State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT, Petitioner, v. WILLIAM WARRINGTON, Respondent.	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT NO. ECE 16282-12 AGENCY REF. NO. PEA 110001-0804-0003.1

This Order addresses the appeal of the Department of Environmental Protection's (Department) January 12, 2012 Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA), alleging that William Warrington (Respondent)[1] violated the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 et seq., and the Flood Hazard Area Control Act (FHACA), N.J.S.A. 58:16A-50 et seq., by undertaking regulated activities on Respondent's property located at Block 67, Lot 10, in Elk Township, Gloucester County, without having obtained the necessary permits. The Department assessed a $17,000 administrative penalty, amended at hearing to $16,000, and ordered Respondent to remove all unauthorized fill material and structures and to restore all disturbed areas to pre-disturbance grade.

[1] The caption has been corrected to reflect the proper status of the parties. The Department is the petitioner in this enforcement action and has the burden of proof to establish the violations alleged.

Respondent filed a timely hearing request and the matter was transferred to the Office of Administrative Law (OAL) where it was assigned to Administrative Law Judge (ALJ) John Schuster, who held a number of settlement conferences. Settlement efforts were not successful and the matter was assigned to ALJ Solomon Metzger for hearing. The matter was then reassigned to ALJ Jeff S. Masin, who held a three-day hearing on August 8, 9, and 10, 2015. The parties submitted post-hearing briefs and, on June 9, 2016, ALJ Masin issued his Initial Decision finding that Respondent violated the FWPA and the FHACA as alleged in the AONOCAPA. The ALJ affirmed both the $16,000 administrative penalty and the remedial actions ordered therein.

On June 22, 2016, Respondent filed exceptions to the Initial Decision. The Department filed a reply to Respondent's exceptions on June 27, 2016 but did not otherwise take exception to the Initial Decision.

FACTUAL BACKGROUND

In the Initial Decision, the ALJ made comprehensive findings of fact, which I adopt as modified herein. The facts are summarized below.

Respondent owns about three acres of property at 978 Whig Lane Road (County Route 619), Block 67, Lot 10, in Elk Township, Gloucester County (property). The eastern property boundary along Whig Lane Road is approximately 100 feet long. The northern lot line and southern lot line extend back from Whig Lane Road more than 1,180 feet and more than 1,200 feet, respectively, to the western property boundary, which is approximately 150 feet long. Thus, the parcel is narrow and deep, widening somewhat toward the western boundary line.

A single family house sits approximately 50 feet back from Whig Lane Road. Approximately 350 feet from the back of the house, a tributary of Still Run crosses the property roughly parallel to the street, i.e., north-south across the property. A 12-foot wide bridge provides access over the stream to the back section of the property, referred to as the "back property."

When Respondent acquired the property in 1999, the property was generally wooded. After Respondent purchased the property, he undertook a series of regulated activities so that he could pursue his hobby of restoring old army trucks in the back property. The activities included clearing an area to put down a 30 foot by 40 foot concrete pad in the back property. To access the concrete pad, on which he eventually built a garage/pole barn, Respondent replaced the wood decking of the bridge that crossed the stream with 30 feet of steel. He also cleared a dirt/gravel road from Whig Lane Road, past the house on the southern side, across the bridge, and around the concrete pad. The road thus resembled the figure "9," with the loop around the concrete pad in the back property.

In the area between the street and the stream, referred to as the "front property," Respondent cleared the vegetation to extend the back lawn behind the house by more than 200 feet to the top of the stream bank.

The activities described above were first observed by David McCreery, a zoning officer for Elk Township, on April 18, 2008. That day, McCreery saw a cement truck in the back property, which indicated to him that a building was "going up." When he went to investigate, he saw a large cleared area in the back property with a 30 foot by 40 foot concrete pad in the middle. He observed a cement mixer truck, concrete smoothers, and a

large pile of dirt. He advised Respondent orally that he thought there were wetlands present on his property where the activities were taking place.

