*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO**.** ECE 16282-12
AGENCY DKT. NO. PEA 110001-0804-0003.1

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

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**Mitchell Kizner,** Esq., for petitioner (Flaster Greenberg, PC, attorneys)

**Daniel Greenhouse** Deputy Attorney General for respondent (Robert Lougy, Acting Attorney General of New Jersey, attorneys)

Record Closed: April 25, 2016 Decided: June 9, 2016

BEFORE **JEFF S. MASIN,** ALJ t/a:

The New Jersey Department of Environmental Protection alleges that William Warrington, owner of property located at Block 67, Lot 10, in Elk Township, Gloucester County, New Jersey, 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. 58:16 A-50 et seq., by engaging in certain conduct on the property without having first obtained

required permits and approvals for that activity. The DEP first issued a Field Notice of Violation (NOV) to Warrington, on May 13, 2008 and then issued a second NOV on June 29, 2010. On January 20, 2012, the DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA). This latter document, the details of which will be explained shortly, ordered Mr. Warrington to cease all regulated activities on the property, remove all unauthorized fill material and structures, restore all disturbed areas to pre-disturbance grade, and pay a civil administrative penalty of $17,000, a figure amended at this hearing to $16,000. On April 16, 2012, Mr. Warrington requested a hearing to dispute the DEP's charges. The Department advised Warrington on April 20, 2012, that his request for an administrative hearing was "under review." On December 7, 2012, the DEP transferred the contested case to the Office of Administrative Law (OAL) for hearing.

After first being managed by another administrative law judge no longer with the OAL, the file was reassigned to this judge, serving on recall, on July 13, 2015. Hearings were held on December 8, 9, and 10, 2015. After obtaining transcripts of the hearings, counsel filed briefs and replies. The final response brief was filed on April 25, 2016, on which date the record closed.

The Administrative Order cites inspections of the property conducted as far back as May 7, 2008. It charges Mr. Warrington with violating regulations prohibiting activities that disturb, fill, grade, and/or clear vegetation in freshwater wetlands without having obtained permits from the Department, as required by N.J.A.C. 7:7A-2.2(a). Additionally, the unpermitted conduct also affected wetland transition areas, in violation of N.J.A.C. 7:7A-2.6(a), and flood hazard area/riparian zones, N.J.A.C. 7:13-2.1(a). The DEP contends that Warrington filled sections of his property falling within these regulated categories, graded an area to create an access road, constructed a 30- by 40-foot concrete pad and placed a garage thereon, and constructed a road crossing over a tributary of Still Run. In total, the Administrative Order alleges that 8,720 of freshwater wetlands, 14,000 square feet of freshwater wetlands transition area, and 360 square feet of flood hazard area/riparian zone were disturbed. In addition, the Department claims that an additional area of 19,780 square feet of freshwater wetlands and 4,300 square feet of riparian buffer were disturbed by unpermitted activities and were

converted to lawn, with the activity affecting these areas occurring at some time between 1995 and 2002. Thus, the Department claims that the total area disturbed consisted of 28,500 square feet of freshwater wetlands, 14,000 square feet of freshwater wetlands transition area, and 4,660 square feet of flood hazard area/riparian zone.

The AONOCAPA assesses a $17,000 administrative penalty. The "Penalty Rationale" set forth in the AONOCAPA includes factors related to the type of violation, the conduct of the respondent, the seriousness of the violation, which takes into account both the size of the area disturbed, and as will be explained, the matrix establishes the point assessments that ultimately determine the monetary sanction based on ranges of disturbed area. Thus, for purposes of determining the monetary penalty, it is necessary first to decide if any violations of the two statutes occurred, and then, if violations are established by the requisite preponderance of the evidence, In the Matter of Polk, 90 N.J. 550 (1982), then it is only necessary to determine the area range in which the violation occurred, not the exact amount of square footage or acreage disturbed. As will be noted, to the extent restoration may be ordered, the details of that restoration plan must be worked out between the DEP and the property owner, and the exact parameters of the disturbances must be determined.

David McCreery, Elk Township's Zoning Officer, testified that on April 18, 2008, he went to the property, also identified as 978 Whig Lane Road, where he observed that a building was being constructed behind the Warrington's one-family residence. He saw a concrete pad that he testified measured 30 feet by 40 feet. He checked his office records and determined that no permit had been issued by the Township for any such construction. He took photographs, which show the presence of a concrete mixer truck and the concrete pad being laid and then show the construction on the pad of a garage.

Trent Todash is a DEP Case Manager assigned to the Bureau of Coastal and Land Use Enforcement. Mr. Todash was assigned to the DEP file pertaining to this property in early 2010. Prior to that time the assigned DEP inspector had been

Olufunsho Sekoni, who is no longer employed by the DEP and to whom Mr. Todash has not spoken concerning this property.[1] Mr. Todash identified a survey of the property (R-11), dated November 19, 1999. The survey identifies the house, a stream that runs across the property and a squiggly line, described by Todash as "close to the rear of the house," which Mr. Todash understood to represent the then existing tree line. No bridge across the stream is identified on this survey. (There is also a designation "wooded and overgrown," just below the stream).

Mr. Todash identified notes made by Mr. Sekoni and placed in the DEP case file regarding Sekoni's visit to the property on May 7, 2008. The notes contain references to soil borings and observations of vegetation. According to his notes, as a result of his inspection, Mr. Sekoni advised Mr. Warrington that the concrete pad was located in a wetlands buffer area and "he either must restore back to its pre-disturbed condition or apply for a permit." The file also contains photos taken that day, showing the pad, a roadway to the pad, and the bridge over the stream. Mr. Sekoni issued a Field Notice of Violation on May 13, 2008, for "unauthorized regulated activities," specifically identifying the "30 by 40 ft. pad," "the clearing of vegetation disturbing approximately 14,000 square ft. of wetlands transition area," the "clearing of vegetation disturbing approximately 8,000 sq. ft. of wetlands, the installation of a 12- by 30-ft. bridge" and the "filling and grading to create a 60- by 12-ft. road on freshwater wetlands."

The file also contains a letter from Mr. Warrington, dated May 14, 2008, which acknowledges that his wife "has already called the Division of Land and Use so they can issue any necessary permits that would allow me to continue my build."

Mr. Todash explained that Mr. Sekoni's notes include a sketch which shows the location of the several soil borings Sekoni performed and described in his notes. Todash identified several aerial photos, drawn from the DEP's database, which show the property as it looked in 1995, 2002, 2007, and 2012. These show that obvious changes have occurred over the years. The photos are in some cases overlaid with Soil Survey information, and the 2012 photo, DEP050, shows that the property contains

[1] The DEP believes that Mr. Sekoni is currently in Texas.

Berryland and Mullica soils, which Todash explained meant there was a good chance that wetlands would be found. Additionally, other aerials overlapped with information concerning Freshwater Wetland Mapping from 1995 and Federal Emergency Management Agency (FEMA) Flood Hazard Mapping, also showed the existence of freshwater wetlands and flood hazard areas "on or near the site." The DEP Soil Survey Mapping shows Bexas, a hydric soil, on the property.

Mr. Todash identified photographs he took when he visited the property on June 2, 2010. That day, he was on the property in the company of DEP employees from the Land Use Permitting section, Mr. Warrington and Warrington's consultant from Key Engineering. The photos show the roadway from the back of the house, which cuts through the lawn area, and a pad site with a back hoe sitting on the pad. Todash's field notes and sketch, made that day, reflect his understanding that the "usable" yard behind the house extends for 110 feet, and the area beyond that limit "must be restored." As a result of his observations during this visit, Todash served Mr. Warrington with a Notice of Violation, adding to the items already identified in the May 7, 2008, Notice issued by Mr. Sekoni. The additional items included the clearing that had occurred to create the lawn beyond 110 feet behind the house, in an area described as involving the disturbance of approximately 19,780 square feet of freshwater wetland. This brought the total disturbed area in the freshwater wetland to 28,500 square feet. Also, the NOV noted that "further investigation" had determined that clearing, filling and grading activities had occurred within the Riparian Zone of the Still Run, measuring approximately 4,300 square feet, bringing the total disturbance in the flood hazard area to 4,660 square feet.

Todash identified the 110-foot-line from the back of the house as about where the squiggly line was located on the November 1999 survey.

Mr. Todash returned to the property on August 12, 2011, so that he could obtain soil borings along the boundary line of the Warrington property where the area was undisturbed, "to see, quantify, clarify if actual wetlands had been impacted . . . ." However, the actual borings were not performed until August 26. Todash actually bored these at three locations on the right side of the property facing toward the stream

crossing, identified on Exhibit R-24, as circles with the numbers 1, 2 and 3 within them. Todash testified that the actual borings occurred on the neighboring property at the boundary with Warrington's property, and not on Warrington's property itself. He did this because the locations where he sunk the bore holes "appeared to be native property. It wasn't disturbed. So as it says in the manual, we go to a neighboring property undisturbed property to see what the soils look like." However, Todash acknowledged that he did not actually know where the property line was, "but I went to where the natural conditions were, and that's where I took the borings at."

