

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF WATER RESOURCES

IN RE: Paul Pimentel
Freshwater Wetlands Violation

C 249

DECISION AND ORDER

This matter came before the hearing officer pursuant to the Freshwater Wetlands Act, R.I.G.L. § 2-1-21. The hearing was held in accordance with the Administrative Procedures Act, R.I.G.L. § 42-31-1 et seq. and the Administrative Rules of Practice and Procedure for the Department of Environmental Management.

On or about December 4, 1987 the Department of Environmental Management (hereinafter "DEM") issued a Notice of Violation and Order to Paul Pimentel (hereinafter "Pimentel") alleging violations of R.I.G.L. § 2-1-21. Section 2-1-21 provides in pertinent part:

No person, firm, industry, company, corporation, city, town, municipal or state agency, fire district, club, non-profit agency, or other individual or group, 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 wetlands as herein defined without first obtaining the approval of the director of the department of environmental management.

The Notice and Order alleged clearing, house construction and allowing sediments to enter in a wooded swamp; clearing, sedimentation and house construction within fifty feet of said swamp; and allowing sediments to enter into an area subject to storm flowage and flooding.

A pre-hearing conference was scheduled for March 30, 1988. The matter was heard on April 14, 1988, in accordance with the Administrative Procedures Act and the Administrative Rules. Pimentel was represented by Stephen M. Litwin, Esq. Robert A. Shawver, Esq. represented the DEM's Division of Water Resources, Freshwater Wetlands Section. Martin Wencek, principal natural resource specialist for the Division of Water Resources and Kevin Fetzer, natural resource specialist, testified on behalf of the Department. DEM introduced twelve exhibits, as follows:

1. Exhibit 1: site inspection of November 13, 1987.
2. Exhibit 2: Notice of Violation dated November 27, 1987.
3. Exhibit 3: Notice of Violation dated December 4, 1987.
4. Exhibit 4: respondent's request for hearing.
5. Exhibit 5: site inspection of December 28, 1988.
6. Exhibit 6: site inspection of February 10, 1988, including photograph of site.

7. Exhibit 7: Notice of Violation dated March 8, 1988.

8. Exhibit 8: site inspection of March 24, 1988.

9. Exhibit 9: respondent's request for hearing.

10. Exhibit 10: site inspection of March 8, 1988

11. Exhibit 11: Notice of Administrative Hearing and Pre-Hearing Conference.

12. Exhibit 12: copy of the Pimentel site plan on which Mr. Wencek indicated the area of wooded swamp.

By agreement, the parties also introduced nine defense exhibits. These included:

1. Respondent's Exhibit 1: building permit application dated July 1, 1987.

2. Respondent's Exhibit 2: surveyor's map of Pimentel property, dated July 1, 1987.

3. Respondent's Exhibit 3: letter from Gerhard Oswald to Paul Pimentel, dated July 3, 1987.

4. Respondent's Exhibit 4: surveyor's map of Pimentel property, showing plans to comply with flood zone requirements.

5. Respondent's Exhibit 5: undated handwritten note from Stephen M. Murgo, Registered Land Surveyor, indicating that the house construction was an insignificant alteration.

6. Respondent's Exhibit 6: building permit application dated July 11, 1987.

7. Respondent's Exhibit 7: building permit dated July 17, 1987.

8. Respondent's Exhibit 8: plat map of property area.

9. Respondent's Exhibit 9: topographic map of Pimentel property, dated March 14, 1988.

Mr. Litwin presented two witnesses, including Pimentel and Larry Smith, an engineer, in support of respondent's case.

The DEM's first witness was Mr. Fetzer. He was qualified as an expert in the inspection and delineation of wetlands under the Freshwater Wetlands Act. Mr. Fetzer testified that he was familiar with the Pimentel property through site inspections which he made in November and December, 1987, and in February and March, 1988.

During the November inspection, Mr. Fetzer identified the area as a wooded swamp and an area subject to storm flowage. He specifically observed an alteration of freshwater wetlands, including fill in a wooded swamp, house construction, and clearing of vegetation. He recommended issuance of a Notice of Violation, admitted as Exhibit 2; a Notice of Violation with corrected dates was also admitted as Exhibit

3. Mr. Fetzer testified that Pimentel requested a hearing (Exhibit 4) on the restoration and fine ordered for the original violation.

Further site inspections in December and February, introduced as Exhibits 5 and 6, led to a Notice of Violation (Exhibit 7) for filling and house construction within a floodplain area, and additional filling into and within fifty feet of a wooded swamp after the issuance of a Cease and Desist Order. The property was re-inspected on March 24, 1988 (Exhibit 8) to permit measurement of the wooded swamp edge.

