

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

RE: MIKE'S PROFESSIONAL TREE SERVICE, INC. AAD NO. 14-001/MM  
NOTICE OF VIOLATION FW 14-9 AND SW 13-88



DECISION AND ORDER

This matter came on for an Administrative Hearing before Hearing Officer David Kerins on October 6, 2015 and October 27, 2015. The matter came before the Department of Environmental Management ("DEM"), Administrative Adjudication Division for Environmental Matters ("AAD") for hearing. The Respondent took an appeal from a Notice of Violation and Order ("NOV") issued by the DEM Office of Compliance and Inspection ("OC&I" "DEM" or the "Department") on April 22, 2014 to the Respondent Mike's Professional Tree Service, Inc., for the property located at 75 Airport Road, also identified as Assessor's Plat 44, Lot 1, Unit 3 in the Town of Coventry, Rhode Island (the "Property"). DEM was represented by Susan B. Forcier, Esquire and the Respondent was represented by Fred J. Volpe, Esquire. At the conclusion of the hearing the parties were instructed to file Post-Hearing Memoranda with Forty-five (45) days. Post-Hearing Memoranda were filed on January 22, 2016.

The NOV cited Mike's Professional Tree Service, Inc. ("MPTS" or "Respondent") with eight violations of the Rhode Island General Laws the *DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act* (the "Wetlands Regulations"), and the *DEM Rules and Regulations for Composting Facilities and Solid Waste Management Facilities* (the "Solid Waste Regulations"). The violations cited were for altering freshwater wetlands without a permit, for non-compliance with the provisions of a freshwater wetlands permit, for disposal of solid waste other than at a licensed solid waste management facility, for operation of a solid waste management or compost facility without a license or registration from DEM, and for the unauthorized acceptance and/ or storage of recyclable materials or waste.

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### **JURISDICTION**

This matter is properly before the Hearing Officer pursuant to the Freshwater Wetlands Act (R.I. General Laws §2-1-18 *et. seq.*), the duly promulgated *Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act* ("Wetlands Regulations"), the Refuse Disposal Act (R.I. General §23-18.9-1 *et. seq.*), the duly promulgated *Rules and Regulations Governing the Enforcement of Solid Waste Disposal* ("Solid Waste Regulations"), the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. General Laws §42-17.7-1 *et. seq.*), the Administrative Procedures Act (R.I. General Laws §42-35-1 *et. seq.*), the Administrative Penalties Act (R.I. General Laws §42-17.1, §42-17.6 , and §42-35 *et. seq.*) ("Penalties Act"), and the duly promulgated *Rules and Regulations for the Assessment of Administrative Penalties* ("Penalties Regulations").

### **HEARING SUMMARY**

The Office of Compliance and Inspection ("OC&I") presented three witnesses: Daniel Lawton, a Senior Environmental Scientist employed by the DEM Office of Compliance and Inspection's waste program; Joshua Burgoyne, a Senior Natural Resource Specialist employed by the DEM Office of Compliance and Inspection's freshwater wetland program; and David Chopy, a Registered Professional Engineer and Chief of the DEM Office of Compliance and Inspection. Mr. Lawton was qualified, by agreement, as an expert in environmental compliance inspections and the application of the Refuse Disposal Act and Solid Waste Regulations. Mr. Burgoyne was qualified, by agreement, as an expert in Wetlands Science and Aerial Photography Interpretation.

Mr. Lawton's testimony included descriptions of what he observed on the Property during his inspections, and about his inspection reports and the inspection report of Ms. Stacey Pinto, as well as the processes followed by OC&I in investigating waste enforcement matters based on his

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experience in the field. Mr. Burgoyne's testimony included descriptions of what he observed on the Property during his inspections, and about his inspection reports and about the processes followed by OC&I in investigating freshwater wetlands enforcement matter based on his experience in the field. Mr. Chopy testified with regard to the development and issuance of the NOV including the assessment of the administrative penalty in this matter. Mr. Chopy testified in detail about the development of the penalty section of the NOV, the Rules and Regulations for the Assessment of Administrative Penalties, and how those regulations were applied in developing and assessing the penalty in this NOV.

The Respondent called a single expert witness, Scott Rabideau, a wetlands scientist and Principal of Natural Resource Services, a consulting firm hired by the Respondent. Mr. Rabideau was qualified, by agreement, as an expert in wetland delineation, habitat evaluation, wetland permitting, and aerial photo interpretation. Mr. Rabideau testified generally about his involvement with and observations of the Property and specifically about aerial photo reviews that he conducted relating to the history of the property and the wetlands thereon over the past eighty or so years. Respondent provided no direct testimony regarding solid waste or penalties.

**BURDEN OF PROOF**

The Department of Environmental Management, Office of Compliance and Inspection ("OC&I") bears the burden of proof in this matter and must prove the allegations in the NOV by a preponderance of the evidence. "The burden of showing something by a preponderance of the evidence... simply requires the trier to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the facts existence" Metropolitan Stevedore Co. V. Rambo, 521 U.S. 121.