Much of the testimony in the case revolves around the procedures for determining the presence of wetlands. Mr. Todash's reference in the above quote was to the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, (Interagency Cooperative Publication, January 1989), and more specifically, Section 4.20, "Disturbed Area and Problem Area Determination Procedures." As that document explains, there are three wetland identification characteristics, hydrophytic vegetation, hydric soils and wetland hydrology. The Federal Manual describes the difficulties that an investigator may encounter in identifying wetlands where the area being examined is "disturbed." In such areas, the character of the area may have been changed, making the identification of one or more of these three characteristics "difficult." Disturbed areas include areas subjected to deposition of fill . . . removal or alteration of vegetation . . . ." Federal Manual," at 50. Todash also identified a resource used in the identification process, known as the Munsell Soil Color Charts (Kollmorgen Corporation 1975). This is a publication that is used to assist in identifying the nature of the soils encountered during a field investigation. It contains color chips that are used to match soil colors. Section 3.17 of the Federal Manual provides that in determining whether soil is hydric or non-hydric, "[S]cientists and others . . . can determine the approximate soil color by comparing the soil sample with a Munsell soil color chart" which, as described in the Manual, identifies soil color by three components, "hue, value and chroma." Federal Manual, at 11-12. Todash, who has performed "thousands" of soil borings during his time as a DEP employee, explained that the FWPA's implementing regulations require that the Federal Manual be used as the standard method for delineation of wetlands.

Todash explained his findings at the three bore sites. Boring 1, conducted at approximately 75 feet from the rear right side of the house, showed soil at 6 inches that was saturated and, from the Munsell chart, had soil that "right off the bat" would be considered a wetlands soil. At 18 inches it was saturated and, again, the darkened soil indicative of wetland soil. At this depth the soil was mottled, meaning that it was saturated long enough to create an anaerobic condition, indicating a lack of oxygen that causes mottling of iron in the soil. As for the vegetation at this location, the dominant vegetation was sweet pepper bush, red maple and arrowwood, "all indicative of a wetland species, and my observation there was standing water." At boring site 2, located roughly in a relative straight line along the side of the property," at 6 inches, he found saturation, with soil matched with the Munsell chart as the darker soil indicative of wetland soil, and the dominant vegetation was sweet gum and sweet pepper bush, again wetland species. Todash also observed standing water. Bore 3 was about 250 feet off of the back of the house. Similar to the other two boring sites, this showed the same 10y 2/1 saturated soil, also at 18 inches. Here, the dominant species were sweet gum and cinnamon fern.

Mr. Todash explained that he had intended to do another boring at site 4, on the opposite side of the property, but could not, due to the presence of "so much standing water that I couldn't get the soil profile in my hand to look at." However, at this location the dominant species were sweet gum and sweet pepper bush. As for standing water, his sketch, made that day, shows that there was standing water "along both sides of the property . . . ." Given the amount of standing water on the southern side of the property, where he had intended to bore at location 4, he did no more borings. However, the southern side also had the wetland vegetation.

The witness testified that looking across the property from the side to where it had been filled, there "was almost like a crown . . . highest in the middle, but along the edges you could see like an elevated raised burn [sic] of something that wasn't there originally." The side of the roadway was grassed.

Based upon the aerial photographs that depict the changes on the property over a period of years and the information gathered during his field inspections, Mr. Todash

concluded that there had been disturbance of wetlands. And the area of Warrington's property where he cleared vegetation and dumped and graded fill material is an area that is protected by the FWPA.

On cross-examination, Mr. Todash explained that he did not know how far his borings were from the Warrington property line. He denied that he was unable to determine the presence of wetlands due to his inability to examine the soils on the southern side of the property because of the amount of standing water.

> No, I wasn't able to see the soils. I can make a conclusion that it was wet because of the wetland vegetation and hydrology that were present . . . there are many times when we can't get all three [characteristics], so we infer. Again, I did the three borings on the other side, and I did the one across. I would have done more, but because of the water stain there in the vegetation, we inferred that the whole filled disturbed area was wetlands.

The mapping information that he had available also played a role in allowing this determination. As for the vegetation,

> we look at vegetation within a 30 foot radius, and we look for the dominant vegetation. So we look at that and we determine is it a facultative fact wet or obligate plant species, and that would make it a call that it's a wetland plant.

Referencing the Federal Manual, Todash noted that it well understood that in disturbed areas, not all of the three characteristics of a wetland may be present. Section 4.22 states

> In disturbed wetlands, field indicators for one or more of the three technical criteria for wetlands identification are usually absent. It may be necessary to determine whether the "missing" indicator(s) (especially wetland hydrology) existed prior to alteration. To do this requires aerial photographs, existing maps, and other available information about the site, and may involve evaluating a nearby reference site (similar to the original character of the one altered for indicater(s) of the "altered" characteristic.

Mr. Todash discussed measurements, apparently taken by Mr. Sekoni, that were contained on that inspector's notes that were in the file that Todash inherited after Sekoni left the DEP. DEP's counsel believes that Sekoni is in Texas, but he had not attempted to speak to Sekoni in regard to this hearing. Todash did take measurements on the property himself, but these were of other areas than those shown as having been measured by Sekoni. On June 2, 2010, Todash, using a measuring wheel supplied by the DEP, measured off the 110 feet beyond the house that he believed to have been lawn prior to the effective date of the FWPA. He then measured to the edge of the stream, a distance of 230 feet from that 110-foot line, or 340 feet from the back of the house. He then measured from what he observed to be the edge of the fill material, that is, where "you could see a drop off on to the undisturbed areas," side to side, for a distance of 86 feet. Multiplying, these figures meant that the area of freshwater wetland disturbance was 19,780 square feet. Todash "believes" that the area of disturbance described in the description of non-compliance, measured by Mr. Sekoni at 8,720 square feet, involves the area from the back side of the stream to the loop road and any disturbance of wetlands along the edges of the loop road. Adding Todash's measurement of 19,780 to Sekoni's 8,720, which had formed the basis for the first NOV, the total area of disturbance in wetlands was 28,500 square feet.

Todash did not measure from the property boundaries, as at that time he did not know the width of those boundaries. So "I just measured the width of the fill." He did not measure the bridge, or the pad, which Sekoni had noted to be 30 by 40 feet. However, Todash did some measurements beyond the stream. He measured the width of the road to be 29 feet wide, and from the backside of the stream at the top of its bank to the edge of the loop road running around the pad at 117 feet. As for the riparian buffer area, Still Run is not a trout production, or a category one, waterway, and as such, it has a 50-foot buffer on either side. The width of the disturbance was 86 feet and the disturbance to the buffer was only on the side of the stream facing the house. This multiplied to a 4,300 square feet disturbance in the flood hazard area/riparian zone, which added to Mr. Sekoni's measurement of 360 square feet, that Todash believed was Sekoni's measurement of the crossing and equals 4,660 square feet. As for the

value of the freshwater wetland, the Department determined that it was of intermediate resource value, which means that it has a 50-foot buffer requirement.

Although Mr. Todash had not himself inspected the area to the rear of the stream, as he accepted Mr. Sekoni's measurements and assessments of violations in that area, considering the soil mapping as it identifies the soils in that area, he believes that wetlands would have been in the area outside of the loop road and in the area of the connecting road from the back side of the stream to the loop road.

Brett Kosowski, employed in the DEP's Land Use Regulation section as a Senior Geologist, testified about communications he had in 2009-2010 with representatives of Key Engineers, an engineering and planning consultant working on behalf of Mr. Warrington. On September 7, 2010, Kosowski received an e-mail from Robert Scott Smith, Vice-President Planning and Environmental at Key Engineers, in which Smith discussed having been paid outstanding invoices from Warrington and thus being prepared to "commence with work on this project again," referring to Key's involvement in creating a plan for the restoration of the property after the Notices of Violation had been issued. The DEP contends that this communication included admissions against interest by Mr. Warrington, made through his authorized representative. Counsel for Warrington objects that this letter and its attachment constitute documents prepared in the course of settlement negotiations and therefore any comments purported to be by or on behalf of his client are privileged and cannot be used as direct evidence in this administrative hearing. Additionally, counsel argues that R-24, the "Wetland Boundary Survey," prepared by Smith and submitted to the DEP, is also a document prepared as a part of the settlement negotiation process and thus any purported admissions thereon, such as the label, "Evidence of Historic Fill Along Edge of Property," cannot be considered an admission by Warrington. That legal issue will be discussed below, but in the interest of avoiding any need for remand, the information that the DEP contends is evidentially significant will be addressed.

