



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
COASTAL AND LAND USE
COMPLIANCE AND
ENFORCEMENT,

Petitioner,

v.

HOPEWELL NURSERY, INC., AND
ROBERT ENCH,

Respondents.

ADMINISTRATIVE ACTION FINAL DECISION

OAL DKT NO.: ESA 10164-04
AGENCY REF. NO.: PEA040002-
0613-03-0003.1

This matter concerns a challenge by Hopewell Nursery, Inc. (Hopewell) and Robert Ench (Ench; collectively Hopewell and Ench are the Respondents) to an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) the Department of Environmental Protection (Department or DEP) issued on September 3, 2004¹, citing Respondents with two violations of the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 et seq., for (1) performing unauthorized regulated activities, involving clearing, filling, grading, and construction of steel framed polytarp agricultural buildings with concrete footings within approximately 18.5 acres of freshwater wetland transition area on property designated as Block 701, Lot 10, on the tax map of Upper

¹ The Assistant Commissioner of Compliance and Enforcement mistakenly signed the AONOCAPA with a date of September 3, 2003.

Deerfield Township,² and Block 4, Lot 33, on the Tax Map of Deerfield Township, Cumberland County (Property), in contravention of N.J.A.C. 7:7A-2.6(a); and (2) performing unauthorized regulated activities, involving clearing, filling, grading, and construction of steel framed polytarp agricultural buildings with concrete footings within approximately 15 acres of freshwater wetlands on the Property in violation of N.J.A.C. 7:7A-2.2(a). The Department assessed a \$603,000 penalty for the FWPA violations.³

The AONOCAPA further cited Respondents with a violation of the Flood Hazard Area Control Act (FHACA), N.J.S.A. 58:16A-50, et seq., for performing unauthorized regulated activities, involving clearing, filling, grading, and installing culvert crossings on approximately 3,409 linear feet of the Thundergust Brook, within a floodway in contravention of N.J.A.C. 7:13-1.3(e). The Department did not assess a penalty for these violations because administrative penalties were not available under the FHACA at the time of the AONOCAPA's issuance.

Respondents requested a hearing on October 13, 2004, to challenge the AONOCAPA. The matter was transferred to the Office of Administrative Law (OAL) and assigned to Administrative Law Judge (ALJ) John R. Tassini. The parties filed motions for summary decision, which ALJ Tassini denied without prejudice on February 21, 2008. ALJ Tassini presided over three days of the hearings, after which he was elevated to the New

² In Respondents' hearing request, they indicated that the AONOCAPA erroneously identified Block 701, Lot 10, in Upper Deerfield Township as Block 64, Lot 10.

³ After the hearing, the Department reduced the area of wetland and wetland transition area disturbance from 33.5 acres to 31.57 acres, and, accordingly, reduced the penalty assessment to \$568,260. Whereas the AONOCAPA had alleged that Respondents conducted unauthorized regulated activities on 18.5 acres of freshwater wetlands, DEP's proofs at the hearing demonstrated a disturbance of 19.6 acres, and whereas the AONOCAPA had alleged that Respondents conducted unauthorized regulated activities on 15 acres of freshwater wetland transition areas, DEP's proofs demonstrated a disturbance of 11.97 acres, for a total of 31.57 acres of wetland and wetland transition area disturbance.

Jersey Superior Court. ALJ Solomon A. Metzger subsequently handled the case for a brief period. Upon ALJ Metzger's retirement, ALJ Patricia M. Kerins presided over the hearing through its completion.

There were twenty-one days of hearing, which began on February 25, 2008, and the parties introduced nearly 200 exhibits.⁴ The Department submitted a certification in support of its penalty rationale, in lieu of live testimony. Respondents filed a motion for reconsideration and partial summary decision limited to the issue of whether Hopewell's use of temporary farm structures constitutes "normal farming" under N.J.S.A. 13:9B-4. On April 1, 2011, ALJ Kerins entered an order denying Respondents' motion. After conclusion of the hearing, ALJ Kerins recused herself from the case, and the OAL re-assigned the matter to ALJ Metzger. In his Initial Decision dated August 12, 2013, ALJ Metzger found that Hopewell violated the FWPA, the FHACA, and their respective implementing regulations, and ordered Hopewell to pay the \$568,260 penalty. ALJ Metzger also concluded that Hopewell's president, Robert Ench, is not individually liable for the violations.

On October 24, 2013, the Department filed exceptions to the Initial Decision. DEP did not disagree with the ALJ's conclusions regarding Hopewell but did object to the

⁴ In its exceptions, the Department asserted that the Initial Decision inappropriately excluded DEP exhibits P-149 and P-150 from the record and erroneously included Respondents' exhibits R-13, R-15, R-33, and R-35. DEP submitted P-149 and P-150 with the penalty certification of Scott Brubaker in lieu of testimony. P-149 and P-150 are the FWPA penalty regulations and statutory text in effect at the time of violations. The Administrative Procedure Act explicitly requires that judicial notice be taken of rules published in the New Jersey Register or in the New Jersey Administrative Code. N.J.S.A. 52:14B-5(e). I, therefore, modify the Initial Decision to include these exhibits as part of the record. In its reply to DEP's exceptions, Respondents indicated they had no objection to the exclusion of R-33. I so modify the Initial Decision to exclude R-33 from the record. My review of the record indicates that ALJ Kerins admitted R-13 and R-15 into evidence, but did not admit R-35 into evidence. Accordingly, I modify the Initial Decision to exclude R-35 from the record.

finding that Ench is not individually liable for the violations cited in the AONOCAPA. Hopewell filed its exceptions to the Initial Decision on October 25, 2013. Hopewell objected to ALJ Metzger's rendering of the Initial Decision because he did not preside over the hearing. In addition, Hopewell took exception to the ALJ's finding that Hopewell violated the FWPA. According to Hopewell, the Department improperly engaged in regulation by enforcement because DEP did not provide notice that FWPA's farming exemption is inapplicable to hoophouse and polyhouse agriculture. Respondents also took exception to the ALJ's reliance on DEP's 1986 and 1988 freshwater wetlands maps to determine the extent of wetlands, and the ALJ's failure to address Hopewell's argument that normal farming activities in transition areas are not regulated pursuant to the FWPA. On November 22, 2013, DEP and the Respondents filed their respective replies to the exceptions. On December 5, 2013, Hopewell filed a sur-reply to DEP's reply papers, and DEP responded to Hopewell's sur-reply on December 10, 2013.

