

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

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

FINAL AGENCY DECISION AND ORDER

JURISDICTION

This matter came before the Designated Director pursuant to an assignment of function filed with the Office of Secretary of State by Louise Durfee, Esq., Director, R.I. Department of Environmental Management on February 27, 1991. Pursuant to this assignment of function the Designated Director is in receipt of and has reviewed a Recommended Decision and Order prepared by Patricia Byrnes, Esq. as Hearing Officer and which is dated February 21, 1991. 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 "Wetlands Regulations"); and the Administrative Rules of Practice and Procedure for the

Department of Environmental Management filed with the Secretary of State on December 11, 1989.

AUTHORITY

The Administrative Hearing Officer by law and regulation is charged with the conduct of the administrative hearing and the preparation of a recommended Decision and Order whose substance is to reflect the reasoned and consistent 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, 937,939(1986). 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, modified or overturned by the Director if the law and regulations are to be applied in a fair and consistent manner.

There is no more compelling or unambiguous interpretation by a promulgating authority of its own rules and regulations than recent precedential regulatory decisions [Final Agency Decisions and Orders] made by that authority. Such precedential

decisions are, in fact, generally recognized as controlling as regards subsequent regulatory decisions made by that authority and are, therefore, to be deferred to by those making or recommending those subsequent decisions.

I have regrettably found in the matter before me that the Administrative Hearing Officer has recommended a Decision and Order which runs directly contrary to a Final Agency Decision and Order which is both precedential and controlling; I refer to this agency's Final Decision and Order in the matter of Kambiz Karbassi, Appeal of Denial of Freshwater Wetlands Applications Nos. 89-0047F and 89-0048F, issued on November 20, 1990. I, therefore, find myself obligated to overturn Hearing Officer Byrnes' Recommended Decision and Order of February 21, 1991 and to direct that Freshwater Wetlands Application No. 89-0555F be denied.

THE CONTROLLING DECISION (KARBASSI)

At issue in the Karbassi Applications was the proposed physical alteration of a fifty foot jurisdictional upland wetland buffer associated with a wetland found to be "valuable" pursuant to the Modified Golet wetlands evaluation system. In summary, the applicant argued that the nature of his proposed alteration of the fifty foot wetland buffer and the inclusion of a vegetative "screen" in his plans protected the "valuable"

wetland from the reduction in value prohibited by Wetlands Rule 5.03(c)(7). The Hearing Officer, again Ms. Byrnes, while denying the application as submitted, indicated that she would be "favorably disposed" towards a revised application which among other refinements would reduce the area of proposed upland wetland buffer disturbance from 20,000 square feet to 10,000 square feet. In affirming the Hearing Officer's denial and overturning her invitation to a revised application the Designated Director found as follows:

At issue is this Department's interpretation of Rule 7.06(b), which sets forth regulatory standards for defining a "valuable [wetland] wildlife habitat" and/or a "valuable [wetland] recreational environment", either of which, in turn, constitutes a "valuable wetland" for regulatory purposes. Also at issue is the related Rule 5.03(c)(7) prohibition against wetlands alterations which result in a reduction in the value of such a "valuable wetland."

The Department's interpretation of these two rules, both generally and specifically as it relates to this application, is based on four essential tenets, each of which was testified to by either or both Martin Wencek and Brian Tefft for the Division of Groundwater and Freshwater Wetlands. These tenets have defined the Department's regulation of "valuable wetlands" in the past and fundamental fairness and regulatory consistency dictates that they be applied to this application as well. They are:

1. Biological wetlands and their associated natural wetland buffers (also referred to as "jurisdictional wetlands") are legally and functionally inseparable components of a single wetland complex; which is to say, they do not function and are consequently not regulated as

unrelated and/or independent features. A "valuable wetland", defined as such pursuant to Rule 7.06(b), therefore, consists of equally "valuable" and ecologically important biological and jurisdictional (buffer) components. The protection of both such components of a "valuable wetland" from alterations which would reduce their value as either or both wildlife habitat and recreational environment is mandated by Rule 5.03(c)(7).

2. The functional contribution of an undisturbed and naturally vegetated jurisdictional wetland (buffer) to the overall wetland complex of which it is a part and, more particularly, to the biological wetland with which it is associated, is extensive and pervasive. Of paramount importance, however, is the ability of an undisturbed and naturally vegetated jurisdictional wetland (buffer) to deter human encroachment into the biological wetland and thereby protect wetland wildlife species and habitat from the various adverse consequences of such encroachment. Preservation of the jurisdictional wetland's ability to deter encroachment, therefore, has always been and must remain a central objective of the Freshwater Wetlands regulations generally and of Rule 5.03(c)(7) specifically.