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### VIOLATIONS

In the NOV OC&I alleged the following Violations:

1. **R.I. General Laws §2-1-21** – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
2. **DEM's Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, Rule 5.01A** – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
3. **DEM's Freshwater Wetland Regulations, Rule 9.04B** – requiring an applicant to comply with all conditions of a permit.
4. **R.I. General Laws §23-18.9-5(a)** – prohibiting the disposal of solid waste at other than a licensed solid waste management facility.
5. **R.I. General Laws §23-18.9-8(a)** – prohibiting the operation of any solid waste management facility or construction and demolition debris processing facility without first having obtained a license or registration to operate from the DEM.
6. **DEM's Solid Waste Regulation 1.4.01** – prohibiting the operation of any solid waste management facility or composting facility without first having obtained a license or registration from the DEM.
7. **DEM's Solid Waste Regulation 1.4.05(b)** – prohibiting the operation of facilities that accept or store co-mingled recyclable materials, including wood waste and construction and demolition debris, without obtaining a license, registration, or approval from the DEM.
8. **DEM's Solid Waste Regulation 1.4.04(b)** – prohibiting the operation of facilities that accumulate material speculatively and/or facilities that accept or store co-mingled recyclable materials and operate outside the confines of a closed structure without obtaining a license, registration, or approval from the DEM.

### ANALYSIS

#### SOLID WASTE VIOLATIONS

The Department has alleged five (5) violations of the Solid Waste Statutes and Regulations. Briefly stated the Respondent is charged with disposing of solid waste at other than a licensed solid waste facility and operating a solid waste facility without a license.

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“Solid Waste” is defined by Rhode Island General Laws §23-18.9-7(12) and Solid Waste Regulations §1.300 as:

“garbage, refuse, tree waste as defined by subsection 14 of this section, and other discarded solid materials generated by residential, institutional, commercial, industrial, and agricultural sources, but does not include solids or dissolved material in domestic sewage or sewage sludge or dredge material as defined in chapter 6.1 of title 46 nor does it include hazardous waste as defined in chapter 19.1 of this title, nor does it include used asphalt, concrete, or Portland concrete cement.”

“Disposal” is defined by the Solid Waste Regulations as “the abandonment, discard, or final disposition of waste.” The Refuse Disposal Act, R.I. General Laws §23-18.9-5(a) prohibits “disposal of solid waste at other than a solid waste management facility licensed by the Director.”

“Operating a solid waste facility” is defined by the Solid Waste Regulations §1.3002 as:

“receiving solid waste at any facility, whether knowingly or unknowingly. For purposes of disposal, such receipt must be in an amount greater than three cubic yards, per R.I. General Law §23-18.9-5; and any property owner is considered to be operating a solid waste management facility if an amount of solid waste greater than three cubic yards exists on their property.”

The Refuse Disposal Act, R.I. General Law §23-18.9-8(a)(1) states that “No person shall operate any solid waste management facility or construction and demolition (“C&D”) debris processing facility or expand an existing facility unless a license is obtained from the Director.”

The evidence in support of the Department’s allegation regarding solid waste violations was presented primarily through witness Daniel Lawton. Mr. Lawton was qualified without objection as an expert in environmental compliance inspections and interpretation and application of the Refuse Disposal Act and Solid Waste Regulations. (TR. p. 21:16-21).

Mr. Lawton testified that solid waste consists, under the law, of anything that can be discarded including “household garbage or construction and demolition debris, yard waste, junkyards, anything of that nature.” (TR. p. 21:8-10). He went on to say that in order to constitute

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a violation the volume of solid waste must be at least three (3) cubic yards.

Mr. Lawton testified that on December 5, 2013 he inspected the property in response to a wetlands violation complaint. He "observed a pile of construction and demolition debris on the property, including clean wood waste, painted wood, particle board, plywood, metal, plastic pipe, insulation, ceiling tile, and clothing, totaling approximately 33 cubic yards." (OC&I Ex. 2-Full and TR. p. 32:20-23). Mr. Lawton explained that the presence of paper yard waste bags in the compost piles is indicative of the origin of the waste: "it's probable that this is yard waste that was collected on a curbside.... It shows that the yard waste probably was generated at a different property.... There's no apparent reason why someone would collect leaves on that property and put them in a bag." (TR. p. 40:10-23).

Mr. Lawton stated that the fact the yard waste was generated off site is important in that it is a clear indication of the fact that the Respondent was operating a compost facility at the Property without a permit from the Department; Respondent was bringing yard waste generated off site onto the property for composting. Even if the yard waste had been generated on the Property, the exception is the Solid Waste Regulations for backyard composting would not have applied to the operation observed by Mr. Lawton during his inspection. Solid Waste Regulation 1 defines "backyard composting" in part to mean "the composting on a residential site of certain wastes generated only at the site and where the compost produced is utilized on site and is not distributed or marketed." (Solid Waste Regulations, Rule 1.3.00). It is uncontested that this property is an industrial site, and not residential or agricultural. Therefore, any composting operations at the Property required a permit from the Department.

