

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Dr. Edward Kent
AAD No. 07-010/FWA
Application No. 06-0020
2009

DECISION AND ORDER

The matter came to be heard by Hearing Officer David Kerins on the appeal of Dr. Edward Kent (“Applicant” or “Dr. Kent”) of a Notice of Denial (“Notice” or “Denial”) from the Office of Water Resources (“DEM” or “OWR”) dated August 2, 2007. The Application of Dr. Kent originates from a Notice of Violation which was issued to Dr. Kent on June 7, 2005 from which a Consent Order was entered into on December 16, 2005 which, inter alia, allowed Dr. Kent to file a formal Application to alter freshwater wetlands. He subsequently filed his Application with the Department of Environmental Management dated December 14, 2005 (received January 9, 2006) seeking a permit to alter freshwater wetlands on real estate located in South Kingstown, Rhode Island on Tax Assessor's Plot 34-2, Lot 76 and 77 also known as 30 Red Feather Trail North, South Kingstown, Rhode Island.

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 *Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act* (“Wetlands Regulations”), and the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD). The hearing was conducted in accordance with the above-noted statutes and regulations.

The Applicant was represented by Christopher E. Friel, Esq. and OWR was represented by Marisa A. Desautel, Esq. An Administrative Hearing was held on March 23rd and 24th of 2009. Applicant filed a Post Hearing Memorandum on August 3, 2009. OWR filed its Post Hearing Memorandum on September 28, 2009. Applicant filed a Supplemental Memorandum on November 18, 2009. OWR filed an Objection to Applicant's Supplemental Memorandum on November 20, 2009.

BACKGROUND AND TRAVEL

The Application (No. 06-0020), OWR Exhibit # 2 Full, was received by DEM on January 9, 2006, requesting a permit to alter 4900 sq. ft of freshwater wetlands pursuant to Rule 9.05 of the *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act* (April 1998). A Notice of Denial was issued by OWR on August 2, 2007. The Applicant filed an appeal from the Denial with the AAD on August 20, 2007. A Prehearing Conference was held on February 14, 2008. At the Prehearing Conference the parties agreed to the following stipulations of fact:

1. Dr. Edward Kent (“Appellant”) is the owner of real property located in South Kingstown, Rhode Island on Tax Assessor's Plat 34-2, Lot 76 & 77, also known as 30 Red Feather Trail North, South Kingstown, Rhode Island (“Property”).
2. Freshwater wetlands, including an intermittent stream, a one hundred-foot riverbank wetlands exist upon the property.
3. A Notice of Violation was issued to Appellant on June 7, 2005 (Complaint File No. C05-0012).

4. A Consent Agreement was executed on December 16, 2005, and Appellant paid a penalty of three thousand five hundred dollars (\$3,500). The Consent Agreement required Appellant to fully restore the altered wetlands on the Property unless Appellant filed an Application to alter Freshwater Wetlands ("Application") and received a permit from the Freshwater Wetlands Permitting Program ("FWPP") that authorized the wetlands alterations.
5. DEM agreed, in the Consent Agreement, to hold restoration in abeyance provided that: Appellant advises DEM of his intent to file an Application; Appellant submits a complete Application within one hundred and twenty days (120) of the Consent Agreement execution; Appellant receives a permit from FWPP (Paragraph C (5)).
6. On December 14, 2005 Appellant filed an Application No. 06-0020 with DEM for Assessor's Lots 76 and 77.
7. Said Application requested a permit to alter 4,900 ft.² of freshwater wetlands pursuant to Rule 9.05 of the *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act* (April 1998).
8. On January 9, 2006, DEM received Appellant's Application, Assessor's Lots 76 and 77.
9. On August 2, 2007 the Office denied Application No. 06-0020.
10. Appellant timely appealed the denial of Application No. 06-0020 to the DEM Administrative Adjudication Division.

At the Prehearing Conference the parties agreed that the following exhibits be marked as full:

OWR 1 Copy of executed Consent Agreement, File No. C05-0012, dated December 16, 2005 (6 Full pages).

