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

IN RE: Environmental Scientific Corp./John Travassos
AAD No. 91-020/FWA
Freshwater Wetlands Application No. 90-0746F

DECISION AND ORDER

INTRODUCTION AND TRAVEL

This matter is before the Hearing Officer on the application of Environmental Scientific Corp./John Travassos to alter freshwater wetlands located east of Fish Road, approximately 800 feet south of its intersection with Route 24, at pole 12, further described as Tax Assessor's Plats 2-1, 3-1, Lots 69, 70 and 73 in the Town of Tiverton, Rhode Island.

The Applicant requested permission to alter Freshwater Wetlands for construction and development of the roadway, drainage and utility infrastructure associated with a future industrial development to be known as "Tiverton Research and Development Park."

The application was denied by the Wetlands Section of the Department of Environmental Management (DEM) on November 6, 1991 and a request for hearing was timely filed.

Dennis H. Esposito represented the applicant and Michael K. Marran represented the Division of Freshwater Wetlands of the Department of Environmental Management.

The prehearing conference was held on February 21, 1992 at the Offices of the Administrative Adjudication Division. No requests to intervene were filed.

Numerous preliminary motions were filed by Applicant. The motions were argued on March 6, 1992 and briefed by the parties. Written decisions on the motions were issued and are part of the administrative record. Hearings in this matter were held on April 6, 8, 9 and 23, 1992.

A view of the site was conducted on April 1, 1992 with the Hearing Officer, counsel of record, John Travassos and Brian Tefft.

The scope of the hearing and of this decision was defined by the parties with the concurrence of the Hearing Officer. This decision addresses a single issue as framed by the parties. It does not grant or deny a permit. It addresses only one ground for denial identified in paragraph 6(a) of the denial letter of November 6, 1991. (Joint Exhibit 10). That limited issue is whether there exists any feasible or practicable upland alternative to the major wetland crossing as proposed by the Applicant and as further addressed in paragraph one (1) and paragraph 6(a) of the Division's denial letter of November 6, 1991.

The following stipulations of fact were entered by agreement of the parties:

1. The Tiverton Industrial and Recreational Development Commission is the owner of those certain parcels of real estate located in the Town of Tiverton, east of Fish Road, approximately 800+- feet south of its intersection with State Route 24 at Pole 12, and recorded in Tiverton Land Evidence Records as Assessor's Plat 2-11, 3-11, Lots 69, 70 and 73.

2. The Town of Tiverton is record owner of a certain parcel of land adjacent to the subject property on its northerly side.

3. Formal Application No. 90-0746F was filed with the Department of Environmental Management, Freshwater Wetlands Section on behalf of the Tiverton Industrial and Recreational Development Commission by John Travassos, Environmental Scientific Corporation.

4. By letter dated November 6, 1991, Brian C. Tefft, in his capacity as Supervisor for Applications, Freshwater Wetlands Section of the Department of Environmental Management denied Application No. 90-0746F.

5. As grounds therefor, the Department found the alterations sought to be unnecessary, citing alternatives, including alternate access to the project, which would significantly reduce environmental impacts of the project.

6. The Applicant filed a timely Notice of Appeal of the denial of Application No. 90-0746F.

7. The Applicant filed all necessary documents and paid all necessary fees so as to be properly before the Department of Environmental Management's Administrative Adjudication Division.

8. The ingress and egress from Fish Road as is presently existing immediately adjacent to Route 24 may be deemed to be unfeasible and not practicable for the purpose of Applicant's intended usage. The parties have agreed that the letter of the Rhode Island Department of Transportation dated February 26, 1991, signed by Edmond T. Parker, Jr., Deputy Assistant Director of Transportation/Public Works to a Mr. Roland Lapierre, Equity Ventures, Inc., constitutes controlling and unrebuttable evidence to this issue.