Mr. Lawton's testimony revealed that, of the approximately 972 cubic yards of composted and uncomposted material that he observed during his December 2013 inspection,

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approximately one third of the pile was already composted, while the other approximately 648 cubic yards was only partially composted and currently undergoing the compost process. (OC&I Ex. 3-Full and TR. p. 37:13-16; pgs. 39-41). The fact that one third of the pile was already composted meant that in order to determine whether or not the already-composted material met the definition of solid waste, a determination would first have had to be made as to where the material came from, and whether it was already composted when it was brought to the Property. (TR. p. 37:1-10). If the already-composted material was composted at a licensed compost facility, it might not qualify as solid waste; if it was composted on this Property, however, it may have constituted solid waste and a violation of the Solid Waste Regulations. Rather than making those determinations, the Department elected to simply discount that portion of the pile and only consider the uncomposted or partially composted leaf and yard waste to be a violation of the Solid Waste Regulations. (Id.)

Because the Respondent did not have a composting license from the Department, not only was the Respondent operating an unlicensed composting facility in violation of the Solid Waste Regulations, but had also disposed of solid waste on the property. The Solid Waste Regulations require that solid waste may not be disposed of at any property without a license from the Department.

The Respondent did not present evidence that the material observed by Mr. Lawton was not solid waste as defined above. The Respondent does not challenge the alleged amounts of material observed by Mr. Lawton. It is therefore uncontradicted that on December 5, 2013 Mr. Lawton observed two piles of solid waste, one consisting of approximately 33 cubic yards and one consisting of approximately 972 cubic yards. Approximately one third of the larger pile of solid waste had been processed (See OC&I Ex. 2-Full).

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The Department raises several objections in its own defense. The Respondent argues that the material was not tested by the Department so we don't know the exact nature of the solid waste. There is no obligation by Statute or Rule, that the material be tested. We know that it was solid waste by the opinion of Mr. Lawton, an acknowledged expert. The Respondent seems to argue that maybe it was not "bad" solid waste but "good" solid waste. This defense is also directed at the determination of the Administrative Penalty. Respondent infers that if it was "good" solid waste that the penalty shouldn't be so severe.

The Respondent also raises the objection that this is a case of selective enforcement. Respondent argues that because there was no solid waste complaint received that the Department was targeting the Respondent. The Department is obliged and authorized to enforce the environmental protection laws of the State and is not limited to only cases where a complaint has been filed.

Finally, the Respondent argues that the solid waste was removed approximately six (6) months after the issuance of the Notice of Violation. This is certainly not a defense but an argument to reduce the Administrative Penalty. It was noted by the Department that although the material was no longer piled on the Property there is no evidence that it was properly disposed of in a license solid waste facility as required by Regulation.

### **FRESHWATER WETLANDS VIOLATIONS**

#### **A. PERMIT VIOLATIONS**

In July 2013 the Department issued an Insignificant Alteration Permit to the Respondent. That permit was revised in September 2013 at the request of Respondent. The Revised permit superseded the original, and authorized the construction of a sediment forebay and detention

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basin, a sand filter, a parking area, and two (2) dry hydrants within the North Perimeter Wetland and the Perimeter Wetland associated with the South Pond. (OC&I Ex. 8-Full).

Mr. Burgoyne testified for the Department that the stormwater best management practices, the sediment detention and forebay and sand filter, were not installed at the time of his January 2014 inspection, nor was the parking area. (TR. p. 87:11-14; 96:16-19). Mr. Burgoyne went on to testify about four specific violations of permit conditions that he observed during his inspection of the property in January 2014, and which were listed as violations in the NOV: Permit condition 2 expressly stated that "this permit is specifically limited to the project, site alterations and limits of disturbance as detailed on the site plans submitted with your application ... changes or revisions to the project that would alter freshwater wetlands are not authorized without a permit from the DEM." (OC&I Ex. 8-Full, condition 2 and TR. p. 92:8-15).

Permit condition 4 required that Respondent "notify this program in writing immediately prior to the commencement of site alterations and upon completion of the project." (OC&I Ex. 8-Full and TR. p. 92:20-23). The Department was never notified prior to commencement of site alteration or upon completion. (TR. p. 92:23-25). Permit condition 9 required that "prior to commencement of site alterations, [Respondent] shall erect or post a sign ... which boldly identifies the initials 'DEM' and the application number of this permit. This sign must be maintained at the site in a conspicuous location until such time that the project is complete." (OC&I Ex. 8-Full and TR. p. 93:2-9). Mr. Burgoyne testified that there was no conspicuously placed sign present at the Property during his inspection. (TR. p. 93:10-16). Finally, permit condition 10 required that "temporary erosion and sediment controls detailed or described on the approved site plans shall be properly installed at the site prior to or commensurate with site alterations. Such controls shall be properly maintained, replaced, supplemented, or modified as

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necessary throughout the life of this project to minimize soil erosion and to prevent sediment from being deposited in any wetlands not subject to disturbance under this permit." (OC&I Ex. 8-Full and TR. p. 93:19-91:2). Mr. Burgoyne testified that there were no erosion and sediment controls present on the site to protect the wetlands that were being worked in and around." (TR. p. 94:3-6). Mr. Chopy testified to the fact that the Department never received a copy of the recorded Permit as required by condition 6 of the Permit. (OC&I Ex. 8-Full and TR. p. 143:2-11).