OWR 2 Copy of Application to alter a Freshwater Wetland No. 06-0020 for Assessor's Plat 34-2, Full Lots #76 & 77, dated December 14, 2005 (2 pages).

OWR 3 Copy of plan entitled "Wetland Restoration Plan" A.P. 34-2, Lot 76 & 77, 30 Red Full Feather Trail North, South Kingstown, RI prepared for Edward A. Kent, dated 9/26/05, prepared by Carrigan Engineering, Inc. (1 page) (to be provided by February 29, 2008).

OWR 4 Copy of Freshwater Wetlands Review Sheet/Application Inspection Report for Full Application No. 06-0020, dated September 21, 2006 (2 pages) (subject to cross examination).

OWR 5 Copy of Freshwater Wetland Review Sheet/Application Inspection Report for Full Application No. 06-0020, dated January 29, 2007 (4 pages) subject to cross examination).

OWR 6 Copy of Biological Evaluation of Application to alter Freshwater Wetlands for Full Application No. 06-0020, dated June 20, 2007 (23 pages) subject to cross examination.

OWR 7 Copy of Supervisor's Determination for Application No. 06-0020, dated July 31, 2007 (3 Full pages) subject to cross examination.

OWR 8 Copy of Application No. 06-0020 denial letter, dated August 2, 2007 (3 pages). Full

OWR 9 Resume of Charles A. Horbert (2 pages) subject to cross examination. Full

HEARING SUMMARY

Dr. Edward Kent was the first witness to testify on his own behalf. He bought Lot 77 of T.A. 34-2 in 2002 and Lot 76 in 2003 or 2004 to prevent further development. His testimony was that he built the three-car garage because he needed more parking spaces for his vehicles and more space to store his property. He currently owns three motor vehicles, one Toyota Highlander and two BMW's. He testified that he had a two-car garage on the southern side of the house but wanted a

three-car garage because he wanted additional room to store his current property and a boat or R.V he may purchase in the future. Photographs of Dr. Kent's house were admitted as Applicant's Exhibit # 1 Full.

Prior to the construction of the three-car garage he said he contacted DEM and spoke with a Clare Swift. He said she advised him that there was no record of wetlands on his property. He applied for and received a building permit from the Town of South Kingstown, Rhode Island. He testified that he was familiar with the intermittent stream in the area but his opinion was that his construction was consistent with other developments in the neighborhood including Lots 73 and 74 on his street.

On cross examination he said that he had considered a shed for storage but that he did not want to drive over his leach field. He said he did not consider the concrete slab in the south side of the building because he did not want his property outside. He currently owns a pop-up camper, a 12-14 foot sail boat and some kayaks. He does not currently own an RV or a larger sail boat but would like to acquire these items.

The Applicant sought to admit into evidence certain aerial photographs. OWR objected on the grounds that these photographs were not submitted with the Application, were inaccurate and unreliable. Applicant argued that these photographs were used by his expert Scott Rabideau but were not referenced in his report. The aerial photographs were not admitted at this time.

Scott Rabideau was called as Applicant's next witness. It was stipulated between the parties that Mr. Rabideau is an expert in the area of wetlands biology and wildlife habitat evaluation. Mr. Rabideau identified his report dated 22nd of February 2006 which has been entered into evidence as Applicant's Exhibit # 4 Full. He indicated that he had first been retained by Dr. Kent with regard to an enforcement action which resulted in the entry of a Consent Agreement. (OWR Exhibit # 1 Full)

Mr. Rabideau testified about his method in evaluating the property and preparing his report. He reviewed aerial photographs to determine the 1972 conditions. He said that the dwelling was present in 1972 and that there had been significant development within the community.

Mr. Rabideau referred to OWR Exhibit # 3 Full in describing historic impact on the 100 foot riverbed wetlands. He said that in his opinion of 4900 square feet of wetlands, only 450 square feet had been previously undisturbed. The lawn on the property comprised 4350 square feet of the compromised area and extended to within six (6) feet of the stream.

