

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF FRESHWATER WETLANDS

IN RE: Profile Construction Company
Freshwater Wetlands Application No. 89-0555F

AMENDED (ON REMAND) FINAL AGENCY
DECISION AND ORDER

This matter has been remanded to the Designated Director (Director) pursuant to Justice Israel's Decision in re C.A. No. 91-3154, dated October 26, 1992. Justice Israel has instructed the Director to reconsider whether the applicant has met his burden of proof under Rule 5.03 (c) (7) of the Rules and Regulations Governing Enforcement of the Freshwater Wetlands Act, and more particularly, to do so "in the light only of the evidence presented in this [the administrative hearing] record." (Decision of October 26, 1992; at page 11).

In determining whether this application should be approved or denied, the Director has been further instructed by Justice Israel to:

1. Consider "whether or not the applicant has so mitigated the impact of the proposed alteration that the natural character of the wetland has not been degraded and the value of the wetland has not been reduced." (id., at page 6.)
2. Issue the required permit "[i]f [the] applicant can show that it has so mitigated the impact of [the] alteration to [the] wetland that in fact it no longer violates Rule 5.03...."(id., at page 8.)
3. Not apply any "controlling interpretation" of Rule 5.03(c)(7) which prohibits "without qualification" the alteration of "any" aspect of a valuable wetland (id., at page 10.), or which rejects out-of hand the planting of vegetative screens as a mitigation measure for the destruction and/or displacement of undisturbed and naturally vegetated upland buffer associated with valuable wetlands. (id., at pages 10-11)

Justice Israel, in his Decision of October 26, makes several additional findings, however, which also bear on the manner in which this application must be processed on remand. These are as follows:

1. The proposed construction of a 290 by 24 foot road and associated retaining walls and vegetative plantings in a wetland constitute alterations of the [natural] character of this wetland. (id., at page 6)
2. The applicant has agreed that the wetland it proposes to alter is both a "unique" and a "valuable" wetland as defined in [Freshwater Wetlands] Rule 7.06. As a consequence, this wetland is entitled to the "heightened scrutiny" required by Rule 5.03(c)(6) and (7). (id., at page 6)
3. Rules 5.03(c)(6) and (7) require, with no choice to do otherwise, that the Director deny alterations which result in "any degradation" of the natural character of any unique wetland or "any reduction" of the value of any valuable wetland. (id., at pages 6 and 7)

4. The fifty-foot [upland wetlands] margin or buffer associated with " any bog, marsh, swamp or pond" is to be accorded the same protection as the swamp, bog or other wetland itself. "No lesser concern may be shown under the law for the marginal upland than for any other part of the statutory wetland." (id., page 5)

SUMMARY FINDINGS

The regulatory decision before the Director, on remand, is limited to determining whether the alterations proposed by this applicant in this location are in and of themselves so minimal in their impacts as to conform to Rules 5.03 (c)(6) and (7), or, alternatively, whether their impacts will be sufficiently minimized as to pass regulatory muster by the inclusion of proposed mitigation measures.

First; the proposed road. The hearing record shows that two hundred and ninety feet of twenty-four foot wide paved roadway is proposed to be constructed in and through the legally mandated fifty foot wide upland buffer associated with a "unique" and "valuable" freshwater wetlands (Mishnock Swamp). The hearing record also shows that this wetland, including the aforementioned upland buffer, is entitled to heightened regulatory scrutiny as

"unique" and "valuable" pursuant to Rules 5.03(c)(6) and (7) because so-called "Wetland-Wildlife Evaluations" performed by both the applicant and the Department established conclusively that it exhibits "outstanding" and "high" wildlife diversity and production.

Not surprisingly, the hearing record is devoid of any expert testimony claiming that the paved roadway itself provides suitable replacement wetlands wildlife habitat for that destroyed by its construction or that it otherwise contributes to wildlife diversity or productivity. Under cross examination, in fact, the applicant's biological expert, Scott Rabideau, acknowledged that the roadway physically eliminates regulated wetland perimeter (buffer) adjacent to the Mishnock Swamp complex and, further, acts as a conduit for intrusion of commercial activity into the interior of the swamp. The Department's witnesses testified more extensively both as to the roadway's effect of directly displacing wildlife habitat and resident wildlife species within the wetlands buffer as well as less directly disrupting wildlife breeding, feeding and movement patterns in the adjacent swamp through the introduction of human activity, traffic noise and lights into what is presently an undisturbed and naturally vegetated wetlands buffer.