9. The Texaco Access Road, which is the subject matter of the Division's denial letter of November 6, 1991, paragraph 6(a), cannot commence its northward turn until after crossing existing wetland located adjacent to Fish Road. For the purposes of these proceedings, it is stipulated the access as

proposed by the Applicant on the within application will continue in an easterly direction across said wetland, and further it is the Division's contention that entry to the alternative access can only commence no further west than the eastern edge of said wetland. This wetland is referred to on page 4-1 of the within application as Wetland 1 (see Joint Exhibit 1 - Application to Wetland Formal Application, Volume I).

10. The Applicant contemporaneously with the filing of the formal application as mentioned in paragraph 5 shall also apply for expedited review under the provisions of Title 42, Chapter 1-16, Section 1, et seq. of the General Laws of the State of Rhode Island.

11. The Applicant will hereby waive its right to a hearing on the original application as pertains to the proposed crossing design which, inter alia, consists of two box culverts.

The following documents were admitted into evidence as joint exhibits:

JOINT EXHIBITS

JT. 1. Mounted site plan

JT. 2(a) 2(b) 2(c) Deeds indicating ownership of applicant's property

JT. 3. Deed regarding alternate access to property

JT. 4. Utility easement

JT. 5. Enabling legislation for Tiverton Industrial and Recreational Development Commission

JT. 6. Correspondence from Parker to LaPierre dated 02/26/91

JT. 7. Copy of Rhode Island General Laws § 23-18.2

JT. 8. Resume of Mr. Hollywood

JT. 9. Resume of Mr. Amarantes

JT. 10. Denial letter dated 11/06/91

JT. 11. Evaluation of application by Charles Horbert

JT. 12. Resume of Brian Tefft

JT. 13. Zoning Ordinance

JT. 14. Section of zoning ordinance

JT. 15. Cites

JT. 16. Stamped survey

JT. 17. Article 3 of the Tiverton town code entitled, Other District Regulations

JT. 18. Resume of Carmine Asprinio

In addition to said Joint Exhibits, the following were admitted as Applicant's Exhibits:

APPLICANT'S EXHIBITS

Applic. 1 (a - i) Various photographs of site taken March 29, 1992

The following was marked for identification:

DEPARTMENT'S EXHIBIT (FOR ID ONLY)

Dept. 1. Alternate Roadway dated February 19, 1992 (For ID)

The sole issue to be considered by this Hearing Officer pursuant to stipulation of the parties is as follows:

> Does there exist any feasible or practicable upland alternative to the major wetland crossing as proposed by the Applicant and as further addressed in paragraph 1 and paragraph 6(a) of the Division's denial letter of November 6, 1991?

The Applicant bears the burden of proving by a preponderance of the evidence that there exists no practicable or feasible upland alternative to the major wetland crossing as proposed by the Applicant.

POSITION OF THE PARTIES

The Applicant's position stated in elementary terms is that the upland alternative through land owned by the Town of Tiverton (hereinafter "Town Parcel") cited by the Division is not practical or feasible in light of numerous physical and/or legal obstacles. Borrowing from Applicant's prehearing memorandum, it cites those obstacles as follows:

a. Alternative access to the adjacent upland property is not a practicable alternative as the Applicant has no legal or equitable rights of ownership in said property. The mere existence of upland property neighboring the land owned by the

Applicant is neither a reasonable nor a practicable alternative where the purchase of such property by the Applicant would be required.

b. Even assuming, arguendo, that the purchase of neighboring property to use as an alternative to wetland crossing was "practicable," the Town of Tiverton's upland property in the instant case is not a practicable alternative because of the existence of crucial municipal buildings and operations located on the property.

c. Access through said adjacent property is not practicable because of the unique uses of and encumbrances upon the land.

d. The adjacent property is not a practicable alternative to the proposed wetland crossing as it is not of the appropriate dimensions and geological make-up necessary to accommodate an access road to the proposed project of appropriate width and angles.

e. Adjacent upland property is not a practicable alternative to the proposed wetland crossing due to its nonconformance with applicable zoning and subdivision ordinances of the Town of Tiverton.

f. The adjacent upland property is not a practicable alternative to the proposed wetland crossing in that there is a utility easement which runs through the center of the upland property making it impossible to design an access roadway to the proposed development.

