

*Wetlands Task Force*  
*Rhode Island Department of Environmental Management*  
*Working Group Name: Field Enforcement/Complaint Response*  
*Members: John Boehnert, Chuck Horbert, Hank Ellis*  
*May 15, 2000*

### *Draft Final Report*

Basically, this Subcommittee report will present the viewpoints of two of its members (i.e., Attorney John Boehnert of Partridge, Snow & Hahn and Hank Ellis of DEM). It is presented for the consideration of the full committee in point/counterpoint format because consensus was not achieved on each of the issues. In fairness to John (and myself) the comments in this report were not edited as to the substance of our original comments. Consequently, these reviews are somewhat extensive.

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*Issue 1.* *If a construction activity infringes on a wetland, the problem activity currently needs to be removed, and an application then needs to be filed to address the wetland problem. Could the policy be changed to immediately stop the construction activity and then file an application, with the possibility that the wetland application can address the infringement of the wetland?*

*Point (Hank Ellis):* Hank Ellis began discussion of this subject by stating that the Wetland Compliance Program has been dealing with this matter for almost 6 years. If a construction activity infringes on a wetland and a permit has not been obtained, the Compliance Program has allowed many construction projects to remain in place. The key factors in authorizing an activity to remain are the severity of the alteration and whether the party involved had previously failed to comply with any regulations, order, statute, license, permit or approval issued or adopted by the department. The only time a permanent alteration is allowed to remain in place is for insignificant alterations. When these are allowed, the submission of plans and a review fee is required. In these cases, the review fee represents the amount of money which would have been required if an application was properly submitted to the Permitting Program. These “after-the-fact approvals” by the Compliance Program may or may not involve some restoration of the altered wetland.

By keeping the enforcement action and its ultimate resolution within the confines of the Compliance Program *for these relatively few cases*, we believe that we significantly benefit the violator/landowner who inadvertently alters the freshwater wetland, we benefit the Permitting Program, and the wetland resource is protected using the same standards as those used by the Permitting Group. Those persons who inadvertently violate the Freshwater Wetlands Act are saved the tremendous time and inconvenience of flip-flopping between programs within the Department; the Permitting Program is saved the added burden of reviewing a proposal that is complicated by the presence of an unauthorized alteration; and the wetland resource is protected in a consistent manner as required under state law.

In the case of a major violation of the Freshwater Wetlands Act, where the Compliance Program determines that the unauthorized construction activity is a significant alteration, we will require full

restoration of the affected wetland. In these cases a Notice of Intent to Enforce or a Notice of Violation is issued to the violator. We feel that it is entirely inappropriate to forward all violations to Permitting because of the inherent unfairness involved for the applicant who follows all the rules and the tremendous burden placed on the Permitting Program. This procedure also fails to quickly protect/restore the wetland resource in the most severe instances and it gives the violator an unjustified sense of well being regarding the outcome of their application.

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***Counterpoint: (John Boehnert):*** John Boehnert responded by suggesting that the following factors be considered by the Department in making a determination whether or not a structure, such as a foundation, must be removed:

1. The harm which would be caused to the wetland by such removal.
1. The harm which would be caused to the wetland by the continued presence of the structure, and whether such harm can be mitigated.
2. The permissibility of the construction activity (If this involves home construction activity on an unbuildable lot, for example, the decision regarding removal may be an easy one).
3. The value of the wetland affected.
5. Evidence of intent to violate the wetlands laws (For example, is this a dispute among biologists as to the actual delineation of a wetland line).
6. Is compensatory mitigation available to offset the existing impact on wetlands?
7. Can the harm to the wetland or the requisite “punishment” to the violator be accomplished by the adjustment of the level of fines?
8. The likelihood that new activity elsewhere on the site could also displace or alter other wetlands or constitute a significant alteration.
9. The extent and expense of the structure (A concrete slab for the storage of rubbish barrels may be treated differently than a basement foundation).
10. The involvement of the Department in prior approval of site activity (for example, if the Department’s ISDS section has approved construction of an ISDS system which is later found to infringe on wetlands, equity may weigh in favor of the landowner).

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***Point (Hank) and counterpoint (John)*** Hank Ellis discussed each of John’s issues above. John’s responses have been taken from his May 4, 2000 letter.