Witness Rabideau testified next why he disagreed with the grounds for denial listed in the Notice of Denial dated August 2, 2007 (OWR Exhibit # 8 Full). The reasons for denial are listed on page 2 thereof in subsections a-e. He emphasized the importance of the "primary purpose" of the project as controlling his plan. He said that the primary purpose could only be achieved by the plan as proposed, could not be reduced or located elsewhere on the property. He said that the stream and habitat had been previously disturbed. Mr. Rabideau testified that the habitat is fragmented. It was his opinion that because of the impact that has been in place, the proposed development would not adversely affect the habitat. He points to the plan's proposal to re-vegetate 800+ square feet of the present lawn with planting. In his opinion the plan did not constitute a random alteration but is necessary and desirable.

On cross examination counsel for OWR questioned Mr. Rabideau regarding his report "Narrative of Biological Impact for Red Feather Trail" (Applicant's Exhibit # 4 Full). He said that he used aerial photographs in his analysis but did not reference the aerial photographs in his methodology. He said that during his visit to the site on March of 2006 he did not observe wildlife species within the habitat. He said that his observations of disturbances along the stream were based on a walk up and down the stream.

Mr. Rabideau said that the existing two-car garage on the south side of the property could have been expanded but that would have defeated the primary purpose of the Applicant. He testified that Rule 10.01B regarding impact minimization has to be done only in such a way as not to

impact the Applicant's primary purpose. His report did not consider a smaller garage. Upon the completion of witness Rabideau's testimony, the Applicant rested.

Nancy Freeman was OWR's first witness. She identified herself as a senior environmental scientist for DEM. The parties stipulated that she was an expert in wetlands ecology, wetlands biology, natural resource and aerial photography interpretation.

Witness Freeman testified that she visited the site in January and June of 2006. She determined the function and the value of the resource. She also described the process with which she conducted a biological evaluation. Her biological evaluation was admitted into evidence by agreement as OWR Exhibit # 6 Full. Ms. Freeman testified regarding the wildlife habitat on the site. She said that there was a great deal of impact in the neighborhood in the early 1970's, prior to the passage of the Freshwater Wetlands Act. It was her opinion that we need to protect the remaining habitat to the maximum extent possible, despite the fact that some portions have been altered or disturbed.

Witness Freeman testified that the area of Indian Lake was a valuable area for migrating song birds and that it is critical to have an intact canopy. She said that during her June inspection she heard a wood thrush calling. She also heard robin, blue jay, tufted titmouse, white breasted nuthatch, black-capped chickadee, northern cardinal and gray catbird.

Mr. Freeman testified about edge effects relating to the subject project. She said that by clearing buffer zones and chipping away at the forest, the diversity of wildlife is reduced. Her opinion was that the proposed development as designed would have an adverse impact on the wildlife habitat. She also indicated that the project could have been designed to avoid impact to the critical area of undisturbed wetlands. She testified that based on her analysis of the 2003 aerial photographs that the area of alteration caused by the project is approximately 1200 to 1500 square feet as opposed to 450 square feet as asserted by Applicant's consultant.

On cross examination Ms. Freeman acknowledged that it was more difficult to assess the extent of the disturbed wetlands because Dr. Kent had already substantially completed his alteration. She agreed that some wildlife could travel along the stream to Indian Lake but in a significantly reduced capacity. She acknowledged that there would be no adverse impact on the value of recreation, aesthetics, surface water or water quality. Ms. Freeman also acknowledged that when she visited the site in June of 2006 Dr. Kent's garage had been erected but that she still noted the presence of the birds indicated.

Witness Freedman stated that there is often a lag time when the species is affected following this kind of impact. She noted that the change in vegetation including the loss of shrubs that produce berries that ripen in the summer will adversely affect migratory birds. She said that birds such as the wood thrush rely on an intact canopy of trees. When you clear away vegetation to create lawn next to wetlands, you create what is called edge effect. With edge effect predators can more easily prey on small animals that utilize and breed in the wetlands. Eliminating the buffer zones adversely impact wildlife. Witness Freedman acknowledged that the only criteria from the rules that concerned her were the significant reduction and suitability of the wetlands for use of any resident, migratory seasonal or transient wildlife.