The hearing record, therefore, clearly demonstrates that in and of itself, the paved roadway which this applicant proposes to build and the physical alterations to this wetland which will result from its construction will degrade the natural character of a "unique" wetland and, further, will reduce the value of a "valuable" wetland. Further, the roadway and its construction have no mitigation value relative to impacts on the wetland which are likely to result from this project.

Second; the proposed concrete retaining walls. The applicant proposes to stabilize a portion of the above referenced roadway by constructing approximately one hundred feet of concrete retaining wall along the common boundary between the biological wetland and its associated wetland buffer. The applicant's plans, in fact, indicate that some of this wall would be constructed in the biological wetlands (Mishnock Swamp) itself.

Again, the hearing record contains no expert testimony that such a wall provides suitable replacement wetlands habitat for that destroyed by its construction, otherwise contributes to wildlife diversity or productivity within the protected wetland, or contributes in any way to the mitigation of wetlands impacts associated with this project.

In and of itself, therefore, the proposed wall, like the road with which it is associated, will degrade the natural character of a "unique" wetland and reduce the value of a "valuable" wetland.

Last; proposed landscaped slopes and berms. The applicant's proposal provides for the construction within the wetland buffer of vegetated swales, so-called Cape-Cod berms, whose purpose is to capture and channel rain runoff from the proposed roadway. The applicant also proposes to landscape with a variety of trees and shrubs the earthen embankment which its design shows separating the proposed roadway from the lower (in elevation) Mishnock Swamp. Its plans show that this embankment and consequently the proposed landscaped area is at best twenty feet wide and is, in fact, along most of its length, no more than ten feet wide, with most or all of that ten feet extending past the upland wetlands buffer into the biological wetlands itself.

Applicant's biological expert, Scott Rabideau, testified at length to his opinion that this landscaped slope, due to the density, variety and species of shrubs and trees selected by the applicant's landscaper would improve the pre-existing vegetative habitat of this wetland and its

upland buffer and thereby attract more bird and animal species. He supported this contention in part by opining that the natural character of what he had previously acknowledged to be a "unique" wetlands complex had already been degraded sufficiently such that the applicant's project would not degrade it further.

The Department's biological witnesses, Carl Ruggieri and Brian Tefft, testified to a contrary expert opinion that the applicant's proposed vegetative screen would provide inadequate mitigation for the adverse wetlands impacts of its proposal. They testified to their opinion that this screen was too narrow and provided insufficient separation between the proposed roadway and the disruptive activities associated with that roadway's use on the one side and the biological wetlands and its sensitive wildlife inhabitants on the other. They opined that proposed plantings would provide insufficient attenuation of noise and lights generated by traffic on this roadway and that the construction of the vegetated embankment itself would necessitate further destruction of existing natural habitat, both within the upland wetland buffer and the associated biological wetland .

By the very nature of his proposal, this applicant has placed an extraordinarily heavy regulatory burden on a narrow, vegetated screen. This screen must have been shown to be capable of carrying the full weight of mitigating the adverse impacts on the wetland associated with the construction of a two hundred and ninety foot by twenty-four foot paved roadway, a one hundred foot concrete retaining wall, and the embankment and related drainage swales themselves; all of which alterations are proposed to proceed in a "unique" and "valuable" wetland which by regulation requires what Judge Israel has characterized as "heightened [regulatory] scrutiny." (*id.*, page 6). The applicant has not shown that in this case that this minimally acceptable level of mitigation will be achieved by the construction of the proposed landscaped embankment.

Certainly, it must be acknowledged that the proposed landscaped embankment has some value as a mitigation measure for the various previously cited adverse wetlands impacts which would result from construction of this project, but the degree of that mitigation is simply not sufficient to compensate for the reduction in wildlife diversity and production within a "unique" and "valuable" wetland which is prohibited pursuant to Rules 5.03(c)(6) and (7) and 7.06(a) and (b) and which would result from the

approval of this application.

FINDINGS OF FACT

After review of the entire record in this matter, I hereby find as follows:

1. The Department denied applicant's request (89-0555F) to modify a freshwater wetland on August 28, 1990.
2. A timely notice of appeal was filed by applicant on September 6, 1990.
3. This matter was properly before the Administrative Adjudication Hearing Office pursuant to RIGL 42-17-7.1 et seq., Freshwater Wetlands Act RIGL 2-1-20.1 et seq. as amended; Administrative Procedures Act RIGL 42-35-1 et seq. Rules and Regulations Governing the Enforcement of Freshwater Wetlands; and Administrative Adjudicatory Division Rules and Regulations promulgated July 1990.
4. The Pre-Hearing Conference on this application was held on November 21, 1990 at the Administration

Building, One Capitol Hill, Providence, Rhode Island.