1. The harm which would be caused to the wetland by such removal.

Hank: I have been working in the field of wetland restoration for almost 18 years. During that time, acres of fill and entire houses (not just foundations) have been removed from wetlands. It has been my experience that any damage caused by the “restoration” of a wetland (in this scenario, the removal of a foundation) is temporary. We (both the enforcement and permitting biologists) have become very good at minimizing additional harm during the restoration process and we frequently require mitigation plantings and soil stabilization to facilitate the recovery of the disturbed wetland. The ability of plant communities to reclaim a disturbed area is amazing. From my perspective, I do not find that this issue is one of concern.

2. The harm which would be caused to the wetland by the continued presence of the structure, and whether such harm can be mitigated.

Hank: It is clear that the “harm” factor raises numerous “value oriented” issues and I believe it touches on the crux of the entire wetland program. I believe that Chuck should comment on the mitigation of harm issue as it pertains to the application process.

Harm is an undefined, relative term. However, because they are defined in the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, the more appropriate terms to use would be significant alteration, unnecessary, undesirable, and random. These are the standards by which all proposals are judged, especially the more damaging ones. The term Significant Alteration states that a proposed project in its area, scope, and/or duration, appears to represent more than a minimal change or modification to the natural characteristics, functions, and/or values of any freshwater wetlands(s); may be detrimental to the basic natural capabilities or values associated with any freshwater wetland(s); and/or appears to be random, unnecessary, and/or undesirable. Undesirable Alteration means any proposed activity or alteration which is likely to reduce or degrade any freshwater wetland functions and values. Unnecessary Alteration means any proposed alteration which is not essential, vital, or indispensable to the proposed project and which can be achieved without altering or disturbing freshwater wetlands and Random Alteration means any alteration which is arbitrary or without justification.

To further determine the basis of any harm to a wetland, it is necessary to discuss natural characteristics, basic natural capabilities, functions, and values of each wetland affected by a proposal (either before or after-the-fact). Some of the functions and values of wetlands are broken down into the following categories 1) Wildlife and Wildlife Habitat, 2) Recreation and Aesthetics, 3) Flood Protection, 4) Surface and Groundwater, and 5) Water Quality.

The discussion above was made only to illustrate how much is involved in the determination of significance regarding a proposed alteration within a freshwater wetland. To respond to the first half of the factor stated above, I would suggest that the continued presence of a structure in a swamp or any type of wetland would almost always affect the one or more of the functions and values of a given wetland. The presence of a foundation in a swamp implies that trees and shrubs have been cut down, the area has been grubbed (all stumps removed), and the site has been graded. This type of activity eliminates wildlife habitat in the affected area. In addition, the structure may be displacing flood storage, it could be

impacting a recreational area, or the future use of the site may impact water quality through the use of lawn fertilizer, pesticides, and herbicides. Also, runoff from paved driveways may contribute to degraded water quality. Even if flood displacement, water quality, and recreational issues were not factors, wildlife habitat is affected. To leave the alteration in place perpetuates the loss of habitat.

Mitigation for loss habitat may be appropriate in some instances, but I suggest that we rarely know what exists on site prior to the proposed alteration. From redback salamanders to Black Racers (snakes) and from Ovenbirds to White-footed mice, the actual harm to wildlife populations is theorized at it's best and overlooked at it's worst. Before harm can be mitigated, it is necessary to define what is meant by harm and to determine the variables (e.g., populations, plant communities) that should be involved in mitigation.

*(John):* As you know, I have suggested that factors 1 and 2 be considered (i.e., harm which would be caused to the wetland by such removal, and the harm which would be caused to the wetland by the continued presence of the structure, and whether such harm could be mitigated). While I appreciate your thorough (and to me, enlightening) discussion of harm, I understand the approach is that any harm occasioned by removal is temporary, while any harm occasioned by continued presence of a structure, such as a foundation, is permanent. While that may be, would the incursion of a foundation in a swamp which resulted in the displacement of 10 sq. ft. or 15 sq. ft. of swamp be considered such "permanent harm" as requiring removal of a foundation. As your discussion suggests, harm is necessarily relative, and to the extent there is a minor displacement of a swamp, for example, it may well be argued that the "permanent harm is de minimus.