On redirect examination witness Freedman stated that impact from a culvert near Indian Lake was different from the proposed alteration because the culvert was installed prior to the implementation of the Freshwater Wetlands Act.

The Office of Water Resources called Charles A. Horbert as its next witness. Mr. Horbert was stipulated to as an expert in the areas of wetlands, ecology, biology and as a natural resource specialist. He is a supervising environmental scientist with the Department of Environmental Management. He is familiar with the pending Application as the supervisor managing the review of the Application.

Mr. Horbert testified that he conducted a site visit on June 11, 2007. He viewed the wetlands that were proposed to be altered or were altered observing the characteristics of the subject wetlands. He and Ms. Freedman inspected the stream in both directions from the Applicant's property. He

observed no structures closer to the stream than the Applicant's. Prior to drafting his supervisor's determination and denial letter he reviewed several documents including the Applicant's site plan, the engineer's report, his staff evaluations, topographical maps and aerial photographs. He testified that he reviewed aerial photographs from 2003 which showed the area adjacent to the intermittent stream and the wetlands on Dr. Kent's property. It was in a natural and undisturbed state extending in width from forty (40) feet to ten (10) feet from the intermittent stream. He testified that they were able to determine that approximately twelve hundred (1200) to fifteen hundred (1500) square feet of perimeter and riverbank wetlands had been previously undisturbed. Mr. Horbert testified that he is a trained wildlife biologist and agreed with Ms. Freedman's report. He specifically agreed with her calculation of undisturbed wetlands of twelve hundred (1200) to fifteen (1500) square feet. He did not agree with the report of Natural Resource Services which estimated the previously undisturbed wetlands area of four hundred fifty (450) square feet.

Witness Horbert reviewed through his testimony the contents of his final agency decision which is OWR Exhibit # 7 Full. He acknowledged that it is difficult to evaluate an "after the fact" Application. The wetlands system had modifications from pressures of development but still had function and value. He testified that because this alteration was done prior to the Application, the Applicant had not met with DEM to get input or suggestions on mitigation.

Mr. Horbert reviewed the summary of findings contained in OWR Exhibit # 7 Full. He said that the project had detrimental alterations to wildlife habitat values. The Applicant had not explored all alternatives on the property to avoid or minimize the impact. His conclusion was that the Applicant did not satisfy the requirements of review criteria No. 6 Rule 11.02. The Applicant had not demonstrated appropriate avoidance minimization as required by Rule 10.01. He testified that the Department could not treat "after the fact" Applications differently than those in which a permit was requested before alteration.

Witness Horbert next reviewed the Notice of Denial in this Application which had been pre-marked as OWR Exhibit # 8 Full. He said that the Notice restated the points made in his supervisor's determination. The first reason for denial was that the Applicant has not demonstrated that impacts to freshwater wetlands have been avoided to the maximum extent possible pursuant to Rule 10.01A thereby resulting in unnecessary alteration to freshwater wetlands. The next reason for denial was that the Applicant has not demonstrated that these impacts which are unavoidable have been reduced to the maximum extent pursuant to Rule 10.01B.

Witness Horbert testified that the next reason for denial was the detrimental impact to the wildlife habitat which met the definition of an undesirable alteration. The Notice of Denial stated that the proposed project will contribute to adverse cumulative impact to wetlands. The final reason for the denial was that the Applicant has not shown that he has, to the maximum extent possible, mitigated all damaging effects of proposed project upon the functions and values provided by the subject wetlands and thereby results in an undesirable alteration to freshwater wetlands.

