition 13 of the permit letter.

Northwest Triangle: that triangle of land north of Mosquito Hawk Brook referred to in paragraph/condition 17 of the permit letter. It consists of 0.75 acres.

Cow Pasture: located on the easterly side of the property around the existing detention pond from the northern boundary southerly to within forty (40) feet of Mosquito Hawk Brook, consisting of 5.72 acres.

Remainder: the house, pond and driveway.

A. CONDITION 11

Applicant is required to replant a minimum 40-foot wide vegetated buffer zone along the eastern side of the western-most watercourse, from the northern property bound to Snake Hill Road. The applicant must install

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evergreen trees in a double staggered row, said plantings to consist of 50% Eastern Hemlock (Tsuga canadensis) and 50% Northern White Cedar (Thuia occidentalis) three feet minimum in height at the time of planting and spaced at 20 feet on center. Applicant must also plant shrubs consisting of Highbush Blueberry (Vaccinium corymbosum) spaced accordingly between the above-described evergreen plantings. Applicant is to strictly conform to the red-line typical planting schematic, provided on the approved site plans, in accomplishing these required plantings.

According to Mr. Cohen, the above requirement, which is set forth as Condition 11 in the Permit Letter, would require the replanting of approximately 0.88 acres.

Applicant's wetlands biologist John J. Kupa testified at length about the present state of the area: on the western side of the property is an upland eastern deciduous forest primarily comprised of oak, and a shrub border comprised of witch hazel and some highbush blueberry which grades to a grassy edge by the stream channel; on the northern side, a small stream system is bounded by a wooded swamp; on the eastern side of the property is an upland wooded forest adjacent to a cleared field area; and Snake Hill Road lies as the southern boundary (T1-53-54). Dr. Kupa approved of the present arrangement: "...it seems that the maintenance of this wetland/open field complex adjacent to the extant forest and other swamp wetlands creates an ideal and extremely valuable and diverse wildlife habitat within that area." (T1-48).

Dr. Kupa opposed the requirements of Condition 11, testifying that it would not be beneficial to have a vegetated

buffer zone along the eastern side of the westernmost watercourse because the wet meadow/open field complex in its present state "provides an ideal ecotonal arrangement of plants that promotes the diversity of wildlife" and that "If we plant it up, we lose that complexity." (T1-76).

He opined that the required evergreen plantings, in particular, would have a deleterious effect on the area and would achieve the ultimate result of completely eradicating the existing wetland plants which now provide a habitat for a special wet meadow/open field complex of wildlife:

The hemlock and white cedar block out sunlight with the result that the under story within the system will not support any herbaceous layer within twenty to twenty-five years at all; it would simply be a carpet of needles. The proposed planting of vaccinium, highbush blueberries, will result in the death and loss of those highbush blueberry plants since they will be completely shaded out by the evergreen plantings. (T1-50).

Not only did Dr. Kupa object to the density of the plantings, he considered them to be the wrong species; he stated that the normal course of plant succession in this area would result in deciduous vegetation rather than coniferous. "Hence, I think there will be a net loss of wildlife value." (T1-68).

Under cross-examination, however, Dr. Kupa allowed that he had no knowledge as to what the wetland conditions were like on the property prior to the alterations by Mr. Ronci nor had he considered what the value of those wetland areas would have been had they remained in an unaltered state. (T1-73,

74).

Division witnesses Charles A. Horbert and Dean Albro, both stipulated to be experts, explained the rationale for Condition 11: requiring the vegetative buffer zone along the eastern side of the watercourse was to regain some of the value that the former unaltered riverbank had had to that stream, in terms of both wildlife habitat and water quality attenuation. The required vegetation would provide a better buffer zone for wildlife using the stream course as a travelling and migratory corridor between wetlands to the north and wetlands to the south because, at present, the eastern side of the watercourse provides no cover for wildlife. Additionally, it would have some use as a noise filter for sounds of the cattle and from human disturbance. (T1-139-140, 144, 159, 169).