3. The permissibility of the construction activity (If this involves home construction activity on an unbuildable lot, for example, the decision regarding removal may be an easy one).

*(Hank):* The permissibility to construct a foundation, for a future home, within a swamp would be highly unlikely within the Permitting Program, especially considering the significance standard set forth in the Rules. Perhaps this is what you are referring to by "unbuildable lot". (Note: the term unbuildable lot is unreliable and misleading because the usefulness of the lot for building is totally dependent on the proposed project. While one project may be denied another may be approved).

The same standard applies to a violation encountered in the Enforcement Program. As I commented in earlier correspondence, we attempt to approve those violations that can be considered an insignificant alteration. We ask that a proper plan and review fee be submitted in those instances where this action is deemed appropriate. However, in most instances where it is not deemed appropriate (i.e., the proposal would have been a significant alteration requiring public review and more impact analysis), we require restoration of the wetland as best as practical.

4. The value of the wetland affected.

*Hank:* This factor is informally considered during the investigation stage of each complaint. The nature and extent of the violation and the value of the wetland go hand in hand during our investigation.

*John:* With regard to the consideration of the value of the wetland, while I understand this is informally considered during the investigative stage, the investigator may have a different idea of the value of the particular wetland than the owner's biologist, and there may be considerations not available or known to the investigator, such as the "value" of the wetland when considered in the context of the watershed in which it is located.

4. Evidence of intent to violate the wetlands laws (For example, is this a dispute among biologists as to the actual delineation of a wetland line).

*Hank:* Unless a landowner or someone leasing the land has been previously warned by the Department it is impossible to determine intent. (John, I'm not sure what you mean by dispute among biologists).

*John:* The 5th factor I suggested be considered, which you indicate was not considered, was evidence of intent to violate the wetlands laws. I indicated, for example, that there may be an issue of a dispute among biologists as to the actual delineation of a wetland line. What I meant by that is that two trained and competent biologists, one working for DEM and one working for the owner, may legitimately disagree on the boundary line of the wetland. The DEM biologist determines the foundation is located within the wetland and the owner's biologist determines the foundation is not located within a wetland. If the owner's biologist stakes the wetland line as he determined it, and the foundation was constructed within that boundary, it is strong evidence that the owner had no intent to violate the wetlands laws. I suggest this be considered as a factor in determining whether or not the foundation would be required to be removed. It is a factor based upon simple equity.

5. Is compensatory mitigation available to offset the existing impact on wetlands.

*Hank:* Compensatory mitigation for flood storage is almost always allowed, provided the location of the mitigation area is not in an undisturbed wetland. Mitigation for wildlife habitat is another matter. I believe Chuck should address this issue. I am under the impression that this does not happen very often because the burden on the applicant (in the case of an application) is significant (i.e., to prove that the mitigation area will substitute for the lost habitat due to construction).

6. Can the harm to the wetland or the requisite "punishment" to the violator be accomplished by the adjustment of the level of fines?

*Hank:* I personally do not believe that harm to the wetland can be offset by penalties. The purpose of penalties is deter future noncompliance by the person in violation or, conversely, encourage the continued compliance of people who are not violators. Obviously, the penalty should reflect the nature and severity of the violation.

*John:* I have suggested that factor 7 would be a determination of whether the harm to the wetland or the requisite punishment to the violator could be accomplished by the adjustment of the level of the fine, and understand your position to be that no harm to a wetland could be offset by penalties. While I understand the penalty may not necessarily reverse the harm, it would seem that where the level of harm was de minimus, or slight, that in lieu of requiring removal of the foundation, the penalty could reflect the continuing nature of the harm.

7. The likelihood that new activity elsewhere on the site could also displace or alter other wetlands or constitute a significant alteration.

*Hank:* John, I'm not sure what is meant here.

*John:* I suggested factor 8 to consider the likelihood that new activity elsewhere on this site could also displace or alter other wetlands or constitute a significant alteration. By this I mean that if a lot is considered buildable for purposes of zoning, and the location of a house anywhere on the lot could be seen to constitute some alteration of a wetland, the existing incursion in the wetland by the foundation may be allowed to remain rather than be removed on the basis that to do otherwise would make the lot unbuildable as a result of the presence of wetlands, and would implicate compensation requirements by the State under the Just Compensation Clause of the Constitution.