McCreery reported Respondent's activities to the Department. As a result, on May 7, 2008, a Department inspector, Olufunsho Sekoni (Sekoni), conducted a site visit, took soil borings at four locations in the back property, and determined that Respondent was engaging in unauthorized regulated activities under the FWPA and the FHACA. According to Sekoni's inspection report in the Department's database as well as his field notes, Respondent had cleared vegetation, disturbing approximately 8,000 square feet of wetlands, and placed and graded fill material to create a 60 foot by 12 foot road in wetlands, for a disturbance of 720 square feet, without a permit. Respondent had also disturbed approximately 14,000 square feet of freshwater wetlands transition area by clearing vegetation and constructing a 30 foot by 40 foot concrete pad, without a permit. Lastly, according to Sekoni's report and notes, Respondent had constructed a crossing over the Still Run tributary, impacting approximately 360 square feet in a flood hazard area/riparian zone, also without authorization.

On May 13, 2008, the Department issued Respondent a Field Notice of Violation (FNOV), which directed Respondent to remedy the alleged violations by submitting a restoration plan or submitting the necessary permit applications. In response, Respondent notified the Department that he would be seeking "all permits." Exh. R18. Respondent's letter is dated May 14, 2008, and was received by the Department on May 30, 2008.

In his effort to obtain the necessary permits, Respondent, through his agent Robert Scott Smith, P.L.S., P.P., submitted an application for a flood hazard area applicability

determination dated October 1, 2009.[2] According to the application, Respondent wanted "to determine the applicability of the flood hazard area rules to the work required to resolve the wetland violations." The project description explained that a 30 foot by 40 foot concrete pad was constructed on a knoll surrounded by freshwater wetlands, and that Respondent had constructed a bridge across a tributary of Still Run to access the knoll.

In 2010, after Sekoni left the Department, the file was reassigned to Trent Todash, a Case Manager who has worked with the Department since 2000. Todash, who testified at the hearing,[3] reviewed the file, which included Sekoni's field notes and inspection report. Todash also reviewed historical and then-current aerial photographs of the property from the Department's GIS system, with various overlays, including soil survey mapping, freshwater wetland mapping, and federal flood hazard area mapping. The aerial photographs showed how the site had changed over the years. Todash then compared the aerial photographs of the property against the field data previously collected.

In addition, Todash made his own site visit to the property. On June 2, 2010, Todash observed disturbance in the front property, not previously identified by Sekoni, whose inspection was only of the back property. As to the front property, Todash determined that the yard behind the house pre-dating the FWPA extended back 110 feet, and that the remainder of the yard, which Respondent admitted to clearing, constituted wetland fill. The disturbed and filled area measured approximately 230 feet east-west, from the 110-foot line back to the top of the stream bank, and approximately 86 feet north-

[2] The record indicates that the Department issued a flood hazard applicability determination on October 23, 2009; however, the document was not introduced or admitted into evidence.

[3] Sekoni was not called to testify at the hearing. Todash testified and the Department's counsel represented that Sekoni had moved to Texas. The record does not reflect the Department's attempts, if any, to secure Sekoni's testimony.

south, for a total of 19,780 square feet of freshwater wetlands disturbance in the front property.

The Department issued a Notice of Violation (NOV) dated June 29, 2010, notifying Respondent of the FWW and FHACA violations observed and identified by both Sekoni and Todash. In an effort to resolve the violations, Respondent's consultant, Robert Scott Smith, Key Engineers, Inc., prepared a "Preliminary Compliance Analysis" dated September 23, 2010, and submitted a "Wetland Boundary Survey," revised on September 21, 2010, to the Department. According to the Wetland Boundary Survey, freshwater wetlands were delineated by Robert Scott Smith, P.L.S., P.P., from Key Engineers mapping. The wetland boundary was determined by Key Engineers on March 17, 2009. By cover letter dated September 27, 2010, Respondent, through his agent Key Engineers, submitted these documents to demonstrate potential compliance with the FWPA and FHACA rules, for the bridge crossing, the access road west of the bridge, and the pole barn/garage.

The record indicates that attempts to resolve the outstanding compliance issues were unsuccessful. On July 13, 2011, McCreery, the Elk Township zoning officer, returned to the property[4] and saw a pole barn/garage had been built on the concrete pad. That same day, after receiving a complaint that Respondent had constructed a pole barn/garage on the concrete pad,[5] Todash returned to the property to investigate. No one answered the door.