On October 1, 2009, after the first NOV had been issued in 2008, Key Engineers, working on behalf of Mr. Warrington, filed a "complete application for a "Flood Hazard Area Applicability Determination," submitted "for your review in accordance with the

New Jersey Department of Environmental Protection Checklist." Mr. Warrington signed the "Application Form" that was part of this submission and also signed the section in which he authorized Robert Scott Smith, Professional Land Surveyor and Professional Planner, to act as his "agent/representative in all matters pertaining to my application." Thereafter, on September 27, 2010, Smith forwarded to Kosowski a "Wetland Boundary Survey," revised September 21, 2010. This document purported to have been revised based upon discussions between Key and DEP personnel "with specific focus on attempting to demonstrate potential compliance with the terms and conditions of a Freshwater Wetland General Permit 10B, Freshwater Wetland Transition Area Waiver through averaging and an Individual Flood Hazard Area Permit for the construction of a building. A separate Preliminary Compliance Analysis is included." Kosowski explained that during a site visit on June 2, 2010, observation was made of areas that had apparently been filled. Kosowski noted that the back yard, extending back from 110 feet from the house, was not of the same elevation as the surrounding "undisturbed areas." This indicating the potential for the area having been filled. The vegetation appeared to be newly-planted grass. The September 27, letter from Mr. Smith notes that "areas closest to the dwelling were impacted by previous filling as observed by you . . . the owner and myself during our field meeting on June 2, 2010." This September 2010, submission included a document entitled, "Preliminary Compliance Analysis," dated September 23, 2010.

Barbara Baus, the Section Chief for the Bureau of Coastal Land Use, Compliance and Enforcement, testified as to how the administrative penalty was calculated, using the matrix in the FWPA and the terms of the Environmental Enforcement Enhancement Act of 2008. Mr. Warrington's "conduct" was deemed "moderate," although Baus explained that while Warrington might have at first been unaware of the rules when he placed the concrete pad, once he received the NOV for that action, he certainly was aware that the regulations required a permit. He did not obtain one and continued the work on the property. As such, DEP could have considered his continuation of the work to merit labeling as "major" conduct. However, as he was a single-family homeowner, "we want to give him the benefit of the doubt." Thus, the conduct was kept at the "moderate" level. The resource value was deemed "intermediate," which corresponds to 4 points. "Based on the measurements that were

taken out on the site by the . . . inspectors, by both the inspectors," the acreage impacted merited 3 points as per the matrix, that is, for an area of less than an acre of disturbance. The total of 9 points corresponds to a $10,000 penalty. This penalty was only assessed for one day, although the regulation would have allowed the DEP to impose this $10,000 penalty for each day that the violations persisted. The Flood Hazard Area Control Act penalty was also calculated, treating the conduct again as "moderate" and with the 13 cubic yards of unauthorized activity meriting 1 point. However, based on Todash's inspections, the disturbance in the riparian zone from the clearing and filling affected 4,330 square feet, corresponding to 2 points. Two additional points were assessed for the clearing that occurred in the riparian zone, including removal of trees and shrubs, and 1 point was assessed for the disturbance within 10 feet of the top of the bank, more impactful due to their proximity to the stream. The resultant $6,000 penalty under the Flood Hazard Area Control Act was also assessed for one day. The 4,330 square feet of riparian area was utilized twice to calculate penalties, as there were two different statutory schemes violated in this area, since the affected wetlands also overlay the riparian area.

In addition to these witnesses, the DEP offered as a witness Randy Bearce, a DEP employee who became Mr. Todash's supervisor and who evaluated the Warrington site at the request of the deputy attorney general acting as trial counsel for the DEP. After a lengthy discussion concerning an objection to this witness's testimony, I ruled that he could not testify and his report would not be admitted, due to a significant violation of discovery obligations on the DEP's part. In his brief following trial, Mr. Greenhouse argues that at this time the prejudice found during trial to Mr. Warrington if Bearce were permitted to testify should be found to no longer exist, apparently due to the passage of time from the trial to the end of the briefing schedule, which included time for the preparation and receipt of trial transcripts. I **FIND** no reason to revisit the earlier ruling, and surely the post-trial time cannot serve to validate the inappropriate conduct in discovery that led to the original ruling. As such, the apparent attempt to reopen the trial record is **DENIED**.

Warrington's Witnesses

The respondent's expert witness was Gary Brown, a licensed professional engineer and President of RT Environmental Services, described as an environmental services firm, which works on site remediation, tank removals, contaminated soil cleanups, waterfront development projects, including wetlands permitting, with wetland delineation as a part of the process. Mr. Brown has had continuing education in wetlands delineation and is familiar with the Federal Manual, which he has utilized in New Jersey. Field testing for the Warrington project was performed by Ahren Ricker of RT Environmental. Mr. Brown was on-site and identified for Ricker where he wanted test pits dug. Ricker provided Brown with a verbal report of his findings before Ricker left the site that day. Over objection, and based on his education, training and experience and in conformity with the standard for admission of experts used in New Jersey, Mr. Brown was admitted as an expert in wetlands delineation. However, in his testimony, Brown acknowledged that he had not utilized the Munsell Soil Color Chart in his assessment of the presence or absence of wetlands on the Warrington site. In view of this admission, counsel for the DEP argues that not only is his testimony not worthy of belief, but it should be excluded by the trier of fact, as without reference to the Munsell chart the soil analysis cannot be considered reliable. For this argument, the deputy attorney general points to the Federal Manual, but more particularly to the DEP's regulations implementing the FWPA, particularly N.J.A.C. 7:7A-2.3. The Federal Manual provides that soil colors "often reveal much about a soil's wetness, that is, whether the soil is hydric or non-hydric. Scientists and others examining the soil can determine the approximate color by comparing the soil sample with a Munsell soil color chart." The Manual then describes the use of that chart, with its "standardized Munsell soil colors" to identify the soil's three components, hue, value and chroma. Counsel argues that "any opinion about wetland determinations by Brown or Ricker are wholly unreliable and not based on data normally relied upon by experts in the field, and therefore should be entirely excused for this matter," citing N.J.R.E. 703 and Salas v.

NJDEP, ESA 5478-04, Initial Decision (November 17, 2005), adopted, Comm'r (December 29, 2005), <http://njlaw.rutgers.edu/collections/oal/>.[2]

N.J.R.E. 703 provides

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Mr. Brown testified that he studied the previous uses of the property, which had been as farmland, and aerial photographs, the earliest of which was from 1951, the others a 1986 Wetlands Map and the 2013 National Wetlands Inventory Map. He noted that the watercourse, which he described as having been "built as an agricultural ditch," "manmade stream channel," has not been maintained over time and has taken several "paths."

Mr. Brown prepared a Wetlands Mitigation Plan for the site which was submitted to, and rejected by, the DEP. Then four main test pits were bored by Ricker on September 30, 2012. Ricker also wrote the field notes. The location of the four test pits is shown on Exhibit 42(a). Test pit 3 was 100 feet from the stream and 245 feet from the back of the house. According to Mr. Brown, Ricker reported to him that the only wetlands were near the stream. Brown explained that as for test pits 1, 2 and 3, Ricker told him that the water level was "down in the clay, well below the bottom of the sand and at the bottom of the sand there is a soil layer . . . where there's also some clay . . . ." Given the location of the water, "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 and they weren't. So we said it's just not wetlands. I agreed with him and that was the end of that." These areas were clearly disturbed, and as such, filled, and in such areas,

[2] At the hearing, when Mr. Brown was called to testify, the deputy attorney general attempted, for the first time, to exclude his testimony as "net opinion." Although he had received an expert report from Brown sometime before trial, no in limine motion was filed seeking to exclude the expert report or testimony as net opinion.

"you're not going to have the vegetation because essentially it's been smothered." The absence of vegetation is not in itself definitive, for "professional judgment" must be utilized, and even if the vegetation is missing, if the water is within 6 inches, then by other definitions it is wet and thus "we're supposed to say at this particular point it's wetlands." As for test pit 4, from Ricker's observations, "we immediately accepted as clearly an indication of wetlands . . . ." "This determination was based upon the topsoil, with darker brown and orange clay, . . . dark clay." There was copper mottling, which, when you have it, means its wetlands." Also, the vegetation there was appropriate for wetlands.

Brown noted some questions about the former use of the property for agriculture and the dark soil layer as consistent with this use, with sand placed on top of it. He noted a question about farmland exemption and when that stops after the agricultural use is abandoned.

As for his and his assistant's non-use of the Munsell Soil Color Chart, Mr. Brown explained that its use is not mandatory. In regard to Brown's review of the DEP's soil borings and logs, he testified that "they did two parts of the three part test . . . They said it was 'saturate,' they documented the types of vegetation and I didn't see anything on this about the soils at all." As for the State's delineation of wetlands on the Warrington site, Brown opined that "the proper delineation wasn't done. They have a map, the map is not field verified and it's not complete. You can't reach conclusions in any sense from - - in any way that I've ever done it in anything I've done in soils and water if you only have a line, you don't have any volume. So I don't understand how they come up with I guess square footage . . . it's just a presence or absence determination at best, it's not documentation that fills occurred over a square footage or wetlands was covered or disturbed."

On cross-examination, Mr. Brown confirmed that his company did no work in the area beyond the stream. Such work was never included by the client in the scope of his work. He also confirmed that on the day that Mr. Ricker worked on the site, he did not have a measuring tool, as "I don't think he would use anything other than the GPS. It

takes too long to measure it and he's there by himself, so if he used anything he would have used the GPS."