8. The extent and expense of the structure (A concrete slab for the storage of rubbish barrels may be treated differently than a basement foundation).

*Hank:* I do not believe that the issue of expense should enter into a decision regarding the appropriateness of a project.

*John:* Another factor I considered was the extent and expense of the structure, with the idea that it may be far less expensive to remove a concrete slab for the storage of rubbish barrels than to remove an entire foundation for a house. I understand the Department's position to be that it did not consider the expense involved in the compliance with the order by the owner. I simply disagree with this approach.

9. The involvement of the Department in prior approval of site activity (for example, if the Department's ISDS section has approved construction of an ISDS system which is later found to infringe on wetlands, equity may weigh in favor of the landowner).

*Hank:* I believe a similar issue was litigated in the Frederick and Louise Williams case. The superior court confirmed the decision of DEM and the supreme court did not hear the appeal.

The only way to avoid this problem in the future is to train all inspectors (e.g., ISDS, Wetlands, Waste, Hazardous Materials, Air) to identify all environmental problems which may occur on a piece of property during their review of an application. I'm not sure this is

possible given the constraints of the state personnel system and the education requirements of each discipline.

*John:* With regard to the last factor, whether the Department gave prior approvals with regard to site activity which in fact implicated the infringement of a wetland, I again continue to believe that as a matter of equity this is a factor which should be considered by the Department in its determination of whether or not to require the removal of a structure located in a wetland.

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*Counterpoint: (John Boehnert)* This is the remainder of John's May 4, 2000 letter on the issues.

With reference to my concern that the Department requires the removal and full restoration of an affected wetland by construction activity which constitutes a "significant alteration", prior to a permitting request, I understand that this position is taken because the Department has determined that the construction activity (in our example, the construction of a foundation in a wetland) "will result in an unacceptable impact to the wetland and must be removed". It is indicated that in making this decision the Department considers many of the factors I suggested in my March 6, 2000 letter be considered during the permitting process for a significant alteration.

I further understand the Department's position to be that by ordering the removal and restoration prior to permitting for a significant alteration, the Department has in fact "saved the violator from expending significant time and money in pursuing a permit that will almost certainly be denied", and has resulted in the wetlands restoration process beginning sooner. I certainly understand this rationale, and the common sense approach of why spend 6 to 12 months in a permitting process which will necessarily result in denial.

My primary response is based upon considerations of administrative law. To the extent the Department wishes to conclude and convey to an applicant in a pre-application conference that the application is almost certain to be denied, the applicant can make its decision whether or not to proceed. But that is a different matter than the applicant told it cannot proceed without removing its foundation, when that determination is made by the Department without benefit of a full application process, including an adjudicatory hearing on a denial of that permit, based upon the record developed in the application process.

I very much appreciate the time you have taken to respond in detail to my comments, and I appreciate understanding your reasoning in making these enforcement determinations. I am hopeful that this exchange will prove of some benefit to the Wetlands Task Force as well.

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*Issue 2.* Program emphasis should include an oversight function that insures that permit conditions are being implemented in the field.

We have initiated compliance checks as part of our routine program activity. On December 2, 1999 Chuck Horbert of the Permitting Program forwarded a list of approved projects to the Compliance Program where it was known that the construction project was presumed to be underway. From the Permitting perspective, these cases were thought to be the more sensitive environmental projects that have the potential for significant harm if they are not constructed as approved. We have been making the effort to inspect several of these per month.

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***Issue 3.** DEM should provide better feedback to the public in response to complaints concerning potential violations of the Wetlands Act.*

If someone wishes to be notified of our findings regarding a wetland complaint we will take their name and respond to them after we have completed our investigation.

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Conclusion Since issues 2 and 3 have already been addressed, the only issue before the full committee is Issue 1. Based on the comments made above it is clear that this Issue was partially misstated from the beginning. All unauthorized construction activity infringing on a wetland is not removed immediately. It depends entirely on the severity of the alteration whether the unauthorized alteration is removed or if it is allowed to remain. I believe the point/counterpoint discussion above will be helpful to the committee regarding the appropriateness of “after-the-fact” applications for the most severe freshwater wetland violations. If anyone has any questions I can be reached at 401-222-4700 Ext. 7401.

Hank Ellis