

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

IN RE: Environmental Scientific Corporation  
Westerly Plaza Phase II  
Permit Application No. 87-0557F

FINAL AGENCY DECISION AND ORDER

JURISDICTION AND AUTHORITY

This matter came before the Designated Director pursuant to an assignment of function filed with the Office of Secretary of State by Michael A. Annarummo, Director, R.I. Department of Environmental Management on September 7, 1990. Pursuant to this assignment of function the Designated Director is in receipt of and has reviewed a Recommended Decision and Order prepared by William C. Clifton, Esq. as Hearing Officer and which is dated August 22, 1990. The Designated Director is likewise in receipt of and has reviewed the entire documentary and testimonial record of this proceeding as maintained by the Hearing Officer.

This matter is before the Designated Director pursuant to the Freshwater Wetlands Act (the "Act")(Chapter 2-1 and specifically Sec. 2-1-11 of the Rhode Island General Laws, 1956 as amended); the Administrative Procedures Act (Chapter 35 of title 42 of the Rhode Island General Laws and specifically Sec. 42-35-9); the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act (the "Wetland Regulations"); the Administrative Rules of Practice and Procedure for the

Department of Environmental Management filed with the Secretary of State on December 11, 1989; and the Water Quality Regulations for Water Pollution Control filed with the Secretary of State on September 29, 1988.

WHY THE HEARING OFFICER'S RECOMMENDATION

MUST BE REJECTED

The Administrative Hearing Officer is appointed by the Director and charged with the conduct of the administrative hearing and the preparation of a recommended Decision and Order whose substance is to reflect the reasoned application of the Department's rules and regulations to the facts placed in evidence at the hearing. In interpreting applicable rules and regulations the Hearing Officer, however, has a responsibility to give great weight to the meaning, purpose and intent of those rules and regulations as interpreted by the promulgating authority. (Gryguc v. Bendick, 510 A.2d at 937). Interpretations of such rules and regulations which are inconsistent with the meaning, purpose and/or intent articulated by the promulgating authority must be corrected and as appropriate, overturned by the Director if the law and regulations are to be applied in a fair and consistent manner.

I have found in the matter before me that the Hearing Officer, in adopting wholesale the applicant's proposed findings of fact and conclusions of law, has interpreted this Department's rules and regulations regarding freshwater wetlands and water quality certification in a manner which is, in fact, clearly contrary to the agency's and the responsible Division's historic and articulated interpretation of their

meaning, purpose and intent and, furthermore, in a manner which, if left uncorrected, will result in violations of applicable law and regulation. As the Director for purposes of this application I, therefore, find myself obligated to overturn the Hearing Officer's Recommended Decision and Order and to direct that Freshwater Wetlands Permit Application No. 87-0557F be denied.

The specific reasons for which I take this action are set forth in some detail in this Final Agency Decision and Order, but are briefly summarized below.

The recommended Decision and Order would have the effect of subjecting "valuable" and "unique" wetlands such as the Aguntaug Swamp to inevitable incremental degradation in a manner which is prohibited by sections 5.03(c)(6) and (7) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act and which, further, runs contrary to the expressed legislative intent underlying the Freshwater Wetlands Act; "to preserve and regulate the use of swamps, marshlands, and other freshwater wetlands". (2-1-18, RIGL; emphasis added). The recommended Decision and Order would also have the effect of authorizing the further degradation of water quality in an area not presently in compliance with applicable water quality standards and criteria set for it by law and regulation; this in violation of Water Pollution Control Regulation 7.2.