As previously noted, Mr. Brown testified that the DEP representatives had determined the presence of wetlands, but in reviewing their data, "I didn't see anything on this about the soils at all." Asked to examine the field notes for the DEP inspection of August 26, 2011, Brown acknowledged the presence in those notes of specific references to the Munsell Soil Color Chart and designations of soil indicators. Asked if he had recognized the presence of this color chart information when he examined the notes, Brown explained, "No. I didn't look at it and realize that that was what it said. I thought it was a date or something that it says - - as I read it to you."

William Warrington testified that he has owned the property since 1999. He identified the squiggly line on R-11, a document which came with the house when he purchased it, as not representing a vegetation line, but instead the septic system. He denied that the survey of the property showed any wetlands, nor did the deed identify their presence. The bridge over the stream was already in place. The only man-made feature when he moved in was the house. The stream is approximately 3 feet wide and 2 feet deep. The water level is 6 to 8 inches, but the stream dries up "all the time." At times the stream will overflow and he has sought assistance from government officials at the municipal, county and state levels to deal with the clogging that affects a pipe downstream, causing water to back up and overflow onto his property.

When Warrington first moved in the yard was small. He cleared some land in 2000 and made the lawn larger. There was no standing water in the area he cleared. He cut an access path and road through the trees behind the enlarged yard. He did not think that he needed any permit for this work. In approximately 2000, he put metal decking on the bridge, which had rotting wood. The steel he used allowed him to drive over the bridge. He did not expand it. The work did not affect the stream, which lies 3 feet below the bridge. He did not think that he was working in a wetland or a flood hazard area.

Mr. Warrington cleared the area beyond the stream, taking down trees and clearing fallen trees. The ground in this area was sandy, not muddy, and there was no standing water. He poured the concrete pad for a garage/storage building to accommodate his hobby of restoring old army trucks. While he was pouring the concrete, the Township's zoning officer came to the property and told him that he needed a permit. The work was at a stage where it could not be stopped. Within a few weeks the DEP arrived, telling him that they were checking on complaints. From his conversation with Mr. Sekoni, he understood that he needed permits for the work. He then hired Key Engineers to assist him in the permitting process. On several occasions representatives of Key and the DEP came to the site. However, Warrington was not happy with Key's work, as they seemed to be doing more for the DEP than for him. As a result, he fired Key.

Warrington explained that Mr. Smith of Key Engineers prepared the "Wetland Boundary Survey" Exhibits R-24 and P-46, as part of the attempt to obtain permits. Warrington paid for this work. He does not agree with the comments on R-24, such as the wording on the bubble that states that there had been disturbance in a transition area. R-24 bears a date of 3/17/10 and another date, included on the exhibit as "9/21/10 Revised for N.J.D.E.P. Consideration." R-46 is apparently an earlier version of the "Wetland Boundary Survey," with the same original date of 3/17/10, but without the reference to it being revised. This too was prepared by Key Engineering, and it does not contain any reference to disturbed transition areas. Warrington explained that the September revision was prepared because "[W]e were trying to negotiate the wetlands to see what I could keep and what I couldn't keep" as a part of the process to resolve the dispute with the DEP. Warrington testified that he did not see this revised survey before it was submitted to the DEP.

Warrington constructed the building on the concrete pad after he knew that the DEP claimed he needed permits. Asked to explain why he did so, two years after he hired Key Engineers, when he knew that there "was an issue with the DEP," he answered, "Yes, we thought that that map was going to resolve it and it was a done deal, so it was like I say, it was going to be a no-brainer, you're good to go, put it up."

Applicable Regulatory Provisions

The AO/NOCAPA charges that Mr. Warrington violated the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. N.J.S.A. 13B-2 reads

> The Legislature finds and declares that freshwater wetlands protect and preserve drinking water supplies by serving to purify surface water and groundwater resources; that freshwater wetlands provide a natural means of flood and storm damage protection, and thereby prevent the loss of life and property through the absorption and storage of water during high runoff periods and the reduction of flood crests; that freshwater wetlands serve as a transition zone between dry land and water courses, thereby retarding soil erosion; that freshwater wetlands provide essential breeding, spawning, nesting, and wintering habitats for a major portion of the State's fish and wildlife, including migrating birds, endangered species, and commercially and recreationally important wildlife; and that freshwater wetlands maintain a critical baseflow to surface waters through the gradual release of stored flood waters and groundwater, particularly during drought periods.

The Legislature similarly expressed its findings in regard to the Flood Hazard Area Control Act, at N.J.S.A. 58:16A-50 b.

> It is in the interest of the safety, health, and general welfare of the people of the State that legislative action be taken to empower the Department of Environmental Protection to delineate and mark flood hazard areas, to authorize the Department of Environmental Protection to adopt land use regulations for the flood hazard area, to control stream encroachments, to coordinate effectively the development, dissemination, and use of information on floods and flood damages that may be available, to authorize the delegation of certain administrative and enforcement functions to county governing bodies and to integrate the flood control activities of the municipal, county, State and Federal Governments.

In accordance with the legislative direction, the DEP adopted regulations to implement these statutes. N.J.A.C. 7:7A-2.2(a) provides that certain activities carried out in areas determined to be wetlands are “regulated,” and require prior permit approval before such activities can be undertaken in such areas.

> (a) The following activities are regulated under this chapter when performed in a freshwater wetland unless excluded under (c) below:
>
> 1. The removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind;
> 2. The drainage or disturbance of the water level or water table so as to alter the existing elevation of groundwater or surface water, regardless of the duration of such alteration, by:
>
> i. Adding or impounding a sufficient quantity of stormwater or other water to modify the existing vegetation, values or functions of the wetland; or
> ii. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water so as to modify the existing vegetation, values or functions of the wetland;
>
> 3. The dumping, discharging or filling with any materials;
> 4. The driving of pilings;
> 5. The placing of obstructions, including depositing, constructing, installing or otherwise situating any obstacle which will affect the values or functions of a freshwater wetland; and
> 6. The destruction of plant life which would alter the character of a freshwater wetland, including killing vegetation by applying herbicides or by other means, the physical removal of wetland vegetation, and/or the cutting of trees.

Additional areas are designated as wetland transition areas, in which certain activities are also regulated and permits required before such activities may be undertaken. N.J.A.C. 7:7A-1.4 defines these areas

> "Transition area" means an area of upland adjacent to a freshwater wetland which minimizes adverse impacts on the wetland or serves as an integral component of the wetlands ecosystem.

N.J.A.C. 7:7A-2.6(a) provides

> (a) Except as provided in (b) and (c) below, the following are regulated activities when they occur in transition areas:
>
> 1. Removal, excavation, or disturbance of the soil;
> 2. Dumping or filling with any materials;
> 3. Erection of structures;
> 4. Placement of pavements; and

> 5. Destruction of plant life which would alter the existing pattern of vegetation.

N.J.A.C. 7:13-2.1(a) is the permitting requirement in the FHACA.

> (a) No person shall engage in a regulated activity in a regulated area without a flood hazard area permit as required by this chapter, or a coastal permit as required by N.J.A.C. 7:7 and 7:7E, as set forth in (b) and (c) below. Initiation of a regulated activity in a regulated area without a flood hazard area or coastal permit as set forth at (b) below (except as provided in (c) below) shall be considered a violation of this chapter and shall subject the party or parties responsible for the regulated activity to enforcement action, as set forth at N.J.A.C. 7:13-19. Regulated areas are set forth at N.J.A.C. 7:13-2.3 and regulated activities are set forth at N.J.A.C. 7:13-2.4.

## Discussion

There is no dispute that over a period of years, the property owned by William Warrington has been changed from its condition when he purchased it in 1999. Aerial photographs and Mr. Warrington's own testimony confirm that since his purchase, he has enlarged the area behind the previously existing home, thereby extending the "lawn," and he has created a road that goes down the center of the property, over a bridge that was apparently already on the property when he purchased it, and then loops around a concrete pad and building placed thereon. Warrington does not dispute that he did create the enlarged lawn, the road, the concrete pad and the building. He also does not dispute that if any permits were required under either the FWPA or the FHACA for any of this work, including the maintenance work he claims to have done on the bridge decking, he had no such permits. The DEP contends that the activities he performed impacted wetlands and wetland transition areas, and areas that are regulated by the FHACA.

The activities admittedly carried out by Mr. Warrington on his property come within the regulatory ambit of these statutes only if the areas impacted qualify as wetlands, wetland transition areas and/or areas within the designated flood

hazard/riparian zone. Thus, the process for determining the presence or absence of wetlands in the disputed areas is critical to resolution of this matter. The DEP has identified the sources and methods for such identification in N.J.A.C. 7:7A-2.3.[3] Here,

[3] N.J.A.C. 7:7A-2.3 Identifying freshwater wetlands

(a) Freshwater 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.

(b) To aid in determining the presence or absence of freshwater wetlands, the Department may refer to any of the following sources of information:

1. New Jersey Freshwater Wetlands maps prepared by the Department and available as indicated in (f) below;

2. United States Department of Agriculture Soil Surveys;

3. USGS quad maps;

i. NWI maps shall be used to indicate the approximate location of some freshwater wetlands;

ii. NWI maps have been determined to be unreliable for the purposes of locating the actual wetlands boundary;

4. United States Geologic Survey topographic maps;

5. Letters submitted by applicants containing site specific data;

6. Comments filed by municipal and county governments and interested citizens; and

7. Comments filed by State or Federal agencies.

(c) Vegetative species classified as hydrophytes and indicative of freshwater wetlands shall include, but not be limited to, those plants listed in "National List of Plant Species that Occur in Wetlands: 1988 New Jersey," compiled by the United States Fish and Wildlife Service in cooperation with the ACOE, USEPA, and the United States Soil Conservation Service, and any subsequent amendments thereto.

