



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. ELU 842-15

AGENCY DKT. 1113-11-0003.1

FWW-LI14-120001

**RAJESHWAR SINGH YADAV,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION – LAND USE REGULATION,**

Respondent.

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**Rajeshwar Singh Yadav**, petitioner, pro se

**Timothy Malone**, Deputy Attorney General for respondent (John J. Hoffman,  
Acting Attorney General of New Jersey, attorney)

Record Closed: December 1, 2015

Decided: January 19, 2016

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

On January 15, 2015, the Department of Environmental Protection (DEP) transmitted to the Office of Administrative Law (OAL) an administrative appeal involving the Department and Rajeshwar Singh Yadav. The transmittal form specifically identified the issue in dispute that was transmitted for a hearing in the OAL as “Appeal of a(n) Cancellation of Letter of interpretation [LOI] Application.” The OAL is not a court of original jurisdiction. It is instead a forum for litigation involving disputes with Executive Branch agencies that arise within the agency’s regulatory functions and it draws its jurisdiction regarding contested cases only from the agencies themselves and only where the agency head does not choose to personally sit on any element of the

contested case but instead chooses to transmit the case, or any part thereof, to the OAL. N.J.S.A. 52:14B-10(c); N.J.S.A. 52:14F-8(b). As such, it is within the power of the transmitting agency to limit the issues transmitted to the OAL for hearing, with the important caveat that once an issue is transmitted any legal issues relevant to the resolution of the transmitted issue are proper subjects for OAL consideration. Given this, here it was within the authority of the Commissioner of the DEP to limit the transmittal to the validity of the cancellation of the LOI and it is that single issue that is the subject of the DEP's current motion seeking summary decision in its favor, seeking dismissal of Mr. Yadav's appeal of the DEP's Land Use Regulation Unit's cancellation of the LOI application. While Mr. Yadav argues that other issues are properly part of this OAL proceeding, such as "taking," as will be explained herein, they are not. The parties have exchanged their legal and factual positions and the last submission was received on December 1, 2015. The case was reassigned to this judge on December 17, 2015.

The LOI is a means of verifying the location of freshwater wetlands, transition areas, and State-open waters located on a particular property or in a particular location. The LOI is used in conjunction with the processes mandated by the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 et seq., and the regulations adopted to fulfill the legislative mandate of the FWPA, N.J.A.C. 7:7A-1 et seq. To obtain an LOI, an applicant "shall submit a proposed delineation of wetlands, transition areas, and/or State open waters, which the Department will confirm or modify." N.J.A.C. 7:7A-3.4. The record establishes that the Yadavs, owners of property located in Princeton Junction (the "Property"), submitted just such an application on August 30, 2012. The administrative regulations require that the DEP identify and delineate freshwater wetlands in conformity with the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," ("Federal Manual"), published by the United States Environmental Protection Agency in 1989. N.J.A.C. 7:7A-2.3. According to the undisputed record, the DEP responded to the Yadavs' LOI application on October 11, 2012, issuing to them a letter noting the deficiencies that the DEP had determined existed in the LOI application, requesting that the petitioners re-evaluate the property, correct labeling of areas delineated as "ditches," which the DEP contended were in fact "streams," and correct identified data that DEP found inaccurate. The Yadavs then submitted a revised plan and data sheets on January 28, 2013. However, the DEP again determined that this information was deficient, and the submitted materials were

unsigned and unsurveyed. According to a Certification submitted in support of the DEP's motion, its staff conducted on-site assessments, as well as a review of relevant historical maps, surveys and the like, both in regard to the first LOI application and the second submission of January 28. After its second review, including as noted on-site examination of the Property, the DEP issued a second deficiency letter, dated January 30, 2013, again asking that the applicants correct the submitted data and offering to meet with Mr. Yadav and his consultant, on-site, to establish an accurate wetlands line so as to assist in the preparation of the requested corrected data. However, according to DEP's Certification, since that date, despite Mr. Yadav's "numerous letters and information about the cause of conditions on the Property" and, in his view, the DEP's failure to consider that what it viewed as wetlands should actually not be so categorized, there has been no submission of the requested corrected data, accurate labeling and accurate depiction of the actual location of wetlands on the Property, as was requested of the applicant both on October 11, 2012, and January 30, 2012. DEP contends that despite his strenuous protestations about many concerns, Mr. Yadav does not dispute that he did not provide the DEP with the information requested in the two deficiency letters. According to the Certification submitted by Patrick Ryan, an Environmental Specialist 3 with the DEP, on May 10, 2013, a letter was sent to Yadav advising that unless the requested information was submitted within thirty days, the LOI Application would be cancelled. It is the DEP's position that having received no such response, it merely acted in accordance with the governing regulation, for on July 22, 2013, the DEP issued a cancellation letter to Yadav.