Based upon my review of the record as explained below, I concur with the ALJ, and I therefore ADOPT the Initial Decision with modifications to incorporate the corrections to the record of admitted exhibits as described in footnote 4 of this Final Decision.

FACTUAL DISCUSSION

Hopewell is a New Jersey corporation in the business of growing wholesale outdoor plants, nursery stock, trees, and shrubs. Ench is Hopewell's majority stockholder, the company's president, and Chairman of the Board of Directors. Hopewell began leasing the Property in 1989 from Bench Realty, an entity in which Ench had a partnership interest. Hopewell purchased the Property in 1999.

The Property encompasses approximately 422 acres of relatively flat land on Woodruff Road in Deerfield and Upper Deerfield Townships, Cumberland County. The Property is bordered on the north by Centerton Nursery, on the south by farms and residential properties, on the east by woodlands and forested wetlands, and on the west by Woodruff Road. A stream known as Thundergust Brook runs from the northern edge of the Property about 4,000 feet to the southeast, where it leaves the Property and eventually drains to Thundergust Lake in Parvin State Park.

In the AONOCAPA's findings, the Department noted that the Respondents had received prior NOV's pursuant to the FWPA. First, in August 1997, DEP inspector Roderick Falla observed that Bench Realty and Ench had filled and graded the entire 4,000-foot length of Thundergust Brook and associated freshwater wetlands located on the Property. After receiving a September 4, 1997 NOV, Ench and Bench Realty retained the engineering firm Lynch, Giuliano & Associates, P.A. (Lynch Giuliano), to prepare a wetlands restoration plan. DEP approved the proposal to restore the wetlands in accordance with Lynch Giuliano's 1988 topographic map delineating the wetlands, which Lynch Giuliano had previously prepared on Bench Realty's behalf in connection with a proposed residential development. Bench Realty and Ench removed the deposited fill down to the prior grades to restore the stream to its 1988 contours, and restored the hydrology and wetlands. As a result, the parties were able to amicably resolve the 1997 NOV.

Then, on January 20, 2003, DEP issued a Field NOV to Ench concerning a separate property in Upper Deerfield Township. The Department cited Ench for clearing and grading within a freshwater wetlands and a "blue line stream," which is a stream that flows for a considerable period of the year and is marked on topographic maps with a solid blue

line. DEP observed approximately 15,000 square feet of disturbed freshwater wetlands and approximately 2,000 square feet of dry stream bed. The Field NOV required corrective action in the form of ceasing clearing and grading, restoring the area to its pre-disturbance grade, and allowing the area to naturally re-vegetate. Ench agreed to implement a restoration plan, and, once again, the parties amicably resolved the matter.

Hopewell began erecting polyhouses and hoopouses at the Property in August 2001, and completed construction in March 2002. Polyhouses and hoopouses are agricultural structures that provide for a controlled growing environment and can produce higher yields versus traditional in-ground farming. The polyhouses and hoopouses consist of metal framing, which is covered with plastic sheeting that may be removed for a portion of the year. These structures include irrigation pipes and permeable matting on the inside ground. A primary distinction between a polyhouse and a hoopouse is that the installation of a polyhouse also requires the placement of a pre-cast concrete post into a two and a half foot deep hole with poured concrete at the bottom. An additional amount of concrete is necessary to level off the post after insertion into the ground. The record establishes that Hopewell graded the land below the polyhouses and hoopouses, in order to facilitate drainage. After completion of the grading, Hopewell compacted the soil with a power roller. In addition, after erecting the polyhouses and hoopouses, Hopewell deposited crushed stone around the polyhouses and hoopouses to control erosion.

In March 2004, Deerfield Township Mayor John Stanzione called DEP to complain about an alleged greenhouse constructed over a stream on the Property. On March 18, 2004, DEP's Roderick Falla met with Mayor Stanzione on an adjacent property to discuss the allegations. That same day, Falla met with Ench to inspect the Property. At hearing,

Falla testified that he observed substantial clearing and grading, as well as the presence of hoophouses and polyhouses in areas that appeared to be freshwater wetlands. As a result, Falla informed Ench that there were apparent wetlands violations at the Property. Subsequent to Falla's March 2004 inspection, he reviewed 2002 aerial photographs of the Property to approximate the limits of the wetlands disturbance, as well as the June 1988 topographic map Lynch Giuliano had prepared in connection with the proposed residential development.

Falla visited the Property again on April 16, 2004 to investigate the complaint further. While there, Falla collected soil borings. Falla testified that there were four areas of the Property where he encountered violations of the FWPA, each area consisting of intermediate resource value wetlands. Area 1 is located in the northeast corner of the Property. Falla observed that the wetlands had been graded and that hoophouses had been constructed there, impacting 7.7 acres of freshwater wetlands and 3.2 acres of transition area. Area 2 borders the banks of the Thundergust Brook, which flows through the center of the Property in a southeasterly direction. Falla testified that he observed a significant volume of filling within the freshwater wetlands in Area 2, as well as the construction of polyhouses. According to Falla, the volume of the fill was so extensive that it converted the freshwater wetland into upland. In addition, soil borings indicated the presence of hydric soils beneath the fill. Falla also observed that culverts had been constructed in Thundergust Brook in order to facilitate road crossings. At hearing, Falla testified that the activities in Area 2 impacted 5.13 acres of wetlands and 3.0 acres of transition area along the Thundergust Brook's northern bank, and 5.16 acres of wetlands and 2.97 acres of transition area along its southern bank.