(d) To obtain a determination from the Department of the presence, absence, or boundaries of freshwater wetlands on a particular site, a person may apply to the Department for a letter of interpretation under N.J.A.C. 7:7A-3.

(e) The Department has developed freshwater wetlands maps at a scale of 1:12000 to provide guidance and for general informational purposes. These freshwater wetlands maps can help to determine the approximate extent and location of wetlands. However, these maps are for guidance only and do not take the place of nor supersede a wetland

the Department has attempted to establish the presence of wetlands through the testimony of its employee, Mr. Todash, who testified about both his own activity on the site and that of the former DEP employee, Mr. Sekoni, whose field notes Todash found in the file when he inherited the matter following Sekoni's departure from the DEP. Sekoni was not called to testify and the only explanation for this offered by the DEP is that he is believed to be in Texas. In addition to the evidence from Todash, the information gathered by Sekoni, various photographs and soil mappings, the DEP also relies on what it argues are admissions by Mr. Warrington, these in the form of documents submitted to the DEP, including a revised "Wetland Boundary Survey," dated September 21, 2010; a "Preliminary Compliance Analysis, dated September 23, 2010, which is signed in several places by Warrington; and a Flood Hazard Area Applicability Determination, dated October 1, 2009, created by Mr. Warrington's hired consultants, Key Engineering, and its employee, Robert Scott Smith. Warrington, who subsequent to the submission to DEP of the revised survey, fired Key Engineering, objects to the use of that document for the purpose of offering so-called admissions against his client.

Mr. Warrington's defense to the charges is not that he did not carry out the several activities on his property, but that to the extent it is claimed that these activities

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delineation that the Department has approved through a letter of interpretation issued for a particular site.

(f) The Department has provided the New Jersey freshwater wetlands maps to the following offices for public inspection:

1. The county clerk or registrar of deeds and mortgages in each county;

2. The municipal clerk of each municipality; and

3. The Department's Maps and Publications Sales Office, located at the address listed in N.J.A.C. 7:7A-1.3.

HISTORY:

Amended by R.1992 d.117, effective March 16, 1992.
See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).
Added new (c)1. and recodified existing 1.-6. as 2.-7.
Amended by R. 2001 d.312, effective September 4, 2001.
See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

occurred in wetland and wetland transition areas, the DEP has not proven that such areas fell within those characterizations and, to the extent that they may have, the DEP has failed to establish the actual extent of such wetlands and/or transition areas, thus making the various purported square footages used to calculate the penalty and/or area to be restored figures without support.

The DEP contends that to the extent that Warrington has offered alleged expert evidence to refute its own evidence concerning the existence and extent of regulated areas on the property, his expert, Mr. Brown, although allowed to testify as an expert under the liberal definition applicable to admitting such evidence, nevertheless established in his testimony his lack of significant and reliable expertise in the wetland delineation process and his failure to properly understand the DEP's evidence supporting its own delineation.

Despite the designation on the DEP's transmittal sheet used to transfer this contested case to the OAL, which lists the caption as Warrington v. DEP, in an enforcement proceeding such as this, the DEP is the complaining party and bears the burden to prove its allegations by a preponderance of the credible evidence. In the Matter of Polk, 90 N.J. 550, 560 (1982).

Initially, in regard to those parts of Mr. Warrington's property that lie beyond the stream, such as the loop road and the pad, Mr. Todash testified that he performed no testing in those areas, bored no holes, and did not independently evaluate those areas to determine if they contained wetlands. For that matter, Messrs. Brown and Ricker also did no work in this area. While Todash referred to aerial photographs and soil mapping overlays that indicate that wetland soils were identified in those areas, all of the field work verifying the presence of wetlands in these areas was performed by Mr. Sekoni, who bore the holes, evaluated the hydraulics and the soil in the holes and the vegetation, and decided that the area where the pad was constructed, the bridge was "installed," and the 60 x 12 foot road was created, were freshwater wetland or wetland transition areas. Mr. Todash "accepted" all of this, and also Sekoni's calculations of the extent of the restricted areas affected by this activity.

Given this, the analysis of where and to what extent wetlands exist or were present on the site before disturbance is examined first for the area from the back of the 110-foot yard to the stream and then, for the areas lying beyond the stream.

The Area Before the Stream

Mr. Todash's field work was restricted to areas between the 110-foot yard area deemed by him to be permissible and the front side of the stream. He testified that he performed soil borings on August 26, 2011. He found that the soil in the borings at boring locations 1, 2 and 3 all had saturated soil within 6 inches of the surface. He utilized the Munsell Soil Color Chart, as referenced in the Federal Manual, and found that the soil had appropriate color indications for wetland soil and that the vegetation at those locations was similarly the sort that would be expected in a wetland location. At his soil boring 4, on the opposite side of the property, the ground was covered with standing water, and he was not able to check the soil in the boring, but the vegetation was again wetland vegetation. He concluded that given the characteristics he had observed, each of the locations was wetland.

The key issue with Todash's findings is that he admitted that he believed that he had been just off of the Warrington property when he bored, although he did not know precisely where the property boundary was located. He bored "at the edge of the fill." He wanted to bore along the "undisturbed boundary next to Mr. Warrington's property so I could determine what the original soil conditions were." Given this, and considering Todash's explanation as to how he determined that each bore site was in a wetland, I **FIND** that he correctly identified these areas in which the borings occurred as wetland. Todash appears to have properly considered the characteristics at these sites, the hydrology, soil characteristics and vegetation, and come to the proper conclusion. However, in order to determine that Warrington actually conducted regulated activities in wetlands, it is necessary to determine whether the wetland conditions field-verified as actually present at the "undisturbed" locations of the four borings also previously existed in the areas before the stream, clearly within Warrington's property lines, disturbed over the years by lawn expansion and road creation. This means we must be able to extrapolate from the wetland condition at the borings to the larger, disturbed areas

between these sites that sit on Warrington's property. Todash performed no borings that were known by him to be on Warrington's property, and attempted no borings in the disturbed areas that are the actual focus of the charges.

As previously noted, the Federal Field Manual recognizes the difficulty that may be presented in determining if a site that has been disturbed contained wetlands prior to that disturbance occurring. Thus, Section 4.22 states

> In disturbed wetlands, field indicators for one or more of the three technical criteria for wetlands identification are usually absent. It may be necessary to determine whether the "missing" indicator(s) (especially wetland hydrology) existed prior to alteration. To do this requires aerial photographs, existing maps, and other available information about the site, and may involve evaluating a nearby reference site (similar to the original character of the one altered for indicater(s) of the "altered" characteristic.

Here, Mr. Todash, following the guidance of this section, examined the aerial photographs and soil maps and evaluated "nearby reference site(s)," that is, the four bore sites that he described as being just at the edge of the property, although likely somewhere over the property line on the adjoining properties on each side. Significantly, he described the appearance of the area in between his bore sites, that is, in between the outside areas of the property on each side, as "having an elevated raised burn [sic][4] of something that wasn't there originally," with "almost like a crown . . . highest in the middle" and grass at the side of the roadway. This would suggest that this entire area between the bore sites had been disturbed and filled. And given that the sides each were properly field-verified and determined to be wetlands, and the mapping showed that wetland soils were present, it is more likely than not that the disturbed area in between was itself wetland before it was disturbed, raised with fill material, and the normal vegetation and other characteristics of wetlands buried and, at least to a major extent, eliminated. As Mr. Brown explained, when some characteristics of wetlands are present at a site, but other such characteristics are not, it is still possible to conclude that the wetlands existed. "It says in the training and it says in your books to use your judgment. You can't just ignore that somebody covered the wetlands so it's not

[4] This word has been mis-transcribed, and is, no doubt, "berm."

wetlands, just because there's no vegetation there, it's not professionally appropriate." Thus, extrapolating from the clear evidence of wetlands at the borders to a conclusion that wetlands existed in between these boring sites is professionally appropriate. I **FIND** that the area between the two sides of the property at which field-verification of soil mapping occurred did constitute freshwater wetlands, although, of course, this area is now greatly disturbed.