N.J.A.C. 7:7A-12.6, provides

(b) The Department shall cancel an application if the Department requests additional information regarding the application, and the information is not submitted within 30 days after the date of the request. Before canceling an application, the Department shall send the applicant a letter stating that the application will be cancelled. If, within 15 days of the date of the Department's letter, the applicant submits the information, or a letter providing good cause for the delay, the Department shall extend the time required for submittal of the information. If the applicant does not submit the information or a letter providing good cause, the Department shall cancel the application.

It is from this act of cancellation that Yadav appeals. And the DEP argues that the material facts that relate to the legal propriety of this cancellation are not in dispute, therefore permitting an order dismissing this appeal on summary decision.

### Summary Decision

The Uniform Administrative Procedure Rules, N.J.A.C. 1:1-12.5, which govern the conduct of contested cases, specifically authorize a party to file a motion for summary decision as a means of determining the outcome of a contested case. Summary decision is the administrative law equivalent of a summary judgment motion in the judicial branch. The standards for deciding such a motion were first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954) and more recently illuminated in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). Under the Brill standard, as before, a motion for summary decision may only be granted where there are no “genuine disputes” of “material fact.” The determination as to whether “genuine” disputes of “material fact” exist is made after a “discriminating search” of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of “genuine” disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than “facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ,” Judson, supra, at 75 (citations omitted). The Brill decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is “genuine” or is simply of an “insubstantial nature.” Brill, supra at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. “The essence of the inquiry in each is the same: ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.’” Id. at 536, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214. In searching the proffered evidence to determine the motion, the

judge must be guided by the applicable substantive evidentiary standard of proof, that is, the “burden of persuasion” which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that “reasonable minds could differ” as to the material facts, then the motion must be denied and a full evidentiary hearing held. Again, it is not merely any dispute of fact that must be shown to exist. Only the existence of disputed facts the resolution of which can have legal significance in the particular case and under the applicable law can defeat the motion.

#### Discussion

A review of the Yadavs’ briefs filed in response to the DEP’s motion, as well as an examination of prior decisions of trial and appellate courts, indicates that the Yadavs have had a lengthy dispute with the DEP and with West Windsor Township concerning the Property at issue in this case. The Yadavs have for a very long time desired to subdivide the Property, Yadav v. Township of West Windsor, A-2329-04T3, (App. Div. 2006) (unpublished). The Yadavs have also claimed that to the extent the DEP contends that wetlands exist on the Property beyond that which the Yadavs might agree, the condition has been caused by problems with the drainage system installed in the Benford Estate development in or around 1970. The Yadavs have previously claimed, and again in this case contend, that the Property is exempt from the demands of the FWPA because of a preliminary subdivision approval they received prior to July 1, 1988. See Yadav Brief, November 17, 2015, page 22. However, to the extent that the contention of an exemption based upon that subdivision approval is raised here as a defense to the very need for an LOI and thus presumably as a basis to object to the cancellation of that application as effectively ending the Yadavs’ current attempt to develop the Property, the Yadavs’ claims about the legal significance of that preliminary subdivision approval have been considered before and wholly rejected. In its decision in 2006, cited above, the court took note of a 1985 preliminary subdivision approval and

the subsequent appeal of that resolution by the Yadavs. It then noted that the statute of limitations regarding that approval expired while the Yadavs' appeal was pending. Their subsequent resubmission for a new approval was met by the Township with the need for revisions, which the court notes the Yadavs did not submit. The court recites in detail the subsequent history of litigation over the subdivision approval and concludes that

Courts in the prior cases [both State and federal] have also made rulings on the merits of the Yadavs' claim that the town had a continuing obligation under the 1983 consent order . . . These courts have issued final judgments based upon those rulings . . . Consequently, the Yadavs no longer have any right to develop their land in accordance with the 1983 consent order, the 1985 preliminary approval, or the 1989 Appellate Division opinion affirming the approval with modification . . . Accordingly, the Yadavs may no longer rely upon the preliminary approval or any of the previous court orders to subdivide their property.

To the extent that the Yadavs argue either against the cancellation of the LOI Application or on its non-relevancy to their plans to develop, based on the theory that they do not even need to comply with the FWPA, the Appellate Division's clear rejection of the pre-1988 preliminary subdivision approval as having any ongoing legal significance eliminates that contention as at all viable.<sup>1</sup>

Much of the Yadavs' response to the motion consists of repeated contentions that the actions of the DEP have been "dictatorial" and that the Department has been misapplying concepts for identifying wetlands when assessing their property, as it is a disturbed property affected by man-made conditions. In addition, there is much reference to the action of the DEP as involving a "taking" of their property, with Constitutional implications. To the extent that the Yadavs may claim that their property has been "taken" and seek compensation, neither the DEP nor the OAL has jurisdiction to adjudicate such a claim, which is a function reserved to the judicial branch.