Respondent did not present any evidence whatsoever to the effect that they complied with the regulatory requirements associated with the Insignificant Alteration Permit. The allegations by the Department in the NOV are, therefore, uncontradicted and accepted as fact.

**B. UNAUTHORIZED ALTERATION OF FRESHWATER WETLANDS**

Mr. Burgoyne, a Senior Natural Resource Specialist, conducted a complete freshwater wetlands inspection of the Property on January 13, 2014. Following his inspection, Mr. Burgoyne prepared two reports, a Site Inspection Report and a Complaint Inspection Report, which were introduced at the Hearing as OC&I Exhibits 6-Full and 7-Full, respectively. Mr. Burgoyne testified at length about the wetlands violations that he observed at the property.

Mr. Burgoyne identified the wetlands on the property, using OC&I Exhibit 7A-Full, a blown up sketch taken from Mr. Burgoyne's Complaint Inspection Report OC&I Exhibit 7-Full. Those wetlands include a northern Wetland Complex consisting of a large pond and two wooded wetlands, and a southern Pond, and associated Perimeter Wetlands. (TR. p. 75:23-25). He testified that according to the Freshwater Wetlands Act and Regulations, a "Pond" is "a place not less than one-quarter (1/4) acre in extent, natural or manmade, wholly or partly within the State of Rhode Island, where open standing or slowly moving water shall be present for at least six (6)

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months a year.” (R.I. General Laws §2-1-20(7); Freshwater Wetlands Regulation §4.00; and TR. p. 78:6-8; 99:10-16). Mr. Burgoyne further explained the wetlands delineations on the Property by explaining that

The perimeter wetland ... is the area within fifty feet of any freshwater wetland consisting, in part or in whole, of a bog, marsh, pond, or swamp. So we treat this area, pond and woody wetland features included, as one freshwater wetland that consists, in part, of a pond and therefore, the area within fifty feet of this entire wetland complex is perimeter wetland. So because there's a hydrologic and vegetative connection between these woody wetland features and this pond, it becomes one freshwater wetland and it is entirely enveloped within the perimeter wetland. (TR. p. 100:1-13 (emphasis added)).

Both Mr. Lawton and Mr. Burgoyne testified regarding the concrete wall that they observed surrounding the entire North Pond, within the perimeter wetland. As previously discussed, the prior property owner had previously placed a line of spaced boulders along the western perimeter of both the North and South Ponds, extending to the southern perimeter of the South Pond. These boulders are visible on aerial photographs dated from 2011, including that introduced as part of Respondent's Exhibit D-Full. Mr. Burgoyne explained that the uninterrupted concrete wall installed by the Respondent is not equivalent to the spaced boulder, which had previously been placed by the prior owner of the Property and for which the Department issued a warning letter. The wall built by the Respondent consists of “interlocking concrete blocks that were stacked. It appeared to be two blocks high in most locations, and they were built on top of fill material ... [the fill material] appeared to be a sand and gravel like material that was used to fasten the concrete blocks in place.” (TR. p. 78:21– 79:6). The boulders that were placed by [the prior owner] along the western and southern perimeters of the wetlands were placed in an area that was already disturbed. It was not vegetated. These portions of the pond perimeter were disturbed prior to the placement of the boulders. The block wall was placed

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on top of additional fill material that was used that spills into the ponds themselves ... And, also, in order to complete the construction of the block wall around the western, northern, and eastern perimeters of the northern wetland complex, a significant amount of forested buffer zone had to be cleared, which is an extremely significant impact to the Northern Wetland Complex." (TR. p. 117:3-18).

The boulders that existed prior to Respondent's purchase of the property for which the Department had previously issued a warning letter were not merely replaced with blocks. The spaced boulders were removed, fill was added, and an interlocking concrete wall was built in its place. That wall was not limited to the area where the boulders previously sat, it was extended all the way around the Northern Wetland Complex, an act which included such significant clearing and filling of regulated, protected wetlands so as to render those wetlands almost unrecognizable by the Department's experienced wetlands inspectors. (TR. pgs. 79-80).

OC&I Exhibit 1-Full is an inspection report for the Property dated May 26, 2013, prepared by Stacey Pinto, a Water Pollution inspector for OC&I. In that report, dated approximately one month after Respondent purchased the property, Ms. Pinto observed fish 6 inches to a foot in length living in the pond, and explained that the ponds were "surrounded by woods to the north and the east" at the time of her inspection, a month after Respondent purchased the Property. (OC&I Ex. 1-Full). The report includes an aerial photo taken from Google Earth dated 4/2/2012, which clearly illustrated the extent of the wooded wetlands to the north and east of the northern pond, and three photos taken during the inspection. Photo number 2 is taken from the area between the two ponds, looking northeast and the eastern wooded wetland, intact and pristine at the time that Respondent purchased the Property.