[4] The record does not explain why McCreery returned to the property.

[5] Presumably, McCreery made the complaint to the Department, given that the complaint was received by the Department on the same date McCreery visited the property; however, the record does not state who made the complaint to the Department.

After another unsuccessful attempt on August 12, 2011 to investigate, Todash returned on August 26, 2011, to take soil borings, with Respondent and his attorney present. Todash took three soil borings along the north side of the front property at locations along the boundary between Respondent's property and the neighboring undisturbed property. At each of the three soil boring locations, Todash observed hydric soils, as well as hydrophytic vegetation and hydrology indicating wetlands. Although Todash attempted to take another soil boring on the south side of the property, he was unable to do so because there was too much standing water to properly obtain a soil profile. He observed sweet gum and sweet pepper bush, both wetland plants, as the dominant species in this location.

On January 12, 2012, Todash conducted another site visit and saw that no restoration work had occurred. That same day, the Department issued the AONOCAPA. Based on all of the above, the Department calculated that approximately 8,720 square feet of freshwater wetlands were disturbed in the back property, due to the clearing of vegetation, placement of fill material, and grading to create an access road; approximately 14,000 square feet of freshwater wetland transition area were disturbed in the back property, due to the clearing of vegetation and construction of the concrete pad and garage; approximately 19,780 square feet of freshwater wetlands were disturbed in the front property, due to the clearing of vegetation, placement of fill material, and grading to create a lawn area and access road; and approximately 4,660 square feet of flood hazard area/riparian zone were disturbed, due to the construction of a road crossing over the Still Run tributary and the clearing of vegetation and placement of fill material in the riparian buffer.

In the AONOCAPA, the Department directed Respondent to cease all regulated activities on the site and to submit a restoration plan. The Department assessed a penalty of $11,000 for the freshwater wetlands violations and a penalty of $6,000 for the flood hazard violations, for a total penalty of $17,000. At the hearing, as explained below, the Department amended the penalty for the freshwater wetlands violations to $10,000, for an amended total penalty of $16,000.

DISCUSSION

In 1987, the FWPA was enacted in order "to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance." N.J.S.A. 13:9B-2. The Legislature recognized that wetlands provide a variety of important environmental functions, including protecting and preserving drinking water supplies by serving to purify surface and ground water resources, providing a natural means of flood and storm damage protection, serving as transition zones between dry land and water courses, providing essential habitats for a major portion of New Jersey's fish and wildlife, and maintaining a critical baseflow to surface waters through the gradual release of stored flood waters and ground water. Ibid. Thus, the FWPA established "a program for the systematic review of activities in and around freshwater wetland areas designed to provide predictability in the protection of freshwater wetlands" and established a policy "to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance." Ibid.

The FWPA also established and provided protections for transition areas adjacent to freshwater wetlands of exceptional and intermediate resource value. N.J.S.A. 13:9B-16. A transition area serves as an "ecological transition zone from uplands to freshwater wetlands which is an integral portion of the freshwater wetlands ecosystem …" as well as a "sediment and storm water control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetlands species." Ibid. See generally NJDEP v. Huber, 213 N.J. 338 (2013).

The FWPA provides for a broad range of administrative, civil, and criminal remedies to redress violations. See N.J.S.A. 13:9B-21. Persons who are in violation of the FWPA are subject to the Department's orders requiring restoration of the wetlands, N.J.S.A. 13:9B-21; N.J.A.C. 7:7A-16.3, and to civil administrative penalties, N.J.S.A. 13.9B-21(d); N.J.A.C. 7:7A-16.5.

The primary objective of the FHACA, N.J.S.A. 58:16A-50 et seq., is to protect the public safety, health, and general welfare by delineating and regulating flood hazard areas. Am. Cyanamid Co. v. NJDEP, 231 N.J. Super. 292, 297 (App. Div. 1989). To that end, the FHACA charged the Department with adopting rules and regulations delineating flood hazard areas, which are areas, in the Department's judgment, "the improper development and use of which would constitute a threat to the safety, health, and general welfare from flooding." N.J.S.A. 58:16A-52. The FHACA authorizes the Department to direct compliance through, among other means, administrative enforcement orders and to assess civil administrative penalties. N.J.S.A. 58:16A-63.