Area 3 is located south of Thundergust Brook. Falla observed polyhouses there and grading, filling, and construction activities impacting .82 acres of wetlands and 1.2 acres of transition area. Finally, Falla indicated that .79 acres of wetlands and 1.6 acres of transition area had been disturbed at Area 4, also located to the south of Thundergust Brook. In total, Falla testified at the hearing that Hopewell had disturbed 19.6 acres of wetland and 11.97 acres of transition area without obtaining a permit.

Upon Falla's retirement, DEP assigned Robert Pacione to this matter in 2005. At the hearing, Pacione was qualified as an expert in identifying freshwater wetlands and interpreting aerial photography, and was recognized as certified in the use of GPS equipment. He testified about his 2005 efforts to delineate the freshwater wetlands and transition areas at the Property, as well as Hopewell's disturbances of freshwater wetlands, transition areas, and flood hazard areas. He further testified to his use of the disturbed site methodology in conformance with the 1989 Federal Manual⁵ in his identification of the extent of disturbed wetlands.

Lou Jacoby and John Tyrawski also testified on DEP's behalf. At hearing, Jacoby was qualified as an expert in global positioning satellite systems, and Tyrawski was qualified as an expert in the Department's Geographic Information Systems. Both men assisted in ensuring that the DEP's mapping and overlays in this matter were reliable.

Ralph Spagnolo is an employee of the United States Environmental Protection Agency ("EPA") and a member of the National Technical Committee on Hydric Soil. The Department called Spagnolo as a witness, and he was qualified as an expert in hydric soils.

⁵ The Federal Manual is formally titled the "Wetland and Delineation Manual," and is incorporated into DEP's freshwater wetlands regulations. N.J.A.C. 7:7A-1.4.

In February 2008, at DEP's request, an EPA and DEP team dug test pits throughout the Property to evaluate the condition of the soil beneath the fill. Spagnolo was a member of the interagency team, and he testified regarding the presence of hydric soil in the areas where DEP had identified freshwater wetlands. He detailed his findings of hydric soil at nearly all the test pits dug during EPA's site visits.

Vincent Mazzei is a supervising environmental engineer with the Department, who reviewed permit applications under the FHACA for at least 22 years. He was admitted as an expert on the FHACA. He testified that Thundergust Brook was regulated under the FHACA because it has a contributory drainage basin greater than 50 acres. Furthermore, he testified that the culverts in the brook and the associated fill qualify as "development" that is regulated pursuant to the FHACA.

The Department also called William Voeltz as a witness. Voeltz works for Lynch Giuliano as a professional engineer. Although he was not yet involved with the Property or Hopewell in 1988, he testified as to Lynch Giuliano's 1988 topographic map of the Property. Voeltz provided testimony about his involvement in the resolution of the 1997 NOV the Department issued to Hopewell by reestablishing the Thundergust Brook and regrading the Property in accordance with the 1988 topographic map. He also testified about the preparation of a grading plan in 2001 for the construction of the polyhouses on the Property, and indicated that it was necessary to grade the soil beneath the polyhouses for drainage purposes.

DEP witness Wayne Sweet testified regarding Edward W. Sweet Contracting Corporation's 2001 grading of the Property south of the Thundergust Brook on Hopewell's behalf and explained that the overall elevation was modified between six and eight inches

due to grading. He indicated that his company used bulldozers, earth movers, and other equipment over the course of six weeks to grade the Property in accordance with the 2001 grading plan.

In addition, DEP called Robert Ench to testify. Ench described his roles within Hopewell as owner, director, and corporate officer. He additionally discussed his role as a partner in Bench Realty. He provided testimony regarding Hopewell's installation of hoophouses and polyhouses at the Property, as well as the associated grading.

David Fanz, Chief of DEP's Bureau of Coastal Regulation, was qualified as an expert in wetlands delineation, wetlands hydrology, hydric soils, wetlands vegetation, wetlands identification, wetlands ecology, and wetlands on agricultural property. He testified that freshwater wetlands are no longer present in the areas that Hopewell graded in 2001. He also testified about delineating wetlands by reference to hydric soil in a manner consistent with the 1989 Federal Manual. Respondents have claimed that the hydric soils at the Property are "relic hydric soils," attributable to farming activities over the years prior to the installation of the hoophouses and polyhouses. According to Fanz, however, relic hydric soils are rare. Fanz testified that it was doubtful that farming over the years could have eliminated the Property's wetlands, especially given that the fill was four to five feet thick in certain areas. Similarly, he did not see any evidence to support the proposition that decades of irrigation for farming activities had lowered the Property's water table.

In turn, Hopewell called seven witnesses. Ench testified about Hopewell's nursery business and the efforts to erect the polyhouses and hoophouses at the Property. In addition, he provided testimony concerning the 2003 NOV at the separate property located in Upper Deerfield Township.

Robert Zentner, a sales manager with Hopewell, testified only that he did not meet with Falla during his 1997 inspection. Donald Baldwin, a production manager with Hopewell, testified regarding the construction of hoopouses at the Property, including the use of grading machinery. He also explained that Hopewell placed stones between the hoopouses in the Property's northeast corner.

James Newman, who has worked on the Property for 70 years, testified that he plowed Area 1 up to the banks of Thundergust Brook and did not clear any trees. He had no personal knowledge of the hoopouses and polyhouses at the Property.