As for Mr. Brown's testimony, the major criticism from the DEP is that Brown failed to utilize the Munsell Color Chart, which counsel for DEP essentially argues disqualifies Brown's conclusions as to the absence of wetlands from any serious consideration, even if it is allowed to stand as expert evidence and is judged for its weight and credibility, as opposed to its basic admissibility. The DEP argues that under the New Jersey regulations one must utilize the Munsell chart if one is assessing the three characteristics of wetlands, for its use is mandatory in the assessment of the soil color component. As noted above, N.J.A.C. 7:7-2.3 states, in part, "(a) Freshwater 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." Thus, it is clear that the process for this identification must ("shall") be performed in compliance with the process as described in the Federal Manual. But is the use of the Munsell Chart mandated by the Federal Manual, such that any attempt to identify and delineate without its use is automatically deficient, even wholly unworthy of belief? The Federal Manual identifies the presence of "hydric soils" as an essential characteristic of wetlands. In its discussion of "Hydric Soils" the Manual, at section 3.17, "identifies 'Soil Colors' as often reveal[ing] much about a soil's wetness . . . whether the soil is hydric or non-hydric." It then states that "scientists and others examining the soil can determine the appropriate soil color by comparing the soil sample with a Munsell soil color chart." There then ensues a long discussion about the Munsell soil colors, the three components used to identify the "standardized Munsell soil colors," hue, value and chroma. It is entirely clear that the Federal Manual places great stock in the Munsell chart as a basic aide to identifying hydric and non-hydric soils through the examination of "soil colors."

The Federal Manual, at 2.10, states that

> The technical criteria are mandatory and must be satisfied in making a wetland determination. Areas that meet the NTCHS hydric soil criteria and under normal circumstances support hydrophytic vegetation are wetlands. Field indicators and other information provide direct and indirect evidence for determining whether or not each of the three criteria are met. Sound professional judgement should be used in interpreting these data to make a wetland determination. It must be kept in mind that exceptional and rare cases are possibilities that may call any generally sound principle into question.

Certainly, in order to identify wetlands, the three characteristics of such areas must be considered and identified, at least to the extent that such may be possible in disturbed areas, as explained in section 4.22. As for hydric soils, the presence of such, or at the very least the reasonable determination of the former presence of such, must be satisfied. In doing so, the Manual notes that soil colors are "often" revealing about the soil's wetness. Scientists and others "can determine" soil color with the aid of the Munsell chart. Thus if one is attempting to determine the presence or absence of hydric soils, one apparently would "often" expect that soil color would be an assistance in reaching the conclusion. If one then were trying to determine soil color the chart "can" be used. Section 3.17 does not specifically indicate that the only acceptable method of distinguishing between hydric and non-hydric soils is through consideration of soil color and with the use of the Munsell Chart. The reference to "scientists and others" using it is that they "can determine," not that they "must" or "shall" determine the nature of the soil by using the Munsell chart. Nevertheless, it is quite clear that soil color is a vital element in identifying hydric soils and that the Federal Manual places great stock in the Munsell chart. Without more information in this record, or a more specific statement as to the mandatory nature of its use in either the Federal Manual or the Administrative Code, I am reluctant to conclude that the use of the Munsell is, as a legal matter, absolutely mandatory in New Jersey. However, that said, it may well be that in practice, the Department at the Commissioner level and/or its staff considers it as such. Nevertheless, I am persuaded that if one is attempting to identify the presence or absence of hydric soil within the larger process of identifying the presence or absence of wetlands, and is attempting that determination without resort to the Munsell chart,

one must present significant expert evidence that such an assessment is scientifically valid. Mr. Brown, who of course did not himself view the borings on-site, did not use the chart or direct that Mr. Ricker do so. Brown's explanation that it was not mandatory does not really satisfy as to why he chose not to make use of the chart, which is clearly so much a part of the process as described in the Federal Manual. It seems that once his assistant saw the water level "down in the clay, well below the bottom of the sand" and saw that "at the bottom of the sand there is a soil layer, not up in the sand, he decided there was not wetland. He appears not to have even considered looking at the soil color. And when he reviewed the DEP's own information, he completely failed to realize that that information documenting the soil color was included. "I didn't see anything on this about the soils at all." He mistook some recorded soil data as "being a date or something that it says - - as I read it to you."

On the whole, I **FIND** that the Mr. Todash was a more credible witness regarding the presence or absence of wetlands in the area of the property up to the stream, which is the only part of the property that either he or Mr. Brown and his assistant examined. Brown's testimony was simply lacking in credibility, in that his explanation for not using the Munsell chart 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. Therefore, I reject his testimony as carrying any weight in the assessment that is necessary in this case.

Mr. Todash field-measured the distances for the area before the stream. This area from was 110 feet beyond the house to the edge of the stream, a distance of 230 feet from that 110-foot line. The area from what he observed to be the edge of the fill material, where "you could see a drop off on to the undisturbed areas," was, from side to side, 86 feet. Thus, the disturbed area measured 19,780 square feet. An acre equals 43,560 square feet.

Based upon the above findings, I **CONCLUDE** that Mr. Warrington conducted unauthorized regulated activities within freshwater wetlands, including filling without a permit, in violation of N.J.S.A. and N.J.A.C**.** 7:7A-2.2. Applying the penalty matrix at N.J.A.C. 7:7A-16.8 (c), specifically in regard to this 19,780 square feet of freshwater

wetlands, ("impacting greater than 0.25 acres up to and including 0.5 acres of wetlands and/or transition areas") (2 points), and given the reasonable characterization of Warrington's conduct as "moderate" (2 points) and the resource value as "intermediate," (4 points), the Assessment Table provides for a penalty, based upon a total of 8 points, of $9,000.

The Area of the Stream and Beyond
Mr. Sekoni's Field Notes

Mr. Todash did not perform any testing at either the stream bank or the areas beyond the stream. He accepted the information Mr. Sekoni wrote down and placed in the agency's files. Clearly, Sekoni went to the site on a regular assignment for the DEP, made his observations and recorded his field notes in the normal course of his duties for the DEP. While he was not present to testify to the manner and timing of the creation of the notes, these conclusions are self-evident. The question then is to what extent may Sekoni's notes and his conclusions about the presence of wetlands or of disturbed wetlands be used to meet the DEP's burden to prove that areas disturbed beyond the stream were wetlands.

Mr. Sekoni's field notes are generally admissible in an administrative hearing as hearsay, N.J.A.C. 1:1-15.5(a), and, in addition, certainly constitute public records and findings made in the course of and within the scope of Sekoni's employment with the DEP, N.J.R.E. 803 (8). Additionally, they are business records, that is, in the language of the evidence rules, records of regularly conducted activity of the DEP, N.J.R.E. 803 (6), thus admissible as competent hearsay, the sort of evidence necessary to permit significant material findings, N.J.A.C. 1:1-15.5. That said, it is, true that Mr. Sekoni went to the site for the purpose, at least in part, of examining the area of the stream and beyond to determine if the disturbances had impacted wetlands, a technical assessment requiring a degree of skill and judgment, an element of expertise. The DEP seeks to use his recorded data to prove the existence of wetlands in these areas, most particularly in the areas beyond the stream banks, areas where the road was continued and looped around the concrete pad, and in the area where the pad was constructed and the building was placed thereon. While the records are themselves admissible in

evidence under the Rules of Evidence, N.J.R.E. 803 (6)'s admission of regularly conducted conduct, is subject to Rule 808, which reads

> Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge finds that the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness.

The determination of whether wetlands exist, or more importantly perhaps, whether wetlands existed at a site now disturbed by human activity, is a technical determination that is dependent upon familiarity with scientific and regulatory information, including definitions, characteristics, familiarity with tools of assessment, including such as the Munsell Color Chart. The DEP itself appears to consider such determinations as complex. They may require the performance and assessment of borings, the identification of plant life and some knowledge of hydrology. All in all, it appears that this is the type of determination that is appropriately accepted as evidence only after the declarant is made available to be vetted for his level of knowledge, and is subject to cross-examination. While Mr. Sekoni's motives are not questioned, and he was performing his assigned duty, it is nevertheless troubling to suggest that his unexamined assessments should merely be accepted because his rather conclusory decisions are contained in the DEP file. Mr. Todash did not reassess the ground verification for the mapping, he did not perform his own borings, and he did not fully understand the measurements recorded in the notes. It is not clear exactly how Mr. Sekoni decided upon the total square footage of the violations. Importantly, the DEP has not suggested that Mr. Sekoni's testimony could not have been secured, either by his voluntary personal appearance, or perhaps, by a video conference.

I **FIND** that, in the absence of Mr. Sekoni's testimony, it would not appear proper to accept his hearsay technical analysis and conclusions as evidence merely due to their presence in otherwise admissible government business records. However, Rule 808 does include within the factors that must be analyzed to determine if the hearsay expert opinion is admissible is whether the likelihood is that the opinion is accurate, that

is, is there other evidence that would bolster the "trustworthiness" of the included expert opinion such that its admission is likely to advance the search for the answer without unduly prejudicing the party opposing admission.

"Admissions" By Mr. Warrington

The DEP argues that Mr. Warrington's own authorized representative admitted that certain areas beyond the stream had been wetlands prior to fill being placed. The purported admission consists of the labeling, lines and notes found on the revised Wetland Boundary Survey of September 21, 2010, R-24 in evidence. DEP claims that such admissions as may be drawn from this document constitute admissions attributable to Mr. Warrington. The DEP argues that such admission(s), coupled with Mr. Sekoni's notes and conclusions and Mr. Todash's consideration of aerial photos, soil maps and his limited measurements, settles the issue of whether the areas beyond the stream had been wetlands that were disturbed without any authorization to do so. And, as noted, given the above ruling regarding Sekoni's records, it may be that the DEP would contend that the admission verifies Sekoni's assessments, making them admissible under N.J.R.E. 808.