Though the stream is considered a perennial stream by the United States Geological Survey, the U. S. Geographical Map, Mr. Horbert characterized it as an intermittent stream which carries flow most of the year. (T1-142). He also identified it as a tributary to the Scituate Reservoir Watershed. (T1-139). The plantings were expected to provide protection of the water quality of the stream in several ways: by keeping cows away from the stream, the introduction of animal effluence would be reduced; the vegetative buffer would trap and prevent sedimentation of the stream; and the shading of

the stream would negate some of the warming of the stream water which it presently receives as a result of the additional sunlight caused by the alteration. (T1-142, 144; T2-30). It was the Division's concern that without the vegetative buffer to attenuate the sedimentation and pollutants from entering the stream as a result of the proposed/present land use, the characteristics of this stream would be/has been altered, affecting the aquatic wildlife in that stream. (T1-141-142).

Applicant's witnesses provided little testimony addressing the Division's water quality concerns.

In response to Dr. Kupa's remarks in opposition to Condition 11, Charles Horbert identified evergreens present nearby: a quarter to a half acre area, dominated by hemlock, located directly adjacent to the site to the west, approximately halfway up the property line from Snake Hill Road. The understory, though sparser than the surrounding deciduous areas, contained sweet pepperbush and highbush blueberries. (T1-148). Dean Albro testified that since the plantings would only be three (3) feet high, it would be several decades before the shading effect of the evergreens could possibly block the photosynthesis process thereby changing the plant community. (T2-46).

According to Chief Albro, the intent of Condition 11 was to help mitigate against the loss of the wildlife habitat and

the values associated with that habitat and with that watercourse. (T2-27).

B. CONDITION 13

The applicant must plant an additional single line of evergreen plantings, consisting of either Tsuga canadensis or Thuja occidentalis at a spacing of 20 feet on center, along the eastern-most watercourse.

According to Mr. Cohen, the above requirement, which is set forth as Condition 13 in the Permit letter, would require the replanting of approximately 0.13 acres. (T1-37).

Dr. Kupa identified the area affected by Condition 13 as being on the easterly side of the meadow. The stream system originates from the pond located in the central eastern part of the property and runs southerly in a single channel to the Snake Hill Road drainage system. The channel is larger than the westernmost watercourse and contains a greater volume of water. (T1-55-56). Kupa testified that planting the evergreens adjacent to the stream would shade out the existing vegetation "thereby reducing its overall vitality as a wildlife habitat". (T1-56).

According to Dean Albro, the entire area had been altered and the watercourses changed completely, including the one located on the eastern side of the property. While the pond alteration had been approved by the Department, "there were a number of braided channels in certain sections of the property that had been regraded and modified" without a permit. (T2-44). Charles Horbert explained that the single line of

evergreen plantings and the relocated fence would act as a barrier to the cattle, and the trees would provide shading to the stream as well as additional habitat for wildlife. (T1-145). The rationale for this condition, according to the Chief of the Division, was to provide some minimal mitigative effort along the watercourse and also serve as a reminder to the property owner "that there is a sensitive area nearby and it should be protected..." (T2-32).

C. CONDITION 17

Applicant must allow that portion of the pasture, located in the extreme northwest corner of the property west of the stream, to revert naturally to a natural and undisturbed wild state and remain undisturbed as wildlife habitat.

According to Richard Cohen, the northwest triangle referred to in the above requirement, which is set forth as Condition 17 in the Permit letter, consists of 0.75 acres.

Dr. Kupa also opposed this condition, stating that, by allowing the area to revert to its natural state, Canada goose and other species would have reduced grazing habitat. (T1-78). The pasture, however, would remain an "excellent goose pasture". (T1-78).

Charles Horbert testified that, at present, the vegetative diversity of the site is not as great as what you would normally find in an undisturbed wet meadow habitat because the area experiences periodic grazing by cattle. He surmised that if the wet meadow was left undisturbed for a

year or two, there would be additional vegetative species and "it would grow taller, more dense, increasing the cover and food values of the vegetation..." (T1-148-149). By allowing the northwest triangle at least to revert to its natural state, additional naturally occurring wildlife habitat would be provided to mitigate against the effects of the clearing in the cow pasture area. (T1-146).

Though applicant had agreed in submitting his site plan to allow this northwest triangle to revert to its natural state, he now objects to its imposition as a condition. On its face, this would appear to be an unreasonable and ludicrous position. Applicant contends, however, that he had incorporated the substance of Condition 17 in his site plan as an offer of compromise that had been made at the time the application was filed; according to applicant's counsel, Condition 17 was supposed to be the only condition to the approval of the application. (T1-154-155).