More particularly, the applicant's recommended Findings of Fact and Conclusions of Law as adopted by the Hearing Officer, the former verbatim, fundamentally misinterpret and misapply applicable regulations in the following areas:

1. Freshwater Wetlands Rules 5.03(c)(6) and (7) respectively prohibit without qualification "degradation of the natural character of any 'unique' wetland" and/or "reduction of the value of any 'valuable' wetland." Rule 7.06(a) and 7.06(b) respectively define the terms "unique" and "valuable". The applicant's case rests in part on an interpretation of Rules 5.03(c)(6) and (7) which requires that in order to be prohibited, a proposed alteration must cause a degree of degradation and/or reduction in value so extreme as, in the first instance, to render the impacted wetland no longer "unique" or in the second instance, no longer "valuable" as these terms are defined by regulation.
2. The applicant's case rests in additional part on an interpretation of the Rule 5.03(c)(6) and (7) prohibition which applies a non-existent relativity test to an application whereby the amount of wetland proposed to be destroyed must be shown to represent some undefined "significant" percentage (by area) of the larger wetland of which the project site is part in order to be prohibited.
3. The applicant's case further requires that Rule 5.03(c)(6) and (7) be interpreted as allowing the total destruction of

"unique" and/or "valuable" wetland wildlife habitat within a project site so long as the larger wetlands complex of which the site is part is sufficiently resilient and diverse as to be capable of sheltering wildlife species displaced by such on-site habitat destruction.

4. The applicant's case requires also that the project site be effectively written off as an environmental "poor relation" of the "unique" and "valuable" Aguntauug Swamp wetlands complex of which it is a part. This artificial segregation of the part from the larger whole runs contrary to the hydrology of the site, is inconsistent with the methodology of the "modified Golet" rating system employed to establish the Aguntauug Swamp as "unique" and "valuable" in the first place, and is not even supported by testimony of the applicant's own witnesses.
5. Lastly, as regards water quality impacts, the applicant's case rests on a misinterpretation of the Department's Water Pollution Control Regulations which would, in effect, justify additional pollution loadings to waterbodies not already in compliance with the water quality standards and criteria established for them, this in direct violation of Water Pollution Control Regulation 7.2.

THE HEARING RECORD

1. The hearing record does not support the applicant's argument that the natural character of a "unique" wetland must be degraded to such an extent that the wetland is no longer "unique" in order to be prohibited under Wetlands Rule 5.03(c)(6). It likewise does not support the corresponding argument that the value of a "valuable" wetland must be reduced to the point where the wetland is no longer "valuable" in order to be prohibited by Rule 5.03(c)(7).

The applicant has stipulated that "The Aguntaug Swamp including the area of the project to be altered, .97 acres of wetland and 1.95 acres of a buffer area (the "Subject Site") is ranked outstanding wetland as defined by the modified Golet technique." (Applicant's Post-Hearing Memorandum, p.3; emphasis added). The applicant similarly stipulates "that the Aguntaug Swamp including the Subject Site is a unique and valuable wetland as defined by the modified Golet technique." (Id.; p.11; emphasis added). Both the applicant's biological experts, Scott Hobson and Robert Erickson, testified to their agreement with the Department's designation of this wetlands complex as "unique" and "valuable" (10/17/89 Tr., p.25, lines 12-16; 10/30/89 Tr., p.9, lines 12-20).

The hearing record, moreover, shows that this wetland was assigned a value of 93.5 pursuant to the modified Golet evaluation technique (Biologist's Wildlife Evaluation, Applicant's Exhibit #4). I take administrative notice of the fact that all wetlands which score in excess of 70.5 are deemed "outstanding" and all scoring between 60.5 and 70.00 are deemed "valuable" according to the modified Golet Method, indicating a

considerable range or numerical values to be associated with both wetlands categories.

Mr. Tarantino, for the applicant, makes much in his closing argument and his Post-Hearing Brief of Freshwater Wetlands Division biologist Brian Tefft's acknowledgement under cross-examination that the "remaining portion" of the Aguntaug Swamp will remain "unique" and "valuable" as measured by the modified Golet Method even if the applicant's project is constructed (10/4/89 Tr., p. 74, lines 6-16)). However, he fails to acknowledge, and the Hearing Office completely disregards, Mr. Tefft's testimony as to his expert opinion that the natural character of this "unique" wetland would nevertheless be degraded and its value reduced if the applicant's project were constructed (11/10/89 Tr., p.45, lines 15-22; p.48, lines 1-9; p.71, lines 2-10).