John Van Pelt has been employed by Hopewell since 2007, and he serves as the company's general manager, reporting directly to Ench. He recounted activities at the Property when owned by Hopewell and Bench Realty. Van Pelt testified that, in 1997, Hopewell restored the Thundergust Brook corridor to its 1988 contours, in accordance with the Lynch Giuliano topographic map. Upon comparison of aerial photographs of the Property taken in 1995 and 2002, Van Pelt admitted that Hopewell erected hoopouses in areas where Hopewell was not seeding, plowing, or cultivating in 1995.

Willem Hofman, an engineer employed by Kurt Weiss Greenhouses, the company that installed the polyhouses at the Property, was qualified as an expert in the design and erection of greenhouses and polyhouses and as an expert in the environmental advantages of greenhouses and polyhouses. He testified that the land must be graded for hoopouse and polyhouse construction, and he explained that hoopouse and polyhouse farming is a more efficient agricultural method than in-ground cultivation. According to Hofman, the polyhouses have remained in place since the time of their installation. He testified that after grading the land for the erection of hoopouses, farmers no longer plow in those areas, in

order to ensure that the soil remains compacted. In addition, he described Hopewell's placement of stone between and inside of the polyhouses.

Dr. James Schmid testified on the Respondents' behalf, and he was qualified as an expert in the area of wetlands delineation, ecology, and environmental sciences. He provided testimony about the presence (or absence) and extent of freshwater wetlands at the Property. Schmid rejected DEP's freshwater wetlands maps for the purpose of identifying freshwater wetlands, although the regulations expressly accept such maps as valid tools for that purpose. N.J.A.C. 7:7A-2.3(b)1. Further, he questioned the reliability of United States Department of Agriculture soil surveys, even though the Department recognizes them as useful in identifying freshwater wetlands. N.J.A.C. 7:7A-2.3(b)2.

DISCUSSION

Respondents' Challenge to the Nature of the Proceedings

Respondents claim, in their exceptions,⁶ that the OAL proceedings were inherently flawed because ALJ Metzger rendered the Initial Decision but did not hear the witnesses' live testimony. ALJ Metzger's handling of the case, however, was in complete accord with the Uniform Administrative Procedure Rules. N.J.A.C. 1:1-14.13 governs "[p]roceedings in the event of death, disability, departure from State employment, disqualification or other incapacity of judge," and provides as follows:

⁶ I do not address every one of Respondents' 51 numbered exceptions or their six numbered reply exceptions, which in addition to the broad categories of discussion set forth herein, take issue with specific factual findings made by ALJ Metzger, their dissatisfaction with the extent of his summarization of testimony, and his acceptance of one witness's testimony over another. The factual errors complained of are not material to the ultimate conclusions of the ALJ in the Initial Decision. Moreover, ALJ Metzger's acceptance of the witnesses' testimony was based on his careful review of the hearing record created by ALJ Kerins.

(b) In the event settlement is not reached, another judge shall be assigned to complete the hearing or issue the initial decision as if he or she had presided over the hearing from its commencement, provided:

1. The judge is able to familiarize himself or herself with the proceedings and all testimony taken by reviewing the transcript, exhibits marked in evidence and any other materials which are contained in the record; and
2. The judge determines that the hearing can be completed with or without recalling witnesses without prejudice to the parties.

Upon ALJ Tassini's departure from the OAL and ALJ Kerins' recusal, ALJ Metzger was assigned to issue the Initial Decision. There is no evidence that ALJ Metzger did not familiarize himself with all aspects of the proceedings or that it was necessary for him to recall witnesses. Furthermore, this objection is untimely raised because "a party may not seek review of such orders or rulings after the judge renders the initial decision in the contested case." N.J.A.C. 1:1-14.13.

In addition, the Director of DEP's Office of Permit Coordination and Environmental Review, Scott Brubaker, was scheduled to testify as to the rationale behind the penalty assessment. The parties unsuccessfully attempted to reach a stipulation regarding Brubaker's testimony, and the Respondents subsequently consented to DEP's submission of a certification in lieu of his testimony. Respondents failed to object to the relinquishment of their right to cross-examine Brubaker. As a result, I reject the Respondents' claim that the Initial Decision was inherently flawed because ALJ Metzger did not hear live testimony.

Violations of the Freshwater Wetlands Protection Act

In 1987, having determined that development had destroyed and compromised wetlands, the New Jersey Legislature adopted the FWPA in order “to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance.” N.J.S.A. 13:9B-2. The Legislature recognized that wetlands provide a variety of important environmental functions, including protecting and preserving drinking water, providing a natural means of flood and storm damage protection, serving as a transition zone between dry land and water courses, providing essential habitats for a major portion of New Jersey’s fish and wildlife, and maintaining a critical baseflow to surface waters through the gradual release of stored flood waters and groundwater. N.J.S.A. 13:9B-2. The FWPA regulates development of wetlands in New Jersey, balancing the legitimate aspirations of property owners with the need to preserve wetlands. Ibid.

The FWPA also protects transition areas adjacent to wetlands. A transition area “minimizes adverse impacts on the wetland or serves as an integral component of the wetlands ecosystem.” N.J.S.A. 13:9B-3; see also N.J.A.C. 7:7A-2.5(a). The extent of transition area required is determined by the "resource value" of the wetlands, which may be classified as "exceptional," "ordinary" or, if neither of these, "intermediate." N.J.A.C. 7:7A-2.4.

Regulated activities under the FWPA, which cannot be undertaken without a freshwater wetlands permit, N.J.S.A. 13:9B-9 and N.J.A.C. 7:7A-2.1, include “[t]he removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind” in a freshwater wetland, N.J.S.A. 13:9B-3(1), “[t]he dumping, discharging or filling with any materials” in a freshwater wetland, N.J.S.A. 13:9B-3(3), and “[t]he

destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees[.]" N.J.S.A. 13:9B-3(6); see also N.J.A.C. 7:7A-2.2(a). It is undisputed that Respondents did not obtain a permit for the activities on the Property that were the basis for the AONOCAPA.