The Division's position is that the alternative roadway through the Town Parcel constitutes a practicable and feasible upland alternative to the major wetland crossing. In weighing the feasibility of using or acquiring the Town Parcel, the Division asks this Hearing Officer to find that the Commission and the Town are sufficiently related to consider them one party, or at least, require them to cooperate in the development of the proposed industrial park.

Addressing the Division's position in summary fashion, it contends that Applicant has not taken the steps required to demonstrate that the upland alternative is, in fact, not feasible or practicable. Counsel highlights that Applicant has not even inquired of the Town as to the possibility of using or acquiring the Town Parcel; that no contract was made with Narragansett Electric regarding the possibility of using the property along and in the electric easement; and that no substantive inquiry was made into the actual costs or cost projections to upgrade the Texaco Access Road.

The Division points out that neither the Freshwater Wetlands Act nor the Regulations promulgated in accordance with the Act define the term unnecessary. The Division encourages the Hearing Officer to give the word its plain and ordinary meaning, as well as affording great weight to the Division's interpretation of its own regulations.

SUMMARY OF TESTIMONY

John D. Hollywood testified on behalf of the Applicant and was qualified by agreement as an expert in civil engineering. Mr. Hollywood is a principal in the firm of Sasaki and Associates of Watertown, Massachusetts. Mr. Hollywood has been involved in the proposed project since March of 1989. Sasaki and Associates is providing civil engineering, architectural and land planning services to the Commission. Mr. Hollywood's duties have included the oversight of design of roadways, roadway configuration, park access and lotting.

Mr. Hollywood testified concerning the requirements for an access roadway necessary to serve the anticipated development, the type and degree of traffic planned for and the specific reasons for the designed road widths. Mr. Hollywood indicated that the designed road widths exceed subdivision regulations but are, in his opinion, sound engineering practice in light of the proposed development uses. Likewise, the minimum radius

designed by Sasaki is 200' while the subdivision regulations require only 150'. Again, Mr. Hollywood opined that due to the amount, flow and character of the traffic, sound engineering practice mandates a 200' radius. Mr. Hollywood addressed various "impediments" in his testimony concerning a hypothetical alternative roadway through the Town Parcel. It is clear from Mr. Hollywood's testimony that based on the designed road widths and turning radius, an alternative roadway would have a short section of straight alignment that would approximate the course of the electric easement, and essentially, fall within that easement. In order to take the proposed road out of the easement and westerly, would place it in the cemetery or the Tiverton Police site. Mr. Hollywood indicated that a more easterly placement would not be feasible. At present, the DPW site is east of the electric easement. Mr. Hollywood discussed the DPW operation and traffic requirements at length. If the DPW yard was to remain in its present location, the pavement of the proposed alternative road would be approximately ninety (90) feet from the DPW garage. Mr. Hollywood testified that such road placement would constrain the maneuvering and alignment of vehicles for entry into the garage.

Mr. Hollywood opined that from an engineering standpoint it is not practical or feasible to locate an alternative roadway through the Town Parcel and DPW yard. It was his opinion that it is not feasible from an engineering standpoint to keep the DPW operation in place and build and operate the proposed alternative roadway.

Moving further along the proposed roadway to its intersection with the Texaco Access Road, Mr. Hollywood indicated that an extension or widening of the roadway pavement would be required either by way of full excavation or overlay. In order to upgrade the access road, the adjacent wetland areas would be impacted. Mr. Tefft addressed the issue and stated that biologically, an upgrade of the Texaco Access Road is "grossly preferable" in light of the fact the area has already been altered and it is adjacent to the existing highway resulting in a minimal effect on the wetland. I have accepted Mr. Tefft's testimony on this particular issue.