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<sup>1</sup> As counsel for the DEP has demonstrated, the Yadavs have attempted to litigate the issues pertaining to the subdivision approval so often and with such lack of success as to warrant orders from both the Federal and State Courts limiting, and even barring, their ability to further contest those issues. Yadav v. Township of West Windsor and Mayor, A-5314-09T1 (App. Div. 2012) (unpublished).

The DEP contends that despite its repeated requests to the Yadavs to submit revisions to the data submitted in support of their conception of the proper wetlands delineation, the Yadavs did not comply. In this respect, in its moving papers the Department, in paragraph 14, at page 4, refers to the issuance to the Yadavs of the January 30, 2013, second deficiency letter, in which it offered to meet with Mr. Yadav and his consultant “to establish an accurate wetlands line prior to submission of corrected site plans.” The Department then asserts that despite this offer, the Yadavs never submitted the requested revisions and corrections.

In their response to these assertions, the Yadavs state that the January 30, letter made “crystal clear to me that the intent and purpose of Mr. Ryan’s letter was to meet at the site for obeying his authoritarian and essentially dictatorial command/demands or take a hike.” They saw the letter and the DEP’s actions as examples of “‘dealing in bad faith’ to tighten the entrapment of Yadavs.” But the DEP notes that despite the fact that after January 30, 2013, the Yadavs sent the Department “numerous letters and information about the cause of conditions on the Property, and why the Department should not consider the property to be “regulated resources,” [which the Yadavs’ own brief indicates addressed both their “man-made conditions” and the “exemption” contentions], the Yadavs do not actually dispute that no such revisions or corrections were submitted, even after the May 10, 2013, warning of the prospect that the LOI Application would be cancelled if no response was received within thirty days.

The applicable regulations governing the LOI process address the ability of DEP to seek revisions of LOI applications and the choices that applicants have in respect to such requests.

(h) The Department shall not issue an LOI if the Department determines that the information submitted in the application for the LOI is inaccurate. In such a case, the applicant may provide corrected information upon the Department's request, or may apply directly for a permit without obtaining an LOI. If the applicant applies for the permit without first obtaining an LOI, the permit application must include all information that would be necessary for the Department to issue an LOI for the site, in accordance with N.J.A.C. 7:7A-10.4(a)2, 10.5(a)1, or 10.6(a)3, as applicable. The Department will then review the submitted wetland delineation as part of the permit review process.  
[underlining not in original text]

Thus, the regulations provide that if an applicant files for an LOI and the DEP insists that the application inaccurately delineates the wetlands and/or transition areas on the property, the applicant may continue to seek their LOI by submitting corrected information, or may choose to reject that path and instead seek DEP approval for the projected development by filing a permit application for the site and then proceeding on the permit review path, which may lead to a permit, or perhaps, to the need for a contested case review of a DEP rejection of the permit application. Thus, in the present case, the Yadavs could have filed a permit application, proceeding without an LOI. However, as they did not choose to respond to the DEP with the requested corrections and revisions, the regulations made it crystal clear that the DEP, as it did not agree with the Yadavs' contentions respecting either that the whole process was unnecessary due to exemption or that the Yadavs were correct regarding their proffered delineation, could not issue the LOI. And again, the applicable regulation, N.J.A.C. 7:7A-12.6, provides

(b) The Department shall cancel an application if the Department requests additional information regarding the application, and the information is not submitted within 30 days after the date of the request. Before canceling an application, the Department shall send the applicant a letter stating that the application will be cancelled. If, within 15 days of the date of the Department's letter, the applicant submits the information, or a letter providing good cause for the delay, the Department shall extend the time required for submittal of the information. If the applicant does not submit the information or a letter providing good cause, the Department shall cancel the application.

Based upon the submissions of the parties, I **FIND** that It is abundantly clear that the Yadavs do not agree with the DEP as to the presence, extent and/or the legal implications of any wetlands that may exist on their property, whether they be the result of "natural" or of "man-made" origin. It is also clear that they do not agree with the DEP, or for that matter courts that have reviewed the issue, about whether the Property is exempt from FWPA regulation, given their continued reliance upon a preliminary subdivision approval, long rejected by the courts as any longer relevant. However, I also **FIND** that when requested on two occasions to provide corrected data and revisions to the LOI application and then again after being warned that if they did not do so their application would be cancelled, the Yadavs did not do so. Given this fact, I **CONCLUDE** that there can be no question that in regard to the narrow issue now before the OAL,



that is, whether the DEP acted within the applicable regulatory framework when it cancelled the LOI application, that it did so correctly. There being no genuine dispute of material fact as to this particular question, summary decision is appropriately **GRANTED** in favor of the DEP and the LOI application is **CANCELLED**.

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. 52:14B-10.

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 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



January 19, 2016

DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency:

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Date Mailed to Parties:

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**EXHIBITS:**

Respondent's Brief in Support of Motion for Summary Decision with attached  
exhibits

Petitioners' Brief in Opposition to Respondent's Motion for Summary Decision

Respondent's Letter Brief in Support of Motion for Summary Decision