Mr. Horbert testified that he had reviewed the report filed by Natural Resources Services. He said that Mr. Rabideau had testified at the hearing about methodology not contained in his report. In his opinion the Department took more care in the observations of habitat than the Applicant's expert. Mr. Horbert marked OWR # 3 Full with blue pen to indicate the Department's position on edge of the wetlands and the pre-existing lawn. He disagreed with Mr. Rabideau's opinion of the previous size of the buffer zone. During Mr. Hobart's testimony the Applicant's expert, Mr. Rabideau, was allowed to also give a rough estimate of the previously undisturbed area which he marked with a red pen. Mr. Hobert testified that a review of the aerial photographs show the previously undisturbed area is fifteen (15) to eighteen (18) feet. He said in the area of the proposed garage there is a substantial reduction in that distance.

On cross examination Mr. Hobert did not agree that every project that takes place in designated wetlands has an adverse effect. He answered questions regarding the alteration of a neighboring property. The area of disturbance for that alteration was approximately 8,356 square feet. Mr.

Hobert acknowledged that he had referred to Dr. Kent's proposed alteration as a small alteration. He said that the area of alteration may be misleading and may depend on the degree of encroachment and how close the alteration actually occurred to the wetlands.

On redirect witness Hobert testified that the property to the east is different than Dr. Kent's property. That permit for that property was processed by a preliminary determination. He said the encroachment was not any closer than forty (40) feet to the wetlands' edge. Their buffer zone was more effective and natural. The neighboring property took extensive mitigating measures such as erosion sediment controls and plantings. The most obvious difference between Dr. Kent's Application and the neighbor's Application is that Dr. Kent's alteration was done prior to the Application. This meant that the Department did not have an opportunity to consider the plan and incorporate mitigation measures.

The Department called Clair Swift as a rebuttal witness who had been referenced as the person to whom Dr. Kent had spoken with prior to alteration. She identified herself as an environmental scientist employed by the Office of Water Resources of the Department of Environmental Management. In 2003 she was a senior natural resource specialist. She vaguely recalled a telephone conversation with Dr. Kent. He had asked if there were any wetlands on his property. Their procedure or protocol was to not give determinations over the telephone. She said that there were no circumstances in which she would ever tell Dr. Kent over the telephone that no wetlands exist on his property. DEM rested. The Department and Applicant both reserved the right to make final argument by means of Post Hearing Memorandum.

ANALYSIS

In an appeal from a denial of freshwater wetlands alteration Application, the Applicant has the burden to prove by preponderance of the evidence that the Application is consistent with the purpose of the *Rhode Island Freshwater Wetlands Act*, complies with the rules and is protective of the environment and the health, welfare and general well being of the populace.

Rule 9.05(E)(2) provides that “approval of a proposed alteration to any wetland will be denied by the Director if the project as proposed would result in a random, unnecessary, and/or undesirable alteration of a freshwater wetland, as those terms are defined herein, as such alterations are not in the best public interest.”

Rule 5.89 “Undesirable Alteration means any proposed activity or alteration which is likely to reduce or degrade any freshwater wetland functions and values as set forth herein. Any activity, alteration or proposed project will be considered undesirable unless the applicant shows that she or he has, to the maximum extent possible, mitigated for any damaging effects of the proposed project upon the functions and values provided by any freshwater wetlands.”

Rule 5.90 states Unnecessary Alteration means any proposed alteration which is not essential, vital, or indispensable to the proposed project and which can be achieved without altering or disturbing freshwater wetlands. Any activity, alteration, or project will be considered “unnecessary, unless the applicant shows that:

- A. Alterations of freshwater wetlands and the functions and values they provide have been avoided by exhausting all other non-wetland alternatives; and
- B. The alterations planned for the wetland have been reduced to the maximum extent possible to prevent any damaging or detrimental effects upon wetland functions and values from activities which could otherwise be avoided.”

The pending appeal involves an “after the fact” Application for three-car garage that is partially constructed. A review of the Application, the exhibits and the testimony of the witnesses clearly indicates that the proposed alteration is an “undesirable alteration”. The point that it is an “after the fact” Application means that the Applicant did not participate in the normal preliminary review process. An “after the fact” Application is entitled to fair consideration on its merits. However by not participating in the normal preliminary review process the Applicant takes his

chances by going forward without a permit. Rule 7.01(A) states that “A proposed project or activity which may alter the freshwater wetland requires a permit from the Director”.