Mr. Hollywood, the exhibits of record and other witnesses acknowledge the existence of an eighty (80) foot electric easement on the Tiverton Property. Mr. Hollywood indicated that the existence of the electric easement would constitute an engineering impediment for the construction of an alternative roadway along that easement. He testified that based on his

understanding and experience in dealing with other electrical easements, the power company would want to maintain the ability to shift the poles within the easement. Under cross-examination, however, Mr. Hollywood acknowledged that he had no contact with Narragansett Electric regarding either the easement generally or the placement of the roadway. I can only conclude that Mr. Hollywood's conclusion that the subject easement is an actual engineering impediment is based on speculation and has no probative value.

Karl W. Olsen testified on behalf of Applicant. Mr. Olsen is the President of the Viking Group which is a development consulting company which provides services to the Tiverton Recreational and Industrial Development Commission (hereinafter "Commission"). Mr. Olsen has been involved in the project since 1988. The proposed Tiverton Research and Development Park is being proposed on a 228-acre parcel. Mr. Olsen described the purpose of the Commission as promoting economic development within the Town of Tiverton for the enjoyment of its citizens, to provide gainful employment, to increase tax revenues and to provide recreational facilities. The purpose of the park is industrial development potentially generating approximately 2800 jobs based on full employment projections.

Mr. Olsen next described the Town Parcel which currently houses the Tiverton Police Department, an historical cemetery, the Town's DPW operations and a firing range. Mr. Olsen testified that but for the alternate route which is the subject of this hearing, there exists no other alternative access to the Commission's property. Mr. Olsen testified concerning the proposed upland alternative, specifically stating that it would require a substantial upgrade of the Texaco Access Road. In addressing the feasibility of the upland alternative, Mr. Olsen testified that the first step would be to buy or gain access to the property. He assumed that the property would have to be purchased and relocation costs negotiated. Mr. Olsen stated directly that with respect to the alternative access that a complete new re-engineering of the costs of the project would have to be accomplished because the Commission has not formally considered it. Mr. Olsen stated that it would have to be considered, but he assumed those costs would be substantial. Mr. Olsen reiterated this under cross-examination. He further indicated that the Applicant is presently unaware of the ownership of the Texaco Access Road or the Commission's ability to access it but is pursuing that information. In cross-examination, Mr. Olsen admitted that no contact has been made

with Narragansett Electric concerning the easement, and he restated the fact that the upland alternative has not been discussed with the Town.

On redirect, Mr. Olsen indicated that the upland alternative would require re-engineering and redesigning costs, as well as carrying costs which have not been budgeted. He stated that such reworking and delays would have a significant impact on the funding available for the project and may result in abandonment of the project.

James P. Amerantes testified on behalf of the Applicant. Mr. Amerantes is an attorney, a registered land surveyor and serves as Treasurer of the Town of Tiverton. The parties agreed to Mr. Amerantes' qualification as a registered land surveyor. Mr. Amerantes in his capacity as Town Treasurer testified of his actual knowledge of the parcels of land owned by the Town of Tiverton. He testified that he is familiar with the present DPW site and its operations. Upon direct examination, Mr. Amerantes testified that the DPW yard cannot presently be relocated to any Town-owned land without displacing existing town uses or requiring state permits.

Mr. Amerantes' testimony centered on the present Town ownership of other parcels. The issue of the Town's willingness or unwillingness to relocate the DPW operation was never

addressed. Whether the Town would consider such a move was rendered moot by Mr. Amerantes' testimony that there presently exists no other suitable Town-owned parcel for the relocation of the DPW operation. The testimony of Mr. Amerantes establishes that it is not possible to relocate the DPW yard at this juncture.

The Applicant inquired of William R. Grada, former Highway Superintendent for the Town of Tiverton commencing in 1981 through most of 1989. Mr. Grada provided general testimony and background concerning the DPW operations, types and size of vehicles used and use of the DPW garage. He provided specific testimony on the required maneuvering for vehicles including pickup trucks, plows, sanders and dump trucks. His testimony established that the DPW operations use property to the west of the DPW garage (and into or beyond the area commonly referred to as the electric easement) on a regular basis throughout the year. Mr. Grada testified that two underground storage tanks are located on the property, as well as gasoline pumps, oil storage, vehicle storage and abandoned parts storage.