If the situation is as counsel states, then other applicants may become very hesitant in their dealings with the Division, not trusting when an agreement has been reached. Yet I am reluctant to use this as grounds to strike down this or any other permit condition. As it stands now, all I have is an allegation of "dirty pool" arising from settlement negotiations, testimony about which is inadmissible; and there

may be an explanation other than misdealings between the parties--miscommunication, invalid assumptions, lack of authority, being only a few.

Accordingly, my review of this condition is limited to the testimony and documentary evidence regarding the manner in which it will affect the State's wetlands and applicant's proposed alterations.

IV. AFTER THE FACT APPLICATION

Considering what occurred in this case--a 1981 NOV, a 1982 Consent Agreement, further alterations without a permit after October 1983, and finally an application filed in 1991 - it is understandable that in 1987 the Department of Environmental Management changed its policy so that Consent Agreements would no longer allow after-the-fact applications. As an after-the-fact application, the Division's witnesses testified as to the condition of the site and wildlife habitat as it existed prior to the "proposed" alterations. Aerial photography of the period was used as well as conclusions based on observations of present wildlife and wildlife habitat on site and in the surrounding area.

In contrast, Dr. Kupa spoke only to the existing conditions, that is, after the "proposed" alterations had been completed and established for several years.

I accept Dean Albro's statements:

"...so what we attempted to do was to see what the minimum we could provide to protect wetland values that

would not be in our mind overly excessive as to what had taken place on the whole from an historical standpoint." (T2-40).

"...it was a compromise factor in trying to resolve a very old case. That this was the minimum that we could live with and instead of denying the project and ordering restoration, was to come up with conditions that would mitigate the impacts and resolve the case." (T2-41-42).

I also bear in mind Judge Needham's rationale in Parillo v. Durfee, C.A. No. 92-5722 (R.I. Super Ct., May 24, 1993):

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

This applicant has already been given an advantage--he was allowed to file an after-the-fact application and retain many of his previously unpermitted alterations; he also achieved unpermitted use of a substantial part of the property for many years due to the extraordinary delay in filing his application; and the Division has acknowledged that it imposed minimal conditions in order to resolve "a very old case".

V. CONCLUSION

In essence, Mr. Ronci desires to continue utilizing his property as he does presently, despite the fact that the current use was obtained by altering wetlands on site without the required permit. The crux of his case is that the present use provides a more diverse wetland complex and that he has insufficient acreage as it is to conduct his cattle operation

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and, therefore, losing any grazing area at all would "substantially hurt" his business. (T1-107). This argument ignores the fact that Dr. Kupa's testimony only dealt with the present wetland, that is the "proposed alteration", and not with the wetland as it existed before Mr. Ronci conducted his alterations. In contrast, Charles Horbert testified that the wetland complex would have been even more diverse if the alterations had not been accomplished. While Dr. Kupa applauded the status quo and disapproved of further planting, his testimony failed to consider the Division's concerns regarding protection of water quality.

As for Mr. Ronci's cattle business, applicant had conceded on recross examination that even if "every square inch" of his property was cleared for grassland and grazing and he still had access to the five (5) acres belonging to relatives (T1-99-100) he would have insufficient pasture area--he would not have two acres per cow. (T1-108).

I also note that the alterations were accomplished severalyears before Mr. Ronci grazed his first cow int he pasture. And there is certainly no guarantee that, in years down the line, the cleared and altered wetlands areas will continue to be used for cattle grazing.

While I admire Mr. Ronci's enthusiasm for his hobby/business, it does not preponderate against the necessity to protect the State's wetlands.

I have carefully considered the circumstances surrounding this application and the imposition of the permit conditions and find that applicant has not met his burden of proof. Removal of any of the contested permit conditions would not be consistent with the purposes of the Freshwater Wetlands Act or in compliance with the Wetlands Regulations. The Division of Freshwater Wetlands may, however, consider amending those conditions requiring the planting of evergreen trees if it determines that some other species would obtain the same beneficial result.

Wherefore, after considering the testimony and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. The applicants have filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above-entitled matter.

2. The subject site is located on the north side of Snake Hill Road, approximately 1200 feet west of its intersection with Tourtelotte Road, utility pole 114, Assessor's Plat 15, Lot 110, Gloucester, Rhode Island.

3. The formal application, 00-5572F, was filed in June 1991.

4. The site plan subject of this hearing is identified as "Ronald and Barbara Ronci, Snake Hill Road, Gloucester, Rhode Island, Site Plan" for Assessors Plat 15, Lot 110, revised 12/12/91 and received by the Division on February 20, 1992.