The evidence shows that the alteration as proposed and partially completed alters the freshwater wetlands. There is a difference in opinion between the experts as to the nature and extent of the alteration of freshwater wetlands. Part of the problem in determining the degree of alteration is due to the fact that the alteration was substantially complete when the DEM representatives came on the scene. I accept the estimate of OWR that the proposed project will result in the disturbance of 1200 to 1500 square feet of perimeter and riverbank wetlands. The Applicant has not proven that the proposed project is not “likely to reduce or degrade any freshwater wetland function and values”.

The testimony of the DEM witness, Nancy Freedman, establishes the fact that the area impacted provides a function and value as a wildlife habitat. Her testimony is not challenged or directly contradicted that the area impacted is used by migratory birds as well as other small animals. The Applicant questions generally the quality of the habitat based on other development along the stream. It appears that a great deal of the development, especially down stream, was prior to the enactment of the Freshwater Wetlands Act in 1971. I find that this is a “Cumulative Impact” as defined in Rule 5.17. The fact that the habitat had been impacted by prior alterations does not relieve the DEM from its charge to protect the freshwater wetlands.

The evidence shows that the project is an “Unnecessary Alteration” as prohibited by Rule 5.90. The Applicant and his expert testified as to the “purpose” of the project. The purpose was to provide the Applicant with a three-car garage for storage of his current property including motor vehicles. The Applicant also wants space to store an RV and larger boat which he may purchase in the future. He is seeking to free up his existing two-car garage which he would like to turn into a family room. The Applicant has not shown by a preponderance of the evidence that the project and alteration is “essential, vital or indispensable” as per Rule 5.90. In fact, a review of the Applicant's file shows an absence of any facts to support a finding of necessity.

The Applicant has not proven that he has “to the maximum extent possible, mitigated for any damaging effects of the proposed project upon the functions and values provided by any freshwater wetlands” Rule 5.89. The Applicant has proven that he has taken some steps to mitigate the damage but these attempts are insufficient. This finding flows from the fact that the Applicant attempted to build a three-car garage which caused the removal of vegetation which is an important buffer to the wildlife habitat. The Applicant has not proved that he considered a smaller project such as a two-car garage, for instance, in order to maximize mitigation of any damage. The project is simply too big for the site. The fact that the Applicant wanted more space is not sufficient and is not grounds to disregard the clear language of the Freshwater Wetlands Act. Rule 5.90(B) states that the Applicant must show that “the alterations planned for the wetland have been reduced to the maximum extent possible to prevent any damage or detrimental effects”.

The Applicant has not proven by a preponderance of the evidence that his Application met the requirements of Rule 10.01 Impact Avoidance and Minimization Requirement. The observations made earlier in this Decision establish that the proposed impact has not been “avoided to the maximum extent possible”. It is my opinion that the adverse impacts could have been avoided either by a smaller structure or a modified plan. The Applicant has been unable to prove that he has been able to minimize the impact at this point.

I expressly find that the proposed alteration adversely affects the functions and values of the freshwater wetlands. I specifically accepted as uncontradicted the testimony of witness Nancy Freeman that the alteration adversely affects the functions and values to wildlife and wildlife habitat as described in Rule 11.02(6). I also find that the alteration as proposed does not adversely effect the other functions and values listed in Rule 11.02.

The Applicant raised the issue during the hearing that other alteration has been allowed in his neighborhood, specifically on Lot 73/74 of A.P. 34-2, the property to his east on the other side of

Red Feather Trail. He argued through his counsel that the extent of the alteration was much greater on the neighboring lot, totaling 8356 sq. feet. I find a distinction with this comparison for two basic reasons. The first distinction is that the neighboring lot followed the Application process and modified their plan based on input and concerns expressed by DEM. Secondly the plan submitted for the neighboring property was adjusted through the review process so the alteration at no point was closer than thirty-three (33) feet from the freshwater wetlands. The experts for both sides testified that the buffer zone between the freshwater wetland and Dr. Kent's alteration was 8 feet from the corner of the garage. I find that the arguments presented by the Applicant regarding the neighboring lot are not persuasive.