Mr. Burgoyne's Site Inspection Report (OC&I Ex. 6-Full) includes photos taken at the

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Property during his inspection on January 13, 2014. Photos 6 and 7 attached to Mr. Burgoyne's report illustrate the condition of that same easternmost wooded wetland at the time of his inspection: the area has been generally cleared and graded and includes an interlocking block wall and several fill piles. (OC&I Ex. 6-Full and TR. p. 83:14-84:10). Mr. Burgoyne testified with regard to the eastern side of the Property:

[I]n addition to the stacks of timber and the wall, I observed an area within at least the perimeter wetland of the ponds that appeared to have been recently filled and graded. The material on the east side was distinct. It appeared to be distinctly more recent than the conditions of the western side. The material on the grounds on the eastern side, it was not as compact as the material on the western side was, and the material around the concrete block wall was unconsolidated, unvegetated, and appeared recent ... There was very little left to indicate that wetlands in that area had been filled. There was a slight depression, and there was some vegetation north of the cleared area that was transitional in character; however, it was not until I returned to the office and conducted an aerial photo review that I was able to identify that there was wetlands in that altered area. (TR. p. 79:9-80:7).

Similarly, the aerial photos dated from 2011, 2012, and early 2013, including those attached to OC&I Exhibits 1-Full, 6-Full, 7-Full, and 9-Full, and Respondent's Exhibit D-Full, reveal that the woody wetland and perimeter wetland associated with the Northern Wetland Complex was intact and extended as far as the property line to the north of this Property. OC&I Exhibit 7-Full includes an aerial photo from the Town of Coventry showing the approximate locations of the property lines on the Property. OC&I Exhibit 9-Full includes an aerial photo dated March 27, 2013, approximately seventeen days prior to the Respondent's purchase of the property, which clearly shows a heavily vegetated area to the north of the Northern Wetland Complex. Upon inspecting the Property in January 2014, Mr. Burgoyne observed that a significant portion of that northern perimeter wetland had been cleared of vegetation and filled. (TR. p. 76:10-77:7). Photos 2, 3, and 4 attached to OC&I Exhibit 6-Full accurately represent the condition of that northernmost area of perimeter wetland in January of 2014. The area was not

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only cleared and filled, but the Respondent was storing large piles of timber along the edge of the concrete wall and the wooded wetland, all without permits from the Department. (OC&I Ex. 6-Full).

Mr. Burgoyne also testified as to soil material and solid waste piled within the perimeter wetlands to the west and south of the ponds, as shown in photos attached to OC&I Exhibits 6-Full and 7-Full. Mr. Burgoyne explained that fill material is "a general term that refers to any non-native material that is placed within the wetland without any affinity to the actual type of material itself." (TR. p. 76:11-14).

The Freshwater Wetlands Act and Regulations prohibit the alteration of freshwater wetlands without a permit from the Department. The Department presented ample evidence to demonstrate that the Respondent undertook clearing, filling, grading and construction of a concrete block wall within freshwater wetlands on the Property equating to approximately 51,100 square feet, or almost 1.2 acres of jurisdictional, protected wetlands.

The Respondent presented Scott Rabideau as its only witness. Mr. Rabideau was acknowledged, by agreement, as an expert in the areas of wetlands delineation, wetland permitting, habitat evaluations and interpretation of aerial photography. Mr. Rabideau testified about the history of the cite with the use of aerial photographs (Respondent Exhibits C-Full and D-Full).

Mr. Rabideau testified that he is familiar with the Property and its uses and was hired in June of 2014. He said the Property has multiple open bodies of water and was recently graded. He pointed out in a 1939 aerial photograph of the Property that there existed a wetlands area of approximately 48,044 square feet but no ponds. He testified that over the years there were a number of man-made ponds on the Property. Mr. Rabideau testified also with the aid of

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Respondent Exhibits H-Full, I-Full, and J-Full. These exhibits are copies of Google Earth aerial photographs dated 11/23/04, 7/28/07, and 4/29/09 respectively. He pointed out that the ponds shown in the photographs have been changed or manipulated over the years. In 2004 there were three (3) ponds. Three (3) years later in 2007 one was eliminated and there was significant alteration. In the 2009 photograph there appears more alterations and the areas to the West, South, and North of the remaining two ponds were devoid of vegetation.

Mr. Rabideau testified regarding Respondent Exhibits E-Full, F-Full, and G-Full. These exhibits related to a complaint against a prior owner of the Property for alterations of freshwater wetlands. The alteration included the placement of boulders around the southernmost pond. The result of the complaint was the issuance of a warning "Because of the nature of the property (sand and gravel washing operation and other construction activities) a warning letter will be sent to the owner" (Respondent Exhibit G-Full).