Against this statutory backdrop are the activities described above, which Respondent does not dispute he undertook. The only issue in dispute is whether the

activities occurred in freshwater wetlands and wetland transition areas regulated under the FWPA, and in areas regulated under the FHACA.

The ALJ's Initial Decision set forth the testimony of the witnesses and his legal conclusions based on his factual findings and credibility determinations in a thorough discussion. After a review of the record, I ADOPT in part and REJECT in part the factual findings in the Initial Decision and the corresponding legal conclusions, MODIFY the penalty, and address Respondent's exceptions below.

Regulated Activities in Freshwater Wetlands in the Back Property

Respondent argued both at the hearing and in his exceptions that statements made by Respondent's former engineer in the preliminary compliance analysis and wetland boundary survey were not admissions attributable to Respondent and therefore could not be used to establish that wetlands existed in the back property. The Department responded in its reply that the ALJ properly found that Respondent hired the engineering firm Key Engineers to act as his agent to obtain permits from the Department and that the submissions contained admissible admissions.

I agree with the ALJ's assessment that the documents contain admissions by Respondent, through his agent, that approximately 13,500 square feet of wetlands and transition areas were disturbed due to the filling, grading, and construction of the concrete pad and loop road. As the ALJ explained, the documents did not reflect notations to indicate that they were submitted as part of confidential settlement negotiations. Respondent submitted these documents to the Department to support his effort to obtain the necessary approvals to attain compliance with the FWPA and the FHACA. The

wetland delineations and notations on the wetland boundary survey indicated that they were made by Respondent's engineering consultant, whom Respondent designated as his agent. While the technical and permitting documents may also have served the dual purpose of potentially resolving the matter, the record does not support Respondent's claim that these documents were developed during and for the sole purpose of confidential settlement discussions.

The Wetland Boundary Survey denotes approximately 13,500 square feet of total disturbed wetlands and transition areas in the back property, associated with the concrete pad and loop road. The survey indicates that the straight portion (excluding the loop part of the road, which was included in the 13,500 square feet) of the dirt/gravel access road was also constructed in wetlands. Sekoni's notes and report similarly identified approximately 14,000 square feet of wetland transition area disturbed to build the concrete pad, and an additional 720 square feet of vegetation cleared in wetlands to create an access road. Sekoni also identified approximately 8,000 square feet of wetlands disturbed by clearing vegetation; however, the record is unclear to which area this refers.

Sekoni's field notes and report further corroborated the area of unauthorized disturbance to build the concrete pad and road in the back property. Although Sekoni did not testify at the hearing, the OAL rules allow for hearsay under the residuum rule. N.J.A.C. 1:1-15.5; ZRB, LLC v. NJDEP, 403 N.J. Super. 531, 557 (App. Div. 2008) (explaining hearsay evidence is admissible in a contested case, but "some legally competent evidence must exist to support each ultimate finding of fact" to ensure reliability and to avoid the appearance of arbitrariness). As the ALJ explained, the field notes were made by Sekoni in the course of his official inspection duties and concurrent

with the inspection of Respondent's property, and thus are public records as well as business records. Sekoni's field notes, made contemporaneously with his observations, together with the aerial photographs and Respondent's own submissions, which included wetland boundary delineations, further support a finding that Respondent built the concrete pad, the garage, and the loop road in the back property in wetlands and wetland transition areas. While Sekoni's observations were not able to be tested by cross-examination because the Department did not produce him as a witness, his findings, when reviewed in light of and together with other corroborative evidence, support the conclusion that the Department established the violations by a preponderance of the evidence.

Based on the foregoing technical data, a review of the record and testimony, and accepting the ALJ's finding that the wetland boundary survey is an admission, I find that as to the FWPA violations in the back property, the record supports the conclusion that Respondent disturbed only approximately 13,500 square feet of wetlands and wetland transition area to build the concrete pad, garage, and loop road, and approximately 720 square feet of freshwater wetlands to build the access road. Respondent's submissions (including the wetlands boundary survey), the Department's aerial photographs of the property, and Sekoni's field notes and report established the extent of the violation and area of unauthorized disturbance.