As explained by Mr. Tefft in his testimony, the modified Golet wetlands rating system assigns a higher numerical score to naturally vegetated wetland perimeter than it does to altered or developed perimeter because the former enhances the natural value of the wetland while the latter detracts from it. Mr. Tefft testified that as a consequence of this deliberate scoring bias in favor of naturally vegetated wetland perimeter the "outstanding" modified Golet score and hence high value of the Aguntaug Swamp wetlands complex reflects among other factors the relatively large amount of naturally



vegetated land surrounding the wetland. He testified, therefore, that the modified Golet score and hence value of the Aguntaug Swamp would decrease as the amount of developed (altered) wetland perimeter increases at the expense of naturally vegetated perimeter. (11/10/89 Tr., p.45, lines 1-5; p.48, line 9).

Due to this direct correlation between increased development around the wetland perimeter and decreased wetlands value as measured by the Golet method, Mr. Tefft went on to testify to his expert opinion that the applicant's Westerly Plaza Phase I, by increasing the amount of urban (developed) wetland perimeter, had already measurably degraded the Aguntaug Swamp wetland complex even though it still fell into the "unique" category, albeit at a reduced Golet score. He testified further that the value of the overall wetland complex would continue to decline as a consequence of the development of wetland perimeter associated with Phase II. (11/10/89 Tr., p.92, lines 2-8). That Mr. Tefft's explanation of the requirements of Rules 5.03(c)(6) and (7) accurately reflects the Division of Freshwater Wetlands' interpretation of its own rules and regulations was argued by the Division's counsel at the November 2, 1989 hearing (see p.14, lines 6-22).

It should have been clear based on Mr. Tefft's testimony that the Division interpreted the Rule 5.03(c)(6) and (7) prohibitions against degradation of natural character and reduction in value quite literally and restrictively because of

the great value attached by law and regulation to unique and/or valuable wetlands. It should have been equally clear that the applicant's more permissive interpretation of these Rules would, contrary to law and regulation, allow for the incremental degradation of these two most valuable and heavily regulated classes of wetland as the naturally vegetated land surrounding their perimeters is surrendered to development.

2. The significance attached by the applicant and its witnesses to statistical comparisons between the size of the area proposed to be altered and the 2,000 acre expanse of the Aguntaug Swamp, the State's second largest wetlands complex, has no foundation in law or regulation. It should be obvious that when one is dealing with a 2,000 acre wetland all but the most massive alteration proposals will represent a statistically unimpressive percentage of the whole when measured by area. To suggest, therefore, that a nearly three acre alteration of biological and jurisdictional wetland is statistically insignificant and, therefore, permissible runs contrary to law and regulation and would, again, subject the State's largest wetlands complexes to inevitable incremental destruction.

The applicant has variously described its proposal as representing less than 0.05% of the Aguntaug Swamp's total land area ([Applicant's] Environmental Narrative, DEM Exhibit Q, p.3); approximately ~~0.03% of the Swamp's area~~ (9/25/89 Tr., p.7, lines 1-3); and "under one percent" of that area (10/30/89 Tr., p. 64, lines 4-8). The applicant's biological witness, Robert Erickson, testified to having relied in part on the allegedly insignificant size of the proposed alteration relative to the Aguntaug Swamp as a whole in defending his opinion that the project will not adversely affect wetlands wildlife and habitat in the Swamp (10/30/89 Tr., p.24, lines 20-24; p.25, lines 10-16).

The Freshwater Wetlands Rules nowhere suggest that a given amount of wetland alteration becomes more palatable as the size of the parent wetland complex increases until at some indeterminate point three acres of wetland destruction such as is proposed by this applicant falls below an imagined threshold of regulatory concern. To the contrary, because large size is an acknowledged and important consideration in defining the "uniqueness" of a wetland, such an interpretation would provide a lower level of regulatory protection to the most valued class of wetlands and, perversely, would do so because they exhibit one of the key characteristics, namely size, that renders them unique in the first place. Clearly, the legal mandate to preserve wetlands as set forth in the Freshwater Wetlands Act cannot be implemented if the Freshwater Wetlands Rules are interpreted as allowing the destruction of large and unique wetland complexes such as the Aguntaug Swamp three acres at a time, regardless of what percentage that represents of the Swamp's total land area.