Mr. Rabideau was asked if he would characterized the issuance of the NOV in this matter as selective enforcement. He said that because the Department had allowed manipulation of the open bodies of water from 1972 through 2012 that "it seems to be selective in terms of how they enforce the Wetlands Protection Act on this Property." (TR. p. 213:15-17).

On Cross-examination Mr. Rabideau acknowledged that a man-made body of water greater than one quarter (1/4) of an acre was considered a "pond" and subject to the regulations. They are entitled to the fifty (50) foot perimeter wetlands protection. Although the most significant alterations occurred between 2003 and 2011, the vegetated area to the Northeast of the pond was still undisturbed. He testified that the aerial photographs show that the perimeter wetlands was altered between 2011 and 2014. Mr. Rabideau also testified by the use of Respondent Exhibit D-Full that the previous blocks were replaced with one yard concrete block.

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These line of blocks was extended to go through the perimeter wetlands on the northeastern side of the pond. This was also done between 2011 and 2014 based on the aerial photographs. Mr. Rabideau testified that he had no knowledge of the fact that Respondent had a permit to alter the east side of the pond (TR. P. 222:1-3). He also acknowledged that the recent Insignificant Alterations Permit did not cover alterations to the east side of the pond. On redirect examination Mr. Rabideau testified that if the pond had been eliminated and the property returned to its previous state as a forested wetland without ponds there would be no requirement of a fifty (50) foot perimeter wetlands protective zone.

The Respondent does not deny removing the perimeter wetland or installing the concrete blocks on the Property without permit. The Respondent argues that the Freshwater Wetlands NOV should be dismissed because of selective enforcement. Except for the alterations for which the previous owner Mr. Skurka was issued a warning there is no evidence that the Department had knowledge. The Department is empowered and authorized to enforce the requirements under the Freshwater Wetlands Act. The Department is entrusted with broad discretion to enforce the law. The Department has the expertise and experience to effectively enforce the environmental laws.

The Respondent argues that this Hearing Officer should dismiss the Freshwater Wetlands violations due to the fact that the Department treated a previous owner less strictly. The Respondent does not provide any supporting legal precedent for its argument.

The Department has sustained its burden of proof that the Respondent violated the Freshwater Wetlands Act as alleged in the NOV.

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ADMINISTRATIVE PENALTY

Under Section 12 of the *Rules and Regulations for the Assessment of Administrative Penalties* subsection (c) the burden of proof for establishment of Administrative Penalties is as follows:

“In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.” (See also In Re: Richard Fickett, AAD No. 93-014/ GWE).

The Department has proven the alleged violations by a preponderance of the evidence. It has also satisfied the implied general requirement that the administrative penalty was calculated in accordance with the Penalty Regulations. Department witness David Chohey testified at length and in detail about the method used in calculating the administrative penalty.

Fickett at pages 7 and 8 states “Specifically, once the Division discharges its initial duty to establish in evidence the penalty amount and its calculation, Section 12(c) shifts the burden of proof to the Respondent 1) to produce evidence of record and 2) to bear the burden of persuasion that the Director failed to assess the penalty and economic benefit portion of the penalty in accordance with the Penalty Regulations.” (See also New England Paint Mfg. Co. Inc. AAD No. 09-001/AGE).

The Respondent did not present testimony or documentation to bear the burden of persuasion that the Director failed to assess the penalty and economic benefit portion of the penalty in accordance with the Penalty Regulations.

The Respondent makes argument that the Solid Waste penalty is excessive due to the fact that the Department failed to test the solid waste and therefore only assumed it was aggregious to

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warrant the penalty imposed. There is no requirement in the Rules that the Department must test the solid waste. We have expert testimony that it was solid waste in an amount of almost one thousand (1000) yards, one third of which was processed. This is not a small amount of solid waste. The Respondent could have tested the solid waste if it felt that there was some benefit in having that information, but it did not.

The Respondent argues that the solid waste was removed several months after the issuance of the NOV (OC&I Exhibit 10-Full) on April 22, 2014. The NOV in Section D Order at subsection (4) stated "Within 60 days of receipt of the NOV, remove all solid waste from the Property and dispose of the solid waste at a licensed solid waste management facility."

The Order in the NOV at subsection (5) stated "Within 10 days of the completion of the removal of all solid waste on the Property, submit disposal documentation to the DEM's Office of Compliance and Inspection."

The evidence brought out through Department witnesses is that the Respondent took approximately six (6) months to remove the solid waste. No documentation was provided to DEM that the material was disposed of at a licensed solid waste management facility. DEM did not press them on the matter.

The Department has sustained its burden of proof by a preponderance of the evidence that the Administrative Penalty in this matter in the amount of Seventy-two thousand Two Hundred (\$72,200.00) Dollars was properly calculated and assessed in accordance with the *Rules and Regulations for the Assessment of Administrative Penalties*. The burden of proof having shifted to the Respondent it is evident that the Respondent did not meet its "burden of persuasion that the Director failed to assess the penalty and economic benefit portion of the penalty in accordance with the Penalty Regulations".