Unless a transition area waiver is obtained, the FWPA prohibits the following activities in transition areas: "[r]emoval, excavation, or disturbance of the soil[.]" N.J.S.A. 13:9B-17(a)(1), "[d]umping or filling with any materials[.]" N.J.S.A. 13:9B-17(a)(2), and "[d]estruction of plant life which would alter the existing pattern of vegetation[.]" N.J.S.A. 13:9B-17(a)(5); see also N.J.A.C. 7:7A-2.1(a); N.J.A.C. 7:7A-2.6(a); N.J.A.C. 7:7A-2.5(f). It is undisputed that Respondents did not obtain a transition area waiver for the regulated activities they undertook in the transition areas on the Property.

A fundamental issue here is whether freshwater wetlands existed on the Property prior to the Respondents' activities cited in the AONOCAPA. The FWPA defines freshwater wetlands as:

an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation; provided, however, that the department, in designating a wetland, shall use the 3-parameter approach (i.e. hydrology, soils and vegetation) enumerated in the April 1, 1987 interim-final draft "Wetland Identification and Delineation Manual" developed by the United States Environmental Protection Agency, and any subsequent amendments thereto. [N.J.S.A. 13:9B-3].

Here, DEP's Roderick Falla testified that he relied on the Federal Manual referenced in N.J.S.A. 13:9B-3 in order to identify the freshwater wetlands. He described in detail the three-parameter approach to designating wetlands. Falla, however, explained

that this approach is ineffective for delineation subsequent to a wetlands disturbance because disturbance can result in the loss or disruption of one or more of the parameters, i.e., the wetlands hydrology, soils, and vegetation. In such circumstances, the Federal Manual dictates the use of the disturbed area wetland determination procedure, which requires the “review of aerial photographs, existing maps, and other available information about the site,” in order “to determine whether the ‘missing’ indicator(s) (especially wetland hydrology) existed prior to alteration.” Federal Manual at 69-70. Falla testified that he employed the federally developed disturbed area wetland determination procedure in delineating the wetlands and wetland transition areas in this case. As the Initial Decision discussed, DEP inspectors Falla and Pacione testified that they referred to their personal observations, soil borings, soil surveys, test pits, photographs, United States Geological Survey and DEP mapping, and off-site reference points in making their determinations as to the extent of wetlands and transition areas on the Property. N.J.A.C. 7:7A-2.3(b) specifically authorizes the Department to refer to multiple such sources “[t]o aid in determining the presence or absence of freshwater wetlands”

Respondents’ expert, Dr. James Schmid, disagreed with the Department’s delineation of the wetlands and transition areas. Schmid, however, acknowledged that the Federal Manual sets forth the disturbed area wetland determination procedure to be used in areas where there has been a wetlands disturbance. Schmid did not question the validity of data gathered by the DEP, EPA, or Lynch Giuliano. Instead, Schmid evaluated the data differently, and reached ultimate conclusions different from those reached by the Department’s experts.

Schmid disagreed with the Department's reliance on off-site reference sites because he did not find the four selected sites to be comparable to the areas of alleged violation. In addition, he did not believe that the presence of hydric soils at the areas of alleged disturbance documented the existence of wetlands because he did not see evidence of current hydrology at the test pits. He opined that the hydric soils DEP identified in the test pits were not necessarily attributable to filling, but could just as easily have been relic hydric soils, especially given the prior decades of farming at the Property. Schmid, however, did not testify as to the overall incidence of relic hydric soils in the area. He also expressed concern about the reliance on "aerial photographs with a couple of spot checks," concluding that such a methodology is not credible. Schmid expressed his belief that the areas of alleged violation have not been wetlands for many years, as a result of farming at the Property.

The ALJ was not persuaded by Schmid's testimony, finding that he engaged in speculation that was unsupported by the proffered evidence. Indeed, Schmid's suggestion that ongoing farming drained and filled the wetlands is not supported by sufficient credible evidence in the record, given that the Respondents undisputedly used heavy machinery to grade the Property to construct hoopouses and polyhouses.

Schmid expressed reluctance to accept the DEP's wetlands hydrology identification criteria as required by N.J.S.A. 13:9B-3 and the regulations, which further undercut his testimony. For example, Schmid pointed to the absence of hydrology near the surface of pre-disturbance layers to support his contention that DEP's wetlands lines were overstated. The Federal Manual, however, describes the difficulty inherent in employing hydrology to establish wetlands lines. Instead, the Federal Manual proposes evaluating the presence of

hydric soils to establish wetlands lines. This is the very method the Department employed. In addition, Schmid was skeptical about reliance on freshwater wetlands maps and soil surveys, although the regulations specifically recognize such materials as legitimate aids in identifying freshwater wetlands. N.J.A.C. 7:7A-2.3(b)1, (b)2.

What is more, Schmid rejected Marathon Engineering's identification of freshwater wetlands at Area 3, and Schmid disagreed with all but one of Marathon Engineering's conclusions. In connection with this matter, Hopewell had retained Marathon Engineering to provide an expert opinion as to the Property's conditions as they had been prior to the installation of the hoopouses and polyhouses. In 2004 through 2005, Marathon Engineering dug 36 test pits at the Property and uncovered substantial evidence of wetlands. Schmid further rejected Lynch Giuliano's 1988 report, which the firm prepared on Ench's behalf in connection with a proposed residential development. Schmid's rejection of the findings of the expert testimony from Ench's own prior consultants is not supported by sufficient credible evidence in the record. As the Initial Decision noted, the Lynch Giuliano report provided a detailed study of the Property that was contemporaneous with the same conditions the parties are seeking to describe. Moreover, as ALJ Metzger recognized, Lynch Giuliano would not have had any interest in overstating the extent of wetlands, as that could have constrained the potential development of the Property.