The Applicant raised an issue that he had relied on a representation of an employee of DEM that there were no wetlands present on his property. The employee, Clair Swift, acknowledged that she had a conversation with Dr. Kent but testified that under no circumstances would she advise a person over the telephone of the status of wetlands on their property. I find the testimony of Ms. Swift to be credible and therefore disregard the Applicant's claim of reliance. I also find that, given the nature and character of Lot 77 any reliance by the Applicant on oral statements of a DEM employee would be unreasonable.

CONCLUSION

I uphold the Denial of the subject Application as proper under the Freshwater Wetlands Act. It appears that the Application of Dr. Kent to construct a 30 by 40 foot three-car garage with breezeway is too ambitious for the proposed location. The perceived need of the Applicant for additional storage space does not justify a disregard of the Freshwater Wetlands Act. The size of the proposed alteration is too great and cannot be completed without resulting in unnecessary damage to the wildlife and wildlife habitat. The Applicant has not taken steps to reduce or mitigate impacts to the maximum extent possible. The project is not in compliance with the Review Criteria set forth in Rule 11.02(6) and therefore is an undesirable alteration of the freshwater wetlands.

FINDINGS OF FACT

I make Findings of Fact based on the stipulation of the parties as well as the evidence presented at the Administrative Hearing as follows:

1. Dr. Edward Kent ("Appellant") is the owner of real property located in South Kingstown, Rhode Island on Tax Assessor's Plat 34-2, Lot 76 & 77, also known as 30 Red Feather Trail North, South Kingstown, Rhode Island ("Property").
2. Freshwater Wetlands, including an intermittent stream, a one hundred-foot (100') Riverbank Wetland exist upon the Property.
3. A Notice of Violation was issued to Appellant on June 7, 2005 (Complaint File No. C05-0012).
4. A Consent Agreement was executed on December 16, 2005, and Appellant paid a penalty of three thousand five hundred dollars (\$3,500). The Consent Agreement required Appellant to fully restore the altered wetland on the Property, unless Appellant filed an Application to Alter Freshwater Wetlands ("Application") and received a permit from the Freshwater Wetland Permitting Program ("FWPP") that authorized the wetlands alterations.
5. DEM agreed, in the Consent Agreement, to hold restoration in abeyance provided that: Appellant advises DEM of his intent to file an Application; Appellant submit a complete Application within one hundred and twenty days (120) of the consent Agreement execution; Appellant receive a permit from FWPP (Paragraph C(5)).
6. On December 14, 2005, Appellant filed an Application No. 06-0020 with DEM for Assessor's Lots 76 and 77.

7. Said Application requested a permit to alter 4,900 ft of freshwater wetland pursuant to Rule 9.05 of the *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act* (April 1998).
8. On January 9, 2006, DEM received Appellant's Application, Assessor's Lots 76 and 77.
9. On August 2, 2007, the Office denied Application No. 06-0020.
10. Appellant timely appealed the denial of Application No. 06-0020 to the DEM Administrative Adjudication Division.
11. The proposed plan submitted by Applicant will result in a disturbance of 1200 to 1500 square feet of perimeter and riverbank wetlands.
12. The project as proposed will significantly adversely affect the functions and values to the freshwater wetlands in that it will cause a loss of wildlife and wildlife habitat.
13. The project as proposed by the Applicant is not essential, vital or indispensable.
14. The fact that the Applicant needs room to store his property or property which he intends to acquire does not justify a disregard of the Freshwater Wetlands Act.
15. The project as proposed represents an "unnecessary alteration" of the freshwater wetlands.
16. The Applicant has not taken steps to avoid impact to the maximum extent possible.
17. The Applicant has not proven by a preponderance of the evidence that the Application as submitted to DEM is consistent with the *Rhode Island Freshwater Wetlands Act* and is protective of the environment and the health, welfare and general well being of the populace.
18. No representation was made by any DEM employee that there were no wetlands on Applicant's property.
19. The Applicant has not proven by a preponderance of the evidence that DEM improperly denied his Application.