N.J.R.E. 803(b) provides for the admission in evidence of a

> Statement by party-opponent. -- A statement offered against a party which is:
>
> > (1) the party's own statement, made either in an individual or in a representative capacity, or
> >
> > (2) a statement whose content the party has adopted by word or conduct or in whose truth the party has manifested belief, or
> >
> > (3) a statement by a person authorized by the party to make a statement concerning the subject, or
> >
> > (4) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or . , . , . , .

Here, the DEP claims that Mr. Smith, the Professional Land Surveyor from Key Engineering, was the "person authorized" by Warrington, a party to this case. Initially, on October 1, 2009, Smith presented to the DEP a complete application for a "Flood Hazard Area Applicability Determination," submitted "for your review in accordance with the New Jersey Department of Environmental Protection Checklist." Mr. Warrington signed the "Application Form" that was part of this submission and also signed the section in which he authorized Robert Scott Smith, Professional Land Surveyor and Professional Planner, to act as his "agent/representative in all matters pertaining to my application." This established the relationship between Warrington and the agent. Then, on September 27, 2010, while the agency still continued, Smith offered the September 21, 2010, "Wetland Boundary Survey" as "Revised for N.J.D.E.P. Consideration," as part of the same overall submission seeking to have Warrington's application for a permit approved. This submission was made on behalf of Warrington by Warrington's agent, "concerning a matter within the scope of his employment" and "during the existence of the relationship" that is, "the agency or employment." This document purported to have been revised based upon discussions between Key and DEP personnel, "with specific focus on attempting to demonstrate potential compliance with the terms and conditions of a Freshwater Wetland General Permit 10B, Freshwater Wetland Transition Area Waiver through averaging and an Individual Flood Hazard Area Permit for the construction of a building."

The respondent disputes the admissibility of this document as an admission by him, not because at the time of its submission Smith and Key Engineering were not his authorized representatives, for surely they were. Instead, acknowledging the representative/agent capacity that Smith had prior to Warrington's decision to terminate his relationship with Key, Warrington argues that the document was offered during negotiations to settle, to resolve, his dispute with the DEP over the pending AONOCAPA, and therefore, any document offered during that process, and any "statement" made therein, is privileged and cannot be used as evidence in this hearing, and certainly not as an admission against his interest. N.J.A.C. 1:1-1:1-15.10 provides that, "Offers of settlement, proposals of adjustment and proposed stipulations shall not constitute an admission and shall not be admissible." This rule appears to be based

upon the similar bar to admission of this evidence contained in the New Jersey Rules of Court, where Rule 408 reads

> When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim, shall not be admissible to prove liability for, or invalidity of, or amount of the disputed claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.

"Settlement of litigation ranks high in our public policy." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). Thus, in line with this statement of the New Jersey Supreme Court, the rationale for rules such as N.J.A.C. 1:1-1:1-15.10 and N.J.R. 408 is simple: "If settlement offers were to be treated as admissions of liability, many of them might never be made." State v. Williams, 184 N.J. 432 (2005) (citations omitted)). In this regard, confidentiality is a "fundamental ingredient of the settlement process." Brown v. Pica, 360 N.J. Super. 565, 568 (Law Div. 2001). For this reason, neither of these rules allow settlement negotiations to be admitted. They may not be used as proof of liability. Shotmeyer v. New Jersey Realty Title Ins. Co., 195 N.J. 72, 89 (2008); See also State v. Szawronski, 284 N.J. Super. 578 (Law Div. 1995) (noting that a plain interpretation of the intent behind N.J.R.E. 408 is to address situations where the "validity or amount of claim" is disputed and a party's statements are offered to prove "liability for, or invalidity of, or amount of the claim").

However, the case law has recognized that not every communication that occurs between the parties during the pendency of a litigation is legitimately considered to be within this realm of "confidential" "settlement process" protection. In Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 210, 221 (App. Div. 2005), the court discussed Rule 408 in connection with a demand made for disclosure under the Open Public Records Act (OPRA), a demand for a letter sent by counsel to a party in a pending condemnation action.

> The letter from the attorney for the defendants in the condemnation action transmitting their application to the Farmland Preservation Program is also plainly not inadmissible under N.J.R.E. 408 as a "statement[] . . . in settlement negotiations" because the letter does not contain any "offer[] of compromise" or other statement related to settlement of the condemnation action. The handwritten note from . . . D'Amiano would not be inadmissible under N.J.R.E. 408 because the rule only applies to statements relating to settlement by a party or the party's attorney, and D'Amiano was neither a party to the condemnation action nor an attorney to a party. Although the memorandum from Mark Halper attached to that letter reflects the Halper family's view of the value of development rights to the property, it is not a settlement offer. Therefore, that memorandum probably would not be inadmissible under N.J.R.E. 408. Under these circumstances, we conclude that even if a settlement offer would be exempt from disclosure under OPRA in some circumstances, the County has failed to establish adequate grounds for denial of access to either letter.

In the present matter, after the issuance of the AONOCAPA, Mr. Warrington decided to seek to obtain a permit or permits to regularize the legal status of his property, that is, he determined to follow the normal application process and submit to the DEP whatever was needed to obtain the appropriate permits. In the normal course of that application process, his authorized agent decided to first prepare a Wetland Boundary Survey, and then to revise it to take into account whatever he believed was proper to secure the permit(s), which no doubt might include consideration of DEP's understanding as to what the condition of the property was and had previously been. There appears to be nothing at all unusual about the preparation of a revision of the original survey. At the time of its submission, no claim was made that it was confidential, that it was prepared and presented as an offer of settlement or compromise in respect to the specific allegations and demands of the AONOCAPA. There is no suggestion here that Warrington, acting through an authorized agent in a manner that could then be considered as a statement made by Warrington himself, was by this communication offering a settlement or compromise. There is no evidence of attorney involvement here, no suggestion of any ongoing "negotiation."

Counsel for Warrington cites two initial decisions issued by administrative law judges in opposition to the consideration of these materials under the "negotiations"

theory. Of course, neither initial decision is binding, but on analysis they are not persuasive for the present context. One, W.T. o/b/o V.T. v. Alexandria Township Board of Education, OAL Dkt. No. EDS 8726-01, 2003 WL 1588411, involved a dispute arising under the Individuals with Disabilities Education Act. The proffered evidence of an admission involved matters that were discussed during the attempt to arrive at a mediated resolution of this special education dispute. Matters discussed in a formal mediation process are clearly not admissible. The IDEA provides for such mediations, and they are a critical part of the process that attempts to avoid the often time-consuming and educationally disruptive due process hearing mode for resolving these controversies. The case, and the setting involved, offer no guidance in regard to the present matter. Neither does In the Matter of Christopher Higgins, Department of Human Services, Vineland Developmental Center, njlaw.rutger.edu/collections/oal/html/intial/CSV 7012-14_1./html, a civil service appeal. Judge Miller determined that a purported admission made during discussions occurring just before a Loudermill hearing was not admissible. He determined that the setting was "undisputedly, prehearing settlement discussions that involved appellant and his union representative. And in the absence of specific facts, rules, procedures, orders. etc., I am most inclined to hold all discussions prior to the Loudermill hearing were settlement in nature, See, Evid. R. 408(1)." Again, the setting is crucial, for as the judge noted, settlement discussions "commonly occur at hearings." I **CONCLUDE** that neither of the cases suggests that the type of process that was occurring in connection with the 2009 submission of the "Flood Hazard Area Applicability Determination" and the subsequent follow-up filing of the Wetland Boundary Survey in September 2010, should be considered as a settlement negotiation.

I **CONCLUDE** that to the extent that the DEP offers the information on the Revised Wetland Boundary Survey as an admission by a party-opponent, Mr. Smith stood in the place of Mr. Warrington as his authorized agent, acting within the scope of that agency while it still existed. I further **CONCLUDE** that the use of this material does not violate N.J.A.C. 1:1-15.10.

The DEP points particularly to the "Notes" section of R-24, where Note 4 specifies "Freshwater Wetlands Delineated by Robert Scott Smith PLS, PP from Key

Engineers Inc. Mapping subject to approval and confirmation by DEP." Thus, the Note confirms that Smith himself is responsible for the delineation, and it is not a question of the designations simply being copied from some DEP mapping. Of particular note then is the designation, contained in a "bubble" tied to a line on the Survey, "Approximate Wetland Boundary Prior to Fill Placement" and another, "Total Disturbance of Wetlands and Transition Areas Associated with Pad and Loop Road 13,500 S.F.+-." The first of these designations is for an outlined area encompassing the whole of the area in which the pad and the loop road exist. The second is tied to the same area. Thus, Warrington's designated agent, Smith, having specifically delineated the wetlands, confirms that, as Mr. Sekoni's notes indicate, this whole area was wetland or transition area, was filled and encompasses something in the neighborhood of 13,500 square feet. Also, another notation confirms that the pad is 30 feet by 40 feet, or 1,200 square feet.