3. The applicant and its witnesses have freely acknowledged that nearly all biological and jurisdictional wetland habitat within the project's proposed limit of disturbance will be destroyed and all resident wildlife displaced. This level of environmental disruption is nonetheless deemed so insignificant by the applicant as to be beneath regulatory concern because of the availability of "replacement" habitat elsewhere within the larger Aguntaug Swamp wetlands complex. This interpretation of the Department's regulations would authorize the incremental destruction of unique and valuable wetlands because they exhibit the very ecological resilience that makes them "unique", "valuable", and the object of stringent regulatory protection in the first place.

The hearing record is unambiguous and unrebutted regarding the extent of on-site wetland alteration proposed by this applicant. This includes:

1. The diversion of 380 feet of existing riverbed through a like length of eight foot by four foot concrete box culvert;
2. The diversion of 400 feet of intermittent stream through a like length of forty-eight inch culvert;
3. The filling in of an area subject to storm flowage;
4. The construction of commercial buildings, paved parking lots, driveways and retention basins within biological and jurisdictional wetlands;
5. The filling of a total of 0.97 acres of biological wetland; and
6. The filling of a total of 1.95 acres of jurisdictional wetland (buffer) (Biologist's Evaluation, Applicant's Exhibit #4)

The record is likewise unambiguous and unrebutted that the resulting on-site destruction of wetland wildlife habitat will be total. This point was conceded quite directly by the applicant's biologist, Robert Erickson:

- Q. As a biologist, sir, what will happen to the wildlife habitat in the area of the proposed project should the project be developed?
- A. The entire wetland area that we have identified as 0.98 acres I believe would be completely altered.
- Q. Meaning completely destroyed?
- A. Yes.
- Q. Now, you just stated that it was .98 acres that would be -- isn't it an accurate statement that

it's actually 2.5 acres of state regulated wetland that's being altered here?

- A. Of state regulated wetland, that's correct.
- Q. And that as providing wetland habitat will also be destroyed; correct?
- A. I would say not wetland wildlife habitat. That would also include upland wildlife habitat as well.
- Q. But all of the wildlife habitat included in that two and a half acres would be destroyed; correct?
- A. I believe that's correct, yes, (10/30/89 Tr., p.48, line 13 - p.49, line 7)

Mr. Tefft, for the Division, testified more specifically to the importance of the site's river and intermittent stream as components of the Aguntaug Swamp wetlands complex. He noted that open flowing water bodies create habitat diversity and provide protected corridors for the movement of wildlife within the wetland; values which would be destroyed by the channelization and culverting proposed by the applicant (11/10/89 Tr., p.16, line 17 - p.17, line 18).

The applicant's biological witness, Scott Hobson, had likewise conceded at the October 17, 1989 hearing that the proposed alteration of stream channels would adversely affect wildlife employing them as migratory corridors (10/17/89 Tr., p.126, lines 6-21).

Their testimony regarding the extent of on-site wetland habitat destruction notwithstanding, the applicant's biological witnesses, Mr. Erickson and Mr. Hobson, nonetheless remained

adamant that their investigations showed insignificant to no adverse impacts on wildlife habitat within the Aguntaug Swamp (10/17/89 Tr., p.39, lines 17-23; p.50, lines 1-8; 10/30/89 Tr., p.24, lines 13-18). However, a closer examination of their testimony as well as the applicant's Environmental Narrative shows that to some large extent their opinions are predicated on the representation that the Aguntaug Swamp as a whole is sufficiently large, diverse in habitat types and resilient as to be capable of absorbing without detrimental impact both the total destruction of wetland habitat at the project site and the wildlife displaced by that habitat destruction (10/17/89 Tr., p.67, line 16 - p.68, line 5; 10/30/89 Tr., p.24, lines 5-12; Applicant's Environmental Narrative, DEM Exhibit Q, p.3).