Thomas T. Brady testified next on behalf of the Applicant. Mr. Brady is an attorney practicing in the State of Rhode Island since 1970. Mr. Brady also serves as Vice Chairman of the Tiverton Recreational and Development Commission. Mr. Brady

testified at length concerning portions of the Zoning Ordinance of the Town of Tiverton and its applicability to the Town Parcel and the proposed upland roadway alternative. Mr. Brady testified that certain variances and/or exceptions would have to be obtained from the Zoning Board prior to placement of the roadway. Several other obstacles were addressed by Mr. Brady including the procedures required for the Town to alienate the Town Parcel. I have considered Mr. Brady's testimony, but this evidence is not the basis for this decision.

Carmine Asprinio testified on behalf of the Freshwater Wetlands Division of the Department of Environmental Management. The parties stipulated to his qualification as a registered civil engineer.

Mr. Asprinio testified that he viewed the electrical lines in the area of the easement and that the lines were abandoned in-place. He explained that they are not presently useful but remain in place on the parcel.

Mr. Asprinio stated that he sketched a roadway through the Town Parcel and that he sketched turning radius of one hundred fifty feet (150') on the first curve which resulted in more square footage available for the DPW yard. He did admit on cross-examination that he was not familiar with the turning radius requirements or maneuvering room required for the

vehicles which would exit and enter the roadway. He further stated that the additional square footage he created by reducing the turning radius to 150' would have no impact on whether the DPW operation can continue to exist.

Brian C. Tefft, Supervisor of the Application Permitting Section of the Division of Freshwater Wetlands was the Division's only other witness. Mr. Tefft was qualified by agreement of the parties as an expert in wetlands ecology, wildlife habitat and recreational evaluation and environmental impact assessment. Mr. Tefft is responsible for overseeing the application review procedure by staff biologists and engineers and for consideration of recommendations for division final decisions involving the permitting or denial of a project.

Mr. Tefft is the author of the denial letter of November 6, 1991 directed to the Tiverton Industrial Recreational Development Commission. Mr. Tefft testified that in determining the proposal to be unnecessary, all application materials are considered in light of the nature of the wetland involved, which he stated is a unique wetland. Due to the wetland's characterization, Mr. Tefft also considered the type of applicant, the nature of the specific proposal and the protection discipline of the regulations where unique wetlands are present.

Based on his review of all application materials, on-site inspections and his characterization of the wetland, he decided to review the materials for an alternative route. Mr. Tefft's review of the property deeds (Joint 2A, 2B, 2C) and his review of the Town Parcel and existing access road resulted in his identifying the upland alternative referenced in paragraph 6A of the denial letter. With regard to upgrading the Texaco Access Road, Mr. Tefft stated that from a biological perspective, upgrade of the Texaco Access Road is a preferable alternative to the original plan.

Mr. Tefft stated without hesitation that he did not perform any actual construction tests or design drawings to demonstrate the feasibility of the identified upland alternative. He testified that his role (and that of the Division) is to identify alternatives which appear feasible and which would, if constructed, avoid or minimize impact to the wetland. He testified that the Department does not have the resources to undertake design studies or cost calculations for alternatives which they identify to an Applicant.

DISCUSSION

As the Division points out in it's post-hearing memorandum, there has not yet been a final agency decision addressing the interpretation of "unnecessary" as contained in the Freshwater

Wetlands Act and Regulations where the application specifically involves alternatives to wetland crossings. Both the Applicant and the Division draw the Hearing Officer's attention to the Division's Policy Guidelines for Permitting Wetland Crossings in Rhode Island, dated May 31, 1990 ("Crossings Guidelines"). It provides a definition of unnecessary used by the Division in evaluating proposed wetland crossings. It reads:

> Unnecessary, as defined for this guideline, shall equate to any activity or alteration affecting any freshwater wetland which is not essential, vital, or indispensable and which can be avoided by seeking any practicable upland alternative to the proposal. An activity, alteration or project will meet the definition of "unnecessary" unless the applicant proves by a preponderance of evidence that:
>
> a. Alterations of freshwater wetlands and the values they provide have been avoided to the extent practicable by exhausting all other upland alternatives and,
>
> b. The alterations planned for the wetland have been minimized to the extent possible to prevent any damaging or detrimental effects from activities which could otherwise be avoided.