On cross examination by respondent's counsel, Mr. Fetzer conceded that the filling and construction identified by Exhibit 7 did not increase the quantum of damage to the wetlands.

DEM next called Martin Wencek, whose expert credentials in freshwater wetlands identification and delineation were stipulated to by the respondent. Mr. Wencek testified that he had first become involved with the Pimentel property in his capacity as Mr. Fetzer's supervisor, in November, 1987. He had considerable familiarity with the area because of the City of Bristol's activity on an adjoining wetland property. Thus, he had an opportunity to observe the Pimentel property prior to its alteration.

Mr. Wencek stated that the Pimentel project could not be approved, consistent with the freshwater wetlands act and the pertinent departmental regulations. The alterations destroyed valuable wildlife habitat. Mr. Wencek reverified the wetland edge on March 24, 1988 (Exhibit 8). He drew the edge on Respondent's Exhibit 4, a second copy of which was then renumbered Exhibit 12. This exhibit demonstrates that virtually the entire house, and the majority of the Pimentel lot, are within the wooded swamp. Applying the fifty foot buffer requirement would include the house, leaving only a sliver of land not subject to the strictures of the freshwater wetlands act.

Mr. Wencek detailed the necessary restoration: removal of the house and fill, regrading, and revegetation of the area to restore the wetlands to their state as of July 16, 1971, which was when the freshwater wetlands act was passed.

On cross examination, Mr. Wencek was asked whether the wooded swamp affected by the Pimentel alterations was not a small portion of the wooded swamp. He agreed that the wooded swamp covered areas other than the Pimentel property, and added that the swamp as delineated on Exhibit 12 represented the swamp's configuration prior to the wetlands alteration.

Paul Pimentel took the stand and was first examined by

Mr. Shawver. He bought the subject property from a Michael Murgo on December 31, 1987. He claimed that there was no wetlands disclosure in his purchase and sales agreement.

In May, 1987, he learned that a variance from the town's frontage requirements would be necessary to permit construction of a home. Because the Zoning Board was also concerned about floodplain requirements, Pimentel obtained a floodplain application (Respondent's Exhibit 1) and hired Stephen Murgo, a registered land surveyor, to fill out the application and survey the property. Mr. Murgo's initial effort in this regard was marked Respondent's Exhibit 2. Because the stamp of a professional engineer was required on these plans, Joseph Murgo was enlisted. To Pimentel's knowledge, Joseph Murgo never had any personal contact with the Pimentel property.

The Zoning Board hearing convened in late July, 1987 and agreed to grant the necessary variance. On his building permit application, Pimentel stated that there were no wetlands on his property, relying upon information from surveyor Stephen Murgo (Respondent's Exhibit 5), and engineer Joseph Murgo.

Pimentel began construction of his home in August, 1987, without a permit from the DEM to allow construction in a

wetland. The foundation was dug by Brian Tucker Construction. Soil from the excavation was used as fill elsewhere on the property. Because there wasn't enough fill generated through this process, Tucker agreed to drop off additional loads of fill from other area projects. Fill was subsequently dumped at the Pimentel property in October, 1987 and at some point in 1988.

Pimentel first learned of his problems with the freshwater wetlands act in November. He filed an application with the DEM on November 20, 1987. He received the first Notice of Violation (Exhibit 2) a week later. He did not notify Brian Tucker of the Notice of Violation, and Tucker subsequently placed additional fill on the property without Pimentel's knowledge, leading to the issuance of a further Notice of Violation (Exhibit 7).

Larry Smith was the final witness. On February 24, 1988, he met with Pimentel, and recommended preparation of the topographic drawing which was introduced as Respondent's Exhibit 9. Mr. Smith stated that, in his professional opinion, Stephen Murgu knew nothing whatsoever about wetlands and lacked the ability to discern whether the Pimentel construction would result in an "insignificant alteration" (Respondent's Exhibit 5).

Mr. Smith testified that the floodplain compensation plan was adequate. Since restoration of a wooded swamp is, in Mr. Smith's opinion, the most difficult wetlands problem, he believed that an adequate response to the Notice of Violation would be to permit the house to remain with proper staking of hay bales. He indicated the staking had already taken place. He also suggested that Pimentel might be willing to donate a portion of the property to the state or town, or to offer it for a Green Acres purchase.