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### **CONCLUSION**

The Department has sustained its burden of proof that the Respondent is liable for the violations alleged in that certain Notice of Violation issued on April 22, 2014. (OC&I Exhibit 10-Full). Respondent has violated both the Solid Waste Statutes and Regulations as well as the Freshwater Wetlands Act and related Regulations.

The Department, having proven the violations, has met its burden of proof regarding the Administrative Penalty. The Respondent has not met its burden of persuasion that the penalty was improperly calculated by the Director.

It is therefore the determination of this Hearing Officer that the enforcement Order contained in the subject NOV should be affirmed and sustained including the Administrative Penalty in the amount of Seventy-two Thousand Two Hundred (\$72,200) Dollars.

### **FINDINGS OF FACT**

1. The AAD has jurisdiction over the subject matter and of the parties in the pending appeal.
2. Respondent is the record owner of the Property since April 17, 2013.
3. Respondent received a permit to alter freshwater wetlands on July 5, 2013, which was altered at the Respondent's request and issued as Insignificant Alteration Permit No. 13-0099 on September 5, 2013 (the "Permit"). (OC&I Ex. 8-Full and 8A-Full).
4. The Permit authorized the construction of a sediment forebay and detention basin, a sand filter, a parking area, and 2 dry hydrants within the North Perimeter Wetland and the Perimeter Wetland associated with the South Pond.
5. All work authorized by the Permit was to take place on the west side of the ponds.
6. The Permit included conditions that required the Respondent to notify the Department prior to commencing work, to erect a sign in a conspicuous location identifying the Permit number, install and maintain temporary erosion controls, record the Permit in the land evidence records for the Town of Coventry and provide a copy of the recorded permit to the Department, and to restrict all work on the property to the locations shown on the approved plans.

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7. The Department inspected the Property on December 5, 2013 and January 13, 2014. (OC&I Ex. 2-Full, 6-Full, and 7-Full).
8. The Respondent disposed of solid waste on the ground in the form of construction and demolition debris, at least partially within the South Perimeter Wetland, totaling approximately 33 cubic yards. Said waste was first observed by the Department on December 5, 2013.
9. The Respondent disposed of solid waste on the ground in the form of leaf and yard waste, at least partially within the South Perimeter Wetland, totaling approximately 648 cubic yards. Said waste was first observed by the Department on December 5, 2013.
10. The Respondent arranged the yard waste piles into windrows which were undergoing passive composting at the time of the December 5, 2013 and January 13, 2014 inspections.
11. The Respondent cleared, filled (in the form of at least an interlocking concrete block wall, soil material, and other debris) and graded within a freshwater wetland consisting in part of the North Pond. This unauthorized alteration encompassed approximately 8,200 square feet of freshwater wetland to the north and east of the ponds. (As shown in Instance 1 on OC&I Ex. 8A-Full).
12. The Respondent cleared, filled (in the form of at least an interlocking concrete block wall, soil material, timber, and other debris) and graded within the North Perimeter Wetland. This unauthorized alteration encompassed approximately 37,200 square feet of freshwater wetland to the north and west of the ponds. (As shown in Instance 3 on OC&I Ex. 8A-Full).
13. The Respondent filled (in the form of at least an interlocking concrete block wall, soil material, timber, construction debris, and other debris) within the South Perimeter Wetland. This unauthorized alteration encompassed approximately 5,700 square feet of freshwater wetland to the west and south of the ponds. (as shown in Instance 3 on OC&I Ex. 8A-Full).

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14. Respondent did not install and maintain erosion and sediment controls as required by the Permit.
15. Respondent did not post a conspicuous sign identifying the Permit number as required by the Permit.
16. Respondent did not notify the Department prior to the commencement of work as required by the Permit.
17. Respondent did not provide a copy of the recorded Permit to the Department as required by the Permit.
18. Respondent did not receive approval from the Department to alter the freshwater wetlands on the property as described above.
19. Respondent does not have a license or permit from the Department to dispose of solid waste on the Property.
20. Respondent does not have a license or permit from the Department to operate a solid waste management facility or composting facility on the Property.
21. A Notice of Violation was issued by the Department to the Respondent on April 22, 2014, alleging violations of the Freshwater Wetlands Act, the Freshwater Wetlands Regulations, the Refuse Disposal Act, and the Solid Waste Regulations.
22. The Respondent filed his request for appeal within the time allotted for the same.
23. Respondent's Counsel notified the Department in September 2014 that 75% of the solid waste on the Property had been removed and the remainder would be removed within thirty days. (Respondent Ex. B-Full).
24. The Department never received documentation of proper disposal of the solid waste as required by the NOV.
25. The administrative penalty was properly calculated in accordance with the Penalty Regulations in the amount of Seventy-two Thousand, Two hundred Dollars (\$72,200).
26. The Respondent is responsible for all of the violations listed in the NOV. (OC&I Ex. 10-Full).