3. Lawns are not wetland buffers in any sense of the word and by the very nature of their use, construction and maintenance cannot be made to function as does a naturally vegetated and undisturbed wetland buffer. By purpose and function a lawn provides an avenue for wetlands encroachment, not an impediment to it; lawn construction requires destruction of naturally occurring vegetation and wildlife habitat as well as filling, grading and other permanent physical alterations of the natural jurisdictional wetland (buffer); and lawn maintenance requires feeding which provides an artificial and undesirable source of nutrient loadings to the wetland environment. For these various reasons the Department does not interpret Rule 5.03(c)(7) as authorizing the construction of lawns generally, and the proposed lawns specifically, as an acceptable mitigation measure for alterations which will reduce the value of a "valuable wetland" since the lawns themselves contribute to this reduction in wetlands value.

4. The planting of woody vegetation and other native plants along the biological wetland edge as a means of replacing naturally occurring and undisturbed jurisdictional wetland (buffer) wildlife habitat lost to alteration and/or to mitigate against the adverse impacts of or encroachment on the biological wetland associated with such alteration is at best a stop-gap and inadequate measure. Such measures in no way compensate for nor do they justify the permanent alteration of valuable jurisdictional wetland (buffer). For these reasons, where the Department concludes that a proposed alteration is prohibited pursuant to Rule 5.03(c)(7), the proposed installation of a vegetative barrier provides insufficient mitigating value to overcome the regulatory prohibition. (Kambiz Karbassi; Application Nos. 89-0047F, 89-0048F; Final Agency Decision and Order; November 20, 1990; pp.3-6)

FINDINGS OF FACT (APPLICATION
NO. 89-0555F, PROFILE CONSTRUCTION)

After review of the entire record of the case now before me as Designated Director, particularly as regards the application of Freshwater Wetlands Rules 5.03 and 7.06 as set forth in the Karbassi Decision of November 1990, I hereby find as follows:

1. The Department denied applicant's request (89-0555F) to modify a freshwater wetland on August 28, 1990.
2. A timely notice of appeal was filed by applicant on September 6, 1990.
3. This matter was properly before the Administrative Adjudication Hearing Office pursuant to RIGL 42-17-7.1 et seq., Freshwater Wetlands Act RIGL 2-1-20.1 et seq.

as amended; Administrative Procedures Act RIGL 42-35-1 et seq. as amended; Rules and Regulations Governing the Enforcement of Freshwater Wetlands; and Administrative Adjudicatory Division Rules and Regulations promulgated July 1990.

4. The Pre-Hearing Conference on this application was held on November 21, 1990 at the Administration Building, One Capitol Hill, Providence, Rhode Island.
5. A Pre-Hearing Conference Record was issued on November 21, 1990 and made part of the file.
6. No individuals moved to intervene.
7. Public hearings were held on December 10 and December 11, 1990, at the Administration Building, One Capitol Hill, Providence, Rhode Island.
8. All parties and the Hearing Officer viewed the site on December 13, 1990.
9. This hearing formally closed on January 28, 1991, the date all stenographic notes were received by the Hearing Officer.
10. No brief or memoranda were requested by the Hearing Officer or submitted by the parties.
11. Pursuant to Rule 11.02 of the regulations, the burden of proof and persuasion was upon the applicant to show by preponderance of the evidence that these proposals are not inconsistent with the provisions of the Freshwater Wetlands Act and the accompanying regulations.

12. The site of the proposed alteration is located east of Nooseneck Hill Road, (Route 3), Utility Pole #2, North of I-95 in West Greenwich, Rhode Island.
13. Thirty feet of the subject site is an easement owned by Profile Construction Co.
14. Formal Application No. 89-0555F to alter a wetland was received by DEM on August 4, 1989.
15. The site plan subject to this hearing was received by the Department on April 19, 1990.
16. A site plan was originally sent out to public notice on April 20, 1990. This notice was amended on April 26, 1990 commencing a forty-five day notice period which ended June 10, 1990.
17. The Department received eight public comments during the notice period. Pursuant to the standard set forth in Sec. 5.05(b) of the Rules and Regulations the Department did not deem any of these comments to be of a substantive nature.
18. This project will cause an alteration to a state jurisdictional freshwater wetland.
19. The state jurisdictional wetland affected by the Applicant's proposal includes a wooded swamp and that area of land within fifty (50) feet of the edge of the swamp, henceforth referred to as the "upland buffer."