Regulated Activities in Freshwater Wetlands in the Front Property

Respondent argued that the ALJ improperly disregarded the testimony of his expert Gary Brown that no wetlands had been present in the front property. The Department responded that the ALJ correctly found Todash a more credible witness based on the

testimony. Based on my review of the record, I agree that Todash was more credible than Respondent's expert.

Pursuant to N.J.A.C. 7:7A-2.3, "[f]reshwater wetlands shall be identified and delineated using the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the 1989 Federal Manual, as defined at N.J.A.C. 7:7A-1.4."[6] See also N.J.S.A. 13:9B-3 (defining freshwater wetland and directing the Department to use the three-parameter approach in delineating wetlands). As the ALJ found, Todash followed the three-parameter approach for the front property. Todash took three soil borings at three locations in what he deemed to be undisturbed land, just off the edge of the area he observed to be fill material. As set forth in the Department's rules, see N.J.A.C. 7:7A-2.3, Todash selected these locations in accordance with the 1989 Federal Manual (Federal Manual), which describes the difficulties of identifying wetlands where the property was disturbed because the disturbance may have changed the character of the area. The Federal Manual explains that in disturbed wetlands, field indicators for one or more of the three technical criteria to identify wetlands are usually absent, which may require a review of aerial photographs, existing maps, and evaluation of a nearby reference site.

Todash also attempted to take a soil boring at a fourth location on the south side of the property. Although he was unable to take a soil boring because there was too much standing water, he nevertheless determined the hydrology and vegetation indicated wetlands.

[6] "1989 Federal Manual" means the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, published in 1989 by the EPA, (Federal Manual), an Interagency Cooperative Publication by the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture's Soil Conservation Service, now the Natural Resources Conservation Service. N.J.A.C. 7:7A-1.4.

Brown, however, selected four main test pit locations in the disturbed areas, not in the undisturbed areas as Todash, consistent with the Federal Manual, had done. Brown himself did not take soil borings or evaluate the findings. He relied on the field work and notes of his colleague Ahren Ricker, which indicated that wetlands were present only in the area closest to the stream. As to the other three test pit locations in clearly disturbed areas, although Brown acknowledged that vegetation would be missing because it had been "smothered" by fill, he stated that if "water is not up in the sand and if the water is well down in the clay, it's one of the key definitions that you use in the three part test for wetlands." 3T73:16 to 21. Because Ricker did not observe water "in the sand," he concluded, and Brown agreed, that there were no wetlands. 3T73:9 to 23.

Todash also utilized the Munsell Soil Color (Munsell) charts to compare the soils from the soil boring sites. The Federal Manual explains that soil colors often reveal much about a soil's wetness, i.e., whether the soil is hydric or non-hydric. According to the Federal Manual, the approximate soil color can be determined by comparing the soil sample with a Munsell chart, which uses three components, hue, value and chroma, to identify standardized Munsell soil colors. Brown did not refer to a Munsell chart, because, he stated, it was not mandatory.

As explained above, the Department's rules require use of the Federal Manual in identifying and delineating wetlands. N.J.A.C. 7:7A-2.3; see also N.J.S.A. 13:9B-3, Initial Decision at 26. Although use of the Munsell chart is not mandated in wetlands identification and delineation, as the ALJ found, "soil color is a vital element in identifying hydric soils" and "the Federal Manual places great stock in the Munsell chart[s]." Initial Decision at 27. Brown's failure to use the Munsell charts, while not per se fatal to his

credibility, certainly lessened his credibility. He was not able to adequately explain why he chose not to use the charts; moreover, he did not realize that the Department had documented its soil findings by use of the charts. As the ALJ found, Brown's testimony lacked credibility, "in that his explanation for not using the Munsell chart[s] or even apparently bothering or having his assistant look at the soil color is not persuasive and his failure to perhaps even see or at least understand the soil information on the DEP materials is troubling." Initial Decision at 28.

Accordingly, I adopt the ALJ's finding that Todash was the more credible witness and the corresponding conclusion that Respondent conducted unauthorized regulated activities within freshwater wetlands, comprising 19,780 square feet (230 feet by 86 feet) in the front property.