Schmid's conclusions are unsupported by sufficient credible evidence in the record. By contrast, DEP's experts applied the appropriate methodology to make credible findings regarding the presence and extent of freshwater wetlands, consistent with the 1989 Federal Manual. I agree with the ALJ's credibility determinations as to DEP's experts and the Marathon and Lynch Giuliano findings, all of which overwhelmingly supported the

conclusion that there had been substantial wetlands on the Property. Accordingly, I hereby adopt the Initial Decision's determination accepting the Department's findings of the extent of freshwater wetlands and wetland transition areas.

Applicability of the Freshwater Wetlands Protection Act's Normal Farming Exemption

This matter also implicates the issue of whether the Respondents' activities at the Property qualify for the normal farming exemption under the FWPA. The statute provides:

The following are exempt from the requirement of a freshwater wetlands permit and transition area requirements unless the United States Environmental Protection Agency's regulations providing for the delegation to the state of the federal wetlands program conducted pursuant to the Federal Act require a permit for any of these activities, in which case the department shall require a permit for those activities so identified by that agency:

- a. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage
[N.J.S.A. 13:9B-4a; see also N.J.A.C. 7:7A-2.8(c)1].

The normal farming exemption, however, is inapplicable to discharges of "fill material into a freshwater wetland incidental to any activity which involves bringing an area of freshwater wetlands into a use to which it was not previously subject, where the flow or circulation patterns of the waters may be impaired, or the reach of the waters is reduced." N.J.S.A. 13:9B-4e; see also N.J.A.C. 7:7A-2.8(b)1.

As the Initial Decision recognized, the normal farming exemption contemplates exempting agricultural activities conducted in fields and forests. The FWPA and the Department's regulations make no mention of plastic-covered agricultural structures, such as hoophouses or polyhouses, that are used to cultivate container-grown nursery stock.

There is no evidence to suggest that the Legislature intended to include such structures within the ambit of the normal farming exemption.

N.J.A.C. 7:7A-1.4 expressly defines the terms “plowing, seeding, and cultivating,” which the FWPA includes as examples of normal farming subject to the exemption. The definition of the term “plowing” encompasses “all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops,” and excludes “the redistribution of dredged material, rock, sand, or other surface materials in a manner which changes any area of wetlands to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing.” N.J.A.C. 7:7A-1.4. In addition, “[p]lowing will never involve a discharge of material.” N.J.A.C. 7:7A-1.4. It is thus manifest that Hopewell’s depositing of fill and grading prior to erecting agricultural structures do not constitute “plowing” for the purposes of the normal farming exemption.

Pursuant to N.J.A.C. 7:7A-1.4, “seeding” is “the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands,” and “cultivating” is “physical methods of soil treatment, employed upon planted farm, ranch or forest crops to aid and improve the growth, quality or yield of the crops.” Hopewell’s expert, Hofman, admitted that Hopewell did not have soil beds for seeds or seedlings on the Property. Moreover, Hopewell’s activities did not involve treatment of the Property’s soil to aid crop growth, as the plants were grown in above-ground containers inside agricultural structures, as opposed to in the soil of the Property’s land. Consequently, Hopewell’s erection of the hoopouses

and polyhouses does not fall within the definitions of seeding and cultivating, further supporting that the normal farming exemption is inapplicable here.

The regulatory history of the normal farming exemption supports the view that hoophouses and polyhouses are excluded from the exemption's purview. When DEP promulgated the initial regulations implementing the FWPA, one commenter suggested that "[g]reenhouses and farm structures should be exempted from the ban on new or expanded buildings in transition areas." In its response to the comment, DEP disagreed, explaining that "[t]he Act exempts 'normal farming' and describes a variety of activities related to direct physical work with soil and plants. To expand the exemption to include farm buildings would significantly decrease protection of freshwater wetlands." 20 N.J.R. 1247 (June 6, 1988). The Department's long-standing interpretation thus has been that agricultural structures, which would include hoophouses and polyhouses, are not exempt from the requirements of the FWPA and its implementing regulations. It is established that longstanding agency interpretations of statutes the agency is charged with implementing are entitled to deference. N.J. Dep't Env'tl. Prot. v. Stavola, 103 N.J. 425, 435 (1986). As a consequence, I accept the Department's interpretation that hoophouses and polyhouses do not qualify for the normal farming exemption.

In addition, to qualify for the FWPA normal farming exemption, the activities at issue must occur in an area that is "part of an established, ongoing farming, ranching or silviculture operation," N.J.A.C. 7:7A-2.8(c), which "means activities on areas subject to a farming, ranching, or silviculture use as of June 30, 1988, which use has been pursued continuously since June 30, 1988." N.J.A.C. 7:7A-1.4. Here, there were no agricultural structures on the Property in 1997 in the areas that had been disturbed at the time of the

NOV, and Hopewell did not begin erecting hoophouses and polyhouses until August 2001. Furthermore, after the installation of the hoophouses and polyhouses, Respondents did not conduct any plowing, seeding, or cultivating in the areas where those structures are located.