The testimony of Brian Tefft for the Division debunks the applicant's notion that the destruction of wetland wildlife habitat within a unique and/or valuable wetland is permissible under Rules 5.03(c)(6) and (7) so long as "replacement" habitat is arguably available within the same wetlands complex. It also clearly articulates the Division's position that the destruction of a portion of a "unique" and/or "valuable" wetland's wildlife habitat represents a net loss of available habitat within the overall system regardless of the size, diversity or resilience of the larger wetlands complex as a whole:

Q. Now, sir, I'd like to draw your attention to Page 3 of that document [Applicant's Environmental Narrative], the first full paragraph. Could you read that for me, please?

A. Yes, "The project may impact wildlife which utilize the site by removal of their habitat. Development will eliminate existing shrub swamp/marsh wetland and will place a greater demand on adjoining wetland areas to meet wildlife needs. Due to the size and diversity of wetland types within Aguntaug Swamp, any measurable wildlife values lost should be adequately supplied within remaining areas of the wetland."

Q. Now, sir, do you agree with that paragraph?

A. Yes and no.

Q. In what ways do you agree with that paragraph?

A. Well, certainly the Department is of the opinion that the project will result in a degradation and loss of wildlife habitat that is presently available in the Aguntaug Swamp wetland area, and in fact, it will result in a loss of swamp marsh or shrub swamp and marsh wetland; however, the statement beginning with due to the size and diversity of wetland types within Aguntaug Swamp, any measurable wildlife values lost should be adequately supplied, I have a problem with that statement in that it assumes a trade off, if you will, that can be allowed in terms of "Well, let's alter this area because there is suitable area elsewhere," and it is a justification, if you will, because of the size of the wetland, and I basically disagree with that because that is, in fact, a form of degradation of wildlife habitat which is, in fact, undesirable. At some point cumulatively, as alterations continue or if that justification is allowed to be used, then the net effect is to cause a continual cumulative degradation of wetland areas for wildlife habitat. (11/10/89 Tr., p.11, line 5 - p. 12, line 18).

4. Having acknowledged that virtually all wetlands habitat within the project area will be destroyed if the proposed project is built, the applicant's biological witnesses attempted to minimize the significance of this destruction by portraying on-site wetlands as distinct from and having considerably less environmental value than the "unique" and "valuable" Aguntauag Swamp as a whole. They then attempted to establish that the impact of wetland habitat destruction which would result from this project would be limited to the site itself, as if this level of isolated wetland destruction should, therefore, escape regulatory concern. These various representations are not supported by the hearing record and, moreover, the suggestion that an integrated wetland complex such as Aguntauag Swamp can be sliced into pieces and served up like a pie for regulatory purposes runs contrary to law and regulation and would, again, subject such wetland complexes to inevitable incremental destruction.

Applicant's biologist, Scott Hobson, testified to the results of his investigations of the proposed construction site as indicating low wildlife species diversity as compared to the Aguntauag Swamp; ten species observed as opposed to twenty-one elsewhere (10/17/89 Tr., p.57, line 19-p.58, line 7). He likewise testified to a "fairly low diversity of flora" (Id., p.58, line 8-p.59, line 18). Mr. Hobson opined that based on his examination of flora on site and elsewhere within Aguntauag Swamp the proposed alterations would not adversely affect flora off-site (Id., p.59, line 19-p.60, line 22.). Under cross examination, however, Mr. Hobson conceded as did the applicant's other biological expert, Robert Erickson, that there existed a possibility that some project related impacts



might affect wildlife activity in off-site areas of Aguntaug Swamp (10/17/89 Tr., p.128, lines 6-20; 10/30/89 Tr., p.52, lines 11-19). Both men similarly acknowledged that the wetland features on the project site are part of the Aguntaug Swamp wetlands complex (10/17/89 Tr., p.89, lines 3-21; 10/30/89 Tr., p.56, lines 9-24).