Regulated Activities in the Flood Hazard Area

Lastly, Respondent argued in his exceptions that the FHACA did not apply because his expert testified, without rebuttal, that the stream on the site was a "manmade canal" and manmade canals are exempt from regulation pursuant to N.J.A.C. 7:13-2.2. Therefore, Respondent asserted, the Department had no authority in the first instance to impose penalties relating to the work on the bridge or clearing around the stream. According to Respondent, his claim that the stream was a "manmade canal" was a non-waivable jurisdictional defense that could be raised at any time. The Department responded in its reply to Respondent's exceptions that the Initial Decision correctly excluded this argument because Respondent raised it for the first time in his post-hearing brief[7] and, in any event,

[7] The Department asserted that Respondent's responses to the Department's interrogatories are in evidence as

Respondent did not actually offer testimony or evidence that the stream was a manmade canal.

Respondent additionally argued that, even if the FHACA did apply, he "only repaired portions of the top of the bridge" and replaced the rotting wood with steel, activities which he claims are not regulated activities under the FHACA.

As to the argument that the waterway is a "manmade canal" that is, pursuant to N.J.A.C. 7:13-2.2, not a "regulated water" and therefore is exempt from regulation under the FHACA rules, in the Initial Decision, the ALJ found that Respondent raised this argument for the first time in its post-hearing brief, without proper notice to the Department that such a defense would be raised. Moreover, the ALJ found that Respondent did not offer supporting evidence of this characterization of the stream during the hearing and failed to move to reopen the hearing pursuant to the OAL's Uniform Administrative Procedure Rules, N.J.A.C. 1:1-8.5, to present this "new" defense. Therefore, the ALJ found that Respondent failed to timely raise this defense, and that allowing it after close of the hearing would prejudice the Department. The ALJ thus excluded this argument from consideration.

After careful review of the record, I agree that, even if the argument had been properly raised and preserved for review, Respondent failed to meet his burden of establishing that the stream was a manmade canal and therefore not regulated pursuant to N.J.A.C. 7:13-2.2(a).[8]

R-37, and that Respondent's responses never addressed a claim that the stream is a "manmade canal." Although R-37 was introduced at the hearing during cross-examination of Respondent's expert (3T110:20-25), R-37 was never admitted into evidence and therefore is not part of the record. 3T Exhibit List.

[8] The FHACA rules were amended in 2016. All references to the FHACA rules in this decision are to the rules promulgated and effective in 2007, which governed the regulated activities under review in this matter.

The FHACA rules establish that all waters in New Jersey are regulated but for certain exceptions, including any manmade canal. N.J.A.C. 7:13-2.2(a)1. "Canal" is not specifically defined under N.J.A.C. 7:13-2.2 because a canal "is understood to be a manmade feature that does not have a distinct flood hazard area or riparian zone, and which is often maintained by a government agency." 39 N.J.R. 4473(a), 4595 (Nov. 5, 2007).

Contrary to Respondent's assertion, the burden was not on the Department to establish that none of the regulatory exceptions apply to the stream running through his property, which the Department identified as a tributary of Still Run. On the contrary, the burden was on the Respondent to establish that an exception applied. See, e.g., Hudson County Improvement Auth. v. Miele, 2010 N.J. Super. Unpub. LEXIS 1327 (App. Div. 2010) (agreeing with trial judge that once HCIA carried its burden of proving more than a de minimis amount of solid waste in the compactor, the burden shifted to Defendant to show that the materials were recyclable and thus exempt); Mansfield v. NJDEP, OAL Docket No. ELU-WD 6643-10, 2013 N.J. Agen. LEXIS 520 (Final Decision June 28, 2013) (explaining the person asserting an exemption from permitting has burden of proving entitlement to exemption). Respondent failed to meet his burden.

Todash testified that the Still Run tributary, which runs through Respondent's property, is a regulated water with a 50 foot riparian zone on the property. N.J.A.C. 7:13-4.1(c)3. Todash also explained how he measured the area of disturbance. Because the riparian zone extended 50 feet outward from the top of the bank to each side of the tributary, Todash multiplied 50 feet by 86 feet, which was the distance from fill edge to fill edge, resulting in 4,300 square feet of disturbance.