As a result of the testimony and other evidence presented, I find as fact the following:

1. The Department of Environmental Management issued a Notice and Order to Pimentel on November 27, 1987, December 4, 1987 and March 8, 1988, 1986 alleging violations of the Freshwater Wetlands Act (Exhibits 2, 3 and 7).
2. As provided in the aforementioned Notice and Order, hearings were requested (Exhibits 4 and 9).
3. A notice of the pre-hearing conference and administrative hearing scheduled for March 30 and April 14, 1988, respectively, was issued on or about March 17, 1988.
4. A freshwater wetland described as a wooded swamp and an area subject to storm flowage and flooding exists on the property owned by Pimentel.

5. A house has been constructed within the wooded swamp, therefore altering freshwater wetlands. In connection with the house construction, there has been extensive filling of the Pimentel property, into or within fifty feet of the wooded swamp.

6. The construction and fill have existed on the property at least since August, 1987.

7. Pimentel has not been granted a permit to alter freshwater wetlands on his property.

8. The alteration did not exist prior to the passage of the wetlands act on July 16, 1971 and its amendments on May 9, 1974.

9. Pimentel relied upon the expertise of his land surveyor, Stephen Murgo, in omitting an application to alter freshwater wetlands. Stephen Murgo advised respondent that such an application was unnecessary because the house construction and fill constituted an insignificant alteration.

10. Pimentel further relied upon Joseph Murgo, a professional engineer, whose stamp is affixed to Respondent's Exhibit 1.

11. The additional fill placed by Bruce Tucker Construction during 1988 was done without Pimentel's knowledge, and did not cause additional damage to the subject property.

Based on the foregoing facts and the testimony and documentary evidence of record, I conclude as a matter of law that:

1. Notice of the hearing was duly provided in accordance with R.I.G.L. § 42-35-9.

2. Pimentel did not have a valid permit to alter freshwater wetlands at the subject site.

3. Pimentel violated R.I.G.L. § 2-1-21 by house construction and filling in and within fifty feet of a wooded swamp and an area subject to storm flowage and flooding.

4. The procedures ordered in the Notice and Order dated December 4, 1987 and March 8, 1988 to restore the freshwater wetlands to their state as of May 9, 1974 are reasonable.

5. The construction and fill existing on the freshwater wetlands on Pimentel's property constitute an unlawful alteration of the wetland. The alteration did not exist prior to the passage of the Wetlands Act amendments on May 9, 1974, and no permit was granted for any such alteration. Moreover, the alteration has damaged a portion of the wetland wildlife habitat on the site.

THEREFORE, it is

ORDERED

1. Within one-hundred eighty (180) days of receipt of this Order, Pimentel shall restore the freshwater wetland to its state as of May 9, 1974. This restoration shall include removal of the house constructed on the property, removal of all fill, and regrading.

2. Pimentel must contact this department (277-6820) forty-eight (48) hours prior to the commencement of restoration to insure proper supervision and to obtain required restoration details by representatives of this Department.

3. During restoration, the fill material must be removed down to or slightly below the original swamp elevation. Following restoration, the side slopes adjacent to the wetlands shall be suitably stabilized with seed and a spread hay mulch. The area within the wetlands and within fifty (50') feet of the wetland edge shall be allowed to regrow naturally.

4. Within thirty (30) days of receipt of this Order, Pimentel must pay an administrative penalty in the sum of One Thousand (\$1,000.00) Dollars in accordance with R.I.G.L. § 2-1-23, plus any administrative costs that the Director may show that have been expended during the course

of non-compliance with the applicable laws, regulations or orders of the Director. Such payment shall be in the form of a certified check made payable to the Treasurer, State of Rhode Island and delivered to the Director.

5. For each and every day that Pimentel fails to comply with the requirements imposed by paragraphs one, two, three and four, Pimentel must pay an additional administrative penalty of Five Hundred (\$500.00) Dollars. Such payment shall be in the form of a certified check made payable to the Treasurer, State of Rhode Island and delivered to the Director.

6. Copies of this Decision and Order shall be provided to the appropriate regulatory, licensing, and professional organizations for land surveyors and professional engineers, and to the insurance carriers for Stephen Murgo and Joseph Murgo. It is the opinion of the hearing officer that the conduct of these individuals fully justifies the imposition of all costs associated with the wetlands restoration upon the land surveyor and engineer; however, these parties were not before the hearing officer and therefore jurisdiction to impose such costs is absent.

Date: June 3, 1988


Adrienne G. Southgate
Hearing Officer

Date: 6/1/88

Robert L. Bendick
Robert L. Bendick
Director, Department of
Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded to Stephen M. Litwin, Esq., D'Amico & Hurst, 194 Waterman Street, Providence, RI 02906, regular mail, postage prepaid and to Robert Shawver, Esquire, Legal Counsel, Department of Environmental Management, 9 Hayes Street, Providence, RI 02908 by inter-office mail this _____ day of June, 1988.

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