The Division's biological expert, Brian Tefft, testified that the modified Golet wetlands evaluation system mandated by regulation prohibits the segmentation of a wetland for evaluative purposes since such segmentation requires the creation of "artificial biological boundaries." (10/4/89 Tr., p.82, line 18-p.83, line 4). Ms. Calvert in argument for the Division further reinforced the regulator's position that the Rule 5.03(c)(6) prohibition against degradation of the natural character of "unique" wetland applies equally to all components of such a wetland and does not allow for segregating out some wetlands components as being less equal than others (11/2/89 Tr., p.9, lines 17-24; 11/10/89 Tr., p.42, line 20 - p.43, line 12).

I cannot find, therefore, any support in the hearing record for the applicant's attempt to cull out the project site as an environmental "poor relation" of the Aguntaug Swamp as a whole or to regulate it as anything less than the "unique" and valuable" wetland of which it is a part.

I further find nothing in the Freshwater Wetlands Act or the Department's Rules and Regulations to support such a segmented approach to regulation of "unique" and "valuable" wetlands and I conclude, indeed, that such an approach is inimical to the stated objectives of the Freshwater Wetlands Act.

5. The applicant argued and the hearing officer agreed that the Division of Water Resources' denial of a water quality certification for this project was fatally flawed because it was based solely on the representation that the project would result in the loss (displacement) of pre-existing water bodies. The applicant further attempted to establish that because water quality on site was already degraded from sources unrelated to the proposed project the additional pollution loadings that the project would generate should not be of regulatory concern. The applicant, finally, forwarded the rather ingenious argument that the wetland itself would mitigate project related water pollution by capturing pollutants in its soils and vegetation.

The hearing record demonstrates that water quality impacts in addition to the displacement of water bodies would result from the proposed project. The Department's Water Pollution Control Regulations just as clearly prohibit the further degradation of water bodies already out of compliance with water quality standards. The argument that wetlands should be employed as pollution sinks is specious at best and is violative of Freshwater Wetlands Rule 5.03(c)(4).

Applicant's witness, David Hazebrouck, testified at length as to his expert opinion that construction of the proposed project would not pollute groundwater or threaten a town well located in the Aguntaug Swamp. However, this testimony was based in good part on his conclusion that "groundwater quality [on-site] is already somewhat degraded" (10/30/89 Tr., p.36, line 21; Id., p.65, lines 1-3) and on his further

representation that "thick layers" of organic peat and muck within the Aguntaug Swamp would "greatly reduce" the groundwater impacts of pollutants entering the wetland through storm runoff as this runoff percolates through the deposits into the underlying groundwater aquifer (Id.; p.38, lines 3-6; p.65, lines 4-9).

John Meyer, the applicant's other water quality witness, testified to his expert opinion that the proposed project would not further degrade the wetland's water quality, noted by him as already being out of compliance with its classification (Id.; p.32, line 24-p.33, line 6). He went on to cite as the likely source of heavy metal pollutants he had detected in stormwater runoff on the project site it's immediate proximity to heavily travelled highways draining into the wetland (Id.; p.71, line 20-p.72, line 3; p.78, lines 6-9). This notwithstanding, however, Mr. Meyer expressed no concerns regarding runoff from the "60 to 70%" of the site dedicated to paved parking lots because his analysis had taken into account among other factors "the pollutant removal capabilities of the existing wetland." (Id.; p.79, lines 7-24).

Susan Adamowicz, for the Department's water pollution control program, testified that Water Pollution Control Rule 7.2 prohibits the further degradation of water bodies out of compliance with the standards set for them (11/6/89 Tr., p.46,

lines 8-13). The applicant's David Hazebrouck likewise acknowledged under cross examination that the purpose of the State's groundwater protection law is to prevent the further degradation of water bodies not already in compliance with applicable standards (10/30/89 Tr. p.68, lines 4-15).