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence and based upon the Findings of Fact as set forth herein, I conclude the following as a matter of law:

1. The AAD has personal and subject matter jurisdiction over the Respondent and this matter pursuant to the statutes governing the Administrative Adjudication Division for Environmental Matters (R. I. General Laws §42-17.7-1 *et. seq.*); the *Administrative Procedures Act* (R. I. General Laws §42-35-1 *et. seq.*); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matter* ("AAD Rules"); the *Freshwater Wetland Act* (R. I. General Laws §2-1-18, *et seq.*); the *Freshwater Regulations*; the *Refuse Disposal Act* (R. I. General Laws §23-18.9-1 *et seq.*); and the *Solid Waste Regulations*.
2. The Respondent filed a timely appeal.
3. Altering freshwater wetlands without a permit from the Department is a violation of the *Freshwater Wetlands Act* (R. I. General Laws §2-1-21) and Rule 5.01A of the *Freshwater Wetlands Regulations*.
4. Failure to comply with the terms and conditions of a permit to alter freshwater wetlands is a violation of Rule 9.04B of the *Freshwater Wetlands Regulations*.
5. Disposing of solid waste at other than a licensed solid waste management facility is a violation of the *Refuse Disposal Act* (R. I. General Laws §23-18.9-5).
6. Operating a solid waste management facility, including a construction and demolition debris processing facility or a composting facility, without a license from the Department is a violation of the *Refuse Disposal Act* (R. I. General Laws §23-18.9-8) and Rules 1.4.01 and 1.4.05 of the *Solid Waste Regulations*.
7. The Department complied with the Administrative Penalty Regulations in appropriately calculating the administrative penalty in the NOV. The penalty is appropriate and justified in light of all relevant facts and information at the Department's disposal in calculating the NOV.

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It is hereby

**ORDERED**

1. The Respondent's Appeal is **Denied**.
2. The Department's Notice of Violation issued on April 22, 2014 (OC&I Exhibit 10-Full) is **Affirmed**.

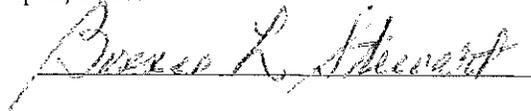
Entered as an Administrative Order this 25<sup>th</sup> day of April, 2016.



David Kerins  
Chief Hearing Officer  
Administrative Adjudication Division  
One Capitol Hill, 2<sup>nd</sup> Floor  
Providence, RI 02908  
(401) 574-8600

**CERTIFICATION**

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail to: Fred J. Volpe, Esquire, Mosca and Volpe, P.O. Box 444, 130 Tower Hill Road, North Kingstown, RI 02852; via interoffice mail to Susan Forcier, Esquire, DEM Office of Legal Services and David Chopy, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this 25<sup>th</sup> day of April, 2016.



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**NOTICE OF APPELLATE RIGHTS**

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General 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.

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**APPENDIX**

**LIST OF EXHIBITS**

OC&I Exhibit 1-Full	5/16/13 Report of Stacey Pinto
OC&I Exhibit 2-Full	12/5/13 Inspection Report of Daniel Lawton
OC&I Exhibit 3-Full	3/5/14 Memo from Daniel Lawton to Chief of Compliance and Inspection
OC&I Exhibit 4-Full	Photographs taken by Daniel Lawton
OC&I Exhibit 5-Full	11/13/14 Inspection Report of Daniel Lawton
OC&I Exhibit 6-Full	1/13/14 Inspection Report of Joshua Burgoyne
OC&I Exhibit 7-Full	Complaint Inspection Report of Joshua Burgoyne
OC&I Exhibit 7A-Full	Large Color-Coded Display prepared by Joshua Burgoyne
OC&I Exhibit 8-Full	9/5/13 Significant Alteration Permit issued to Mike's Professional Tree Service
OC&I Exhibit 8A-Full	Site Plan submitted by Office of Water Resources for Baird Wetlands Application
OC&I Exhibit 9-Full	7/14/14 Office of Compliance and Inspections Notes to File prepared by Joshua Burgoyne
OC&I Exhibit 10-Full	Notice of Violation

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Respondent Exhibit A-Full	2/14/12 letter to Milton Skurka from Harold Ellis with 2/27/12 response
Respondent Exhibit B-Full	9/10/13 correspondence from Fred Volpe, Esquire RE: Remediation of material on site
Respondent Exhibit C-Full	Four photos
Respondent Exhibit D-Full	Four photos
Respondent Exhibit E-Full	Complaint investigation sheet 12/5/08
Respondent Exhibit F-Full	Compliance & Inspection complaint form 9/18/08
Respondent Exhibit G-Full	Notes to file dated February 3, 2012
Respondent Exhibit H-Full	Photo dated 11/22/04
Respondent Exhibit I-Full	Photo dated 7/27/07
Respondent Exhibit J-Full	Photo dated 4/29/09
Respondent Exhibit K-Full	Complaint ID 2924, date received 12/5/2013