Respondents additionally contend that their activities in transition areas are not regulated under the FWPA. There is no merit to this claim. The FWPA's normal farming exemption applies equally to transition areas and freshwater wetlands, and Respondents' activities on the Property do not qualify for that exemption. N.J.S.A. 13:9B-4 ("The following are exempt from the requirement of a freshwater wetlands permit and transition area requirements . . ."). Because the freshwater wetlands are regulated, there continues to be a transition area associated with those freshwater wetlands in which certain activities are also not permitted. N.J.S.A. 13:9B-17(a). Therefore, I accept the Initial Decision's determination that the normal farming exemption does not apply here.⁷

Respondents' Allegations of Regulation by Enforcement and Selective Enforcement

In their exceptions, Respondents argue that the Department improperly engaged in regulation by enforcement because DEP did not issue an NOV prior to the AONOCAPA. I find this argument to be without merit. The FWPA vests the Department with substantial discretion regarding the form and venue of enforcement action and does not require the Department to issue an NOV before taking enforcement action in the form of an

⁷ Even if Respondents had engaged in normal farming activities as part of an established, on-going farming operation, their activities on the Property would still require a permit pursuant to the so-called recapture provision at N.J.S.A. 13:9B-4e. See also N.J.A.C. 7:7A-2.8(b)1. Under N.J.S.A. 13:9B-4e, the normal farming exemption "shall not apply to any discharge of dredged or fill material into a freshwater wetland incidental to any activity which involves bringing an area of freshwater wetlands into a use to which it was not previously subject . . ." Hopewell has converted all four wetland areas into uplands, which constitutes a change in use. U.S. v. Akers, 785 F.2d 814, 823-24 (9th Cir.), cert. denied, 107 S. Ct. 107 (1986).

AONOCAPA. See e.g., N.J.S.A. 13:9B-21(a), (d). The validity of a violation is not dependent on whether the Department provided notice, as property owners are charged with the responsibility to comply with the law. The FWPA and its implementing regulations have always regulated the grading and clearing of vegetation and placement of fill, all of which Hopewell engaged in as part of erecting hoopouses and polyhouses on the Property. See N.J.S.A. 13:9B-3 (“regulated activity” includes “disturbance of . . . soil,” “filling with any materials,” “destruction of plant life . . . including the cutting of trees”); N.J.A.C. 7:7A-1.4; -2.2(a) (Definition of “regulated activity” and “fill”).

I find Respondents’ claim of selective enforcement to be equally lacking. At the hearing, Ench stated his opinion that the neighboring Centerton Nursery extensively violated the FWPA but was not dealt with as harshly as the Respondents. But, as the Initial Decision explained, the circumstances surrounding the Centerton Nursery matter were not developed in the record, and they are irrelevant to the validity of the pending action. Furthermore, “[t]he rare or sporadic enforcement of a statute, standing by itself, does not demonstrate selective prosecution.” State v. Mitchell, 164 N.J. Super. 198, 202 (App. Div. 1978). To establish a violation of equal protection, there must be evidence of purposefully discriminatory enforcement, and “the mere fact that a law has not been fully enforced against others does not give a defendant the right to violate it.” State v. Boncelet, 107 N.J. Super. 444, 453 (App. Div. 1969). Here, the Respondents did not present any evidence of purposefully discriminatory enforcement. As a result, I reject the Respondents’ selective enforcement defense.

Violation of the Flood Hazard Area Control Act

The purpose of the FHACA is to protect the "safety, health, and general welfare" of the public by "delineat[ing] and mark[ing] flood hazard areas" and subjecting them to "land use regulations." N.J.S.A. 58:16A-50b; see Terner v. Spyco, Inc., 226 N.J. Super. 532, 543 (App. Div. 1988). The State has a long-recognized "right and duty . . . to take steps toward the prevention of floodwaters, with their imminent danger to life and destruction of property." Usdin v. N.J. Dep't Env'tl. Prot., 179 N.J. Super. 113 (App. Div. 1981). The right to use one's land cannot be elevated over the public safety.

The FHACA regulations in effect in 2004 at the time of the violations applied to watercourses having a contributory drainage area greater than 50 acres. N.J.A.C. 7:13-2.1(a).⁸ Respondents concede that the Thundergust Brook on the Property is a watercourse that was subject to those regulatory requirements.

The FHACA regulations in effect in 2004 applied to any development within 25 feet from the top of the channel bank. N.J.A.C. 7:13-1.3(a). The preponderance of the evidence indicates that Hopewell installed four concrete culverts surrounded by fill and stone and installed three corrugated plastic pipes that drained into the Thundergust Brook. Hopewell performed these activities, which constitute "development" under the definition of that term at N.J.A.C. 7:13-1.2 in effect in 2004, within 25 feet of the banks of the brook. Therefore, the installation of culverts and corrugated plastic pipes, as well as the depositing of fill, required a FHACA permit under the rules then in effect. It is undisputed that Hopewell failed to seek a FHACA permit for the culverts, fill, or the placement of corrugated plastic piping in and in the vicinity of the Thundergust Brook. As a result, I find that Hopewell

⁸ The rule citations in this discussion refer to the regulations in effect in 2004.

violated the FHACA by performing unauthorized regulated activities within a floodway in contravention of the rules in effect in 2004 at N.J.A.C. 7:13-1.3(e).

Individual Liability of Ench

In its post-hearing brief, the Department asserted three bases for holding Ench individually liable for the acts leading to the violations on the Property: 1) the responsible corporate official theory; 2) individual liability as a “person” pursuant to the FWPA, N.J.S.A. 13:9B-3 and -21; and 3) piercing the corporate veil. The Initial Decision, however, concluded that Ench should not be held individually liable because the responsible corporate official theory was inapplicable and there was no basis to pierce the corporate veil. The Initial Decision did not expressly address the Department’s request that Ench be held individually liable as a “person” under the FWPA.

In its October 24, 2013 exceptions, the Department conceded that Ench was not liable under the responsible corporate official theory. The FWPA definition of a “person” who is subject to that statute’s requirements does not include a responsible corporate officer. N.J.S.A. 13:9B-3. See Asdal Builders v. N.J. Dep’t Env’tl. Prot., 426 N.J. Super. 564 (App. Div. 2012). Consequently, the Department no longer advances that theory as grounds for holding Ench individually liable. Furthermore, in its exceptions, DEP clarified that it does not seek to hold Ench individually liable for the \$568,260 penalty assessment. Rather, the agency seeks to modify the Initial Decision for the purpose of holding Ench individually liable to comply with Paragraph 9 of the AONOCAPA, to comply with the FHACA, and to restore the freshwater wetlands and transition areas at the Property.