Mr. Meyer's and Mr. Hazebrouck's testimony regarding the pollutant trapping capacity of wetland peats and mucks entirely begs the question of how much water pollution will be introduced into the Aguntaug Swamp wetland complex as a result of this project being built. One wonders, in fact, why this phenomenon should be of any interest to the applicant unless water pollutants will, indeed, be introduced. One wonders what solace may be taken from the representation that stormwater pollutants will be trapped by wetland soils when by definition these soils are either in close contact with or actually saturated by groundwater most or all of the year. One wonders why, if heavy metals are presently entering the wetland in quantities sufficient to degrade its water quality via stormwater runoff from nearby highways, more won't similarly be carried into the wetland via stormwater runoff from the acres of paved parking lots proposed to be built in and adjacent to the wetland by this applicant.

## FINDINGS OF FACT

1. On October 28, 1987 Wetland Management Specialist, Inc. now known as The Environmental Scientific Corporation, on behalf of Westerly Commercial Associates, owner of property located in Westerly, Rhode Island (hereinafter the "Applicant") filed an application to alter freshwater wetlands in connection with its proposed development of a commercial-retail complex known as the Westerly Plaza - Phase II (the "Application").

2. The Division of Groundwater and Freshwater Wetlands (the "Division") referred the Application to the Division of Water Resources for a determination as to whether a water quality certification would issue for the proposal.

3. On April 12, 1989, the Division of Water Resources in its interoffice memo to Stephen Morin, Chief, Groundwater and Freshwater Wetlands, denied the issuance of a water quality certification.

4. On April 14, 1989, the Applicant duly appealed the denial of a water quality certification.

5. On May 17, 1989, the Department issued its denial of the Application.

6. On May 24, 1989, the Applicant duly appealed the Department's denial of the Application.

7. The consolidated appeals of the denial of the water quality certification and the Application were scheduled for

hearing in a pre-hearing conference held before the appointed hearing officer on September 22, 1989.

8. Notice of the Pre-Hearing Conference and Public Hearing was published on August 15, 1989.

9. At the commencement of the hearings, the parties entered into the following stipulations:

1. The Aguntaug Swamp including the area of the project to be altered, .97 acres of wetland and 1.95 acres of buffer area (the "Subject Site") is ranked as an outstanding wetland as defined by the modified Golet evaluation.

2. A portion of the premises which is the subject of the application is owned by the State of Rhode Island, approximately 54,000 square feet. The State, by and through the Department of Transportation, has agreed to convey the parcel to Westerly Commercial Associates contingent upon approval from the Department to issue a permit to alter freshwater wetlands.

10. Public hearings were held in Westerly Town Hall, commencing on September 25, 1989 and concluding on April 13, 1990. Hearings were held in accordance with RIGL Section 2-1-22, Section 42-35-9, Wetlands Regulation 11.00, and the Administrative Rules of Practice and Procedure for the Department of Environmental Management.

11. The water use rating of the Subject Site as well as the Aguntaug Swamp is Class B (Rhode Island DEM 1984).

12. The quality of the surface water for the Subject Site is not in compliance with the criteria for Class B waters.

13. Construction of this project will introduce additional pollutants and polluted stormwater runoff into surface water on and adjacent to the Subject Site and further degrade its quality. Pollutants entrained in wetland soils will be regularly exposed to surface and groundwater.

14. The April 12, 1989 denial of water quality certification is based upon the Department's finding that if the project is constructed as proposed it will result in the loss of fish and wildlife habitat contrary to the provisions of Section 17 of the Department's Regulations for Water Pollution Control, entitled "Antidegradation and Upgrading of Water Quality Standards."

15. Construction of this project as proposed will result in the degradation of the natural character of a "unique" wetland and in reduction of the value of a "valuable" wetland, in both cases the Aguntaug Swamp, even though due to its size and habitat diversity Aguntaug Swamp will remain "unique" and "valuable", albeit with a lower modified Golet wetland evaluation score than it presently enjoys.