5. A Pre-Hearing Conference Record was issued on November 21, 1990 and made part of the file.
6. No individuals moved to intervene.
7. Public hearings were held on December 10 and December 11, 1990, at the Administration Building, One Capitol Hill, Providence, Rhode Island.
8. All parties and the Hearing Officer viewed the site on December 13, 1990.
9. This hearing formally closed on January 28, 1991, the date all stenographic notes were received by the Hearing Officer.
10. No brief or memoranda were requested by the Hearing Officer or submitted by the parties.
11. The site of the proposed alteration is located east of Nooseneck Hill Road, (Route 3), Utility

Pole #2, North of I-95 in West Greenwich, Rhode Island.

12. Thirty feet of the subject site is an easement owned by Profile Construction Co.
13. Formal Application No. 89-0555F to alter a wetland was received by DEM on August 4, 1989.
14. The site plan subject to this hearing was received by the Department on April 19, 1990.
15. A site plan was originally sent out to public notice on April 20, 1990. This notice was amended on April 26, 1990 commencing a forty-five day notice period which ended June 10, 1990.
16. The Department received eight public comments during the notice period. Pursuant to the standard set forth in Sec. 5.05(b) of the Rules and Regulations, the Department did not deem any of these comments to be of a substantive nature.
17. This project will cause an alteration to a state jurisdictional freshwater wetland.

18. The state jurisdictional wetland affected by the Applicant's proposal includes a wooded swamp and that area of land within fifty (50) feet of the edge of the swamp, henceforth referred to as the "upland buffer."
19. The jurisdictional wetland affected by the proposed alterations is a component of a \pm 560 acre wetland known as Mishnock Swamp and lies at its western most limit.
20. Both parties to this proceeding performed independent "Modified Golet" Wetland-Wildlife Evaluations of the Mishnock Swamp, this being the evaluation method specified by Wetlands Rule 7.06. This evaluation method measures wildlife diversity and productivity.
21. Both said wetlands evaluations identified the Mishnock Swamp as "valuable" and "unique" for purposes of regulation pursuant to Wetlands Rules 5.03 and 7.06. The Applicant's Environmental Review, completed for it by Natural Resource Services, moreover, determined that this wetland

complex has "outstanding" wildlife diversity and production potential as measured by the Modified Golet evaluation method.

22. The proposed alteration will displace approximately 13,388 square feet (0.31 acres) of naturally vegetated jurisdictional wetland within the Mishnock Swamp complex, most of that being fifty foot upland buffer, and replace same with a two hundred and ninety (290) foot long by twenty-four (24) foot wide paved roadway and associated drainage structures, concrete retaining walls, grading, landscaping and planting. Within the area of proposed disturbance a presently "valuable" and "unique", undisturbed and naturally vegetated upland buffer wildlife habitat will be replaced in its entirety by the above described alterations, as will portions of the associated "valuable" and "unique" biological wetland itself.

23. The biological and upland buffer components of a "valuable" and/or "unique" wetland complex function as inseparable parts of a single ecological system. Preservation of an undisturbed

and naturally vegetated upland buffer is, therefore, critical to preserving the high wildlife diversity and productivity characteristic of a "valuable" and/or "unique" wetland.

24. The applicant's biological expert acknowledges that The construction of a two hundred and ninety foot by twenty-four foot roadway will, in the area of proposed disturbance, result in the destruction of the existing upland buffer associated with the Mishnock Swamp wetlands complex and will further act as a conduit for the intrusion of commercial activity, noise and lights into the interior of the swamp. This intrusion will disrupt wildlife breeding, feeding and movement patterns within the "unique and "valuable" jurisdictional wetland.

25. The applicant's plans show that a one hundred foot concrete retaining wall is proposed to be constructed in the jurisdictional wetland with portions in the biological wetland, and will destroy wetland wildlife habitat in the area of disturbance.