It is well established that, “[e]xcept in cases of fraud, injustice, or the like, courts will not pierce a corporate veil.” N.J. Dept. Env’tl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983). As our Supreme Court explained, “[t]he purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law.” Ibid. A party seeking to pierce the corporate veil carries the burden of proving that doing so is appropriate. Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472, 950 (2008).

Here, the Department has not met its burden. Ench’s undisputed testimony was that Hopewell was founded for the purpose of conducting the business of growing plants. As the Initial Decision noted, DEP has presented no evidence that Ench used the corporate form to perpetrate a fraud or crime or to defeat the ends of justice. As a result, I conclude that piercing the corporate veil to hold Ench individually liable is unwarranted.

I find the Department’s assertion of Ench’s individual liability as a “person” pursuant to N.J.S.A. 13:9B-3 to be equally unavailing. N.J.S.A. 13:9B-3 defines a “person” as “an individual, corporation, partnership, association, the State, municipality, commission or political subdivision of the State or any interstate body” The record, however, demonstrates that Ench was acting in his capacity as a corporate official at all relevant times. Ench signed checks and contracts for the 2001 grading, but he did so in his corporate official capacity, not as an individual. DEP did not adduce any evidence that Ench committed any violations in an individual capacity. As the Initial Decision explained, the fact that small corporations typically have one or two primary decision-makers does not on its own create individual liability. To conclude otherwise would essentially gut the

corporate form. As a consequence, I conclude that Ench is not individually liable for the violations cited in the AONOCAPA.

PENALTY DETERMINATION

The AONOCAPA imposed a \$603,000 civil administrative penalty, which DEP later reduced to \$568,260 after the hearing. The ALJ upheld the \$568,260 penalty in the Initial Decision. I agree with that determination.

If the Department discovers a violation of the FWPA, it may assess a civil administrative penalty. The version of N.J.A.C. 7:7A-16.8 in effect in 2004 established a civil administrative penalty range using a matrix that incorporates the resource value of the freshwater wetlands, the acreage of the impacted area, and the violator's conduct.

The Department determined that the resource value of the wetlands here was "intermediate," which requires an assignment of two points. The DEP assigned three points for the acreage of freshwater wetlands and transition area filled, which was greater than three acres. The Department determined that Hopewell's conduct was "major," which requires an assignment of three points. Thus, the total number of points was eight, which corresponds to a \$9,000 per day penalty assessment pursuant to the penalty matrix.

"Major conduct" under the rules in effect in 2004 was defined as "an intentional, deliberate, purposeful, knowing or willful act or omission by the violator" N.J.A.C. 7:7A-16.8(c)1i. With respect to conduct, the record establishes that the company received an NOV in 1997 for FWPA violations along Thundergust Brook, which violations Hopewell later resolved. As a result, Hopewell was on notice that there were regulated freshwater wetlands at the Property. In addition, the January 20, 2003 Field NOV informed

Each of the prohibition in the FWPA against clearing and grading of wetlands without a permit. Yet Hopewell graded 31.57 acres of wetlands over the course of years, and comparison of 1995 and 2002 aerial photos reveals the large scale clearing of wetlands vegetation between those years. These activities completely transformed wetlands into uplands with no vegetation. It is clear that Hopewell disturbed the soil, poured concrete, and removed vegetation in the regulated freshwater wetlands, despite being on notice of their existence. Hopewell never attempted to obtain a permit for these activities. Consequently, I conclude it was reasonable for the Department to characterize Hopewell's conduct as "major."

Under the version of N.J.A.C. 7:7A-16.8 in effect in 2004, the Department had the authority to assess penalties for every day that Hopewell was in violation. Instead, the Department exercised its discretion and assessed penalties for only 63.14 days of the over 1,000-day period between Hopewell's disturbance of wetlands in August 2001 through September 2004 when DEP issued the AONOCAPA. The Director of DEP's Office of Permit Coordination and Environmental Review, Scott Brubaker, certified in lieu of testimony that it typically takes three days to disturb an acre of freshwater wetlands or freshwater wetlands transition area. Brubaker concluded that a three-day per acre penalty assessment would have resulted in an unreasonably large penalty here, so he reduced the multiplier to two days of violation per acre disturbed. Two days of violation per disturbed acre multiplied by 31.57 disturbed acres⁹ results in 63.14 days of violation. Multiplying 63.14 days of violation by the \$9,000 per day penalty assessment results in a total

⁹ See footnote 3 for an explanation of the Department's reduction of the area of freshwater wetland and wetland transition area disturbance from 33.5 acres to 31.57 acres.

assessment of \$568,260, which is a far lower penalty than DEP was authorized to assess under N.J.A.C. 7:7A-16.8. I therefore find the \$568,260 penalty to be justified.

CONCLUSION

After careful review of the record, I ADOPT the ALJ's Initial Decision for the reasons set forth therein and above, with modifications to incorporate the corrections to the record of admitted exhibits as described in footnote 4 of this Final Decision.

Accordingly, Hopewell is hereby ORDERED to remediate the Property in accordance with Paragraph 9 of the AONOCAPA and to pay the civil administrative penalty of \$568,260 for the violations outlined in the AONOCAPA within twenty (20) days from the date of this Final Decision.

IT IS SO ORDERED.

DATE: November 3, 2014



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT

v.

HOPEWELL NURSERY, INC. AND ROBERT ENCH.
OAL DKT. NO. ESA 10164-04
AGENCY REF. NO. PEA040002-0613-03-0003.1

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