Given Mr. Warrington's admissions, it seems that there is no reason not to accept Mr. Sekoni's analysis that the areas beyond the stream, encompassing the pad and the loop road and areas surrounding that road are disturbed freshwater wetland or freshwater wetland transition areas. Just accepting Warrington/Smith's number of 13,500 square feet of wetland and wetland transition disturbance and combining that with the 19,780 square feet of wetland disturbance before the stream gives a total disturbance of freshwater wetlands and wetlands transition areas totaling 33,280 square feet. This total, while less than the DEP's calculated 42,500, is still between .05 and ("including") 1 acre, which means that for the purposes of the penalty matrix, the points assessed are 3. This means that the penalty for violation of the FWPA is based upon 9 points, which the Assessment Table shows equals a $10,000 penalty assessment.

FHACA Violations

According to the AONOCAPA, Mr. Warrington violated the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and N.J.A.C. 7:13-2.1(a) when he engaged in regulated activities in a flood hazard area/riparian zone without a flood hazard area permit. More specifically, the agency claims that his conduct, including clearing of vegetation and placement of fill material and grading to create lawn area and an access

road, impacted approximately 19,780 square feet of "additional freshwater wetlands" and 4,300 square feet of riparian buffer, as well as an additional 360 square feet that resulted from the "construction of a road crossing over the tributary of Still Run."

N.J.A.C. 7:13-4.1 states:

> (a) A riparian zone exists along every regulated water, except there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula.
>
> (b) The riparian zone includes the land and vegetation within each regulated water described in (a) above, as well as the land and vegetation within a certain distance of each regulated water as described in (c) below. The portion of the riparian zone that lies outside of a regulated water is measured landward from the top of bank. If a discernible bank is not present along a regulated water, the portion of the riparian zone outside the regulated water is measured landward as follows:
>
> > 3. The riparian zone is 50 feet wide along both sides of all waters not identified in (c)1 or 2 above.

The DEP concedes that this waterway is one that fits within this 50-foot wide zone category. Thus, as the distance measured by Mr. Todash across the lot was 86 feet, and the entire 50-foot depth from the top of the bank on the house side of the property was filled and was wetland, a total of 4,300 square feet of riparian zone was affected. This area is also part of the area for which penalties are imposed for the violation of the FWPA, but the statutory violation of the FHACA is a separate offense and therefore the area was the subject of two separate violations for which separate penalties apply. In addition, the Department includes another 360 square feet for the area of the bridge, which Mr. Warrington upgraded without any permit to authorize his conduct.

In his brief filed following the conclusion of the hearing, Mr. Warrington argues that the waterway crossing his property and over which the bridge is placed is a "manmade canal" and is thus not regulated by the FHACA. N.J.A.C. 7:13-2.2(a) provides (a) All waters in New Jersey are regulated under this chapter except for the

following: 1. Any manmade canal. This argument was not made during the hearing. The regulation does not itself define what a "manmade canal" is. Counsel for Warrington, citing a dictionary definition,[5] contends that it is an "artificial waterway for transportation or irrigation." The DEP's attorney objects to consideration of this argument because no notice was given that it would be raised, and therefore the Department did not address the issue in testimony, likening this to the situation that resulted in the exclusion of the Bearce report and testimony, which was excluded due to a violation of the discovery process. The deputy attorney general notes that Warrington never identified this argument about the supposed manmade nature of the waterway in response to the Department's demand for Warrington's factual and legal defenses, made in "numerous interrogatories." Additionally, no other notice of this defense or of this factual issue was made by Warrington, and most significantly, it was never mentioned during the three-day hearing, this despite the fact that Warrington chose to call an expert witness in his defense, who himself never mentioned the "canal" concept. It would certainly be expected if Mr. Warrington were seriously contending that the regulatory scheme did not embrace this particular waterway due to it properly being characterized as a "manmade canal," that he would have presented this argument and factual evidence to support it, in the form of either his own witness(es) or at the very least, during the cross-examination of the DEP's witnesses. He did not, nor, it must be noted, has he either disputed the deputy attorney general's assertions, made in that attorney's reply brief, as to the lack of notice or of any mention of the issue during trial, and, in addition, he never moved to reopen the hearing to present this "new" defense. Whether such a motion would have been granted is entirely unclear given that it hardly seems that this would involve an issue of newly-discovered evidence, but no such application was ever made. As such, I **FIND** that first raising this defense at this late hour in the process is prejudicial to the DEP, and, I note also, there is no evidence in the record to support the characterization. As such, the claim that the waterway is a "manmade canal" is excluded.

The penalty matrix for violations of the FHACA is found at N.J.A.C. 7:19-13-19.1. It again considers the type of violation, the conduct of the respondent, the seriousness

[5] Webster's II New College Dictionary 748 (3rd ed. 2005)

of the violation, which is influenced by the location of the violation in a floodway, or in the flood fringe, and the area, in square feet of a disturbance in the riparian area and the severity of such disturbance, as well as impacts in other special areas of concern. Here, the Department assessed Mr. Warrington's conduct as "moderate," equivalent to 2 points. As for the seriousness of the impact caused by the violation, while it considered that the impact to the floodway in the construction of the road crossing measured "approximately 13 cubic yards, it assessed only 1 point, which is the point total for an impact in the floodway of up to 5 cubic yards of fill or obstruction." According to the Administrative Order's "Penalty Rationale," it assessed 2 points for the disturbance of the riparian area of approximately 4,330 square feet,[6] 2 points for the severity of the riparian disturbance for the clear cutting of all existing woody vegetation (trees and shrubs), with stumps remaining, and 1 point for the impact on the "near-stream portion of the riparian zone, within 10 feet of the top of the bank of the surface water, where clearing and destruction of vegetation has caused or may cause, destabilization of the streambank." The total point accumulation was assessed as 8 points, equivalent to a $6,000 administrative penalty.

The penalty assessment properly evaluates the type of violation, that is, regulated activity performed without a permit, the type of conduct and the seriousness of the violations, including the activity affecting the bridge, which was at least in part "reconstructed" by the replacement of the wood planking with metal, which is activity done upon a structure in the regulated area, performed without any permit in violation of the law. N.J.A.C. 7:13-2.4(a)(5). I **CONCLUDE** that the penalty assessment of $6,000 is proper.

For the reasons stated above, I **CONCLUDE** that Mr. Warrington violated the FWPA and the FHACA and that as a result, he is responsible to pay a civil administrative penalty of $16,000 and to restore the affected areas in accordance with a restoration plan approved by the DEP.

[6] It is unclear if this figure is accurate, as the calculated riparian area affected, that is, within 50 feet of the stream bank and 86 feet across, is 4,300 square feet. In any case, whether the area is 4,300 or 4,330 square feet, the area affected falls within the 2-point category, which encompasses a range of 1,001 to 5,000 square feet.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 086250402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 9, 2016
DATE

**JEFF S. MASIN**, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

**WITNESSES**:

**For petitioner**:

William Warrington

Gary Brown

**For respondent**:

David McCreery

Trent Todash

Brett Kosowski

Barbara Baus

Randy Bearce

**EXHIBITS**:

**For petitioner**:

P-34 Aerial photo, 1951

P-35 Aerial photo, 1965

P-36 Aerial photo, 2010

P-37 Not in evidence

P-38 Kizner letter to Greenhouse re: Bridge, August 6

P-39 Kizner letter to Greenhouse re: Bridge, August 11

P-41 Ricker photos of test pits

P-42 Ricker Field Logs

P-42A Ricker Map/drawing of test pits

P-44 Brown Amendment Report, December 3, 2014

P-45 DEP Field Logs/Compliance Evaluation Summary

P-46 Key Engineers Wetland Boundary Survey, March 17, 2010

**For respondent**:

R-1 Second property visit summons

R-2 Photograph of property

R-3 April 19, 2008 photograph of property
R-4 April 18, 2008 photograph of property
R-5 August 2, 2011 978 Whig Lane Road photos
R-6 July 13, 2011 978 Whig Lane Road photos
R-7 July 13, 2011 978 Whig Lane Road photos
R-8 July 13, 2011 978 Whig Lane Road photos
R-9 July 13, 2011 978 Whig Lane Road photos
R-10 July 13, 2011 978 Whig Lane Road photos
R-11 Survey of premises 978 Whig Lane Road
R-12 April 18, 2008 Incident Report
R-13 Not in evidence
R-14 Rear property photos
R-15 Rear property photos
R-16 Inspection notes phone call report
R-17 Field notice of violation
R-18 May 14, 2008 Warrington/Saucony letter
R-19 April 18, 2008 report incident complaint
R-20 Series of aerial photographs
R-20a 2012 aerial photos
R-20b 2012 aerial photos, mapped streams
R-21 1989 Federal Wetlands Manual
R-22 Not in evidence
R-23 June 2, 2010 Todash field notes
R-24 Wetlands Boundary Survey
R-25 June 29, 2010 Notice of Violation
R-26 Todash August 4, 2010 field notes
R-27 Munsell soil identification book
R-28 January 10, 2012 Todash field notes
R-29a through R-29g Photos of property in file
R-30 Consultant Smith/Kosowski e-mail
R-31 Not in evidence
R-32 Preliminary compliance analysis
R-33 October 1 Smith to land use letter