The Division through the Crossings Guidelines has clearly set forth its interpretation of "unnecessary" as used in the Act and Regulations as it applies to wetland crossings. The Rhode Island Supreme Court has consistently held that although not controlling, the interpretation given a statute by an administrative agency is entitled to great weight. Gryguc v.

Bendick, 510 A.2d 937 (R.I. 1986), Berkshire Cablevision of R.I., Inc. v. Burke, 488 A.2d 676 (R.I. 1985). Moreover, the First Circuit Court of Appeals has ruled that an agency has authority to interpret it's own regulations and that such an interpretation is entitled to considerable respect. National Tank Truck Carriers, Inc. v. Burke, 698 F.2d 559 (1983). In similar fashion, the federal district court for the District of Rhode Island has held that an agency's interpretation of its own guidelines is entitled to substantial deference particularly in specialized areas. Citizens' Savings Bank v. Bell, 605 F. Supp. 1033 (1985).

Based on a reading of the Crossings Guidelines and applicable case law, I am accepting the Division's definition of unnecessary as articulated in the Crossings Guidelines. Having accepted this definition, I must still address the sub-issue of what constitutes a "practicable upland alternative" as contained in the Crossing Guidelines.

The decision in this matter turns upon whether the Applicant has demonstrated by a preponderance of the evidence that the specific upland alternative of a roadway through the Town Parcel is not practicable. The determination of unnecessary is one which must be considered and weighed on the facts of each particular case. There can be no bright line

generic pronouncements that make an alternative practical or impractical, feasible or infeasible. Each case must be considered in light of its particular circumstances. As discussed earlier, Applicant alleges that the upland alternative is not practicable based on a variety of circumstances.

The Rules Governing the Enforcement of the Freshwater Wetlands Act provide no definition of the term "practicable." Black's Law Dictionary defines practicable as " . . . that which may be done, practiced, or accomplished; that which is performable, feasible, possible . . ."[1] Feasible is defined as "Capable of being done, executed, affected, or accomplished. Reasonable assurance of success."[2]

A review of Rhode Island and First Circuit Court decisions provided no guidance on this issue. Three federal cases, although distinguishable in many respects, provide some guidance as to the meaning and application of the terms feasible and practical where roadway projects are contemplated. In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 281 Ed. 2d 136 (1971) the U. S. Supreme Court addressed several administrative law issues which are beyond the scope of the instant matter. Pertinent, however, is a definition of

---

[1] Black's Law Dictionary, 5th ed. at 1055.

[2] Id. at 549.

"feasible" under the Department of Transportation and Federal Aid Highway Act which I believe is of assistance in the freshwater wetland context.

In Overton Park the Department of Transportation sought to build a highway through a portion of a public park. The Department of Transportation Act protected public parks and required that no project could be approved by the Secretary of Transportation unless there was, inter alia, no feasible alternative. The Court held that to find a proposal not feasible, the " . . . Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." Id., 401 U.S. at 411. This finding was reiterated in Wade v. Dole, 631 F. Supp. 1100 (1986). I believe the Overton Park standard is applicable to the present matter. Mr. Hollywood's expert opinion that the upland alternative is not practicable or feasible from an engineering standpoint meets the standard articulated in Overton Park.

I agree with the Division that an Applicant has an obligation to make reasonable inquiry concerning the feasibility of a piece of property cited for use as an upland alternative. Such reasonable inquiry is not an excessive burden on an Applicant in light of the purpose and intent of the Freshwater Wetlands Act. What constitutes reasonable inquiry differs with

the facts of each case. Under the particular circumstances of this case, Applicant has demonstrated that as a matter of sound engineering practice it is not feasible to locate an alternative roadway through the Town Parcel and have the DPW operation remain on site.