5. The wetlands affected by this proposal consist of a swamp, with an associated 50 foot perimeter wetland (that area within 50 feet of the edge of any swamp); a river (Mosquitohawk Brook), with an associated 100 foot riverbank wetland (that area within 100 feet of the edge of a flowing body of water less than 10 feet wide during normal flow; and

an area subject to storm flowage (intermittent stream) with an associated 100 foot riverbank wetland.

6. The alterations as proposed consist of 1) Vegetative clearing, filling, creating soil disturbance, grading and related construction disturbance in and within 50 feet of a swamp; 2) filling in, and diversion into a new channel, of approximately 700 linear feet of a river (Mosquitohawk Brook); 3) Filling in, and diversion into a new channel, of approximately 350 linear feet of an area subject to storm flowage; 4) Vegetative clearing, filling, grading, creating soil disturbance, and other construction disturbance within the 100 foot riverbank wetlands associated with the above-described watercourses.

7. The Division approved this application, with conditions, in a letter dated May 29, 1992 addressed to Ronald Ronci signed by Brian C. Tefft on behalf of the Division.

8. The Applicants, through their attorney, filed a timely request for a hearing contesting the imposition of conditions.

9. The Prehearing Conference was held on July 30, 1992 at One Capitol Hill, Providence, Rhode Island.

10. No requests to intervene were received at or prior to the Prehearing Conference.

11. With the exception of the plantings required in the Permit Conditions, the "proposed" alterations on the site have already been accomplished and are existing.

12. The conditions set forth in the Permit Letter, and specifically Conditions 11, 13 and 17, will protect existing freshwater wetlands on the site.

13. The conditions set forth in the Permit Letter, and specifically Conditions 11, 13 and 17, will mitigate the effects of "proposed" alterations on the site.

14. The conditions listed in the Permit Letter, and specifically Conditions 11, 13 and 17, are reasonable and rationally related to the circumstances presented in the application.

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

CONCLUSIONS OF LAW

1. This matter is properly before the Department of Environmental Management, Administrative Adjudication Division, pursuant to R.I.G.L. Section 42-17.7-2.

2. Notice of the hearing and prehearing conference was duly provided in accordance with the Administrative Procedures Act and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters.

3. The subject site contains state jurisdictional wetlands as defined in R.I.G.L. Section 2-1-20.

4. The Division has authority to issue a wetlands alteration permit upon such terms and conditions as are consistent with the Freshwater Wetlands Act.

5. Applicant must prove, by a preponderance of the evidence, that the conditions are not necessary for the protection of freshwater wetlands.

6. Applicant has failed to prove that Condition 11 is not necessary for the protection of the wetlands.

7. Applicant has failed to prove that Condition 13 is not necessary for the protection of the wetlands.

8. Applicant has failed to prove that Condition 17 is not necessary for the protection of the wetlands.

9. Condition 17 is not in excess of the delegation of authority by the General Assembly to the Department of Environmental Management.

10. The Conditions set forth in the Permit Letter are consistent with the public interest and public policy set forth in R.I.G.L. Section 2-1-18 and Section 2-1-19.

11. The Conditions set forth in the Permit Letter are consistent with the purposes of the Freshwater Wetlands Act and comply with the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

Wherefore, it is hereby

ORDERED

- I. Applicant's Motion to Strike Condition 17 is DENIED.
- II. The Permit Letter with all conditions is UPHELD with the following amendments to Conditions 3 and 18:
 - "3. The effective date of the permit is the date of issuance of the Final Agency Order herein. The permit expires one (1) year from the effective date."
 - "18. Applicant must complete all work within one (1) year of the effective date of this permit. No extensions of this permit are allowed."
- III. The Division of Freshwater Wetlands may consider amending those conditions requiring the planting of evergreen trees if it determines that some other species would obtain the same beneficial result.

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

Entered as an Administrative Order this 30th day of September, 1993.

Mary F. McMahon

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

Adopted as a Final Agency Order this 5th day of October, 1993.

Louise Durfee

Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to James M. Sloan, III, Esq., 1309 Turks Head Building, Providence, RI 02903; Michael K. Marran, Esq., Two Charles Street, Providence, RI 02904; and via interoffice mail to Catherine Robinson Hall, Esq., Office Legal Services, 9 Hayes Street, Providence, RI 02908 on this 6th day of October, 1993.

Margaret Ballard