16. Construction of this project as proposed will result in the total destruction of 0.97 acres of biological wetland,

principally marsh/swamp, river, intermittent stream and area subject to storm flowage, and 1.95 acres of jurisdictional wetland [buffer]. This wetland area is a hydraulically integrated component of the 2,000 acre Aguntaug Swamp wetlands complex and not a separate and/or less valuable or less unique wetland.

17. Construction of this project as proposed will result in the significant and direct loss, encroachment and permanent alteration of 2.92 acres of unique and valuable wetland wildlife habitat, the Subject Site; and the secondary and/or indirect loss, encroachment and/or permanent alteration of an unknown amount of additional unique and valuable wetland wildlife habitat in the vicinity of the Subject Site and elsewhere within the Aguntaug Swamp wetlands complex.

18. Construction of this project as proposed will result in the near total displacement and/or destruction of all naturally occurring wetlands wildlife species, habitat, and flora on the Subject Site.



CONCLUSIONS OF LAW

1. Pursuant to Section 11.02 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act ("Act"), adopted June, 1981, the applicant bore the burden of proof that the subject proposal is not inconsistent with the Freshwater Wetlands Act and the Regulations adopted thereunder.
2. Notice of the Pre-Hearing Conference and Public Hearing was published in substantial compliance with R.I.G.L. Section 2-1-22.
3. Approval of this application will cause random, unnecessary and/or undesirable disturbance or destruction of freshwater wetlands and must, therefore, be denied pursuant to Section 5.03(a) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act (the Rules).
4. The proposed alteration is inconsistent with the public interest and public policy as stated in Sections 2-1-18 and 2-1-19 of the Freshwater Wetlands Act (the Act) and Section 1.00 of the Rules and must, therefore, be denied pursuant to Section 5.03(b) of the Rules.
5. The proposed alteration will cause a reduction in the use assigned to a class of water quality as defined in Rhode Island Water Quality Regulations For Water Pollution Control and must, therefore, be denied pursuant to Section 5.03(c)(4) of the Rules.

6. The proposed alteration will cause a reduction in the ability of a wetland tributary to a public water supply to remove pollutants from surface water and must, therefore, be denied pursuant to Section 5.03(c)(5) of the Rules.
7. The proposed alteration will cause degradation of the natural character of a wetland determined to be "unique" pursuant to Section 7.06(a)(6) of the Rules and must, therefore, be denied pursuant to Section 5.03(c)(6) of the Rules.
8. The proposed alteration will cause reduction of the value of a wetland determined to be "valuable" and which provides valuable wildlife habitat pursuant to Section 7.06(b)(1) of the Rules and must, therefore, be denied pursuant to Section 5.03(c)(7) of the Rules.
9. Approval of this application to alter a freshwater wetland would not be in the best public interest so as to satisfy R.I.G.L. Section 2-1-24(a).
10. Approval of this application will result in the discharge of pollutants into the waters of the State and would result in the additional degradation of water quality criteria for those waters which are already below the water quality standard assigned to them; this in violation of Rule 7.2 of the Water Quality Regulations for Water Pollution Control.

Therefore, it is

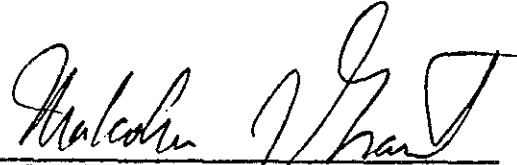
ORDERED

That approval of Application No. 87-0557F by Environmental Scientific Corporation for Westerly Plaza - Phase II is DENIED.

This constitutes a final Agency Decision and Order.

11-2-90

Date



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

CERTIFICATION

I hereby certify that on this 2nd day of November, 1990 a true and accurate copy of the within Final Agency Decision and Order has been mailed first class mail to John A. Tarantino, Esq. and Patricia K. Rocha, Esq., Adler, Pollock & Sheehan, Inc., 2300 Hospital Trust Tower, Providence, R.I. 02903; and sent by interoffice mail to Sandra Calvert, Esq., Office of Legal Services, R.I. Department of Environmental Management, 9 Hayes Street, Providence, R.I. 02908