Applicant has demonstrated through unrebutted testimony that there presently exists no other suitable location for the DPW yard. Mr. Hollywood's expert opinion on the feasibility of the alternative roadway had a sufficient basis in fact, and I find his opinion testimony both competent and credible. Based on the testimony of Mr. Amerantes and Mr. Hollywood, I conclude that the upland alternative is not feasible. Assuming arguendo that the Town was willing to lease or convey the Town Parcel and that the electric easement was not an impediment, the upland alternative would still prove impracticable and unfeasible based on the testimony of Mr. Amerantes and Mr. Hollywood.

Having reached the conclusion that the upland alternative is impracticable and infeasible as a matter of sound engineering practice, I am not reaching the issues of whether applicable zoning and subdivision regulations render the upland alternative impractical or infeasible or the legal status of the Commission as an instrumentality of the Town.

There was no testimony before me concerning the minimization of planned alterations and the possible effects on the wetland. Since the original plan was waived, the sole matter before me is the practicability of the upland alternative. I conclude that alterations to the freshwater wetland have been avoided to the extent practicable by exhausting all other upland alternatives.

I will address Applicant's contention that the existence of the utility easement is a physical and legal impediment to the upland alternative. It is undisputed that the utility easement exists but there is no evidence to indicate that it constitutes the impediment alleged by Applicant. Testimony by Mr. Asprinio establishes that the lines are abandoned in-place. Witnesses for the Applicant have testified that no contact was made with Narragansett Electric to ascertain whether the easement does constitute an actual impediment to the upland alternative. I do not disagree that the easement may, indeed, prove to be the impediment that Applicant purports it to be. However, there is no competent evidence of record that it is a present impediment sufficient to render the upland alternative infeasible on that basis.

FINDINGS OF FACT

After careful review of all the testimonial and documentary evidence of record, I make the following findings of fact upon which this Decision and Order is based:

1. The Tiverton Industrial and Recreational Development Commission is the owner of those certain parcels of real estate located in the Town of Tiverton, east of Fish Road, approximately 800+- feet south of its intersection with State Route 24 at Pole 12, and recorded in Tiverton Land Evidence Records as Assessor's Plat 2-11, 3-11, Lots 69, 70 and 73.

2. The Town of Tiverton is record owner of a certain parcel of land adjacent to the subject property on its northerly side.

3. Formal Application No. 90-0746F was filed with the Department of Environmental Management, Freshwater Wetlands Section on behalf of the Tiverton Industrial and Recreational Development Commission by John Travassos, Environmental Scientific Corporation.

4. By letter dated November 6, 1991, Brian C. Tefft, in his capacity as Supervisor for Applications, Freshwater Wetlands Section of the Department of Environmental Management denied Application No. 90-0746F.

5. As grounds therefor, the Department found the alterations sought to be unnecessary, citing alternatives, including alternate access to the project, which would significantly reduce environmental impacts of the project.

6. The Applicant filed a timely Notice of Appeal of the denial of Application No. 90-0746F.

7. The Applicant filed all necessary documents and paid all necessary fees so as to be properly before the Department of Environmental Management's Administrative Adjudication Division.

8. The ingress and egress from Fish Road as is presently existing immediately adjacent to Route 24 may be deemed to be unfeasible and not practicable for the purpose of Applicant's intended usage. The parties have agreed that the letter of the Rhode Island Department of Transportation dated February 26, 1991, signed by Edmond T. Parker, Jr., Deputy Assistant Director of Transportation/Public Works to a Mr. Roland LaPierre, Equity Ventures, Inc., constitutes controlling and unrebuttable evidence to this issue.