26. The planting of the landscape "screen" or embankment proposed by this applicant provides an inadequate level of mitigation or compensation for the destruction and/or displacement of the undisturbed and naturally vegetated upland buffer associated with the "valuable" and "unique" Mishnock Swamp wetlands complex, and for the similar destruction and/or displacement of portions of the biological wetlands complex itself, all of which would result from the approval of this application. It similarly is insufficient in width and density to mitigate against the intrusive and disruptive impacts on wetlands wildlife diversity and productivity of the adjacent roadway which this applicant proposes to build through the jurisdictional wetland buffer. As a consequence, this applicant has not so mitigated the impacts of the alterations he proposes as to avoid degrading the natural character or reducing the value of this "unique" and "valuable" wetlands.
27. The proposed project, overall, will, therefore, adversely impact wildlife diversity and production

in the Mishnock Swamp wetlands system. It will thereby degrade the natural character and reduce the value of a jurisdictional wetland which is both "unique" and "valuable" as those terms are employed in Wetlands Rules 5.03 and 7.06.

28. A Recommended Decision and Order in this matter was submitted by Administrative Hearing Officer Patricia Byrnes, Esq. on February 31, 1991.

29. A Final Agency Decision and Order was issued by the Director on April 3, 1991.

30. The Final Agency Decision and Order was remanded to the Director for reconsideration pursuant to a Decision by Superior Court Justice Richard Israel, filed on October 26, 1992.

CONCLUSIONS OF LAW

1. The public hearing was held at the Administration Building, One Capitol Hill, Providence, Rhode Island and is in substantial compliance with R.I.G.L. 2-1-22.

2. This matter was properly before the Administrative Adjudication Hearing Officer as required by R.I.G.L. 42-17.7-1 et seq. as amended; Administrative Procedures Act 42-35-1 et seq. as amended; Freshwater Wetlands Act 21-20.1 et seq. as amended; the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands and Administrative Adjudication Division Rules of Practice and Procedure effective July 1990.
3. Pursuant to Rule 11.03(b) of the Regulations, it is the applicant's burden to prove by a preponderance of the evidence that his proposal complies with the Rules and Regulations governing the enforcement of the Act and is protective of the environment and the health, welfare and general well being of the populace. The applicant has not sustained this burden of proof.
4. DEM filed a timely letter denying applicant's request to alter a Freshwater Wetland (89-0555F).
5. Applicant filed an appropriate and timely request for hearing and paid all necessary fees.

6. The area in question is a wetland pursuant to R.I.G.L. 2-1-20.
7. The subject wetland complex, Mishnock Swamp, including its associated jurisdictional upland buffer, is a "unique" wetland pursuant to Sec. 7.06(a) of the Rules and Regulations and a "valuable" wetland pursuant to Rule 7.06(b).
8. Rule 5.03(c) requires the Director to deny approval of a proposed alteration of a wetland if in his opinion it will cause "random, unnecessary and/or undesirable destruction of freshwater wetlands" which is defined as including, but not limited to degradation of the natural character of a "unique" wetland [5.03(c)(6)] or reduction of the value of a "valuable" wetland. [5.03(c)(7)].
9. The proposed project will result in a reduction in wildlife diversity and productivity within a jurisdictional wetland complex considered "unique" pursuant to Rule 7.06 (a)(6) by virtue of its exhibiting "outstanding" wildlife diversity and production as determined by the "Wetland-Wildlife

Evaluation Model." It will thereby degrade the natural character of that "unique" wetland. Rule 5.03 requires that the Director deny any such proposal.

10. The proposed project will exercise a similarly adverse impact on wildlife diversity and productivity within a jurisdictional wetland complex also considered "valuable" pursuant to Rule 7.06(b)(1) by virtue of its being characterized by "high" diversity and production of wildlife. It will thereby reduce the value of that "valuable" wetland. Rule 5.03 requires that the Director deny any such proposal.

11. Approval of the proposed alteration is, therefore, inconsistent with the public interest and public policy as stated in Sections 2-1-18 and 2-1-19 of the Act and Section 1.00 of the Rules and Regulations governing the R.I. Freshwater Wetlands Act.

THEREFORE, IT IS

ORDERED

That Profile Construction Company Freshwater Wetland Application No. 89-0555F is DENIED.

This constitutes the Final Agency Decision and Order in this matter.

2-2-93

Malcolm J. Grant

Date

Malcolm J. Grant
In his capacity as Designated
Director of the R.I.
Department of Environmental
Management

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded, regular mail, postage prepaid to Dennis H. Esposito, Esq., 200 Shakespeare Hall, 128 Dorrance Street, Providence, Rhode Island 02903; and via inter-office mail to Catherine Robinson Hall, Esq., 9 Hayes Street, Providence, Rhode Island 02908 on this 2nd day of February, 1993.

Marie C. Lanza