CONCLUSIONS OF LAW

1. This matter is properly before the Administrative Adjudication Division ("AAD") of the Rhode Island Department of Environmental Management ("DEM") pursuant to RIGL Section 32-17.7-2.
2. The AAD has personal and subject matter jurisdiction of the subject Applicant and Application pursuant to RIGL Section 2-1-20.
3. DEM has authority to issue or deny a wetlands alteration permit pursuant to the *Rhode Island Freshwater Wetlands Act* ("Act").
4. Review and consideration of the subject Application was in accordance with the *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act* (April 1998) (the "Rules").
5. The Applicant has filed a timely appeal of the DEM denial of his Application.
6. The hearing of his appeal has been conducted in accordance with RIGL Section 42-35-1 et seq and the AAD Rules.
7. The Applicant has the burden of proof by a preponderance of the evidence that the proposed alteration as presented in his Application to DEM is consistent with the purposes of the Act, complies with the Rules, and is protective of the environment and the health, welfare and general well being of the populace.
8. The Application as presented to DEM is not in accordance with the Rules in that it will result in a reduction of wetland function and values to wildlife and wildlife habitat as described in Rule 10.02(B).
9. The Applicant has not proven by a preponderance of the evidence that it is in compliance with the Review Criteria set forth in Rule 11.02 and specifically Rule 11.02(6).
10. The Applicant has failed to prove by a preponderance of the evidence that all probable impacts to the wetlands have been avoided to the maximum extent possible as required by Rule 10.01(A).

11. The Applicant has failed to prove by a preponderance of the evidence that there are no alternatives to the proposed alteration which would not alter the natural character of any freshwater wetlands.

12. The Applicant has failed to prove by a preponderance of the evidence that any probable impacts to wetlands functions and values have been reduced to the maximum extent possible or required by Rule 10.01(b).

Wherefore, it is hereby

ORDERED

1. Applicant's Appeal (AAD No. 07-010/FWA) of the Denial of Application No. 06-0020 is hereby **DENIED**.

Entered as an Administrative Order this ___ day of _____, 2009 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins

Chief Hearing Officer

Entered as a Final Agency Decision and Order this ___ day of _____, 2009.

W. Michael Sullivan Ph.D.

Director

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to R.I. Gen. Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

APPENDIX A

LIST OF EXHIBITS

The following exhibits were agreed to by the parties prior to or during the hearing and so marked:

APPLICANT EXHIBITS

Applicant's Exhibit #1 Full	Composite five (5) color photographs of the Applicant's residence.
Applicant's Exhibit #4 Full	Narrative of Biological Impact for Red Feather Trail AP 34-2, Lots 76 and 77, South Kingstown, Rhode Island.

OWR EXHIBITS

OWR Exhibit #1 Full	Consent Agreement dated December 16, 2005
OWR Exhibit #2 Full	Application to Alter Freshwater Wetlands dated December 14, 2008 and filed on January 9, 2009.

- OWR Exhibit #3
Full Wetland Restoration Plan dated September 26, 2005.
- OWR Exhibit #4
Full Freshwater Wetlands Review Sheet reflecting inspection on September 21, 2006.
- OWR Exhibit #5
Full Freshwater Wetlands Review Sheet reflecting inspection on January 25, 2007.
- OWR Exhibit #6
Full Biological Evaluation of Application to Alter Freshwater Wetlands dated June 20, 2007.
- OWR Exhibit #7
Full Supervisor's Determination dated July 31, 2007.
- OWR Exhibit #8
Full Notice of Denial dated August 2, 2007.
- OWR Exhibit #10
Full Resume of Nancy L. Freeman