9. The Texaco Access Road, which is the subject matter of the Division's denial letter of November 6, 1991, paragraph 6A, cannot commence its northward turn until after crossing existing wetland located adjacent to Fish Road. For the purposes of these proceedings, it is stipulated the access as proposed by

the Applicant on the within application will continue in an easterly direction across said wetland, and further it is the Division's contention that entry to the alternative access can only commence no farther west than the eastern edge of said wetland. This wetland is referred to on page 4-1 of the within application as Wetland 1 (see Joint Exhibit 1 - Application to Wetland Formal Application, Volume I).

10. The Applicant will hereby waive its right to a hearing on the original application as pertains to the proposed crossing design which, inter alia consists of two box culverts.

11. A view of the site was conducted on April 1, 1992 with the hearing officer, counsel of record, John Travassos and Brian Tefft.

12. The upland alternative cited by the Division is on property owned by the Town of Tiverton (Town Parcel).

13. The Tiverton Police Station, the Tiverton Department of Public Works Garage, a municipal firing range and a cemetery are presently located on the Town Parcel.

14. An electric easement running to Narragansett Electric Company approximately eighty feet (80') in width runs through the Town Parcel. The status of the electrical wires through the easement is abandoned in-place.

15. The Applicant made no contact with Narragansett Electric to inquire of the status of the electrical lines or the possible alignment of a roadway within the easement.

16. The designed road widths and radius exceed subdivision regulations but constitute sound engineering practice in light of the proposed development uses.

17. Based on designed road widths and radius a roadway through the upland alternative would fall within the electric easement.

18. It is not feasible to move the proposed roadway more easterly or westerly on the Town Parcel.

19. There presently exists no other suitable Town-owned parcel for the relocation of the DPW operation.

20. Although it is physically possible to build an alternative roadway through the Town Parcel, as a matter of sound engineering, it is not feasible to keep the DPW yard in its present location and build and operate the proposed alternative roadway.

21. The alternative roadway, including an upgrade of the Texaco Access Road, is biologically preferable to the major wetland crossing initially proposed by Applicant.

22. With the exception of the proposed roadway, there exists no other alternative access to the Commission's property.

23. The Tiverton Industrial and Recreational Development Commission was created by an Act of the Legislature in 1988.

24. The Legislature declared the purposes of the Commission with regard to industrial and recreational expansion to be in the interests of the public welfare.

CONCLUSIONS OF LAW

Based upon careful review of the documentary and testimonial evidence of record, I conclude the following as a matter of law:

1. This matter is properly before the Administrative Adjudication Division for Environmental Matters pursuant to R.I.G.L. § 42-17.1-7.

2. The Applicant filed a timely request for hearing and paid all necessary fees.

3. Under the limited scope of this hearing, the Applicant bore the burden of proof by a preponderance of the evidence that the upland alternative was not practicable.

4. The Applicant has demonstrated by a preponderance of the evidence that the purpose of the proposed alterations is vital pursuant to the Commission's enabling legislation.

5. The Applicant has demonstrated by a preponderance of the evidence that the upland alternative cited by the Division in paragraph 6(a) is not practicable or feasible.

Therefore, it is

ORDERED

that the upland alternative identified in paragraph 6A of the denial letter of November 6, 1991 is not practicable or feasible.

Entered as an Administrative Order this 14th day of September, 1992.

Kathleen M. Lanphear

Kathleen M. Lanphear
in her capacity as
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

I hereby adopt the within Recommended Decision and Order as a Final Agency Order.

9/17/92
Date

Malcolm J. Grant

Malcolm J. Grant
in his capacity as
Delegated Director
Department of Environmental Management
22 Hayes Street
Providence, RI 02908

091492

CERTIFICATION

I hereby certify that I caused a true copy of the within Final Agency Order to be forwarded via REGISTERED mail, postage prepaid to Dennis Esposito, Esq., Adler Pollock & Sheehan, Inc., 2300 Hospital Trust Tower, Providence, RI 02903 and via interoffice mail to Michael K. Marran, Esq., Marran & Lessard, Two Charles Street, Providence, RI 02904-2269 on this 18th day of September, 1992.

Marie E. Lasorsa

091492