20. The jurisdictional wetland affected by the proposed alterations is a component of a \pm 560 acre wetland known as Mishnock Swamp and lies at its western most limit.
21. Both parties to this proceeding performed independent "Modified Golet" Wetland-Wildlife Evaluations of the Mishnock Swamp, this being the evaluation method specified by Wetlands Rule 7.06. This evaluation method measures wildlife diversity and productivity.
22. Both said wetlands evaluations identified the Mishnock Swamp as "valuable" and "unique" for purposes of regulation pursuant to Wetlands Rules 5.03 and 7.06. The Applicant's Environmental Review, completed for it by NaturalResource Services, moreover, determined the overall wetland complex to have "outstanding" wildlife diversity and production potential as measured by the Modified Golet evaluation method.
23. The proposed alteration will displace approximately 13,388 square feet (0.31 acres) of naturally vegetated jurisdictional wetland within the Mishnock Swamp complex, most of that fifty foot upland buffer, and replace same with a two hundred and ninety (290) foot long by twenty-four (24) foot wide paved roadway and associated drainage structures, concrete retaining

walls, grading, landscaping and planting. Within the area of proposed disturbance a presently "valuable", undisturbed and naturally vegetated upland buffer wildlife habitat will be replaced in its entirety by the above described alterations.

24. The biological and upland buffer components of a "valuable" wetland complex function as inseparable parts of a single ecological system. Preservation of an undisturbed and naturally vegetated upland buffer is, therefore, critical to preserving the high wildlife diversity and productivity characteristic of a "valuable" and/or unique wetland.
25. The planting of a vegetative "screen" of the sort proposed by this applicant provides an inadequate level of mitigation or compensation for the destruction and/or displacement of the undisturbed and naturally vegetated upland buffer associated with the "valuable" and "unique" Mishnock Swamp wetlands complex.
26. The proposed project will adversely impact wildlife diversity and production in the Mishnock Swamp wetlands system. It will thereby reduce the value and degrade the natural character of a wetland which is both "unique" and "valuable" as those terms are employed in Wetlands Rules 5.03 and 7.06.

CONCLUSIONS OF LAW

1. The public hearing was held at the Administration Building, One Capitol Hill, Providence, Rhode Island and is in substantial compliance with R.I.G.L. 2-1-22.
2. This matter was properly before the Administrative Adjudication Hearing Officer as required by R.I.G.L. 42-17.7-1 et seq. as amended; Administrative Procedures Act 42-35-1 et seq. as amended; Freshwater Wetlands Act 21-20.1 et seq. as amended; the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands and Administrative Adjudication Division Rules of Practice and Procedure effective July 1990.
3. DEM filed a timely letter denying applicant's request to alter a Freshwater Wetland (89-0555F).
4. Applicant filed an appropriate and timely request for hearing and paid all necessary fees.
5. The area in question is a wetland pursuant to R.I.G.L. 2-1-20.
6. The subject wetland complex, Mishnock Swamp, is a "valuable" wetland - wildlife habitat pursuant to Sec. 7.06(b) of the Rules and Regulations.
7. The subject wetland complex, Mishnock Swamp, is a "unique" wetland pursuant to Sec. 7.06(a) of the Rules and Regulations.

8. Rule 5.03(c) requires the Director to deny approval of a proposed alteration of a wetland if in his opinion it will cause "random, unnecessary and/or undesirable destruction of freshwater wetlands" which is defined as including, but not limited to degradation of the natural character of a "unique" wetland or reduction of the value of a "valuable" wetland.
9. The Final Agency Decision and Order in Karbassi as hereinbefore cited, unambiguously articulates this Agency's controlling interpretation of Rule 5.03 (c) (7) as prohibiting without qualification the alteration of undisturbed and naturally vegetated wildlife habitat within either the biological or upland buffer components of a "valuable" wetland.
10. Karbassi also articulates the Agency's controlling interpretation of Rule 5.03 (c) (7) which is that the planting of vegetative "screens" provides a level of mitigation or compensation for the destruction and/or displacement of undisturbed and naturally vegetated upland buffer associated with "valuable" wetlands which is insufficient to overcome the Rule 5.03 (c) prohibition against such destruction and/or displacement.
11. The proposed project will result in a reduction in wildlife diversity and productivity within a jurisdictional wetland complex considered "unique" pursuant to Rule 7.06 (a)(6) by virtue of its

exhibiting "outstanding" wildlife diversity and production as determined by the "Wetland-Wildlife Evaluation Model." It will thereby degrade the natural character of that "unique" wetland, which is prohibited by Rule 5.03(c)(6).

12. The proposed project will exercise a similarly adverse impact on wildlife diversity and productivity within a jurisdictional wetland complex considered "valuable" pursuant to Rule 7.06(b)(1) by virtue of its being characterized by "high" diversity and production of wildlife. It will thereby reduce the value of that "valuable" wetland, which is prohibited by Rule 5.03(c)(7).
13. Approval of the proposed alteration is, therefore, inconsistent with the public interest and public policy as stated in Sections 2-1-18 and 2-1-19 of the Act and Section 1.00 of the Rules and Regulations governing the R.I. Freshwater Wetlands Act.