Respondent did not dispute the measurement or that he cleared his property to extend his lawn to the stream bank. He only argued that the stream was not a regulated water because it was a "manmade canal." As the ALJ found, Brown's testimony provided no support for Respondent's argument that the stream is a "manmade canal," i.e., a manmade feature with no distinct flood hazard area or riparian zone, and maintained by a government agency, see 39 N.J.R. at 4595, exempt from regulation. Initial Decision at 38.

The Department, however, did not establish that an additional 360 square feet of regulated area was disturbed when Respondent replaced the rotted wooden decking of the bridge with 30 feet of steel. Although reconstruction of a structure is a regulated activity, N.J.A.C. 7:13-2.4(a)5, reconstruct means "to patch, mend, replace, rebuild and/or restore a lawfully existing structure to a usable condition after decay or damage has occurred, in which greater than 50 percent of the structure is replaced and/or the size, shape or location of the structure is altered." N.J.A.C. 7:13-1.2. Respondent testified that he did not construct the bridge crossing the Still Run tributary, and admitted only that he replaced the rotted wooden decking with steel. More importantly, evidence in the record also includes a similar statement made by Respondent's wife. The Department did not present any evidence to show that greater than 50 percent of the structure was replaced, or that "the size, shape or location of the structure [wa]s altered." Ibid. Therefore, I reject the ALJ's finding and conclusions regarding the bridge crossing.

PENALTY

The AONOCAPA explained the penalties assessed for the FWPA and FHACA violations, using the penalty matrix applicable to each program. Although Respondent did

not raise any exceptions to the penalty findings, I find it is appropriate to independently review the penalties assessed and I have determined that the penalties for the FWPA and the FHACA violations must be revised as explained below.

The Department offered the testimony of Barbara Baus, Chief of the Compliance and Enforcement Section, Bureau of Coastal Land Use, to explain the penalty assessed. Baus explained the penalty matrix that sets forth the calculation for assessing penalties for freshwater wetlands violations. There are two types of violations, those for activities conducted without a permit, and those for activities conducted in violation of a permit. N.J.A.C. 7:7A-16.8 (Civil administrative penalty amount for failure to obtain a permit prior to conducting regulated activities); N.J.A.C. 7:7A-16.9 (Civil administrative penalty amount for any [other] violation). Here, Respondent conducted regulated activities without a permit and the penalty was assessed using N.J.A.C. 7:7A-16.8, pursuant to which a base penalty is determined according to points assigned to the violation using a conduct factor and a seriousness factor.

As to the conduct factor, the Department determined that Respondent's conduct was unintentional but foreseeable, because once he received the FNOV for disturbing wetlands, creating an access road and constructing the concrete pad, he was aware of the applicable regulations. He nevertheless proceeded to build the pole barn/garage, which Baus explained was a "continuation of the project without a permit." Baus further testified that the Department could have assessed his conduct as major, but exercised its discretion to assess the conduct as moderate.

The activity that the Department relied on to assess Respondent's conduct as moderate was the construction of the pole barn on the concrete pad, which the Department

described as a "continuation" of the unauthorized activities. However, the construction of the pole barn did not result in further disturbance of wetlands or transition areas. Moreover, the record shows that in September 2010, Respondent, through his engineering consultant, submitted documents to the Department in an effort to resolve the issues. Respondent also testified that he built the pole barn on top of the concrete pad because he thought the issues would be amicably resolved. Given the lack of clarity in the factual record surrounding construction of the pole barn, and because this activity did not increase the disturbance to wetlands or transition areas, I find that Respondent's conduct should have been assessed as minor, for one point.

As to the seriousness factor, points are assigned based on the resource value of the freshwater wetland and the acreage affected. The AONOCAPA reflects that the 42,500 square feet of disturbance of wetlands and transition area combined converts to 0.97 acres, and that, for a disturbance between 0.5 and 1 acre, three points were assigned. As explained above in the discussion of the wetlands violations, the total disturbance of wetlands and transition area should have excluded 8,000 square feet of disturbed wetlands because the record did not support this finding. Therefore, the total disturbance equals 34,000 square feet, consisting of 14,220 square feet in the back property and 19,780 square feet in the front property, which converts to 0.78 acre and so falls between 0.5 and 1 acre, for the same three points. Based on the field inspections and collected data, the resource value was determined to be intermediate, for four points. Baus explained at the hearing that a typographical error in the AONOCAPA resulted in the resource value being assigned five points instead of four points. With the correction of this error at the hearing, a total of

nine points was assigned (two points for conduct and seven points for seriousness), for a penalty amount of $10,000.

With the additional change noted above modifying the assessment of the conduct from moderate to minor and therefore assigning one point, the penalty points total eight, resulting in a penalty for the FWPA violations of $9,000.

For the FHACA violations, the AONOCAPA included the FHACA Penalty Calculation for Conducting Regulated Activities without a Permit, which was used to calculate the appropriate penalty. See N.J.S.A. 58:16A-63d (authorizing the Department to assess a civil administrative penalty up to a maximum of $25,000 per day for each violation, utilizing criteria based on type, seriousness, duration, and conduct). The Department's FHACA Penalty Calculation provided that the base penalty should be determined based on: 1) Type (i.e., conducting a regulated activity without a permit); 2) Conduct of the Respondent (one, two, or five points if the conduct was considered Minor, Moderate, or Major, respectively); 3) Seriousness (zero to five points in five subcategories, namely, Floodway Impacts, Flood Fringe Impacts, Area of Riparian Disturbance, Severity of Riparian Disturbance, and Impacts to Other Special Resources of Concern); and 4) Duration (number of days there were violations).

Here, the violation was the conduct of regulated activities without a permit. Respondent's conduct was determined to be moderate, i.e., an unintentional but foreseeable act, and assigned two points. The floodway impact, due to the construction of the road crossing over the stream, which the Department determined to be approximately 13 cubic yards,[9] was assessed in the Department's discretion only one point rather than the

[9] The record does not reflect the basis for the Department's calculation.

two points that the penalty range indicates would apply to fill in the amount of 6 to 30 cubic yards. The Department determined there were no flood fringe impacts, but the area of disturbance in the riparian zone due to the clearing and placement of fill was approximately 4,330 square feet. This area fell within the range of 1,001 and 5,000 square feet, for two points.

As explained above, the Department did not establish that 360 square feet of regulated area was disturbed when Respondent replaced the bridge decking. The total area of disturbance in the riparian zone is thus modified to 4,300 square feet, derived from multiplying 50 feet (the length of the riparian zone) by 86 feet (the width from fill edge to fill edge). This modified area of disturbance does not affect the two points assigned for the area of riparian disturbance, because the disturbed area is still within the range to which two points are assigned (1,001 to 5,000 square feet). Nor does the modified area of disturbance affect the severity of the riparian disturbance, which was assigned two points due to the clear-cutting of trees and shrubs, or the one point that was assigned for impacts to other resources of concern, which was based on the clearing and destruction in the riparian zone close to the stream, within ten feet of the top of the bank. The Department exercised its discretion to assess the penalty for only one day of violation.

I find, however, that the record does not support a finding of floodway impact due to the construction of a road crossing over the stream. Therefore, no points for floodway impact should have been assessed, and the total points are revised to seven points, for a revised penalty for the FHACA violations of $5,000.

The total penalty for the FWPA and FHACA violations is revised to $14,000.

CONCLUSION

For the reasons set forth therein and above, I ADOPT in part and REJECT in part the ALJ's Initial Decision affirming the Department's AONOCAPA as to the FHACA violations. I also ADOPT the ALJ's Initial Decision affirming the Department's AONOCAPA as to the FWPA violations, as MODIFIED herein. Respondent is ORDERED to pay the civil administrative penalty for the FHACA violations in the MODIFIED amount of $5,000, and the civil administrative penalty for the FWPA violations in the MODIFIED amount of $9,000 in the manner directed in paragraph 21 of the AONOCAPA. Respondent is also ORDERED to submit a restoration plan, as directed by paragraphs 12 through 14 of the AONOCAPA. Respondent is ORDERED to submit the restoration plan and pay the total penalty of $14,000 within twenty (20) days from the date of this Final Decision.

IT IS SO ORDERED.

October 19, 2016
DATE

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, COASTAL AND LAND USE
COMPLIANCE AND ENFORCEMENT, v.
WILLIAM WARRINGTON

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